

OPINIONS

"A member, who shall have been an employee in each of the 10 years next preceding his retirement, shall, upon the application of the head of the department in which he shall have been employed or upon his own application or the application of one acting in his behalf, be retired for ordinary disability by the board of trustees, on a regular disability allowance if he is under 60 years of age and on a service allowance if he has reached or passed that age. The physician or physicians designated by the board shall have first made a medical examination of him at his residence or at any other place mutually agreed upon and shall have certified to the board that the member is physically or mentally incapacitated for the performance of duty and should be retired."

N. J. S. A. 43:15A-43 deals with accident disability retirement of members who have not attained the age of seventy, and also requires medical proof of physical or mental incapacity for the performance of duty.

In view of the foregoing, it is our opinion that the Board cannot retire a person under the age of seventy at the request of his public employer unless the conditions set forth in N. J. S. A. 43:15A-42 and N. J. S. A. 43:15A-43 dealing with disability retirements are fully met.

Very truly yours,

GROVER C. RICHMAN, JR.,
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By: CHARLES S. JOELSON,
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MAY 4, 1955.

MR. STEPHEN E. SCHANES,
Bureau of Public Employees' Pensions,
State House Annex,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 9. (Revised)

DEAR MR. SCHANES:

This is in answer to questions raised with reference to the status of employees of the Compensation Rating and Inspection Bureau for purposes of Social Security coverage and eligibility for membership in the Public Employees' Retirement System.

BACKGROUND AND HISTORY

By virtue of P. L. 1911, c. 95, there was established a system of workmen's compensation insurance. Every insurance company or mutual association insuring employers against liability to employees was required to file its classification of risks and premiums and rules pertaining thereto, together with the basis rates and system of merit or schedule ratings applicable to such insurance, with the Commissioner of Banking and Insurance, hereinafter called the "Commissioner," and obtain his approval thereof before same could take effect (P. L. 1917, c. 178).

To secure an impartial application of such filed and approved matter, the commissioner was "authorized to create, organize, and supervise such rate, and inspection bureau or bureaus with such jurisdiction under his supervision as hereinafter provided." (P. L. 1917, c. 178, par. 15).

Pursuant to this power, and in the same law (Article II), the Compensation Rating and Inspection Bureau of New Jersey, hereinafter called the "bureau," was created and presently functions (R. S. 34:15—89 through 91).

Members of the bureau consist of mutual associations and stock associations writing workmen's compensation insurance, who must, as a condition precedent to writing such insurance, become members (N. J. S. A. 34:15—89).

The duties and objects of the bureau, under N. J. S. A. 34:15—89, are that:

- A. "It shall establish and maintain rules, regulations and premium rates for workmen's compensation and employer's liability insurance and equitably adjust the same, as far as practicable, to the hazard of individual risks, by inspection by the bureau.
- B. "It shall adopt means for assuring uniform and accurate audit of payrolls as they relate to policies of workmen's compensation and employers' liability insurance by auditors, appointed by the bureau, with the approval of the said commissioner or by such other means as the bureau may, with the approval of the commissioner of banking and insurance, establish.
- C. "It shall furnish upon request to any of its members or to any employer upon whose risk a rating has been promulgated by it, information as to such rating, including the method of its computation, and shall encourage employers to reduce the number and severity of accidents by offering reduced premium rates for improved working conditions under such uniform system of merit or schedule rating as may be approved by the said commissioner."

Each member of the bureau is represented by one person who has one vote in the administration of bureau affairs. The bureau adopts such rules and regulations for its procedure and provides such income as is necessary for its maintenance and operation (N. J. S. A. 34:15—90).

The Commissioner appoints a special deputy to be ex-officio chairman of the bureau. Besides this appointing power the Commissioner is specifically empowered to

- a. approve and ratify all officers, members of committees, and employees of the bureau (N. J. S. A. 34:15—90);
- b. employ an actuary and necessary assistants and fix their compensation, subject to the provisions of Title 11, *Civil Service* (N. J. S. A. 34:15—91);
- c. compel the production of books, data, papers and records necessary for the actuary to compile statistics for determining workmen's compensation insurance costs (N. J. S. A. 34:15—91);
- d. examine personally, or through a person appointed by him, payroll records, policies and other data to determine compliance by employers with the general law (N. J. S. A. 34:15—91).

The board functions under the direction of a manager elected by its members. As a matter of practice, said manager has always been, and is, the special deputy who is appointed by the Commissioner pursuant to statute to serve as chairman of the bureau.

The employees of the Compensation Rating and Inspection Bureau are in two separate categories. The first category consists of those employees who are employed by the Commissioner of Banking and Insurance pursuant to R. S.

34:15—91 subject to Title 11 of the Civil Service Act. The second category consists of those employees who are employed by the Rating and Inspection Bureau subject to the approval of the Commissioner of Banking and Insurance pursuant to R. S. 34:15—90. The employees in the first category are paid by the State Treasurer out of State funds, but those in the second category are paid by the Rating and Inspection Bureau out of its own funds, raised by assessments levied against its members under rules and regulations adopted pursuant to R. S. 34:15—90.

R. S. 34:15—93 provides that companies writing workmen's compensation insurance shall "defray the expenses of the Commissioner of Banking and Insurance in carrying out the provisions of this article" by a payment of a sum of money equivalent to one-quarter of one percent of the net premiums received by such companies for workmen's compensation insurance written within the State. These payments are not used to pay employees of the Rating and Inspection Bureau in the second category described above.

AS TO SOCIAL SECURITY COVERAGE: Sec. 218 (a) (1) of the Federal Social Security Act (Title 42 U. S. C. A. § 418) provides that the Secretary of Health, Education and Welfare of the United States may enter into an agreement with any State for the purposes of extending social security insurance to "services performed by individuals as employees of such State or any political subdivision thereof." The Federal statute cited further provides, in Section 218 (b) (2) thereof, that the term "political subdivision" includes "an instrumentality" of a State. The term "coverage group" is defined in Section 218 (b) (5) of the Federal Social Security Act to include "employees of a political subdivision of a State other than those engaged in performing service in connection with a proprietary function."

Upon examining the general duties and responsibilities of the Compensation Rating and Inspection Bureau as set forth in the statutes referred to above, it is evident that this body was created in the public interest. It also appears that in order to meet the statutory requirement that the bureau be impartial, the Commissioner of Banking and Insurance, either directly or through his special deputy, has authority over all activities of the bureau. It is, therefore, our opinion that the bureau constitutes an "instrumentality" of the State within the meaning of the Federal Social Security Act, and that its employees are eligible for social security coverage.

AS TO MEMBERSHIP IN THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM: For the reasons stated above, we are of the opinion that the employees in the first category who are State employees are eligible as such State employees for membership in the Public Employees' Retirement System, but that the employees in the second category, who are as we have stated, not State employees, are not so eligible.

We are further of the opinion that the employees in the second category cannot be admitted as employees of a public agency or organization within the meaning of N. J. S. A. 43:15A—65 and N. J. S. A. 43:15A—71.

N. J. S. A. 43:15A—65 provides as follows:

"All employees of any public agency or organization of this State, which employs persons engaged in service to the public, shall be eligible to participate in the Public Employees' Retirement System provided, the employer consents thereto by resolution and files a certified copy of such resolution with the board of trustees of the Public Employees' Retirement System and the board of trustees approves thereof by resolution. Such

organization shall be referred to in this act as the employer. If the participation of such employees is so approved then the employer shall contribute to the contingent reserve fund on account of its members at the same rate per centum as would be paid by the State if the members were State employees."

N. J. S. A. 43:15A—71 provides as follows:

"The words 'public agency or organization' as used in this act shall be construed to mean and include any agency or organization which operates public works or is engaged in service to the public for 1 or more municipalities, local boards of health, or counties, and whose revenue is derived from other than State funds, but shall not be construed to include any subdivision of any county, municipality, school district, privately owned public utility or service or any religious, educational or charitable organization."

Although the Rating and Inspection Bureau's revenue is derived from other than State funds, as provided in N. J. S. A. 43:15A—71, it does not operate public works or engage in service to the public for one or more municipalities, local boards of health, or counties as provided for in that section.

You have asked us whether the Rating and Inspection Bureau may adopt its own separate retirement system for those employees in the second category described above who are not to be considered as State employees. We understand that the employer's contributions to such a separate system would be made by the member insurance companies, and would not come out of the contributions of one-fourth of one percent of net premiums of participating companies provided for in R. S. 34:15—93 to defray the expenses of the Commissioner of Banking and Insurance in carrying out the provisions of the law pertaining to the Rating and Inspection Bureau.

We are of the opinion that such a separate retirement system may be adopted provided it is approved by the Commissioner of Banking and Insurance. The approval of the Commissioner would be required in view of R. S. 43:15—89 which provides as follows:

" . . . To secure the impartial application of . . . approved classifications, rules, rates or system of merit or schedule rating, the Commissioner of Banking and Insurance is hereby authorized to create, organize, and supervise such rating and inspection bureau . . ."

We are, therefore, of the opinion that even though a separate retirement system for those employees of the Rating and Inspection Bureau who are not State employees would not be supported in any way by State funds, the approval of such a system by the Commissioner of Banking and Insurance is required under the quoted statute.

Very truly yours,

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cc: HON. CHARLES R. HOWELL