

COMMONWEALTH OF PENNSYLVANIA

OPINIONS

OF THE

Attorney General

OF

Pennsylvania

1979-1981

J. JUSTIN BLEWITT, JR., ACTING ATTORNEY GENERAL

(January 1, 1979 to January 16, 1979)

EDWARD G. BIESTER, JR., ATTORNEY GENERAL

(January 16, 1979 to May 19, 1980)

HARVEY BARTLE III, ATTORNEY GENERAL

(May 20, 1980 to January 20, 1981)

J. Justin Blewitt, Jr., Acting Attorney General

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(January 16, 1979 to May 19, 1980)

Harvey Bartle III, Attorney General

(May 20, 1980 to January 20, 1981)

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OFFICIAL OPINION NO. 79-1

Board of Commissioners of Public Grounds and Buildings—Liquor Control Board—Department of General Services—Administrative Code—Liquor Code—Offices—Rooms and Accommodations—Stores.

1. The Board of Commissioners of Public Grounds and Buildings is required to approve leases of State liquor stores.
2. The terms "offices, branch offices, rooms, and accommodations" were intended to include all facilities leased by agencies of the State government.

January 9, 1979

Honorable Henry Kaplan
Chairman, Liquor Control Board
501 Northwest Office Building
Harrisburg, PA

Dear Chairman Kaplan:

We have been asked by the Acting Chief Counsel of the Liquor Control Board for an opinion as to whether or not leases of State liquor stores are required to be approved by the Board of Commissioners of Public Grounds and Buildings. It is our opinion, and you are advised, that they are so required.

Section 2413 of the Administrative Code of 1929, 71 P.S. § 643, provides:

"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."

The Liquor Code contains a provision specifically authorizing the leasing of State liquor stores. Section 301, 47 P.S. § 3-301, provides:

"The board may lease the necessary premises for such stores or establishments, but all such leases shall be made through the Department of General Services as agent of the board."

Although this section speaks of "stores or establishments" rather than "offices, branch offices, rooms, and accommodations", it is our opinion that the latter terms were intended to include all facilities leased by agencies of the State government. Therefore, you are advised that the Board of Commissioners of Public Grounds and Buildings is required to approve leases of State liquor stores.

Very truly yours,

W. W. ANDERSON
Deputy Attorney General

J. JUSTIN BLEWITT, JR.
Acting Attorney General

OFFICIAL OPINION NO. 79-2

Department of Aging—Department of Public Welfare—Title XX of the Social Security Act—Title XX Budget of the Department of Aging.

1. Pursuant to Act 70 of 1978, the Department of Public Welfare, in state fiscal years 1979-1980, 1980-1981 and 1981-1982, must allocate to the new Department of Aging no less than 12.24% of the funds allotted pursuant to Title XX of the Social Security Act to Pennsylvania by the federal government for those years.
2. The following funds are not to be included in computing this percentage: matching funds, retroactive funds, day care funds at the 100% reimbursement rate, and training funds.
3. Pursuant to Act 70 of 1978, the Department of Public Welfare, in state fiscal years 1979-1980, 1980-1981, and 1981-1982, must allocate to the new Department of Aging no less than 14.26% of the funds available in Pennsylvania for Title XX training in the aforementioned fiscal years.
4. The Department of Public Welfare is free to increase these percentages and the General Assembly, may also, by appropriation, increase the percentages.

January 11, 1979

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

Hon. Aldo Colautti
Secretary
Department of Public Welfare
333 Health and Welfare Bldg.
Harrisburg, PA 17120

Hon. Milton Berkes
Special Asst. for Human Services
238 Main Capitol
Harrisburg, PA 17120

*Re: Computation of the Title XX Budget
of the Department of Aging*

Dear Secretary McIntosh, Secretary Colautti, and Mr. Berkes:

Milton Berkes, Chairman of the Governor's Transition Task Force on the Department of Aging, has asked for our opinion concerning the proper interpretation of Section 6 of the Act of June 20, 1978, P.L. 477, No. 70, 71 P.S. § 581-1 *et seq.*, (hereinafter referred to as Act 70). Act 70 is the Act which establishes the new Department of Aging. Section 6 of Act 70 is the section which describes, *inter alia*, the way in which the Department of Public Welfare shall transfer certain federal funds to the Department of Aging. Because our opinion involves the formulation of the budget of the Department of Public Welfare, we

have also directed our opinion to Secretary McIntosh and to Secretary Colautti. It is our opinion that Section 6 must be interpreted as set forth below.

I. INTRODUCTION

The federal funds in question are transferred from the federal government to the Commonwealth pursuant to the Social Security Act, *as amended* by the Act of January 4, 1975, Pub. L. 93-647, 88 Stat. 2337 (42 U.S.C. § 1397 *et seq.*) (hereinafter referred to as Title XX) and the regulations promulgated by the United States Department of Health, Education and Welfare (hereinafter referred to as HEW) pursuant thereto. 45 C.F.R. § 228.0 *et seq.* The Department of Public Welfare has been designated as the single state agency in Pennsylvania for purposes of receiving and disbursing federal funds allotted to the Commonwealth under Title XX.

Title XX funds are used to fund a number of social services activities in the Commonwealth, including activities of the Office for the Aging. The Office for the Aging is currently an administrative office within the Department of Public Welfare. However, on July 1, 1979, pursuant to Act 70, it will become the new Department of Aging.

Section 6 of Act 70 amends the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 51 *et seq.*, by establishing a new section of the code, Section 2210-A, 71 P.S. § 581-10. Subsection (d) of Section 2210-A describes the powers and duties of the Department of Public Welfare and the new Department of Aging vis-à-vis Title XX funds as follows.

(d) The Department of Public Welfare shall transfer, for three State fiscal years immediately subsequent to the effective date of this act, to the Department of Aging *a proportion of the State allotment under Title XX of the Social Security Act at least equal to the proportion of such funds, including training and administrative funds, allocated to the office for the aging in relation to the State's total allotment in the same fiscal year as the effective date of this act* (emphasis added).

The purpose of subsection (d) is to place upon the Department of Public Welfare, as single state agency for Title XX purposes, a duty to allocate to the new Department of Aging no less than a certain percentage of the Title XX funds allotted to the Commonwealth in the state fiscal year in which the Act became effective. In order to properly interpret subsection (d), and thereby arrive at the correct percentage to be allocated, two questions must be answered: 1) what was the Commonwealth's total Title XX allotment in the state fiscal year in which Act 70 became effective; and, 2) what portion of those funds, including training and administrative funds, were allocated to the Office for the Aging in that same fiscal year.

II. TOTAL STATE ALLOTMENT

Section 15 of Act 70 provides that Act 70 shall take effect on January 1, 1979. State fiscal year 1978-1979 began on July 1, 1978 and ends on June 30, 1979. Act 70, therefore, takes effect in state fiscal year 1978-1979. Thus, the phrase "the State's total allotment in the same fiscal year as the effective date of this act" refers to the total allotment made to the Commonwealth in state fiscal year 1978-1979, i.e., between July 1, 1978 and June 30, 1979.

Computation of the total allotment made to the Commonwealth between July 1, 1978 and June 30, 1979 is governed by Title XX and the regulations promulgated by HEW pursuant hereto. 45 C.F.R. § 228.0 *et seq.** Section 228.52 of those regulations, entitled "Allotments to States", sets forth, with particularity, the way in which allotments are computed. Since the period in question is from July 1, 1978 to June 30, 1979, we are concerned with allotments made in federal fiscal years after federal fiscal year 1976-1977. Accordingly, Subsection (c) of Section 228.52 which is entitled "Allotments for (federal) Fiscal Years Beginning After June 30, 1976" is applicable. Paragraph (1) and (2) thereof provides as follows.

(1) The allotment of each State for each (federal) fiscal year beginning after June 30, 1976, shall be an amount which bears the same ratio to \$2,500 million as the population of such State bears to the population of all the States.

(2) The allotment for each State will be promulgated for each (federal) fiscal year by the Secretary prior to the first day of the third month of the preceding fiscal year, on the basis of the population of each State and of all the States as determined on the basis of the most recent satisfactory data available from the Department of Commerce.

Pursuant to these paragraphs, the federal government announces the Commonwealth's allotment on June 1 but actually makes the allotment on October 1, the beginning of the federal fiscal year. Although the allotment is made on October 1, it is made in and for the state fiscal year which began on the preceding July 1.¹

We have been informed by the Department of Public Welfare and the Budget Secretary's Office that the Secretary of HEW has, pursuant to Section 228.52(c), allotted to the Commonwealth the sum of \$146,611,500. This sum is the State's total Title XX allotment for state

*Editor's Note—Part 228 was redesignated Part 1396, See 45 Fed. Reg. 56707 (1980).

1. The Commonwealth's fiscal year covers a different period of time than the federal fiscal year. The federal allotment is adjusted accordingly. Thus, the Commonwealth's allotment for state fiscal year 1978-1979 (July 1, 1978 to June 30, 1979) is composed of $\frac{1}{4}$ of the federal 1977-1978 fiscal year (October 1, 1977-September 30, 1978) allotment and $\frac{3}{4}$ of the federal 1978-1979 fiscal year (October 1, 1978-September 30, 1979) allotment.

fiscal year 1978-1979 and is, therefore, the Commonwealth's total Title XX allotment referred to in subsection (d).

This figure reflects the increase in the Commonwealth's allotment made pursuant to the Revenue Act of 1978, Pub. L. 95-600, 92 Stat. 2763. This Act temporarily increases the national Title XX ceiling and the Commonwealth's allotment was increased accordingly. 43 Fed. Reg. 57348 (1978).

This figure does *not* include any funds raised by state or local taxation or local contribution i.e., "state funds". The word "allotment", as used in subsection (d), refers only to the funds allotted to the Commonwealth pursuant to the above-quoted section of the Title XX regulations. It does not include any state or other funds which may be used to match that sum.

This figure does not include any of the funds allotted to the Commonwealth for reimbursement of child day care funds at the 100% reimbursement rate. For state fiscal year 1978-1979, these funds are allotted pursuant to Title XX *as amended* by Section 801(b) of the Revenue Act of 1978, Pub. L. 95-600 and Sections 228.51(c) and 228.52(c)(3) of the Title XX regulations. It is apparent, from an examination of Section 801(b) and the pertinent parts of these regulations,² that these funds are a separate allotment to the states for provision of certain day care services. *See also* Section 3 of Pub. L. 94-401 *amending* Section 2002(a)(2) of the Social Security Act (predecessor to Section 801(b) of Pub. L. 95-600). In contrast to funds under the general allotment, these funds are set aside for day care and cannot be used for any other purpose, including the funding of aging programs. Accordingly, they cannot be counted in the general allotment described in the above-quoted regulations.

This figure also does not include any so-called "retroactive" Title XX funds. These so-called "retroactive" Title XX funds are, by their very definition and description, not part of the Commonwealth's allotment

2. Section 228.51(c) provides, in part, as follows: Notwithstanding paragraph (a) of this section, FFP is available at the 100 percent rate up to the State's share of the *additional allotments* described in § 228.52(c)(3) (emphasis added).

Section 228.52(c)(3) provides: The *basic allotment* described in paragraph (c)(1) of this section shall be increased by an amount which bears the same ratio to . . . \$200 million in the 1977 fiscal year as the population for such State bears to the population of all States. The amount of these *additional allotments* payable to each State shall be the lesser of: (A) The amount of each *additional allotment*; or (B) The amount of actual expenditures incurred for the provision of child day services and for grants by States to child day care providers for the employment of welfare recipients (emphasis added).

These regulations were promulgated in furtherance of Section 3 of Pub. L. 94-401 to reflect the availability of these funds in federal fiscal year 1977-1978. Section 801(b) of Pub. L. 95-600 is a virtual reenactment of Section 3 for federal fiscal year 1978-1979. Accordingly, the only change in these regulations necessitated by the enactment of Pub. L. 95-600 will be a change to reflect the availability of these funds in federal fiscal year 1978-1979.

for state fiscal year 1978-1979. They are actually part of previous years' allotments but, because of the interplay between the state and federal fiscal processes, they are available for appropriation and expenditure in state fiscal year 1978-1979. Accordingly, although so-called "retroactive" Title XX funds in the amount of \$27,398,000 were available for appropriation and expenditure in state fiscal year 1978-1979 and were actually appropriated to a number of program areas, including aging programs, they are not part of the Commonwealth's Title XX allotment for state fiscal year 1978-1979 and cannot be considered in making any computations under subsection (d).³

3. Retroactive Title XX funds can be described as follows.

In a particular fiscal year, the Commonwealth is allotted a certain sum under Title XX. This allotment is, however, actually received by the Commonwealth only when it provides HEW, at a later date, with receipts demonstrating that expenditures reimbursable under Title XX were, in fact, made.

It is of no legal import to HEW within which state program area the funds are spent so long as the expenditures are otherwise eligible for reimbursement.

It is, however, important to the Commonwealth under which program areas the funds are spent. To wit, pursuant to the Act of June 29, 1976, P.L. 469, No. 117, 72 P.S. § 4611 *et seq.*, the General Assembly has assumed the power to appropriate all federal funds, including Title XX funds. *See Shapp v. Sloan*, 26 Pa. Commonwealth Ct. 589, 365 A.2d 169; 27 Pa. Commonwealth Ct. 312, 367 A.2d 791 (1976), *aff'd*, 480 Pa. 449, 391 A.2d 595 (1978), *appeal dismissed sub nom., Thornburgh v. Casey*, 440 U.S. 942 (1979). In appropriating Title XX funds, the General Assembly appropriates specific amounts to various program areas within the Department of Public Welfare and within other agencies. Once that state appropriation ceiling has been reached, no more Title XX funds may be drawn down in that particular year by that program area. 72 P.S. § 4613.

However, because of the mandatory nature of certain of the programs funded by Title XX and because of the availability of other sources of funds for these programs, expenditures continue under these programs, despite the fact that the Pennsylvania state appropriation ceiling for Title XX funds for that program has been reached. These expenditures are, nevertheless, eligible for Title XX reimbursement and records are kept to document this eligibility.

In other program areas, sufficient eligible expenditures are not always available to exhaust all of the Title XX funds appropriated to a particular program area. Thus, at the end of a particular fiscal year, a situation arises in which there are excess eligible expenditures in certain program areas and insufficient eligible expenditures in others, a condition which results in the Commonwealth being unable to exhaust its entire Title XX allotment for that year.

Accordingly, in succeeding fiscal years, the excess eligible expenditures previously incurred are forwarded to HEW and used to draw upon that portion of the previous year's allotment which was not used. *Cf.* 42 U.S.C. § 1397a; 45 C.F.R. § 228.52(e). The funds made available in this fashion from previous years' allotment are the so-called "retroactive" Title XX funds. These funds are appropriated along with the regular allotment of Title XX funds. 72 P.S. § 4615 (appropriation of federal "credits"). It is important to note, however, that the General Assembly retains the power to appropriate these "retroactive" funds to program areas other than those in which the expenditures earning them were incurred. 72 P.S. § 4615.

Thus, as stated above, it can be seen that these "retroactive" funds are, by their very nature, not part of the allotment of the year in which they are appropriated and, therefore, cannot be included in the state's total allotment for state fiscal year 1978-79.

III. ALLOCATION TO THE OFFICE FOR THE AGING IN STATE FISCAL YEAR 1978-79

The second question to be answered is: what was the amount of funds allocated in state fiscal year 1978-1979 by the Department of Public Welfare to the Office for the Aging.

We are informed by the Department of Public Welfare and the Budget Secretary's Office that from the \$146,611,500 allotted to the Commonwealth in state fiscal year 1978-1979, funds were allocated to the Office for the Aging in two program areas; "Aging" and "General Government".

In the program area "Aging", the sum of \$17,032,000 was allocated.

The sum of \$5,300,000 was allocated to the program area "General Government". Of that sum, the Office for the Aging received \$915,000 for its administration.

Adding together these two sums, we find that the total allocation to the Office for the Aging for state fiscal year 1978-1979 was \$17,947,000. All of the above figures are confirmed by an examination of the Title XX Comprehensive Annual Service Plan for fiscal year 1978-79 which explains these figures in detail. 8 Pa. B. 1795, 1810-1811. It is through the Plan that the Department of Public Welfare gives notice of Title XX allocations. 45 C.F.R. §§ 228.27, 228.28.⁴

IV. PERCENTAGE TO BE APPLIED TO FUTURE ALLOCATIONS

Subsection (d) provides that in state fiscal years 1979-1980, 1980-1981, and 1981-1982, the Department of Public Welfare shall allocate no less than the same percentage of Title XX funds to the new Department of Aging as it allocated to the Office for the Aging in state fiscal year 1978-1979. As noted above in I and II, in state fiscal year 1978-1979, the Department allocated to the Office for the Aging the sum of \$17,947,000 out of a total Title XX allotment of \$146,611,500 or, in other words, it allocated 12.24% of the Commonwealth's Title XX allotment to the Office for the Aging.⁵ Accordingly, in state fiscal years 1979-1980, 1980-1981 and 1981-1982, the Department must allocate to the new Department of Aging no less than 12.24% of the Title XX funds allotted to the Commonwealth for those years, excluding 100% day care funds.

It is however, important to note that subsection (d) requires only this allocation as a minimum. The Department of Public Welfare is free to allocate a greater percentage of the Title XX allotment to the Department of Aging. Furthermore, we would also note that, pursuant to the

4. We have been informed by the Department of Public Welfare that this allocation will not change as a result of the Revenue Act of 1978.

5. These sums were subsequently appropriated as allocated. Federal Augmentation Act of 1978, Act of September 27, 1978, P.L. 1649, No. 61A.

Act of June 29, 1976, P.L. 469, No. 117, 72 P.S. § 4611 *et seq.*, the General Assembly has the power to appropriate a greater or lesser percentage of the Commonwealth's Title XX allotment to the Department of Aging.

V. TRAINING FUNDS

Under Title XX, there is no maximum or ceiling on the amount of funds which the Commonwealth may draw down from the federal government for training purposes so long as the federal funds are matched in the requisite 75%-25% ratio. 42 U.S.C. § 1397a(a)(2)(A); 45 C.F.R. § 228.80. Training funds are, therefore, as a matter of federal law, not part of the federal allotment of Title XX funds made pursuant to Section 228.52(c). However, Subsection (d), in referring to the Commonwealth's Title XX allotment, includes therein a reference to "training funds" as if those funds were part of the Commonwealth's Title XX allotment for a particular fiscal year. The language of Subsection (d) is, therefore, not explicit on this point and we must attempt to ascertain the intent of the General Assembly in this regard. 1 Pa. C.S. § 1921(c). In our opinion, the General Assembly intended the following in regard to Title XX training funds.

Although there is no federal allotment of training funds, the Commonwealth does itself allocate training funds within program areas. The Commonwealth, through the Department of Public Welfare, establishes a maximum budget level on the amount of training funds to be spent in Pennsylvania in a particular year. This is done to reflect the availability of matching funds and also as a means of insuring programmatic integrity. In state fiscal year 1978-1979 this amount was set at \$10,171,000. Out of this sum, the sum of \$1,450,000 or 14.26% was set aside for training purposes for the Office of the Aging. 8 Pa. B. 1810-1811.⁶

In execution of its power to appropriate federal funds, the General Assembly further fixed these sums by making respective appropriations of these sums to the Department and to the Office.⁷

In our opinion, the intent of subsection (d) was to insure that the new Department of Aging have available to it, in fiscal years 1979-1980, 1980-1981, 1981-1982, this same 14.26% of the Title XX training funds otherwise available in the Commonwealth. Accordingly, it is our opinion that pursuant to subsection (d), the Department of Public Welfare must allocate to the Department of Aging at least 14.26% of the training funds to be spent in the Commonwealth in state fiscal year 1978-1979. This allocation is separate and distinct from the allocation of monies which are part of the federal Title XX allotment. We would also note that the Department of Public Welfare is free to increase this percentage and the General Assembly is, of course, free to increase or decrease the percentage by appropriation.

6. This figure will, of course, not change as a result of the Revenue Act of 1978.

7. Federal Augmentation Act of 1978, Act of September 27, 1978, P.L. 1649, No. 61A.

VI. CONCLUSION

In summary, you are advised that in interpreting subsection (d) of Section 2210-A of the Administrative Code of 1929, added by Section 6 of Act 70, the amount allotted to the Commonwealth pursuant to Title XX for state fiscal year 1978-1979 was \$146,611,500. This sum does not include funds raised by state or local taxation or funds otherwise received; it does not include so-called "retroactive" Title XX funds; it does not include funds for day care at the 100% reimbursement rate; it also does not include training funds.

The amount allocated by the Department of Public Welfare to the Office of the Aging in state fiscal year 1978-1979 was \$17,947,000 or 12.24% of the total Title XX allotment. Therefore, pursuant to subsection (d), the Department of Public Welfare must, in state fiscal years 1979-1980, 1980-1981, and 1981-1982, allocate to the new Department of Aging at least 12.24% of the total Title XX allotment for those years. In regard to Title XX training funds, the Department of Public Welfare must allocate to the new Department of Aging at least 14.26% of the funds available in Pennsylvania for Title XX training in the afore-mentioned fiscal years. The Department of Public Welfare is free to increase these percentages and, of course, the General Assembly has the power to increase or decrease that percentage by appropriation.

You are advised that the Department of the Auditor General and the Treasury Department have 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 of the Administrative Code, 71 P.S. § 192).

Sincerely yours,

PAUL SCHILLING
Deputy Attorney General

J. JUSTIN BLEWITT, JR.
Acting Attorney General

OFFICIAL OPINION NO. 79-3

Civil Service Act—Sections 904 and 906—Political Activities—Dismissal from Classified Service—Attorney General's Opinion No. 223 of 1960.

1. The Civil Service Commission must enforce Sections 904 and 906 of the Civil Service Act in the manner described in Attorney General's Opinion No. 223 of 1960.
2. When an employee has engaged in the political activities prohibited by Section 904, the penalties set in Section 906 must be applied, whether or not such employee engaged in such activity intentionally or unintentionally.
3. Nothing has occurred since the issuance of Attorney General's Opinion No. 223 of 1960 which would lead to a different conclusion.

January 11, 1979

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

Dear Chairman McCarthy:

You have asked for our opinion concerning the enforcement, by the Civil Service Commission, of Sections 904 and 906 of the Civil Service Act, Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. §§ 741.904, 741.906.

In our opinion, the manner in which the Commission should enforce the provisions of Sections 904 and 906 was correctly set forth in Attorney General's Opinion No. 223 of 1960, to wit: when, after a hearing, it is proven that an employee in the classified service has engaged in the political activities prohibited by Section 904, the penalties set forth in Section 906 must be applied, whether or not such employee engaged in such activity intentionally or unintentionally.

Nothing has occurred since the issuance of that opinion which would cause us to reach a different conclusion. *Commonwealth v. Urda*, 23 Pa. Commonwealth Ct. 607, 353 A.2d 61 (1976); *Wasniewski v. Civil Service Commission*, 7 Pa. Commonwealth Ct. 166, 299 A.2d 676 (1973). Accordingly, we must reiterate the conclusions set forth therein.

While we recognize that our construction of this statute may lead to a harsh result in some cases, we nevertheless feel that the language of the statute is clear and compels the conclusion we reach. Attempts to temper the law's mandate must be addressed to the General Assembly.

Sincerely,

PAUL SCHILLING
Deputy Attorney General

J. JUSTIN BLEWITT, JR.
Acting Attorney General

OFFICIAL OPINION NO. 79-4

Heart and Lung Act—State Police—Disability—Annual and Sick Leave Benefits.

1. Members of the Pennsylvania State Police temporarily incapacitated by an injury sustained in the course of duty continue to accrue sick leave, annual leave and such other benefits as they would otherwise have been entitled to absent the injury.
2. The intent of the Legislature in the Act of June 28, 1935, P.L. 477, *as amended*, 53 P.S. § 637 *et seq.*, was to insure that an injured policeman would be paid his full rate of salary during incapacity and not to reduce any usual sick leave period.
3. Official Opinion No. 3 of 1978 is reversed.

October 9, 1979

Honorable Robert C. Wilburn
Secretary of the Budget and
Administration
238 Main Capitol Building
Harrisburg, Pa. 17120

Re: Heart and Lung Act

Dear Secretary Wilburn:

I have reviewed Attorney General's Opinion No. 3 of 1978, issued to former Secretary of Administration James Wade, and have decided that Opinion should be reversed.

The single issue involved in that Opinion is whether the Heart and Lung Act, Act of June 28, 1935, P.L. 477, *as amended*, 53 P.S. § 637, *et seq.*, insofar as it pertains to a member of the Pennsylvania State Police who is temporarily disabled, permits the member to accrue annual leave, sick leave and other benefits incidental to ordinary active employment during a period in which the member is temporarily incapacitated due to a job-related injury.

A 1958 Attorney General's Opinion, Official Opinion No. 136 of 1958, had concluded that such leave and other benefits did continue to accrue during such a period of temporary incapacity. The 1978 Opinion, however, affirming a 1973 informal opinion on the issue, reversed the earlier Opinion and concluded that the Act did not provide any greater protection to an injured State Policeman than that he or she not *lose* any accrued annual and sick leave during a period of temporary incapacity or be required to utilize such accrued leave toward the period of incapacity.

In reviewing this issue we note the lack of any relevant case law or other precedent upon which to base a resolution of this issue.

We believe that there are considerations which should have been given greater weight in the 1978 Opinion. One of these is that, in the absence of changed circumstances, new law or other compelling factors, a formal statutory interpretation by the Attorney General should not be disturbed unless clearly incorrect. Moreover, the intervening years were undoubtedly characterized by a reliance by the Pennsylvania State Police membership and its collective bargaining representatives on the 1958 Opinion to the end that there was no effort to obtain, through collective bargaining or legislative lobbying, a benefit already considered to be securely in hand.¹

1. In 1976, after the Office of Administration had ceased permitting the continued accrual of benefits during temporary incapacity in reliance upon the 1973 informal opinion, the Fraternal Order of Police negotiated for and was awarded (in the Lowenberg Award, effective July 1, 1977) a provision for accrual during incapacity. However, based upon the 1978 Opinion, the awarded benefit has not been provided.

Some interpretive guidance is provided by the Statutory Construction Act, Act of December 6, 1972, P.L. 1339, *as amended*, 1 Pa. C.S. § 1501 *et seq.* 1 Pa. C.S. § 1921(c) provides:

“When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:

- (1) The occasion and necessity for the statute.
- (2) The circumstances under which it was enacted.
- (3) The mischief to be remedied.
- (4) The object to be attained.
- (5) The former law, if any, including other statutes upon the same or similar subjects.
- (6) The consequences of a particular interpretation.
- (7) The contemporaneous legislative history.
- (8) Legislative and administrative interpretations of such statute.”

In our judgment, the words of the statute in question are not explicit as to the issue present here. It is appropriate, then, to consider the issue in the light of the eight factors presented:

(1) The occasion and necessity for the statute, in a simplistic but correct sense, were that members of the State Police force were unprotected against loss of pay and benefits upon a job-related injury or incapacity in the absence of such legislation. Given the considerable possibility of job-related injury or incapacity, this possibility was rightly considered by the legislature to call for a remedy.

(2) The statute was enacted under circumstances that cannot reliably be stated, due to the scant legislative history.

(3) The legislative history, although scant, contains some guidance as to the mischief sought to be remedied.

“Mr. EROE: . . . [the bill] now provides for the payment of compensation, medical and hospital expenses of policemen and firemen by cities, boroughs, towns and townships who are injured in the performance of their duties and providing that absence during injuries *shall not reduce any usual sick leave period.*”

We expect our police and firemen to perform their duties under sometimes very hazardous conditions. I think that it is no more than right that the people in these subdivisions take care of these men if they are injured in the line of duty, and provide them with compensation until

they are fit to return to duty. I ask for the support of this bill." [Emphasis added]

While it may be a matter of minimal significance what one legislative sponsor of the statute said in one brief statement on the floor of the legislature, it is noteworthy that the terminology employed was, "not reduce any usual sick leave period." If Mr. Eroe had meant to imply that the purpose was to not reduce previously accrued sick leave, he would not have spoken in terms of a "usual" period but would have spoken in terms of a fixed, accumulated, accrued or established period. "Usual", in this context, implied regularity, recurrence and repetition rather than something already fixed but differing in quantity from member to member.

(4) The object to be obtained by the legislation appears to have been, by the language of the Act and by the legislative history, "Not to reduce any usual sick leave period" by reason of the policeman's temporary incapacity and to pay the policeman his "full rate of salary" during such incapacity.

(5) The former law contained no similar provision.

(6) The consequences of the interpretation in Official Opinion No. 3 of 1978 are that the policeman loses parity with his peers by virtue of his job-related disability. He does not, as do they, continue to accrue leave time. He does not, as do they, become eligible for time-in-service-based promotions or pay increases.

Another consequence of this interpretation is that a construction of the statutory phrase "full rate of salary" to exclude ordinary benefits such as routine pay increases based upon time-in-service and the accrual of annual, sick and personal leave, implies a distinction between salary in the form of a paycheck and salary in the form of collateral benefits that is not logical as to this issue or as to other issues. If the distinction apparently drawn in Official Opinion No. 3 of 1978 were carried to its logical conclusion, there is no reason why the temporarily incapacitated trooper should continue to receive health insurance coverage, state-paid contributions toward retirement, time-in-service credit towards retirement and the rest of the panoply of benefits which come to the trooper in some form other than the periodic paycheck.

The consequences of the interpretation in Official Opinion No. 136 of 1958 are potentially increased costs to the Commonwealth in the form of pay increases and accrued annual, personal and sick leave.

(7) The extent of substantive contemporaneous legislative history is set forth above.

(8) There appear to be no legislative interpretations. The Attorney General's Opinions appear to be the sole interpretations.

The Statutory Construction Act supports the interpretation in the 1958 Opinion.

A legislative review of the issue would be ideal. While I hope such a review will be forthcoming, it is my duty to rule presently. It is my opinion, and you are hereby advised, that the conclusion stated in Official Opinion No. 3 of 1978 is hereby reversed. Members of the Pennsylvania State Police temporarily incapacitated due to an injury resulting from the performance of their duties shall continue, while so incapacitated, to accrue sick leave and annual leave and to receive such other benefits as they would otherwise be entitled to if they had not been so injured.

Sincerely yours,

EDWARD G. BIESTER, JR.
Attorney General

OFFICIAL OPINION NO. 79-5

Certification of Laboratories Analyzing Public Water Supply Samples—Attorney General Opinion No. 144 of 1958—Act 275 of 1970.

1. The power to certify laboratories which analyze samples of the public water supply, ascribed to the Department of Health in Attorney General Opinion No. 144 of 1958, has been transferred by Act 275 of 1970 to the Department of Environmental Resources.
2. The official text of DER's Waterworks regulations, since 1972, has required such certification to be performed by DER.
3. Accordingly, all files regarding this program must be transferred from the Department of Health to DER and all participating laboratories notified of the transfer.

October 29, 1979

Honorable Gordon K. MacLeod, M.D.
Secretary
Department of Health
802 Health & Welfare Building
Harrisburg, Pennsylvania 17120

Honorable Clifford Jones
Secretary
Department of Environmental
Resources
202 Evangelical Press Building
Third and Reily Streets
Harrisburg, Pennsylvania 17120

Dear Dr. MacLeod and Secretary Jones:

By memorandum dated January 26, 1979, Deputy Secretary Morton D. Rosen of the Department of Health asked for our legal review of Attorney General Opinion No. 144 of 1958 (hereinafter "Opinion 144") which ruled that the Department of Health had the power to examine and approve laboratories which analyze samples of water in connection with the Health Department's then existing program of public water supply supervision.

It is our opinion and you are so advised that Opinion 144 has been superseded by subsequent legislation, in which the powers ascribed in that Opinion to the Department of Health were transferred to the Department of Environmental Resources (hereinafter "DER"). Accordingly, Opinion 144 should now be considered as applying to DER, rather than the Department of Health.

At the time that Opinion 144 was written, the authority for the Health Department's program of supervision of public water supply was found in Section 2109(b) of the Administrative Code of 1929, which read:

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

(b) To issue water works permits, and stipulate therein the conditions under which water may be supplied to the public, and to administer sections one, two, and three of the act, approved the twenty-second day of April, one thousand nine hundred and five (Pamphlet Laws, two hundred and sixty), entitled "An act to preserve the purity of the waters of the State for the protection of the public health,"¹ its amendments and supplements. The Act of April 9, 1929, P.L. 177, § 2109, 71 P.S. § 539(b) (repealed by Act of December 3, 1970, P.L. 834, § 25).

Opinion 144 found in this cited language the authority for the Department of Health to certify and to make inspections of laboratories which perform bacteriological analyses of samples of water served to the public. The Opinion held that, although no laboratory could be required to be certified and inspected, the Department of Health need not accept analyses of water from laboratories which did not voluntarily participate. Further, the Department was authorized to require water works to have their water analyzed by a certified laboratory as a condition for their receiving a permit to supply water to the public.

On December 3, 1970, Governor Shafer signed Act No. 275, P.L. 834, (hereinafter "Act 275"), which created the Department of Environmental Resources and invested DER with various powers and duties, a number of which had previously reposed in the Department of Health.

1. 35 P.S. §§ 711-715.

Section 25 of Act 275 repealed Section 2109(b) of the Administrative Code, thereby eliminating the statutory basis of Opinion 144 as it applied to the Department of Health. Simultaneously, however, Section 20 of Act 275 added Article XIX-A to the Administrative Code, re-enacting verbatim the language of Section 2109(b) as a power and duty of the Department of Environmental Resources. 71 P.S. § 510-18(1).

In addition, Section 20 of Act 275 provides:

The Department of Environmental Resources shall, subject to any inconsistent provision in this Act contained, continue to exercise the powers and perform the duties by law heretofore invested in and imposed upon:

(6) the Department of Health and the Secretary of Health in so far as such powers and duties pertain . . . to management of the sanitary affairs of the Commonwealth, the issuance of waterworks permits and to the control of water pollution;

(7) the former Commissioner of Health and the Department of Health by the Act of April 22, 1905 (P.L. 260), entitled "an act to preserve the purity of the waters of the State, for the protection of the public health;". . . §§ 1901-A(6) & (7), 71 P.S. §§ 510-1 (6) & (7).

The ineluctable legal consequence of these provisions of Act 275 is that the Department of Health no longer has the authority set forth in Opinion 144 to certify laboratories performing bacteriological analyses of water supplies, and that this function has been statutorily transferred to the Department of Environmental Resources.

Accordingly, it is our opinion and you are so advised that Attorney General Opinion 144 of 1958 is no longer valid as it applies to the Department of Health, but rather the powers and duties described in that Opinion have been transferred by statute to the Department of Environmental Resources.

Act 275 became effective on January 19, 1971 (Section 37 of Act 275). Subsequently, the new Department of Environmental Resources adopted wholesale the relevant regulations of the Department of Health and other agencies whose previous powers had been transferred to it. This was accomplished by a notice published in the *Pennsylvania Bulletin* at 1 Pa. B. 1804, September 11, 1971. This notice did not reprint the voluminous regulations involved, but rather made reference to them as Pa. B. Docket No. 71-1802, an annex filed for public inspection. Among the regulations adopted was Chapter 109, "Waterworks", which was taken from the prior Health Department regulations on the subject.

As provided in Article IV of the Commonwealth Documents Law, the Act of July 31, 1968, P.L. 769, 45 P.S. § 1401 *et seq.*, now 45 Pa. C.S. § 701 *et seq.*, Chapter 109 was codified in Volume 25 of the Pennsyl-

vania Code in 1972. The codification was certified by the Director of the Legislative Reference Bureau on March 11, 1972.

Section 109.34(d), as codified, reads:

Bacteriological analyses shall be performed by laboratories certified by the Department.*

The "Department" to which this section of the DER regulation refers is, of course, DER itself. See 25 Pa. Code § 1.1.

Thus, since 1972, the official, legally controlling version of the DER regulations has properly placed the authority to certify these laboratories in DER. (The version of regulations appearing in the Code prevails over any other form of the regulations. See Section 501 of the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, 45 P.S. § 1501, which was replaced by 45 Pa. C.S. § 901).

Unfortunately, 25 Pennsylvania Code Section 109.34(d) has never been implemented. To this day, DER requires these laboratories to be certified by the Department of Health, despite Health's lack of authority to do so. The apparent reason for this situation is that Section 109.34(d) in the annex docketed with the Legislative Reference Bureau in 1971, mistakenly read:

Bacteriological analyses shall be performed by laboratories certified by the *Pennsylvania Department of Health*. (emphasis supplied).

Although the Legislative Reference Bureau recognized this error and edited out the reference to the Department of Health in the official codification, DER continues to this day to reprint, distribute and enforce the erroneous, superseded version. Therefore DER still requires these laboratories to be certified by the Department of Health.

Since it is clear that Act 275 transferred these certification powers to DER, that the reasoning of Opinion 144 accordingly now applies to DER, and that the official version of DER's own regulations places this responsibility on DER, it is our opinion and you are so advised that DER must:

- 1) immediately correct its reprinted version of 25 Pennsylvania Code Section 109.34(d) to conform to the actual regulations,
- 2) obtain from the Department of Health all files regarding certification of these laboratories, and

* Editor's Note—Subsequent to the issuance of this Opinion, 25 Pa. Code § 109.34(d) was amended on April 25, 1980, 10 Pa. B. 1664, and now reads: All drinking water analyses shall be performed by laboratories certified by the United States Environmental Protection Agency.

3) notify participating laboratories of the corrected regulations.

Sincerely,

ROBERT E. RAINS
Deputy Attorney General

EDWARD G. BIESTER, JR.
Attorney General

OFFICIAL OPINION NO. 80-1

Liquor Control Board—Alcoholic Beverages—Liquor Code Prices.

1. A "fixed allocation cost" is a "service or handling charge" under Section 207(b) of the Liquor Code.
2. A "fixed allocation cost" may be added to the fixed sales price, which is the sum of the manufacturer's contract price and the percentage markup, provided that the cost bears some relationship to the actual cost of handling the merchandise and, in the opinion of the Board, the added cost is required for the efficient operation of the State Store System.

September 10, 1980

Daniel W. Pennick, Chairman
Liquor Control Board
532 Northwest Office Building
Harrisburg, Pennsylvania 17124

*Re: New Pricing System for Liquor
Control Board Merchandise*

Dear Mr. Pennick:

You have asked whether the Liquor Control Board can revise its method of pricing products sold in Pennsylvania Liquor Stores by adding a "fixed nondiscriminatory overhead allocation cost" (hereinafter "fixed allocation cost") on either a per bottle, per case, or per ounce basis.

In this connection you have asked us to review official Attorney General's Opinion No. 118 of 1972 and No. 206 of 1959* which you believe may contradict one another. We have reviewed both Opinions, and we find that the addition of a fixed allocation cost, if added to the fixed sales price, will not conflict with either Opinion.

Section 207(b) of the Liquor Code, 47 P.S. § 2-207(b), provides, in part:

* Editor's Note—Official Opinion of the Attorney General No. 118 of 1972 "superseded and rescinded" Official Opinion No. 206 of 1959. See Official Opinion of the Attorney General No. 124 of 1972.

Under this act, the board shall have the power and its duty shall be:

* * * * *

(b) . . [T]o fix the wholesale and retail prices at which liquors and alcohol shall be sold at Pennsylvania Liquor Stores: *Provided, That in fixing the sale prices, the board shall not give any preference or make any discrimination as to classes, brands or otherwise, except to the extent and for the length of time necessary to sell such classes or brands in compliance with any Federal action freezing or otherwise controlling the price of said classes or brands, or except where special sales are deemed necessary to move unsaleable merchandise, or except where the addition of a service or handling charge to the fixed sales price of any merchandise in the same comparable price bracket, regardless of class, brand or otherwise, is, in the opinion of the board, required for the efficient operation of the State store system. . .*

(Emphasis added)

The existing price structure consists of the manufacturer's contract price, including Federal taxes and delivery charges to the Liquor Control Board storage warehouse. A 48% markup is then added on all wine, liquor and alcohol sold in State Stores. To the cost and the 48% markup is added the 18% Emergency Tax and to the combined amount is added the 6% Sales Tax. The total is the price paid by the consumer.

The new pricing method you propose would add the "fixed allocation cost" to the contract price and then a percentage markup would be computed which would result in a "base price." To the "base price" would be added the statutorily required taxes of 18% and 6%.

Section 207(b) specifically gives the Board the authority to add "a service or handling charge" to any merchandise "in the same comparable price bracket, regardless of class, brand or otherwise," if in the Board's opinion it is "required for the efficient operation of the State Store System." A "fixed allocation cost," therefore, is permissible so long as it bears some relationship to the actual cost of handling the merchandise. Section 207(b), however, specifically allows the service or handling charge only if it is in "addition" to the "fixed sales price," which is the manufacturer's contract price plus the percentage markup. Thus, the statute mandates that any service or handling charge be placed on the product after the computation of a percentage markup on the manufacturer's contract price. It cannot be added before the markup as you suggest. The addition of the handling or fixed cost to the contract price before markup would, as you have correctly noted, produce a profit on the service or handling charge contrary to the intent of the statute. The two taxes, of course, would still be imposed on top of the fixed sales price plus the fixed allocation cost.

Official Attorney General's Opinion No. 18 of 1977, dated October 5, 1977, stated that a flat 15 cent across the board increase added to the 48% existing markup would violate Section 207 by giving preference to, or discriminating in favor of, more expensive classes or brands of liquor inasmuch as the brunt of the price increase would fall on the less expensive classes or brands. In the same opinion, however, it was stated that a flat 15 cent service or handling charge added to the selling prices (the cost plus percentage markup) of all wines, liquors and alcohol across the board would be legal if that service or handling charge bears some relationship to the actual cost of handling the merchandise.

The "fixed allocation cost" method you propose of adding the same charge across the board to all products will be justified as a service charge under Section 207(b) provided it is added after and not before the markup is computed, and provided also that the amount bears a relationship to the actual cost of handling the merchandise. For example, a \$1.00 handling charge added to the fixed sale price of every bottle in the store would be legal if the cost of handling each bottle is at least \$1.00. Similarly, a \$10.00 charge added to the price of every case would be legal if the cost of handling each case is at least \$10.00. This could then be divided among the bottles in the case. An allocation per ounce would be permissible if it can be shown that the cost of handling merchandise varies in accordance with its volume and that the per ounce charge bears some relationship to that cost.

In conclusion, it is the Opinion of the Attorney General, and you are so advised, that § 207(b) of the Liquor Code permits the addition of the above described fixed nondiscriminatory overhead allocation cost to the fixed sales price of alcoholic beverages before the taxes are computed if, in the Board's opinion, it is required for the efficient operation of the State Store System.

Sincerely yours,

HARVEY BARTLE, III
Acting Attorney General

OFFICIAL OPINION NO. 80-2

Health Care Services Malpractice Act—Effect of the Supreme Court's Opinion Mattos v. Thompson on Arbitration Panels for Health Care—Jurisdiction of the Panels to Hear Medical Malpractice Claims—Claims Filed with the Arbitration Panels as Tolling the Statute of Limitations—Procedure for Administrator of Arbitration Panels to Implement Mattos v. Thompson—Transfer of Claims Under Pa. R.C.P. No. 213(f)

1. Although *Mattos v. Thompson* declared unconstitutional Section 309 of the Health Care Services Malpractice Act which vested "original exclusive jurisdiction" in arbitration panels to hear medical malpractice claims, the opinion left intact the remaining sections of the Act.

2. Section 309 of the Act was declared unconstitutional because the Court held delays in processing arbitration claims infringed the right to a jury trial: a right held by defendant as well as by plaintiff.
3. In light of the rationale of *Mattos v. Thompson*, arbitration under the Health Care Services Malpractice Act, 40 P.S. §§ 1301.101 *et seq.*, continues to exist only as a voluntary system for arbitrating medical malpractice claims.
4. A medical malpractice claim filed with an arbitration panel continues to toll the statute of limitations under Section 401 and 605 of the Health Care Services Malpractice Act.
5. To implement the *Mattos* opinion the parties in all pending cases should be notified of this opinion and the opportunity for voluntary arbitration.
6. In pending cases where any of the parties do not consent to arbitration the cases must be transferred to an appropriate Court of Common Pleas pursuant to Pa. R.C.P. No. 213(f).

October 14, 1980

Arthur S. Frankston, Esquire
Administrator
Arbitration Panels for Health Care
3 Riverside Office Center
2101 North Front Street
Harrisburg, Pennsylvania 17120

Re: *Mattos v. Thompson, et al.*

Dear Mr. Frankston:

You have asked for an opinion as to the status of the Arbitration Panels for Health Care as a result of the September 22, 1980 decision of the Pennsylvania Supreme Court in the case of *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980), wherein the Court declared unconstitutional Section 309 of the Health Care Services Malpractice Act, Act of October 15, 1975, P.L. 390, *as amended*, 40 P.S. § 1301.101 *et seq.* (hereinafter "the Act"). Specifically, you have asked whether or not the entire arbitration system is now void, and if it continues to exist whether it retains jurisdiction at the sole option of the plaintiff or whether consent of all parties is required.

The Act, which established a system for the compulsory arbitration of malpractice claims against health care providers, provided in Section 309:

The arbitration panel shall have original exclusive jurisdiction to hear and decide any claim brought by a patient or his representative for loss or damages resulting from the furnishing of medical services which were or which should have been provided. The arbitration panel shall also have original exclusive jurisdiction to hear and decide any claim asserted against a nonhealth care provider who is made a party defendant with a health care provider. 40 P.S. § 1301.309

While the Court declared unconstitutional the system's "original exclusive jurisdiction to hear and decide" health care malpractice claims, it is our opinion that it left intact the remaining sections of the Act relating to the arbitration system. This conclusion is supported not only by the language of the majority opinion, but by the separate opinion of Mr. Justice Larsen who dissented in part precisely because the majority did not void the entire arbitration scheme.

Our position that the remainder of the system continues unaffected is supported by Section 1007.1 of the Act added by Act of December 14, 1979, P.L. 562 which states that "the provisions of this act are declared to be severable" and by the Statutory Construction Act, 1 Pa. C.S. § 1925 which provides that if a section of a statute is held to be invalid, the rest of the act stands unless "the Court finds" that the remaining valid sections are essential to or inseparable from the void sections or that the otherwise valid provisions would be incomplete or incapable of execution. No such finding was made here. See also *Stoner v. Presbyterian University Hospital*, 609 F.2d. 109, 112 (3d Cir. 1979).

The question remains therefore as to whether the Arbitration Panels for Health Care under the Act retain jurisdiction if a plaintiff alone wishes to proceed thereunder or whether they may arbitrate only with the consent of all parties.

The Supreme Court declared Section 309 of the Act, 40 P.S. § 1301.309, unconstitutional "because the delays involved in processing these claims under the prescribed procedures set up under the Act result in an oppressive delay and impermissibly infringes upon the constitutional right to a jury." Since defendants as well as plaintiffs have a right to a jury trial, I conclude that a plaintiff cannot have the option of proceeding under arbitration without the consent of all defendants and additional defendants. Otherwise a defendant would be compelled to accept "oppressive delay" in derogation of his right to a trial by jury.

Since arbitration under the Act continues to exist, I conclude that it does so as a voluntary system. Thus the consent of all parties shall be necessary before the system can proceed with any matter over which it previously had original exclusive jurisdiction.

Arbitration has strong support in the public policy of this Commonwealth. The majority's decision in *Mattos v. Thompson* stated that "Nothing in this opinion . . . , should be taken as a retreat from our long-held belief in 'arbitration as a viable, expeditious, alternative method of dispute-resolution.' . . . we are confident, as experience has demonstrated, that arbitration is still a viable alternative that can be effective in many areas." Voluntary arbitration is also authorized by 42 Pa. C.S. § 7362.

Accordingly, it is our opinion that the arbitration system under the Act can continue to accept and docket new complaints, and to decide motions, hold hearings and render decisions on new or presently pend-

ing cases, provided that the consent of all parties to the jurisdiction of the Arbitration Panels for Health Care is obtained. If any defendant or additional defendant, whether in pending cases or in future cases, does not agree to arbitration under the Act, the case shall be transferred to the appropriate Court of Common Pleas pursuant to Rule 213(f) of the Pennsylvania Rules of Civil Procedure—rules which are applicable to the arbitration panels under Section 506 of the Act, 40 P.S. § 1301.506.

Sections 401 and 605 of the Act, 40 P.S. §§ 1301.401, 1301.605, toll the running of the statute of limitations upon the filing of a complaint with the Administrator of the system so that no fatal prejudice will result from the transfer to the Court of a case that has been filed with him.

In order to implement the Supreme Court's decision, you should notify by mail, as soon as possible, all parties involved in pending claims of the preceding interpretation and the opportunity for voluntary arbitration under the Act. They should be advised to respond to you within a time certain whether or not they consent to continued arbitration, and if no response withholding consent is received within the prescribed time period, consent to arbitration will be presumed. You should also set forth that where consent is withheld, the case will be transferred to the appropriate Court of Common Pleas, pursuant to Pa. R.C.P. No. 213(f).

In the meantime, until consent from all parties in a case is obtained or until the prescribed time period has passed, you cannot act on that case except to file and docket a complaint or other papers received or to transfer the case under Pa. R.C.P. No. 213(f).

Sincerely,

HARVEY BARTLE, III
Attorney General

OFFICIAL OPINION NO. 81-1

Liquor Control Board—Liquor License—Power to Refuse to Renew—Power to Revoke.

Liquor License—Ability of creditor, including Commonwealth of Pennsylvania tax authorities, to execute on liquor license.

1. The Liquor Control Board, under § 470 of the Liquor Code, may refuse to renew a license for non-payment of taxes owed to the Commonwealth by the licensee, where the taxes are related to, or result from, a business operation conducted under the franchise of a liquor license.
2. The Liquor Control Board, under § 471 of the Liquor Code, may suspend or revoke a liquor license upon failure of the licensee to file tax returns or to pay outstanding Pennsylvania taxes reasonably related to, and arising from the operation of the licensed business.

3. Taxing authorities of the Commonwealth, as well as other creditors, may levy upon and execute against a liquor license issued by the Pennsylvania Liquor Control Board, and may have it sold by the Sheriff to satisfy liens for delinquent taxes as well as other money judgments.

January 13, 1981

The Honorable Robert K. Bloom
Acting Secretary of Revenue
11th Floor
Strawberry Square
Harrisburg, Pennsylvania 17127

The Honorable Mario Mele, Member
Liquor Control Board
532 Northwest Office Building
Harrisburg, Pennsylvania 17124

Dear Messrs. Bloom and Mele:

You have asked for an official Attorney General's Opinion concerning the right of the Liquor Control Board to revoke, or to refuse to renew, a liquor license for failure or refusal to pay taxes owed to the Commonwealth.

You have also asked whether a license is property for purposes of execution and sale to satisfy such delinquent taxes.

We will address these questions separately.

I.

You have asked us for an opinion as to whether or not the Liquor Control Board (hereinafter "L.C.B." or "the Board") may refuse to renew a license if the licensee fails or refuses to pay taxes owed the Commonwealth.

Section 470 of the Liquor Code, 47 P.S. § 4-470, requires the Board to renew the license:

Unless the board shall have given ten days' previous notice to the applicant of objections to the renewal of his license, based upon violation by the licensee or his servants, agents or employes of any of the laws of the Commonwealth or regulations of the board relating to the manufacture, transportation, use, storage, importation, possession or sale of liquors, alcohol or malt or brewed beverages, or the conduct of a licensed establishment, or unless the applicant has by his own act become a person of ill repute, or unless the premises do not meet the requirements of this act or the regulations of the board . . .

Accordingly, one issue is whether the failure or refusal to pay taxes on revenues arising from the ownership of a liquor license¹ is a violation of the law of the Commonwealth “relating to . . . the conduct of a licensed establishment . . .”²

While there are no Pennsylvania cases that construe the phrase, “the conduct of a licensed establishment,” § 1903 of the Statutory Construction Act provides that “words and phrases shall be construed according to rules of grammar and according to their common and approved usage.” 1 Pa. C.S. § 1903(a); *Derry Twp., Dauphin County v. Swartz*, 21 Pa. Commonwealth Ct. 587, 346 A.2d 853 (1975).

Webster’s Third New International Dictionary provides the definition of the word “conduct” when used as a noun:

The act, manner or process of carrying out (as a task) or carrying forward (as a business, government, or war).

A New York state court has held that, “Conduct” means, to introduce, to manage, to command, to carry on, control or direct. *People v. Hill*, 18 Misc. 2d 352, 192 N.Y.S. 2d 342, 344 (1959).

Thus, the Liquor Control Board can refuse to renew a license, if the licensee has violated any laws of the Commonwealth relating to the licensee’s management, direction or carrying on of a licensed establishment, including the licensee’s failure to act.

An integral part of the management or conduct of a licensed business is the generation of revenues and the payment of taxes such as sales tax, corporate taxes, employer withholding tax and personal income tax, which arise from the generation of these revenues. Without the grant by the L.C.B. of the franchise to sell alcoholic beverages, the entrepreneur, depending on the type of business he conducts, would have no commercial enterprise at all; or would be limited in his ability to generate gross receipts, to realize net income and to provide employment for himself and others.

It is obvious that a licensee has a statutory obligation to file tax returns and pay taxes.³ The failure or refusal of a licensee either to file a tax return or to pay taxes relates directly to his management or direction of the business, and thus constitutes a violation of the law of the Commonwealth, “. . . relating to . . . the conduct of a licensed establishment” under § 470 of the Liquor Code.

1. For our purposes the words “liquor license” shall include all types of licenses issued by the Liquor Control Board.
2. As a result of this conclusion we do not deem it necessary to reach the issue of whether the failure to pay taxes is a violation of the “laws of the Commonwealth . . . relating to the sale of liquors . . .”. Nor need we decide whether the applicant, by such a violation, “. . . has by his own act become a person of ill repute . . .”
3. For example, the payment of sales tax is mandated under 72 P.S. § 7202; the payment of corporate excise tax under 72 P.S. § 7402; and the payment of withholding tax under 72 P.S. §§ 7316 and 7319.

A licensee presently may generate revenues, employ workers, and reap profits under the franchise of a liquor license, yet that licensee is not required, as a condition to keep that license, to pay to the Commonwealth, the grantor of the license, the taxes related to those revenues, employees, and profits, none of which the licensee would have had in the first instance without the license.

The present situation is not only absurd, but also contrary to the intent of the Liquor Code, which provides in Section 104, 47 P.S. § 1-104:

... [it] shall be deemed an exercise of the police power of the Commonwealth for the protection of the public welfare, ... and morals of the people of the Commonwealth . . . , and all of the provisions of this act shall be liberally construed for the accomplishment of this purpose.

It is our opinion, and you are so advised, that the Liquor Control Board may refuse to renew a license for non-payment of taxes owed to the Commonwealth by the licensee, where the taxes are related to, or result from, a business operation conducted under the franchise of a liquor license.

II.

You have also asked us for an opinion as to whether or not the L.C.B. may fine the licensee or suspend or revoke the license if the licensee fails or refuses to pay taxes owed to the Commonwealth.

The authority of the Board to suspend or revoke a liquor license or to impose a fine is found in § 471 of the Liquor Code, 47 P.S. § 4-471. This provision sets forth a procedure by which a licensee may be required to appear and show cause why a license should not be suspended or revoked or a fine imposed if the Board learns of:

... any violation of this act or any laws of this Commonwealth relating to liquor, alcohol or malt or brewed beverages, or of any regulations of the board adopted pursuant to such laws, of any violation of any laws of this Commonwealth or of the United States of America relating to the tax payment of liquor or malt or brewed beverages by any licensee within the scope of this article, his officers, servants, agents or employes, or upon any other sufficient cause shown . . .

Under the Code, the L.C.B. has authority to revoke or suspend if there is "any violation of any laws of this Commonwealth or of the United States of America relating to the tax payment of liquor . . . by any licensee . . ."

While the words "the tax payment of liquor" makes no sense if read literally, the meaning of the phrase is clear. The obvious intent of the legislature was to state either "... the payment of taxes on liquor" ... or "... the payment of taxes relating to liquor ...".

Although there are no reported cases interpreting this language, the Statutory Construction Act provides in § 1923(a), 1 Pa. C.S. § 1923(a):

Grammatical errors shall not vitiate a statute. A transposition of words and clauses may be resorted to where a sentence is without meaning as it stands.

Additionally, “words and phrases shall be construed according to rules of grammar and according to their common and approved usage.” § 1903(a), Statutory Construction Act, 1 Pa. C.S. § 1903(a).

It is, of course, a violation of the laws of the Commonwealth to fail to file a return when required, or to neglect or refuse to pay taxes when due.⁴ Therefore, failure to pay taxes relating to liquor or malt or brewed beverages by any licensee exposes the licensee to sanctions under § 471.

In addition, a license may be revoked under this section “upon any other sufficient cause shown.” That language had been used in statutes preceding the current Liquor Code. Thus, the Act of March 22, 1867, P.L. 40, contained the language that “upon sufficient cause being shown” and “having due regard to the . . . character of the petitioner for and against such application,” the court shall have the power to revoke any license. Thus, “sufficient cause” was not restricted to violations of law relating to the sale of liquors. *Dolan’s Appeal*, 108 Pa. 564 (1885).

The Superior Court, in the leading case of *Revocation of Mark’s License*, 115 Pa. Superior Ct. 256, 176 A.254 (1934), held that the Quarter Sessions Court⁵ had the power under a prior statute to revoke a malt liquor license for cause shown other than a violation of the laws of the Commonwealth relating to the sale of malt liquors or relating to the manufacture, sale or transportation of alcoholic liquor. In that case where the licensee was convicted of keeping a gambling house on the licensed premises, the opinion states at page 265 “. . . (the act) very wisely does not attempt to catalogue the causes which it deems sufficient; leaving it to the legal discretion of the court to determine, subject to review on certiorari by the appellate court . . .”

In 1940 the Superior Court in *Comm. v. Lyons*, 142 Pa. Superior Ct. 54, 15 A.2d 851, (1940) upheld the revocation of a license where the licensee was convicted of a gambling offense committed off the licensed premises:

4. For example: 72 P.S. § 7202 mandates payment of sales tax; 72 P.S. § 7402 mandates payment of corporate excise tax; 72 P.S. §§ 7316 and 7319 mandate payment of withholding tax.

5. Under the Act of May 3, 1933, P.L. 252, and many prior statutes, the Quarter Sessions Court performed a similar function to that of the present Liquor Control Board in regard to issuing and revoking licenses.

The purpose of the Pennsylvania Liquor Control Act is, *inter alia*, not to give the licensee a vested or irrevocable license, but rather to preserve and protect the public welfare. If the appellant had violated any liquor law, on or off the licensed premises, no doubt would exist as to the board's right to revoke the license, but the act expressly states that that is not the only cause for which the board may take such action. It may do so "upon any other sufficient cause shown." These words mean something. They cannot be ignored or deleted. Obviously they are placed in the statute for a definite purpose. They signify that the legislature intended to give to the board a certain supervisory power over the conduct of a licensee after a license has been granted. *Id.* at 57.

"It is almost impossible to anticipate all the actions that may justify revocation of a license. *Weinstein Liquor License Case*, 159 Pa. Superior Ct. 437, 48 A.2d 1 (1946). Therefore, to accomplish the remedial purpose of the Act a 'catch-all' provision is needed. The 'other sufficient cause' provision is proper for this purpose." *Quaker City Development Co., Inc.*, 27 Pa. Commonwealth Ct. 13, 16, 365 A.2d 683, 684 (1976).

More recently, the Supreme Court of Pennsylvania held in *V.J.R. Bar Corp. v. Commonwealth of Pa., Liquor Control Board*, 480 Pa. 322, 390 A.2d 163 (1978), that the Liquor Control Board could impose sanctions upon a liquor licensee upon finding that the licensee permitted gambling to occur on its premises, even though criminal charges against the manager and two other employees of the licensee based on the same activity had been dismissed. The Court, after citing *Quaker City Development Co., Inc.*, with approval, goes on to state, 480 Pa. at page 325:

Based on the plain meaning of the statute, courts have upheld the Board's imposition of penalties for a variety of conduct not expressly prohibited by the Liquor Code but reasonably related to the sale and use of alcoholic beverages on licensed premises.

It is our opinion that the failure of a licensee to pay Commonwealth of Pennsylvania taxes that result from the operation of the licensed business is a course of conduct "reasonably related" to the sale and use of alcoholic beverages on the premises. As stated above in connection with the non-renewal of a license, there is an inescapable nexus between the conducting of the business under the license and the tax obligations that arise out of the operation of the business.

If the Liquor Control Board can penalize a licensee for a gambling conviction unrelated to the operation of the licensed premises (see *Comm. v. Lyons*), and if the Liquor Control Board can penalize a licensee for gambling activities on the premises where there has been no criminal conviction (see *V.J.R. Bar Corp. v. L.C.B.*), certainly the Liquor Control Board can penalize a licensee for failing to file tax re-

turns or to pay Commonwealth taxes related to the operation of the licensed premises.

As the Supreme Court said in *Tahiti Bar, Inc. Liquor License Case*, 395 Pa. 355, 360-361, 150 A.2d 112, 115-116 (1959):

There is perhaps no other area of permissible state action within which the exercise of the police power of a state is more plenary than in the regulation and control of the use and sale of alcoholic beverages . . .

An individual has no constitutional right to engage in the business of selling alcoholic beverages.

For all of the reasons set forth herein, you are advised that under § 471 of the Liquor Code, the Liquor Control Board may suspend or revoke a liquor license upon failure of the licensee to file tax returns or to pay outstanding Pennsylvania taxes reasonably related to, and arising from the operation of the licensed business.

III.

Finally, the question has been posed as to whether a license to sell alcohol, liquor and malt or brewed beverages, issued by the L.C.B. constitutes "personal property" within the meaning of Rule 3107 of the Pennsylvania Rules of Civil Procedure, and therefore subject to the execution process. For the reasons set forth below, it is our opinion that an L.C.B. license is indeed a "property" right for the purposes of execution, and as such, may be sold to a third party to satisfy a Commonwealth lien, tax judgment or other money judgment, subject to the other provisions of the Liquor Code, 47 P.S. § 1-101 *et seq.*⁶

Generally, the Board regulates the issuance, transfer, renewal and revocation of licenses under the police power of the sovereign. Thus, in *Tahiti Bar, Inc. Liquor License Case*, 395 Pa. 355, 360-361, 150 A.2d 112, 115-116 (1959), the Supreme Court stated:

There is perhaps no other area of permissible state action within which the exercise of the police power of a state is more plenary than in the regulation and control of the use and sale of alcoholic beverages, . . .

The license so issued is not absolute, and may be terminated or suspended by a state even though it may have been valid when initially issued, . . .

An individual has no constitutional right to engage in the business of selling alcoholic beverages.

6. Any sale, of course, would be subject to the other provisions of the Liquor Code. A purchaser at a Sheriff's Sale would still have to satisfy the other statutory requirements before L.C.B. would transfer the license. A license would, for example, be subject to cancellation or non-renewal for the reasons specified in the Code.

The Liquor Code itself provides in § 468(b.1), 47 P.S. § 4-468(b.1), that a liquor license is a “personal privilege granted by the board and nothing herein shall constitute the license as property.”⁷

As between the Liquor Control Board *and* the licensee, the license is a privilege only, which may be revoked without compensation to the holder. *Feitz Estate*, 402 Pa. 437, 167 A.2d 504 (1961); *Leonardziak Liquor License Case*, 210 Pa. Superior Ct. 511, 233 A.2d 606 (1967); *Spankard's Liquor License Case*, 138 Pa. Superior Ct. 251, 10 A.2d 899 (1940); *Kaufman's License*, 59 York 178 (1945). Yet Pennsylvania courts have consistently held that the very same liquor license that is a mere personal privilege, vis-à-vis the L.C.B. and the licensee, is the personal property of the licensee as between the licensee and any party other than the issuing authority. In short, as between the licensee and any third party, the license is property with certain rights attached hereto. Thus in *Leonardziak, supra*, at 512, 513, the Pennsylvania Superior Court stated:

While it is true, “[a]s between the Commonwealth and the licensee . . . the license is simply a personal privilege subject to termination for cause or upon the death of the licensee;” *Feitz' Estate*, 402 Pa. 437, 444 (1961), the statute insures that the holder of the license “. . . may pass on the right to apply for a transfer of the license . . . a clear recognition that the right to apply for a transfer of the license is a property right” *id.*, at 445 citing *Cochrane v. Szpakowski*, 355 Pa. 357 (1946).

The Pennsylvania courts have also held that a licensee must be compensated to the extent that the value of a liquor license is destroyed by another private party. *Kosco v. Hachmeister, Inc.*, 396 Pa. 288, 152 A.2d 673 (1959).

In that case the defendant removed ten thousand tons of earth during a grading operation which resulted in a small landslide that damaged the plaintiff's hotel. The plaintiff was awarded damages in the amount of the value of the fixtures in the hotel and the value of the liquor license, both of which were “destroyed” as a result of the landslide.

In *Feitz Estate, supra*, the Supreme court, after reaffirming the principle that the license was a mere privilege as between the L.C.B. and the licensee went on to hold that the right to transfer the license⁸ was a property right of the deceased licensee, which was taxable for inheritance tax purposes.

7. This provision of the Liquor Code permits the Liquor Control Board to control the issuance, transfer, assignment for the benefit of creditors and revocation of licenses in the limited situation where the licensee has become insolvent.

8. The procedure to transfer the license is set forth in section 468, 47 P.S. § 4-468, of the Liquor Code.

Mr. Justice Jones, speaking for the majority in *Feitz*, quotes with approval from a Washington state case:

In *Jaffe v. Pacific Brewing & Malting Co., et al.*, 124 P.1122, 1123 (Wash.) it was said: "The right to conduct the business is personal to the licensee, and does not pass upon his death to his administrators or assigns. But this is true only as between the state or the licensor and the licensee, and as to third persons when the statutes do not permit transfers from one person to another. 'But where the statute recognizes the right of transfer from one to another, and where the right is a valuable right, capable of being surrendered and reduced to money, a different rule prevails. In such cases the license or right to do business becomes a valuable property right, subject to barter and sale. It is property with value and quality' . . .".

Pennsylvania courts have also ordered specific performance of a contract to transfer a liquor license, which in itself indicated that the license possesses value. *Cochrane v. Szpakowski*, 355 Pa. 357, 49 A.2d 692 (1946); *Pichler v. Snavely*, 366 Pa. 568, 79 A.2d 227 (1951).

In 1975, the Pennsylvania Supreme Court decided *Redevelopment Authority of the City of Philadelphia v. Lieberman*, 461 Pa. 208, 336 A.2d 249 (1975), which held that a licensee is entitled to compensation for the loss of value of his liquor license resulting from condemnation. After discussion of the meaning of the term "property," the court stated, *Id.*, at 222, 336 A.2d at 257:

The issuance of a liquor license in Pennsylvania constitutes governmental "permission" to use *particular premises* for a particular purpose. The "Liquor Code", Act of April 12, 1951, P.L. 90, Art. I § 101 et seq., 47 P. S. § 1-101 et seq. Unless we bog down in technical and unrealistic concepts, it cannot be disputed that a liquor license adds significant use value to a particular premises. Once granted, the license may not be arbitrarily revoked. Indeed, a licensee who is "aggrieved by the refusal of the [Board] . . . to renew or transfer any such license may appeal" to the courts for judicial review. (47 P.S. § 4-464).

The court then observed that "[a] liquor license has also been considered 'property' in other situations." discussing the *Feitz* case, *supra*, in detail and then citing with approval cases in other jurisdictions in which courts have held that a liquor license is property subject to levy.

Among the cases cited in *Lieberman, supra*, are *Boss Co., Inc., v. Bd. of Commissioners of Atlantic City*, 40 N.J. 379, 192 A.2d 584 (1963) (liquor license is property subject to Internal Revenue tax lien), and *Cordano's Appeal*, 91 Conn. 718, 101 A.85 (1917) (liquor license is property with pecuniary value subject to sale, levy or replevin).

Not only have other states reached this conclusion, but the Internal Revenue Service, under the mandate of Federal law, has for several years likewise done so. See *Aqua Bar and Lounge, Inc.*, 30 Pa. Commonwealth Ct. 253, 373 A.2d 768 (1977).

The Pennsylvania Supreme Court in *Lieberman* recognized that the terms traditionally applied to a liquor license should not be allowed to override reality:

The fact that a liquor license is sometimes referred to as a "privilege" rather than a "right" is irrelevant to the issue before us. We rejected the nomenclature argument in *Kosco v. Hachmeister* . . . We conclude that the trial court properly considered the loss of value in the condemnee's liquor license resulting from the condemnation. That loss resulted from the destruction of a property interest within the meaning of the United States Constitution and Pennsylvania Constitution, and the Eminent Domain Code. To hold otherwise would be to ignore reality. 461 Pa. at 225, 226, 336 A.2d at 258, 259.

In a number of recent decisions the Commonwealth Court, following *Lieberman, supra*, has held that liquor licenses constitute valuable property in condemnation proceedings, for which the condemnee must be compensated (at the fair market value of the license) by the municipal redevelopment authority. *Redevelopment Authority of the City of Philadelphia v. Driscoll*, 45 Pa. Commonwealth Ct. 202, 405 A.2d 975 (1979); *Redevelopment Authority of the City of Philadelphia v. Royal Janet Corp.*, 42 Pa. Commonwealth Ct. 546, 401 A.2d 17 (1979).

Justice Traynor's statement in *Roehm v. Orange County*, 32 Cal.2d 280, 196 P.2d 550, 552 (1949) applies equally to Pennsylvania law:

Although a liquor license is merely a privilege so far as the relations between the licensee and the state are concerned, it is property in any relationship between the licensee and third persons, because the license has value and may be sold . . . These decisions recognize the principle that since such a license has a transferable value to the debtor it is property that in fairness ought to be within the reach of his creditors. Since by statute a liquor license in this state has in effect been given a transferable value, it has assumed the characteristics of property.

It would be unfair, on the one hand, to allow licensees (with the approval of the L.C.B.) to reap monetary benefit from selling alcoholic beverages or from selling the L.C.B.-issued license for profit; and on the other hand, to prohibit all creditors, including the taxing authorities of the Commonwealth, from executing on the same license and subjecting the same to sale. To hold otherwise would be to "ignore reality." See *Lieberman, supra*.

It is our opinion, and you are so advised, that the taxing authorities of the Commonwealth, as well as other creditors, may levy upon and execute against a liquor license issued by the Pennsylvania Liquor Control Board, and may have it sold by the Sheriff to satisfy liens for delinquent taxes as well as other money judgments.

Sincerely yours,

HARVEY BARTLE, III
Attorney General

OFFICIAL OPINION NO. 81-2

Public School Teachers—Citizenship—Eligibility of aliens to teach in the public schools.

1. *Ambach v. Norwick*, 441 U.S. 68 (1979), compels reversal of the advice rendered in Official Opinion No. 9 of 1973.
2. Sections 1109 and 1202 of the Public School Code, 24 P.S. §§ 11-1109, 12-1202, are constitutional.
3. No permanent certificate to teach may be granted to any individual who is not a citizen of the United States and no provisional certificate to teach may be granted to any individual who is not a citizen and has not declared in writing to the Department of Education the intention of becoming a citizen.
4. Individuals permanently or provisionally certified to teach without having secured or having declared their intention to secure United States citizenship must be afforded a reasonable period of time within which to do so without being subject, during that period, to loss of employment or revocation of certification.

January 14, 1981

Honorable Robert G. Scanlon
Secretary
Department of Education
333 Market Street
Harrisburg, PA 17126

Dear Secretary Scanlon:

You have requested our opinion whether the decision of the United States Supreme Court in *Ambach v. Norwick*, 441 U.S. 68 (1979), compels reversal of the advice rendered by this Office in Official Opinion No. 9 of 1973. The Supreme Court, in *Ambach*, upheld provisions of the New York Education Law prohibiting certification as a public school teacher of any person who is not a citizen of the United States and has not manifested an intention to apply for citizenship. Opinion No. 9 of 1973 advised the Secretary of Education that comparable provisions of the Public School Code, Act of March 10, 1949, P.L. 30, *as amended*, 24 P.S. § 1-101 *et seq.*, are unconstitutional.

On the assumption that *Ambach* does compel reversal of the advice rendered in Opinion No. 9 of 1973, you have also requested our opinion

as to the status of resident aliens who have been permanently or provisionally certified as public school teachers in Pennsylvania since the issuance of that Opinion.

I. Effect of *Ambach v. Norwick* upon Opinion No 9 of 1973

Sections 1109 and 1202 of the Public School Code provide as follows:

Every teacher employed to teach in the public schools of this Commonwealth . . . must be a citizen of the United States: Provided, That citizenship may be waived in the case of exchange teachers not permanently employed, and teachers employed for the purpose of teaching foreign languages, including special teachers who speak the idiomatic or colloquial language of immigrants residing in the school district, and employed for the purpose of easing the transition period of such immigrants.

24 P.S. § 11-1109.

A certificate to teach shall not be granted or issued to any person not a citizen of the United States, except in the case of exchange teachers not permanently employed and teachers employed for the purpose of teaching foreign languages.

In the case of a resident foreign national holding an immigrant visa who has declared, in writing, to the Department of Public Instruction the intention of becoming a citizen of the United States, such person shall be eligible for a provisional college certificate.

24 P.S. § 12-1202.

In Opinion No. 9 of 1973, this Office advised the Secretary of Education that, insofar as the foregoing provisions prohibit otherwise qualified resident aliens from teaching in the public schools on the same terms as qualified citizens, they violate the Equal Protection Clause of the United States Constitution and that, accordingly, the Secretary should certify teachers without regard to their citizenship or their intention to obtain United States citizenship.

The Opinion was premised on the Supreme Court's decision in *Graham v. Richardson*, 403 U.S. 365 (1971), which struck down, on equal protection grounds, a Pennsylvania statute restricting public assistance eligibility to United States citizens and an Arizona statute restricting public assistance eligibility to citizens and longtime resident aliens. The Court held in *Graham* that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Id.* at 372 (footnotes omitted).

Applying the strict scrutiny standard of *Graham*, the Court subsequently held invalid state statutes which excluded aliens from a state's classified civil service, *Sugarman v. Dougall*, 413 U.S. 634 (1973), from

the practice of law, *In re Griffiths*, 413 U.S. 717 (1973), from working as an engineer, *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976), and from receiving state educational benefits. *Nyquist v. Mauclet*, 432 U.S. 1 (1977). In *Sugarman*, however, the Court recognized that a state could constitutionally require citizenship as a qualification for governmental positions which involve the performance of functions "that go to the heart of representative government." *Sugarman v. Dougall*, 413 U.S. at 647. The exclusion of aliens from such positions would not, the Court indicated, invite strict judicial scrutiny. *Id.* at 648.

The Supreme Court directly applied the governmental function exception in upholding a New York statute excluding aliens from the state's police force. *Foley v. Connelie*, 435 U.S. 291 (1978). Because the police function "fulfills a most fundamental obligation of government to its constituency" and because police officers "are clothed with authority to exercise an almost infinite variety of discretionary powers," *Id.* at 297, the state was required to justify its classification only "by a showing of some rational relationship between the interest sought to be protected and the limiting classification." *Id.* at 296.

The Court again applied the governmental function exception in *Ambach*. Citing *Sugarman* and *Foley*, the Court concluded that "public school teachers may be regarded as performing a task 'that go[es] to the heart of representative government'" and that "[p]ublic education, like the police function, 'fulfills a most fundamental obligation of government to its constituency.'" *Ambach v. Norwick*, 441 U.S. at 75-76 (citations omitted). The Court then applied the rational relationship test to uphold the New York statutory scheme for restricting alien eligibility for teacher certification.

Clearly, *Ambach* requires reversal of the advice rendered in Opinion No. 9 of 1973. It was concluded in that Opinion that teaching in the public schools is not an essential governmental function. The Supreme Court, of course, concluded otherwise in *Ambach*. The Opinion also subjected the relevant provisions of the Public School Code to a compelling state interest test. It is clear, however, from *Ambach* that the classification created by those provisions need only be rational to withstand equal protection challenge.

The Statutory Construction Act requires that Section 1202 of the Public School Code, to the extent it renders resident aliens who have declared in writing their intention to become United States citizens eligible for provisional teacher certification, be read as an exception to the general requirement of Section 1109 that every public school teacher in the Commonwealth be a citizen of the United States. See 1 Pa. C.S. § 1933. The statutory scheme thus created closely resembles the statutory scheme in New York which the Supreme Court, applying the rational relationship test, upheld in *Ambach*.

Accordingly, we are compelled to conclude that Sections 1109 and 1202 of the School Code are constitutional and that, therefore, those provisions must once again be enforced. As of the date this Opinion is issued, no permanent certificate may be granted to any individual who is not a citizen of the United States and no provisional certificate may be granted to any individual who is not a citizen and has not declared in writing to the Department of Education the intention of becoming a citizen.¹

II. Status of Resident Aliens Certified Since the Issuance of Opinion No. 9 of 1973

In determining the status of resident aliens certified to teach in Pennsylvania since the issuance of Opinion No. 9 of 1973², we must balance the interest of such individuals in continued eligibility to teach in the Pennsylvania public schools against the public interest in the enforcement of the School Code's citizenship requirements. Striking that balance requires, in our opinion, that individuals permanently or provisionally certified to teach without having secured or having declared their intention to secure United States citizenship be afforded a reasonable period of time within which to do so without being subject, during that period, to loss of employment or revocation of certification.

As previously observed, Section 1202 of the School Code renders eligible for a provisional certificate a resident alien who has declared in writing to the Department of Education the intention of becoming a United States citizen. Section 1204, 24 P.S. § 12-1204, limits provisional certificateholders to one three-year certificate and one three-year renewal.³ Section 1205, 24 P.S. § 12-1205, renders teaching under a provisional certificate a qualification for permanent certification.

In our view, the General Assembly's purpose in rendering eligible for provisional certification resident aliens who have declared their intention to secure citizenship was to permit them to teach for a period of up to six years in order that they may, by pursuing citizenship during that period, simultaneously satisfy the teaching and citizenship require-

1. These conclusions are, of course, subject to the exceptions specifically prescribed in Sections 1109 and 1202 for exchange teachers and teachers employed to teach foreign languages.
2. The status of resident aliens certified to teach since the issuance of Opinion No. 9 of 1973 is an issue because Opinion No. 9 of 1973 could not and did not render the relevant School Code provisions a nullity. As an officer of the executive branch of state government, the Attorney General has no power to declare unconstitutional and thereby void a statute; that power rests exclusively with the judiciary. At most, the Attorney General is empowered, when clearly convinced that a statute is unconstitutional, to advise his executive official client that, pending judicial review, the statute should not be enforced.
3. By regulation of the State Board of Education, provisional certificates are valid for a period of six years. See 22 Pa. Code § 49.82. The State Board has thus incorporated the renewal period *ab initio* into the life of the certificate.

ments for permanent certification. In light of this purpose, we believe it appropriate to afford resident aliens certified to teach since the issuance of Opinion No. 9 of 1973 a period of six years within which to become United States citizens.

It is our understanding that, in accordance with the mandate of Opinion No. 9 of 1973, the Department of Education, since the issuance of that Opinion, has not inquired as to the citizenship status of applicants for certification. We are further advised that the Department does not maintain current address data for certificateholders and that as many as two hundred thousand certificates have been issued by the Department since the issuance of Opinion No. 9 of 1973. In this setting, it is not feasible to implement this Opinion by direct notification to all certificateholders only a very small percentage of whom, of course, are noncitizens.

In our view, identification of noncitizen certificateholders and affording them notice of this Opinion and its effect is best accomplished through the district superintendents and school principals in the public school system. While this approach will not reach every noncitizen holding a Pennsylvania teaching certificate, it will accomplish the essential purpose of ensuring enforcement of the School Code's mandate that every teacher employed to teach in the public schools of the Commonwealth be a United States citizen or a resident alien who has declared, in writing, to the Department of Education the intention of becoming a United States citizen.

We shall not attempt herein to detail a comprehensive system for implementation of this Opinion. Such is an administrative task properly delegated to the appropriate program personnel in the Department of Education. We shall, however, require that the system developed be approved as to legality by this Office prior to its effectuation and that the following guidelines be observed:

- (1) Noncitizen certificateholders should be given a fixed and limited period of time, following the date on which they are notified of this Opinion and its effect, within which to declare their intention to become United States citizens.⁴
- (2) Resident aliens holding permanent certification should be permitted to retain their permanent certificates throughout the six-year period following the date on which they declare their intention to become United States citizens.
- (3) Resident aliens holding provisional certification should be issued

4. Since the Department of Education does not inquire into the citizenship status of applicants for certification, it is conceivable, though unlikely, that responses to the notice will reveal individuals holding certificates who, not only are not U.S. citizens, but also are not "resident foreign national[s] holding an immigrant visa." 24 P.S. § 12-1202. In such event, the Department of Education should seek the further advice of this Office since each such case may require a particularized resolution.

a new provisional certificate effective the date on which they declare their intention to become United States citizens.⁵

(4) Where necessary, and otherwise to the extent appropriate, this Opinion should be implemented not only by direct communication to local school officials and, through them, to noncitizens teaching in the public schools, but also by amendment to Department of Education and/or State Board of Education regulations.

(5) As part of the notice of this Opinion and its effect, resident alien certificateholders should be advised that, if they do not declare their intention to become citizens within the time limit prescribed by the Department of Education or if they do not, in fact, obtain United States citizenship within the six-year period following the date on which they declare their intention to become citizens, they shall no longer be eligible for employment in the Pennsylvania public schools and shall be subject to revocation of certification.

This Office stands ready to assist the Department of Education in the implementation process.

Sincerely yours,

HARVEY BARTLE, III
Attorney General

OFFICIAL OPINION NO. 81-3

Pennsylvania Crime Commission—Civil Service Act—Positions Not in Classified Service—Incumbents Retain Civil Service Protection.

1. The Pennsylvania Crime Commission employee positions are not in the classified service under the Civil Service Act.
2. The procedures provided in the Civil Service Act are the exclusive means for separating an individual from the classified service.
3. The Pennsylvania Crime Commission positions were covered by Civil Service prior to the establishment of the new Commission in Act 1978-169, P.L. 876, 71 P.S. § 1190.1 *et seq.* and Act 1978-334, P.L. 1418, 71 P.S. § 179.1.
4. The employees of the Pennsylvania Crime Commission who were in the classified service prior to Act 1978-169 and Act 1978-334 retain their civil service status.

5. The certificate should be valid for the entire six-year period prescribed in 22 Pa. Code § 49.82.

January 16, 1981

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

Alvin B. Lewis, Jr., Chairman
Pennsylvania Crime Commission
P.O. Box 45
St. Davids, PA 19087

Dear Chairmen McCarthy and Lewis:

The Pennsylvania Crime Commission has requested our opinion concerning the civil service status of its employees in light of the passage of Act 1978-169, P.L. 876, 71 P.S. § 1190.1 *et seq.*, and Act 1978-334, P.L. 1418, 71 P.S. § 179.1, the Acts which created the Crime Commission. Because this opinion interprets the provisions of the Civil Service Act, Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. § 741.1 *et seq.*, we have also addressed it to the Civil Service Commission.

Specifically, the Crime Commission has requested our opinion on two questions: (1) Are the Crime Commission's employee positions in the classified service; and, (2) if those positions are not in the classified service, do the incumbents continue to enjoy civil service protection?

It is our opinion that the positions in the Pennsylvania Crime Commission are not in the classified service but that the incumbents continue to enjoy civil service protection.

I. *The Positions Are Not In The Classified Service.*

Sections 3(d)(1)-(12), (14)-(16) of the Civil Service Act define the positions which are in the classified service by specifically naming the departments, boards and commissions whose positions are intended to be covered. 71 P.S. § 741.3(d)(1)-(12), (14)-(16).

The Pennsylvania Crime Commission, however, is not named in Section 3(d) or in Act 1978-169 or Act 1978-334 as an agency included in the classified service.

Section 3(d) of the Civil Service Act further provides that the following positions shall be included in the classified service:

“all positions now existing or hereafter created in any department or agency *under the Governor's jurisdiction* which (i) are required to be under a merit system in order to qualify the agency or department for the receipt of funds from the United States Government, or any agency or instrumentality thereof, (ii) were designated as professional or technical by the Executive Board of the Commonwealth on or before October 1, 1962, (iii) were covered by Civil Service under the terms of an agreement entered into between the department or

agency and the commission on or before October 1, 1962, other than those agreements arising out of the Executive Board resolution of September 10, 1956, as amended and supplemented." 71 P.S. § 741.3(d)(13) (emphasis added).

We are informed that some of the positions in the Commission were designated as professional or technical by the Executive Board on or before October 1, 1962.

Section 3(d)(13), however, does not operate to place the Crime Commission's position in the classified service since, as set forth below, the new Crime Commission is not under the Governor's jurisdiction.

Under the original Pennsylvania Crime Commission statute, the Commission consisted of four commissioners appointed by the Governor with the Attorney General as chairman. Act of July 31, 1968, P.L. 754, § 2. In the 1978 Act, the composition of the Commission was changed to one person appointed by the Governor and two each appointed by leaders of the House of Representatives and the Senate. The commissioners serve staggered terms. This change shows an intention to remove the Commission from the Governor's control. Under the Constitution, the commissioners may be removed "at the pleasure of *the power by which they shall have been appointed.*" Penna. Constitution, Article VI, Section 7 (emphasis added). The extent of the Governor's control of the Commission is limited to the one member he appoints. The other four members are clearly not under his jurisdiction and his action to remove one member out of five would not affect any decision of the Commission. See, *Moore v. Commonwealth of Pennsylvania*, 1 Pa. Commonwealth Ct. 73, 272 A.2d 283 (1970).

II. *The Incumbents Retain Civil Service Protection.*

Even though the positions in the Pennsylvania Crime Commission are not included in the classified service, the question remains whether the incumbents continue to enjoy civil service protection. It is our opinion, for the reasons set forth below, that the incumbents continue to enjoy civil service protection, notwithstanding the fact that the positions which they occupy are no longer in the classified service.

In a letter dated April 17, 1970, to Richard A. Rosenberry, then Executive Director of the Civil Service Commission, Attorney General William C. Sennett interpreted federal law as requiring that employee positions in the Pennsylvania Crime Commission be placed in the classified service pursuant to the above-quoted language of Section 3(d)(13)(i) of the Civil Service Act, 71 P.S. § 741.3(d)(13)(i). Accordingly, the positions were placed in the classified service.

Acts 1978-169 and 1978-334 created the new Pennsylvania Crime Commission. Both Acts are silent on the question of the civil service status of the Commission's employees. This silence, however, cannot be interpreted as removing the individuals in question from the classified service.

Section 801 of the Civil Service Act provides that once an individual is in the classified service, he may be permanently separated from that service only through rejection on probation, retirement, resignation or removal. 71 P.S. § 741.801. The Act further provides that removal may only be for just cause, 71 P.S. § 741.807, after notice and an opportunity to be heard. 71 P.S. §§ 741.950, 741.951. Given the specificity of the provisions for separation from the classified service and the abundant due process protections afforded an individual prior to removal, we conclude that the methods specified by Section 801 are the exclusive means for separating an individual from the classified service.

None of the individuals employed by the Commission has been permanently separated from the classified service pursuant to these provisions. Accordingly, we further conclude that the Commission employees remain in the classified service, notwithstanding the fact that the positions they occupy are no longer in that service.

The General Assembly, of course, retains the right to legislate with respect to the civil service status of an individual in the classified service. *Kelly v. Jones*, 419 Pa. 305, 214 A.2d 345 (1965). When, however, the Assembly does legislate to separate individuals from the classified service, it does so in an explicit and affirmative fashion. Indeed, our Supreme Court's decision in *Kelly v. Jones* was based on the presence, in Section 28 of the Act of August 27, 1963, P.L. 1257, amending the Civil Service Act, of language which *explicitly* removed individuals such as Kelly from the classified service of the "executive civil service" and placed them, upon completion of the requisite probationary period, in the "legislative civil service." We can find no similar provision in either Act 1978-169 or Act 1978-334.

The General Assembly, when creating new administrative departments from existing agencies, has provided, on several occasions, that employees of the new agency shall retain their civil service status upon transfer. Act of July 22, 1975, P.L. 75, No. 45 § 19(b) (Department of General Services); Act of June 20, 1978, P.L. 477, No. 70 § 10(b) (Department of Aging). The failure of the General Assembly to state affirmatively in Act 1978-169 or Act 1978-334 that the individuals in question retained their civil service status upon creation of the new Crime Commission, however, does not operate to deprive them of that status. As noted above, that status flows from the Civil Service Act, particularly Articles VIII and IX of the Civil Service Act and we may not conclude that those statutes are impliedly repealed for these specific employees. 1 Pa. C.S. § 1971.

It is therefore our opinion, and you are hereby so advised, that the employees of the Pennsylvania Crime Commission who were in the civil service prior to the 1978 acts remain in the classified service, despite

the fact that their positions are no longer in the classified service. Their retention in the classified service upon any subsequent change in employee status, however, will depend upon the nature of their new job classifications: If the new position is in the classified service, then the individual will retain protection; if the position is not in the classified service, then the individual will no longer enjoy that protection.

We note that our advice in this matter is consistent with previous informal opinions which have been issued to the Civil Service Commission as well as with recent adjudications of the Civil Service Commission on related questions and with the practice of the United States Civil Service Commission.

Sincerely,

HARVEY BARTLE, III
Attorney General

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