

Commonwealth of Pennsylvania

MILTON J. SHAPP

Governor

---

OPINIONS

OF THE

Attorney General

OF

Pennsylvania

---

1978

---

ATTORNEYS GENERAL

ROBERT P. KANE

(January 1978 to June 1978)

GERALD GORNISH

(June 1978 to December 1978)

**ROBERT P. KANE, ATTORNEY GENERAL**

(January 1978 to June 1978)

**GERALD GORNISH, ATTORNEY GENERAL**

(June 1978 to December 1978)

**VINCENT X. YAKOWICZ**

**SOLICITOR GENERAL**

**ABRAHAM D. COHN**

**EXECUTIVE DEPUTY FOR ADMINISTRATION**

Gerald Gornish  
Deputy Attorney General  
Office of Civil Law  
(January 1978 to June 1978)

J. Justin Blewitt, Jr.  
Deputy Attorney General  
Office of Civil Law  
(June 1978 to December 1978)

J. Andrew Smyser  
Deputy Attorney General  
Office of Criminal Law

**DEPUTY ATTORNEYS GENERAL**

David H. Allshouse  
Eugene J. Anastasio  
W. William Anderson  
Conrad C. M. Arensberg  
David M. Baer  
J. Justin Blewitt, Jr.  
Jeffrey N. Cooper  
Robert P. Coyne  
Bartholomew J. DeLuca  
Guy J. DePasquale  
David J. DeVries  
Vincent J. Dopko  
John M. Duff  
Melvin H. Evans  
Susan J. Forney  
Peter B. Foster  
Michael H. Garrety  
Emanuel Gutgold  
Jack G. Handler  
William H. Haubert  
Joseph K. Hegedus  
Robert B. Hoffman  
Margaret H. Hunting  
Andrea C. Jacobsen  
Patricia M. Jasper  
Martin H. Katz  
Robert E. Kelly  
Bruce A. Krain  
G. Alan Kramer  
Mary Ellen Krober  
Howard Levinson

Sally A. Lied  
Lance H. Lilien  
Michael Louik  
Joseph L. McCann  
Kathleen F. McGrath  
Joseph W. McGuire  
Kent D. Mikus  
Edward Miller  
Gwendolyn T. Mosley  
Donald J. Murphy  
Thomas D. Nabors  
Robert E. Rains  
Joel M. Ressler  
Paul S. Roeder  
Louis J. Rovelli  
Paul Schilling  
John L. Shearburn  
Ronald S. Shearer  
Elisabeth S. Shuster  
Melvin R. Shuster  
Ronald H. Skubecz  
M. David Smeltz  
Howard M. Snyder  
Walter J. Sullivan  
Michael von Moschzisker  
Allen C. Warshaw  
Norman J. Watkins  
Joel G. Weisberg  
Vincent X. Yakowicz  
Amy Zapp

OPINION EDITORS  
J. Justin Blewitt, Jr.  
Donald J. Murphy

ASSISTANT OPINION EDITOR  
Ngoc Tan Luong

OFFICIAL OPINION NO. 78-1

*Unemployment Compensation—State Employers—Nonprofit Organizations—Relief from Charges.*

1. State employers, including authorities, are entitled to relief from charges for unemployment compensation benefits on the same terms and conditions as apply to contributing employers.
2. A nonprofit organization electing to reimburse the Unemployment Compensation Fund is not liable for benefits paid to ineligible claimants where the organization has successfully contested the claimant's eligibility.
3. A nonprofit organization electing to reimburse the Unemployment Compensation Fund is not entitled to relief from charges where a claimant who has reestablished eligibility pursuant to Section 401(f) of the Unemployment Compensation Law receives benefits based in part on wages earned in the employ of the organization.

January 12, 1978

Honorable Paul J. Smith  
 Secretary  
 Department of Labor and Industry  
 1700 Labor and Industry Building  
 Harrisburg, Pennsylvania 17120

Dear Secretary Smith:

You have requested our opinion on whether State agencies and certain non-profit organizations which make payments to the Unemployment Compensation Fund on a reimbursement basis can be relieved from charges for benefits paid former employees who left work without good cause or who were dismissed for willful misconduct. It is our opinion that relief from charges can be granted in certain cases, as explained hereafter.

*I. STATE AGENCIES*

The manner in which State agencies are to be charged for unemployment compensation benefits is governed by Article X of the Unemployment Compensation Law, Act of December 5, 1936, Sec.Ex.Sess., P.L. (1937) 2897, added September 27, 1971, P.L. 460, 43 P.S. §§ 891-893. Article X applies to the Commonwealth of Pennsylvania and all its departments, bureaus, boards, agencies, commissions and authorities. 43 P.S. § 891. In Official Attorney General's Opinion No. 43 of 1973, we concluded that Article X applies to redevelopment authorities, created pursuant to the Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, as amended, 35 P.S. § 1701, *et seq.* Article X also applies to housing authorities, created pursuant to the Housing Authorities Law, Act of May 28, 1937, P.L. 955, as amended, 35 P.S. § 1541, *et seq.*, *Commonwealth, Department of Justice v. Knox*, 29 Pa. Commonwealth Ct. 302, 370 A.2d 1238 (1977).

The procedure for charging State employers for benefits paid former employees is set forth in Section 1003(a), which provides as follows:

In lieu of contributions required to be paid by employers under this act, the Commonwealth of Pennsylvania shall pay into the Unemployment Compensation Fund an amount equivalent to the amount of compensation paid to claimants and charged to its account in accordance with the provisions of Section 302(a) of this act. 43 P.S. § 893(a).

Section 302(a) provides in part:

Subsequent to June thirtieth, one thousand nine hundred forty-nine, such account shall be charged with all compensation, paid to each individual who received from such employer wage credits constituting the base of such compensation, in the proportion that such wage credits with such employer bears to the total wage credits received by such individual from all employers: Provided, That if the department finds that such individual was separated from his most recent work for such employer due to being discharged for willful misconduct connected with such work, or due to his leaving such work without good cause attributable to his employment, *thereafter no compensation paid to such individual with respect to any week of unemployment occurring subsequent to such separation, which is based upon wages paid by such employer with respect to employment prior to such separation, shall be charged to such employer's account under the provisions of this subsection (a);* provided, such employer has filed a notice with the department in accordance with its rules and regulations and within the time limits prescribed therein; \* \* \*. 43 P.S. § 782(a). (Emphasis supplied).

It is a fundamental rule of statutory construction that: "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." Statutory Construction Act, 1 Pa.C.S. § 1921(b). Section 1003 clearly provides that a State employer is to reimburse the Unemployment Compensation Fund by an amount equivalent to the amount charged to its account in accordance with Section 302(a). Section 302(a) makes it evident that the State employer is not to be charged for any benefits paid a claimant who left work without good cause or was fired for willful misconduct. This relief from charges applies even when such claimants reestablish eligibility for benefits pursuant to Section 401(f), 43 P.S. § 801(f).

Our conclusion that State employers are entitled to the relief from charges provided by Section 302(a) is supported by Section 1001 of the Act, which provides in part: "Except as herein provided, all other provisions of this Act shall continue to be applicable in connection herewith." Thus, in those cases where contributing employers are entitled

to relief from charges, State employers are also entitled to relief. \*

## II. NONPROFIT ORGANIZATIONS

The obligation of nonprofit organizations to pay unemployment compensation charges is governed by Article XI of the Unemployment Compensation Law, 43 P.S. §§ 901-910. Article XI was added by the Act of September 27, 1971, P.L. 460, in order to bring Pennsylvania's law into conformity with requirements of the Employment Security Amendments of 1970, Act of August 10, 1970, Pub.L. 91-373, 84 Stat. 695.

Section 1103, 43 P.S. § 903, makes nonprofit organizations liable for contributions pursuant to Sections 301 and 301.1, 43 P.S. §§ 781 and 781.1, but allows them the option of paying instead on a reimbursement basis. The nonprofit organization's obligation to make reimbursement payments, should it elect that method, is set forth in Section 1104(a):

Any nonprofit organization which, on or after January 1, 1972, is or becomes liable to the contribution provisions of this act may, in lieu of payment of such contributions, elect to pay to the department for the Unemployment Compensation Fund an amount equal to the amount of regular benefits and of one-half of the extended benefits paid, that is attributable to service in the employ of such nonprofit organization. . . 43 P.S. § 904(a).

The method by which payments are to be made is set forth in Section 1106, which provides in subparagraph (a) that:

---

\*Editor's Note—Subsequent to the issuance of this Opinion, the Pennsylvania General Assembly, by the Act of July 1, 1978, P.L. 583, No. 108, amended Section 1003(a) of the Unemployment Compensation Law, 43 P.S. § 893(a), to provide as follows:

In lieu of contributions required to be paid by employers under this act, the Commonwealth of Pennsylvania shall pay into the Unemployment Compensation Fund an amount equal to the amount of regular benefits and of one-half of the extended benefits paid, (after December 31, 1978 the full amount of extended benefits paid) that is attributable to service in the employ of the Commonwealth and all its departments, bureaus, boards, agencies, commissions and authorities.

By removing from Section 1003(a) the reference to Section 302(a) of the Law, 43 P.S. § 782(a), the General Assembly eliminated relief from charges for the Commonwealth for benefits paid to claimants who, by reason of their discharge for willful misconduct or their leaving without good cause, were not eligible for benefits upon separation from Commonwealth employment, but who reestablished eligibility pursuant to Section 401(f), 43 P.S. § 801(f), and thereafter received benefits based in part on wages earned in the employ of the Commonwealth. This amendment (which the General Assembly made effective retroactive to January 1, 1978) did not, however, render the Commonwealth liable for benefits paid to claimants during the pendency of an appeal in which the Commonwealth successfully challenges the claimant's eligibility. Rather, by adding the "attributable to service" language to Section 1003(a), the General Assembly placed the Commonwealth in the same position with respect to liability for benefits paid to ineligible claimants as nonprofit organizations.

Payments in lieu of contributions shall be made in accordance with the following provisions of this Section.

(a) At the end of each calendar quarter or at the end of any other period as determined by the department, the department shall bill each non-profit organization (or group of such organizations) which has elected to make payments in lieu of contributions for the amount of benefits charged to its account during such quarter or other prescribed period that is attributable to service in the employ of such organization. 43 P.S. § 906(a).

In our opinion these provisions mean that a nonprofit organization electing the reimbursement method is only liable to pay an amount equal to the amount of benefits paid to eligible claimants. If the nonprofit organization successfully challenges a claimant's eligibility, through the administrative or judicial appeals allowed under the law, it is not liable for any benefits paid to that ineligible claimant during the pendency of the appeal. This conclusion is supported by Section 1106(b) of the law, which provides:

Payment of any bill rendered under subsection (a) shall be made not later than thirty days after such bill was mailed to the last known address of the nonprofit organization or was otherwise delivered to it, unless there has been an application for review and redetermination under Section 301 of this act. 43 P.S. § 906(b).

One of the considerations in a review and redetermination under Section 301(e)(1) is whether the employer has successfully contested a claimant's eligibility for benefits. Since contributing employers successful in such challenges are exempt from charges for benefits paid during the pendency of the appeal, we conclude the General Assembly, by its reference in Section 1106(b) to Section 301, intended reimbursable employers to be exempt also. See Statutory Construction Act, 1 Pa.C.S. § 1921(c)(8).

The same conclusion was reached in *Wilmington Medical Center v. Unemployment Insurance Appeal Board*, 346 A.2d 181 (Del.Super. 1975), *aff'd*, 373 A.2d 204 (Del.Sup. 1977). The provisions of Delaware's Unemployment Compensation Law allowing the reimbursement method of payment [19 Del.C. § 3345(c)(3)] are in all material respects the same as those in Article XI of Pennsylvania's Law. Noting that the phrase "attributable to service" had been enacted as a result of Federal requirements, the Superior Court of Delaware concluded:

It appears that the intent of Congress in enacting the reimbursement method of financing was to enable nonprofit organizations to escape the burden of contributing greater amounts to the Unemployment Compensation Fund *than the costs which were incurred directly by actions of the nonprofit organizations in a given year*. This was seen by the Senate as

desirable public policy in light of the charitable nature of such organizations. 346 A.2d at 183. (Emphasis supplied).

The Court concluded that the nonprofit organizations could not be charged for benefits to ineligible claimants.

Since benefits paid to ineligible claimants cannot be charged to a nonprofit organization electing the reimbursement method, such benefits must be charged to the account funded by the State Adjustment Factor, Section 301.1, 43 P.S. § 781.1. This account was specifically created by the General Assembly to provide funds for non-chargeable benefits.

However, a nonprofit organization electing the reimbursement method is not entitled to relief from charges under Section 302(a) in the special case of a claimant who reestablishes eligibility for benefits pursuant to Section 401(f), where such benefits are based in part on wage credits earned with the nonprofit organization. The General Assembly expressly set forth in Section 1108, 43 P.S. § 908, the nonprofit organization's obligation to make reimbursements in such cases. The Unemployment Compensation Law as a taxing statute must be strictly construed against the taxing authority. However, where the taxpayer seeks to bring itself within an exception from the tax, the requirement of strict construction shifts against the taxpayer. Statutory Construction Act, 1 Pa.C.S. § 1928(b)(5); *Bureau of Employment Security v. Hecker & Co.*, 78 Dauph. 354 (1962). The nonprofit organization's obligation under Section 1108 is clear; there are no provisions in Article XI indicating the General Assembly intended to relieve an organization of that obligation. Since Section 1108 is specific and is the more recent enactment, its provisions must prevail over the general provisions of Section 302(a). Statutory Construction Act, 1 Pa.C.S. § 1933.

### III. CONCLUSION

For the above-stated reasons we are of the opinion, and you are so advised, that:

1. State employers, including authorities, are entitled to relief from charges on the same terms and conditions as apply to contributing employers.
2. A nonprofit organization electing to reimburse the Unemployment Compensation Fund is not to be charged for benefits paid to ineligible claimants where the organization has successfully contested the claimant's eligibility.
3. A nonprofit organization electing to reimburse the Unemployment Compensation Fund is not entitled to relief from charges under Section 302(a) where a claimant who has reestablished eligibility pursuant to Section 401(f) receives benefits based in part on wages earned in the employ of the organization.

Very truly yours,



## OPINIONS OF THE ATTORNEY GENERAL

EDWARD MILLER  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

---

OFFICIAL OPINION NO. 78-2*Age Discrimination Prohibition—Effect on State Apprenticeship and Training Council*

1. The Human Relations Act prohibits age discrimination in employment by both employers and employment agencies.
2. The terms “employer” and “employment agency” are defined broadly enough to include both the State Apprenticeship and Training Council and the sponsors.
3. The bona fide occupational qualification exception is not available to perpetuate age discrimination based upon historical usage, tradition or custom.
4. Federal regulations permitting the use of age limitations in apprenticeship programs meeting federal standards do not provide an exception for programs which must conform to the Pennsylvania Human Relations Act.

January 12, 1978

Honorable Paul J. Smith, Secretary  
Department of Labor and Industry  
1700 Labor and Industry Building  
Harrisburg, Pennsylvania 17120

Dear Secretary Smith:

The State Apprenticeship and Training Council has raised the issue whether age limitations can continue to be imposed in apprenticeship programs. It is our opinion, and you are so advised, that age limitations cannot be set by the Council or by the sponsors where such limitations would be contrary to the prohibition against age discrimination contained in the Pennsylvania Human Relations Act,<sup>1</sup> and that bona fide occupational qualification exemptions cannot be granted by the Human Relations Commission to apprenticeship programs on the basis of age unless the standards expressed in the applicable regulations are met.<sup>2</sup>

The State Apprenticeship and Training Council was established by statute<sup>3</sup> to coordinate the development of programs designed to help people obtain work skills. The policy stated in the Act to which the Council is required to give effect, is “(1) to encourage the development of an apprenticeship and training system. . . (2) to provide for. . . stand-

---

1 Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§ 951-963.

2 16 Pa. Code §§ 41.71-41.73

3 Act of July 14, 1961, P.L. 604, § 3, 43 P.S. § 90.3.

ards of apprenticeship and training. . . (3) to aid in providing maximum opportunities for unemployed and employed persons to improve and modernize their work skills; and (4) to contribute to a healthy economy by aiding in the development and maintenance of a skilled labor force. . .” Act of July 14, 1961, P.L. 604, § 1, 43 P.S. § 90.1. This expression of policy is broad enough to include all workers of all ages in the apprenticeship program. Indeed, the reference to improving and modernizing work skills to include opportunities for unemployed persons, suggests retraining older workers whose skills have become outdated in order to improve their productivity as workers.

Despite the policy expressed in the statute, and possibly in recognition of the special needs of apprenticeship programs, the regulations established by the Council pursuant to this statute provide that qualification standards can be set which include age requirements. 34 Pa. Code § 81.35(2). Sponsors are permitted to set qualification standards which meet specific guidelines in order to select apprentices from the eligible applicants. 34 Pa. Code § 81.32(2)(i); § 81.35(2). Granting the option of setting an age restriction as a qualification standard for admission to the apprenticeship program, however, is not considered an inflexible limitation in the regulations. For example, a sponsor must dispense with its maximum age limit in order to obtain minority apprentices where such action is required by an affirmative action plan. 34 Pa. Code § 81.22(b)(9).

The Human Relations Act prohibits age discrimination in certain circumstances by both employers and employment agencies. These two categories are defined broadly enough to include both the State Apprenticeship and Training Council and the sponsors. Act of October 27, 1955, P.L. 744, § 4(b), (e), *as amended*, 43 P.S. § 954(b), (e). The term “employer” is specifically defined in the regulations of the Council to include sponsors. 34 Pa. Code § 81.3. Among the discriminatory practices prohibited by the act are refusal by an employer to hire or employ an individual due to his or her age, and refusal by an employment agency to refer an individual for employment because of his or her age. Act of October 27, 1955, P.L. 744, § 5(a), (f), *as amended*, 43 P.S. § 955(a), (f). The term “age”, of course, only includes those persons between the ages of 40 and 62. 43 P.S. § 954(h). It is therefore apparent that under the Human Relations Act neither the Council nor the sponsors may set age limitations which have the effect of discriminating against persons in this age group.

In the letter of the Council’s Director which was forwarded to us, it was indicated that exemptions had been granted to apprenticeship programs in the past which allowed for age limitations. There is nothing presently in the Human Relations Act or in the Human Relations Commission Regulations on which to base an exemption allowing age limitations that exclude workers between the ages of 40 and 62. The bona fide occupational qualification exception, which was mentioned in the Director’s letter as a basis for an exemption, is so narrowly defined as

to be unavailable for this purpose. Act of October 27, 1955, P.L. 744, § 5, *as amended*, 43 P.S. § 955; 16 Pa. Code § 41.71. It is specifically stated in the regulations that the bona fide occupational qualification exception is not warranted if based upon "historical usage, tradition, or custom." 16 Pa. Code § 41.71(e)(3).

In his letter, the Director of Apprenticeship and Training points to a federal regulation permitting age limitations in apprenticeship programs which meet the federal standards. 29 CFR § 860.106. The fact that the State Apprenticeship and Training Council can impose age limitations without violating federal requirements, however, does not automatically bring it into conformity with Pennsylvania law. Pennsylvania can require adherence to stricter standards in the area of civil rights than those established by the federal government. *Anderson v. Upper Bucks County Area Vocational Technical School*. 30 Pa. Commonwealth Ct. 103. 373 A.2d 126 (1977). In this case, although an exception exists in the federal law for age limitations in apprenticeship programs, such an exception is not available under Pennsylvania law. It is therefore necessary to advise the Council that limitations excluding the age group of 40 to 62, covered by the Human Relations Act, cannot be imposed by the Council or its sponsors.

Sincerely yours,

MARGARET H. HUNTING  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

---

### OFFICIAL OPINION NO. 78-3

*Heart and Lung Act—State Police—Disability—Administrative Code of 1929—Leave of Absence*

1. Sick leave and annual leave cannot be accumulated during a time of temporary disability under the Heart and Lung Act.
2. Increases in salary may not be earned by an employee during a time of temporary disability under the Act.
3. Official Opinion No. 136 of 1958 is overruled insofar as it interprets the Heart and Lung Act to allow an employee to accumulate sick leave and annual leave during temporary disability covered by the Act.
4. The purpose of Section 2 of the Act is to make clear that employees covered by the Act would not lose any annual and sick leave accrued prior to the time of their disability.

February 21, 1978

Honorable James N. Wade  
Secretary of Administration  
425 Main Capitol  
Harrisburg, Pennsylvania

Re: Heart and Lung Act

Dear Secretary Wade:

You have asked for our opinion concerning an apparent conflict between a formal Attorney General's Opinion of 1958 and an informal Deputy Attorney General's Opinion of 1973. The point in question is whether or not various types of leave should accrue while a member of the State Police force is absent from work due to disability covered by the Heart and Lung Act, Act of June 28, 1935, P.L. 477, as amended, (53 P.S. § 637 et seq.). While the formal opinion issued in 1958 suggests that various types of leave could accrue during the period an employe is absent by reason of disability, the 1973 informal opinion states that accrual of such leave should not be allowed.

Insofar as it applies to the State Police, the Heart and Lung Act provides as follows:

(a) Any member of the State Police Force, . . . who is injured in the performance of his duties. . . and by reason thereof is temporarily incapacitated from performing his duties, shall be paid by the Commonwealth of Pennsylvania. . . his full rate of salary. . . until the disability arising therefrom has ceased. All medical and hospital bills, incurred in connection with any such injury, shall be paid by the Commonwealth of Pennsylvania. . . . During the time salary for temporary incapacity shall be paid by the Commonwealth of Pennsylvania. . . ., any workmen's compensation, received or collected by any such employe for such period, shall be turned over to the Commonwealth of Pennsylvania. . . and paid into the treasury thereof. . . .

(b) In the case of the State Police Force . . . who have served for four consecutive years or longer, diseases of the heart and tuberculosis of the respiratory system, contracted or incurred by any of them after four years of continuous service as such, and caused by extreme overexertion in times of stress or danger or by exposure to heat, smoke, fumes or gases, arising directly out of the employment of any such member of the State Police Force, . . . shall be compensable in accordance with the terms hereof;

\* \* \*

(Section 1, 53 P.S. § 637)

No absence from duty of any such policeman. . . by reason of

any such injury shall in any manner be included in any period of sick leave, allowed such policeman . . . by law or by regulation of the police . . . department by which he is employed. (Section 2, 53 P.S. § 638)

This Act was interpreted by the Attorney General in Official Opinion No. 136, dated July 10, 1958, to allow the accrual of sick leave and annual leave during a State Policeman's absence from work due to temporary disability. The opinion states that: "[t]emporary incapacity due to injury or disability in the line of duty is, for these purposes, equivalent to full time duty."

On the other hand, the informal opinion written by Lillian B. Gaskin, Deputy Attorney General, on June 11, 1973, interpreted the Act to mean only that employes covered by the Act would not lose any annual or sick leave accrued prior to the temporary disability. According to her, there was no intent under the Act that sick leave and annual leave would accrue while the employe was off from work due to the disability. In addition, Ms. Gaskin concluded that such employes were not entitled to salary increases during the period of disability.

Having reviewed both the formal and informal opinions, it is our judgment that the 1973 informal opinion is correct. The 1958 opinion interprets Section 2 of the Act to require the employe to receive "his regular period of sick leave" once he returns to regular duty and it interprets Section 222 of the Administrative Code of 1929 (71 P.S. § 82) to require an employe to receive fifteen days leave of absence with full pay during each calendar year unaffected by any period of temporary incapacity.

Ms. Gaskin's interpretation of Section 2 to the effect that its purpose is to make clear that employes covered by the Act would not lose any annual and sick leave accrued prior to the time of their disability is, to us, a more accurate reading of the section. Further, there is no reason to conclude that Section 222 of the Administrative Code cannot be affected by any period of incapacity. To say that temporary incapacity is equivalent to full time duty, as was said in the Official Opinion of 1958, is incorrect and cannot be derived from the language of the Heart and Lung Act.

Therefore, it is our opinion, and you are advised; (1) that Official Opinion No. 136 of 1958 is overruled insofar as it interprets the Heart and Lung Act to allow an employe to accumulate sick leave and annual leave during temporary disability covered by the Act; (2) that such leave cannot be accumulated during a time of temporary disability under the Act; and (3) that increases in salary may not be earned by an employe during a time of temporary disability under the Act. \*

Very truly yours,

\* Editor's Note—This opinion was reversed by Official Opinion No. 4 of 1979, dated October 9, 1979

W. W. ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

---

OFFICIAL OPINION NO. 78-4

*Publication of Documents—Department of Community Affairs—Distribution of Documents to the Public.*

1. The Department of General Services is authorized to publish and distribute certain publications and documents to the public upon payment of such sum per copy as shall cover the cost of publication.
2. The Department of General Services may authorize other agencies, including the Department of Community Affairs, to publish or distribute any publication or other document to the public.
3. Although it may be impractical for the Department of Community Affairs to publish certain documents, the Department of General Services may authorize Community Affairs to distribute certain documents to the public free of charge. However, the Department of Community Affairs must reimburse General Services in an amount equal to the cost of publication.

February 21, 1978

Honorable Ronald G. Lench  
Secretary  
Department of General Services  
Commonwealth of Pennsylvania  
Harrisburg, Pennsylvania

Honorable Albert L. Hydeman, Jr.  
Secretary  
Department of Community Affairs  
Commonwealth of Pennsylvania  
Harrisburg, Pennsylvania

Dear Secretaries Lench and Hydeman:

You have asked for an opinion as to whether the Department of Community Affairs may distribute, free of charge, certain publications to citizens of the Commonwealth. A 1968 opinion from former Deputy Attorney General, John Fernsler, indicated that the Department of Community Affairs, in the absence of expressed statutory direction, was not authorized to distribute publications to citizens of the Commonwealth free of charge. Upon review of the matter it is our opinion, and you are advised, that Mr. Fernsler's opinion is incorrect and no longer binding. The Department of Community Affairs, if properly au-

thorized by the Department of General Services, may distribute without charge certain publications to citizens of the Commonwealth.

The powers and duties of the Department of Community Affairs are enumerated in section 2501-C of the Administrative Code of 1929, 71 P.S. § 670.101. Those duties include, *inter alia*, acting as a central clearing house for information concerning local government problems, maintaining close contacts with local governments to help them improve their administrative methods, providing technical assistance and research to political subdivision, conducting research for various units of local government and aiding in the preparation and distribution of handbooks, research, financial and other reports.

Clearly the Administrative Code authorizes the Department of Community Affairs to become involved in the publication and distribution of certain pamphlets, handbooks and reports which may aid local government units. However, section 2406 of the Administrative Code of 1929, 71 P.S. § 636(j) states that the Department of General Services shall have the power:

To distribute to the public, upon payment to the department of such sum per copy as shall cover the cost of publication, any documents published by the department for the Commonwealth, or any department, board, commission, or officer thereof, which shall cost more than twenty cents per copy to publish except documents published for the Governor and General Assembly which shall be distributed without charge as heretofore. . .

This provision seems to indicate that the Department of General Services must, in fact, distribute the aforementioned documents to the public and charge a certain sum to cover the cost of publication. However, this provision must be read together with section 521 of the Administrative Code of 1929, 71 P.S. § 201, which states:

No department, board, or commission shall publish or distribute any publication, map or document to the public, except through the Department of [General Services], unless the Department of [General Services] shall have consented to the direct publication or distribution of such publication, map or document, by such other department, or by such board or commission.

Reading the two provisions together, it is evident that the Department of General Services may authorize Community Affairs to publish or distribute certain documents which it deems necessary to carry out its power and duties. Although it might be impractical to authorize the Department of Community Affairs to publish these documents, the Department may be authorized to engage in the distribution.

In conclusion, it is our opinion that the Department of Community Affairs may distribute, pursuant to section 2501-C of the Administra-

tive Code of 1929, certain documents to the public free of charge in order to effectuate its powers and duties. It should be noted that under section 2406 of the Administrative Code of 1929 that the Department of General Services must charge Community Affairs a certain sum to cover the cost of publication. However, the fact that section 2406 of the Administrative Code of 1929 requires that the Department of General Services be reimbursed for the cost of publication does not mandate that Community Affairs must charge for the distribution of its publications.

Very truly yours,

BART J. DELUCA, JR.  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

---

OFFICIAL OPINION NO. 78-5

*Veterans Benefits—Honorable Discharge Definition—Clemency Discharge*

1. In order to be eligible for the benefits and preferences enumerated in Chapter 71 of the Pennsylvania Military Code, a veteran must receive an honorable discharge from the Armed Forces of the United States.
2. A discharge issued pursuant to President Ford's Clemency Discharge Program is not considered an honorable discharge.
3. A veteran receiving a discharge issued pursuant to President Ford's Clemency Discharge Program is not eligible for the preferences and benefits enumerated in Chapter 71 of the Military Code.

February 21, 1978

Honorable John A. McCarthy, Chairman  
Civil Service Commission  
Room 317  
South Office Building  
Harrisburg, Pennsylvania 17120

Dear Mr. McCarthy:

You have asked for our opinion as to whether an individual who received a clemency discharge pursuant to President Gerald R. Ford's Clemency Discharge Program, has received an "honorable discharge" for purposes of section 7101 of the Military Code, 51 Pa. C.S. § 7101, and is therefore entitled to those veterans' benefits and preferences extended by the various provisions of Chapter 71 of the Military Code, 51 Pa. C.S. § 7101, *et seq.* It is our opinion, and you are hereby advised, that a discharge received pursuant to President Ford's Clemency Dis-



charge Program\* is not an "honorable discharge" for purposes of the Military Code.

Chapter 71 of the Military Code, 51 Pa. C.S. § 7101, *et seq.*, provides for certain benefits and preferences which are available to eligible veterans. In order to establish eligibility for these preferences and benefits, a veteran must qualify as a "soldier" as that term is defined in the Military Code.

As used in this chapter, "soldier" means a person who served in the armed forces of the United States, or in any women's organization officially connected therewith, during any war or armed conflict in which the United States engaged, or who so served or hereafter serves in the armed forces of the United States, or in any women's organization officially connected therewith, since July 27, 1953, including service in Vietnam, and who has an *honorable discharge* from such service. (Emphasis added) 51 Pa. C.S. § 7101.

In order to be considered a "soldier", as that term is defined in Chapter 71 of the Military Code, it is necessary that a veteran receive "an honorable discharge" from the armed forces. Therefore, it is necessary to determine what type or types of discharges constitute "an honorable discharge" under the Military Code and whether a discharge received pursuant to President Ford's Clemency Program qualifies as "an honorable discharge" under Pennsylvania law.

Attorney General's Opinion No. 35 of 1957 held that preferences are available not only to those possessing an honorable discharge, but also to those possessing general discharges, good discharges, satisfactory discharges, indifferent discharges, or special order discharges. The Opinion concluded that each of these discharges must be treated as "an honorable discharge" for purposes of veterans' preference because each was issued "under honorable conditions". We deem this to be the central conclusion of that Opinion. A discharge, whatever its denomination must be treated as an honorable discharge for purposes of veterans' preference as long as it is issued "under honorable conditions."

President Ford's Clemency Discharge Program was established by Presidential Proclamation No. 4313, 3A C.F.R. 68 (1974). In order to implement the Proclamation, President Ford established by Executive Order No. 11803, 3A C.F.R. 168 (1974), the Clemency Board. The Board promulgated regulations governing, *inter alia*, the nature of a clemency discharge, 40 Fed. Reg. 12,763 (1975). The Executive Order and the Board's regulations indicate that the clemency discharge is a neutral discharge.

This conclusion is confirmed by the Report of the Clemency Board to President Ford.

\* We do not pass upon the question of whether discharges upgraded by President Carter's program are entitled to be considered as "honorable discharges" for purposes of veterans' preference.

The Clemency Discharge was intended by the President to be a "neutral" discharge, to be neither under "honorable" conditions nor under "other than honorable" conditions. Military records are recharacterized with the new Clemency Discharge, which is in substitution for the earlier Bad Conduct or Undesirable Discharge (under other than honorable conditions) or Dishonorable Discharge (under dishonorable conditions). A Clemency Discharge is neutral, better than the discharge it replaces but not as good as a General Discharge, which is given affirmatively under honorable conditions. By express direction in the Proclamation, a Clemency Discharge bestows no veterans' benefits itself. Nor, however, does it adversely affect the conditional availability of veterans' benefits to holders of Undesirable or Bad Conduct Discharges. Otherwise, the President's act of clemency would have had the unintended effect of impairing and not improving an applicant's status.

\* \* \*

The President's program was a unique and supplemental form of relief to certain classes of former servicemen. It did not deny pre-existing statutory or administratively granted avenues of relief available to individuals regardless of their eligibility for clemency. While perhaps the relinquishment of those rights could have been made a condition of the President's program, no such condition was expressed in his Proclamation. For that reason, all military applicants who receive a Clemency Discharge can still apply for a further upgrade through the appropriate military review boards. Likewise, they can still appeal for benefits to the Veterans' Administration. Their chances for success should be much better with a pardon and Clemency Discharge than with their original discharge and record of unpardoned offenses. Presidential Clemency Board, Report to the President, p. 13 (1975).

And by the opinion of Lawrence M. Baskir, Counsel to the Presidential Clemency Board,

The Clemency Discharge is a neutral discharge, issued neither under "honorable conditions" nor under "other than honorable conditions." It is to be considered as ranking between an Undesirable Discharge and a General Discharge. Such a discharge in and of itself restores no Veterans Benefits. While there is no change in benefit status per se, a recipient may apply to the Veterans Administration for benefits. He may also apply for an upgrade in his original discharge (Undesirable, Bad Conduct, Dishonorable) to the appropriate Discharge Review Board, where the Clemency Discharge should greatly improve the recipient's chances for success. Finally, the Clemency Discharge, like a Presidential Pardon, is an expression by

the Chief Executive that the stigma of a bad record has been removed, and that the bearer of a Clemency Discharge should no longer be discriminated against in his future opportunities. OP. WHITE HOUSE COUNSEL (Sept. 5, 1975).

In short a discharge granted pursuant to President Ford's Clemency Discharge Program is not issued "under honorable conditions." Rather it is a neutral discharge which by Presidential Proclamation and Executive Order has been upgraded from a bad conduct, undesirable or dishonorable discharge. While the receipt of a clemency discharge may remove the punitive effects of a bad conduct, undesirable or dishonorable discharge, it is not issued under honorable conditions.

In conclusion it is our opinion, and you are hereby advised, that holders of clemency discharges issued pursuant to President Ford's Clemency Discharge Program are not entitled to the preferences and benefits extended to veterans under Chapter 71 of the Military Code. The clemency discharge is a neutral discharge, not issued under honorable conditions. Therefore, the recipient of a clemency discharge is not a "soldier", as that term is defined by section 7101 of the Military Code, 51 Pa. C.S. § 7101, and is not entitled to veterans' benefits.

*Very truly yours,*

BART J. DELUCA, JR.  
*Deputy Attorney General*

PAUL SCHILLING  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

---

### OFFICIAL OPINION NO. 78-6

*Department of General Services—Administrative Code of 1929—Contracts—Printing—Maximum Price*

1. Section 2410 of the Administrative Code of 1929 (71 P.S. § 640) requires the Department of General Services to award a contract for public printing and binding to the lowest responsible qualified bidder or bidders whose bid is equal to or below the maximum prices fixed in the schedule or schedules prepared by the department.
2. To interpret the language of the act literally and require the disqualification of a bid equal to the maximum price, whereas a bid one cent lower would have been acceptable, would, in view of the obvious confusion, be unreasonable.
3. Section 1922 of the Statutory Construction Act (1 Pa. C.S. § 1922), provides that in the enactment of a statute, it may be presumed that the General Assembly does not intend a result that is unreasonable.

March 6, 1978

Honorable Ronald G. Lench  
Secretary of General Services  
515 North Office Building  
Harrisburg, Pennsylvania

Dear Secretary Lench:

We have a request for an opinion from your department concerning the interpretation of Section 2410 of the Administrative Code of 1929 (71 P.S. § 640) as it relates to the term "maximum price".

Section 2410, entitled Method of Awarding Contracts for Public Printing and Binding, provides, in part, as follows:

The Secretary of Property and Supplies [now General Services] shall open all proposals received, publicly, and shall proceed publicly to award the contract or contracts for which bids were asked, to the lowest responsible qualified bidder or bidders *below the maximum price or prices* fixed in the schedule or schedules prepared by the department, . . . (emphasis added)

The use of the phrase "below the maximum" is confusing since "maximum" generally means equal to or less than, whereas "below the maximum" would seem to indicate that a bid equal to the maximum price should be disallowed. We are informed that occasionally a bidder will submit a proposal in an amount equal to the maximum price stated, and when such a proposal is the lowest bid, it has been the practice of your department to reject it and to have the contract rebid. However, if the lowest bid had been one cent lower, an award would have been made.

Because of the admitted confusion in the phrase "below the maximum", it has been suggested that when the lowest bid is equal to the maximum price, it be adjusted downward by one cent and a letter sent to the vendor requesting confirmation in writing. At the same time, doubt has been expressed as to the appropriateness of this procedure.

After reviewing the statutory provision and the definition of the term "maximum",\* it is our opinion that the intention of the Legislature in enacting Section 2410 was to allow a bidder to make a proposal up to or equal to but not exceeding the maximum price stated. To interpret the language literally and require the disqualification of a bid equal to the maximum price, whereas a bid one cent lower would have been acceptable, would, in view of the obvious confusion, be unreasonable. Section 1922 of the Statutory Construction Act of 1972 (1 Pa.

---

\* Maximum: n. - the greatest quantity or value attainable in a given case: . . . an upper limit allowed by law or other authority; adj. - greatest in quantity or highest in degree attainable or attained; Maximum fee: n. - a fee determined on the basis of payment at an hourly or per diem rate *up to but not exceeding* an agreed maximum sum for the entire task. *Webster's Third New International Dictionary*.

C.S. § 1922), provides that in the enactment of a statute, it may be presumed that the General Assembly does not intend a result that is unreasonable.

Therefore, it is our opinion, and you are advised, that Section 2410 of the Administrative Code requires the Department of General Services to award a contract for public printing and binding to the lowest responsible qualified bidder or bidders whose bid is equal to or below the maximum price or prices fixed in the schedule or schedules prepared by the department.

Very truly yours,

W. W. ANDERSON

*Deputy Attorney General*

VINCENT X. YAKOWICZ

*Solicitor General*

ROBERT P. KANE

*Attorney General*

---

OFFICIAL OPINION NO. 78-7

*Unemployment Compensation—Political Subdivisions—Relief from Charges.*

1. A political subdivision which has elected to reimburse the Unemployment Compensation Fund is entitled to relief from charges for benefits paid to ineligible claimants, but is not entitled to relief from charges for benefits paid to claimants who reestablish eligibility and thereafter receive benefits based in part on wages earned in the employ of the political subdivision.

March 20, 1978

Honorable Paul J. Smith

Secretary

Department of Labor and Industry

1700 Labor and Industry Building

Harrisburg, Pennsylvania 17120

Dear Secretary Smith:

You have requested our opinion as to whether political subdivisions of the Commonwealth which have elected to make payments to the Unemployment Compensation Fund on a reimbursement basis are entitled to relief from charges for benefits paid to former employees who voluntarily left work without good cause or who were dismissed for willful misconduct. As explained in this opinion, the answer to your question varies depending upon the circumstances under which the former employee has received benefits.

The obligation of political subdivisions to pay unemployment compensation charges is governed by Article XII of the Unemployment

Compensation Law, Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P. S. § 751 *et seq.* (1964 & Supp. 1978), Art. XII added September 27, 1971, P.L. 460, 43 P.S. §§ 911-914 (Supp. 1978). Article XII was amended by the Act of July 6, 1977, P.L. 41, in order to bring Pennsylvania's law into conformity with requirements of the Federal Unemployment Compensation Amendments of 1976, Pub. L. 94-566, 90 Stat. 2667.

Pursuant to Section 1202.1 of the Unemployment Compensation Law, 43 P.S. § 912.1, a political subdivision is liable for contributions to the Unemployment Compensation Fund unless the political subdivision elects to pay on a reimbursement basis. Section 1202.2(a), 43 P.S. § 912.2(a), provides that:

Any political subdivision of the Commonwealth or any instrumentality of one or more thereof, which on or after January 1, 1978 and prior to January 1, 1979 is or becomes liable to the contribution provisions of the act may, in lieu of payment of such contributions, elect to pay to the department for the Unemployment Compensation Fund, an amount equal to the amount of regular benefits and of one-half of the extended benefits paid, (after December 31, 1978 the full amount of extended benefits paid) that is attributable to service in the employ of such political subdivision of the Commonwealth or any instrumentality of one or more thereof. Such employer shall continue to be liable for reimbursement of benefit payments based on wages paid prior to the termination date of such election.

The method by which reimbursement payments are to be made is specified in Section 1202.4, 43 P.S. § 912.4, which provides, in subsection (a), that:

At the end of each calendar quarter or at the end of any other period as determined by the department, the department shall bill each political subdivision of the Commonwealth or any instrumentality of any one or more thereof (or group of political entities) which has elected to make payments in lieu of contributions for the amount of benefits charged to its account during such quarter or other prescribed period that is attributable to service in the employ of such organization.

In our opinion, Sections 1202.2(a) and 1202.4(a) obligate a political subdivision to reimburse the Unemployment Compensation Fund only for benefits paid to eligible claimants. If a political subdivision successfully challenges a claimant's eligibility through the administrative or judicial appeals allowed under the law, the political subdivision is not liable for any benefits paid to the ineligible claimant during the pendency of the appeal. This conclusion is supported by Section 1202.4(b), 43 P.S. § 912.4(b), which provides that:

Payment of any bill rendered under subsection (a) shall be made not later than thirty days after such bill was mailed to the last known address of the political subdivision or any instrumentality of any one or more thereof, or was otherwise delivered to it, unless there has been an application for review and redetermination under section 301.

One of the considerations in a review and redetermination under Section 301(e)(1), 43 P.S. § 781(e)(1), is whether the employer has successfully contested a claimant's eligibility for benefits. Since contributing employers successful in such challenges are exempt from charges for benefits paid during the pendency of the appeal, it follows by virtue of the reference in Section 1202.4(b) to Section 301 that political subdivisions electing to pay on a reimbursement basis are also exempt from such charges.

While a political subdivision electing to pay on a reimbursement basis is treated the same as a contributing employer with respect to relief from charges for benefits paid to ineligible claimants, a political subdivision electing to pay on a reimbursement basis is not treated the same as a contributing employer with respect to relief from charges for benefits paid to claimants who reestablish eligibility under Section 401(f), 43 P.S. § 801(f), and thereafter receive benefits based in part on wages earned in the employ of the political subdivision.

A contributing employer is entitled, under Section 302(a), 43 P.S. § 782(a), to relief from charges for benefits paid to claimants who, by reason of their discharge for willful misconduct or their leaving without good cause, were not eligible for benefits upon separation from employment with such employer, but who reestablished eligibility pursuant to Section 401(f) and thereafter received benefits based in part on wages earned in the employ of such employer. A political subdivision is not entitled, however, to the same relief from charges as Section 1203, 43 P.S. § 913, subjects political subdivisions to the provisions of Section 1108, 43 P.S. § 908; Section 1108 renders employers electing to pay on a reimbursement basis proportionally liable for benefits paid to claimants who reestablish eligibility and thereafter receive benefits based in part on wages earned in the employ of the reimbursing employer, and no provision of the law relieves reimbursing employers of such liability.

In summary, it is our opinion, and you are so advised, that a political subdivision which has elected to reimburse the Unemployment Compensation Fund is entitled to relief from charges for benefits paid to ineligible claimants, but is not entitled to relief from charges for benefits paid to claimants who reestablish eligibility and thereafter receive benefits based in part on wages earned in the employ of the political subdivision.<sup>1</sup>

1 See 1978 Op. Atty. Gen. No. 1 reaching the same conclusions with respect to nonprofit organizations under Article XI of the Unemployment Compensation Law, 43 P.S. §§ 901-910.

Sincerely yours,

LOUIS J. ROVELLI  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

---

OFFICIAL OPINION NO. 78-8

*State Employees Retirement Board—Diversification of Assets.*

1. The State Employees Retirement Board, may pursuant to 71 Pa. C.S. § 5931 "split", diversify or reallocate the assets of the State Employees Retirement System among several money managers so long as such action is done in a reasonable and prudent manner, and there is adherence to investment standards.

April 5, 1978

Sol Zubrow, Chairman  
State Employees Retirement Board  
204 Labor & Industry Building  
Harrisburg, Pennsylvania 17120

Re: Diversification of Assets

Dear Mr. Zubrow:

You have requested advice as to whether the State Employees Retirement Board has the legal authority to "split" or reassign to other money managers the assets accumulated or to be accumulated in the retirement system presently managed by Mellon Bank, N.A. You also requested advice as to the guidelines under which such reassignment may occur to insure that the proposed splitting of assets be in accordance with appropriate legal and financial standards.

Without passing on the wisdom or desirability of diversifying the portfolio assets, it is our opinion and you are so advised that the State Employees Retirement Board has the authority to "split", diversify and reallocate assets of the State Employees Retirement System in accordance with the legal principles set forth below.

The State Employees Retirement Board is a statutory creation and has been the administrative agency charged with the responsibility of supervising the State Employees Retirement System since its inception in 1923. By specific legislation, enacted on March 1, 1974, (71 Pa. C.S. § 5101, *et seq.*) the Board was made an independent administrative agency consisting of seven members, including the State Treasurer, *ex officio* (Section 5901). The crucial provision, for purposes of the re-



quest for advice is Section 5931, which clearly and unambiguously provides that;

- (a) The members of the board shall be the trustees of the fund and shall have exclusive control and management of the said fund and full power to invest the same, subject, however, to all the terms, conditions, limitations, and restrictions imposed by this part or other law upon the making of investments.

This authority includes the power to "hold, purchase, sell, assign, transfer or dispose" of any portfolio assets. This provision is a substantial re-enactment of Section 502 of the 1959 Retirement Code, (71 P.S. § 1725-502) (repealed).

One need not look further than this provision to conclude that the exclusive authority to control and manage the fund rests solely with the Board, in its trustee capacity, subject to the limitations contained in the Act, such as limits on the percent of preferred and common stock in the portfolio (5931(h)) and limits on the types of fixed income assets which may be purchased (72 P.S. § 3603).

This management authority is always subject to the standards of diligence and prudence in the making, holding, investing and liquidating of such assets. The policy decision of the Board, as reflected in its intention to diversify its portfolio, among several, as distinguished from one, money managers may be accomplished through a variety of methods. It is clear, however, that the decision to "split" the fund is a matter of policy for the Board to make, given the clear statutory authority to exclusively control and manage the portfolio in its fiduciary capacity. The Board must keep in mind the aforementioned investment limitations in addition to its responsibility to "exercise . . . that degree of judgment and care under the circumstances then prevailing which men of prudence, discretion and intelligence exercise in the management of their own affairs not in regard to speculation, but in regard to the permanent disposition of the funds, considering the probable income to be derived therefrom as well as the probable safety of their capital" (5931(h)(1)).

Accordingly, it is our opinion and you are so advised that the Board may "split", diversify or reallocate assets among several money managers subject however to the Board's role as trustee and the investment limitations imposed by law. This opinion is not intended to approve either the decision of the Board to diversify or the identity of any proposed money manager. It would be sufficient to state that the Board has the legal right to diversify, however, subject to the requirement that such diversification be undertaken in a reasonable and prudent manner. We would expect that the Board has sought objective professional advice concerning the reallocation of the portfolio assets including the qualifications and experience of the proposed managers. In any

event, the final responsibility and accountability for the decisions made by the Board rests solely with the Board.

Sincerely,

LANCE H. LILLEN  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

---

### OFFICIAL OPINION NO. 78-9

*Department of Health—Hearing Aid Sales Registration Law—Hearing Aid Fitters and Dealers—Exclusion for Physicians, Surgeons and Audiologists—Medical Practice Act of 1973*

1. The Hearing Aid Sales Registration Law requires hearing aid fitters to pass an examination, but only requires hearing aid dealers to register.
2. The Law totally excludes from coverage physicians, surgeons and audiologists except those engaged directly or indirectly in the sale of hearing aids.
3. This exclusion was intended to require these professionals to register as dealers if they sell hearing aids, but to exempt them from examination as fitters.
4. To interpret this exclusion otherwise would be contrary to the Statutory Construction Act for it would lead to unreasonable distinctions between professionals and would render ineffective Article IV of the Law which places emphasis on the medical expertise in this field by physicians.
5. In addition, requiring physicians and surgeons to take the hearing aid fitters examination would improperly abrogate that part of the Medical Practice Act of 1974 which grants them "the right to practice medicine and surgery without restriction in this Commonwealth".
6. Since the exclusion from the Law treats audiologists the same as physicians and surgeons, they too are exempted from taking the hearing aid fitters examination.

April 5, 1978

Honorable Leonard Bachman  
Secretary  
Department of Health  
802 Health and Welfare Building  
Harrisburg, Pennsylvania 17120

Dear Dr. Bachman:

By memorandum dated March 27, your office has asked the opinion of this Department as to the legal effect of Section 309 of the Hearing Aid Sales Registration Law, Act of November 24, 1976, P.L. 1182, No. 262, 35 P.S. § 6700-309. Under Section 301 of the Law, there are two types of registration certificates for which an individual may qualify:

1) the certificate for "hearing aid fitter" for those persons engaged in fitting and selling of hearing aids and 2) the certificate for "hearing aid dealer" for those persons engaged in the business of selling hearing aids. Under Section 302 of the Act, the Secretary of Health may require proof of the honesty, truthfulness and good reputation of the applicant for either type of certificate, but in addition must give an examination to any person seeking a certificate as a hearing aid fitter. An individual who wishes merely to be licensed as a hearing aid dealer is not required to take this examination.

Section 309 of the Law, entitled "Persons Excluded from Registration," provides a qualified exception to the registration requirement outlined above. That Section states:

This act does not apply nor affect any physician or surgeon licensed under appropriate licensing laws or to an individual supervised by such physician or surgeon, who does not directly or indirectly engage in the sale or offering for sale of hearing aids, nor to any audiologist or to an individual supervised by such audiologist in conducting fitting procedures and who does not directly or indirectly engage in the sale or offering for sale of hearing aids.

The question you have asked is whether or not physicians, surgeons or audiologists are obligated to take an examination to qualify as hearing aid fitters or should merely be registered as hearing aid dealers.

It is our opinion and you are so advised that the legal effect of Section 309 is to exclude all physicians, surgeons and audiologists from the requirement of taking the examination to become hearing aid fitters, and only to require these professionals to be licensed as hearing aid dealers should they engage directly or indirectly in the sale or offering for sale of hearing aids.

In ascertaining the intention of the General Assembly in the enactment of a statute, the Statutory Construction Act mandates several presumptions. First, the General Assembly does not intend a result that is either absurd or unreasonable. 1 Pa. C.S. § 1922(1). If Section 309 will operate to require some, but not all, licensed physicians, surgeons and audiologists who fit hearing aids to take the examination as hearing aid fitters, it is apparent that there would be an absurd and unreasonable result. That is, taking two physicians, if both engage in the fitting of hearing aids, but only one is engaged in the selling of hearing aids, only one will be required to take the examination. That is, the requirement for taking the examination to be a fitter would not be dependent upon whether or not the professional engages in the fitting of hearing aids, but only on an unrelated activity - sale. In legal terminology, there would be no "nexus" between the activity giving rise to the obligation to take the examination and the activity which is to be examined.

Second, it must be presumed that the General Assembly intends an

entire statute to be effective. 1 Pa. C.S. § 1922(2). The entirety of Article IV of the Hearing Aid Sales Registration Law is focused on ensuring that persons obtaining hearing aids will be referred to physicians for a proper medical examination, diagnosis, prescription and opinion. Thus, the Law clearly recognizes the expertise of physicians in making medical determinations relative to the fitting of hearing aids. This provision would be meaningless if, in fact, Section 309 were meant to eradicate the presumption of physicians' competence in this area. Certainly if some physicians were intended by the Act to be licensed as fitters, those physicians would not be required to refer prospective purchasers to physicians. However, Section 402 does not except any registered fitter from the requirement of referring prospective purchasers to physicians. This, too, is an indication that physicians were not meant to be registered as fitters.

Third, it is a general rule of statutory construction that a later statute shall not be construed to repeal an earlier statute unless the two statutes are irreconcilable. 1 Pa. G.S. § 1971(c). The Medical Practice Act of 1974 provides that all physicians who have complied with the requirements of the State Board of Medical Education and Licensure and who have passed a final examination and have otherwise complied with the provisions of that Act, shall receive a license entitling them to the right to practice medicine and surgery without restriction in this Commonwealth. Act of July 20, 1974, P.L. 551, No. 190, § 10(a), 63 P.S. § 421.10(a). Further, "medicine and surgery" are defined as the art and science having for its object the cure of the diseases of and the preservation of the health of man including all practice of the healing art with or without drugs, except healing by spiritual means or prayer. 63 P.S. § 421.2(3). Clearly, "all practice of the healing art" would include those things defined as "fitting" under Section 103 of the Hearing Aid Sales Registration Law. Thus, to require licensed physicians and surgeons to take an additional examination in order to fit hearing aids would be to deprive them of their right to practice medicine and surgery without restriction in this Commonwealth. This would effect an implied repealer in part of the Medical Practice Act of 1974, which implied repealer we cannot presume to have been the intent of the General Assembly.

Finally, although the reasons ascribed in the preceding two paragraphs only apply directly to physicians and surgeons, because audiologists are treated identically with physicians and surgeons in Section 309 of the Hearing Aid Sales Registration Law, it must be concluded that they too were not meant to be required to take the examination or to register as hearing aid fitters even if they, in fact, engage in the sale of hearing aids. They, like physicians and surgeons, are only required to register as hearing aid dealers should they be engaged directly or indirectly in the sale of hearing aids.

Sincerely,  
ROBERT E. RAINS  
*Deputy Attorney General*  
VINCENT X. YAKOWICZ  
*Solicitor General*  
ROBERT P. KANE  
*Attorney General*

---

OFFICIAL OPINION NO. 78-10

*State Council of Civil Defense — Federal Disaster Relief Act of 1974—Public Facilities—  
Public Entity—Local Government—Library—Flood*

1. The Cambria County Library Association is a "public entity" within the meaning of Section 102(6) of the Disaster Relief Act of 1974.
2. The flood damage to the library facilities caused by the flood of 1977 constituted damage to "public facilities belonging to [a] local government" within the meaning of Section 402(a).

April 19, 1978

Colonel Oran K. Henderson  
Director, State Council of  
Civil Defense  
151 Transportation & Safety Building  
Harrisburg, Pennsylvania 17120

Re: Cambria County Public Library

Dear Colonel Henderson:

You have requested our opinion as to whether the Cambria County Public Library is a "public entity" within the meaning of Section 102(6) of the federal Disaster Relief Act of 1974. If so, it is eligible for disaster assistance with respect to damage to the building and destruction of much of its contents during the flood of 1977. It is our opinion that the library is a public entity within the meaning of that section.

On July 20, 1977, the City of Johnstown, Cambria County, and surrounding communities, were devastated by a major flood. The Cambria County Library in the City of Johnstown was severely damaged. Structural damage to the library building was \$157,635.00 and loss of or damage to equipment, books, materials and supplies was \$937,994.78, making a total loss of \$1,095,629.78.

Application for disaster assistance was made to the Federal Disaster Administration of the Department of Housing and Urban Development. The Regional Director of the Administration denied the application on the ground that the Cambria County Library Association, which operates the library, is a nonprofit corporation separate and dis-

tinct from Cambria County and, thus, not eligible for disaster relief under the Act. An appeal from this denial was made to the Regional Director who agreed to withhold final decision on the matter pending receipt of further information and an opinion from this office. In his letter dated December 12, 1977, the Regional Director stated:

From the information I have available, it appears that the Cambria Library Association is a nonprofit corporation which is a separate entity from Cambria County. It further appears that the Association maintains the Library buildings and manages its own financial affairs. If you could give me further information showing that the Library Association is in fact an operating department of the County government, or a 'public entity' as that term is used in Section 102(6) of the Disaster Relief Act of 1974, I would reconsider my previous decision. You may wish to obtain the opinion of your State's Attorney General in this regard. . .

Public facilities belonging to local governments are entitled to disaster relief under Section 402(a) of the Disaster Relief Act of 1974, 42 U.S.C. § 5172(a), which provides as follows:

(a) The President is authorized to make contributions to State or local governments to help repair, restore, reconstruct, or replace public facilities belonging to such State or local governments which were damaged or destroyed by a major disaster.

Under this section, the Cambria County Public Library is eligible for disaster relief if it is "public facilities belonging to [a] local government." "Local government" is defined in Section 102 of the Act, 42 U.S.C. § 5122 as follows:

"Local government" means (A) any county, city, village, town, district, or other political subdivision of any State, any Indian tribe or authorized tribal organization, or Alaska Native village or organization, and (B) includes any rural community or unincorporated town or village or any other *public entity* for which an application for assistance is made by a State or political subdivision thereof.

Thus, if the Cambria County Library Association is a "public entity" within the meaning of that definition, it will be eligible for disaster relief under the Act.

In support of the contention that the library is a "public entity", we have been furnished the following information:

1. The library building is owned by Cambria County.
2. The Cambria County Commissioners, by resolution adopted May 13, 1969, designated the Cambria County Library Association to "act for and on behalf of the Board of Commissioners to provide public library services to the residents and taxpayers of Cambria County."

3. The Cambria County Library Association was organized as a non-profit corporation for the purpose, as set forth in its Articles of Incorporation, of "the establishment of a public library as an integral part of public education."

4. The Association serves as a District Library Center for the Commonwealth of Pennsylvania, a county library for Cambria County and a local library for the City of Johnstown, all in accordance with "The Library Code", Act of June 14, 1961, P.L. 324, 24 P.S. § 4101 *et seq.*

5. Except for book fines and interest on a perpetual trust fund owned by the Association, the sources of funds for operations, maintenance and repairs, and capital improvements to the library, are appropriations of public taxing bodies or from federal or state support. Cambria County provided 44% of the library's support in 1976, the Commonwealth of Pennsylvania provided 32%, and the City of Johnstown and the municipalities of Conemaugh Township, Dale Borough, East Conemaugh Township, Ferndale Borough, Lower Yoder Township, Southmont Borough, Stonycreek Township, Upper Yoder Township, Westmont Borough, Westmont-Hilltop School District and West Taylor Township provided most of the balance. The interest from the perpetual trust fund accounted for less than 2%.

6. Each year the Association submits a proposed budget to the County Commissioners of Cambria County who either approve it or reduce the proposed expenditures.

In our opinion these factors establish that the Association is a "public entity". The service to the public, the funding by public funds, the ownership of the building by the County, and the County control over the budget lead inevitably to that conclusion.

Therefore, it is our opinion, and you are advised, that the Cambria County Library Association is a "public entity" within the meaning of Section 102(6) of the Disaster Relief Act of 1974, *supra*, and that the flood damage to the library facilities caused by the flood of 1977 constituted damage to "public facilities belonging to [a] local government" within the meaning of Section 402(a).

Very truly yours,

W. WILLIAM ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

---

## OFFICIAL OPINION NO. 78-11

*Tax Reform Code—Franchise Tax—Foreign Corporations—Manufacturing Exemption*

1. A foreign manufacturing corporation transacting all of its business in Pennsylvania must use a single assets fraction to obtain the benefits of the statutory manufacturing exemption.
2. A foreign corporation entitled to use the three factor formula, may not elect to use the single assets fraction.
3. Intangible assets of a foreign corporation are properly includible in the numerator of the single assets fraction if such assets have acquired a business situs within the Commonwealth.

June 21, 1978

The Honorable Milt Lopus  
Secretary of Revenue  
Commonwealth of Pennsylvania  
207 Finance Building  
Harrisburg, PA 17127

Dear Secretary Lopus:

The Corporation Tax Bureau of the Department of Revenue has requested an opinion regarding three corporate tax issues relative to the granting of the manufacturing exemption to certain corporations. Since the date of the request, several other questions have arisen and proposed regulations have been drafted. This opinion will discuss all of the issues raised.

Section 602(b) of the Act of March 4, 1971, P.L. 6, No. 2, as amended, Tax Reform Code of 1971 (hereinafter "TRC"), 72 P.S. § 7602(b), provides for the imposition of the franchise tax on foreign corporations. This section states in relevant part as follows:

... The actual value of its whole capital stock of all kinds, including common, special, and preferred, shall be ascertained in the manner prescribed in section 601 of this article. The taxable value shall then be determined by employing the relevant apportionment factors set forth in Article IV: . . .

The underlined language above was the phrase that the Commonwealth and Supreme Courts construed in the case of *Commonwealth v. Greenville Steel Car Company*, 20 Pa. Commonwealth Ct. 385, 343A2d 79 (1975), *aff'd*. 469 Pa. 444, 366 A.2d 569 (1976). Although the *Greenville Steel Car* case involved a domestic corporation, § 602(a) of the TRC, 72 P.S. § 7602(a) (imposition of capital stock tax on domestic corporations) provides "that any domestic corporation . . . may elect to compute and pay its tax under and in accordance with the provisions of subsection (b) of this section 602 . . ." [i.e. as quoted above].

The Commonwealth Court stated that:

As the above statutory provisions indicate, Article VI of the



Code, imposing a capital stock-franchise tax, does not establish an independent apportionment formula as under the prior law, but rather incorporates by reference the apportionment formulas utilized in computing the corporate net income tax under Article IV of the Code (sections 401 et seq., 72 P.S. § 7401 et seq.). Under section 401(3), defining "taxable income", three methods of determining taxable base are delineated, the utilization of which is dependent upon whether the corporation taxed 1) transacts business entirely within the state [§ 401(3)1.]; 2) transacts business within and without the state [401(3)2.]; or 3) is a regulated investment company which transacts business within and without the state [401(3)3.]. 20 Pa. Commonwealth Ct. 385, 389, 343 A.2d 79, 81 (1975)

The Court held that the taxpayer in *Greenville* fell into the second category. The Court then went on to hold that even though the taxpayer did transact business within and without the Commonwealth, it did not meet the other condition precedent to the use of the three factor apportionment formula (i.e. have "income from business activity which is taxable both within and without this State"). Therefore, if a taxpayer that meets one of the two conditions precedent is not allowed to use the three factor formula, clearly a taxpayer that meets neither of the tests would not qualify to use said three factor formula.

There is no differentiation in the statute or the Court opinion between a domestic or foreign corporation regarding this point. As a matter of fact, the Commonwealth Court specifically stated that:

... The express language of the Code now requires that a foreign corporation be transacting business within and without the Commonwealth and have income from that activity taxable by another state before it may apportion the value of its capital stock. As Appellant has failed to satisfy the latter condition, apportionment was not available to it in determining its franchise tax. 20 Pa. Commonwealth Ct. at 393, 343 A.2d at 83.

Although the Pennsylvania Supreme Court did not specifically state that the condition precedent applied to foreign corporations, it is clear for several reasons that they agreed.

First of all, the taxpayer's counsel made a constitutional argument concerning the effect of this interpretation on a foreign corporation. The Supreme Court noted this argument in a footnote and stated that the instant taxpayer could not raise the unconstitutionality of an act as applied to another taxpayer.

The Supreme Court also specifically held that the legislature in enacting the TRC corrected the inequity that had arisen in the case of *Commonwealth v. Rieck Investment Corporation*, 419 Pa. 52, 213 A.2d 277 (1965). That case involved a *foreign* corporation. Therefore there

should be no question that the conditions precedent to utilizing the three factor apportionment apply to both foreign and domestic corporations.

With the above background material in mind, we reach the specific questions involved. These questions basically revolve around the central question of how a corporation not transacting business or taxable outside Pennsylvania is to be granted the manufacturing exemption. The *Greenville Steel Car* case involved a year (1971) when the manufacturing exemption was not in effect. The Act of August 31, 1971, P.L. 362, No. 93 amended sections 602(a) and (b) to read as follows (the amendment is underlined):

Imposition of Tax.—(a) That every domestic corporation other than corporations of the first class, nonprofit corporations, and cooperative agricultural associations not having capital stock and not conducted for profit, and every joint-stock association, limited partnership, and company whatsoever, from which a report is required under section 601 hereof, shall be subject to, and pay into the treasury of the Commonwealth annually, through the Department of Revenue, a tax at the rate of ten mills, upon each dollar of the actual value of its whole capital stock of all kinds, including common, special, and preferred, as ascertained in the manner prescribed in section 601, for the calendar year 1971 and the fiscal year beginning in 1971 and each year thereafter, except that any domestic corporation, limited partnership, joint-stock association or company subject to the tax prescribed herein may elect to compute and pay its tax under and in accordance with the provisions of subsection (b) of this section 602:

*Provided, That the provisions of this section shall not apply to the taxation of the capital stock of corporations, limited partnerships and joint-stock associations organized for manufacturing, processing, research or development purposes, which is invested in and actually and exclusively employed in carrying on manufacturing, processing, research or development within the State, but every corporation, limited partnership or jointstock association organized for the purpose of manufacturing, processing, research or development shall pay the State tax of ten mills herein provided, upon such proportion of its capital stock, if any, as may be invested in any property or business not strictly incident or appurtenant to the manufacturing, processing, research or development business, in addition to the local taxes assessed upon its property in the district where located, it being the object of this proviso to relieve from State taxation only so much of the capital stock as is invested purely in the manufacturing, processing, research or development plant and business. 72 P.S. § 7602(a)*

The amendment to section 602(a) in conjunction with the Act of June 22, 1931, P.L. 685, No. 250, as amended, 72 P.S. § 1896, clearly allows a domestic corporation to use the single fraction for purposes of claiming the manufacturing exemption. The only authority a domestic corporation would have for utilizing the three factor formula is the phrase in § 602(a) that

... any domestic corporation ... may elect to compute and pay its tax under and in accordance with the provisions of subsection (b) of this section 602 ...

Therefore, we are again faced with the situation wherein the test for entitlement to the three fraction apportionment formula is the same for both domestic and foreign corporations.

The manufacturing exemption is an exemption from actual value to arrive at taxable value. The statute clearly provides that taxable value shall be determined by employing the *relevant apportionment factors*. To make it clear that this phrase also covers the manufacturing exemption, the statute (as amended) goes on to provide

... the manufacturing ... exemptions ... shall also apply to foreign corporations and in determining the *relevant apportionment factors* ... 72 P.S. § 7602(b)

By using this same phrase again, the legislature has made its intention clear that the manufacturing exemption is applied via whatever the relevant apportionment factors happen to be in the case at hand. The second part of this sentence which provides:

... in determining the relevant apportionment factors the numerator of the property, payroll, or sales factors shall not include any property payroll or sales attributable to manufacturing, processing, research or development activities in the Commonwealth. 72 P.S. § 7602(b)

is not independent authority for the use of the three factor apportionment in every case. It is simply a direction on how to grant the manufacturing exemption if the three factor apportionment formula is the relevant formula. Without this language, it would have been unclear how to grant the manufacturing exemption in the case where the taxpayer is entitled to the three factor apportionment formula.

Thus, if a foreign manufacturing corporation does 100% of its business in Pennsylvania and is not taxable outside of Pennsylvania, it is not entitled to use the three factor apportionment. However, the taxpayer would be entitled to use the single fraction for manufacturing exemption purposes, that domestic corporations are entitled to. The basis for this conclusion is twofold. The first is the statute itself which provides in pertinent part:

... the manufacturing ... exemptions *as contained under section 602(a)* shall also apply to foreign corporations ... 72 P.S. § 7602(b)

The manufacturing exemption in 602(a) provides that a corporation is only taxed

... upon such proportion of its capital stock ... as may be invested in any property or business not strictly incident or appurtenant to the manufacturing ... business. 72 P.S. § 7602(a)

This clause read in conjunction with the Act of June 22, 1931, P.L. 685, No. 250, as amended, 72 P.S. § 1896, provides a clear method of granting the manufacturing exemption for both domestic and foreign corporations.

Secondly, such a construction of the statute is constitutionally required. As the Pennsylvania Supreme Court stated in the case of *Columbia Gas Transmission Corp. v. Commonwealth*, 468 Pa. 145, 150, 360 A.2d 592, 595 (1976):

Classifications based solely on the place of incorporation, without any further justification, cannot stand constitutional scrutiny [citations omitted].

If the Commonwealth were to allow the manufacturing exemption to a domestic corporation transacting 100% of its business within the Commonwealth and not taxable without the Commonwealth, but not allow it to an identical corporation solely on the basis that it is incorporated in a foreign state, such construction would clearly violate the Uniformity Clause of the Pennsylvania Constitution. Section 1922(3) of the Statutory Construction Act 1 Pa. C.S. § 1922(3) requires that a statute be construed to preserve its constitutionality.

It is our opinion and you are so advised as follows:

1. A foreign manufacturing corporation transacting all of its business in Pennsylvania must use a single assets fraction to obtain the benefits of the statutory manufacturing exemption.
2. A foreign corporation entitled to use the three factor formula, may not elect to use the single assets fraction.
3. Intangible assets of a foreign corporation are properly includible in the numerator of the single assets fraction if such assets have acquired a business situs within the Commonwealth.

Very truly yours,

EUGENE ANASTASIO  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

GERALD GORNISH  
*Acting Attorney General*

---

## OFFICIAL OPINION NO. 78-12

*Department of Health, Department of Environmental Resources—Third class cities—Home Rule Charter and Optional Plans Law—Public eating and drinking places—Licensing and inspection*

1. Any city that is subject to the Third Class City Code is obliged to perform the health services specified in the Code and may not shift those functions to the Department of Health.
2. The Departments of Health and Environmental Resources have neither a statutory duty nor authority to provide health services to citizens of third class cities.
3. State agencies derive their duties and responsibilities from statutes enacted by the General Assembly.

June 30, 1978

Honorable Leonard Bachman  
Secretary of Health  
802 Health and Welfare Building  
Harrisburg, Pennsylvania

Honorable Maurice K. Goddard  
Secretary of Environmental Resources  
Third and Reily Streets  
Harrisburg, Pennsylvania

Dear Secretary Bachman and Secretary Goddard:

We have been asked to furnish you with an opinion concerning the legal authority of the Departments of Health and Environmental Resources to cease providing health services to certain third class cities, including the licensing and inspection of public eating and drinking places. It is our opinion, and you are advised, that your departments are not only authorized but required to discontinue such services.

Between 1961 and 1970, the cities of Lower Burrell, New Kensington and Arnold, along with ten other third class cities, enacted ordinances surrendering to the Department of Health their responsibility for providing public health services. The Department of Health accepted this responsibility subject to the understanding that the cities would eventually have to take it back. Later an arrangement was made with the Department of Environmental Resources (DER) whereby DER assumed some of the responsibility, including the inspection of public eating and drinking places.

In 1975, the Department of Health notified the thirteen cities concerned that they would have to resume their public health services by January 1, 1976. As of May 1978, five of those cities have re-established their own health departments but eight have not. In October of 1977, the Department of Health notified the remaining eight cities that it and DER would completely discontinue the health services as of July 1, 1978. However, in December of 1977, the General Assembly reduced the budget of DER's Bureau of Community Environ-

mental Control by \$400,000, making it necessary to move up the date for discontinuance of services to March 15, 1978. Since the cities have not taken up where your departments have left off, there is presently a lapse in the health services provided. In this situation, we have been asked by certain members of the General Assembly and the mayors of three of the cities to advise you as to whether you can legally discontinue the services when the effect is that no health services are provided at all.

Third class cities, except those that have adopted Home Rule Charters, are governed by the Third Class City Code (53 P.S. §§ 35101 *et seq.*). Article XXIII of the Code requires each third class city to create a board of health. Section 2301 (53 P.S. § 37301) provides:

Each city shall, by ordinance, create a board of health as herein provided, or, in lieu thereof, council shall be the board of health.

Section 2305 (53 P.S. § 37305) provides:

The board shall appoint as a health officer a person with some experience or training in public health work. . . .

Sections 2306 and 2307 (53 P.S. §§ 37306 & 37307) charge the health officer and the board of health with the duties of enforcing the laws of the Commonwealth and the rules, regulations and orders of the Department of Health.

These provisions are not discretionary but mandatory. Third class cities *must* provide the health services described. Moreover, there is no provision in the Third Class City Code that authorizes a city to transfer its responsibilities for public health to the Department of Health, nor is the department authorized to accept, or compel, such transfer. This is in contrast to the laws applicable to boroughs and townships which explicitly authorize such transfers (both voluntary and involuntary) under certain circumstances. See 71 P.S. § 532; 53 P.S. §§ 48111, 56611, 66961.

It is therefore our opinion that any city that is subject to the Third Class City Code is obliged to perform the health services specified in the Code and may not shift those functions to the Department of Health.

However, third class cities which have adopted home rule charters under the Home Rule Charter and Optional Plans Law, Act of April 13, 1972, P.L. 184, as amended, (53 P.S. § 1-101 *et seq.*) may be exempt from the provisions of the Third Class City Code. Section 301 of that Act (53 P.S. § 1-301) provides:

A municipality which has adopted a home rule charter may exercise any powers and perform any function not denied by the Constitution of Pennsylvania, by its home rule charter or by the General Assembly at any time. All grants of municipal power to municipalities governed by a home rule charter under this act, whether in the form of specific enumeration or

general terms, shall be liberally construed in favor of the municipality.

There are certain restrictions on this broad power, contained in Section 302 (53 P.S. § 1-302), the only pertinent one being subsection (c) which provides:

Acts of the General Assembly in effect on the effective date of this act that are uniform and applicable throughout the Commonwealth shall remain in effect and shall not be changed or modified by this act.

Although this provision has not been interpreted by the courts, it is arguable that the Third Class City Code is not uniform and applicable throughout the Commonwealth and, hence, that a Home Rule Charter City is exempt from the public health requirements of that Code. In *Greenberg v. Bradford City*, 432 Pa. 611, 248 A. 2d 51 (1968) the Supreme Court held that an exception from the powers granted to third class cities under the "Optional Third Class City Charter Law", Act of July 15, 1957, P.L. 901 (53 P.S. § 41101 *et seq.*) did not require observance of the provisions of the Third Class City Code, reasoning that to rule otherwise would render the Optional Third Class City Charter Law nugatory.

Thus, it can be argued that a third class city which has adopted a home rule charter under the Home Rule Charter and Optional Plans Law is no longer bound by the Third Class City Code to provide health services to its citizens. However, the question before us is not whether third class cities under home rule continue to be bound by the Third Class City Code, but whether the Department of Health is required or permitted to provide such services under any circumstances. In our view, it is not.

State agencies derive their duties and responsibilities from statutes enacted by the General Assembly. As indicated above, there is no statutory authority for the Department of Health, or DER, to provide health services to third class cities. On the contrary, prior to the enactment of the Home Rule Charter and Optional Plans Law in 1972, third class cities were required to provide those health services themselves.\* While the enactment of that law may have removed the mandatory requirement imposed on those third class cities that have adopted charters, there is absolutely nothing in that law, or in any other law, which purports to confer such duties on the Department of Health or DER.

More particularly, the specific responsibility for the licensing and inspection of public eating and drinking places is contained in the Act of May 23, 1945, P.L. 926, as amended, (35 P.S. §§ 655.1 *et seq.*). Section 2 of that Act (35 P.S. § 655.2) provides:

\* The Optional Third Class City Charter Law, *supra*, enacted in 1957, prohibits a city from limiting powers granted to it by acts of the General Assembly relating to public health. However there is no similar provision in the Home Rule Charter and Optional Plans Law.

From and after a period of six months after the effective date of this act, it shall be unlawful for any proprietor to conduct or operate a public eating or drinking place without first obtaining a license, as herein provided. Such license shall be issued by the health authorities of cities, boroughs, incorporated towns and first-class townships . . . No license shall be issued until inspection of the premises, facilities and equipment has been made by the licensor, and they are found adequate to the protection of the public health and comfort of patrons. . . .

Again, this language is mandatory and there is no provision relating to third class cities in this or any other law authorizing or permitting the transfer of such responsibility by third class cities to the State. Additionally, this is a law that is "uniform and applicable throughout the Commonwealth" and, as such, has not been changed or modified by the Home Rule Charter and Optional Plans Law. See 53 P.S. § 1-302, *supra*.

In conclusion, the Departments of Health and Environmental Resources have neither a statutory duty nor authority to provide health services to citizens of third class cities. Accordingly, in the absence of such statutory duty or authority, you have no discretion and are compelled to discontinue such services. This is so regardless of whether third class cities have adopted Home Rule Charters or are still governed by the Third Class City Code.

Very truly yours,

W. WILLIAM ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

GERALD GORNISH  
*Acting Attorney General*

---

### OFFICIAL OPINION NO. 78-13

*Illegitimates—Inheritance and Estate Tax Act of 1961—Unconstitutional Invidious Discrimination Contra Fourteenth Amendment to the United States Constitution*

1. The State Legislature and/or the Department of Revenue may require reasonably exacting standards of proof for a person to establish that he or she is the biological illegitimate child or lineal descendant when claiming from or through the father.
2. In such cases where the standard of proof is met and established, the Pennsylvania Inheritance and Estate Tax Act of 1961 is unconstitutional in that it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by invidiously discriminating on the basis of illegitimacy insofar as it imposes a higher rate of tax in the amount of fifteen (15) percent.



June 30, 1978

The Honorable Milt Lopus  
Secretary of Revenue  
Commonwealth of Pennsylvania  
207 Finance Building  
Harrisburg, Pennsylvania

Dear Secretary Lopus:

We have been requested to issue an opinion on the constitutionality of the differential inheritance tax rates applied to legitimate and illegitimate children inheriting from and through their fathers.

The relevant statutory provisions are as follows:

Section 403 of the Pennsylvania Inheritance and Estate Tax Act of 1961 as amended, (72 P.S. § 2485-403) provides:

Inheritance tax upon the transfer of property passing to or for the use of any of the following shall be at the rate of six (6) percent:

(1) Grandfather, grandmother, father, mother, husband, wife, and lineal descendants;

Section 102(3) (72 P. S. § 2485-102(3)) provides:

“Children” includes adopted children, stepchildren, *illegitimate children of the mother*, and the children of the natural parent who are adopted by his spouse. *It does not include illegitimate children of the father* or adopted children in the natural family, except as above set forth. (*emphasis supplied*)

Section 102(13) (72 P.S. § 2485-102(13)) provides:

“Lineal descendants” includes children and their descendants, adopted descendants and their descendants, stepchildren, *illegitimate descendants of the mother* and their descendants, and children and their descendants of the natural parent who are adopted by his spouse. It does not include descendants of stepchildren, *illegitimate children of the father* and their descendants, or adopted children and their descendants in the natural family, except as above set forth. (*emphasis supplied*)

Section 404 of the Pennsylvania Inheritance and Estate Tax Act of 1961 (72 P.S. § 2485-404) provides:

Inheritance tax upon the transfer of property passing to or for the use of all persons other than those designated in section 403, shall be at the rate of fifteen (15) percent.

Pursuant to these sections of the Act, illegitimate children of the mother inherit as children and as lineal descendants of the mother.

They are taxed on such inheritance at the rate of six (6) percent.

Illegitimate children of the father are excluded as children and as lineal descendants of the father. They are taxed on such inheritance at the rate of fifteen (15) percent.

We shall discuss the recent evolution of the law with respect to the constitutionality of discriminatory provisions against illegitimates.

In *Labine v. Vincent*, 401 U.S. 532 (1971), the guardian of an illegitimate minor child attacked the constitutionality of Louisiana's laws which bar an illegitimate child from sharing equally with legitimates in the estate of their father who has publicly acknowledged the child. The guardian argued that the statutory scheme for intestate succession that bars this illegitimate child from sharing in her father's estate constitutes an invidious discrimination against illegitimate children and contravenes the rights established under the Due Process and Equal Protection Clauses of the Constitution.

The Supreme Court noted that even if they were to apply the "rational basis" test to the Louisiana intestate succession statute, that statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the state. The Court states:

...the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State. Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws. 401 U.S. at 538-539.

The Court concluded by holding that:

there is nothing in the vague generalities of the Equal Protection and Due Process Clauses which empowers this Court to nullify the deliberate choices of the elected representatives of the people. . . 401 U.S. at 539-540.

Thirteen months after *Labine v. Vincent* the question before the United States Supreme Court concerned the right of dependent, unacknowledged, illegitimate children to recover benefits under Louisiana workmen's compensation laws for the death of their natural father on an equal footing with his dependent, legitimate children. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). The Court held that there was inequality of treatment under the statutory scheme which constituted impermissible discrimination against the illegitimate children and violated the Equal Protection Clause of the Fourteenth Amendment.

In its reasoning and analysis the Court stated:

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise. 406 U.S. at 175-176.

*Labine* was distinguished on the basis that it reflected the traditional deference to a state's prerogative to regulate the disposition at death of property within its borders; that the Court has long afforded broad scope to state discretion in this area; and the substantial state interest in providing for the stability of land titles and in the prompt and definitive determination of the valid ownership of property left by decedents was absent in the case of *Weber*.

In *Gomez v. Perez*, 409 U.S. 535 (1973), the issue presented was whether the laws of Texas may constitutionally grant legitimate children a judicially enforceable right to support from their natural fathers and at the same time deny that right to illegitimate children. The Court held that the Texas law violates the Equal Protection Clause of the Fourteenth Amendment and went on to state:

*We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination.* 409 U.S. at 538 (Emphasis supplied).

Apparently the Supreme Court was concerned with and recognized the serious problems of fraud in claims of paternity, and inferentially recognized the rights of states to establish and require strict standards of proof of paternity, for the above quote of the Per Curiam opinion is GRATIS DICTUM. The state trial judge had found as a fact that the defendant was the "biological father" of the plaintiff and proof of paternity does not appear to have been in issue on appeal.

In *Jimenez v. Weinberger*, 417 U.S. 628 (1974), the Secretary of HEW denied claims of a subclass of illegitimates pursuant to the Social Security Act. The Court, while recognizing that prevention of spurious and fraudulent claims is a legitimate governmental interest, held that "the blanket and conclusive exclusion of appellants' subclass of illegitimates" contravenes equal protection guaranteed by the Due Process Clause of the Fifth Amendment.

*Trimble v. Gordon*, 430 U.S. 762 (1977), involved the Illinois Probate Act which allows illegitimate children to inherit by intestate succession only from their mothers. During his lifetime, the court entered a paternity order finding Gordon to be the father of Deta Mona Trimble and ordered him to pay support. Gordon thereafter supported Deta Mona in accordance with the paternity order and openly acknowledged her as his child. He later died intestate.

The Illinois courts excluded Deta Mona from inheriting his estate on the basis of the Probate Act. The United States Supreme Court, in a 5 to 4 decision, held that the statutory discrimination against illegitimate children was unconstitutional. The Court concluded that the adjudication of paternity in the support action should be equally sufficient to establish the right to claim a child's share of the estate, "for the State's interest in the accurate and efficient disposition of property at death would not be compromised in any way by allowing her claim in these circumstances." 430 U.S. at 772.

The majority with respect to the *Labine Case* stated:

In subsequent decisions, we have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships. 430 U.S. at 769.

Because of the importance of the decision in *Trimble v. Gordon*, we extensively quote therefrom:

The Illinois Supreme Court relied on *Labine* for another and more substantial justification: the State's interest in "establish[ing] a method of property disposition." 61 Ill. 2d, at 48, 329 N.E.2d at 238. Here the court's analysis is more complete. Focusing specifically on the difficulty of proving paternity and the related danger of spurious claims, the court concluded that this interest explained and justified the asymmetrical statutory discrimination against the illegitimate children of intestate men. The more favorable treatment of illegitimate children claiming from their mothers' estates was justified because "proof of a lineal relationship is more readily ascertainable when dealing with maternal ancestors." *Id.*, at 52, 329 N.E.2d at 240. Alluding to the possibilities of abuse, the court rejected a case-by-case approach to claims based on alleged paternity. *Id.*, at 52-53, 329 N.E.2d, at 240-241.

The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally. We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between § 12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property

at death. The court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws. Because it excludes those categories of illegitimate children unnecessarily, § 12 is constitutionally flawed.

The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance.

The judicial task here is the difficult one of vindicating constitutional rights without interfering unduly with the State's primary responsibility in this area. Our previous decisions demonstrate a sensitivity to "the lurking problems with respect to proof of paternity," *Gomez v. Perez*, 409 U.S. 535, 538 (1973), and the need for the States to draw "arbitrary lines...to facilitate potentially difficult problems of proof," *Weber*, 406 U.S., at 174. "Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination." 430 U.S. at 770-771.

In *Browning Estate*, 5 D. & C.3d 772 (C.P. Phila., 1977), an alleged illegitimate son of the decedent claimed an intestate share of the estate. Placed into evidence was a certified copy of a Common Pleas Court Order in connection with a Fornication and Bastardy proceeding against defendant-decedent and in favor of the claimant born out of wedlock.

Applying the constitutional concepts expressed in *Trimble v. Gordon*, the Court in *Browning Estate* held the evidence sufficient to establish the illegitimate's claim and held Section 2107 of the Probate, Estates and Fiduciaries Code, 20 Pa. C.S. § 2107 unconstitutional in that it violates the Fourteenth Amendment of the United States Constitution.

Pursuant to these decisions of the courts, it is our opinion and you are so advised that:

(1) The State Legislature and/or the Department of Revenue may require reasonably exacting standards of proof for a person to establish

that he or she is the biological illegitimate child or lineal descendant when claiming from or through the father.

(2) In such cases where the standard of proof is met and established, the Pennsylvania Inheritance and Estate Tax Act of 1961 is unconstitutional in that it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by invidiously discriminating on the basis of illegitimacy insofar as it imposes a higher rate of tax in the amount of fifteen (15) percent.

Very truly yours,

VINCENT X. YAKOWICZ  
*Solicitor General*

GERALD GORNISH  
*Acting Attorney General*

---

#### OFFICIAL OPINION NO. 78-14'

##### *Identification of Adoptees' Natural Parents—Disclosure—Vital Statistics—Birth Certificates*

1. The Division of Vital Statistics of the Department of Health is mandated by law to continue making certified copies of their original birth certificates available to adoptees who have attained majority and are not incompetent.
2. Such access is required by Section 603(c) of the Vital Statistics Act of 1953, Act of June 29, 1953, P.L. 304, No. 66, 35 P.S. § 450.603(c), which was not repealed by Section 505 of the Adoption Act, Act of July 24, 1970, P.L. 620, No. 208, 1 P.S. § 505.

July 31, 1978

Honorable Leonard Bachman  
Secretary  
Department of Health  
802 Health and Welfare Building  
Harrisburg, Pennsylvania 17120

Dear Dr. Bachman:

Questions have been raised concerning the legal propriety of the practice of the Vital Statistics Division of the Department of Health of releasing certified copies of original birth certificates to requesting adoptees. It is the opinion of this office that the current practice is lawful, that a certified copy of the original birth certificate must be made available to a requesting adoptee provided he has reached the age of majority and is of sound mind. The reasons for this opinion are as follows:

Section 603(c) of the Vital Statistics Law of 1953, specifically authorizes such release:

After the amended certificate is prepared, any information

disclosed from the record shall be from the amended certificate; and access to the original certificate of birth and to the documents of proof on which the amended certificate is based shall be authorized only upon request of the person involved if he has attained majority and is not incompetent, or upon request of his parent, guardian or legal representative, or upon order of a court of competent jurisdiction. Act of June 29, 1953, P.L. 304, No. 66, 35 P.S. § 450.603(c).

The question is whether Section 505 of the Adoption Act negates this legal mandate. Section 505 provides:

All petitions, exhibits, reports, notes of testimony, decrees, and other papers pertaining to any proceeding under this act, or under the Act of April 4, 1925 (P.L. 127), entitled "An act relating to Adoption," shall be kept in the files of the court as a permanent record thereof and withheld from inspection except on an order of court granted upon cause shown. Act of July 24, 1970, P.L. 620, No. 208, 1 P.S. § 505.

Sections 334 and 402 of the Adoption Act enumerate the exhibits which are to be included in the petition for adoption which become part of the court record and are then normally withheld from inspection. Act of July 24, 1970, P.L. 620, No. 208, 1 P.S. §§ 334 and 402. Specifically, either a birth certificate or a certification of registration of birth of the child is to be attached to the adoption petition as an exhibit. By attaching either exhibit, compliance is had with Section 505 of the Adoption Act without impounding the original birth certificate. In practice, the original birth certificate is never impounded by the court when an adoption is finalized because the Vital Statistics Division only releases information from or a certified copy of the original birth certificate and is not authorized to ever release the original birth certificate itself. Since the original birth certificate remains with the Vital Statistics Division, the Division can allow access to it when specifically authorized by statute to do so, as by Section 603(c).

Outside of very limited circumstances not applicable here, it is only when statute are irreconcilable that the later one may be construed to imply repeal of the earlier one. 1 Pa.C.S. § 1971(c). Consequently, for the 1970 passage of Section 505 to impliedly repeal the 1953 enactment of Section 603(c), the two provisions must be irreconcilable. Our interpretation of the two provisions indicates that they are not irreconcilable as a matter of law; nor have they been as a matter of practice. Therefore, we conclude that the Vital Statistics Division is statutorily mandated to continue making certified copies of original birth certificates available to requesting adoptees in accordance with the specific authorization of Section 603(c) of the Vital Statistics Law.

Sincerely,

ROBERT E. RAINS  
*Deputy Attorney General*

GERALD GORNISH  
*Acting Attorney General*

OFFICIAL OPINION NO. 78-15

*Department of Public Welfare—Act No. 1978-51—Article III, § 29—Article VIII, § 17.*

1. Recompensing individuals who have suffered a property loss in a flood is not one of the allowable purposes for which a charitable, educational or benevolent grant may be made under Article III, § 29 of the Pennsylvania Constitution.
2. Act No. 1978-51 should not be enforced because it violates Article III, § 29 and is not permitted under Article VIII, § 17 of the Pennsylvania Constitution.
3. Joint Resolution No. 2 of 1977 evinces an intent not to permit the payment of direct flood relief grants as provided in Act No. 1978-51 by failing to authorize submission of the question of such payment to the voters.
4. The Attorney General has the right, duty and obligation to support, obey and defend the Constitution of Pennsylvania.
5. Consistent with that duty, the Attorney General may advise state officers that, unless otherwise ordered by a court, they may disregard the provisions of a particular statute which he concludes are inconsistent with the Constitution.

August 11, 1978

Honorable Aldo Colautti  
Secretary, Department of Public  
Welfare  
328 Health & Welfare Building  
Harrisburg, Pennsylvania 17120

Dear Secretary Colautti:

This Official Opinion is directed to the question of the constitutionality of the Act of April 28, 1978, No. 1978-51. You were previously advised by this office that the Act is unconstitutional under Article III, § 29 and that it is not rendered constitutional by Article VIII, § 17(b) of the Constitution. Because that opinion was not signed by the previous Attorney General, under the unusual circumstances which then obtained in this office, and since we had not afforded the State Treasurer and Auditor General the opportunity to comment on the opinion under Section 512 of the Administrative Code of 1929, 71 P.S. § 192,<sup>1</sup> we requested their comments. We have now received and reviewed their replies, and are submitting our Official Opinion after another review of all the issues.

1 There is some question whether the issue before us is required to be submitted to the State Treasurer and Auditor General under Section 512, which refers to the "interpretation" of an appropriation act or act authorizing the expenditure of money. This opinion deals with the "validity" rather than the "interpretation" of an act. However, it is and shall continue to be our policy that any opinion which deals with such matters should be submitted to the State Treasurer and Auditor General.



It is our opinion that Act 1978-51 (which became law by the Governor deliberately refusing to sign it so that the constitutional issues, which this office had raised to him, could be resolved) violates Article III, § 29 of the Pennsylvania Constitution; is not rendered constitutional by Article VIII, § 17 of the Pennsylvania Constitution; and that this office has not only the authority, but the duty to advise you under the circumstances not to approve any payments under the Act.\*

I. Act 1978-51 purports to allow grants of money to persons who suffered property losses in the flood of July, 1977, to cover a portion of their loss of non-business or non-farm personal property.

Article III, § 29 of the Pennsylvania Constitution provides:

No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association: Provided, That appropriations may be made for pensions or gratuities for military service and to blind persons twenty-one years of age and upwards and for assistance to mothers having dependent children and to aged persons without adequate means of support and in the form of scholarship grants or loans for higher educational purposes to residents of the Commonwealth enrolled in institutions of higher learning except that no scholarship, grants or loans for higher educational purposes shall be given to persons enrolled in a theological seminary or school of theology.

It is our opinion that the grant provided by Act 1978-51 clearly violates Article III, § 29 of the Pennsylvania Constitution as it has been interpreted by the courts of Pennsylvania. Recompensing individuals who have suffered a property loss in a flood is not one of the allowable purposes for which a charitable, educational or benevolent grant may be made under the Constitution. On this issue, we adopt and follow the reasoning contained in the earlier opinion of this office, which we now summarize.

In a prior opinion of the Attorney General discussing the standards to be applied in construing Article III, § 29, we expressly recognized that "[t]he history of the construction of this section shows a growing limitation upon the scope of its prohibitive effect." Opinion No. 154 of 1972, 1972 Op. Att'y Gen. 149.<sup>2</sup> Under the guise of an expanding no-

\*Editor's Note—This Opinion was superseded by the Attorney General's letter of March 9, 1979, advising Secretary O'Bannon that the question of the constitutionality of Act 51 is more properly one for the courts to decide and relieving the Secretary of any prohibition upon the distribution of payments under Act 1978-51.

2 This program is clearly distinguishable from the emergency disaster loan program we upheld in Opinion No. 154 of 1972. That program was undertaken under the Industrial and Commercial Development Authority Law, 73 P.S. § 371, *et seq.*, which allowed loans to businesses, the constitutionality of which had been upheld in *Basehore v. Hampden Industrial Development Authority* 433 Pa. 40, 248 A.2d 212 (1968). The distinctions are clear. In that program there were short-term loans as op-

tion of public duty and function, the Pennsylvania courts have had no difficulty in sustaining the validity of statutes providing benefits to the poor and unemployed. See *Commonwealth v. Perkins*, 342 Pa. 529, 21 A.2d 45 (1941), *aff'd per curiam*, 314 U.S. 586 (1942) and *Commonwealth ex rel. Schnader v. Liveright*, 308 Pa. 35, 161 A.697 (1932). The Supreme Court has, however, been careful to emphasize that merely because a statute can be characterized as "humanitarian" or to the benefit of all persons, it will not necessarily satisfy the constitutional requirement of public function or purpose. *Kurtz v. Pittsburgh*, 346 Pa. 362, 31 A.2d 257 (1943). Rather, the decision in each case must rest upon the determination of whether the public receives or will receive a corresponding benefit from the payment of public funds. *Loomis v. Philadelphia School District Board*, 376 Pa. 428, 103 A.2d 769 (1954); *Kurtz, supra*.

Applying these principles to the Act of April 28, 1978 we find that the grant program does not meet the public benefits test of the cases construing Article III, § 29. The proposed program is benevolent because it is a recognition by the State of individual loss and an attempt at individual recompense. The program does not exclusively benefit the poor or unemployed; anyone, regardless of financial status, can receive a grant for property damaged. The expanding notion of public duty and function cannot justify a program that does not exclusively benefit the poor and unemployed. Accordingly, there is no corresponding public benefit to be derived from the payment of these funds. This program is strictly a pay-out from the State Treasury to an individual, and by no stretching of the cases on point can such an individual aid program be justified.

II. We next consider the question of whether Act 1978-51 comes within either Section 17(a) or (b) of Article VIII of the Pennsylvania Constitution, which contain exceptions to Article III, § 29. In order properly to evaluate this question, it is necessary to review the history of paying state flood relief grants to individuals.

After the great flood of June, 1972, caused by Hurricane Agnes, the Legislature, recognizing the extensive property damage suffered by many of the citizens of Pennsylvania, sought to compensate them through the payment of direct grants. Realizing the constitutional impediments to such a program, the Legislature resolved to submit a con-

---

posed to grants; the purpose of the loan was specifically limited to rehabilitating business property which had been damaged in the flood (pending permanent loans by the Small Business Administration), as opposed to a grant of money which could be used for any purpose by the recipient; the law under which the loans were to be made had been held constitutional (because it had the public purposes of combatting unemployment and encouraging industrial development), as opposed to a grant for flood damages which has never been recognized to be constitutional. As we stated in that Opinion (1972 Opinions at 150): Finally, there is no gratuity or charity involved in the program because nothing is given away. It is not grants which will be made but loans secured by notes and repayable in the near future from the federal loans to which the recipients are entitled.

stitutional amendment to the electorate. The General Assembly expressly acknowledged the constitutional prohibitions against such direct grants in Joint Resolution No. 1 of 1972, 1st Sp. Sess., P.L. 1970. That Resolution stated that:

The General Assembly desires to alleviate such storm or economic deprivation caused by the flood, *but is limited in its efforts by rigid restrictions in the Constitution of the Commonwealth of Pennsylvania.* (Emphasis added.)

The foregoing shows a clear legislative recognition that such direct payments are in violation of the Constitution, presumably Article III, § 29. The General Assembly therefore resolved to add Article VIII, § 17 to the Pennsylvania Constitution and submit the same to the voters for approval. Article VIII, § 17, as submitted to the electorate in 1972, pertinently stated that:

*Notwithstanding any provisions of this Constitution to the contrary*, the General Assembly shall have the authority to enact laws providing for tax rebates, credits, exemptions, grants-in-aid, State supplementations, or otherwise provide special provisions for individuals, corporations, associations or nonprofit institutions, including nonpublic schools (whether sectarian or nonsectarian) in order to alleviate the danger, damage, suffering or hardship faced by such individuals, corporations, associations, institutions or nonpublic schools as a result of a Great Storm or Flood of September, 1971 or of June, 1972. (Emphasis added.)

This amendment was approved by the voters in November, 1972.

Thereafter, pursuant to the permission granted by the electorate in adopting Article VIII, § 17, the Legislature passed the Act of May 11, 1973, P.L. 27 ("Act 13"), which authorized direct appropriations to owners of homes or personal property to compensate them for flood losses.

In September, 1975, the Commonwealth was once again extensively inundated by flood waters from Hurricane Eloise. The Legislature, again desiring to provide direct grants to flood victims, and again recognizing the problems of Article III, § 29, proposed an amendment to Article VIII, § 17 by adding to the end of Section 17 the phrase "or of 1974, or of 1975." Joint Resolution No. 2 of 1975, P.L. 622. This had the effect of permitting payments of direct grants to individuals suffering damages from the 1975 flood, but the Legislature did not pass enabling legislation to implement this permission. Thus, the only grants paid to individuals were derived from federal monies, as provided in Public Law 93-288 (discussed *infra.*), with matching state funds under the constitutional authorization.

With this background of how the Legislature dealt with previous disasters, we turn our attention to the present question of the 1977

flood. House Bill No. 304 of 1977 was introduced and passed by the House of Representatives on March 29, 1977. The version of the bill that passed the House (Printer's No. 808) repeated the language of then Article VIII, § 17, and proposed, for submission to the electorate, an amendment to this provision, by adding to the end thereof "or of 1976, or of 1977. . . ." Thus, although the Johnstown flood had not occurred at the time of House approval of the bill, the language initially passed by the House, assuming it was thereafter approved by the voters, would have allowed for the payment of direct grants to Johnstown flood victims because the disaster in fact occurred during 1977.

The bill was sent to the Senate shortly thereafter and was referred to the Constitutional Changes and Federal Relations Committee. The bill was consigned to committee until July 25, 1977, some five days after the Johnstown flood, when it was reported out.<sup>3</sup>

The bill that was reported out (Printer's No. 1839) warrants careful scrutiny for the differences between this bill and prior legislative action on such problems form part of the basis for our conclusion that Act 1978-51 is unconstitutional. In the first place, the bill that was reported out deleted the phrase "or of 1977. . ." from the language which had previously been utilized to waive the prohibitions of Article III, § 29.

Another important difference can be found in the purpose clause of the amendment. The purposes of both previous constitutional amendments, Joint Resolution No. 1 of 1972, *supra*, and Joint Resolution No. 2 of 1975, *supra*, and been stated to be:

Proposing an emergency Constitutional amendment to the Constitution of the Commonwealth of Pennsylvania *granting the General Assembly the power to enact special laws to aid certain individuals, corporations, associations, institutions or nonpublic schools adversely affected by conditions caused by certain storms or floods.* (Emphasis added).

This was also the same legislative purpose which was found in House Bill No. 304, as originally introduced. The bill that was reported out of the Senate Committee—the language of which was subsequently approved by the General Assembly—deleted the emphasized language and substituted new language, so that the final purpose of Joint Resolution No. 2 of 1977, P.L. 362 (House Bill No. 304) read as follows:

Proposing an emergency Constitutional amendment to the Constitution of the Commonwealth of Pennsylvania *providing that special emergency legislation may be enacted when Federal emergency or disaster assistance is available.* (Emphasis added).

Once again we see the Legislature deleting language which had

3 We assume that the reporting out of the bill on July 25 was in direct response to the disaster.

previously been utilized to waive the prohibitions of Article III, § 29. In its stead it added language which speaks directly of and makes specific reference to federal disaster relief assistance. This was accompanied by changes to the body of the Resolution and the addition of a new subsection to Section 17. Section 1 of the bill provided:

Many Pennsylvanians have suffered greatly from the ravages of Great Storms and Floods in recent years. The Great Storms or Floods of 1974, 1975, 1976 and 1977 were additional major disasters causing loss of life and great damage and destruction to property of individuals, industrial and commercial establishments and public facilities.

It is imperative that the victims of these disasters receive the fullest possible aid from both the Federal Government and the Commonwealth in order to accomplish a speedy recovery.

The Congress of the United States, through enactment of the Disaster Relief Act of 1974, Public Law 93-288, has authorized the making of certain disaster relief grants. The General Assembly wishes to make such Federal disaster relief grants, or other grants made available from Federal programs hereafter enacted, available to eligible individuals and families in order to alleviate the deprivation caused by storms or floods which have occurred in the past and seeks to address those emergencies of future years. However, the General Assembly is limited by rigid restrictions in the Constitution of the Commonwealth of Pennsylvania. The safety and welfare of the Commonwealth requires the prompt amendment to the Constitution to aid those already inflicted by the Great Storms of 1976 or 1977 and any future emergency that may strike Commonwealth citizens.

In order to effectuate a proper constitutional adjustment to permit receipt of federal disaster relief funds, subsection (b) was added to Article VIII, § 17.<sup>4</sup> It provided:

(b) Notwithstanding any provision of this Constitution to the contrary, subsequent to a Presidential declaration of an emergency or of a major disaster in any part of this Commonwealth, the General Assembly shall have the authority to make appropriations limited to moneys required for federal emergency or major disaster relief. This subsection may apply retroactively to the great storms or floods of 1976 or 1977.

As finally adopted, additional changes were made to Section 17(b), which now reads:

(b) Notwithstanding the provisions of Article III, Section 29 subsequent to a Presidential declaration of an emergency or of a major disaster in any part of this Commonwealth, the

<sup>4</sup> That which was previously Section 17 thus became Section 17(a).

General Assembly shall have the authority by a vote of two-thirds of all members elected to each House to make appropriations limited to moneys required for Federal emergency or major disaster relief. This subsection may apply retroactively to any Presidential declaration of an emergency or of a major disaster in 1976 or 1977.

Section 17(a) as finally adopted was also amended to reinsert "1976," but *not* "1977."

Significantly, *only* subsection (b) ("this subsection") applies to "1976 or 1977." Moreover, Section 17(b) permits the General Assembly, by two-thirds vote of each house, to "make appropriations *limited* to moneys required for federal emergency or major disaster relief." The Legislature, by use of the word "limited", manifested an intention that the substantive provisions thereafter set forth be more restrictive than the legislative grant in 17(a).

In excluding applicability of the permissive language in subsection (a) to the year 1977, *with full knowledge of the Johnstown disaster*, while at the same time adding the amendment making specific reference to Federal disaster legislation, and making *it* applicable to 1977, the Legislature evinced an intent not to permit the payment of direct state grants to the affected citizens of Johnstown by not submitting the question to the voters.

Counsel to the State Treasurer and Auditor General, in their comments submitted to us, both conclude that Act 1978-51 is constitutional under Article VIII, § 17(b). The Auditor General states that the word "Federal" should be held to modify only the word "emergency" but not the phrase "major disaster relief." The use of the conjunction "or" between these words is emphasized to support that "or" signifies an intent to ascribe to the term "major disaster relief" a meaning wholly unrelated to the preceding "Federal emergency." It is argued under this interpretation that monies allocated for "major disaster relief" are not limited to federal benefits, but may derive purely from state revenues, i.e., Act 1978-51 state grants. To reach this conclusion, however, we would have to overlook the context in which the amendment was adopted and the remaining provisions of House Bill No. 304. House Bill No. 304, Printer's No. 1861, as finally adopted, clearly stated its purpose to be that of "providing that special emergency legislation may be enacted when *federal emergency or disaster assistance is available*." (Emphasis added.)

Both of those terms are specifically defined in the Federal Disaster Relief Act of 1974, 42 U.S.C. § 5121, *et seq.* This Act (Public Law 93-288) which is specifically cited in the amendment, shows the following: Section 408(a) of Public Law 93-288, 42 U.S.C. § 5178(a) authorizes the President to make grants to a state for purposes of meeting disaster related needs of "individuals or families adversely affected by a *major disaster*." (Emphasis added.) "Major disaster" is defined by Section 102

of the Act, 42 U.S.C. § 5122 as a “. . . storm, flood, . . . which, in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter, above and beyond *emergency*.” (Emphasis added.) “Emergency” is separately defined in Section 102, *supra*, as that “which requires Federal emergency assistance to supplement State and local efforts to save lives and protect property.” “Emergency assistance” is also provided for in 42 U.S.C. § 5145. Determinations of either “emergency” or of a “major disaster” are made by the President after reviewing the request by the state governor. 42 U.S.C. § 5141. Based on request to find that an emergency exists, “the President may determine that an emergency exists which warrants Federal assistance.” 42 U.S.C. § 5141(a). Based on a request to declare a major disaster, “the President may declare that a major disaster exists, or that an emergency exists.” 42 U.S.C. § 5141(b). See also Section 306(a), 42 U.S.C. § 5146(a) (“In any major disaster or emergency. . .”).

Accordingly, we do not agree with the Auditor General’s interpretation. The use of “Federal emergency” and “major disaster relief” in Section 17 (b) is directly related to the grants which were made available by the Federal government and are to be given the same meaning as the federal act which gives them life.<sup>5</sup>

The State Treasurer also relies on the language of Article VIII, § 17(b) which refers to “a Presidential declaration of an emergency or of a major disaster. . .” He reads this to refer either to a Presidential declaration of an emergency or to the “occurrence of a major disaster.” For the reasons above-stated we do not believe that this is a proper reading of the Constitution because it completely ignores the context of Federal law under which it was adopted. In addition, there would have been no need to repeat the word “of” in the clause quoted. Indeed, it would not even be grammatical to use that word under the State Treasurer’s interpretation. Furthermore, the second sentence of the constitutional provision states that it applies “retroactively to any presidential declaration of an emergency or of a major disaster in 1976 or 1977.” Clearly, if the State Treasurer were correct, the second “of” should have been “to.”<sup>6</sup> It is therefore our conclusion, as expressed above, that the reference to both of these terms is not to divorce them from a Presidential declaration, but rather to tie them to the Federal Disaster Relief Act, as we have shown. Moreover, the whole purpose of the constitutional amendment adopting Article VIII, § 17(b) shows that this was the purpose.

5 It should be noted that implicit in the Auditor General’s argument is the authorization to the Legislature to determine what constitutes a “major disaster.” Significantly, Act 1978-51 does not purport to make such a determination.

6 It should also be noted that this sentence was amended to read as it does on final consideration to make specific reference to a “presidential declaration of an emergency or of a major disaster” rather than “to the great storms or floods of 1976 or 1977.”

Thus, we conclude that, given the deletion of "1977" from Section 17(a) and the use of the term "major disaster relief" in the context presented in Section 17(b), the Legislature did not present to the voters the question of whether they wanted to continue and expand the state flood relief grants to include the Johnstown flood victims. Accordingly, Act 1978-51 does not escape invalidity under Article III, § 29 by virtue of Article VIII, § 17.

III. The final question is what effect is to be given to our conclusion that Act 1978-51 is not sanctioned by the Constitution. Both the Auditor General and State Treasurer have observed that only the judicial branch of government can declare a statute unconstitutional. Further concern is expressed in that the Attorney General has a duty to represent the departments of the Commonwealth and that he must do his utmost to argue and sustain an enactment of the General Assembly. Reference is made to the case of *Hetherington v. McHale*, 10 Pa. Commonwealth Ct. 501, 311 A.2d 162 (1973), *rev'd. on other grounds*, 458 Pa. 479, 329 A.2d 250 (1974), to support this position. Finally, it is pointed out that neither of the fiscal officers is bound by an opinion of the Attorney General regarding constitutionality.

We appreciate the thoughts and opinions of the fiscal officers. We are cognizant of the fact that only the judiciary can declare a statute unconstitutional. On the other hand, we are bound by our oath to support, obey and defend the Constitution of Pennsylvania and our duty to advise state agencies of their responsibilities under law. This is not antithetical to our duty to represent such agencies because we will represent them in any litigation arising from our opinions. This is a position which has been taken by Attorneys General going back to the early days of our 1874 Constitution.<sup>7</sup> See, *Commonwealth ex rel. Wolfe v. Butler*, 99 Pa. 535 (1882); *Collins v. Commonwealth*, 262 Pa. 572 106 A.229 (1919); *Commonwealth ex rel. Schnader v. Liveright*, 308 Pa. 35 161 A.697 (1932). In *Commonwealth ex rel. Woodruff v. Lewis*, 282 Pa. 306, 127 A.828 (1925), the court recognized the right of an officer of the Commonwealth not to follow a law he believed was unconstitutional so that a proper suit could be brought to determine its validity.

Even those Attorneys General who took a more conservative view, such as Attorney General Bell, advised his then-client, the Auditor General, that while he would not tell him that a statute was unconstitutional, if the Auditor General had "substantial doubt" of the constitutionality of the act in question, he should decline to comply with the act

7 As early as 1881, Attorney General Henry W. Palmer stated in his opinion advising the State Treasurer not to make certain payments to members of the General Assembly:

It is the *right* of a private citizen to question the constitutionality of any act of assembly that infringes upon his rights and bring it before the courts for adjudication. It is the *duty* of a public officer who is sworn to support, obey and defend the Constitution to raise such a question and procure judicial determination whenever required to pay out public money under acts which he is properly advised are not sanctioned by the Constitution.



so that the matter could be litigated. *Mothers' Pensions*, 1913-14 Pennsylvania Attorney General's Opinions 47, 52, 41 Pa. C.C. 216, 222 (1913).

Even in *Hetherington v. McHale*, *supra*, where the Commonwealth Court held that the Attorney General ordinarily should not issue such opinions, the court recognized exceptions.

If the Attorney General in his opinion believes that a statute is unconstitutional, he has the right and indeed the duty to either cause to be initiated an action in the courts of this Commonwealth and thus obtain judicial determination of the issue or he may prepare, for submission to the General Assembly, such revision of the statute as he may deem advisable. . . 10 Pa. Commonwealth Ct. at 511, 311 A.2d at 167.

It is significant that on appeal, the Supreme Court, in reversing the Commonwealth Court, did not discuss the opinion of the Commonwealth Court relating to the Attorney General's power, but rather *held, on the merits, that the opinion of the Attorney General was correct*. *Hetherington v. McHale*, 458 Pa. 479, 329 A.2d 250 (1974), reversing 10 Pa. Commonwealth Ct. 501, 311 A.2d 162 (1973).

Even accepting the above-quoted statement of the Commonwealth Court, it recognized the "right and indeed the duty" of the Attorney General to "cause to be initiated an action in the courts of this Commonwealth." In this particular case, the *only way* that the Attorney General can "cause to be initiated an action in the courts of the Commonwealth" is to advise the Department of Public Welfare that his conclusion precludes the Department from paying the grants. Those individuals who have claims and believe that the statute requires them to be paid will then have the right to commence actions against the Commonwealth to have them paid. The result of this opinion will be the fulfillment of the suggestion of the Commonwealth Court. The suggestion of submitting legislation is illusory in this case. There is no action that we ourselves could initiate to test the issue.<sup>8</sup>

Our action in issuing this advice does not encroach on the judicial function, because it does not declare the statute to be unconstitutional. It rather acts as the catalyst to bring the issue before the courts when, in fulfilling our responsibilities under the Administrative Code, we conclude that a state agency should not administer a certain statute because it is unconstitutional.<sup>9</sup> This view was perhaps best summarized

<sup>8</sup> Where such a course is available, we have pursued it. See *Shapp v. Sloan*, 27 Pa. Commonwealth Ct. 312, 367 A.2d 791 (1976), *aff'd*, 480 Pa. 449, 391 A.2d 595 (1978).

<sup>9</sup> Significantly, in the first case in which the Supreme Court of Pennsylvania held that the judiciary had the authority to *declare* a statute unconstitutional, it recognized the duties of the executive branch in this regard as well:

Whether the party moves in the sphere of the Legislative, Executive, or Judicial department, he is bound to maintain and uphold those compacts made with the people. . . In the Executive branch, he shall carefully avoid every act which may have that injurious tendency. *Emerick v. Harris*, 1 Binn. 416, 421 (1808). (Emphasis added).

by then Attorney General Packel in his brief to the Supreme Court of Pennsylvania in *Hetherington v. McHale*:

The advice of unconstitutionality given to the official does not suspend or abrogate the statute. It tells the official that, unless otherwise ordered by a court he may disregard a statutory provision. Such an opinion is in no way binding upon the public. The law is still on the books. . . [A]ny aggrieved person has a right to go to court to test the propriety of the official's conduct. It is for this reason that the opinion of the Attorney General refers to the obligation of the public official to disregard a provision believed to be unconstitutional and does not make a bald declaration of unconstitutionality.

### CONCLUSION

We have set forth our views in full because we believe that our advice on an issue of this nature should not issue lightly. We are aware of our duty to try to find a constitutional basis for state statutes wherever possible, and have striven to do so. In this regard, we appreciate the views of counsel to the Auditor General and counsel to the State Treasurer. Nevertheless, for the reasons set forth above, based on past judicial construction of Article III, § 29 and the history of Article VIII, § 17, which explicitly recognizes the applicability of Article III, § 29 to this question, we are unable to agree with their conclusion.

There has been significant pressure on this office to place a constitutional seal of approval on the Act 1978-51 grants to flood victims on the theory that public policy *favours* an interpretation upholding the program. It is important, however, to note that for each dollar paid to an individual flood victim, that same dollar comes out of the pocket of the taxpayers of Pennsylvania. The concern with the payer as well as the receiver must be within the scope of the review. The constitutional bar against "charitable" or "benevolent" appropriations is just that recognition. The people have a legal right to be specifically and directly consulted before their tax dollars are used to fund direct charitable and benevolent payments to individuals. This was not done in this case. The permission sought of the voters related solely to the use of state tax dollars to obtain matching federal funds and it was that proposition and no other which they approved.

It is therefore our opinion, and you are so advised, that you are not to approve payments under Act 1978-51.<sup>10</sup>

Very truly yours,

CONRAD C. M. ARENSBERG  
*Deputy Attorney General*

<sup>10</sup> We have already advised you to accept applications under the Act so that, in the event that a court of competent jurisdiction should hold that Act 1978-51 is constitutional, you will be in a position to implement the Act.

LANCE H. LILIEN  
*Deputy Attorney General*

GERALD GORNISH  
*Acting Attorney General*

---

OFFICIAL OPINION NO. 78-16

*General Appropriation Bill—Substantive Language—Pennsylvania Constitution—Article III, § 11*

1. The General Appropriation Bill shall embrace nothing but appropriations for the Executive, Legislative and Judicial departments of the Commonwealth, for the public debt and for public schools.
2. The General Appropriation Act may not contain substantive language, but it may contain language conditional or incidental to an appropriation. The test to determine whether language is substantive and unconstitutional or conditional and constitutional is as follows:
  - A. The first condition is that the language be germane to the appropriation; once the germaneness is determined,
  - B. The second condition is that the language not repeal or amend a current statute; and finally
  - C. The third condition is that the provision not extend beyond the life of the Appropriation Act. If the provision attempts to do something permanent, then it is an act of substantive legislation and is unconstitutional.

August 11, 1978

Honorable Milton J. Shapp  
Governor, Commonwealth of Pennsylvania  
238 Main Capitol Building  
Harrisburg, Pennsylvania 17120

Dear Governor Shapp:

You requested an opinion of this office regarding the scope and meaning of Article III, § 11 of the Pennsylvania Constitution, with respect to the inclusion of substantive legislative language in a general appropriation bill. You received an opinion from Deputy Attorney General Conrad C.M. Arensberg dated May 31, 1978, in order to guide you in considering the General Appropriation Act of 1978.

We have subsequently received the views of the State Treasurer and Auditor General in accordance with Section 512 of the Administrative Code of 1929, 71 P.S. § 192. They do not concur in the opinion.

Nevertheless, it is my opinion and you are hereby advised that the opinion of May 31, 1978, which is attached hereto in full, is hereby adopted as the official opinion of this office.

Very truly yours,  
GERALD GORNISH  
*Acting Attorney General*

May 31, 1978

Honorable Milton J. Shapp  
Governor  
Commonwealth of Pennsylvania  
225 Main Capitol  
Harrisburg, PA 17120

Dear Governor Shapp:

You have asked for a detailed explanation of the scope and meaning of Article III, § 11 of the Pennsylvania Constitution, with respect to the inclusion of substantive legislative language in a general appropriation bill.

Article III, § 11 is one of several provisions in the Constitution detailing the appropriation powers of the General Assembly. These provisions are necessary to a coherent functioning of government and receive strict enforcement by the courts, both in Pennsylvania and in other states with similar constitutional provisions. Accordingly, it is our opinion and you are hereby advised that Article III, § 11 is as vital today as when it was first adopted. Its effect is to prohibit the enactment of substantive legislation by means of a general appropriation act; that mandate is still binding upon the General Assembly.

### HISTORY

The omnibus bill, containing provisions on a variety of subjects, posed problems to an orderly and rational legislative process as early as Roman times. *See*, Luce, *Legislative Procedure* 548 (1922). While the omnibus bill was a source of dissatisfaction in colonial days, it was not until the 19th century that the one-subject rule for laws began working its way into state constitutions. *See*, Ruud, *No law shall embrace more than one subject*, 42 Minn. L.Rev. 389 (1958). The provision which is set forth in Article III, § 3 of the Pennsylvania Constitution is typical of most state constitutions; it states:

No bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof.

The primary and universally recognized goal of the one-subject rule is to prevent log-rolling—the practice of several minorities combining their several, different proposals into one bill in order to obtain a majority vote for the omnibus bill, where no single proposal could have obtained majority approval separately. A variation of log-rolling is the “rider”, which is the attachment of a proposal to a bill that is certain of passage, so that the rider secures adoption not on its own merits, but on the merits of the measure to which it is attached. *See*, Crawford, E.T., *Statutory Construction* § 95 (1940); 1A Sands, *Sutherland Statutory Construction* § 17.01 (1972). In addition to preventing log-rolling the one-subject rule promotes an orderly legislative process; by limiting

each bill to one subject, the issues presented by a bill can be better grasped and more intelligently discussed.

General appropriation bills are excepted from the mandate of Article III, § 3, so that the General Assembly need not pass hundreds of bills in order to enact a budget. A general appropriation bill, nevertheless, presents a special temptation for the attachment of riders. It is a necessary and popular bill, usually certain of passage. The sheer bulk of the bill makes it easy for an attached rider to escape the attention which would cause it to face deletion by amendment. If the rider is attached by a conference committee, neither house can remove the rider by majority vote but must accept or reject the entire bill. A rider would have to be very offensive in order for a house to reject the entire bill because it disapproves of a rider. The same consideration constrains the Governor when he must pass on the bill. Veto is unlikely as a governor will be loathe to bring the wheels of government to a halt for want of funds. In short, a substantial danger exists that the principle of majority rule may be subverted by a rider in a general appropriation bill. *See, Commonwealth v. Barnett*, 199 Pa. 161, 172-173, 48 A. 976, 977 (1901).

Our Constitution has addressed this danger in Article III, § 11, which states as follows:

The general appropriation bill shall embrace nothing but appropriations for the executive, legislative and judicial departments of the Commonwealth, for the public debt and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject.

Under Article III, § 11, a general appropriation act is a permissible omnibus bill but one that in its pristine form, ought to contain nothing but appropriations of amounts of money and their designation. An appropriation act must not contain substantive language; if it does, then it becomes precisely the kind of omnibus bill the single subject rule was meant to prohibit. The object of Article III, § 11 is identical to that of Article III, § 3, i.e. to prevent the practice of passing legislation by log-rolling or by rider. *See, White, Commentaries on The Constitution of Pennsylvania*, 291-92 (1907); P.L.E., Statutes, § 83.

#### **TESTS FOR JUDGING THE CONSTITUTIONALITY OF AN APPROPRIATION ACT.**

Strictly interpreted, Article III, § 11 mandates a general appropriation bill that is nothing more than a bare schedule of amounts appropriated and the objects of the expenditures. No court, however, in Pennsylvania or elsewhere, has applied the language of Article III, § 11 in such a literal fashion. In a leading case, *Comm. ex rel. Greene v. Gregg*, 161 Pa. 582, 29 A. 297 (1894), for example, the Court held constitutional a provision within the appropriation act authorizing employment of a clerk in the office of the Supreme Court prothonotary and appropriating money to pay the salary. The Court concluded that this lan-

guage was simply incidental to the main purpose of the appropriation act, that is "to secure the performance of the regular and ordinary work of the office." *Id.* at 588, 29 A. at 298. The Court was fully cognizant of the danger against which Article III, § 11 was intended to guard and issued a learned summary of the provision. The Court also recognized that it "cannot be assumed that the constitution meant to compel the legislature even to supervise all the details of the government," which would be the logical consequence if the General Assembly were required to enact "a separate bill. . . every time an additional clerk was to be appointed in a public department." *Id.* at 587-588, 29 A. at 298. Three Pennsylvania Attorney General Opinions also provide support for the use of this type of incidental language in an appropriation act. *See*, Op. Att'y. Gen. No. 59 (1958); Op. Att'y. Gen. No. 12 (1957); 1905-1906 Op. Att'y. Gen. 355 (July 21, 1905).

Cases from other jurisdictions provide examples of language in an appropriation act which may appear substantive but which were found to be language "conditional" or "incidental" to an appropriation and therefore proper. In *Lewis v. State*, 352 Mich. 422, 90 N.W.2d 856, 860 (1958), the Supreme Court of Michigan concluded that language in an appropriation act which reduced state military retirement benefits by the amount an officer received from the federal government to be constitutional: "Limitational provisos, appended to appropriations made by an act thus entitled, are quite germane to the title-declared objective and belong there." The Court quoted an attorney general opinion which held,

The tying of legislative strings to appropriations of state funds for governmental purposes has never been considered as adding a second object to an appropriation law, although the Supreme Court has held invalid conditions attached to appropriation acts, which conditions amounted to legislative invasion of foreign fields. (Citations omitted). Opinion No. 764 (Mich. Op. Att'y. Gen. 1947-1948, p. 675).

The use of limitational language in an appropriation act was specifically held constitutional by one Pennsylvania Attorney General on the theory that merely because a statute authorizes the General Assembly to appropriate money to a program does not require it to appropriate. *See* Op. Att'y Gen. No. 12 (1957).

Another example of "incidental" language that met with court approval was a provision limiting reimbursement for lodging and subsistence to \$5 per day. *State ex rel. Whittier v. Safford*, 28 N.M. 531, 214 P. 759 (1923). A provision in a deficiency budget which authorized the Commissioner of General Services to negotiate a contract for construction of a library and museum was challenged in *Schuyler v. South Mall Constructors*, 32 App. Div. 2d 454, 303 N.Y.S.2d 901 (1969) The court concluded that this provision did not violate the proscription against substantive language since it was incidental to the act of appropriation.

Case law also offers, on the other hand, examples of provisions that may appear to be nothing more than "incidental" to an appropriation but which were found to be substantive language and therefore unconstitutional. A rider declaring that both a husband and wife may not be included on the public payroll was held to be an unconstitutional attempt to establish a new qualification for state employment. *Caldwell v. Board of Regents*, 54 Ariz. 404, 96 P.2d 401 (1939). A provision in an appropriation act that limited public assistance to single people to those over 50 years of age was found unconstitutional in *Flanders v. Morris*, 88 Wash.2d 183, 558 P.2d 769 (1977). The same result was reached respecting a provision authorizing the state highway commission to pledge proceeds received from vehicle fuel taxes to guarantee payment of principal and interest on toll bridge bonds. *Washington Toll Bridge Authority v. Yelle*, 54 Wash.2d 545, 342 P.2d 588 (1959).

Permitting "conditional" or "incidental" language in an appropriation act has, accordingly, generated litigation on the question of interpretation. The line between conditional and substantive language is a fine one, and a catalogue of holdings is not decisive in drawing the line since the holdings cannot be fully reconciled. It is difficult to see the difference, for example, between a provision authorizing a commissioner to construct a building, as in *Schuyler v. South Mall Constructors*, *supra*, and one which authorizes a commissioner to pledge funds in a certain way, as in *Wash. Toll Bridge Authority v. Yelle*, *supra*, and yet the results in these cases were opposite. Another problem with the cases is that often the conclusion is reached on the *ad hoc* basis without any attempt to establish a set of standards by which to test questionable language. In Pennsylvania, there have been at least ten Attorney general opinions<sup>1</sup> on the subject of what constitutes substantive language in an appropriation act but few contain more than a recital of the reasons for outlawing riders.

While a study of holdings alone is not particularly helpful in establishing guidelines by which to test questionable provisions in an appropriation act, a review of the analyses made by some of the courts and in some of the Pennsylvania Attorney General opinions is of use. In *Schuyler*, *supra*, for example, the Court simply looked to see if the questionable provision was germane to appropriations. This kind of approach to the problem was also applied in a recent case, *Henry v. Edwards*, \_\_\_ La. \_\_\_, 346 So.2d 153 (1977), but with the opposite result. The court rejected attempts by the legislature to circumvent constitutional strictures by:

. . . artfully drafting general law measures so that they appear to be true conditions or limitations on an item of appropriation. . . . Conditions and limitations properly included in an ap-

<sup>1</sup> See, Op. Att'y Gen. No. 11 (1977); Op. Att'y Gen. No. 268 (1966); Op. Att'y Gen. No. 237 (1961); Op. Att'y Gen. No. 101 (1958); Op. Att'y Gen. No. 59 (1958); Op. Att'y Gen. No. 16 (1957); Op. Att'y Gen. No. 12 (1957); Op. Att'y Gen. No. 7 (1957); Op. Att'y Gen. No. 81 (1933); 1905-1906 Op. Att'y Gen. 355 (July 21, 1905)

appropriation bill must exhibit such a connexity with money items of appropriation that they logically belong in a schedule of expenditures. *Id.* 346 So.2d at 158.

A study of germaneness, then, while a starting point, may tend to weed out only the most egregious violations.

In *Flanders, supra*, the Court struck down the provision that prevented single people under 50 from collecting public assistance because it conflicted with an already existing general law. The provision was actually an amendment to the public assistance law and as such, the Court decided, "the proper legislative procedure is to enact separate, independent, properly titled legislation." *Id.* 558 P.2d at 773. If a provision amends or repeals an already existing law, it is substantive and must follow the correct procedure for amendments. *See*, 1A, Sands, *Sutherland Statutory Construction* § 22.16. In five Pennsylvania attorney general opinions language was found to be violative of Article III, § 11 on the basis that it conflicted with other laws. *See*, Op. Att'y Gen. No. 237 (1961); Op. Att'y Gen. No. 101 (1958); Op. Att'y Gen. No. 16 (1957); Op. Att'y Gen. No. 12 (1957); Att'y Gen. No. 81 (1933).<sup>2</sup>

The fact that a questionable provision does *not conflict* with an act of general legislation does not, however, immunize it from constitutional attack. It is equally unconstitutional for the Legislature to use an appropriation rider to establish new programs or provisions that should properly be enacted in separate bills with the purposes clearly expressed in their titles. While it may be more difficult to challenge substantive language that does not repeal or amend an existing law, such challenges have been successfully made. Case law and Pennsylvania Attorney General opinions offer examples of ways to analyze appropriations riders that attempt to establish new law.

The first point to be examined is whether or not the provision is germane to appropriations. In Opinion No. 16 (1957) the Pennsylvania Attorney General advised a Commonwealth agency to ignore an unconstitutional appropriations rider. He reasoned that new fiscal procedures mandated in the appropriations act constituted an attempt to es-

---

2 As already noted, limitational provisos are proper in an appropriations act. This view was supported and explained by the Pennsylvania Attorney General in Opinion No. 12 of 1957. In this opinion, the question was whether Act No. 95-A of 1957 conflicted with sections of the Public School Code. The School Code authorized reimbursement to school districts for adult extension classes, but the appropriation act limited reimbursement to extension classes for the blind. The Attorney General found no conflict between the two acts because the Legislature is not obligated to appropriate funds merely because it is authorized to appropriate.

On the other hand, Official Opinion No. 81 (1933) rejected as unconstitutional some riders that limited the salaries of certain medical personnel at state owned hospitals. The limits conflicted with the Administrative Code which gave the Executive Board the right and duty to establish salaries. Thus, the mere fact the language in question is "limiting" will not insulate it from attack under Article III, § 11 if there is a conflict with a general law. In short, the power to "limit" appropriations is not without bounds.



tablish new regulations and were not appropriations. He concluded that "[i]f the legislature wants to impose special requirements. . . in the handling of these funds, it must do so by a bill apart from the general appropriation bill."

In addition to noting that the language was not germane, the Attorney General also observed that it established new fiscal procedures which were permanent in nature. Thus permanency will likewise invalidate substantive language in an appropriation act. In *Washington Toll Bridge, supra*, the Court found that since appropriations are temporary in nature, "it follows that if legislation of a general and continuing nature is passed, it cannot come under the subject of appropriations." *Id.* 342 P.2d at 592. The Supreme Court of New Mexico also invalidated a provision in an appropriation act on the grounds it attempted to establish a permanent policy. *Delgado v. Sargent*, 18 N.M. 131, 134 P. 218 (1913). The provision considered in that case provided a certain disposition of funds collected by the insurance department, which was to continue indefinitely. The court noted that the provision probably was germane to appropriations and would have been constitutional but for its permanent character. Any provision, therefore, that appears to be permanent or will endure beyond the life of the appropriation act<sup>3</sup> is likely to be substantive in nature and thereby unconstitutional, even if it appears germane to appropriations.

Guidelines, for deciding whether or not a provision is allowing as "conditional" or "incidental" language, include reviewing the language to determine: (1) germaneness to appropriations, (2) conflicts with already existing general law, and (3) duration of the provision. These guidelines will not resolve every ambiguity. One court has remarked: "We conclude. . . that the ultimate test is one of appropriateness." *Henry v. Edwards, supra*, \_\_\_\_, 346 So.2d at 158.

### NON—PREFERRED APPROPRIATIONS

Not every appropriation made by the General Assembly belongs in the general appropriation act. Article III, § 11 states that only the operating budgets for the three branches of government and money for the public debt and for public schools can lawfully be enacted in the form of an omnibus bill: "All other appropriations shall be made by separate bills, each embracing but one subject." An appropriation to a charitable or educational institution is an example of an "other appropriation". Non-preferred appropriations are excluded from the general appropriation act not only by operation of Article III, § 11 but also by Article III, § 30 which provides as follows:

3 The Pennsylvania Attorney General noted, however, in Official Opinion No. 268 of 1966 which interpreted the scope of Article III, § 11 (then § 15), that the spending in an appropriation act can extend beyond one fiscal year. What limits the legislature in its ability to appropriate is the amount of revenues received in a given fiscal year. It has the right to take longer than one fiscal year to spend those revenues. In that opinion, the length of time the legislature has to spend money was the only question, not whether or not a particular provision was substantive.

No appropriation shall be made to any charitable or educational institution not under the absolute control of the Commonwealth, other than normal schools established by law for the professional training of teachers for the public schools of the State, except by a vote of two-thirds of all the members elected to each House.

This provision was first enacted in the Pennsylvania Constitution of 1874, and the debates of the Constitutional convention of 1873 are most instructive on the origins of Article III, § 30. The members of the convention were anxious that public money be given freely to worthy charities but equally concerned that it be given wisely. At that time the abuses of charitable contributions were flagrant. Some "charities" were nothing more than front organizations by which money was funneled back to legislators' or other favored persons' pockets. Even the legitimate charities often had to share large parts of their appropriations with legislators in kickback money. Charitable giving had been reduced to an institutionalized system of bribery. See, *Debates of the Convention to Amend the Constitution of Pennsylvania*, Vol. II. 636-648 (1873); *White, Commentaries on the Constitution of Pennsylvania*, 274-275 (1907).

Article III, § 30 was adopted to prevent exploitation of public donations to charities. The two-thirds vote was deemed necessary to end phony giving, but it was not so high a vote as to impede honest contributions. Article III, § 3 is also an important ingredient of the scheme of protection the Constitution establishes. Each charitable contribution must be enacted separately, lest that by log-rolling contribution bills together the two-thirds vote would become a meaningless impediment to the abuses that had developed around charitable giving.

For all of these protective reasons, the Constitution requires that legislation unconnected with Commonwealth financing be enacted by separate bills, and if it is in aid of a charitable institution, then by a two-thirds vote.

### CONCLUSION

The policy considerations that gave rise to the adoption of Article III, § 11 in the Pennsylvania Constitution are not difficult to grasp and to recite. The problem with respect to this provision is in the application of its mandate. The courts permit "conditional" language in an appropriations act but never "substantive" language, and it is often not easy to distinguish between the two. By a study of case law and previous attorney general opinions, we have derived a test by which to make a determination of constitutionality:

1. The first condition is that the language be germane to the appropriation; once the germaneness is determined,
2. the second condition is that the language not repeal or amend a current statute; and finally

3. the third condition is that the provision not extend beyond the life of the appropriation act. If the provision attempts to do something permanent, then it is an act of substantive legislation and is unconstitutional.

These guidelines will not accomplish the task of interpretation in every instance, but they do provide a starting point. The ultimate test, of course, is a determination of whether the provision in question represents the type of mischief the single subject rule was meant to prevent. Moreover, it must be remembered that making the distinction between "substantive" or "incidental" language is not the only constitutional question to be decided when considering an appropriation act. There are many provisions in the Pennsylvania Constitution that may have particular relevance to an appropriation act such as the prohibition against increasing the salary of a public officer after his election or appointment (Article III, § 27), the prohibition against appropriating funds for benevolent purposes to an individual (Article III, § 29), or the prohibition against any legislation that impairs contract rights (Article I, § 17).

Finally, an appropriation act must contain only items for the executive, legislative and judicial departments of the Commonwealth, for the public debt and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject.

Bearing these Constitutional principles in mind, this office has analyzed the general appropriations bill currently on your desk (House Bill 2246, Printer's No. 3156). This analysis, wherein we find certain language to be substantive in nature, and thus improperly contained in the general appropriation bill, is attached as an Appendix. This office stands ready to assist further should questions arise.

Sincerely yours,

CONRAD C. M. ARENSBERG  
*Deputy Attorney General*

#### APPENDIX

Applying the principles established in the foregoing opinion, an examination of House Bill 2246, Printer's No. 3156 reveals the following language improperly contained in this general appropriation bill. This language is basically improper because it violates Article III, § 11 of the Constitution as it is unconstitutionally substantive in nature. For a precise analysis of the impropriety of this language, please see the text of the opinion to the Honorable Milton J. Shapp of this date.

Secretaries of the Departments in whose appropriation this improper language is found are instructed that the language contained in the bill as noted herein is a nullity, and that they may properly ignore the intent and substance of the language. Department Secretaries are cau-

tioned however, that by this ruling we are not invalidating the general import of the language at this time, nor are we commenting on the advisability or the legality of the language if it were properly enacted at some later date. We limit our holding only to the fact that this language is unconstitutionally found in this bill. We also note that additional language may be found to be improper as comparisons are made during the fiscal year between this budget bill and existing statutory programs in the Departments.

The following language is found to be improper in House Bill 2246, Printer's No. 3156 (1978):

To the Treasury Department

p. 6, line 7 - 10:

All moneys in the Vietnam Veterans' Compensation Fund not needed to pay claims presently on hand shall be transferred to the Vietnam Veterans' Compensation Sinking Fund.

To the Department of Education

p. 12, line 9 - 11:

No funds appropriated herein shall be used in any way relating to State Colleges and University Distinguished Faculty Awards.

p. 13, line 8 - 30; p. 14, line 1 - 30; p. 15, line 1 - 30; and p. 16, line 1 12:

Note: This language referring to reports by state colleges is too lengthy to include herein but shall be considered null and void by this reference to the bill.

p. 17, line 17 - 21:

Provided, That in the event a claim exists for an intermediate unit and/or a school district and Secretary of Education shall prior to any other payments, pay those prior claims first.

p. 19, line 9 - 13:

For fiscal year 1978-1979 and each fiscal year thereafter, the Commonwealth shall not be liable for any retirement expenses incurred by school districts for district employees funded by Federal funds.

p. 20, line 25 - 30; p. 21, line 1 - 15:

Note: This language referring to funds for community colleges is too lengthy to include herein but shall be considered null and void by this reference to the bill.

To the Department of General Services

p. 27, line 10 - 17:

No funds from any of the above appropriations to the Department of General Services shall be used to establish or operate any Public Assis-

tance Office at 7143 to 7145 Frankford Avenue in Philadelphia, Pennsylvania, said location also known as the Merban Theater, nor shall any funds appropriated herein be expended for any salaries or transfers of any employees to this location.

To the Department of Health

p. 27, line 30; p. 28, line 1 - 2:

The Department of Health shall not charge any State agency in any manner for such services.

To the Department of Public Welfare

p. 36, line 9 - 29:

Note: This language referring to certain reports of the Department is too lengthy to include herein but shall be considered null and void by this reference to the bill.

p. 38, line 3 - 10:

Subject to Federal law and regulations, the department shall fix the reimbursement fees at an amount not less than that allowed for the previous fiscal year for out-patient hospital visits for those hospitals qualified to participate under Title XIX of the Federal Social Security Act and meet the special criteria for clinic participation established by Medical Assistance Regulation 9412-11.

p. 38, line 11 - 16:

No money shall be disbursed from this appropriation to pay for, make reimbursement for, or otherwise to support the performance of any abortion except where the abortion is certified in writing by a physician to be necessary to save the life of the mother.

p. 38, line 28 - 30; p. 39, line 1 - 4:

Provided, That any rule, regulation or policy adopted by the Secretary of Public Welfare during the fiscal period 1978-1979 which adds to the cost of any public assistance programs shall be effective only from and after the date upon which it is approved as to the availability of funds by the Governor.

p. 41, line 13 - 20:

No funds from any of the above appropriations to the Department of Public Welfare shall be used to establish or operate any Public Assistance Office at 7143 to 7145 Frankford Avenue in Philadelphia, Pennsylvania, said location also known as the Merban Theater, nor shall any funds appropriated herein be expended for any salaries or transfers of any employees to this location.

To the Pennsylvania State Police

p. 42, line 30, p. 43, line 1 - 4:

No State Police substation shall be closed until the State Police have

presented justification and received approval for such action before a public hearing of the Appropriation Committees of the House of Representatives and the Senate.

---

OFFICIAL OPINION NO. 78-17

*Department of Community Affairs—Act 13 of 1973—26 P.S. § 1-602*

1. Owners of real property damaged in the floods of 1971 or 1972 and acquired by a local public agency who receive pre-flood value based on 26 P.S. § 1-602 are not eligible for a Flood Relief Grant under Act 13 of 1973 even though such property is voluntarily transferred to the local public agency.
2. The use of the term "condemned" in Section 2 of Act 13 is intended to cover voluntary or amiable acquisitions as well as formal condemnation proceedings.

August 14, 1978

Honorable A. L. Hydeman, Jr.  
 Secretary of Community Affairs  
 South Office Building  
 Harrisburg, PA 17120

Dear Secretary Hydeman:

You have requested our opinion as to whether persons whose real property was acquired by a redevelopment authority or other local public agency at pre-flood values are eligible for a Pennsylvania Flood Relief Grant under the Act of May 11, 1973, P.L. 27 (Act 13). It is our opinion, and you are so advised, that they are not eligible.

The General Assembly passed Act 13 of 1973 to provide for up to a maximum of \$3,000 per applicant to non-farm owners of homes or personal property damaged or destroyed by the floods of September, 1971 or June, 1972. Section 2 of Act 13 provides:

If real property was condemned under eminent domain proceedings and where measure of damages is calculated under Section 602 of the Act of June 22, 1964 (P.L. 84, No. 6), known as the "Eminent Domain Code" said owner shall not be eligible for the grant provided in Section 1 hereof.

Section 602(c) of the Eminent Domain Code, Act of June 22, 1964, P.L. 84, as amended, 26 P.S. § 1-602(c), referred to in Act 13 provides:

In case of the condemnation of property in connection with any program or project which property is damaged by floods, the damage resulting therefrom shall be excluded in determining fair market value of the condemnee's entire property interest therein immediately before the condemnation.

The facts as you have stated indicate that many homeowners voluntarily transferred their properties to public authorities without the

filing of formal declarations of taking, which is normally the initial step in a condemnation proceeding. These homeowners received pre-flood value for their properties as provided in Section 602(c). The crux issue, therefore, is whether voluntary transfers of real property at pre-flood value to redevelopment authorities or other public agencies constitute a condemnation, as contemplated by the Legislature, which would disqualify the homeowner from benefits under Act 13.

In our opinion the most reasonable conclusion is that the Legislature did intend to exclude such voluntary transferors from receiving the grant.

Many thousands of properties were acquired without formal condemnation proceedings throughout the Commonwealth by various redevelopment authorities and other public agencies after the flood of 1972. If formal condemnation proceedings had been required to accomplish all these acquisitions, with the corresponding use of court time and manpower, then monies utilized to compensate property owners would instead have been diverted to legal and administrative costs. It is therefore understandable that the various agencies in question decided to obtain properties without formal condemnation, thereby reducing the costs of acquisition. But once having determined that "condemnation" for purposes of payment of pre-flood value under the Eminent Domain Code may be accomplished by voluntary acquisition, then it logically follows that condemnation for purposes of Act 13 exclusion must equally encompass a voluntary transfer.

The only authority to pay these individuals pre-flood values is Section 602(c), which refers to "the condemnation of property." The facts presented to us are that the homeowners claiming a state grant received pre-flood value for their property even in the absence of formal condemnation proceedings. They were, accordingly, treated as condemnees under the Eminent Domain Code and received the benefit of Section 602(c). Accordingly, we do not believe that a real property owner can on one hand contend that a voluntary acquisition should not be considered as a condemnation for purposes of exclusion from the grant and on the other hand accept the pre-flood benefits of Section 602, which are predicated on a "condemnation." The Legislature could not have intended to create such an absurd dichotomy.

The purpose of Act 13 was to give grants for certain losses as a result of the 1971 and 1972 floods. Once, however, a homeowner received pre-flood value for his or her home, eligibility for the grant was eliminated. For this reason Section 2 of Act 13 was enacted as part of the law. It would be illogical to allow the grant to owners whose properties were not formally condemned but were nevertheless in the same financial position as those whose properties were acquired in formal condemnation proceedings.

Accordingly, it is our opinion that the use of the term "condemned" in Section 2 of Act 13 is intended to cover voluntary or amiable acquisi-

tions as well as formal condemnation proceedings, and the determination as to whether a Flood Relief Grant may be paid is dependent upon the manner in which damages are measured under Section 602 of the Eminent Domain Code and not the method of acquisition.

Very truly yours,

LANCE H. LILIEN

*Deputy Attorney General*

GERALD GORNISH

*Acting Attorney General*

---

OFFICIAL OPINION NO. 78-18

*Non-preferred appropriations are excluded from the general appropriation act by operation of Article III, § 11 and Article III, § 30.*

1. Act of May 31, 1978, P.L. 1485, No. 16-A discussed and construed.
2. Pennsylvania Constitution, Article III, § 11 and § 30 discussed and construed.
3. Non-preferred appropriations are excluded from the general appropriation act by operation of Article III, § 11 and Article III, § 30.

August 16, 1978

Honorable Charles P. McIntosh  
Budget Secretary  
Office of the Budget  
425 S.W. Main Capitol  
Harrisburg, PA 17120

Dear Secretary McIntosh:

You have asked for our legal evaluation of the Act of May 31, 1978, P.L. 1485, No. 16-A, in particular an examination of the act to determine if it contains constitutionally impermissible appropriations. Please be advised as follows:

The general appropriation act, under Article III, § 11 must contain no items except the operating budget for the three branches of government and money for the public debt and for public schools. "All other appropriations shall be made by separate bills, each embracing but one subject." Categories of "other appropriations" not to be enacted through the general omnibus bill include charitable and educational institutions not directly controlled by the Commonwealth. Article III, § 30, which reads as follows, deals specifically with these non-preferred appropriations.

No appropriation shall be made to any charitable or educational institution not under the absolute control of the Commonwealth, other than normal schools established by law for



the professional training of teachers for the public schools of the State, except by a vote of two-thirds of all the members elected to each House.

This provision was first enacted in the Pennsylvania Constitution of 1874, and the debates of the Constitutional Convention of 1873 are most instructive on the origins of Article III, § 30. The members of the convention were anxious that public money be given freely to worthy charities but equally concerned that it be given wisely. "Certain abuses of a very flagrant character having crept into the practice of making large appropriations to real or alleged charitable or educational institutions, it being charged that there was a regular system of bribery by division of the appropriations, the entire matter was regulated by [Article III, §§ 29, 30]." *White, Commentaries on the Constitution of Pennsylvania*, 274-275 (1907). Legitimate charities often had to share large parts of their appropriations with legislators in kickback money. Charitable giving had been reduced to an institutionalized system of bribery. *See, Debates of the Convention to Amend the Constitution of Pennsylvania*, Vol. II, 636-648 (1873).

Article III, § 30 was adopted to prevent exploitation of public donations to charitable and educational institutions. The two-thirds vote was deemed necessary to assure that state taxpayer funds would be bestowed wisely and that all truly necessitous cases would be provided for.

Article III, § 30 provides further protection against potential abuses through the removal of non-preferred appropriations from the general appropriation bill. Each charitable appropriation must be enacted separately under Article III, § 11, lest the two-thirds vote become a meaningless impediment to the abuses that had developed around appropriations to charitable or educational institutions not under the absolute control of the Commonwealth by log-rolling the various appropriations together in one bill.

Non-preferred appropriations, then, are excluded from the general appropriations act by operation of Article III, § 11 and Article III, § 30. The Constitution requires that legislation unconnected with Commonwealth financing be enacted by separate bills, and if it is in aid of a charitable or educational institution not under the absolute control of the Commonwealth, it must be passed by a two-thirds vote.

In accordance with Section 512 of the Administrative Code, 71 P.S. § 192, the Auditor General and the State Treasurer have been afforded an opportunity to present any views which they may have upon this matter.

Bearing these constitutional principles in mind, this Office has reviewed the language contained in the recently overridden line item vetoes relating to non-preferred appropriations. This review, wherein we find certain appropriations are made to non-preferred institutions, and thus improperly contained in the general appropriation act, is at-

tached as an Appendix. This office stands ready to assist further should questions arise.

Sincerely yours,

CONRAD C. M. ARENSBERG  
*Deputy Attorney General*

GERALD GORNISH  
*Acting Attorney General*

### APPENDIX

Applying the principles established in the foregoing opinion, an examination of Act No. 16-A of 1978 reveals the following language improperly contained in this general appropriation act. This language is basically improper because it violates Article III, § 11 and Article III, § 30 of the Constitution by including non-preferred appropriations in a general appropriations act.

Charitable and educational institutions listed below are instructed that the language contained in the act as noted herein is a nullity. All institutions affected by this ruling are advised, however, that we are not commenting on the advisability or the legality of these appropriations if they were to be properly enacted at some later date. We limit our holding only to the fact that these appropriations are unconstitutionally found in this act.

The following language is found to be improper in Act No. 16-A of 1978:

p. 2, Line 27:

(1) Erie Philharmonic Orchestra. . . . .	\$70,000
--	----------

p. 2, Line 28:

(2) Lansdowne Philharmonic Orchestra . . . . .	\$5,000
--	---------

p. 2, Line 29:

(3) Schuylkill County Council for the Arts . . . . .	\$85,000
--	----------

p. 10, Lines 16-19:

"Milrite" - For the administration, operation and expenses of Milrite Council for the project "Make Industry and Labor Right in Today's Economy" . . . . .	\$200,000
--	-----------

p. 25, Lines 21-23:

For support of the Pennsylvania Conservation Leadership School at Stone Valley Recreation Area. . . . .	\$30,000
---	----------

p. 28, Line 11:

Central Penn Oncology Group. . . . .	\$100,000
--------------------------------------	-----------

p. 29, Lines 16-18:

For payment to the Wistar Institute of Philadelphia, Pennsylvania for research in the field of cellular biology . .	\$200,00
---	----------

p. 29, Lines 19-21:

For payment to the Inglis House of Philadelphia for the detection and diagnosis of neurological diseases. . . . .	\$30,000
---	----------

p. 29, Lines 22-27:

For the following research programs:

Lankenau Hospital - Research . . . . .	\$75,000
Cardio-Vascular studies - University of Pennsylvania. . .	\$60,000
Cardio-vascular studies St. Francis Hospital, Pittsburgh . . . . .	\$60,000

p. 30, Lines 1-8:

For outpatient-inpatient treatment:

Cerebral Palsy - St. Christopher's Hospital . . . . .	\$75,000
Cerebral Dysfunction - Children's Hospital, Pittsburgh .	\$25,000
Pittsburgh Cleft Palate . . . . .	\$30,000
For payment to the Burn Foundation of Greater Delaware Valley. . . . .	\$155,000
Lancaster Cleft Palate. . . . .	\$30,000

p. 30, Lines 9-11:

For a comprehensive program relating to persons with Tay-Sachs Disease at the Jefferson Medical College and Hospital, Philadelphia, Pennsylvania. . . . .	\$50,000
---	----------

p. 31, Lines 9-16:

For administration of Allentown Art Museum . . . . .	\$50,000
For administration of the Somerset Historical Center . .	\$47,000

For refurbishing of the stone maintenance building at Conrad Weiser Park for the use of the Tulpehocken Settlement Historical Society for a geneological center for the preservation of Pennsylvania German ancestry. . . . .	\$18,000
---	----------

p. 37, Lines 18-24:

For the provision of services to the blind at:

Center for the Blind - Delaware County. . . . .	\$25,000
Beacon Lodge Camp . . . . .	\$25,000
Center for the Blind - Philadelphia . . . . .	\$25,000
Pittsburgh Association for the Blind. . . . .	\$25,000

Rudolph Residence for the Blind . . . . .	\$25,000
p. 40 Lines 19-21:	
Arsenal Family and Children's Center. . . . .	\$100,000
Blair County Society for Crippled Children and Adults . . . . .	\$25,000
p. 40, Lines 22-30:	
For adult programs for victims of cerebral palsy and other severe physically disabling diseases:	
(1) Scranton: United Cerebral Palsy of Lackawanna County . . . . .	\$59,000
(2) Pittsburgh: United Cerebral Palsy of Pittsburgh and vicinity . . . . .	\$28,000
(3) Bethlehem: United Cerebral Palsy of Lehigh Valley p. 41, Lines 1-6:	\$7,000
(4) Erie: United Cerebral Palsy of Northwest Pennsylvan- ia . . . . .	\$19,000
(5) Reading: Association of Retarded Citizens . . . . .	\$7,000
(6) Pottsville: United Cerebral Palsy of Schuylkill Coun- ty . . . . .	\$11,000

OFFICIAL OPINION NO. 78-19

*Act of June 21, 1937, P.L. 1960, No. 385, § 4 (55 P.S. §§ 6, 7) discussed and construed.*

1. Act of June 21, 1937, P.L. 1960, No. 385, § 4 (55 P.S. §§ 6, 7) discussed and construed.
2. The statutes which created the Navigation Commission for the Delaware River and its navigable tributaries and the Director of Commerce of the City of Philadelphia empowered those bodies to grant a license for construction below the low-water mark of the Delaware and Schuylkill Rivers.
3. The deed or title which must be produced as a prerequisite to licensure is that of the riparian land down to the low-water mark.
4. Statutory and case law demonstrate that historically no interest greater than a license has been intended to pass to riparian owners along the Delaware River and its navigable tributaries for construction of obstructions below the low-water mark.

August 21, 1978

The Honorable Maurice K. Goddard  
Secretary of Environmental Resources  
Evangelical Press Building  
Third and Reily Streets  
Harrisburg, PA 17120

Dear Secretary Goddard:

You have asked for a clarification of our Official Opinion No. 77-20 "Water Obstruction Permits", dated December 30, 1977, in the light of the authority of the Navigation Commission for the Delaware River and its navigable tributaries and the Director of Commerce of the City of Philadelphia to grant licenses for the construction of facilities in the Delaware and Schuylkill Rivers below the low-water mark.

Opinion No. 77-20 stated that an applicant for a water obstruction permit for facilities extending below the low-water mark of a navigable river or stream must first obtain an easement or other interest in the submerged land below the low-water mark. This legal interest is necessary because the Commonwealth is the owner of the bed of navigable rivers and streams below the low-water mark. Since existing law requires that specific authority must be obtained from the General Assembly for the grant of such an interest, the opinion pointed out that the applicant must obtain such an interest from the General Assembly by a duly enacted statute.

The question you have raised is whether, with respect to the Delaware and Schuylkill Rivers, the General Assembly has not already provided specifically for the conveyance of an interest in the submerged land to anyone desirous of constructing facilities extending below the low-water mark in those rivers.

It is our opinion, and you are advised, that the statutes enacted by the Pennsylvania General Assembly for the creation of the Navigation Commission for the Delaware River and its navigable tributaries and the Director of Commerce of the City of Philadelphia empowered those bodies to grant an interest in the river bed (a license) for the construction of facilities below the low-water mark of the Delaware and Schuylkill Rivers.

The statutory language which requires clarification by this opinion is found in the Act of June 21, 1937, P.L. 1960, No. 385 § 4 (55 P.S. §§ 6, 7) and reads as follows:

Whenever any person . . . shall desire to construct, extend or alter any wharf or pier, . . . into or on the aforesaid river and its navigable tributaries, such person . . . shall make application to the president of the Commissioners . . . and file in the office of the president of the Commissioners plans and specifications showing fully the proposed erection, construction, extension, alteration, or improvement, *and produce their deed or deeds, or other evidence of title, to the property to be so occupied, altered, or improved* . . . the Commissioners shall . . . give their assent, and issue a license for the erection . . . (emphasis added)

Similar language to this act was in the Act of June 8, 1907, P.L. 488, No. 321 which created the Department of Wharves, Docks and Ferries,

the predecessor of the Director of Commerce of the City of Philadelphia with respect to the grant of such licenses.

It is our opinion that the deed or title referred to in the underlined language above is the deed or title to the riparian land down to the low-water mark. It does not refer to title in the bed of the river. This conclusion will become clear through a discussion of the statutory and case law on the subject in Pennsylvania.

The Navigation Commission for the Delaware River and its navigable tributaries was created in 1937 by the Act of June 21, 1937, *supra*. This Act authorized the Commission to issue a license for the erection, construction, extension, alteration or improvement of facilities extending below the low-water mark of the Delaware River and its navigable tributaries except in the City of Philadelphia. The 1937 Act provided that the license contain a condition requiring the licensee to obtain a water obstruction permit from the Water and Power Resources Board (now the Department of Environmental Resources).<sup>1</sup>

Similar statutes which concern the granting of licenses in the submerged bed of the Delaware River and its navigable tributaries have existed since the 19th century (the Act of March 29, 1803, P.L. 542, 4 Sm.L. 67; the Act of March 25, 1805, P.L. 160, 4 Sm.L. 232; the Act of February 7, 1818, P.L. 72, 7 Sm.L. 34; and the Act of April 8, 1868, P.L. 755, No. 698). These statutes dealt with the powers of the Board of Wardens of the Port of Philadelphia.

Every statute subsequent to the Act of March 29, 1803 has contained language requiring production of evidence by the applicant of ownership of an interest in the ground on which the facilities were to be erected—i.e., language similar to the present statute (55 P.S. § 6).

However, the Act of March 29, 1803 contained additional language which provides a basis by which the later statutes can be construed. See 1 Pa.C.S. § 1921(c)(5). The relevant language of that Act provided as follows:

That when and so often as any person shall be desirous to extend any wharf, or other building of the nature of a wharf,

---

1 The predecessor of the Navigation Commission for the Delaware River and its navigable tributaries was the Board of Commissioners of Navigation for the River Delaware and its navigable tributaries created by the Act of June 8, 1907, P.L. 496, No. 322.

The predecessor of the Director of Commerce of the City of Philadelphia with respect to the grant of a license for the construction of facilities below the low-water mark within the city of Philadelphia was the Department of Wharves, Docks and Ferries for the City of Philadelphia created by the Act of June 8, 1907, P.L. 488, No. 321.

The predecessor of both the Department of Wharves, Docks and Ferries for the City of Philadelphia and the Board of the Commissioners of Navigation for the River Delaware and its navigable tributaries was the Board of Wardens for the port of Philadelphia created by the Act of March 29, 1803, P.L. 542, 4 Sm. L. 67.

Authority for each of these predecessors was similar to that of the Navigation Commission.

or cause any such wharf or building to be made in the tide-way of the river Delaware, *from any part of the City or liberties of Philadelphia*, such person shall make application to the Board of Wardens, at any of their monthly meetings aforesaid, stating in writing, the nature, extent and plan of such intended wharf or building, *and produce their deed or deeds for said lot or lots . . .* (emphasis added)

The clear meaning of that language is that the production of a deed "for said lot or lots" refers to the "part of the City or liberties of Philadelphia" from which the wharf or building was to extend. Also, "said lot or lots" is referring to dry land, *not* deeds to river bottom land which was of course never subdivided in the traditional manner of "lots." This language reflects legislative intent that licenses were to be granted only to riparian owners and that these owners were required only to prove title by the production of a deed to their own land. Though subsequent statutes changed the wording of the Act of 1803, a study of case law demonstrates a continuation of legislative intent.

It is evident from a review of the case law that historically no interest greater than a license has been intended to pass to riparian owners along the Delaware River and its navigable tributaries for construction of obstructions below the low-water mark. It is well-settled that the limit of title possessed by a riparian owner of lands on tidal waters is the low-water mark and that title to land below that mark is in the Commonwealth. *United States v. Pennsylvania Salt Manufacturing Co.*, 16 F.2d 476 (1926). ". . . All the property on the river front of the city below low-water mark of the river Delaware is held merely by license from the Commonwealth, under and subject to such laws and restrictions as the legislature has seen fit to enact." *Simpson v. Neill*, 89 Pa. 183 (1879) at 186. Nor is the right of a riparian owner to build out into the tideway of the river an incident attaching to ownership of land fronting on the navigable waterway. "To low water mark this is true, beyond that the Commonwealth is owner; that ownership is one of unqualified sovereignty. Whatever right the riparian owner may possess, it is just that which the Commonwealth gives him and no more." *Philadelphia and Reading Railroad Co. v. I. P. Morris*, 7 Phila. 286 (1869) at 292.

Though no case states in so many words that no more than a deed to riparian lands need be produced to satisfy the statutory requirement, several cases contained wording which lead to the same conclusion. *Tinicum Fishing Co. v. Carter*, 61 Pa. 21 (1869) at 30 described the statutory power granted to the Board of Wardens of the port of Philadelphia in the following manner: ". . . the Board is empowered to grant licenses to the owners of land fronting on the river to extend wharves and piers into the bed and channel . . ." Furthermore, in *Pennsylvania Salt Manufacturing Co.*, *supra.* at 481, the court said:

It is true that it is the policy (confirmed by state statutes) . . . , for obvious reasons, not to license constructions on the river

front of lands by others than abutting property owners; but this circumstance does not affect the legal rights of the licensee to constructions beyond his property lines.

It is the riparian right of the owner in conjunction with a license that legalizes the existence of an obstruction. *Philadelphia v. Commonwealth*, 284 Pa. 225, 130 A. 491 (1925). The construction belongs to the landowner though it is not landed property. The riparian landowner has the rights of an owner, though not of a landowner since his property is bedded in the land of the Commonwealth. *U.S. v. Penna. Salt Mfg. Co.*, *supra*.

In no instance has a court insisted, or so much as mentioned, the possibility of requiring a riparian landowner to have title to land below the low-water mark in order to obtain a license for construction. In fact, the opposite is true: The courts repeatedly state that title remains in the Commonwealth. The courts would not have repeatedly found limited incidents of ownership in wharves, etc., had the owner originally had to have produced a "deed" to the river bottom. Therefore, the "deed" required to be produced has always meant a "deed" to the riparian land. The intent of the various statutes has been to grant licenses to riparian land owners upon proof of title in those riparian lands.

The goal of the various statutes discussed has been to enhance the accessibility of the Delaware River by development in a controlled manner. The licensing procedure gives riparian landowners a sufficient interest in the submerged land to build wharves, piers, etc. Since the Delaware River is essentially a public highway,

... control below the low-water mark is in the state, both because of its police power control over navigable water highways and also its ownership of the land under the water; ... whatever easement rights ... exist or may be acquired in and over navigable waters and the lands under them are subject to the control of the police power of the state ... , *U.S. v. Pennsylvania Salt Mfg. Co.*, 16 F.2d 476 (1926) at 481.

There is no precedent for believing the legislative intent of the subject provision (55 P.S. § 6), to require more than title to riparian lands in order to obtain a license from the Navigation Commission.

We have examined records of the Board of Wardens for the port of Philadelphia located in the State Archives including minutes of meetings at which applications for licenses were received and discussed and licenses granted. We have also examined an index of State laws up through 1892 for evidence of statutes authorizing the conveyance of portions of navigable river beds, finding none. In point of fact, the Delaware River has been developed to its present state through the use of licenses, not submerged land conveyances. This development has taken place under statutes with language essentially identical to that being clarified by this opinion. Proof of title to land below the low-wa-



ter mark has not been required in the past. There is no sound reason for requiring it at the present time.

It is therefore, our opinion that the requirement in the various statutes, including those currently directed to the Director of Commerce of the City of Philadelphia and the Navigation Commission for the Delaware River and its navigable tributaries, for the production of evidence of ownership of the ground involved refers to the riparian land and not the river bed below the low-water mark. It is our view that the General Assembly did not intend in these various statutes that title or any interest beyond a simple revocable license be granted to the applicant by the Director of Commerce or Navigation Commission to whom was delegated that authority by the General Assembly.

Accordingly, it is our view that anyone desiring to construct, alter or extend facilities in the Delaware or Schuylkill Rivers need not seek from the General Assembly a statute authorizing the grant of an interest in the submerged land on which the construction is to be done inasmuch as the General Assembly has already authorized, by statutes, the Director of Commerce of the City of Philadelphia, for those portions of the rivers within the City of Philadelphia, and the Navigation Commission for the Delaware River and its navigable tributaries, for portions outside of Philadelphia, to grant the required interest in the river bed.

Sincerely yours,

CONRAD C. M. ARENSBERG  
*Deputy Attorney General*

GERALD GORNISH  
*Attorney General*

---

#### OFFICIAL OPINION NO. 78-20

*Public School Employees' Retirement Board—\$100 Per Diem Allowance for Certain Members*

1. The Public School Employees' Retirement Code, 24 Pa. C.S. § 8501(d), provides for a \$100 per day payment while attending meetings to all members of the Retirement Board who are not members of either the school system or the State Employees' Retirement System. A question has arisen as to exactly what constitutes a "meeting" within the meaning of this section.
2. Regular and Special Board meetings clearly qualify as meetings within this section.
3. Board Committee meetings, workshops, and seminars do not qualify as meetings unless the Board members participate in them at the call of the chairman or president.
4. Meetings with State Government officials, meetings or national conferences of retirement associations, and conference calls cannot be deemed "meetings" for which compensation would be payable.

August 30, 1978

John D. Killian, Esq.  
Chairman, Public School Employees'  
Retirement Board  
City Towers, Third and Chestnut Streets  
Harrisburg, Pennsylvania 17108

Dear Mr. Killian:

You have requested advice as to whether members of the Public School Employees' Retirement Board, who are not employed by school districts or receiving a benefit from the System, may be entitled to the \$100 per diem payments provided in Section 8501(d) of Act of October 2, 1975, P.L. 298, No. 96, 24 Pa. C.S. § 8501(d). That section, in relevant part states that "the members of the Board who are not members of either the school system or the State Employees' Retirement System may be paid \$100 per day when attending meetings and all board members shall be reimbursed for any necessary expenses." The conclusions which we reach hereafter necessarily depend upon an interpretation of the word "meetings" as it appears in this section and to those other statutes which may be relevant to this inquiry.

A "meeting" is defined in Black's Law Dictionary, 4th Edition, as a "coming together of persons; an assembly".

Section 518 of the Administrative Code of 1929 provides that:

Every independent administrative board or commission, departmental administrative board or commission, and every advisory board or commission, shall meet upon the call of the chairman or president thereof, at such times and places as the chairman or president shall designate, and at such times and places as the board or commission may by rule designate. 1929, April 9, P.L. 177, Art. V, § 518; 1931, June 1, P.L. 350, § 1, 71 P.S. § 198.

You have provided us with a suggested list of activities, which may or may not qualify as meetings, within the intendment of this section and are set forth as follows:

1. Regular Board meetings.
2. Special Board meetings.
3. Board Committee meetings.
4. Conference or meetings with staff, financial advisors or consultants and Board workshops or seminars.
5. Meetings with State Government officials.
6. Representing the Board at meetings or national conferences of retirement associations.
7. Conference calls.

As we interpret the various categories enumerated above, it can clearly be stated that regular Board meetings and special Board meetings, during which a quorum of the Board acts on matters properly before it and to which all Board members are requested to be present, qualify as meetings within this section. This is further substantiated by Section 8502(d), 24 Pa. C.S. § 8502(d) which specifically imposes the duty upon the Board to "hold at least six *regular* meetings annually and *such other meetings* as it may deem necessary." Clearly, regular and special meetings of the full Board, to conduct any business which comes before it would include both special and regular meetings for which the per diem payment may be made.

The activities of the Board also, by necessity, include committee meetings, workshops and seminars at which the Board is kept abreast of the functioning of the system both administratively and from the standpoint of being apprised of the status of its financial and actuarial responsibilities. Committee meetings would include those conducted by the finance committee, election committee, personnel committee, and other ad hoc committees which the chairman may deem appropriate. While such meetings, workshops and seminars are open to all members of the Board and, in many instances, precede or follow regular or special Board meetings, such committee meetings and workshops or seminars as outlined above, cannot reasonably be included within the term "meeting" as defined in Section 8501(d), or Section 518 of the Administrative Code, 71 P.S. § 198. These meetings would not be at the call of the chairman, and any conduct of business by the Committee would have to await the formal action of a Board meeting called by the chairman.

However, should the Board meet with such committees at the call of the chairman, or participate in a seminar or workshop at the call of the chairman or president, then such a meeting would be included in the term "meetings" as defined in Section 8501(d) and it therefore follows such eligible Board members would be entitled to the per diem allowance.

The Board and its members in the conduct of their responsibilities may be called upon, on occasion to meet with government officials, attend national conferences concerning public retirement programs and discuss matters of Board interest through conference calls. However, when one considers the definition of "meetings" as an outgrowth of the determinations made above, these three categories cannot reasonably be deemed "meetings" for which compensation would be payable. While we necessarily must consider the activities of the Board as a matter of degree, logic and reason dictate that these categories are not compensable "meetings" within the purview of Section 8501.

One caveat should be stated at this time. It is expected that the meetings for which the per diem allowance may be payable are of a reasonable duration so as to justify the allowance and are not being called or conducted in a manner which may raise questions as to their frequency

or necessity. These situations are, by their very nature, matters of judgment and discretion.

In accordance with Section 512 of the Administrative Code of 1929, 71 P.S. § 192, we requested comments from the Auditor General and State Treasurer. We have received replies from these departments concurring in this opinion and accordingly we are submitting our official opinion.

Sincerely,

GUY J. DEPASQUALE  
*Deputy Attorney General*

GERALD GORNISH  
*Acting Attorney General*

---

OFFICIAL OPINION NO. 78-21

*State Art Commission—Pennsylvania State University—"Public Place"*

1. The State Art Commission does not have jurisdiction to approve the design and location of a building constructed on the Penn State campus to be paid for entirely with private funds.
2. There is a dearth of legal authority precisely defining the parameters of what constitutes a "public place".
3. The maxim of "ejusdem generis" and the doctrine of "noscitur a sociis" respectively provide that in the construction of laws (a) the general words are not to be construed in their widest sense but are held as applying only to things of the same general class as those specifically enumerated, and (b) general and specific words are associated with and take color from each other, restricting general words to a meaning analogous to the specific.

August 31, 1978

John L. Haughwout, Secretary  
State Art Commission  
Department of General Services  
529 William Penn Memorial Museum Building  
Harrisburg, Pennsylvania 17120

Dear Mr. Haughwout:

You have requested our opinion concerning the jurisdiction of the State Art Commission to approve the design and location of a building constructed on the campus of Penn State University, the construction to be paid for entirely with private funds. The particular structure which raised the issue is a relatively modest-sized two-story building to be used as a faculty restaurant-dining facility. The facility is now completed, but because there are plans for other privately financed buildings to be constructed on the Penn State campus, you have requested us to address the question in anticipation of those future facilities.

The applicable law consists of the following provision of the Act which created the State Art Commission:

No monument, memorial, building, or other structure, *belonging to any person or corporation*, shall be erected upon or extend over any highway, stream, lake, square, park, or *other public place*, within any subdivision of this State, except the design for and the location thereof shall have been approved by such commission. Act of May 1, 1919, P.L. 103, § 5, 71 P.S. § 1672 (emphasis added).

This provision gives rise to two questions that must be answered affirmatively before the State Art Commission can be deemed to have jurisdiction over the privately financed faculty club building: (1) Is Penn State University a corporation? and (2) Is the Penn State campus a "public place" within the meaning of the Act? Although the answer to the first question is yes, the answer to the second is no, and, therefore, it must be concluded that the State Art Commission does not have such jurisdiction.

I. Penn State was originally incorporated as the Farmers' High School of Pennsylvania under the Act of February 22, 1855, P.L. 46 (24 P.S. § 2531 *et seq.*) and subsequently brought itself under the "Non-profit Corporation Law", Act of May 5, 1933, P.L. 289, as amended, (15 P.S. § 7001 *et seq.*). Thus, there can be no question as to Penn State being a corporation.

II. As to the question whether the Penn State campus is a "public place" as that term is used in the Act, one factor appears relatively clear - there is a dearth of legal authority precisely defining the parameters of what constitutes a "public place". The term is so vague and imprecise that a fair summary of its meaning has been expressed by the courts as:

"Public place" is a relative term, and what is a public place for one purpose may not be for another. *Gulas v. City of Birmingham*, 39 Ala. App. 86, 94 So. 2d 767 (1957); *People v. Simcox*, 379 Ill. 347, 40 N.E. 2d 525 (1942).

A nightclub<sup>1</sup>, laundromat<sup>2</sup>, and a cubicle in a massage parlor<sup>3</sup> have been held to be a "public place" for certain purposes. No one would seriously suggest, however, that the intention of the Legislature was to grant jurisdiction to the Art Commission to approve the design of nightclubs and laundromats, or cubicles in massage parlors. Obviously, a strict construction rather than a broad construction was intended.

The maxim of "ejusdem generis" and the doctrine of "noscitur a sociis" are helpful. They respectively provide that in the construction

1 *People v. Karns*, 81 Misc. 2d 186, 365 N.Y.S. 2d 725 (1975).

2 *State v. Gates*, 25 Ariz. App. 241, 542 P. 2d 822 (1975).

3 *Rushing v. State*, 133 Ga. App. 434, 211 S.E. 2d 389 (1974).

of laws (a) the general words are not to be construed in their widest sense but are held as applying only to things of the same general class as those specifically enumerated, and (b) general and specific words are associated with and take color from each other, restricting general words to a meaning analogous to the specific.

The statute refers to “. . . *any highway, stream, lake, square, park, or other public place* . . .” The general words “*other public place*” limit the scope of the preceding specific words which in turn limit the meaning of “*public place*”.

Applying these rules of construction, the statute can be perceived as applying to:

- (1) public highways
- (2) public streams
- (3) public lakes
- (4) public squares
- (5) public parks, and
- (6) similar public places

The Art Commission possesses no jurisdiction to approve designs of buildings constructed upon or extended over any private stream, lake, square or park, and any streams, lakes, squares or parks that are public are normally those that are governmentally owned, and devoted to the use of the public at large.

The fact that Penn State is “State related” and receives considerable public funding does not make its campus a public place within the connotation of the statute which is directed toward governmentally owned and controlled property devoted to the use of the public at large.

Therefore, it is our opinion and you are advised that the State Art Commission does not have jurisdiction to approve the design and location of a building constructed on the Penn State campus to be paid for entirely with private funds.

Very truly yours,

W. W. ANDERSON  
*Deputy Attorney General*

GERALD GORNISH  
*Acting Attorney General*

---

## OFFICIAL OPINION NO. 78-22

### *Child Labor Laws—Volunteer Services*

1. The Pennsylvania Child Labor Law and the child labor provisions of the Fair Labor Standards Act of 1938 are intended to provide children with protection from exploitation for profit by others, and to prohibit children from engaging in certain occupations deemed harmful to their well-being and development.

2. Volunteer clean up activities performed by children as part of civic conservation projects in State Parks and Forests do not present such a potential for exploitation as would call for the application of the Pennsylvania or Federal Child Labor Laws.

August 31, 1978

Honorable Maurice K. Goddard  
Department of Environmental Resources  
Evangelical Press Building  
Third and Reily Streets  
Harrisburg, Pennsylvania 17120

Dear Secretary Goddard:

You have asked for our opinion as to whether children under sixteen years of age may perform volunteer activities within our State Parks and State Forests such as trail maintenance, litter removal, and tree planting. You have indicated that civic organizations and service clubs conduct such programs with children participating and that the Boy Scouts of America routinely request permission to engage in these and similar conservation projects as part of their merit badge program. In the context of the foregoing, you have questioned us as to what bearing, if any, the Pennsylvania Child Labor Law, Act of May 13, 1915, P.L. 286, as amended, 43 P.S. § 41 *et seq.*, and the Federal Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. § 201 *et seq.*, may have on the involvement of our young people with respect to these activities. It is our opinion, and you are hereby advised, that neither the Pennsylvania Child Labor Law nor the Federal Fair Labor Standards Act of 1938 proscribes the performance of volunteer conservation and clean up activities by children in our parks or forests.

It is clear that the Federal Fair Labor Standards Act of 1938 does not present an impediment to the volunteer services that you contemplate. This Act sets the minimum wage for the nation, among other things, and concerns itself with the introduction of goods and services into the channels of interstate commerce. The purpose of the Act is to "prohibit the shipment of goods in interstate commerce if they are produced under substandard labor conditions" and to "eliminate substandard labor conditions, including child labor." *Roland Electrical Co. v. Walling*, 326 U.S. 657, 669, 670 (1946).

Section 212(a) of the Act is the basic child labor provision and states that,

No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment . . . in or about which . . . any oppressive child labor has been employed. 29 U.S.C. § 212(a).

"Oppressive child labor" is defined at section 203(1). The operative elements of the definition are,

a condition of employment under which (1) any employee un-

der the age of sixteen years is employed . . . in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed . . . in any occupation . . . particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; . . . 29 U.S.C. § 203(l).

The activities you have described and to which the children volunteers shall lend their hands do not appear to involve any consideration of products being introduced into interstate commerce. Nor does it appear to involve steps preparatory to the introduction of goods or services into interstate commerce. Therefore, an analysis of the concept of "oppressive child labor" need not be conducted in reaching a conclusion regarding the applicability of the Federal Fair Labor Standards Act of 1938. However, by referring to the concept of "oppressive child labor", the purpose of the inclusion of the child labor provision in the Act is underscored.

The history of the statute is consistent only with the conclusion that Congress intended to keep the arteries of commerce free from pollution by the sweat of child labor. *Lenroot v. Western Union Telegraph Co.*, 52 F.Supp. 142, 147-48 (S.D. N.Y. 1943) *reversed on other grounds*, 323 U.S. 490 (1945)

Because the Fair Labor Standards Act is not applicable on the grounds demonstrated above, it is not necessary to treat other concepts contained in section 203 of the statute such as "employer", "employee" and the precise meaning of the word "employ". It suffices to say that the incidence of the statute is founded upon the general principle that,

The ban of the statute is against shipment or delivery for shipment, in commerce, . . . of any goods produced in an establishment . . . in or about which any oppressive child labor has been employed. *Lenroot v. Western Union Telegraph Co.*, *supra*, at 147.

Turning now to Pennsylvania's Child Labor Law. The most important sections of the Child Labor Law for the purposes of this discussion are 43 P.S. § 42 which states, in relevant part, that,

No minor under sixteen years of age shall be employed or permitted to work in, about, or in connection with, any establishment or in any occupation . . . .

and 43 P.S. § 41 which defines the term "establishment"

1 In *Lenroot v. Interstate Bakeries Corporation*, 55 F.Supp. 234, 236 (W.D. Mo. 1944) it was observed that the child labor provisions of the statute were enacted because it was deemed desirable "to protect adult employees against the competition of minors" and because Congress was afforded an opportunity, primarily by the advent of the Depression, "to enact a law long agitated and exceedingly desirable to protect children against harmful labor."



Any place within this Commonwealth where work is done for compensation of any kind, to whomever payable . . .

Only one Pennsylvania case can be found which analyzes in any depth the phrase "permitted to work in, about or in connection with any establishment where work is performed by others for compensation." In *Commonwealth v. McKaig*, 29 D&C 629 (C.P. Phila., 1937), the word "work" was treated exhaustively after being identified as the most critical element when assessing the circumstances under which the Act should be applied. We will treat *McKaig* in detail because of its status as the only Pennsylvania case bearing directly on your questions. First, we will concede that a sound argument can be made that a State Park or State Forest is an "establishment" where work is performed for compensation and do thereby dispense with the need to discuss section 42 directly. We will also note that the absence of compensation for the children volunteers is not crucial in determining whether the Child Labor Law is to be given effect. *McKaig* at p. 632; also see *Brock v. Bowser*, 376 Pa. 209, 102 A.2d 121 (1954). These matters aside, we now turn to an analysis of the ruling in *McKaig*.

The facts in *McKaig* can be briefly summarized. A skating arena that was commonly used for public entertainment was privately leased for the purpose of an ice skating competition. There were amateur skating contests in the afternoon. At night, there were three skating exhibitions. One exhibition was given by a nine year old child, one was given by an amateur adult, and one was given by a professional ice skater, who was paid for performing. The entire program was conducted on a nonprofit basis. An admission fee was charged of the spectators. While the three skaters were part of a complete show for that evening, they performed independently of one another. With respect to the minor, the "child's skating was in no way linked with the professional's exhibition, . . . her display of skill was not performed as a part of the work of the professional." *Commonwealth v. McKaig, supra*, at 634

In ruling that the child skater's performance was not "work" within the meaning of the Child Labor Law, the Court placed great significance on the child having not been a part of the professional's act. From this, the Court arrived at a test for deciding whether any given activity is work as contemplated by the Child Labor Law;

whether or not the child's activities at a particular establishment are so connected with the work of others as to be immediately supplementary thereto or in direct aid thereof.  
*Commonwealth v McKaig, supra*, at 633

If we were to take the language of this test standing alone, we would be led into a discussion of whether, for instance, the planting of trees by Boy Scouts is "immediately supplementary to . . . or in direct aid" of the paid, professional park and forest employees. In another vein, we could be drawn into a discussion of how a recent amendment to the Child Labor Law (43 P.S. § 48.3(b)) permitting children under sixteen

to perform clean up services as members of volunteer forest fire crews is to be compared with the general clean up activities these children will perform. This is not necessary.

We do not consider the word "work" and the construction given that word in *McKaig* as controlling. The test developed there was particularly tailored to the unique factual circumstances. The Court in *McKaig* was apparently fearful of the situation where a minor is made an integral part of an adult professional show business performer's act and exploited thereby. The minor, presumably, would view the entire situation as one involving fun or play and not work as adults would understand that concept. The activities assumed under your question do not carry with them the same potential for exploitation as was found in *McKaig*. Therefore, we should be guided by the broader principles enunciated in *McKaig* and look to the general purpose of the Child Labor Law for direction.

Child labor laws are highly remedial in character, being intended to protect children, in their healthful development to adult age, from exploitation by business and industry, and to ensure to them, in the interests of the public welfare, that condition of freedom from debilitating spiritual and physical labor in which alone they can develop into fully efficient economic and social units of the State. Hence such laws should receive a reasonably liberal interpretation to effect their beneficent objects. Nevertheless their penal provisions cannot be extended by interpretation to include those activities of children which are not essentially "work" in its ordinarily accepted meaning, or which cannot fairly be said to tend to the exploitation of the labor of children for commercial or other remunerative purposes. 29 D&C at 631

It is our belief that the activities in which the youthful volunteers will participate cannot be considered to be work violative of the Pennsylvania Child Labor Law without ignoring and perverting the very purpose for which the law was enacted.<sup>2</sup>

In conclusion, it is our opinion, and you are hereby advised, that neither the Federal Fair Labor Standards Act of 1938 nor the Pennsylvania Child Labor Law has the effect of prohibiting the performance of conservation and clean up services within our State Parks and State Forests by children under sixteen years of age as part of volunteer programs. It is our belief that such programs comport with the beneficial opportunities these laws were intended to confer upon our youth. Permitting children to engage in conduct under the general heading of "nature appreciation" does not "tend to the exploitation of the labor of children for commercial or other remunerative purposes." There ap-

<sup>2</sup> In the case of the Federal statute and its child labor provisions, one purpose was to prevent persons from profiting from the "stunted and broken bodies of little children." *Lenroot v. Interstate Bakeries*, *supra*, at 237.

pears no likelihood that any of the children who will partake in these programs will be exploited because of greed or any other sordid motive. Therefore, the protective provisions of these laws are not to be applied.

Very truly yours,

RONALD H. SKUBECZ  
*Deputy Attorney General*

GERALD GORNISH  
*Acting Attorney General*

---

### OFFICIAL OPINION NO. 78-23

*Department of Education—Act No. 1978-173—Statutory Construction.*

1. Thaddeus Stevens State School of Technology may continue to operate as heretofore notwithstanding the repeal of the Act of May 11, 1905 (P.L. 518, No. 429).
2. Repeals in an act must be germane to the title.
3. Principles of statutory construction applied and construed.

November 28, 1978

Honorable Caryl M. Kline  
Secretary  
Pennsylvania Department of Education  
Harrisburg, PA 17120

Dear Secretary Kline:

You have requested our opinion as to whether the Thaddeus Stevens State School of Technology, which is under your jurisdiction, may continue to operate as a state funded school, notwithstanding the repeal of the act creating the Thaddeus Stevens School in Act Number 173 of 1978. It is our opinion, and you are hereby advised, that the Thaddeus Stevens State School of Technology may continue to operate as a state funded school, and should continue to be administered by your agency.

In a series of over fifty repeals relating to equal rights between men and women, section 9(a) of the Act of October 4, 1978 (P.L. 909, No. 173) repealed the Act of May 11, 1905 (P.L. 518, No. 429), entitled, as amended, "An act making an appropriation for the erection of a home or school for indigent orphans, to be called the Thaddeus Stevens State School of Technology, in which school provision shall be made for giving instruction in reading, writing, arithmetic, drawing, duties of citizenship, elementary manual training, the elements of farming, and other requisite branches."

The purpose of this repeal, as expressed by the legislature in the same act, is to conform statutory law to Section 28 of Article I of the Constitution of Pennsylvania relating to equality of rights regardless

of sex. 1 Pa.C.S. § 2301(a). There is no expressed or implied intent by the legislature that a school which is currently functioning and under the jurisdiction of the Pennsylvania Department of Education should cease to exist.

In at least three other statutes, the legislature has expressed its intent to fund that school and that its administration should continue. See, Administrative Code, Section 202, 71 P.S. § 62; the definition of "employer" in the Public School Employees' Retirement Code, 24 Pa.C.S. § 8102; and in the Act of May 31, 1978, P.L. 1485, No. 16-A, "The General Appropriation Act of 1978" which provided, within the budget for the Department of Education, an appropriation of one million seven hundred thousand dollars to the Thaddeus Stevens State School of Technology. Therefore, an ambiguity exists in the statutes which requires interpretation.

Article III, Section 3 of the Constitution of the Commonwealth of Pennsylvania, states: "No bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof."

"... The purpose of this constitutional provision is to give information to the members of the legislature, or others interested, by the title of the bill, of the contemplated legislation, and thereby to prevent the passage of unknown and alien subjects which may be coiled up in the folds of the bill." *Fedorowicz v. Brobst et al.*, 254 Pa. 338, 98 A. 973 (1916). See also *Phosphorus Matches*, 1911-1912 Op. Att'y Gen. 366, 368, 21 Pa. Dist. 554, 556 (1912). The purpose of this constitutional requirement is that the subject or the object of the legislative act be expressed in its title, thus insuring reasonable notice to the members of the General Assembly and to the public of the scope of the act. It is sufficient "... that the title shall give notice of the subject dealt with so that a reasonably inquiring state of mind would lead one to examine the body of the Act" *Ewalt v. Pennsylvania Turnpike Commission*, 382 Pa. 529, 115 A.2d 729 (1955).

Since the expression of the subject must be found, if at all, in the words of the title, one must look to the title of Act 173 of 1978. It reads as follows: "Amending Title I (General Provisions) of the Pennsylvania Consolidated Statutes, implementing Section 28 of Article I of the Constitution of Pennsylvania relating to equality of rights regardless of sex, making conforming amendments to other titles and making repeals." There is nothing which would put a person on notice that a functioning school is being abolished. The various provisions of the act must be germane to the subject expressed in the title; otherwise, the provision must fall.

"Germane" is defined as meaning in close relationship or pertinent to the general single subject, and no portion of a bill not germane to the expressed subject can be given the force of law. If any of the various

provisions do not relate to the subject, the Constitution is not complied with. There must be a reasonable basis for grouping the various matters together so as not to deceive the legislature and the public. See *Commonwealth v. Fireman's Fund Insurance Company*, 369 Pa. 560, 87 A.2d 255 (1952). Clearly, the rule of "germaneness" has been violated in this case.

Since there is ambiguity between this statute and others in *pari materia*, it is possible to look at the intent of the legislature in passing this provision. The legislative intent in this act is clearly articulated by Section 2301(a) of the act, 1 Pa.C.S. § 2301(a): "(a) General rule—In recognition of the adoption of Section 28 of Article I of the Constitution of Pennsylvania, it is hereby declared to be the intent of the General Assembly that where in any statute heretofore enacted there is a designation restricted to a single sex, the designation shall be deemed to refer to both sexes unless the designation does not operate to deny or abridge equality of rights under the law of this Commonwealth because of the sex of the individual." This intent cannot be misconstrued. It is clear that the General Assembly intended, in the repealer section of the act, to repeal statutes which are obsolete in order to remove sex discrimination from the laws of the Commonwealth. There is no intent in either the title or the purpose of Act 173 to do away with the existence of this school. To abolish the school by means of this act is clearly contrary to legislative intent (and in this case would probably be unconstitutional—a result which the General Assembly does not intend. 1 Pa.C.S. § 1921(c)(7) and § 1922(3)). Case law makes it clear that not only must the substance of an act relate to the title, but also that any repealer which is written into an act must be germane to the title of the act. See *Exempt Firemen's Association of City of New Rochelle v. City of New Rochelle*, 8 A.D.2d 634, 185 N.Y.S.2d 903 (1959), *aff'd.*, 7 N.Y.2d 1005, 200 N.Y.S.2d 50 (1960).

Other evidence leads us to the conclusion that the legislature did not intend to do away substantively with the Thaddeus Stevens State School of Technology. Where the provisions of a statute appear to be ambiguous or are inconsistent, the intention of the legislature may be determined by examining not only the purpose of the statute, but also circumstances surrounding the enactment of the statute. Thus, the contemporaneous legislative history regarding the new act can be examined. In *re Martin's Estate*, 365 Pa. 280, 74 A.2d 120 (1950). In a document entitled "Final Report: Proposed Legislation to Bring Pennsylvania Statutes Into Conformance with the State Equal Rights Amendment", which comprises the comments of the Commission for Women which drafted the statute in question, on pages 49 and 51, it becomes clear that what was intended was to repeal acts which are currently obsolete and that the drafter of the statute assumed that the Thaddeus Stevens State School of Technology was no longer in existence. This has, of course, been shown to be false.

The history of an act may also be examined as an aid to recognition of

what object was intended by passage of the act. It is clear from the language of the repealer in Act 173 of 1978, that no notice was taken of the comprehensive reform of the earlier 1905 act establishing the Thaddeus Stevens State School of Technology which occurred in 1976, eliminating the sex discrimination problems which had been observed in the 1905 act.

By Act of November 30, 1976 (P.L. 1214, No. 266), the Act of May 11, 1905 (P.L. 518, No. 429) was amended to reflect the passage of Article I, Section 28 of the Constitution of Pennsylvania and to make other changes. The name of the school was changed from the Thaddeus Stevens Trade School to the Thaddeus Stevens State School of Technology. Section 1 of the 1905 Act (24 P.S. § 2641) was amended to permit "...other deserving persons..." rather than "...other deserving boys..." to be admitted to the school. Section 5 of the 1905 Act (24 P.S. § 2644) was amended to permit accommodation of two hundred "persons" rather than "boys," as was formerly the case, and Section 8 of the 1905 Act (24 P.S. § 2647) was amended to prohibit sex and marital status discrimination, adding these terms to the former list of protected classes. This revision in fact made it unnecessary for this statute to be included in the comprehensive effort to implement the Equal Rights Amendment statutorily.

The question is also one of statutory construction, and we find ample authority in 1 Pa.C.S. § 1921(c), (1), (2), (3), (4), (5), (6), (7); § 1922 (1), (3); and § 1939 to determine that the legislature did not intend this result. All courts have declared that it is possible, in order to avoid an absurd and harsh result, to look beyond the strict letter of the law to interpret a statute according to its reason and spirit and to accomplish the object intended by the legislation. We will not ascribe to the legislature an intent to create an absurd or harsh consequence in this case.

You are advised that the Department of Auditor General and the Treasury Department has been informed of the question upon which this opinion has been requested and they have been afforded an opportunity to present any views they may have. (Section 512, Administrative Code, 71 P.S. § 192).

In conclusion you are advised that the repealer contained in the Act of October 4, 1978, P.L. 909, No. 173 does not operate to abolish the Thaddeus Stevens State School of Technology and that as its intent has been implemented at an earlier date, the repealer in question may be regarded as a nullity and may properly be ignored.

Sincerely yours,

CONRAD C. M. ARENSBERG  
*Deputy Attorney General*

GERALD GORNISH  
*Acting Attorney General*

---

## OFFICIAL OPINION NO. 78-24

*Article III, State Police Arbitration Award of March 24, 1978—Article III, § 26 of the Pennsylvania Constitution—Article III, § 29 of the Pennsylvania Constitution—40 P.S. § 535—43 P.S. § 217.1, et seq.—71 P.S. § 249(a)—72 P.S. § 7301, et seq.*

1. The continuation of medical benefits for surviving dependents of State Policemen killed in the line of duty does not constitute the payment of “extra compensation” in violation of Article III, § 26 of the Pennsylvania Constitution.
2. The continuation of medical benefits for surviving dependents of State Policemen killed in the line of duty does not constitute an appropriation for “charitable, educational or benevolent purposes” in violation of Article III, § 29 of the Pennsylvania Constitution.
3. Article III of the State Police Arbitration Award of March 24, 1978, need not be submitted to the Legislature for implementation.
4. Payments made pursuant to Article III of the Arbitration Award are not “compensation” under the Tax Reform Code of 1971 and as such are not taxable.

November 30, 1978

The Honorable James N. Wade  
Secretary of Administration  
425 Main Capitol Building  
Harrisburg, PA 17120

Dear Secretary Wade:

You have requested our advice as to whether Article III of the State Police Arbitration Award dated March 24, 1978, effective July 1, 1978, 8 Pa. B. 1952, is constitutional.

It is our opinion, and you are so advised, that you should treat this award as valid and implement its provisions.

The award provides as follows:

In the event a State Police member is killed in line of duty, all medical benefits shall inure to the eligible dependents of the deceased member for a period of two years, or until the remarriage of the spouse, whichever is earlier.

You have questioned whether this arbitration award is constitutional given the provisions of Article III, §§ 26 and 29 of the Pennsylvania Constitution. In reviewing the issue of constitutionality, we are constrained by the law and precedent to recognize the presumption of the constitutionality and to resolve any doubt on the side of constitutionality. *Comm. ex rel. Schnader v. Liveright*, 308 Pa. 35, 161 A. 697 (1932); *Singer v. Sheppard*, 464 Pa. 387, 346 A.2d 897 (1975). Only in a case where we can say clearly that a statute is unconstitutional will we do so. See *Hetherington v. McHale*, 10 Pa. Commonwealth Ct. 501, 512, 311 A.2d 162, 167 (1973), *reversed* 458 Pa. 479, 329 A.2d 250 (1974). While the case at hand does not directly involve a statute, nevertheless the arbitration award is rendered pursuant to a direct legislative mandate providing for binding arbitration for State Police-

men (Act of June 24, 1968, No. 111, *as amended*, 43 P.S. § 217.1, *et seq.*). For the reasons which follow, we are constrained to advise you that since we cannot say the award is clearly unconstitutional, we must, therefore, conclude that it is constitutional.

1. Your first question related to whether Article III, § 26 renders the arbitration award unconstitutional. The relevant portion of Article III, § 26 is as follows:

No bill shall be passed giving any extra compensation to any public officer, servant, employe, agent or contractor, after services shall have been rendered.

The crux issue is at what point is the compensation awarded or given. If we view the compensation as being awarded or given at the point where the medical benefits are actually paid out to the surviving dependents, then Section 26 is violated because no employment relationship exists at this point. Thus, payment of the benefit would be necessarily on account of services already rendered and an employment status which no longer exists.

However, we believe the better view is that compensation is not awarded at the point when it is actually paid out of the State Treasury but that the crucial time for determination under Article III, § 26 is July 1, 1978, the date the award becomes effective. It is at this point where the right of the policeman to receive the benefit, which is the knowledge that his dependents' medical expenses will be paid after his work-related death, is established. To put it another way, on July 1, 1978, a State Policeman has a vested right that requires the continuation of his medical benefits for his dependents after his work-related death. Thus, the benefit is not given after the services are rendered, but in conjunction with or preceding the completion of services upon which the benefit is based, as is the case of insurance or retirement benefits which flow to the beneficiaries of deceased employees.

2. You have also questioned whether the award is permitted under Article III, § 29 of the Pennsylvania Constitution. This section pertinently provides:

No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association:

Article III, § 29, as above set forth, states that no appropriation may be made for certain specified charitable purposes. But this provision has never been construed to prevent fringe benefits to public employees, such as retirement benefits. See *Busser v. Snyder*, 282 Pa. 440, 128 A. 80 (1925); *Retirement Board v. McGovern*, 316 Pa. 161, 174 A. 400 (1934). Such a fringe benefit is regarded as deferred compensation. *McGovern, supra*, at 168-169. Article III, § 29 would be violated if an award of a pension to one particular person were enacted by



the Legislature. *Francis v. Neville Township*, 372 Pa. 77, 92 A.2d 892 (1952). This does not occur under this award where the benefit is made available to all members of a class of employees who take risks in their jobs which exceed those taken by most public employees.

That this class of public employees is singled out for this type of benefit presents no problem since law enforcement officials have been recognized as a distinct class. *McIlvaine v. Pennsylvania State Police*, 6 Pa. Commonwealth Ct. 505, 296 A.2d 630 (1972), *aff'd*, 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed*, 415 U.S. 986 (1974); *Harney v. Russo*, 435 Pa. 183, 255 A.2d 560 (1969); *Iben v. Monaca Borough*, 158 Pa. Superior Ct. 46, 43 A.2d 425 (1945); Pa. Const., Art. III, § 31.

The benefit here should be distinguished from the benefit struck down in *Kurtz v. City of Pittsburgh*, 346 Pa. 362, 31 A.2d 257 (1943), where there was a partial payment of salary to the dependents of public employees who entered the armed forces. The Court held that this pay was unrelated to services rendered by the employees. But the Court did recognize the validity of employee benefits such as "sick leave" as a constitutional use of state funds. In *Loomis v. Board of Education of School District of Philadelphia*, 376 Pa. 428, 103 A.2d 769 (1954), the Court upheld the constitutionality of military leaves of absence of public employees and limited *Kurtz* to a holding that "the public received no benefit from the payments proposed. . . and they were therefore gratuities constitutionally prohibited." 376 Pa. at 434-435, 103 A.2d at 772.

We conclude, as the Court did in *Loomis*, that there is a public benefit provided by the award under consideration. It encourages State Policemen to continue in their occupations, to accept the risks associated therewith, and to perform their duties properly through the knowledge that should they be killed in the line of duty, the financial condition of their dependents will be alleviated in part.

Other similar fringe benefits to public employees have been accepted with little or no challenge. See *e.g.*, Act of September 26, 1961, P.L. 1661, *as amended*, 71 P.S. § 780.1, *et seq.* (group life insurance); Administrative Code of 1929, § 222, *as amended*, 71 P.S. § 82 (annual and sick leave); Act of June 28, 1935, P.L. 477, *as amended*, 53 P.S. § 637(a) (special pay and medical benefits to law enforcement officers and firemen injured in performance of duties); Act of September 27, 1951, P.L. 1473, *as amended*, 53 P.S. § 637(b) (heart and lung diseases contracted by law enforcement officers and firemen in line of duty); Governor's Office Management Directive 505.7 (employee training). The benefit under consideration is thus a further recognition of the interest of the public to encourage public employment and does not go beyond similar benefits enumerated above which have been accepted by our laws.

3. You have also requested that we determine, if the award is constitutional, whether the Legislature must act to implement the award.

Section 7(a) of the Act of June 24, 1968, No. 111, 43 P.S. § 217.7(a), provides that the determination of the arbitrator "shall constitute a mandate. . .to the appropriate officer of the Commonwealth if the Commonwealth is the employer, with respect to matters which can be remedied by administrative action, and to the lawmaking body. . .of the Commonwealth with respect to matters which require legislative action. . . ." The above would not specifically mandate legislative action unless an "appropriate officer" of the Commonwealth could not implement the award by administrative action.

In our opinion, the legislative action is not required to implement this award.

The Commonwealth of Pennsylvania, or any department or division thereof, . . . (is) hereby specifically authorized to make contracts of insurance. . .insuring its elected or appointed officers and employees or any class or classes thereof, or their dependents, under a policy or policies of group insurance covering life, health, hospitalization, . . . Section 1 of the Act of June 22, 1931, P.L. 844, *as amended*, (40 P.S. § 535)

The foregoing clearly contemplates administrative and not necessarily legislative permission to enter into health insurance contracts for employees and their dependents (including surviving dependents). Thus, the "appropriate officer" as required by the statute is satisfied so as to negate the need for specific legislative implementation.

Additionally, it is to be noted that it has been longstanding administrative practice to consider Blue Cross and Blue Shield benefits as "salaries and wages" as set forth in 71 P.S. § 249(a) and thus the responsibility of the Executive Board to establish and maintain such benefits.

Finally, legislative action in the form of a specific appropriation is unnecessary to implement the language of Article III. By its language, the award does not confer a new benefit on the class of persons consisting of eligible dependents of State Police members who are killed in the line of duty. It merely continues existing medical benefits to this class for a period of two years following the member's death. Because Article III only involves an extension of the period of coverage of existing benefits, a legislative appropriation is not required.

4. You have also requested advice as to the taxability of payments made both for state and federal purposes.

The imposition of the state income tax is authorized by The Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. § 7301, *et seq.* This act assesses an income tax on all "compensation" received by an individual. Compensation in 72 P.S. § 7301(d)(vi) is defined as not including "payments made by employers. . .for programs covering hospitalization, sickness, disability or death. . . ."

The above does not differentiate between the payments made to

benefit only the employee and those benefitting spouse or other dependents of the employee, merely that such payment be made by "employer." Therefore, it would seem clear that the Legislature intended to exclude from taxation all payments made to fund fringe benefits of employees, and just as we find that there is an employment relationship as would satisfy Article III, § 26 of the Pennsylvania Constitution, we must likewise find one that satisfies 72 P.S. § 7301(d)(vi). Even if such payments are not within the contemplation of the exclusion, the benefits would not be included in the definition of compensation as set forth in § 7301. "Compensation" is defined in 72 P.S. § 7301(d) as including "salaries, wages, commissions, bonuses and incentive payments whether based on profits or otherwise, fees, tips and similar remuneration received for services rendered, . . ." Clearly, the better reasoned construction of the foregoing definition is that medical benefits could not be considered as salaries or wages as the statute requires for taxability. Thus, the conclusion no matter how you interpret the exclusionary language in § 7301(d)(vi) is that the benefits paid are not in any event taxable.

With regard to your questions relating to the Federal taxability and reporting requirements of payments to the surviving dependents, we have determined that no opinion should be expressed at this time on these questions. We are most reluctant to give an opinion on a subject where such opinion is not binding. This determination must be made by the Internal Revenue Service, since it involves construction of a Federal statute. Appropriate personnel of the IRS have indicated that they will issue a ruling on this subject upon submission of a formal request. Steps have been taken to obtain a formal ruling from the IRS and we shall advise you upon receipt thereof.<sup>1</sup>

Very truly yours,

LANCE H. LILIEN  
*Deputy Attorney General*

GERALD GORNISH  
*Attorney General*

---

1. Pursuant to Section 512 of the Administrative Code (71 P.S. § 192) this Opinion was submitted to the Auditor General and State Treasurer for their views as the Opinion authorizes the expenditure of money. Both the Auditor General and State Treasurer concur in the conclusion that the Arbitration Award is constitutional under Article III, §§ 26 and 29. The Auditor General and State Treasurer disagree with the opinion expressed herein on the question of implementation, suggesting that implementing legislation is necessary. The Auditor General and State Treasurer express no opinion on the question of taxability of the benefits paid.

## OFFICIAL OPINION NO. 78-25

*Department of Education—Department of Transportation's Bureau of Traffic Safety—School Districts—The School Code—Free Transportation—Hazardous Walking Routes*

1. If a walking route along the shoulder of a highway where there are no sidewalks that pupils must travel to obtain access to free transportation is determined by the Bureau of Traffic Safety to be hazardous, the school district is required to extend the bus route in order to eliminate the hazardous walking route and it may not discontinue the bus route entirely.
2. Although the School Code does not require that free transportation be extended generally to pupils living within one and one-half miles of the school, considerations of safety require the school directors, if they provide free transportation to anyone, to provide it to pupils within one and one-half miles of the school who otherwise would have to walk along a hazardous walking route.
3. School districts are not required to provide free transportation; however, if they do provide free transportation, they must comply with the requirements of Section 1361 and Section 1362 of the School Code and, if in compliance with the two requirements relating to access routes, they will be reimbursed under Section 2541.

December 20, 1978

Honorable Caryl M. Kline  
Secretary of Education  
317 Education Building  
Harrisburg, PA.

Honorable George S. Pulakos  
Secretary of Transportation  
1200 Transportation and Safety Building  
Harrisburg, PA.

Dear Secretary Kline and Secretary Pulakos:

We have been asked for an opinion concerning the effect of certification by the Department of Transportation's Bureau of Traffic Safety, of a portion of a highway as a hazardous walking route under Sections 1362 and 2541 of the Public School Code (24 P.S. §§ 13-1362, 25-2541). In particular, the question is whether such a certification requires a school district to provide free transportation to pupils who would otherwise have to use the hazardous walking route.

Section 1361 of the Public School Code (24 P.S. § 13-1361), authorizes (but does not require) school directors to provide free transportation for pupils who are residents of the school district. The section establishes a number of conditions which must be met before free transportation may be provided. For example, the pupil must be lawfully enrolled in a nonprofit school located within the district or not more than ten miles from its boundaries (except that the ten-mile limit does not apply to vo-tech schools) and nonpublic school pupils must be provided identical transportation.

Section 1362 describes the types of transportation facilities which may be utilized in providing the free transportation authorized in Sec-

tion 1361; namely, school conveyances, private conveyances, electric railways or other common carriers. The section also attaches certain restrictions to the free transportation, when provided, namely:

- (1) No pupil shall be required to travel by public highway more than one and one-half miles to obtain access to the free transportation.
- (2) Stations or other proper shelters shall be provided where needed.
- (3) Highway, road or traffic conditions may not be such that walking on the shoulder where there are no sidewalks constitutes a hazard to the safety of the child, as certified by the Bureau of Traffic Safety of the Department of Transportation.
- (4) All private motor vehicles shall be adequately covered by public liability insurance.

Section 2541(a) establishes a payment formula for reimbursement to school districts of a portion of the cost of providing the free transportation authorized in Section 1361. Subsection (b) further delineates the payments to be made to the various types of school districts for pupil transportation and reiterates as conditions for reimbursement two of the conditions imposed on pupil transportation by Section 1362; namely the requirement that no pupil be required to travel by public highway more than one and one-half miles to obtain access to the free transportation, and the requirement that highway, road or traffic conditions must be such that walking on the shoulder where there are no sidewalks does not constitute a hazard to the safety of the child as certified by the Bureau of Traffic Safety of the Department of Transportation.

The effect of the foregoing sections of the Public School Code is, in short, that school districts are not required to provide free transportation; however, if they do provide free transportation, they must comply with the requirements of Section 1361 and Section 1362 and, if in compliance with the two requirements relating to access routes, they will be reimbursed under Section 2541.

Under this state of the law, the question is, what is the responsibility of the school district when the Bureau of Traffic Safety determines that a particular walking route along the shoulder of a road where there are no sidewalks, is hazardous.

If there is an existing school bus route, is the school district required to extend the bus route closer to the pupils' homes in order to eliminate the hazardous walking route, or in the alternative, may it, since it is not legally required to provide free transportation in the first place, discontinue the bus route entirely. It is our opinion that under such circumstances, the school district is required to extend the bus route in

order to eliminate the hazardous walking route and it may not discontinue the bus route entirely.\*

As recognized by Attorney General Israel Packel, in Official Opinion No. 56 of 1974, the authority of school directors to provide transportation services is discretionary. The directors have discretion to furnish such service to one class of students and not another (except that non-public school students must be treated in an identical manner). The discretionary power is not unlimited, however, and the board may not abuse its discretion or act in an arbitrary manner contrary to the public interest.

In discussing such discretionary power, the Attorney General said:

School directors, entrusted by the Legislature with the care of pupil-passengers and the custody of public property, have the duty to take reasonable measures for the safety and protection of both. In this regard, the reasonableness of their actions is to be determined from a consideration of all the circumstances culminating in a decision to provide or deny transportation services to . . . pupils. A bare minimum of care would impose a duty to consider the safety of such pupils before considering the cost of transportation services. The purpose of school transportation laws is to provide for the safety and welfare of school children. If school directors can attest to the reasonableness of their actions, to a careful consideration of their duty to all pupil-passengers in their care, and to a compelling interest in limiting the expenditure of district funds, then the conclusions can be drawn that there is no mandatory obligation on the part of school districts to provide transportation services to . . . children under the statute as written. 1974 Op. Atty. Gen. 225-226

Here, the consideration of the pupils' safety requires the school district to continue the transportation service in such a way as to eliminate the safety hazard. Discontinuing the bus route would have the opposite effect. It cannot be assumed that all pupils on a discontinued bus route can avail themselves of alternative transportation to and from school. There will inevitably be some pupils who will have to walk the entire distance to school. In any such case it can be expected that a natural walking route from the pupils' homes to the school would follow the discontinued bus route and would also include the very walking route declared by the Bureau of Traffic Safety to be hazardous. It would be ironic if the declaration of a walking route between the pupils' homes and the bus route as hazardous, would result in the pupils continuing to walk along a hazardous route and also all the way to school.

Thus far, the discussion has been concerned with the walking route from the pupils' homes to a bus stop. The same considerations apply,

\* It is arguable, however, that the school directors could legally discontinue all transportation to the entire district.

however, to a hazardous walking route from home to school for pupils who live less than one and one-half miles from the school. Although the School Code does not require that free transportation be extended generally to pupils living within one and one-half miles of the school, considerations of safety require the school directors, if they provide free transportation to anyone, to provide it to pupils within one and one-half miles of the school who otherwise would have to walk along a hazardous route.

In conclusion, it is our opinion, and you are advised, that school districts are not required by law to provide free transportation to pupils in the district, but if they provide it to some pupils, and a walking route along the shoulder of a road, either between the pupil's home and the bus route or between the pupil's home and the school if the pupil is not on a bus route, is declared by the Bureau of Traffic Safety, Department of Transportation, to be hazardous, then the district must provide free transportation to those pupils to relieve them from the danger of having to walk along a hazardous walking route.

Very truly yours,

W. W. ANDERSON  
*Deputy Attorney General*

GERALD GORNISH  
*Attorney General*

---

### OFFICIAL OPINION NO. 78-26

*Department of Community Affairs—State Adverse Interest Act—State Employee—State Agency—City Councilman—Contracts—Conflict of Interest*

1. An employee of the Department of Community Affairs who is also a city councilman has an adverse interest in contracts between the Department and the city of which he is a councilman.
2. The city councilman is a member of a party to contracts with the Department by which he is employed and, therefore, has an adverse interest in such contracts.
3. There is a conflict of interest under the State Adverse Interest Act even though the employee does not or will not deal with the contracts in any manner as both a State employee and as a representative or member of a party which has contracts with the State agency by which he is employed.
4. A conflict of interest arises when the State employee joins or becomes a member or representative of a party which already has a contract with the State agency by which he is employed.
5. Members of community organizations, such as volunteer fire companies, which have a contract with a State agency by which the State employees are employed are in violation of the State Adverse Interest Act.
6. The State agency has a duty to insure that its employees are in compliance with the State Adverse Interest Act.

December 20, 1978

Honorable A. L. Hydeman, Jr.  
Secretary of Community Affairs  
216 South Office Building  
Harrisburg, PA. 17120

Dear Secretary Hydeman:

This is in reply to your request for an opinion regarding the State Adverse Interest Act, 71 P.S. §§ 776.1 *et seq.* You have asked whether an employee of the Department of Community Affairs who is also a city councilman has an adverse interest in contracts between the Department and the city of which he is a councilman. It is our opinion that he does have an adverse interest in such contracts.

An official opinion interpreting the State Adverse Interest Act was issued by Attorney General Kane on December 1, 1975 (O.O. No. 75-45). That opinion concluded that a county commissioner could not serve as a member of the Governor's Council on Drug and Alcohol Abuse since the council enters into grant agreements with each county. In reaching that conclusion, the Attorney General stated:

Under the Adverse Interest Act, an adverse interest is defined as being "a party to a contract. . . or a stockholder, partner, member, agent, representative or employe of such party." Since a county commissioner is a party to the grant agreement entered into by his county, he has an adverse interest in such agreement.

In the situation you have described, the city councilman is a *member* of a party to contracts with the Department by which he is employed, and therefore, has an adverse interest in such contracts.

The answers to the specific questions you have asked are as follows:

1. There is a conflict of interest under the State Adverse Interest Act even though the employee does not or will not deal with the contracts in any manner as both a State employee and as a representative or member of a party which has contracts with the State agency by which he is employed.

2. A conflict of interest arises when the State employee joins or becomes a member or representative of a party which already has a contract with the State agency by which he is employed. Section 6 of the Act (71 P.S. § 776.6) provides:

No person having an adverse interest in a contract with a State agency, shall become an employe of such agency until such adverse interest shall have been wholly divested.

3. Members of community organizations, such as volunteer fire companies, which have a contract with a State agency by which the State employees are employed are in violation of the State Adverse Interest



Act. A member of such an organization is on the same footing as a stockholder of a corporation having a contract with the State agency. Both are included within the definition of "have an adverse interest".

4. The State agency has a duty to insure that its employees are in compliance with the State Adverse Interest Act. This means that the employee must be asked to resign from the State agency or from the organization having a contract with the State agency as soon as the agency learns of the violation.

Very truly yours,

W. W. ANDERSON

*Deputy Attorney General*

GERALD GORNISH

*Attorney General*

---

### OFFICIAL OPINION NO. 78-27

*Pennsylvania State Police—Effect of a Pardon—Certification Under Section 6(f) of the Lethal Weapons Training Act—The right to own and possess a firearm.*

1. A pardon in Pennsylvania exempts the recipient from further legal penalties and disabilities and restores all civil rights.
2. A person who has been granted a pardon for a crime of violence is eligible for certification under Section 6(f) of the Lethal Weapons Training Act, the Act of October 10, 1974, P.L. 705, No. 235, 22 P.S. § 46, and has the right to own and possess a firearm.

December 20, 1978

Honorable Milton J. Shapp  
Governor  
225 Main Capitol Building  
Harrisburg, PA 17120

Dear Governor Shapp:

An opinion has been requested by Colonel Paul J. Chylak, Commissioner of the Pennsylvania State Police, as to whether a person who applies for certification under Section 6(f) of the Act of October 10, 1974, P.L. 705, No. 235, 22 P.S. § 46 (known as the "Lethal Weapons Training Act" and hereinafter referred to as the "Act"),<sup>1</sup> is eligible for such certification when he has been convicted of a crime of violence but has

- 
1. Section 6(f) of the Act provides:

After the application has been processed and if the Commissioner determines that the applicant is eighteen years of age and has not been convicted of or has not pleaded guilty or nolo contendere to a crime of violence, and has satisfied any other requirements prescribed by him under his powers and duties pursuant to Section 5, he shall issue a certificate of qualification which shall entitle the applicant to enroll in an approved program.

received a pardon for that crime. The Commissioner has asked this question for the reason that the State Police are charged with the duty of administering the Act.

The resolution of this important question requires that we first address the effect of a pardon generally. In view of the fact that this is the first Attorney General's Opinion to discuss the effect of a pardon, we have deemed it appropriate to direct this Opinion to you, and are sending copies to Lieutenant Governor Ernest P. Kline and the other members of the Board of Pardons, as well as to Colonel Chylak.

A pardon can have two possible effects, which are separate and distinct. A pardon can exempt the recipient from further legal penalties and disabilities which flow from a conviction and restore all civil rights; it can also obliterate the record of conviction, leaving no evidence of the recipient's guilt. If a pardon does both things, it has the same effect as an acquittal.<sup>2</sup> If a pardon does not do both things, it will generally end the punishment and restore the civil rights only.

The Pennsylvania Supreme Court, in the case of *Diehl v. Rodgers*, 169 Pa. 316, 32 A. 424 (1895), adopted the view of a pardon which ascribed to it both effects. In holding that a convicted perjurer who was later pardoned is competent to testify, the Court quoted the following language from the United States Supreme Court in *Ex parte Garland*, 71 U.S. 333 (1866), in which this view was first espoused:

A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. . . [I]t removes the penalties and disabilities, and restores him to all his civil rights. . . *Id.* at 380.

The language from *Garland* was quoted again in *Commonwealth v. Quaranta*, 295 Pa. 264, 145 A. 89 (1928), where the court was met with the appellant's contention that the lower court had committed error by

---

2. It should be noted that even a state pardon which has both effects does not inherently remove all the disabilities imposed by federal law. In *Thrall v. Wolfe*, 503 F.2d 313 (7th Cir. 1974), cert. denied, 420 U.S. 972 (1975), the Court upheld the denial of a firearms manufacturer's and dealer's license under 18 U.S.C. § 923 to one convicted of assault with a loaded pistol who was later granted a pardon by the Governor of that state. The Court held that language in 18 U.S.C. § 925(c) indicated a legislative intent that a pardon was not to be conclusive. The result in *Thrall* is not required, however, by another section of the same law, 18 U.S.C. App. § 1203(2), which provides an exemption from a prohibition regarding receipt, possession or transportation of firearms found in 18 U.S.C. App. § 1202 for "any person who has been pardoned by the President of the United States or the Chief Executive of a State and has expressly been authorized to receive, possess, or transport in commerce a firearm." See *United States v. One Lot of Eighteen Firearms*, 325 F.Supp. 1326 (D.N.H. 1971). See also *United States v. Kelly*, 519 F.2d 794 (8th Cir. 1975), cert. denied, 423 U.S. 926 (1975).

permitting the impeachment of his testimony on cross-examination by the introduction of the evidence of a conviction for which he was pardoned. The court rejected this argument and, notwithstanding the broad scope it gave to a pardon in its discussion, held that both the conviction and the pardon may be the subject of examination where a defendant testifies in a criminal case.

In 1936, the Supreme Court of Pennsylvania harmonized its language with its holding, giving a narrower effect to a pardon. In *Commonwealth ex rel. v. Smith*, 324 Pa. 73, 187 A. 387 (1936), the court was faced with the issue of the applicability of a statute which provided for a greater sentence for a second offender to a convicted criminal who had been pardoned for a prior crime. In ruling that the statute applied, the court clearly modified the earlier view of the effect of a pardon. Relying upon a New York case<sup>3</sup> affirmed by the United States Supreme Court, the court stated:

"The pardon of this defendant did not make a 'new man' of him; it did not 'blot out' the fact or the record of his conviction. . . . The pardon in this case merely restored the defendant to his civil rights." 324 Pa. at 76, 77, 187 A. at 388, 389.

Cases decided after *Smith* reaffirmed the modified view of a pardon, though the broad language of *Diehl* continues to resurface in dicta. In *Commonwealth v. Cannon*, 386 Pa. 62, 123 A.2d 675 (1956), *cert. denied*, 352 U.S. 898 (1956), and *Commonwealth ex rel. Cannon v. Maroney*, 419 Pa. 461, 214 A.2d 498 (1965), the State Supreme Court held that a prior conviction for manslaughter in Maryland for which the individual was pardoned could be used for the purpose of aiding the jury in determining the penalty to be imposed for a crime committed in Pennsylvania. See also *Commonwealth v. Sutley*, 474 Pa. 256, 378 A.2d 780 (1977) (dictum); *Commonwealth ex rel. Banks v. Cain*, 345 Pa. 581, 28 A.2d 897 (1942).

In a more recent relevant case, *Cohen v. Barger*, 11 Pa. Commonwealth Ct. 617, 314 A.2d 353 (1974), the Commonwealth Court was faced directly with the claim that a pardon should be taken as having both effects. In this case the State Police refused to comply with the order of a lower court which provided for the expunction of a record of a conviction for which the plaintiff had been pardoned. The court did not adopt the early broad view of a pardon but ruled that a person who has received a pardon for a reason other than innocence is not entitled to have his criminal record expunged. Quoting from *Smith*, the court stated:

"The pardon in this case merely restored the defendant to his civil rights. . . . But it did not obliterate the record of his conviction, or blot out the fact that he had been convicted." *Id.* at 620, 314 A.2d at 354.

3. *People v. Carlesi*, 154 App. Div. 481, 139 N.Y.S. 309, *affirmed* 208 N.Y. 547, 101 N.E. 1114, *affirmed* 233 U.S. 51 (1914).

Just this year in the case of *Commonwealth v. Homison*, 253 Pa. Superior Ct. 486, 385 A.2d 443 (1978), the issue of the right of a pardoned offender to have his criminal record expunged was again raised. The Pennsylvania Superior Court,<sup>4</sup> citing *Smith* and *Cannon*, echoed *Cohen* and held that the grant of a pardon for reasons other than innocence does not entitle the person to have his criminal record expunged.<sup>5</sup>

The decisions in *Smith*, *Cannon I*, *Cannon II*, *Cohen*, and *Homison* make clear the distinction between a pardon which has the effect of exonerating the recipient from legal penalties and disabilities, restoring civil rights and expunging the record of conviction and one which does no more than exonerate and restore civil rights. These cases also demonstrate that the Pennsylvania courts have abandoned the view expressed in *Diehl*, *supra*, in favor of a more restricted view of a pardon.

What this means is that where a conviction involves certain disqualifications, the pardon removes such disqualifications. Such disqualifications generally include, but are not limited to, incompetency to testify, ineligibility to vote, ineligibility to serve as a juror, ineligibility to become a naturalized citizen, and ineligibility for certain licenses or privileges.

The case of *Agosto's Petition*, 84 P.L.J. 177 (W.D.Pa. 1936), is one of the earliest in which the restorative effect of a pardon upon its recipient's civil rights was discussed. Here the Naturalization Bureau opposed the application for citizenship of Gerlando Agosto who had been convicted of second degree murder, but was later pardoned, on the grounds that he was not of good moral character. Drawing in part upon the language in *Garland*, the court held a conviction of second degree murder for which a person was pardoned could not be pleaded against him to bar him from naturalization as a United States citizen.

The fact that a person has been granted a pardon and is thereby exonerated from further punishment and restored to all his civil rights does not, however, automatically give such a person a good reputation for

4. In *Commonwealth v. Binder*, 104 Montg. 282 (1978), the court, relying on dicta in *Commonwealth v. Zimmerman*, 215 Pa. Superior Ct. 534, 536, 258 A.2d 695, 696 (1969), allowed an expungement of a record *after* a pardon had been granted. This holding is deemed inconsistent with the cases discussed in this opinion, and has been appealed. With respect to expungement, see Act No. 1978-305 of November 26, 1978, the Criminal History Record Information Act, § 302.

5. The two most recent cases just mentioned, *Cohen* and *Homison*, imply not only that a pardon for innocence blots out the record of conviction but also that such a pardon constitutes a presently identifiable subset of all those that have been granted. This notion was derived from *Commonwealth v. Cannon*, *supra*, 386 Pa. at 66, 123 A.2d at 678 and an article which attempted to make distinctions based on pardons for innocence. Weihofen, "The Effect of a Pardon," 88 U. of Pa. L. Rev. 177 (1939). Practically, however, the Board of Pardons does not recommend pardons based on innocence and is not in a position to go behind a verdict of guilt. Accordingly, while it is conceivable that a pardon for innocence might be granted, before the grant could be made on this basis, the Board of Pardons would require the submission of evidence of the recipient's innocence that is direct and incontrovertible.

honesty, integrity, and fair dealing. So, where character is a necessary qualification and certain conduct would disqualify a person even though there were no criminal prosecution for the crime, the fact that an offender had been pardoned would not make him any more eligible.

An examination of the section of the Act in question here reveals that there is no requirement that a determination as to the character of the applicant be made and no mention of an applicant's participation in acts of violence for which there has been no criminal prosecution. In the words of the statute, the Commissioner, after finding that the applicant is eighteen years old, is bound only to determine that the person "has not been convicted of . . . a crime of violence. . ." It is the fact of conviction alone which triggers the disqualification of the applicant under Section 6(f).

A pardon, in exempting the recipient from further legal penalties and disabilities and restoring all civil rights, was clearly meant to remove all disqualifications such as the one found in Section 6(f) which flows solely from the fact of conviction.

Nothing in the foregoing discussion is intended to suggest that the Board of Pardons may not grant a pardon on the condition that the person who receives it *not* carry a gun so as to prevent such a person from becoming eligible for certification under Section 6(f). The granting of such a conditional pardon is within the power of the Board and the recipient of it would be bound to its limitations. However, absent such a condition, the rule in Pennsylvania is that a pardon removes all disqualifications involving guns.<sup>6</sup>

Nor should the discussion be taken to mean that a person granted a full pardon may not be found ineligible for certification on some ground other than the fact of conviction in accordance with the requirements found in another section of the Act. The record of conviction of a pardoned person may be used as evidence of character in some circumstances. *Commonwealth v. Quaranta, supra*.

Moreover, it is clear that a person who has received a pardon may not state that he or she has never been convicted of a crime when that question is properly posed, as on certain employment or license applications. The proper answer requires an affirmative admission coupled with the statement that a pardon has been granted.

Therefore, it is our opinion and you are so advised that a person who has been granted a pardon for a crime of violence is eligible for certification under Section 6(f) of the Lethal Weapons Training Act. Further-

6. This rule is consistent with the views of the members of the Board of Pardons pursuant to discussion. It is important because of cases like *United States v. Kelly*, 519 F.2d 794 (8th Cir. 1975), *cert. denied*, 423 U.S. 926 (1975). That case held that a state pardon does not allow a person to possess a firearm under 18 U.S.C. App. § 1202(a) (1) unless the pardon expressly authorizes such possession. 18 U.S.C. App. § 1203(2). By virtue of this opinion, all pardons are deemed to allow such possession unless they are otherwise qualified.

more, such a person shall have the right to own a firearm and to have one in his possession unless the pardon expressly provides otherwise.

Very truly yours,

GWENDOLYN T. MOSLEY  
*Deputy Attorney General*

GERALD GORNISH  
*Attorney General*

---

OFFICIAL OPINION NO. 78-28

*Department of General Services—Administrative Code—Self-Insurance—Procure—Purchase*

1. In the absence of a law authorizing the Commonwealth, or its departments, boards or commissions to carry liability insurance, other than automobile liability insurance, Subsection (b) of Section 2404 of the Administrative Code does not, standing alone, authorize the Department of General Services to purchase liability insurance for them.
2. The Commonwealth, its departments, boards, and commissions may, nevertheless, establish a self-insurance program to accomplish that same purpose since the very absence of any such authority means, of necessity, that the Commonwealth and its agencies are in a self-insured status.
3. The Department of General Services is authorized to create a self-insurance fund for automobile liability and it need not establish the impossibility of purchasing commercial insurance before doing so.

December 27, 1978

Honorable Ronald G. Lench  
Secretary of General Services  
515 North Office Building  
Harrisburg, PA

Dear Secretary Lench:

We have received a request for an opinion from your department concerning the purchase of liability insurance, or the establishment of a self-insurance program for the Commonwealth, in light of the recent decision of the Supreme Court of Pennsylvania,\* which abrogates sovereign immunity, and subsequent legislation waiving the sovereign's immunity in certain areas.\*\* In particular, we have been asked whether Subsection (b) of Section 2404 of the Administrative Code authorizes your department to purchase liability insurance, other than automobile liability insurance, for the Commonwealth, its departments, boards and commissions, and, if so, whether the department can legally establish a self-insurance program as an alternative to con-

---

\* *Mayle v. Pennsylvania Department of Highways*, 479 Pa. 384, 388 A.2d 709 (1978).

\*\* Act of September 28, 1978, P.L. 788, No. 152, § 2, 42 Pa.C.S. § 5110.

tracting with commercial insurance companies. A related question is whether the procurement of automobile liability insurance, which is specifically required by law, can be accomplished by a self-insurance program as an alternative to commercial insurance. It is our opinion, and you are advised: (1) that Subsection (b) of Section 2404 does not authorize the department to purchase liability insurance for the Commonwealth itself, but (2) nevertheless, the department is authorized to establish a self-insurance program for the Commonwealth, and (3) a self-insurance program covering automobile liability is a legitimate alternative to contracting with commercial insurance companies.

I. Subsection (b) of Section 2404 of the Administrative Code of 1929 (71 P.S. § 634(b)) provides, in relevant part:

The Department of [General Services] shall have the power, and its duty shall be:

\* \* \* \* \*

(b) To procure automobile liability insurance, covering vehicles owned by the Commonwealth of Pennsylvania. . . and to procure public liability insurance covering all State employees. . . and to purchase such insurance on a group basis, or otherwise. . . and in the department's discretion, to purchase excess fire insurance on State buildings, and any *other kind of insurance which it may be lawful for the Commonwealth, or any department, board, commission, or officer thereof, to carry and for which an appropriation has been made to the department, or to any other administrative department, board, or commission.*

(emphasis added)

This provision authorizes the department to purchase any kind of insurance which it may be lawful for the Commonwealth, or any department, board, commission or officer thereof to carry and for which an appropriation has been made. This means that if the Commonwealth, or any department, board, commission or officer thereof, is otherwise authorized by law to carry a particular kind of insurance and an appropriation has been made for it, the Department of General Services is authorized by this section to purchase the insurance for the Commonwealth or department, board, commission, or officer.

With regard to liability insurance, other than automobile liability insurance, for the Commonwealth itself or any department, board or commission thereof, there is no law otherwise authorizing such insurance to be carried; indeed, there was no need for such a law as long as the Commonwealth and its agencies had available the defense of sovereign immunity. In the absence of a law authorizing the Commonwealth, or its departments, boards or commissions to carry liability insurance, it must be concluded that Subsection (b) of Section 2404 does not, standing alone, authorize the Department of General Services to purchase liability insurance for them. It may, of course, purchase

automobile liability insurance which is specifically authorized by Subsection (b).

II. However, even though the department is not authorized to purchase liability insurance, other than automobile liability insurance, for the Commonwealth, its departments, boards and commissions, it may, nevertheless, establish a self-insurance program to accomplish that same purpose. The very absence of any such authority means, of necessity, that the Commonwealth and its agencies are in a self-insured status.

Self-insurance does not necessarily mean that there is a fund out of which to pay claims. However, the authority to establish such a fund can be derived, by implication, from the fact that claims against the Commonwealth are now lawful. Further, the Legislature will have to indicate its approval or disapproval of a self-insurance fund when it is called upon to appropriate the money for it, either directly or indirectly to the various departments, boards and commissions who will be assessed for such purpose.

A distinction should be made between self-insurance in this situation and self-insurance for employees' liability as addressed in Attorney General's Opinion No. 76-25 of August 11, 1976.

In that opinion we noted that Section 2404(b) required the department to *procure* public liability insurance for Commonwealth employees and to *purchase* such insurance on a group basis or otherwise. We said that the conjunction of the words "procure" and "purchase" meant that such insurance must be purchased if at all possible, and only after it became impossible to purchase it could the department fulfill its mandatory duty to procure such insurance by establishing a self-insurance fund. Here there is no need to interpret the statutory language "procure" and "purchase". The authority for self-insurance here is based upon an absence of authority to purchase commercial insurance. Thus, there is no duty, indeed there cannot be, to attempt to purchase commercial liability insurance for the Commonwealth and its agencies before establishing a self-insurance fund.

III. Although the question of self-insurance as an alternative to commercial automobile liability insurance requires an interpretation of the language of Section 2404(b), the reasoning is not the same as that relating to employees liability insurance in Opinion No. 76-25. While the department is directed in Section 2404(b) to "procure" automobile liability insurance, it is not directed also to "purchase" it, the clause containing the words "purchase on a group basis or otherwise" coming after the words "procure public liability insurance covering all State employees" and not pertaining to automobile liability insurance at all. Since "procure" is a broader word than "purchase", as we said in Opinion No. 76-25, and since the word "procure", as it pertains to employee liability insurance, includes self-insurance as an alternative to commercial insurance, it is our opinion that the same word in the same subsec-



tion of the statute must be given the same meaning as it applies to automobile liability insurance as it was determined to apply to employees liability insurance. Hence, the department is authorized to create a self-insurance fund for automobile liability, and it need not establish the impossibility of purchasing commercial insurance before doing so.

Very truly yours,

W. W. ANDERSON  
*Deputy Attorney General*

GERALD GORNISH  
*Attorney General*

---

### OFFICIAL OPINION NO. 78-29

*Commonwealth Compensation Commission; cabinet officers; public officers; Article III, § 27 of the Pennsylvania Constitution.*

1. Cabinet officers named in the Administrative Code who require Senate confirmation are public officers for purposes of Article III, § 27 of the Pennsylvania Constitution and as such are prohibited from receiving salary increases or decreases while in office.
2. Reports of the Commonwealth Compensation Commission affect only those office-holders who assume their duties after the date of the report.

December 29, 1978

Harry L. Rossi, Esquire  
Chairman, Commonwealth Compensation  
Commission  
513 Finance Building  
Harrisburg, PA 17120

Dear Mr. Rossi:

You have requested our opinion as to whether cabinet officers may receive salary increases during their terms of office. It is our opinion and you are so advised that those cabinet officers<sup>1</sup> named in the Administrative Code who require Senate confirmation are public officers

---

1. The term "cabinet officers" is an informal term to designate those individuals whom the Governor includes in his "cabinet." There is, however, no legal designation of any particular position in the cabinet and the Governor may create such positions as he chooses to be in his cabinet. Accordingly, while it may be a misnomer to refer to "cabinet officers" in this opinion, we limit the term to those named in Section 207.1(d) (1) of the Administrative Code of April 9, 1929, P.L. 177, as amended, 71 P.S. § 67.1(d) (1) who head departments under the Governor's jurisdiction and are subject to confirmation.

for purposes of Article III, § 27 and as such are prohibited from receiving salary increases while in office.<sup>2</sup>

Article III, § 27 of the Pennsylvania Constitution (formerly Article III, § 13) provides: "No law shall extend the term of any public officer, or increase or diminish his salary or emoluments, after his election or appointment."

It has always been assumed that such increases are impermissible and this was the view taken in recent years by the Shapp Administration, although no formal opinion ever addressed the issue of cabinet officers.<sup>3</sup> Recently, however, this position has been questioned for the reason, as expressed in your letter of request, that cabinet officers do not meet the "fixed term" component of the prerequisites of a "public officer." It is our opinion, and you are advised, that cabinet officers are indeed public officers under Article III, § 27 and that they do meet whatever "fixed term" standard that definition requires.

Furthermore, it should be noted that not only the Constitution dictates the conclusion that cabinet officers may not receive increases in compensation while in office, but a plain reading of the statute creating the Commonwealth Compensation Commission also leads to the same conclusion. The law provides that any report of the Commission is effective on the "date of assumption of office of persons affected thereby. . ." Act of June 29, 1976, P.L. 452 § 6, 65 P.S. § 364. Thus, by the very terms of the statute, any report issued will be effective only as to those who assume office after the date of the report. Therefore, as a practical matter, those office holders who are in office at the time of the report and continue in office have not assumed their duties after the date of the report and as such would not be affected by the report.

One of the leading cases construing Article III, § 27 is *Richie v. Philadelphia*, 225 Pa. 511, 74 A. 430 (1909). The court there held at page 513 as follows:

. . . What we are again called upon to decide is whether the thirteenth section of the third article of the constitution is broad enough, and was so intended by the framers of the constitution, to extend to all public officers (except those saved by the constitution itself) upon whom grave and important duties are imposed for a *fixed* term, . . .

and further held at page 516:

- 
2. Just as Article III, § 27 prohibits increasing the salary of "public officers" while in office, it likewise prohibits decreasing the same public officers' salaries while in office. Thus, the Legislature, if displeased with the action of a particular cabinet officer, could not show such displeasure by reducing the public officer's salary to \$1.00 per annum.
  3. See Attorney General Opinion No. 245 of 1961 covering members of various boards and commissions. See also, Attorney General Opinion No. 30 of 1974 which assumes the applicability of Article III, § 27 to cabinet officers.

...Where, however, the officer exercises important public duties and has delegated to him some of the functions of government *and his office is for a fixed term* and the powers, duties and emoluments become vested in a successor when the office becomes vacant, such an official may properly be called a public officer. . . . Their duties are designated by statute; *they serve for a fixed period*; act under oath, the duties they perform are semi-judicial in character and their services are indispensable in the fiscal system as established by the state. . . . (Emphasis supplied)

In determining what office or officer comes within the proscriptive language of the Constitution, the court, in delineating the elements to be considered, used the conjunctive word "and" in stating that the office is for a fixed term or period. Thus, for an individual to be a public officer, he must both exercise important duties as well as have a "fixed term."

In *Commonwealth ex rel. v. Moffitt*, 238 Pa. 255, 86 A. 75 (1913), the Supreme Court of Pennsylvania stated at page 257:

...Wherever an officer exercises important duties and has delegated to him some of the functions of government, and his office is for a fixed term,. . .

Other cases such as *Commonwealth ex rel. v. Moore*, 71 Pa. Superior Ct. 365 (1919), *affirmed* 266 Pa. 100, 109 A. 611 (1920); *Tucker's Appeal*, 271 Pa. 462, 114 A. 626 (1921); *In re Appeal of Harry W. Bowman*, 111 Pa. Superior Ct. 383, 170 A. 717 (1934); and *Vega v. Burgettstown Borough*, 394 Pa. 406, 147 A.2d 620 (1958), similarly defined a "public officer" as one discharging important public responsibilities for a fixed term of office. Other cases have focused more specifically on the fixed term requirement. In *Commonwealth ex rel. Foreman v. Hampson*, 393 Pa. 467, 143 A.2d 369 (1958), and *Wiest v. Northumberland Co.* 115 Pa. Superior Ct. 577, 176 A. 74 (1935), the court refused to find that a county solicitor and a solicitor to a county controller were public officers on the ground that solicitors are not appointed for a fixed term but occupy their positions at the will of the commission or controller who appoints them.

Thus, the cases uniformly reflect the definition of a public officer as one with a fixed term of office and one who exercises important public functions. The latter requirement is clearly met by cabinet officers. They are the highest ranking officials in executive departments and have broad policy-making responsibilities, which include the administration of budgets of several millions of dollars and supervision of several thousand employees.

The problem, therefore, is determining whether cabinet officers have a "fixed term" as would satisfy the first requirement for the determination of a public officer. You have suggested in your request, and the argument has recently been advanced, that they do not have the requi-

site "fixed term" to be considered "public officers" because they serve at the pleasure of the Governor.

The relevant section of the Administrative Code of April 9, 1929, P.L. 177, is Section 208, as amended, 71 P.S. § 68, which provides that the terms of office of persons appointed by the Governor shall be as follows:

- (a) The Attorney General and the Secretary of the Commonwealth serve during the pleasure of the Governor.
- (b) The term of the Superintendent of Public Instruction (now the Secretary of Education) shall be four years.
- (c) The heads of other administrative departments shall hold office for terms of four years coterminous with that of the Governor, and until their successors have been appointed and qualified.

Superficially, therefore, since practically all heads of administrative departments have a fixed four-year term, then under the foregoing cases, one would conclude that cabinet officers are public officers under Article III, § 27. However, an argument can be made that the "fixed term" of such officers is illusory for purposes of Article III, § 27, because they can be removed by the Governor who appoints them.

Article VI, § 7 of the Pennsylvania Constitution provides:

...Appointed civil officers, other than judges of the courts of record, may be removed at the pleasure of the power by which they shall have been appointed.

As a general rule, under Article VI, § 7 of the Constitution officers are removable at the pleasure of the appointing power even though the appointments are made for a *statutorily fixed term*. For example, in *Kraus v. City of Philadelphia*, 337 Pa. 30, 10 A.2d 393 (1940), a real estate assessor was elected by the City Council for a period of five years. During the five-year term, the Council, by resolution sought to remove Kraus from the office. The court held that Council, under the authority of Article VI § 4 (now § 7), had an "untrammelled" right, with or without cause, to remove plaintiff as they saw fit. See also, *Commonwealth ex rel. Benjamin v. Likeley*, 267 Pa. 310, 110 A. 167 (1920); *Muir v. Madden*, 286 Pa. 233, 133 A. 226 (1926); *Commonwealth ex rel. Logan v. Hiltner*, 307 Pa. 343, 161 A. 323 (1932); *Commonwealth ex rel. Houlahan v. Flynn*, 348 Pa. 101, 34 A.2d 59 (1943); and *Schluraff v. Rzymek*, 417 Pa. 144, 208 A.2d 239 (1965).

Comparing the cases cited under Article VI, § 7 with those cited under Article III, § 27 with regard to the "fixed term" standard, we see that those cases under Article III, § 27 did not closely analyze the fixed term requirement, but gave a greater weight to the nature of the duties involved. In cases under Article VI, § 7, which more directly

analyzed the seeming conflict between an employe with a "fixed term" and the right of removal as set forth in Article VI, § 7, courts concluded that a fixed term is in reality not a fixed term, but rather a fixed term only so long as the appointing authority so dictates.

Thus, the conclusion which one draws from cases under Article VI, § 7 is that the "fixed term" requirement is in reality a legal fiction because while it sets time boundaries, it does not make them immutable; the appointing authority can change them. The "fixed term" requirement can thus not serve as the key legal standard against which to gauge a particular office, but rather the key determination is the nature of the duties of the particular office.

From a policy standpoint, it makes no logical sense to hold a cabinet-level officer, having responsibilities for a large bureaucracy, is not a "public officer" for purposes of Article III, § 27, while finding a borough supervisor, for example, with limited responsibilities, to be one merely because one is elected for a fixed term while the cabinet officer may be removable at will.

In any event, it is clear from the terms of 71 P.S. § 68 that all cabinet officers, except for the Attorney General and Secretary of the Commonwealth, meet the "fixed term" requirement. However, as the cases so amply indicate, the "fixed term" is somewhat of a misnomer given the power of the Governor to remove any cabinet officer at will.<sup>4</sup> Thus, even though the statute may facially distinguish between cabinet officers vis a vis their terms of office, in reality all cabinet officers are subject to the same removal power and as such should not be treated differently. Additionally, it would make absolutely no sense to allow the Attorney General to receive an increase in compensation while denying it to the others.

Therefore, it is our conclusion that cabinet officers, based upon their extensive policy-making responsibilities, are public officers under Article III, § 27 and as such would be prohibited from receiving a salary increase or decrease during their terms of office.

Very truly yours,

LANCE H. LILIEN  
*Deputy Attorney General*

GERALD GORNISH  
*Attorney General*

---

4. By constitutional amendment approved by the voters in May, 1978, the Attorney General will be elected for a fixed four-year term commencing the third Tuesday in January, 1981. However, until that first election, the Attorney General serves at the pleasure of the Governor (Act No. 1978-25).

OFFICIAL OPINION NO. 78-30

*Fish Commission—Game Commission—Pennsylvania Constitution, Article VIII, Section 12(b)—Act No. 149 of 1978—Capital Projects—Operating Funds*

1. The Fish Commission and the Game Commission are required to submit to the Governor a detailed listing of specific capital projects that they intend to acquire or construct during the year for purposes of having them included in a capital budget.
2. As independent administrative commissions, the Fish Commission and the Game Commission must furnish to the Secretary of the Budget, not later than November 1 of each year, such detailed information pertaining to their proposed capital projects for the ensuing fiscal year as he shall request.

December 29, 1978

Honorable Charles P. McIntosh  
Budget Secretary  
Governor's Office  
Harrisburg, PA

Re: Capital Projects of the Fish and Game Commissions

Dear Secretary McIntosh:

You have asked for an opinion as to whether or not the Fish Commission and the Game Commission are required to submit to the Governor a detailed listing of specific capital projects that they intend to acquire or construct during the year for purposes of having them included in the Governor's Capital Budget. It is our opinion, and you are advised, that the Fish Commission and Game Commission are required to submit such a detailed listing.

Article VIII, Section 12(b) of the Pennsylvania Constitution provides:

Annually, at the times set by law, the Governor shall submit to the General Assembly:

\* \* \* \*

(b) A capital budget for the ensuing fiscal year *setting forth in detail proposed expenditures to be financed* from the proceeds of obligations of the Commonwealth or of its agencies or authorities or *from operating funds*; (emphasis added)

The question is whether that provision requires the Fish Commission and the Game Commission, which finance capital projects out of operating funds, to furnish the Governor with an itemized list of their proposed capital projects for the ensuing fiscal year, specifying the nature, purpose and estimated cost of each project in order that the Governor may incorporate them in the capital budget submitted to the General Assembly.

This issue has been resolved by the passage of Act No. 149 of 1978 (Act of September 27, 1978) which has implemented the constitutional provision as it relates to operating funds. Section 613 provides, in relevant part, as follows:

As soon as possible after the organization of the General Assembly, . . . the Governor shall submit to the General Assembly copies of agency budget requests and a State budget and program and financial plan embracing:

\* \* \* \*

(2)\* A capital budget for the ensuing fiscal year setting forth capital projects to be financed from the proceeds of obligations of the Commonwealth or of its agencies or authorities or from operating funds.

Although the pertinent words "in detail" are omitted from the legislative language, which otherwise follows closely the language of the Constitution, the implementing legislation must be interpreted so as to give effect to the constitutional provision. This means that the Governor is required each year to submit a capital budget to the General Assembly setting forth in detail capital projects to be financed from obligations of the Commonwealth and also capital projects to be financed from operating funds.

In order for the Governor to do that with respect to capital projects of the Fish Commission and the Game Commission, it will be necessary for those commissions to furnish him with the necessary detailed information through the Secretary of the Budget. Section 610 of Act No. 149 provides:

(a) . . . It shall be the duty of each administrative department, and each *independent administrative board and commission to comply*, not later than November 1, *with any and all requests made by the Secretary of the Budget in connection with the budget.*

(b) . . . The Secretary of the Budget shall, on or before January 1 next succeeding, submit to the Governor, in writing, the above information, and any additional requested by the Governor, as the basis for the Governor's requests for appropriations for the next succeeding year. (emphasis added)

As independent administrative commissions, the Fish Commission and the Game Commission must furnish to the Secretary of the Budget, not later than November 1 of each year, such detailed information pertaining to their proposed capital projects for the ensuing fiscal year as he shall request.

In accordance with Section 512 of the Administrative Code (71 P.S. § 192), the State Treasurer and the Auditor General have been given an opportunity to comment on a draft of this opinion. The State Treas-

\* The enrolled bill designated this as subparagraph (iii) under paragraph (1); however, it will be printed as paragraph (2) to carry out the intention of the General Assembly which was for Section 613 to correspond to Article VIII, Section 12 of the Constitution. (Paragraph (2) will be printed as paragraph (3)).

urer has indicated his concurrence with our conclusion. The Auditor General has declined to comment.

Very truly yours,

W. W. ANDERSON

*Deputy Attorney General*

GERALD GORNISH

*Attorney General*

---

OFFICIAL OPINION NO. 78-31

*Board of Commissioners of Public Grounds and Buildings—Department of General Services—Administrative Code—Leases—Amendments—Consideration—Utility Escalation Clause*

1. The Department of General Services is not empowered to amend leases during the renewal terms thereof to include a utility escalation clause without any consideration passing from the lessor in exchange.
2. Even if there were consideration for the amendment, the Department could not enter into it without the consent of the Bureau of Employment Security, the occupying agency, since its expenses are paid out of special funds.
3. The Board of Commissioners of Public Grounds and Buildings is not empowered to amend leases, but only to approve or disapprove amendments.
4. The power to enter into a lease carries with it, by implication, the power to amend or modify a lease after it has been executed. However, there must be consideration for the amendment or modifications.

December 31, 1978

Honorable Paul J. Smith  
Secretary of Labor and Industry  
1700 Labor and Industry Building  
Harrisburg, PA.

Dear Secretary Smith:

You have asked for our opinion as to the authority of the Board of Commissioners of Public Grounds and Buildings (the Board) to include utility escalation clauses in preexisting leases of State offices to be applicable during the renewal terms of the leases.

You have advised us that the Board met on March 27, 1978 and voted to approve the inclusion of utility escalation clauses in lease agreements that were entered into prior to March 4, 1977 with options to renew for periods of three years or more. The clauses would apply to the renewal terms only and only with respect to options exercised after March 4, 1977. You have further advised us that the federal government finances the rental of offices occupied by the Bureau of Employment Security, of your department, and you question the Board's au-



thority to increase the costs of occupying leased space without the approval of the occupants.

The powers of the Board are found in Section 2413 of the Administrative Code of 1929 (71 P.S. § 643) as follows:

The Board of Commissioners of Public Grounds and Buildings shall have the power, and its duty shall be:

(a) To approve or disapprove all proposed leases for offices, branch offices, rooms and accommodations.

This power of approval or disapproval, as it relates to your question, is of leases entered into on behalf of Commonwealth agencies by the Department of General Services. That department's statutory authority is derived from Section 2402 of the Administrative Code (71 P.S. § 632) as follows:

The Department of General Services shall have the power, and its duty shall be:

\* \* \* \*

(d) To contract in writing for and rent proper and adequate offices, rooms or other accommodations, outside of the Capitol buildings, for any department, board, or commission, which cannot be properly and adequately accommodated with offices, rooms and accommodations in the Capitol buildings; . . . It shall be unlawful for any other department, board, commission, or agency of the State Government to enter into any leases, but the Department of [General Services] shall act only as agent in executing leases for departments, boards, and commissions, the expenses of which are paid wholly or mainly out of special funds, and, in such cases, the rentals shall be paid out of such special funds.

The power to enter into a lease carries with it, by implication, the power to amend or modify a lease after it has been executed. However, there must be consideration for the amendment or modification. See 49 Am. Jur. 2d, Landlord and Tenant, § 168.

While the Department of General Services is authorized to amend leases, any amendment is subject to the approval or disapproval of the Board. The Board cannot initiate a lease amendment, however; its authority is limited to passing upon an amendment brought to it by the Department of General Services.

The question becomes whether the Department of General Services can legally amend leases prior to the renewal terms, to be effective only during the renewal terms, by adding utility escalation clauses. Since, from the factual information you have given us, it is evident that the lessors, who will benefit from such clauses, have not given any consideration for their inclusion in the leases, the answer is no.

A similar situation was confronted by Attorney General Israel Packer who responded in Official Opinion No. 2 of January 14, 1974, that the Department of Property and Supplies (predecessor to the present Department of General Services) could not legally enter into amendments to contracts with suppliers of coal. The suppliers had asked for additional compensation because of unanticipated price increases they had incurred in acquiring the coal they furnished to the Commonwealth. The Attorney General advised, however, that the contracts could not be amended, because an increase in compensation to the coal suppliers would result in an expenditure of public funds without the Commonwealth receiving any consideration in exchange. In so advising, he stated as follows:

The only circumstances where a renegotiation of a contract could be considered is where unforeseen circumstances make performance impossible or impractical. In a case such as that, however, a renegotiation of the contract could not result in an increase in compensation, but could only involve a mutual agreement to terminate the contractual relationship.

An increase in expense, such as evidenced by the circumstances facing coal vendors today, is not such a change in circumstances sufficient to warrant a termination of the contractual relationship.

The same reasoning applies to the circumstances confronting the lessors who have requested utility escalation clauses in their leases; the leases involved were entered into at a time when utility prices were more stable than at present. Because of the higher than usual inflation of utility prices in recent years, the lessors, who had originally agreed to bear the utility costs, have found the leases to be uneconomical from their point of view. However, such circumstances cannot legally justify the payment of additional funds from the public treasury, or, as noted above, the termination of the leases.

Even if there were consideration for the lease amendment, the Department of General Services could not enter into it without the consent of the Bureau of Employment Security. Section 2402 of the Administrative Code, quoted above, specifies that the Department shall act only as agent in executing leases for departments, boards and commissions, the expenses of which are paid wholly or mainly out of special funds. Since the administrative expenses of the Bureau of Employment Security are paid by the federal government, the Department can only execute a lease amendment as the Bureau's agent. As agent, however, it is subject to the Bureau's control. See Restatement (Second) Agency § 14.

Therefore, it is our opinion, and you are advised, that the Board of Commissioners of Public Grounds and Buildings is not empowered to amend leases but only to approve or disapprove proposed amendments, and, further, that the Department of General Services is not em-

powered to amend leases during the renewal terms thereof to include a utility escalation clause without any consideration passing from the lessor in exchange, and, further, that even if there were consideration for the amendment, the Department could not enter into it without the consent of the Bureau of Employment Security.

Very truly yours,

W. W. ANDERSON  
*Deputy Attorney General*

GERALD GORNISH  
*Attorney General*

---

OFFICIAL OPINION NO. 78-32

*Department of Transportation—Public Utility Commission—Transportation Commission—Administrative Code—Public Utility Law—Pennsylvania Constitution, Article VIII—Capital Facilities Debt Enabling Act—Act No. 149 of 1978—Capital Budget—Capital Projects—Operating Funds*

1. The Public Utility Commission has legal authority to order the Department of Transportation to repair or reconstruct a railroad bridge regardless of whether or not the repair work or reconstruction constitutes a capital project.
2. The Transportation Commission is required to set the order of priority for the capital projects to be undertaken by PennDOT under the 12 Year Capital Program and to recommend the program to the Governor, the General Assembly and the Secretary of Transportation.
3. The provisions of Article VIII, Sections 7 and 12 of the Pennsylvania Constitution have been implemented, as to the proceeds of obligations, by the Capital Facilities Debt Enabling Act. (72 P.S. §§ 3920.1 *et seq.*).
4. The legislation implementing Article VIII, Section 12(b) of the Constitution, as it relates to operating funds, is Act No. 149 of September 27, 1978.
5. Act No. 149 does not define "capital project"; this means that even those capital projects with a useful life of less than five years or with an estimated financial cost of less than \$100,000 must be included in the capital budget.
6. A P.U.C. order validly issued pursuant to its authority supersedes and sets aside any action of the Transportation Commission to the contrary.

December 29, 1978

Honorable George S. Pulakos  
Secretary  
Department of Transportation  
1200 Transportation and Safety Building  
Harrisburg, PA. 17120

Dear Secretary Pulakos:

We have received a request for an opinion concerning the legal authority of the Department of Transportation (PennDOT) to comply with an order of the Public Utility Commission (P.U.C.) directing the

construction or reconstruction of rail-highway bridges where the total cost, including design, right-of-way and construction, exceeds \$100,000 and the useful life is five (5) years or more, until such projects have been included in a Capital Budget and approved by the General Assembly. In particular, the question is whether the P.U.C. may order PennDOT to complete repairs to the Matsonford Bridge within 60 days of the order and to submit plans to the Commission for the reconstruction of the bridge within six (6) months of the order, absent inclusion of the project in a Capital Budget approved by the General Assembly.

We have been advised that the required repairs have been made but the order to submit plans cannot be complied with because, in PennDOT's opinion, the reconstruction of the Matsonford Bridge is a capital project which has not been included in a Capital Budget as required by the Pennsylvania Constitution. It is our opinion, and you are advised, that the P.U.C. does have legal authority to order PennDOT to repair or reconstruct a railroad bridge regardless of whether or not the repair work or reconstruction constitutes a capital project.

The P.U.C.'s authority is contained in Sections 409 and 411 of the Public Utility Law, Act of May 28, 1937, P.L. 1053, as amended (66 P.S. §§ 1179 and 1181) which vest in the P.U.C. exclusive jurisdiction over matters pertaining to rail-highway crossings. Section 409(c) specifies that:

the commission shall have exclusive power. . .to order any such crossing heretofore or hereafter constructed to be re-located or altered, or to be suspended or to be abolished upon such reasonable terms and conditions as shall be prescribed by the commission. . .*The commission may order the work of construction, relocation, alteration, protection, suspension or abolition of any crossing aforesaid to be performed in whole or in part by any public utility or municipal corporation concerned or by the Commonwealth.* (emphasis added)

PennDOT contends, however, that it cannot comply with a P.U.C. order that pertains to a capital project having a total cost of at least \$100,000 and a life expectancy of at least five (5) years unless the project is first included in PennDOT's 12 Year Transportation Program pursuant to the Act of May 6, 1970, P.L. 356 (No. 120) (71 P.S. § 511 *et seq.*) and then included in a Capital Budget containing proposed expenditures from the proceeds of obligations or from operating funds.

Act 120, referred to in the preceding paragraph, amended the Administrative Code of 1929 to create the Department of Transportation and, in Section 18 (71 P.S. § 521), to establish the State Transportation Commission. Section 13(a)(13) of the Act (71 P.S. § 512) provides that PennDOT is required to prepare, in even-numbered years, a 12 Year Capital Program to be submitted to the State Transportation Commission:

(a) The Department of Transportation in accord with appro-

priations made by the General Assembly. . .shall have the power and its duty shall be:

\* \* \* \* \*

(13) To prepare and submit every even-numbered year. . .to the State Transportation Commission for its consideration, a program which it recommends to be undertaken by the Department of Transportation during the *twelve fiscal years* next ensuing. Each two years thereafter, the Department of Transportation, *taking into consideration the recommendations of the State Transportation Commission*, and other relevant information, shall review, revise, adjust and extend its construction program for two years. The preparation and consideration of the program *shall be coordinated with the preparation and consideration of the Commonwealth's Capital Program* by the State Planning Board. . . (emphasis added)

Section 18(c) (71 P.S. § 521(c)) provides:

(c) The Commission shall have the power, and its duties shall be to gather and study all available information, data, statistics and reports, relating to the *needs for highway construction or reconstruction. . .in the Commonwealth* to determine. . .services which should be constructed or reconstructed and the recommended order of priority in which such. . .facilities and services should be constructed or reconstructed and to certify from time to time the results of such determination to the Governor, to the General Assembly and to the Secretary of Transportation, for their consideration. *Transportation programs so determined shall not be changed, deleted or altered, except by the Commission. . .* (emphasis added)

Thus, the Transportation Commission is required to set the order of priority for the capital projects to be undertaken by PennDOT under the 12 Year Capital Program and to recommend the program to the Governor, the General Assembly and the Secretary of Transportation. Once the program is determined by the Transportation Commission, it cannot be changed, deleted or altered except by the Commission. The program is forwarded by PennDOT to the Governor who includes it in the Capital Budget submitted to the General Assembly for enactment, in accordance with Article VIII of the Pennsylvania Constitution.

Section 7(a) of Article VIII authorizes the incurring of debt for capital projects:

(4) *Debt may be incurred without the approval of the electors for capital projects specifically itemized in a capital budget* if such debt will not cause the amount of all net debt outstanding to exceed one and three-quarters times the average of the annual tax revenues deposited in the previous five fiscal years as certified by the Auditor General. (emphasis added)

Section 7(b) provides:

All debt incurred for capital projects shall mature within a period not to exceed the estimated useful life of the projects as stated in the authorizing law, and when so stated shall be conclusive.

Section 12 requires the Governor each year to submit a Capital Budget to the General Assembly:

Section 12. Annually, at the times set by law, the Governor shall submit to the General Assembly:

\* \* \* \* \*

(b) A capital budget for the ensuing fiscal year setting forth in detail proposed expenditures to be financed *from the proceeds of obligations of the Commonwealth* or of its agencies or authorities or *from operating funds*. . . (emphasis added)

These provisions have been implemented, as to the proceeds of obligations, by the Capital Facilities Debt Enabling Act (72 P.S. §§ 3920.1 *et seq.*). In Section 2 of the Act the term "Capital Project" is defined as follows:

(1) "Capital project" means and includes (i) any building, structure, facility, or physical public betterment or improvement. . . provided that the project is designated in a capital budget as a capital project, has an estimated useful life in excess of five years and an estimated financial cost in excess of one hundred thousand dollars (\$100,000). . . (72 P.S. § 3920.2(1)).

That Act does not apply, however, to capital projects to be financed from operating funds. The legislation implementing Article VIII, Section 12(b) of the Constitution as it relates to operating funds is Act No. 149 of September 27, 1978, which provides in Section 613 as follows:

As soon as possible after the organization of the General Assembly. . . the Governor shall submit to the General Assembly copies of agency budget requests and a State budget and program and financial plan embracing:

\* \* \* \* \*

(2) <sup>1</sup>A capital budget for the ensuing fiscal year setting forth *capital projects to be financed* from the proceeds of obligations of the Commonwealth or of its agencies or authorities or *from operating funds*. (emphasis added)

1. The enrolled bill designated this as subparagraph (iii) under paragraph (1); however, it will be printed as paragraph (2) to carry out the intention of the General Assembly which was for Section 613 to correspond to Article VIII, Section 12 of the Constitution. (Paragraph (2) will be printed as paragraph (3)).

Act No. 149 does not define "capital project"; this means that even those capital projects with a useful life of less than five years or with an estimated financial cost of less than \$100,000 must be included in the Capital Budget.

Since the reconstruction of the Matsonford Bridge is a capital project, regardless of its useful life or its cost, it must be included in the Capital Budget submitted by the Governor to the General Assembly whether it is to be financed from obligations or from operating funds.

In the case of the Matsonford Bridge, the project was submitted to the Transportation Commission but the Commission failed to include it in the 12 Year Capital Program and as a result, it was left out of the Capital Budget.

The question becomes whether the Transportation Commission, pursuant to the authority granted to it by Act 120, can nullify an order of the P.U.C. issued pursuant to its authority in the Public Utility Law by failing to include a P.U.C. ordered project in the 12 Year Capital Program. This is an apparent conflict between two statutes.

The solution is found, however, in Section 22 of Act 120 which provides:

Nothing contained in this Act shall impair, suspend, contract, enlarge or extend or affect in any manner the powers and duties of the Pennsylvania Public Utility Commission. . .

It would be hard to find a clearer expression of legislative intent. There can be no doubt that the Legislature intended for a P.U.C. order validly issued pursuant to its authority under the Public Utility Law to supersede and set aside any action of the Transportation Commission to the contrary.

Therefore, it is our opinion, and you are advised, that a capital project ordered by the P.U.C. must be submitted by PennDOT to the Governor for inclusion in the Capital Budget submitted to the General Assembly, regardless of whether or not the project is included by the Transportation Commission in a 12 Year Capital Program.<sup>2</sup>

The answers to the seven specific questions at the end of the letter requesting the opinion are as follows:

1. Where the P.U.C. orders PennDOT to design, acquire right-of-way and/or construct a rail-highway crossing improvement project and the project in question will have a useful life of five (5) years or more and a total cost of more than \$100,000, PennDOT can comply with the order even though the project is not on the department's 12 Year Capital Program as required by Act 120. Moreover, PennDOT *must* comply with the order.

---

2. Of course, PennDOT's compliance with the P.U.C. order will have to await approval of the Capital Budget by the General Assembly.

2. PennDOT cannot use bond funds to comply with such a P.U.C. order if the project is not included in a Capital Budget approved by the General Assembly for obligation funds in accordance with the Capital Facilities Debt Enabling Act and Article VIII, Sections 7(a) and 12 of the Pennsylvania Constitution, but it is required to include the project in the Governor's Capital Budget for submission to the General Assembly.

3. PennDOT cannot use operating funds to comply with such a P.U.C. order if the project is not included in a Capital Budget approved by the General Assembly as required by Article VIII, Section 12 of the Pennsylvania Constitution, but it is required to include the project in the Governor's Capital Budget for submission to the General Assembly.

4. Where a highway or rail-highway project will have a cost, including design, right-of-way acquisition and/or construction, in excess of \$100,000 to be funded by debt obligation and will have an expected life of five (5) years or more, each phase of the project must be on a Capital Budget even though one or more individual phases are less than \$100,000. For example, the costs of design in the Matsonford Bridge case are only \$75,000, but since the total project exceeds \$100,000, the engineering cost cannot be financed from obligations without being included in the Capital Budget. As to funding individual phases from operating funds, they must be included in the Capital Budget regardless of their cost or the cost of the total project, since the implementing legislation for capital projects to be financed from operating funds does not define capital projects in terms of cost.

5. If operating or obligation funds are not budgeted for the project when a P.U.C. order is received, the department must attempt to secure a supplemental Capital Budget authorization from the General Assembly to comply with the order and may not merely place the ordered project in the next regularly scheduled budget submission.

6. If operating funds are used to comply with a P.U.C. order to construct a rail-highway crossing improvement project, the funds must come from the appropriation passed by the General Assembly for the Capital Budget. It would not be proper for PennDOT to utilize funds from other General Assembly appropriations which were designated for other purposes.

7. The P.U.C.'s order does not necessarily supersede a directive of the Governor's Budget Secretary to suspend currently approved capital projects financed by obligation funds, as long as the order can be complied with by obtaining General Assembly approval to utilize operating funds.

The State Treasurer and the Auditor General have been given an opportunity to comment on a draft of this opinion by virtue of Section 512 of the Administrative Code (71 P.S. § 192) but have not done so.



The Auditor General did submit comments on an earlier draft, however, and indicated concurrence generally with our conclusions.

Very truly yours,

W. W. ANDERSON

*Deputy Attorney General*

GERALD GORNISH

*Attorney General*

---

TABLE OF CASES CITED

<i>Cases</i>	<i>Opinion</i>	<i>Page</i>
Agosto's Petition, 84 P.L.J. 177 (W.D. Pa. 1936) . . . . .	27	105
Anderson v. Upper Bucks County Area Vocational Technical School, 30 Pa. Commonwealth Ct. 103, 373 A.2d 126 (1977) . . . . .	2	8
Basehore v. Hampden Industrial Development Authority, 433 Pa. 40, 248 A.2d 212 (1968) . . . . .	15	46
Brock v. Bowser, 376 Pa. 209, 102 A.2d 121 (1954) . . . . .	22	86
Browning Estate, 5 D.&C. 3d 772 (C.P. Phila. 1977) . . . . .	13	42
Bureau of Employment Security v. Hecker & Co., 78 Dauph. 354 (1962) . . . . .	1	5
Busser v. Snyder, 282 Pa. 440, 128 A.80 (1925) . . . . .	24	93
Caldwell v. Board of Regents, 54 Ariz. 404, 96 P.2d 401 (1939) . . . . .	16	60
Cohen v. Barger, 11 Pa. Commonwealth Ct. 617, 314 A.2d 353 (1974) . . . . .	27	104
Collins v. Commonwealth, 262 Pa. 572, 106 A.229 (1919) . . . . .	15	53
Columbia Gas Transmission Corp. v. Commonwealth, 468 Pa. 145, 360 A.2d 592 (1976) . . . . .	11	33
Commonwealth v. Barnett, 199 Pa. 161, 48 A.976 (1901) . . . . .	16	58
Commonwealth v. Binder, 104 Montg. 282 (1978) . . . . .	27	105
Commonwealth v. Cannon, 386 Pa. 62, 123 A.2d 675 (1956), <i>cert. denied</i> , 352 U.S. 898 (1956) . . . . .	27	104
Commonwealth v. Fireman's Fund Insurance Company, 369 Pa. 560, 87 A.2d 255 (1952) . . . . .	23	90
Commonwealth v. Greenville Steel Car Company, 20 Pa. Commonwealth Ct. 385, 343 A.2d 79 (1975), <i>aff'd</i> 469 Pa. 444, 366 A.2d 569 (1976) . . . . .	11	29
Commonwealth v. Homison, 253 Pa. Superior Ct. 486, 385 A.2d 443 (1978) . . . . .	27	105
Commonwealth v. McKaig, 29 D.&C. 629 (C.P. Phila. 1937) . . . . .	22	86
Commonwealth v. Perkins, 342 Pa. 529, 21 A.2d 45 (1941), <i>aff'd per curiam</i> , 314 U.S. 586 (1942) . . . . .	15	47
Commonwealth v. Quaranta, 295 Pa. 264, 145 A.89 (1928) . . . . .	27	103
Commonwealth v. Rieck Investment Corporation, 419 Pa. 52, 213 A.2d 277 (1965) . . . . .	11	30
Commonwealth v. Sutley, 474 Pa. 256, 378 A.2d 780 (1977) . . . . .	27	104
Commonwealth v. Zimmerman, 215 Pa. Superior Ct. 534, 258 A.2d 695 (1969) . . . . .	27	105

	<i>Opinion</i>	<i>Page</i>
Commonwealth, Department of Justice v. Knox, 29 Pa. Commonwealth Ct. 302, 370 A.2d 1238 (1977) . . . . .	1	1
Commonwealth ex rel. Banks v. Cain, 345 Pa. 581, 28 A.2d 897 (1942) . . . . .	27	104
Commonwealth ex rel. Benjamin v. Likeley, 267 Pa. 310, 110 A.167 (1920) . . . . .	29	113
Commonwealth ex rel. Cannon v. Maroney, 419 Pa. 461, 214 A.2d 498 (1965) . . . . .	27	104
Commonwealth ex rel. Foreman v. Hampson, 393 Pa. 467, 143 A.2d 369 (1958) . . . . .	29	112
Commonwealth ex rel. Greene v. Gregg, 161 Pa. 582, 29 A.297 (1894) . . . . .	16	58
Commonwealth ex rel. Houlahan v. Flynn, 348 Pa. 101, 34 A.2d 59 (1943) . . . . .	29	113
Commonwealth ex rel. Logan v. Hiltner, 307 Pa. 343, 161 A.323 (1932) . . . . .	29	113
Commonwealth ex rel. v. Moffitt, 238 Pa. 255, 86 A.75 (1913) . . . . .	29	112
Commonwealth ex rel. v. Moore, 71 Pa. Superior Ct. 365 (1919), <i>aff'd</i> , 266 Pa. 100, 109 A.611 (1920) . . . . .	29	112
Commonwealth ex rel. Schnader v. Liveright, 308 Pa. 35, 161 A.697 (1932) . . . . .	15, 24	47, 92
Commonwealth ex rel. v. Smith, 324 Pa. 73, 187 A.387 (1936) . . . . .	27	104
Commonwealth ex rel. Wolfe v. Butler, 99 Pa. 535 (1882) . . . . .	15	53
Commonwealth ex rel. Woodruff v. Lewis, 282 Pa. 306, 127 A.828 (1925) . . . . .	15	53
Delgado v. Sargent, 18 N.M. 131, 134 P.218 (1913) . . . . .	16	62
Diehl v. Rodgers, 169 Pa. 316, 32 A.424 (1895) . . . . .	27	103
Emerick v. Harris, 1 Binn. 416 (1808) . . . . .	15	54
Ewalt v. Pennsylvania Turnpike Commission, 382 Pa. 529, 115 A.2d 729 (1955) . . . . .	23	89
Ex parte Garland, 71 U.S. 333 (1866) . . . . .	27	103
Exempt Firemen's Association of City of New Rochelle v. City of New Rochelle, 8 App. Div. 2d 634, 185 N.Y.S. 2d 903 (1959) <i>aff'd</i> , 7 N.Y. 2d 1005, 200 N.Y.S. 2d 50 (1960) . . . . .	23	90
Fedorowicz v. Brobst et al., 254 Pa. 338, 98 A.973 (1916) . . . . .	23	89
Flanders v. Morris, 88 Wash. 2d 183, 558 P.2d 769 (1977) . . . . .	16	60
Francis v. Neville Township, 372 Pa. 77, 92 A.2d 892 (1952) . . . . .	24	94

# CASES CITED

129

	<i>Opinion</i>	<i>Page</i>
Greenberg v. Bradford City, 432 Pa. 611, 248 A.2d 51 (1968). . . . .	12	36
Gomez v. Perez, 409 U.S. 535 (1973). . . . .	13	39
Gulas v. City of Birmingham, 39 Ala. App. 86, 94 So. 2d 767 (1951) . . . . .	21	82
Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969) . . . . .	24	94
Henry v. Edwards, — La. —, 346 So. 2d 153 (1977) . . . . .	16	60
Hetherington v. McHale, 10 Pa. Commonwealth Ct. 501, 311 A.2d 162 (1973), <i>rev'd, on other grounds</i> , 458 Pa. 479, 329 A.2d 250 (1974). . . . .	15, 24	53, 92
Iben v. Monaca Borough, 158 Pa. Superior Ct. 46, 43 A.2d 425 (1945) . . . . .	24	94
In Re: Appeal of Harry W. Bowman, 111 Pa. Superior Ct. 383, 170 A.717 (1934) . . . . .	29	112
In Re: Martin's Estate, 365 Pa. 280, 74 A.2d 120 (1950) . . . . .	23	90
Jimenez v. Weinberger, 417 U.S. 628 (1974). . . . .	13	39
Kraus v. City of Philadelphia, 337 Pa. 30, 10 A.2d 393 (1940). . . . .	29	113
Kurtz v. Pittsburgh, 346 Pa. 362, 31 A.2d 257 (1943). . . . .	15, 24	47, 94
Labine v. Vincent, 401 U.S. 532 (1971). . . . .	13	39
Lenroot v. Interstate Bakeries Corporation, 55 F.Supp. 234 (W.D. Mo. 1944) . . . . .	22	85
Lenroot v. Western Union Telegraph Co., 52 F.Supp. 142 (S.D. N.Y. 1943). . . . .	22	85
Lewis v. State, 352 Mich. 422, 90 N.W. 2d 856 (1958) . . . . .	16	59
Loomis v. Philadelphia School District Board, 376 Pa. 428, 103 A.2d 769 (1954). . . . .	15, 24	47, 94,
McIlvaine v. Pennsylvania State Police, 6 Pa. Commonwealth Ct. 505, 296 A.2d 630 (1972), <i>aff'd</i> , 454 Pa. 129, 309 A.2d 801 (1973) <i>appeal dismissed</i> , 415 U.S. 986 (1974). . . . .	24	94
Mayle v. Pennsylvania Department of Highways, 479 Pa. 384, 388 A.2d 709 (1978). . . . .	28	107
Muir v. Madden, 286 Pa. 233, 133 A.226 (1926) . . . . .	29	113
Philadelphia v. Commonwealth, 284 Pa. 225, 130 A.491 (1925). . . . .	19	77
Philadelphia and Reading Railroad Co., v. I.P. Morris, 7 Phila. 286 (1869) . . . . .	19	76

	<i>Opinion</i>	<i>Page</i>
People v. Carlesi, 154 App. Div. 481, 139 N.Y.S. 309, <i>aff'd</i> , 208 N.Y. 547, 101 N.E. 1114, <i>aff'd</i> , 233 U.S. 51 (1914). . . . .	27	104
People v. Karns, 81 Misc. 2d 186, 365 N.Y.S. 2d 725 (1975). . . . .	21	82
People v. Simcox, 379 Ill. 347, 40 N.E. 2d 525 (1942) . . .	21	82
Retirement Board v. McGovern, 316 Pa. 161, 174 A.400 (1934). . . . .	24	93
Richie v. Philadelphia, 225 Pa. 551, 74 A.430 (1909) . . .	29	111
Roland Electrical Co. v. Walling, 326 U.S. 657 (1946). . .	22	84
Rushing v. State, 133 Ga. App. 434, 211 S.E. 2d 389 (1974). . . . .	21	82
Schluraff v. Rzymek, 417 Pa. 144, 208 A.2d 239 (1965) . .	29	113
Schuyler v. South Mall Constructors, 32 App. Div. 2d 454, 303 N.Y.S. 2d 901 (1969). . . . .	16	59
Shapp v. Sloan, 27 Pa. Commonwealth Ct. 312, 367 A.2d 791 (1976), <i>aff'd</i> , 480 Pa. 449, 391 A.2d 595 (1978) . . .	15	54
Simpson v. Neill, 89 Pa. 183 (1879). . . . .	19	76
Singer v. Sheppard, 464 Pa. 387, 346 A.2d 897 (1975) . .	24	92
State v. Gates, 25 Ariz. App. 241, 542 P.2d 822 (1975). . .	21	82
State ex rel. Whittier v. Safford, 28 N.M. 531, 214 P.759 (1923). . . . .	16	59
Thrall v. Wolfe, 503 F.2d 313 (7th Cir. 1974) <i>cert. denied</i> , 420 U.S. 972 (1975). . . . .	27	103
Tinicum Fishing Co. v. Carter, 61 Pa. 21 (1869) . . . . .	19	76
Trimble v. Gordon, 430 U.S. 762 (1977) . . . . .	13	41
Tucker's Appeal, 271 Pa. 462, 114 A.626 (1921). . . . .	29	112
United States v. Kelly, 519 F.2d 794 (8th Cir. 1975), <i>cert. denied</i> , 423 U.S. 926 (1975). . . . .	27	103
United States v. One Lot of Eighteen Firearms, 325 F.Supp. 1326 (D.N.H. 1971). . . . .	27	103
United States v. Pennsylvania Salt Manufacturing Co., 16 F.2d 476 (1926) . . . . .	19	76
Vega v. Burgettstown Borough, 394 Pa. 406, 147 A.2d 620 (1958) . . . . .	29	112
Washington Toll Bridge Authority v. Yelle, 54 Wash. 2d 545, 342 P.2d 588 (1959). . . . .	16	60
Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972). . . . .	13	39

# CASES CITED

131

	<i>Opinion</i>	<i>Page</i>
Wiest v. Northumberland Co., 115 Pa. Superior Ct. 577, 176 A.74 (1935) . . . . .	29	112
Wilmington Medical Center v. Unemployment Insurance Appeal Board, 346 A.2d 181 (Del. Super. 1975), <i>aff'd</i> , 373 A.2d 204 (Del. Sup. 1977) . . . . .	1	4

## TABLE OF STATUTES CITED

<i>Pennsylvania Statutes</i>	<i>Opinion</i>	<i>Page</i>
1 Pa. C.S. § 1921 (b) . . . . .	1	2
1 Pa. C.S. § 1921 (c),(1),(2),(3),(4),(5),(6),(7) . . . . .	23	91
1 Pa. C.S. § 1921 (c),(5) . . . . .	19	75
1 Pa. C.S. § 1921 (c),(7) . . . . .	23	90
1 Pa. C.S. § 1921 (c),(8) . . . . .	1	4
1 Pa. C.S. § 1922 . . . . .	6	18
1 Pa. C.S. § 1922 (1),(3) . . . . .	23	91
1 Pa. C.S. § 1922 (1) . . . . .	9	24
1 Pa. C.S. § 1922 (2) . . . . .	9	25
1 Pa. C.S. § 1922 (3) . . . . .	11,23	33, 90
1 Pa. C.S. § 1928 (b), (5) . . . . .	1	5
1 Pa. C.S. § 1933 . . . . .	1	5
1 Pa. C.S. § 1939 . . . . .	23	91
1 Pa. C.S. § 1971 (c) . . . . .	9,14	25, 44
1 Pa. C.S. § 2301 (a) . . . . .	23	89
1 P.S. § 334 . . . . .	14	44
1 P.S. § 402 . . . . .	14	44
1 P.S. § 505 . . . . .	14	44
15 P.S. §§ 7001 <i>et seq.</i> . . . . .	21	82
20 Pa. C.S. § 2107 . . . . .	13	42
22 P.S. § 46 . . . . .	27	102
24 P.S. § 13-1361 . . . . .	25	97
24 P.S. § 13-1362 . . . . .	25	97
24 P.S. § 25-2541 . . . . .	25	97
24 P.S. §§ 2531 <i>et seq.</i> . . . . .	21	82
24 P.S. § 2641 . . . . .	23	91
24 P.S. § 2644 . . . . .	23	91
24 P.S. § 2647 . . . . .	23	91
24 P.S. §§ 4101 <i>et seq.</i> . . . . .	10	28
24 Pa. C.S. § 8102 . . . . .	23	89
24 Pa. C.S. § 8501 (d) . . . . .	20	79
24 Pa. C.S. § 8502 (d) . . . . .	20	80
26 P.S. § 1-602 . . . . .	17	67
26 P.S. § 1-602 (c) . . . . .	17	67
35 P.S. § 450.603(c) . . . . .	14	44
35 P.S. §§ 655.1 <i>et seq.</i> . . . . .	12	36
35 P.S. § 655.2 . . . . .	12	36
35 P.S. §§ 1541 <i>et seq.</i> . . . . .	1	1
35 P.S. §§ 1701 <i>et seq.</i> . . . . .	1	1
35 P.S. § 6700-309 . . . . .	9	23
40 P.S. § 535 . . . . .	24	95
42 Pa. C.S. § 5110 . . . . .	28	107
43 P.S. § 41 . . . . .	22	85
43 P.S. §§ 41 <i>et seq.</i> . . . . .	22	84
43 P.S. § 42 . . . . .	22	85
43 P.S. § 48.3 (b) . . . . .	22	86
43 P.S. § 90.1 . . . . .	2	7
43 P.S. § 90.3 . . . . .	2	6

# STATUTES CITED

133

	<i>Opinion</i>	<i>Page</i>
43 P.S. §§ 217.1 <i>et seq.</i> . . . . .	24	93
43 P.S. § 217.7 (a) . . . . .	24	95
43 P.S. §§ 751 <i>et seq.</i> . . . . .	7	19
43 P.S. § 781 . . . . .	1	3
43 P.S. § 781 (e)(1) . . . . .	7	20
43 P.S. § 781.1 . . . . .	1	3
43 P.S. § 782 (a) . . . . .	1,7	2, 20
43 P.S. § 801 (f) . . . . .	1,7	2, 20
43 P.S. § 891 . . . . .	1	1
43 P.S. §§ 891-893 . . . . .	1	1
43 P.S. § 893 (a) . . . . .	1	2
43 P.S. §§ 901-910 . . . . .	1,7	3, 20
43 P.S. § 903 . . . . .	1	3
43 P.S. § 904(a) . . . . .	1	3
43 P.S. § 906(a) . . . . .	1	4
43 P.S. § 906(b) . . . . .	1	4
43 P.S. § 908 . . . . .	1,7	5, 20
43 P.S. §§ 911-914 . . . . .	7	19
43 P.S. § 912.1 . . . . .	7	19
43 P.S. § 912.2 (a) . . . . .	7	19
43 P.S. § 912.4 . . . . .	7	19
43 P.S. § 912.4 (b) . . . . .	7	19
43 P.S. § 913 . . . . .	7	20
43 P.S. §§ 951-963 . . . . .	2	6
43 P.S. § 954 (b), (e) . . . . .	2	7
43 P.S. § 954 (h) . . . . .	2	7
43 P.S. § 955 . . . . .	2	8
43 P.S. § 955 (a), (f) . . . . .	2	7
51 Pa. C.S. § 7101 . . . . .	5	13
51 Pa. C.S. §§ 7101 <i>et seq.</i> . . . . .	5	13
53 P.S. §§ 1-101 <i>et seq.</i> . . . . .	12	35
53 P.S. § 1-301 . . . . .	12	35
53 P.S. § 1-302 . . . . .	12	36
53 P.S. §§ 637 <i>et seq.</i> . . . . .	3	9
53 P.S. § 637 . . . . .	3	9
53 P.S. § 637 (a) . . . . .	24	94
53 P.S. § 637 (b) . . . . .	24	94
53 P.S. § 638 . . . . .	3	10
53 P.S. §§ 35101 <i>et seq.</i> . . . . .	12	35
53 P.S. § 37301 . . . . .	12	35
53 P.S. § 37305 . . . . .	12	35
53 P.S. § 37306 . . . . .	12	35
53 P.S. § 37307 . . . . .	12	35
53 P.S. §§ 41101 <i>et seq.</i> . . . . .	12	36
53 P.S. § 48111 . . . . .	12	35
53 P.S. § 56611 . . . . .	12	35
53 P.S. § 66961 . . . . .	12	35
55 P.S. § 6 . . . . .	19	74
55 P.S. § 7 . . . . .	19	74
63 P.S. § 421.2(3) . . . . .	9	25
63 P.S. § 421.10(a) . . . . .	9	25



	<i>Opinion</i>	<i>Page</i>
65 P.S. § 364.....	29	111
66 P.S. § 1179.....	32	121
66 P.S. § 1181.....	32	121
71 P.S. § 62.....	23	89
71 P.S. § 67.1(d)(1).....	29	110
71 P.S. § 68.....	29	113
71 P.S. § 82.....	3, 24	10, 94
71 P.S. § 192.....	15, 16, 18, 20, 23, 24, 30, 32	45, 56, 70, 81, 91, 96, 116, 125
71 P.S. § 198.....	20	79
71 P.S. § 201.....	4	12
71 P.S. § 249(a).....	24	95
71 P.S. §§ 511 <i>et seq.</i> .....	32	121
71 P.S. § 512.....	32	121
71 P.S. § 521.....	32	121
71 P.S. § 521 (c).....	32	122
71 P.S. § 532.....	12	35
71 P.S. § 632.....	31	118
71 P.S. § 634 (b).....	28	108
71 P.S. § 636 (j).....	4	12
71 P.S. § 640.....	6	17
71 P.S. § 643.....	31	118
71 P.S. § 670.101.....	4	12
71 P.S. §§ 776.1 <i>et seq.</i> .....	26	101
71 P.S. § 776.6.....	26	101
71 P.S. §§ 780.1 <i>et seq.</i> .....	24	94
71 P.S. § 1672.....	21	82
71 P.S. § 1725-502 (repealed).....	8	22
71 Pa. C.S. §§ 5101 <i>et seq.</i> .....	8	21
71 Pa. C.S. § 5901.....	8	21
71 Pa. C.S. § 5931.....	8	21
71 Pa. C.S. § 5931 (h).....	8	22
72 P.S. § 1896.....	11	32
72 P.S. § 2485—102 (3).....	13	38
72 P.S. § 2485—102 (13).....	13	38
72 P.S. § 2485—403.....	13	38
72 P.S. § 2485—404.....	13	38
72 P.S. § 3603.....	8	22
72 P.S. §§ 3920.1 <i>et seq.</i> .....	32	123
72 P.S. § 3920.2(1).....	32	123
72 P.S. §§ 7301 <i>et seq.</i> .....	24	95
72 P.S. § 7301 (d).....	24	96
72 P.S. § 7301 (d) (vi).....	24	95
72 P.S. §§ 7401 <i>et seq.</i> .....	11	30
72 P.S. § 7602 (a).....	11	29
72 P.S. § 7602 (b).....	11	29
73 P.S. §§ 371 <i>et seq.</i> .....	15	46

CONSTITUTION OF PENNSYLVANIA

	<i>Opinion</i>	<i>Page</i>
Art I, § 17 . . . . .	16	64
Art I, § 28 . . . . .	23	88
Art III, § 3 . . . . .	16,23	57, 89
Art III, § 11 . . . . .	16,18	56, 69
Art III, § 26 . . . . .	24	92
Art III, § 27 . . . . .	16,29	64, 111
Art III, § 29 . . . . .	15,16,24	45, 64, 92
Art III, § 30 . . . . .	16,18	63, 69
Art III, § 31 . . . . .	24	94
Art VI, § 7 . . . . .	29	113
Art VIII, § 7 . . . . .	32	120
Art VIII, § 7 (a) . . . . .	32	122
Art VIII, § 7 (b) . . . . .	32	123
Art VIII, § 12 . . . . .	32	120
Art VIII, § 12 (b) . . . . .	30,32	115, 123
Art VIII, § 17 . . . . .	15	46
Art VIII, § 17 (a) . . . . .	15	47
Art VIII, § 17 (b) . . . . .	15	45

UNITED STATES STATUTES

	<i>Opinion</i>	<i>Page</i>
18 U.S.C. § 923 . . . . .	27	103
18 U.S.C. § 925 (c) . . . . .	27	103
18 U.S.C. App. § 1202 . . . . .	27	103
18 U.S.C. App. § 1202 (a)(1) . . . . .	27	106
18 U.S.C. App. § 1203 (2) . . . . .	27	103
29 U.S.C. §§ 201 <i>et seq.</i> . . . . .	22	84
29 U.S.C. § 203 (l) . . . . .	22	85
29 U.S.C. § 212 (a) . . . . .	22	84
42 U.S.C. §§ 5121 <i>et seq.</i> . . . . .	15	51
42 U.S.C. § 5122 . . . . .	10,15	27, 52
42 U.S.C. § 5141 . . . . .	15	52
42 U.S.C. § 5141 (a) . . . . .	15	52
42 U.S.C. § 5141 (b) . . . . .	15	52
42 U.S.C. § 5145 . . . . .	15	52
42 U.S.C. § 5146 (a) . . . . .	15	52
42 U.S.C. § 5172 (a) . . . . .	10	27
42 U.S.C. § 5178 (a) . . . . .	15	51

CONSTITUTION OF UNITED STATES

	<i>Opinion</i>	<i>Page</i>
5th Amendment . . . . .	13	40
14th Amendment . . . . .	13	39

## RULES AND REGULATIONS

<i>Pennsylvania Code</i>	<i>Opinion</i>	<i>Page</i>
16 Pa. Code § 41.71 . . . . .	2	8
16 Pa. Code § 41.71 (e)(3) . . . . .	2	8
16 Pa. Code §§ 41.71—41.73 . . . . .	2	6
34 Pa. Code § 81.3 . . . . .	2	7
34 Pa. Code § 81.22 (b) (9) . . . . .	2	7
34 Pa. Code § 81.32 (2) (i) . . . . .	2	7
34 Pa. Code § 81.35 (2) . . . . .	2	7
<i>Code of Federal Regulations</i>		
29 CFR § 860.106 . . . . .	2	8
<i>Executive Order</i>		
Exec. Order No. 11803, 3A CFR 168 (1974) . . . . .	5	14
<i>Presidential Proclamation</i>		
Proclamation No. 4313, 3A CFR 68 (1974) . . . . .	5	14
<i>Federal Register</i>		
40 Fed. Reg. 12,763 (1975) . . . . .	5	14

## OPINIONS OF THE ATTORNEY GENERAL CITED

	<i>Opinion</i>	<i>Page</i>
Opinion Attorney General of July 21, 1905 (1905-1906 Op. Att'y Gen. 355) . . . . .	16	59
Opinion Attorney General of January 24, 1912 (1911- 1912 Op. Att'y Gen. 366) . . . . .	23	89
Opinion Attorney General of September 17, 1913 (1913- 1914 Op Att'y Gen. 47) . . . . .	15	54
Opinion Attorney General No. 81 of June 2, 1933 . . . . .	16	60
Opinion Attorney General No. 7 of September 18, 1957 . .	16	60
Opinion Attorney General No. 12 of September 20, 1957	16	59
Opinion Attorney General No. 16 of October 3, 1957 . . .	16	60
Opinion Attorney General No. 35 of December 2, 1957 . .	5	14
Opinion Attorney General No. 59 of January 30, 1958 . .	16	59
Opinion Attorney General No. 101 of April 17, 1958 . . .	16	60

# OPINIONS OF ATTORNEY GENERAL CITED

137

	<i>Opinion</i>	<i>Page</i>
Opinion Attorney General No. 136 of July 10, 1958 . . . . .	3	10
Opinion Attorney General No. 237 of June 7, 1961 . . . . .	16	60
Opinion Attorney General No. 245 of October 25, 1961 . .	29	111
Opinion Attorney General No. 268 of January 25, 1966 . .	16	60
Opinion Attorney General No. 154 of October 27, 1972 . .	15	46
Opinion Attorney General No. 43 of June 15, 1973 . . . . .	1	1
Opinion Attorney General No. 2 of January 14, 1974 . . . .	31	119
Opinion Attorney General No. 30 of June 5, 1974 . . . . .	29	111
Opinion Attorney General No. 56 of November 13, 1974 .	25	99
Opinion Attorney General No. 45 of December 1, 1975 . .	26	101
Opinion Attorney General No. 25 of August 11, 1976 . . . .	28	109
Opinion Attorney General No. 11 of June 30, 1977 . . . . .	16	60
Opinion Attorney General No. 20 of December 30, 1977 . .	19	74
Opinion Attorney General No. 1 of January 12, 1978 . . . .	7	20

## INDEX

	<i>Opinion</i>	<i>Page</i>
<b>Administration, Secretary of</b>		
Heart and Lung Act - State Police - Disability - Leave of absence . . . . .	3	8
<b>Administrative Code of 1929</b>		
Department of Community Affairs Distribution of documents to the public . . . . .	4	11
Department of General Services - Contract for public printing - Maximum price. . . . .	6	16
Department of General Services Self-insurance program for the Commonwealth-Self-insurance fund for automobile liability . . . . .	28	107
Leases - Amendments - Consideration . . . . .	31	117
PUC - Legal authority to order repair or reconstruction of a railroad bridge. . . . .	32	120
Sick leave and annual leave during temporary disability under Heart and Lung Act . . . . .	3	8
State Adverse Interest Act State employee State agency . . . . .	26	100
<b>Adoption</b>		
Identification of adoptees' natural parents Vital Statistics - Birth certificates . . . . .	14	43
<b>Age Discrimination</b>		
Prohibition by Human Relations Act - Effect on State Apprenticeship and Training Council. . . . .	2	6
<b>Appropriations</b>		
General appropriation bill - Substantive language - Constitutionality . . . . .	16	56
Non-preferred appropriations excluded from general appropriation act . . . . .	18	69
<b>Audiologists</b>		
Hearing Aid Sales Registration Law Exclusion for physicians, surgeons and audiologists . . . . .	9	23
<b>Birth Certificate</b>		
Certified copies of original birth certificates available to adoptees . . . . .	14	43
<b>Board of Commissioners of Public Grounds and Buildings</b>		
Leases - Amendments. . . . .	31	117
<b>Cabinet Officers</b>		
Commonwealth Compensation Commission Salary increase . . . . .	29	110

	<i>Opinion</i>	<i>Page</i>
<b>Capital Budget</b>		
Capital projects of Fish and Game Commissions . . . . .	30	115
Twelve Year Capital Program - Capital Facilities Debt Enabling Act - Operating funds . . . . .	32	120
<b>Capital Projects</b>		
Capital Facilities Debt Enabling Act - Capital budget - Operating funds - Twelve Year Capital Program . . . .	32	120
Fish and Game Commissions - Submission to Governor of a listing of capital projects . . . . .	30	115
<b>Child Labor Law</b>		
Volunteer services within State Parks and State Forests	22	83
<b>City</b>		
Third class cities - Health services . . . . .	12	34
<b>Civil Service Commission</b>		
Veterans benefits - Honorable discharge - Clemency dis- charge. . . . .	5	13
<b>Commonwealth Compensation Commission</b>		
Cabinet officers - Salary increase . . . . .	29	110
<b>Community Affairs, Department of</b>		
Publication of documents - Distribution of documents to the public . . . . .	4	11
<b>Constitutional Law</b>		
Capital budget Fish Commission and Game Commis- sion - Capital projects . . . . .	30	115
Commonwealth Compensation Commission - Cabinet of- ficers - Salary increase . . . . .	29	110
Flood relief - Act No. 1978-51 - Constitutionality. . . . .	15	45
General appropriation bill - Substantive language . . . .	16	56
Inheritance and Estate Tax Act Unconstitutional in- vidious discrimination against illegitimates. . . . .	13	37
Non-preferred appropriations excluded from general ap- propriation act . . . . .	18	69
State Police Arbitration Award-Continuation of medical benefits for surviving dependents of State policemen killed in the line of duty . . . . .	24	92
<b>Contract</b>		
Public Printing and Binding - Maximum price . . . . .	6	16
<b>Director of Commerce of the City of Philadelphia</b>		
See Navigation		
<b>Disaster Relief Act</b>		
Public facilities belonging to local government-Public entities-Library . . . . .	10	26

	<i>Opinion</i>	<i>Page</i>
<b>Discharge</b>		
Honorable discharge Clemency discharge - Veterans benefits . . . . .	5	13
<b>Documents</b>		
Publication and distribution . . . . .	4	11
<b>Environmental Resources, Department of</b>		
Third class cities Legal authority of Departments of Health and Environmental Resources to cease to pro- vide health services . . . . .	12	34
<b>Firearm</b>		
Certification under section 6(f) of Lethal Weapons Training Act-Effect of a pardon-Right to own and possess a firearm . . . . .	27	102
<b>Fish Commission</b>		
Capital projects - Operating funds . . . . .	30	115
<b>Flood Relief</b>		
Act No. 13 of 1973 - Real property's owners receiving pre-flood value in voluntary acquisition not eligible for flood relief grant under the Act . . . . .	17	67
Act No. 1978-51 - Constitutionality-Payments under the Act . . . . .	15	45
Federal Disaster Relief Act - Public facilities belonging to local government - Public entities - Library . . . . .	10	26
<b>Foreign Corporation</b>		
Franchise tax - Manufacturing exemption . . . . .	11	29
<b>Game Commission</b>		
Capital projects - Operating funds . . . . .	30	115
<b>General Services, Department of</b>		
Contract for Public Printing and Binding Maximum price . . . . .	6	16
Leases - Amendments - Consideration . . . . .	31	117
Publication of documents - Department of Community Affairs - Distribution to the public . . . . .	4	11
Self-insurance program for the Commonwealth - Self-in- surance fund for automobile liability . . . . .	28	107
<b>Health, Department of</b>		
Hearing Aid Sales Registration Law - Hearing aid fitters and dealers - Exclusion for physicians, surgeons and audiologists . . . . .	9	23
Identification of adoptee's natural parents - Birth cer- tificates . . . . .	14	43
Third class cities - Legal authority of Departments of Health and Environmental Resources to cease to pro- vide health services . . . . .	12	34

**Hearing Aid Sales Registration Law**

Hearing aid fitters and dealers - Exclusion for physicians, surgeons and audiologists. . . . .	9	23
--	---	----

**Heart and Lung Act**

Temporary disability - Sick leave and annual leave . . . .	3	8
--	---	---

**Illegitimate**

Inheritance and Estate Tax Act - Unconstitutional invidious discrimination against illegitimate children of the father . . . . .	13	37
--	----	----

**Labor and Industry, Department of**

Age discrimination prohibition Effect on State Apprenticeship and Training Council . . . . .	2	6
Unemployment compensation - Political subdivisions Relief from charges . . . . .	7	18
Unemployment compensation State employers Nonprofit organizations - Relief from charges . . . . .	1	1

**Leave of Absence**

Sick leave and annual leave during temporary disability under Heart and Lung Act . . . . .	3	8
--	---	---

**Library**

Federal Disaster Relief Act - Public facilities belonging to local government - Public entities. . . . .	10	26
--	----	----

**Maximum Price**

Contract for Public Printing and Binding . . . . .	6	16
--	---	----

**Medical Benefits**

State Police Arbitration Award - Surviving dependents of State policemen killed in the line of duty . . . . .	24	92
---	----	----

**Navigation**

Director of Commerce of the City of Philadelphia - Authority to grant license for construction below the low-water mark . . . . .	19	73
Navigation Commission for the Delaware River Authority to grant license for construction below the low-water mark . . . . .	19	73

**Nonprofit Organizations**

Unemployment compensation - Relief from charges. . . .	1	1
--	---	---

**Pardon**

Effect of a pardon - Certification under section 6 (f) of Lethal Weapons Training Act. . . . .	27	102
--	----	-----

**Pennsylvania State University**

Public place - State Art Commission jurisdiction . . . . .	21	81
--	----	----



	<i>Opinion</i>	<i>Page</i>
<b>Physicians and Surgeons</b>		
Hearing Aid Sales Registration Law Exclusion for physicians, surgeons, and audiologists . . . . .	9	23
<b>Political Subdivisions</b>		
Unemployment compensation - Relief from charges. . . .	7	18
<b>Public Entities</b>		
See Disaster Relief Act		
<b>Public Facilities</b>		
See Disaster Relief Act		
<b>Public Place</b>		
Pennsylvania State University campus . . . . .	21	81
<b>Public School Employees' Retirement Code</b>		
Public School Employees' Retirement Board - Per diem allowance for members attending meetings . . . . .	20	78
<b>Public Utility Commission</b>		
Legal authority to order repair or reconstruction of a railroad bridge . . . . .	32	120
<b>Publication of Documents</b>		
Distribution to the public . . . . .	4	11
<b>Revenue, Department of</b>		
Inheritance and Estate Tax Act - Unconstitutional invidious discrimination against illegitimate children of the father . . . . .	13	37
Tax Reform Code - Franchise tax - Foreign corporations - Manufacturing exemption . . . . .	11	29
<b>Schools and School Districts</b>		
Free transportation - Hazardous walking routes . . . . .	25	97
<b>State Adverse Interest Act</b>		
State employee - State agency - Contract - City councilman . . . . .	26	100
<b>State Agencies</b>		
Unemployment compensation - Relief from charges. . . .	1	1
<b>State Apprenticeship and Training Council</b>		
Age discrimination prohibition . . . . .	2	6
<b>State Art Commission</b>		
Pennsylvania State University - Public place . . . . .	21	81
<b>State Council of Civil Defense</b>		
Flood relief - Public facilities belonging to local government - Library . . . . .	10	26

	<i>Opinion</i>	<i>Page</i>
<b>State Employees Retirement Board</b>		
Diversification of assets . . . . .	8	21
<b>State Police Arbitration Award</b>		
Continuation of medical benefits for surviving dependents of State policemen killed in the line of duty.	24	92
<b>Statutory Construction</b>		
Act No. 1978-173 - Thaddeus Stevens State School of Technology not abolished . . . . .	23	88
<b>Taxation</b>		
Inheritance and Estate Tax Act - Unconstitutional invidious discrimination against illegitimates . . . . .	13	37
Tax Reform Code - Franchise tax on foreign manufacturing corporations - Manufacturing exemption. . . . .	11	29
<b>Thaddeus Stevens State School of Technology</b>		
Not abolished by the repealer contained in Act No. 173 of 1978 . . . . .	23	88
<b>Unemployment Compensation</b>		
Nonprofit organizations - Relief from charges . . . . .	1	1
Political subdivisions - Relief from charges . . . . .	7	18
State agencies - Relief from charges . . . . .	1	1
<b>Veterans</b>		
Honorable discharge - Clemency discharge Veterans benefits . . . . .	5	13
<b>Volunteer Services</b>		
Child Labor Law not applicable to performance of volunteer services by children . . . . .	22	83