

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 jointly, 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 employees (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 members 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 freeholders, 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.