May 5, 1954.

FORMAL OPINION—1954. No. 5

HON. FREDERICK M. RAUBINGER,
Commissioner of Education,
175 West State Street, Trenton, New Jersey.

DEAR COMMISSIONER:

You have requested our opinion on two questions which arise when a town school district with a population over 10,000, which has an appointed Board of Education of five members, adopts a proposal to change the Board to an elected one, pursuant to Chapter 100 of the Laws of 1951 (N.J.S.A. 18:7-52.1 et seq.). The questions are (1) whether the number of members on the Board will automatically increase to nine, and (2) if so, when and how will the additional members be appointed or elected.

In my opinion, the aforesaid change from the appointive to the elective method of inducting Board members does not affect the number which shall constitute the Board. The answer to your first question, therefore, must be in the negative, whereupon your second question becomes academic.

The statute above cited sets forth the procedure whereby an incorporated town school district governed by Chapter 7 of Title 18 may determine whether the members of the Board of Education shall be appointed or elected. Section 3 of the statute (N.J.S.A. 18:7-52.3) provides that if the voters adopt the proposition (whether it be for election or appointment), the members of the Board "shall thereafter be elected by the legal voters of the district at the regular school election to be held in said district, or appointed by the Mayor, as the case may be." Section 4 (N.J.S.A. 18:7-52.4) provides as follows:

> "The members of the board of education in office in the district at the time such proposition is approved shall continue in office until the expiration of their respective terms of office but their respective successors shall be elected by the legal voters of the district, or appointed by the mayor, as the case may be."

This law makes no mention of a change in the number of board members, nor is any procedure provided therein for effecting such a change in the event of adoption of a new method of inducting members.

R.S. 18:7-4 states that in each district there shall be a board consisting of nine members, except as otherwise provided in Article 2 of Chapter 7 of Title 18. However, the number of board members in town school districts with a population over 10,000 has been fixed at five by R.S. 18:7-48 and 18:7-49 with exceptions not here material. These last two sections were derived from Chapter 280 of the Laws of 1929, while R.S. 18:7-4 was derived from Chapter 1 of the Laws of 1903. Insofar as the later acts are repugnant to the earlier, the later repealed the earlier to the extent of the repugnancy. Bruck vs. Credit Corporation, 3 N. J. 401, 408 (1950). Moreover, where there is a conflict between a provision of a general statute and a provision of a later statute relating to the same subject matter in a more minute and definite way, the later statute will prevail over the general statute and will be considered an exception to the latter. Hackensack Water Co. vs. Division of Tax Appeals. 2 N.J. 157, 165 (1949); Monte vs. Milat. 17 N.J. Super., 260, 267 (1952).

The number of board members can apparently be increased from five to seven by the procedure set forth in the last two paragraphs of R.S. 18:7-9, as amended. which also authorizes an increase from three to five or from three to seven. I can find no authority in the law for an increase beyond seven. The presence of Section 18:7-9 indicates that if the legislature had intended to provide for an increase in number to nine, whether or not in connection with an election under 18:7-52.1, such an intent would have been manifested in express language. The absence of any such provision requires, in my opinion, the answer above given.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: THOMAS P. COOK,
Deputy Attorney General.

TPC:JC

May 26, 1954.

CONSOLIDATED POLICE AND FIREMEN'S
PENSION FUND COMMISSION,
State House,
Trenton, New Jersey.

Attention: HON. ARCHIBALD S. ALEXANDER.

FORMAL OPINION—1954. No. 7

GENTLEMEN:

You have requested our opinion concerning the scope of the statutory function conferred upon the commission by the phrase "and the commission concurs therein" as contained in the last sentence of R.S. 43:16-2, as amended, with respect to an application for reinstatement.

It is our understanding that there is pending before the commission the application of a retired member of a municipal fire department who was retired for disability on August 28, 1950 at the age of 51 years after having served as fireman for 31 years. The disability for which the employee was retired was "general poor health." Recently, on March 19, 1954, the employee filed an application seeking reinstatement to his job in the Fire Department. His present age is 55. The municipal Fire Department has indicated that there is available the job of assistant mechanic in the Fire Department in which the individual would be employed should he be reinstated. Two physicians have certified that the individual is physically capable of performing limited physical activities and that they have been given to understand that the job of assistant mechanic is such a job.

It is our opinion that the statutory language in question confers upon the commission the quasi-judicial function of making an independent determination that the applicant is, or is not, "fit for his usual duty or any other available duty in the department which his employer is willing to assign to him" and that such a finding must be based upon record evidence submitted to the commission which must include, at least, the report of not less than a majority of the physicians or surgeons referred to in earlier paragraphs of R.S. 43:16-12, as amended. The record should also contain evidence to the effect that the employee's usual duty is vacant or available or that there is other available duty to which the employer is willing to assign the former employee should he be reinstated.