

It would surely be unfair to members who have vested their pension rights in reliance upon the present status of the law to be deprived of substantial benefits by reason of a subsequent change in the legislation. This the Legislature tried to avoid by enacting Chapters 123 and 124.

It is clear, therefore, that to hold that Chapters 123 and 124 do not apply to members who vest would be to defeat the legislative intent, a result which should be avoided.

It should be observed, moreover, that when a member vests his benefits after having completed 20 years of service, all administrative steps applicable to retirement are taken, except for the pro forma approval of the retirement by the Board upon the member's attaining age 60. The contributions of members and employers are determined; both noncontributory and contributory death benefits are accumulated; and the right to monthly retirement allowances at the service retirement age of 60 accrues.

Therefore, we advise you that for purposes of Chapters 123 and 124 of the Laws of 1960 members who vested their benefits pursuant to N.J.S.A. 43:15A-38 and N.J.S.A. 18:13-112.38 are considered to be "retired."

Very truly yours,

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ELMER J. HERRMANN, *Clerk*
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FORMAL OPINION 1961—No. 29

DEAR MR. HERRMANN:

Our opinion has been asked as to whether or not the members of district election boards are casual employees as that term is used in the Workmen's Compensation Act and consequently whether or not they are excluded from coverage under the provisions of that Act.

The members of the district boards of election are appointed by the various County Boards of Election, N.J.S.A. 19:6-1, to serve for a period of one year, N.J.S.A. 19:6-8. The County Board specifies the municipalities and districts in which the members shall serve, N.J.S.A. 19:6-3 and 19:6-7; the time and place of any meeting that the district board members must attend is fixed by the County Board, N.J.S.A. 19:6-9; and the County Board may remove with or without cause any member of the district board, N.J.S.A. 19:6-4 and 19:6-5. The members of the district boards ordinarily perform their duties only on primary and general election days. The salary of the members of the district boards of election is paid by the county in which they perform their services, N.J.S.A. 19:45-4.

Casual employment is defined by N.J.S.A. 34:15-36. Under the provisions of this section of the statute if the work is done ". . . in connection with the employer's

business . . ." then the occasion for it must arise by "chance" or it must be "purely accidental" in order to find "casual employment." If, on the other hand, the work is not done in connection with the employer's business then casual employment is defined as ". . . employment not regular, periodic or recurring; . . ."

Thus, it is apparent that there are in fact two tests which may be applied in order to determine whether or not a person is a "casual employee." The test which will be used in any particular factual situation depends upon a determination, in the first instance, as to whether or not the work or service performed is the kind of work that is ordinarily undertaken by the employer. *Graham v. Green*, 54 N.J. Super. 397 (1959).

It is apparent that the members of district election boards perform a service of the kind ordinarily undertaken by their employer. This is true whether it is held that the county itself is the employer, since the salaries are paid by the county, or whether it is held that the County Board of Elections is the employer, since the members of the district boards are appointed and controlled by the County Boards.

The decided cases in New Jersey have held, without exception, that the duration or frequency of the employee's work is immaterial if the work is performed in connection with the employer's business. In *Malloy v. Capitol Bakery*, 38 N.J. Super. 516, 521 (1955) the court stated:

"Even assuming that the petitioner's work was only for a single day, his right to compensation cannot be denied, if it was not occasioned by chance or pure accident and was in accordance with the plans of the respondent to carry out its usual business."

Casual employment in instances where the work performed is of the kind ordinarily performed by the employer, is employment which comes about ". . . to meet the exigencies of a particular situation or a temporary emergency." *Ludwig v. Kirby*, 13 N.J. Super. 116, 125 (App. Div. 1951).

Therefore, it is clear that the statutory definition of "casual employee" does not apply to the appointment of the members of a district board of elections. They are appointed or employed in accordance with a statutory plan or design (N.J.S.A. 19:6-1 et seq.). The elements of "chance" or "accident" do not exist, even in the slightest degree, with regard to their appointment.

For these reasons and also keeping in mind that "casual employments are only exempted because they occur under circumstances rendering it difficult to provide coverage in advance," *Malloy v. Capitol Bakery*, 38 N.J. Super. 516, 523 (1955), we have reached the conclusion that the members of district boards of election are not "casual employees" within the meaning of that term as it is used in the Workmen's Compensation Act.

Very truly yours,

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