

represents but a small portion of the inmate population as a whole for it is inconceivable that a great number of prisoners would die under conditions of pauperism while in confinement. The benefit of the burial plot flows to this small percentage and it cannot be said that it is maintained for the "use, benefit and general welfare of the inmate population as a whole."

Since these monies constitute a fund in the nature of a trust, the expenditure therefrom must be in strict compliance with the spirit and letter of the law for the purposes intended by the statute. The use which is proposed is not properly within the provisions of the act.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: EUGENE T. URBANIAK,
Deputy Attorney General.

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SEPTEMBER 22, 1950.

HON. FRANK W. SHERSHIN,
80 First Street.
Clifton, New Jersey.

FORMAL OPINION—1950. No. 62.

DEAR ASSEMBLYMAN SHERSHIN:

You have inquired whether the warden of your County jail who has been the warden for only five years but who has been in the service of the County for a total period of 19 years, not continuously, and not in the same position, would be eligible for a pension under Chapter 228, Laws of 1949 (Revised Statutes 43:9-5.1).

The facts as submitted by you did not state that the warden is physically incapacitated but because the determination of his eligibility for pension is requested under the provisions of this statute, it must be assumed that he is. Your real concern then is whether the warden qualifies as to years of service. The answer is yes. Chapter 228 of the Laws of 1949 provides that:

"The Board of Chosen Freeholders of any county may, in its discretion, adopt a resolution providing for the payment of a pension to a warden or keeper of the county jail, who has been in the employ of such county for a period of not less than sixteen years and who has become physically incapacitated for further service to the county where such physical condition was caused or aggravated by injuries received while on duty in the service of the county."

The purpose of this statute is to authorize the pensioning of wardens or keepers of county jails in certain limited cases. The pensioning under this statute is permissive and is not mandatory. By the terms of the statute three conditions are imposed which must be met. First, that the warden or keeper must have been in the employment of the County for not less than 16 years. Second, that the warden or keeper

be now physically incapacitated for further service to the county. Third, that such physical condition was caused or aggravated by injuries received while on duty in the service of the county.

As to the first condition, it is not a requirement that the 16 years were passed in the office of warden or keeper nor is it a requirement that the employment be continuous for the 16 years. The statute says: "... who has been in the employ of of such county for a period of not less than sixteen years . . ." Had the legislative intent been that the 16 years be continuous and in the same office they would have so provided. In providing for pensioning of county clerks the Legislature said: "... who shall have held such public office for thirty years continuously . . ." (R. S. 43:9-19). In providing for the pensioning of superintendents of county lunatic asylums or county hospitals for mental diseases the Legislature said "... who has served continuously for twenty-five years as such superintendent . . ." (R. S. 43:9-22), and in providing for the pensioning of secretaries of county boards of taxation the Legislature said: "... who was employed as such secretary for twenty years or more . . ." (R. S. 43:9-17).

In all of the other pension statutes examined the Legislature specifically required that the employment be continuous for a certain number of years in the same office or employment. The same would have been required by this statute if that had been the intent of the Legislature. As we interpret this statute any employment by the county prior to the taking of the position of warden or keeper can be counted in computing the necessary 16 years to qualify thereunder.

As to conditions two and three, the burden of proof is on the warden to establish that he is physically incapacitated for further service to the county and that the physical condition was caused or aggravated by injuries received while in the employ of the county.

In advising you that it is our opinion that the warden of your county jail is eligible for pension under the provisions of Revised Statutes 43:9-5.1 (Chapter 228 of the Laws of 1949) you must bear in mind that we have assumed that the warden is physically incapacitated and can sustain the burden of proof as to the cause as required by the statute.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: HERMAN M. BELL, JR.
Deputy Attorney General.

HMB :rk