

53:5A-8

LEGISLATIVE HISTORY CHECKLIST

WJSA 53:5A-8 (State Police—Superintendent—Retirement age)

LAWS OF 1979 CHAPTER 203

Bill No. S1334

Sponsor(s) Orechio and others

Date Introduced Sept. 18, 1978

Committee: Assembly Judiciary, Law, Public Safety and Defense

Senate State Govt., Federal & Interstate Relations and Veterans Affairs

Amended during passage Yes No

Date of Passage: Assembly June 21, 1979

Senate Jan. 16, 1979

Date of approval Sept. 20, 1979

Following statements are attached if available:

Sponsor statement Yes No

Committee Statement: Assembly Yes No

Senate Yes No

Fiscal Note Yes No

Veto message Yes No

Message on signing Yes No

Following were printed:

Reports Yes No

Hearings Yes No

Attorney General Opinion cited in Senate Committee statement (attached)

Do Not Remove From Library
DEPOSITION COPY

EJ
9/1/78

SENATE, No. 1334

STATE OF NEW JERSEY

INTRODUCED SEPTEMBER 18, 1978

By Senators ORECHIO, FORAN, LIPMAN, GRAVES, SHEIL,
CAFIERO, PARKER, GREENBERG, BEDELL, MARESSA,
DWYER, DODD, RODGERS and SCARDINO

Referred to Committee on State Government, Federal and
Interstate Relations and Veterans Affairs

AN ACT to amend the "State Police Retirement System Act,"
approved June 9, 1965 (P. L. 1965, c. 89).

1 BE IT ENACTED *by the Senate and General Assembly of the State*
2 *of New Jersey:*

1 1. Section 8 of P. L. 1965, c. 89 (C. 53:5A-8) is amended to read
2 as follows:

3 8. a. Any member of the retirement system who was a member
4 of the former "State Police Retirement and Benevolent Fund" on
5 June 30, 1965, may retire on a service retirement allowance upon
6 the attainment of age 50 years and the completion of at least 20
7 years of creditable service as a State policeman. Upon the filing
8 of a written and duly executed application with the retirement
9 system, setting forth at what time, not less than 1 month, subsequent
10 to the filing thereof he desires to be retired, any such member
11 retiring for service shall receive a service retirement allowance
12 which shall consist of:

13 (1) An annuity which shall be the actuarial equivalent of his
14 aggregate contributions and

15 (2) A pension in the amount which, when added to the member's
16 annuity, will provide a total retirement allowance of 50% of his
17 final compensation plus 1% of his final compensation multiplied by
18 his number of years of creditable service which exceed 25 years of
19 such service.

20 *Except for the Superintendent of State Police, any [Any] mem-*
21 *ber of the retirement system who was a member of the former*
22 *"State Police Retirement and Benevolent Fund" on June 30, 1965,*
23 *who has completed at least 25 years of creditable service and who*

**EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill
is not enacted and is intended to be omitted in the law.**

24 has reached the age of 55 years shall be retired forthwith on the
25 first day of the next calendar month.

26 b. *Except for the Superintendent of State Police, any* **[Any]**
27 member of the retirement system who was not a member of the
28 former "State Police Retirement and Benevolent Fund" on
29 June 30, 1965 who has attained the age of 55 years shall be retired
30 forthwith on the first day of the next calendar month provided,
31 however, such member, at his option, may continue in the employ-
32 ment of the Division of State Police upon the request of the
33 Superintendent, and with the concurrence of the Attorney General,
34 for an additional year beyond the date upon which he would other-
35 wise be required to retire hereunder, and such member may
36 thereafter in each succeeding year continue in the employment of
37 the Division of State Police upon the request of the Superintendent,
38 with the concurrence of the Attorney General, until he has attained
39 the age of 65 years, whereupon he shall be retired forthwith on the
40 first day of the next calendar month. Any such member, *including*
41 *the superintendent, having attained at least the age of 55 years and*
42 *retiring for service hereunder shall receive a service retirement*
43 *allowance which shall consist of:*

44 (1) An annuity which shall be the actuarial equivalent of his
45 aggregate contributions and

46 (2) A pension in the amount which when added to the member's
47 annuity will provide a total retirement allowance of 2% of his final
48 compensation multiplied by his number of years of creditable ser-
49 vice up to 25 plus 1% of his final compensation multiplied by his
50 number of years of creditable service over 25.

51 c. Upon the receipt of proper proofs of the death of a member
52 who has retired on a service retirement allowance, there shall be
53 paid to the member's beneficiary, an amount equal to one-half of
54 the final compensation received by the member.

1 2. This act shall take effect immediately.

STATEMENT

The purpose of this bill is to resolve the apparent contradiction between the provisions of N. J. S. A. 53:1-2, which provides a statutory term of office for the Superintendent of State Police, and N. J. S. A. 53:5A-8, which concerns the mandatory retirement provisions of the State Police Retirement System. This act would make clear that the superintendent may serve his full statutory term despite the provisions of the latter statute.

S.1334 (1979)

SENATE STATE GOVERNMENT, FEDERAL AND
INTERSTATE RELATIONS AND VETERANS AFFAIRS
COMMITTEE

STATEMENT TO
SENATE, No. 1334

STATE OF NEW JERSEY

DATED: NOVEMBER 20, 1978

The purpose of this bill is to eliminate an apparent conflict in Title 53 with respect to the term of office of the Superintendent of State Police and the mandatory retirement provisions of the State Police Retirement and Benevolent Fund.

Title 53 presently provides that the superintendent "shall serve during the term of office of the Governor appointing him and until the superintendent's successor is appointed and has qualified" (R. S. 53:1-2). At the same time, however, the State Police Retirement Fund, pursuant to C. 53:5A-8, requires that certain members of the system retire at age 55. This bill would amend the appropriate sections of the law to exempt the superintendent from this requirement thereby eliminating the conflict of statutes.

The conflict was most recently confronted with respect to the retirement status of former superintendent David B. Kelly. At that time the Office of the Attorney General reviewed the question and, in a lengthy opinion, found that it was the intent of the statutes to distinguish the superintendent from the other members of the State Police. In point of fact there is no statutory requirement that the superintendent must be a State Policeman prior to his appointment (R. S. 53:1-4).

It should be noted that the change will not affect the term of Superintendent Clinton L. Pagano, at least during the term of the present Governor. Superintendent Pagano is presently 51 years old.

FROM THE OFFICE OF THE GOVERNOR

FOR IMMEDIATE RELEASE

FOR FURTHER INFORMATION

SEPTEMBER 20, 1979

JOE SANTANGELO

Governor Brendan Byrne has signed the following bills:

S-811 and S-812, sponsored by Senator Laurence S. Weiss (D-Middlesex), which prohibits the interment of more than one of a deceased person or stillborn infant in the same interment space or container without proper written authorization.

S-811 applies to cemeteries and S-812 applies to morticians.

Proper written consent to a multiple burial may be given by the decedent before he becomes such, a court of competent jurisdiction or certain of the decedent's relatives in an order specified in the bill.

S-811 also provides that multiple death burials are permitted if they have been contracted for between the purchaser of the space and the owner of the cemetery.

S-1028, sponsored by Senator Matthew Feldman (D-Bergen), which permits minors between the ages of 16 and 18 to work in the executive offices, maintenance departments, or pool or beach areas of hotels, motels or guest houses.

Under prior law, minors were permitted to work in restaurants, provided they did not engage in the preparation, sale or serving of alcoholic beverages, tobacco products or photographs and did not participate in dancing or theatrical exhibitions.

The minors will continue to be protected under other provisions of the Child Labor Law.

S-1334, sponsored by Senator Carmen Orechio (D-Essex), which eliminates an apparent conflict in the statutes with respect to the term of office of the Superintendent of State Police and the mandatory retirement provisions of the State Police Retirement and Benevolent Fund.

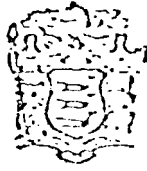
-more-

Under current law, the Superintendent serves during the term of the Governor appointing him and until his successor is appointed, but the retirement fund requires that certain members of the system retire at age 55. This bill amends the appropriate sections of the statute to eliminate the Superintendent from the age requirement.

This change will not effect the term of State Police Superintendent Clinton Pagano, at least during the term of Governor Byrne, since Colonel Pagano is currently 51 years old.

S-3288, sponsored by Senator John Ewing (R-Somerset), validates certain proceedings of school districts for the issuance of bonds.

###



State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY

DIVISION OF LAW
STATE HOUSE ANNEX
TRENTON 03823

MARILYN LOFTUS SCHAUER
FIRST ASSISTANT ATTORNEY GEN.

GEORGE F. KUGLER, JR.
ATTORNEY GENERAL

December 19, 1972

Mr. Elmar Baggaley
Secretary of the State Police
Retirement System
Division of Pensions
20 West Front Street
P. O. Box 2058
Trenton, New Jersey

Dear Mr. Baggaley:

A question has been raised to this Office regarding the retirement status of Superintendent of State Police, David B. Kelly. Superintendent Kelly became 55 on Monday, December 18 and the question has been raised whether he must retire under the provisions of N.J.S.A. 53:5A-8(a)(2).

Since this question must be resolved by the State Police Retirement System, I am attaching a copy of the opinion of this Office representing our legal conclusions on the applicability of the above provision to Superintendent Kelly. As you can see from the opinion it is our position that that provision does not apply to the position of Superintendent of State Police.

I understand from our telephone conversation this morning that you will consider this problem and seek an expedient resolution of it.

Very truly yours,

Edward C. Laird
Deputy Attorney General

ECL:amb

MEMORANDUM

Issue

Whether the New Jersey Legislature intended by the establishment of the State Police Retirement System to affect the term of a Superintendent of the State Police.

Resolution

The Legislature did not intend to limit the statutorily established term of a Superintendent of the State Police by the establishment of the State Police Retirement System.

Discussion

A full understanding of the history and nature of the office of Superintendent of State Police as well as a thorough examination of the statutes establishing the Department of State Police [thereafter the Division] and the State Police Retirement System is necessary to a resolution of the question involved. N.J.S.A. 53:1 et seq. and N.J.S.A. 53:5A-1 et seq. Once that history is understood it becomes clear that the statutorily established term of the Superintendent of State Police - to be coextensive with the term of the Governor appointing him - was not intended to be modified by the retirement system providing benefits to members of the Department of State Police and to the Superintendent of State Police. Consequently it becomes clear that the present

Superintendent of State Police, David B. Kelly, is legally permitted to continue his term as Superintendent of State Police beyond the age of 55. (1)

At first blush an examination of the statutes as well as the case law would lead one to the immediate conclusion that a Superintendent who is a member of the pre-1965 State Police Retirement System must retire as Superintendent upon attaining the age of 55. This immediate reaction is prompted by the following statutory provision:

"Any member of the retirement system who was a member of the former 'State Police Retirement and Benevolent Fund' on June 30, 1965, who has completed at least twenty-five years of creditable service and who has attained the age of 55 years shall be retired forthwith on the first day of the next calendar month."
N.J.S.A. 53:5A-8(a)(2)

Superintendent David B. Kelly joined the State Police Retirement and Benevolent System [the pre-1965 system] as a trooper upon his entrance into the State Police. (2) He has creditably served the State Police for over twenty-five years and he attains the age of 55 on December 18, 1972. The initial reaction to these facts and the above quotation is to suggest that Superintendent Kelly must retire. Nonetheless upon

(1) It should be noted also that this opinion does not foreclose reappointment of Superintendent Kelly to subsequent terms.

(2) The pension records for Superintendent Kelly indicate that he joined the State Police Retirement System on May 20, 1946.

... the procedure of Superintendent and of the history of the Retirement System and of the Department of State Police it becomes apparent that this would be an erroneous conclusion.

Initially it is necessary to recognize the generally accepted rule that a statutory or constitutional term of office is subject to termination by death, removal or resignation but is otherwise usually considered unalterable without specific legislative direction. See Wilhelm v. Drake, 1 N.J. Misc. 155 (Sup. Ct. 1923); cf. Marvel v. Camden County, 137 N.J.L. 47 (E & A) 1947. In the case of a Superintendent of the State Police it is statutorily provided that:

"The Superintendent of State Police, hereinafter referred to as the Superintendent, shall be appointed by the Governor with the advice and consent of the Senate, shall serve during the term of office of the Governor appointing him and until the Superintendent's successor is appointed and has qualified and shall be removable by the Governor after charges have been preferred and a hearing granting." N.J.S.A. 53:1-2.

This language represents the most current statute relating to the appointment of the Superintendent and was passed in 1971 and effective April 16 of that year. It had its origins as did the Department of State Police in the 1921 Act of the New Jersey Legislature which established at that time the Department of State Police. L.1921, c.102, p.167.

The movement for a State Police in New Jersey first reached the Legislature in 1914, when a bill was introduced by a Senator from

Middlesex County providing for a force of 114 men, modeled after the Pennsylvania system, and carrying with it an appropriation in the amount of \$200,000. The same bill was introduced again in 1915, when passed the Senate by a vote of 11 to 7, but was tabled by the House Committee on Judiciary because of lack of time for proper consideration.

An impartial study was then begun by the Bureau of State Research which was affiliated with the New Jersey State Chamber of Commerce. This study resulted in a lengthy report entitled "The State Police Problem in America" and was submitted to the people and Legislature of New Jersey in 1917. This report, which examined all existing State Police systems and which placed particular emphasis on the State Police system in Pennsylvania⁽³⁾, ultimately provided a major impetus and substantial basis for passage in 1921 of Chapter 102 of The Laws of 1921. See "The State Police Problem in America", (N.J. State Chamber of Commerce, 1917) [hereinafter cited as the 1917 Report].

(3) A comparison of the Pennsylvania statute in force at the time with the New Jersey statute adopted in 1921 indicates great similarity between the two systems as well as the specific wording of the Statutes. Compare 1917 Report at p.7 with Chapter 102 of The Laws of 1921. Indeed the wording of the title of each act is identical.

Perhaps most significant for present purposes is the fact that the administrative structure and organization of the Pennsylvania State Police upon which the New Jersey State Police was modeled consisted of a Superintendent appointed by the Governor of Pennsylvania, a Deputy Superintendent, a bookkeeper and a stenographer. These individuals were distinct from and considered separate from the Police Force of 228 men which were divided into four barracks of 57 men each. The Pennsylvania act specified no particular qualifications of the Superintendent but it did provide eligibility requirements for all 228 members of the force. Similarly the New Jersey statute provided that a Superintendent would be appointed by the Governor with the advice and consent of the Senate for a term of five years and that he would be permitted the authority to appoint a deputy and a bookkeeper and stenographer. See L.1921, c.102, §§1 and 2. In addition the New Jersey statute provided

the following specific qualifications for the Superintendent, Deputy Superintendent and the Captain and Lieutenant of each troop:

a) Citizen of the United States, b) Two years as an officer in the Army of the United States, c) Honorable discharge from such service with a rank not lower than that of Lieutenant. The New Jersey Act provided separate and distinct qualifications for all officers and troopers of the State Police as follows: a) Citizen of the United States, b) Good health, c) Good moral character, d) Between the ages of 21 and 40, e) Passage of a physical and mental examination prepared by the United States Army. See L.1921, c.102, §§4 and 3.

It is apparent right from the origin of the New Jersey State Police therefore that the Superintendent has been treated separately from the other members of the State Police Department and that his qualifications are distinct from those which are required of the officers and troopers of the State Police force.

This distinct and separate treatment has continued through every change in the State Police law which has occurred throughout the course of the past 50 years. In 1922 the Legislature amended §4 of the 1921 Act to add the proviso that a commissioned officer in the State Police shall be eligible to promotion to the rank of Captain or to ranks above that of Captain and the further proviso that a non-commissioned officer of the State Police shall be eligible to promotion to the rank of Lieutenant only. This amendment appeared to be related to the military origin of many of the members joining the State Police at that time and was specifically directed at continuing the distinction between those above the rank of Captain, up to and including Superintendent, from those below the rank of Captain in the State Police. In 1937 the Legislature passed a separate act which was a supplement to the State Police Act and which granted tenure to any member of the Department of State Police who has served for a period of five years but this act excluded from such tenure the Superintendent, expressing the reason in the language "whose term is fixed by law." It would appear that this language specifically recognizes the fixed nature of the Superintendent's term and evinces not only legislative recognition of that fact but the desire of the Legislature not to interfere with L.1937, c.115. In 1945 the Legislature amended the original §3 of the act which had subsequently become N.J.S.A. 53:1-9 to provide

that the age limits for members of the State Police force were to be between 22 and 35 years. This amendment did not of course affect in any way the qualifications of the Superintendent. L.1945, c.247. In 1947 a significant change was made in the statute providing qualifications for the Superintendent. The Legislature dropped the requirement of military experience and honorable discharge and provided only that the Superintendent shall be a citizen of the United States and "shall be appointed on the basis of training, experience and administrative qualifications required for the responsibilities of the office." L.1947, c.65 amending N.J.S.A. 53:1-4. These qualifications were also applicable to the Deputy Superintendent, the executive officer of the State Police and the Captain or Lieutenant of each troop. It was therefore clear that not only did the Legislature eliminate military experience as a specific requirement of eligibility but the Legislature also made quite clear that it was not necessary that any of the enumerated officers have State Police training per se. Once again this amendment made quite clear that the Superintendent and his executive officers were treated distinctly in the legislative scheme establishing the membership of the Department of State Police.

In 1953 the Legislature once again amended N.J.S.A. 53:1-9 and established the ages for State Police members to be between 21 and 35 years and changed the mental and physical fitness test to one which must be conducted by the Division of State Police and established

to the satisfaction of the Superintendent. L.1958, c.74.

And of course the most recent change of significance was the 1971 act referred to above which provided that no longer would the Superintendent of State Police have a term of five years but he would serve a term co-extensive with the term of the Governor who appointed him. Consequently the Superintendent was specifically designated by the Legislature as an individual whose position required the benefit of a specific term of office, which was of course consistent with the original intention and purpose of the 1921 Legislature to keep politics out of the appointment process as much as possible. Thus the treatment of the State Police Superintendent by the Legislature within the context of the development of the Department and later the Division of State Police evinces a clear legislative recognition of the significance and singular importance of the man who assumes the responsibility of Superintendent and indicates moreover that the Legislature recognizes that this man may be a State Policeman, a military man, a civilian or any other citizen of the United States whose training and experience equips him for the job of Superintendent and who once eligible is entitled to a term of office which obviously is not to be terminated without clear legislative direction.

With this background and with the recognition of the treatment which has legislatively been accorded to the Superintendent

of State Police, it is cooperative in order to resolve the present problem to examine the similar history and background relating to the State Police Retirement System. In 1925, just four years after the establishment of the Department of State Police, the New Jersey Legislature established a fund to be known as the State Police Retirement and Benevolent Fund. The Act establishing this Fund was obviously intended to provide a retirement system for any member of the Department of State Police. It included provisions providing for retirement upon age and service, for disability, and for disability resulting from injury or disease. This act also provided pension benefits to widows of members of the Department of State Police. The 1925 Act, however, nowhere mentioned the eligibility of the Superintendent of State Police for any of the benefits provided by this system. As a result of that fact the Legislature in 1937 amended the Act to add the words "The Superintendent, the Deputy Superintendent, and any other member of the Department of State Police" would be eligible for an age and service pension. There was no addition of those words to the disability sections of the statute, however, and a close reading of the statute would raise the question of whether or not the Superintendent or Deputy Superintendent was entitled to anything other than an age and service pension. In any event the purpose for adding these words was reflected upon in the case of Schwarzkopf v. State House Commission, 123 N.J.L. 78 (N.J. Sup. Ct. 1939). In that case the first Superintendent of the

State Police, Norman Schwarzkopf, sought a pension in accordance with the 1937 amendment. The court denied his request stating that the Legislature did not intend to apply the pension benefits retroactively. In passing, the court indicated that the Legislature obviously intended to make it clear that the Superintendent and Deputy Superintendent were classed with the other members of the Department, at least insofar as age and service pensions were concerned. 123 N.J.L. at 81.

The next legislative change in the retirement system act occurred in 1949. For the first time the Legislature passed an act which established a mandatory retirement age of 55 years for any member of the Department of State Police who had actively served for 25 years. This act supplemented the Retirement System Act of 1925 and provided them with a relatively early retirement system similar to that of the military which not only benefitted retirees but also encouraged enlistment in the State Police. (4)

The act provided as follows:

(4) It should be noted that while the age of 55 is mentioned specifically in this 1949 statute it nevertheless is used in conjunction with the requirement of 25 years of active service. In point of fact this meant that it was possible for members of the State Police who had joined the force prior to 1945 to continue in service until

"Notwithstanding any other provision of law, any member of the Department of State Police who actively served in said Department for a period of twenty-five years and who has reached the age of 55 years shall be retired and upon such retirement shall receive monthly from the Pension Fund an amount equal to 3/4 of the salary received by such member at the time of his retirement; but no pension shall be in excess of 1/2 of the salary, including maintenance and allowance of such applicant at the time of his retirement." L.1949, c.251 which became N.J.S.A. 53:5-2.1. (Emphasis added)

It can clearly be seen in the provisions of this act that the Legislature did not choose to designate the Superintendent of State Police as someone who is specifically subject to the provisions of this supplemental act as it had done on amending the retirement system act in 1937. The fact that this was a separate and supplemental act without specific inclusion of the Superintendent clearly left open the question of whether it was at all indeed intended to apply to a duly appointed Superintendent.

It was this very question which arose in 1964 and which prompted a proposed legislative amendment to N.J.S.A. 53:5-2.1.

At that time Superintendent Capello had remained in office beyond

(Footnote 4 Cont.)

the age of 65 since the maximum age prior to 1945 for admission to the State Police Force was 40. It also meant that members of the force who joined the State Police after 1945 could possibly serve until the age of 60 since the maximum age after 1945 for eligibility was 35. Thus while a mandatory age of 55 was mentioned it was obviously subject to certain conditions and did not certainly establish an across-the-board policy of retirement for State Policemen at the time of enactment of this Legislation in 1949.

the age of 55 and the Legislature undertook consideration of Senate Bill 188 of 1964 which proposed to add the following language to the 1949 supplement to the retirement act:

"The Superintendent, Deputy Superintendent and any other member of the Division of State Police in the Department of Law and Public Safety. . . (Emphasis added).

The rest of the provision remained the same and therefore the only change was to add the Superintendent and Deputy Superintendent in a way similar to that which was done in 1937 to include them as eligible members of the Department of State Police for at least the purpose of seeking an age and service pension. The 1964 legislation was never enacted. It is instructive however to consider the comments of the then and present Director of the Division of Pensions, William J. Joseph, on Senate Bill 188 which were transmitted to the Office of the Governor and contained in the Governor's bill file of 1964. In describing the bill's effect Director Joseph pointed out that it amends the act governing the retirement of State Police so that the compulsory retirement of the members of State Police after 5 years of service and the attainment of age 55 shall also apply to the Superintendent and Deputy Superintendent as well as all other members in the State Police. In discussing the desirability of the effect of the Legislation Director Joseph commented as follows:

"In the past there have been several occasions when the Superintendent of the State Police has remained in his position beyond the compulsory retirement age of 55 and this problem has been advanced on those occasions. This bill would clarify the status of the Superintendent and his Deputy but may not be administratively desirable. In fact, in our negotiations with the State Police on this very problem, we have agreed to continue the mandatory retirement age of 55 for all present members of the State Police Fund but that in the future, new employees could be retained on a year to year basis with the consent of the Superintendent and the Attorney General. It has always appeared to us that while there may be some question about promotional opportunities within the State Police as the result of the Superintendent or his Deputy remaining in office beyond the age of 55, it might be much more important to have individuals at that level and even on a much lower level, remain in the State's service where they can complete their career in government to the advantage of the State and its taxpayers rather than by their premature retirement so that private industry gains the value of their experience at the State's expense."

And Director Joseph continued in his memorandum to express the departmental position on Senate Bill 188 and thus the opinion of the Division of Pensions:

"We do not recommend approval of this legislation since we believe this is a matter of gubernatorial appointment and should be one resolved by the Governor and the Attorney General."

While the position of the Division of Pensions cannot be considered dispositive on the question of legislative intent relating to a specific bill it does seem indeed helpful to refer to the agency whose administrative expertise has been applied to the State Police Retirement System over many years. And in this case the comments

of that Division support the legislative history and conclusions reached here in this memorandum and are quoted specifically for that purpose. Moreover these comments as well as the proposed amendment in 1964 indicate that when the legislature wants to cover the Superintendent of State Police within a particular statutory provision it designates him by his position, as it did in 1937 and as it proposed to do in 1964, and does not refer to him as just any other member of the Division of State Police.

The latest significant change in the State Police Retirement System occurred in the following year 1965. That change is contained in N.J.S.A. 53:5A-1 et seq. It repealed the prior State Police Retirement System but it did not affect the benefits or the beneficiaries of that system. The 1965 act continued the benefits for all members of the pre-1965 fund and specifically provided that membership of the retirement system under the 1965 law would include the following:

- "(a) The members of the former State Police Retirement and Benevolent Fund.
- (b) Any person becoming a full-time commissioned officer, non-commissioned officer or trooper of the Division of State Police of the Department of Law and Public Safety of the State of New Jersey provided that the Division of State Police certifies that he has satisfied the age and health requirements prescribed for members of the State Police force.

Membership in the retirement system is a condition of employment for such officers, non-commissioned officers and troopers."⁽⁵⁾

(5) It should be noted that the language used in subparagraph (b)

Thus the Legislature established two classes within the retirement system and continued the slightly better benefits of the pre-1965 group while at the same time providing a similar but not quite as lucrative system for post-1965 members. In addition the mandatory retirement provisions provide for separate treatment between the two groups. As indicated earlier N.J.S.A. 53:5A-8(a)(2) provides that pre-1965 members with twenty-five years of creditable service must be retired at the age of 55. This of course is a

(Footnote 5 Cont.)

its origin in the early legislation establishing the Department of State Police. It may indeed indicate that a Superintendent of the State Police is not in fact eligible to join the post-1965 retirement system. This is true because of the use of the words full-time commissioned officer, non-commissioned officer or trooper and also because of the proviso that these individuals must have satisfied the age and health requirements prescribed for members of the State Police force. The history of this language as indicated earlier in this memorandum indicates that it applies only to members of the Division of State Police who were traditionally treated separately and apart from the Superintendent and his staff. This would also be consistent with the last sentence of this section which makes membership in the system a condition of employment; it would not be expected that it makes membership an additional eligibility requirement for a Superintendent or indeed a Deputy Superintendent. The 1965 Act therefore is, like all other legislation relating to the State Police, subject to the interpretation that since the Superintendent was not specifically named he was not intended to be included in the post-1965 retirement system. If that is true, of course, a Superintendent could only be entitled to the benefits of that system if he became Superintendent after having become a member of the retirement system as a commissioned officer, non-commissioned officer or trooper of the Division.

conjunctive requirement and therefore it is indeed possible that an individual within this group would not be eligible for retirement until age 60 if he did not become a member of the Division until age 35. The post 1965 retirement system members are subject to the following mandatory retirement provision:

"Any member of the retirement system who is not a member of the former 'State Police Retirement and Benevolent Fund' on June 30, 1965 who has attained the age of 55 years shall be retired forthwith on the first day of the next calendar month provided however such member, at his option, may continue in the employment of the Division of State Police upon the request of the Superintendent, and with the concurrence of the Attorney General for an additional year beyond the date upon which he would otherwise be required to retire hereunder, and such member may thereafter in each succeeding year continue in the employment of the Division of State Police upon the request of the Superintendent, with the concurrence of the Attorney General, until he has attained the age of 65 years, whereupon he shall be retired forthwith on the first day of the next calendar month." N.J.S.A. 43:5A-8

Neither of these provisions, despite the previous experience indicated by the 1964 amendment to include the Superintendent within the mandatory age provisions, contain any specific language including the Superintendent within either of the mandatory retirement provisions.

In fact the retirement provision for post-1965 members makes their continuation in employment until age 65 dependent upon the request of the Superintendent. It would not seem reasonable to conclude that the Legislature intended that the Superintendent should continue upon the request of the Superintendent; it would seem more logical to conclude that the Legislature never intended the Superintendent

The foregoing provisions of the 1965 legislation also seem to indicate that the age 55 retirement provision was not intended by the Legislature to indicate a legislative judgment that policemen must retire at 55 because they are no longer capable of performing their duties. Obviously the Legislature would not have provided for extension beyond age 55 if it had reached such a conclusion. Indeed the 65 age limit is consistent with other retirement systems applying to policemen. (6) Consequently this legislation does not in any way establish a general across-the-board mandatory retirement age based upon the judgment that that age indicates the outer limit of capability in this particular profession. This is to be distinguished from the Public Employees Retirement System where the age of 70 has been chosen for policy reasons.

(6) See N.J.S.A. 43:16-1 (Mandatory retirement for active members of municipal and county police and fire departments at age 65); N.J.S.A. 43:16-17(2) and (3) (establishing for employee members who are not subject to call for active duty the age of 70 for retirement); N.J.S.A. 43:16A-1 et seq. (the police and firemen retirement system which establishes in 43:16A-5(1) a mandatory retirement age of 65 for members). These systems also make distinctions between administrative and line personnel. See e.g. N.J.S.A. 43:16-17.2; N.J.S.A. 43:16A-3.1.

Thus after examining the history and development of both the Department of State Police and its retirement system certain facts become quite clear:

A. The Superintendent of State Police is the only member of that Department provided with a statutory term of office;

B. The Superintendent of State Police has traditionally been treated separately in terms of qualifications, powers and retirement benefits from other members of the State Police;

C. The Legislature has specifically referred to the Superintendent by name when it has chosen to include him within any statutory provisions relating to the Division of State Police or to the retirement benefits to be associated with them;

D. The Legislature has not established a mandatory retirement age for State Policemen based upon their ability to perform their enumerated functions;

E. The State Legislature has recognized and specifically provided for the employment of a Superintendent of the State Police who does not come from the ranks of the State Police;

F. The Legislature was specifically cognizant of a problem similar to the one now under consideration when it enacted the Retirement System of 1965 and chose not to specifically enumerate or designate the inclusion of the Superintendent within its provision

despite a history of doing so when that was its intention. All of these facts become important to the determination of whether or not the Legislature has intended to limit a Superintendent's term of office by providing legislation establishing a retirement system.

Superintendent Kelly is clearly a member of the pre-1965 State Police Retirement System. As such he is included as a member in the State Police System under the 1965 Act. He joined that system not as the Superintendent but as a trooper with the Division of State Police. Indeed at the time he joined the system there was in fact no provision relating to the mandatory retirement of State Policemen at any particular age. Nonetheless the position has been espoused that his Superintendency, to which he ascended as a result of gubernatorial appointment in 1965 and which he retained as a result of gubernatorial reappointment in 1969, is in some way to be terminated by the mere fact that he joined the pre-1965 system as a trooper. Clearly this is not a case of a Superintendent waiving his right to remain in office by consciously electing a particular retirement system and the benefits it provided. Cf. Division of Pensions v. Lindeman, 103 N.J. Super. 375 (Ch. Div. 1968), aff'd per curiam 53 N.J. 70 (1968); Earlich v. Public Employees Retirement System of N.J., 42 N.J. Super. 419 (Law Div. 1956).

The Lindeman case involved a dispute between a judge of the Juvenile and Domestic Relations Court and the Division of Pensions over what date the judge was required to retire. The judge was first appointed to the Juvenile Court in March, 1945 and he served continuously since that time. On November 25, 1968 he was to reach his 70th birthday. Thirteen years earlier, in 1955, he applied for membership in, and became a member of, the Public Employees Retirement System of New Jersey (PERS). He was appointed in 1965 by Governor Hughes for another five-year term. He argued that this appointment superseded the PERS statute which established the age of 70 as a mandatory retirement age for all PERS members. In addition the PERS statute, in N.J.S.A. 43:15A-25, reads in part:

"Every employee to whom this act applies shall be deemed to consent and agree to any deduction from his compensation required by this act and to all other provisions of this Act."

It was this provision of the PERS statute which was used by the court as the basis for its conclusion that the judge's appointment, though based on a five-year statute, could not override the statutory retirement age set for all PERS members.

In reaching this conclusion the court cited the Ehrlich case supra with approval and quoted from it as follows:

"The plaintiff has accepted the provisions of the Public Employees Retirement System, N.J.S.A. 43:15A-1 et seq. He is, therefore, subject to the provisions of that Act, and must accept retirement unless he is continued in service from time to time

head of the Department where the employee is employed. N.J.S.A. 43:15 47 [cites omitted] To that extent, he has waived the protection of N.J.S.A. 40:46-7 [in this case the tenure statute applying to the office of a municipal clerk]". 42 N.J. Super. at 422.

There are several distinctions between these two cases and the present question under review. First, the State Police Retirement System statute does not contain a provision similar to that contained in N.J.S.A. 43:15A-25 and upon which the court relied in the Lindeman case. Second, Superintendent Kelly did not join the retirement system as a Superintendent as Judge Lindeman did as a judge or as did the municipal clerk as a municipal clerk. He joined prior to his ever becoming Superintendent of the State Police and prior to the provision in the retirement system's statute establishing a mandatory retirement age of 55 for pre-1965 members. It is difficult therefore to conclude that Superintendent Kelly waived the protection afforded him by the statute establishing his term of office. Third, it must be remembered that in the Lindeman and Ehrlich cases the courts were confronting a mandatory retirement age applicable to a wide class of employees. In the Superintendent of State Police question there is only one position involved and it has a long and distinct history. Fourth, the conclusion reached in Lindeman as in the Ehrlich case depends in great measure upon the fact that in those cases the court was dealing with a mandatory retirement age of 70 which was established across-the-board for all State employees as an expression of the legislative intent that the age of 70 was the age at which most State employees should be retired. This mandatory retirement age was undoubtedly based upon the legislative intent

in government and also because it was undoubtedly concluded that by the age of 70 State employees' capabilities have generally been reduced to the point where State service benefited by younger people in the designated jobs. These facts and these conclusions expressed by the PERS legislation are not in existence and do not apply to the question of Superintendent Kelly's retirement status. Indeed the Legislature has recognized that post-1965 retirement system members of the State Police may continue until a maximum retirement age of 65. Moreover since the Superintendent may indeed be a civilian appointee and therefore be subject to the PERS mandatory retirement statute he may with legislative sanction continue until the age of 70 and even thereafter with the approval of his appointing authority. (7)

These facts when combined with the recognition that most

(7) That the Superintendent of the State Police may be a civilian non-member of the Division is demonstrated not only by the statutory qualifications but also by the history of the office of Superintendent itself. Obviously the first Superintendent, H. Norman Schwarzkopf, was not trained in the Department of State Police. A subsequent Superintendent, Mark O. Kimberling, was a non-member of the Department at the time of his appointment. He was at the time serving as Principal Keeper of the State Prison in Trenton. See generally, Coakley, Jersey Troopers at pp.141-143 (1971). In light of the potential appointment of a non-member of the Division to the post of Superintendent, it would be an odd conclusion to reach that the Legislature intended to retire a member Superintendent who could be appointed as a non-member Superintendent the following day.

police retirement systems establish the age of 65 as the mandatory retirement age for police members demonstrate not only that the Legislature has generally considered 65 as the mandatory retirement age for policemen, but also that the Legislature has recognized that the Superintendent undertakes administrative functions primarily as opposed to line functions and therefore may indeed not even be subject to the 65 mandatory retirement policy judgment.⁽⁸⁾ It would seem unusual to conclude that the Legislature intends that a Superintendent who happens to be a member of the pre-1965 Retirement System would be forced to retire at the early age of 55, while a Superintendent who happens to be a member of the post-1965 Retirement System would be permitted to continue in office until the age of 65 and while a civilian Superintendent who is not a member of either retirement benefit system would be permitted to continue until at least age 70 and perhaps even thereafter in the discretion of his appointing authority. There would seem to be no rational basis for concluding that by establishing the retirement system for the members of the State Police the Legislature intended to establish three different mandatory retirement ages for a Superintendent and thereby created a rather unclear and certainly unreasonable distinction among Superintendents who perform the very same function. Moreover it is difficult to believe that in light

⁽⁸⁾ Cf. Footnote 6, *supra*.

of the specific statutory term provided by the Legislature that it was its intent by the establishment of the State Police Retirement System to curtail those terms based upon the coincidence of membership in a particular retirement system. Indeed it would seem unusual that the Legislature would provide a statutory scheme of retirement and term-termination for Superintendents which penalize the Superintendent who rose from within the ranks and favor the Superintendent who was appointed from without.

In conclusion therefore the answer to the question of whether the Legislature intended to limit the statutory term of a Superintendent of State Police by the enactment of the State Police Retirement System and in this case whether it intended to limit the term of Superintendent Kelly must be that it did not. Superintendent Kelly therefore is entitled to remain in the office of Superintendent of State Police. He shall continue as a member of the Retirement System and he shall be entitled to all benefits of that system and shall make the appropriate contributions thereunder. The practical effect of the conclusion reached herein therefore is to apply all appropriate provisions of the Retirement System Act to Superintendent Kelly with the exception of the mandatory age 55 retirement provision contained in N.J.S.A. 53:5A-8(a)(2).

George F. Kugler, Jr.
Attorney General for the
State of New Jersey

By Edward C. Jand

Department of Law and Public Safety



RECEIVED
Inter-Communication
13 APR 1977

PL?

OFFICE OF ATT. GEN.
D.L.B.

From: DAG George Ciszak

To: Special Assistant Bliss

Date: April 4, 1977

(Institution or Department)

Re: Proposed Legislation--State Police Superintendent's Retirement

Pursuant to your request, I have reviewed the proposed legislative change of N.J.S.A. 53:5A-8.

The initial question to be considered, before consideration of the proposed change, is whether or not the existing provisions of N.J.S.A. 53:5A-8 mandate the retirement of the Superintendent of State Police at the time he achieves the age of 55 years. In confronting this question, it is noted that this was confronted by former Deputy Attorney General Edward C. Laird in a memorandum prepared for him bearing date of December 19, 1972 (see annexed copy). DAG Laird's memo encompassed an extensive analysis of the statutes establishing the Department of State Police (thereafter the Division of State Police), and the State Police Retirement System. His in-depth historical analysis of the legislation initially creating this organization, the position of Superintendent and the present statutes which address themselves to the Division of State Police, led him to the conclusion that, in fact, the statutory scheme did not intend the Superintendent to be considered on the same plane as the other members of the State Police.

DAG Laird's analysis concluded that there are significant distinctions created by the legislature between the Superintendent and the other members of the State Police to such a degree that the provisions of the retirement system were not intended, with respect to mandatory retirement, to encompass the position of the Superintendent.

To synopsise the rationale presented by DAG Laird, suffice it to say that he concluded, (1) that the Superintendent of State Police is the only member of that Department provided with a statutory term of office; (2) that the Superintendent of State Police has traditionally been treated separately in terms of qualifications, powers and retirement benefits than any other members of the State Police; (3) that the legislature has specifically referred to the Superintendent by name when it has chosen to include him within any statutory provisions relating to the Division of State Police or to the retirement benefits to be associated with him; (4) that the legislature has not established the mandatory retirement age for the State Police based upon their ability to perform their enumerated functions; (5) that the state legislature

Special Assistant Bliss

April 4, 1977

has recognized and specifically provided for the employment of the Superintendent of the State Police who is not mandated to come from the ranks of the State Police; (6) that there are significant distinctions with respect to qualifications between the appointment of a Superintendent as opposed to the other members of the State Police. The distinctions created, therefore, by the legislature as witnessed by DAG Laird's memo are real and not imagined. In reviewing DAG Laird's in-depth memo, I find nothing in the present statutes or case law which negates the conclusion which was contained in his memo of December 19, 1972.

Although I concur in the original conclusion of DAG Laird as to the in-applicability of the mandatory retirement age with respect to the Superintendent, I am of the opinion that because this matter has surfaced from time to time, it would be advisable to ultimately clarify same by specific statutory amendment. I am of this opinion based on the fact that the significance of the question and the importance of the position behoves a clear legislative expression of this separation from the mandatory retirement provisions of the existing statute to preclude this question from surfacing in the future. Inasmuch as there are no specific cases which have adjudicated this question, the legislative route appears to be the most decisive means by which to lay this question to rest once and for all.

Having concluded the appropriateness of a legislative change on this question, two questions present themselves as to the propriety of the legislation as proposed. The first question is whether or not this proposed amendment would be contrary to Article IV, Section VII, Paragraph VII of the New Jersey Constitution which generally prohibits special legislation. The second question being whether or not this legislation is contrary to the fourteenth amendment of the United States Constitution. Both questions arise because of the proposed amendment's culling out of the Superintendent of State Police from the mandatory retirement provisions while such provision would pertain to all other members and officers of the State Police.

The fourteenth amendment of the United States Constitution provides in part:

"...nor deny to any person within its jurisdiction the equal protection of the laws."

A review of the cases, both federal and state, which have from time to time interpreted this amendment of the United States

Special Assistant Bliss

April 4, 1977

Constitution reveal that it was the intention of such constitutional amendment to prohibit both the unequal application of the law to individuals and to proscribe legislation which arbitrarily creates various classes. The essence of the right of equal protection is that all persons similarly situated be treated alike. People v. Passero, 1974, 357 N.Y.S. 2d 677 (1974) 78 Misc. 2d. 548. However, the equal protection clause of this amendment is directed only against "arbitrary discrimination"; that is, discrimination without any reasonable basis. Verreault v. City of Lewiston (1957) 104 Atlantic 2d 538, 150 Me. 67. The court, however, in Johnson v. Robinson, 94 S.Ct. 1160 (1974) at 1169, set the criteria by which classifications may be utilized and the standards for their efficacy. In defining same, the court stated:

"A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

See also Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Reed v. Reed, 404 U.S. 71, at pages 75 and 76, 92 S.Ct. 251, 253, 30 L.Ed 2d. 225 (1971). Hence, it is apparent that a classification, therefore unequal treatment, must be based on a reasonableness of the classification and a legitimate distinction between the class which it covers and those which it excludes.

In evaluating the proposed amendment based on this U.S. Constitutional Standard, it is my opinion that the distinction which pervades the existing legislation concerning the State Police in general and the Superintendent in particular is well-grounded, there being distinct necessities for varying criteria between the general members of the State Police and the position of the Superintendent. Having, therefore, concluded the viability of the pervading distinction in the existing statutes and of the previous statutes dealing with the State Police and the Superintendent, it is my opinion that the validity of the distinction and the reason for same carries through to the anticipated legislative change and the creation or continuance of this long pre-existing distinction.

Article IV, Section VII, Paragraph VII of the New Jersey Constitution provides:

"No general law shall embrace any provision of a private, special or local character."

Special Assistant Bliss

April 4, 1977

This New Jersey Constitutional provision is somewhat akin to the Fourteenth Amendment provision as previously treated herein. It prohibits private legislation; however, it does recognize the propriety of creating "class" legislation which may be directed to only a few individuals, things or places. The test of the "generality" of a law and, hence, its propriety is that it must embrace all and exclude none whose conditions and wants render such legislation equally appropriate to them as a class. Sbrolla v. Hess, 23 N.J. Misc. 229.

On this question, the court in Meadowlands Regional Development Agency, et al. v. State of New Jersey, et al, 112 N.J. Super 89 (1970) affirm. 63 N.J. 35, appeal dismissed 94 S.Ct. 543, 414 U.S. 991), stated at page 102:

"The test in determining whether a specific item of legislation is special or general is conditioned on whether said 'is the legislation a legitimate product of the legislature's power to classify, in that the regulated class is distinguished by characteristics sufficiently marked and important to make it a class by itself, and related thereto, does it arbitrarily exclude subjects and characteristics of which warrant their inclusion within the class?'"

Roe v. Kervick, 42 N.J. 191, 233 (1964).

"Thus, the issue in this aspect of the case is reasonable classification viewed against the purpose which the act exists to serve." Bayonne v. Palmer 90 N.J. Super 245, 284 (Ch. Div. 1966) aff'd 47 N.J. 520 (1966).

See also Application of Freygaq, 46 N.J. Super 14, (1955) aff'd 25 N.J. 357 at page 23; Burlington v. Pennsylvania R. Co., 104 N.J.L. at page 654; and Gundaker Central Motors, Inc. v. Gassert, 23 N.J. 71, at page 80 (1956).

This standard which has been utilized to judge the efficacy of a classification is of longstanding duration. Chief Justice Beasley stated the criteria in VanRyper v. Parsons, 40 N.J.L. 1, 3 (Sup. Ct. 1878), as follows:

"The term 'general law' does not import universality in the subjects or operation of such law. It has been said that a law is general if it embraces all and excludes none whose conditions and wants render such legislation equally appropriate to them as a class."

Special Assistant Bliss

April 4, 1977

Utilizing the aforereferenced criteria, it is noted that a significant distinction does exist between the position and the criteria for the position of Superintendent as opposed to the general membership of the New Jersey State Police. I am further of the opinion that in applying this standard that the needs and the distinctions as they apply to the Superintendent, vis-a-vis the general members of the State Police, is real and not imaginary, grounded on sufficient rational distinctions so as to be in accord with the general criteria espoused herein.

Based on the foregoing, it is my opinion that the legislation, as proposed, is legally sufficient in its purpose and that, as drafted, would meet the end which it seeks to achieve.

E. C.
E. C.

GC:ka