

I am informed that the Army authorities at Fort Dix have taken the view that the lease in question does not terminate the general military use of the property leased. The Federal courts have frequently indicated that the view of the military authorities on the subject will at least be entitled to great weight. See *Bowen vs. Johnston, supra*, 306 U. S. at pp. 29-30; *Benson vs. United States, supra*, 146 U. S. at p. 331; *Rogers vs. Squier, supra*, 157 Fed. 2d at p. 950.

It has been suggested that the local authorities have the power to tax property in the housing development under the paragraph of the lease pertaining to payment of taxes by the lessee. An examination of that clause, however, reveals no support for such a contention. The clause merely provides for payment of such taxes and assessments as may be properly imposed with respect to the leased property, and for an adjustment in the rent "in the event" that any taxes are imposed with the consent of Congress. That event has not occurred, according to my examination of the law, and it follows that no taxes on that property (other than the leasehold interest of the lessee therein) may legally be assessed by the local governmental bodies.

The foregoing reasons lead to the conclusion that children residing in the proposed housing development at Fort Dix do not reside in a local school district within the meaning of N. J. S. A. 18:14-1.

Very truly yours,

THEODORE D. PARSONS,  
*Attorney General.*

By: THOMAS P. COOK,  
*Deputy Attorney General.*

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NOVEMBER 28, 1951.

HON. PERCY A. MILLER, JR.,  
*Commissioner of Labor and Industry,*  
State House,  
Trenton 7, N. J.

RE FORMAL OPINION—1951. No. 38.

*Regulation of Private Employment Agencies and the Application of Fee Schedule Under Title 34, Chapter 8, of the New Jersey Revised Statutes.*

DEAR COMMISSIONER:

Your letter of October 4, 1951, requesting an opinion as to the manner of the charging of fees by a nurses registry under certain circumstances is acknowledged, and opinion rendered as follows:

STATEMENT OF FACTS.

An individual trading as a nurses registry, operating in Ridgewood, Bergen County, New Jersey, is duly licensed under New Jersey Revised Statutes 34:8-1 to 34:8-23, inclusive, to operate as a private employment agency, and has filed with the Commissioner of Labor and Industry a schedule of fees proposed to be charged by the agency. Under the proposed schedule practical nurses must pay \$60.00 for

an annual registration fee, payable in one sum, or in semi-annual or quarterly installments. For part time services, applicants for employment must pay 5% of each case until the \$60.00 fee has been paid (payable weekly).

The applicant registered with the agency, paid fees in the amount of \$45.00 to cover a nine-month period. Under the alternate provisions of the fee schedule providing for part time services the number of placements of this applicant for the period of January 1, 1951, to July 31, 1951, when computed on a 5% basis, would entitle the agency to \$52.50 instead of the \$45.00 which had been paid on account of the annual registration fee.

It also appears that the agency was closed for summer vacation between July 15 and July 30, 1951, and that during that two-week period the applicant secured employment from a previous employer originally obtained through the subject agency. The agency in computing its fee on the 5% basis includes a charge for this placement.

#### QUESTIONS PRESENTED.

The questions propounded in your letter of October 4, 1951, are:

No. 1. Is it permissible under the provisions of the New Jersey Revised Statutes 34:8-1 to 34:8-23 for an employment agency or nurses registry to charge "registration" fee payable either on an annual basis or on the basis of quarterly or semi-annual payments?

No. 2. Is it permissible under the provisions of the New Jersey Revised Statutes above referred to for an employment agency or nurses registry to charge "registration" fee payable either on an annual basis or on the basis of quarterly or semi-annual payments, and at the same time include in its schedule of fees, a percentage basis of 5% of the salary for each placement until the annual fee is reached?

#### ANSWER.

The answer is yes. (Questions 1 and 2 are grouped together as they may be answered for the same reason.) Under the New Jersey Revised Statutes 34:8-1 to 34:8-23, inclusive, the New Jersey State Legislature enacted a statute providing for the licensing of private employment agencies, including therein statutory requirements to be performed by the applicant. Under the New Jersey Revised Statutes 34:8-10 every employment agency shall file with the commissioner a schedule of fees proposed to be charged for any services rendered to employers seeking employees, and persons seeking employment, and all charges must conform thereto. Such schedule of fees, on blanks provided by the commissioner, shall be posted in a conspicuous manner in the office of the agency.

The above section is the only statutory requirement pertaining to fees that appears in the employment agency act.

Under the New Jersey Revised Statutes 34:8-15 the Commissioner of Labor and Industry may enforce this chapter and he may refuse to issue and may revoke any license for any good cause shown within the meaning and purpose of this chapter, and when it is shown to his satisfaction that any licensed person is guilty of any immoral or illegal conduct in connection with the conduct of said business, it shall be his duty to revoke the license of such person, but notice of the charge shall be presented and reasonable opportunity shall be given the licensed person to defend himself.

The right of the State to enact this legislation has been sustained by the State's highest courts, and the United States Supreme Court.

*Ribnik vs. McBride*, 48 Sup. Ct. Rep. 543, 137 Atl. 437, 133 at 870.

*Brazeo vs. Michigan*, 36 Sup. Ct. Rep. 561.

*McBride vs. Clark*, 101 N. J. L. 213.

In *Ribnik vs. McBride*, *supra*, the New Jersey Supreme Court opinion citing the United States Supreme Court opinion in *Brazeo vs. Michigan*, *supra*, said:

"It seems clearly that without violating the Federal Constitution, a State exercising its police powers may require licenses for employment agencies and prescribe reasonable regulations in respect of them to be enforced according to the legal discretion of a commissioner."

Under New Jersey Revised Statutes 34:8-15, and in the reported cases, the commissioner may refuse to issue a license, or may likewise revoke any license for any good cause shown (1) *within the meaning and purpose of the act* and the power of the Legislature to limit such right for the safety of the public morals and public health under the police power must rest (2) *on some reasonable basis and cannot be arbitrarily exercised*.

Likewise under Revised Statutes 34:8-15 the commissioner may revoke a license when it is shown to his satisfaction that any licensed person is guilty of any immoral or illegal conduct in connection with the conduct of said business. There is nothing within the meaning of this act, New Jersey Revised Statutes 34:8-1 to 34:8-23, inclusive, which would vest the Commissioner of Labor and Industry with the right to revoke a license for the charging of a registration fee either on an annual basis or on the basis of quarterly or semi-annual payments, or for the issuance and charge of a registration fee payable on a quarterly or annual basis, and at the same time include in the schedule of fees a percentage basis based upon placement until the annual fee is reached. Unless such a method discloses that it is illegal to make such a charge the commissioner cannot revoke a license of an agency that conducts the business in such a manner.

The Legislature in the enactment of New Jersey Revised Statutes referring to employment agencies has limited the commissioner in the exercise of his discretion as to the reasons for which a license may be revoked. The commissioner hence cannot read into the statute something which does not exist, and by doing so he would be usurping legislative functions. The statute is purely regulatory under our police powers and must be applied as it appears.

The laws of 1918, chapter 227, creating the Employment Agency Act contained a provision requiring the filing of a schedule of fees proposed to be charged with the commissioner *for his approval*. The statute permitting the Commissioner of Labor and Industry to regulate fees was held valid by our New Jersey Supreme Court and the Court of Errors and Appeals in the case of *Ribnik vs. McBride*, 4 N. J. Misc. 623, affirmed 103 N. J. L. 708. However, the United States Supreme Court reversed the State court decision in 48 Supreme Court 545 in an opinion which held powers regulating prices and fees were unconstitutional.

Evidently following the impact of the United States Supreme Court decision the Legislature amended the act in 1928, chapter 283, and omitted the phrase *for his approval*, thereby removing the right to regulate fees from the commissioner's powers, laws of 1928, chapter 283, is still in effect.

Since this statute is penal in nature it must be strictly construed.

*Saks Theatrical Agency vs. Mentine*, 48 Atl. 2nd 644, 24 N. J. Misc. 332.

An agreement to pay a fee and to charge a fee is created between the agency and the applicant, and unless the contract is illegal the commissioner cannot, under the statute, be permitted to intervene. Any right of action arising under said contract is purely a civil one and either party has a remedy in the civil courts for the enforcement of same. Therefore, an agency may permit an annual fee to be collected on a quarterly or semi-annual basis, and may likewise agree with an applicant for part time position to pay on a 5% basis until such annual fee is paid.

#### QUESTION.

No. 3. May a licensee of an employment agency or nurses registry charge a fee for work which is secured directly from the employer when the agency is inactive?

#### ANSWER.

The answer is no. Unless specifically agreed upon between the applicant and the agency, the latter is not entitled to charge a fee for part time services unless it recommends said service to the employee. Each contract for part time services is separate and apart from the other. The New Jersey Employment Agency Act, R. S. 34:8-10, among other things says that no agency is to send out an applicant for employment without having obtained either orally or in writing a bona fide order therefor and if it shall appear that no employment of the kind applied for exists at the place to which the applicant was directed the agency shall refund to the applicant within three days of demand all fees paid by the applicant.

It is my opinion that the employee was not directed to the employer in this instance, and was not informed by the agency of the existence of the part time work. In order to comply with the legislative intent it is necessary that the agency refer the applicant to the position. If the obtaining of a position at some subsequent time was through an independent agreement between the applicant and the former employee the agency would not be entitled to be paid. This situation, of course, can be changed by a separate and independent agreement between the parties, but under the circumstances presented, there existed no such agreement.

I believe the foregoing opinion adequately answers the three questions proposed by you.

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By: LOUIS S. COHEN,  
*Deputy Attorney General.*