MARCH 7, 1950.

MR. FRANK B. BAER, *Secretary,*
Prison Officers' Pension Fund,
1604 Greenwood Avenue,
Trenton 9, New Jersey.

FORMAL OPINION—1950. No. 25.

MY DEAR MR. BAER:

I have your letter of the 23rd ult. with enclosures relative to the application of one Perkins for retirement on pension from your Prison Officers' Pension Fund. Your letter states that Mr. Perkins is 52 years of age and has only had fifteen years of service. The question upon which you seek my opinion is whether Mr. Perkins is eligible for pension.

The application has been signed for Mr. Perkins by his wife, as his guardian, and from the enclosures I gather that he is under confinement in a mental institution.

Your Prison Officers' Pension Act (Chapter 220 of the Laws of 1941) provides for a pension to a prison officer who has served continuously or in the aggregate as such for a period of twenty years, and who shall have attained the age of 55 years, but there are other circumstances under which a prison officer may be retired. Under Section 6 of your act, a prison officer who has received permanent disability in the performance of his duty, may be retired on pension. The section then reads as follows: "Where, however, any such prison officer shall desire to retire by reason of injury or disease, such prison officer shall make application in writing to the pension commission for such retirement;" whereupon the pension commission shall proceed in accordance with the requirements of that section, that is, by calling to their assistance the aid of a regularly licensed and practicing surgeon or physician, and the applicant doing likewise, and your commission is authorized to call in other persons in respect to the matter of granting the pension. The determination of the commission as to whether a pension is to be allowed or not must be by resolution. The statute further provides that in the event that the two surgeons or physicians called in as hereinbefore mentioned shall fail to agree upon the physical condition of the applicant, then your pension commission is authorized to call a third and disinterested licensed and practicing surgeon or physician and the determination of the majority of the three surgeons or physicians, who shall be first duly sworn, shall be reduced to writing and signed by them, and your pension commission shall consider the same in reaching their decision.

In the case of *Cummings* vs. *Police Officers' Pension Fund,* 121 N. J. Law Reports, page 129, our Court of Appeals by unanimous vote of fifteen of its members had before it an application for a pension under Chapter 160 of the Laws of 1920 providing for the retirement of policemen and firemen in municipalities, where the language used is practically identical with the language used in Section 6 of your act where an application is received from a member who desires to retire by reason of injury or disease. The Court of Appeals said "We think it clear that the petitioner could only succeed by showing that his disability, which is admitted, arose out of his performance of duty as a policeman. The words injury and disease are used in the same connection and both relate back to the disability received in such performance above recited".

As you know, your act, in Section 6, speaks of permanent disability in the performance of duty and is followed by the clause which we are construing where a person

desires to be retired by reason of injury or disease. It is clear, therefore, that the injury or disease upon which an application for retirement is based must be an injury or disease resulting from his performance of duty.

With respect to the application, I observe a number of certificates from which I gather that Mr. Perkins is ill and may never be able to return to duty. In my opinion, if his present physical condition resulted from the performance of his duties as a prison officer, then and in that event, his application for retirement having been received by your Prison Officers' Pension Commission, that commission should proceed in accordance with the requirement of Section 6 of your act and call to their aid a physician or surgeon and the applying member should do likewise and thereupon your commission can make a determination in accordance with the further requirements of that section.

The papers which you enclosed are returned herewith.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

Encs.
TB:B

APRIL 17, 1950.

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

FORMAL OPINION—1950. No. 26

DEAR DOCTOR ERDMAN:

As we understand it, in connection with the reorganization of the State Department (Forestry Division) you state that an officer of that department originally was discharged from his initial period of service in the armed forces of the United States in 1946; that he subsequently returned to the department for a short period of duty and thereafter accepted an offer of further service with the armed forces, and continues in the military service at the present time.

You ask if the department is required to hold open for an employee on leave of absence with the armed forces, who has re-enlisted after returning from his initial service, the identical position which he held before entering military service.

Chapter 327 of the Laws of 1942 specifies that a person entering the service of the armed forces of the United States in time of war must be given leave of absence for the period of military service and for a period of three months after receiving his discharge from such service.

In this case, we are considering an individual who voluntarily re-enlisted and thus made it impossible for him to return to his original employment from which he received a leave of absence. It is hard to believe that the legislature ever intended that Chapter 327 should apply to a situation such as we are considering. The voluntary