

re-enlistment was undoubtedly to the benefit of the employee and such voluntary enlistment cannot thwart the clear mandate of the statute that when the individual in question was discharged from the military service, he must thereafter return to his original place of employment.

In so ruling, this office is mindful that Chapter 72, Laws of 1942, defines the meaning of the words "present war" when used or named within this state should mean so long as the United States of America continues in the present war with the governments of Japan, Germany and Italy. Nevertheless, we feel that this situation is not applicable in light of the fact that the legislature has provided otherwise by the terms of Chapter 327 of the Laws of 1942.

This office has, by formal opinion dated February 11, 1949, addressed to John A. Wood 3d, Secretary of the Teachers' Pension and Annuity Fund, interpreted the statute involved in the manner herein set forth.

Very truly yours,

THEODORE D. PARSONS,  
*Attorney General,*

By: JOHN W. Griggs,  
*Deputy Attorney General.*

MARCH 13, 1950.

STATE PAROLE BOARD,  
State Office Building,  
Trenton, New Jersey.

FORMAL OPINION—1950. No. 27.

GENTLEMEN:

It appears that you desire to be advised as to whether the State Parole Board is empowered by law to consider, for release on parole, a prisoner serving a life sentence, who originally had been sentenced to death and whose death sentence had been commuted by action of the Governor to a sentence of imprisonment for life.

It is our opinion and we so advise you that the State Parole Board cannot release upon parole such a prisoner serving a life sentence after commutation of a death sentence, for we construe the pertinent statutes to reflect a legislative intent that the power to release such a prisoner from confinement shall at all times reside in the Governor.

"The pardoning power is generally regarded as not being inherent in any officer of the state, or any department of the state, but the power is one of the government, in the people, who may confer it on any officer or department as they see fit." (46 C. J. 1184 and foot-note cases).

In New Jersey, the people have determined that the pardoning power shall be vested in the Governor and this by virtue of Art. V, Sec. II, par. 1, of the State Constitution, wherein it is provided that "The governor may grant pardons and reprieves in all cases other than impeachment and treason and may suspend and remit fines and forfeitures."

"Although there is authority to the contrary, it is generally held that the general power to pardon necessarily contains in it the lesser power of remission and commutation. If the whole offense may be pardoned, a fortiori a part of the punishment

may be remitted or the sentence commuted." (46 C. J. 1197). In this jurisdiction, the late Chancellor Walker in his exhaustive opinion in *In re Court of Pardons* 97 N. J. Eq. 555, expressed the view that the power to pardon did in fact carry with it the power to remit a part of the penalty without a complete pardons of the entire offense.

Despite the foregoing, the Legislature, by the provisions of Chapter 83, P. L. 1948, apparently deemed it necessary to implement the constitutional authority of the Governor in matters of executive clemency and in Section 1 of that act restated the exact language of the Constitution, above cited. An interesting provision is found in Section 4, which, in our judgment, is expressive of a legislative intent that the eventual release from confinement of a prisoner whose death sentence has been commuted to one of life shall be at the discretion of the Governor, and we quote the section as follows:

"The principal keeper of the State Prison, upon receiving such order, (of commutation of sentence of death) shall refrain from executing the sentence of death and shall detain said prisoner for the term for which the sentence was commuted *but such term of imprisonment shall not be remitted or commuted except by the governor.*"

Any authority that the State Parole Board might have to parole such a prisoner serving a commuted sentence of life would derive from Section 11, Chapter 84, P. L. 1948, as follows:

"Any prisoner serving a sentence of life shall be eligible for consideration for release on parole after having served 25 years of his sentence, less commutation time for good behavior and time credits earned and allowed by reason of diligent application to work assignments."

The above cited sections of the respective statutes, both of which were enacted simultaneously, having been approved by the Governor on May 28, 1948, must be deemed in *pari materia*. The principle of law governing a situation of this kind is aptly stated by Justice Heher in the case of *In re Huyler* 133 N. J. L. 171, as follows:

"It is a primary canon of construction that the provisions of statutes in *pari materia* shall be reconciled and harmonized, if possible, into a consistent, homogeneous whole. *Crater vs. County of Somerset*, 123 N. J. L. 407; *Broderick vs. Abrams*, 116 Id. 40. This rule is in aid of the discovery of the legislative intent, and its application is circumscribed accordingly. The effectuation of the legislative will is the end to be served in the exposition of statutes; and this of necessity calls for an accommodation of apparent conflicts to advance the essential statutory policy, giving to each clause a meaning not in opposition to the related provisions, if that is reasonably consonant with the terms employed to voice the legislative design. The literal import of the terms oftentimes gives way to the outstanding legislative purpose, considering the particular statute in relation to statutes in *pari materia*."

It now becomes necessary to apprehend the legislative will that impelled the enactment of Chapter 83, P. L. 1948, which, save for the prohibition in Section 4, is merely a restatement of the constitutional power of the Governor in matters of executive clemency and is declaratory of the decision of Chancellor Walker that the power to pardon includes the right to commute a death sentence to one of life imprisonment.

It is true that provision is made in the same law for reference by the Governor, of applications for commutation and restoration of suffrage, to the State Parole Board for review and recommendation but this is merely procedural, for the Governor in the exercise of his constitutional authority to grant pardons and reprieves and remit fines and forfeitures is not bound by law to refer such matters to another agency for such would be an unwarranted legislative abridgment of a constitutional grant to the Governor.

Therefore, the prohibition contained in Section 4, in our opinion, is an expression of the people through the Legislature that the disposition to be made of a prisoner whose sentence of death has been commuted to one of life by the Governor shall be determined at all times by the Governor. In short, we perceive no legislative intent that such a prisoner is within the purview of Section 11, Chapter 84, P. L. 1948, above cited and accordingly is not eligible for parole consideration thereunder for the reasons above stated, and further because he is not serving a sentence of life imposed by the court but rather a commuted sentence of life achieved by grace of the Governor's intervention in the exercise of his sovereign power of clemency.

This opinion violates no constitutional rights or privileges of such a prisoner for he may, in the discretion of the Governor, be released on a further conditional pardon to partake of a release in the nature of a parole, with conditions attached, in exactly the same manner as he might be released by the State Parole Board. One who has partaken of executive clemency may again be the recipient of further beneficence for "the commutation of a death sentence to life imprisonment does not exhaust the power of commutation vested in the Governor and preclude a subsequent commutation to a limited term of years." (46 C. J. 1199).

We are not unmindful of the fact that in some jurisdictions it has been determined by judicial decision that the commutation of a death sentence to one of life by the Governor has the same legal effect as though the life sentence had been imposed originally for the life term. We have examined these cases and in no situation has there been a legislative prohibition similar to that in Section 4, Chapter 83, P. L. 1948.

Were it not for the existence of Section 4 aforesaid, we would adopt the view that your Board could treat with a commuted life term prisoner under Section 11 of the law establishing your Board.

However to do so, in view of the enactment of Section 4, would be to find that the section is without meaning but such an interpretation is repugnant to the primary canons of statutory construction.

"A statute is a solemn enactment of the State acting through its legislature and it must be assumed that this process achieves an effective and operative result. It cannot be presumed that the legislature would do a futile thing." (Sutherland-Statutory Construction, Vol. 2, par. 4510).

As demonstrated above, we feel that the primary purpose of Section 4 supra was to prevent any State officer or agency, save the Governor, from releasing a commuted life sentence prisoner on parole or otherwise to prevent the shortening of such sentence, except by direct act of the Governor. If Section 4 does not have the purpose and meaning that we have ascribed to it, then it can have no meaning whatsoever for no other intent can be attributed thereto. This for the reason that the Constitution of New Jersey limits the power to remit or commute a sentence to the Governor, which right cannot be abridged or enlarged by the Legislature, and cannot conceivably be vested concurrently, by statute, in some other State officer or agency.

While it is true that the word "parole" was not specifically alluded to in said Section 4, nevertheless, we feel that the Legislature intended by the use of the phrase "remitted or commuted" to include, in the broader sense, the term "parole" and any other method that might be used to shorten the period of confinement of a commuted life term prisoner.

For the above reasons, and to give meaning and purpose to Chapter 83, P. L. 1948, we are of the opinion that it is part of the constitutional and legislative policy of this State that the Governor shall at all times control the destiny of a prisoner whose sentence of death has been commuted to one of life, and this particularly in view of the fact that such prisoner will be denied none of the rights or privileges which would be available to him if your Board were permitted to consider his case for purposes of parole.

Very truly yours,

THEODORE D. PARSONS,  
*Attorney General,*

By: EUGENE T. URBANIAK,  
*Deputy Attorney General.*

ETU:HH

MARCH 13, 1950.

DR. DANIEL BERGSMA,  
*State Commissioner of Health,*  
Department of Health,  
Trenton, New Jersey.

FORMAL OPINION—1950. No. 28.

MY DEAR DR. BERGSMA:

I have your letter of the 7th instant stating that at the present time your department has eight nurses with permanent status who receive less than 50% of their total salary from State funds and that the balance of their salary may be made up from funds of one or more local communities in whose area they carry out nursing functions of your department.

The question which you have presented for consideration is whether these nurses should be compelled to join the State Employees' Retirement System. The answer is in the affirmative. These nurses undoubtedly are civil service employees, and by the State Employees' Retirement System act such employees are required to be members of the Retirement System. I therefore advise you to certify the names of these employees to the State Employees' Retirement System.

I note your observation that your department was advised by the Retirement System on March 6, 1946 that these nurses could be members of the Retirement System but that such membership was not compulsory. This determination may have been reached on the assumption that these employees were not full time employees of the State, but I think this reasoning is unsound. Undoubtedly, the first duty of these