examining the records to inquire further as to whether approval of the action taken was intended. Your signature, of course, does not indicate that the minutes accurately reflect what took place at the meeting. That function should be performed by the individual acting as secretary of the particular council.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: JOHN F. CRANE,
Deputy Attorney General.

JANUARY 12, 1955.

MR. GEORGE BORDEN, *Secretary,*
State Employees' Retirement System of New Jersey,
State House Annex,
Trenton, New Jersey.

MEMORANDUM OPINION P-1.

DEAR MR. BORDEN:

This is in answer to your letter of December 23, 1954, in which you ask whether a person drawing a "free veteran's pension" is eligible to apply for an additional veteran's retirement under the new Public Employees' Retirement System.

The employee in question is apparently now drawing his pension pursuant to R. S. 43:4-1, 43:4-2 and 43:4-3. R. S. 43:4-2 provides as follows:

> "When an honorably discharged soldier, sailor or marine has or shall have been for twenty years continuously or in the aggregate in office, position or employment of this State or of a county, municipality or school district or board of education, the body, board or officer having power to appoint his successor in case of vacancy may, with his assent, order his retirement from such service, or he may be retired on his own request . . ."

R. S. 43:4-3 provides as follows:

> "A person so retired shall be entitled, for and during his natural life, to receive by way of pension, one half of the compensation then being received by him for his service . . ."
>
> *"In case of retirement with pension from office or Position under any other law of this State, the person retiring shall waive either his pension under that law or his pension under this article."* (Underscoring supplied)

R. S. 43:3-1, as amended, provides:

> "Any person who is receiving or who shall be entitled to receive any pension or subsidy from this or any other State or any county, municipality or school district of this or any other State, shall be ineligible to hold any public position or employment other than elective in the State or in any county, municipality or school district, unless he shall have previously notified and authorized the proper authorities of said State, county, municipality or school district, from which he is receiving or entitled to receive the pension that, for the duration of the term of office of his public position or employment he elects to receive (1) his pension or (2) the salary or com-

pensation allotted to his office or employment. Nothing in this chapter shall be construed to affect any pension status or the renewal of payments of the pension after the expiration of such term of office except that such person shall not accept both such pension or subsidy and salary or compensation for the time he held such position or employment".

Section 56 of Chapter 84 of the laws of 1954 goes even further, and provides as follows:

"No public employee veteran eligible for membership in the Public Employees' Retirement System shall be eligible for, or receive, retirement benefits under Sections 43:4-1, 43:4-2, and 43:4-3 of the Revised Statutes."

From the foregoing, it is apparent that a public employee who is a veteran cannot be eligible for pensions under both Chapter 84 of the Laws of 1954 and R. S. 43:4-1 et seq., and that if the applicant is eligible for membership in the Public Employees' Retirement System under Chapter 84 of the Laws of 1954, steps should be taken to terminate pension payments under R. S. 43:4-1 et seq.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

JANUARY 19, 1955.

MR. GEORGE BORDEN, *Secretary,*
Public Employees' Retirement System,
48 West State Street,
Trenton, New Jersey.

MEMORANDUM OPINION P-2.

DEAR MR. BORDEN:

This is in answer to your letter of January 5, 1955 in which you request an opinion as to whether a state employee who was inducted into military service of the United States on November 11, 1918 and discharged on November 13, 1918 may be considered a veteran for the purposes of Chapter 84 of the laws of 1954.

Article III, Section 6(L) of Chapter 84 of the laws of 1954 defines a veteran as "any honorably discharged officer, soldier, sailor, airman, marine, nurse, or army field clerk, who has served in the active military or naval service . . . in World War I between April 6, 1917 and November 11, 1918."

The great weight of authority holds that where a statute requires that a certain thing shall be done between one day and another, each of such days is to be excluded. The word "between" when used in speaking of the period of time "between" two certain dates generally is held to exclude the dates designated as the commencement and termination of such period. *People v. Hornbeck* 61 N. Y. S. 978; *Kendall v. Kingsley* 120 Mass. 94; *Weir v. Thomas,* 44 Nebraska 507; *Greenberg v. Newman,* 320 Ill App 99. *Arcadia Citrus Growers v. Hollingsworth,* 135 Fla 322.

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Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

JANUARY 19, 1955.

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Public Employees' Retirement System,
48 West State Street,
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The New Jersey position accords with the weight of authority. In *Delaware, Lackawanna, and Western Railroad Company et al v. Mehrof Bros. Co.,* 53 N. J. L. 205 (Err & App, 1890) the court stated:

"Between two days does not mean on one or both of the two days. When the word is predicable of time, it excludes both terminal days."

In *Melis et al v. Goldstein et al* 4 N. J. Misc 364 (Circuit Ct. 1926), the Court states:

"It is settled in this State that a period of time defined as between two certain dates does not include either of the terminal dates."

It should be pointed out that in the old New Jersey case of *Morris & Essex Railroad Company v. Central Railroad Company of New Jersey,* 31 N. J. L. 205 (Sup. Ct. 1865), the Court held that the word "between" should be treated inclusively where a railroad was chartered to operate "between Phillipsburg and Easton." In that case, the Court was of the opinion that what it termed a "rigidly verbal interpretation of the clause . . . will fall short of the evident and undeniable object of the law makers."

Nevertheless, the courts of New Jersey and the great majority of the courts of other jurisdictions treat the word "between" as indicating an exclusion in cases involving dates rather than distances.

It is, therefore, our opinion that the claim of the applicant for veteran's status within the meaning of Chapter 84 of the laws of 1954 must be denied.

Returned herewith are the documents with which you furnished us.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

FEBRUARY 1, 1955.

HON. DWIGHT PALMER,
State Highway Commissioner,
1035 Parkway Avenue,
Trenton, New Jersey.

MEMORANDUM OPINION P-3.

DEAR COMMISSIONER PALMER:

Your recent request for advice asks whether employees of your department may lawfully engage in outside employment and if so, whether there are any limitations on such employment.

Since your request was phrased in general terms our advice must be of a general nature. You are advised that employees of your department may engage in outside employment during a time other than their regular working hours so long as they are able to perform their duties with your department in an efficient and satisfactory manner and so long as such employment does not involve a conflict with the interests of the State. See 35 Am. Jur. 516, 517; 56 C. J. S. 481. Engaging

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Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

FEBRUARY 1, 1955.

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1035 Parkway Avenue,
Trenton, New Jersey.

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in activity inimical to the interests of the state, however, might well form the basis of disciplinary action under the provisions of Civil Service Rules 58 and 59. See 56 C. J. S. 430. "An employee commits a breach of duty if he engages in a business or renders services conflicting with his duties to his employer * * *." Note 13 A. L. R. 909. Such conduct, in our opinion, would include the preparation of bids on state projects for private contractors, the preparation of plans or other work for contractors doing work for the state, work for a county or a municipality in a situation in which the State contributes to the cost of the project. In short any situation in which a state employee might possibly be influenced in his official capacity by interests arising out of his private employment should be avoided.

The State is entitled to the complete and undivided loyalty of each of its employees.

> "There is an implied agreement on the part of the employee in every contract of service that he will serve his employer honestly and faithfully. It is his duty to communicate to him all facts which he ought to know." 56 C. J. S. 480.

Language found in the case of *Elco Shoe Manufacturers v. Sisk*, 260 N. Y. 100, 183 N. E. 191 (Ct. App. N. Y. 1932) seems particularly appropriate. At 183 N. E. 192 the court said,

> "* * * no man can serve two masters with equal fidelity when rival interests come into existence. Agents are bound at all times to exercise the utmost good faith toward their principals. They must act in accordance with the highest and truest principles of morality."

It should be pointed out that you have the power under the provisions of R. S. 27:1-8 to "* * * adopt rules and regulations and prescribe duties for the efficient conduct of the business, work and general administration of the department, its officers and employees." If you have specific problems of a recurring nature you may wish to consider the advisability of promulgating rules and regulations on this subject. Since, as has been pointed out above, an employee owes the duty to his employer to disclose facts the employer should know, you may require full disclosure of the outside employment of your employees so that you can determine whether or not such activities are in conflict with the employee's duty to the department.

The foregoing advice is intended to apply generally to all of the officers and employees of your department. One of the officers, however, namely the State Highway Engineer, is required to "* * * devote his entire time and attention to the duties of his office." R. S. 27:1-14, as amended. This requirement effectively bars him from engaging in any other gainful pursuit. See, *First Calumet Trust and Savings Bank v. Rogers*, 289 Fed. 953, 958 (7 Cir. 1923); Cf. *Sheppard Pub. Co. v. Harkins*, 9 Ont. L. Rep. 504, 508 (Div. Ct. 1905).

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: JOHN F. CRANE,
Deputy Attorney General.

JFC:b.

FEBRUARY 17, 1955.

HON. ARCHIBALD S. ALEXANDER,
State Treasurer,
State House,
Trenton, N. J.

MEMORANDUM OPINION P-4.

DEAR MR. ALEXANDER:

You have asked whether the State of New Jersey can become a member of and have an interest in a mutual insurance company and whether the fact that an insurance policy issued by a mutual insurance company states that the policy is non-assessable and there is no contingent liability, would eliminate the possibility of an assessment against the State as a member of such a mutual insurance company.

Our opinion is that the State of New Jersey can become a member of and have an intereset in a mutual insurance company where the insurance contract states that the policy is non-assessable and that there is no contingent liability, provided that such provision in the insurance contract is authorized by the statutes of the state in which the insurance company is incorporated and by the constitution and bylaws of such a mutual insurance company.

The statute governing the purchase of insurance by the State is N. J. S. A. 52:27B-62:

> "The director (referring to the Director of the Division of Purchase and Property) shall, subject to the approval of the commissioner, (referring to the former office of State Commissioner of Taxation whose powers in this respect are now vested in the State Treasurer (N. J. S. A. 52:18A-32), effect and maintain insurance against loss or damage by fire upon the State House and the contents thereof in such sum as may be deemed necessary. The director is hereby authorized, and it shall be his duty, after consultation with the heads of State departments and agencies, to purchase and secure all necessary casualty insurance, marine insurance, fire insurance, fidelity bonds, and any other insurance necessary for the safeguarding of the interest of the State. He is hereby authorized, subject to the commissioner's supervision and approval, to establish in the Division of Purchase and Property, a bureau to administer a centralized system of insurance for all departments and agencies of the State Government."

In the case of *State v. Community Health Service, Inc.*, 129 N. J. L. 427, 429 (E. & A. 1943), the Court approved the following definition of insurance:

> "* * * an agreement by which one party for a consideration promises to pay money or its equivalent or to do an act valuable to the insured upon the destruction, loss or injury of something in which the other party has an interest."

Neither the statute itself nor the common-law definition of the term "insurance" limits the term "insurance" to any particular type thereof.

The distinguishing feature of mutual insurance companies, is the power of mutual insurance companies to levy assessments against their members. The question then arises whether a mutual insurance company, by a provision in its contract with a member, can issue a policy which is non-assessable.

FEBRUARY 17, 1955.

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State Treasurer,
State House,
Trenton, N. J.

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The distinguishing feature of mutual insurance companies, is the power of mutual insurance companies to levy assessments against their members. The question then arises whether a mutual insurance company, by a provision in its contract with a member, can issue a policy which is non-assessable.

A mutual insurance company may, unless prohibited by statute, issue insurance policies for cash only, without contingent liability attaching to the policyholder. *Mygatt v. N. Y. Protective Ins. Co.*, 21 N. Y. 52 (1860); 18 Appleman, Insurance (1945) † 10054, p. 130.

Where neither the constitution nor the bylaws of the mutual insurance company, nor the policy or certificates issued by such company, authorize the levying of assessments to meet losses, the insured is not liable therefor. *Beaver State M. M. F. Ins. Assn. v. Smith*, 97 Or. 579, 192 Pac. 798 (Sup. Ct. Oregon 1920). Only those members who have assumed a contract obligation to pay assessments can be subjected to assessments. *Stanley v. Northwestern Life Assn.*, 36 Fed. 75 (C. C.), *Com. v. Mass. M. F. Ins. Co.*, 112 Mass. 116, *Tolford v. Church*, 66 Mich. 431, 33 N. W. 913 (Sup. Ct. Mich. 1887).

The New Jersey statute allows mutual insurance companies to issues policies for cash premiums only. This statute, 17:28-3, as amended, reads as follows:

> "The maximum premium shall be expressed in the policy of a mutual company organized under any law of this state, and, in a company other than a life insurance company, it may be solely a cash premium or a cash premium and an additional contingent premium which contingent premium shall not be less than the cash premium, but no such company shall issue an insurance policy for a cash premium and without an additional contingent premium until and unless it possesses a surplus above all liabilities of at least three hundred thousand dollars ($300,000.00).
>
> "Wherever any company shall issue policies for cash premiums only, in pursurance of the authority of this section, it may waive all contingent premiums set forth in policies then outstanding. The issuance of policies for cash premiums only in pursuance of this section may not be exercised by any such company until written notice of intention to do so, accompanied with a certified copy of the resolution of the board of directors providing for the issuance of such policies, shall have been furnished the Commissioner of Banking and Insurance."

Nor does the purchase of such insurance violate Art. VIII, Sect. II, Par. 1 of the Constitution of 1947 which provides that "The credit of the State shall not be directly or indirectly loaned in any case." (See *Miller v. Johnson*, 4 Cal. (2d) 265, 48 P. (2d) 956, 958, (Sup. Ct. Cal. 1935). See also *French v. Millville*, 66 N. J. L. 392, 49 Atl. 465, (Sup. Ct. 1901), affirmed on opinion below 67 N. J. L. 349, 51 Atl. 1109, (E. & A. 1902).

Before a contract is entered into by the State with a mutual insurance company, the laws of the State in which the mutual insurance company is incorporated and the certificate of incorporation and bylaws of the company must be inspected to ascertain if they empower the mutual insurance company to issue policies that are non-assessable and without contingent liability and that the insurance contract complies with the statutory conditions, if any.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By. ROBERT E. FREDERICK,
Deputy Attorney General.

REF:R

FEBRUARY 24, 1955.

HON. JOSEPH E. MCLEAN,
Commissioner, Department of
Conservation and Economic Development,
State House Annex,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-5.

Re: Public Lands
Agreements to Lease.

DEAR COMMISSIONER MCLEAN:

You have submitted for our consideration two questions which have arisen in connection with the administration of the Department of Conservation and Economic Development.

Question No. 1 is:

> "Does the Department of Conservation and Economic Development have the right to enter into an agreement with a private person to permit him to prospect for minerals in a State forest?"

We are of the opinion that the Department of Conservation and Economic Development does not have the authority to enter into such agreement.

By way of elucidating this answer, it may be helpful to review briefly the legislative history of laws enacted relating to forestry conservation.

The primary purpose of legislation creating the Department of Conservation and Development, (Now the Department of Conservation and Economic Development) was, among other things, for the "acquiring, holding, protecting, managing or developing lands or other properties for the use of the State of New Jersey, for a state park or a forest reserve or other state reservation, whether made for historic, for scenic, for watershed protection or for any other purpose * * *" L. 1929, c. 213, sec, 1, p. 399, suppl. to L. 1915, c. 241, p. 426 (R. S. 13:1-18). The Department was governed by a board which had "full control and direction of all state conservation and development projects" (R. S. 13:1-1; R. S. 13:1-11), and its administrative functions were entrusted to a director selected by the board. (R. S. 13:1-3).

Chapter 22 of the Laws of 1945 established in the Executive Branch of the State Government a State Department of Conservation and created the office of State Commissioner of Conservation with the authority to exercise the powers of the department and to administer its work. (N. J. S. A. 13:1A-5). This act also established the Division of Forestry, Geology, Parks and Historic Sites (N. J. S. A. 13:1A-4) and transferred to said division the "functions, powers, duties, records and property of the Department of Conservation and Development and the Board of Conservation and Development." (N. J. S. A. 13.1A-24). Thereafter the Legislature, by the Laws of 1948, Chapter 448, established in the executive branch of the State Government a principal department known as the Department of Conservation and Economic Development (N. J. S. A. 13:1B-1) and transferred the powers and duties of the Division of Forestry, Geology, Parks and Historic Sites to said principal department. (N. J. S. A. 13:1B-6). Among the powers granted to the Department by the Legislature was the power to use the forest lands for "any other purpose than the maintenance of forests" if the welfare of the state would be advanced.

(R. S. 13:8-10). However, the legislative history is clear that such use must be for the purpose of maintaining and conserving the forest lands of the State for the ultimate enjoyment and benefit of the people.

The State has, in general, "the same rights and powers in respect to property as an individual. It may acquire property, real and personal, by conveyance, will or otherwise and may hold or dispose of the same or apply it to any purpose, public or private, as it sees fit. The power of the State in respect of its property rights is vested in the Legislature, and the Legislature alone can exercise the power necessary to the enoyment and protection of those rights, by the enactment of statutes for that purpose." 59 C. J. Sec. 276. See also *Wilson v. Gloucester County Bd. of Chosen Freeholders,* 83 N. J. Eq. 545, 90 A. 1021, (Ch. Ct. 1914).

The Department of Conservation and Economic Development cannot enter into an agreement with an individual, association or corporation permitting prospecting for minerals in a State forest because the Legislature has not given it the authority to exercise such power.

Question No. 2 is:

> "Does this department have the right to lease mining rights at a rental on a royalty basis, and if so, must there first be advertising and award to the first bidder?"

We are of the opinion that the Department does not have the right to lease or contract for mining rights on any basis.

"A contract of the State must ordinarily rest upon some legislative enactment", (49 Am. Jur. Sec. 62, p. 275), and as we have indicated, no authority has been granted by the Legislature to the Department of Conservation and Economic Development to enter into an agreement with any individual, association or corporation for prospecting rights in State owned lands.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: ROGER M. YANCEY,
Deputy Attorney General.

RMY:BK

March 2, 1955.

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

MEMORANDUM OPINION P-6.

DEAR PRESIDENT KELLY:

You have requested advice as to the power of the Department of Civil Service to deal with a situation in which it is alleged that an applicant for a promotion in the service of a municipality has made a false response to a question contained in the application for promotion.

As we understand the facts the application asked the question "Have you ever been convicted of a crime?" to which response was given in the negative. The application was processed, the employee's name certified as eligible for promo-

(R. S. 13:8-10). However, the legislative history is clear that such use must be for the purpose of maintaining and conserving the forest lands of the State for the ultimate enjoyment and benefit of the people.

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Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: ROGER M. YANCEY,
Deputy Attorney General.

RMY:BK

March 2, 1955.

HONORABLE WILLIAM F. KELLY, JR.,
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State House,
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As we understand the facts the application asked the question "Have you ever been convicted of a crime?" to which response was given in the negative. The application was processed, the employee's name certified as eligible for promo-

tion and the promotion was made by the appointing authority. It has now come to the attention of the Department that the employee was convicted of assault, battery and robbery in 1929. In justification of the negative response the employee maintains that he was pardoned for the offense and has submitted a County Clerk's certificate purportedly evidencing that fact. An examination of the certificate reveals that the former Court of Pardons remitted the forfeiture of the right of being an elector on December 1, 1938.

We shall first consider the effect of the action taken by the former Court of Pardons. It is our opinion that the specific action taken by the Court of Pardons does not have the effect of extinguishing the committed crime. The Court of Pardons, under the New Jersey 1844 Constitution, Article V, paragraph 10, was empowered to remit fines and forfeitures and to grant pardons after conviction in all cases except impeachment. This court has since been abolished. Under R. S. 2:197-2, repealed by P. L. 1948, c. 83, any person after conviction and service of sentence could apply to the Court of Pardons for a pardon and restoration of rights and privileges forfeited as a result of said conviction. The Court of Pardons existed as a creature of the Executive power and could grant full or limited pardons. A restoration of suffrage rights was considered as a limited pardon by *In Re New Jersey Court of Pardons,* 97 N.J. Eq. 555 (E. & A. 1925); and *Cook v. Board of Freeholders,* 26 N.J.L. 326 (Sup. Ct. 1847) aff'd. 27 N.J.L. 637 (E. & A. 1858). Under these cases any pardon, whether full or limited, operated prospectively and not retrospectively and, therefore, did not erase the fact that a crime was committed. See also *State v. Tansimore,* 3 N. J. 516 (1950).

Had these facts been known to the Department before its approval of the application and certificates of the individual as eligible for the promotion sought, the Chief Examiner and Secretary, in the proper exercise of his discretion, could have rejected the application and refused to certify the name of the individual as eligible. Rule 26 of the Civil Service Rules specifically grants such permissive discretionary power to the Chief Examiner and Secretary. It provides as follows

> "The chief examiner and secretary may reject the application of any person for admission to tests for a given position or refuse to test any applicant or to certify the name of an eligible from the employment list for any of the following or other good causes:
>
> * * * *
>
> (d) That the applicant has been guilty of a crime or of disgraceful conduct;
>
> * * * *
>
> (f) That the applicant has intentionally made a false statement in his application with regard to any material fact or has practiced or attempted to practice deception or fraud in connection with such application;
>
> * * * *
>
> The chief examiner and secretary shall notify in writing any person whose application is rejected under this rule specifying the cause for the rejection. Upon receiving a written request from any person whose application is rejected the president may give him an opportunity to show cause why such application should not be rejected, but announced tests shall not be postponed or delayed for this reason."
>
> See also: R. S. 11:9-10, Civil Service Rule 39.

Since the underlying facts were not known to the Chief Examiner and Secretary at the time the employee's name was certified we shall now consider what action can be taken.

We have noted that you have been previously advised by an opinion dated January 18, 1918 that the Civil Service Commission has no power to revoke or direct the revocation of an appointment. That opinion stated,

> "I am unable to find anything in the Civil Service Law authorizing The Commission to revoke the appointment of any officer or employee appointed to or to require the person having the power of appointment to revoke the appointment. The appointment having once been made in accordance with the provisions of the Civil Service Act and by the proper authority. I think it unquestionable that the Civil Service Commission has no further power in the matter."

While unquestionably a certification should not ordinarily be disturbed we cannot agree that the Commission is completely without power in the matter. The Commission is specifically empowered to enforce the provisions of the Civil Service Law and the rules and regulations promulgated thereunder, R. S. 11:1-7. If it is found that an applicant for a position has violated a provision of the statute by furnishing false information, see R. S. 11:23-1, R. S. 11:23-2, the Commission in the exercise of its enforcement powers could revoke the certification upon which the appointment or promotion was based. In keeping with the basic policy of the act to afford employees an opportunity to be heard before action affecting their position is taken we think a hearing should be held by the Commission with full opportunity being given to the employee to offer evidence in justification or mitigation. The power to reconsider action previously taken is one which should be exercised sparingly. Matters which have been closed should not be reopened for trivial reasons. The exercise of the power requires sound discretion, *Klauss v. Civil Service Commission*, 132 N. J. L. 434 (Sup. Ct. 1945).

If after a hearing it is found that the information upon which an appointment or promotion was based was fraudulently falsified it would have the power to take appropriate action. In this case appropriate action would take the form of revocation of the certification upon which the promotion was based. This could be enforced if necessary by withholding approval of the payroll under R. S. 11:22-20, as amended, or by an action for enforcement under the provisions of R. S. 11:1-7.

It should be remembered that even if the applicant had disclosed that he had been convicted of a crime, it does not necessarily follow that he should have been excluded from eligibility. Civil Service Rule 26 allows the Chief Examiner and Secretary to determine in his discretion whether the public interest would be endangered by appointment of an individual who had been convicted of a crime. The wording of the Rule is permissive and not mandatory; if the Chief Examiner and Secretary is of the opinion that the commission of the crime in 1929 does not indicate a present moral unfitness for the position the individual would not be disqualified for the position.

The alleged misrepresentation question is of a different nature. On this issue it should be determined factually whether the applicant intended to deceive the Department or whether he believed in good faith that the document obtained from the Board of Pardons vitiated the crime. Whether he intended to obtain the promotion by fraudulent means is a factual question which should be determined in a quasi-judicial manner with opportunity being extended to the employee to present evidence in his behalf.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By. DAVID M. SATZ, JR.,
Deputy Attorney General.

DMS;b

March 16, 1955.

HONORABLE D. KNOWLTON READ, *Chairman*
Narcotic Control Commission,
State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-7.

DEAR MR. READ:

You have requested our opinion as to the effect of the mandatory sentencing provision of N. J. S. 2:A168-1 on the provisions of N. J. S. 24:18-47 providing the penalties for violations of the Uniform Narcotic Drug Law (Chapter 18 of Title 24 of the Revised Statutes).

N. J. S. 2A:168-1 permits a sentencing court, where it deems it to be in the best interests of the defendant and of the public, to suspend the imposition or execution of sentence and place the defendant on probation for not less than 1 year and not more than 5 years.

However, as to sentences imposed for a violation of any provision of the Uniform Narcotic Drug Law (Chapter 18 of Title 24 of the Revised Statutes), N. J. S. 2A:168-1 provides:

> "The provisions of this section shall not permit the suspension of the imposition or execution of any sentence and the placing of the defendant on probation after conviction or after a plea of guilty or non vult for violation of any provision of chapter eighteen of Title 24 of the Revised Statutes except in the case of a first offender."

It is clear that N. J. S. 2A:168-1 does not permit a judge sentencing a defendant for a violation of Chapter 18 of Title 24, to suspend the imposition of the jail sentence if the defendant is a second or a subsequent offender and that he must impose a jail sentence for the period set forth in R. S. 24:18-47.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: FRANCIS J. TARRANT,
Deputy Attorney General.

April 11, 1955.

COLONEL JOSEPH D. RUTTER,
Superintendent of State Police,
West Trenton, New Jersey.

MEMORANDUM OPINION P-8.

DEAR SIR:

You have asked for our opinion in respect to the following questions relating to the statutes of limitation.

1. Under Title 2A:159-3, is the limitation on this type of crime (public officials, etc.) still five years?

N. J. S. 2A:159-3 provides as follows:

> "Any person holding or having held, or who may hereafter hold, any public office, position or employment, either under this state or under any

March 16, 1955.

HONORABLE D. KNOWLTON READ, *Chairman*
Narcotic Control Commission,
State House,
Trenton 7, New Jersey.

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Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: FRANCIS J. TARRANT,
Deputy Attorney General.

April 11, 1955.

COLONEL JOSEPH D. RUTTER,
Superintendent of State Police,
West Trenton, New Jersey.

MEMORANDUM OPINION P-8.

DEAR SIR:

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1. Under Title 2A:159-3, is the limitation on this type of crime (public officials, etc.) still five years?

N. J. S. 2A:159-3 provides as follows:

> "Any person holding or having held, or who may hereafter hold, any public office, position or employment, either under this state or under any

political subdivision or agency thereof, whether elective or appointive, or any person being or having been, or who may hereafter be, an executor, administrator, guardian, trustee or receiver, or any officer or director holding or having held, or who may hereafter hold, office, position or employment with any public, quasi public or public quasi corporation or with any charitable, religious or fraternal organization or with any mutual benefit society or association for nonpecuniary benefit or with any bank or building and loan association or savings and loan association or with any trust, insurance, mortgage, guaranty, title or investment company, may be prosecuted, tried and punished for any forgery, larceny or embezzlement, or conspiracy to commit forgery, larceny or embezzlement, or conspiracy to defraud, committed while in such office, position or employment, where the indictment has been or may be found within five (5) years from the time of committing such offense. This section shall not apply to any person fleeing from justice."

There has been no legislative change in the provisions of the above since May 5, 1938, when the foregoing section became effective, by reason of which its provisions are the existing law on the subject.

2. Under Title 2A:159-1, is the limitation of prosecution for the crime of Treason still three years?

N. J. S. 2A:159-1 provides as follows:

"No person shall be prosecuted, tried or punished for treason, unless the indictment therefor shall be found within 3 years next after the treason shall be done or committed. This section shall not apply to any person fleeing from justice."

Since treason is punishable with death (N. J. S. 2A:148-1), the provsions of N. J. S. 2A:159-2, as amended, (see below) do not apply, for the reason that crimes punishable with death are expressly excluded therefrom.

The answer to your question is in the affirmative.

3. Are gambling crimes committed prior to the enactment of N. J. S. 2A:159-4 still in the same two-year limitation as other crimes under section 2A:159-2, prior to its amendment effective June 30, 1953?

Prior to the enactment of N. J. S. 2A:159-4, (effective April 23, 1952), the statute of limitations on prosecutions for all crimes including gambling and gaming (crimes punishable with death and those committed by public officials excepted) fixed a period of two years (N. J. S. 2A:159-2), within which time an indictment must be found.

N. J. S. 2A:159-2, as amended effective June 30, 1953, provides as follows:

"Except as otherwise expressly provided by law no person shall be prosecuted, tried or punished for any offense not punishable with death, unless the indictment therefor shall be found within five years from the time of committing the offense or incurring the fine or forfeiture. This section shall not apply to any person fleeing from justice."

Prosecution of gambling offenses committed prior to April 23, 1950, where no indictment has been found, are now barred by the statutes of limitation.

4. Are all gambling crime limitations now five years?

N. J. S. 2A:159-4, which became effective April 23, 1952, provides as follows:

"Any person who shall, contrary to law, gamble or operate any gambling device, practice or game of chance, or conduct a lottery or sell any lottery ticket, may be prosecuted, tried and punished therefor where the indictment has been or may be found within four years from the time of com-

mitting such offense. The limitation of any such criminal prosecution shall not apply to any person fleeing from justice."

N. J. S. 2A:159-4 was amended, effective July 20, 1953, and reads as follows:

"Any person who shall, contrary to law, gamble or operate any gambling device, practice or game of chance, or make or take what is commonly known as a book, upon the running, pacing or trotting, either within or without this State, of any horse, mare or gelding, or conduct the practice commonly known as bookmaking or pool selling, or keep a place to which persons may resort for engaging in any such practice, or for betting upon the event of any horse race or other race or contest, either within or without this State, or for gambling in any form, or conduct a lottery or sell any lottery ticket, may be prosecuted, tried and punished therefor where the indictment has been or may be found within five years from the time of committing such offense. The limitation of any such criminal prosecution shall not apply to any person fleeing from justice."

The statute of limitation on prosecutions for gambling crimes is as follows:

a. Crimes committed prior to April 23, 1950, where no indictment has been found, are barred;

b. Crimes committed after April 23, 1950 are covered by the five year statute of limitations. The statute fixing the period of limitation at four years has no effect presently since all crimes committed after April 23, 1950 were not barred from prosecution prior to the enactment of the five year limitation on July 20, 1953. "An Act extending the time for prosecution of certain offenses from two years to five, though it had no effect on cases in which the limitation had expired, was operative on those where the limitation had not expired prior to its enactment." (*State v. Miller,* 4 N. J. L. J. 252 (Middlesex Oyer & Terminer, May Term 1881).

5. Are any crimes covered by R. S. 2A:159-2 committed prior to the enactment of the amendment of 1953 still to be listed and carried for two years, or does the limitation automatically increase to five years?

All crimes, excluding gambling, those punishable with death and those committed by public officials are subject to the following limitations on the prosecution:

a. Crimes committed prior to June 30, 1951 are barred by N. J. S. 2A:159-2.

b. Crimes committed after June 30, 1951 are covered by the five year statutes of limitation (N. J. S. 2A:159-2, as amended) and are not barred.

It is to be noted that all of the above statutes of limitation do not apply in favor of "any person fleeing from justice."

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: SAUL N. SCHECHTER,
Deputy Attorney General.

SNS:BK

April 18, 1955.

HONORABLE CHARLES SUMMERS,
Chairman, Consolidated Police
& Firemen's Pension Fund Commission
State House,
Trenton, New Jersey.

MEMORANDUM OPINION P-9.

DEAR SIR:

Your recent letter requested an opinion as to whether your Commission may pay a subsidy in addition to the salaries of secretaries employed by your Commission.

As a matter of fundamental policy, an employee's salary is generally intended to compensate him for all services rendered to the State, so long as he is not required to work beyond the ordinary hours of duty. See N. J. S. A. 52:14-17.13. Rule 18 of the Civil Service Rules provides, in part,

> "The rates of pay set forth in the compensation plan represent the total remuneration including pay in every form, except as otherwise expressly provided in the compensation schedule for the class."

Civil Service Rule 20 provides, in part, as follows;

> "Extra compensation and overtime payment. 1. State Service. No extra compensation, bonus or special payment for extra work shall be paid any permanent or temporary employee unless the work for which such extra compensation, bonus or special payment is proposed, is performed entirely outside of the regularly prescribed hours of duty and is independent of the regular routine daily duties of the employee for whom such extra pay is proposed. No pay roll, estimate or claim for such extra compensation, bonus or special payment shall be approved for any state employee unless such extra employment for pay, together with the rate of compensation to be paid therefor, is first reported to and authorized by this department and such payment shall be not in excess of the rates established by this department after consultation with appointing authorities and their principal assistants."

The Civil Service Rules thus prohibit the payment of extra compensation unless it is performed entirely outside the regularly prescribed hours of duty.

We conclude, therefore, that it would not be proper for your Commission to pay a subsidy to the salaries of the secretaries of your Commission.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By. JOHN F. CRANE,
Deputy Attorney General.

May 4, 1955.

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

MEMORANDUM OPINION P-10.

DEAR DIRECTOR GASSERT:

You have requested our opinion as to whether you have the power under R. S. 39:5-32 to grant a new motor vehicle driver's license to a person whose driver's license was permanently revoked in 1948 upon a second conviction for drunken driving. You inform us that the "first" conviction occurred in the State of North Carolina under the motor vehicle or criminal laws of that State.

R. S. 39:5-32 authorizes the Director of the Division of Motor Vehicles to issue a new driver's license at any time to any person whose license previously was revoked. R. S. 39:4-50 imposes mandatory penalties for drunken driving, as follows:

> "A person who operates a motor vehicle while under the influence of intoxicating liquor or a narcotic or habit producing drug, or permits another person who is under the influence of intoxicating liquor or a narcotic or habit producing drug to operate a motor vehicle owned by him or in his custody or control, shall be subject, for a first offense, to a fine of not less than two hundred nor more than five hundred dollars ($500.00), or imprisonment for a term of not less than thirty days nor more than three months, or both, in the discretion of the magistrate, and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of two years from the date of his conviction. For a subsequent violation, he shall be imprisoned for a term of three months and shall forfeit his right to operate a motor vehicle over the highways of this State for a period of ten years from the date of his conviction and, after the expiration of said period, he may make application to the Director of the Division of Motor Vehicles for a license to operate a motor vehicle, which application may be granted at the discretion of the director. A magistrate who imposes a term of imprisonment under this section may sentence the person so convicted either to the county jail or to the workhouse of the county wherein the offense was committed.
>
> "A person who has been convicted of a previous violation of this section need not be charged as a second offender in the complaint made against him in order to render him liable to the punishment imposed by this section on a second offender."

The Superior Court, Appellate Division, held in *Mac Kinnon v. Ferber,* 16 N. J. Super. 390 (1951) that the grant of power contained in R. S. 39:5-32 is confined to cases where the Director or a magistrate has revoked a driver's license in the exercise of a discretionary authority and, specifically, not to a case of forfeiture pursuant to R. S. 39:4-50. By amendment in P. L. 1952, c. 286, the penalty under R. S. 39:4-50 for second offenses was reduced from permanent forfeiture to forfeiture for ten years.

Thus, you raise the question whether you as Director can disregard the penalty of forfeiture imposed by a magistrate purportedly pursuant to R. S. 39:4-50, by an independent determination that the applicant for a new license was punishable only as a first offender because his previous conviction was sustained in another jurisdiction.

By the express terms of R. S. 39:4-50, a person who has been convicted of a previous violation of that section may be liable for penalties as a second offender,

although the complaint against him for drunken driving fails to charge him as a second offender. The fact of the first drunken driving conviction in New Jersey is therefore not an issue in determining guilt or innocense of the second charge.

In *MacKinnon v. Ferber, supra,* a magistrate imposed a sentence for a first drunken driving violation. Upon report of the conviction, the then Commissioner of Motor Vehicles discovered a prior conviction in New Jersey and notified the motorist that his license was permanently forfeited. This action by the Commissioner was sustained. Judge Bigelow wrote for the court:

> "The act of operating an automobile while intoxicated does not of itself work a forfeiture, but a conviction effects a forfeiture by force of R. S. 39:4-50, whether or not the judgment expresses the forfeiture. And if the conviction is, in fact, a second one, the forfeiture is permanent . . ."

The former Court of Errors and Appeals in *State* v. *Mowel,* 116 N. J. L. 354 (1936) quoted with approval the language in *State* v. *Rowe,* 116 N. J. L. 48 (Sup. Ct. 1935) that a former conviction for drunken driving in New Jersey "was relevant . . . on the question of punishment only."

Nevertheless, the Supreme Court in *State* v. *Myers,* 136 N. J. L. 288 (1947) set aside a sentence imposing the penalties for a second conviction under R. S. 39:4-50 on the ground that the accused had no opportunity to be heard on the truth or accuracy of the certification of a previous conviction. Chief Justice Case said at p. 291:

> "We do not hold that those factors need be introduced at the trial, but we do find that the defendant should be given knowledge of the contents of the certification of earlier conviction by virtue of which he is to be sentenced and an opportunity to address himself thereto before sentence is pronounced. There was, therefore, error in the fixing of sentence."

The conviction in *State* v. *Myers* was in the Court of Special Sessions on appeal and trial de novo. The then Department of Motor Vehicles submitted the certification of the prior drunken driving conviction in New Jersey between the trial and the imposition of sentence.

State v. Myers is not cited in *Mac Kinnon v. Ferber,* supra; according to the *MacKinnon* decision, the forfeiture is automatic and the function of the Director of the Division of Motor Vehicles in refusing a new license is ministerial upon discovery of the record of an earlier conviction.

The opportunity to be heard prior to the imposition of sentence is a requirement of procedural due process of law according to the rationale of *State* v. *Myers, supra.* The constitutional right presumes that an adjudication of the issue will ensue. *Stanley* v. *Board of Chosen Freeholders,* 60 N. J. L. 392 (Sup. Ct. 1897); *Callen* v. *Gill,* 7 N. J. 312 (1951); *Hyman* v. *Muller,* 1 N. J. 124 (1948).

Reconciling *Mac Kinnon* v. *Ferber* and *State* v. *Myers,* the motorist must be granted a hearing on the validity of the first conviction of drunken driving prior to the imposition of the additional sentence for a second offense, with a right of judicial appeal. If the sentence fails to impose the mandatory penalty for a second offense, the Director must nevertheless treat this an automatic ten year revocation case upon notice to the convicted motorist and an opportunity for him to be heard relative to the validity of the first conviction. Notification of permanent revocation was made to the accused according to the recital of facts in *Mac Kinnon* v. *Ferber.* Under the State Constitution and Rules of Court, adverse action by the Director is reviewable by a proceeding in lieu of prerogative writ. *Mac Kinnon* v. *Ferber* recognizes the practicality that magistrates may not be apprised of earlier drunken driving convictions prior to disposition of such cases.

The question whether a conviction of drunken driving in another State is a first offense, as this term is used in R. S. 39:4-50, is a matter for judicial determination. While there is no authority directly in point in this State, we point out that R. S. 39:4-50 specifies that a person who has been convicted of "a previous violation of this section" need not be charged in the complaint as a second offender. In addition, as an established rule of construction, penal statutes must be strictly construed. See *State* v. *Mundet Cork Corp.*, 8 N. J. 359 (1952). There are no guiding precedents under the Habitual Criminal Act (N. J. S. 2A:85-8 et seq.) or the Uniform Narcotic Drug Law (R. S. 24:18-1 et seq.), both of which expressly authorize the imposition of more severe penalties for second offenses after conviction of comparable crimes under the laws of the United States or of another State.

Hinnekens v. *Magee,* 135 N. J. L. 537 (Sup. Ct. 1947) and *Tichenor* v. *Magee,* 4 N. J. Super. 467 (App. Div. 1949), which uphold the discretionary authority of the Director of the Division of Motor Vehicles to revoke a license because of an out of State drunken driving conviction are not in point. The statutes governing these two decisions are R. S. 39:3-10 and R. S. 39:5-30. The former sets forth that:

> "the director in his discretion may refuse to grant a license to drive motor vehicles to a person who is, in his estimation, not a proper person to be granted such a license . . .",

while R. S. 39:5-30 empowers the Director to suspend or revoke any license for a violation of the Motor Vehicle Title or

> "on any other reasonable grounds."

The Appellate Division said in the *Tichenor* decision at p. 471:

> "We are satisfied that plaintiff's conviction in Maryland is reasonably comprehended within the term 'other reasonable grounds' (R. S. 39:5-30) justifying defendant's revocation of plaintiff's New Jersey license. Upon conviction of a person for operating an automobile while under the influence of intoxicating liquor over the highways of this State, his right to operate a motor vehicle is forfeited for a period of two years. R. S. 39:4-50. It reasonably follows that one holding a New Jersey driver's license, upon proof of a conviction for that offense in another State, should not be permitted to continue to operate a motor vehicle in New Jersey."

In response to your specific inquiry therefore, we advise you that the determination of the magistrate in 1948, imposing sentence for a second drunken driving conviction, is binding upon you and cannot, in effect, be collaterally set aside. No appeal was taken and the magistrate's decision stands invulnerable to collateral attack.

On the broader question, we advise you that you may in your discretion regard a drunken driving conviction preceded by a similar out of State offense as grounds for revocation of the driving privilege. In the absence of a judicial decision to the contrary, you are not compelled to but may revoke a New Jersey driver's license for ten years upon ascertaining that a drunken driving violator had sustained a conviction for that offense in another jurisdiction.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: DAVID D. FURMAN,
Deputy Attorney General.

May 11, 1955.

MR. AARON K. NEELD, *Director,*
Division of Taxation,

State House,
Trenton, New Jersey.

MEMORANDUM OPINION P-11.

DEAR MR. NEELD:

You have requested an opinion concerning the running of interest on public utility franchise and gross receipts taxes under L. 1940, c. 5, as amended (R. S. 54:31-45, et seq.).

You inform us that there are presently pending before the Division of Tax Appeals petitions filed by the Atlantic City Transportation Company seeking review of the amount of franchise and gross receipts taxes assessed against it for the years 1951, 1952, 1953 and 1954.

Your letter puts the question as follows:

> ". . . whether the taxes assessed for the years 1951 through 1954 bear interest from the dates when these taxes would ordinarily have become payable or whether no interest is chargeable until the entry of judgments on the appeals above mentioned."

More specifically, you state the question to be "whether section 54:31-58 suspends all interest charges in those cases involving appeals from assessments of franchise and gross receipts taxes."

In our opinion, it is clear that an appeal by a taxpayer of the amount of franchise and gross receipts taxes assessed against it does not toll the running of interest pending the final determination of such an appeal.

R. S. 54:31-58 provides as follows:

> "The taxes payable by each taxpayer hereunder shall be and remain a first lien on the property and assets of such taxpayer on and after the date the same become payable, as herein provided, until paid with interest thereon, and the same shall be collected in the same manner and subject to the same discounts, interest and penalties as personal taxes against other corporations or individuals and the same proceedings now available for the collection of personal taxes against other corporations or individuals shall be applicable to the collection of the taxes hereby imposed and payable to any municipality."

The same section of the act does prevent interest from running pending certain appeals, by providing that:

> "In case of an appeal from any apportionment valuation or apportionment or any review thereof in any court, the portion of any such tax not paid prior to the commencement of any such appeal or proceedings for review, shall not become payable until thirty days after final determination of such appeal or review and the certification or recertification of the apportionment, if required."

But, the very wording of this provision postponing the due date for subject taxes limits the operation thereof to appeals from apportionment and apportionment valuations. Such postponement is not made applicable to appeals from the amount of the assessment, which is the basis for the relief sought in the appeals now pending before the Division.

Only an aggrieved municipality is authorized to appeal the apportionment valuations (R. S. 54:31-53) and thus bring the postponement provision into operation.

Indeed, for the taxpayer to appeal the apportionment valuations or the apportionment would be fruitless for no matter what change was made in either, the amount of the tax assessed against the taxpayer would not be affected. Moreover, even if it desired to do so, the taxpayer would not be permitted to contest either the apportionment valuation or the apportionment. See *New Jersey Water Company* v. *Hendrickson,* 88 N. J. L. 595 (Sup. Ct. 1916); aff'd 90 N. J. L. 537 (E. & A. 1917).

The letter accompanying your request for this opinion indicates that there is a question as to the rate of interest to be charged on franchise and gross receipts taxes paid after the due date. As quoted above, R. S. 54:31-58 provides that these taxes shall be ". . . subject to the same . . . interest . . . as personal taxes . . ." This has reference to the interest rate on personal property taxes, for which a taxpayer is personally liable under R. S. 54:4-1, as amended.

The interest rate on such taxes is arrived at pursuant to R. S. 54:4-67 which states, inter alia:

> "The governing body may also fix the rate of interest to be charged for the nonpayment of taxes or assessment on or before the date when they would become delinquent. The rate so fixed shall not exceed eight per cent per annum."

Thus, a resolution adopted in accordance with this provision operates to fix the rate of interest to be charged on franchise and gross receipts taxes paid after the due date.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: THOMAS L. FRANKLIN,
Deputy Attorney General.

May 16, 1955.

HON. ARCHIBALD S. ALEXANDER,
State Treasurer of New Jersey,

State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-12.

Re: *Pension Fund Voucher Signatures*

DEAR MR. ALEXANDER:

We have your recent memorandum requesting our opinion as to whether the chairman of the board of trustees of a pension fund may "properly authorize the secretary of the board, or some other official of the board, to affix his signature by machine" to the pension fund vouchers.

The several statutes creating the State Pension Fund Systems vary somewhat in defining the powers and duties of the officers of the board of trustees or commissioners who are charged with the responsibility of administering the pension funds. Some statutes provide that all payments from the funds shall be made by the State Treasurer only upon "vouchers signed by the chairman and countersigned by the secretary of the board of trustees," (N. J. S. A. 43:15A-35), while others provide that all moneys paid out of the pension fund shall be paid by the State Treasurer upon warrants "signed by the president and secretary of said pension commission, or such other officers as the pension commission shall designate," (R. S. 43.7-19,

Indeed, for the taxpayer to appeal the apportionment valuations or the apportionment would be fruitless for no matter what change was made in either, the amount of the tax assessed against the taxpayer would not be affected. Moreover, even if it desired to do so, the taxpayer would not be permitted to contest either the apportionment valuation or the apportionment. See *New Jersey Water Company* v. *Hendrickson,* 88 N. J. L. 595 (Sup. Ct. 1916); aff'd 90 N. J. L. 537 (E. & A. 1917).

The letter accompanying your request for this opinion indicates that there is a question as to the rate of interest to be charged on franchise and gross receipts taxes paid after the due date. As quoted above, R. S. 54:31-58 provides that these taxes shall be ". . . subject to the same . . . interest . . . as personal taxes . . ." This has reference to the interest rate on personal property taxes, for which a taxpayer is personally liable under R. S. 54:4-1, as amended.

The interest rate on such taxes is arrived at pursuant to R. S. 54:4-67 which states, inter alia:

> "The governing body may also fix the rate of interest to be charged for the nonpayment of taxes or assessment on or before the date when they would become delinquent. The rate so fixed shall not exceed eight per cent per annum."

Thus, a resolution adopted in accordance with this provision operates to fix the rate of interest to be charged on franchise and gross receipts taxes paid after the due date.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: THOMAS L. FRANKLIN,
Deputy Attorney General.

May 16, 1955.

HON. ARCHIBALD S. ALEXANDER,
State Treasurer of New Jersey,

State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-12.

Re: *Pension Fund Voucher Signatures*

DEAR MR. ALEXANDER:

We have your recent memorandum requesting our opinion as to whether the chairman of the board of trustees of a pension fund may "properly authorize the secretary of the board, or some other official of the board, to affix his signature by machine" to the pension fund vouchers.

The several statutes creating the State Pension Fund Systems vary somewhat in defining the powers and duties of the officers of the board of trustees or commissioners who are charged with the responsibility of administering the pension funds. Some statutes provide that all payments from the funds shall be made by the State Treasurer only upon "vouchers signed by the chairman and countersigned by the secretary of the board of trustees," (N. J. S. A. 43:15A-35), while others provide that all moneys paid out of the pension fund shall be paid by the State Treasurer upon warrants "signed by the president and secretary of said pension commission, or such other officers as the pension commission shall designate," (R. S. 43.7-19,

as amended). Still others provide that all payments from the pension fund shall be made by the State Treasurer "only upon vouchers signed by the chairman and countersigned by such other person as the board of trustees may designate," (R. S. 18:13-104), and R. S. 43:16A-14(2) states that all payments shall be made by the State Treasurer only "upon vouchers signed by two persons designated by the board of trustees." (See also N. J. S. A. 43:8A-17(2), R. S. 43:16A-14(2) and R. S. 43:7-19, as amended.)

In determining the question posed, we think that it turns on the proposition as to whether the statute creating a particular pension fund gives authority to the pension officer to delegate his power to sign the voucher and whether the exercise of that power is discretionary or ministerial.

Generally, it has been held that in the absence of statutory authority, a public officer cannot delegate his discretionary authority. "An officer, to whom a power of discretion is entrusted, cannot delegate the exercise thereof, except as prescribed by statute" (67 C. J. S. Sec. 104). "Where judgment and discretion are required of municipal officers, they cannot be delegated without express legislative authority." (*State, Danforth, pros.* v. *City of Paterson,* 34 N. J. L. 163, (Supreme Court 1870). "A public officer charged with the performance of official duties does not necessarily have the power to delegate his authority to a person not authorized by law to act," (43. Am. Jur. Sec. 461). "Official duties involving the exercise of discretion and judgment for the public weal cannot be delegated. They can be performed only in person." (43 Am. Jur. Sec. 461.)

It is not easy to enunciate a hard and fast rule distinguishing which acts are discretionary from those which are ministerial, but the following definitions have received court approval:

> "A ministerial act has been defined as '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 District of Danbury* v. *Christiansen,* 49 N. W. 2d 263 (Supreme Court Iowa, 1951). See also *Schwartz* v. *Camden,* 77 N. J. Eq. 135 (Ch. 1910).

The officers and members of the several boards of trustees and commissions are legislatively charged with the responsibility of administering the pension funds. The signing of the warrant by the pension officials is evidence of the determination made by them, in the exercise of their judgment and discretion, that the payee is entitled, under the existing facts and law, to the pension payment therein referred to. The power to make this determination cannot be delegated, unless there be specific statutory authorization for such delegation.

Since several of the pension acts contain express authority for the delegation of the power to sign pension vouchers, while others do not, reference should be made in each case to the applicable statute.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: ROGER M. YANCEY,
Deputy Attorney General.

RMY:BK

May 19, 1955.

HON. JOSEPH E. CLAYTON,
Assistant Commissioner of Education,
175 West State Street,
Trenton, New Jersey.

MEMORANDUM OPINION P-13

DEAR COMMISSIONER:

You have requested our opinion as to whether it is lawful for a State Teachers' College to enter into an agreement with an English college for an exchange professorship, whereby a professor in the State Teachers' College will be granted a leave of absence with full pay during the year of his teaching at the English college, while our State Teachers' College will receive during that same period the services of the professor from the English college at no cost to this State. Thus the two professors will exchange places for the academic year, with each continuing to receive his salary from the institution where he is a regular faculty member. The United States Office of Education is fostering such exchange professorships with foreign countries in cooperation with your department and with departments of education in other states.

In our opinion the arrangement above described would be legal and proper. While the statutes pertaining to State teachers' colleges are silent on this particular point, the control and management of these colleges are vested by R. S. 18:16-11 and 18:16-20 in the Commissioner of Education, subject to the approval of the State Board of Education. The latter section provides among other things that the Commissioner, subject to the approval of the State Board, shall "Appoint and remove principals, teachers and other employees, and fix the compensation of those whose compensation is not fixed by statute or otherwise determinable by authority of law." R. S. 18:16-21 provides:

> "The commissioner, with the approval of the state board, may make regulations concerning leaves of absence and payment during such leaves for teachers employed in the state normal schools and state teachers' colleges."

We believe that the granting of a leave of absence with full pay in connection with an exchange professorship as above outlined falls within the powers vested in the Commissioner and the State Board by the statutes just cited, and partciularly R. S. 18:16-21. Under this arrangement the State would receive, from the foreign professor, without added cost, services the same as or equivalent to those regularly performed by the faculty member of our teachers' college, while he in turn would be obtaining valuable experience and knowledge during his year abroad. For these reasons, the proposed exchange professorship would serve the interests of the State and may be entered into pursuant to the legal authority granted by R. S. 18:16-21.

A similar statutory provision is found in R. S. 11:14-1, which authorizes the Chief Examiner and Secretary of the Civil Service Commission to prepare regulations regarding leaves of absence with or without pay for employees in the classified service. In a memorandum opinion to the State Commissioner of Health, dated September 17, 1954, we held that under R. S. 11:14-1, employees of the Department of Health may be given special leaves of absence, with or without pay, for the purpose of training or education in fields related to the functions of that Department. We feel that that opinion should be followed by analogy here, since the experience of the New Jersey professor during his year aboard will give him training and education closely related to his functions in the State Teachers' College which regularly employs him.

In order to literally comply with R. S. 18:16-21, we recommend that the exchange professorship be authorized in the form of a regulation of the Commissioner of Education, with the approval of the State Board.

Yours very truly,
GROVER C. RICHMAN, JR.,
Attorney General.
By: THOMAS P. COOK,
Deputy Attorney General.

tpc:b

June 2nd, 1955.

HON. ROBERT B. MEYNER,
Governor of New Jersey,
State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-14

DEAR GOVERNOR MEYNER:

You have requested our opinion concerning the effect of the State Constitution of 1947 on P. L. 1942, c. 167, which vests in the Legislature the power to elect members of the South Jersey Port Commission.

By Article IV, Section V, Paragraph 5 of the 1947 Constitution, the Legislature is barred from the election or appointment of any executive or administrative officer except the State Auditor. While the Legislature may appoint commissions or other bodies whose main purpose is to assist it (Article IV, Section V, Paragraph 2), the South Jersey Port Commission is an administrative agency performing governmental functions in the development of port and transportation facilities along the Delaware Bay and tidal portions of the Delaware River.

The Constitution of 1947 preserves the force and effect of all statutes not "superseded, altered or repealed by this Constitution or otherwise" (Article XI, Section I, Paragraph 3).

Since the election or appointment of executive or administrative officers is ultra vires the Legislature, there is a repugnancy between the Constitution and P. L. 1942, c. 167, amounting to a repeal of the provision of that statute empowering the Legislature to elect the members of the South Jersey Port Commission.

Unlike the Constitution of 1844 (see *Ross* v. *Frecholders of Essex,* 69 N. J. L. 291 (E. & A. 1903)), the Constitution of 1947 vests exclusive appointive authority in the Governor except in those instances where some other provision for appointment is fixed in the Constitution or by law. Article V, Section I, Paragraph 12. "By law" means by a valid law. A law in effect prior to the new Constitution but repugnant thereto is constitutionally invalid. The Legislature cannot exercise prerogatives vested by Constitution in the Governor. Thus, election or appointment of members of the South Jersey Port Commission by the Legislature would be a nullity. In the absence of a valid law vesting the appointive power elsewhere, the Governor should nominate and appoint the members of the South Jersey Port Commission.

We are advised that, subsequent to the Constitution of 1947, nine appointments were made to the South Jersey Port Commission, all by Governor Driscoll.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.
By: DAVID D. FURMAN,
Deputy Attorney General.

DDF:lmv

In order to literally comply with R. S. 18:16-21, we recommend that the exchange professorship be authorized in the form of a regulation of the Commissioner of Education, with the approval of the State Board.

Yours very truly,
GROVER C. RICHMAN, JR.,
Attorney General.
By: THOMAS P. COOK,
Deputy Attorney General.

tpc:b

June 2nd, 1955.

HON. ROBERT B. MEYNER,
Governor of New Jersey,
State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-14

DEAR GOVERNOR MEYNER:

You have requested our opinion concerning the effect of the State Constitution of 1947 on P. L. 1942, c. 167, which vests in the Legislature the power to elect members of the South Jersey Port Commission.

By Article IV, Section V, Paragraph 5 of the 1947 Constitution, the Legislature is barred from the election or appointment of any executive or administrative officer except the State Auditor. While the Legislature may appoint commissions or other bodies whose main purpose is to assist it (Article IV, Section V, Paragraph 2), the South Jersey Port Commission is an administrative agency performing governmental functions in the development of port and transportation facilities along the Delaware Bay and tidal portions of the Delaware River.

The Constitution of 1947 preserves the force and effect of all statutes not "superseded, altered or repealed by this Constitution or otherwise" (Article XI, Section I, Paragraph 3).

Since the election or appointment of executive or administrative officers is ultra vires the Legislature, there is a repugnancy between the Constitution and P. L. 1942, c. 167, amounting to a repeal of the provision of that statute empowering the Legislature to elect the members of the South Jersey Port Commission.

Unlike the Constitution of 1844 (see *Ross* v. *Freeholders of Essex,* 69 N. J. L. 291 (E. & A. 1903)), the Constitution of 1947 vests exclusive appointive authority in the Governor except in those instances where some other provision for appointment is fixed in the Constitution or by law. Article V, Section I, Paragraph 12. "By law" means by a valid law. A law in effect prior to the new Constitution but repugnant thereto is constitutionally invalid. The Legislature cannot exercise prerogatives vested by Constitution in the Governor. Thus, election or appointment of members of the South Jersey Port Commission by the Legislature would be a nullity. In the absence of a valid law vesting the appointive power elsewhere, the Governor should nominate and appoint the members of the South Jersey Port Commission.

We are advised that, subsequent to the Constitution of 1947, nine appointments were made to the South Jersey Port Commission, all by Governor Driscoll.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.
By: DAVID D. FURMAN,
Deputy Attorney General.

DDF:lmv

June 8, 1955.

MR. WILLIAM J. JOSEPH,
Bureau of Public Employees' Pensions,
State House Annex,
Trenton, New Jersey.

MEMORANDUM OPINION P-15

DEAR MR. JOSEPH:

You have asked our opinion as to the rights of a public employee veteran who terminates his public employment after twenty years of service, but before having attained the age of sixty.

N. J. S. A. 43:15A-38 provides as follows:

"Should a member of the Public Employees' Retirement System, after having completed 20 years of service, be separated voluntarily or involuntarily from the service, before reaching service retirement age, and not by removal for cause on charges of misconduct or delinquency, such person may elect to receive: (a) the payments provided for in section 41.b. of this act, if he so qualifies under said section, or; (b) a deferred retirement allowance, beginning at the retirement age, which shall be made up of an annuity derived from the accumulated deductions standing to the credit of the individual member's account in the annuity savings fund at the time of his severance from the service, and a pension which when added to the annuity will produce a total retirement allowance of 1/70 of his final compensation for each year of service credited as Class A service and 1/60 of his final compensation for each year of service credited as Class B service, calculated in accordance with section 48 of this act, with optional privileges provided for in section 50 of this act; provided, also that such election is communicated by such member to the board of trustees in writing stating at what time subsequent to the execution and filing thereof he desires to be retired; and provided further, that such member, as referred to in subsection (b) may later elect: (a) to receive the payments provided for in section 41.b. of this act, if he had qualified under that section at the time of leaving service, or; (b) to withdraw his accumulated deductions or, if such member shall die before attaining service retirement age then his accumulated deductions shall be paid to such person, if living, as he shall have nominated by written designation duly executed and filed with the board of trustees otherwise to the executor or administrator of the member's estate."

Since N. J. S. A. 43:15A-41b, which is referred to in N. J. S. A. 43:15A-38 refers to the annuity and reduces pension benefits immediately payable to a member who resigns after completing 25 years of service, we shall not be concerned with that section here.

N. J. S. A. 43:15A-61 provides, in part, as follows:

"a. Any public employee veteran member in office, position or employment of this State or of a county, municipality, or school district or board of education on January 2, 1955, who remains in such service thereafter and who has or shall have attained the age of 60 years and who has or shall have been for 20 years in the aggregate in office, position or employment of this State or of a county, municipality or school district or board of education, satisfactory evidence of which service has been presented to the board of trustees, shall have the privilege of retiring and of receiving a retirement

allowance of 1/2 of the compensation received during the last year of employment upon which contributions to the annuity savings fund or contingent reserve fund are made with the optional privileges provided for in section 50 of this act.

"b. Any veteran becoming a member after January 2, 1955, who shall be in office, position or employment of this State or of a county, municipality or school district or board of education and who shall have attained 62 years of age and who shall present to the board of trustees satisfactory evidence of 20 years of aggregate service in such office, position or employment shall have the privilege of retiring and of receiving a retirement allowance of 1/2 of the compensation received during the last year of employment upon which contributions to the annuity savings fund or contingent reserve fund are made with the optional privileges provided for in section 50 of this act . . ."

In view of the statutes cited above, you have asked whether a public employee veteran who, after having completed twenty years of service, is separated from service not for cause, misconduct, or delinquency, should upon attaining the age of sixty, receive a retirement allowance of one-half of the compensation he received during the last year of his employment pursuant to N. J. S. A. 43:15A-61a, or the lesser benefits provided by N. J. S. A. 43:15A-38.

N. J. S. A. 43.15A-61a provides the privilege of retirement at one-half pay to any public employee veteran member in office, position, or employment "on January 2, 1955, who remains in such service thereafter and who has or shall have attained the age of 60 years and who has or shall have been for 20 years in the aggregate in office, position, or employment." Therefore, a public employee veteran with twenty years of service who was in public service on January 2, 1955, but who does not remain in such service until attaining the age of sixty, can acquire no right to retirement at one-half pay under said section.

Furthermore, N. J. S. A. 43:15A-38, which is referred to in the index preceding Chapter 15A of Title 43 in the Revised Statutes as pertaining to "vesting," is the only section which provides for a deferred retirement allowance for employees whose employment is terminated before they reach the age of retirement. Since this section makes no distinction between veterans and non-veterans as to the deferred retirement allowances available, its terms must be held to govern the deferred retirement allowances available to all public employees.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

csj ;b

JUNE 10, 1955.

HON. JOSEPH E. MCLEAN, *Commissioner,*
Department of Conservation and Economic Development,
State House Annex,
Trenton, New Jersey.

MEMORANDUM OPINION P-16.

DEAR DR. MCLEAN:

You have asked our opinion as to whether or not a county planning board created pursuant to R. S. 40:27-1 qualifies as a "regional planning agency" under section 701 of Title VII of the Federal Housing Act of 1954.

Section 701 of Title VII of the Federal Housing Act of 1954 provides for two types of Federal planning grants. The Administrator is empowered to make grants to State planning agencies "to facilitate urban planning for smaller communities (under 25,000 population) lacking adequate planning resources" by providing "planning assistance (including surveys, land use studies, urban renewal plans, technical services and other planning work, but excluding plans for specific public works)." Further, "The Administrator is further authorized to make planning grants for similar planning work in metropolitan and regional areas to official State, metropolitan, or regional planning agencies empowered under State or local laws to perform such planning."

As is set forth in section 2.3 of the Regulations issued by the Administrator of the Housing and Home Finance Agency relating to grants under section 701:

> "In general, metropolitan planning is construed to mean planning for the urbanized or related area surrounding, and including, a major city or group of cities." * * *
>
> "Metropolitan planning is not limited to the area *outside* of the central city or cities. Its purposes is to secure coordinated planning of the entire area and this may well involve general land use plans, major thoroughfare plans, uniform platting controls and other measures dealing both with the central city and its environs. However, metropolitan planning, as used in Section 701 of the Act, is not intended to include items which are the exclusive concern of individuals cities, such as, for example, plans for the development of the central business district, civic center plans or a detailed zoning code." * * *
>
> "Regional planning may also include areas that are not metropolitan, in the sense of being centered in a major city, but which are characterized by other types of urban development."

Section 2. 4 of those Regulations provides in part:

> "The Act states that grants may be made 'to official State, metropolitan, or regional planning agencies empowered under State or local laws to perform such planning.' The applicant agency may be an official State agency which is authorized to plan for metropolitan or regional areas within the State, or it may be an official metropolitan or regional planning agency empowered by State or local laws to do planning work for metropolitan or regional areas." * * *
>
> "Furthermore, there are many county planning agencies which, by virtue of the size, location and urban character of the county, are actually engaged in planning of a metropolitan nature. Finally, there are various

authorizations in State and local laws for joint action by a city and county, or by several adjoining jurisdictions so that they may conduct planning work on a metropolitan or regional basis.

It is not possible to lay down a precise rule as to what types of agency can qualify under Section 701 of the Housing Act. A final determination of eligibility can be made only after submission of documentation establishing the legal basis for the applicant's claim to eligibility and an application describing the work which it proposes to do with the aid of Federal funds." Finally, section 2. 5 of the Regulations provides:

"In order to qualify for grants for metropolitan or regional planning, applicant agencies must be:

a. Legally created as an official State, metropolitan or regional planning agency empowered under State or local laws to perform planning work in metropolitan or regional areas.
b. Legally empowered to receive and expend Federal funds and expend other funds for the purpose stated in a. above, and to contract with the United States with respect thereto.
c. In position to provide non-Federal funds in an amount at least equal to one-half the estimated cost of the planning work for which the Federal grant is requested.
d. Technically qualified to perform the planning work, either with their own staffs or through acceptable contractual arrangements with other qualified agencies or private professional organizations or individuals."

The formation of county planning boards by action of the governing body of the respective counties in this state was authorized by chapter 251 of the Laws of 1935, now R. S. 40:27-1 et. seq.

The duties of the county planning board are set forth in R. S. 40:27-2 which provides:

"The county planning board shall make and adopt a master plan for the physical development of the county. The master plan of a county, with the accompanying maps, plats, charts, and descriptive and explanatory matter, shall show the county planning board's recommendations for the development of the territory covered by the plan, and may include, among other things, the general location, character, and extent of streets or roads, viaducts, bridges, waterway and waterfront developments, parkways, playgrounds, forests, reservations, parks, airports, and other public ways, grounds, places and spaces; the general location and extent of forests, agricultural areas, and open-development areas for purposes of conservation, food and water supply, sanitary and drainage facilities, or the protection of urban development, and such other features as may be important to the development of the county.

The county planning board shall encourage the co-operation of the local municipalities within the county in any matters whatsoever which may concern the integrity of the county master plan and to advise the board of chosen freeholders with respect to the formulation of development programs and budgets for capital expenditures."

The county planning board is authorized to employ experts, with moneys which are appropriated to it by the county, or which are "placed at its disposal through gift" (R. S. 40:27-3). A public hearing is required before adoption of the master

plan, with provision being made for the co-ordination of municipal plans with the county master plan (R. S. 40:27-4).

That a planning board set up under the New Jersey Act for a county, which has been defined "as a political organization of certain territory, within the State, particularly defined by geographical limits." (14 Am. Jur. 185) constitutes a "regional planning agency" within the meaning of Section 701 of Title VII of the Federal Housing Act of 1954 is, in our opinion, clear.

However, we understand that some question has been raised as to whether a county planning board can constitute a "regional planning agency" under the Federal Act because the same act which authorizes creation of county planning boards also authorizes, by R. S. 40:27-9, the creation of regional planning boards; this even though in fact no regional planning board has been created in this State.

So, R. S. 40:27-9 provides in part as follows.

> "The councils or corresponding administrative bodies of any group of municipalities, independently or together with the board or boards of freeholders of any county or counties in which such group of municipalities is located or of any adjoining county or counties; or the council or corresponding administrative body of any municipality together with the board of freeholders in which such municipality is located; or the boards of freeholders of any two or more adjoining counties, may co-operate in the creation of a regional planning board for any region defined as may be agreed upon by said co-operating councils and board or boards or by said co-operating boards."

Such regional planning board is required to make a master plan applicable to its region (R. S. 40:27-10); its member municipalities may delegate to it the powers and duties of municipal planning boards under R. S. 40:55-1 et. seq., and its member counties may delegate to it "any and all of the powers and duties of a county planning board as provided by sections 40:27-1 to 40:27-8 * * * for the territory of the county so resolving" (R. S. 40:27-11).

A reading of the quoted section authorizing the creation of regional planning boards makes it clear, however, that the legislative intent was not to destroy the status of county planning boards as "regional planning agencies," but rather to authorize the creation of planning boards other than county planning boards, by groups of municipalities, or counties, or both, to deal with an area other than the geographical limits of a particular county.

The region dealt with by a county planning board formed under R. S. 40:27-1 is the county; that dealt with by the regional planning board formed pursuant to R. S. 40:27-9 may be more or less than a county. The statutory authorization for the formation of a "regional planning board" does not destroy the qualification and standing of a "county planning board" as a "regional planning agency" within the meaning of Section 701 of Title VII of the Federal Housing Act of 1954.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: STANLEY COHEN,
Deputy Attorney General.

K:C:P

JULY 6, 1955.

MR. W. LEWIS BAMBRICK,
Unsatisfied Claim and Judgment Fund Board,

222 West State Street,
Trenton, New Jersey.

MEMORANDUM OPINION P-17.

DEAR MR. BAMBRICK:

You have asked our opinion as to whether the Unsatisfied Claim and Judgment Fund Board may accept as timely notice under N. J. S. A. 39:6-65, a notice bearing a postmarked date which is within thirty days after an accident, but which is not received by the Unsatisfied Claim and Pension Fund Board within said thirty day period.

N. J. S. A. 39:6-65 provides as follows:

> "Any qualified person, or the personal representative of such person, who suffers damages resulting from bodily injury or death or damage to property arising out of the ownership, maintenance or use of a motor vehicle in this State on or after the first day of April, one thousand nine hundred and fifty-five, and whose damages may be satisfied in whole or in part from the fund, shall, within thirty days after the accident, as a condition precedent to the right thereafter to apply for payment from the fund, give notice to the board, on a form prescribed by it, of his intention to make a claim thereon for such damages if otherwise uncollectible and otherwise comply with the provisions of this section;" . . .

In *Poetz v. Mix,* 7 N. J. 436 (Sup. Ct. 1951), the Court considered the question of when a pleading may be considered as "filed". The Court stated:

> ". . . In contemplation of law, a paper or pleading is considered as filed when delivered to the proper custodian and received by him to be kept on file . . ."

It should be noted that N. J. S. A. 36:6-65 does not require that a prospective claimant against the Unsatisfied Claim and Judgment Fund "file" his claim within thirty days from an accident, but merely that he "give notice to the board" within said period. However, there are several cases which rule that where a statute requires a notice to be given within a certain number of days after a certain event, the notice must be actually received, and not merely mailed, within the prescribed period of time.

In *Rapid Motor Lines v. Cox,* 134 Conn. 235, 56 A 2d 519 (Conn. Sup. Ct. of Err. 1947), where a statute provided that no action would lie against the state highway commission for damages caused by a defect in the highway unless notice of injury "shall have been given within thirty days thereafter to the highway commissioner," the court said:

> ". . . the clause 'notice shall be given' requires a completed act within the number of days prescribed by the statute . . . It is our conclusion that these words require that the notice shall be delivered to the commissioner within the sixty day period specified in the statute, and that sending on the sixtieth day a notice which is not received by him until the sixty-first day does not constitute compliance with the statute."

In *Chase v. Surry,* 88 Maine 468, 34 Atl. 270 (1896) where a statute required that the claimant "notify" municipal officers by letter or otherwise in writing, the Court stated:

"The statute expressly provides the time in which such notice may be given, and also the manner of giving it . . . The writing and mailing a notice within the time is not notifying the officers of the town as the statute requires."

In the above case the Court rejected the contention that the mailing of the notice, properly addressed within the prescribed period of time, was a legal notification, whether or not it was actually received by the town officers.

In *O'Neil v. Boston,* 257 Mass. 414 (1926), a notice to a municipality of an injury due to a defective condition on a sidewalk, which notice was mailed on the tenth day after the injury, but not received until the eleventh day, was held not a sufficient compliance with a statute requiring notice within ten days after the injury as a condition precedent to the maintenance of an action against the city.

We have also found that, with regard to cases involving the question of whether or not notice was given within the time limited by an insurance policy, the weight of authority is to the effect that notice must actually be received, not merely mailed, within the prescribed time. No cases in New Jersey are to be found on the general subject, with the exception of cases involving "filing" of a paper or pleading with a court. (Poetz v. Mix, supra).

In view of the foregoing, it is our opinion that the Unsatisfied Claim and Judgment Fund Board may not accept as timely notice under N. J. S. A. 39:6-65, a notice bearing a postmarked date which is within thirty days after an accident, but which is not actually received by the Unsatisfied Claim and Judgment Fund Board within said thirty day period.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

csj;b

JULY 7, 1955.

HON. CHARLES F. SULLIVAN,
Director, Division of Purchase and Property,

State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-18.

Re: 200-Bed Housing Unit and New Kitchen Addition—New Jersey State Hospital, Marlboro, New Jersey.

DEAR DIRECTOR SULLIVAN:

We have your letter of June 27th last, together with its enclosures relating to the above entitled matter.

It is to be noted that you desire our opinion as to whether the proposal of Anthony Lewis, Inc. of 14-22 Newark Way, Maplewood, New Jersey, the lowest responsible bidder on General Construction Work at New Jersey State Hospital, Marlboro, New Jersey, should be rejected in view of its request to be relieved of

"The statute expressly provides the time in which such notice may be given, and also the manner of giving it . . . The writing and mailing a notice within the time is not notifying the officers of the town as the statute requires."

In the above case the Court rejected the contention that the mailing of the notice, properly addressed within the prescribed period of time, was a legal notification, whether or not it was actually received by the town officers.

In *O'Neil v. Boston,* 257 Mass. 414 (1926), a notice to a municipality of an injury due to a defective condition on a sidewalk, which notice was mailed on the tenth day after the injury, but not received until the eleventh day, was held not a sufficient compliance with a statute requiring notice within ten days after the injury as a condition precedent to the maintenance of an action against the city.

We have also found that, with regard to cases involving the question of whether or not notice was given within the time limited by an insurance policy, the weight of authority is to the effect that notice must actually be received, not merely mailed, within the prescribed time. No cases in New Jersey are to be found on the general subject, with the exception of cases involving "filing" of a paper or pleading with a court. (Poetz v. Mix, supra).

In view of the foregoing, it is our opinion that the Unsatisfied Claim and Judgment Fund Board may not accept as timely notice under N. J. S. A. 39:6-65, a notice bearing a postmarked date which is within thirty days after an accident, but which is not actually received by the Unsatisfied Claim and Judgment Fund Board within said thirty day period.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

csj;b

JULY 7, 1955.

HON. CHARLES F. SULLIVAN,
Director, Division of Purchase and Property,

State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-18.

Re: 200-Bed Housing Unit and New Kitchen Addition—New Jersey State Hospital, Marlboro, New Jersey.

DEAR DIRECTOR SULLIVAN:

We have your letter of June 27th last, together with its enclosures relating to the above entitled matter.

It is to be noted that you desire our opinion as to whether the proposal of Anthony Lewis, Inc. of 14-22 Newark Way, Maplewood, New Jersey, the lowest responsible bidder on General Construction Work at New Jersey State Hospital, Marlboro, New Jersey, should be rejected in view of its request to be relieved of

all obligations by reason of an error made in estimating the cost of performing the job or whether the State should pursue its remedies under the performance bond posted by the bidder in the amount of $35,000.00.

It appears from your letter that on April 19, 1955, sealed proposals were received, after advertisement, for construction of a 200-Bed Housing Unit and New Kitchen Addition at the New Jersey State Hospital, Marlboro, New Jersey. It further appears that the difference between the Lewis' bid and the next low bidder is $63,585.00.

It is noted that time is of the essence since the job to be performed is of an urgent nature.

Anthony Lewis, Inc. cannot exculpate itself from liability because it made an error in estimating the cost of the General Construction Work. It conformed to the requirements of notice to bidders and therefore is the lowest bidder. *Tufano v. Boro of Cliffside Park,* 110 N. J. L. 370 (Sup. Ct. 1932) 165 A. 628. The award of the contract was made to it pursuant to N. J. S. A. 52:34-12 (d) which provides that the

> "* * * award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State, price and other factors considered. Any or all bids may be rejected when the State Treasurer or the Director of the Division of Purchase and Property determines that it is in the public interest so to do."

This section also provides for the rejection of any or all bids by the Treasurer or the Director of the Division of Purchase and Property in the exercise of sound discretion.

We are of the opinion that the State may hold Anthony Lewis, Inc. and its surety to the responsibility of proceeding with the contract. The State is not responsible for the bidder's miscalculation or error in making estimates as to the costs of construction of a particular project when notice has been duly given with respect to the requirements of the contract alike to all bidders. However, as indicated by N. J. S. A. 52:34-12 (d) the State may reject any or all bids and advertise anew, if it is determined that the exigencies of the situation require, in the public interest, that such action be undertaken.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: ROGER M. YANCEY,
Deputy Attorney General.

JULY 11, 1955.

HON. JOSEPH E. MCLEAN, *Commissioner,*
Department of Conservation and Economic Development,
State House Annex,
Trenton, New Jersey.

MEMORANDUM OPINION P-19.

DEAR MR. MCLEAN:

You have advised us that the Borough of Edgewater, which is not the upland owner, has applied for a grant of land now under water for use as a public park, and that the application was approved by the Planning and Development Council of the Department of Conservation and Economic Development. You have further advised that subsequent to the approval, several upland owners protested the grant, and as a result, six months notice was given by the applicant of the intention to take such grant; that although that period of time has expired, none of the upland owners applied for a riparian grant; but that those upland owners contend that before the State's grant may issue that the Planning and Development Council of the Department of Conservation and Economic Development must take steps, as provided in R. S. 12:3-9, as amended, to fix the amount to be paid to the upland owners, and that the municipality must make an appropriation of funds sufficient to pay the amount found to be due under R. S. 12:3-9.

Specifically, you have requested our opinion as to whether or not the State's grant may issue to the Borough of Edgewater before determination is made of the value of the upland owners' "rights and interest" pursuant to R. S. 12:3-9.

It is our opinion that R. S. 12:3-9 is not applicable to a grant to be made to a municipality of lands under water for use as a public park; that in such case there are no "rights and interest" of the riparian owners to be valued; and indeed that there is no requirement that six months notice be given to the upland owners, the provisions of R. S. 12:3-7 being inapplicable to the instant case.

The title which the state holds to tidelands is complete and unencumbered by any limitations except as provided by the legislature. In *Stevens v. Paterson and Newark R. R. Co.,* 34 N. J. L. 532 (E. & A.) 1870, the court said:

> "The steps which I have thus far taken have led me to this position: That all navigable waters within the territorial limits of the state, and the soil under such waters, belong in actual propriety to the public; that the riparian owner, by the common law, has no peculiar rights in this public domain as incidents of his estate, and that the privileges he possesses * * * to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature."

Riparian owners have no inherent right in lands under water in front of their uplands; nor any inherent right to damages or to notice. Such right as they may have with respect to lands under tidewater arises only by legislative grant under the provisions of the applicable statutes.

R. S. 12:3-33 provides.

> "Whenever a public park, place, street or highway has been or shall hereafter be laid out or provided for, either by or on behalf of the state or any municipal or other subdivision thereof, along, over, including or fronting

upon any of the lands of the state now or formerly under tidewater, or whenever a public park, place, street or highway shall extend to such lands, the board of commerce and navigation, upon application of the proper authority of the state, or the municipal or other subdivision thereof, may grant to such proper authority the lands of the state now or formerly under tidewater, within the limits of or in front of said public park, place, street or highway."

Under this section, a municipality, which has laid out or provided for a public park, may obtain a grant of state's lands under tidewater. There is no requirement that notice be given to the upland or riparian owner (*Leonard v. State Highway Department,* 24 N. J. Super. 376 (Ch. Div. 1953), aff'd. 29 N. J. Super. 188 (App. Div. 1954).

Judge Goldmann writing for the Appellate Division in *Leonard v. State Highway Department, supra* said at 29 N. J. Super. 195:

"We agree with the conclusion reached by the Chancery Division that the State Highway Commissioner, as applicant, did not have to notify plaintiffs, as riparian proprietors, of his application for a riparian grant." * * *

"It may also be noted that R. S. 12:3-33, quoted in the opinion below, does not require notice to the riparian owner where a proper authority of the State makes application for a riparian grant for highway purposes, as here. That statute has its source in L. 1916, c. 98, adopted long after the statute from which R. S. 12:3-7 derives."

Although *Leonard v. State Highway Department, supra,* dealt with a grant made to the State Highway Department pursuant to R. S. 12:3-33, what was there said is also applicable to the proposed grant to the Borough of Edgewater for a public park which has been laid out or provided for, pursuant to R. S. 12:3-33.

It should also be noted that the Appellate Division, in *Leonard v. State Highway Department, supra,* further set forth the following additional reason as to why no notice had to be given to the upland owners, which appears equally applicable to the instant case. So, Judge Goldmann said at 29 N. J. Super. 196:

"In addition to the reasons given by the court below, 24 N. J. Super. 376, 383-384 (Ch. Div. 1953), there is the added reason that R. S. 12:3-7 does not, in our view, require the State or the State Highway Commissioner, its agent, to give notice to the riparian owner of an application for a riparian grant. That statute is applicable only to "any person or persons, corporation or corporations, or associations." The proviso refers to "any other than a riparian proprietor," and the words "any other" reasonably have reference only to any other "person or persons, corporation or corporations, or associations" at the beginning of the section. N. J. S. A. 1:1-2 defines "person," when used in the Revised Statutes, as including "corporations, companies, associations, societies, firms, partnerships and joint stock companies as well as individuals," adding that when the word is "used to designate the owner of property which may be the subject of an offense, (it) includes this State * * *." The words "municipality" and "State" are separately defined in the same section. Accordingly, we conclude that the State and the State Highway Commissioner are not included within the meaning of the word "person" or "corporation" in R. S. 12:3-7."

It is, therefore, our opinion that the grant may issue to the Borough of Edgewater for use of the lands for the public park which has been laid out or provided

for, and that the provisions of R. S. 12:3-9 relating to the procedure to be followed where there is a grant to a "person" other than the riparian owner, is not applicable to the instant case and need not be followed.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By. SIDNEY KAPLAN,
Deputy Attorney General.

sk;d

JULY 19, 1955.

MR. GEORGE A. LOUDEN, *Chief Clerk,*
Office of the Secretary of State,
Trenton, New Jersey.

MEMORANDUM OPINION P-20.

DEAR MR. LOUDEN:

This will confirm my oral advice to you in response to your inquiry as to whether or not you should accept for filing a proposed certificate of incorporation of "Carter Corporation", a corporation formed for the sole object of acting "as trustee or successor trustee under intervivos trusts."

As I advised you, the proposed corporation could not be incorporated under the General Corporation Law, since that law prohibits the formation thereunder of a bank or trust company (R. S. 14:2-1). The object for which the "Carter Corporation" is to be formed is within the prohibition as to trust companies (*McCarter v. Imperial Trustee Co.*, 72 N. J. L. 42, (Sup. Ct. 1905)).

The Banking Law of 1948, (R. S. 17:9A-1 et seq.) under which corporations exercising such banking or trust powers may be formed, provides in R. S. 17:9A-28 in part as follows:

> "A bank which is a qualified bank shall have the following agency and and fiduciary powers * * *
>
> (9) to receive from any person and hold in trust and dispose of, by sale or otherwise, personal and real property, upon such terms as may be specified;
>
> (10) to accept, administer, and execute all other trusts and to act in all other fiduciary capacities not herein specifically enumerated, not inconsistent with law."

R. S. 17:9A-338 provides:

> "Except to the extent specifically made applicable by this act, the provisions of Title 14 of the Revised Statutes as enacted and as heretofore or hereafter amended or supplemented shall not apply to banks and savings banks."

for, and that the provisions of R. S. 12:3-9 relating to the procedure to be followed where there is a grant to a "person" other than the riparian owner, is not applicable to the instant case and need not be followed.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By. SIDNEY KAPLAN,
Deputy Attorney General.

sk;d

JULY 19, 1955.

MR. GEORGE A. LOUDEN, *Chief Clerk,*
Office of the Secretary of State,
Trenton, New Jersey.

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R. S. 17:9A-338 provides:

> "Except to the extent specifically made applicable by this act, the provisions of Title 14 of the Revised Statutes as enacted and as heretofore or hereafter amended or supplemented shall not apply to banks and savings banks."

The Banking statute is exclusive, and the powers sought may only be obtained by complying with the terms of that statute. They may not be granted to a corporation organized under the General Corporation Act. (*McCarter, Attorney General v. Imperial Trustee Co.*, 72 N. J. L. 42, 44 (Sup. Ct. 1905)).

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: HAROLD KOLOVSKY,
Assistant Attorney General.

hk:d

JULY 21, 1955.

MR. W. LEWIS BAMBRICK,
Unsatisfied Claim and Judgment Fund,
222 West State Street,
Trenton, New Jersey.

MEMORANDUM OPINION P-21.

DEAR MR. BAMBRICK:

You have requested our opinion as to whether the owner of a stolen motor vehicle has a valid claim against the Unsatisfied Claim and Judgment Fund based on an unsatisfied judgment against the person who stole same for damages sustained to such vehicle as a result of an accident occurring while the vehicle was being operated by the thief. You have asked us to assume that the owner of the motor vehicle was not covered by any insurance policy under which he could be reimbursed for his damages.

In order to resolve this problem, it is necessary to consider the purpose for which the Unsatisfied Claim and Judgment Fund Act was enacted. Although no statement was appended to the Unsatisfied Claim and Judgment Fund Act, the purpose of the legislation was obviously to protect holders of judgments in so-called "negligence" actions based upon damage to property or injury to person by means of a motor vehicle. It was designed to eliminate the economic hardship which would otherwise be sustained by a holder of such an unsatisfied judgment who incurred property damage or personal injury by the negligent operation of a motor vehicle by another. In effect, it is a corollary to the Motor Vehicle Security-Responsibility Law, N. J. S. A. 39:6-23, et seq., which provides, among other things, for the suspension of the operator's license and registration certificate of a person who has failed to satisfy a judgment rendered against him for personal injury or property damage resulting from the ownership, maintenance, use, or operation of a motor vehicle.

Although the courts of New Jersey have not yet dealt with the Unsatisfied Claim and Judgment Fund Act, several cases have considered the Motorists' Financial Responsibility Law, R. S. 39:6-1, et seq., which was the predecessor of the

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Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: HAROLD KOLOVSKY,
Assistant Attorney General.

hk:d

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222 West State Street,
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Motor Vehicle Security-Responsibility Law, N. J. S. A. 39:6-23, et seq. In *Garford Trucking, Inc. v. Hoffman,* 114 N. J. L. 522 (Sup. Ct. 1935), we find the following:

> ". . . The Financial Responsibility Law of our State seeks to impose a penalty not for the failure to pay a judgment that is merely incidental, but rather does it impose a penalty for negligent driving . . ."

In the case presently under consideration, the action of the owner of the motor vehicle against the person who stole it is not grounded upon negligence of the thief in the operation of the motor vehicle; it is grounded upon the theft itself, and all damages flowing from same, in an action in the nature of trover and conversion. It is our opinion that an unsatisfied judgment in an action of this nature is not the type of judgment for which the Unsatisfied Claim and Judgment Fund is chargeable.

In *Sutherland on Statutory Construction,* Vol. 2, Sec. 4505, p. 323, we find the following:

> "It must be understood, of course, that a well-drafted statute will in most cases and certainly should, present the words used with sufficient precision and accuracy that additional inquiry by the court will be unnecessary. But as all future circumstances cannot be anticipated by even the most farsighted legislator the function of judicial interpretation cannot be completely avoided. When such a circumstance arises, certainly the safest starting point for interpretation will be the statute itself. But it is by no means the safest stopping point. Before the true meaning of the statute can be determined consideration must be given to the problem in society to which the legislature addressed itself, prior legislative consideration of the problem, the legislative history of the statute under litigation, and to the operation and administration of the statute prior to litigation."

It is our opinion that the owner of a stolen motor vehicle who obtains an unsatisfied judgment against the person who stole such motor vehicle by reason of damage to such motor vehicle while same was operated by the thief, is not entitled to payment by the Unsatisfied Claim and Judgment Fund.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

csj:b/mjd

JULY 25, 1955.

HON. CARL HOLDERMAN,
Commissioner, Department of Labor and Industry,

1035 Parkway Avenue,
Trenton, New Jersey.

MEMORANDUM OPINION P-22.

DEAR MR. HOLDERMAN:

You have requested our opinion as to whether or not, prior to the enactment of Chapter 65 of the Laws of 1955, the Director of the Division of Employment Security had the right to abate penalty assessments against employers for failure to supply wage data or for failure to forward unemployment compensation contributions as required by law.

Prior to its amendment by P. L. 1955, C. 65, N. J. S. A. 43:21-14 (a), which provides for the collection of contributions from employers, read as follows:

> "(a) In addition to such reports as the Director of the Division of Employment Security may require under the provisions of subsection (g) of section 43:21-11 of this chapter (R. S. 43:21-1 et seq.), every employer shall file with the division periodical contribution reports on such forms and at such times as the director shall prescribe, to disclose the employer's liability for contributions under the provisions of this chapter (R. S. 43:21-1 et seq.), and at the time of filing each contribution report shall pay the contributions required by this chapter (R. S. 43:21-1 et seq.) for the period covered by such report. The director may require that such reports shall be under oath of the employer. Any employer who shall fail to file any report, required by the director, on or before the last day for the filing thereof shall pay a penalty of one dollar ($1.00) for each day of delinquency until and including the tenth day following such last day and, for any period of delinquency after such tenth day, a penalty of one dollar ($1.00) a day or twenty per centum (20%) of the amount of the contributions due and payable by the employer for the period covered by the report, whichever is the lesser. If there be no liability for contributions for the period covered by any contribution report or in the case of any report other than a contribution report, the employer or employing unit shall pay a penalty of one dollar ($1.00) a day for each day of delinquency in filing or fifteen dollars ($15.00), whichever is the lesser. Any employer who shall fail to pay the contributions due for any period on or before the date they are required by the division to be paid, shall pay interest at the rate of one per centum (1%) a month on the amount thereof from such date until the date of payment thereof. Upon the written request of any employer or employing unit, filed with the division on or before the due date of any report or contribution payment, the director, for good cause shown, may grant, in writing, an extension of time for the filing of such report or the paying of such contribution with interest at the rate of one per centum (1%) a month on the amount thereof; provided, no such extension shall exceed thirty days and that no such extension shall postpone payment of any contribution for any period beyond the day preceding the last day for filing tax returns under Title IX of the Federal Social Security Act for the year in which such period occurs."

It will be noted that although the statute empowered the Director "for good cause shown and upon written request filed with the Division" to grant an extension

of time for the filing of a report or the paying of contribution with interest, it did not contain any provision authorizing the Director to waive the payment of a penalty, as does, for example, N. J. S. A. 43:21-16 (b) 2, which requires employers to furnish information for the making of an initial determination as to whether or not the employer is an employer covered by the Act. The last mentioned section provides, in part, as follows:

> " * * * provided, that when such report or reports are not filed within the prescribed time but it is shown to the satisfaction of the director that the failure was due to a reasonable cause, no such penalty shall be imposed. * * *"

Although the Legislature is without constitutional power to authorize the remission of interest due the State (*Wilentz v. Hendrickson,* 135 N. J. E. 244, E. & A. 1944), it does have the constitutional power to remit penalties pursuant to a general law. (23 Am. Jur. 643, "Penalties," Sec. 53; *Wilentz v. Hendrickson,* supra; *Meilink v. Unemployment Reserve Commission,* 314 U. S. 564, 567).

A penalty is "a sum of money of which the law exacts payment by way of punishment for doing some act that is prohibited or omitting to do some act that is required to be done." (70 C. J. S. 387; see also *Wilentz v. Hendrickson,* supra).

It is clear that the Legislature may delegate the power to remit penalties to some administrative agency (See, for example, the delegation of such power contained in N. J. S. A. 43:21-16 (b) 2, referred to above, and delegation of such power to Director of Division of Taxation contained in N. J. S. A. 54:49-11).

But, in the absence of such an express delegation by the Legislature to the administrative agency, the agency is without power to waive the penalty. The agent of the State has no authority to contract to the detriment, disadvantage or injury of his principal without clear delegation of such authority (*State v. Erie Railroad Co.,* 23 N. J. Misc. 203, Sup. Ct. 1945).

It is, therefore, our opinion that, prior to the enactment of P. L. 1955, C. 65, the Director of Employment Security had no authority to abate penalty assessments against employers for failure to supply wage data or for failure to forward unemployment compensation contributions as required by law.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

ROBERT E. FREDERICK,
Deputy Attorney General.

July 29, 1955.

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

MEMORANDUM OPINION P-23.

DEAR DIRECTOR GASSERT:

You have requested our opinion as to whether or not, as Director of the Division of Motor Vehicles, you have authority to sign a reciprocity arrangement between the Province of Alberta and the State of New Jersey, whereby each grants

of time for the filing of a report or the paying of contribution with interest, it did not contain any provision authorizing the Director to waive the payment of a penalty, as does, for example, N. J. S. A. 43:21-16 (b) 2, which requires employers to furnish information for the making of an initial determination as to whether or not the employer is an employer covered by the Act. The last mentioned section provides, in part, as follows:

> " * * * provided, that when such report or reports are not filed within the prescribed time but it is shown to the satisfaction of the director that the failure was due to a reasonable cause, no such penalty shall be imposed. * * *"

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A penalty is "a sum of money of which the law exacts payment by way of punishment for doing some act that is prohibited or omitting to do some act that is required to be done." (70 C. J. S. 387; see also *Wilentz v. Hendrickson,* supra).

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But, in the absence of such an express delegation by the Legislature to the administrative agency, the agency is without power to waive the penalty. The agent of the State has no authority to contract to the detriment, disadvantage or injury of his principal without clear delegation of such authority (*State v. Erie Railroad Co.,* 23 N. J. Misc. 203, Sup. Ct. 1945).

It is, therefore, our opinion that, prior to the enactment of P. L. 1955, C. 65, the Director of Employment Security had no authority to abate penalty assessments against employers for failure to supply wage data or for failure to forward unemployment compensation contributions as required by law.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

ROBERT E. FREDERICK,
Deputy Attorney General.

July 29, 1955.

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

MEMORANDUM OPINION P-23.

DEAR DIRECTOR GASSERT:

You have requested our opinion as to whether or not, as Director of the Division of Motor Vehicles, you have authority to sign a reciprocity arrangement between the Province of Alberta and the State of New Jersey, whereby each grants

to the other full reciprocity as to motor vehicles properly registered in one jurisdiction, operating in the other, while engaged in through or interstate commerce.

Although there is nothing in the New Jersey statutes that expressly gives to the Director the authority to enter into such a written agreement, a reciprocity status exists even without the formality of a written agreement. Therefore, the authority of the Director to so act may be necessarily implied.

R. S. 39:3-15 grants reciprocal touring privileges for any type motor car, omnibus, or motor vehicle used for the transportation of goods, wares and merchandise, motorcycle or motor drawn vehicle belonging to a non-resident, which is registered in accordance with the laws of the State, or Province of the Dominion of Canada, in which the non-resident resides.

R. S. 39:3-16 gives authority to the Commissioner (Director) to suspend the operating privilege of motor vehicles registered in another State or Province of the Dominion of Canada when, in his judgment, any such State or Provinve prohibits the free operation of any class of motor vehicle belonging to residents of this State and properly registered here.

R. S. 39:3-17 extends the touring privileges referred to in the above-mentioned sections to any non-resident chauffeur or driver who has complied with the laws of his resident State or country.

R. S. 39:4-9.1 provides for the reciprocal exchange of information under which the Commissioner (Director), upon receiving a certificate of conviction of a non-resident operator or chauffeur for certain violations of our law, shall transmit a certified copy of such record to the motor vehicle administrator of the State where the non-resident operator or chauffeur resides.

The Legislature, by enacting the above-mentioned provisions, has granted to non-residents reciprocity to the extent that the State or Province in which said non-resident resides grants touring and driving privileges to residents of New Jersey. This is, in effect, reciprocity by reason of the above-mentioned law. Reciprocity is recognized and is actually now in effect.

A reading of the proposed reciprocity arrangement between the Province of Alberta and the State of New Jersey does not reveal that such arrangement contemplates the granting of reciprocity with respect to any matters other than those already covered by the sections of the New Jersey law above referred to.

In view of the foregoing, we can see no objection to the Director entering into an agreement in writing in a matter that peculiarly affects the Motor Vehicle Division, especially since the matters referred to in the proposed reciprocity arrangement are already part of the law of this State. In view of the above, it is our opinion that the Director of Motor Vehicles has the authority to enter into the proposed arrangement with the Province of Alberta.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

JAMES T. KIRK,
Deputy Attorney General.

August 31, 1955.

MR. W. LEWIS BAMBRICK,
Unsatisfied Claim and Judgment Fund Board,
222 West State Street,
Trenton, New Jersey.

MEMORANDUM OPINION P-24.

DEAR MR. BAMBRICK:

You have requested our opinion concerning the validity of a notice given under N. J. S. A. 39:6-65 in the following two cases:

In the first case, a husband was involved in an accident while operating a motor vehicle which was registered in the name of his wife. As a result of the accident, the husband sustained personal injuries, and the motor vehicle belonging to his wife was damaged. The husband gave timely notice under N. J. S. A. 39:6-65 of a notice of accident and intention to file claim. In his notice, he listed his own personal injuries and damages to his wife's motor vehicle. We assume that the notice was accompanied with a physician's certification and automobile repairmen's estimates as required by N. J. S. A. 39:6-65.

In the second case, a wife was involved in an accident while operating a motor vehicle which was registered in the name of her husband. As a result of the accident, the wife and her infant child, who was a passenger in the car operated by her, sustained personal injuries, and the motor vehicle belonging to her husband was damaged. The husband gave timely notice under N. J. S. A. 39:6-65 of a notice of accident and intention to file claim. In his notice, he listed the personal injuries of his wife and child and the damage to his motor vehicle. Again, we assume that the notice was accompanied by the required physician's certification and repairmen's estimates.

The questions raised in the above cases are whether one spouse may give notice in behalf of another under N. J. S. A. 39:6-65, and whether a parent may give notice in behalf of a child under N. J. S. A. 39:6-65.

N. J. S. A. 39-6-65 provides as follows:

> "Any qualified person, or the personal representative of such person, who suffers damages resulting from bodily injury or death or damage to property arising out of the ownership, maintenance or use of a motor vehicle in this State on or after the first day of April, one thousand nine hundred and fifty-five, and whose damages may be satisfied in whole or in part from the fund, shall, within thirty days after the accident, as a condition precedent to the right thereafter to apply for payment from the fund, give notice to the board, on a form prescribed by it, of his intention to make a claim thereon for such damages if otherwise uncollectible and otherwise comply with the provisions of this section; . . ."

The purpose underlying N. J. S. A. 39:6-65 is evidently to insure that the Unsatisfied Claim and Judgment Fund Board receive all required information within the stated period of time. In the cases which you have referred to us for consideration, the Unsatisfied Claim and Judgment Fund Board received such information by means of notice given within the period of time fixed by the statute.

We, therefore, are of the opinion that the Unsatisfied Claim and Judgment Fund Board may accept as valid notices under N. J. S. A. 39:6-65, notices given by one person in behalf of another in the cases set forth above.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By. CHARLES S. JOELSON,
Deputy Attorney General.

August 31, 1955.

MR. GEORGE M. BORDEN, *Secretary,*
Public Employees' Retirement System,
48 West State Street,
Trenton 7, N. 'J.

MEMORANDUM OPINION P-25.

DEAR MR. BORDEN:

You have requested our opinion as to whether the Public Empolyees' Retirement System should continue the practice of withholding the payment of an accidental disability retirement allowance to a public employee for such period of time as the public employee is collecting workmen's compensation payments as a result of the same accident upon which his claim for an accidental disability retirement allowance is based. You have attached to your request for an opinion a letter from the attorney of a public employee who claims to be entitled to an accidental disability retirement allowance even though he is presently receiving workmen's compensation payments as a result of the same accident upon which his claim for accidental disability retirement is based. In attempting to support such a position, the attorney for the public employee states:

> ". . . It is my understanding that the Board has rejected claim on the basis of the provisions of R. S. 34:15-43.
>
> If my understanding is true, I respectfully direct the Board's attention to the fact that that statute provides that workmans' compensation shall not be paid to an employee who has been retired. The statute is under the Workman's Compensation Act. It certainly does not indicate that a person may not be retired who is receiving workman's compensation. I do not believe that the Board should concern itself with workman's compensation. . . ."

N. J. S. A. 43:15A-43 which provides for accidental disability retirement for members of the Public Employee's Retirement System makes no reference to the relationship between workmen's compensation benefits and accidental disability retirement under the Public Employee's Retirement System. However, R. S. 34:15-43, which is to be found in the Workmen's Compensation Act, provides as follows:

> "Every employee of the state, county, municipality or any board or commission, or any other governing body, including boards of education, and also each and every active volunteer fireman doing public fire duty under

We, therefore, are of the opinion that the Unsatisfied Claim and Judgment Fund Board may accept as valid notices under N. J. S. A. 39:6-65, notices given by one person in behalf of another in the cases set forth above.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By. CHARLES S. JOELSON,
Deputy Attorney General.

August 31, 1955.

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Public Employees' Retirement System,
48 West State Street,
Trenton 7, N. J.

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> "Every employee of the state, county, municipality or any board or commission, or any other governing body, including boards of education, and also each and every active volunteer fireman doing public fire duty under

the control or supervision of any commission, council or any other governing body of any municipality or any board of fire commissioners of such municipality or of any fire district within the state, who may be injured in line of duty shall be compensated under and by virtue of the provisions of this article and article 2 of this chapter (§ 34:15-7 et seq.), but no person holding an elective office shall be entitled to compensation. *Nor shall any former employee who has been retired on pension by reason of injury or disability be entitled under this section to compensation for such injury or disability*. . . ." (Underscoring supplied).

In *DeLorenzo v. City of Newark,* 134 N. J. L. 7 (E. & A. 1945), the court considered the case of a public employee who, while receiving workmen's compensation benefits, applied for retirement under R. S. 43:12-1, which provides pension for municipal employees. In rejecting the plaintiff's claim that he was entitled to be granted a pension while receiving workmen's compensation benefits, the court stated:

"The issue to be determined is whether a public employee receiving workmen's compensation payments for physical disability, which arose out of and in the course of his employment with the defendant, may also receive a pension under the provisions of R. S. 43:12-1. We do not find any legislative authority which expressly permits the payment of both a pension and workmen's compensation payments to a public employee, nor does the plaintiff submit any judicial authority therefor in this state. . . .

We distinguish between the status of a person receiving a pension and a person receiving workmen's compensation. The relationship of an employer and an employee is not consistent with the position of a pensioner as such, for the reason that a pensioner severs all relationship of employer and employee, he has no further duty to his employer nor is he entitled to any of the benefits which may accrue to an employee. An employee receiving workmen's compensation is under the relationship of employee and employer, as is indicated by the fact that such employee must continue to be carried on the public payroll pursuant to R. S. 34:15-44. The plaintiff must be one or the other and as he admittedly now receives workmen's compensation he is an employee. We therefore hold that the plaintiff cannot have the benefits of both statutes. Judson v. Newark Board of Works Pension Association, 132 N. J. L. 106; affirmed, 133 Id. 28."

While it is true that the pension sought by the plaintiff in the above-cited case was one based upon years of service and age, rather than upon disability, the logic of its reasoning would be equally applicable to an application for a disability retirement allowance.

It is, therefore, our opinion that the Public Employees' Retirement System should continue to withhold payment of an accidental disability retirement allowance to a public employee for such period of time as he is collecting workmen's compensation payments.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

csj;b
cc:Mr. Steven Schanes

September 16, 1955.

MR. MAURICE D. MCBRIDE, *Chairman,*
Union County Board of Elections,

Court House,
Elizabeth, New Jersey.

MEMORANDUM OPINION P-26.

DEAR MR. MCBRIDE:

Receipt is acknowledged of your inquiry requesting our opinion as to the operation and effect of the 1955 election statute, which authorizes the Commissioner of Registration, upon application in writing, to register any incapacitated voter at his place of residence or confinement.

The statute limits such registration to those voters who are chronically or incurably ill, or totally incapacitated and unable to attend a place of registration, and requires each such application be accompanied by a physician's affidavit certifying to such fact, and further, that such voter is mentally competent and cannot attend a place of registration.

You seek a construction of the statute and submit two queries as to your jurisdiction in the administration thereof. They are:

1. Is it the intent of the new amendment to R. S. 19:31-6 to take a registration of a Union County resident who may be confined in another County or outside of New Jersey; and

2. May the County Board designate a proper person in another County or outside of the state to take such registration.

The 1955 act is an amendment to Section 19:31-6 of the Revised Statutes (Election Law) concerning municipalities having permanent registration and provides:

> "When any person shall apply to the commissioner in writing setting forth that due to a chronic or incurable illness, or that he is totally incapacitated and he cannot attend a place of registration and such application is accompanied by an affidavit by a physician duly licensed to practice medicine in this State certifying that such person is chronically or incurably ill or totally incapacitated, that such person is mentally competent and that such person cannot attend a place of registration, then the commissioner shall cause such person to be registered at his place of residence or confinement."

The 1955 amendment is but an extension of the method of registration provided by R. S. 19:31-6.

Where, heretofore, registrations might be taken during office hours at the office of the commissioner, or at such other place or places as might be designated, they may now be additionally taken at the place of residence or confinement of the incapacitated voter.

It will be noted that the enlarged statute limits both the commissioner of registration and the several county boards, in their respective jurisdictions, both as to the manner and method of registration, by directing that "The Commissioner shall cause such person to be registered at his place of residence or confinement." "Residence" is a well defined term in the election law and means the fixed domicile or permanent home, and once obtained, continues without intermission until a new one is gained. *Brueckmann v. Frignoca,* 152 A. 780, 9 N. J. Misc. 128.

The best evidence of a voter's residence are his acts rather than his declarations concerning his residence. It is not sufficient to merely designate an address as a "voting residence" since the residence must be real, actual and positive, and to be a "voting residence" there must be not only the intention of having the address for the purpose of voting, but that intention must be accompanied by acts of living, dwelling, lodging or residing sufficient to reasonably establish that it is the real and actual residence of the voter. *Jacobsen v. Gardella,* 38 A. 2d 126, 22 N. J. Misc. 277.

Therefore, registrations must be taken at the domicile or place of residence of the incapacitated voter and within the county in which he claims his vote.

With respect to his place of confinement it must likewise be within the county in which the vote is claimed and within the jurisdiction of the county board of elections.

R. S. 19:6-17 and R. S. 19:6-18, among other things, provide:

"19:6-17. The county board shall consist of four persons, who shall be legal voters of the counties from which they are respectively appointed. * * *"

"19:6-18. The Chairman of the State Committee of each of such two political parties shall during the month of February in each year, in writing, nominate one person residing in each county, duly qualified for member of the county board in and for such county. * * *"

The 1955 act nowhere indicates a legislative purpose to authorize or permit county boards of election to function beyond their respective county limits. The county board is a statutory creation, and all of its powers must be found in the statute.

Had it been the legislative intent to vest the several county boards with statewide as well as out-of-state powers of registration, the statute would have so provided. While election laws are to be liberally construed so as to effectuate their purpose. *Carson v. Scully.* 89 N. J. L. 458, 465 (Sup. Ct. 1916) affirmed, 90 N. J. L. 295 (E. & A. 1917), the 1955 statute should not be construed to confer an over-lapping county jurisdiction in the absence of clear and explicit language to that effect.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: JOSEPH LANIGAN,
Deputy Attorney General.

jl/d

September 23, 1955.

MR. WILLIAM J. JOSEPH,
Divisions of Pensions,

State House Annex,
Trenton, New Jersey.

MEMORANDUM OPINION P-27.

DEAR MR. JOSEPH:

You have requested our opinion as to whether the employees of the following offices are to be considered as state or county employees: Probation Department, Prosecutor's Office, County Detectives, County Park Commission, Clerk of the Grand Jury. Jury Commission, and Sheriff. We shall deal with each office separately.

PROBATION DEPARTMENT

N. J. S. A. 2A:168-5 provides as follows:

"The judge or judges of the county court in each county, or a majority of them, acting joinlty, may appoint a chief probation officer, and, on application of the chief probation officer, such men and women probation officers as may be necessary. All probation officers appointed subsequent to April 22, 1929, who are to receive salaries shall be appointed in accordance with the rules and regulations of the civil service commission. . ."

N. J. S. A. 2A:168-7 provides as follows:

"The chief probation officer shall have general supervision of the probation work under the direction of the court. He may appoint such other employees as may be necessary to carry out the purposes of this chapter, but the amount expended for this purpose shall not exceed the amount appropriated therefor in the annual county budget. The chief probation officer may make such necessary rules and regulations with respect to the management and conduct of the probation officers and other employees as may be authorized by the judge or judges of the county court."

N. J. S. A. 2A:168-8 provides as follows:

"The judge or judges authorized to appoint a chief probation officer or probation officers shall fix, by order under the hand of such judge or judges, annual salaries to be paid such officers, and such order shall be filed in the office of the clerk of the county court. The amounts so fixed shall be paid in equal semimonthly payments in the same manner as the salaries of other officers of the county.

"The necessary and reasonable expenses of salaried probation officers incurred in the performance of their duties shall be paid out of the county treasury, after itemized statements of such expenses have been approved by the chief probation officer and one of the county court judges. On request of the chief probation officer, the necessary traveling and maintenance expenses in attending probation officers' meetings and conferences of social work shall be included, when previously authorized by the judge or judges authorized to appoint probation officers.

"The salaries of employees appointed by the chief probation officer shall be fixed by the board of chosen freeholders in accordance with the schedules of the civil service commission, and paid in the same manner as the salaries of probation officers."

N. J. S. A. 2A:168-11 provides as follows:

"Probation officers shall have the powers of constables in the execution of their duties. The duties of probation officers shall be, among others:

"a. To make such investigations and reports under sections 2A:168-3 and 2A:168-13 of this title as may be required by the judge or judges of any court having jurisdiction within the county for which the officer is appointed;

"b. To receive under their supervision, on request of the court having jurisdiction, any person ordered to pay any sum for alimony or support in an order or judgment entered in a matrimonial action;

"c. To receive under supervision any person placed on probation by any court within the county for which the officer is appointed;

"d. To collect from persons under their supervision such payments as may be ordered by the court so to be made, and disburse the money so received under the direction of the court;

"e. To furnish each person under their supervision with a statement of the conditions of his probation and to instruct him regarding them;

"f. To keep detailed records of all the work done;

"g. To keep accurate and complete accounts of all money collected and disbursed, and to give and obtain receipts therefor. and

"h. To make such reports to the courts as they may require."

From the foregoing statutes, it appears that probation departments are created to perform services for the various county courts, and also for the superior court with relation to certain matrimonial matters, N. J. S. A. 2A:168-5 provides for the appointment of probation officers by county court judges, and N. J. S. A. 2A:168-7 places probation work generally "under the direction of" the county courts. Furthermore, the duties of probation officers, as listed in N. J. S. A. 2A:168-11, clearly indicate that probation departments are adjuncts of county courts.

In a previous opinion of ours to your department bearing date of March 3, 1955, we advised you that county court judges must be considered as state employees even though paid by the various counties. It should, therefore, follow that probation officers must also be regarded to be state employees. We are mindful of the fact that N. J. S. A. 2A:168-8 states that salary payments to probation officers shall be paid in the same manner as salaries "of other officers of the county." However, we do not regard this language as a strong enough indication of a legislative intention to constitute probation officers as county employees so as to negate their position as state employees in view of their position with relation to the judicial machinery of the State. They are appointed by county judges who are state employees and operate under the general supervision and control of such state employees. It is, therefore, our opinion that probation officers are state employees who are paid by the various counties in which they are employed.

PROSECUTOR'S OFFICE

Article VII, Section II, paragraph 1 of the New Jersey Constitution provides as follows.

"County prosecutors shall be nominated and appointed by the Governor with the advice and consent of the Senate. Their term of office shall be five years, and they shall serve until the appointment and qualification of their respective successors."

N. J. S. A. 2A:158-1 substantially repeats these constitutional provisions. N. J. S. A. 2A:158-3 prescribes the oath of office to be taken by each county prosecutor, in which the holder of that office swears to "execute the duties of county prosecutor of this state."

N. J. S. A. 2A:158-4 provides as follows:

"The criminal business of the state shall be prosecuted exclusively by the prosecutors, except in counties where, for the time being, there may be no prosecutor, or where the prosecutor desires the aid of the attorney general, or as otherwise provided by law."

N. J. S. A. 2A:158-5 provides as follows:

"Each prosecutor shall be vested with the same powers and be subject to the same penalties, within his county, as the attorney general shall by law be vested with or subject to, and he shall use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the laws."

N. J. S. A. 2A:158-7 provides that expenses of prosecutors in enforcement of laws, "upon being certified to by the prosecutor and approved, under his hand, by a judge of the superior court or of the county court for such county, be paid by the county treasurer whenever the same shall be approved by the board of chosen freeholders of such county."

N. J. S. A. 2A:158-10 fixes the salaries of prosecutors in the various counties according to population, and N. J. S. A. 2A:158-16 does the same as to assistant prosecutors. N. J. S. A. 2A:158-13 provides that "the salaries of prosecutors shall be paid at the same times and in the same manner as other county salaries are paid.' N. J. S. A. 2A:158-16 provides similarly as to assistant prosecutors.

N. J. S. A. 52:17A-5 provides among other things that "whenever the Attorney General shall have taken over the duties of a county prosecutor, he shall have all of the authority conferred by law upon the prosecutor."

N. J. S. A. 52:17A-15 requires the various county prosecutors to make annual reports to the Attorney General "of the performance of their duties and the operations of their offices." It further directs them to "make such other reports to the Attorney General as the Attorney General may require from time to time."

The position of a county prosecutor in our political structure was considered thoroughly in *State v. Longo,* 136 N. J. L. 587 (E.&A., 1947). Although this case was decided in 1947, the constitutional provisions and the statutes therein considered were similar to, if not identical with, the constitutional provisions and statutes now in existence. In that case, the court stated:

"The Attorney-General and the several Prosecutors of the Pleas are constitutional officers (article 7, section 2, paragraph 3). Their duties are not defined by the constitution but are left, by necessary implication, for definition by the legislature. *Public Utility Commissioners v. Lehigh Valley Railroad Co.,* 106 N. J. L. 411; *O'Reardon v. Wilson,* 4 N. J. Mis. R. 1008, 1011. A prosecutor of the pleas is empowered by statute (R. S.: 2:182-1), except as otherwise provided by law, to prosecute the pleas of the state in his county and to do and perform such acts and things in behalf of the State in and about such prosecution as were formerly done and performed by the Attorney-General; and (R. S. 2:182-4) "the criminal business of the state shall be prosecuted exclusively by the prosecutors of the pleas, except in counties where, for the time being, there may be

no prosecutor, or where the prosecutor desires the aid of the attorney-general or as otherwise provided by law." The Attorney-General, among his other duties, is empowered (R. S. 52:17A-4f, chapter 20, Pamph. L. 1944) to prosecute the criminal business of the state in a county having no prosecutor or render aid in a prosecution at the request of the prosecutor and may be called upon by a Justice of the Supreme Court to prosecute the criminal business of the state therein, and to represent the state in proceedings on error in criminal cases in the Supreme Court and the Court of Errors and Appeals, and (R. S. 52:17A-5) in functioning in a county shall have all the power and authority of the prosecutor including the representing of the state in all proceedings in criminal cases, on error or otherwise, in the Supreme Court and the Court of Errors and Appeals. . . ."

"Thus, by statute, a county prosecutor is, within his county, the person who is to do such acts and things in behalf of the state as were formerly done by the Attorney-General. . . ."

In view of all the foregoing, it is our opinion, that the office of a county prosecutor must be considered a state office, and its employees must, therefore, be regarded as state employees who are paid by the various counties.

COUNTY DETECTIVES

N. J. S. A. 2A:157-2 provides as follows:

"The prosecutor in each of the several counties of this State may appoint such number of suitable persons, not in excess of the number, and at salaries not less than the minimum amounts, in this chapter provided, to be known as county detectives, to assist the prosecutor in the detection, apprehension, arrest and conviction of offenders against the law. Persons so appointed shall be in the classified service of the civil service and shall possess all the powers and rights and be subject to all the obligations of police officers, constables and special deputy sheriffs in criminal matters."

N. J. S. A. 2A:157-3 through N. J. S. A. 2A:157-9 fixes the salaries of county detectives in the various counties according to population. N. J. S. A. 2A:157-10 provides for the creation of the position of county investigators in the office of the prosecutor, to be appointed by the prosecutor. N. J. S. A. 2A:157-11 through N. J. S. A. 2A:157-16 fixes their salaries in the various counties according to population.

N. J. S. A. 2A:157-18 provides that the salaries of county detectives and county investigators shall be paid by the various counties. In *Dodd v. Van Riper,* 135 N. J. L. 167 (E.&A., 1946) the court stated:

"The third basic contention of the appellants is that the respondent did not comply with the proper procedure in terminating their services. The claim is made that the respondent followed the statutes applicable to county empployees (R. S. title 11, subtitle 3); that the position of county detective is governed by the statutes and rules applicable to state employees (R. S. title 11, subtitle 2 and Civil Service rule No. 46); and that the action taken by the respondent was improper and insufficient so that the rights of the appellants were prejudiced thereby.

"An inspection of the proofs submitted below tends to indicate that the respondent, in terminating the services of the appellants, did purport to follow the statutes applicable to the county service. However, this of itself

is not prejudicial to the appellants if there was also substantial compliance with the statutes and rules applicable to the state service, accepting appellants' contention that the position of county detective falls within the state service."

Although the above-quoted case did not squarely decide that county detectives are state employees, an examination of the status of county detectives and county investigators in the light of pertinent statutes leads to the conclusion that they must be so regarded. They are appointed by, and are under the direct control of the various county prosecutors. Since we have found county prosecutors to be state employees, it is, therefore, our opinion that county detectives and county prosecutors are also state employees who are paid by the various counties.

COUNTY PARK COMMISSION

R. S. 40:37-73 provides for the appointment of county park commissions generally by the boards of chosen freeholders in the various counties which have by referenda adopted the provisions of R. S. 40:37-72 through R. S. 40:37-95.

R. S. 40:37-76 provides that such commissions may sue and be sued, and use a common seal. R. S. 40:37-78 requires the boards of chosen freeholders in the various counties to provide offices for the county park commissions, and to appropriate "such moneys as may be necessary for the payment of salaries and wages . . . and the maintenance of parks, parkways, playgrounds, and recreation places acquired or established by the commission."

R. S. 40:37-79 authorizes the various boards of freeholders to issue bonds for park and recreation facilities "on the requisition of the county park commission." R. S. 40:37-81 authorizes county park commissions to acquire real estate by gift, purchase, or condemnation, but provides that "all such property shall be acquired by the commission in the name of the county."

R. S. 40:37-84 authorizes county park commissions to establish county park police.

Separate provisions are made by statute regarding counties having a population of more than two thousand inhabitants in R. S. 40:37-96 through R. S. 40:37-174, but also provides for the adoption of said provisions by referenda in the various counties. R. S. 40:37-97, as amended, provides that the members of such county park commissions are to be appointed by the Superior Court assignment Judges of the various counties.

R. S. 40:37-99 constitutes such county park commissions as bodies corporate and politic, and R. S. 40:37-101, authorizes them to acquire real estate in their corporate name. R. S. 40:37-101, as amended, provides for the financial support of such county park commissions by the various boards of chosen freeholders by annual appropriation after a public hearing.

R. S. 40:37-129 authorizes the various boards of freeholders, on the requisition of the park commission, to "borrow money in the name and on the credit of the county by issuing bonds of the county . . . ".

The status of county park commissions in counties with a population of more than two hundred thousand inhabitants as established by R. S. 40:37-96 et seq., has been considered by our Courts in *Parks v. Union County Park Commission*, 7 N. J. Super 5 (App. Div., 1950). In that case, the court stated:

"It is conceded by the parties that the Park Commission was established under authority of R. S. 40:37-96, et seq. A careful scrutiny of the statutory provisions convinces us that the Union County Park Commission is an agency of the county. Its creation, structure, purpose, and operation manifestly support our conclusion."

The Court reviewed the pertinent statutory provisions of R. S. 40:37-96, et seq., as outlined hereinabove, and then said (page 8):

"It is readily discernible from the foregoing statutory powers vested in the County Park Commission that it is an instrumentality which is undeniably an adjunct of the county government; that it is established for the beautification and resulting attractiveness of the county and for the benefit of all of the residents; that the cost of its acquisition, operation and maintenance becomes the burden and responsibility of all of the taxpayers of the county. As stated *Glick v. Trustees of Free Public Library*, 2 N. J. 579 (1949), at pp. 583, 584:

'* * * It is an agency of the municipality notwithstanding its incorporation as a body politic. That in itself does not give rise to a relationship radically different in character from that which would otherwise exist. It is that substance and not the form of the creation that is the key to the legislative design.'

Cf. *Trustees v. Civil Service Commission*, 83 N. J. L. 196 (Sup. ct. 1912); affirmed, 86 N. J. L. 307 (E. & A. 1914). It necessarily follows that plaintiff is an employee of Union County . . .".

Since the Court ruled that employees of county park commissions established pursuant to R. S. 40:37-96, et seq., are county employees despite the fact that the members of such county park commissions are appointed by Superior Court Judges and have authority to acquire real estate in the name of such county park commissions, it would obviously regard as county employees those employees of other park commissions, whose memebers are appointed by the various boards of chosen freeholders, and which must acquire real estate in the name of the county.

It is, therefore, our opinion that employees of county park commissions are to be regarded as county employees.

CLERK OF GRAND JURY

N. J. S. A. 2A:73-5 provides for the appointment of a clerk to the grand jury by "the county court of each county." N. J. S. A. 2A: 73-6 provides that clerks to the grand juries shall "receive such annual salaries as shall be fixed by the courts appointing them," which salaries are to be paid by the county treasurers of the various counties.

Since we have previously advised you that county courts are to be considered state instrumentalities, and since we have herein advised you that prosecutors are to be regarded as state employees, it should follow that persons employed in the operation of grand juries, which are a part of our state judicial machinery relating to criminal matters should also be treated as state employees.

This conclusion is fortified by a consideration of the oath which is directed to be administered to foremen and members of grand juries by N. J. S. A. 2A:73-3. In the prescribed oath, they swear "to sit in behalf of the State of New Jersey in and for the county. . . ."

It is, therefore, our opinion that the clerk to a grand jury is to be considered a state employee who is paid by the county.

JURY COMMISSION

N. J. S. A. 2A:68-1, as amended, provides that "in each county of the state there shall be appointed by the Supreme Court, two citizens, resident therein who shall not be members of the same political party, who shall constitute and be designated the jury commissioners of the county." N. J. S. A. 2A:68-2 fixes the term of office of the jury commissioners for one year, and N. J. S. A. 2A:68-4, as amended, provides that "the Supreme Court may remove a jury commissioner at any time."

N. J. S. A. 2A:68-7 fixes the compensation to be paid to jury commissioners in the various counties according to population, and directs such compensation to be paid "by the board of chosen freeholders."

N. J. S. A. 2A:68-11 provides that 'the board of chosen freeholders of each county may select a clerk to the jury commissioners appointed therefor, and fix his compensation . . ." . N. J. S. A. 2A:68-12 provides that "the board of chosen freeholders of each county may appoint all necessary clerks and stenographers in the office of the commissioners of juries, subject to the provisions of Title 11, Civil Service, of the Revised Statutes."

Since jury commissioners are appointed by the Supreme Court and subject to removal by the Supreme Court, and since they are an adjunct to the judicial machinery of the state, they must be regarded as state employees. We must, however, further determine whether their clerks and stenographers, who are appointed as well as paid by the various boards of chosen freeholders, are also to be considered state employees. These employees, although appointed and paid by the boards of freholders, are necessarily under the control and supervision of the jury commissioners. The element of control is a vital, if not conclusive, factor in making a determination of this nature. Furthermore, it would not be logical to regard employees of jury commissioners to be county employees when it has been determined that the jury commissioners themselves are employees of the state.

It is, therefore, our opinion that jury commissioners and their employees are to be regarded as state employees who are paid by the various counties.

SHERIFF

Article VII, Section II, paragraph 2 of the New Jersey Constitution provides as follows:

> "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."

R. S. 40:41-1 provides that "no person shall be sheriff of any county unless he shall have been a citizen of this state and an inhabitant of the county for at least three years next preceding his election."

R. S. 40:41-2, as amended, requires the bond of a sheriff of any county to be fixed and approved by the senior county court Judge or, in certain cases, by the Superior Court Assignment Judge of the county.

R. S. 40:41-4, as amended, sets forth the oath to be administered to every sheriff-elect. In this oath, the sheriff-elect must swear to "well and truly serve the State of New Jersey in the office of sheriff of the county . . .".

R. S. 40:41-5, as amended, provides for a sheriff-elect to be commissioned by the governor after certification of a County Court Judge or Superior Court Judge that the sheriff-elect has executed a proper bond, and subscribed the oath of office in due form of law.

R. S. 40:41-6 through R. S. 40:41-7.10, as amended, fix the salaries of the sheriffs of the various counties according to population.

R. S. 40:41-14, as amended, provides that a vacancy in the office of sheriff shall be filled by the governor, with the advice and consent of the Senate, from the members of the same political party as that of the previous incumbent of the office.

The status of the office of sheriff was considered in *Doyle v. County of Warren,* 15 N. J. Misc. 434, (Circuit Ct., 1937). The court said:

> "It is sufficiently clear that a sheriff, although chosen by the voters to serve in a county, is a public officer in the State government. The duties he performs include services rendered not alone to the inhabitants of the county, but to the people of the State as well."

Although this case was never taken to the appellate courts, and does not appear to have been referred to by such upper courts, indication is to be found that a sheriff would not be regarded as an officer in the State government by such court. This indication is to be found in *Crater v. County of Somerset,* 123 N. J. L. 407, (E. & A., 1939).

Although *Crater v. County of Somerset* (Supra) does not deal directly with the office of sheriff, it does treat exhaustively with the office of county clerk which, along with the office of surrogate and sheriff, is provided for in Article VII, Section II, paragraph 2 of the New Jersey Constitution, and concerning which there are statutory provisions similar to those relating to the office of sheriff. The constitutional and statutory provisions therein referred to antedate the present New Jersey Constitution, but they are similar to, if not identical with, the provisions presently in existence.

In finding the office of county clerk to be a county office, rather than a State office, the court states:

> "True, respondent is the holder of an office established by the State Constitution. Article VII, section II, placitum 6. Yet, the jurisdiction is essentially local in character, albeit the incumbent may on occasions exercise delegated sovereign power. Territorially, his jurisdiction is limited to the county—as a common law political subdivision—whose electors have chosen him to serve in that capacity. The Constitution classifies the incumbents as 'clerks * * * of counties,' and provides for their election 'by the people of their respective counties * * *.' It is of no moment that, as maintained by respondent, 'the duties of the county clerk * * * affect the welfare of the state and its people as a whole.' Nor is it conclusive of this inquiry that the Constitution provides that 'all civil officers elected or appointed pursuant to the provisions' thereof 'shall be commissioned by the Governor,' or that the Governor is empowered to fill pro tempore a vacancy in such office. Article VII, section II, placitum 10; article V, placitum 12. The prescribed service is rendered to the county as a political subdivision of the state. While fixed by the legislature, the salary is paid by the county.
>
> "But, apart from the foregoing, the question is, after all, one of legislative intent. While a public officer may function in a dual capacity, i.e.,

in the exercise of state governmental functions and those strictly municipal (vide *Rodgers v. Taggart,* 120 N. J. L. 243; affirming 118 Id. 542), the determinative inquiry here is whether the legislature, by the designation 'officer * * * of any county,' embodied in R. S. 1937, 40:11-17, designed to include the clerk of such civil division. We find unmistakable tokens of that purpose. Under title 40, 'Municipalities and Counties,' subtitle 1, chapter 11, 'Officers and Employes,' it is ordained that, except as otherwise provided by law, residence in the county is an indispensable qualification for the holder of 'an office, the authority and duties of which relate to a county only * * *.' R. S. 1937, 40:11-1. The statutory provision under review has likewise been incorporated in title 40, subtitle 1, chapter 11, supra; and it is also significant of this legislative view that, in the provision fixing salaries, such officers are designated as 'county clerks.' *Sheriffs are in like manner classified.* R. S. 1937, 40:41-1. So, too, the surrogates, although under a different title. R. S. 1937, 2:7-1, et seq.; 2:31-4, et seq."
(Underscoring supplied)

It should be noted that the court, in *Crater v. County of Somerset* (supra), finds it "significant of the legislative view" that county clerks and sheriffs are classified under Title 40, relating to "Municipalities and Counties". Since *Crater v. County of Somerset* (supra) is not only the product of a higher court than decided *Doyle v. County of Warren,* but was also decided at a later date, it must be regarded as prevailing.

It is, therefore, our opinion that a county sheriff and his employees should be regarded as county employees.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

CSJ:mjd

DECEMBER 28, 1955.

HON. EDWARD J. PATTEN,
Secretary of State,

State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-28.

MY DEAR SECRETARY OF STATE:

This opinion is in response to your request for advice concerning the beginning and ending dates of terms of office of County Clerks, Surrogates and Sheriffs. We have previously in Formal Opinion, 1955—No. 44 dealt with the beginning and ending dates of the terms of office of County Clerks and Surrogates. In this opinion we shall deal with the beginning and ending dates of the term of office of Sheriff.

Article 7, Section 2, Par. 2 of the Constitution of 1947 provides that Sheriffs shall be elected at general elections; that their term of office shall be three years, but does not provide when such terms shall begin or end. R. S. 40:41-11, however, provides as follows:

> "The commission of every Sheriff elected at any general election shall bear date and take effect on the Wednesday after the first Tuesday succeeding such election, and his term of office shall expire on the first Tuesday after the third succeeding general election."

The statutes also require that the Sheriff shall post his bond on the first Tuesday following the general election, R. S. 40:41-2 as amended, R. S. 40:41-3 as amended.

In view of the specific language of the statute we advise you therefore, that the legislative intention was to have the Sheriff's office commence on the Wednesday after the first Tuesday succeeding the general election, and to have his term of office expire on the first Tuesday after the third succeeding general election.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: JOHN F. CRANE,
Deputy Attorney General.

JFC:lc