

Commonwealth of Pennsylvania

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

Pennsylvania

FOR THE YEARS

1955 and 1956

ATTORNEYS GENERAL

HERBERT B. COHEN

Commissioned January 18, 1955

Resigned December 17, 1956

THOMAS D. McBRIDE

Commissioned December 17, 1956

OFFICIAL OPINIONS

1955-1956

OPINION No. 651

Tax Anticipation Notes, Series of 1954—Constitutionality and legal status.

The allocations of the monies in the General Fund, which are specifically set forth on the face of the notes, made by the Department of Revenue, and approved by the Governor, the Auditor General and the State Treasurer, to provide a sinking fund for the payment of said notes, are payable into and shall be set aside in the sinking fund accounts mentioned on the face of the notes in the amounts and at times specified, prior to all other expenditures, expenses, debts and appropriations, including current expenses, payable from the General Fund.

Harrisburg, Pa., September 28, 1954.

Honorable John S. Fine,
Honorable Weldon B. Heyburn,
Honorable Charles R. Barber.

Sirs: We have your request for an opinion as to the legal status of ninety million dollars (\$90,000,000) Tax Anticipation Notes, Series of 1954, dated September 27, 1954, maturing May 27, 1955.

We have examined the proceedings relative to the issuance by the Commonwealth of Pennsylvania of Tax Anticipation Notes, Series of 1954, to the amount of ninety million dollars (\$90,000,000).

This issue was authorized by the General Assembly of this Commonwealth by the Act approved September 29, 1951, P. L. 1646. As stated in Formal Opinion No. 626, dated November 29, 1951, we are satisfied that the Act of September 29, 1951, *supra*, was duly and properly enacted. We have examined the journals of both Houses and the original records on file in the office of the Secretary of the Commonwealth as to certain appropriation acts aggregating in excess of \$900,000,000.

The constitutionality of the issuance of tax anticipation notes was upheld by the Supreme Court of Pennsylvania in the case of *Kelley v. Baldwin, et al.*, 319 Pa. 53 (1935). Since the Act of September 29, 1951, *supra*, is similar to the act held to be constitutional in *Kelley v. Baldwin, supra*, we believe it to be constitutional.

The Act provides, *inter alia*, that the current revenues for any biennial fiscal period accruing to the General Fund of the State Treasury shall be pledged for the payment of principal of and interest

on the notes during such fiscal biennium, and that so much of said revenues as may be necessary, are specifically appropriated for such payment, the Department of Revenue being authorized to allocate such revenues to said payment. The Act authorizes the Governor, the Auditor General and the State Treasurer to determine the terms and conditions of the issue, rates of interest and time of payment of interest, provided that the notes shall not mature later than May 31 of the second fiscal year of any current biennium, and shall not bear interest in excess of $4\frac{1}{2}\%$ per annum. The minutes of the meetings held by the Governor, the Auditor General and the State Treasurer, show that all proceedings taken relative to the issuance of the notes comply fully with the provisions of the Act and are in due legal form, and that all necessary action has been duly taken.

We have examined notes number one of the following denominations: five thousand dollars (\$5,000), ten thousand dollars (\$10,000) and one hundred thousand dollars (\$100,000), in bearer form and find that the same are duly and properly executed and conform with the form approved by you.

In conclusion, we have no hesitation in advising you that the ninety million dollars (\$90,000,000) notes of the Commonwealth of Pennsylvania, Series of 1954, dated September 27, 1954, maturing May 27, 1955, constitute legal obligations payable by the Commonwealth of Pennsylvania, from current revenues accruing to the General Fund of the State Treasury of the Commonwealth of Pennsylvania during the two fiscal years ending May 31, 1955, and are secured by the current revenues levied and assessed for revenue purposes of every kind and character accruing to the said General Fund during said biennial period.

The Appropriation Acts are appropriations made for the current biennium by the General Assembly for the general purposes of the fiscal biennium and are appropriations of amounts that exceed the amount of the notes and of the Series LT Tax Anticipation Notes previously issued and paid in this biennium by more than three times.

We are further of the opinion that the allocation of the moneys in the General Fund, which are specifically set forth on the face of the notes, made by the Department of Revenue, and approved by the Governor, the Auditor General and the State Treasurer, to provide a

sinking fund for the payment of said notes, are payable into and shall be set aside in the sinking funds accounts, mentioned on the face of the notes in the amounts and at times specified, prior to all other expenditures, expenses, debts and appropriations, including current expenses, payable from the General Fund.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

FRANK F. TRUSCOTT,
Attorney General.

OPINION No. 651-A

Confidential information—Tax refunds on review—Disclosure of names and amounts—Board of Finance and Revenue—The Fiscal Code of April 9, 1929. Section 731 as amended, P. L. 343.

Section 731 of The Fiscal Code of April 9, 1929, P. L. 343, as amended, which provides with certain exceptions that any information obtained officially by any administrative agency for tax purposes must be kept confidential, prohibits the voluntary disclosure of information regarding the action of the Board of Finance and Revenue on petitions for review or refund, except for the purposes specified in the act, so that the names of taxpayers and amounts granted to them by the board on refund and review may not be disclosed.

Harrisburg, Pa., January 7, 1955.

Honorable Weldon B. Heyburn, State Treasurer and Chairman, Board of Finance and Revenue, Harrisburg, Pennsylvania.

Sir: We have the Resolution of the Board of Finance and Revenue requesting to be advised as to whether or not under Section 731 of The Fiscal Code (Act of April 9, 1929, P. L. 343 as amended, 72 P. S. § 731), the names of taxpayers and amounts granted to them by refund or review are confidential information.

The function of the Board of Finance and Revenue with respect to refunds is provided for in Section 503 of The Fiscal Code, as last

amended by the Act of January 19, 1952, P. L. (1951-52) 2178, 72 P. S. § 503, which reads in part as follows:

“Section 503. Refunds of State Taxes, License Fees, Et Cetera.—The Board of Finance and Revenue shall have the power, and its duty shall be.

“(a) To hear and determine any petition for the refund of taxes, license fees, penalties, fines, bonus, or other moneys paid to the Commonwealth and to which the Commonwealth is not rightfully or equitably entitled and, upon the allowance of any such petition, to refund such taxes, license fees, penalties, fines, bonus, or other moneys, out of any appropriation or appropriations made for the purpose, or to credit the account of the person, association, corporation, body politic, or public officer entitled to the refund. * * *”

That section further provides that petitions for refunds must be in the form prescribed by the Board and filed within two years of the payment for which refund is requested or within two years of the settlement of the tax, whichever period last expires. In certain valuation cases, the time limit is one year, and in cases where a court has held a statute to be unconstitutional or to have been erroneously interpreted by the taxing officers, the limit is five years, with certain exceptions not relevant here. These time limitations are mandatory: *Federal Deposit Insurance Corporation v. Board of Finance and Revenue*, 368 Pa. 463 (1951). Where the court has held that the tax statute is unconstitutional or has been erroneously interpreted, the duty of the Board to order a refund or credit is mandatory: *Hotel Casey Co. v. Ross*, 343 Pa. 573 (1942); *Chapman-Burrous, Inc. v. Board of Finance and Revenue*, 63 Dauph. 258 (1953).

The function of the Board of Finance and Revenue on review is set forth in Section 1103 of The Fiscal Code, 72 P. S. § 1103, as last amended by the Act of April 25, 1949, P. L. 745, No. 183, which provides in part as follows:

“Section 1103. Petition to Board of Finance and Revenue for Review.—Within sixty days after the date of mailing of notice by the Department of Revenue, or of the Auditor General, or of the Department of State of the action taken on any petition for a resettlement filed with it, or of any resettlement made under the provisions of section one thousand one hundred five of this act, the party with whom the settlement was made or the Commonwealth of Pennsylvania may, by petition, request the Board of Finance and Revenue to review such action.

"Every petition for review, filed hereunder, either shall state specifically therein the reasons upon which the petitioner relies, or shall incorporate, by reference, the petition for resettlement in which such reasons shall have been stated.

* * * * *

"The Board of Finance and Revenue may sustain the action taken on the petition for resettlement, or it may resettle the account upon such basis as it shall deem according to law and equity.

* * * * *

This procedure for review follows the action of the Secretary of Revenue and the Auditor General in settling and resettling taxes under the various sections of The Fiscal Code (c. g. 801, 802, 1101, 1102, 72 P. S. §§ 801, 802, 1101, 1102).

In the disposition of all petitions for refund and petitions for review, the Board of Finance and Revenue considers the data submitted with the petition before it, together with the files of the taxing departments, the tax reports, investigations, settlements and resettlements. If the Board sustains the action of the taxing officers, the petition is denied. If the Board reduces the amount of the tax owed by the taxpayer, it does so by redetermining the tax. This involves the same procedure as used by the taxing officers in making settlements and resettlements, and requires a recomputation of the fractions involved, the multiplicand, the tax base and the ultimate amount of the tax payable.

In the case of the reduction of the tax on review, if the taxpayer has not paid the tax, no credit becomes necessary, but if the taxpayer has paid the tax, he secures a credit on the books of the Department of Revenue by reason of the resettlement by the Board on review.

In the case of a petition for a refund, the tax has already been paid by the taxpayer. If the Board grants the prayer of the petition, the taxpayer becomes entitled to a credit for the difference between the amount settled or resettled against him by the fiscal officers, and the amount which the Board decides that the settlement should have been.

Therefore, the question raised by the inquiry is whether the Secretary of the Board may voluntarily divulge for other than official use the results of the redetermination of taxes by the Board on petitions for refund and review.

Section 731 was added to The Fiscal Code by the Act of June 6, 1939, P. L. 261, Section 9. As amended by the Act of July 9, 1941, P. L. 305, it reads as follows (72 P. S. § 731):

"Section 731. Confidential Information.—Any information gained by any administrative department, board, or commission, as a result of any returns, investigations, hearings or verifications required or authorized under the statutes of the Commonwealth imposing taxes or bonus for State purposes, or providing for the collection of the same, shall be confidential except for official purposes, and except that such information may be given to any other state or to the Government of the United States, where such state or the United States by law authorizes the furnishing of similar information to the Commonwealth of Pennsylvania. Any person or agent divulging such information shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not in excess of five hundred dollars (\$500.00), or to undergo imprisonment for not more than three (3) years, or both, in the discretion of the court."

The purpose of this section has been considered on two occasions by the Supreme Court of Pennsylvania.

In *Commonwealth v. Mellon National Bank & Trust Co.*, 360 Pa. 103, 110 (1948), in adopting the ruling of the court below (62 D. & C. 105, 121), the court said, with respect to Section 731:

"* * * "The purpose of this Section is to prohibit voluntary disclosures. It is not intended to defeat justice by prohibiting the production of necessary records in judicial proceedings. * * *"

In *Graham Farm Land Co. v. Commonwealth*, 363 Pa. 571, 573 (1950), the court said that Section 731 was added to The Fiscal Code "* * * in order to protect the taxpayer from unnecessary disclosures of the information contained in his tax return * * *".

Since the purpose of Section 731 was to protect taxpayers from voluntary disclosures of the tax information contained in the tax return, Section 731 must be construed so as to effectuate that purpose. In our opinion, the privacy of the taxpayer would be invaded by the voluntary disclosure of the amounts of tax resettled against the taxpayer either on review or refund by the Board. The statute prohibits the disclosure of "any information" which the Board has obtained "as a result of any returns, investigations, hearings or verifications." The redetermination of taxes as settled or resettled by the fiscal departments is so closely identified with the information

which the statute labels as confidential as to compel the conclusion that the Board's records as to such redeterminations may not be voluntarily disclosed under Section 731.

The rules of statutory construction confirm this conclusion. Since the purpose of Section 731 was to protect the taxpayer from disclosures which were not prohibited prior to the enactment of Section 731, the Section is remedial, and should be construed liberally to accomplish that purpose: Section 58 of the Statutory Construction Act of May 28, 1937, P. L. 1019, 46 P. S. § 558.

Moreover, if it should be contended that Section 731 is ambiguous as to disclosure of refunds or credits established by the Board, it must be remembered that it has been the policy of the Board since the enactment of this section not to make a voluntary disclosure of such information. The administrative interpretation of a statute while not controlling, is entitled to great weight in construing the meaning of the statute: Section 51 (8) of the Statutory Construction Act, 46 P. S. § 551 (8). In *Federal Deposit Insurance Corp. v. Board of Finance and Revenue*, supra (368 Pa. 463), the court said:

“* * * It is true, of course, that the contemporaneous construction of a statute by those charged with its execution and application, especially when it has long prevailed, is entitled to great weight and should not be disregarded or overturned except for cogent reasons, and unless it is clear that such construction is erroneous: * * *”

We are not attempting to pass upon the wisdom of the policy of the Legislature in requiring that the taxpayer's business accounts with the Commonwealth shall remain confidential. However, it may be noted that the bare statement of an amount of tax resettled or refunded by the Board would be meaningless to any person making inquiry for a legitimate purpose, unless he also received additional information explaining why and how these amounts were computed by the Board. The disclosure of such additional information is clearly prohibited by Section 731.

It must be presumed that the Legislature did not intend an unreasonable result: *Commonwealth v. Gill*, 166 Pa. Super. 223, 229 (1950); Section 52 of the Statutory Construction Act, 46 P. S. § 552. It does not seem reasonable that the Legislature intended to require the Board to disclose meaningless data while prohibiting the disclosure of additional information necessary to understand such data.

Therefore, we are of the opinion that the provisions of Section 731 of The Fiscal Code, as construed by the Supreme Court of Pennsyl-

vania and by the long-established policy of the Board of Finance and Revenue, prohibits the voluntary disclosure of information regarding the action of the Board on petitions for review or refund, except for the purposes specified in that section. Accordingly, you are advised that the names of taxpayers and amounts granted to them by the Board on refund or review are confidential information under the law enacted by the General Assembly and presently in effect.

Very truly yours,

DEPARTMENT OF JUSTICE,

GEORGE W. KEITEL,
Deputy Attorney General.

FRANK F. TRUSCOTT,
Attorney General.

OPINION No. 652

*Poor—Public assistance—Residence requirements—Minors over one year of age—
Residence with parents—Married women—Public Assistance Law of June 24,
1937, P. L. 2051.*

1. Minor children over one year of age, who have been absent from Pennsylvania after having resided with their parents in Pennsylvania for a year or more, meet the residence requirements for public assistance when they return to the home of their parents, where such parents have retained residence in Pennsylvania.

2. Minor children over one year of age, who come to reside with their parent or parents in Pennsylvania, need not be in the State for a year or more in order to meet the residence requirements for public assistance if their parent or parents have resided in Pennsylvania for a year or more immediately preceding the date of making application for assistance.

3. Minor children over one year of age who meet the residence requirements for public assistance do not lose their eligibility on the basis of residence where either or both parents go to live in another State and the children continue to reside with relatives in Pennsylvania, since under section 9 (a) of the Public Assistance Law of June 24, 1937, P. L. 2051, a dependent child is eligible for public assistance if the child is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt, in a place of residence maintained by one or more of such relatives as his or their own home.

4. If a married woman is living separate and apart from her husband she may qualify in her own right for public assistance on the basis of having resided in the Commonwealth under conditions specified in the Public Assistance Law of June 24, 1937, P. L. 2051; however if the wife lives with her husband her eligibility on the basis of residence depends on that of her husband.

5. The general principles of law that the legal residence of an unemancipated minor follows that of the father, mother or guardian, as the case may be, and that the legal residence of a wife follows that of her husband except in certain specified instances, should be adhered to in the administration of the Public Assistance Law of June 24, 1937, P. L. 2051.

Harrisburg, Pa., January 17, 1955.

Honorable Eleanor G. Evans, Secretary of Public Assistance, Harrisburg, Pennsylvania.

Madam: This department is in receipt of your communication requesting advice relative to legal residence of unemancipated minors and wives under the Public Assistance Law, the Act of June 24, 1937, P. L. 2051, as amended, 62 P. S. Section 2501 et seq.

Specifically, you present the following questions:

1. Do minor children over one year of age, who have been absent from Pennsylvania after having resided with their parents in Pennsylvania for a year or more, meet the residence requirements for public assistance when they return to the home of their parents who have retained residence in Pennsylvania?
2. Must minor children over one year of age who come to reside with the parent or parents in Pennsylvania be in the State for a year or more in order to meet the residence requirements for public assistance, even though their parent or parents had already resided in Pennsylvania for a year or more immediately prior to the coming of the children?
3. Do minor children over one year of age who meet the residence requirements for public assistance lose their eligibility on the basis of residence if either or both parents go to live in another state and the children continue to reside in Pennsylvania?
4. Must a married woman qualify in her own right on the basis of having resided in the Commonwealth under the conditions specified in the Public Assistance Law, or does her eligibility on the basis of residence depend on that of her husband?

Section 9 of the Public Assistance Law, supra, was amended by the Act of August 22, 1953, P. L. 1361, 62 P. S. Section 2509. Sections of the act providing for settlement and quasi-settlement were eliminated by this amendment. Section 9 of the Public Assistance Law, as amended,

supra, provides that in the absence of reciprocity with the other state, the applicant must have resided within the State of Pennsylvania for one year immediately preceding the date of making application for assistance.

Said Section 9, as amended, provides:

"Eligibility for Assistance.—Any person residing within this Commonwealth shall hereafter be entitled to receive public assistance, as provided by law, without regard to the period of time he or she has resided therein, and the Department of Public Assistance shall grant assistance without regard to the period of time any person seeking public assistance and otherwise entitled thereto shall have resided within this State: Provided, however, *That if the applicant for public assistance has resided in Pennsylvania for less than one year immediately preceding the date of making application for assistance, such person shall only be entitled to receive public assistance if he or she was last a resident of a state which by law, regulation or reciprocal agreement with Pennsylvania grants public assistance to a person who has resided therein for less than one year.* A child less than one year of age is considered as deriving residence from either (1) a parent, or (2) other relative with whom he is living, as provided in this section. Except as hereinafter specifically otherwise provided in the case of pensions for the blind, all persons of the following classes, except those who hereafter advocate and actively participate by an overt act or acts in a movement proposing a change in the form of government of the United States by means not provided for in the Constitution of the United States, shall be eligible to receive assistance, in accordance with rules, regulations and standards established by the Department of Public Assistance, with the approval of the State Board of Assistance, as to eligibility for assistance, and as to its nature and extent. Absence in the service of the Commonwealth or of the United States shall not be deemed to interrupt residence in the Commonwealth if a domicile has not been acquired outside the Commonwealth.

"(a) Dependent Children. * * *

"(b) Aged Persons. * * *

"(c) Blind Persons. * * *

"(c.1) Disabled Persons. * * *

"(c.2) Any children * * *

"(d) Other persons * * *" (Italics ours)

Under the above quoted provision of the Public Assistance Law, an applicant, unless he comes from a state which on the basis of

reciprocity with Pennsylvania requires no residence as a condition of eligibility, is required to have one year's residence immediately preceding the date of making application for assistance. In other words, the applicant must have lived in Pennsylvania for one year.

We shall first consider the problem of the unemancipated minor child. In Pennsylvania, infants or minors do not establish their own residence but acquire their residence by operation of law, that is, they derive residence through their parents or other guardians. A child is under the control of its parents or other relative, and in certain instances, such as where it is a dependent, neglected or delinquent child, it is under the control of the juvenile court. A child does not have intent to establish a residence or to acquire one elsewhere in the same manner as an adult. Planning for the living arrangements of children or minors is done not by them but for them by persons responsible for their care, custody or control.

Though legally the words "residence" and "domicile" are not convertible terms, they can be construed as synonymous. In *re Lewis's Estate*, 10 Pa. C. C. 331; and In *re Cannon's Estate*, 15 Pa. C. C. 312, 10 Montg. 179, in which the court held that the word "residence" is to be construed as synonymous with "domicile"; also that residence is a matter of intention and a minor, unemancipated, cannot form such an intention for himself.

That "legal residence" is synonymous with domicile see the *Lesker Case*, 377 Pa. 411, 105 A. 2d 376 (1954), where the Court said at pages 415-416:

"There can be no doubt, therefore, that in order to qualify under Article 2, Section 5 of our present Constitution a candidate for assemblyman must be an inhabitant (a permanent resident) within his claimed legislative district; and he must have resided there, that is, maintained a permanent home established there, for at least a year.

"* * * It must be recognized that some confusion has arisen in the lay mind as to what constitutes legal residence because the word residence is often used synonymously with domicile. Not only are residence and domicile employed synonymously and interchangeably but often they are used overlappingly with one word including, within its meaning, a part of the meaning of the other. Thus, the person with a country home and a city home may with grammatic correctness say that he resides at both places. In point of law, however, only one of these places can be his permanent legal residence, that is, his domicile. * * *

In Pennsylvania, as stated above, the domicile or legal residence of a minor child follows that of his father, and continues until he acquires a domicile or legal residence of choice which he cannot do until he becomes *sui juris*. See *Guier v. O'Daniel*, 1 Binn. 349 note; *In re Hood's Estate*, 21 Pa. 126 (1853); *Dorrance's Estate*, 309 Pa. 151 (1932).

In Restatement of the Law (Conflict of Laws), Section 30, we find this statement: "Except as stated in §§ 31 to 35, a minor child has the same domicile as that of its father." The exceptions mentioned relate to domicile of an emancipated child, a child whose parents are divorced or separated, an illegitimate child, an abandoned child, and an adopted child.

An emancipated child can acquire a domicile of choice (Section 31). A minor child's domicile or legal residence in the case of divorce or judicial separation of its parents is that of the parent to whose custody it has been legally given; if there has been no legal fixing of custody, its domicile or legal residence is that of the parent with whom it lives, but if it lives with neither, it retains the father's domicile (Section 32).

Section 33 provides:

"Abandoned Child.

"(1) Subject to the statement in Subsection (2).

"(a) a child abandoned by one parent has the domicile of the other parent, and

"(b) a child abandoned by both parents has the domicile of the parent who last abandoned it at the time of the abandonment; if both parents abandon it at the same time, it has the domicile of the father at the time of abandonment.

"(2) The statements in Subsection (1) are not applicable to determine the domicile of an abandoned child for whom a guardian has been appointed."

An illegitimate minor child has the same domicile or legal residence as that of its mother (Section 34).

An adopted minor child has the same domicile or legal residence as that of the adoptive parent (Section 35).

Following the general rule as stated above, that the legal residence of a minor child is that of the father or other parent or guardian, as the case may be, we present the following answers to your particular questions:

1. The answer to your first question is in the affirmative. Minor children over one year of age who have been absent from Pennsylvania after having resided with their parents in Pennsylvania for a year or more do meet the residence requirements for public assistance when they return to the home of their parents in Pennsylvania, who have retained their residence in Pennsylvania. According to the Restatement of the Law (Conflict of Laws), Section 30, the legal residence of the minor child continues to be that of the parent even while away from his parent. (See illustrations under Section 30.)

2. The answer to your second question is in the negative. Minor children who come to reside with their parent or parents in Pennsylvania do not have to be in the State for a year or more if their parent or parents meet the residence requirement of one year. Stated on a positive basis, minor children over one year of age who come to reside with their parent or parents in Pennsylvania qualify as far as residence of one year is concerned if their parent or parents have resided in Pennsylvania for a year or more immediately preceding the date of making application for assistance.

3. The answer to your third question is in the negative. Such children derive residence through their parents or relatives specified in Section 9(a) of the Public Assistance Law. Under Section 9(a), a dependent child is eligible for public assistance if the child is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, or aunt, in a place of residence maintained by one or more of such relatives as his or their own home.

We turn now to the question of residence of a married woman. We find in the Restatement of the Law, *supra*, Section 27, that a wife, with certain exceptions, has the same domicile or legal residence as that of her husband. However, if a wife lives apart from her husband without being guilty of desertion, according to the law of the state which was their domicile or residence at the time of separation, she can have a separate domicile or residence.

Following the general rule stated above, that the residence of a wife is that of her husband, we present the following answer to your particular question:

4. The answer to your fourth question is in the affirmative unless the wife is living with her husband who has residence, in which event she would, under the Public Assistance Law, derive residence from her husband. If a married woman is living separate and apart from her husband, she should qualify in her own right on the basis of having

resided in Pennsylvania under the conditions specified in the Public Assistance Law; if she is living with her husband, then, as stated above, her legal residence follows that of her husband.

The above interpretations are in accord with the legislative intent of the Public Assistance Law, *supra*, as expressed in Section 1 of the Public Assistance Law, *supra*, as amended by the Act of May 21, 1943, P. L. 434, 62 P. S. Section 2501, that assistance shall be administered promptly and humanely with due regard for the maintenance and preservation of family life, as follows:

"It is hereby declared to be the legislative intent that the purpose of this act is to promote the welfare and happiness of all the people of the Commonwealth, by providing public assistance to all of its needy and distressed; that assistance shall be administered promptly and humanely *with due regard for the preservation of family life*, and without discrimination on account of race, religion or political affiliation; and that assistance shall be administered in such a way and manner as to encourage self-respect, self-dependency and the desire to be a good citizen and useful to society." (Italics ours)

This represents the intent of the Legislature which is in conformity with the present day emphasis on the importance of preserving and stabilizing the family unit.

We are of the opinion, therefore, and you are accordingly advised that the general principle of law that the legal residence of an unemancipated minor child follows that of the father, mother, or guardian, as the case may be, should be adhered to in the administration of the Public Assistance Law, the Act of June 24, 1937, P. L. 2051, as amended, 62 P. S. Section 2501 et seq.; also that the general principle of law that the legal residence of a wife follows that of her husband except in certain specified instances, is also to be followed in the administration of the Public Assistance Law, as amended, *supra*.

Very truly yours,

DEPARTMENT OF JUSTICE,

M. LOUISE RUTHERFORD,
Deputy Attorney General.

FRANK F. TRUSCOTT,
Attorney General.

OPINION No. 653

Tax Anticipation Notes, First Series of 1955—Constitutionality and legal status.

The allocations of monies in the General Fund, which are specifically set forth on the face of the notes, made by the Department of Revenue, and approved by the Governor, the Auditor General and the State Treasurer, to provide a sinking fund for the payment of said notes, are payable into and shall be set aside in the sinking fund accounts, mentioned on the face of the notes in the amounts and at times specified, prior to all other expenditures, expenses, debts and appropriations, including current expenses, payable from the General Fund.

Harrisburg, Pa., July 28, 1955.

Honorable George M. Leader,
Honorable Charles R. Barber,
Honorable Weldon B. Heyburn.

Sirs: We have your request for an opinion as to the legal status of sixty million dollars (\$60,000,000) Tax Anticipation Notes, First Series of 1955, dated July 25, 1955, maturing May 25, 1956.

We have examined the proceedings relative to the issuance by the Commonwealth of Pennsylvania of Tax Anticipation Notes, First Series of 1955, to the amount of sixty million dollars (\$60,000,000).

This issue was authorized by the General Assembly of this Commonwealth by the Act approved September 29, 1951, P. L. 1646, as amended by Act No. 75, of the 1955 Session, approved June 30, 1955. We are satisfied that the Act of September 29, 1951, and the amendment thereto of June 30, 1955, *supra*, were duly and properly enacted. We have also examined the official estimates submitted to the Governor, through the Budget Secretary, by the Department of Revenue, stating the amount of the contemplated revenues provided for the current biennium by the General Assembly for the current purposes of any fiscal biennium, and the amount thereof that remains uncollected.

The constitutionality of the issuance of tax anticipation notes was upheld by the Supreme Court of Pennsylvania in the case of *Kelley v. Baldwin, et al.*, 319 Pa. 53 (1935). Since the Act of September 29, 1951 as amended is similar to the act held to be constitutional in *Kelley v. Baldwin, supra*, we believe it to be constitutional.

The Act provides, *inter alia*, that the current revenues for any biennial fiscal period accruing to the General Fund of the State Treasury shall be pledged for the payment of principal of and interest on the notes during such fiscal biennium, and that so much of said revenues as may be necessary, are specifically appropriated for such payment, the Department of Revenue being authorized to allocate such revenues to said payment. The Act authorizes the Governor, the Auditor General and the State Treasurer to determine the terms and conditions of the issue, rates of interest and time of payment of interest, provided that the notes shall not mature later than **May 31** of the second fiscal year of any current biennium, and shall not bear interest in excess of $4\frac{1}{2}\%$ per annum. The minutes of the meetings held by the Governor, the Auditor General and the State Treasurer, show that all proceedings taken relative to the issuance of the notes comply fully with the provisions of the Act and are in due legal form, and that all necessary action has been duly taken.

We have examined notes number one of the following denominations; five thousand dollars (\$5,000), ten thousand dollars (\$10,000) and one hundred thousand dollars (\$100,000), in bearer form and find that the same are duly and properly executed and conform with the form approved by you.

In conclusion, we have no hesitation in advising you that the sixty million dollars (\$60,000,000) notes of the Commonwealth of Pennsylvania First Series of 1955, dated July 25, 1955, maturing May 25, 1956, constitute legal obligations payable by the Commonwealth of Pennsylvania, from current revenues accruing to the General Fund of the State Treasury of the Commonwealth of Pennsylvania during the two fiscal years ending May 31, 1957, and are secured by the current revenues levied and assessed for revenue purposes of every kind and character accruing to the said General Fund during said biennial period.

The amount of the Commonwealth of Pennsylvania Tax Anticipation Notes, First Series of 1955 is less than one-third of the uncollected amount of the officially estimated revenues provided by the General Assembly under existing laws for the General Fund in the current two year fiscal period, and is also less than one-tenth of such officially estimated revenues, the borrowing limitation now applicable since the General Assembly is still in session.

We are further of the opinion that the allocation of the moneys in the General Fund, which are specifically set forth on the face of the

notes, made by the Department of Revenue, and approved by the Governor, the Auditor General and the State Treasurer, to provide a sinking fund for the payment of said notes, are payable into and shall be set aside in the sinking fund accounts, mentioned on the face of the notes in the amounts and at times specified, prior to all other expenditures, expenses, debts and appropriations, including current expenses, payable from the General Fund.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 654

Process—Service by certified mail where statute requires registered mail.

In the absence of specific statutory authorization, certified mail may not be used in place of registered mail for the service of process or notice where a statute provides for the use of registered mail, because all the safeguards of registered mail are not attendant in the use of certified mail.

Harrisburg, Pa., September 30, 1955.

Honorable Henry E. Harner, Deputy Secretary of the Commonwealth,
Harrisburg, Pennsylvania.

Sir: You have requested an opinion as to whether service of process or notice by Certified Mail will satisfy those statutory provisions which call for service of process or notice by Registered Mail.

An analytical comparison of the distinctive attributes of Certified and Registered Mail is necessary to determine whether Certified Mail is so similar to Registered Mail as to satisfy such statutory provisions.

A new service known as Certified Mail was introduced by the United States Post Office Department on June 7, 1955. For the most part, letters sent by Certified Mail are handled and dispatched as

ordinary, first class mail. However, Certified Mail differs from ordinary mail in that prior to dispatch a receipt, which upon delivery must be signed by the addressee or his agent is attached to each piece of Certified Mail. Should the sender so request, the addressee or his agent will also be required to sign a receipt to be returned by the postal authorities to the sender. During transportation, Certified Mail is commingled with ordinary mail and no special precautions, other than those applicable to First Class Mail generally, are taken to protect Certified Mail from loss or theft. The Post Office Department maintains no record of the receipt of an individual piece of Certified Mail from the sender. Thus, if a piece of Certified Mail were lost or misplaced the postal authorities would have no way of learning of the loss and, consequently, the sender would receive no notification thereof. Records of Certified Mail delivery slips are destroyed by the Post Office Department after six months.

On the other hand, special precautions are provided to protect Registered Mail against loss or theft. For example, Registered Mail is not commingled with ordinary mail and when such mail is transferred within the Post Office Department the recipient must acknowledge possession by his signature. As a result of these special precautions, the postal authorities would be alerted to any loss of a particular piece of Registered Mail, and their records would enable them to notify the sender of such loss immediately. Registered Mail records are retained for three years.

On the basis of the foregoing, it is clear that Certified Mail is not substantially the same as Registered Mail. It is, rather, a distinct service having some of the attributes of both Registered Mail and ordinary mail.

It is our opinion, therefore, and you are accordingly advised that in the absence of specific statutory authorization, Certified Mail may not be used in place of Registered Mail for the service of process or notice where a statute provides for the use of Registered Mail.

Very truly yours,

DEPARTMENT OF JUSTICE,

MARVIN GARFINKEL,
Assistant Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 655

State government—Employes—Retirement annuities—Increasing allowances after retirement—Constitutionality—Constitution of Pennsylvania, Article III, sec. 11.

The Act of January 19, 1952, P. L. 2176, which granted increased annuities to former state employes who were receiving retirement allowances under the State Employes' Retirement Act of June 27, 1923, P. L. 858, is in violation of Article III, sec. 11 of the Constitution of Pennsylvania, which provides, inter alia, that no bill shall be passed which gives extra compensation to any public employe after services have been rendered.

Harrisburg, Pa., November 4, 1955.

Honorable James A. Finnegan, Chairman, State Employes' Retirement Board, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you if the State Employes' Retirement Board, in view of the opinion of the Pennsylvania Supreme Court in *J. H. Jameson v. City of Pittsburgh et al.*, 381 Pa. 366 (1955), should discontinue paying the increased annuities granted retired State employes under the Act of January 19, 1952, P. L. 2176, 71 P. S. Section 1743.1.

The above act established minimum allowances for beneficiaries who were receiving either a disability or superannuation retirement allowance under the State Employes' Retirement Act, the Act of June 27, 1923, P. L. 858, 71 P. S. Section 1731 et seq. In compliance with the provisions of the 1952 amendment, the State Employes' Retirement Board recalculated retirement allowances of beneficiaries of record on the effective date of the act. As a result, increased annuities were granted to 749 members.

Article III, Section 11, of the Pennsylvania Constitution states that:

"No bill shall be passed giving any extra compensation to any public officer, servant, employee, agent or contractor, after services shall have been rendered or contract made, nor providing for the payment of any claim against the Commonwealth without previous authority of law."

In *Koehnlein v. Retirement System for Employees of Allegheny County*, 373 Pa. 535, 97 A. 2d 88 (1953), the Supreme Court of Pennsylvania held that an act granting increased retirement allowances to an employe retired before passage of the act was unconstitutional as a grant of extra compensation after services were rendered.

In the Jameson case the situation was similar except that to become eligible for the increased allowance the retired employe had to make a contribution of \$200.00 into the retirement fund. The Supreme Court held that such payment made no difference in the situation, that an increased pension is still "gratuitous disbursement" to which the employe was not entitled.

Since the principles of the Koehnlein and Jameson cases are equally applicable to the problem you present, it is our opinion that the State Employees' Retirement Board may not continue to pay the increased retirement allowances granted to employes retired on or before the effective date of the Act of January 19, 1952, P. L. 1276.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY J. RUBIN,
Assistant Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 656

Schools—Employes' retirement allowances—Increasing benefits after retirement—Constitutionality—School Employees' Retirement Law of July 18, 1917, as amended—Constitution of Pennsylvania, Article III, sec. 11.

1. The Acts of May 23, 1949, P. L. 1804, and May 26, 1949, P. L. 1818, amending the School Employees' Retirement Law of July 18, 1917, P. L. 1043, which provide for increased retirement allowance for certain former school employes who had been separated prior the passage of the amendments, are both in violation of Article III, sec. 11, of the Constitution of Pennsylvania which provides, *inter alia*, that no bill shall be passed which gives extra compensation to any public employe after services have been rendered.

Statutes—Statutory construction—Inconsistent amendments—Priority of latest—Failure of legislature to refer to prior amendment—Legislative attempt to retroactively overrule judicial decision—Statutory Construction Act of May 28, 1937, as amended.

2. Section 2 of the Act of May 27, 1953, P. L. 242, amending section 75 of the Statutory Construction Act of May 28, 1937, P. L. 1019, as amended, which provides for a retroactive rule of construction of statutes, is an unconstitutional attempt by the legislature to overrule a prior judicial decision.

3. The Act of May 26, 1949, P. L. 1818, amending the School Employees' Retirement Act of July 18, 1917, P. L. 1043, as amended, repealed the Act of May 23,

1949, P. L. 1804, amending that act because construction of these amendments must be made in accordance with section 75 of the Statutory Construction Act as interpreted by the courts prior to passage of Section 2 of the Act of May 27, 1953, P. L. 242, amending section 75, and under the courts' interpretation, where there are two conflicting amendments to a law and the latter overlooks and makes no reference to the former, the latter will be deemed to repeal the former by necessary implication.

Harrisburg, Pa., November 4, 1955.

Honorable Ralph C. Swan, Deputy Superintendent, Department of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have requested an opinion from this department as to whether the Public School Employees' Retirement Board may continue to pay the increased retirement allowances provided for in the Act of May 23, 1949, P. L. 1804 (hereinafter referred to as the "First Amendatory Act"), which amended subsection 4 of Section 14 of the Act of July 18, 1917, P. L. 1043, as amended, commonly known as the School Employees' Retirement Law.

The First Amendatory Act increased the minimum monthly payment to former teachers, principals, supervising principals and superintendents who were separated from school service for any reason prior to July 1, 1919, and had twenty years of service or who were separated from school service prior to July 1, 1919, because of physical or mental disability. It also established minimum disability and superannuation allowances for those retired employees or their beneficiaries who were in receipt of disability or superannuation retirement allowances on September 1, 1949.

I

Statutory Construction

The Act of May 26, 1949, P. L. 1818 (hereinafter referred to as the "Second Amendatory Act"), was enacted into law three days after the First Amendatory Act. It also amended Section 14 of the School Employees' Retirement Law. The purpose of the Second Amendatory Act as indicated by the italicized words in the official reprint thereof was to add clause (d) to subsection 3 of Section 14. However, it restated the entire section and in so doing restated subsection 4 as it had appeared prior to enactment of the First Amendatory Act. Clause (d), inter alia, established a minimum superannuation retirement allowance for certain retired employees.

Section 71 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, as amended, provides that in printing amendatory laws the words, phrases or provisions of existing law, if any, which have been stricken out or eliminated by the adoption of the amendment shall be printed between brackets and all new words, phrases or provisions, if any, which have been inserted into or added to the law by the passage of such amendment shall be printed in italics. No words were printed in brackets in the official reprint of the Second Amendatory Act, thus, indicating that the Legislature did not intend to repeal the First Amendatory Act.

Section 75 of the Statutory Construction Act provided in 1949 that:

“Whenever two or more amendments to the same provision of a law are enacted at the same or different sessions, one amendment overlooking and making no reference to the other or others, * * * the latest in date of final enactment shall prevail from the time it becomes effective.”

U. S. Steel Co. v. Allegheny County, 369 Pa. 423 (1952) (two dissents), involved a conflict between two amendments to the same section of an act passed at the same session of the Legislature, each overlooking and making no reference to the other. The Act of July 12, 1935, P. L. 674, expressly abolished a specific statutory right to pay taxes into court and replaced it with an entirely different procedure. The words intended to be deleted from existing law were bracketed and the new words were inserted in italics as required by Section 71 of the Statutory Construction Act. The Act of July 15, 1935, P. L. 1007, amended the same section by adding a sentence to the same section as it had read prior to enactment of the Act of July 12, 1935, P. L. 674. The new sentence was in italics but there were no other brackets or italics to indicate that the amendment of July 12th was being repealed. The Supreme Court held that the two acts were absolutely irreconcilable and that the Act of July 12th was repealed by necessary implication. The decision was based upon general case law and Section 75 of the Statutory Construction Act. The Court stated that since this was not an express repeal but a repeal by necessary implication no brackets or reference to the earlier law were necessary. Accord: Loushay Appeal, 370 Pa. 453 (1952).

Section 75 of the Statutory Construction Act was thereafter amended by the Act of May 27, 1953, P. L. 242, to read as follows:

“Whenever two or more amendments to the same provision of a law are enacted at the same or different sessions, one amendment overlooking and making no reference to the other

or others, the changes in the law made by each shall be given effect and all the amendments shall be read into each other. If the changes made in the law are to any extent in direct conflict with each other, the latest in date of final enactment shall prevail, to the extent of the direct conflict, from the time it becomes effective. The fact that a later amendment (i) restates language of the original act which was deleted by an earlier amendment, or (ii) fails to restate language inserted by an earlier amendment, does not of itself create a conflict between the two amendments. Amendments are in conflict with each other only if the changes in the law made by each without considering the inserts and strike-outs of the other cannot be put into operation simultaneously."

Section 2 of the Act of May 27, 1953, P. L. 242, which amended Section 75 of the Statutory Construction Act, provides:

"The provisions of the foregoing amendments being intended as a clarification of existing law, shall apply to all acts of assembly heretofore enacted as well as to those hereafter enacted. The provisions of this section shall not affect any matter heretofore finally adjudicated by any court of this Commonwealth."

The stated purpose of the 1953 amendment to Section 75 of the Statutory Construction Act was to clarify existing law; the General Assembly in effect saying that the interpretation given to Section 75 by the Supreme Court in *U. S. Steel Co. v. Allegheny County and Loushay Appeal*, *supra*, was not in accord with the original legislative intent.

The First Amendatory Act and Second Amendatory Act were both passed in 1949, prior to the 1953 amendment to Section 75 of the Statutory Construction Act. Therefore, if Section 2 of the 1953 act, which amended Section 75 of the Statutory Construction Act is constitutional, the conflict between the First Amendatory Act and the Second Amendatory Act will be resolved in accordance with the provisions of Section 75, as amended, the changes made by each amendment will be given effect and the two amendments will be read into each other. However, if this section is unconstitutional, the conflict between the First Amendatory Act and the Second Amendatory Act will be resolved in accordance with the provisions of Section 75 as it read prior to the amendment of 1953 and as construed by the Supreme Court in *U. S. Steel Co. v. Allegheny County and Loushay Appeal*, *supra*.

The problem of statutory construction thus turns on the question of whether or not Section 2 of the 1953 act is constitutional.

As late as 1949, the Supreme Court, in dictum, reiterated the fundamental proposition that under the doctrine of separation of powers the Legislature cannot dictate to the courts how they shall decide matters coming before them nor can the Legislature overrule a judicial decision by an Act of Assembly: *Leahey v. Farrell*, 362 Pa. 52 (1949). A long line of cases has firmly settled the proposition that the Legislature cannot pass an expository act to compel the courts to adopt a particular construction of a previously enacted statute: *Commonwealth v. Warwick*, 172 Pa. 140 (1895); *Titusville Iron Works v. Keystone Oil Co.*, 122 Pa. 627 (1888); *Haley v. City of Philadelphia*, 68 Pa. 45 (1871); *Reiser v. The William Tell Saving Fund Association*, 39 Pa. 137 (1861).

Section 2 of the 1953 act is, therefore, clearly an unconstitutional attempt by the Legislature to overrule the U. S. Steel and Loushay cases and in determining whether the Second Amendatory Act repealed the First Amendatory Act we must look to Section 75 of the Statutory Construction Act as then in effect and as interpreted by the Supreme Court. Under the rule laid down in the U. S. Steel and Loushay cases, we are driven to the conclusion that the Second Amendatory Act repealed the First Amendatory Act by necessary implication and that, therefore, the changes made in subsection 4 of Section 14 were repealed.

II

Constitutionality

Even if we assume that the Second Amendatory Act did not repeal the First Amendatory Act, the First Amendatory Act is clearly unconstitutional.

Article III, Section 11 of the Constitution of Pennsylvania provides:

"No bill shall be passed giving any extra compensation to any public * * * employee * * * after services shall have been rendered * * *."

Subsequent to enactment of the First and Second Amendatory Acts, the Supreme Court declared that an increase in a retirement allowance after the employe has retired and performs no further services is violative of this constitutional inhibition: *Koehnlein v. Allegheny County Employees' Retirement System*, 373 Pa. 535 (1953); *Jameson v. Pittsburgh*, 381 Pa. 366 (1955). The language of Mr. Justice Jones in the *Koehnlein* case (at page 543) has equal application to the instant question:

"The plight of retired * * * employees because of the inadequacy of their retirement allowances in relation to the increased cost of living, particularly in the past few years, is regrettable to say the least. But, sympathy for their distress affords no justification for ignoring established constitutional restraints. If legislative inroads upon retirement funds by way of gratuitous disbursements therefrom were to be tolerated, it would not be long before retirement systems in general would be imperiled, if not destroyed, to the detriment not only of the retired employees intended to be benefitted by the unconstitutionally increased retirement allowances but also of the current contributors to retirement funds who are still in the service * * *"

III

Conclusion

It is our opinion that the First Amendatory Act was repealed by the Second Amendatory Act. It is also our opinion that the First Amendatory Act and the similar provision in the Second Amendatory Act are unconstitutional. For these reasons we must advise you that you may not continue to make increased payments to any former employee who was retired on or before the effective date of such purported increase.

Very truly yours,

DEPARTMENT OF JUSTICE,

STEPHEN B. NARIN,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 657

Unemployment compensation—Unemployment Compensation Fund—Calculation of Fund balance and safety factor—Fiscal items included in the calculation of.

1. The term "Unemployment Compensation Fund," as used in the Act of December 5, 1936, P. L. (1937) 2897, as amended by the Act of March 30, 1955, P. L. 6, is not limited to the monies in that Unemployment Compensation Fund as defined in Section 601 of the Act of December 5, 1936, Second Executive Session, P. L. (1937) 2897, as amended, but is intended to include the monies in both the Unemployment Compensation Fund and the Unemployment Trust Fund.

2. Monies on hand or in transit in the Unemployment Trust Fund, Unemployment Compensation Fund, and the Compensation Account are clearly part of the Unemployment Compensation Fund, since approved banking and accounting practices would consider such items as cash on hand and available for the payment of benefits.

3. Contributions that might be paid in December 1955 for contributions due on fourth quarter 1955 taxable wages, actually required payable in January, 1956, are not a part of the Unemployment Compensation Fund as of December 31, 1955, since these contributions are payments which would be the subject, according to Department rules and regulations, of reports and payments during the month of January, 1956.

4. Contributions that might be paid in December, 1955, for contributions not yet due or payable on covered taxable wages in 1956, yet labeled as advance payments against such contributions, when due and payable, are not to be included as part of the Unemployment Compensation Fund as of December 1955 for the same reasons set out above.

5. True voluntary contributions without reservation paid by any employer in December, 1955, but not due on or covering any specific covered taxable wages, but of benefit to the employer's account and possibly of value to his reserve, and later sufficient to reduce his 1956 contribution rate would be included in the Unemployment Compensation Fund.

6. The interest earned on the Unemployment Compensation Fund in the fourth quarter of 1955 is not, because of the accounting procedures presently used, a part of the Fund.

7. The cash on hand in banks against which checks have been issued but not yet cashed by beneficiaries cannot be deemed part of the Unemployment Compensation Fund since these items would not be available once a check has been issued against the Fund.

Harrisburg, Pa., December 30, 1955.

Honorable John R. Torquato, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication of November 14, 1955, requesting advice on the interpretation of those sections of the Unemployment Compensation Law, the Act of December 5, 1936, P. L. (1937) 2897, as amended, 43 P. S. Section 751 et seq., pertaining to the calculation of the Fund balance and the element termed the safety factor.

The basic purpose of the Pennsylvania Unemployment Compensation Law as stated in Section 3, 43 P. S. Section 752, is:

"* * * the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

It is, of course, axiomatic that if this purpose is to be attained, the reserves so set aside must be maintained in an amount adequate to meet the needs of the beneficiaries for whose benefit this Fund is, in the first instance, created. Likewise, it is apparent that due to changing economic conditions these needs may vary from year to year. Accordingly, the amount of contributions required to be made into the Fund to maintain it on a sound basis would likewise vary from year to year as circumstances might require or dictate.

For the purpose of insuring the adequacy and stability of the reserves and, at the same time, to correlate payments into the Fund for replacement purpose with changing economic conditions, the Legislature incorporated into Section 301 (c) (B) of the law as last amended by the Act of March 30, 1955, P. L. 6 (Act No. 5), 43 P. S. Section 781, a so-called "safety factor" provision. Under this provision, the amount of contributions for any given calendar year payable by employers subject to the law is directly related to the balance in the Unemployment Compensation Fund as of December 31 of the preceding calendar year. By this simple device, the Legislature established a basic yardstick for maintaining the Fund Balance at a level necessary to meet the demands which might be made upon it.

By definition (Section 4(v) as amended 43 P. S. Section 753), the term "Unemployment Trust Fund" means the Unemployment Trust Fund established with the Federal government under the provisions of the Federal Social Security Law. Similarly by definition (Section 601 as amended, 43 P. S. Section 841), the term "Unemployment Compensation Fund" means the special fund created under the law which is divided into two accounts: the Employer's Contribution Account and the Compensation Account. Contributions received from employers are first credited to the Employer's Contribution Account, and then remitted to the Federal government for credit to the account of Pennsylvania with the Unemployment Trust Fund. Moneys requisitioned by the Commonwealth from the Unemployment Trust Fund are, upon receipt, credited to the Compensation Account to be used solely for the payment of unemployment compensation benefits. While Section 301 (c) (B) uses the term "Unemployment Compensation Fund," we are of the opinion that, as used in this section, this designation cannot be limited to the moneys in that Fund as defined in Section 601, but is intended to include the moneys in both the Unemployment Compensation Fund and the Unemployment Trust Fund.

Your letter of November 14, 1955, requests our opinion as to which of the items mentioned therein may be properly used in the calculation of the Fund balance within the meaning of Section 301 (c) (B).

The primary purpose of this Fund is, of course, to provide the moneys reasonably necessary for the payment of current unemployment compensation benefits. Viewed solely from this standpoint, it might be said that any moneys currently available for deposit into such Fund or on deposit in the Fund should be included in the calculation of the Fund balance. However, such a limited approach would ignore the avowed purpose of the law and would, in practical effect, nullify the safety provisions incorporated in Section 301 (c) (B) of the law. It is, therefore, the opinion of the Department that there may be properly included in the calculation of the Fund balance for the purposes of Section 301 (c) (B) only those items which both represent funds currently available for the payment of benefits; and which are in keeping with the purpose and intent of the safety provisions incorporated in Section 301 (c) (B).

Viewed thusly, the answer to your specific inquiries as to moneys that may properly be considered a part of the Pennsylvania Unemployment Compensation Fund as of December 31, 1955, is as follows:

1. Moneys on hand or in transit in the Unemployment Trust Fund, Unemployment Compensation Fund, and the Compensation Account. This item is clearly part of the Fund, since approved banking and accounting practices would consider this item as cash on hand and disbursable and available for the payment of benefits.

2. Contributions that might be paid in December for contributions due on fourth quarter 1955 taxable wages, actually required payable in January 1956. This item is not a part of the Fund as of December 31, 1955, since these contributions are payments which would be the subject, according to Department rules and regulations, of reports and payments during the month of January 1956. To include in the 1955 calculations any of these payments would be to credit for 1955 sums due in 1956 and upon whose payment in 1956, 1956 calculations would be made. To permit the payment of these sums in 1955 is to augment the 1955 figure, obviously at the expense of the 1956 figure.

By possibility payments of such contributions as these, if accepted and if credited to 1955 figure, could grow to include anticipated payments for the first, second, third, and even fourth

quarters of 1956. It needs little demonstration that such procedure would defeat the very purpose of stability and security of the Fund.

In brief, to count as assets for this year's balance payments properly attributable to 1956, for the sole purpose of preventing a change in tax rate mandated by the Legislature would violate accounting principles and circumvent the law. Safety measures specifically enacted by the Legislature cannot be flouted.

3. Contributions that might be paid in December for contributions not yet due or payable on covered taxable wages in 1956, yet labeled as advance payments against such contributions when due and payable. This item cannot be included as part of the Unemployment Compensation Fund as of December 31, 1955, for the same reasons set out above regarding Item No. 2.

4. Any voluntary contributions that might be paid by any employer in December, but not due on or covering any specific covered taxable wages, but of benefit to the employer's account and possibly of a value to his reserve, later sufficient to reduce his 1956 contribution rate from what it would have been without such voluntary additional credit to his account. A true voluntary contribution, within the meaning of Section 302 (g) of the law, would immediately upon being received become a part of the Fund, though it could not be used by the contributor as a payment on account or as a pre-payment of his obligation for the fourth quarter of 1955, which would be payable in January of 1956. In order to be such voluntary contribution, the payment must be made without reservation.

Funds received with the condition that they be credited toward the 1955 fourth quarter payments are pre-payments, and in the same position as the contributions referred to in Items 2 and 3 above, and, in such latter case, are not part of the Fund as of December 31, 1955.

5. The interest earned on the Fund in the fourth quarter of 1955 (notice and value thereof usually received by the Department in January, but as of December 31 effective date). This item is not part of the Fund, since the accounting procedures presently in effect are maintained on a cash basis. Any sums not received by the Department by December 31, 1955, cannot be calculated as part of the fund.

6. The cash on hand in bank against which checks have been issued but not yet cashed by beneficiaries. The question here is whether advantage can be taken of the actual fact that the bank balance is always higher on a given date (December 31, 1955) than the bookkeeping balance of the Department since many thou-

sands of checks are in the mail, in transit, in clearance, and not yet presented for payment to the bank of requisition. These items cannot be deemed part of the Fund, since the moneys would not be available once a check has been issued against the Fund for such moneys, even though the checks have not cleared or been charged against the account.

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON EHRLICH,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 658

Social Security—Unemployment compensation—Receipt of private unemployment benefits as disqualification for State unemployment compensation—Remuneration—Unemployment Compensation Law of December 5, 1936, as amended.

1. An individual who receives unemployment benefits under the terms of a guaranteed annual wage contract, which provides that the employer shall establish a trust fund for the purpose, that the fund is not recoverable by the employer, that the moneys are to be used to pay supplemental unemployment compensation over and above State payments, that the employe is not entitled to pay from the trust fund unless eligible for benefits under the State unemployment compensation law, that the amount of payment is dependent on longevity of service, that the employe has no vested rights in the fund except as he may qualify for benefits, that the moneys are specifically designated in the contract as not being wages for any purpose, and that the benefits are specifically designated as unemployment compensation benefits supplemental to benefits under State law, may also receive full benefits under the provisions of the present Unemployment Compensation Law of December 5, 1936, P. L. (1937) 2897, as amended, providing that the individual is otherwise qualified.

2. An individual who receives benefits under the guaranteed annual wage contract above described will still be deemed unemployed within the purview of subsection 4 (u) of section 402 (c) of the Unemployment Compensation Law of December 5, 1936, P. L. (1937) 2897, as amended, so that he will remain qualified to receive benefits under the State law.

3. Even though a person receives benefits under the guaranteed annual wage contract above described, he does not receive remuneration as that term is used in subsection 4 (u) of section 402 (c) of the act.

Harrisburg, Pa., January 26, 1956.

Honorable John R. Torquato, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: You have requested this department to advise you concerning the effect of certain agreements recently negotiated between the United Auto Workers on the one hand and the Ford Motor Company and General Motors Corporation on the other. Specifically, you ask whether an individual receiving supplemental unemployment compensation benefits under the terms of one of these agreements also may receive full benefits under the provisions of the present Pennsylvania Unemployment Compensation Law.

The salient features of the agreements under consideration are:

1. The employer pays into a separately established trust fund five cents (5¢) per hour for each hour worked by the employes covered by the agreement until the maximum amount provided for under the terms of the agreement has been reached.
2. The payments made by the employer into the trust fund are not recoverable by the employer under any circumstances.
3. The moneys in the trust fund are to be used to pay supplemental unemployment compensation benefits to the employes over and above the amounts to which they may be entitled under the provisions of a state unemployment compensation law.
4. As a general rule, an employe is not entitled to receive any payments from the trust fund unless he is also concurrently eligible for benefits under a state unemployment compensation law.
5. The amount which an employe is entitled to receive from the trust fund is, within the maximum sum stated in the agreement, determined by his length of service with the employer.
6. The employe has no vested right to any of the moneys paid into the trust fund except as he may qualify for benefits therefrom under the terms of the agreement.
7. The moneys paid into the trust fund are specifically designated as not being wages for any purpose.
8. The benefits paid out of the trust fund are specifically designated as unemployment compensation benefits supplemental to any such benefits received under a state unemployment compensation law.

Section 3 of the Pennsylvania Unemployment Compensation Law (Declaration of Public Policy) provides, in part, that:

“* * * Security against unemployment and the spread of indigency can best be provided by the systematic setting aside of financial reserves to be used as compensation for loss of wages by employes during periods when they become unemployed through no fault of their own. The principle of the accumulation of financial reserves, the sharing of risks, and the payment of compensation with respect to unemployment meets the need of protection against the hazards of unemployment and indigency. * * *” Act of December 5, 1936, P. L. (1937) 2897, 43 P. S. Section 752.

It seems clear, therefore, that private plans for unemployment compensation benefits, such as the agreements under consideration, are specifically within the general policy of the Commonwealth with respect to the subject matter as evidenced by the language of Section 3. In this connection it is interesting to note that private unemployment compensation plans antedate by many years the enactment of governmental unemployment compensation plans, one such plan having been initiated by the National Wallpaper Company in 1894. We understand that, as of this year, there are approximately two hundred such plans in operation throughout the United States.

The Federal Social Security Act of 1935, as well as a few state unemployment compensation laws, recognized the existence of such private plans. It is significant, therefore, that when the Pennsylvania Unemployment Compensation Law was enacted in 1936, it was specifically provided in Section 402(c) that a claimant would be ineligible for benefits under the Pennsylvania law for any week with respect to which he was claiming unemployment benefits under another state or federal law. In view of the principles enunciated in the declaration of public policy (Section 3) and the failure to include benefits under private compensation plans as a disqualifying factor under Section 402(c), we conclude that the concurrent receipt of benefits under a state plan and a private plan does not violate the basic policy of the law.

An examination of other pertinent provisions of the Pennsylvania Unemployment Compensation Law discloses, likewise, that there is no other provision which specifically makes the receipt of benefits under a private plan a factor for disqualification under the state law. The general conditions prescribed for eligibility under the state law are set forth in Section 401 of the law. As the Superior Court said in the case of *McFarland v. Unemp. Comp. Board of Rev.*, 158 Pa. Super. Ct.

418, 45 A. 2d 423 (1946), a claimant who has met these qualifications is not to be disqualified except by virtue of some other applicable provision of the law itself. The general conditions of ineligibility are contained in Section 402 of the law, and we think it apparent that none of these provisions is specifically applicable to the situation under consideration.

The basic condition upon which eligibility for compensation under the Pennsylvania Unemployment Compensation Law is predicated is that the claimant shall be "unemployed." This term is defined in subsection 4(u) of the law, in part, as follows:

"An individual shall be deemed unemployed (I) with respect to any week (i) during which he performs no services for which remuneration is paid or payable to him and (ii) with respect to which no remuneration is paid or payable to him, or (II) with respect to any week of less than his full-time work if the remuneration paid or payable to him with respect to such week is less than his weekly benefit rate plus six dollars (\$6): Provided, That for the purposes of this subsection, (i) vacation pay and similar payments, whether or not legally required to be paid, and (ii) wages in lieu of notice, separation allowances, dismissal wages and similar payments, which are legally required to be paid, shall be deemed remuneration paid or payable with respect to such period as shall be determined by rules and regulations of the department. * * *" Act of December 5, 1936, P. L. (1937) 2897, as amended by the Act of August 24, 1953, P. L. 1397, 43 P. S. Section 753(u).

Regulation 108 of the Department of Labor and Industry, Bureau of Employment Security, implementing the above provisions of Section 4(u), as currently in effect, provides, in part, that:

"(1) (a).—Application of this regulation is intended (1) to insure that unemployment compensation shall not be paid for periods of unemployment during or for which the claimant shall receive either a vacation with pay or a terminal leave with wages or salary or a payment in lieu of wages or salary
* * *"

It is apparent that an employe performs no services during the week involved; hence, the provisions of paragraph (I) (i) of subsection 4(u) are not applicable. Thus, unless payments from the fund constitute "remuneration" paid or payable with respect to the week in question, the recipient is not disqualified from receiving benefits under the statute.

Although the word "remuneration" is not specifically defined in the Unemployment Compensation Law, it was given a broad definition in *Fazio Unemp. Comp. Case*, 164 Pa. Super. Ct. 9, 63 A. 2d 489 (1949). In holding that voluntary dismissal payments are "remuneration," the Court said:

"We are obliged to conclude from the language used in the Act that if the term 'wages' is equivalent to the term 'remuneration,' less the various categories specified, then the term 'remuneration' must be equivalent to the term 'wages' together with the specified categories of payments. Consequently, a voluntary dismissal payment is 'remuneration,' and the employee who receives it does not become unemployed until the end of the period for which it is paid.

* * * * *

"The provisions of section 4(u) were obviously designed, inter alia, to prevent the payment of benefits during periods of idleness where the claimant has received money, the payment of which relates to the particular period of idleness and this purpose is in accord with the general purpose of the Unemployment Compensation Law which is to alleviate the rigors of unemployment." (164 Pa. Super. Ct. 9, 12-13.)

This definition of "remuneration" was restricted by the subsequent decision in *Pendleton Unemp. Comp. Case*, 167 Pa. Super. Ct. 256, 75 A. 2d 3 (1950), where the Court considered the effect on eligibility of receiving pension payments from the Health and Welfare Fund of the United Mine Workers:

"It is safe to assert that pension payments are not wages within the meaning of the Law, sec. 4(x), 43 P. S. 753, and that their receipt will not disqualify an employee who meets the other requirements of the Law. Nor are payments made by an employer to a pension fund regarded as wages. Law, sec. 4(x) (2) (A). The purpose of the unemployment legislation is 'the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own': Law, sec. 3, 43 P. S. 752. By it the Legislature seeks to prevent 'the spread of indigency,' but an employee need not be indigent to secure the benefits provided by the Law. If he meets the requirements of the Law he is entitled to compensation even though he has other resources and from them receives income adequate for his needs; e. g., interest on savings accounts, mortgages, United States bonds, or rent from real estate owned by him. The purpose of a pension plan is 'to pay additional compensation for services rendered in the past,' *Kline v. State Employees Retirement Board*, 353 Pa. 79, 85, 44 A 2d 267. However, it is not remuneration within sec. 4(u), 43 P. S. 753, since

the pensioner performs no services during the period covered by the pension payments." (167 Pa. Super. Ct. 256, 260.)

In addition to the types of "remuneration" mentioned in the Pendelton decision, there are other types of "remuneration" the receipt of which does not disqualify an otherwise qualified claimant; e. g., certain types of gratuities (Bd. Dec. B-26769), federal subsistence allowances (Bd. Dec. B-18115), rents (Bd. Dec. B-178937A), and workmen's compensation payments (Bd. Dec. B-7993).

As noted above, payments into the trust fund are made by an employer during a period of employment. In this respect they are similar to payments made currently by an employer into a retirement or pension fund or into a workmen's compensation fund. If, as indicated by the Court in the Pendleton decision, the ultimate receipts of benefits from such funds does not constitute "remuneration" under the Unemployment Compensation Law, it follows that the receipt of benefits from the trust funds established under the Ford and General Motors agreements likewise do not constitute "remuneration." It is thus unnecessary to determine whether these benefits are "paid or payable" with respect to the week in question.

Accordingly, it is our opinion that an individual who receives benefits under the terms of the United Auto Workers-Ford Motor Company or United Auto Workers-General Motors Corporation agreement may also receive full benefits under the provisions of the present Pennsylvania Unemployment Compensation Law, assuming, of course, that such individual is otherwise qualified.

Very truly yours,

DEPARTMENT OF JUSTICE,

HERBERT B. COHEN,
Attorney General.

OPINION No. 659

Tax Anticipation Notes, Series of 1954—Constitutionality and legal status.

The allocations of the monies in the General Fund, which are specifically set forth on the face of the notes, made by the Department of Revenue, and approved by the Governor, the Auditor General and the State Treasurer, to provide a sinking fund for the payment of said notes, are payable into and shall be set aside

in the sinking fund accounts mentioned on the face of the notes in the amounts and at times specified, prior to all other expenditures, expenses, debts and appropriations, including current expenses, payable from the General Fund.

Harrisburg, Pa., February 24, 1956.

Honorable George M. Leader, Governor, Harrisburg, Pa.,
Honorable Charles R. Barber, Auditor General, Harrisburg, Pa.,
Honorable Weldon B. Heyburn, State Treasurer, Harrisburg, Pa.

Sirs: We have your request for an opinion as to the legal status of twenty-seven million dollars (\$27,000,000) Commonwealth of Pennsylvania Tax Anticipation Notes, First Series of 1956, dated February 24, 1956, maturing May 24, 1957.

We have examined the proceedings relative to the issuance by the Commonwealth of these Tax Anticipation Notes in the amount of twenty-seven million dollars (\$27,000,000).

This issue was authorized by the General Assembly of this Commonwealth by the Act approved September 29, 1951, P. L. 1646, as amended by Act No. 75, of the 1955 Session, approved June 30, 1955. We are satisfied that the Act of September 29, 1951, and the amendment thereto of June 30, 1955, *supra*, were duly and properly enacted. We have also examined the official estimates submitted to the Governor, through the Budget Secretary, by the Department of Revenue, stating the amount of the contemplated revenues provided for the current biennium by the General Assembly for the current purposes of any fiscal biennium and the amount thereof that remains uncollected.

The constitutionality of the issuance of Tax Anticipation Notes was upheld by the Supreme Court of Pennsylvania in the case of *Kelley v. Baldwin, et al.*, 319 Pa. 53 (1935). Since the Act of September 29, 1951, as amended, is similar to the act held to be constitutional in *Kelley v. Baldwin, supra*, we believe it to be constitutional.

The act provides, *inter alia*, that the current revenues for any biennial fiscal period accruing to the General Fund of the State Treasury shall be pledged for the payment of principal of and interest on all notes issued during such fiscal biennium, and that so much of said revenues as may be necessary, are specifically appropriated for such payment, the Department of Revenue being authorized to allocate such revenues to said payment. The act authorizes the Governor, the Auditor General and the State Treasurer to determine the terms

and conditions of the issue, rates of interest and time of payment of interest, provided that the notes shall not mature later than May 31 of the second fiscal year of any current biennium, and shall not bear interest in excess of $4\frac{1}{2}\%$ per annum. The minutes of the meetings held by the Governor, the Auditor General and the State Treasurer, show that all proceedings taken relative to the issuance of the notes comply fully with the provisions of the act and are in due legal form, and that all necessary action has been duly taken.

We have examined fully executed notes of the following denominations: five thousand dollars (\$5,000), ten thousand dollars (\$10,000) and one hundred thousand dollars (\$100,000), in bearer form and find that the same are duly and properly executed and conform with the form approved by you.

In conclusion, we have no hesitation in advising you that the twenty-seven million dollars (\$27,000,000) notes of the Commonwealth of Pennsylvania, First Series of 1956, dated February 24, 1956, maturing May 24, 1957, constitute legal obligations payable by the Commonwealth of Pennsylvania from current revenues accruing to the General Fund of the State Treasury of the Commonwealth of Pennsylvania during the two fiscal years ending May 31, 1957, and together with the \$60,000,000 Commonwealth of Pennsylvania Tax Anticipation Notes, First Series of 1955 dated July 25, 1955, and maturing May 25, 1956, and any such notes hereafter issued in the biennium are equally and ratably secured by the current revenues levied and assessed for revenue purposes of every kind and character accruing to the said General Fund during said biennial period.

The total amount of the Commonwealth of Pennsylvania Tax Anticipation Notes, First Series of 1956, together with the amount of the outstanding First Series of 1955 Notes is less than one-third of the uncollected amount of the officially estimated revenues provided by the General Assembly under existing laws for the General Fund in the current two year fiscal period, and is also less than one-tenth of such officially estimated revenues, the borrowing limitation now applicable since the General Assembly is still in session.

We are further of the opinion that the allocation of the moneys in the General Fund, which are specifically set forth on the face of the notes, made by the Department of Revenue, and approved by the Governor, the Auditor General and the State Treasurer, to provide a sinking fund for the payment of said notes, are payable into and shall be set aside in the sinking fund accounts, mentioned on the face

of the notes in the amounts and at times specified, prior to all other expenditures, expenses, debts and appropriations, including current expenses, payable from the General Fund.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 660

Counties—Appointment of persons to fill vacancies in elective offices—Length of term of governor's appointee—County Code of August 9, 1955, P. L. 323, Section 409—Constitution of Pennsylvania, Article IV, Section 8.

That portion of section 409 of the County Code of August 9, 1955, P. L. 323, which provides that a person appointed by the Governor to fill a vacancy in a county office shall serve for the balance of the unexpired term, is not applicable to elective county offices, since the Pennsylvania Constitution, Article IV, Section 8, provides, inter alia, that where an elective office becomes vacant, a person shall be elected to fill the vacancy on the next appropriate election day, so that where the Governor appoints a person to fill the vacancy created in an elective county office, the person filling the vacancy serves only until the person elected at the next appropriate election day takes office.

Harrisburg, Pa., February 24, 1956.

Honorable Henry E. Harner, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: You have requested an opinion as to the applicability to elective county offices of the provision of Section 409 of the County Code of August 9, 1955, Act No. 130, P. L. 323, that a person appointed by the Governor to fill a vacancy shall continue in the office to which he was appointed for the balance of the unexpired term.

Section 409 provides that:

"In case of a vacancy, happening by death, resignation or otherwise, in any county office created by the Constitution or laws of this Commonwealth, and where no other provision

is made by the Constitution, or by the provisions of this act, to fill the vacancy, it shall be the duty of the Governor to appoint a suitable person to fill such office, who shall continue therein and discharge the duties thereof for the balance of the unexpired term. Such appointee shall be confirmed by the Senate if in session. 1955, Aug. 9, P. L. 323, No. 130, § 409."

This section departs from prior law which generally provided for persons appointed to fill vacancies to continue in office until the first Monday of January next succeeding the first municipal election occurring two or more months after the happening of such vacancy. [See the General County Law of May 2, 1929, P. L. 1278, as amended by the Act of June 9, 1931, P. L. 401, § 1, 16 P. S. 60 (Supp. 1954)].

It should be noted that Section 409 is applicable only when there is no other provision in either the Constitution or the Code for filling the vacancy. The County Code provides that the Court of Common Pleas shall fill any vacancies which occur in the offices of commissioner, auditor, or district attorney (§ 501, 701, 1404), while the Court of Quarter Sessions is authorized to fill vacancies in the office of surveyor (§ 1001) and the President Judge of the Court of Common Pleas¹ fills vacancies in the office of jury commissioner (§ 1504). Section 7 of Article 14 of the Commonwealth Constitution (Amendment of November 2, 1909) provides that the Court of Common Pleas shall fill vacancies in the offices of county commissioner and county auditor.

Article IV, Section 8, of the Constitution of the Commonwealth provides in part that:

"* * * [I]n any such case of vacancy, in an elective office, a person shall be chosen to said office on the next election day appropriate to such office according to the provisions of this Constitution, unless the vacancy shall happen within two calendar months immediately preceding such election day, in which case the election for said office shall be held on the second succeeding election day appropriate to such office * * *."

This section of the Constitution is clearly applicable to county offices. Commonwealth ex. rel. King v. King, 85 Pa. 103 (1877),

¹Section 1504 provides that the "president judge" shall by appointment fill vacancies in the office of jury commissioner. It is clear considering Section 294 of the Act of May 2, 1929, P. L. 1278, which uses similar language, together with Sections 292 and 293 of the Act of 1929, that the reference is to the President Judge of the Court of Common Pleas.

Commonwealth ex. rel. Markle v. Doverspike, 7 Dist. 122 (1897), Commonwealth ex. rel. Wilson v. Milliken, 41 Dauph. 234 (1935). It precludes any statutory provision for a person appointed to fill a vacancy in an elective county office to continue in such office for the balance of the unexpired term.

Article XIV, Section 2, of the Constitution provides that:

“County officers shall be elected at the municipal elections and shall hold their offices for the term of four years, beginning on the first Monday of January next after their election, and until their successors shall be duly qualified; all vacancies not otherwise provided for, shall be filled in such manner as may be provided by law. (Amendment of November 2, 1909.)”

This section of the Constitution does not authorize any statutory provisions respecting the filling of vacancies inconsistent with Article IV, Section 8.

It is our opinion, arrived at after correlating Section 409 of the County Code with Article IV, Section 8, and Article XIV, Section 2, of the Constitution, and you are accordingly advised, that the provision of Section 409 of the County Code providing that a person appointed by the Governor to fill a vacancy shall discharge the duty thereof for the balance of the unexpired term is not applicable to elective county offices. In any case of a vacancy in an elective county office the person appointed by the Governor shall serve only until a person chosen to fill such vacancy on the next appropriate election day shall take office. Should the vacancy happen within two calendar months immediately preceding such election day, election for said office shall be held on the second succeeding election day appropriate to such office, and the appointee of the Governor shall serve only until the person elected at such election takes office.

Very truly yours,

DEPARTMENT OF JUSTICE,

MARVIN GARFINKEL,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 661

Public offices—Judge of County Court—Right to hold another office of profit under the state—Waiver of compensation as member of the Pennsylvania Fair Employment Practice Commission qualifies a Judge to serve on the Commission—Pennsylvania Constitution, Article V, Section 18—Effect.

It is lawful for an appointee, who is now holding a public office as a Judge of the County Court of Allegheny County, to serve on the Pennsylvania Fair Employment Practice Commission, if he waives his right to compensation as a member of the Commission. It was the intention of the framers of the Constitution to prevent an office holder from drawing compensation from two public sources rather than preventing him from serving in two different capacities.

A waiver or donation of compensation, during a period of service in a public office, is lawful, provided it is established to be the voluntary act of the officer.

Harrisburg, Pa., March 2, 1956.

Honorable George M. Leader, Governor of Pennsylvania, Harrisburg, Pennsylvania.

Sir: You have asked whether it is lawful for an appointee now holding a public office as Judge of the County Court of Allegheny County to serve on the Pennsylvania Fair Employment Practice Commission, if such appointee waives his right to compensation as a member of the Pennsylvania Fair Employment Practice Commission.

Article V, Section 18 of the Constitution provides as follows:

“The judges of the Supreme Court and the judges of the several courts of common pleas, and all other judges required to be learned in the law, shall at stated times receive for their services an adequate compensation, which shall be fixed by law, and paid by the State. They shall receive no other compensation, fees, or prerequisites of office for their services from any source, nor hold any other office of profit under the United States, this State or any other State.”

The last phrase of this section of the Constitution raises the question as to whether membership on the Commission is an office of profit.

Examination of Act No. 222, approved October 27, 1955, P. L. 744, leads to the conclusion that the Commissioners are public officers and since the act provides for compensation at the rate of \$15.00 per day for the time actually devoted to the business of the Commission, it is in our opinion an office of profit.

However, you state the appointee plans to waive his right to such compensation during his period of service. The Supreme Court has upheld these waivers or donations in the case of *Schwarz v. Philadelphia*, 337 Pa. 500 (1940) provided it is established to be the voluntary act of the officer.

It seems clear that it was the intention of the framers of the Constitution to prevent an office holder from drawing compensation from two public sources rather than preventing him from serving in two different capacities. If it had been intended to prevent him from holding two offices, the words "of profit" would have been omitted.

Holding two offices is not unusual or illegal in Pennsylvania and there are many instances of one person holding two offices, unless specifically prohibited.

We are, therefore, of the opinion and you are accordingly advised that if the appointee clearly and unconditionally waives his right to the compensation of a Commissioner, he may legally serve on the Pennsylvania Fair Employment Practice Commission.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 662

Motor vehicles—Registration of—Registration by military personnel required by military orders to be within the jurisdiction—Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 58 Stat. 722, 50 App. U.S.C.A. Section 574 (1951)—Effect on registration.

The Department of Revenue may not require the registration of motor vehicles owned by individuals in the military service who are absent from the locality of their prior residence solely by reason of compliance with military orders so long as such individuals have paid all fees, taxes and excises imposed on such vehicle by their home locality.

Harrisburg, Pa., May 29, 1956.

Honorable Gerald A. Gleeson, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You have requested an opinion as to whether the Federal Soldiers' and Sailors' Civil Relief Act prohibits the Department of Revenue from requiring the registration of motor vehicles being operated within this Commonwealth and owned by individuals in the military service who have a regular place of abode within the Commonwealth.

Section 401 of The Vehicle Code, the Act of May 1, 1929, P. L. 905, 75 P. S. 91, as amended, provides that, with certain exceptions not here relevant, no motor vehicle may be operated upon any highway in this Commonwealth unless such vehicle shall be properly registered with the Department of Revenue, except where such motor vehicle is owned by a nonresident and exempt from registration under a reciprocity agreement. Section 2 defines "Resident" as a person who has a regular place of abode or business in the Commonwealth for a period of more than thirty consecutive days in the year.

Section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 58 Stat. 722, Title 50 App. U.S.C.A. Section 574 (1951) provides that:

"(1) For the purposes of taxation in respect of any person, or of his personal property, * * * by any state, * * * such person shall not be deemed to have lost a residence or domicile in any State * * * solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, * * * any other State, * * * while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, * * * of any such person by any State, * * * of which such person is not a resident * * * personal property shall not be deemed to be located or present in or have a situs for taxation in such State, * * * Provided, That nothing contained in this section shall prevent taxation by any State, * * * in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. * * *

"(2) When used in this section, (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed

in respect to motor vehicles or the use thereof: **Provided,** That the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid. * * *

It is clear that the above provision of federal law, which must under the supremacy clause of the United States Constitution (Article VI, Clause 2) supersede inconsistent State legislation, prohibits the Commonwealth of Pennsylvania from requiring the registration of motor vehicles owned by persons temporarily located within the Commonwealth who are absent from the locality of their prior residence or domicile solely by reason of compliance with military or naval orders, so long as the license, fee, or excises imposed by the home state have been paid and the vehicle is not being used for the purpose of trade or business.

It should be noted that under this provision the significant factor is that the individual is away from his former place of residence solely by reason of military orders. There has been no judicial determination as to whether the presence in the particular jurisdiction whose taxing authority is limited by the act must be under such orders. It would appear, though, that within reasonable limit such presence should be under military orders. We may assume it to be reasonable for an individual who is assigned to a military facility in one state to reside nearby in another state. It would thus not be necessary under the act for the person to be required by the military orders to be in the jurisdiction which seeks to impose the tax so long as the military orders require him to be away from the place of his prior residence.

In *Dameron v. Brodhead*, 345 U. S. 322 (1953), the United States Supreme Court held that this provision of the Civil Relief Act was constitutional as applied to a serviceman who was absent from his state of original residence as a result of military orders, and that the statute prohibited the state of temporary presence from imposing a personal property tax upon such an individual. See also *Woodroffe v. Village of Park Forest*, 107 F. Supp. 906 (N. D. Ill.) (1952).

It is therefore the opinion of this department, and you are accordingly advised, that the Department of Revenue may not require the registration of motor vehicles owned by individuals in the military service who are absent from the locality of their prior residence solely

by reason of compliance with military orders so long as such individuals have paid all fees, taxes and excises imposed on such vehicle by their home locality.

Very truly yours,

DEPARTMENT OF JUSTICE,

MARVIN GARFINKEL,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 663

Veterans—Civil service preference—Service after Korean Armistice—Veterans' Preference Act of May 22, 1945, P. L. 837, as amended.

1. Veterans who have served in the armed forces of the United States, or in any women's organization officially connected therewith, are not eligible to receive any benefits under the provisions of the Veterans' Preference Act of May 22, 1945, P. L. 837, as amended, unless at least part of such service occurred during a war or armed conflict; therefore, a person who served in the armed forces subsequent to the signing of the Korean Armistice on July 27, 1953, is not eligible to receive the 10-point preferential benefit for civil service appointment provided by sections 2 and 3 of the act, unless he has also served in the armed forces some time during a war or armed conflict.

2. The Pennsylvania Civil Service Commission not only may, but must, cancel any 10-point preferential benefit added to the examination score of any veteran who has not served in the armed forces at some time during a war or armed conflict.

Harrisburg, Pa., June 8, 1956.

Honorable Elmer D. Graper, Chairman, State Civil Service Commission, Harrisburg, Pennsylvania.

Sir: The State Civil Service Commission has requested the opinion of this department regarding the following matter. The Commission has received and is continuing to receive claims, pursuant to the provisions of the Veterans' Preference Act, for the addition of ten point preferential benefits to test scores earned in appointment examinations from persons who have served in the armed forces subsequent to the signing of the Korean Armistice on July 27, 1953, subsequent to which date the United States has not been engaged in

any war or armed conflict. You desire advice as to whether such claims are valid. If you are advised that such claims are not valid, you wish to know whether the Commission may now cancel any such credits which have been added to the test scores of persons ineligible therefor.

Section 1 of the Act of May 22, 1945, P. L. 837; 51 P. S. § 492.1 as amended, commonly known as the Veterans' Preference Act, provides:

"Section 1. The word 'soldier' as used in this act, shall be construed to mean a person who served in the armed forces of the United States, or in any women's organization officially connected therewith, during any war *or armed conflict* in which the United States engaged, and who has an honorable discharge from such service."

The underlined words "or armed conflict" were added by the Act of December 7, 1955, P. L. 801. It is manifest that the Legislature by inserting these words in Section 1 intended to bring veterans of the Korean Conflict within the provisions of the Act. It was necessary to enact this amendment in order to overcome the possible effect on this Act of *Beley v. Pennsylvania Mutual Life Insurance Co.*, 373 Pa. 231 (1953) cert. den. 346 U. S. 820 (1953), a life insurance case which held that the Korean Conflict was not a war within the meaning of that word as used in a life insurance policy.

Sections 2 and 3 of the Act provide that whenever any soldier shall successfully pass a civil service appointment examination, ten points shall be added to the mark or grade credited for the examination for the discipline and experience represented by his military training and for the loyalty and public spirit demonstrated by his service for the preservation of his country. The total mark or grade thus obtained represents his final mark or grade and determines his standing on any eligible or promotional list.

The Supreme Court of Pennsylvania has held that the granting of preference in the case of original appointments is constitutional so long as the soldier first meets the minimum qualifications under uniform eligibility rules before receiving the preference. *Commonwealth ex rel. Graham v. Schmid*, 333 Pa. 568 (1938); *Carney v. Lowe*, 336 Pa. 289 (1939).

The definition of "soldier" in Section 1, clearly limits the benefits of the Veterans' Preference Act to persons who have served in the armed forces of the United States or in any women's organization

officially connected therewith during a war or armed conflict. Service in time of war or armed conflict is a condition precedent to eligibility for benefits under the Act. A veteran who has not served in time of war or armed conflict is not eligible for any benefits under the Act regardless of his length of service in time of peace.

It is, therefore, the opinion of this department and you are accordingly advised that:

(1) Persons who have served in the armed forces of the United States or in any women's organization officially connected therewith are not eligible to receive any benefits under the provisions of the Veterans' Preference Act unless at least a part of such service occurred during a war or armed conflict; therefore, a person who served in the armed forces subsequent to the signing of the Korean Armistice on July 27, 1953, is not eligible to receive the ten point preferential benefit unless he has also served in the armed forces at some time during a war or armed conflict.

(2) The Commission not only may but must cancel any ten point preferential benefit added to the examination score of any veteran who has not served in the armed forces at some time during a war or armed conflict.

Very truly yours,

DEPARTMENT OF JUSTICE,

STEPHEN B. NARIN,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 664

Compensation fees and salaries—Teachers—Increase in salary during the school year—Mandatory section of statute granting increase, unconstitutional—Act of June 1, 1956, P. L. 1948—Constitution of Pennsylvania, Article III, Section 11—Effect of.

Section 4 of Act No. 656, approved June 1, 1956, P. L. 1948, requiring increases in compensation for the remainder of the school year 1955-56 to all professional

employees of school districts even though such employees are performing required services under existing contracts, is unconstitutional as violative of Article III, Section 11 of the Pennsylvania Constitution.

Harrisburg, Pa., June 20, 1956.

Honorable Charles H. Boehm, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: You request advice concerning the constitutionality of that part of Section 4 of Act No. 656, approved June 1, 1956, P. L. 1948, which provides:

"Notwithstanding any other provision of the public school code of 1949 its amendments and supplements professional employes of all school districts and vocational school districts and temporary professional employes who have satisfactory ratings shall receive for the remainder of the school year 1955-1956 an increase in compensation of one hundred dollars (\$100) in excess of that being paid for the school year 1955-1956 which shall not be considered to be a part of the regular salary of such employes for the school year 1956-1957 * * *"

This provision mandates an increase in compensation for the remainder of the 1955-56 school year to all professional employes of school districts even though such employes are under contract with the school districts to perform the required services for the compensation specified in their contracts of employment.

Section 11 of Article III of the Pennsylvania Constitution provides:

"No bill shall be passed giving any extra compensation to any public officer, servant, employe, agent or contractor, after services shall have been rendered or contract made, nor providing for the payment of any claim against the Commonwealth without previous authority of law: * * *"

Section 1101 (24 P. S. Section 11-1101) of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30 as amended (hereinafter referred to as the "Code"), defines "professional employe" to include teachers and other specified employes.

The Supreme Court of Pennsylvania has clearly stated that school teachers are public employes having contracts of employment with the school districts by which they are employed. Teachers' Tenure Act Cases, 329 Pa. 213 (1938). Section 1121 of the Code (24 P. S. Section 11-1121) sets forth a required form of employment contract

for each professional employe having tenure. This form provides a blank space for the insertion of the professional employe's annual compensation and then contains a provision that:

"* * * this contract shall continue in force year after year, with the right of the board of school directors (or board of public education) to increase the compensation over the compensation herein stated, from time to time, as may be provided under the provisions and proper operation of the established salary schedule, if any, for the school district, subject to the provisions of law, without invalidating any other provision of this contract * * *"

The contract is terminable by the employe upon sixty (60) days' notice and by the school district for cause.

The provision that the contract shall continue in force year after year makes it clear that the professional employe is under contract for a one year period with an automatic renewal each year, if the contract is not sooner terminated, for an additional year. Since the renewal of a contract is in effect the making of a new contract, an employe's compensation may be increased for any renewal year as this will merely be setting forth the agreed upon compensation in the new contract. This procedure will not conflict with Section 11 of Article III of the Pennsylvania Constitution. However, any attempt to increase a teacher's annual compensation after the commencement of a contract year clearly violates the prohibition of Section 11 that:

"No bill shall be passed giving any extra compensation to any public * * * employe * * * after * * * contract made * * *"

See: *Harbold v. Reading*, 355 Pa. 253 (1946).

"We are therefore of the opinion, and you are accordingly advised, that that part of Section 4 of Act No. 656, approved June 1, 1956, P. L. 1948, set forth in your inquiry, is in conflict with Article III, Section 11 of the Constitution of Pennsylvania and any payment thereunder would be unlawful and void.

Very truly yours,

DEPARTMENT OF JUSTICE,

HERBERT B. COHEN,
Attorney General.

OPINION No. 665

Leases—Department of Property and Supplies—Authorization to lease and acquire land and property for the Bureau of Employment Security without specific legislative authorization—Act of December 5, 1936, P. L. (1937) 2897, as amended.

By authorization of the Act of December 5, 1936, P. L. (1937) 2897, as amended, the Secretary of Property and Supplies at the request of the Secretary of Labor and Industry and with the consent of the Governor can lease and acquire through rental-purchase agreements with certain prescribed conditions, lands and buildings without the usual requirement of specific legislative authorization.

Harrisburg, Pa., July 16, 1956.

Honorable John S. Rice, Secretary of Property and Supplies, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for an opinion as to whether the Department of Property and Supplies, with the approval of the Governor, has the authority to enter into rental purchases for space for the Bureau of Employment Security of the Department of Labor and Industry.

We understand that this bureau is financed entirely with Federal funds and that the proposed procedure is recommended by the Federal government as appears from the Employment Security Manual, copy of which is attached to your request.

The general rule has been that the various departments of the Commonwealth may not purchase real estate without specific authority from the General Assembly to do so, and this department has, in Informal Opinion No. 1198, dated December 10, 1941, Informal Opinion No. 1431, dated March 11, 1947, and Informal Opinion No. 1448, dated December 8, 1947, so advised State officials.

That it has been the long-standing procedure to seek legislative authority to purchase real estate or to accept gifts of real estate is evidenced by the many bills introduced in each Session of the Legislature authorizing such action. See House Bills Nos. 1031, 1466, 1614, 1615, 1616 and 1965, to mention just a few introduced in the Session of 1955.

Section 513 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, 71 P. S. Section 193, prohibits the acceptance of real estate as a gift without legislative authority; it provides:

"Except as otherwise in this act expressly provided, a department, board, or commission, shall not accept any gift of real estate, or of any interest in real estate, without specific authority from the General Assembly so to do."

It is a fundamental principle of law that administrative officials have only the powers clearly given or necessarily implied.

Turning now to the statutes which are pertinent to your inquiry, we find that the Act of December 5, 1936, P. L. (1937) 2897, as amended, 43 P. S. Section 751 et seq., known as the "Unemployment Compensation Law," contains in Section 201, as amended, 43 P. S. Section 761, a statement that it shall be the duty of the Department of Labor and Industry to administer and enforce the act, and in subsection (b) of said section the following appears:

"(b) The department and the Department of Property and Supplies are hereby authorized to acquire land and buildings or to use land in or in the immediate vicinity of the City of Harrisburg, now owned by the Commonwealth, deemed necessary by the Secretary of Labor and Industry, with the approval of the Governor, and in the case of the use of land now owned by the Commonwealth, the approval of the board or other agency of the Commonwealth having jurisdiction over the same, for the administration of this act in accordance with the following provisions of this subsection:

"(1) The department through the Secretary of Property and Supplies, with the approval of the Governor, is hereby authorized to acquire, by purchase or condemnation, land with or without buildings; to erect buildings thereon, or on land in or in the immediate vicinity of the City of Harrisburg, now owned by the Commonwealth; to purchase fixtures, equipment and facilities, including such necessary appurtenances as cafeterias and parking accommodations, and to make necessary alterations and improvements thereof.

"(2) The Secretary of Property and Supplies, with the approval of the Governor, is authorized to enter into contracts with any person, firm or corporation which shall agree to erect on land owned, or to be acquired, by such person, firm or corporation, suitable buildings within the Commonwealth, at locations acceptable to the Governor and to the department, and to agree on behalf of the Commonwealth to lease such land and buildings for a period of not more than fifteen (15) years from the time of the completion of said buildings, at such rentals and subject to such terms and conditions as may be agreed upon. No such contract shall be entered into until the plans and specifications for the proposed building shall have been approved by the department and the Department of Property and Supplies. Each such

contract and lease shall provide that upon the termination of said lease, or upon the sooner payment in full of the total amount specified therein, the lessor shall convey to the Commonwealth title in fee simple by general warranty deed to the land and buildings covered under said lease.

“(3) The Secretary of Property and Supplies, with the approval of the Governor, is authorized to enter into contracts with any person, firm or corporation which provide (i) for the conveyance or lease by the Commonwealth to such person, firm or corporation of land acquired under the provisions of this subsection or of land in or in the immediate vicinity of the City of Harrisburg, now owned by the Commonwealth: Provided, That such property shall be reconveyed to the Commonwealth or such lease shall terminate upon payment in full of the total amount specified in the lease executed by said person, firm or corporation as lessor, as provided under clause (iii) of this paragraph, (ii) for the erection on such land, by such person, firm or corporation, of buildings, the plans and specifications for which have been approved by the department, and the Department of Property and Supplies, and (iii) for the leasing by said person, firm or corporation to the Commonwealth for a period of not more than fifteen years from the time of completion of said buildings, the terms of such lease to provide that upon the termination of said lease, or upon the sooner payment in full of the total amount specified therein, the lessor shall convey to the Commonwealth all its right, title and interest in and to the land and buildings covered under said lease.

“The Secretary of Property and Supplies, with the approval of the Governor, is hereby authorized, on behalf of the Commonwealth, to sell and convey or to lease any property covered by such agreement for such consideration to be paid by the department as may be agreed upon, and to make and execute a deed or lease conveying or leasing the same to the person, firm or corporation with which the agreement was made. Such property shall be for the use of the Department of Labor and Industry. All deeds and leases shall be approved by the Department of Justice.

“(4) The term building, as used in this subsection, shall include fixtures, equipment and facilities, including such necessary appurtenances as cafeterias and parking accommodations.

“(5) In carrying out the provisions of this subsection the department shall reimburse the Department of Property and Supplies for all services performed in an amount mutually agreed upon by the department and the Secretary of Property and Supplies, as representing the actual cost to the Department of Property and Supplies of performing such services.

"(6) Space in such buildings shall be primarily utilized by the Bureau of Employment and Unemployment Compensation, but any space in excess of the requirements of said bureau, as determined by the department, may be allocated to other departments, boards and commissions of the Commonwealth, or other bureaus of the department under agreements entered into by the department with the Department of Property and Supplies. All such agreements shall provide for payment from moneys appropriated, or otherwise available for such purposes, to such departments, boards, commissions and bureaus to which such space may be allocated, into the Special Administration Fund of amounts which shall approximate the fair rental value of such space as mutually agreed upon between the department and the Department of Property and Supplies.

"(7) Under a similar agreement entered into by the department with the Department of Property and Supplies, the fair rental value of all space in such buildings utilized by the Bureau of Employment and Unemployment Compensation shall be determined and transfer of amounts equal to such rental value from the Administration Fund to the Special Administration Fund are hereby authorized.

"(8) In carrying out the provisions of this subsection any moneys, and only such moneys as are or may be placed in the Special Administration Fund, may be used.

"(9) Any contract for the erection of buildings entered into under the provisions of this subsection shall provide on the face thereof that such contract is made under the provisions of this act; that the Commonwealth under such contract shall incur no general liability; that such contract shall never become a lien on or secured by any property, real, personal or mixed of the Commonwealth, except to the extent herein expressly authorized, and that any obligation incurred under such contract shall be payable solely from funds authorized for such purposes by this act.

"(10) As all property acquired under the provisions of this subsection shall be used exclusively for the performance of essential governmental functions, no taxes shall be required to be paid or assessments made upon any such property from the time that the Commonwealth actually takes title to such property in the event of outright purchase, or from the time that the Commonwealth takes possession of such property under a lease-purchase agreement as provided herein."

It will be noted that clause (2) of subsection (b) gives the Secretary of Property and Supplies, with the approval of the Governor, the authority to enter into contracts to erect suitable buildings at locations

acceptable to the Governor and to the department, and to agree, on behalf of the Commonwealth, to lease such land and buildings for a period of not more than fifteen (15) years at such rentals and subject to such terms and conditions as may be agreed upon. The contract is to be approved by the Department of Labor and Industry and the Department of Property and Supplies. The usual practice of asking for competitive bids should be adhered to, and we understand the procedures of the Federal government in this regard may be helpful in applying our present procedures to this type of contract.

Clause (3) refers to the situation where the land is presently owned by the Commonwealth in Harrisburg or in the immediate vicinity.

These provisions constitute an exception to the general rule above stated and since authority has been given under the terms of the above quoted provisions, your department may proceed according to such legislative authority.

We have quoted extensively from the act since there are so many conditions and provisions which must be adhered to in entering into these contracts and agreements, and we specifically call your attention to the fact that the authority to enter into these contracts has by the General Assembly been confined to the Department of Labor and Industry, and this opinion must not be cited as authority for the proposition that other departments may, through your department, enter into similar contracts.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General,

HERBERT B. COHEN,
Attorney General.

OPINION No. 666

*Turnpike construction and maintenance—Pennsylvania Turnpike Commission—
Supervision of activities by the Department of Highways—Act of May 21, 1937,
P. L. 774.*

Under the Act of May 21, 1937, P. L. 774, the Department of Highways is required to approve all contracts and agreements of the Pennsylvania Turnpike Commission relating to the construction of the turnpike and connecting tunnels

and bridges, to supervise all construction and maintenance in connection with the turnpike and connecting bridges and to approve all locations and acquisitions of rights in land deemed necessary for the construction and operation of the turnpike and its extensions.

Harrisburg, Pa., July 19, 1956.

Honorable Joseph J. Lawler, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: Your letter of June 26, 1956, asking for advice as to the duties and responsibilities of the Department of Highways under the various statutes dealing with the Pennsylvania Turnpike Commission, has been received.

The Pennsylvania Turnpike Commission, an instrumentality of the Commonwealth, was created by the Act of May 21, 1937, P. L. 774, 36 P. S. Section 652a et seq.

The Commission, by Section 4 of said act, 36 P. S. Section 652d, is given authority to:

“* * * enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act, and to employ engineering, traffic, architectural and construction experts and inspectors * * * as may be necessary in its judgment, and fix their compensation: *Provided, however, That all contracts and agreements relating to the construction of the turnpike and connecting tunnels and bridges shall be approved by the Department of Highways, and the turnpike and connecting tunnels and bridges shall be constructed under the supervision of the Department of Highways.* * * *” (Emphasis supplied.)

This places certain responsibilities upon the Department of Highways and upon you as Secretary thereof, in addition to those which devolve upon you by reason of your membership on the Commission.

That this no mere “rubber stamp” type of approval is indicated by the Supreme Court of Pennsylvania in the case of *Dickens v. Pennsylvania Turnpike Commission*, 351 Pa. 252 (1945), where it called attention to and said of this proviso at page 256:

“* * * It follows that the Chief Engineer [i. e. of the Turnpike Commission] had no power to change the terms and conditions of the contract, and the contractor is bound to take notice of that fact. * * *”

We are of the opinion, therefore, that when, as a member of the Commission, you resolve in favor of the execution of a contract or

the award of a contract that does not of itself completely discharge your duties. The approval of the Department of Highways should be noted on every contract within the above category with your signature, or that of your authorized deputy. Your approval should be withheld if the contracts have not been submitted to the competitive bidding process and if it is proposed to award the contract to other than the lowest responsible bidder.

Through the Department of Highways all construction work of the Turnpike Commission is subject to your supervision.

You will observe that the above proviso is limited to all contracts and agreements relating to the construction of the turnpike and connecting tunnels and bridges. This limitation becomes more significant when we refer to Section 12 of the act, 36 P. S. Section 652l, which provides:

“The turnpike when completed and opened to traffic shall be maintained and repaired by and under the control of the commission through the Department of Highways of the Commonwealth, and all charges and costs for such maintenance and repairs actually expended by said Department of Highways shall be paid to it by the commission upon certification thereof out of tolls. * * *”

In other words, the Department of Highways is charged with the duty of repairing and maintaining the turnpike and then billing the Commission for the cost thereof. This work, which is to be performed either by Highway Department employees or contractors therewith, is the responsibility of the Department of Highways and such contracts should be processed like other contracts made by the Department of Highways. Your department should, of course, ask for bids on all proposed contracts as you do with other highway contracts and make an award to the lowest responsible bidder.

Section 1 of the Act of 1937, supra, 36 P. S. Section 652a, provides that the location of the turnpike shall be approved by the Department of Highways. Subsequent acts providing for extensions specify that the locations of such extensions shall be approved by the Governor and the Department of Highways.

The plans of changes of the lines and grades of State highways are subject to the approval of the Department of Highways when the construction of extensions necessitate such changes. See Section 6 of the Act of June 11, 1941, P. L. 101, 36 P. S. Section 654e and Section 6 of the Act of May 16, 1940, P. L. (1941) 949, 36 P. S. Section 653e.

The purchase of lands, property rights, rights of way, franchises, easements and other interests in lands deemed by the Commission necessary or convenient for the construction and operation of the turnpike is subject to the approval of the Department of Highways. See Section 8 of the Act of 1941, *supra*, 36 P. S. Section 654g and Section 8 of the Act of 1940, *supra*, 36 P. S. Section 653g.

We are, therefore, of the opinion and you are accordingly advised that the Department of Highways is responsible for:

- (1) Approving all contracts and agreements relating to the construction of the turnpike and connecting tunnels and bridges.
- (2) Supervision of all construction work in connection with the turnpike and connecting bridges.
- (3) Maintenance of the turnpike.
- (4) Approval of locations of the turnpike and extensions.
- (5) Approval of purchase of lands, property rights, rights of way, easements and other interests in lands deemed by the Commission necessary or convenient for the construction and operation of the turnpike.

These conclusions are in conformity with Informal Opinion No. 1174, rendered to the then Secretary of Highways, under date of June 5, 1941.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 667

State institutions for the mentally defective—status of boards of trustees—Effect on status of Act of December 14, 1955, P. L. 853.

The boards of trustees of State mental institutions, with the exception of Eastern Pennsylvania Psychiatric Institute, *possess* advisory and recommendatory powers only, and the Secretary of Welfare has express authority in subsection (b) of Section 2313 of The Administrative Code of 1929, Act of April 9, 1929, P. L. 177 as amended by Act of December 14, 1955, P. L. 853, to approve or disapprove the advice and recommendations of the boards of trustees of State mental institutions.

Harrisburg, Pa., July 24, 1956.

Honorable Harry Shapiro, Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: Reference is made to your inquiry of July 3, 1956, with regard to the status of the boards of trustees of each State institution within the Department of Welfare caring for the mentally ill, feeble-minded, mentally retarded, mentally deficient and juvenile delinquents, as the result of the enactment of House Bill No. 670, Act No. 255, during the recent Session of the General Assembly.

Turning to The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. Section 51 et seq., we find a list of the various institutions in Section 202 of the Code, as amended by Act No. 255, approved by Governor Leader December 14, 1955, 71 P. S. Section 62. Since your inquiry is concerned with all mental institutions, we shall, in the interest of brevity, omit quoting this section of the Code in full.

Section 2313 of The Administrative Code of 1929, as amended by Act No. 255, supra, 71 P. S. Section 603, reads:

“Mental Health.—The Department of Welfare shall have the power and its duty shall be:

“(a) To administer and enforce the laws of this Commonwealth relative to the prevention of mental diseases, mental defect, epilepsy, and inebriety, the admission and commitment of mental patients to hospitals for mental diseases and institutions for mental defectives and epilepsy, and the transfer, discharge, escape, interstate rendition, and deportation of mental patients.

“(b) Subject to any inconsistent provisions in this act contained, approve or disapprove the advice and recommendations of the several boards of trustees of State mental institutions other than the Board of Trustees of the Eastern Pennsylvania Psychiatric Institute.”

Section 2313.1 of The Administrative Code of 1929, as added by Act No. 255, supra, 71 P. S. Section 603.1, places upon the Secretary of Welfare the authority, with the approval of the Governor, of appointing a Deputy Secretary with the title of Commissioner of Mental Health. Subject to your approval, he is charged with certain responsibilities. Because it indirectly affects the status of the boards of trustees of mental institutions, we quote this section in full:

"Commissioner of Mental Health.—The Secretary of Welfare shall appoint, with the approval of the Governor, a Deputy Secretary who shall have the title of Commissioner of Mental Health and who shall be a psychiatrist with at least seven years' training and experience in the care of patients. The Commissioner of Mental Health shall serve for a five year term and shall be eligible for reappointment. The Commissioner of Mental Health, with the approval of the Secretary of Welfare, shall develop plans and programs and make recommendations with respect to the general policy of the Commonwealth's mental health program. He shall initiate, develop and with the approval of the Secretary of Welfare, carry into effect plans and programs designed to prevent, treat and cure the mentally ill. He shall recommend to the Secretary of Welfare such professional and skilled personnel as may be necessary to carry out the plans and programs of the department in the field of mental health. He shall recommend to the Secretary of Welfare the appointment of the superintendents of state mental institutions who in turn shall assign, appoint and dismiss personnel of the institutions."

More specifically, Section 2313.3, as added by Act No. 255, supra, 71 P. S. Section 603.3, treats of the authority of boards of trustees of State mental institutions, and we particularly direct your attention to the underlined word "only" appearing in subsection (1) of Section 2313.3. The section reads:

"Boards of Trustees of State Mental Institutions.—(1) The powers and duties of the boards of trustees of each State institution within the Department of Welfare caring for the mentally ill, feeble-minded, mentally retarded, mentally deficient and juvenile delinquents, shall be only as defined in this section.

"(a) To advise, assist and make recommendations to the superintendent with respect to the management and operation of the institution and with respect to any plans or programs for its improvement.

"(b) To keep under review all matters pertaining to the welfare and well-being of patients and to make recommendations to the superintendent with respect thereto.

"(c) To advise and make recommendations to the Commissioner of Mental Health with regard to the selection and appointment of a superintendent in case of a vacancy.

"(d) To advise and make recommendations to the superintendent with regard to his selection of employes of the institution.

"(e) To develop and further means and methods of establishing proper relations and understanding between the institution (and its program) and the community in which it is located, and generally to provide liaison between the institution and the community in order better to serve the interests and needs of both.

"(f) To make recommendations to the Advisory Council on Mental Health on matters of policy and program emerging from its intimate knowledge and experience of mental health programs in operation.

"(2) The provisions of this section shall be applicable to the boards of trustees in all of the State mental institutions within the Department of Welfare caring for mentally ill, feeble-minded, mentally retarded, mentally deficient and juvenile delinquents, but shall not apply to the Board of Trustees of the Eastern Pennsylvania Psychiatric Institute."
(Emphasis supplied.)

It is apparent that the boards of trustees of mental institutions are no longer charged by the General Assembly with the responsibility of the general direction and control of the property and management of these institutions with the exception of the Eastern Pennsylvania Psychiatric Institute. Their status is an advisory and recommendatory one.

Our conclusion is confirmed by reference to Section 2318 of The Administrative Code of 1929, as amended by Act No. 255, *supra*, 71 P. S. Section 608. In this section the boards of trustees of the State mental institutions are removed from the list of boards of State institutions, so that only those remaining will continue to exercise the general direction and control of the property and management of such institutions.

This removal has the effect of making applicable to these mental institutions the provisions in Section 214 of The Administrative Code of 1929, as amended, *supra*, 71 P. S. Section 74, which reads:

"* * * Except as otherwise provided in this act, the heads of the respective administrative departments shall appoint and fix the compensation of such clerks, stenographers, and other assistants, as may be required for the proper conduct of the work of any departmental administrative bodies, boards, commissions, or officers, and of any advisory boards or commissions established in their respective departments."

Section 202 of The Administrative Code of 1929, as amended by Act No. 255, supra, 71 P. S. Section 62, makes the boards of trustees of State mental institutions departmental administrative boards of the Department of Welfare.

Therefore, we are of the opinion, and you are accordingly advised that boards of trustees of State mental institutions, with the exception of the Eastern Pennsylvania Psychiatric Institute, possess advisory and recommendatory powers only and you, as Secretary of Welfare, are given express authority in subsection (b) of Section 2313 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended by Act No. 255, approved December 14, 1955, 71 P. S. Section 603, to approve or disapprove the advice and recommendations of the boards of trustees of State mental institutions.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 668

Public officers—Compensation of State Senators—Resigning office after serving part of term—Rendering of service—Constitution of Pennsylvania, article II, sec. 8—Act of June 24, 1919, as amended.

Under article II, sec. 8, of the Constitution of Pennsylvania and section 1 of the Act of June 24, 1919, P. L. 579, as amended, as well as the various applicable appropriation acts, the compensation of State Senators is for their services rendered during their attendance at regular or special sessions of the General Assembly, so that where a Senator resigns a pro rata amount should be deducted, for time during which he was absent and rendered no service, from the salary to which he would have been entitled had he completed his term.

Harrisburg, Pa., August 10, 1956.

Honorable M. Harvey Taylor, President Pro Tempore of the Senate,
Harrisburg, Pennsylvania.

Sir: Reference is made to telephone conversation with Miss Frobert concerning the salary of former Senator Elmer J. Holland who resigned February 7, 1956.

Some question has been raised as to what compensation, if any, Senator Holland is entitled to receive with respect to the year 1956 for his services as Senator.

The compensation of members of the General Assembly is controlled by constitutional and statutory provisions.

Article II, Section 8, of the Constitution provides as follows:

"The members of the General Assembly shall receive such salary and mileage for regular and special sessions as shall be fixed by law, and no other compensation whatever, whether for service upon committee or otherwise. No member of either House shall during the term for which he may have been elected, receive any increase of salary, or mileage, under any law passed during such term."

The compensation of members of the General Assembly is fixed by Section 1 of the Act of June 24, 1919, P. L. 579, as last amended by the Act of May 31, 1955, P. L. 127, 46 P. S. Section 4, which reads as follows:

"The salary of the members of the General Assembly shall be three thousand dollars (\$3000) for each biennial session, or if annual sessions are provided for three thousand dollars (\$3000) for each annual session, and mileage to and from their homes at the rate of five cents per mile circular for each week a member was in actual attendance at the session, to be computed by the ordinary mail route between their homes and the capitol of the State. The salary of the members of the General Assembly shall be five hundred dollars (\$500), and mileage as aforesaid, for each special or extraordinary session lasting less than one calendar month, and seven hundred and fifty dollars (\$750), and mileage as aforesaid, for each special or extraordinary session lasting one calendar month or more, and no other compensation shall be allowed whatever, except each member of the General Assembly shall receive an allowance for clerical assistance and other expenses incurred during his term in connection with the duties of his office the sum of three thousand dollars (\$3,000) for each year of service, payable one thousand seven hundred fifty dollars (\$1,750) on June 1, 1955, two hundred fifty dollars (\$250) on July 1, August 1, September 1, October 1, and November 1, 1955,

thereafter five hundred dollars (\$500) on January 15 of each year and two hundred fifty dollars (\$250) on the first day of each month except January and December."

The General Appropriation Act of 1953 (Appropriation Acts of 1953, page 84) makes the following appropriation for the payment of the salaries of Senators (page 85):

"For the payment of the salaries of fifty Senators and extra compensation allowed by law to the President pro tempore of the Senate, Session of one thousand nine hundred fifty-five, the sum of one hundred fifty-one thousand dollars (\$151,000)."

The General Appropriation Act of 1953 provides that the salaries of the Senators shall be paid as follows (page 84):

"* * * the salaries, stationery and mileage of the Members of the Senate and House of Representatives of the Legislative Session of one thousand nine hundred fifty-five shall be paid by requisition of the Chief Clerk of the Senate or the Chief Clerk of the House of Representatives upon the Auditor General only after statement of the amounts due the several Senators and Members shall have been certified to the respective Chief Clerks by the President pro tempore of the Senate or Speaker of the House of Representatives, and that the Senators and Members receiving fixed salaries for said Session shall be paid *one-fifth of his total salary each month for the first four months of the Session if the Legislature shall be in session that long*, and the balance on the day fixed for the final adjournment of the Legislature or during the two days previous thereto." (Emphasis supplied.)

It will be noted that the constitutional provision and the various legislative enactments mentioned above all provide for, or relate to, the payment of the salaries of Senators for a regular or special session. In other words, the compensation of Senators is for their services rendered during their attendance at a regular or special session of the General Assembly.

In a Formal Opinion rendered by former Attorney General John C. Bell to Honorable Thomas H. Garvin, then Chief Clerk of the House of Representatives, under date of April 19, 1913 (Official Opinions of the Attorney General, 1913-1914, page 355), this department ruled that the estate of a member of the General Assembly who died during the session was entitled only to the proportionate part of his salary for which he served during the session; and that his successor, who was elected during the session, was entitled to receive only the

compensation fixed by law for such services as were rendered by him on and after the date he qualified as a Senator. The basis of that opinion was that the relation between a public officer and the government does not rest upon the theory of contract, but arises from the rendition of services. Thus, it is stated at page 357:

“On the question of the legal rights of the members to receive the compensation provided by law, it is clear that the salary or compensation spoken of in the Constitution and the act of assembly above mentioned, is to be paid to the officers in question for actual services rendered by them.”

The opinion also refers to a prior opinion of this department rendered by former Attorney General Carson, dated December 28, 1906, and reported in 33 Pa. C. C. 177, which exhaustively reviewed the nature of the office of a member of the General Assembly and the right of such member to receive the compensation provided by law. In the course of his opinion, former Attorney General Carson said (page 180):

“It is also clear that the compensation spoken of in the Constitution and in the act of assembly is for services rendered, and it would follow that, if a member of either house died before the rendition of such services, or resigned, or became incapacitated, or for any cause was removed, he could not claim, nor could his estate claim, payment for services not rendered.”

Applying the above principles to the facts of the present case, it is apparent that Senator Holland rendered no services during the period between February 7, 1956, and May 22, 1956. There should therefore, be deducted from the one-fifth of the salary to which he was entitled the pro rata amount for the time during which he was absent and rendered no service. From the time of the payment of the fourth installment (May 1, 1955) until the time of his resignation (February 7, 1956), we have a period of 9 months and 7 days, or 283 days which he served. The Session ended May 22, 1956, and thus there was a period of 3½ months which he failed to serve. The time which he should have served to qualify for the final \$600.00 was 1 year and 22 days or 388 days. Since he served but 283 days he is entitled to

| | |
|-----|--------------------------|
| 283 | |
| 388 | of \$600.00 or \$437.60. |

Accordingly, you are advised that Senator Holland is entitled to the sum of \$437.60 for services rendered up to and including the date of his resignation, February 7, 1956, in accordance with the general rule that compensation is payable only for services rendered.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 669

State government—Levy by Federal Internal Revenue Service—Effect on Commonwealth Held Property—Internal Revenue Code of 1954, section 6332 (a)

The Commonwealth of Pennsylvania is not a "person" within the meaning of section 6332 (a) of the Internal Revenue Code of 1954, 68A Stat. 784, which provides that any person in possession of property subject to levy shall surrender the property upon demand of the Secretary of the Treasury or his delegate, so that a levy by the Federal Internal Revenue Service upon accounts payable by the Commonwealth to vendors and upon refunds due to State taxpayers need not be honored by the Commonwealth.

Harrisburg, Pa., August 27, 1956.

Honorable Weldon B. Heyburn, State Treasurer, Harrisburg, Pennsylvania.

Sir: The federal Internal Revenue Service has levied upon accounts payable by the Commonwealth to vendors who owe federal taxes. The Service also has indicated that it intends to levy upon refunds due to taxpayers from the Board of Finance and Revenue of the Commonwealth. The question arises as to whether or not the Commonwealth should honor these levies.

The Internal Revenue Code of 1954, section 6332 (a), states as follows:

"Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which

a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process."

Failure to comply with this subsection makes the person liable to the United States for the amount of the property or rights, but not exceeding the amount of tax due, plus interest.

"Person" is defined as follows:

"The term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." Int. Rev. Code of 1954, section 7701 (a).

"The term 'person', as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member, is under a duty to surrender the property or rights to property, or to discharge the obligation." Int. Rev. Code of 1954, section 6332 (c).

Immediately, the question arises as to whether or not a state is included within the meaning of the word "person." If it is not a "person" under section 6332 of the Code, then obviously it is not required to honor the levies made by the federal government.

The Internal Revenue Service has referred to several cases to support its position that a state is a "person." However, each of them can be distinguished. In *United States v. City of New York*, 12 F. Supp. 169 (S. D. N. Y. 1935), the court assumed that a municipal corporation (here, the city of New York) was a "person" without any discussion. Even if that assumption be accepted as correct, the status of a state is not necessarily equivalent to that of a municipal corporation.

South Carolina v. U. S., 199 U. S. 435 (1905), and *Ohio v. Helvering et al.*, 292 U. S. 360 (1934), both involved state liability for the federal license tax imposed upon every "person" engaged as a retail dealer in liquor. While the direct question was avoided in the former case by a holding that the individual sellers were liable as agents for the

state, the question was considered in the latter case. The court held that where a state becomes a liquor dealer it is a "person" within the meaning of the statute. In both cases the states were held liable for the tax since they were not engaging in a governmental function. *State of Georgia v. Evans*, 316 U. S. 159 (1942), held that a state was a "person" within the meaning of section 7 of the Sherman Act permitting an injured "person" to recover treble damages.

Finally, in *U. S. v. Graham et al.*, 96 F. Supp. 318 (S. D. Cal. 1951), *aff'd per curiam sub nom. State of California et al. v. U. S.*, 195 F. 2d 530 (9th Cir. 1952), *cert. denied* 344 U. S. 831 (1952), the federal district court held, in part, that the state was a "person" under section 7403 (b) of the Code. This section provides for enforcement of a federal lien through civil action by the Attorney General regardless of whether or not a levy has been made and requires that all "persons" having liens upon or any interest in the property involved be made parties to the action.

In none of the cited cases except the last is the analogy with the present case germane. As stated by the court in *Ohio v. Helvering et al.*, *supra*: "Whether the word 'person' or 'corporation' includes a state or the United States depends upon the connection in which the word is found." The position of a municipal corporation and the status of a state either as a liquor dealer or a wronged plaintiff under the Sherman Act are not the same as that of a state under the Internal Revenue Code. Garnishment of the state involves an action against it in the course of its governmental function, not a private one. Even the *Graham* case did not involve the state's liability under the levy provision, but rather its susceptibility to being joined in a suit to enforce a lien.

While the *Graham* case was concerned with a provision of the Internal Revenue Code, we feel that its holding that the state is a "person" under section 7403 of the Code is not applicable to the instant situation. Considering the facts that the Commonwealth is here pursuing one of its governmental activities and that Congress has not seen fit to amend the tax laws over the years specifically to include a state within the definition of "person", it is our opinion that the Commonwealth is not a "person" under section 6332 (a) of the Internal Revenue Code and is not obligated to abide by its provisions.

In view of this conclusion that the Commonwealth is not a "person" under section 6332 (a) of the Code, it is unnecessary to consider the further question of whether, in any event, the Commonwealth is liable in garnishment proceedings. You are advised that levies served on the State Treasurer upon accounts payable to vendors by the Commonwealth and upon refunds due from the Board of Finance and Revenue should not be honored.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY J. RUBIN,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 670

State government—Authority of Pennsylvania Navigation Commission—Summoning pilot without complaint—Acts of March 29, 1803, P. L. 542, as amended, and August 19, 1953, P. L. 983.

The Pennsylvania Navigation Commission for the Delaware River and its navigable tributaries has authority, under the Act of August 19, 1953, P. L. 983, which further amended the Act of March 29, 1803, P. L. 542, to summon a pilot before it, on its own motion without necessity of a complaint, for trial for misbehavior in the execution of his duty.

Harrisburg, Pa., August 29, 1956.

Honorable Maurice K. Goddard, Secretary of Forests and Waters,
Harrisburg, Pennsylvania.

You requested advice regarding the authority of the Navigation Commission for the Delaware River and its navigable tributaries, to summon a pilot before it, on its own motion without necessity of a complaint, for trial for misbehavior in the execution of his duty.

Specific reference is made by you to an opinion dated January 8, 1913, rendered to George F. Sproule, Secretary, Board of Commissioners of Navigation, by Assistant Deputy Attorney General William

M. Hargest, wherein it was enunciated that the Board was powerless to act in the absence of a complaint filed by a "person or persons injured or aggrieved."

That opinion was predicated upon a construction by this office of the Act of March 29, 1803, P. L. 542, 4 Sm. L. 67, Section 31, as amended by Section 8 of the Act of June 8, 1907, P. L. 469, which provided, *inter alia*, as follows:

"If any pilot shall misbehave himself in the execution of his duty, so that damage shall accrue by reason of his negligence or incapacity, it shall be lawful for the person or persons injured or aggrieved to complain to the said board of commissioners of navigation, who shall *thereupon* appoint a time and place of hearing, * * *" (Emphasis supplied.)

The suggestion was incorporated therein that the Board consider the propriety of securing necessary legislation conferring authority upon it to proceed *sua sponte* in such cases.

No legislative action of this nature was effected for a considerable period of time. However, the aforecited statute was ultimately amended by the Act of August 19, 1953, P. L. 983, Section 1, 55 P. S. Section 72 (p.p.), which obviated the filing of a complaint as a condition precedent to the exercise by the Commission of its powers authorized thereunder.

The act as amended in 1953 omits the following language appearing in the earlier enactment:

"* * * it shall be lawful for the person or persons injured or aggrieved to complain to the said board of commissioners of navigation, who shall *thereupon* appoint a time and place of hearing, * * *" (Emphasis supplied.)

and provides instead:

"If any pilot shall misbehave himself in the execution of his duty, so that damage shall accrue by reason of his negligence or incapacity, it shall be lawful for the Board of Commissioners of Navigation to appoint a time and place of hearing, * * *"

It is, therefore, our opinion and you are accordingly advised that the Commission has the right, on its own motion, to summon a pilot before it for trial for misbehavior in the execution of his duty, and to impose appropriate penalties as prescribed by the aforesaid act.

Very truly yours,

DEPARTMENT OF JUSTICE,

HERBERT B. COHEN,
Attorney General.

OPINION No. 671

State government—General State Authority—State construction of buildings—Philadelphia Building Code authorized by Act of April 14, 1937.

The General State Authority is not subject to the Philadelphia Building Code authorized by the Act of April 14, 1937, P. L. 313, and need not, therefore, obtain a permit from the building inspection division to proceed with the construction of a building within the city limits.

Harrisburg, Pa., August 31, 1956.

Honorable John N. Forker, Executive Director, General State Authority, Harrisburg, Pennsylvania.

Sir: The General State Authority presently is engaged in the construction of a tuberculosis sanatorium at Corinthian and Girard Avenues, Philadelphia, Pennsylvania, Project No. G. S. A. 305-2B.1. The Building Inspection Division, Department of Licenses and Inspection, City of Philadelphia, has informed the contractor for the above project that such construction without permits having been obtained from the department is in violation of the building code of the City of Philadelphia and, therefore, illegal. The question arises as to whether or not the General State Authority is subject to said building code.

The City of Philadelphia has enacted a building code pursuant to its powers under the Act of April 14, 1937, P. L. 313, 53 P. S. Section 2224 et seq. In so doing, it provided that said code applies to every building and structure erected in the City of Philadelphia, excluding only those buildings and structures title to which is in the United State Government. Code of General Ordinances, City of Phila. Title 4, Section 4-101.

The General State Authority is an instrumentality of the Commonwealth of Pennsylvania, established, among other reasons, to construct State institutions. Act of March 31, 1949, P. L. 372, Section 3, 71 P. S. Section 1707.4. The present project has been undertaken in pursuance of this power. Thus, the basic question is whether or not an instrumentality of the State government is subject to municipal regulations in the exercise of its statutory powers.

The City of Philadelphia is a municipal corporation and, like all municipal corporations, is dependent upon the State Legislature for its powers. *Warren Borough v. Willey*, 359 Pa. 144, 58 A. 2d 454 (1948), *Commonwealth v. Moir*, 199 Pa. 534, 49 A. 351 (1901). The Act of 1937, *supra*, gives to the City of Philadelphia broad powers in dealing with matters of local concern. However, it is established law that a statute cannot affect the rights of the sovereign unless the sovereign is expressly designated therein. *Culver v. Commonwealth*, 348 Pa. 472, 35 A. 2d 64 (1944); *Commonwealth of Pennsylvania, State Employees' Retirement System v. Dauphin County et al.*, 335 Pa. 177, 6 A. 2d 870 (1939). Nothing in the cited statutes indicates an intention, express or implied, on the part of the General Assembly to give Philadelphia the power to enforce its local regulations against the State or its agencies. We thus conclude that the General State Authority is not subject to the building code of the City of Philadelphia.

Agreement with this conclusion is found in several cases from other jurisdictions. *The Town of Bloomfield v. New Jersey Highway Authority*, 18 N. J. 237, 113 A. 2d 658 (1955), *City of Charleston v. Southeastern Construction Co. et al.*, 134 W. Va. 666, 64 S. E. 2d 676 (1951). Moreover, in the analogous area of municipal taxation, it has been held that a municipality cannot tax property of the State unless clearly authorized to do so by statute. *Commonwealth of Pennsylvania, State Employees' Retirement System v. Dauphin County et al.*, *supra*.

Therefore, you are advised that the General State Authority is not subject to the building code of the City of Philadelphia and need not obtain permits from that City's Building Inspection Division in order to proceed with construction of Project No. G. S. A. 305-2B. 1.

Very truly yours,

DEPARTMENT OF JUSTICE,

HERBERT B. COHEN,
Attorney General.

OPINION No. 672

Tax Anticipation Notes, Second Series of 1956—Constitutionality and legal status.

The allocation of the monies in the General Fund, which are specifically set forth on the face of the notes, made by the Department of Revenue, and approved by the Governor, the Auditor General and the State Treasurer, to provide a sinking fund for the payment of said notes, are payable into and shall be set aside in the sinking fund accounts mentioned on the face of the notes in the amounts and at times specified, prior to all other expenditures, expenses, debts and appropriations, including current expenses, payable from the General Fund.

Harrisburg, Pa., October 10, 1956.

Honorable George M. Leader,
Honorable Charles R. Barber,
Honorable Weldon B. Heyburn.

Sirs: We have your request for an opinion as to the legal status of thirty-five million dollars (\$35,000,000.00) Tax Anticipation Notes, Second Series of 1956, dated October 9, 1956, maturing May 24, 1957.

We have examined the proceedings relative to the issuance by the Commonwealth of Pennsylvania of Tax Anticipation Notes, Second Series of 1956, in the amount of thirty-five million dollars (\$35,000,000.00).

This issue was authorized by the General Assembly of this Commonwealth by the Act approved September 29, 1951, P. L. 1646, as amended by the Act approved June 30, 1955, P. L. 247. We are satisfied that the Act of September 29, 1951, P. L. 1646, and the amendment thereto of June 30, 1955, were duly and properly enacted. We have also examined the official estimates submitted to the Governor, through the Budget Secretary, by the Department of Revenue, stating the amount of the contemplated revenues provided for the current biennium by the General Assembly for the current purposes of any fiscal biennium and the amount thereof that remains uncollected.

The constitutionality of the issuance of Tax Anticipation Notes was upheld by the Supreme Court of Pennsylvania in the case of *Kelley v. Baldwin et al.*, 319 Pa. 53 (1935). Since the Act of September 29, 1951, as amended, is similar to the act held to be constitutional in *Kelley v. Baldwin*, *supra*, we believe it to be constitutional.

The act provides, *inter alia*, that the current revenues for any biennial fiscal period accruing to the General Fund of the State Treasury shall be pledged for the payment of principal of and interest on all notes issued during such fiscal biennium, and that so much of said revenues as may be necessary, are specifically appropriated for such payment, the Department of Revenue being authorized to allocate such revenues to said payment. The act authorizes the Governor, the Auditor General and the State Treasurer to determine the terms and conditions of the issue, rates of interest and time of payment of interest, provided that the notes shall not mature later than May 31 of the second fiscal year of any current biennium, and shall not bear interest in excess of $4\frac{1}{2}\%$ per annum. The minutes of the meetings held by the Governor, the Auditor General and the State Treasurer, show that all proceedings taken relative to the issuance of the notes comply fully with the provisions of the act and are in due legal form, and that all necessary action has been duly taken.

We have examined fully executed notes of the following denominations: five thousand dollars (\$5,000.00), ten thousand dollars (\$10,000.00), twenty-five thousand dollars (\$25,000.00), fifty thousand dollars (\$50,000.00), and one hundred thousand dollars (\$100,000.00), in bearer form and find that the same are duly and properly executed and conform with the form approved by you.

In conclusion, we have no hesitation in advising you that the thirty-five million dollars (\$35,000,000.00) Tax Anticipation Notes of the Commonwealth of Pennsylvania, Second Series of 1956, dated October 9, 1956, maturing May 24, 1957, constitute legal obligations payable by the Commonwealth of Pennsylvania from current revenues accruing to the General Fund of the State Treasury of the Commonwealth of Pennsylvania during the two fiscal years ending May 31, 1957, and together with the twenty-seven million dollars (\$27,000,000.00) Commonwealth of Pennsylvania Tax Anticipation Notes, First Series of 1956, are equally and ratably secured by the current revenues levied and assessed for revenue purposes of every kind and character accruing to the General Fund during said biennial period, and are being issued in anticipation of collectible current revenues.

The total amount of the Commonwealth of Pennsylvania Tax Anticipation Notes, Second Series of 1956, together with the amount of the First Series of 1955 Notes, heretofore issued and paid and the amount of the outstanding First Series of 1956 Notes is less than one-third of the officially estimated revenues provided by the General Assembly under existing laws for the General Fund in the current two year fiscal

period, one of the two borrowing limitations now applicable since the General Assembly is not in session. The amount of the outstanding Notes, including this issue, is less than one-third of the uncollected amount of such revenues, the other applicable borrowing limitation.

We are further of the opinion that the allocation of the moneys in the General Fund, which are specifically set forth on the face of the notes, made by the Department of Revenue, and approved by the Governor, the Auditor General and the State Treasurer, to provide a sinking fund for the payment of said notes, are payable into and shall be set aside in the sinking fund accounts, mentioned on the face of the notes in the amounts and at times specified, prior to all other expenditures, expenses, debts and appropriations, including current expenses, payable from the General Fund.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 673

Appropriations—Training Schools—Elwyn Training School—Increased per capita maintenance of wards of the Commonwealth—Constitutional limitations.

An increase in the maximum per capita allowance made to a training school for the maintenance of wards of the Commonwealth does not come within the constitutional prohibition against increased or extra compensation where there is no contract between the school and the state. A statute, setting the maximum per capita allowance, is not a contract, but merely an indication of a course of conduct to be pursued until circumstances or views of policy change and may be increased at the will of the legislature.

Harrisburg, Pa., October 19, 1956.

Honorable Charles R. Barber, Auditor General, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your letter of July 10, 1956, in which you ask to be advised with regard to the appropriations made to the Elwyn Training School, Elwyn, Pennsylvania, for the maintenance of wards of the Commonwealth.

You call attention to the Act of April 12, 1956, Act No. 53-A, amending the Act of August 22, 1953, by changing the maximum per capita allowance for the expired biennium from \$850.00 to \$960.00 per annum. Section 1 of Act No. 53-A reads as follows:

"Section 1. An appropriation is hereby made to the Elwyn Training School at Elwyn in the County of Delaware, Commonwealth of Pennsylvania for the maintenance of six hundred (600) wards of the Commonwealth at nine hundred sixty dollars (\$960) per capita per annum and the sum of one million twenty thousand dollars (\$1,020,000) or as much thereof as may be necessary is hereby specifically appropriated to the said institution for the purpose stated to cover the two fiscal years beginning June first one thousand nine hundred fifty-three. Absences or vacations of three weeks or less in any fiscal year shall not be deducted but any absences or vacations in excess of three weeks in any fiscal year shall be deducted."

You cite Article III, Section 11 of the Constitution, and ask whether the requisitions for the increased per capita cost shall be approved for payment.

Article III, Section 11 of the Constitution reads:

"No bill shall be passed giving any extra compensation to any public officer, servant, employee, agent or contractor, after services shall have been rendered or contract made, nor providing for the payment of any claim against the Commonwealth without previous authority of law."

It is a well established principle of law that the control of State finances rests with the Legislature, subject only to constitutional restrictions. *Leahey et al. v. Farrell et al.*, 362 Pa. 52 (1949), and *Commonwealth ex rel. Schnader v. Liveright, Secretary of Welfare et al.*, 308 Pa. 35 (1932).

In the latter case, our Supreme Court said at page 67:

"Legislative power is vested in the General Assembly by article II, section 1, and its power is supreme on all such subjects unless limited by the Constitution. The control of the state's finances is entirely in the legislature, subject only to these constitutional limitations; and, except as thus re-

stricted, is absolute. Unless expressly prohibited or otherwise directed by that instrument, appropriations may be made for whatever purposes and in whatever amounts the law-making body finds desirable. The legislature in appropriating is supreme within the limits of the revenue and moneys at its disposal."

The question arises as to whether the increase comes within the constitutional prohibition of Article III, Section 11.

There is no written contract between the Commonwealth and the Elwyn Training School. This school is a private institution, founded in 1852, and has patients other than those maintained by the Commonwealth. It submits quarterly requisitions to the Department of the Auditor General, whereupon representatives of that department visit the school for the purpose of establishing the validity of the financial representations included in the quarterly requisitions. After audit by the Auditor General and approval by that department and the Department of Welfare, the requisitions are processed for payment.

Turning to the legal question, it is clear that the Elwyn Training School is not a public officer, servant, employee or agent. The question may thus be reduced to "Is the Elwyn Training School a contractor, in the sense that term is used in the Constitution," or, in other words, does the statute constitute a contract between the Commonwealth and the school.

The Supreme Court of the United States in the case of *Dodge et al. v. Board of Education of Chicago et al.*, 302 U. S. 74 (1937), at pages 78-79, said:

"The parties agree that a state may enter into contracts with citizens, the obligation of which the legislature can not impair by subsequent enactment. They agree that legislation which merely declares a state policy, and directs a subordinate body to carry it into effect, is subject to revision or repeal in the discretion of the legislature. The point of controversy is as to the category into which the Miller Law falls.

"In determining whether a law tenders a contract to a citizen it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state the case for obligation binding upon the state is clear. Equally clear is the case where a statute confirms a settlement of disputed rights and defines its terms. On the other hand, an act merely fixing salaries of officers creates no contract in their favor and the compensation named

may be altered at the will of the legislature. This is true also of an act fixing the term or tenure of a public officer or an employe of a state agency. The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption. If, upon a construction of the statute, it is found that the payments are gratuities, involving no agreement of the parties, the grant of them creates no vested right."

One of the cases cited in support of this last proposition arose in Pennsylvania (*Butler v. Pennsylvania*, 10 How. 402), where it was held that a Pennsylvania law reducing the pay of a State officer and removing him was not a violation of the Federal constitutional provision prohibiting the impairment of contracts, since the appointment to the office and the statute itself did not create a contract. This case, *Butler v. Pennsylvania*, supra, arose in 1844, when the constitutional provision with regard to increasing or decreasing salaries applied only to the Governor and Judges. At page 410 the Court said:

"Commonwealth v. Mann, Watts & Serg. 418: 'The point that it is a contract, or partakes of the nature of a contract, will not bear the test of examination.'

"Barker v. City of Pittsburgh, 4 Barr, 51: 'That there is no contract, express or implied, for the permanence of a salary, is shown by the constitutional provision for the permanence of the salaries of the governor and judges as exceptions.'"

In the case of *Wisconsin and Michigan Railway Co. v. Powers*, 191 U. S. 379 (1903), the Supreme Court had before it the question as to whether in a general tax law providing that railroads thereafter building and operating a road south of a certain parallel shall be exempted from the tax for ten years unless the gross earnings shall exceed a certain sum constituted a contract, the obligation of which could not be impaired consistently with the Constitution of the United States. The Court, speaking through Mr. Justice Holmes, held that there was no contract and that the act "simply indicates a course of conduct to be pursued, until circumstances or its views of policy change."

Applying the language of the opinions above cited to the question before us, it is clear that the law does not provide for the execution of a contract, nor does it confirm a settlement of disputed rights. It is similar to a statute fixing the salary of an officer at a certain figure which the court held to be no contract.

The question arises as to whether this view is contradictory of our position in Formal Opinion No. 664, wherein we cited the case of Teachers Tenure Act Cases, 329 Pa. 213 (1938). In this latter case, the Supreme Court held that school teachers are *public employees* having *contracts* of employment with the school districts by which they are employed.

In fact, the law under consideration in that case, as well as present law, provides that *written contracts* in a prescribed form shall be entered into between the school districts and the teachers.

This is the very situation referred to in the second paragraph of the cited excerpt from Dodge et al. v. Board of Education of Chicago, et al., *supra*.

Thus, there is no conflict between the position taken in Formal Opinion No. 644 and the position taken in this opinion, since the situations are distinguishable on the facts and principles involved.

Having in mind the opinion of the Supreme Court in Commonwealth ex rel. Schnader v. Liveright, *supra*, that the Legislature in appropriating is supreme, subject only to constitutional limitations, and the fact that no contract exists by virtue of the statute, we are of the opinion that Act No. 53-A does not come within the constitutional prohibition of Article III, Section 11, and the requisitions for the increased per capita cost should be approved for payment.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 674

Commonwealth lands—Liability for the maintenance of reservoir and water pipe line system constructed by Commonwealth's predecessor in title—Doctrine of adverse user.

The Commonwealth of Pennsylvania is under no obligation to repair, maintain or improve a water supply system, constructed on land now owned by the Com-

monwealth, by its predecessor in title where an easement by prescription has not been established. The doctrine of adverse *user* cannot be availed of to establish rights of present users as the initial use was by permission of the former owner, and was not adverse, hostile, and uninterrupted for 21 years.

Once the Commonwealth acquired title to the land, the users of the water system could acquire no rights against the Commonwealth by reason of adverse use since that doctrine does not apply to the Commonwealth.

Harrisburg, Pa., October 30, 1956.

Honorable Maurice K. Goddard, Secretary of Forests and Waters,
Harrisburg, Pennsylvania.

Sir: You asked if the Commonwealth is obligated to maintain a water reservoir and water pipe line system situated on land owned by the Commonwealth and now used for forest purposes.

Under the facts submitted, the Commonwealth's predecessor in title, a lumber company, owned the land for a period of approximately twenty-one years and eleven days, ending in 1914, immediately prior to the Commonwealth's acquisition of the land.

The lumber company, during its ownership, and at its expense, constructed a water reservoir and water pipe line system on the land now owned by the Commonwealth and furnished water service through the pipe lines to the homes of its employees and the residents of a neighboring village, as well as other persons in the area beyond the boundaries of the lumber company's land, without cost to the users of the water consumed.

The deed to the Commonwealth made no mention of the water pipe line system and after the Commonwealth acquired the land in 1914, the same persons and their successors, as well as some new users, have continued to receive the water from the pipe lines without hindrance or charge by the Commonwealth.

The water supply system is now in need of improvement and repair to assure an adequate supply of water, of a purity acceptable to the Department of Health.

An easement by prescription has not been established. Even though the facts would ordinarily create such an easement, the doctrine of adverse user cannot be used to establish rights of the present users of the water system, in so far as it relates to any installations on the land now owned by the Commonwealth, for the reason that the initial use of the reservoir and water pipe line by the residents of the village and other persons was by permission or license of the lumber company

as distinguished from an adverse or hostile use against the lumber company. *Rogers v. Stoever*, 24 Pa. 186 (1855); *Citizens Electric Co. v. Susquehanna Boom Co.*, 227 Pa. 448 (1910); *Lund v. Brown*, 14 W.N.C. 489 (1884).

If the doctrine of adverse user were applicable, the adverse user of the reservoir and water lines on the land now owned by the Commonwealth would be for an insufficient time to ripen into an easement, since the whole term of the lumber company's ownership was about twenty-one years, eleven days, commencing in 1893 and the information on the water supply system, consisting of the reservoir and pipe lines, indicates it was not installed until some years after the lumber company owned the land. *In re Penny Pot Landing*, 16 Pa. 79 (1851); *Schmitt v. City of Carbondale*, 257 Pa. 451 (1917).

Once the Commonwealth had acquired title to the land, the users of the water reservoir and pipe lines could acquire no rights against the Commonwealth, by prescription, by reason of adverse user since that doctrine does not apply to the Commonwealth. *Henry v. Henry*, 5 Pa. 247 (1847); and see *Vale's Penna. Digest*, Vol. 2, Adverse Possession, Section 8.

It is our opinion, therefore, and you are accordingly advised that the Commonwealth of Pennsylvania is under no obligation to repair, maintain or improve the water supply system, consisting of a water reservoir and water pipe lines referred to in your question.

Very truly yours,

DEPARTMENT OF JUSTICE,

HERBERT B. COHEN,
Attorney General.

OPINION No. 675

State employees—Leaves of absence—Military leave rights denied to Civil Service employees on leaves granted subsequent to July 27, 1953—"War leaves" discussed—Effect of Act of June 7, 1917, P. L. 600.

1. If any employee now applies for military leave of absence without pay, in order to enter the military service either voluntarily or as a result of being drafted, such application must be denied and such employee is not entitled to return to his former position upon his release from military service.

2. All such military leaves of absence granted after July 27, 1953, are invalid and should be cancelled.

3. Any employe who has re-enlisted subsequent to July 27, 1953, has abandoned his right to be continued on a military leave and has abandoned his right to his former position upon his release from active military service.

Harrisburg, Pa., November 14, 1956.

Honorable Elmer D. Graper, Chairman, State Civil Service Commission, Harrisburg, Pennsylvania.

Sir: The State Civil Service Commission has requested the opinion of this department on the following questions relating to employees in the classified service:

1. If an employee now applies for military leave of absence without pay in order to enter military service, either voluntarily or as a result of being drafted, may such application be granted; if so, is such employee entitled to return to his former position upon his release from active military service?

2. Are military leaves of absence granted within the last year or last few years still valid, and does an employee who was granted such leave have the right to return to his former position upon his application for reinstatement?

3. Does an employee who was granted a military leave of absence several years ago and who has been continued on military leave through one or more periods of re-enlistment have a right to be continued on military leave during such periods of re-enlistment and to return to his former position upon his release from active military service?

The answer to all of these questions depends upon the proper interpretation of Section 1 of the Act of June 7, 1917, P. L. 600, 65 P. S. Section 111 (hereinafter referred to as the "Act"), which provides:

"Whenever any appointive officer or employee, regularly employed by the Commonwealth of Pennsylvania in its civil service * * * *shall in time of war or contemplated war* enlist, enroll, or be drafted in the military or naval service of the United States, or any branch or unit thereof, he shall not be deemed or held to have thereby resigned from or abandoned his said office or employment, nor shall he be removable therefrom during his period of service, but the duties of his

said office or employment shall, if there is no other person authorized by law to perform the powers and duties of such officer or employe during said period, be performed by a substitute * * *” (Emphasis supplied.)

Since the benefits of Section 1 of the Act are limited to officers and employees who enter the military or naval service of the United States in time of war or contemplated war, and no distinction is made between those who voluntarily enlist and those who are drafted, consideration must be given to when this country has during the last few years been in a state of war or contemplated war and the meaning of those words as used in the Act.

The Japanese attacked Pearl Harbor on December 7, 1941; Congress declared war on Japan on December 8, and on Germany on December 11. The state of war between the United States and Germany was terminated by a proclamation of the President on October 9, 1951, on which date a joint resolution of Congress was passed also declaring the war terminated. A treaty of peace was signed with Japan on September 8, 1951, and ratified by the United States on March 20, 1952. It came into force on April 28, 1952.

On June 25, 1950, the Republic of Korea was invaded and on June 27, President Truman ordered the use of United States Troops to aid South Korea. There was never any formal declaration of war. The Korean Armistice was signed July 27, 1953. This department concluded in Formal Opinion No. 646, dated April 9, 1954, 1953-1954 Op. Atty. Gen. 34, that the word “war” as used in this Act is used in its common or ordinary sense and that those who were in military or naval service of the United States during the Korean conflict were in the armed services during “time of war or contemplated war” as that term is used in the Act.

It is, therefore, clear that the United States was at “war” within the meaning of that word as used in the Act from December 7, 1941 to July 27, 1953, since the beginning of the Korean conflict and the end of World War II overlapped.

Have we been in a “time of * * * contemplated war” since July 27, 1953? The term “contemplated war” was discussed in Formal Opinion No. 377, dated December 9, 1940, 1939-1940 Op. Atty. Gen. 486, wherein it was concluded that this country was in “time of * * * contemplated war” in the latter part of 1940 after enactment of the Selective Service and Training Act on September 16, 1940. At that time most of the major nations of the world had been engaged in

World War II for over a year and it seemed probable that the United States would be involved in that conflict in a very short time. Today the situation is quite different. The actual fighting of World War II has been over for more than ten years and the Korean conflict has been over for more than three years.

Webster's New International Dictionary, Second Edition, Unabridged, defines the word "contemplate" as: "To have in view as contingent or probable or as an end or intention; to look forward to; to purpose or intend." Clearly the *possibility* of war exists at the present time as it almost always does in time of peace. However, despite the present situation in Eastern Europe and the Middle East, there are presently no major wars raging in the world; and world conditions are not such that we can say that we are in a period of contemplated war even though we recognize the need to maintain our defenses. Preparedness in order to prevent war is not the contemplation of war. For this reason we conclude that the United States has not been in "time of war or contemplated war" at any time since July 27, 1953, on which date the Korean Armistice was signed.

Section 9(b) of the Selective Service Act of 1948 (name changed to Universal Military Training and Service Act in 1951) 62 Stat. 614 (1948) 50 U. S. C. A. App. Section 459, makes it compulsory for his former employer to rehire any person who is drafted into the Armed Forces if such person meets certain specified conditions and if his former employer was a private employer or the United States Government, one of its territories, possessions or political subdivisions. However, if such person was in the employ of any state or political subdivision thereof, the provisions are not mandatory, they merely enunciate the sense of the Congress as follows:

"(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should—

. "(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

"(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of the employer, be restored to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case."

Since Section 1 of the Pennsylvania Act is the only legislative authority for granting military leaves (except for certain provisions of the Military Code of 1949 and certain other statutes providing for short term military leaves for training with the Pennsylvania National Guard or the reserve components of the United States Armed Forces which are not here applicable), any leave not granted pursuant to that authority is void.

It is, therefore, the opinion of this department, and you are accordingly advised that:

1. If any employee now applies for military leave of absence without pay, in order to enter the military service either voluntarily or as a result of being drafted, such application must be denied and such employee is not entitled to return to his former position upon his release from military service.

2. All military leaves of absence granted after July 27, 1953, are invalid and should be cancelled.

3. Any employee who has re-enlisted subsequent to July 27, 1953, has abandoned his right to be continued on a military leave and has abandoned his right to return to his former position upon his release from active military service.

Very truly yours,

DEPARTMENT OF JUSTICE,

STEPHEN B. NARIN,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 676

Corporations—Special procedure for incorporating certain charitable and eleemosynary institutions—Provisions of “purpose” clause in articles of incorporation—Determination of nonsectarianism—Nonprofit Corporation Law of May 5, 1933, sec. 212.

1. The procedure set forth in section 212 of the Nonprofit Corporation Law of May 5, 1933, P. L. 289, for the incorporation of certain charitable and eleemosynary institutions must be followed where the proposed corporation will be a non-

sectarian institution in which indigent persons are to be treated or maintained in the regular course of operations and where the proposed articles of incorporation provide specifically for that purpose or are broad enough to permit it.

2. Where articles of incorporation of a proposed corporation are submitted to the Department of Welfare, pursuant to section 212 of the Nonprofit Corporation Law of May 5, 1933, P. L. 289, solely because they are broad enough to permit operation as a nonsectarian institution in which indigent persons are to be treated or maintained and where the incorporators indicate that they do not intend to operate as such, the incorporators must either insert into the purpose clause a statement which will remove the proposed corporation from the scope of section 212 or else comply with its provisions.

3. Whether a proposed corporation is sectarian or nonsectarian is to be determined from all the facts of the situation.

Harrisburg, Pa., November 16, 1956.

Honorable Harry Shapiro, Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: You have requested this department to advise you as to when the special procedure for incorporation of certain charitable and eleemosynary institutions set forth in Section 212 of the Nonprofit Corporation Law, the Act of May 5, 1933, P. L. 289, 15 P. S. Section 2851-212, must be followed:

Section 212 provides:

"Section 212. Special Procedure for Incorporation of Certain Charitable and Eleemosynary Institutions.—Whenever articles of incorporation for the incorporation of a nonsectarian hospital or other nonsectarian charitable or eleemosynary institution or society, in which indigent persons are treated or are to be treated or maintained, are filed with the prothonotary, he shall forthwith transmit the articles to the Department of Welfare of the Commonwealth. Thereupon the department shall make a thorough investigation as to the need for such a corporation in the community wherein the work of the corporation is to be carried on, and, within sixty days, shall certify upon the articles whether or not the needs of the community wherein the work of the corporation is to be carried on require the incorporation of such hospital, institution or society, and the reasons for its conclusion. The court shall not approve such application unless and until the articles are returned by the department, and unless the department shall certify that the incorporation of such hospital, charitable, eleemosynary institution or society is required by the needs of the community in which its work is to be carried on. The certification of the department as to such necessity shall be conclusive upon the court."

Clearly, the special procedure set forth in Section 212 is to be followed only when the proposed articles of incorporation are for the incorporation of a nonsectarian hospital or other nonsectarian charitable or eleemosynary institution or society in which indigent persons are treated or are to be treated or maintained.

Two questions of interpretation are inherent in this section. First, what is "a nonsectarian hospital or other nonsectarian charitable or eleemosynary institution or society in which indigent persons are to be treated or maintained" (hereinafter referred to as a "Section 212 corporation")? Second, when do articles of incorporation indicate that the proposed corporation will be a Section 212 corporation?

Whether a proposed corporation is sectarian or nonsectarian is a matter to be determined from all the facts of the particular situation. In general "sectarian" means denominational; devoted to, peculiar to, pertaining to, or promotive of, the interest of a sect, or sects; especially marked by attachment to a sect or denomination; and the term, in a broader sense, is used to describe the activities of the followers of one faith as related to the activities of adherents of another. The term is most comprehensive in scope. See Formal Opinion No. 455, dated May 12, 1943, to the Honorable S. M. R. O'Hara, Secretary of Welfare, and cases cited therein for an extensive discussion of the question.

Once it has been decided that the proposed corporation is nonsectarian, whether it is a hospital or other charitable or eleemosynary institution or society must then be determined, as the special procedure must be followed only in the case of proposed corporations which intend to operate such a hospital or institution and not to those which intend merely to contribute funds toward the support of such hospitals or institutions. This question was discussed in Informal Opinion No. 1105, dated May 23, 1940, and addressed to the Honorable E. Arthur Sweeny, Secretary of Welfare, in which it was stated:

"Your second question is whether or not this section of the act governs organizations which do not conduct hospitals or institutions, but contribute toward the support of hospitals or institutions where indigent persons are treated or maintained.

"Since this section of the act specifically refers to institutions in which indigent persons are treated or maintained,

the answer to your second inquiry seems equally free from doubt.

"We are of the opinion, therefore, and you are accordingly advised that:

* * * * *

"(2) Neither does Section 212 of the act apply to organizations which do not conduct hospitals or institutions, but merely contribute toward the support of hospitals or institutions where indigent persons are treated or maintained."

Finally, when is such a hospital or institution one in which indigent persons are to be treated or maintained? Every hospital will treat an emergency case even though the patient may be indigent and the hospital may be a high-cost private institution. However, as used in this section, the phrase clearly refers only to those hospitals or institutions in which indigent persons are to be treated or maintained in the regular course of operations. For example, the incorporation of a private hospital in which each patient would ordinarily pay in full for the services received by him would not be subject to the special procedure set forth in Section 212.

The purpose of Section 212 clearly is to prevent the incorporation of Section 212 corporations not required by the needs of the community in which the proposed corporation's work is to be carried on. For this reason we must conclude that whenever proposed articles of incorporation either specifically provide for the incorporation of a Section 212 corporation or are so broad as to permit the proposed corporation to operate as a Section 212 corporation the special procedure set forth in Section 212 must be followed.

Whenever proposed articles of incorporation are submitted to the Department of Welfare pursuant to Section 212 solely because they are so broad as to permit the proposed corporation to operate as a Section 212 corporation and the incorporators indicate to the department that they have no intention of so operating, the proposed articles should not be approved unless they are amended so as to eliminate such possibility. The insertion into the purpose clause of the following:

"The corporation will not maintain a nonsectarian hospital or other monsectarian charitable or eleemosynary institution or society, in which indigent persons are to be treated or are to be treated or maintained."

or a similar sentence or phrase will remove the proposed corporation from the scope of Section 212. However, if the proposed articles are not so amended, the special procedure set forth in Section 212 must be followed as indicated above.

If there is any doubt in a particular case as to whether or not, under the facts, a proposed corporation is a Section 212 corporation, the facts should be submitted to this department for a legal determination.

Very truly yours,

DEPARTMENT OF JUSTICE,

STEPHEN B. NARIN,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 677

Unemployment Compensation—Contribution payments of employers—Private industry payments made to laid-off workers are not “wages”—Effect of Act of December 5, 1936, P. L. (1937) 2897.

Payments made by employers pursuant to the terms of supplemental unemployment benefit plans, commonly called “guaranteed annual wage” plans, are not “wages” and thus are not subject to the contribution provisions of the Pennsylvania unemployment compensation law.

Harrisburg, Pa., November 30, 1956.

Honorable John R. Torquato, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: You have requested this department to advise you whether payments made by employers pursuant to the terms of supplemental unemployment benefit plans* are subject to the contribution provisions of the Pennsylvania unemployment compensation law.

* A “supplemental unemployment benefit plan” is a program under which a private industry pays stipulated amounts to laid-off workers during the period of lay-off in addition to the unemployment benefits these workers receive from the State. Such plans are popularly known as guaranteed annual wage plans.

Under Section 301 of the Pennsylvania unemployment compensation law, employer contributions are based upon a percentage of wages paid by him for employment. Act of December 5, 1936, P. L. (1937) 2897, Section 301; 43 P. S. Section 781. Therefore, the determination of whether supplemental unemployment benefit payments are subject to contribution depends, primarily, on whether such payments are wages as defined in the act.

The definition of "wages" is contained in Section 4 (x) of the act. It states:

" 'Wages' means all remuneration (including the cash value of mediums of payments other than cash), paid by an employer to an individual with respect to his employment * * * " Act of December 5, P. L. (1937) 2897, Section 4 (x); 43 P. S. Section 753.

In *Pendleton Unemployment Compensation Case*, 167 Pa. Super. 256, 75 A. 2d 3 (1950), the court held that pension payments are not wages within the meaning of this provision or "remuneration" under Section 4 (u) in determining whether or not the recipient was disqualified from receiving benefits. It also noted that payments by an employer to a pension fund are not "wages" under the exclusion, in Section 4 (x) (2) (i), for payments made into a fund for retirement purposes.

In Formal Opinion No. 658, issued January 26, 1956, we stated, in referring to supplemental unemployment benefits:

" * * * they are similar to payments made currently by an employer into a retirement or pension fund or into a workmen's compensation fund. If, as indicated by the Court in the *Pendleton* decision, the ultimate receipt of benefits from such funds does not constitute "remuneration" under the Unemployment Compensation Law, it follows that the receipt of benefits from the trust funds * * * likewise do not constitute 'remuneration.' "

This analogy is pertinent to the present case. We are of the opinion, therefore, that such contributions are not "remuneration," and, hence, not "wages," within the meaning of Section 4 (x).

It should be noted, also, that the federal Internal Revenue Service has ruled that such contributions are deductible from gross income as business expenses for income tax purposes. Rev. Rul. 56-102, 1956-12, 5. The Service also has stated that these contributions are not

“wages” under the federal unemployment tax act. Int. Rev. Code of 1954, Section 3306 (b). Since, under Section 4 (x) (6) of the Pennsylvania unemployment compensation law, payments deemed “wages” under the federal act are also deemed such under the Pennsylvania act, a negative implication supports our conclusion that such payments are not “wages” under Section 4 (x) of the Pennsylvania law.

Accordingly, you are advised that payments made by employers pursuant to the terms of supplemental unemployment benefit plans are not subject to the contribution provisions of the Pennsylvania unemployment compensation law.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY J. RUBIN,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 678

Social security—State employees—Division of retirement systems for referendum purposes—Delegation of legislative power—Reduction of state retirement benefits—Constitutionality of the Social Security Enabling Legislation, Act of June 1, 1957, P. L. 1973.

1. The adoption of prospective amendments and modifications to the Federal Social Security Act as permitted by the Social Security Enabling Legislation, Act of June 1, 1956, P. L. 1973, does not constitute an unconstitutional delegation by the General Assembly of its legislative power since there is an overlying law which establishes a primary policy standard.

2. Since a contributor, who becomes eligible to receive benefits under the integrated social security and state retirement plan, normally receives reduced benefits from the state or local system, the Constitution of Pennsylvania, Article I, Section 17, would forbid any interpretation of the Social Security Enabling Legislation, Act of June 1, 1956, P. L. 1973 which would permit the dissenting minority in a referendum to be compelled to accept such coverage.

3. The Social Security Enabling Legislation, Act of June 1, 1956, P. L. 1973, does permit the division of the retirement system referred to therein, for referendum purposes, as authorized by Section 218(d)(6) of the Federal Social Security Act, into two divisions or parts; one composed of those contributors who desire to be covered under Old Age and Survivors Insurance and the other composed of those contributors who express the desire not to be so covered.

Harrisburg, Pa., December 6, 1956.

Honorable John R. Torquato, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether or not Pennsylvania Social Security Enabling Legislation, Act No. 662 of the 1955 Session of the General Assembly, does permit the division of the retirement systems referred to therein, for referendum purposes, as authorized by Section 218 (d) (6) of the Federal Social Security Act, into two divisions or parts; one composed of those contributors who express the desire to be covered under Old Age and Survivors Insurance and the other composed of those contributors who express the desire not to be covered under Old Age and Survivors Insurance.

It is our conclusion that such a division is permissible. In support of this conclusion, we must look to the intention of the General Assembly, the attendant circumstances and the positive law.

On June 1, 1956, Act No. 662, *supra*, was approved by the Governor; and the Federal Social Security Amendments of 1956 which permit the division of a retirement system, were approved by the President on August 1, 1956. Therefore, the question arises as to whether the said Act of the General Assembly permits the Commonwealth, its political subdivisions and the instrumentalities of either to take advantage of subsequent liberalizations of the Federal Social Security Act without necessitating further legislative action which said further legislative action would demand a passage of time with the resulting delay therefrom effecting a foreclosure upon the acquisition of necessary quarters of coverage required by many employees and extended to them in accordance with the privilege of retroactive coverage permitted under Federal law.

It may not be argued that an interpretation of Act No. 662, *supra*, which permits the adoption of the Federal Social Security Amendments of 1956, in so far as it relates to the adoption of the provisions relative to a division of retirement systems by the Governor or an agency designated by the Governor represents an instance where the Legislature unconstitutionally delegated its power to make laws.

There is no unlawful delegation of legislative powers to make laws by the adoption of prospective Federal regulations where there is an

overlying law which constitutes the primary standard and the function of the delegated power merely determines a fact or state of things upon which the enforcement of the primary standard law depends.

As here applied both the state and the nation are attempting to extend coverage and thereby provide protection to employees of the Commonwealth and its political subdivisions and to the instrumentalities of either on as broad a basis as is permitted under Federal law. Both governments have decreed that this can best be done through the enactment of enabling legislation which shall set standards of such coverage. These statutes are the overlying laws or the primary standard. The power to fill in the details is the delegated power.

An incidental objection that the Federal amendment was not in being when the state law was approved is immaterial if the primary standard has been laid down. Nothing could be more obvious than that the filling in of details must of necessity be subsequent to the primary standard law.

So, too, while the Legislature cannot delegate the powers to make a law, it may confer authority and even discretion in connection with the execution of the law so long as it establishes primary standards and imposes upon others the duty of carrying out declared legislative policy in accordance with general provisions. *Belovsky v. Redevelopment Authority of City of Philadelphia*, 357 Pa. 329; *In re Marshall*, 363 Pa. 326; *In re Hasswell*, 1 Cal. App. 2d 183, 36 P. 2d 678.

Furthermore, Act No. 662, *supra*, could not be construed to mean that if the referendum disclosed that a majority of the contributors in the particular retirement system desired coverage under Federal law that in that case, all of the contributors including the dissenting minority would be compelled to obtain said coverage. Such an interpretation would manifestly contravene constitutional mandates.

Our Constitution prohibits the passage of any law "impairing the obligation of contracts." Constitution of Pennsylvania, Article I, Section 17.

Act No. 662, *supra*, provides that when a contributor becomes eligible to receive benefits under the integrated social security and state or local retirement plan, he is to receive the benefits directed towards him under social security and the benefits under the state or local retirement system may be reduced. Thus, the amount received

by the contributor from the state or local retirement system may necessarily be less than that which he would have received without the integrated social security plan although the combination of both gives to him a greater amount.

Clearly, no such reduction would be permissible unless the consent of the contributor was obtained since he made his contributions on the basis of the existing rules, regulations and provisions for eligibility for retirement allowance as of the time he joined the fund and "his right to continued membership therein, under the same rules and regulations existing at the time of his employment, was complete and vested. The Legislature could not thereafter constitutionally alter the provisions of his already existing contract of membership. His rights in the fund could only be changed by mutual consent." *Baker v. Retirement Board of Allegheny County*, 374 Pa. 165; *Hickey v. Pension Board of the City of Pittsburgh*, 378 Pa. 300; *Mauch v. Retirement Board of Allegheny County*, 381 Pa. 492.

It is a fundamental rule of statutory construction that the Legislature is presumed not to have intended to violate the Constitution of the United States or the Commonwealth of Pennsylvania. The Statutory Construction Act, Article IV, Section 56, the Act of May 28, 1937, P. L. 1019, 46 P. S. Section 556. This presumption is so strong that nothing but a clear infringement would justify the judiciary in nullifying a legislative enactment. *Loomis v. Philadelphia School District*, 376 Pa. 428; *Evans v. West Norriton Township Municipal Authority*, 370 Pa. 150; *Commonwealth v. Flickinger*, 165 Pa. Super. 95.

It is, therefore, manifest and clear that the act does permit the division of retirement systems for referendum purposes, as authorized by Section 218 (d) (6) of the Federal Social Security Act into two divisions or parts; one composed of those persons who desire Old Age and Survivors Insurance and the other composed of those persons who do not desire such coverage.

In further support of this contention, we must look to the act in question.

The Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, Article IV, Section 54, *supra*, 46 P. S. Section 554, provides:

"The title and preamble of a law may be considered in the construction thereof. * * *"

The title of Act No. 662 *supra*, provides that the purpose of the law is to:

"* * * provide for the coverage of certain officers and employes of the Commonwealth and its political subdivisions under the Old Age and Survivors Insurance provisions of Title II of the Federal Social Security Act, as amended. * * *"

Section 1 of the Pennsylvania Social Security Enabling Legislation, Declaration of Policy, provides that:

"* * * it is hereby declared to be the policy of the General Assembly, subject to the limitations of this act, that such steps be taken as to provide such protection to employes of the Commonwealth and its political subdivisions and to the instrumentalities of either on as broad a basis as is permitted under the Federal Social Security Act."

In interpreting and construing the act and the subsequent provisions thereof, the above Declaration of Policy, as a constituent part of the act, must be considered. *Barclay White Co. v. U. S. Board of Review*, 356 Pa. 43, *Department of Labor and Industry v. Unemployment Compensation Board*, 148 Pa. Super. 246.

In construing the phrase "on as broad a basis as is permitted," it must be remembered that a basic concept of our form of government is that an individual should be able to exercise a freedom of choice unless he is expressly limited. Thus, the said phrase must, in view of this sacred concept, be construed to mean that in broadening the basis of coverage, just and necessary thought must be given to such freedom of choice.

So too, it is basic that in construing statutes which relate to pension laws, the construction placed thereon should be broad and liberal so that the objectives thereof may be achieved.

The objectives which are to be achieved thereunder can best be assured by an interpretation which permits the extension of social security coverage at the instance of those who desire such coverage for themselves.

That the 1955 General Assembly foresaw the possibility of further amendments in the Federal Social Security Act and intended that the changes brought by such amendments should be available to public employees in Pennsylvania, is clearly indicated by Section 2(a) of Act No. 662, in which the term "Social Security Act" is defined as "the Act of Congress, approved the fourteenth day of August, 1935, Chapter 531, 49 Stat. 620, officially cited as the 'Social Security Act' (including regulations and requirements issued pursuant thereto), as such act has

been and *may from time to time be amended.*" Likewise the term "applicable Federal Law" is similarly defined as including future amendments of the Social Security Act "which provide for extending the benefits of Title II of the Social Security Act to employees of states, political subdivisions and their instrumentalities."

Section 6.1 of Act No. 662, *supra*, provides that:

"* * * Any referendum shall be conducted and the Governor shall designate an agency or individual to supervise its conduct in accordance with * * * section 218 (d) (3) of the Social Security Act, on the question of whether service in positions covered by a retirement system established by the Commonwealth or by a political subdivision or instrumentality thereof should be excluded from, or included under, an agreement under this act. * * *"

It therefore becomes necessary to look to the provisions of Section 218 (d) (3) of the Federal Social Security Act.

Section 218 of the Social Security Act sets forth the terms and conditions under which the Secretary of Health, Education and Welfare and a State may contract for the extension of Old Age and Survivors Insurance coverage "to services performed by individuals as employees of such State or any political subdivision hereof." Certain types of service are mandatorily excluded from such coverage and certain other types of services may, at the request of the State be included or excluded under the agreement or modification of the Federal-State agreement. Prior to 1954, among the services mandatorily excluded were "all services performed by individuals as members of a coverage group in positions applicable to such coverage group." Under the 1954 amendments to this act it was provided in paragraph (3) of subsection (d), Section 218, that "an agreement with the State may be made applicable (either in the original agreement or by any modification thereof) to service performed by employees in positions covered by a retirement system * * *" if the Governor of the state certifies to the Secretary of Health, Education and Welfare that the following conditions have been met:

1. A referendum by secret written ballot was held on the question of whether service in positions covered by such retirement system should be excluded from or included under an agreement under this section;
2. An opportunity to vote in such referendum was given (and was limited) to eligible employees;

3. Not less than ninety days' notice of such referendum was given to all such employees;
4. Such referendum was conducted under the supervision of the Governor or agency or individual designated by him; and
5. A majority of the eligible employees voted in favor of including service in such positions under an agreement under this section.

By way of definition and explanation of the provisions of paragraph (3), the 1954 amendments also provided, in paragraph (6) of Section 218 (d), that for the purpose of extending Old Age and Survivors Insurance coverage to positions covered by a retirement system, a single retirement system may, under certain circumstances "if the State so desires," be deemed to be composed of two or more separate retirement systems. The options thus given to the states to divide a retirement system for the purpose of extending Federal coverage were further amplified in the 1956 amendments to the Social Security Act. As amended in 1956, effective 1956, paragraph (6) provides in part as follows:

"For the purposes of this subsection, any retirement system established by the States of Florida, Georgia, New York, North Dakota, Pennsylvania, Tennessee, Washington, Wisconsin, or the territory of Hawaii, or any political subdivision of any such state or territory, which, on, before, or after the date of enactment of this section is divided into two divisions or parts one of which is composed of positions of members of such system who desire coverage under an agreement under this section and the other of which is composed of positions of members of such system who do not desire such coverage, shall, if the state or territory so desires and if it is provided that there shall be included in such division or part composed of members desiring such coverage the positions of individuals to become members of such system after such coverage is extended, be deemed to be a separate retirement system with respect to each such division or part."
(Emphasis supplied.)

That all of the provisions of Section 218 must be considered in arriving at the conditions and limitations under which Federal coverage may be extended to public employees is apparent not only from the fact that they deal with the same subject matter and are in many respects interdependent but also because many of the subsections and paragraphs are, by cross reference, specifically related to other subsections and provisions. A prime example of this interrelationship is

found in paragraphs (3) and (6) of subsection (d). Even under the 1954 amendments, the provisions of paragraph (3) had to be read in the light of the provisions of paragraph (6) which defined and explained the manner in which the term "retirement system" was used therein with reference to the conduct of referenda. To this, the amendments of 1956 as quoted above specifically added that "*for the purpose of this subsection*" a retirement system may, in certain specified states including Pennsylvania, be divided into two parts, one composed of positions of members who desire Federal coverage and the other of positions of members who do not desire coverage, and be deemed a separate "retirement system" with respect to each such part. It is clear therefore that paragraph (3) of subsection (d) is not a complete exposition of the law with respect to referenda but necessarily includes the provisions of paragraph (6) both under the 1954 and 1956 amendments.

It follows that since Section 6.1 of the Pennsylvania Act provides that any referendum shall be conducted in accordance with the requirements of Section 218 (d) (3) of the Social Security Act and since Section 2 (a) of Act No. 662 defines "Social Security Act" to mean the act officially cited as the Social Security Act "as such Act has been and may from time to time be amended," a referendum conducted in accordance with Section 218 (d) (3) of the Social Security Act as further defined and explained in the 1956 amendments to paragraph (6) meets the requirements of the Pennsylvania Social Security Enabling Legislation.

The only question as to the application of the above to a retirement system referendum in Pennsylvania is as it relates to the School Employees Retirement System referendum. The question arises, in this case, under the following language of subsection (c) in Section 6.1 of Act No. 662:

"Immediately after a favorable referendum of the eligible members of the public school employees retirement association the services of *all* employees of *all* school districts, vocational school districts and joint schools shall be included under the agreement with the Secretary of Health, Education and Welfare for the extension of old-age and survivors insurance protection as provided in the Federal Social Security Act. There shall likewise be included under such agreement the services of *all other employees* in departments of the Commonwealth, who perform services in positions which are eligible for coverage under the public school employees retirement

laws as well as any eligible members of the public school retirement association not otherwise included by this subsection." (Emphasis supplied.)

Any construction of the above subsection which would invite the thought that the Legislature intended to discriminate against the contributors of the Public School Employees Retirement Fund and deny to them the freedom of choice permitted to the contributors of State Employees' Retirement Fund and other local retirement systems is untenable. Furthermore, such a construction would place the above subsection in contravention to the constitutional mandates for the reasons hereinbefore given.

The declared policy of the law together with the broad, liberal interpretation which must be given to such a statute demand that only that construction is tenable which permits only those contributors who so express their desire to be covered to be so covered under Old Age and Survivors Insurance coverage.

So too, the legislative intent that such coverage, if it is so desired, be extended to the employees employed in connection with the public school system notwithstanding that they are not members of the public school employees retirement fund, is clearly and expressly manifested.

Therefore, it must be concluded that the Pennsylvania Social Security Enabling legislation, Act No. 662, of the 1955 Session of the General Assembly does permit the division of the retirement system referred to therein, for referendum purposes, as authorized by Section 218 (d) (6) of the Federal Social Security Act, into two divisions or parts; one composed of those contributors who express the desire to be covered under Old Age and Survivors Insurance and the other composed of those contributors who express the desire not to be so covered and you are accordingly so advised.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY L. ROSSI,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

OPINION No. 679

Administrative jurisdiction—Pennsylvania Turnpike Commission—Land condemnation proceedings—Attorney General has responsibility for and authority to conduct such proceedings.

By the Act of May 21, 1937, P. L. 774, which created the Pennsylvania Turnpike Commission, and the subsequent acts authorizing extensions to the system, all legal proceedings pertaining to land condemnation are to be conducted by the Department of Justice or the Attorney General acting for the Pennsylvania Turnpike Commission.

Harrisburg, Pa., December 12, 1956.

Honorable G. Franklin McSorley, Chairman, Pennsylvania Turnpike Commission, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request of June 25, 1956, for advice as to the responsibility for and authority to conduct land condemnation proceedings on behalf of the Pennsylvania Turnpike Commission.

The Act of May 21, 1937, P. L. 774, 36 P. S. Section 652a, et seq., created the Pennsylvania Turnpike Commission as an instrumentality of the Commonwealth, and that act authorizes in Section 6, 36 P. S. Section 652f, an application to the courts of common pleas by the Department of Justice when it is necessary to condemn land or interests therein needed by the Turnpike Commission. Section 6 reads:

“Whenever a reasonable price cannot be agreed upon, or whenever the owner is legally incapacitated or is absent, or is unable to convey valid title or is unknown, the commission is hereby authorized and empowered to acquire by condemnation any such tunnel or tunnels, whether wholly or partly constructed, or interest or interests therein, and any lands, rights, easements, franchises and other property deemed necessary or convenient for the construction or the efficient operation of the turnpike in the manner hereinafter provided. In such event application shall be made by the commission, acting through the Department of Justice, or by any owner or owners to the court of common pleas of the county in which the property is located, or in the case of property on the boundary line between two or more counties, then in any such counties for the appointment of viewers. Whereupon said court, or any law judge thereof, shall appoint three disinterested freeholders to view such property and estimate the value thereof. None of the freeholders shall be a resident of the county wherein such application shall be made. The court shall fix a time, not less than twenty nor more than

thirty days thereafter, when the viewers shall meet upon the property and view the same. The viewers shall cause at least ten days' personal notice of the time and place of such meeting to be given to the Attorney General and to the owner or owners, if resident within said county. If the owner is a corporation, such notice shall be given to the president, secretary or treasurer thereof, if such officer resides within said county. If neither owner nor any of such officers reside within the county, or cannot be found therein, or is unknown, notice of such first meeting shall be given as the court may direct. The viewers having been duly sworn or affirmed faithfully and impartially to perform the duties required of them under the provisions of this act, shall, at the time fixed for the first meeting, proceed to ascertain as accurately as may be the value of such tunnel, lands, rights, easements, or franchises, and, to that end, may require the attendance of any person whose testimony may be pertinent thereto and production of any such books or papers as the viewers may deem necessary. If any person shall refuse to appear and testify before such viewers, or refuse to produce such books and papers when they are required, then the court, or any judge thereof, shall, on application of the viewers or a quorum thereof, make such order therein as may be necessary. Whenever the viewers shall have ascertained the value of the tunnel, lands, rights, easements or franchises, they shall prepare a full report of their labors. Upon the completion of the report, the viewers shall fix a time when they shall meet and exhibit same. Ten days' written notice of the time and place of such meeting, together with a copy of said report, shall be given to the chairman of the commission, to the Attorney General, and to the owner or owners of the property condemned. At the time and place mentioned in such notice, the viewers shall meet and publicly exhibit the report and hear all exceptions thereto. After making any changes in such report as they may deem necessary, the same shall be filed in the court. Within thirty days after the filing of the report in the court, the commission, acting through the Department of Justice, or any person interested may file exceptions thereto. Whereupon the court may confirm the report absolutely, or modify it, or refer it back to the same or to any viewers with like powers and duties of the former viewers. Within thirty days after final action on the report by the court, the commission, acting through the Department of Justice, or any person interested may demand a trial by jury. From the action of the court on exceptions, or from any judgment after a jury trial, an appeal may be taken by any party to the Supreme or Superior Court. Each of the viewers shall receive a sum not exceeding ten dollars for each day

actually and necessarily employed in the performance of the duties herein prescribed and all necessary expenses actually incurred in the performance of his duties. Title to any property condemned by the commission shall be taken in the name of the commission. The commission shall be under no obligation to accept and pay for any property condemned or any costs incidental to any condemnation proceedings, and shall, in no event, pay for the same except from the funds provided by this act; and in any condemnation proceedings, the court having jurisdiction of the suit, action or proceedings may make such orders as may be just to the commission and to the owners of the property to be condemned, and may require an undertaking or other security to secure such owners against any loss or damage by reason of the failure of the commission to accept and pay for the property; but such undertaking or security shall impose no liability upon the Commonwealth except such as may be paid from the funds provided under the authority of this act.

"In addition to the foregoing powers, the commission and its authorized agents and employees, may enter upon any lands, waters and premises in the State for the purpose of making surveys, soundings, drillings and examinations, as it may deem necessary or convenient for the purpose of this act, and such entry shall not be deemed a trespass.

"All counties, cities, boroughs, townships and other political subdivisions and municipalities, and all public agencies and commissions of the Commonwealth of Pennsylvania, notwithstanding any contrary provision of law, are hereby authorized and empowered to lease, lend, grant or convey to the commission, upon its request, upon such terms and conditions as the proper authorities of such counties, cities, boroughs, townships, political subdivisions or other municipalities may deem reasonable and fair, and without the necessity for any advertisement, order of court or other action or formality other than the regular and formal action of the authorities concerned, any real property which may be necessary or convenient to the effectuation of the authorized purposes of the commission, including real property already devoted to public use."

Substantially similar provisions appear in the provisions of the law authorizing extensions of the turnpike. These sections outline the procedures for the acquisition of lands and interests therein deemed necessary for the construction of the turnpike and its extensions. The Department of Justice is authorized to apply to the court of common

pleas of the county in which the property is located for the appointment of viewers. The viewers are required to give at least ten days' notice of the time of their meeting to the Attorney General. Upon completion of their report, they are required to give ten days' notice to the Attorney General of their intention to exhibit the report and hear exceptions. The Department of Justice is given thirty days' time after the filing of the report of the viewers to file exceptions. After the court acts upon the report, the Department of Justice is authorized to demand a trial by jury.

Section 7 of the Act of May 21, 1937, P. L. 774, *supra*, 36 P. S. Section 652g, provides a method of obtaining immediate possession of structures or rights therein. The method is that provided by law for the obtaining of possession by the Secretary of Highways of occupied structures, and is the responsibility of the attorneys in the Department of Justice.

It is obvious that all legal proceedings pertaining to condemnation are to be conducted by the Department of Justice or the Attorney General acting for the Turnpike Commission. The reason for this provision is equally obvious since uniformity of administrative practices and policies is highly desirable when proceeding against the property of private individuals. The Turnpike Commission has jurisdiction over several hundred miles of highways, where the Department of Highways has jurisdiction over forty thousand miles of highways. It would, therefore, be incongruous for the Turnpike Commission, with its comparatively small mileage, to pay higher prices than the Highway Department for comparable lands, as well as being unfair to the land owners.

It was logical, therefore, to place the responsibility with the Department of Justice which handles this work for the Highway Department. In effect, the General Assembly was affirming the provisions of The Administrative Code of 1929, P. L. 177, 71 P. S. Section 51 *et seq.*, wherein it is provided in Section 902, 71 P. S. Section 292:

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

"(a) To furnish legal advice to the Governor, and to all administrative departments, boards, commissions, and officers of the State Government, concerning any matter or thing arising in connection with the exercise of the official powers or the performance of the official duties of the Governor, or such administrative departments, boards, commissions, or officers;

“(b) To supervise, direct and control all of the legal business of every administrative department, board, and commission of the State Government.”

Therefore, when legal action becomes necessary this department will assign attorneys to handle these matters in the appropriate counties.

We are of the opinion, therefore, and you are accordingly advised that the provisions of the law with regard to the conduct of condemnation proceedings require that such proceedings be handled by the Department of Justice.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

HERBERT B. COHEN,
Attorney General.

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Words and Phrases

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| “contemplate”. To have in view as contingent or probable or as an end or intention; to look forward to; to purpose or intend | 675 | 83 |
| “person” as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation. Int. Rev. Code of 1954, Sec. 6332 (c) | 669 | 66 |
| “person” . . . Commonwealth is not a “person” under section 6332 (a) of the Internal Revenue Code and is not obligated to abide by its provisions | 669 | 67 |
| “person” shall . . . mean and include an individual, a trust, estate, partnership, association, company or corporation. Int. Rev. Code of 1954, Sec. 7701 (a) | 669 | 66 |
| “resident” . . . a person who has a regular place of abode or business in the Commonwealth for a period of more than thirty consecutive days in the year | 662 | 43 |

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| "sectarian" means denominational; devoted to, peculiar to, pertaining to, or promotive of, the interest of a sect, or sects; especially marked by attachment to a sect or denomination; and the term, in a broader sense, is used to describe the activities of the followers of one faith as related to the activities of adherents of another | 676 | 86 |
| "Social Security Act" . . . the Act of Congress, approved the fourteenth day of August, 1935, Chap. 531, 49 Stat. 620, officially cited as the "Social Security Act" (including regulations and requirements issued pursuant thereto), as such act has been and <i>may from time to time</i> be amended | 678 | 94 |
| "soldier" . . . a person who served in the armed forces of the United States, or in any women's organization officially connected therewith, during any war <i>or armed conflict</i> | 663 | 46 |
| "Unemployment Compensation Fund" means the special fund created under the law which is divided into two accounts: the Employer's Contribution Account and the Compensation Account | 657 | 27 |
| "Unemployment Trust Fund" means the Unemployment Trust Fund established with the Federal government under the provisions of the Federal Social Security Law | 657 | 27 |
| "wages" . . . all remuneration (including the cash value of mediums of payments other than cash) paid by an employer to an individual with respect to his employment | 677 | 89 |