

JANUARY 31, 1955.

HONORABLE WILLIAM F. KELLY, JR.,
President, Civil Service Commission,
State House,
Trenton 7, New Jersey.

FORMAL OPINION—1955. No. 2.

DEAR COMMISSIONER KELLY:

Your department has inquired as to the propriety of the appointment of a Township Engineer in Parsippany-Troy Hills. The correspondence attached to the request indicates that in Parsippany-Troy Hills on July 1, 1954 there was placed in effect a Council-Manager form of government known as Council-Manager Plan "A" as provided for by the Optional Municipal Charter Law, N. J. S. A. 40:69A-81, et seq. We understand that previously the electorate of the township had voted by referendum to be governed by the provisions of the Civil Service Law with respect to personnel matters. Anthony J. Mara, Public Works Superintendent since 1936, complains that on July 20, 1954 the Manager appointed one Henry H. Ahlers, Township Engineer, without compliance with the Civil Service Law and that the duties of the Public Works Superintendent were transferred to the newly appointed Township Engineer. Mr. Mara claims to have suffered a demotion and demands a hearing. The Manager, on the other hand, requests that " * * * the position of 'Superintendent of Public Works' be reexamined by your classification section."

Whether Mr. Mara has suffered a demotion or reduction is a factual question which should be determined, after a hearing, in accordance with the appropriate provisions of the statutes and rules. See: R. S. 11:21-4, R. S. 11:22-38; N. J. S. A. 11:2A-1; Civil Service Rule 58, 59 (4); *Scancarella v. Department of Civil Service*, 24 N. J. Super. 65, 69, 93 A. 2d 637 (App. Div. 1952). This is a matter properly within the jurisdiction of the Commission.

We cannot agree, however, that the Commission has the authority to establish different duties than those heretofore established for the office of Superintendent of Public Works as requested by the Manager. This we conceive to be the function of the municipal council. N. J. S. A. 40:69A-29 grants to each municipality the power to

"organize and regulate its internal affairs, and to establish, alter, and abolish offices, positions and employments and to define the functions, powers and duties thereof and fix their term, tenure and compensation;"

N. J. S. A. 40:69A-90 provides,

"The municipal council shall continue or create, and determine and define the powers and duties of such executive and administrative departments, boards and offices, in addition to those provided for herein, as it may deem necessary for the proper and efficient conduct of the affairs of the municipality, including the office of deputy manager which shall not be included in the classified service under Title 11 of the Revised Statutes. Any department, board or office so continued or created may at any time be abolished by the municipal council."

The Commission has great power with respect to the creation of positions and the assignment of duties thereto in the state service. It has the power to adopt classification and compensation plans, R. S. 11:5-1, as amended: R. S. 11:7-1, to supervise the division, combining, altering or abolishing of positions; R. S. 11:7-2, and through its Chief Examiner investigate the " * * * need for every existing

position in the classified service * * * ", R. S. 11:7-5. All of the foregoing powers relate to officers and positions in the state service. Significantly, we find no counterpart in Subtitle 3 of Title 11 of the Revised Statutes and the several amendments and supplements thereto dealing with Counties, Municipalities and School Districts. The inference to be drawn from this obvious omission is that the legislature intended the municipalities to exercise a degree of what has been commonly called "home rule" with relation to the creation of offices and positions and the assignment of duties to them. See also: N. J. S. A. 40:69A—29, R. S. 40:48—1. Public employees have no vested right in having their positions continued unchanged; so long as reclassification powers are exercised reasonably and in good faith their use should not be hindered. Cf. *Carls v. Civil Service Commission*, 17 N.J. 215 (decided January 10, 1955). Whether a change in duties of a municipal employee is a reasonable and *bona fide* exercise of the locally vested power or whether it amounts to a demotion or reduction is a question to be determined by the Commission based upon evidence which might be adduced at a hearing.

We turn now to the question whether the Manager has the power to appoint a Township Engineer in the unclassified service. We find no specific mention of this office or position in R. S. 11:22-2, as amended, wherein unclassified offices and positions are listed. There is no specific provision in the Optional Municipal Charter Law permitting the appointment of a Municipal Engineer for a fixed term. And we are aware of no reason why the post could not be filled by competitive examination, non-competitive examination, or minimum qualifications as set forth in N. J. S. A. 11:22-50. It is possible that the position may be regarded as heading a department and thus be unclassified pursuant to the provisions of R. S. 11:22-2(d), as amended, but facts bearing on this question have not been presented to us.

It is true that under the form of government previously in effect in Parsippany-Troy Hills (Township Committee) the Township Engineer was appointed for a definite term, R. S. 40:145-12 and 13. Hence, his position was regarded as unclassified and not subject to the provisions of the Civil Service Law, *Browne v. Hagen*, 91 N. J. L. 544 (E. & A. 1918). The provisions of that statute are no longer applicable to Parsippany-Troy Hills, however. Under the Optional Municipal Charter Law after a new form of government has been adopted by the voters, " * * * the municipality shall thereafter be governed by the plan adopted, by the provisions of general law * * *." N. J. S. A. 40:69A-26. The term "general law" is defined as " * * * any law or provision of law, not inconsistent with this act, heretofore or hereafter enacted which is by its terms applicable or available to all municipalities * * *." The statutes governing townships not being applicable or available to all municipalities are not within the scope of the term "general law" as used in the Optional Municipal Charter Law and are thus not applicable any longer to Parsippany-Troy Hills. The Civil Service Law on the other hand is available to all municipalities through referendum, R. S. 11:20-1, as amended, and is thus applicable as "general law" to the selection of employees in Parsippany-Troy Hills.

N. J. S. A. 40:69A-29 empowers each municipality governed by the provisions of the Optional Municipal Charter Law

" * * * *subject to the provisions of this act or other general law* * * * to establish, alter, and abolish offices, positions and employments and to define the functions, powers and duties thereof and *fix their term, tenure and compensation* * * *." (Emphasis supplied.)

An argument might be made that the power to fix terms grants power to appoint individuals to positions in a manner which would result in the position's being treated as unclassified on the authority of *Browne v. Hagen*, *supra*. We have emphasized the language quoted above "subject to the provisions of this act or

other general law" because in our opinion the language incorporates by reference the Civil Service Law. In *Davaillon v. Elisabeth*, 121 N. J. L. 380 (Sup. Ct. 1938) it was held that section 40:48-1 of the Revised Statutes granting the governing body of every municipality the authority

" * * * to prescribe and define, *except as otherwise may be provided by statute*, the duties and *terms* of office of all officers, clerks and employees * * *".

did not permit a municipality to create for a fixed term and fill, without adherence to the Civil Service Law, the position of city clerk. At 121 N. J. L. 383 the Court said,

"But the Civil Service act of 1908 (Comp. Stat. 1910, p. 3795; R. S. 1937, 11:1-1 et seq), adopted by the defendant municipality on November 4th, 1913, plainly falls into the category of general legislation, and therefore the qualifying phrase 'except as otherwise provided by law,' contained in section 40:48—1, R. S. 1937, serves to subject the exercise of the power so conferred to the provisions of that enactment."

The rationale of the *Davaillon* case dealing with the position of City Clerk is equally applicable to the case at hand wherein the position or office of Township Engineer is concerned.

Therefore, for all of the foregoing reasons, we advise you that under the facts presented the appointment of a Township Engineer for a fixed term without adherence to the Civil Service Law must be regarded as improper.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General,

By: JOHN F. CRANE,
Deputy Attorney General.

JFC:b

FEBRUARY 10, 1955.

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

FORMAL OPINION—1955. No. 3.

DEAR COMMISSIONER:

You have requested our opinion as to whether school nurses who are employed without a certificate, pursuant to chapter 133 of the laws of 1947 (N. J. S. A. 18:14-56.3), qualify for placement on the minimum salary schedule for teachers established by chapter 249 of the laws of 1954.

In our opinion, the answer is in the affirmative.

The salary schedule referred to is for "teachers in this state", and the act provides that the term teacher "shall include any full-time member of the professional staff of any district or regional board of education or any board of education of a county vocational school, the qualifications for whose office, position, or employment are such as to require him to hold an appropriate certificate issued