JANUARY 21, 1958

HON. JOHN W. TRAMBURG, *Commissioner*
Department of Institutions and Agencies
State Office Building
Trenton, New Jersey

MEMORANDUM OPINION—P-3

DEAR COMMISSIONER TRAMBURG:

You have raised the following questions dealing with the administration of the various institutions within the jurisdiction of your department.

1. Are the chief executive officers of the several institutions in the classified or unclassified service of Civil Service?

2. Is it incumbent upon the several boards of managers to organize annually and appoint its president, secretary and such other officers as may be required to discharge its duties and responsibilities?

3. Is it necessary for the board of managers of each of the several institutions to appoint its chief executive officer annually?

4. Assuming the answer to No. 3 to be in the affirmative, would a chief executive officer with veteran's status acquire tenure?

We find the following answers dispositive of the questions raised:

1. The chief executive officers of the several institutions referred to in R.S. 30:4-3, appointed by each board of managers, with the approval of the State Board, are in the unclassified service of Civil Service, and this because of R.S. 11:4-4(p):

> "The position held by the following officers and employees shall not be within the classified service; ***(p) Superintendents or directors of State institutions."

Further, we are informed, that no competitive examinations are scheduled or contemplated for the filling of these positions because in addition to R.S. 11:4-4(p), above, it is further provided in R.S. 30:4-3 that:

> "Each board, with the approval of the State board, shall appoint the chief executive officer of each institution or agency in its charge and determine his official title."

See also R.S. 30:4-13 where it is said:

> "Any officer or employee connected with any of the institutions or non-institutional agencies whose office or employment is not within the classified service list of the Civil Service of the State, whose performance of or qualifications for the duties of his office or employment are unsatisfactory to the board of managers, may, with the approval of the State board, be discharged therefrom, or the State board may act in the premises without the initiative or assent of the board of managers."

2. The several boards of managers are not continuous bodies and, thus, should reorganize annually and appoint a president, secretary and such other officers as may be required to administer the functions of the institution.

Because of the legislative mandate that a board of managers shall not be a continuous body but rather shall receive into the membership thereof two or more new or reappointed members on the first day of July of each year, it is incumbent upon each board of managers to reorganize annually, as promptly after July first as possible, and elect its presiding officer, secretary and such other officers as are required for a proper administration of its functions, duties and responsibilities. To hold otherwise would be to deny incoming members any opportunity to participate in the selection of these officers of the board.

It is provided in R.S. 30:4-1 that:

> "The term of each board member shall be three years commencing on the first day of July and ending on the thirtieth day of June of the third year thereafter. A vacancy shall be filled by the State board for the *unexpired term only.*" (Emphasis supplied)

Then it is said that:

> "The members of new or additional boards of managers shall at the time of their appointment be divided into groups so that the terms of two members shall expire on the thirtieth day of June of the year next succeeding appointment; the terms of two others on the thirtieth day of June of the second year succeeding appointment; the term of the fifth member and in case of larger boards the term of the sixth member, on the thirtieth day of June of the third year succeeding appointment; the term of the seventh member of a board having seven members, on the thirtieth day of June of the fourth year succeeding appointment. Their successors shall be appointed for three-year terms."

There is a significant and conspicuous policy enunciated by the Legislature to establish a board of managers for each institution which contemplates that the term of at least two members shall expire each year. Thus, such a board is not a continuous body and may be compared to the Senate of New Jersey which expires annually.

The leading case on this point is *State* v. *Rogers*, 56 N.J.L. 480 (Sup. Ct. 1894). There it was the court's decision that the Senate of New Jersey was a non-continuing body. The court said, while the Constitution gave the Senate an always existent membership, it did not give it a continuous vitality. Chief Justice Beasley at page 626 said:

> "The Assembly is, of course, a body that needs a yearly reorganization, and the Senate is here (by Constitution) required, to all appearances, to do precisely what the Assembly is directed to do."

This means the Constitution requires the yearly organization of the Senate. The court then goes on to say:

> "Such a regulation is appropriate to a body that expires yearly, but it is most inappropriate and unprecedented to a body possessed of permanent life."

This view was reinforced in *Gulnac* v. *Freeholders of Bergen*, 74 N.J.L. 543 (E. & A. 1906). It was held in that case that a resolution of the board of freeholders

adopted at their last meeting in December, 1905, could not be rescinded by the succeeding board, which organized on January 1, 1906, after an election had intervened involving a change in membership. The court said:

> "Although only a portion of the board of freeholders goes out of office each year, the body itself is not a continuous body."

Cf. *Andrew* v. *Lamb*, 136 N.J.L. 548 (Sup. Ct. 1948), where a township committee was found a non-continuous body because the terms of a portion of its members expired each year.

The problem was most squarely faced in *Skladzian* v. *Board of Education of Bayonne*, 12 N.J. Misc. 602 (Sup. Ct. 1934) aff'd. 115 N.J.L. 203 (E. & A. 1935). In a Per Curiam opinion, the court said at page 604:

> "A new board comes into being each year since, as here, the term of three members expires each year and, whether new persons are appointed to complete the board or the personnel remains the same, in fact and in law it is a new board of education. *Such board is not therefore a continuous body for that reason. . . .*" (Emphasis supplied)

Cf. *Evans* v. *Board of Education of Gloucester City*, 13 N.J. Misc. 506 (Sup. Ct. 1935) aff'd 116 N.J.L. 448 (E. & A. 1936).

A non-continuous body has a duty to reorganize and to adopt rules for its administration on the date of commencement of the terms of the newly appointed or elected members. Under the established authorities the board of managers of the institutions should thus reorganize annually.

3 and 4. These questions may be treated together.

Pursuant to R.S. 30:4-3, each board of managers "shall appoint the chief executive officer * * * and determine his official title." While the board of managers is also authorized to "determine the number, qualifications, powers and duties of the officers and employees," the statute is significantly silent concerning the power to fix the term of any officer or employee. It follows, therefore, that the board of managers is powerless to fix a definite term of office for the chief executive officer and, absent further statutory provision concerning removal, such appointee would be removable at will "unless he came within the independent protection of pertinent * * * tenure provisions." *DeVita* v. *Housing Authority of City of Paterson*, 17 N.J. 350, 356 (1955).

The statute, however, expressly prohibits the discharge of any officer or employee unless his "performance of or qualifications for the duties of his office or employment are unsatisfactory to the board of managers * * *." R.S. 30:4-13, above. The statute shows an overriding legislative purpose that the chief executive officers of the institutions are subject to removal for unsatisfactory service by the respective boards of managers. Since the legal effect is to set definite limits to their employment, the provisions of the Veterans' Tenure Act (R.S. 38:16-1) are not applicable to the chief executive officers. See *McGrath* v. *Bayonne*, 85 N.J. L. 188 (E. & A. 1913), and *Greenfield* v. *Passaic Valley Sewerage Commissioners*, 126 N.J.L. 171 (Sup. Ct. 1941), where definite terms were fixed pursuant to statutory authorization; *Talty* v. *Board of Education, Hoboken*, 10 N.J. 69 (1952), where the statute mandatorily required the appointing authority to fix the term; and *Ackley* v. *Norcross*, 122 N.J.L. 569 (Sup. Ct. 1939), affirmed 124 N.J.L., 133 (E. & A. 1939), where the statute provided that the appointment was "during the pleasure" of the employer.

The resolution of the issue "is largely one of legislative intent to be gathered from the language and plan of the particular statute under construction." *DeVita, supra,* at page 358. Where, as here, the statute provides job security during satisfactory performance, such a specific directive will prevail over the provisions of the general tenure legislation. *Ackley* v. *Norcross, supra.*

Reference should also be made to the principle embodied in the *Skladzien* case, *supra,* to the effect that the appointments of a non-continuous body, if the terms are not fixed pursuant to the permissive authority delegated to it by statute, are deemed to be co-terminous with the life of the appointing body. This principle, however, is subordinate to specific statutory provision to the contrary. In *Lohsen* v. *Borough of Keansburg,* 4 N.J. 498, 504 (1950), the statute protected the employee against discharge "as long as he shall perform the duties of his office to the satisfaction" of his employer. It was held that this "statutory direction is controlling" and that the principle of *Skladzien* was inapplicable.

We advise you, therefore, that although a chief executive officer may not be accorded the benefits of the veterans' tenure legislation he, nevertheless, possesses employment protection pursuant to the provisions of R.S. 30:4-13 and is thus not subject to annual appointment.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: EUGENE T. URBANIAK
Deputy Attorney General

JANUARY 29, 1958

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

MEMORANDUM OPINION—P-4

Re: Integration of Panzer College into the State Teachers College at Montclair.

DEAR GOVERNOR MEYNER:

You have requested our opinion as to the legality of the proposed integration of the Panzer College of Physical Education and Hygiene into the Montclair State Teachers College, as more fully described hereinafter. We respectfully advise you that, in our opinion, such integration may lawfully be undertaken on the terms proposed by the Trustees of Panzer College.

The college was originally organized on March 17, 1917 under the name of "Newark Normal School for Physical Education and Hygiene," for the following purposes as set forth in its Certificate of Incorporation:

> "The purposes for which this corporation is formed are to offer a two years Normal course in Physical Education to both sexes in the State of New Jersey and in other States; to prepare them to teach the subject of Physical Education and Hygiene and to give degrees under the laws of the State of New Jersey for this purpose."