

virtue of the earlier statute without such certificates. There would be no reason to so discriminate against the older nurses who had acquired experience and even tenure before the 1947 act. In our opinion, that part of the definition of "teacher" which requires the holding of an appropriate certificate issued by the State Board of Examiners is intended to denote generally the classes of positions which require certification of an applicant who is now entering the school system for the first time.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: THOMAS P. COOK,
Deputy Attorney General.

MARCH 2, 1955.

HONORABLE ARCHIBALD S. ALEXANDER,
State Treasurer,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 4.

DEAR MR. TREASURER:

This will acknowledge receipt of your recent communication by which you request our opinion on the following question:

Where a claim for repayment of money, in the custody of the State Treasurer pursuant to a custodial judgment entered under the provisions of Article 3, Chapter 37, Title 2A, N. J. S., is made as provided in Section 2A:37-32 N. J. S. may the State Treasurer delegate the duty of determining the validity of such claim to one or more subordinate officers or employees within the department of the Treasury?

The procedure by which a claim for the repayment of money, in the custody of the State Treasurer under the provisions of Article 3, Chapter 37, Title 2A N. J. S., is to be made and paid may be found in Section 2A:37-32 N. J. S. which provides in part:

" * * * If a claim is made to the state treasurer within such period of 2 years, and he shall determine that the claim is valid, he shall pay the moneys so claimed to the person entitled thereto. If the state treasurer shall determine that the claim is not valid, he shall reject the claim. The claimant may thereupon apply to the superior court, chancery division, for a review of his determination, and the claim shall thereupon be heard and determined, de novo."

It is a general rule of law that, in the absence of a statute to the contrary, a public officer may delegate those powers which are ministerial in nature but not those which are discretionary. *The Law of Public Offices and Officers*, Mechem Sections 567, 568, *Public Officers*, Throop Section 570.

In 67 C. J. S. *Officers* Section 104, it is stated:

"In the absence of statutory authority a public officer cannot delegate his powers, even with the approval of a court. An officer, to whom a power of discretion is intrusted, cannot delegate the exercise thereof except as prescribed by statute. He may, however, delegate the performance of a ministerial act, as where, after the exercise of discretion, he delegates to another the performance of a ministerial act to evidence the result of his own act of discretion."

Also, in 43 *Am. Jur. Public Officers* Section 461, it is said:

"Official duties involving the exercise of discretion and judgment for the public weal cannot be delegated. They can be performed only in person."

This rule has been followed in *State v. Howard*, 74A 392 (Sup. Ct. Vt. 1909) *State, Danforth, pros. v. Paterson* 34 N. J. L. 163, (Sup. Ct. 1870) *Sodekson v. Lynch, et al.* 9 N. E. 2nd, 372 (Sup. Jud. Ct. Mass. 1937) *Broderick v. City of New York* 67 N. E. 2nd 737, (N. Y. Ct. App. 1946).

While the Courts have experienced some difficulty in giving the terms "ministerial" and "discretionary" a practical working definition, *Note*, 26 *Mich. L. Rev.* 933 (1928), they have recently been defined with approval as follows:

"A ministerial act is one which a person or board performs upon a given state of facts, in a prescribed manner, in observance of the mandate of legal authority and without regard to or the exercise of his own judgment upon the propriety of the act being done.

"Discretion may be defined, when applied to public functionaries, as the power or right conferred upon them by law of acting officially under certain circumstances, according to the dictates of their own judgment and conscience, and not controlled by the judgment or conscience of others." *Independent School Dist. of Danbury v. Christiansen*, 49 N. W. 2nd 263 (Sup. Ct. Iowa 1951).

While it is manifest that the proper exercise of any delegated ministerial function involves some degree of discretion, where the legislative intent may be reasonably said to include the judgment and discretion of the public officer, there can be no delegation of the discretion so conferred. Cf. *Schwartz v. Camden*, 77 N. J. Eq. 135 (Ch. 1910). When it is considered that the claims made under Section 2A:37-32 N. J. S. may be repaid without limitation as to amount, No. 21 *Opinions of the Attorney General of New Jersey*, 1954, it is reasonable to say that the legislative intent included the judgment and discretion of the State Treasurer.

Accordingly, there being no statutory authority to delegate, the duty imposed upon the State Treasurer by Section 2A:37-32 N. J. S. to determine the validity of claims for repayment of money in his custody cannot be delegated.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES J. KEHOE,
*Assistant Deputy
Attorney General.*

CJK:MG

MARCH 4, 1955.

HON. FREDERICK J. GASSERT, JR.,
Director, Division of Motor Vehicles,
State House,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 5.

DEAR DIRECTOR GASSERT:

Our opinion has been requested (1) as to the power of a municipality, (the Borough of Demarest in this case) to pass an ordinance establishing "no through" streets on which all traffic will be prohibited other than that whose destination is to some point on that street, and (2) if such power exists, is such an ordinance subject to your approval.