

of the sections by implication. Judge Schettino followed in this respect the decision of Judge Francis, who, also sitting in the Chancery Division, held, in *Mahr v. State*, 12 N.J. Super. 253, 262 (1951), that 'it is plain that the Legislature, in enacting the Escheat Act, intended to efface the sections of the Distribution Act relied upon by the defendant township.'

"We fully agree that such was the legislative design. A comparison of the two statutes plainly reveals that the later Escheat Act fully asserts the State's sovereign right to escheat property of this kind to itself and covers the whole subject of escheatable property dealt with by the mentioned sections of the Distribution Act. The reasonable, indeed inescapable, conclusion therefore is that the Escheat Act was intended by the Legislature to supplant the earlier law. This is thus a case for application of the settled rule of statutory construction that in that circumstance the later statute, though not expressly saying so, will be held to operate to repeal the earlier law. *State Board of Health v. Borough of Vineland*, 72 N.J. Eq. 862 (E. & A. 1907)."

We are satisfied that the foregoing reasoning applied to R.S. 3:5-9, 10 and 11 in the *Mahr* case and the *Roberts* case is equally applicable to R.S. 30:6A-11. Accordingly, the estate of any inmate in the Soldiers Home who dies without known heirs, next of kin or surviving spouse is subject to the general Escheat Act of New Jersey (N.J.S. 2A:37-12).

Very truly yours,

DAVID D. FURMAN
Attorney General

By: CHARLES J. KEHOE
Deputy Attorney General

JULY 20, 1961

HONORABLE WILLIAM F. HYLAND, *President*
Board of Public Utility Commissioners
101 Commerce Street
Newark 2, New Jersey

FORMAL OPINION 1961—No. 16

DEAR COMMISSIONER HYLAND:

You have asked our opinion whether a municipal water utility filing reports pursuant to N.J.S.A. 40:62-1 may be charged any fees under N.J.S.A. 48:2-56 for the furnishing of report forms and for the filing, examination and audit of such reports.

N.J.S.A. 40:62-1 provides:

"Every municipality operating any form of public utility service shall keep accounts thereof in the manner prescribed by the board of public utility commissioners for the accounting of similar public utilities, and shall file with the board such statements thereof as may be directed by the board."

N.J.S.A. 48:2-56, the so-called "fee bill," provides, in part:

"The Board of Public Utility Commissioners is hereby empowered, authorized and required to charge and collect fees and charges for the purposes and in the amounts hereinafter set out. Such fees and charges are applicable to all public utility companies and persons unless otherwise indicated."

The essential issue is twofold, that is, whether a municipal water utility is a public utility company or whether it is a person within the meaning of the act. N.J.S.A. 48:2-13, which sets forth the general jurisdiction of the Board of Public Utility Commissioners and which defines a public utility, provides, in part:

"The term 'public utility' shall include every individual, co-partnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, that now or hereafter may own, operate, manage or control within this State any steam railroad, street railway, traction railway, autobus, canal, express, subway, pipeline, gas, electric light, heat, power, water, oil, sewer, telephone or telegraph system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof."

It seems to be settled now that except as noted below, a municipal water utility is not a public utility and is not subject to the jurisdiction of the Board of Public Utility Commissioners, at least for rate-making purposes. It has been held by the Supreme Court of New Jersey in *In re Glen Rock*, 25 N.J. 241, 135 A. 2d 506 (Sup. Ct. 1957), that N.J.S.A. 48:2-13 does not include a municipal corporation, since a municipal corporation is of an entirely different nature than a commercial corporation and the Legislature would have specifically included municipal corporations if it had intended to submit them to the jurisdiction of the Board. The Court further held that a municipal water utility was not included within the scope of N.J.S.A. 40:62-24 which declares every municipality in supplying electricity, gas, steam or other product beyond its corporate limits to be a public utility. "Other product" does not encompass a municipal water utility.

However, not all municipal water utilities are exempted from the Board's jurisdiction. Under N.J.S.A. 40:62-49(f), a municipality acquiring property pursuant to the provisions of paragraph (d) thereof ". . . shall furnish and supply water to the adjoining municipality in which the connected distribution system is located and to any other municipality served from the same source or sources of supply when acquired, to the extent, for such length of time and under such terms and conditions as may be ordered by the board of public utility commissioners." This section has been construed by our Supreme Court in the *Glen Rock* case, *supra*, and in *Woodside Homes, Inc. v. Morristown*, 26 N.J. 529, 141 A. 2d 8 (Sup. Ct. 1958), as applying only to municipal water systems acquired after the date of its enactment, which was 1929.

We find a further grant of jurisdiction to the Board in N.J.S.A. 40:62-85.1 whereunder any second class city having a population of not less than 120,000 and supplying water to users within any other municipality is treated for rate-making purposes the same as public utilities and is deemed for that purpose to be a public utility.

While municipal water utilities generally are thus not subject to the jurisdiction of the Board for rate-making purposes or to its regulatory powers, it is clear that

for certain purposes the Legislature has placed them under the Board's control. By its very language, N.J.S.A. 40:62-1 requires all municipal utilities, water or otherwise, to keep its accounts in the manner prescribed by the Board for similar public utilities, and requires a filing of such statements as the Board directs.

Whether or not municipal water utilities would be considered as public utilities for this limited purpose of accounting is a question that it is unnecessary to decide, for the Legislature has made the fees and charges applicable to persons as well as to public utility companies. The organization and language of the "fee bill" (N.J.S.A. 48:2-56) reveals a systematic approach and intent to charge fees for all services rendered or materials supplied by the Board. The fees and charges are applicable ". . . to all public utility companies and persons *unless otherwise indicated.*" (Emphasis supplied.) To contend that a municipality or a municipal utility is not within the meaning of either term is in accord with neither the practice of the Board in administering the fee bill nor with the intent of the Legislature. One or two illustrations conclusively substantiate this interpretation: (1) the fee bill in paragraph C provides charges for copies of the Board's annual report, pamphlets and decisions, as well as charges for sundry other materials, and there is no indication that municipalities upon requesting such materials are to receive them free of charge; (2) when a municipality files a complaint with the Board, it is required to pay a fee under paragraph E (15), of the fee bill which requires a fee for "Any application or petition not herein specifically designated or described." The Board is not only empowered and authorized but is *required* under the statute to charge and collect fees and charges for the purposes and in the amounts set out and yet, under an interpretation that municipalities are not subject to the fee bill, all materials and services would be rendered by the Board free of charge. "Unless otherwise indicated," the fees are applicable, and nowhere does it appear in the fee bill that a municipal corporation or a municipal utility shall be exempt from paying the charges. Paragraphs A and B of the statute designate the charges for the filing, examination, and auditing of annual reports. As indicated above, municipalities operating any form of public utility service are required to file such statements regarding their accounts as the Board directs, and the Board has required them to file annual report forms.

To conclude that a municipal utility can be considered to be a person is not to reach a unique result, for municipal corporations have been considered as persons in other contexts. For example, municipal corporations have been treated as persons in the imposition of liability upon them within the wrongful death statute. *Hartman v. City of Brigantine*, 42 N.J. Super. 247, 126 A. 2d 224 (App. Div. 1956). Whether a municipal corporation be considered as a public utility for the limited purpose of the fee bill or whether it be treated as a person, it is clear that a municipality obtaining services or materials from the Board of Public Utility Commissioners within the confines of the fee bill is required to pay the applicable fee or charge. The intent of the Legislature that fees and charges be paid is manifest in the systematic organization of the fees and charges.

The authority of the Legislature over municipal moneys and the disposition of them seems to be undisputed.

"The doctrine everywhere prevails, sustained by early and late cases, that public moneys in the custody of municipalities are subject to state control and disposition for governmental purposes, within the limitations of the constitution. . . . The authority of the legislature of a state to direct a municipality

to make any payment of its funds rests upon the fact that such funds are public moneys acquired under the authority of the state for public purposes. The legislature has the same power of disposition over the public moneys in the custody of the municipality that it has over those in the state territory." I McQuillan, *The Law of Municipal Corporations*, 710.

We therefore wish to advise you that a municipally-owned water utility is required to pay the applicable fees for report forms and for the filing, examination and audit of them pursuant to N.J.S.A. 40:62-1.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: ANTHONY D. ANDORA
Deputy Attorney General

AUGUST 1, 1961

HONORABLE VINCENT P. KEUPER
Prosecutor, Monmouth County
Court House
Freehold, New Jersey

FORMAL OPINION 1961—No. 17

DEAR PROSECUTOR:

You have asked for my construction of the recent supplement to the Lottery Law (N.J.S. 2A:121-1 *et seq.*), Chapter 39 of the Laws of 1961, which redefines the term "lottery" to exclude giveaways. That enactment provides:

"As used in this chapter, the term 'lottery' shall mean a distribution of prizes by chance in return for a consideration which may be in the form of money or other valuable thing or in the form of an actual inconvenience. This definition shall not pertain to a distribution of prizes by chance when there is an intent to distribute prizes as a gift where the class of donees performs acts not exceeding those necessary to become a member of the class of donees or to receive the gift."

The statement of legislative purpose is significant:

"The purpose of this bill is to permit the distribution of prizes by chance when no actual price is paid or inconvenience suffered as a condition for participation. It will bring New Jersey in line with the more modern majority rule in this country which recognizes a liberal construction of the term 'consideration.' The bill does not violate the Constitutional prohibition against gambling, for it will merely define the term 'consideration' as it was probably understood when the Constitutional amendment was made in 1896."

Chapter 39 of the Laws of 1961 would infringe the State Constitution if its purpose was to legalize any activity which constituted common law gambling. The State Constitution is specific in Art. IV, Sec. VII, para. 2: