OPINIONS

OF THE

Attorney General

OF

NEW JERSEY

FOR THE

Period from January 1, 1958
to December 31, 1959

MacCrellish & Quigley Co
Printers
Trenton, New Jersey

STATE OF NEW JERSEY

Department of Law and Public Safety

Division of Law

JANUARY 1, 1958—DECEMBER 31, 1959

ATTORNEY GENERAL:

David D. Furman ..... Bedminster

DEPUTY ATTORNEY GENERAL IN CHARGE:

David M. Satz, Jr. ..... South Orange

DEPUTY ATTORNEYS GENERAL:

Donald M. Altman ..... Passaic
Anthony D. Andora ..... East Paterson
Harold J. Ashby ..... Newark
George H. Barbour ..... Maple Shade
John J. Bergin ..... Passaic
William Blohm, Jr. ..... Jersey City
Theodore I. Botter ..... Hackensack
William L. Boyan ..... Bergenfield
Murry Brochin ..... Newark
John F. Cannon ..... Trenton
F. Michael Caruso ..... Newark
Van Y. Clinton ..... Newark
Thomas P. Cook ..... Princeton
John F. Crane ..... Nutley
Remo M. Croce ..... Pennsauken
Alfred P. D'Auria ..... Jersey City
Philip A. Donnelly ..... Scotch Plains
Julius A. Feinberg ..... Newark
Felix G. Forlenza ..... Bloomfield
Thomas L. Franklin ..... Rutherford
Robert E. Frederick ..... Phillipsburg
David J. Goldberg ..... Trenton
Richard F. Green ..... Elizabeth
Martin L. Greenberg ..... Newark
Morton I. Greenberg ..... Trenton
William Gural ..... Hillside
Eugene F. Hayden ..... Parlin
Samuel B. Helfand ..... Roselle
William D. Hill ..... Levittown
G. Douglas Hofe, Jr. ..... South Orange
Lee A. Holley ..... Orange
Peter L. Hughes, III ..... Elizabeth
Burrell Ives Humphreys ..... Nutley
Michael R. Imbriani ..... Bound Brook

Joseph A. Jansen	Trenton
Charles S. Joelson	Paterson
Sidney Kaplan	Camden
Charles J. Kehoe	Trenton
David Landau	Orange
Charles I. Levine	Trenton
Stephen F. Lichtenstein	Trenton
Joseph Lipkin	Camden
John A. Lombardi	Jersey City
Joseph P. Lordi	Newark
William J. McCormack	West Orange
James J. McLaughlin	Trenton
Robert S. Miller	Trenton
Thomas C. Mitchell	New Brunswick
J. Wilson Noden	Trenton
Thomas P. Nolan	Union City
John W. Noonan	Newark
Howard T. Rosen	Millburn
Andrew A. Salvest	Kearny
Saul N. Schechter	Belvidere
Lawrence E. Stern	Jersey City
H. Douglas Stine	Plainfield
June D. Strelecki	Irvington
John G. Thevos	Paterson
David C. Thompson	Glen Ridge
Eugene T. Urbaniak	Trenton
Frank A. Verga	Jersey City

ASSISTANT DEPUTY ATTORNEY GENERAL:

Grace J. Ford	Montague

OPINION BOARD

1958 — 1959

DAVID D. FURMAN, Attorney General of New Jersey

Chairman—DAVID M. SATZ, JR., Deputy Attorney General in Ch

Members—THOMAS L. FRANKLIN, Deputy Attorney General
SAMUEL B. HELFAND, Deputy Attorney General
WILLIAM L. BOYAN, Deputy Attorney General
JUNE D. STRELECKI, Deputy Attorney General
THEODORE I. BOTTER, Deputy Attorney General

Secretary—VIRGINIA M. RAHILLY

STATUTES CITED

(New Jersey Statutes Annotated—Revised Statutes of 1937)

SESSION LAWS CITED

CONSTITUTION OF 1947

CONSTITUTION OF 1844

ADMINISTRATIVE RULES AND REGULATIONS

JANUARY 21, 1958

HONORABLE FREDERICK J. GASSERT, JR.
Director, Division of Motor Vehicles
State House
Trenton, New Jersey

FORMAL OPINION 1958—No. 1

DEAR MR. GASSERT:

You have requested our opinion as to the interpretation to be given to recentl enacted Chapter 69 of the Laws of 1957 which we will hereinafter refer to a N.J.S.A. 39:4–197.2, and which in its entirety provides as follows:

N.J.S.A. 39:4–197.2:

"Any municipality, which maintains a paid police force, may, with the consent of the board of chosen freeholders of the county, by ordinance, regulate traffic and parking along and upon any county road or part thereof, lying within its corporate limits, in the same manner and to the same extent that it is authorized by law to regulate the same upon municipal roads and streets.

"This act shall take effect immediately."

More specifically, your letter indicates a request for our opinion on the following queries:

(1) Does N.J.S.A. 39:4–197.2 permit a Board of Chosen Freeholders to grant consent to any or all of its municipalities having a paid police force to enact ordinances regulating traffic and parking on county roads, or does the statute limit the Board's authority to grant consents to specific ordinances regulating traffic or parking enacted by any municipality within the county having a paid police force?

(2) Whether the Director of Motor Vehicles may properly advise all Boards of Chosen Freeholders that their resolution indicating their consent to proposals of a municipality concerning traffic regulations or parking on county roads should be adopted by the Board only upon presentation to the Board of a formal request by the municipality accompanied by a copy of the proposed municipal ordinance?

As to query number one:

While the State has sovereign and absolute jurisdiction and control of the roads, streets and highways within its borders, the State's legislative body may, in the public interest, delegate this power to a local governing body. *Sexton* v. *Public Service Coordinated Transport*, 5 N.J. Super. 555; *Hackensack Water Company* v. *Ruta*, 3 N.J. 139.

The Legislature has seen fit, as expressed in N.J.S.A. 39:4–201, to delegate, within certain limitations to the County Boards of Chosen Freeholders the power to regulate and supervise traffic on any county road.

N.J.S.A. 27:16–1 et seq. confers upon the various Boards of Chosen Freeholders the power and duty to provide and maintain county roads. More specifically, N.J.S.A. 27:16–6 provides:

"The duty of maintaining and keeping in repair every road so laid out and opened, taken over, or acquired shall devolve exclusively upon the board of chosen freeholders, and *all other duties* and all powers *respecting such road* shall be *imposed upon* and *invested* in it. . . ." (Emphasis ours)

Upon a closer reading of the italicized portions of the above statute, it becomes apparent that concomitant with the duty of maintaining and keeping in repair, there also devolves upon the county the duty to regulate parking and traffic on county roads.

Thus we have the several counties not only with the delegation of power to regulate traffic on county roads, but with the duty of exercising that delegated power.

The question now arises whether a county has the right to abandon this duty and leave the regulation of traffic on county roads to the municipalities within the county. We think not. N.J.S.A. 39:4–197.2 is not authority for this abandonment. The statute is clear. It is directed to and permits municipalities to regulate traffic and parking upon county roads, only upon securing the consent of the county board of freeholders. The new enactment cannot be read to authorize the county boards of freeholders to issue approvals in advance to any ordinance or ordinances regulating traffic or parking on county roads enacted by any municipality having a paid police force. The county boards of freeholders have a continuing duty to review each specific municipal ordinance regulating traffic or parking on county roads prior to consent.

As to query number two:

The Director may lawfully advise and direct all Boards of Chosen Freeholders that any resolution granting consent to municipalities to regulate parking or traffic on county roads should be adopted by the Board only upon presentation to it of a copy of the proposed municipal ordinance, with a request for the Board's approval.

It is also our opinion that a resolution passed by a Board of Chosen Freeholders giving consent to a municipality to regulate traffic on county roads is a resolution concerning traffic conditions adopted by a body having jurisdiction over highways within the purview of N.J.S.A. 39:4-8, and as such, of no force and effect unless approved by the Director of Motor Vehicles. N.J.S.A. 39:4–8 also provides that:

> ". . . .The commissioner shall not be required to approve any such ordinance or resolution, unless, after investigation by him, the same shall appear to be in the interest of safety and the expedition of traffic on the public highways."

It would thus appear that if the Director concludes that, in the interest of safety and the expedition of traffic on highways, any proposed county resolution granting consent to municipalities to regulate traffic on county roads should be adopted only if there is a request by a municipality for such consent accompanied by a copy of the proposed resolution, the Director could then lawfully advise Boards of Chosen Freeholders that approval of such resolutions by the Director would be withheld unless these conditions are met.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: REMO M. CROCE
Legal Assistant

JANUARY 24, 1958

HONORABLE AARON K. NEELD
State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION 1958—No. 2

DEAR MR. NEELD:

An opinion has been requested whether or not members of the Teachers' Pension and Annuity Fund, who are called to active duty for training pursuant to Chapter 655, 84th Congress, First Session 1955 "Reserve Forces Act of 1955" can be considered veterans in accordance with the provisions of N.J.S.A. 18:13–112.4(r). The Reserve Forces Act of 1955, section 262(a) states that:

> "Until August 1, 1959, whenever the President determines that the enlisted strength of the Ready Reserve of the Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve cannot be maintained at the level at which he determines to be necessary in the interest of national defense, he may authorize the acceptance of enlistments in units of such Ready Reserve pursuant to the provisions of this section under regulations prescribed by the Secretary of Defense. Enlistments under this section may be accepted only within quotas (which quotas shall not exceed a total of 250,000 persons annually) prescribed by the appropriate Secretary with the approval of the Secretary of Defense. No enlistment shall be accepted under this section in the Ready Reserve of any reserve component if such enlistment would cause the strength of such Ready Reserve to exceed the authorized strength of such Ready Reserve."

Section 262(c) states that:

> "Each enlistment under this section shall be for a period of eight years. Each person so enlisted shall be required during such enlistment (1) to perform an initial period of active duty for training of not less than three months or more than six months, and (2) thereafter to perform satisfactorily all training duty prescribed by section 208(f) of this act, * * *"

Section 262(d) makes the following provisions:

> "Notwithstanding any other provision of law, any person performing the period of active duty for training required by clause (1) of subsection (c) of this section shall—
>
> "(1) during such period, and during any period of hospitalization incident to the performance of such duty, receive pay at the rate of $50. per month;
>
> "(2) be deemed to be serving in pay grade E-1 (under four months) for the purpose of determining his eligibility to receive allowances for subsistence or for travel and transportation, or to receive any benefit under title IV of the Career Compensation Act of 1949, as amended; and

"(3) be deemed to be a member of a reserve component called or ordered into active service for extended service in excess of thirty days for the purpose of determining eligibility for any benefit made available to members of reserve components by the Act entitled 'An act to provide for members of the reserve components of the Armed Forces who suffer disability or death from injuries incurred while engaged in active duty training for periods of less than thirty days or while engaged in active duty training,' approved June 20, 1949 (63 Stat. 201), except that (A) no such person shall be entitled to any benefit under section 621 of the National Service Life Insurance Act of 1940, as amended, and (B) the indemnity accorded to such person under the Servicemen's Indemnity Act of 1951, as amended, shall terminate thirty days after the release of such person from such period of active duty for training.

"Except as specifically provided by this subsection, no person shall become entitled, by reason of his performance of a period of active duty for training required by clause (1) of subsection (c) of this section, to any right, benefit, or privilege provided by law for persons who have performed active duty in the Armed Forces."

It is to be noted that, in the legislative history in connection with this section of the law, the following statement appears:

"Inasmuch as persons enlisted in the Reserve and undergoing the period of active-duty training are not specifically authorized to receive the benefits indicated below, they would be excluded from such benefits:

"Benefits of title V (mustering-out payment) of the Veterans' Readjustment Assistance Act of 1952, or any other benefits under any laws administered by the Veterans' Administration, except the Servicemen's Indemnity Act of 1951, as amended, with respect to his initial 6 months of active duty for training.

"Quarters allowances.
Benefits of the Dependents Assistance Act of 1950.
Incentive pay.
Veterans' preference." (Emphasis supplied)
84th Congress, First Session, 1955, *U.S. Code, Court and Administrative News,* Page 2815.

Since from the legislative history it appears that it was not the intention to give veterans preference, and from reading section 262(d) of the Reserve Forces Act of 1955, it does not appear that veterans' preference was given to such individuals. It must, therefore, follow that persons who enlisted pursuant to the above program do not attain veterans' preference under Federal law.

You will note that persons called to duty pursuant to section 262 of the Reserve Forces Act of 1955 are called to active duty for training; they remain assigned to the Reserve component to which they had been originally assigned.

Our office has indicated that whether or not a person is entitled to veterans' status may be in part a Federal question. By Memorandum Opinion dated September 11, 1957, we ruled that whether service in the military forces is active or inactive service should be determined by Federal law.

Since Congress has seen fit to state that men who enlist pursuant to section 262 of the Reserve Forces Act of 1955 are not to have veterans' preference, we are of the opinion that men enlisting pursuant to this program enlist in the reserve forces of the United States and therefore, are not to be considered as serving on active duty so as to entitle them to be considered veterans under N.J.S.A. 18:13-112.4(r).

Very truly yours,

HAROLD KOLOVSKY
Acting Attorney General

By: FRANK A. VERGA
Deputy Attorney General

FEBRUARY 5, 1958

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

FORMAL OPINION 1958—No. 3

DEAR COMMISSIONER HOLDERMAN:

You have requested our opinion as to the construction of the industrial homework law (L. 1941, c. 308; N.J.S.A. 34:6-136.1 et seq.). More specifically, you ask whether manufacturing under the following conditions constitutes industrial homework under that act:

First, the individual operates in an outbuilding situated in the rear of his house; as, for example, a garage or chicken house used as a work room.

Second, the individual operates in an outbuilding of the above type in the rear of a house in which other persons dwell but in which he does not dwell.

Third, an individual operates in the building in which he dwells but in a room separate from his living quarters but with entrance to his home and to his work room from a common hallway.

Fourth, the individual operates in a room in the house in which he dwells where the room for the manufacturing operations is so separated from his living quarters that an entrance to the work room from the living quarters can be effected only by going out of doors from the living quarters and entering into the work room from an outside door.

N.J.S.A. 34:6-136.2(e) provides:

"(e) 'Industrial homework' means any manufacture, in a home, of materials or articles for an employer, but shall not be construed to mean or include any manufacture performed for an employer by any person employed by him at the place of manufacture, where such place is used for manufacturing only, and who does not dwell in the building where the manufacture is performed, even though persons may dwell in other parts of such building; provided, however, that where persons dwell in such building, the living quarters shall be entirely separate and independent from the part of the build-

ing where the manufacture is performed and have independent entrances separated by open air. A place of manufacture shall not be construed to be a cellar or basement of a house or an outbuilding."

Manufacturing in a "home" is an essential feature of "industrial homework." A "home" is defined in N.J.S.A. 34:6–136.2(c) as follows:

"(c) 'Home' means any room, house, apartment or other premises, whichever is most extensive, used in whole or in part as a place of dwelling; and includes outbuildings upon premises that are primarily used as a place of dwelling, where such outbuildings are under the control of the persons dwelling on such premises."

Paragraph (e) of N.J.S.A. 34:6–136.2, after defining "industrial homework" as "* * * any manufacture, in a home, of materials or articles for an employer," then goes on to exclude from the definition, manufacturing performed under certain conditions. Paragraph (e) concludes with the following sentence: "A place of manufacture shall not be construed to be a cellar or basement of a house or an outbuilding." Thus, the provisions of paragraph (e), which exclude from the definition of industrial homework, certain manufacturing, are not applicable to manufacturing in an outbuilding.

Therefore, in answer to your questions dealing with outbuildings, the necessary determination to be made is whether the outbuildings to which you refer satisfy the definition of a "home" so as to render manufacturing in them, "industrial homework." Paragraph (c) of N.J.S.A. 34:6–136.2 provides that an outbuilding is a "home" if the outbuilding is under the control of the persons dwelling upon the premises upon which the outbuilding is situate, and if such premises are primarily used as a place of dwelling.

With this understanding of the statute involved, we will take up the first two questions which you have presented.

Your first question is directed to an individual operating in an outbuilding situated in the rear of his house. Since this is an outbuilding upon premises that are primarily used as a place of dwelling, the outbuilding, if it is under the control of the person dwelling on the premises, constitutes a "home" and, therefore, manufacturing in such an outbuilding is "industrial homework" under the act.

Your second question is directed to an individual operating in an outbuilding in the rear of a house dwelt in by persons other than himself. Here, only if the persons dwelling in this house have control of the outbuilding, would the manufacturing be homework under the terms of the act.

Your third and fourth questions necessitates a further analysis of the industrial homework law. This law as originally enacted in 1941 provided in N.J.S.A. 34:6–136.2(e):

"(e) 'Industrial homework' means any manufacture, in a home, of materials or articles for an employer."

The additional language presently appearing in paragraph (e) and quoted at the outset of this opinion was added by L. 1942, c. 307. The reason for this amendment is made clear in the statement attached to the 1942 act:

"The industrial home work law of 1941 defines a home to be every building where a person dwells and prohibits certain types of manufacturing in such a building except by persons who dwell therein. This definition prohibits manufacturing by an employer in any building where any person resides unless all of the employees also reside in the same building. To comply with the law such employers must either discharge all employees who do not live on the premises or move their plants to new buildings where there are no living quarters.

This situation drastically affects buildings designed and built to include manufacturing space as well as living quarters. The embroidery industry, in particular, which industry, following a custom of many years standing, operated looms on the ground floor of a building, the upper floors of which are used for living quarters. Manufacturing of this type in an industrial plant was not and is not intended to be industrial homework.

The purpose of this amendment is to remedy this condition, and it does not in any way weaken the control or regulation of industrial homework as such."

The situation referred to in the statement resulted from the operation of N.J.S.A. 34:6–136.12(1) prohibiting the issuance of a home worker's certificate to non-residents of the home in which work was to be done. What the amendment sought to do was to remove from the coverage of the act work performed under conditions and circumstances outlined in the statement attached to the 1942 amendment. *Deaney* v. *Linen Thread Co.*, 19 N.J. 578 (1955). Thus, those workers to whom a certificate could not theretofore be issued, i.e., workers who did not dwell in the home in which the work was done, are, by the 1942 amendment, not only permitted to perform such work, but are exempt from the provisions of the act so long as the other conditions appearing in the exempting portion of paragraph (e) of N.J.S.A. 34:6–136.2 are met.

With respect to your third and fourth questions, you ask to whom the word "who" refers in the phrase "who does not dwell in the building in which manufacturing is performed" as it appears in paragraph (e) of N.J.S.A. 34:6–136.2. It is our opinion, for the reasons discussed above, that the word "who" refers to an employee.

With this further analysis of the industrial homework law, we will now consider the third and fourth questions which you have presented.

Your third question is directed to an individual operating in the building in which he dwells but in a room separate from his living quarters but with an entrance to his home and to his work room from a common hallway. Since this individual does dwell in the building in which he works, the condition of non-residence required in the exemption in paragraph (e) of N.J.S.A. 34:6–136.2 is not met. As a result, the work described in your third question constitutes manufacturing in a home under sections (c) and (e) of N.J.S.A. 34:6–136.2 and is, therefore, industrial homework under the act.

Your fourth question is directed to an individual operating in the house in which he dwells where the room for the manufacturing operations is so separated from his living quarters that an entrance to the work room from the living quarters can be effectuated only by going outdoors from the living quarters and entering into the work room from an outside door. Here, too, as in your third question, the individual, by dwelling in the building in which he works, falls without the exemption in para-

graph (e) of N.J.S.A. 34:6–136.2. Thus, the work described in your fourth question likewise constitutes manufacturing in a home under sections (c) and (e) of N.J.S.A. 34:6–136.2 and is, therefore, also industrial homework under the act.

Very truly yours,

HAROLD KOLOVSKY
Acting Attorney General

By: MARTIN L. GREENBERG
Legal Assistant

FEBRUARY 19, 1958

HON. AARON K. NEELD
State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION 1958—No. 4

DEAR MR. NEELD:

You have sought the opinion of the Attorney General as to the construction of certain provisions of Chapter 145 of the Laws of 1957 amending R.S. 43:3–5, the statute granting exemptions from R.S. 43:3–1, which prohibits public pensioners from holding public employment in this State except upon waiver of the pension or the salary or compensation allotted to the office or employment.

The enactment of 1957 was intended to make public pensioners eligible for part-time public employment at salaries not exceeding $1,200.00 per year, according to its introductory statement. The specific language of the amendment is as follows:

> "The provisions of this Chapter shall not apply * * * to the employment, by the State or by any county, municipality or school district in any position or employment, to the duties of which the holder thereof is not required to devote his full time, at a salary or compensation of not more than $1,200.00 per calendar year, of any person who is receiving or who shall be entitled to receive any pension or subsidy from this or any other State or any county, municipality or school district of this or any other State * * *. The provisions of this section shall not authorize the employment as a policeman or fireman of any person who is receiving or shall be entitled to receive any pension or subsidy from this or any other State or any county, municipality or school district of this or any other State as a result of services as a member of a police department or a fire department."

You ask first for a definition of "full time" as applied in the foregoing Chapter 157. We advise you that "full time" signifies the normal and customary period of employment per day, per week and per year in the government service, i.e., 7 to 8 hours per day in a 5-day work week throughout the year, with vacation and sick leave privileges. The definition of "full time" in *Beaver Dam Co.* v. *Hocker*, 202 Ky. 398, 259 S.W. 1010, 1011 (Ct. of App. 1924) may be followed, with an adaptation to the current 5-day week and paid vacation:

> "One who works only part of the day, or only two or three days out of a week, or only a few weeks out of the year, cannot be said to be working at full time. We therefore conclude that the words 'full time' necessarily mean a full working day for six days in every week of the year."

You ask secondly for a definition of "employment as a policeman or fireman." The definition of "policeman or fireman" in the Police and Firemen's Retirement System Act (N.J.S.A. 43:16A-1 *et seq.*) is not suitable because of its limitation to permanent and full time employees; the definition is obviously inapplicable in a statute permitting part-time employees to earn up to $1,200.00 in any calendar year, without sacrificing their pension, in employments other than as policemen or firemen. We advise you that "employment as a policeman or fireman" includes, however, employment in the categories enumerated in N.J.S.A. 43:16A-1 (2): active uniformed employee and active employee who is a detective, lineman, fire alarm operator or inspector of combustibles of any police or fire department of a municipality or a fire department of a fire district located in a township or a county police department.

Your third inquiry goes to the fundamental operation of R.S. 43:3-1, without relation to the amendment of 1957. That inquiry seeks our advice on the construction of the term "pension" in the waiver provision of R.S. 43:3-1. Public pensioners are barred from receiving any salary or compensation for holding a public office or employment except upon waiver of their "pension." You ask whether R.S. 43:3-1 requires a waiver of the full retirement allowance or merely the pension portion of the retirement allowance.

You refer undoubtedly to the general statutory scheme in this State for making up retirement allowances for public pensioners from (1) an annuity which is the actuarial equivalent of the member's accumulated deductions at the time of retirement together with regular interest and (2) a pension which, when added to the annuity, will produce the full retirement allowance. See N.J.S.A. 43:15A-48; N.J.S.A. 43:16A-5; N.J.S.A. 18:13-112.46.

We nevertheless are of the opinion that the purpose of R.S. 43:3-1 is to prevent double compensation of public salary plus public pension. The word "pension" in the waiver section should be construed as "retirement allowance." This construction does not work an unconstitutional impairment of contract. The former Supreme Court stated in *Turner* v. *Passaic Pension Commission*, 112 N.J.L. 476 (Sup. Ct. 1933);

> "The pensioner (in this case, the prosecutor of this writ) has his election. He is enjoying a pension. He does hold a public position such as is contemplated by the statute and from which he receives a salary. He cannot receive both his salary as a public officer and his annuity as a beneficiary of the pension fund."

Your fourth and sixth questions deal with the effect of so-called temporary full time employment under Chapter 145. The term "temporary full time employment" is a misnomer. As analyzed in answer to your first question, part time public employees, i.e., those working less than a full work day, week or year and earning less than $1,200.00 within a calendar year, are exempted by the new amendment from the general prohibition of R.S. 43:3-1. Such public pensioners need not waive, in the alternative, their pension or the salary or compensation allotted to their public office

or employment. Upon earning the total of $1,200.00 in any calendar year, the public pensioner must forego double compensation and make the election, under R.S. 43:3-1, if he decides to continue in part time employment during the remainder of the calendar year. The plain intention of Chapter 145 is to grant public pensioners the right to engage in part time public employment at a compensation of not more than $1,200.00 per year, without sacrifice of their retirement allowance. Any earnings in excess of $1,200.00 per year may not be retained by them except upon waiver of their pension pursuant to R.S. 43:3-1. The waiver requirement of R.S. 43:3-1 does not apply, however, except "during the duration of the term of office of his [the pensioner's] public position or employment."

You raise the additional question as to whether the amendment of 1957 has a retroactive effect. Chapter 145 was effective on July 15, 1957. We advise you that its effect is prospective only in accordance with the established law in this State that legislative enactments are not retroactive unless so provided by clear, strong and imperative terms. See *Lascari* v. *Bd. of Education of Borough of Lodi*, 36 N.J. Super. 426 (App. Div. 1955).

Yours very truly,

HAROLD KOLOVSKY
Acting Attorney General

By: FRANK A. VERGA
Deputy Attorney General

APRIL 9, 1958

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

FORMAL OPINION 1958—No. 5

DEAR DR. BERGSMA:

We have been asked whether sterilized whole milk in hermetically sealed containers "is permitted to be sold in New Jersey without permit therefor" from the Department of Health.

R.S. 24:10-2 forbids the distribution of "any milk" in New Jersey unless the person who collected or assembled the milk into plants has obtained a "permit from the * * * department to engage in such business in the manner * * * set forth [in the statutes]."

Sterilized milk in hermetically sealed containers, if intended for human consumption, may therefore not be imported into New Jersey unless the plants into which the milk is assembled hold permits.

Since the context of the request for an opinion presents an additional inquiry as to whether the department has an obligation to inspect the plants involved in States hundreds of miles from New Jersey, this matter will be discussed.

R.S. 24:10-6 makes it mandatory that the department be satisfied that the milk is of the standard and quality required by the statutes, see R.S. 24:10-15, 16, and by regulations of the department, before a permit is issued. This section does not demand inspection of any milk or plants.

R.S. 24:10-11 makes all milk imported into New Jersey "subject to inspection at its source of supply" and all plants handling it "likewise * * * subject to inspection to determine if * * * they meet the minimum requirements set forth in [R.S. 24:10-15, supra]." This section does not require that the department inspect, but is a grant of discretionary power to the department to inspect the milk and plants involved. If the department can fulfill its duty under R.S. 24:10-6 in some other manner, satisfying itself that the milk meets the prescribed standards, it need not inspect.

R.S. 24:10-9 authorizes the department to place reasonable reliance in fulfilling its duty under R.S. 24:10-6 on information supplied to it on reports of applicants. R.S. 24:10-9 permits the department to require reports which "may be necessary to ascertain * * * that * * * milk * * * is of the standard and quality required * * *."

The department may also take into consideration facts obtained from other sources including tests of random samples of the finished product.

R.S. 24:10-12 permits the State department to rely on inspections by health authorities in other States. *Cf. Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951).

In summary, sterilized whole milk in hermetically sealed containers may not be imported into New Jersey except where the plants into which the milk was assembled or collected hold permits issued by the department. The department has power to inspect such plants through its own personnel but need not if it can be satisfied by some other adequate method of inspection that the milk meets the prescribed standards.

Very truly yours,

DAVID D. FURMAN
Acting Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

APRIL 16, 1958

MR. FREDERICK J. GASSERT, JR.
Director, Division of Motor Vehicles
State House
Trenton, New Jersey

FORMAL OPINION 1958—No. 6

DEAR DIRECTOR:

We have been asked whether, consistent with the rule of *State* v. *Laird*, 25 N.J. 298 (1957), a magistrate may resentence a motor vehicle offender in a case where he has previously prescribed a fine that is less than a mandatory minimum. If the magistrate has such power, and the Directors of the Division of Motor Vehicles becomes aware of the need for its exercise, either as a result of N.J.S.A. 39:5-42 or otherwise, it would seem appropriate in cases involving the Director's function under

N.J.S.A. 39:5-40 in the collection of fines payable to the State, for the Director to call the situation to the attention of the magistrate and request that the proper fine be imposed under R.R. 8:7-11.

In the *Laird* case the defendant was convicted for the second time of drunken driving. The statute made an increased penalty mandatory for offenses "subsequent" to the first. N.J.S.A. 39:4-50. However, the magistrate was not aware at the time of the trial that this was a "subsequent" offense, and so imposed a penalty as for a first offense.

The complaint did not charge a "subsequent" offense. See N.J.S.A. 39:4-50. Nor was the defendant notified in any other manner that he was subject to sentencing as a "subsequent" offender. That this was a subsequent offense was not proven on the record in the first trial. The Supreme Court held that in these circumstances resentence as a subsequent offender to the increased statutorily mandatory penalty was not permitted under R.R. 8:7-11.

R.R. 8:7-11 permits the correction of an illegal sentence at any time, without specifying whether the correction may result in increased penalty. The rule also permits the court to "reduce or change a [valid] sentence within 60 days from the date of judgment".

In *State* v. *Culver,* 23 N.J. 495 (1957), the court held that the State may initiate the correction of a sentence which is illegal because excessive on the ground that since the sentence originally imposed had no warrant in law, "[t]o hold otherwise would allow the guilty to escape punishment through a legal accident". 23 N.J. at 511. There is no case under R.R. 8:7-11 considering the correction of a sentence which was without warrant in law because less than a mandatory minimum. However, under the same provision of Rule 35, Fed. R. Crim. Proc., the Supreme Court of the United States has held that a sentence may be revised upward to satisfy a statutory minimum. *Bozza* v. *United States,* 330 U.S. 160 (1947). The court adopted precisely the same reasoning as the New Jersey court in the *Culver* case: "If this inadvertent error cannot be corrected in the manner used here by the trial court, no valid and enforceable sentence can be imposed at all . . . This court has rejected the 'doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether because the court committed an error in passing the sentence.'" 330 U.S. at 166. See also *Pollard* v. *United States,* 352 U.S. 481 (1957), permitting resentence as "in the first instance" for substantially the same term where the original sentence was void because imposed in the absence of defendant on the ground that the alternative would be to let defendant go free. The New Jersey Supreme Court in the *Laird* case expressly stated that its ruling there did not extend to a situation such as in *Bozza.* "[T]here is no occasion to pursue that inquiry; we are concerned only with the specific issue raised here." 25 N.J. at 313.

In *People* v. *MacKenna,* 298 N.Y. 494, 84 N.E. 2d 795 (1949), the record in the trial would have permitted an increased sentence under a statute so providing where the defendant carried a gun. The increase was not imposed originally. Later, on defendant's motion, the sentence imposed was vacated. Defendant had been sentenced as a second offender but an out-of-state offense which had been counted as the first offense was not of sufficient gravity under New York law. The court held that since the defendant had never been legally sentenced, even though he had been imprisoned, it was proper on resentencing to impose the increased penalty for carrying a gun.

The court in *Laird* emphasizes that "the sentence imposed at the outset was valid, by the record made * * * ." A first offense was all that the record showed.

"[T]he original sentence conformed to the statutory command for a first offense * * * ." 25 N.J. at 312. The court's holding is limited to instances in which a valid sentence has been handed down. The factual situation stated in your request for opinion is plainly distinguishable because of the illegal sentence imposing a fine less than the statutory minimum.

We therefore advise you that a magistrate, upon notice from the Director of the Division of Motor Vehicles, should correct a sentence imposing a fine to accord with the mandatory statutory minimum for the motor vehicle offense.

Very truly yours,

DAVID D. FURMAN
Acting Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

APRIL 16, 1958

HONORABLE JAMES M. SULLIVAN
Chief, Consumer Credit Division
Department of Banking and Insurance
State House Annex
Trenton, New Jersey

FORMAL OPINION 1958—No. 7

DEAR MR. SULLIVAN:

You have asked for the opinion of the Attorney General as to whether the duty imposed by R.S. 8:2-38 and 39 upon the Department of Banking and Insurance to supervise and examine trust and special funds of "every cemetery association" applies to such funds of all cemetery associations or only to those of cemetery associations incorporated pursuant to the Rural Cemetery Act, presently embodied in R.S. 8:1-1 et seq.

R.S. 8:2-38 requires "every cemetery association" holding property in trust, or as a special fund, to file in the Department of Banking and Insurance, within 60 days after the close of each fiscal year of such association, a duly verified report of the principal and investments thereof. R.S. 8:2-39 requires the Department to inspect and supervise each fund at least once every two years.

Formerly, cemetery associations were created by special law or pursuant to the provisions of "An act authorizing the incorporation of rural cemetery associations," enacted in 1851. As part of the 1875 revision, the 1851 law was repealed and there was enacted "An act to authorize the incorporation of rural cemetery associations and regulate cemeteries." In 1918 there was enacted "A Supplement to an act entitled 'An act to authorize the incorporation of rural cemetery associations and regulate cemeteries, approved April ninth, eighteen hundred and seventy-five'" which, for the first time, required the Department of Banking and Insurance to supervise and examine the trust and special funds of "any cemetery association." The 1875 Act and 1918 Supplement were thereafter incorporated by the 1937 revision into what is presently R.S. 8:1-1 et seq., "Cemeteries."

It had been argued, prior to the 1937 revision, that the titles of the 1875 Act and 1918 Supplement were not broad enough to permit the regulation by the Department of Banking and Insurance of cemetery associations not incorporated pursuant to the Rural Cemetery Act. The phrase "and regulate cemeteries" was thought to be limited by the first portion of the title which reads "An act to authorize the incorporation of rural cemetery associations." Since a law is without force and effect unless the object thereof is expressed in the title of a statute, *Hendrickson* v. *Fries,* 45 N.J.L. 555, 563 (E. & A. 1883), there was uncertainty as to whether the 1875 Act could be construed to permit the regulation of a cemetery association not incorporated pursuant to the Rural Cemetery Act. However, in *Newark* v. *Mount Pleasant Cemetery Co.,* 58 N.J.L. 168, 172 (E. & A. 1895) the former Court of Errors and Appeals strongly suggested that the 1875 Act was applicable to a cemetery association not incorporated pursuant to the Rural Cemetery Act.

In arriving at its conclusion that the Rural Cemetery Act was intended to apply also to cemetery associations otherwise incorporated, the court noted that the act specifically refers to cemetery associations otherwise incorporated. This is still the case today. For instance, in the present statute R.S. 8:1-4 permits "any cemetery association incorporated under the provisions of this title, or under the provisions of any other law of this State, general, special or private . . ." to change its name; R.S. 8:1-6 entrusts the care and management: "of all cemetery associations incorporated under the authority of sections 8:1-1 to 8:1-5 of this title, or under any general law . . . to a board of managers or trustees . . ."; R.S. 8:2-18 deals with the streets and roads of "any cemetery association, however incorporated"; R.S. 8:2-27 exempts the "land and property of any cemetery association, however incorporated" from being seized under legal process, and R.S. 8:2-42 permits "any cemetery association, organized either under a general or special law" to sell its lands which are not used for burial purposes.

Thus, it is clear that the Rural Cemetery Act was intended to apply to any cemetery association regardless of how incorporated.

In any event, the 1937 revision, which enacted R.S. 8:1-1 et seq., is a wholly independent enactment superseding all existing general law, *Duke Power Co.* v. *Somerset Co. Bd. of Taxation,* 125 N.J.L. 431 (E. & A. 1940) and, since it is merely entitled "Cemeteries", it cannot be subjected to any narrow construction which could have been placed upon the former statutes. There is no valid reason why the phrase "every cemetery association" in R.S. 8:2-38 should be limited to "every cemetery association incorporated pursuant to this act". R.S. 8:1-1 merely sets forth one, and not the only method of forming a "cemetery association" (See Title 15; *Di Cristofaro* v. *Laurel Grove Memorial Park,* 43 N.J. Super. 244, 255 (App. Div. 1957)); the regulatory features of Title 8 on Cemeteries apply to every cemetery which is incorporated.

It is our opinion that the duty of the Department of Banking and Insurance to supervise and examine trust and special funds of "every cemetery association", as provided for by R.S. 8:2-38 and 39, applies to the trust and special funds of every cemetery association, regardless of how incorporated.

Very truly yours,

DAVID D. FURMAN
Acting Attorney General

By: MICHAEL R. IMBRIANI
Deputy Attorney General

MAY 7, 1958

HONORABLE CARL HOLDERMAN
Commissioner of Labor and Industry
20 West Front Street
Trenton, New Jersey

FORMAL OPINION, 1958—No. 8

DEAR COMMISSIONER HOLDERMAN:

You request our opinion as to whether a corporation doing business in New Jersey may lawfully deduct and withhold from its employees who are residents of the City of Philadelphia a portion of their wages for the purpose of payment of the wage tax of that city (Ordinances of December 13, 1939). You state that the City of Philadelphia contends that since Radio Corporation of America now has three business locations in that city, the corporation is required to withhold the Philadelphia wage tax from the wages of all Philadelphia residents employed by it in New Jersey. This contention is apparently based upon the holding in *City of Philadelphia* v. *Westinghouse Electric & Manufacturing Company,* 55 D. & C. 343 (Common Pleas No. 2, Philadelphia County, 1945).

The defendant in that case operated a business in Philadelphia and in Lester, Delaware County, Pennsylvania. At the Lester plant the defendant employed residents of Philadelphia. The court held that section 4 of the ordinance, which provides that:

> "Each employer within the City of Philadelphia who employs one or more persons on a salary, wage, commission or other compensation basis, shall deduct * * * at the time of payment thereof, the tax * * * and pay to the Receiver of Taxes the amount of tax so deducted * * *",

requires an employer, present and subject to municipal legislation, to collect the wage tax at the source from residents of the city employed and paid by the employer outside the city. The court went on to hold that the fact that the employer keeps its payrolls and pays its employees outside the city does not alter the situation.

It should be noted at the outset that the withholding here questioned is for a tax upon wages paid in New Jersey for work done in this State, which is attempted to be assessed not by the federal government but by a city of a sister jurisdiction. Concepts of constitutional supremacy applicable in such areas as withholding of federal income tax (26 U.S.C.A. § 3402) and social security deductions (26 U.S.C.A. § 3102) are, therefore, not relevant. Nor, we may add, are we here concerned with the specific applications of the Philadelphia wage tax. Assuming the applicability to Philadelphia residents working in New Jersey, we concern ourselves only with the question presented above.

R.S. 34:11-4, as amended, provides:

> "Every person, firm, association or partnership doing business in this State, and every corporation organized under or acting by virtue of or governed by the provisions of Title 14, Corporations, General, or by the provisions of the act entitled 'An act concerning corporations' (Revision 1896), approved April twenty-first, one thousand eight hundred and ninety-six, in this State, shall pay at least every two weeks, in lawful money of the

United States, to each and every employee engaged in his, their or its business, or to the duly authorized representative of such employee, the full amount of wages earned and unpaid in lawful money to such employee, up to within twelve days of such payment.

"It shall not be lawful for any such person, firm, association, partnership or corporation to enter into or make any agreement with any employee for the payment of the wages of any such employee otherwise than as provided by this section, except to pay such wages at shorter intervals than every two weeks. Every agreement made in violation of this section shall be deemed to be null and void, and the penalties provided for in section 34:11-6 of this Title may be enforced notwithstanding such agreement; * * *."

R.S. 34:11-6, as amended, provides:

"Every person, firm, association, partnership or corporation mentioned in section 34:11-4 of this Title and every officer or agent thereof who shall violate any of the provisions of said section 34:11-4 shall, for the first offense, be liable to a penalty of fifty dollars ($50.00), and for the second and each subsequent offense to a penalty of one hundred dollars ($100.00), to be recovered by and in the name of the Department of Labor of this State."

These statutory provisions, commonly referred to as the "Wage Payment Law", were discussed in *Department of Labor and Industry* v. *Rosen,* 44 N.J. Super. 42 (App. Div. 1957), where the court at pages 45 and 46 said:

"Historically, N.J.S.A. 34:11-4 is derived from *chapter* 179 of the *Laws* of 1896 and *chapter* 38 of the *Laws* of 1899, the latter entitled 'An act to provide for the payment of wages in lawful money of the United States every two weeks.' The motivating factor for the enactment of the legislation was the elimination of the practice prevalent among factory owners, particularly by owners of glass factories in southern New Jersey, of paying wages in the form of order books or scrip, redeemable only at company-owned stores. *Cumberland Glass Mfg. Co.* v. *State,* 58 N.J.L. 224 (Sup. Ct. 1895); see *Daily True American,* Trenton, N.J., March 14-17, 1896; February 28, March 10 and 17, 1899. The statutes, an exercise of the police power of the State, have decided economic benefits to the employee. The assurance of payment in cash at regular intervals of wages upon which an employee is dependent for the support of himself and his family is obviously an economic and social necessity. Indeed, such a view has biblical support: 'The wages of him that is hired shall not abide with thee all night until the morning,' *Leviticus,* 19, 13; 'At his day thou shalt give him his hire, neither shall the sun go down upon it; * * *' *Deuteronomy,* 24, 15.

"The unsavory practice proscribed by the Legislature had also been prevalent in other jurisdictions where employers in so-called company towns paid employees in scrip or specially marked coinlike pieces of metal redeemable only at company commissaries for food and clothing, or applicable to rent for company houses."

The statute is clear. "Every * * * firm * * * doing business in this State, * * * shall pay at least every two weeks, in lawful money of the United States, to each * * * employee * * * or to the duly authorized representative of such employee, the *full amount* of wages earned and unpaid in lawful money * * *." (Emphasis supplied) Deduction from wages of an amount to be used as a deposit for security that the employees will not terminate their employment before a given date is prohibited by the "Wage Payment Law", Attorney General's Opinion to Commissioner Blunt, August 30, 1929; nor can there be a withholding of a bonus to insure service where the bonus is a part of the wage itself, Attorney General's Opinion to Commissioner Bryant, December 8, 1919; deficiencies in the payment of rent upon the lease of an employer-owned home cannot be withheld, any agreement between the employee and employer notwithstanding, Attorney General's Opinion to Commissioner Bryant, April 25, 1916.

Payroll deductions from compensation of officials and employees of the State of New Jersey have been authorized by the Legislature, with respect to the purchase of war bonds (R.S. 52:14-15.5), and group insurance premiums (R.S. 52:14-15.9a). Payroll deductions were, in these cases, the subject of legislative action despite the voluntary authorization by State employees and officials. Memorandum Opinion to Henry W. Peterson, April 7, 1955.

Since our Legislature has not authorized payroll deductions from the wages of non-public employees, and since the *full* amount of the wages earned and unpaid must be paid at least every two weeks to the employee or his authorized representative, it is our opinion, and you are accordingly advised, that a deduction or withholding of any portion of such wages of a New Jersey employee for the purpose of satisfaction of the wage tax of the City of Philadelphia would be contrary to the provisions of our "Wage Payment Act" and would constitute a violation thereof.

Very truly yours,

DAVID D. FURMAN
Acting Attorney General

By: MARTIN L. GREENBERG
Deputy Attorney General

JULY 24, 1958

HONORABLE DWIGHT R. G. PALMER, *Commissioner*
State Highway Department
1035 Parkway Avenue
Trenton, New Jersey

FORMAL OPINION 1958—No. 9

DEAR COMMISSIONER:

We have been asked whether an agreement among the Highway Department, the Commonwealth of Pennsylvania, and certain political subdivisions of New Jersey and Pennsylvania providing for a joint "survey and study of transportation facts in the Philadelphia-Camden Metropolitan Area" can become effective without action by the Congress of the United States. This study, you have advised, is to be undertaken in conjunction with the federal interstate highway construction program.

This question is prompted by Art. I, Sec. 10 of the United States Constitution, which provides:

"* * *

"*No State shall,* without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, *enter into any agreement or compact with another State,* or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." (Emphasis added)

A literal application of this broad language was perhaps the early view of the law. See *Holmes* v. *Jennison,* 39 U.S. (14 Pet.) 540 (1840); *United States* v. *Rauscher,* 119 U.S. 407, 414 (1886); *People* v. *Curtis,* 50 N.Y. 321, 325 (1872). But the rule today is that only those compacts and agreements which would aggrandize the political or sovereign power of a State or impede the realization of a national interest or responsibility need the consent of Congress for validity. This view was expressed in *Virginia* v. *Tennessee,* 148 U.S. 503, 518 (1893):

"There are many matters upon which different States may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York, which the latter State might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter State to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair in Chicago, should desire to transport them a part of the distance over the Erie canal, it would hardly be deemed essential for that State to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that State in that way. If the bordering line of two States should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering States to agree to unite in draining the district, and thus removing the cause of disease. So, in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session. If, then, the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one State and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?

"* * *

"Looking at the clause in which the terms, 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States. * * * [T]he consent of Congress may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief."

See also *Wharton* v. *Wise,* 153 U.S. 155, 170 (1894).

This view is in accord with both prior and subsequent decisions of State courts. *Dover* v. *Portsmouth Bridge,* 17 N.H. 200 (1845); *Union Branch Ry.* v. *East T. & G. Ry.,* 14 Ga. 327 (1853); *Fisher* v. *Steele,* 39 La. Ann. 447, 1 So. 882 (1887); *Mackay* v. *New York, N.H. & H. RR.,* 82 Conn. 73, 72 Atl. 583 (1909); *McHenry County* v. *Brady,* 37 N.D. 59, 163 N.W. 540 (1917); *Roberts Tobacco Co.* v. *Michigan Dept. of Revenue,* 322 Mich. 519, 34 N.W. 2d 54 (1948); *Bode* v. *Barrett,* 412 Ill. 204, 106 N.E. 2d 521 (1952); *Duncan* v. *Smith,* 262 S.W. 2d 373 (Ky. 1953); *Landes* v. *Landes,* 1 N.Y. 2d 358, 135 N.E. 2d 562 (1956); *Ivey* v. *Ayers,* 301 S.W. 2d 790 (Mo. 1957).

The Supreme Court of the United States has not had the necessity to face the issue squarely. But in *Dixie Wholesale Grocery, Inc.* v. *Martin,* 308 U.S. 609 (1939), the court denied certiorari after a State court, relying on *Virginia* v. *Tennessee,* had held that an agreement to exchange data in sales tax reports was valid although not submitted to Congress for consent, 278 Ky. 705, 129 S.W. 2d 181 (1939). See *Zimmerman and Wendell, The Interstate Compact Since 1925,* at 34-42 (1951); *National Conference of Commissioners on Uniform State Laws, Proceedings of the Thirty-First Annual Meeting,* 330 (1921).

The need for cooperation between States to exchange views and information has led to the establishment of a very large number of associations of State officials, including the American Association of State Highway Officials, without seeking the consent of Congress. *Frankfurter and Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments,* 34 Yale L.J. 685, 689 (1925). Agreements between administrative officials of several States not implemented by action of the Legislatures "never have been brought before Congress because consent to them never has been thought necessary." *Zimmerman and Wendell, op. cit., supra,* 42.

The present proposal calls only for a survey and study. New Jersey has repeatedly undertaken interstate planning without obtaining Congressional consent. This is so even where, ultimately, the construction of joint facilities was intended and it was clear that construction could be undertaken only with consent. In the case of the Holland Tunnel, a New York Commission was created in 1906. N.Y.L. 1906, c. 260. A New Jersey Commission was given authority to plan on February 14, 1918. L. 1918, cc. 49, 50. On April 8, 1919 the New Jersey Commission was specifically authorized to enter into a contract to provide for construction with the corresponding New York Commission. L. 1919, c. 70, effective April 8, 1919. Only on July 11, 1919 was Congressional consent obtained. 41 Stat. 158. In the case of the Port of New York Authority, New Jersey authorized joint study in 1917. L. 1917, c. 130. The study recommended a compact to provide for the construction and operation of facilities. In 1921 the New Jersey Legislature authorized our Commission to negotiate such a compact, L. 1921, c. 151, which was executed on April 30, 1921, 42 Stat. 174, 180. Only after this was the consent of Congress obtained on August 23, 1921. 42 Stat. 174. In the case of the Metropolitan Rapid Transit Commission, which was authorized to make a joint study, L. 1952, c. 194, as amended by L. 1954, c. 44, N.J.S.A. 32:22-1 to 19, no Congressional consent was sought.

Thus, both case law and practice make it clear that the undertaking of joint studies and planning by neighboring States for regional transportation needs is not such activity that can be done only with Congressional consent. New Jersey and Pennsylvania need not obtain Congressional consent to the proposed agreement.

It might be noted in passing that the proposed study is compatible with the will of Congress as expressed in numerous provisions of federal statutes. "The Federal Highway Administrator, in cooperation with the State highway departments of the respective States, is * * * directed to investigate the service afforded to traffic, population, and lands by all highways of each State, as determined by State-wide surveys adequate for the purpose. * * *" 23 U.S.C.A. sec. 20a. "The Secretary of Commerce is authorized * * * to engage in research on all phases of highway * * * development [and] design * * * and traffic conditions * * *. The Secretary may carry out the authority granted * * * in connection with any * * * State agency * * *." 23 U.S.C.A. sec. 21-1(a). "The Secretary of Commerce is directed to * * * expedite * * * tests * * * by the Highway Research Board * * * in cooperation with the Bureau of Public Roads, [and] the several States * * * for the purpose of determining the maximum desirable dimensions and weights for vehicles operated on the Federal-aid highway systems * * *." 23 U.S.C.A. sec. 158 (k). The Secretary of Commerce is authorized in cooperation with State highway departments to make a study of the whole question of the sharing of highway costs by vehicles in relation to their dimensions and weight. 23 U.S.C.A. sec. 174(b). The Secretary of Commerce is directed to make available to State and local governments scientific and technical information of every sort. 15 U.S.C.A. sec. 1152.

The proposed agreement, while vesting "administrative responsibility" for the study in the highway departments of Pennsylvania and New Jersey, nevertheless, provides for one representative of the Federal Bureau of Public Roads on the Policy Committee and two representatives of the Bureau of Public Roads on the six-member Executive Committee. Sec. 3.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

JULY 31, 1958

HONORABLE PHILLIP ALAMPI
Secretary, Department of Agriculture
One West State Street
Trenton, New Jersey

FORMAL OPINION 1958—No. 10

DEAR SECRETARY ALAMPI:

The poultry industry of New Jersey through the State Poultry Association and various marketing groups has recommended that specifications for the purchase of eggs for State institutions be changed to limit purchases to those produced within the State. You inquire as to the propriety of such action.

The Director of the Division of Purchase and Property in the Department of the Treasury is vested with the powers, duties and responsibilities involved in the efficient operation of a centralized State purchasing service. *N.J.S.A.* 52:27B-56. Among those powers is the authority, in consultation with heads of departments, to develop standard specifications for all commodities commonly purchased. *N.J.S.A.* 52:27B-58. It is directed that he shall:

> "a. Determine and establish and from time to time change standards and specifications according to the needs of all using agencies so far as their needs are in common, and for groups of using agencies or for single using agencies so far as their needs differ;
>
> "b. Fix physical or chemical formulae and otherwise determine the service, quality, fitness and suitability of all articles tendered or furnished;"

N.J.S.A. 52:18A-19 and52:27B-61 provide a procedure whereby detailed applications and schedules for all articles to be purchased are to be submitted to the Director. He shall then arrange such schedules or parts thereof for purchase and contract in the manner best calculated to attract competition and advantageous prices. Contracts or orders for purchases are to be awarded to the lowest responsible bidder meeting all specifications and conditions.

While, as stated in your letter, the Division of Purchase and Property and your department want to do all possible to favor taxpayers and citizens of New Jersey and give every marketing advantage to New Jersey products, there is to be considered the legislative mandate that the Director shall "attract competition" and obtain "advantageous prices." No geographical limitation is placed on the sources of supply. It is not indicated in any way that the Director should be confined to New Jersey in his purchasing operations. If a responsible non-New Jersey producer is able to furnish the same quality egg at a lower price than New Jersey producers, then under present legislation the Director is bound to award the contract to him. The purpose of the statute is to secure to the State the advantage of competition in the furnishing of all articles. *Cf. Asbury Park Press* v. *City of Asbury Park*, 23 *N.J.* 50 (1956). All persons, within and without the State, shall have a fair opportunity to bid upon equal terms—the object being to secure economy in government, to prevent fraud, favoritism and extravagance. *Cf. Marangi Bros.* v. *Bd. of Com'rs. of Ridgewood*, 33 *N. J. Super.* 294, 303 (*App. Div.* 1954).

The State is required by *N.J.S.A.* 52:18A-19 and 52:27B-61 to award the instant contract to the "lowest responsible bidder," and it cannot evade that obligation through indirection by changing its specifications in such a manner as to eliminate prospective bidders. Such specifications would not be consistent with the requirement that State work is to be given to and done by the lowest responsible bidder. In *Frame* v. *Felix*, 167 *Pa.* 47, 31 *Atl.* 375 (*Sup. Ct.* 1895) it was held that a provision in the specifications of a municipal contract requiring the contractor to employ no one not a citizen of the United States and to pay not less than a stipulated wage per day was inconsistent with the law requiring municipal work to be let to the lowest responsible bidder.

Whether the interest of the citizens of this State will best be served by the purchase of only New Jersey produced eggs for State institutions is not a question to be answered by administrative fiat. If it is to be the policy of this State to deliberately preclude those from without the State from a chance to contract for State business then that decision lies with the Legislature. Until such time as it speaks, administrative officials concerned with purchasing are neither geographically limited by statute nor authorized to impose such limitations, except for such territorial considerations as may be inherent in requirements of freshness and like quality factors.

Trade barriers should not be erected or extended by implication. Where the Legislature has desired to prefer New Jersey citizens it has clearly manifested its in-

tent. See *R.S.* 52:36-3 (printing to be done within the State) and 34:9-2 (preference in employment of New Jersey citizens in construction of public works). In like manner it has affirmatively designated that American products shall be used in State work and on public works. *R.S.* 52:32-2; 52:33-2. Having enacted such legislation as above and having ventured only into the field of printing, it seems fair to say that the legislators are well aware of the considerations so colorfully stated by Justice Terrell in his dissenting opinion in *State* v. *Lee*, 150 *Fla.* 35, 7 *So. 2d* 110 (*Sup. Ct.* 1942), involving a statute which required the letting of certain contracts to bidders who operated their plants within the State. He stated:

> "[The statute] has no place in a world committed to the good neighbor policy. It should under no circumstances be extended to doubtful cases. It is about as congenial to the good neighbor policy as a brace of tom cats would be to each other if thrown over the clothes line with their tails tied together. In fact the Florida orange grower of the good neighbor era arises in the morning to the chant of Old Domineck who was imported from Missouri as a day old chick, he dons a shirt made in New Jersey, slips into a pair of overalls made in North Carolina of Alabama cotton, and a pair of shoes made in St. Louis from the hide of a Texas steer; he turns on his radio made in New York and listens to a Columbia announcer tell the world how his own boys are saluting Japs in Java with machine guns and how his neighbor's boys are saluting the Fuhrer from Iceland with bombing planes. If the price of oranges is looking up, his wife greets him at dinner with a Kansas City steak broiled in a Pittsburgh skillet, flanked with Georgia grits lubricated with ham gravy from an Iowa pig, tapered off with a cut of apple pie made of Virginia apples embroidered with Wisconsin cheese and a cup of coffee from Brazil, sweetened with Cuban sugar and stirred with a silver spoon from Nevada. He drives to work in an automobile made in Detroit, cultivates his grove with a Chicago plow, hauls his oranges in a Michigan truck empowered by Oklahoma gas, and hopes that people from everywhere, even California, will drink his orange juice. He sleeps on a Grand Rapids bed, sits on a High Point chair, cooks on a General Electric stove, and gets his religion and code of morals from the Bible that came from Egypt, Babylon, and Israel and is governed by the Common Law of England after being tinctured with the civil law from Rome; in fine, he patronizes the four points of the compass and is such an embodiment of the good neighbor philosophy that the cackle of his hens is about the only homespun product on the grove." (at *p.* 116)

We believe the Legislature was conscious of the thoughts so ably expressed above and did not intend in any way to restrict public officials in their purchasing activities.

Having concluded that the Director is not vested with the authority to effectuate the proposal, we need not consider the question of whether such State action would contravene the Commerce clause and the Fourteenth Amendment of the United States Constitution. See *People* v. *Coler*, 166 *N.Y.* 144, 59 *N.E.* 776 (*Ct. App.* 1901) [statute required stone used in municipal work be worked, dressed or carved within State]; *Knight* v. *Barnes*, 7 *N.D.* 591, 75 *N.W.* 904 (*Sup. Ct.* 1898) [statute required printing be done within State]; *Ex parte Gemmill*, 20 *Idaho* 732, 119 *Pac.* 298 (*Sup. Ct.* 1911) [statute required printing be done within State].

Therefore, it is our opinion that the Director of the Division of Purchase and Property may not limit the purchase of eggs for State institutions to those produced in New Jersey.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: HAROLD J. ASHBY
Deputy Attorney General

SEPTEMBER 25, 1958

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

FORMAL OPINION 1958—No. 11

DEAR MR. PATTEN:

We have been asked to describe the duties of the Secretary of State ancillary to the submission to the people, pursuant to Article IX, Section IV, of the New Jersey Constitution of 1947, of the proposed amendment to Article VIII, Section IV, paragraph 2 of the Constitution. The proposed amendment was agreed to by the Legislature on June 16, 1958 in Senate Concurrent Resolution No. 16, which reads as follows:

> "*Be It Resolved* by the Senate of the State of New Jersey (the General Assembly concurring):
>
> 1. The following proposed amendment to the Constitution of the State of New Jersey is hereby agreed to:
>
> PROPOSED AMENDMENT
>
> Amend Article VIII, Section IV, paragraph 2 of the Constitution to read as follows:
>
> 2. The fund for the support of free public schools, and all money, stock and other property, which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of free public schools, for the equal benefit of all the people of the State; and it shall not be competent, except as hereinafter provided, for the Legislature to borrow, appropriate or use the said fund or any part thereof for any other purpose, under any pretense whatever. The bonds of any school district of this State, issued according to law, shall be proper and secure investments for the said fund and, in addition, said fund, including the income therefrom and any other moneys duly appropriated to the support of free

public schools may be used in such manner as the Legislature may provide by law to secure the payment of the principal of or interest on bonds or notes issued for school purposes by counties, municipalities or school districts or for the payment or purchase of any such bonds or notes or any claims for interest thereon."

The Secretary of State should notify the clerks of all counties that the proposed amendment is to be submitted to the people at the general election to be held on November 4, 1958. See R.S. 19:14-15.

On ballots not intended for use in voting machines, preceding the text of the proposed amendment there should be instructions to voters on the manner of recording their vote. Ordinarily, such instructions should be couched in the language of R.S. 19:14-14. However, at the election at which the proposed amendment is to be submitted to the people, another public question, whether the Water Bond Act of 1958, L. 1958, c. 35, should be approved, is also to be submitted. Under the authority of R.S. 19:14-15, you have directed that the Water Bond Act question is to appear as the first public question on the ballot, and the proposed amendment is to appear as the second. The Water Bond Act expressly provides that the certain instructions are to precede the Water Bond Act question on the ballot in counties not using voting machines. L. 1958, c. 35, sec. 24.

The substance of these instructions appearing once above both questions will satisfy the intent of R.S. 19:14-14 and will obviate the confusion to the voter which would result if instructions with the same import but different language preceded each of the two questions.

On ballots to be used in voting machines, no special instructions on the manner of recording a vote need be given. The county clerk is to make appropriate arrangements for the voters to record a "yes" or "no" vote on the amendment. R.S. 19:49-2; see also L. 1958, c. 35, sec. 24. The text of the amendment as it appears on voting machines must be preceded by a description of the question not exceeding six (6) words. N.J.S.A. 19:49-2. The following description should be used: "Proposed Constitutional Amendment Concerning School Bonds." On voting machine ballots, both this description and the question must be printed in red ink. N.J.S.A. 19:49-2.

When a proposed constitutional amendment is to be submited to the people of the State at a general election, a printed copy of the amendment must be mailed to each registered voter in the same envelope with the sample ballot, where envelopes are used. R.S. 19:14-27. Where envelopes are not used to mail out the sample ballots, pursuant to N.J.S.A. 19:49-4(b), the Commissioner of Registration shall make such arrangements for mailing printed copies of the amendment as are practical. R.S. 19:14-27. When the proposed amendment adds new matter to the Constitution, the added matter must be italicized. R.S. 19:14-28.

In addition to the text of the amendment, the Attorney General, if he deems proper, may make a summary statement to inform the voters of the effect which the adoption of the proposed amendment would have which must be mailed to them with the copies of the amendment. R.S. 19:14-31. The Attorney General does not deem it necessary to add a statement to the language of the present amendment to inform the voters of its effect. Therefore, the statutory requirements of notice to the voters will be satisfied if each is mailed the following material:

"Shall the prosposed amendment agreed to by the Legislature on June 16, 1958 to change Article VIII, Section IV, paragraph 2 of the Constitution to read: '2. The fund for the support of free public schools, and all money, stock and other property, which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of free public schools, for the equal benefit of all the people of the State; and it shall not be competent, *except as hereinafter provided,* for the Legislature to borrow, appropriate or use the said fund or any part thereof for any other purpose, under any pretense whatever. *The bonds of any school district of this State, issued according to law, shall be proper and secure investments for the said fund and, in addition, said fund, including the income therefrom and any other moneys duly appropriated to the support of free public schools may be used in such manner as the Legislature may provide by law to secure the payment of the principal of or interest on bonds or notes issued for school purposes by counties, municipalities or school districts or for the payment or purchase of any such bonds or notes or any claims for interest thereon.*' be approved? (The italicized words are the new matter that would be added to the Constitution by this proposed amendment.)"

This material, while technically required to be mailed to the voter "with" the sample ballot, R.S. 19:14-27, may be printed on the sample ballot to avoid the needless expense which would result from printing it on a separate sheet.

Very truly yours,

DAVID D. FURMAN
Attorney General

SEPTEMBER 25, 1958

MR. SALVATORE A. BONTEMPO, *Commissioner*
Department of Conservation and
Economic Development
State House Annex
Trenton, New Jersey

FORMAL OPINION 1958—No. 12

DEAR COMMISSIONER:

We have been asked the following questions to define the obligation of the State toward Hunterdon County arising out of the fact that the Lebanon-Stanton Road, a county road, must be relocated because the site of its present bed will be inundated by the Round Valley Reservoir, land for which has been acquired pursuant to Laws of 1956, c. 60, sec. 5 and Laws of 1957, c. 215, sec. 5; N.J.S.A. 58:20-5:

1) Would an apparently circuitous relocated route be lawful?
2) Must the relocated route terminate at the same points as the former road?
3) Must the relocated route have a 60 foot wide right-of-way in contrast to the 33 foot wide right-of-way of the former route?
4) May the State provide a 60 foot wide right-of-way for the new route even though not required to do so by law?

5) Does the Department of Conservation and Economic Development have authority to acquire land outside the reservoir taking line as may be necessary to relocate the road?

In the statutes providing for the acquisition of land for the Round Valley Reservoir, the Legislature has provided that the county is to be paid the cost of relocating any county roads displaced. L. 1956, c. 60, sec. 5; N.J.S.A. 58:20-5. The State may not expropriate county property which is needed for State projects. *State* v. *Cooper,* 24 N.J. 261, 269 (1957). In this instance, instead of providing for compensation commensurate with the "sale price" of the property, see *State* v. *Cooper, supra,* at 270, the Legislature has provided that the county is to be paid the cost of construction of an equivalent replacement road.

An equivalent road is one not necessarily of identical dimensions as the original road but one with the present and future facility to handle an equal volume of traffic. The paved width of the present road is a substantial factor in determining its present traffic capacity. The total width of the right-of-way is a substantial factor in determining its potential for traffic.

The replacement road should also meet all minimum standards for county roads imposed by law even if the current minimum standards would give the replacement road a greater traffic capacity or potential than the original road. When the Legislature provided for a relocated road in the Round Valley Acts, it intended a lawful road. However, there is no requirement of law of a minimum width in feet for county roads. In the absence of such authority, the answer to whether the relocated road must be 60 feet wide, see question 3 above, depends solely on what width is needed to afford a facility for traffic equal to that of the taken road.

In answer to question 1, the mere fact that a plan view of a proposed new route may appear circuitous does not *ipso facto* make it unreasonable and unlawful. An apparently circuitous route may be chosen where there is a reasonable basis for it, such as to minimize grades, to avoid excessive excavation or filling, or because it is otherwise necessary to service the same needs as the taken road did. Cf. *Tennessee Gas Transmission Co.* v. *Hirschfield,* 38 N.J. Super. 132 (App. Div. 1955) and 39 N.J. Super. 286 (App. Div. 1956).

In answer to question 2, the prime consideration in the location of the termini, as well as the other physical characteristics of the new road, must be to minimize dislocation to communities and individuals despite the construction of the reservoir. To this end, the new road ought to service as near as may be the needs which the taken road served. In *State* v. *Cooper, supra,* where the State took by eminent domain land designated for a municipal park, the Supreme Court held that the compensation paid to the municipality should be used to "approximate fulfillment of [the park's donor's] general benevolent intent." 24 N.J. at 276.

Thus the choice of a route is a highly factual matter. No answer can be given by us to the question whether a particular route may be selected without a familiarity with all the facts. However, we can advise you that there is no absolute requirement that the termini of the replacement road correspond with those of the taken road.

In answer to question 4, the State has no duty or power to provide a road wider than is necessary either to afford an equivalent traffic capacity or to meet current minimum standards imposed by law.

By providing that payment for the relocation is to be made by the State Treasurer to the county, L. 1956, c. 60, sec. 5; N.J.S.A. 58:20-5, the Legislature has

implied that the county, and not the State, is to arrange for the construction of the replacement road. The county has adequate power to do so. N.J.S.A. 27:16-1, 2, 42; N.J.S.A. 27:20. Therefore, it is unnecessary to answer the fifth question, whether the Department of Conservation and Economic Development has authority to acquire land outside the reservoir taking line.

As noted above, payment for the reasonable cost of relocation is to be made by the State Treasurer to the county. Since the reasonableness of the amount requested by the county cannot be determined until the route has been selected, and all the facts concerning the proposed new route are available, the Treasurer may withhold payment of any excess over what will clearly be a reasonable amount in any case until he can determine that the full amount requested is reasonable. Since the State Treasurer does not have technical competence to determine the reasonableness of cost of the proposed relocation, he may call on the Department of Conservation and Economic Development for advice. N.J.S.A. 52:27C-7; cf. N.J.S.A. 52:27C-18.

Any payment to the county is held in trust by it for the relocation costs. Cf. *State* v. *Cooper, supra,* at 276.

To the extent that amounts are unexpended, an appropriation is available to cover the cost of relocation of the road involved here. L. 1958, c. 64, sec. 1, account N-12 appropriated the balance of the funds originally appropriated for the acquisition of the Round Valley site, see L. 1956, c. 60, sec. 7; N.J.S.A. 58:20-7, (with the exception of that part of the balance previously appropriated by L. 1957, c. 113 at 475) to carry out the purposes of L. 1957, c. 215, sec. 5, which include *inter alia* the reenacted provision in L. 1956, c. 60, sec. 5 for reimbursement to counties for the cost of relocating roads.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

SEPTEMBER 25, 1958

HONORABLE CARL HOLERMAN
Commissioner of Labor and Industry
20 West Front Street
Trenton, New Jersey

FORMAL OPINION 1958—No. 13

DEAR COMMISSIONER HOLDERMAN:

You have requested our opinion as to whether certain industrial research establishments not physically integrated with production establishments come within the purview of the sections of statutes enforced by the Bureau of Engineering and Safety of the Department of Labor and Industry relating to requirements for plan filing and other conditions affecting safe employment.

Specifically, you question whether those statutes afford jurisdiction over physically segregated industrial research establishments where such establishments:

> "a. employ laboratory scale operations essentially similar in nature to larger scale industrial processes;
>
> b. employ 'pilot plant' operations which duplicate in nature and perhaps in size large scale industrial processes in use or contemplated for use, and which are constructed for the purpose of product or process research;
>
> c. make, synthesize or substantially alter any product, article or substance for use in further research or for experimental test purposes."

Your request concerns the operation of physically segregated industrial research premises only. In accordance with established administrative construction, and on the basis of Formal Opinion 1952, No. 30, December 1, 1952 (holding that eating facilities physically integrated with production establishments are a part thereof for the purpose of the Female Hours Law, R.S. 34:2-24 et seq.), research facilities located in and integrated with other manufacturing facilities come within the ambit of R.S. 34:6-1 and 3.

R.S. 34:6-1 and 3 require that buildings may not be devoted to use as "a factory, workshop, mill or place where the manufacture of goods of any kind is carried on" until the Commissioner of Labor and Industry approves the plans and specifications as to safety and adequacy of various means of egress, ventilation and sanitation. The express provisions of these sections are as follows:

> "No building shall be erected or adapted for any of the purposes enumerated in section 34:6-1 of this title, nor shall any addition more than two stories high be constructed unless the plans and specifications as to stairways, elevator shafts, fire escapes, doors and windows, ventilation and sanitation be first approved by the commissioner of labor on the advice of the commissioner of institutions and agencies." R.S. 34:6-3.
>
> "Every factory, workshop, mill or place where the manufacture of goods of any kind is carried on shall under the supervision and direction of the Commissioner be provided with ample and proper ways and means of egress * * *." R.S. 34:6-1.

Authority over safety inspections in buildings likewise devoted to use as "a factory, workshop, mill or place where the manufacture of goods of any kind is carried on" is conferred on the Commissioner by various other provisions of law: R.S. 34:6-14 — Fire alarms — "every factory, workshop, mill, or place where the manufacture of goods is carried on which is more than two stories in height * * *"; R.S. 34:6-20 — Smoking — "Smoking in any factory, workshop, mill, or *other* place where the manufacture of goods is carried on, * * * is forbidden" (italics added); R.S. 34:6-24 and R.S. 34:6-42 — Elevators — "* * * factory, workshop, mill or place where the manufacture of goods (of any kind) is carried on * * *" (portion in parentheses appears only in R.S. 34:6-24); R.S. 34:6-47 — Hoistways, etc. — "* * * factory, workshop, mill or place where the manufacture of goods is carried on * * *"; R.S. 34:6-60 — Air space — "* * * factory, workshop, mill or place where the manufacture of goods is carried on * * *"; R.S. 34:6-61 — Ventilation — "* * * factory, workshop, mill or place where the manufacture of goods is carried on * * *"; R.S. 34:6-62 — Machine guards — "* * * factory, workshop, mill or place where the manufacture of goods is carried on where machinery is used * * *"; R.S. 34:6-63, as amended, P.L. 1942, c. 31, p. 236, sec. 1 — Meal times — "* * * factory, workshop, mill, mine, or place where goods are manufactured * * *"; R.S. 34:6-66 — Toilet facilities — "* * * every factory, workshop, or mill shall contain * * * water closets and wash rooms * * *".

The words "factory, workshop, mill or place where the manufacture of goods of any kind is carried on" have been the subject of a series of opinions of the Attorney General. Dating from 1915, these opinions suggest that the words "where the manufacture of goods of any kind is carried on" modify "factory, workshop, mill or place." In a survey of the various sections of the present chapter 6, title 34, the Attorney General, in an opinion to Lewis T. Bryant, Commissioner of Labor, dated October 5, 1915, stated:

> "* * * The fourth section of this supplement, (R.S. 34:6-3), which provides for the filing of plans before a new building is constructed, is restricted, in its operation, to buildings used for factory purposes, while the thirteenth section of the act, (R.S. 34:6-22), which provides the penalties for failure to comply with its provisions, empowers the commissioner to close a building which does not comply with the requirements of the act for manufacturing purposes and imposes a penalty upon the use of the building for manufacturing purposes after it has been so closed by the commissioner. It is plain that the two provisions last above mentioned are restricted to places in which manufacturing is done, and do not include within their operation workshops in which no manufacturing is done." (parentheses added).

See also, Formal Opinion 1951—No. 36, November 20, 1951; Formal Opinion 1952—No. 8, May 20, 1952.

The question to be determined, therefore, is whether industrial research establishments which perform the functions you have outlined can be deemed to be places in which "manufacturing" is carried on according to the terms of R.S. 34:6-1 et seq.

The statutes with which we are here dealing are remedial in nature and seek, through the exercise of the police power of the State, to insure that minimum standards of health and safety are met in industrial plants. As such, they must be given a liberal and broad interpretation to accomplish their intended results. *Lane* v. *Holderman,* 23 N.J. 304 (1957); *State* v. *Meinken,* 10 N.J. 348 (1952).

Such a construction was given to the phrase "manufacturing of goods of any kind" as used in R.S. 34:6-1 et seq. in Formal Opinion 1953—No. 52, December 3, 1953, where it was determined that R.S. 34:6-1 gives the Commissioner of Labor and Industry regulatory power over electrical power plants. In so holding, the opinion relied upon *Bates Machine Co.* v. *Trenton R.R.,* 70 N.J.L. 684 (E. & A. 1904).

In the *Bates Machine Co.* case, the court was faced with the question whether machinery furnished for the production and control of electric power and its adaptation for use upon a trolley system was machinery for "manufacturing purposes" under P.L. 1898, p. 538, section 8 (Mechanics Lien Act). After holding that the entire clause, "fixed machinery, or gearing or other fixtures for manufacturing purposes", was qualified by the last three words, the court at pp. 686, 7 and 8 went on to state:

> "The question, however, is not one of scientific terminology but rather of the sense in which an ordinary term was used by the Legislature in framing an enactment whose sole purpose was to secure to laborers and others payment for furnishing and erecting machinery for manufacturing purposes, a

descriptive term that should be given its broadest signification in order to effect what was clearly the legislative will. That the word 'manufacture' is no longer limited to something that is made by hand is not more obvious than that, by the very necessities of the case, it must continue to travel farther and farther from its first meaning in keeping with the growth and progress of the thing for which it continues to stand; so that to make by machinery, or by chemical reaction, or by any other device known to art, has already entirely superseded the original notion of hand fabrication. While its original meaning lasted, however, it necessarily involved the idea of tangibility, but with the elimination of the manual element from the essential meaning of the word, there was no longer the slightest justification for the retention of this notion of tangibility as a restriction upon its broadening usefulness, and, as a fact, it has been entirely dropped from current use when applied to such processes as the manufacture of oxygen, or of carbonic acid, or of nitrous oxide, or of illuminating gas, or of a host of other products totally lacking in tangibility. The essential meaning retained by the word 'manufacture,' or perhaps that has been acquired by it, is that of effecting by art some change in materials or elements as they exist in a state of nature by which they are rendered more subject to man's control or more serviceable to his use. A mere appropriation of natural objects without imparting to them this added quality, as in the case of agriculture or of the gathering of natural ice, is not manufacture in this current sense, nor is the mere liberation or collection of natural products, such as petroleum or natural gas. But the production of illuminating gas is a manufacture. *Nassau Gaslight Co.* v. *City of Brooklyn,* 89 N.Y. 409. So is the making of ice by artificial means. *People* v. *Knickerbocker Ice Co.,* 99 Id. 181.

"Neither the fact, therefore, that the material elements to be acted upon already exist in a state of nature, nor the fact of their intangibility before or after the desired change has been impressed upon them, militates against the application of the word 'Manufacture' to the process by which such change is wrought. In the recent case of *People* v. *Wemple,* 129 N.Y. 543, decided in the New York Court of Appeals, the precise question we are now considering was before the court as a basis for exemption from taxation, to which, for obvious reasons, a much more stringent rule is applied than to remedial legislation, such as our Mechanics Lien Law. In the opinion in that case, Judge O'Brien said: 'The true inquiry would seem to be whether the corporation would not be considered, in common language, as engaged in some manufacturing process. Though granting all that is said by experts and others about electricity as a natural element or force, to say that electricity exists in a state of nature; and that the relator collects or gathers it, does not fully or accurately express the process. According to the common understanding, the electricity or thing that produces the results is generated or produced by the application of power to machinery; that is, by a process purely artificial. Passing by the refinements of scientific discussion, it would seem to be common sense to hold that a corporation that does this is, in every just sense of the term, a manufacturing corporation. The materials from which all manufactured things originate exist in a state of nature, but the manufacturer, by application to these materials of labor and skill gives to them a new and useful property. The electricity which is generated and transmitted by the operation of the relator is a very different thing from that mysterious element which is said to pervade nature.'"

You point out that the last 15 years have seen the growth and establishment of separate industrial research centers at a rate which has made or is soon likely to make New Jersey first in the nation among host States for the industrial research enterprise. You further point out that your experience with industrial research facilities which are an integral physical part of production establishments has indicated that the danger to life and limb in such work places is probably greater than that encountered in manufacturing operations in general.

Industrial research as it is known today was nonexistent at the time of the enactment of the statutes under discussion. The industrial research process represents an amalgamation of scientific creative techniques with economic motivations. The application of available research resources to a given project or program in industrial research can begin with the exploratory stage where the problems are not clearly defined and the object is the investigation of feasibility and probability, and continue through the intensive to the trial stage, in which pilot or plant-scale trials preparatory to commercial use of the results are conducted. *Hertz, The Theory and Practice of Industrial Research,* 1950, page 138.

The mere fact, however, of its youth, or highly technical processes, affords no basis for excluding it from the necessarily broad application to be given to the term "manufacture" as it appears in these remedial statutes. The test for this purpose, against which all activity should be measured, is that laid down in the *Bates* case, *supra.* Does the activity effect "by art some change in materials or elements as they exist in a state of nature by which they are rendered more subject to man's control or more serviceable to his use?"

We are of the view that the three specific illustrations cited at the outset constitute "manufacturing" within this definition and that, therefore, such activities come within the purview of the statutes discussed above. In all three cases materials or elements are rendered more serviceable to man or more subject to his control. Each activity must be judged independently, upon its own processes. A determination as to jurisdiction must be made in each case.

In holding that jurisdiction exists in these instances, we are not unmindful of Formal Opinion 1949—No. 111, December 5, 1949. In that Opinion the Attorney General held that the Commissioner of Labor and Industry had no jurisdiction under any portion of Title 34 of the Revised Statutes over certain operations involving the use of radio-active substances and radio isotopes. The U.S. government had contracted with a New Jersey laboratory to assay and analyze certain material for the Atomic Energy Commission. The laboratory was "primarily a way station and no processing of any kind is carried out." The material was crushed and ground to a fine state, analyzed and tested, and then shipped to other locations "probably outside the State for further use." Holding that a "workshop" is "a place where the manufacture of goods of any kind is carried on," the opinion concluded that "It cannot be said that the highly technical processes involved in the operations under consideration were within the contemplation of the Legislature."

Insofar as that opinion held that manufacturing was not involved despite the fact that something was done to a natural element which made it more useful or more controllable in a later process, it is contrary to the opinion herein expressed and is overruled. We feel, in accordance with the opinion expressed in *Scrymser* v. *Seabright Electric Light Co.,* 74 N.J. Eq. 587 (Ch. 1908), that new, highly technical processes,

unknown to science when reference to manufacturing was originally made, are not to be excluded from such a categorization merely on the basis of their newness or the degree of technical skill involved.

Our further opinion is that if any research activity, not involving some change in materials or elements as they exist in nature so as to render them more subject to man's control or more serviceable to his use, is carried on in conjunction with, or accompanied by, research which does work such change, then the entire research program and any activity incidental thereto falls within the legislative classification termed "manufacturing." Formal Opinion 1952—No. 30, December 1, 1952.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: MARTIN L. GREENBERG
Deputy Attorney General

SEPTEMBER 29, 1958

COLONEL JOSEPH D. RUTTER
Superintendent
Division of State Police
Trenton, New Jersey

FORMAL OPINION 1958—No. 14

DEAR COLONEL RUTTER:

You have requested our opinion as to the legal validity of a system of warning citations which carry no penalty, to be issued by State Police and Motor Vehicle Inspectors in the enforcement of the motor vehicle laws (R.S. 39:1-1 *et seq.*). In your request, you have summarized several advantages of such a system from the standpoint of effective traffic law enforcement.

1. The authority of a law enforcement officer to issue warnings, in addition to summonses, increases his potential for both education and enforcement. The effect of a warning on a driver can be both corrective and deterrent. There are many bad driving practices which can and often do cause serious accidents. A law enforcement officer with only the authority to issue a summons often hesitates to take such action when he observes a bad driving practice, because he has not secured sufficient evidence to convict the motorist of any violation beyond a reasonable doubt, as the law requires, or because he determines that the violation is minor and not an immediate threat to safety on the highway or street. By issuing a warning citation, the officer would stress to the driver the specific bad driving practice and its possible dangerous consequences.

   As an example, a driver approaches a stop sign and fails to come to a complete halt. He has made reasonable observation to his right and left, and no other vehicles are approaching the intersection. While the law has been technically violated, the issuance of a warning here, with an explanation by the issuing officer that the practice can result in a careless habit leading to accidents, may appear to the officer to have the best possible effect on the driver. If the officer ignores the occurrence, the driver may assume that the practice was proper and legal. If, on the other hand, he issues a summons, the driver may fail to realize the potential seriousness of his bad driving practice. The ability to issue warning citations would vastly increase, therefore, the number of contacts between trained law enforcement officers and the driving public with every indication of bringing greater safety to our highways.

2. The experience of other States, specifically Arkansas, Connecticut, Georgia, Kansas, Minnesota, South Carolina, Texas, Utah, Vermont, Washington, West Virginia and Wisconsin, where warnings are now issued, as well as the past experience of 27 years of use of such a system in New Jersey, are concrete evidence of the effectiveness of such a system. Nearly one and three-quarter million warnings were issued by the State Police of New Jersey alone and they had a marked effect in improving driving practices.

3. The increase in contacts between law enforcement officers and drivers, which a warning citation system would provide, can, in many instances, lead to discovery of other serious violations, some criminal in nature. Enforcement of revocation of license and detection of contraband goods and concealed weapons would be substantially increased by this system.

4. In dealing with equipment violations, not of a serious nature, such as a defective tail light or a crack in the windshield, a warning system would have particular advantages. A warning could be issued requiring repair of the defect within a specified period of time; if the defect were not corrected, a summons could then issue or auxiliary administrative remedy be instituted. This system would assure that the defect was speedily corrected and the vehicle put in good operating condition and not a continuing potential threat to highway safety.

In your request you advise also that you would permit such warnings to be issued by your officers only under strict control and supervision; and that under no circumstances would you permit the issuance of warnings for any serious motor vehicle violation, such as drunken driving or reckless driving.

You point out further your general conclusion that driver attitude is the single most significant factor in the reduction of traffic accidents and fatalities. Drivers who are inattentive, careless and lacking in courtesy are accident prone. Education in safe driving attitude and courtesy is their paramount need. Such drivers detected in a borderline violation may learn nothing from an arrest and conviction, but resent what they consider technical and rigid enforcement. In your opinion, a warning would serve to educate such drivers and to instill an attitude of cooperation and responsibility, with an understanding of the terrible risks to person and property in the careless operation of motor vehicles.

The warning system, as outlined by you, would impose no penalties. You recommend written warnings, however, as a record of individual State policemen's activities, as an additional factor in statistical studies, which are particularly important in the work of traffic safety improvement, and as a possible basis for physical reexamination of drivers receiving multiple warnings.

Your request raises two legal questions: (1) the authority of a State police officer to stop a motor vehicle and to issue a warning when he determines that there is

not sufficient evidence to arrest for a violation; and (2) the authority of a State police officer to stop a motor vehicle and to issue a warning when he determines that there is sufficient evidence to arrest for a violation.

Our answers to both these questions will apply to motor vehicle inspectors as well as State police, because the State police exercise the powers of motor vehicle inspectors in the enforcement of the motor vehicle law (R. S. 53:2-1).

There is specific statutory authority granting a motor vehicle inspector and a State police officer the power to stop a motor vehicle without observance of a violation of the law. R.S. 39:2-9 provides in part:

> "Motor vehicle inspectors * * * shall have power to stop any motor vehicle and examine the same to see that it complies with the requirements of this subtitle, whether in the matter of equipment, identification or otherwise, to require the production of the license of the driver and the certificate of registration of the motor vehicle from the driver thereof, * * *."

Law enforcement officers who stop motor vehicles to admonish errant drivers are, in addition, shielded from liability for false arrest, false imprisonment or related civil tort actions because of the recognized immunity of police officers acting in good faith and with a color of authority. *Earl* v. *Winne*, 14 N.J. 119, 128 (1953); *Pine* v. *Okzewski*, 112 N.J.L. 429 (E. & A. 1934); *Pollack* v. *Newark*, 147 F. Supp. 35, 38 (D. N.J. 1956).

We advise you in response to the first legal question that State police officers in the performance of their duties may stop motor vehicles and issue warnings for bad driving practices despite the absence of sufficient proof to arrest and convict. A typical example may be cited. A driver is observed by the police officer to be speeding but in the opposite direction. The police officer makes a U-turn but when he overtakes the driver, he is then within the speed limit. The warning carries no penalty but it serves to caution the motorist against driving at speeds endangering safety.

We next deal with warnings for equipment violations, which we also hold would be valid. You cite the reluctance of State police officers to arrest, for example, for one defective tail-light, not an immediate danger to the public safety. We suggest an alternative administrative method of enforcement. The warning for an equipment violation would require the motorist to have the defect repaired or otherwise corrected within a short period of time, such as 48 hours, and to receive a certification to that effect from a motor vehicle inspection station or, possibly, any police officer. Failure to correct the condition would be treated as grounds for revocation or suspension of the driver's license or the motor vehicle registration by the Director of the Division of Motor Vehicles, to whom the certification would be directed. The Director, under R.S. 39:5-30, may revoke or suspend drivers' licenses or motor vehicle registrations both for any violation of Title 39, Motor Vehicles, or for "any other reasonable grounds."

The Appellate Division of the Superior Court specifically approved the auxiliary enforcement of the motor vehicle laws by the Director of the Division of Motor Vehicles, in *Sylcox* v. *Dearden*, 30 N.J. Super. 325 (1954). There, the revocation of a license for careless driving (R.S. 39:4-97) was upheld, although the driver had been acquitted in a magistrate's court on a charge of illegal passing (R.S. 39:4-86). The same facts were the basis for both the magistrate's court proceeding and the

administrative proceeding before the Director. The court held there was no double jeopardy and stated:

> "The suspension or revocation of a driver's license need not necessarily be regarded as punitive in purpose. It may be a measure for the prospective safety and protection of the traveling public in the nature of an auxiliary remedial sanction. Cf. *Helvering* v. *Mitchell*, 303 U.S. 391, 58 *Sup. Ct.* 630, 82 *L. Ed.* 917 (1937); *United States ex rel. Marcus* v. *Hess*, 317 *U.S.* 537, 63 *Sup. Ct.* 379, 87 *L. Ed.* 443 (1942)."

The final question in determining the validity of warnings for what amount to prima facie violations of the motor vehicle laws must be dealt with at length. We consider and distinguish *State* v. *Winne*, 12 N.J. 152 (1953), which sustained as valid an indictment for criminal nonfeasance against a county prosecutor who was charged with willfully omitting to perform his statutory duty to detect, arrest, indict and convict offenders against the criminal laws of the State, despite knowledge of specific gambling operations.

Motor vehicle laws are not criminal laws but are at most quasi-criminal. *State* v. *Emery*, 27 N.J. 348, 353 (1958); *State* v. *Rowe*, 116 N.J.L. 48 (Sup. Ct. 1935), aff'd 122 N.J.L. 466 (E. & A. 1939). The prime intention of the motor vehicle laws is to control a dangerous instrumentality in the interest of public safety. *Unwin* v. *State*, 73 N.J.L. 529 (Sup. Ct. 1906), aff'd 75 N.J.L. 500 (E. & A. 1907); *Hendrick* v. *Maryland*, 235 U.S. 610 (1914). According to *Cleary* v. *Johnson*, 79 N.J.L. 49, 51 (Sup. Ct. 1909), the statutory purpose is "securing the safety of the public in its use of highways."

The Legislature has recognized that the movement of motor vehicles over the streets and highways presents constant dangers to the public. Strict regulation and means of constant surveillance must be employed to preserve the public safety. *Pine* v. *Okzewski, supra.*

The standards imposed upon motorists fall into two general categories. Drivers are required to be licensed (R.S. 39:3-10), and all vehicles must be registered (R.S. 39:3-4). Licenses and registrations are subject to suspension or revocation after notice and hearing (R.S. 39:5-30). There is, in addition, the pattern of standards found in R.S. 39:4-1 *et seq.* setting forth driving offenses of omission or commission, including the offenses of careless driving (R.S. 39:4-97), failure to keep right (R.S. 39:4-82, 39:4-88), observance of stop signs and yield right of way signs (R.S. 39:4-140 *et seq.*), driving through amber light (R.S. 39:4-105), failure to use hand signals (R.S. 39:4-123 and 39:4-126), driving too fast for conditions (R.S. 39:4-98), within which many bad driving practices warranting warnings may technically fall. The Legislature has delegated a broad area of control to the Director of the Division of Motor Vehicles under R. S. 39:5-30 and broad powers to motor vehicle inspectors and to State police in the enforcement of the motor vehicle laws.

New Jersey has always exacted the highest degree of diligence from its law enforcement officers. N.J.S. 2A:135-1; *State* v. *Winne, supra.* At the same time, our courts have recognized that a law enforcement officer, with the power of arrest, who acts in good faith, may be justified legally in exercising discretion by use of other means to carry out his responsibilities, i.e., under the motor vehicle statutes, the regulation and control of operators, vehicles, their operators and pedestrians in promoting the public safety.

Such was stated by Chief Justice Vanderbilt in *State* v. *Winne, supra.*, where the Supreme Court, in reviewing the duty of county prosecutors, stated at p. 174:

> "A county prosecutor has an obligation to detect and arrest, as well as to obtain indictments and prosecute them. He is under a statutory duty to investigate suspicious situations and determine the facts in the process of detecting and arresting, especially when he receives information that makes it reasonably probable that the law has been violated. There are undoubtedly many instances when a refusal in good faith to prosecute after due investigation would lack the element of 'wilfullness,' but where he willfully refuses to act, i.e., without just cause or excuse, he is guilty of a breach of duty rendering him liable to indictment. The distinction between the exercise of discretion in good faith and a willful failure to act is to be judged by his conduct in the light of all the facts and circumstances. A county prosecutor within the orbit of his discretion inevitably has various choices of action and even of inaction. This discretion applies as much to the seeking of indictments from the grand jury as it does to prosecuting or recommending a *nolle prosequi* after the indictment has been found, but he must at all times act in good faith and exercise all reasonable and lawful diligence in every phase of his work."

See also: *Driscoll* v. *Burlington-Bristol Bridge Co.*, 8 N.J. 433, 474-6 (1952).

In *Dell Publishing Co.* v. *Beggans*, 110 N.J. Eq. 72 (Ch. 1932), the court approved of a practice by municipal police of giving warnings to newsdealers selling allegedly obscene magazines. At pp. 74 and 75 the court stated:

> "Complainant stresses that defendants have not arrested any newsdealers or taken any lawful action to uphold the law; that they have used extra legal means, namely, have ordered the newsdealers not to sell the magazine and have threatened to confiscate and destroy copies of the magazine that were not removed from sale. Further, the defendants admitted at the argument that, when on January 8th they ordered the removal of the magazine from the news stands, they collected all the copies they could find and took them to one of the police stations in Jersey City, so as to insure that they would not be sold.
>
> "An order by police officers that a magazine be not sold has no more legal weight than a similar order given by a private individual. It is effective, however, because it carries an implied threat that disobedience will be followed by arrest and prosecution. Complainant contends that any action by the police in advance of the commission of a crime (not amounting to a breach of the peace) is unlawful; that their only function is to wait until a crime has been accomplished and then to arrest and prosecute. I do not think this sound. In my opinion, the police have a preventive function; if they have reason to believe a crime is contemplated, they may properly give warning that if the crime is committed they will proceed against the wrongdoer."

See also: *Conte, et al.* v. *Roberts, et al.*, 58 R.I. 353, 192, Atl. 814 (Sup. Ct. 1937), adopting language of the *Dell* case.

The exercise of discretion can of course be abused. An officer acting in bad faith, who willfully refuses or neglects to act properly as the circumstances demand, is subject to indictment. Abuse of discretion as well as the preventative function of law enforcement officials was discussed in *People* v. *Galpern*, 259 N.Y. 279, 181 N.E. 572 (Ct. App. 1932), where the court stated:

> "* * * The duty of police officers, it is true, is 'not merely to arrest offenders, but to protect persons from threatened wrong and to prevent disorder. In the performance of their duties they may give reasonable directions.' *People* v. *Nixon*, 248 N.Y. 182, 188, 161 N.E. 463, 466. Then they are called upon to determine both the occasion for and the nature of such directions. Reasonable discretion must, in such matters, be left to them, and only when they exceed that discretion do they transcend their authority and depart from their duty."

Traffic law enforcement has been the subject of many extra-judicial pronouncements. In the Beecroft Memorial Lecture, delivered by the late Chief Justice Vanderbilt to the Metropolitan Section of the Society of Automotive Engineers on October 20, 1949 (4 *Rutgers Law Rev.* 555, 567), the need for specially trained traffic police was discussed:

> "The role of the police in traffic enforcement is by no means confined to making arrests and giving testimony. Equally with the judge and the prosecutor are they responsible for inculcating respect for law. On their sound judgment on our highways and streets, moreover, quite as much as what happens in the courtroom depends the successful enforcement of the traffic laws. If they attempt to issue a summons for every violation without making proper use of warnings, if they show any favoritism to one group of citizens as against another, if they set out to make a quota of arrests each day, regardless of whether the arrests are justified, they will inevitably be doing harm to traffic law enforcement and the cause of highway safety. But if they go about their work intelligently and courteously, supervising highway traffic on the basis of preventing the types of violations that analysis has shown to be responsible for accidents, their work will be quite as important as that of the judge or prosecutor."

This language became incorporated *in toto* into the 11th Resolution of *"Traffic Law Enforcement and the Sixteen Resolutions of the Chief Justices and the Governors,"* Arthur T. Vanderbilt, Institute of Judicial Administration, July 1953.

A warning citation system would not conflict with the jurisdiction of the Supreme Court over practice and procedure in the courts, as exercised in R.R. 8:10-1 *et seq.*, since the warning would not be a pleading or summons, as is the uniform traffic ticket; the jurisdiction of the courts would not be invoked. The warning procedure would supplement an enforcement program based upon the issuance of a summons, but would not conflict with it.

We therefore advise you that State police and motor vehicle inspectors may stop a vehicle and issue a warning citation where they have observed a bad driving practice or defective equipment on a vehicle amounting to a prima facie violation of the Motor Vehicle Act, within their discretionary authority to promote the public safety on the highways.

Very truly yours,

DAVID D. FURMAN
Attorney General

OCTOBER 23, 1958

HONORABLE DWIGHT R. G. PALMER
Commissioner, N. J. State Highway Department
1035 Parkway Avenue
Trenton, New Jersey

HONORABLE RAYMOND F. MALE
President, Civil Service Commission
State House
Trenton, New Jersey

FORMAL OPINION 1958—No. 15

GENTLEMEN:

We have been asked to review the status of certain State Highway Department employees who are on so-called "extended military leave of absence." The inquiry is directed towards the status of employees who entered th active military service of the United States during World War II and who have either not returned to State service, or who having once returned to State service upon being separated from active military duty, thereafter re-entered the armed services on such active duty.

The controlling statute in this matter is N.J.S.A. 38:23-4 which provides:

> "Every person holding office, position or employment, other than for a fixed term or period, under the government of this State or of any county, municipality, school district or other political subdivision of this State, or of any board, body, agency or commission of this State or any county, municipality or school district thereof, who after July first, one thousand nine hundred and forty, has entered, or hereafter shall enter, the active military or naval service of the United States or of this State, in time of war or an emergency, or for or during any period of training, or pursuant to or in connection with the operation of any system of selective service, or who, after July first, one thousand nine hundred and forty, has entered or hereafter, in time of war, shall enter the active service of the United States Merchant Marine, or the active service of the Women's Army Auxiliary Corps, the Women's Reserve of the Naval Reserve or any similar organization authorized by the United States to serve with the Army or Navy, shall be granted leave of absence for the period of such service and for a further period of three months after receiving his discharge from such service. If any such person shall be incapacitated by wound or sickness at the time of his discharge from such service, his leave of absence shall be extended until three months after his recovery from such wound or sickness, or until the expiration of two years from the date of his discharge from such service, whichever shall first occur.
>
> *"In no case shall such person be discharged or separated from his office, position or employment during such period of leave of absence because of his entry into such service.* During the period of such leave of absence such person shall be entitled to all the rights, privileges and benefits that he would have had or acquired if he had actually served in such office, position or employment during such period of leave of absence except, unless otherwise provided by law, the right to compensation. Such leave of absence may be granted with or without pay as provided by law. Such person shall be entitled to resume the office, position or employment held by him at the time of his entrance into such service, provided he shall apply therefor before the expiration of his said leave of absence. Upon resumption of his office, position or employment, the service in such office, position or employment of the person temporarily filling the same shall immediately cease. No person who, after entry into such service, shall have been separated from any such service by a dishonorable discharge shall be entitled to any of the rights, privileges or benefits herein conferred." (Emphasis supplied) (P.L. 1941, c. 119, as amended by P.L. 1942, c. 327).

Although the cessation of hostilities of World War II was officially proclaimed by the President of the United States by Proclamation No. 2714 on December 31, 1946, the state of war was not officially terminated thereby. World War II was officially terminated with Germany by Presidential Proclamation No. 2950 on October 19, 1951 and with Japan by Presidential Proclamation No. 2974 on April 28, 1952. In the meantime, this nation had become involved, in June 1950, in the Korean conflict. N.J.S.A. 38:23-4.1 provides that the term "emergency" as used in N.J.S.A. 38:23-4 shall include "any period of time after June 23, 1950, and prior to the termination, suspension, or revocation of the proclamation of the existence of a national emergency issued by the President of the United States on December 16, 1950, or termination of the existence of such national emergency by appropriate action of the President or Congress of the United States."

Although hostilities in the Korean "emergency" were terminated on July 27, 1953, there has been no official "termination of the existence of such national emergency by appropriate action of the President or Congress of the United States" within the requirements of N.J.S.A. 38:23-4.1. The only Presidential action with respect thereto was Presidential Proclamation No. 3080, dated January 7, 1955, which fixed February 1, 1955, as the terminal date respecting service in the armed forces which would entitle persons to certain veterans' benefits, preferences, and other assistance under *federal law.* In addition, except for the period 1946-1948, the Selective Service system has been in continuous operation from July 1, 1940 to date.

To determine whether or not the individuals concerned are entitled to the rights afforded under the statute, it is necessary for us to decide whether or not they may still be regarded as State employees after being absent, in some instances, for almost 18 years. While a literal reading of the above cited statutes and Presidential proclamations would tend to support the conclusion that the individuals concerned should still be regarded as State employees, it is our opinion that such a result was not intended by N.J.S.A. 38:23-4.

The intent of N.J.S.A. 38:23-4 in providing for leaves of absence was to protect public employees performing military service during times of national crisis. However, it is clear from the underscored language in N.J.S.A. 38:23-4, *supra,* that no such protection was intended for those voluntarily re-entering or continuing in service on a career basis since at that time they must be deemed to have abandoned State service for federal service. The Legislature obviously did not purport to confer upon such individuals unlimited claims against the State and its pension funds regardless of the future conduct of the individual. Otherwise, an employee could enter State service and after a relatively short period join the military service and remain there for twenty years; even though he had served the State only a short period,

he would thereby be entitled to a State pension in addition to any federal pension for the rest of his life.

In *Salz* v. *State House Commission,* 18 N.J. 106 (1955) holding that a State employee who was still in the armed services was not entitled to receive a pension, the Supreme Court stated at p. 114 that:

> "* * * We are in accord with the reasoning and result of the opinion delivered . . . for the Appellate Division [32 N.J. Super. 230 (App. Div. 1954)], and the direction that the judgment be without prejudice to a reconsideration of the applicant's rights 'either in the event an application is made upon his separation from active service in the Army or in the event of his disability or death. The issue of abandonment and forfeiture of office by continued absence from the State service may then be litigated and determined.'"

In our opinion, public employees entering active military service must be deemed to have lost the protection of the statute at such time as they have abandoned State service in favor of a military career. Abandonment is a question of fact to be determined by the agency concerned after an examination of the particular circumstances presented in each case. Generally, abandonment may be inferred from voluntary continuance or resumption of a military career beyond the termination date of any initial period of service, whether or not that original service was incurred voluntarily or by obligation.

See also consistent opinions addressed to Mr. John A. Wood, Secretary, State Employees' Retirement System, dated March 24, 1944; to Dr. William S. Carpenter, President, Civil Service Commission, dated December 17, 1948; Formal Opinion #26 of 1950 addressed to Dr. Charles R. Erdman, Jr., Commissioner, Department of Conservation & Economic Development, dated April 17, 1950; and Formal Opinion #24 of 1952 addressed to Dr. Lester H. Clee, President, Civil Service Commission, dated August 27, 1952. To the extent that Memorandum Opinion of May 25, 1955 addressed to George M. Borden, Secretary, Public Employees' Retirement System is inconsistent with the opinion herein, the former opinion is expressly overruled.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: DONALD M. ALTMAN
Deputy Attorney General

OCTOBER 30, 1958

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

FORMAL OPINION 1958—No. 16

DEAR COMMISSIONER HOWELL:

You have requested our opinion as to whether a corporation resulting from a merger or consolidation of two or more mutual insurance companies (other than mutual life insurance corporations) must file new certificates of appointment of agent and pay the statutory fee of $2.00 for each such certificate.

N.J.S.A. 17:22-6.14 provides:

> "Any insurance company[1] lawfully authorized to transact business in this State may, by a written certificate of authority, contract with and appoint as its representative in this State, as its agent or agents, any person or persons who holds an unexpired certificate of authority issued prior to the effective date of this act, or a license issued under the provisions of this act.
>
> "Such company shall file with the commissioner a certificate showing the names and addresses of such appointees and shall pay a fee of two dollars ($2.00) for each company appointment so made. * * * Such certificate of authority shall remain in full force and effect until the license as agent is revoked by the commissioner as provided in this act or canceled by the company upon written notice to that effect filed with the commissioner. * * *"

It has been suggested that the surviving or new company in a merger or consolidation need not file new certificates of appointment of agent since such certificates remain in full force and effect until canceled by the company or until revocation of agency license. Further argument for this contention is premised upon N.J.S.A. 17:27-5.4 relating to the legal effect of such a merger or consolidation:

> "Upon such merger or consolidation, all the rights, franchises, and interests of the corporations so merging or consolidating in and to every species of property and things in action belonging to them, or either of them, shall be deemed to be transferred to and vest in the corporation resulting from such merger or consolidation, without any other deed or transfer, and the merged or consolidated corporation shall hold and enjoy the same to the same extent as if the merging or consolidating corporations, or either of them had continued to retain their titles and transact business. * * *"

Logically, two related but distinct questions are presented. First, must the resulting company file new certificates of appointment? Second, if so, must payment of the statutory fee be made?

You inform us that you have construed N.J.S.A. 17:22-6.14, *supra,* to require new filings to cover all agents of the resulting corporation except that no filings need be made in respect of agents of a merged or consolidated corporation where the resulting corporation bears the same name as the merged or consolidated corporation. (For a resulting domestic insurance corporation's power to adopt a new name or that of a merged or consolidated corporation, see N.J.S.A. 17:27-1. For a domestic

1 N.J.S.A. 17:22-6.23 qualifies this apparently broad language to make it applicable only to non-life insurance companies.

insurance corporation's general power to change its name, see N.J.S.A. 17:26-1.) The certificates of authority required by N.J.S.A. 17:22-6.14 are filed by the Department of Banking and Insurance according to the name of the agent. An important use of these certificates is in investigating complaints which the Department receives from the general public from time to time. Often, the complainant knows the name only of the agent with whom he has dealt but not the name of the corporation. Yet, it is almost always necessary to contact the corporation on whose behalf the agent acted in order to investigate and resolve a complaint. For the Department to carry out its supervisory responsibility over the insurance business, it is essential that it have a file of agents indicating the true current name of the corporations for whom they are authorized to act.

In our opinion, the Legislature did not intend, by providing in N.J.S.A. 17:22-6.14 that the certificate should remain in effect until canceled by the corporation, that the certificate should survive when both the character and name of the original corporation has been changed by merger or consolidation. Nor, in our opinion, did the Legislature intend to create such an exemption by enacting N.J.S.A. 17:27-5.4. It is recognized that "* * * even when a statute confers upon a corporation in general terms 'all the rights, powers, franchises, and privileges' of another corporation, it should not be construed as conferring rights and privileges which are detrimental to the public, unless there is something else to show that the Legislature so intended. * * *" *Fletcher, Cyclopedia of Corporations, Permanent Edition,* Vol. 15, c. 63, §7095.

To construe either or both of these statutes to excuse corporations resulting from mergers or consolidations from the duty to make new filings (except in respect of agents of a resulting corporation who were authorized to act for a merged or consolidated corporation having the same name as the resulting corporation) would be to create a substantial impediment to the execution of your supervision of the insurance business. Such a construction should not be followed unless expressed in clear terms in the statute. Cf. *Application of Welsh Producers Ass'n.,* 40 N.J. Super. 318, 326-327 (App. Div. 1956).

That the insurance business is affected with a public interest and, as such, is subject to reasonable regulation and control in the exercise of the police power to serve the public need is well settled. *Saffore* v. *Atlantic Casualty Ins. Co.,* 21 N.J. 300, 310 (1956). The filing requirements of N.J.S.A. 17:22-6.14 are plainly within a reasonable exercise of that power.

The statutory filing fee of $2.00 is imposed to defray the cost of the record keeping and other similar expenses involved in carrying out the statute. We are informed that filing certificates of appointment in the case of a merger or consolidation entails approximately the same amount of work by personnel of your office as would be done upon a new filing. The statute does not contemplate that filing be made but no fee required.

It is our opinion that the construction you have placed on the statute is correct, that a new filing must be made by the corporation resulting from a merger or consolidation except that no filing need be made in respect of an agent authorized to act for a merged or consolidated corporation bearing the same name as the resulting corporation, and that the fee must be paid for each filing.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: LAWRENCE E. STERN
Deputy Attorney General

NOVEMBER 20, 1958

HON. FREDERICK J. GASSERT, JR., *Director*
Division of Motor Vehicles
State House
Trenton, New Jersey

FORMAL OPINION 1958—No. 17

DEAR DIRECTOR:

We have been asked whether a person operating a motor vehicle on the New Jersey Turnpike recklessly, carelessly or while under the influence of intoxicating liquor may be charged with violation of N.J.S.A. 39:4-96, 39:4-97 or 39:4-50, respectively, and if convicted, penalized under N.J.S.A. 39:4-96, 39:4-104 or 39:4-50, respectively.

N.J.S.A. 39:4-96 forbids reckless driving and subjects a violator to a fine of up to $200 or imprisonment for not more than 60 days or both for a first offense and a fine of not more than $500.00 or imprisonment for not more than 3 months or both for a subsequent offense.

N.J.S.A. 39:4-97 prohibits careless driving. N.J.S.A. 39:4-104 subjects a person convicted of violation of 39:4-97 to a fine of not more than $200 or imprisonment for not more than 10 days or both.

N.J.S.A. 39:4-50 forbids driving while under the influence of intoxicating liquor and provides a $200 to $500 fine or a 30-day to 3-month imprisonment or both and the forfeiture of one's driver's license for a 2-year period for a first offense and a 3-month imprisonment and loss of one's driver's license for a 10-year period for a subsequent offense.

N.J.S.A. 39:4-1 makes Chapter 4 of Title 39 applicable to "the owners and drivers of vehicles on the highways, including roadways or driveways, upon grounds owned and maintained by the State of New Jersey, or any State department or agency, the counties, the municipalities and the school district boards of education of this State." This section subjects operation of vehicles on projects of the New Jersey Turnpike Authority to Chapter 4 of Title 39. See *New Jersey Turnpike Authority* v. *Parsons,* 3 N.J. 235 (1949; Attorney General's Formal Opinion 1951—No. 20. Therefore, the above sections of Title 39 dealing with reckless, careless and drunken driving apply to conduct on the turnpike in the absence of any provision of law to the contrary. Recognizing this, section 15 of Chapter 264 of the Laws of 1951 (N.J.S.A. 27:23-39)[1] states:

> "Except as otherwise provided by this act or by any regulation of the New Jersey Turnpike Authority made in accordance with the provisions hereof, the requirements of Title 39 of the Revised Statutes applicable to persons using, driving or operating vehicles on the public highways of this State * * * shall be applicable * * * on any turnpike project * * *."

1 Chapter 264 of the Laws of 1951, N.J.S.A. 27:23-25 to 39, hereinafter referred to for convenience as the "Turnpike Act", provides generally for the regulation of traffic. It is not to be confused with the New Jersey Turnpike Authority Act of 1948, as amended, N.J.S.A. 27:23-1 to 22, creating the New Jersey Turnpike Authority and authorizing it to construct projects.

It has been urged that section 2 of the Turnpike Act, which forbids reckless, careless or drunken driving on the turnpike, supersedes all of the above statutes in the case of persons operating motor vehicles on the turnpike. It provides:

> "No vehicle shall be operated on any such turnpike project carelessly or recklessly, or in disregard of the rights or safety of others, or without due caution or prudence, or in a manner so as to endanger unreasonably or to be likely to endanger unreasonably persons or property, or while the operator thereof is under the influence of intoxicating liquors or any narcotic or habit-forming drug, nor shall any vehicle be so constructed, equipped, lacking in equipment, loaded or operated in such a condition of disrepair as to endanger unreasonably or to be likely to endanger unreasonably persons or property."

Section 2 defines the substantive offenses of careless, reckless and drunken driving in substantially the same terms as the general prohibition on these types of conduct in N.J.S.A. 39:4-96, 97 and 50. N.J.S.A. 27:23-26.

Section 2 does not contain a penalty provision. But section 8 provides that any conduct which violates the Turnpike Act should be punished pursuant to general law as if the turnpike were "any public road." N.J.S.A. 27:23-32. This section reads as follows:

> "If the violation of any provision of this act, or the violation of any regulation adopted by the Authority under the provisions of this act, would have been a violation of law or ordinance if committed on any public road, street or highway in the municipality in which such violation occurred, it shall be tried and punished in the same manner as if it had been committed in such municipality."

Although section 10 provides a general penalty of not more than $200 or imprisonment for not more than 30 days or both for violation of the Turnpike Act, by its own terms it embraces only those violations which are not punishable under general law pursuant to section 8, as if committed on any public road, street or highway. N.J.S.A. 27:23-34. Thus, section 2, either alone or in concert with section 10, is not in any way contrary to the provisions of Title 39 and is therefore not a provision "otherwise" within the meaning of the exception clause in section 15. As a result, the provisions of Title 39 defining reckless, careless or drunken driving and providing for their punishment remain in effect on the turnpike. See N.J.S.A. 39:4-1, *supra*.

This construction and application of the Turnpike Act does not render section 2 ineffectual. Section 5 grants the Turnpike Authority the power to modify by regulation the provisions of Title 39. N.J.S.A. 27:23-29. Section 15, providing for the non-repeal of Title 39, makes an exception for regulations modifying the effect of Title 39 adopted pursuant to section 5. N.J.S.A. 27:23-39. Section 5 contains standards to govern the exercise of this regulatory power, including: "the need for and desirability of such regulation for the safety of persons and property * * * and the contribution which any such regulation would make toward the efficient and safe handling of traffic * * *." In addition to these general limitations on the regulatory power, section 5 expressly requires that the regulations be not inconsistent with the other sections of the Turnpike Act. Section 2 thus still stands as a limitation on the

Turnpike Authority's power to modify the application of Title 39 by regulations. Section 5, N.J.S.A. 27:23-29.

Therefore, it is our opinion that persons driving on the New Jersey Turnpike recklessly, carelessly or while under the influence of intoxicating liquor may be charged with violations of N.J.S.A. 39:4-96 or 97 or 50, respectively, and if convicted, punished pursuant to N.J.S.A. 39:4-96, 104 or 50, respectively.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

DECEMBER 8, 1958

HON. SALVATORE A. BONTEMPO, *Commissioner*
Department of Conservation and Economic Development
State House Annex
Trenton, New Jersey

FORMAL OPINION 1958—No. 18

DEAR COMMISSIONER BONTEMPO:

We have been asked whether the State as owner of the Delaware and Raritan Canal may charge a water utility company a fee for the privilege of laying a 60" transmission main on canal property. Our opinion is that it may.

The suggestion has been made that since R.S. 48:19-17[1] gives water companies the right to "lay its pipes beneath such public roads, streets and alleys as it may deem necessary" without payment of any fee, and R.S. 48:19-19[2] gives them the right to "lay such supply mains and pipes as may be thought necessary * * * under the surface of any streets, roads, highways or public places, provided that the companies first obtain the consent by ordinance of the municipalities through which the mains and pipes are to be laid," the statute under which the State took possession of the canal by declaring that it "shall continue to be a public highway," L. 1934, c. 139, §2; see L. 1934, c. 238, §1; R.S. 13:13-3, gives water companies the right to lay mains on the canal property. The short answer to this contention is that the

1 R.S. 48:19-17: "Each such company may lay its pipes beneath such public roads, streets and alleys as it may deem necessary for its corporate purposes, free from all charge to be made by any person or body politic whatsoever for such privilege, and may also construct and maintain hydrants on and along such streets and alleys, provided that the consent shall be obtained of the corporate authorities of the municipality through which the pipes may be laid.

"The pipes shall be laid at least three feet below the surface and shall not in anywise unnecessarily obstruct or interfere with the public travel or damage public or private property."

2 R.S. 48:19-19: "Every company organized under this chapter may contract with any company organized under any law of the State for a supply of water upon such terms and for such times as may be mutually agreed upon. Such companies may lay such supply mains and pipes as may be thought necessary to furnish such supply through any property upon obtaining the consent in writing of the owner thereof, or under the surface of any streets, roads, highways or public places, provided that the companies first obtain the consent by ordinance of the municipalities through which the mains and pipes are to be laid.

"The municipal body having control of such streets, roads, highways or public places shall designate the place therein where and the manner in which the pipes or mains shall be laid."

designation of the canal as a public highway was impliedly repealed by L. 1944, c. 172, which provided that the use of the canal was to be "as a source of industrial water supply and for recreational purposes." N.J.S.A. 13:13-12.1. An examination of the history leading up to this enactment makes the implication of repeal clear.

The Delaware and Raritan Canal Company was incorporated by a special act of the New Jersey Legislature on February 4, 1830. Operation of the canal began in June 1834. Department of Conservation and Development and Delaware and Raritan Canal Commission Report on Final Disposition of the Delaware and Raritan Canal 1942 [hereinafter referred to as "Report (1942)"]. From that date up to and including 1932 the canal was continuously open to traffic except for shut-downs in winter months due to ice. The Pennsylvania Railroad succeeded to the control of the canal in 1872. See L. 1872, c. 223, and L. 1867, c. 69. On February 27, 1933 the railroad advised the Board of Public Utility Commissioners of the State of New Jersey that it did not plan to reopen the canal on March 1st of that year after the winter shut-down but intended to abandon operation. Report (1942), p. 1. Under section 17 of the original act incorporating the Delaware and Raritan Canal Company the State had an option to take possession of the canal if it were abandoned. On June 5, 1933 Joint Resolution No. 12 authorized the appointment of a commission to ascertain whether the canal could be acquired by the State for a nominal consideration and whether it could be operated by the State upon a self-sustaining basis. On April 10, 1934 this commission filed its report. Report of the Delaware and Raritan Canal Commission 1934 [hereinafter referred to as "Report (1934)"]. The report recognized the value of the canal as a transportation artery.

> "The Delaware and Raritan Canal is an important link in the chain of inland waterways extending from Maine to Florida. With the exception of the Delaware and Raritan Canal, the Federal government owns or operates every canal on the Atlantic coastway. It is reasonable to assume that the Federal government will desire to acquire this link, particularly if the canal may be acquired without any cost to the government. Inasmuch as the canal is a short cut between the great commercial centers of New York and Philadelphia and affords the means of avoiding the great hazards and extreme dangers of the rough waters opposite Barnegat Bay, the government may well regard it as most desirable that the canal be kept open for transportation.
>
> "A bill is now pending in Congress authorizing the Secretary of War to conduct a preliminary examination and survey, with a view to reopening the canal to water traffic. We have been advised that no appropriation accompanied this bill, inasmuch as the members of the Rivers and Harbors Committee of Congress were awaiting action of the State of New Jersey before they would go to the expense entailed in a survey, very properly feeling that it would be inconsistent on the part of the government to proceed with a comprehensive survey unless the government knew the medium through which the title would be acquired by the Federal government.
>
> "We are advised that the States of Florida and Virginia have each first acquired canals within their boundaries and have then presented these canals to the government. These precedents have indicated the policy of the government to await prior State action." (Report (1934), p. 7.)

It is implicit in the report that the Commission considered it beyond the financial potential of the State to undertake the modernization and operation of the canal.

The Commission attached to its report a proposed act for the acquisition of the canal by the State. Report (1934), Exhibit B, p. 15. The draft act was substantially enacted as Chapter 139 of the Laws of 1934. It was approved May 3, 1934 and would have become effective on July 4th of that year. Although section 2 of this act provided that the canal "shall continue to be deemed a public highway," it is clear from Conclusion No. 2 of the report of the Commission accompanying the proposed act that it was not intended that the act make a permanent disposition of the canal. It was concluded therein that "The State should * * * take possession of the canal * * * to be used or disposed of as the Legislature may deem proper." Report (1934) p. 12.

On June 11, 1934, before Chapter 139 of the Laws of 1934 had become effective, Chapter 238 was enacted, effective immediately, to place control of the canal in the Department of Conservation and Development rather than the State Highway Commission. The Department was directed to "maintain, repair and keep in safe condition existing highway bridges over [the] canal." L. 1934, c. 238, §1. This was important to keep alive the possibility of reopening the canal to water traffic. Many of the bridges were low moveable bridges to permit the passage of barges and boats. Report of the Delaware and Raritan Canal Commission (1938) pp. 33-34 [hereinafter referred to as "Report (1938)"]. Report (1942), p. 9; Brief of the State of New Jersey, Delaware and Raritan Canal Commission to the Special Board of Army Engineers, the Delaware and Raritan Canal (October 21, 1937) p. 22 [hereinafter referred to as "Brief (1937)"]. If the bridges were allowed to deteriorate so as to become immoveable, the canal would no longer be usable for water traffic. The department was also directed to keep the tow path free of weeds and "the wickets of the locks in the canal in condition that such wickets may be opened for the flow of water." L. 1934, c. 238, §1. The department was given permission but was not required to permit the use of the canal, including the locks, by pleasure and commerical craft or pleasure craft alone. L. 1934, c. 238, §3. On the same day that this act was passed Joint Resolution No. 6 memorializing Congress for the acquisition of the Delaware and Raritan Canal by the Federal government was passed. This resolution offered the canal to the Federal government at a cost of $1.00 for incorporation into the inland waterway system which the Federal government operated from Maine to Florida. On May 18, 1935 the Legislature in Joint Resolution No. 9 appointed a commission to furnish information as to costs of improvement and maintenance and anticipated revenues of the canal as a navigable waterway to facilitate the determination by the Federal government whether to take over the canal.

On the same day it authorized the Department of Conservation to convey canal lands and rights in them under certain conditions, but in no case was a grant to "interfere with the canal as a waterway for either drainage, recreational or commercial use." L. 1935, c. 211, §2; R.S. 13:13-10.

On March 30, 1936 the city of Trenton was given permission to fill part of the canal for highway purposes. L. 1936, c. 44. However, this was not inconsistent with the continuing intention to persuade the Federal government to take over the operation of the canal as a navigable waterway because the Corps of Engineers in a preliminary investigation had already determined that it would be completely impractical to attempt to operate a modern canal through the city of Trenton with numerous bridges crossing the canal at such levels that they would have to be drawn to permit the passage of barges and boats, interrupting street traffic almost constantly. The Commission and the Department had agreed with this decision of the

Corps of Engineers and urged that a bypass be constructed around Trenton. Brief (1937), pp. 2; 5-6; Report (1938), pp. iv, 22, 33, 36, 37.

The act permitting the filling of the old route through Trenton, hopeful that the United States might still modernize the canal as a through navigable waterway, permitted the filling of the Trenton section "by agreement * * * with any federal agency * * *." L. 1936, c. 44, §2; R.S. 13:13-12.

On June 26, 1936 the Legislature appropriated $5,000 for the use of this Commission. L. 1936, c. 254, §3. The next year the Legislature appropriated an additional $10,000 to gather data to induce the Federal government to take over the canal. L. 1937, c. 18, §3.

A special Board of Army Engineers was constituted to consider the advisability of Federal operation of the canal. A hearing was held in Newark, New Jersey, on October 21, 1937. The Delaware and Raritan Canal Commission presented an extensive brief in support of Federal operation. After discussing other alternative inland waterway routes across New Jersey and concluding that they were not practical, the brief states:

> "There remains then only the Delaware and Raritan Route now being preserved by New Jersey, pending action by the Federal government. *The State of New Jersey cannot maintain this waterway for an indefinite period of time pending some future solution of the Intracoastal Waterway System.* If the Federal government rejects the proposed dedication of the Delaware and Raritan Canal by the State, then some other disposal of the canal will be made by the State." Brief (1937), p. 43.

In connection with the discussion of an alternative route which the Federal government considered developing as a canal provided the State supplied the land, the Commission was of the view that the people of the State of New Jersey would be unwilling to spend even the 2 to 8 million dollars required for land alone. *Id.*, p. 40.

The Federal authorities decided finally on May 20, 1942 not to take over the Delaware and Raritan Canal and not to construct any canal at all in place of it. Report (1942), p. 11. But a decision of the Special Board of Army Engineers issued April 18, 1941 had previously indicated that this would be the outcome. Report (1942), p. 21. As a result of this adverse Federal action after 7 years of attempting to persuade the Federal government to take over the canal, the State faced the problem of the canal's ultimate disposition on its own. On June 14, 1941 the Department of Conservation and Development was directed to "investigate and study all available and feasible plans for the ultimate use or disposal of the * * * canal." L. 1941, c. 203, §1. The Department filed a report on November 16, 1942. In discussing the need for designation of permanent use, the report stated:

> "Base maintenance has been justified for the interim while waiting decision as to whether there was federal interest in the reopening of the canal for transportation, but it will be both uneconomical and unwise longer." Report (1942), p. 11.

The report noted that:

> "With navigation abandoned the downstream gates [of the locks] are unnecessary and some have already been removed." Report (1942), p. 15.

The report considered the following possible uses of the canal: (1) abandonment; (2) motor highways; (3) navigable waterway; (4) potable water supply; (5) industrial water supply; (6) recreational areas; and (7) a combination of more than one of the above uses. Report (1942), pp. 18 to 27. It dismissed the first alternative as costly but unrewarding. *Id.*, p. 18. It dismissed the second on the advice of the State Highway Engineer as impractical because of the narrowness of the right-of-way and its location within an area already served by highways. *Id.*, p. 19. The Highway Engineer pointed out the troublesome drainage situation which would "plague the designing engineer * * *." *Id.*, Appendix C, p. 67. In discussing the third alternative the report describes the unsuccessful effort to interest the Federal government in taking over the canal. *Id.*, p. 20. The fourth alternative, a potable water supply, after a preliminary survey, was considered feasible but only at the expenditure of about $40,000,000. *Id.*, p. 24. The fifth alternative, industrial water supply, was considered to require an additional investment to recondition the canal of only $365,000. *Id.*, p. 25. It was estimated that the sale even of half of the estimated capacity of the canal would meet operating costs. *Id.*, p. 25. It was also thought that "the canal as an industrial water supply would prove a State asset through increased tax ratables and improvement." *Ibid.*, p. 25. In considering the sixth alternative, recreational use, the report stated that "the canal is uniquely located in that it traverses or is adjacent to the most densely populated region of the State, yet is itself almost entirely in open country." *Id.*, p. 26. In discussing combinations of uses, the following was stated:

> "Use of the canal as a potable water source would be an irrevocable disposition, excluding or severely limiting any combination or secondary use.
>
> "Its legislative designation as a recreational waterway would hold the canal in at least its present status for future development and at the same time, at slight additional cost, permit some immediate realization on its potential value. Designation as a combination industrial water supply and recreational waterway would permit larger immediate benefits and open the way to much greater future value. Such development would also preserve the diversion rights and improve the physical condition of the canal for future conversion to a potable water supply, if sufficiently urgent, or for a remotely possible revival of its Federal improvement for transportation. *It should be noted that any reservation binding the canal to the possibility of such future conversions is not recommended since it would seriously limit its potential value as an industrial water supply.*" (Emphasis added.) *Id.*, p. 27.

The report's principal recommendation was: "that the Legislature authorize the Department of Conservation and Development to hold the Delaware and Raritan Canal for use as a combined industrial water supply and State park." *Id.*, p. 28. In its detailed discussion of the industrial water supply use of the canal the report stated:

> "The proposed industrial water supply is not adaptable to combination with highway use; which would involve a heavily reinforced conduit at prohibitive cost, or with a transportation waterway, which would limit industrial water use to cases where the water was returned to the canal, or with a potable water supply, which would require all the available flow." *Id.*, p. 40.

The recommended concurrent use of the canal for recreational purposes did not intend the use of the canal as a through waterway. Boating was intended only through a minimum number of locks. *Id.*, p. 51. Use of the canal as an industrial water supply was considered completely consistent with the proposed recreational use. *Id.*, p. 56.

The recommendations of the Commission were enacted in Chapter 172 of the Laws of 1944. See N.J.S.A. 13:13-12.1 to 12.8. In a preamble this act recited that the Department of Conservation and Development had been directed in prior acts to maintain the canal "until the Legislature shall have further directed the use or dispossession [disposition?] of the [canal]." The preamble further recited that the Department and the Delaware and Raritan Canal Commission had made a joint report "with recommendations as to the permanent utilization of [the] canal * * *" and that the Legislature was of the opinion that the canal was "the best source now available for increase in the industrial water supply * * * and that the best interests of the State will be served by the permanent utilization of [the] canal as a supply for industrial water and for recreational purposes * * *." Section 1 provided that the canal "shall henceforth be used as a source of industrial water supply and for recreational purposes * * *." N.J.S.A. 13:13-12.1. The Department of Conservation and Development was directed in section 3 to maintain the canal in such manner "as shall assure and maintain such flow of water through [the] canal as may from time to time be appropriate in order that the maintenance and operation of [the] canal as a source of water supply may be efficiently provided for." N.J.S.A. 13:13-12.3. This is in contrast with the direction in the acts by which the State took possession of the canal in 1934 directing the maintenance of the same depth of water in the canal as when it was operated as a navigable waterway. L. 1934, c. 238, §2; c. 139, §2. Under sections 4 and 5 of chapter 172 of the Laws of 1944, N.J.S.A. 13:13-12.4 and 12.5, the Department of Conservation was empowered to make long term contracts for the sale of industrial water from the canal. Under section 7 of the act, N.J.S.A. 13:13-12.7, the Department was authorized to develop canal properties for recreational and park uses. Nowhere in this act, which was intended to provide for the permanent disposition of the canal, is there any authorization to the Department to operate the canal as a through navigable waterway. This is in contrast with the permissive power to so operate the canal included in the laws by which the State took over the canal in 1934. L. 1934, c. 238, §3; c. 139, §4. This was in harmony with the observation in the report on the final disposition of the canal that the proposed industrial water supply was not adaptable to combination with a transportation waterway. Report (1942), p. 40, *supra*. In section 10 of chapter 172 of the Laws of 1944 it was enacted that "the provisions of any other act or acts inconsistent with the provisions of this act are hereby repealed."[1] The most obviously inconsistent provisions of prior acts and perhaps the only inconsistent provisions are those denominating the canal as a public highway, L. 1943, c. 238, §2; c. 139, §2, R.S. 13:13-3, and granting power to operate the canal as a through navigable waterway, L. 1934, c. 238, §3; c. 139, §4, R.S. 13:13-6.

From this history it is clear that these statutes have been repealed and that the Delaware and Raritan Canal is not now a public highway.

On May 19, 1949, the Department of Conservation was authorized to make long term contracts for the sale of water from the canal "at wholesale * * * to * * * corporations, municipalities, * * * and * * * water commissions for industrial, public, potable and other purposes." L. 1949, c. 168, §§1, 2; N.J.S.A. 13:13-12.9, 12.10. The act provided that devotion of the canal to recreational purposes was to be unaffected. L. 1949, c. 168, §1; N.J.S.A. 13:13-12.9. No attempt is made to "save" the canal as a through navigable waterway. Obviously, sale of the water for consumption in substantial quantities is incompatible with use of the canal as a through navigable waterway.

Therefore, utility companies may not rely on R.S. 13:13-3 to encroach upon canal property without payment of a fee pursuant to statutes or charters authorizing them to use public highways.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: WILIAM L. BOYAN
Deputy Attorney General

[1] Although this section does not appear in the text of the law in the current edition of New Jersey Statutes Annotated, its substance is noted under N.J.S.A. 13:13-12.1. It has not been repealed and remains law.

DECEMBER 16, 1958

HON. JOSEPH E. CLAYTON
Asst. Commissioner of Education
175 West State Street
Trenton, New Jersey

FORMAL OPINION 1958—No. 19

DEAR COMMISSIONER:

We have been asked whether for the purpose of determining State aid payable to regional school districts the "transition year" of 1954-1955 should be counted as one of the "first five years under [the State School Aid Act of 1954] that the regional school is in operation." The State School Aid Act of 1954 provides generally that aid shall be paid by the State to each school district which would provide a foundation program of $200 per pupil in average daily enrollment if the school district pays its own fair share as defined by the act. N.J.S.A. 18:10-29.34, 29.32, 29.33.

N.J.S.A. 18:10-29.33 provides that the local fair share of every school district shall be composed primarily of a fraction of the equalized valuation of the property within the district. Ordinarily, this fraction is .005. Special provision is made for regional school districts and ordinary school districts embraced within the same territorial limits. The equalized valuations of all property within the territorial limits of the regional district are allocated among the regional district and its components in proportion to the number of pupils in each. The fraction of equalized valuation to be included in the fair share of the component districts is the same as in districts generally, .005. But in the case of regional school districts a lesser fraction is fixed during the early years of the regional district's existence under the act.

> "* * * That part of the local fair share of the regional district measured by property valuations shall be determined at the rate of 3 mills per dollar of such allocated valuation during the first 5 years under this act that the regional school is in operation and at the rate of 4 mills per dollar during

the second 5 years under this act that the regional school is in operation, and thereafter at the full 5 mills, with respect to any regional school district heretofore or hereafter established." N.J.S.A. 18:10-29.33(b) (effective June 30, 1954).

This favorable treatment of regional high schools for a limited period was recommended by the Tax Policy Commission in order to encourage the establishment of high schools of optimum size. *Commission on State Tax Policy, Seventh Report 100* (1954), hereinafter referred to as the "Seventh Report." The introductory statement to L. 1954, c. 85 enacting the State School Aid Act of 1954, N.J.S.A. 18:10-29.30 to 29.48, recited generally that the State School Aid Act was intended to carry out the recommendations of the *Seventh Report*. In N.J.S.A. 18:10-29.46, the Legislature made special provisions for determining the amount of State aid payable to all school districts for the first year under the new program. Part of this section made directory only various deadlines for action.

"* * *. In the distribution of State aid for the school year 1954-1955 pursuant to this act, the several provisions as to time for reports, certifications and determinations shall be deemed to be directory only. The commissioner may determine the amount of State aid due each district within a reasonable time after the passage of this act, and may require any or all school districts to furnish such special reports and information as he may deem necessary to that end."

But another part of this same section dealt with the amounts to be paid during the so-called "transition year."

"Each school district shall be paid State or other aid under this act for the school year 1954-1955 in such sum as will equal the amount of the State or other aid lawfully anticipated in the budget of the district heretofore adopted for such school year plus ¼ of the amount by which State aid otherwise payable under this act would exceed the sum of the amount so anticipated pursuant to the statutes repealed by this act. * * *"

It has been suggested that the indulgence granted to regional school districts for the two five-year periods under N.J.S.A. 18:10-29.33 intended 10 ordinary years and the provision in N.J.S.A. 18:10-29.46 for a transitional year implies that 1954-1955 should not be counted as one of those years. It is our opinion that this cannot be the intent of the law. N.J.S.A. 18:10-29.46 in providing for a transition year does not suspend the operation of N.J.S.A. 18:10-29.33. Section 29.46 depends upon section 29.33 for the meaning of the critical term "State aid otherwise payable under this act." This expression can only mean the amount by which the foundation program exceeds the local fair share as defined in section 29.33. Since the State School Aid Act of 1954 altered the very basis upon which State aid was to be computed, *Seventh Report* 77 to 83, under the new formula some districts might gain monetarily and some might lose. *Meyner, Veto Messages* 140 (1955). It was anticipated that of the 7 regional school districts in operation during the year 1954-1955, 4 would receive more aid under the new formula and 3 would not. *Seventh Report* 101. Therefore, necessarily, section 29.33 had to be operable in the year 1954-1955 in determining the amount payable to every school district.

In our opinion the transition year of 1954-1955 counts as the first year under section 29.33 in the case of every regional school district that was in operation during that year. Therefore, the year 1959-1960 will be the sixth year under the new program for such schools and the fraction of equalized valuation to be used in computing the fair share of such districts for that year must be increased to .004.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

DECEMBER 16, 1958

HON. SALVATORE A. BONTEMPO
Commissioner, Department of Conservation and Economic Development
State House Annex
Trenton, New Jersey

FORMAL OPINION 1958—No. 20

DEAR COMMISSIONER BONTEMPO:

You have requested our opinion as to whether low rent housing projects constructed under R.S. 55:14A, the Local Housing Authorities Law, must comply with the provisions of the following paragraph taken from R.S. 55:5-7 of the New Jersey Tenement House Act:

"* * * Every tenement house more than two stories in height which is arranged for more than twelve families above the entrance floor shall have a two and one-half gallon fire extinguisher bearing the label of the Underwriters' Laboratories, Inc., and shall be of the type using water or water solution. The fire extinguisher shall be conveniently located in the public hall near the stairs on each floor."

The Tenement House Act does not except any houses from its reach because of the identity or character of their owner or manager. Without more, this would subject the activity of a local housing authority to the strictures of the Tenement House Act administered by the (State) Bureau of Tenement House Supervision (see N.J.S.A. 52:17B-13 and 55:9-1). An immunity from general law administered by one government agency in favor of another government agency is presumed only where the other agency is superior in the hierarchy of government. Cf. *Aviation Services, Inc.* v. *Board of Adjustment,* 20 N.J. 274, 282 (1956), interpreting *Town of Bloomfield* v. *New Jersey Highway Auth.*, 18 N.J. 237 (1955), and *Hill* v. *Borough of Collingswood*, 9 N.J. 369 (1952).

But N.J.S.A. 55:14A-11 removes all doubt:

> "All housing projects of [a local housing] authority shall be subject to the planning, zoning, *sanitary and building laws,* ordinances and regulations *applicable to the locality* in which the housing project is situated. * * *"

In *Passaic Jr. Chamber* v. *Passaic Housing Auth.*, 45 N.J. Super. 381, 388 (App. Div. 1957), it was held that this section subjected local housing authority projects to municipal zoning ordinances. It is clear from the words of the section "laws, ordinances and regulations applicable to the locality" that not only ordinances but statutes (concerning sanitation and building) govern local housing authorities. The language of this section "laws, ordinances and regulations *applicable to the locality*" is in contrast with that of N.J.S.A. 55:7-2 that certain tenement houses "shall comply with all *local ordinances* regulating the construction of buildings." (Emphasis added)

In enacting the Local Housing Authorities Law the Legislature declared:

> "* * * that there exist in the State insanitary or unsafe dwelling accommodations and that persons of low income are forced to reside in such insanitary or unsafe accommodations; * * * that the clearance, replanning and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations by any public body for persons of low income are public uses and purposes for which public money may be spent and private property acquired and are governmental functions of State concern; * * *" R.S. 55:14A-2.

While recognizing the existence of insanitary and unsafe dwelling accommodations, the Local Housing Authorities Law is directed mainly to the establishing and financing of municipal housing authorities to combat these evils and is devoid of any provisions establishing safety or sanitary standards for dwelling construction or accommodation. Thus, no conflict as to safety or sanitary standards exists between the Local Housing Authorities Law and the Tenement House Act.

Those who occupy tenement houses constructed pursuant to the Local Housing Authorities Law are entitled to as much protection of their health and lives as those living in tenements elsewhere in the State. Nothing in that law indicates that fire escapes, proper drainage, and similar safety and sanitary safeguards are less needed in tenement houses constructed pursuant to it than in other buildings which fall within the definition of a tenement house. The risk and hazards of occupancy are the same in both instances. The protection and benefits given by the Tenement House Act are as much needed in tenements constructed pursuant to the Local Housing Authorities Act as tenements generally.

You are accordingly advised that low rent housing projects constructed under R.S. 55:14A must comply with the provisions of R.S. 55:5-7.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: REMO M. CROCE
Deputy Attorney General

DECEMBER 30, 1958

MR. WALTER H. CRAMER
State Superintendent
Division of Weights and Measures
187 West Hanover Street
Trenton, New Jersey

FORMAL OPINION 1958—No. 21

DEAR SIR:

We have been asked to render an opinion upon the meaning of the phrase "shall be given to the purchaser" as it is used in *N.J.S.A.* 51:9-7, which concerns the sale and delivery of liquid fuel. *N.J.S.A.* 51:9-7 provides:

> "A delivery ticket and duplicate thereof shall be issued upon the completion of delivery of each sale or delivery of liquid fuel exceeding ten gallons. If the sale or delivery exceeds 50 gallons and is of a type of liquid fuel which is required to be measured by meter, the ticket shall be printed by means of an automatic printing device attached to and co-ordinated with the operating mechanism of a meter approved for the measurement of liquid fuels pursuant to the provisions of this chapter. On each ticket there shall be distinctly and legibly expressed the date, the name and address of the seller, the name and address of the purchaser, the number of gallons sold or delivered, the grade of liquid fuel, and the signature of the person making such sale or delivery or his agent. One of such tickets *shall be given to the purchaser* and the other shall be retained by the seller for a period of one year, such retained tickets being subject to inspection by any weights and measures official. Delivery tickets shall be serially numbered. No duplicate or retained ticket shall be destroyed but may be voided and kept on file." (Our emphasis)

Your precise question is whether the delivery ticket must be given to the purchaser or left at the place of delivery immediately upon completion of the delivery of liquid fuel, or whether the delivery ticket may be mailed to the purchaser at a later time. It is our opinion that the statute in question contemplates and requires that the delivery ticket, which sets forth, among other things, the quantity and grade of the sale, must be presented to the purchaser or left at the place of delivery with the person in charge; or if there is no one in charge, left in a conspicuous place therein, immediately upon completion of delivery.

The sections treating of the sale and delivery of liquid fuel compose only a part of Title 51 of the New Jersey Statutes. Other sections deal with the delivery, among other things, of solid fuel, *R.S.* 51:8-9, liquefied gases, *N.J.S.A.* 51:10-6, and lumber and lumber products, *R.S.* 51:4-18. Contained as it is among statutes regulating the sale and delivery of other fuels and products, *N.J.S.A.* 51:9-7 must be construed together with them. As stated in *Palmer* v. *Kingsley*, 27 N.J. 425, 429 (1958): "It is a cardinal principle of statutory construction that statutes relating to the same or similar subject matter—statutes *in pari materia*—are to be construed together." See also *State* v. *Brown*, 22 N.J. 405, 416 (1956); *In re Appeal of N. Y. State Terminal Realty & Terminal Co.*, 21 N.J. 90, 98 (1956). It is the ultimate goal of statutory construction that the true intention of the law be applied, *viz.*, the "reasonably prob-

able intention as shown by the symbols of expression, read and evaluated in the light of the context and the other relevant considerations." *State* v. *Brown, supra,* at p. 416.

N.J.S.A. 51:9-7 was originally passed in 1937, *L.* 1937, *c.* 183, § 7 and amended in 1956, *L.* 1956, *c.* 109, § 3. Neither of these enactments (1937 Sen. B. 114 and 1956 Assembly B. 209), contained a statement as to its purpose. Reference, however, to those statutes that are *in pari materia* fills the void. *N.J.S.A.* 51:10-6 (liquefied gases), enacted as *L.* 1953, c. 143, § 6, provides that a copy of the delivery ticket "shall be delivered to the person receiving the liquefied petroleum gas * * *." The statement appended to the bill (Assembly B. 481) states:

> "The purpose of this bill is to protect the purchaser and consumer of commercial or industrial liquefied petroleum gas and to provide standards of measure which shall be used throughout the State in the sale and distribution of this product."

R.S. 51:4-18 (lumber and lumber products), enacted as *L.* 1935, *c.* 236, §2, requires that a ticket "shall be delivered to the person, firm or corporation receiving such lumber or lumber products * * *." The legislative intent is thus set forth:

> "The purpose of this bill is to protect the general public in the purchase of lumber and lumber products from unscrupulous lumber dealers in the delivery of false specie, measure and quality." Statement, Assembly B. 372.

With regard to *R.S.* 51:8-9 (solid fuel), we need go no further than the language of the section. It provides that a copy of the delivery ticket shall be "left with the purchaser of the solid fuel or his agent * * *."

A study of the statutes mentioned above demonstrates that the intent of the Legislature in enacting each of these statutes was to protect the consumer by enabling him to ascertain that the quantity and grade marked upon the delivery slip (for which he would be charged) were the same as that actually delivered. The detection of a false quantity, particularly with regard to the delivery of liquid fuel, would be almost impossible unless the consumer is given an opportunity to check his receipt against the meter attached to the delivery truck. If this opportunity were not available, an unscrupulous dealer, upon completion of his delivery, could return to his storeyard and increase the reading of the meter by running fuel into his own tanks. In addition, the requirement that the delivery ticket be given to the purchaser immediately upon completion of the delivery permits the Superintendent of Weights and Measures to maintain a better inspection system enforcing the statutory regulations than he could without such a requirement. *R.S.* 51:9-1 et seq.

Where there is an opportunity for fraud, the Legislature can correct it in the manner it deems most appropriate. *Cresci* v. *Brock,* 225 P. 2d 685, 694 (Cal. Dist. Ct. App. 1951). In the light of the foregoing considerations, it is our opinion that the Legislature intended that the delivery ticket be given to or left with the purchaser or left at the place of delivery with the person in charge; or if there is no one in charge, left in a conspicuous place therein, immediately upon completion of the delivery. In this way, the public will be protected against occasional defalcations.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: STEPHEN F. LICHTENSTEIN
Deputy Attorney General

JANUARY 8, 1958

HONORABLE AARON K. NEELD
State Treasurer
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-1

DEAR STATE TREASURER:

You have requested advice as to whether or not a member of the Police and Firemen's Retirement System electing additional death benefit coverage may thereafter cancel this election.

N.J.S.A. 43:16A-9.1 provides as follows:

> "(1) Within 6 months after July 1, 1955, or after the effective date of membership, whichever date is later, each member shall have the right to select additional death benefit coverage * * *.
>
> "(2) Each member selecting the additional death benefit coverage under this section shall agree to the deduction of a percentage of his compensation in addition to that required under section 15 * * *.
>
> "(3) The percentage rate of contribution payable by members selecting coverage under this section shall be subject to adjustment from time to time by the board of trustees on the basis of annual actuarial valuations and experience investigations as provided under section 13, so that the value of future contributions of members selecting the additional death benefit coverage under this section when taken with present assets held for such additional death benefits, shall be equal to the value of prospective benefit payments.
>
> "(4) All other provisions of this section notwithstanding, this section and the benefits provided under this section shall not come into effect until a required percentage of the members shall have applied for the additional death benefit coverage under this section. This required percentage shall be fixed by the board of trustees and shall not be less than 65% nor more than 75% of the members. Such application shall be made with the secretary of the board of trustees in such manner and upon such forms as the board of trustees shall provide.
>
> "(5) Any other provision of this act notwithstanding, the additional contributions of members selecting the additional death benefit coverage under this section shall not be returnable to the member or his beneficiary in any manner, or for any reason whatsoever, nor shall such contributions be included in any annuity payable to any such member or his beneficiary."

From reading the foregoing statute it becomes apparent that a member has the right to decide whether or not he shall select the additional death benefit coverage The statute further states that the additional contributions of a member selecting additional death benefit coverage shall not be returnable to the member or his beneficiary in any manner or for any reason whatsoever.

Since a member has the right to select the additional death benefit coverage, he should also have the right to terminate or cancel the said coverage and relieve himself of making further contributions for said additional death benefit.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: FRANK A. VERGA
Deputy Attorney General

JANUARY 8, 1958

HONORABLE AARON K. NEELD
State Treasurer
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-2

DEAR MR. NEELD:

Our opinion has been requested as to the applicability of the statutory procedure for advertisement for bids to the acquisition by State departments and agencies of articles or supplies which are manufactured or produced by institutional labor pursuant to R.S. 30:4-92 et seq. We advise you that such transactions are not governed by the State Purchase Act (P.L. 1954, c. 48).

The State Purchase Act vests authority in the Director of the Division of Purchase and Property over all purchases, contracts or agreements to be paid in whole or in part out of State funds, subject to the requirement of advertisement for or waiver of bids. The terms "purchases, contracts or agreements" connote transactions between separate legal entities. Articles manufactured by institutional labor in the State institutions are not purchased or contracted for purchase by the respective State departments or agencies to which they are supplied, but are transferred pursuant to a system of debits against the receiving department or agency and credits in favor of the State Use Division in accordance with R.S. 30:4-100, which we quote:

> "The Legislature shall annually appropriate to the department a sum for working capital, which may be allotted by the State Board among the several institutions, which the State Treasurer shall, upon the Comptroller's warrant of the State Commissioner of Taxation and Finance, as directed by rule or order of the State Board, advance to the several officers of the respective institutions designated as the custodians of the working capital thereof. Settlements between institutions, departments, boards and other State agencies shall not be made in cash, but by debits and credits on the comptroller's books. The custodian of working capital funds of an institution shall, on or before the tenth day of each month, file with the State House Commission a statement showing all deliveries made by such institution during the month immediately preceding. Delivery shall be considered to have been made only when the producing institution shall have received and submitted, with its monthly report, the acknowlegment of receipt from the receiving institution, board, commission or other State agency, or in event of sales in the open market, acknowledgment of receipt by the purchaser. A separate report to be submitted with the report of deliveries shall show all products sold, acknowledgment of delivery of which has not been received. All receipts from sales shall be credited to the working capital appropriation for the then current fiscal year and thereafter, from year to year, as replacement thereof, without further appropriation and shall not lapse into the unappropriated funds of the State treasury except as hereinafter provided. * * *"

The acquisition by the State departments and agencies of articles manufactured or produced by institutional labor is mandatory; the State departments and agencies are without discretion to purchase or contract for the purchase of such articles on the open market according to R.S. 30:4-95, which provides:

> "The several State and county institutions and noninstitutional agencies, the several counties and all departments and agencies of the State shall purchase from the State board all articles or supplies manufactured or produced by institutional labor which are needed by them and shall not purchase any such supplies or articles from another source unless the State board shall first certify on requisition made to it that it cannot furnish the same or the equivalent thereof. The State board as far as practicable shall honor all requisitions."

Under R.S. 30:4-94, the various State departments and agencies receive a catalogue containing a description and price list of all articles manufactured or produced by institutional labor. That catalogue is sufficient notice to require the acquisition of such articles or supplies from the State Use Division in the Department of Institutions and Agencies, in accordance with R.S. 30:4-95.

The reorganization act of 1948, in establishing a Division of Purchase and Property within the Department of Treasury, specifically excepted the statutes dealing with the purchase or use of institutional labor from the statutes defining the jurisdiction and control over State purchasing of the Director of the Division of Purchase and Property (N.J.S.A. 52:18A-19).

We accordingly advise you that the requirements of advertisement for or waiver of bids and other specific terms of Chapter 48 of the Laws of 1954 and other statutes dealing with State purchasing are inapplicable to the acquisition by any State department or agency of articles or supplies manufactured or produced by institutional labor.

Very truly yousr,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

JANUARY 21, 1958

HON. JOHN W. TRAMBURG, *Commissioner*
Department of Institutions and Agencies
State Office Building
Trenton, New Jersey

MEMORANDUM OPINION—P-3

DEAR COMMISSIONER TRAMBURG:

You have raised the following questions dealing with the administration of the various institutions within the jurisdiction of your department.

1. Are the chief executive officers of the several institutions in the classified or unclassified service of Civil Service?

2. Is it incumbent upon the several boards of managers to organize annually and appoint its president, secretary and such other officers as may be required to discharge its duties and responsibilities?

3. Is it necessary for the board of managers of each of the several institutions to appoint its chief executive officer annually?

4. Assuming the answer to No. 3 to be in the affirmative, would a chief executive officer with veteran's status acquire tenure?

We find the following answers dispositive of the questions raised:

1. The chief executive officers of the several institutions referred to in R.S. 30:4-3, appointed by each board of managers, with the approval of the State Board, are in the unclassified service of Civil Service, and this because of R.S. 11:4-4(p):

> "The position held by the following officers and employees shall not be within the classified service; ***(p) Superintendents or directors of State institutions."

Further, we are informed, that no competitive examinations are scheduled or contemplated for the filling of these positions because in addition to R.S. 11:4-4(p), above, it is further provided in R.S. 30:4-3 that:

> "Each board, with the approval of the State board, shall appoint the chief executive officer of each institution or agency in its charge and determine his official title."

See also R.S. 30:4-13 where it is said:

> "Any officer or employee connected with any of the institutions or non-institutional agencies whose office or employment is not within the classified service list of the Civil Service of the State, whose performance of or qualifications for the duties of his office or employment are unsatisfactory to the board of managers, may, with the approval of the State board, be discharged therefrom, or the State board may act in the premises without the initiative or assent of the board of managers."

2. The several boards of managers are not continuous bodies and, thus, should reorganize annually and appoint a president, secretary and such other officers as may be required to administer the functions of the institution.

Because of the legislative mandate that a board of managers shall not be a continuous body but rather shall receive into the membership thereof two or more new or reappointed members on the first day of July of each year, it is incumbent upon each board of managers to reorganize annually, as promptly after July first as possible, and elect its presiding officer, secretary and such other officers as are required for a proper administration of its functions, duties and responsibilities. To hold otherwise would be to deny incoming members any opportunity to participate in the selection of these officers of the board.

It is provided in R.S. 30:4-1 that:

> "The term of each board member shall be three years commencing on the first day of July and ending on the thirtieth day of June of the third year thereafter. A vacancy shall be filled by the State board for the *unexpired term only.*" (Emphasis supplied)

Then it is said that:

> "The members of new or additional boards of managers shall at the time of their appointment be divided into groups so that the terms of two members shall expire on the thirtieth day of June of the year next succeeding appointment; the terms of two others on the thirtieth day of June of the second year succeeding appointment; the term of the fifth member and in case of larger boards the term of the sixth member, on the thirtieth day of June of the third year succeeding appointment; the term of the seventh member of a board having seven members, on the thirtieth day of June of the fourth year succeeding appointment. Their successors shall be appointed for three-year terms."

There is a significant and conspicuous policy enunciated by the Legislature to establish a board of managers for each institution which contemplates that the term of at least two members shall expire each year. Thus, such a board is not a continuous body and may be compared to the Senate of New Jersey which expires annually.

The leading case on this point is *State* v. *Rogers*, 56 N.J.L. 480 (Sup. Ct. 1894). There it was the court's decision that the Senate of New Jersey was a non-continuing body. The court said, while the Constitution gave the Senate an always existent membership, it did not give it a continuous vitality. Chief Justice Beasley at page 626 said:

> "The Assembly is, of course, a body that needs a yearly reorganization, and the Senate is here (by Constitution) required, to all appearances, to do precisely what the Assembly is directed to do."

This means the Constitution requires the yearly organization of the Senate. The court then goes on to say:

> "Such a regulation is appropriate to a body that expires yearly, but it is most inappropriate and unprecedented to a body possessed of permanent life."

This view was reinforced in *Gulnac* v. *Freeholders of Bergen*, 74 N.J.L. 543 (E. & A. 1906). It was held in that case that a resolution of the board of freeholders

adopted at their last meeting in December, 1905, could not be rescinded by the succeeding board, which organized on January 1, 1906, after an election had intervened involving a change in membership. The court said:

> "Although only a portion of the board of freeholders goes out of office each year, the body itself is not a continuous body."

Cf. *Andrew* v. *Lamb*, 136 N.J.L. 548 (Sup. Ct. 1948), where a township committee was found a non-continuous body because the terms of a portion of its members expired each year.

The problem was most squarely faced in *Skladzian* v. *Board of Education of Bayonne*, 12 N.J. Misc. 602 (Sup. Ct. 1934) aff'd. 115 N.J.L. 203 (E. & A. 1935). In a Per Curiam opinion, the court said at page 604:

> "A new board comes into being each year since, as here, the term of three members expires each year and, whether new persons are appointed to complete the board or the personnel remains the same, in fact and in law it is a new board of education. *Such board is not therefore a continuous body for that reason. . . .*" (Emphasis supplied)

Cf. *Evans* v. *Board of Education of Gloucester City*, 13 N.J. Misc. 506 (Sup. Ct. 1935) aff'd 116 N.J.L. 448 (E. & A. 1936).

A non-continuous body has a duty to reorganize and to adopt rules for its administration on the date of commencement of the terms of the newly appointed or elected members. Under the established authorities the board of managers of the institutions should thus reorganize annually.

3 and 4. These questions may be treated together.

Pursuant to R.S. 30:4-3, each board of managers "shall appoint the chief executive officer * * * and determine his official title." While the board of managers is also authorized to "determine the number, qualifications, powers and duties of the officers and employees," the statute is significantly silent concerning the power to fix the term of any officer or employee. It follows, therefore, that the board of managers is powerless to fix a definite term of office for the chief executive officer and, absent further statutory provision concerning removal, such appointee would be removable at will "unless he came within the independent protection of pertinent * * * tenure provisions." *DeVita* v. *Housing Authority of City of Paterson*, 17 N.J. 350, 356 (1955).

The statute, however, expressly prohibits the discharge of any officer or employee unless his "performance of or qualifications for the duties of his office or employment are unsatisfactory to the board of managers * * *." R.S. 30:4-13, above. The statute shows an overriding legislative purpose that the chief executive officers of the institutions are subject to removal for unsatisfactory service by the respective boards of managers. Since the legal effect is to set definite limits to their employment, the provisions of the Veterans' Tenure Act (R.S. 38:16-1) are not applicable to the chief executive officers. See *McGrath* v. *Bayonne*, 85 N.J. L. 188 (E. & A. 1913), and *Greenfield* v. *Passaic Valley Sewerage Commissioners*, 126 N.J.L. 171 (Sup. Ct. 1941), where definite terms were fixed pursuant to statutory authorization; *Talty* v. *Board of Education, Hoboken*, 10 N.J. 69 (1952), where the statute mandatorily required the appointing authority to fix the term; and *Ackley* v. *Norcross*, 122 N.J.L. 569 (Sup. Ct. 1939), affirmed 124 N.J.L., 133 (E. & A. 1939), where the statute provided that the appointment was "during the pleasure" of the employer.

The resolution of the issue "is largely one of legislative intent to be gathered from the language and plan of the particular statute under construction." *DeVita, supra*, at page 358. Where, as here, the statute provides job security during satisfactory performance, such a specific directive will prevail over the provisions of the general tenure legislation. *Ackley* v. *Norcross, supra.*

Reference should also be made to the principle embodied in the *Skladzien* case, *supra*, to the effect that the appointments of a non-continuous body, if the terms are not fixed pursuant to the permissive authority delegated to it by statute, are deemed to be co-terminous with the life of the appointing body. This principle, however, is subordinate to specific statutory provision to the contrary. In *Lohsen* v. *Borough of Keansburg*, 4 N.J. 498, 504 (1950), the statute protected the employee against discharge "as long as he shall perform the duties of his office to the satisfaction" of his employer. It was held that this "statutory direction is controlling" and that the principle of *Skladzien* was inapplicable.

We advise you, therefore, that although a chief executive officer may not be accorded the benefits of the veterans' tenure legislation he, nevertheless, possesses employment protection pursuant to the provisions of R.S. 30:4-13 and is thus not subject to annual appointment.

Very truly yours,
GROVER C. RICHMAN, JR.
Attorney General
By: EUGENE T. URBANIAK
Deputy Attorney General

JANUARY 29, 1958

HONORABLE ROBERT B. MEYNER
Governor of New Jersey
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-4

Re: Integration of Panzer College into the State Teachers College at Montclair.

DEAR GOVERNOR MEYNER:

You have requested our opinion as to the legality of the proposed integration of the Panzer College of Physical Education and Hygiene into the Montclair State Teachers College, as more fully described hereinafter. We respectfully advise you that, in our opinion, such integration may lawfully be undertaken on the terms proposed by the Trustees of Panzer College.

The college was originally organized on March 17, 1917 under the name of "Newark Normal School for Physical Education and Hygiene," for the following purposes as set forth in its Certificate of Incorporation:

> "The purposes for which this corporation is formed are to offer a two years Normal course in Physical Education to both sexes in the State of New Jersey and in other States; to prepare them to teach the subject of Physical Education and Hygiene and to give degrees under the laws of the State of New Jersey for this purpose."

The name of the institution was changed on March 29, 1929 to "Panzer College of Physical Education and Hygiene"; but the original purposes of the college have never been changed, and it continues today to perform them.

Under the plan of integration, the State Board of Education would establish on the campus of the Montclair State Teachers College the Panzer School of Health and Physical Education, and would incorporate in the Montclair program as much as possible of the present program of the Panzer College. The student body now at Panzer would be matriculated at Montclair and would receive credit for work done at Panzer toward the degree of Bachelor of Science in education to be awarded at Montclair. The State Board of Education would employ in the Montclair program as many as possible of the faculty and staff of Panzer College. The Trustees of Panzer College would turn over to the State Board the library, laboratory and academic equipment of the institution, together with all its academic records including those of alumni, with the understanding that Montclair maintain these records in current order and make them available at any time for necessary reference by the alumni of Panzer. Finally, the Board of Trustees of Panzer would retain the title to and control of the real estate and all other assets of the college not previously mentioned, including endowment funds, but after discharging the obligations of the college, would utilize the income, or corpus, or both, of such remaining assets exclusively for the benefit of the program of the Panzer School at the Montclair State Teachers College or its successors, in such ways as seem most appropriate to the Board of Trustees and in accordance with the statutes of this State pertaining to education, and the approval of the State Board of Education.

Under R.S. 18:16-19 and 20, the Commissioner of Education, with the approval of the State Board, clearly possesses authority to establish in the teachers colleges a course or courses for the purpose of training teachers of physical education. The purpose of State Teachers Colleges, as written in R.S. 18:16-19, is "training and educating persons in the science of education and art of teaching." Physical education is one of the subjects which must be taught in all public schools, under the requirements of R.S. 18:14-93, et seq., and accordingly the commissioner, under his power to prescribe courses of study for the teachers colleges (R.S. 18:16-20), would be well within his authority in prescribing courses in the teaching of physical education as now proposed for Montclair.

The property offered by the Trustees may be accepted by the Commissioner, with the approval of the State Board of Education and yourself, by virtue of N.J.S.A. 18:3-21, the pertinent portion of which reads as follows:

> "Subject to approval by the Governor and the State Board of Education, the Commissioner of Education may accept on behalf of the State and administer for the State any grant, conveyance, devise, bequest, or donation to be applied, principal or income, or both, for the purposes specified in such grant, conveyance, devise, bequest, or donation to the maintenance and use of any service in, or activity of, any division or bureau established in the State Department of Education, or of any teachers' college, school or institution of learning under the control of the Commissioner of Education and the State Board of Education; * * *"

The only legal question meriting further discussion is whether the Trustees of Panzer College could turn over to the State the assets of the college, including endowment funds, to be used for the benefit of the proposed program at Montclair. In answering this question, it is not the function of the Attorney General to advise

the Trustees as to their fiduciary duties; we point out that in case of doubt they may apply to the appropriate court for instructions.

The purpose of Panzer College, as already noted, is to train teachers of physical education and hygiene. Thus, the use of Panzer's assets for such training, even though given at a State Teachers College, would serve to accomplish its corporate purposes. In the absence of restrictions to the contrary in the terms of any gift to Panzer now administered by the Trustees, it matters not that the trust will be fulfilled by a somewhat different means.

This case bears a close resemblance to the recent Rutgers reorganization case, *Trustees of Rutgers College in N. J.* v. *Richman,* 41 N.J. Super. 259 (Ch. Div. 1956). There, one of the main questions was whether the Trustees would breach their fiduciary duties by agreeing to the plan of reorganization of Rutgers under which substantial managerial powers would be delegated to a new Board of Governors, a majority of whom would be appointed by the Governor of the State with the advice and consent of the Senate, in return for greater financial support from the State. The Superior Court upheld the validity of the plan as constituting no substantial departure from the purposes of the college and its charter, but rather "a most reasonable advance in the successful development of the institution" (p. 291). Judge Schettino's comprehensive opinion further declared (p. 292):

> "It is clear that the purposes of the charter, namely, to establish a college 'for the education of youth in the learned languages, liberal and useful arts, and sciences,' is advanced and nurtured by the plan which seeks to effect greater financial support in order to bring the facilities of the university in line with the demands of modern society. The basic functions, purpose and role of the university as an educational institution remains unchanged. The mode or technique of internal management is changed. I find that the modifications are fair and reasonable and consistent with the purposes set forth in the charter and its subsequent amendments."

The Panzer plan would similarly delegate the management of its program to a State agency, i.e., the Department of Education, but would in turn make better facilities available and would pave the way for greater financial support from the State for the attainment of the ultimate purposes of the college. Thus, as in the *Rutgers* case, the plan now under consideration appears to present a fair and reasonable method of advancing the object of the trust administered by the Trustees in conformity with the purposes of the charter by making the trust property more effective than ever in meeting the increasing demand for physical education teachers.

We conclude, therefore, that the State may lawfully proceed with the proposed integration, subject to special conditions attaching to any particular gift, trust or other instrument which may be affected, and without prejudice to the rights and interests of any persons therein as may be determined in accordance with law, but without rendering any opinion upon the legal validity of the delegation or relinquishment of trust duties by the Trustees of Panzer College.

Very truly yours,

HAROLD KOLOVSKY
Acting Attorney General

By: THOMAS P. COOK
Deputy Attorney General

JANUARY 29, 1958

HONORABLE CARL HOLDERMAN
Commissioner of Labor and Industry
20 West Front Street
Trenton, New Jersey

MEMORANDUM OPINION—P-5

DEAR COMMISSIONER HOLDERMAN:

You have asked whether the Department of Labor and Industry may require every employer to file with the Department a report covering each accidental injury and occupational disease suffered by an employee.

We understand that this report would be filed for any injury which causes a loss of time from regular duties beyond the working day or shift during which the accident occurred, or which required medical treatment beyond ordinary first aid or more than two treatments by a physician, and also for any occupational disease whether or not time was lost. The items of information which you desire are contained in items 1 through 31 of Form WC-1 of the Department of Labor and Industry.

In our opinion, it is within the power of the Department of Labor and Industry to require the filing of such reports.

R.S. 34:1-49 provides:

> "The Bureau of Statistics and Records shall collect, classify and report to the Legislature, on or before the last day of October in each year, statistical details relating to labor in the State with particular regard to the commercial, industrial, social, educational and sanitary condition of the laboring classes, and in all suitable and lawful ways foster and encourage all productive industries, with the view to their permanent establishment upon a prosperous basis, both to employer and employed."

The obligation of the employer to submit reports is stated in R.S. 34:1-52 which provides:

> "It shall be the duty of every owner, operator, lessee, manager or superintendent of every factory, mill, workshop, mine or other establishment or industry in which labor is employed within this State, to make such reports or returns on blanks furnished by the bureau as the bureau may require for compiling statistics authorized by law within the time prescribed therefor, and to certify to the correctness of the same."

The penalty for failure to submit such reports is contained in R.S. 34:1-53 which states:

> "Any owner, operator, lessee, manager or superintendent of an establishment or industry in which labor is employed within this State, who wilfully neglects or refuses to make return or report as and when required pursuant to section 34:1-52 of this title shall be subject to a penalty of fifty dollars for each such failure or delay, to be recovered in an action at law brought by and in the name of the commissioner."

The Bureau (now the Bureau of Research and Statistics in the Division of Labor) is thus empowered to collect statistical details relating to labor in this State, and for refusal by an employer to submit reports for this purpose, a penalty may be imposed. Assuming that the details which you desire concerning accidental injuries and occupational disease serve the statistical purposes of the Bureau, the requirement of such reports is proper.

Very truly yours,

HAROLD KOLOVSKY
Acting Attorney General
By: THOMAS L. FRANKLIN
Deputy Attorney General

JANUARY 29, 1958

ALAN S. MEYER, *Research Director*
Youth Study Commission
335 Clifton Avenue
Clifton, New Jersey

MEMORANDUM OPINION—P-6

DEAR MR. MEYER:

You have inquired whether the staff employed by the Youth Study Commission, which includes a research director employed full time, an educational director employed part time, and an office secretary employed part time, is entitled to coverage under the Federal Social Security Act.

The Youth Study Commission was originally created by J.R. 4 of 1954, as the Juvenile Delinquency Commission. Its name was changed to the Youth Study Commission by J.R. 19 of 1956.

The Federal and State statutes governing social security coverage afford such coverage on a broad basis. See 42 U.S.C.A., Section 418; N.J.S.A. 43:15A-1, 43:22-1. For the purposes of social security, the term "employee" includes any person holding "office, position or employment in the service of the State or of any county, municipality or school district, or of any public department, board, body, commission, institution, agency, instrumentality or authority of, or in, the State, or of, or in any county, municipality or school district in the State." N.J.S.A. 43:22-2(c).

N.J.S.A. 43:15A-1 extends the permissible area of coverage to governmental units having no retirement system, stating that:

> "The State Agency, . . . with the approval of the Governor, is hereby authorized and directed to enter, on behalf of the State, . . . and of any public department, board, body, commission, . . . of, or in, the State . . . into an agreement . . . for the purpose of extending the services of the Federal Old-Age and Survivors Insurance system to all services performed by employees as members of any coverage group as defined in section 218(b)(5) of the Social Security Act, unless such services are already covered by an agreement under this act."

In view of the broad scope of coverage provided by the above cited provisions and the expression of policy by the Legislature providing such social security coverage on as broad a basis as possible (N.J.S.A. 43:22-1), you are advised that members of the staff of the Youth Study Commission are entitled to social security coverage. You should contact the social security section of the Division of Pensions for assistance in completing the ministerial acts necessary to institute coverage.

Very truly yours,

HAROLD KOLOVSKY
Acting Attorney General

By: DAVID LANDAU
Deputy Attorney General

JANUARY 29, 1958

HONORABLE ABRAM M. VERMEULEN, *Director*
Division of Budget and Accounting
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-7

DEAR MR. VERMEULEN:

You have asked for our opinion relating to the annual appropriation by the State to the Teachers' Pension and Annuity Fund. The specific problem which you raise is whether the Legislature should include the amount estimated by actuarial determination as the State's obligation during the fiscal year 1958-59 in the next appropriations bill.

We advise you that the appropriation of this amount in the next appropriations bill for payment to the Teachers' Pension and Annuity Fund on or after July 1, 1958 is mandatory in strict compliance with the express terms of N.J.S.A. 18:13-112.35. That statute provides as follows:

> "Upon the basis of each actuarial determination and appraisal provided for in this act, the board of trustees shall prepare and submit to the Governor in each year an itemized estimate of the amounts necessary to be appropriated by the State to provide for payment in full during the ensuing fiscal year of the obligations of the State accruing during that year. The Legislature shall make an appropriation sufficient to provide for such obligations of the State. The amounts so appropriated shall be paid into the contingent reserve fund."

N.J.S.A. 18:13-112.35, which was enacted as part of the Teachers' Pension and Annuity Fund-Social Security Integration Act (L. 1955, c. 37; N.J.S.A. 18:13-112.3 et seq.), revised the method of appropriation by the State to the purposes of the Teachers' Pension and Annuity Fund. As you point out, the source of State payment to the Teachers' Pension and Annuity Fund was formerly dedicated railroad taxes under R.S. 18:10-30 and 31, but these receipts are no longer available to defray the State's commitment. As a result, the ascertainment of the total appropriation necessary by the State in each fiscal year is arrived at through an actuarial determination

in the preceding fiscal year. That is the plain import of N.J.S.A. 18:13-112.35. The Governor's Budget and the Appropriations Act should include the amounts to be appropriated by the State to provide for the payment in full of the obligations of the State to the Fund which the actuary estimates will accrue during the ensuing fiscal year. Specifically, we advise you our opinion that the Governor's Budget and the Appropriations Act for the fiscal year 1958-59 should include an appropriation of the amount payable by the State under the Teachers' Pension and Annuity Fund-Social Security Integration Act during the fiscal year commencing July 1, 1958.

Yours very truly,

HAROLD KOLOVSKY
Acting Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

JANUARY 30, 1958

HONORABLE CARL HOLDERMAN
Commissioner of Labor and Industry
20 West Front Street
Trenton, New Jersey

MEMORANDUM OPINION—P-8

DEAR COMMISSIONER HOLDERMAN:

You have requested an opinion involving the interrelation between the Mine Safety Act (L. 1954, c. 197; N.J.S.A. 34:6-98.1 et seq.) and a local ordinance designed to regulate the use of explosives for blasting purposes. You state that there appear to be conflicts between the ordinance and the act, and indicate a desire to know whether a quarry operator in such case would be required to comply with the State statute or the conflicting provision of the municipal regulation.

In your letter you refer to section 10 of the Mine Safety Act which provides as follows (N.J.S.A. 34:6-98.10):

> "No municipality or other governmental subdivision shall have the power to make any ordinance, by-law or resolution providing for safety to workers in the mining industry or providing for protection of property that does not comply with the standards herein established by this act, and the rules and regulations promulgated by the commissioner hereunder. Nothing in this act shall, however, limit the right of any municipality or other governmental subdivision to make inspections of mining operations."

With respect to standards for the use of explosives in quarries, we are specifically referred by the Mine Safety Act to the 1941 explosives law (L. 1941, c. 27; N.J.S.A. 21:1A-1 et seq.) Section 8 of the Mine Safety Act (N.J.S.A. 34:6-98.8) states:

> "a. When explosives are used in a mine or quarry, the manner of storing, keeping, handling, moving, charging and firing, or in any manner using such explosives, *shall be in accordance with the requirements of chapter 27 of the*

laws of 1941 [the 1941 explosives act, supra] as amended and supplemented, and the rules and regulations now in effect or hereafter issued thereunder, except for the following limitations.

"b. All explosives in excess of the amount required for the work of 1-day underground operations may be stored underground in a safely located secondary storage magazine. The maximum amount of explosives to be stored in such magazine shall not exceed the requirements for a 48 hours' supply.

"c. The commissioner may regulate and limit the amount of explosives stored in a primary magazine in any underground portion of a mine with due regard for the safety of miners.

"d. Any temporary supply for the work of a shift shall be kept in such a place that its accidental discharge will not endanger the miners." (Emphasis ours)

The 1941 explosives law in turn makes it clear that municipalities may impose stricter regulations on the use of explosives than those imposed by the State. It provides (N.J.S.A. 21:1A-124):

"Nothing contained in this act shall affect any existing ordinance, rule or regulation of any city or municipality not less restrictive than this act governing the manufacture, storage, sale, use or transportation of explosives, or affect, modify or limit the power of cities or municipalities in this State to make ordinances, rules or regulations not less restrictive than this act governing the manufacture, storage, sale, use or transportation of explosives within their respective corporate limits."

From the foregoing we conclude that with respect to any so-called conflict arising because the municipal ordinance as applied to the use of explosives in a quarry is more strict than the State statute, the quarry operator would be required to comply with the local regulation; but as to any other conflict, the State enactments would prevail in accordance with the general rule that "municipal ordinances regulating subjects, matters and things upon which there is a general law of the State must be in harmony with that State law, and in any conflict between an ordinance and a statute the latter must prevail" (McQuillan, *Municipal Corporations*, Sec. 15.20). See *Auto-Rite Supply Co.* v. *Woodbridge Twp.*, 25, N.J. 188 (1957).

Very truly yours,

HAROLD KOLOVSKY
Acting Attorney General

By: THOMAS L. FRANKLIN
Deputy Attorney General

FEBRUARY 14, 1958

HONORABLE DWIGHT R. G. PALMER
Commissioner of State Highway Department
1035 Parkway Avenue
Trenton, New Jersey

MEMORANDUM OPINION—P-9

DEAR COMMISSIONER:

Our opinion has been requested as to the extent of the limitation on the expenditure of certain State Aid funds as contained in *R.S.* 27:14-48. You have asked

"In view of the provision of *R.S.* 27:14-48, are we justified in permitting the use of not more than 50% of the annual State Aid allotment to each county, for debt service?"

R.S. 27:14-48 reads as follows:

"If the public body referred to in section 27:14-47 of this title shall not have sufficient funds with which to pay its share of the cost of such repairs, it may issue bonds in a sum not exceeding the sum to be advanced by the commissioner for and towards such repairs as stated in its certificate, to defray and pay its share of the costs.

"The commissioner may, in his discretion, approve and permit the use of not more than fifty percent of the motor vehicle fund allotment made by the State to the counties each year to be used toward the payment of interest on such bonds, and for the retirement of such bonds, except that he shall not permit the use of the State motor vehicle funds for such purposes in an amount which, if subtracted from the total allotment by the State to the county would, in the opinion of the commissioner, leave an amount insufficient for the proper repair and maintenance of the other existing county roads.

"No motor vehicle funds shall be used for any work or contract performed or entered into by a county prior to March twenty-sixth, one thousand nine hundred and nineteen."

To determine the extent of the limitation referred to in the above statute, we must first refer to *R.S.* 27:14-47 which reads:

"When an improved public road is in need of *extraordinary* repairs or reconstruction, the public body charged with its care shall prepare specifications and any plans and cross sections necessary to explain and describe the repairs contemplated and forward them to the commissioner, who may in his discretion approve them and certify the amount of State moneys he will set aside for the repair of such roads.

"Upon the approval and issuance of the certificate of the commissioner as provided in this article, the public body shall advertise for bids and thereafter proceed as provided in this article." (Emphasis supplied)

It will be noted that *R.S.* 27:14-47 refers to *extraordinary* repairs or reconstruction and that the bonds issued under *R.S.* 27:14-48 are those issued with respect to the payment of the costs of such repairs. The latter statute says in essence that when

a county does not have sufficient funds for extraordinary repairs as provided for in *R.S.* 27:14-47, it may issue bonds in a certain sum to defray the costs of such repairs. The commissioner may permit up to 50% of the motor vehicle fund allotment made by the State to the counties each year to be used for the payment of interest on such bonds or for the retirement of such obligations. The commissioner is further limited by the statute as to the amount he may allow for debt service because he must at all times leave in the allotment an amount sufficient for proper repair and maintenance of the other existing county roads, i.e., for *ordinary* repairs.

Thus, where the fund is to be used to pay interest and principal on bonds issued to finance extraordinary repairs or construction, the clear legislative intent is to limit the amount of the fund that may be allocated thereto to not more than 50% as prescribed by *R.S.* 27:14-48.

Very truly yours,

HAROLD KOLOVSKY
Acting Attorney General

By: HAROLD J. ASHBY
Deputy Attorney General

FEBRUARY 19, 1958

BOARD OF GOVERNORS
Rutgers, The State University
New Brunswick, New Jersey

MEMORANDUM OPINION—P-10

GENTLEMEN:

You have requested our opinion as to whether Rutgers, The State University, can legally make a contract with a single contractor for the construction of certain projected university buildings or whether multiple contracts should be let.

R.S. 52:32-2 provides:

> "When the entire cost of the erection, construction, alteration or repair by the State of any public buildings in this State will exceed one thousand dollars, the person preparing the plans and specifications for such work shall prepare separate plans and specifications for the plumbing and gas fitting and all work kindred thereto, the steam and hot water heating and ventilating apparatus, steam power plants and all work kindred thereto, and electrical work, structural steel and ornamental iron work.
>
> "The board, body or person authorized by law to award contracts for such work shall advertise for, in the manner provided by law, and receive separate bids for each of said branches of the work and shall award contracts for the same to the lowest responsible bidder for each of the branches respectively."

Under the provisions of this statute, contracts for the "construction * * * by the State of any public buildings," no matter how or by whom the construction is financed, are not to be let to a single bidder for the entire job, but are to be awarded

separately to the lowest bidder on each of certain enumerated branches of the work. The issue raised by your inquiry, therefore, is whether the construction of buildings by Rutgers, The State University, is "construction * * * by the State of any public buildings."

The policy of requiring separate bidding for different categories of work upon a State building was first established by Chapter 95 of the Laws of 1915. The original date of enactment of R.S. 52:32-2 thus antedates the establishment of Rutgers University as presently constituted, L. 1956, c. 61.

Prior to its reorganization in 1956, Rutgers had been treated in certain respects as an agent of the State. An opinion by Attorney General Wilentz filed on October 8, 1935, informed the Works Progress Administration that certain schools within the University were, for the purpose of Federal grants, agents of the State. In a Memorandum Opinion filed March 31, 1955, we advised that Rutgers was a State instrumentality for the purpose of determining eligibility of its employees for benefits under the Federal Social Security Act.

Chapter 61 of the Laws of 1956 provided for the first time for public control over the administration of Rutgers University. The 13-member Board of Governors has 11 voting members, 6 of whom are appointees of the Governor with the advice and consent of the Senate, and 5 of whom are subject to appointment by the Board of Trustees from among the Alumni Trustees, Alumnae Trustees and Charter Trustees. The Board of Governors has general supervision over the conduct of the University, with authority and responsibility to determine policies, direct and plan expenditures, borrow money for the needs of the University, enter into purchases, determine salaries, approve expenses, and generally to manage The State University. Theretofore, except as to the State Agricultural College and to a limited extent other branches or departments, the State had not had direct control over the management and administration of Rutgers University.

By L. 1956, c. 61, the name of the corporation "The Trustees of Rutgers College in New Jersey" was changed to "Rutgers, The State University." The corporation continues as an instrumentality of the State for the purpose of maintaining the State University, with all of its property and educational facilities impressed with a public trust for higher education of the people of the State. Similar provisions designating Rutgers as an instrumentality of the State for providing public higher education and impressing the property of the Trustees of Rutgers College in New Jersey with a public trust for higher education were set out in L. 1945, c. 49, but without the vesting of voting control in a Board of Governors dominated by public appointees.

The existing Board of Trustees of the corporation formerly known as the Trustees of Rutgers College in New Jersey was continued, although no longer bearing the identical name as the corporation and superseded as to its essential management responsibilities and functions by the Board of Governors. The limited powers of the Board of Trustees within the corporation are set forth in section 19 of the 1956 Act:

> "I. The Board of Trustees
>
> "(1) Shall act in an over-all advisory capacity;
>
> "(2) Shall (a) control (i) properties, funds and trusts vested as of August 31, 1956, in the Corporation in possession, or remainder, or expectancy (other than and expressly excluding properties and funds owned by or titled to which is the State of New Jersey or which are held upon an express trust for the use of the State, or which have been acquired by the use of moneys

appropriated by the State or by the Federal Government to the use of the Corporation or the Land Grant College of New Jersey, including but not limited to real estate, buildings, improvements, fixtures, and appurtenances thereto, and tangible personal property); and (ii) properties, funds and trusts received by the Corporation on or after September 1, 1956, by private gift, donation, bequest or transfer, in any manner, under the terms of any applicable trust, gift, bequest or donation dated or delivered (aa) prior to September 1, 1956, unless otherwise designated, or (bb) on or after September 1, 1956, if so designated; provided, however, that all property, educational facilities, rights and privileges which are impressed with a public trust for higher education of the people of the State of New Jersey shall continue to be so impressed; and (b) make available (after meeting all expenses of its administration) to the Board of Governors the income from such funds and the use of or income from such properties, subject to the provisions stated hereinafter in Section 20;

"(3) Shall have sole authority over the investment of funds under its control;

"(4) Shall have power to maintain such administrative staff and incur and pay such expenses as it deems reasonably necessary to the effective exercise of its functions and responsibilities under this Act or by reason of any other fiduciary responsibilities to which it is subject; and

"(5) Shall be represented on the membership of the committees of the several colleges."

In addition, the Board of Trustees was vested with a power over the Board of Governors in two administrative functions: (1) the borrowing of money (L. 1956, c. 61, section 18(5)), and (2) the election of president (L. 1956, c. 61, section 27(c)).

In resolving whether Rutgers is the *alter ego* of the State for the purposes of R.S. 52:32-2, no particular significance is attached to the remaining private control over the appointment of 5 of the 11 voting members of the Board of Governors by the Board of Trustees. Such arrangements are by no means unique in State government. For example, by R.S. 4:1-5 the annual Farmer's Convention makes nominations to the State Board of Agriculture which apparently must be ratified by the Governor; similar provision for the nomination of the Fish and Game Council is found in N.J.S.A. 13:1B-24. Direct appointment by private groups of members of State boards of managers or trustees are commonplace, e.g., R.S. 30:7-1 and N.J.S.A. 43:16-6.1.

We note the strong statement of "public policy" that the University shall continue to be given a high degree of self-government, L. 1956, c. 61, section 20, and that nothing in the act "shall be deemed or constituted to create * * * a debt, liability, or a loan or pledge of the credit, of the State of New Jersey." L. 56, c. 61, section 34. Nevertheless, it is evident that since the majority of the Board of Governors is appointed by the Governor, the public is granted major control over the policies and administration of the University.

We also note the language of section 21 of chapter 61 which provides:

"The Boards shall have and exercise the powers, rights and privileges that are incident to their respective responsibilities for the government, conduct and management of the Corporation, and the control of its properties and funds, and of the University, and the powers granted to the Corporation

or the Boards or reasonably implied may be exercised without recourse or reference to any department or agency of the State, except as otherwise expressly provided by this Act or other applicable statutes."

We have indicated, in Formal Opinion 1956—No. 9, dated July 2, 1956, that the functions exercised in the past by the Division of Purchase and Property with respect to purchases and construction for Rutgers have now been expressly reserved as functions of the new Board of Governors under Chapter 61 of the Laws of 1956. This relocation of the power to contract has no application to the question at hand since R.S. 52:32-2 is directed to "The board, body or person authorized by law to award contracts. . ."

In *Trustees of Rutgers College of New Jersey* v. *Richman*, 41 N.J. Super 259 (Ch. 1956), Rutgers University, as constituted after the reorganization of 1956, was found to be "an *alter ego* of the State, to which donations of land and appropriation of money might be made without offending the constitutional prohibition against gifts or appropriations to private corporations or associations," p. 298. In that case the court, at page 296, pointed out that:

"State appropriations pursuant to L. 1956, c. 61, will be made not to the Board of Trustees, which continues in existence after September 1, 1956 with limited powers, but to 'Rutgers, The State University,' a State instrumentality for public higher education whose property and assets are impressed with a public trust for that purpose. The disbursement of State funds will henceforth be to a public instrumentality under the control of the State and for the fulfillment of the important objective of providing higher education for the people of the State."

While it is true that Rutgers University is a corporation, and thus constitutes a legal entity with a limited capacity, yet when all the provisions of its reorganization in 1956 are examined, it is made very clear that the corporation designated "Rutgers, The State University" was created and exists for the sole purpose of more conveniently governing the educational institution called the "University." The language appearing in *University of Utah* v. *Bd. of Examiners of State*, 4 Utah, 2d 408, 295 P. 2d 348 (S. Ct., 1956) is here particularly applicable:

"The university is clearly a State institution, and is so treated, since the members constituting its governing board are appointed by the Governor. * * * Moreover, the corporation holds all the property in trust merely. * * * While the naked legal title to the buildings and paraphernalia may be vested in the corporation, it is nevertheless held in trust * * *." 295 P. 2d 364.

It is our opinion, and you are so advised that, for the purposes of R.S. 52:32-2, construction of buildings by "Rutgers, The State University," is "construction * * * by the State of any public buildings," and that therefore, to effectuate such construction, multiple contracts must be let.

Very truly yours,

HAROLD KOLOVSKY
Acting Attorney General

By: MARTIN L. GREENBERG
Legal Assistant

FEBRUARY 24, 1958

MAJOR GENERAL JAMES F. CANTWELL
Chief of Staff
Department of Defense
Trenton, New Jersey

HON. AARON K. NEELD
State Treasurer
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-11

GENTLEMEN:

You have asked for the opinion of the Attorney General as to the right of State employees to State pay during periods of active duty for training as members of the National Guard, naval militia or New Jersey State Guard. A six months' active duty for training program, which with subsequent part-time training discharges the guardsmen's draft obligation, is now authorized in accordance with the Reserve Forces Act of 1955, Ch. 655, 84th Congress, First Session.

We advise you that State employees on active duty for training as members of the National Guard under the aforementioned six months training program are not entitled to any salary or compensation from the State. Neither R.S. 38:12-4 nor R.S. 38:12-5, making payment of State salary or compensation to National Guard members mandatory under certain circumstances, is applicable. The payment of salary or compensation by the State except for services rendered or in accordance with a specific statutory authorization is without sanction in law.

R.S. 38:12-4 provides:

> "All officers and employees of this State or of any county or of any municipality in the State or of any board or commission of the State or of any county or municipality who are members of the National Guard, naval militia or New Jersey State Guard shall be entitled to leave of absence from their respective duties without loss of pay or time on all days during which they shall be engaged in field training or other duty ordered by the Governor."

The six months' active duty for training is not field training. You inform us as a fact that the active duty for training fails to meet the definition of "field training" set down by the Supreme Court in *Lynch* v. *Borough of Edgewater*, 8 N.J. 279, 285 (1951), viz.; participation in unit training in field operations, not including attendance at service schools. Nor is the active duty for training "other duty ordered by the Governor" within R.S. 38:12-4. The letter orders to enlisted personnel in the National Guard to report for active duty for training for a period of six months are by order of the Secretary of the Army of the United States.

R.S. 38:12-5 is a measure guaranteeing State employee members of the National Guard, naval militia or New Jersey State Guard against a reduction in pay because

of active service in time of war or national emergency with the Army or Navy of the United States. That act provides:

> "During the absence of any such officer or other employee, mentioned in section 38:12-4 of this Title, on active service with the Army or Navy of the United States or any other organization affiliated therewith, such person shall receive such portion of his salary or compensation as will equal the loss he may suffer while on such active service.
>
> "Any officer, warrant officer or enlisted man in the State Department of Defense, who is a member of the National Guard and who heretofore has been or who shall hereafter be transferred to Federal service, by order of the chief of staff of said State Department of Defense, shall during any period of such transferred service retain all rights and privileges as were accorded to officers, warrant officers and enlisted men in the State Department of Defense transferred to Federal service during World War II, including pay differential and any pension or retirement rights and privileges conferred by the laws of this State."

The limitation of the first paragraph of R.S. 38:12-5 to active service in time of war or national emergency is made plain by the second paragraph, enacted as Chapter 82 of the Laws of 1953, which guarantees the payment of the pay differential to Department of Defense employees during any period of transfer to active Federal status. The limitation is further exemplified by the discussion of R.S. 38:12-5 by the former Court of Errors and Appeals in *Adams* v. *Atlantic County*, 137 N.J.L. 648, 652 (E. & A. 1948):

> "Generally, statutes of the character under consideration would be liberally construed in favor of the citizen who volunteers his services in time of war, but it is not the judicial function to add beneficiaries to those specified in the statutes."

We need not pass upon the technical legal question as to whether the Korean emergency is a continuing emergency because no termination or cut-off date has been proclaimed by the President of the United States or enacted by the Congress or State Legislature. The six months' active duty for training pursuant to the Reserve Forces Act of 1955 is not active service with the Army or Navy of the United States qualifying the trainee for benefits, as we previously advised State Treasurer Neeld in Formal Opinion 1958—No. 2 dated January 24, 1958.

Very truly yours,

HAROLD KOLOVSKY
Acting Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

MARCH 13, 1958

HONORABLE DWIGHT R. G. PALMER, *Commissioner*
State Highway Department
1035 Parkway Avenue
Trenton, New Jersey

MEMORANDUM OPINION—P-12

DEAR COMMISSIONER PALMER:

You have asked for our opinion concerning the applicability of the Hatch Act to the employees of the State Highway Department. You specifically raise the question as to whether the employees of the Maintenance Division are subject to the Hatch Act, inasmuch as no Federal funds are contributed for maintenance or repairs on State highways.

The Hatch Act bars political activity by any officer or employee of any State agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency. Section 12(a) of the Hatch Act, 5 U.S.C.A., Sec. 118k(a) provides:

> "No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No such officer or employee shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of the second sentence of this subsection, the term 'officer or employee' shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices."

Section 12 (b) of the above act charges the United States Civil Service Commission with the investigation and determination of alleged violations of the act. 5 U.S.C.A. Section 118k(b). Section 12(d) authorizes the Commission to adopt such reasonable laws as it deems necessary to execute its functions under the act. 5 U.S.C.A. Section 118k(d).

In accordance therewith, the Commission has promulgated a "General Rule of Section 12(a) Jurisdiction" as follows:

> "An officer or employee of a State or local agency is subject to the act if, as a normal and foreseeable incident to his principal position or job, he performs duties in connection with an activity financed in whole or in part by Federal loans or grants; otherwise he is not."

The United States Supreme Court reviewed this section of the Hatch Act in *Oklahoma* v. *United States Civil Serv. Comm.*, 330 U.S. 127 (1947) and ruled that a member of the Oklahoma Highway Commission was subject to the Hatch Act prohibition against political activity. The State of Oklahoma had been ordered by the Civil Service Commission to suspend from office the Oklahoma Highway Commission member, who was acting as Chairman of the Democratic State Central Committee and ex officio as a member of a "Victory Dinner" committee for the purpose of raising funds for the Democratic Party. Upon the State's refusal to suspend the State Highway Commission member, Federal highway funds would be withheld from the State, according to the Civil Service Commission order. That order was upheld by the United States Supreme Court in an opinion which sustained the constitutionality of the Hatch Act.

The United States Civil Service Commission construed General Rule of Section 12(a) Jurisdiction in detail in the case of *In the Matter of Slaymaker and the State of Illinois*, 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-1 (U.S. Civ. Serv. Comm. 1943). In that case, Highway Department employees of the State of Illinois whose sole employment was with the Highway Department, contended that they were not subject to the Hatch Act because the greater part of their duties concerned the State system of highways which did not receive Federal grants, rather than the Federal system of highways which did receive Federal aid. The Commission stated:

> "For an employee of a State or local agency to be subject to the act, it is not prerequisite that his salary be derived, in whole or in part, from Federally contributed funds. We so held in *In the Matter of Huict and the State of Georgia*, Docket No. 86; Pike and Fischer Admin. Law, Dec. Note 375. If an employee upon a project supported in part through Federal contributions finds in that employment a field, a means, or (desiring to please politically minded superiors) an incentive for pernicious political activity, that activity is advanced in substantially the same way by the Federal funds whether they are applied to his salary, or to other expenses of the project that makes his employment possible. * * *
>
> "* * * When we consider jurisdiction, the first problem is definition of 'principal employment',—or more simply, of 'employment'. The respondent's position is that 'employment' means the *things a person does*. Therefore he would interpret 'principal employment' according to what, as a convenient descriptive term, we may call the 'scale theory': viz., that when part of an employee's work is upon Federally financed projects, and part is not, we weigh the two types, and unless the first outweighs the second, the employee is exempt from the Act.
>
> "* * * However, * * * we do not agree with the respondent's interpretation of the term 'principal employment.'
>
> "* * * It is now our considered opinion that 'employment' should be taken to mean 'position' or 'job'. Therefore, in determining whether a person is subject to Section 12(a), two questions are asked: First, 'What is his principal employment, i.e., position or job?' * * * Second, 'Is that employment (position or job), 'in connection with a Federally financed activity?' The question is not whether the employment is wholly 'in', but whether it has 'connection with' such activity.

"* * * Thus we follow what, in contrast with the term 'scale theory,' we shall call the analytical interpretation of the expression principal employment. Under it, we do not divide and weigh the things which an employee does. We merely analyze the position or job to determine, first—whether it is his 'principal' one, and second—whether it involves (as a normal and foreseeable incident thereof) performance of duties in connection with a Federally financed activity. * * *"

The following decisions uphold the above construction of the General Rule of Section 12(a) Jurisdiction: *In the Matter of Anderson and the State of Montana,* 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-37 (U.S. Civ. Serv. Comm. 1950); remanded on other grounds, 119 F. Supp. 567 (D. Mont. 1954); *In the Matter of Kennedy and the State of Maryland,* 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b-1-20 (U.S. Civ. Serv. Comm. 1946); *In the Matter of Stewart and the Commonwealth of Pennsylvania,* 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-20 (U.S. Civ. Serv. Comm. 1945); *In the Matter of Duberstein and the State of Arizona,* 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-19 (U.S. Civ. Serv. Comm. 1944); *In the Matter of Hutchins and the State of Arizona,* 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-14 (U.S. Civ. Serv. Comm. 1944), affirmed 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-19 (U.S. Dist. Ct., D. Ariz. 1945); *In the Matter of McEachren and the State of Arizona,* 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-8 (U.S. Civ. Serv. Comm. 1944); *In the Matter of Flemming and the State of Illinois,* 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-3 (U.S. Civ. Serv. Comm. 1943).

Thus it will be seen that the construction placed upon the act by the Commission is broad enough to encompass State Highway Department officers and employees who perform duties in connection with a Federally financed activity; merely because the greater part of the employee's duties concerns a State system of highways not financed by Federal grants does not work as an exclusion from the coverage of the act.

The cases and rules of the Commission reveal, however, that under two circumstances State Highway Department officers and employees may be outside the Hatch Act. The first exception concerns employees engaged exclusively in maintenance work. The Commission held in the case of *In the Matter of Joseph L. Todd and the State of Illinois,* 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-5 (U.S. Civ. Serv. Comm. 1943), that a person employed by a State Highway Department exclusively in maintenance work is not subject to the act, because the Federal Government pays nothing for maintenance and does not participate in that work.

The second area of exclusion is stated in the Commission's "Secondary Rule of Jurisdictional Limitation":

"An employee of a State or local agency is not within the 'principal employment' requirement of Sec. 12(a) of the Hatch Act, if the only duties in respect to any activity financed in whole or in part by Federal loans or grants which he performs as a normal and intended incident of his principal job or position, are so inconsequential in comparison with other duties of his said job or position as to make applicable the maxim 'de minimis non curat lex'."

The last stated rule was applied in the *Todd* case, *supra,* to exclude from coverage of the act an employee who spent only about 1/10 of 1 per cent of his time on Federally financed activities.

We advise you that, under the conclusive standards set forth in the above cited United States Civil Service Commission rules and decisions, the employees of the Maintenance Division are not subject to the Hatch Act prohibition against political activity and that other officers and employees of the State Highway Department must be held to be governed by the Hatch Act, unless the particular circumstances of their employment fit within the two exceptions recognized in *In the Matter of Joseph L. Todd and the State of Illinois.*

Very truly yours,

HAROLD KOLOVSKY
Acting Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

MARCH 26, 1958

HON. CARL HOLDERMAN, *Commissioner*
Department of Labor and Industry
20 West Front Street
Trenton, New Jersey

MEMORANDUM OPINION—P-13

DEAR COMMISSIONER HOLDERMAN:

You have asked whether the Division of Workmen's Compensation can refuse to permit the search of its records by Accident Index Bureau, Inc., a New Jersey corporation organized:

"to prepare and maintain records of accidents and such other information as may be of interest to employers, insurers, and insurance companies; and to issue reports thereof whenever necessary, and such other services as might be rendered by any natural persons to business or industry."

Accident Index Bureau, Inc., in a publication entitled "How Much Do You Really Know About the Man You Are About To Hire?" states:

"* * * All too often the employer finds that he has unwittingly put on his payroll a workmen's compensation 'professional'. It is only when an injury is reported and a claim filed that the hapless employer finds that he has 'been taken'. Then it's too late. (In New Jersey alone last year, 81% of claims paid were for 'permanent partial disabilities'. In innumerable cases, no time or pay was lost. You pay for this in your premium. Many other States show similar liberal tendencies to give away the employers' money, through his insurance companies, money which he eventually repays in higher premiums.)

"The time to prevent these costly mistakes is before you put any person on your payroll, as a permanent employee, and he automatically becomes your responsibility.

"Pre-employment physical examinations—which cannot always detect 'low back injuries' and the like—and private investigations have proved too costly.

"There is only one sure, economical method to obtain the information to which you are entitled. That is by membership in the Accident Index Bureau which is being increasingly utilized by employers. From the Bureau's files and from its other sources, you will receive a complete history of previous injuries and claims by any individual.

"Your annual membership fee is only $25.00.

"The charge for each report on an individual is only $5.00. * * *"

You have indicated that Accident Index Bureau, Inc. seeks inspection of the card index (R.S. 34:15-59) containing petitioners' names arranged alphabetically and referring the searcher to a report concerning the date of claim, nature of injury, name of employer, and determination. The corporation seeks this information on a petitioner by petitioner basis, each search being made as a result of a specific request either by an insurance company involved in litigation or an employer interested in prospective employees. The inspection involves no interference with the performance of official duties of the Division.

Legislation governing the functioning of the Division of Workmen's Compensation, R.S. 34:15-1, et seq., provides for the keeping of records pertaining to the Division's operations. R.S. 34:15-58 (decisions, awards and rules for judgment or orders approving settlements); R.S. 34:15-96, 97, 98 (reports of accidents by employers and insurance carriers); R.S. 34:15-100 (insurance medical reports).

Certain records are required to "be open to the inspection of the public," pursuant to R.S. 34:15-59, which imposes an obligation to maintain a card index of the record of each case as well as the Division's dockets in which are to be entered the title of each cause, the record of the official conducting the hearing, the date of determination thereof, the date of appeal, if any, and the date on which the record, in case of appeal, was transmitted to the appellant. Certain other records "shall not be made public, and shall not be open to inspection unless, in the opinion of the Commissioner of Labor, some public interest shall so require," pursuant to R.S. 34:15-99 which deals with the first reports of accidents.

The records required by law to be kept by the Division and not restrained by statute from public access are public records. In *Josefowicz* v. *Porter,* 32 N.J. Super. 585, 591 (App. Div. 1954) the court stated:

> "'Public Record' has been defined as * * * 'one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, * * * or a writing filed in a public office.'"

See also P.L. 1953, c. 410 (N.J.S.A. 47:3-16).

The right of a citizen to inspect public records was limited under the English practice to cases in which inspection was necessary as an aid in litigation maintainable by the petitioner. *Rex* v. *Shelley,* 3 T.R. 141; *In re Freeman,* 75 N.J.L. 329 (S. Ct. 1907).

> "In time, as inspection came to be sought for purposes other than use in litigation, courts in England and the United States began to depart, albeit with some reluctance and resort to pretext, from the narrow view that use in litigation was the only sufficient special interest. In that departure New Jersey and Vermont * * * were notable." *Cross, The People's Right to Know,* p. 26 (1953).

In the leading case of *Ferry* v. *Williams,* 41 N.J.L. 332 (Sup. Ct. 1879), the right to inspect recommendations for saloon licenses was vindicated after a careful analysis of the authorities upon the ground that any citizen in his capacity as a taxpayer had such an interest in the proper observance of the provisions of the city charter for licensing saloons, that he might, under certain circumstances, litigate for its protection; in order to ascertain whether those circumstances existed so as to be in a position to serve the public convenience, he was entitled, when actuated by the motives shown in that case, to the inspection sought. See Memorandum Opinions of Attorney General—dated September 25, 1915 and September 29, 1915.

This limited right of inspection was extended furthur in *Higgins* v. *Lockwood,* 74 N.J.L. 158 (Sup. Ct. 1906) where it was held that a voter was entitled to a *mandamus* to secure an inspection of registered lists for an election, although his only interest was as a voter and no litigation was intended to which the inspection might be an aid. Both the *Ferry* and *Higgins* cases recognized the necessity that the motives of the petitioner be proper. The effect of these cases, although such is by no means the nationwide view, is that a requirement of lawful, proper, and legitimate purpose not adverse to the public interest is inherent in the right to inspect public records. *Cross, The People's Right to Know,* p. 36 (1953). Thus, the court in *In re Freeman,* supra, at p. 332, in denying inspection of affidavits filed against a candidate 21 years prior to his candidacy, in an abortive disbarment proceeding, stated:

> "When, as in this case, the only right of the petitioner is his interest as one of the general public in securing the nomination and election to public office of proper men, he ought to show that the issue of the writ would conduce to that end and that he himself is actuated by proper motives. The courts ought to lend their aid in such a case, but they ought not to lend it where the information sought cannot be helpful for the ostensible purpose or where the petitioner's motive is partisan hostility or personal ill will.
>
> "* * * he was actuated rather by the zeal of the partisan rather than by a desire solely for the public weal."

The propriety of the motives of the one seeking an inspection was further discussed in *Taxpayers Association* v. *City of Cape May,* 2 N.J. Super. 27 (App. Div. 1949) and *Casey* v. *MacPhail,* 2 N.J. Super. 619 (Law Div. 1949). In the former case the court held valid the motives of a Taxpayers Association and permitted inspection of tax records for information which might support the Association's demand for increased governmental efficiency in the face of a proposed increase

in the tax rate. In the *MacPhail* case, a candidate was permitted inspection of the names and addresses of registered voters since he had a legitimate interest in ascertaining that only those that have a right to vote in the election shall vote in that election. See also *In re Caswell,* 18 R.I. 835, 29A. 259 (S. Ct. 1893) denying newspaper access to divorce proceedings where proposed use would be harmful to public interest.

The right to inspect public records is further qualified in this State in two respects. The inspection may not interfere with the performance of official duties. *Taxpayers Association* v. *City of Cape May,* supra; *Casey* v. *MacPhail,* supra; *Memorandum Opinion of Attorney General* dated February 21, 1957. The inspection cannot be an indiscriminate one which has as its purpose the general abstraction of public records in order to carry on the business of furnishing such abstracts to the public. *Barber* v. *West Jersey Title and Guaranty Company,* 53 N.J. Eq. 158 (E. & A. 1895).

The operation of Accident Index Bureau, Inc. indicates neither interference with the performance of official duties of the Division of Workmen's Compensation, nor the indiscriminate use of its files prohibited in the *Barber* case, supra. Access must then be granted unless it is sought for an unlawful, improper, or illegitimate purpose adverse to the public convenience or welfare.

> "* * * The right to inspect a public record does not attach to all persons or to every situation. He who asserts that right must have some interest in the record in which he seeks inspection, and the inspection must be for a legitimate purpose. There is no right of inspection of a public record when the inspection is sought to satisfy a person's mere whim or fancy, to engage in a pastime, to create scandal, to degrade another, to injure public morals, or to further any improper or useless end or purpose * * *"

State v. *Harrison,* 130 W. Va. 246, 230, 43 S.E. 2nd, 214, 218 (S. Ct. of App. 1947). See also 53 C.J. Records § 40.

Acts which are considered harmful to the public and contrary to the public good are determined by the public policy enunciated through legislative enactments. *Schaffer* v. *Federal Trust Co.,* 132 N.J. Eq. 235 (Ch. 1944). The purpose of our Workmen's Compensation Act is:

> "* * * to shoulder on industry the expense incident to the hazards of industry; to lift from the public the burden to support those incapacitated by industry and to ultimately pass on to the consumers of the products of industry such expense * * *."

Morris v. *Hermann Forwarding Company,* 18 N.J. 195, 197, 198 (1955). In order to accomplish this purpose, employees must be free to file claims without fear of retribution. They should not be made to feel that the filing of a claim will have a detrimental effect upon prospects for future employment. To instill that fear would be to defeat the objects of our Workmen's Compensation Legislation.

It is also the policy of this State to vocationally rehabilitate our physically handicapped for placement in remunerative employment. P.L. 1955, c. 64. (N.J.S.A. 34:16-20, et seq.). In order to encourage employment of the handicapped the One Percent Fund (Second Injury Fund) was originated. R.S. 34:16-94 et seq. The intent of this portion of our Workmen's Compensation Law has been clearly

established. As was stated in *In re Glennon,* 18 N.J. Misc. 196 (Co. Ct. 1940) at p. 196:

> "* * * This intent is (1) to insure to the employee full compensation, where a compensable disability succeeds, but has no causative connection with, the results of a prior disability, the combination of the two leaving the employee permanently and totally disabled. Its purpose is (2) to relieve the employer of the undue burden of a prior disability, with which, or its results, the disability arising in his employ had no causative connection, but which burden the previous broad provisions of the Workmen's Compensation Act were found to impose upon him. *Combination Rubber Manufacturing Co.* v. *Obser,* 95 N.J.L. 43; 96 Id. 544; 115 Atl. Rep. 138; *Richardson* v. *Essex National Trunk and Bag Co., Inc.,* 119 N.J.L. 47; 194 Atl. Rep. 622."

By this act the Legislature evinced a clear intent not to impose any greater obligation upon an employer who hires or employs a person previously injured than if he had hired a person previously not injured. In *Richardson* v. *Essex National Trunk and Bag Co., Inc.,* 119 N.J.L. 47 (E. & A. 1937), the court stated at p. 52 that:

> "* * * we clearly discern * * * a continued and progressive development of the law to meet unforeseen contingencies as they arise to the end that full force and effect be given to the objective sought to be accomplished by the State, namely, to make its plan of rehabilitating injured persons workable and a useful reality. That goal can only be accomplished if all affected act in cooperation. The State has done, and is doing, its part; the employee—the direct beneficiary—undoubtedly welcomes the opportunity of engaging in honorable and gainful occupation; but how was the employer to be induced to cooperate? * * *"

Many employers will not hire handicapped workers because they believe it will raise their workmen's compensation costs. This attitude and this belief persists even though the insurance industry itself has for many years, engaged in a widespread education to insure employers that handicapped workers do not cost them more in premium rates. See, for example, The Physically Impaired Can Be Insured Without Penalty (published by The Association of Casualty and Surety Companies, New York, New York); and also The Job for the Handicapped Man (published by the National Association of Mutual Casualty Companies, Chicago, Illinois).

Insurance companies have, for example, publicized the fact that Workmen's Compensation Insurance rates are based primarily on: (1) The hazards inherent in the industry concerned; and (2) the accident experience of the individually insured employee. Physically handicapped workers cannot possibly affect the first factor and could only influence the second if they were prone to have more accidents than workers without handicaps. Research studies conducted by various groups have shown that, when properly placed, handicapped workers have accident experience as good as or often better than that of other persons. B.L.S. Bulletin 923, U.S. Dept. of Labor, p. 9.

Whatever the cause or nature of their disability, the State's physically handicapped citizens want to lead normal, productive lives; do a good day's work of useful employment; to support themselves and their families. The State of New Jersey has recognized this fact and acting in the interest of all its citizens, has sought to encourage such employment.

No person can lawfully do that which has a tendency to be injurious to the public or against the public good. *Driver* v. *Smith*, 89 N.J. Eq. 339 (Ch. 1918); *Brooks* v. *Cooper*, 50 N.J. Eq. 761 (E. & A. 1893). The service as outlined by Accident Index Bureau, Inc. is designed to discourage the employment of the handicapped and would frustrate the efforts of the Department of Labor and Industry to effectuate the policy of this State concerning industrial injuries and employment of the handicapped.

Consequently, it is our opinion, and you are accordingly advised, that the Division of Workmen's Compensation can refuse to permit the search of its records by Accident Index Bureau, Inc. where the purpose of the search is to provide employers with information concerning prospective employees.

Verly truly yours,

DAVID D. FURMAN
Acting Attorney General

By: MARTIN L. GREENBERG
Legal Assistant

APRIL 9, 1958

HONORABLE JOSEPH E. McLEAN
Commissioner of Canservation and Economic Development
State House Annex
Trenton, New Jersey

MEMORANDUM OPINION—P-14

DEAR COMMISSIONER McLEAN:

You have requested our opinion as to whether or not you may designate a representative to serve in your place on the Board of Review established by N.J.S.A. 18:5-1.6. That section is part of the statute governing the creation of new school districts, and the function of the board in question is to review the petition for the creation of a new school district and to grant or deny the same after considering the effect of the proposed separation upon the educational and financial situations of both the new and the remaining districts. Section 18:5-1.6 provides that the Board of Review shall "consist of the Commissioner of Education as Chairman, the Commissioner of the Department of Conservation and Economic Development, and the Director of the Division of Local Government in the Department of the Treasury."

It is our opinion that your function as a member of such Board of Review involves the exercise of discretion and judgment and therefore cannot be delegated except as specifically allowed by statute. 43 Am. Jur. "Public Officers" §461; 67 C.J.S. "Officers," § 104; see also cases cited in Attorney General's Memorandum Opinion P-2, rendered to the State Treasurer March 26, 1954. We find no statute authorizing you to make such delegation.

N.J.S.A. 13:1B-4, defining your powers of delegation, 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. He shall, by order, rule or regulation filed with the Secretary of State, designate one or more of the officers or employees in the department who may act for him and on his behalf in the event of his absence or disability."

We advise you that the general power of delegation set forth in N.J.S.A. 13:1B-4 does not extend to the delegation of your statutory function of deciding matters according to your judgment as a member of the Board of Review, except in the instances of your absence from the State or disability. N.J.S.A. 18:5-1.6 entrusts this responsibility exclusively to the Commissioner of Conservation and Economic Development, without any authority, express or necessarily implied, for its delegation to a subordinate. Your inquiry, therefore, must be answered in the negative.

Very truly yours,

DAVID D. FURMAN
Acting Attorney General

By: THOMAS P. COOK
Deputy Attorney General

APRIL 16, 1958

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

MEMORANDUM OPINION—P-15

DEAR COMMISSIONER:

You have requested our opinion as to whether your department is authorized to participate financially in a program of beach protection where the municipality proceeded with the work in question without first complying with the procedure ordinarily required in connection with such State aid projects.

The Appropriations Act under which the State proposes to make its contribution to the project is Chapter 100 of the Laws of 1956, which contains the usual appropriation for beach protection. The pertinent portion of the Appropriations Act provides, among other things, as follows:

> "All projects shall be constructed under contract with and under supervision of the Department of Conservation and Economic Development."

Other parts of the section provide for the participating municipality to match the State's contribution, and to deposit its 50% share with the State Treasurer through the Department of Conservation and Economic Development. The Appropriations Act for the fiscal year 1957-58 (Chapter 113 of the Laws of 1957) contains an identical provision.

In the particular case referred to us by you, the Borough of Beach Haven took emergency action to place approximately 700 tons of stone at the outshore end of a jetty which was constructed in 1953, to overcome a scouring condition induced by another jetty to the south. The borough entered into an emergency agreement with a contractor, who completed the work successfully and in good order. The resolution of the borough authorizing the work indicated that the timber section of the jetty in question was in imminent danger of overturning and destruction, and that the great financial loss which would ensue if the jetty were so destroyed created an emergency requiring immediate reconstruction through the removal of sand from one side of the jetty to the other and the placing of stone along its south side. The borough evidently decided that because of the urgency of the situation, it should not run the risk inherent in delaying the repairs in order to go through the prior procedure regularly required for State participation in the project.

It is our opinion that under the special circumstances here presented, your department has the authority to contribute toward the cost of the project a sum not exceeding 50% thereof. The condition in the Appropriations Act that all projects should be constructed under contract with and under supervision of your department was imposed for the benefit of the State, and accordingly it can be waived by the State in a proper case, in the exercise of sound discretion. No abuse of discretion would be involved here, since, according to our information, the work was necessitated by an emergency condition, the plans were such as would have been approved if they had been timely submitted, and the work was properly accomplished in accordance with those plans and at reasonable cost.

You have also advised us of three other similar instances in the last few years where your department paid State aid to the local municipality. You have thus made a practical construction of the Appropriations Acts and have established precedents which are entitled to considerable weight. *Burlingon County* v. *Martin*, 129 N.J.L. 92 (E. & A. 1942). Presumably the Legislature knew of this practical construction of the prior Appropriations Acts when it re-enacted substantially the same provisions in the subsequent legislation. In so doing, the Legislature may be deemed to have approved your prior construction of the law as applied to emergency situations of the type here involved.

Very truly yours,

DAVID D. FURMAN
Acting Attorney General

By: THOMAS P. COOK
Deputy Attorney General

APRIL 30, 1958

HONORABLE SALVATORE A. BONTEMPO
Deputy Commissioner
Department of Conservation and
Economic Development
State House Annex
Trenton, New Jersey

MEMORANDUM OPINION—P-16

DEAR MR. BONTEMPO:

We are in receipt of your request for an opinion concerning the method and manner of fixing the amount to be paid by oyster dealers to the State of New Jersey for oysters packed and shipped, or otherwise sold in the shell to persons not required to be licensed under Chapter 39, Laws of 1945.

The method and manner of fixing the amount to be paid by the oyster dealers to the State are set forth in the following statutes:

N.J.S.A. 50:3-20.18 provides:

"In the case of oysters packed and shipped or otherwise sold in the shells by oyster dealers to persons not required to be licensed under this act, the respective *oyster dealers shall pay to the State of New Jersey the true, fair, cash market value of the oyster shells* so packed and shipped and otherwise sold, as fixed by the Board of Shell Fisheries, under the provisions of this act, *on the basis of one bushel of shells for each bushel of oysters so sold or shipped* which payments shall be made as statements are submitted." (Emphasis supplied)

N.J.S.A. 50:3-20.19 provides:

"Every operator of an oyster shucking house licensed under this act shall submit, in writing, monthly, a verified statement or report of the number of bushels of oysters so originating, purchased from each oyster planter or oyster dealer licensed under this act during the preceding month and every oyster dealer licensed under this act *shall* likewise submit, in writing, each month, a verified statement or report of the number of bushels of oysters so originating, purchased from each oyster planter or oyster dealer licensed under this act and the number of bushels of oysters packed and shipped and otherwise sold, in the shells, to persons not licensed under this act and the number of bushels of oysters so originating, packed and shipped and otherwise sold to persons licensed under this act, which statement or report shall be furnished on or before the fifteenth day of the month following the month for which such statement is made." (Emphasis supplied)

N.J.S.A. 50:3-20.20 provides in part as follows:

"The Board of Shell Fisheries shall, between June first and July first of each year, make a survey . . . and *shall ascertain the true, fair, cash, market value of oyster shells per bushel to be paid in lieu of the return of oyster shells* under this act during said year." (Emphasis supplied)

The method and manner of fixing the amount to be paid by oyster dealers stated briefly is:

Oyster dealers under R.S. 50:3-20.19 shall give a report on or before the 15th of each month of the number of bushels of oysters procured and packed and shipped during the preceding month. Said oyster dealers shall submit along with the said monthly report the sum per bushel as fixed by the Board of Shell Fisheries pursuant to N.J.S.A. 50:3-20.18.

The Board of Shell Fisheries is required under N.J.S.A. 50:3-20.18 to fix the value of oyster shells at the true, fair, cash market value. This language is specific, unambiguous, and unequivocal; the price per bushel to be paid is the true, fair, cash market value. Under this language the Board of Shell Fisheries has the duty and obligation to fix the value of oyster shells at the same figure as oyster shells are selling for on the open market. This language is repeated in N.J.S.A. 50:3-20.20 wherein the Board of Shell Fisheries is directed to make an annual survey between June first and July first of each year to ascertain the true, fair, cash market value of oyster shells per bushel to be paid in lieu of the return of oyster shells.

You are accordingly advised that the Board of Shell Fisheries shall between June first and July first of each year, fix the true, fair, cash market value of oyster shells and that oyster dealers shall, during the ensuing year, pay the price so fixed to the State of New Jersey for all oysters packed and shipped or otherwise sold in the shells by them.

Very truly yours,

DAVID D. FURMAN
Acting Attorney General

By: GEORGE H. BARBOUR
Deputy Attorney General

APRIL 30, 1958

HONORABLE FREDERICK J. GASSERT, JR.
Director, Division of Motor Vehicles
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-17

DEAR DIRECTOR GASSERT:

Your recent inquiry poses the question whether commercial registration fees are properly required for passenger cars which "are mounting brackets, 12 inches by 40 inches on the rear bumper" or other portion thereof, and upon which "the space * * * is sold regularly through an advertising agency and is occupied by advertising signs."

As here pertinent, R.S. 39:1-1, as amended, provides:

> "'Commercial motor vehicle' includes every type of motor-driven vehicle used for commercial purposes on the highways, such as the transportation of goods, wares and merchandise * * * ."

By Memorandum Opinion of September 23, 1957 you were advised that the word "commercial" within the statute must be construed in its broad sense so as to include general business activity. In this connection it should be observed that the phrase "such as the transportation of goods, wares and merchandise" in the statutory definition is clearly intended as descriptive, and not in limitation, of the words "commercial purposes."

Since the stated circumstances unquestionably embrace a general business activity and thus a purpose which must be considered as "commercial" within the meaning of the cited statute, an affirmative response is indicated to your inquiry. You are, therefore, advised that passenger cars which engage in the foregoing activity are required to register as commercial vehicles.

Very truly yours,

DAVID D. FURMAN
Acting Attorney General

By: REMO M. CROCE
Legal Assistant

MAY 15, 1958

HONORABLE FREDERICK J. GASSERT, JR.
Director, Division of Motor Vehicles
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-18

DEAR DIRECTOR GASSERT:

You have requested our opinion as to whether or not you are required to suspend the license and registration certificate of an uninsured motorist, subject to the provisions of the Security Responsibility Law, against whom a judgment has been rendered, where such judgment is not discharged of record although it has been paid and satisfied by a surety under bond posted with you. You state that the judgment has been assigned by the plaintiff to the surety after payment made, and a transcript of said judgment, so kept open of record, has been forwarded to you by the court wherein it was rendered pursuant to R.S. 39:6-35.

The Motor Vehicle Security Responsibility Law, R.S. 39:6-23, et seq., is directed toward the protection of the public so as to assure reparation for those who suffer damages resulting from the negligent operation of motor vehicles. *Suffore* v. *Atlantic Casualty Ins. Co.*, 21 N.J. 300 (1956); *Atlantic Casualty Ins. Co.* v. *Bingham*, 15 N.J. Super. 328 (Ch. Div. 1951), aff'd *per curiam*, 18 N.J. Super. 170 (App. Div. 1952), aff'd 10 N.J. 460 (1952); cf. *Woloshin* v. *The Century Indemnity Co.*, 116 N.J.L. 577 (Sup. Ct. 1936).

In certain cases involving damages in excess of $100.00, you are required to determine the amount of security necessary to satisfy a judgment anticipated for such damages. R.S. 39:6-25(a). You are then required to suspend the operator's license and registrations of the owner of the motor vehicle unless such security is deposited with you. R.S. 39:6-25. These provisions do not apply, however, to

persons who are (a) covered by an appropriate liability insurance policy or bond, or (b) self-insurers and their agents; nor do these provisions apply under certain other circumstances (R.S. 39:6-26).

A person not within the specific exclusions referred to above, must post security or suffer suspension of his license unless:

a. He has been released from liability;

b. He has been finally adjudicated not liable;

c. He has agreed in writing to pay all damages resulting from the accident.

The security so deposited with the Director shall be retained by him and "shall be applicable *only* to the payment of a judgment or judgments rendered against the person or persons on whose behalf the deposit was made, *for damages arising out of the accident in question* * * *." R.S. 39:6-30. (Emphasis supplied)

The above provisions illustrate the plan of the statute is to furnish some measure of security or indemnity for members of the public who suffer injury or damage through the fault of uninsured motorists. When this end is satisfied, by insurance coverage before an accident, by security posted thereafter, by evidence of satisfaction through a release or an agreement for installment payment, or, ultimately, by satisfaction of a judgment, the suspension of license privilege does not apply.

In the case at hand the defendant motorist posted security in the form of a bond, with a bonding company as surety. A judgment was rendered against defendant, and it was satisfied by the surety. The judgment was not discharged, however, and the clerk of the court thereafter forwarded to you a certified copy of said judgment as open of record.

R.S. 39:6-35 provides, *inter alia* that:

> "If a person fails to pay and satisfy every judgment against him for damages * * * in excess of $100.00, resulting from the ownership * * * or operation of a motor vehicle * * * the operator's license and all registration certificates * * * shall * * * be forthwith suspended by the director."

There is a distinction between the satisfaction of a judgment and its discharge, which is recognized by the very provisions of R.S. 39:6-35. This section further provides that the license suspensions shall continue "until every such judgment is satisfied *or* discharged * * *." (Emphasis supplied)

R.S. 39:6-38 defines "satisfaction of judgment" for the purposes of the act. In some cases a judgment is deemed satisfied though it is not paid in full, and, is therefore not discharged. This section provides that payment of $5,000 on a judgment exceeding $5,000 for bodily injury to one person in any one accident constitutes "satisfaction of judgment" for the purposes of the act so as to prevent suspension of the motorist's license. Payment of $10,000 toward a judgment in excess of that amount resulting from an accident involving injuries to more than one person is also deemed "satisfaction of judgment." Similarily, where a judgment for property damage exceeds $1,000 as the result of an accident, payment of $1,000 credited toward said judgment is defined as "satisfaction of judgment" for the purposes of the act, though such judgment would not be discharged.

Thus it appears that satisfaction of the injured party, within certain minimum limits, is the objective of the act and is explicitly defined as such. The act distinguishes between satisfaction of a judgment and its discharge. A license is not to be revoked, if, within the meaning of the act, it has been satisfied, though it may not be discharged.

As Justice Heher said in *Saffore* v. *Atlantic Casualty Ins. Co., supra,* at p. 309:

> "The essential reason of the law, its internal sense, is the key to its understanding.
>
> "There is involved here, not a mere regulation of the relations between the insurer and the insured *inter partes,* but a policy for the protection of the public against irremedial injury from negligence in the operation of motor vehicles on the public highways, * * *."

The suspension of license privileges under the act is unrelated to the contractual rights, voluntarily assumed, between the defendant motorist and his surety who, in satisfying plaintiff's judgment, may acquire rights thereto by assignment or subrogation. It is our opinion that the clear meaning and purpose of the act has been met in this situation, and the judgment has been satisfied by payment to the party injured in the accident.

You are accordingly advised not to suspend the license or registration of a motorist under circumstances where a judgment is satisfied by his surety, although such judgment is not discharged of record.

Very truly yours,

DAVID D. FURMAN
Acting Attorney General

By: THEODORE I. BOTTER
Deputy Attorney General

JUNE 20, 1958

HONORABLE PHILLIP ALAMPI, *Secretary*
Department of Agriculture
1 West State Street
Trenton, New Jersey

MEMORANDUM OPINION—P-19

DEAR SECRETARY ALAMPI:

You have requested our opinion as to the scope and effect of N.J.S.A. 4:5-106.1 to 4:5-106.20 inclusive, P.L. 1957, Chapter 140 and the rules and regulations promulgated pursuant thereto, especially with respect to their applicability to the non-garbage feeding segment of the swine industry of the State of New Jersey. The bill was entitled "An act concerning the control of contagious and infectious swine diseases, providing for the licensing and regulating of garbage-feeding hog farms, and fixing the penalties for the violations of the provisions hereof." We have been advised by your office that the bill was prepared and introduced by the Legislature with the intent that it would apply to the entire swine industry. The following provisions are pertinent to this inquiry:

4:5-106.2 Rules and regulations:

> "The board may adopt and promulgate such rules and regulations as it may deem necessary in carrying out the provisions of this act in order to prevent the spread of disease among domestic animals."

4:5-106.3 Duties of Department of Agriculture:

"It shall be the duty of the department to:

a. License garbage-feeding hog farms as prescribed in this act;

b. Carry on a program which will demonstrate swine disease control practices and measures for the control and eradication of contagious and infectious diseases;

c. Enforce rules and regulations adopted by the board for the control of contagious and infectious swine diseases."

4:5-106.17 Committee representing swine industry:

"The board shall appoint a committee of 5 representatives of the swine industry of the State, 1 of whom shall be a producer of grainfed swine, and 4 of whom shall be feeders of cooked or treated garbage. * * * The committee shall serve as an advisory committee to the board and to the secretary on all matters pertaining to the swine industry and to the control of contagious and infectious diseases of swine. * * *"

It is clear from the provisions outlined above including the Title to the law that the primary objective and intent of P.L. 1957, c. 140 is to control contagious and infectious swine disease of the entire swine industry; such control should not be limited to garbage-feeding hog farms only. That the Legislature saw fit to provide for licensing of garbage-fed hog farms to insure that garbage would be properly treated, as one means of controlling disease, does not indicate that other methods of preventing disease in the swine industry as a whole are prohibited. The New Jersey State Board of Agriculture is specifically authorized by N.J.S.A. 4:5-106.2 to promulgate and adopt rules and regulations for the control of contagious and infectious swine diseases. N.J.S.A. 4:5-106.3 empowers the New Jersey Department of Agriculture to enforce the rules and regulations adopted by the State Board of Agriculture for the control of contagious and infectious swine diseases and to carry on a program which will demonstrate swine disease control practices and measures for the control and eradication of contagious and infectious diseases. N.J.S.A. 4:5-106.17 provides for an advisory committee consisting of both segments of the industry, garbage and grain-feeding, to advise the Secretary on "* * * all matters pertaining to the swine industry and to the control of contagious and infectious diseases of swine * * *."

Nowhere in the above quoted sections nor in the entire statute is there any language or evidence of any intent to limit the general purposes of the statute solely to garbage-feeding hog farms. This statute falls within the general welfare and health type legislation and is therefore to be accorded a liberal construction. *Sutherland Statutory Construction,* 3rd Ed., Vol. 3, p. 397, Section 7202 (1943).

"* * * Since a very early time the courts have been committed to the doctrine of giving statutes which are enacted for the protection and preservation of public health an extremely liberal construction for the accomplishment of their objectives. The public and social purposes served by such legislation greatly exceed the inconvenience and hardship imposed upon the individual, and therefore the former is given greater emphasis in the problems of interpretation. Therefore the courts are inclined to give health statutes a liberal interpretation despite the fact that such statutes are primarily penal in nature and frequently impose criminal penalties. In most cases the proper enforcement of health laws is dependent upon administrative officers and agencies upon whom the efficacy of such legislation is dependent. While the courts have usually employed a rather rigid interpretation of statutes granting powers to administrative agencies, this rule has notably been relaxed in the interpretation of statutes granting powers to boards having control over public health."

You are accordingly advised that the provisions of the statute and of any rules or regulations promulgated thereunder dealing with the control and eradication of contagious and infectious swine diseases are applicable to the entire swine industry. The power to license hog farms pertains solely to garbage-feeding hog farms.

Verly truly yours,

DAVID D. FURMAN
Attorney General

By: GEORGE H. BARBOUR
Deputy Attorney General

JULY 9, 1958

HONORABLE ROBERT B. MEYNER
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-20

DEAR GOVERNOR MEYNER:

You have requested an opinion as to whether the members of the Local Government Board in the Division of Local Government, Department of Treasury, who are appointed by you with the advice and consent of the Senate, may be appointed without regard to political party affiliation.

The Local Government Act of 1938 (P.L. 1938, c. 158; N.J.S.A. 52:27A-1 et seq.) created a State Department of Local Government. Section 10 of that act established the "Local Government Board" in this department and provided that its membership should consist of the Commissioner of Local Government, as chairman, and four members appointed by the Governor with the advice and consent of the Senate for five year terms, the initial terms of office to be staggered. Section 15 of the 1938 act prescribed the powers and duties of board members. Section 12 provided for their compensation. Important here is Section 11 (N.J.S.A. 52: 27A-11) of the act which prescribed the qualifications of the members of the board as to experience and in addition, provided that:

"* * * Not more than two of the members shall belong to the same political party."

In 1944 the State Department of Taxation and Finance was established. (P.L. 1944, c. 112; N.J.S.A. 52:27BB-1). Art. 7, Sec. 1 of this act provided in part that:

"The State Department of Local Government as heretofore constituted and provided for by law shall be the Division of Local Government in the

> State Department of Taxation and Finance except that the term of office of the present members of the Local Government Board shall expire on the effective date of this act and the board shall consist thereafter of the director as chairman, and three members appointed by the Governor by and with the advice and consent of the Senate * * *"

This section, in effect, reduced the number of appointments made by the Governor to the Board from four to three. It is silent as to the qualifications of membership either as to experience or political affiliation.

Significantly, the 1944 act expressly repealed sections 8 and 12 of P.L. 1938, c. 158 pertaining to the compensation for the Commissioner of Local Government and the members of the board. Section 11, however, was neither amended nor repealed as it pertained to experience and party affiliation. At that time, although not expressly provided, the requirement that not more than two members of the board appointed by the Governor should be of the same political affiliation remained in effect and was not impliedly repealed. See *Swede* v. *City of Clifton*, 22 N.J. 303, 317 (1956).

Thereafter, however, the "Local Government Supervision Act" (P.L. 1947, c. 151; N.J.S.A. 52:27BB-1 et seq.) was enacted and among other things, expressly repealed section 11 of P.L. 1938, c. 158; N.J.S.A. 52:27A-11, which, to repeat, dealt with political affiliation limitations.

Therefore, in light of this express repealer, you are advised that you may appoint, subject to Senate approval, persons to the Local Government Board without regard to political affiliation. Appointments to this Board, presently established in the Division of Local Government, Department of the Treasury by virtue of the 1948 Reorganization Act (P.L. 1948, c. 92; N.J.S.A. 52:18A-1 et seq.) should be made in accordance with the express provisions of P.L. 1944, c. 112, Art. 7, Sec. 1 (N.J.S.A. 52:27B-69).

Respectfully yours,

DAVID D. FURMAN
Attorney General

By: DAVID M. SATZ, JR.
Deputy Attorney General

JULY 10, 1958

MR. W. LEWIS BAMBRICK
Unsatisfied Claim & Judgment Fund Board
222 West State Street
Trenton 25, New Jersey

MEMORANDUM OPINION—P-21

DEAR MR. BAMBRICK:

You have requested our opinion as to the rate of interest to be paid by a judgment debtor on a judgment which has been assigned to the Director of the Division of Motor Vehicles pursuant to the provisions of the Unsatisfied Claim and Judgment Fund Law. The act provides that before payment is made from the fund to one who has recovered an uncollectible judgment against an uninsured motorist, the

judgment must be assigned to the director, and thereafter the director "shall be entitled to enforce the same for the full amount thereof with interest and costs and if more money is collected upon any such judgment than the amount paid out of the fund, the director shall pay the balance, after reimbursing the fund, to the judgment creditor." N.J.S.A. 39:6-77. The act further provides that the license or registration of an uninsured motorist shall not be restored until the Treasurer be repaid such moneys as have been paid out of the fund, by reason of a claim against said motorist, together with interest at the rate of 4% per annum. N.J.S.A. 39:6-87. The question posed is whether interest on the judgment shall be charged at the usual rate of 6% per annum (a) as to the entire judgment, or (b) as to the balance of the judgment not paid by the fund, or whether interest at the rate of 4% per annum is chargeable on all or part of the judgment by virtue of the interest rate specified in N.J.S.A. 39:6-87(a).

The general rule is that judgments do not bear interest, as a matter of legal right or under the common law, in the absence of constitutional or statutory provision. 47 C.J.S., Interest, Section 21.

> "'Interest' is not a common-law inheritance. It was denounced by the Mosaic law and by the later ecclesiastical law; and it was rejected by the courts in keeping with the philosophy of the classical and medieval economists from the time of Aristotle that money was but a medium of exchange, inherently barren and nonproductive. 47 C.J.S., Interest, § 2; *Am. Jur.*, Interest, section 3." *Consolidated Police etc. Pension Fund Comm.* v. *Passaic* 23 N.J. 645, 652 (1957).

The fundamental principle of law is that "interest is no part of a debt unless so stipulated in the contract; that, usually, it is of statutory origin, and is awarded as damages for the detention of a debt." *Warren Bros. Co.* v. *Hartford Accident & Indemnity Co.*, 102 N.J.L. 616 (E. & A. 1926); *Consolidated Police etc. Pension Fund Comm.* v. *Passaic, supra.* In New Jersey interest on a judgment is not granted by statute; however, the collection of interest on judgments is allowed by practice and custom. *Simon* v. *N.J. Asphalt & Paving Co.*, 123 N.J.L. 232, 234 (Sup. Ct. 1939); *Erie Railway Co.* v. *Ackerson*, 33 N.J.L. 33 (Sup. Ct. 1868).

In *Erie Railway Co.* v. *Ackerson, supra,* the court stated at p. 36 as follows:

> "By the English practice, until it was altered by an act of parliament, (1 and 2 *Vict., ch.* 110, § 117), no interest was collected on a judgment, unless an action was brought on it, and interest assessed as damages for the detention * * *. But, from a very early period, it has been the practice in this State to collect legal interest on a judgment, by means of an endorsement on the execution, and the right to do this must be regarded as the common law of New Jersey, * * *."

In *Cox* v. *Marlatt*, 36 N.J.L. 389 (Sup. Ct. 1873) the court said at p. 390:

> "Our practice has been, for many years, independent of any express statute, to allow interest to be levied under execution as an incident to the judgment, and as an increase of damages for the detention of the debt, without bringing a distinct action for the interest on damages for such detention."

The rate of interest due upon a judgment is the legal rate in effect at the time of the entry of the judgment. At the present time, 6% per annum is the legal rate of interest in New Jersey as fixed by the act against usury, R.S. 31:1-1. *See*: *Cox* v. *Marlatt, supra.*

Normally, then, in the absence of a contrary statutory intent, interest at 6% per annum would run on the judgment in question. However, where a statute is involved, the court will look to the particular statute creating the obligation or to the regulations or policy of the administrative agency in enforcing its provisions to determine whether interest is allowable and the rate intended to be charged. Cf. *Consolidated Police etc. Pension Fund Comm.* v. *Passaic, supra*; *Warren Bros. Co.* v. *Hartford, etc., supra.* In the *Consolidated Police Pension Fund* case, *supra,* the statute in question did not provide for interest on the obligations which it created. The administrative agency attempted to charge interest after it had accepted a long-delayed payment of the principal obligation and before any administrative regulation or practice for charging interest had been in effect. The court held that interest had been waived by acceptance of the principal payment.

Here, the injured party has recovered a judgment in a negligence action arising out of an automobile accident and such judgment would normally bear interest at 6% per annum. However, instead of proceeding on the judgment, certain rights are afforded to the injured party by the Unsatisfied Claim and Judgment Fund Law where a judgment is or would be uncollectible. In such case, payment may be obtained from the fund (a) upon settlement of the claim or (b) after judgment is entered. N.J.S.A. 39:6-72 provides for payment out of the fund upon a settlement of the claims between the injured party and the defendant-uninsured motorist, with the consent of the Unsatisfied Claim and Judgment Fund Board. In case of settlement, payment from the fund is conditioned upon the defendant agreeing in writing to repay the Treasurer of New Jersey. N.J.S.A. 39:6-72(7). It has been the practice of the board to require the defendant to sign a bond evidencing his indebtedness to the Treasurer and agreeing to repay same. The form of bond used by the board has provided for 4% interest per annum on such indebtedness. Where no settlement is made, payment may be obtained from the fund upon an uncollectible judgment, provided the judgment is assigned to the Director of the Division of Motor Vehicles. Thereupon, "the Director shall be deemed to have all the rights of the judgment creditor under the judgment and shall be entitled to enforce the same for the full amount thereof *with interest* and costs and if more money is collected upon any such judgment than the amount paid out of the fund, the director shall pay the balance, after reimbursing the fund, to the judgment creditor." (Emphasis added). N.J.S.A. 39:6-77.

It is concluded from the foregoing and from the provisions of N.J.S.A. 39:6-87 that interest is payable by the debtor both in cases of settlement and where a judgment is recovered against him. N.J.S.A. 39:6-87 provides that:

> "Where the license * * * or the registration * * * has been suspended or cancelled under the Motor Vehicle Security-Responsibility Law of this State, *and the treasurer has paid from the fund any amount in settlement of a claim or towards satisfaction of a judgment against that person,* the cancellation or suspension shall not be removed, nor the license, privileges, or registration, restored * * * until he has
>
> "(a) Repaid in full to the treasurer the amount so paid by him together *with the interest thereon at four per centum (4%) per annum* from the date of such payment * * *" (Emphasis added).

This is the only section which specifies the interest rate with reference to this act.

We construe this section as an expression of the Legislature not only to determine the condition for restoral of license privileges, but also to determine the rate of interest on the obligations to repay moneys paid out of the fund. By this provision the Legislature has expressed its intention to limit the interest rate to 4% per annum on all obligations for reimbursement of moneys paid out of the fund.

While N.J.S.A. 39:6-87 refers to interest at 4% per annum on moneys paid from the fund "* * * in settlement of a claim or towards satisfaction of a judgment * * *," there is no provision in this act which alters the interest rate on the balance of moneys due on said judgment in excess of the amount paid from the fund. We conclude that the usual interest rate of 6% per annum shall apply to such portion of judgments, the right to which remains in the judgment creditor. N.J.S.A. 39:6-77; N.J.S.A. 39:6-85. To apply a different interest rate would be in derogation of the common law of New Jersey; it is a construction not favored and not compelled by any express or implied provision of the act. We must enforce the legislative will as written and not according to some unexpressed intention. *Hoffman* v. *Hock*, 8 N.J. 397, 409 (1952); *Dacunzo* v. *Edgye*, 19 N.J. 443, 451 (1955). "If a change in the common law is to be effectuated, the legislative intent to do so must be clearly and plainly expressed." *DeFazio* v. *Haven Savings and Loan Ass'n.*, 22 N.J. 511, 519 (1956).

For the above reasons, you are advised that interest at 4% per annum is payable on obligations to repay the State Treasurer for moneys paid from the fund towards satisfaction of judgments and under settlement agreements. However, interest at 6% per annum is payable on that portion of judgments not paid by the fund and to which moneys the original judgment creditor is entitled if and when collected.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: THEODORE I. BOTTER
Deputy Attorney General

JULY 24, 1958

MR. THOMAS E. HEATHCOTE
Secretary-Director
State Board of Professional Engineers and Land Surveyors
1100 Raymond Boulevard
Newark 2, New Jersey

MEMORANDUM OPINION—P-22

DEAR MR. HEATHCOTE:

You have asked for a clarification of several sections of the statute governing the State Board of Professional Engineers and Land Surveyors. In particular, you are concerned with the proper construction of the saving clauses in Chapter 342 of the Laws of 1938 (N.J.S.A. 45:8-36 and N.J.S.A. 45:8-42).

Chapter 342 of the Laws of 1938 accomplished a fundamental revision in the licensing of Professional Engineers. Prior to its effective date, under P.L. 1921, c. 224 as amended, the State Board had granted licenses in special classifications, as follows: Civil Engineer; Mechanical Engineer; Electrical Engineer; Chemical Engineer; Mining Engineer; Metallurgical Engineer; Highway Engineer; Sanitary Engineer; Structural Engineer; Hydraulic Engineer; Railroad Engineer; Valuation Engineer; Construction Engineer; Heating and Ventilating Engineer; Industrial Engineer; Architectural Engineer; Traffic Engineer.

The 1938 statute established a single category for licensing, that of Professional Engineer, with a separate licensing category for persons without the educational qualifications of Professional Engineer as Land Surveyor. All Professional Engineers licensed in the various classifications under the previous statutes were specifically empowered to continue to practice in their specialty or specialties by Section 10 of the 1938 statute, now N.J.S.A. 45:8-36, as follows:

> "All professional engineers licensed by this board prior to the passage of this chapter, shall continue to practice under the various classifications heretofore granted and within the branches of engineering indicated or may, upon application therefor, and the payment of a fee of five dollars ($5.00) receive a new certificate under the title 'professional engineer'; provided, said professional engineer presents evidence satisfactory to the board of his qualifications to practice in the field of general engineering comprehended in the title 'professional engineer'."

An additional saving clause is set forth in Section 16 of the 1938 statute now N.J.S.A. 45:8-42 as follows:

> "Notwithstanding anything in this chapter to the contrary no professional engineer licensed in this State prior to the passage of this chapter and holding an appointment by the State or by any department, institution, commission, board or body of the State Government, or any political subdivision thereof, shall be deprived of the right of reappointment to the same office or position or appointment to any other office or position requiring similar qualifications."

The import of these sections of the 1938 statute is plain. Persons licensed in special categories prior to the effective date of the act may continue to practice only the separate branch of professional engineering for which they are licensed. They are prohibited from practicing professional engineering generally, except upon payment of an additional fee of $5.00 and upon presenting evidence satisfactory to the State Board of qualifications to practice in the field of general engineering. Any attempt on the part of a licensed Electrical Engineer, for example to practice metallurgical engineering would constitute an illegal practice in violation of Chapter 8 of Title 45 of the Revised Statutes.

N.J.S.A. 45:8-42 similarly safeguards the right of any Professional Engineer licensed in one of the separate categories prior to the passage of the 1938 statute to receive reappointment as a municipal engineer or engineer assigned to any governmental subdivision within the State, or to receive a new appointment to any other public office or position for which his special license is a qualification. We do not construe this statute to mean that a municipal engineer loses its benefits upon the denial of reappointment by the municipality in which he served prior to 1938. He

continues to be qualified to receive appointment as municipal engineer of such municipality or in a similar governmental office or position. Neither N.J.S.A. 45:8-36 nor N.J.S.A. 45:8-42 sets up a rigid requirement that persons holding engineering licenses antedating the 1938 statute must serve continuously in their special category or categories of professional engineering in order to hold the benefits of the saving clauses.

We trust that this opinion sufficiently answers the queries raised by your letter concerning N.J.S.A. 45:8-36 and N.J.S.A. 45:8-42.

Yours very truly,

DAVID D. FURMAN
Attorney General

SEPTEMBER 25, 1958

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

MEMORANDUM OPINION—P-23

Re: Motor Fuels Tax Refund—New Jersey Highway Authority

DEAR MR. KERVICK:

You have requested our opinion as to whether the New Jersey Highway Authority is entitled to a refund of the New Jersey motor fuels tax pursuant to R.S. 54:39-66(a) which provides in part:

> "Any person who shall use any fuels as herein defined for any of the following purposes:
>
> (a) operating or propelling motor vehicles, motor boats or other implements owned by the State and all the political subdivisions thereof, * * * and who shall have paid the tax for such fuels hereby required to be paid, shall be reimbursed and repaid the amount of tax so paid upon presenting to the commissioner an application for such reimbursement or repayment, in form prescribed by the commissioner, * * *."

The New Jersey Highway Authority was created pursuant to chapter 16 of the Laws of 1952 (N.J.S.A. 27:12B-1, et seq.). Section 16 of P.L. 1952, c. 16 (N.J.S.A. 27:12B-16) provides that the Highway Authority "shall not be required to pay any taxes or assessments upon *any* project or *property* acquired or used by the Authority under the provisions of [the New Jersey Highway Authority Act] or upon the income therefrom, and every project and *any property* acquired or used by the Authority under the provisions of this act and the income therefrom and the bonds or notes issued under the provisions of this act, their transfer and the income therefrom * * * shall be exempt from taxation." (Emphasis added) This same section recites that the justification for the exemptions provided is that the activities of the Authority are "essential governmental functions" and that the exercise of the powers granted by the act are "in all respects for the benefit of the people of the State."

Legislative rules of construction as specifically defined by R.S. 1:1-2 dictate that the term "property" unless restricted or limited by context to either real or personal property, which is not the case here, includes both types of property.

We are not unmindful of the rule that statutes granting exemptions from taxation are to be strictly construed against the claimant and a claimant for tax exemption has the duty and burden of proving its entitlement to the exemption. *Julius Roehrs Co. v. Division of Tax Appeals,* 16 N.J. 493 (1954). However, we are of the opinion that the exemption of the Highway Authority from liability for the motor fuels tax is clear.

Moreover, for administrative purposes, we are of the opinion that N.J.S.A. 27:12B-16, which exempts the Highway Authority from the payment of the motor fuels tax, should be construed harmoniously with R.S. 54:39-66(a) which provides for refunds of such payments. Accordingly, for the purposes of carrying out the legislative intent enunciated in N.J.S.A. 27:12B-16, the Highway Authority may be considered to be a "political subdivision" of the State and entitled to refunds of the amount of taxes that are paid. See *Behnke* v. *N. J. Highway Authority,* 13 N.J. 14, 29 (1953).

Insofar as the views expressed herein are inconsistent with those expressed in Memorandum Opinion to Armand J. Salmon, Jr., State Supervisor, Motor Fuels Tax Bureau, dated January 18, 1954, that opinion is expressly overruled.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: DONALD M. ALTMAN
Deputy Attorney General

SEPTEMBER 25, 1958

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

MEMORANDUM OPINION—P-24

DEAR MR. KERVICK:

We have been asked concerning the propriety of the extension of the 3% discount on cigarette tax stamps generally (see L. 1956, c. 10, sec. 2; N.J.S.A. 54:40A-11) to two cent meter tax sales in respect of cigarette packages held in inventory and already metered at the former 3 cents per pack rate (see L. 1948, c. 65, sec. 301) on the effective date of the present 5 cents a pack rate (see L. 1956, c. 10, sec. 1; N.J.S.A. 54:40A-8).

Some discussion of the mechanics of cigarette tax collection is necessary. By L. 1948, c. 65, sec. 301, a tax of 3 cents per package was imposed on the use of cigarettes. The tax was collected by either of two procedures: one depended upon the sale of tangible stamps to wholesale distributors who have the responsibility to affix them to the cigarette packages. N.J.S.A. 54:40A-15. The tangible stamps bore on their face the amount of the tax, just as postage stamps indicate on their face an

amount of postage. An alternate method of collection through the use of meters similar to postage meters was provided. N.J.S.A. 54:40A-17. Under this method, pursuant to rules adopted by the Director of the Division of Taxation, the distributor prepays a certain dollar amount of tax. An agent of the Cigarette Tax Bureau thereupon sets the distributor's meter with a capacity to impress with the legend "TAX PAID" a number of packages of cigarettes sufficient to consume the tax credits established by the prepayment. (The meter is then sealed.)

The Legislature granted an allowance to distributors to compensate them for the expense which they incurred in the tax collection process. N.J.S.A. 54:40A-11, 17. This is consistent with the intendment of N.J.S.A. 54:40A-10.1 and the act as a whole, N.J.S.A. 54:40A-1 to 43, that the tax is to be imposed in ultimate effect upon the user of the cigarette. See also Rev. Rul. 13661, 1951-2 Cum. Bull. 24.

To the distributors who used tangible stamps this allowance took the form of a discount on the purchase price when they bought the stamps. N.J.S.A. 54:40A-11. In the case of distributors using meters the allowance took the form of a discount on the amount which they had to prepay to have equivalent credits set up on their meters. N.J.S.A. 54:40A-17.

Effective April 16, 1956 the tax rate was increased from 3 cents per pack to 5 cents per pack. L. 1956, c. 10, secs. 1, 4. The same law provided that the higher rate was to be imposed upon cigarettes already stamped, whether or not by meter, and remaining in inventory. L. 1956, c. 10, sec. 2. Since the tangible stamps bore on their face indication of payment only at the rate of 3 cents a pack, it was necessary to affix tangible stamps of 2 cent denomination to them to avoid any question of legality of the possession of these cigarettes by later persons in the distribution chain under N.J.S.A. 54:40A-16, 25, 28, 30, 32. However, in the case of metered cigarette packages bearing only the legend "TAX PAID," which is the same on metered cigarettes both under the 3 cent tax and the 5 cent tax, it was not necessary to make any additional markings on the packages.

The collection of the additional 2 cent tax on inventory cigarettes in the case of those tangibly stamped was accomplished by sale by the Cigarette Tax Bureau of special 2 cent tangible stamps which were then affixed to the packages. L. 1956, c. 10, sec. 2. In the case of metered cigarettes the additional 2 cents per pack tax was collected by an adjustment of meters by an agent of the Cigarette Tax Bureau to consume credits registered on them. In both cases the Cigarette Tax Bureau has allowed the discount to the distributors provided by N.J.S.A. 54:40A-11, 17.

You have informed us that the State auditors are presently conducting an examination of the books and records of the Cigarette Tax Bureau and that they question the propriety of the extension of the discount to meter users in the case of the collection of the additional 2 cents per pack in inventory. You inform us that the State auditors have been moved to this view by the fact that in connection with the additional 2 cent tax on these cigarettes there has been no additional affixation on the packages themselves.

The governing statute, N.J.S.A. 54:40A-11, provides:

> "* * * the Director shall allow, as compensation for the services and expenses of the distributor in affixing and handling of * * * stamps, a discount of 3 percent * * *."

It is made applicable to meter tax collection by N.J.S.A. 54:40A-17:

> "* * * Any licensed distributor authorized * * * to affix evidence of tax payment to packages of cigarettes by means of a metering machine shall * * * make a prepayment, allowing for the discount * * * subject to the same conditions as in the case of the sale of [tangible] stamps * * *."

It is apparent from the generality of N.J.S.A. 54:40A-11, applicable alike to all distributors, big and small, without regard to the manner of their operation, that this is not an attempt to compensate the distributors for the exact amount of expense incurred by them in the collection of the cigarette tax but provides only an approximately equivalent recompense. Viewed in this light, the statute does not intend that to be entitled to the discount the distributor must both "affix and handle" the stamps. It is enough if the distributor performs some substantial service or incurs some expense in implementing the collection process. In the case of the metered cigarettes it is apparent that the distributors had to perform substantial services in determining the number of packages in their inventory which had been already metered and in bringing the meters to the Cigarette Tax Bureau at a time when they still contained credits and would not have had to have been brought to the Cigarette Tax Bureau were it not for the increase in the tax rate. It is our opinion that the statute intends that the discount be allowed for these services and that the action taken by the Cigarette Tax Bureau was lawful.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: FRANK A. VERGA
Deputy Attorney General

SEPTEMBER 25, 1958

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

MEMORANDUM OPINION—P-25

DEAR MR. KERVICK:

We have been asked whether proposed regulation CT 23, providing for the remission of tax liability on unstamped cigarettes stolen from a distributor is unlawful, and if so, whether the proposed regulation would be applied retroactively to entitle distributors to refunds who have paid a tax on stolen unstamped cigarettes under protest. Proposed regulation CT 23 reads as follows:

> "Excluding internal pilferage and subject to such restrictions of proof as may be demanded by the director, tax liability shall not accrue in situations where unstamped cigarettes are stolen from the place of business of a licensed distributor."

The tax on cigarettes imposed by N.J.S.A. 54:40A-8 is collected by the mechanism of requiring distributors to affix stamps (which they have purchased from the Director of the Division of Taxation, N.J.S.A. 54:40A-11, 17) to the packages of cigarettes either within 24 hours after receipt of the cigarettes and "prior to any and all deliveries" (with certain exceptions not here relevant), N.J.S.A. 54:40A-15. This mechanism is intended to implement the basic imposition of tax on "the sale, use or possession for sale or use" of cigarettes contained in N.J.S.A. 54:40A-8. "Sale" within the meaning of this section is expressly defined to include "theft." N.J.S.A. 54:40A-2(n).

Since the requirement in N.J.S.A. 54:40A-15 that cigarettes be stamped prior to delivery is intended to implement the more basic provision of section 54:40A-8 that a tax be imposed upon "sale," which includes theft, "delivery" in section 15 should be read to include theft. For this reason, the proposed regulation would conflict with the statutes.

While the collection of a tax on stolen unstamped cigarettes visits a burden on the distributor which he would not anticipate, since the law intends that ordinarily the ultimate burden of the tax shall fall upon the consumer, N.J.S.A. 54:40A-10.1, Rev. Rul. 13661, 1951-2 Cum. Bull. 24, this is not a justification for excusing the liability. The collection of a tax in respect of stolen cigarettes from any person earlier in the chain of distribution than the consumer visits the same sort of burden as that which is sought to be relieved by the proposed regulation. The effect of the statutory definition of "sale" to include theft, as discussed above, shows that the Legislature intends such burdens to be imposed. There is nothing in the statutory scheme to afford a basis for differentiating between particular instances of such burdens which result from the theft of cigarettes.

In light of the conclusion that the tax liability in question may not be excused, it is unnecessary to answer the second question presented, whether the proposed regulation may be applied retroactively.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: FRANK A. VERGA
Deputy Attorney General

SEPTEMBER 25, 1958

WILLIAM F. PARKER, *Sheriff*
Burlington County
Mount Holly, New Jersey

MEMORANDUM OPINION—P-26

DEAR SHERIFF PARKER:

You have inquired whether you, as county sheriff, or the county board of freeholders, constitute the "appointing authority" for appointment of deputy sheriffs.

The governing statutes are R.S. 40:41-31 and R.S. 11:19-1.

The phrase "appointing authority" is defined in R.S. 11:19-1 and means the ". . . officer, commission, board or body having power of appointment or election to, or removal from, subordinate positions in an office, department, commission, board or institution of a county, municipality or school district operating under this title." R.S. 40:41-31 provides in part, "*The sheriff shall select and employ* the necessary deputies, chief clerks and other employees, who shall receive such compensation as shall be recommended by the sheriff and approved by the board of freeholders. . . ." (Emphasis added).

Read together, the quoted statutes make it clear that the county sheriff and not the Board of Chosen Freeholders is the "appointing authority" for his deputies, chief clerks and other employees. *Scancarella* v. *Dept. of Civil Service*, 24 N.J. Super. 65, 72 (App. Div. 1952).

Very truly yours,

DAVID D. FURMAN
Attorney General

By: DAVID LANDAU
Deputy Attorney General

SEPTEMBER 25, 1958

MR. EDWIN L. DAVIS
Member, Burlington County
Board of Taxation
County Office Building
Mount Holly, New Jersey

MEMORANDUM OPINION—P-27

DEAR MR. DAVIS:

We have been asked whether the third of the three members of a county board of taxation (see N.J.S.A. 54:3-2) may act as the board on appeals by an individual taxpayer from the assessed valuation of his property pursuant to N.J.S.A. 54:3-21 when one member's position has been vacated by death and a second has disqualified himself because he is the owner of the property which is the subject of appeal.

N.J.S.A. 54:3-25 provides that:

> "A majority of the members of the board shall constitute a quorum for the transaction of business."

It is of no consequence whether the expression "members of the board" in this section intends the members presently serving, in this case two, or the total number when all vacancies are filled (N.J.S.A. 54:3-2, *supra*). It is clear that "majority" means "more than 50%." *Downing* v. *Rugar*, 21 Wend. 178, 34 Am. Dec. 223, 225 (N.Y. Sup. Ct. 1839); 42 *Am. Jur., Pub. Admin. Law*, sec. 72 (1942).

"More than 50%" of either two or three members signifies two. Therefore, in the situation presented the county board is impotent to act on the merits of the appeal.

However, the taxpayer-board member is not deprived of a right of appeal on the assessed valuation of his property. His disqualification only bars him from acting on the merits of his own appeal. He may join with the remaining member to form a quorum of the county board to enter a judgment that the appeal must be dismissed without prejudice because of the lack of a quorum qualified to determine the merits. The taxpayer-county board member may then file an appeal to the Division of Tax Appeals in the Department of the Treasury pursuant to N.J.S.A. 54:2-39. This section permits an appeal to the Division by any taxpayer "who is dissatisfied with the judgment of the county board of taxation." It does not require that the Division must find that the county board committed a legal error in the strict sense before the Division may afford relief to the taxpayer. The Division is to use every lawful resource to do full justice to the parties. Cf. *Gibraltar Corrugated Paper Co.* v. *North Bergen Twp.*, 20 N.J. 213 (1955). The hearing before the Division will be as full as one before the county board since it is de novo. N.J.S.A. 54:29A-33; *Delaware, L. & W. R. R.* v. *Hoboken*, 10 N.J. 418, 425 (1952); *Central R. R.* v. *Neeld*, 26 N.J. 172, 181, 183 (1958), cert. denied 357 U.S. 928 (1958).

Very truly yours,

DAVID D. FURMAN
Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

SEPTEMBER 25, 1958

HONORABLE SALVATORE A. BONTEMPO
Department of Conservation and
Economic Development
State House Annex
Trenton, New Jersey

MEMORANDUM OPINION—P-28

DEAR COMMISSIONER BONTEMPO:

The Township of Green Brook in Somerset County, which at one time had asked for a grant of an estate in a small portion of Washington Rock Park on which it wishes to locate fire fighting equipment to protect the mountain areas of the township and which request had been refused because of the conclusions contained in a Memorandum Opinion which we furnished your immediate predecessor in office under date of January 8, 1957, now asks that we reconsider those conclusions. That opinion held that no greater right than a license could be granted because of the nature of the language in the deed by which the State took its title.

The township authorities have taken exception to the conclusions in that opinion and have renewed their plea for the conveyance on the ground that there is an ever increasing growth in population in the mountain areas which have no adequate fire protection available presently. They also note that there is considerable State property of historic value in the park itself, the safety of which is jeopardized by the lack of first class fire protection. The township proposes to construct, outfit and maintain on the tract sought to be acquired a building suitable for a fire company.

The deed to the State for Washington Rock Park was made by Charles W. McCutcheon on November 29, 1913 for 27 acres and the acceptance of the conveyance was authorized by L. 1913, c. 141. A portion of the preamble to the statute set forth that "Washington Rock was of historic importance and was to be acquired and

maintained as a public park." The enacting part of the statute provided for the appointment by the Governor of a commission to be known as the Washington Rock Park Commission with power "to take care of, care for, keep, improve, maintain and develop the said lands as a public park in commemoration of * * *." The granting clause contained words which operated to convey a fee simple title while by the habendum the grantee was to have and hold the premises "for the use and purposes of a public park, to take over, care for, keep, improve, maintain and develop the said lands as a public park in commemoration of * * *." The habendum clause also contains the condition that the "conveyance is made subject to the terms and conditions of an act of the Legislature approved March 27, 1913." (L. 1913, c. 141) So it is to be seen that the deed in question and the statute authorizing its acceptance contain somewhat identical language with reference to the nature of the estate conveyed and no conditions are expressly stated, nor does the grantor reserve to himself, or his heirs, a right of re-entry for a condition broken.

Several questions present themselves and will be answered categorically.

The first concerns itself with the problem as to whether you, as Commissioner of the Department of Conservation and Economic Development, have the authority by statute to convey lands acquired for park purposes. The park was acquired by the State in 1913 and a special commission denominated the Washington Rock Park Commission was established to administer it. L. 1913, c. 141, as amended L. 1924, c. 56. In 1931 the Commission on Historic Sites was created with power *inter alia* to care for monuments to which the State had title but which were not entrusted to any special commission. L. 1931, c. 24, §5; R.S. 28:1-1, 6. Control of Washington Rock Park was transferred to the Historic Sites Commission in the following year. L. 1932, c. 208 at 478; R.S. 28:1-13. In 1945 a Department of Conservation was established with five divisions, including a Division of Forestry, Geology, Parks and Historic Sites. L. 1945, c. 22, §4; N.J.S.A. 13:1A-4. The powers and property of the Commission on Historic Sites was transferred to this division. L. 1945, c. 22, §24; N.J.S.A. 13:1A-24. The Department of Conservation became part of the Department of Conservation and Economic Development in 1948. L. 1948, c. 448, §1; N.J.S.A. 13:1B-1. At that time the functions of the Division of Forestry, Geology, Parks and Historic Sites were transferred to the Division of Planning and Development. L. 1948, c. 448, §7; N.J.S.A. 13:1B-7. The control of Washington Park rests today in this Division of Planning and Development.

The Division of Planning and Development, as successor to the Division of Forestry, Geology, Parks and Historic Sites, N.J.S.A. 13:1B-7, *supra,* which in turn was the successor to the Board of Conservation and Development, L. 1945, c. 22, §24; N.J.S.A. 13:1A-24, has power, in the service of the best interests of the State, "to lease, sell or exchange * * * any portion of the * * * properties acquired for the purposes indicated in [article 3 of chapter 1 of title 13 of the Revised Statutes]," R.S. 13:1-23, including property acquired for the purpose of "a State park * * * or other State reservation * * * made for historic * * * scenic * * * or * * * any other purpose * * *." R.S. 13:1-18.

You are therefore advised that, as Commissioner of the Department of Conservation and Economic Development, you have the full right and power to sell, lease or exchange for other lands, the lands in question to Green Brook Township to be used for a fire fighting station subject to a finding that the contemplated transaction will be in the best interests of the State (R.S. 13:1-23). If you sell, or exchange the lands for other lands of the township, then you must have the approval of the Governor, R.S. 13:1-23. If such lands are to be leased, no approval is necessary.

The next question is whether or not the deed or the statute in question limits those rights which you have under R.S. 13:1-23. We find nothing in the deed or statute which imposes any condition on the conveyance by McCutcheon to the State that the lands in question be used solely and exclusively for a public park, nor is there anything present which provides for, or which, by implication, may be taken to hold that upon the failure of the State to maintain all or any part of the Washington Rock Park that the title to all or part of that area shall revert to the grantor or his heirs.

Support is given by the text contained in 19 Am. Jr. (Estates) §71 as follows:

> "A condition will not be raised by implication from a mere declaration in the deed that the grant is made for a special and particular purpose without being coupled with words appropriate to make such a condition. Such recitals are usually construed as giving rise, at most, to an implied covenant that the grantee will use the property only for the specified purpose. They are merely to restrain the generality of the preceding clauses; and in the case of sales to municipal and other corporations, they are considered as having been inserted merely for the purpose of showing the grantee's authority to take, even though the authorization under which the land is taken itself limits its use to the purpose specified.
>
> * * *
>
> " * * * and following the rule as to strict construction in favor of covenants, the courts have held in effect that the fact that deeds were without consideration would not, standing alone, render a recital in the deed as to the purpose for which the land was to be used a condition subsequent, but that unless an intent on the part of the grantor to impose a condition was apparent, such a recital should be regarded as a covenant or a trust. * * *"

See also discussion of fees simple defeasible, *Restatement, Property* §§44 and 45 (1936).

Therefore, you are advised that it is our opinion that the State holds an unqualified fee simple title to the lands in question.

Since the township wishes to pay no money consideration for the conveyance, it is suggested that the grant be made upon condition that the facilities and services of the fire department of the township in the mountain area shall be available at all times of emergency to agencies of the State located in the township and that in the event that the grantee shall at any time in the future discontinue the use of the premises for the purpose of maintaining fire fighting facilities and other appropriate buildings, then title thereto shall revert to the State of New Jersey. If the grantee should be a volunteer fire company and the grant is made to it as a corporation, organized not for pecuniary profit (R.S. 15:8-1; R.S. 15:1-1), it is our opinion that the conveyance would not violate any constitutional provision regarding gifts to private corporations (N.J. Constitution Art. 8, Sec. 3, par. 3), and that the receipt by the State of fire protection services in return for the lands would constitute consideration. The presence of a reverter clause in the deed from the State would eliminate the possibility that the lands might eventually be used for private purposes.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: SIDNEY KAPLAN
Deputy Attorney General

OCTOBER 30, 1958

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

MEMORANDUM OPINION—P-29

DEAR MR. PATTEN:

You have requested an opinion fixing the terms of the members of the State Board of Public Accountants.

The State Board of Public Accountants was created by P.L. 1904, c. 230, which provided for a 3-member board to be appointed by the Governor. The pertinent sections of this act provided as follows:

> "1. Within sixty days after the passage of this act the Governor of the State of New Jersey shall appoint three persons who shall be public accountants residing in the State of New Jersey, and who have been engaged in the practice of their profession for at least three years; the said three persons shall constitute the New Jersey State Board of Public Accountants, one of whom shall be appointed to hold office for one year, one shall be appointed to hold office for two years and one shall be appointed to hold office for three years.
>
> "2. Upon the expiration of the term of each member, the Governor shall appoint his successor from among the certified public accountants of the State of New Jersey for a term of three years, in like manner as the previous appointments; each member shall hold over after the expiration of his term until his successor shall have been duly appointed and qualified.
>
> "3. Any vacancy occurring in the membership of the State Board of Public Accountants shall be filled for the balance of the unexpired term in like manner; the members of the board shall serve without compensation for their services, except as hereinafter provided."

The board was continued by the Revised Statutes of 1937 and the sections quoted were incorporated into R.S. 45:2-1.

To determine the terms of office of the present members of the State Board of Public Accountants, it is necessary to decide whether the three-year term is affixed or attached to the office of the board member or to the incumbent thereof. *Marvel* v. *Camden County*, 137 N.J.L. 47 (E. & A. 1948).

We are of the opinion that the acts creating the office of member of the State Board of Public Accountants attached the term to the office and not to the incumbent of that office. This conclusion is substantiated by the clear legislative intent to have one term of the original three expire each year. It is further supported by the provision that a vacancy shall be filled by the Governor for the unexpired term only. *Marvel* v. *Camden County*, supra; *Monte* v. *Milat*, 17 N.J. Super, 260 (Law Div. 1952).

The fact that the acts here in question provide that the members of the board shall serve until their successors shall have been appointed and have qualified does not weaken this conclusion. As the court points out in *Monte* v. *Milat*, supra at 268:

> "* * * Since the term of an office is distinct from the tenure of an officer, 'the term of office' is not affected by the holding over of an incumbent beyond the expiration of the term for which he was appointed; and a holding over does not change the length of the term, but merely shortens the term of his successor. 67 C.J.S. 206, §48 (c.) * * *."

To ascertain the dates on which the terms of the present members of this board expire, the terms of the original appointees and their successors has been traced from 1904 to the present.

The first three members were appointed to the board on April 29, 1904. Isaac A. Lewis received the one-year term expiring April 29, 1905. Elmer B. Yale received the two-year term expiring April 29, 1906. Frank G. DuBois received the three-year term expiring on April 29, 1907. The appointment of these members on April 29th fixed that date as the day on which all subsequent terms would begin and, in accordance with the legislative mandate in the 1904 law, one three-year term has commenced each year thereafter on April 29th.

For example, the term succeeding the one to which Mr. Lewis was appointed began on April 29, 1905 and ran to April 29, 1908. The term following the one Mr. Yale received started on April 29, 1906 and continued until April 29, 1909. Similarly, Mr. DuBois' original term was followed by one that began April 29, 1907 and continued until April 29, 1910.

Joseph Thieberg is the present incumbent of the office originally filled by Isaac A. Lewis. Your records indicate that Mr. Thieberg's term expired on November 18, 1957 and that, therefore, he is a holdover in that office. Our calculations indicate that the term to which Mr. Thieberg was appointed on November 18, 1954, expired on April 29, 1956. Mr. Thieberg has been serving as a holdover, in accordance with the provisions of R.S. 45:2-1, and is entitled to so serve until his successor is appointed and qualifies for a term that will expire April 29, 1959.

Abraham H. Puder is now the holder of the office to which Elmer B. Yale was the original appointee. Your records indicate that his term expired on November 18, 1957. Our calculations indicate that at the time he was appointed, on November 18, 1954, he received a term expiring April 29, 1957. Since that date, Mr. Puder has been serving in a holdover capacity. Like Mr. Thieberg, he is entitled by statute to continue to so serve until his successor is appointed and qualifies for the term expiring April 29, 1960.

The office to which Frank G. DuBois was originally appointed is now held by Joseph J. Seaman. Your records indicate that Mr. Seaman's term is to expire May 25, 1959. According to our calculations, Mr. Seaman, who was appointed on May 25, 1956, was appointed to a term that expired April 29, 1958. Mr. Seaman, therefore, is also serving in a holdover capacity until his successor is appointed and qualifies for a term expiring April 29, 1961.

For opinion dealing with similar situation, see Memorandum Opinion to you, dated January 23, 1957, concerning the terms of office of the members of the New Jersey Real Estate Commission and other opinions cited therein.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: DAVID J. GOLDBERG
Deputy Attorney General

OCTOBER 30, 1958

JOHN B. KEENAN, *Commissioner of*
Registration and Superintendent
of Elections
Hall of Records
Newark 2, New Jersey

MEMORANDUM OPINION—P-30

DEAR MR. KEENAN:

You have requested an opinion as to whether a motor vehicle agent who was convicted of the crime of embezzlement is disenfranchised pursuant to the terms of R.S. 19:4-1, as amended. We have been advised that the agent in question pleaded non vult to an indictment charging him with embezzlement under N.J.S. 2A:102-5, embezzlement by employees, agents, consignees, factors, bailees, lodgers or tenants.

R.S. 19:4-1, as amended, deprives certain persons of the right to vote for specific reasons and reads in pertinent part as follows:

> "No person shall have the right of suffrage— . . .
>
> "(2) Who was convicted, prior to October 6, 1948, of any of the following designated crimes, that is to say—blasphemy, treason, murder, piracy, arson, rape, sodomy, or the infamous crime against nature, committed with mankind or with beast, polygamy, robbery, conspiracy, forgery, larceny of above the value of $6.00, perjury or subornation of perjury, unless pardoned or restored by law to the right of suffrage; or
>
> "(3) Who was convicted after October 5, 1948 or shall be convicted, of any of said crimes, except polygamy or larceny above the value of $6.00, or of bigamy or larceny of above the value of $20.00, or who shall be convicted of the crime of burglary or of any offense described in chapter 94 of Title 2A, or section 2A:102-1 or section 2A:102-4, of the New Jersey Statutes or described in sections 24:18-4 and 24:18-47 of the Revised Statutes, unless pardoned or restored by law to the right of suffrage. . . ."

As can be seen from the above quoted sections, in order for an individual to be disenfranchised he must have been convicted of one of the crimes or offenses listed in R.S. 19:4-1, as amended. Embezzlement by an agent, pursuant to N.J.S. 2A:102-5, is not such a designated offense. The former motor vehicle agent, to whom you refer, is not within the class of persons who are denied the right of suffrage by R.S. 19:4-1; his conviction was for a violation of N.J.S. 2A:102-5, not N.J.S. 2A:102-1 or 4.

The Legislature is empowered by Article 2, Sec. 7, par. 7 of the New Jersey Constitution to deprive persons of their right of suffrage upon conviction of such crimes as the Legislature shall designate. This right of suffrage has been described by Justice Heher in *Gangemi* v. *Berry*, 25 N.J. 1 (1957) on page 5 of his opinion as a

> ". . . basic right . . . , a civil and political franchise—of the very essence of our democratic process—that is to be liberally and not strictly construed to promote and not to defeat or impede the essential design of the organic law . . ."

Consequently, since R.S. 19:4-1, as amended, deprives certain individuals of this basic right, it is necessary to strictly construe said statute so that only those persons convicted of crimes actually designated in R.S. 19:4-1, as amended, will be disenfranchised. You are, therefore, advised that the motor vehicle agent in question is not deprived of his right to vote as a result of his conviction for a violation of N.J.S. 2A:102-5.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: FRANK A. VERGA
Deputy Attorney General

OCTOBER 30, 1958

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

MEMORANDUM OPINION—P-31

DEAR COMMISSIONER HOWELL:

You have requested our opinion as to whether the Commissioner of Banking and Insurance may grant a certificate of authority to a partnership to act as an agent for the sale of life, accident and health insurance pursuant to N.J.S.A. 17:22-6.24.

N.J.S.A. 17:22-6.24 presently provides, *inter alia:*

> *"No agent of any insurance company authorized to transact* in this State the business of *life insurance, or life, accident and health insurance shall make* or procure to be made, or act or aid in any manner in the negotiation of any *such insurance* for such a company in this State *until he procures from the commissioner a certificate of authority so to do,* which shall state in substance that the company is authorized to do business under the laws of this State, and that the person named therein is the constituted agent of the company for the transaction of the business. * * *" (Emphasis added)

You inform us that the established practice of the Department since 1944 has been to license individuals only and not corporations or partnerships under this section of the law. This practice was based upon the following informal advice of the office of the Attorney General which stated in part that:

> "* * * You are advised that Section 24 is clear that licenses to agents of life, accident and health insurance may be issued only to individuals. The central scheme of Chapter 175, Laws of 1944, is to issue licenses only to individuals who are required to possess certain qualifications. There is as I have heretofore advised one exception to that scheme and which may be found in Section 14 of the act. By the provisions of Section 24 of the applicable statute, licenses to agents negotiating life, accident and health insurance may be issued only to individuals."

Section 14 referred to in the above quotation which is applicable only to agents, brokers and solicitors not writing life insurance (see Section 23; N.J.S.A. 17:22-6.23) provided as follows:

> "* * * If an agency is operating its business affairs as a copartnership or corporation, such certificate of authority may be issued by such company in the name of such copartnership or corporation, which *certificate shall permit such copartnership or corporation to be licensed as an insurance agent* under this act; provided, all individuals actively engaged in the insurance business of such agency hold an unexpired agent's license issued in accordance with the provisions of this act. * * *" (Emphasis added)

Since sections 1, 2 and 3 of Chapter 175 (N.J.S.A. 17:22-6.1 to 6.3) had defined agents, brokers and solicitors as individuals, the express provision to the contrary in section 14 was questioned. You were then advised that section 14 permitted the licensing of corporations or partnerships as agents for the writing of non-life insurance:

> "* * * Sections 1, 2, 3, 6, 9[1] and others clearly indicate application only to individuals and generally inconsistent with that portion of Section 14 which makes it permissible, under certain circumstances, to issue an agent's license to a corporation or a partnership.
>
> "Despite such a lack of harmony, and because there is a presumption in law that the Legislature has not enacted either futile or senseless legislation, the Commissioner may issue a license to a corporation or partnership upon full compliance with *all* of the following conditions:
>
> 1. An authorized insurance company has issued a certificate of authority to act as its agent.
>
> 2. All individuals actively engaged in the insurance business of such agency (corporate or partnership) hold an unexpired agent's license issued in accordance with the provisions of Chapter 175, Laws of 1944.
>
> 3. Payment of a fee of $10.00.
>
> "The mere issuance of a certificate of authority by an insurance company to a corporate or partnership agency does not entitle such agency to a license from the Commissioner. Section 14 is not self-executing. It requires an affirmative act by the corporation or partnerships named in the insurance company's certificate of authority and compliance by it with the foregoing conditions."

1 Sections 1, 2 and 3 are the definition sections referred to *supra*. Section 6 prescribes the manner of applying for a license. The applicant is required to supply a certificate from a representative of an insurance company authorized to do business in New Jersey stating: "* * * (b) that the applicant is personally known to him; (c) that the applicant has had experience or instruction in the general insurance business * * * (d) that the applicant is of good reputation and is worthy of a license * * *." Section 9 gives the commissioner power to make a "personal examination" of the applicant "in order to determine his trustworthiness and competency * * *." The commissioner is to grant the license where he finds that the applicant is of good reputation, has had experience or training, or is otherwise qualified by education, that he is reasonably familiar with the insurance laws of this State and with the terms of the policies he is proposing to solicit and finds that he is worthy of a license.

Section 9, which the above opinion had grouped with several other sections applicable only to individuals, was amended by Chapter 82 of the Laws of 1945 to provide expressly that:

> "A license may be issued by the Commissioner to and in the name of any copartnership or corporation engaged in the insurance brokerage business upon written request and payment of the twenty-five dollars ($25.00) fee prescribed in section thirteen of this chapter; provided, all members of the copartnership or all the officers of the corporation, as the case may be, actively engaged in the insurance brokerage business of the copartnership or corporation in this State hold an unexpired license as an insurance broker issued in accordance with the provisions of this act."

This made Sections 9 and 14, both dealing only with agents, brokers and solicitors of non-life insurance companies (see section 23; N.J.S.A. 17:22-6.23) consistent with each other but still anomalous to the rest of the act. No change was made in Section 24 dealing with agents, brokers and solicitors of life insurance companies.

Sections 23 and 24 of Chapter 175, Laws of 1944, were amended by Chapter 291 of the Laws of 1946; the amendments were of a clarifying nature and the significance of the section remained substantially unchanged. Section 24 was amended again in 1948 by Chapter 146 of the laws of that year. This amendment provided for personal examination of first-time appointees and set forth the conditions relating to such examination. It is clear from the 1948 amendment that the licensing of corporations was not contemplated. It is also reasonable to assume that the Legislature, in enacting the amendments of 1946 and 1948, was aware of the administrative interpretation placed upon Section 24 limiting licensing thereunder to individuals.

Since 1944, the Department has limited Section 24 to licensing of individuals. This interpretation is of long standing and is well settled. In our opinion, it should not be disturbed. See *In re West New York*, 25 N.J. 377, 385 (1957); *Kravis* v. *Hock*, 137 N.J.L. 252, 255 (Sup. Ct. 1948).

Very truly yours,

DAVID D. FURMAN
Attorney General

By: LAWRENCE E. STERN
Deputy Attorney General

OCTOBER 30, 1958

HONORABLE RAYMOND F. MALE, *President*
Civil Service Commission
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-32

DEAR PRESIDENT MALE:

You have requested our opinion as to whether Walter Popielaski, who has requested a hearing on his removal from the employment list for Guard, Middlesex County, is properly entitled to such a hearing.

We understand that Mr. Popielaski pleaded *non vult* to a charge of desertion and non-support, receiving a suspended sentence of one year in the county workhouse. Mr. Popielaski was put on probation for three years. The application for examination submited by Popielaski was dated November 12, 1957 and clearly indicated the offense and sentence noted above. Popielaski was admitted to and successfully completed the examination. On June 5, 1958 his name was certified to the County of Middlesex on a list of eligibles for the position of Jailkeeper, Middlesex County, the employment list for Guard being deemed appropriate for filling that position. On June 25, 1958, the Chief Examiner of the Department of Civil Service notified Popielaski that his name was to be removed from the eligible roster because of his conviction.

The reason given for the removal was based on *Vanderwart* v. *Civil Service,* 19 N.J. 341 (1955). The Supreme Court ruled that R.S. 11:9-6 made it mandatory to refuse to admit persons convicted of crimes to Civil Service examinations. See Memorandum Opinion dated January 31, 1957. Even though the principle in the *Vanderwart* case governed at the time Popielaski was removed from the list, it was and is now necessary to abide by the terms of Civil Service Rule 40 which requires that once an individual has been certified to the appointing authority, and it is subsequently determined to remove his name from the employment list, the person whose name is subject to removal must be notified and given opportunity to be heard before the removal is accomplished. Rule 40 provides in part:

> "* * * On the approval of the president and the commission the name of any person who has been dismissed from some other position in the public service or whose character, qualifications and record are found to be such as not to warrant employment in a public position, may be removed from any employment list upon which it may appear. In all such cases the person whose name is considered for removal will be notified of such contemplated action and given reasonable opportunity to be heard."

See also: Memorandum Opinion dated March 2, 1955; Formal Opinion 1955, #10 dated March 24, 1955.

We advise you, therefore, that before action is taken to remove Popielaski's name from the eligible list, his request for hearing should be granted.

Respecting the rule of law to be followed at the hearing to be held, reference is made to Chapter 104 of the Laws of 1958, effective July 2, 1958, amending R.S. 11:9-6. This act became law after the determination to remove Popielaski from eligibility and changed the rule in the *Vanderwart* case to make the admission to public employment of persons convicted of crimes a matter of sound discretion rather than mandatory rejection. The department is now bound by the new legislation. See *Guaclides* v. *Englewood Cliffs,* 11 N.J. Super. 405 (App. Div. 1951). The discretionary power to admit to public employment persons convicted of crime may only be exercised by the Chief Examiner and Secretary of your department in concurrence with the appointing authority.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: DAVID LANDAU
Deputy Attorney General

NOVEMBER 17, 1958

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

MEMORANDUM OPINION—P-33

DEAR MR. PATTEN:

You have requested an opinion fixing the term of the members of the New Jersey Racing Commission.

The New Jersey Racing Commission was created by P.L. 1940, c. 17, which provided for a 4-member commission to be appointed by the Governor. Section 2 of this act provides as follows:

> "2. The commission shall consist of four members, all of whom shall be appointed by the Governor, by and with the advice and consent of the Senate, and not more than two of whom shall be of the same political party, and one of whom of the first to be appointed hereunder shall be designated by the Governor to be the chairman of the commission; said chairman thereafter shall be annually elected by the members of said commission. Each commissioner, at the time of his appointment and qualification, shall be a resident of the State of New Jersey, and shall have resided in said State for a period of at least seven years next preceding his appointment and qualification and he shall also be a qualified voter therein and not less than thirty years of age. The term of office of each member of the first commission shall commence on confirmation after appointment. One of said commissioners shall hold office for two years from the beginning of his term of office and until his successor shall qualify; one of said commissioners shall hold office for four years from the beginning of his term of office and until his successor shall qualify, and two of said commissioners shall hold office for six years from the beginning of their terms of office and until their successors shall qualify; *provided, however,* that the two members whose terms shall expire in six years shall not be of the same political party. The Governor, at the time of making and announcing the appointment of said four commissioners, shall designate which of said commissioners shall serve for the term of two years, which of said commissioners shall serve for the term of four years, and which of said commissioners shall serve for the term of six years, as aforesaid, and also who shall be the chairman of said commission. Upon the expiration of the terms of such respective commissioners, the Governor, by and with the advice and consent of the Senate, shall appoint their successors, each to hold office for a term of six years and until his successor has been appointed and qualified. Any vacancy in the commission shall be filled for the unexpired term. Each commissioner shall be eligible for reappointment in the discretion of the Governor."

To determine the terms of office of the present members of the New Jersey Racing Commission, it is necessary to decide whether the 6-year term is affixed or attached to the office of commissioner or to the incumbent thereof. *Marvel* v. *Camden County,* 137 N.J.L. 47 (E. & A. 1948).

We are of the opinion that the act creating the office of commissioner of the New Jersey Racing Commission attached the term to the office and not to the incumbent of that office. This conclusion is substantiated by the clear legislative intent to have at least one term of the original four expire every two years. It is further supported by the provision that a vacancy shall be filled by the Governor for the unexpired term only. *Marvel* v. *Camden County*, supra; *Monte* v. *Milat*, 17 N.J. Super. 260 (Law Div. 1952).

The fact that the act here in question provides that a commissioner shall serve until his successor shall have been appointed and qualified does not weaken this conclusion. As the court points out in *Monte* v. *Milat*, supra at 268:

> "* * * Since the term of an office is distinct from the tenure of an officer, 'the term of office' is not affected by the holding over of an incumbent beyond the expiration of the term for which he was appointed; and a holding over does not change the length of the term, but merely shortens the term of his successor. 67 C.J.S. 206, §48 (c.) * * *."

To ascertain the dates on which the terms of the present members of this commission expire, the terms of the four original appointees and their successors have been traced from 1940 to the present.

The first four members were appointed to the commission on March 18, 1940. Louis A. Reilly received one of the two 6-year terms which expired on March 18, 1946. The second 6-year term was received by John R. Rodgers. Joseph A. Brophy received the 4-year term which expired on March 18, 1944. The 2-year term was received by William H. Cane and this term expired on March 18, 1942. Since the statute did not fix any time for the commencement of these terms, they began to run from the date of the first appointment, March 18th, and, in accordance with the legislative mandate, contained in the 1940 act, at least one 6-year term has commenced every two years thereafter. Cf. *Haight* v. *Love*, 39 N.J.L. 476 (E. & A. 1877).

For example, the terms succeeding the ones to which Mr. Reilly and Mr. Rodgers were appointed began on March 18, 1946 and ran to March 18, 1952. The term following the one Mr. Brophy received started on March 18, 1944 and continued until March 18, 1950. Similarly, Mr. Cane's original term was followed by one that began on March 18, 1942 and continued until March 18, 1948.

The present incumbent of the office originally filled by Louis A. Reilly is Richard V. Mulligan. Your records indicate that Mr. Mulligan's term will expire on June 12, 1964. Our calculations indicate that the term to which Mr. Mulligan was appointed on July 31, 1958 is the term that commenced on March 18, 1958, which is to expire on March 18, 1964.

Hugh J. Strong is now the holder of the office to which John R. Rodgers was the original appointee. Your records indicate that his term is to expire on June 12, 1964. Our calculations indicate that the term to which he was appointed on July 31, 1958 commenced on March 31, 1958 and, like Mr. Mulligan's term, will expire on March 18, 1964.

The office to which Joseph A. Brophy was originally appointed is now held by Thomas J. Brogan. Your records indicate that Mr. Brogan's term is to expire March 21, 1963. According to our calculations, Mr. Brogan, who was appointed to his present term on June 16, 1958, received a term that commenced on March 18, 1956 and will expire on March 18, 1962.

Hugh L. Mehorter is the present incumbent of the office to which William H. Cane was appointed. Your records indicate that his term is to expire on January 14, 1964. According to our calculations, Mr. Mehorter, who was appointed on January 14, 1958, received a term which commenced on March 18, 1954 and which, therefore, will expire on March 18, 1960.

In summary, the expiration dates of the terms now held by the present members of the New Jersey Racing Commission is as follows:

Richard V. Mulligan	March 18, 1964
Hugh J. Strong	March 18, 1964
Thomas J. Brogan	March 18, 1962
Hugh L. Mehorter	March 18, 1960.

For opinions dealing with similar situations, see Memorandum Opinion to you, dated October 30, 1958, concerning the terms of office of the members of the State Board of Public Accountants and other opinions cited therein.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: DAVID J. GOLDBERG
Deputy Attorney General

NOVEMBER 19, 1958

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

MEMORANDUM OPINION—P-34

DEAR MR. PATTEN:

You have requested an opinion fixing the terms of the members of the State Board of Shorthand Reporting.

The State Board of Shorthand Reporting was created by P.L. 1940, c. 175, which provided for a 3-member board to be appointed by the Governor. Section 1 of this act provides as follows:

> "1. There is hereby established a State Board of Shorthand Reporting (herein referred to as the board) to be composed of three members to be appointed by the Governor, by and with the consent of the Senate. The members of the board, with the exception of the members first to be appointed, shall be holders of certificates issued under the provisions of this act. The members first appointed shall be skilled in the art and practice of shorthand reporting and shall have been actively and continuously engaged as professional shorthand reporters within the State of New Jersey for at least five years preceding their appointments. The members shall hold office for a term of three years, except that, (1) any member appointed to fill a

vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and (2) the terms of office of the members first taking office after the date of enactment of this act shall expire, as designated by the Governor at the time of nomination, one at the end of one year, one at the end of two years, and one at the end of three years after such date. The board shall elect one of its members as chairman and one as secretary-treasurer, who shall hold their respective offices for one year. The secretary-treasurer shall give bond to the State in such sum as may be determined by the board. The board shall make all necessary rules and regulations to carry out the provisions of this act. Any two members shall constitute a quorum for the transaction of business. The board shall keep a complete record of all its proceedings and shall file an annual report with the office of the Secretary of State."

To determine the terms of office of the present members of the State Board of Shorthand Reporting, it is necessary to decide whether the 3-year term is affixed or attached to the office of board member or to the incumbent thereof. *Marvel* v. *Camden County*, 137 N.J.L. 47 (E. & A. 1948).

We are of the opinion that the act creating the office of member of the State Board of Shorthand Reporting attached the term to the office itself and not to the incumbent of that office. This conclusion is substantiated by the clear legislative intent to have one term of the original four expire each year. It is further supported by the provision that a vacancy shall be filled by the Governor for the unexpired term only. *Marvel* v. *Camden County*, supra; *Monte* v. *Milat*, 17 N.J. Super. 260 (Law Div. 1952).

To ascertain the dates on which the terms of the present members of this board expire, the terms of the three original appointees and their successors have been traced from 1940 to the present.

The first member named to the board was John F. Trainer who was appointed for the 3-year term on January 5, 1941. Vincent Donegan was appointed on May 26, 1941 for the 2-year term. The 1-year term was received by Charles J. Drescher, also on May 26, 1941. Since the statute did not fix any time for the commencement of these terms, they began to run from the date of the first appointment, January 6, 1940, and, in accordance with the legislative mandate contained in the 1940 act, one 3-year term has commenced every year thereafter. Cf. *Haight* v. *Love*, 39 N.J.L. 476 (E. & A. 1877). For example, the term succeeding the one to which Mr. Trainer was appointed began on January 6, 1944 and ran to January 6, 1947. The term following the one Mr. Donegan received started on January 6, 1943 and continued until January 6, 1946. Similarly, Mr. Drescher's original term was followed by one that began on January 6, 1942 and continued until January 6, 1945.

The present incumbent of the office originally filled by John F. Trainer is Sidney Lichter. Your records indicate that Mr. Lichter's term will expire on January 6, 1961. Our calculations indicate that the term to which Mr. Lichter was appointed on June 2, 1958 is the term that commenced on January 6, 1956 and which, therefore, will expire on January 6, 1959.

George Sakson is now the holder of the office to which Vincent Donegan was the original appointee. Your records indicate that his term is to expire on January 6, 1961. We are in accord with this listing.

The office to which Charles J. Drescher was originally appointed is now held by John P. Walsh. Your records indicate that Mr. Walsh's term is to expire on January 6, 1960. We are also in agreement with this listing.

In summary, the corrected expiration dates of the terms held by the present members of the State Board of Shorthand Reporting is as follows:

Sidney Lichter ..... January 6, 1959
George Sakson ..... January 6, 1961
John P. Walsh ..... January 6, 1960

For opinions dealing with similar situations, see Memorandum Opinion to you, dated October 30, 1958, concerning the terms of office of the members of the State Board of Public Accountants and other opinions cited therein.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: DAVID J. GOLDBERG
Deputy Attorney General

DECEMBER 16, 1958

HONORABLE PHILLIP ALAMPI, *Secretary*
Department of Agriculture
1 West State Street
Trenton, New Jersey

MEMORANDUM OPINION—P-35

Re: Meaning of word "poultry."

DEAR SECRETARY ALAMPI:

You have requested an opinion as to the meaning of the word "poultry" when used in a general way in agricultural acts. Where the statute in question defines the meaning of the word, statutory construction requires that the words be given the meaning as defined in the statute unless such construction will defeat the legislative purpose, 2 *Sutherland Statutory Construction* (3rd ed. 1943), sec. 3002, p. 222. An example of this type of statutory definition is contained in the Poultry Products Promotion Council and Tax Act, R.S. 54:47A-1 et seq., where the word "poultry" is defined to mean "chickens, turkeys, ducks, geese, guinea fowl and pheasants." Here the language is plain and unambiguous. The Legislature has supplied the meaning and this meaning is binding when the statute is being construed.

Where the statute does not supply a definition, the words normally are to be given their natural and ordinary meaning, *Lloyd* v. *Vermeulen*, 40 N.J. Super. 151, 165 (Law Div., 1956); *In re Act Concerning Alcoholic Beverages*, 130 N.J.L. 123, 128 (Sup. Ct., 1943). There is no safer or better settled manner of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses. In the instant case the word "poultry" has a well defined meaning.

Corpus Juris Secundum, Vol. 72, pages 395, 396, defines poultry as follows:

"A generic word, meaning domestic fowls reared for the table, or for their eggs or feathers, such as cocks and hens, capons, turkeys, ducks, and

geese. The term is sometimes applied to pigeons if reared for table consumption."

This definition is also contained in *Words and Phrases*, Permanent Edition, Vol. 33, page 135, and except for the last sentence, it is the same definition as that contained in *Webster's New International Dictionary of the English Language*, 1931 Edition.

While it is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute, the literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the Legislature. The intention prevails over the letter and the letter must, if possible, be read so as to conform to the spirit of the act. The intention of the Legislature must be ascertained from the words used to express it, the manifest reason and obvious purpose of the law should not be sacrificed to a literal interpretation of such words. Thus, words or clauses may be enlarged or restricted to harmonize with other provisions of an act.

In *Alexander* v. *N.J. Power & Light Co.*, 21 N.J. 373 (1956) Justice Heher, speaking for a unanimous court, at page 378 said:

> "The statute is to receive a reasonable construction, to serve the apparent legislative purpose. The inquiry in the final analysis is the true intention of the law; and, in the quest for the intention, the letter gives way to the rationale of the expression. The words used may be expanded or limited according to the manifest reason and obvious purpose of the law. The spirit of the legislative direction prevails over the literal sense of the terms. The particular words are to be made responsive to the essential principle of the law. When the reason of the regulation is general, though the provision is special, it has a general acceptation. The language is not to be given a rigid interpretation when it is apparent that such meaning was not intended. The rule of strict construction cannot be allowed to defeat the evident legislative design. The will of the law-giver is to be found, not by a mechanical use of particular words and phrases, according to their actual denotation, but by the exercise of reason and judgment in assessing the expression as a composite whole. The indubitable reason of the legislative terms in the aggregate is not to be sacrificed to scholastic strictness of definition or concept. *Wright* v. *Vogt*, 7 N.J. 1 (1951).
>
> "It is not the meaning of isolated words, but the internal sense of the law, the spirit of the correlated symbols of expression, that we seek in the exposition of a statute. The intention emerges from the principle and policy of the act rather than the literal sense of particular terms, standing alone. *Caputo* v. *Best Foods, Inc.*, 17 N.J. 259 (1955)."

You are therefore advised that when the word "poultry" is used in a general manner in a statute, it is to be given its common ordinary meaning as set forth above, unless the literal interpretation will result in thwarting the apparent legislative purpose or intention as gathered from the entire act, in which event the ordinary meaning of the word "poultry" is to be expanded or limited so that it is made responsive to the essential legislative spirit, intent and purpose.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: GEORGE H. BARBOUR
Deputy Attorney General

DECEMBER 16, 1958

WILLIAM MACPHAIL, *Superintendent of Elections of Hudson County*
591 Summit Avenue
Jersey City 6, New Jersey

MEMORANDUM OPINION—P-36

DEAR MR. MACPHAIL:

You have requested an opinion as to the eligibility of a person who has been convicted of a crime which would disenfranchise him but has since had the record of conviction expunged by a county judge, to have his voting rights restored. You would like to know whether said person can be permitted to vote once the record has been expunged.

N.J.S. 2A:164-28 provides in part that:

> ". . . an order may be granted directing the clerk of such court to expunge from the records all evidence of said conviction and that the person against whom such conviction was entered shall be forthwith thereafter relieved from such disabilities as may have heretofore existed by reason thereof, excepting convictions involving the following crimes: treason, misprision of treason, anarchy, all capital cases, kidnapping, perjury, carrying concealed weapons or weapons of any deadly nature or type, rape, seduction, aiding, assisting or concealing persons accused of high misdemeanors, or aiding the escape of inmates of prisons, embracery, arson, robbery or burglary."

R.S. 19:4-1, as amended, deprives certain persons of the right to vote for specific reasons and reads in pertinent part as follows:

> "No person shall have the right of suffrage—. . .
>
> "(2) Who was convicted, prior to October 6, 1948, of any of the following designated crimes, that is to say—blasphemy, treason, murder, piracy, arson, rape, sodomy, or the infamous crime against nature, committed with mankind or with beast, polygamy, robbery, conspiracy, forgery, larceny of above the value of $6.00, perjury or subornation of perjury, unless pardoned or restored by law to the right of suffrage; or
>
> "(3) Who was convicted after October 5, 1948, or shall be convicted, of any of said crimes, except polygamy or larceny above the value of $6.00, or of bigamy or larceny of above the value of $20.00, or who shall be convicted of the crime of burglary or of any offense described in chapter 94 of Title 2A, or section 2A:102-1 or section 2A:102-4, of the New Jersey Statutes or described in sections 24:18-4 and 24:18-47 of the Revised Statutes, unless pardoned or restored by law to the right of suffrage; or
>
> * * *
>
> "(5) Who shall be convicted of a violation of any of the provisions of this Title, for which criminal penalties are imposed, if such person shall be deprived of such right as part of the punishment therefor according to law, *unless pardoned or restored by law to the right of suffrage.*" (Emphasis supplied)

Article II, par. 7 of the *New Jersey Constitution* states:

"The Legislature may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate. Any person so deprived, when pardoned or otherwise restored by law to the right of suffrage, shall again enjoy that right."

Article V, sec. 2, par. 1 of the *New Jersey Constitution* vests the power to grant pardons and reprieves and to suspend and remit fines and forfeitures solely in the Governor. Although both Article II, par. 7 of the *New Jersey Constitution* and R.S. 19:4-1, as amended, provide that one who has been disenfranchised as a result of having been convicted of a crime cannot have his right to vote restored unless he is pardoned or restored by law to the right of suffrage, it has been held that the phrase "restored by law" does not mean by act of the Legislature. *In re N.J. Court of Pardons,* 97 N.J. Eq. 555 (Ct. Pardons 1925), Chancellor Walker stated at page 563 that:

". . . Now, as the power to pardon includes the power to remit a forfeiture, which in turn, clearly must include the remission of a forefeiture, of the right of suffrage (the loss of which is a part of the penalty of the conviction), then, when the Constitution provided in article 2, paragraph 1, that a person convicted of a certain crime shall not enjoy the right of an elector unless pardoned or restored by law to the right of suffrage, the restoration by law undoubtedly meant the granting by the pardoning power of the gracious act of remitting the forfeiture of the right of suffrage to the end that that right might be thereby restored without the pardoning of the offense or remitting any of the other penalties incident to the conviction. In other words, a remitting of the forfeiture of the right of being an elector because of conviction of a certain crime would work a restoration to the right of suffrage, and this 'by-law.'

"It has been suggested that the words 'restored by law' mean by act of the Legislature, but, obviously, this is not so. The legal meaning or definition of the word *law* is not restricted to that of a statute. Blackstone's familiar definition is, that law signifies a rule of action. 1 Bl. Com. 38. One definition is: A rule or method of action or order of sequence. Another: A general rule of external human action enforced by a sovereign political authority. 2 Bouv. L. Dict. (Rawle's Rev.) 144. When, therefore, the Constitution says, 'Unless pardoned or restored by law to the right of suffrage,' it could not have meant by 'restored by law,' that such restoration should be by 'act of the Legislature,' as that is not expressed, and there is nothing in the phrase, or the context where it is found, to indicate any such idea; and to attribute such meaning to it would necessarily be to conclude that the Constitution makers who bestowed the pardoning power on the executive department (the Governor and certain officials acting with him), and provided that no person belonging to any of the departments of the government should exercise any of the power properly belonging to either of the others, deliberately intended, notwithstanding such inhibition, that the Legislature might, nevertheless, encroach upon the prerogative of the executive in the exercise of the pardoning power by remitting a forfeiture, a thing expressly reserved to the executive department. The meaning undoubtedly was, 'unless pardoned or restored by the court of pardons by remission of the penalty of loss of suffrage,' which would be a lawful restoration, and, therefore, a restoration by law, for the deprivation of the right of suffrage following the commission of certain crimes, was certainly the forfeiture of that right, and the power to 'remit fines and forfeitures and grant pardons' is in the same organic law as the provision for the deprivation and restoration of the right of suffrage, and, therefore, the two provisions must be construed together, and being so read would amount to a provision, such as above stated, namely, unless pardoned or unless restored by the court of pardons to the right of suffrage through the medium of a remission of the forfeiture. . . ."

You are advised, therefore, that an expunging of the record in accordance with N.J.S. 2A:164-28 does not restore the right to vote; restoration of franchise can only be obtained by executive action.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: FRANK A. VERGA
Deputy Attorney General

JANUARY 15, 1959

HON. NED J. PARSEKIAN
Acting Director of Motor Vehicles
State House
Trenton, New Jersey

FORMAL OPINION 1959—No. 1

DEAR SIR:

We have been asked whether a citizen of New York who has a claim for bodily injuries (or death) suffered in an accident in New Jersey on or after January 1, 1959 should be considered a "qualified person" under the provisions of the Unsatisfied Claim and Judgment Fund Law. N.J.S.A. 39:6-61 *et seq.* Our opinion is yes, and that relief may be granted, accordingly, under said law.

New Jersey's Unsatisfied Claim and Judgment Fund Law defines a "qualified person" as a resident of this State "or a resident of another State, territory, or Federal district of the United States or Province of the Dominion of Canada, or foreign country, in which recourse is afforded, to residents of this State, of substantially similar character to that provided for by this act." N.J.S.A. 39:6-62.

In *Betz* v. *Director, Division of Motor Vehicles,* 27 N.J. 324 (1958) it was held that a resident of New York was not a "qualified person" within the meaning of our act under the New York law existing at the time of the accident there involved, namely, July 16, 1956. The Court acknowledged, at 328, 329, the provisions of the New York Motor Vehicle Financial Security Act, L. 1956, C. 655, Vehicle and Traffic Law, *McKinney's Consol. Laws,* Sec. 93 *et seq.,* requiring all persons registering motor vehicles in New York to give proof of their financial responsibility in the form of liability insurance coverage, the posting of a financial security bond or

deposit, or qualification as a self-insurer. Nevertheless, the Court in the *Betz* case held that the New York law then in effect "does not afford recourse to residents of New Jersey of a substantially similar character to that provided by the New Jersey Fund law." (at 330). The court indicated at p. 330 the following specific instances where a person injured in New York might not be able to satisfy part or all of his claim for such injuries, notwithstanding the requirements of "compulsory insurance" laws, if such injuries were caused by: (a) uninsured motor vehicles not registered in the State of New York; (b) unidentified motor vehicles which leave the scene of an accident, that is, "hit-andrun" accidents; (c) stolen motor vehicles; (d) motor vehicles operated without the permission of the owner; (e) insured motor vehicles where the insurer successfully disclaims liability or denies coverage; and (f) motor vehicles operated without compliance with applicable New York laws such as unregistered motor vehicles or motor vehicles registered in New York without a liability insurance policy being in effect at the time of the accident.

Since the date of the accident involved in the *Betz* case, *supra*, the New York Legislature enacted the Motor Vehicle Accident Indemnification Corporation Law, L. 1958, C. 759, amending the insurance law of New York by adding thereto Art. 17-A; Insurance Law, *McKinney's Consol. Laws*, Sec. 600 *et seq.* As noted by the court in the *Betz* case, at 331, "That law creates an unsatisfied judgment fund similar to that in existence in our State." This new law goes into effect as to accidents occurring in New York on or after January 1, 1959. Laws of New York, C. 759, Sec. 626.

We must determine whether under the New York Motor Vehicle Accident Indemnification Corporation Law a New Jersey resident would be afforded recourse "of substantially similar character" to that provided for by the New Jersey law. The New York law contains a reciprocity provision virtually identical to that contained in the New Jersey law. Section 601 (b) (2) of the New York law defines a qualified person as "a resident of another State, territory or federal district of the United States or province of the Dominion of Canada, or foreign country, in which recourse is afforded, to residents of this State, of substantially similar character to that provided for by this article, or his legal representative." The New York Motor Vehicle Accident Indemnification Corporation, at its meeting on October 22, 1958, passed a resolution "* * * that citizens of New Jersey should be recognized as qualified persons by the M.V.A.I.C. if New Jersey takes parallel action." New Jersey citizens, therefore, will be recognized as qualified persons for benefits under the New York law providing New York citizens are recognized in New Jersey as qualified persons under our Unsatisfied Claim and Judgment Fund Law.

An examination of the New York law, coupled with the aforesaid resolution of the agency administering said law, indicates that substantially similar recourse will be afforded to New Jersey citizens under the New York law as is afforded by our own law, with respect to claims for bodily injury or death suffered in accidents occurring on or after January 1, 1959. The New York law does not afford recovery from the "fund" for property damage claims.

Claims for bodily injuries or death of persons, who, through no fault of their own [Sec. 600(2)], are injured in New York on or after January 1, 1959 can be paid by the Corporation (Motor Vehicle Accident Indemnification Corporation) where such injuries or death are caused by:

> a. known owners or operators of motor vehicles who are financially irresponsible and who were uninsured at the time of the accident, or, if insured, as to whom the insurer has disclaimed liability or denied coverage [Secs. 600(2), 608(a and c) and 620]; or
>
> b. "hit-and-run" motorists, which include cases where the identity of the motor vehicle and of the operator and owner thereof cannot be ascertained and cases where a motor vehicle was operated without the owner's consent at the time of the accident by an unidentified person [Secs. 608(b), 617 and 618].

The maximum amounts payable from the New York "fund" are $10,000.00 "on account of injury to, or death of, one person, in any one accident" and, subject to such limit for any one person, $20,000.00 "on account of injury to or death of, more than one person, in any one accident," Sec. 610. Payments from the fund are further reduced by the amount of available assets or any contribution of the financially irresponsible motorist, as well as the amount of collectible liability insurance coverage on said motorist and, further, by the amount of any payments received or recoverable from other persons liable for the claim jointly or severally with said irresponsible motorist. Secs. 610, 611(g) and 612(b). Similar limits apply to "hit-and-run" cases. Sec. 619(a).

It can readily be seen that the New York law affords the same basic relief as is available under the New Jersey Law in cases of bodily injury or death. The New York law contains numerous parallels to our New Jersey law, and in fact, much of the phraseology is identical. The New Jersey law affords a remedy in the same two broad classifications shown above, namely, (a) in cases of a known, uninsured, financially irresponsible motorist and (b) in "hit-and-run" cases, including unidentified motor vehicles, owners and operators as well as motor vehicles operated by unidentified persons without the consent of the owner. N.J.S.A. 39:6-65, 39:6-70, 39:6-78 and 39:6-79. The limits of recovery in New Jersey, effective January 1, 1959, are exactly the same as in New York. N.J.S.A. 39:6-69(a) and (b), 39:6-84.

The procedures for collecting from the respective funds so established in New York and in New Jersey are similar. For example, a qualified person must first file a notice of intention to make a claim with the board or corporation administering the fund within 90 days after the accident, and such notice is made "a condition precedent to the right thereafter to apply for payment from the (fund or the corporation, as the case may be)." N.J.S.A. 39:6-65; N.Y. Insur. L., Art. 17-A, Sec. 608. In "hit-and-run" cases, occurring in New Jersey, the action is commenced against the Director of the Division of Motor Vehicles. N.J.S.A. 39:6-78. Under the New York act, the action is commenced against the corporation, with leave of the court. Sec. 618. After a judgment is rendered in favor of a claimant, or his personal representative, for his injuries or death, an application is made to the court in which the judgment was entered, on notice to the board or corporation, for an order directing payment of the amount unpaid upon such judgment within the limits of the act. N.J.S.A. 39:6-69; N.Y. Insur. L., Art. 17-A, Sec. 610. The court thereupon proceeds in a summary manner to determine the application. The applicant must show to the court, among other things, that he is a qualified person, that he has complied with various provisions of the act, that the application is not made by or on behalf of any insurer, and what amount, if any, he has received in payment of judgments recovered against any other person against whom he has a cause of action in respect to his damages for bodily injury or death arising out of the accident. N.J.S.A. 39:6-70 and N.Y. Insur. L., Art. 17-A, Sec. 611.

As might be expected. there are differences as well as similarities in the New York and New Jersey laws. In order to obtain reciprocity on a general level, however, the relief available need not be identical in every respect, and certainly the procedure for obtaining the relief can vary. As stated in the *Betz* case, *supra,* by Justice Proctor, speaking for the Court, at 330: "We do not imply that N.J.S.A. 39:6-62 requires complete identity of the foreign legislation with ours. Some points of difference may, and in all probability must, exist. Reciprocity does not require that the foreign law exactly parallel that of New Jersey." Of course, in each State a claimant must satisfy the particular requirements of the law under which his claim is made.

In accordance with the foregoing, the Unsatisfied Claim and Judgment Fund Board should recognize claims of New York citizens for bodily injury or death suffered in accidents occurring in New Jersey on or after January 1, 1959.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: THEODORE I. BOTTER
Deputy Attorney General

FEBRUARY 18, 1959

HONORABLE CARL HOLDERMAN
Commissioner of Labor and Industry
20 West Front Street
Trenton, New Jersey

FORMAL OPINION, 1959—No. 2

DEAR COMMISSIONER HOLDERMAN:

You have requested our opinion as to the legality of a proposed agreement under which agreement a builder would erect a structure to house the Department of Labor and Industry, and the State would lease and pay rent for the space for a suitable period of years. An option would be granted to the State empowering it, at stated intervals, to purchase the building during the life of the lease at a price in accordance with a sliding scale reflecting the depreciated value of the building and the fair market value at the time of purchase. In addition, the State, upon exercising the option, would pay a premium, determined at the time of, and included in, the agreement based upon the amount of total rental loss to the builder as a result of the exercise of the option.

In a recent opinion (Formal Opinion, 1957—No. 10, July 12, 1957) the Attorney General held that a "lease-purchase" agreement between the State and a private contractor for the construction of buildings to house State agencies would be improper. Under such an agreement the title to the property would remain in the contractor until the completion of all "rental" payments, whereupon it would vest automatically in the State. The proposed transaction was held not to constitute a true lease, but rather an installment purchase which violated the debt limitation provisions of Article VIII, Section II, paragraph 3 of the New Jersey Constitution in that the obligation to pay the "rent" constituted an indebtedness of the State, since the "rent" would not be compensation for the use of the structure but would constitute payments of the purchase price. See *McCutcheon* v. *State Building Authority,* 13 N.J. 46 (1953).

The proposed lease embraced by the plan you have questioned would not create a liability beyond the current annual rental obligation. See *Ambrozich* v. *City of Eveleth,* 200 Minn. 473, 274 N.W. 635, 112 A.L.R. 269 (Sup. Ct. 1937); *City of Los Angeles* v. *Offner,* 19 Cal. 2d 483, 122 P. 2d 14, 145 A.L.R. 1358 (Sup. Ct. 1942); *Dean* v. *Kuchel,* 35 Cal. 2d 444, 218 P. 2d 521 (Sup. Ct. 1950); *Jefferson School Township* v. *Jefferson Township School Building Co.,* 212 Ind. 542, 10 N.E. 2d 608 (Sup. Ct. 1937); 112 A.L.R. 278; cf. *Kelley* v. *Earle,* 325 Pa. 337, 190 A. 140 (Sup. Ct. 1937); *Walinske* v. *Detroit-Wayne Joint Bldg. Authority,* 325 Mich. 562, 39 N.W. 2d 73 (Sup. Ct. 1949); *Heberer* v. *Board of Com'rs. of Chaffee County,* 88 Colo. 159, 293 P. 349 (Sup. Ct. 1930); *Walla Walla* v. *Walla Walla Water Company,* 172 U.S. 1, 19, 19 S. Ct. 77, 43 L. Ed. 341, 349 (1898); 15 *McQuillin, Municipal Corporations* (3rd ed. 1950), 394. Many of the State's present leases are for longer than a one year duration. That such governmental leases are valid has been judicially determined. *McMahon* v. *City of Bayonne,* 10 N.J. Misc. 12, 15 (Sup. Ct. 1932); *Viracola* v. *Long Branch,* 1 N.J. Misc. 200 (Sup. Ct. 1923); *DeBow* v. *Lakewood Township,* 131 N.J.L. 291 (Sup. Ct. 1944). In the *McCutcheon* case, *supra,* Justice Jacobs, with whom former Justice Brennan joined in dissenting and discussing an issue not reached by the majority, stated at page 70:

> "* * * the State of New Jersey had for years prior to the 1947 Convention (during which time the same constitutional restraints against pledging the State's credit existed) entered into many long-term leases; though these leases were excuted without any specific law supported by referendum, there never had been any suggestion that their execution violated any constitutional provision." (Parenthesis added)

And see *Passaic* v. *Consolidated Police, etc. Pension Fund Commission,* 18 N.J. 137 (1955).

In the present case, the proposed agreement affords to the State the additional and important advantage of having the premises built to meet its specific needs.

Under the proposed agreement the State would be free at any time during the term of the lease to exercise or refrain from exercising its option to buy. If the option were exercised, the prior rental payments would afford no credit toward the purchase price which, in fact, would be the fair market value of the building. Thus, there would be no creation of a debt or liability which, under the Constitution, would require a referendum approval.

The remaining question is whether annual general appropriation acts such as the current one, P.L. 1958, c. 64, would authorize the payments contemplated by the proposed agreement. Subject to available funds in Account T11 entitled "Rents: Fees and building," payments could be made to meet current rental obligations imposed by the lease. The rental payments by the State would be made as consideration for the current use and enjoyment of the premises and in consideration for the option to purchase. "Where an option is contained in a lease of premises, payment of rent is applicable as consideration for the agreement to convey at the named price." *Patsourakos* v. *Kolioutos,* 132 N.J. Eq. 87, 90 (Ch. 1942), aff'd 133 Eq. 37 (E. & A. 1942). Such payments would be authorized by the annual general appropriation act since "rent" includes payments made in consideration for an option to purchase as well as for the current use and enjoyment of the premises. *McCormick* v. *Stephany,* 61 N.J. Eq. 208 (Ch. 1900), *Patsourakos* v. *Kolioutos, supra.* The premium payment

due upon the exercise of the option would not become a debt or liability of the State until the year that the option was exercised. The question whether there is or may be an available appropriation authorizing payment of the option premium may be deferred until the election to exercise the option is made.

For the reasons advanced, it is our opinion that the proposed agreement would be valid under the Constitution and statutes of this State.

Very truly yours,

DAVID D. FURMAN
Attorney General
By: MARTIN L. GREENBERG
Deputy Attorney General

MARCH 20, 1959

COL. JOSEPH D. RUTTER, *Superintendent*
Division of State Police
State Police Headquarters
West Trenton, New Jersey

FORMAL OPINION 1959—No. 3

DEAR COLONEL RUTTER:

We have been asked whether bank guards employed to protect the transportation of securities and money and to perform other similar functions require permits to carry firearms.

In Formal Opinion 1956—No. 17 we advised you that even a member of an organized police department must secure a permit to *purchase* a pistol or revolver. N.J.S. 2A:151-32. However, our law has a clear distinction between the requirement of a permit to purchase a pistol and the requirement of a permit to carry a pistol. N.J.S. 2A:151-32, *supra,* requires every person without exception to obtain a permit before purchasing a pistol or revolver. N.J.S. 2A:151-41 makes it a crime to carry a pistol, revolver or other firearm in any automobile or other vehicle or concealed on the person without first having obtained a permit pursuant to N.J.S. 2A:151-44. However, N.J.S. 2A:151-43 expressly exempts certain described persons from the reach of N.J.S. 2A:151-41. Subsection (k) extends this exemption to "any guard in the employ of any * * * banking * * * institution of this State * * *."

The provisions of N.J.S. 2A:151-47 do not alter the result. This section provides for the issuance of permits to carry firearms to banking institutions in blank to be used by "messenger, clerks or other employees or agents * * * while engaged in the performance of their respective duties." The distinction between messengers and clerks on the one hand and guards on the other is clear. N.J.S. 2A:151-47 implies that messengers, clerks and similar employees are not within the exception for guards provided by N.J.S. 2A:151-43(k) and would otherwise be within the reach of N.J.S. 2A:151-41.

In conclusion, it is our opinion that bank guards do not require permits to carry firearms even though they would require permits to purchase them.

Very truly yours,

DAVID D. FURMAN
Attorney General
By: WILLIAM L. BOYAN
Deputy Attorney General

MARCH 31, 1959

HONORABLE CARL HOLDERMAN
Department of Labor and Industry
20 West Front Street
Trenton, New Jersey

FORMAL OPINION 1959—No. 4

DEAR COMMISSIONER HOLDERMAN:

You have requested an opinion relating to your authority on behalf of the State of New Jersey to enter into an agreement with the Federal Government whereby the State, as an agent of the Federal Government, can disburse Federal funds to provide temporary unemployment benefits to certain eligible claimants in accordance with the terms of the Temporary Unemployment Compensation Act of 1958, P.L. 85-441; 72 Stat. 171.

This act, as originally adopted on June 4, 1958, provided a method whereby individuals who had exhausted their regular unemployment benefits under State and Federal programs could obtain further payments according to certain conditions, one of which was that payments could not be made under the program after April 1, 1959. Pursuant to the Federal Act, States were authorized to enter into agreements to act as agents for the Federal Government in order to make payments. The State of New Jersey, pursuant to P.L. 1958, c. 72, authorized you to enter into such an agreement with the Federal Secretary of Labor, acting for the Federal Government to carry out the program. This was done on June 24, 1958.

With the advent of April 1, 1959 Congress has passed and today, March 31, 1959, the President of the United States has signed into law H.R. 5640 which amends the Federal 1958 act to provide an extension of time to July 1, 1959, during which such temporary payments may be made, provided, for the purposes of examination here, that claimants have filed claims prior to April 1, 1959.

In light of the amendment to the Federal act and the expiration of the original agreement executed June 24, 1958 with the Secretary of Labor, you have asked whether you have authority, without further New Jersey legislative sanction, to enter into an additional agreement to permit New Jersey to continue to act as disbursing agent and to provide funds to persons eligible for temporary unemployment benefits.

It is our opinion that you can enter into such an agreement without any further legislative authority. P.L. 1958, c. 72, giving you original permission was prospective in nature and contained no cut-off date limiting the time during which any agreement that was made could be operative. That act was permissive in nature and merely referred to action taken under the Temporary Unemployment Compensation Act of 1958. That act has been amended only insofar as it relates to the time during which benefits may be paid to eligible persons. The substance dealing with the power of the Secretary of Labor to enter into agreements with States is not disturbed. It is clear that the amendment became incorporated in and part of the 1958 act: *General Investment Co.* v. *American Hide and Leather Co.,* 97 N.J. Eq. 214 (Ch. 1925), *modified on other grounds and aff'd,* 98 N.J. Eq. 326 (E. & A. 1925). Clear legislative intent evinced in congressional reports dictates this result. The New Jersey enabling legislation shows nothing to the contrary either expressly or impliedly.

Therefore, you may execute such an agreement on behalf of the State of New Jersey in accordance with the terms of the Temporary Unemployment Act of 1958, as amended, and, subject to the execution of the agreement with the Secretary of Labor, continue to disburse funds to eligible claimants until July 1, 1959.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: DAVID M. SATZ, JR.
Deputy Attorney General in Charge

APRIL 6, 1959

HONORABLE NED J. PARSEKIAN
Acting Director of Motor Vehicles
State House
Trenton, New Jersey

FORMAL OPINION 1959—No. 5

DEAR DIRECTOR:

We have been asked specifically whether a mechanic may drive an empty bus without having the license required by R.S. 39:3-10.1 from garage to repair point, from garage to storage point and back, or on test runs, and generally, whether a mechanic driving an empty bus under any conditions must have the special license.

The pertinent portions of R.S. 39:3-10.1 provide as follows:

> "No person shall drive any motor vehicle or trackless trolley with a capacity of more than six passengers and used for the transportation of passengers for hire, * * * unless specially licensed to do so by the director."

Statutes should be interpreted in accordance with the object sought to be achieved in relation to the evils and mischief sought to be remedied. *State* v. *Meinken,* 10 N.J. 348 (1952); *Lane* v. *Holderman,* 23 N.J. 304 (1956); *Leonard* v. *Werger,* 21 N.J. 539 (1956); and as an aid to interpretation, the courts will look at the history of a statute and its historical background. *Deaney* v. *Linen Thread Co.,* 19 N.J. 578 (1955).

The first general motor vehicle licensing statute was passed in this State in 1921. P.L. 1921, c. 208. No provision was made therein for the special licensing of bus drivers. In 1936 this act was amended to read as follows:

> "On and after January 1, 1937 no person under the age of 21 shall hereafter drive any motor vehicle * * * with a capacity of more than 6 passengers * * * unless specially licensed to do so * * *." P.L. 1936, c. 240.

The statement appended to Senate Bill #172 which resulted in the adoption of the above amendment provided:

> "The purpose of this law is to make safer the requirements for drivers applying to operate busses carrying more than six passengers on the highways of this State.

> "Its further purpose is to present evidence of previous experience and good moral character as a condition precedent to the issuance of a special motor vehicle bus driver's license. The law further sets out a requirement for a physical examination at least once a year and every time such driver's license certificate is renewed or expired.
>
> "This legislation is prompted by reason of the serious accidents occurring recently outside of the State that caused a large toll of lives, and by the desire to use every precaution to prevent busses being operated by persons who have not been given a thorough examination."

An examination of the 32d Annual Report of the Commissioner of Motor Vehicles made in 1937 which was the year the special licensing law first went into effect, discloses:

> "In addition to the regular examination, the Department conducts a different test for persons desirous of operating vehicles licensed for the transportation of passengers for hire. This special test includes a physical examination by a physician. Today, all men engaged in operating buses carry special licenses *thus assuring the public* that they possess a reasonable degree of physical fitness." (Emphasis supplied)

Thus, it appears that in enacting R.S. 39:3-10.1, the Legislature's purpose was to assure that the safety of persons who might become passengers for hire in buses would be entrusted to competent operators rather than to set higher standards for drivers of large vehicles.

The latter interpretation is hardly tenable when we consider that in 1953 an amendment (See P.L. 1953, c. 66) was made to R.S. 39:3-10.1 which sought to bring in for special licensing, in addition to bus drivers, the drivers of truck-tractor, semitrailer or any truck and trailer combination and that this amendment was repealed (See P.L. 1954, c. 12) some two months before the amendment was to go into effect.

> "Generally the rejection of an amendment indicates that the Legislature does not intend the bill include the provisions embodied in the rejected amendment." *Sutherland, Statutory Construction* §5015, at 506 (3d Ed. 1943).

The statute clearly provides that two conditions relative to a motor vehicle must exist before special licensing for driving such vehicle is necessary, i.e., (1) the vehicle must be one with a capacity of more than six persons, (2) the vehicle must be used for the transportation of passengers for hire. It is not necessary for the satisfaction of the latter condition in the statute that persons be physically present as passengers in the vehicle. In our opinion, a vehicle is used for the transportation of passengers for hire when the operator has a present intention to receive persons who may present themselves as passengers. The operator of a bus on a run for the purpose of carrying passengers must have a license required by R.S. 39:3-10.1 without regard to whether any passengers are actually present in the vehicle (which might be the factual situation, for example, at the very beginning or toward the very end of the run). For the statutory conditions requiring a license to be fulfilled it is not necessary that the run be a scheduled run so long as it is undertaken in expectation of obtaining passengers for hire.

In answer to your specific questions, it is our opinion that mechanics driving empty busses from a garage to a repair point, from a garage to a storage point and back, or on a test run need not possess special licenses pursuant to R.S. 39:3-10.1. However, the answer to your general question whether a mechanic driving an empty bus would ever require a license under R.S. 39:3-10.1 is that whenever a bus capable of carrying more than six passengers is being operated with the intention of receiving persons presenting themselves as passengers for hire the operator must have the license required by the statute.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: REMO M. CROCE
Deputy Attorney General

APRIL 14, 1959

STATE BOARD OF PROFESSIONAL ENGINEERS
AND LAND SURVEYORS
1100 Raymond Boulevard
Newark 2, New Jersey

FORMAL OPINION 1959—No. 6

GENTLEMEN:

You have requested our opinion as to whether the seal of a land surveyor must be attached to tax maps which are received by or filed with the Division of Taxation in the Department of the Treasury. We are informed by you that the Division of Taxation presently does not require such a seal upon any plans which are received by or filed with that Department. You question the propriety of that practice by the Division of Taxation in view of the provisions of *N.J.S.A.* 45:8-45 which generally requires, among other things, that plans and specifications involving land surveying filed with State agencies must have affixed thereto a seal of a professional land surveyor licensed pursuant to *N.J.S.A.* 45:8-27. You maintain that a tax map is a "plan" involving land surveying and must comply with the requirements of this section. We do not need to resolve the issue based upon a construction of this section. Other statutory requirements dealing in general with tax maps indicate that a seal of a licensed land surveyor is required on all such maps.

By the terms of *L.* 1913, *c.* 175 (*Acts Saved from Repeal, N.J.S.A.* 54:1-15(1) to (6)), every municipality was required to prepare an accurate map for the purposes of taxation. The then State Board of Equalization, now Division of Taxation, Department of Treasury, *L.* 1905, *c.* 67; *L.* 1915, *c.* 244; *L.* 1931, *c.* 336; *L.* 1944, *c.* 112; *Art.* IV, §1 (*N.J.S.A.* 52:27B-48); *L.* 1948, *c.* 92, §24 (*N.J.S.A.* 52:18A-24), had broad powers to supervise, review and approve the preparation of tax maps.

Acts Saved from Repeal, N.J.S.A. 54:1-15(6) provides:

> "The Board of Equalization of Taxes shall have full control over the preparation, maintenance and revision of all tax maps however prepared, and may prescribe such rules as will insure the periodical revision and provide for the safekeeping of original maps either in custody of the taxing district or by the county tax board as in any case may best serve the public convenience and insure the accuracy and safety of the maps, and the board may direct the furnishing of duplicates by blueprints or otherwise at the charge of the taxing district to assessors and taxing officials."

Duplicates of approved tax maps must be filed with the county clerk or recorder's office in the particular county involved. *L.* 1915, *c.* 122 (*Acts Saved from Repeal, N.J.S.A.* 54:1-15(7)).

To be considered *in pari materia* are the terms of *L.* 1953, *c.* 358, §2 (*N.J.S.A.* 46:23-9.2) which provides in part that:

> "No map required, or that may be required, by law to be filed with a county recording officer, or that may be presented to a county recording officer for filing, shall be received for filing by such officer unless it shall conform to the following:
>
> * * *
>
> "(m) There shall be endorsed thereon or attached thereto a certificate of a land surveyor, as follows:
>
> "I hereby certify that this map and the survey has been made under my immediate supervision, and complies with the laws of the State of New Jersey. * * *."

It is clear by these terms and by those of the statutory requirements for the preparation and filing of tax maps that the tax map filed with the Division of Taxation and with the County are one and the same. Therefore, it is our opinion that a certification of a licensed professional land surveyor, and, in turn, a seal accompanying such attestation (*N.J.S.A.* 45:8-36) must be affixed to such official tax maps.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: STEPHEN F. LICHTENSTEIN
Deputy Attorney General

APRIL 9, 1959

DR. KEMBLE WIDMER, *Chief*
Bureau of Geology and Topography
Division of Planning and Development
520 E. State Street
Trenton, New Jersey

FORMAL OPINION 1959—No. 7

DEAR DR. WIDMER:

You have requested our advice as to whether or not the State well drilling law may be enforced against persons constructing wells on Federal property. Laws of 1947, c. 377, N.J.S.A. 58:4A-5, et seq. This law provides that no person may serve as a well driller in New Jersey without being personally licensed (N.J.S.A. 58:4A-6) and empowers the Commissioner of Conservation and Economic Development to appoint an examining board of well drillers who in turn are authorized to issue licenses to qualified persons seeking to engage as well drillers. Additionally the act forbids the drilling of any well even by a licensed well driller unless a permit therefor has been first secured from the Division of Water Policy and Supply. N.J.S.A. 58:4A-14. Nothing in the act vests the Division with power to refuse a permit provided that application accompanied by a fee of $3.00 is properly made. While the act does empower the Department of Conservation and Economic Development to promulgate rules and regulations in furtherance of its general power and supervision over the natural resources in the State, no such rule or regulation has ever been adopted. N.J.S.A. 58:4A-5.

Proper disposition of this question requires an analysis of the nature of Federal property holdings within New Jersey. The Federal government may own property with either a legislative or proprietary jurisdiction. Legislative jurisdiction authorizes exercise of governmental control over the property. Except for a common proviso permitting service of process Federal legislative jurisdiction is usually exclusive and thereby precludes the State from exercising any co-extensive legislative jurisdiction. On the other hand, the Federal government may own property without accompanying legislative jurisdiction. Such proprietary ownership in itself vests the Federal government with no privileges beyond those possessed by private owners.

Federal legislative jurisdiction may be derived from three sources, one of which was contemplated by the Constitution and two of which have been recognized by the case law and statutory development. Article I, Section VIII, clause 17 of the Federal Constitution provides that Congress shall have the power to exercise exclusive legislative jurisdiction over "all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." Although this clause by enumeration of types of places for which legislative jurisdiction may be established could have been construed to forbid establishment of legislative jurisdiction for other uses, the cases relying on the term "needful Buildings" have generally held that it authorizes Congress to establish exclusive legislative jurisdiction for any lawful purpose involving a structure. *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937); *United States* v. *Tucker*, 122 Fed. 518, 522 (W.D. Ky. 1903) ("all structures and all places necessary for carrying on the business of the national government"); *Sharon* v. *Hill*, 24 Fed. 726 (C.C.D. Cal. 1885), *appeal dismissed*, 131 U.S. 438 (1888); *Ex Parte Tatem*, 23 Fed. Cas. 708, No. 13759 (E.D. Va. 1877); *Wills* v. *State*, 50 Tenn. (3 Heisk) 141 (1871). In addition, the Supreme Court of the United States has recognized that Federal legislative jurisdiction may be established by cession from the State to the Federal government or may be retained over Federal territory within a State being admitted to the union. *Fort Leavenworth R.R.* v. *Lowe*, 114 U.S. 525 (1885). Notwithstanding the seemingly mandatory requirement in Article I, Section VIII, clause 17 that Federal legislative jurisdiction be exclusive it may whether derived from consent, cession or reservation be partial or concurrent with jurisdiction retained by the State. *James* v. *Dravo Contracting Co.*, *supra*. Jurisdiction may be concurrent if the State consent or cession statute saves a reservation of jurisdiction or if since 1940 the Federal government chooses to accept less than complete jurisdiction. See 54 Stat. 19 (1940), *as amended*, 40 U.S.C. § 255 (1952), discussed *infra*.

As a result of two statutes most Federal land in New Jersey is under virtually exclusive legislative jurisdiction. Joint Resolution No. 6 adopted September 11, 1841, codified in Section 355 of the Federal Revised Statutes of 1877, required the Federal government to secure the consent of the State Legislature to the purchase of realty before the Federal government could spend money for the erection of public buildings on it. Such consent if unconditionally given vested exclusive legislative jurisdiction in the Federal government under Article I, Section VIII, clause 17. Though this act was amended in 1940 to make optional the establishment of such jurisdiction, 54 *Stat.* 19 (1940), *as amended*, 40 U.S.C. § 255 (1952), almost all Federal enclaves established during the intervening 99 years remain subject to exclusive Federal legislative jurisdiction. A list of 37 special statutes consenting to particular Federal acquisitions of land within New Jersey and ceding jurisdiction with exceptions relating only to service of process is found in a revisor's note following R.S. 52:30-1. From 1907 the State of New Jersey has by general statute and with the usual process reservation consented to the acquisition by the United States of land within this State "for the erection of dock-yards, customs houses, court houses, post offices or other needful buildings" acquired "pursuant to the provisions of Article I, Section VIII, paragraph 17 of the Constitution of the United States." Laws of 1907, c. 19; R.S. 52:30-1, et seq. Although this statute is *prima facie* rather narrow, *cf. United States* v. *Hopkins*, 26 Fed. Cas. 371, No. 15387A (C.C.D. Ga. 1830); but *cf. Ex Parte Tatem*, *supra*, it is in *pari materia* with the cited constitutional provision and was intended to implement it. See 2 *Sutherland, Statutory Construction*, § 5206 (3d ed. 1943). Since Article I, Section VIII, clause 17 had been construed long before 1907 to authorize the exercise of exclusive Federal legislative jurisdiction over any lands needed for any Federal structure, the New Jersey consent statute must be treated as similarly broad. *United States* v. *Tucker*, *supra*; *Sharon* v. *Hill*, *supra*; *Ex Parte Tatem*, *supra*; *Wills* v. *State*, *supra*. In addition, the title to the act, "An act ceding to the United States jurisdiction over lands acquired for public purposes within this State," supports this view. In cases of ambiguity in the body of a statute the title may be consulted in aid of construction. *Pancoast* v. *Director General*, 95 N.J.L. 428 (E. & A. 1921). Therefore, the century long Congressional requirement of securing State consent to establishment of Federal enclaves coupled with the New Jersey acquiescence in this policy resulted in the creation of virtually exclusive Federal jurisdiction over the numerous Federal properties acquired in New Jersey between 1841 and 1940. Since retrocession of jurisdiction has not been general these areas of exclusive jurisdiction have survived the repeal of the Resolution of 1841.

The abandonment in 1940 of the requirement of consent which had thereby resulted in establishment of exclusive Federal jurisdiction did, however, make possi-

ble a significant prospective change. Since 1940 the appropriate official in charge of each Federal agency has been given discretion "at such times as he may deem desirable" to secure partial or complete legislative jurisdiction over lands subject to his control. 54 Stat. 19 (1940), *as amended*, 40 U.S.C. § 255 (1952). But unless formal notice of acceptance of jurisdiction is given the proper State officer it is "conclusively presumed that no such jurisdiction has been accepted." *Ibid.* In fact, since the Federal administrative policy since 1940 has been not to secure legislative jurisdiction, most Federal enclaves established or expanded within the last eighteen years are not subject to Federal legislative jurisdiction.

While it is not possible to detail within this opinion the jurisdictional status of all Federal property in New Jersey, nonetheless since your question particularly concerned Lakehurst Naval Air Station the status of that installation will be given. Lakehurst was initially a site of approximately 1,450 acres purchased by the Federal government in 1926 and 1929. While there is no specific New Jersey statute consenting to this purchase, it was clearly within the general act of 1907. Hence under Article I, Section VIII, clause 17 the Federal government has exclusive jurisdiction over this land except for the statutory reservation pertaining to service of process. See 38 *Opinions of Attorneys General (United States)* 185 (1935). But in 1942 and 1944 Lakehurst was expanded by the acquisition of two tracts of 5,838.12 and 5,076 acres, respectively. We understand that notwithstanding the New Jersey Act of 1907 the Federal government has never accepted jurisdiction over these lands. Accordingly these two tracts are held in a mere proprietary capacity.

Land within a State subject to exclusive Federal legislative jurisdiction is withdrawn from the operation of *subsequently* enacted State laws. *Pacific Coast Dairy, Inc.* v. *Department of Agriculture*, 318 U.S. 285 (1943). Therefore absent an appropriate reservation in the grant of jurisdiction, State laws requiring licenses are ineffective within previously established Federal enclaves. *Collins* v. *Yosemite Park and Curry Co.*, 304 U.S. 518 (1938); *cf. In re Ladd*, 74 Fed. 31 (C.C.D. Neb. 1898). Under these decisions it is clear that the well drilling law at its enactment in 1947 could not apply in Federally owned areas in New Jersey subject to exclusive Federal legislative jurisdiction. However, slightly different considerations apply to areas which become subject to exclusive Federal legislative jurisdiction after 1947. International law has long provided that when one sovereign takes legislative jurisdiction from another, local statutory law not inconsistent with the public policy of the successor sovereign is continued in force notwithstanding the change in sovereignty. *Chicago, Rock Island and Pacific Ry.* v. *McGlinn*, 114 U.S. 542, 546 (1885). Therefore, it is *prima facie* possible to apply the well drilling law in areas becoming subject to exclusive Federal legislative jurisdiction subsequent to its adoption. However, to this general rule of international law there is an applicable exception; State law contemplating administrative action is not retained in an area when sovereignty is transferred. *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94 (1940). As above noted the well drilling act requires administrative action in two ways: (1) the issuance of a license qualifying a would-be well driller; (2) the issuance of a permit for each well to be drilled. Under these circumstances the well drilling law cannot as a matter of sovereign prerogative be enforced in areas of Federal legislative jurisdiction even though established after 1947. See also *In re Ladd*, 74 Fed. 31 (C.C.D. Neb. 1896) (Nebraska statute requiring that persons dispensing liquor be licensed cannot be enforced on an area becoming subject to exclusive jurisdiction subsequent to the enactment of the licensing law).

We do not believe that the provisions of the Federal Assimilative Crimes Act of 1948 require a result different from that above reached. 18 U.S.C. § 13 (1952). That act provides that if any person in any Federal enclave "is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment." At most the Assimilative Crimes Act would render persons failing to secure licenses and permits liable to Federal punishment. But even if the failure to secure a license or permit is a Federal crime, nothing in the act authorizes State authorities to themselves enforce State law on Federal reservations. *Crater Lake Nat'l Park Co.* v. *Oregon Liquor Control Comm'n*, 26 F. Supp. 363 (D. Ore. 1939); *Johnson* v. *Yellow Cab Transit Co.*, 137 F. 2d 274, 278 (10th Cir. 1943) (concurring opinion), *aff'd*, 321 U.S. 383 (1944). Additionally, it is extremely doubtful that the act is intended to assimilate crimes involving violation of regulatory statutes. See *Johnson* v. *Yellow Cab Transit Co.*, 321 U.S. 383, 390-91 (1944). Finally it should be noted that violations of the State Well Drilling Law are dealt with in penalty actions. N.J.S.A. 54:4A-24. Since such actions are civil rather than criminal they probably are not within the scope of 18 U.S.C. § 13 (1952). See *Sawran* v. *Lennon*, 19 N.J. 606, 612 (1955).

The recent case of *Mississippi River Fuel Corp.* v. *Fontenot*, 234 F. 2d 898 (5th Cir. 1956), *cert. denied*, 352 U.S. 916, suggests that the above rules of sovereign claims and tolerances may be superseded by simple contract law. The Court of Appeals there approved the imposition of a State tax upon the severance of gas and oil from an area subject to exclusive Federal legislative jurisdiction. Its theory was that the lessee by contract with the Federal government obliged himself to obey local laws and payment of taxes was contemplated by this contractual obligation. In this sense the State law was enforced not as a matter of sovereignty but rather because the State was a third party beneficiary to the contract between the Federal government and its contractor. Similarly, if in New Jersey the Federal government by its contracts with the well drillers provides that the drillers abide by local law, the State as a third party beneficiary of these contracts may require the well drillers to secure licenses and permits under the act. The requirement could be enforced in a civil action. While we are not cognizant of whether such agreements are now extracted by the Federal government since it is a beneficiary of the information compiled pursuant to the well drilling law, it might be induced to require its contractors to secure licenses and permits. In any event this contractual means of enforcement of the well drilling law should not be overlooked.

The State Well Drilling Law may be enforced against contractors employed by the Federal government on land held in a solely proprietary sense. It is well established that persons doing business with the Federal government can be required to comply with nondiscriminatory State regulations so long as such compliance only incidentally affects the Federal government. Hence, minimum price regulations for the sale of milk can be enforced against a dealer selling to the Federal government in an area not under exclusive Federal legislative jurisdiction. *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U.S. 261 (1943); *cf. United States* v. *Detroit*, 78 S. Ct. 474 (1958). Since the well drilling act merely requires a well driller to be licensed and provides for the ministerial issuance of well drilling permits, it can in no sense be deemed to directly limit the Federal government. Under these circumstances the

act as now written may be enforced in any area not subject to the exclusive Federal legislative jurisdiction. It should be noted, however, that in view of Article IV, Section 3, clause 2 and Article VI, clause 2 of the Federal Constitution serious problems would be raised if regulations are promulgated which limit drilling in certain areas. Article IV, section 3, clause 2 provides:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

Article VI, clause 2 provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The cases under these sections establish that Federal use of Federal property may not be regulated by the State and that the Federal government is generally free from State control. *Utah Power and Light Co.* v. *United States*, 243 U.S. 389, 403-05 (1917); *Hunt* v. *United States*, 278 U.S. 96 (1928). *M'Cullough* v. *Maryland*, 17 U.S. (4 Wheat) 316 (1819); *United States* v. *Chester*, 144 F. 2d 415 (3rd Cir. 1944).

In summary, therefore, it appears that the State Well Drilling Law can be enforced on Federal property in New Jersey to the extent outlined above. Specifically contractual drillers at Lakehurst are subject to the act only if drilling on those areas of the base added after 1940. Only in cases in which the contractor is drilling on property held in a proprietary sense or has agreed to abide by local law can a license or permit be required. While the distinctions made here may seem to make the act difficult to administer, this may be ameliorated either by procuring an agreement from the Federal government that they will require contractors to get licenses and permits or by promulgating a regulation excluding all Federal property. N.J.S.A. 58:4A-5.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: MORTON I. GREENBERG
Deputy Attorney General

JANUARY 22, 1959

MR. JOHN F. CRANE
Deputy State Treasurer
Department of the Treasury
Division of Taxation
State House Annex
Trenton, New Jersey

FORMAL OPINION 1959—No. 8

DEAR SIR:

You have requested an opinion whether a veteran is entitled to a full $500.00 exemption from the assessed value of his real and personal property, as authorized by the *1947 New Jersey Constitution, Article* VIII, *Section* 1, *paragraph* 3, in addition to the $100.00 exemption provided by statute from the assessed value of household furniture and effects, *L.* 1950, *c.* 185; *N.J.S.A.* 54:4-3.16, or whether the amount of the veterans' exemption must be reduced by the amount of the household goods exemption, where the latter is claimed.

The pertinent section of *Article* VIII, *Section* 1, *paragraph* 3 of the *1947 Constitution* provides:

> "3. Any citizen and resident of this State now or hereafter honorably discharged or released under honorable circumstances from active service, in time of war or of other emergency as, from time to time, defined by the Legislature, in any branch of the Armed Forces of the United States shall be exempt from taxation on real and personal property *to an aggregate assessed valuation not exceeding five hundred dollars ($500.00)*, which exemption shall not be altered or repealed. * * *" (Emphasis ours).

This provision was implemented by the enactment of *L.* 1951, *c.* 184, *secs.* 2 and 8 (*N.J.S.A.* 54:4-3.12(j) and (p)). The statutes contain the same language as the constitutional provision specifically relating to those resident citizens who are honorably discharged veterans of the Armed Forces of the United States, and reiterate that the exemption therein provided on the assessed valuation of real and personal property should not exceed $500.00 in the aggregate. Your precise question is whether the constitutional phrase "to an aggregate assessed valuation not exceeding five hundred dollars ($500.00)," limits the total tax exemption that a veteran may claim to $500.00, inclusive of the household furniture and effects exemption.

N.J.S.A. 54:4-3.16 provides:

> "Household furniture and effects to a value not exceeding one hundred dollars ($100.00) in amount, when located and used in the residence of the owner thereof, shall be exempt from taxation under this chapter; *provided,* such owner shall be the head of the family and the said household furniture and effects shall be used by such family. Where one residence is occupied by more than one owner of household furniture and effects, not more than one exemption under this section shall be allowed but the amount of each single exemption may be apportioned among the several owners if such an apportionment is requested by the said several owners."

Comparison of this provision with the constitutional provision and supplementing statutes establishing the veterans' exemption illustrates a substantial distinction with regard to the nature of the exemptions granted. The exemption to veterans is based upon the status of the claimant. It was held in *Tippett* v. *McGrath*, 70 *N.J.L.* 110 (*Sup. Ct.* 1903), affirmed *o.b.*, 71 *N.J.L.* 338 (*E. & A.* 1904) that a tax exemption dependent upon the personal qualifications of the property owner must be authorized by the Constitution. Although that case involved exemptions to firemen, its applicability to veterans' exemptions is clear. See *N.J. Turnpike Authority* v. *Washington Tp.*, 16 *N.J.* 38, 44-45 (1954). The household furniture and effects exemption, however, is based solely upon the status of the property. It is well established that the Legislature, with regard to exemptions based upon the status of the property as opposed to those involving qualifications of the claimant, may provide for exemptions among particular classifications of property where there is a reasonable basis for such treatment. *Schwartz* v. *Essex County Board of Taxation*, 129 *N.J.L.* 129, 132-134 (*Sup. Ct.* 1942), affirmed 130 *N.J.L.* 177 (*E. & A.* 1943); *General Electric Co. and Division of Tax Appeals* v. *City of Passaic* (decided December 22, 1958, not yet officially reported). See *Black, Taxation in New Jersey*, §233, p. 364 (5th ed. 1940).

The constitutional exemption given to veterans by virtue of their status as such must be treated as distinct from the legislative exemption allowed for houshold furniture to heads of families. Thus, the constitutional and statutory limitations upon veterans that no more than $500 "in the aggregate" be allowed for personal and real property, do not apply to the legislative exemption for houshold furniture which is enjoyed by both veterans and non-veterans.

A constitutional provision for veterans' exemption must be construed to give full effect to the purpose of the enactment "which is to minimize the burden of taxation upon those persons who honorably served our country * * *." *Sherman* v. *Quinn*, 31 Cal. 2d 661, 192 *P. 2d* 17 (*Sup. Ct.* 1948); *Flaska* v. *State*, 51 N.M. 15, 177 *P. 2d* 174 (*Sup. Ct.* 1946). In determining the full effect of the exemption the guide is the intent of the voters adopting it. *Flaska* v. *State, supra.* See *Annotation*, 149 A.L.R. 1485 (1944). Cf. *Teaneck Tp.* v. *Lutheran Bible Institute*, 20 N.J. 86, 90 (1955); *General Electric Co. and Division of Tax Appeals* v. *City of Passaic, supra*, dealing with the doctrine that laws granting exemptions must be strictly construed.

The constitutional provision embracing the phrase "in the aggregate" was intended to mean that the total veterans' exemption on both real and personal property wherever located, i.e., in more than one taxing district, was to be $500.00. There is no basis for implying that the term was intended to affect in any way the $100.00 exemption on household furniture and effects provided by the Legislature. The latter is based strictly on classification of the property.

It is our opinion, therefore, that the $500.00 exemption provided by *Article* VIII, *Section* 1, *paragraph* 3 of the *1947 New Jersey Constitution* is in addition to the exemption provided by N.J.S.A. 54:4-3.16.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: STEPHEN F. LICHTENSTEIN
Deputy Attorney General

MAY 29, 1959

HON. GEORGE PFAUS
Acting Commissioner of Labor and Industry
20 West Front Street
Trenton, New Jersey

FORMAL OPINION 1959—No. 9

DEAR COMMISSIONER:

You have sought our opinion as to whether taxed costs owing to the Department of Labor and Industry pursuant to R.S. 34:11-67 may be written off for accounting purposes when they have proven uncollectible.

Such an administrative practice has been questioned on the grounds that the New Jersey Constitution, *Art.* VIII, Section 3, paragraph 3 would be derogated. This paragraph states that:

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

You are careful to distinguish this proposal of recognized accounting practice from the actual cancellation of a debt due to the State. Without passing upon the constitutionality of the ability to cancel a debt, *see In re Voorhees*, 123 N.J. Eq. 142 (Prerog. Ct. 1938); *Wilentz* v. *Hendrickson*, 133 N.J. Eq. 447 (Ch. 1943), aff'd 135 N.J. Eq. 244 (E. & A. 1944); *In re Wellhofer*, 137 N.J.L. 165 (S. Ct. 1948); *State* v. *Erie Railroad Co.*, 23 N.J. Misc. 203 (Sup. Ct. 1945), it is our opinion that you are authorized to treat a debt as uncollectible for accounting purposes. The State's claim would not be extinguished nor its rights impaired. Debts due the State in the form of taxed costs rendered in wage collection proceedings pursuant to N.J.S.A. 34:11-67 remain outstanding as a matter of record against the judgment debtor. Such a technique is an accepted accounting procedure necessary for accurate valuation of receivables. *Kester, Principles of Accounting*, 553 (1939). Subject to the uniform system of accounting authorized by the Treasurer pursuant to R.S. 52:27B-33, you may, therefore, write off for accounting purposes those taxed costs due pursuant to R.S. 34:11-67 which in your sound judgment are uncollectible.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: DAVID M. SATZ, JR.
Deputy Attorney General in Charge

MAY 29, 1959

HON. JOSEPH E. CLAYTON
Assistant Commissioner of Education
175 West State Street
Trenton, New Jersey

FORMAL OPINION 1959—No. 10

DEAR COMMISSIONER:

You have requested our opinion as to the validity of a so-called "personnel ordinance" of a municipality insofar as it purports to apply to the board of trustees of the free public library of that municipality. The question arises because of the apparent conflict between such an ordinance and N.J.S.A. 40:54-12, which among other things authorizes the board of library trustees to "hire librarians, and other necessary personnel, and fix their compensation."

Ordinances of the type in question may include substantially the following provisions:

1. The governing body shall establish an employment policy relating to all municipal government operations, and shall approve the creation of any new position.
2. A new position cannot be filled by any municipal department without prior authorization from the governing body, which must also provide in its budget a specific amount for the compensation of each new appointee.
3. Vacancies in positions are to be filled by the governing body by selection from a list of applicants, such list in some cases being compiled by a central personnel office.
4. All positions in the municipal service shall be classified according to duties and responsibilities, with a view to establishing similar requirements as to training and experience and similar rates of compensation with respect to positions in each class.
5. Schedules of annual or hourly rates of compensation are prescribed for the respective classes of positions.
6. Schedules are also prescribed to govern hours of work, attendance requirements and their enforcement, and similar matters. The schedules may either be established by the governing body or by a personnel office.
7. Rights to and the extent of vacation leave, sickleave, and special leave are set forth on a uniform basis.
8. Promotions and dismissals must be approved by the governing body or by a personnel office.
9. Retirement policies and procedures are established, including provisions for an optional and for a mandatory retirement age.
10. In some cases, grievance procedures are provided for, with jurisdiction being given to a personnel office to adjudicate the matter.

Provisions such as the foregoing may presumably be adopted pursuant to N.J.S.A. 40:48-1 and 40:48-2, which together authorize the governing body of every municipality to make ordinances which "prescribe and define, except as otherwise provided

by law, the duties and terms of office or employment, of all officers and employees; and to provide for the employment and compensation of such officials and employees, in addition to those provided for by statute, as may be deemed necessary for the efficient conduct of the affairs of the municipality," and to make such other ordinances "not contrary to the laws of this State or of the United States, as it may deem necessary and proper * * * to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law."

Our opinion, in brief, is that the library trustees and the governing body of the municipality each have certain prerogatives vested in them respectively by statute, that these should be reconciled and given effect as far as possible; but that those sections of the ordinance which plainly conflict with the powers granted to the library trustees expressly or by fair implication must be ruled invalid so far as library personnel are concerned. It is well settled that to the extent an ordinance conflicts with the mandate of the State Legislature, it is of no effect. N.J.S.A. 40:48-2; *Strauss* v. *Bradley Beach,* 117 N.J.L. 45, 46 (Sup. Ct. 1936), *aff'd* 118 N.J.L. 561; *Pennsylvania R. R. Co.* v. *Jersey City,* 84 N.J.L. 716 (E. & A. 1913); *Hertz Washmobile System* v. *South Orange,* 41 N.J. Super. 110 (Law Div. 1956).

N.J.S.A. 40:54-1, et seq. provides for the establishment of a free public library within the corporate limits of any municipality by a referendum vote of the people. Section 40:54-11 provides that the board of trustees "shall be a body corporate," with corporate powers of succession and to sue and be sued. Appointments are made by the mayor or other chief executive of the municipality, N.J.S.A. 40:54-9. Section 40:54-12 reads, so far as here pertinent, as follows:

> "The board shall hold in trust and manage all property of the library. It may rent rooms, or, when proper, construct buildings for the use of the library, purchase books, pamphlets, documents, papers and other reading matter, hire librarians, and other necessary personnel, and fix their compensation, make proper rules and regulations for the government of the library, and generally do all things necessary and proper for the establishment and maintenance of the free public library in the municipality."

Tax support for the library is provided by N.J.S.A. 40:54-8, which requires the governing body of every municipality governed by this statute to appropriate annually and raise by taxation a sum equal to one-third of a mill on every dollar of assessable property within such municipality; and the section further authorizes the governing body to appropriate and raise by taxation annually such additional sum as in its judgment is necessary for the proper maintenance of the library. The trustees have the power to hold and manage any devise, bequest or donation for the establishment or maintenance of the library (N.J.S.A. 40:54-19), and to accept gifts and bequests of paintings and other art objects (N.J.S.A. 40:54-20); but where gifts are made for the purpose of building a library, they must be accepted by the governing body, which thereafter must raise annually by taxation such amount as may be required by the condition of the gift for the support and use of the library (N.J.S.A. 40:54-21). Any gift accepted by the governing body for library purposes shall be expended by and under the direction of the library board of trustees, in the same manner as other funds are expended by such board (N.J.S.A. 40:54-22).

The foregoing sections of the law indicate a general scheme under which a free public library shall receive its financial support partly by mandatory taxation and partly through the exercise of discretion by the governing body, and that once such

funds have been obtained for library purposes, their expenditure is a matter resting solely with the trustees. The evident legislative intent was to give the library trustees a large measure of autonomy and independence, in a manner somewhat analogous to the independent status given chapter 7 school districts under N.J.S.A. Title 18. By express mandate of the statute, the custody and control of the library, its property and its funds are vested in the trustees; they are specifically authorized to hire librarians and other personnel and to fix their compensation; and they are given all the incidental powers necessary and proper to the exercise of the duties specifically imposed upon them. By implication, the statute plainly excludes any interference by the municipal governing body with the exercise of the powers granted to the trustees.

On the other hand, our courts have placed limitations upon this seemingly autonomous statutory power. In *Newark Library Trustees* v. *Civil Service Commission*, 86 N.J.L. 307 (E. & A. 1914) the court held that the employees of the free public library of the city of Newark were "in the paid service of the municipality," and that since the city had accepted the provisions of the Civil Service Act, the library employees were subject to the provisions of that act and could accordingly be classified by the Civil Service Commission. More recently, the Supreme Court held in *Glick* v. *Trustees of Free Public Library*, 2 N.J. 579 (1949) that the free public library of Newark was "an agency of the municipality notwithstanding its incorporation as a body politic," so that it was embraced within the provision of N.J.S.A. 40:50-1 forbidding a "municipality" from entering into a contract of the class specified unless competitive bidding procedures had been followed. The opinion of the court, rendered by Mr. Justice Heher, noted that "it would be contrary to the plain policy of the statute to hold that the central government is bound by the provision for competitive bidding but the library board is not merely because, for the purpose of convenience in administration, it has been given a corporate status." (2 N.J. at p. 584). In reviewing the legislative and judicial authority it was stated at page 583 that:

> "* * * the old Supreme Court ruled that the Trustees form 'a branch or a board of the municipal government, * * * to manage educational matters for the benefit of the whole community,' and not an 'independent entity,' and, while given a corporate existence 'for * * * convenience and for the purposes of * * * administration,' the corporate body is yet 'a mere branch or agency for that special purpose.' The Court of Errors and Appeals found it sufficient to rest affirmance of the particular judgment on the narrower ground that the employees of the Library are 'in the paid service of the municipality,' and therefore subject to the provisions of the Civil Service Act. *Trustees of Free Public Library of Newark* v. *Civil Service Commission*, 83 N.J.L. 196 (Sup. Ct. 1912); affirmed, 86 N.J.L. 307 (E. & A. 1914).
>
> "There is no need to delineate the statutory scheme. It suffices to say that the function delegated to the library management is local and municipal in legislative concept; the instrumentality is an adjunct of the local government in the field of education and intellectual recreation, and under its control. It is the municipality that is empowered to 'establish a free public library within its corporate limits.' R.S. 40:54-1. There is provision for a referendum. R.S. 40:54-2 et seq. The cost of operation is borne by local taxation; and the money is appropriated by the local governing body or appropriate board. R.S. 40:54-8. The trustees are appointed by the mayor or chief executive; and the mayor and one of the local superintendents of schools or the supervising principal are made members of the board. R.S. 40:54-9. Library funds are deposited in the municipal treasury, and drawn upon by municipal officers on the vouchers of the trustees. R.S. 40:54-18. And, as we have seen, the library employees are in the paid service of the municipality. It is an agency of the municipality notwithstanding its incorporation as a body politic. That in itself does not give rise to a relationship radically different in character from that which would otherwise exist. It is that substance and not the form of the creation that is the key to the legislative design. * * *"

We are thus presented with the problem of pinpointing the fine line which limits the autonomy given by the Legislature to the library trustees. Some light is shed on the problem by the recent decision of Judge Kolovsky in *Grosso* v. *City of Paterson and Board of Health of the City of Paterson*,—N.J. Super.—(Law Div. 1959), which involved a statute (N.J.S.A. 26:3-19) giving to local boards of health the power to "employ such personnel as it may deem necessary * * * to carry into effect the powers vested in it" and to "fix the duties and compesation of every appointee." The court held that even though the municipality determines the amount of moneys to be appropriated to the local board of health (N.J.S.A. 26:3-43), the former has no power to intrude upon the prerogative of the local board in appointing its agents and employees and fixing their compensation, nor could the municipal governing body veto salaries fixed by ordinance of the board of health.

In the light of the statutes and the decisions above cited, we believe the situation under discussion is governed by the general principle that the municipality cannot enforce in respect to the library any provision of the ordinance which attempts to detract from the statutory power of the trustees to hire employees, fix their compensation, and make personnel rules and regulations peculiarly needed for or appropriate to the maintenance of a free public library.

We find it significant that the foregoing view is consistent with constructions given to the law for many years by the Attorney General and the Director of Local Government, as well as by the former Public Library Commission. For example, Attorney General Wilentz, by an opinion to the State Librarian dated June 16, 1942, ruled that the library law places the hiring of librarians and other necessary servants and the fixing of their compensation in the hands of the board of trustees, who were thus authorized by section 40:54-12 to select a librarian and other necessary personnel. On November 1, 1951, in a letter to the Division of the State Library, the Director of Local Government advised that in municipal budgets it was not required that the appropriation for the maintenance of a free public library be subdivided into (a) salaries and wages, and (b) other expenses; the appropriation for the library is a line item in a given amount. On December 5, 1951, the Director of Local Government further advised the Division of the State Library that the moneys raised for the library trustees are expended at their discretion, and that so long as they are properly used for library purposes, the governing body of a municipality has no jurisdiction over the matter. On November 29, 1944, the Attorney General advised the State Librarian that the library trustees had the authority to allow one or more of the employees of the library to attend meetings or conferences and to pay their expenses, and that in matters of this kind "much must be left to the judgment of the trustees."

A construction of a statute indulged in for many years by those charged with its administration and interpretation is entitled to great weight. *State* v. *Clark*, 15

N.J. 334 (1954); *Burlington Co.* v. *Martin*, 129 N.J.L. 92, 93 (E. & A. 1942). We find no reason for departing from the opinions just enumerated.

The board of library trustees and the governing body of the municipality are public officials serving the same group of citizens, and the spirit of the law calls for the closest cooperation between them, with the trustees adopting different policies and practices only to the extent that these are specially needed for the maintenance of the library committed to their charge.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

JUNE 19, 1959

HON. SALVATORE A. BONTEMPO, *Commissioner*
Department of Conservation and
Economic Development
205 West State Street
Trenton, New Jersey

FORMAL OPINION 1959—No. 11

DEAR COMMISSIONER BONTEMPO:

You have requested our opinion as to whether a "Meadowlands Regional Development Agency" may be created to reclaim and develop the New Jersey meadowlands and if so, whether a municipality which has authorized its local housing authority to proceed with the redevelopment of blighted areas may participate in the creation of the Agency. Although the meadowlands embrace areas along the Arthur Kill, Newark Bay and Hackensack River in the Counties of Union, Essex, Hudson and Bergen, we understand that it is contemplated that the agency will function only in fourteen municipalities in the latter two counties. There are approximately 14,500 acres of meadowlands in these municipalities. It is our opinion that both questions require affirmative answers.

The Redevelopment Agencies Law, Laws of 1949, c. 306, N.J.S.A. 40:55C-1 et seq., provides that the governing body of any municipality may create a redevelopment agency, a body corporate and politic, which shall be an instrumentality of the creating municipality. The law further authorizes two or more municipalities to create a regional development agency which shall be a body corporate and politic and deemed the instrumentality of all the municipalities joining in its creation. N.J.S.A. 40:55C-6. While the law carefully distinguishes in the creation and concept of redevelopment and regional development agencies, they are vested with identical substantive powers. N.J.S.A. 40:55C-12 confers general and specific powers to all agencies created by this act. Therefore, a regional agency possesses the same authority as a municipal agency.

Under the law an agency may propose a redevelopment plan which upon proper approval by the municipality or municipalities in which the redevelopment is to take

place, may be effectuated. Redevelopment includes development. N.J.S.A. 40:55C-5. Though a finding that an area is blighted need not be made prior to the organization of an agency no municipality or municipalities may approve a redevelopment plan until it determines that the area embraced by the plan is "blighted" as defined in the Redevelopment Agencies Law. N.J.S.A. 40:55C-17.

Thus our inquiry is whether the meadowlands are a blighted area within the law. N.J.S.A. 40:55C-3 provides in part:

> "The term 'blighted area' is defined to be that portion of a municipality which by reason of, or because of, any of the conditions hereinafter enumerated is found and determined as provided by law to be a social or economic liability to such municipality:
>
> * * *
>
> "(c) Unimproved vacant land, which has remained so for a period of ten years prior to the determination hereinafter referred to, and which land by reason of its location, or remoteness from developed sections or portions of such municipality, or lack of means of access to such other parts thereof, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital;
>
> * * *
>
> "(e) A growing or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein and other conditions, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare."

The above sections fairly describe the condition of the meadowlands. The meadowlands are largely unimproved and vacant, and owing to low elevation, flat topography and tidal intrusion are marshy and thus of limited value in their current condition. Notwithstanding the increasing industrialization of our State with its concomitant expanding population, the meadowlands have not been developed through private capital. Further it is frequently difficult to ascertain ownership of property within the area. Indeed the former Court of Chancery once remarked: "As every Newark lawyer knows, meadow land titles present great difficulties." *Yara Engineering Corp.* v. *Newark*, 136 N.J. Eq. 453, 457 (Ch. 1945). Inasmuch as the meadowlands are blighted as defined in the act the agency may be lawfully created and authorized to reclaim and develop the meadowlands. This conclusion is supported by reference to the declaration of policy in the Redevelopment Agencies Law which speaks of blighted areas as arising from unsanitary buildings, inadequate planning and deleterious land use. N.J.S.A. 40:55C-2. Certainly the existence of a large tract of undeveloped land in close proximity to the City of New York and the northern New Jersey industrial complex is evidence of inadequate planning and deleterious land usage. Development of land to attract tax producing private enterprises is a favored public objective. *New Jersey Turnpike Authority* v. *Township of Washington*, 16 N.J. 38 (1954).

Of course nothing in the Redevelopment Agencies Law requires that a single plan for development of the entire meadowlands be adopted or that every municipality

participating in a regional development agency approve each redevelopment plan of the agency. To the contrary N.J.S.A. 40:55C-17 provides:

> "No agency shall proceed with a redevelopment plan unless: (a) the municipality has first determined that the area to which said plan refers is blighted, which determination shall be made by the governing body of said municipality as provided by chapter one hundred eighty-seven of the laws of one thousand nine hundred and forty-nine; and (b) the governing body of the municipality has first, by ordinance, approved a redevelopment plan after study and recommendation of its planning board, if any, and finds that said plan provides an outline for the replanning, development or redevelopment of said area sufficient to indicate: (1) its relationship to definite local objectives as to appropriate land uses, density of population and improved traffic, public transportation, public utilities, recreational and community facilities and other public improvements; (2) proposed land uses and building requirements in the area; (3) provision for the temporary and permanent relocation of persons living in such areas; by arranging for (unless already available) decent, safe and sanitary dwelling units at rents within the means of the persons displaced from said areas."

We are satisfied from the foregoing that the Legislature intended that the approval of a municipality participating in a regional development agency need be secured only when a particular plan of the agency contemplates development within that municipality. *Cf. Wilson* v. *Long Branch,* 27 N.J. 360 (1958), *cert. denied,* 358 U.S. 873 (1958). We do not believe that the Legislature would empower a municipality to make a determination that lands within other municipalities are blighted.

The answer to your second question is that municipalities which have authorized their local housing authorities to redevelop blighted areas are not foreclosed from participation in the creation of a regional development agency. N.J.S.A. 40:55C-9 provides:

> "No municipality shall create a redevelopment agency under this act if it has authorized the local housing authority to proceed with the redevelopment of blighted areas pursuant to existing law. L. 1949, c. 306, p. 982, par. 9."

There is a valid policy reason for refusing to read the words "regional development agency" into N.J.S.A. 40:55C-9. The obvious design of this section is to prohibit duplication of operation by two governmental authorities in overcoming a particular blight. The Legislature apparently felt that no municipality should have independent overlapping instrumentalities proceeding with intra-municipal redevelopment. See N.J.S.A. 55:14A-35. (No municipality with a redevelopment agency shall authorize a housing authority to carry out a redevelopment project). Since regional development agencies are by definition concerned with inter-municipal problems, creation of such an agency would not duplicate the efforts of a local housing authority already authorized to proceed with a redevelopment plan.

Moreover, N.J.S.A. 40:55C-9 merely forbids creation of a "redevelopment" agency. As already noted the distinction between redevelopment and regional development agencies is entirely clear; thus the above section may not be construed to include the latter. It should be noted that in describing the powers created by the law the Legislature elsewhere used the naked word "agency," without modification.

Indeed in view of the fact that "agency" is defined to "mean a redevelopment agency or a regional development agency created pursuant to this act" express inclusion of the modifying words precludes implied enlargement of this category. *Gangemi* v. *Berry,* 25 N.J. 1 (1957). N.J.S.A. 40:55C-5(a).

In conclusion, therefore, we are of the opinion that a Meadowlands Regional Development Agency may be created to develop the meadowlands and that municipalities which have heretofore authorized their local housing authorities pursuant to N.J.S.A. 55:14A-31 et seq. to redevelop blighted areas may participate in the creation of such an agency.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: MORTON I. GREENBERG
Deputy Attorney General

JUNE 19, 1959

HON. JOHN W. TRAMBURG, *Commissioner*
Department of Institutions and Agencies
135 West Hanover Street
Trenton, New Jersey

FORMAL OPINION 1959—No. 12

DEAR COMMISSIONER TRAMBURG:

We have been asked whether an order placing a child under the guardianship of the State Board of Child Welfare pursuant to N.J.S.A. 30:4C-20 to 22 is "an order * * * terminating parental rights and * * * granting guardianship of the child to such approved agency * * *" within the meaning of R.S. 9:3-23A(3).

Ordinarily, the final hearing on a petition for adoption of a child takes place not less than one year from the date of the institution of the action. R.S. 9:3-25(A). The final hearing in such cases is preceded by a preliminary hearing, R.S. 9:3-24, and by the appointment and report of a "next friend," R.S. 9:3-25, 26. Where certain conditions are satisfied, the final hearing is held within 30 days of the institution of the action. R.S. 9:3-23(B). The third of the four conditions which must be satisfied in order to proceed summarily is:

> "(3) that at least one year prior to the institution of the action the custody of the child had been surrendered to such approved agency by each parent or other person having custody of the child, and that by the terms of such surrender the approved agency had been authorized to place the child for adoption; or *that an order of judgment had been entered by a court of competent jurisdiction terminating parental rights and* transferring custody of the child to such approved agency or *granting guardianship of the child to such approved agency;* * * *" (Emphasis added). R.S. 9:3-23(A)(3).

The State Board of Child Welfare is an approved agency as defined by R.S. 9:3-18(a). See also R.S. 9:3-19.

N.J.S.A. 30:4C-15 permits a petition to be filed seeking the commitment of a child to the guardianship of the State Board of Child Welfare in four situations:

> "Whenever (a) it appears that a court wherein a complaint has been proffered as provided in chapter 6 of Title 9 of the Revised Statutes, has entered a conviction against the parent or parents, guardian, or person having custody and control of any child because of abuse, abandonment, neglect of or cruelty to such child; or (b) it appears that any child has been adjudged delinquent by a court of proper jurisdiction in this State; or (c) it appears that the best interests of any child under the care or custody of the State Board of Child Welfare require that he be placed under guardianship; or (d) it appears that the parent or parents, guardian, or person having custody and control of any child is grossly immoral or unfit to be intrusted with the care and education of such child, or shall fail to provide such child with proper protection, maintenance and education, or is of such vicious, careless or dissolute habits as to endanger the welfare of such child; * * *."

On the completion of the hearing where the court is satisfied that the best interests of the child so require, it shall make an order "committing such child to the guardianship and control of the State Board of Child Welfare, and such child shall thereupon become the legal ward of such board, and such board shall be the legal guardian of such child for all purposes." N.J.S.A. 30:4C-20. The order of the court committing a child to the guardianship of the State Board of Child Welfare may not in any way be restrictive "of the duties, powers and authority of such board in the care, custody, placement, welfare and exclusive guardianship of the child * * *." N.J.S.A. 30:4C-21. The guardianship of the State Board of Child Welfare is to be "full and complete for all purposes * * *." N.J.S.A. 30:4C-22.

The completeness of an order vesting custody in the State Board of Child Welfare is illustrated by contrast with other provisions of the statutes. Where the court may have entered an interlocutory order committing a child to the temporary guardianship of the State Board of Child Welfare, N.J.S.A. 30:4C-17, but on the final hearing determines not to enter an order of permanent guardianship, the State Board of Child Welfare is to "return the child forthwith to the parent or parents * * *," or if the parents cannot be found, upon order of the court the child is to be placed with some other person expressing willingness to accept the child, but this "shall in no wise be construed as a grant of custody or guardianship." N.J.S.A. 30:4C-20.

In addition to the other methods provided by the statutes "for establishing guardianship by the State Board of Child Welfare," the board may "take voluntary surrenders and releases of custody and consents to adoption from the parent [or parents]." N.J.S.A. 30:4C-23.

From a consideration of all of these statutory provisions, it is apparent that an order pursuant to N.J.S.A. 30:4C-22 is intended to vest in the State Board of Child Welfare, rather than in the parents, the power to consent to an adoption of the child. The expression in R.S. 9:3-23, "terminating parental rights," includes divesting the parents of power to consent to an adoption. An order establishing guardianship by the State Board of Child Welfare satisfies the requirements both of termination of parental rights and granting of guardianship in the second half of R.S. 9:3-23(A) (3), and therefore, it is not necessary to consider whether the latter statute is satisfied by an order which might be thought of as granting guardianship but not terminating parental rights.

Therefore, the question presented is answered in the affirmative.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: EUGENE T. URBANIAK
Deputy Attorney General

JULY 1, 1959

HONORABLE ALFRED N. BEADLESTON
12 Broad Street
Red Bank, New Jersey

FORMAL OPINION 1959—No. 13

DEAR ASSEMBLYMAN:

You have requested my opinion as to the constitutionality of proposed legislation which would revise the statutory system for the taxation of property owned by railroads.

The plan envisions that the Railroad Tax Law of 1948 be amended to afford railroads tax relief, while saving municipalities harmless from any loss of revenues. The distinctions between Class I and II railroad property would be eliminated. All real property owned by railroads would be subject to taxation to the State and for the use of the State. A single tax rate would be fixed by statute or by a State official such as the Director of the Division of Taxation acting pursuant to legislative delegation. The assessment of former Class I and II railroad property would continue to be in accordance with true value or other uniform standard. Companion legislation would direct that out of the general treasury, as provided in a general appropriation act or otherwise, moneys would be paid to the municipalities in lieu of the Class II railroad property taxes presently received under the Railroad Tax Act of 1948.

My conclusion is that properly drawn legislation would not violate any provision of the Federal or State Constitution. Two constitutional issues might be drawn in litigation attacking the proposed amendments and supplements to the Railroad Tax Law of 1948: (1) Validity under the equal protection provisions of both constitutions; and (2) validity under Article VIII, Section I, paragraph 1 of the State Constitution, which provides:

> "1. 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."

I. Validity under the equal protection provisions of both Federal and State Constitutions.

The right of the Legislature to classify property for taxation is established beyond dispute. The Legislature may enact statutes dealing separately with the railroads including tax legislation. Such legislation has been upheld since *State Board of Assessors* v. *Central Railroad Co.,* 48 N.J.L. 146 (E. & A. 1886). Another settled principle is that the Legislature may exempt or treat separately classes of property so long as there is reasonable classification without discrimination against other classes of property. The Supreme Court in *General Electric Co.* v. *Passaic,* 28 N.J. 499 (1958) confirmed these basic principles.

City of Jersey City v. *State Board of Tax Appeals,* 133 N.J.L. 202 (Sup. Ct. 1945) is a square judicial holding supporting the taxation of railroad property at a lower rate than other property subject to a tax for the use of municipalities. Between 1941 and 1948 (P.L. 1941, c. 291) the railroads were charged a fixed rate of $3.00 per hundred dollars assessed valuation in lieu of local rates on all Class II property. The City of Jersey City attacked this legislation claiming among other things that the railroad property was not assessed "under general laws and by uniform rules, according to the true value," a mandate of Article IV, section VII, paragraph 12 of the 1844 Constitution, and that railroads were called upon to assume a lesser tax burden for their property than other owners.

The former Supreme Court reviewing the long recognized precedents concluded that property used for railroad purposes can be separately classified, with the burden unequal and subject to taxation at different rates. The Court of Errors and Appeals affirmed this holding in 134 N.J.L. 239 (E. & A. 1945) but modified the judgment as it pertained to the operation of the statute with relation to the amount of taxes due in the year 1941. At 133 N.J.L. 204, 205 Justice Perskie's opinion stated:

> "From the very beginning property used for railroad purposes has occupied and continues to occupy a separate classification, from all other property, in the field of taxation. The particular or special use to which railroad property has been and continues to be put is the basis which supports both its separate classification and the legislative power to impose a separate tax to be paid on property so classified and used. When, as here, the separate classification is proper and embraces all property in that classification, a law which taxes the property so classified may provide what tax the railroad companies, owners of the separately classified property, shall pay, and in what way it should be assessed provided that the assessment of their property is made 'under general laws and by uniform rules, according to the true value.' (Article IV, section VII, paragraph 12, state constitution). That has been and is the settled law of this State."

In *State* v. *State Board of Tax Appeals,* 134 N.J.L. 34 (Sup. Ct. 1946), aff'd per curiam, 135 N.J.L. 481, 482 (E. & A. 1947), the theory in *City of Jersey City* v. *State Board of Tax Appeals* was reaffirmed, the Supreme Court announcing that it is a firmly established principle of law "that it is the particular or special use to which the railroad property is in fact put which has supported and continues to supoprt its legally favored and separate classification, and which further supports the legislative power to impose a separate and different tax thereon so long as the classification is proper and embraces all property in that classification." 134 N.J.L. at 42.

Other New Jersey cases approving of legislation selecting railroads for special tax treatment include *Bergen & Dundee Railroad Co.* v. *State Board,* 74 N.J.L. 742 (E. & A. 1907) and *Central Railroad Co.* v. *State Board,* 75 N.J.L. 772 (E. & A. 1907). A compelling statement in support of the validity of tax legislation setting up a separate classification for railroad companies is found in *Florida Central and Peninsular R.R. Co.* v. *Reynolds,* 183 U.S. 471 (1902);

> "In the light of these decisions, if the State of Florida had deemed it for the best interests of its people to encourage the building of railroads by exempting their property from taxation, such exemption could not have been adjudged in conflict with the 14th Amendment, even though thereby the burden of taxation upon other property in the State was largely increased. Indeed that was the policy of the State prior to the Constitution of 1868. And, conversely, if the State had subjected railroads to taxation, while exempting some other class of property, it would be difficult to find anything in the 14th Amendment to overthrow its action. The mere fact that such legislation may operate with harshness is not of itself sufficient to justify the court in declaring it unconstitutional. These matters of classification are of State policy, to be determined by the State; and the Federal government is not charged with the duty of supervising its action." 183 U.S. at 180.

II. Validity under Article VIII, Section I, paragraph 1 of the State Constitution.

Article VIII, Section I, paragraph 1 of the State Constitution requires tax assessment of all property under general laws and by uniform rules. This requirement would be met under the proposed legislation for the assessment of former Class II railroad property at true value or other uniform standard. Nor would there be any infringement of the mandate that property be assessed under general laws because of the recognized authorities cited supra that taxing statutes dealing separately with railroad property are general within that classification, in the constitutional sense. The further requirement for taxation at the general tax rate of the taxing district is inapposite. This provision is limited to property "assessed and taxed locally or by the State for allotment and payment to taxing districts."

The history of the Constitutional Convention in 1947 fully supports the conclusion that property taxed by the State and for the use of the State was not subject to the terms of the second sentence of Article VIII, Section I, paragraph 1, which fixes the requirement of taxation of property for the use of local taxing districts at a general tax rate. There were several principal proposals concerning taxation of real estate.

The Committee on Taxation and Finance originally provided that "property shall be assessed for taxes under general laws and by uniform rules, according to its true value." See II *Proceedings of the Constitutional Convention of 1947,* 1237 (hereinafter referred to as "Proceedings"). This sentence merely would have carried forward the provision in Article IV, Section 7, par. 12 of the Constitution of 1844, which provision was added in 1875. There were several proposals to amend it. Frank Hague Eggers offered an amendment to the committee proposal which would have provided:

> "Property shall be assessed for taxation under general laws and by uniform rules, according to its true value. Real property now defined by law as Class II railroad and canal property shall be assessed for taxes as herein-

above provided and shall be taxed at the local tax rate of each municipality wherein such property is located, and the proceeds thereof shall be paid to each such municipality."

Amendment No. 16 to the committee proposal was introduced by William T. Reed and was ultimately adopted on the floor of the convention as the present Article VIII, Section I, par. 1. II Proceedings, 1245; I Proceedings, 785. In addition, a proposal was introduced by Clyde W. Struble which would have provided:

"Property shall be assessed according to classification and standards of value to be established by law."

Milton B. Conford before the Committee on Taxation and Finance offered a proposal which would have provided:

"Property shall be assessed for taxes under general laws and by uniform rules, according to its true value. The burden of direct taxation upon all real property not exempted shall be equal."

Frank Murray, who spoke against the adoption of the Reed amendment, emphasized that the compromise amendment merely fixed one standard of value and one rate insofar as the real property was being assessed "by the State for allotment and payment to the tax district." I Proceedings, 780. It is evident that the delegates consciously avoided freezing Class II railroad property as a source of municipal tax revenues exclusively.

Similarly, rejection of the Conford proposal that the burden of direct taxation upon all real property not exempted should be equal indicates an intent to permit classification so long as the tax is not being assessed and levied for local purposes and is further strong comfirmation of the sanction for taxation of railroad property at special rates, provided that such taxation is not imposed by the State for allotment and payment to municipalities.

Very truly yours,

DAVID D. FURMAN
Attorney General

JUNE 30, 1959

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

CHARLES F. SULLIVAN
Division of Purchase and Property
State House
Trenton, New Jersey

FORMAL OPINION 1959—No. 14

GENTLEMEN:

A plan has been suggested whereby the State will be in a position to select the site desired for the proposed agricultural building. This plan contemplates that the State acquire, without cost, an option on such site from the owner of the land. Bids would then be let for the construction of the building which would include the cost of purchasing the land in question at the option price obtained by the State. The land and building would then be leased-back to the State under an agreement giving the State an option to ultimately purchase the land and building. The lease with option to purchase provision has been authorized by the Attorney General in Formal Opinion 1959, #2, dated February 18, 1959.

There are many advantages to the proposal that the State acquire an option on the site where it desires the agricultural building to be constructed. The plan appears more desirable than one in which the State would first purchase the land in question and then let bids for the construction of a buidling designed for that site. The alternative to the State actually purchasing the land in advance is to seek bids for construction of a building on land owned or acquired by the ultimate lessor.

In choosing the land in advance, the State will have the advantage of designing a building with a particular location in mind or of acquiring land most suitable for the type of building intended to be constructed. Contractors who bid for the construction of the building would be on an equal footing. The land variable will be eliminated from the bidding and only construction cost, based upon a fixed set of plans, would constitute the variable factor in bids.

You have asked if the State can validly acquire an option on the land in question, without cost to the State, and transfer said option to the ultimate purchaser of the land in connection with the construction, lease-back agreement. It is our opinion that this proposal is legal since it contemplates a transaction whereby a valuable consideration is obtained by the State in furtherance of a public purpose. We assume that in the option, the purchase price fixed for the land will have been determined by the same formality as in fixing the price for land to be purchased by the State.

Article VIII, Section III, paragraph 3 of the New Jersey Constitution, provides:

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

We do not consider the transaction outlined above a gift of land or money by the State. We assume that the State acquires the option, without cost, because of the inducement given the owner of the land by the improved prospect of selling the land to someone who will build the agricultural building. The option, therefore, would not cost the State anything to acquire. Nevertheless, the option to purchase the land has value, a value intimately connected with the ultimate proposal for the construction of the agricultural building. In transferring this option to the successful bidder, the State will have received valuable consideration for the transfer. The consideration at the outset is the ability of the State to select a desired site, without purchase or cost to the State. The consideration on the consummation of the plan is the ultimate construction of a building desired by the State on such land which will be leased to the State and as to which building and land the State will acquire an option to purchase at a future time.

We note that an option to purchase land is neither land owned by the State nor an appropriation of money. The option to purchase does not obligate the State to consummate the purchase. It is, in this case, an assignable right to purchase acquired without cost to the State. The transfer of this right would not literally or otherwise be a "donation of land" within the meaning of Art. VIII, §III, par. 3 of the 1947 Constitution. *See: Kirzenbaum* v. *Paulus,* 51 N.J. Super. 186, 199 (L. Div. 1958).

More significantly, however, the transfer of the option to purchase is for a valuable consideration derived by the State. Therefore, the transfer cannot be deemed a gift or donation and is not prohibited by the constitutional provision aforesaid. *Trustees of Rutgers College in New Jersey* v. *Richman,* 41 N.J. Super. 259, 295, 298 (Chan. Div. 1956). In the latter case Judge, now Justice, Schettino said, "Donations of land and appropriations of money by the State have been sustained in cases in which * * * the recipient has furnished or agreed to furnish a substantial *quid pro quo* to the State." (at 295). And, at 298, "The accomplishment of an important public objective or a moral duty to the citizens of the State is sufficient to sustain the validity of the appropriations," citing *Morris & Essex Railroad Co.* v. *City of Newark,* 76 N.J.L. 555, 560 (E. & A. 1908).

In the *Morris & Essex* case, *supra,* the Court of Errors and Appeals sustained an agreement between the City of Newark and certain railroad companies whereby the City agreed to pay a portion of the cost for elevating or depressing certain railroad lines in the City of Newark. The Court held that this agreement did not contravene the provisions of the 1844 Constitution comparable to those of the 1947 Constitution with which we are now concerned. *Cf. Kirzenbaum* case, *supra,* at 199. The court held that the contract was validated by virtue of the consideration obtained by the City for the moneys so spent, in accomplishing an important public objective.

Under the circumstances, the above proposal cannot be considered a constitutionally prohibited gift or transfer. You are therefore authorized to employ this plan in connection with the proposed agricultural building.

Very truly yours,

DAVID D. FURMAN
Attorney General of New Jersey

By: THEODORE I. BOTTER
Deputy Attorney General

JULY 20, 1959

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

FORMAL OPINION 1959—No. 15

DEAR MR. PATTEN:

We have been asked whether any public official has a duty to supply petition forms to be used in connection with the county-wide referenda on the application of L. 1959, c. 119, the new Sunday Closing Law, and whether such petitions need be executed or verified in any particular manner.

L. 1959, c. 119 provides generally for a Sunday Closing Law to become effective if approved by a majority of the voters at a general election. Section 8. The question is to be put on the ballot if the county clerk receives a petition signed by not less than 2,500 registered voters of the county 45 days prior to the election. Section 6.

The forms for petitions should be provided by the county clerks in the respective counties. R.S. 19:9-1 defines election supplies to include "all things other than ballots and equipment as may be necessary to enable the provisions of this title to be carried out properly." It seems clear that this includes petition forms. R.S. 19:10-1 provides that all petitions of nomination are to be preserved by the officer with whom they are filed for two years. R.S. 19:9-2 specifies which papers are to be supplied by the Secretary of State. These do not include petitions for use within a single county. Additionally, this same section provides that all other blank forms and supplies for the general election shall be "furnished, prepared and distributed by the clerks of the various counties * * *." Thus the forms are to be provided by the county clerks. However, the form is not specified. Therefore, the county clerks may use any reasonable form. County clerks may also accept petitions on forms which have been privately prepared.

With regard to your second question, it is our opinion that no verifications need be affixed to the petitions. The Sunday Closing Law under consideration does not contain any express requirement for verification but merely requires that the petition be signed by not less than 2,500 registered voters of the county. L. 1959, c. 119, section 6.

However, R.S. 19:1-4 provides the general rule for the application of the provisions of Title 19, Revised Statutes, subject to certain qualifications, to the determination of public questions by referendum. It is stated that:

> "Except as in this title otherwise provided, the provisions for the election of public and party offices shall also apply to the determination of public questions under the referendum procedure so far as may be."

A "public question" is defined in N.J.S.A. 19:1-1 as:

> "'Public question' includes any question, proposition or referendum required by the legislative or governing body of this State or any of its political subdivisions to be submitted by referendum procedure to the voters of the State or political subdivision for decision at elections."

The answer to the applicability of the provisions for the election of public and party offices to the referendum procedure depends upon whether there are any express provisions in Title 19 that deal with the requirements for verification of signatures of persons signing referenda petitions, and whether the general provisions of Title 19 dealing with the verification of nominating petition signatures of persons to party or public office may be applicable at all to the referendum procedure outlined in L. 1959, c. 119. There are no other provisions in Title 19 dealing with the verification of a referendum petition. And, while various requirements are outlined for the nomination by petition of persons to party and public office, it is our opinion that they do not govern the referendum signature procedure. The clear intent of the phrase "so far as may be" at the end of R.S. 19:1-4 is to make practical applicability the test.

The provisions for the election of public and party offices in Title 19 cover the manner of execution of petitions in two situations, the petitions nominating all candidates in primary elections, and the petitions for direct nomination of independent candidates for public office in the general election. R.S. 19:13-5 governs the number of signatures required on a petition for nomination of independent candidates in the general election. The general rule is that the petition must be signed by 2% of the voters in the district which the candidate would represent if elected. However, where the office is a State office, not more than 800 signatures are required. For all lesser offices, not more than 100 signatures are required. Signatures on such petitions must be verified by 5 of the voters signing the petition swearing that the petition is made in good faith and that the affiants saw all the signatures made and that they believe that the signers are duly qualified voters. R.S. 19:13-7. The requirement that the affidavit be made that the signatures are affixed in good faith is intended as a check on the creation of a profusion of candidacies of persons representing similar views by their political opponents in order to split the vote of the faction who would normally support its views. There is no analogous consideration in the case of the referendum on the Sunday Closing Law.

In the case of primary elections, different and more liberal provisions are made by statute. R.S. 19:23-8 fixes the number of signatures required. Where the candidate stands for a State office, a thousand signatures are required; for a congressional district, 200 signatures; for a county office, 100, and lesser numbers in the case of offices from smaller political subdivisions. In sharp contrast to the requirements for the nomination of independent candidates for public office in the general election, R.S. 19:23-10 provides that the signatures need not be on a single petition, but may be on several. Similar liberality is extended in R.S. 19:23-11 which requires only a single voter to verify each petition with no requirement that the same person verify the signatures on all petitions. R.S. 19:23-11 requires an oath similar to that in R.S. 19:13-7 that the petition is prepared and signed in good faith for the same reasons that R.S. 19:13-7 so provides. Again, these considerations are not analogous in the Sunday Closing Law referendum.

This analysis of the various sections in Title 19 dealing with petitions for nomination of candidates indicates that the several procedures outlined are peculiar to the particular legislative scheme of requirements for nomination to those offices only and are not applicable in any manner to petitions to place public questions on the ballot at the general election.

Thus, the language "so far as may be" contained in R.S. 19:1-4 excepting the applicability of Title 19 requirements to the referendum procedure imparts a sensible and rational result when the requirements for the verification of petitions for nomination of persons for public and party office differ. cf. *McCaskey* v. *Kirchoff*, 56 N.J. Super. 178 (App. Div. 1959).

Bearing in mind the safeguard provided by the Legislature in requiring 2,500 signatures to place the Sunday Closing Law on the ballot in each county, as contrasted with much less stringent requirements, as hereinbefore outlined, for the nomination by petition of persons to county-wide public and party offices where verification is necessary (100 signatures) it would be difficult, in absence of express or even general provisions to the contrary to impose the additional requirement of verification of each signature. See *McCaskey* v. *Kirchoff*, *supra*, at p. 182. The integrity of the election process would not be defeated. The proper official charged with the duty of insuring against falsification of signatures would not be afforded some of the additional means of affixing responsibility upon persons who verify signatures as is the case in the nominating procedure. But, the actual signatures may be examined as in other cases.

Therefore, petitions with 2,500 signatures without any verification may be accepted in order to place L. 1959, c. 119 on the general election ballot in the various counties this coming November.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: FRANK A. VERGA
Deputy Attorney General

AUGUST 13, 1959

BUREAU OF TENEMENT HOUSE SUPERVISION
1100 Raymond Boulevard
Newark, New Jersey

FORMAL OPINION 1959—No. 16

GENTLEMEN:

We have been asked to define the scope of L. 1959, c. 12. This statute amends the definition of a tenement house in R.S. 55:1-24. The statutory definition delimits those premises which are subject to the jurisdiction of the Bureau of Tenement House Supervision. L. 1959, c. 12 narrows the prior definition to exclude detached dwelling houses constructed or converted before September 1, 1959 of not more than three stories and having central heating which are equipped for occupancy by three families living independently where the space provided for at least one of the families is not equipped with full cooking facilities. If any of these conditions is not met in a particular case, the building remains subject to the jurisdiction of the Bureau of Tenement House Supervision.

You have informed us that in attempting to apply the new statute two questions arise as to the meaning of terminology. The first is as to the meaning of the term "central heating," whether it means a system of heating a group of buildings from one plant or whether it means heating an entire building by the use of a single furnace or heating plant located within that building. The second question concerns the term

"less than full cooking facilities," and how much cooking and kitchen equipment an apartment may have and still not come under the jurisdiction of the Bureau of Tenement House Supervision.

In connection with central heating we note that Webster's International Dictionary, 2 Ed., Unabridged, gives the following definition:

> "central heating (British)—a system of heating of the parts of the building from one heating plant. (United States)—a system of heating of a group of buildings from one heating plant."

The Enclyclopedia Britannica, Vol. II, gives the following definition:

> "Central heating—In Great Britain and in Europe generally the term central heating usually refers to the heating of a building by means of one heating unit instead of fireplaces or stoves in every room. As understood in North America, however, it means the supplying of heat to a number of separate buildings from a central plant."

We have also communicated with technical people in the heating industry and employed by insurers. The consensus of opinion of such persons is that the term "central heating" is understood to be the use of a furnace or one heating plant to heat the entire building. We hold, therefore, that central heating is the heating of the entire building by one furnace or one heating plant.

With regard to the meaning of the term "less than full cooking facilities," the legislative purpose in taking from the jurisdiction of the Bureau of Tenement House Supervision three-family houses where one apartment does not have full cooking facilities was undoubtedly to overrule Formal Opinion 1957—No. 14, of the Attorney General. This opinion held that the use of a one-burner cooking apparatus constituted "cooking upon the premises" within the meaning of R.S. 55:1-24 as it then read, thereby subjecting three-family houses where one apartment used only a one-burner cooking apparatus to the jurisdiction of the Bureau of Tenement House Supervision. The 1957 opinion had been requested as a result of a question arising from Formal Opinion 1953—No. 50.

The Attorney General had ruled that where several individuals or families had kitchen privileges, the buildings were not subject to the jurisdiction of the Bureau of Tenement House Supervision "unless each unit has kitchen facilities * * *." This language has been interpreted by some persons affected thereby to exempt from board jurisdiction rooms or apartments using a one-burner cooking apparatus. L. 1959, c. 12 was enacted in order to assist persons who had so interpreted the 1953 opinion and had constructed or converted facilities on the assumption that they would remain outside board jurisdiction. In the light of this history, it is our opinion that the term "less than full cooking facilities" as used in L. 1959, c. 12, should be given a meaning approximately equivalent to the common understanding of what constitutes something less than a complete kitchen. We are also aware of the importance of adopting a workable administrative standard. For all of these reasons, it is our opinion that if an apartment has a cooking facility with three burners, it should be considered to have full cooking facilities. If one of three apartments in a three-family dwelling otherwise within the definition of a tenement house has a cooking facility with less

than three burners, it is our opinion that such an apparatus is something less than a full cooking facility.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: FRANK A. VERGA
Deputy Attorney General

AUGUST 20, 1959

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

FORMAL OPINION 1959—No. 17

DEAR COMMISSIONER:

You have requested our advice as to whether our Formal Opinion of 1958—No. 15 applies to employees of boards of education who enter or have entered the military service.

The answer is yes. The Statute under consideration in the aforesaid opinion is N.J.S.A. 38:23-4, which provides for a leave of absence during a period of active military service for "every person holding office, position or employment, other than for a fixed term or period, under the government of this State or of any county, municipality, school district or other political subdivision of this State." The employees of a "school district" are employees of a board of education. *Falcone* v. *Board of Education of Newark*, 17 N.J. Misc. 75, 78 (Co. Ct. 1939). Since such employees are expressly covered by the statute in question, the reasoning and conclusions of Formal Opinion 1958—No. 15, which construed the statute as it pertained to employees of the State Highway Department, are equally applicable to employees of a board of education of this State.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

AUGUST 21, 1959

HONORABLE GEORGE S. PFAUS
Acting Commissioner of Labor and Industry
20 West Front Street
Trenton, New Jersey

FORMAL OPINION 1959—No. 18

DEAR ACTING COMMISSIONER PFAUS:

In your letter of June 5, 1959 you ask whether the word "day," as used in *R.S.* 34:2-24, means any twenty-four hour period or only that period of time passing between two successive midnights (the calendar day). The statute in question limits the period of time during which a female may work at certain occupations. It reads as follows:

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

The specific problem posed is whether a female who works from 3:30 to 11:55 p.m. may, at her own request, be permitted to change shifts in the middle of the week and begin her new shift at 7:00 a.m. (having worked until 11:55 the immediately preceding evening).

In our opinion the word "day" means any twenty-four hour period. Your specific question, therefore, must be answered in the negative. To hold that "day" means calendar day would permit employment of females for a working day of more than 10 hours in a twenty-four hour period (hours before and after midnight). This certainly was not the intent of our Legislature in enacting the statute. In an informal opinion addressed to the Commissioner of Labor, dated December 14, 1916, Attorney General Westcott stated with regard to the statute in question:

> "* * * that the word 'day' as it appears in this act may be construed to mean working day; that the purpose of the statute was to prohibit a day's work of greater length than ten hours; that it is entirely immaterial whether this day is all included within one calendar day or whether it covers part of two calendar days, so long as it constitutes but one working day. This construction of the statute will, in my judgment, be in accord with the undoubted purpose of the act."

The reasoning underlying this construction remains valid and is expressly reaffirmed.

Justification for limiting the hours of labor for women include "her physical organization, her maternal function, the rearing and education of women and the maintenance of the home." 31 *Am. Jur.*, Labor, § 787, p. 968 (1958). In *Toohey* v. *Abramowitz Dep't. Store, Inc.*, 124 N.J.L. 209 (Sup. Ct. 1940), a case involving *R.S.* 34:2-24, Justice Bodine stated, at page 210:

> "The public interest is not served by the physical injury resulting from labor too long continued."

The court concluded in *Toohey* that "six days, or fifty-four hours in any one week" means that a woman is prohibited from working *either* (a) seven successive days or

(b) more than fifty-four hours in a seven-day period. As this case demonstrates, the statute in question is aimed at preventing the employment of females for oppressive hours. A construction that will further this purpose is preferred to one that permits avoidance of the intended prohibition. *N.J.S.A.* 34:2-28 (prohibiting certain employment of women before 7:00 a.m. and after 12:00 midnight) provides additional support for the view that "day" means any twenty-four hour period without regard to midnight as a terminal point. See also, *Opinion of the Attorney General*, Memorandum—P-24 (August 8, 1956), wherein it was held that the word "week," contained in *R.S.* 34:2-24, meant any period of seven consecutive days.

The pertinent New Jersey cases defining the word "day" involve statutes obviously referring to the calendar day. *Walinski* v. *Mayor & Council, Gloucester City*, 25 N.J. Super. 122 (Chan. Div. 1953) and *In re Byrne*, 19 N.J. Super. 313 (Law Div. 1952). *In re Byrne* concerned the construction of a statute limiting the time for filing nominating petitions, and the court construed "day" to mean the time between consecutive midnights. *Walinski* involved construction of a statute prohibiting the sale of liquor on Sunday, and it was held that Sunday was the twenty-four hour period of time following Saturday midnight. These cases are not binding here.

Accordingly, we hold that "day," as used in *R.S.* 34:2-24, means any twenty-four hour period. The violation caused by the change of shifts discussed earlier in this opinion can be avoided by making the change effective following the individual's day of rest.

Very truly yours,

DAVID D. FURMAN
Attorney General
By: STEPHEN F. LICHTENSTEIN
Deputy Attorney General

AUGUST 26, 1959

MR. WILLIAM MACPHAIL
Superintendent of Elections
595 Newark Avenue
Jersey City, New Jersey

FORMAL OPINION 1959—No. 19

DEAR MR. MACPHAIL:

You have requested an opinion whether former residents of Puerto Rico who have appeared for the purpose of being registered to vote and who are unable to speak or read the English language are entitled to register and vote.

The qualifications for voting in New Jersey are set out in Art. 2 N.J. Const. (1947). Paragraph 3 sets out the qualifications of citizenship of the United States, attainment of 21 years of age, and residence in the State for 6 months and in the county for 60 days. Paragraph 6 denies suffrage to idiots and insane persons. Paragraph 7 denies suffrage to persons convicted of crimes designated by the Legislature. (R.S. 19:4-1 enumerates the crimes which disqualify.)

While you have made reference to this problem as it applies to Puerto Ricans, this opinion applies as well to all citizens who cannot read or write.

These constitutional provisions concerning qualification to vote are exclusive. The Legislature has no power either to enlarge or diminish them. *Cf. Stothers* v. *Martini*, 6 N.J. 560, 566 (1951); *Imbrie* v. *Marsh*, 3 N.J. 578, 585 (1950). Any provision or interpretation of statutes which would deny the right to vote based on inability to understand English would attempt to modify the constitutional provisions and would therefore be void.

Although the Legislature may not change the constitutional qualification on the right to vote, it may adopt reasonable regulations for the exercise of the rights conferred by the Constitution. *Sadloch* v. *Allan*, 25 N.J. 118, 122 (1957); see *Lassiter* v. *Northampton County Bd. of Elections*, 79 S. Ct. 985 (1959). In exercising this power the Legislature has provided that everyone must be permanently registered in order to exercise his franchise. R.S. 19:31-1.1. As part of the process of registration, the applicant must subscribe to the following oath or affirmation which appears in the statute, R.S. 19:31-6:

> "You do solemnly swear (or affirm) that you will fully and truly answer such questions as shall be put to you touching your eligibility as a voter under the laws of this State."

If it were the legislative intent that such an oath be administered only in English so that a person unable to speak English could not take the oath, the legislation would violate the Constitution and therefore be void. However, it would seem that it was not the intention of the Legislature that the oath be exclusively administered in English. The requirement that registrant subscribe to an oath written in a statute in English has been part of the registration law at least since 1930. L. 1930, c. 187, par. 384. From 1930 until 1944 this law expressly provided for the rendering of assistance in preparing official ballots to persons unable to read the English language. L. 1930, c. 187, par. 198; (former) R.S. 19:15-35; L. 1944, c. 230, sec. 4. Certainly, there would not have been a provision in the law for assistance in preparing ballots to persons unable to read English if it had been the intent of the Legislature to have already disfranchised them at the registration stage by requiring them to understand and take an oath administered in English. The oath may be administered in any language.

The repeal in the 1944 act, *supra*, of the provision for aid in preparing their ballot to persons unable to read English must be considered intentional, and an indication that assistance may not be rendered in the voting booth to a person unable to speak English who is physically able to mark the ballot. Compare the language repealed, L. 1930, c. 187, par. 198, with the present provision, N.J.S.A. 19:31A-8 (authorizing aid to the blind or physically disabled only), which was enacted by L. 1944, c. 230, sec. 2, a part of the act in which the 1930 act (later embodied in R.S. 19:15-35) was repealed, L. 1944, c. 230, sec. 4. See also *State* v. *Sweeney*, 154 Ohio St. 223, 94 N.E. 2d 785 (Sup. Ct. 1950). But this does not make impossible the effective and intelligent exercise of the franchise by persons unable to read and write English. Many States permit persons unable to read English to vote. *Lassiter* v. *Northampton County Bd. of Elections*, *supra*, 79 S. Ct. at 990 n. 7.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

AUGUST 31, 1959

MRS. EDWARD L. KATZENBACH, *President*
State Board of Education
175 West State Street
Trenton 25, New Jersey

FORMAL OPINION 1959—No. 20

DEAR MRS. KATZENBACH:

You have requested an opinion clarifying the responsibilities of the State Board of Education in connection with the administration of the State Competitive Scholarship Act, L. 1959, c. 46, as amended by L. 1959, c. 150. Specifically, you ask to have defined the relationship between the State Board of Education, hereinafter called the "State Board" and the State Scholarship Commission, hereinafter called the "Commission" in view of section 3 of L. 1959, c. 46, as amended which states in part that:

> "There is hereby created the State Scholarship Commission which is hereby allocated to the State Department of Education * * *."

The Commission, according to L. 1959, c. 46, as amended, consists of the Commissioner of Education, who by the terms thereof serves as chairman, together with 8 other persons appointed by the Governor. It is empowered to administer the competitive scholarship program by conducting annual examinations and awarding scholarships to qualified persons (Section 12). The Commission is authorized to carry out this plan by adopting appropriate regulations (Section 14). Additionally, it is given power to expend appropriations made by the Legislature for the program (Section 14).

The Commission was allocated to the State Department of Education in response to one of several constitutional infirmities outlined by Governor Meyner in his conditional veto message dated May 11, 1959. It was pointed out therein that Senate Bill 2 (which later became L. 1959, c. 46) creating the program and commission failed to fulfill the requirement of the *New Jersey Constitution, Art.* V, *Sec.* IV, *par.* 1 that:

> "All executive and administrative offices, departments, and instrumentalities of the State government, . . . and their respective functions, powers and duties, shall be allocated by law among and within not more than twenty principal departments, . . ."

The defect was cured by what was to become L. 1959, c. 150. This law effectively amended the prior legislation by the allocation of the commission to the Department of Education, thus filling the constitutional requirement requiring allocation.

The question of the relationship between various agencies performing executive functions and the principal departments in State government did not come under extensive discussion when the novel proposal was advanced in the 1947 Constitutional Convention. The purpose of consolidating as many agencies as possible into not more than 20 principal departments was to centralize responsibility for agency operation in a single executive. See remarks of Governor Driscoll. *V Convention Pro-*

ceedings 44. However, as pointed out by William K. Miller, Esq., some agencies that were to be placed in a department would be quasi-independent by their very nature and functions. V *Convention Proceedings* 371. Hence, the language of the Constitution that agencies be allocated "within" a department must be construed in the light of a recognition at the constitutional convention of 1947, that there were some agencies that would not be under the complete supervision of a principal department head, but because of the provisions of governing statute law would be in whole or in part autonomous.

In order to determine to what extent an agency is controlled by a principal executive department to which the agency is allocated, the intent and internal meaning of the particular department-agency legislation must be examined to determine the legislative purpose. An example of this is clear in *N.J. Turnpike Authority* v. *Parsons,* 3 N.J. 235 (1949). One of the questions presented there was whether revenue bonds issued by the Turnpike Authority did not create a debt or liability of the State in excess of the limitations prescribed by *Art.* VIII, *Sec.* II, *par.* 3 of the *N. J. Constitution* because the Authority was "established in the State Highway Department," N.J.S.A. 27:23-3. The Supreme Court, in effect, held that the agency was not subject to control of the department by stating that it was "in but not of" the department. The legislation dealing with the powers of the Highway Commissioner was held not to be applicable to the Turnpike Authority. Additionally, the Turnpike Authority is supported entirely from its own revenues derived from tolls it collects, primarily from private users of the Turnpike, as distinguished from public appropriations.

Such is not the case here. A review of the State Competitive Scholarship Act, L. 1959, c. 46, as amended by L. 1959, c. 150, and the legislative powers and responsibilities authorized and conferred upon the State Board which serves as the head of the Department of Education, N.J.S.A. 18:2-1 exhibits a pattern of interrelationship that was sought to be avoided in the Turnpike Authority-Highway Department relationship.

While there is no express power over the Commission in the sense that the Legislature in L. 1959, c. 46 did not amend any prior legislation affecting the powers of the State Board so as to include a recognition of the commission as an agency directly under its supervision, the Scholarship Act primarily is designed to assist qualified students to receive higher education at institutions of this State. Higher education, public and private, is in several ways subject to the jurisdiction of the State Board. *Cf.* the relationship between Rutgers, the State University, and the State Board, N.J.S.A. 18:22-14.1 et seq.; *Trustees of Rutgers in N. J.* v. *Richman,* 41 N.J. Super. 259 (Ch. 1956). Among the specific powers conferred by N.J.S.A. 18:2-4 upon the State Board is the authority to advance the education of people of all ages (par. 1); establish standards of higher education (par. m); license institutions of higher education (par. n); approve the basis of conferring degrees (par. o); require from institutions of higher education such reports as may be necessary to enable the State Board to carry out its functions (par. p); survey the needs for higher education and the facilities available therefor and recommend to the Legislature procedures and facilities to meet such needs (par. q).

In this respect, the role of the Commissioner of Education is important. He serves under the direction of the State Board of Education, is the chief executive officer of the Department of Education, N.J.S.A. 18:3-7.1, and, at the same time, is the chairman by virtue of his office of the Commission, L. 1959, c. 46. The fact

that there is a liaison between the State Board and the Commission is indicative of a legislative intent to place the Commission within the Department and subject to its supervisory control. Equally significant is the fact that the 1959 Appropriation Act, L. 1959, c. 106 apportions to and authorizes the expenditures of funds out of the general treasury by the Department of Education (Account P 75, page 120) "For the purpose of providing a State-wide scholarship program * * *." It is concluded from this language that the over-all responsibility for the fiscal affairs of the Commission is placed in the State Board. The power expressed in L. 1959, c. 1, as amended by L. 1959, c. 150, section 14 which authorizes the expenditure of appropriations by the Commission is therefore subject to State Board supervision. State Board control should extend to a review and approval of budget requests, transfers of funds, and vouchers submitted by the Commission for payment.

The State Board also possesses the power to approve rules and regulations adopted by the Commission in their function of administering the Scholarship Program. A degree of control of this kind is necessary and proper in view of the interrelationship that has been outlined and because of the fiscal delegation that has been made by the Legislature to the Department of Education and, in turn, the State Board in the Appropriation Act. Such a conclusion is not designed to imply that the State Board has the right to award scholarships or, subject to the terms of the Scholarship Act, to determine who should receive the awards. The degree of control is general and supervisory in nature in order to permit the State Board to fulfill its statutory responsibilities and to insure that the Commission is administering the act according to law.

It is our opinion, therefore, that the State Scholarship Commission is within the Department of Education and, to the extent outlined above, under the supervision of the State Board of Education.

Very truly yours,
DAVID D. FURMAN
Attorney General
By: DAVID M. SATZ, JR.
Deputy Attorney General in Charge

SEPTEMBER 3, 1959

HON. GUY W. CALISSI
Prosecutor, Bergen County
Court House
Hackensack, New Jersey

FORMAL OPINION 1959—No. 21

DEAR PROSECUTOR CALISSI:

You have requested an opinion dealing with the scope of authority and functions of the Bergen County Police. Specifically, as chief law enforcement officer of Bergen County, N.J.S. 2A:158-1 et seq.; *State* v. *Winne,* 12 N.J. 152 (1953), you wish to have clarified the powers and duties of the county police as they relate to your responsibilities.

The Bergen County Police derives its existence by virtue of L. 1929, c. 205, now R. S. 40:22-1 et seq. That law authorized the board of chosen freeholders to

establish a county police department and to appoint such persons as it deemed necessary "* * * for the supervision and regulation of traffic upon county roads." R.S. 40:22-1. The powers and duties conferred upon police officers appointed by the freeholders were "* * * to enforce the provisions of law and the resolutions or ordinances adopted by the board of chosen freeholders in relation to the supervision and regulation of traffic on such roads, and to arrest for the commission of any crime in any part of the county." R.S. 40:22-2.

The board was authorized to fix the pay, prescribe the duties, and provide quarters and equipment for the proper operation of the department. R.S. 40:22-3.

The background of this legislation is traced to 1911 when "An act to provide for the protection of county public roads in counties of the first class and to authorize the regulation of traffic thereon" was enacted, L. 1911, c. 272. This law, enacted before the advent of any State-wide motor vehicle regulation (see L. 1921, c. 208, providing for registration, licensing and regulation of motor vehicles) was designed to authorize complete control by county officers of traffic on the county's own roads in first class counties. Regulations were authorized to cover rules for driving, sizes of vehicles and similar conditions. Violations of such regulations were subject to penalties enforceable in local courts. A county police force was authorized to be appointed by the freeholders (one man per each mile of county road) to enforce the county regulations. Such persons possessed "* * * all the powers, with regard to the enforcement of such rules and the supervision of traffic upon such roads, as are now possessed by constables, or deputy sheriffs in counties, or police officers in cities."

In 1920, L. 1920, c. 98 removed the pre-existing numerical restriction upon the personnel complement. Then, in 1923, c. 57 of the laws of 1923 among other things amended the 1911 act to empower county police to enforce "An act for suppressing vice and immorality" (the Sunday Closing Law; formerly R.S. 2:207-1, now N.J.S. 2A:171-1), in addition to the provisions of what was to become part of Title 39, Revised Statutes (Motor Vehicles and Traffic Regulation), and, "* * * to arrest for the commission of any crime in any part of the county in which said officers are appointed."

The statement appended to the bill (A205) provided:

> "The purpose of this act is to give to the county police full authority to enforce the laws."

The 1911 law dealing with first class county police, as amended, became R.S. 40:22-4, 5 and 6 in the 1937 revision. L. 1929, c. 205 (R.S. 40:22-1, 2 and 3) was intended to give similar powers to counties of all classes. As was indicated in the statement to that bill (S85):

> "The above bill substantially re-enacts the provisions of Chapter 272 of the Laws of 1911, except that the limitation to first class counties is omitted. By Chapter 57 of the Laws of 1923 the title of the 1911 act was changed so that the authority is not now vested in counties of the first class to establish a police department, and the purpose of this act is to again vest such authority in boards of first class counties and to extend the same authority to all counties."

It is our opinion that the statutory history dealing with authority of county police indicates that the statutory reference to the power "* * * to arrest for the commission

of any crime in any part of the county in which said officers are appointed * * *" (R.S. 40:22-1 and 5) is limited in scope. As is evidenced by the title L. 1911, c. 272, the body of that act, the amended title of L. 1923, c. 57 and the substance contained therein, together with the 1929 law (directly applicable here) which should be read *in pari materia* with R.S. 40:22-4, 5 and 6 (the 1911 law, as amended), the primary function of county police is to assist the board of chosen freeholders in regulating traffic on county roads. This is why the county police department was established. The power to arrest for the commission of crime should be viewed as authority to arrest criminals if such is incidental to the traffic duties being performed. Such power should not permit the formation of a complete police department that is designed to detect crime throughout the county under any circumstances.

An intensive search of case law throughout the country has been conducted on this subject for controlling authorities. One case is directly in point in our opinion. In *State* v. *Necaise*, 228 Miss. 542, 87 So. 2d 922 (Sup. Ct. 1956) a person was charged with unlawful possession of a whiskey still. Search warrants had been executed by county patrol officers acting pursuant to a statute which stated that:

> "Said patrol officers are hereby authorized to do and perform all acts authorized to be done by the sheriff, constable or any other peace officer."

The State contended that road patrolmen were given the same authority for the serving of search warrants or other process of any kind, as was vested in the sheriff, constable or other peace officer of the county. The Supreme Court of Mississippi held that the power of the county patrol officers to serve search warrants under any circumstances was prohibited. At p. 925 of 87 So. 2d, the court stated that:

> "But we think that the provision of the statute which authorizes the patrol officers 'to do and perform all acts authorized to be done by the sheriff, constable or any peace officer,' is intended to vest in the patrol officers only such police powers as may be necessary to enable them to perform properly the duties imposed upon them by the statute as county road patrolmen. We do not think that it was the intention of the Legislature to authorize the patrol officers who were employed 'to patrol the roads of the county and to enforce the road and motor vehicle laws' to take over the duties or exercise the powers of the sheriff, or constable or other peace officer, in the enforcement of the general criminal laws of the State or in the service of criminal or civil process in cases which do not arise out of and have no relation to the performance of their duties as county road patrolmen.
>
> * * * *
>
> "We think that the first sentence of Code Section 8062 means that, the patrol officers, in the performance of their duties in patrolling the roads of the county and enforcing the road and motor vehicle laws, are authorized to do and perform all acts authorized to be done by the sheriff, constable, or any other peace officer in the performance of his duties as such peace officer. The patrol officers are authorized as an incident to the performance of their duties as county road patrolmen, to arrest without warrant any person or persons committing or attempting to commit any misdemeanor, felony or breach of the peace within their presence or view on any road of the county, or the road right of way, and to pursue any person committing such offense to any place in the county where he may go, or to arrest fleeing

felons using the county roads to effect their escape; and, if authorized and empowered to do so by the commissioner of public safety, the patrol officers may enforce or aid in the enforcement of the traffic laws upon any highway of the State highway system. The patrolmen may be authorized to serve search warrants where such action is necessary as an incident to the performance of their duties as county road patrolmen. But their powers as police officers are limited to the performance of their duties as county road patrolmen. We find nothing in the statute to warrant the conclusion that the Legislature intended to make the county road patrolmen general police officers for the enforcement of the general criminal laws of the State and the service of criminal and civil process in cases which do not arise out of and have no relation to the performance of their duties as county road patrolmen."

Cf. Vickers v. *State*, 176 Tenn. 415, 142 S.W. 2d 188 (Sup. Ct. 1940); *Mullins* v. *State*, 304 S.W. 2d 333 (Tenn. Sup. Ct. 1957); *Mitchell* v. *State*, 74 Okl. Cr. 416, 127 P. 2d 211 (Cr. Ct. App. 1942) where officers with primarily limited duties are specifically authorized to assist other agencies in making arrests or serving warrants.

This result is reinforced by an application of the well established principle that the substantative provisions of an act must be embraced within the subject expressed in its title. *Art.* IV, *Sec.* VII, *par.* 4, *N.J. Const.* (1947). An examination of the titles of all the acts leading up to the 1929 act authorizing the Bergen County Police shows that they are limited to the protection of the county public roads and the regulation of traffic thereon. The title of the 1911 act (L. 1911, c. 272) reads as follows:

"An act to provide for the protection of county public roads in counties of the first class and to authorize the regulation of traffic thereon."

The title of the 1920 act (L. 1920, c. 98) was simply an act to amend the 1911 act [reciting the title of the 1911 act]. The title of the 1923 act (L. 1923, c. 57) was as follows:

An act to amend the title and body of an act entitled "An act to amend an act entitled 'An act to provide for the protection of county public roads in counties of the first class, and to authorize the regulation of traffic thereon,' approved April twenty-seventh, one thousand nine hundred and eleven," which amendatory act was approved April sixth, one thousand nine hundred and twenty.

This act amended the title of the 1920 act to read as follows:

"'An act to amend an act entitled "An act to provide for the protection of county public roads in counties where a county police department now exists, and to authorize the regulation of traffic thereon," approved April twenty-seventh, one thousand nine hundred and eleven,' * * *."

The title of the 1929 act (L. 1929, c. 205) itself reads as follows:

"An act to provide for the control and use of county roads in this State."

The grant of power "to arrest for the commission of any crime in any part of the county," R.S. 40:22-2, cannot be given a broader sweep than the titles of the acts in question would permit. A similar situation was presented in *Martin* v. *Follis*,

133 Okla. 162, 271 Pac. 672 (Sup. Ct. 1928). There the question of the scope of the power to arrest vested in special highway patrolmen by a statute whose grant of power and whose title were both similar to those involved here was considered. The grant of power in that act read as follows:

"For the purpose of enforcing the provisions of this act, any peace officer or specially commissioned officer shall have authority to make arrests for the violations of any of the provisions of this act, and the board of county commissioners of any county is hereby given authority to commission special officers or patrolmen as peace officers to patrol public highways and they shall have authority to make arrests for the violations of any of the provisions of this act or any other act regarding motor vehicles or the usage of public highways or for other violations of law. * * *"

The title of the act involved there reads as follows:

"* * * An act regulating the gross weight of vehicles or other objects; regulating the distribution of loads and speeds; providing for other restrictions of the usage of public highways; providing for enforcement and providing penalty, declaring the existence of an emergency."

The Oklahoma Constitution had a requirement that the subject of every act be clearly expressed in its title, similar to the provision in *Art.* IV, *Sec.* VII, *par.* 4, *N.J. Const.* (1947). The argument was made that if the power to arrest were construed as a general power to arrest, the scope of the act would be broader than the title, and therefore, the act would be unconstitutional. The court upheld the act by giving it a narrower scope. It stated at p. 674 of 271 Pac. that the intention of the Legislature must have been:

"* * * not only to regulate traffic upon the highways of the State, but to protect the traveling public from reckless drivers, robberies, and other unlawful acts committed *upon or near the highways*, and to clothe the special officers with full authority to make arrests for any and all of these offenses." (Emphasis added.)

In defining the grant of power the court said:

"With the many crimes that have in recent years been committed *upon our highways*, the Legislature would naturally authorize the peace officers to make arrests for these crimes." (Emphasis added.)

The purported effect of the legislative grant in R.S. 40:22-2 "* * * to arrest for the commission of any crime in any part of the county * * *" must be similarly limited in scope to traffic control and protection on county highways.

Neither the county police nor the board of chosen freeholders have any common law or statutory powers to act throughout the county detecting crime or keeping the peace, similar to the authority possessed by the county prosecutor or municipalities. Other than those powers specified in R.S. 40:22-1 et seq., the board of chosen freeholders in the law enforcement field possesses no other statutory or common law authority. County prosecutors, however, by virtue of N.J.S. 2A:158-4 are vested with the exclusive authority to conduct the criminal business in the county (except under conditions not present here) and additionally, pursuant to N.J.S. 2A:158-5,

are empowered to use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the laws. Municipal police possess authority to act on behalf of the municipality in which they serve as peace officers in protecting the health, safety and welfare of the community. See R.S. 40:48-1, 2 and other related statutes dealing with different types of local government in establishing the several kinds of police forces. Ancillary to this power is the obvious need to afford authority to arrest when crimes are committed in the presence of such officers. But there is no broad authority present in the board of chosen freeholders to create a complete law enforcement agency to exercise a full police jurisdiction in the county. Not only is there no statutory power to do so, overlapping law enforcement of this character would tend to be inefficient, expensive and confusing.

Thus, it is apparent that county policemen who engage in detecting crime away from their normal duties of patrolling county roads lack the power of arrest for any crime; they would have only the citizen's powers of arrest. 4 *Am. Jur., Arrest,* §§ 2, 24, 28, 35, 36 (1936).

As prosecutor you are primarily responsible for the administration and enforcement of the criminal laws in your county. N.J.S. 2A:158-4. There can be no question but that your constitutionally created office, *N.J. Constitution, Art.* VII, *Sec.* II, *par.* 1, has been legislatively implemented pursuant to N.J.S. 2A:158-1 et seq. to afford to you complete command of law enforcement. *State* v. *Winne,* 12 N.J. 152 (1953). This case carefully and clearly enunciated your powers and responsibilities for ensuring effective enforcement in your jurisdiction. Resolutions of a board of chosen freeholders that would conflict with such statutory and judicially recognized and imposed duties would be invalid. Any law enforcement activity on behalf of county government should be subordinate to your direction.

We conclude that the primary function of county police is traffic law enforcement and that the power to arrest is incidental to the statutory duty of enforcing the motor vehicle laws within the county.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: DAVID M. SATZ, JR.
Deputy Attorney General

OCTOBER 26, 1959

A. HEATON UNDERHILL, *Director*
Division of Fish and Game
230 West State Street
Trenton, New Jersey

FORMAL OPINION 1959—No. 22

DEAR DIRECTOR UNDERHILL:

You have requested our opinion as to whether members of the public may, with the permission of the State, fish or operate boats on the entire surface of a fresh water lake if the State owns any portion of its shore line or whether these activities may be carried on solely on the slice of the lake extending from the boundaries of the State-owned property to the center point of the lake. It is our opinion that absent a prescriptive right, dedication to general use, or license from the owners of the bed insofar as not owned by the State, the public may be authorized to fish and boat solely over that portion of the lake, the bed of which is owned by the State.

Title to the fresh water lakes does not belong to the State as successor to the English sovereign but rather was retained by the proprietors subsequent to the surrender of their governmental powers in 1702 and is thus subject to private ownership. *Baker* v. *Normanoch Ass'n,* 25 N.J. 407 (1957). Ordinarily a person may fish or boat over a portion of a lake, whether natural or artificial, only if he owns the soil beneath it. *Walden* v. *Pines Lake Land Co.,* 126 N.J. Eq. 249 (E. & A. 1939); *Upper Greenwood Lake Property Owners Ass'n* v. *Grozing,* 6 N.J. Super. 538 (Ch. Div. 1949); *Mitchell* v. *D'Olier,* 68 N.J.L. 375 (E. & A. 1902); *Albright* v. *Cortright,* 64 N.J.L. 330 (E. & A. 1900); *Cobb* v. *Davenport,* 32 N.J.L. 369 (Sup. Ct. 1867). Though *Cobb* v. *Davenport* recognizes that the private ownership is subject "to a servitude to the public for purposes of navigation, if the waters are navigable in fact," (32 N.J.L. at 378), navigation in this context means availability for use in commerce. Thus the court indicated that the only fresh water lake then used for navigation was Lake Hopatcong through which the Morris Canal ran. 32 N.J.L. at 380. Although the rights of non-owners to fish and boat are commonly dealt with together, the former is a profit *a prendre* and the latter an easement. *Albright* v. *Sussex County Lake and Park Comm'n,* 71 N.J.L. 303 (E. & A. 1904); *Cobb* v. *Davenport,* 33 N.J.L. 223 (Sup. Ct. 1868). Therefore the State's ownership of shore line along a fresh water lake does not privilege its licensees to enter upon the lake. To the contrary, such entrance upon any portion is justifiable only if the State owns the bed beneath that part, or has secured a license authorizing it to in turn license persons to use that portion of the lake, if there is an easement of entrance on the lake appurtenant to the upland owned by the State or if the lake has been dedicated to public use. *Walden* v. *Pines Lake Land Co., supra.* But since a profit *a prendre* is not subject to dedication, fishing rights cannot be obtained in the last mentioned manner. *Cobb* v. *Davenport,* 33 N.J.L. 223 (Sup. Ct. 1868); *Albright* v. *Sussex County Lake and Park Comm'n, supra.*

A right to use a lake may arise through grant or prescription. You have indicated that the lake has been subject to entrance by the general public for a long time. Though a prescriptive right to use a lake cannot arise in favor of the public, *Camp Clearwater, Inc.* v. *Plock,* 52 N.J. Super. 583, 602 (Ch. Div. 1958), nonetheless such a right may well have been acquired by the State and its predecessors in title in favor of and appurtenant to their upland. Of course, a right so acquired could embrace boating and fishing privileges, both being subject to prescriptive acquisition. *Fidelity Union Trust Co.* v. *Cochrane,* 116 N.J. Eq. 190 (Ch. 1934). In either case the prescriptive right in favor of the upland owned by the State may arise only if the use has been adverse or hostile, exclusive, continuous, uninterrupted, visible and notorious for at least 20 years. *Baker* v. *Normanoch Ass'n. supra.* The 20 years may be compiled by adding the periods of continuous adverse use by successors in title. *Cf. O'Brien* v. *Bilow,* 121 N.J.L. 576 (E. & A. 1939). If there is a prescriptive right to boat the State may license others to use it provided that the burden on the subservient estate, the lake, is not thereby unreasonably expanded. *Restatement, Property* §479, comment (1944); *cf. 23 William St. Corp.* v. *Berger,* 10 N.J. Super. 216 (Ch. Div. 1950). However in view of *Upper Greenwood Lake Property Owners Ass'n* v. *Grozing, supra,* which holds that an appurtenant profit *a prendre* may not be exercised

by a person without a transfer to him of the upland, no license to fish should be given on the basis of the State's ownership of an appurtenant, prescriptive profit *a prendre*.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: MORTON I. GREENBERG
Deputy Attorney General

NOVEMBER 30, 1959

HON. SALVATORE A. BONTEMPO
Commissioner, Department of Conservation and Economic Development
State House Annex
Trenton, New Jersey

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

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

FORMAL OPINION 1959—No. 23

GENTLEMEN:

We have been asked to determine whether a corporation organized under our General Corporation Act (Title 14, R.S.N.J.) may become licensed as a "Small Business Investment Company" under the Federal Small Business Investment Act of 1958.

The portion of the federal act (72 Stat. 694, Pub. L. No. 699, 85th Cong. August 21, 1958) which is considered in this memorandum is that which permits creation of Small Business Investment Companies (S.B.I.C.'s) organized to make long-term equity or loan funds available to small businesses, together with advisory services. The details of the entire Federal program will not be discussed except insofar as they pertain to the problem under review.

It should be pointed out that under the federal act, if there is no State legislation available under which an S.B.I.C. company can be organized, a federal charter may be obtained. This feature expires in 1961.

Set forth below are the major considerations involved in determining the questions you have raised.

(1) Conflict with R.S. 14:8-10.

R.S. 14:8-10 prohibits loans by a corporation to its stockholders, subject to the penalty that where such loans are made, joint and several liability is incurred on the

part of the recipient, and the corporation officers assenting to the loan. It is debatable whether the legislative proscription contained in this Section was originally intended to apply to transactions of the type contemplated by section 304(d) of the federal act. The language of R.S. 14:8-10, however, is clear, unambiguous and all-embracive, and we are not at liberty to read into that statute an exception.

The State of New York has amended its comparable statutory section by adding the following language:

> "A small business investment company as defined in and operating pursuant to the provisions of an act of Congress entitled, 'Small Business Investment Act of 1958' shall have the power to lend money to a small business concern as defined in said act, even though such small business concern is or becomes a stockholder of such small business investment company, without violating this section."

A similar amendment would be required here before general business corporation charters can be granted. We understand that federal legislation, eliminating the mandatory stock purchase by borrowers, is being considered. Should this be enacted, of course, there will be no bar under N.J.S.A. 14:8-10.

(2) Would an S.B.I.C. if it were chartered by the State, be engaged in the business of banking?

This question is presented because of the fact that Section 301, subdivision (d), paragraph 9, of the Small Business Investment Act of 1958 provides that a corporation organized under that act shall have power "to act as depository or fiscal agent of the United States when so designated by the Secretary of the Treasury."

N.J.S.A. 17:9A-213 specifically provides that only a banking institution shall exercise within the State of New Jersey the power to receive money on deposit (N.J.S.A. 17:9A-26(1)) and the power to act as the fiscal agent of the United States (N.J.S.A. 17:9A-25 (13)). Thus if Section 301 of the Small Business Investment Act of 1958 is read as requiring that an S.B.I.C. must have these powers, New Jersey could not charter such a corporation. Section 103(3) of the Small Business Investment Act of 1958, however, excludes from compliance with the provisions of 301 a State-chartered investment company. This section reads in pertinent part as follows:

> "(3) the terms 'small business investment company' and 'company' mean a small business investment company organized as provided in title III, including (except for purposes of section 301 and section 308(f)) a State-chartered investment company which has obtained the approval of the Administrator to operate under the provisions of this Act as provided in section 309 and a company converted into a small business investment company under section 401 of this Act."

That Section 301(d)(9) of the Small Business Investment Act is applicable only to a corporation chartered by the Small Business Administration rather than a State-chartered corporation is further supported by a reading of the regulations promulgated by the Small Business Administration, dated December 1, 1958 (23 F.R. 9383). Section 107.301-1 thereof lists the charter requirements of a corporation chartered by a State and does not include the powers enumerated in Section 301(d)(9).

It is our opinion therefore that the granting of a State charter to an S.B.I.C. would not violate the provisions of the Banking Act of New Jersey. N.J.S.A. 17:9A-1 *et seq.*

(3) Does the New Jersey Investment Companies Act (N.J.S.A. 17:16A-1 *et seq.*) govern S.B.I.C. licensees?

This question is raised only because of the similarity in names which has led to some confusion between the federal act and N.J.S.A. 17:16A.

The New Jersey Investment Companies Act defines an "investment company" substantially as any corporation, partnership or individual which engages principally in the business of making, issuing, or guaranteeing investment contracts. An "investment contract" is defined as any agreement or writing whereby the company making, issuing, or guaranteeing the same undertakes to pay a holder or his assignee a fixed or determinable cash sum on a fixed or determinable date in consideration for a contractually fixed payment. The use of the word "making" is as a word of art similar to its use in negotiable instruments law. An S.B.I.C., however, would be the holder, and not the maker of any such agreement.

Only if an S.B.I.C. were to secure its investment capital through the methods detailed in N.J.S.A. 17:16A, and then only if it be deemed to be principally engaged in such business, would it be subject to that act.

(4) We have also given consideration to the question whether a corporation organized as a Business Development Corporation under the provisions of the New Jersey Business Development Corporation Act of 1957 (N.J.S.A. 17:52-1, *et seq.*) may be eligible for licensing as an S.B.I.C. under the Federal Small Business Investment Act.

The corporations formed under these two programs share many common objectives. Each statute, nevertheless, lays down widely varying powers, methods of organization and control, as well as limitations upon persons who may participate. Apart from the difficulties inherent in administration by multiple regulatory bodies, these variations would make necessary substantial legislative changes before Business Development Corporations could be licensed as, or converted into, S.B.I.C.'s under the Federal act.

CONCLUSIONS

1. Corporate charters under Title 14 must be denied where powers under the Federal Small Business Investment Companies Act are sought, unless federal or State legislation is enacted to eliminate the problem created by N.J.S.A. 14:8-10.

2. Should such legislation be enacted, there would be no problem of conflict with the Banking Act inasmuch as State-chartered S.B.I.C.'s do not have depository powers or fiscal agency powers. Should such powers be granted, they would be in conflict with N.J.S.A. 17:9A-213.

3. Unless a Small Business Investment Company secures its capital for investment through the methods detailed in N.J.S.A. 17:16A-1, it is not subject to that statute.

4. Barring substantial legislative change, Business Development Corporations organized under the provisions of N.J.S.A. 17:52-1 *et seq.* do not conform to the requirements laid down by the Federal Small Business Investment Act for S.B.I.C. licensees.

5. Until appropriate legislative amendments are enacted application for S.B.I.C. charters may be made directly to the federal government.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: DAVID LANDAU
Deputy Attorney General

NOVEMBER 30, 1959

HON. SALVATORE A. BONTEMPO
Commissioner of Department of
Conservation and Economic Development
205 West State Street
Trenton, New Jersey

FORMAL OPINION 1959—No. 24

DEAR COMMISSIONER:

You have requested our opinion as to the constitutionality of R.S. 23:4-31 providing as follows:

> "No unnaturalized foreign-born person shall hunt for, capture or kill in this State, a wild bird or animal, either game or otherwise, of any description, excepting in defense of person or property, and to that end he shall neither own nor be possessed of a shotgun or rifle of any make. A person violating this section shall be liable to a penalty of twenty dollars for each offense. In addition to the penalty, all guns of the kind herein mentioned found in possession or under control of such person, shall upon conviction of such person be declared forfeited to this State, and shall be sold by the board as hereinafter provided. This section and sections 23:4-32 to 23:4-35 of this title shall not apply to an unnaturalized, foreign-born person who owns real estate in this State to the value of two thousand dollars above all encumbrances."

It is our opinion that this section is valid. The outstanding case on this subject is *Patsone* v. *Pennsylvania,* 232 U.S. 138 (1914). There Justice Holmes upheld a Pennsylvania statute rendering it unlawful for any unnaturalized foreign born resident to kill any wild bird or animal other than in the defense of person or property or to have possession of a shotgun or rifle for these purposes. The alien's Fourteenth Amendment objections that he had been deprived of property and had been singled out for invidious discrimination were deemed insufficient. Though the *Patsone* case has been distinguished, *Takahashi* v. *Fish and Game Comm'n,* 334 U.S. 410, 421 (1948), never having been overruled we treat it as conclusive of the federal questions raised by R.S. 23:4-31. See also *Truax* v. *Raich,* 239 U.S. 33 (1915). Further, we are of the opinion that the Supreme Court of New Jersey would follow *Patsone* in construing the due process and special legislation clauses of the New Jersey Constitution. Constitution of 1844, Art. 1, par. 1, Art. 4, §7, par. 9; Constitution of 1947, Art. 1, par. 1, Art. 4, §7, par. 8. As recently as 1956 the Court in *Guill* v. *Hoboken,* 21 N.J. 574, 582 (1956) cited and paraphrased the *Patsone* decision with approval.

The provision in R.S. 23:4-31 providing that the section is inapplicable to aliens owning real estate in New Jersey of $2,000 in value above encumbrances does not establish an unreasonable classification. There are two bases for the $2,000 exemption. Firstly, real property taxes bear a large percentage of the burden of government; therefore, an alien owning a substantial amount of property makes a contribution to the State not shared by nonproperty owning foreigners and thus shoulders a prime obligation of citizenship. The distinction between real and personal property is

reasonable because as a matter of administrative practice, personalty is rarely taxed in New Jersey. As noted in the Sixth Report of the New Jersey Commission on State Tax Policy, p. XV (1953):

> "The personal property tax has completely broken down. While locally assessable at its 'true value' for over a hundred years, it has been the practice from the beginning to assess such property either at a small fraction of its value or not at all."

It is no answer to say that the Legislature could have achieved a similar result by directing the charging of higher fees for licenses for aliens not owning realty in New Jersey. If the Legislature adopts means likely to reach a permissible goal, the courts cannot void its product on the ground that other means are equally well suited to the ends. *Robson* v. *Rodriquez,* 26 N.J. 517 (1958). Secondly, the exemption may be sustained because of the dangerous nature of hunting. *Cf. Davis* v. *Hellwig,* 21 N.J. 412 (1956). If an alien injures a New Jersey resident the latter may have no recourse to our courts because of the alien's unavailability to receive process. If, however, he has real property in this State it may be attached to satisfy the plaintiff's claim. Laws of 1948, c. 358, N.J.S. 2A: 26-2. While it is true that when R.S. 23:4-31 was enacted no attachment could be secured in a tort action without showing that the defendant had committed an outrageous battery akin to mayhem, see Laws of 1901, c. 74, *Messina* v. *Petroli,* 11 N.J. Misc. 583 (Cir. Ct. 1933), in determining the reasonableness as opposed to formal validity of R.S. 23:4-31, we look to existing circumstances. See *Egan* v. *Erie R.R. Co.,* 29 N.J. 243 (1959); *cf. Four-G Corp.* v. *Rutta,* 56 N.J. Super. 52 (App. Div. 1959); *Crecca* v. *Nucera,* 52 N.J. Super. 279 (App. Div. 1958); *Kelley* v. *Curtiss,* 16 N.J. 265 (1954); *Prudential Ins. Co.* v. *Laval,* 131 N.J. Eq. 23 (Ch. 1942). Other Legislatures have recognized the importance of providing redress for residents as against absconding nonresident tortfeasers. See *Nelson* v. *Miller,* 11 Ill. 2d 378, 143 N.E. 2d 673 (Sup. Ct. 1957). R.S. 23:4-31 similarly facilitates redress in our own courts for injuries committed here.

The distinction between aliens and nonresident American citizens is, of course, meaningful. It is one thing to require a New Jersey citizen to pursue a defendant to another State with the availability of federal jurisdiction in cases where the claim is in excess of $10,000, 28 U.S.C.A. §1332 (Supp. 1959); it is quite another to remand him to a foreign court. And the distinction between realty and personalty is vital. Personalty is removable and its ownership is not easily established. On the other hand realty is fixed and its ownership is ordinarily a matter of record. See Laws of 1947, c. 275, N.J.S.A. 46:16-1; R.S. 54:4-29, 30.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: MORTON I. GREENBERG
Deputy Attorney General

DECEMBER 28, 1959

R. SCHUYLER BOGART, *Chief Clerk*
Union County Board of Elections
Court House
Elizabeth 4, New Jersey

FORMAL OPINION 1959—No. 25

DEAR MR. BOGART:

We have been asked who has the responsibility for drawing the boundary lines of new election districts where they may be needed after a municipality has adopted the mayor-council Plan F under the Faulkner Act. Plan F appears as Article 8 in L. 1950, c. 210, §8-1; N.J.S.A. 40:69A-74 to 80. Section 17-48 of the act, N.J.S.A. 40:69A-197, provides that when a municipality adopts Article 8, the municipality is to be divided into wards by ward commissioners. You inform us that in the municipality in question, the ward boundaries have been drawn. Apparently the new ward boundaries intersect the boundaries of the old election districts and the election districts are not wholly included within single wards. R.S. 19:4-6 requires that election districts not extend beyond the boundary lines of a single ward. R.S. 19:4-7 provides that where the election districts are not contained within a single ward because of a change in ward lines, that new election district boundaries are to be drawn by the county board of elections in counties of the first class and the elective governing body of the municipality in all other counties. Although the law does not expressly provide for the case where there never have been ward boundaries before in the municipality, and by law it becomes necessary to have ward boundaries and they are drawn so as not to include within single wards each election district, it is our view that it is the spirit of R.S. 19:4-7 that in counties other than counties of the first class the elective governing body of the municipality should have exclusive jurisdiciton over the entire question of drawing election district boundaries.

We understand that in the particular case with which you are concerned, the municipality is not in a first class county. Therefore, it is our opinion that in this case the responsibility for drawing the new election district boundaries rests with the elective governing body of the municipality.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

FEBRUARY 24, 1959

HONORABLE JOHN W. TRAMBURG, *Commissioner*
Department of Institutions and Agencies
Trenton, New Jersey

MEMORANDUM OPINION 1959—P-1

MY DEAR COMMISSIONER TRAMBURG:

We have been asked to define the status of an inmate now in State prison who was convicted of non-support and ordered to pay fines of $1,000.00 to his wife and to his children pursuant to *N.J.S.* 2A:100-2. This statute expressly provides that a husband who deserts or willfully neglects the maintenance of his wife or children who are in destitute or necessitous circumstances may be convicted of a misdemeanor, and subjected to a fine which may be paid to the wife or the guardian of the children. Specifically, this person served his time but has paid none of the fine which was imposed. Your question is whether the prisoner must be (1) held until the fine is paid to the wife; (2) held for a period of time during which he is given credit toward the fine; or (3) paroled on condition that he pay the fine according to terms outlined by the Parole Board.

This statute is part of subtitle 10 (of Title 2A of the New Jersey Statutes) which is entitled "Crimes." It permits the sentencing judge to impose a fine which may be paid either into the public treasury or to the wife or children. In either case the statute describes the money to be paid by the defendant as "a fine." *N.J.S.* 2A:100-2 makes it a crime to neglect a wife or children "in destitute or necessitous circumstances." The Legislature has distinguished between these two offenses in that it has permitted payment of the fine to be made directly to the wife or guardian of the children where they are in destitute or necessitous circumstances. This does not change the essential character of the payment as a punishment. Therefore, there is no reason to distinguish this type of fine from any other fine.

N.J.S. 2A:164-18 provides that where a defendant is convicted, he shall be kept in prison until the time of his confinement shall have expired and "the fine or fines and cost of prosecution be paid or remitted, or until he shall be otherwise discharged according to law." This provision is implicitly part of every sentence imposing a fine, including sentences for violation of *N.J.S.* 2A:100-2. Therefore, in default of payment of a fine imposed under the latter statute, or other discharge according to law, a person subjected to a fine under this statute must be held in confinement. However, this confinement will not continue indefinitely. *N.J.S.* 2A:166-16 provides that any person held in confinement in a State penal institution solely in default of payment of a fine shall be given credit against the fine at the rate of $3.00 for each day of confinement.

Alternatively, the inmate may be paroled on condition that he pay the fine through the probation office. *N.J.S.A.* 30:4-123.15. If a defendant is released on condition that he pay the fine and he thereafter defaults, parole may be revoked.

In summary, then, it is our opinion that a person ordered to pay a fine to his wife or children under *N.J.S.* 2A:100-2 may be held in confinement in default of payment of the fine, but must be given credit at the rate of $3.00 a day, and may be paroled on condition that he pay the fine.

Very truly yours,
DAVID D. FURMAN
Attorney General
By: EUGENE T. URBANIAK
Deputy Attorney General

MARCH 19, 1959

HONORABLE HAROLD J. ASHBY, *Chairman*
State Parole Board
State Office Building
Trenton, New Jersey

MEMORANDUM OPINION 1959—P-2

DEAR MR. ASHBY:

In our letter of October 21, 1958, we advised you that the jurisdiction of the Governor under his pardoning power extended to motor vehicle offenses although we recommended that the pardoning power not be exercised in such cases. You have asked for further advice as to whether the pardoning power of the Governor also encompasses the offense of juvenile delinquency.

A finding by the Juvenile & Domestic Relations Court that a person is guilty of juvenile delinquency is not a conviction, nor is the guilty person considered a criminal. *N.J.S.* 2A:4-39. Our statutes deem a child under the age of 16 years to be incapable of committing a crime. *N.J.S.* 2A:85-4. Civil disabilities ordinarily imposed by conviction of a crime are not imposed upon those adjudged guilty of juvenile delinquency. *N.J.S.* 2A:4-39; *State* v. *De Paola*, 5 N.J. 1, 18 (1950) (adjudication of juvenile delinquency "not a conviction of crime such as may be shown to attack the credibility of a witness * * *.").

However, as we stated in our prior letter to you, the pardoning power is not limited strictly to criminal cases, but also extends to those violations which are considered quasi-criminal. It, in effect, extends to every violation of State law. *Brown* v. *Walker*, 161 U.S. 591 (1896); 67 *C.J.S. Pardons*, § 4, p. 560 (1950). A pardon is historically considered as the remitting or forgiving of offenses against the State. *Cook* v. *Freeholders of Middlesex Co.*, 26 N.J.L. 326, 328 (Sup. Ct. 1857), affirmed 27 N.J.L. 637 (E. & A. 1858). Though one found guilty of juvenile delinquency has not committed a crime nor is to be considered a criminal, the finding of guilt does impose upon the person involved the disciplinary jurisdiction of the State. The acts for which a person may be found guilty of juvenile delinquency are those which would otherwise constitute violations of State laws triable in the adult courts. *N.J.S.* 2A:4-14.

Since a finding of juvenile delinquency is predicated upon a violation of State law, although the proceedings subsequent to the commission of such a violation are civil in nature, we see no reason for excluding the offense of juvenile delinquency from the operation of the pardoning power of the Governor.

Sincerely yours,
DAVID D. FURMAN
Attorney General

APRIL 1, 1959

C. J. SCHWEIKHARDT, D.D.S.
Secretary, State Board of Registration and Examination in Dentistry
150 East State Street
Trenton 8, N. J.

MEMORANDUM OPINION 1959—P-3

DEAR DR. SCHWEIKHARDT:

You have requested our opinion as to whether or not teachers in dental schools require a license to practice dentistry in this State.

R.S. 45:6-19 defines what constitutes "practicing dentistry" in this State and also sets forth which practices, acts and operations shall not be regarded as practicing dentistry within the meaning of said statute. Subsection 9 of R.S. 45:6-19, under the heading "Any person shall be regarded as practicing dentistry within the meaning of this chapter who * * *

> "Performs any clinical operation included in the curricula of recognized dental schools or colleges."

You have advised us that your profession is in general agreement that the following subjects would be considered clinical operations: (a) Operative Dentistry; (b) Prosthetic Dentistry; (c) Crown and Bridge; (d) Orthodontia; (e) Oral Surgery; (f) Peridontia. You further advised that all technique and laboratory classes connected with these subjects are considered clinical.

It appears, therefore, that anyone teaching the aforementioned subjects in any dental school in this State must be a licensed dentist in New Jersey because R.S. 45:6-13 provides that "no person shall practice dentistry within the meaning of this chapter unless licensed so to do, and no person shall be deemed so licensed unless he is now licensed and registered so to do or shall hereafter be licensed and registered under the provisions of this chapter.* * *"

R.S. 45:6-19 further provides under the heading, "The following practices, acts and operations shall not be regarded as practicing dentistry within the meaning of this chapter:" Subsection 3 thereof provides:

> "The operation of a dental school or college as now conducted and approved, or as may be approved, by the Board of Dental Examiners; and the practice of dentistry by students in any such dental school or college approved by the board, when acting under the direction and supervision of any registered and licensed dentist acting as instructor; * * *".

It will be noted that this provision merely relates to the operation of a dental school. It makes no mention as to whether or not the teachers therein must or must not be licensed to practice dentistry in the State of New Jersey, with the exception that whenever dentistry is practiced by students therein, they must be under the supervision of a licensed dentist. There is no question that the licensed dentist referred to in this subsection means a dentist licensed in this State. It is, therefore, our opinion that wherever a teacher is engaged in performing any clinical operation or teaching any of the aforementioned subjects in a dental school in this State, such teacher must be licensed to practice dentistry in New Jersey. Any teacher engaged in the teaching

of any theoretical subjects and who does not perform any clinical operation is not required to be licensed to practice dentistry in New Jersey.

You further request our opinion as to whether or not the taking and diagnosing of X-rays can be considered clinical and should require a license. R.S. 45:6-19 provides, under subsection 4, that whoever "uses himself or by any employee, uses a Roentgen or X-ray machine for dental treatment, dental radiograms, or for dental diagnostic purposes; * * *" is regarded as practicing dentistry within the meaning of this statute and would, therefore, be required to be licensed in the State of New Jersey by R.S. 45:6-13, as cited above. In this regard, there may be an exception under subsection 6 of the practices excepted by 45:6-19 where, "The use of Roentgen or other rays for making radiograms or similar records of dental or oral tissues under the supervision of a licensed dentist or physician; provided, however, that such services shall not be advertised, by any name whatsoever, as an aid or inducement to secure dental patronage; and provided, further, that no corporation shall advertise that it has, leases, owns or operates a Roentgen or X-ray machine for the purpose of making dental radiograms of the human teeth or tissues of the oral cavity, or administering treatment thereto for any disease thereof; * * *".

Therefore, it is our opinion that the taking and diagnosing of X-rays by an unlicensed teacher in a dental school is not permitted unless he is under the supervision of a dentist licensed in the State of New Jersey or a licensed physician and surgeon of this State.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: ANDREW A. SALVEST
Deputy Attorney General

APRIL 1, 1959

HON. JOHN W. TRAMBURG, *Commissioner*
Department of Institutions and Agencies
State Office Building
Trenton, New Jersey

MEMORANDUM OPINION 1959—P-4

DEAR COMMISSIONER TRAMBURG:

Responsive to your inquiry of February 25, 1959, it appears that the State Parole Board desires advices concerning the proper handling of sentences imposed upon inmates in confinement wherein said sentences are concurrent in part and consecutive in part.

The Parole Board suggested an example case to highlight the legal points involved as follows:

> Inmate John Smith received a sentence of 5 to 7 years on January 1, 1957, the maximum expiring on January 1, 1964, without regard to commutation time for good behavior or reduction of the sentence for the work performed. After serving two years of the sentence, the inmate, on January 1, 1959, received an additional sentence of 5 to 7 years and the court did not specify that said sentence should be consecutive to the first sentence being served.

Since a sentence commences upon the day of imposition thereof, the second sentence commenced on January 1, 1959, at which time five years remained to be served on the first sentence. The second sentence, imposed on January 1, 1959, having a 7-year maximum, would expire on January 1, 1966, again without regard to commutation time for good behavior or work credits. Thus, the two sentences, being concurrent in part and consecutive in part, commenced on January 1, 1957, the date of imposition of the first sentence, and will terminate on January 1, 1966, the date of expiration of the second sentence which extends for 2 years beyond the expiration date of the first sentence. It is apparent from the foregoing that the aggregated sentence is of 9 years duration.

The State Parole Board desires to be informed whether commutation time for good behavior as prescribed in *R.S.* 30:4-140 should be calculated upon these two sentences on an individual basis or whether they should be considered as a single sentence, the maximum being the aggregate of the maxima of the two sentences, as explained in the example case.

It is our opinion and we advise you that commutation time for good behavior as described in *R.S.* 30:4-140 should be calculated on the period of 9 years which is the aggregate maximum of the combined maxima of the sentences described, assuming the inmate consents to the aggregation.

The manner in which sentences imposed by different courts at different times shall be considered by the State Parole Board for purposes of fixing the date upon which a prisoner shall be eligible for consideration for release on parole is found in *R.S.* 30:4-123.10 which reads:

> "With regard to consecutive sentences imposed upon prisoners * * * by different courts at different times, all such consecutive sentences, with the consent of the prisoner, may be aggregated by the board to produce a single sentence, the minimum and maximum of which shall consist of the total of the minima and maxima of such consecutive sentences. Such aggregation shall be for the purpose of establishing the date upon which such prisoner shall be eligible for consideration for release on parole."

An examination of *R.S.* 30:4-140 discloses a schedule of the number of days commutation time for good behavior that may be allowed by the board of managers of the institution on sentences of varying duration. Immediately, it is apparent that there is opportunity for gaining accelerated good behavior credits on longer sentences for, by way of example, the number of days allowed on a sentence of one year is 72 days; whereas, on a 5-year sentence it is 444 days which is 84 days in excess of the amount allowed for one year multiplied by the factor of five for the 5-year sentence. These credits accelerate additionally for sentences of longer duration.

Our courts first dealt with the question of accelerated credits for good behavior in the case of *In re Fitzpatrick,* 9 N.J. Super. 511 (Cty. Ct. 1950); aff., per curiam, 14 N.J. Super. 213 (App. Div. 1951). There the court observed that the combining of consecutive sentences to produce a single sentence, without statutory authorization for such combining, was illegal. The view was adopted *In the Matter of Clover,* 34 N.J. Super. 181 (App. Div. 1955). Both *Fitzpatrick* and *Clover, supra,* recognized the desirable advantages to the inmate to have consecutive sentences aggregated because of the acceleration of the credits on sentences of longer duration. In *Lipschitz* v. *State,* 43 N.J. Super. 522, 524 (App. Div. 1957) the court said:

> "R.S. 30:4-140 provides for certain credits against the maximum and minimum terms of a State Prison sentence. These credits are awarded for 'faithful performance of assigned labor, * * * continuous orderly deportment, * * * and * * * manifest effort of self-improvement and control * * *.' They are allowed on a progressive or accelerated basis, increasing in direct ratio to the length of sentence."

However, in *Fitzpatrick, supra,* the court said:

> "But authority to lump such sentences, if such authority is desirable, must be obtained from the Legislature."

R.S. 30:4-123.10, the Parole Law, was first amended by *Chap.* 292, *P.L.* 1950, to accommodate *Fitzpatrick, supra,* and the amendment provided that when two or more consecutive sentences were imposed at the same time by the same court upon the same inmate, there shall be deemed to be imposed upon him a single sentence the minimum and maximum limits of which is the combined minima and maxima of the consecutive sentences. However, this amendment made no provision for consecutive sentences imposed prior to the effective date thereof, to wit: July 3, 1950, and, thus, the amendment of *Chap.* 277, *P.L.* 1953 was enacted to provide that such consecutive sentences could be aggregated, with the consent of the prisoner, since, if no such consent was forthcoming, aggregation was illegal as determined by *Fitzpatrick, supra.*

It is apparent that neither of these amendments would accommodate consecutive sentences imposed upon the same inmate by different courts at different times but the most recent amendment of *Chap.* 102, *P.L.* 1956, made such provision, and here again, consent of the prisoner was essential.

These amendments are indicative of a legislative scheme or policy to make available to the prisoner, assuming his consent, the maximum accelerated credits for long term sentences which are produced by the aggregation of consecutive sentences, whether they be consecutive in whole or in part, such as those described in the example above. Since these amendments made no distinction between sentences consecutive in their entirety and those which are consecutive in part, we cannot supply such an interpretive distinction and "consecutive sentences" must encompass those which are consecutive either in whole or in part.

Superimposed thereon are the decisions of this jurisdiction which lead to the conclusion that penal statutes must be strictly construed and most favorably to the individual in confinement. The principle is so well grounded in our law that a recitation of the numerous decisions seems superfluous.

Because the Legislature by a series of amendments to the Parole Law evidenced a clear intent to make available to the inmate in confinement the maximum accelerated credits for good behavior on aggregated sentences, and because the rules of statutory exposition on penal statutes requires a liberal view thereof, we must find that the sentences referred to in the example submitted by the State Parole Board must be deemed "consecutive" in contemplation of the foregoing amendments since they are consecutive in part and the maximum credits for good behavior should be made available thereon to the prisoner, to the extent that such sentences are consecutive, as provided in *R.S.* 30:4-140, assuming the prisoner consents to the aggregation.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: EUGENE T. URBANIAK
Deputy Attorney General

MAY 25, 1959

HON. JOSEPH E. CLAYTON
Assistant Commissioner of Education
175 West State Street
Trenton, New Jersey

MEMORANDUM OPINION 1959—P-5

DEAR COMMISSIONER:

You have requested our opinion as to whether or not it is mandatory for a local board of education to pay the dues provided for membership in the State Federation of District Board of Education.

In our opinion the answer is yes.

R.S. 18:9-1 provides that "*All* boards of education of the various school districts *shall* constitute a 'state federation of district boards of education.'"; and R.S. 18:9-2 provides that each of the district boards "*shall* select annually one of its members as a delegate to the State federation." The functions of the State Federation are to investigate such subjects relating to education as it may think proper, and to "encourage and aid all movements for the improvement of the educational affairs in this State." (R.S. 18:9-3.) R.S. 18:9-6 provides as follows:

> "For the purpose of defraying the necessary expenses of the State Federation, the various district boards may pay the necessary expenses incurred by its delegates, and may appropriate annually such sums for dues as may be assessed by the Federation at any delegate's meeting, which assessment of dues shall be made only upon two-thirds vote of the delegates present at such delegate's meeting, after notice of the taking of such vote shall have been given to each district board in writing at least sixty days before such delegate's meeting. The aforesaid dues shall be assessed upon a graduated scale according to the size of the school district, but in no case shall the dues for any one district exceed the sum of one hundred fifty dollars ($150.00) for any one year. Dues shall be payable by the custodian of school moneys of the school district to the treasurer of the State Federation."

We read the above quoted section as requiring the payment of dues, once they have been assessed in accordance with the procedures and limitations set forth in R.S. 18:9-6. It is to be observed that the dues "*shall* be assessed upon a graduated scale" etc., and that "dues *shall* be payable by the custodian of school moneys * * * to the treasurer of the State Federation." Reading this language together with the sections requiring all boards of education to be members of the State Federation and requiring each board to select a member as a delegate to the State Federation, we believe that the word "shall" as above twice quoted from R.S. 18:9-6 should be given its usual mandatory significance. See *Union Terminal Cold Storage Co.* v. *Spence,* 17 N.J. 162, 166 (1954); *Foley* v. *Orange,* 91 N.J.L. 554, 555 (E. & A. 1918). Moreover, it would be somewhat anomalous for one or more local boards to be members of the Federation, as they must by law, without paying the dues contemplated by R.S. 18:9-6. For these reasons, we would construe the provision of Section 18:9-6 that the various district boards "may appropriate annually such sums for dues as may be assessed" as a grant of power which each board will be under a duty to exercise when the assessment has been effected in accordance with the statute. *City of Bayonne* v. *North Jersey etc. Commission,* 30 N.J. Super. 409, 417 (App. Div. 1954); *Clark* v. *Elizabeth,* 61 N.J.L. 565, 581-582 (E. & A. 1898). In the case last cited, the Court of Errors and Appeals set forth the rule as follows (pp. 581-582):

> "Words which, in their ordinary acceptation and when interpreted exclusive of the context and the subject-matter, imply a discretion or power, such as 'may,' 'it shall be lawful,' and the like, become in the construction of statutes mandatory where such is the legislative intent. The general rule is stated as follows: 'Where a statute confers authority to do a judicial, or, indeed, any other act, which the public interest or even individual right many demand, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having a right to make the application. In giving one person the authority to do an act the statute impliedly gives to others the right of requiring that the act be done, the power being given for the benefit not of him who is invested with it, but of those for whom it is to be exercised. * * * When, therefore, the language in which the authority is conferred is only directory, permissive or enabling—for instance, when it is enacted that the person authorized "may," or "is empowered," or "shall if he deems it advisable," or that "it shall be lawful" for him to do the act—it has been so often decided as to have become an axiom that such expressions have a compulsory force, unless there be special grounds for a different construction.'"

Very truly yours,

DAVID D. FURMAN
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

MAY 25, 1959

SALVATORE A. BONTEMPO, *Commissioner*
Department of Conservation and Economic Development
205 West State Street
Trenton, New Jersey

MEMORANDUM OPINION 1959—P-6

DEAR COMMISSIONER BONTEMPO:

You have requested our opinion as to whether a veteran who has a total of 13 years of public service and who has been injured in the course of his employment, would be eligible for a disability pension pursuant to N.J.S.A. 43:4-1 et seq. This question must be answered in the negative.

N.J.S.A. 43:4-1 reads as follows:

> "This chapter shall apply to and include persons serving in and honorably discharged from the military or naval service of the United States, including nurses, in any war in which the United States is or has been engaged and in connection with the American punitive expedition or other intervention

campaign or trouble with the Republic of Mexico during the administration of President Woodrow Wilson; provided, such designated persons shall have attained the age of sixty-two years or become incapacitated after twenty years of continuous or aggregate service for the duties of their office or position of employment."

From the above quoted provision, it can be seen that a veteran who is not incapacitated must have at least 20 years of service and must have reached the age of 62 years in order to qualify for a veteran's pension; a veteran who is incapacitated must have at least 20 years of service but need not meet the minimum age requirement of 62 years of age. Since the veteran in question does not have 20 years of service, he would not qualify for a veteran's pension pursuant to N.J.S.A. 43:4-1 et seq.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: JUNE STRELECKI
Deputy Attorney General

MAY 29, 1959

COLONEL JOSEPH D. RUTTER
New Jersey State Police
State Police Headquarters
West Trenton, New Jersey

MEMORANDUM OPINION 1959—P-7

DEAR COLONEL RUTTER:

You have requested an opinion concerning the following problem. An officer of a detective agency incorporated and licensed in New York State as a detective agency has filed an application for an individual private detective's license in New Jersey pursuant to R.S. 45:19-9 et seq. However, the person does not hold an individual New York State License. The applicant insists that he is qualified as an individual to receive a private detective's license. You have questioned your authority to issue such a license because the person might not be qualified according to the terms of N.J.S.A. 45:19-12 which, in part, states that:

"* * * No license shall be issued to * * * any person, firm, association or corporation unless such person or at least one member of the firm and one officer or director of the association or corporation has had at least five years' experience as an investigator or as a police officer with an organized police department of the State or a county or municipality thereof, or with an investigative agency of the United States of America or any State, county or municipality thereof. * * *"

You have informed us that the individual lacks the qualifications enumerated above. You have also indicated to the person that because he has not the necessary investigative experience the fact that persons in his New York corporation do in

fact possess investigative experience cannot be credited to his application for an individual's license.

It is our opinion that you are correct in refusing to issue a license to this person. The statute is absolutely clear in this regard. Furthermore, this individual cannot invoke the reciprocity provisions of N.J.S.A. 45:19-23 which states that:

"Any person, firm, assocation or corporation incorporated or licensed under the laws of any other State of the United States, and intending to conduct a private detective business or act as a private detective or investigator within this State shall file in the office of the superintendent a written application duly signed and verified and obtain from the superintendent a license as herein provided and shall be subject to all the provisions of this act."

The obvious intent of this statute is to permit a person, firm, association or corporation licensed in New York State to operate in New Jersey under a New Jersey-issued private detective's license if that particular person, firm, association or corporation is the applicant. That is not the case here. To permit individuals from corporations licensed to be private detectives in other States to operate in this State as individuals under the aegis of the reciprocity provisions would lead to harmful results. Actions by an individual in this State could be the actions of the corporation which, in fact, is not licensed to do business in this State. Such a guise would tend to subvert the control which the Legislature has conferred upon you.

In summary, you have the right to deny the applicant for an individual private detective license under the terms of N.J.S.A. 45:19-9 et seq.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: DAVID M. SATZ, JR.
Deputy Attorney General in Charge

MAY 29, 1959

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

MEMORANDUM OPINION 1959—P-8

DEAR MR. KERVICK:

You have requested our opinion as to whether more than one individual may be designated as a beneficiary under a Public Employees' Retirement System Group Life Insurance Policy, and whether unnamed children of a beneficiary who predeceases the insured member may be named as alternate beneficiaries.

It is our opinion that more than one individual may be designated as a beneficiary under such a life insurance policy but that unnamed children of a beneficiary who predeceases the insured may not be named as alternate beneficiaries. The Public

Employees' Retirement System—Social Security Integration Act, N.J.S.A. 43:15A-6 et seq., contains several provisions which deal with beneficiary designations on life insurance benefits. N.J.S.A. 43:15A-41(c); N.J.S.A. 43:15A-45(c); N.J.S.A. 43:15A-46(c); N.J.S.A. 43:15A-48(d).

N.J.S.A. 43:15A-41(c) reads as follows:

> "Upon the receipt of proper proof of the death of a member in service on account of which no accidental death benefit is payable under section 49 there shall be paid to such person, if living, as he shall have nominated by written designation duly executed and filed with the board of trustees, otherwise to the executor or administrator of the member's estate:
>
> "(1) His accumulated deductions at the time of death together with regular interest; and
>
> "(2) An amount equal to 1½ times the compensation upon which his contributions are based or received by the member in the last year of creditable service; provided, however, that if such death shall occur on or after July 1, 1956, and after the member shall have attained age 70, the amount payable shall equal 3/16 of the compensation received by the member in the last year of creditable service instead of 1½ times such compensation."

The language of N.J.S.A. 43:15A-45(c), 46(c) and 48(d) is identical with the language quoted above with regard to designation of beneficiaries. Thus, it is necessary to determine the meaning of "such person, if living" in order to ascertain whether "person" refers to one individual or more.

According to law, when the singular of the term "person" is described, such word importing the singular number shall be understood to include and to apply to several persons or parties as well as to 1 person or party. N.J.S.A. 1:1-2.

Further, an examination of the insurance policy issued to the Board of Trustees of the Public Employees' Retirement System of New Jersey by the Prudential Insurance Company of America, which policy is the group policy covering individual members of the Public Employees' Retirement System, reveals that the statutory language referred to above has been taken from this policy. There is contained within this group insurance policy a section entitled "Beneficiary." The first paragraph contains language identical with the above cited sections of the Public Employees' Retirement System—Social Security Integration Act, N.J.S.A. 43:15A-6 et seq. The third paragraph of said section contains the following language:

> "If more than one Beneficiary is designated and in such designation the insured individual has failed to specify their respective interests, the Beneficiaries shall share equally. If any designated Beneficiary predeceases the insured individual, the interest of such Beneficiary shall terminate and shall be shared equally by such of the Beneficiaries as survive the insured individual, unless the insured individual has made written request to the contrary in his Beneficiary designation."

Thus, it can be seen that it was contemplated that a member might designate more than one individual as a beneficiary of his life insurance benefits or there would have been no need for paragraph three.

Since the Legislature in enacting the insurance provisions of the Public Employees' Retirement System—Social Security Integration Act was aware of the insurance agreement between the Board of Trustees of the Public Employees' Retirement System and the Prudential Insurance Company of America and adopted the language of said policy within these insurance provisions, the interpretation of the word person should be consistent with that intended by both the Board of Trustees of the Public Employees' Retirement System and the Prudential Insurance Company. Resort may be had to contemporaneous constructions of statutory provisions to ascertain the meaning of technical terms or to explain a doubtful or obscurely expressed phrase. *Lloyd* v. *Vermeulen*, 22 N.J. 200 (1956); *Suburban Electric Co.* v. *City of Elizabeth*, 59 N.J.L. 134 (Sup. Ct. 1896).

For the foregoing reasons, it is our opinion that more than one individual may be designated as a beneficiary under a life insurance policy.

With regard to the second question, a beneficiary designation which provided for distribution to the unnamed children of a deceased beneficiary would not be acceptable. The terms of N.J.S.A. 43:15A-41(c) are clear. The requirement imposed upon the member is to "nominate" beneficiaries. The import of such a term is to name an actual person. Additionally, in Memorandum Opinion, dated June 20, 1956, by former Deputy Attorney General Lawrence E. Stern, addressed to George M. Borden, which opinion interpreted the provisions of N.J.S.A. 43:15A-41(c), *supra*, it was concluded that this section contemplated as designees living persons only. Although this opinion dealt with the question of whether a corporation or charitable organization could be designated as a beneficiary rather than the question of unnamed beneficiaries, the same reasoning may logically be applied to the question presently under discussion. In determining that neither a corporation nor charitable organization could be designated, the opinion pointed out that a serious administrative burden would result if the agency were required to check the propriety of various legal documents pertaining to the status of such corporation or charitable organization.

The same principles apply here. We are of the opinion that the Legislature did not contemplate that each designation of unnamed children of deceased beneficiaries had to be checked by the agency to determine the existence or whereabouts of such persons.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: JUNE STRELECKI
Deputy Attorney General

MAY 29, 1959

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

MEMORANDUM OPINION 1959—P-9

DEAR MR. KERVICK:

You have requested our opinion as to the proper interpretation to be placed on specific sections of c. 143, P.L. 1958. N.J.S.A. 43:3B-1 et seq. P.L. 1958, c. 143 provides for an increase in the retirement allowance of certain retired public employees according to a legislative formula which is based on percentages determined by the calendar year in which the retirement became effective. The questions will be answered in the order asked.

1. In computing the years of service, may the Division base its computation on whole years of service and consider a fractional portion of six months or more equivalent to a full year of service, while disregarding any fractional portion of less than six months? [i.e. May twenty-four years and four months be considered twenty-four years of service, while twenty-four years and six months be considered twenty-five years service?]

In computing years of service the retirant should be credited with the same credit which he has received from the system from which he is receiving his regular retirement allowance. In most systems the board of trustees is specifically empowered with the authority to fix and determine by appropriate rules and regulations how much service in any year shall equal a year of service and part of a year of service, e.g., N.J.S.A. 43:15-39 (Public Employees' Retirement System); N.J.S.A. 18:13-112.17 (Teachers' Pension and Annuity Fund). Since this increase is an increase in the regular retirement allowance, there is no reason to treat it in a manner different from that used to compute regular retirement credit.

2. If an individual who is eligible for an increased pension under this statute dies during the month, is the accrued portion of the increase payable to his estate or beneficiary? It should be noted that the procedure followed by the retirement system with respect to the regular retirement allowance is to pay such accrued portion.

You have advised that with respect to regular retirement allowances the accrued portion of an allowance of an individual who dies during the month is paid to the estate of the decedent. Therefore, it is our opinion that the accrued portion of this increase should be paid to the estate of the decedent. As stated above, the increase provided for by Chapter 143, P.L. 1958 is an increase in the regular retirement allowance and consequently the same procedures should be followed in making payment of this increase as are followed in making payment of the regular retirement allowance.

3. May the Division of Pensions include the increase under Chapter 143 in the regular retirement check or must a separate check be issued for the increased amount? In the event the Division of Pensions decides to continue the issuance of separate checks for the increased amount, would its action be proper?

The question of whether one check or two should be issued is an administrative decision which should be made by the Director of the Division of Pensions with the approval of the board of trustees of the retirement system involved. The general administration and responsibility for the proper operation of each pension system is vested in its board of trustees. N.J.S.A. 43:15A-16; N.J.S.A. 43:16A-13; N.J.S.A. 18:13-112.58; N.J.S.A. 43:8A-5; N.J.S.A. 43:7-18; N.J.S.A. 43:16-7. N.J.S.A. 52:18-95 established a Division of Pensions within the Department of the Treasury. N.J.S.A. 52:18-96 transferred the various pension systems to the Division of Pensions together with all of their respective functions, powers and duties. Pursuant to N.J.S.A. 52:18-99 the Division of Pensions is headed, directed and supervised by a Director. It, therefore, follows that administrative decisions should be made by the Director of the Division of Pensions with the approval of the board of trustees of the pension system or systems involved.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: JUNE STRELECKI
Deputy Attorney General

MAY 29, 1959

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

MEMORANDUM OPINION 1959—P-10

DEAR MR. KERVICK:

You have requested our opinion as to whether Levitt and Sons, Incorporated, a New York corporation (hereinafter called Levitt), is liable for taxes under the Corporation Business Tax Act (1945), Laws of 1945, c. 162, N.J.S.A. 54:10A-1 et seq., for the years 1954, 1955 and 1956. In 1954 and 1955 two agents of Levitt commenced purchase of certain property in New Jersey. Payment for the property was made by the agents and although Levitt supplied the funds title was taken in their names. Levitt was authorized to do business in New Jersey on March 22, 1956 and thereafter received conveyances of the properties previously purchased with its funds. Levitt filed its first return under the Corporation Business Tax Act in 1957 for the fiscal year ending February 28, 1957.

N.J.S.A. 54:10A-2 provides in part:

> "Every domestic or foreign corporation which is not hereinafter exempted shall pay in annual franchise tax for the year one thousand nine hundred and forty-six and each year thereafter, as hereinafter provided, for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State. And such franchise tax shall be in lieu

of all other State, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act."

The prerequisites to imposition of tax liability in the foregoing section are stated in the disjunctive; thus if Levitt in any given year owned or employed capital or property or was doing business within the State, he is liable for the tax provided by the Corporation Business Tax Act for that year.

Levitt was an equitable owner of property in New Jersey from the time that either of the agents entered into a contract for the purchase of property in this State and was authorized to make payment with moneys advanced by Levitt. It is well settled that if a buyer of property causes title to be taken in the name of another person the later generally secures only a legal interest subject to equitable title in the former. The court ordinarily presumes that no gift was intended and thus impresses a trust on behalf of the supplier of the consideration. *Weisberg* v. *Koprowski,* 17 N.J. 362 (1955). Usually a purchase money resulting trust arises from a direct payment by the cestui que trust to the vendor; nonetheless even if the person in whose name title is taken makes actual payment to the vendor his interest may be impressed with a resulting trust so long as funds of another person are used for the purchase. For example, in *Young* v. *Greer,* 250 Ala. 641, 35 So. 2d 619 (Sup. Ct. 1948) the plaintiff and defendant had agreed jointly to purchase a house. The plaintiff supplied half of the purchase price to the defendant who added the other half and actually made payment to the vendor. Title was taken solely in the name of the defendant. The Court imposed the trust and held:

> "While it is necessary in order to establish a trust in favor of complainant that his money should enter into the purchase price of the property, this rule does not require that the plaintiff should have actually counted out and paid the money to the vendor. It is sufficient if he furnished respondent with the money to cover one-half of the purchase price at the time of or before the sale and the respondent then paid the purchase money." 35 So. 2d at 620-21.

See also *Hoffman* v. *Mazeley,* 247 N.C. 121, 100 S. E. 2d 243 (Sup. Ct. 1957); 2A *Bogert, Trusts and Trustees* §455 (1953). The New Jersey cases are in accord with the above quotation. *Ostheimer* v. *Single,* 73 N.J. Eq. 539 (Ch. 1907) (*dictum*); *Fagen* v. *Falvey,* 96 N.J. Eq. 461 (Ch. 1924), *aff'd per curiam,* 98 N.J. Eq. 411 (E. & A. 1925); see *Weisberg* v. *Koprowski,* 17 N.J. 362 (1955). Thus in the absence of contrary evidence we are obliged to presume that the purchasers took title as trustees for Levitt.

But Levitt must be considered to have had equitable title to property in New Jersey even prior to the transfer of legal title to either agent. Upon the making of a contract for the purchase of realty equitable title vests in the purchaser, though legal title remains in the seller. *Newark* v. *Fischer,* 8 N.J. 191 (1951); *Coolidge & Sickler, Inc.* v. *Regn,* 7 N.J. 93 (1951). Thus even prior to the closing of title the agents were vested with equitable title as against the vendors. But their equitable title was in turn impressed with the resulting trust in favor of Levitt. While ordinarily a trust is imposed upon a legal title of another, nonetheless the validity of a trust on an equitable title has often been recognized. 1 *Scott, Trusts* §83 (2d ed. 1956); 1 *Bogert, Trusts and Trustees* §113 (1951). See *Schumacher* v. *Howard Savings Institution,* 128 N.J. Eq. 56 (Ch. 1940), *aff'd per curiam,* 131 N.J. Eq. 211 (E. & A. 1942) (validity assumed without discussion). Thus Levitt became an equitable owner of

property in New Jersey at the instant that either agent, contemplating making payment with money advanced by Levitt, made a contract for the purchase of realty in New Jersey.

We are of the view that an equitable title must be considered ownership within N.J.S.A. 54:10A-2. Our case law prior to the passing of the Corporation Business Tax Act in 1945 had announced that an equitable title was sufficient to support imposition of tax liability on account of ownership of realty. In *Mausoleum Builders* v. *State Bd. of Taxes and Assessments,* 90 N.J.L. 163 (E. & A. 1917) the prosecutor on *certiorari* sought to challenge an assessment of realty taxes levied against it. The *locus in quo,* property within a cemetery purchased by the prosecutor from a cemetery company, under the applicable statute had been exempt from taxation in the hands of the vendor. Laws of 1903, c. 208, §3(6). The prosecutor though not a cemetery company sought to invoke the exemption in its behalf on the theory that inasmuch as its only interest in the property was under an executory contract of purchase the exemption of its vendor had continued. The court rejected this position and held that equitable title was sufficient to justify assessment against the prosecutor. See also *West Ridgelawn Cemetery* v. *Clifton,* New Jersey Tax Reports (1934-39), 775 (Bd. of Tax App. 1939), *cert. dismissed sub nom. West Ridgelawn Cemetery* v. *State Bd. of Tax Appeals,* 124 N.J.L. 284 (Sup. Ct. 1940), *aff'd per curiam,* 125 N.J.L. 274 (E. & A. 1940), following *Mausoleum Builders* v. *State Bd. of Taxes and Assessments* on similar facts. *Cf. Ocean Grove Camp Meeting Ass'n* v. *Reeves,* 79 N.J.L. 334 (Sup. Ct. 1910), *aff'd per curiam,* 80 N.J.L. 464 (E. & A. 1911). In *In re Hance,* 53 N.J.L.J. 118 (Bd. of Taxes and Assessments 1930) the petitioners were vendees under an executory contract for the sale of realty from a Federal agency in whose hands the property had been exempt from taxation. Though legal title had not passed, the Board held that the making of the contract had placed equitable title in the purchaser who was therefore rightfully assessed. The Board declared:

> "There seems to be no reasonable doubt that an equitable interest in land is subject to taxation in New Jersey." 53 N.J.L.J. at 120.

The decision of the Supreme Court of the United States in *New Brunswick* v. *United States,* 276 U.S. 547 (1928), though not binding on questions of New Jersey law, is in accord with the above decisions and is entitled to great weight. In that case, arising through the Federal courts, the Supreme Court anticipated the decision in *In re Hance* and held that under New Jersey law the equitable interest of a purchaser of property from the United States under an executory contract of sale was taxable even though legal title secured by a vendor's lien remained in the United States.

The foregoing cases were available to the Legislature in 1945 and, presumably having been considered by it, control the construction of the word "owner" as used in the Corporation Business Tax Act. See *Barringer* v. *Miele,* 6 N.J. 139, 144 (1951); *Asbury Park Press, Inc.* v *.Asbury Park,* 19 N.J. 183, 190 (1955); *cf. Egan* v. *Erie R.R. Co.,* 29 N.J. 243 (1959). Though the Corporation Business Tax Act imposes a franchise tax on account of the ownership rather than a property tax upon the ownership, in each case the prerequisite to liability is simply ownership. Thus the distinction is without substance.

The cases subsequent to 1945 are consistent with those before. In *Newark* v. *Fischer,* 8 N.J. 191 (1951) property owned by the Trustees for the Support of Public Schools but subject to an executory contract of sale to a private person was held taxable notwithstanding the vendors' exempt status. The court quoted the following language from *S.R.A., Inc.* v. *Minnesota,* 327 U.S. 558 (1946) with approval:

"The whole equitable ownership is in the petitioner and the value of that ownership may be ascertained on the basis of the full value of the land." 327 U.S. at 570; 8 N.J. at 198.

In *S.R.A., Inc.* v. *Minnesota* the Supreme Court of the United States had sustained imposition by Minnesota of a tax on land subject to an executory contract of sale from the United States to the taxpayer. *Cf. Milmar Estate, Inc.* v. *Fort Lee,* 36 N.J. Super. 241 (App. Div. 1955). *State* v. *Low,* 18 N.J., 179 (1955) though not a tax case is helpful. There the Supreme Court held that a vendee under an executory contract for the sale of realty is an "owner" within N.J.S. 2A:102-10 which provides:

"All moneys received by a contractor from the owner or mortgagee of real estate for the purpose of having a building erected * * *" are a trust fund.

The court observed:

"The vendee under a contract for the purchase of real estate is the *owner* of an interest in such property." 18 N.J. at 184. (Emphasis added.)

As a foreign corporation owning realty in New Jersey, it is our opinion that Levitt became liable for taxes under the Corporation Business Tax Act at the time when either agent entered into a contract for the purchase of realty in New Jersey, having been authorized to make payment with funds derived from Levitt.

In view of the foregoing it is not necessary to determine whether Levitt was doing business or employed capital in the State prior to its registration here.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: MORTON I. GREENBERG
Deputy Attorney General

MAY 29, 1959

NED J. PARSEKIAN, *Acting Director*
Division of Motor Vehicles
State House
Trenton, New Jersey

MEMORANDUM OPINION 1959—P-11

DEAR DIRECTOR PARSEKIAN:

You have requested our opinion as to whether the Director of Motor Vehicles may approve an ordinance regulating traffic permitting temporary and experimental regulations to be put in effect for a 90 day period, or in the alternative, whether he may approve an ordinance regulating traffic which would be effective for a pre-determined period of time. R.S. 39:4-8 provides for the approval of local ordinances

or resolutions regulating traffic by the Director of Motor Vehicles and reads as follows:

"No ordinance or resolution concerning, regulating or governing traffic or traffic conditions, adopted or enacted by any board or body having jurisdiction over highways, nor any such regulation promulgated by the State Highway Commissioner, shall be of any force or effect, unless the same is approved by the director or has been approved by the Commissioner of Motor Vehicles or the Traffic Commission according to law. The director shall not be required to approve any such ordinance, resolution or regulation, unless, after investigation by him, the same shall appear to be in the interest of safety and the expedition of traffic on the public highways."

It should be noted that pursuant to R.S. 39:4-8, the only requirement for *approval* by the Director of Motor Vehicles of *any* ordinance or resolution regulating traffic enacted by a board or body having jurisdiction of a highway is that such ordinance or regulation shall "appear to be in the interest of safety and the expedition of traffic on public highways." The Director cannot make a judgment whether a proposed ordinance is in the interest of safety and the expedition of traffic unless its provisions are specific. Therefore, he may not approve any blanket ordinance. The question remains whether he may approve specific ordinances which are effective for a limited period of time.

The subject matter of and limitations placed upon ordinances regulating traffic which may be enacted by the various municipalities, are found in R.S. 39:4-197. The subject matter and the limitations therein set forth also govern the enactment of resolutions or ordinances regulating traffic on county roads by the various boards of chosen freeholders. (See R.S. 39:4-201)

Neither R.S. 39:4-197 nor R.S. 39:4-201 precludes the enactment of an ordinance or resolution, otherwise valid, which would be effective for a pre-determined period of time.

It is well settled law in this State that traffic ordinances should bear direct relationship to public safety, be reasonable and not arbitrary or discriminatory. *Garneau* v. *Eggers,* 113 N.J.L. 245 (Supreme Ct. 1934); *Pimick* v. *Newark,* 14 N.J. Super. 134 (Law Div. 1951); *Terminal Storage Inc.* v. *Twp. of Raritan,* 15 N.J. Super. 547 (Law Div. 1951).

It is our opinion that the mere inclusion of a pre-determined time limitation in an ordinance regulating traffic would not vitiate its legal validity assuming it otherwise passes the common law tests of bearing a direct relationship to public safety and its being a reasonable one and not arbitrary or discriminatory. (See "McQuillan on Municipal Corporations" 3rd Ed., Volume 5, p. 153.)

Accordingly, you are advised that the Director of Motor Vehicles need not withhold approval of an ordinance merely because there is contained therein a pre-determined period of time during which such ordinance is to be in effect.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: REMO M. CROCE
Deputy Attorney General

JUNE 22, 1959

DR. DANIEL BERGSMA
Commissioner of Health
129 E. Hanover Street
Trenton, New Jersey

MEMORANDUM OPINION 1959—P-12

DEAR DR. BERGSMA:

We have been asked whether L. 1959, c. 20 provides means by which all municipalities may continue to permit within their boundaries the disposition of garbage by open dumping until June 30, 1960 or is limited in its application to municipalities which had taken advantage of a somewhat similar extension of a right to dispose of garbage by open dumping until March 31, 1959 contained in L. 1958, c. 38. Our conclusion is that the former alternative is the correct interpretation.

When the Department of Health was reorganized in 1947, L. 1947, c. 177, a Public Health Council was established. N.J.S.A. 26:1A-4. It was given power to adopt a State Sanitary Code covering *inter alia* "any subject affecting public health" and "prohibiting nuisances hazardous to human health". N.J.S.A. 26:1A-8. The component sanitary regulations of the Code and any amendments were to be adopted only after a public hearing. Id. On March 11, 1957 the Public Health Council held such a hearing to consider a proposed Chapter 8 of the Code entitled "Refuse Disposal." On May 13, 1957 the Council adopted Chapter 8 effective July 1, 1958. Regulation 1 of Chapter 8 declared dumps to be nuisances hazardous to human health. It provided that organic matter (garbage) and combustible matter may be disposed of on land in this State only through the use of sanitary landfills or incinerators complying with the regulations of the Air Pollution Control Commission. Before this regulation became effective, L. 1958, c. 38 was enacted on May 16, 1958. This permitted any municipality, by ordinance, to extend the cutoff date for the disposition of garbage in dumps prescribed by Regulation 1 of Chapter 8 of the State Sanitary Code until March 31, 1959. In the absence of such a statute the provisions of the Sanitary Code would have the force of law and would supersede ordinances in conflict. N.J.S.A. 26:1A-9.

As the March 31, 1959 deadline approached apparently there were some municipalities which considered that it would be a hardship if the disposition of garbage by open dumping ceased at that time. S 60 (1959), intending to afford some relief was passed by both Houses of the Legislature to amend the 1958 extender by changing the March 31, 1959 deadline to June 30, 1960. The Bill in this form was conditionally vetoed by the Governor. The Governor had the following objection:

> "The factual basis for the bill is that there are some municipalities, primarily in rural districts, where the population density is very low and where municipal collection and disposal are not yet provided. It is claimed that application of the Code at this time would work hardship on such municipalities because of the small population in relation to the cost of securing equipment.
>
> "In those instances where the concentration of population is low, I can appreciate that economic considerations may justify the proposed authority to extend the date. At the same time, there are other locations in highly populated areas where open dumping is extensive, often close to residential areas and sometimes across the boundary line in a contiguous municipality. In these cases further extension cannot be permitted since open dumping provides a breeding place for rats, insects and other vermin.
>
> "This factual conflict can only be resolved on an administrative basis so that the varying facts of each location can be taken into account.
>
> "I am accordingly returning herewith Senate Bill No. 60 for reconsideration and with the recommendation that it be amended as follows:
>
> "On page 1, section 1, line 11, immediately following the word 'prevail,' insert the following: '; provided, however, that no such ordinance shall take effect until it shall have been submitted to and approved by the State Commissioner of Health, who shall, in each case, make his determination on the basis of the extent of the need to establish such methods in the particular area affected.'"

The conditional veto message was issued March 9, 1959, several weeks before the previous extender would have expired. The Legislature accepted the objections of the Governor and repassed S 60 in the amended form which became law in L. 1959, c. 20 on April 14, 1959. At the time of the signing of the law by the Governor, his office made a press release which included the following comment on his action in signing the Bill into law:

> "'Open dumping' disposal now in effect under ordinances extending noncompliance until March 31, 1959, may continue only if a new municipal ordinance extending the time period receives the approval of the State Commissioner of Health, whose determination will be based on the extent of the need to establish the approved methods in the particular locality."

The plain language of the law as it now reads includes within its scope any municipality. The municipality must both pass an ordinance and have it approved by the Commissioner of Health before it may lawfully permit disposition of garbage by open dumping after March 31, 1959. There is no limitation on the municipalities which may seek to take advantage of these provisions.

The suggestion has been made that the above quoted statement by the Governor in his conditional veto message and the excerpt from his press release, *supra,* may indicate that the law was only intended to provide a possible further extension for municipalities who had taken advantage of the 1958 extender. A fair reading of this material does not lend support to such a view. At the time of the Governor's conditional veto message, three weeks still remained in which municipalities might take advantage of the 1958 extender. There was then no limitation on the number of municipalities which might take advantage of the 1958 extender. The message speaks of municipalities where population density is low and municipal collection and disposal of garbage is not yet provided for. It does not speak of municipalities which had or might take advantage of the 1958 extender.

The statement in the press release does direct attention to municipalities having ordinances permitting open dumping of garbage until March 31, 1959 under the 1958 extender. However, the reason for this was to call the attention of these municipalities to the fact that even though S 60 opened an avenue of relief to them it was necessary for them to adopt a new ordinance extending the time period and to obtain the

approval of the Commissioner of Health before such an ordinance could become effective.

In summary, it is our opinion that both a fair reading of the statute and a consideration of the legislative history indicates that there is no limitation on the expression "any municipality" in L. 1959, c. 20. A municipality adopting an ordinance extending the time for open dumping under this act must obtain the approval of the Commissioner of Health before the ordinance can become effective.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

JUNE 30, 1959

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

MEMORANDUM OPINION 1959—P-13

DEAR MR. KERVICK:

You have requested our opinion as to the proper interpretation of paragraph 2 of N.J.S.A. 18:13-112.22 with regard to the payment of interest. This paragraph reads as follows:

> "Upon the submission of such evidence as the board of trustees may require, the board of trustees shall refund to any member, at his request, that part of his accumulated deductions which were paid into the retirement system as a result of deductions based on payments to him over and above compensation as defined in this act."

The above quoted section provides for the refund to a member, at his request, of that part of his accumulated deductions which were paid into the retirement system based on deductions of payments to him over and above his actual compensation. Compensation is defined in N.J.S.A. 18:13-112.4(d) as "* * * the contractual salary for services as a teacher * * *". Accumulated deductions are defined by N.J.S.A. 18:13-112.4(a) as follows:

> "'Accumulated deductions' means the sum of all the amounts, deducted from the compensation of a member or contributed by him, including interest credited prior to January 1, 1956, standing to the credit of his individual account in the annuity savings fund."

Thus, where a member has made contributions to the Teachers' Pension and Annuity Fund which were based on payments made to him over and above his actual contractual salary for services as a teacher, such member may request a return of these contributions including interest credited prior to January 1, 1956.

Your specific question is whether interest should have been credited on any such deductions, which have been returned to a member, to January 1, 1956 or to June 30, 1955 in accordance with your regular procedure of crediting interest to a member's account yearly on the 30th of June.

It is our opinion that interest should have been credited only to June 30, 1955 on deductions which were returned to members pursuant to paragraph 2 of N.J.S.A. 18:13-112.22. Had the Legislature intended that interest be credited to January 1, 1956, they would have so provided. See for example, paragraph 1 of N.J.S.A. 18:13-112.22 which provides for the return of excess contributions together "with regular interest to January 1956." There is no provision for the payment of interest in paragraph 2 of N.J.S.A. 18:13-112.22 so we must look to 18:13-112.4(a) wherein accumulated deductions are defined as the sum of all amounts contributed by a member "including interest credited prior to January 1, 1956." As pointed out *supra*, interest would have been credited to these accounts on June 30, 1955 with no additional credit during that year. Thus, the only interest credited prior to January 1, 1956 would be that interest credited on June 30, 1955. You are accordingly advised that since no interest was credited on any of these accounts after June 30, 1955 no additional interest should have been paid in returning any such deductions.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: JUNE STRELECKI
Deputy Attorney General

JUNE 30, 1959

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

MEMORANDUM OPINION 1959—P-14

DEAR MR. KERVICK:

You have requested our opinion as to the proper interpretation of the term "regular interest to January 1, 1956" as used in N.J.S.A. 18:13-112.22.

N.J.S.A. 18:13-112.22 reads in pertinent part as follows:

> "Any contributions made by a member which are in excess of (a) those required on the basis of the rate of contribution initially certified and any changes in such rate in accordance with section 5 of this act, and (b) any contributions made by the member for the purchase of prior service credit shall be refunded with regular interest to January 1, 1956, to the member or his beneficiary or estate or shall, at his request, be used at retirement with regular interest, to provide an annuity of equivalent actuarial value which shall be in addition to his retirement allowance as computed in accordance with section 44."

It can be seen from the above quoted section that the purpose of this provision was to refund contributions made by members of the Teachers' Pension and Annuity Fund which were in excess of those required on the basis of the member's rate of contribution initially certified and as changed in accordance with N.J.S.A. 18:13-112.7, and contributions made by members for the purchase of prior service credit. These contributions were to be refunded with "regular interest to January 1, 1956."

Regular interest is defined by N.J.S.A. 18:13-112.4(m) as follows:

> "'Regular interest' shall mean interest as determined from time to time by the board of trustees. The regular interest rate shall be limited to a minimum of 3% per annum, and a maximum of 4% per annum."

You advise that pursuant to N.J.S.A. 18:13-112.4(m), *supra,* interest is computed on an annual basis as of June 30 of each year so that the normal computation of interest on such excess contributions was made as of June 30, 1955 and interest would not have been credited again until June 30, 1956. Therefore, the specific question raised is whether excess contributions made by a member to January 1, 1956 should have been returned with interest credited to June 30, 1955 in accordance with the administrative procedure followed by the Division of Pensions or whether the statutory language of N.J.S.A. 18:13-112.22 required that interest be credited to January 1, 1956.

It is our opinion that interest should have been credited to January 1, 1956. It is significant that the phrase "to January 1, 1956" follows the phrase "with regular interest." This would indicate that the Legislature intended that this date would apply both to the return of excess contributions and the amount of interest to be paid thereon. Thus, in addition to providing for the return of excess contributions made up to January 1, 1956, the Legislature also provided that regular interest should be paid on these contributions to January 1, 1956. Accordingly, you are advised that interest should have been credited on excess contributions made after June 30, 1955 and up to January 1, 1956.

Very truly yours,
DAVID D. FURMAN
Attorney General
By: JUNE STRELECKI
Deputy Attorney General

JULY 8, 1959

CAPTAIN ERIC H. HOSSACK, *Secretary*
Bureau of Tenement House Supervision
1100 Raymond Boulevard
Newark 2, New Jersey

MEMORANDUM OPINION 1959—P-15

DEAR CAPTAIN HOSSACK:

You have asked my opinion as to the scope of Chapter 23 of the Laws of 1958. You inquire as to whether the entire act is limited in its application to cities having 400,000 inhabitants in view of the wording of its title: "AN ACT concerning tenement houses, amending sections 55:5-2 and 55:10-4, and supplementing chapter 5 of Title

55, of the Revised Statutes as to certain tenement houses located in cities having more than 400,000 inhabitants."

I hereby advise you that the amendments to sections 55:5-2 and 55:10-4 of the Revised Statutes govern tenement houses throughout the State. Section 1 of Chapter 23 of the Laws of 1958 is limited in its applicability both by its own specific provisions and by the title of the act to cities having a population in excess of 400,000.

You ask further whether the Board of Tenement House Supervision has authority to be guided by the Standard Building Code of New Jersey or by the standards of nationally accepted codes under the amendment to R.S. 55:10-4. My conclusion is that the Board must rely upon the Standard Building Code of New Jersey or upon some nationally accepted code in approving plans and specifications in instances where the Tenement House Act does not set out standards. The Standard Building Code or the nationally accepted codes are not to be followed if there is a conflict between such code and the Tenement House Act. The additional provisions of R.S. 55:10-4, as added to the law by Chapter 23 of the Laws of 1958, is intended to cover details of construction methods, materials or designs which are not prescribed in mandatory terms in the Tenement House Act.

Yours very truly,
DAVID D. FURMAN
Attorney General

AUGUST 3, 1959

COLONEL JOSEPH D. RUTTER
Superintendent
New Jersey State Police
Trenton, New Jersey

MEMORANDUM OPINION 1959—P-16

DEAR COLONEL RUTTER:

We have been asked whether establishments which are commonly known as motels are subject to the provisions of the Hotel Fire Safety Law, R.S. 29:1-8 to 46. R.S. 1:1-1 provides that in the construction of laws of this State words shall be given their generally accepted meaning according to the approved usage of the language unless a different meaning is expressly indicated. R.S. 29:1-11 defines "hotel" as:

> "* * * every building kept, used, maintained, advertised as or held out to be a place where sleeping accommodations are supplied for pay to transient or permanent guests, in which fifteen or more rooms are rented furnished or unfurnished, including any room found to be arranged for or used for sleeping purposes, with or without meals, for the accommodation of such guests, or every building, or part thereof, which is rented for hire to thirty or more persons for sleeping accommodations.
>
> "This definition shall not be construed to include any building defined as a tenement house in Title 55, subtitle one, chapters one to thirteen of the

> Revised Statutes, recorded as a tenement house under the jurisdiction of the Bureau of Tenement House Supervision, and occupied exclusively as such."

To make abundantly clear that this definition, rather than the ordinary usage of the language, controls, R.S. 29:1-10 provides as follows:

> "For the purpose of this act certain words and phrases are defined, and certain definitions shall be construed as provided in this act."

Applying this definition, every individual building which would be embraced within the ordinary meaning of the term "motel" would be subject to the Hotel Fire Safety Law if it has 15 or more rooms for sleeping purposes or has sleeping accommodations for 30 or more guests.

The primary purpose of the law in question is protection against fire. Perhaps it would seem that there is less danger from fire in motels because they are usually of fewer stories and with more exits readily accessible to sleeping quarters than is true in the case of conventional hotels. But the Legislature was undoubtedly aware of this when in 1948 it enacted section 37 of chapter 340 repealing R.S. 29:1-1, which would seem to have excluded what are generally known as motels because of the requirement there in that to be subject to the law buildings must be at least of 3 stories in height. At the same time, the exclusion of fireproof hotel buildings from the law's coverage, formerly provided by R.S. 29:1-2, was also repealed. It would seem a reasonable judgment by the Legislature that conventional motels present their own peculiar fire hazards despite their frequent masonry construction because they are frequently located far from the location of fire-fighting apparatus in urban centers, and because they probably have a smaller ratio of service personnel to guests than do conventional hotels.

The definition in R.S. 29:1-11 expressly provides that it is immaterial in determining the coverage of the present law whether or not meals are served, whether or not the guests are transient, and whether or not the rooms are furnished.

Frequently, where a statute does not expressly define the words "hotel" or "motel," it has become necessary for the court to construe their ordinary meaning in the light of a particular problem. For example, in *Schermer* v. *Fremar,* 36 N.J. Super. 46 (Ch. 1955), the question was raised whether a motel was within the enumeration of permitted uses in a zoning ordinance, including "hotels." In *Pierro* v. *Baxendale,* 20 N.J. 17 (1955), it was necessary to determine whether a distinction between "rooming houses" and "motels" in the legislation itself could be made consistent with the constitutional requirements of equal protection of the laws. In neither of these cases was there any special legislative definition of the terms. The principles of R.S. 1:1-1, *supra,* would be applicable there, but not here. This distinguishes these cases (and many others from other jurisdictions which could be collected) from the question presented by this opinion.

As stated above, individual buildings commonly known as motels are subject to the Hotel Fire Safety Law if they have either 15 rooms for sleeping or sleeping accommodations for 30 or more guests, as provided by R.S. 29:1-11.

Very truly yours,

DAVID D. FURMAN
Attorney General

AUGUST 3, 1959

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

MEMORANDUM OPINION 1959—P-17

DEAR MR. KERVICK:

You have requested our opinion with regard to the date upon which the contributory insurance coverage provided for in L. 1955, c. 37, §53, as amended by L. 1956, c. 145, §14 (N.J.S.A. 18:13-112.55) becomes effective with respect to new members of the Teachers' Pension and Annuity Fund.

Pursuant to N.J.S.A. 18:13-112.55 (j) the contributory insurance benefits could not go into effect until a required percentage of members applied for such coverage. You advise that by December of 1957 a sufficient number of employees had applied and consequently the Board of Trustees entered into an insurance agreement with the Prudential Insurance Company of America for the purchase of this group insurance coverage. N.J.S.A. 18:13-112.78. This policy became effective January 1, 1958.

N.J.S.A. 18:13-112.55 (a) makes eligible for the purchase of such additional insurance each person who becomes a member of the Teachers' Pension and Annuity Fund provided such person selects this additional coverage within one year after the effective date of his or her membership. N.J.S.A. 18:13-112.55 (k) requires contributory insurance coverage for all new members eligible for such coverage for the first year of their membership. This section reads as follows:

> "Any person becoming a member of the retirement system after the benefits provided under this section shall have come into effect, who is, by sex or other characteristic, within the grouping to which the additional death benefit coverage under this section is applicable, for the first year of his membership in the retirement system shall be covered by the additional death benefit coverage provisions of this section with the benefit in the event of death, in the first year of membership only, being based upon contractual salary instead of compensation actually received and shall make contributions as fixed by the board of trustees during such period. Such member shall have the right to continue to be covered by the benefits of this section and to contribute therefor after his first year of membership has been completed. This sub-section shall not apply in the case of such a member who has already attained his sixtieth birthday prior to becoming a member of the retirement system unless he shall furnish satisfactory evidence of insurability at the time of becoming a member."

In addition, the Group Insurance Policy with the Prudential Insurance Company of America specifically provides in paragraph 2 of the section "Insured Individuals" that:

> "Except as provided in sub-section C below, each person becoming a Member of the retirement system after the Policy Date shall automatically become insured for the contributory insurance provided under this Policy from the date he becomes a Member."

L. 1955, c. 37, §4 as amended by L. 1956, c. 145, §1 (N.J.S.A. 18:13-112.6) provides that the membership of the retirement system shall consist, among others, of "any person becoming a teacher on or after the effective date of this act . . .". In Formal Opinion No. 18 (1957) we construed similar language contained in the Public Employees' Retirement-Social Security Integration Act (L. 1954, c. 84, §7 as amended) to mean that membership in the retirement system was compulsory upon commencement of employment. We reiterate that opinion with respect to the provisions of N.J.S.A. 18:13-112.6.

Therefore, since contributory insurance coverage of a new member is required from the date of membership in the retirement system and such membership commences upon the date of employment, the contributory insurance coverage provided for in N.J.S.A. 18:13-112.55 becomes effective with respect to a new member of the retirement system on the date of such person's commencement of employment.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: JUNE STRELECKI
Deputy Attorney General

AUGUST 26, 1959

HONORABLE NED J. PARSEKIAN
Acting Director
Division of Motor Vehicles
Trenton, New Jersey

MEMORANDUM OPINION 1959—P-18

DEAR DIRECTOR:

You have sought my opinion as to whether you are authorized to charge a fee of $10.00 to members of the medical profession who apply for registration plates with the identifying letters MD. The applicable statute is Chapter 56 of the Laws of 1959, which provides:

> "The Director of the Division of Motor Vehicles is hereby authorized to issue upon application, registration plates of a particular identifying mark or marks to be displayed as provided in section 39:3-33 of the Revised Statutes, composed of such combination of letters and figures, in accordance with the identification system as may be requested in such application provided that the particular identifying mark so requested is not then issued to and held by some other person or otherwise reserved by the director.
>
> "The director is authorized to charge an additional fee for the issuance of such particular identifying mark in such amount as he may fix from time to time but not in excess of $10.00, and the amount of such fee shall accompany the application."

I understand that pursuant to the authority of this section you have fixed a fee of $10.00 for the issuance of registration plates with a particular identifying mark or marks. Having determined upon such additional fee, you have no authority to eliminate or reduce the fee for any group of private citizens, including members of the medical profession. The Legislature has failed to provide any special exception for medical doctors, nor is there any discretion vested in you by Chapter 56 of the Laws of 1959 to deviate from the regular fee in favor of medical doctors or any other group who apply for registration plates of a particular identifying mark or marks.

Yours very truly,

DAVID D. FURMAN
Attorney General

AUGUST 26, 1959

STATE BOARD OF ARCHITECTS
1100 Raymond Boulevard
Newark, New Jersey

MEMORANDUM OPINION 1959—P-19

GENTLEMEN:

In reviewing opinion requests I find that no formal answer has been rendered to your inquiry of April 30, 1958 concerning the eligibility of corporations to practice the profession of architecture within this State. The pertinent statutes are explicit. Only licensed persons may enter the practice of architecture in this State. Applicants for an architect's license must establish educational and other qualifications and pass successfully regularly conducted examinations, according to R.S. 45:3-5. Such provisions are applicable only to natural persons, not to corporations.

The board may continue to permit the name of a corporation, association or partnership to appear on plans, specifications or other drawings but subject to the requirement that the licensed architect's or architects' names appear in the title block, both for the protection of the public and the proper supervision of the profession of architecture.

Yours very truly,

DAVID D. FURMAN
Attorney General

SEPTEMBER 11, 1959

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

MEMORANDUM OPINION 1959—P-20

DEAR DR. RAUBINGER:

You have sought my opinion on two questions raised by the State Competitive Scholarship Act, L. 1959, c. 46, as amended by L. 1959, c. 150.

You ask first as to the eligibility for State competitive scholarships of high school graduates of June, 1959, who enroll as freshmen in institutions of collegiate grade in September, 1959. I hereby advise you that pursuant to sec. 7(b) such individuals are eligible for State competitive scholarships because of their graduation from high school within a period not greater than one year from the date of the application. Awards of scholarships may be made during the college year commencing September, 1959 and terminating June, 1960.

Your second inquiry is as to the maximum scholarship award which may be made to any individual subsequent to the commencement of the college year in September, 1959. My understanding is that the State Scholarship Commission may hold its competitive examination and otherwise determine the selection of recipients of State competitive scholarships during October and November, 1959. I hereby advise you that graduates of high school in June, 1959 may be awarded State competitive scholarships in the full amount of $400 per year, or the amount charged for tuition for a regular academic year, whichever is the smaller amount, at any time during the college year (L. 1959, c. 46, sec. 8). There is no statutory requirement that the scholarship award be prorated, upon its award subsequent to the matriculation of the student in an institution of collegiate grade. The legislative intention is to reimburse eligible New Jersey residents attending collegiate institutions for their tuition expenses up to $400 per year.

Very truly yours,

DAVID D. FURMAN
Attorney General

SEPTEMBER 23, 1959

HONORABLE NED J. PARSEKIAN
Acting Director
Division of Motor Vehicles
State House
Trenton, New Jersey

MEMORANDUM OPINION 1959—P-21

DEAR DIRECTOR PARSEKIAN:

We have been asked whether vehicles whose loaded weights are 40,000 to 70,000 pounds which are registered as constructor vehicles may be used to transport material for stockpiling which is not part of a construction project. In our opinion they may not.

N.J.S.A. 39:3-84 provides generally that no single vehicle whose loaded weight is more than 40,000 pounds may be operated upon any highway in this State. *N.J.S.A.* 39:3-84.1 provides that these limitations shall not apply to vehicles registered for use with constructor registration plates. *N.J.S.A.* 39:3-20 permits the Director of the Division of Motor Vehicles to:

> "* * * issue registrations providing for the gross weight of vehicle and load of over forty thousand pounds but not exceeding seventy thousand pounds, upon application therefor and proof to the satisfaction of the director that the applicant is actually engaged in construction work or in the business of supplying material, transporting material, or using such registered vehicle for construction work. The license plate so issued shall be marked 'constructor' and shall be placed upon the vehicle or vehicles registered under this section."

This statute permits the use of oversized vehicles by two types of persons. One, a person actually engaged in construction work and, two, a person who, while not himself in construction work, is aiding in construction work either by supplying material or transporting material or in some other way using his vehicle in aid of construction. The language "supplying material" and "transporting material" cannot be taken in isolation to permit the use of oversized vehicles for supplying or transporting materials not used or intended for construction work.

In addition *N.J.S.A.* 39:3-20 provides that vehicles registered under this section and using constructor plates "may not be operated at a greater distance than 30 miles from the point established as a headquarters *for the particular construction operation.*" (Emphasis added) This clearly indicates that this statute contemplates the use of oversized vehicles only in connection with construction work.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

OCTOBER 30, 1959

DR. ROSCOE P. KANDLE
Commissioner
Department of Health
State House
Trenton, New Jersey

MEMORANDUM OPINION 1959—P-22

DEAR COMMISSIONER KANDLE:

The State Consultant Committee on Community Homemaker Service (an advisory committee to the Division of Chronic Illness Control of the State Department of Health) has asked whether the Community Homemaker Service groups would be immune from tort liability under Chapter 131 of the Laws of 1958, as extended by Chapter 90 of the Laws of 1959 (*N.J.S.A.* 16:1-48 et seq.).

This legislation grants an immunity from certain tort claims arising out of negligence to beneficiaries of non-profit corporations, societies or associations which are "organized exclusively for religious, charitable, or hospital purposes."

The Community Homemaker Service is a locally sponsored agency that places trained women workers in homes where illness or disability might disrupt the normal family routine. They take over household tasks such as marketing, preparing meals, light cleaning and laundry work, and caring for children. Service is part time only, a few hours a day, for as long as needed.

At present there are 13 homemaker services functioning in New Jersey, with others in the process of being established. Seven of these are incorporated, all as non-profit organizations. Funds are raised from donations by the United Fund, Community Chest and similar groups; from private contributions; and by charging a fee of $1.50 per hour ($1.75 by one local group). Of the latter fee, $1.25, plus cost of transportation, goes to the homemaker herself, the rest going to pay for administrative costs (including a five-day training course for each homemaker by the Rutgers Extension Service, and the salary of the Director of the local service). When the family to be served is indigent or cannot afford the fee, no charge is made. Every family in the community, without regard to race, religion or financial status, is eligible to take advantage of this service.

Each group is guided and operated by a volunteer board of directors which sets policy, raises money, helps run the office and does publicity work, the services being rendered without compensation. The State Consultant Committee, which is appointed by the Commissioner of the Department of Health, is responsible for organizing and establishing new local services throughout the State; its members are also volunteer, unpaid people.

In order to qualify as a charitable organization, two requirements must be met: 1. The organization must be non-profit. *Leeds* v. *Harrison,* 7 *N.J. Super.* 558, 569 (*Ch. Div.* 1950); *Rafferzeder* v. *Raleigh, etc. Hospital,* 30 *N.J. Super.* 82 (*App. Div.* 1954) (see also same case in 33 *N.J. Super.* 19, (*App. Div.* 1954)); *The Kimberley School* v. *Town of Montclair,* 2 *N.J.* 28 (1949); *Dana College* v. *State Bd. Tax Appeals,* 14 *N.J. Misc.* 308, 310 (*Sup. Ct.* 1936), *aff'd.* 117 *N.J.L.* 530 (*E. & A.* 1937). 2. The group to be benefited must be an "indefinite class." *Bianchi* v. *South Park Presbyterian Church,* 123 *N.J.L.* 325 (*E. & A.* 1939); *Mills* v. *Montclair Trust Co.;* 139 *N.J. Eq.* (*Ch. Div.* 1946); *Jones* v. *St. Mary's Roman Catholic Church,* 7 *N.J.* 533 (1951), *cert. denied* 342 *U.S.* 866, 96 *L. Ed.* 644, 72 *S. Ct.* 175 (1951); *Guarantee Trust Co. of New York* v. *New York Community Trust,* 141 *N.J. Eq.* 238 (*Ch.* 1948), *affirmed* 142 *N.J. Eq.* 726 (*E. & A.* 1948); *Leeds* v. *Harrison,* 9 *N.J.* 202, 217 (1952).

Under the first requirement, i.e. that the association be non-profit, the fact that the association charges a fee for its services does not necessarily mean that it is non-profit. *Institute of Holy Angels* v. *Bender,* 79 *N.J.L.* 34 (*Sup. Ct.* 1909); "Liability of a Charitable Institute for the Torts of its Agents," *3 Mercer Beasley Law Review,* 206, 207 (1934).

The converse of this proposition is that the fact that a group or association is *incorporated* as a non-profit organization does not necessarily mean that it is a "charitable institution." *Rafferzeder* v. *Raleigh etc. Hospital, supra,* (30 *N.J. Super.* 82); *Dana College* v. *State Bd. Tax Appeals, supra,* and *Carteret Academy* v. *State Bd. of Taxes and Assessments,* 98 *N.J.L.* 868 (*E. & A.* 1923).

The charitable character of the institution depends on the particular facts of each individual case. *Rafferzeder* v. *Raleigh etc. Hospital, supra,* (30 *N.J. Super.* 82); *The Kimberley School* v. *The Town of Montclair, supra; Carteret Academy* v. *State Bd. of Taxes and Assessments, supra; Montclair* v. *State Bd. of Eq. of Taxes,* 86 *N.J.L.* 497 (*Sup. Ct.* 1914), *aff'd* 88 *N.J.L.* 374 (*E. & A.* 1915); *D'Amato* v. *Orange Memorial Hospital,* 101 *N.J.L.* 61 (*E. & A.* 1925). To determine whether an organization is charitable within the meaning of the statute, as many as possible of the individual facets of its operation must be considered, all with a view of deciding whether the "dominant motive" in the conduct of the organization is or is not to make a profit. *The Kimberley School* v. *The Town of Montclair, supra.*

In addition to the non-profit requirement, another test must be satisfied. This is that the benefits must accrue to an "indefinite class." In *Bianchi* v. *South Park Presbyterian Church, supra,* at page 332, the Court, in holding the Presbyterian Church immune from tort liability because it was an eleemosynary institution, declared:

> "Thus it is that the test of a charity in the legal sense is whether its beneficence falls upon a class sufficiently large and indefinite as to be fairly termed of common and public incidence; and the defendant corporation answers that description."

This definition was substantially followed and approved in *Mills* v. *Montclairs Trust Co., supra, Jones* v. *St. Mary's Roman Catholic Church, supra,* and *Guarantee Trust Co. of New York* v. *New York Community Trust, supra.* The definition was given a slightly different phraseology by the Supreme Court in *Leeds* v. *Harrison,* 9 *N.J.* 202, 217 (1952) (holding that the restriction contained in the bylaws of the Y.W.C.A. limiting membership to members of Protestant Evangelical churches was not invalid), the court announcing that the Y.W.C.A. is "religious, charitable and benevolent in nature. [citing authority] A trust is public or charitable if the subject property is devoted to the accomplishment of purposes which are beneficial or may be supposed to be beneficial to the community."

A review of the facts concerning the Community Homemaker Service groups indicates that they meet both the aforementioned tests and therefore should be considered as falling within the statutory protection. First, the dominant motive is

not to make a profit, but rather to help keep home and family together. There is no indication that any Homemaker Service group has been operating at a profit or that the salaries paid to the Director and office help are higher than that usually paid to people of comparable ability and training. Second, the group benefited is large enough to be termed an "indefinite class;" certainly the services rendered by these groups are "beneficial to the community."

N.J.S.A. 16:1-51 declares the public policy of the statute to be "the protection of non-profit corporations, societies and associations organized for religious, charitable, educational or hospital purposes." This policy would be furthered by holding the local homemaker service groups to be "charitable" within the meaning of the statute. Thus, notwithstanding the fact that the homemaker service groups are not "charitable" in the traditional sense of hospitals, churches, etc., it would seem that they come within the scope of the applicable legislation.

Very truly yours,

DAVID D. FURMAN
Attorney General

NOVEMBER 30, 1959

THOMAS S. DIGNAN, *Acting State Director*
Civil Defense and Disaster Control
Department of Defense
Armory Drive
Trenton 10, New Jersey

MEMORANDUM OPINION—P-23

DEAR MR. DIGNAN:

You have requested our opinion as to whether or not the Division of Civil Defense may print paid advertisements in a State Civil Defense magazine, "The Siren." We are of the opinion that the question must be answered in the negative.

The Office of Civilian Defense Director is a State administrative body within the State Department of Defense. N.J.S.A. App. A:9-37. It is a general rule of statutory construction that only those powers are granted to an administrative agency which are expressly or by necessary implication conferred. *Welsh Farms Inc.* v. *Bergsma,* 16 N.J. Super. 295 (App. Div. 1951); Sutherland, *Statutory Construction,* 3d Edition, §6603. Further, a basic principle accepted in this State is that "an administrative officer is a creature of legislation who must act only within the bounds of authority delegated to him. . . ." *Elizabeth Federal Savings & Loan Association* v. *Howell,* 24 N.J. 488 (1957).

The purpose of the act creating the Office of Civilian Defense is to provide for the health, safety and welfare of the people of this State and to aid in the prevention of damage to and destruction of property during any emergency. N.J.S.A. App. A:9-33. The Legislature, in furthering this purpose has not conferred any express authority to negotiate contracts for the sale of advertisements as it has, for instance, expressly given the power to contract as is necessary and convenient to cooperate with the Federal government in wartime. N.J.S.A. App. A:10-1(e).

Nor can it be fairly implied that such a power is incidental or necessary to carry out the stated purpose. In this regard you call our attention to N.J.S.A. App. A:9-63 (L. 1951, c. 72, p. 462, §6), which reads as follows:

> *"Acceptance of services, equipment, supplies, or funds from individuals, firms or corporations*
>
> Whenever any person, firm, or corporation shall offer to the State or to any political subdivision thereof, services, equipment, supplies, materials, or funds by way of gift, grant, or loan, for purpose of civil defense, the State, acting through the Governor, or such political subdivision, acting through its executive officer or governing body, may accept such offer and upon such acceptance the Governor of the State or executive officer or governing body of such political subdivision may authorize any officer of the State or of the political subdivision, as the case may be, to receive such services, equipment, supplies, materials, or funds on behalf of the State or such political subdivision, and subject to the terms of the offer."

The same bill also added the immediately preceding section (N.J.S.A. App. A:9-62) entitled "Acceptance of services, equipment, supplies, or funds from Federal government." This section was enacted to allow the State and municipalities to receive contributions from the Federal government permitted by 50 U.S.C.A. §2281(i), enacted on January 12th of the same year. The statement appended to the New Jersey bill indicates the intent of the Legislature in passing both of these sections was to allow "the State and political subdivisions to *accept* gifts, grants or loans for civil defense purposes." (Emphasis ours)

In view of the identity of wording of the two New Jersey sections and the obvious purpose of the former, we conclude that N.J.S.A. App. A:9-63 was intended merely to allow the acceptance of contributions and the like from private sources. Therefore, the above quoted section cannot carry with it the power to contract for the sale of advertising space since the purchase cannot be construed as a gift, grant or loan nor can the sale of space be construed as an acceptance contemplated by the act.

In reaching this conclusion, we are not unmindful of the value "The Siren" will have in advancing the interests of civil defense and we note that section App. A:9-63 allows the acceptance of funds for that purpose. Therefore, you may accept gifts to defray the cost of publication. While the appearance of display advertisements of private concerns might be interpreted by readers as an official endorsement contrary to the public policy of this State, a formal public acknowledgment of such financial support printed in the magazine at the discretion of the Division is certainly proper. Authority to acknowledge any gifts is an incidental power which may be fairly implied from the above quoted section.

For these reasons we conclude, and you are so advised, that the Division of Civil Defense may not accept paid advertisements for insertion in a State Civil Defense magazine.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: G. DOUGLAS HOFE, JR.
Legal Assistant

NOVEMBER 30, 1959

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

MEMORANDUM OPINION 1959—P-24

DEAR MR. KERVICK:

You have asked our legal opinion as to whether a receiver trustee or other court appointed fiduciary is required to file the necessary returns for the corporation represented by him for the period (a) covering all or part of any accounting period prior to appointment and (b) covering all or part of any accounting period subsequent to appointment.

The Corporation Business Tax Act imposes a franchise tax upon "every domestic or foreign corporation which is not hereinafter exempted . . . for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State." R.S. 54:10A-2.

Under the terms of this section, every domestic corporation, whatsoever, and every foreign corporation authorized to do business in New Jersey, and every foreign corporation which, although not authorized to do business in this State, nonetheless does business, employs or owns capital or property or maintains an office in this State is liable to pay a franchise tax. See Regulations 16:10-1.130; 16:10-1.140; 16:10-1.150; 16:10-1.160.

Taxes accruing prior to an adjudication in bankruptcy are debts of the corporation, provable in bankruptcy, and entitled to a fourth priority. Bankruptcy Act, Section 64(a)-4, 11 U.S.C. §104a(4).

Insofar as New Jersey law is concerned, franchise taxes continue to accrue after the filing of a petition in bankruptcy and during the bankruptcy administration. The tax is imposed on the *"privilege"* of having or exercising a corporate franchise, doing business, employing or owning capital, etc. See *Werner Machine Co.* v. *Director of Division of Taxation,* Dept. of Treasury, 17 N. J. 121 (1954) aff'd 350 U.S. 492 (1956). In other words, a corporation is subject to the tax so long as it retains the privilege to do business, etc. and regardless of whether or not it actually utilizes such privilege. *Cf. People of State of Michigan* v. *Michigan Trust Co.,* 286 U.S. 334 (1932). Neither adjudication as a bankrupt nor discharge dissolves a corporation. *In re Town Crier Bottling Co.,* 123 F. Supp. 588 (D. Mo. 1954); See 11 U.S.C. §32. Hence all domestic corporations and such foreign corporations as are authorized to do business in the State continue to be liable for franchise taxes during bankruptcy administration and until the franchise or authorization to do business is forfeited or abandoned, or until the corporation is dissolved. *Cf. In re United States Car Co.,* 60 N.J. Eq. 514 (E. & A. 1900).

A Federal bankruptcy trustee or receiver who conducts a business, either in connection with a corporate reorganization or pursuant to court order as preliminary to liquidation is, by express Federal statute fully subject to State tax laws. The Federal statute provides (28 U.S.C. §960):

> "Any officers and agents conducting any business under authority of a United States Court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

Construing this statute, the United States Supreme Court in *Palmer* v. *Webster and Atlas Nat. Bank of Boston,* 312 U.S. 156 (1941) stated (at p. 163):

> "'The purpose of this bill is to subject businesses conducted under receivership in Federal courts to State and local taxation the same as if such businesses were being conducted by private individuals or corporations.'
>
> * * *
>
> "What Congress intended was that a business in receivership, or conducted under court order, should be subject to the same tax liability as the owner would have been if in possession and operating the enterprise."

The New Jersey Statute, R.S. 54:10A-11, imposes a liability on bankruptcy trustees for corporate franchise taxes in the following terms. The statute provides:

> "Any receiver, referee, trustee, assignee or other fiduciary, or any officer or agent appointed by any court, to conduct the business or conserve the assets of any corporation shall be subject to the tax imposed by this act in the same manner and to the same extent as a corporation hereunder."

The scope of the tax liability which R.S. 54:10A-11 imposes on a trustee in bankruptcy must be construed as identical with the scope of tax liability which 28 U.S.C. §960 permits a State to impose. This is so because Congress, under its paramount power over bankruptcy administration possesses, and by 28 U.S.C. §960 has exercised, the power to define a trustee's tax liability. *In re David Standard Bread Co.,* 46 F. Supp. 841 (D. Cal. 1942), aff'd sub nom. *State Board of Equalization* v. *Boteler,* 131 F. 2d 386 (9th Cir. 1942). It would therefore be improper and probably futile to construe the New Jersey statute to attempt to impose any broader liability on a bankruptcy trustee. *California State Bd. of Equalization* v. *Goggin,* 245 F. 2d 44 (9th Cir. 1957) cert. denied 353 U.S. 961 (1957). Hence the phrase "conduct the business or conserve the assets," which appears in the New Jersey statute, must be construed as no more comprehensive than the phrase, "conducting any business" in the Federal statute.

The weight of authority holds that if a trustee continues to operate a business, or a part thereof, he is "conducting" it within the meaning of 28 U.S.C. §960 and is therefore liable for taxes accruing as the result of his operations; but if he is merely liquidating it, he is not liable for taxes which may accrue as a matter of State Law during the period of liquidation. *In re F. P. Newport Corp., Ltd.,* 144 F. Supp. 507 (D. Cal. 1956); *In re West Coast Cabinet Works,* 92 F. Supp. 636 (S.D. Cal. 1950), aff'd sub nom. *California State Bd. of Equalization* v. *Goggin,* 191 F. 2d 726 (9th Cir. 1951), cert. denied 342 U.S. 909 (1952); *California State Bd. of Equalization* v. *Goggin,* 245 F. 2d 44 (9th Cir. 1957) cert. denied 353 U.S. 961 (1957); *United States* v. *Metcalf,* 131 F. 2d 677 (9th Cir. 1942) cert. denied 318 U.S. 769 (1942). See *Philadelphia Co.* v. *Dipple,* 312 U.S. 168 (1941). A few cases, however, hold that a trustee who is merely liquidating is also "conducting" a business within the meaning of the cited Federal statute and may be liable for taxes. *In re Mid-America Co.,* 31 F. Supp. 601 (S.D. Ill. 1939); *State of Missouri* v. *Gleick,* 135 F. 2d 134 (8th Cir. 1943). However, the reasoning of these minority cases is not persuasive. Furthermore,

Attorney General Formal Opinion 1950—No. 77, holds that the New Jersey corporate franchise tax statute is not intended to tax corporations in the process of liquidation. Whether a trustee is "conducting" a business or liquidating it is a question of fact in each case. *U.S.* v. *Sampsell,* 224 F. 2d 721 (9th Cir. 1955).

A trustee who is "conducting" a business within the meaning of 28 U.S.C. §960 is obligated to file corporate tax returns for the period of his operation. State franchise taxes which accrue during bankruptcy administration as the result of his conducting the business of the bankrupt are entitled to the status of administration expenses and must be given priority over all other unsecured debts. *People of State of Michigan* v. *Michigan Trust Co.,* 286 U.S. 334 (1932). This liability includes any interest or penalties which may arise from the trustee's failure to pay post-bankruptcy franchise taxes as they arise. *Boteler* v. *Ingels,* 308 U.S. 57 (1939). Since a bankruptcy trustee or receiver is subject to being surcharged for unnecessary expenses to the State resulting from his negligence or other misconduct, it seems clear that receivers or trustees operating the business of a bankrupt corporation should file New Jersey corporation franchise tax returns as required by the New Jersey statute and, if they fail to do so, will be compelled to file them by the Federal court upon appropriate application by the State.

At least since the adoption of the Chandler Act on June 22, 1938 as an amendment to the Bankruptcy Act, claims for pre-bankruptcy taxes must be filed and proved by the creditor and need not be sought out by the trustee. *In re Ward,* 131 F. Supp. 387, 395 (D. Colo. 1955); *In re Mid-America Co.,* 31 F. Supp. 601 (D. Ill. 1939); *Matter of Lambertville Rubber Co. Inc.,* 111 F. 2d 45 (3d Cir. 1940). See 3 Collier on Bankruptcy par. 64.409. Since a trustee in bankruptcy is not responsible for determining and paying tax claims unless properly proved, he has no duty to file tax returns for years prior to bankruptcy. In the case of *In re Town Crier Bottling Co.,* 123 F. Supp. 588 (E.D. Mo. 1954) the court stated:

> "The trustee in bankruptcy would have no personal knowledge of the income or operations of the bankrupt corporation during the two taxable years prior to his appointment; he could not certify to the correctness of such return; in most instances he would be obliged to burden the estate with the expense of an accountant to make possible the preparation of such returns and such expense should not be authorized by this court. All books and records are available for use by Treasury Department agents from which the substituted returns mentioned in the government's brief could be made. No one is harmed if the trustee does not perform this gratuitous service. I find no legal compulsion for him to do so."

To the same effect see *In re Owl Drug Co.,* 21 F. Supp. 907, 910 (D. Nev. 1937), *Matter of Standard Elec. Med. Corp.,* 38 Am. Bankr. Rep. N.S. 402 (Ref. N.D. Cal. 1938); *Cf. In the Matter of F. P. Newport Corp., Ltd.* 144 F.S. 507 (S.D. Cal. 1956).

Section 64A of the Bankruptcy Act, 11 U.S.C. §104, provides that "in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court"; i.e. by the bankruptcy court. In the case of *New Jersey* v. *Anderson,* 203 U.S. 483 (1906) a domestic corporation which did business only in Illinois failed to file tax returns in New Jersey under the Corporation Stock Act which imposed a tax whose amount was determined by the amount of stock outstanding. The State Board of Assessors therefore assessed a tax on the authorized

stock of the corporation, rather than on the smaller amount which was actually outstanding. The bankruptcy court, however, set aside the assessment on the tax on the basis of the authorized stock and reduced it to an amount appropriate in view of the number of shares actually outstanding. The U.S. Supreme Court upheld the reduction of the assessment by the bankruptcy court. To the same effect, see *In re Monongahela Rye Liquors,* 141 F. 2d 864 (3d Cir. 1944); *In re Spier Aircraft Corp.,* 66 F. Supp. 236 (D.N.J. 1945) aff'd 156 F. 2d 62 (3d Cir. 1946) cert. denied 329 U.S. 729 (1946). *Cf. Arkansas Corporation Commission* v. *Thompson,* 313 U.S. 132 (1941).

Very truly yours,

DAVID D. FURMAN
Attorney General

By: MURRY BROCHIN
Deputy Attorney General

DECEMBER 31, 1959

HONORABLE BRENDAN T. BYRNE
Prosecutor of Essex County
Court House
Newark, New Jersey

MEMORANDUM OPINION 1959—P-25

DEAR PROSECUTOR:

You have asked whether the provisions of L. 1959, c. 161, which increase the number of county detectives and the number of county investigators, require approval by the Board of Chosen Freeholders before taking effect.

Section 1 of the act amends N.J.S. 2A:157-3 to increase the authorized number of county detectives in a first class county, such as Essex, from 18 to 24. Section 7 of the act amends N.J.S. 2A:157-11 to increase the authorized number of investigators from 18 to 24. These sections also increase the minimum salaries payable to detectives and investigators.

Section 13 of the act provides that the increases in minimum salaries shall not become operative in any county until adopted by resolution of the Board of Freeholders. However, there is no provision requiring approval by the Freeholders of the increase in the number of detectives and investigators. The failure to require approval by the Freeholders except as to salary changes is indicative of a legislative intention that no such resolution is necessary to make effective the increase in the number of authorized detectives and investigators. In this regard, L. 1959, c. 161 is self-executing.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

DECEMBER 31, 1959

MR. H. P. J. HOFFMANN
Commissioner of Registration
Bergen County Board of Elections
Administrative Building
Hackensack, New Jersey

MEMORANDUM OPINION 1959—P-26

DEAR MR. HOFFMANN:

You have asked our opinion whether the County Board of Elections may foreclose persons from registering to vote during the 40 day period prior to the holding of school elections. Such elections are held annually on the second Tuesday in February. R.S. 18:7-14.

R.S. 18:7-27 provides that a person may not vote in a school election unless his name appears on the signature copy register and "for the purpose of said school election no person shall be entitled to vote unless he shall be registered at least forty days prior to the date of said school election." R.S. 18:7-28 provides that the signature copy registers delivered to the school district clerks shall contain the names of persons registered in the affected election districts "who are entitled to vote at the school election."

It is our opinion that the aforesaid statutes do not require that registrations be refused during the 40 day period prior to school elections. They do require, however, that the signature copy registers transmitted to the school district clerks shall only contain the permanent registration forms of persons entitled to vote in said election, namely persons who have been registered 40 or more days before the election. Thus, it is our opinion that a person may register within the 40 day period prior to the school election, but he may not vote in said school election and, therefore, his permanent registration form should not be placed in the signature copy register until after the election in question.

The above statutes in Title 18, specifically relating to school elections, are not overcome by any provisions in Title 19 relating to elections in general.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

DECEMBER 31, 1959

R. SCHUYLER BOGART, *Chief Clerk*
Union County Board of Elections
Court House
Elizabeth 4, New Jersey

MEMORANDUM OPINION 1959—P-27

DEAR MR. BOGART:

We have been asked whether a member of the County Board of Elections is eligible to run as an alternate delegate or delegate to a national convention of a political party. R.S. 19:6-17 provides that a person shall be deemed to have vacated his position as a member of the County Board of Elections if he runs for any office to be voted on at the primary election. The single exception to this rule is if a member of the County Board of Elections runs for county committeeman or State committeeman of the political party of which he is a member, he may remain a member of the County Board of Elections. R.S. 19:3-3 and R.S. 19:24-4 provide that delegates and alternate delegates to the national conventions of political parties are to be elected at the primaries.

Therefore, if a member of a County Board of Elections becomes a candidate for the position of delegate or alternate delegate to a national convention of a political party, he thereby forfeits his position as a member of the County Board of Elections.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

INDEX

D.

E.

F.

G.

H.

I.

J.

L.

M.

N.

O.

P.

R.

S.

T.