

defer the effective date of parole to accommodate an intervening period of imprisonment such as that represented by the case here under review. Accordingly, a parole granted by the State Parole Board, becomes effective upon the date specified therein and the sentence of the prisoner continues to run until the maximum thereof unless said parole is revoked for cause, as provided by law.

In the situation you speak of, the confinement of the prisoner in default of payment of the fine is analogous to a consecutive sentence following a prior sentence upon which parole had been granted by the board.

The manner in which consecutive sentences shall be dealt with is set out in the case of *In re Fitzpatrick* 9 N. J. Super. 511 (County Court, 1950); affirmed 14 N. J. Super. 213 (App. Div. 1951). Therein it is stated that when parole is granted on one of a series of consecutive sentences, such parole shall become effective upon the date specified therein and thereupon while under such parole, the prisoner shall enter into and upon service of the next succeeding sentence. At that time, as the court observed, he has the dual status of a prisoner on parole on a prior sentence and a prisoner in confinement on the next succeeding sentence.

Accordingly, with respect to the case under discussion, the same result obtains and the prisoner is deemed to be serving his sentence of incarceration, upon which he has been paroled, and at the same time he is disposing of the fine for which he is now in confinement under default of payment thereof at the rate of \$3 per each day of imprisonment as provided in chapter 56, P. L. 1950.

Very truly yours,

THEODORE D. PARSONS,
Attorney General of New Jersey.

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

DECEMBER 17, 1952.

HON. WALTER T. MARGETTS, JR.,
State Treasurer,
State House,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 42.

DEAR MR. MARGETTS:

You ask whether the benefits of Social Security coverage under section 218 of the Federal Social Security Act are available to employees of specified political subdivisions of the State of New Jersey in view of the enactment of chapter 253 of P. L. 1951.

Section 218(b) and (d) of the Social Security Act limits coverage to those individuals who are not already covered under an existing retirement system of the State or of any of its political subdivisions.

Specifically, section 218 (b) (4) provides :

"The term 'retirement system' means a pension, annuity, retirement, or similar fund or system established by a State or by a political subdivision thereof."

and (d) states :

"No agreement with any State may be made applicable (either in the original agreement or by any modification thereof) to any service performed by employees as members of any coverage group in positions covered by a retirement system on the date such agreement is made applicable to such coverage group."

The nub of the question for determination is whether the political subdivisions of the State have already "established" a retirement system for their employees which would bar coverage under the Social Security Act.

A retirement system is deemed to be established when an employer has in operation an existing plan entitling his employees to specified benefits in consideration of services rendered or in recognition of merit. The usual indicia of an established plan are that: coverage available for all employees or specified classes; eligibility requirements are definitely specified; stated benefits are payable, the amount and duration dependent on the length of service and salary of the employee. If such factors are existent then, without doubt, a plan has been established and would operate to deny coverage under the Social Security Act to those employees eligible.

The pertinent statutory provisions :

R. S. 43:12-63. Persons holding office, position or employment; retirement

Whenever any person holding office, position or employment, in any borough, has or shall have been continuously in office, position or employment in such borough, whether elective or appointive or both elective and appointive, for a period of twenty-five years, and has or shall have attained the age of sixty-five years, the governing body of such borough may allow the retirement of such person from service, upon his application. L. 1949, c. 262, p. 829, § 1.

R. S. 43:12-64. Amount of Pension.

Upon any such retirement, the person so retired shall be entitled, for and during the remainder of his natural life, to receive an annual pension equal to one-half of his salary or compensation at the time of his retirement or at the time of his completion of twenty-five years of continuous service, whichever is greater, and the governing body of the borough shall provide for the payment of such pension. L. 1949, c. 262, p. 829, § 2.

R. S. 18:5-50.9. Terminating employment of employees 65 years old, resolution.

The board of education of any school district, by resolution duly adopted by a majority of the members of the board, may terminate the employment of any employee of the district who has or shall have attained the age of sixty-five years, as of the date or time specified in the resolution, * * * notwithstanding the fact that such employee has or shall have acquired tenure of office or employment by virtue of the provisions of any other law. * * *

R. S. 43:9-1. Conditions for retirement; amount of pension.

A person who has been continuously in the employ of any county for a period of forty years and has reached the age of sixty-five years, may retire or be retired at any time thereafter.

On and after his retirement such employee may be paid by the county one-half of the amount he was receiving as salary from the county at the time of his retirement.

R. S. 43:12-1. Retirement for service and age.

A person who has been continuously in the employ of any city for a period of twenty-five years and has reached the age of seventy years or who has been continuously in the employ of any city for a period of forty years and has reached the age of sixty years or who has been continuously or otherwise in the employ of any city for a period of twenty-five years and has reached the age of seventy-five years, may retire or be retired at any time thereafter. * * *

R. S. 43:12-56. Assessors of taxes; amount of pension.

Any person, who shall have held the office of assessor of taxes in any township continuously for a period of twenty-five years and who shall have reached the age of eighty years while holding such office, may be retired upon pension by the township committee on his application or on motion of the township committee. * * *

R. S. 43:12-57. Retirement of tax collectors.

The governing body of any township may retire any person, who has served as collector of taxes in the township for twenty-five years and who has attained the age of seventy years, on pension in such amount as shall be determined by said governing body. L. 1944, c. 154, p. 585, § 1.

R. S. 43:12-57.1. Health officers, retirement of

The local board of health of any township is authorized and empowered, in its discretion, to order the retirement from the service (on a pension as hereinafter provided) * * *.

R. S. 43:12-57.4. Treasurer; retirement

The governing body of any township may retire any person, who has served as treasurer of the township continuously for twenty years * * *.

R. S. 43:12-57.5. Clerk of township

The governing body of any township may retire on pension any person who has served continuously as clerk of the township for twenty-five years. * * *.

The above specified statutory provisions do not, of themselves, constitute a retirement system which would bar the employees working in such positions from coverage under section 218 of the Social Security Act.

The statutes are not self-operative but merely authorize a governing body, if and when proper legal action is invoked by it, to formulate a retirement plan or

system for its employees. These unilateral acts of the Legislature do not, of themselves, erect the necessary scheme so that it may be considered that a retirement plan or system is legally effective. They do not create any entitlement to benefit on the part of employees occupying the positions denominated therein. In order to effectuate the purpose of the statute, further action is required, either by ordinance or resolution. In the absence of any such implementation, a "naked" contingent right exists which does not materialize until the political subdivision acts. If a political subdivision "stands by" and does nothing then, without question, an employee has only an inchoate right, which vests only if and when a plan or system is created by a legislative act of his employer. Until such affirmative legal action, on the part of the particular political subdivision, to carry out the purpose of the statute, is completed, a retirement system is not constituted, within the meaning of section 218. Given their broadest interpretation, the statutes merely authorize a governing body, if and when it deems it necessary, to create rights to a pension or retirement benefit, by legislative action on its part, for employees who occupy certain offices or who are engaged in certain employment. This is insufficient to establish a plan or system for the retirement of the employees.

If a political subdivision has, by ordinance or resolution, pursuant to a statute, adopted an ordinance or resolution for the benefit of employees holding certain positions or offices, some question of discrimination may arise, if the municipality does not invoke the provisions of the statute for the benefit of other employees who have served meritoriously for the required period of time. However, it has been held that a pension granted by public authorities is not a contractual obligation but a gratuitous allowance and that the pensioner has no vested right. *Moran vs. Firemen's and Policemen's Pension* (November 1942) Hudson C. C., 28 Atl. (2nd) 885. It may be necessary, therefore, if an application for coverage under the Social Security Act is made on behalf of employees who might be entitled to the benefit of the aforesaid statutes, that inquiry be directed to the proper municipal officials as to whether other employees have been granted the benefit permitted under those statutes. If such has been the case, the question of discrimination will, at such time, have to be carefully examined and determined.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: WILLIAM C. NOWELS,
Deputy Attorney General.

TDP:wnr