In *Pashman* vs. *Friedbauer,* 1 N. J. Super. 616, 620 (Superior Court, 1949) the Court said:

"The vacancy and the power of appointment must coincide. As was held in *Dickinson* vs. *Mayor, &c., of Jersey City,* 68 N. J. L. 99, 102:

" 'The official board or body of a municipality which is or will be in office at the time an appointee is to take his office can alone make an appointment to such office, unless there be express legislative authority otherwise. This rule is founded in sound public policy. Any other rule would work for confusion and disorganization in municipal affairs. If an existing board can appoint to an office falling within the term of the next incoming board, why not for one falling in the term of the same board two or five years hence?'

"The same is true of an individual appointing power."

In 43 Am. Jur., Section 160, pp. 18-19, the rule is summarized: "At common law, an officer clothed with authority to make appointments to a public office may not forestall the rights and prerogatives of his successor by making a prospective appointment to fill an anticipated vacancy in an office the term of which cannot begin until after his own term and power to appoint have expired."

Upon a consideration of the Constitution and the cited cases, it would seem that the power of appointment to fill an anticipated vacancy does not extend beyond the constitutional term of the Governor.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk

JUNE 12, 1953.

HON. RUSSELL E. WATSON, JR.,
Secretary to the Governor,
State House,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 26.

DEAR MR. WATSON:

Your inter-communication of June 5th, requests an opinion as to the legality of the loyalty oath, which it is assumed each State employee takes, pursuant to R. S. 41:1–3 (P. L. 1949, chapter 22, page 68).

In considering said chapter 22, together with statutes of a similar nature (chapters 21, 24 and 25 of the Laws of 1949) in the case of *Imbrie* vs. *Marsh,* 5 N. J. Super. 239, 247 (1949) the Appellate Division of the Superior Court held, that these statutes are invalid insofar as they relate to the Governor, Senators and members of the General Assembly, and candidates for these offices (p. 247). While this judgment was affirmed in the Supreme Court, 3 N. J. 578, 593, the opinion was broadened so as to include State officials.

At page 592 the Court said:

"Thus, there is nothing in the history of either the Constitutional Convention of 1844 or of the Constitutional Convention of 1947 that lends countenance to the idea that the Legislature was authorized to impose oaths in addition to those set forth in the Constitution on the classes of public officials covered hereby. * * *

"This decision in nowise affects the duty of allegiance owed by a legislator or State officers generally to the State. Even though it is beyond the power of the Legislature to prescribe an oath of allegiance for members of the Legislature and other State officers, they are nevertheless bound, along with every other citizen, in their allegiance to the State even in the absence of an oath;"

What are these oaths set forth in the Constitution and who are the classes of public officers covered thereby? The Constitution by Article IV, Section VIII, paragraphs 1 and 2, provides:

"1. Members of the Legislature shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: 'I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will faithfully discharge the duties of Senator (or member of the General Assembly) according to the best of my ability.' Members-elect of the Senate or General Assembly are empowered to administer said oath or affirmation to each other.

"2. Every officer of the Legislature shall, before he enters upon his duties, take and subscribe the following oath or affirmation: 'I do solemnly promise and swear (or affirm) that I will faithfully, impartially and justly perform all the duties of the office of ....., to the best of my ability and understanding; that I will carefully preserve all records, papers, writings, or property entrusted to me for safe-keeping by virtue of my office, and make such disposition of the same as may be required by law.'"

The Constitution by Article VII, Section I, paragraph 1, provides:

"1. Every State officer, before entering upon the duties of his office, shall take and subscribe an oath or affirmation to support the Constitution of this State and of the United States and to perform the duties of his office faithfully, impartially and justly to the best of his ability."

Commenting on these sections of the Constitution and the required oaths thereunder, the Appellate Division said (5 N. J. Super. p. 246):

"The Constitution sets out the exact words of the oath to be taken by Senators and Assemblymen. The legislators are not permitted to frame their own oaths; here nothing is left to their discretion. The Legislature cannot authorize the omission of the oath or any part of it, or the addition of other clauses or of another oath.

"The clause in our Constitution respecting the oath of other State officers is differently framed; it sets forth the ground to be covered by the oath, but probably leaves some scope to legislative action. We may surmise, for in-

stance, that the duties of the office may be set forth with some particularity in the oath. But no oath can be required that does not come within what the Constitution prescribes."

That the invalidity and infirmity of said chapter 22 does not extend to persons holding positions and employments is best shown by the language of the dissenting opinion of Justice Oliphant (3 N. J. p. 621) reading in part as follows:

"The constitutionality of chapter 23 of these laws was not argued before this Court and as I understand the majority opinion, while it states that chapters 21, 22, 24 and 25 are unconstitutional, it affirms the judgment of the Appellate Division and holds that these statutes are unconstitutional as they relate to the Governor, Senators and Members of the General Assembly and candidates for those offices, and they are unconstitutional as to all State officers who fall within the provisions of Article VII, Section 1, Constitution of 1947."

The persons required to take the oath of allegiance set forth in R. S. 41:1–3, are detailed in the first part of this statute. Among them are:

"* * * every person who shall be elected, appointed or employed to, or in, any public office, position or employment, legislative, executive or judicial, or to any office of the militia, of, or in, this State or of, or in, any department, board, commission, agency or instrumentality of this State, * * *"

State officers who come within the provisions of Article VII, Section I of the Constitution are excepted from the statute by the *Imbrie* vs. *Marsh* case, *supra*.

The statute speaks of "public office, position or employment." There is a clear distinction in this State between an office on the one hand and a position or employment on the other. *Fredericks* vs. *Board of Health,* 82 N. J. L. 200 (Sup. Ct., 1912).

"An office is a place in a governmental system 'created or recognized by the law of the State which, either directly or by delegated authority, assigns to the incumbent thereof the continuous performance of certain permanent public duties'; a position is analogous to an office 'in that the duties that pertain to it are permanent and certain, but it differs from an office, in that its duties may be non-governmental and not assigned to it by any public law of the State'; and an employment differs from both an office and a position 'in that its duties, which are nongovernmental, are neither certain nor permanent.' *Fredericks* vs. *Board of Health,* 82 N. J. L. 200 (Sup. Ct., 1912). The test of a public office is whether the incumbent is 'invested with any portion of political power partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority.' *City of Hoboken* vs. *Gear,* 27 N. J. L. 265 (Sup. Ct., 1859). An office partakes in some degree of political power or governmental authority; a position is an employment 'not calling for the exercise of governmental authority.' *Dolan* vs. *Orange,* 70 N. J. L. 106 (Sup. Ct., 1903). See also, *Uffert* vs. *Vogt,* 65 N. J. L. 377 (Sup. Ct., 1900); *Duncan* vs. *Board of Fire and Police Commissioners of Paterson,* 131 N. J. L. 443 (Sup. Ct., 1944)." *Thorp* vs. *Bd. of Trustees of Schools for Industrial Ed.,* 6 N. J. 506, 507 (Sup. Ct., 1951).

The distinction between an office, and a position and employment, having been judicially recognized and defined, the statute is operative and effective with respect to positions and employments, and the occupants thereof must comply with the law by taking and subscribing the required oath of allegiance.

The result is, therefore, that the condemned portions of the statute, being severable, have been excised and rejected, thus leaving the remainder of the statute intact.

> "The settled rule regarding severability as laid down in the cases is that while a statute may be in part constitutional and in part unconstitutional, if the Legislature would have passed the constitutional parts independently of those deemed unconstitutional and the different parts of the statute are not so intimately connected with and dependent upon each other so as to make the statute one composite whole, unconstitutional parts may be rejected and the constitutional parts may stand. *Johnson* vs. *State*, 59 N. J. L. 535 (E. & A., 1896); *Riccio* vs. *Hoboken*, 69 N. J. L. 649 (E. & A., 1903); *McCran* vs. *Ocean Grove*, 96 N. J. L. 158 (E. & A., 1921); *Wilentz* vs. *Galvin*, 125 N. J. L. 455 (Sup. Ct., 1940)." *Lane Distributors, Inc.* vs. *Tilton*, 7 N. J. 349, 370 (Sup. Ct., 1951).

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk

JULY 1, 1953.

COLONEL RUSSELL A. SNOOK,
Superintendent, Division of State Police,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 27.

DEAR COLONEL SNOOK:

You have requested our opinion as to whether a municipality of this State may enact or enforce an ordinance which (a) compels a dealer in liquefied petroleum gas, required to obtain a State license, to also secure from the municipality a permit to transport, use or store such commodity, and (b) limits domestic installations to 100 gallons water capacity and industrial installations to 500 gallons water capacity.

In my opinion, neither of such provisions is valid, because each is in conflict with Chapter 139, Laws of 1950, and with the rules and regulations of the Division of State Police issued pursuant thereto.

The statute authorizes the State Police to promulgate and enforce regulations setting forth minimum general standards covering the design, construction, location, installation and operation of equipment for storing, handling and transporting by motor vehicle and utilizing liquefied petroleum gas. The statute further provides that said regulations shall be such as are reasonably necessary for the protection of the health, welfare and safety of the public and persons using such materials, and shall be in substantial conformity with the generally accepted standards of safety con-