OPINIONS

OF THE

Attorney General

OF

NEW JERSEY

FOR THE

Period from January 1, 1956

to December 31, 1957

STATE OF NEW JERSEY

Department of Law and Public Safety
Division of Law

JANUARY 1, 1956—DECEMBER 31, 1957

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Frank A. Verga	Jersey City
Roger M. Yancey	Newark

*Deceased July 18, 1956
**Deceased August 18, 1957

ASSISTANT DEPUTY ATTORNEY GENERAL:

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1956 - 1957

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STATUTES CITED

(New Jersey Statutes Annotated — Revised Statutes of 1937)

1:1-2 ..... P.M. 33, 1957

2A:4-14 ..... F.O. 11, 1956
2A:4-18 ..... F.O. 20, 1956
2A:4-30.1 et seq. ..... F.O. 20, 1956
2A:4-39 ..... P.M. 2, 1957
2A:5-4 et seq. ..... F.O. 3, 1956
2A:8-27, 28 ..... P.M. 31, 1957
2A:15-26 ..... F.O. 7, 1957
2A:17-50 et seq. ..... F.O. 12, 1956
2A:34-24 ..... F.O. 20, 1956
2A:96-6 to 8 ..... P.M. 13, 1956
2A:112-1 et seq. ..... P.M. 1, 1957
2A:121-1 et seq. ..... P.M. 1, 1957
2A:151-32 et seq. ..... F.O. 17, 1956
2A:157-2 ..... F.O. 10, 1956
2A:170-18 ..... P.M. 1, 1957

3A:20-1 et seq. ..... P.M. 22, 1956

4:12A-21, 22, 23, 49 ..... F.O. 23, 1957
4:12A-1, 28, 33, 39, 41 ..... P.M. 33, 1957

5:8-6 ..... F.O. 6, 1957
5:8-24 et seq. ..... P.M. 1, 1957
5:8-50 et seq. ..... P.M. 1, 1957

9:3-19 ..... P.M. 13, 1956

11:1-1 ..... P. M. 18, 1956
11:9-6 ..... P.M. 2, 1957
11:9-10 ..... P.M. 25, 1956
11:21-6 ..... P.M. 26, 1957
11:23-2 ..... P.M. 2, 1957
11:27-1 ..... F.O. 5, 1957
11:27-4 ..... P.M. 2, 1957

12:3-12 ..... P.M. 30, 1956
12:3-17 ..... P.M. 35, 1956
12:6-6 ..... F.O. 11, 1956
12:7-34.1 to 34.35 ..... F.O. 10, 1956
12:7-34.1(d), 34.2, 34.22, 44.47 ..... P.M. 32, 1957
12:7-44 to 53 ..... F. O. 10, 1956
P.M. 30, 1956
12:16A-1 ..... P.M. 31, 1956

13:1-18 ..... P.M. 11, 1957
13:1-31(a), 34 ..... P.M. 20, 1957
13:1A-10 ..... P. M. 5, 1956
13:1A-24 ..... P.M. 11, 1957
13:1B-3(c) ..... P.M. 11, 1957
P.M. 30, 1957
13:1B-7 ..... F.O. 6, 1956
P.M. 11, 1957
P.M. 30, 1957
13:1B-8 ..... F.O. 6, 1956
P.M. 35, 1956
P.M. 11, 1957
P.M. 30, 1957
13:1B-13 ..... P.M. 35, 1956
13:1B-23 ..... P.M. 11, 1957
13:1B-27 ..... P.M. 11, 1957
13:1B-65 ..... F.O. 9, 1957
13:8-9, 10 ..... P.M. 30, 1957

14:3-1(b) ..... P.M. 33, 1957
14:12-5 ..... P.M. 33, 1956
14:13-14 ..... F.O. 7, 1957
14:14-23 ..... P.M. 23, 1956

15:1-14 ..... P.M. 19, 1957

17:9-39 ..... P.M. 22, 1957
17:9A-175A ..... P.M. 4, 1957
17:9A-284 ..... P.M. 23, 1956
17:12A-151 ..... F.O. 11, 1956
17:16B-1 ..... P.M. 8, 1956

18:7-68, 69 ..... F.O. 1, 1956
18:10-5, 6 ..... F.O. 13, 1956
18:10-29.35 ..... F.O. 8, 1957
18:10-29.40 ..... P.M. 7, 1957
18:13-24 to 100 ..... F.O. 8, 1956
18:13-112.70 ..... F.O. 2, 1956
F.O. 14, 1956
F.O. 15, 1956
18:14-71.23 ..... F.O. 8, 1957
18:14-78 ..... P.M. 24, 1957
18:22-15.1 et seq. ..... F.O. 13, 1957
18:22-15.5 ..... P.M. 9, 1957
18:22-15.42 ..... P.M. 9, 1957

19:1-1 ..... P.M. 12, 1956
19:4-1 ..... P.M. 20, 1956
19:4-7 ..... P.M. 9, 1956
19:6-2 ..... P.M. 13, 1957
19:6-17 ..... P.M. 12, 1956
19:23-45 ..... P.M. 13, 1957

19:31-2 ..... P.M. 34, 1957
19:31-6, 7 ..... P.M. 29, 1957
19:31-10 ..... P.M. 5, 1957
19:31-15 ..... P.M. 28, 1956
19:57-1 et seq. ..... F.O. 1, 1956
19:57-31 ..... F.O. 21, 1957

21:1B-1 et seq. ..... P.M. 36, 1956
21:3-2 ..... P.M. 19, 1956

22A:2-1, 2, 5 ..... P.M. 10, 1957

23:2-4, 6, 8 ..... P.M. 27, 1956
23:3-11 ..... P.M. 11, 1957
23:10-5, 17, 20 ..... P.M. 27, 1956

26:3-21 ..... P.M. 17, 1956
26:8-40 ..... P.M. 15, 1956

27:12B-9 ..... P.M. 7, 1956
27:17-7 ..... P.M. 34, 1957

30:3-7 ..... P.M. 29, 1956
30:4-66, 74 ..... P.M. 22, 1956
30:4-92 to 100 ..... F.O. 5, 1956
30:4C-22 ..... P.M. 22, 1956
30:5-14, 14.1 ..... F.O. 20, 1956

32:8-3 ..... F.O. 13, 1957
32:9-17 ..... F.O. 13, 1957
32:14-7, 28, 29 ..... F.O. 13, 1957
32:19-3 ..... P.M. 32, 1956

34:2-24 ..... P.M. 24, 1956
34:16-25 ..... P.M. 16, 1956

38:23-4 ..... P.M. 6, 1957
P.M. 25, 1956
38:23-4.1 ..... P.M. 6, 1957
38:23-5 ..... P.M. 6, 1957
38:23-6 ..... P.M. 6, 1957
P.M. 26, 1956

39:1-1 ..... F.O. 19, 1956
39:3-10, 17, 40 ..... F.O. 23, 1956
39:3-27 ..... P.M. 12, 1957
39:3-30 ..... P.M. 15, 1957
P.M. 33, 1956
39:3-31 ..... P.M. 15, 1957
39:4-30 ..... F.O. 23, 1956
39:5-6 ..... P.M. 31, 1957
39:5-25 ..... F.O. 10, 1956
39:5-30 ..... F.O. 23, 1956
39:5-40 ..... P.M. 3, 1957
39:6-25 ..... P.M. 28, 1957
39:6-28 ..... F.O. 19, 1956
F.O. 21, 1956
39:6-35 ..... F.O. 19, 1956
39:6-46, 62 ..... P.M. 28, 1957
39:6-61 to 91 ..... P.M. 10, 1956
F.O. 15, 1957
39:6-63 ..... P.M. 12, 1957
P.M. 28, 1957
39:10-2, 9 ..... P.M. 33, 1956

40:2-33, 34 ..... P.M. 11, 1956
40:11A-6 ..... P.M. 27, 1957
40:43-1 ..... F.O. 18, 1956
40:44-1 to 8 ..... P. M. 9, 1956
40:47-3 ..... P.M. 2, 1957
40:47-15 ..... F.O. 10, 1956
40:47-19 ..... P.M. 26, 1957
40:50-1 ..... F.O. 18, 1956
40:55-1.10 ..... F.O. 9, 1957
40:55-1.12 ..... F.O. 1, 1957
40:55-1.13 ..... F.O. 1, 1957
F.O. 3, 1957
40:55-33 ..... F.O. 9, 1957
40:60-6, 7 ..... P.M. 29, 1957
40:62-49 ..... F.O. 20, 1957
40:64-1 et seq. ..... P.M. 34, 1956
40:87-13 ..... P.M. 4, 1956
40:149-2 ..... P.M. 26, 1957

41:2-1 ..... P.M. 31, 1957

43:3-1 ..... P.M. 4, 1956
P.M. 18, 1957
43:4-1 et seq. ..... F.O. 12, 1957
43:14-29 ..... P.M. 21, 1956
43:15A-1 et seq. ..... F.O. 18, 1957
43:15A-7 ..... P.M. 3, 1956
F.O. 4, 1957
P.M. 18, 1957
43:15A-11 ..... P.M. 3, 1956
43:15A-24 ..... F.O. 17, 1957
F.O. 19, 1957
43:15A-25 ..... P.M. 3, 1956
F.O. 17, 1957
43:15A-37, 38 ..... F.O. 17, 1957
43:15A-39 ..... P.M. 3, 1956
F.O. 4, 1957
43:15A-41 ..... F.O. 20, 1956
P.M. 21, 1956
F.O. 17, 1957

P.M. 6, 1957
43:15A-43 ..... F.O. 20, 1956
43:15A-47 ..... P.M. 18, 1957
43:15A-57 ..... P.M. 6, 1957
P.M. 18, 1957
43:15A-59 ..... F.O. 7, 1956
F.O. 15, 1956
P.M. 16, 1957
43:15A-60, 62, 63 ..... F.O. 19, 1957
43:15A-64 ..... F.O. 7, 1956
43:15A-75 ..... P.M. 18, 1957
43:15A-108 ..... P.M. 6, 1957
43:15A-111, 112 ..... P.M. 16, 1957
43:16-1 et seq. ..... F.O. 20, 1956
43:16-1, 17 ..... P.M. 21, 1957
43:16-5 ..... F.O. 12, 1957
43:16A-3, 11, 19 ..... F.O. 12, 1957
43:21-6, 30, 50 ..... P.M. 2, 1956
43:21-15 ..... P.M. 10, 1957
43:22-12 ..... P.M. 16, 1957

44:7-14 ..... P.M. 22, 1956

52:18-25.1 ..... P.M. 2, 1956
52:18A-19.2, 19.3 ..... P.M. 29, 1956
52:18A-86, 89 ..... P.M. 1, 1956
52:20-14 ..... F.O. 10, 1957
52:27B-64 ..... F.O. 10, 1957
52:27B-67 ..... P.M. 30, 1957

52:30-1, 2 ..... P.M. 1, 1957
52:34-6 ..... P.M. 29, 1956
F.O. 10, 1957
F.O. 13, 1957
P.M. 30, 1957
52:34-7 ..... P.M. 29, 1956
52:34-9(a) ..... F.O. 11, 1957

53:2-7 ..... F.O. 10, 1956
P.M. 23, 1957
54:4-1 et seq. ..... F.O. 16, 1956
54:4-3.12(i) ..... P.M. 36, 1957
54:4-3.12(j) ..... F.O. 16, 1956
54:5-6 ..... P.M. 23, 1957
54:10B-2 ..... P.M. 8, 1956
54:29A-63 ..... P.M. 8, 1956
54:39-66(a) ..... P.M. 27, 1957

55:1-24 ..... F.O. 14, 1957
55:16-1 et seq. ..... P.M. 14, 1956

56:7-18 et seq. ..... F.O. 22, 1957

58:1-10, 11, 12 ..... P.M. 5, 1956
58:1-17 ..... P.M. 5, 1956
F.O. 20, 1957
58:1-20, 21, 33 ..... F.O. 20, 1957
58:2-1 et seq. ..... P.M. 35, 1957
58:6-1, 3, 5 ..... F.O. 20, 1957

SESSION LAWS CITED

P.L. 1880, c. 106 ..... F.O. 13, 1957
P.L. 1881, c. 81 ..... F.O. 13, 1957
P.L. 1885, c. 95, sec. 13 ..P.M. 29, 1957
P.L. 1894, c. 71 ..... F.O. 13, 1956
P.L. 1907, c. 252 ..... P.M. 35, 1957
P.L. 1908, c. 156, sec. 3 ..P.M. 18, 1956
P.L. 1913, c. 67, sec. 1 ...F.O. 10, 1957
P.L. 1915, c. 241 ..... P.M. 11, 1957
P.L. 1917, c. 105, secs.
1, 3 ..... P.M. 18, 1956
P.L. 1918, c. 147, secs.
701-709 ..... F.O. 5, 1956
P.L. 1921, c. 208 ..... F.O. 10, 1956
P.L. 1929, c. 212, sec. 1 ..P.M. 18, 1956
P.L. 1934, c. 215 ..... F.O. 13, 1957
P.L. 1937, c. 148 ..... F.O. 13, 1957
P.L. 1940, c. 100 ..... P.M. 20, 1957
P.L. 1944, c. 148, sec. 1 ..P.M. 1, 1956
P.L. 1945, c. 22 ..... P.M. 11, 1957
P.M. 30, 1957
P.L. 1945, c. 22, secs.
10, 28, 29 ..... P.M. 5, 1956
P.M. 35, 1956
P.L. 1947, c. 92, sec. 13 ..P.M. 22, 1957
P.L. 1947, c. 283 ..... F.O. 13, 1957
P.L. 1948, c. 67, sec.
175A ..... P.M. 4, 1957
P.L. 1948, c. 263 ..... P.M. 11, 1957
P.L. 1948, c. 448 ..... P.M. 35, 1956
P.L. 1948, c. 448, sec. 7 ..F.O. 6, 1956
P.M. 30, 1957
P.L. 1948, c. 448, sec. 29 .P.M. 11, 1957
P.L. 1948, c. 448, sec. 116 F.O. 9, 1957
P.L. 1949, c. 184 ..... P.M. 14, 1956
P.L. 1949, c. 305 ..... P.M. 14, 1956
P.L. 1950, c. 139 ..... P.M. 36, 1956
P.L. 1951, c. 138 ..... F.O. 20, 1956
P.M. 22, 1956
P.L. 1951, c. 184 ..... F.O. 16, 1956
P.L. 1951, c. 284 ..... F.O. 13, 1957
P.L. 1952, c. 16 ..... P.M. 6, 1956
P.L. 1952, c. 17 ..... P.M. 6, 1956
P.L. 1952, c. 157 ..... F.O. 10, 1956
F.O. 11, 1956
P.L. 1952, c. 190 ..... P.M. 2, 1956
P.L. 1952, c. 231 ..... F.O. 16, 1956
P.L. 1952, c. 247 ..... F.O. 22, 1957
P.L. 1952, c. 333 ..... F.O. 13, 1957
P.L. 1952, c. 360 ..... P.M. 29, 1956

P.L. 1953, c. 211 ..... F.O. 1, 1956
F.O. 2, 1957
P.L. 1953, c. 224 ..... P.M. 6, 1956
P.L. 1953, c. 255 ..... F.O. 1, 1956
P.L. 1953, c. 264 ..... P.M. 13, 1956
P.L. 1953, c. 265 ..... P.M. 13, 1956
P.L. 1953, c. 360 ..... F.O. 8, 1956
P.L. 1953, c. 433, sec. 13 .F.O. 1, 1957
F.O. 3, 1957
P.L. 1953, c. 436 ..... F.O. 16, 1956
P.L. 1954, c. 6 ..... F.O. 6, 1957
P.L. 1954, c. 7 ..... F.O. 6, 1957
P.L. 1954, c. 48 ..... P.M. 29, 1956
F.O. 11, 1957
P.L. 1954, c. 84 ..... F.O. 7, 1956
F.O. 15, 1956
F.O. 18, 1957
P.L. 1954, c. 84, secs.
7, 47, 75 ..... P.M. 18, 1957
P.L. 1954, c. 84, secs.
41 (c) ..... P.M. 6, 1957
P.L. 1954, c. 84, sec. 57 ..P.M. 6, 1957
P.M. 18, 1957
P.L. 1954, c. 212 ..... P.M. 32, 1956
P.L. 1954, c. 236 ..... F.O. 10, 1956
F.O. 11, 1956
P.L. 1955, c. 32, sec. 2 ...P.M. 1, 1956
P.L. 1955, c. 37 ..... F.O. 8, 1956
P.L. 1955, c. 37, sec. 2 ...P.M. 26, 1956
P.L. 1955, c. 37, sec. 34 ..P.M. 26, 1956
P.L. 1955, c. 37, sec. 68 ..F.O. 2, 1956
F.O. 14, 1956
F.O. 15, 1956
P.L. 1955, c. 37, sec. 70 ..P.M. 26, 1956
P.L. 1955, c. 38 ..... P.M. 16, 1957
P.L. 1955, c. 46 ..... P.M. 32, 1956
P.L. 1955, c. 76, sec. 1 ...P.M. 15, 1957
P.L. 1955, c. 206 ..... P.M. 19, 1957
P.L. 1955, c. 259 ..... F.O. 8, 1956
P.L. 1955, c. 261, secs.
5, 39 ..... F.O. 4, 1957
P.L. 1956, c. 2 ..... P.M. 29, 1956
P.L. 1956, c. 61 ..... P.M. 9, 1957
F.O. 13, 1957
P.L. 1956, c. 61, secs.
18, 21, 36 (c) ..... F.O. 9, 1956
P.L. 1956, c. 100 ..... P.M. 31, 1956
P.L. 1956, c. 169 ..... P.M. 16, 1957
P.L. 1957, c. 21 ..... F.O. 5, 1957
P.L. 1957, c. 57 ..... F.O. 6, 1957
P.L. 1957, c. 113 ..... F.O. 9, 1957
P.L. 1957, c. 147 ..... F.O. 13, 1957

CONSTITUTION OF 1947

Article		*Article*	
II, par. 3	P.M. 14, 1957	VIII, sec. III, par. 3	F.O. 10, 1957
IV, sec. VII, par 2A	F.O. 6, 1957		P.M. 36, 1957
V, sec. IV, par 6	P.M. 32, 1957	VIII, sec. IV, par. 1	P.M. 7, 1957
VI, sec. VI, par. 3	F.O. 3, 1956	VIII, sec. IV, par. 2	F.O. 13, 1956
VI, sec. VII, par. 11	P.M. 9, 1956	VIII, sec. VII, par. 2	P.M. 3, 1957
VIII, sec. I, par. 3	F.O. 16, 1956	XI, sec. IV, par. 1	F.O. 3, 1956

CONSTITUTION OF 1844

Article

IV, sec. VII, par. 6 ..... F.O. 13, 1956

JANUARY 11, 1956

MR. ROBERT L. FINLEY
Deputy State Treasurer
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-1

DEAR MR. FINLEY:

You seek our opinion as to whether the proceeds from the sale of the Camden Armory which have been remitted to the State Treasurer shall be retained by him in a separate account, or may be transferred to the General Treasury Account, and if a separate account must be maintained, whether the funds may be properly invested.

Chapter 32 of the Laws of 1955 authorized the Department of Defense to dispose of surplus or unsuitable buildings and grounds, and agreeably thereto the Camden Armory was sold to the City of Camden.

Section 2 of the Act provides:

> "The proceeds of any sale made pursuant to this act shall be remitted to the State Treasurer and by him held for application to the purchase price of further sites or grounds or the cost of construction of new buildings for the use of the State military or naval services."

The statute is clear that the remitted proceeds shall be held by the State Treasurer for a specific purpose, to wit, to be applied to the purchase price of further sites or grounds or the cost of construction of new buildings for the use of the State military or naval services. This prevents the deposit of the Camden Armory proceeds in the merged General Treasury Account.

Concerning the investment of the fund, Revised Statutes 52:18-25.1 provides:

> "In any case in which the State Treasurer holds moneys of the State under a requirement that said moneys be held for a particular time or be held for a particular use, he may invest such moneys in bonds or notes of the United States until such particular time has arrived or until such time as said moneys are required to be applied to the particular use." (P.L. 1944, c. 148, p. 417, § 1)

The 1944 restriction placed upon the State Treasurer by Chapter 148, P.L. 1944 supra, as to the type of investments he might make with moneys held for a "particular time," or for a "particular use", was removed by the provisions of N.J.S.A. 52:18A-86 as amended. This statute transferred the functions, powers and duties relating to the investment of such moneys from the State Treasurer to the Director of the Division of Investment, Department of the Treasury, to be exercised subject to the provisions and provisos therein contained.

N.J.S.A. 52:18A-89, as amended, authorizes the Director of the Division of

Investment to invest said moneys in such securities and other evidences of indebtdness as are detailed in the Act.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: JOSEPH LANIGAN
Deputy Attorney General

JL:MG

JANUARY 23, 1956

MR. WILLIAM F. DITTIG, *Superintendent*
Disability Insurance Service
20 West Front Street
Trenton 10, New Jersey

MEMORANDUM OPINION—P-2

DEAR MR. DITTIG:

You have requested an opinion in regard to the application of a decision of the New Jersey Supreme Court in the case of *Deaney* v. *The Linen Thread Company, Inc.*, 19 N. J. 578, decided on November 7, 1955, affirming a decision of the Board of Review of the Division of Employment Security, dated April 18, 1955 and mailed on May 9, 1955, on other claimants who are requesting reimbursement for the amounts deducted from their temporary disability benefits equivalent to the amount that they received concurrently under the Federal Social Security Law.

In the case of Khanan Chodorowsky (Charles Chodorow), S.S. No. 151-18-8438, you have requested a decision where the claimant became sick on April 30, 1953 and received benefits for the period May 8, 1953 to November 5, 1953, inclusive, and his benefits for the last twenty-two weeks of this period were reduced by $18.62 per week because he received social security benefits for the same weeks. You have stated that he made no appeal until November 10, 1955.

In the case of Antonio Cucci, S.S. No. 149-10-8651, disability payments were reduced for the compensable weeks from February 3, 1955 through May 4, 1955 because he became entitled to social security payments for this period of time. Mr. Cucci's first request for restoration of the deductions was incorporated in a letter dated November 9, 1955.

N.J.S.A. 43:21-30 provided expressly for the reduction of benefits in the amount of any primary insurance benefits being paid to the claimant as federal old age insurance benefits.

An amendment, P.L. 1952, c. 190, effective July 1, 1952, provided as follows:

> " * * * Disability benefits otherwise required hereunder shall be reduced by the amount paid concurrently under any governmental or private retirement, pension or permanent disability benefit or allowance program to which his most recent employer contributed on his behalf."

The administrative ruling of the Disability Insurance Service in regard to the 1952 amendment was that the amendment did not change the prior Act in regard to the deduction of the amount of benefits received under the Federal Social Security Act from benefits received under the Temporary Disability Benefits Law.

In a decision dated April 18, 1955 and mailed on May 9, 1955, *Deaney* v. *The Linen Thread Co. Inc.*, BR-DS 426-C, the Board of Review of the Division of Employment Security held that the payments received under the Federal Social Security Act were not deductible from temporary disability benefits.

The Supreme Court of New Jersey in *Deaney* v. *The Linen Thread Co. Inc.*, 19 N. J. 578, decided on November 7, 1955, affirmed the decision of the Board of Review.

The functions of the Board of Review of the Division of Employment Security are quasi-judicial. *Carbone v. Atlantic Yachting Co.*, 14 N.J. Super. 269 (App. Div. 1951); *Adolph* v. *Elastic Stop Nut Corp., America*, 18 N.J. Super. 543 (App. Div. 1952); *Borgia* v. *Board of Review*, 21 N.J. Super. 462 (App. Div. 1952); *Krauss* v. *A. & M. Karagheusian, Inc.*, 24 N.J. Super. 277, (App. Div. 1953). The term quasi-judicial is used to describe governmental officers, boards and agencies which, while not a part of the judiciary, nevertheless perform functions of a judicial character. *Adolph* v. *Elastic Stop Nut Corp., America*, supra.

A decision of the Board of Review controls a prior inconsistent ruling of the agency. See *Henry A. Dreer, Inc.* v. *Unemployment Compensation Commission*, 127 N.J.L. 149 (Sup. Ct. 1941).

After the receipt of the Board of Review decision in the *Deaney* case on May 9, 1955, the Disability Insurance Service ceased to deduct from their payments the amounts received concurrently by the claimants from federal social security.

A regulation of an administrative agency out of harmony with a statute is mere nullity. Since the original rule could not be applied, the amended regulation becomes the primary and controlling rule. Neither an amended regulation nor a judicial determination stating that a prior administrative ruling was incorrect are retroactive in operation. Cf. *Manhattan General E. Co.* v. *Commissioner of Int. Rev.*, 297 U.S. 129, 56 S. Ct. 397 (1936).

A change in an authoritative rule of law resulting from a decision in an independent case announced subsequent to a judgment previously entered, neither demonstrates an error of law apparent upon the face of the judgment, nor constitutes new matter in pais, justifying a review of the judgment. *John Simmons Co.* v. *Grier Bros., Co.*, 258 U.S. 82, 42 S. Ct. 196 (1922); *Miller* v. *McCutcheon*, 117 N.J.E. 123 (E & A 1934); *Lockwood* v. *Walsh*, 137 N.J.E. 445 (Prerog Ct. 1946). But see *In re O'Mara*, 106 N.J.E. 311 (Prerog. Ct. 1930). The same rule should be applied to the decisions of a quasi-judicial administrative agency.

Since neither the opinion of the Board of Review nor of the Supreme Court are retroactive, the question then arises as to the effective date of the decisions as a precedent.

R.S. 43:21-6(h), as amended, provides:

> "Any decision of the board of review shall become *final* as to any party *upon the mailing* of a copy thereof to such party or to his attorney, * * *." (Italics added).

R.R. 1:3-1 provides:

> "Where an appeal is permitted, it shall be taken to the appropriate appellate court within the following periods of time after the entry of the judgment, order or determination appealed from:
>
> "(b) 45 days-final judgments of all courts except municipal courts;

judgments nisi in matrimonial matters; and *final state agency decisions or actions, except here the time shall run from the date of the service of the decision of the agency or of notice of the action taken, as the case may be.*" (Italics added).

The operative date of the decision would appear to be the date of notification and mailing, May 9, 1955.

The provision of the Temporary Disability Benefits Law providing for review, R.S. 43:21-50(b), as amended, states:

> "Individuals claiming benefits under the State Plan shall be entitled to review hearing and determination as provided in unemployment compensation cases."

The provision of the Unemployment Compensation Act governing appeals is R.S. 43:21-6(b)(1)(C), as amended, which provides:

> "Any claimant or any interested entity or person may file an appeal from any determination * * * within five calendar days after the delivery of notification, or within seven calendar days after the mailing of notification, of such determination. *Unless such an appeal is filed such determination shall be final* and benefits shall be paid or denied in accordance therewith. * * *" (Italics added).

"It is sound jurisprudence and public policy as well that there should be finality to judgments of courts of competent jurisdiction which parties let go unchallenged, by failing to exercise their right of appeal." *Miller* v. *McCutcheon,* supra, at p. 130.

Our opinion is that the appeals of Khanan Chodorowsky (Charles Chodorow) and Antonio Cucci were not timely and additional payments under the Temporary Disability Benefits Law should be denied to them.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: ROBERT E. FREDERICK
Deputy Attorney General

JANUARY 23, 1956

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

MEMORANDUM OPINION—P-3

DEAR MR. BORDEN:

You have asked our opinion to whether a member of the Public Employees' Retirement System who was granted a six months leave of absence from his position as Senior Clerk in the Division of Employment Security on December 1, 1955 in order to assume temporary duties as Economist with the Department of Conservation and Economic Development must continue to make contributions to the Public Employees' Retirement System during the time he served temporarily with the Department of Conservation and Economic Development. We understand that the member in question has requested that he be allowed to discontinue contributions during the period for which he is on leave of absence and holding a temporary position with the Department of Conservation and Economic Development.

N.J.S.A. 43:15A-39 provides as follows:

> ". . . In computing the service or in computing final compensation, no time during which a member was absent on leave without pay shall be credited, unless such leave of absence was for 3 months or less, or unless the service rendered to an employer other than the State or a political subdivision thereof was allowed for retirement purposes by the provisions of any law of this State. Any such member shall be required to contribute, either in a lump sum or by installment payments, an amount calculated, in accordance with the rules and regulations of the board of trustees, to cover the contributions he would have paid for any service or compensation credited for the period of such official leave of absence without pay, unless the service rendered to an employer other than the State or a political subdivision thereof was allowed for retirement purposes by the provisions of any law of this State."

The above quoted section indicates that a member who is "absent on leave without pay" is not obliged to continue to contribute to the Public Employees' Retirement System during the period of such leave of absence. However, it is our opinion that it does not apply to the case under consideration. N.J.S.A. 43:15A-39 contemplates a situation in which a member of the Public Employees' Retirement System actually discontinues his public employment and forfeits his public remuneration. It does not encompass a situation, such as the one under consideration, in which a member of the Public Employees' Retirement System is granted a so-called "leave of absence" from one department of the State so that he may be free to assume temporary duties with another department of the State.

It might be argued that the member in question is not obligated to continue his contributions to the Public Employees' Retirement System because N.J.S.A. 43:15A-7b limits membership in the Public Employees' Retirement System to "permanent employees", and because N.J.S.A. 43:15A-11 provides that a person in temporary employment by the State whose temporary employment results in permanent employment "shall be permitted to make contributions covering this temporary service in accordance with the rules and regulations of the board of trustees and receive the same annuity and pension credits as if he had been a member during the temporary service." However, rather than being regarded as a temporary employee of the Department of Conservation and Economic Development, the member in question must be regarded as a permanent State employee inasmuch as he has previously been employed by the State in the Division of Employment Security, is now employed by the State in the Department of Conservation and Economic Development, and will continue employment by the State in the Division of Employment Security at such time as his duties with the Department of Conservation and Economic Development may be terminated.

As such a permanent State employee, this person's continued membership in the Public Employees' Retirement System is required by N.J.S.A. 43:15A-7, which defines the membership of the Public Employees' Retirement System. Consequently,

deductions from his salary by way of contributions to the Public Employees' Retirement System are required by N.J.S.A. 43:15A-25, which provides that "Every employee to whom this act applies shall be deemed to consent and agree to any deduction from his compensation required by this act and to all other provisions of this act."

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHARLES S. JOELSON
Deputy Attorney General

csj;b

JANUARY 23, 1956

MR. GEORGE M. BORDEN, *Secretary*
Public Employees' Retirement System of New Jersey
48 West State Street
Trenton 25, New Jersey

MEMORANDUM OPINION—P-4

DEAR MR. BORDEN:

You have asked our opinion as to whether a person receiving retirement benefits from the Public Employees' Retirement System would be eligible to hold the position of Councilman of the Borough of Oceanport if he fills such a position by virtue of appointment by the Mayor and Council to fill an existing vacancy rather than by actual election.

R.S. 43:3-1, as amended, provides as follows:

> "Any person who is receiving or who shall be entitled to receive any pension or subsidy from this or any other State or any county, municipality or school district of this or any other State, shall be ineligible to hold any public position or employment other than elective in the State or in any county, municipality or school district, unless he shall have previously notified and authorized the proper authorities of said State, county, municipality or school district, from which he is receiving or entitled to receive the pension that, for the duration of the term of office of his public position or employment he elects to receive (1) his pension or (2) the salary or compensation allotted to his office or employment. Nothing in this chapter shall be construed to affect any pension status or the renewal of payments of the pension after the expiration of such term of office except that such person shall not accept both such pension or subsidy and salary or compensation for the time he held such position or employment."

In the case under consideration, the pensioner's position as Councilman would be based upon N.J.S.A. 40:87-13, as amended by Chapter 19, P.L. 1955. This statute provides that "all vacancies occurring in any elective office . . . shall be filled by appointment until January first . . . following the next annual election and until the election and qualification of a successor." Since the position of Councilman is an

elective office, it is our opinion that a person receiving benefits from the Public Employees' Retirement System would be eligible to hold such position since R.S. 43:3-1, as amended, specifically exempts elective office from the disability from holding public office which it establishes for a person receiving a public pension.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHARLES S. JOELSON
Deputy Attorney General

csj;b

JANUARY 26, 1956

HONORABLE JOSEPH E. MCLEAN
Commissioner, Department of Conservation and Economic Development
State House Annex
Trenton, New Jersey

MEMORANDUM OPINION—P-5

DEAR COMMISSIONER:

You have requested our opinion as to whether or not the Water Policy and Supply Council, in granting applications for permission to divert water for water supply purposes, pursuant to R.S. 58:1-17 et seq., may limit the amount of diversion so permitted in accordance with regional distribution quotas. Also involved in your inquiry is the power of the Council to establish a master plan for the conservation and development of the principal watersheds of the State.

In our opinion, the Council has the power both to adopt a master plan for the foregoing purpose and to limit diversion permits either in accordance with that plan or in the light of other regional needs even if a comprehensive plan has not been adopted.

Chapter 22 of the Laws of 1945, section 10 (N.J.S.A. 13:1A-10) makes the following provision regarding the functions of the Water Policy and Supply Council:

> "The council, in addition to other powers and duties vested in it by this act, shall, subject to the approval of the commissioner:
>
> a. Formulate comprehensive policies for the preservation and improvement of the water supply facilities of the State.
>
> b. Survey the needs of the State for additional water supply facilities and formulate plans for the development of such facilities."

R.S. 58:1-11 likewise directs the Water Policy Commission (the predecessor of the Council) to "continue and extend investigations of the water resources of the state * * * so as to complete a comprehensive study for the entire state, for the conservation, development, regulation and use of the waters in each of the principal watersheds of the state." R.S. 58:1-12 requires the commission "to report to the

legislature from time to time the results of such investigations, with plans, to the end that a complete plan be finally presented for the economical and comprehensive development * * * of all the water resources in each of the principal watersheds of the state." The foregoing sections all implement R.S. 58:1-10, which provides:

> "The commission shall have general supervision over all sources of potable and public water supplies, including surface, subsurface and percolating waters, to the end that the same may be economically and prudently developed for public use."

In passing upon applications for diversion permits, the Council is directed by R.S. 58:1-20 to make a number of findings, including "whether the plans are just and equitable to the other municipalities and civil divisions of the state affected thereby and to the inhabitants thereof, particular consideration being given to their present and future necessities for sources of water supply." Section 58:1-21 authorizes the Council, in granting an application, to impose "such conditions as it may determine should be made therein to protect * * * the water supply and interests of any municipal corporation or other civil division of the state, or the inhabitants thereof;" and the Council shall "make a reasonable effort to meet the needs of the applicant, with due regard to the actual or prospective needs and interests of all other municipal corporations and civil divisions of the state affected thereby, and the inhabitants thereof."

Section 13:1A-10, in conjunction with R.S. 58:1-11 and related sections above cited, makes it not only the power but the duty of the Council to formulate comprehensive policies and plans for the preservation and improvement of the water supply facilities of the State. Sections 58:1-20 and 58:1-21 require the Council to consider the needs of other municipalities and civil divisions of the State as they may be affected by the granting of any particular application. Thus the law seeks to protect the interests of such other municipalities and civil divisions by the adoption of a comprehensive plan for all the principal watersheds of the State, and the use of a regional quota system pursuant to the comprehensive plan.

However, the statute does not make the adoption of a comprehensive state-wide plan a prerequisite to the limiting of diversion permits in the interests of other present or potential users of waters, and it is the duty of the Council at all events, in granting diversion permits, to give due consideration to the water needs of others, either by applying a regional distribution quota system or by any other appropriate means.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

tpc;b

JANUARY 27, 1956

HON. ROBERT S. FINLEY
Acting State Treasurer
State House
Trenton, New Jersey

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

MEMORANDUM OPINION—P-6

GENTLEMEN:

You have requested our opinion as to whether, under the statutes creating it, the New Jersey Highway Authority has the power to construct the proposed "Thruway feeder road" from Paramus to the New York State line.

That question was heretofore answered in the affirmative in Attorney General's Formal Opinion 1952 - #28 written by Deputy Attorney General Benjamin C. Van Tine for Attorney General Theodore D. Parsons under date of September 15, 1952.

That opinion reads in part as follows:

> "On behalf of the New Jersey Highway Authority, you have requested an opinion on three certain questions concerning the interpretation and application of the New Jersey Highway Authority Act (P.L. 1952, ch. 16) and the related act which provides for the guarantee of bonds of the New Jersey Highway Authority by the State of New Jersey in a principal amount not exceeding $285,000,000 (P.L. 1952, ch. 17). In substance, the questions relate to the powers of the New Jersey Highway Authority. The questions, together with my answers thereto, are set forth herewith:
>
> 1. Q. Whether the northernmost limit of the Garden State Parkway must be at Paramus or Ridgewood or whether the New Jersey Highway Authority is authorized to include, as a part of the Garden State Parkway project, construction made northerly of such designated points in order to connect with other through arteries?
>
> A. P.L. 1952, ch. 16, section 20 authorizes the construction of a project to be known as 'The Garden State Parkway', beginning at State Highway Route No. 17 in Paramus or Ridgewood. Whether any construction can be undertaken northwardly of such designated points depends upon whether, in the opinion of the New Jersey Highway Authority, such construction will create or facilitate access to the Parkway and increase the use thereof.
>
> It is provided by P.L. 1952, ch. 16, section 5(n) that the Authority shall have the power:
>
> > 'To construct, maintain, repair and operate any feeder road * * * which in the opinion of the Authority will increase the use of a project * * *'
>
> A feeder road is defined in section 3(g) of ch. 16 as follows:

'Feeder road' means any road which in the opinion of the Authority is necessary to create or facilitate access to a project.'

That a 'feeder road' is itself a part of a project is shown by section 15 of ch. 16 which provides in part as follows:

'Each feeder road or section thereof acquired, constructed or taken over in connection with a project by the Authority shall for all purposes of this act be deemed to constitute part of the project, * * *.'

In my opinion, if the New Jersey Highway Authority determines that a 'feeder road' northwardly of Paramus or Ridgewood will create or facilitate access to the Garden State Parkway and will increase the use thereof, the Authority is presently empowered to construct, maintain, operate and repair such 'feeder road' as a part of the project to be known as the 'Garden State Parkway,' authorized by P.L. 1952, ch. 16, section 20.* * *"

We concur in the quoted conclusion of Mr. Van Tine.

It should be noted that it was also ruled in Formal Opinion 1952 - #28 that under section 15 of P. L. 1952, ch. 16 (N.J.S.A. 27:12B-15) no toll could be charged for transit between points on a feeder road constructed under the act. To give the Authority power to charge tolls on feeder roads more than six miles in length, the Legislature, by P. L. 1953, c. 224, amended section 15 of the original act (N.J.S.A. 27:12B-15) so that it now reads in part as follows:

"* * * no toll shall be charged for transit between points on any public highway taken over as a feeder road or on any feeder road of less than six miles in length constructed by the Authority, * * *"

That the proposed feeder road is to be somewhat more than eight miles in length does not affect the Authority's power to construct it, for by P. L. 1953, c. 224, the Legislature recognized that feeder roads may be more than six miles in length; it authorized toll charges for transit between points on a feeder road only where it was more than six miles in length.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: HAROLD KOLOVSKY
Asst. Attorney General

HK:kms

JANUARY 27, 1956

HON. ROBERT L. FINLEY
Acting State Treasurer
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-7

DEAR MR. FINLEY:

We have your request dated January 11, 1956 for our opinion as to whether the Governor, the Acting State Treasurer and the Comptroller (hereinafter referred to as the "State officials") may legally assent at this time to the proposed current bank borrowing of $8,000,000 by the New Jersey Highway Authority and to express by a writing, in the form annexed hereto as Exhibit A, their intention and decision to assent to the issuance by the Authority, following the completion of the Egg Harbor Bridge (the Minimum Parkway Completion date), of revenue bonds in the amount of $22,000,000 for costs of completion of the Parkway proper and construction of the Thruway feeder road, as provided for in the Fourth and Fifth Supplemental Resolutions of the Authority, copies of which have been submitted.

As we advised former State Treasurer Archibald S. Alexander by letter dated August 20, 1954, no provision requiring assent by the State officials to borrowing by the New Jersey Highway Authority is found in the act creating the Highway Authority and defining its powers nor in the act providing for the State's guaranty of the first $285,000,000 of bonds issued by the Highway Authority.

The only provisions for such assent are found in the covenants of the General Bond Resolution adopted by the New Jersey Highway Authority on July 8, 1953. The mechanics for the authorization of the bonds of a series are set forth in section 403 and following of the General Bond Resolution. After the bonds, other than guaranteed bonds, have been authorized by a Supplemental Resolution of the Authority, they are to be executed on behalf of the Authority and then delivered to the Trustee under the General Bond Resolution for authentication (section 405 G.B.R.). The Trustee is then required (section 406 G.B.R.) to authenticate the bonds and deliver them to the Authority or upon its order, if the conditions, if any, set forth in the Supplemental Bond Resolution authorizing such bonds and the conditions set forth in section 407 of the General Bond Resolution have been complied with. Section 407 sets forth various conditions which must be fulfilled before the Trustee may authenticate and deliver bonds of any series. Among those conditions is the requirement that there be delivered to the Trustee "(5) A written document signed by the Governor, State Treasurer and State Comptroller of the State, or any two of such officials including the Governor, referring to the Supplemental Resolution authorizing such Bonds and stating that said Supplemental Resolution is assented to by the signers".

Section 708 of the General Bond Resolution, quoted at length in my letter of August 20, 1954, likewise requires the assent of the State officials before bonds, notes or other evidence of indebtedness other than the bonds provided for by the General Bond Resolution may be issued.

As we also stated in our letter of August 20, 1954:

"The provisions in Sections 407 and 708 requiring the written consent of the Governor, State Treasurer and State Comptroller or two of any such

officials including the Governor, are valid covenants made pursuant to the authority of R.S. 27:12B-9. They constitute a contractual restriction on the right of the Authority to issue additional bonds, notes or other evidence of indebtedness. Failure of the State officials named to give their consent would prohibit the issuance by the Authority of any additional securities irrespective of the reason, if any, given by the State officials for refusal to give their consent.

I call to your attention, however, that Attorney General Parsons, in his opinion of July 6, 1953 (Formal Opinion 1953 - No. 29), which dealt with the first issue of $150,000,000 of State guaranteed bonds, said:

> 'The State's vital interest in the timely and successful completion of the Garden State Parkway is matched by the people's concern that State revenues will not be required to contribute to the payment of obligations incurred by the Authority. The restrictions accepted by the Authority and the covenants which it has given are capable of achieving both objectives. In my opinion, the Authority, in issuing further securities at a later date, and the Governor, State Treasurer, and Comptroller, in consenting to such action at that time will be obligated at such time to satisfy themselves that Garden State Parkway revenues always will be adequate to discharge all Highway Authority debts.' "

In our opinion, the State officials have the power to assent to the current bank borrowing of $8,000,000, this pursuant to the provisions for such assent found in Section 708 of the General Bond Resolution.

It is further our opinion that the State officials have the power now to execute and deliver Exhibit A hereto attached in which, among other things, they state that:

> "If the Authority, on or after August of 1956, shall be required to sell said Series D Bonds and Series E Bonds in order to comply with its obligations under said resolution of January 18, 1956 and the Loan Agreement authorized thereby, and if the bonds so sold bear a rate or rates of interest, and are sold at prices, reasonably consistent with the rates of interest prevailing on, and market prices obtainable for, new issues of bonds of like character at the time of such sale, it is our intention and we have decided to assent to said Fourth and Fifth Supplemental Resolutions when completed and adopted by the Authority.
>
> The foregoing does not, of course, in any way preclude the Authority from requesting assent to resolutions authorizing bonds (or notes to be issued) at an earlier date for retiring such Promissory Notes or prevent our assenting to such resolutions if we determine that such assent should be given."

The Fourth and Fifth Supplemental Resolutions referred to contain all the terms of the proposed bonds except for the interest rates. We understand from representatives of the Authority and the State Officials' financial advisor that the sinking fund and redemption provisions conform to those of the prior issues of the Highway Authority bonds so that the proposed new bonds are not required to be redeemed or paid off at a faster pro rata rate than the bonds now outstanding.

You refer in your letter to Mr. McKelvey's findings as to the effect of the issuance of additional bonds for the construction of the Thruway feeder road on the surplus available for retirement of the bonds heretofore issued. Mr. McKelvey's findings do not affect the legal power or authority of the State Officials to assent to the present bank borrowing and to execute the writing annexed as Exhibit A. Those findings are one of the factors, among others, to be considered by the State Officials in determining whether to give their assent to the bank borrowing and to execute Exhibit A. Among the many other factors which the State Officials should (and have) considered are: Mr. McKelvey's complete analysis of the situation and the financial aspects of the proposed bank borrowing and bond issues, and the various representations which have been made to the State Officials by the Highway Authority, its engineers, etc., including representations as to the substantial savings to be realized if work on the proposed Thruway feeder road is begun forthwith rather than awaiting the expiration of the Minimum Parkway Completion date.

Nor is the power and authority of the State Officials affected by the fact referred to in your letter:

> "a. The fact that the Minimum Parkway Completion Date will not be attained until the completion of the Egg Harbor Bridge some time in May 1956 and that therefore any present assent by the State authorities to the present issuance of notes and later issuance of bonds would precede the attainment of such Minimum Parkway Completion Date and the actual issuance of the bonds, which must await the attainment of such date."

The Minimum Parkway Completion Date is defined in the General Bond Resolution (Sec. 102) (32)) as the date when the authority shall have opened to traffic the original Parkway project from Paramus to Cape May. We are advised that that date will arrive when the Egg Harbor Bridge is completed. As Hawkins, Delafield & Wood, bond counsel for the Authority, correctly observe: "First, the restriction on bond financing based on the Minimum Parkway Completion Date relates only to Bonds issuable under the General Bond Resolution and not to notes or other bonds issuable by the Authority pursuant to the Act, and indeed relates only to Bonds authorized with respect to acquisition of additional parkway facilities or financing the Thruway Feeder Road, and not to Bonds for further financing or necessary repair of the Parkway Project (Sections 407 - 412). Secondly, this time restriction established in the General Bond Resolution (Sections 411 (2) and 412 (3)) controls only the action of the Trustee in delivering Bonds previously authorized or sold and addresses itself in no respect to the powers of the Authority to undertake construction of the Thruway Feeder Road or financing thereof on notes or other bonds or to the privilege given by the General Bond Resolution (Section 407 (5)) to the State Officers to assent to a Supplemental Resolution of the Authority authorizing Bonds for financing the Thruway Feeder Road or for any other authorized purpose. Thirdly, the time restriction, established as it is as binding only on the Trustee, is not by the General Bond Resolution made applicable to Authority financing on notes or other bonds on a subordinated basis which is permitted as an exception to other restrictions of the General Bond Resolution (Section 708) substantially on authorizing action by the Authority and State Officers only, not the Trustee."

In view of the foregoing, it is our opinion that the fact that the Minimum Parkway Completion date has not yet been reached does not affect the power of the State Officials to execute the assent and the writing annexed hereto as Exhibit A.

When the bonds are actually to be issued, which will be after a determination is made as to the interest rate and the price at which the bonds are to be sold, the Authority will have to obtain an assent from the State Officials. Without such assent the Trustee under the General Bond Resolution would not have authority to authenticate the proposed new bonds.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: HAROLD KOLOVSKY
Asst. Attorney General

HK:kms

FEBRUARY 8, 1956

AARON K. NEELD, *Director*
Division of Taxation
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-8

DEAR MR. NEELD:

You have requested an opinion (1) whether the purchase of accounts receivable by a corporation constitutes the doing of a financial business within the meaning of N.J.S.A. 54:10B, and (2) whether the phrase "discounting and negotiating" as used in this statute impliedly includes "purchasing" so as to subject such a corporation's activities to a tax under the Financial Business Tax Act.

The facts, as stated by you, are that the American Commercial Corporation, a New Jersey corporation, purchases from its customers receivables, book debts, notes, acceptances, drafts and other choses in action by written agreement. On making such purchases, American pays 75% of the face value of the accounts receivable to the customer from moneys it borrows from banks. American acquires full and absolute title at the time of purchase. As the debtor makes payment to American, the 25% originally withheld is paid to the customer, subject to a service charge levied by the corporation. Such service charge is the only source of income of American. You also state the corporation's activities do not appear to be in substantial competition with the business of national banks.

The section of the Financial Business Tax Law defining financial business is N.J.S.A. 54:10B-2(b), which reads:

> "'Financial business' shall mean all business enterprise which is (1) *in substantial competition* with the business of national banks and which (2) employs moneyed capital with the object of making profit by its use as money, *through discounting and negotiating* promissory notes, drafts, bills of exchange and other evidences of debt; buying and selling exchange; making of or dealing in secured or unsecured loans and discounts; * * *. This shall include, without limitation of the foregoing businesses commonly known as industrial banks, dealers in commercial paper and acceptances, sales finance, personal finance, small loan and mortgage financing businesses, as well as any other enterprise employing moneyed capital coming into competition with the business of national banks; * * *." (Italics added).

As an aid to the interpretation of the foregoing statute, N.J.S.A. 17:16B-1(e) defines a sales finance company as follows:

> "Sales finance company means and includes any person engaging in this State in the business, in whole or in part, of acquiring retail installment contracts from retail sellers by *purchase, discount* or pledge, or by loan or advance to a retail seller on the security thereof, or otherwise."
> (Italics added).

Since N.J.S.A. 54:10B-2(b) states that it includes the business of "sales finance" *without limitation* by the words "discounting and negotiating", and the foregoing definition of sales finance company includes the acquisition by "purchase" as well as by "discount", it would appear to be the legislative intent to include by implication the word "purchase" in N.J.S.A. 54:10B-2(b), since the statutes are in pari materia.

" * * * in the business of banking, 'discount', in the ordinary acceptance of the term, includes what is called 'purchase'." *Danforth* v. *National State Bank of Elizabeth,* 48 Fed. 271 (3 Cir. 1891); *Morris* v. *Third Nat. Bank of Springfield, Mass.,* 142 Fed. 25 (8 Cir. 1905).

"To negotiate means, among other things, to transfer, to sell, to pass, to procure by mutual intercourse and agreement with another, to arrange for, to settle by dealing and management." *Yerkes* v. *National Bank,* 69 N. Y. 382 (Ct. of Appeals 1877).

The word "negotiated" as used in the Negotiable Instruments Act, N.J.S.A. 7:2-30, is used in the sense of the word "transferred". *Fidelity Union Trust Co.* v. *Decker Co.,* 106 N.J.L. 132, at p. 136 (E & A 1930).

The statute setting forth the powers of national banks is 12 U.S.C.A., § 24, p. 18, which provides:

> " * * * a national banking association * * * shall have the power
>
> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by *discounting and negotiating* promissory notes, drafts, bills of exchange, and other *evidences of debt;* * * *."
> (Italics added).

The wording of the powers granted in this statute is comparable to part of the definition of "financial business" in N.J.S.A. 54:10B-2(b)(2), supra.

Competition means there is a *material* amount of moneyed capital engaged in a business which bids against national banks for the business which they are authorized to do. *First National Bank* v. *City of Hartford,* 187 Wisc. 290, 203 N.W. 721 (Sup. Ct. of Wisc. 1925); reversed on other grounds, 273 U.S. 548, 47 S. Ct. 462 (1927). Competition may exist although it does not extend to all aspects of the business of national banks. *Crown Finance Corp.* v. *McColgan,* 23 Cal. 2d 280, 144 P. 2d 331 (Sup. Ct. of Cal. 1943).

Few banks undertake loans on accounts receivable, since they are too risky. The business has devolved upon specialized brokerage or discount houses, and the banks, instead of lending directly by discounting accounts receivable, lend to the discount house on the security which it can provide. See *Westerfield - Money, Credit and Banking,* 941 (Rev. Ed. 1947).

It is our opinion that if the Corporation Tax Bureau finds that the operations of American Commercial Corporation are not in substantial competition with the business of national banks, the corporation is not taxable under the Financial Business Tax Law even though its purchases of accounts receivable are within the satutory definition of "discounting and negotiating . . . evidences of debt."

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: ROBERT E. FREDERICK
Deputy Attorney General

FEBRUARY 8, 1956

MR. HARRY E. BLOCH
Assistant Clerk
Hudson County Board of Elections
591 Summit Avenue
Jersey City 6, New Jersey

MEMORANDUM OPINION—P-9

DEAR MR. BLOCH:

You have requested our opinion as to the right of the Hudson County Board of Elections to further revise and re-adjust election districts in a municipality, pursuant to the Election Law (R.S. 19:4-7), after the municipality has re-adjusted its ward and boundary lines and divided such wards into election districts, pursuant to the provisions of the Revised Statutes, Title 40, Chap. 44, Sections 40:44-1 through 40:44-8.

Your inquiry presents this factual situation:

> "The facts in the matter are as follows: The Township of North Bergen, Hudson County, has re-warded its Township pursuant to a resolution, copy of which is enclosed herewith. As a result of said Ordinance, Ward Commissioners were appointed and proceeded to divide the Township into wards pursuant to Revised Statutes 40:44-8 and thereafter, said Ward Commissioners proceeded to establish District Lines in said wards pursuant to said Revised Statutes 40:44-8."

Revised Statutes, Title 40, Chap. 44, establishes a procedure for the division of municipalities into wards and districts. The governing body of any municipality may by ordinance provide for the division of such municipality into wards, or where such municipality has heretofore been so divided, it may by ordinance provide for a change of lines and boundaries of wards or for an increase or decrease in the number thereof (Sec. 1). Upon the ordinance becoming effective the mayor or other chief executive officer of the municipality shall appoint four commissioners to fix and define the lines and boundaries of such wards. The commissioners shall, within ten days after their appointment, take and subscribe an oath to faithfully and impartially perform the duties imposed upon them (Sec. 2). The commissioners shall, within

sixty days after their appointment, make their report to the governing body of the municipality, and file it with the municipal clerk, in which report the boundaries and dividing lines of such wards shall be properly described, with a statement of the population of each ward as nearly as can be ascertained, and a map showing the lines and the extent and boundaries of such wards shall be made and filed by the commissioners with their report; all of which shall be attested and certified by the commissioners under their hands, and shall remain a record in the office of the municipal clerk.

All such wards shall be formed of contiguous territory, and in fixing the lines and boundaries thereof, the commissioners shall have regard to equality of population (Sec. 3). Ten days after the making and filing of the report the lines and boundaries of such wards shall be as set forth in the report of the commissioners, and all other and former ward lines and boundaries shall thereupon be abolished. Sections 5 and 6 provide for the re-adjustment of wards and the acts of the majority of the commissioners shall be deemed to be the acts of all and a report signed by a majority of the commissioners shall be considered the report of the commissioners. The Act, by Section 7, provides for the continuance of current officers and the terms of subsequent officers.

Section 8 of the Act provides:

"40:44-8. Wards divided into election districts

> When any municipality is divided into wards, or a change is made in the lines or boundaries of wards, or the number of wards increased or decreased as hereinbefore provided, the commissioners shall divide the wards into election districts or precincts."

* * * * *

The Election Law (R. S. 19:4-7) authorizes the re-adjustment of boundaries of election districts subject to the conditions set forth in the statute. It reads:

> "19:4-7. Readjustment of boundaries of election districts without regard to number of voters.
>
> "Where it appears that serious inconvenience has been caused the voters by the size or shape of an election district in a municipality, or that certain districts contain an unreasonably large or small number of voters in comparison with other districts in such municipality or that a change is necessary because of a change of ward lines, the county board in counties of the first class and the elective governing body of the municipality in counties other than counties of the first class may revise or readjust the election districts in the municipality, without regard to whether a readjustment is authorized by section 19:4-6 of this title."

Section 19:4-6 is not relevant in the instant case.

Your inquiry involves a construction of the cited sections of Title 40, originally the Home Rule Act of 1917, and the section of the Election Law quoted by you.

The specific question for consideration is, does the amended election law (19:4-7) expressly or impliedly repeal the statutory grant of power to a municipality, in a county of the first class, acting by its commissioners, to divide its wards into election districts or precincts.

It must be conceded that there is no express repeal in this instance.

A uniform line of decision in this State has established the principle that repeal by implication is not favored. In the case of *Scancarella* v. *Dept. of Civil Service*, 24 N. J. Super. 65, (A. D. 1952), the court observes on Page 70:

> "Implied repealers are not favored in the law and are not declared to exist unless the later statute is 'plainly repugnant to the former and is designed to be a complete substitute for the former.' *Goff* v. *Hunt*, 6 N. J. 600, 606 (1951.)"

Furthermore, the State Constitution by Article IV, Section VII, Paragraph 11, provides:

> "11. The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law."

We are of the opinion, therefore, that the municipality retains its right to erect the election districts in the new wards, but that your Board has the authority to revise and re-adjust election districts for the reasons contained in R. S. 19:4-7, provided your Board makes a finding, based upon substantial facts, that a serious inconvenience has been caused.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: JOSEPH LANIGAN
Deputy Attorney General

JL:MG

MARCH 15, 1956

MR. W. LEWIS BAMBRICK, *Manager*
Unsatisfied Claim and Judgement Fund Board
222 West State Street
Trenton, New Jersey

MEMORANDUM OPINION—P-10

DEAR MR. BAMBRICK:

You have requested our opinion concerning an application for payment from the Unsatisfied Claim and Judgement Fund which has been made to the Essex County District Court pursuant to R.S. 39:6-61 et seq.

You have informed us that the applicant suffered personal injuries and property damage in a motor vehicle accident, filed proper notice of the accident and an intention to file a claim against an uninsured driver of a motor vehicle, required by R.S. 39:6-65, and sued for his damages in the Essex County District Court where judgment in the amount of one thousand dollars ($1,000.00) was entered in his favor on October 4, 1955. The plaintiff-applicant thereupon filed an application for payment of the judgment under the provisions of R.S. 39:6-69 which states that:

> "When any qualified person recovers a valid judgment for an amount in excess of two hundred dollars ($200.00), exclusive of interest and costs, in any court of competent jurisdiction in this State, against any other person, who was the operator or owner of a motor vehicle, for injury to, or death of, any person or persons or for damages to property, except property of others in charge of such operator or owner or such operator's or owner's employees, arising out of the ownership, maintenance or use of the motor vehicle in this State on or after the first day of April, one thousand nine hundred and fifty-five, and any amount in excess of two hundred dollars ($200.00) remains unpaid thereon, such judgment creditor may, upon the termination of all proceedings, including reviews and appeals in connection with such judgment, file a verified claim in the court in which the judgment was entered and, upon ten days' written notice to the board may apply to the court for an order directing payment out of the fund of the amount unpaid upon such judgment, which exceeds the sum of two hundred dollars ($200.00) and does not exceed * * * (certain maximum amounts not at issue herein) * * *."

R.S. 39:6-70 directs the court to proceed upon the application in a summary manner and to examine the judgment creditor as to whether he has complied with certain conditions stated therein to the effect that he has made a diligent search and has been assured that the judgment debtor has no assets with which to pay any part of the judgment. Upon being satisfied that the claim is valid, the court may make an order directing the State Treasurer to make payment from the Unsatisfied Claim and Judgment Fund (R.S. 39:6-71).

In order to satisfy the requirements of R.S. 39:6-70 the applicant, in his attempt to show the court that he has diligently attempted to find assets which could be recovered in payment of the judgment which was unsuccessful, has stated in his affidavit submitted to the court, paragraph 6, that:

> "On October 4, 1955 a judgment was entered in the Essex County District Court in the sum of $1,000.00 and the amount owing at this time is the sum of $1,000.00 exclusive of a separate agreement whereby the defendant paid $200.00 to be applied over and above the $800.00 that the Unsatisfied Claim and Judgment Fund Board would pay after the assignment of the judgment to them. The said $200.00 by the said agreement was to be applied after he had faithfully and fully made his payments to the said Board and was to be held by myself as the share that the Unsatisfied Claim and Judgment Fund would not reimburse me for until and when they were successful in collecting the amount of money due the Fund by the assignment of this judgment."

In effect, the applicant is stating that he has received previous payment from the uninsured defendant of two hundred dollars ($200.00) which he intends to apply over and above the maximum amount that he could receive from the court on the application of eight hundred dollars ($800.00) because of the provisions of R.S.

39:6-73 which provides for a deduction of two hundred dollars ($200.00) from the total amount of the judgment (R.S. 39:6-73 (c)). It is our opinion that the position of the plainff-applicant that he is entitled to the full eight hundred dollars ($800.00) instead of six hundred dollars ($600.00) is untenable in light of the intent and meaning of the statute.

R.S. 39:6-70 (h) requires the applicant to show that:

> "(h) He has caused to be issued a writ of execution upon said judgment and the sheriff or officer executing the same has made a return showing that no personal or real property of the judgment debtor, liable to be levied upon in satisfaction of the judgment, could be found or that the amount realized on the sale of them or of such of them as were found, under said execution, was insufficient to satisfy the judgment, stating the amount so realized and the balance remaining due on the judgment after application thereon of the amount realized,"

Subsection (j) of the same section further requires him to show that:

> "(j) He has made all reasonable searches and inquiries to ascertain whether the judgment debtor is possessed of personal or real property or other assets, liable to be sold or applied in satisfaction of the judgment,"

and subsection (k) provides that:

> "(k) By such search he has discovered no personal or real property or other assets, liable to be sold or applied or that he has discovered certain of them, describing them, owned by the judgment debtor and liable to be so sold and applied and that he has taken all necessary action and proceedings for the realization thereof and that the amount thereby realized was insufficient to satisfy the judgment, stating the amount so realized and the balance remaining due on the judgment after application of the amount realized,".

The statutory provision dealing with the procedure which the court follows in making an order directing the treasurer to make payment to the applicant from the fund, R.S. 39:6-71, requires the court to be satisfied:

> "* * * (a) of the truth of all matters required to be shown by the applicant by section 10 * * * (R.S. 39:6-70) * * *."

The plaintiff-appellant, by the very terms of his own affidavit, has shown that he has not complied with subsection (k) of R.S. 39:6-70 which requires him to show the court that he has discovered no personal property of the defendant which may be applied to the judgment. In fact, he has recovered the sum of two hundred dollars in advance of his application to the court.

This sum should be applied to reducing the judgment before the order of the court is entered directing the treasurer to pay the unsatisfied portion of the judgment. Any other construction of the intention of the Legislature as expressed in these provisions would defeat the purpose of the fund. If any other construction would be made, applicants could easily make arrangements to defeat the purpose of the requirement set forth in R.S. 39:6-70 (Cf. also R.S. 39:6-71 (b) (1) and (2)).

When the intent of the Legislature is clearly and plainly expressed, it must be

carried out by the court. *Dacunzo* v. *Edgye*, 19 N.J. 443, 451 (1955). It is clear that the Legislature intended to make funds available to applicants, attempting to obtain money from indigent defendants of sums over the amount of two hundred dollars (R.S. 39:6-73 (c)), and further intended that the balance of that two hundred dollars should be collected after payment had been made out of the fund, but not before. The statute is clear and unambiguous in this respect and should be so interpreted *Barthalf* v. *Board of Review*, 36 N. J. Super. 349, 360 (App. Div. 1955); see also *Bravand* v. *Neeld*, 35 N.J. Super. 42, 52 (App. Div. 1955)).

Furthermore, plaintiff cannot contend that an arrangement such as he has entered into with the judgment debtor is a payment in escrow which takes effect *after* an order to pay out of the fund is made by the court. In *Mantel* v. *Landau*, 134 N.J. Eq. 194 (Ch. 1943), a mortgagee in a chattel mortgage proceeding stated in his affidavit of true consideration that the sum loaned by him was $12,500, and that $2,500 of that amount represented a premium for making the loan. In a bill filed by the assignee for the benefit of creditors to set aside the chattel mortgage, the mortgage was attacked primarily on the ground that the affidavit did not truthfully set forth the true consideration as required by R.S. 46:28-5. The reason set forth was that of the $10,000.00 loaned, $2,000.00 was deposited by the mortgagee with his attorney, in escrow, for delivery to the mortgagor as soon as certain old liens were cancelled of record, and this the assignee claimed was not actually loaned on the day the affidavit was made and that, therefore, the affidavit was false and the mortgage invalid.

The court in this case said at p. 195:

> "A deposit in escrow is irrevocable except by consent of both parties. Upon performance of the condition mentioned in the escrow agreement, the depositary is bound to make delivery pursuant to the agreement, and if he fails to do so, he becomes personally liable for his breach of duty. The delivery of the escrow by the depositary to the person entitled to receive it, will be related back to the original delivery to the depositary, when necessary to effectuate the intention of the parties, or to promote justice. *Fred* v. *Fred*, 50 Atl. Rep. 776; *Kelly* v. *Chinich*, 91 N.J. Eq. 97; *Mecray* v. *Goldman*, 102 N.J. Eq. 559; 105 N. J. Eq. 583; *First National Bank* v. *Scott*, 109 N.J. Eq. 244."

For these reasons it is our conclusion that the applicant is only entitled to six hundred dollars as a payment from the fund.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

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

GCR:DMS/kms

MARCH 23, 1956

HON. GEORGE C. SKILLMAN
Director of Local Government
Department of the Treasury
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-11

DEAR DIRECTOR:

You have requested our advice as to whether or not a municipality maintaining separate funds as hereinafter described may properly invest those funds in a savings and loan association up to the limit of $10,000 in each of these funds. The answer depends, in our opinion, upon whether the separate account maintained by each of these funds would be insured by the Federal Savings and Loan Insurance Corporation. See R.S. 17:12A-151; Formal Opinion 1949, No. 80. For the reasons hereinafter given, our answer is in the affirmative.

The funds in question, which are required by law to be kept in separate accounts, are (1) tax moneys and other revenues to support its general operations, known as the "Current Account", (2) moneys derived from the operation of each publicly owned or operated utility, known as the "Utility Fund" (R.S. 40:2-33), and (3) receipts derived from special assessments on property specially benefited by local improvement, known as the "Assessment Revenue Fund" (R.S. 40:2-34). It is expressly provided in R.S. 40:2-33 that the Utility Fund shall be applied only to the payment of operating and maintenance costs and debt service of such utility; and R.S. 40:2-34 makes a similar provision that the Assessment Revenue Fund shall be applied only to the payment of that part of the cost of any such improvement as has been specially assessed, or of any bonds to finance such improvement, until all such bonds have been paid. R.S. 40:2-35 further provides:

> "Moneys held in any separate fund shall be treated by the officers of the county or municipality as moneys held in trust for the purpose for which such separate fund was created and no banking institution accepting any such fund shall divert the moneys in such funds to any other purpose."

Upon receipt of your inquiry, we wrote to the Federal Savings and Loan Insurance Corporation, which has replied with the following opinion from its Legal Department:

> "Section 401(b) of the National Housing Act, as amended, provides that a public official having official custody of public funds and lawfully investing the same in an insured institution is an insured member and for the purpose of determining the amount of the insured account shall 'be deemed an insured member in such custodial capacity separate and distinct from any other officer, employee, or agent of the same or any public unit having official custody of public funds and lawfully investing the same in the same insured institution in custodial capacity.'
>
> "Recognizing that various funds held by a public official may be held under different conditions as funds allocated to bond-holders or other individuals dealing with a public unit as distinguished from general funds, the Legal Department has construed the statute as permitting the separate insurance of funds which are distinct funds required under local law to be held separate and to be used for a specific purpose, provided each such fund is held by the public official in a custodial capacity distinct from his official capacity as custodian of other funds or general funds of the public unit. However, the mere labelling of funds for accounting or bookkeeping purposes would not permit separate insurance of each such fund for the reason all would be held in the same custodial capacity. The custodial capacity in which funds are held determines insurance coverage and not the title of an account."

In view of the foregoing, we are of the opinion that each of the funds in question would be held by a municipal official in a custodial capacity distinct from his official capacity as custodian of other funds of the municipality; that each such fund would therefore be insured up to the amount of $10,000; and that, accordingly, a municipality may properly invest each of said funds in an insured savings and loan association up to the limit of $10,000 in each fund.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

TPC:kms

MARCH 23, 1956

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

MEMORANDUM OPINION—P-12

DEAR MR. PATTEN:

You sbumit for our opinion the following question:

"Can a Member of the County Board of Elections be a candidate for Delegate to the National Convention?"

The election statute, R.S. 19:6-17, provides:

"19:6-17. The county board shall consist of four persons, who shall be legal voters of the counties for which they are respectively appointed. Two members of such county board shall be members of the political party which at the last preceding general election, held for the election of all of the members of the general assembly, cast the largest number of votes in this state for members of the general assembly, and the remaining two members of such board shall be members of the political party which at such election cast the next largest number of votes in the state for members of the general assembly. No person who holds elective public office shall be eligible to serve as a member of the county board during the term of such elective office. The office of member of the county board shall be deemed vacant

upon such member becoming a candidate for an office to be voted upon at any primary, general election or special election, except for nomination for or election to membership in any county committee or state committee, such candidacy to be determined by the filing of a petition of nomination duly accepted by such member in the manner provided by law."

It will be noted that the office of Member of a County Board of Elections shall be deemed vacant, upon such Member becoming a candidate for an office to be voted upon at any primary election, except for nomination for or election to membership in any County Committee or State Committee.

The Election Law, R.S. 19:1-1 defines a Primary Election as:

> "'Primary election" means the procedure whereby the members of a political party in this state or any political subdivision thereof nominate candidates to be voted for at general elections, or elect persons to fill party offices, or delegates and alternates to national conventions."

The candidacy of a County Election Board Member for Delegate to the National Convention is determined by his filing of a Petition of Nomination, duly accepted.

By so doing he thereby vacates his election office and may participate in the Primary Election as a candidate for the Party office of Delegate.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: JOSEPH LANIGAN
Deputy Attorney General

JL:MG

APRIL 11, 1956

THE HONORABLE JOHN W. TRANBURG, *Commissioner*
Department of Institutions and Agencies
State Office Building
Trenton, New Jersey

MEMORANDUM OPINION—P-13

DEAR COMMISSIONER TRAMBURG:

You have advised us that questions have been raised as to possible interpretations of the term "assist in placement" which appears in section 3 of chapter 264 of the Laws of 1953 (N.J.S.A. 9:3-19(A)) and chapter 265 of the Laws of 1953 (N.J.S. 2A:96-6 to 8) and you ask our opinion on the following question: "Does the referral of an unmarried mother or a prospective adopting parent to an approved adoption agency represent assistance in the placement of a child for adoption, or an offering to place a child for adoption, so as to make a physician subject to criminal or civil penalty for so doing?"

You advise that the activities of the physician are confined to rendering advice to an unmarried mother or to a prospective adopting parent that their situation might best be handled by an approved adoption agency and, further, that the physician

might undertake to furnish these individuals with the names of one or more such approved adoption agencies.

It is our opinion and we so advise you that such activity on the part of a duly licensed physician does not constitute an effort on his part to "place, offer to place, or assist in the placement of any child in New Jersey for the purpose of adoption" as contemplated in R.S. 9:3-19, nor does it constitute a violation of N.J.S. 2A:96-6 and 7.

N.J.S.A. 9:3-19(A), which is part of section 3 of L. 1953, c. 264, reads as follows:

> "A. No person, firm, corporation, association or agency shall place, offer to place, or assist in the placement of any child in New Jersey for the purpose of adoption, unless such person, firm, corporation, association or agency shall be the natural or adopting parent of the child or shall have been approved for such purpose by the Department of Institutions and Agencies and such approval shall not have been rescinded at the time of placement or offer for placement; provided, however, that this prohibition shall not apply to the placement of a child for the purpose of adoption with a brother, sister, aunt, uncle, grandparent or stepparent of such child. The Superior Court, in an action by the Commissioner of the Department of Institutions and Agencies, shall restrain any party found by the court to have violated this subsection A from any further violation of this subsection."

N.J.S. 2A:96-6 and 7, which were enacted as sections 1 and 2 of chapter 265 of the Laws of 1953, provide as follows:

> 2A:96-6. "No person, firm, corporation, association, or agency shall place, offer to place, or in any manner assist in the placement of a child in the home of any other person, or persons for the purpose of adoption, other than in the home of a brother, sister, aunt, uncle, grandparent or stepparent of such child, unless such person, firm, corporation, association, or agency shall be the natural or adopting parent of the child, or shall have been approved for such purpose as provided by law. Any person, firm, corporation, association, or agency violating this section shall be guilty of a misdemeanor. L. 1953, c. 265, p. 1779, § 1."

> 2A:96-7. "No person, including a natural parent or parent by adoption, and no firm, corporation, association or agency, other than an agency approved to place children for adoption as provided by law, shall place, offer to place, or in any manner assist in the placement of a child in the home of any other person or persons for the purpose of adoption and, in so doing, take, receive or pay any money or anything of value, or undertake or discharge any financial obligation, except in connection with the birth and any illness of the child. Any person, including a natural parent or parent by adoption, and any firm, corporation, association or agency, other than an agency approved to place children for adoption as provided by law, violating this section, shall be guilty of a high misdemeanor. L. 1953, c. 265, p. 1779, § 2."

Chapters 264 and 265 of the Laws of 1953 are in *pari materia* and in view thereof the meaning of the words "assist in the placement of any child in New Jersey for the purpose of adoption" is made clear when the statutes are considered together

(Horowitz v. *Reichenstein,* 15 N. J. 6 (1954); *Maritime Petroleum Corp.* v. *City of Jersey City,* 1 N. J. 287 (1949)).

The unauthorized conduct is not the referral of an unmarried mother or a prospective adopting parent to an approved adoption agency, but rather, the placement or assistance in the placement of a child in the home of any other person or persons for the purpose of adoption other than in the home of a brother, sister, aunt, uncle, grandparent or step-parent of such child by anyone other than the natural or adopting parent of the child or an approved agency.

The activity of the physician described in your question does not constitute placement of a child for adoption but rather, mere reference of interested parties to an agency established for that purpose. The ultimate decision as to the placement of the child for adoption is one to be made by the agency after examination of all factors in the background of the child and the adopting parents and is not to be influenced by the intervention of the physician. He acts only in the capacity of one who seeks full compliance with the law and merely suggests that unmarried mothers and prospective adopting parents utilize the services of an accredited agency to accomplish their objective.

Although we have found no New Jersey case which has dealt specifically with the question raised by you, we do find that the Court of Appeals for the District of Columbia dealt with substantially the same question in the opinion filed by it in *Goodman* v. *District of Columbia,* 50 A.2d 812 (Mun. Ct. of App. for the Dist. of Col. 1947). In that case the Court had affirmed the conviction of a lawyer for violating the "Baby Brokers' Law", 32 Dist. of Col. Code 1940, sections 781 to 789. The court discussed the provisions of section 785 of the District's Code, which read as follows:

> "No person other than the parent, guardian, or relative within the third degree, and no firm, corporation, association or agency, other than a licensed child-placing agency, may place or arrange or assist in placing or arranging for the placement of a child under sixteen years of age in a family home or for adoption.* * *"

After pointing out that the statutory language was aimed not at prohibiting, but rather, at insuring that referrals to approved agencies will be made to protect the children and parents involved "not only from corrupt or irresponsible intermediaries but also from the careless and untrained", the court said, at 50 A.2d 814:

> "We think it plain that so long as the lawyer gives only legal advice; so long as he appears in court in adoption proceedings, representing either relinquishing or adopting parents; so long as he refrains from serving as intermediary, go-between, or placing agent; *so long as he leaves or refers the placement of children and the arrangements for their placement to agencies duly licensed, he is within his rights under the statute.* * *"*
> (emphasis supplied)

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: EUGENE T. URBANIAK
Deputy Attorney General

GCR:HK:ETU/kms

APRIL 12, 1956

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

MEMORANDUM OPINION—P-14

DEAR MR. MCLEAN:

You have referred to us letter dated March 16, 1956 from the Federal Housing Administration at Washington, D. C. to Mr. William F. Hoffman, Director of the Federal Housing Administration office at Newark, New Jersey, raising several questions with reference to the New Jersey "Limited-Dividend Housing Corporations Law" (N.J.S.A. 55:16-1 et seq.) and the effect of certain provisions of that law in a situation where a housing project is to be constructed by a limited-dividend housing corporation with mortgage financing insured by the Section 220 Housing Insurance Fund (12 U.S.C.A. Sec. 1715), through the Federal Housing Administration.

The Limited-Dividend Housing Corporation Law was originally enacted as Chapter 184 of the Laws of 1949. After a declaration of the existence of a housing shortage and of blighted areas requiring public assistance for the construction of new housing, the Act permits the organization of limited-dividend housing corporations to construct and operate housing projects when authorized by the Public Housing and Development Authority in the Department of Conservation and Economic Development, hereinafter called the Authority (N.J.S.A. 55:16-4). The Act authorizes the formation of such housing corporations after approval of the certificate of incorporation by the Authority (N.J.S.A. 55:16-6,7), contains limitations relating to dividends and distribution of surplus on dissolution of the corporation; provides authority for municipalities to exempt the housing project from taxation and to accept in lieu thereof annual payments on a formula basis (N.J.S.A. 55:16-18) and sets out in N.J.S.A. 55:16-8 the powers of such corporation. Included among such powers are those provided in Subsection 14, which was added by the amendment to the Act accomplished by Chapter 305 of the Laws of 1949.

Subsection (14) reads as follows:

> "* * * (14) To obtain, or aid in obtaining, from the Federal Government any insurance or guarantee or commitment therefor, as to, or for the payment or repayment of interest or principal, or both, or any part thereof, of, any loan or other extension of credit, or any instrument evidencing or securing the same, obtained or to be obtained or entered into by it; and to enter into any agreement, contract or any other instrument whatsoever with respect to any such insurance or guarantee."

The section also provides "the Authority may make the exercise of any of the rights, powers and privileges of housing corporations set forth in this section, subject to its prior approval."

In addition to various other provisions governing the operation of limited-dividend housing corporations, the Act permits the Authority to "make, amend, modify and repeal rules and regulations to effectuate the purposes of the act and to supervise the operations of any housing corporations thereunder" * * * and "to

supervise the planning, development and management of new housing projects undertaken by such corporation" (N.J.S.A. 55:16-11). It also provides that prior approval of the Authority is necessary before any project is purchased, acquired or undertaken (N.J.S.A. 55:16-12); that the Authority shall have the power to supervise housing corporations and their real and personal property in various designated respects (N.J.S.A. 55:16-16); and that the Authority may institute proceedings to enforce the provisions of the Act or its regulations and to foreclose mortgages it may hold (N.J.S.A. 55:16-17).

Regarding foreclosure of mortgages covering such projects, N.J.S.A. 55:16-17 provides in part:

> " * * * In any foreclosure action, other than a foreclosure action instituted by the Authority: the Authority and the municipality in which any tax exemption or abatement is provided any housing corporation, in addition to other necessary parties, shall be made parties defendant; and the Authority and the municipality shall take all steps in such action necessary to protect the interest of the public therein, and no costs shall be awarded against the Authority or the municipality. *Subject to the terms of any applicable contract, agreement, guarantee or insurance entered into or obtained pursuant to subsection (14) of section eight hereof*: judgment of foreclosure shall not be entered unless the court to which application therefor is made shall be satisfied that the interest of the lien-holder or holders can not be adequately secured or safeguarded except by the sale of the property; and in any such proceeding, the court shall be authorized to make an order increasing the rentals to be charged for the housing accommodations in the project involved in such foreclosure, or appoint the Administrator or any officer of the municipality in which any tax exemption or abatement with respect to the project is provided, as a receiver of the property, or grant such other and further relief as may be reasonable and proper; and in the event of a foreclosure sale or other judicial sale, the property shall be sold only to a housing corporation which will maintain, operate and manage the project subject to the provisions of this act and the regulations of the Authority, approved by the Council, issued hereunder, unless the court shall find that the interest and principal on the obligations secured by the lien the subject of foreclosure cannot be earned under the limitations imposed by the provisions of this act and that the proceeding was brought in good faith, in which event the property may be sold free of limitations imposed by this act or subject to such limitations as the court may deem advisable to protect the public interest."
> (Emphasis supplied)

The letter from the Federal Housing Administration, after recognizing the feasibility of financing housing projects constructed under the Limited-Dividend Housing Corporations Law through a Federal Housing Administration insured mortgage, expresses concern with reference to the restrictions placed on foreclosure of mortgages by N.J.S.A. 55:16-17. The letter sets out the four statutory requirements applicable to mortgage foreclosure proceedings with which they are concerned as follows:

> "(1) In addition to the mortgagor, the Housing Authority shall be made parties defendant and the Authority and the municipality are required to take all steps in such action necessary to protect the interest of the public therein.
>
> "(2) Judgment of foreclosure shall not be entered unless the court to which application therefor is made shall be satisfied that the interest of the lien-holder cannot be adequately secured or safeguarded except by sale of the property.
>
> "(3) The court is given broad discretionary powers in the matter of appointment of a receiver and the fixing of rentals to be charged during the time the foreclosure action is pending.
>
> "(4) In the event of a foreclosure sale, the property shall be sold only to a housing corporation, which will maintain, operate and manage the project subject to the provisions of the Act, and the regulations, unless the Court shall find that the interest and principal on the obligations secured by the lien cannot be earned under the limitations imposed by the provisions of the Act and that the proceedings were brought in good faith, in which event the property may be sold free of limitations."

Our opinion is requested as to the applicability of these restrictions to mortgages which have been insured by the Federal Housing Administrator and as to the power of the housing corporation or the Authority, or both, to waive these restrictions.

Under the applicable portion of N.J.S.A. 55:16-17 quoted above, it will be necessary, in the event of foreclosure, that the Authority and the municipality in which the project is located be joined as parties defendant. This creates no problem and need not be of any concern. Its evident purpose is to insure that the Authority and the municipality have notice of the foreclosure and reasonable opportunity to take such steps as they may deem necessary to protect the public interest.

However, the restrictions referred to in items 2, 3 and 4 of the letter would not affect a mortgage insured by the Federal Housing Administrator if, at the time of the execution of such mortgage, or in the mortgage itself, the housing corporation, with the approval of the Authority, enters into an agreement providing that they should not. This is so because by the express provisions of N.J.S.A. 55:16-17 the applicability of such restrictions may be limited by the terms of "any applicable contract, agreement, guarantee or insurance entered into or obtained pursuant to subsection 14" of N.J.S.A. 55:16-8, that is, an agreement made for the purpose of obtaining or aiding in the obtaining from the Federal Government of a mortgage insurance or guarantee, pursuant to the power granted the corporation by subsection 14 of N.J.S.A. 55:16-8. The power so granted by that subsection clearly includes the power to waive the statutory restrictions referred to in items 2, 3 and 4 of the Federal Housing Administration's letter.

In our opinion, it is clear the statutory restrictions limiting the right to entry of a judgment of foreclosure, granting the court discretionary power in the matter of the appointment of a receiver and the fixing of rentals and prohibiting sale under foreclosure except to another housing corporation will not apply where the mortgage loan has been guaranteed by the Federal Government or its agency, the Federal Housing Administration, and there has been an agreement in connection with such loan that such provisions limiting the rights on foreclosure be waived.

The language of N.J.S.A. 55:16-8 and 55:16-17 makes this clear. It is buttressed

by the fact that P.L. 1949 c. 305, which amended section 8 of the Act to add subsection 14 which authorized a limited-dividend housing corporation to obtain financing through Federal guaranteed or insured mortgages, also amended N.J.S.A. 55:16-17 to add the following language which now precedes the limitations in event of foreclosure hereinbefore referred to, viz: "Subject to the terms of any applicable contract, agreement, guarantee or insurance entered into or obtained pursuant to subsection (14) of section eight hereof".

It is our opinion that except for the formal requirement of the joinder of the Housing Authority and the municipality as parties defendants to the foreclosure, the mortgagor limited-dividend housing corporation can, under our law, with the approval of the Public Housing and Development Authority of New Jersey, waive the other restrictions on the foreclosure proceedings referred to in the letter of the Federal Housing Administration.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: STANLEY COHEN
Deputy Attorney General

SC:MG

APRIL 13, 1956

HON. E. POWERS MINCHER
Assistant to the Commissioner
New Jersey State Department of Health
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-15

DEAR MR. MINCHER:

You have requested our opinion concerning the effect on the birth certificate of child born out of wedlock in New Jersey of a judgment of the Superior Court of Arizona declaring the child to be legitimate.

Your letter sets forth the following case:

> "X was born out of wedlock in Newark in December, 1954, the child of Y, whose putative father is Z. Subsequently, Y brought an action against Z under Art. 27, Sect. 402 of the Arizona Civil Code in the Superior Court of the State of Arizona in and for the County of Maricopa. That honorable Court, on November 30, 1955, rendered judgment declaring Z to be the father of X and entitling X to bear the surname of Z."

Your question is: "Must the Bureau of Vital Statistics correct or amend the birth certificate on the basis of this judgment alone."

The Registrar of Vital Statistics is authorized to alter, amend or correct birth certificates only where he is expressly given that power by statute, or pursuant to a court order.

The pertinent New Jersey Statute is R.S. 26:8-40 which states:

> "When a child born out of the bonds of matrimony has been legitimated by the marriage of its natural parents as prescribed by law and there shall be submitted to the state registrar or any local registrar proof of the marriage of the parents, the state registrar and any local registrar of vital statistics shall be authorized to accept from the father and mother of the child a correction or amendment to the original birth record giving the child the father's surname and adding to the record the information concerning the father, now required by law upon birth certificates. After the acceptance of such a correction or amendment no information regarding the illegitimacy shall be disclosed."

It is clear from the language of this statute that prior to the legitimation of a child by the subsequent remarriage of his parents, the child may not use the father's surname. This restriction as to use of the father's surname is covered in a previous opinion by the Attorney General dated September 13, 1939.

It is claimed by the attorney for the mother that while the above is the law, full faith and credit should be given to a judgment of the Superior Court of Arizona rendered in a proceeding brought under Section 402 of the Arizona Code which states:

> "The mother of a child born out of wedlock may within one year after the birth of such child bring a civil action in the Superior Court to establish the parentage of said child. Such action shall be commenced by the mother as plaintiff against the alleged natural father as defendant, and the same proceedings had therein as in other civil actions. The parentage may be proved like any other fact, except that the mother of said child shall not be a competent witness if the alleged natural father of said child is dead at the time of the trial, provided, however, that a statement in writing may be made by the parents of said child admitting the parentage thereof and upon which judgment may be entered. Such action shall be deemed cumulative to the remedies provided in the subsequent sections of this chapter".

However, the question whether an illegitimate will be regarded as legitimated by virtue of acts performed in another state in which the parent and child were then domiciled is one of comity and is not controlled by the constitutional provisions as to full faith and credit. *In re Lund's Estate,* 26 Cal. 2d 472, 162 A.L.R. 606, 159 P. 2d 643; see also *Olmsted* v. *Olmsted,* 216 U.S. 386, 30 S. Ct. 292 (1909).

Speaking generally of the effect of the full faith and credit clause, the United States Supreme Court said in *Pacific Insurance Co.* v. *Industrial Accident Commission,* 306 U.S. 493, 59 S. Ct. 629, at p. 633:

> "It has often been recognized by this Court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy. See *Wisconsin* v. *Pelican Insurance Co.,* 127 U.S. 265, 8 S. Ct. 1370, 32 L. Ed. 239; *Huntington* v. *Attrill,* 146 U.S. 657, 13 S. Ct. 224, 36 L. Ed. 1123; *Finney* v. *Guy,* 189 U.S. 335, 23 S. Ct. 558, 47 L. Ed. 839; *Milwaukee County* v. *White Co.,* supra, page 273, et seq., 56 S. Ct. page 232 et seq.; see, also, *Clarke* v. *Clarke,* 178 U.S. 186, 20 S. Ct. 873, 44 L. Ed. 1028; *Olmsted* v. *Olmsted,* 216 U.S. 386, 30 S. Ct. 292, 54 L. Ed. 530,

25 L.R.A., N.S., 1292; *Hood* v. *McGehee,* 237 U.S. 611, 35 S. Ct. 718, 59 L. Ed. 1144; cf. *Gasquet* v. *Fenner,* 247 U.S. 16, 38 S. Ct. 416, 62 L. Ed. 956. And in the case of statutes, the extra-state effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events."

Furthermore, the Arizona courts themselves have construed judgment under this law to be in the nature of declaratory judgments. *In re Cook's Estate,* Arizona 63 Ariz. 78, 159 P. 2d 797, 801.

A declaratory judgment simply declares the rights of the parties or expresses opinions of court on a question of law without ordering anything to be done, its distinctive characteristic being that the declaration stands by itself and no executory process follows as of course and no execution is sought from the opposing party. *Burgess* v. *Burgess,* 210 Ga. 380, 80 S.E. 2d 280.

The judgment in the instant case orders, adjudges and decrees that the defendant Z is the father of male child X, born of plaintiff Y in the City of Newark, State of New Jersey on December 8, 1954 and that X be entitled to bear the surname of Z. There is no executory provision whatsoever in the judgment.

We advise you that, under the circumstances, you have no power to change the records in your charge on the basis of the Arizona judgment.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: HAROLD KOLOVSKY
Assistant Attorney General

APRIL 17, 1956

HONORABLE CARL HOLDERMAN
Commissioner of Labor and Industry
1035 Parkway Avenue
Trenton, New Jersey

MEMORANDUM OPINION—P-16

Re: Removal of appointed members from the Rehabilitation Commission

DEAR COMMISSIONER HOLDERMAN:

We have your request for an opinion concerning the authority of the Rehabilitation Commission or the Governor to remove appointed members of the Commission whose record of consecutive absences from the regular meetings of the Commission seriously hampers its operations.

N.J.S.A. 34:16-25 provide that:

"The governor may at any time remove for inefficiency or neglect of duty any member of the commission appointed by him, charges having been preferred and substantiated after public hearing."

The above provision clearly bestows upon the governor the right to remove commission members when they have been proven to be guilty of inefficiency or neglect of duty. It has been clearly established in this State that the Legislature can constitutionally clothe the appointing authority with the power of removal for neglect of duty. *McCran* v. *Gaul,* 95 N.J.L. 393 (Sup. Ct. 1920), Affirmed 96 N.J.L. 165 (E & A 1921); *Finnigan* v. *Miller,* 132 N.J.L. 192 (Sup. Ct. 1944); *Vanderbach* v. *Hudson County Board of Taxation,* 133 N.J.L. 126 (E & A 1945).

In our opinion unreasonably continued absence from meetings amounts to neglect of duty within the meaning of the statute. The provisions of Civil Service Rule 59 and 60 indicate that absence without leave is a sufficient cause for removal with respect to classified employees. Although those rules are not specifically applicable because the members of the Rehabilitation Commission are not classified employees, they furnish a persuasive analogy. Moreover, in *Vanderbach* v. *Hudson County Board of Taxation,* 135 N.J.L. 349 (E. & A. 1946) it was held that absence from regular duties without proper leave or permission was a valid cause for removal of a secretary of a county tax board.

You are advised, therefore, that if a hearing discloses that a member of the Rehabilitation Commission has absented himself from the meetings of the Commission continually and without justifiable reason, he may lawfully be removed from office by the Governor. No authority to remove members of the Commission appears to be vested in any other officer or body.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: GRACE J. FORD
Ass't. Deputy Attorney General

GJF:MH:JFC:mb

APRIL 26, 1956

HONORABLE DANIEL BERGSMA, M.D.
Commissioner, Health Department
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-17

DEAR DR. BERGSMA:

You have asked for an opinion with respect to the propriety of granting public health laboratory technician licenses without examination to licensed health officers, who were performing laboratory duties in 1950, but who did not file applications for such licenses within one year from the effective date of L. 1950, c. 119 which amended N.J.S.A. 26:3-21. You have also stated that although necessary application forms were furnished to these officials at the proper time, they allege that they did not file them with the Department because a responsible Department employee advised that

as licensed health officers it was not necessary for them to obtain technicians' licenses.

The pertinent statutory section is N.J.S.A. 26:3-21, which provides in part:

> "All laboratory technicians now employed by boards of health under whatsoever title for the specific purpose of performing laboratory tests in bacteriology, serology, chemistry and related technical laboratory tests shall be granted public health laboratory technicians' licenses, without further examination, by the State Department of Health; provided, that said technicians apply to the department for same on a form provided by the department within one year of the effective date of this act." (As amended L. 1947, c. 181, p. 825, § 3; L. 1950, c. 119, p. 224, § 7.)

The statute in this regard is clear and unambiguous, leaving no room for the exercise of administrative discretion by any member of your Department. A holding that applications for laboratory technician licenses may be filed subsequent to one year from the effective date of the statute would do violence to the express statutory language employed.

Because the statute was effective in 1950, it is our opinion that such applications may no longer be entertained.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

TPC:DL:G

MAY 14, 1956

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

MEMORANDUM OPINION—P-18

DEAR MR. PATTEN:

We have your request for an opinion concerning the terms of office of the Commissioners of the Civil Service Commission.

The Civil Service Commission was established by Chapter 156 of the Laws of 1908. Section 3 of that act provided:

> "The Governor shall, by and with the advice and consent of the Senate, appoint four persons to be civil service commissioners under this act, all of whom must be residents of the State of New Jersey, and at the time of such appointment shall designate one of said commissioners to hold office for the term of one year, one for the term of two years, one for the term of three years and one for the term of four years, beginning from the date of the approval of this act; and thereafter at the expiration of such period of one year the Governor of this State shall, by and with the advice and consent of the Senate, appoint one person as the successor of the commissioner whose term shall have expired, to serve for a term of four years, and until his successor shall have been appointed and qualified. No commissioner shall hold any other office of profit under the government of this State or of the United States. Three members of said commission shall constitute a quorum for the transaction of business. Any vacancy in such commission shall be filled by appointment by the Governor for the remainder of the term, subject to confirmation by the Senate, but any appointment shall be in force until acted upon by the Senate."

The four original commissioners were appointed on May 8, 1908 for initial terms of one, two, three and four years. Thereafter, their successors were appointed for four-year terms, one expiring on May 8 of each year. That act was subsequently amended by Chapter 105 of the Laws of 1917 to increase the membership to five persons, and the terms from four to five years. Section 1 of that act provided:

> "The Governor of this State shall, by and with the consent of the Senate, appoint five persons to be Civil Service Commissioners under the act referred to in the title of this act and to which this act is a supplement, one of whom shall, at the time of such appointment, be designated by the Governor as president of the Civil Service Commission, all of whom must be residents of the State of New Jersey, and at the time of such appointment the Governor shall designate one of said commissioners to hold office for the term of one year, one for the term of two years, one for the term of three years, one for the term of four years, and one for the term of five years, beginning from the date of the approval of this act, and thereafter at the expiration of each of said periods of one year, two years, three years, four years and five years, respectively, the Governor of this State shall, by and with the advice and consent of the Senate, appoint one person as the successor of the commissioner whose term shall then have expired to serve for the term of five years and until his successor shall have been appointed and qualified, and thereafter the terms of said five commissioners shall each be for the period of five years. No commissioner shall hold any other office of profit under the government of this State or of the United States. Three members of said commission shall constitute a quorum for the transaction of business. Any vacancy in said commission shall be filled by the appointment by the Governor for the remainder of the term, subject to confirmation by the Senate, but any appointment shall be in force until acted upon by the Senate. The other commissioners shall be eligible to appointment to fill a vacancy in the office of president of said commission."

and Section 3 provided:

> "That the offices of the four Civil Service Commissioners appointed under the provisions of the act to which this act is a supplement be and the same are hereby vacated, to take effect upon the appointment, confirmation and qualification of the five Civil Service Commissioners whose appointment is directed and provided for by this act."

It is important to note the language in Section 1 of that act to the effect that the initial terms were to be for one, two, three, four and five years "beginning from the

date of the approval of this act". That act was approved on March 23, 1917. Accordingly, the initial terms all specifically commenced on March 23, 1917.

The term of five years clearly attaches to the office and not to the incumbent, because it was the obvious legislative intent to have one term expire in each year on March 23rd. See *Monte* v. *Milat,* 17 N.J. Super. 260, 268 (Law Div. 1952), where the court, in discussing a similar situation, observed:

> "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 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). Where the clear intent of the Legislature is that the entire board should not go out of office at once, but that the various members should retire at regularly recurring intervals, the term of office of one appointed to fill a vacancy on a board of several officers is for the unexpired term only. *Note,* 50 L.R.A. (N.|.S.) 345. Such orderly rotation, in order to create a continuing body, could not be carried out if the commissioner appointed to fill a vacancy were to hold a full term of five years from the time of his appointment, regardless of the date of such appointment."

This construction is strengthened by the provision in R.S. 11:1-1 that appointments to fill vacancies are for unexpired terms only.

See also *Clay* v. *Browne,* 96 N.J.L. 303 (Sup. Ct. 1921), aff'd. 97 N.J.L. 315 (E. & A. 1922), and *Marvel* v. *Camden County,* 137 N.J.L. 47 (E. & A. 1948).

The five commissioners under the 1917 act were appointed on March 30, 1917 for initial terms of one, two, three, four and five years. Thereafter, however, the terms of the members became confused and the records of the Secretary of State in 1929 indicated that the terms of the then commissioners would expire as follows: March 31, 1929, April 6, 1930, January 24, 1932, March 31, 1932 and March 30, 1933.

Apparently recognizing this deviation from the original legislative intent, the Legislature enacted Chapter 212 of the Laws of 1929, which was effective April 27, 1929, and which provided in Section 1:

> "The terms of office of all members of the Civil Service Commission now in office are hereby terminated. Their said offices are hereby vacated by and upon the passage of this act."

This section was substantially the same as Section 3 of the 1917 act, but the 1929 act did not include any provisions comparable to Section 1 of the 1917 Act. Accordingly, the 1929 act merely vacated the offices and terminated the term of the incumbents. It did not affect the terms which attach to the office and not the incumbent.

The initial terms of the commissioners appointed in 1917 expired as follows:

William K. Devereux	March 23, 1918
John D. Prince	March 23, 1919
Albert L. Stillman	March 23, 1920
Edward H. Wright	March 23, 1921
William D. Nolan	March 23, 1922

Thus, on the effective date of the 1929 enactment, April 27, 1929, the terms were

to expire respectively on the following dates: March 23, 1930, March 23, 1931, March 23, 1932, March 23, 1933 and March 23, 1934.

To fill the vacancies created by the 1929 act, the following appointments were made to terms which by law were as follows:

William S. Stiles	April 30, 1929 to March 23, 1930
Henry O. Carhart	April 30, 1929 to March 23, 1931
Carl A. Ruhlmann	April 30, 1929 to March 23, 1932
Lawrence M. Hicks	April 30, 1929 to March 23, 1933
Joseph A. Brohel	April 30, 1929 to March 23, 1934

The only remaining consideration is whether the language of Section 11:1-1 of the Revised Statutes of 1937 changes either the staggered terms or the date of commencement of the terms. That section in the Revision read:

> "The civil service commission, hereinafter referred to as the 'commission', created by an act entitled 'An act regulating the employment, tenure and discharge of certain officers and employees of this State, and of the various counties and municipalities thereof, and providing for a civil service commission, and defining its powers and duties,' approved April tenth, one thousand nine hundred and eight (L. 1908, c. 156, p. 235), as supplemented by the act approved March twenty-third, one thousand nine hundred and seventeen (L. 1917, c. 105, p. 218), is continued.
>
> "The commission shall consist of five persons, as commissioners, all of whom shall be residents of this State.
>
> "The commissioners shall be appointed by the governor, by and with the advice and consent of the senate. Each commissioner shall hold office for the term of five years, and until his successor has been appointed and qualified.
>
> "The governor shall designate one of the commissioners as president of the commission.
>
> "A vacancy in the commission shall be filled by appointment by the governor, for the remainder of the term, subject to confirmation by the Senate, but any appointment shall remain in force until acted upon by the Senate. The other commissioners shall be eligible to appointment to fill a vacancy in the office of president of the commission.
>
> "No commissioner shall hold any other office of profit under the government of this state or of the United States."

This section was subsequently amended in respects not material here. P.L. 1944, c. 65; P.L. 1948, c. 89.

The language in the revision specifically "continued" the civil service commission as created by the 1908 act and supplemented by the 1917 act. It did not attempt to change the commission, its membership or the terms of office. The only change was a restatement of the language of the prior statutes deleting the provision for staggering the initial terms because it had exhausted its effect.

In *Crater* v. *County of Somerset,* 123 N.J.L. 407, 414 (E. & A. 1939), the court pointed out:

> "There is a presumption against a legislative intention, by a revision of

general laws, to effect a change of substance. That presumption is not, *ex necessitate,* overcome by mere change of phraseology, or the addition or omission of words in the revision; the intention to alter the essence must be expressed in language admitting of no reasonable doubt of the purpose. *King* v. *Smith,* 91 N.J.L. 648; *Newark* v. *Tunis,* 81 Id. 45; affirmed, 82 Id. 461; *Trenton* v. *Standard Fire Insurance Co.,* 77 Id. 757; *State* v. *Anderson,* 40 Id. 224; *In Re Murphy,* 23 Id. 180; *Hendrickson* v. *Fries,* 45 Id. 555; *O'Hara* v. *National Biscuit Co.,* 69 Id. 198."

For the foregoing reasons, we disagree with and specifically overrule the letter opinion of the former Attorney General dated February 28, 1947 which held that a member of the civil service commission received a full five-year term upon his appointment regardless of the date of such appointment. That opinion was based upon a consideration of Section 11:1-1 of the Revised Statutes without consideration of the earlier enactments.

It is our conclusion that the terms of each commissioner commence on March 23 and terminate five years thereafter. Vacancies are filled for the unexpired terms only.

In order to ascertain the expiration dates of the present members of the commission, we have traced the appointments from the original appointments in 1929. The records of the Secretary of State disclose the following:

1) William S. Stiles was appointed on April 30, 1929 for a term of one year. He was thereafter reappointed for terms of five years in 1930 and 1935. James K. Allardice succeeded Stiles on June 3, 1940 and was reappointed in 1945 and 1950. The last term expired on March 23, 1955. Harry A. Walsh was appointed to succeed him for a term which ends March 23, 1960.

2) Henry O. Carhart was appointed on April 30, 1929 for a two-year term and was thereafter reappointed for a full five-year term. He was succeeded by Claude C. Post and Joseph L. Delate, each of whom only served one term.

   Edward M. Gilroy was appointed to succeed Delate on December 30, 1946. His term expired on March 23, 1951. He was reappointed on April 4, 1952 for his present term which expired on March 23, 1956.

3) Carl A. Ruhlmann was appointed on April 30, 1929 for a three-year term. He was succeeded by Maurice J. Cronin who served two terms and Vincent P. Keuper who served one term which expired on March 23, 1947. James A. Bowers was appointed to succeed Keuper on June 28, 1948 to a term which expired on March 23, 1952, and reappointed for a term which ends March 23, 1957.

4) Lawrence M. Hicks was appointed on April 30, 1929 to a four-year term. He was succeeded by John E. Joyce to fill Hicks unexpired term and was subsequently reappointed twice. He, in turn, was succeeded by Pearl M. Bridegum who was appointed on March 31, 1944 for a term which expired on March 23, 1948. She was reappointed in 1948 and again in 1953. Her present term expires on March 23, 1958.

5) Joseph A. Brohel was appointed on April 30, 1929 for a five-year term.

He was succeeded by Harry Harper who served two terms and William S. Carpenter who served the unexpired term of Harper and two additional full terms. Carpenter was succeeded by Lester H. Clee, who in turn was succeeded by William F. Kelly. Kelly's present term expires on March 23, 1959.

Thus, in summary, the terms of the present commissioners terminate as follows:

Harry A. Walsh	March 23, 1960
Edward M. Gilroy	March 23, 1956
James I. Bowers	March 23, 1957
Pearl M. Bridegum	March 23, 1958
William F. Kelly, Jr.	March 23, 1959

For similar opinions, see Formal Opinion 1954, #6, concerning the terms of office of the members of the Delaware River Port Authority, Memorandum Opinion to you dated October 27, 1954 dealing with the terms of the Board of Examiners of Ophthalmic Dispensers and Technicians; Memorandum Opinion dated May 27, 1955 concerning the terms of office of the Migrant Labor Board; Memorandum Opinion dated May 27, 1955 concerning terms of office of the Veterans' Services Council; our Memorandum Opinion dated September 30, 1955 concerning the terms of office of the New Jersey Commissioners on Uniform Laws; Memorandum Opinion dated October 3, 1955 concerning terms of office of members of the Commission on Civil Rights; Memorandum Opinion dated October 20, 1955 concerning the terms of office of the members of the Water Policy and Supply Council; Memorandum Opinion dated October 20, 1955 concerning the terms of office of the members of the Planning and Development Council, and Memorandum Opinion dated April 13, 1956 concerning the terms of office of the members of the State Board of Mediation.

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

By: DAVID C. THOMPSON
Deputy Attorney General

JUNE 15, 1956

HONORABLE CARL HOLDERMAN
Commissioner
Department of Labor and Industry
State Highway Building
Parkway Avenue
Trenton, New Jersey

MEMORANDUM OPINION—P-19

DEAR COMMISSIONER:

You have asked for our opinion whether the sale or offer for sale of toy pistols or toy guns in which explosive paper caps may be used is in violation of R.S. 21:3-2.

R.S. 21:3-2 provides as follows:

"It shall be unlawful for any person to offer for sale, expose for sale, sell, possess or use, or explode any blank cartridge, toy pistol, toy cannon, toy cane or toy gun in which explosives are used; * * *".

You advise that certain toy pistols or toy guns, although not sold together with paper caps, may be used to explode such paper caps which contain materials of an explosive nature.

It is our opinion that the foregoing statute clearly indicates a legislative intent to make unlawful the offer for sale, exposure for sale, sale, possession or use of a toy pistol or gun which may be used to set off an explosive. The fact that the explosive substance is not sold at the same time as the toy pistol or toy gun is sold is immaterial. To hold otherwise would defeat the very purpose of the statute, which is for the protection of the public health, safety and welfare of the people of the State of New Jersey. See R.S. 21:3-1.

It is our opinion that such toy pistols or toy guns may not be offered for sale, exposed for sale, sold, possessed or used under the provisions of R.S. 21:3-2, supra.

It is to be noted that the opinion rendered to you on March 28, 1956, had application only to toy pistols or toy guns in which explosives could not be used.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: SAUL N. SCHECHTER
Deputy Attorney General

SNS:BK

JUNE 15, 1956

HON. PAUL A. VIVERS, *Commissioner*
Bergen County Board of Elections
Administrative Building
Hackensack, New Jersey

MEMORANDUM OPINION—P-20

DEAR COMMISSIONER VIVERS:

You have asked our opinion concerning the qualification to vote of a person who was convicted of the crime of conspiracy in 1934 or 1935 in the U. S. District Court for the District of New Jersey.

Conviction of the crime of conspiracy results in loss of the right of suffrage pursuant to R.S. 19:4-1, which provides:

"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; * * *"

According to the settled law in this State, a person convicted in the Federal Courts or the Courts of another State of one of the above enumerated crimes thereby suffers the loss of his right of suffrage in New Jersey. The two leading decisions are *In re Marino,* 23 N.J. Misc. 159 (Essex Co. Ct. 1945) and *In re Smith,* 8 N.J. Super. 573 (Essex Co. Ct. 1950).

In the *Marino* case, the applicant had been convicted of conspiracy in the U. S. District Court for the District of New Jersey three years before. The well reasoned opinion of Judge Hartshorne held that he was disqualified from voting in New Jersey because of this conviction. The major purpose of the provision of the Constitution of 1844 for forfeiture of the right of suffrage upon conviction of certain crimes was considered to be the preservation of an electoral roll made up of fit and qualified voters who had not forfeited the basic right of suffrage as the result of a conviction for a felony or other serious crime of moral turpitude. That purpose was equally advanced by the disqualification of persons convicted of such crimes in the Courts of New Jersey and elsewhere. The Court further cited the manifest unfairness of granting the franchise to a person convicted in another jurisdiction of the identical crime for which a person convicted in the State Courts suffered disenfranchisement. General precedents support the construction that disqualification for "any crime" covers convictions of crime in any jurisdiction, Federal or state *(Brown* v. *State,* 62 N.J.L. 666, 694, E. & A. 1899).

The application for an order to have the name of a citizen who had been convicted in Ohio of the crime of larceny in 1931 removed from the challenge list, was rejected by the Essex County Court in *In re Smith,* 8 N.J. Super. 573. The provision in the Constitution of 1947 in Art. II, Sec. III, empowering the Legislature to enact laws "to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate" was held to authorize legislation applying to persons convicted of crimes in or outside the State prior to the effective date of the Constitution.

We therefore advise you that the person referred to in your letter and others convicted in the Federal Courts of crimes which cause disenfranchisement under R.S. 19:4-1 have no right of suffrage in this State.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

f;p

JUNE 20, 1956

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

MEMORANDUM OPINION—P-21

DEAR MR. BORDEN:

You have requested our opinion as to whether under the provisions of N.J.S.A. 43:15A-41c a member may designate a corporation or a charitable organization as a designee. That section provides:

> "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 sections 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 received by the member in the last year of creditable service."

It is clear from the foregoing language that the enactment contemplates as designees living persons only. If the designee is not living the benefit is to be paid to the executor or administrator of the member's estate, and accordingly, neither a corporation nor a charitable organization can be designated.

Under the provisions of the former legislation, R.S. 43:14-1 et seq, somewhat similar language may be found in Section 43:14-29:

> "* * * If a contributor dies before retirement his accumulated deductions shall be paid to his estate or to such person as he shall have nominated by written designation duly executed and filed with the board of trustees . . ."

It should be observed that Section 43:14-29, unlike the present section, does not specify that the designee be living. Accordingly, the language employed in the present section, N.J.S.A. 43:15A-41c, may be viewed in the light of that employed in the former section. In your request for opinion, you state that under the former State Employees' Retirement System you permitted the designation of corporations and charitable organizations. It may well be that the Legislature in enacting the present section had in mind the administrative difficulties inherent in permitting the designation of corporations and charitable organizations. Particularly, they may have had in mind the considerable time required to be expended in checking the propriety of the various legal documents pertaining to the status of such corporations and charitable organizations.

Reiterating, it is our opinion that under N.J.S.A. 43:15A-41c neither a corporation nor a charitable organization can be designated.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: LAWRENCE E. STERN
Deputy Attorney General

LES:ba

JUNE 28, 1956

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

MEMORANDUM OPINION—P-22

DEAR COMMISSIONER TRAMBURG:

You have requested a legal opinion concerning the authority of the State Board of Child Welfare to utilize funds of a ward committed to its guardianship for reimbursement to the public treasury of tax monies expended for support and maintenance of said ward. It appears in the particular situation you describe that the ward had no funds when the expenditures for care and maintenance were made but did subsequently acquire funds at a time when expenditures were no longer being made.

It is our opinion and we advise that such reimbursement of public monies can be made for the reasons and in the manner which we outline herein.

We have examined R.S. 30:4C-22 (Chap. 138, P.L. 1951, sec. 22) which provides that the State Board shall have authority "to apply funds other than earnings of any ward against expenditures for the maintenance of such ward." This is clear legislative intent that a ward of the State Board of Child Welfare if possessed of sufficient funds shall be obliged to reimburse the public treasury for monies expended in its behalf for maintenance, education and support.

It seems basic in the legislation of this jurisdiction dealing with public welfare that this type of reimbursement shall be had wherever possible. (See R.S. 44:7-14 on grants of assistance to aged persons; R.S. 30:4-66 and 30:4-74, maintenance of mental incompetents in State and county institutions.)

A guardian of a minor, other than an agency of the State, such as the State Board of Child Welfare, is obliged to make application to a court of competent jurisdiction for leave to utilize income or principal from the estate of a minor for support and education of the ward. (See N.J.S. 3A:20.1, et seq.) This requirement seems to be dispensed with in the statute under review for the legislature has empowered the board "to apply funds****of any ward against expenditures for the maintenance of such ward."

R.S. 30:4C-22 became effective on May 31, 1951 and has no retroactive application prior to its effective date. Our courts have spoken on the subject matter of retrospective legislation in a number of cases and most recently in *Lascari* v. *Bd. of Education of Lodi,* 36 N.J. Super 426 (App. Div. 1955), where it was said:

"Words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them". See also *Nichols* v. *Bd. of Education of Jersey City,* 9 N.J. 248 (1952).

As to expeditures made for support and maintenance of a ward of the board prior to May 31, 1951, the remedy available to the board for reimbursement of such costs is suggested in the case of *Alling* v. *Alling,* 52 N. J. Eq. 92 (Chancery Court 1893), where it was determined that an order for reimbursement on a retroactive basis is contemplated but that such repayment shall consist of the actual costs of maintenance and support of the ward which in the matter under discussion would be the precise amount of monies expended from the public treasury.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: EUGENE T. URBANIAK
Deputy Attorney General

ETU:HH:mjd

JULY 12, 1956

HONORABLE ROBERT L. FINLEY
Deputy State Treasurer
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-23

Re: Application of collateral where bank becomes insolvent

DEAR MR. FINLEY:

You have requested our advice regarding the effect of collateral on a depositor's claim in the event of the insolvency of a bank. The question is important in determining the amount of collateral which you should require to secure the deposit of State funds.

To illustrate the question, you have put the case where the State has deposited $5,000,000 in a bank, against which collateral of $4,000,000 has been posted by the depository. In the event of a bank's insolvency, the question is whether you could prove a claim for the entire $5,000,000, receiving a dividend of, let us say, 60%, or $3,000,000, and applying the $4,000,000 of collateral as needed to make up the deficiency; or whether you must first apply the collateral to the debt, and prove a claim only for the balance of $1,000,000 in which event presupposing a 60% dividend, the State would lose $400,000.

Our examination of the law leads to the conclusion that in the case of New Jersey banking corporations the matter is governed by the so-called "bankruptcy rule", which requires the depositor first to apply his collateral against the debt and then to prove only for the balance. *Butler* v. *Commonwealth Tobacco Co.,* 70 N.J. Eq. 423 (E. & A. 1908); *Nutz* v. *A. W. Crone & Sons,* 109 N.J. Eq. 95, 98 (E. & A. 1931). The liquidation of insolvent New Jersey banks is covered by R.S. 17:9A-284, which provides that "the proceeds of the liquidation of the assets of a bank, the property and business of which the Commissioner has taken possession, shall be distributed according to the priorities and preferences provided by Chapter 14 of Title 14 of the Revised Statutes * * * ". The pertinent section of Chapter 14 of Title 14 is R.S. 14:14-23, which provides in part:

"After payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, the creditors shall be paid proportionally to the amount of their respective debts, excepting mortgage and judgment creditors when the judgment has not been by confession for the purpose of preferring creditors."

The two decisions above cited hold that the statute just referred to is "essentially a bankruptcy act," requiring the practice of "applying collateral securities to the liquidation of a debt against an insolvent corporation, and of proving only for the balance". See *Nutz* v. *A. J. Crone & Sons,* supra., 109 N.J. Eq. at pages 99, 100. Furthermore, the State of New Jersey does not possess the Crown's common law prerogative to have debts due it paid before debts due other creditors. *Freeholders of Middlesex County* v. *State Bank at New Brunswick,* 29 N.J. Eq. 268 (Ch. 1878), aff'd. 30 N.J. Eq. 311; *Bowes* v. *United States,* 127 N.J. Eq. 132, 140 (Ch. 1940). Nor has any statute given to the state any such priority in its favor with regard to State funds deposited in State banks.

It follows that where the State Treasurer deposits funds in banks organized under the New Jersey law, he should require collateral or other satisfactory security in the full amount of the deposit; otherwise some loss of the State funds deposited in that bank would be most probable in the event of insolvency.

On the other hand, banks organized under the National Banking Act are governed by the so-called "equity rule", under which a secured creditor may prove and receive dividends on the full amount due him at the date of insolvency without regard to his collateral, provided only that the total sum received by way of dividends and from collateral does not exceed the entire debt. His claim is not limited to the unsecured portion of his debt. *Merrill* v. *National Bank of Jacksonville,* 173 U.S. 131 (1899); *Aldrich* v. *Chemical National Bank,* 176 U.S. 618 (1900); *American Surety Co. of N. Y.* v. *Bethlehem National Bank,* 314 U.S. 314 (1941); *Butler* v. *Commonwealth Tobacco Co., supra.* Liquidation of an insolvent national bank is controlled by the National Banking Act (12 U.S.C.A. Sec. 191, 192), and the method provided by that Act is exclusive. *Liberty National Bank* v. *McIntosh,* 16 F. 2d 906, 909 (C.C.A. 4th, 1927), Appeal dismissed 273 U.S. 783, *Way* v. *Camden Safe Deposit & Trust Co.,* 21 F. Supp. 700, 702 (1937), and cases there cited; *Cox* v. *Nance,* 143 S.W. 2d 897 (Tenn. App. 1940). The National Bankruptcy Act (11 U.S.C.A., Sec. 22) specifically excludes any "banking corporation" as either a voluntary or involuntary bankrupt.

Accordingly, in the case of deposits which the State Treasurer may make with national banks, it would appear less important to require collateral for the full amount of the deposit. The amount of collateral required in any particular case should be sufficient, in the judgment of the Treasurer, to cover any reasonably foreseeable

deficiency which might be left after all liquidating dividends have been paid.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

TPC:MG

AUGUST 8, 1956

HONORABLE CARL HOLDERMAN
Commissioner, Department of Labor and Industry
1035 Parkway Avenue
Trenton, New Jersey

MEMORANDUM OPINION—P-24

DEAR COMMISSIONER HOLDERMAN:

You have requested an opinion as to whether an employer will violate R.S. 34:2-24 if he allows a female employee one day off per calendar week but permits such an employee to work more than six consecutive days.

R.S. 34:2-24 provides that:

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

The answer to your inquiry turns on the meaning of the word "week" as found in this statute. In 86 *C. J. S., Time,* Sec. 11, the following comment is made concerning that word:

> ". . . in its usual and ordinary and most accurate sense it denotes a period of time of seven consecutive days; any seven consecutive days of a month or year; a period of seven consecutive days beginning with any day; and in some states the term is defined by statute. Such a week is sometimes called a 'statutory week' or a 'secular week.'
>
> "In its other sense, the word 'week' means a calendar week . . .
> ". . . its meaning in any particular instance will depend on the context in which it appears and the object sought to be obtained by its use."

The legislation here under consideration seeks to protect the health and well-being of female employees. This is clearly pointed out by the court in *Toohey* v.*Abromowitz Department Store, Inc.,* 124 N.J.L. 209 (Sup. Ct. 1940), where the court states:

> "Public policy requires that there should be control over the hours of work in certain occupations. The public interest is not served by the physical injury resulting from labor too long continued. The statute further forbids more than six days' labor in any one week. This has been regarded as good practice for men as well as women from the earliest time."

It is our conclusion that the phrase "in any one week" as used in this statute means "in any period of seven consecutive days." Any other construction of these words would do violence to the apparent legislative intention. If the construction of calendar week is adopted, an employer would be able to work a female employee up to twelve consecutive days without violating R.S. 34:2-24. Clearly such a result was not intended by the legislature.

In *U. S.* v. *Southern Pacific Co.,* 209 Fed. 562 (C.C.A. 8th 1913), the court construed a provision which stated in part that an employee could work up to thirteen hours during a twenty-four hour period on "not exceeding three days in any week." At page 567 they state:

> "We also think that the word 'week' in the statute was intended to mean a period of 7 days, and not necessarily a calendar week, and that the statute is not violated if no employee worked overtime more than 3 days out of 7."

A similar construction is reached in *Danielson v. Industrial Commission of Colorado,* 96 Colo. 522, 44 P. 2d 1011 (1935).

In our opinion, an employer who permits a female employee to work more than six consecutive days, even though the female employed is allowed one day off per calendar week, is in violation of the law.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS L. FRANKLIN
Deputy Attorney General

TLF:lc

AUGUST 10, 1956

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

MEMORANDUM OPINION—P-25

DEAR MR. KELLY:

You have requested our advice and opinion as to whether your Department is authorized or required by statute to hold a promotion test for a state employee who was on military leave from State service at the time the test was held. The basis for this request is N.J.S.A. 38:23-4, which provides in part:

> "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 . . . ."

The specific facts were these:

While the employee, a motor vehicle examiner, was on military leave from September 18, 1950 to August 16, 1953, a competitive promotion test for "Supervisor, Testing Division, Motor Vehicle" was announced under Civil Service Rule 24 and was held on May 2, 1952. A list of 53 eligibles was promulgated in October, 1952, and expired after the statutory maximum of three years had run in October, 1955. Eight of the fifty-three eligibles on the list were actually promoted during these three years. The list was not extended, and under R.S. 11:9-10 it can no longer be extended. On May 26, 1956, approximately nine months following the expiration of the list of eligibles, and almost three years following his return from the military to State employ, this employee made application to take the promotion test held on May 2, 1952.

It is our opinion that the Civil Service Commission has no authority to grant this request and that, if granted, it would constitute unauthorized preferential treatment for the employee in question.

N.J.S.A. 38:23-4 does not grant the employee greater rights than he would have had by taking the May 1952 test. Had this employee passed that test he would have been placed on the list of eligibles which was promulgated in October 1952. Since this list has now expired, and can no longer be reopened, a right to be placed on such list, or a test to acquire that right is meaningless.

Thus, if this employee were to pass a special test, such as that suggested, he would necessarily be the sole eligible on a new list, because the previous list has expired. This would do more than grant him equality with his fellow employees who took the May 1952 exam. It would place him in a preferred position with respect to the forty-five eligibles who remained on the previous list when it expired.

If any right existed, it is clear that it expired along with the eligible list in October 1955. There was ample opportunity to make application before expiration of the list.

For the above reasons, we must advise you that the Department of Civil Service should not authorize this promotional test.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID LANDAU
Deputy Attorney General

DL:jo

AUGUST 24, 1956

HON. ROBERT L. FINLEY
Deputy State Treasurer
State House
Trenton 7, New Jersey

MEMORANDUM OPINION—P-26

DEAR MR. FINLEY:

You have requested our opinion as to whether war veteran members of the Teachers' Pension & Annuity Fund who are entitled to the refund of their accumulated deductions pursuant to P. L. 1955, c. 37, §70 are entitled to receive, as part of their

refunds, amounts paid as contributions in their behalf by their public employers pursuant to N.J.S.A. 38:23-6.

Section 70 provides, inter alia:

> "a. Each veteran member shall have returned to him, except as provided in subsection 'd' of this section, his accumulated deductions as of January 1, 1956, less contributions based on his compensation for the year 1955 at the rate of contribution provided in subsection 'b'. All service rendered in office, position, or employment of this State or of a county, municipality, or school district, board of education or other employer by such veteran member previous to January 1, 1955, for which evidence satisfactory to the board of trustees is presented within 1 year of the effective date of this section, shall be credited to him as a 'Class B' member and the accrued liability for such credit shall be paid by the employer as provided in section 33."

Several things are quite clear from an examination of this and related sections of the act. First, veteran members are given free prior service credit for their prior employment. Second, their respective employers are to be charged with the accrued liability for such credit. See §§ 18 & 33. Third, accumulated deductions standing to their credit are to be returned to veteran members.

Section 2 of the act states:

> "As used in this act:
>
> a. '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."

The instant question is whether the term "accumulated deductions" as used in the act includes the amounts paid in wartime by the employers of persons in military service as contributions in their behalf pursuant to N.J.S.A. 38:23-6.

N.J.S.A. 38-23-6 provides:

> "During the period beginning with the time of the entry of such person into such service and ending at the earliest of (a) three months after the time of such person's discharge from such service or (b) the time such person resumes such office, position or employment or (c) the time of such person's death or disability while in such service, the proper officer of the State, county, municipality, school district, political subdivision, board, body, agency or commission shall contribute or cause to be contributed to such fund the amount required by the terms of the statute governing such fund based upon the amount of compensation received by such person prior to his entry into such service and during the period first mentioned in this section any such person receiving compensation from the State, county, municipality, school district, political subdivision, board, body, agency or commission, shall continue to contribute the amount required by statute to be paid by members of such fund *and during the period first mentioned in this section any such person not receiving compensation from the State, county, municipality, school district, political subdivision, board, body, agency or commission shall not be*

required to contribute the amount required by statute to be paid by members of such fund, but said amount shall be contributed for such person by the State, county, municipality, school district, political subdivision, board, body, agency or commission." (Italics supplied).

The expression "such person" relates back to N.J.S.A. 38:23-5 and means, generally speaking, a public employee who was a member of a pension system or fund and entered military service in wartime.

Thus, as seen from the underlined portion of N.J.S.A. 38:23-6 a public employee in military service during wartime was not required to contribute to his pension fund or system, but such contribution was made for him by his employer.

Should such contributions be considered "accumulated deductions" as defined in Section 2 of P. L. 1955, c. 37 so as to include them in the refund to be made to veteran members of the Teachers' Pension & Annuity Fund pursuant to Section 70 of that act? In our opinion, they should not be so considered.

The definition of accumulated deductions set forth in Section 2, *supra,* bars such inclusion. The contributions made by the employer pursuant to N.J.S.A. 38:23-6 were not amounts "deducted from the compensation of a member", nor were they amounts "contributed by him". The specific nature of the statutory definition resolves the question with clarity. In this circumstance, no further observations would ordinarily be made by us. However, we consider it worthwhile in the present instance to point out the essential soundness of the result.

First, it should be observed that the result reached in no way deprives the veteran member of anything to which he is entitled. He receives free prior service credit for his prior employment, including free credit for the time spent by him in the military service during wartime. The accrued liability for all of such credit is charged to the employer. The employer has, in a very real sense, already prepaid the fund for that period of time during the war while the employee was in military service, and is entitled to the benefit thereof. To hold otherwise would be to require the employer not only to pay for all of the free prior service credit granted the employee by the act, but also to pay the same doubly for part of that time. See section 18d of P. L. 1955, c. 37.

We are likewise cognizant of that portion of § 34 of P. L. 1955, c. 37, which states:

"****. No veteran member shall be entitled to withdraw the amount of his accumulated deductions contributed by his employer covering his military leave unless he shall have returned to the payroll and contributed to the retirement system for a period of 90 days."

This provision specifically permits payment to an employee of the accumulated deductions "contributed by" his employer while he was on military leave in the event of his subsequent withdrawal from employment (provided he returns to the payroll and contributes to the retirement system for at least 90 days). It is noteworthy that no such language is employed in section 70 of the act and section 34 involves no double charge against the employer.

Accordingly, it is our opinion that war veteran members of the Teachers' Pension & Annuity Fund are not entitled to receive, as part of their refunds, amounts paid as contributions in their behalf by their public employers pursuant to N.J.S.A. 38:23-6.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: LAWRENCE E. STERN
Deputy Attorney General

LES:b.

AUGUST 30, 1956

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

MEMORANDUM OPINION—P-27

DEAR COMMISSIONER MCLEAN:

You have requested our opinion on the status of Fish and Game Wardens as peace officers. We understand that you are concerned with the powers of arrest of Fish and Game Wardens both under the fish and game laws and under the criminal laws generally.

Fish and Game Wardens are statutory officers with limited powers as peace officers to enforce the provisions of the fish and game laws. The appointment is by the Division of Fish and Game in the Department of Conservation and Economic Development pursuant to R.S. 23:2-4. The principal powers and duties of the Fish and Game Wardens are set forth as follows:

R.S. 23:2-6. Powers and duties of protector and wardens.

"The wardens shall enforce all the laws of this state for the protection of fish, birds and game animals, and may execute all processes issued for the violation of these laws and serve subpoenas issued for the examination, investigation or trial of all offenses against these laws."

R.S. 23:2-8. Summary arrest; aid by peace officers.

"The council, the wardens, the deputy wardens and the protector shall have the power of summary arrest in cases of flagrant violation of this Title, or of the provisions of the State Fish and Game Code, and may, in the discharge of their duties, call in the aid of a constable, sheriff, or other peace officer when deemed necessary."

R.S. 23:10-5. Arrest on view without warrant; interference with or resisting officer.

"Any constable, police officer, fish and game warden, protector, or deputy warden, or any officer or member of any incorporated game protective society

may, for a violation of any provision of this Title, or any provision of any law supplementary thereto, or of any provision of the State Fish and Game Code committed within the view of any such officer or person, arrest, without warrant, the offender and carry him before a court in the county wherein such arrest is made."

R.S. 23:10-17. Powers and fees for service of process of certain officers.

"The fish and game protector, fish and game wardens and deputy wardens shall have the same power as constables and be entitled to the same fees for the service of process in proceedings under this chapter as are provided by law for constables in the court in which the proceedings are had."

R.S. 23:10-20. Searches and seizures; immunity from civil suit.

"A member of the Fish and Game Council, the fish and game protector or a warden may, without warrant, search and examine any boat, conveyance, vehicle, fish box, fish basket, game bag, game coat or other receptacle for game and fish, when he has reason to believe that a provision of this Title, or any law supplementary thereto, or the State Fish and Game Code has been violated, and shall seize and take possession of any bird, animal or fish unlawfully caught, taken, killed, had in possession or under control, shipped or about to be shipped."

None of the foregoing statutes grant the Fish and Game Wardens any policing authority outside the enforcement of the fish and game laws. The reference in R.S. 23:2-8 to resort to the aid of constables, sheriffs or other "peace officers" is significant of the legislative intendment that Fish and Game Wardens are not vested with the status of peace officers in the enforcement of the criminal laws in general. R.S. 23:10-17 specifically limits the power of the Fish and Game Wardens and deputy wardens as constables, to proceedings under the fish and game act.

The courts of Michigan in *People* v. *Bissonette,* 327 Mich. 377, 42 N.W. 2d, 113 (1950) and of New York in *City of Rochester* v. *Lindner,* 167 Misc. 790, 4 N.Y.S. 2d 4 (City Ct. 1938) have held under comparable statutes that Fish and Game Wardens may not exercise and are not vested with any of the powers or functions of peace officers under the Constitution, statutes or general law, other than in the enforcement of the fish and game laws.

Fish and Game Wardens, established under Title 23 of the Revised Statutes, are empowered to act as peace officers in strict accordance with the legislative grants of authority there set forth. As peace officers, Fish and Game Wardens may carry out searches and seizures and make arrests without warrant, as well as serve process under the provisions of that title. Enforcement functions outside the fish and game laws are barred to Fish and Game Wardens, except insofar as exercisable by private persons.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

f;p

SEPTEMBER 20, 1956

MR. HAROLD E. WINDER
Chairman, Cape May County Board of Elections
Cape May Court House, N. J.

MEMORANDUM OPINION—P-28

DEAR MR. WINDER:

You have asked for our opinion whether certain persons whose names have been removed from the registration list during the year 1956 in accordance with the provisions of N.J.S. 19:31-15 may reregister before September 27, 1956 and in this manner become qualified to vote in the General Election to be held on November 6, 1956.

N.J.S. 19:31-15, after providing for the manner and method in which the registered names of persons may be removed from the registry list, provides as follows:

"Any person affected by any action of the county board in counties not having a superintendent of elections shall, during the two weeks immediately preceding any election and on election day, have the right to make application to any judge of the County Court of that county, for the purpose of obtaining an order entitling him to vote in the district in which he actually resides. The burden of proof shall be upon the applicant. The judge of the County Court if satisfied that the applicant is entitled, under the law, to vote at such election, and after determining the election district in which such person actually resides, may issue an order directing the district board of that district to permit such person to vote. Such person must reregister before voting at any subsequent election by court order or otherwise. If the applicant shall be refused the right to vote, due to inability of the district board or of the commissioner or of the county board to find the permanent regisration forms of such applicant, then in addition such applicant shall establish by reference to the registry lists of former elections, that he was previously registered. Such evidence shall be deemed sufficient to establish the fact that the applicant was formerly registered. If the order is directed to a district board, the district board shall certify and return the order at the close of the election to the commissioner."

A reading of the foregoing shows an intent by the Legislature that the only remedy available to a person whose name has been removed from the registry list is to make application to the judge of the county court for an order directing the District Board of Elections to permit such person to vote. If a person fails to avail himself of such remedy, he cannot qualify himself to vote at an election to be held in the same year in which his name is removed from the registry list. If a person whose name had been removed from the registry list could reregister and vote in the same year in which his name was removed, the language "such person must reregister before voting at any subsequent election by court order or otherwise" would be meaningless. It is clear from the entire context of the statute that "any subsequent election" refers to any general or primary election subsequent to the election held in the year in which disqualified voter's name has been removed by the County Board of Elections.

It is our opinion that persons whose names have been removed from the registry list during the year 1956 are not qualified to vote at the General Election to be held

on November 6, 1956 unless such persons secure from the judge of the county court an order directing the District Board to permit such persons to vote. Any attempted reregistration by such persons before municipal clerks to vote in the General Election of 1956 are therefore invalid.

To carry out the intent of the Legislature under the provisions of N.J.S. 19:31-15, it is our opinion that the County Board of Elections has the authority and the duty to do any and all things to prevent fraudulent and improper voting, including voting by persons whose names have been removed from the registry list for disqualification and who have not obtained an order of the county court permitting them to vote.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: SAUL N. SCHECHTER
Deputy Attorney General

SNS/LL

SEPTEMBER 26, 1956

HONORABLE ROBERT L. FINLEY
Deputy State Treasurer
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-29

DEAR MR. FINLEY:

Our opinion has been requested concerning two questions which have arisen in connection with the authority vested in the Division of Purchase and Property to award contracts respecting the construction of buildings or public works. The questions posed are (1) whether contracts, invoices, change orders and other documents executed with respect to the construction of a building or public work require the approval of an agency or department of the State other than the Division of Purchase and Property; and (2) whether contracts executed with respect to the construction of a building or public work may validly provide that approval or acceptance of the promised performance by an agency or department which did not execute the contract on behalf of the State is a condition precedent to payment.

I

IS APPROVAL OF CONTRACTS, INVOICES AND CHANGE ORDERS BY AGENCY OR DEPARTMENT OTHER THAN DIVISION OF PURCHASE AND PROPERTY NECESSARY?

We turn first to the pertinent provisions of Title 52 vesting contracting power in the Division of Purchase and Property:

> "All purchases, contracts or agreements, the cost or contract price whereof is to be paid with or out of State funds shall, except as otherwise provided in this act, be made or awarded only after public advertisement for bids therefor, in the manner provided in this act." (*N.J.S.A.* 52:34-6).

> "Any such purchase, contract or agreement may be made, negotiated, or awarded by the Director of the Division of Purchase and Property without advertising if the aggregate amount involved does not exceed $2,500.00, in any manner which he may deem effective to promote full and free competition whenever competition is practicable." (*N.J.S.A.* 52:34-7).

It appears evident that Chapter 48 of the Laws of 1954 (*N.J.S.A.* 52:34-6, *et seq.*) was intended to consolidate in one agency the letting of all contracts involving State funds, except as otherwise provided in the act. Further we fail to find any evidence in the act which establishes that the Legislature intended this authority to let contracts be exercised subject to the approval of other agencies or departments. Of course, this power may be subject to exceptions, expressed or implied, elsewhere appearing in legislative enactments; but in their absence there is conferred on the Division of Purchase and Property exclusive authority to enter into contracts.

In other words, *N.J.S.A.* 52:34-6, *et seq.*, in the absence of other qualifying legislation, seemingly vests in the Division of Purchase and Property the exclusive power to award contracts, and this power is exercisable without the approval of any other agency or department. However, as there may be exceptions from this general grant of power, it will be necessary in outlining the relationship of the Division of Purchase and Property with other departments of the State government to examine the aforementioned statutes in the light of the statutory scheme that exists with respect to the agency or department concerned. Thereby we can ascertain whether a department or agency has been excepted, either expressly or impliedly, from the provisions of *N.J.S.A.* 52:34-6, *et seq.*

As it is not feasible, for the reasons hereinabove stated, to set forth in one opinion our conclusions with respect to all State departments, we shall limit this opinion to a consideration of the relationship of the Division of Purchase and Property with the Department of Institutions and Agencies and the Department of Education. The opinion request seems to indicate that these departments should be among the first considered.

Department of Institutions and Agencies

In a Memorandum Opinion to the Department of Institutions and Agencies dated November 10, 1955, the functions and powers of the Division of Purchase and Property with respect to the construction of State institutional buildings were outlined as follows:

> "It is our opinion that N.J.S.A. 52:18A-19.2 through N.J.S.A. 52:18A-19.4 contains provisions of such a comprehensive nature as to effectively place in the hands of the Director of the Division of Purchase and Property all the functions, powers and duties which were formerly in the State Board of Control of Institutions and Agencies, the Department of Institutions and Agencies and the Commissioner of Institutions and Agencies with relation to the construction of State institutional buildings. Accordingly, the State Board of Control of Institutions and Agencies, the Department of Institutions and Agencies, and the Commissioner of Institutions and Agencies no longer have any functions, powers, duties or responsibilities with respect thereto."

Inherent in this transfer of functions and duties was a vesting of authority in the

Division of Purchase and Property to let contracts with respect to State institutional buildings without the approval of the Department of Institutions and Agencies. That authority is confirmed by *N.J.S.A.* 52:34-6, *et seq.*

In the absence of any subsequent legislation superseding Chapter 48 of the Laws of 1954 *(N.J.S.A.* 52:34-6, *et seq.)* it is our opinion that the approval of the Department of Institutions and Agencies is not required with respect to contracts, change orders, invoices, and other decuments executed in connection with the construction of State institutional buildings.

Department of Education

At the outset it is to be noted that the powers formerly vested in the State Board of Control of Institutions and Agencies with respect to construction specifically excepted therefrom the State Board of Education. *R.S.* 30:3-7. Thus, the Division of Purchase and Property did not by virtue of *N.J.S.A.* 52:18A-19.2 and 52:18A-19.3 (transferring certain functions and powers of the Department of Institutions and Agencies) obtain any such powers or functions with respect to the State Board of Education.

It is our understanding that the Department of Education is presently engaged in the construction program authorized by Chapter 360 of the Laws of 1952. By that enactment there was appropriated to the Department of Education from the State Teachers' College Building Construction Fund certain sums for the purpose of constructing, reconstructing, repairing and developing the several State Teachers' College buildings and for providing equipment and facilities therefor. An additional appropriation from the Fund was made by Chapter 2 of the Laws of 1956.

The 1952 enactment provides as follows:

> "3. The State Treasurer is hereby authorized, empowered and directed and it shall be his duty to set up and maintain the aforementioned appropriation in the 'State Teachers' College Building Construction Fund', established heretofore pursuant to the statutes of this State. The funds herein appropriated may be requisitioned by the State Board of Education for the uses and purposes specifically enumerated herein subject to the approval of the Director of the Division of Purchase and Property in the Department of the Treasury and subject to the same restrictions and control as are exercised over all other appropriated State funds, but not inconsistent with the provisions of chapter three hundred and forty of the laws of one thousand nine hundred and fifty-one."
>
> * * *
>
> "7. The State Board of Education, subject to the approval of the Director of the Division of Purchase and Property in the Department of the Treasury, is hereby authorized and empowered to acquire, on behalf of the State, within the limits of available appropriations therefor, such lands that may be necessary to carry into effect the aims and purposes of this act either by purchase, gift, grant, devise or by the exercise of the power of eminent domain; and, through the said Division of Purchase and Property in the Department of the Treasury, is further authorized and empowered to do all things necessary to carry out the provisions of this act and to give full force and effect thereto."
>
> "8. The State Board of Education, subject to the approval of the State House Commission, is further authorized and empowered to use for buildings and equipment at the State Teachers' Colleges any money or other property heretofore or hereafter acquired by gift or otherwise for such purposes, in addition to the amounts appropriated for such purposes by this or any other law."

Thus with reference to the construction, development, etc. authorized under the aforementioned act, it would seem that the State Board of Education is authorized, subject to approval of the Director of the Division of Purchase and Property, to enter into contracts acquiring lands. However, with respect to matters other than the acquisition of land the statute provides that the State Board of Education is empowered to do these things "through the said Division of Purchase and Property".

It is well settled that in construing a statute "it is to be assumed that the Legislature was and is thoroughly conversant with its own legislation." *State* v. *McCall,* 14 *N.J.* 538, 547 (1954); *Barringer* v. *Miele,* 6 *N.J.* 139, 144 (1951). The Legislature being charged with knowledge of its own legislation enacted Chapter 48 of the Laws of 1954 *(N.J.S.A.* 52:34-6, *et seq.)* well knowing that by Chapter 360 of the Laws of 1952 there had been conferred on the State Department of Education certain powers with respect to the State Teachers' College building construction program. Was there a repeal by substitution?

Chapter 48 of the Laws of 1954 applies to *"all* purchases, contracts or agreements, the cost or contract price whereof is to be paid with or out of State funds" [emphasis supplied]. This indicates a legislative intent to cover in one statute the entire subject matter of the award of State contracts. By force of this legislative declaration the provisions of Chapter 360 of the Laws of 1952 with respect to letting contracts are to be discarded, not upon the ground of repeal or because of inconsistency, but by way of substitution. *Cf. Board of Education* v. *Tait,* 81 *N.J. Eq.* 161 *(E. & A.* 1913); *McGarvey* v. *Board of Pension Commissioners,* 119 *N.J.L.* 390 *(E. & A.* 1938). The words of Justice Garrison in the *Tait* case, *supra,* succinctly state the principle:

> "The doctrine in question is that when a general rule is provided by the legislature to cover an entire subject-matter, all earlier and different legislative rules touching such matter are to be discarded in favor of such later rule." (81 *N.J. Eq.* at *pp.* 162, 163)

Accordingly, it is our opinion that in the absence of subsequent legislation superseding Chapter 48 of the Laws of 1954 *(N.J.S.A.* 52:34-6, *et seq.)* that contracts, change orders, invoices, and other documents executed by the Division of Purchase and Property in connection with the construction program authorized by Chapter 360 of the Laws of 1952 are not subject to the approval of the Department of Education.

The position of the Division of Purchase and Property with respect to Rutgers University was set forth in Formal Opinion 1956 — No. 9, dated July 2, 1956. There you were advised 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.

II

MAY A CONTRACT VALIDLY PROVIDE THAT APPROVAL OF PROMISED PERFORMANCE BY AN AGENCY OR DE-

PARTMENT WHICH DID NOT EXECUTE THE CONTRACT ON BEHALF OF THE STATE BE A CONDITION PRECEDENT TO PAYMENT?

We now turn our attention to the second of your inquiries. This presents for consideration the validity of making payments under a contract contingent upon the acceptance of the work by an agency or department of the State which did not execute the contract on behalf of the State. The problem posed requires that we examine briefly the subject of conditions in a contract.

Initially we note this observation of the court in *Duff* v. *Trenton Beverage Co.*, 4 *N.J.* 595 (1950):

> "The parties may make contractual liability dependent upon the performance of a condition precedent; . . . A condition in a promise limits the undertaking of the promisor to perform, either by confining the undertaking to the case where the condition happens, or to the case where it does not happen. By its very nature, a conditional promise becomes absolute only upon performance of the prescribed condition." (at *pp.* 604, 605).

Without more this statement would seem to answer the query posed, but we will not rest our position on that alone.

Building and construction contracts are governed by the general principles of law applicable to contracts generally, *Terminal Const. Corp.* v. *Bergen County, etc., Dist. Authority*, 18 *N.J.* 294, 310 (1955), and this includes conditions precedent and subsequent, 9 *Am. Jur., Building and Construction Contracts*, §16, *p.* 13. A promise in terms conditional on the satisfaction or approval of a third party is common in contracts. In many contracts it is expressly provided that some act of a third person shall be a condition of a promisor's duty to pay money or to render some other specified performance, 9 *Am. Jur., Building and Construction Contracts*, §33, *p.* 23; 3 *Corbin on Contracts* (1951), §649, *p.* 587; 3 *Williston on Contracts* (*Rev. ed.* 1936) §675A, *p.* 1943, for parties to a contract are at liberty to agree upon a condition precedent upon which their liability shall depend. *Kennedy* v. *Westinghouse Elec. Corp.*, 29 *N.J. Super.* 68, 78 (*App. Div.* 1953), affirmed 16 *N.J.* 280 (1954); *Duff* v. *Trenton Beverage Co., supra* (at *p.* 604). Such stipulations in contracts are valid and upheld by the courts. *United States* v. *Bussey*, 51 *Fed. Supp.* 996, 998 (*D.C. Calif.* 1943).

Illustrative of such contracts are promises to pay for land subject to the approval of title by a third party, *Atlas Torpedo Co.* v. *United States Torpedo Co.*, 15 *S.W. 2d* 150 (*Tex. Civ. App.* 1929); or to purchase a lease provided its validity is approved by a third party, *Wilhelm* v. *Wood*, 151 *App. Div.* 42, 135 *N.Y. Supp.* 930 (*Sup. Ct.* 1912). In this jurisdiction our courts have been called upon many times to give effect to contracts providing that certain rights shall accrue or be withheld upon the issuance of a certificate of an architect or engineer. *Byrne* v. *Sisters of St. Elizabeth*, 45 *N.J.L.* 213 (*Sup. Ct.* 1883); *Bradner* v. *Roffsell*, 57 *N.J.L.* 412 (*E. & A.* 1894); *Landstra* v. *Bunn*, 81 *N.J.L.* 680 (*E. & A.* 1911); see *Schauffelee* v. *Greenberg*, 83 *N.J.L.* 737, 738 (*E. & A.* 1912); *T. F. Callahan, Inc.* v. *Commrs., etc., Union Twp.*, 102 *N.J.L.* 705 (*E. & A.* 1926); see *Annotations*, 54 *A.L.R.* 1255 and 110 *A.L.R.* 137. Our attention has not been brought to any case in this jurisdiction in which the validity of such provisions has been successfully challenged. Nor, are we aware of any rule of law or of public policy which forbids the parties to a contract to submit to a third party for determination or decision the question of satisfactory performance.

Too, the duty to pay for work or goods may be conditioned on the promisor's satisfaction as contracts requiring the work to be satisfactory to the employer are valid. *Williams* v. *Hirshorn*, 91 *N.J.L.* 419 (*Sup. Ct.* 1918); *Gwynne* v. *Hitchner & Yerkes*, 66 *N.J.L.* 97 (*Sup. Ct.* 1901); *Restatement, Contracts* §265.

Accordingly, the Division of Purchase and Property may validily provide in contracts that payment shall be conditional on the acceptance or approval of the work or materials by an agency or department which did not execute the contract on behalf of the State. As a matter of policy, there may be merit in conferring upon the using department which is versed in the field, the authority to accept the performance.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: HAROLD ASHBY
Legal Assistant

SEPTEMBER 28, 1956

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

MEMORANDUM OPINION—P-30

DEAR COMMISSIONER MCLEAN:

You have asked our opinion concerning the enforceability of a clause which is proposed to be inserted in deeds for the grant of riparian lands by the State. The clause reads:

> "This grant is made with the understanding that the lands herein described and conveyed shall not be used for the purpose of ingress to or egress from a lagoon or bayou lying inshore of the aforesaid granted lands other than such lagoons or bayous as are shown on the map attached hereto and made part hereof until such permission is authorized, and upon payment of such additional compensation and upon such other terms as shall be fixed by said Department of Conservation and Economic Development, Division of Planning and Development, or its successors in function."

You inform us that additional compensation is charged to the upland owner for a grant of riparian lands if his application discloses a proposed lagoon or bayou construction inshore from the mean high water line. Instead of $5.00 per front foot, for example, a lump sum consideration in excess of that amount (usually at the rate of one-tenth of the front foot consideration for each foot of lagoon frontage) is fixed by the Council as the purchase price of the grant, within its discretion to determine the compensation for riparian deeds pursuant to R.S. 12:3-10.

The lagoon clause is intended to guarantee additional compensation to the State at the same rate, in the event that the State's grantee or his assignee seeks a permit to dredge in order to admit tidal waters to his upland at any time subsequent to the

grant. In legal effect, this is a covenant that the grantee will not construct a lagoon on his upland without the payment of additional compensation upon application for a permit to dredge. In practical terms, a permit to dredge will be requisite in all cases because the flow of tidal waters into the lagoon is accomplished through dredging both below and above the mean high water line.

Grants of riparian lands by the State are authorized in Chapter 3 of Title 12 of the Revised Statutes. R.S. 12:3-12 specifically sets forth that the State may require in its interests covenants, clauses and conditions in such grants. The lagoon clause as a covenant is enforceable against the grantee, his heirs and assignees.

The only foreseeable challenge against the lagoon clause is that it violates the constitutional rights of the grantee under the equal protection clause of the fourteenth amendment to the Federal Constitution and of Article I, Paragraph 1 of the New Jersey Constitution. This opinion therefore deals with the enforceability of the clause upon such challenge.

Riparian grants are voluntarily entered into by the State and private persons as grantees. The owner of upland under the conclusive authorities in this State has no right to compel a grant of the adjoining lands under tidewaters by writ of mandamus or other legal process. *Leonard* v. *State Highway Dept.*, 24 N.J. Super. 376, 384 (Ch. Div. 1953).

The legal issue of the enforceability of the lagoon clause would arise therefore only in a proceeding to compel the issuance of a permit to dredge to open up a lagoon or bayou without the payment of additional compensation. The upland owners' argument depending upon the equal protection clause would be that the State penalized the landowner arbitrarily in denying a permit without the payment of additional compensation.

Under the facts supplied to us, there is, contrary to the above assertion, a reasonable basis for the covenant to pay additional compensation upon the construction of a lagoon. The Bureau of Navigation has received for filing in the past year maps showing an extension of 60 miles of waterfront through new lagoon construction. By the statute regulating power vessels on tidal waters (L. 1952, c. 157, N.J.S.A. 12:7-44) the State is compelled to supervise and police the additional miles of waterfront in lagoons and bayous. The employment of new personnel, including harbor masters, in the Department of Conservation and Economic Development, as well as the construction of further navigation aids, should necessarily result.

We are of the opinion, therefore, that the courts would enforce the lagoon clause which you have referred to us on the ground that the State may impose a supplemental charge upon property owners who add to the policing cost and burden of the State by opening up new tidal waters. The insertion of the lagoon clause in riparian deeds is a reasonable exercise of the discretion vested by the Legislature in the Council of the Division of Planning and Development and in the Commissioner of the Department of Conservation and Economic Development to issue deeds for riparian lands.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

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OCTOBER 9, 1956

HONORABLE JOSEPH MCLEAN, *Commissioner*
Dept. of Conservation and Economic Development
State House Annex
Trenton, New Jersey

MEMORANDUM OPINION—P-31

DEAR COMMISSIONER MCLEAN:

Our opinion has been requested as to the authority in the Department of Conservation and Economic Development to allocate the sum of $7,500.00 for the construction of new bulkheads to replace the deteriorated bulkheads at the municipal wharf, owned by the City of Salem and fronting on the Salem River. Because the proposed construction will be located approximately 1¼ miles upstream from the Delaware River on a body of water flowing into the Delaware River and therefore, not in the Delaware River itself, you have raised the question whether the proposed construction comes within the geographical area in which funds may be appropriated under Chapter 100 of the Laws of 1956.

Chapter 100 provides that the Department of Conservation and Economic Development may spend $1,000.000.00 for any construction or maintenance of beach protection projects, bulkheads, backfills, groins, jetties, seawalls, breakwaters, beach fills or dunes, pumping of sand, advertising and inspection costs within the projects outlined in R.S. 12:6A-1. R.S. 12:6A-1 empowers the Department to repair, reconstruct or construct bulkheads within the following geographical area:

> "* * * along the Atlantic Ocean in the State of New Jersey, or any beach front along the Delaware Bay or Delaware River, Raritan Bay, Barnegat Bay and Sandy Hook Bay, *or any inlet or estuary or any inland waters adjacent to any inlet or estuary along the shores of the State of New Jersey,* * * *"

The Appropriations Act (L. 1956, c. 100) requires matching expenditures by the county or municipality participating in the beach project. We assume that the City of Salem has furnished evidence of its commitment to expend the matching amount of $7,500.00 for the construction of the proposed bulkheads.

Since the construction is not to be built on any of the named body of waters such as the Atlantic Ocean, Delaware Bay or Delaware River, it becomes necessary to consider whether the location of this project is within the geographical area set forth in the last part of the above quoted statute:

> "* * * any inlet or estuary or any inland waters adjacent to any inlet or estuary along the shores of the State of New Jersey, * * *"

The words "any inlet or estuary" refers to the phrase "along the shores of the State of New Jersey". Your department, therefore, has authority to allocate money for this bulkheading if it is upon "* * * any inlet or estuary * * * along the shores of the State of New Jersey, * * *".

According to your department, the water in the vicinity of this project is saline and ebbs and flows with the tide in the Delaware River. Further information from the recent coast and geodetic survey, United State Dept. of Commerce (1955) *Tide Tables —East Coast—North and South America Including Greenland,* page 208, Table 2, shows that the daily rise and fall of the tide for Salem Cove, which is where the Salem

River empties into the Delaware River, is approximately 5.3 feet. The same table indicates that the daily range of tide at the location of the proposed construction is also 5.3 feet. The tidal pull at the mouth of the river and at the place of the proposed bulkheading is of exactly the same force.

An estuary is defined by Black Law Dictionary, (4th Ed. 1951) in the following manner:

> "That part of the mouth or lower course of the river flowing into the sea which is subject to the tides; enlargement of a river channel towards its mouth in which the movement of the tide is very prominent."

In *Vail* v. *McGuire,* 50 Wash. 187, 96 Pac. 1042 (1908), the Supreme Court of Washington held that an estuary of Puget Sound included that part of the Snohomish River, a tributary of Puget Sound which was affected by the ebb and flow of the tide from Puget Sound.

The phrase contained in the statute which refers to the "shores of the State of New Jersey" should be considered as having a fixed and definite meaning. In its ordinary sense "shore" signifies the land that is periodically covered and uncovered by the tide. All between ordinary high and low-water mark is within that denomination. The term "shore" is inapplicable to non-tidal rivers. *Gough* v. *Bell,* 21 N.J.L. 156, 162 (Sup. Ct. 1847); *Attorney General* v. *Central Railroad Company,* 68 N.J. Eq. 198, 210 (Ch. 1904); *Morrison* v. *First National Bank of Skowhegan,* 88 Me. 155, 33 Atl. 782, 783 (1895); see *Child* v. *Starr,* 4 Hill, 369, 375 (N. Y. Ct. of Errors, 1843).

We advise you therefore that you have authority to approve the expenditure for the construction of new bulkheads fronting on the Salem River and owned by the City of Salem, as a project within the authorization for appropriations for matching sums for beach protection, bulkheading and related projects in the Appropriations Act (L. 1956, c. 100).

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

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OCTOBER 10, 1956

HON. ABRAM M. VERMEULEN
Budget Director
Division of Budget and Accounting
Department of the Treasury
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-32

DEAR MR. VERMEULEN:

You have forwarded to us a copy of Assemblyman Mosch's letter to you dated August 24, 1956 relating to Chapter 46 of the Laws of 1955, and have asked our opinion with respect to the question raised therein.

In his letter, Assemblyman Mosch says in part:

> "A reading of the provisions of the act indicate that the said commission is empowered to make a study of smoke and air pollution in the areas of New York and New Jersey specified in Section 32:19-3 of the Revised Statutes. Reference to the statutory provisions indicate that the areas referred to are bodies of water.
>
> "Since the jurisdiction of the Interstate Sanitation Commission is limited to the said areas this body would have no authority to proceed elsewhere. If the commission should proceed beyond the areas indicated it would have no lawful right to any sums of money for such purposes."

We cannot agree with this analysis of the scope and effect of the amendment of the Interstate Sanitation Commission Compact accomplished by the adoption of Chapter 46 of the Laws of 1955, the enactment of similar legislation by the States of New York and Connecticut and the enactment of Public Law 946 of the 84th Congress which gave Congressional assent to that amendment of the Compact.

The Compact creating the Interstate Sanitation Commission was authorized, with the consent of Congress, by legislation adopted by the States of New Jersey, New York and Connecticut. The Commission was established to deal with the control and abatement of pollution in tidal and coastal waters contiguous to the three States. By R.S. 32:19-3, the Commission was given power to make rules, regulations and orders with regard to the pollution of all the coastal, estuarial and tidal waters within or covering portions of the three States referred to in the statute. In carrying out its duties under the Compact, the Commission has taken steps to abate existing sources of pollution in the portions of the three States served by the Commission. Among other things, it has issued and had enforced orders requiring municipalities and other bodies involved to construct sewerage treatment works. (See e. g. *Interstate Sanitation Commission* v. *Township of Weehawken,* 1 N.J. 330 (1949)).

The problem of air pollution has been of increasing concern to various State and local governments during recent years. In 1954, by Chapter 212 of the Laws of 1954, New Jersey established an Air Pollution Control Commission in the Department of Health. The functioning of the Commission was necessarily limited to the geographical boundaries of this State.

However, it was recognized that, particularly in the heavily industrial metropolitan areas of northern New Jersey and New York City, the problem transcended state boundaries. Smoke and other polluting materials originating in one state crossed the state line and affected the lives and property of people of the other state. As was stated in the memorandum accompanying the New York legislation (Chapter 422 of the Laws of 1955) which is a counterpart to Chapter 46 of the Laws of 1955 "it is a recognized fact that air pollution does not stop at a state boundary, that it certainly is an interstate problem and can only be controlled by interstate cooperation".

Chosen to make the study of interstate smoke and air pollution was the Interstate Sanitation Commission. To provide it with authority to act, the original Compact was amended by the enactment of Chapter 46 of the Laws of 1955 and complementary legislation of New York and Connecticut, followed by a grant of Congressional consent to the amendment.

Chapter 46 of the Laws of 1955 and the similar statutes enacted by New York and Connecticut authorized and empowered the Interstate Sanitation Commission "to make a comprehensive study of smoke and air pollution in the areas of New York

and New Jersey specified in section 32:19-3 of the Revised Statutes and the problems caused thereby", the study to include a survey of the sources and extent of the pollution, property damage caused thereby, its effect upon public health and comfort, and relevant meteorological, climatological and topographical factors.

The Commission was ordered to make a report to the Governors and the Legislatures on or before February 1, 1956; this was later extended to February 1, 1957. The act further provided:

> *"The report shall set forth the findings of the commission, its recommendations for a smoke and air pollution control program and a plan for the administration of such a program by an appropriate agency.* It shall also include a study and evaluation of existing laws in the States of New York, New Jersey, Connecticut and in other jurisdictions relating to smoke and air pollution and drafts of proposed legislation to carry out the recommendations of the commission." (Italics added)

Public Law 946 of the 84th Congress which gave Congressional consent to the amendment of the Interstate Sanitation Act provided in part as follows:

> "The further consent of Congress is given to the States of New York, New Jersey, and Connecticut to confer upon the Interstate Sanitation Commission, in accordance with chapter 286 of the laws of the State of New York (1956), chapter 46 of the laws of New Jersey (1955) (as amended by chapter 23 (1956), and public act 27 of the laws of Connecticut (1955), *the power to make studies of smoke and air pollution within any and all of the territory served by the Commission.* Such studies shall include surveys of the sources and extent of the pollution, property damage caused thereby, the effect upon public health and comfort, and relevant meteorological, climatological, and topographical factors." (Italic added)

In considering the powers granted to the Interstate Sanitation Commission by the amendatory legislation just outlined, it is well to bear in mind the settled rules of law applicable to statutory construction. As Mr. Justice Heher said recently in *Alexander* v. *N. J. Power & Light Co.*, 21 N.J. 373, at p. 378:

> "* * * 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 lawgiver 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 of 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). * * *"

Further, it should be noted that the powers conferred upon an agency or commission include not only those expressly granted but also those which, by necessary or fair implication, are incidental to a full effectuation of the legislative intent in the light of the purposes for which the agency or commission was created. *Rosenthal* v. *State Employees' Retirement System of New Jersey*, 30 N.J. Super. 136, 142 (App. Div. 1954); *Application of Waterfront Commission of New York Harbor*, 39 N.J. Super 33, 39 (Law Div. 1956)

Keeping in mind these settled rules of statutory construction, it is our opinion that the actvities of the Interstate Sanitation Commission, in its study of smoke and air pollution, are not to be limited to the physical areas of the waters of the Interstate Sanitation district. The evident legislative intent is to require studies of smoke and air pollution which affect the territory served by the Commission. By the express language of Chapter 46 of the Laws of 1955, "the study shall include a survey of the sources and extent of such pollution". Obviously the Commmission is not to be limited to the physical areas of the waters of the district.

The problems with which the Interstate Sanitation Commission is to be concerned in its study are those existing in the areas of the States of New Jersey and New York which it serves. How far the Commission will have to go to properly evaluate the sources and causes of interstate smoke and air pollution is a matter for the expert decision of the Commission itself, to be made in the course of its study. It clearly has the implied power to make that determination as well as the power and duty to recommend to the Governors and Legislatures of the states the boundaries of the area to which any proposed interstate control of smoke or air pollution should be limited.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: HAROLD KOLOVSKY
Assistant Attorney General

HK:rk

OCTOBER 17, 1956

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

MEMORANDUM OPINION—P-33

DEAR MR. GASSERT:

This will acknowledge receipt of your recent communication in which you request our opinion on the following question:

"Does the merger of two or more corporations, one or both of which own motor vehicles, have the effect of transferring the ownership of the motor vehicles under the provisions of Chapter 10 of Title 39 so that the registration of those motor vehicles becomes void under the provisions of R.S. 39:3-30, or if not, is a mere change on the certificate of ownership to the name of the continuing corporation sufficient and permitted by law?"

It is our opinion and you are so advised that where there is a merger of two or more corporations there is not any transfer of title to the motor vehicles owned by the continuing corporation, but there is a transfer of title to the motor vehicles owned by those corporations which are merged into the continuing corporation and such transfer of title must be made in the manner prescribed by the Motor Vehicle Certificate of Ownership Law and upon such transfer the registration of those motor vehicles becomes void under the provisions of R.S. 39:3-30.

The term "merger" means the absorption of one corporation by another which retains its name and corporate identity with the added capital, franchises and powers of the merged corporation. It is the uniting of two or more corporations by the transfer of property to one of them which continues in existence the other being merged therein. 15 Fletcher, *Cyclopedia Corporations* (1938) §7041, p. 8.

The corporation merged into the continuing corporation "will pass out of the picture". *Bingham* v. *Savings Invest. &c., East Orange,* 101 N.J. Eq. 413 (Ch. 1927) aff'd. 102 N.J. Eq. 302 (E. & A. 1928).

You have indicated to us that it has been contended that the merger of corporations under the General Corporation Act does not contemplate a transfer of ownership of any property of the corporation and consequently no transfer of title should be required other than a change of name on the certificate of ownership.

This contention is apparently based upon a provision of Section 14:12-5 of the Revised Statutes (Corporations, General) which provides:

"When such merger or consolidation is effected, all the rights, privileges, powers and franchises of each of such corporations, both of a public and private nature, all real and personal property, all debts due on any account, as well for stock subscriptions as all other things in action or belonging to each of the corporations, and all and every other interest, shall vest in the consolidated corporation as effectually as they where vested in the several and respective former corporations. * * * "

Whatever effect the aforesaid provision of R.S. 14:12-5 may have on personal property other than motor vehicles, it is evident that it has no application to the transfer of title to a motor vehicle, for the Legislature has prescribed a specific method for transferring title to motor vehicles and these statutory provisions must be complied with strictly. This method differs from that prevailing and required as to other chattels. *Merchants Security Corp.* v. *Lane,* 106 N.J.L. 169 (E. & A. 1929) re-argument denied 106 N.J.L. 576 (E. & A. 1930); *Eggerding* v. *Bicknell,* 20 N.J. 106, 112 (1955).

That there is a transfer of title to the motor vehicles owned by the merged corporation subject to the provisions of the Motor Vehicle Certificate of Ownership Law appears indisputable in the light of the following provisions of said law.

N.J.S.A. 39:10-2 provides in part:

"As used in this chapter unless other meaning is clearly apparent from the language or context, or unless inconsistent with the manifest intention of the Legislature:

" * * *

" 'Person' includes natural persons, firms or copartnerships, corporations, associations, or other artificial bodies, receivers, trustees, common law or statutory assignees, executors, administrators, sheriffs, constables, marshals, or other persons in representative or official capacity, and members, officers, agents, employees, or other representatives of those hereinbefore enumerated.

" 'Buyer' includes purchaser, conditional vendee, lessee, bailee, transferee, chattel mortgagor, and any person buying, attempting to buy, or receiving a motor vehicle, under conditional sale contract, lease, bailment, transfer agreement, chattel mortgage, trust receipt or any other form of security or possession agreement, or legal successor in interest.

" 'Seller' includes manufacturer, dealer, lessor, bailor, transferror, conditional vendor, chattel mortgagee, and any person selling, attempting to sell, or delivering a motor vehicle, under conditional sale contract, lease, bailment, transfer agreement, chattel mortgage, trust receipt or other form of security or possession agreement, or legal successor in interest.

"The term 'sell' or 'sale' or 'purchase' or any form thereof includes absolute or voluntary sales and purchases, agreements to sell and purchase, bailments, chattel mortgages, leases, trust receipts and other forms of security agreement whereby any motor vehicles are sold and purchased, or agreed to be sold and purchased, involuntary, statutory and judicial sales, inheritance, devise or bequest, gift or any other form or manner of sale or agreement of sale thereof, or the giving or transferring possession of a motor vehicle to a person for a permanent use; continued possession for sixty days or more is to be construed as permanent use."

N.J.S.A. 39:10-9 provides (with an exception not here applicable) as follows:

"In all sales after a new motor vehicle is sold by the manufacturer, his agent or a dealer, and in every sale of a used motor vehicle, the seller shall, * * * execute and deliver to the purchaser, in the case of absolute sale, assignment of the certificate of ownership or assignment of bill of sale issued prior to the effective date of this amendment; if other than absolute sale, assignment of the certificate of ownership, subject to contract, or assignment of bill of sale, subject to contract, issued prior to the effective date of this amendment."

Our view in this matter, we believe, is further supported by the holding in the case of *Columbus & Southern Ohio Electric Co.* v. *West, Registrar* 140 Ohio St. 200, 42 N.E. 2d, 906 (Sup. Ct. 1942), where the Court considered the following question:

When there has been a consolidation under the Ohio General Corporation Act of constituent corporations which have during a given year registered their motor vehicles and paid the motor vehicles license fees thereon, must the consolidated corporation again register the motor vehicles and pay new license fees?

It had been urged upon the Court that by force of the provisions of Section 86:2368 of the General Code, which provided:

> "Such consolidated corporation shall be subject to all the liabilities and duties of each of such corporations so consolidated; and all property, real, personal and mixed, and all debts and liabilities due to any of said constituent corporations on whatever account, as well for subscriptions for shares as all other things in action of or belonging to each of such corporations, shall be vested in the consolidated corporation, and all property, rights, privileges, powers, franchises, and immunities and all and every other interest shall thereafter be as fully and effectually the property of the consolidated corporation as they were the property of the several and respective constituent corporations * * * "

the consolidated corporation takes over the license privilege of the constituent corporations and need not make application for new registration or secure new motor vehicle number plates.

In answer to this contention the Court said:

> "The above-quoted provisions are part of the General Corporation Act of Ohio. True, they do provide generally for the succession by the consolidated company to the 'privileges' theretofore enjoyed by the constituent companies. But it would, we hold, be a forced construction to interpret these general provisions as controlling the sharp and explicit clauses of Section 6294-1, providing that where there is a 'transfer of ownership' the 'registration * * * shall expire' and further providing that 'it shall be the duty of the original owner to immediately remove such number plates from such motor vehicle.' Before these explicit statutory provisions of Section 6294-1, the general statutory provisions of Section 8623-68 must give way. 37 Ohio Jurisprudence, 413, Section 152; *Leach* v. *Collins,* 123 Ohio St. 530, 533, 176 N.E. 77."

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHARLES J. KEHOE
Ass't Deputy Attorney General

CJK:ah

NOVEMBER 7, 1956

HONORABLE GEORGE C. SKILLMAN
Director, Division of Local Government
Department of the Treasury
Commonwealth Building
Trenton, New Jersey

MEMORANDUM OPINION—P-34

DEAR DIRECTOR:

You have requested our opinion as to whether it is legal for a borough to turn over to its Shade Tree Commission the funds which have been appropriated for its use, so that said funds may be held by the Commission in its own bank account and disbursed by it.

In our opinion the answer is in the negative. The statute governing Shade Tree Commissions (R.S. 40:64-1, et seq.) contains no authority for the transfer of such funds to the Commission or for their disbursement by that body, and makes no provision for the appointment of a treasurer by the Commission. R.S. 40:64-3 authorizes a three-member Commission to organize annually by the election of one of its members as president, and the appointment of a secretary; no mention is made of a treasurer. R.S. 40:64-11 provides for the appropriation of funds for the use of the Commission, and declares that all sums so appropriated by the governing body shall be "placed to the credit of, and subject to be drawn upon by the Shade Tree Commission for the purposes of its work." Likewise, under R.S. 40:64-13 all monies collected by the Commission either as penalties or as charges against real estate "shall be forthwith paid over to the municipal officer empowered to be custodian of the funds of the municipality, shall be placed to the credit of the Shade Tree Commission of such municipality and be subject to be drawn upon by the Commission for its work".

These provisions clearly indicate, in our opinion, that funds for shade tree purposes are, like most other municipal funds, to be kept in the custody of the municipal treasurer, to be disbursed by him upon warrant or certification by the Commission. We find no reason to read into the foregoing statutes any power in a Shade Tree Commission to hold and disburse funds, or to appoint a treasurer for that purpose.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

TPC:tb.

DECEMBER 5, 1956

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

MEMORANDUM OPINION—P-35

DEAR COMMISSIONER MCLEAN:

You have requested our advice as to what State officer or agency now is vested with the power formerly vested in the Board of Commerce and Navigation by R.S. 12:3-17, to survey tidewaters of the State and to prepare maps of the surveys showing what lines have been fixed and established as exterior lines for solid filling and pier lines to be filed in the office of the Secretary of State.

By Chapter 22, P.L. 1945, the authority of the Board of Commerce and Navigation was transferred to and vested in the Division of Navigation of the State Department of Conservation. Section 29 of Chapter 22 of the Laws of 1945 provided:

"The functions, powers and duties, records and property . . . . of the Board of Commerce and Navigation are hereby transferred to and vested in the Division of Navigation established under this act, to be exercised by the council thereof, in accordance with the provisions of this act. No action shall be taken by said council except upon approval of the Commissioner of Conservation."

The council referred to in Section 29, *supra,* which could exercise the authority of the former Board of Commerce and Navigation was known as the Navigation Council. It was created by Section 28 of Chapter 22 of the Laws of 1945 and consisted of nine members appointed by the Governor with the consent of the Senate.

The Legislature, in creating the Navigation Council, made all its actions, including the making of surveys and the fixing of bulkhead and pierhead lines under R.S. 12:3-17, subject to the approval or disapproval of the Commissioner of Conservation. This power was conferred on the Commissioner by Section 28, Chapter 22 of the Laws of 1945.

In 1948, Chapter 448, P. L. 1948, N.J.S.A. 13:1B-1 et seq., created the Department of Conservation and Economic Development and all of the powers and functions of the various divisions and councils of the former State Department of Conservation, including the authority of the Commissioner of Conservation, were transferred to this department. N.J.S.A. 13:1B-7 further provided that the powers, functions and duties transferred to the Department of Conservation and Economic Development were to be exercised through the Division of Planning and Development, exclusive of powers, functions and duties which were specifically transferred to other divisions or agencies within the Department.

By N.J.S.A. 13:1B-8, the authority vested in the Division of Planning and Development is administered by the Director. N.J.S.A. 13:1B-8 provides:

"The Division of Planning and Development shall be under the immediate supervision of a director, who shall be a person qualified by training and experience to direct the work of such division. The Director of such division shall be appointed by the Governor, with the advice and consent of the Senate, and shall serve during the term of office of the Governor appointing him and until the director's successor is appointed and has qualified. He shall receive such salary as shall be provided by law.

"The director shall administer the work of such division under the direction and supervision of the commissioner, and shall perform such other functions of the department as the commissioner may prescribe."

We refer generally to Formal Opinion (1955) No. 45 on the powers granted by the Legislature to the Planning and Development Council of the Division of Planning and Development. The power to make surveys and to establish bulkhead and pierhead lines pursuant to R.S. 12:3-17, is not set forth as a specific power of the Council. The Council is vested, however, by N.J.S.A. 13:1B-13, with the authority to execute riparian leases or grants for the State, subject to the approval of the Governor and the Commissioner of Conservation and Economic Development. The regular administrative practice, we are informed, is to establish bulkhead and pierhead lines in riparian grants or leases at the outer limits of the grant (see *Bailey* v. *Driscoll,* 19 N.J. 363 (1955)) but without the endorsement or other approval of the Director of the Division of Planning and Development.

In summary, the Director of the Division of Planning and Development administers the powers, functions and duties of the Division under the direction and supervision of the Commissioner of Conservation and Economic Development, including the function of conducting surveys and of establishing bulkhead and pierhead lines pursuant to R.S. 12:3-17. In those instances, when a riparian grant or lease fixes a bulkhead or pierhead line, the concurring approval of the Director of the Division of Planning and Development, as the successor to the powers of the former Board of Commerce and Navigation, is requisite and should be endorsed on the riparian instrument.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

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DECEMBER 19, 1956

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

MEMORANDUM OPINION—P-36

DEAR COMMISSIONER HOLDERMAN:

You have inquired whether the "Rules and Regulations for Storing, Handling, Transportation and Utilization of Liquefied Petroleum Gases," adopted by the Division of State Police on January 2, 1951, are applicable to refineries.

These regulations were promulgated pursuant to the New Jersey liquefied petroleum gas law, L. 1950, c. 139; N.J.S.A. 21:1B-1 et seq.

Section 2 of that law (N.J.S.A. 21:1B-2) provides in part as follows:

"The Division of State Police shall make, promulgate and enforce regulations setting forth minimum general standards covering the design, construction, location, installation and operation of equipment for storing, handling, transporting by motor vehicle, tank truck, tank trailer, and utilizing liquefied petroleum gases and specifying the odorization of said gases and the degree thereof."

The State Police regulations referred to above, state (Section 1.2):

"*New and existing installations.* These regulations apply to all new liquefied petroleum gas equipment, systems and installations; existing installations may be required to comply with these regulations if satisfactory evidence is reported that any existing liquefied petroleum gas equipment system or installation is unsafe, provided however, that all existing equipment shall be maintained in conformity with these regulations."

The regulations further provide (Section 3.0):

"All liquefied petroleum gas equipment shall be installed and maintained

in a safe operating condition and in conformity with these regulations."

From the foregoing it appears that the regulations apply generally to all liquefied petroleum gas equipment, vessels and systems, including those located at refineries.

It is noted that refineries are excluded from certain provisions of the regulations. Thus, they are excluded from the requirement of Section 4 which calls for the submission to the State of plans and specifications for a proposed installation. Likewise, refineries are excepted from the requirements set forth in Section 5 of the regulations with reference to permits for operation. This exception is conditioned, however, upon compliance with the balance of the regulations under the supervision of the Bureau of Engineering and Safety. Thus, Section 5.0, subparagraph d, provides:

> "excepting from these requirements new or existing vessels, equipment, systems or modifications thereto in *any* factory, mill, workshop, place where goods are manufactured, printery, newspaper plant, public utility generating station, *refinery*, mine or quarry which *shall conform to these regulations* under the supervision of the Bureau of Engineering and Safety of the Department of Labor and Industry." (Italics ours)

Except to the extent noted above it is our conclusion that refineries in this state are subject to the State Police liquefied petroleum gas regulations adopted on January 2, 1951.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS L. FRANKLIN
Deputy Attorney General

TLF:lc

JANUARY 9, 1956

MR. REUBEN C. STROUSE, *Chairman*
Hunterdon County Board of Elections
Flemington, New Jersey

FORMAL OPINION, 1956—No. 1

DEAR MR. STROUSE:

You request our opinion as to whether your County Board of Elections should count and canvass absentee ballots voted in school elections.

Chapter 211 of the Laws of 1953 is known and may be cited as the "Absentee Voting Law (1953)"—N.J.S.A. 19:57-1 et seq., P.L. 1953, c. 211, p. 1577.

The Absentee Voting Law by section 3 provides:

> "3. The following persons shall be entitled to vote by absentee ballot in any election to be held in this State in the manner hereinafter provided."

The statute then defines a "military service voter" and a "civilian absentee voter", and the manner of obtaining ballots.

Section 6 of the act further provides:

> "6. In the case of any State-wide or county-wide election, the application or request shall be made to the county clerk of the county.
>
> In the case of any municipal election, the application or request shall be made to the clerk of the municipality; in the case of any school election, the application or request shall be made to the district clerk of the school district and in the case of any election to be held in any fire district, road district, sewerage district, street lighting district, water supply district or other special district, other than a municipality, created for specified public purposes within one or more municipalities, the application or request shall be made to the commissioners or other governing or administrative body of the district, or to the clerk of any municipality in, or forming part of, the district, in which such election district is situated, and in case such application or request is made to any such officer other than the county clerk, such officer shall forward the same to the county clerk forthwith."

* * *

With respect to the count and canvass of absentee ballots, section 31 of the act provides:

> "31. On the day of each election each county board of elections shall open in the presence of the commissioner of registration or his assistant or assistants the inner envelopes in which the absentee ballots, returned to it, to be voted in such election, are contained, except those containing the ballots which the board or the County Court of the county has rejected, and shall remove from said inner envelopes the absentee ballots and shall then proceed to count and canvass the votes cast on such absentee ballots, but no absentee ballot shall be counted in any primary election for the general election if the ballot of the political party marked for voting thereon differs from the designation of the political party in the primary election of which such ballot is intended to be voted as marked on said envelope after the canvass is completed, the respective county boards of election shall certify the result of such canvass to the county clerk or the municipal or district clerk or other appropriate officer as the case may be showing the result of the canvass by ward and district, and the votes so counted and canvassed shall be counted in determining the result of said election."

It will be noted that this section authorizes and directs the county board to certify the result of such canvass to the district clerk, or other appropriate officer as the case may be.

The office of District Clerk was first created by the original school law of 1903, and presently the power to appoint is detailed in R.S. 18:7-69, P.L. 1953, Chapter 255. The title of District Clerk was changed to that of Secretary, (R.S. 18:7-68, P.L. 1953, c. 255, p. 1751). This amended section in substance provided that the title of every district clerk in office from July 1, 1953 is changed to that of secretary.

The Absentee Voting Law should be liberally construed to effectuate its purposes and the cited sections clearly contemplate that a "military service voter" and "civilian absentee voter" may vote in school elections and the statute imposes upon the county boards of election a duty to count and canvass such absentee ballots. They should be

treated and counted in the same manner as absentee ballots for the general election and the result of the canvass certified to the appropriate district clerk.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: JOSEPH LANIGAN
Deputy Attorney General

JL:MG

JANUARY 11, 1956

MR. WILLIAM J. JOSEPH
Assistant to Secretary
Division of Pensions
State House Annex
Trenton, New Jersey

FORMAL OPINION, 1956—No. 2

DEAR MR. JOSEPH:

You have asked our opinion as to whether a teacher who retires as a member of the Teachers' Pension and Annuity Fund upon full retirement allowance at a time when she lacks a sufficient period of service in order to be covered by Social Security may continue to be paid such full retirement allowance in the event she subsequently becomes eligible to receive Social Security benefits by reason of public employment covered by Social Security.

You have brought to our attention a situation which may likely come about now that, by virtue of the authority of c. 37, P.L. 1955, the State Agency for Social Security has entered into a contract with the Secretary of the United States Department of Health, Education and Welfare for the purpose of extending Social Security coverage to members of the Teachers' Pension and Annuity Fund effective January 1, 1955. You ask us to contemplate a situation in which a teacher retires on full retirement allowance effective March 31, 1956, at a time when she will have only five quarters of coverage under Social Security instead of the six quarters which are necessary to entitle her to Social Security benefits. You ask us to assume further that such teacher is immediately re-employed as of April 1, 1956 as a substitute teacher, a position which is not covered by the Teachers' Pension and Annuity Fund, but which would be covered by Social Security. As a result of such employment for a period of three months, such teacher would obtain her sixth quarter of Social Security coverage, thereby making her eligible to receive Social Security benefits if she has attained the required age. Incidentally, during this three month period of employment as a substitute, she might still continue to receive her pension inasmuch as R.S. 43:3-5, as amended, removes the disqualification established by R.S. 43:3-2, as amended, against a pensioner holding public employment in the case of a retired member of the Teachers' Pension and Annuity Fund who is employed by the State, county, municipality, or school district "at a salary or compensation of not more than seven hundred fifty dollars ($750.00) per year."

Specifically, you ask whether or not, in the situation outlined in the paragraph

immediately above, the Teachers' Pension and Annuity Fund is entitled to offset against the full retirement allowance of such teacher, the amount received or receivable by her by way of Social Security benefits to which she may become entitled by reason of the sixth quarter of employment as a substitute teacher at a time when she was not a contributing member of the Teachers' Pension and Annuity Fund.

Sec. 68, c. 37, P.L. 1955, provides as follows:

> "When a member who retires reaches age 65, or upon retirement of a member after the attainment of age 65, the board of trustees shall reduce the retirement allowance by the amount of the old age insurance benefit under Title II of the Social Security Act paid or payable to him whether received or not. Membership in the retirement system shall presume the member's acceptance of and consent to such reduction. However, such reduction shall be subject to the following limitations:
>
> "(a) The amount of the old age insurance benefit shall be computed in the same manner as computed by the Federal Social Security Administration, except that in determining such benefit amount only the wages or compensation for services performed in the employ of the State, or 1 or more of its instrumentalities, 1 or more of its political subdivisions, or 1 or more instrumentalities of its political subdivisions, or 1 or more instrumentalities of the State and 1 or more of its political subdivisions shall be included. . ."

The above section requires that Social Security benefits based upon specified public employment are to be offset from retirement allowances from the Teachers' Pension and Annuity Fund. It does not limit this offset to benefits based upon public employment at a time before retirement under the Teachers' Pension and Annuity Fund Act. Furthermore, it would be a distortion of the clear purpose of c. 37, P.L. 1955, which is generally to integrate the Teachers' Pension and Annuity Fund with Social Security, if a member of the Teachers' Pension and Annuity Fund were to be permitted to avoid the necessity of giving the Fund credit for Social Security benefits based upon public employment by the simple expedient of retiring on full pension at a time when she does not have sufficient service covered by Social Security to entitle her to Social Security benefits, and thereafter accept employment as a substitute teacher which will entitle her to such benefits. In view of this fact, and in view of Sec. 68, c. 37, P.L. 1955, it is our opinion that the Teachers' Pension and Annuity Fund is entitled to offset against the retirement allowance of the teacher in the case which you have presented to us for consideration, the amount received or receivable by her for Social Security benefits to which she might become entitled by reason of service rendered subsequent to retirement in the employ of a school district or board of education.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHARLES S. JOELSON
Deputy Attorney General

csj;b

JANUARY 17, 1956

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

FORMAL OPINION, 1956—No. 3

DEAR GOVERNOR MEYNER:

You have asked our opinion concerning the status and tenure, if any, of Judge Frank T. Lloyd, Jr., of the Superior Court.

Judge Lloyd had his first judicial appointment in the former Circuit Court on December 15, 1947. He was appointed pursuant to the former statute (R.S. 2:5-4 et seq.) to replace Justice Albert E. Burling. His term expired upon the taking effect of the Judicial Article of the Constitution of 1947 (September 15, 1948) with the dissolution of the Circuit Court. This appointment was noted interim. The Senate in special session confirmed Judge Lloyd. He was eligible, as were all counsellors at law of ten years' standing, for appointment to the new Superior Court.

Judge Lloyd was appointed to the Superior Court on June 28, 1948 and confirmed on that day. His commission was dated September 15, 1948. His nomination for appointment by Governor Driscoll on June 28, 1948 stated that it was for the term prescribed by Article VI, Section VI, Paragraph 3 of the Constitution of 1947.

Article VI, Section VI, Paragraph 3 provides for initial terms of seven years and tenure upon reappointment for Justices of the Supreme Court and Judges of the Superior Court. As a first appointment, Judge Lloyd received a seven-year term without tenure.

Article XI, Section IV, Paragraph I of the Constitution of 1947, in providing for tenure upon reappointment for incumbent judicial officers at the time of the adoption of the Constitution is inapplicable to Judge Lloyd. The schedule contained in Article XI was intended to provide for the orderly transition between the former and the new judicial branches of government. It was intended to govern incumbent judges until the expiration of their terms but to have no effect as to the status and tenure of judicial officers thereafter appointed. See Vol. 2, Minutes of the Constitutional Convention of 1947, page 1195 (Committee on the Judiciary Report).

Judge Lloyd was not in judicial office on the date of the adoption of the Constitution of 1947 (November 4, 1947), and, therefore, is not one of the class of judges governed by the schedule providing for transition between the two court systems.

Article XI, Section IV, Paragraph 1 provides:

> "Subsequent to the adoption of this Constitution the Governor shall nominate and appoint, with the advice and consent of the Senate, a Chief Justice and six Associate Justices of the new Supreme Court from among the persons then being the Chancellor, the Chief Justice and Associate Justices of the old Supreme Court, the Vice Chancellors and Circuit Court Judges. The remaining judicial officers enumerated and such Judges of the Court of Errors and Appeals as have been admitted to the practice of law in this State for at least ten years, and are in office on the adoption of the Constitution, shall constitute the Judges of the Superior Court. The Justices of the new Supreme Court and the Judges of the Superior Court so designated shall hold office each for the period of his term which remains unexpired at the time the Constitution is adopted; and if reappointed he shall hold office during good behavior."

The Justices of the new Supreme Court and the Judges of the Superior Court who were in judicial office at the time of the adoption of the Constitution of 1947 continued to hold office for the period of their respective terms which remained unexpired on that date and were eligible for tenure upon reappointment. Judge Lloyd was not a Circuit Court Judge at the time of the adoption of the Constitution. He was not therefore in the class of judges who automatically constituted the Judges of the new Superior Court. He was not serving a term on November 4, 1947; the constitutional provision that incumbent judges serve out the periods of their terms which remained unexpired at the time the Constitution was adopted had no applicability to Judge Lloyd.

In my opinion, Judge Lloyd has no tenure either under Article VI, Section VI, Paragraph 3 or Article XI, Section IV, Paragraph 1 of the Constitution of 1947.

Respectfully,

GROVER C. RICHMAN, JR.
Attorney General

GCR:F:K

JANUARY 23, 1956

HONORABLE CARL HOLDERMAN
Commissioner of Labor and Industry
1035 Parkway Avenue
Trenton, New Jersey

FORMAL OPINION, 1956—No. 4

DEAR COMMISSIONER HOLDERMAN:

You have requested our opinion as to whether there is a conflict of interest between a physician's status as an insurance company examiner and as a medical examiner in the Division of Workmen's Compensation.

Your supplemental letter sets forth the following illustrative case:

> "Mr. A is injured in a plant and is referred to Dr B, who is retained by the insurance company, for examination as to the extent of his injuries. Dr. B later during informal proceedings in our Workmen's Compensation court, acting as a State employed Medical Examiner, examines Mr. A and recommends to the Referee who is presiding at the hearing, his diagnosis as to the extent of Mr. A's injuries."

Under the facts which you present, we are of the opinion that the interests of the state and the interests of insurance companies who insure respondents in workmen's compensation cases are conflicting. A state medical examiner in the Division of Workmen's Compensation who also examines workmen's compensation claimants on behalf of insurance companies has breached his duty of undivided loyalty to the state and may be subject to disciplinary action.

Faithful service is required by every employee.

> "The law implies an agreement on the part of the servant or employee

to faithfully serve and be regardful of the interest of his employer during the term of his service." 35 Am. Jur. 82.

If a state employee engages in outside employment, he must take care that he does nothing which will conflict with the state's interest or impede the effective performance of his official duties. See: Attorney General's Memorandum Opinion to Commissioner Palmer dated February 1, 1955; 56 C.J.S. 70; note 13 A.L.R. 909.

Informal hearings are held by the Division of Workman's Compensation in accordance with Section I of its rules. Rules No. 2 and 3 provide as follows:

"The State doctor shall examine the claimant and report his opinion of the extent of disability to the Referee for his consideration.

On the date of an informal hearing, the claimant or employer shall, on demand of the Referee, present to the State doctor at the time and place of the hearing, the report or reports of the attending physician or physicians, including x-rays, reports of x-rays and laboratory tests."

It thus appears that the state medical examiner has the duty to report impartially to the Referee to aid in the Referee's determination. Previous participation by him in the same case in the role of an insurance company examiner would seriously affect his ability to form an independent and impartial judgment. Even if he were to disqualify himself in every case in which he has previously acted, his ability to perform his duties properly would be impeded by being retained by an insurance company writing workmen's compensation insurance.

As to formal hearings, Rule 22 prohibits a state medical examiner from testifying for either side. This rule recognizes the impropriety of a doctor's participating on behalf or one of the litigants. The policy underlying a similar rule formerly in effect has been the subject of judicial comment in two cases.

In *Harrison* v. *Garlitti,* 120 N.J.L. 64, 65 (Sup. Ct. 1938) it was said,

"The effect of such a rule should be to keep the testimony and conclusions of such witnesses entirely impartial. If doctors, paid by the state to assist in the just administration of this important bureau, may be retained by either side in a contested case, they would soon come to be at least under the suspicion of leaning towards the side paying for their services. Public policy would seem to demand such a rule, and so we find no error here."

In *Frisby* v. *Good Humor Corp.,* (not officially reported) 17 N.J. Misc. 277, 278 (Com. Pl. Essex Co. 1939) the court discussed the case of *Harrison* v. *Garlitti,* supra, saying

"But this case, as its opinion clearly indicates applied to far different facts, i.e., in forbidding state doctors to 'be retained by either side' for the obvious reason that they would then 'soon come to be at least under the suspicion of leaning toward the side paying for their services.' Obviously, the Supreme Court reads the rule as applicable to the facts before it, i.e., the preferred testimony of the state doctor as an expert opinion witness, whose opinion might well be swayed by his retention as an expert and the payment for his services. For this swayed testimony to come in fact from the lips of one occupying the influential position of a state doctor, would clearly be against 'public policy.' But by the same token, the Supreme Court did not hold this rule to apply to a mere fact witness, as here. * * *"

Both opinions indicate the judicial attitude toward the retention of state doctors by litigants or insurers. It is clearly against public policy.

In *Latorre's case,* 302 Mass. 24, 18 N.E. 2d 357 (Sup. Ct. Mass. 1938) a physician who had made an x-ray examination of an employee at the request of the employee's physician was held not to qualify as impartial and thus not competent to serve as one of three industrial disease referees in a hearing where the employee examined by him was the claimant. At 18 N.E. 2d 358 the court said,

"Such a circumstance was utterly inconsistent with the requirements of plain justice and the demands of a full and fair hearing of an important issue of fact. * * * It may be that the physician was constant in his belief that the employee had the disease in question and that he was not conscious of any bias or prejudice; but one occupying a position, the duties of which in some respects resemble judicial functions, must avoid even the appearances of partiality or interest."

It is generally recognized that an expert who has been engaged by one of the litigants to a controversy does not possess complete objectivity. Samuel R. Gerber, M.D. in an article entitled *Expert Medical Testimony and the Medical Expert* appearing in *Physician in the Court Room,* (Western Reserve U. Press, 1954) at page 65 says:

"Under modern court procedures there are two factors which tend to thwart full and completely objective testimony by the expert witness. One factor is that at the present time in this country each litigant engages one or more experts to support his side of the question and to attempt to impress the judge and jury with the correctness of his stand, disregarding objectivity. If the expert were chosen by the court or a commission were set up for the purpose, it would obviate the natural feeling that the expert is, one might say, on one team. Such sentiment often leads to an unconscious bias or mental block on the part of the expert who dislikes to 'let down' the side who engaged him. * * *"

The importance of impartiality and objectivity on the part of medical examiners whose function it is to advise workmen's compensation officials has been discussed in Yerion, *Expert Medical Testimony in Compensation Cases,* 2 Law and Contemporary Problems 476 (1935). At page 487 the author comments as follows:

". . . In solving any problem connected with the administration of justice, there must be competent and honest officials to administer the law; and where compensation officials are the agents in securing impartial testimony, they must always be on the alert to keep off the list of impartial examiners those whose practice is derived in the main either from the insurance companies or from compensation claimants. While this may seem to be a large order, it is not impossible of accomplishment even under the existing systems of procedure. Where this is done and where sufficient power and funds are granted to obtain disinterested medical testimony when needed, most of the evils popularly associated with expert medical testimony will be overcome or greatly lessened. * * *"

For the foregoing reasons we advise you that the engagement or association of state medical examiners with insurance companies or affiliates of companies which write workmen's compensation insurance should be prohibited. This may be accomplished by regulation. It need not be a part of the rules of practice before the agency but could be a part of the internal regulations of the division.

Yours very truly,

GROVER C. RICHMAN, JR.
Attorney General

By: JOHN F. CRANE
Deputy Attorney General

JFC:jeb

MARCH 15, 1956

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

FORMAL OPINION, 1956—No. 5

DEAR DIRECTOR GASSERT:

You have advised us that:

"Ever since license plates have been manufactured at the State Prison, it has been the practice of the Motor Vehicle Division to advise the State Use Industries in the Department of Institutions and Agencies well in advance of the Motor Vehicle Division's requirements for new plates or inserts. Many months ago we advised the State Use Industries that we would want a new general issue of plates, the first supply of which were to be available in June of 1956. Already, 110,000 sets of these plates have been manufactured. The ordering of the dies, of the material and paint for the plates was all made by the State Use Industries through the Division of Purchase and Property.

"The Appropriations Committee on Thursday last questioned the legality of this procedure noting that the appropriation request to pay for these plates was in the budget for the fiscal year 1956-1957."

You have requested an opinion whether or not this procedure is in any way illegal or not in conformity with the existing statutes.

It is our opinion that you have correctly conformed with the proper statutory procedure and that your actions were legal and proper.

R.S. 30:4-92 to 100, originally adopted in 1918 (P.L. 1918, c. 147, Secs. 701-709), provides a comprehensive scheme by which institutional labor may be employed to manufacture products that can be used by various State agencies. This program is under the supervision of the State Board of Control of the Department of Institutions and Agencies, which through its State Use Division has in previous years manufactured license plates which are required by the provisions of Title 39 to be displayed by every motor vehicle registered in this State.

R.S. 30:4-95 states that:

"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."

and, R.S. 30:4-96 provides that:

"At least thirty days before the commencement of each state fiscal year, the proper officials of each institution, noninstitutional agency, department or agency of the state or the counties thereof, shall report to the state board estimates for the ensuing year of the amount of supplies of different kinds required by them, which shall refer to the catalogue issued by the state board, in so far as the articles indicated are included within such catalogue. No purchasing agency shall be allowed to evade the intent and meaning of this article by specifying slight variations from the standards adopted by the state board, when the articles provided by it in accordance with its standards are reasonably adapted to the actual needs of the purchasing agency."

Pursuant to the above section, you held numerous conferences with the State Use Division regarding your requirements for license plates which you intended to use beginning June, 1956. Furthermore, we have been informed that the State Use Division, by prior experience, would require approximately seventy-five weeks of normal production to fill the demand for these plates during the fiscal year commencing July 1, 1956 and approximately fifteen weeks to complete requirements needed in the first quarter of that fiscal year. We understand that these plates are manufactured and kept on an inventory basis by the State Use Division and when needed, are purchased by the Division of Motor Vehicles out of available appropriations.

Clearly, no funds have been expended by you in excess of your appropriations or amount limited by law. You have simply advised the State Use Division, as required by statute, of your forthcoming needs.

R.S. 30:4-100 provides a method by which the expenses incurred by the State Use Division to manufacture products may be underwritten prior to the time of actual purchase and use by an agency which has complied with the provisions of R.S. 30:4-95 and 96. Under this section, a working capital fund is maintained on a revolving basis. This fund is supported by direct appropriations from the Legislature, by proceeds from sales to private persons under certain conditions pursuant to R.S. 30:4-97, and by moneys transferred into this fund on a debit and credit arrangement from appropriations made available to agencies for which such products have been manufactured.

In this instance, the working capital fund bears the cost of the manufacture of the license plates. No delivery is made until the Division of Motor Vehicles is prepared to and does reimburse the State Use Division out of such funds as are appropriated for this purpose by the Legislature.

If the Legislature fails to appropriate the necessary funds with which to pay for the license plates, the State Use Division may hold the plates in inventory until

such time as the Legislature does make an appropriation to the Division of Motor Vehicles to consummate the purchase.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

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

DMS:kms

MARCH 22, 1956

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

FORMAL OPINION, 1956—No. 6

DEAR COMMISSIONER MCLEAN:

Our recent Formal Opinion (1955) No. 45 has prompted an inquiry from your department as to its effect on Formal Opinion (1949) No. 41. The 1949 opinion traced the history of the predecessors of the Planning and Development Council and concluded (we think erroneously) that the Council continued to possess the powers that had been possessed by its predecessors. Your request is directed to the questions designated as numbers 4 and 5 in Formal Opinion (1949) No 41. The question, and the anwers given, were:

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

The answer is "Yes".

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

The answer is "Yes".

Your inquiry states:

"What we would like to know is: Does this department have to secure the approval of the Planning and Development Council on location of waterfrant and jetty improvements, and does the department have to secure the approval of the Planning and Development Council on contracts to be awarded for such work?"

As we advised you in Formal Opinion 1955 No. 45 the functions of the Planning and Development Council are to formulate comprehensive policies with respect to natural and economic resources, State forests and parks, historic sites, and beach erosion, to advise the commissioner, to study the actvities of the Division of Planning and Development, to report to the Legislature and the Governor, and to approve riparian leases and grants. These are the only powers granted to the Planning and Development Council. The remaining powers of the former Navigation Council and

the Division of Navigation were transferred to the Department of Conservation and Economic Development to be exercised and performed through the Division of Planning and Development, P. L. 1948, Chapter 448, Section 7, N.J.S.A. 13:1B-7. The Director of the Division of Planning and Development is vested with the power of supervising and administering the work of the Division, P L. 1948, Chapter 448, Section 8, N.J.S.A. 13:1B-8.

The answers to questions 4 and 5 in Formal Opinion 1949 No. 41 are without support in the statutes and are inconsistent with our Formal Opinion 1955 No. 45. To that extent you should regard Formal Opinion 1949 No. 41 as overruled.

To answer your specific inquiries, the advice of the Planning and Development Council may, but need not be sought, on such matters as the location of waterfront and jetty improvements and contracts to be awarded for such work. It is clear that the Council does not have the power to approve or disapprove of such undertakings.

Yours very truly,

GROVER C. RICHMAN, JR.
Attorney General

By: JOHN F. CRANE
Deputy Attorney General

MARCH 23, 1956

HON. ROBERT L. FINLEY
Deputy State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION, 1956—No. 7

DEAR MR. FINLEY:

You have requested our opinion as to whether the retirement allowances payable by the Public Employees' Retirement System must be reduced by the amount of Social Security benefits based on public employment in the cases of veteran employees as well as non-veteran employees.

N.J.S.A. 43:15A-59 provides as follows:

"Upon attainment of age 65 by a retired member or upon retirement by a member after the attainment of age 65, the board of trustees shall reduce such member's retirement allowance by the amount of the old age insurance benefit under Title II of the Social Security Act payable to him. Membership in the retirement system shall presume the member's acceptance of and consent to such reduction. . ."

The above-quoted section requires generally that Social Security benefits shall be offset from retirement allowances paid by the Public Employees' Retirement System. It makes no differentiation as to veteran employees. In fact, the basic reason for enacting C 84, P.L. 1954, (N.J.S.A. 43:15A-1 et seq.) was to provide for integration of Social Security with the state's own retirement system. In return for the amounts saved by the retirement system through Social Security offsets, the legislation made

provision for additional benefits including an insurance program without additional cost to members. This life insurance program is available to veterans and non-veterans alike as long as they are covered by Social Security (N.J.S.A. 43:15A-64).

In view of the foregoing, it is our opinion that retirement allowances payable by the Public Employees' Retirement system must be reduced by the amount of Social Security benefits pursuant to N.J.S.A. 43:15A-59 in the cases of veteran employees as well as non-veteran employees.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHARLES S. JOELSON
Deputy Attorney General

MARCH 23, 1956

MR. JOHN J. ALLEN, *Secretary*
Teachers' Pension and Annuity Fund
State House Annex
Trenton, New Jersey

FORMAL OPINION, 1956—No. 8

DEAR MR. ALLEN:

You have asked our opinion as to the effect of C. 259, P.L. 1955, which by its terms became effective "immediately". After original passage by the legislature, it was vetoed by the Governor on August 8, 1955, and passed over the Governor's veto on January 5, 1956. Thus, January 5, 1956 is the effective date of the act. By its title, C. 259, P.L. 1955, is designated as "An Act to amend 'An act relating to the Teachers' Pension and Annuity Fund, and supplementing chapter 13 of Title 18 of the Revised Statutes,' approved August 11, 1953 (P.L. 1953, c. 360)." Chapter 259, P.L. 1955, amends c. 360, P.L. 1953 (N.J.S.A. 18:13-70.3) by increasing minimum retirement allowances to be paid to members of the Teachers' Pension and Annuity Fund.

However, C. 37, P.L. 1955, which was approved on June 1, 1955, and which by its terms became effective on January 1, 1956 as a result of a referendum of members of the Teachers' Pension and Annuity Fund as provided by law, expressly repealed "sections 24 to 110, inclusive of chapter 13 of Title 18 of the Revised Statutes of New Jersey with all amendments and supplements thereto," and provided a new pension system for teachers. It, therefore, appears that C. 259, P.L. 1955, attempted to amend a statute which had already been repealed on the effective date of C. 259, P.L. 1955. Thus, we must determine the effect of a statute which purports to amend a repealed statute.

In *Newark* v. *Grodecki*, 21 N.J. Misc. 241, (Essex County Court of Common Pleas), Judge Hartshorne states as follows (p. 245):

> ". . . even where a statute has been repealed our courts have held it may be amended, provided the new enactment is a law complete in itself. *Abrams* v. *Smith*, 98 N.J.L. 319. And such is the weight of authority. . ."

Analysis of C. 259, P.L. 1955, indicates that it is not "a law complete in itself" within the meaning of *Newark* v. *Grodecki* (supra). On the contrary, it is an amendment of only one section of a general pension statute (R.S. 18:13-24 et seq.), which had already been repealed in its entirety on the effective date of the amendatory legislation.

It is, therefore, our opinion that C. 259, P.L. 1955, cannot be given any effect.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHARLES S. JOELSON
Deputy Attorney General

csj;b

JULY 2, 1956

HON. ROBERT L. FINLEY
Deputy State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION, 1956—No. 9

DEAR MR. FINLEY:

You have inquired whether such functions as have been exercised in the past under the Division of Purchase and Property with respect to purchases and construction for Rutgers University have, under Chapter 61 of the Laws of 1956, approved June 1, 1956, been expressly reserved as functions of the Board of Governors there created.

Section 18 of the new Act provides in part:

> "The Board of Governors shall have general supervision over and be vested with the conduct of the University. It shall have the authority and responsibility to . . .
>
> (4) Direct and control the expenditures of the Corporation and the University in accordance with the appropriation acts of the Legislature, and as to funds received from the Trustees and other sources, in accordance with the terms, of any applicable trusts, gifts, bequests, or other special provisions. All accounts of the University shall be subject to post-audit by the State; * * *
>
> (6) (a) Purchase all lands, buildings, equipment, materials and supplies; and
>
> (b) Employ architects to plan buildings; secure bids for the construction of buildings and for the equipment thereof; make contracts for the construction of buildings and for equipment; and supervise the construction of buildings;
>
> (7) Manage and maintain, and provide for the payment of all charges on and expenses in respect of all properties utilized by the University; * * * "

The following statutory sections set forth the principal requirements and duties of State instrumentalities and the Division of Purchase and Property with respect to purchases and construction: N.J.S.A. 52:34-6, *et seq.;* 52:18A-19; 52:25-1, *et seq.;* and 52:27B-53, *et seq.*

As the result of the application of these sections, purchasing and contracting for State agencies and instrumentalities is handled by the Division of Purchase and Property. In the absence of other expressions by the Legislature, these provisions would control in the case of Rutgers.

It is our opinion, however, that by the new Act, the Legislature has expressly reserved such functions to the Board of Governors. It will be noted that the language quoted above vests, in plain and unambiguous words, authority and *responsibility* in the Board of Governors for purchasing all lands, buildings, etc., and for engaging architects and making contracts for construction, for management and maintenance, and for providing for payment of all expenses. This language is, in our opinion, controlling.

"There is no safer or better settled canon of interpretation than when the language is clear and unambiguous it must be held to mean what it plainly expresses." *Sutherland Statutory Construction,* 3rd Ed., Vol. 2, p. 334, quoted with favor in *Asbury Park Press* v. *City of Asbury Park,* 19 N.J. 183, 196 (1955).

"Laws are presumed to be passed with deliberation and with full knowledge by the Legislature of the existing law upon the subject." *Eckert* v. *New Jersey State Highway Department,* 1 N.J. 474 (1949); *Mahr* v. *State,* 12 N.J. Super. 253, 261 (Ch. Div., 1951). (See discussion at pages 190 and 196, et seq. in the *Asbury Park* case, *supra.*)

The Legislature has in fact clarified any remaining doubt with respect to the interpretation of the Act in its section 21 by providing as follows:

> "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.*"
> (Italics ours)

The Act also contains, in section 36(c), a repealer, effective September 1st, 1956, of all Acts and parts of Acts inconsistent with its provisions.

You are accordingly advised that under the new legislation on Rutgers, 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. This opinion is, of course, subject to the filing by the Rutgers Trustees of a certificate of adoption pursuant to section 37 of the Act.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID LANDAU
Legal Assistant

DL:kms

JULY 12, 1956

HON. PETER J. GANNON
Chief, Bureau of Navigation
Department of Conservation and Economic Development
1060 Broad Street
Newark, New Jersey

FORMAL OPINION, 1956—No. 10

DEAR MR. GANNON:

You have requested our opinion as to whether regular police officers of municipalities or other political subdivisions are empowered to serve summons or make arrests under the provisions of the Power Vessel Act, L. 1954, c. 236, N.J.S.A. 12:7-34.1 to 34.35, as well as under the Statute regulating power vessels on tidal waters, L. 1952, c. 157, N.J.S.A. 12:7-44 to 53. We understand from Mr. Gianetti of your Bureau that you are primarily interested in the question of arrests without warrant.

Although neither statute has been construed by the courts, it is our opinion that such police officers have the power to serve and execute process upon and to arrest, with or without warrant, any person violating the provisions of the cited statutes, provided, however, that in the case of an arrest without warrant the offense for which the arrest is made must have been committed in the presence of the arresting officer.

By the terms of Section 33 of the Power Vessel Act, N.J.S.A. 12:7-34.33, the Commissioner of Conservation and Economic Development and other officers therein enumerated (not including, however, police officers) are empowered to arrest without warrant any person violating any provision of the Act. Under Section 28, any such violation of the Act or of any rule or regulation issued thereunder where the penalty therefor is not specifically prescribed constitutes the violator a disorderly person. In this connection, only Section 19, dealing with the operation of power vessels by persons under the influence of intoxicating liquor or drugs, prescribes specific penalties.

It is provided by N.J.S. 2A:169-3 that any constable or police officer shall apprehend without warrant or process any disorderly person committing an offense in his presence and take him before any magistrate of the county where apprehended. Therefore, as to all sections of the Act save Section 19, there is power, and indeed a duty, on the part of police officers to arrest violators without warrant. As to Section 19, however, while the offense there treated is obviously more serious than any other offense recognized by the Act, there is no specific statutory authority for arresting violators thereof without warrant since an offense under that section does not constitute the violator a disorderly person. Nevertheless, it is well recognized in New Jersey that under the common law constables and other peace officers have the right to arrest any person who, in their presence, is engaged in or who threatens to engage in an affray or other breach of peace. *Noback* v. *Town of Montclair,* 33 N.J. Super 420 (L.D. Super. Ct. 1954); *Wiegand* v. *Meade,* 108 N.J.L. 471 (Sup. Ct. 1932); and *Collins* v. *Cody,* 95 N.J.L. 65 (Sup. Ct. 1920).

Although there are no New Jersey cases directly on point, it is well established in other jurisdictions that the operation of a motor vehicle while intoxicated constitutes a breach of the peace which justifies the arrest of the violator without warrant. See, for example, *Commonwealth* v. *Gorman,* 288 Mass. 294, 192 N.E. 618 (1934). In this connection it is interesting to note that under L. 1913, c. 67, Sec. 1, later superseded by L. 1921, c. 208, from which a large part of the present motor vehicle title was derived, it is provided that a person who operates a motor vehicle while intoxicated

is a disorderly person. (Under the present law, of course, arrests without warrant may be made for any violation of the Motor Vehicle Code, R.S. 39:5-25).

In Alexander's The Law of Arrest (1949) the author, discussing the elements of breach of the peace, says in Section 656, "It is not the doctrine of the Law that there is no breach of the peace unless the public repose is disturbed." In the same section the word "peace" is defined as "the state of *safety* and tranquility or quietness ordinarily existing in a community necessary to the comfort and happiness of every citizen." (Emphasis supplied).

From the foregoing it appears clear and comports with reason that the offense of operating a power vessel while under the influence of liquor or drugs or of permitting another to do so constitutes a breach of the peace for the violation of which a police officer may arrest without warrant.

As to the issuance of summons and the execution of process, these powers are given generally to members of municipal police departments by R.S. 40:47-15.

County detectives (N.J.S. 2A:157-2) and State Police officers (R.S. 53:2-1) possess all of the aforementioned powers with respect to the issuance and execution of summons and other process as well as the power of arrest, including arrest without warrant.

Insofar as violations of L. 1952, c. 157 are concerned, Section 9 thereof (N.J.S.A. 12:7-52) provides that the procedure for enforcement "shall be the same as in the case of other violations under Title 12 of the Revised Statutes relating to power vessels and motors and certain boats and craft operating in other than tidal waters." L. 1952, c. 157 is, therefore, enforceable in the same manner as the Power Vessel Act.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHRISTIAN BOLLERMANN
Deputy Attorney General

CB:jd

JULY 13, 1956

HONORABLE JOSEPH E. McLEAN
Commissioner of Conservation and Economic Development
State House Annex
Trenton 7, New Jersey

FORMAL OPINION, 1956—No. 11

DEAR COMMISSIONER McLEAN:

You have transmitted to us a request for an opinion concerning the power of law enforcement officials of your department to deal with juvenile offenders of the laws regulating the operation of power vessels.

Regulation of the operation of power vessels on waters other than tidal is provided for by *L.* 1954, c. 236, N.J.S.A. 12:7-34.1 et seq. Operation of a vessel on waters other than tidal while under the influence of liquor or drugs subjects the operator to fine or imprisonment, N.J.S.A. 12:7-34.19; persons committing violations of other

sections or regulations are declared to be disorderly persons and are subjected to fine or imprisonment, N.J.S.A. 12:7-34.28. Enforcement is by arrest and complaint, N.J.S.A. 12:7-34.33, jurisdiction being vested in the County Court, county district court, county criminal judicial court and municipal court to enforce the act, N.J.S.A. 12:7-34.31.

Operation of vessels on tidal waters is regulated by *L.* 1952, c. 157, N.J.S.A. 12:7-44 et seq. Persons violating the provisions of the act are made subject to fine or imprisonment, N.J.S.A. 12:7-51. The method of enforcing is the same as in the case of violations committed on waters other than tidal, N.J.S.A. 12:7-52.

As to violations occurring in waters other than tidal,

> "The Commissioner of Conservation and Economic Development, the Director of the Division of Planning and Development in the Department of Conservation and Economic Development, the Chief of the Bureau of Navigation in said department, the chief inspector, the assistant inspectors and the special inspectors appointed under the provisions of this Act, shall each have the right to make complaints hereunder and to arrest without warrant any person violating any provision of this act in his presence and bring the offender before any judge or magistrate having jurisdiction hereunder to receive the complaint for such violation." N.J.S.A. 12:7-34.33.

Controlling jurisdiction to supervise the use of tidal waters is vested in the harbor masters, N.J.S.A. 12:7-50, who are granted power to arrest and generally to act as special officers for the enforcement of the laws relating to power vessels, R.S. 12:6-6. They are required to follow the same procedure as that established for non-tidal waters, N.J.S.A. 12:7-52.

Within their respective areas of jurisdicton the harbormaster, inspectors and other officers mentioned above thus have power to make complaints and arrests for violations of the statutes.

In our opinion violation of either statute by a person under the age of eighteen years would constitute juvenile delinquency as defined by N.J.S. 2A:4-14. Paragraphs (1)c. and d. define as juvenile delinquency

> "c. Any act or offense for which he could be prosecuted in the method partaking of the nature of a criminal action or proceeding, or
>
> d. Being a disorderly person".

The procedure applicable to juvenile offenders is outlined in the rules of court R.R. 6:8-1 et seq. R.R. 6:8-3 provides as follows:

> "(a) Any duly appointed peace officer may take into custody without process any juvenile who in the opinion of the officer, is engaging in conduct defined by law as juvenile delinquency. Such action shall not be construed as an arrest but shall be deemed a measure to protect the health, morals, and well-being of the juvenile.
>
> "(b) The officer taking the child into custody shall make immediate arrangements to have the juvenile taken to his home, where he shall be released in the custody of his parents, guardian, or custodian, upon the written promise of the parents, guardian, or custodian to assume responsibility for the presence

of the juvenile in court should a hearing be scheduled; or such child may be released in the custody of a probation officer or other person designated by the court.

"(c) If it be impracticable to proceed as in paragraph (b) above, or if the nature of the offense is such as to require the immediate detention of the juvenile, the officer taking the child into custody shall make immediate arrangements to have the juvenile placed in a detention facility approved by the court.

"(d) Whenever a juvenile has been taken into custody in accordance with this rule, the officer taking the child into custody or his duly constituted superior officer shall proceed to file a complaint or preliminary notice with the court in accordance with Rules 6:8-1 or 6:8-2."

We are of the opinion that the officers to whom authority to enforce the laws relating to power vessels is given have authority to apprehend a juvenile and deal with him in the manner prescribed by the rules. For the purpose of enforcing the laws regulating power vessels they are peace officers within the meaning of the foregoing rules. Moreover, the rule does not purport to express a grant of authority to act but only spells out the procedure to be followed by one who is given authority by other law.

The issuance of summons is done by the judge or clerk of the court; service may be made by any peace officer or other person, R.R. 6:8-5. If it appears that immediate custody of the juvenile is in the public interest, the judge may issue a warrant which shall be executed by any peace officer or other person authorized by law, R.R. 6:8-6; R.R. 3:2-2(c).

Our advice in summarized form is as follows:

The Commissioner of Conservation and Economic Development, the Director of the Division of Planning and Development, the Chief of the Bureau of Navigation, the Chief Inspector, the Assistant Inspectors and the Special Inspectors on waters other than tidal and the Harbor Masters on tidal waters have the power to apprehend a juvenile who commits a violation of the laws or regulations governing the operation of power vessels in their presence.

After apprehending the juvenile the officer should make immediate arrangements to have the juvenile taken to his home. He should obtain a written promise of a parent to assume responsibility for the presence of the juvenile in court. When this has been done a complaint should be filed with the Juvenile and Domestic Relations Court charging a violation of one of the relevant statutes.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: JOHN F. CRANE
Deputy Attorney General

JFC:K

JULY 19, 1956

HON. ROBERT L. FINLEY
Deputy State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION, 1956—No. 12

DEAR MR. FINLEY:

Our opinion has been requested by the Hon. Archibald S. Alexander, State Treasurer, as to the right of the United States Treasury Department, Internal Revenue Service, to levy upon the accrued salaries of an employee of the State of New Jersey to obtain satisfaction of the employe's unpaid federal income taxes.

In our earlier study of this problem involving a levy upon the salary of an employee of one of the State Hospitals, we concluded "that there is no warrant in law for the action and procedure proposed by the Federal Government." *Formal Opinion* 1952, No. 4. Our subsequent study has only served to reinforce and confirm that conclusion, though not necessarily for the reasons there propounded.

Section 6321 of the Internal Revenue Code of 1954 provides that if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount of the tax shall be a lien in favor of the United States upon all property and rights of property, whether real or personal, belonging to such person. Section 6331 further provides that if any person liable to pay any tax neglects or refuses to pay the same after demand, collection of such tax is authorized by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which the lien provided in section 6321 exists. Section 6334 enumerates the property exempt from seizure, and further provides that notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by said section. Section 6332(a) imposes upon any person in possession of (or obligated with respect to) property or rights to property, subject to levy, upon which a levy has been made a duty to surrender such property or rights upon proper levy and demand. This duty is subject to an exception not pertinent to the present inquiry. The section further provides a penalty for violation of its requirements. Subsection (c) of section 6332 defines the term "person" as used in subsection (a) as including "an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation." "Person" is also defined in section 7701(a). There it is stated that when the term "person" is used in the Internal Revenue Code and where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, such term "shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation."

From a study of the foregoing provisions a crucial question would seem to be whether the State is a "person" in possession of property or rights to property of the taxpayer, within the meaning of section 6332. A State has sometimes been held to be included within the meaning of "person." *State of Georgia* v. *Evans*, 316 *U.S.* 159 (1942) [Sherman Anti-Trust Act]; *California* v. *United States*, 320 *U.S.* 577 (1944) [Federal Shipping Act]; *United States* v. *Graham*, 96 F. Supp. 318 (D.C.S.D. Cal. 1951), affirmed *sub nom.; State of California* v. *United States*, 195 F. 2d 530 (9th Cir. 1952), *cert. denied*, 344 U. S. 831 (1952) [Section 3678 (b), 1939 Internal Reve-

nue Code]; *State* v. *Longo,* 132 N.J.L. 515 (Sup. Ct. 1945), affirmed 133 N.J.L. 301 (E. & A. 1945) [forgery statutes]. It has also been held that the term does not include a state. *Banton* v. *Griswold,* 95 Me. 445, 50 A. 89 (Sup. Jud. Ct. 1901) [attachment statute]; *Baker* v. *Kirschnek,* 317 Pa. 225, 176 A. 489 (Sup. Ct. 1935) [state statute re sale of intoxicating liquors]; *McBride* v. *Board of Commissioners of Pierce County,* 44 Fed. 17 (Cir. Ct., D. Wash. 1890). See *Onondago County Sav. Bank* v. *Love,* 166 Misc. 697, 3 N.Y.S. 2d 428 (Sup. Ct. 1938); *State* v. *Ambrose,* 191 Md. 353, 62 A2d 359, 364 (Ct. App. 1948); *In the Matter of Will of Fox,* 52 N.Y. 530 (Ct. App. 1873) affirmed *sub nom.; United States* v. *Annie Fox,* 94 U.S. 315 (1877); *United States* v. *Cooper Corporation,* 312 U.S. 600 (1941), indicating that the term usually does not include the state. The decisions upon this question are not easily reconciled. The term "person" may mean and include states, but such a meaning must be founded in legislative intent as it is expressed or gathered from the purpose of the enactment, the subject matter, the context, the legislative history, and the executive interpretation of the statute.

In *United States* v. *Graham, supra,* it was held that a state was a "person" within the meaning of section 3678 (b) of the Internal Revenue Code of 1939 (now section 7403(b), 1954 I.R.C.). It reads as follows:

> "All persons having liens upon or claiming any interest in the property or rights to property sought to be subjected as aforesaid shall be made parties to such proceedings and be brought into court."

This section is concerned with the parties to a proceeding to enforce a lien on property. That Congress did not mean to exclude the state from those who could be made a party to such a proceeding is consonant with reason and the objective there sought to be achieved—the adjudication of the rights of *all* claimants. But a decision that the state may be brought in as a party along with other claimants does not establish that there was a Congressional intent to include the state within the meaning of the term "person", wherever said term may appear in the Internal Revenue Code. The legislative environment of each section must be examined.

In *State of Ohio* v. *Helvering,* 292 U.S. 360 (1934) the federal statute involved imposed a tax upon "every person who sells . . . distilled spirits". The State of Ohio which was engaged in the sale of alcoholic beverages through its stores was held to be conducting a nongovernmental proprietary function and was embraced within the meaning of the word "person" as used in the statute. Income taxes were not involved there and, moreover, as it was previously noted, there is little to be gained in drawing analogies as the interpretation of each statute, or sections of the same statute, depends upon its legislative environment which includes many varying factors. There is no common thread running through all statutes or even, in many instances, through sections of the same statute. With so many variables underlying statutes, a result attained solely on the basis of analogy (particularly the meaning of a term) would be subject to an inherent impairment.

Since in common usage, the term "person" does not include the sovereign, and since we are not persuaded by the legislative history that Congress meant to include the State as a "person" within the meaning of section 6332, we cannot subscribe to the view that has been advanced by the Internal Revenue Service. With due deference to their position, we must point out that it is not our function to speculate as to what Congress probably intended by the words used or to lend enforcement to the

supposed policy underlying the Internal Revenue Code by adding words which Congress might have incorporated but omitted.

It is also to be noted that before *Helvering* v. *Gerhardt,* 304 U.S. 405 (1938) [holding that salaries of state employees are not exempt from federal income taxes], the Internal Revenue Service, United States Treasury Department, held that under the Revenue Act of 1926 the compensation of certain municipal officers and employees was subject to federal income tax, but that their salaries while in the hands of city treasurer were not subject to distraint. *I.T.* 2405, *VII*-1, *C.B.* 72 (1928). This ruling was not revoked until recently when it was held that the State and local governments and their agencies and instrumentalities were subject to levy for amounts owed as accrued salaries to their employees who are delinquent in the payment of their federal taxes. *Rev. Rul.* 55-227, *C.B.* 1955-1, 551. Also see *U. S. Treasury Department Regulations, Section* 301, 6331-1(4) (ii) promulgated under the 1954 Internal Revenue Code. Against the Treasury's prior longstanding and consistent administrative interpretation, its more recent contention, in the absence of substantial statutory changes, cannot be accorded the weight normally afforded executive interpretation in the construction of statutes. *Cf. United States* v. *Leslie Salt Co.,* 350 U.S. 383, 396 (1956). And further, was not there implied Congressional acquiescence in the interpretation?

There appears to be only one case bearing on the present problem. In *United States* v. *Newhard,* 128 F. Supp. 805 (D.C. Pa. 1955) a levy was made upon the County Treasurer of Fayette County, Pennsylvania to attach the accrued wages of a county employee who was indebted to the Federal Government for various withholding and social security taxes. The levy was not honored and an action was brought to enforce the tax lien against the wages of the county employee. The County and its fiscal officers joined with the taxpayer in moving for a dismissal of the action on the ground, *inter alia,* that the County and its officers were agents of the Commonwealth of Pennsylvania and as such were not subject to service of process attempting to "garnish" the wages of one of its employees. On the Federal Government's subsequent motion for summary judgment the court ruled in its favor.

The *Newhard* case was brought under section 3678 of the 1939 Internal Revenue Code (now section 7403, 1954 Internal Revenue Code) and not under section 3710 of said Code (now section 6332, 1954 Internal Revenue Code). Thus, that case is not authority that the Federal Government may proceed against the State as a "person" under section 6332 of the present Code. That question was neither involved nor considered.

There is a strong public policy in this jurisdiction disfavoring the stripping of a public servant of his remuneration, voluntarily or involuntarily. The philosophy underlying the position which New Jersey takes is quite aptly stated in *Schwenk* v. *Wyckoff,* 46 N.J. Eq. 560 (E. & A. 1890).

> "It was apparent that the salary or remuneration incident to a public office, as a rule, were essential to a decent and comfortable support of the incumbent. If the officer should be deprived of this support, there would arise a hazard of his being driven to an inappropriate meanness of living, of his being harassed by the worry of straightened circumstances and tempted to engage in unofficial labor, and of the likelihood of his falling off in that official interest and vigilance which the expectation of pay keeps alive. It was because of these probable consequences, that the courts refused to countenance any act or proceeding which might result in stripping the officer of his anticipated reward." (at pp. 562, 563).

In *Cahn* v. *Allen*, 124 N.J.L. 159 (Sup. Ct. 1940), where the salary of a federal employee was sought to be rendered subject to execution, the court held that in the absence of a clear mandate from the Legislature evincing an intent to abrogate the policy theretofor existent, it would not extend the enactment beyond those members of the class specifically mentioned in the statute. Thus the salary of a federal employee was not subject to execution. But see now *N.J.S.* 2A:17-64.

Though the Legislature has deemed it desirable to render the salaries of State employees subject to execution, *N.J.S.* 2A:17-50, *et seq.*, those salaries are not available to an unlimited extent. Only a portion thereof may be so obtained. Here the Internal Revenue Service seeks to levy upon the entire salary due the delinquent taxpayer in contravention of New Jersey's strong policy disfavoring such action. The State should not in such areas allow its policy to be subordinated in the absence of clear constitutional authority and Congressional manifestation that such was intended.

We are, of course, no longer concerned with the power of the Federal Government to tax the income of State officers and employees. The decisions of the United States Supreme Court, *(Helvering* v. *Gerhardt,* 304 U.S. 405 (1938); *Graves* v. *N. Y. ex rel O'Keefe,* 306 U.S. 406 (1939)) and the enactment of the Public Salary Tax Act of 1939 have removed that problem from the field of controversy. But the *Gerhardt* and *Graves* cases concerned the power to *tax,* not the power to *collect.* The question of the immunity of public employees from levy on their salaries for unpaid federal taxes was not before the Court, and it is not to be assumed that the Supreme Court would have arrived at the same result, had that been the issue.

Among the enumerated powers of the Federal Government is the power to lay and collect taxes. *U. S. Const., Art I, Sec.* 8. And the Congress is invested with the authority to make all laws which shall be necessary and proper for carrying such power into execution. *Ibid.* But it was recognized more than a century ago that there are limitations on the collection power of Congress. One of the first cases testing the power to collect taxes was *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. 272 1855). There the United States Supreme Court stated:

> "The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, *unless some such means should be forbidden in some other part of the Constitution.*" (p. 281) [Italics supplied].

Among the matters which are implied, though not expressed, in the United States Constitution is that the Federal Government and the State are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers. *South Carolina* v. *United States,* 199 U.S. 437, 451 (1905). It is a principle implied from the necessity of maintaining our dual system of government. The Federal Government may not unduly impair the State's function of government or unduly interfere with the performance of its sovereign duties.

It is to be noted that the Court in the *Newhard* case, *supra,* was careful to point out that "there was no allegation or suggestion (except by the court) that the enforcement of the attachment would in the slightest degree interfere with, handicap or endanger the public welfare of Fayette County. True, it was said that Newhard resigned, but it was not averred that he was irreplaceable or that his resignation jeopardized any vital governmental interests. Obviously, he was not an elected official, and apparently his work did not require continuous service." (at p. 810).

The validity of the collection process is to be determined by the practical effect of the enforcement. When a levy is effected by a collection officer of the Internal Revenue Service on the accrued salary of a State employee, it necessarily must be made upon the *entire* accrued wages of the employee rather than upon a percentage thereof as in garnishment proceedings. The employee would be stripped of his entire anticipated reward. The effect on the State of an employee being placed in such dire circumstances is not difficult to envision. Completely deprived of income to support himself and his family, would he not be tempted to engage in unofficial labor? Certainly there would be a falling off of that official interest, incentive and vigilance which the expectation of pay keeps alive. There would be a preoccupation with matters not conducive to efficient service. These are but a few of the probable consequences, and these on the assumption that the individual would continue in the State's employment. It is not unlikely that he would resign and thereby the State would be completely deprived of his services. This is not an instance where the effect upon the State is speculative and uncertain. There would definitely be a serious impairment, if not a curtailment, of essential State functions. Thus the immunity does not redound to the exclusive benefit of the delinquent taxpayer, but reflects an equivalent public advantage.

The doctrine of sovereignty, as respects the effect of the collection procedure on State activities, is not to be chipped away on the basis of easy assumptions which ignore practicalities. To subject the State of New Jersey, in the performance of its constitutional functions, to the law sought to be invoked here is an unthinkable result and one so clearly unconstitutional that we need not dwell further on the interference with, or indeed, the complete frustration of many State activities. Despite the inroads into the immunity doctrine, true intergovernmental immunity remains.

Aside from the denial of the employee's service which the proposed procedure would cause, there is imposed on the State the attendant administrative details of effecting payment of the employee's salary to the Federal Government. This additional administrative burden would hamper, impede, and perhaps delay the timely payment of other State employees, which timeliness is so essential for the maintenance of morale and efficient service to the public. Underlying all theory of intergovernmental immunity is the premise that one sovereign government should not be subject to the domination of the other, and its application is peculiarly apposite here.

We discern no basis for disturbing the conclusion reached in our earlier opinion, *Formal Opinion* - 1952 No. 4, and reaffirm our position that a levy upon the salaries of State employees to obtain satisfaction of unpaid federal income taxes is unwarranted in law.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: HAROLD J. ASHBY
Legal Assistant

HJA:tb.

AUGUST 31, 1956

HONORABLE JOSEPH E. MCLEAN
Commissioner of Department of Conservation and Economic Development
State House Annex
Trenton, New Jersey

FORMAL OPINION, 1956—No. 13

DEAR MR. MCLEAN:

Our opinion has been requested as to whether the revenue from licenses issued by the Division of Navigation for submerged lands under tidewaters of the State should be applied to the school fund investment account or to the school fund income account.

We are advised that the licenses issued are either (1) one fee revocable licenses (2) yearly renewal licenses for structures outshore or inshore of established exterior lines or (3) one fee licenses for dredging. It is further indicated that in the license category there are instruments termed "agreements" which permit the party thereto to dig, dredge or remove any deposits of sand or other material from lands of the State under tidewaters.

Our present New Jersey Constitution, as did its predecessor, contains a provision with respect to the funds for the support of free public schools. It reads as follows:

> "The fund for the support of free public schools, and all money, stock and other property, which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of free public schools, for the equal benefit of all the people of the State; and it shall not be competent for the Legislature to borrow, appropriate or use the said fund or any part thereof for any other purpose, under any pretense whatever." *(N.J. Const., Art. 8, Sec. 4, Par. 2)*

By *R.S.* 18:10-5, all State owned lands now or formerly flowed by tidewater "are appropriated for the support of public schools". In *Henderson* v. *Atlantic City,* 64 *N.J. Eq.* 583, *(Ch.* 1903) where a predecessor statute (*L.* 1894, *c.* 71) was being construed in the light of the 1844 constitutional provision *(Art.* 4, *Sec.* 7, *Par.* 6), the court said:

> "It seems also manifest that the appropriation of these lands as property under the constitutional provision had in view the conversion of this property into money which was to be securely invested." (at *p.* 587).

Thus there is an equating under the constitutional provision of the lands and the proceeds from the sales of such lands. These items are held upon a public trust and make up the perpetual school fund. See *State* v. *Owen,* 23 *N. J. Misc.* 123 *(Sup. Ct.* 1945); *In re Camden,* 1 *N.J. Misc.* 623 *(Sup. Ct.* 1923). Any doubts as to the irrevocable devotion of the proceeds from sale to the support of public schools and their application to the permanent school account are dispelled by the provision of *R.S.* 18:10-5 that moneys received from the sales of these submerged lands shall constitute a part of the permanent school fund.

It was stated in *State* v. *Rutherford,* 98 *N.J.L.* 465, 466 *(E. & A.* 1923) with respect to the constitutional provision here involved that "the language of the constitution seems to us too plain to call for interpretation or construction", and that clearness of expression, here as there, dictates the answer to the problem posed. Perforce the constitutional provision, coupled with the pertinent statutes, submerged lands or the moneys derived from the sale of such lands are dedicated to the permanent school fund. But, the income arising from such lands, while limited to being expended for the annual support of the free public schools or if deemed expedient for an increase of the capital of the fund, is not so dedicated. Thus in terms of accounting our fundamental law envisions two accounts—a school fund investment account (perpetual fund) and a school fund income account (income from perpetual fund). As revenue from the licenses here is neither submerged land nor proceeds from the sales thereof, it must be applied to the latter account.

Our position with respect to the proper application of the license revenue is buttressed by *R.S.* 18:10-6 which provides that income from the leases of submerged lands shall be a part of the income of the school fund. License revenue and lease income are both gains derived from the lands here held and for present purposes seem equivalent. These incomes are allied by nature and may be said to be of the same kind. On principle they should be afforded like treatment.

It is our opinion that revenue from license agreements permitting the party thereto to maintain any structure or to dig, dredge or remove any deposits of sand or other material upon or from the submerged lands of the State should be applied to the school fund income account.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: HAROLD ASHBY
Legal Assistant

HA:tb

SEPTEMBER 4, 1956

MR. JOSEPH E. CLAYTON
Assistant Commissioner of Education
Department of Education
175 West State Street
Trenton, New Jersey

FORMAL OPINION, 1956—No. 14

DEAR COMMISSIONER CLAYTON:

You have requested our opinion as to whether a teacher who was 65 years of age or older when she retired on March 31, 1956, and who then did not have sufficient quarters of coverage by virtue of public employment to qualify her for Social Security benefits, and who has since qualified for such benefits through private employment, may be employed as a substitute teacher earning not more than $1,200.00 annually without any offset being applied against her retirement allowance.

In our opinion, such a person may be employed as a substitute teacher without

any offset being applied against her retirement allowance. The applicable law, Section 68 of C. 37, P.L. 1955 (N.J.S.A. 18:13-112.70) provides:

"When a member who retires reaches age 65 or upon retirement of a member after the attainment of age 65, the board of trustees shall reduce the retirement allowance by the amount of the old age insurance benefit under Title II of the Social Security Act paid or payable to him whether received or not. Membership in the retirement sysem shall presume the member's acceptance of and consent to such reduction. However, such reduction shall be subject to the following limitations:

(a) The amount of the old age insurance benefit shall be computed in the same manner as computed by the Federal Social Security Administration, except that in determining such benefit amount only the wages or compensation for services performed in the employ of the State, or 1 or more of its instrumentalities, 1 or more of its political subdivisions, or 1 or more instrumentalities of its political subdivisions, or 1 or more instrumentalities of the State and 1 or more of its political subdivisions shall be included. * * *"

The enactment makes provision for offset in two circumstances only. In the case of a member who retires before age 65, the offset is applied at the time such person reaches age 65. In the case of a member who retires after attaining age 65, the offset is applied at the time of retirement. Under the facts stated, the teachers retired at age 65 and worked their final quarter qualifying them for Social Security benefits in private employment. No offset may be applied against their teachers' pensions because of subsequent earnings as substitute teachers.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: LAWRENCE E. STERN
Deputy Attorney General

SEPTEMBER 18, 1956

HON. ROBERT L. FINLEY
Deputy State Treasurer
State House
Trenton 7, New Jersey

FORMAL OPINION, 1956—No. 15

DEAR MR. FINLEY:

You have requested our opinion as to what effect the Social Security Amendments of 1956, Pub. L. No. 880, 84th Cong., 2d Sess., Ch. 836 (August 1, 1956), amending Title II of the Social Security Act, may have upon the offset provisions of c. 84, P.L. 1954, and c. 37, P.L. 1955, as amended.

The State acts in question deal with the Public Employees' Retirement System and the Teachers' Pension and Annuity Fund. Both of them contain sections providing for offsetting the amount of an individual's Social Security benefit against the

amount of his or her retirement allowance payable from the State administered systems.

Section 59 of c. 84, P.L. 1954, (N.J.S.A. 43:15A-59) provides, *inter alia*:

"Upon attainment of age 65 by a retired member or upon retirement of a member after the attainment of age 65, the board of trustees shall reduce such member's retirement allowance by the amount of the old age insurance benefit under Title II of the Social Security Act payable to him. Membership in the retirement system shall presume the member's acceptance of and consent to, such reduction. However, such reduction shall be subject to the following limitations:

a. The amount of the old age insurance benefit shall be computed in the same manner as computed by the Federal Social Security Administration, except that in determining such benefit amount only wages or compensation for services performed in the employ of the State, 1 or more of its instrumentalities, 1 or more of its political subdivisions, or 1 or more instrumentalities of its political subdivisions, shall be included. * * * "

Section 68 of c. 37, P.L. 1955, (N.J.S.A. 18:13-112.70) similarly provides *inter alia*:

"When a member who retires reaches age 65 or upon retirement of a member after the attainment of age 65, the board of trustees shall reduce the retirement allowance by the amount of the old age insurance benefit under Title II of the Social Security Act paid or payable to him whether received or not. Membership in the retirement system shall presume the member's acceptance of and consent to such reduction. However, such reduction shall be subject to the following limitations:

(a) The amount of the old age insurance benefit shall be computed in the same manner as computed by the Federal Social Security Administration, except that in determining such benefit amount only the wages or compensation for services performed in the employ of the State, or 1 or more of its instrumentalities, 1 or more of its political subdivisions, or 1 or more instrumentalities of its political subdivisions, or 1 or more instrumentalities of the State and 1 or more of its political subdivisions shall be included. * * *"

Two principal changes have been effectuated by the enactment of the Social Security Amendments of 1956. First, the age at which women may commence receiving Social Security benefits has been reduced from sixty-five to sixty-two. Sec. 102, amending Sec. 216 (a) of the Social Security Act. Second, fewer quarters of coverage are now required in many instances for both men and women to obtain the benefits of the legislation. Section 108 of the act provides that Section 214(a)(3) of the Social Security Act has been amended to read as follows:

"(3) In the case of any individual who did not die prior to January 1, 1955, the term 'fully insured individual' means any individual who meets the requirement of paragraph (2) and, in addition, any individual with respect to whom all but four of the quarters elapsing after 1954 and prior to (i) July 1, 1957, or (ii) if later, the quarter in which he attained retirement age

or died, whichever first occurred, are quarters of coverage, but only if not fewer than six of such quarters so elapsing are quarters of coverage."

Your first question is:

"1. Do these new Social Security amendments have an effect upon persons who have already retired from the two systems and who under previous Federal Law were not eligible for Social Security benefits by virtue of public employment and who now would qualify for such benefits by virtue of a reduction in the requirement concerning quarters of coverage? For example, a female employee age 62, who retired on July 31, 1956, would receive a full retirement allowance for the remainder of her life by virtue of the fact that she had not qualified for a Social Security benefit under previous Federal Statute. This person is eligible to receive Social Security benefits as of November 1, under the new Federal amendments. Does this new eligibility mean that this person's retirement allowance will be off-set by Social Security benefits upon her attaining age 65 even though she retired at a time when the new amendments were not in effect?"

As you state, at the time of retirement from State service of the individuals in question, they were not entitled to Social Security benefits by virtue of the public employment in which they had been engaged. Under the Social Security Amendments of 1956, they will be entitled to receive such benefits commencing November, 1956 and thereafter, nothwithstanding the fact that they have not been employed subsequent to their retirement. Thus, this Federal legislation applies to employees who retired prior to its enactment. It is clear from the language of both State enactments that when the individuals in question attain the age of 65 the offset must be applied. It is not the retirement of a person under the age of 65 which brings into operative effect the offset provisions of the sections in question. The offset is not applied until such retired person attains the age of 65. It is at this time, subsequent to the passage of the amendatory Federal legislation, that the amount of the Social Security benefit is examined so that the offset may be applied. Hence, there is no meritorious question of retroactive application or the like. We may observe that if a person retired prior to August 1, 1956 without then having sufficient quarters of coverage in public employment to be fully insured, and also attained the age of 65 prior to that date, the offset would not be applied.

We may note also that neither paragraphs (e) and (f) of N.J.S.A. 18:13-112.70 nor paragraphs (d) and (e) of N.J.S.A. 43:15A-59 are pertinent to the question presented. Paragraph (e) of N.J.S.A. 18:13-112.70 and paragraph (d) of N.J.S.A. 43:15A-59 relate to an increase in the amount of the benefit. The Federal legislation in question has not changed the amount of the benefit; rather, it has reduced the retirement age for women and decreased the number of quarters of coverage required to be "fully insured". Paragraph (f) of N.J.S.A. 18:13-112.70 and paragraph (e) of N.J.S.A. 43:15A-59 have substantially the same language. Paragraph (f) of N.J.S.A. 18:13-112.70 provides:

"(f) Whenever the amount of such reduction from the retirement allowance shall have been once determined, it shall remain fixed for the duration of the retirement allowance, except that any decrease in the amount of the old age insurance benefit under Title II of the Social Security Act shall result in a corresponding decrease in the amount of reduction from the retirement allowance, and except that any error may be corrected, as provided in section 63 of this act. * * *"

The amount of reduction from the retirement allowance is determined at the time the offset is applied. Thus, in the particular example you pose in your first question, the offset or amount of reduction from the retirement allowance of the female employee in question would be determined and applied when she reaches 65 years of age. It would remain unchanged thereafter except in the case of a decrease in the amount of the benefit.

Under the Social Security Act as amended, but prior to the 1956 amendments in question, a person who retired at age 65 or older needed only six continuous quarters of coverage to be fully insured. Thus, those members of the Public Employees' Retirement System and the Teachers' Pension and Annuity Fund who retired at age 65 or older on June 30, 1956, then having six continuous quarters of coverage in public employment, were fully insured and the offset provisions of our New Jersey statutes were applied to them. Under the Social Security Amendments of 1956, a minimum of six quarters of coverage is still required in order to be fully insured.

You next ask:

"2. Do the new Federal amendments affect the calculation of the retirement allowance of a person retiring after October 1, but prior to November 1, 1956, who would not qualify for a Social Security benefit under previous federal law but who will be eligible for benefits after November 1, under the new amendments?

3. Will the new Federal amendments apply in determining the retirement allowances of all persons retiring after November 1, 1956?"

The answer to both of these questions is obviously in the affirmative. We may add that we have been informed by counsel to the Department of Health, Education and Welfare that the amendments to section 214 (a)(3) are effective upon enactment, i.e. August 1, 1956.

We emphasize that a legislative declaration of policy is clearly implicit in both the Public Employees' Retirement System and the Teachers' Pension and Annuity Fund statutes. These laws were not designed to grant two pensions to a member employee, that is, a State retirement allowance plus Federal Social Security benefits.

The evident policy underlying these enactments was to integrate State pensions and Federal Social Security in order to permit public employees and teachers to obtain greater benefits than would otherwise be actuarially practicable. The application of the offset provisions permits the granting of these greater benefits by deferral of a substantial portion of the liability to the Federal Social Security fund. By the integration acts, the Federal government for the first time assumed that liability to public employees and teachers of New Jersey.

The additional benefits now available pursuant to Chapter 84 of the Laws of 1954 and Chapter 37 of the Laws of 1955 include the death benefits of one and one-half times the salary for all active members up to age 70 and three-sixteenths of salary for retired members age 60 or over. If the State, instead of the Federal government, had to pay for these benefits, sound actuarial policy would require the maintenance of large reserves to meet the liabilities thereby created. In sum, the policy of the enactments in question is to grant to public employees and teachers

greater benefits than could be obtained for them otherwise and to accomplish this end without heavy additional outlay. The policy of the enactments is not to furnish *double* pensions, both State and Federal, as some employees seeking to avoid the offset provisions of the acts apparently consider. The payment of such benefits would be an unjustifiable windfall, fiscally and actuarially ruinous to the State of New Jersey. There has been some avoidance of the offset provisions heretofore on technical legal grounds by employees who had not qualified for Federal Social Security coverage through public employment at the time of retirement. Such avoidance cannot be available in the future, under the present laws, for the vast majority of public employees and teachers.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: LAWRENCE E. STERN
Deputy Attorney General

LES:mtb

SEPTEMBER 18, 1956

MR. WILLIAM J. HARDING, *President*
Middlesex County Board of Taxation
County Record Building
New Brunswick, N. J.

FORMAL OPINION, 1956—No. 16

DEAR SIR:

You have requested our opinion regarding the eligibility for veterans tax exemptions of persons honorably discharged or released under honorable circumstances from active service in the armed forces of the United States since the commencement of the Korean conflict.

Art. VIII, *Sec.* 1, *Par.* 3 of the 1947 Constitution of New Jersey provides as follows:

> *"Any citizen and resident of this State now or hereafter honorably discharged or released under honorable circumstances from active service, in time of war or of other emergency as, from time to time, defined by the Legislature, in any branch of the Armed Forces of the United States shall be exempt from taxation on real and personal property to an aggregate assessed valuation not exceeding five hundred dollars ($500.00), which exemption shall not be altered or repealed.* Any person hereinabove described who has been or shall be declared by the United States Veterans Administration, or its successor, to have a service-connected disability, shall be entitled to such further exemption from taxation as from time to time may be provided by law. The widow of any citizen and resident of this State who has met or shall meet his death on active duty in time of war or of other emergency as so defined in any such service shall be entitled, during her widowhood, and while a resident of this State, to the exemption in this paragraph provided for honorably discharged veterans and to such further exemption as from time to time may be provided by law. The widow of any citizen and resident of this State who has had or shall hereafter have active service in time of war or of other emergency as so defined in any branch of the Armed Forces of the United States and who died or shall die while on active duty in any branch of the Armed Forces of the United States, or who has been or may hereafter be honorably discharged or released under honorable circumstances from active service in time of war or of other emergency as so defined in any branch of the Armed Forces of the United States shall be entitled, during her widowhood and while a resident of this State, to the exemption in this paragraph provided for honorably discharged veterans and to such further exemptions as from time to time may be provided by law."
> (Italics added)

N.J.S.A. 54:4-3.12j, as amended, L. 1953, c. 436, provides:

> "Every person a citizen and resident of this State now or hereafter honorably discharged or released under honorable circumstances from *active service in time of war* in any branch of the Armed Forces of the United States and a widow as defined herein, during her widowhood and while a resident of this State, shall be entitled, on proper claim being made therefor, to exemption from taxation on real and personal property to an assessed valuation not exceeding five hundred dollars ($500.00) in the aggregate."
> (Italics supplied)

The definition section of this act, N.J.S.A. 54:4-3.12i. as amended by L. 1952, c. 231 and L. 1953, c. 436, reads as follows:

> "As used in this act:
>
> "(a) 'Active service in time of war' means active service at sometime during one of the following periods:
>
> "The Korean conflict, June 23, 1950, 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;
>
> * * * * *
>
> "(d) 'Honorably discharged or released under honorable circumstances from active service in time of war,' means and includes every form of separation from active, full-time duty with military or naval pay and allowances in some branch of the Armed Forces of the United States in time of war, other than those marked 'dishonorable', 'undesirable,' 'bad conduct,' 'by sentence of general court martial,' 'by sentence of summary court martial' or similar expression indicating that the discharge or release was not under honorable circumstances. A disenrollment certificate or other form of release terminating temporary service in a military or naval branch of the armed forces rendered on a voluntary and part-time basis without pay, or a release from or deferment of induction into the active military or naval service shall not be deemed to be included in the aforementioned phrase."

The introducers' statement appearing on Assembly Bill 2 of the First Special

Session of 1953 which became L. 1953, c. 436, (N.J.S.A. 54:4-3.12j) stated that it was enabling legislation to implement *Art.* VIII, *Sec.* 1, *Par.* 3 of the Constitution. This statement constitutes relevant evidence as to the legislative purpose, meaning or intent, *Deaney* v. *Linen Thread Co.,* 19 N.J. 578 at p. 585 (Sup. Ct. 1955).

The preamble of Assembly Bill 394 of the Session of 1951 which became L. 1951, c. 184 (N.J.S.A. 54:4-3.12i), later amended by L. 1952, c. 231, stated that the purpose of the legislature was to prescribe uniform rules and procedure for veterans' exceptions under *Art.* VIII, *Sec.* 1, *Par.* 3 of the Constitution.

The preamble of an act may be used for the purpose of not only interpreting the act itself but also for the purpose of establishing the constitutional basis for the legislaitve action. *Sutherland Statutory Construction* (*3rd Ed.* 1953) § 4808, p. 353; *Blackman* v. *Iles,* 4 N.J. 82 (Sup. Ct. 1950); *Grobart* v. *Grobart,* 5 N.J. 161 (Sup. Ct. 1950); *Bass* v. *Home Improvement Co.,* 8 N.J. 219 (Sup. Ct. 1951); *Jamouneau* v. *Harner,* 16 N.J. 500 (Sup. Ct. 1954).

The implementing statute, N.J.S.A. 54:4-3.12j, does not re-enact the words, "other emergency" set forth in *Art.* VIII, *Sec.* 1, *Par.* 3 of the Constitution. Thus, the Legislature was prescribing, within its constitutional grant of authority, that active service during the period of the Korean conflict was active service in time of war. The definition section of the act, N.J.S.A. 54:4-3.12i, states unequivocally that "active service in time of war" includes the Korean conflict which had been proclaimed a National Emergency by President Truman on December 16, 1950 (Proclamation 2914, 64 Stat. A. 454, 50 U.S.C.A. App. p. 6).

The National Emergency has never been terminated by action of the President or Congress. Since the legislature has expressly predicated the termination of the period of "active service in time of war" for the Korean conflict on such action, the eligibility period for such an exemption still continues under the Veterans' Tax Exemption Act.

The legislation that "active service in time of war" includes the Korean conflict is not unconstitutional because the United States never formally declared war. See Attorney General's Formal Opinion - 1953, No. 49.

While neither the New Jersey Constitution nor statutes define the term "active service" the words have been construed by courts of other jurisdictions.

In *U. S.* v. *Woodworth,* 36 F. Supp. 645 (Dist. Ct. D. Mass. 1941), the court held that a dental student who joined the Medical Enlisted Reserve Corps to complete his dental education was not in active service in the army. The court stated at page 646, "Active service does not necessarily mean actual service, but does mean service performed at the direction of a superior officer or officers while receiving the emoluments to which a soldier is entitled."

State v. *Pierce,* 118 Ore. 533, 247 p. 812 (Sup. Ct. Ore. 1926), held that persons serving in the Student Army Training Corps established by Congress in World War I were in "active army service."

Mantz v. *Mantz,* 69 N.E. 2d 637 (not officiolly reported) (Common Pleas Ct. Ohio, Summit County 1946) used the terms "active service" or "duty" as synonymous.

In *Minnich* v. *World War II Service Compensation Board,* 244 Iowa 715, 57 N.W. 2d 803, (Sup. Ct. of Iowa 1953), the Court held that a cadet at West Point during World War II qualified for service compensation for those residents "who served on active duty in the armed forces of the United States . . . ." The Court held that active duty included active duty at an "armed services school."

A member of the National Guard called into the service of the United States by the President, entered into "active service" of the government within the meaning of the War Risk Insurance Act. *U. S.* v. *Carlson,* 44 F. 2d 5 (9C.C.A. 1930).

State v. Josephson, 120 La. 433, 45 So. 381 (Sup. Ct. of La. 1908), held that the militia is not necessarily in "active service" because of the fact it is always subject to call.

In *Betty v. State,* 188 Ala. 211, 66 So. 457 (Sup. Ct. Ala. 1914), the court held that a member of the militia staff ordered by the Governor to attend the Presidential Inauguration at Washington, D. C. was not in "active service."

A member of the Civil Air Patrol was not in "active service" in the military forces within the meaning of Sec. 6 (d)(1) of the Current Tax Payment Act of June 9, 1943, 57 Stat. 126, 146, 26 U.S.C.A. § 1622. *U.S.* v. *Popham,* 198 F. 2d 660 (C.C.A. 8th 1952).

The court found that from the time of its creation as part of the Office of Civilian Defense, the Civil Air Patrol was a strictly civilian activity and not included by Congress in the military or naval forces of the United States

Riave v. *Committee of Bar Examiners,* 42 C. 2d 835, 271 p. 2d 1, (Sup. Ct. Cal. 1954), which dealt with the exemption of veterans from bar examinations, stated that an applicant who had served "on active duty for training" was not on "active duty in the armed forces during a period of hostilities."

In the case of *Tyrell* v. *Committee of Bar Examiners,* 42 Cal. 2d 880, 271 p. 2d 4 (Sup. Ct. Cal. 1954), the court held that an applicant who was recalled to active duty for one day for the purpose of taking a physical examination had not entered on "active duty in the armed forces" as required for admission to practice law without examination.

The term "honorably discharged or released under honorable circumstances", as used in the Constitution, is defined with preciseness in N.J.S.A. 54:4-3.12i. See Attorney General's Formal Opinion - 1951, No. 31.

It is our opinion that the National Emergency pertaining to the Korean conflict proclaimed by the President on December 16, 1950 has never been officially terminated. The period of eligibility under the New Jersey statute continues to run. Persons who qualify under *Art.* VIII, *Sec.* 1, *Par.* 3 of the 1947 Constitution of New Jersey and N.J.S.A. 54:4-3.12i through 54:4-3.12u, inclusive, are eligible for veterans tax exemptions as set forth therein.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: ROBERT E. FREDERICK
Deputy Attorney General

SEPTEMBER 20, 1956

COL. JOSEPH D. RUTTER, *Superintendent*
Division of State Police
State Police Headquarters
West Trenton, New Jersey

FORMAL OPINION, 1956—No. 17

DEAR COLONEL RUTTER:

You have asked for our opinion whether a bona fide member of an organized police department is required to secure a permit to purchase a pistol or revolver.

N.J.S. 2A:151-32 provides as follows:

> "No person shall sell a pistol or revolver to another unless the purchaser has first secured a permit to purchase or carry a pistol or revolver."

The foregoing prohibits the sale of a pistol or revolver *"to another"* (emphasis supplied) unless such person has secured a permit to purchase or carry such pistol or revolver and no exception is made in the case of a sale to a bona fide member of an organized police department.

There is no exemption of a bona fide member of an organized police department from the requirement in N.J.S. 2A:151-32 et seq. of a permit to purchase a pistol or revolver, although a bona fide member of an organized police department is exempted from the provisions of N.J.S. 2A:151-41 (concerning concealed weapons), for which reason he is not required to secure a permit to carry a concealed weapon.

N.J.S. 2A:151-38 provides as follows:

> "The permit shall be in the form prescribed by the superintendent of state police and shall be issued to the applicant in triplicate. The applicant shall deliver to the seller the permit in triplicate and the seller shall indorse on the back of each copy the make, model, caliber and serial number of the pistol or revolver sold under the permit. One copy shall then be returned to the purchaser with the pistol or revolver, 1 copy shall be kept by the seller as a permanent record, and the third copy shall be forwarded by the seller within 3 days to the superintendent of state police."

A person selling a pistol or revolver to a police officer who did not have a permit to purchase it subjects himself to criminal prosecution as provided in N.J.S. 2A:151-40 as follows:

> "Any person who violates any provision of this article is guilty of a misdemeanor."

It is our opinion that a bona fide member of an organized police department is required to secure a permit to purchase a pistol or revolver.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: SAUL N. SCHECHTER
Deputy Attorney General

SNS/LL

SEPTEMBER 20, 1956

HONORABLE GEORGE C. SKILLMAN, *Director*
Division of Local Government
Commonwealth Building
Trenton 8, New Jersey

FORMAL OPINION, 1956—No. 18

DEAR DIRECTOR SKILLMAN:

You have requested our opinion regarding the right of a municipality to enter into an agreement to become the lessee of certain types of capital assets. Specifically you inquire as to whether the governing body of the municipality may rent a device to be used for the sweeping of streets and an automobile for use as a police car.

That a municipality may enter into such a rental agreement appears clear from a reading of the applicable statutes. The broad authority is conferred by R.S. 40:43-1 to ". . . . purchase, acquire, *lease,* hold, let and convey real and *personal property* for the use and benefit of the municipality." (emphasis supplied). Moreover, R.S. 40:50-1 permits the hiring of teams and vehicles with the qualification (among others not pertinent here) that the governing body must first publicly advertise for bids if the amount to be expended exceeds the sum of one thousand dollars. Both statutes thus plainly allow the rental of a vehicle to be used as a police car. As to a street sweeper, even if it be assumed that such a device is not a "vehicle" within the contemplation of R.S. 40:50-1, a leasing thereof for the use of the municipality falls within the broad authority of R.S. 40:43-1.

The authority to enter into contracts for the rental of equipment having been established, the next question becomes whether such contracts may bind the municipality during a period of time beyond the term of office of the governing body; for, it is a general principle of law that the hands of successors cannot be tied by contracts relating to governmental functions. However, if the contract relates to business or proprietary affairs of the municipality, there is no such restriction upon the power of the contracting body. The general proposition is thus stated in 10 McQuillin, *Municipal Corporations,* (3d ed.) sec. 29.101, pp. 408 - 409:

> "Respecting the binding effect of contracts extending beyond the terms of officers acting for the municipality, there exists a clear distinction in the judicial decisions between governmental and business or proprietary powers. With respect to the former, their exercise is so limited that no action taken by the governmental body is binding upon its successors, whereas the latter is not subject to such limitation, and may be exercised in a way that will be binding upon the municipality after the board exercising the power shall have ceased to exist."

See in Accord: 37 Am. Jur., Municipal Corporations, sec. 66, page 679; 63 C.J.S., Municipal Corporations, sec. 987, page 549. See also *Skladzien* v. *Board of Education of Bayonne,* 12 N.J. Misc. 602 (Sup. Ct. 1934), affirmed on opinion below, 115 N.J.L. 203, (E. & A. 1935).

The distinction between the two types of functions is well recognized in New Jersey. As the Court observed in *Allas* v. *Borough of Rumson,* 115 N.J.L. 593, 594 (E. & A. 1935):

> "There is, of course, a well recognized distinction between the exercise

of a governmental function or duty imposed upon the municipality by law for the benefit of the public, and from the performance of which no profit or advantage is derived, and powers conferred for the accomplishment of corporate purposes essentially special or private in character, in respect of which the municipality stands upon the same footing as a private corporation."

Therefore, it must be determined whether the rental of a police car and a street sweeper involves the exercise of a "governmental" or "proprietary" function. While there is no New Jersey case directly on point, the United States Supreme Court in *Harris* v. *District of Columbia,* 256 U.S. 650 (1919) had occasion to consider whether the use of a street sweeper involved the exercise of a proprietary or governmental function. The Court held that sweeping of the streets was a governmental function within the municipal governing body's discretionary powers to protect public health and comfort.

Although the *Harris* case involved a question of the liability of the municipality for an injury incurred because of the negligent operation of the machine, there is no reason why the same general language would not dictate that for present purposes the renting of a street sweeper is a governmental act, as to which a municipal governing body is powerless to act beyond its term of existence.

On the further question whether the rental of a police car involves a governmental function so as not to bind successor governing bodies, the tort cases again furnish a guide. It is a general rule that the city is not liable for an injury caused by the negligent operation of a vehicle by a policeman in the performance of his duties which are governmental functions. 18 McQuillin, *Municipal Corporations,* sec. 53.81, p. 363. In practicality, the maintenance and operation of a police force is obviously a "governmental" function. See *Henry* v. *City of Los Angeles,* 114 C.A. 2d 603, 250 p. 2d 643 (Calif. Dist. Ct. of App. 1952); *Boorse* v. *Springfield Tp.,* 377 Pa. 109, 103 A. 2d 708 (1954); *Kelley* v. *City of Wilmington,* 5 W.W. Harr. 9, 156 A. 867 (Del. Super. Ct. 1931). The very purpose of the police force is to protect the health, safety and welfare of the people and the essence of these dutis is governmental. Therefore, a police car rental scheme must be denominated governmental and any contracts intended to carry out such activity would not be binding upon the successors of the contracting body.

In summary, then, while a municipality has the statutory authority to become the lessee of personal property, that authority does not enable the governing body to bind its successors in the exercise of any of the latter's governmental, as distinguished from proprietary, functions; and since the rental of a police car or a street sweeper is a governmental function, such rental agreement would be binding only for the duration of the term of the contracting body.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

TPC:tb.

SEPTEMBER 21, 1956

HONORABLE FREDERICK J. GASSERT
Director, Division of Motor Vehicles
State House
Trenton 7, New Jersey

FORMAL OPINION, 1956—No. 19

DEAR DIRECTOR GASSERT:

You have requested our opinion as to whether the provisions of *N.J.S.A.* 39:6-35 are applicable to a judgment debtor who had not been issued a driver's license at the time of the accident which resulted in the judgment. Your question arises in connection with the initial application for a driver's license of one who when he was but 15 years of age was involved in an accident while operating his father's automobile. This occurred on March 7, 1953. A subsequent suit resulted in judgments being entered in favor of certain parties against the infant. These judgments were subsequently discharged in bankruptcy proceedings. Now without having satisfied the judgments the applicant seeks an operator's license.

N.J.S.A. 39:6-35 reads in part as follows:

"If a person fails to pay and satisfy every judgment rendered against him for damages because of personal injury or death, or damage to property in excess of one hundred dollars ($100.00), resulting from the ownership, maintenance, use or operation of a motor vehicle and every judgment based on an agreement or contract made in settlement of damages arising out of a motor vehicle accident, within sixty days after its entry, or if an appeal is taken therefrom within that time, within sixty days after the judgment as entered or modified becomes final, the operator's license and all registration certificates of any such person, other than a chauffeur or operator employed by the owner of a motor vehicle and so acting at the time of the damage, injuries or death resulting in the judgment, shall, upon receiving a certified copy of a transcript of the final judgment from the court in which it was rendered showing it to have been still unsatisfied more than sixty days after it became final, be forthwith suspended by the director.

* * *

"The license and registration certificates shall remain so suspended and shall not be renewed, nor shall a motor vehicle be thereafter registered in the name of that person while the judgment remains unstayed, unsatisfied, subsisting and until every such judgment is satisfied or discharged, and until he gives proof of his ability to respond in damages, as required in this act, for future accidents.

"A discharge in bankruptcy shall not relieve the judgment debtor from any of the requirements of this act."

Though that section of the Motor Vehicle Security-Responsibility Law is expressly applicable to licensed drivers, its provisions by virtue of *N.J.S.A.* 39:6-28(a) are equally applicable to an operator or owner of a motor vehicle who is involved in an accident and has no license. *N.J.S.A.* 39:6-28(a) provides as follows:

"In case the operator or the owner of a motor vehicle involved in an

accident within this State has no license or registration, or is a nonresident, he shall not be allowed a license or registration until he has complied with the requirements of this act to the same extent that would be necessary if, at the time of the accident, he had held a license and registration."

Thus the applicant here should not be allowed a license until he has complied with the requirements of *N.J.S.A.* 39:6-35.

Additionally, our conclusion is not altered by the fact that the applicant was only 15 years of age at the time the accident occurred. *N.J.S.A.* 39:6-35 is applicable to "a person [who] fails to pay and satisfy every judgment rendered against him for damages because of personal injury or death or damage to property . . . . resulting from the ownership, maintenance, use or operation of a motor vehicle . . . .". *Person* is defined in *N.J.S.A.* 39:1-1 to include "natural persons, firms, co-partnerships, associations and corporations".

It is unnecessary here to attempt to define "natural persons". It is sufficient to say that no conception of that term consonant with the statute can justify the exclusion of an individual less than 17 years of age who in fact operated a motor vehicle involved in an accident.

The laws regulating motor vehicles are designed to safeguard the public generally. *Hochberger* v. *G. R. Wood, Inc.*, 124 *N.J.L.* 518, 520 *(E. & A.* 1940). The Motor Vehicle Security-Responsibility Law bears a direct relationship to that public safety, (see *Garford Trucking, Inc.* v. *Hoffman,* 114 *N.J.L.* 522, 527 *(Sup. Ct.* 1935) construing predecessor statute), and should not be construed in a manner that will do violence to the spirit and intent of the legislative scheme. The law is part of a comprehensive system set up by the Legislature to secure greater public safety.

We cannot, in the face of clear legislative intent, adopt a construction of the statute which will place beyond the reach of this legislation those who, despite their inability to qualify for an operator's license because of age, operate motor vehicles upon the highways causing personal injuries and damage to property. The Motor Vehicle Security-Responsibility Law must have a practicable interpretation and not an arbitrary or unreasonable construction.

No distinction is shown to us whereby the statute should be directed, in its application, toward licensed drivers who fail to satisfy a judgment to the exclusion of unlicensed drivers who do likewise; and we know of none.

We conclude, therefore, that *N.J.S.A.* 39:6-35 is applicable to a judgment debtor who had not been issued a driver's license at the time of the accident which resulted in the judgment. And this is equally true of such an operator who had not attained age 17 at the time of the accident.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: HAROLD ASHBY
Legal Assistant

HA:sk

SEPTEMBER 26, 1956

HON. JOHN W. TRAMBURG, *Commissioner*
Department of Institutions and Agencies
State Office Building
Trenton 7, New Jersey

FORMAL OPINION, 1956—No. 20

DEAR COMMISSIONER TRAMBURG:

You have requested our opinion as to whether funds accumulated by a County employee in the Public Employees' Retirement System can be used for the support of the wife and children of that employee when that employee has deserted his wife and children in destitute circumstances and they have become public charges.

It is our opinion that such funds can be made available through judicial process for the support of the employee's wife and children even though N.J.S.A. 43:15A-53 provides:

"The right of a person to a pension, an annuity, or a retirement allowance, to the return of contributions, any benefit or right accrued or accruing to a person under the provisions of this act and the moneys in the various funds created under this act, shall be exempt from any State or municipal tax and from levy and sale, garnishment, attachment or any other process arising out of any State or Federal court and, except as in this act otherwise provided, shall be unassignable."

The New Jersey Supreme Court in *Fischer* v. *Fischer,* 13 N.J. 162 (1953) dealt with a similar problem. The question in the *Fischer* case was whether a pension provided to a retired police officer of the City of Irvington under R.S. 43:16-1 et seq., as amended, was wholly immune from judicial appropriation, before the individual installments reach the hands of the pensioner, to the satisfaction of alimony established by judgment. R.S. 43:16-7 states:

"* * * All pensions granted under this chapter shall be exempt from execution, garnishment, attachment, sequestration or other legal process.* * *"

The Court held that the language of the above provision did not prevent reaching pension benefits payable to the husband to satisfy the wife's award of alimony. Justice Heher, in so holding, looked to the policy behind this provision and stated on page 167:

" * * * it is abundantly clear that the policy of the immunity provision is to shield the pensioner against the coercive remedial and executorial processes available to creditors, and thus to secure the pensioner and his family against improvidence and want. 'Legal' process undoubtedly has this generic sense i.e., legal and equitable remedies in favor of those having a right of action grounded in contract or tort, a penalty or a forfeiture."

Justice Heher further stated on page 168:

"A holding barring recourse to the statutory pension to absolve the public from the burden of supporting the pensioner's wife or children would be perversive of the true intent and meaning of the act * * *."

R.S. 43:16-7 provides for an exemption from execution, garnishment, attachments, and sequestration or other legal process. In N.J.S.A. 43:15A-53 the exemption is from any state or municipal tax and from levy and sale, garnishment, attachment or any other process arising out of any State or Federal court. The language of the two is sufficiently similar to indicate that in both instances the Legislature had in mind the same general policy. This policy has been spelled out by the N. J. Supreme Court in *Fischer* v. *Fischer, supra,* and as stated above, is to protect the pensioner from creditors and not to relieve him of his obligation of support.

It should be pointed out, however, that our New Jersey Supreme Court distinguished between exemption of pension funds from civil process by contract provision and statutory exemption of pension funds from civil process. The Supreme Court in *Hoffman* v. *Hoffman,* 8 N. J. 157 (1951), held that the provisions of a group insurance contract made between the defendant's employer and an insurance company making retirement annuity benefits payable to the employee upon his retirement nonassignable, either by voluntary act or by operation of law, were valid and enforceable and payments made under the policy to the defendant were not subject to attachment by the defendant's former wife to pay accrued alimony under a judgment of a court in a sister state. The language used by Justice Heher in the *Fischer* case, *supra,* in making the distinction is as follows:

> "The *Hoffman* case cited *supra* is plainly not to the contrary. There, the subject matter was a group insurance contract which made the retirement annuity and death payments 'nonassignable, either by voluntary act or by operation of law'; and the holding was that if the annuity benefits were made available for the satisfaction of the foreign decree for alimony 'that contractual undertaking' would be violated. There, the contract was enforced *inter partes;* here, the determinative is the policy of the statute." *Fischer* v. *Fischer,* 13 N. J. 162, 169 (1953).

We may also observe that N.J.S.A. 43:15A-53 was enacted subsequent to the Supreme Court's decision in *Fischer* v. *Fischer, supra,* and that it is a familiar principle of law that the Legislature in enacting statutes is presumed to be familiar with decisional authority relating thereto.

Therefore, since the exemption with which we are here concerned, N.J.S.A. 43:15A-53, is a statutory exemption and, as stated previously, similar to R.S. 43:16-7, pension funds accumulated can be made available through judicial process for the support of the employee's wife and children. Presumably, the pension funds to which you refer are the accumulated deductions standing to the credit of the husband's individual account in the annuity savings fund. You state that your request for opinion has arisen in connection with one specific instance in which Home Life Assistance has been granted to a woman because of the desertion of her husband. You say that she "is presently receiving assistance for herself and seven children while her husband, who prior to his desertion was a public employee, has an accumulated fund in the Public Employees' Retirement System".

N.J.S.A. 43:15A-41 provides:

> "a. A member who withdraws from service or ceases to be an employee for any cause other than death or retirement shall receive all or such part as he demands, of the accumulated deductions standing to the credit of his individual account in the annuity savings fund * * *".

Of course, in order to reach these funds, the right of the wife and children to support payments must be adjudicated and appropriate process must be issued by way of execution, etc. pursuant to such adjudication. The Juvenile and Domestic Relations Court has concurrent jurisdiction with the Chancery Division of the Superior Court in matters pertaining to support. N.J.S. 2A:4-18; N.J.S. 2A:34-24.

R.S. 30:5-14 provides:

> "Whenever it appears that a child has received assistance under any provision of this chapter, either directly or indirectly, by reason of the desertion of its father, the state board of children's guardians or the county welfare board may institute proceedings in any court of competent jurisdiction, constituted for the trial of such causes, for the purpose of collecting from such father any or all assistance granted to such child under any provision of this chapter. * * *"

We should note that P. L. 1951, c. 138 did not repeal the Home Life Assistance Program found in Article IV of Chapter 5 of Title 30, nor did it repeal Articles I and II of Chapter 5 insofar as they were applicable to the administration and financing of the Home Life Assistance Program found in Article IV. Attorney General's Formal Opinion 1955—No. 12.

N.J.S.A. 30:5-41.1 similarly provides:

> "Whenever assistance is granted to or for any person pursuant to the chapter hereby supplemented, the State Board of Child Welfare, or the welfare board of the county where such assistance was granted, shall be authorized to take all necessary and proper action to enforce the maintenance and support of such person by those relatives legally responsible therefor under the laws of this State."

We note that under the Uniform Reciprocal Enforcement of Support Act, N.J.S. 2A:4-30.1 et seq., this State or a political subdivision thereof has the right to initiate proceedings against any person owing a duty of support to a resident of New Jersey to whom support has been furnished by the State or political subdivision in order that the State or its political subdivision may secure reimbursement for expenditures made. N.J.S. 2A:4-30.8.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: LAWRENCE E. STERN
Deputy Attorney General

LES:mtb

SEPTEMBER 27, 1956

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

FORMAL OPINION, 1956—No. 21

DEAR DIRECTOR GASSERT:

You have requested our opinion on the applicability of certain provisions of the Security-Responsibility Law and particularly as to whether R.S. 39:6-28, subsection (b) and subsection (c) should be regarded as a reciprocity statute.

R.S. 39:6-28(b) provides:

> "When a nonresident's operating privilege is suspended pursuant to section three or section five of this act the director shall transmit a certified copy of the record of such action to the official in charge of the issuance of licenses and registration certificates in the State in which such nonresident resides, if the law of such other State provides for action in relation thereto similar to that provided for in subsection (c) of this section."

Subsection (b) is definitely based upon reciprocity because it requires the Director to transmit a certified copy of his official action only "if the law of such other State provides for action in relation thereto similar to that provided for in subsection (c) of this section."

R.S. 39:6-28 (c) provides as follows:

> "Upon receipt of such certification that the operating privilege of a resident of this State has been suspended or revoked in any such other State pursuant to a law providing for its suspension or revocation for failure to deposit security for the payment of judgments arising out of a motor vehicle accident, under circumstances which would require the director to suspend a nonresident's operating privilege had the accident occurred in this State, the director shall suspend the license of such resident if he was the operator, * * *."

In both sections (b) and (c) above, it must be noted that the Director of Motor Vehicles of New Jersey is required to act only if the law of the other State concerned contains provisions similar to the New Jersey law for the suspension of the driving privileges of out-of-state drivers for failure to satisfy judgments.

Thus subsection (b) above does not become operative unless the law of the "other State provides for action in relation thereto similar to that provided for in subsection (c) of this section."

Subsection (c) requires the Director to act where the law of the foreign state provides for revocation or suspension of license "under circumstances which would require the director to suspend a nonresident's operating privilege had the accident occurred in this State, * * * ."

We find no warrant in the statute for a construction that the Director of the Division of Motor Vehicles is required to suspend a New Jersey resident driver's license because of failure to deposit security only in instances where the State where the accident occurred is required to suspend its own resident's driver's license for failure to deposit security under the New Jersey Security Responsibility Law.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: JAMES T. KIRK
Deputy Attorney General

JTK/LL

NOVEMBER 16, 1956

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

FORMAL OPINION, 1956—No. 22

DEAR MR. BONTEMPO:

You have requested what you term a clear-cut definition as to New Jersey's boundary in the Delaware Bay and the Delaware River and advise that it is imperative that you obtain our definition because of the current activity in dredging operations in the Delaware River and the Delaware Bay. The explanation that the request has reference to dredging operations indicates that you wish to be informed on the limited topic of the territorial limits and ownership of the State of New Jersey in the soil under both bodies of water mentioned. The two states occupying the shores opposite those of New Jersey along the Delaware River and Bay are Delaware and Pennsylvania. The case with Delaware will be discussed first in view of the fact that the boundary between that state and ours has been the subject of litigation and has been adjudicated. *State of New Jersey* v. *State of Delaware,* 291 U.S. 361, 54 S. Ct. 407 (1934).

The State of Delaware and the State of Pennsylvania have a common boundary at the point where both states border the Delaware River, and from that point Pennsylvania bounds the Delaware River northwardly, and Delaware southwardly to the sea. In the issues involved in the case of *New Jersey* v. *Delaware,* sometimes called the Delaware boundary case, the Court characterizes them as follows:

> "The controversy divides itself into two branches, distinct from each other in respect of facts and law. The first branch has to do with the title to the bed or subaqueous soil of the Delaware river within a circle of twelve miles about the town of New Castle. Delaware claims to be the owner of the entire bed of the river within the limits of this circle up to low-water mark on the east or New Jersey side. New Jersey claims to be the owner up to the middle of the channel. The second branch of the controversy has to do with the boundary line between the two states in the river below the circle and in the bay below the river. In that territory as in the river above, New Jersey bounds her title by the Thalweg. Delaware makes the division at the geographical center, an irregular line midway between the banks or shores." 54 S. Ct. 408

AS TO THE TWELVE-MILE CIRCLE

The arc of the circle of twelve miles about the Town of New Castle which crosses the Delaware River to the north is at a point on the river where Delaware and Pennsylvania have a common boundary. Where the arc of the circle crosses the Delaware River to the south is a point on the Delaware shore at about Bay View Beach. We will consider the boundary question within the twelve-mile circle.

In the Delaware case, the Special Master appointed by the Court in January 1930 found that Delaware traced her title to the river bed within the circle through deeds going back two and one-half centuries and more.

In 1682 the Duke of York delivered to William Penn a deed conveying the Town of New Castle and all the land lying within the compass or circle of twelve miles about the same, situate, lying and being upon the Delaware River, together with the river and the soil thereunder, lying north of the southernmost part of the circle of twelve miles about the town.

The Master in his filed report found that William Penn's title to the lands in question was good. The Court, at pages 411, 412, said that:

> "The colony of Delaware as defined by this patent was the one that declared its independence in 1776 and that succeeded in 1783 to any fragment of ownership abiding in the Crown."

> "Delaware's chain of title has now been followed from the feoffment of 1682 to the early days of statehood, and has been found to be unbroken."

The Court discussed the various claims made by the State of New Jersey to title to that area of the twelve-mile circle covered by water to the low-water mark and concluded that such claims had no foundation in law or fact and upheld the title of Delaware to the land within the Circle.

Accordingly, the Court confirmed the master's report as it applied to the twelve-mile circle and decreed that:

> "Within the twelve-mile circle, the river and the subaqueous soil thereof up to low-water mark on the easterly or New Jersey side will be adjudged to belong to the State of Delaware, subject to the Compact of 1905."

The Compact of 1905 gave the State of New Jersey no proprietary rights in the soil within the twelve-mile circle.

You are, therefore, advised that within the twelve-mile circle, the boundary between New Jersey and Delaware follows the low-water mark along the New Jersey shore.

AS TO THE RIVER AND BAY BELOW THE TWELVE-MILE CIRCLE

The Delaware River extends about five miles below the twelve-mile circle and then broadens into the Delaware Bay.

With respect to the territorial limits of the State of New Jersey in the tidewaters of the Delaware River and Bay below that twelve-mile circle a different situation exists.

In *New Jersey* v. *Delaware,* supra, at page 413, it is stated:

> "Below the twelve-mile circle there is a stretch of water about five miles long, not different in its physical characteristics from the river above, and below this is another stretch of water forty-five miles long where the river broadens into a bay.
>
> The title to the soil of the lower river and the bay is unaffected by any to the Duke of York or others. The letters patent to James do not affect the ownership of the bed below the circle. Up to the time when New Jersey and Delaware became independent states, the title to the soil under the waters below the circle was still in the Crown of England. When independence was achieved, the precepts to be obeyed in the division of the waters were those of international law."

The Master found that neither party made any claim of title to the river or bay below the twelve-mile circle, except in succession to the rights of the Crown.

> "In 1783, when the Revolutionary War was over, Delaware and New Jersey began with a clean slate. There was no treaty or convention fixing the boundary between them. There was no possessory act nor other act of dominion to give to the boundary in bay and river below the circle a practical location, or to establish a prescriptive right.
> *New Jersey* v. *Delaware,* supra, at page 415.

Having determined that there was no agreement between the parties with respect to the boundary line between the states and that neither party had by any act of possession or dominion established a prescriptive right in the soil under the waters of the Delaware River below the twelve-mile circle, the Court then outlined the principles of law which it felt were controlling, and the authorities relied on for justification. It said at page 413:

> "International law today divides the river boundaries between states by the middle of the main channel, when there is one, and not by the geographical center, halfway between the banks. It applies the same doctrine, now known as the doctrine of the 'Thalweg,' to estuaries and bays in which the dominant sailing channel can be followed to the sea. The 'Thalweg' or downway, is the track taken by boats in their course down the stream, which is that of the strongest current."

The doctrine of "thalweg" is the test applied in determining boundaries between states.

49 Am. Jur., Sec. 20, p. 241

> "The general rule is that when a river is the boundary between two states, if the original property is in neither, and there is no special convention respecting it, long use equivalent thereto, or other controlling circumstances to the contrary, each state holds to the middle of the main channel of the stream. This is known as the doctrine of 'thalweg'. In the case of navigable rivers, the doctrine is ordinarily construed to mean that each state takes to the middle of the principal channel of navigation, not necessarily the deepest channel—and it does not, therefore, mean, with respect to navigable rivers, a line equidistant from each bank. The reason for this doctrine making the

middle of the channel of commerce the boundary line, or the doctrine of 'thalweg' as it is called, rather than the middle line between the shores of the river, lies in the right of each state to equal privileges in the navigation of the river. The channel is the bed of a stream of water, especially the deeper part of a river or bay where the main current flows. When employed in treating of subjects connected with the navigation of rivers, it indicates the line of deep water which vessels follow, the space within which vessels may and usually do pass."

The Master in his report indicates that he has followed the doctrine of "thalweg", and based on that doctrine made the following findings:

"Below the twelve-mile circle there is a portion of the river of about 8,500 yards measured along the center of the main ship channel on Exhibit 3, to the division line between the river and bay established by agreement of the parties in 1907 (Exhibit 161, pp. 44-5) as a line from Liston's Point to the mouth of Hope Creek. Between this area and the mouth of the bay there is a distance of 78,750 yards, more or less, to the overfalls light at the Atlantic Ocean. (Exhibits 3 and 4.)

The question is presented as to whether through these two areas the rule of geographical center is to be applied in the ascertainment of the boundary between the two States or the rule of the thalweg.

The plaintiff contends that the rule of the thalweg, that is to say, the main sailing ship channel, controls throughout the river and bay below the circle. Defendant, on the other hand, maintains that the rule of the thalweg cannot apply because, it says, there is no main sailing channel in the bay and river, the bay and river being equally navigable in all directions.

But the proof shows that as early as Fisher's Chart of the Delaware Bay 1756 (Exhibit 99) there has been a well-defined channel of navigation up and down the river and bay. This channel, since the Revolution, has been regularly marked by the government. In the United States Coast Pilot, Section C, published 1930 by the United States Coast and Geodetic Survey, it is stated (p. 44):

'Delaware Bay is, properly speaking, only an expansion of the lower part of the Delaware River. . . . The channel is well marked by lighthouses and buoys, but strangers in deep-draft vessels should not attempt to enter by night.' (Exhibit 102.)

'The channel is well marked by lighthouses and buoys to the entrance of the dredged channel and by lighted ranges and buoys above that point. The dredged channels are generally 800 feet wide in the straight reaches, 1,000 feet wide in the bends, and 1,200 feet wide in Bulkhead Bar Channel. The buoys marking the dredged channels are usually maintained on or close to the edge, and vessels on the ranges will usually pass them at a distance of 100 to 200 yards.'

'There is a channel along the western side of Delaware Bay which is marked by a line of perpendicularly striped buoys from off the mouth of St. Jones River southward to below Old Bare Shoal. It is used by most of the vessels frequenting the tributaries on the western side of the bay. It is said to lead clear of dangers if the buoys are followed closely, but leads close to the shoals in places.'

Red sectors are established in the lighthouses to cover the dangers on both sides of the channel from Overfalls Lightship to the entrance of the dredged channel and should be observed closely if running at night.

There are many detached shoal spots with depths of 2 to 6 feet (0.6 to 11.8 m.) along the western side of Delaware Bay and Delaware Breakwater northward to Bombay Hook Point. They are generally unmarked, except in the vicinity of the main ship channel, and are subject to some change, both in depth and position. Strangers using any of the channels westward of the main ship channel should proceed with caution.

'Cape Henlopen, on the southwest side of the entrance to Delaware Bay, is a high white sand hill, bare of vegetation. The point of the cape, from a comparison of the surveys, is moving northward at a slow but uniform rate. Vessels should keep in the white sector of Delaware Breakwater light when passing north of the cape. A shoal with little depth, as shown on the chart, extends nearly ⅜ mile eastward from the end of Cape Henlopen, and is marked at its easterly end by a black bell buoy.'

'Breakwater Harbor, on the west side of Cape Henlopen, southward of the inner breakwater, is easy of access both day and night and is a safe harbor for light-draft vessels in all but heavy northwesterly gales, and affords considerable protection even in such weather. Under the most favorable conditions a vessel of as much as 15 feet (4.5 m.) draft can select anchorage with sufficient swinging room in the easterly part of the harbor, but the harbor is generally crowded in heavy weather, and vessels of a greater draft than about 10 feet (3 m.) should preferably anchor westward or northwestward of the inner breakwater or in the Harbor of Refuge.'

Breakwater Harbor has depths of 10 to about 30 feet (3 to 9.1 m.) in its easterly part, eastward of a line joining the reporting station on the breakwater and the easternmost fish-oil works. The angle in the westerly part of the breakwater is shoal, depths of 9 to 10 feet (2.7 to 3 m.) extend nearly ⅜ mile southsouthwestward from the westerly half of the breakwater, and depths of 12 to 13 feet (3.6 to 3.9 m.) extend to shore southwestward." (pp. 53-4.)

The Court observed the following in the Delaware boundary case:

"The findings of the special master, well supported by the evidence, overcome the argument thus drawn from physical conditions. He finds that 'as early as Fisher's Chart of Delaware Bay (1756) there has been a well-defined channel of navigation up and down the Bay and River,' in which the current of water attains its maximum velocity; that 'Delaware River and Bay, on account of shoals, are not equally navigable in all directions, but the main ship channel must be adhered to for safety in navigation'; that the Bay, according to the testimony, 'is only an expansion of the lower part of the Delaware River,' and that the fresh water of the river does not spread out uniformly when it drains into the bay, but maintains a continuing identity

through its course into the ocean. 'The record shows the existence of a well-defined deep water sailing channel in Delaware River and Bay constituting a necessary track of navigation, and the boundary between the States of Delaware and New Jersey in said bay is the middle of said channel."

Concerning the date when the formula of the Thalweg is to be applied to the division between Delaware and New Jersey, the Court in the Delaware case held that it went back to the Peace of Paris as it had applied it in the boundary case between Illinois and Iowa. *Iowa* v. *Illinois,* 147 U.S. 1, 135 S. Ct. 239. The Court made the further observation that the difference in time between 1776 and 1783 would not affect the result in the Delaware case. The year 1776 is the one of independence for the American colonies. The year 1783 is the one in which the Treaty of Paris was signed by Great Britain and the American Colonies ending the War of Independence.

"* * * the several states which composed the Union, so far at least as regarded their municipal (internal affairs) regulations, became entitled, from the time when they declared themselves independent to all the rights and powers of sovereign states, and they did not derive them from concessions made by the British Crown. The treaty of peace contains a recognition of their independence, not a grant of it." *McIlvaine* v. *Coxe's Lessee,* 8 U.S. 208. (definition within parentheses supplied)

"It is thus with the formula of the Thalweg in its application to the division between Delaware and New Jersey. We apply it to that boundary, which goes back to the Peace of Paris. * * * The line of division is to be the center of the main channel unless the physical conditions are of such a nature that a channel is unknown."

"Below the twelve-mile circle, the true boundary between the complainant and the defendant will be adjudged to be the middle of the main ship channel in Delaware River and bay."

Therefore, be advised that the true boundary between the States of New Jersey and Delaware below the twelve-mile circle is the center of the main ship channel in the river and bay.

GEOGRAPHIC LIMITS AS TO PENNSYLVANIA

As to Pennsylvania, the problem also divides itself into two branches distinct from each other in respect to facts and law.

THE DELAWARE RIVER ABOVE TRENTON

A portion of the Delaware River which lies between the States of New Jersey and Pennsylvania is tidal, a portion is above tide water. *Attorney General* v. *Delaware and Bound Brook RR Co.,* 27 N.J. Eq. 1, 8. In that case the Court quoted *Rundle* v. *Delaware and Raritan Canal Co.,* 1 Wall., Jr., 275, as follows:

"The river Delaware is the boundary between the States of Pennsylvania and New Jersey. The tide ebbs and flows to the part of the Trenton Falls where the Trenton bridge crosses the river; above that point it is a fresh water stream. * * *"

Under the established law in New Jersey the State is the owner of the soil under tidal streams to the high water mark. But in non-tidal waters the riparian owners held to the middle of the stream. The State holds no title to the lands under water in the Delaware River above Trenton.

8 Am. Jur., Sec. 19, p. 757

"Under the English Common law, the bed of all rivers as far as the flow of the tide extends is in the Crown, but the bed of all fresh-water rivers above the ebb and flow of the tide is vested in the riparian owners, and this without regard to the navigability of the rivers."

8 Am. Jur., Sec. 21, p. 759

"Under the rule of the common law which vests title to the bed of tidal rivers in the state where lands are described in a deed as bounded by a navigable river in which the tide ebbs and flows, the presumption is that the title extends merely to the waters edge and the boundaries of the tract should be drawn along the bank or shore at high watermark. Citing *Simmons* v. *Paterson,* 60 N.J. Eq., 385. *New Jersey Zinc & Iron Co.* v.*Morris Canal & Banking Co.,* 44 N.J. Eq. 398, *Arnold* v. *Mundy,* 6 N.J.L. 1. The common law, however, limits this rule to tidal rivers."

The boundary between the States of New Jersey and Pennsylvania in the waters of the Delaware River above the falls at Trenton is the middle of the river. The legal title to the lands in question stems from the West Jersey proprietors and is in the riparian proprietors, and not in the State.

THE DELAWARE RIVER BELOW TRENTON

The only remaining problem is to advise you concerning the Delaware River as it runs between the falls at Trenton down to the boundary line between Pennsylvania and Delaware.

While the general rule as it applies to fixing the boundaries between states in tidal waters is expressed in the New Jersey-Delaware case above, that opinion does not consider certain variations to the general rule.

In the Delaware case the State of New Jersey did set up as its basis for claiming title to the soil in part of the twelve-mile circle through principles of law involving acquiescence, estoppel, usage and the effect of the Compact between the states. The claim did not concern itself with the effect of avulsion, accretion or the possibility that the old channel as it existed in 1783 may have been relocated through dredging an artificial channel. It is assumed that there was no proof of the existence of such happenings. If any of these factors would have any influence in fixing the main ship channel between New Jersey and Pennsylvania, please consider them in the light of the following:

49 Am. Jur., Sec. 21, p. 242

"The effect upon boundaries of a state, where such boundaries are fixed by the middle of the main channel of a river, by changes in that channel through processes of accretion and avulsion is dependent upon the gradualness or suddenness of the change; when the course of the river and its channel changes gradually, the boundary follows the channel, but if the river suddenly

changes its course, or deserts its natural channel, the boundary remains where it was before, that is, the middle of the altered or deserted river bed."
56 Am. Jur., p. 893

"But where the change takes place suddenly and perceptibly either by reliction or avulsion, as where a stream from any cause suddenly abandons its old and seeks a new bed, such a change works no change of boundary or ownership."

Cunningham v. *Prevow,* 192 S.W. 2d 338, 29 Tenn. App. Co. 43, Tenn. Court of Appeals 1945.

" 'Avulsion' is the sudden or violent action of the elements of the shore or bank of a river, the effect and extent of which is perceptible while the action is in progress."

McClure v. *Couch,* 188 S.W. 2d 550, 182 Tenn. 563, Tenn. Supreme Ct. 1945.

"Avulsion is a sudden change of channel or stream, and it does not change the boundary which remains as it was in the middle of old channel, though water no longer flows therein."

State of Arkansas v. *State of Tennessee,* 38 S. Ct. 557, 247 U.S. 461 (1908):

"The true boundary line between the states of Arkansas and Tennessee, aside from the question of avulsion of 1876, hereinafter mentioned, is the middle of the main channel of navigation of the Mississippi River as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes."

Whiteside v. *Norton,* (CCA 8th) 205 F. 5. Appeal dismissed 36 S. Ct. 97.

"Nor does dredging of a new channel by the government in a river which forms the boundary between the two states change the state boundary from the middle of the former main navigable channel to the newly formed channel."

The boundary between the States of New Jersey and Pennsylvania between the falls at Trenton and the twelve-mile circle is the "thalweg" or "main sailing channel" as it existed in 1783, as changed only by natural and gradual processes.

SUMMARY

Summarizing the conclusions reached above we find that beginning at the most northerly point in New Jersey and continuing southwardly the boundary between Pennsylvania and New Jersey is the middle of the river to the falls of Trenton but that New Jersey is not the owner of the soil under those waters. From the falls of Trenton to the twelve-mile circle the boundary between New Jersey and Pennsylvania is the "thalweg" or "main sailing channel" to which point in the river the State of New Jersey is the owner of the soil beneath the river. In the twelve-mile circle the boundary between Delaware and New Jersey is the low-water mark along the New Jersey shore and New Jersey has no ownership in the soil offshore of said low-water mark. From the twelve-mile circle southwardly to the sea the boundary between Delaware and New Jersey is the "thalweg" or "main sailing channel" and New Jersey owns the soil under the river and bay from its shore to said boundary.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: SIDNEY KAPLAN
Deputy Attorney General

SK:mp

DECEMBER 11, 1956

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

FORMAL OPINION, 1956—No. 23

DEAR DIRECTOR GASSERT:

You have requested our opinion concerning the applicability of R.S. 39:3-40 to a nonresident motor vehicle operator whose driver's license has been suspended or revoked or who has been prohibited from obtaining or has been refused a driver's license in his own State. For the reasons hereinafter stated, it is our opinion that R.S. 39:3-40 applies in such circumstances.

By R.S. 39:3-10 it is provided in part as follows:

"No person shall drive a motor vehicle on a public highway in this State unless licensed to do so in accordance with this article. No person under 17 years of age shall be licensed to drive motor vehicles, nor shall a person be licensed until he has passed a satisfactory examination as to his ability as an operator. . . ."

The penalties for violating this section are a fine not exceeding $500 or imprisonment in the county jail for not more than 60 days.

By R.S. 39:3-17 this jurisdiction has extended the so-called "reciprocity privilege" to drive a New Jersey registered vehicle as well as one registered outside of New Jersey to any nonresident driver "who has complied with the law of his resident State, or country, with respect to the licensing of drivers. . ."

R.S. 39:3-17 also provides in pertinent part as follows:

"A nonresident shall, at all times while operating a motor vehicle in this State under his reciprocity provision, have in his possession the registration certificate of the car which he shall be then operating and his driver's license, and shall exhibit them to any motor vehicle inspector, police officer or magistrate who, in the performance of the duties of his office, shall request the same. Any person violating the provisions of this section shall be subject to a fine not exceeding five hundred dollars, or to imprisonment in the county jail for not more than sixty days."

R.S. 39:3-40, to which the present inquiry is directed, reads as follows:

"No person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining a driver's license, shall personally operate a motor vehicle during the period of refusal, suspension, revocation or prohibition.

No person whose motor vehicle registration has been revoked shall operate or permit the operation of such motor vehicle during the period of such revocation.

A person violating any provision of this section shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), or be imprisoned in the county jail for not more than ninety days or both."

The Legislature imposed stronger sanctions for the violation of R.S. 39:3-40, i.e., a mandatory minimum fine of $100 as well as a longer maximum imprisonment, than those imposed for a violation of either R.S. 39:3-10 or 17. The reason for the stronger penalty may be found in the fact that R.S. 39:3-40 involves driving after suspension, revocation, prohibition or refusal of a driver's license, while the other cited sections concern themselves only with driving without a license. An operator who violates R.S. 39:3-40 would of course also violate either R.S. 39:3-10 or 17, and it has been held that a conviction may be had under both R.S. 39:3-40 and R.S. 30:3-10, although the same act is involved. *State* v. *Williams,* 21 N.J. Misc. 329 (Recorder's Ct. 1943).

In our opinion R.S. 39:3-40 may operate against nonresident drivers in two circumstances: (1) when such drivers operate a motor vehicle upon New Jersey highways after having had their driving privileges suspended, revoked, prohibited or refused in their home State, and (2) in cases where New Jersey has revoked or suspended their reciprocity privilege. The statute of course also operates against resident drivers whose New Jersey driver's license has been suspended, revoked, prohibited or refused.

Nonresidents who are properly licensed in their home State are by R.S. 39:3-17, *supra,* given a reciprocity privilege to operate motor vehicles upon the highways of this State. By R.S. 39:5-30 New Jersey driver's licenses as well as reciprocity privileges of nonresidents may be revoked or suspended for a violation of the motor vehicle code "or on any other reasonable grounds." See also R.S. 39:4-50, applicable to both residents and nonresidents, whereby, upon a conviction for driving while under the influence of liquor or drugs, a forfeiture of the "right to operate a motor vehicle over the highways of this State" results.

If a nonresident is not properly licensed in his home State he has no reciprocity privilege in New Jersey and upon his operation of a vehicle in New Jersey a violation of R.S. 39:3-17 results. If he not only is unlicensed in his home State but such license was there suspended, revoked, prohibited or refused his operation of a motor vehicle upon the highways of this State violates R.S. 39:3-40 as well, regardless of whether action against his reciprocity privilege under R.S. 39:5-30 or against his "right to operate a motor vehicle" under R.S. 39:4-50 has been taken, in the same manner as the operation of a motor vehicle by a resident under similar circumstances would violate R.S. 39:3-40. Absent the broad application of R.S. 39:3-40 to all drivers,

whether resident or non resident, the latter class would escape the more severe sanctions of this statute although resident drivers would be clearly subjected to such penalties.

In summary, it is clear from both the plain meaning of R. S. 39:3-40 and the context in which this statute must be considered—particularly R.S. 39:3-10 and R.S. 39:3-17—that it was the legislative intent to apply the sanctions of R.S. 39:3-40 to a nonresident whose driver's license has been suspended, revoked, prohibited or refused in his home state and who thereafter operates a motor vehicle upon the highways of this State.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHRISTIAN BOLLERMANN
Deputy Attorney General

CB:MG

JANUARY 4, 1957

HONORABLE MERRITT LANE, JR., *Secretary*
Legalized Games of Chance Control Commission
1100 Raymond Boulevard
Newark 5, New Jersey

MEMORANDUM OPINION—P-1

DEAR MR. LANE:

You have requested our opinion as to whether organizations not qualified under the Bingo Licensing Law or the Raffles Licensing Law may conduct games of chance on United States Government military reservations within the State of New Jersey. For the reasons hereinafter stated it is our opinion that such persons would violate federal but not New Jersey law.

Persons conducting or participating in the games of chance commonly known as bingo or raffles in this jurisdiction would, absent compliance with the Bingo Licensing Law, *L.* 1954, *c.* 6, N.J.S.A. 5:8-24 et seq., or the Raffles Licensing Law, *L.* 1954, *c.* 5, N.J.S.A. 5:8-50 et seq., as the case may be, violate N.J.S. 2A:112 (gaming), N.J.S. 2A:121 (lotteries) and N.J.S. 2A:170-18 (possession of lottery or numbers slips). By N.J.S.A. 5:8-40 and 67 compliance with the Bingo Licensing Law and the Raffles Licensing Law confers immunity for what would otherwise constitute a violation of the cited sections of N.J.S. 2A. Compliance with the Acts involves, *inter alia,* licensing by municipality in which such game of chance is to be held. By N.J.S.A. 5:8-42 and 69 no municipality may issue licenses unless the provisions of the Acts have been adopted by the legal voters of such municipality pursuant to N.J.S.A. 5:8-43 to 49 and N.J.S.A. 5:8-70 to 76. As is apparent from N.J.S.A. 5:8-43 and N.J.S.A. 5:8-70, the earliest date on which the Acts could have been adopted in any New Jersey municipality is April 20, 1954.

It is provided by Article 1, sec. 8, clause 17 of the United States Constitution that:

"The Congress shall have power . . . to exercise exclusive legislation in

all cases whatsoever . . . 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 . . ."

The respective legislative jurisdiction which vests in the United States on the one hand and which is retained by the ceding State on the other upon a purchase of land pursuant to the above provisions of the United States Constitution depends upon several factors, among them the terms of the cession as evidenced by the acts of the legislature of the ceding state, the terms of acceptance, if any, of the United States, and such adjustments of jurisdiction as may take place between the two entities. *Collins* v. *Yosemite Park & Curry Co.,* 304 U.S. 518 (1938). It will be assumed for purposes of this opinion that the United States has accepted the terms of cession imposed by the New Jersey legislature upon the purchase and condemnation of all lands now being used as military reservations and that all such lands were acquired prior to April 20, 1954, the earliest possible effective date of the Bingo Licensing Law and the Raffles Licensing Law in any New Jersey municipality. As to specific aquisitions of such land, a list of 38 acts of the New Jersey legislature whereby jurisdiction was ceded to the federal government is set forth following R.S. 52:30-1 of New Jersey Statutes Annotated.

The New Jersey statutes dealing with cession of jurisdiction to the United States are R.S. 52:30-1, 2 and 3. R.S. 52:30-1 and 2 read as follows:

"52:30-1. Consent to acquisition of land by United States

The consent of this state is hereby given, pursuant to the provisions of article one, section eight, paragraph seventeen, of the constitution of the United States, to the acquisition by the United States, by purchase, condemnation or otherwise, of any land within this state, for the erection of dock-yards, custom houses, courthouses, post offices or other needful buildings.

52:30-2. Jurisdiction over lands acquired

Exclusive jurisdiction in and over any land so acquired by the United States is hereby ceded to the United States for all purposes except the service of process issued out of any of the courts of this state in any civil or criminal proceeding.

Such jurisdiction shall not vest until the United States shall have actually acquired ownership of said lands, and shall continue only so long as the United States shall retain ownership of said lands."

It appears from the foregoing that New Jersey is one of the states which, upon the purchase of lands pursuant to Article I, section 8, clause 17 of the United States Constitution, cedes exclusive or partially exclusive legislative jurisdiction to the United States, the only reservation being a right to serve civil and criminal process within the confines of such lands. This reservation, however, does not defeat the exclusive jurisdiction of the United States. *United States* v. *Unzeuta,* 281 U.S. 138 (1930).

Upon the cession of exclusive legislative jurisdiction to the United States only such subsequently enacted local laws as are adopted by the United States become effective within the lands in question and where such adoption occurs the local laws

so adopted become federal laws enforceable only in the federal courts. *Johnson* v. *Yellow Cab Transit Co.,* 321 U.S. 383 (1944); *Collins* v. *Yosemite National Park & Curry Co., supra,; Atkinson* v. *State Tax Commission,* 303 U.S. 20 (1938) and *United States* v. *Press Publishing Co.,* 219 U.S. 1 (1911). It may be noted that despite the constitutional provision conferring exclusive jurisdiction upon the federal government the United States Supreme Court has held that appropriate local law not inconsistent with national purposes *which is in effect at the time sovereignty is surrendered* continues in force until abrogated by the United States. *James Stewart & Co.* v. *Sadrakula,* 309 U.S. 94 (1940).

By 18 U.S.C., sec. 13, known as the Assimilative Crimes Act, it is provided as follows:

"Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this Title, is guilty of any act or omission which, although not made punishable by an enactment of Congress, would be punishable if committed or omitted 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."

18 U.S.C., sec. 7 referred to in sec. 13, supra., defines special maritime and territorial jurisdiction of the United States and includes therein lands purchased for the purposes set forth in Article 1, sec. 8, clause 17 of the Constitution. Such lands include those used for military reservations and the legislative jurisdiction thereby acquired by the United States is not confined to those portions of the reserve which are actually used for military purposes. *Benson* v. *United States,* 146 U.S. 325 (1892).

The authorities recognize that if the act or omission to act referred to in 18 U.S.C. sec. 13 is the subject of a federal statute, no adoption of local laws concerning this subject matter is effected. *Johnson* v. *Yellow Cab Transit Co., supra.*

An examination of the federal statutes discloses that there is no counterpart of N.J.S. 2A:112, N.J.S. 2A:121 or N.J.S. 2A:170-18. The only prohibition against gambling found in the federal statutes is one against gambling on vessels on waters within the jurisdiction of the United States. 18 U.S.C., sec. 1081 et seq.

It is clear that the conduct of bingo, raffles and related games of chance upon United States military reservations in New Jersey would, upon the authority of 18 U.S.C., sec. 13, constitute a federal crime punishable only in the federal courts. In response to your specific request for our opinion, we therefore advise you that organizations not qualified under the Bingo Licensing Law or Raffles Licensing Law may not lawfully conduct games of chance on United States Government Military Reservations within New Jersey.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHRISTIAN BOLLERMANN
Deputy Attorney General

CB:MG

JANUARY 31, 1957

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

MEMORANDUM OPINION—P-2

DEAR COMMISSIONER KELLY:

You have requested our opinion in connection with the propriety of certifying certain persons on the eligible list for appointments to the police department of the City of Newark.

The facts, we are informed, are as follows: After certification of the list of eligibles by the Civil Service Commission to the Newark Police Department, the City of Newark made an independent investigation of the qualifications and character of the persons so certified. Such an examination, including a check of state police records had already been made by your Department before certification. The inquiries by the City of Newark, however, produced information which was not present in the state police files and which prompted the police department of Newark to advise certain of the eligibles certified by the Civil Service Department that they were not acceptable. These individuals have appealed to the Civil Service Commission from this action. All are veterans, and so must be appointed in the order of their standing on the list under R.S. 11:27-4.

Before proceeding further into the specific facts prompting the action by the City of Newark, we deem it important to point out that the action of the City of Newark in directly notifying the eligibles was improper. Objection to persons on the list certified by Civil Service should properly be brought to the attention of the Civil Service Department so that, if warranted, the list of persons certified may be changed.

We understand that the objections raised by Newark all relate generally to the moral character of the individuals in question. These objections may be broken down for convenience in this opinion into three categories.

Category one includes individuals who have had juvenile arrest and adjudication records, but no record subsequent to their eighteenth birthday. Category two includes those individuals who have had adult records of convictions of offenses of varying degrees. Category three includes individuals who have had adult records, not involving convictions but involving either arrest or other evidence of unsavory companions and character.

N.J.S.A. 40:47-3 provides:

> "No person shall be appointed to police or fire departments unless he is of good moral character . . ."

and further provides:

> "No person shall be so appointed who has been convicted of any crime constituting an indictable offense, or who has been convicted of any crime or offense involving moral turpitude."

R.S. 11:23-2 provides that:

> "The commission may refuse to examine or certify persons who have been guilty of a crime or infamous or notoriously disgraceful conduct or who have been dismissed from the public service for delinquency or misconduct."

(In the case of *Vanderwart* v. *Department of Civil Service*, 19 N.J. 341 (1955) the same language in R.S. 11:9-6 was construed to *require* the chief examiner to reject or refuse to certify any applicant falling within its terms.) Both R.S. 11:9-6 and 11:23-2 provide for hearings where candidates' names are stricken for cause.

N.J.S. 2A:4-39, which deals with juvenile offenders, provides that adjudications upon the status of children under eighteen shall not be deemed convictions and that the disposition of such children or any evidence given in the juvenile and domestic relations court against such children shall not be used against them in any other proceedings or held against their records in any future civil service examination, appointment or application.

Civil Service Rule 26 provides that the chief examiner and secretary shall notify in writing any person whose application is rejected for cause and that upon receiving a written request from any person whose application is so rejected, the President may give him an opportunity to show cause why it should not be rejected. Civil Service Rule 40 provides that the name of any person who has been dismissed from another position in public service or whose character, qualifications and record are found not to warrant public employment, may be removed from any employment list. It further provides that in such cases, the person whose name is considered for removal should be notified of such contemplated action and given reasonable opportunity to be heard.

Applying the statutes and rules cited above to the three categories noted, you are advised as follows: Category one—if the only evidence tending to point to the poor moral character of a candidate is his juvenile record, or evidence given at a juvenile hearing, it would be improper for the Civil Service Commission to refuse to certify him and for the municipality to refuse to appoint him. However, if external evidence dealing with the offense, independently secured, is offered, which tends to indicate a poor moral character, the person's application may be rejected with a specification of the reasons for such rejection and a notification that a hearing will be granted upon request. Similarly, if the person's name has already been placed upon an employment list, upon opportunity for hearing, his name may be removed from such list, if his character, qualifications and record are found to be such as not to warrant public employment.

It should be noted that the removal of the individual's name from the employment list, once he has been certified, must be done by the President and the Commission, and not by the appointing authority.

Category two—no person in this category should be admitted to examination, unless the crime involved did not constitute either an indictable offense or one involving moral turpitude. If one has been admitted and certified, the provisions of Rule 40 should be followed. Refusal to admit or certify such candidates is mandatory under the *Vanderwart* decision.

Category three—If information acquired by the chief examiner tends to indicate that an individual is of poor moral character, or has been guilty of disgraceful conduct sufficient to indicate unfitness for police employment, he may be denied opportunity

for examination, subject to his right to a hearing, or if certified, his name may, upon prior notice and opportunity to be heard, be removed from the certified list by the commission.

We shall be happy to furnish further advice if the case of any one individual poses a special problem not answered by this opinion.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID LANDAU
Legal Assistant

DL:mc

FEBRUARY 7, 1957

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

MEMORANDUM OPINION—P-3

DEAR DIRECTOR GASSERT:

You have requested our opinion as to whether you may refund driver's license fees in cases where the licensee has died before the expiration of the license. For the reasons hereinafter stated it is our opinion that you may not refund such fees.

While there appear to be no decisions concerning refunds in cases where the license has died, the authorities agree that a licensing agency which has illegally exacted fees may not be compelled to refund them absent statutory authorization therefor. *City of Camden* v. *Green,* 54 N.J.L. 591 (E. & A. 1892), and *Shoemaker & Co.* v. *Board of Health,* 83 N.J.L. 423 (Sup. Ct. 1912). See also 53 C.J.S. 696 *(sec.* 57, Licenses). It would seem that a similar rule should prevail where the fee has been properly collected but the license has prematurely lapsed through no fault of the licensor.

As to your right to make such refunds, there is no statutory provision permitting this to be done. On the contrary, it is provided by R.S. 39:5-40 that:

> "Except as otherwise provided by this subtitle all moneys received in accordance with the provisions of this Title, whether from fines, penalties, forfeitures, registration fees, license fees, or otherwise, shall be accounted for and forwarded to the commissioner, who shall pay the same over to the State Treasurer, to be credited to the State Highway Fund and used for the purposes of such fund as provided by section 52:22-20 of the Title, State Government, Departments and Officers."

The licensing fees which you have received have of course all been paid over to the State Treasurer pursuant to the quoted statute and are no longer available to you. Such moneys may not be drawn out of the treasury except upon legislative appropriation. In this connection it is provided by Article VIII, Section II, paragraph 2 of the New Jersey Constitution in pertinent part as follows:

> "No money shall be drawn from the State treasury but for appropriations made by law. All moneys for the support of the State government and for all other State purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriation law covering one and the same fiscal year. . ."

It may be pointed out that this office advised Director Dearden that R.S. 39:5-40 bars refunds of motor vehicle fines which have been erroneously assessed. *Op. Atty. Gen.,* July 6, 1953, No. 30.

For the foregoing reasons it is our opinion that you may not refund driver's license fees in cases where the licensee has died before the expiration of the license.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHRISTIAN BOLLERMANN
Deputy Attorney General

CB:MG

FEBRUARY 6, 1957

HONORABLE ROBERT L. FINLEY
Deputy and Acting State Treasurer
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-4

Re: Federal land bank consolidated farm loan bonds

DEAR MR. FINLEY:

You have requested our opinion as to whether consolidated farm loan bonds issued by the Federal land banks qualify as legal investments for savings banks in New Jersey under the provisions of P.L. 1948, c. 67, § 175A (N.J.S.A. 17:9A-175A). In our opinion they do so qualify.

N.J.S.A. 17:9A-175 provides in part:

> "A A savings bank may invest in
>
> * * *
>
> (6) bonds, debentures or other obligations issued by *a* Federal land bank or by a federal intermediate credit bank, under the Act of Congress of July 17, 1916, known as the 'Federal Farm Loan Act,' as amended and supplemented from time to time" (emphasis supplied).

The "Federal Farm Loan Act" (12 U.S.C.A. § 641 *et seq.)* provides for the issuing of farm loan bonds individually by the twelve Federal land banks (12 U.S.C.A. § 841) and for the issuing of *consolidated* farm loan bonds as the joint and several obligation of the twelve banks (12 U.S.C.A. §§ 847, 876).

The question presented is whether the phrase "obligations issued by *a* Federal

land bank" prevents New Jersey savings banks from investing in such consolidated bonds.

A literal reading of the statutes involved leads to the conclusion that the consolidated bonds are legal investments for New Jersey savings banks since "joint and several obligations" are the obligations of each and every one of the twelve Federal land banks, and hence the obligations of "*a* Federal land bank."

We understand that while prior to 1933 the farm loan bonds were issued individually by each Federal land bank, since that date only consolidated bonds have been issued. We also understand that all presently outstanding farm loan bonds are in the form of consolidated obligations. It must be assumed that in enacting P.L. 1948, c. 67, the Legislature acted with knowledge of the existing provisions of the related federal legislation and thus intended that the consolidated bonds under consideration be legal investments for savings banks in this State. *Goldberg & Co., Inc.* v. *Division of Employment Security, etc.,* 21 N.J. 107 (1956).

As above stated, only consolidated bonds have been issued by land banks since 1933. To conclude that such bonds are not eligible for investment would be to preclude investment by New Jersey Savings Banks in any Federal land bank obligations. This would violate the general rule that a construction which renders a part of a statute inoperative, superfluous or meaningless is to be avoided. *Abbotts Dairies* v. *Armstrong,* 14 N.J. 319 (1954).

It is our opinion and you are so advised that consolidated farm loan bonds issued as the joint and several obligation of the twelve Federal land banks qualify as legal investments for savings banks in New Jersey.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DONALD M. ALTMAN
Legal Assistant

DMA:ad

FEBRUARY 21, 1957

MRS. RUTH WILLIAMSON, *Clerk*
Hunterdon County Board of Elections
Hall of Records
Flemington, New Jersey

MEMORANDUM OPINION—P-5

MY DEAR MRS. WILLIAMSON:

Receipt is acknowledged of your letter of January 30, 1957 by which you request, on behalf of the Hunterdon County Board of Elections, the opinion of this office as to the interpretation to be given to R.S. 19:31-10.

R.S. 19:31-10 in pertinent part provides that there shall be kept on file in the office of the Commissioner of Registration original and duplicate permanent voter registration forms. The duplicate voter registration forms and the corresponding voting record shall constitute and be known as the signature copy register. The signature copy registers shall at all times, except when they are in process of delivery to or from or in the possession of the various district boards of election, be open to public inspection subject to reasonable rules and regulations.

You first inquire whether the phrase "public inspection" as used in R.S. 19:31-10 would include the right to copy voting records from the register.

The answer to your inquiry is in the affirmative.

You will note that R.S. 19:31-10 provides that the binders containing the duplicate permanent registration forms and the corresponding record of voting forms shall constitute and be known as the signature copy registers.

You will also note that except during certain specified times the signature copy registers shall, by the terms of R.S. 19:31-10, be open to public inspection.

Although R.S. 19:31-10 expressly grants the right to inspect the signature copy registers it is silent as to whether copies may be made of these registers.

The authorities are agreed that at common law a person may inspect public records in which he has an interest or make copies or memoranda thereof and that where a statute grants the right of inspection of public records such grant gives the right to inspect with all of its common law incidents. (76 C.J.S., Records, § 35, p. 133, 135).

It has been held in this State that registration lists on file with a county board of elections are public records which may be inspected and copied. *Higgins* v. *Lockwood,* 74 N.J.L. 158 (Sup. Ct. 1906).

Mr. Justice Garrison expressed the theory which underlies the rule allowing inspection of public records when he said in the case of *Fagan* v. *State Board of Assessors,* 80 N.J.L. 516, 518 (Sup. Ct. 1910):

> "As a citizen and a taxpayer he has that abiding interest in the administration of his government and of every department of it that affects him or his fellows that marks the difference between a citizen and a subject. It is to the failure of the citizen to assert these rights that we must look for those evils that are incident to our form of government rather than to a superabundant zeal in this respect. It would be unfortunate in the extreme for the courts of a republic to erect technical barriers by which these duties of citizenship were discouraged or denied; and no more effectual barrier could be set up than the rule that records required by public law for the performance of their public duties by public servants are possessed of a privacy into which the mere citizen, however patriotic his purposes, may not inquire."

It is our opinion that the term public inspection as used by R.S. 19:31-10 contemplates both the inspection and copying of the signature copy registers required to be kept on file in the office of the Commissioner of Registration.

You also ask if the phrase "reasonable rules and regulations", which may be adopted by the Commissioner of Registration to govern the inspection of the signature copy registers, could justify a rule to require that a person seeking to inspect and copy the signature copy registers be required to demonstrate to the Commissioner that his reason for inspecting and copying the record is in the public interest.

The right to inspect public records has, in this State, been subject to qualifications. Thus, in the case of *Casey* v. *MacPhail,* 2 N.J. Super. 619, 624 (Law Div. 1949) the court said:

"The general principle of the right of any citizen and taxpayer to inspect and have access to public records when such inspection and access can be had without undue interference with the conduct of public business is qualified not only by the right in the judicial discretion of the trial judge to deny the inspection or access when the motive is improper but also is qualified by any enactments by the legislature which may bear upon his right of use of the information which he gains through the inspection or access."

The right of citizens and taxpayers to inspect public records should be broadly recognized in the furtherance of good government. *Taxpayers Ass'n. of Cape May* v. *City of Cape May*, 2 N.J. Super. 27 (App. Div. 1949).

It is our opinion that pursuant to R.S. 19:31-10 "reasonable rules and regulations" may be promulgated with reference to the safekeeping of the records and the prevention of any interference with the performance of official duties. We advise you specifically that such regulations may not require that persons declare their reasons for inspecting and copying the voting records.

We do not exclude, however, the right of the Commissioner of Registration and the County Board of Elections to bar any access to the signature copy registers for an illegal purpose in violation of the criminal laws of the State.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: JAMES J. MCLAUGHLIN
Deputy Attorney General

JJM:jeb

MARCH 6, 1957

HONORABLE ROBERT L. FINLEY
Deputy State Treasurer
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-6

DEAR MR. FINLEY:

You have requested our opinion as to whether members of the Public Employees' Retirement System who are on leave of absence in the military or naval service of the United States, or who hereafter take such leave, are entitled to the continued death benefit protection available to members of that System under Sections 41(c) and 57 of P.L. 1954, c. 84, as amended, for longer than 93 days after their entry into such service.

Sections 41(c) and 57 of P.L. 1954, as amended, provide for the payment of death benefits to members of the Public Employees' Retirement System who die "in service". P.L. 1955, c. 261 (N.J.S.A. 43:15A-108) provides:

"a. For the purposes of section 41(c) and section 57 of chapter 84 of the public laws of 1954, a member of the Public Employees' Retirement System shall be deemed to be in service for a period of no more than 2 years while on official leave of absence without pay; provided, that satisfactory evidence is presented to the board that such leave of absence without pay is due to illness.

b. For the purposes of section 41(c) and section 57 of chapter 84 of the public laws of 1954, a member of the Public Employees' Retirement System shall be deemed to be in service for a period of no more than 93 days while on official leave of absence without pay when such leave of absence is due to any reason other than illness. * * *."

The Legislature has spoken clearly in specifying one exception to the 93-day limitation, that is for sick leave. However, the question is presented as to whether the foregoing is affected by the provisions of N.J.S.A. 38:23-4, 38:23-5, and 38:23-6, as amended.

N.J.S.A. 38:23-4 grants leave of absence to various public employees who enter military or naval service during war or emergency. (It should be noted that the existence of the present National Emergency proclaimed by the President on December 16, 1950 has never been terminated. See N.J.S.A. 38:23-4.1 and Attorney General's Formal Opinion 1956 No. 16) N.J.S.A. 38:23-4 also provides:

"* * *. 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, unless otherwise provided by law, the right to compensation."

N.J.S.A. 38:23-5 provides that no such person entering such service ". . . who, at the time of such entry was or is a member in good standing of any pension, retirement or annuity fund, shall suffer the loss or impairment of any of the rights, benefits or privileges accorded by the laws governing such pension, retirement or annuity funds; and the time spent in such service by any such person shall be considered as time spent in the office, position or employment held by him at the time of his entry into such service, in all calculations of the amount of pension to which he is entitled and of the years of service required to entitle him to retire * * *".

N.J.S.A. 38:23-6 provides:

"During the period beginning with the time of the entry of such person into such service and ending at the earliest of (a) three months after the time of such person's discharge from such service or (b) the time such person resumes such office, position or employment or (c) the time of such person's death or disability while in such service, ths proper officer of the State, county, municipality, school district, political subdivision, board, body, agency or commission shall contribute or cause to be contributed to such fund the amount required by the terms of the statute governing such fund based upon the amount of compensation received by such person prior to his entry into such service and during the period first mentioned in this section any such person receiving compensation from the State, county, municipality, school district, political subdivision, board, body, agency or commission, shall continue to contribute the amount required by statute to be paid by members

of such fund and during the period first mentioned in this section any such person not receiving compensation from the State, county, municipality, school district, political subdivision, board, body, agency or commission shall not be required to contribute the amount required by statute to be paid by members of such fund, but said amount shall be contributed for such person by the State, county, municipality, school district, political subdivision, board, body, agency or commission."

It is arguable that (absent the specific legislative declaration in N.J.S.A. 43:15A-108) the broad language of N.J.S.A. 38:23-4 might be construed as extending to employees on such leave the continued protection of the death benefits in question. The same observation can be made regarding N.J.S.A. 38:23-5. As to N.J.S.A. 38:23-5, it should be noted that the reference to "the time spent in such service" is limited in effect to the "calculations of the amount of pension to which he is entitled and of the years of serving required to entitle him to retire". It is somewhat doubtful whether the death benefit protection in question is a part of one's pension; it is more likely that "pension" as used in N.J.S.A. 38:23-5 would have reference to the retirement allowances provided under P.L. 1954, c. 84, as amended, insofar as the latter legislation is concerned. N.J.S.A. 38:23-6 has less direct bearing on the problem, relating to the employer's required contributions during the employee's military or naval service.

Under sections 41(c) and 57 of P.L. 1954, c. 84, as amended, death benefits are paid only in the event of the death of a member "in service". As noted, N.J.S.A. 43:15A-108 specifically delineates the meaning of "in service" in the foregoing sections. A member is deemed to be "in service" for "no more than 93 days . . . when such leave of absence is due to any reason other than illness." Compared to the general language of N.J.S.A. 38:23-4 and 38:23-5, the foregoing language of N.J.S.A. 43:15A-108 is definite and specific. It is settled that where there is a seeming conflict between a general statute and a specific statute covering a subject in a more minute and definite way, the latter prevails over the former. *Hackensack Water Co.* v. *Division of Tax Appeals,* 2 N.J. 157, 165 (1949); *Goff* v. *Hunt,* 6 N.J. 600, 607 (1951); *State* v. *Hotel Bar Foods,* 18 N.J. 115, 128 (1955). Additionally significant in the present matter is the fact that the specific statute is the more recent declaration of the legislative will.

Accordingly, it is our opinion that the death benefit protection afforded to members of the Public Employees' Retirement System under section 41(c) and 57 of P.L. 1954, c. 84, as amended, does not extend for longer than 93 days after their entry into military or naval service.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: LAWRENCE E. STERN
Deputy Attorney General

LES:b.

APRIL 5, 1957

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

MEMORANDUM OPINION—P-7

DEAR DR. RAUBINGER:

You have requested our opinion as to whether it is permissible under the provisions of N.J.S.A. 18:10-29.40 for emergency aid allocated to a particular school district to be used by that district to employ personnel who will attempt to improve these emergency conditions in other districts within the county as well as in the district to which the funds have been allocated. In our opinion, the foregoing procedure is permissible.

The statute in question provides as follows:

"There shall be appropriated annually the sum of $350,000.00 to be distributed by the commissioner, upon the approval of the State Board of Education, to meet unforeseeable conditions in any school district, and to make up any deficit in the amount of State aid lawfully anticipated in the budget of any school district for the school year beginning July 1, 1954, where the State aid payable to the district under this act shall be less than the sum of the amount so anticipated pursuant to the statutes repealed by this act. The amount of such emergency aid shall be payable by the State Treasurer upon the certificate of the commissioner and the warrant of the Director of Budget and Accounting."

The statute thus states that the emergency aid is to be distributed "to meet unforeseeable conditions in any school district"; and under this authority, any district receiving such aid could use it for the employment of personnel needed to cope with the unforeseeable conditions in that district which the aid was designed to meet.

The act is silent on the question whether a district may receive its aid in kind or in services rather than in money. In our opinion, the act should be liberally construed so as to allow the first alternative, particularly where it appears to be the most economical and efficient means of achieving the ultimate purposes of the aid, i.e., to meet the emergency needs of that district. Under the circumstances here, the district receiving the money and employing the necessary personnel is acting in substance as the agent of the State for the distribution of emergency aid to all the districts which will share in the services to be rendered by such personnel.

Neither the foregoing statute nor any other provision of law prohibits a school district from allowing its employees to assist another district in solving problems common to both districts. On the contrary, such cooperation between districts furthers the constitutional and legislative policy of maintaining an "efficient" system of free public schools. N. J. Constitution, Article VIII, Section IV, par. 1; R.S. 18:2-1. In many instances, it would be most inefficient for several school districts each to employ, even part-time, a person needed to deal with emergency problems of curriculum, teacher training, etc. when one person could perform the function for several districts. The employment of such person or persons by one district, the cost being defrayed by state aid and the services procured thereby being available to several

districts, is a reasonable and lawful method of implementing the educational policy of this State.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

TPC:tb.

APRIL 17, 1957

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

MEMORANDUM OPINION—P-8

DEAR MR. NEELD:

You have submitted to us for advice a form of release which a railroad company doing business in this state has requested that employees of the Railroad Tax Bureau, Division of Taxation, Department of the Treasury, execute prior to entry upon railroad lands in the course of their duties of assessing such property as required by the Railroad Tax Law of 1948, N.J.S.A. 54:29A-1 et seq.

More particularly, you wish to know whether (1) you should accede to the request of the railroad at all, and (2) if so, whether the suggested form of release is satisfactory.

The Railroad Tax Law of 1948 provides a comprehensive scheme for the taxation of real and tangible personal property of common carrier railroads engaged in owning or constructing facilities for the transportation of persons or property in or through this state (N.J.S.A. 54:29A-2, N.J.S.A. 54:29A-7 et seq.).

In order to administer the provisions of this act, N.J.S.A. 54:29A-63 states that:

> "For the purpose of administering this act, the commissioner, whenever he deems it expedient, may make or cause to be made by an employee of the State Tax Department, engaged in the administration of this act, an audit, examination, or investigation of the books, records, papers, vouchers, accounts and documents of any taxpayer, and also field surveys, inspections and examinations of all lands and physical property. It shall be the duty of every taxpayer and of every director, officer, agent or employee of every taxpayer to exhibit to the commissioner or to any such employee of the State Tax Department all such books, records, papers, vouchers, accounts and documents of the taxpayer and to facilitate any such audit, examination, field examination or investigation so far as it may be in its or their power so to do. It shall be lawful for the commissioner, or any employee in the State Tax Department by him thereunto designated to take the oath of any person signing any application, deposition, statement, or report required by the commissioner in the administration of this act. If any returns are not made, the commissioner shall ascertain the necessary facts from the best information he can obtain and in such manner as he may find convenient, using his personal knowledge and judgment."

This section clearly gives a right to Railroad Tax Bureau employees to enter property owned by a railroad in order to conduct examinations of the lands and physical property of a railroad, as well as its books, records, papers and other matter in its possession and control. At the same time, the statute imposes a responsibility and duty on a railroad to allow entry upon its property of bureau employees for the purpose of making such studies. When such a duty has been imposed by the Legislature, the railroad taxpayer may not impede the work of the Bureau in any manner, nor may it absolve itself of any wrongdoing on its part by requiring such release to be signed. To impede investigations would contravene the spirit and letter of this section. (Cf. *Grogan* v. *DiSapio*, 11 N.J. 308 (1953)).

Without considering any further legal questions, the answers to which would also prevent the execution of such a release, we advise you to inform the railroad that you cannot accede to their request.

Since question number one is answered in the negative, the second question has been mooted and need not be answered.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

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

DMS:ew

APRIL 17, 1957

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

MEMORANDUM OPINION—P-9

Re: Power to appoint the Board of Managers of the New Jersey Agricultural Experiment Station

DEAR GOVERNOR MEYNER:

You have inquired whether Chapter 61 of the Laws of 1956, which effects a reorganization of Rutgers University, will make any changes in the method of designation of the Board of Managers of the New Jersey Agricultural Experiment Station set forth in Chapter 49 of the Laws of 1945 (N.J.S.A. 18:22-15.5).

Chapter 61 of the Laws of 1956 does not expressly repeal Chapter 49 of the Laws of 1945. Accordingly, only in those portions of the 1945 law which are in conflict with the provisions of the superseding 1956 act may a repealer possibly be construed.

Under the provisions of the 1945 statute (N.J.S.A. 18:22-15.5),

"... the functions, powers and duties of the Board of Managers of the New Jersey Agricultural Experiment Station are transferred to the Trustees of Rutgers College in New Jersey which shall appoint a board of managers to act as its agent in managing and directing the New Jersey Agricultural Experiment Station."

The Act then goes on to specify how the board of managers shall be appointed.

Until Chapter 61 of the Laws of 1956 became effective, the legal name for the Rutgers corporate entity was "The Trustees of Rutgers College in New Jersey". Under the new legislation, the official name of the Rutgers corporate entity was changed to "Rutgers, the State University". Accordingly, N.J.S.A. 18:22-15.5 must now be interpreted by reading "Rutgers, the State University" wherever the words "The Trustees of Rutgers College in New Jersey" appear.

Until the 1956 legislation, "The Trustees of Rutgers College in New Jersey" was managed by a single governing body known as the Board of Trustees. The Board of Trustees, possessing the principal management functions of the university, exercised the appointment powers delegated by statute to the university. Chapter 61 of the Laws of 1956, however, vests the principal management functions of the university, including the power to appoint, in the newly created Board of Governors. See L. 1956, c. 61, sec. 18 (N.J.S.A. 18:22-15.42); *Trustees of Rutgers College* v. *Richman*, 41 N.J. Super 259, 287, 288 (Ch. Div. 1956).

You are accordingly advised that the Board of Governors of Rutgers, the State University, is the proper appointing agent to designate members to the Board of Managers of the New Jersey Agricultural Experiment Station under Chapter 49 of the Laws of 1945 (N.J.S.A. 18:22-15.5).

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID LANDAU
Legal Assistant

DL:mc

APRIL 17, 1957

HONORABLE I. GRANT SCOTT
Clerk of the Superior Court
State House Annex
Trenton, New Jersey

MEMORANDUM OPINION—P-10

DEAR MR. SCOTT:

This office is in receipt of your letter of March 7, 1957 wherein you request our opinion concerning the interpretation to be given R.S. 43:21-15(b). Specifically, you advise that at all times since the effective date of the Judicial Article of the 1947 Constitution on September 15, 1948 you have construed the cited statute to preclude the taxation of costs against employees who fail to prevail on appeal to the Superior Court, Appellate Division in actions arising under the Unemployment Compensation

Law, R.S. 43:21-1 et seq. We further understand that this practice has been followed during the same period by the Clerk of the Supreme Court. For the reasons hereinafter stated, it is our opinion that you have correctly interpreted R.S. 43:21-15(b) and that this section prohibits the taxing of such costs.

R.S. 43:21-15(b) reads as follows:

"(b) Limitation of fees. No individual claiming benefits shall be charged *fees of any kind* in any proceeding under this chapter by the commission or its representatives or by any court or any officer thereof. Any individual claiming benefits in any proceeding before the board of review or a court may be represented by counsel or other duly authorized agent; but no such counsel or agents shall either charge or receive for such services more than an amount approved by the board of review. Any person who violates any provision of this subsection shall, for each such offense, be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00), or imprisoned for not more than six months, or both." (Emphasis supplied)

R.R. 1:9-2, made applicable to the Superior Court, Appellate Division by R.R. 2:9-2, provides for the taxation by the Clerk of the Court of "such costs as are recoverable by law" in favor of the prevailing party.

N.J.S. 22A:2-1 and 2 deal, respectively, with the *fees* payable to the Clerk of the Supreme Court and the *costs* to be awarded therein. These sections are made applicable to the Superior Court, Appellate Division by N.J.S. 22A:2-5. It is clear that when used as words of art the terms "fees" and "costs" have different and distinct meanings. It has frequently been said that "fees" represent compensation to an officer for services rendered in the progress of a cause, while "costs" are allowances to a party for expenses incurred in prosecuting or defending a suit. *McLain* v. *Continental Supply Co.*, 66 Okl. 225, 168 P. 815 (Sup. Ct. 1917); *Tillman* v. *Wood*, 58 Ala. 578 (Sup. Ct. 1877); *Bohart* v. *Anderson*, 24 Okl. 82, 103 P. 742 (Sup. Ct. 1909); and *State* v. *Ayer*, 194 Wash. 165, 77 P. 2d 610 (Sup. Ct. 1938). The aforesaid authorities, while recognizing the distinction between the words in question, all agree that they are commonly used interchangeably and they so construe and apply these terms.

The word "fees" in the present context would appear to apply to attorneys' fees as well as to filing fees and other fixed charges paid by litigants. On the other hand, the word "costs" as used in N.J.S. 22A:2-2 and R.R. 1:9-2 embrances those charges, including filing fees, to which the prevailing party is generally entitled. As to the meaning of the term "fees *of any kind*" in R.S. 43:21-15(b), it is our opinion that the *Italic* words evince a legislative intention to equate "fees" with the word "costs" as the latter is used in N.J.S. 22A:2-2 and R.R. 1:9-2. This view is strengthened by the fact that the "fees" dealt with in R.S. 43:21-15(b) are not, as they could have been, limited either to filing fees or attorney's fees. Moreover, while it may be urged that there is no prohibition in the statute against the payment of such fees to an employer who prevails on appeal, before an employer or any prevailing party can collect court costs the latter must be taxed, or charged, by the Clerk of the Court. It is this taxing or charging which we believe is prohibited by R.S. 43:21-15(b).

It may also be contended that the instant question is a procedural one to be governed solely by the rules of Court. It is not necessary, however, to characterize

it as either substantive or procedural since R.R. 1:9-2 specifically refers to "such costs as are recoverable by law." Cf. 4:55-6(a), in which reference is made to the taxation of costs in favor of the prevailing party "except when express provision therefor is made either in a statute or in these rules".

The aforesaid interpretation of R.S. 43:21-15(b) is further supported by the fact that the Unemployment Compensation Law is remedial and should be liberally construed. See R.S. 43:21-2, *Bergen Point Iron Works* v. *Board of Review,* 137 N.J.L. 685 (E. & A. 1948) and *Ford Motor Co.* v. *New Jersey Department of Labor and Industry,* 7 N.J. Super. 30 (App. Div. 1950), aff'd 5 N.J. 494 (1950). To give the term "fees of any kind" as used in R.S. 43:21-15(b) a narrower meaning than the word "costs" as used in N.J.S. 22A:2-2 and R.R. 1:9-2 would, we believe, run counter to legislative intent.

Finally, the fact that both you and the Clerk of the Supreme Court have for many years construed the word "fees" as synonymous with "costs" is illuminative of the proper meaning to be given that term. See *Lane* v. *Holderman,* 23 N.J. 304, 322 (1957), and the cases therein cited; *Sutherland, Statutory Construction* (3rd Edit.), Section 5107.

In summary, it is our opinion and you are advised that R.S. 43:21-15(b) precludes you from charging costs against an employee who fails to prevail on an appeal to the Superior Court, Appellate Division.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHRISTIAN BOLLERMANN
Deputy Attorney General

CB:MG

APRIL 17, 1957

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

MEMORANDUM OPINION—P-11

DEAR COMMISSIONER MCLEAN:

You have requested our opinion whether the State can lease mineral rights for the mining or extraction of certain minerals from the sands of the Colliers Mills Public Shooting and Fishing Grounds. This tract is administered by the Division of Fish and Game in your department (*R.S.* 13:1B-23, 27; *R.S.* 23:3-11), and it is our understanding that the ore in question can be extracted from the surface without permanently damaging the property for a fish and game preserve.

The acquisition of the Colliers Mills tract was pursuant to the authority contained in *R.S.* 13:1-18 and *R.S.* 23:3-11. The tract as it now stands consists of certain property known as the Emson Estate which was purchased by the State from the First National Bank of Hightstown, New Jersey; lands acquired by virtue of

the exchange authorized by Chapter 263 of the Laws of 1948; certain acreage comprising Success Lake and adjoining lands which were acquired by gift in 1949; and certain other acreage which was purchased by the State in 1952.

By the Laws of 1915, Chapter 241, there was established a Department of Conservation which was to be governed by a board to be known as the Board of Conservation and Development. That legislation was supplemented in 1929 and the Board was given, *inter alia,* this additional power:

> "The board, when, in its judgment, it deems that the best interests of the state will be served thereby, shall have power to lease, sell or exchange for other lands or property, any portion of the lands or properties acquired for the purposes indicated in or under the provisions of this article, or to sell or exchange any products of such lands. No such sale or exchange shall be made without the approval of the governor. Such leases, sales or exchanges shall be made in the name of the State of New Jersey, by the board under its seal, signed by the president and secretary thereof." (R.S. 13:1-23).

With a view to consolidating and coordinating State conservation activities, the Legislature in 1945 established the State Department of Conservation with five divisions: (a) Division of Water Policy and Supply, (b) Division of Fish and Game, (c) Division of Shell Fisheries, (d) Division of Forestry, Geology, Parks and Historic Sites, and (e) Division of Navigation. (*R.S.* 13:1A-1, *et seq*). Also, as part of that enactment, it was provided that:

> "The functions, powers and duties, records and property of the Department of Conservation and Development and of the Board of Conservation and Development, except as otherwise provided by this act * * * are hereby transferred to and vested in the Division of Forestry, Geology, Parks and Historic Sites, to be exercised and used by the council thereof, in accordance with the provisions of this act. No action shall be taken by said council except upon approval by the Commissioner of Conservation." (*R.S.* 13:1A-24).

Some three years later the Department was reorganized as it now stands with the following divisions being authorized: (a) Division of Planning and Development, (b) Division of Veterans' Services, (c) Division of Fish and Game, (d) Division of Shell Fisheries, (e) Division of Water Policy and Supply, and (f) Administrative Division, (*R.S.* 13:1B-1 *et seq*). As will be noted, the Division of Forestry, Geology, Parks and Historic Sites was not continued.

The functions, powers and duties of the former State Department of Conservation and of each of the divisions therein and of each of the councils of the respective divisions were vested by the 1948 legislation in the present Department of Conservation and Economic Development. The duty of administering the work of the department was assigned to the Commissioner, *R.S.* 13:1B-3, and it was provided that he should "perform, exercise and discharge the functions, powers and duties of the department through such divisions as may be established by this act or otherwise by law." (*R.S.* 13:1B-3c).

With respect to the assignment of the various functions and powers of the Department, we note that the power to sell, lease or exchange lands which the Legislature had by virtue of the Laws of 1929, Chapter 213 (*R.S.* 13:1-23) conferred on the former Board of Conservation and Development, was not in express language

vested in any particular division. However, not having been repealed, it was one of the powers of the former Department which carried over and could be exercised by one of the divisions. Both the Division of Planning and Development and the Division of Fish and Game are under the supervision of a Director who is given the power to "administer the work of such division under the direction and supervision of the Commissioner." *R.S.* 13:1B-8 and 27. The authority vested in these divisions is spelled out in part as follows:

> "* * * all of the functions, powers and duties of the State Commissioner of Conservation, of the existing State Department of Conservation and of the respective divisions and councils therein, herein transferred to the Department of Conservation and Economic Development, exclusive of those of, or relating to, or administered through, the Division of Fish and Game, the Division of Shell Fisheries, and the Division of Water Policy and Supply; * * * are hereby assigned to, and shall be exercised and performed through, the Division of Planning and Development in the department." (*R.S.* 13:1B-7).
>
> * * *
>
> "All of the functions, powers and duties of the Division of Fish and Game of the existing State Department of Conservation, of the Fish and Game Council therein, and of the State Commissioner of Conservation relating to or administered through said division, herein transferred to the Department of Conservation and Economic Development, are hereby assigned to, and shall be exercised and performed through, the Division of Fish and Game in the department." (*R.S.* 13:1B-23).

It is our opinion that it was the intent of the Legislature that the power to lease, sell or exchange lands, (where such lands were, as here, acquired under the authority of *R.S.* 13:1-18 and *R.S.* 23:3-11), was to be exercised through the Division of Fish and Game. The power of disposal which was formerly vested in the Board of Conservation and Development and later in the State Department of Conservation and now in the Department of Conservation and Economic Development is, we submit, in the instant case one of the functions or powers assigned to the Division of Fish and Game by *R.S.* 13:1B-23, and which is to be exercised by the Director thereof. *R.S.* 13:1B-27.

We find support for our conclusion by reading together *R.S.* 13:1-18 to 22 (which are the general land acquisition provisions in Title 13) and *R.S.* 23:3-11. When this is done there seems little doubt that the power to acquire lands such as are involved in our present inquiry is vested in the Division of Fish and Game. This being so, the disposition of the lands so acquired is likewise the responsibility of the Division of Fish and Game, subject to the provisions of Article IV of Title 13 of the Revised Statutes. Chapter 448 of the Laws of 1948 in Section 29 (*R.S.* 13:1B-27) provides as follows:

> "The Division of Fish and Game shall be under the immediate supervision of a director, who shall be a person with special training and experience in wild life management and otherwise qualified to direct the work of such division. The director of such division shall be appointed by the Fish and Game Council, subject to the approval of the Governor, and shall, unless sooner removed by the Governor as hereinafter provided, serve at the pleasure of such council and until the director's successor is appointed and has qualified. He shall receive such salary as shall be provided by law.
>
> "The director shall administer the work of such division under the direction and supervision of the commissioner."

Accordingly, you are advised that a lease of mineral rights for the mining or extraction of certain minerals from the sands of the Colliers Mills Public Shooting and Fishing Grounds may be executed by the State of New Jersey acting through the Division of Fish and Game upon a determination by yourself in the exercise of your direction and supervision of the Division of Fish and Game that such lease is for the best interests of the State, subject to the approval of such lease by the Governor.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: HAROLD J. ASHBY
Legal Assistant

HJA:tb

APRIL 24, 1957

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

MEMORANDUM OPINION—P-12

DEAR DIRECTOR GASSERT:

You have requested our opinion concerning the application of Section 3 of the Unsatisfied Claim and Judgment Fund Law, *L.* 1952, *c.* 174, *sec.* 3, N.J.S.A. 39:6-63, to certain charitable and eleemosynary organizations. More specifically, you wish to be advised whether such organizations are required to make payments to the Fund in view of the fact that they are exempted from paying motor vehicle registration fees by R.S. 39:3-27. For the reasons hereinafter stated it is our opinion that these organizations are required to contribute to the Fund in the same manner and to the same extent as other persons registering motor vehicles.

N.J.S.A. 39:6-63, dealing with the creation of the Fund, provides in part as follows:

> "For the purpose of creating the fund
>
> (a) *Every person registering an uninsured motor vehicle* in this State for the yearly period commencing April 1, 1954, shall pay *at the time of registering the same,* in addition to any other fee prescribed by any other law, a fee of $3.00;
>
> (b) *Every person registering any other motor vehicle* in this State for the yearly period commencing April 1, 1954, shall pay *at the time of register-*

ing the same, in addition to any other fee prescribed by any other law, a fee of $1.00;" (emphasis supplied).

There follow provisions for the payment of contributions by insurers commencing March 31, 1955 and for the payment of annual assessments thereafter if the director determines that the estimated balance of the Fund is insufficient to carry out the provisions of the statute during the ensuing registration year. Such contributions cannot, however, exceed ½ of 1% of the aggregate net direct written premiums for the preceding calendar year. It is thereafter provided by N.J.S.A. 39:6-63:

> "If such assessment against insurers be insufficient in the judgment of the director to provide the estimated amount needed to carry out the provisions of this act for the ensuing registration license year, he shall determine the amount to be fixed as the Unsatisfied Claim and Judgment Fund Fee for such license year. Such fee shall in no case exceed $1.00, and *shall be paid by each person registering a motor vehicle* for such ensuing year *at the time of registration* in addition to any other fee prescribed by any other law; provided, however, that each owner of an uninsured motor vehicle at the time of payment of such fee shall also pay the sum of $2.00 in addition thereto." (emphasis supplied)

It is clear from the quoted provisions of this statute that charitable and eleemosynary organizations are not excepted from the operations of the Unsatisfied Claim and Judgment Fund Law, or to state the point affirmatively, the statute contemplates that *all* persons registering motor vehicles shall make the payments in question *at the time of registering.* "Person" is defined in N.J.S.A. 39:6-62 to include natural persons, firms, copartnerships, associations and corporations.

There is nothing in R.S. 39:3-27 which exempts such organizations from making payments to the Fund. That statute merely provides that "no fee shall be charged for the registration of motor vehicles not used for pleasure or hire" which are owned by certain named public, charitable and eleemosynary bodies and organizations. R.S. 39:3-27 also specifically requires that: "These vehicles shall be registered and display number plates as provided in this subtitle. . ." It confers no benefits upon and grants no immunities to the owners of such vehicles other than free registration. Since N.J.S.A. 39:6-63 provides that contributions to the Fund are to be made by "every person registering" any motor vehicle "at the time of registering the same," it clearly applies to owners of motor vehicles who though not required to pay a registration fee must register their vehicles.

In summary, neither N.J.S.A. 39:6-63 nor R.S. 39:3-27 can be read to exempt charitable or eleemosynary organizations from contributing to the Unsatisfied Claim and Judgment Fund. It is therefore our opinion and you are advised that such organizations are required to make the payments called for by N.J.S.A. 39:6-63 in the same manner and to the same extent as must other persons registering motor vehicles in this State.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHRISTIAN BOLLERMANN
Deputy Attorney General

CB:MG

APRIL 24, 1957

MR. HAROLD E. WINDER, *Chairman*
Cape May County Board of Elections
Cape May Court House, New Jersey

MEMORANDUM OPINION—P-13

DEAR MR. WINDER:

You have asked our opinion as to the legal validity of the action of the Cape May County Board of Elections in appointing district election board members who have not voted for three consecutive years in the political party which they represent on the district board. You have cited instances in which the county board has not been able to secure a district board member who has voted for three consecutive years in the same political party.

Under the terms of R.S. 19:6-2, any legal voter who has voted for three consecutive years in the same political party may make written application to serve as a member of the district board of the municipality in which he resides. The county board is vested by R.S. 19:6-3 with the power to appoint the four members of district boards on or before March 20 of each year. Membership must be apportioned equally between the two major political parties, but without any limitation to voters who have cast primary ballots in that party for three consecutive years.

The election laws elsewhere define membership in a political party. R.S. 19:23-45 provides:

> "A voter who votes in a primary election of a political party shall be deemed to be a member of that party until two subsequent annual primary elections have elapsed after casting of such party primary vote."

Persons are eligible to sign nominating petitions for party primaries, according to R.S. 19:23-7 who state that they are "members of a political party, that they voted for a majority of its candidates at the last general election, and that they intend to affiliate with that party at the ensuing primary election.

We advise you that in the appointment of members of the district boards, the county board of elections may appoint any voter of the municipality who has voted in the primary election of that political party in either of the two preceding years or who has shown an intention to affiliate himself with that political party by signing a petition for the nomination of candidates at the ensuing primary election.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

f;p

APRIL 24, 1957

MR. THOMAS KOCLAS, *Secretary*
Morris County Board of Elections
Hall of Records
Morristown, New Jersey

MEMORANDUM OPINION—P-14

DEAR MR. KOCLAS:

You have asked for a ruling as to the voting status of the wife of a military serviceman, who travels with her husband, under certain facts: (1) the wife has been a resident of Morris County but no longer maintains a residence there, and (2) the couple owns a dwelling house in Morris County which is rented.

The qualifications for voting in the State of New Jersey are fixed in Art. II, par. 3 of the State Constitution. Citizenship, attainment of age 21 and residence within the State for one year and within the county for five months are the constitutional prerequisites. As construed by the Supreme Court in *State* v. *Benny*, 20 N.J. 238 (1955) residence under Art. II, par. 3 connotes domicile or the true, fixed, permanent home to which a person, whenever absent, intends to return. Residence in fact and the intention to establish a permanent home are the two elements of domicile. *State* v. *Benny, supra.*

The wives of military service personnel who are not residents in fact of Morris County are not eligible to vote in Morris County. Property ownership is not a qualification for voting in this State; the ownership of a dwelling house which is rented is therefore immaterial to the issue of the eligibility of the owner to vote. Only domiciliaries with residence in fact within the State and county are qualified to vote.

We therefore advise you that under the stated facts, the wives of military service personnel, who have abandoned their residences in Morris County, may not register or vote in Morris County and their names should be removed from the registration lists.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

f;p

APRIL 24, 1957

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

MEMORANDUM OPINION—P-15

DEAR DIRECTOR GASSERT:

You have requested our opinion concerning the applicability of R.S. 39:3-31, providing for the issuance of duplicate registration certificates and driver's licenses upon

the payment of a fee of one dollar, to situations in which licensees who have applied for a renewal of their driver's license by mail advise you that they have not received such license. For the reasons hereinafter set forth it is our opinion that R.S. 39:3-31 is not applicable to such situations and that a replacement license should be issued by you without further charge.

R.S. 39:3-10, as amended by *L.* 1955, *c.* 76, *sec.* 1, which provides for the issuance of renewals of driver's licenses by mail, reads in pertinent part as follows:

> "All applications for renewals of licenses shall be made on forms prescribed by the director, which forms shall be mailed by the director from the central office of the division to the last addresses of the licensed drivers as they appear on the records of the division. Upon the return by mail of such forms, accompanied by the requisite fees, the director shall issue renewals of such licenses by mail from the central office of the division."

It is established in this jurisdiction that adequate and uncontradicted evidence showing that a letter has been mailed in due course raises a presumption that it was received. *New York Central R. Co.* v. *Petrozzo*, 92 N.J.L. 425 (E. & A. 1918). Moreover, it may well be that the issuance of renewal licenses under the cited statute is completed upon proper mailing, irrespective of receipt. *Womack* v. *Fenton*, 28 N.J. Super. 345 (App. Div. 1953); *Loeloff* v. *Kelly Press Division*, 10 N.J. Misc. 1156 (Comm. Pls. 1932) (not officially reported).

As concerns the type of evidence required to prove mailing, it was held in *Cook* v. *Phillips*, 109 N.J.L. 371 (E. & A. 1932), that "the mere dictation or writing of a letter, coupled with evidence of an office custom with reference to the mailing of letters, is [not] sufficient to constitute proof of mailing of same, in the absence of some proof or corroborating circumstance sufficient to establish the fact that the custom in the particular instance has in fact been followed." The court concluded that the testimony of two employees to the effect that they had dictated and signed the notice alleged to have been mailed and had left it upon their desks to be collected by another employee whose duty it was to take letters to the mailing department where they would be sealed, stamped and mailed was insufficient to constitute the required corroborating evidence. In this connection the court held in *Borgia* v. *Board of Review*, 21 N.J. Super. 462 (App. Div. 1952), that a notation on a notice of determination which showed the date of mailing was insufficient to prove such mailing. Cf. *Womack* v. *Fenton, supra,* where the court held that the defendant insurer had proved a proper mailing of its cancellation of an insurance contract by "definite and precise evidence."

It is our understanding that because of the large numbers of renewal licenses issued by you by mail, it is impossible to obtain evidence of mailing of the type referred to in the above-cited cases. Because you would be unable to prove such mailing to the satisfaction of a court, we believe that as an administrative matter you may, and indeed should, treat licenses which are asserted not to have been received as licenses which have in fact not been issued by you, at least for the purpose of determining what charge should be made for the issuance of a replacement license. In this connection, R.S. 39:3-31 reads as follows:

> "The commissioner, upon presentation of a statement duly sworn to, stating that the original registration certificate or driver's license has been destroyed, lost or stolen, may, if he is satisfied that the facts as set forth in

the statement are substantially true, issue a duplicate registration certificate or driver's license to the original holder thereof, upon the payment to the commissioner of a fee of one dollar for each duplicate registration certificate or driver's license so issued."

R.S. 39:3-31 was first enacted in 1921 as *L.* 1921, *c.* 208. Thus even if it were otherwise applicable, it was not designed to be applied to situations of the type here involved. Rather, until March 1, 1956, the effective date of *L.* 1955, *c.* 76, both registration certificates and driver's licenses were issued by motor vehicle agencies and were delivered directly to the owner or driver. The destroyed, lost or stolen certificate or license for the replacement of which R.S. 39:3-31 prescribes a fee of one dollar was a certificate or license which was destroyed, lost or stolen after it had actually been delivered to the owner or driver. The same situation would not necessarily prevail if this statute were applied to licenses issued by mail in the above-stated circumstances.

However, while we believe that R.S. 39:3-31 would in a proper case be applicable to licenses issued by mail—cases in which such licenses can be proved to have been delivered or, at the very least, mailed—it is our view that it should not be invoked unless such proof exists. To take a contrary position would result in different treatment of this problem at the administrative level than it would receive in the courts, a consequence which we feel should be avoided.

Since it appears from the information supplied us that you would be unable to *prove* either a delivery or a mailing, it is our opinion and you are advised that R.S. 39:3-31 is inapplicable to the case of a licensee to whom—so far as your records disclose—a renewal license has been mailed, but who asserts that it has not been received.

We wish to add parenthetically that although a replacement of such license should be issued without further charge, it would be a good practice to obtain a sworn statement similar to the type referred to in R.S. 39:3-31 (but drawn to deal with the situation here presented) from applicants who assert that they did not receive their renewal license by mail. Such a statement would serve the dual purpose of discouraging false claims and of furnishing you with a record upon which to base the issuance of replacement licenses.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHRISTIAN BOLLERMANN
Deputy Attorney General

CB:MG

MAY 1, 1957

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

MEMORANDUM OPINION—P-16

Re: The Board of Education Employees' Pension Fund of Hudson County, Inc.

DEAR MR. NEELD:

We have your request for an opinion concerning a recent resolution adopted by the Board of Education of the City of Hoboken which stated:

"WHEREAS, Chapter 169, P.L. 1956 approved December 3, 1956 makes the Public Employees' Retirement System available to members of other contributory pension funds, and

WHEREAS, the new Act becomes operative sixty days after the members of any plan have successfully secured Social Security coverage, which coverage is made possible after a majority of the membership vote in favor of its adoption in a referendum called by the Governor, and

WHEREAS, Chapter 169 requires a request to the Governor by the political subdivision maintaining a contributory pension fund that he issue a proclamation calling for the holding of a referendum among the eligible members of the local plan, therefore, be it

RESOLVED, that we hereby request Governor Robert B. Meyner to issue a proclamation calling for the holding of a referendum among the eligible members of the local plan known as 'The Board of Education Employees' Pension Fund of Hudson County, Inc.'

January 21, 1957"

Your inquiry is essentially two-fold, namely: (1) may the Governor pursuant to P.L. 1955, c. 38 authorize among the employees of the *Hoboken* Board of Education a referendum on the question of extending "social security coverage" to such employees? and (2) if by referendum such employees elected social security coverage, would they then become members of the Public Employees' Retirement System pursuant to P.L. 1956, c. 169?

We understand that "Hudson County Fund" is not supported in whole or in part by the State and includes within its membership employees of several political subdivisions, including the City of Hoboken. With regard to extending social security coverage to the *Hoboken* employees, P.L. 1955, c. 38 (N.J.S.A. 43:22-12) provides in part:

". . . With respect to the employees of a political subdivision covered by a retirement system which is not supported in whole or in part by the State and which is applicable to more than 1 political subdivision, the Governor is *empowered* to authorize . . . a referendum [on the question of whether such employees should be extended social security coverage]"
(emphasis supplied).

Where the system covers but 1 political subdivision the Governor "*shall* authorize such a referendum upon the request of the governing body of such subdivision" and any such referendum is conducted pursuant to the requirements of 42 U.S.C.A. § 418. *Id.* (emphasis supplied).

42 U.S.C.A. § 418(d)(6) provides in part:

> "If a retirement system . . . covers positions of employees of two or more political subdivision of the State, then, for the purposes of [social security coverage,] there shall, *if the State desires,* be deemed to be a separate retirement system with respect to any one or more of the political subdivisions concerned . . ." (emphasis supplied).

We must assume that our legislature acted with knowledge of the existing provisions of the related federal statute. *Goldberg* v. *Division of Employment Security,* 21 N.J. 107, 113 (1956). Read in conjunction with 42 U.S.C.A. § 418(d)(6) the meaning of P.L. 1955, c. 38 is clear, i.e., the Governor *may* authorize the requested referendum among the employees of the Hoboken Board of Education and such authority is permissive rather than imperative.

With regard to your second question, P.L. 1956, c. 169 (N.J.S.A. 43:15A-111) provides:

> "[The Public Employees' Retirement System] shall become operative with regard to *a pension* fund . . . supported in whole or in part . . . by 1 or more . . . municipalities, 60 days after a majority of the membership of *such pension fund* qualified to vote in a referendum as required by [42 U.S.C.A. § 418] shall have voted to be covered under the terms of [The Social Security Act] provided that the terms and conditions for holding such referendum as set forth in [N.J.S.A. 43:22-12] have been met." (emphasis supplied).

N.J. S.A. 43:15A-112 provides:

> "When this act becomes operative with regard *to a pension fund,* such *pension fund* shall terminate. Upon the termination of such *pension fund,* all securities, assets and records of *such fund* shall be transferred to the board of trustees of the Public Employees' Retirement System". (emphasis supplied).

In our opinion, the extension of the Public Employees' Retirement System to the members of another fund upon the election of such members to be covered by the Social Security Act and the termination of such other fund is limited to the situation where a referendum is had among the membership of the *entire* pension fund, i.e., the *Hudson County Fund* and, not as in this case, among the membership of but one segment of such fund. To decide otherwise would result in a county-wide fund being terminated upon the election of one municipality only (Hoboken) within that fund. Nor is there a partial termination of the County Fund to the extent that the *Hoboken* employees are admitted to the State system. Such a partial termination of the County Fund is necessarily precluded by the clear and unambiguous language of N.J.S.A. 43:15A-111, 112.

As previously stated, the holding of a referendum under the circumstances herein lies within the *discretion* of the Governor and thus, is essentially a matter of policy. You have informed us that if the referendum is held and the Hoboken employees

elect to be covered by Social Security, such coverage would be extended to them as a benefit in addition to any benefits payable by the County Fund. Such employees would be required, however, to pay the Social Security tax in addition to the full contribution to the County Fund since there is no offset arrangement as provided for members of the *integrated* State retirement programs such as the Public Employees' Retirement System, N.J.S.A. 43:15A-59.

Accordingly it is our opinion and you are so advised that the Governor may authorize a referendum among the Hoboken members of the Hudson County Fund and that such referendum should be conducted pursuant to the provisions of N.J.S.A. 43:22-12 and 42 U.S.C.A. 418 §(d)(3) and that if the Hoboken members elect to be covered by Social Security, such election will not terminate the Hudson County Fund either in whole or in part nor bring the Hoboken employees into the Public Employees' Retirement System.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DONALD M. ALTMAN
Legal Assistant

DMA:ccm

MAY 17, 1957

WATER POLICY AND SUPPLY COUNCIL
Division of Water Policy and Supply
Department of Conservation and Economic Development
520 East State Street
Trenton, New Jersey

MEMORANDUM OPINION—P-17

GENTLEMEN:

You have requested our opinion as to whether diversions from the Delaware and Raritan Canal within the Delaware River watershed should be charged against the 100 m.g.d. which the State of New Jersey may withdraw from the Delaware River pursuant to the recent United State Supreme Court decree.

In our opinion the answer is no.

The question arises because the canal conveys water from the Delaware River to the Raritan River, crossing from one watershed to the other in the vicinity south of Princeton, so that water may be withdrawn from the canal and thereafter discharged in either watershed.

Diversions *outside* the Delaware River watershed are limited to one hundred million gallons per day by the decree of the United States Supreme Court in *New Jersey* v. *New York,* et al., 347 U.S. 995 (1954); but we can find in the decree no quantitative limitation on the amount that may be taken from the river through the canal for use *within* the Delaware watershed.

Section V of the decree authorizes the State of New Jersey, upon the occurrence of certain conditions, to "divert outside the Delaware River watershed, from the

Delaware River or its tributaries in New Jersey, without compensating releases the equivalent of 100 m.g.d." The decree goes on to provide that until New Jersey builds and utilizes one or more reservoirs to store waters of the Delaware River or its tributaries "for the purpose of diverting the same to another watershed", the State may divert an average of not more than 100 m.g.d., with the diversion on any day not to exceed 120 million gallons; and that regardless of whether the State builds such reservoirs, its total diversion "for use outside of the Delaware River watershed" shall not exceed an average of 100 m.g.d. during any calendar years without compensating releases. Section VI of the decree provides as follows :

> "VI. EXISTING USES NOT AFFECTED BY AMENDED DECREE. The parties to this proceeding shall have the right to continue all existing uses of the waters of the Delaware River and its tributaries, not involving a diversion outside the Delaware River watershed, in the manner and at the locations presently exercised by municipalities or other governmental agencies, industries or persons in the Delaware River watershed in the States of New York, New Jersey and Delaware and the Commonwealth of Pennsylvania."

The section just quoted means, in our opinion, that New Jersey may continue to take water from the River through the Canal which is not diverted outside the Delaware River watershed, and which is taken in the manner and at the location used as of the date of the decree (June 7, 1954), and that the water so taken is not chargeable against the 100 m.g.d. allowed to be diverted to another watershed. As we interpret the decree, it does not prevent the State from taking into the Canal any quantity of water for use in accordance with Section VI of the decree, in addition to the 100 m.g.d. which can be diverted outside the Delaware River watershed under Section V. The Court's decision in the original case (283 U.S. 805) substituted the doctrine of equitable apportionment for the common law rule requiring undiminished flow; and no limit was placed on the quantity of water which could be diverted within the watershed because it has hitherto been unnecessary to do so. The Court has retained jurisdiction over the River water so that it may reallocate the same or impose further conditions at any time that the equities of the interested parties make it appropriate.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

TPC:kms

MAY 17, 1957

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

MEMORANDUM OPINION—P-18

DEAR MR. NEELD:

Former Deputy Treasurer Finley has requested a Memorandum Opinion as to the eligibility of a public employee for membership in the Public Employees' Retirement System after retirement at age 70 and reemployment by a political subdivision of the State.

Section 75 of L. 1954, c. 84 (N.J.S.A. 43:15A-75) governs membership of employees of counties or municipalities in the Public Employees' Retirement System. By its specific terms:

> "Membership shall be compulsory for all employees entering the service of the county or municipality after the date this act becomes effective."

The Public Employees' Retirement-Social Security Integration Act (L. 1954, c. 84) became effective in counties and municipalities which were covered by the former State Employees' Retirement System on January 2, 1955 and in all counties and municipalities subsequently approving it by referendum on June 30 of the year following such referendum.

We understand that the Public Employees' Retirement System was effective in the political subdivision which reemployed this retired public employee, upon the date of his reemployment. Accordingly, his membership in the Public Employees' Retirement System is mandatory under Section 75 of the Public Employees' Retirement-Social Security Integration Act.

We refer to several legal consequences of the resumption of public employment and membership in the Public Employees' Retirement System by an individual over age 70. He is immediately subject to the provisions of Section 47 of the Act (N.J.S.A. 43:15A-47). His retirement is mandatory except upon written notice of his continuation in employment to the Board of Trustees of the Public Employees' Retirement System from the head of the department or other employing unit. We suggest that such written notice should be presented to the Board of Trustees at the time of reemployment and reenrollment as a member in the Public Employees' Retirement System.

In accordance with R.S. 43:3-1, a retired member of the Public Employees' Retirement System who reenters public employment must elect to receive either his pension or the salary or compensation allotted to his employment. Since the ultimate retirement allowance will be based upon his final compensation, reemployment at a lower salary or compensation may be disadvantageous to the employee. In addition, the death benefits available after attainment of age 70 are only 3/16 of the compensation received by the member in the last year of creditable service instead of 1½ times such compensation (N.J.S.A. 43:15A-57). The employer must make the death benefit contribution on behalf of the employee over age 70, pursuant to subsection (g) of this section:

"* * * provided, however, that no contribution shall be required after June 30, 1956, while a member remains in service after attaining age 70 but that his employer shall be required to pay into the fund on his behalf in such case an amount equal to the contribution otherwise required by the board of trustees in accordance with this section."

We point out finally that this opinion applies equally to retired members over age 70 of the Public Employees' Retirement System who reenter public employment with the State. Section 7 of L. 1954, c. 84 (N.J.S.A. 43:15A-7) makes membership mandatory in the Public Employees' Retirement System for all persons who become permanent employees' of the State after January 2, 1955.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: FRANK A. VERGA
Deputy Attorney General

MAY 31, 1957

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

MEMORANDUM OPINION—P-19

DEAR MR. PATTEN:

You have submitted to us for advice the question of whether an amendment to the certificate of incorporation of a non-profit association can be filed in the office of the Secretary of State without first being recorded in the respective county clerk's office.

The statute dealing with this subject is contained in R.S. 15:1-14. Prior to 1955 this statute after providing for the method of amending the certificate of incorporation of a non-profit association provided that:

"* * * The amended certificate, duly signed and acknowledged by the trustees as required for certificates of incorporation under this title, shall be recorded by the trustees of the association in the office of the clerk of the county in which its original certificate was recorded, and filed with the secretary of state. * * *"

By Chapter 206 of the Laws of 1955 this section was changed and the pertinent provisions thereof now provide as follows:

"* * * If 2/3 of the members having voting powers present at such meeting and voting shall vote in favor of such amendment, change or alteration, the corporation shall make a certificate thereof under its seal and the hands of its president or vice-president and secretary or assistant secretary, which

certificate shall be acknowledged or proved as in the case of deeds of real estate and shall be filed in the office of the Secretary of State. * * *"

The change made by the aforesaid Laws of 1955 with respect to the question under consideration was to eliminate the requirement that the amendment be filed in the respective county clerk's office.

You are, therefore, advised that amendments of the certificate of incorporation of non-profit associations are not required to be filed in the county clerk's office prior to filing in the office of the Secretary of State.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: GEORGE H. BARBOUR
Deputy Attorney General

GHB:jeb

JUNE 3, 1957

MR. NELSON T. KESSLER
Secretary-Treasurer
Tree Expert Bureau
Department of Conservation and Economic Development
520 East State Street
Trenton 25, New Jersey

MEMORANDUM OPINION—P-20

DEAR MR. KESSLER:

You have requested our opinion as to whether it is legally proper to renew the certificates of arborists and tree surgeons who no longer reside in New Jersey. It is our opinion that these certificates cannot be renewed.

Chapter 100, P.L. 1940, known as the "tree expert act" authorizes the Bureau of Tree Experts to grant certificates to tree experts who comply with the requirements set forth in the act. One such requirement is that the applicant must be a "legal resident of the State of New Jersey". R.S. 13:1-31(a). The individuals with whom we are here concerned met this residence requirement when their certificates were granted initially. They no longer meet this requirement so that the question to be determined is whether the requirement that applicants be residents of New Jersey is a continuing requirement and therefore one which must be complied with both when a certificate is issued and when it is renewed.

The section of the act which provides for renewal of certificates, R.S. 13:1-34, does not set forth any renewal requirements. It is, therefore, necessary to examine the act as a whole to determine whether renewal requirements are expressly set forth elsewhere in the act or may be inferred from the act as a whole.

"In ascertaining the presence of standards and norms to support delegated powers, it is fundamental that we are not confined to the four corners of the particular section under consideration but are obligated to examine the entire

act in the lights of its surroundings and objectives. Nor need the standards be set forth in express terms, if they may reasonably be inferred from the statutory scheme as a whole." *Schierstead* v. *City of Brigantine,* 20 N.J. 164, 169 (1955).

An examination of the act reveals that although renewal requirements are not expressly set forth, they may reasonably be inferred from the act as a whole. Looking first to R.S. 13:1-31(a) referred to above, it is obvious that the Legislature intended this residence requirement be a continuing requirement; otherwise, it would be rendered almost meaningless for a certificate holder could remove himself from the state the day after he received his certificate. It is significant that there is no language in R. S. 13:1-31(a) or any other section of the act which could be construed as limiting residence to mean residence at the time of issuance of the initial certificate.

The recent decision in *Richman* v. *Blank,* 45 N.J. Super. 272 (Decided May 24, 1957) confirms this construction. The Superior Court there held that a requirement of residence within the Passaic Valley Sewerage District was a continuing one and did not govern solely eligibility for appointment.

Our conclusion that residence is a continuing requirement is further supported by the fact that the purpose of the act as stated in the title is not only to license but also to supervise tree experts. The act requires that certified tree experts maintain a place of business and devote the regular business hours of the day to their practice. R.S. 13:1-29. The Bureau of Tree Experts is empowered to revoke or suspend the license of a certified tree expert who has been "convicted of a misdemeanor in the courts of this State", or who has been found guilty of any fraud or deceit in obtaining his certificate or who has been found guilty of negligence or wrongful conduct in his practice. R.S. 13:1-33. If certificates of non-residents were renewed, supervision would be extremely difficult if not impossible in some instances. The fact that residence is a requisite for adequate supervision was discussed at length in *La Tourette* v. *McMaster,* 104 S. Car. 501, 89 S.E. 398, 399 (Sup. Ct. of S.C. 1916) aff'd. 248 U.S. 465 (1919). The Supreme Court of South Carolina in upholding the constitutionality of a residence requirement for the licensing of insurance brokers stated on page 504:

". . . By the terms of this act and others regulating the business, the books, papers, and accounts of such brokers are at all times to be open to the inspection of the commissioner, who is given supervisory control of the business for the protection of the insured as well as the insurers. Now, without question, such supervision can be exercised over brokers residing in the state more expeditiously, advantageously, and effectively than if they resided in many different states of the Union, and the Commissioner can more readily ascertain whether they have the requisite skill and ability and are faithful in the performance of their duties and obey the laws of the state. Moreover, they are required to exercise due care in placing insurance, and would be personally liable for neglect of that duty. They are also liable to indictment for violations of the laws of the state regulating the business and for disobeying the lawful orders of the commissioner with respect thereto. It is therefore desirable, if not imperatively necessary for the proper regulation of the business, that they should be residents of the state and subject to the jurisdiction of its courts. . . ."

That the Legislature considered and dealt with the problem of non-residents is evidenced by section 13:1-36 of the act which authorizes the bureau in its discretion to register the certificates of non-residents provided such non-residents are lawful holders of certified tree expert certificates of another state which extends similar privileges to New Jersey certified tree experts. Since the Legislature has seen fit to provide specifically for the registration of one group of non-residents, i.e., those holding certificates from other states, and thus subject to supervision by another state, in accordance with the doctrine that an affirmative expression in a statute ordinarily implies a negation of any other, *Dillemuthe* v. *Efinger,* 126 N.J.L. 579 (Sup. Ct. 1941); *Moses* v. *Moses,* 140 N.J. Eq. 575 (E. & A. 1947), this group is the only group of non-residents who may practice as certified tree experts in New Jersey.

There being no expression to the contrary, the logical inference to be drawn from a reading of the entire act is that the requirements for renewal of a certificate are the same requirements which the Legislature set forth for the initial issuance of a certificate. See *Division of New Jersey Real Estate Commission* v. *Ponsi,* 39 N.J. Super. 526, 531 (App. Div. 1956) wherein the Superior Court in affirming the action of the Real Estate Commission denying the license renewal application of a real estate broker stated:

". . . It seems inconceivable that the Legislature intended to establish one standard for the issuance of a license and another for its renewal or revocation."

For the foregoing reasons, certificates of non-residents cannot be renewed.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: JUNE STRELECKI
Deputy Attorney General

JS:ccm

JUNE 5, 1957

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

MEMORANDUM OPINION—P-21

DEAR MR. NEELD:

You have requested an opinion as to whether a member of the Consolidated Police and Firemen's Pension Fund may retire while on military leave of absence when such leave of absence constitutes a major portion of his total years of public service.

Retirements within the Consolidated Police and Firemen's Pension System are governed by R.S. 43:16-1. Any active member of a municipal or county police department or of a paid or part paid fire department is eligible to retire after twenty-five years service upon attainment of the age of fifty-one years. Any employee member of any such department qualifies for retirement after twenty-five years service upon

attainment of the age of sixty years. According to the definitions in R.S. 43:16-17, active members are members of the Pension System subject to call for active service or duty, and employee members are all other contributing members.

In our opinion the recent decision of the Supreme Court in *Salz* v. *State House Commission,* 18 N.J. 106 (1955) is decisive. That case held that a person in military service was ineligible for retirement under the State Police Pension System despite his entry into military service directly from State employment. As the Court pointed out, under the express terms of R.S. 38:23-4, the plaintiff was not entitled to compensation, whether pay or pension, until the termination of his leave of absence by separation from military service. Justice Heher wrote further for the Court:

> "The civil servant absent on leave for military service may on separation return to his department of government for active service, or if barred from service by age, for retirement on pension if he fills the statutory prerequisites."

It is significant and it must be pointed out that the Court also went on to say that "the judgment be without prejudice to a reconsideraion of the applicant's rights 'either in the event an application is made upon his separation from active serviec in the Army or in the event of his disability or death.' The issue of abandonment and forfeiture of office by continued absence from State service may then be litigated and determined."

We therefore advise you that a member of the Consolidated Police and Firemen's Pension Fund is not eligible for retirement while on military leave of absence but must return to State service to qualify for retirement. Upon reemployment and application for retirement at that time, the Board of Trustees must determine whether he has abandoned or forfeited his State office or employment by continued voluntary absence in military service.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: FRANK A. VERGA
Deputy Attorney General

P

JUNE 19, 1957

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

MEMORANDUM OPINION—P-22

DEAR MR. NEELD:

Former Deputy State Treasurer Robert L. Finley requested our advice on a claim by Mr. E'tienne O'Brian for the repayment of an escheated unclaimed bank deposit in the amount of $329.06 in the Cranford Trust Company, Cranford, New Jersey, which had been paid over to the State Treasurer.

The facts we have been advised are as follows: In 1934 a group of property owners in a neighborhood in Cranford, New Jersey, each contributed a small sum of money to be used for the protection of their properties. The money collected was deposited in the Cranford Trust Company (now the Suburban Trust Company) of Cranford, New Jersey as a savings account in the name of Home Owners Association. One of the members who was authorized to sign for withdrawals has since departed this life. The Home Owners Association never adopted any charter, articles of association, by-laws or other type of formal organization or regulations. The aforesaid deposit, having been inactive for more than twenty successive years, became an unclaimed bank deposit, escheated to the State of New Jersey and was paid over to the State Treasurer, all pursuant to L. 1947, c. 92.

The claim of Mr. O'Brian for repayment is submitted in writing and signed by him "for Home Owners Association". In support of said claim there is submitted signed mimeographed statements by Mr. O'Brian and six other persons wherein it is stated that they are former members of the Home Owners Association and they consent and agree to the appointment of L. E. O'Brian to act for them in recovering the said deposit and directing Mr. O'Brian to deliver same to the Building Fund of the Cranford Historical Society. These persons and one other, who it is represented will also sign a like statement of appointment of Mr. O'Brian, are the only surviving contributors known to Mr. O'Brian although he indicates he cannot be sure this is a complete list of the surviving members and it is clear that some of the members have died.

The Suburban Trust Company of Cranford has indicated to your Department, by letter dated January 8, 1957, that they would have permitted the withdrawal of these funds on the strength of the authorizations to Mr. O'Brian if said funds were still on deposit in their bank.

More particularly Mr. Finley inquired:

> "In these circumstances where it is impossible to determine who constituted the original contributors and where in addition some of the contributors have died and the identification of their heirs is quite impossible, may the State apply the escheated funds to the purpose which the known survivors of the funds wish them applied to, namely the Cranford Historical Society."

It is our opinion and you are so advised that the authority of the State Treasurer to repay an unclaimed bank deposit which has escheated under the provisions of L. 1947, c. 92 is contained in Section 13 of L. 1947, c. 92 (N.J.S.A. 17:9-39) wherein it is provided as follows:

> "Any claimant who or which in any capacity has or asserts any right, title or interest in or to any such moneys escheated under this act, or to any part of any such moneys, may file claim therefor with the State Treasurer who is authorized to pass upon and determine the claimant's claim; if the State Treasurer shall determine the claimant's proofs of title thereto to be sufficient he shall pay the escheated unclaimed bank deposit or such part thereof to which he may determine the claimant is entitled, without interest, * * *."

We believe the administrative discretion conferred upon the State Treasurer is clearly set forth. Repayment of an escheated unclaimed bank deposit shall be made

where the claimant's "proofs of title" are sufficient. It is not possible to make out any fair implication or intendment of the Legislature that repayment of escheated unclaimed bank deposits may be based upon the purpose for which the money is to be applied or upon the fact that the bank where the money was deposited indicates that it would assume the risk of double liability by making payment of the deposit on the authorizations presented by a claimant. These factors can be of no consequence in determining whether the claimant's proofs of title are sufficient. *Swede* v. *City of Clifton,* 22 N.J. 303, 312 (1956).

Accordingly, the State Treasurer is without authority to apply the escheated funds here involved to the purpose which the known survivors desire. The funds can be repaid only upon sufficient proof of title.

Our review of this case indicates a marked absence of evidence upon which factual findings can be made to support a determination of the sufficiency or insufficiency of the proofs of title of this claimant. We also observe that while this claimant visited your office he was not granted a hearing, on notice, at which time he could have witnesses testify and present other evidence on the many questions existing in this matter.

Under the available facts the Home Owners Association can be most accurately classified as a voluntary unincorporated association. Such an association is not a legal entity separate and distinct from the persons who comprise it and the ownership of the association's property is vested in the individual members. 7 C.J.S. *Associations* § 27, p. 69; *Harker* v. *McKissock,* 12 N.J. 310 (1953); Wrightington, *The Law of Unincorporated Associations and Business Trusts* (2d Ed. 1923) § 60, p. 351.

For Mr. O'Brian to prove title to the property of the Home Owners Association, it will be necessary for him to present evidence on at least the following questions, which are not intended to be an exclusive list of possible questions involved but are suggested for the purpose of providing a starting point:

(a) Is the Home Owners Association a continuing association?

(b) If a continuing association, who is the person authorized to receive money for the association?

(c) If this association has dissolved who were the members in good standing at the time of dissolution?

(d) What was the amount contributed by each member?

So that adequate findings of fact may be made concerning this claim, we suggest that Mr. O'Brian be granted an opportunity to submit additional evidence by affidavit or affidavits or that he be granted an opportunity to submit such additional evidence at a hearing, on notice, so that thereby a complete record will be created, for the basis of your findings and determination and also for judicial review should such review be sought. *Metropolitan Motors* v. *State,* 39 N.J. Super. 208 (App. Div. 1956).

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHARLES J. KEHOE
Deputy Attorney General

CJK:ah

JUNE 27, 1957

HONORABLE DWIGHT R. G. PALMER
State Highway Commissioner
Trenton, New Jersey

MEMORANDUM OPINION—P-23

DEAR COMMISSIONER PALMER:

You have requested our opinion concerning the liability of the State of New Jersey for real property taxes in cases where the Highway Department acquires land for highway purposes by (1) eminent domain and (2) purchase. For the reasons hereinafter stated, it is our opinion that the State of New Jersey is not liable for real property taxes which accrue, in the case of condemnation, after the date of taking possession or payment of compensation, whichever is earlier, or, in the case of purchase, after the date title passes. We are of the further opinion that non-liability in the stated circumstances does not depend upon acquisition of such land prior to January 1 of the taxable year.

It is firmly established in this jurisdiction that in the absence of a clear legislative expression that property of the State, or its political subdivisions, shall be taxed, such property is excluded from the operation of general tax statutes. *Trustees of Public Schools* v. *City of Trenton,* 30 N.J. Eq. 667 (E. & A. 1879); *Township of Hanover* v. *Town of Morristown,* 4 N.J. Super. 22, 24 (App. Div. 1949). The foregoing principle was stated by Mr. Justice Depue, speaking for the Court of Errors and Appeals in the *Trustees of Public Schools case, supra,* as follows:

> "The immunity of the property of the state, and of its political subdivisions, from taxation, does not result from a want of power in the legislature to subject such property to taxation. The state may, if it sees fit, subject its property, and the property owned by its municipal divisions, to taxation, in common with other property within its territory. But inasmuch as taxation of public property would necessarily involve other taxation for the payment of the taxes so laid, and thus the public would be taxing itself in order to raise money to pay over to itself, the inference of law is that the general language of statutes prescribing the property which shall be taxable, is not applicable to the property of the state or its municipalities. Such property is, therefore, by implication, excluded from the operation of laws imposing taxation, unless there is a clear expression of intent to include it. *Cooley on Taxation,* 131. Hence crown lands, and the property of the state, or its political subdivisions, are not taxable under general statutes providing for taxation." 30 N.J. Eq. at p. 681.

An examination of the applicable statutes indicates that there has been no such clear expression of intent on the part of the legislature to permit the taxation of real property used for highway purposes for any period subsequent to its acquisition by the State Highway Department, whether such acquisition is by condemnation or purchase. The tax statutes dealing with the question of assessment and exemption of real property read in pertinent part as follows:

> R.S. 54:4-1. "All property real and personal within the jurisdiction of this State not expressly exempted from taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this

chapter at its true value, and shall be valued by the assessors of the respective taxing districts. * * * All property shall be assessed to the owner thereof with reference to the amount owned on October first in each year * * *."

R.S. 54:4-2.1. "All lands, except riparian lands and lands excepted by section 54:4-2.2 of this Title, owned by or held in trust for the State, which are used or to be used for State purposes, whether the title thereto be in the name of the state, or any board, commission or corporation, shall be taxed in the municipality wherein such lands are situate, for municipal and local school purposes, unless the aggregate area of such lands is less than nine per centum (9%) of the total area of the municipality after deducting from the total area of the municipality so much thereof, if any, as is exempt from taxation because it comprises State forests, State parks, riparian lands, lands held by the State Board of Proprietors or lands held for highway, bridge or tunnel purposes or is exempt from taxation under the provisions of article one of chapter eight of the Title 'Conservation and Development—Parks and Reservations' (§13:8-1 et seq.), or sections 54:4-5 or 54:4-6 of this Title. Said lands shall be assessed at the same value at which they were assessed at the time they were acquired by the State. * * *"

R.S. 54:4-2.2. "The provisions of section 54:4-2.1 of this title shall in no way affect the provisions of article 1 of chapter 8 of the title Conservation and Development—Parks and Reservations (§13:8-1 et seq.), or sections 54:4-5 or 54:4-6 of this title; and no taxation of lands mentioned in said article 1 of chapter 8 or in said sections 54:4-5 or 54:4-6 shall be made under the provisions of said section 54:4-2.1, and no taxation shall be made under said section 54:4-2.1, of state forests, state parks, riparian lands, lands held by the state board of proprietors or lands held for highway, bridge or tunnel purposes."

R.S. 54:4-3.3. "Except as otherwise provided by article one of this chapter (§54:4-1 et seq.), the property of the State of New Jersey; and the property of the respective counties, school districts and taxing districts used for public purposes, or for the preservation or exhibit of historical data, records or property; and property acquired by the municipalities through tax title foreclosure or by deed in lieu of foreclosure, if not used for private purpose, shall be exempt from taxation under this chapter, but this exemption shall not include real property bought in for debts or on foreclosure of mortgages given to secure loans out of public funds or out of money in court, which property shall be taxed unless devoted to public uses. The lands of counties, municipalities, and other municipal and public agencies of this State used for the purpose and for the protection of a public water supply, shall be subject to taxation by the respective taxing districts where situated, at the true value thereof, without regard to any buildings or other improvements thereon, in the same manner and to the same extent as the lands of private persons, but all other property so used shall be exempt from taxation. * * *"

In addition, it is provided by R.S. 54:5-6 that:

R. S. 54:5-6. "Taxes on lands shall be a lien on the land on which they are assessed on and after the first day of January of the year for which the taxes are assessed, and all interest, penalties, and costs of collection which thereafter fall due or accrue shall be added to and become a part of such lien."

It may be contended that the effect of R.S. 54:4-1, requiring property to be assessed to the owner thereof as of October 1 preceding the taxable year, and of R.S. 54:5-6, creating a lien upon the land as of January 1 of the taxable for such year's taxes, is to impose a tax liability upon the land if the latter is acquired after such dates from a non-exempt owner, regardless of whether the acquisition is by the otherwise tax-exempt sovereign. A review of the authorities, however, reveals that neither R.S. 54:4-1 nor R.S. 54:5-6 has the effect of withholding or destroying the statutory and common law exemption from local taxation enjoyed by the sovereign.

In *Edgewater* v. *Corn Products Refining Co.*, 136 N.J.L. 220 (Sup. Ct. 1947), modified and affirmed 136 N.J.L. 664 (E. & A. 1948), a suit in which a municipality and a condemnee sought an adjudication of the condemnee's liability for real estate taxes for the year 1942, during which the property in question had been condemned by the United States, it was held that the condemnee, which had paid one-half of the 1942 taxes in advance, was entitled to a refund of two months' taxes for the reason that the condemnation, including acquisition of title, took place on May 2. The municipality argued that because the property was non-exempt on the assessment date, i.e., October 1, 1941, such non-exempt status should continue to apply to the entire year 1942, the year for which the assessment was made. It therefore urged that it was entitled to a full year's taxes out of the award paid into court by the United States.

In rejecting the municipality's contention the court pointed out that when an award is paid into court all claims against the land, including tax liens, are payable out of the award. It held that a municipality is entitled to be paid only such proportion of the taxes for the current year as the number of days between January 1 and the acquisition date bears to the full calendar year, citing R.S. 54:4-56. The latter statute provides for the apportionment of taxes between buyer and seller and condemnor and condemnee based upon the proportionate part of the tax year during which the parties held the property.

To the same effect as the *Corn Products* decision is *New Jersey Highway Authority* v. *Henry A. Raemsch Coal Co.*, 40 N.J. Super. 355 (Law Div. 1956), in which the court, in an opinion by Judge (now Justice) Weintraub, again held that a tax claim based on the non-exempt status of the owner on the assessment date can be satisfied out of an award in condemnation only up to the amount attributable to the owner.

We point out that under *Milmar Estate* v. *Borough of Fort Lee*, 36 N.J. Super. 241 (App. Div. 1955) the decisive date to determine the amount of tax attributable to the owner upon a condemnation by a governmental authority is the date of entry into possession by the condemnor. In that case the state, by the Highway Commissioner, instituted condemnation proceedings in June, 1953 and agreed with the condemnee that it would take possession on September 30, 1953. On March 8, 1954 the State paid the amount of the award into court. The court, before releasing the condemnee's share of the award, demanded proof that local tax claims had been satisfied. The municipal tax collector refused to give such proof unless the first half of 1954 taxes were paid. Such taxes were paid under protest by the condemnee, whereupon it brought an action against the municipality to recover them.

In affirming a judgment for plaintiff the Appellate Division held that *for pur-*

poses of determining the taxability of the state's property under R.S. 54:4-1 its title would be deemed to relate back to the date it obtained possession, i.e., September 30, 1953. It assumed for purposes of the case that legal title to the land did not pass until March 8, 1954, when payment into court was made. In arriving at its decision the court specifically refused to pass upon the effect of R.S. 54:4-56 on the facts of the case. Indeed there was no occasion to apportion taxes under R.S. 54:4-56 since the court held that the municipality was not entitled to any 1954 taxes. Apparently no question was raised with respect to 1953 taxes from October 1 to December 31. R.S. 54:4-1, of course, may be read to fix the status of property with respect to exemption or non-exemption as of October 1 of the year prior to the taxable year. It specifically provides that "all property shall be assessed to the *owner* thereof with reference to the amount owned on October 1 in each year * * *." (emphasis supplied). Nevertheless, the court's application of the doctrine of relation back in the *Milmar Estate* case plainly declined to view legal ownership on the tax assessment date as decisive.

It is clear from the *Corn Products* case that where title to land is acquired by eminent domain the municipality's recovery of real property taxes out of the award is limited to that proportion of the year's taxes which is attributable to the prior owner, i.e., the condemnee. It follows, therefore, that a condemnee cannot acquire rights against a governmental condemnor under the apportionment statute, R.S. 54:4-56, on account of taxes attributable to any period following condemnation, whether such taxes have been paid or not.

While *Corn Products* did not deal with the situation in which a municipality seeks payment of taxes from the condemning sovereign it is helpful here since it recognizes that the status of property on the assessment date is not controlling insofar as concerns tax liens which have not been perfected at the time of condemnation. The recovery of such liens out of the award is, as noted, limited to that part of the year during which the condemnee had title. The Court pointed out that upon condemnation the lien on the land is transferred to the award and that such lien is limited to the taxes attributable to that part of the year during which the condemnee held title.

During the time involved in the *Corn Products* case, taxes did not become a lien on property until December 1 of the year in which they were due. Since the enactment of *L.* 1944, *c.* 247, however, R.S. 54:4-6 provides that such taxes become a lien on January 1 of the year for which they are assessed. The *Corn Products* decision therefore did not squarely deal with the situation where a lien has been perfected at the time of condemnation, nor does the *Milmar Estate* case concern itself with this matter, since the court there invoked the doctrine of relation back.

While there are no reported New Jersey cases which deal directly with this point, it is clearly the majority view in other jurisdictions that municipal liens become void when the state acquires title, whether by condemnation or purchase. See, for example, *Halvorsen* v. *Pacific Company*, 22 Wash. 2d 532, 156 P. 2d 907 (Sup. Ct. 1945), and *State ex rel. Hoover* v. *Minidoka County*, 50 Idaho 419, 298 P. 366 (Sup. Ct. 1931). In the *Halvorsen* case the court held that liens upon lands subsequently acquired by the state become merged in the title and are discharged. It further stated that such liens are not revived when the property passes into private ownership again, a point which it is not necessary to anticipate here. In the *Hoover* decision it was held that taxes and tax liens upon lands procured by the state are discharged and become nil by virtue of the state's constitutional exemption from taxation. See

also 158 A.L.R. 563. in which a lengthy annotation discusses the many situations in which courts have struck down tax and other governmental liens upon the acquisition of title by the state.

As to cases in which you acquire land for highway purposes by purchase, we understand from you that it is the practice of the Highway Department to pay off municipal taxes up to the date of passing of title. The municipality affected is therefore placed in as good a position as where the state acquires property by condemnation. We are of the opinion that a municipality should acquire no greater rights against the state in the case of a purchase than it would in the case of condemnation. The courts have consistently treated tax liens the same whether the property they affect has been condemned or purchased. 158 A.L.R. 563. In *United States* v. *City of East Orange*, 78 F. Supp. 371 (U.S.D.C., D.N.J. 1948), it was held by Judge Smith that where the United States purchased land in New Jersey between the assessment date and the lien date there was no laibility for taxes for the year for which they were assessed. The court said, at 78 F. Supp. 372:

> "The property of the United States, held for public purposes, is immune from taxation by the state. The tax lien in question is voided and may not be enforced against the United States."

Although the United States had acquired title prior to the lien date the defendant municipality relied on the status of the property on the assessment date as fixing the tax liability for the following year. This contention was summarily rejected by the court.

The only New Jersey authority which can be urged to be out of line with the foregoing principles is *Jersey City* v. *Montville*, 84 N.J.L. 43 (Sup. Ct. 1913), affirmed 85 N.J.L. 372 (E. & A. 1913). The court there held that property purchased in one municipality by another municipality for water purposes was not exempt from taxation for the year following the assessment date since on the assessment date title had been held by a non-exempt owner. In our opinion the holding of that case is inapplicable here. Moreover, although *Montville* has never been explicitly overruled, it has been rejected by implication in subsequent decisions. The *Montville* decision was relied upon by the municipality in *Edgewater* v. *Corn Products Refining Co.*, *supra* at 136 N.J.L. 666. The case is in any event distinguishable from the facts here presented in that the governmental unit there claiming exemptioin was a municipality and not the state.

For the reasons above stated, it is our opinion that the State of New Jersey is not liable, in the case of condemnation, for real property taxes which accrue after the date of taking possession or payment of compensation, whichever is earlier, nor, in the case of purchase, after the date title passes.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHRISTIAN BOLLERMANN
Deputy Attorney General

CB:MG

JUNE 27, 1957

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

MEMORANDUM OPINION—P-24

DEAR COMMISSIONER:

You have requested our opinion as to whether it is lawful for a Board of Education to sanction the oral and collective saying of Grace by the school children before lunch. You have appended several forms of table Grace which have been used in a particular school district within the State.

We view R.S. 18:14-78 as decisive. That section of the School Law prohibits religious services or exercises in public schools except the reading of the Bible and the repeating of the Lord's Prayer. *Doremus* v. *Board of Education of Hawthorne*, 5 N.J. 435 (1950), upheld the constitutionality of R.S. 18:14-78, as well as the constituionality of R.S. 18:14-77 which requires the reading of at least five verses of the Old Testament, without comment, in each public school classroom at the opening of the school day. According to the Supreme Court in the *Doremus* case, the Old Testament and the Lord's Prayer are not sectarian or religiously controversial.

Grace invokes the Divine Blessing before a meal. As a religious exercise, it is barred in the public schools of this State under R.S. 18:14-78. There can be no legal or constitutional objection, however, to the reading of passages from the Old Testament or the repeating of the Lord's Prayer immediately prior to the noon meal. We point out that the sample Graces which you have supplied are not drawn from the Bible.

Our further opinion is that an interval of silence understood by the school children to be set aside for the saying of Grace to themselves, if they choose, would constitute a religious exercise subject to the prohibtion of R.S. 18:14-78. An interval of silence at lunchtime without any understanding that the school children are to repeat Grace to themselves, if they choose, meets no constitutional or statutory prohibition.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

JULY 10, 1957

HONORABLE JOSEPH E. MCLEAN
Commissioner of the Department of Conservation and Economic Development
State House Annex
Trenton, New Jersey

MEMORANDUM OPINION—P-25

DEAR COMMISSIONER MCLEAN:

You have asked our opinion as to whether the State of New Jersey has title to submerged lands, formerly islands, situated in the tidewaters of the State.

We advised Mr. James F. Finn, Senior Engineer, Bureau of Navigation, on October 27, 1954 that islands formerly flowed by tidewaters are owned in the proprietary right of the State of New Jersey as sovereign. While your immediate opinion request raises the antithetical issue, the principles set forth in the Memorandum Opinion of October 27, 1954 are governing. The State of New Jersey has title derived from the English crown to the lands which are flowed or have been flowed by tidewaters at any time since the Revolutionary War.

Leonard v. *State Highway Dept.*, 29 N.J. Super. 188, (App. Div. 1954), is a recent decision of the Superior Court, Appellate Division, affirming the established law that upon erosion of fast lands, the owner loses his title to the State of New Jersey. In the riparian law, erosion is distinguished from avulsion. Avulsion or temporary flooding by the tides through a storm does not shift the ownership of the lands from the private owner. In the *Leonard* case the Court ruled that the natural tide-flooding of lands formerly banked against a tidal creek resulted in a divestment in favor of the State of New Jersey. We understand that the former islands referred to in your opinion request became tide flowed through erosion, not through avulsion. Other parallel authorities are *Seacoast Real Estate Co.* v. *American Timber Co.*, 92 N.J. Eq. 219 (E. & A. 1920) and *Dewey Land Co.* v. *Stevens*, 83 N.J. Eq. 314 (E. & A. 1914).

We further point out that under the Submerged Lands Act, 67 Stat. 29 (1953), 43 U.S.C., Sec. 1301 et seq. (Supp. 1954), 43 U.S.C.A., the title of the State of New Jersey was recognized to a boundary of three geographical miles extending seaward from the coastline, except as granted out or acquired through wharfing. The sovereign title of the State of New Jersey to former islands now submerged under the tidewaters of the Atlantic Ocean to a seaward limit of three miles is thus established by the judicial authorities and by the Federal legislation.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

DDF:kma

JULY 12, 1957

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

MEMORANDUM OPINION—P-26

Re: Classification of Police of Raritan Township

DEAR MR. KELLY:

You have inquired as to the Civil Service status of the police of Raritan Township. The facts, we understand, are as follows:

1. Raritan Township adopted Civil Service on November 2, 1954.

2. On that date and prior to that date and until October 8, 1955, policemen of the Township of Raritan were appointed each year for the term of one year. During such times, there was no regular police department in the Township.

3. On October 8, 1955, an ordinance establishing a regular police department was adopted by the Township of Raritan in accordance with the provisions of R.S. 40:19-1, which provides for the establishment of regular township police departments.

4. Shortly after the ordinance was passed, a classification survey was made and adopted by ordinance for the Township of Raritan. In this survey, the Raritan Township Police were placed within the classified service, apparently on the assumption that they were members of a regular police department on the date Civil Service was adopted.

5. On March 2, 1956, the Township, by ordinance, repealed the ordinance establishing the regular police department, and by resolution on the same day appointed the same personnel as special police officers "in accordance with the provisions of R.S. 40:149-2".

Under Civil Service law, jobs in existence at a specified time before adoption of Civil Service by a municipality, of a character justifying their being placed in the classified service, are considered to be in the classified service when Civil Service is adopted by the Township. Persons holding such jobs are given Civil Service protection. R.S. 11:21-6. It is also very clear that once Civil Service has been adopted, jobs which thereafter become classified must be filled in compliance with Civil Service recruitment procedure. R.S. 11:21-1. Because such procedures were not followed, the action by the classification specialists in classifying the police jobs as being within the classified service, and the action of the Township of Raritan in approving and adopting this classification survey by ordinance cannot, in themselves, place the individual members of the police department within the classified Civil Service. We must determine, therefore, whether the classification survey was correct in placing the Raritan Township policemen in the classified service.

It is well established that where appointments are validly made for a fixed term, and not for an indefinite term, such positions may not be included in the classified Civil Service. *Connors* v. *Bayonne,* 36 N.J. Super. 390, 395, 396 (App. Div. 1955); *Township of Woodbridge* v. *Civil Service Commission,* 4 N.J. Super. 111 (App. Div. 1949); *Davaillon* v. *Elizabeth,* 121 N.J.L. 380, 386, 387 (Sup. Ct. 1938); Civil Service Rule 7-2(t).

It is also established by Civil Service Rule 7-2(t) that where a statute provides that an appointee shall serve only at the pleasure of the appointing authority, such office or position is in the unclassified service. Until the short-lived ordinance of October 8, 1955, there was no regular police department in Raritan Township. Accordingly, the appointments of Raritan Township Police must have been pursuant to R.S. 40:149-2, which provides for appointment of special police by township committees and gives such committees the power to dismiss at will. The only other colorable authority for appointment would be R.S. 40:47-19, a general statute applying to all municipalities, which refers to municipalities having regular police departments and was accordingly inapplicable in Raritan Township.

The police of the Township of Raritan were in fact appointed for one year terms.

Whether such one year appointments were authorized under R.S. 40:149-2 or not, is not material to the issue as to whether the individuals concerned should have been placed in the classified service at the time of adoption of Civil Service. For at that time, whether their appointments were "at will" or valid term appointments, they were properly in the unclassified service under Civil Service Rule 7-2(t).

Since adoption of Civil Service, an ordinance creating a regular police department was passed. A classification survey based thereon was adopted, placing the police in the classified service, as are all police departments in municipalities covered by Civil Service. However, since this was done, subsequent to adoption of Civil Service, appointments to such positions would have to conform to Civil Service recruitment provisions. This was not done, and so individuals employed during this period acquired no Civil Service rights. The question is now moot in that the ordinance establishing a regular police department has been repealed. We offer no opinion as to the validity of making one year appointments under R.S. 40:149-2, although the cases of *Uffert* v. *Vogt,* 65 N.J.L. 621 (E. & A. 1901) affirming 65 N.J.L. 377 (Sup. Ct. 1900) and *Mathis* v. *Rose,* 64 N.J.L. 726 (E. & A. 1900) affirming 64 N.J.L. 45 (Sup. Ct. 1899) cast serious doubt on this point.

You are advised, however, that whether the Raritan Police are properly appointed for a term or to serve at the pleasure of the Township Committee, Civil Service Rule 7-2(t) provides that the positions be placed in the unclassified service.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID LANDAU
Deputy Attorney General

DL:mc

AUGUST 28, 1957

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

MEMORANDUM OPINION—P-27

Re: Motor Fuels Tax Refund

DEAR MR. NEELD:

You have requested our opinion as to the eligibility of the Parking Authority of the City of Elizabeth, New Jersey, to obtain refund of the New Jersey motor fuels tax pursuant to R.S. 54:39-66(a). This section 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 or leased 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 Parking Authority of the City of Elizabeth was created by an ordinance adopted by the City of Elizabeth under the authority granted by the "Parking Authority Law", N.J.S.A. 40:11A-1 et seq.

The Authority is expressly recognized as a political subdivision of the State by N.J.S.A. 40:11A-6 which provides in part:

"The authority shall constitute a public body corporate and politic and a political subdivision of the State with the same territorial boundaries as the boundaries of the municipality or county creating the authority, exercising public and essential governmental functions, . . ."

Accordingly, you are advised that as a political subdivision of this State the Parking Authority of the City of Elizabeth is entitled to the refund in question pursuant to the statutes above cited.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DONALD M. ALTMAN
Deputy Attorney General

DMA:ccm

AUGUST 30, 1957

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

MEMORANDUM OPINION—P-28

DEAR DIRECTOR GASSERT:

We have your request for an opinion concerning an Unsatisfied Claim and Judgment Fund assessment or fee against a New Jersey resident car owner presently stationed in a foreign country, who upon renewal of his New Jersey motor vehicle registration, presents evidence that he has liability insurance meeting all of the other requirements of the statute except for the fact that the insuring company is not authorized to do business in New Jersey. The pertinent sections of the Unsatisfied Claim and Judgment Fund Law provide as follows:

R.S. 39:6-62. "Definitions

* * * 'Unsatisfied Claim and Judgment Fund Fee' means the additional fee to be collected under this act as a contribution to the fund from the owner of a motor vehicle upon the registration thereof in this State. * * *"

R.S. 39:6-63. "Creation of fund

For the purpose of creating the fund

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

(1) Assess the estimated deficiency against insurers for such year's contribution to the fund. Such deficiency shall be apportioned among such insurers in the proportion that the net direct written premiums of each bears to the aggregate net direct written premiums of all insurers during the preceding calendar year as shown by the records of the commissioner. Such aggregate assessment, however, shall in no event exceed ½ of 1% of the aggregate net direct written premiums for such preceding calendar year. Each insurer shall pay the sum so assessed to the treasurer on or before March 31, next following.

(2) If such assessment against insurers be insufficient in the judgment of the director to provide the estimated amount needed to carry out the provisions of this act for the ensuing registration license year, he shall determine the amount to be fixed as to the Unsatisfied Claim and Judgment Fund Fee for such license year. Such fee shall in no case exceed $8.00 and shall be paid by each person registering an uninsured motor vehicle during such ensuing year at the time of registration in addition to any other fee prescribed by any other law."

R.S. 39:6-62. "Definitions

* * * 'Uninsured motor vehicle' means a motor vehicle as to which there is not in force a liability policy meeting the requirements of sections 3, 24, 25, or 26 of the Motor Vehicle Security-Responsibility Law of this State, established pursuant to the provisions of chapter 173 of the laws of 1952, as amended and supplemented, and which is not owned by a holder of a certificate of self-insurance under said law. * * *"

R.S. 39:6-25:

"* * * No such policy or bond shall be effective under this section unless issued by an insurance company or surety company authorized to do business in this State, except that if such motor vehicle was not registered in this State, or was a motor vehicle which was registered elsewhere than in this State at the effective date of the policy or bond, or the most recent renewal thereof, such policy or bond shall not be effective under this section unless the insurance company or surety company if not authorized to do business in this State shall execute a power of attorney authorizing the director to accept service on its behalf of notice or process in any action upon such policy or bond arising out of such accident; * * *"

R.S. 39:6-46. "Liability policies; requirements

A motor vehicle liability policy furnished as proof of financial responsibility as provided herein shall be a policy of liability insurance issued by an insurance carrier authorized to transact business in this State to the person therein named as insured, or in the case of a nonresident, by an in-

surance carrier authorized to transact business in any of the States or provinces hereinafter stated. * * *"

Under the plain language of the foregoing statutes, a New Jersey resident is required to have liability insurance in an insurance company authorized to do business in the State of New Jersey or in the alternative, at the time of the registration of his motor vehicle, to pay the Unsatisfied Claim and Judgment Fund fee provided for in R.S. 39:6-63. Non-residents of the State of New Jersey are, by express language in the above statute, permitted to have liability insurance in companies not authorized to transact business in New Jersey provided certain additional requirements not pertinent to the question under consideration are met. This exemption as to non-residents, however, in no way affects the requirements as to residents of the State of New Jersey. *State* v. *Garford Trucking, Inc.*, 4 N.J. 346 (1950)

You are, therefore, advised that a New Jersey resident, temporarily out of the State of New Jersey, is required, at the time of the registration of his motor vehicle in New Jersey, to have a liability insurance policy in an insurance company authorized to transact business in New Jersey or in default thereof, to pay the Unsatisfied Claim and Judgment Fund fee provided for the registration of an uninsured motor vehicle.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: GEORGE H. BARBOUR
Deputy Attorney General

GHB:jeb

SEPTEMBER 12, 1957

MR. J. FRANK O'DONNELL, *Member*
Union County Board of Elections
263 North Broad Street
Elizabeth, New Jersey

MEMORANDUM OPINION—P-29

DEAR MR. O'DONNELL:

You have asked our opinion concerning the legality of a proposed resolution by the governing body of the City of Elizabeth.

The resolution in question in pertinent part recites that due to the increasing difficulties of transportation and parking in the City of Elizabeth, it has been determined that the best interest of the residents of the City of Elizabeth can be served by increasing the facilities of the office of the City Clerk for the purpose of registering voters and performing other duties incidental to the office of the City Clerk. The proposed resolution authorizes and directs the City Clerk to maintain his office, in addition to maintaining said office at the regular time at City Hall, at six named locations within the City of Elizabeth, between the hours of 6:00 P. M. and 8:00 P. M. on seven designated days in the month of September, 1957.

Specifically you request our opinion as to the legality of the proposed resolution

in view of the provisions of R.S. 19:31-7, as amended, and other applicable statutes, R.S. 19:31-7, as amended, provides as follows:

"Registration by municipal clerks. For the convenience of the voters the respective municipal clerks or their duly authorized clerk or clerks in all municipalities shall also be empowered to register applicants for permanent registration at their respective offices, up to and including the fortieth day preceding any election and after any such election, in the manner indicated above, subject to such rules and regulations as may be prescribed by the commissioner, in counties having a superintendent of elections, and the county board in all other counties. Duly authorized clerk as used in this section shall mean a clerk who resides within the municipality and has been approved by the commissioner or the county board as the case may be. For this purpose the commissioner shall forward to each municipal clerk a sufficient supply of the original and duplicate permanent registration forms. The commissioner shall keep a record of the serial numbers of these forms and shall periodically make such checks as are necessary to accurately determine if all such forms are satisfactorily accounted for. Each municipal clerk shall transmit daily to the commissioner in a stamped envelope to be prepared and supplied by the commissioner all of the filled out registration forms that he may have in his office at the time."

Pursuant to the provisions of Section 13, of L. 1855, c. 95, approved March 13, 1855, denominated "An Act to Establish the City of Elizabeth" the duties of the City Clerk are prescribed. Section 13 in pertinent part provides as follows:

"And be it enacted, that the City Clerk shall be Clerk of the City Council, and shall be sworn to the faithful performance of his duties; he shall perform such duties as shall be prescribed by the Council."

R.S. 40:60-6, as amended, permits the governing body of a municipality to obtain and maintain such building or buildings as may be necessary or suitable for the transaction of public business, or for any other municipal use or public purpose.

R.S. 40:60-7, permits the governing body of a municipality to obtain temporary quarters and transfer thereto any municipal offices or departments when municipal building has, among other things, become ill adapted or inadequate for public use.

Our study of the proposed resolution indicates to us that the governing body of the City of Elizabeth has deemed it to be in the best interest of the residents of the City of Elizabeth to expand the facilities of the office of the city or municipal clerk for a designated time and at designated places.

We point out that R.S. 19:31-6 requires the County Board of Elections to publish notice of the designation of a place or places for receiving registrations other than the office of the County Board of Elections, within at least ten days prior to the date that such place or places are to be open for the purpose of registering voters. This provision, which is for the benefit of citizens seeking to register, is not made applicable by statute to registrations by City Clerks at places other than their offices at the City Hall or municipal building, but in no event should the failure to publish ten days' notice be construed to invalidate registrations which are in fact received from citizens at the designated place or places of registration other than the City Hall or municipal building.

The State Constitution has vested all political power in the people. The extension of the franchise to all eligible voters is an ultimate objective to be promoted and safeguarded as a right sacred to the democratic form of government. Highest considerations of public policy support the extension of available registration facilities. The right to registration and suffrage should not be impaired or curtailed through inaccesssibility of public offices for receiving registrations of voters who are unable or find it a hardship to appear at a registration office during the working day. As the Superior Court said in *In re Wene*, 26 N.J. Super. 363, 374 (1953):

> "There can be no argument with the statement that every American citizen of proper age and residence is entitled to vote in every primary or general election, and that in fact, it is his or her civic duty to discharge this obligation."

Registration laws are liberally construed and held to be directory to avoid depriving individuals of their franchise and to give citizens the fullest opportunity to vote. 3 *Sutherland Statutory Construction*, Sec. 5820; *C. J. S. Elections*, Section 37. R.S. 19:31-7 must be construed in favor of the authority of municipal governing bodies to designate the office of the municipal clerk for purposes of registration during evening hours at places other than the City Hall or municipal building.

In view of the statutory authorization for such action by the governing body of the City of Elizabeth, hereinbefore cited, it is our opinion and you are so advised that the proposed resolution here under consideration would be, if enacted, legal and proper and the municipal clerk would be empowered pursuant to the terms of R.S. 19:31-7, as amended, to register voters and perform other duties incident to the office of the City Clerk at the temporary offices designated by the proposed resolution.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: JAMES J. McLAUGHLIN
Deputy Attorney General

mcl;p

SEPTEMBER 25, 1957

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

MEMORANDUM OPINION—P-30

DEAR COMMISSIONER McLEAN:

Our opinion has been requested as to the authority, if any, of the Department of Conservation and Economic Development to lease mineral rights for the mining or extraction of minerals from State forests.

In a Memorandum Opinion to you dated February 24, 1955, there was reviewed

certain of the laws of this State relating to forestry conservation. There we traced the authority that is now vested in the Department of Conservation and Economic Development to deal with forests. In that earlier opinion we noted that the powers and duties of the Division of Forestry, Geology, Parks and Historic Sites (which Division was established by Chapter 22 of the Laws of 1945) were transferred to the present Department of Conservation and Economic Development which was established by Chapter 448 of the Laws of 1948, but did not indicate to which Division of that Department those duties were transferred.

The 1948 legislation did not provide for the continuance of the Division of Forestry, Geology, Parks and Historic Sites (see Memorandum Opinion to you dated April 17, 1957), but it was provided therein that

> "* * * all of the functions, powers and duties of the State Commissioner of Conservation, of the existing State Department of Conservation and of the respective divisions and councils therein, herein transferred to the Department of Conservation and Economic Development, exclusive of those of, or relating to, or administered through, the Division of Fish and Game, the Division of Shell Fisheries, and the Division of Water Policy and Supply; * * * are hereby assigned to, and shall be exercised and performed through, the Division of Planning and Development in the department." (*L.* 1948, *c.* 448, § 7; *N.J.S.A.* 13:1B-7).

Thus the authority formerly vested in the Board of Conservation and Development of the Department of Conservation and Development and subsequently in the State Commissioner of Conservation in the State Department of Conservation (as respects State forests) now reposes in the Division of Planning and Development of the Department of Conservation and Economic Development.

Among the powers granted by the Legislature as respects forest park reserves and reservations are those embodied in N.J.S.A. 13:8-9 and 10, which read as follows:

> "The board shall have power to lease, sell, or exchange for other land, any portion of the lands acquired under the provisions of this article, with any buildings which may be thereon, when, in the judgment of the board, such lease, sale or exchange is deemed to be for the best interests of the State in the furtherance of this article; but no sale or exchange shall be made without the approval of the Governor. All such leases, sales or exchanges shall be made in the name of the State of New Jersey by the Board of Conservation and Development, under the seal of the board, signed by the president and secretary of the board. All moneys derived from such sales, leases or exchanges shall be paid into the General State Fund." (*N.J.S.A.* 13-8-9).
>
> "Whenever it shall appear that the welfare of the state will be advanced by cutting or selling or disposing of any of the timber on state forest lands, or by using a portion of such lands for agriculture, or for any other purpose than the maintenance of forests, the board shall have power to cut and sell such timber, or to provide for the use and development of such land in the way that, in its judgment, is most proper, on terms most advantageous to the state." (*N.J.S.A.* 13:8-10).

Particularly significant for present purposes is *N.J.S.A.* 13:8-10 which provides that whenever it shall appear that the welfare of the State will be advanced, the

Board (now the Commissioner of the Department of Conservation and Economic Development) may provide for the use of such lands for any other purpose than the maintenance of forests. And, moreover, it may provide for the use and development of such land in the way that, in its judgment, is most proper, on terms most advantageous to the State. It seems clear that this broad grant of power includes the authority to lease mineral rights for the mining or extraction of minerals.

As to the procedure for effecting such a lease, it is first to be noted that *N.J.S.A.* 13:1B-3 confers on the Commissioner of the Department of Conservation and Economic Development the duty of administering the work of the Department and it is provided that he should "perform, exercise and discharge the functions, powers and duties of the Department through such divisions as may be established by this act or otherwise by law". *N.J.S.A.* 13:1B-3c. Secondly, we observe that the Division of Planning and Development is under the supervision of a Director who is charged with the responsibility of "administer[ing] the work of such division under the direction and supervision of the commissioner". *N.J.S.A.* 13:1B-8.

It is the opinion of this office that a lease of mineral rights for the mining or extraction of minerals from forest park reserves and reservations may be executed by the State of New Jersey acting through the Division of Planning and Development upon a determination by yourself, in the exercise of your direction and supervision of the Division of Planning and Development, that such lease is for the best interests of the State and that the welfare of the State will be advanced thereby, subject to the approval of the Governor. There is no requirement that there be bidding under *N.J.S.A.* 52:34-6, *et seq., N.J.S.A.* 52:27B-67 or any other statute.

To the extent that our Memorandum Opinion to you dated February 24, 1955 is inconsistent with the opinion expressed herein, it is hereby overruled.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: HAROLD J. ASHBY
Deputy Attorney General

HJA:tb.

OCTOBER 2, 1957

COLONEL JOSEPH D. RUTTER
Superintendent, Divison of State Police
Department of Law and Public Safety
West Trenton, New Jersey

MEMORANDUM OPINION—P-31

DEAR COLONEL RUTTER:

You have asked our opinion whether a complaint for a traffic violation may be made under oath before a notary public of this State.

R.R. 8:3-1(a) provides as follows:

"The camplaint is a written statement of the essential facts constituting the offense charged. It may be made upon information and belief and shall be made upon oath before any magistrate, the person in charge of any police station who is authorized to administer oaths, the clerk of any court, or any person empowered by law to take complaints. In non-traffic cases the complaint shall be in the form set out in Local Criminal Court Forms 1 or 2, printed in the Appendix of Forms and in traffic cases the complaint shall be in the form set out in Local Criminal Court Form 12, printed in the Appendix of Forms."

Since a notary public is not specifically designated as such a person before whom a complaint may be made under oath, it must be determined if a notary is "any person empowered by law to take complaints."

R.R. 8:3-1 (a), N.J.S.A. 39:5-6 and N.J.S. 2A:8-27 are the authority for those who may take a complaint for any violation of the Motor Vehicle Act. *State* v. *Mershon,* 39 N.J. Super 599, (1956) at page 601.

N.J.S.A. 39:5-6 provides as follows:

"All acts, whether in connection with the taking of complaints, issuing of process, return thereof, taking of bail for appearance or committing to custody for failure to deposit such bail and all proceedings preliminary to trial, including the arraignment, taking of plea and postponement of trial and all ministerial acts and proceedings subsequent to trial, may be performed by the clerk or deputy clerk of a magistrate, and the jurisdiction so to do with respect to a violation of this subtitle is hereby conferred."

N.J.S. 2A:8-27 provides as follows:

"Any judge of a county court, county district court or criminal judicial district court, or any clerk or deputy clerk thereof may, within the county wherein an offender may be apprehended, or any magistrate of a municipal court, any clerk or deputy clerk thereof, any officer authorized by section 2A:8-28 of this title to take bail, the chief of police or other person acting in that capacity in any municipality and the police officer in responsible charge of the police station may, within the municipality wherein an offender may be apprehended, administer or take any oath, acknowledgment, complaint or affidavit to be used in the proceeding, issue warrants and summonses, endorse warrants from other counties, and upon arrest hold the accused to bail, the offense with which he is charged being bailable, for his appearance before the superior court, the county court, the county district court, any criminal judicial district court or any municipal court, in the county at such time as he may direct."

N.J.S. 2A:2-28 confers authority upon the mayor or other chief executive officer of the municipality or the municipal clerk, and under certain circumstances recorders properly appointed, to take bail for the appearance of a defendant.

It can be seen by the above that neither of the foregoing statutes authorizes the making of a complaint under oath before a notary public.

The authority of a notary public to administer an oath is contained in N.J.S. 41:2-1 which provides as follows:

"All oaths, affirmations and affidavits required to be made or taken by law of this State, or necessary or proper to be made, taken or used in any

court of this State, or for any lawful purpose whatever, may be made and taken before any one of the following officers: The Chief Justice of the Supreme Court or any of the justices or judges of courts of record of this State; Masters of the Superior Court; Municipal magistrates; Mayors or aldermen of cities, towns or boroughs or commissioners of commission governed municipalities; Surrogates, registers of deeds and mortgages, county clerks and their deputies; City clerks; Clerks of all courts; Notaries public; Commissioners of deeds; Attorneys-at-law of this State.

"This section shall not apply to official oaths required to be made or taken by any of the officers of this State, nor to oaths or affidavits required to be made and taken in open court."

The general authority of a notary public to administer oaths does not affect the requirement of other statutes that oaths in particular cases be administered by other specified officers. See 66 C.J.S. 615.

It is our opinion that a complaint for a traffic violation cannot be properly made under oath before a notary public and must be made under oath before the persons specifically designated in R.R. 8:3-1(a), N.J.S.A. 39:5-6 and N.J.S. 2A:8-27, supra.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: SAUL N. SCHECHTER
Deputy Attorney General

SNS/LL

OCTOBER 9, 1957

HONORABLE T. J. LANGAN
Director, Division of Planning and Development
Department of Conservation and Economic Development
520 East State Street
Trenton, New Jersey

MEMORANDUM OPINION—P-32

DEAR DIRECTOR LANGAN:

You have asked us to advise you as to whether or not the Division of Planning and Development may establish non-ski areas on the inland waterways and other waterways under the jurisdiction of the State. We interpret your question to mean that you may wish to prohibit water skiing in designated localities, should an investigation and study on our part disclose that such action is necessary, and that you now inquire concerning your authority to do so.

Water skiing has become a popular sport and the manner in which it is engaged in has become familiar to most people. It is sufficient to say that one person, or more, is towed over water at a good rate of speed by means of a long line with distinctive attachments, one end of which is fastened to a power boat and the other end of which is held by the person being towed who is able to maintain his upright balance by the use of water skis attached to parts of his body.

Correspondence attached to your request letter indicates that the matter of regulation of the sport in one particular area has been studied and discussed among members of two ski clubs, a harbor master and an expert on boating who writes articles for a leading newspaper in New Jersey, and that as a result it has been agreed that as to that area, regulation is desirable.

Waters in New Jersey are classified as being tidal or non-tidal. The state is the owner of the subaqueous soil under tidal waters and as such proprietor may control the use of these waters for the common benefit of its people. As a sovereign state, and in order to promote the public welfare and safety, it may regulate the use of both tidal and non-tidal streams. In the exercise of its police power with reference to non-tidal waters see Attorney General's Formal Opinion—1954 No. 25.

The legislature has delegated to your department the authority to regulate navigation on the waters within the state, and particularly with reference to the use of power vessels by Chapter 7 of Title 12 of the Revised Statutes of New Jersey.

In *State Board of Milk Control* v. *Newark Milk Co.*, 118 N.J. Eq. 504, the court said:

"The legislature indubitably has power to vest a large measure of discretionary authority in the agency charged with the administration of a law, enacted in pursuance of the police power, to secure the health and the safety of the people. * * * It is only necessary that the statute establish a sufficient basic standard—a definite and certain policy and rule of action for the guidance of the agency created to administer the law."

The latest definition of power vessels is supplied in N.J.S.A. 12:7-34.1(d):

"The term 'power vessel' shall mean a vessel temporarily or permanently equipped with a motor, and shall not be deemed to include a vessel propelled wholly by sails or by muscular power."

The authority for the power to regulate the operation of power vessels on all waters of the state is contained in the following sections of our statutes, the first applying to tidal and the second to non-tidal waters.

N.J.S.A. 12:7-44:

"In addition to the powers conferred upon the Department of Conservation and Economic Development by the provisions of Title 12 of the Revised Statutes, the said Department of Conservation and Economic Development is hereby authorized and empowered to regulate the operation, docking, mooring and anchoring of power vessels operating on the tidal waters within the confines of the State of New Jersey."

N.J.S.A. 12:7-34.2:

"The department is hereby authorized and empowered to prescribe rules and regulations, not inconsistent with this act, governing the registration, licensing, inspection, operation, equipping, anchoring and racing of power vessels upon the waters other than tidal waters of this State. Said rules or regulations shall be such as are reasonably necessary for the protection of the health, safety and welfare of the public and for the free and proper use of said waters by any persons or vessels in, on or about such waters. Said regulations shall, insofar as practicable, be in substantial conformity with

regulations issued by the agency or agencies of the United States having jurisdiction with respect to power vessels upon the tidal waters of this State."

In addition to the power given to regulate the use of power vessels, the legislature has fixed additional standards by which you may be guided in promulgating rules and regulations governing their operation on both classes of waters.

As to tidal waters:

N.J.S.A. 12:7-47:

"No power vessel shall be operated in a reckless manner. Reckless operation shall include operating such a vessel in a manner which unnecessarily interferes with the free and proper use of any waters, or which unnecessarily endangers other craft therein, or the life or limb of any person upon such other craft or in the water."

As to non-tidal waters:

N.J.S.A. 12:7-34.22:

"No power vessel or motor shall be operated in a reckless or careless manner. Reckless or careless operation shall include operating a power vessel or motor in a manner which unnecessarily interferes with the free and proper use of any waters, or unnecessarily endangers other craft therein, or the life or limb of any person upon any craft or in the water."

It is our opinion that by reason of the authority so vested in the Department of Conservation and Economic Development by the foregoing statutory enactments to be exercised and performed through the Division of Planning and Development of which you are the Director, you may prohibit or ban water skiing on any waters in New Jersey by promulgating rules or regulations prohibiting operation of a power vessel in connection with water skiing on any of the waters of this state, tidal or non-tidal. You may limit the prohibition to a designated area. What would constitute reckless operation, as defined above, on waters in certain localities would not necessarily be dangerous at other places.

Before taking any administrative action you are urged to be certain that your findings and conclusions are reasonable, and that there is a supporting basis for the agency determination, rule or regulation in accordance with the legislative standards. See *McKenna* v. *N.J. Highway Authority*, 19 N.J. 270, 283; *Bailey* v. *Council of the Division of Planning, etc. State of New Jersey*, 22 N.J. 366, 374; *Burnett* v. *Abbott*, 14 N.J. 291, 294. You are reminded that any rules and regulations promulgated should be filed with the Secretary of State as provided for in the 1947 Constitution, Art. V, Sec. IV, Par. 6.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: SIDNEY KAPLAN
Deputy Attorney General

SK:mp

OCTOBER 31, 1957

HON. FLOYD R. HOFFMAN, *Director*
Office of Milk Industry
1 West State Street
Trenton, New Jersey

MEMORANDUM OPINION—P-33

DEAR DIRECTOR:

We have been asked whether a division of a corporation may be licensed as a milk dealer.

N.J.S.A. 4:12A-28 requires a milk dealer to be licensed. N.J.S.A. 4:12A-1 defines a milk dealer as "any person who sells or distributes milk * * *". R.S. 1:1-2 defines "person" to include corporations but makes no reference to divisions of a corporation. The divisions of a corporation are not separate entities within the statutory definition of "person".

The Milk Control Act, N.J.S.A. 4:12A-33, requiring an application for a license, contemplates that the applicant may be "a firm or association", both within the statutory definition of "person". Again, divisions of a corporation are not specifically listed and are not within the category intended to be covered by the statute.

N.J.S.A. 4:12A-39 imposes a fine on any person who violates the act and N.J.S.A. 4:12A-41 provides for collection of this fine by judicial proceeding. The General Corporation Act gives a corporation the power to be sued only in its own name. N.J.S.A. 14:3-1(b); *Markey* v. *Robert Hall Clothes of Paterson, Inc.*, 27 N. J. Super. 417, 420 (Co. Ct. 1953). It does not give divisions the power to be sued. R.R. 4:4-4 provides no method for service of process on a division of a corporation. Therefore, ordinary sanctions could not be brought to bear against divisions of corporations as such.

We hereby advise that the definition of "person" contained in N.J.S.A. 1:1-2 is to be applied in the definition of "milk dealer" in N.J.S.A. 4:12A-1 and 28. Licenses as "milk dealers" may not be issued to divisions of corporations.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: WILLIAM L. BOYAN
Legal Assistant

NOVEMBER 7, 1957

SOMERSET COUNTY BOARD OF ELECTIONS
Administrative Building
Somerville, New Jersey

MEMORANDUM OPINION—P-34

GENTLEMEN:

You have sought our advice as to whether the Somerst County Board of Elections has the power to establish salaries paid to its employees. According to the informa-

tion you have supplied us, the county board of freeholders has refused to recognize the salary recommendations submitted to it by the county board of elections.

Our opinion is that the county board of elections is vested with the statutory power to fix the compensation of its employees. The county treasurer must pay such salaries as necessary expenses, when certified and approved by the county board of elections. The provisions of R.S. 19:31-2 are governing.

> "In all counties having a superintendent of elections, the superintendent of elections is hereby constituted the commissioner of registration and in all other counties the secretary of the county board is hereby constituted the commissioner of registration.
>
> "The commissioner of registration in all counties having a superintendent of elections, and the county board in all other counties, shall have complete charge of the permanent registration of all eligible voters within their respective counties.
>
> "The commissioner of registration in counties of the first class having less than eight hundred thousand inhabitants, and the county board in all other counties, shall have power to appoint temporarily, and the commissioner of registration in counties of the first class having more than eight hundred thousand inhabitants shall have power to appoint on a permanent, or temporary basis, such number of persons, as in his or its judgment may be necessary in order to carry out the provisions of this title.
>
> * * *
>
> "All necessary expenses incurred, as and when certified and approved by the commissioner of registration in counties having a superintendent of elections, and by the county board in all other counties, shall be paid by the county treasurer of the county; provided, however, that all expenses of every nature in the office of the commissioner of regisration in counties of the first class, exclusive of county board expenses, shall not exceed the sum of two hundred ninety-five thousand dollars ($295,000.00) per annum commencing with the year one thousand nine hundred and fifty-three and annually thereafter."

Somerset County, a county of the third class, has no office of superintendent of elections. According to the specific terms of R.S. 19:31-2, the county board of elections in counties without a superintendent of elections is empowered to appoint temporary employees. The salaries of such temporary employees must be paid by the county treasurer as one of the necessary expenses of the county board of elections in carrying out its statutory functions and meeting its statutory obligations under Title 19.

The courts of New Jersey have consistently viewed the several county boards of election as State agencies, vested with authority independent of the county government.

In *McDonald* v. *Hudson County Freeholders,* 98 N.J.L. 386 (Sup. Ct. 1923), plaintiff, the Superintendent of Elections, made a demand upon the Board of Freeholders for the payment of his salary and the salaries of those appointed by him. Demand was refused. The Court, in reversing the action of the Board of Freeholders, characterized the election laws as being of state-wide significance, and the salaries of the employees of the election board to be of legislative concern, properly above the local interest of the Board of Freeholders. In this connection, the Court said at page 394:

> "It must be conceded that honest elections are the vital machinery of good and free government. It is a matter of the gravest importance to the state that elections should be fairly and honestly conducted. The entire state has a vital interest in protecting elections against fraud, corruption and illegal voting."

Another analogous case is *Nolan* v. *Fitzpatrick,* 9 N.J. 477 (1952). In the *Nolan* case the legislature created the boulevard commissioners of Hudson County. The boulevard commissioners, in accordance with their statutory authority, made written requisition to the defendant board of freeholders for $1,175,534.00, the amount the commissioners deemed necessary to carry out their statutory responsibilities. The freeholders denied this full amount and attempted to make a substantial reduction. The statute in question was N.J.S.A. 27:17-7 which reads:

> "On or before January first, in each year, the commissioners shall make a requisition in writing on the board of chosen freeholders of the county, for the moneys necessary to enable the commissioners to carry out the purpose of this chapter.
>
> "The board of chosen freeholders shall cause the amount to be raised and collected in the same manner as money for other county purposes and the moneys thus raised shall remain a fund in the hands of the county treasurer to be used for such purposes only, and to be drawn, on warrants signed by the president and secretary of the commission, and the board of chosen freeholders shall have no control over the fund."

The question presented was whether the commissioners' requisition was mandatory upon the freeholders or whether the freeholders could within their discretion reduce the amount requested. Chief Justice Vanderbilt considered the entire body of law on similar requisitions and said, in approving *McDonald* v. *Hudson County Freeholders*:

> "Statutes imposing mandatory obligations on the county are thus no novelties in our law. The Legislature where it desires to confide discretion to a board of chosen freeholders has experienced no difficulty in finding apt language to do so. Where, as here, it has not only employed mandatory language with respect to appropriations but by the entire statutory scheme of relations between the boulevard commissioners and the board of chosen freeholders has indicated an intent * * * either as to the method of appropriating funds to the boulevard commissioners or the very existence of the boulevard commissioners as an independent political corporation."

The Court suggested that the freeholders, as private citizens and with the same right as other private citizens, could attack the requisitions as excessive or unnecessary but, in an official capacity, lacked the power to take the law into their own hands and thus defeat the clear legislative intent.

As an elementary principle, the underlying motive of the Legislature should be

the determining factor in interpreting statutes. *Lynch* v. *Borough of Edgewater*, 14 N.J. Super. 329 (1951). The Legislature apparently intended to free the county board of elections from control of the freeholders with respect to the fixing of salaries. We conclude therefore that the power to fix the salaries of the employees of the board of elections is vested by legislative mandate in the board of elections and is not subject to revision or control by the board of freeholders.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

DDF:gd

NOVEMBER 7, 1957

HONORABLE JOSEPH E. MCLEAN
Commissioner, Department of
Conservation and Economic Development
State House Annex
Trenton, New Jersey

MEMORANDUM OPINION—P-35

DEAR COMMISSIONER MCLEAN:

You have sought our advice as to the construction of the 1918 grant of water rights in the Raritan and Millstone Rivers to Elizabethtown Water Company and other water companies now merged in Elizabethtown Water Company. The grant was made by the former Board of Conservation and Development pursuant to P.L. 1907, c. 252, p. 634.

You raise the following particular questions:

(1) What is the total amount of water which may be obtained by Elizabethtown Water Company from the Raritan and Millstone Rivers:

(2) What is the rate of charge by the State for such water supply;

(3) May the State charge Elizabethtown Water Company for a part of the cost of construction and maintenance of storage facilities upstream from the point of diversion?

The grant is specific as to the amount of water which may be obtained by Elizabethtown Water Company and the companies merged with it. The maximum diversion from the Raritan and Millstone Rivers is 20 million gallons per day. This legislative allowance is independent of Elizabethtown Water Company's rights to divert water from other sources of surface or subsurface water.

Elizabethtown Water Company is obligated to pay to the State pursuant to paragraph 5 of the 1918 grant, "Such annual charge for the diversion of water as is now lawfully made or may hereafter be lawfully required." R.S. 58:2-1 et seq. is the governing statute on the fixing of charges for surface water diverted by authority

of the Board of Conservation and Development or successor agencies. Private water companies supplying water to the public are charged only for diversions in excess of a total amount equal to 100 gallons daily for each inhabitant of the municipality or municipalities supplied, in accordance with the census of 1905, or in excess of such greater amount as such company may have been legally diverting on June 17, 1907. You have informed us as a fact that Elizabethtown Water Company and the other companies now merged in it were not diverting water in excess of 100 gallons daily for each inhabitant of the municipality or municipalities supplied on June 17, 1907. The application by Elizabethtown Water Company and other companies now merged in the Elizabethtown Water Company, prior to the 1918 grant, sets forth the total population of the municipalities furnished with the public water supply as approximately 200,000. We have no definite information as to the population of the municipalities in the 1905 census, but presume that the population in 1905 was less than that in 1918. Elizabethtown Water Company is chargeable with the excess amount diverted over 100 gallons per day for each inhabitant of the municipality supplied, as of 1905, at a rate of not less than $1.00 nor more than $10.00 per million gallons (R.S. 58:2-2).

Your final question concerning Elizabethtown Water Company's liability under the legislative grant for the construction of up-river water storage facilities is governed by paragraph 6 as follows:

> "The Board hereby expressly reserves the right, in case it shall be necessary in the future to provide storage of storm waters along the Raritan and Millstone rivers or their tributaries for the purpose of supplying municipalities or water companies that may lawfully take water from the said rivers and their tributaries, to apportion the expense of providing the necessary storage among the petitioners and such other companies or municipalities as may at the time have a right to take water from said rivers, their tributaries, or either of them, for public or domestic use, as may be equitable."

The Supreme Court in *City of New Brunswick* v. *Board of Conservation and Development*, 94 N.J.L. 46 (Sup. Ct. 1918), affirmed on opinion below 94 N.J.L. 558 (E. & A. 1920) commented on the important condition wherein the board reserved to itself full authority relating to the future storage of storm waters and the apportionment of its cost between the parties entitled to participate in its use, at p. 51:

> "In other words the state board apprehended a future demand for water in excess of the ordinary flow of the two rivers, and the requirement of storage of storm water, which the statute permits, exacted from the petitioners a promise to pay their share of such expense because manifestly it might become very essential to the petitioners to have storm water stored if it should happen that the present flow was not sufficient to supply the demands of municipalities entitled to a supply of water. And while the condition does not impose terms on any subsequent applicant for the use of water which it might become necessary to store, we think the board exercised a wise precaution in making it a condition of this consent that if the public interest required the empounding of the storm water of these two rivers these applicants should bear their share of the expense."

We, therefore, advise you that pursuant to legislative grant Elizabethtown Water Company may draw up to a maximum of 20 million gallons per day from the Raritan

and Millstone Rivers, that the rate of charge is for excess water diverted, under the statutory formula in R.S. 58:2-1 et seq. and that Elizabethtown Water Company is obligated to assume its apportioned share of the cost of any future storage of storm waters along the Raritan and Millstone Rivers or their tributaries for the purpose of supplying industrial or potable water to municipalities or water companies.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

DDF:gd

DECEMBER 17, 1957

OCEAN COUNTY BOARD OF TAXATION
Toms River, New Jersey
Attention: J. CHESTER HOLMAN, *Secretary*

MEMORANDUM OPINION—P-36

DEAR SIRS:

You have requested our opinion concerning an application of the so-called Veterans' Exemption Act, N.J.S.A. 54:4-3.12i et seq.

The facts are stated to be as follows. A taxpayer has made application in a certain municipality for a veteran's exemption commencing with the tax year 1958. The applicant has lived in Ocean County with his wife and two children since March 1957. In April 1957 he purchased a home, taking title and recording the deed in August 1957. The applicant is still in service and is presently stationed at the Naval Air Station, Lakehurst. Previously, he had been stationed at Seattle, Washington where he lived with his family before moving to Ocean County, New Jersey. The applicant possesses more than one honorable discharge.

You further inform us that the exemption is being denied by the municipality on the ground that the applicant "has not lived in the State of New Jersey a year in order to establish a residence in this State."

In effect, your inquiry is whether a person must establish the fact that he has lived in New Jersey one year in order that he may be considered a resident under the provisions of the Veterans' Exemption Act.

The answer is no.

The term "resident" is defined in the Act as follows (N.J.S.A. 54:4-3.12i):

> "'Resident' means one legally domiciled within the State of New Jersey. Mere seasonal or temporary residence within the State, of whatever duration, shall not constitute domicile within the State for the purposes of this act. Absence from this State for a period of twelve months shall be prima facie evidence of abandonment of domicile in this State. The burden of establishing legal domicile within the State shall be upon the claimant."

Neither the statute as set forth above nor Article VIII, paragraph 3, of our New

Jersey Constitution, which the statute implements, places a prerequisite period upon residence such as is found in Article II, paragraph 3, of the Constitution concerning the residence qualifications for purposes of voting.

In the leading case of *Peff* v. *Peff*, 2, *N.J.* 513 (1949) at pages 521-22 the Court laid down the prerequisites for establishing legal domicile and residence as follows:

> "A man has the right to choose his own domicile, and his motive in so doing is immaterial. [citing cases].
>
> "A person may legitimately move to another state in order to avail himself of its laws, including its divorce laws, the only requirements being absolute good faith in the taking up of such residence and of the intention of remaining there—the *animus manendi*. The avowal that the object in moving to the other jurisdiction is for that purpose is only an element to be considered in determining the *bona fides* of residence—*Wallace* v. *Wallace*, supra.
>
> ". . . The *animus manendi*, i.e., the intention of remaining indefinitely in the new residence, and the intention not to return to the old, i.e., *the animus non revertendi*, are essential elements of domicile. [citing cases].
>
> "In *Harral* v. *Harral*, supra, it was said: 'There must be a voluntary change of residence; the residence at the place chosen for the domicile must be actual; to the *factum* of residence must be added the *animus manendi;* and that place is the domicile of a person in which he has voluntarily fixed his habitation, not for a temporary or special purpose, but with the present intention of making it his home, unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home.'"

As stated by Justice Heher in *Kurilla* v. *Roth*, 132 N.J.L. 213, 215 (Sup. Ct. 1944):

> ". . . 'Domicile' is the relation which the law creates between an individual and a particular locality or country. In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. 17 *Am. Jur.* 588, 590; 28 *C.J.S.* 3. It is the place with which he has a settled connection for certain legal purposes, either because his home is there or because that place is assigned to him by the law."

In the instant case, the fact that the applicant is presently on active duty in New Jersey with the Armed Forces of the United States, in the opinion of this office, is not of itself controlling. In *Mangene* v. *Diamond*, 229 F. 2d 554 (C.C.A. 3, 1956) the Court dealt with considerations of military personnel and their respective rights in relation to residence and domicile. The Court in discussing this problem stated as follows (p. 555):

> "We are not dealing with any confusion between domicile and residence. We start with the proposition that appellee, despite the fact that his home was in Pennsylvania and he was in California entirely because of service

orders, could have obtained such residency had he so intended."

In sum, a determination that the applicant is domiciled in New Jersey is a condition precedent to the granting of a veteran's exemption, but there is no requirement that the veteran shall have been domiciled here for a period of 12 months. The question of whether a domicile has been established is factual and depends upon a consideration of all the facts and circumstances in the particular case. *Cromwell* v. *Neeld,* 15 N.J. Super. 296, 301 (App. Div. 1951).

The sentence in N.J.S.A. 54:4-3.12i(f) which provides that "[a]bsence from this State for a period of twelve months shall be prima facie evidence of abandonment of domicile in this State" refers in our opinion to abandonment of domicile in this State after such New Jersey domicile had already existed, which is not the situation you present.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS P. NOLAN
Deputy Attorney General

TPN:lc

JANUARY 24, 1957

GEORGE C. SKILLMAN
Director of Local Government
Department of the Treasury
Commonwealth Building
Trenton 25, New Jersey

FORMAL OPINION, 1957—No. 1

DEAR DIRECTOR:

You have requested our opinion regarding the jurisdiction of a Planning Board to inquire into the estimated cost and proposed financing of a school construction project submitted to the Planning Board for recommendation under Section 13 of the Municipal Planning Act of 1953 (N.J.S.A. 40:55-1.13).

In our opinion, the Planning Board does have such jurisdiction. Section 40:55-1.13 reads in part as follows:

> "Whenever the planning board after public hearing shall have adopted any portion of the master plan, the governing body or other public agency having jurisdiction over the subject matter, before taking action necessitating the expenditure of any public funds, incidental to the location, character or extent of one or more projects thereof, shall refer action involving such specific project or projects to the planning board for review and recommendation, and shall not act thereon without such recommendation or until forty-five days after such reference have elapsed without such recommendation.
>
> * * *
>
> The planning board shall have full power and authority to make such investigations, maps and reports and recommendations in connection therewith relating to the planning and physical development of the municipality as it deems desirable."

The foregoing section must be read in connection with other sections of the Planning Act of which it is a part (N.J.S.A. 40:55-1.1 et seq.) and particularly Section 40:55-1.12, which provides:

> "In the preparation of the master plan the planning board shall give due consideration to the probable ability of the municipality to carry out, over a period of years, the various public or quasi-public projects embraced in the plan *without the imposition of unreasonable financial burdens.*
>
> In such preparation, the planning board shall cause to be made careful and comprehensive surveys and studies of present conditions and the prospects for future growth of the municipality. The master plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the municipality and its environs which will, in accordance with present and future needs, best promote health, safety, morals, order, convenience, prosperity and general welfare, as well as efficiency and economy in the process of development and the maintenance of property values previously established. To such end, the master plan shall also include adequate provision for traffic and recreation, the promotion of safety from fire and other dangers, adequate provision for light and air, the promotion of good civic design and arrangements, *the wise and efficient expenditure of public funds,* and adequate provision for public utilities and other public requirements." (Italics ours)

The underlined portions of Section 40:55-1.12 above quoted show that the reasonableness and wisdom of the financial burdens involved in any public project are essential matters for the Planning Board to consider in determining how the project fits into the master plan for the municipality, and what recommendations should be made thereon by the Planning Board to the public agency having jurisdiction over the matter.

For the foregoing reasons, we think the legislative intent was clear that in passing upon a proposed school construction program, the Planning Board should request, and the board of education has a duty to furnish, a sufficiently detailed statement of the anticipated cost of the project, together with such other information as may be appropriate in order that the Planning Board may make a well considered recommendation as to the reasonableness and wisdom of the financial burdens involved, as well as on the other planning aspects of the proposal.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

TPC:JHA

APRIL 5, 1957

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

FORMAL OPINION, 1957—No. 2

DEAR MR. PATTEN:

You have requested our opinion as to whether persons who have religious scruples against riding and writing on Tuesday, April 16, 1957 may vote by absentee ballot at the Primary Election to be held on that day.

The Absentee Voting Law (1953) permits voting by absentee ballot by civilians (1) who expect to be or may be absent outside the State on the day on which the election is held or (2) who will be unable to cast ballots on the day of the election because of illness or physical disability.

The statute makes no provision for absentee voting by citizens who have religious objections to marking ballots or signature copy registers at the polling places within the election districts on the day of the election.

We therefore advise you that persons can not vote by absentee ballot at the forthcoming Primary Election to be held on April 16, 1957 unless meeting or expecting to meet the statutory conditions for eligibility of absence outside the State, sickness or physical disability.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

f;p

MAY 1, 1957

LT. COLONEL SAMUEL F. BRINK
Adjutant General
Department of Defense
Armory
Trenton, New Jersey

FORMAL OPINION, 1957—No. 3

DEAR COLONEL BRINK:

You have requested our opinion concerning the application of Section 13 of the Municipal Planning Act of 1953, *L.* 1953, *c.* 433, *sec.* 13, N.J.S.A. 40:55-1.13 to the Department of Defense in cases where it constructs buildings upon State-owned lands. For the reasons hereinafter stated it is our opinion that the cited statute does not apply to the Department of Defense and that the latter is not required to comply with its terms.

N.J.S.A. 40:55-1.13 reads in pertinent part as follows:

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

To paraphrase N.J.S.A. 40:55-1.13, whenever the governing body or other public agency having jurisdiction over the subject matter contemplates action incidental to the location, character or extent of a project which requires the expenditure of public funds it must, if a master plan has been adopted in the municipality, refer the matter to the planning board for review and recommendation. In a word, the statute is applicable in the stated circumstances to a "governing body or other public agency."

The term "governing body" is defined in N.J.S.A. 40:55-1.2 to mean "the chief legislative body of the municipality. In cities having a board of public works 'governing body' means such board." While the statute does not specifically define "public agency", the latter term is explained by that part of N.J.S.A. 40:55-1.13 which is underscored in the above excerpt. It is clear that the Department of Defense is not "a housing, parking, highway or other authority, redevelopment agency [or] school board." The question remains, however, whether it comes within the meaning of the phrase "or other similar public agency, Federal, State, county or municipal."

It is clear from a reading of N.J.S.A. 40:55-1.13 that the Legislature did not intend all public bodies to be subject to the Act. If such had been its intention it would have employed more general language rather than spell out the specific types of public bodies to which the Act was to apply.

It is commonly said that where general words follow particular words in an enumeration describing the subject the general words are, under the rule of *ejusdem generis,* construed to embrace only objects similar in nature to those enumerated by the antecedent specific words. *Salomon* v. *Jersey City,* 12 N.J. 379 (1953); *In re Armour,* 11 N.J. 257 (1953). The application of this aid to statutory construction leads to the conclusion that the Department of Defense is not a public agency within the meaning of the statute. The same result is reached regardless of whether this rule is applied since the modification of the term "public agency" by the words "other similar" likewise delimits the term. Housing, parking and highway authorities as well as redevelopment agencies all are concerned primarily with the use of land and the construction of projects upon land. Even school boards, while they cannot be considered to be engaged primarily in construction, are concerned to a large extent with the use of lands and the construction of buildings thereon. The Department of Defense on the other hand does not have a similar statewide impact upon the use of land and therefore cannot be regarded as a public agency of the type dealt with in N.J.S.A. 40:55-1.13. A further basic distinction between the types of agencies enumerated in N.J.S.A. 40:55-1.13 and the Department of Defense is that the former are public instrumentalities vested with independent or autonomous powers and not departments of the Federal, State, county or municipal governments.

For the foregoing reasons it is our opinion and you are advised that the Department of Defense is not affected by and therefore need not comply with Section 13 of the Municipal Planning Act of 1953,*L.* 1953, *c.* 433, *sec.* 13, N.J.S.A. 40:55-1.13.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHRISTIAN BOLLERMANN
Deputy Attorney General

CB:MG

MAY 23, 1957

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

FORMAL OPINION, 1957—No. 4

Re: P. L. 1955, c. 261, § 5 (N.J.S.A. 43:15A-7c)

DEAR MR. NEELD:

Former Deputy State Treasurer Finley requested our opinion as to (1) whether an employee who earns a combination of salaries aggregating $500 or more can be permitted to join the Public Employees' Retirement System if no single salary amounts to $500 and (2) whether an employee who earns an annual salary of $500 or more in one employment, office or position and less than $500 in another shall contribute on the basis of both salaries or only upon the salary of $500 or more.

P.L. 1955, c. 261, § 5, provides in part:

> ". . . No person in employment, office or position, for which the annual salary or remuneration is fixed at less than $500.00 shall be eligible to become a member of the retirement system". (N.J.S.A. 43:15A-7c).

An examination of the legislative history of this particular provision discloses that prior to the enactment of P.L. 1955, c. 261, the Board of Trustees of the Public Employees' Retirement System, pursuant to the authority of N.J.S.A. 43:15A-17, had adopted Rule E-5, which is still in effect and provides in part:

> "In the case of a public employee who is employed by one or more public employers, membership shall be optional with the employee . . . provided he received an annual salary of at least $500 *from any one participating employer* . . ." (emphasis supplied).

The plain and unambiguous terms of P.L. 1955, c. 261, § 5 restrict eligibility in the Public Employees' Retirement System to persons in an employment, office or position for which the annual salary is $500 or more. It is our opinion that public employees earning an aggregate of $500 or more but less than $500 in any single public employment, office or position are not eligible to join the Public Employees' Retirement System.

With regard to your second question, namely, whether an employee who earns an annual salary of $500 or more in one employment, office or position and less than $500 in another shall contribute on the basis of both salaries or only upon the salary of $500 or more, the statute is silent. However, with regard to *computing for retirement purposes* the total service of a member or in *computing final compensation,* P.L. 1954, c. 84, § [illegible] (N.J.S.A. 43:15A-39) provides:

> ". . . no time during which a member was in employment, office or position, for which the annual salary or remuneration was fixed at less than $500 shall be credited, except that in the case of a veteran member credit shall be given for service rendered prior to January 2, 1955 in an employment, office or position if the annual salary or remuneration therefor was fixed at less than $300. . ."

In replying to your second question, the interpretation to be placed upon the Public Employees' Retirement-Social Security Integration Act must be one which is consistent with the above quoted statutory language and with the section of the act dealing with eligibility.

Accordingly, it is our opinion that an employee may not contribute on the basis of any position where the salary is less than $500.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DONALD M. ALTMAN
Legal Assistant

JUNE 7, 1957

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

FORMAL OPINION, 1957—No. 5

Re: Determination of Status of Disabled Veteran of World War II

DEAR MR. KELLY:

You have asked whether any changes in Attorney General Formal Opinion 1954, No. 11 are necessitated by Chapter 21 of the Laws of 1957. In that opinion you were advised *inter alia* that under R.S. 11:27-1, where an applicant was inducted into the Armed Forces within 90 days prior to September 2, 1945 and continued in such service for over a year thereafter, and at an unascertained time suffered a disability, such person was not a disabled veteran of World War II because he had not presented "full and convincing evidence" of disability *between* September 16, 1940 and September 2, 1945.

You were further advised that in order for a person to be qualified either as a "veteran" of World War II or "veteran with a record of disability incurred in line of duty" of World War II, it would be necessary for that person to have served at least 90 days between September 15, 1940 and September 2, 1945 or to have incurred a service-connected disability at any point during that time.

Chapter 21 of the Laws of 1957 has amended R.S. 11:27-1 (10). As amended, it defines the period of service necessary to constitute an individual a veteran of World War II as "after September 16, 1940 who shall have served at least 90 days commencing on or before September 2, 1945 in such active service. . .". The obvious intent and result of this amendment is that any person serving at least a 90 day period in the Armed Forces which commenced on or before September 2, 1945 is considered a veteran of World War II for purposes of the Civil Service statutes. To this extent, Formal Opinion No. 11 is hereby amended.

No changes were made in that section of R.S. 11:27-1 which defines "veteran with a record of disability incurred in line of duty" since Formal Opinion No. 11 of 1954 set forth its interpretation. As set forth by the statute, a person seeking status as a disabled veteran of World War II must be,

> "Any veteran as hereinafter defined who is eligible under the United States veterans' bureau qualifications for service-connected disability from World War or emergency service or who is receiving or who is entitled to receive equivalent compensation for service-connected disability arising out of such other military or naval service hereinafter defined . . ."

In other words, in order for one to qualify as a disabled veteran of World War II, one must be not only a veteran as defined in R.S. 11:27-1 but his eligibility for service-connected disability must be acquired from service during the period which the statute defines as constituting World War II service. The only period subsequently specified by the statute relative to World War II is the section of R.S. 11:27-1 quoted earlier in this opinion, i.e., "after September 16, 1940 who shall have served at least 90 days commencing on or before September 2, 1945 in such active service." The intent and effect of this amended language was to add 89 days to the period as it was previously interpreted. Whereas previous to the adoption of Chapter 21 of the Laws of 1957, the statute had been construed to require a minimum of 90 days of service or a service-incurred disability *between* September 16, 1940 and September 2, 1945, the new amendment redefined the period of service sufficient to constitute World War II service as one ending on the 89th day following September 2, 1945. Whatever the total period of military service, the time essential to constitute war service is now fixed by the statute as the 90-day period commencing on or before September 2, 1945.

Accordingly, Formal Opinion No. 11, 1954 is further amended so as to expand the definition of disabled veteran to include those who were in service on or before September 2, 1945, who were disabled not later than 89 days after September 2, 1945, while on active duty, and present the requisite proof thereof.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID LANDAU
Deputy Attorney General

DL:mc

JUNE 7, 1957

HON. MERRITT LANE, JR., *Secretary*
Legalized Games of Chance Control Commission
1100 Raymond Boulevard
Newark, New Jersey

FORMAL OPINION, 1957—No. 6

DEAR COMMISSIONER LANE:

You have submitted two questions for our opinion relating to the effect of a recently enacted law, P.L. 1957, c. 57, which permits qualified organizations to conduct bingo on premises not owned by them subject to certain conditions.

Previous to this enactment, in order to carry out its duty to prevent games of chance from being conducted for commercial purposes (N.J.S.A. 5:8-6), the Commission determined, by rule, that no organization could hire premises for the conduct or operation of a bingo game except from any other organization qualified to conduct bingo or raffles under the Bingo and Raffles Licensing Laws (see Rule 20, Part VII). This regulation was sustained in *Daughters of Miriam, etc.* v. *Legalized Games of Chance Control Commission*, 42 N. J. Super 405 (App. Div. 1956). Thereafter, because certain organizations attempted to evade the Commission's policy against commercialism by paying incidental fees in lieu of rent, the Commission adopted Rule 25, Part VII which limited the number of times a commercial hall could be *used* by any number of qualified organizations to six times a month. Thus, qualified organizations, authorized to conduct bingo on six occasions a month by statute (N.J.S.A. 5:8-33) had to either conduct bingo games on their own premises or rent from another qualified organization if the commercial hall where they had previously operated bingo games was used in excess of the authorized number of occasions.

Now, the Legislature, empowered to restrict and control the terms and conditions by which such games of chance may be conducted by qualified organizations *(New Jersey 1947 Constitution*, Art. IV., Sec. VII, Par. 2A) has seen fit to permit qualified organizations to conduct bingo either in commercial halls rented for that specific purpose or in premises owned by other qualified organizations. In P.L. 1957, c. 57, which supplements both the Bingo Licensing Law (P.L. 1954, c. 6), and the law conferring upon the Commission the power to administer and supervise the conduct of bingo and raffles (P.L. 1954, c. 7), renting commercial halls is specifically permitted: But, at the same time, the Commission is given complete authority to exercise the strictest control over such commercial operations. The terms of this act empower the Commission to insure that rentals charged qualified organizations shall be fair and reasonable and that the rentors of such halls shall be free from crime and of good moral character. Control is exercised by way of requiring that such rentors be licensed, which license the Commission has a right to revoke if certain requirements are not fulfilled, or if any law dealing with games of chance or Commission regulations are violated.

The first question you ask is whether Rule 25, Part VII, may be continued, or is abrogated by virtue of the fact that in the section which authorizes the Commission to implement P.L. 1957 c. 57 with rules and regulations, a limitation is placed upon the Commission's general power relating to the number of times commercial premises may be used. The Commission has raised this question because of some feeling on its part that the new act acts only prospectively and does not effect formerly adopted rules.

Section 8, in question here, states that:

"The commission shall have power to make and enforce such reasonable rules and regulations as it may deem necessary to effectuate the provisions of this act and the powers conferred upon it hereunder and to prevent the circumvention or evasion thereof. Said rules and regulations may, among other things, require that all rental or use agreements be in writing and in form approved by the commission and may provide for the form of application and the information to be furnished the commission on any application for approval, *but shall not impose limitations on the number of days a month the premises may be used for purposes authorized by the act* hereby supplemented." (Emphasis supplied)

Rule 25, Part VII, on the other hand, states that:

"Bingo games shall not be held, operated or conducted in any premises more often than on six days in any calendar month, except in such premises as are owned by a qualified organization registered with the Control Commission."

It is our opinion that the act in question supersedes the former legislation dealing with the rental of premises, and also, by virtue of the terms quoted above, abrogates any conflicting rules and regulations which imposed limitations and restrictions upon the renting of premises *(U. S.* v. *Phlimac Mfg. Co.,* 192 F. 2d 517 (C. A. 3 1951); *Willapoint Oysters Inc.* v. *Ewing,* 174 F. 2d 676 (C. A. 9 1949); cert. den. 338 U.S. 860 (1949), petition for rehearing den. 339 U.S. 945 (1950). A fair and reasonable interpretation of P.L. 1957, c. 57 leads to only one conclusion, that the Legislature, fully recognizing the Commission's broad powers and authority to prevent commercial halls from being rented to qualified organizations *(Daughters of Miriam, etc.* v. *L.G.C.C.C., supra),* intended to permit commercial leasing under strict supervision. To repeat, the Legislature has complete power to prescribe the restrictions and controls of the playing of bingo by virtue of the constitutional provisions cited above. The supplement to the 1954 legislation is a direction to the Commission, acting on behalf of the Legislature, to permit commercial renting under the terms and controls therein prescribed. To continue, Rule 25, Part VII would cause the Commission to enlarge or vary the powers conferred by the Legislature. Any rule or regulation which is in conflict with the organic statute would be wholly invalid *(Abelson's Inc.* v. *N. J. State Board of Optometrists,* 5 N.J. 412 (1950); *Sherry* v. *Schomp,* 31 N.J. Super 267 (App. Div. 1954); *Welsh Farms Inc.* v. *Bergsma,* 16 N.J. Super. 295 (App. Div. 1951)). Thus, not only are Rules 20 and 25, Part VII superseded, but the terms and provisions dealing with certain restrictions relating to the rental of premises that are contained in N.J.S.A. 5:8-26 are repealed by implication.

Your second question about P.L. 1957, c. 57, is whether a qualified organization which wishes to rent its premises to another qualified organization so as to enable the latter to conduct bingo, must comply with the same conditions and requirements as would a commercial lessor, and if so, whether the required statutory license fee of $100.00 (P.L. 1957, c. 57, § 5(b)) may be waived.

As has been related above, P.L. 1957, c. 57 enables qualified organizations to rent commercial halls and also premises owned by other qualified organizations. However, the act differentiates between the two types of rentors.

Section 1 of P.L. 1957, c. 57, defines an organization as:

"'Organization' shall mean any organization licensed to hold, operate or conduct games of chance under the Bingo Licensing Law (P.L. 1954, c. 6, as amended and supplemented)."

The rentor is defined as:

"'Rentor' shall mean and include the owner, lessor, and supplier of premises furnished or supplied to, or used by, an organization for the purpose of holding, operating or conducting games of chance under the Bingo Licensing Law."

Section 2 goes on to state that:

"An organization may, for the purpose of holding, operating and conducting games of chance under the Bingo Licensing Law rent or use premises not owned by such organization upon compliance with the provisions of this act. No such rental or use shall be permitted unless the commission shall determine that the payment to be made for such rental or use of the premises is fair and reasonable and that the rentors of said premises are approved rentors under this act."

And Section 3 states that:

"From and after the effective date of this act, no person shall act as, or be, a rentor unless said person (a) is itself licensed to hold, operate or conduct games of chance under the Bingo Licensing Law or (b) has first obtained from the commission a license as an approved rentor."

The terms of Section 3 are important. Two classes of rentors are established. First, there are qualified organizations. Second, there are commercial rentors who must obtain a license in order to rent premises to qualified organizations. The latter class are "approved rentors" who must comply with those sections (Secs. 4 through 7) enumerated in the act. Qualified organizations do not need to obtain a license; commercial rentors must do so, and in addition thereto, pay the $100.00 fee. This is the obvious design of the statute. The Commission which had in the past and will in the future have control over qualified organizations, now for the first time, may exercise complete jurisdiction over this new class of licensees, the "approved rentor", also known as the commercial lessor. Under this statutory pattern, although qualified organizations need not be licensed, the Commission still exercises complete jurisdiction over both types of rentors and, by the terms of Section 2 of this act, may determine what rent is fair and reasonable and may be paid by a qualified organization.

Therefore, it is our opinion that qualified organizations intending to rent premises to other organizations do not have to obtain a license or pay the required license fee. This limitation, however, does not prohibit the Commission from exercising its general power to supervise qualified organizations under its general rule-making authority to carry out the intent and purpose of this act as well as the general laws dealing with the conduct of bingo.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

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

DMS:ew

JUNE 13, 1957

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

FORMAL OPINION, 1957—No. 7

DEAR SECRETARY PATTEN:

We have your request for an opinion as to whether you are authorized to accept service of a summons and complaint against a corporation in instances where by statute service of process may be made upon the Secretary of State. The legal issue of the applicability of R.R. 4:4-6 is thus raised. R.R. 4:4-6 provides:

> "A general appearance or an acceptance of the service of the summons, signed by the defendant's attorney or signed and acknowledged by the defendant, shall have the same effect as if the defendant had been properly served."

Service of process on the Secretary of State or the chief clerk in his office in actions against a domestic corporation or a foreign corporation authorized to transact business in the state is authorized pursuant to N.J.S. 2A:15-26, under the following circumstances:

> "a. The corporation has failed to file the annual report required by section 14:6-2 of the title, Corporations, General, of the Revised Statutes, within the time thereby required; or
>
> "b. The corporation has failed to establish or has ceased to maintain a principal office in this state with a designated agent in charge thereof, upon whom process against the corporation may be served, as required by section 14:4-2 of the title, Corporations, General, of the Revised Statutes; or
>
> "c. The designated agent upon whom process against the corporation may be served has died, resigned, become disqualified or has removed from this state, or can not, with due diligence, be found therein; or
>
> "d. The corporation, when the agent designated pursuant to section 14:4-2 of the title, Corporations, General, of the Revised Statutes, has died, resigned, removed from the state or has become disqualified, has failed to file the certificate containing the name of a new agent upon whom process against the corporation may be served as required by section 14:4-5 of the title, Corporations, General, of the Revised Statutes, and the corporation's certificate of authority to transact business in this state has been revoked by the secretary of state as provided by said section 14:4-5, in which case process against the corporation in an action upon a liability incurred within this state may be served upon the secretary of state or his chief clerk as herein provided."

Similar provision for service on the Secretary of State in actions against dissolved corporations is found in R.S. 14:13-14. This statute is as follows:

> "In any action or other legal proceeding commenced in any court of this State against a domestic or foreign corporation, or to which such corporation shall be a party defendant, where the charter of the corporation has heretofore expired or shall hereafter expire by its own limitation, or has heretofore been or shall hereafter be forfeited, dissolved or annulled by the Legislature or in any other manner, the corporation shall continue a body corporate for the purpose of defending the cause. Service of a summons or other process for appearance issued out of any court and other papers in the cause may be made upon the corporation by serving the same on such person as was, at the time of such expiration, forfeiture, dissolution or annulment, the president or secretary of the corporation, or the agent in charge of its principal office, or its designated registered agent for this State, personally, or by leaving the same at the dwelling house or usual place of abode of such president, secretary, agent in charge of said principal office or designated registered agent of the corporation. If service thereof cannot be made as hereinabove provided, then it may be made upon the corporation by serving the Secretary of State * * * ."

R.R. 4:4-6 cannot be construed to authorize a general appearance or an acceptance of the service of process by you as Secretary of State. The court rule provides for a general appearance or acceptance of service by the defendant or by the defendant's attorney only. There is no authorization for a statutory agent of the defendant or any other person to accept service of the summons and complaint. Neither N.J.S. 2A:15-26 nor R.S. 14:13-14 directly or by implication vests the Secretary of State or the chief clerk in his office with power to accept or acknowledge service, where service cannot be made upon an agent of record or under the other conditions for lawful service upon the Secretary of State or upon the chief clerk in his office.

R.R. 4:4-3 fixes the procedure for service of the summons and complaint by the sheriff or other duly authorized person. That procedure should be strictly followed in the service of the summons and complaint upon the Secretary of State or chief clerk. See *X-L Liquors, Inc.* v. *Taylor*, 29 N.J. Super. 486, 490 (App. Div. 1954); *Driscoll* v. *Burlington-Bristol Bridge Co.*, 8 N.J. 433, 493 (Sup. Ct. 1951).

We therefore advise that you as Secretary of State and the chief clerk in your office have no authority to accept service of process within N.J.S. 2A:15-26 and R.S. 14:13-14. The court rules governing procedure require that the summons and complaint be served on you by the sheriff or other duly authorized person in actions against domestic and foreign corporations.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: GEORGE H. BARBOUR
Deputy Attorney General

JUNE 17, 1957

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

FORMAL OPINION, 1957—No. 8

DEAR COMMISSIONER RAUBINGER:

You have requested our opinion as to whether or not State aid is payable under N.J.S.A. 18:10-29.35 for instruction given by a Board of Education pursuant to N.J.S.A. 18:14-71.23 (d), which provides for the education of physically handicapped children "by instruction supplementary to the regular program of the school not to exceed 5 hours weekly, whenever, in the judgment of the board of education with the consent of the commissioner, the physically handicapped pupil will be best served thereby".

We are of the opinion that the question should be answered in the affirmative.

The State School Aid Act of 1954 makes the following provision for atypical pupils (N.J.S.A. 18:10-29.35):

"(a) In addition to all other aid, each school district operating an approved special class or classes shall be paid $2,000.00 per class for such classes, and each school district sending atypical children to special classes outside the district of residence shall be paid ½ the amount by which the tuition charged for such pupils exceeds $200.00.

"(b) For every mentally retarded or physically handicapped pupil furnished individual instruction or training at home or in school, by reason of the fact that there are too few mentally retarded or physically handicapped pupils in the district to form a class or by reason of the impracticability of transporting such a pupil to a class maintained in another district, the school district shall be paid ½ the cost of such education as determined by the Commissioner of Education."

We note that N.J.S.A. 18:14-71.23 provides for five different methods of education of physically handicapped pupils as follows:

"(a) By establishing a special class or classes in the district, including a class or classes in hospitals, convalescent homes, or other institutions; or

(b) By sending pupils to a special class in the public schools of another district; or

(c) By agreement with 1 or more school districts to provide joint facilities, including a class or classes in hospitals, convalescent homes, or other institutions; or

(d) By instruction supplementary to the regular program of the school not to exceed 5 hours weekly, whenever, in the judgment of the board of education with the consent of the commissioner, the physically handicapped pupil will be best served thereby; or

(e) By individual instruction at home or in school whenever in the judgment of the board of education with the consent of the commissioner, there are too few physically handicapped pupils to form a class in the district or whenever it is impracticable to transport a child because of distance or other good reason to a class referred to in subsections a, b, c or d."

Our opinion is that N.J.S.A. 18:10-29.35, read in the light of the entire State School Aid Act, was intended to provide State aid for all forms of authorized education given to atypical pupils at the expense of a local Board of Education. The supplementary instruction of 5 hours a week authorized by section 18:14-71.23(d) falls within the term "individual instruction * * * in school, by reason of the fact that there are too few mentally retarded or physically handicapped pupils in the district to form a class or by reason of the impracticability of transporting such a pupil to a class maintained in another district", and therefore one-half of the cost of such education, i.e., the supplementary education, must be paid to the school district under subdivision (b) of section 18:10-29.35.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

TPC:tb.

JULY 10, 1957

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

FORMAL OPINION, 1957—No. 9

DEAR COMMISSIONER MCLEAN:

You have requested our opinion as to the eligibility of municipalities which have no organized planning board for Federal and State financial assistance under Title VII of the Federal Housing Act (Title 40 U.S.C.A., Sec. 461) and the State Appropriations Act (L. 1957, c. 113) in drafting master plans and zoning ordinances.

Title VII of the Federal Housing Act authorizes Federal contributions not exceeding fifty per centum of the estimated cost for planning assistance including surveys, land use studies, urban renewal plans, techincal services and other planning work. The Federal funds are payable to State planning agencies for distribution to eligible municipalities with a population of less than 25,000. By a recent amendment (70 Stat. 1102, effective August 7, 1956), planning assistance may be furnished as well to municipalities with a population of 25,000 or more: "which have suffered substantial damage as a result of a flood, fire, hurricane, earthquake, storm, or other catastrophe which the President, pursuant to section 1855(a) of Title 42, has determined to be a major disaster".

The State Appropriations Act for 1957-58 provides an appropriation to the Division of Planning and Development in the amount of $50,000 for an expanded and

regional planning program. This appropriation may be applied with Federal assistance under Title VII for planning grants to municipalities within the State of New Jersey. Chapter 448 of the Laws of 1948 (N.J.S.A. 13:1B-65) empowers the Department of Conservation and Economic Development, acting through the Commissioner, with the approval of the Governor, to serve as the State planning agency to apply for and accept the Federal planning grants.

Master plans for the physical development of a municipality are prepared in this State by planning boards (N.J.S.A. 40:55-1.10); no authority, statutory or otherwise, exists in the municipal governing body or any other local agency for the formulation of a master plan, in the absence of a planning board established pursuant to the Municipal Planning Act of 1953.

Zoning ordinances are promulgated under R.S. 40:55-33 by the municipal governing body or board of public works pursuant to the recommendations of a planning board or a zoning commission. The establishment of a planning board and its preliminary report is not prerequisite. As an alternative, the municipal governing body or board of public works may appoint a zoning commission from among citizens of the municipality to recommend appropriate zoning regulations and boundaries.

We therefore advise you that Federal and State financial assistance under Title VII of the Federal Housing Act and the State Appropriations Act for 1957-58 may be made available (1) for the drafting of master plans in municipalities in the population range fixed in the Federal act which have organized planning boards and (2) for the drafting of zoning ordinances in all municipalities eligible under the Federal act without regard to the existence of a municipal planning board.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

DDF:d

JULY 12, 1957

HONORABLE CHARLES F. SULLIVAN
Director of the Division of Purchase and Property
State House
Trenton, New Jersey

FORMAL OPINION, 1957—No. 10

DEAR DIRECTOR SULLIVAN:

You have requested our opinion concerning the power of the Division of Purchase and Property to secure additional building space for the Department of Agriculture by arranging for the erection of certain structures by private contractors either upon State-owned or privately-owned land. According to the proposed arrangement payment for the structures would be made over a period of time in the form of rentals with title to the structures (and to the land, in cases where it is not owned by the State) to remain in the contractor or other private party until the completion of all payments, whereupon it will vest in the State. The total payments under such plan

would approximate the purchase price of the structures and of the land upon which they are located if the State does not already own it. For the reasons hereinafter stated it is our opinion that you are without authority to enter into the above-described contracts.

It is clear that the proposed transaction is not a true lease. In essence it is the installment purchase by the State of a building. Payments to be made under the proposed agreement though designated rentals would not be compensation for the use of the building but would constitute the purchase price of the structure. *McCutcheon* v. *State Building Authority*, 13, *N.J.* 46 (1953). In this case it was held that such arrangement violated the debt limitation provisions of Article VIII, Section II, paragraph 3 of the New Jersey Constitution for the reason that the obligation to pay for the purchase price of such structures constituted an indebtedness of the State. It would seem that the proposed agreement is equally vulnerable to such constitutional objection.

In any event, however, the plan under consideration cannot be executed because of lack of statutory authority therefor. This point was not raised in the *McCutcheon* case because the statute there involved did purport to confer the necessary power to enter into lease-purchase contracts.

The power of a State officer to enter into contracts is limited by statute. *State v. Erie Railroad Co.*, *23 N.J. Misc.* 203 (*Sup. Ct.* 1945). A public officer can make for the government he represents only such contracts or agreements, expressed or implied, as he is authorized to make. *Id.* at *pp.* 212, 213. We find no general authority in the Division of Purchase and Property to independently contract for the erection of buildings. Even that power which it has by virtue of the transfer of powers from the State House Commission with respect to the construction of new buildings in the City of Trenton is subject to the requirement that no debt or obligation shall be incurred therefor until the Legislature has been fully informed as to the proposed structure and the improvement is concurred in by both houses of the Legislature. *N.J.S.A.* 52:20-14 and 52:27B-64.

The authority to contract for the erection of buildings is found in line items of appropriation acts or, if an appropriation is not required (as where federal funds have been made available to the State), in some other statute clearly setting forth the power in question. That authority, once a specific appropriation is made or funds are otherwise available, is vested in the Director of the Division of Purchase and Property. *N.J.S.A.* 52:34-6, *et seq.* See *Formal Opinion* No. 9 (1956); *Memorandum Opinion to Honorable Robert L. Finley*, September 26, 1956. In the present situation we have neither funds appropriated to the Department of Agriculture for the construction of a building nor other legislation empowering the Director of the Division of Purchase and Property to act.

We point out also that the proposed arrangement may be open to the charge that it constitutes a donation of State property in violation of Article VIII, Section III, paragraph 3 of the New Jersey Constitution and *Wilentz* v. *Hendrickson*, 133 *N.J. Eq.* 447 (*Ch.* 1943), affirmed 135 *N.J. Eq.* 244 (*E. & A.* 1944).

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: HAROLD J. ASHBY
Legal Assistant

HJA:MG

JULY 12, 1957

HONORABLE AARON K. NEELD
State Treasurer
Department of the Treasury
State House
Trenton, New Jersey

FORMAL OPINION, 1957—No. 11

DEAR MR. NEELD:

You have been requested to waive the advertising requirements of Chapter 48 of the Laws of 1954 in connection with the execution of certain contracts between the Department of Health and various private hospitals. It is undisputed that the nature of the services to be rendered under these contracts is of a technical and professional nature but you question whether, in view of the fact that the services are to be performed by a corporate entity, the contract comes within the statutory language of N.J.S.A. 52:34-9(a) which reads as follows:

> "Any such purchase, contract or agreement may be made, negotiated or awarded pursuant to section 3 of this act when the subject matter thereof consists of
>
> "(a) services to be performed by the contractor personally which are (a) of a technical and professional nature,* * *."

In construing a statute, the inquiry must be to determine the purpose and intent of the Legislature. The word "personally" standing in certain contexts might connote individual conduct as distinguished from performance by an association, partnership or corporation. But it is not so here. The obvious legislative purpose was to exclude from the advertising requirements of *N.J.S.A.* 52:34-6, *et seq.* contracts requiring scientific knowledge and professional skill.

There is in *N.J.S.A.* 52:34-9(a) a legislative recognition of the generally accepted principle that contracts of a technical and professional nature do not come within the provisions of statutes and ordinances requiring advertising and competitive bidding. *Heston* v. *Atlantic City*, 93 *N.J.L.* 317 *(Sup. Ct.* 1919) [accounting company employed to audit municipal records]; *Franklin* v. *Horton*, 97 *N.J.L.* 25 (*Sup. Ct.* 1922), affirmed 98 *N.J.L.* 262 *(E. & A.* 1922) [preparation of plans and specifications for municipality]; *Hordin* v. *City of Cleveland*, 77 *Ohio App.* 491, 62 *N.E. 2d* 889 (Ct. App. 1945) [municipal contract with partnership of advertising specialists]; *Jeffersontown* v. *Cassin*, 267 *Ky.* 568, 102 *S. W. 2d* 1001 *(Ct. App.* 1937) [municipal contract with partnership to make surveys, estimates, plans]; *City of Cleveland* v. *Lausche, Mayor*, 71 *Ohio App.* 273, 49 *N.E. 2d* 207 (*Ct. App.* 1943) [municipal contract with corporation for operation of zoo]; *Cochran County* v. *West Audit Co.*, 10 *S.W. 2d* 229 (*Tex. Civ. App.* 1928) [county contract with accounting corporation for audit of books]; *Harlem Gaslight Co.* v. *Mayor, etc., of New York*, 33 *N.Y.* 309 (*Ct. App.* 1865) [municipal contract with corporation for supplying gas]; 10 *McQuillin, Municipal Corporations* (*3rd ed.* 1950) § 29.35; *p.* 281; see cases collected in *Annotations* 44 *A.L.R.* 1150 and 142 *A.L.R.* 542.

We submit, as the cases seem to demonstrate, that it is not the status of the entity that controls, but the nature of the service to be performed. If the service be so intricate and complex as to demand highly specialized skill, knowledge, training and

experience, it is outside the operation of the advertising and competitive bidding statutes or ordinances, whether that service is to be rendered by an individual, partnership, association, or corporation. To say that *N.J.S.A.* 52:34-9(a) created an exception with respect to individuals without the intent similarly to except associations, partnerships or corporations flies in the face of the plain legislative purpose in creating the exception. The Supreme Court said in *In re Roche*, 16 *N.J.* 579, 587 (1954):

> "The meaning of the statute is not to be ruled by the strict letter, but rather by the sense and meaning fairly deducible from the context. The reason of the provision prevails over the literal sense of the words; the obvious policy is an implied limitation on the sense of general terms, *and a touchstone for the expansion of narrower terms.* The spirit gives character and meaning to the particular symbols of expression. The evident policy is the true key to open the understanding of the act." [*emphasis supplied*]

Other recent expressions of the judicial attitude on liberal statutory construction include *Morss* v. *Forbes*, 24 *N.J.* 341, 357 (1957) and *Lane* v. *Holderman*, 23 *N.J.* 304 (1957).

It is our opinion that the word "personally" as used in *N.J.S.A.* 52:34-9(a) connotes a performance that is without the intervention of another, *i.e.* direct from the contractor, himself or itself, to the State; it matters not whether the contractor be an individual, association, partnership or corporation. Accordingly you are advised that a waiver may be properly executed with respect to the pending contracts between the Department of Health and various private hospitals for technical professional services.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: HAROLD J. ASHBY
Legal Assistant

HJA:tb

AUGUST 7, 1957

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

FORMAL OPINION, 1957—No. 12

DEAR MR. NEELD:

You have requested an opinion on the following two questions:

(1) Can a war veteran member of the Police and Firemen's Retirement System resign from public employment upon attaining the age of 62 and having 20 years of service and thereby receive a refund of his contributions to the Retirement System, and subsequently, retire under the provisions of the free Veterans' Retirement Act, R.S. 43:4-1 et seq.?

(2) Can a war veteran member of the Consolidated Police and Firemen's Pension Fund, upon attaining the age of 62 and having 20 years of service, retire under the provisions of the free Veterans' Retirement Act rather than under the provisions of the Consolidated Police and Firemen's Fund?

We wish to advise you that N.J.S.A. 43:16A-3 governing the Police and Firemen's Retirement System provides:

> "(1) After the date of the establishment of this retirement system, any person becoming a full time policeman or fireman in a county or municipality or fire district located in a township where prior to the date of this act takes effect, a pension under chapter 16 of Title 43 or article 4 of chapter 10 of Title 43 of the Revised Statutes for policemen or firemen has been established, shall become a member of this retirement system as a condition of his employment; provided, that his age at becoming such full time policeman or fireman is not over 30 years; and further provided, that he shall furnish such evidence of good health at the time of becoming a member as the board of trustees shall require.
>
> "Any person who became a policeman or fireman in any such county, municipality or fire district after June 30, 1944, and prior to April 11, 1945, and who at the time of becoming such policeman or fireman was over 30 years and not more than 35 years of age, shall become a member of this retirement system as a condition of his employment; provided, that he shall furnish such evidence of good health at the time of his becoming a policeman or fireman as the board of trustees shall require.
>
> "(2) After the date upon which this act becomes effective in any county, municipality or political subdivision thereof, pursuant to a referendum as hereinafter provided (a) Any person becoming a full time policeman or fireman in any such county, municipality or political subdivision shall become a member of this retirement system as a condition of his employment; provided, that his age at becoming such full time policeman or fireman is not over 30 years; and provided further, that he shall furnish such evidence of good health at the time of becoming a member as the board of trustees shall require; and (b) any person in service as a full time policeman or fireman in any such county, municipality or political subdivision on the date this act becomes effective therein who, within the time and in the manner permitted by this act, elects to become a member of this retirement system, shall become such member . . ."

It is apparent, from a reading of the foregoing statutes, that policemen and firemen, as a condition of employment, must join the retirement system and become members thereof.

The Police and Firemen's Retirement Act further provides in N.J.S.A. 43:16A-11:

> "If a member should cease to be a fireman or policeman, except by death or retirement as provided in this act, he shall be paid the amount of his aggregate contributions."

R.S. 43:4-1 provides that veterans who shall have attained the age of 62 or become incapacitated after twenty years of continuous or aggregate service for the duties of their office or position or employment may be retired.

R.S. 43:4-2 states:

> "When an honorably discharged soldier, sailor or marine has or shall have been for twenty years continuously or in the aggregate in office, position or employment of this State or of a county, municipality or school district . . . he shall be retired . . ."

The Supreme Court has held that it is mandatory for policemen to become members of the Police and Firemen's Retirement System as a condition of employment. In the case of *Seire* v. *Police & Firemen's Pension Fund of Orange*, 6 N.J. 586 (1951), the Court held in accordance with N.J.S.A. 43:16A-19 that persons becoming members of the State fund are deprived of benefits under any other pension fund established by statute which provides wholly or in part at the expense of a municipality for a policemen's retirement fund.

The option of retiring under the free Veterans' Retirement Act (R.S. 43:4-1 et seq.) is nevertheless available to policemen and firemen; *Kelly v. Kearins*, 132 N.J.L. 308 (Sup. Ct. 1944) so ruled under a related statute (R.S. 43:16-1 et seq.). The relator in that action failed to secure a non-contributory veterans' pension because he lacked the statutory qualifications, but the Court recognized that the Veterans' Retirement Act and the Police & Firemen's Retirement Act were cognate statutes in pari materia. An eligible policeman or fireman is put to a choice, namely, retirement under the free Act or under the Police & Firemen's Retirement Act. He can not have the benefit of both, and upon retirement under either system is obliged to waive all retirement benefits under the other system. See *Kelly* v. *Kearins*, 132 N.J.L. 308, 311 (Sup. Ct. 1944).

The question now arises as to whether having resigned for the purpose of retirement, could the said policeman or fireman receive a refund of his contributions. We must then, of necessity, refer to N.J.S.A. 43:16A-11. Under this provision of the statute, he cannot receive a return of the contribution that he made to the pension fund if he ceases to be a fireman or policeman for the purpose of retirement. He is eligible for the return of his accumulated contributions only upon his ceasing to be an employee otherwise than for that purpose.

Once having left employment as a policeman or fireman and having received a refund of his contributions, the individual is ineligible for retirement under the Veterans' Retirement Act. The specific terms of that statute require retirement as a condition for the accrual of the right to pension benefits. An employee must retire under that act in order to qualify; a former employee who attains the age of 62 years can not claim a free Veterans' Pension unless he returns to public employment or service. See *Salz* v. *State House Commission*, 18 N.J. 106 (1955), which affirmed the denial of retirement benefits to a State employee on leave of absence in active military service.

A police or fireman member of the Police and Firemen's Retirement System may resign from said System upon attaining the age of 62 and having 20 years of service, and retire under the free Veterans' Act, R.S. 43:4-1 et seq. However, he cannot receive a return of his contributions.

With reference to the second question, N.J.S.A. 43:16-5 sets forth that for the purpose of paying the pensions provided by that chapter, all pension funds heretofore created and in existence pursuant to the provisions of an act entitled "An act providing for the retirement of policemen and firemen of the police and fire departments

in municipalities of this State, including all police officers having supervision or regulation of traffic upon county roads, and providing a pension for such retired policemen and firemen and members of the police and fire departments, and the widows, children and sole dependent parents of deceased members of said departments, shall, from and after July 1, 1953, be consolidated." Section A of this particular section of the statute provides that there shall be deducted from every payment of salary to each member, as defined in the supplement to this chapter, five per cent of the amount thereof if he entered the service on or before attaining the age of thirty-five years, and if he entered the service after attaining the age of thirty-five years, the percentage shall be increased to such an amount as to correspond to the risk arising by his additional age.

It must be stated that members of the Consolidated Police and Firemen Pension Fund may, if they desire, retire under the provisions of the free Veterans' Act.

Our courts have held that compulsory contributions by members of the City Police Department paid into the Police & Firemen's Pension Fund of the City, were, in effect, but a reduction of salary, and contributions did not become the property of the member but remained the property of the City. In the absence of statutory provisions for return of deductions, members of the City Police Department from whose salary semi-monthly installments were deducted and paid into city police and firemen's pension fund was not entitled on resignation to return of contributions. *McFeely* v. *Pension Commission of City of Hoboken,* 8 N.J. Super. 575, 73 A. 2d 757. There is no provision in the statute for a return of contributions in the event of resignation from the System.

We are of the opinion that members of the Consolidated Police and Firemen's Pension Fund may, upon attaining the age of 62 and having 20 years of service, retire under the provisions of the free Veterans' Act rather than the provisions of the Consolidated Police and Firemen's Pension Fund. However, upon so retiring, they must waive their pension under the Consolidated Police and Firemen's Pension Fund and cannot receive their return of the contributions made by them to the Pension Fund.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: FRANK A. VERGA
Deputy Attorney General

FAV:ccm

AUGUST 14, 1957

HONORABLE CHARLES F. SULLIVAN, *Director*
Division of Purchase and Property
State House
Trenton, New Jersey

FORMAL OPINION, 1957—No. 13

DEAR DIRECTOR SULLIVAN:

Our opinion has been requested as to the authority of the Division of Purchase and Property in the Department of the Treasury to purchase automobiles for the New Jersey Agricultural Experiment Station, the Delaware River Joint Toll Bridge Commission and the Palisades Interstate Park Commission. We shall consider each entity under its appropriate heading.

New Jersey Agricultural Experiment Station

By the Laws of 1880, Chapter 106, there was established the New Jersey Agricultural Experiment Station. The direction of the institution was committed to a board of directors consisting of the Governor, the Board of Visitors of the State Agricultural College and the President and Professor of Agriculture of that institution. By a later act the Board of Directors was designated the Board of Managers. *L.* 1881, *c.* 81. Thereafter the Laws of 1945, Chapter 49 *(N.J.S.A.* 18:22-15.1) designated certain units maintained by the Trustees of Rutgers College in New Jersey and other organizations as the "State University of New Jersey". Among the enumerated organizations was the New Jersey Agricultural Experiment Station managed and directed by the Board of Managers. A subsequent provision of the Act transferred the functions, powers and duties of the Board of Managers of the New Jersey Agricultural Experiment Station to the Trustees of Rutgers College in New Jersey. *N.J.S.A.* 18:22-15.5. There that power vested until Chapter 61 of the Laws of 1956. Though that legislation did not effect any change in the units comprising the educational entity, *N.J.S.A.* 18:22-15.28, it did provide that the "government, control, conduct, management and administration of the Corporation [designated under the new legislation as Rutgers, the State University] and the University shall be respectively vested in and allocated between the Board of Governors and the Board of Trustees." *N.J.S.A.* 18:22-15.41.

Additionally the 1956 legislation provided, among other things, that the Board of Governors created thereby should have authority to purchase all lands, buildings, equipment, materials and supplies, *N.J.S.A.* 18:22-15.42(6). The extent of this power and its relation to the Division of Purchase and Property was set forth by this office in *Formal Opinion* No. 9 dated July 2, 1956. There we stated 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."

Summarizing, we take the view that the New Jersey Agricultural Experiment Station is now a part of Rutgers, the State University, and that the authority to effect purchases for that entity is vested in the Board of Governors of that institution. Accordingly you are advised that the Division of Purchase and Property is not authorized to purchase automobiles for the New Jersey Agricultural Experiment Station.

The Delaware River Joint Toll Bridge Commission

By Compact between the State of New Jersey and the Commonwealth of Pennsylvania, the Delaware River Joint Toll Bridge Commission was created in 1934. The Compact created the Commission as a "public corporate instrumentality" of the two States to perform State functions, among others, the location, construction, operation and maintenance of bridges extending between the two States and across a specified section of the Delaware River. As to New Jersey the original Compact was embodied in the Laws of 1934, Chapter 215. Supplemental agreements are set forth in *L.* 1947, *c.* 283; *L.* 1951, *c.* 284; and *L.* 1952, *c.* 333. See also *L.* 1957, *c.* 147.

It is apparent that the States of New Jersey and Pennsylvania created the Com-

mission as a body distinct from its parent States. It is not an agency of either State, but is Pennsylvania and New Jersey acting conjointly. See *Formal Opinion* No. 14, June 23, 1952. It is a bi-state agency, existing by virtue of the laws of two States, as consented to by the Congress.

Ordinarily where the contract price is paid out of "State funds" *N.J.S.A.* 52:34-6, *et seq.*, as previously construed by this office, provide that such contracts are to be executed on behalf of the State by the Division of Purchase and Property. But the broad language of said statutes is subject to limitations, and certainly excepted therefrom should be, and is, a bi-State body which is not a State agency and whose funds are derived for the most part from its own revenues.

The Commission operates upon two separate and distinct budgets, one as to its toll bridges and the other as to its free bridges. See *N.J.S.A.* 32:9-17 appropriating to the Commission all moneys received from any source whatsoever. As to its free bridges the Commission operates upon an appropriation made by the State of New Jersey and the latter is reimbursed in turn by the Commonwealth of Pennsylvania in an amount equal to one-half of the New Jersey appropriation. Therefore, funds of the Commission are derived either from its revenues (and used for operation of toll bridges) or from the joint contribution of New Jersey and Pennsylvania (and used for the operation of free bridges). As such, neither moneys can be considered "State funds" as that term is used in *N.J.S.A.* 52:34-6. Thus, the Commission not being a State agency and not making its expenditures out of "State funds" is without the general contracting power vested in the Division of Purchase and Property.

It is plain that under the Compact, without reference to *N.J.S.A.* 52:34-6, *et. seq.*, the Commission can purchase automobiles. The Compact is explicit in its specification of what powers are vested in the Commission. Among them in *N.J.S.A.* 32:8-3 we find authority:

> "(h) To enter into contracts.
>
> (i) To acquire, own, hire, use, operate and dispose of personal property.
>
> (j) To acquire, own, use, lease, operate and dispose of real property and interest in real property, and to make improvements thereon."

Any construction of the above statute which would subject the Commission to the general contracting power of the Division of Purchase and Property would defeat the intention of the Agreement of the States. As is evident from a reading of the Compact of 1934 and its supplements, the contracting States set forth their independence of such limiting authority under the law of each State as is represented by *N.J.S.A.* 52:34-6, *et seq.*

Moreover, to vest authority here in the Division of Purchase and Property would constitute a unilateral amendment of the Compact, because such authority is in direct conflict with express powers contained in the Compact. This would represent an invalid infringement of the agreement. As Justice Jones stated in *Henderson* v. *Delaware River Joint Toll Bridge Commission,* 362 *Pa.* 475, 66 *A. 2d* 843 *(Sup. Ct.* 1949):

> "It is within the competency of a State, which is a party to a compact with another State, to legislate in respect of matters covered by the compact so long as such legislative action is in approbation and not in reprobation of the compact." (at *pp.* 849, 850).

A State statute which is in conflict with an interstate compact approved by the Congress is an invalid impairment of contract in violation of the contract clause of the United States Constitution, Article I, Section X, par. 1. *Green* v. *Biddle,* 23 *U.S.* 1 (1823); *Cf. Olin* v. *Kitzmiller,* 259 *U.S.* 260 (1922); *P. J. McGowan & Sons, Inc.* v. *Van Winkle,* 21 *F. 2d* 76 *(D.C. Oreg.* 1927) affirmed 277 *U.S.* 574 (1928). Accordingly, the general contracting power vested in the Division of Purchase and Property cannot constitutionally apply to the Commission.

We are, therefore, of the opinion that the Division of Purchase and Property is not authorized to purchase automobiles for the Delaware River Joint Toll Bridge Commission.

The Palisades Interstate Park Commission

The Palisades Interstate Park Commission was created by an interstate compact between New York and New Jersey. This compact was authorized by *L.* 1937, *c.* 148 of the Laws of New Jersey and *L.* 1937, *c.* 170 of the Laws of New York, and was approved by the Congress of the United States. There was thereby created "a body corporate and politic" and the Commission is described as a "joint corporate municipal instrumentality" of the States of New York and New Jersey which is "deemed to be performing governmental functions of the two states."

As was stated with respect to the Delaware River Joint Toll Bridge Commission, the Palisades Interstate Park Commission is a bi-state agency, existing by virtue of the laws of the two States, as consented to by the Congress, and as such cannot be considered an agency solely of the State of New Jersey.

Too, we note that there has been conferred on the Commission by *N.J.S.A.* 32:14-7 the power to:

> ". . . purchase or otherwise acquire personal property and to hold the same. . ."

And as to its financial operations it was provided that the Commission should annually report to the Legislature all receipts or expenditures. *N.J.S.A.* 32:14-28. Further, the Legislature provided that the Commission should have authority to "expend such sum or sums as may be included in the annual appropriation bill for necessary expenses of the Commission, and for carrying out the provisions of this chapter." *N.J.S.A.* 32:14-29. And quite significant is the further provision of the latter section which provides that "such expenditures shall be approved by the Governor and Comptroller before payment thereof." *N.J.S.A.* 32:14-29.

The statutory references referred to above clearly evince a legislative intent that there should be vested in the Commission the authority to purchase, and this authority, we feel, is independent of any similar authority vested in the Division of Purchase and Property. That obtaining in the Division of Purchase and Property is a general authority and like most general authorizations is subject to exceptions, expressed or implied.

Aside from express power to execute purchases such as are here contemplated, it is to be noted that the expenditures of the Palisades Interstate Park Commission must have the approval of the Governor and Comptroller before they are paid. This is significant and important. No such requirement exists with respect to purchases

made by the Division of Purchase and Property. Therefore, if the general statutes be held applicable, there would be withdrawn from the Governor's and Comptroller's surveillance, the expenditures of this Commission. Such a withdrawal should not rest in implication, and that would be the result if we were to find that there had been an implied repeal of the purchasing authority conferred upon the Commission by *N.J.S.A.* 32:14-7 and 32:14-29. In the prior section of this opinion dealing with the Delaware River Joint Toll Bridge Commission we set forth our position with respect to the impairment of interstate contracts, and those comments are equally applicable here.

Accordingly, you are advised that the Division of Purchase and Property is not authorized to purchase automobiles for the Palisades Interstate Park Commission, and in summary neither is it empowered to make such purchases for the New Jersey Agricultural Experiment Station or the Delaware River Joint Toll Bridge Commission.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: HAROLD J. ASHBY
Legal Assistant

HJA:tb

AUGUST 30, 1957

MAJOR WILLIAM O. NICOL
Bureau of Tenement House Supervision
1100 Raymond Boulevard
Newark, New Jersey

FORMAL OPINION, 1957—No. 14

DEAR MAJOR NICOL:

You have requested our opinion concerning the definition of a tenement house as contained in R.S. 55:1-24. Specifically, you have requested an interpretation as to what constitutes "cooking upon the premises" within the meaning of the statute. The problem, as presented by you, is concerned with the use of "one burner" cooking apparatus in houses occupied by three or more families. R.S. 55:1-24 states:

> "A 'tenement house' is any house or building or portion thereof which is rented, leased, let, or hired out to be occupied or is occupied as the home or residence of three families or more living independently of each other and doing their cooking upon the premises."

There are no cases found in New Jersey which specifically define cooking on the premises. However, an opinion of the Attorney General dated May 1, 1922 in volume 16, *Attorney General Opinions,* at page 517 decided that cooking on the premises meant general cooking. Previously, in volume 16, *Attorney General Opinions,* at page 279 in an Opinion dated December 7, 1921, which involved the question whether a three story building in which separate families occupied the first and second floors and a single person rented the third floor was a tenement house, the Attorney General said "I think it makes little difference whether a family or group

of individuals is composed of one or more than one. *The test is whether such persons are living independently from the other and doing their cooking on the premises.*" (Emphasis added)

There is nothing in either of these opinions to the effect that a one burner cooking apparatus of itself does or does not bring a house containing three or more separate apartments within the purview of the tenement house law.

In 1929 in the case of *Apartment Hotel Owners' Association, Inc.* v. *City of New York,* 233, N. Y. S. 553, 133, Misc. Rep. 881 (Sup. Ct. 1929) thirty-seven building owners in the City of New York sought to enjoin the City from enforcing the Tenement House Law against them. These building owners had provided their tenants with an 8x12 "serving pantry" which included a sink, ice box, shelves, cupboards and an electric outlet. Electric cooking devices of varying sizes had been installed by the lessees in these pantries with regularity, with the owners' knowledge. As a matter of fact, the owners in their advertising recommended such uses for the apartments. The Court found this to be "cooking on the premises" within the meaning of the statute. The Judge held that the statute would not require that all of the family's cooking be done on the premises, and would not aim to measure the amount of cooking done in order for the Tenement Law to apply and stated at page 557.

> "If the facilities of the 'pantry' or kitchenette are more limited than those of the cookstove of old, it is evident that the demands upon it have diminished proportionately. The definition in the Tenement House Law does not aim at measurement by yardstick or cubic content. The so-called serving pantries were either designed or made apt for the preparation of meals by and for the occupants of the several apartments, and they are so used in a fairly large proportion of cases. Moreover, one of the general arguments of plaintiff's counsel is to the effect that the buildings of the plaintiff's members fill a present want felt by small families which, under present labor conditions, are disinclined to ordinary housekeeping; that what they desire now is apartments, where they may enjoy the dual advantage of meals from a general kitchen when desired, and of 'light housekeeping' whenever they prefer to eat in their own apartments; in other words, the very accommodations offered by plaintiff's members fill an immediate want of tenants. If that be so, then in a literal sense the cooking done in these apartments is, as to the occupants, 'their cooking.'"

The Court further said at page 558:

> "Nor may it be overlooked that the Legislature sought to define the *building by the character of the residence, and not to control or direct an amount or kind of cooking.* In my opinion the language of the statute designates the accommodations and practices in plaintiff's buildings." (Emphasis added)

Finally, the Court at page 563 said:

> "It is not the function either of courts of administrative officers to oppose their views of what is good or advisable to a legislative enactment. This is not a question of modifying or adapting some general equitable rule to harmonize with changed human conditions, but one of applying a standard prescribed by the Legislature. For somewhat the same reason I have not under-

taken to determine accurately what the particular purpose of the several provisions of the Tenement House Law may have been. One thing, however, has been made clear by the evidence before me, namely, that protection against fire was not the only purpose. Light, air, ventilation, and general sanitation were perhaps the chief objects. In a remedial measure of this kind, some fixed standards have to be established. Some persons may be of opinion that a differentiation between electric ranges and other electric appliances, or between cooking and other household practices, is not justified; but I repeat that the question whether some article or structure is as good or better or worse than another is for the Legislature, and its prescription is determinative.

We have here a concededly remedial statute designed to protect the public interest. The definition of its scope is necessarily in rather general terms, in view of the fact that it deals with many classes of buildings, good, bad and indifferent. Many definitions in statutes of this kind may be analyzed and shown by a species of reductio ad absurdum to be apparently inapplicable, at least of little use in a particular instance. That, however, does not present a juridical question. The question before me is whether the glove fits, not whether it is desirable."

For the purposes of comparison with our law it is interesting to note that the definition in the Tenement House Law in force at that time reads as follows:

"1. A 'tenement house' is any house or building, or portion thereof which is either rented, leased, let or hired out, to be occupied, or is occupied, in whole or in part, as the home or residence of three families or more living independently of each other, and doing their cooking upon the premises, and includes apartment houses, flat houses and all other houses so occupied."

11. * * * Wherever the words 'is occupied' are used in this chapter, applying to any building, such words shall be construed as if followed by the words 'or is intended, arranged or designed to be occupied.'"

The object and purpose of the New Jersey Tenement House Law is to protect the life and health of the citizens of this State against the hazards and risks incident to the occupancy of the tenement houses. *Board of Tenement House Supervision of New Jersey* v. *Mittleman,* 104 N. J. L. 486, 488, 141 A. 571 (Sup. Ct. 1828).

The Legislature's intention was to prevent the occupants of tenement houses from risks such as fires, and it is logical to assume that such a risk is increased with the use of the so called "one burner" apparatus.

Furthermore, when an act is remedial it will be so construed to give its words the most effective meaning to which they are reasonably acceptable. *Wasserman* v. *Tannenbaum,* 23 N.J. Super 599, 610, 93 A2d, 812 (App. Div. 1953).

Webster's International Dictionary, 1921, defines cooking as the preparation of food for the table by the action of the heat, which definition was adopted *In re Miller* 82 F2d 408, 410, (Board of Custom and Patent Appeals 1936).

Therefore, it is our opinion and we so advise you that it is the character of the residence of each house containing three or more families, with facilities for cooking on the premises which controls. The law does not seek to measure the amount of cooking which must be done before the law applies, nor does it aim to exempt or include one cooking facility or another as such, from its requirements.

This is a fact question which must be resolved by the Bureau. If an inspection reveals the existence of cooking facilities, such as a "one burner" apparatus, and in addition, there are other indicia that cooking is being or can be done upon the premises such as the existence of a refrigerator, sink, cupboards, pots and pans, dishes, etc., then you are advised that this creates a prima facie presumption that cooking is being done on the premises within the meaning of the statute and that, therefore, it should be classified as a tenement house. If, however, an inspection of the premises reveals merely the existence of a cooking facility such as a "one burner plate" and none of the other faclities mentioned above then the Bureau must make a factual determination whether cooking is or is not being done on the premises.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: JOHN W. NOONAN
Deputy Attorney General

JWN:sk

AUGUST 30, 1957

HON. W. LEWIS BAMBRICK, *Manager*
Unsatisfied Claim and Judgment Fund Board
222West State Street
Trenton, New Jersey

FORMAL OPINION, 1957—No. 15

DEAR MR. BAMBRICK:

You have requested our opinion as to whether the recourse afforded residents of the State of New Jersey by Chapter 655 of the Laws of 1956 of the State of New York is substantially similar in character to the recourse provided for residents of New Jersey by the Unsatisfied Claim and Judgment Fund Law of the State of New Jersey contained in R.S. 39:6.61 to 39:6-91 inclusive. This question is important because R.S. 39:6-62 defines as a person qualified to secure recovery from the Unsatisfied Claim and Judgment Fund; ". . . . 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."

Under the Unsatisfied Claim and Judgment Fund Law of the State of New Jersey, a fund was created out of which those suffering damage or injury by reason of the operation or use by others of a motor vehicle in the State of New Jersey might recover provided they were free from fault as to the cause of the damage or injury, and provided no other means or source of recovery for the damage or injury is available. The fact that the damage or injury was caused by a hit and run driver, the operator of a stolen motor vehicle, or the operator of a motor vehicle used without permission in no way affects the innocent victim's right to recover from the fund. If the operator of the motor vehicle responsible for the damage had no liability insurance and is unable to respond financially, and there is no other source of recovery, the innocent victim is entitled to payment from the fund provided he meets the other requirements of the law, which are not pertinent to this inquiry.

The above cited New York statute, known as the "Motor Vehicle Financial Security Act", provides that no motor vehicle shall be registered in New York unless the application for such registration is accompanied by proof of financial security which shall be evidenced by a certificate of insurance, or evidence of a financial security bond, a financial security deposit, or qualification as a self-insurer under the act. Violations of the act are discouraged by the imposition of penalties, but no fund is created to provide a source of recovery for the innocent victims who suffer damage or injury by reason of the operation or use of a motor vehicle without complying with the act by one who is financially irresponsible. The New York statute offers no recourse for those who suffer damage or injury at the hands of a hit and run driver, the operator of a stolen motor vehicle, or the operator of a motor vehicle used without the owner's permission. There is no fund of any kind established under the New York statute; therefore, if damage or injury is caused by the operation or use of a motor vehicle and there is no liability insurance in effect or there is no financial deposit or bond and the person causing the damage or injury is financially irresponsible, the innocent victim has no recourse. Under the New Jersey statute the Unsatisfied Claim and Judgment Fund was created for the express purpose of providing a recourse for these innocent victims. The New York statute attempts to decrease the number of persons who find themselves placed in such a predicament by requiring proof of financial security from all who seek to register a motor vehicle in New York, but no recourse is provided for one who finds himself in a position where financial recovery for his injury or damage is impossible. The New York statute imposes penalties against the wrongdoer but it does not afford relief to the innocent victim.

You are, therefore, advised that Chapter 655 of the Laws of 1956 of the State of New York does not afford to New Jersey residents recourse substantially similar in character to the recourse provided for New Jersey residents by R.S. 39:6-61 to 39:6-91 inclusive and that New York residents therefore fail to meet the statutory definition of qualified persons under the Unsatisfied Claim and Judgment Fund Law.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: GEORGE H. BARBOUR
Deputy Attorney General

GHB:jeb

SEPTEMBER 11, 1957

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

FORMAL OPINION, 1957—No. 16

DEAR MR. ALAMPI:

You have requested an opinion from this office as to whether certain employees in your Department may accept after-hours employment.

The facts, as we understand them, are as follows: The Department of Agriculture,

as part of an extensive program to further the New Jersey poultry industry, is responsible for the operation of a program of pullorum-typhoid testing and bird selection of certain poultry breeding flocks.

Bird selection insures a high standard of quality within the breeding flocks. The object of pullorum and typhoid testing is to insure that the breeding flocks do not pass on, through eggs or otherwise, either of these diseases. The prevention of these diseases is, of course, of tremendous import to New Jersey's poultry industry and agricultural economy. In addition, although these diseases are not communicable to humans, products of infected chickens may produce symptoms of food poisoning in humans.

The ultimate program aim is thus to produce chicks which can be represented to be pullorum and typhoid free and of a specified high standard of quality. Sales of these chicks are made to the industry upon such representations.

The work of testing and bird selection under the program is in some cases done by employees of the State, but is also performed, under the supervision of State employees, by poultrymen who have been licensed as agents by your Department. The supervision by State employees insures maintenance of proper standards by the licensed poultrymen and largely determines whether they shall retain their licenses.

Several of the licensed agents are desirous of employing, after their normal working day is concluded, State personnel who are regularly employed in supervision as well as testing and selection under the Department program. If so employed, the State personnel would do testing and selection work for the licensed agents. Apparently, it is felt that these men provide a pool of otherwise unavailable skilled labor.

Because their State work involves supervision of licensed agents in addition to actual testing and bird selection work, we must advise you that a potential conflict exists between the public and proposed private employment of these State employees. We direct your attention to a previous opinion of this office, Printed Memorandum Opinion P3, 1955, dated February 1, 1955, in which we advised that employees may engage in outside employment after their regular working hours, provided that they are able to perform their departmental duties efficiently and satisfactorily and "so long as such employment does not involve a conflict with the interests of the State". In advising you, we reiterate the standard set forth in our previous opinion, i.e., that State departments must avoid "any situation in which a State employee might possibly be influenced in his official capacity by interests arising out of his private employment . . ."

As a rule governing private employment by State employees, there must be at all times meticulous avoidance of any situation involving the possibility that divided loyalties may influence the fair and impartial conduct of a State employee in the public interest. We must advise you, therefore, that employees of your department may not accept after-hours employment of the type described in your letter requesting the Attorney General's opinion.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID LANDAU
Deputy Attorney General

DL:mc

OCTOBER 17, 1957

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

FORMAL OPINION, 1957—No. 17

DEAR MR. NEELD:

We are in receipt of your inquiry concerning the liability of the Division of Employment Security for employer contributions to the Public Employees' Retirement System on behalf of employees who have resigned from service but whose membership in the system has not terminated. For the reasons hereinafter stated it is our opinion that employer contributions should not be made on behalf of such persons.

It is clear from N.J.S.A. 43:15A-25 that employee payments to the annuity savings fund, in the form of deductions from compensation, are payable only so long as such compensation continues to be received, i.e., while employment continues. On the other hand the employer's contribution to the contingent reserve fund is made on an annual basis, which in the case of an employing unit which is part of the State government assumes the form of a legislative appropriation. By N.J.S.A. 43:15A-24 it is provided in pertinent part as follows:

> "a. Upon the basis of such tables as the board adopts, and regular interest, the actuary of the board shall compute annually the amount of contribution, *expressed as a proportion of the compensation paid to all employees,* which if paid monthly during the entire prospective service of the employees, will be suffiicient to provide for the pension reserves required at the time of discontinuance of active service to cover all pensions to which they may be entitled or which are payable on their account and to provide for the amount of the death benefits payable on their account by the State, which are not covered by accrued liability contributions, to be made as provided in paragraph b. hereof, and the funds in hand available for such benefits . . .
>
> "d. The board shall estimate and certify annually the aggregate amount payable to the contingent reserve fund in the ensuing year, which amount shall be equal to the sum of the proportion of the earnable compensation of all members, computed as described in paragraph a. hereof and of the State's accrued liability contribution, payable in the ensuing fiscal year, as described in paragraph b. hereof. The State shall pay into the contingent reserve fund during the ensuing year the amount so determined. The cash death benefits, payable as a result of contribution by the State under the provisions of this chapter upon the death of a member in active service, shall be paid from the contingent reserve fund." (emphasis supplied)

N.J.S.A. 43:15A-24b concerns accrued liability on account of prior service credit which is extended to veteran members by N.J.S.A. 43:15A-60 and is not dealt with here.

By N.J.S.A. 43:15A-37 provision is made for submission to the Governor of an itemized estimate of the amounts required to be appropriated by the State to the various funds created by N.J.S.A. 43:15A-1 et seq., and the legislature is directed to appropriate sufficient moneys to provide for such obligations of the State.

An examination of the entire statute reveals that the benefits thereunder—those which arise by reason of death as well as those which mature upon the retirement of an employee (whether such retirement is brought about by accidents, disability or age) —are generally not payable unless the event upon which they are based has occurred during employment or retirement. An apparent exception to this rule is found in N.J.S.A. 43:15A-41b whereby annuity, pension and death benefits are payable in lieu of a return of accumulated deductions to members who, having completed 25 years of service, resign from service before attaining retirement age. See also N.J.S.A. 43:15A-38 by which similar benefits are conferred upon members who have completed 20 years of service and who have been separated from service under similar circumstances. Even in such cases, however, the quantum of benefits payable is measured by membership credit and prior service credit which was earned or purchased during service, as is the situation with respect to ordinary death and retirement benefits. When considered in this context, the requirement of N.J.S.A. 43:15A-24a, supra, that employer contributions are to be expressed as a proportion of the compensation paid to all employees acquires added significance and it becomes clear that such contributions should not be made on behalf of former employees whose membership in the system has not terminated.

It is pointed out that the total amount of employer contributions paid into the contingent reserve fund will not be affected by having such contributions made on behalf of employee members only. The actuary, in computing the contribution under N.J.S.A. 43:15A-24, is required in the words of the statute, to base his calculations on a sum which is "sufficient to provide for the pension reserves . . . and to provide for the amount of the death benefits payable . . . by the State . . ." This sum will not vary whether contributions are made on behalf of all members of the system or only on behalf of employee members, since in the latter situation the contribution per member will be proportionately larger.

For the foregoing reasons it is our opinion and you are advised that employer contributions pursuant to N.J.S.A. 43:15A-24a are to be made only on behalf of members who are in service.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: FRANK A. VERGA
Deputy Attorney General

FAV:ccm

OCTOBER 21, 1957

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

FORMAL OPINION, 1957—No. 18

DEAR MR. NEELD:

You have asked our opinion as to the date of commencement of the contributory and non-contributory death benefit coverage under Public Employees' Retirement-

Social Security Integration Act (L. 1954, C. 84) for public employees for whom membership in the Public Employees' Retirement System is mandatory.

Several classes of public employees became members of the Public Employees' Retirement System by force of the Act on its effective date of January 2, 1955: (1) members of the former State Employees' Retirement System enrolled as such as of December 30, 1954 (N.J.S.A. 43:15A-7); (2) State employee veterans not members of any other retirement system supported wholly or partly by the State (N.J.S.A. 43:15A-7) and (3) public employee veterans of governmental subdivisions of the State in positions not covered by a contributory pension system, other than Federal social security, on January 2, 1955 (N.J.S.A. 43:15A-63).

After the effective date of the act, membership is compulsory for persons becoming permanent State employees (N.J.S.A. 43:15A-7), veterans becoming employees of governmental subdivisions (N.J.S.A. 43:15A-62) and new employees of governmental subdivisions brought within the Public Employees' Retirement System by referendum (N.J.S.A. 43:15A-75).

Eligibility for optional death benefit coverage to which the members contribute is limited by Section 57 of the Act (N.J.S.A. 43:15A-57):

> "Each member who is a member on the date this amendment takes effect and each person who thereafter becomes a member, will be eligible to purchase the additional death benefit coverage hereinafter described, provided that he selects such coverage within 1 year after the effective date of this section as amended or after the effective date of membership, whichever date is later."

Members of the Public Employees' Retirement System automatically enrolled on January 2, 1955 thus had one year from that date within which to purchase the optional death benefit coverage.

We advise you that the effective date of membership of a permanent employee for whom membership is mandatory pursuant to Section 7 (N.J.S.A. 43:15A-7) is the date upon which the member acquires status as a permanent employee of the State. He is therefore eligible to purchase the optional death benefit coverage within one year after becoming a permanent employee of the State under the explicit provisions of Section 57.

The same ruling holds for the other classes of public employees for whom membership in the system is compulsory at some date subsequent to January 2, 1955. The effective date of membership is the date of membership by force of Chapter 84 of the Laws of 1954, without regard to the date of filing of an application form for membership with the Board of Trustees.

N.J.S.A. 43:15A-109 governs eligibility for non-contributory death benefit coverage for persons for whom membership in the Public Employees' Retirement System is optional but not mandatory under Section 7. You have not raised any inquiry concerning the date of death benefit coverage for such optional members, but we refer to the limitation in N.J.S.A. 43:15A-109 that persons entitled but not required to become members of the Public Employees' Retirement System must apply for membership within one year after the effective date of the act or within one year after first becoming eligible for membership in the system, whichever date is later, or in the alternative must furnish satisfactory evidence of insurability in order to receive death benefits.

By its terms N.J.S.A. 43:15A-109 is without application to persons for whom membership in the system is compulsory and who are entitled to the non-contributory death benefits provided in Sections 41, 45, 46 and 48 (N.J.S.A. 43:15A-41, 45, 46 and 48) upon the effective date of membership. We accordingly advise you that non-contributory death benefit coverage commences on the date upon which such employee becomes a member of the Public Employees' Retirement System by force of Chapter 84 of the Laws of 1954, as amended.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: FRANK A. VERGA
Deputy Attorney General

FAV:gd

OCTOBER 21, 1957

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

FORMAL OPINION, 1957—No. 19

DEAR MR. NEELD:

We have your request for an opinion as to the extent of accrued liability of municipalities under the Public Employees' Retirement-Social Security Integration Act (L. 1954, c. 84) on behalf of elected officials who as veterans became members of the Public Employees' Retirement System on January 2, 1955 but who were defeated for reelection or did not stand for reelection therafter.

Public employee veterans within the State who were in office on January 2, 1955 were enrolled automatically as members of the Public Employees' Retirement System on that date by force of N.J.S.A. 43:15A-62 and 63, with exceptions not pertinent here.

N.J.S.A. 43:15A-62:

> "* * * every public employee veteran in the employ of [a county or municipality covered by the former State Employees' Retirement System] on the effective date of this section who shall not have notified the board of trustees, within 30 days of such date that he does not desire to become a member, shall become a member of the Public Employees' Retirement System."

N.J.S.A. 43:15A-63:

> "Any public employee veteran of a county, municipality or school district or board of education who on the effective date of this section is in a position not covered by a retirement system to which both he and his employer make monetary contributions, other than the old-age and survivors insurance provisions of Title II of the Federal Social Security Act, unless he shall have notified the board of trustees that he does not desire to become a member,

shall be a member of the Public Employees' Retirement System as of the effective date of this section; and any veteran becoming an employee of a county, municipality or school district or board of education in such a position, after the effective date of this section, shall be a member of the Public Employees' Retirement System. The employer of such public employee veterans shall make such contributions to the retirement system on behalf of all service rendered by such employees in office, position, or employment of this State or of any county, municipality or school district as are required of employers under the provisions of this act."

Section 7 of this Act includes elected officials within the employees eligible for membership in the system, subject to the board of trustees' right to deny membership to "any class of elected officials." By regulation, elected officials in positions not covered by Federal Social Security are barred from membership (Rule E5 of the Public Employees' Retirement System). Your present inquiry deals with elected officials in positions covered by Federal Social Security for whom membership in the Public Employees' Retirement System as public employee veterans is compulsory.

A basic plan of Chapter 84 of the Laws of 1954 was to furnish free prior service credit to public employee veterans, who became members by force of the Act, for all public employment within the State prior to its effective date on January 2, 1955. N.J.S.A. 43:15A-60 provides:

"Each public employee veteran member shall have returned to him his accumulated deductions as of the effective date of this section. All service rendered in office, position, or employment of this State or of a county, municipality, school district or board of education or service rendered for the State University of New Jersey, instrumentality of this State, after April 16, 1945, and the New Jersey State Agricultural Experiment Station established by an act approved March 10, 1880 (P.L. 1880, c. 106 and continued pursuant to chapter 16 of Title 4 of the Revised Statutes), an instrumentality of this State, excluding service rendered as County Extension Service Farm and Home Demonstration Agents, but such veteran member previous to the effective date of this section, for which evidence satisfactory to the board of trustees is presented within 6 months of the effective date of this section, shall be credited to him as a 'Class B' member and such credit shall be known as prior service credit and the obligation of the employer on account of such credit shall be known as the accrued liability on behalf of such veteran member. Service by a veteran member as a member of the Congress of the United States from the State of New Jersey, if any, pursuant to election or appointment as a United States Senator or member of the United States House of Representatives shall be included within the calculation of prior service, as though such service had been rendered in office, position or employment of this State."

The Act of 1954, instead of requiring the employer of the veteran member to contribute the accrued liability on his behalf in a lump sum, fixed a 30-year period beginning July 1, 1956 for the payment of the obligation of the State or governmental subdivision, as set out in N.J.S.A. 43:15A-24(b):

"Upon the basis of such tables as the board adopts, and regular interest, the actuary of the board shall compute, annually, the amount of the liability which has accrued by reason of allowances to be granted on account of services rendered by State employee veteran members as provided in section 60 of this act prior to the establishment of the retirement system, which has not already been covered by State contributions to the former 'State Employees' Retirement System.' Using the total amount of this liability remaining as a basis, he shall compute the amount of the flat annual payment, which, if paid in each succeeding fiscal year commencing with July 1, 1956, for a period of 30 years, will provide for this liability."

The actuarial calculation under Section 24(b) is based upon the amount of prior service of the public employee veteran. The accrued liability reflects probabilities of death, resignation, retirement and other factors involving all employees, including elected officials. Once computed, the accrued liability is not shifted because of the veteran's transfer to employment with another governmental subdivision or terminated because of his resignation, defeat for reelection or failure to stand for reelection. The accrued liability covers all veterans in the employment of any municipality as of the effective date of Chapter 84 of the Laws of 1954.

We advise you that each municipality must continue to pay the accrued liability computed by the actuary pursuant to N.J.S.A. 43:15A-24(b), on behalf of all veteran employees in employment as of January 2, 1955, including elected officials, over the 30-year period commencing July 1, 1956.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

OCTOBER 24, 1957

MR. JOHN WYACK, *Secretary*
Water Policy and Supply Council
520 East State Street
Trenton, New Jersey

FORMAL OPINION, 1957—No. 20

Re: Jersey City Longwood Valley Project - Jurisdiction and Powers of Water Policy and Supply Council

DEAR MR. WYACK:

The Water Policy and Supply Council has requested the opinion of this office concerning a number of questions, hereinafter set forth, as to the jurisdiction and authority of the Council in connection with the application of the City of Jersey City for an additional water supply from its proposed Longwood Valley Project.

1. Does the Council have jurisdiction to entertain the application regardless of whether or not Jersey City has acquired rights to divert additional water from the Rockaway River (a) as against the Dundee Water Power and Land Company (hereinafter referred to as "Dundee") and Plant Management Commission of Paterson, successor to the Society for Establishing Useful Manufactures (hereinafter re-

ferred to as "S.U.M."), in view of their alleged legislative charter rights; and (b) as against other riparian owners?

In our opinion, the Council does have jurisdiction to proceed without the City's having acquired rights as against any of the parties mentioned.

The application has been made both under R.S. 58:1-17, et seq. for permission from the Council to divert water from a new or additional source, and under R.S. 58:1-33 for permission from the Council for enlargement of the applicant's existing water supply from its present source on the Rockaway River. Neither statute expresses a mandate that the applicant obtain the necessary riparian and other property rights in advance of filing its petition with the Council; nor is there any reason why such a requirement should be implied. On the contrary, R.S. 58:1-17 prohibits a public water supplier or a private water company from exercising its power to condemn lands, water or water rights for water supply purposes until it has first submitted its petition to the Council and has received the approval of that body after a public hearing. Since in most cases it would be impossible for the applicant to acquire the necessary land and water rights without exercising the power of condemnation, the statute should not be construed so as to compel an applicant to attempt to acquire the needed property by negotiation before making its application to the Council. Furthermore, the applicant should not be put to the burden of acquiring or attempting to acquire such property when it does not know whether or not the Council will approve of the project for which the property may have been purchased.

It is also of significance that the Council has always entertained jurisdiction of such applications without considerating whether or not the applicant has obtained the necessary land and water rights. One such case which eventually went to court was the application of the North Jersey District Water Supply Commission in 1916 for its 50 m.g.d Wanaque Reservoir Project. After the project had been approved by the Council's predecessor, the Court of Chancery was called upon to pass upon the acquisition of the necessary rights from the Lehigh Valley Railroad Company as owner of the Morris Canal. No question was raised in that case regarding the propriety of the diversion grant in advance of the acquisition of the water rights in question *Lehigh Valley R.R. Co.* v. *North Jersey District Water Supply Commission,* 94 N.J. Eq. 94 (Ch. 1922). The Council's long-continued practical construction of the statute has thus received at least tacit judicial approval; and if the legislative intent were otherwise obscure, such administrative construction would in this instance, we believe, carry decisive weight in the courts *State* v. *Clark,* 15 N.J. 334, 341 (1954).

2. Can a municipality condemn property and water rights outside the municipality for the purpose of supplying customers beyond the municipal borders (a) under R.S. 40:62-49 without the approval of the Council; (b) under R.S. 58:6-3 with the approval of the Council?

In our opinion, the answer in both cases is in the affirmative.

R.S. 40:62-49 authorizes any municipality to "provide and supply water, or an additional supply of water, for the public and private uses of such municipality and its inhabitants" in any one of several methods, including contracts between any two or more municipalities for one to supply water for the public and private uses of the other. The section further provides (subsection (g)) that "any municipality may purchase, condemn or otherwise acquire the necessary lands, and rights or interests in lands, and water rights and rights of flowage or diversion, within or without the municipality, for the purpose of a water supply, or an additional water supply".

Similar provisions in earlier statutes have been construed to mean that a city

could condemn land and water rights to secure a supply of water, even though the city was also supplying water to another municipality. *Mundy* v. *Fountain,* 76 N.J.L. 701 (E. & A. 1908); *Paterson* v. *Jersey City,* 84 N.J.L. 454 (Sup. Ct. 1913), aff'd 87 N.J.L. 163; see also *Paterson* v. *West Orange Water Co.,* 84 N.J.L. 460 (Sup. Ct. 1913), aff'd 87 N.J.L. 538. In *Mundy* v. *Fountain,* the question arose whether the City of Perth Amboy had the power to condemn land for its water supply when it was furnishing water to South Amboy. In holding that it did, the Court said (76 N.J.L. at p. 702):

> "The counsel for the plaintiffs in error denies that this power to condemn existed. He insists that the power to condemn contained in the act of 1876, 'To enable cities to supply the inhabitants thereof with pure and wholesome water' (*Gen. Stat., p.* 646), could not be employed by Perth Amboy because it was supplying water to South Amboy; while the power to condemn was only conferred for the purpose of supplying the inhabitants residing within the corporate limits of the condemning city. But the purpose for which the power to purchase and condemn was conferred could be enlarged by subsequent statutes, and was so enlarged by the acts.
>
> "But aside from this it is to be observed that the contention of the plaintiffs in error if sound, would strip Perth Amboy of the power to purchase the land and water in question; for power to purchase land and water rights stands upon the same footing as the power to condemn. With the exception that there must be an inability to agree as a condition precedent to condemnation, both rights cover the same subject-matter and exist upon the same condition."

It was also held in *Slingerland* v. *City of Newark,* 54 N.J.L. 62 (Sup. Ct. 1891), that where a city condemning land for its water supply system, obtained more water than needed for its present public uses and therefore disposed of the surplus for an outside use, that fact did not deprive the condemnation of its public character.

We thus find nothing in the statute or in judicial pronouncement which would limit the power of condemnation to those instances where the city is supplying only its own habitants with water, and no sufficient reason appears for maintaining such a view.

Without regard to the authority under R.S. 40:62-49 to condemn, which we hold that the city enjoys, the city could be empowered to condemn property and water rights elsewhere by approval of the Council under R.S. 58:6-1. That statute provides that every municipal corporation engaged in the business of supplying water for public use in one or more municipalities of this State, upon obtaining the Council's approval of the diversion of water for any new or additional supply, "may acquire by gift, devise, purchase or condemnation of such lands, water and water rights as may be required to enable such municipal * * * corporation * * * to divert and use water for such new or additional water supply * * * in accordance with * * * the assent of the State so obtained". This law, however, does not "limit or in any way affect any power to condemn lands, water or water rights which any such municipal * * * corporation * * may now have or hereafter acquire under any existing law of this State." R.S. 58:6-5. See *Grobart* v. *Passaic Valley Water Commission,* 135 N.J. L. 190 (E. & A. 1947).

The provisions of R.S. 58:6-1 are broad and sweeping, and would plainly empower

the Council to authorize any municipal water company to condemn property and water rights outside the municipality for the purpose of supplying customers in other municipalities.

3. Do the conclusions reached in answer to the preceding question apply to the condemnation by Jersey City of the rights vested in Dundee and in S.U.M.?

The water rights of Dundee and S.U.M. derive from legislative grants rather than from riparian ownership. It has been stated in *Van Reipen* v. *Jersey City,* 58 N.J.L. 262, 267 (Sup. Ct. 1895), that where a franchise has been granted by the State, it is "exclusive, except as against the State, in the absence of express provision or necessary implication to the contrary", and that: "While the government, in the exercise of its sovereignty, may sanction the acquisition of rights resting upon prior grant, on just compensation being made, no power to take will flow from mere authority to acquire by condemnation such rights as a city may deem it proper to obtain." Accordingly, the Court held in the *Van Reipen* case that Jersey City, under its general powers of condemnation for the purposes of a water supply, could not take the water rights of the Morris Canal, for which a charter had been previously granted by the State. Likewise, in *S.U.M.* v. *Morris Canal and Banking Co.,* 30 N.J. Eq. 145 (Ch. 1829), the general power of eminent domain given to the Morris Canal Co. was construed not to be exercisable against the water rights of S.U.M., which had likewise acquired its rights under a charter from the State.

In view of the aquisition of water rights by Dundee and S.U.M. through legislative action, we advise that the approval of the Council under R.S. 58:6-1 should be sought for the condemnation of such water rights. The Council is vested by the Legislature with broad authority over the granting of water rights and of condemnation powers as to existing water rights, throughout the State. Charter grants for private purposes may be condemned by a municipality without prior sanction of the Council. See *Bogert v. Hackensack Water Co.,* 101 N.J.L. 518 (E. & A. 1925). A detailed analysis of the legislative grants of Dundee and S.U.M. to determine their public obligations, if any, is not warranted, however, in view of the available procedure for Council approval, within its legislative authority, for the condemnation of water rights for public, as well as private, uses.

As pointed out in *City of New Brunswick* v. *Board of Conservation and Development,* 94 N.J.L. 46 (Sup. Ct. 1919), aff'd on opinion below, 94 N.J.L. 558, the Board (predecessor to the Water Policy and Supply Council) was the "State agency to which the Legislature had delegated the power to approve plans in such cases, the statute declaring, 'The approval of the commission shall constitute the state's assent to the diversion of water'". The function of the Council was likewise described by Justice Heher for the Supreme Court in the case of *In re Plainfield Union Water Co.,* 11 N.J. 382, 386 (1953), as follows:

> "The powers vested in the old State Water Policy Commission by R.S. 58:1-1 et seq. have been transferred to the State Division of Water Policy and Supply by *L.* 1945, *c.* 22, *p.* 66, *N.J.S.A.* 13:1A-9, for exercise by the Water Policy and Supply Council set up within the Division in accordance with the provisions of the act. The Council, in virtue of its succession to the general jurisdiction of the Water Policy Commission in relation to the State's water supplies, was clothed with 'general supervision over all sources of potable and public water supplies, including surface, subsurface and percolating waters, to the end that the same may be economically and prudently developed for public use.'"

It is well established that the State itself may authorize the taking of property, upon payment of just compensation, even though such property may consist of rights previously acquired from the State or pursuant to the exercise of eminent domain. The only question in such cases is whether the Legislature has intended such a result. See *Weehawken Township* v. *Erie R.R. Co., supra; Van Reipen* v. *Jersey City, supra; State Highway Commission* v. *Elizabeth,* 102 N.J. Eq. 221 (Ch. 1928), aff'd 103 N.J. Eq. 376; *Lehigh Valley Railroad Co.* v. *North Jersey District Water Supply Commission,* 94 N.J. Eq. 94, 102 (Ch. 1922).

Under R.S. 58:6-1 and 3, the Council as agent of the State gives the specific consent of the sovereign to the exercise of eminent domain by the applicant as may be necessary to enable the applicant to divert and use the water allocated to it by the Council. It is this provision for specific State action which, in our opinion, indicates a legislative intent that under R.S. 58:6-1 (even if not under R.S. 40:62-49) a municipality may be empowered to condemn rights previously granted to private corporations like S.U.M. and Dundee. Furthermore, the Council may grant its approval only upon a determination that the particular diversion is just and equitable to the parties affected thereby (R.S. 58:1-17, et seq.), so that the condemnee has a forum both before the Council and, if still aggrieved, on judicial review.

4. In determining, under R.S. 58:1-20, whether the plans of the applicant are "just and equitable to the other municipalities and civil divisions of the State affected thereby and to the inhabitants thereof, particular consideration being given to their present and future necessities for sources of water supply," must the Council take into consideration such factors as possible loss of tax ratables and recreational facilities resulting from the construction of the proposed reservoir, or should evidence as to what is "just and equitable" be limited to the subject of present and future water supply necessities?

We are of the opinion that the phrase "just and equitable to other municipalities * * * and to the inhabitants thereof" is so broad and general that such matters as loss of tax ratables and recreational facilities should be taken into consideration by the Council.

In the first place, we note the language of the section that "particular consideration" should be given to present and future water supply necessities; the statute does not say "sole" or "exlusive" consideration shall be given to such matters, thus clearly implying that the Council's function is not so limited.

Moreover, in R.S. 58:1-21, which deals with conditions to be imposed by the Council in connection with its approval of the application, such conditions should protect "the water supply *and the interests* of the applicant or of the inhabitants of the territory supplied by it with water, or the water supply *and interests* of any municipal corporation * * * or the inhabitants thereof"; and that the Council shall make a reasonable effort to meet the needs of the applicant, "with due regard to the actual or prospective needs *and interests of* all other municipal corporations and civil divisions of the State affected thereby, and the inhabitants thereof". (Underlining ours). If water supply needs were the only subject to be considered by the Council, it would have been superfluous for the Legislature so frequently to mention "the interests" of the parties concerned in addition to the subject of water supply; and of course the Legislature is presumed not to have made use of superfluous words. *Ford Motor Co.* v. *N. J. Dept. of Labor and Industry,* 5 N.J. 494, 502 (1950).

Every taking of land for municipal reservoir purposes will involve loss of tax ratables to a greater or lesser degree, and many water supply projects may have some

adverse effect on the recreational opportunities afforded by the water course involved. Evidence as to these and similar factors should be admitted by the Council within reasonable limits, and they, along with water supply needs, should be accorded such weight as may be appropriate in determining whether the applicant's plans are "just and equitable" and give due regard to the interests of other parties affected.

Furthermore, under R.S. 58:1-21, the Council in granting a diversion permit may impose such conditions as it may deem appropriate in the interests of public recreation. The Council does not, however, possess authority to determine what payments, if any, should be made by the grantee in lieu of taxes, or to assess any damages resulting from the permitted diversion. *Boonton* v. *State Water Policy Commission,* 122 N.J.L. 34 (Sup. Ct. 1939); see also *Passaic* v. *Clifton,* 14 N.J. 136, 142-143 (1953).

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

OCTOBER 25, 1957

MR. ELMER J. HERRMANN, *Clerk*
Essex County Board of Elections
Hall of Records
Newark, New Jersey

FORMAL OPINION, 1957—No. 21

DEAR SIR:

Receipt is acknowledged of your recent inquiry, on behalf of the Essex County Board of Elections, concerning certification by the Board of Elections of the results of the Military and Civilian absentee ballots cast pursuant to R.S. 19:57.

Your letter states as follows:

"What the Board wishes to have clarified is:

"1. Shall the certification by the Board to the County Clerk be in the form of Ward and District order, as to the number of votes each candidate receives, in each district, so the district total can be added to the total reported on the Statement of Results by the respective District Election Boards, or:

"2. Shall a complete tabulation be made, by the County Board, showing the total votes received by the various candidates, County Wide?"

R.S. 19:57-31 provides as follows:

"On the day of each election each county board of elections shall open in the presence of the commissioner of registration or his assistant or assistants the inner envelopes in which the absentee ballots, returned to it, to be voted in such election, are contained, except those containing the ballots which the board or the County Court of the county has rejected, and shall remove from said inner envelopes the absentee ballots and shall then proceed to count and canvass the votes cast on such absentee ballots, but no absentee ballot shall be counted in any primary election for the general election if the ballot of the political party marked for voting thereon differs from the designation of the political party in the primary election of which such ballot is intended to be voted as marked on said envelope by the county board of elections. Immediately after the canvass is completed, the respective county boards of election shall certify the result of such canvass to the county clerk or the municipal or district clerk or other appropriate officer as the case may be showing the result of the canvass by ward and district, and the votes so counted and canvassed shall be counted in determining the result of said election."

In view of the specific references in the above quoted section of the Absentee Ballot Law to certification by the Board of Elections to various officers therein designated by ward and district it is our opinion that your certification of the results of the Military and Civilian absentee ballots cast should take this form and not that as suggested by the second alternative suggested by your letter.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: JAMES J. McLAUGHLIN
Deputy Attorney General

JJMcL:msg

NOVEMBER 13, 1957

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

FORMAL OPINION, 1957—No. 22

DEAR MR. NEELD:

You have requested our opinion concerning the application of the Unfair Cigarette Sales Act of 1952, L. 1952, c. 247, N.J.S.A. 56:7-18 et seq., to situations in which cigarette manufacturers, as part of a program to promote a specified brand of cigarettes, give cigarette lighters or containers of soft drinks with the sale of cartons of such cigarettes. The cigarettes are sold for a price which is no lower than that permitted by law. Although the sales in question are made on the retail level, the manufacturer supplies the cigarette lighters or containers of soft drinks at his own cost. For the reasons hereinafter stated it is our opinion that the aforesaid practices do not violate the Act.

The only sections of the Unfair Cigarette Sales Act of 1952 which may here be applicable are N.J.S.A. 56:7-20a and N.J.S.A. 56:7-23. N.J.S.A. 56:7-20a reads as follows:

"It shall be unlawful and a violation of this act:

a For any retailer or wholesaler *with intent to injure competitors or destroy or substantially lessen competition*—

(1) to advertise, offer to sell, or sell, at retail or wholesale, cigarettes *at less than cost to such a retailer or wholesaler*, as the case may be,

(2) to offer a rebate in price, to give a rebate in price, to offer a concession of any kind, or *to give a concession of any kind or nature* whatsover in connection with the sale of cigarettes . . ."
(emphasis supplied)

It is clear that N.J.S.A. 56:7-20a(1) is inapplicable here since the cigarettes are not sold at less than cost insofar as the retailer or wholesaler is concerned. This conclusion is unavoidable because the lighters and soft drinks are supplied at no cost to the retailer or wholesaler.

There appears to be no violation of N.J.S.A. 56:7-20a(2) since the concession which is given in connection with the sale of cigarettes is a concession on the part of the manufacturer, not of the retailer or wholesaler. However, even if we assume that such concession is attributable to the retailer or wholesaler, the fact that similar concessions are made by other retailers who deal in the brand of cigarettes which are being promoted excludes any "intent to injure competitors or destroy or substantially lessen competition", at least on the retail or wholesale level. In so concluding we are mindful of N.J.S.A. 56:7-20d by which evidence of the giving of a concession of any kind in connection with the sale of cigarettes is made prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition. The prima facie presumption so made out is destroyed by the facts of this case, again assuming that the concession referred to in the statute is that of the retailer or wholesaler.

The only other section of the Act which requires consideration is N.J.S.A. 56:7-23, which states:

"In all advertisements, offers for sale or sales involving two or more items, at least one of which items is cigarettes, at a combined price, and in all advertisements, offers for sale, or sales, involving the giving of any gift or concession of any kind whatsoever (whether it be coupons or otherwise), the *retailer's or wholesaler's* combined selling price shall not be below the 'cost to the retailer' or the 'cost to the wholesaler', respectively, of the total costs of all articles, products, commodities, gifts and concessions included in such transactions." (emphasis supplied)

For the reasons stated above the retailer's or wholesaler's combined selling price cannot be said to be below the cost to such retailer or wholesaler since the items given gratis with sales of cigarettes are supplied by the manufacturer.

The conclusion that the practices in question do not violate the Act, at least insofar as sales below cost are concerned, is further supported by N.J.S.A. 56:7-28b, by which it is provided:

"Merchandise given gratis or payment made to a retailer or wholesaler by the manufacturer thereof for display, or advertising, or *promotion purposes, or* otherwise, shall not be considered in determining the cost of cigarettes to the retailer or wholesaler." (emphasis supplied)

Further, the fact that the concessions above referred to are those of the manufacturer and are, so far as appears, made available to the public through many or all retailers which trade in the manufacturer's cigarettes indicates that there is no violation of the spirit of the Act since such practices do not injure competitors or destroy or substantially lessen competition at the retail or wholesale level.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: CHRISTIAN BOLLERMANN
Deputy Attorney General

NOVEMBER 7, 1957

HON. FLOYD R. HOFFMAN, *Director*
Office of Milk Industry
1 West State Street
Trenton, New Jersey

FORMAL OPINION, 1957—No. 23

DEAR DIRECTOR:

We have been asked whether the Office of Milk Industry has power to fix consumer resale prices in Area I. The question presented is answered in the affirmative.

Area I includes the northern twelve counties of the State and part of a thirteenth. Regulations H-2, H-7. The New York-New Jersey Milk Marketing Administrator has authority to fix monthly minimum prices payable by handlers to producers for milk consumed in this area (and for certain other milk not relevant to the present inquiry) whether produced in this State or another. 7 U.S.C.A. §§ 601 to 659 (1952); Order 27, 22 Fed. Reg. 4643, amending 7 C.F.R. § 927.3. The Administrator has adopted a complex formula for redetermining the prices monthly. Order 27, supra, §§ 927.40 to 927.45. These prices may vary widely, even from month to month. For example, from July to August of this year the basic price per hundredweight rose from $4.09 to $4.68, and in September, to $5.03.

The Director has authority to fix "the prices at which milk is to be * * * sold" as part of his power to "regulate * * * the entire milk industry of the State of New Jersey." N.J.S.A. 4:12A-21. He also has authority to fix "the minimum prices to be charged the consumer for milk in the several municipalities or markets of this State * * *". N.J.S.A. 4:12A-22. The legislature has enacted a declaration of its intention to subject milk to regulation by New Jersey at the earliest moment when it can be so regulated, consistent with the commerce clause of the federal constitution. N.J.S.A. 4:12A-49. The Supreme Court of the United States has held that a state may regulate a phase of the milk industry where it is acting to protect an important domestic interest by means which do not discriminate against interstate commerce, although having a substantial effect on such commerce. This was the *ratio decidendi* of *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346 (1939), in which it was held that Pennsylvania could require licenses and bonds of dealers and regulate the prices they paid Pennsylvania producers even though the milk was resold out of state. On this principle, New Jersey may fix consumer prices in Area I in any manner which does not discriminate against interstate commerce. (There is no preemption problem here as the market administrator has no power to fix consumer prices). *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 615 (1937).

If the director does fix consumer resale prices, he must take into consideration a reasonable return to dealers, processors and subdealers. N.J.S.A. 4:12A-22. If the director did not reset prices monthly, the handlers' return might diminish upon an Order 27 price increase, possibly below a reasonable minimum. If the Order 27 price dropped, the return to handlers would tend to become excessive at the expense of the statutory purpose of providing maximum assurance of an adequate supply of wholesome milk to consumers. L. 1941, c. 274, Preamble. Therefore, monthly adjustments of any fixed minimum consumer resale prices are necessary in the area where Order 27 determines the price the handler pays.

But if the course of adopting specific prices for one month terms were adopted, serious practical disadvantages would result. No Office of Milk Industry order is effective until fifteen days after filing with the Secretary of State. N.J.S.A. 4:12A-23. Recurrent hearings would unduly burden both the Office of Milk Industry staff and the representatives of the various groups in the milk industry who find it necessary to appear at price fixing hearings. Where the cost of processing and distribution remains substantially constant but the wholesale price fluctuates, as under Order 27, we suggest that the most effective way for determining consumer prices is to fix an increment to the Order 27 price. The Legislature anticipated this exigency by giving the director power to fix prices "under varying conditions". N.J.S.A. 4:12A-22.

If the Office of Milk Industry exercises the power to fix cosumer prices in terms of an increment to Order 27 handler prices, it must be done after a hearing at which evidence of the appropriate increment or "spread" is presented. N.J.S.A. 4:12A-23.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

NOVEMBER 7, 1957

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

FORMAL OPINION, 1957—No. 24

Re: New York City Release Flows in the Delaware River

DEAR COMMISSIONER:

You have requested our opinion as to the obligation of New York City to maintain release flows in the Delaware River pursuant to the 1954 decree of the United States Supreme Court in the case of *New Jersey* v. *New York*, 347 U.S. 995 (1954). The inquiry also involves the authority of the River Master to permit the City to reduce the amount of water released where the circumstances might appear to warrant such reduction.

The decree enjoins the State and City of New York from diverting water from the Delaware River "except to the extent herein authorized and upon the terms

and conditions herein provided". Various diversion rates and correlative release flow requirements are provided for the different stages of completion of the New York City reservoir system on the Delaware River. At the present time, the Neversink and East Branch Reservoirs have been completed, but the Cannonsville Reservoir has not. For this stage, the decree authorizes a diversion of 490 m.g.d., but requires the City to let down enough water to maintain a minimum basic flow of 1525 c.f.s. at Montague, and to make additional releases in accordance with a formula set forth in paragraphs B-1(c) and (d) of the decree.

The questions here presented arise because New York has for a considerable number of days this past summer failed to maintain either the minimum or the excess release flows. Furthermore, the River Master has permitted diversions by New York to continue in spite of these failures to make the required releases, and the basis for his action appears in the following statement submitted by him to the members of the Delaware River Advisory Committee dated October 2, 1957:

> "In administering the terms of the Decree, in the interim period prior to completion of Cannonsville Reservoir, the River Master has taken the view that it would be totally unrealistic to contend that the intent of the Decree was that New York City should have to forego use of the Delaware Basin reservoirs or overcome natural limitations to the extent of guaranteeing that the release capacity would be sufficient to maintain a flow of 1525 cfs at Montague at all times. Because of the various extenuating circumstances brought about by the current unprecedented drought, the emergency facing New York City necessitating shutting down the Delaware Aqueduct for cleaning, the change in pattern of operation of the Wallenpaupack power plant, and the physical condition of constructed release works, it is the view of the River Master that during the 1957 low flow season to date, releases from Neversink and Pepacton Reservoirs, as limited by the capacity of the release works, has constituted acceptable compliance in carrying out the intent of the Decree. This is not to be construed as setting a precedent for future operations."

The questions before us were recently passed upon by the Attorney General of Delaware, and on July 18, 1957 he rendered an opinion to the Delaware State Geologist. He concluded that under the terms of the decree, the City's right to divert water from the Delaware River is conditioned upon its meeting its obligations to release sufficient water to maintain at all times a minimum flow of 1525 c.f.s. at Montague until the Cannonsville project is completed; that the City may not divert any water from the Delaware except upon complying with this condition, which is unqualified; and that the River Master may not permit diversions by New York without first having determined that the present release requirements and the requirements for the predictable future can be met.

For the reasons given in the opinion of the Delaware Attorney General, we fully concur in his conclusions as above stated. As we have already noted, the Supreme Court enjoins New York from diverting water from the Delaware River except upon the terms and conditions set forth in the decree; and while the City is permitted at the present stage to divert 490 m.g.d., the decree specifically states that *"in no event* shall such diversion impair the obligation of the City to make the releases hereinafter specified". (Underlining ours). In view of the unqualified language used by the Court, the City cannot plead impossibility of maintaining release flows because of the structure of its release works, while it continues to divert in violation of the Supreme Court's injunction.

Nor do we find any authority in the River Master to allow New York to cut down its releases below the minimum while it continues to divert. An examination of the duties and responsibilities of the River Master as set forth in the decree indicates that his functions are ministerial rather than discretionary so far as the amount of the minimum release flow is concerned. He must "administer the provisions of this decree relating to yields, diversions and releases so as to have the provisions of this decree carried out with the greatest possible accuracy". The provision that "compliance by the City with directions of the River Master with respect to such releases shall be considered full compliance with the requirements" of the decree in respect to the basic minimum flow of 1525 c.f.s. does not, in our opinion, vest discretionary authority in the River Master to permit a relaxation of the minimum flow requirements under extenuating circumstances. So long as the decree remains in its present form, New York and the River Master must comply with its express terms.

In our opinion, relief by way of equitable apportionment during dry seasons can be granted only by further action of the Supreme Court, which might take the form either of a relaxation provision such as was written in the original Montague formula in the 1931 decree, or of vesting authority in the River Master to adjust the release flow requirements in cases of unforeseen hardship. By paragraph X of the decree, the Supreme Court has retained jurisdiction of the matter, so that any of the parties may at any time apply at the foot of the decree for other or further relief. Until the decree is so modified, New Jersey and its sister downstream states have the right to insist upon literal compliance with its terms by New York and the River Master.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

TPC:tb.

INDEX

A.

Administrative Agencies—
Decisions—Decision of Board of Review controls a prior inconsistent ruling of the agency, and is not retroactive in operation. P.M. 1, 1956.

Adoption—
Assist in placement—Physician recommending approved adoption agency to prospective adopting parents not in violation of N.J.S. 2A:96-6 and 7. P.M. 13, 1956.

Agricultural Experiment Station—
Automobiles—Purchase—Power is now vested in Board of Governors of Rutgers University. F.O. 13, 1957.
Board of Managers—Appointed by Board of Governors of Rutgers University. P.M. 9, 1957.

Agriculture, Department of—
Buildings—Contracts for by Director of Purchase and Property—Lack of Power in installment purchase. F.O. 12, 1957.
Employees—Conflict of Interest. F.O. 16, 1957.

Air Pollution—
See Interstate Sanitation Commission.

Arborists—
See Licenses—Tree Experts.

Arrest—
Power Vessels—Power of Local police officers to make arrests relating to. F.O. 10, 1956.

Assimilative Crimes Act—
See Legalized Games of Chance—Military Reservations.

Associations Not For Profit—
Certificate of Incorporation—Amendments—Where Filed. P.M. 19, 1957.

Automobiles—
See Motor Vehicles.

B.

Banks and Banking—
Collateral—Effect of collateral on depositor's claim in the event of insolvency of a bank. P.M. 23, 1956.
Deposit of State Funds—Effect of collateral on depositor's claim in the event of insolvency of a bank. P.M. 23, 1956.
Savings Banks—Qualification of Federal Land Bank Consolidated Farm Loan Bonds as legal investment. P.M. 4, 1957.

Bingo—
See Legalized Games of Chance.

Board of Education Employees' Pension Fund of Hudson County, Inc.—
See Pensions—Referendum, Coverage.

Borough Councilman—
Continued receipt of retirement allowance while holding position of, since it is an elective office within R.S. 43:3-1. P.M. 4 1956.

Bulkheads—
See Wharves.

C.

Camden Armory—
Sale—Maintenance of separate account for proceeds from said sale. Investment of such proceeds. P.M. 2, 1956.

Charitable Organizations—
Application of Unsatisfied Claim and Judgment Fund Law. P.M. 12, 1957.
Designee under pension statute. P.M. 21, 1956.

Cigarettes—
Unfair competition—Gifts by manufacturer—Not within prohibition of Unfair Cigarettes Sales Act. F.O. 22, 1957.

Civil Service—
Certification of persons to police department of City of Newark where appointees have juvenile records, convictions of various degrees, or have been arrested without having been convicted. P.M. 2, 1957.
Employment list—Removal once certified—Performed by President and Commission and not by appointing authority. P.M. 2, 1957.
Examinations—State employee has no right to take promotion examination held while on military leave, where eligibility list had expired at time of his application. P.M. 25, 1956.
Raritan Township Police—Status. P.M. 26, 1957.
Veterans—Definition of World War II veteran in view of P.L. 1967, c. 21. F.O. 5, 1957.

Civil Service Commission—
Term of Office. P.M. 18, 1956.

Civilian Absentee Voting—
See Elections—Absentee Voting.

Colliers Mills Public Shooting and Fishing Grounds—
Mineral rights—lease. P.M. 11, 1957.

Comity—
See Judgments—Foreign.

Complaints—
Traffic Violations—See Motor Vehicles.

Conflict of Interest—
Physician—Conflict between positions held as Insurance Company Examiner and a Medical Examiner in the Division of Workmen's Compensation. F.O. 4, 1956.
State Employees—Department of Agriculture employees engaged in pullorum-typhoid testing and bird selection of poultry are not permitted to engage in similar work after hours. F.O. 16, 1957.

Conservation and Economic Development, Dept. of—
Commerce and Navigation, Board of—Successor to powers, functions and duties regarding bulkhead or pierhead lines in riparian lands is the Director of the Division of Planning and Development. P.M. 35, 1956.
Fish and Game, Division of—Lease of mineral rights at Colliers Mills Public Shooting and Fishing Grounds. P.M. 11, 1957.
Law Enforcement Officers—Power Vessels—Juvenile offenders—Power to deal with juvenile offenders. F.O. 11, 1956.
Navigation, Division of—Revenue from licenses issued by Division for submerged lands under tidewater to be applied to School Fund Income Account. F.O. 13, 1956.
Planning and Development, Division of—Director—Powers and duties regarding surveys and establishing bulkhead or pierhead lines as successor to Board of Commerce and Navigation. Approval of Director requisite to riparian grant, where bulk-

head or pierhead line fixed in grant or lease. P.M. 35, 1956.
Planning and Development, Division of—Lease of mineral rights in State forest park reserves and reservations. P.M. 30, 1957.
Planning and Development, Division of—Regulation of Water Skiing. P.M. 32, 1957.
Water Policy and Supply Council—Jurisdiction and powers regarding Jersey City Longwood Valley Project. F.O. 20, 1957.
Water Policy and Supply Council—Power to establish master plan for conservation and development of principal watersheds of the state. P.M. 5, 1956.

Corporations—
Designee under pension statute. P.M. 21, 1956.
Divisions—Milk dealer License not to be issued to. P.M. 33, 1957.
Financial Business Tax Act—Corporation not in competition with national banks not subject to tax under. P.M. 8, 1956.
Motor Vehicles—Merger of corporations requires new registration as N.J.S.A. 39:3-30 voids old registration. P.M. 33, 1956.
Service—Secretary of State or his chief clerk have no authority to accept service of process within .N.J.S. 2A:15-26 and R.S. 14:13-14. F.O. 7, 1957.

County Board of Elections—
See Elections.

Courts—
Costs—R.S. 43:21-15(b) precludes taxing of costs to employee not prevailing on appeal to Superior Court, Appellate Division. P.M. 10, 1957.
Opinions—Operation and effect. P.M. 1, 1956.
Tenure—Frank T. Lloyd, Jr.—Tenure and status under Constitution of 1947. F.O. 3, 1956.

Criminal Record—
Effect on Civil Service certification. P.M. 2, 1957.

D.

Dairy Products—
Milk—Power of Office of Milk Industry to fix consumer resale prices in Area I. F.O. 23, 1957.

Dairy Products—
Milk Dealer—License not to be issued to divisions of a corporation. P.M. 33, 1957.

Defense, Department of—
Applicability of Section 13 of Municipal Planning Act of 1953. F.O. 3, 1956.

Delaware—
Boundary in Delaware Bay. F.O. 22, 1956.

Delaware River—
See Waters and Watercourses.

Delaware River Joint Toll Bridge Commission—
Automobiles—Purchase—Power to purchase rests with the Commission. F.O. 13, 1957.

Dundee Water Power and Land Company—
Water Rights, concerning. F.O. 20, 1957.

E.

Education, Department of—
Public Contracts—Approval of contracts for buildings or public works not necessary. P.M. 29, 1956.

Election Districts—
See Elections—County Board of Elections.

Elections—
Absentee Voting—Certification of Results of Military and Civilian ballots to be in ward and district fashion under R.S. 19:57-31. F.O. 21, 1957.
Absentee Voting—Religious scruples regarding day on which election is held does not entitle a person to vote in Primary election by absentee ballot. F.O. 2, 1957.
Absentee Voting—School Elections—Count and canvass of absentee ballots by County Board of Elections. F.O. 1, 1956.
County Board of Elections—Absentee Voting—Count and canvass of school election results. F.O. 1, 1956.
County Board of Elections—Employees—Salaries—Power to establish rests with Board. P.M. 34, 1957.
County Board of Elections—Members—Candidate for Delegate to National Convention. P.M. 12, 1956.
County Board of Elections—Qualifications of persons for appointment as District Board Members by County Board. P.M. 13, 1957.
County Boards of Elections—Right to revise or readjust election districts subsequent to erection by municipalities. P.M. 9, 1956.
Crimes—Persons convicted in Federal courts of crimes which cause disenfranchisement under R.S. 19:4-1 have no right of suffrage in this State. P.M. 20, 1956.
District Board Members—Qualifications for Appointment by County Board of Elections. P.M. 13, 1957.
Military Personnel—Wives—Prohibited from voting in county after abandoning residence. P.M. 14, 1957.
Registration of Voters—Additional officers—Validity of Resolution of City of Elizabeth authorizating registration. P.M. 29, 1957.
Registration of Voters—Status of voter in general election in year in which his name was removed from registration list. P.M. 28, 1956.
Religious—Religious scruples regarding day on which election is held does not entitle person to vote in primary election by Absentee Ballot. F.O. 2, 1957.
Residence—Wife of military serviceman may not vote in county after abandoning residence. P.M. 14, 1957.
Right of Suffrage—Persons convicted in Federal courts of crimes which cause disenfranchisement under R.S. 19:4-1 have no right of suffrage in this State. P.M. 20, 1956.
School Elections—See Absentee Voting under this title, supra.
Voting Records—Reasonable rules and regulations may be promulgated with reference to safekeeping and the prevention of interference with the performance of official duties. P.M. 5, 1957.
Voting Records—Whether "public inspection" as used in R.S. 19:31-10 includes the right to copy voting records from the register. P.M. 5, 1957.

Eleemosynary Organizations—
See Charitable Organizations.

Elizabeth, City of—
City Clerk—additional offices. See Municipalities—City Clerk.

Elizabethtown Water Company—
Construction of 1918 grant of water rights. P.M. 35, 1957.

Eminent Domain—
Taxation of property condemned—Liability of State. P.M. 23, 1957.

Escheat—
Repayment by State Treasurer only upon sufficient proof of title. P.M. 22, 1957.

F.

Federal Aid—
Municipal Planning and Zoning. F.O. 9, 1957.

Federal Land Bank Consolidated Farm Loan Bonds—
Qualification as Legal Investments for savings banks under N.J.S.A. 17:9A-175A. P.M. 4, 1957.

Female Labor—
Days of work—Whether employer is in violation of R.S. 34:2-24 if he allows a female employee one day off per calendar week but permits such an employee to work more than six consecutive days. P.M. 24, 1956.

Fish and Game Wardens—
Status as peace officers. P.M. 27, 1956.

Full Faith and Credit—
See Judgments—Foreign.

G.

Governor—
Mineral Leases—Approval necessary. P.M. 11, 1957, P.M. 30, 1957.
Pensions—Authority to authorize election by one municipality in county fund for social security coverage. P.M. 16, 1957.
Removal Power—Removal of appointed members of Rehabilitation Commission for continued absence from meetings without justifiable reason rests solely in the Governor under R.S. 34:16-25. P.M. 16, 1956.

Grace, Saying of—
Schools—Prohibited. P.M. 24, 1957.

H.

Health, Department of—
Contracts—Advertising requirements of P.L. 1954, c. 48 may be waived in contract with private hospital where work is of technical or professional nature. F.O. 11, 1957.

Hospitals—
Contracts with State—Advertising requirements of P.L. 1954, c. 48 may be waived in contract with Department of Health where work is of technical or professional nature. F.O. 11, 1957.

Housing—
See Municipalities—Housing.

Husband and Wife—
Support—Accumulated deductions to the credit of employee to be used for support of wife and children deserted by employee. F.O. 20, 1956.

I.

Infants—
Judgment Debtors—Applicability of N.J.S.A. 39:6-35 to a judgment debtor who had not attained age 17 at time of accident. F.O. 19, 1956.

Institutions and Agencies—
Public Contracts—Approval of contracts for buildings or public works not necessary. P.M. 29, 1956.
Wards of the State—Reimbursement of State Treasury. P.M. 22, 1956.

Insurance Company Examiner—
See Conflict of Interest, supra.

Interstate Sanitation Commission—
Jurisdiction—Study of smoke and air pollution. P.M. 32, 1956.

Investments—
Public Funds—Investment of, under R.S. 52:18-25.1. P.M. 2, 1957.

J.

Jersey City Longwood Valley Project—
Jurisdiction and Powers of Water Policy and Supply Council. F.O. 20, 1957.

Jetty and Waterfront Improvements—
See Planning and Development Council.

Judgments—
Foreign—Operation and effect of foreign declaratory judgment in New Jersey to effect change of surname on birth certificate of child born out of wedlock. P.M. 15, 1956.
Unsatisfied Claim and Judgment Fund—Applicability of N.J.S.A. 39:6-35 to a judgment debtor who had not been issued a driver's license at the time of the accident. F.O. 19, 1956.

Juvenile Record—
Effect on Civil Service certification. P.M. 2, 1957.

Juveniles—
Power Vessels—Power of law enforcement officers of Department of Conservation and Economic Development to deal with juvenile offendors of statutes relating to. F.O. 11, 1956.

K.

Korean Conflict—
See National Emergency.

L.

Laboratory Technician License—
See Public Health Officers.

Legalized Games of Chance—
Bingo—Rental of premises. Effect of P.L. 1957, c. 57. F.O. 6, 1957.
Licenses—Rental of premises by qualified organizations does not require a license. F.O. 6, 1957.
Military Reservations—Games of chance conducted on, by organizations not qualified violate Federal law and not New Jersey law. P.M. 1, 1957.

Levy for Unpaid Income Taxes—
See United States.

License Plates—
See Motor Vehicles—Registration Plates.

Licenses—
Milk Dealers—Not to be issued to divisions of corporations. P.M. 33, 1957.
Tree Experts—Not renewable where no longer resident. P.M. 20, 1957.

Limited-Dividend Housing Corporations Law—
See Municipalities.

Liquefied Petroleum Gas Regulations—
Applicability to Refineries. P.M. 36, 1956.

Lloyd, Frank T. Jr.—
Tenure and status as member of the Judiciary under Constitution of 1947. F.O. 3, 1956.

M.

Medical Examiner — Division of Workmen's Compensation—
See Conflict of Interest.

Military Leave—
Retirement while on military leave prohibited. P.M. 21, 1957.
State employee had no right to take promotion examination held while on military leave where eligibility list had expired at time of application. P.M. 25, 1956.

Military Service Voter—
See Elections—Absentee Voting.

Milk Dealer—
Licenses—May not be issued to divisions of corporations. P.M. 33, 1957.

Milk Industry, Office of—
Consumer Resale Prices—Power of Office to fix in Area I. F.O. 23, 1957.

Millstone River—
See Elizabethtown Water Company.

Mines and Minerals—
State lands — Forests — Lease of mineral rights for mining or extraction of minerals from forest park reserves and reservations. P.M. 30, 1957.
State lands—Lease of mineral rights—Bidding unnecessary. P.M. 30, 1957.
State lands—Lease of mineral rights for mining or extraction of certain minerals from Colliers Mills Public Shooting and Fishing Grounds. P.M. 11, 1957.

Mortgages—
Mortgage finance insurance of limited-dividend housing corporation project by Federal Housing Administration. Waiver of restrictions imposed by R.S. 55:16-17. P.M. 14, 1956.

Motor Fuels Tax—
See Taxation.

Motor Vehicles—
Complaints for traffic violations—May not be made under oath before a notary public. P.M. 31, 1957.
Driver's License — Replacement — Charge should not be made where proof of mailing is made but license not received. P.M. 15, 1957.
Driver's License Fees—Refund—Not authorized to refund fees where licensee has died prior to expiration of license. P.M. 3, 1957.
Driver's License Fees—Replacement charge—Where proof of mailing is made but license not received, replacement charge should not be made. P.M. 15, 1957.
Judgments—Infants—Applicability of N.J.S.A. 39:6-35. F.O. 19, 1956.
Nonresident—Applicability of R.S. 39:3-40 to nonresident who has had his driver's license suspended, revoked or refused in his home state. F.O. 23, 1956.
Purchase—Division of Purchase and Property—Lack of power to purchase for New Jersey Agricultural Experiment Station, Delaware River Joint Toll Bridge Commission, and the Palisades Interstate Park Commission. F.O. 13, 1957.
Registration—Merger of corporations requires new registration as N.J.S.A. 39:3-30 voids old registration. P.M. 33, 1956.
Registration Plates—Legality of advising State Use Industries of number of registration plates needed for following year. F.O. 5, 1956.
Security Responsibility Law — Reciprocity Statute—Whether R.S. 39:6-28 (b) and (c) should be regarded as a reciprocity statute. F.O. 21, 1956.
Traffic Violations—Complaint may not be made under oath before a notary public. P.M. 31, 1957.

Municipal Planning Act of 1953—
Applicability of Section 13 to Department of Defense. F.O. 3, 1957.

Municipalities—
Appropriation — Shade Tree Commission — Appropriations for the Commission to be held by the municipal treasurer and disbursed upon warrant or certification by the Commission. P.M. 34, 1956.
City Clerk—City of Elizabeth—Validity of Resolution authorizing additional offices for registration of voters and other duties. P.M. 29, 1957.
Election Districts—Right of County Board of Elections to revise or readjust subsequent to creation by municipalities. P.M. 9, 1956.
Funds—Investment of separate funds in Savings and Loan Association. P.M. 11, 1956.
Housing—Power of limited-dividend housing corporation to waive restrictions imposed by R.S. 55:16-17 in foreclosure proceedings on property mortgage finance insured by Section 220, Housing Insurance Fund through the Federal Housing Administration. P.M. 14, 1956.
Planning—State and Federal aid with regard to. F.O. 9, 1957.
Planning Boards—Jurisdiction to inquire into estimated cost and proposed financing of school construction project submitted under N.J.S.A. 40:55-1.13. F.O. 1, 1957.
Rentals—Rental of police car and street sweeper being used to further a governmental function not binding upon successive governing bodies. F.O. 18, 1956.
Wharves—Propriety for Department of Conservation and Economic Development to allocate $7500 for construction of new bulkheads at municipal wharf of City of Salem on Salem River. P.M. 31, 1956.

N.

National Emergency—
Korean Conflict — Included within phrase "active service in time of war". F.O. 16, 1956.

Navigable Waters—
See Waters and Watercourses.

New Jersey—
Boundary in Delaware River and Delaware Bay. F.O. 22, 1956.

New Jersey Highway Authority—
Bonds—Assent of State officials in connection therewith. P.M. 7, 1956.
Power to construct "thruway feeder road" from Paramus to the New York State line. P.M. 6, 1956.

New York City—
Delaware River—Obligation to maintain release flows under decree of U.S. Supreme Court of 1954. F.O. 24, 1957.

New York Unsatisfied Claim and Judgment Fund—
Recourse afforded to New Jersey residents by New York law not substantially similar to recourse afforded New York residents by New Jersey law. F.O. 15, 1957.

Newark, City of—
Police—Appointments—Propriety of certification by Civil Service Department where appointees have juvenile record, convictions of various degrees, or have been arrested without having been convicted. P.M. 2, 1957.

Notary Public—
Complaint for traffic violation—cannot be made under oath before. P.M. 31, 1957.

O.

Oaths—
See Notary Public.

P.

Palisades Interstate Park Commission—
Automobiles—Purchase—Power to purchase vests with the Commission. F.O. 13, 1957.

Parking Authority—
Motor Fuels Tax Refund to Parking Authority of City of Elizabeth. P.M. 27, 1957.

Peace Officers—
Fish and Game Wardens status as peace officers. P.M. 27, 1956.

Pensions—
Accumulated Deductions — No return when retired under Veterans' Retirement Act. F.O. 12, 1957.
Accumulated Deductions—Used for support of wife and children deserted by employee. F.O. 20, 1956.
Contributions — Positions paying less than $500 cannot be used as a basis for contributions by public employee. F.O. 4, 1957.
Contributions—Temporary employment while on leave of absence—continuance during temporary employment. P.M. 3, 1956.
Coverage—Election by one municipality for social security coverage does not terminate county fund nor allow electors to enroll in Public Employees' Retirement System where other segments of county fund have not voted. P.M. 16, 1957.
Coverage—Public employees earning an aggregate of $500 or more but less than $500 in any single public employment are not eligible to join the Public Employees' Retirement System. F.O. 4, 1957.
Coverage — Retired employee — mandatory membership where re-employed on permanent basis. P.M. 18, 1957.
Death Benefit Coverage for time in military or naval service. P.M. 6, 1957.
Death Benefit Coverage, non-contributory—effective date for members of Public Employees' Retirement System. F.O. 18, 1957.
Designee—Under R.S. 43:15A-41c neither a corporation nor a charitable organization may be designated as a designee since the enactment contemplates living persons only. P.M. 21, 1956.
Election of retirement system—Person may elect to retire under provisions of Veterans' Retirement Act, but is not entitled to return of contributions from Police and Firemen's Pension Fund. F.O. 12 ,1957.
Employer contributions—contributions to be made only on behalf of employees still in service. F.O. 17, 1957.
Employer contributions — municipal liability for pension contributions for veteran employees including elected officials employed as of January 2, 1956. F.O. 19, 1955.
Employer contributions—Whether paid during military service these are to be included within term "accumulated deductions" to be returned to veteran employee under L. 1955, c. 37, section 70. P.M. 26, 1956.
Military Leave—Retirement while on leave prohibited. P.M. 21, 1957.
Military or naval service—Death Benefit Coverage during. P.M. 6, 1957.
Municipal liability for pension contributions for veteran employees including elected officials employed as of January 2, 1955. F.O. 19, 1957.
Referendum—Authority of Governor to authorize referendum by one municipality for social security coverage in county fund. P.M. 16, 1957.
Retired employee — Mandatory membership in Retirement System where reemployed on a permanent basis. P.M. 18, 1957.
Retirement allowance—Elective Office—Continued receipt of retirement allowance during term of office. P.M. 4, 1956.
Retirement allowance—Social Security—Effect of 1956 Social Security Act Amendments upon offset provisions of L. 1954, c. 84 and L. 1955, c. 37. F.O. 15, 1956.
Retirement allowance — Social Security — Teachers' Retirement allowance to be offset by amount received from Social Security where Social Security benefits paid because of public employment subsequent to retirement. F.O. 2, 1956.
Retirement allowance — Social Security Teacher's Retirement allowance not be offset by salary of $1200 received as substitute teacher, where remaining quarters for social security benefits were obtained through private employment. F.O. 14, 1956.
Retirement allowance — Social Security — Veteran as well as non-veteran public employees retirement allowance must be offset by social security benefits based on public employment. F.O. 7, 1956.
Retirement allowance—Teacher's continued receipt under R.S. 43.3-5, as amended, while temporarily employed as substitute teacher overruling disqualification under R.S. 43:3-2, as amended. F.O. 2, 1956.
Social Security — Effect of benefits upon retirement allowance.
See Retirement Allowance—Social Security, under this title, *supra*.
Social Security—Election by one municipality in a county fund for social security coverage does not terminate county fund or allow enrollment in State System. P.M. 16, 1957.
Veterans' Retirement Act—Retirement under does not entitle person to return of contributions to Police and Firemen's Pension Fund. F.O. 12, 1957.

Pennsylvania—
Boundary in Delaware River. F.O. 22, 1956.

Physically Handicapped Children—
State Aid for instruction pursuant to N.J.S.A. 18:14-71.23 payable under N.J.S.A. 18:10-29.35. F.O. 8, 1957

Physicians—
Adoption—Whether recommending an approved adoption agency to prospective adopting parents violates N.J.S. 2A:96-6 and 7. P.M. 13, 1956.
Conflict of Interest regarding position held in the Division of Workmen's Compensation. F.O. 4, 1956.

Planning and Development Council—
Functions. F.O. 6, 1956.
Waterfront and Jetty Improvements—Advice of Council may, but need not be sought, concerning improvements and contracts awarded for such work. Council's power to approve or disapprove of such undertakings. F.O. 6, 1956.

Plant Management Commission of Paterson—
Water rights, concerning. F.O. 20, 1957.

Police—
Newark—Certification by Civil Service where appointees have juvenile records, convictions of various degrees, or have been arrested without having been convicted. P.M. 2, 1957.
Power Vessels—Power to serve summons and make arrests for violations in regard to. F.O. 10, 1956.
Raritan Township—Civil Service status. P.M. 26, 1957.

Weapons—Securing of permit upon purchase. F.O. 17, 1956.

Poultry—
Conflict of Interest between state employment in pullorum-typhoid testing and bird selection and similar employment after hours. F.O. 16, 1957.

Power Vessels—
Arrest with or without warrant—power of local police officers to make under statutes dealing with. F.O. 10, 1956.
Juvenile Offenders—Power of Law enforcement officers of Department of Conservation and Economic Development to deal with juvenile offendors of statutes relating to power vessels. F.O. 11, 1956.

Prayer—
See Grace, saying of.

Process—
Service—Secretary of State or his chief clerk have no authority to accept service of process within N.J.S. 2A:15-26 and R.S. 14:13-14. F.O. 7, 1957.
Summons—Power of local police officers to serve and make arrests under statutes dealing with power vessels. F.O. 10, 1956.

Public Contracts—
State, contracts with—Advertising requirements may be waived in contract between Department of Health and private hospital where work is of technical or professional nature. F.O. 11, 1957.
State, contracts with—approval by agency other than Division of Purchase and Property not necessary. P.M. 29, 1956.
State, contract with—Condition as to acceptance of performance by agency which did not execute the contract is valid. P. M. 29, 1956.
State, contract with—Director of Division of Purchase and Property without power to enter into contract for building on installment basis. F.O. 10, 1957.
State, contracts with—Lease of mineral rights—bidding unnecessary. P.M. 30, 1957.

Public Employees—
County Board of Elections—Salaries—Power to establish rests with Board. P.M. 34, 1957.
Municipal—Municipal liability for pension contributions for veteran employees, including elected officials, employed as of January 2, 1955. F.O. 19, 1957.
Municipal—Elected Officials—Municipal liability for pension contributions for veteran employees including elected officials employed as of January 2, 1955. F.O. 19, 1957.
Retired—Reemployment—Membership in Retirement System mandatory. P.M. 18, 1957.
State—Conflict of Interest—Department of Agriculture employees engaged in pullorum-typhoid testing and bird selection program are not permitted to engage in similar work after hours. F.O. 16, 1957.
State—Military Leave—No right to take promotion examination held while on military leave where list had expired at time of application. P.M. 25, 1956.
State—Salaries—Levy by Federal government upon salaries to satisfy unpaid Federal income taxes is unwarranted in law. F.O. 12, 1956.
State—Temporary Employment—Person on leave of absence temporarily employed by another department must continue contributions to Pension Fund. P.M. 3, 1956.
Veterans—Whether employer contributions paid during term of military service are to be included within term "accumulated deductions" returnable to veteran employee under L. 1955, c. 37, section 70. P.M. 26, 1956.
Veterans and non-veterans—Effect of social security benefits on retirement allowance. F.O. 7, 1956.

Public Employees Retirement System—
See Pensions.

Public Health Officers—
Laboratory Technician License—Failure to file for license within one year after effective date of L. 1950, c. 119, precludes the issuance of such license at the present time. P.M. 17, 1956.

Public Housing and Development Authority—
See Municipalities—housing.

Public Lands—
State—Lease of mineral rights — Colliers Mills Public Shooting and Fishing Grounds. P.M. 11, 1957.
State—Lease of mineral rights—State forest park reserves and reservations. P.M. 30, 1957.
State—Liability of State for taxes where acquired by condemnation or purchase. P.M. 23, 1957.

Purchase and Property, Division of—
Contracts—Approval of contracts for buildings or public works by Department of Institutions and Agencies or Department of Education is not necessary and it is valid to condition payment for public contract on acceptance of performance by party which did not execute contract on behalf of the State. P.M. 29, 1956.
Director — Contract for building — Lack of power to enter contract on installment basis. F.O. 10, 1957.
Purchasing Functions — Automobiles — No power to purchase for New Jersey Agricultural Experiment Station, Delaware River Joint Toll Bridge Commission, Palisades Interstate Park Commission. F.O. 13, 1957.
Purchasing Functions—Rutgers University—Vested in Board of Governors by L. 1956, c. 61. F.O. 9, 1956.

R.

Raffles—
See Legalized Games of Chance.

Railroads—
Release—Propriety of signing by state employee of release prior to entering upon railroad property for assessment purposes. P.M. 8, 1957.

Raritan River—
See Elizabethtown Water Company.

Real Property—
Taxation—Veterans Exemption Act.
See Taxation—Veterans.

Refineries—
Applicability of Liquefied Petroleum Gas Regulations. P.M. 36, 1956.

Rehabilitation Commission—
Appointed Members—Removal by Governor. P.M. 16, 1956.

Religion—
Elections—Religious scruples regarding voting on day of Primary election does not entitle person to Absentee Ballot. F.O. 2, 1957.
Schools—Saying of Grace prohibited. P.M. 24, 1957.

Residence—
Renewal of Tree Expert license based on. P.M. 20, 1957.

Revenues—
Licenses—Submerged Lands—Revenues derived to be applied to School Fund Income Account. F.O. 13, 1956.

Riparian Lands—
Bulkhead and Pierhead Lines—Power to conduct surveys regarding and to establish as successor to Board of Commerce and Navigation is in Director of the Division of Planning and Development. P.M. 35, 1956.
Deeds—Lagoon clause in deed for grant of riparian lands by the State is enforceable. P.M. 30, 1956.
Grants—Approval of Director of Division of Planning and Development requisite where bulkhead or pierhead lines fixed in grant or lease. P.M. 35, 1956.

Lagoon Clause—See Deeds under this heading.

Rutgers University—
Board of Governors—Appointment of Board of Managers of Agricultural Experiment Station. P.M. 9, 1957.
Board of Governors—Purchasing functions formerly vested in Division of Purchase and Property. F.O. 9, 1956.

S.

Salaries—
See Public Employees.

Savings & Loan Associations—
Municipalities—Power to invest separate funds in Savings & Loan Associations. P. M. 11, 1956.

Schools—
Construction Project—Jurisdiction of Planning Board to inquire into cost and financing of. F.O. 1, 1957.
District Clerk—Designation changed to Secretary. F.O. 1, 1956.
District Secretary—See District Clerk under this title, supra.
Elections—See Elections, supra.
Emergency Aid—Use of in school districts other than that for which allocated. P.M. 7, 1957.
Grace, Saying of—Prohibited. P.M. 24, 1957.
School Districts — Emergency Aid — Use in district other than that for which allocation made. P.M. 7, 1957.
School Fund Income Account—Revenue derived from licenses issued by Division of Navigation for submerged lands under tidewaters to be applied to. F.O. 13, 1956.
School Fund Investment Account—See School Fund Income Account under this title.
State Aid—Physically Handicapped Children —Payable under N.J.S.A. 18:10-29.35 for instruction pursuant to N.J.S.A. 18:14-71. 23. F.O. 8, 1957.
Teachers—Retirement. See Pensions—Retirement Allowance under separate title, supra.

Secretary of State—
Associations not for profit—Amendments to Certificate of Incorporation—Filing. P.M. 19, 1957.
Service—Secretary of State or his chief clerk have no authority to accept service of process within N.J.S. 2A:15-26 and R.S. 14:13-14. F.O. 7, 1957.

Security Responsibility Law—
See Motor Vehicles.

Shade Tree Commission—
Appropriations—To be held by municipal treasurer and disbursed upon warrant or certification by the Commission. P.M. 34, 1956.

Smoke Control—
See Interstate Sanitation Commission.

Social Security—
See Pensions, supra.

Society for Establishing Useful Manufacturers.
Water rights, concerning. F.O. 20, 1957.

State—
Contracts with. See Public Contracts.
Funds—Effect of collateral on depositor's claim in the event of the insolvency of a bank. P.M. 23, 1956.
Treasury—Reimbursement of Treasury for funds expended for support of ward from funds acquired by ward when expenditures were no longer being made. P.M. 22, 1956.
Wards—Reimbursement of State Treasury for funds expended for support of ward from funds acquired by ward when expenditures were no longer being made. P.M. 22, 1956.

State Aid—
Municipal Planning and Zoning. F.O. 9, 1957.
Physically Handicapped Children — Instruction pursuant to N.J.S.A. 18:14-71.23 payable under N.J.S.A. 18:10-29.35. F.O. 8, 1957.

State Forest Reserves—
See Public Lands—State.

State Officials—
New Jersey Highway Authority Bond Issue—Assent of State Officials in connection therewith. P.M. 7, 1956.

State Treasurer—
Escheat—Repayment only upon sufficient proof of title. P.M. 22, 1957.
Sale of Property — Camden Armory — Maintenance of separate account for proceeds of said sale. P.M. 2, 1956.

State Use Industries—
Legality of Division of Motor Vehicles advising State Use Industries of number of registration plates needed for coming year. F.O. 5, 1956.

Statutes—
Effect of a statute purporting to amend a repealed statute. F.O. 8, 1956.
Reciprocity — Security Responsibility Law — Whether R.S. 39:6-28(b) and (c) should be regarded as a reciprocity statute. F.O. 21, 1956.

Support—
See Husband and Wife.

T.

Taxation—
Domicile—Requisite to granting of veteran's exemption. Duration. P.M. 36, 1957.
Financial Business Tax Act—Corporation not in competition with national banks not subject to tax under. P.M. 8, 1956.
Financial Business Tax Act — Discounting and Negotiating — Purchasing included within term. P.M. 8, 1956.
Motor Fuels—Refund to Parking Authority of City of Elizabeth. P.M. 27, 1957.
Railroads—Propriety of signing release by State employee prior to entering upon railroad property for assessment purposes. P M. 8, 1957.
State Lands—Liability of State for taxes where acquired by condemnation or purchase. P.M. 23, 1957.
Veterans—Domicile in New Jersey requisite to granting of exemption. Duration necessary. P.M. 36, 1957.
Veterans—Eligibility for veteran's tax exemption for duty subsequent to commencement of Korean conflict. F.O. 16, 1956.

Teachers' Pension and Annuity Fund—
See Pensions, supra.

Technical or Professional Work—
Advertising requirements of P.L. 1954, c. 48 may be waived in public contract where work is of. F.O. 11, 1957.

Temporary Disability Benefits Law—
Retroactive effect of court decision upon prior inconsistent rule. P.M. 1, 1956.

Tenement Houses—
Definition of cooking upon the premises. F.O. 14, 1957.

Term of Office—
Civil Service Commission. P.M. 18, 1956.
Lloyd, Frank T., Jr. F.O. 3, 1956.

Thruway Feeder Road—
See N. J. Highway Authority.

Toy Pistols or Guns—
See Weapons.

Tree Surgeons—
See Licenses—Tree Experts.

U.

Unclaimed Property—
See Escheat.

Unemployment Compensation Law—
Appeals—Costs—Precluding taxing of costs to employee where he fails to prevail in Superior Court, Appellate Division. P.M. 10, 1957.

Unfair Cigarette Sales Act—
See Unfair Competition.

Unfair Competition—
Cigarette Sales—Gifts by manufacturer not within prohibition of Unfair Cigarette Sales Act. F.O. 22, 1957.

United States—
Income Taxes—Levy upon salaries of State employees to satisfy unpaid income taxes is unwarranted in law. F.O. 12, 1956.

Unsatisfied Claim and Judgment Fund—
Charitable and eleemosynary organizations—Law does not exempt these organizations from payment to Fund. P.M. 12, 1957.
Claims—Payment by defendant to claimant prior to payment from funds to be deducted from amount payable from fund. P.M. 10, 1956.
Insurer—Doing business in New Jersey—Alternative of paying fee for uninsured vehicle. P.M. 28, 1957.
Judgment Debtor—See Judgments.
New York law, L. 1956, c. 655, does not provide recourse to N.J. residents substantially similar to the recourse afforded N.Y. residents by the N.J. Law. F.O. 15, 1957.
Resident temporarily out of State—Liability policy taken out with company transacting business in New Jersey—Necessity for. P. M. 28, 1957.
Uninsured Motor Vehicle—Necessity of insurer doing business in New Jersey—Alternative payment for. P.M. 28, 1957.

V.

Veterans—
Disabled World War II—Persons who were in service on or before September 2, 1945, who were disabled not later than 89 days after September 2, 1945, while on active duty and other requirements under N.J.S. A. 11:27-1. F.O. 5, 1957.
Municipal liability for pension contributions for veteran employees including elected officials employed as of January 2, 1955. F.O. 19, 1957.
See also Public Employees.
Tax Exemption—Korean Conflict—Eligibility for veteran's tax exemption for duty subsequent to commencement of Korean conflict. F.O. 16, 1956.
World War II—A person serving at least a 90-day period in the Armed Forces commencing on or before September 2, 1945, is considered a veteran for purposes of the Civil Service Statutes under P.L. 1957, c. 21. F.O. 5, 1957.

Veterans' Exemption Act—
See Taxation—Veterans.

Veterans' Retirement Act—
See Pensions.

Vital Statistics—
Birth Certificate—Power of Bureau of Vital Statistics to change surname of child born out of wedlock based on a declaratory judgment of a foreign court. P.M. 15, 1956.

W.

Water Skiing—
Regulation of. P.M. 32, 1957.

Waterfront and Jetty Improvements—
See Planning and Development Council.

Waters and Watercourses—
Delaware and Raritan Canal—Diversions. See Delaware River, Diversions under this heading.
Delaware River—Diversions—Water diverted from Delaware and Raritan Canal for use in Delaware River watershed not to be applied against allocation from Delaware River for use outside watershed. P.M. 17, 1957.
Delaware River—New Jersey's boundary in Delaware River and Delaware Bay. F.O. 22, 1956.
Delaware River—New York City must literally comply with decree of U. S. Supreme Court as to water diversion until modified. F.O. 24, 1957.
Delaware River—Release flows by New York City under decree of U. S. Supreme Court of 1954. F.O. 24, 1957.
Delaware River—River Master—Authority of, to permit New York City to reduce release flows. F.O. 24, 1957.
Diversions—Delaware and Raritan Canal—Not to be applied against allocation fixed at 100 m.g.d. from Delaware River. P.M. 17, 1957.
Elizabethtown Water Company—Construction of grant of 1918. P.M. 35, 1957.
Grants — Elizabethtown Water Company — Construction of Grant of 1918. P.M. 35, 1957.
Jersey City Longwood Valley Project—Jurisdiction and powers of Water Policy and Supply Council. F.O. 20, 1957.
Power Vessels—Power of local Police officers to serve summonses and to make arrests in connection with. F.O. 10, 1956.
Submerged Lands under tidewater—Revenue from licenses issued for to be applied to School Fund Income Account. F.O. 13, 1956.

Submerged Lands under tidewater—Title to former islands now submerged through erosion under tidewaters of Atlantic Ocean to a seaward limit of three miles vests in the State. P.M. 25, 1957.
Water Skiing—Regulation of. P.M. 32, 1957.
Water Supply—Water Policy and Supply Council—Power to impose limit on diversion of water for water supply purposes in

accordance with regional distribution quotas. P.M. 5, 1956.
Wharves—City of Salem—Salem River. Authority of Dept. of Conservation and Economic Development to allocate money for new bulkheads. P.M. 31, 1956.
Weapons—
Police—Securing of permit upon purchase. F.O. 17, 1956.
Toy Pistols or Guns—Sale or offer for sale of, in which explosive paper caps may be used is in violation of R.S. 21:3-2. P.M. 19, 1956.
Wharves—
Municipal Wharves—City of Salem—Salem River—Authority of Department of Conservation and Economic Development to allocate money for new bulkheads. P.M. 31, 1956.
Words and Phrases—
Cooking upon the premises—As used in N.J.S.A. 55:1-24. F.O. 14, 1957.
In any one week—As used in N.J.S.A. 34:2-24. P.M. 24, 1956.
Milk Dealer—"Person" as defined in N.J.S.A. 1:1-2 is to be applied in definition of, in N.J.S.A. 4:12A-1 and 28. P.M. 33, 1957.
"Obligations issued by a Federal land bank" as used in N.J.S.A. 17:9A-175A. P.M. 4, 1957.
"Public Inspection" as used in R.S. 19:31-10 includes the right to copy voting records from the register. P.M. 5, 1957.
"Reasonable rules and regulations" as used in R.S. 19:31-10 may be promulgated for safekeeping of records and prevention of interference with official duties. P.M. 5, 1957.
Workmen's Compensation—
Conflict of Interest between positions held as Insurance Company Examiner and as a Medical Examiner in the Division of Workmen's Compensation. F.O. 4, 1956.

Z.

Zoning—
Ordinances—State and Federal aid with regard to drafting of. F.O. 9, 1957.