

Nor does the provision in R. S. 43:16-3 which establishes a pension to the widow of a member of a police or fire department "who shall have continued in service after becoming eligible for pension and shall not have lost his life while on duty" sanction any member being kept on duty after the age of compulsory retirement. It is evident that this provision deals with a member, under the age of sixty-five who, although eligible for permissive retirement, remains as a member of a police or fire department as expressly allowed by R. S. 43:16-1, as amended. It also applies to a fire or police chief who may be retained in service after the age of sixty-five by the governing body of a municipality pursuant to the express authority of R. S. 43:16-1.1.

In view of the foregoing, it is our opinion that no pension rights may be granted under R. S. 43:16-4 to the widow of a member of a fire or police department who continues in such employment beyond the mandatory retirement age provided in N. J. S. A. 43:16-1.

Pension rights may, however, be granted to the widow herein of the lesser pension benefits provided under R. S. 43:16-3, since it provides for the widow of a member "who shall have been retired on a service retirement pension . . ." The member herein should be so regarded since he should have been in retirement status at the time of his death.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

CSJ/gc

MAY 25, 1955.

HONORABLE CHARLES R. HOWELL,
Commissioner of Banking and Insurance.
State House Annex,
Trenton 7, New Jersey.

FORMAL OPINION—1955. No. 22.

Re: Taxation of annuity considerations, deductibility of considerations returned under provisions of annuity policies.

DEAR COMMISSIONER HOWELL:

Our advice has been requested as to whether it is proper for an insurance company in filing its annual report as required by Section 8, Chapter 132, P. L. 1945, N. J. S. A. 54:18A-8, to deduct from gross considerations on annuity policies sums paid at death or surrender of the policy. We understand that the companies concerned have asserted a right to a deduction only as to sums paid on annuity contracts under which annuity payments have not commenced and we limit our opinion to a consideration of that situation.

In connection with this problem we have examined the provisions of several policies. One provides, "If the annuitant dies before the policy anniversary on which the annuitant's age, nearest birthday, is 65, the Company will pay to the beneficiary a sum equal to the premiums for this policy * * *. The owner can surrender this policy at any time before the pension date and receive its cash value. * * *." Another of such policies provides that if a participant shall die before the effective annuity date there shall be refunded to his beneficiary the contributions made with respect to such annuity with interest. Likewise, if the employment of a participant

is terminated (this is a group employees' contract) the participant may elect to have his contributions refunded with interest. Provision is also made for credit to the employer of a percentage of its contributions in the event of cancellation of an annuity for reasons other than death of its participant. A third contract examined requires no contributions from participants and provides no benefits on death or termination of service.

Chapter 132, P. L. 1945, N. J. S. A. 54:18A-1 et seq., imposes a tax on the premiums collected by insurance companies. Section 5 of the act, N. J. S. A. 54:18A-5, excludes from the definition of taxable premiums " * * * premiums or considerations (but excluding cash surrender values) returned on policies or contracts." The question presented thus, is whether sums paid to a beneficiary, owner or participant in accordance with the terms of a policy on account of death or withdrawal from participation are within the statutory exclusion.

The phrase "Return of Premium" has been defined in Black's Law Dictionary, (4th Ed. 1951) p. 1481 as,

"The repayment of the whole or a ratable part of the premium paid for a policy of insurance, upon the cancellation of the contract before the time fixed for its expiration."

In an opinion of a previous Attorney General dated May 25, 1945 you were advised that payment made at death under annuity contracts were not premiums returned even though the amount was measured by the premiums paid. We have examined that opinion and find no reason to depart from that view. Such a payment occurs not on the cancellation of a policy, but on the fulfillment of one of its alternative objects.

Whether payments made upon the cancellation of an annuity contract prior to the commencement of annuity payments under it are "premiums or considerations returned" within the meaning of the statute would depend upon the circumstances under which the cancellation was effected. A payment made to an owner upon the voluntary surrender of a policy would appear to be in the nature of a cash surrender value as that term is commonly understood in the field of insurance law. The term has been defined as "* * * the cash value, ascertainable by established rules, of a contract of insurance which has been abandoned and given up for cancellation to the insurer by the person having the contract right to do so." *In re Knight's Estate*, 31 Wash. 2d 813, 199 P. 2d 89, 191 (Sup. Ct. Wash. 1948); see also—*in re Welling*, 51 C. C. A. 151, 113 F. 189, 192 (C. C. A. 7, 1902). Although the term is most frequently used in connection with policies of life insurance the definition is applicable to policies of the kind here under discussion. It would seem then that payments made upon the voluntary surrender of the policy ought to be logically regarded as cash surrender values which are not deductible under the statute. Our view is buttressed by the language used in one of the policies to which reference has heretofore been made. That policy speaks of surrender of the policy and the payment of its "cash value".

Other situations may give rise to a proper deduction under the statute. For example if the policy is cancelled for fraud or some similar reason so that it appears the risk never attached, the policy would be cancelled and the premium returned. Such a payment would not be a cash surrender value, it would be a return of the premium and would hence be deductible under the statute.

In cases arising in California, and Kansas, it has been broadly stated that amounts returned to annuity purchasers upon the cancellation of an annuity policy are deductible. *Equitable Life Assurance Society v. Johnson*, 53 Cal. App. 2d 49, 127 P. 2d 95 (Dist. Ct. App. 1942), *Equitable Life Assurance Soc. of U. S. v. Hobbs*, 155 Kan. 534, 127 P. 2d 477 (Sup. Ct. 1942). The California case turned on the interpretation of a constitutional provision which taxed "gross premiums received

upon its business done in this State, less return premiums". The provision did not exclude cash surrender values as does our statute. In the Kansas statute a deduction was provided for any premiums returned on account of cancellation. Again no mention of cash surrender values was made. Neither case considered the problems arising out of a situation where an annuitant dies before the commencement of payments under the policy.

Accordingly, we advise you that it is not proper for insurance companies to deduct sums paid at death or surrender of annuity policies from gross considerations reported under the requirements of Section 8, Chapter 132, P. L. 1945, N. J. S. A. 54:18A-8.

Very truly yours,

GROVER C. RICHMAN, JR.,
*Attorney General of
New Jersey.*

By: JOHN F. CRANE,
Deputy Attorney General.

JFC:b

JUNE 10, 1955.

HONORABLE WILLIAM F. PARKER,
Sheriff, Burlington County,
County Court House,
Burlington, New Jersey.

FORMAL OPINION—1955. No. 23.

DEAR MR. PARKER:

You have asked for our opinion whether you, as Sheriff of Burlington County, have the authority to appoint Special Deputies Sheriff under the following circumstances.

On or about April 1, 1955, desiring to institute a motor vehicle patrol of the highways in your County, you appointed, by deputation in writing, 12 persons as Special Deputies Sheriff to conduct such patrol, without compensation.

You issued to such deputies, uniforms purchased by the Board of Freeholders, and a gun, shells, blackjacks, handcuffs and a number of blank summonses.

Since the above date, such deputies have patrolled the State, County and Municipal highways, in teams of two, in motor vehicles owned by the County of Burlington and furnished to the deputies by you.

During the course of such patrols, the deputies have on many occasions issued a summons to a person apprehended for a violation of the Motor Vehicle Act.

The deputies also have been making inspections of premises in the County to determine if any violation of the criminal laws has occurred, and on at least one occasion, have made an arrest on a charge of disorderly conduct.

It is our opinion that a Sheriff has no authority to appoint Special Deputies Sheriff under the foregoing circumstances.

A County Sheriff is an official recognized by the Constitution of this State. Art. 7, Sec. 2, Par. 2 of the 1947 Constitution provides:

"County clerks, surrogates and sheriffs shall be elected by the people of their respective counties at general elections. The term of office of county clerks and surrogates shall be five years, and of sheriffs three years. Whenever a vacancy shall occur in any such office it shall be filled in the manner to be provided by law."