

Jury service is a civic duty and there is no right to compensation for such service in the absence of a statute. See *31 Am. Jur., Jury, 595*. However, in New Jersey, R. S. 22:1-1 provides:

"Every person summoned as a petit juror in the Superior Court and the County Courts shall receive, for each day's attendance at such courts, to be paid by the sheriff of the county in which the juror shall serve, at the expiration of each term of service or at such other time or times within such terms as the board of chosen freeholders of the county shall direct the sum of five dollars (\$5.00)."

The above-mentioned statute is self-explanatory. Any person, be he State employee or otherwise, is entitled to the fund so paid and it would be beyond the power of your department to say that any employee is not entitled to the allowance which the Legislature has granted.

It might be further noted that there is no statute of this State which disqualifies a public employee merely because he is paid a salary by the State, municipality or county.

We feel that it is sound policy to pay State employees their regular salaries while on jury service and we believe there is ample authority for these payments, pursuant to R. S. 11:14-11 which provides as follows:

"The chief examiner and secretary shall, after consultation with the heads of departments and their principal assistants, prepare, and, after approval by the commission, administer regulations regarding . . . *special leaves of absence* with or without pay. . . ."

Your attention is respectfully called to the fact that the Federal Government follows the procedure above outlined, as do the vast majority of private industries.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: JOHN W. GRIGGS,
Deputy Attorney General.

JUNE 23, 1952.

HON. J. LINDSAY DE VALLIERE,
Director, Division of Budget and Accounting,
Department of the Treasury,
State House,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 14.

DEAR MR. DE VALLIERE:

I acknowledge your request for an opinion, relative to the pension rights of Mr. Christopher Sipler, 331 Moreau Street, Morrisville, Pa., a bridge officer employed by the Delaware River Joint Toll Bridge Commission. Mr. Sipler has made application

to the State of New Jersey for a pension under the provisions of chapter 134, P. L. 1921 (R. S. 43:5-1 to 43:5-4, inclusive). This act is commonly referred to as the "Heath Act."

The Heath Act authorizes a State pension to "all persons in the State service qualifying hereunder as of January 1, 1921," who do not draw a pension or who are not specifically entitled to do so under any other law enacted prior to March 31, 1921, who do not have a fixed term of office, who have been continuously in the employ of the State for a period of twenty-five years, and who have reached the age of sixty years. Such persons may retire or be retired by reason of physical disability or incapacity developed during their "service to the State." The pension is equal to one-half of the average annual salary or wage received by "an employee" for the two years prior to the time of filing the application.

Mr. Sipler's pension application discloses that he is employed by the Delaware River Joint Toll Commission as a bridge policeman, and has been so employed by the present commission, and its predecessor commission, for nearly 34 years. I am informed by the commission, that the applicant's original appointment in 1918 was made by the commission of our State created by an act entitled "An act authorizing the acquisition and maintaining by the State of New Jersey, in conjunction with the State of Pennsylvania, of toll bridges across the Delaware river, and providing for free travel across the same," approved April 1, 1912 (Chapter 297, P. L. 1912), as amended and supplemented, the New Jersey Commission acting as a joint commission in conjunction with a similar commission created by Pennsylvania.

In 1934, by compact or agreement between the State of New Jersey and the Commonwealth of Pennsylvania, the present Delaware River Joint Toll Bridge Commission was created, consisting of the two former commissions. The New Jersey statute is chapter 215, P. L. 1934 (R. S. 32:8-1 to 32:8-15, inclusive). This compact was consented to by the Congress on August 30, 1935. The original compact was amended by a supplemental agreement set forth in chapter 283, P. L. 1947 (R. S. 32:8-10) and by a second supplemental agreement contained in chapter 284, P. L. 1951 (R. S. 32:8-11, 32:8-11.1, 32:8-11.2, 32:8-11.3, 32:8-11.4, 32:8-11.5, 32:8-11.6 and 32:8-16).

The original compact provides that no action of the Joint Commission shall be binding "unless a majority of the members of the commission from New Jersey, and a majority of the members of the commission from Pennsylvania shall vote in favor thereof" (R. S. 38:8-2); and that each of the States must pass bridge legislation similar to that enacted by the other, and must make like appropriations. (R. S. 32:8-14). Thus duality of control is established and maintained.

Insofar as its free bridges are concerned, the Joint Toll Bridge Commission operates upon an appropriation made by the State of New Jersey; and New Jersey is reimbursed in turn by the Commonwealth of Pennsylvania, in an amount equal to one-half of the New Jersey appropriation. Through administrative procedures adopted by the Joint Toll Bridge Commission and the State of New Jersey, persons performing duties in connection with the free bridges, are paid by check or warrant of the State of New Jersey, drawn against the New Jersey appropriation. Mr. Sipler's duties being in connection with the free bridges, his salary has been so paid, and to the extent that New Jersey is reimbursed by Pennsylvania for one-half of the New Jersey appropriation, Mr. Sipler may be said to draw his pay in the final analysis from both States involved.

It will be recalled that the Heath Act, in describing those entitled to its benefits, uses several different phrases as, "all persons in the State service," "in the employ of the State," "the employee," and those retiring "from the service of the State."

The real question before us, therefore, is whether Mr. Sipler, an employee of the Delaware River Joint Toll Bridge Commission, may be considered under the Heath Act, to be an employee of the State of New Jersey.

It is my opinion, and I so advise you, that Mr. Sipler is not an employee of the State of New Jersey, and accordingly he is not entitled to a pension under the Heath Act cited above.

In the first place, it is clear that the applicant was not hired by the State of New Jersey, and that the State of New Jersey does not determine the character or nature of his employment, his working conditions, or amount of compensation. Nor may the State of New Jersey direct him nor discharge him. Thus, the very attributes and incidents of the employer-employee relationship, are determined in the present case, not by the State of New Jersey, but by the Joint Commission, the latter being a bi-state agency, existing by virtue of the laws of two States, as consented to by the Congress. In other words, the essence of the employer-employee relationship—namely, control, is missing from the present situation, insofar as the State of New Jersey is concerned.

In view of our inability to point out any control by the State of New Jersey over employees of the Delaware River Joint Toll Bridge Commission, as Mr. Sipler, we are unable to classify Mr. Sipler as an employee of our State.

The fact that the element of control is the necessary ingredient to the employer-employee relationship has been stated by our Courts in a number of decisions. In *Outdoor Sports Corp. vs. American Federation of Labor*, 6 N. J. 217 (1951), the Supreme Court held:

"It is of the essence of the employer-employee relationship that there be a hiring for a fixed or definite period of time for either fixed wages or some form of remuneration fixed or agreed upon *and that the employee's work should be subject to the direction and control of the employer.*" (Italics supplied.)

On the same point, our Superior Court in the earlier case of *Ford vs. Fox*, 8 N. J. Super. 80 (1950), said:

"Our courts have recognized that 'control by the master over the servant is of the essence of that relationship.'"

The words "in the service of a county or municipality" as used in an earlier version of the Veterans' Pension Act, were construed by the Supreme Court in *Reilly vs. Board of Education*, 127 N. J. L. 490 (1941), as not including employees of a municipal board of education.

The status of employees of bi-state agencies has been discussed by our Courts and by the Federal Courts in a number of cases. Bearing on our present discussion, are the decisions dealing with the Port of New York Authority, which as the Delaware River Joint Toll Bridge Commission, is a bi-state agency, existing by virtue of a compact between two States, consented to by Acts of the Congress, and composed of representatives of both States.

In the unreported decision of *Green vs. Firemen's and Policemen's Pension Fund of the City of Jersey City*, dated April 6, 1937, Judge Frank L. Cleary, sitting in the Union County Circuit Court, had before him a suit instituted by the plaintiff, a retired member of the Jersey City Fire Department, against the Pension Fund of the City of Jersey City. The plaintiff following his retirement, had accepted employment with the Port of New York Authority. Thereafter, the Pension Fund

directed plaintiff's attention to the provisions of chapter 259, P. L. 1932, which statute, in its then form, prohibited any State, county or municipal pensioner, from holding "any public position or employment in the State or in any county, city, town, township, borough, village or other municipality, unless the pensioner waived his pension, for the duration of the public position or employment. The Pension Fund stopped payment of plaintiff's pension. Plaintiff then brought the present suit. Defendant's answer set up chapter 259, P. L. 1932, as its defense. Plaintiff thereupon moved to strike out the answer on a number of grounds, one of which was:

"That the answer filed by the defendant in this cause sets forth no legal defense to the cause of action set forth by the plaintiff in the complaint, in that the same is frivolous, as chapter 259 of the Pamphlet Laws of 1932 of the State of New Jersey does not affect the plaintiff's cause of action in that employment of the plaintiff by the Port of New York Authority is not employment in the 'State or in any County, City, Town, Township, Borough, Village or other municipality or school district' within the meaning of the said act."

The court dismissed the answer on this ground, namely, that employment by the Port Authority was not employment by the State, and therefore the statute referred to did not affect the petitioner's employment with the Port Authority. In this regard, the court held:

"The only question argued on the return day of this motion was whether or not the plaintiff is entitled to receive his pension from the defendant during the period he has been employed by his present employer, the Port of New York Authority.

"The issue in this case is limited to such a narrow sphere, that it does not seem to me to require any lengthy discussion upon the subject. As set forth in the memorandum filed on behalf of the defendant, and also in a memorandum filed by Russell E. Watson, Esq., attorney for the Port of New York Authority, amicus curiae, the sole question to be determined is, whether or not the provisions of the 1932 act apply to employment such as the plaintiff has been engaged in since the time of his retirement. In other words, is the Port of New York Authority such an agency as to come within the classification set forth in the act of 1932, so as to give the pensioning body the right under the statute to suspend the payment of such pension while the employment continues?"

"I have reached the conclusion that the 1932 act has no application to the Port of New York Authority, the plaintiff's present employer

"Having reached the conclusion that the 1932 statute does not apply to this case I am of the opinion that there is no defense raised in the answer to the plaintiff's complaint and that the motion to strike said answer should be granted."

Another decision bearing on the present matter, is *Rubright vs. Civil Service Commission*, 137 N. J. L. 369 (1948), 58 Atl. 2nd 772. In this case, our Supreme Court had before it a certiorari proceeding instituted by the prosecutor against the Civil Service Commission of the State of New Jersey, seeking to review a determination by the commission as to the prosecutor's permanent State Civil Service status. The prosecutor had been employed in the State Employment Service Division, the records, facilities and personnel of which were subsequently transferred

to the Federal Government. Thereafter, the Federal service was terminated and the records, facilities and personnel on temporary leave, including the prosecutor, were returned to the State service. The prosecutor, in order to uphold his civil service status contended that he continued to be an employee of the State while on "temporary loan" to the Federal Government. The court held that workers temporarily on loan to the Federal government, being compensated for their labors by the Federal Government, were not, while in Federal service "also employees of the State" as they were not subject to State control, while thus assigned.

The fact that the applicant before us is paid by the check or warrant of the State of New Jersey, has, in my opinion, no effect whatsoever on the situation. This is simply an administrative procedure adopted by the Commission and the State of New Jersey to facilitate transaction of the joint commission's fiscal affairs, and to provide administrative controls over the disbursement of the appropriation.

In performing the administrative or ministerial act of making payments and disbursements for the joint commission, the State of New Jersey is performing merely a fiscal service for the joint commission, without affecting, in any manner, Mr. Sipler's status.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: DANIEL DE BRIER,
Deputy Attorney General.

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JULY 2, 1952.

HONORABLE WALTER T. MARGETTS, JR.,
State Treasurer,
Trenton 7, New Jersey.

FORMAL OPINION—1952. No. 15.

DEAR MR. MARGETTS:

Receipt is acknowledged of your request, transmitted through Mr. de Valliere, for an opinion as to whether the issuing officials (comprised of the Governor, the State Treasurer and the Comptroller) named in P. L. 1951, c. 340, "An act authorizing the creation of a debt of the State of New Jersey by the issuance of bonds of the State in the sum of fifteen million dollars (\$15,000,000.00) for State teachers' college buildings," etc., may issue bonds under said act prior to an actual legislative appropriation.

The answer is "No."

Section two of the act under consideration (P. L. 1951, c. 340), provides that bonds in the sum of \$15,000,000.00 are authorized "for State teachers' college buildings, their construction, reconstruction, development, extension, improvement, equipment and facilities for the education of teachers as follows: for the construction, reconstruction, development, extension, improvement and equipment of State teachers' college buildings, and for the appurtenances thereto, and for acquisition of land for said purposes, if necessary." However, the same section prescribes that such con-