

MAY 15, 1961

HONORABLE JOHN A. KERVICK
State Treasurer
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-8

DEAR MR. KERVICK:

You have requested our advice as to whether the provisions of N.J.S.A. 43:3-1 et seq. prohibit the receipt of salary or pension by the present Magistrate in Rockaway, New Jersey. The factual situation you present is as follows: a retired State policeman on a pension from the State Police Retirement Benevolent Fund is serving now as Magistrate in both Rockaway and Rockaway Township at annual salaries of \$1,500 each, either or both of which are less than his pension. At the time of his appointment to both terms, the population of the municipality served was less than 5,000 persons. However, since the promulgation of the 1960 census (P.L. 1961, c. 3; N.J.S.A. 52:4-1), the population of one of these municipalities will exceed that figure.

Must this individual waive either his salary or pension because of his service as Magistrate, for the remainder of his term, in a municipality achieving a population in excess of 5,000 persons during said term of office?

N.J.S.A. 43:3-1 provides that:

"Any person who is receiving * * * any pension or subsidy from this * * * State * * * shall be ineligible to hold any public position or employment other than elective in this State * * * unless he shall have previously notified and authorized the proper authorities * * * that, for the duration of the term or office of his public position or employment he elects to receive (1) his pension or (2) his salary or compensation allotted to his office or employment. * * * such person shall not accept both such pension or subsidy and salary or compensation for the time he held such position or employment."

However, this strict prohibition is modified by N.J.S.A. 43:3-5, insofar as is pertinent to the question you have raised, as follows:

"The provisions of this chapter shall not apply to * * * any person who is appointed to the office of magistrate of any municipal court in any municipality having a population of less than 5,000 where the salary paid to such municipal magistrate is less than the amount of his pension."

The magistrate in question need not waive his salary or pension for services in a municipality having less than 5,000 persons. The sole question is whether he must elect to waive one of the aforesaid remunerations because during the term of his appointment the population in the other municipality officially rose to over 5,000 persons.

The individual in question was appointed magistrate while the population in the municipality was less than 5,000 persons. The terms of N.J.S.A. 43:3-1 et seq. imply that determinations of eligibility for receipt of both pension and compensation be made at the time of appointment or employment. The statute requires previous

notification of an election to waive either remuneration before he "shall be eligible to hold any public position or employment." Where a magistrate accepts employment and the obligations thereof, knowing that he is not required to waive his pension or salary, it would be unreasonable to force him to forfeit such position during his term of office because external circumstances changed during such term. However, if at the end of the present term he is reappointed, the magistrate will have to waive his pension.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: LEE A. HOLLEY
Deputy Attorney General

MAY 16, 1961

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

MEMORANDUM OPINION—P-9

DEAR COLONEL RUTTER:

We have been asked whether a pension paid to a member of the State Police after retirement for longevity should continue to be paid to his dependent mother after the retiree's death without having left a widow or children. In our opinion, it should not.

R.S. 53:5-5 expressly provides for the payment of a pension to a widow or dependent parent after the death in service of a member of the State Police. The same statute also expressly provides for the continued payment of a pension to the widow of a member of the State Police who dies after retirement. However, it makes no provision for the continued payment of a pension to a dependent parent of a member of the State Police who dies after retirement: In this context, the failure of the Legislature to provide expressly for continued payment of a pension to a dependent parent of a member who dies after retirement must be interpreted as intending that no such payment be made.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General