Commonwealth of Pennsylvania

OPINIONS

OF THE

ATTORNEY GENERAL

OF

Pennsylvania

1957

THOMAS D. McBRIDE
Attorney General

PREFACE

This publication of the 1957 Opinions of the Attorney General of Pennsylvania marks two changes in the practice of past years. The first involves a change in the method of giving advice. Opinions of the Attorney General have been given and numbered either as Formal Opinions or Informal Opinions since 1931; but only the former have been published. Beginning August 27, 1957, a new procedure was instituted whereby opinions were divided between Official Opinions and Memorandum Opinions, the latter limited to advice reiterating a prior formal or official opinion and to matters of relative unimportance. The result of this change can be seen in the number of official opinions printed in this volume. It is hoped that by printing all of these opinions and thus making them a matter of record, a more valuable research tool will be provided for those persons interested in the operation of state government.

The second change is the publication of a single year's opinions for the first time. Since at least 1889-1890 the Opinions of the Attorney General have appeared biennially, but the increase in the number of opinions given during 1957 has made it desirable to change this practice, also. Future publications will adhere to this change as far as practicable.

FORMAL OPINIONS

1957

FORMAL OPINION No. 680

Social security—Extension to State employees—Division of State retirement systems for referendum purposes—Notice of referendum—Constitutional prohibition against modification of existing retirement system without consent of members—Section 6. 1 of the Act of January 5, 1952, P. L. (1951) 1833, as amended—Section 218 of the Federal Social Security Act of August 14, 1935, 64 Stat. 514, as amended.

Under section 218 of the Social Security Act of August 14, 1935, 64 Stat. 514, as amended, the statutory 90 days' notice period may not commence running prior to the date on which existing retirement systems are divided for referendum purposes and a 90-day period must elapse prior to the date on which that division occurs. That procedure will best satisfy the apparent intention of Congress that employees have sufficient time to determine their rights and liabilities and the intention of the legislature as set forth in section 6.1 of the Act of January 5, 1952, P. L. (1951) 1833, as amended, and will comply with the provision of the Constitution and the case law decided under it which permits existing retirement systems to be modified only with the consent of their members.

Harrisburg, Pa., January 22, 1957.

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

Sir: You have asked to be advised as to whether or not the ninety (90) days' notice of referendum as required by Section 218 of the Social Security Act may commence running prior to the date upon which the existing retirement systems are divided for referendum purposes.

It is our conclusion that it may not commence running prior to such date.

It is our further conclusion that a ninety (90) day period must elapse prior to the date upon which the existing retirement system is divided for referendum purposes in order to insure the proper and adequate dissemination of information concerning social security coverage.

Section 218 (d) (3) of the Social Security Act as amended, 42 U. S. C. § 418, sets forth the referendum procedures under which 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 thereof."

The Governor of the state must certify to the Secretary of Health, Education and Welfare as a prerequisite to contract, that the following conditions have been met:

> "A. A referendum by secret written ballot was held on the question of whether service in position covered by such retirement system should be excluded from or included under an agreement under this section;
>
> "B. An opportunity to vote in such referendum was given to eligible employes;
>
> "C. *Not less than ninety days' notice of such referendum was given to all such employes;*
>
> "D. Such referendum was conducted under the supervision of the Governor or agency or individual designated by him; and
>
> "E. A majority of the eligible employes voted in favor of including service in such position under an agreement under this section." (Emphasis supplied)

On August 1, 1956, subsequent to the effective date of the above subsection, Section 218 (d) (6) of the Social Security Act was amended permitting in certain named states, including Pennsylvania, a division of existing retirement systems for referendum purposes into two divisions or parts; one composed of those contributors who expressed the desire to be covered under Old Age or Survivors Insurance and the other composed of those contributors who expressed the desire not to be so covered. The aforesaid amendment was necessary because of the existence of constitutional prohibitions in state constitutions forbidding any impairment of existing retirement contractual obligations running between the state and the members of its retirement systems. 1955-56 Op. Atty. Gen. 90.

The question now arises as to when the ninety (90) days' notice of referendum as required in Section 218 (d) (3) (supra) may commence running, that is, prior or subsequent to the date upon which the existing retirement systems are divided as aforesaid for referendum purposes. The Social Security Act provides no answer within its provisions. Indeed Section 218 (d) (3) thereof was not correspondingly amended to answer the variation provided in the amendment to the Social Security Act permitting a division in existing retirement systems.

Section 218 (d) (3) was enacted in contemplation of a "majority rule" procedure in existing retirement systems and not in contemplation of individual selection.

We agree that the notice of referendum appears to serve no reasonable purpose if it must be given after the existing retirement system is divided since the division is the all important event.

It is the division of the existing retirement system which actually determines the substantial changes in the pension benefits of the participants.

If it was the intention of Congress to insure the participants in the referendum of proper notice so that they might determine what benefits would accrue to them and the liabilities to which they will be subject, it would seem that notice should occur prior to the division of the existing retirement system.

Notwithstanding the above observations, certain considerations must be given to the conditions which must be met prior to coverage contract as provided by Federal law and to certain guides and information directed to the states by the Department of Health, Education and Welfare related thereto.

Transmittal letter No. 5 of the *Handbook for OASI Administrators* contains the following information:

> "The division of a retirement system, as described in item 3 above (1956 amendment permitting the division of retirement systems on basis of whether or not employes desire coverage) establishes two new deemed retirement systems for purposes of Section 218 (d) (6) of the Act. After the division has been made, service of individuals in either of these two retirement systems may be covered *only pursuant* to the referendum procedures set forth in Section 218 (d) (3) (related hereinabove) of the Act. The referendum requirements are explained in sections 230-238 of the Handbook. *Since the divisions of a retirement system serves to establish two new systems, it appears that the State will need to give notice of and hold the referendum after the retirement system has been divided in order to meet the requirements of the Social Security Act. If, however, a State believes that it can follow a different procedure, it may submit its plan through the regional representative for advice as to whether the requirements of the Act will be met.*" (Emphasis supplied)

It is, therefore, at least the unofficial opinion of the Bureau of Old Age and Survivors Insurance that the State is required to give notice of the referendum *after the retirement system has been divided for referendum purposes.*

Believing that a different procedure could be followed, the Bureau of Social Security for Public Employes for the Commonwealth of

Pennsylvania submitted a plan to the regional representative which incorporated a provision for notice of referendums to be given prior to the division of the existing retirement system together with a request for advice as to whether the requirements of the Act were being met.

The office of the regional representative refused to give such advice but rather submitted the following in letter form:

> "* * * This is to advise you that our Federal Act contemplates no such prior approvals. As you recognize, the provisions of section 218 (d) (3) contemplate only a certification from the Governor of the State to the Secretary of our Department that the conditions there set forth have been fulfilled. In our prior experience with other states in which referenda have been held, prior official advice of proposed procedures for the conduct of referenda has not generally been requested."

Thus, the regional representative has thrust the problem back to the Governor and to the Commonwealth, and we, in order to provide the additional benefits of social security coverage to our employees, must interpret the Federal law with the view of insuring to such employees that they will receive the same if they so desire without the existence of doubt as to the mandates contained therein.

It is noted also that orally, the regional representative cautioned the Bureau of Social Security for Public Employes of the Commonwealth that Transmittal Letter No. 5 (supra) did contain language which appeared to advise that the State is required to give notice of the referendum after the retirement system has been divided for referendum purposes in order to meet the requirements of the Social Security Act.

It is also noted that in the State of Wisconsin, the identical problem arose and when the regional representative failed to render advice with respect to such problem, it was decided that two notices be given, one before the division of the retirement system and the other subsequently thereto. We have been further notified that in the State of Tennessee, procedures have been instituted which provide for the ninety (90) days' notice after the division of the retirement system.

New York, however, did not provide for a ninety (90) day period of notice after the division of their system. New York does not anticipate any problems as a result of their action, but the State of Wisconsin was guided in its decision to give a ninety (90) day notice after the division of their system in anticipation of problems arising

from antagonism directed towards the coverage program by certain school teachers groups.

It seems apparent that if any litigation would develop as the result of not adhering to the ninety (90) day notice after division, that such litigation would be directed not from the Federal government, but by groups within the state.

The regional representatives have stated that so long as the Governor certifies that the conditions related in Section 218 (d) (3) (supra), have been met, they will not look beyond such certification.

Therefore, it appears that in order to avoid any possibility of litigation, a ninety (90) day notice period must be required after the division of our existing retirement system.

It is realized that we are confronted by the limitations of time and a compulsion to effect early coverage of our employees thereby securing coverage for those individuals who by reason of death or retirement prior to coverage will not, nor will their survivors benefit by social security coverage.

We must, however, in spite of our sympathy for the relatively few who will be prohibited from obtaining coverage for the above reasons, weigh their loss against the great loss which would result by general invalidation of our procedure or by greater delays produced by litigation. The institution of litigation might be accompanied by a successful attempt to stay all proceedings pending the disposition of the litigation.

We are still confronted, however, with another problem, that is, we must consider the sufficiency of any period provided for informational purposes which will enable our employees to select their preference wisely.

In providing that "not less than ninety days' notice of such referendum was given to all such employes," Congress must have intended to insure to the employees, sufficient notice so that they might determine what benefits would accrue to them and to what liabilities they would be subject before they were called upon to express their desire or lack thereof for coverage in a secret referendum.

Thus, it was the secret referendum which produced changes, if any, in the substantive rights of employees in existing retirement systems before the 1956 amendments to the Social Security Act were approved.

The 1956 amendments to the Social Security Act, however, permitted a division in existing retirement systems for the purpose of permitting employees to select to be covered or not to be covered by social security before the secret referendum was held thereby freeing dissenting employees from any compulsion to be bound by majority rule and prevent an impingement upon any right which may have vested under their existing retirement system.

Therefore, where this preliminary division was permitted, the importance of exercising choice shifted from the secret referendum to the choice in the division, since it is the division of the existing retirement system which actually determines the substantive changes in the pension benefit of the employees.

Thus, if before the 1956 amendment the ninety (90) days' notice of referendum served to insure employees against insufficient notice and time in which to consider whether or not they desired coverage before the secret referendum, and we think that such was the case, then an information period must now serve to insure employees against insufficient notice and time in which to consider whether or not they desire coverage before selecting a division in the existing retirement system.

Surely, an information period between the date of the division and the secret referendum can serve no useful purpose since it is the selection by the employee of the division which determines his rights, benefits and liabilities and not the secret referendum. Indeed, the secret referendum has been reduced to a mere formality in those cases in which a preliminary division occurs.

The question arises as to when such informational period should be given.

It seems clear and logical that if an informational period is to serve any useful purpose it must be given before the date scheduled for the division of the existing retirement system.

Our legislature clearly expressed their intent in this regard and for this purpose matches the intent of Congress.

Section 6.1 of the Act of January 5, 1952, P. L. (1951) 1833, as amended by the Act of June 1, 1956, P. L. (1955) 1973 (Pennsylvania Social Security Enabling Legislation) provides:

> "* * * The notice of referendum required to be given to employes shall contain or shall be accompanied by a statement

in form and detail as the agency or individual designated to supervise the referendum shall deem necessary to inform the employes of the rights which will accrue to them and their dependents and survivors, and the liabilities to which they will be subject if their services are included under an agreement under the act and of the charges, if any, proposed to be made in the provisions of their pension or retirement system at the time the agreement is entered into. The information shall be sufficient to illustrate to the eligible employes the total combined costs and benefits which will accrue from social security and the pension or retirement system or the proposed modification thereof."

Certainly the above information must be given to the employees prior to their exercising a choice in the division of our existing retirement system.

The importance of the information period is centered upon the provision of the Constitution of the Commonwealth of Pennsylvania and upon court decisions which demand that where the existing retirement system is to be modified, it can only be accomplished with the consent of the members therein; otherwise contractual obligations might be impaired and vested right impinged upon.

A consent by a member would be valid only where he has been given sufficient information upon which he could act and decide and sufficient time in which he could weigh such information.

If the information is not sufficient or if the information period falls short of that which is required, our procedure would be subject to attack and this deficiency might be considered as having vitiated any attempted consent by an employee.

In view of the provisions of Federal law requiring a ninety (90) day notice and the reasons therefor, and in view of the mandates of our enabling legislation relative to information to be given, it must be concluded that the mandate of both Federal and State law would be best satisfied by providing a period of ninety (90) days for the dissemination of information and the study thereof prior to the date upon which the selection will be made by employees of a division of our existing retirement systems for referendum purposes.

It is our opinion and you are accordingly advised that the ninety (90) days' notice of referendum as required by Section 218 of the Social Security Act may not commence running prior to the date upon which the existing retirement systems are divided for referendum purposes and that a ninety (90) day period must elapse prior to the

date upon which the existing retirement systems are divided for referendum purposes during which said ninety days proper and adequate information relative to social security coverage may be disseminated.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY L. ROSSI,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

FORMAL OPINION No. 681

Social security—Extension to members of Public School Employees' Retirement Fund—School district's duty to reimburse the Commonwealth—Act of June 1, 1956, P. L. (1955) 1973—Section 218 of the Federal Social Security Act of August 14, 1935, 64 Stat. 514, as amended.

The school districts must appropriate in their budgets funds necessary to reimburse the Commonwealth for one-half of the employer's contribution which must be paid under the agreement to be signed by the Commonwealth and Federal government for the period from the effective date of that agreement to the commencement of the next succeeding school year, pursuant to section 218 of the Social Security Act of August 14, 1935, 64 Stat. 514, as amended, and the Act of June 1, 1956, P. L. (1955) 1973.

Harrisburg, Pa., January 22, 1957.

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

Sir: You have advised this department that pursuant to Section 218 of the Federal Social Security Act, as amended, 42 U. S. C. § 418, and the enabling legislation passed by the General Assembly of the Commonwealth of Pennsylvania, the Act of June 1, 1956, P. L. 1973, 65 P. S. §§ 201-209, it is proposed to bring within the coverage of the Social Security Act those members of the Public School Employes' Retirement Fund who elect to be covered. Further, it is proposed that this social security coverage commence at some date prior to the date on which the agreement between the Federal government and the Commonwealth will be signed, in accordance with and for the time set forth in the Social Security Act and the Pennsylvania enabling legislation.

You have asked us to advise you whether the several school districts of the Commonwealth have the authority to appropriate in their budgets the necessary funds for payment of their respective shares of the social security contributions which will have to be paid by the Commonwealth for the period from the effective date of the agreement to the commencement of the current year for which the school district's budget is being prepared.

It is the opinion of this department and you are accordingly advised that the several school districts of the Commonwealth do have such authority.

Clause (f) of Section 218 of the Social Security Act and Section 4 of the Pennsylvania enabling legislation, the Act of June 1, 1956, P. L. (1955) 1973, make it abundantly clear that the effective date of the agreement may be any date after December 31, 1954.

Section 2 of the Act of June 1, 1956, P. L. (1955) 1968, added Section 9.1 (24 P. S. § 2122.1), School Employes' Retirement System Act, the Act of July 18, 1917, P. L. 1043, 24 P. S. §§ 2081-2141. This section provides for limited integration of the social security benefits and Public School Employes' Retirement System. Section 9.1 provides:

> "Where the Superintendent of Public Instruction enters into an agreement with the Commonwealth to place under Federal Social Security Act all employes of all school districts and joint schools, and departments in the Commonwealth, and other employes eligible for coverage thereunder, the Commonwealth shall pay on account of the school districts and joint schools and departments and on account of the employes thereof into the contribution fund created under the * * * [enabling legislation] such amounts and at such times as are required to be paid on account of such coverage.
>
> "The Commonwealth shall be reimbursed to the extent of the total amounts contributable by the employes and to one-half the amounts contributable by the school district, joint schools and departments."

This provision follows the same pattern as is presently applicable to payments made into the Public School Employes' Retirement Fund, whereby the Commonwealth contributes one-half and the school district contributes one-half of the employer's share of the contributions into the fund.

Since this act specifically states that the Commonwealth shall be reimbursed to the extent of one-half the amounts contributable by

the school district, joint schools and departments, we now reach the one question remaining, which is the specific subject of your inquiry: Can the school districts reimburse the Commonwealth for one-half of the employer's contribution for the period from the effective date of the agreement to the commencement of the next succeeding school year beginning after the date on which the agreement is signed, since that will be the first budget for which the various boards of school directors will have been forewarned and able to provide for such contributions.

The answer to this question must be in the affirmative unless there is some specific statutory or constitutional prohibition against such reimbursement since it has been clearly mandated by the Legislature. We know of no statutory or constitutional prohibition.

We are of the opinion, therefore, and you are accordingly advised that the several school districts of the Commonwealth not only have the authority but also the duty to reimburse the Commonwealth for one-half of the employer's contribution commencing with the effective date of the agreement.

Very truly yours,

DEPARTMENT OF JUSTICE,

STEPHEN B. NARIN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

FORMAL OPINION No. 682

Appropriation—Department of Welfare—Research and training in State-owned institutions—Commonwealth Mental Health Research Foundation—Act of June 1, 1956, Act No. 146-A.

An agreement between the Department of Welfare and the Commonwealth Mental Health Research Foundation for the payment of a portion of the department's general appropriation for the purpose of research and training in State-owned institutions is legal and proper and such payment may be made pursuant thereto.

Harrisburg, Pa., February 19, 1957.

Honorable Harry Shapiro, Secretary of Welfare, and Honorable Charles R. Barber, Auditor General, Harrisburg, Pennsylvania.

Sirs: You have requested this department to advise you as to the right of the Department of Welfare to enter into a contract with the Commonwealth Mental Health Research Foundation, under which $250,000.00 of the department's general appropriation will be paid to the Commonwealth Mental Health Research Foundation for the purposes of research and training.

The agreement contains several recitals, including the following:

> "WHEREAS, it is the desire of both the Foundation and the Department to coordinate their activities in the field of mental health and to work together under the supervision of the Foundation to best promote the purposes set forth in * * * [the Commonwealth Mental Health Research Foundation Act and the department's general appropriation act]."

Thereafter, the agreement provides that upon the execution of the agreement the department will pay to the Foundation $250,000.00 in return for which the Foundation will supervise, regulate and administer the program of the department for training personnel in psychiatry, including social work, psychology, occupational and recreational therapy and all other related work in the field of mental health, and will supervise, regulate and administer the department's program of research into the causes of mental illness, methods of treating the mentally ill and the effect and use of drugs in the field of mental health.

The general appropriation act of the Department of Welfare, Act No. 146-A, approved by the Governor June 1, 1956, appropriates a lump sum of $143,550,000.00 to the Department of Welfare for the various purposes set forth in the act, including "for research and training in existing State-owned and State-aided institutions under the regulations of the department." There is set aside in the department's budget for the 1955-57 biennium $500,000.00 for research and training in the field of mental health.

The Commonwealth Mental Health Research Foundation was created by the Act of May 21, 1956, P. L. (1955) 1642. Section 2 of the act provides that the Foundation is an instrumentality of the Commonwealth, and the exercise by the Foundation of powers and duties conferred upon it shall be deemed and held to be an essential governmental function of the Commonwealth. Section 3 provides that the purpose of the Foundation shall be to support, encourage, and finance research of every nature and description in the field of mental health, including all aspects thereof or related thereto, and to train men in the field of mental health. Section 6 of the act provides that the programs of

research and of training men in the field of mental health shall be carried out only in mental institutions under the jurisdiction of the Department of Welfare. Section 8 of the act authorizes the Foundation to accept gifts or grants from any source whatsoever.

The management of the Foundation is entrusted to a Board of Trustees of eleven members, two of whom are the Governor and the Secretary of Welfare, and the act directs the Secretary of Welfare to appoint a Research Advisory Committee of nine members, six of whom shall be selected from six named medical schools, colleges or mental institutions having active research departments. The act thus provides for a very close relationship between the Foundation and the Department of Welfare.

We have been informed that the money is needed by the Foundation to engage proper and competent personnel to develop and supervise the research programs in state mental hospitals, and to train personnel in the field of mental health and allied areas for such state mental hospitals.

Although this department has been informed by the State Treasurer and the Auditor General that it is not customary to make advance payments such as the one contemplated by this contract, and although this department does not pass on the wisdom of making such payments, we know of no statutory or other prohibition thereof, and we feel that such a payment is authorized by the department's general appropriation act.

It should also be noted that under the provisions of Section 403 of The Fiscal Code, the Act of April 9, 1929, P. L. 343, as amended, which governs audits of agencies receiving state aid, the expenditure of such money by the Foundation will be subject to audit by the Department of the Auditor General.

It is, therefore, the opinion of this department, and you are accordingly advised, that the agreement providing for the Department of Welfare to pay to the Commonwealth Mental Health Research Foundation a portion of its general appropriation for the purpose of research and training in State-owned institutions is perfectly legal and proper and such payment may be made pursuant thereto.

Very truly yours,

STEPHEN B. NARIN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

FORMAL OPINION No. 683

Department of Welfare—Training program—Salary payments to employees during training periods—Act of June 1, 1956, Act No. 146-A.

Salary payments may properly be made to employees of the Department of Welfare who are being trained in educational institutions in graduate work in the fields of clinical psychology, nursing education, occupational therapy, rehabilitation, social work and teaching of retarded children, pursuant to the research and training program established by the department, where the employee has executed an agreement of employment.

The General Appropriation Act of June 1, 1956, Act No. 146-A, which includes an appropriation for research and training in existing State-owned and State-aided institutions, constitutes a valid exercise of legislative authority, since the training received by employees contributes to their efficiency as public employees and benefits the taxpayers, and the employment and training program adopted by the department is a proper and legal implementation of the act.

Harrisburg, Pa., March 14, 1957.

Honorable Harry Shapiro, Secretary of Welfare, and Honorable Charles R. Barber, Auditor General, Harrisburg, Pennsylvania.

Sirs: You have requested this Department to advise you if payment should be made to the employees specified in Voucher Transmittal No. V. T. 12, dated February 5, 1957, for services performed during those periods of their employment during which they are being trained in educational institutions pursuant to the research and training program established by the Department of Welfare.

These employees are all employed by the Commonwealth on a full time basis. Each was originally employed for a fixed term during a part of which he is obligated to undergo training to better qualify him to perform service for the Commonwealth. He is also required to render additional services to the Commonwealth during the period of his training as well as thereafter. The term of employment is approximately twice the length of the period during which the employee received the aforesaid training. At the time of their original employment the Department of Welfare required each of these employees to enter into a written agreement prepared by the Department of Welfare. The form of this agreement was incomplete and did not accurately reflect the terms of the employment in the following particulars: it did not correctly define the terms of the employment nor bind the employees to continue in the employment of the Department during the entire term; it did not make clear that the training was incidental to and a part of the employment; it did not define the duties of the employee to render continuous service to the Commonwealth during periods of the year when he is not receiving training in an edu-

cational institution; and it imposed a penalty upon the employee equal to all salary paid to him and expenses incurred in connection with his training for breach of the agreement, which penalty was inconsistent with his status as an employee. When this agreement came to the attention of the Department of Justice it was completely revised in the form of a confirmatory letter to conform the written agreement to the actual agreement of the parties and to law. A copy of the revised agreement is attached hereto as Exhibit "A".

The training of these employees consists of graduate work in the following fields: clinical psychology, nursing education, occupational therapy, rehabilitation, social work, or the teaching of retarded children. The periods during which training is required range from one to four years and the periods of obligated employment consequently range from two to eight years, including the period of training. During the period of training, all required clinical practice and field work must be performed primarily in Department of Welfare institutions and secondarily in State-aided institutions. During those periods of the year when the institution in which he is receiving academic instruction is not in session, the employee is assigned to a departmental institution.

The agreements provide that the employees shall pay all expenses in connection with their training except for tuition, which will be paid by the Commonwealth. They further set forth reduced salary schedules until the employee has completed the required training, and thereafter salaries equal to the then current salary schedule of the Department for employees with comparable skill, experience and service. During the period of training it is specifically provided as a condition of employment that an academic standing be maintained satisfactory to the proper authorities of the educational institution at which the training is being received.

The program under which these persons are employed is necessitated by an acute shortage of trained professional and technical personnel in Commonwealth institutions that can only be alleviated by this type of an on-the-job training program. There is no question that the Department of Welfare carries a great public responsibility and performs vital functions in the operation of our government. It is just as necessary for the Department of Welfare to train employees as it is for the Pennsylvania State Police or any other department of the State government. The fact that particular individuals receive educational training as a part of this program is incidental to the primary purpose of the Department to recruit and train qualified professional and technical personnel. These individuals are not being paid to go to school. They are employed for specific types of jobs and are sent

to educational institutions in order to train them to perform their present duties more efficiently, and also to perform additional duties. They remain Commonwealth employees while in attendance at these educational institutions. See: *Otten v. State,* 229 Minn. 488, 40 N. W. 2d 81 (1949); *Krause v. Trustees of Hamline University,* 243 Minn. 416, 68 N. W. 2d 124 (1955); *Carraway Methodist Hospital, Inc. v. Pitts,* 256 Ala. 665, 57 So. 2d 96 (1952); *Sbarbaro v. United States,* 112 F. Supp. 93 (E. D. Pa. 1953); *Bellview v. United States,* 122 F. Supp. 97 (D. Vt. 1954). The Commonwealth could even go so far as to establish its own school for the training of such employees if deemed necessary.

We have been informed that a similar program has been in effect in the Department of Welfare on a smaller scale since 1943, and other departments, such as the Pennsylvania State Police and the Department of Public Assistance, do presently and have at various times in the past conducted personnel training programs on both individual and group bases.

The General Appropriation Act of the Department of Welfare for the 1955-57 biennium, Act No. 146-A, approved by the Governor on June 1, 1956, appropriates $143,550,000.00 to the Department of Welfare for the various purposes set forth in the act, including "for research and training in existing State-owned and State-aided institutions under the regulations of the department." There is set aside in the Department's budget for the 1955-57 biennium $500,000.00 for such research and training.

There is no legal prohibition against the expenditure of State funds for this purpose as set forth in the appropriation. The employment comprehended by the aforesaid agreements clearly falls within its terms.

The only possible legal objection to the appropriation is Article III, Section 18, of the Constitution of Pennsylvania which provides that:

> "No appropriations shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association; * * *"

This constitutional provision has no application to the question under consideration and does not impair or affect the validity of the aforesaid appropriation and agreements entered into pursuant thereto. This appropriation is not an appropriation to any person for educa-

tional purposes, but is, rather, an appropriation to the Department of Welfare for the proper purposes and functions of the Department.

In *Loomis v. Philadelphia School District Board of Education*, 376 Pa. 428, 103 A. 2d 769 (1954), the Supreme Court of Pennsylvania held that a statute authorizing the Commonwealth to grant annual military leaves of absence without loss of pay, time or efficiency to employees in reserve components of the armed forces did not provide for a gratuity and did not violate Article III, Section 18, because such training contributes to their efficiency as public employees and the taxpayers thus benefit therefrom. Similarly, the training received by these employees contributes to their efficiency as public employees; and the taxpayers benefit both directly in the improvement of each individual's service and indirectly in the improvement of the overall operation and program of the Department of Welfare.

It is, therefore, the opinion of this Department, and you are accordingly advised, that the above appropriation is a constitutional exercise of legislative authority and the employment and training program adopted by the Department of Welfare as herein described is a proper and legal implementation of said appropriation act. You are further advised that salary payments may properly be made to each of the employees specified in Voucher Transmittal No. V. T. 12, dated February 5, 1957, upon certification by the Department of Welfare that such employee has executed the revised agreement.

Very truly yours,

DEPARTMENT OF JUSTICE,

STEPHEN B. NARIN,
Deputy Attorney General.

EDWARD FRIEDMAN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

March 11, 1957

Dear :

All of the terms and conditions of the agreement under which you are presently employed by the Department of Welfare as _____ _____ are hereby clarified and confirmed.

Your employment pursuant to said agreement began on _____ _____ to continue until _____, a period of ____ years.

In connection with your employment and during the first _____ years thereof you are to be trained in the field of _____ at _____. In connection with said training you shall perform clinical practice and field work in state-owned or state-aided institutions. All expenses in connection with said training shall be paid by you except your tuition which will be paid by the Commonwealth.

As compensation for services rendered you are to receive a salary of _____ dollars ($) bi-weekly until completion of the first year of your training; _____ dollars ($) bi-weekly until completion of the second year of your training; _____ dollars ($) bi-weekly until completion of the third year of your training; and _____ dollars ($) bi-weekly until completion of the fourth year of your training and thereafter for the remaining contract period a salary equal to the then current salary schedule of the Department for employees with comparable skill, experience and service.

It is specifically understood that as a condition to the continuance of your employment hereunder you shall maintain an academic standing satisfactory to the proper authorities of the educational institution at which you are taking your training during the period of your attendance. Your failure to do so shall constitute sufficient grounds for termination of your employment by the Department.

Kindly confirm the aforesaid restatement of our agreement by signing the enclosed copy of this letter where indicated and returning it to us at your earliest convenience.

It is hereby understood and agreed that this confirmatory letter as accepted by you constitutes a valid and binding contract between yourself and the Commonwealth of Pennsylvania as of the date of your initial employment as set forth above and that you intend to be legally bound hereby.

Very truly yours,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF WELFARE

By: _____

Harry Shapiro
Secretary of Welfare

ACCEPTED:

_____

Employee

Exhibit "A"

FORMAL OPINION No. 684

Auditor General—Firemen's relief fund associations—Audit of accounts—Act of June 28, 1895, P. L. 408, as amended—The Fiscal Code, § 403—Informal opinion No. 1181 overruled.

The Department of the Auditor General is empowered and has a duty to audit the accounts and records of firemen's relief fund associations which receive monies derived from the premium tax on foreign fire insurance companies under the Act of June 28, 1895, P. L. 408, as amended.

Informal opinion No. 1181, promulgated July 10, 1941, is overruled.

Harrisburg, Pa., April 12, 1957.

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

Sir: You have inquired whether or not The Fiscal Code requires the Auditor General to audit the accounts and records of firemen's relief fund associations which receive funds from the Commonwealth under the provisions of Section 2 of the Act of June 28, 1895, P. L. 408, as amended (72 P. S. § 2262).

The Act of June 28, 1895, P. L. 408, as amended, provides that the State Treasurer shall pay to the treasurers of the several cities, towns, townships and boroughs within the Commonwealth the entire net amount received from the two per centum tax paid upon earnings by foreign fire insurance companies. The amount to be paid to each such city, town, township or borough shall be proportionate to the premiums received by such insurance companies on account of insurance written upon property located in such city, borough, town or township.

Under the aforesaid statute, the funds received by the municipal treasurers are to be forthwith delivered over to paid or volunteer firemen's relief fund associations duly recognized by the city or borough council or the township commissioners or supervisors or to the pension

fund covering the employees of the fire department of such municipalities.

The Auditor General's powers to audit the accounts and records of agencies receiving funds from the Commonwealth are set out in Section 403 of The Fiscal Code, Act of April 9, 1929, P. L. 343, 72 P. S. § 403, which provides:

> "The Department of the Auditor General shall have the power, and its duty shall be, to audit the accounts and records of every person, association, corporation, and public agency, receiving an appropriation of money, payable out of any fund in the State Treasury or entitled to receive any portion of any State tax for any purpose whatsoever, as far as may be necessary to satisfy the department that the money received was expended or is being expended for no purpose other than that for which it was paid. Copies of all such audits shall be furnished to the Governor.
>
> "If at any time the department shall find that any money received by any person, association, corporation, or public agency, has been expended for any purpose other than that for which it was paid, it shall forthwith notify the Governor, and shall decline to approve any further requisition for the payment of any appropriation, or any further portion of any State tax, to such person, association, corporation or public agency, until an amount equal to that improperly expended shall have been expended for the purpose for which the money improperly expended was received from the State Treasury."

The foregoing provisions of The Fiscal Code place a duty upon the Department of the Auditor General to audit the accounts and records of firemen's relief fund associations which receive monies derived by the Commonwealth from the premium tax on foreign fire insurance companies. Under this section of The Fiscal Code, the accounts and records of every recipient of a portion of any State tax shall be audited by the Department of the Auditor General whether such recipient is a private person, association or corporation or a public agency. In this case, the firemen's relief fund associations are recipients of monies payable out of a fund of the State Treasury which monies are derived from a State tax.

Any suggestion that the municipalities are the recipients of these funds and that the Department of the Auditor General is limited to auditing the accounts and records of such municipalities merely to see that they have paid such funds over to the relief associations is unrealistic and would defeat the object of Section 403 of The Fiscal Code. The object of Section 403 as expressly stated therein, is to

assure that public funds are expended for proper purposes. Since the municipalities themselves do not expend the funds, the auditing of their accounts would not achieve the intended purpose of the law. Section 2 of the Act of June 28, 1895, P. L. 408, as amended, requires the municipalities to forthwith pay such funds over to the relief fund associations thereby leaving no discretion in the municipalities with respect to the disposition of such monies. Within the intendment of this statute, the relief fund associations and not the municipalities are, in fact, the recipients of such funds.

The Department of the Auditor General in auditing firemen relief associations must satisfy itself that "the money received was expended or is being expended for no purpose other than that for which it was paid." The Act of June 28, 1895, P. L. 408, as amended, does not expressly state the purposes for which such funds may be used by relief fund associations; however, the Superior Court of Pennsylvania in *Commonwealth v. Souder,* 172 Pa. Super. 463, 470, 93 A. 2d 458 (1953), recognized that under the aforesaid statute, the relief fund associations do not have complete freedom in the use of such funds. The Department of the Auditor General in making audits of the accounts and records of relief fund associations should, of course, take cognizance of the statement of the Superior Court in *Commonwealth v. Souder,* supra, at page 470 that "The manner in which the [relief] fund was to be set up or administered was left by the Legislature to the municipalities."

In view of the foregoing considerations, it is the opinion of this department that the Department of the Auditor General is empowered and has a duty to audit the accounts and records of firemen's relief fund associations which receive monies derived from the premium tax on foreign fire insurance companies under the Act of June 28, 1895, P. L. 408, as amended.

This opinion overrules Informal Opinion No. 1181 promulgated by the Attorney General on July 10, 1941.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

EDWARD L. SPRINGER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

FORMAL OPINION No. 685

Volunteer police officers—Authority of Governor to appoint and commission—Act of July 18, 1917, P. L. 1062.

The Governor of the Commonwealth is without authority to appoint and commission volunteer police officers under the provisions of the Act of July 18, 1917, P. L. 1062.

Harrisburg, Pa., April 16, 1957.

Honorable Earl J. Henry, Commissioner, Pennsylvania State Police, Harrisburg, Pennsylvania.

Sir: We are in receipt of your request for advice, dated March 25, 1957, in which you inquire as to the present status of the Act of July 18, 1917, P. L. 1062, 35 P. S. §§ 1421-1424, which relates to the appointment of volunteer police officers. Your department has the responsibility for processing applications for such appointment and, specifically, you ask whether the Governor has authority to appoint and commission volunteer police officers at the present time.

Section 1 of the act in question (35 P. S. § 1421) provides:

> "Upon application to the Governor of the Commonwealth, the said Governor is hereby authorized, immediately after the passage of this act, and at any time during the continuance of the present war with Germany, or in any war in which this Nation may become involved, to appoint and commission, at his discretion, such number of volunteer police officers, to serve without pay, in the several counties as may be deemed necessary. In all cities, boroughs and townships where there is a duly constituted police department or police commission, such volunteer police officers shall be under, and subject to the authority and direction of such department or commission. In all other cases the said Governor shall designate and appoint such officials, or official person or persons, to advise and direct the said police officers and services to be by them performed."

Section 4 of the same act (35 P. S. § 1424) also provides:

> "The police officers herein provided for shall be organized and disciplined especially for the purpose of the suppression of riots and tumults, and to preserve the public peace and safety; and shall be used whenever necessary to guard, protect, and preserve from injury and destruction by enemies of the Nation in the present war with Germany, or in any war in which this Nation may become involved, all railroads, railways, mines, oil-wells, chemical plants, light-, heat-, and power-plants, water-works and plants, iron-works, steel-plants, ammunition-plants, manufacturing plants, and all other industries, as well as all public works and public buildings."

From the above provisions it is clear that the Governor's power to appoint volunteer police officers can only be exercised during a time of war.

It is a fact, of which we take judicial notice, that at the present time the United States is not at war with or involved in war with any other nation.[1]

For the foregoing reasons we conclude and you are accordingly advised that at the present time the Governor of the Commonwealth is without authority to appoint and commission voluntary police officers under the provisions of the Act of July 18, 1917, P. L. 1062.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK P. LAWLEY, JR.,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

FORMAL OPINION No. 686

Public assistance—Nursing home care—Direct payments to sectarian or denominational nursing homes—Constitution, Article III, Section 18—Act of June 24, 1937, P. L. 2051, Section 2, as amended.

Payments on behalf of individuals eligible to receive financial assistance for nursing home care under the Public Assistance Law, the Act of June 24, 1937, P. L. 2051, section 2, as amended, which are made directly to sectarian or denominational nursing homes, do not contravene Article III, Section 18, of the Constitution because such payments are made pursuant to a governmental function and, in effect, to specified individuals, since granted in their behalf and for their benefit.

Harrisburg, Pa., April 22, 1957.

Honorable Ruth Grigg Horting, Secretary of Public Assistance, Harrisburg, Pennsylvania.

Madam: We are in receipt of your letter in which you request advice as to whether direct payments for nursing home care can lawfully

[1] See and compare Formal Opinion No. 675, dated November 14, 1956, 1955-56 Op. Atty. Gen. 80 in which it was held that the present time is not a period of war or contemplated war within the meaning of the Act of June 7, 1917, P. L. 600 (65 P. S. § 111) authorizing military leave.

be made to sectarian or denominational nursing homes, on behalf of those entitled to receive financial assistance for nursing home care by virtue of the Act of May 15, 1956, P. L. (1955) 1573 which amends Section 2 of the Act of June 24, 1937, P. L. 2051 as amended, 62 P. S. § 2502. In that letter you refer to the fact that the Social Security Administration of the Federal Department of Health, Education and Welfare will not consider any nursing home care plan eligible for partial reimbursement from Federal funds unless the payments for such care are made directly to the nursing home and not to the individual receiving nursing home care.

Section 2 of the Act of June 24, 1937, as amended by the Act of May 15, 1956, P. L. (1955) 1573, provides as follows:

> "* * * The word, assistance, shall also be construed to include sufficient financial assistance to enable physically disabled persons who require nursing home care, as prescribed by responsible physicians, to secure adequate nursing home care even though the rate of such assistance may be greater than the usual rate of assistance to persons who do not need nursing home care."

Section 2 of the amendatory Act of 1956, supra, provides as follows:

> "The sum of three million dollars ($3,000,000), or as much thereof as may be necessary, is appropriated to the Department of Public Assistance, for the purpose of providing adequate nursing home care, in accordance with the provisions of the act to which this is an amendment, from March 1, 1956."

The legality of direct payments for nursing home care to sectarian nursing homes involves the provisions of Article III, Section 18 of the Constitution of Pennsylvania which provide as follows:

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

Since there is no question but that grants made to needy individuals pursuant to the "Public Assistance Law," the Act of June 24, 1937, P. L. 2051, as amended, 62 P. S. §§ 2501-2516, are an exercise of a governmental function, the only pertinent inquiry is whether payments on behalf of individuals eligible to receive financial assistance for nursing home care made to sectarian or denominational nursing homes contravenes Article III, Section 18 of the Constitution.

This section of our Constitution has been considered by the Supreme Court on various occasions: *Collins v. Kephart,* 271 Pa. 428, 117 Atl. 440 (1921); *Busser v. Snyder,* 282 Pa. 440, 128 Atl. 80 (1925); *Collins v. Martin,* 290 Pa. 388, 139 Atl. 122 (1927); *Commonwealth ex rel. Schnader v. Liveright,* 308 Pa. 35, 161 Atl. 697 (1932); and in *Schade v. Allegheny County Institution District,* 386 Pa. 507, 126 A. 2d 911 (1956).

In *Collins v. Kephart,* supra, the Supreme Court struck down certain appropriations to institutions found to be sectarian. On page 433 of its opinion, the court said:

> "* * * The intent of these provisions was, and therefore still is, to forbid the state from giving, either directly or indirectly, any recognition to a religious sect or denomination, even in the fields of public charity and education; they in effect provide that, to serve charitable, educational or benevolent purposes, *the money of the people shall not be put under denominational control or into sectarian hands, for administration or distribution, no matter how worthy the end in view.*" (Emphasis supplied)

Collins v. Martin, supra, extended the doctrine of the *Kephart* case, supra, to enjoin lump sum payments by the Department of Welfare to sectarian hospitals for the care of indigent sick persons in those hospitals. The court in the *Martin* case, supra, said at pages 398-399:

> "As to the second proposition: it is true the department of welfare is an agency of government and not a sectarian or denominational institution; though, if the State's contention be correct, it might easily become one. It is urged that there is lodged in it power to secure any non-state owned hospital it chooses, regardless of article III, section 18, to execute the purpose expressed in the Act of 1925, and the department alone controls the expenditure of the money appropriated. This is a unique presentation, but where does it lead us? *Imagine the appropriation of millions to a state-created agency to be spent at its discretion in defiance of the Constitution! For illustration, suppose an appropriation of millions to the department of education to be used for educational purposes, as is now the case, and that department could contract with sectarian institutions for the education of our youth in such institutions, instead of providing this education through the means of the public schools. The grip that could be thus laid on state finances would soon become a matter of church polity, wherein all efforts directed against church control, so much feared by the framers of the Constitution, would be paralyzed.* The mere statement of the possibilities that follow in the wake of such construction should be sufficient answer to this contention. Observe further as

the present case, under the Commonwealth's contention, demonstrates. The act has placed in the hands of one person the sum of one million dollars ($1,000,000) with unlimited power to distribute it among nonstate owned hospitals for the treatment and maintenance of the indigent sick, or, in other words, for charitable purposes. The individual at the head of this department could select only hospitals of the faith of appellant, and after the accommodations of such hospitals became adjusted to continue the work, a new officer might be appointed, who, through prejudice, bigotry or other cause, would select non-state owned hospitals of other faiths, or of no particular faith, and deny to those of appellant's faith any right to participate in the fund appropriated. Can it be doubted for a moment that a circumstance of like nature was one of the reasons which caused the framers of the Constitution to place therein the section now under discussion?" (Emphasis added)

In both the *Kephart* and *Martin* cases, supra, the court was concerned with the question of lodging in the legislature or an executive department, the power of appropriating public moneys to sectarian institutions in contravention of the express prohibition of Article III, Section 18 of the Constitution of Pennsylvania. In both cases the court struck down the appropriation insofar as they were designed to benefit sectarian institutions. The *Liveright* and *Busser* cases, supra, although not concerned with appropriations to sectarian institutions, reaffirm the principles laid down in the *Kephart* and *Martin* cases, supra.

In the recent case of *Schade v. Allegheny County Institution District*, supra, the Supreme Court held that payments to sectarian institutions by County Institution Districts for the care of minor children committed by the juvenile court did not offend Article III, Section 18 of the Constitution of Pennsylvania. The court said on pages 511-512 of its opinion in the *Schade* case, supra:

"We, therefore, choose to bottom our decision on the ground that payments made by the Institution District for the support and maintenance of neglected or dependent children, who are under the jurisdiction and control of the Juvenile Court, are not appropriations within the meaning of that term as employed in Section 18 of Article III. Indeed, they were not appropriations at all within the most extended scope of the term. This view is so cogently set forth in the concurring opinion that we cannot do better than quote therefrom as follows: '. . . the plaintiffs have failed to prove any appropriations have, and are being made by [the Institution District] for charitable, educational or benevolent purposes to any denominational or sectarian institutions, or that any

public funds are administered through such forbidden channels, or put under their control as an aid to such institutions.

'The cost of the maintenance of neglected children either by the State or the County is neither a charity nor a benevolence, but a governmental duty. All the plaintiffs proved was that the monies received by the defendant institutions were in partial reimbursement for the cost of room and board of such minors. The services had been rendered before partial payment on account of same was received. A considerable part of this money is recouped by the Juvenile Court from the parents of these minor wards. The balance of the funds so expended are, in legal effect, payments to the child—not the institution supporting and maintaining him or her. [See *Cochran v. Board of Education,* 281 U. S. 370, 374-375] . . .

'The Constitution does not prohibit the State or any of its agencies from doing business with denominational or sectarian institutions, nor from paying just debts to them when incurred at its direction or with its approval. Numerous cases can be readily visualized where such situations have occurred: i. e., payment of the bill of an injured employe to a sectarian hospital.' "

The *Schade* case, supra, permits payments made by a governmental body in pursuance of a governmental function on behalf of and for the benefit of specified individuals to sectarian or denominational institutions on the theory that such payments are payments to the individual.

Therefore, this department is of the opinion, and you are accordingly advised, that direct payments to sectarian or denominational nursing homes pursuant to Section 2 of the Public Assistance Law, supra, does not offend the Constitution of Pennsylvania and such payments may be made by your department at the request of needy persons applying for financial assistance for nursing home care.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. COHEN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINIONS
1957

OFFICIAL OPINION No. 1

Unfair cigarette sales—Act of May 20, 1949, P. L. 1584—Cigarettes—Trading stamps—Department of Revenue.

It is not a violation of the Unfair Cigarette Sales Act to give trading stamps with the sale of cigarettes at retail when they are issued in good faith with all merchandise on a uniform basis as a general business practice and not as a subterfuge for the purpose of evading the act.

Harrisburg, Pa., August 27, 1957.

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

Sir: You have requested this department to advise you if it is a violation of the Unfair Cigarette Sales Act, the Act of May 20, 1949, P. L. 1584, 73 P. S. §§ 231.1-231.5, for a cigarette dealer to give trading stamps in connection with the sale of cigarettes at retail.

Section 3 of the Unfair Cigarette Sales Act makes it unlawful for any retailer, with intent to injure competitors or destroy or substantially lessen competition, to advertise, offer to sell or sell cigarettes at less than cost to such retailer.

Cost to the retailer is defined as his basic cost of cigarettes plus his cost of doing business and must include, without limitation, labor costs including salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, and all types of licenses, insurance and advertising. In the absence of proof of a lesser or higher cost of doing business by the retailer making the sale, his cost of doing business is presumed to be 6% of the basic cost of the cigarettes to him. It would, of course, also include the cost of the trading stamps.

Basic cost of cigarettes is defined as the invoice cost of the cigarettes or the replacement cost within thirty days prior to the date of sale in the quantity last purchased, whichever is lower, less all trade discounts and customary discounts for cash, to which shall be added the full face value of any cigarette tax not already included in the price.

As a practical matter, with respect to a retailer who sells items other than cigarettes, it is almost impossible to compute his actual "cost to the retailer." Therefore, in order to determine the minimum price at which he may sell cigarettes the retailer adds 6% thereof to

his basic cost of cigarettes. For example, if his net invoice cost is 15¢ per pack and there is a tax of 5¢ per pack the basic cost of the cigarettes is 20¢ per pack to which is added 6% thereof or 1 and 2/10 cents per pack making a minimum retail price of 21 and 2/10 cents per pack; thus, one pack could be sold for 22¢ or more; two packs for 43¢ or more; three packs for 64¢ or more; four packs for 85¢ or more, and five packs for $1.06 or more.

If the value of the trading stamps to be given with each pack of cigarettes in any particular case is less than the difference between the minimum price at which that pack of cigarettes can be sold and the selling price, which in many cases will be the next higher even cent, the trading stamps can, without question, be given with the cigarettes, since even if the value of the stamps is deducted from the selling price of the cigarettes the remaining price is still more than the minimum price at which the cigarettes can be sold, and there can be in such a situation no violation of the provisions of the Unfair Cigarette Sales Act. However, the question arises in the case where the value of the trading stamps is greater than the difference between the minimum price at which the cigarettes can be sold and the selling price. Returning to our earlier example, we find that the minimum price at which five packs of cigarettes could be sold would be $1.06 even. Therefore, if trading stamps were given with the sale of five packs of cigarettes at $1.06, the value of those trading stamps deducted from the selling price of the cigarettes would result in a selling price lower than the minimum price at which the cigarettes could be sold. The question would thus be limited to whether a sale of cigarettes under such circumstances is a sale at less than cost to the retailer if such an inquiry were not precluded by existing decisions of the Pennsylvania Supreme Court in an analogous area.

If this question were being approached without the benefit of any appellate cases in Pennsylvania, it could be argued that the giving of trading stamps in this situation was the equivalent of a discount and, therefore, that the value of the stamps would have to be considered in determining whether or not the cigarettes were being sold above, at, or below the cost to the retailer. However, there are two Pennsylvania Supreme Court cases both holding, under the Pennsylvania Fair Trade Act, the Act of June 5, 1935, P. L. 266, as amended, that trading stamps, when issued in good faith with all merchandise as a general business practice and not as a subterfuge for the purpose of evading the act, are not a price-cutting device but rather a form

of advertising: *Gever v. American Stores Co.*, 287 Pa. 206, 127 A. 2d 694 (1956); *Bristol-Myers Co. v. Lit Brothers, Inc.*, 336 Pa. 81, 6 A. 2d 843 (1939). In the *Gever* case, the Court speaking through Mr. Chief Justice Horace Stern stated (p. 212):

> "Viewed realistically, the giving of trading stamps may be regarded as nothing more than the equivalent of a normal cash discount, which is merely a term of payment and not a price reduction. Indeed, in a sense, the stamps have no value in themselves but acquire it only if the stipulated amount of other purchases is made. They cannot be regarded as cutting prices any more than free delivery service or free parking could be so regarded although these are practices which obviously save money for the customers of stores offering such advantages. Accordingly, the use of trading stamps, pursued as a general business practice by a commercial establishment, does not violate either the letter or the spirit of the Fair Trade Act."

Section 4 of the Unfair Cigarette Sales Act does not refer specifically to trading stamps, nor does the Pennsylvania Fair Trade Act. In the *Gever* case, the Court noted that subsequent to its decision in the *Bristol-Myers Company* case, the Legislature amended the Milk Control Law of April 28, 1937, P. L. 417, by the Act of July 24, 1941, P. L. 443, and added a specific provision barring the use of trading stamps as a method or device whereby milk would be sold at a price less than the applicable minimum price, thus showing that when the Legislature wished to ban trading stamps in connection with the sale of a fixed price article, it indicated such intention by an express provision to that effect. No such amendment has been made to the Pennsylvania Fair Trade Act nor to the Unfair Cigarette Sales Act, which itself was passed approximately ten years after the *Bristol-Myers Company* case had been decided.

It should also be noted that Mr. Justice Drew wrote a vigorous dissent in the *Bristol-Myers Company* case in which he was joined by Mr. Chief Justice Kephart, but that the *Gever* case was decided by a unanimous Court.

Although both the *Bristol-Myers Company* case and the *Gever* case were decided under the Fair Trade Act and this opinion is concerned with the Unfair Cigarette Sales Act, the rationale of those cases is completely applicable to the question here involved and we feel bound by those decisions.

It is, therefore, the opinion of this department and you are accordingly advised that it is not a violation of the Unfair Cigarette Sales

Act to give trading stamps with the sale of cigarettes at retail when they are issued in good faith with all merchandise on a uniform basis as a general business practice and not as a subterfuge for the purpose of evading the act, even though by deducting the value of the stamps from the price of the cigarettes a figure is arrived at which is less than the cost to the retailer.

Very truly yours,

DEPARTMENT OF JUSTICE,

STEPHEN B. NARIN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 2

State employees—Act of July 8, 1957, P. L. 557—"Regularly employed" defined.

Where incidents of employment are steady and uniform in recurrence the employment is regular within the meaning of the Veterans Preference Act of 1957.

State employees—Act of July 8, 1957, P. L. 557—Military leaves of absence.

Persons regularly employed, who are otherwise qualified and who were drafted after July of 1953, must be granted military leave of absence as of the date on which they were drafted if they are still serving their term of military service.

State employees—Act of July 8, 1957, P. L. 557—Military leaves of absence—Replacements hired for those entitled to.

Persons subsequently hired to replace those now entitled to military leave enjoy a status dependent upon the terms of their employment.

State employees—Act of July 8, 1957, P. L. 557—Military leaves of absence—Contributions to retirement fund.

Hourly and per diem employees who are granted military leaves of absence and who are members of the retirement system may pay into the retirement system an amount determined by an average of their contributions for an established period prior to their entrance into military service.

Harrisburg, Pa., September 5, 1957.

Honorable John H. Ferguson, Secretary of Administration and Budget Secretary, Governor's Office, Harrisburg, Pennsylvania.

Sir: You have requested an opinion as to the proper interpretation of the Act of July 8, 1957, P. L. 557, 51 P. S. §§ 493-1 to 493.9 known as the "Veterans Preference Act of 1957." You inquire specifically as to whom the words "regularly employed" apply and more particularly if hourly and per diem employees employed for less than 750 hours or 100 days per annum are eligible for military leaves of absence, and whether hourly or per diem employees employed for greater periods per annum are similarly eligible.

The Act of May 28, 1937, P. L. 1019, Article III, § 33, 46 P. S. § 533, states that words and phrases shall be construed according to their common and approved usage, but technical words and phrases and such others as have acquired a peculiar and appropriate meaning or are defined in the act, shall be construed according to such peculiar and appropriate meaning. Of course, the troublesome word is "regularly." In Webster's New International Dictionary, Second Edition, page 2099, the word "regularly" is defined as:

> "In a regular, orderly, lawful, or methodical way; ***"

On this same page we find the word "regular" defined as follows:

> "3. Steady or uniform in course, practice, or occurrence; not subject to unexplained or irrational variation; returning or recurring at stated or fixed times or uniform intervals; * * *"

This particular definition has been approved by several courts: *Bankers & Shippers Ins. Co. of New York v. Blackwell,* 260 Ala. 463, 71 So. 2d 267, 270 (1954); *Ellis v. Stokes,* 207 Ga. 423, 61 S. E. 2d 806, 809 (1950). In addition, the Supreme Court of Pennsylvania in *Zulich et al v. Bowman,* 42 Pa. 83, 87 (1862), relied upon Webster's Dictionary to determine the meaning of the adverb "regularly."

In *Miller v. Farmers Nat. Bank et al.,* 152 Pa. Super. 405, 33 A. 2d 646 (1943), the Court was called upon to define "regular employee," in connection with a workmen's compensation claim. The facts indicated that the decedent was a paperhanger and painter and was directed by the bank to repaint the walls and ceilings of parts of the building. The decedent was to be paid for services at an hourly rate. The contemplated work would require from eight to ten weeks for completion. Some work of a like nature was done in the building each year in accordance with a definite maintenance program and for a number of years the decedent was employed to do all of this class of work. The Court found that the decedent, though his services were intermittent, was a regular employee of the bank. Judge Hirt stated at page 410:

> "* * * One may be a regular employee if he performs all of the work of a class which the employer can supply; full time employment is not essential to take the work out of the class of casual employment. In Cochrane v. William Penn Hotel, supra [339 Pa. 549, 16 A. 2d 44], Mr. Justice Stern said: '* * * even though an employment is not continuous, but only for the performance of occasional jobs, it is not to be considered as casual if the need for the work recurs with a fair degree of frequency and regularity, and, it being thus anticipated, there is an understanding that the employee is to perform such work as the necessity for it may from time to time arise. Even if there be but a single or special job involved, this does not conclusively stamp the employment as casual. If the work is not of an emergency or incidental nature but represents a planned project, and the tenure of the service necessary to complete it and for which the employment is to continue is of fairly long duration, the employment is not casual, and it is immaterial that the accident to the employee for which compensation is sought may occur within a very short period after his entry upon the work.' * * * Tenure of service may persist throughout the year though the work provided is not continuous. * * *"

The case of *Cochrane v. William Penn Hotel,* 339 Pa. 549, 16 A. 2d 44 (1940), was cited by the Court in *Application of Gardner,* 26 Lehigh L. J. 524 (1956). Here the Court was called upon to determine whether the applicant for a detective license had been regularly employed as a detective. The Court was willing to assume that because the applicant worked about 300 hours a year on an hourly basis over a period of 3 to 5 years that this constituted regular employment. However, because there were only sporadic instances of true investigative work connected with the applicant's work, the Court was unable to conclude that he was regularly employed as a detective.

In addition, there are interpretations of the term "regularly employed" as this was used in the Act of June 7, 1917, P. L. 600, 65 P. S. § 111, a predecessor of the Veterans Preference Act of 1957. For example, a person employed as an extra stenographer was ruled not to be a regular employee: 1917-1918 Op. Atty. Gen. 299, 300. Similarly, a substitute called to perform the duties of one in military service was not considered to be regularly employed, for his tenure was dependent upon the return of the person whose place he was taking: 1917-1918 Op. Atty. Gen. 503. We also note that the Act of June 14, 1947, P. L. 609, amending § 222 of The Administrative Code of 1929, granted leave privileges to hourly and per diem employees at a rate of one day for each 200 hours of employment. There was no statutory requirement for a minimum number of hours or days per annum to qualify such employees for this benefit.

From the authorities above cited it is clear that no hard and fast rule can be set forth in defining the term "regularly employed." However, guide posts are set within which determinations in particular cases are to be made. The answer lies not in the quantum of work involved but in the steadiness and uniformity of recurrence of the employment.

In reaching this conclusion we have not overlooked the provisions of the Act of June 27, 1923, P. L. 858, as amended, 71 P. S. § 1731, which, for the purposes of State employees' retirement benefits, states:

> "The term 'State employe' shall also include officers and employes regularly employed on a per diem or hourly basis, or partly at a fixed annual or monthly salary and partly on a per diem or hourly basis. Regular employment shall not be construed to include employment of less than one hundred days or seven hundred fifty hours in any year. In all cases of doubt the retirement board shall determine whether any person is a State employe as defined in this paragraph, and its decision shall be final."

It is well established that a word or group of words may be given different interpretations in different statutes. The final interpretation depends on the context in which the word is used and, even more significantly, the purpose of the statute. In rejecting the limited definition of regular employment, quoted above, in favor of the more commonly accepted meaning, it should be borne in mind that the Veterans Preference Act of 1957 has two definite purposes. The first and predominant of these is to guarantee reemployment to persons leaving State positions for duty in the military service. In this respect the act is designed to replace the Act of June 7, 1917, supra. Under this latter act the term "regular employment" had received an interpretation in keeping with the common usage of the words.

The second purpose of the present act is to preserve retirement rights of persons who were called upon to perform military service. In this respect, the present act serves also as an amendent to the State Employes' Retirement Act, the Act of July 3, 1941, P. L. 244, §§ 1 and 2, 71 P. S. §§ 1756.1 and 1756.2. In this narrow respect only does the present act find a historical basis in the limited legislative interpretation of the words "regular employment."

An exact comparison of the two predecessor acts clearly illustrates that when the Legislature wanted to give the words "regularly employed" a more confined definition it freely did so. The failure to restrict these words in the Veterans Preference Act of 1957 lends

further weight to our conclusion that the more usual and liberal construction must be accepted, and that "regular employee," as used in the Veterans Preference Act, means one whose employment is steady and uniform in recurrence.

Your next inquiry refers to employees who were drafted after July 27, 1953, and who are still serving the term of military service for which they were drafted. Section 8 of the present Veterans Preference Act clearly sets forth that an employee otherwise eligible for military leave of absence shall be granted a military leave commencing on the date of his eligibility regardless of whether such date occurred before or after the enactment of this act. This modifies Formal Opinion No. 675, dated November 14, 1956, 1955-56 Op. Atty. Gen. 80. Such leaves will expire ninety days after the expiration of the period for which the employee was drafted.

In view of the clear wording of the statute, the answer to your second inquiry is that an otherwise qualified employee drafted after July of 1953 who is still serving the term of military service for which he was drafted should be granted a military leave of absence as of the date of his eligibility.

Your third inquiry is directed to the status of employees who were subsequently hired to replace persons now eligible for military leave. Basically, the answer to this question depends upon the terms of employment of these new employees. There is nothing in the Veterans Preference Act which purports to alter or change any existing employment rights of the substituting employees hired prior to the passage of the act. There is a presumption against retroactive application of any law: Section 56 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, Article IV, § 56, 46 P. S. § 556. If the new employees are covered by the provisions of the Civil Service Act of August 5, 1941, P. L. 752, as amended, 71 P. S. § 741, reference to this legislation will serve to answer many of the varying problems that might foreseeably arise.

Particular attention should be directed to Article VIII, § 802 of the Act of August 5, 1941, P. L. 752, as amended by the Acts of June 1, 1945, P. L. 1366, § 1, June 21, 1947, P. L. 835, § 1, and September 29, 1951, P. L. 1636, § 2. There provisions are made for the furloughing of employees where a reduction of force is necessary. If a veteran's return necessitates transfer of the substituting employee to an existing vacancy, there would, of course, be no problem. If, on the other hand, there is no existing vacancy, a situation would arise

calling for a reduction in force. In this instance § 802 could be utilized to solve the problem.

If a substitute employee holds an extra position or is in a probationary status under civil service, reference to pertinent provisions of the Civil Service Act will provide the solution to these problems as they arise.

Further, if a substitute employee is in the unclassified service, and it is impossible to transfer him satisfactorily upon the return of a qualified veteran, resort should be made to existing policy in the department, board or commission employing him.

Any substituting employee hired after the effective date of the Veterans Preference Act should be employed only as a temporary substitute. (See § 3 of this Act).

In your final question you attempt to ascertain the rate of payment to the retirement fund for hourly and per diem employees who are eligible for and who are granted military leaves of absence. Initially, in answering this question you should bear in mind that some hourly or per diem employees will be eligible for military leave of absence under the interpretation above and yet will not be members of the retirement system because of the narrow legislative interpretation in the Act of June 27, 1923, supra.

Assuming, however, that the person is both entitled to military leave and is a member of the retirement system, the only equitable means of determining his rate of payment would be to take the average payment he had made into the fund over a prior period to be determined by the retirement board. The board should establish a standard period, for example, one year. Then the total contributions of the employee during the year prior to his entry into military service could be divided by twelve to arrive at his average monthly contribution, or by four to determine his average quarterly contribution, etc. When this period is determined a uniform rule will be in effect, and the employee's payments to the fund for the period of his military leave can be made on this basis.

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

(1) Persons whose incidents of employment are steady and uniform in recurrence are regular employees within the meaning of the Veterans

Preference Act of 1957, even though they are employed on an hourly or per diem basis for less than 750 hours or 100 days per annum.

(2) Employees, otherwise qualified, who were drafted after July of 1953 and who are still serving the term of military service for which they were drafted must be granted a military leave of absence as of the date on which they were drafted.

(3) The status of employees who were subsequently hired and who are replacing those now entitled to military leave of absence depends upon the terms of employment of such subsequently hired persons; and

(4) Hourly and per diem employees who are eligible for and who are granted military leaves of absence and who are members of the retirement system may pay into the retirement system an amount determined by an average of their contributions for an established period prior to their entrance in military service.

Very truly yours,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 3

Corporations—Fictitious names—Similarity of names—Act of July 11, 1957, P. L. 783—Department of State.

A corporation may, under the provisions of the Fictitious Corporate Name Act, Act of July 11, 1957, P. L. 783, register any fictitious name as defined therein which the corporation in its registration application alleges to have been assumed prior to the effective date of the Fictitious Corporate Name Act, September 1, 1957, notwithstanding that such name is the same as, or deceptively similar to, the proper corporate name of a Pennsylvania corporation or of a foreign corporation authorized to do business in this Commonwealth.

A corporation may not, however, register under the Fictitious Corporate Name Act a fictitious name adopted on or after September 1, 1957, that is the same as, or deceptively similar to, the proper corporate name of a domestic corporation or of a foreign corporation authorized to do business in this Com-

monwealth, except where such name could be adopted by the corporation seeking registration as its proper corporate name pursuant to the provisions of the Business Corporation Law of May 5, 1953, P. L. 364, 15 P. S. §2852-1 et seq.

Harrisburg, Pa., September 5, 1957.

Honorable James A. Finnegan, Secretary of the Commonwealth, Department of State, Harrisburg, Pennsylvania.

Sir: You have requested our opinion as to whether a corporation either incorporated, domesticated or authorized to do business within this Commonwealth under the Business Corporation Law of May 5, 1933, P. L. 364, 15 P. S. §§ 2852-1 to 2852-1202, may, under the provisions of the Fictitious Corporate Name Act of July 11, 1957, P. L. 783, register a fictitious name which is the same as, or deceptively similar to, the proper corporate name of a domestic corporation or of a foreign corporation authorized to do business in this Commonwealth.

The Fictitious Corporate Name Act provides that a foreign or domestic corporation, either alone or in combination with any other entity[1], may not after September 1, 1957, conduct business in this Commonwealth under any fictitious name unless such corporation shall have first registered such fictitious name by filing an application in the office of the Secretary of the Commonwealth and in the office of the Prothonotary of the county wherein the registered office of such corporation is located[2]. A foreign corporation using a fictitious corporate name may register only after it has been authorized to carry on or conduct business under the laws of this Commonwealth[3].

The registration required under the statute is in addition to all other acts required of a corporation prerequisite to its doing business in this Commonwealth[4], and no provision of the statute may be construed as relieving a corporation of any duty under any other law[5]. Registration under the Fictitious Corporate Name Act imparts no legal right to the registering corporation except that the conducting of business by it under a registered fictitious name is not a violation of the act[6].

[1] The term "entity" is defined by Section 2 (5) of the Fictitious Corporate Name Act as "Any natural persons, corporation, association, partnership, joint-stock company, business trust, syndicate, joint adventureship or other combination or group of persons."

[2] § 5.

[3] § 10.

[4] § 23.

[5] § 23.

[6] § 24.

Prior to the enactment of the Fictitious Corporate Name Act, corporations in Pennsylvania using names other than their proper corporate name were not required to register such names. See our formal opinion to the Secretary of the Commonwealth dated April 24, 1930, 1929-1930 Op. Atty. Gen. 76, 13 D. & C. 524 (1930), in which this Department stated that for the purpose of administering the corporation laws, the Department of State must take the position that a Pennsylvania corporation cannot adopt or use a name other than that contained in the certificate of incorporation. This view is, of course, no longer applicable by reason of the adoption of the Fictitious Corporate Name Act. We also stated in that opinion that the Department of State may not register as an assumed or fictitious name of an individual, or of individuals, a name such as one concluding with "Inc." or "Incorporated" or "Corporation," since the use of such an assumed or fictitious name must necessarily deceive the public into believing that the business conducted under such name has been incorporated. We stated that "whether a business is conducted by an individual, a partnership or a corporation may or may not be important, but in any event public policy would seem to require that official recognition should not be given in any way, shape or form to the use of a name which on its face is calculated to deceive the public." This basic policy must still control your Department in registering fictitious names whether the person seeking registration be an individual or a corporation. This principle directly applied to registrations under the Fictitious Corporate Name Act prohibits the registration of a name under that act if it contains a corporate designation and one or more of the entities in combination with which the registering corporation seeks to conduct the business under the fictitious name is not a corporation. For the same reason, you may not register a name which appears to be the proper name of an individual since such name may deceive the public into believing that the entity using the name is an individual with unlimited liability.

Pennsylvania lower courts have held that corporations may trade under assumed names other than their proper corporate names. *Philadelphia School of Beauty Culture v. Haas,* 78 D. & C. 97, 100 (1949); *Hershey Estates v. Rettew,* 19 D. & C. 262 (1933); *Apparel Arts Publications, Inc., v. United Knitting Company, Inc.,* 17 D. & C. 685 (1932); *McCarthy Brothers & Wilson, Inc., v. Schmitt,* 6 D. & C. 147 (1925); *Berg Brothers v. Douredoure Brothers,* 5 D. & C. 597 (1925); *Cf., Phillips v. International Text Book Company,* 26 Pa. Super. 230 (1904).

Prior to the enactment of the Fictitious Corporate Name Act, your Department did not generally have occasion to consider the propriety

of the assumption of a particular fictitious name by a corporation. Of course, it was of significance to a corporation which had registered a particular name as its proper corporate name that another corporation had assumed the name and was using it as a fictitious name in its activities. The Courts have often restrained one entity from using a name deceptively similar to that previously assumed by another, especially where an appropriation of the good will and trade of the prior user is involved. See *R. H. Macy and Company v. Macy's Drug Store, Inc.*, 84 F. 2d 387 (3rd Cir. 1936). The United States District Court extensively reviewed the applicable Pennsylvania case law in *Acme Chemical Company v. Dobkin,* 68 F. Supp. 601 (W. D. Pa. 1946). In *Pennsylvania Central Brewing Company v. Anthracite Beer Company,* 258 Pa. 45, 101 Atl. 925 (1917), the Pennsylvania Supreme Court held that conduct, the natural and probable effect of which is to deceive the public so as to pass off the goods or business of one person as and for that of another, constitutes actionable unfair trade competition. The Court stated that if the effect of the assumption of another's name is to injure the person senior in business, the fact that the defendant had no fraudulent intent is no defense to a claim for injunctive relief.

The various provisions of the Business Corporation Law pertinent to corporate names must be considered in *pari materia* with the Fictitious Corporate Name Act. The two laws must be construed together where possible as one law[7]. Section 202 of the Business Corporation Law sets forth certain limitations upon "the corporate name." Section 203 of the act sets forth the procedure whereby a corporation may reserve the exclusive right to use a corporate name for a limited period of time. Section 204 of the act provides that the article of incorporation must set forth "the name of the corporation . . ." The "corporate name" referred to in the various provisions of the Business Corporation Law is the name referred to in section 2 (6) of the Fictitious Corporate Name Act as the "proper corporate name of the corporation using such name." Section 202 of the Business Corporation Law, in restricting the use of the corporate name, reflects sound public policy in prohibiting the use of certain specific names and in eliminating the use of other names except under certain circumstances. A corporate name may not imply that the corporation is a governmental agency of the Commonwealth or of the United States. It may not be the same as, or deceptively similar to, the name of any other domestic corporation or of a foreign corporation authorized to do business in this Commonwealth, or of the name of any unincorpo-

[7] Section 62 of the Statutory Construction Act of May 28, 1937, P. L. 1019, 46 P. S. 562.

rated body whatsoever voluntarily registered with the Department of State under any act of assembly. Subsection (b) of this section includes the following provision:

> "* * * Provided, that nothing herein contained shall be construed to refer or apply to any assumed or fictitious name required by law to be filed with the department * * *."

Since, at the time of the adoption of the Business Corporation Act, there was no law of the Commonwealth requiring the registration of fictitious names used by corporations, the significance of this proviso is that a corporation is not prohibited from using as its proper corporate name a name which had been previously registered as an assumed or fictitious name of an individual or partnership. This is consistent with the basic principle underlying the Fictitious Name Act of May 24, 1945, P. L. 967, as amended, 54 P. S. §§ 28.1-28.13, and its predecessor, the Act of June 28, 1917, P. L. 645, as amended, 54 P. S. §§ 21-27, that registration of a fictitious name is not an appropriation of such name but rather a divulgence of the identity of persons using the name for the protection of the public The Fictitious Name Act of 1945 and its predecessor did not prohibit the assumption of the same fictitious name by a number of individuals or partnerships and the duplicate registrations thereof. Nor, did either of these acts preclude an individual or partnership from assuming and registering thereunder a fictitious name which was similar to the name of a corporation registered under the corporation laws of the Commonwealth.

Section 202 of the Nonprofit Corporation Law of May 5, 1933, P. L. 289, 15 P. S. § 2851-202, restricts a corporate name which may be adopted by a nonprofit corporation in much the same manner as Section 202 of the Business Corporation Act.

The right of a corporation to the exclusive use of its own name existed at common law. See *Consolidated Home Specialties Company*, 358 Pa. 14, 19, 55 A. 2d 404 (1947).

These various restrictions upon the name which a corporation may adopt as its proper corporate name would be without real significance if a corporation were permitted to use as an assumed or fictitious corporate name, a name which it is prohibited from assuming as its proper corporate name. The Fictitious Corporate Name Act, by the provisions of sections 23 and 24, is not intended to extend to corporations any rights which prior to the adoption of the act they did not have. The act is intended only to limit and control a right which corporations previously had; that is, to use an assumed or fictitious corporate name

where such use is not in contravention of the laws of the Commonwealth or the rights of others.

Prior to the adoption in 1933 of the Business Corporation Law and of the Nonprofit Corporation Law there were no general statutory prohibitions against corporations adopting a proper corporate name which was the same as, or deceptively similar to, that of another corporation. Section 2 of the Act of May 16, 1923, P. L. 246, 15 P. S. § 442, did prohibit certain unincorporated associations and organizations and nonprofit corporations from registering a name that was the same as, or deceptively similar to, a previously registered name while the Act of May 18, 1917, P. L. 257, repealed by section 1102 of the Nonprofit Corporation Law, prohibited the use of certain names similar to the name of state governmental units by nonprofit corporations. Nevertheless, the Secretary of the Commonwealth had, prior to the adoption of the Corporation Laws of 1933, developed a practice of refusing to grant charters to corporations under a name similar to that of a previously incorporated corporation. See *Standard Quemahoning Coal Company,* 39 Pa. C. C. 97 (1911), wherein this office in an opinion to the Governor on June 27, 1911, reviewed the applicable law regarding the registration of similar corporate names; see also *Kidd Brothers and Burger v. Steel Wire Company,* 5 Pa. Dist. 56 (1895); *Bradley Fertilizer Company,* 6 Pa. Dist. 423, 19 Pa. C. C. 971 (1897); *In re Pittsburgh No. 8 Coal Company,* 16 Pa. Dist. 577 (1907); *Pennsylvania Correspondence Schools,* 28 Pa. C. C. 512 (1903); *Similarity of Corporation Names,* 12 Pa. Dist. 373 (1903); *Hershey Brothers' Application,* 29 Pa. Dist. 786 (1919). This Department, in an opinion to the Secretary of the Commonwealth dated December 13, 1916, 1915-16 Op. Atty. Gen. 83, 26 Pa. Dist. 755 (1916), stated that in considering whether to refuse an application for a charter because of similarity of a proposed corporate name with that of a corporation previously chartered, the Secretary of the Commonwealth should consider:

> ". . . not only whether such similarity would operate to disconcert it [the Commonwealth] in its imposition and collection of taxes or produce uncertainty in the service of judicial process, but also, of equal importance, whether such similarity would produce confusion in the public mind or hamper the activities of the Federal government, especially that of its postal service."

We stated that:

> "The government of the state exists for the benefit of its citizens, and its officers are trustees for the public good. To approve the application of a proposed corporation whose name is so similar to that of a corporation in existence as to create

> in the minds of the public an uncertainty as to the identity of the respective corporations would be an inadequate exercise of the official duty and public trust. The corporation directly so injured may resort to the courts, but the public cannot. It is the duty of the executive officials of the State to guard the interest of its citizens, and they cannot escape that duty by its reference to the judiciary."

These principles are still applicable. The Secretary of the Commonwealth may not, in registering a fictitious corporate name pursuant to the provisions of Fictitious Corporate Name Act, acquiesce in or knowingly become a party to the assumption by a corporation of a fictitious name in contravention of public policy or where such assumption may lead to an infringement upon the rights of another corporation. Nevertheless, you must register a name where it appears from the application the corporation seeking the name has a real vested property right in the name. This would be the case where the corporation seeking the registration had, prior to the adoption of the Fictitious Corporate Name Act, properly used the name it seeks to register, even though such name is the same as, or deceptively similar to, a name which had been previously registered as a proper corporate name by another corporation. This rule is not applicable to fictitious names assumed by corporations after the effective date of the Fictitious Corporate Name Act since registration must occur immediately upon first use. If, when a corporation seeks to register a fictitious name, it should develop that another corporation is using the name as a proper corporate name, then the corporation seeking to adopt the name as a fictitious name is forewarned prior to the accruing of property rights through use. In applying this principle you must act only in a ministerial capacity. You need not, therefore, go beyond the allegations in the application.

You are, therefore accordingly advised that you may, under the provisions of the Fictitious Corporate Name Act, register any fictitious name as defined therein which a corporation in its registration application alleges it has assumed prior to the effective date of the Fictitious Corporate Name Act, notwithstanding that such name is the same as, or deceptively similar to, the proper corporate name of a Pennsylvania corporation or of a foreign corporation authorized to do business in this Commonwealth. You must not, however, register under the Fictitious Corporate Name Act a fictitious name adopted on or after September 1, 1957, that is the same as, or deceptively similar to, the proper corporate name of a domestic corporation or of a foreign corporation authorized to do business in this Commonwealth, except where such name could be adopted by the corporation seeking registration

as its proper corporate name pursuant to the provisions of the corporation laws of this Commonwealth.

Very truly yours,

DEPARTMENT OF JUSTICE,

MARVIN GARFINKEL,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 4

Fish Commission—Game Commission—Public Utility Commission—Executive Board—Right to compel independent administrative commissions to accept civil service coverage.

The Executive Board can impose civil service requirements on the hiring of employees by the Fish, Game and Public Utility Commissions, but cannot impose such standards in so far as they relate to the discharge of employees of these Commissions.

Harrisburg, Pa., September 12, 1957.

Honorable Andrew M. Bradley, Secretary, Executive Board, Commonwealth of Pennsylvania, Harrisburg, Pennsylvania.

Sir: You have requested an opinion as to whether the Fish Commission, the Game Commission and the Public Utility Commission could be compelled to accept Executive Board civil service coverage, that is, whether the Executive Board could compel these three Commissions to enter into contracts with the Civil Service Commission whereby this latter agency would administer the procedures involved in the employment and discharge of employees in accordance with civil service standards. Because the employment and discharge aspects of the problem are controlled by different factors, we will discuss them here separately.

On the question of whether the Executive Board has power over the three named Commissions to regulate the hiring of employees, we find that the employment of game protectors and regular employees of the Game Commission is controlled by the Game Law, the Act of

June 3, 1937, P. L. 1225, § 206, 34 P. S. § 1311.206. This act provides that the Commission shall appoint such number of competent men as, in its opinion, may be needed to discharge properly the duties devolving upon said Commission. The act also defines the powers and duties of those game protectors. In addition, the act states that the Commission shall also appoint such employees and stenographers as may be deemed necessary.

An almost identical provision, pertaining to Fish Commission employees, is found in The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, § 2702, as amended, 71 P. S. § 692. The members of the Fish Commission are given the power to appoint competent employees.

In regard to the employees of the Public Utility Commission, the Act of March 31, 1937, P. L. 160 § 6 (b), 66 P. S. § 457, states that employees of this Commission are appointed by the Commission with the approval of the Governor.

Although the Legislature has specifically directed that each of the three Commissions shall be the appointing authority for its own employees, the question arises as to whether the Executive Board may impose conditions or limitations upon such hiring. The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, § 709, as amended, 71 P. S. § 249, states that the Executive Board shall have the power:

> "(a) To standardize the qualifications for employment, and all titles, salaries, and wages, of persons employed by the administrative departments, boards, and commissions * * *."

On its face this provision would unquestionably seem to give the Executive Board the power to standardize the qualifications for employment of all employees of all administrative commissions. The question arises as to whether the Legislature's use of the word "commissions" should be restricted to mean only "departmental administrative commissions" as defined in § 202 of The Administrative Code of 1929, supra, 71 P. S. § 62, to the exclusion of "independent administrative commissions," such as the Fish, Game and Public Utility Commissions (Act of April 9, 1929, § 201, supra, 71 P. S. § 61).

Any possible misgiving on this subject disappears when we examine subsections (b), (e) and (g) of § 709 of The Administrative Code of 1929, which is quoted, in part, above. In these latter subsections the Legislature specifically used the term *"independent* administrative commissions." While an argument may be made that the Legislature's

specific addition of the adjective "independent" in subsections (b), (e) and (g) limits Executive Board powers over independent commissions to only those particular subsections, we feel that this would be a strained and improper interpretation. It would necessitate reading into subsection (a) of § 709 the adjective "departmental" prior to the word "commissions."

Where the Legislature has desired to distinguish departmental commissions from independent commissions it has done so explicitly and not by implication. For example, in § 223 of The Administrative Code, as amended by the Act of April 4, 1956, P. L. (1955) 1387, § 1, 71 P. S. § 83, it is provided:

> "Each employe of an administrative department, of an *independent* administrative board or commission, and of a *departmental* administrative board or commission, shall be paid his regular salary every other week." (Emphasis supplied)

See also §§ 220 and 222 of The Administrative Code of 1929, supra, for similar language.

Still another reenforcing factor appears from an examination of § 214 of The Administrative Code, which was amended as recently as 1953, the Act of August 21, 1953, P. L. 1329, § 1. Here it is stated, inter alia, that employees appointed by heads of independent administrative boards and commissions shall receive compensation which is subject to approval by the Governor and after the Executive Board has fixed the standard compensation for any kind, grade or class of service or employment, the compensation of all persons in that kind, grade or class shall be fixed in accordance with such standard.

It is our view that where the word "commissions" stands alone, it means all commissions, both departmental and independent. On this basis it is clear that the Executive Board does have the power to standardize the qualifications for employment of all commissions and thereby could control the hiring of employees by the Fish, Game and Public Utility Commissions. This power to standardize qualifications encompasses the power to direct the three Commissions in question to enter into contracts with the Civil Service Commission under which contracts the Civil Service Commission could set proper qualifications of employment, i.e., designate competent persons. After these standards are set the three Commissions in question would then exercise their power to appoint one or more of these competent persons.

We parenthetically note that, since the Governor must approve the appointment of Public Utility Commission employees, this approval

could be conditioned upon the employee's qualification under civil service standards.

Turning to the question of the Executive Board's power to require the Fish, Game and Public Utility Commissions to enter into contracts with the Civil Service Commission, which contracts would impose limitations on their discharge powers, we find that the Game Law, supra, provides that all employees of the Game Commission shall be removable at the discretion of the Game Commissioners. The same discretion is placed in the Fish Commissioners in regard to employees of the Fish Commission by the Act of April 9, 1929, P. L. 177, § 2702, supra.

As to the Public Utility Commission, there appears to be no clear-cut legislative mandate setting forth, in detail, who shall discharge the employees of the Commission. There is one provision in the Act of March 31, 1937, P. L. 160, § 13(c), 66 P. S. § 464. There it is stated that former employees of the Public Service Commission (the present Commission's predecessor) shall hold their positions until removed or appointed to other positions by the Commission. This clause is obviously of limited scope, however.

Unlike the question of hiring employees there is no specific legislative power vested in the Executive Board to control, in any way, the discharge of employees by these three Commissions.

It has been held by the Supreme Court of Pennsylvania in *Seltzer v. Fertig,* 237 Pa. 514, 85 Atl. 869 (1921), that the Legislature could control the method of appointing and discharge of employees of the Commonwealth who enjoy a status lower than appointed officers as this term is used in Article VI, Section 4, of the Constitution of the Commonwealth. We are, of course, here dealing with such subordinate employees. In view of the holding in the *Seltzer* case, supra, it is clear that the Legislature has designated the method of discharge of Fish and Game Commission employees. It has stated that they will be discharged at the discretion of their respective commissioners. In the absence of any specific grant of power to the Executive Board to alter this pattern, it remains clear that the Executive Board could not compel the Fish and Game Commissions to accept Executive Board civil service in relation to the discharge of their employees.

Although the Legislature has not been clear in defining who shall have the power to remove Public Utility Commission employees, under the common law all employees of the Commonwealth are subject to removal at the pleasure of the appointing power, in this case the

Public Utility Commission, unless there is legislative provision to the contrary: *Ruch v. Wilhelm,* 352 Pa. 586, 43 A. 2d 894 (1945). The Legislature has not granted power to the Executive Board to place any condition on such removals. The Legislature's failure to extend to the Executive Board any control over the discharge of this Commission's employees, leads us to the conclusion that the Executive Board could not compel the Public Utility Commission to accept Executive civil service in regard to the discharge of the Commission's employees.

It is, therefore, our opinion and you are accordingly advised that as to the Fish, Game and Public Utility Commissions, (1) the Executive Board can impose civil service requirements on the hiring of employees, and (2) the Board cannot impose such standards on these Commissions in so far as they relate to the discharge of employees.

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 5

Public school buildings—Leases—Superintendent of Public Instruction—State Council of Education—Act of March 10, 1949, P. L. 30.

A school district may lease, for a reasonable term at a fair consideration, an unused public school building to a religious group for parochial school use; but, the Superintendent of Public Instruction has no ad interim authority conditionally to approve such a lease on behalf of the State Council of Education.

Harrisburg, Pa., September 12, 1957.

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

Sir: We have received your request, dated September 4, 1957, for advice concerning the meaning and effect of § 775 of the "Public School Code of 1949," Act of March 10, 1949, P. L. 30, as amended, 24 P. S. § 7-775.

Specifically, you inquire whether the provisions of § 775 authorize the School District of Lebanon City to lease an abandoned public school building to the appropriate officials of St. Mary's Parish of Lebanon City for use as a parochial school.

St. Mary's Parish is affiliated with the Roman Catholic Church. The proposed leasing agreement, which is for a term of one year, would require St. Mary's Parish to pay an annual rental to the School District of $1,200.00 and to be responsible for all costs incident to the operation of the school building. We understand that the School District has no present need for the use of the school building in question and that, if the building may be leased to St. Mary's Parish, the building will be used in connection with the education of some 250 children.

Section 775 of the "Public School Code," 24 P. S. § 7-775 provides, inter alia, that:

> "The board of school directors of any school district shall have power and authority to lease any part of their respective school building, equipment, and premises, or any vacant building, for any educational purpose. Such leases shall be subject to the terms and regulations which may be adopted by the board of school directors, and except in districts of the first class, shall be further subject to the approval of the State Council of Education."

It is at once apparent that the proposed leasing agreement between the School District of Lebanon City and St. Mary's Parish is within the statutory authorization for the leave of "any vacant building, for any educational purpose." Moreover, under the facts presented, there can be no question as to the reasonableness of the term of the lease or the fairness of the consideration therefor. Since the lease is for a period of only one year, there will be no problem in recovering the building at the end of that time should the School District desire to use the building again; the fixed rental involved ($1,200.00) is substantial, not merely nominal; and the lessee is additionally obligated to maintain the building during the term of the lease. The advantages of the proposed leasing agreement need only be mentioned to be appreciated: the School District will receive the fixed annual rental plus the maintenance (and possible improvement) of a building which, if left vacant, would be susceptible to vandalism; and, at the same time, there is implementation of the traditional policy of the Commonwealth of encouraging educational opportunities for the young.

Nor does the fact that the proposed lessee is a religious group raise any constitutional objections to the lease. Article X, Section 2, of the Pennsylvania Constitution, which provides that no money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian school, is plainly inapposite. Equally inapposite are the provisions of the Federal and State Constitutions which forbid the establishment or preference of religion. We know of no constitutional prohibition against the leasing of an unused public school building for a reasonable time and for a substantial consideration to a religious group.

Section 775 requires that where a board of school directors (other than in a district of the first class) leases a vacant building for educational purposes, such lease shall be subject to the approval of the State Council of Education.

Since the next meeting of the State Council of Education is not scheduled until September 18, 1957, you also inquire whether the Superintendent of Public Instruction has ad interim authority conditionally to approve a lease entered into under the provisions of § 775 pending formal action by the State Council of Education. If the Superintendent does possess such authority, it must have its root in the statute laws of the Commonwealth, either expressly or by necessary implication. We have been unable to find any such statutory authorization.

Section 408 of "The Administrative Code of 1929," Act of April 9, 1929, P. L. 177, 71 P. S. § 118, provides that:

> "The State Council of Education shall consist of the Superintendent of Public Instruction, who shall be the president and chief executive officer thereof, and nine other members."

However, the fact that § 408 of "The Administrative Code" designates the Superintendent of Public Instruction as "the president and chief executive officer" of the State Council of Education does not, without more, clothe the Superintendent with ad interim authority to act for the State Council of Education in connection with § 775 of the "Public School Code of 1949"; and nowhere in the "Public School Code of 1949" or in "The Administrative Code of 1929" is any additional authorization to be found.

It is, therefore, our opinion and you are accordingly advised that:

1. Section 775 of the "Public School Code of 1949" authorizes a school district to lease, for a reasonable term at a fair consideration, an unused public school building to a religious group for parochial school use.

2. The Superintendent of Public Instruction has no ad interim authority conditionally to approve such a lease on behalf of the State Council of Education.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. DONNELLY,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 6

Department of Labor and Industry—Transportation of migrant workers—Regulation—Act of May 18, 1937, P. L. 654.

1. The Secretary of Labor and Industry has the power to regulate the transportation of migrant workers within the Commonwealth in order to provide for the health, safety and comfort of the occupants of labor camps.

2. The regulation applies to transportation in commercial motor vehicles not regulated by the Public Utility Commission.

Harrisburg, Pa., September 17, 1957.

Honorable William L. Batt, Jr., Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: You have requested an opinion whether the Department of Labor and Industry has authority to issue regulations governing the transportation of migrant workers in commercial vehicles on the highways of the Commonwealth of Pennsylvania.

If the power and duty to promulgate regulations governing such transportation are given to the Department of Labor and Industry, they must be found in § 9 and § 12 of the Act of May 18, 1937, P. L. 654, 43 P. S. § 25-9 and § 25-12, which read as follows:

> "All canneries for the canning or preserving of fruits, vegetables, or meats shall be kept in a clean and sanitary condition, and all labor camps operated in connection with such canneries and all other labor camps shall be located, construc-

ted, maintained and operated in all respects as to provide for the health, safety, and comfort of occupants of such camps."

"The Department of Labor and Industry shall have the power and its duty shall be to make, alter, amend, and repeal rules and regulations for carrying into effect all the provisions of this act, and applying such provisions to specific conditions."

Migrant labor camps are clearly included within the term "all other labor camps" in § 9. The term "operated in all respects," when reasonably interpreted, must be taken to cover all phases and activities conducted in the normal everyday operation of a labor camp. Since the purpose of operating a labor camp is to provide a labor force for neighboring farmers and others who require the services of such laborers, it is inherent in such operation that the laborers be transported from the camps to the fields to perform their duties. Section 9, therefore, includes the transportation of migrant workers; § 12 empowers the Department of Labor and Industry to regulate this activity.

In regulating the transportation of migratory workers in commercial vehicles, the Commonwealth cannot regulate the transportation beyond the boundaries of the Commonwealth. However, where workers are being transported from one labor camp to another within the Commonwealth or into or out of the Commonwealth where the destination within the Commonwealth or the point of departure from the Commonwealth is a labor camp, regulation of such transportation, limited to that portion commencing and concluding within the Commonwealth, is a reasonable exercise of the regulatory authority of § 12. Such transportation, included within the meaning of the "operation in all respects" of a labor camp, arises pursuant to oral or written contracts. These contracts, executed within or without the Commonwealth, provide that the operator of a labor camp within the Commonwealth or his agent will furnish transportation to and from the site of the labor camp or camps from which the laborer agrees to perform services for a given period of time. It is contemplated in these contracts that transportation to the camp or camps will be furnished in order that the operator may have available the labor force essential to the operation of the labor camp.

It is, therefore, the opinion of this Department and you are accordingly advised that transportation in commercial vehicles, not regulated by the Public Utility Commission, of migrant workers within the Commonwealth may be regulated to provide for the health, safety and

comfort of the occupants of labor camps within the Commonwealth by the Department of Labor and Industry.

Very truly yours,

DEPARTMENT OF JUSTICE,

FREDERIC G. ANTOUN,
Deputy Attorney General.

THOMAS D. McBRIDE,
Attorney General.

OFFICIAL OPINION No. 7

Appropriations—Act No. 95-A, approved July 19, 1957—Department of Health—Interpretation of provision restricting grants under Local Health Administration Law to counties participating as of effective date of Act No. 95-A—Constitution of Pennsylvania, Article III, Section 7—Act of August 24, 1951, P. L. 1304.

The General Appropriation Act of 1957 appropriated funds to the Department of Health for providing aid to county health departments in accordance with the Local Health Administration Law, Act of August 24, 1951, P. L. 1304. The appropriation provision restricted eligibility for such funds to those counties participating under the Local Health Administration Law as of the effective date of Act No. 95-A. This restriction is unconstitutional for it violates the clause of Article III, Section 7, of the Constitution of Pennsylvania forbidding the passage of a local or special law regulating the affairs of counties.

Appropriations—Act No. 95-A, approved July 19, 1957—Department of Health—Funds for county health departments as provided in Local Health Administration Law.

Any county which now or hereafter meets the requirements of the Local Health Administration Law, Act of August 24, 1951, P. L. 1304, to receive grants from the Commonwealth is entitled to receive the same from the appropriated funds in Act No. 95-A of the 1957 session.

Harrisburg, Pa., September 18, 1957.

Honorable Berwyn F. Mattison, Secretary of Health, Harrisburg, Pennsylvania.

Sir: House Bill No. 1700, Printer's No. 1002, of the 1957 session of the General Assembly, signed by the Governor on July 19, 1957, as Act No. 95-A, contains the following provision among those appropriating sums to the Department of Health:

"Providing aid to counties in the establishment and maintenance of county health departments in accordance with the act of August 24, 1951 (P. L. 1304). Only those counties participating under the act of August 24, 1951 (P. L. 1304) as of the effective date of this act shall be eligible for assistance .....3,000.000"

You have requested our advice on the interpretation and effect of the second sentence in the above provision, noting that such sentence would appear to preclude state aid to counties which had not established a county health department as of July 19, 1957, the effective date of the act.

The Act of August 24, 1951, P. L. 1304, 16 P. S. §§ 12001 to 12028, the "Local Health Administration Law," governs the establishment and operation of county health departments in all but first class counties. Section 25 of the act provides for state grants to county departments of health and to eligible municipalities. While that section conditions full payment of grants on the appropriation of sufficient funds[1], neither it nor any other section imposes a limitation on the time within which counties must create their health departments in order to be eligible for the grants. Such limitation appears only in the provisions of Act No. 95-A quoted above. Nor is there any requirement that to be eligible for assistance during a biennium a county must create its health department prior to the time the appropriation is made for the biennium by the legislature. Section 25 of the act contemplates eligibility to receive grants whenever the health department is created for it provides for an "initial grant" to cover operation of the department "from the date of its establishment to the end of the calendar year in which it is established[2]" and for "annual grants" during calendar years thereafter[3].

Several problems concerning the constitutionality of the questioned clause in Act No. 95-A arise. First, is the provision in violation of Article III, § 6, of the Pennsylvania Constitution which forbids amendment of a law by reference to its title only? Second, does the provision transgress the requirement of Article III, § 15, that the general appropriation bill embrace only certain subjects of appropriation specified therein (a so-called "rider" being forbidden)? Third, is the clause, in effect, a local or special law regulating the affairs of counties in violation of Article III, § 7? Under the view we take of the problem, we need not consider the applicability of §§ 6 and 15 of Article

[1] If sufficient funds are not appropriated to permit maximum grants to be made, the Secretary of Health is to distribute the available funds on an equitable basis.

[2] Act of August 24, 1951, P. L. 1304, § 25(a), 16 P. S. § 12025(a).

[3] Act of August 24, 1951, P. L. 1304, § 25(b), 16 P. S. § 12025(b).

III (i.e. first and second questions above). Therefore, we expressly refrain from passing upon those issues; and nothing said herein should be taken as an expression of our views on these questions.

The restriction included in Article III, § 7—that the legislature shall not pass any local or special law regulating the affairs of counties—involves a problem of classification. This restriction does not prevent the classification of counties according to population in order that special consideration may be given to the varying problems of smaller and larger counties, and the enactment of legislation applying to a class or classes of counties based on population is valid[4]. It does, however, prevent the legislature from arbitrarily singling out one or more counties for special treatment. Thus, the "Local Health Administration Law," supra, does not apply to counties of the first class; and the legislature could have limited its application to counties of the fourth, fifth and sixth classes were there reasonable grounds for so doing. The legislature could not, however, specifically restrict its application to named counties within a class or accomplish the same result in an indirect manner. And while it can condition applicability upon a county's meeting certain requirements if the requirements applied similarly to all counties in the same class, it cannot arbitrarily impose conditions as to eligibility and, thereby, indirectly achieve the passage of a special or local law regulating the affairs of counties.

In the present situation we believe that the legislature has enacted a discriminatory condition which falls within the proscription against a local or special law. Our views concerning the impropriety and the unreasonableness of the classification are supported both by case law and the nature of the discrimination. The Pennsylvania Supreme Court has stated that there can be no proper classification of counties except by population.[5] Although this statement subsequently has been criticized as too restrictive[6], it seems that a classification based on population as well as on any other basis is subject to the test of reasonableness[7]; that is, it must be rationally designed to secure a goal properly within the scope of legislative action.

In the present case neither the method of classification nor its design is proper. The classification sets apart those counties which were

[4] See *Lloyd v. Smith et al.*, 176 Pa. 213, 218, 35 Atl. 199 (1896) and cases cited therein.

[5] *Commonwealth ex rel Fertig et al. v. Patton et al.*, 88 Pa. 258 (1878); *Commonwealth ex rel Brown v. Gumbert et al.*, 256 Pa. 531, 100 Atl. 990 (1917).

[6] *Haverford Township et al. v. Siegel et al.*, 346 Pa. 1, 28 A. 2d 786 (1942).

[7] See *Loomis v. Philadelphia School District Board of Education*, 376 Pa. 428, 103 A. 2d 769 (1954); *Terenzio et al. v. Devlin, Director, et al.*, 361 Pa. 602, 65 A. 2d 374 (1949); *Mason-Heflin Coal Co. v. Currie*, 270 Pa. 221, 113 A. 2d 202 (1921).

participating on July 19, 1957, from those which were not, population playing no part in the separation. It bears no reasonable relation to a possible goal of stimulating counties to create health departments since it cuts off an incentive to do so without warning. In this connection it should be noticed that the classification was not established by the "Local Health Administration Law" of 1951 (where no time limit for participation was set forth), but by the clause in Act No. 95-A of 1957. The classification must be viewed from the time it was created, and the fact that counties had ample time to participate prior to passage of the cutoff provision is irrelevant since during none of that time did any county have notice that there would be a cutoff. We need not consider the propriety of the legislature's establishing a time in the future as the cutoff date. It did not do so. Here, the date carries with it an inbred unreasonableness.

A legislative attempt to restrict eligibility to counties specifically named in either Act No. 95-A or the "Local Health Administration Law" would be improper; in either of these cases the prohibition of Article III, § 7, would apply to strike down the provision. We feel that the operation of this section should be the same where the special and local character of the statute is of equal effect, though more indirectly worded.

For this reason it is our opinion that the provision of Act 95-A restricting eligibility for state grants to counties participating in the local health program as of the effective date of the act is unconstitutional. You are advised, accordingly, that this provision should be disregarded when making grants from the appropriated sum and that counties which now or hereafter meet the requirements of the Act of August 24, 1951, P. L. 1304, to receive grants from the Commonwealth are entitled to receive the same from the appropriated funds.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY J. RUBIN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 8

Appropriations—Act No. 95-A, approved July 19, 1957—Department of Welfare—Right of Secretary of Welfare to transfer funds from one institution named in the act to another institution.

The Department of Welfare does not have the right to transfer funds from one institution named in Act No. 95-A to another institution named in the act.

Appropriations—Act No. 95-A, approved July 19, 1957—Department of Welfare—Mental Health Services, Commonwealth Mental Health Center—Classification and reception center for mental health—Philadelphia General Hospital—Mental health care program in Philadelphia General Hospital.

Funds appropriated by Act No. 95-A to the Department of Welfare for Mental Health Services, Commonwealth Mental Health Center are disbursable under the control of the department but such disbursements must be for the purposes and within the monetary limitations as set forth in the appropriation act.

Harrisburg, Pa., September 18, 1957.

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

Sir: You have requested an opinion as to (1) whether the Department of Welfare has the right to transfer funds specifically designated for institutions named by Act No. 95-A, approved July 19, 1957, to other institutions named in the act where, in the exercise of his discretion, the Secretary of Welfare, or the Commissioner of Mental Health, determines the needs of the department will best be served by such a transfer; and (2) whether funds specifically appropriated by Act No. 95-A for Mental Health Services, Commonwealth Mental Health Center are disbursable under the control of the department.

Act No. 95-A appropriates to the Department of Welfare various sums of money for departmental and institutional purposes (page 65 et seq., of House Bill No. 1700, Printer's No. 1002). Concerning appropriations for the State institutions, the Legislature appropriated specific sums of money to the Department of Welfare to be used for the operation and maintenance of named State institutions. In each case the act designates the institution by name and specifies a corresponding amount. Provision is made whereby if the income of a designated institution exceeds an amount established in the act, such surplus is appropriated for that institution. The appropriation to the Department of Welfare is concluded with the appropriation of particular amounts of money to the department for the operation and maintenance on a contractual basis of a Classification and Reception

Center for mental health at the Philadelphia General Hospital and for the operation and maintenance on a contractual basis of the mental health care program at the Philadelphia General Hospital.

Previous opinions of this department control the answer to your problem. Where the Legislature appropriated a sum of money to be used for a program of medical inspection of pupils in the public schools and where the funds for this program had been exhausted, we ruled that it would be improper to divert funds which the Legislature had appropriated for overcoming epidemics of disease to the public school medical inspection program. We stated in 1915-1916 Op. Atty. Gen. 333, 334, that:

> "Where the Legislature has divided an appropriation to a Department of the State government among certain divisions or bureaus of that Department, it is not permissible to use the funds appropriated to one division or bureau for the work of another, no matter how necessary or meritorious that work may be, in the absence of some provision specifically authorizing such action.
>
> "Similarly when the Legislature, in its appropriation to a Department or bureau, has specified how much money shall be used for a particular purpose or object committed to that department or bureau, the sum which may be expended on that account is limited to the amount thus appropriated for it, in the absence of some discretionary power given the head of the department or bureau authorizing the use of an additional amount, if necessary, from some general, contingent or special fund placed at his disposal for such contingencies."

Later we ruled on a situation where the Legislature had appropriated a specific sum of money to the Department of Property and Supplies to facilitate that department's purchase of supplies and materials. The same General Appropriation Act gave a specific sum to the Treasury Department for the purchase, through the Department of Property and Supplies, of office equipment to facilitate the collection of emergency taxes. We decided that it would be improper for the Department of Property and Supplies to pay for the equipment of the Treasury Department out of the appropriation made to the Department of Property and Supplies. On the contrary, we held that this sum must be paid from the appropriation made to the Treasury Department for such equipment: 1923-1924 Op. Atty. Gen. 296.

In another opinion we ruled that an appropriation earmarked for maintenance of the State Industrial Home for Women at Muncy could not be utilized to rent additional buildings as the latter purpose did not fall within the designation of maintenance made by the Legislature: 1921-1922 Op. Atty. Gen. 540.

It appears from the above that the Legislature may properly designate the purpose for which specific sums are appropriated to a department, provided such designation does not offend the provisions of the Pennsylvania Constitution. Once an allocation is made, the department is bound to disburse the funds in accordance with the terms of the appropriation act.

In your second request you seek to determine whether the appropriations to the department for the operation of a Classification and Reception Center for mental health and the mental health care program at the Philadelphia General Hospital are disbursable under the control of the Department of Welfare. It would appear from the same authorities relied upon above that these funds are disbursable under the control of the Department of Welfare with the limitation that such disbursing must be in accordance with the mandate of the Legislature in its establishment of specific appropriations for each of these two programs.

It is, therefore, our opinion and you are accordingly advised that (1) the Department of Welfare does not have the right to transfer funds from one institution named in Act No. 95-A to another institution named in the act and that (2) funds appropriated by that act to the department for Mental Health Services, Commonwealth Mental Health Center are disbursable under the control of the department but such disbursements must be for the purposes and within the monetary limitations as specifically set forth in the appropriation act.

Very truly yours,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 9

Corporations—Delinquent taxes—Perfection of liens.

Under § 1401 of The Fiscal Code, 72 P. S. § 1401, a lien for delinquent State corporation taxes is perfected on the date of settlement, assessment or determination.

Unemployment Compensation—Delinquent contributions—Perfection of liens.

Under § 308.1 of the Unemployment Compensation Law, 43 P. S. § 788.1, a lien for delinquent unemployment compensation contributions is perfected as of the date of recording in the office of the prothonotary in the county in which the property is located.

Liens—State and federal claims—Judicial sales—Priority in distribution of funds.

Except where a prior properly recorded real estate mortgage is involved, liens for delinquent State corporation taxes, delinquent unemployment compensation contributions and unpaid Federal taxes are of equal rank in the distribution of funds available as a result of a judicial sale, and the order of distribution is determined by the order in time in which the liens are perfected.

Where a real estate mortgage created by the debtor concerned is properly recorded prior in time to perfection of the lien for delinquent unemployment compensation contributions, a lien for unpaid State corporation taxes and a lien for unpaid Federal taxes, liens for State corporation taxes and Federal taxes have priority over the mortgage lien while the lien for delinquent unemployment compensation contributions is subordinated to the lien of the mortgage in the distribution of funds available as a result of a judicial sale.

Liens—Claims of State departments and federal govnerment—Agreement for distribution of funds arising from judicial sales.

Section 1410 of The Fiscal Code, 72 P. S. § 1410, and § 309.1 of the Unemployment Compensation Law, 43 P. S. § 789.1, do not grant the Department of Revenue and the Bureau of Employment Security, Department of Labor and Industry, the authority to enter into an overall agreement between the departments for the pro rata distribution of the funds arising from judicial sales and available for distribution.

Section 1410 of The Fiscal Code, 72 P. S. § 1410, and § 309.1 of the Unemployment Compensation Law, 43 P. S. § 789.1, do not grant the Department of Revenue and the Bureau of Employment Security, Department of Labor and Industry, the authority to enter into an overall agreement with the United States government for the pro rata distribution of the funds arising from judicial sales and available for distribution.

Harrisburg, Pa., September 19, 1957.

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

Sir: We have received your request for advice as to the relative priority of perfected liens arising out of Commonwealth claims for state taxes, Commonwealth claims for delinquent unemployment com-

pensation contributions and United States government claims for unpaid federal taxes in the distribution of the funds produced by judicial sales. Your letter also asks for advice as to whether the Department of Revenue and the Bureau of Employment Security, Department of Labor and Industry, priority lien holders, may enter into a blanket agreement to apportion between themselves on a pro rata basis the funds produced by judicial sales and available for distribution to them. Lastly, your letter asks whether a similar agreement may be entered into with the United States government.

The relative priority of Commonwealth liens in the distribution of funds produced by judicial sales[1] are provided for by statute. Liens for unpaid taxes are treated under § 1401 of The Fiscal Code, Act of April 9, 1929, P. L. 343, as reenacted by the Act of August 19, 1953, P. L. 1146, § 6, 72 P. S. § 1401, as follows:

> "All State taxes imposed under the authority of any law of this Commonwealth, . . . and all public accounts . . . shall be a first lien upon the franchises and property, both real and personal, . . . from the date of settlement, assessment or determination, and whenever the franchises or property of a corporation, association, or person shall be sold at a judicial sale, all taxes, interest, bonus, penalties, and public accounts due the Commonwealth shall first be allowed and paid out of the proceeds of such sale before any judgment, mortgage, or any other claim or lien against such corporation, association or person: . . ."

Contributions under the Unemployment Compensation Law are treated under the Act of December 5, 1936, P. L. (1937) 2897, § 308.1, 43 P. S. § 788.1, as follows:

> "All contributions and the interest and penalties thereon due and payable by an employer . . . shall be a lien upon the franchises and property, both real and personal, . . . from the date a lien . . . is entered of record in the manner hereinafter provided. Whenever the franchises or property of an employer is sold at a judicial sale, all contributions and the interest and penalties thereon thus entered of record *shall first be allowed and paid out of the proceeds of such sale in the same manner and to the same extent that State taxes are paid: Provided, however, That the lien hereby created shall not be prior to pre-existing duly recorded real estate mortgages. . . .*" (Emphasis supplied)

[1] It is to be noted that this opinion does not deal with the priority of liens in situations where the distribution takes place under insolvency proceedings in any court.

The construction of these two statutory provisions requires separate consideration of those instances in which a properly recorded real estate mortgage created by the debtor is involved as compared to any situation in which such a mortgage is not present. In the first instance, the lien for unpaid state taxes has first priority. The lien of the mortgage would be entitled to the second priority in the distribution of the fund, and the lien for delinquent unemployment compensation contributions would be the last to be satisfied. In a judicial sale in which a real estate mortgage created by the debtor is not involved, liens for unpaid state taxes and delinquent unemployment compensation contributions are both of first priority. The general rule between such liens is that the first in time to be perfected is the first in right. *Portneuf-Marsh Valley Canal Co. v. Brown,* 274 U. S. 630, 47 S. Ct. 692, 71 L. Ed. 1243 (1927).

The problem of when these liens are perfected is of major importance. Under § 1401 of The Fiscal Code, liens for unpaid state taxes are perfected when the tax is settled, assessed or determined. In the absence of any litigation on this point, the statutory provision is binding. The problem of when the lien for delinquent unemployment compensation contributions becomes perfected has been before the court in the case of *Commonwealth v. Lombardo,* 356 Pa. 597, 52 A. 2d 657 (1947), in which it was held that the meaning of § 308.1 of the Unemployment Compensation Law was controlled by the subsequent phrase:

> "'. . . upon which record it shall be lawful for writs of scire facias to issue and be prosecuted to judgment and execution in the same manner as such writs are ordinarily employed.'"

The court held that because of this phrase, the rules governing ordinary liens on personalty are controlling and that until the writ of fieri facias is handed to the sheriff, the lien is not so perfected as to prevent a transfer of personal property to a bona fide purchaser for value free and clear of the lien.

The time of the perfection of the lien is also of great importance when, in addition to Commonwealth liens, there are liens against the same personal property entered on behalf of the United States for delinquent taxes under § 6321 of the Internal Revenue Code of 1954. The rule of the United States Supreme Court is that the priority of a lien of the United States for unpaid taxes, relative to other liens, always involves a federal question which is to be determined by the federal courts. *United States v. Security Trust and Savings Bank,* 340 U. S.

47, 71 S. Ct. 111, 95 L. Ed. 53 (1950). Under § 6321 a perfected federal lien on personal property is created which is valid against any mortgagee, pledgee, purchaser or judgment creditor from the time notice of the lien is filed pursuant to § 6323 in the office of the prothonotary in the county in which the property is situated. But under § 6321, [or any predecessor statute], Congress did not confer any priority upon the federal tax lien, *United States v. New Britain*, 347 U. S. 81, 74 S. Ct. 367, 98 L. Ed. 520 (1954).

In spite of the failure of the federal statute to provide for a special priority for federal tax liens, the Supreme Court of Pennsylvania in the case of *Littlestown National Bank v. Penn Tile Works Co.*, 352 Pa. 238, 42 A. 2d 606 (1945), held that no lien perfected after a federal tax lien is recorded can receive a priority in distribution ahead of the federal lien. The lien for federal taxes arises out of the constitutional power of the United States to "lay and collect taxes," Article I, § 8 of the United States Constitution; and the laws of Congress enacted pursuant thereto are "the supreme Law of the Land," Article VI, § 2. Therefore, as the United States Supreme Court held in the case of *State of Michigan v. United States*, 317 U. S. 338, 63 S. Ct. 1302, 87 L. Ed. 312 (1942), "a priority in favor of the United States which arises from priority in the date of its lien cannot, without the consent of Congress, be impaired or superseded by state law in favor of subsequent liens imposed by authority of any law or judicial decision of the state."

Having established the principle that except when a real estate mortgage created by the debtor is involved[2] liens for delinquent federal and state taxes as well as unemployment compensation contributions are of equal rank, their relative priority in the distribution of the funds available from a judicial sale is determined by their relative dates of perfection. However, we find serious conflict in two lower court cases as to when the lien for unpaid unemployment compensation contributions actually is perfected where a federal tax lien is involved.

The *Lombardo* case, 356 Pa. 597, received close scrutiny in the Common Pleas Court of Lackawanna County in the case of *Ferbro Trading Corp. v. Jo-Mar Dress Corp. et al.*, 78 D. & C. 337 (1947), where the court was involved in distributing the fund from a judicial sale. The federal tax liens were recorded after the unemployment compensation contribution liens, but before the writ of fieri facias had been handed to the sheriff. The United States argued that since the

[2] In such a case, the lien for delinquent unemployment compensation contributions is subordinated to the lien of the mortgage.

federal lien is perfected when recorded and under the *Lombardo* decision the Commonwealth's lien is not perfected until the writ of fieri facias is handed to the sheriff, the United States had first priority.

The court rejected the Federal Government's argument and held that the *Lombardo* case was not relevant in a contest between lien holders. Limiting the Pennsylvania Supreme Court case to its particular factual situation, the common pleas court stated that the *Lombardo* case merely held that the lien on personal property is not self-executing and may be cut off by a transfer to an innocent purchaser for value who is not charged with constructive notice by the filing of the lien in the prothonotary's office. But the lien is a completed and perfected charge on the property and, when prior in time in recording, is prior in right to the liens of the United States under the Internal Revenue Code.

In the most recent case on the subject, *Ersa v. Dudley,* 234 F. 2d 178 (3rd Cir. 1956), the Court of Appeals accepted the Federal Government's argument. Without any mention of the *Ferbro* case the opinion adopted the statements of the *Lombardo* case and extended them to conclude that until the writ of fieri facias has been delivered to the sheriff, the Commonwealth lien for delinquent unemployment compensation contributions is inchoate and unperfected. As a result a federal tax lien recorded after the entry of the state lien was held prior in time of perfection and therefore entitled to a first priority.

This conflict in interpretation of § 308.1 of the Unemployment Compensation Law as it affects the relative priority of federal and state liens is between two lower courts of independent jurisdiction. Both are merely persuasive authority and neither is binding upon the Pennsylvania Supreme Court[3]. Therefore, in the absence of a clearly defined rule of law enunciated by the Supreme Court, this department is of the opinion that the Commonwealth's position as upheld in the *Ferbro* case should be followed by the Department of Revenue and the Department of Labor and Industry. As between the Commonwealth of Pennsylvania and the United States of America, the liens for delinquent unemployment compensation contributions are perfected when recorded in the prothonotary's office and their priority as against federal tax liens dates from this point in time.

The Fiscal Code, the Act of April 9, 1929, P. L. 343, §§ 1 to 1804, as amended, 72 P. S. §§ 1 to 1804, contains no specific provisions grant-

[3] The decision of a lower Federal Court on a Federal question is not binding upon Commonwealth of Pennsylvania Courts. It is merely persuasive authority: *Hangelias v. Dawson,* 158 Pa. Super. 370, 45 A. 2d 39 (1946).

ing the Department of Revenue authority to enter into a blanket agreement with other taxing bodies for the pro rata distribution of funds available resulting from judicial sales. Nor can any section of that act be held implicitly to cover this situation. Section 1410 which permits the Department of Revenue, under severe restrictions, to compromise debts due from individual taxpayers is confined by its terms to a case by case procedure. But a single agreement to cover all sales on a standard formula, to be entered into with parties other than the taxpayer involved, does not appear to be contemplated by this or any other section of The Fiscal Code or any other act defining the rights and duties of the Department of Revenue.

The Unemployment Compensation Law, the Act of December 5, 1936, P. L. (1937) 2897, §§ 1 to 510, 43 P. S. §§ 751 to 875, contains neither in its express language nor by implication any authority to enter into an agreement with any other taxing bodies for the pro rata distribution of funds available as a result of judicial sales. Section 309.1 of the Act, as amended, 43 P. S. § 789.1, which permits the department to enter into compromise agreements, limits that right, except in cases of bankruptcy, receivership or death of an employer, to a reduction of delinquent interest and penalties only. But as in The Fiscal Code, an agreement to cover all cases on a standard formula, to be entered into with parties other than the taxpayer involved, does not appear to be contemplated by this section or any other section of the Unemployment Compensation Law or any other act defining the rights and duties of the Department of Labor and Industry.

An examination of the pertinent provisions of the Internal Revenue Code of 1954 also reveals no express or implied authority on the part of the Internal Revenue Service to enter into such an agreement.

Therefore, this department is of the opinion, and you are accordingly advised:

(1) That except when there is a real estate mortgage properly recorded prior in time to the lien for delinquent unemployment compensation contributions, the liens for delinquent state corporation taxes, delinquent unemployment compensation contributions and delinquent federal taxes are of equal rank. Their relative priority in the distribution of the funds available as a result of judicial sales is determined by the rule that the first in time is first in right. In the event that there is such a mortgage involved, then the lien for delinquent unemployment compensation contributions is subordinated to the lien of the mortgage. Liens for state corporation taxes are

deemed to be perfected on the date of settlement, assessment or determination. Liens for unemployment compensation contributions are deemed perfected as of the date they are recorded in the office of the prothonotary in the county in which the property is located. Liens for federal taxes are deemed perfected as of the date they are recorded in the office of the prothonotary in the county in which the property is located.

(2) That the Department of Revenue and the Bureau of Employment Security, Department of Labor and Industry, do not have the authority to enter into an overall agreement for the pro rata distribution of the funds arising from judicial sales and available for distribution.

(3) That the Department of Revenue and the Department of Labor and Industry do not have the authority to enter into an overall agreement with the United States Government for the pro rata distribution of the funds arising from judicial sales and available for distribution.

Very truly yours,

DEPARTMENT OF JUSTICE,

SIDNEY MARGULIES,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 10

State Council of Education—Reconsideration of county plan previously approved without request for reconsideration by county board of school directors—Public School Code of 1949.

The State Council of Education may, at its own initiative, reconsider and either reapprove or disapprove a county plan which it had previously approved according to the Public School Code of 1949 to the extent that such plan has not wholly or partially been approved by the electorate subsequent to the Council's initial approval.

Harrisburg, Pa., September 20, 1957.

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

Sir: You have requested our opinion on whether the State Council of Education may reconsider and revoke its prior approval of a county plan without such reconsideration and revocation being requested by the county board of school directors. No specific facts are stated in your memorandum requesting this advice. Therefore, we shall consider the question in all of its aspects.

The phrase "county plan" is nowhere defined in the statutes of the Commonwealth. However, it appears in § 2576 of the "Public School Code of 1949[1]" in reference to approval by the Department of Public Instruction of leases between a school district and the State Public School Building Authority and of payments by the school district of certain charges for school buildings. Approval is to be given if the project being considered:

> "* * * is in conformance with county-wide plans prepared by the county board of school directors and approved by the State Council of Education for the orderly development of improved attendance areas and administrative units and for the improved housing of public schools in the Commonwealth * * *."

This use of the phrase appears to be directly connected to §§ 261 and 262 and §§ 733 to 735[2] of the Code relating to review and approval or disapproval by the Council of plans submitted by county boards of school directors[3] for the merger of school districts and for the reorganization of administrative units and attendance areas and to the establishment by the Council of standards for the construction, heating and ventilation of public school buildings. Thus, your question specifically appears to refer to the Council's power of review under §§ 261 and 262 and whether approval, once given, can be reconsidered and revoked.

It should be noted that once the Council has approved such plans submitted by a county board of school directors, the latter group is to present petitions for merger to the court of common pleas of the county and to request therein submission of the question of merger to the electors of each affected school district[4].

Nothing in existing law prohibits the Council from reconsidering a plan. However, since a definite statutory procedure exists which con-

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[1] Act of March 10, 1949, P. L. 30, as amended, 24 P. S. § 2-2576.
[2] Act of March 10, 1940, P. L. 30, 24 P. S. §§ 2-261 and 2-262 and §§ 7-733 to 7-735.
[3] Under §§ 262 and 925 (5) of the "Public School Code of 1949," Act of March 10, 1949, P. L. 30, 24 P. S. §§ 2-262 and 9-925 (5) the county board of school directors is required to submit such plans.
[4] Act of March 10, 1949, P. L. 30, as amended, 24 P. S. §§ 2-263.

templates submission to the electorate after approval of the Council is once given, it is our opinion that reconsideration cannot be had after approval of the plan by the electorate. At this point the action of the Council has become fixed for the plan is to become effective on the first Monday in July succeeding the election[5]. This statutory provision would be nullified were the Council able to reconsider and effectually disapprove a plan[6].

You are advised, therefore, as follows: (1) the State Council of Education may, without being so requested by the county board of school directors, to reconsider and either reapprove or disapprove a "county plan" which it had previously approved to the extent that all or part of such plan[7] has not been approved by the electorate subsequent to the Council's initial approval; (2) to the extent that all or part of a "county plan" has been approved by the electorate following initial approval by the Council, it cannot be reconsidered by the Council.

Very truly yours,

DEPARTMENT OF JUSTICE,

ELMER T. BOLLA,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 11

Appropriations—Act 146-A approved June 1, 1956—95-A approved July 19, 1957—Eastern Pennsylvania Psychiatric Institute—Moneys collected from employees for meals served in Institute's Cafeteria.

All moneys collected from employees of the Eastern Pennsylvania Psychiatric Institute for meals served in the Institute's Cafeteria during the biennium beginning June 1, 1955, are to be paid into the General Fund and made available to the

[5] Ibid.

[6] We do not pass upon the problem presented where, after approval by the electorate and either before or after effectuation, the plan is partially or wholly voided by statute or court decision. It is doubtful whether the Council would have reason to reconsider on its own initiative since, practically speaking, nothing would be before it. Probably, the county board would have to initiate a new plan for consideration.

[7] By the phrase "all or part of such plan" we refer to the ineffectiveness of a merger as to school districts wherein a majority of the electors have not assented to the merger.

Institute, as an appropriation, and all such moneys collected during the biennium beginning June 1, 1957, are similarly to be paid into the General Fund; and the exact amount by which the collections, including the moneys collected from the employees, exceed the amount of $23,611, is to be made available to the Institute, as an appropriation.

Harrisburg, Pa., September 20, 1957.

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

Sir: You have requested an opinion as to what disposition should be made of moneys collected from employees of the Eastern Pennsylvania Psychiatric Institute for meals served to them in the Institute's cafeteria.

The Act of June 1, 1956, Act No. 146-A, the General Appropriation Act for the Department of Welfare for the two years beginning June 1, 1955, provides in § 1 that:

> "The following sums, or as much thereof as may be necessary, are hereby specifically appropriated * * * to the Department of Welfare * * *."

Following a list of purposes and an appropriation of $143,550,000.00 for these purposes, the act provides:

> "* * * In addition to this sum, all moneys received from the United States government or from political subdivisions or from any other source as contributions, towards any program authorized by this act, or in payment for services and facilities furnished under any program authorized by this act, shall be paid into the General Fund and credited to the proper allocation within this appropriation."

The very broad language above makes it clear that where the Institute follows the administrative practice of charging employees for meals the money received falls within the meaning of the words "all moneys received from * * * any other source as * * * payment for services and facilities * * * under any program authorized by this act." With this established, it is equally clear that all such money received during the biennium beginning June 1, 1955, should be paid into the General Fund and credited to the Institute.

Act No. 95-A, approved July 19, 1957, the General Appropriation Act of 1957, appropriates the sum of $4,383,961.00 to the Eastern Pennsylvania Psychiatric Institute for the period of two years beginning June 1, 1957. Thereafter, it is provided that:

"And in addition to the above amounts all income and all moneys collected at the several mental hospitals and paid into the general fund of the State Treasury under existing laws in excess of the amounts estimated by the Department of Revenue to be collected are hereby appropriated out of the general fund to the several mental hospitals for the same purpose each hospital to receive from such appropriation the exact amount by which the collections at said hospital during the said fiscal years exceed the following amount

* * * * * *

"Eastern Pennsylvania Psychiatric Institute .... $23,611"

As in the case of Act No. 146-A, the moneys collected in the cafeteria from employees are to be paid into the General Fund under Act No. 95-A. The sole difference is that under the 1957 act the institution is credited with not all such collections but rather with the surplus of all collections of any description (including those in question) over the statutory amount of $23,611.00.

It is, therefore, our opinion and you are accordingly advised that (1) all moneys collected from employees of the Eastern Pennsylvania Psychiatric Institute for meals served in the Institute's cafeteria during the biennium beginning June 1, 1955, are to be paid into the General Fund and made available to the Institute, as an appropriation, and (2) all such moneys collected during the biennium beginning June 1, 1957, are similarly to be paid into the General Fund; and the exact amount by which the collections, including the moneys collected from employees, exceed the amount of $23,611.00, is to be made available to the Institute, as an appropriation.

Very truly yours,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 12

Act No. 95-A, 1957 Session—General Appropriation Act—Appropriation to Department of Public Instruction for vocational education program.

Appropriation provision includes authorization for purchase of equipment for the state staff in carrying out the functions under the vocational education program.

Appropriation provision includes authorization for payments to county boards of school directors to operate and purchase instructional equipment for area technical schools and to operate vocational education classes for unemployed persons despite failure of provision to enumerate these purposes specifically.

Act No. 95-A, 1957 Session—General Appropriation Act—Appropriation to Department of Public Instruction for extension education program—Pennsylvania Constitution, Article III, §§ 6 and 15—Act of July 13, 1957, P. L. 864.

Appropriation provision limiting reimbursement to school districts for extension education does not violate either § 6 or § 15 of Article III of the Pennsylvania Constitution even though the Public School Code of 1949 provides for more complete reimbursement.

Harrisburg, Pa., September 20, 1957.

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

Sir: You have requested our advice concerning several provisions of House Bill No. 1700, Printer's No. 1002, of the 1957 Session of the General Assembly. This bill was signed by the Governor on July 19, 1957, and became Act No. 95-A of that Session.

I

On pages 56 and 57 of the above printer's no. the following appropriation is made:

> "Administration of the vocational education program and payment of State and Federal subsidies to school districts and county boards of school directors for approved vocational courses traveling expenses extension classes and equipment in area technical schools as provided in sections 1802, 1804, 2504, 2506, 2507 and 2508 of the Public School Code of 1949 and the acts of July 11 1917 (P. L. 757) and May 11, 1949 (P. L. 1202) ..... $2,744,786"

You inquire, first, whether this provision includes authorization for the purchase of equipment for the State staff in carrying out its functions under this program and, second, whether the authorization to make expenditures under § 2508 of the Public School Code of 1949 includes similar authorization under §§ 2508.1, 2508.2 and 2508.3 of the Code. It should be noted that extensive supervision over the vocational education program is vested in the Superintendent of Public Instruction and in the State Board for Vocational Education[1].

[1] See Act of March 10, 1949, P. L. 30, "Public School Code of 1949," Article XVIII, 24 P. S. §§ 18-1801 to 18-1847 and § 25-2508.

The quoted appropriation provision is subject to the clause found at the beginning of the appropriations to the Department of Public Instruction. This clause is on page 45 of the above printer's no. and reads as follows:

> "For the salaries, wages and all other expenses necessary for the proper conduct of the following purposes and activities."

The specific appropriation here in question is then read as if it immediately followed this clause, and the question becomes simply whether the purchase of equipment for the State staff is an expense necessary for the proper administration of the vocational education program.

The term "expenses" is defined in section 6 of House Bill 1700 (page 96 of the above printer's no.). The definition is extremely broad and includes ". . . the purchase of replacement or additional equipment and machinery other than passenger motor vehicles . . ." Thus, it seems quite clear that such equipment (other than motor vehicles which are purchased by the Department of Property and Supplies) for the State staff as is necessary for the proper administration of the vocational education program is authorized to be purchased by the provision under consideration.

II

Your second question is whether authorization is given under the above provision to make expenditures under §§ 2508.1 2508.2 and 2508.3 of the "Public School Code of 1949." The specific statutory sections enumerated in the provision include authorizations for administration of the vocational education program[2], for payment to the various school districts and county boards of school directors on account of vocational curriculum[3], approved travel[4] and approved vocational extension classes[5] and for allocation of unencumbered state and federal vocational education funds[6]. The additional statutory sections not specifically mentioned and about which you inquire are for payments to county boards of school directors for instructional equipment in area technical schools[7] and for the operation of such

[2] §§ 1802 and 1804 of the Public School Code of 1949, Act of March 10, 1949, P. L. 30, 24 P. S. §§ 18-1802 and 18-1804.

[3] § 2504, Public School Code of 1949, 24 P. S. § 25-2504.

[4] § 2506, Public School Code of 1949, 24 P. S. § 25-2506.

[5] § 2507, Public School Code of 1949, 24 P. S. § 25-2507.

[6] § 2508, Public School Code of 1949, 24 P. S. § 25-2508.

[7] § 2508.1, Public School Code of 1949, 24 P. S. § 25-2508.1.

schools generally[8] and for payment of the cost of operating vocational education classes for unemployed persons[9]. These last three activities are conducted with both state and federal funds, the latter being received pursuant to federal vocational education laws[10].

Without the enumeration of specific sections in the appropriating clause no problem would be present, for clearly the authority to pay "state and federal subsidies to school districts and county boards of school directors for approved vocational courses traveling expenses extension classes and equipment in area technical schools . . ." includes every phase of the vocational education program. In fact, the payment for "equipment in area technical schools" appears to be a direct reference to the payment mandated by § 2508.1. Considering the interrelationship between these various sections and the great breadth of the appropriating clause, it seems that the authorization to make payments from the amount appropriated extends to every aspect of the vocational education program, including the payments mandated by §§ 2508.1, 2508.2 and 2508.3. We conclude, therefore, that authorization to make expenditures under §§ 2508.1, 2508.2 and 2508.3 is included in the clause under consideration though not as a result of the authorization under § 2508.

III

On Page 54 of House Bill No. 1700, Printer's No. 1002 (Act No. 95-A, Session of 1957), lines 15 to 19, appears the following appropriating clause:

> "Payments to school districts on account of extension education including recreation as provided in section 2510 of the Public School Code of 1949. No part of this appropriation shall be used to reimburse school districts for adult education or adult recreation except for the blind .....2,100,000"

You raise three questions concerning this appropriation: (1) The above prohibiting provision, being in seeming conflict with § 2510 of the Public School Code of 1949[11], as amended by the Act of July 13, 1957, P. L. 864, which of these provisions of law is to govern the Department of Public Instruction in administering the reimbursement to school districts for extension education; (2) what effect does the prohibiting sentence have on state reimbursement for extension edu-

[8] § 2508.2, Public School Code of 1949, 24 P. S. § 25-2508.2.

[9] § 2508.3, Public School Code of 1949, Act No. 398, 1957 Session of the General Assembly, approved July 13, 1957.

[10] 39 Stat. 929 (1917), 60 Stat. 775 (1946), 70 stat. 925 (1956), 20 U.S.C. §§ 11 to 28 (1952).

[11] Act of March 10, 1949, P. L. 30 § 2510, 24 P. S. § 25-2510.

cation generally; (3) since payments to school districts for extension education programs are made in the biennium succeeding the one in which the programs were conducted, does the above provision in any way affect the payment of commitments to school districts for the years 1955-1956 and 1956-1957.

Section 7 of the Act of July 13, 1957, supra, amended § 2510 of the Code in pertinent part as follows:

> "Section 2510. Payments on Account of Extension Classes and Instruction of Home Bound Children. Every school district regardless of classification shall be paid by the Commonwealth for every school term *of school years prior to the school year 1957-1958* on account of approved extension classes . . . *and for the school year 1957-1958 and for each school year thereafter on account of approved extension classes except adult extension recreation classes . . .*"

It thus seems that a conflict exists between this provision of the Public School Code and the provision of Act No. 95-A. The former provides for reimbursement by the Commonwealth to school districts for every school term of school years prior to the school year 1957-1958 on account of all approved extension classes. This obviously would include all adult extension classes, recreational or otherwise. The provision existed prior to the amendments of 1957[12]; that is, reimbursement for extension education formed part of the Public School Code as passed originally in 1949. The 1957 amendments cut off this all-inclusive reimbursement as of the conclusion of the 1956-1957 school year and eliminated future reimbursement on account of "adult extension recreation classes."

Act No. 95-A, on the other hand, makes no use of these somewhat precise terms. Instead of referring to "adult extension classes" or "adult extension recreation classes," the act prohibits use of the appropriated funds to reimburse school districts for both "adult education" and "adult recreation" (except for the blind). Two questions immediately present themselves. The first is whether this prohibiting clause is an unconstitutional rider or an unconstitutional attempt to amend the "Public School Code of 1949." The second, assuming the constitutionality of the clause, concerns the proper construction of the words used. If the terms in Act No. 95-A are considered synonymous with those in § 2510, then use of the appropriated funds for any adult extension education classes, including recreational classes, is clearly prohibited. The adult extension education program, while

[12] Act of July 13, 1957, P. L. 864, § 7, 24 P. S. § 25-2510.

remaining in full effect, simply would be unable to rely on state funds for financial support.

Article III, § 6 of the Pennsylvania Constitution forbids the amendment of a law by reference to its title only. This has been held to forbid so-called "blind amendments"—those placed before the legislature in a form which does not make the proposed change understandable without reference to a prior act[13]. The distinction between such an amendment and a valid restriction on the use of funds contained in an appropriation act is difficult to draw. It is our opinion, however, that where the attempted limitation on the use of funds does not alter the substantive features of the other act, it is not in violation of the restriction of Article III, § 6.

In the present case the extension education program itself is not modified, expanded or eliminated. The provisions of Article XIX of the "Public School Code of 1949" relating to extension education[14] remain intact, and school districts are authorized to conduct the extension education program in the future as they have in the past. The difference is that reimbursement cannot be made from the funds appropriated in Act No. 95-A for those aspects of the extension education program embracing adult education and adult recreation education[15]. The school districts will have to finance them without state aid.

This restriction on the use of appropriated funds is within the legislative power. "The control of the state's finances is entirely in the legislature, subject only to these constitutional limitations; and, except as thus restricted, is absolute[16]." If the General Assembly chooses in the general appropriation act to forbid the use of funds for a particular program and in no way alters the features of the program itself, it may do so, however inconsistent its action may be with the obvious intent of the program act. Here, the "Public School Code of 1949" expressly contemplates reimbursement for extension education[17]; while Act No. 95-A would forbid it from the funds therein appropriated except for instructional and recreational service for out-of-school youth. Unquestionably, the legislature could have failed to

[13] *Wilkes-Barre et al. v. Pennsylvania Public Utilities Commission,* 164 Pa. Super. 210, 63A. 2d 452 (1949).

[14] Act of March 10, 1949, P. L. 30, §§ 1901 to 1906, 24 P. S. §§ 19-1901 to 19-1906.

[15] Section 1901 of the "Public School Code of 1949" defines "extension education." The term includes three programs: (1) instructional service for out-of-school youth, (2) instructional service for adults and (3) recreational service. The first of these programs is entitled to receive funds from the appropriation in Act No. 95-A; the second and third are not.

[16] *Commonwealth ex rel. Schnader v. Liveright,* 308 Pa. 35, 67, 161 Atl. 697 (1932).

[17] Except for adult recreation extension classes for 1957-1958 and thereafter.

appropriate any funds at all; it is no less able to designate which programs shall not receive funds and, by implication, which shall. The General Assembly has done just that in the present situation; and since it has not changed the substantive features of the extension education program, it has not acted in violation of Article III, § 6.

Article III, § 15 of the Constitution of Pennsylvania states as follows:

> "The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the Commonwealth, interest on the public debt and for public schools; all other appropriations shall be made by separate bills, each embracing but one subject."

This section is directed against the inclusion of so-called "riders" in a general appropriation bill [18]. The legislature is forbidden to insert into the general appropriation bill anything other than appropriations for the ordinary expenses of the state government, for interest on the public debt and for public schools. Our discussion above concerning Article III, § 6, indicates that the legislature has not stepped beyond the area of appropriations; and, accordingly, we cannot consider the present provision in any sense a "rider" or otherwise in violation of Article III, § 15.

In view of these considerations it is our opinion that the General Assembly acted within its constitutional powers in prohibiting use of the appropriated funds to reimburse school districts for "adult education" or "adult recreation." We also conclude that the terms used are unambiguous and are synonymous with those used in § 2510 of the "Public School Code of 1949." The General Assembly's intent is clearly expressed, and we are not free to disregard this explicit language[19]. Accordingly, you are advised

(1) while § 2510 of the "Public School Code of 1949" authorizes payment to school districts by the Commonwealth for certain extension education classes, no appropriation has been made by the General Assembly to provide for such reimbursement in so far as any instructional service through adult extension classes and any adult recreational service through extension classes are concerned, and the Department of Public Instruction may not use the appropriated funds to reimburse school districts for such classes (except for the blind);

[18] See *Greene v. Gregg et al.*, 161 Pa. 582, 29 Atl. 297 (1894).

[19] "Statutory Construction Act," Act of May 28, 1937, P. L. 1019, § 51, 46 P. S. § 551.

(2) while § 2510 of the "Public School Code of 1949" remains in full force and effect, the General Assembly through the prohibiting sentence in Act No. 95-A has failed to appropriate funds to reimburse school districts for adult extension classes and adult recreation extension classes, thus limiting use of the appropriated funds to reimbursement on account of instructional and recreational service for out-of-school youth and extension classes generally for the blind[20];

(3) the prohibiting provision in Act No. 95-A prevents the payment of commitments to school districts for the years 1955-1956 and 1956-1957 on account of adult extension classes and adult recreation extension classes (except for the blind) in so far as said commitments are payable from the funds appropriated by the clause under discussion[21].

To sum up the conclusions reached in this opinion you are advised:

1. The appropriation for the administration of the vocational education program includes authorization for the purchase of equipment for the State staff in carrying out its functions under this program;

2. The appropriation for the administration of the vocational education program includes authorization for expenditures under Sections 2508.1, 2508.2 and 2508.3 of the "Public School Code of 1949;" and

3. The appropriation to the Department of Public Instruction for payments to school districts on account of the extension education program has been limited by the General Assembly and, thus, cannot be used to reimburse the school districts on account of adult extension classes and adult recreation extension classes (except for the blind).

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY J. RUBIN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

[20] It should be noted that school districts are still allowed and required to conduct extension education classes as provided in Article XIX of the "Public School Code of 1949." The General Assembly has only restricted the use of state funds for reimbursement purposes.

[21] We know of no other appropriated funds available to pay such commitments authorized by the 1957 session of the General Assembly. We do not pass upon the power of the General Assembly to provide the necessary funds at its 1959 session.

OFFICIAL OPINION No. 13

Act of May 21, 1931, P. L. 149—The Liquid Fuels Tax Act—Reimbursement for fuels consumed in agricultural purposes.

The Board of Finance and Revenue may consider a claim for reimbursement of tax paid on liquid fuels consumed in agricultural uses only when such claim is received or post-marked not later than September 30 for the preceding year ending June 30, and on a form furnished by the Board.

Harrisburg, Pa., September 23, 1957.

Honorable W. Ken Duffy, Secretary, Board of Finance and Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised as to whether a "claim" for reimbursement of liquid fuels tax paid on certain agricultural uses must be filed with the Board of Finance and Revenue on or before September 30 on the form furnished by the Board.

Section 17 of The Liquid Fuels Tax Act, Act of May 21, 1931, P. L. 149, as last amended by the Act of March 12, 1957, P. L. 8, 72 P. S. § 2611q, first provides that all claims for such reimbursement "shall be made upon a form to be furnished by the Board of Finance and Revenue" and then specifies what each such "claim" shall contain. Section 17 then provides:

> "* * * Every such claim shall be made annually for the preceding year ending on the thirtieth day of June and shall be submitted to the Board of Finance and Revenue not later than the thirtieth day of September of each year and *the board shall refuse to consider any claim received or post-marked later than such date.* * * * (Emphasis supplied)

The foregoing language is clear and unambiguous, and makes September 30 the mandatory deadline for filing "every such claim." It also prohibits the Board from considering "any claim" submitted after that date. The term "claim" refers back to the beginning of the paragraph, which requires that "All such claims for reimbursement shall be made upon a form to be furnished by the Board of Finance and Revenue." Since the Act requires the "claim" to be upon the forms furnished by the Board, obviously the "claim" is not filed timely with the Board unless it is submitted on the Board's form and is received or post-marked on or before September 30.

Accordingly, you are advised that the Board may consider a claim for reimbursement of tax paid on liquid fuels consumed in agricultural

purposes only when such claim is received or post-marked not later than September 30 for the preceding year ending June 30, and on a form furnished by the Board.

Very truly yours,

DEPARTMENT OF JUSTICE,

GEORGE W. KEITEL,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 14

Resident antlerless deer hunting licenses—Nonresident defined—The Game Law—Act of June 3, 1937, P. L. 1225.

1. The Game Law definition of "resident" for license purposes refers to residents of any county of Pennsylvania.

2. Discrimination in a State statute between residents of the several counties solely on the basis of such residence would contravene the equal protection clause of the Federal Constitution.

3. County Treasurers may not issue resident antlerless deer permits only to residents of their own counties.

Harrisburg, Pa., September 26, 1957.

Honorable M. J. Golden, Deputy Executive Director, Pennsylvania Game Commission, Harrisburg, Pennsylvania.

Sir: You ask whether County Treasurers may issue resident antlerless deer hunting licenses only to applicants who reside in the county of issue.

Section 501 (c) of The Game Law, the Act of June 3, 1937, P. L. 1225, as amended by the Acts approved July 19, 1951, P. L. 1131 and January 14, 1952, P. L. (1951) 2020, 34 P. S. § 1311 501 (c) provides inter alia:

> "(c) Resident and Nonresident Hunters' Licenses and Tags for Antlerless Deer. If in any year the commission, by resolution, declares an open season for antlerless deer, it shall

issue resident and nonresident hunter's licenses and tags for antlerless deer to hunt for or kill such deer, at a fee of one dollar fifteen cents under such rules and regulations governing the issuance of such licenses and tags as it may deem necessary to limit the number of persons who may hunt for such deer in any county of the Commonwealth, provided public notice of such action is given as hereinafter required; and Provided, however, That no applications for antlerless deer licenses received from nonresidents shall be approved or licenses issued, except during a period of thirty (30) days immediately preceding the opening date of such antlerless deer season. Such licenses and tags may be issued only to holders of resident or nonresident hunting licenses.

"Resident and nonresident hunters' licenses and tags for antlerless deer shall be issued only by the county treasurers in counties where such deer may be hunted and killed, who, for that purpose, are hereby made agents of the Department of Revenue."

The only question here is whether Pennsylvania applicants residing outside the county of issue are "nonresidents" within the meaning of this statute.

The meaning of "resident" is clearly defined in § 301 of The Game Law, to wit:

"Section 301. Residents of State.—For the purpose of this article any person who has been a bona fide resident of this Commonwealth for a period of sixty days next preceding his application, and was born in the United States of America, or was fully naturalized under the laws of the United States, or who is a citizen of the United States of America and regularly enrolled in the United States Army, the United States Navy, or the United States Marine Corps and officially stationed within the Commonwealth thirty or more days next preceding his application, shall be entitled to the license herein referred to as the resident hunter's license, upon the further fulfillment of the requirements of this article."

"Nonresident" in other licensing provisions of the Act is used synonymously with "nonresident" of this Commonwealth (§ 303, § 303.1). This internal evidence clearly establishes that the Legislature did not contemplate any such discrimination among citizens of the Commonwealth.

Moreover, statutes wherever possible must be construed to give them constitutional effect, and the discrimination suggested here would contravene the equal protection clause of the Federal Constitution[1]:

[1] U. S. Const., amend. XIV, § 1.

Sayre Borough v. Phillips, 148 Pa. 482, 24 Atl. 76 (1892); *Commonwealth v. Snyder,* 182 Pa. 630, 38 Atl. 356 (1897).

It is our opinion, and you are accordingly advised, that the term "nonresident" in § 501 (c) of The Game Law refers to nonresidents of the Commonwealth, and "resident" as used therein refers to all residents of Pennsylvania regardless of the county of their residence. It follows that County Treasurers may not lawfully restrict issuance of "resident" antlerless deer licenses to residents of their respective counties, but are required by law to issue them in order of receipt to all applicants who are residents of Pennsylvania.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 15

Department of Welfare—Philadelphia State Hospital—Mercy-Douglass Hospital—State-owned institutions—State-aided institutions—Contracts—Mental health—The Administrative Code of 1929, § 604—Auditor General.

The Secretary of Welfare was authorized to contract to pay certain funds to Mercy-Douglass Hospital out of an appropriation to Philadelphia State Hospital where Mercy-Douglass agreed to operate a psychiatric unit as an addition to the State Hospital under the control of the Department of Welfare and the State Hospital.

The Auditor General should not withhold approval of payments under § 604 of The Administrative Code of 1929 unless and until the Governor notifies him of a department's failure to submit requested estimates.

Where a contract between Department of Welfare and Mercy-Douglass Hospital provided for monthly payments to the hospital at a set rate, but went on to provide that if the income of the hospital exceeded a designated amount the department's payments would be diminished in a like amount, the fact that there might not be a complete discharge of the department's contractural liability did not affect the validity of the contract.

Harrisburg, Pa., September 27, 1957.

Honorable Charles C. Smith, Auditor General, Harrisburg, Pennsylvania.

Sir: You have requested an opinion as to: (1) under what statute is the Secretary of Welfare authorized to enter into a contract for the expenditure of funds for which neither the Governor in his Budget nor the Legislature in any appropriation act had made any provision, (2) whether the Secretary of Welfare may properly contract to expend funds specifically appropriated to a State-owned and operated institution for payments to a privately operated State-aided institution where the facilities and services for which these payments are made are not for the operation and maintenance or under the control of the State-owned institution, (3) whether in view of the provisions of § 4 of Act No. 95-A, approved July 19, 1957, your department can approve these payments without notification of compliance with § 604 of The Administrative Code of 1929, Act of April 9, 1929, P. L. 177, as amended, (4) if the amounts received as contemplated under paragraph 6[1] of the contract are not, at least, equal to the amount disbursed under paragraph 5[2] of said contract, how will reimbursement of its appropriation be effected to the Philadelphia State Hospital and (5) whether payments provided for under a contract[3] between the Department of Welfare and the Mercy-Douglass Hospital may legally be made in view of the provisions of the General Appropriation Act No. 95-A, Act of July 19, 1957, passed by the 1957 Session of the Legislature and other applicable statutes, including The Administrative Code of 1929?

By the Act of September 29, 1951, P. L. 1652, the Legislature authorized the construction of an addition to the Philadelphia State Hospital by the General State Authority on certain lands already conveyed or to be conveyed to the Authority by the Mercy-Douglass Hospital. Section 1 provided that "upon erection, construction and completion said hospital building shall be constituted an addition to the Philadelphia State Hospital." Section 2 provided for the leasing by the General State Authority to the Commonwealth of Pennsylvania and the subleasing by the Department of Property and Supplies to the Board of Trustees of Mery-Douglass Hospital of the lands and hospital building upon terms and conditions agreeable to the parties. By the Act of March 15, 1956, P. L. (1955) 1294, the Legislature

[1] In paragraph 6 of the contract Mercy-Douglass agrees to credit against the payments required to be made by the department any sums in excess of nine dollars ($9.00) per day per patient which Mercy-Douglass may receive from, for or in behalf of patients quartered in the psychiatric unit.

[2] In paragraph 5 the Department of Welfare agrees to pay Mercy-Douglass twenty-nine thousand two hundred fifty dollars ($29,250.00) per month out of funds appropriated to the Department for the operation and maintenance of Philadelphia State Hospital.

[3] Under the contract Mercy-Douglass Hospital agreed to continue to provide 110 beds together with all services and personnel, except professional medical personnel, for a psychiatric unit in the addition to Philadelphia State Hospital.

amended this act in the following manner: while the original act had provided for the construction of a medical and surgical hospital building as an addition to the Philadelphia State Hospital, the amended act now reads "mental, medical and surgical hospital building."

On September 24, 1955, there was executed between the Commonwealth of Pennsylvania, acting through the Department of Property and Supplies, and the Board of Trustees of Mercy-Douglass Hospital a lease of the building constructed under the 1951 Act and of certain removable equipment, furnishings and improvements installed or placed in the addition to the Philadelphia State Hospital. Under the lease Mercy-Douglass Hospital agreed to—

> "(a) Maintain and operate the leased premises as an addition to the Philadelphia State Hospital in accordance with the provisions of the Act of September 29, 1951, P. L. 1652, as amended by the Act of March 15, 1956, P. L. 1294 (Act No. 399) and in so doing further agrees to comply with all the laws, rules and regulations of the City and County of Philadelphia and the Commonwealth of Pennsylvania;"

Further, the hospital agreed that it would make no alteration or addition costing more than $1,500.00 without first obtaining written permission from the Department of Welfare. The hospital agreed that it would remove no equipment or furnishings without the consent of the Department of Welfare, nor would it use or occupy the addition to the Philadelphia State Hospital or the equipment for any other purpose than those provided in the Act of 1951, supra, as amended. Mercy-Douglass was required to secure the consent of the Department of Welfare prior to a subleasing of any portion of the addition to Philadelphia State Hospital or prior to permitting its use by any other party. Mercy-Douglass also agreed that if any dispute would arise in connection with the lease, such dispute would be referred to the Department of Justice for decision.

The Legislature by Act No. 33-A, approved February 10, 1956, recognized that the General State Authority had "recently completed a two hundred thirty-eight (238) bed ten story addition to the Philadelphia State Hospital which the Legislature has authorized the Mercy-Douglass Hospital to operate * * *." It also took cognizance of the fact that Mercy-Douglass Hospital lacked funds to open and operate this "new addition to the hospital." Thereafter, the General Assembly appropriated the sum of $650,000.00, or as much thereof as was necessary to the Department of Welfare to assist in paying for the "operation and maintenance by the Board of Trustees of the Mercy-Douglass Hospital of the addition to the Philadelphia State Hospital * * *."

Prior to June 1, 1957, as under the present contract, the psychiatric unit, located in the State Hospital addition, was supplied by Mercy-Douglass with beds, food and services other than professional medical services. The University of Pennsylvania under a contract with the Department of Welfare provided skilled medical personnel. These two combined to provide an efficient research and treatment unit for which no counterpart existed in the overcrowded Philadelphia State Hospital[4].

All patients in the psychiatric unit are referred or approved by agencies of the Department of Welfare. Mercy-Douglass does not enter its own patients in this psychiatric unit. The Department of Welfare does not exercise this control over the facilities of the Mercy-Douglass Hospital other than the psychiatric unit in question.

In the budget estimates for the 1957-1959 biennium prepared by the Department of Welfare for the Governor there was listed, under the Philadelphia State Hospital budget request, an item in excess of one-half million dollars to be used in the program to be carried on in Mercy-Douglass Hospital. The Governor submitted his budget request to the Legislature in the same amount as that requested by the department. The Legislature appropriated funds to the Department of Welfare for the Philadelphia State Hospital. There was no indication in that appropriation that the funds should not be used for psychiatric unit in question.

Act No. 33-A, approved February 10, 1956, recited the need for the facilities at Mercy-Douglass Hospital, the deficiency of funds to operate the hospital and thereafter the appropriation to meet that need. In May of 1957 officials of Mercy-Douglass Hospital estimated a biennial deficit of $778,118.00 for the 1957-1959 period. In reviewing the budget estimates submitted by the Department of Welfare to the Governor, it is obvious that it was the intention of the Department of Welfare to secure a 1957-1959 counterpart for Act No. 33-A.

Because of the unique fashion in which the Legislature chose to construct and lease the hospital and because of the subsequent administrative history, the Mercy-Douglass-Philadelphia State Hospital relationship is one which has no counterpart in Pennsylvania.

The first question states that the Governor did not provide in his budget and the Legislature did not provide in any appropriation for

[4] As of June 1, 1957, the rated capacity of the Philadelphia State Hospital was 5,366. The occupancy on that date was 6,453, which meant that the hospital was obliged to house 1,087 patients more than its rated capacity.

the expenditure of funds of this contract. In view of the facts set forth above, we conclude that the Governor did make such provision in his budget and we are of the opinion that the failure of the Legislature to exclude payments to Mercy-Douglass Hospital for operation of the addition to the Philadelphia State Hospital is authority for the Secretary of Welfare's action in regard to this contract.

The second question contains assertions which are contrary to the facts as we find them. The psychiatric unit in the Mercy-Douglass addition is being operated for and on behalf of the Philadelphia State Hospital, under the control of the State Hospital and the Department of Welfare. In view of the legislative background, the provisions of the lease and the terms of the contract, the psychiatric unit in question is an operation of the Philadelphia State Hospital. As such, the Secretary of Welfare was authorized to expend Philadelphia State Hospital funds under the contract.

In this regard you refer in your letter to a separate appropriation in the amount of $275,000.00 to Mercy-Douglass Hospital, as a State-aided institution under Act No. 81-A, approved July 15, 1957. Other facilities of Mercy-Douglass Hospital, not part of the psychiatric unit, are not such an integral adjunct to the Philadelphia State Hospital. These other facilities may be eligible for grants under Act No. 81-A. Unquestionably, however, the psychiatric unit being operated as a State-owned institution is not merely a State-aided institution.

Turning to the third question you ask whether your department can approve payments under the contract without first receiving notification that there has been compliance with § 604 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 224. Section 604 of The Administrative Code of 1929 states that the Auditor General shall not draw any warrant in favor of any department if the Governor has notified the Auditor General, in writing, of such department's failure or refusal to submit an estimate to the Governor. It does not provide, as your question implies, that you are to draw warrants only upon notification from the Governor that such requests have been met.

In the fourth question you inquire as to how reimbursement of the Philadelphia State Hospital appropriation will be effected if the amounts received as contemplated under paragraph 6 are not, at least, equal to the amount disbursed under paragraph 5 of the contract. A fair reading of the contract in question indicates the reimbursement feature to be merely incidental to the main purpose of the contract.

It provides a relief clause whereby the Department of Welfare will be excused from making certain payments if the income from Mercy-Douglass Hospital exceeds the figures stipulated in the contract. The contract does not provide for a loan of money which is definitely to be repaid to the Department of Welfare. Rather it provides for the payment by the Department of Welfare for services and facilities furnished by Mercy-Douglass Hospital as are necessary for the operation of the Philadelphia State Hospital.

The last inquiry appears to be a summation of the previous four questions discussed.

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

(1) The Secretary of Welfare was authorized under the provisions of Act No. 95-A to contract for the expenditure of the funds in question.

(2) The Secretary of Welfare may contract to expend funds specifically appropriated to a State-owned and operated institution for payments to a privately operated State-aided institution where the facilities and services for which these payments are made are for the operation and maintenance of or under the control of the State-owned institution.

(3) Nothing in Act No. 95-A prevents you from approving these payments unless and until you are notified by the Governor that the Department of Welfare has failed to comply with § 604 of The Administrative Code.

(4) If the amounts received as contemplated in paragraph 6 are not, at least, equal to the amount disbursed under paragraph 5 of the contract, reimbursement will not be made to the Philadelphia State Hospital. Such reimbursement is not an essential feature of the contract nor is it required by any provision of the law.

(5) Payments provided for by the contract in question may be legally made.

Very truly yours,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 16

Act No. 95-A, 1957 Session—General Appropriation Act—Appropriation to Department of Military Affairs for work of Civil Air Patrol—Fiscal procedures—Repeal of Act of May 29, 1956, P. L. 1787—Pennsylvania Constitution, Article III, § 15.

The provisions of Act No. 95-A of the 1957 Session of the General Assembly which establish procedures for the disbursement of the appropriated funds and repeal the Act of May 29, 1956, P. L. 1787, are unconstitutional, being in violation of Article III, § 15, of the Pennsylvania Constitution, and should be disregarded.

Harrisburg, Pa., October 3, 1957.

Honorable John W. Macfarlane, Executive Director, Pennsylvania Aeronautics Commission, Harrisburg State Airport, New Cumberland, Pennsylvania.

Sir: House Bill No. 1700, Printer's No. 1002, Act No. 95-A of the 1957 session of the General Assembly contains the following provision:

> "The payment for services in connection with the function of and by authority of the Pennsylvania Aeronautics Commission provided for under contract with the Pennsylvania Wing Civil Air Patrol $30,000
>
> "Vouchers covering all expenditures of such funds authorized and appropriated hereby shall be issued by the commanding officer of the Pennsylvania Wing Civil Air Patrol and approved by the Department of Military Affairs.
>
> "All payments and expenditures hereunder shall be made on the basis of a contract or contracts entered into between the Pennsylvania Aeronautics Commission and the Pennsylvania Wing Civil Air Patrol for the furnishing of rescue and other aviation services.
>
> "The act of May 29, 1956 (P. L. 1787), entitled 'An act authorizing the Department of Military Affairs to expend State funds for civil air patrol aviation education training aids and maintenance of civil air patrol aircraft and making an appropriation,' is repealed."

You have asked several specific questions in regard to this provision: (1) What are the form and content of the contracts required? (2) What form of vouchers will be acceptable or required? (3) What is the meaning of "other aviation services?"

The act of May 29, 1956, P. L. (1955) 1787, 2 P. S. §§ 1448 to 1450, referred to in the last sentence of the above provision, author-

ized the expenditure of state funds for civil air patrol purposes by the Department of Military Affairs. It also set forth procedural requirements which were to be followed in making and authorizing expenditures.

The basic question concerning the provision quoted above is whether, in view of Article III, § 15, of the Constitution of Pennsylvania, it is constitutional. This section, designed to prevent "riders" being placed in an appropriation bill[1], reads:

> "The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the Commonwealth, interest on the public debt and for public schools; all other appropriations shall be made by separate bills, each embracing but one subject."

The first paragraph in the quoted provision is clearly valid since it does no more than make an appropriation for an ordinary expense of the Department of Military Affairs. However, the remainder of the provision both establishes fiscal procedures and repeals an existing law. In our opinion it is precisely this type of material which Article III, § 15, was designed to exclude from an appropriation act. These added matters are not "appropriations for the ordinary expenses . . . of the Commonwealth . . ."; they are regulations governing expenditure of funds and a repealer. If the legislature wants to impose special requirements on the Department of Military Affairs and the Pennsylvania Aeronautics Commission in the handling of these funds, it must do so by a bill apart from the general appropriation bill.

Therefore, you are advised that the second, third and fourth paragraphs of page 36 of House Bill No. 1700, Printer's No. 1002, shall be disregarded in expending the appropriated funds and that the relevant provisions of the act of May 29, 1956, P. L. (1955) 1787, are to be followed in making such expenditures. In view of this conclusion it is not necessary to discuss or answer the specific questions you have asked.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY J. RUBIN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

[1] *Commonwealth v. Gregg*, 161 Pa. 582, 29 Atl. 297 (1894).

OFFICIAL OPINION No. 17

Statutes—Construction of section, several amendments during 1957 legislative session—The Vehicle Code—Section 1201 of the Act of May 1, 1929, P. L. 905, as amended.

1. Section 1201 with Act of June 14, 1957, P. L. 313, incorporated therein, directs that all information charging violations of The Vehicle Code in the city of Philadelphia be brought before any magistrate of the traffic court of Philadelphia, rather than before the nearest available magistrate as heretofor.

2. Section 1201 with Act of June 21, 1957, P. L. 356, incorporated therein, authorizes police officers in cities of the second class to present alleged offenders of The Vehicle Code a notice to appear in the central traffic court.

3. Section 1201 with Act of July 3, 1957, P. L. 470, incorporated therein, permits a police officer making an arrest on any turnpike to file the information before the nearest available magistrate within the county where the alleged violation occurred in either direction from the first exit, interchange or emergency exit, and in addition thereto permits a prosecution for a misstatement of facts made in any application or affidavit filed with the Secretary of Revenue to be prosecuted in the county where the application was filed or in Dauphin County where the application was received by the Secretary.

4. Section 1201 with Act of July 5, 1957, P. L. 497, incorporated therein, requires that informations charging violations of The Vehicle Code shall contain such information as the Secretary of Revenue deems necessary for his records.

Harrisburg, Pa., October 7, 1957.

Honorable E. J. Henry, Commissioner, Pennsylvania State Police, Harrisburg, Pennsylvania.

Sir: You have requested advice as to the wording of § 1201 of the Act of May 1, 1929, P. L. 905, known as The Vehicle Code, as a result of that section having been amended by the following acts: Act of June 14, 1957, P. L. 313; Act of June 21, 1957, P. L. 356; Act of July 3, 1957, P. L. 470; and Act of July 5, 1957, P. L. 497.

The Act of June 14, 1957, P. L. 313, directs that all informations charging violations of The Vehicle Code in the City of Philadelphia be brought before any magistrate of the Traffic Court of Philadelphia, rather than before the nearest available magistrate.

The Act of June 21, 1957, P. L. 356, authorizes police officers in cities of the second class to present alleged offenders of The Vehicle Code a notice to appear in central traffic court.

The Act of July 3, 1957, P. L. 470, vests authority in a police officer making an arrest on a turnpike to file the information before the

nearest available magistrate within the county where the alleged violation occurred in either direction from the first exit, interchange or emergency exit. The amendment also permits prosecution for a misstatement of facts made in any application or affidavit filed with the Secretary of Revenue to be prosecuted in the county where the application was filled in or in Dauphin County where the application was received by the Secretary.

The Act of July 5, 1957, P. L. 497, requires that informations charging violations shall contain such information as the Secretary of Revenue deems necessary for his records.

The Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, § 75, as amended by the Act of May 27, 1953, P. L. 242, § 1, 46 P. S. § 575, specifically states:

> "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.
>
> * * *"

You are advised, therefore, that § 1201, as amended by the 1957 session of the General Assembly, is as follows:

Section 1201. Limitations of Actions.—(a) Informations, charging violations of any of the summary provisions of this act in such detail as the department may prescribe as being necessary for its records, shall be brought before the nearest available magistrate within the city, borough, incorporated town, or township in the county where the alleged violation occurred, except for informations charging any such violations in the City of Philadelphia which shall be brought before any magistrate of the Traffic Court of Philadelphia, and except violation of section 620, subsection (j), shall be determined to have occurred in the county where the affidavit was sworn to, or where the form was filled in, or in Dauphin County where the application or form was received by the department, and except information charging any such violation upon any turnpike or highway under the supervision of the Pennsylvania Turnpike Commission, which shall be brought before the available magistrate within the county where the alleged violation occurred who is nearest in either direction to the first exit or interchange or emergency exit from that part of the turnpike or highway where the alleged violation occurred; where there is no substantial difference between the respective distances from the place where the alleged violation occurred or the exit or interchange or

emergency exit from a turnpike to the offices of more than one magistrate, any such prosecution may be brought before any one of such magistrates, or if there is no person holding the office of magistrate in such city, borough, incorporated town, or township, then such information shall be brought before such nearest available magistrate in any adjoining city, borough, incorporated town, or township in the county, within fifteen (15) days after the commission of the alleged offense and not thereafter, except that where an information is filed against a person prima facie guilty of a summary offense, and it subsequently appears that a person other than the person named in the information was the offender, an information may be filed against such other person within fifteen (15) days after his or her identity shall have been discovered, and excepting further, that informations charging violations of the provisions of §§ 205, 207, 210, 212, 213, 406.1, 506(a), 511, 610.1, 620(b), (c), (j), 813, 823.1, 1023.1 and 1025(d) of this act may be brought within fifteen (15) days after it is discovered that a violation of any of these sections has been committed.

(b) Where the offense committed is designated a felony or misdemeanor, information may be filed as now provided by law.

(c) Any salaried police officer, excluding any person compensated solely or in part by fees, who shall be a member of a police department organized and operating under the authority of cities of the first, second and third class, borough, incorporated town or township of the first class, when in uniform and exhibiting his badge or other sign of authority, whenever a summary offense as described in this act is committed in his presence, shall be vested with the authority to stop and present to the alleged offender a printed notice to appear before the nearest available magistrate, or in cities of the first class or cities of the second class, any magistrate sitting in the central traffic court. The notice shall have the full force and effect of a summons issued in the name of the Commonwealth. The notice to appear shall bear the name and address of the alleged offender, his operator's license and the license number and type of vehicle or other means of identification, if a pedestrian, the nature of the offense charged, the location, date and time when and where the alleged offense took place, and shall be signed by the police officer issuing the notice, and shall bear his number, and date and time for the appearance of the offender before the nearest available magistrate having jurisdiction over summary offenses as defined by this act. The date and time for appearance shall be not less than five (5) days nor more than fifteen (15) days of the date of the alleged offense. Within twenty-four (24) hours after presenting to the alleged offender, the printed notice, as provided herein, the police officer shall file a sworn information, charging the

violation of the specific summary provisions of this act in such detail as the department may prescribe as being necessary for its records, with the court having jurisdiction under this act.

(d) Any person who receives from a police officer a notice to appear, as provided in subsection (c) of this section, has the privilege of paying the prescribed fine to such magistrate before or within the time specified in the notice to appear by entering a pleas of guilty and waiving appearance in court. The court, upon accepting the fine, shall issue a receipt to such person acknowledging payment thereof, and shall immediately record the payment upon the docket.

(e) A failure to respond to the notice to appear, provided in subsection (c) of this section, shall have the same effect as a failure to appear in cases wherein the proceedings are commenced by the filing of information under this act.

Very truly yours,

DEPARTMENT OF JUSTICE,

FREDERIC G. ANTOUN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 18

State employees—Adverse interests—Act of July 19, 1957, P. L. 1017.

Since no law, rule or regulation was violated by a State official's solicitation of advertising for personal gain from the Commonwealth, the head of the department may take such administrative action as his discretion dictates.

The Act of July 19, 1957, P. L. 1017, does not become effective until 90 days after its enactment.

Harrisburg, Pa., October 10, 1957.

Honorable William L. Batt, Jr., Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: We have your request for an opinion concerning the following situation:

"A. May an Administrative Official of this Department solicit and obtain from this or any other Department of the Commonwealth advertisements for a publication, from which solicitation he derives income?

"B. If the answer to the above is negative, what action may or shall or must the Department take?

"C. In the event that the Administrative Official in question has done the solicitation in the past, and if it be found that such conduct was in violation of the Administrative Code or any other Statute or Regulation, what action, if any, may or must the Department take?"

Section 516 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, 71 P. S. § 196, reads:

"No member or officer of any department of the government shall be in any way interested in any contract for furnishing stationery, printing, paper, fuel, furniture, materials, or supplies, to the State Government, or for the printing, binding, and distributing of the laws, journals, department reports, or any other printing and binding, or for the repairing and furnishing the halls and rooms used for the meetings of the General Assembly and its committees."

The solicitation of advertisements is not specifically covered by this statute. The more recent policy of the General Assembly is set forth in the "State Adverse Interest Act," the Act of July 19, 1957, P. L. 1017, which becomes effective ninety (90) days after enactment. Sections 5, 7 and 8 of this act read:

"Section 5. No State employe shall have an adverse interest in any contract with the State agency by which he is employed.

"Section 7. No State employe except in the performance of his duties as such employe shall for remuneration directly or indirectly represent any other person upon any matter pending before or involving any State agency.

"Section 8. Any person who violates any of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be sentenced to pay a fine not exceeding one thousand dollars ($1,000) or to be imprisoned for a term not exceeding one year or both and in addition shall automatically forfeit any office or employment under a State agency which he may then hold."

The incident which caused your inquiry was not, therefore, within the purview of this statute although a repetition of it after the effective date of the act would be a violation thereof. Nor does the incident

cited by you come within the rule that "public policy" forbids an employee of the State from accepting remuneration for his services from anybody other than the State or the department thereof which employs him. See *State v. Hendrix,* 56 Ariz. 342, 107 P. 2d 1078 (1940).

In the event you have promulgated no rule or directive concerning incompatible activities of employees, it is obvious the employee cannot be charged with any violation thereof.

There was no law in force at the time the situation arose which formed the basis of your inquiry which is applicable to the employee.

In view of these facts, it follows that you are limited in your action against this employee, as to the incident mentioned, to such administrative action as the exercise of your discretion dictates.

We are of the opinion, therefore, and you are accordingly advised that as to the incident cited by you, the employee violated no law and apparently violated no rule or regulation of your department and that you may exercise such administrative action, as you, in the exercise of your discretion, see fit.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 19

Liquid fuels tax—Exemption—Delaware River Port Authority—Act of May 21, 1931, P. L. 149.

Gasoline purchased and used by the Delaware River Port Authority is not subject to the imposition of the liquid fuels tax under The Liquid Fuels Tax Act, Act of May 21, 1931, P. L. 149, as amended, 72 P. S. §§ 2611a-2611z.

Harrisburg, Pa., October 10, 1957.

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

Sir: We have received your request for advice as to whether gasoline purchased and used by the Delaware River Port Authority is subject to the imposition of the liquid fuels tax under The Liquid Fuels Tax Act, the Act of May 21, 1931, P. L. 149, as amended, 72 P. S. §§ 2611a-2611z.

Although many State courts and the United States Supreme Court have held that a tax based upon and measured by the gallonage of gasoline sold, used or possessed is an excise tax and not a property tax, *Monamotor Oil Company v. Johnson,* 292 U. S. 86, 78 L. ed. 1141, 54 S. Ct. 575 (1934)[1], the Pennsylvania Supreme Court held otherwise in the case of *Commonwealth v. Pure Oil Company,* 303 Pa. 112, 154 Atl. 307 (1931). While this Pennsylvania case construed the Act of May 1, 1929, the subsequent reenactment of The Liquid Fuels Tax Act, the Act of May 21, 1931, P. L. 149, as amended, 72 P. S. §§ 2611a-2611z, did not significantly change those provisions which the court believed were determinative in reaching its conclusion that the tax was not an excise tax but a tax on property.

The Liquid Fuels Tax Act does not specifically exempt from taxation the gasoline acquired or used by the Delaware River Port Authority. The imposition section of the tax act provides that:

> "A permanent state tax . . ., is hereby imposed upon all liquid fuels used or sold and delivered by distributors within the Commonwealth. . . .
>
> * * * * * *
>
> "The tax shall be payable upon liquid fuels sold and delivered to or used by the Commonwealth and every political subdivision thereof." Act of May 21, 1931, P. L. 149, 72 P. S. § 2611d.

The Delaware River Port Authority was originally organized as the Delaware River Joint Commission under a Compact between two sovereign states, Pennsylvania and New Jersey. The enabling Pennsylvania statute was the Act of June 12, 1931, P. L. 575, as amended, 36 P. S. §§ 3503-3505. The Authority is exempt from the payment of all the taxes on property acquired or used by it by the express terms of the Compact which state:

> ". . . since the commission will be performing essential governmental functions in effectuating said purposes, the commission shall not be required to pay any taxes or assessments upon any property acquired or used by it for such purposes, . . ." Agreement between the Commonwealth of Pennsylvania and the State of New Jersey, Act of June 12, 1931, P. L. 575, § 1, 36 P. S. § 3503, Article XI.

[1] See 47 A. L. R. 998, 84 A. L. R. 866, 111 A. L. R. 200.

The enabling Pennsylvania statute creating the Delaware River Port Authority was enacted on June 12, 1931, while The Liquid Fuels Tax Act was enacted on May 21, 1931. Therefore, the express exemption from taxation on property acquired or used by the Authority contained in Article XI of the Compact controls, since the law later in date of final enactment must prevail; Statutory Construction Act, Act of May 28, 1937, P. L. 1019, § 66, 46 P. S. § 566.

Therefore, this department is of the opinion and you are accordingly advised that gasoline purchased and used by the Delaware River Port Authority is not subject to the imposition of the liquid fuels tax under The Liquid Fuels Tax Act, the Act of May 21, 1931, P. L. 149, as amended, 72 P. S. §§ 2611a-2611z.

Very truly yours,

DEPARTMENT OF JUSTICE,

SIDNEY MARGULIES,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 20

Water well drillers—License fees—Proration Act of May 29, 1956, P. L. 1840.

No legislative authority allows proration of license fees for water well drillers' licenses.

Harrisburg, Pa., October 10, 1957.

Honorable Genevieve Blatt, Secretary of Internal Affairs, Harrisburg, Pa.

Madam: We have received your request of September 16, 1957, for an opinion with regard to the legality of prorating license fees charged applicants for water well drillers' licenses who apply late in the fee year.

The licensing of water well drillers is provided for by the Act of May 29, 1956, P. L. 1840, 32 P. S. §§ 645.1-645.13, known as the

"Water Well Drillers License Act." The act provides in § 4, 32 P. S. § 645.4, that:

> "(a) After the effective date of this act, no person shall drill a water well within the Commonwealth, unless he has first secured from the department a license issued in such form and subject to such reasonable rules and regulations as the department shall prescribe, * * *"

Section 6(b), 32 P. S. § 645.6, provides for an annual license fee of $8.00, and § 7, 32 P. S. § 645.7, provides that every license issued under the provisions of the act shall expire on the last day of May next following the date of issue of such license or permit.

You inquire about elimination of the inequity of requiring the payment of a license fee by someone who applies late in the license year, as in early May, who would be asked to pay an additional fee on June 1. The regulation proposed for adoption is as follows:

> "The basic fee is $3.00 for a license, plus $5.00 for each water well rig operated during the license period from 1 June to 31 May. The fee for licenses and rigs permits issued on or after 1 December will be $1.50 for the license and $2.50 for a rig, minimum fee of $4.00 for both during the remainder of the license period."

You ask whether such proposal is legal, and you state the prorating of the license fees will not adversely affect the administration and enforcement of the act.

In addition to the provisions quoted from § 4 above, § 12 of said act, 32 P. S. § 645.12, provides:

> "The department is hereby authorized, empowered and directed to effectuate the provisions of this act and to adopt, amend and rescind such reasonable rules and regulations as may be necessary to accomplish the purposes of this act."

Section 13 of the act, 32 P. S. § 645.13, reads:

> "All fees payable under this act and all other moneys received in connection with the administration thereof, together with all fines and penalties collected under the provisions of this act for violation of the same and all bail forfeited, shall be paid into the State Treasury, and shall be credited to the general appropriation of the Department of Internal Affairs for the purpose of administration of this act. The expenditure of these funds for the administration and enforcement of this act is hereby authorized and, for these purposes, such funds are hereby appropriated."

There is no provision in the act relative to prorating the fee.

In 37 C. J. Licenses Section 116, and 53 C. J. S. Licenses Section 48, it is stated:

> "* * * In the absence of a provision for a pro rata license, a person taking out a license must pay the full amount prescribed *even though he takes out his license after the beginning of the license year* or discontinues his business before the expiration of such year. * * *" (Cases cited to the text) (Emphasis supplied)

The following is a representative holding in other jurisdictions: *Botes v. City of Franklin,* 203 Ky. 357, 262 S. W. 282, 283 (1924), provides:

> "When appellant Botes applied for a license in October, 1920, he knew that the city clerk had authority to issue a license for a term not beyond the first Monday in the following January. The ordinance so provided. With this knowledge he took out the license and paid the $600. The general rule upon the subject is stated as follows: If a statute authorizing the levy of a fixed amount as an annual business license makes no provision for a pro rata license, a person commencing business in the latter part of the year must pay the full amount of the license required to be assessed. 25 Cyc. 627.
>
> "The license ordinance not only did not provide for a pro rata license, but expressly provided for the payment of the full amount required for the entire year before a license for a term less than one year could be issued. It therefore follows that appellant Botes was not entitled to a pro tanto recovery of the license tax paid by him. * * *"

It is to be noted that where it saw fit to do so, the General Assembly has provided for the prorating of a license fee. See the Private Trade School Law, the Act of May 2, 1945, P. L. 401, 24 P. S. §§ 1725.1-1725.11.

In the case of *Commonwealth v. McCarthy,* 332 Pa. 465, 3 A. 2d 267 (1938), the Supreme Court of Pennsylvania held that a license tax may not be apportioned, in the absence of a legislative direction, in favor of places which discontinue business during part of the year.

Accordingly, in the absence of legislative direction, we are of the opinion and you are accordingly advised that you do not have the

legal authority to prorate the license fee prescribed by the Water Well Drillers License Act and that the full fee must be collected.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 21

School districts of the second, third and fourth class—County board of school directors—Power and duty of each to provide classes for handicapped children.

A school district of the second, third and fourth class has the power and duty to provide classes and schools for handicapped children. The county board of school directors does not have exclusive power and duty to provide classes for handicapped children in such school districts.

When the school district provides and maintains such classes and schools, then the county board of school directors can only provide other additional classes as may be necessary in that district.

Where a school district does not maintain classes and schools for handicapped children, then the county board of school directors shall have the power and its duty shall be to provide the same.

Harrisburg, Pa., October 11, 1957.

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

Sir: You have requested our opinion concerning whether a second class school district has the power to construct, maintain, operate, provide, supervise and administer classes and schools for handicapped children.

Section 925 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended, 24 P. S. § 9-925, provides:

> "The county board of school directors shall have power and its duty shall be—
>
> * * * * * *
>
> "(16) To estimate and file with the Department of Public Instruction, on or before the first day of July of each year, the cost of classes and schools for handicapped [sic], when-

ever such classes and schools are authorized, and the cost of transportation of pupils to and from classes and schools for handicapped children, *whether or not conducted by the county board.*

"(15) (b) The county board of school directors in respect to second, third and fourth class school districts within the county *shall have power and its duty shall be—*

"(1) To prepare plans for the proper education and training of handicapped children as hereinafter provided;

"(2) To provide, maintain, administer, supervise and operate schools and classes for handicapped children *in accordance with a plan approved by the State Council of Education as hereinafter provided:*

"(3) To estimate and file with the Department of Public Instruction the cost of classes and schools for handicapped on or before the first day of July of each year;

"(4) To employ temporary professional and professional employes, supervisors and teachers, and to employ all other persons necessary to carry on education and training for handicapped children and to determine the salaries to be paid. All employes so employed shall have the same rights of membership in the Public School Employes' Retirement Association as employes of school districts." (Emphasis supplied)

The question, therefore, is whether the language in § 925, supra, vests exclusive power in the county board of school directors to conduct such educational facilities.

The words "whether or not conducted by the county board" as provided in § 925, supra, negative exclusive jurisdiction in the county board of school directors and evidences legislative intent that a local school district can, in its own right, conduct educational schools and classes for handicapped children as well as can the county board of school directors under certain circumstances.

It is necessary to consider other pertinent provisions of the School Code, supra, to determine the authority, right, power and duty of second class school districts to conduct schools and classes for handicapped children. The pertinent sections of the Public School Code of 1949, supra, are as follows:

Section 502, 24 P. S. § 5-502, provides:

"In addition to the elementary public schools, the board of school directors in any school district may establish, equip, furnish, and maintain the following additional schools or de-

partments for the education and recreation of persons residing in said district, and for the proper operation of its schools, namely:—

* * * * * *

"Schools for physically and mentally handicapped,

* * * * * *"

Section 508, 24 P. S. § 5-508, provides:

"The affirmative vote of a majority of all members of the board of school directors in every school district, duly recorded, showing how each member voted, shall be required in order to take action on the following subjects:—

* * * * * *

"Establishing additional schools or departments.

* * * * * *"

Section 1371, 24 P. S. § 13-1371, provides:

"It shall be the duty of the secretary of the school board, in every school district of the second, third and fourth class, in accordance with rules of procedure prescribed by the Superintendent of Public Instruction, to secure information and report to the county board of school directors, on or before the fifteenth day of October of each year, and thereafter as cases arise, every child of compulsory school age within said district who, because of apparent exceptional physical or mental condition, is not being properly educated and trained. As soon thereafter as possible the child shall be examined by a person certified by the Department of Public Instruction as a public school psychologist, and also by any other expert which the type of handicap and the child's condition may necessitate. A report shall be made to the county board of school directors of all such children examined and of all children residing in the district who are enrolled in special classes. * * *"

Section 1372, 24 P. S. § 13-1372, provides:

"(1) Standards for Proper Education and Training of Handicapped Children. The State Council of Education shall adopt and prescribe standards and regulations for the proper education and training of all handicapped children *by school districts or counties singly or jointly.* * * *

"(2) Plans for Education and Training Handicapped Children. The county board of school directors cooperatively with other county boards and with boards of directors of districts of the second, third and fourth class shall prepare and submit to the Department of Public Instruction, on or before

the first day of July, one thousand nine hundred fifty-six, for its approval or disapproval, plans for the proper education and training of all handicapped children in districts of the second, third and fourth class in accordance with the standards and regulations adopted by the State Council of Education. Plans as provided for in this section shall be subject to revision from time to time as conditions warrant, subject to the approval of the Department of Public Instruction.

"(3) Special Classes or Schools Established and Maintained by School Districts. The county or district superintendant of schools shall submit, to the board or boards of school directors, plans for establishing and maintaining by the district or districts under his supervision special classes in the public schools or special public schools in the manner provided in the approved plan. *Except as herein otherwise provided, it shall be the duty of the board of school directors of any district to provide and maintain, or to jointly provide and maintain with neighboring districts, special classes or schools in accordance with the approved plan.* The State Superintendent of Public Instruction shall superintend the organization of such special classes and such other arrangements for special education and shall enforce the provisions of this act relating thereto. If the approved plan indicates that it is not feasible to form a special class in any district or to provide such education for any such child in the public schools of the district, the board of school directors of the district shall secure such proper education and training outside the public schools of the district or in special institutions, or by providing for teaching the child in his home, in accordance with rules and regulations prescribed by the Department of Public Instruction, on terms and conditions not inconsistent with the terms of this act or any other act in force applicable to such children.

"(4) County Classes for Handicapped Children. The county board of school directors shall have power, and it shall be their duty, to provide, maintain, administer, supervise and operate such *additional classes* or schools as are necessary or to otherwise provide for the proper education and training in the manner set forth in the approved plan for all handicapped children *who are not enrolled in classes or schools maintained and operated by school districts of the second, third and fourth class or who are not otherwise provided for in accordance with the approved plan.*" (Emphasis supplied)

Section 1373, 24 P. S. § 13-1373, provides:

"School districts maintaining special classes in the public schools or special public schools or providing special education, as specified in this subdivision of this article, shall receive reimbursement, as provided by this act. * * *"

Section 1373.1, 24 P. S. § 13-1373.1, provides:

> "The Commonwealth shall reimburse school districts out of the moneys appropriated to the Department of Public Instruction for special education for the cost of readers, helpers, guides, aids, appliances, special school books and supplies and devices for any child between the ages of six and twenty-one years of age who is blind, deaf, or afflicted with cerebral palsy, and who is enrolled, with the approval of the Department of Public Instruction, in any of the public schools of the Commonwealth, an amount equal to the costs of these services and equipment multiplied by the district's reimbursement fraction.
>
> "No such expenditures nor purchases may be made by any school district unless in accordance with a budget submitted by the district and approved by the Department of Public Instruction. * * *"

Section 1374, 24 P. S. § 13-1374, provides:

> "Any physically or mentally handicapped child, who is regularly enrolled in a special class that is approved by the Department of Public Instruction, or who is enrolled in a regular class in which approved educational provisions are made for him, may be furnished with free transportation by the school district. When it is not feasible to provide such transportation the board of school directors may in lieu thereof pay for suitable board and lodging for any such child. If free transportation or board and lodging is not furnished for any physically or mentally handicapped child who, by reason thereof, is unable to attend the class or center for which he is qualified, the county board of school directors shall provide the transportation necessary."

Section 2509, 24 P. S. § 25-2509, provides for payments by the Commonwealth to every school district for courses conducted for mentally and physically handicapped children[1].

Section 2509.1, 24 P. S. § 25-2509.1, provides for payment by the Commonwealth to the county board of school directors for classes or schools conducted for handicapped children[2].

It is crystal clear from the above language that the legislative purpose was to have plans submitted and approved whereby handicapped children would be properly educated and trained, either by individual school districts, by school districts acting jointly, by the county board

[1] This section is not quoted because the reimbursement data and percentages are not material to the present issue.
[2] Ibid.

or by county boards acting jointly. Thus, in a particular county, the plan might provide that one or more of the larger school districts would provide and operate its or their own schools for such children, that other school districts would jointly operate such schools and that the county board would conduct such schools for other students, who are not enrolled in the schools maintained by the school districts. The act does not merely empower a school district, but makes it its duty, to provide schools for handicapped children, if such is in accordance with the approved plan. The act gives the county board the power to provide such schools *only* for handicapped children who are not enrolled in the schools maintained by school districts of the second, third and fourth class.

We are of the opinion, and you are accordingly advised, that (1) the board of school directors of a school district of the second class shall follow the approved plan for the education and training of handicapped children and have the power and duty to provide and maintain classes and schools for handicapped children; and when it does so, the county board of school directors does not have the power to provide and maintain the same type of school or class in that district; (2) where classes for handicapped children are conducted, according to the approved plan in school districts of the second class, then the county board of school directors can provide and maintain other additional classes where necessary; (3) where the school district of the second class does not maintain classes and schools for handicapped children, then the county board of school directors, with respect to school districts whose directors are eligible to vote at the election of members of the county board, shall have the power and its duty shall be to maintain such schools and classes in that district, and (4) the foregoing opinion and the same principles, as set forth in (1), (2) and (3), supra, are applicable to school districts of the third and fourth class.

Very truly yours,

DEPARTMENT OF JUSTICE,

ELMER T. BOLLA,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 22

State Adverse Interest Act—Act of July 19, 1957, P. L. 1017—Conduct by Commonwealth advisors, consultants and employees prohibited.

The State Adverse Interest Act applies only to persons working for and activities involving the executive branch of the state government and a small number of independent agencies.

The State Adverse Interest Act prohibits certain covered persons from having an adverse interest in a contract with certain agencies in the executive branch of state government or with a covered independent agency.

A state employee as defined in the act is prohibited from representing another person for remuneration before a covered state agency or on any matter involving a covered state agency.

Harrisburg, Pa., October 16, 1957.

Honorable John H. Ferguson, Secretary of Administration, Harrisburg, Pennsylvania.

Sir: You have requested our advice concerning the Act of July 19, 1957, P. L. 1017, 71 P. S. §§ 776.1 to 776.8[1], the so-called "State Adverse Interest Act." Specifically, you ask what conduct on the part of Commonwealth employees is prohibited by this act.

Your request for advice is in general terms and does not present a specific situation or set of facts for our analysis. Our advice, therefore, must similarly be given in general terms; and this opinion sets forth such clear standards of conduct as are required by the act. Where possible, we have included specific examples of proscribed conduct as well as of conduct not prohibited by the act. It is obvious that this opinion cannot anticipate and, thus, cannot resolve all possible questions which may arise. Individual problems will require individual answers. To this end the Department of Justice already has advised the heads of the various departments and commissions of the state government that we stand ready to assist any person who feels that he has an individual problem arising under the act. We now reiterate our offer of assistance.

Initially, it should be noted that the act is written in terms limiting both the persons and activities covered. The basic qualification is found in use of the term "state agency," for both a person who works for a "state agency" and an activity involving a "state agency" must

[1] Act No. 451, 1957 Session of the General Assembly.

be present before the act applies[2]. The definition of "state agency" is as follows:

> "(1) State agency: a department, board, commission or other part of the executive branch of the government of the Commonwealth or the Pennsylvania Turnpike Commission, the General State Authority or other State Authority created by a statute which declares in substance that such authority performs or has for its purpose the performance of an essential governmental function and that its bonds shall not pledge the faith or credit or be obligations of the Commonwealth."

This definition excludes not only all parts of government at the local levels, but also both the judicial and legislative branches of the state government. The exclusion of the legislative branch applies not just to such an obviously legislative body as the General Assembly; it applies equally to the Public Utility Commission[3] and to the Milk Control Commission[4], both of which are agents of the legislature. Thus, the scope of the act is restricted to persons working for and activities involving the executive branch of the state government and the small number of named agencies operating in varying degrees apart from the executive branch[5].

The remainder of the act is devoted to outlining the persons and activities covered. The former are divided into three categories: (1) state advisor, (2) state consultant and (3) state employee. A "state advisor" is defined as follows:

> "(2) State advisor: a person who performs professional, scientific, technical or advisory service for a State agency or serves as a member of an advisory board, professional licensing board or similar part of a State agency and who receives no compensation for his service other than reimbursement for expenses incurred by him in furnishing such service."

This category is limited to persons who receive no compensation—per diem or otherwise—for their services except reimbursement for their expenses. An example of such person would be a citizen member of the State Planning Board.

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[2] The entire act is written in terms of persons who serve state agencies and of activities by such persons which involve state agencies.

[3] See *Commonwealth ex rel. v. Benn*, 284 Pa. 421, 131 Atl. 253 (1925).

[4] See *Snyder v. Barber*, 378 Pa. 377, 106 A. 2d 410 (1954).

[5] The Pennsylvania Turnpike Commission and the General State Authority are specifically named. The only other authorities which appear to come within the definition are the State Highway and Bridge Authority, the State Public School Building Authority and the parking authorities incorporated under the Act of June 5, 1947, P. L. 458, as amended, 53 P. S. §§ 341 to 356 (see *Pittsburgh Public Parking Authority Petition*, 366 Pa. 10, 76 A. 2d 620 (1950)).

A "state consultant" is defined as follows:

> "(3) State consultant: a person who as an independent contractor performs professional, scientific, technical or advisory service for a State agency and who receives a fee, honorarium or similar compensation for such service."

The restriction of "state consultant" to an "independent contractor" excludes any person who serves the state and receives compensation therefrom as a result of an appointment by the Governor or other official. The only persons covered are those who serve the state under contractual arrangement. An example of this would be a professional management firm which contracts with a state department to review its internal procedures.

The final category is "state employee":

> "(4) State employe: an appointed officer or employe in the service of a State agency and who receives a salary or wage for such service."

This title covers persons serving at all levels of activity (i.e. officers at the higher levels, employees at the lower). It includes members of the various boards and commissions and the administrative officers and employees thereof. This conclusion applies equally to persons who receive per diem compensation, such as members of the State Civil Service Commission, and to those who receive an annual salary, such as members of the Labor Relations Board or Pennsylvania Turnpike Commission.

To sum up the discussion thus far, the only persons subject to the provisions of the act are the following: (1) uncompensated advisors to and members of boards in the executive branch of the state government, the Pennsylvania Turnpike Commission and the General State or other state Authority; (2) compensated contractors who perform professional or similar services for any of the above; and (3) compensated officers and employees of any of the above.

Inquiry into a person's status is not the only one that must be made, however. If it is established that a person does come within one of the three categories, it is then necessary to determine if a particular activity is proscribed. These activities involve two types of situations: (1) adverse interest in a contract[6] and (2) representation[7]. In each case the activity must be with a "state agency";

[6] Act of July 19, 1957, P. L. 1017, §§ 3, 4 and 5, 71 P. S. §§ 776.3, 776.4 and 776.5.
[7] Id., § 7, 71 P. S. § 776.7.

that is, a covered person is not forbidden from carrying on representation before or having an adverse interest in a contract with a legislative or judicial agency of the state government or with an agency of local government.

To have an adverse interest in a contract means to be a party (or stockholder, partner or agent of a party), other than the Commonwealth or a "state agency", to a contract for the "acquisition, use or disposal by a state agency of services or of supplies, materials, equipment, land or other personal or real property[8]." Excluded from this is the contract between a covered person and the state respecting his own personal services to the state[9]. The following dealings are then prohibited:

(1) A "state advisor" or "state consultant" is not allowed to have an adverse interest in a contract with a "state agency" only if the agency involved is the one in which he serves *and* if he recommended either the making of the contract or a course of action which contemplated the making of the contract[10]. If both of these conditions are not present, the advisor or consultant has not violated the act.

(2) A "state employe" is not allowed to deal in any way with a contract in which he has an adverse interest. This includes influencing or attempting to influence the making of such contract or the supervising of such contract, and the restriction is not limited to contracts with the agency in which the person is employed[11]. However, he is not prevented merely from *having* an adverse interest in a contract with a non-employing state agency although he is so prohibited where his own agency is involved[12].

Restrictions on representation are limited to "state employees" only. Except in performing his duties as an employee, such a person is forbidden to represent for remuneration any other person *before* a state agency or on any matter *involving* a state agency[13]. Since indirect representation is included, a business or professional partner of a

[8] Id., §§ 2(6) and 2(5), 71 P. S. §§ 776.2(6) and 776.2(5).
[9] Id., § 2(5), 71 P. S. § 776.2(5).
[10] Id., § 3, 71 P. S. § 776.3.
[11] Id., § 4, 71 P. S. § 776.4.
[12] Id., § 5, 71 P. S. § 776.5. Note, however, that while the act does not so prevent an employee a mere interest in certain contracts is forbidden by the Pennsylvania Constitution, Article III, § 12, and by "The Administrative Code of 1929," Act of April 9, 1929, P. L. 177, § 516, 71 P. S. § 196, which implements the constitutional provision. These restrictions must be read together with § 5 of the "State Adverse Interest Act." Note also, § 690 of "The Penal Code," Act of June 24, 1939, P. L. 872, 18 P. S. § 4690, with regard to architects and engineers who are state employees.
[13] Id., § 7, 71 P. S. § 776.7.

state employee may not so act without subjecting the employee to the sanctions of the statute. We reiterate that representation by a state employee before a legislative or judicial state body or before a local body is not forbidden. Also, routine actions on behalf of others (e.g. filing of a tax return or of articles of incorporation) do not come within the concepts of "pending before" or "involving" and may be engaged in by a state employee. We caution, however, that such routine matters may subsequently become non-routine (e.g. if the state assesses additional tax or refuses to accept the articles of incorporation); if so, the employee must withdraw.

The act contains two sanctions. First, no person who has an adverse interest in a contract with a state agency may become an employee of that agency until he divests himself of such interest[14]. Second, violation of any of the provisions of the act subjects the violator to criminal penalties and forfeiture of any office or employment held by him in a state agency[15].

We hope this general outline is of assistance to you. We want to emphasize that this act in no way precludes the heads of the various departments, boards and commissions from promulgating such administrative regulations concerning their employees' activities which might involve conflicts of interest as they see fit. Such administrative regulations may be more stringent than this act although they may not be more lenient or contravene its provisions in any other way.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY J. RUBIN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 23

Mutual Casualty Insurance Companies—Maintaining Surplus over all liabilities—Pennsylvania Constitution, Article III, §3—Act of July 3, 1957, P. L. 460—Validity.

Under Article III, § 3, Pennsylvania Constitution, an act must contain language sufficient to inform those to be affected of the contents of the bill.

[14] Id., § 6, 71 P. S. § 776.6.
[15] Id., § 8, 71 P. S. § 776.8.

The title of Act of July 3, 1957, P. L. 460 limits the scope of the act to mutual casualty companies while the substantive provisions thereof extend to all mutual insurance companies other than mutual life insurance companies.

Act of July 3, 1957, P. L. 460 is valid and subsisting as to mutual casualty insurance companies but can have no effect under Article III, § 3, of the Constitution as to mutual insurance companies other than mutual casualty insurance companies.

Harrisburg, Pa., October 18, 1957.

Honorable Francis R. Smith, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have requested an opinion of this department as to what effect a discrepancy between the title of Act No. 257, the Act of July 3, 1957, P. L. 460, and the substantive provisions of that act has upon its validity.

The title of the aforesaid act states that it amends the Act of May 17, 1921, P. L. 682, The Insurance Company Law of 1921, by "requiring certain mutual *casualty* insurance companies to maintain a surplus over all liabilities." The substantive provisions of the above act added a new section to The Insurance Company Law of 1921 to be designated § 810 which reads as follows, 40 P. S. § 920:

> "Section 810. On or after July 1, 1957, no mutual insurance company, other than a mutual life insurance company, shall transact any of the class of insurance mentioned in subdivision (c) (1) of section 202 of this act, until it shall have and shall maintain, at all times, a surplus over all liabilities including unearned premiums, computed in accordance with the laws of this Commonwealth, of not less than two hundred and fifty thousand dollars ($250,000.00): Provided, however, That nothing in this section shall be construed to reduce the requirements under section 806 of this act*."

It will be noted that the title of Act No. 257 expressly refers to *certain mutual casualty insurance companies* while the substantive language in the act refers to *mutual insurance companies other than mutual life insurance companies.*

Article III, § 3, of the Pennsylvania Constitution provides:

> "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title."

* Subdivision (c)(1) of § 202 of The Insurance Company Law of 1921 pertains to surety and indemnity contracts.

This constitutional prohibition has been considered by the Supreme Court of Pennsylvania on numerous occasions. In *Harvey v. Ridley Township,* 350 Pa. 210, 213 (1944), the Supreme Court said:

> "* * * While the title to an act need not be a complete index to its contents it must contain language sufficient to inform those to be affected of the contents of the bill: * * *"

In an earlier decision, *Leinbach's Estate,* 241 Pa. 32, 37, 88 Atl. 67 (1913), the Supreme Court stated that the title of an act "shall fairly give notice of the subject of the act so as to reasonably lead to an inquiry into the body of the bill." In *Phillips' Estate,* 295 Pa. 349, 353, 145 Atl. 437(1929), the Supreme Court held that the scope of the substantive provisions of an act must be restricted to the scope of the act as expressed in its title.

Under the foregoing decisions of the Supreme Court, Act No. 257 can be constitutionally applied only to those mutual insurance companies which are put on notice by its title that the provisions thereof are applicable to them. The act, therefore, can be applied only to mutual casualty insurance companies.

The substantive provisions of Act No. 257 are broader than its title. While the title limits the scope of the act to mutual *casualty* insurance companies, the substantive provisions of the act are extended to *all* mutual companies other than mutual life insurance companies which would include not only mutual casualty insurance companies but also mutual fire insurance companies. The problem presented by this act is similar in principle to that which was considered by the Supreme Court in *Phillips' Estate,* supra. In that case, the Court held that where the title of the act in question prohibited physicians from testifying in certain civil cases to *communications* made to them by their patients, they could not refuse to testify as to knowledge learned from a physical examination of the patient even though the substantive provisions of the act expressly prohibited such physicians from disclosing *any information* acquired in attending the patient. The Court's decision was based upon the grounds that the act must be limited to the scope of its title. Act No. 257, in fact, presents a stronger case for limiting its applicability to the scope of its title than was presented to the Supreme Court in *Phillips' Estate,* supra, for the reason that the discrepancy in Act No. 257 pertains to the adequacy of notice to those affected thereby, and only mutual casualty insurance companies would reasonably be led to inquire into the body of the bill.

The fact that under Article III, § 3 of the Constitution, Act No. 257 is partially ineffective does not render the act invalid in its entirety. The Pennsylvania Supreme Court in *Rutenberg et al., v. Philadelphia et al.*, 329 Pa. 26, 39, 196 Atl. 73 (1938), set forth as follows the test of severability:

> "The test of severability may be stated in simple terms as follows: after the invalid portion of the act has been stricken out, whether that which remains is self-sustaining and is capable of separate enforcement without regard to that portion of the statute which has been cast aside. If this be true the statute should be sustained to the extent of that which remains."

An application of this test to Act No. 257 would sustain its validity as applied to mutual casualty insurance companies.

We know of nothing in Article III, § 7, of the Constitution of Pennsylvania which would proscribe this limited application of the act. Moreover, on numerous occasions, mutual insurance companies have been classified by the Legislature as casualty, fire and life insurance companies for distinct purposes under the insurance laws of this Commonwealth. Such classification exists for purposes of incorporation (§§ 201 and 202 of The Insurance Company Law, 40 P. S. §§ 381 and 382) and for the purpose of establishing minimum financial requirements (§ 206 of The Insurance Company Law of 1921, 40 P. S. § 386).

You are, therefore, accordingly advised that Act No. 257, the Act of July 3, 1957, P. L. 460, is valid and subsisting as to mutual casualty insurance companies, but can have no effect under Article III, § 3, of the Constitution as to mutual insurance companies other than mutual casualty insurance companies.

Very truly yours,

DEPARTMENT OF JUSTICE,

EDWARD L. SPRINGER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 24

Separate building contracts—General State Authority—Department of Property and Supplies—Act of May 1, 1913, P. L. 155.

The Separation Act of May 1, 1913, P. L. 155, is applicable to the General State Authority, but not to the Department of Property and Supplies.

Harrisburg, Pa., October 21, 1957.

Honorable A. J. Caruso, Executive Director, General State Authority, Harrisburg, Pennsylvania.

Sir: We have received your letter regarding the recent resolution of the Board of the General State Authority which requests an opinion on the legality of the Authority's operating under the same rules and regulations as the Department of Property and Supplies with respect to the letting of contracts. You particularly inquire whether the Authority may, as may the department, enter into a single contract for the erection of a building or must follow the Act of May 1, 1913, P. L. 155, 53 P. S. § 1003, which requires separate contracts for certain phases of the work.

The Department of Property and Supplies is governed by The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. §§ 51 to 732. This act contains detailed provisions on the procedures to be followed. Section 508(a) of said Code, as amended, 71 P. S. § 188, provides:

> "No administrative department, except the Department of Property and Supplies, and no administrative board or commission, shall, except as in this act otherwise specifically provided, erect or construct, or contract for the erection or construction of, any new building, or make, or contract for making, any alterations or additions to an existing building, involving an expenditure of more than four thousand dollars ($4,000), and, in any case in which any other department or any board or commission is by this act authorized to erect or construct buildings, or make alterations or additions involving an expenditure of less than four thousand dollars ($4,000), such erection or construction may be generally supervised by the Department of Property and Supplies."

Section 2408(e), as amended, 71 P. S. § 638, provides that:

> "The department may invite proposals, either for completely erecting, altering, or adding to any building, or separately for parts of the work, or both. Whether it shall invite proposals for part of the work, and, if so, for what parts, shall rest within the sole discretion of the department."

This section of the Code impliedly repealed the Act of May 1, 1913, supra, as to the Department of Property and Supplies. That section reads:

> "Hereafter in the preparation of specifications for the erection, construction, and alteration of any public building, when the entire cost of such work shall exceed one thousand dollars, it shall be the duty of the architect, engineer, or other person preparing such specifications, to prepare separate specifications for the plumbing, heating, ventilating, and electrical work; and it shall be the duty of the person or persons authorized to enter into contracts for the erection, construction, or alteration of such public buildings to receive separate bids upon each of the said branches of work, and to award the contract for the same to the lowest responsible bidder for each of said branches."

An examination of The Administrative Code of 1929 reveals that the General State Authority is not expressly brought within its purview. The General State Authority in § 3 of The General State Authority Act of 1949, the Act of March 31, 1949, P. L. 372, 71 P. S. § 1707.3, is created as a body corporate and politic, constituting a public corporation and governmental instrumentality. The Authority has been held to be an independent public corporation. See *Kelley v. Earle et al.*, 325 Pa. 337, 190 Atl. 140 (1937). Its purposes, powers and authority are set forth in § 4 of the Act of 1949, supra, 71 P. S. § 1707.4. Nowhere in said act is authority given it, as is given to the Department of Property and Supplies in § 2408 of The Administrative Code of 1929, supra; nor is there language anywhere in said act which would exempt the Authority from the Act of 1913, supra, or repeal said act as far as the General State Authority is concerned.

In the case of *Pittsburgh Public Parking Authority Petition*, 366 Pa. 10, 76 A. 2d 620 (1950), the Supreme Court of Pennsylvania, referring to the Act of 1913, supra, said at page 13:

> "* * * It is obvious that the Legislature by the Act of 1913 was setting forth a declaration of public policy. To require separate bids on the various items hereinbefore set forth was in compliance with such declared public policy. In Tragesser v. Cooper et al., 313 Pa. 10, 169 A. 376, this Court stated that the Act is an expression by the Legislature of public Policy. We said in that case concerning a similar statute: 'Being a public policy, it must be applied wherever it fits, and is not to be excluded unless the intention to exclude it is clearly made to appear.' Such a statement applies with equal force to the Act of 1913. * * *"

The Legislature has not indicated that the General State Authority is to be excluded from the application of the Act of 1913, supra. In fact, by its failure to enact into law bills which have been introduced from time to time[1], which would have excluded the General State Authority from the purview of the Act of 1913, supra, it has indicated that the Act of 1913, supra, as a matter of public policy should be applied to the General State Authority.

We are, therefore, of the opinion and you are accordingly advised that the General State Authority is subject to the provisions of the Act of May 1, 1913, P. L. 155, 53 P. S. § 1003, and must continue to enter into separate construction contracts as specified therein.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 25

Pennsylvania Historical and Museum Commission—Disposition of admission fees —Administrative Code of 1929.

Under the Act of May 27, 1957, P. L. 204, moneys collected at the Pennsylvania Farm Museum of Landis Valley are payable into the Historical Preservation Fund.

Harrisburg, Pa., October 21, 1957.

Honorable S. K. Stevens, Executive Director, Pennsylvania Historical and Museum Commission, Harrisburg, Pennsylvania.

Sir: Reference is made to your memorandum regarding the disposition of funds collected as admissions to the Pennsylvania Farm Museum of Landis Valley, in the Township of Manheim, Lancaster County, Pennsylvania.

[1] House Bill No. 317 of the 1957 Session.
House Bill No. 470 of the 1955 Session.
House Bill No. 835 of the 1953 Session.
House Bill No. 1500 of the 1951 Session.

The Act of June 28, 1951, P. L. 591, amended clause (g) of § 2801-A of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, 71 P. S. § 716, and authorized the Pennsylvania Historical and Museum Commission to charge admission fees to historical buildings, such fees to be paid into the State Treasury through the Department of Revenue and credited to the Historical Preservation Fund. The same act added § 2802-A to the Code, 71 P. S. § 717, and this section then read:

> "Historical Preservation Fund.—All moneys collected by the Department of Property and Supplies from the sale of publications of the Pennsylvania Historical and Museum Commission, and all moneys collected by the commission from fees charged for admission to historical buildings, shall be paid into the State Treasury through the Department of Revenue and credited to a fund to be known as the 'Historical Preservation Fund,' which is hereby created. Except as hereinafter provided, all moneys in the fund from time to time are hereby appropriated to the Pennsylvania Historical and Museum Commission for the preservation, care and maintenance of the historical buildings, grounds, monuments and antiquities committed to its custody, and for the publication and republication of matters of historical or archaeological interest, and for the research and editorial work incidental thereto. Whenever the moneys credited to the Historical Preservation Fund during any fiscal biennium exceeds the average biennial allocation for the above purposes for the two preceding fiscal bienniums, the excess shall be transferred to the General Fund."

The Act of June 28, 1951, P. L. 593, amended The Fiscal Code, the Act of April 9, 1929, P. L. 343. By amendment to § 302, 72 P. S. § 302, the Historical Preservation Fund was added to the funds listed in this section and clause 22 was added to the same section, and reads:

> "22. Historical Preservation Fund.—All moneys received by the Treasury Department from the Department of Revenue arising from the sale by the Department of Property and Supplies of publications of the Pennsylvania Historical and Museum Commission, and all moneys received from admission fees to historical buildings, shall be credited to the Historical Preservation Fund."

The Act of January 5, 1952, P. L. (1955) 1824, 71 P. S. §§ 1060.41 to 1060.46, authorized the Department of Property and Supplies, with the approval of the Pennsylvania Historical and Museum Commission, to acquire all the land, buildings and appurtenances known as the Landis Valley Museum in the Township of Manheim, Lancaster County, and § 6 thereof, 71 P. S. § 1060.46, provided that the admission fees and proceeds from the sale of many duplicate or inappropriate

objects in the Landis Valley collections received by the Pennsylvania Historical and Museum Commission should be paid into the General Fund of the State Treasury and appropriated to the Pennsylvania Historical and Museum Commission for the maintenance of existing buildings, the construction of new buildings, landscaping, and repair of antiquities at the Pennsylvania Farm Museum of Landis Valley.

Thus, the Acts of 1951, supra, were irreconcilable in so far as the designation of the fund into which the admission fees collected at the Pennsylvania Farm Museum were concerned.

Turning to the "Statutory Construction Act," the Act of May 28, 1937, P. L. 1019, as amended, 46 P. S. §§ 501 to 602, we find the following applicable provision in § 65, 46 P. S. § 565:

> "Whenever the provisions of two or more laws passed during the same session of the Legislature are irreconcilable, the law latest in date of final enactment, irrespective of its effective date, shall prevail from the time is becomes effective. * * *"

This section is a statutory expression of a judicially established canon of interpretation. See *In re Report of Auditors of Borough of Stroudsburg*, 154 Pa. Super. 659, 37 A. 2d 21 (1944). *Petition of Bowie Coal Co.*, 368 Pa. 102, 82 A. 2d 24 (1951), also held that if acts are clearly inconsistent and irreconcilable the one latest in date of final enactment must prevail.

Thus, the Act of January 5, 1952, P. L. (1955) 1824, supra, which was by its terms effective immediately, became the prevailing act on that date in so far as admission fees collected at the Pennsylvania Farm Museum were concerned and required their payment into the General Fund.

This brings us to a consideration of the Act of May 27, 1957, P. L. 204, which amended The Administrative Code of 1929, and more specifically § 2802-A, 71 P. S. § 717. This section now reads:

> "Historical Preservation Fund. All moneys collected by the Department of Property and Supplies from the sale of publications for the Pennsylvania Historical and Museum Commission and all moneys collected by the commission from fees and sales shall be paid into the State Treasury through the Department of Revenue and credited to a fund to be known as the 'Historical Preservation Fund,' which is hereby created. Except as hereinafter provided all moneys in the fund from time to time are hereby appropriated to the Pennsylvania Historical and Museum Commission for the preservation, care and maintenance of the historical buildings, museums, grounds, monuments, public records and antiquities committed to its custody for the publication and republication of matters of historical or archaeological interest and for the

> research and editorial work incidental thereto and for the purchase of publications, postcards and other souvenirs of an historical nature for sale at the State Museum and at the historical properties administered by the commission. Whenever the moneys credited to the Historical Preservation Fund during any fiscal biennium exceed the average biennial allocation for the above purposes for the two preceding fiscal bienniums the excess shall be transferred to the General Fund."

This situation is governed by § 66 of the Statutory Construction Act, supra, 46 P. S. § 566, which reads:

> "Whenever the provisions of two or more laws passed at different sessions of the Legislature are irreconcilable, the law latest in date of final enactment shall prevail."

Applying this principle of interpretation, it is clear that the Act of 1957, supra, must prevail.

One other provision of the Statutory Construction Act merits attention with respect to the questions raised by your inquiry.

Section 63 of said act, 46 P. S. § 563, reads:

> "Whenever a general provision in a law shall be in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the Legislature that such general provision shall prevail."

We are of the opinion that since the general provision is the latest enactment and since the General Fund is mentioned in this act and provision made as to what moneys are to be paid into it, the General Assembly has manifested its intention that the general provision will prevail over the special provision.

We are of the opinion and you are accordingly advised that pursuant to the provisions of the Act of May 27, 1957, P. L. 204, moneys collected at the Pennsylvania Farm Museum of Landis Valley should be paid into the Historical Preservation Fund.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 26

Funds—Deposits—Sale of non-prison products—Sale of prison products—Inmates' personal funds.

Monies derived from the sale of non-prison industries products resulting from private inmate labor not performed for wages payable out of the Manufacturing Fund must be deposited and retained in the Inmates' General Welfare Fund.

Monies derived from the sale of products resulting from the employment of inmate labor for which wages are paid out of the Manufacturing Fund must be deposited in or transferred to the Manufacturing Fund.

Inmates' personal funds must be deposited or retained in the Inmates' General Welfare Fund.

Harrisburg, Pa., October 24, 1957.

Honorable Arthur T. Prasse, Commissioner, Bureau of Correction, Department of Justice, Harrisburg, Pennsylvania.

Sir: You have requested an opinion as to the legality of depositing in the Inmates' General Welfare Fund monies derived from the sale of non-prison industries products. This question arises as a result of an audit by the Office of the Auditor General of prison industries for the fiscal years ended May 31, 1955 and 1956, dated May 3, 1957, wherein the following recommendation was made:

> *"INSTITUTIONAL INDUSTRIES CASH*
>
> During the course of our audit it was noted that from June 1, 1954 through January, 1956, transfers were made from the Institutional Industries Fund to the Manufacturing Fund of moneys received from the sale of non-Prison Industries products in accordance with the advice contained in Informal Opinion of the Department of Justice, No. 146, dated January 10, 1950. However, subsequent to January, 1956 the proceeds from the sale of these non-Prison Industries were transferred to the Inmates' General Welfare Fund. This procedure is contrary to the advice contained in Informal Opinion No. 1462, dated January 10, 1950. It is, therefore, recommended that moneys transferred to the Inmates' General Welfare Fund be deposited in the Manufacturing Fund, and in the future, the proceeds from the sale of non-Prison Industries products be transferred directly to the Manufacturing Fund."

The Inmates' General Welfare Fund was created in January, 1956, for the purpose of consolidating the separate inmates individual and welfare funds then maintained by the seven penal institutions throughout the Commonwealth. Such consolidation was accomplished in the

interest of establishing a sound investment policy, an equitable distribution of expenditure for institutional benefits and a system of controls and balances generally desirable in government accounting. The inmates' individual and welfare funds, all non-appropriated, arise from the following sources: inmates' personal accounts, commissary sales, hobby shop sales, non-prison industries functions, donations and the like. As of June 30, 1957, the Inmates' General Welfare Fund consisted of $292,318.66 of inmates' personal monies and $173,215.51 of "welfare monies," representing proceeds received from the sale of non-prison industries products and commissary profits. All of these funds are held by the Commonwealth in a fiduciary capacity.

Informal Opinion No. 1462, issued by the Department of Justice on January 10, 1950, dealt with the questions of the legality of maintaining hobby shops in the institutions and the legality of depositing in the Manufacturing Fund monies derived from the operation of such hobby shops.

At the time Informal Opinion No. 1462 was written, § 2312 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 602, provided that the Department of Welfare had the power and duty to establish and maintain prison industries in the penal and correctional institutions of the Commonwealth. Section 2312 prescribed the nature and method of conducting prison industries and provided for the payment into the Manufacturing Fund of the proceeds of sales of manufactured products produced by prison industries. The section further provided for the payment out of the Manufacturing Fund of all expenses of such industries and for the compensation to be paid for the labor performed by inmates in such industries.

Informal Opinion No. 1462 recognized that hobby shops are maintained for the employment of inmates who are incapable of performing industrial work and that individual employment of inmates in other than prison industries was provided in subsection (k) of § 2312, in part, as follows:

> "The Department of Welfare shall have the power, and its duty shall be:
>
> * * * * * *
>
> "(k) To the extent to which it is unable to provide work for every physically able inmate of such institutions, to authorize the several boards of trustees of such institutions to permit inmates to engage in such work or industries as the

Department may approve, and which they are able to provide from other sources, but all such work shall be performed, the products thereof sold, and the proceeds thereof disposed of, under the rules and regulations of the department covering the same;"

Based upon the foregoing outlined provisions and quoted subsection, Informal Opinion No. 1462 reached the following conclusions:

"1. Under the provisions of Section 2312(k) of The Administrative Code of 1929, the Department of Welfare has the power and duty to authorize the several boards of trustees of the State penal and correctional institutions to permit inmates to engage in such work or industries as hobby shops, as the department may approve, the products thereof to be sold, and the proceeds thereof to be disposed of, under the rules and regulations of the department, in accordance with Section 2312(k) which reads as follows:

* * * * * *

"This subsection makes it necessary for the establishment of hobby shops or any other form of work to be conditioned upon the failure to provide the kind of work as authorized by subsection (a) of Section 2312 of The Administrative Code of 1929, and that before a hobby shop is established in an institution there should be some form of action by the Department of Welfare setting forth this failure, and authorizing the board of trustees of the institution involved to establish a hobby shop or other form of work. This action should be followed by the enactment of rules and regulations by the Department of Welfare covering the particular work authorized.

"2. The proceeds of the sale of such products must be deposited in the Manufacturing Fund, in accordance with the provisions of Section 2312(g) of The Administrative Code of 1929."

The Act of July 29, 1953, P. L. 1428, 71 P. S. § 301, transferred supervision and control of the State penal and correctional institutions from the Department of Welfare to the Department of Justice and created a Bureau of Correction in the Departmenet of Justice to carry on the administrative powers and duties previously assigned to the Department of Welfare. With certain changes which have no effect upon the situation covered by this opinion or Informal Opinion No. 1462, former § 2312 became § 915 of the Act of July 29, 1953, P. L. 1428, as amended, 71 P. S. § 305.

Subject to certain limitations, hereinafter set forth, Informal Opinion No. 1462 continues to represent the view of this department.

Former § 2312 and present § 915 establish a program of inmate labor. Subsection (a) of each section establishes the prison industries program and provides that "all persons * * * who are physically capable of such labor, may be employed at labor for not to exceed eight (8) hours each day, other than Sundays and public holidays." Subsection (a) of present § 915, which differs from former § 2312 in minor grammatical respects, continues as follows:

> "Such labor shall be for the purpose of doing printing or of manufacturing and producing supplies, or for the preparation and manufacture of building materials for the construction or repair of any State institution or in the work of such construction or repair, or for the planting of seed trees, or for the purpose of industrial training or instruction, or in the manufacture and production of crushed stone, brick, tile and culvert pipe or other material suitable for draining roads of the State or in preparation or road building and ballasting material."

Subsection (g) of each section provides that the proceeds "of all sales of manufactured products made under this section and all moneys received for the labor of inmates in State forests or elsewhere than on the grounds of the institution" shall be paid into the Manufacturing Fund. Subsection (h) of each section provides for payment from the Manufacturing Fund of the expenses incurred in the operation of the prisons, including inmates' wages. Subsection (i) of each section provides for the minimum amount, rate and method of payment of inmates' wages, payable out of the Manufacturing Fund. Subsection (k) of each section, quoted above, authorizes the performance of non-prison industry work for inmates physically incapable of performing prison-industry labor as provided in subsection (a) quoted above.

The plain purpose of former § 2312 and present § 915 is the establishment of a program of inmate labor based upon an eight hour work day excepting Sundays and holidays. These sections contemplate that inmates will be employed in prison industries as far as possible. In those cases where inmates are physically incapable of performing an eight hour work day in prison industries, or where prison industry work cannot be provided for every physically able inmate, non-prison industry labor is authorized. Where inmate labor, performed on the basis of an eight hour work day, is used to produce articles, services or products for sale in prison hobby shops and the inmates so working are paid out of the Manufacturing Fund for such labor, Informal Opinion No. 1462 continues to represent the view of this department that the proceeds from the sale of such articles, services or products must be deposited in the Manufacturing Fund. On

the other hand, Informal Opinion No. 1462 was never intended to apply to other proceeds of hobby shops derived from the sale of articles and products produced by inmates in their spare time. Nor should Informal Opinion No. 1462 be construed to apply to monies credited to the individual accounts of inmates derived from wages, personal funds, gifts, Social Security benefits, or similar private sources, or to profits derived from commissary sales, donations, or similar non-appropriated fund sources.

It is, therefore, the opinion of this department and you are accordingly advised that the June 30, 1957, balance of $465,534.17 in the Inmates' General Welfare Fund should be disposed of as follows:

(1) The sum of $292,318.66, consisting of inmates' personal funds must be retained in the Inmates' General Welfare Fund;

(2) So much of the sum of $173,215.51, representing proceeds from the sale of products, resulting from the employment of inmate labor during an eight hour work day in hobby shop work for which wages are paid out of the Manufacturing Fund, must be transferred to the Manufacturing Fund; and

(3) So much of the sum of $173,215.51, representing profits of commissary sales, donations, other non-appropriated contributions, and proceeds from the sale of non-prison industries products, resulting from private inmate labor not performed for wages payable out of the Manufacturing Fund, must be retained in the Inmates' General Welfare Fund.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK P. LAWLEY, JR.,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 27

Pennsylvania Tax Anticipation Notes, Series of 1957, dated October 29, 1957, maturing May 20, 1958—Legal status.

Harrisburg, Pa., October 31, 1957.

Honorable George M. Leader, Governor,
Honorable Charles C. Smith, Auditor General,
Honorable Robert F. Kent, State Treasurer.

Sirs: We have your request for an opinion as to the legal status of thirty-three million dollars ($33,000,000) Tax Anticipation Notes, Series of 1957, dated October 29, 1957, maturing May 29, 1958.

We have examined the proceedings relative to the issuance by the Commonwealth of Pennsylvania of Tax Anticipation Notes, Series of 1957, in the amount of thirty-three million dollars ($33,000,000).

This issue was authorized by the General Assembly of this Commonwealth by the Act approved September 29, 1951, P. L. 1646, as amended by 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, 179 Atl. 736 (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 the 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 4½% 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-three million dollars ($33,000,000) Tax Anticipation Notes of the Commonwealth of Pennsylvania, Series of 1957, dated October 29, 1957, maturing May 29, 1958, 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, 1959, and are being issued in anticipation of collectible current revenues.

The total amount of the Commonwealth of Pennsylvania Tax Anticipation Notes, Series of 1957, 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 this issue of notes is also 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 must 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.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 28

Motor vehicles—Repossession—Variance between application for transfer of title to encumbrance holder and original certificate—Authority to issue certificate.

1. The Secretary of Revenue will not issue a certificate of title to the encumbrance holder-repossessor of a motor vehicle if there is any variance between the contract on which the repossession was made and the encumbrance as recorded on the certificate of title until the variance is explained by affidavit of the applicant to the satisfaction of the Secretary.

2. The appearance of an additional name on the original contract as a joint or several obligor is not such a variance as must be explained by affidavit.

Harrisburg, Pa., October 31, 1957.

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

Sir: You have requested an opinion concerning the procedure to be followed by the Bureau of Motor Vehicles of the Department of Revenue with regard to the issuance of a certificate of title applied for by an encumbrance holder upon repossession of a motor vehicle. Since September 15, 1949, the policy of the Bureau of Motor Vehicles has been that where there is a variance in dates, amounts, names or other material particulars, between the original encumbrance as recorded and the contract submitted by the applicant for a certificate of title, the Secretary of Revenue will refuse to issue a certificate of title. This policy is based upon a letter of advice issued to your department from the Department of Justice on July 18, 1949.

Motor vehicle financing is accomplished mainly through the security devices of the conditional sale and the bailment lease with an option to purchase. Loans are also made using a motor vehicle as collateral through the security device of the chattel mortgage. Upon the execution of any of these security transactions, the seller, lessor or mortgagee records his lien for the purchase price, rental or loan, with interest and charges, with the Department of Revenue, and a certificate of title is issued in the name of the buyer, lessee or mortgagor and delivered to the encumbrance holder. The application for a certificate of title is filed under § 202 of The Vehicle Code, Act of May 1, 1929, P. L. 905, as amended, 75 P. S. § 32, which provides inter alia:

> "(a) Application for a certificate of title shall be made upon a form prescribed and furnished by the department; and shall be accompanied by the fee prescribed in this act; and shall contain a full description of the motor vehicle, trailer,

> or semi-trailer, the actual or bona fide address and name of the owner, together with a statement of the applicant's title, and of any liens or encumbrances upon said motor vehicle, trailer, or semi-trailer, and whether possession is held subject to a chattel mortgage or under a lease, contract of conditional sale, or other like agreement."

The certificate of title in these situations is delivered to the encumbrance holder under § 203 of The Vehicle Code, supra, 75 P. S. § 33, which provides inter alia:

> "(b) Where there are no liens or encumbrances upon the motor vehicle, trailer, or semi-trailer, the certificate of title shall be delivered to the owner, but otherwise it shall be delivered to the person holding the first lien or encumbrance upon said motor vehicle, trailer, or semi-trailer, and shall be retained by such person until the entire amount of such first lien or encumbrance is fully paid by the owner of said motor vehicle, trailer, or semi-trailer. The outstanding certificate of title, when issued by the secretary showing a lien or encumbrance, shall be adequate notice to the Commonwealth, creditors, subsequent mortgagees, lienors, encumbrancers and purchasers that a lien against the motor vehicle, trailer, or semi-trailer exists, and failure to transfer possession of the vehicle, trailer, or semi-trailer shall not invalidate said lien or encumbrance."

Upon default by the conditional buyer, bailment lessee or chattel mortgagor, the seller, lessor or mortgagor frequently exercises his contract rights to repossess the motor vehicle rather than execute on a judgment or bring an action of replevin. Subsequently, the seller, lessor or mortgagee applies to the Bureau of Motor Vehicles for a transfer of title. This application is submitted under § 208 of The Vehicle Code, supra, 75 P. S. § 38, which provides inter alia:

> "* * * The secretary, upon surrender of the outstanding certificate of title . . . when the said certificate of title . . . is held by a person holding a first lien, encumbrance, or legal claim thereon, upon presentation of satisfactory proof to the secretary of ownership and right of possession to such motor vehicle . . . and upon payment of the fee prescribed in this act, and presentation of an application for a certificate of title, may issue to the applicant . . . a certificate of title thereto * * *"

Proof of ownership and right of possession normally is supplied by a certified copy of the sales contract, bailment lease or chattel mortgage.

The problem of whether to issue a new certificate of title arises at the point where inspection of the contract, lease or mortgage by

the Bureau of Motor Vehicles reveals a variance either with respect to the sum involved in the original security transaction or the names of the parties to the transaction. The following example will illustrate the problem: A, a married man, desires to purchase a motor vehicle, finance a portion or all of the sales price and take title to the vehicle in his sole name; C, the seller or lender, in order to secure payment of the debt or loan, requires A to execute a note and security agreement, in the form of a conditional sales contract, bailment lease or chattel mortgage; C, in addition, requires that B, A's wife, also execute the note and security agreement and assume a joint and several obligation thereon. Though title to the motor vehicle is in A, both A and B appear on the contract, lease or mortgage as co-obligors. A and B subsequently default and C repossesses the vehicle. A discrepancy is then revealed between the parties or the financing contract and the name on the original certificate of title at the time the secretary is requested to issue a new certificate of title in the name of the encumbrance holder, C.

With regard to the situation of a variance or discrepancy in dates and amounts, the letter of advice issued by this department on July 18, 1949, reached the conclusion that the Secretary of Revenue was reasonably justified in refusing to issue a certificate of title until such discrepancy was explained by affidavit of the encumbrance holder that the contract attached to the application for a certificate constitutes the existing contractual relationship between the repossessor and the registered owner, and, the basis for its asserted right of ownership and possession. Since under § 205 of The Vehicle Code, supra, 75 P. S. § 35, the secretary may cancel any certificate of title and issue a corrected certificate upon good cause appearing, where a certificate has been issued in error to a person not entitled thereto, or contains incorrect information for any reason, it is proper for the secretary to require a similar showing of good cause before issuing a repossession certificate where a patent variance in dates or amount appears suggesting "incorrect information due to any cause" sufficient to empower the secretary to cancel a certificate. In this respect the letter of advice of July 18, 1949, continues to represent the view of this department.

The letter of advice also represents the view of this department with regard to discrepancies in the spelling of names, use of different initials, and other such variances in the name appearing in the security device and the certificate of title. On the other hand, the letter of advice of July 18, 1949, does not represent the view of this department in concluding that when a variance appears between the parties to the

contract creating the encumbrance and the original certificate of title, the secretary must require more than the affidavit of the repossessor that, in substance, B was a mere surety or guarantor. Such policy needlessly requires a repossessor to bring appropriate proceedings under a writ of fi. fa. pursuant to a judgment or an action of replevin, and furnish evidence thereof with the application for a certificate of title. This conclusion was based upon a restrictive interpretation of § 201 of The Vehicle Code, supra, 75 P. S. § 31, and a misconstruction of the intent of the Legislature in enacting such provision. Section 201 provides inter alia:

> "(a) No person who is a resident of this Commonwealth shall own a motor vehicle, trailer, or semi-trailer, in this Commonwealth unless a certificate of title therefore shall have been obtained as provided in this act . . ."

An "owner" of a motor vehicle is defined in § 102 of The Vehicle Code, supra, 75 P. S. § 2, as "A person or persons holding the legal title of a vehicle; or, in the event a vehicle is the subject of a chattel mortgage or an agreement for the conditional sale or lease thereof or other like agreement, with the right of purchase upon performance of the conditions stated in the agreement, and with an immediate right of possession vested in the mortgagor, conditional vendee or lessee, then such mortgagor, conditional vendee or lessee shall be deemed the owner for the purpose of this act."

The certificate of title is made a necessary incident to ownership of a motor vehicle by § 201 of The Vehicle Code. *Majors v. Majors,* 153 Pa. Super. 175, 33 A. 2d 442 (1943), affirmed 349 Pa. 334, 37 A. 2d 528 (1944). But the certificate does not create ownership, nor is it a warrant of ownership or muniment of title. *Cunchula v. Harris & Sauer,* 34 Erie 90 (1950); *Macrone v. Macrone,* 34 Del Co. 293 (1947); *Bricker v. Lauback,* 50 Lanc. Rev. 167 (1946). Nor is it conclusive evidence of ownership; it is evidence only of prima facie right to possession of a motor vehicle. *Weigelt v. Factors Credit Corp.,* 174 Pa. Super. 400, 101 A. 2d 404 (1954); *Automobile Banking Corporation v. Draper,* 129 Pa. Super. 501, 195 Atl. 441 (1938); *Sunbury Finance Co. v. Boyd Motor Co.,* 40 Dauph. 199 (1934), affirmed 119 Pa. Super. 412, 180 Atl. 103 (1935); *Anewalt v. Reber,* 43 Berks 129 (1951).

In *Majors v. Majors,* 349 Pa. 334, 37 A. 2d 528 (1944) the Supreme Court stated the purpose of § 201 of The Vehicle Code as follows:

> "We are aware the primary purpose of the act was not designed to establish the ownership or proprietorship of an

> automobile, but rather to register the name and address of the person having the right of possession, and to furnish persons dealing with one in possession of an automobile a means of determining whether such possession was prima facie lawful . . ."

The purpose of the section thus being not to establish conclusive evidence of title, but rather to prevent theft and commerce in stolen cars and to assist owners in recovery of cars, it does not logically follow that the Legislature intended that all persons identified with the original transaction as conditional buyers, lessees or mortgagors should appear as co-owners in the certificate of title. If the conclusions expressed in the letter of advice are to be followed, the Secretary of Revenue would not be justified in issuing a certificate of title in the first instance, unless he examined the original security device to determine that all parties obligated therein are to be included as owners on the certificate of title. Having thus reached a conclusion opposite to that of the said letter of advice with regard to the legislative intent of § 201 of The Vehicle Code and the practical effect of such conclusion, we cannot allow the policy to continue whereby a certificate of title will be refused where there is an additional party included in the note and security agreement as a joint and several obligee.

It should be understood that where, as in the above illustration, A and B, as husband and wife, execute a note and security agreement and thereby assume a joint and several obligation, there is no actual *variance* in names since the "several" obligation of A appearing on the security agreement is the basis of C's right of ownership and possession where A's name appears as owner on the original certificate of title. This several obligation of the registered owner of the motor vehicle is equally as great as would be his liability under a note and security agreement executed solely by him.

It is therefore, the opinion of this department and you are accordingly advised that the Secretary of Revenue may issue a certificate of title to an encumbrance holder-repossess upon satisfaction of the statutory requirements of § 208 of The Vehicle Code, even though a variance appears in dates, amounts, names or other material particulars, between the original encumbrance as recorded and the contract submitted by the applicant for a certificate of title; provided, however, that where any such variance appears, the Secretary of Revenue may refuse to issue a certificate until the particular variance is explained to the satisfaction of the Secretary by affidavit of the applicant that the contract attached to the application constitutes the existing contractual relationship between the repossessor and the

registered owner, and is the basis for the applicant's asserted right of ownership and possession.

You are further advised that it is not a *variance* in dates, amounts, names or other material particulars where an additional party's name is placed on the note and security agreement as a joint and several obligor, and in such case you are obliged to transfer title without the necessity of forcing the repossessor to take court action prior to issuance of a certificate of title.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN, III,
Legal Assistant.

FREDERIC G. ANTOUN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 29

Investments—Public School Employes' Retirement Board—Purchase of corporate bonds which are convertible into common stock.

Departments, boards or commissions, or officers of the State government may purchase corporate bonds which are convertible into common stock of the issuing corporation or are accompanied by warrants to purchase common stock, so long as said departments, boards, commissions or officers do not exercise the option to convert such bonds into common stock or exercise a right to purchase such stock. Such bonds, however, may not be purchased if the issuing corporation also has an option to convert the corporate bonds.

The said departments, boards, commissions or officers must take into consideration the additional purchase price to be paid because of the conversion features or the accompanying warrants when purchasing such bonds, with the view of obtaining a return which is advantageous, notwithstanding said additional purchase price.

Harrisburg, Pa., October 31, 1957.

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

Sir: You have requested our opinion as to whether the Public School Employes' Retirement Board may purchase as investments corporate bonds which are convertible into common stock of the issuing corporation or are accompanied by warrants to purchase common stock.

Investment of funds in the custody of administrative departments, boards or commissions, or officers of the State government other than moneys in the State Sinking Fund are regulated and authorized by the Act of April 25, 1929, P. L. 723, as amended, 72 P. S. § 3603. This act limits said departments, boards and commissions to certain types of investments which are expressly enumerated.

The Legislature in not designating the purchase of common stock as an authorized investment, under the above act, has precluded the said departments, boards and commissions from now investing in such common stock.

This act nevertheless does authorize departments, boards and commissions to purchase corporate bonds providing that the issuing corporation or guaranteeing corporation meets certain qualifications. Corporate bonds which are convertible into common stock or are accompanied by warrants to purchase common stock are essentially corporate bonds which are accompanied by an option granted to the holder thereof, permitting him to exercise the option for the purpose of converting the said bond into the common stock of the issuing corporation. Where such an option is to be exercised by the holder of the bond and not by the issuing corporation, it would appear that the departments, boards and commissions could purchase such corporate bonds as long as the option to convert such bonds into common stock, or as long as the warrants to purchase common stock are not actually exercised. Where the conversion option is exercisable by the issuing corporation or some third party, the purchase of such bonds would be prohibited. In the former case, the departments, boards and commissions would only be purchasing corporate bonds and not common stock; in the latter case, they would have no such assurance.

It must be pointed out, however, that § 1 of the Act of 1929, as amended, supra, 72 P. S. § 3603, permits the purchase of the corporate bonds if:

* * * * * *

> "(i) Purchased in the exercise of that degree of judgment and care under the circumstances then prevailing which men of prudence, discretion and intelligence exercise in the

> management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income to be derived therefrom as well as the probable safety of their capital;
>
> * * * * * *"

The above duty imposed upon the departments, boards and commissions is called to your attention since at whatever price the above classes of corporate bonds are offered, the price would necessarily include a value based upon the existence of the conversion feature or the accompanying warrants to purchase common stock. If then the departments, boards and commissions may not exercise the option to purchase common stock or convert the bonds into common stock of the issuing corporation, the purchase price of such bonds must not be such that the departments, boards and commissions would be charged with failing to exercise proper discretion in the management of the funds entrusted to it by virtue of the fact that the purchase price for such bonds was excessive in light of the inability to effectuate the conversion.

Therefore, we are of the opinion and you are accordingly advised that although the Public School Employes' Retirement Board may purchase corporate bonds which are convertible into common stock of the issuing corporation or are accompanied by warrants to purchase common stock, said Board may not exercise its option to convert such bonds into common stock or exercise a right to purchase such stock.

Furthermore, such bonds may not be purchased by the Board if the issuing corporation also has an option to convert the corporate bonds in the possession of the holder into common stock.

Lastly, if the Board purchases such bonds it must do so with the view of obtaining a return which is advantageous, notwithstanding the additional purchase price it must pay because of the conversion features or the accompanying warrants to purchase, and not in violation of the duties imposed upon it by the above act.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY L. ROSSI,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 30

Public records—Board of Finance and Revenue—Review docket and refund docket—Right to Know Law of June 21, 1957, P. L. 390.

Right to Know Law of June 21, 1957, P. L. 390, 65 P. S. § 66.1, requires that the contents of the review docket and the refund docket of the Board of Finance and Revenue be made available for public examination and inspection.

Section 731 of The Fiscal Code of April 9, 1929, P. L. 343, as amended, 72 P. S. § 731, does not make confidential the contents of the review docket and the refund docket of the Board of Finance and Revenue.

Harrisburg, Pa., October 31, 1957.

Edward V. Ryan, Esquire, Board of Finance and Revenue, Treasury Department, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether the review docket and the refund docket of the Board of Finance and Revenue are public records available for examination and inspection by the public under the provisions of the "Right to Know Law," the Act of June 21, 1957, P. L. 390, 65 P. S. §§ 66.1-66.4. In this connection you have appended to your request for advice a sample sheet of the review docket, which you have marked "A," and a sheet of the refund docket, which you have marked "B."

The review docket of the Board of Finance and Revenue shows the number of the claim, the name of the taxpayer, the nature of the case, the time period involved, the date and amount of settlement, payments made by the taxpayer, the date on which the petition for resettlement was filed with the Department of Revenue, the action on the petition for resettlement by the Department of Revenue and the Department of Auditor General, the date of notice of the action on the petition for resettlement by the Department of Revenue, the date on which the petition for review was filed, the reasons for the review and the disposition of the case.

The refund docket of the Board of Finance and Revenue shows the number of the claim, the name of the taxpayer, the nature of the case, the period of time involved, the ledger record of payments, the date of filing the petition with the Board of Finance and Revenue, the reasons for requesting a refund and the disposition of the case.

The foregoing information, which is roughly equivalent to the information contained in the dockets of courts of record, pertains to the

administrative adjustment of a taxpayer's liability. The administrative action of the Board which is recorded in the review and refund dockets may, and often does, result in a reduction of a taxpayer's liability; and in those cases where tax payments have been made in excess of the adjusted tax liability refunds are authorized. Because this function of the board so vitally affects the administration of the taxing program of the Commonwealth, the actions of the board, as recorded in the review and refund dockets, should, unless forbidden by law, be open to public scrutiny. Such is the legislatively-expressed public policy of the Commonwealth.

Section 2 of the "Right to Know Law," supra, provides that:

> "Every public record of an agency shall, at reasonable times, be open for inspection by any citizen of the Commonwealth of Pennsylvania."

Section 1 (2) of the act defines a "public record" as including "any account * * * dealing with the receipt or disbursement of funds by an agency" or any "decision by an agency fixing the * * * property rights * * * or obligations of any person or group of persons." The Board of Finance and Revenue is an "agency" within the meaning of that term as defined in § 1(1) of the act. It follows that the action of the board in resettling a taxpayer's liability or authorizing a refund of tax payments falls squarely within the command of the "Right to Know Law" that such actions shall be open for public inspection.

So much would dispose of the present inquiry were it not for the fact that the definition of "public record" in § 1(2) of the "Right to Know Law" contains a proviso excluding from the definition of "public record" any record "access to or the publication of which is prohibited, restricted or forbidden by statute law." It remains, therefore, to determine whether § 731 of The Fiscal Code, the Act of April 9, 1929, P. L. 343, as amended, 72 P. S. § 731, prohibits public inspection of the board's review and refund dockets.

Prior to 1956, § 731 of The Fiscal Code provided, inter alia, that:

> "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. * * *"

Violation of this provision was made a misdemeanor punishable by fine and imprisonment.

This provision was twice before our Supreme Court for interpretation: see *Commonwealth v. Mellon National Bank & Trust Co.*, 360 Pa. 103, 61 A. 2d 430 (1948), and *Graham Farm Land Co. v. Commonwealth*, 363 Pa. 571, 70 A. 2d 219 (1950). Both of these decisions involved production of *tax returns* in response to subpoenae duces tecum and are not helpful in the present inquiry. Subsequently, the meaning and effect of § 731 were considered in Formal Opinion No. 651-A, 1955-56 Op. Atty. Gen. 3, dated January 7, 1955. There, the Attorney General advised the Chairman of the Board of Finance and Revenue that § 731 of The Fiscal Code:

> "* * * 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."

It is unnecessary for us now to reexamine the views expressed in Formal Opinion No. 651-A in the light of the provisions of the "Right to Know Law" because, as subsequent legislation demonstrates, the views expressed in that opinion can no longer be considered as the binding advice of this office.

In 1956 the legislature amended § 731 by adding the following sentence:

> "For purposes of this section, information regarding refunds or credits and the names of the persons or corporations entitled thereto, which is available for public inspection under the provisions of this act, shall not be deemed confidential[1]."

The net effect of the 1956 amendment was to overrule the holding of Formal Opinion No. 651-A and to remove the cloak of privilege from the names of taxpayers receiving refunds or credits from the Board of Finance and Revenue. The information thus removed is precisely that information which appears in the review and refund dockets of the board. Moreover, the opening of the review and refund dockets for

[1] See the Act of March 6, 1956, P. L. (1955) 1218.

public inspection would not reveal information of a sort protected by the first sentence of § 731, that is, information the disclosure of which would injure a taxpayer's competitive position in the business world.

The 1956 amendment of § 731 of The Fiscal Code withdrew the confidential status theretofore accorded to the data contained in the review and refund dockets of the board. That being the case, the provisions of the "Right to Know Law," heretofore discussed, became fully applicable.

It is, therefore, our opinion and you are accordingly advised that the contents of the review docket and the refund docket of the Board of Finance and Revenue are not made confidential by § 731 of The Fiscal Code and must be made available for public scrutiny under the "Right to Know Law."

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. DONNELLY,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 31

Judges—Retirement—80% limitation of final salary after selection of retirement plan—Section 13 of the State Employes Retirement Law.

The 80% limitation contained in subsection (6) of § 13 of the State Employes' Retirement Law, Act of June 27, 1923, P. L. 858, 71 P. S. § 1743, is designed only as a limitation after selection of the plan under which a judge chooses to retire and that it does not apply after computation of the single life annuity and before selection of an option when a judge chooses an optional retirement plan.

Harrisburg, Pa., November 1, 1957.

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

Sir: You have asked our opinion with respect to the interpretation and application of subsection (6) of § 13 contained in the Act of July 5, 1957, P. L. 514, amending the State Employes' Retirement Law, the

Act of June 27, 1923, P. L. 858, as amended, 71 P. S. §§ 1711-1758.3. Subsection (6), 71 P. S. § 1743, provides:

> "(6) The annual payments provided for *in this act* to be paid to any judge shall not exceed eighty per centum of his or her final salary." (Emphasis supplied)

Your request for advice is the result of certain questions which have arisen with respect to this subsection. You will note that the provisions contained in the subsection were placed in § 13 of the State Employes' Retirement Law, supra. This section refers to the computation of superannuation retirement or the single life annuity. Because the language of this subsection was placed in § 13, there is a question as to its application. A contributor, at superannuation, may select either the single life annuity plan under § 13 or an optional plan under § 14. If the contributor selects an option, he will receive a reduced retirement allowance calculated by reducing the single life annuity by amounts representing the factors required to be applied under the particular option. The question now presented is whether the 80% limitation applies after the computation of the single life annuity and before the further reduction required by the option or only after final computation of the actual allowable annual payment. If the 80% limitation is applied after the computation of a single life annuity and before the further reduction required by the option, the contributor, by selecting an option, could never receive 80% of his salary.

In the interpretation of statutes, the legislative will is the all important or controlling factor. Indeed, the intention of the Legislature constitutes the law. Accordingly, the primary law of construction of statutes is to ascertain and declare the intention of the Legislature and carry such intention into effect to the fullest degree. The intention of the Legislature, when discovered, must prevail and any technical rule of construction is subservient.

The Act of May 28, 1937, P. L. 1019, Article IV, § 51, 46 P. S. § 551, known as the "Statutory Construction Act," provides:

> "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the Legislature. Every law shall be construed, if possible, to give effect to all its provisions.
>
> *"When the words of a law are clear and free from all ambiguity, the letter of it is not to be disregarded* under the pretext of pursuing its spirit." (Emphasis supplied)

The courts have clearly stated that the express language of a statute must be the controlling instrument of interpretation. A statute must be construed according to its terms and plain words of a statute cannot be disregarded, particularly where the language is not equivocal and a literal application of the language will not defeat the purpose of the legislation: *Commonwealth v. Sun Ray Drug Company,* 360 Pa. 230, 61 A. 2d 350 (1948); *Commonwealth v. Hallberg,* 168 Pa. Super. 596, 81 A. 2d 270 (1951).

In construing a statute the Legislature's intention and meaning must primarily be determined from the language of the statute itself; the legislative intent must be ascertained from the words in the statute: *Cartwright v. Cartwright,* 350 Pa. 638, 40 A. 2d 30 (1944); *Bonasi v. Board of Adjustment of Haverford Township,* 382 Pa. 307, 115 A. 2d 225 (1955); *Pedrick v. Gordin,* 382 Pa. 26, 114 A. 2d 124 (1955); *Commonwealth v. Przychodski,* 177 Pa. Super. 203, 110 A. 2d 737 (1955).

It is well established that in interpreting a legislative enactment each word contained therein must be considered. The Legislature cannot be deemed to have intended that language used in a statute shall be superfluous or without import. Court cannot delete or disregard words in a statute. The Legislature must be deemed to have employed words according to their common and approved usage and in doing so it commands the courts to give effect to all provisions of an act: *Commonwealth v. Mack Brothers Motor Car Company,* 359 Pa. 636, 59 A. 2d 923 (1948); *Sterling v. City of Philadelphia,* 378 Pa. 538, 106 A. 2d 793 (1954); *Commonwealth v. One 1939 Cadillac Sedan,* 158 Pa. Super. 392, 45 A. 2d 406 (1946); *Hickey v. Hickey,* 158 Pa. Super. 511, 45 A. 2d 380 (1946); *Allentown v. State Public Utility Commission,* 173 Pa. Super. 219, 96 A. 2d 157 (1953); *In re Borough of Lemoyne,* 176 Pa. Super. 38, 107 A. 2d 149 (1954).

In the instant case, the language contained in subsection (6) of § 13, supra, clearly and expressly manifests the intention of the Legislature. If we read this subsection alone, its meaning is unquestionable. The Legislature is clearly saying that the annual payments which are to be made to any judge as provided for *in this act* shall not exceed 80% of his final salary.

The legal meaning of the words "act" and "section" are obvious and need not be considered at length. The word "act" has a clear and unambiguous meaning. It cannot be ignored or be interpreted to mean section. The Legislature in utilizing the word "act" must be pre-

sumed to have meant that the 80% limitation was to be applied subsequent to the selection by a judge of any of the retirement plan choices offered to him in the said act and not only under § 13 thereof. If the Legislature had intended to apply the 80% limitation to the single life annuity or superannuation retirement before the selection of an option, it would not have used the word "act."

Whenever § 13 of the State Employes' Retirement Law, supra, has been amended in the past, the amendments thereto were clearly designated as amendments to that section and the language contained in such amendments clearly made that intention manifest: Act of June 21, 1935, P. L. 389; Act of May 18, 1937, P. L. 683; Act of January 19, 1952, P. L. (1951) 2176; Act of March 24, 1956, P. L. (1955) 1341; Act of June 1, 1956, P. L. (1955) 1863. These amendments either limited or expanded the factors which were to be utilized in the computation of the single life annuity and the language contained therein clearly limited the application of the provisions of § 13, supra. It is clear that these factors were to be taken into consideration before the option formulas were to be applied.

The questions which have arisen as to the interpretation of subsection (6), supra, arise only because said provision appears in § 13, supra. These questions would have been avoided if the provisions contained in subsection (6) had been placed in a separate section. The existence of this drafting error, although unfortunate, cannot have the effect of distorting the clear and express intent of the Legislature.

The Statutory Construction Act, Article IV, § 54, supra, 46 P. S. § 554, states as follows:

> "The title and preamble of a law may be considered in the construction thereof. Provisos shall be construed to limit rather than to extend the operation of the clauses to which they refer. Exceptions expressed in a law shall be construed to exclude all others. *The headings prefixed to chapters, articles, sections and other divisions of a law shall not be considered to control but may be used to aid in the construction thereof.*" (Emphasis supplied)

It is clear that where no ambiguity exists in the language of a statute the headings of sections may not be considered in interpreting the provisions of the statute. Although little case law exists in Pennsylvania on this subject, it appears clear from the study of that case law and the case law in other jurisdictions that where the language of an act itself is clear and unambiguous, resort may not be had to headings of a section or other subdivisions and a heading or subtitle may not be

used to restrict the scope of a provision which is clear. In *Commonwealth v. Evans,* 156 Pa. Super. 321, 40 A. 2d 137 (1944), the Court in construing a section of the Election Code, stated that the heading of the section in question was not controlling.

In *Logan v. Fidelity and C. Company,* 146 Mo. 114, 47 S. W. 948, 949 (1898), the Supreme Court of Missouri stated the almost universally accepted law applicable in the construction of statutes and their headings, as follows:

> "* * * It is the language of the section, and not its arrangement in the statute under one title or another, that must first be looked to, to determine its meaning."

See also, *Pickering v. Arrick,* 9 Mackey (D. C.) 169 (1891); *People v. O'Neil,* 54 Hun. 610, 8 N. Y. Supp. 123 (1889); *New York v. Eisler,* 2 N. Y. Civ. Pro. Rep. 125 (1882); *Collings-Taylor Company v American Fidelity Company,* 96 Ohio St. 123, 117 N. E. 158 (1917); *Ozawa v. The United States,* 260 U. S. 178, 43 S. Ct. 65, 67 L. ed. 199 (1922); *State v. Linsig,* 178 Iowa 484, 159 N. W. 995 (1916); *State v. Crothers,* 118 Wash. 226, 203 Pac. 74 (1922); *Security State Bank v. Aetna Insurance Company,* 106 Neb. 126, 183 N. W. 92 (1921); *In re Chisholm's Will,* 176 N. C. 211, 96 S. E. 1031 (1918); *Weesner v. Davidson County,* 182 N. C. 604, 109 S. E. 863 (1921); *Trader v. Jester,* 40 Del. 66, 1 A. 2d 609 (1938); *Seven Springs Water Company v. Kennedy,* 156 Tenn. 1, 299 S. W. 792 (1927).

The Statutory Construction Act, Article IV, § 51, supra, 46 P. S. § 551, also states, in part, as follows:

> "When the words of a law are not explicit, the intention of the Legislature may be ascertained by considering, among other matters—(1) *the occasion and necessity for the law;* (2) the circumstances under which it was enacted; (3) the mischief to be remedied; (4) *the object to be attained;* (5) the former law, if any, including other laws upon the same or similar subjects; (6) *the consequences of a particular interpretation;* (7) the contemporaneous Legislative history; and (8) legislative and administrative interpretations of such law." (Emphasis supplied)

The occasion and necessity for the subject amendment in question, its object and the consequence of its interpretation are clear. The subsection in question together with the other provisions of the amendments to the State Employes' Retirement Law, supra, contained in the Act of July 5, 1957, P. L. 514, were aimed at providing a fair and needed change in our retirement laws with respect to our judges. These

changes embodied in the amendments were initiated in recognition that the acceptances of commissions by judges were often accompanied by a loss of income and fear of future financial uncertainties. The private law practice abandoned by an able lawyer becoming a judge is not easily, if ever, regained at the termination of his service as a judge. If we are to ask able lawyers to assume this all important duty, we cannot in turn ask them to suffer the penalties which could, and often do, result from their detachment and severance from the private practice of law. It was believed that the approval of these amendments would induce able lawyers to accept judgeships without fear of future financial uncertainties and that as a result of this the interests of justice would be better served.

If then this subsection would be interpreted to restrict the annual pension payments to judges by 80% of their final salary before applying the reducing formulas of the option provisions, the increased contributions by judges mandated by these amendments would not only be not beneficial to the older judges with many years of service, but they would, indeed, demand payment by judges of large amounts of money without granting to them corresponding benefits. The necessity for the amendments and the object to be attained thereby would not materialize. The additional costs to the Commonwealth, though perhaps unanticipated, are costs which must be borne because of the legislative mandate.

We are of the opinion, therefore, and you are accordingly advised, that (1) the language contained in subsection (6) of § 13 is not to be construed as a limitation to the single life annuity plan unless the single life annuity plan is the one under which a judge chooses to retire, and (2) the limitation contained in said subsection is not to be applied until the Board computes the annual payment to be made to a judge under his chosen retirement plan, whether it be the single life annuity or one of the options.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY L. ROSSI,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 32

Volunteer police—Commissions—Expiration—Act of July 18, 1917, P. L. 1062.

Volunteer police commissions issued under the Act of July 18, 1917, P. L. 1062, have expired.

Harrisburg, Pa., November 1, 1957.

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

Sir: You have requested advice as to the present statute of volunteer police officer commissions heretofore issued either by you or by your predecessors under the Act of July 18, 1917, P. L. 1062, 35 P. S. § 1421; and, assuming these commissions to be void, you inquire as to what measures can be taken to assure proper protection of the municipalities and industries covered by the Act of July 18, 1917[1].

On April 16, 1957, the Department of Justice issued Formal Opinion No. 685[2], in which we advised that at the present time you are without authority to appoint and commission volunteer police officers under the Act of July 18, 1917, since your power of appointment can only be exercised during time of war. Section 4 of the Act of 1917, supra, 35 P. S. § 1424, declares the purpose and use of volunteer police officers where it provides:

> "The police officers herein provided for shall be organized and disciplined especially for the purpose of the suppression of riots and tumults, and to preserve the public peace and safety; and shall be used whenever necessary to guard, protect, and preserve from injury and destruction by enemies of the Nation *in the present war with Germany, or in any war in which this Nation may become involved,* all railroads, railways, mines, oil-wells, chemical plants, light-, heat-, and power-plants, water-works and plants, iron-works, steel-plants, ammunition-plants, manufacturing plants, and all other industries, as well as all public works and public buildings." (Emphasis supplied)

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[1] The Secretary of the Commonwealth has made similar inquiry. This opinion is intended to cover both requests for advice. It should be understood that this opinion is limited to an interpretation of the Act of 1917 and in no way attempts to delineate the power of the Governor to carry out his functions as the supreme executive authority of the State government vested in him by Article IV, § 2 of the Constitution.

[2] 1957 Op. Atty. Gen. 23.

It is apparent from this section that volunteer police officers may only be commissioned and used in time of war[3]. Though the act is silent on the point, it is obviously implied therein that commissions properly issued during time of war shall be considered to have expired once war has ended. Under these circumstances, you should revoke all outstanding commissions.

With regard to your second inquiry, namely, what measures can be taken to assure proper protection of the municipalities and industries covered by the Act of July 18, 1917, we have thoroughly analyzed the applicable statutes and find that municipalities and industries have ample statutory authorization for proper police protection.

Under the Act of August 9, 1955, P. L. 323, § 2326, 16 P. S. § 2326, and the Act of July 28, 1953, P. L. 723, Article XXV, § 2526, 16 P. S. § 5526, counties are authorized to employ watchmen. First class cities have authority to employ police, special patrolmen for mobs and riots, and additional necessary patrolmen, under the Act of June 25, 1919, P. L. 581, Article V, § 3, as amended, 53 P. S. § 12233; the Act of June 25, 1919, P. L. 581, Article II, § 6, 53 P. S. § 12127, and the Act of June 25, 1919, P. L. 581, Article V, § 6, 53 P. S. § 12236, respectively. Second class cities are authorized to organize night watch and police, police at places of public resort, and park patrolmen under the Act of March 7, 1901, P. L. 20, Article XIX, § 3, clause XV, 53 P. S. § 23119; the Act of March 7, 1901, P. L. 20, Article XIX, § 3, clause XIX, 53 P. S. § 23124, and the Act of March 17, 1899, P. L. 10, § 1, 53 P. S. § 23405, respectively. Police and extra policemen are authorized in third class cities under the Act of June 23, 1931, P. L. 932, Article XX, § 2001, as amended, 53 P. S. § 37001, and the Act of June 23, 1931, P. L. 932, Article XX, § 2003, as amended, 53 P. S. § 37003, respectively. The Act of May 4, 1927, P. L. 519, Article XI, § 1125, as amended, 53 P. S. § 46125, authorizes police in boroughs. Police in first and second class townships are authorized by the Act of June 24, 1931, P. L. 1206, Article XIV, § 1401, as amended, 53 P. S. § 56401, and the Act of May 1, 1933, P. L. 103, Article V, § 590, as amended, 53 P. S. § 65590, respectively. Auxiliary police may be appointed in any city, borough, town and township, under the provisions of the Act of January 14, 1952, P. L. (1951) 2016, § 2, 53 P. S. § 732. School police and special school police may be appointed under the Act of March 10, 1949, P. L. 30, Article VII, § 778, 24 P. S. § 7-778, and the Act of June 24, 1931, P. L. 1206, Article XIV, § 1416, as amended, 53 P. S. § 56416, respectively.

[3] The Preamble to the act states: "Whereas, there exists an urgent need, during the time this Nation is at war, to * * * organize * * * [a] * * * volunteer police force * * *"

With regard to police protection for industries, railroad police, street railway police and private watchmen with police powers in first class cities are authorized by the Act of February 27, 1865, P. L. 225, § 1, 38 P. S. § 31; the Act of June 7, 1901, P. L. 508, § 1, 67 P. S. § 1371, and the Act of April 26, 1870, P.L. 1269, § 1, 53 P. S. § 17096, respectively. Under the Act of April 18, 1929, P. L. 546, 38 P. S. §§ 1-14, industrial police, appointed by the Governor, were authorized in collieries and other industries. This act was repealed by the Act of June 15, 1935, P. L. 348, § 1, 38 P. S. §§ 1-14. Subsequently, the Act of May 25, 1937, P. L. 799, § 1, 38 P. S. § 15, made it unlawful for industrial police to carry firearms or other weapons except when on duty, and required such weapons to be left at the place of employment. This act defined "industrial police" to mean police officers employed "for the protection of its property by the owner or operator of any colliery, furnace, rolling mill, water company, water supply company, water power company, electric light company, electric power company, electric transmission company, mineral, mining or quarrying company, or express company." The clear implication of this act is that the enumerated industries may employ private police for plant protection and internal security purposes, subject to the limitations of the act. Their police authority, however, is limited to the property of their employer.

It is, therefore, our opinion and you are accordingly advised that commissions heretofore issued under the Act of July 18, 1917, have expired; that you should revoke all outstanding commissions; and that the present laws give ample police protection to municipalities and industries covered by the aforesaid act.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK P. LAWLEY, JR.,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 33

Alcoholics—Admission to private psychiatric hospitals—Contract between Department of Health and hospital—Act of August 20, 1953, P. L. 1212.

An alcoholic patient cannot be committed by a court, pursuant to the Act of August 20, 1953, P. L. 1212, 50 P. S. §§ 2101-2113, to a private psychiatric hospital unless and until the Secretary of Health has contracted with such hospital for

the treatment of alcoholic patients and has established standards for the administration and organization of such a facility. The Secretary of Health may, in his discretion, make such a contract with any private institution, capable of rendering proper services, for the care of persons addicted to the excessive use of alcoholic beverages.

Any private institution may receive and treat alcoholic patients who voluntarily enter or who are committed by the court pursuant to laws other than the Act of 1953.

Harrisburg, Pa., November 1, 1957.

Honorable Berwyn F. Mattison, Secretary of Health, Harrisburg, Pennsylvania.

Sir: You have requested our opinion concerning certain provisions of the Act of August 20, 1953, P. L. 1212, 50 P. S. §§ 2101-2113. From your request it appears that you desire answers to the following questions:—(1) may the Pennsylvania Hospital, a private psychiatric hospital licensed by the Department of Welfare, receive a patient who was willing to be committed by a court as an alcoholic under the provisions of the above act; and (2) may the Department of Health contract with private hospitals for the care of alcoholic patients?

Section 4 of the Act of 1953, supra, 50 P. S. § 2104 states:

> "The Secretary of Health shall contract for or establish such hospital and clinical facilities as are necessary to care properly for persons addicted to the excessive use of alcholic beverages, and shall establish standards for the administration and organization of these facilities."

Section 5 of the act provides that any person who, through the excessive use of alcoholic beverages, has become unable to care for himself, his family, or his property, or who has become a burden to the public, may be admitted *to the hospital or clinical facilities established or contracted for under §4 of the act* by court commitment on voluntary application, court commitment in lieu of sentence, court commitment upon petition by any relative, guardian, next friend or any other responsible person.

No contract exists between the Pennsylvania Hospital and the Department of Health for the establishment of hospital and clinical facilities to care for alcoholics.

It is, therefore, our opinion and you are accordingly advised that an alcoholic patient could not be committed by a court, pursuant to this act, to the Pennsylvania Hospital unless and until the Secretary of

Health has contracted with the Pennsylvania Hospital for treatment of such alcoholic patients and has established standards for the administration and organization of such a facility. By the same token it is clear that the Secretary of Health may, in his discretion, make such a contract with the Pennsylvania Hospital, or with any other private institution capable of rendering proper services, for the establishment of facilities for the care of persons addicted to the excessive use of alcoholic beverages. Of course, the Pennsylvania Hospital, or any other such institution may receive and treat alcoholic patients who voluntarily enter or who are committed by the courts pursuant to laws other than the act in question.

Very truly yours,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 34

Municipalities—Local Health Administration Law—Exemption from jurisdiction of County Department of Health—State grants—State Department of Health.

1. A municipality exempt from the jurisdiction of a Department of Health of a county in which such municipality is located is one which, under the provisions of the Local Health Administration Law, the Act of August 24, 1951, P. L. 1304, 16 P. S. § 12001 et seq., is a municipality as defined in § 3 of the said act which meets the following conditions:

a. At the time of the establishment of the county Department of Health, the municipality in question had its own Department or Board of Health; and

b. That the State Department of Health was not, at the time of the establishment of the county Department of Health, performing the local administration of health laws in the municipality.

2. A municipality exempt from the jurisdiction of a Department of Health in a county in which such municipality is located may receive State grants, as provided in § 25 of the Local Health Administration Law, if it meets the conditions set forth in that section, more particularly those conditions set forth in subsection (b).

3. Neither the Department of Health of this Commonwealth nor any county Department of Health may declare a municipality not to be exempt from the jurisdiction of the county Department of Health for the reason that such municipality does not meet the requirements necessary to receive State grants as provided in § 25 (b) of the act, since this section pertains to the making of grants alone and not to the determination of whether a given municipality is not "an exempt municipality."

4. If a municipality has its own Department or Board of Health prior to the establishment of a county Department of Health in the county in which it is located, the Department of Health of this Commonwealth cannot declare such a municipality exempt from the jurisdiction of the county Department of Health, unless the Department of Health of this Commonwealth has been performing the local administration of the Health laws in such municipality at the time of the establishment of the county Department of Health.

Harrisburg, Pa., November 1, 1957.

Honorable Berwyn F. Mattison, Secretary of Health, Harrisburg, Pennsylvania.

Sir: You have requested advice of this department as to the meaning of the term "municipalities exempt from the jurisdiction of county departments of health" as it occurs in the Act of August 24, 1951, P. L. 1304, the "Local Health Administration Law," 16 P. S. §§ 12001-12028. Specifically, you have asked whether a proposed letter to be sent by the Department of Health to municipalities in Allegheny County that have not joined the Allegheny County Department of Health is in conformity with the "Local Health Administration Law."

The final paragraph of the proposed letter reads as follows:

> "As of January 1, 1957, our records do not indicate that the City * * * was fulfilling its responsibility for administering all the State's laws and regulations that it was empowered to enforce; and, accordingly does not qualify as an exempt municipality. Unless you furnish evidence that [name of city] does quality as an exempt municipality within 30 days, we will consider [name of city] to, in fact, be within the jurisdiction of the Allegheny County Health Department which will be expected to provide those services mentioned above."

The question is whether the Department of Health of the Commonwealth or the department of health of a county in which a municipality is located may declare the municipality not to be exempt from the jurisdiction of the county department of health for the reason that such municipality was not fulfilling its responsibility of administering all the state laws and regulations pertaining to health that it was

empowered to enforce. This question can only be answered by an examination of the entire "Local Health Administration Law."

Section 3, clause (h) of the "Local Health Administration Law," supra, defines a municipality as any city, borough, incorporated town and township of the first class. Section 3 of the Act does not define the term "municipalities exempt from the jurisdiction of the county departments of health." However, §§ 13 and 14 of the Act establish the criteria which must be considered in determining whether a municipality, as defined in § 3 (h) of the Act, is to be considered exempt from the jurisdiction of the county department of health. These sections provide as follows:

> "Jurisdiction of County Departments of Health—The jurisdiction of an established county department of health in the county or counties which have established it shall extend to all townships of the second class, to all municipalities which do not have departments or boards of health at the time of the establishment of the county department of health, *to all municipalities or parts of municipalities in which the local administration of health laws at the time of the establishment of the county department of health is being performed by the State Department of Health for any reason whatsoever, to all municipalities which dissolve their departments or boards of health in accordance with Section 15 of this act, and to certain parts of municipalities as provided in Sections 15 and 16 of this act.*" (Emphasis Added)

> "Municipalities Exempt From Jurisdiction of County Departments of Health—Any municipality having a department or board of health at the time of the establishment of a county department of health in the county in which the municipality is located, or in a county in which part of the municipality is located, shall be exempt from the jurisdiction of the county department of health; *except that any municipality in which the local administration of health laws, at the time of the establishment of the county department of health, is being performed by the State Department of Health for any reason whatsoever shall not be exempt from the jurisdiction of the county department of health.*" (Emphasis Added)

Thus, a municipality, as defined in § 3 (h) of the act, is exempt from the jurisdiction of the county department of health in the county in which it is located if and only if the following conditions are met:

> 1. At the time of the establishment of the county department of health the municipality in question had its own department or board of health; and

2. That the State Department of Health was not at the time of the establishment of the county department of health, performing the "local administration of health laws" in the municipality.

It is not difficult to determine whether the first condition is met since a mere checking of the records of the municipality in question would reveal whether or not that municipality had a department or board of health at the time of the establishment of the county department of health in which it is located. In order to determine whether the municipality in question meets the second condition it is necessary for your department to determine whether at the time of the establishment of the county department of health, the State Department of Health was performing the local administration of health laws in that municipality.

It is not enough that the municipality in question was not performing all those health functions that it is empowered to perform. It must affirmatively appear that your department was performing those health functions, at the time the county department of health is established.

This conclusion follows from a consideration of §§ 13, 14, 15, and 25 of the act. Sections 13 and 14, above quoted, set forth the criteria for determining whether a municipality is exempt. Section 15 provides a method whereby an exempt municipality may, by dissolving its own department or board of health, become subject to the county department of health. Section 15 also provides that an exempt municipality may receive grants under the provisions of the act if it meets criteria set forth in § 25 (b) of the act, which criteria are as follows:

"* * * The Secretary of Health shall approve the payment of any quarterly installment of an annual grant to a county department of Health or to a municipality eligible under § 15 of this act only if he finds:

"(1) that such county department of health or municipality is complying with any and all regulations of the State Department of Health prescribing minimum public health activities, minimum standards of performance of health services, and standards of personnel administration on a merit basis; and

"(2) that such county department of health or municipality is accomplishing the purpose described in § 2 of this act."

Section 15 recognizes that exempt municipalities may receive state grants as provided in § 25. This negates any inference that the criteria

in § 25 determine whether a municipality is exempt. These criteria refer only to the eligibility of an exempt municipality to receive state aid. If a municipality in a county in which there is a department of health established is exempt, for reasons above stated, it is still necessary to determine whether that municipality is entitled to receive state grants. This last determination can only be made with reference to the provisions of § 25 of the act.

Therefore, this department is of the opinion and you are accordingly advised that neither your department nor a county department of health may declare a municipality not to be exempt from the jurisdiction of the county department of health in the county in which it is located unless such municipality fails to meet either of the following conditions:

1. At the time of the establishment of the county department of health the municipality in question had a department or board of health.

2. At such time your department was not performing the local administration of health laws in that municipality.

Further, you are advised that the proposed letter to be sent to municipalities which have not joined the Allegheny County Health Unit does not conform to the provisions of the "Local Health Administration Law" since it fails to indicate that your department was performing the "local administration of health laws" in these municipalities at the time of the establishment of the Allegheny County Health Department.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. COHEN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 35

Veterans' preferences—Honorable discharge as condition precedent to—Analysis of types of discharge.

Any person who served in the armed forces of the United States, or in a recognized women's organization connected therewith, during any war or armed conflict in which the United States engaged, and who has a certificate of separation given under honorable conditions, which would include but not be limited to

honorable discharge, general discharge, good discharge, satisfactory discharge, indifferent discharge or special order discharge is a "soldier" within the meaning of the Act of May 22, 1945, P. L. 837, and would be entitled to veteran's benefits under the act. A person awarded a dishonorable discharge, bad conduct discharge, undesirable discharge, a dismissal, or any other type of separation certificate given under conditions other than honorable would not be entitled to such benefits.

Harrisburg, Pa., December 2, 1957.

Mr. Ralph D. Tive, Executive Director, Civil Service Commission, Harrisburg, Pennsylvania.

Sir: You have requested an interpretation by this department of the various separation certificates awarded by the military services to persons at the conclusion of their periods of active duty. You state that you have been receiving for consideration the following types of discharges:

1. Discharge under honorable conditions.
2. General discharge (under honorable conditions).
3. Good discharge (under honorable conditions).
4. Satisfactory discharge (under honorable conditions).
5. Indifferent discharge (under honorable conditions).
6. Special order discharge (Navy).

In addition, you inquire about status of Air Force officers who are separated from the service under "honorable discharge" conditions.

The Act of May 22, 1945, P. L. 837, as amended, 51 P. S. §§ 492.1-492.8, gives "soldiers" preference in receiving appointments to and retention of public positions. Throughout the act the various aspects of these preferences are given to "soldiers." Section 1 of this act, 51 P. S. § 492.1, defines the word "soldier" as:

> "* * * 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.*" (Emphasis supplied)

The question thus becomes, assuming wartime service in the armed forces of the United States, whether the veteran seeking the benefits of the act is entitled to them only when his separation certificate bears the title "Honorable Discharge," or whether the words "honorable discharge" as used in the act have a broader meaning.

The Judge Advocates General of the Army, Navy and Air Force have informed us that all the services issued dishonorable and bad conduct discharges[1] pursuant to conviction of courts-martial. A veteran awarded such a separation certificate would be ineligible for veteran's preference[2]. All other separation certificates are awarded on an administrative rather than punitive basis.

The Air Force issues the following forms of administrative separation certificates:

1. Honorable discharge.
2. General discharge.
3. Undesirable discharge.

The regulations of the Air Force list the first two of these as being given under honorable conditions. Air Force Regulation, No. 39-10, dated October 27, 1953, paragraph 8 (a) states:

> "a. Effects of Honorable or General Discharge. The effects of an honorable or a general discharge are identical with respect to veterans' benefits, and normally entitled an airman so discharged to full rights and benefits. A general discharge may be a disadvantage to an airman seeking civilian employment. A general discharge received by a female airman precludes her reenlistment."

The same regulations list the undesirable discharge as being given under conditions other than honorable. Paragraph 8 (b) of Air Force Regulation, No. 39-10, states:

> "b. Effects of a Discharge Under Conditions Other Than Honorable. The undesirable discharge and the bad conduct discharge may or may not deprive an airman of veterans' benefits, and a determination is made by the Veterans' Administration in each individual instance to fix the airman's rights. It does render an airman ineligible to reenlist."

The Army issues the same administrative discharges. The causes for issuance are the same and the effect of each is the same as those in the Air Force. In addition, the Army issues to officers a discharge under other than honorable conditions. This is in all respects similar to an undesirable discharge.

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[1] Officers could receive a dismissal in instances where enlisted men receive a dishonorable or bad conduct discharge.

[2] Under the Federal statutes awarding veteran's benefits, an officer's resignation for the good of the service in lieu of court-martial is given the same effect as an enlisted man's bad conduct discharge.

The Navy, at the present time, issues the three administrative discharges described above. The reason for issuance and the effect of issuance is the same as in the other services.

In the communication we received from The Judge Advocate General of the Navy we were informed that the Navy has, in the past, issued numerous variations in the exact form of discharge certificates. These have included the "ordinary," "indifferent," "good," and "special order discharges." These types were given in situations which today would call for the issuance of a general discharge. All these named certificates contain the characterization "under honorable conditions."

In determining how we should construe the Veterans' Preference Act of 1945, supra, we have looked to the following authorities.

In the case of *Dierkes v. City of Los Angeles*, 25 Cal. 2d 938, 156 P. 2d 741 (1945), the facts indicated that the plaintiff was a member of the Los Angeles police department and was at the same time on a retired status in the United States Navy. Immediately prior to the outbreak of World War II he was recalled to active duty with the Navy and continued in such service until November of 1942, at which time he was returned to an inactive status.

Under the pertinent provisions of the Charter of the City of Los Angeles, any member of the police department who left the department to enter the military service of the United States and thereafter returned, having been honorably discharged from such service, was to receive certain veteran's preferences. The City of Los Angeles claimed that the plaintiff's transfer from active duty to an inactive status in the Naval Reserve after honorable service therein did not bring him within the provisions of the charter whereby he was required to have been honorably discharged.

The Court cited with favor the case of *Gibson v. City of San Diego*, 25 Cal. 2d 930, 156 P. 2d 737 (1945), wherein it was held that veterans' pension provisions should be liberally construed in favor of the applicant. The Court in the *Dierkes* case, supra, went on to state at pp. 744-745:

> "* * * Likewise here it is our duty to avoid, if reasonably possible, a result which would upon a purely arbitrary basis (the fact that the particular employe-veteran was given an 'honorable discharge' instead of being transferred without discharge to inactive status in a reserve corps) confer credit benefits upon some city employe-veterans who had served the

> nation honorably in the armed forces (and had been 'discharged') while denying such benefits absolutely to other city employe-veterans who had served equally honorably in the armed forces (but who had been transferred to inactive status in the reserve corps or retired instead of being discharged).
>
> "We are satisfied that the words 'honorably discharged from such service' must be construed to mean, in a proper case, honorably *relieved, released, transferred, or retired from active duty status,* * * *" (Court's emphasis)

Similarly, in the case of *Quam v. City of Fargo,* 77 N. D. 333, 43 N. W. 2d 292 (1950), where the plaintiff was retired from military service because of a service connected disability with a certificate attesting honorable service in the Army of the United States, it was held by the Court that he was entitled to veteran's benefits notwithstanding the fact that he did not have an "honorable discharge" certificate from such service as was required by the act. The Court pointed out that it is not so much the form of certificate that is controlling but rather the character of service which the certificate represents. In this respect, the Court cited with approval the definition of the words "honorably discharged" as given in the *Dierkes* case, supra. The Court also cited with approval the case of *Gibson v. City of San Diego,* supra, for the proposition that (p. 295):

> "* * * 'Laws protecting the civil rights of public employees who enter the armed forces in time of war or emergency are favored. National, state, and municipal legislative bodies, and the people themselves by direct vote, have been alert to meet the need for special protective and encouraging measures. In a like progressive spirit both federal and state courts "have kept pace and have evinced a firm intention to take a liberal view" of these enactments "in order that their protective purposes may be fulfilled without undue imposition of constitutional limitations or hindrance through narrow judicial construction." * * * We are bound by accepted rules of construction to consider the obvious purposes and objects sought to be attained by their adoption and to construe the language used, insofar as it reasonably permits, to the end of giving it vitality and efficacy in the accomplishment of such purposes and objects and fairness in its applications.' * * *"

We are mindful of our own rule of statutory construction that:

> "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the Legislature. * * *" (Act of May 28, 1937, P. L. 1019, Article IV, § 51, 46 P. S. § 551)

It is, therefore, our opinion and you are accordingly advised that any person who served in the armed forces of the United States, or in a recognized women's organization connected therewith, during any war or armed conflict in which the United States engaged, and who has a certificate of separation given under honorable conditions, which would include but not be limited to honorable discharge, general discharge, good discharge, satisfactory discharge, indifferent discharge or special order discharge is a "soldier" within the meaning of the Act of May 22, 1945, supra, and would be entitled to veteran's benefits under the act. A person awarded a dishonorable discharge, bad conduct discharge, undesirable discharge, a dismissal, or any other type of separation certificate given under conditions other than honorable would not be entitled to such benefits.

Very truly yours,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 36

Second and third class cities—Salaried fire chiefs—Compensation as assistant to Pennsylvania State Police—Act of April 27, 1927, P. L. 450.

Any fire chief who receives a salary for the performance of public duties, whether on a full time or part time basis, is not entitled to compensation for services rendered as an assistant to the Pennsylvania State Police under the provisions of the Act of April 27, 1927, P. L. 450.

Harrisburg, Pa., December 2, 1957.

Honorable E. J. Henry, Commissioner, Pennsylvania State Police, Harrisburg, Pennsylvania.

Sir: You have requested an opinion as to the interpretation of § 9 of the Act of April 27, 1927, P. L. 450, as amended, 35 P. S. § 1189. This section deals with the compensation of fire chiefs in second and third class cities, among others, for services rendered involving in-

spections of fires and flammable liquid storage facilities and installations conducted by them in their respective districts. You specifically ask the following two questions:

> 1. Shall State funds be expended to regularly paid fire chiefs for such services when it is an established fact that inspections are made by the fire chiefs as a routine part of their general duties on city time and by use of city owned equipment?
>
> 2. Are part-paid fire chiefs in third class cities eligible for reimbursements of similar services rendered?

Section 9 of the said act, 35 P. S. § 1189, provides:

> "The assistants to the Pennsylvania State Police, *not receiving a salary for the performance of public duties,* shall receive, upon the audit of the Pennsylvania State Police, fifty cents for each report of each separate fire reported to the Pennsylvania State Police under this act, and, in addition thereto, shall be paid the sum of fifteen cents for each mile traveled to the place of fire and, in the discretion of the Pennsylvania State Police, where an investigation has been made, a sum not to exceed three dollars ($3.00) for each day's service spent in such investigation." (Emphasis supplied)

"Assistants to the Pennsylvania State Police" are defined in § 1 of the Act of 1927, supra, 35 P. S. § 1181, as follows:

> "The Commissioner of the Pennsylvania State Police may appoint and remove the chief of the fire department of any county, city, borough, town, or township, where a fire department is established, or, where no such fire department exists, the burgess or constable of any borough or town, or constable or the president or chairman of the board of supervisors of any townships, as assistants to the department * * *"

The above quoted provisions state that fire chiefs of second and third class cities may be appointed as assistants to the Pennsylvania State Police. Section 9 provides for the compensation of such assistants, provided they are "not receiving a salary for the performance of public duties." In view of the unambiguous language of these sections, it would appear that a fire chief of any county, borough, town, township or city may not receive compensation under § 9 as an assistant to the Pennsylvania State Police where such fire chief receives a salary, either on a full time or part time basis, for the performance of public duties either as fire chief or in any other capacity.

It is, therefore, our opinion and you are accordingly advised that under the provisions of the Act of April 27, 1927, P. L. 450, 35 P. S.

§§ 1181-1189, any fire chief who receives a salary for the performance of public duties may not receive compensation for services rendered as an assistant to the Pennsylvania State Police.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK P. LAWLEY, JR.,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 37

Pennsylvania State Police—Compulsory retirement—Act of July 10, 1957, P. L. 682—Applicability to civilian employes.

Under the Act of July 10, 1957, P. L. 682 (Act No. 360), resignation is mandatory when a member of the State Police force attains the age of 60 years.

The act does not include civilian employees.

Members of the force who refuse to submit a resignation must be dropped from the rolls of the force.

Harrisburg, Pa., December 2, 1957.

Honorable E. J. Henry, Commissioner, Pennsylvania State Police, Harrisburg, Pennsylvania.

Sir: You have requested an opinion as to the interpretation of the Act of July 10, 1957, P. L. 682, as it relates to resignations of members of the State Police force who have attained the age of sixty years. In particular, you request answers to the following questions:

> "(a) In the event a member of the State Police who has attained, or who shall attain, the age of 60 years, on and after the effective date of the subject act, January 1, 1958, refuses to submit his resignation, is the Commissioner of the Pennsylvania State Police required to drop such member from the rolls of the State Police?
>
> "(b) Does the provision of the subject act apply to civilian employees of the Pennsylvania State Police such as maintenance men, clerks, mechanics, etc.?"

The Act of July 10, 1957, supra, amended § 205 of the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 65, by adding a new paragraph which reads as follows:

> "Any member of the Pennsylvania State Police except the Commissioner and Deputy Commissioner regardless of rank who has attained or who shall attain the age of sixty years shall resign from membership in the said police force provided however that the provision of this paragraph shall not apply to members of the State Police Force who upon attaining the age of sixty years shall have less than twenty years of service. Upon completion of twenty years of service the provision of this paragraph shall become applicable to such persons."

The purport of this new paragraph is abundantly clear. With certain enumerated exceptions every "member of the Pennsylvania State Police * * * shall resign" at the age of sixty years. Resignation is mandatory; and in any case where a member refuses to submit a resignation, the Commissioner of the Pennsylvania State Police force has no alternative but immediately to drop such member from the rolls. The Commissioner, therefore, must drop from the rolls any member of the State Police force who refuses to submit a formal resignation upon attaining the age of sixty years, having completed twenty years of service.

As for your second inquiry, the term "member of the Pennsylvania State Police" refers solely to officers and enlisted men of the force and does not include civilian employees. The preceding paragraph of § 205 makes this distinction clear where, in providing for appointments and compensation of the State Police force and its employees, reference is made to "members of the State Police Force *and* the chiefs, statisticians, clerks, experts, and other assistants, engaged in the work of the Pennsylvania State Police * * *." (Emphasis supplied)

It is, therefore, our opinion and you are accordingly advised that where any member of the State Police force, except the Commissioner and Deputy Commissioner, refuses to submit a resignation upon attaining the age of sixty years after completing twenty years of service, the Commissioner must immediately order such member dropped from the rolls, and further, that the term "members of the Pennsylvania State Police" refers solely to officers and enlisted men of the force and does not include civilian employees.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK P. LAWLEY, JR.,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 38

Department of Labor and Industry—Division of Private Employment Agency Licenses—Scope of licensing—Interpretation of term "Representative"—Act of July 31, 1941, P. L. 616, § 15.

1. Act does not limit licensure of representatives to theatrical booking agencies only; but applies to employment agencies generally covered by act.

2. The fact that practice has been to license representatives of theatrical booking agencies only does not preclude enforcement of act to apply to all employment agencies covered by act.

Harrisburg, Pa., December 3, 1957.

Albert Leven, Chief, Division of Private Employment Agency Licenses, Bureau of Inspection, Department of Labor and Industry, Harrisburg, Pennsylvania.

Sir: We have your request for our opinion with respect to the scope of the licensing provisions of the Act of July 31, 1941, P. L. 616, 43 P. S. §§ 535 to 564, the "Employment Agency Law", particularly with reference to § 15 thereof which provides for the licensing of "Representatives" of employment agencies.

You state that until the present time, it has been the practice of your department to require licensure of representatives of theatrical booking agencies only. This practice has been established and followed notwithstanding the fact that the said act refers not only to such agencies, but also to employment agencies generally. You inquire as to the propriety of such practice and whether the same should be continued.

The title of the Employment Agency Law gives notice of the Legislature's specific intention to provide for the licensing of representatives, as defined therein, in the following language:

> "Defining, regulating and providing for the licensing and registration of employment agents, and their representatives, * * *"

Section 15 of the act which prescribes the procedure for obtaining a license as an employment representative provides, inter alia, as follows:

> "It shall be unlawful for any person to act or assume to act as the representative of any employment agency without first obtaining a license as such representative from the department. It shall be unlawful for any person to engage in,

operate or carry on the business of an employment agency unless each representative of such agency is a licensed employment representative.

* * * * * *

"The department shall charge an annual *fee of* twenty-five dollars ($25.00) for issuing each such license, which fee shall be paid at the time application is made." (Emphasis supplied)

The following definition of employment representatives is found in § 2 (11) of the act:

"'Representative' as used in this act means any employe who solicits business and arranges or becomes a party to contracts between employers and employe clients."

Such definition includes any employee of any employment agency who performs any activity having to do with the procurement of clients for the agency and their subsequent placement. The intention of the Legislature to include agency representatives of all employment agencies within the licensing requirements of the act has been fully carried out in the enactment, and such employees must be licensed before they can perform any service whatsoever having to do with the solicitation of business and the arrangement of or becoming party to contracts between the clients and the employers.

The language of the act is so clear and specific that there is no basis for any statutory construction which would authorize any conclusion contrary to that herein expressed. The Statuory Construction Act, the Act of May 28, 1937, P. L. 1019, Article IV, § 51, 46 P. S. § 551 provides as follows:

"The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the Legislature. Every law shall be construed, if possible, to give effect to all its provisions.

"When the words of a law are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."

Since the language of the Employment Agency Law is clear, specific and free from ambiguity, there is no basis for the interpretation heretofore adopted by your department. The clear intent of the act is to require licensing not only of all employment agencies, but also of all employees who solicit business and arrange or become parties to contracts between employers and employee clients.

The fact that your department has read a contrary intent into the act and has not applied and enforced it as to all representatives does not justify a continuation of this improper interpretation. This proposition was confirmed in the case of *Federal Deposit Insurance Corporation, Appellant v. Board of Finance & Revenue of Commonwealth,* 368 Pa. 463, 84 A. 2d 495 (1951), wherein the court stated at page 471:

> "* * * But it will be noted that the principle of giving weight to administrative interpretation and practice under a statute is applicable only where the act is ambiguous and calls for a choice of one out of two or more possible constructions; departmental interpretation is not persuasive, much less controlling, where the statute is clear and explicit in its language. *An administrative body cannot by mere usage, invest itself with authority or powers not fairly or properly within the legislative grant; it is the law which is to govern rather than departmental opinions in regard to it:* 25 R. C. L. 1046, § 274; 42 Am. Jur. 400, 401, 403, 405, §§ 80, 81, 82; Lawrence County v. Horner, Treasurer, 281 Pa. 336, 343, 126 A. 783, 786; Commonwealth v. Stewart, 286 Pa. 511, 519, 134 A. 392, 394; Commonwealth v. Quaker City Cab Co., 287 Pa. 161, 168, 134 A. 404, 407; Grime v. Department of Public Instruction, 324 Pa. 371, 376, 188 A. 337, 339. * * *" (Emphasis supplied)

It is, therefore, our opinion, and you are accordingly advised, that under the Employment Agency Law, all employment agencies and their representatives as defined by the act are required to be licensed.

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON EHRLICH,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 39

Handicapped children—Examination—Certified public school psychologist—Family physician.

Under § 1371 of the Public School Code, an examination of a mentally and physically handicapped child in a school district of the second, third or fourth class must be made by a person certified by the Department of Public Instruction as a public school psychologist, and also by any other expert which the type of

handicap and the child's condition may neessitate; and that no provision is made that would allow such examination of a child by his family physician.

Harrisburg, Pa., December 4, 1957.

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

Sir: You request our advice as to whose medical opinion takes precedence, that of the child's own family physician or that of a school physician in the event that the examination is of a handicapped child of compulsory school age who has a severe nervous condition and also has an emotional disturbance.

Article XIV of the "Public School Code of 1949," Act of March 10, 1949, P. L. 30, as amended, 24 P. S. §§ 14-1401 to 14-1422, deals with school health services generally and provides that such services are to be performed by school health personnel. However, § 1407 permits examinations of a child of school age to be made by a family physician or a family dentist in lieu of the examinations provided for in Article XIV.

Section 1371 of Article XIII (F), Mentally or Physically Handicapped Children, of the Code, 24 P. S. § 13-1371, provides:

> "It shall be the duty of the secretary of the school board, in every school district of the second, third and fourth class, in accordance with rules of procedure prescribed by the Superintendent of Public Instruction, to secure information and report to the county board of school directors, on or before the fifteenth day of October of each year, and thereafter as cases arise, every child of compulsory school age within said district who, because of apparent exceptional physical or mental condition, is not being properly educated and trained. As soon thereafter as possible the child shall be examined by a person certified by the Department of Public Instruction as a public school psychologist, and also by any other expert which the type of handicap and the child's condition may necessitate. A report shall be made to the county board of school directors of all such children examined and of all children residing in the district who are enrolled in special classes. In school districts of the first and first A class every child of compulsory school age, who because of apparent exceptional physical or mental condition is not being properly educated and trained, shall be reported to the superintendent of the district as he shall direct."

Article XIV relates to regular school health services, such as vision tests, hearing tests, measurements of height and weight and chest X-rays.

While the examinations conducted under Article XIV may be made by the family physician, such examinations are not of the same type nor for the same purpose as an examination given under § 1371, supra. There is no provision in Article XIII allowing an examination of a handicapped child by a physician of the child's own choice, and the permission given in Article XIV is limited to examinations made in lieu of those required by that article.

We are of the opinion, and you are accordingly advised, that under § 1371, supra, which applies only to school districts of the second, third and fourth class, an examination of a mentally and physically handicapped child must be made by a person certified by the Department of Public Instruction as a public school psychologist and also by any other expert which the type of handicap and the child's condition may necessitate. Since no provision is made for examination of such a child by his family physician, there can be no question of precedence in such a case[1].

Very truly yours,

DEPARTMENT OF JUSTICE,

ELMER T. BOLLA,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 40

Handicapped children—Class assignments—Responsibility of teacher—Local and county boards of school directors—Public School Code of 1949, § 925.

By "class assignment" is meant the regular designation of studies to be pursued within a particular class by the students. It does not refer to the placement of students.

[1] Of course, the family physician may be certified as the school psychologist; but in such event he is acting in the latter capacity, not the former.

Class assignments are specifically made the responsibility of the teacher of each class under the direction of the proper superintendent of schools. For this reason, neither the local board of school directors nor the county board of school directors can make such assignments and there is no question of precedence involved.

Harrisburg, Pa., December 4, 1957.

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

Sir: You request advice concerning the interpretation of the law in the case of a difference of opinion as to the proper class assignments[1] for a physically handicapped child. Specifically, you ask whose opinion takes precedence, that of a local board of school directors or that of a county board of school directors. In the specific case before you, the school district does not maintain a class for the physically handicapped whereas the county board does have such a class in operation.

Section 925 of the "Public School Code of 1949," the Act of March 10, 1949, P. L. 30, as amended, 24 P. S. § 9-925, provides for the maintenance of classes for handicapped children by county boards of school directors.

In our Official Opinion No. 21[2], addressed to you and dated October 11, 1957, in construing § 925, we stated:

> "The question, therefore, is whether the language in § 925, supra, vests exclusive power in the county board of school directors to conduct such educational facilities.
>
> "The words 'whether or not conducted by the county board' as provided in § 925, supra, negative exclusive jurisdiction in the county board of school directors and evidences legislative intent that a local school district can, in its own right, conduct educational schools and classes for handicapped children as well as can the county board of school directors under certain circumstances.
>
> * * * * * *"

and we held that:

> "* * * (1) the board of school directors of a school district of the second class shall follow the approved plan for the edu-

[1] By "class assignments" is meant the regular designation of studies to be pursued within a particular class by the students. It does not refer to the placement of students.

[2] 1957 Op. Atty. Gen. 102.

> cation and training of handicapped children and have the power and duty to provide and maintain classes and schools for handicapped children; and when it does so, the county board of school directors does not have the power to provide and maintain the same type of school or class in that district; (2) where classes for handicapped children are conducted, according to the approved plan in school districts of the second class, then the county board of school directors can provide and maintain other additional classes where necessary; (3) where the school district of the second class does not maintain classes and schools for handicapped children, then the county board of school directors, with respect to school districts whose directors are eligible to vote at the election of members of the county board, shall have the power and its duty shall be to maintain such schools and classes in that district, and (4) the foregoing opinion and the same principles, as set forth in (1), (2) and (3), supra, are applicable to school districts of the third and fourth class."

Thus, a county board of school directors and the local board of school directors, separately and independently, maintain classes for the handicapped. There is no overlapping of such classes.

Section 1531 of the Public School Code of 1949, supra, 24 P. S. § 15-1531, provides:

> "Teachers in the public schools shall, under the direction of the proper superintendents of schools, grade and classify the pupils in their schools so that they may pursue the courses of study herein provided for, and all pupils found proficient may be promoted twice each year."

The section must be interpreted in conjunction with § 925.

A teacher's responsibility to act under the direction of the proper superintendent of schools, as provided in § 1531, supra, means that the teacher and not the local school board or the county board of school directors must grade and classify pupils. This function necessarily includes the making of assignments to the pupils. Therefore, a difference of opinion between the two school boards is of no relevance in the making of class assignments.

We are of the opinion, and you are accordingly advised, that (1) when classes for handicapped children are conducted by the county board of school directors, then the local board of school directors has no authority over the proper class assignments; (2) when classes for handicapped children are conducted by the local board of school directors, then the county board of school directors has no authority over the proper class assignments; (3) when the county board of school

directors maintains classes for handicapped children, it is the teacher employed by the board, not the board itself, who does the grading, classification and promotion of the pupils; (4) when the local school board maintains classes for handicapped children, it is the teacher employed by the board, not the board itself, who does the grading, classification and promotion of the pupils; and (5) in view of our conclusions in (1), (2), (3) and (4), supra, the opinion of neither the county board of school directors nor the local board of school directors takes preference in the making of class assignments for handicapped pupils.

Very truly yours,

DEPARTMENT OF JUSTICE,

ELMER T. BOLLA,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 41

County School Superintendent's Office—Expenditures—Attendance at out-of-state educational meetings—Public School Code of 1949.

Department of Public Instruction—Expenditures by county and assistant county superintendents, etc., in attending out-of-state educational meetings under certain conditions.

Harrisburg, Pa., December 4, 1957.

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

Sir: We have your request for an opinion as to the legality of expenditures of county superintendents, assistant county superintendents and other members of the office of the county superintendent for expenses incurred in their attendance at out-of-state educational conventions.

You call attention to the fact that in an opinion rendered May 2, 1930, 1929-30 Op. Atty. Gen. 201, 13 D. & C. 771, this department ruled that legislative authority would be necessary for the expendi-

ture of school funds for the purposes set forth above. This opinion of May 2, 1930, was based upon the interpretation of § 1121 of the Act of May 18, 1911, P. L. 309. This earlier act was incorporated as § 1068 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, 24 P. S. § 10-1068, and it reads:

> "Expenses.—In addition to the foregoing salaries each county superintendent, each assistant county superintendent, and each supervisor of special education shall be entitled to receive annually the payment of actual and necessary expenses *incurred in visiting schools within his district, in attending educational meetings,* and in the performance of such other official duties as may be required of him by law. In preparing the budget, an average of seven hundred dollars ($700) shall be used in estimating the travel cost of county superintendents, and in addition thereto, an average of seven hundred dollars ($700) shall be used in estimating the travel cost of assistant county superintendents and supervisors of special education. The Department of Public Instruction shall allocate the travel funds to the several counties in accordance with regulations to be determined by the Superintendent of Public Instruction. Payments shall be made monthly, on account of such expenses, to county superintendents, assistant county superintendents, or supervisors of special education, by requisition of the Superintendent of Public Instruction upon the Auditor General, upon the production to him of itemized vouchers in the usual manner." (Emphasis supplied)

The question arises as to the proper interpretation of the term "educational meetings."

Section 901 of the Code, as amended, 24 P. S. § 9-901, provides for an annual convention of school directors to be called by the county superintendent of public schools for the purpose of consideration and discussion of questions and subjects pertaining to the welfare and promotion of the public schools. This section also provides that the county superintendent may call together the school directors within the county when any emergency may exist or when, in the opinion of the county superintendent of public schools, a special meeting should be called for the consideration and discussion by the school directors of subjects pertaining to the welfare and promotion of the public schools. At the annual convention or at any special meeting so called, authority is given to pass on and approve activities and services and schools and classes for the handicapped. The county superintendent gives notice of the annual meeting and of all special meetings of the county school directors.

Section 921, as amended, 24 P. S. § 9-921, provides for a county board of school directors; and § 923, 24 P. S. § 9-923, provides that the county board of school directors shall meet in at least ten regular meetings each year and at such special meetings as shall be called by the county superintendent.

The county superintendent in § 926, 24 P. S. § 9-926, is named the chief executive officer of the county board of school directors and ex officio a member of all committees thereof. He is privileged to attend all meetings of the county board of school directors and to enter into all discussions and debates, but he is denied the right to vote. It is his duty to furnish such reports as may be required by the county board of school directors and by the Department of Public Instruction.

The powers and duties of the county board of school directors are set forth in § 925, as amended, 24 P. S. § 9-925, and in many of these duties are participation of the county superintendent or his approval is required.

The assistant county superintendent in § 1058, 24 P. S. § 10-1058, is given the duty of visiting the schools assigned by the county superintendent, not only with regard to the educational work but also to the inspection of school property. He is made, as his name implies, the general assistant to the county superintendent; and he must meet with the boards of school directors when it is deemed necessary or when requested by the directors to do so. In other words, the statutes make it quite clear that the duties of an assistant county superintendent may embrace practically any duty assigned to the county superintendent.

The supervisor of special education may be any person who is certificated to teach in the public schools of the Commonwealth or who is certificated as a public school psychologist by the Department of Public Instruction. A supervisor is appointed by the county board of school directors upon the nomination of the county superintendent. His qualifications are set forth in § 1054, 24 P. S. § 10-1054.

It is the duty of such supervisor of special education to examine and investigate the abilities, disabilities and needs of the exceptional children in the schools, to make recommendations concerning the instruction of such children, and to supervise such instruction. It shall be the duty of a supervisor of special education to make reports to the judge of the juvenile court and to assist the county superintendent in

the preparation, administration and interpretation of examinations for promotion or graduation when so directed by the county superintendent. These obligations are set forth in § 1059, 24 P. S. § 10-1059.

It is our opinion, therefore, that the educational meetings which are referred to in § 1068, 24 P. S. § 10-1068, are primarily the meetings provided for by the above cited sections. This is particularly true since § 1068 is the only provision made for the travel expenses of the county superintendent and the other officials. However, since the General Assembly has not defined the phrase "educational meetings," or limited its application from a geographical standpoint—i.e. to meetings within the county—we are of the opinion that, after the primary obligation of attending the intra-county meetings specified by statute has been fulfilled by the county superintendents, assistant county superintendents and supervisors of special education, any funds remaining in the allocation may be used by them for attendance at out-of-state educational meetings.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 42

Compulsory arbitration—Labor disputes—Public transportation industry—Act of June 30, 1947, P. L. 1161, 43 P. S. §§ 213.1 to 213.16.

The Act of June 30, 1947, P. L. 1161, 43 P. S. §§ 213.1 to 213.16, is not applicable to public transportation companies. The Pennsylvania General Assembly has no power to enact measure requiring compulsory arbitration of labor disputes in the public transportation industry since existing federal legislation guarantees the right to strike and thus precludes conflicting state legislation.

Harrisburg, Pa., December 7, 1957.

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

Sir: You have received a telegram from fifteen members of the State's General Assembly requesting that you call a special session of

that body "for the purpose of enacting legislation, which will authorize compulsory arbitration of labor disputes affecting public transportation of passengers[1]." We note that the telegram received by you refers to a labor dispute currently going on in Pittsburgh between the Pittsburgh Railways Company and its employees and that the telegram apparently urges the new legislation in order to bring this dispute to an end. You have asked for our views as to the possible scope of any such legislation.

The statutes of Pennsylvania includes the Act of June 30, 1947, P. L. 1161, 43 P. S. §§ 213.1 to 213.6, which pertains to "labor disputes between public utility employers engaged in furnishing electric, gas, water and steam heat services to the public and their employes . . .[2]" The act purports to require settlement of such labor disputes by mediation and, that procedure failing, by binding arbitration[3]. Limited review of the arbitrators' order may be had in the courts[4]. Complementing these procedures is a provision prohibiting a strike or a lockout[5].

The act is not applicable to the dispute between the Pittsburgh Railways Company and its employees since it does not apply to public transportation companies. We assume that the legislation urged by the signers of the telegram would take the form either of an amendment to this act or of a new act applicable to public transportation companies and with provisions paralleling those of the Act of 1947. We must turn, therefore, to a review of the legality of such legislation.

In *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, Division 998 et al. v. Wisconsin Employment Relations Board,* 340 U. S. 383, 71 S. Ct. 359, 95 L. Ed. 364 (1951), the United States Supreme Court had before it the Wisconsin Public Utility Anti-Strike Law. This act was virtually identical to the Pennsylvania Act of 1947, supra. However, it included, unlike the Pennsylvania act, disputes between public passenger transportation companies and their employees within the scope of its provisions. The Wisconsin act was applied to halt a dispute between the Milwaukee

[1] Telegram, dated December 4, 1957, addressed to Governor George Leader, and signed by the following members of the General Assembly: Edwin C. Ewing, Chairman, Frank Kopriver, Jr., Morris H. Goldstein, Glenn E. Stuart, Lester E. Spray, Dennis D. Stevens, Samuel Jenkins, Wm. P. H. Johnson, Laurence V. Gibb, Willard F. Agnew, Jr., Raymond E. Wilt, Lee A. Donaldson, Geo. W. Cooper, John R. Haudenshield, Ronald L. Thompson.

[2] Act of June 30, 1947, P. L. 1161, § 1, 43 P. S. § 213.1.

[3] Id. §§ 5 to 12, 43 P. S. §§ 213.5 to 213.12.

[4] Id., § 13, 43 P. S. § 213.13.

[5] Id., § 14, 43 P. S. § 213.14.

Electric Railway and Transport Company and its employees, and its constitutionality was upheld by the Wisconsin Supreme Court upon review of this action.

The Supreme Court of the United States reversed the decision of the Wisconsin Court, holding that the Wisconsin act was in conflict with the National Labor Relations Act of 1935[6] and the Labor Management Relations Act of 1947[7]. These acts, said the Court, are the supreme law of the land under Article VI of the United States Constitution; and their supremacy renders the Wisconsin act unconstitutional. The Court noted that the federal labor legislation, encompassing all industries "affecting commerce[8]," applies to a "privately owned public utility whose business and activities are carried on wholly within a single state[9]." It also pointed out that the federal legislation, supra, safeguarded the right of employees in covered industries to strike, which right the Wisconsin act sought to deny altogether. This conflict in policy required that the Wisconsin act be struck down[10].

No clearer statement of unconstitutionality could be found. Any attempt to amend the Pennsylvania act in order to apply it to the Pittsburgh dispute would be foredoomed[11]. The General Assembly is impotent to enact any measure which would force settlement of the dispute, and calling it into special session thus would be a meaningless act.

We, therefore, advise you that the United States Congress has supreme authority to legislate in this field of activity because of its power under Article 1, § 8, cl. 3 (commerce clause), of the United States Constitution; that the Congress has so legislated to the exclusion of conflicting state legislation; that state legislation requiring compulsory arbitration in public utility labor disputes would be in conflict with existing federal legislation; and that, accordingly, the General Assembly of Pennsylvania can not enact constitutional legis-

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[6] 49 Stat. 449, 29 U. S. C. §§ 151 to 187 (the Wagner Act).

[7] 61 Stat. 136, 29 U. S. C. §§ 141 to 187 (the Taft-Hartley Act).

[8] 29 U. S. C. §§ 141, 160, 173.

[9] 340 U. S. 383, 391; 71 S. Ct. 359, 364; 95 L. ed. 364, 374.

[10] See also *International Union of United Automobile, etc. Workers of America, C.I.O. et al. v. O Brien, Prosecuting Attorney et al.*, 339 U. S. 454, 70 S. Ct. 781, 94 L. ed. 978 (1950), where Michigan statutory provisions in another area of labor dispute were in conflict with the federal acts and were struck down.

[11] At least one other state law, similar to the Wisconsin and Pennsylvania ones, dealing with labor disputes has been invalidated as a result of the decision in the *Amalgamated Association* case discussed in the text, supra. *Henderson v. Florida ex rel. Lee*, 65 So. 2d 22 (1953). Another has been held superseded by federal pre-emption of the field *Grand Rapids City Coach Lines, Inc. v. Howlett et al.*, 137 F. Supp. 667 (W. D. Mich., 1955).

lation requiring compulsory arbitration of the existing labor dispute between the Pittsburgh Railways Company and its employees.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY J. RUBIN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 43

Department of Revenue—Expenditures out of Inheritance Tax Collections Made by the Register of Wills—Furniture and Office Equipment—Local Counsel Fees—Compensation of State-wide Management Staff—Act of July 8, 1919, P. L. 782, § 1, as last amended by the Act of May 23, 1945, P. L. 866.

1. Payment for furniture and office equipment to be used by local Department of Revenue inheritance tax personnel may be made from inheritance tax collections in the hands of the Register of Wills.

2. The payment of fees of local counsel who assist in the collection of the tax may not be paid out of inheritance tax collections made by the Register of Wills.

3. Payment of compensation of a state-wide management staff which supervises and assists all local transfer inheritance tax personnel in the collection of inheritance taxes may be made from inheritance tax collections.

Harrisburg, Pa., December 10, 1957.

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

Sir: You have requested advice from this department concerning the interpretation of the Act of July 8, 1919, P. L. 782, § 1, as last amended by the Act of May 23, 1945, P. L. 866, 72 P. S. § 2482, which provides as follows:

> "All clerks, appraisers, investigators and other persons required to assist any register of wills, in any county of the Commonwealth, in collecting and paying over inheritance taxes shall be appointed and their compensation fixed by the

> Secretary of Revenue, and, upon his approval and order, shall be paid out of the said taxes in the hands of the registers together with other necessary expenses incident to the collection of such taxes, including the payment of the cost of the premium on bonds filed by registers with the Department of Revenue."

Specifically, you ask whether, under this statute, you may pay out of local inheritance tax collections for the following three items:

(1) Furniture and office equipment used by local Department of Revenue Transfer Inheritance Tax personnel;

(2) Where necessary, compensation paid to counsel assisting in the collection of the tax;

(3) Compensation paid to a small state-wide management staff to supervise and assist all local transfer inheritance tax personnel in the collection of inheritance taxes.

We will discuss these questions seriatim.

1. The department ruled negatively on this question by letter of advice dated July 28, 1952, which had as its basis two prior rulings, Informal Opinion No. 369 and a letter of advice from former Attorney General Schnader, both of which construed the mercantile license tax.[1]

The mercantile license tax was collected at the local level as is the inheritance tax, but the former within its framework contained no procedure whereby the compensation paid to clerks, appraisers, etc. *"together with other necessary expenses incident to the collection of such taxes"* was to be paid out of the funds in the hands of the local register of wills. Unquestionably, the method of payment of the costs of collection of inheritance taxes is a departure from existing procedure as directed by law pertaining to the expenditure of state funds (pursuant to an appropriation by the legislature). Yet the specific nature of the legislative treatment of this question indicates that its purpose was definite. Any analogy to the mercantile license tax situation thus seems inapposite.

In the earlier letter of advice on this subject which concluded that these expenditures could not be paid out of local tax collections, it was said that "only expenses incurred by the register of wills which are not capital expenditures, but which are expenses of a recurring nature * * * are properly deductible from such tax collections." We

[1] Repealed by the Act of May 7, 1943, P. L. 237.

fail to see that the prohibition against capital expenditures as enunciated in that letter comes within the purview of the broad language of the act here under discussion.

There are no cases to aid us in the construction of the statute. We, therefore, have ascribed to the legislature the accepted meaning of the words contained therein.

The following definitions are found in Webster's New International Dictionary, Second Edition:

> Expense—"* * * outlay; cost or money paid out * * *"
>
> Necessary—"1. A thing that is necessary or indispensable to some purpose; something that one cannot do without; a requisite; an essential."
>
> Incident—"5. Law: Dependent on, or appertaining to, another thing (the principal); directly and immediately pert. to, or involved in, something else, though not an essential part of it."

In view of the broad definition of these words by the legislature, we conclude that the purchase of furniture and office equipment is a necessary expense incident to the collection of inheritance taxes. Therefore, it follows that payment for such purchases approved by the Secreatry of Revenue can be made out of local tax collections subject to the following two conditions: (1) that such purchases may only be made through the Department of Property and Supplies in accordance with the provisions of The Administrative Code of 1929, and (2) that such equipment be for use only by local tax personnel, not including the Register of Wills or members of his staff.

2. The second question asks whether the payment of compensation for attorneys necessarily assisting in the collection of inheritance taxes may be made from local tax collections according to this section.

An examination of the statute indicates within its framework that it establishes two classes of expenditures: (a) those dealing with compensation, and (b) those other "necessary expenses incidental" to the collection of the tax.

Logically, and in view of the fact that this question deals with compensation, we believe that we must analyze the question in the light of the category dealing with compensation rather than the second category, i.e. the necessary expenses incidental to the collection of the tax. There are two reasons why we must conclude negatively on this question.

(1) Clerks, appraisers and investigators are in themselves a group of persons immediately *concerned with the administration of the tax act,* as distinguished from attorneys who are not. We think that the phrase "other persons" would exclude attorneys for that reason. The ejusdem generis rule of construction aids us in this conclusion. See Endlich on the Interpretation of Statutes, Section 405.

(2) The Administrative Code of 1929, P. L. 177, Art. IX, Section 902, 71 P. S. § 292, provides:

> "The Department of Justice shall have the power, and its duty shall be:
>
> * * * * * * *
>
> "(b) To *supervise, direct* and *control* all of the legal business of every administrative department, board, and commission of the State Government." (Emphasis supplied)

Section 903, 71 P. S. § 293 provides:

> "The Department of Justice shall have the power, and its duty shall be:
>
> * * * * * * *
>
> "(b) *To represent the Commonwealth, or any department, board, Commission, or officer thereof, in any litigation* to which the Commonwealth or such department, board, commission, or officer, may be a party, or in which the Commonwealth or such department, board, commission, or officer, is permitted or required by law to intervene or interplead." (Emphasis supplied)

Section 906, 71 P. S. § 296 provides:

> "In addition to such deputy attorneys general as may be appointed to assist in the conduct of the regular work of the department, the Attorney General, with the approval of the Governor, shall have power:
>
> * * * * * * *
>
> "(b) From time to time appoint and fix the compensation of special deputy attorneys general, and special attorneys, to represent the Commonwealth, or any department, board, or commission thereof, in special work or in particular cases.
>
> "(c) To appoint and fix the compensation of deputy attorneys general, to represent the Commonwealth, and the several departments, boards, and commissions thereof, in all legal matters arising in any city or county, other than the State capital, except as otherwise provided in this act: Provided, That the same deputy attorney general may be assigned

to two or more cities or counties in the discretion of the Attorney General."

The Administrative Code further provided in Section 512, 71 P. S. § 192:

> *"It shall be unlawful* for any department, board, commission, or officer, of the Commonwealth, to engage any attorney to represent such department, board, commission, or officer, in any matter or thing relating to the public business of such department, board, commission, or officer, *without the approval in writing of the Attorney General."* (Emphasis supplied)

From an examination of these statutes, we believe that, notwithstanding the expression in Section 512 which is negative and is merely exculpatory, the appointment of special attorneys or special deputies is vested soley in the Attorney General. *The act in question in no way refers to the Attorney General, but, seemingly, confines itself to the field wherein the Secretary of Revenue can legally operate so far as appointment is concerned.* This leads us to the conclusion that the act cannot be speaking of attorneys in using the phrase "other persons."

For these reasons then, we conclude that the compensation of attorneys cannot be included as a deduction from local tax collections in the hands of registers of wills.

3. The third question deals with whether you may pay out of inheritance tax collections in the hands of the Register of Wills the cost of maintaining a statewide management staff to assist the local personnel in the collection of such tax.

Once again, the broad scope of the act is decisive of the question. In reaching our conclusion, we take note of the fact that the transfer inheritance tax has grown in importance as a source of revenue to this Commonwealth, and that, with such growth, the need for greater uniformity and control has become manifest. The many problems that present themselves to the local tax collector dictate that some supervision of the individual registers, appraisers, etc., be established so as to insure uniformity in the administration of the act. We believe that the establishment of a state-wide staff would assist in reaching such goal, inasmuch as such a staff will "assist" the Register of Wills, who acts as the agent of the Commonwealth *(Commonwealth ex rel. Duff v. Huston,* 361 Pa. 1, 61 A. 2d 831 (1948)) in the collection of inheritance taxes.

In order to conform to the act, we further conclude that expenses incurred in accordance with this opinion must be computed and allocated proportionately to the several Registers of Wills. Such an allocation might be obtained by the use of a fraction, the numerator of which is the local tax collections of a Register of Wills for a given period and the denominator the total tax collections of resident decedents throughout the Commonwealth for the same period. This same fraction could then be applied to the total expense of the maintenance of the staff. The product would be the amount chargeable to each local tax collection.

If the method of allocation in the preceding paragraph were established, the method of payment of the management staff creates a further problem. Since this management staff will be appointed by the Secretary of Revenue and will work out of Harrisburg assisting all of the Registers of Wills throughout the state, it is presumed that they will be paid by the Department of Revenue in Harrisburg. This will require that the sum derived as a result of the allocation provided for herein be forwarded to Harrisburg and deposited in a fund for the purpose of making payment to the staff.

We hold that you may, providing some sort of an allocation be established in a manner indicated herein, spend local inheritance tax collections for the maintenance of a state-wide supervisory staff.

To summarize the conclusions reached herein:

(1) You may pay for furniture and office equipment needed by local inheritance tax personnel from funds received by the Register of Wills resulting from inheritance taxes;

(2) You may not pay from such funds for the services of counsel who assist in the collection of inheritance taxes;

(3) You may maintain a central staff and pay therefor out of such funds in the hands of the local Register of Wills if such staff assists the Register of Wills in the collection of inheritance taxes, provided that an allocation of the expense of such a staff be made to each Register of Wills throughout the Commonwealth.

Very truly yours,

DEPARTMENT OF JUSTICE,

RALPH S. SNYDER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 44

Land Patent Applications—Secretary of Internal Affairs—Bureau of Land Records —Act of April 18, 1905, P. L. 202.

The Secretary of Internal Affairs may process patent applications accompanied by abstracts containing omissions or other defects.

The Secretary of Internal Affairs may not require patent applicant to cure defects by bringing Rule for Ejectment under Act of April 18, 1905, P. L. 202, 12 P. S. §§ 1559 to 1563. "Vacant Land" defined.

Harrisburg, Pa., December 13, 1957.

Honorable Genevieve Blatt, Secretary of Internal Affairs, Harrisburg, Pennsylvania.

Madam: You ask if you may require an applicant for a patent to land to secure a favorable decree of court under the provisions of the Act of April 18, 1905, P. L. 202, 12 P. S. §§ 1559 to 1563, before you process the application in situations where the applicant's abstract or chain of title demonstrates exclusive record title in the applicant or his predecessors in title for only forty or fifty years previous to the date of the application.

You also ask if a patent to land may be legally issued in a case where the abstract accompanying the application does not demonstrate a complete chain of title into the applicant.

1. A patent to land issues in cases where land is vacant[1] or where the patenting process has not been completed, and it serves to remove land from the primary title of the Commonwealth. Accordingly, for any particular piece of land, only one patent ever should issue. The purpose of requiring an applicant for a patent to furnish an abstract of title with his application is to assist the Commonwealth in determining whether a patent has been issued previously on the same land; for if it has, a new one should not be issued.

Your questions, thus, are limited to those situations in which a person has occupied land either through a chain of possession (usually

[1] Black's Law Dictionary (1944) defines "vacant land" as "absolutely free, unclaimed and unoccupied." Pennsylvania decisions modify this definition to mean that land is vacant and unappropriated in the sense that no office rights have been taken out and completed even though the land actually is occupied by cultivated fields, etc. See discussion in *Hockenberry v. Snyder*, 2 W. & S. 240 at 251 (1841); *Smith v. Crawford*, 1 Yeates 287 (1793); *Confair v. Steffer*, 6 S. & R. 249 (1820); and the Act of May 3, 1909, P. L. 413, 64 P. S. § 321.

starting with someone who began, but never completed, the patenting process) or adversely to presumed title-holders without a patent having originally issued.

The Act of April 18, 1905, is a statute primarily designed to enable a person who claims either as an occupant, or through predecessors in title, for a period of twenty-one years and upwards to require persons claiming the whole or an interest in the title to bring an action of ejectment within six months or forever be barred. Obviously, the decree of court, while quieting title in the applicant as against certain named or unknown persons, would be of little assistance to you in deciding if the land had previously been patented. The proceeding itself may, of course, be helpful in unearthing evidence of the chain of possession and hence assist you to that extent. But even the securing of a favorable decree by an applicant would not entitle him to a patent if the land already had been patented. For these reasons it is our opinion that the Secretary of Internal Affairs should not require an applicant to proceed under the Act of 1905, supra, as a prerequisite to the processing of his application for a patent.

2. In respect to your question as to the issuance of a patent on those lands on which the abstract or chain of title accompanying the application is incomplete, it is within your authority, nevertheless, to grant the patent applied for as long as you, in the exercise of reasonable diligence (including approval of affidavits confirming possession, etc., supplied by applicant) are assured that the applicant is the person to whom the patent should issue and that no other person has been issued a patent for the same land.

It is our opinion, therefore, and you are accordingly advised, as follows:

1. A decree under the provisions of the Act of April 18, 1905, P. L. 202, 12 P. S. §§ 1559 to 1563, quieting title to land adversely held for a period of not less than twenty-one years would be only one factor to be considered in determining the granting of a patent and, if presented, should be supplemented by other record evidences of title extending back to at at least the earliest available records in the county where the land is situate.

2. An applicant may not be affirmatively required by the Secretary of Internal Affairs to secure a favorable decree of court under the provisions of the Act of 1905, supra, before the application is processed, since the decree would be no guarantee of the patent's being granted and is not necessary for such grant.

3. Even though there may be omissions in the chain of title or abstract furnished by the applicant, you may process the application for favorable recommendation and issuance of the patent as long as you, in the exercise of reasonable diligence, have ascertained that no previous patent has been issued for the same land and the applicant is otherwise eligible.

Very truly yours,

DEPARTMENT OF JUSTICE,

RAYMOND C. MILLER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 45

Counties—Liquid Fuels Tax Fund—Use of Fund for Metropolitan Area Transportation Study—Act of May 21, 1931, P. L. 149 § 10.

Section 10 of The Liquid Fuels Tax Act of May 21, 1931, P. L. 149, as amended, 72 P. S. § 2611j, permits the use of moneys in a county liquid fuels tax fund for the preparation of an area mass transportation study.

Counties may lawfully contribute moneys in their county liquid fuels tax funds under § 10 of The Liquid Fuels Tax Act of May 21, 1931, P. L. 149, as amended, 72 P. S. § 2611j, for the preparation of a mass transportation study to serve as the basis for immediate and future highway construction in the affected area.

Harrisburg, Pa., December 17, 1957.

Honorable Lewis M. Stevens, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: You have inquired whether the provisions of § 10 of The Liquid Fuels Tax Act of May 21, 1931, P. L. 149, as amended, 72 P. S. § 2611j, permit a county to utilize moneys in its "County Liquid Fuels Tax Fund" to defray its share of the cost of a transportation study preliminary to the determination of when, where and what type of new highways will be constructed in and near that county.

We understand that large sums of money are now available under the Federal-Aid Highway Act of 1956 for highway planning and construction in urban areas and that the United States Bureau of Public Roads and the Pennsylvania and New Jersey Departments of Highways intend to conduct an intensive survey of the area within a 20-mile radius of downtown Philadelphia in order to provide essential information for assessing existing transportation needs and resources and for constructing vital improvements in the most advantageous sequence. This survey—covering the cities of Philadelphia and Camden together with portions of Bucks, Delaware, Montgomery and Chester Counties in Pennsylvania and adjacent areas in New Jersey—will insure that large outlays for construction improvements will be spent in the best interests of the region and that transportation arteries so constructed will be adequate to the needs of the area for not less than the next twenty-five years.

The estimated cost of the Philadelphia-Camden Metropolitan Area Transportation Study is approximately $2.3 million.[1] The cost of the survey is to be borne jointly by the participating parties. Of the $2.3 million required for the survey, New Jersey will contribute $300,000, the United States Bureau of Public Roads $1,000,000, and the Pennsylvania Department of Highways $666,667; the remainder ($333,333) is to be contributed by Philadelphia ($241,000) and Bucks ($9,000), Chester ($3,666), Delaware ($48,000) and Montgomery ($31,667) Counties.

The Liquid Fuels Tax Act, supra, imposes a tax of 3 cents on each gallon of liquid fuels used or sold and delivered by distributors within the Commonwealth.[2] By virtue of Article IX, § 18, of the Constitution of Pennsylvania (Amendment of November 6, 1945) the proceeds of all "gasoline and other motor fuel excise taxes" are required to be kept separate from the general funds of the Commonwealth. After deducting from the proceeds the cost of administration and collection of such taxes and the payment of obligations incurred in the construction and reconstruction of public highways and bridges, the net proceeds are earmarked soley for use in the "construction, reconstruction, maintenance and repair of and safety on public highways and bridges and air navigation facilities *and costs and expenses incident thereto*" (Emphasis supplied).

In faithful compliance with the command of Article IX, § 18, of the Constitution, The Liquid Fuels Tax Act provides for the segre-

[1] This compares to an estimated $2 billion expenditure in the Philadelphia-Camden area over the next twenty-five years for roadway construction.

[2] See § 4, as amended, 72 P. S. § 2611d. The act provides for exemptions and deductions for certain sales of liquid fuels but none of these has any relevance here.

gation of tax proceeds collected thereunder.[3] One-half cent of the 3 cent per gallon tax is paid into the "Liquid Fuels Tax Fund" of the State Treasury.[4] The remaining 2½ cents per gallon is paid into Motor License Fund and specifically appropriated therefrom "for the same purposes for which moneys in the Motor License Fund are appropriated by Law."[5] We are here concerned only with the disposition of the ½ cent per gallon of the tax which is paid into the "Liquid Fuels Tax Fund" of the State Treasury. Section 10(a)[6] provides that these funds shall be paid over to the several counties of the Commonwealth on the first day of June and December of each year according to a specific formula. All moneys received by the counties are required to be deposited and maintained in a special fund designated as the "County Liquid Fuels Tax Fund" to be used for certain specified purposes, which are substantially the same as are provided for under Article IX, § 18 of the Constitution. The exact language of § 10 (a) is as follows:

> "Moneys so received and deposited shall be used only for the purpose of *construction, reconstruction, maintenance, and repair of roads, highways and bridges, including the payment of property damage, now due or hereafter to become due, occasioned by the relocation or construction of highways and bridges,* and for the payment of interest and sinking fund charges on bonds issued or used for highways and bridge purposes, or on so much of any bonds as have been used for such purposes, and all payments made by any county, either directly or indirectly, prior to the first day of January, one thousand nine hundred and forty-six, for any or all such purposes are hereby validated" (Emphasis supplied).

The fundamental question raised by your inquiry is whether a contribution by an interested county for the preparation of the Philadelphia-Camden Metropolitan Area Transportation Study may properly be made out of the County Liquid Fuels Tax Fund. Stated otherwise, the question is whether the collection, organization and analysis of transportation data for the area involved is such an integral and inseparable element in the construction of a modern highway that an authorization for the use of funds for highway construction is necessarily an authorization for the use of funds for highway planning.

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[3] See § 10, as amended, 72 P. S. § 2611j.
[4] See § 10(a), as amended, 72 P. S. § 2611j(a).
[5] See § 10(d), as amended, 72 P. S. § 2611j(d).
[6] 72 P. S. § 2611j(a).

The purpose of all statutory and constitutional construction is to ascertain as clearly as is possible the intention of the authors of the language used.[7] And, in construing that language, we are required to give the words and phrases used their common and approved meanings.[8]

What, then, did the framers of the Constitution and the General Assembly intend when they restricted the use of liquid fuels excise tax funds for the purposes of "construction, reconstruction, maintenance and repair" of public highways and bridges? Certainly, an interpretation which would limit the expenditure of such funds to the physical construction, reconstruction, maintenance and repair would produce absurd results which, the legislature tells us, are to be avoided.[9] It would be wholly unrealistic to say that the construction of a highway means nothing more than the pouring of concrete. Roads cannot be constructed haphazardly. Modern highway construction requires careful, long-range planning; highway construction must be well conceived to be of enduring usefulness. Casual, chance or uncoordinated expansion of facilities is wasteful because such expansion cannot adequately keep pace with or provide for future requirements.

Careful analysis of the pertinent constitutional and statutory provisions plainly demonstrates that there was no intention to limit the use of these funds for physical construction only. Article IX, § 18, of the Constitution expressly authorizes the use of liquid fuel excise tax funds for, inter alia, "costs and expenses incident" to "construction, reconstruction, maintenance and repair;" and for "costs and expenses incident" to insuring "safety on public highways and bridges." Planning and engineering are clearly incident to highway construction. Every highway being constructed by the Pennsylvania Department of Highways, individually or in association with the United States Bureau of Public Roads, is the result of painstaking planning, design and engineering. Our modern multiple lane highways, resulting from the most advanced techniques of planning and design—including traffic surveys and studies of traffic flow, moderate grades, broad fluid curves, divided roadways, adequate clear sight distances, precision paving and so forth—have understandably achieved enviable safety records while promoting the free flow of vehicular transportation. These results are largely derived from the expenditure

[7] See § 51 of the Statutory Construction Act of May 28, 1937, P. L. 1019, 46 P. S. § 551.

[8] See § 33 id, 46 P. S. § 533.

[9] See § 52(1) id, 46 P. S. 552(1).

by the Department of Highways (often jointly with the United States Bureau of Public Roads) of substantial sums of money for the planning, design and engineering functions which today are integrally bound up in the construction of highways. We know of no attack that has ever been made upon the expenditure of motor license funds for such purposes.[10]

The failure of the legislature to include the phrase "and costs and expenses incident thereto" in § 10 of The Liquid Fuels Tax Act does not evidence any intention to restrict the use of moneys in a county liquid fuels tax fund to purposes narrower than those set forth in Article IX, § 18 of the Constitution. That the construction of highways involves the preparation of plans requiring the expenditure of liquid fuel excise tax moneys is recognized in § 10 (a) of The Liquid Fuels Tax Act,[11] wherein it is provided that:

> "* * * no expenditures from the county liquid fuels tax fund shall be made by the county commissioners for new construction on roads or bridges *without first having obtained the approval of the plans for such construction from the Department of Highways.*"[12] (Emphasis supplied)

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[10] In *Peoples Bridge Co. of Harrisburg v. Shroyer,* 355 Pa. 599, 50 A. 2d 499 (1947), the Supreme Court of Pennsylvania enjoined the purchase of a toll bridge by the Department of Highways out of moneys in the Motor License Fund declaring, inter alia, that the word "construction" as used in Article IX, § 18, of the Constitution was not intended to authorize the purchase of an existing toll bridge. This decision is patently not germane. The controversy there involved a "purchase," whereas the instant inquiry relates to the preparation of plans for the "construction" of highways.

In Kentucky, which has an "anti-diversion" constitutional provision similar to Article IX, § 18, of our Constitution, the Court of Appeals sustained the use of highway funds for the "printing and distribution of road maps, bulletins, booklets, photographs and advertisements concerning" Kentucky highways: *Keck v. Manning,* 313 Ky. 433, 231 S. W. 2d 604 (1950). Similarly, in *Grauman v. Department of Highways,* 286 Ky. 850, 151 S. W. 2d 1061, 1062 (1941), decided before the adoption of the Kentucky "anti-diversion" constitutional provision, the Court of Appeals, considering the uses to which highway funds could be put, aptly observed: "It can hardly be doubted that the term 'construction and maintenance' of the highway has a broader meaning than that of construction and maintenance of the actual road bed. We think the term is broad enough to include everything appropriately connected with and incidental to the construction and maintenance of an efficient road system, including the ordinary and usual devices used on roads to promote the safety and convenience of traffic."

[11] 72 P. S. § 2611j(a).

[12] The propriety of such expenditures from a county liquid fuels tax fund is additionally supported by a further provision of § 10(a) of the act, 72 P. S. § 2611j(a), which states that: "* * * the county commissioners shall not allocate moneys from the county liquid fuels tax fund to any political subdivision within the county, *until the application and the contracts or plans for the proposed expenditures have been made on forms, prescribed, prepared and furnished, and first approved by the Department of Highways.*" (Emphasis supplied.)

There is no doubt that moneys in a county liquid fuels tax fund may properly be expended for plans and other items of preparation reasonably necessary in the construction of public highways and bridges.

Condemnation and construction plans and drawings naturally fall within this allowable orbit; however, even condemnation and construction plans and drawings depend, ultimately, upon the gathering and processing of basic information—information which must also fall within the range of permissible expenditures. It is precisely this type of basic data that the Philadelphia-Camden Metropolitan Area Transportation Study will supply.

The proposed study is not intended as an academic gathering and processing of information relating to transportation problems. The United States Bureau of Public Roads now has available billions of dollars for allocation to the several states for the planning and construction of urban transportation arteries. Pennsylvania has already received proportionate allocations of these funds for the improvement of transportation facilities within the Commonwealth. A part of the Pennsylvania allocation will be spent in construction highway improvements in the Philadelphia metropolitan area—perhaps as much as $2 billion dollars during the next twenty-five years. The Bureau has allocated $1 million, to be matched by equal funds in Pennsylvania and supplemented by additional funds from New Jersey, for the preparation of transportation study in the Philadelphia metropolitan area. As soon as the proposed study is completed we shall have a blueprint for immediate and future highway construction in this area.

The proposed study is expected to yield the following results:

1. An accurate assessment of existing transportation facts in the region as they affect highways, including the natural capacity and efficiency of all transportation facilities and services, the characteristics of travel in the region, the population, economy and land uses in the region as they affect travel patterns.

2. A determination of immediately needed and achievable adjustments of the present transportation system of the region.

3. Projection of existing facilities in the light of conditions excepted to obtain in 1975 and 1985 and the assignment of projected travel to alternative systems of transportation facilities and services for these dates.

4. Comparison of relative costs and relative benefits of the alternative schemes and of individual projects under consideration.

5. Preparation of a coordinated transportation plan which will meet the anticipated 1975 and 1985 transportation needs of the area more satisfactorily and with the most economical use of highway funds.

6. Development of a program for construction of transportation facilities and for changes in services based upon priority of need, the availability of funds and effects of individual projects on other parts of the total transportation system.

7. The making of adequate provisions for keeping the records of current facts up to date and for the periodic adjustment of projects and the amendment of plans and programs according to changing conditions.

The preparation of the Philadelphia-Camden Metropolitan Area Transportation Study under the joint auspices of the United States Bureau of Public Roads and the Pennsylvania and New Jersey Departments of Highways will produce adequate and exact data which will guide the engineering and construction of new highways and bridges in the area now and for many years to come. Condemnation, design and construction plans and drawings will be based on the information and conclusions contained in the study. Study, design, condemnation and construction are all inextricably interwoven and, in the final analysis, represent one continuing process in the construction of public highways and bridges.

It is, therefore, our opinion and you are accordingly advised that affected counties may properly contribute moneys in their county liquid fuels tax funds for the preparation of the Philadelphia-Camden Metropolitan Area Transportation Study.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. DONNELLY,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 46

Fictitious names—Advertisement—Amendment of original certificate—Adding or deleting names of parties in interest—Fictitious Name Act of 1945.

The Fictitious Name Act of 1945, Act of May 24, 1945, P. L. 967, as amended, by § 6.1 of the Act of June 5, 1957, P. L. 258, 54 P. S. §§ 28.1-28.13, does not require advertisement where an application is filed with the Secretary of the Commonwealth, and the prothonotary for the purpose of amending an original certificate of registration under the Fictitious Name Act, supra, by either adding the names of additional parties in interest or adding the names of additional parties in interest and deleting the name or names of former parties in interest where there is no change in the business name.

Harrisburg, Pa., December 20, 1957.

Honorable James A. Finnegan, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether the "Fictitious Name Act of 1945," Act of May 24, 1945, P. L. 967, amended by Act No. 126, the Act of June 5, 1957, P. L. 258, 54 P. S. §§ 28.1-28.13, requires advertising whenever an original fictitious registration certificate is amended (1) merely to add names of additional parties in interest or (2) both to add names of additional parties in interest and to delete names of former parties in interest in cases where there has been no change in the business name. Section 6.1 of Act No. 126, provides as follows:

> "Any person conducting or carrying on any business in the Commonwealth in compliance with the provisions of this act, shall, for the purpose of adding the names of additional parties in interest or for the purpose of adding the names of additional parties in interest and deleting the name or names of former parties in interest where no change of the business name is involved, amend their original certificate by filing with the Secretary of the Commonwealth and the prothonotary an application for an amended certificate listing the names and addresses of the new parties in interest and the names and addresses of former parties in interest where former parties have been deleted. The Secretary of the Commonwealth and the prothonotary shall each issue an amended certificate to the applicant. The secretary shall charge a fee of five dollars ($5.00) for his services. The prothonotary shall charge a fee of five dollars and twenty-five cents ($5.25) for his services."

You will note that where the purpose of the amendment is to accomplish either (1) or (2) above, § 6.1 merely requires the applicant

to amend the original certificate by filing an application for an amended certificate with the Secretary of the Commonwealth and the prothonotary. The application is to include, of course, the names and addresses of the new parties in interest and the names and addresses of former parties in interest where former parties have been deleted. Nowhere in § 6.1 does any statement appear which requires the submission of proof of advertisement by an applicant.

It is unquestioned that § 3 of the Fictitious Name Act, 54 P. S. § 28.3, requires the submission of proofs of advertisement where an original application of registration is submitted to the Office of the Secretary of the Commonwealth and the office of the prothonotary. However, no advertisement is necessary where an applicant seeks to dissolve a business or withdraw as a party in interest therefrom, and an application for such purposes is filed with the Secretary of the Commonwealth and the prothonotary in accordance with § 7 of said act, 54 P. S. § 28.7.

Prior to Act No. 126 an original application for registration could not be amended by adding the name of a party in interest, or adding the name of a party in interest and deleting the name of a former party in interest, unless the original application was withdrawn in accordance with the provisions of § 7 and a new application was filed under § 3. The purpose of Act No. 126 was to avoid the unwarranted burdensome and expensive procedure where an applicant sought merely to add or add and delete the names of parties in interest, there being no accompanying change of the business name.

It is clear that the Fictitious Name Act, supra, must be strictly construed since the act is a penal statute: *Wolf v. William Goldman Theatres, Inc.*, 26 D. & C. 616 (1936). If we are to conclude that Act No. 126 requires advertisement for the purposes set forth therein, we must base our conclusion on a clearly manifested legislative intention. No such intent appears in the act.

Indeed, it is interesting to note that prior to the passage of Act No. 126, House Bill No. 558, then Printer's No. 257 (which ultimately became Act No. 126), contained a proposed amendment to § 3 which would have required advertisement in cases where an application was filed under § 6.1. The final printer's number (414) however, omitted from the bill the proposed amendment to § 3 and deleted in § 6.1 the reference therein requiring proofs of publication as provided in § 3.

The purpose of the Fictitious Name Act is to protect the public against imposition and fraud and to prohibit persons from concealing

their identity by doing business under an assumed name. The inquiring public remains protected by the provisions of Act No. 126 without imposing unjustified burdensome and expensive procedures upon applicants thereunder. Public records will disclose the identity of all persons doing business under an assumed name. The additional requirement of advertisement would not, as a practical matter, further the purpose aforesaid.

We are of the opinion, and you are accordingly advised, that the Act of May 24, 1945, P. L. 967, as amended by the Act of June 5, 1957, P. L. 258 does not require advertisement where an application is filed with the Secretary of the Commonwealth and the prothonotary for the purpose of amending an original certificate of registration under the Fictitious Name Act, supra, by either adding the names of additional parties in interest or adding the names of additional parties in interest and deleting the name or names of former parties in interest where there is no change in the business name.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY L. ROSSI,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 47

Notaries Public—Waiver of fees—Act of August 21, 1953, P. L. 1323.

The Notary Public Law, Act of August 21, 1953, P. L. 1323, 57 P. S. §§ 147-169, does not prohibit notaries from waiving their fee in whole or in part in any particular case.

Harrisburg, Pa., December 20, 1957.

Honorable James A. Finnegan, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: You have asked to be advised as to whether notaries may waive part of their fee under "The Notary Public Law," Act of

August 21, 1953, P. L. 1323, P. S. §§ 147-169. Section 21 of the act, 57 P. S. § 167, provides:

> "The fees of notaries public shall be fixed by the Secretary of the Commonwealth with the approval of the Attorney General."

In accordance with § 21, supra, the Secretary of the Commonwealth has provided a notary public maximum fee schedule. The only limitation in The Notary Public Law, supra, relative to fees is contained in § 19, 57 P. S. § 165, which forbids directors, officers and clerks of banks, banking institutions and trust companies from performing notary services for such companies and states that fees otherwise earned by such persons shall be their own and not the company's. This provision obviously does not prevent such a notary from waving his fee.

There are, of course, provisions contained in The Penal Code[1] prohibiting overcharges and in our general laws[2] prohibiting the charging of fees to servicemen, their widows or orphans of servicemen or servicemen's parents, none of which are of any import in the present discussion.

The Notary Public Law is a penal statute and must, therefore, be strictly construed. Its provisions afford public redress for its violation: Statutory Construction Act, Act of May 28, 1937, P. L. 1019, Article IV, § 58, 46 P. S. § 558.

Since the said law does not contain any limitations relating to fees other than those stated above, we cannot impose additional limitations unless the dictates of public policy so demand. The dictates of public policy have, in the past, initiated only the enactment of the express limitations imposed on notaries in § 19. There would appear to be no other public policy consideration which would prevent a notary from doing "what he will with his own." *Schwartz v. Philadelphia,* 337 Pa. 500, 504, 12A. 2d 294 (1940); *Patton v. Philadelphia,* 126 Pa. Super. 212, 218, 190 Atl. 670 (1937) (discussing right of State officers to voluntarily relinquish whole or part of salary). In the absence, therefore, of any impelling public policy consideration or statutory limitation, there appears to be no reason why a notary public cannot waive his fee in a particular case. This department has, on two prior occasions rendered opinions which included therein our considerations relating to the fees of notaries public.

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[1] Act of June 24, 1939, P. L. 872, § 318, 18 P. S. § 4318.
[2] Act of June 11, 1879, P. L. 148, § 1, as amended, 51 P. S. § 401.

In Attorney General's Opinion, dated December 31, 1919, 1919-20 Op. Atty. Gen. 52, 29 Pa. Dist. Rep. 952, we stated that a notary public was not obliged to charge the full fee prescribed by the Act of July 10, 1919, P. L. 903 (repealed by subsequent Notary Public Laws). In that opinion we stated that "there is no reason why a notary public may not remit his fee of service in whole or in part."

In Attorney General's Opinion, dated January 6, 1921, 1921-22 Op. Atty. Gen. 21, it was stated that "I am of the opinion that while the notary himself can waive his rights to fees, no one else can do it for him."

Both opinions, of course, made reference to then existing statutes relating to notaries which have since been repealed. There are, however, no extraordinary provisions in existing law which could justify or support an opinion divergent to those stated in both of the above cited opinions.

We are of the opinion, and you are accordingly advised, that notaries may waive their fee in whole or in part in any particular case.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY L. ROSSI,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 48

Department of Public Instruction—General Appropriation Act of 1957—Transportation of handicapped pupils.

Advancement of funds to county boards of school directors should be charged to Appropriation 20 of the General Appropriation Act of 1957, Act No. 95-A.

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

Harrisburg, Pa., December 20, 1957.

Sir: This department has received your request for advice as to whether the prepayment of funds to county boards of school directors on account of the transportation of handicapped pupils should be charged to Appropriation 67, i.e., education of handicapped pupils, or to Appropriation 20, which covers money for the transportation of pupils.

Act No. 95-A, the General Appropriation Act of 1957, approved July 19, 1957, provides on page 81, Appropriation Acts, Session of 1957, for:

> "Payments to school districts on account of pupil transportation as provided in sections 2541 and 2542 of the Public School Code of 1949.....34,521,407."

On page 82 the following item appears:

> "Payments to school districts and county boards of school directors on account of special education of handicapped pupils as provided in section 2509 of the Public School Code of 1949.....12,150,000."

Your department and the Budget Office have designated the first mentioned appropriation item as Appropriation 20 and the second item as Appropriation 67, and we will refer to them as such herein.

Section 2541 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended, 24 P. S. § 25-2541, which is referred to in Appropriation 20, provides for payments on account of pupil transportation generally and specifically with reference to the transportation of physically or mentally handicapped children, as follows:

"* * * * * * *

> "Such payments for pupil transportation shall be made in the following cases:
>
> "* * * * * * *
>
> "(3) *To all school districts,* for the transportation of physically or mentally handicapped children regularly enrolled in special classes approved by the Department of Public In-

struction or enrolled in a regular class in which approved educational provisions are made for them.

"* * * * * * *"

(Emphasis supplied)

Section 2509 of the Public School Code of 1949, as amended, 24 P. S. § 25-2509, which is mentioned in Appropriation 67, provides for the payment on account of courses for handicapped children. This section makes no reference to the transportation of physically and mentally handicapped children nor to the payment for such transportation.

Section 2509.1 of the Public School Code of 1949, as last amended by the Act of June 1, 1956, P. L. 2013, 24 P. S. § 25-2509.1, reads as follows:

"Annually, before the first day of July every county board of school directors shall submit, for prior review and approval by the Department of Public Instruction, an estimate of the cost of classes or schools for handicapped children to be operated by the county board during the ensuing school year, and for transportation of pupils to and from classes and schools for handicapped children, whether or not conducted by the county board. On or before the first day of August, the Commonwealth shall pay to the county board of school directors a sum equal to one-half of the approved estimated annual cost of operation of classes and schools and transportation for handicapped children and, on or before the first day of January, shall pay an equal sum, or a lesser sum as may be shown to be necessary by an adjusted budget based upon expenditures during the first half of the school term. At the end of each school year all unexpended funds shall be credited to Commonwealth. Payments due for the succeeding school year on account of the operation of such classes or upon direction of the Superintendent of Public Instruction shall be returned to the Commonwealth. All such funds returned are hereby specifically appropriated to the Department of Public Instruction for support of schools and classes, and transportation for handicapped children. For each child enrolled in any special class or school for handicapped children operated by a county board of school directors, the school district in which the child is resident shall pay to the Commonwealth a sum equal to the 'tuition charge per elementary pupil' or the 'tuition charge per high school pupil,' as determined for the schools operated by the district or by a joint board of which the district is a member, based upon the costs of the preceding school term as provided for in section two thousand five hundred sixty-one of the act to which this is an amendment. In the event that any school district

> has not established such 'tuition charge per elementary pupil' or 'tuition charge per high school pupil,' the Superintendent of Public Instruction shall fix a reasonable charge for such district for the year in question. In addition, the district shall pay on account of transportation by the county board of pupils to and from classes and schools for handicapped children, whether or not conducted by the county board, an amount to be determined by subtracting from the cost of transportation per pupil the reimbursement due the district on account of such transportation in order to facilitate such payments by the several school districts. The Superintendent of Public Instruction shall withhold from any moneys due to such district out of any state appropriation, except from reimbursements due on account of rentals as provided in section two thousand five hundred eleven point one of the act to which this is an amendment, the amounts due by such school districts to the Commonwealth. All amounts so withheld are hereby specifically appropriated to the Department of Public Instruction for the support of public schools."

This section provides for the advancement of money by the Commonwealth to the county board of school directors for the transportation of physically or mentally handicapped children and for their education. The school district pays the difference between the ordinary rate of reimbursement for transportation and the rate for the transportation of the physically or mentally handicapped. The Commonwealth collects this money by deducting the amount thereof from the transportation reimbursement to the school district by the Commonwealth under the provisions of § 2541.

Since Appropriation 20 refers specifically to payments to school districts on account of pupil transportation, while § 2509.1 only provides for the method of payment by the school district of the difference between the general transportation and transportation of the physically or mentally handicapped, it is our opinion and you are accordingly advised that the advancements made to county boards of school directors should be charged to Appropriation 20 of the General Appropriation Act of 1957, Act No. 95-A.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 49

Taxation—Capital Stock and Franchise Tax Act—52-53 week year—Manufacturer's exemption effective date.

Corporations reporting on a fiscal year basis as a result of their use of a 52-53 week year, and who begin a "fiscal year" during the last six days of 1957, are entitled to the manufacturer's exemption provision of the Capital Stock and Franchise Tax Act, Act of June 1, 1889, P. L. 420, § 21 (a), as last amended by the Act of March 15, 1956, P. L. (1955) 1285, § 1, 72 P. S. § 1871 (a).

Taxation—Capital Stock and Franchise Tax Act—Short period returns—Manufacturer's exemption effective date.

Corporations filing Capital Stock or Franchise Tax returns for a short period of operations beginning in 1958, prior to the commencement of a full taxable fiscal year in 1958, are entitled to the manufacturer's exemption provision of the Capital Stock and Franchise Tax Act, Act of June 1, 1889, P. L. 420, § 21 (a), as last amended by the Act of March 15, 1956, P. L. (1955) 1285, § 1, 72 P. S. § 1871 (a).

Harrisburg, Pa., December 20, 1957.

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

Sir: We are in receipt of your letter requesting advice as to whether corporations reporting on a "fiscal year" basis as a result of their use of a 52-53 week year, and who begin a "fiscal year" during the last six days of 1957, are entitled to the manufacturer's exemption provision of the Capital Stock and Franchise Tax Act which becomes effective with the taxable year 1958.[1] Your letter also requests advice as to whether corporations filing tax returns for a short period of operations beginning in 1958, preceding the commencement

[1] "* * * Provided further, That after said eleven year period [calendar year 1957 or fiscal year beginning in 1957] the provisions of this section shall not apply to the taxation of the capital stock of corporations, * * * organized for manufacturing purposes, which is invested in and actually and exclusively employed in carrying on manufacturing within the State, * * * but every corporation, * * * shall pay the State tax * * *, upon such proportion of its capital stock, if any, as may be invested in any property or business not strictly incident or appurtenant to the manufacturing business, * * *" Act of June 1, 1889, P. L. 420, § 21(a), as last amended by the Act of March 15, 1956, P. L. (1955) 1285, § 1, 72 P. S. § 1871(a). (Subsequent clauses contain similar provisions for foreign corporations required to pay a franchise tax.)

of a full taxable fiscal year in 1958, are entitled to the benefit of the manufacturer's exemption for the short period of operations.

I

Section 20 of the Capital Stock and Franchise Tax Act[2] permits taxpayers to file their reports on a fiscal year basis. The term "fiscal year" has been defined as an accounting period of 12 months ending on the last day of any month other than December: *United States v. Mabel Elevator Company,* 17 F. 2d 109, 110 (D. Minn. 1925); *John Morrell & Co. v. Wilder,* 72 S. D. 441, 36 N. W. 2d 390, 391 (1949). A 52-53 week year is an accounting period which does not necessarily end on the last day of any month. Rather, the period ends on the same day of the week, 52 or 53 weeks after the beginning of the period. The period may begin during any calendar month. The use of a fiscal year permits a corporation to close its books at the end of its natural business year, while the use of the 52-53 week year permits a corporation to divide a calendar year into thirteen (13) uniform and more comparable periods of time. Their purposes are entirely different but both devices may be simultaneously employed. Therefore, a 52-53 week year is not in itself a "fiscal year" as that term is generally defined. A 52-53 week year which begins within six days of January first and ends within six days of December thirty-first is basically a calendar year with a slight adjustment to facilitate the keeping of accounting records.

Your department has allowed taxpayers to file tax reports on a 52-53 week basis under the provisions of § 702 of The Fiscal Code[3] which provides that a corporation which closes its fiscal year on "some other date than the thirty-first day of December" and reports to the United States Government on that basis shall file any report due 105 days after such date. No other section of The Fiscal Code or any other of the Commonwealth's tax statutes make any special provision for reporting on a 52-53 week basis. Therefore, when the effective date of a particular provision is expressed in terms of taxable years beginning or ending with reference to the first or last day of the month or in terms of taxable years, either calendar or fiscal,

[2] The Act of June 1, 1889, P. L. 420, § 20, as last amended by the Act of May 24, 1956, P. L. (1955) 1703, §1, 72 P. S. § 1902.

[3] The Act of April 9, 1929, P. L. 343, Art. VII, § 702, as last amended by the Act of July 13, 1957, P. L. 838, 72 P. S. § 702.

taxpayers reporting on a 52-53 week basis must consider their taxable year as beginning with the first day of the calendar month beginning nearest to the first day of their taxable year and as ending with the last day of the calendar month ending nearest to the last day of their taxable year. In this way taxpayers who report on a 52-53 week year come within either a fiscal or a calendar year and still are allowed to report on the same basis as they do for the United States Government. The result is a uniform method of taxation which is not unreasonable in application nor unwieldly in administration. Therefore, corporations reporting on a 52-53 week year beginning their taxable years during the last six days of 1957 shall be considered to be reporting on a calendar year basis and shall be entitled to the manufacturer's exemption provision of the Capital Stock and Franchise Tax Act, supra.

II

The Capital Stock and Franchise Tax Act, supra, provides that after an eleven year period which is to end with the calendar year 1957, or any fiscal year beginning in the calendar year 1957, the manufacturer's exemption is to become effective. The plain meaning of words of the Act, "* * * That after said eleven year period the provisions of this section shall not apply * * *.", requires an interpretation which will allow any corporation filing a report which covers a period of time beginning on or after January 1, 1958, to claim the manufacturer's exemption. The fact that the report is to cover a short period of operations in lieu of a complete year is of no relevance in the absence of any provision in the statute making such a distinction:

"* * * * * * *

> "When the words of a law are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."[4]

Therefore, you are accordingly advised that corporations reporting on a "fiscal year" basis as a result of their use of a 52-53 week year, and who begin a "fiscal year" during the last six days of 1957, are entitled to the manufacturer's exemption provision of the Capital

[4] Statutory Construction Act, Act of May 28, 1937, P. L. 1019, § 51, 46 P. S. § 551.

Stock and Franchise Tax Act. You are further advised that corporations filing tax returns for a short period of operations beginning in 1958, preceding the commencement of a full taxable fiscal year in 1958, are also entitled to the benefits of the manufacturer's exemption for the short period of operations.

Very truly yours,

DEPARTMENT OF JUSTICE,

SIDNEY MARGULIES,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

MEMORANDUM OPINIONS

1957

MEMORANDUM OPINION No. 1

Insurance Department—Group life insurance—Computation of amount of insurance applicable to single member of insurable group—Income sources—Group Life Insurance Act, Act of May 11, 1949, P. L. 1210, as amended.

1. The amount of insurance applicable to a single member of an insurable group is to be computed upon the basis of his income derived from, or related to, his membership in the group and not upon income from other sources.

2. The computation of the amount of insurance applicable to a single member of an insurable group upon the basis of his income from all sources would constitute discrimination against other members of the group and against insured persons outside the group.

Harrisburg, Pa., September 9, 1957.

Honorable Francis R. Smith, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have inquired of this Department as to the proper interpretations of Sections 2 (4), 4 (4) and 5 (4) of the Group Life Insurance Act, Act of May 11, 1949, P. L. 1210, as amended by the Act of July 2, 1953, P. L. 350, 40 P. S. § 532.1-532.9 which place maximum limitations upon the amount of life insurance that may be issued to an individual under a group plan.

Section 2 of the Group Life Insurance Act prescribes the requirements applicable to a group life insurance policy to be issued to an employer or to the trustees of a fund established by an employer to insure the employees of such employer. Section 4 of the said act prescribes such requirements for the issuance of a group life insurance policy to a labor union or a police fraternity to insure members of such union or fraternity. Section 5 of the said act prescribes requirements for the issuance of a group life insurance policy to the trustees of a fund established by two or more employers in the same industry, or by one or more labor unions, or by one or more employers and one or more labor unions to insure the employees of the employers or members of the unions.

Section 2, subsection (4), provides:

> *"The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the employes or by the employer or trustees.* No policy may be issued which provides term insurance on any employe which together with any other term insurance under any group life insurance policy or policies issued to the employers or any of them exceeds twenty thousand dollars

($20,000) *or one and one-half times the basic annual earned income of the employe, whichever is the greater, but in no case exceeding forty thousand dollars ($40,000).*"

(Emphasis added)

Sections 4 and 5, in subsection (4) thereof, contain identical limitations upon the amount of individual insurance under such a policy and the manner in which such amounts are selected.

Your inquiry is whether or not the "earned income" of the employee, member or person referred to in §§ 2 (4), 4 (4) and 5 (4) is to be interpreted as including such employee's, member's or person's earned income from all sources or only such part of his earned income as is dervied from his employment within or connected with the group.

A study of the Group Life Insurance Act establishes that the limitations referred to previously on the amount of individual insurance under a group life plan based upon the insured's income relates to his earned income from the employment which is the basis of the group, and not to earned income from other sources.

It should be noted that insured persons under group life insurance plans preferential treatment over the individually insured person both as to physically qualifying for insurance and in the cost of such insurance. The Legislature has prescribed in detail certain groups which may be the basis for the issuance of group life insurance policies. If a person were permitted to increase the amount of insurance applicable to him by basing it upon outside income, he would be effectually removing himself from the group for the purposes of insurance, as group membership clearly presupposes common employment and common earnings from such employment. If a person should be permitted to increase the insurance applicable to him in the aforesaid manner, a discrimination would be practiced against individual policyholders outside the group contary to the intent of the Legislature.

Furthermore, the increasing of individual insurance under a group plan by basing it upon the individual's earned income from any source would also be discriminatory against other insured members of the group and, in addition, would place upon the employer, union or fraternity an unjustified burden of expense. Discrimination against other insured members of the group would result from the fact that a disproportionate share of employer, union or fraternity funds would be used for purchasing insurance for the benefit of certain insured persons. For example, under § 5 group plan where no part of the premium may

be derived from funds contributed by insured persons, if a union member were permitted to have his insurance coverage based on his outside income, he could thereby receive far greater insurance benefits than another union member in an identical position but who has no outside income. Since, in all instances, the employers, unions or fraternities pay either all or part of the costs of group insurance, any increase in such costs resulting solely from basing the amount of insurance upon outside income of group members would constitute an unjustifiable expense upon employers, unions or fraternities without any commensurate benefit resulting therefrom.

Such discrimination as would occur if the amount of individual insurance under a group plan were geared to outside income might be in violation of § 353 of The Insurance Company Law of 1921, Act of May 17, 1921, P. L. 682, 40 P. S. § 477a, which renders it a misdemeanor for insurers or their agents to issue policies within this Commonwealth which unfairly discriminate between individuals of the same class in the amount of premiums or rates charged for any policy of life insurance.

The foregoing considerations no doubt explain why the Legislature, in §§ 2, 4 and 5 of the Group Life Insurance Act, expressly provided that "the amounts of insurance under the policy must be based upon some plan precluding individual selection" either by the employees, union or fraternity members or by the employer or trustees. These provisions expressly preclude insured members of a group from computing the insurance applicable to them upon income earned from sources unrelated to the group. If insured members were to so compute the insurance applicable to them, they would be making an individual selection of the amount of their insurance under the policy contrary to the Group Life Insurance Act.

It is, therefore, the opinion of this Department and you are accordingly advised that the "earned income" referred to in Sections 2 (4), 4 (4) and 5 (4) of the Group Life Insurance Act refers only to earned income derived from the employment which is the basis for the creation of the group under which the insurance is issued.

Very truly yours,

DEPARTMENT OF JUSTICE,

EDWARD L. SPRINGER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

MEMORANDUM OPINION No. 2

Department of Welfare—Statistics—Criminals and Delinquents—Transfer of Functions—Repeal of § 2311(c) of The Administrative Code of 1929.

The Department of Welfare is no longer required to continue to obtain statistics with respect to criminals and delinquents under § 2311(c) of The Administrative Code of 1929. These duties have been transferred to the Department of Justice under Reorganization Plan No. 5 of 1955. § 2311(c) of The Administrative Code of 1929 has been repealed by the Act of July 13, 1957, P. L. 852, and the newly merged Department of Public Welfare will have no authority to obtain the information under that section of the Code.

Harrisburg, Pa., September 20, 1957.

Honorable John H. Ferguson, Secretary of Administration, Harrisburg, Pennsylvania.

Sir: You have asked us whether the Department of Welfare is required to continue to obtain statistics with respect to criminals and delinquents under The Administrative Code of 1929, § 2311(c)[1] and if this duty is no longer mandatory whether the department may notify the sources of information that it is no longer collecting this data.

The Act of July 13, 1957, P. L. 852, repeals § 2311(c) of The Administrative Code. It is clear that this act becomes effective on or before June 1, 1958, and that on the effective date of this act the newly merged Department of Public Welfare will have no authority to obtain the information under that section of the Code.

Under Reorganization Plan No. 5 of 1955, the Department of Welfare was relieved of functions, powers and duties with regard to the supervision, visiting and inspection of prisons and jails maintained by counties, cities, boroughs or townships. The data authorized under § 2311(c) of The Administrative Code would be of value to the department only with respect to its functions in supervising and inspecting prisons and jails. Since at the present time these duties have been transferred to the Department of Justice, the Department of Welfare may cease collecting information under § 2311(c) and may notify the sources of this information that in view of the Act of July 13, 1957, P. L. 852 it will no longer request such information.

[1] Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 601.

The Director of Research and Statistics, Bureau of Correction, Department of Justice, Box 200, Camp Hill, Pennsylvania, now collects such data. All information and inquires may be referred to him.

Very truly yours,

DEPARTMENT OF JUSTICE,

LOIS G. FORER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

MEMORANDUM OPINION No. 3

Tuberculosis sanitoria—Treatment of lung ailments other than tuberculosis—Act of April 4, 1956, P. L. (1955) 1394.

1. The Act of April 4, 1956, P. L. (1955) 1394, § 1, 71 P. S. 537 authorizes the Secretary of Health to maintain sanatoria for the reception and treatment of persons affected or suspected of being affected with tuberculosis.

2. There is no statutory authority which would permit the Secretary of Health to maintain such sanatoria for any purpose other than the treatment or reception of persons affected or suspected of being affected with tuberculosis.

Harrisburg, Pa., September 20, 1957.

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

Sir: You have inquired whether present law permits the treatment of lung ailments other than tuberculosis in tuberculosis sanatoria by the Department of Health. You have also asked to be informed as to what ailments, if any, may be treated at such sanatoria.

The Act of April 6, 1956, P. L. (1955) 1435, 35 P. S. § 381, provides as follows:

> "That one or more sanatoria or colonies be established in the State, for the reception and treatment of persons affected or suspected of being affected with tuberculosis, and removed from their families and people at large to prevent the spread of contagion.

> "For these purposes the Department of Health, with the approval of the Governor, shall be authorized to acquire property, erect buildings, equip the same and do all things necessary to accomplish such work, for the best interests of the people of this Commonwealth, in curing and preventing tuberculosis."

The Act of April 4, 1956, P. L. (1955) 1394, § 1, 71 P. S. § 537, provides as follows:

> "The Department of Health shall have the power, and its duty shall be:
>
> "(a) To maintain sanatoria, or colonies for the reception and treatment of persons affected or suspected of being affected with tuberculosis;
>
> "(b) To approve or disapprove plans and specifications for county hospitals or sanatoria erected for the treatment therein of persons suffering from tuberculosis, as may now or hereafter be provided by law."

These acts authorize the Department of Health to maintain sanatoria for the treatment and reception of persons affected or suspected of being affected with tuberculosis. The Department of Health, therefore, may not treat persons in such institutions other than those affected or suspected of being affected with tuberculosis. There is no statutory authority which would permit these sanatoria to be used other than for the purposes above mentioned.

In the last Legislature, a bill was introduced at the suggestion of the Department of Health to provide that these sanatoria may also be used for the treatment of nontubercular pulmonary diseases. This bill was not passed.

It is, therefore, the opinion of this Department and you are accordingly advised that the tuberculosis sanatoria operated by the Department of Health may be used only to treat those affected with or suspected of being affected with tuberculosis.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. COHEN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

MEMORANDUM OPINION No. 4

Water works operators—Certification program—Department of Health—Statutory powers—Act of April 27, 1905, P. L. 260, § 3.

1. The Act of April 27, 1905, P. L. 260, § 3, 35 P. S. § 713, does not condition the granting of a permit to any water works upon the certification of water works operators.

2. The statutory powers given the Department of Health, the Secretary of Health and the Advisory Health Board do not expressly empower the Department of Health to require that water works operators be certified.

3. Departmental agencies may only exercise those powers clearly given them by statute or necessarily implied in the grants of power.

4. The power to certify water works operators according to education, experience and competitive examination is not a power necessarily implied from the grant of powers to the Department of Health, Secretary of Health or the Advisory Health Board.

Harrisburg, Pa., September 20, 1957.

Honorable Berwyn F. Mattison, Secretary of Health, Harrisburg, Pennsylvania.

Sir: You have requested an opinion from this department concerning whether the Department of Health may adopt rules and regulations establishing a certification program for water works operators.

This certification program would enable the Department of Health to certify water works operators upon the basis of education and experience in their field. Under the proposed program your department would grade water works on the basis of their complexity, amount of water treated, and the population served by a water works. The certification of water works operators would be graded similarly so that a person qualified to operate a grade C water works, for example, would not necessarily qualify to operate a grade B water works. The department would examine the applicants for certification and on the basis of this examination, together with their education and experience, would issue certificates to such applicants, which certificates would be graded as above mentioned. No one not presently a water works operator would be enabled to operate a water works without prior certification from your department.

The Act of April 27, 1905, P. L. 260, § 3, 35 P. S. § 713, provides as follows:

> "No municipal corporation, private corporation, company, or individual shall construct waterworks for the supply of

> water to the public within the State, or extend the same, without a written permit, to be obtained from the Commissioner of Health if, in his judgment the proposed source of supply appears to be not prejudical to the public health. The application for such permit must be accompanied by a certified copy of the plans and surveys for such waterworks, or extension thereof, with a description of the source from which it is proposed to derive the supply; and no additional source of supply shall subsequently be used for any such waterworks without a similar permit from the Commissioner of Health. When application shall be made for a permit, under either of the above provisions of this section, it shall be the duty of the commissioner to proceed to examine the application without delay, and, as soon as possible, he shall make a decision, in writing; and, within thirty days after such decision, the corporation, company, or individual making such application may appeal to any court of common pleas of the county, and said court shall, without delay, hear the appeal, and shall make an order approving, setting aside, or modifying such decision, or fixing the terms upon which said permit shall be granted. The penalty for failure to file copies of plans, surveys, and descriptions of existing waterworks, within the time hereinbefore fixed, and for the construction or extension of waterworks, or the the use of an additional source of supply, without a permit from the Commissioner of Health, shall be five hundred dollars, and further penalty of fifty dollars per pay for each day that the works are in operation contrary to the provisions of this act, recoverable by the Commonwealth, at the suit of the Commissioner of Health, as debts of like amount are recoverable by law."

Nothing in this act conditions the granting of a permit to any water works upon the certification of water works operators. Nor does any other act expressly give the Department of Health the power to certify water works operators. Therefore, the question is whether the Department of Health may, under its broad powers to protect the health of the citizens of Pennsylvania, promulgate rules and regulations establishing a certification system for water works operators.

These broad powers are contained in a series of enactments: Act of April 27, 1905, P. L. 312, § 8, 71 P. L. § 1403 (Powers of the Secretary of Health); Act of April 9, 1929, P. L. 177, § 2102, as amended, 71 P. S. § 532 (Powers of the Department of Health); *ibid.*, § 2111, 71 P. S. § 541 (Powers of the Advisory Health Board).

Although these acts give the Secretary and the Department of Health broad powers, these powers are subject to the limitation that

departmental agencies may only excersie those powers clearly given them or necessarily implied in the grants of power. See *Green v. Milk Control Commission, 340 Pa. 1, 16A. 2nd 9 (1940); Swarthmore v. Public Service Commission, 277 Pa. 472, 121 Atl. 488 (1923); Nevins v. State Board of Pharmacy, 51 Dauph. 264 (1941); Fire Association of Philadelphia v. Insurance Commissioner, 49 Dauph. 386 (1940).*

Since no express power is given to the Secretary of Health, the Department of Health, or the Advisory Health Board to certify water-works operators, the question remains whether this power is necessarily implied from their broad powers. Certainly, the Legislature could have enacted legislation requiring water works operators to be certified and to prescribe standards for certification in the interest of public health. The Legislature has not seen fit to do so. The power to certify water works operators cannot be necessarily implied from the powers granted to the Secretary of Health, the Department of Health, or to the Advisory Health Board.

In the absence of such legislation the Department of Health may not require water works operators to be certified. However, the department can conduct a certification program on a voluntary basis as it has in the past.

It is, therefore, the opinion of this department and you are accordingly advised that your department may not require water works operators to be certified, but that you may continue a certification program on a voluntary basis.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. COHEN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

MEMORANDUM OPINION No. 5

Pennsylvania State Police—Salary schedule—Increments—Duties—Bearing on salary—Informal Opinion No. 1494.

State policemen are entitled to salary and automatic increments set forth in the salary schedule dated October 11, 1956.

Duties of state policemen have no bearing on the amount of salary or increment which he should receive.

Harrisburg, Pa., October 23, 1957.

John Grillo, Comptroller, Pennsylvania State Police, Harrisburg, Pennsylvania.

Sir: We are in receipt of your letter requesting advice as to (1) whether the members of the Pennsylvania State Police are legally entitled to an increment each year; and (2) whether Pennsylvania State Police officers who are "permanently" assigned to jobs which might be performed by civilians are entitled to state police salaries and increments.

It appears that both your questions were answered in Informal Opinion No. 1494, dated November 30, 1956. As to your first question, we stated:

> "The Commissioner of the Pennsylvania State Police, with the approval of the Governor, and in conformity with the standards established by the Executive Board, is authorized to fix the compensation of state policemen, which authorization includes the power to establish increments and subsistence allowances: Act of April 9, 1929, P. L. 177, as amended, 71, P. S. Section 65.
>
> "In accordance with the above authorization and the provisions of the Act of April 4, 1956, P. L. 1387, Act No. 446, P. S. Section 83, requiring bi-weekly salary payments, a new bi-weekly pay schedule *for state policemen* was adopted and became effective October 11, 1956. This bi-weekly salary schedule provides for basic pay for every rank or grade and makes further provision for *automatic* increments based upon length of service." (Emphasis in original)

An examination of this schedule indicates that increments are mandated yearly for the first seven years of service, and thereafter, upon completion of ten, thirteen, sixteen, nineteen, twenty-two and twenty-five years of service.

These increments must be given to each state policeman upon the completion of each of the above designated years of service. The bi-weekly salary schedule adopted on October 11, 1956, was approved by the Governor and conforms to Executive Board standards adopted by its Resolution of July 29, 1956. The Executive Board as late as March 15, 1957, has confirmed the Commissioner's policy in giving automatic increments. By Resolution on that date, the Board set up a policy for granting increments to Commonwealth employees

based upon meritorious performance and stated that increments "shall not be granted automatically." However, paragraph 11 states:

> "This policy does not apply to positions or employees in agencies which were under Civil Service prior to September 10, 1956. *Nor does this policy apply to enlisted members of the Pennsylvania State Police.*" (Emphasis supplied)

As to your second question, you state that some State Policemen are "permanently" doing work ordinarily done by a civilian employee. You refer specifically to "personnel work, purchasing department duties or mechanical division." You inquire as to whether such state policemen are entitled to state police salaries and increments. This appears also to have been decided in Informal Opinion No. 1494 wherein we state:

> "The salary of a state policeman is, therefore, determined by two factors, viz., his rank and length of service, The duties of a particular policeman do not, in any way, enter into the determination of the salary which he is to receive.
>
> * * * * * * *
>
> "During his term of employment such policeman is subject to assignment by the Commissioner of the state police to such duties as he may deem appropriate to be performed at any place within the Commonwealth: Section 4 of the Act of April 28, 1943, P. L. 94, 71 P. S. Section 251. The Commissioner may also, at any time, reassign any state policeman to new duties or to additional duties. *It, therefore, becomes obvious that the present duties being performed by any state policeman can have no bearing upon the salary which he is to receive.* To hold otherwise would be inviting chaos. There would be day-to-day fluctuation. Enlisted personnel would be reluctant to perform duties for which there was provided lesser compensation, and the Commissioner could not effectively carry out the duties mandated to him by law." (Emphasis supplied)

To elaborate upon the above quoted matter, it is clear that the assignment of duties to any particular state policeman is a power within the exclusive jurisdiction of the Commissioner of the state police. We fully realize that there are some duties in connection with state police work which, in any other department, would be performed by a civilian employee. However, it cannot be gainsaid that police work is of a sensitive nature. We can understand and agree that the Commissioner may wish to place some state policemen in jobs where, ordinarily, some non-police duties are performed. As a matter of illustration, it is your feeling that the assignment of state police

officers to personnel work cannot be justified. We cannot agree with this assertion. The Commissioner may decide that retention of state policemen to handle personnel work is desirable for a number of reasons, including the recruitment program, enlistment, discharge and reenlistment problems, promotions, court martials, efficiency reports and the like. These are matters which are peculiar to the Pennsylvania State Police force in that no other department employs a person for a specific term.[1]

Finally, you state that "the restrictions placed upon budget expenditures and the justification thereof, may have the effect by reason of insufficient funds of nullifying the granting of such increments." In planning the budget for the Pennsylvania State Police, the advice given in Informal Opinion No. 1494 should have been followed. This opinion is full justification for such expenditures. A sufficient allocation of funds should have been made to pay the automatic increments mandated by law and put into effect by the Commissioner's action of October 11, 1956.

We hereby reaffirm our conclusion of Informal Opinion No. 1494, and you are advised that:

(1) State policemen, regardless of the duties which they are performing, are entitled to the salary and automatic increments set forth in the salary schedule dated October 11, 1956, as approved by the Governor.

(2) The job which a particular state policeman is doing at the present time, whether temporary or "permanent," has no bearing on the amount of salary and increment which he should receive.

(3) In planning the budget for the state police and in expanding funds already appropriated, the advice herein given is justification for the expenditure as a matter of law and must be followed.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK P. LAWLEY, JR.,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

[1] The Pennsylvania State Police force has frequently been characterized as a semi-military organization. It is pertinent to point out that, while many civilians perform functions for the armed forces, personnel matters are handled by other members of the particular armed force involved.

MEMORANDUM OPINION No. 6

Game Commission—Telephones and extensions—Field employees—Expenditures —Section 1401 of The Game Law—"Necessary expense" defined.

1. Expenditures for telephones may be made from the Game Fund.

2. Provision of telephone and extensions thereof for Game Commission field employees is a "necessary expense" within the meaning of Section 1401 (b) of The Game Law.

Harrisburg, Pa., December 2, 1957.

Honorable M. J. Golden, Deputy Executive Director, Pennsylvania Game Commission, Harrisburg, Pennsylvania.

Sir: You ask whether the Game Commission may pay out of the Game Fund for extensions to the telephones which the Game Commission now furnishes in the homes of field employees engaged in law enforcement. It is our understanding that these extension telephones are to be used exclusively for official business of the Game Commission.

Section 507 (c) (2) of the Act of April 9, 1929, P. L. 177, The Administrative Code of 1929, provides that any department, board or commission may "contract for utility services furnished by public utility companies, political subdivisions and authorities * * *" It is, therefore, within the authority of the Game Commission to contract for utility services, which include telephone service.

Section 1401 (b) of the Act of June 3, 1937, P. L. 1225, The Game Law, provides for payment out of the Game Fund for "necessary expenses" of the field employees in question. It appears unquestioned that adequate communication with the public is indispensable to the work of these field employees, and that therefore the cost of such telephones and extensions thereof as the Game Commission may find necessary for this purpose is a proper charge against the Game Fund.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

MEMORANDUM OPINION No. 7

Veterans Preference Act of 1957—Military leave—Female employees—Enlistment.

A female employee of the Commonwealth who enlisted in a women's branch of the military service on October 14, 1957, is not entitled to military leave under the Veterans Preference Act of 1957. Such leave is available only to persons who are drafted or who voluntarily enter into active military service to satisfy a draft obligation.

Harrisburg, Pa., December 3, 1957.

Mr. Ralph D. Tive, Executive Director, Civil Service Commission, Harrisburg, Pennsylvania.

Sir: You have requested an opinion of this department as to whether a female employee of the Commonwealth who enlisted in a women's branch of the military service on October 14, 1957, is entitled to a military leave under the Act of July 8, 1957, P. L. 577, 51 P. S. §§ 493.1-493.9, known as the "Veterans Preference Act of 1957."

Section 3 of the act provides for the granting of military leaves to employees who enlist in time of war or armed conflict or who are drafted at any time. The United States was not engaged in war or in armed conflict at the time the female employee in question enlisted.[1]

The term "be drafted" is defined in § 2 (a) of the act as meaning:

> "* * * to be drafted to be ordered into active military service if a member of a reserve component of the armed forces or in any way to enter involuntarily or remain in active military service or to enter voluntarily into active military service for such period as is necessary to satisfy one's draft obligation."

It is obvious that since the employee in question *enlisted* she was not ordered into military service nor was her entry involuntary. Her enlistment cannot be construed as necessary to discharge her draft obligation since no such obligation is placed upon the women of this country.

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[1] Formal Opinion No. 675, dated November 14, 1956, 1955-56 Op. Atty. Gen. 80, concluded that the United States has not been in a state of war or contemplated war since July 27, 1953.

It is, therefore, the opinion of this department and you are accordingly advised that a female employee of the Commonwealth who enlisted in a women's branch of the military service on October 14, 1957, is not entitled to military leave under the "Veterans Preference Act of 1957."

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

MEMORANDUM OPINION No. 8

State employees—Physicians—Nurses—Personal liability for malpractice—Immunity—Malpractice insurance.

1. A physician or nurse has no immunity from personal liability for malpractice simply because such person may be an employee of the Commonwealth.

2. No suit may be brought against the Commonwealth unless it is of the type authorized to be brought by statute.

3. The Commonwealth is not liable for the malpractice of any of its employees since it has not consented to be sued in trespass.

4. Section 2404 of The Administrative Code, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 634, requires that an appropriation be made before the Commonwealth may purchase any kind of insurance which it is lawful for the Commonwealth to purchase, other than the specific types of insurance mentioned in the section.

5. It is lawful for the Commonwealth to purchase malpractice insurance covering doctors and nurses employed by it under the following conditions:

a. That the policy of insurance covered only those physicians and nurses employed by the Commonwealth to the extent that they were acting on Commonwealth business;

b. That the policy would exclude any coverage which was not connected with Commonwealth business.

6. Malpractice insurance cannot be purchased during this biennium since there has been no appropriation made for the purpose of purchasing such insurance.

Harrisburg, Pa., December 24, 1957.

Honorable C. L. Wilbar, Jr., Secretary of Health, Harrisburg, Pennsylvania.

Sir: You have inquired whether physicians and nurses employed by your department may be in need of malpractice insurance and whether the Department of Health may carry such insurance to cover such persons.

A physician or nurse has no immunity from personal liability for malpractice simply because such person may be an employee of the Commonwealth: *Meads v. Rutter,* 122 Pa. Super. 64, 184 Atl. 560 (1936). In that case on page 69 it is stated:

> "An employee or officer of the Commonwealth is not a member of a privileged class—exempt from liability for his individual tort. It would be unfortunate, indeed, if one, who has sustained a wrong by an individual, would be remediless and not able to sue him the same as any other citizen because he was an agent, officer or employee of the Commonwealth. Like all others, he must personally answer for his wrongful acts, the doctrine of respondeat superior does not prevail against this Commonwealth. The rule that a state is not liable for the neglience or misfeasance of its officers or agents, except where the legislature voluntarily assumes liability, is well recognized: 25 R. C. L. 407 § 43. See, also, Collins v. Com., 262 Pa. 572, 106 A 229. 'The immunity of the state does not extend to its officers, and as a general rule state officers and agents are personally liable in tort for unauthorized acts committed by them in the performance of official duties.' 59 C. J. 146, § 228."

Article 1, Section 11, of the Pennsylvania Constitution provides as follows:

> "* * * Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct."

This has been interpreted to mean that unless a claim against the Commonwealth is of the type authorized to be brought against the Commonwealth by statute, no cause of action exists against it, *Pentz v. Commonwealth of Pennsylvania,* 110 F. Supp. 809 (E. D. 1953). This principle has long been recognized in this State: See *Monongahela Navigation Co. v. Coons,* 6 W. & S. 101 (1843).

The State has not given its consent to be sued in trespass; and since an action for malpractice is a trespass action, the State would not be liable for malpractice by one of its employees.

Section 2404 of The Administrative Code of 1929 of this Commonwealth, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 634 contains the following provisions with respect to insurance:

> "The Department of Property and Supplies shall have the power, and its duty shall be:
>
> * * * * *
>
> "(b) To procure automobile liability insurance, covering vehicles owned by the Commonwealth of Pennsylvania or the United States of America or its instrumentalities, which are loaned to and operated by State officers or employees or officers and enlisted men of the Pennsylvania National Guard, the Pennsylvania Reserve Corps or its successor, and, in its discretion, excess fire insurance on State buildings, *and any other kind of insurance which it may be lawful for the Commonwealth, or any department, board, commission, or officer thereof, to carry and for which an appropriation has been made to the department, or to any other administrative department, board, or commission.*
>
> "The department shall pay for such insurance, out of the moneys appropriated to it, except that it shall not pay for insurance covering—(1) officers, employees, or property of the departments, boards, and commissions, whose expenses are wholly paid out of funds other than the General Fund of the State Treasury: or (2) officers, employees, and property of departments, boards, and commissions receiving appropriations out of the General Fund for such purpose. Insurance covering the officers, employees, and property of such departments, boards, and commissions shall be paid for out of the special funds appropriated to them, or out of the moneys of the General Fund, appropriated to them, as the case may be."

The express words of this statute clearly indicate that an appropriation for the purpose of purchasing malpractice insurance is a necessary prerequisite to the purchase of such insurance by the Department of Property and Supplies on behalf of your department.

After enumerating specific types of insurance which the Department of Property and Supplies is permitted to procure § 2404 of The Administrative Code, supra, provides that the Department of Property and Supplies may purchase any other kind of insurance which it is lawful for the Commonwealth to purchase, if there is an appropriation

therefor. If there were an appropriation for malpractice insurance covering doctors and nurses employed by the Department of Health, the expenditure of such funds for such insurance would be a lawful expenditure of the Commonwealth, arising under the following conditions: (1) that the policy of insurance covered only those physicians and nurses employed by the Department of Health to the extent that they were acting on Commonwealth business; (2) that the policy would exclude any coverage which was not connected with Commonwealth business. Under these conditions there would be nothing unlawful in the expenditure of funds for malpractice insurance. The purchase of malpractice insurance covering doctors and nurses employed by your department would facilitate recruitment of personnel who would otherwise be reluctant to enter State employment if they knew that they were personally responsible for their own malpractices while being employed on State business.

Therefore, we are of the opinion, and you are accordingly advised that:

(1) Physicians and nurses employed by your department are personally liable for their malpractices even though they are employees of the Commonwealth;

(2) It is lawful for your department to procure through the Department of Property and Supplies malpractice insurance covering physicians and nurses employed by your department to the extent that such insurance only covers those physicians and nurses engaged in State business;

(3) Section 2404 of The Administrative Code requires that an appropriation for the purpose of obtaining malpractice insurance be made to either your department or the Department of Property and Supplies before your department may procure such insurance;

(4) Since there is no appropriation this biennium for malpractice insurance, your department may not procure such insurance during the 1957-1959 biennium.

Yours very truly,

DEPARTMENT OF JUSTICE,

JOSEPH L. COHEN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

MEMORANDUM OPINION No. 9

Taxation—Capital assets—Tangible property allocation—Royalty income from lease of coal lands.

A corporation may not report net royalties received from the lease of coal lands as gains from the sale of capital assets consisting of tangible property situated outside of the Commonwealth, not to be allocated in any part to this Commonwealth, under § 2-2(b) of the Corporate Net Income Tax Act, Act of May 16, 1935, P. L. 208, as last reenacted and amended by the Act of March 6, 1956, P. L. (1955) 1247, § 1, 72 P. S. § 3420b 2(b). A corporation must report such net royalty income as other income subject to apportionment under § 2-2(c) of the Corporate Net Income Tax Act, supra.

Harrisburg, Pa., December 24, 1957.

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

Sir: We are in receipt of your letter requesting advice as to whether, under § 2-2(b) of the Corporate Net Income Tax Act,[1] a Delaware corporation may report net royalties received from the lease of coal lands located in West Virginia as proceeds received from the sale of capital assets situated outside of the Commonwealth.

Section 2 of the Corporate Net Income Tax Act, supra, provides that:

> "2. In case the entire business of any corporation, * * * is not transacted within this Commonwealth, the tax imposed by this act shall be based upon such portion of the net income of such corporation * * * as defined in clause one hereof, as may be determined by allocations and apportionments made as follows:
>
> * * * * * * *
>
> "(b) Gains realized and losses sustained from the sale or exchange of capital assets, if such assets consist of real estate or tangible personal property situated outside of the Commonwealth, shall not be allocated in any part to this Commonwealth.
>
> "(c) The remainder of such net income shall * * *"

(The subsequent paragraphs provide for the apportionment of all income other than from the sale of capital assets by the use of three fractions to determine that amount of income subject to the tax.)

[1] Act of May 16, 1935, P. L. 208, as last reenacted and amended by the Act of March 6, 1956, P. L. (1955) 1247, § 1, 72 P. S. § 3420b 2(b).

Clause one of the act, supra, referred to in the quotation above, defines "net income" as "taxable income * * * as returned to and ascertained by the Federal Government." This phrase has been defined by the Pennsylvania Supreme Court in the case of *Commonwealth v. Electrolux Corporation,* 362 Pa. 333, 67 A. 2d 105 (1949), by adoption of the explanation used in the case of *Commonwealth v. Warner Bros. Theater, Inc.,* 51 Dauph. 310 (1941), affirmed 345 Pa. 270, 27 A. 2d 62 (1942):

> "We think it can have only one meaning, namely, ascertaining the *amount* of net income subject to Federal tax."
> (Emphasis supplied)

Therefore, while the Commonwealth is bound to use the taxable income as reported to and ascertained by the Federal Government as the tax base, it is bound to do so only to the extent of measuring the *amount* of net income. However, the characterization of that income as between gains or losses from the sale of capital assets and other types of income is governed solely by State law. The Federal statutes, and the decisions interpreting them, are merely persuasive authority in clarifying areas in which the State law is not clear.

The Corporate Net Income Tax Act, supra, does not define the term "capital asset;" nor has there been any Pennsylvania Court decision defining the term. However, it is generally recognized that the definitions provided in the Federal Internal Revenue Code represents the most widely used concept.[2] Section 1221 of the 1954 Internal Revenue Code provides in pertinent part that:

> "* * * 'Capital asset' means property held by the taxpayer (whether or not connected with his trade or business), but does not include:—
>
> "(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;"
> (Emphasis supplied)

Adopting this definition of a "capital asset," we now turn to the question of whether coal lands come within the scope of the term as so defined.

[2] See 1 P-H State and Local Taxes, Pa. (1945), Para. 9135.

Under Pennsylvania law (as well as that of West Virginia) when a lease of coal properties provides that as the lessee removes the coal, he is to pay a royalty to the lessor and when the lease also provides for the taking of all the coal, such lease constitutes a sale of tangible property in the form of coal in place, *Shenandoah Boro. v. Philadelphia,* 367 Pa. 180, 79 A. 2d 433 (1951); *National Coal Company v. Overholt,* 81 W. Va. 427, 94 S. E. 735 (1917). This rule of law is acknowledged by your department to be applicable to the lease involved in this particular situation. However, while the term "capital asset" may include tangible property such as coal in place, it does not necessarily follow that the gain realized from every such sale of coal in place constitutes "gain" from a "sale of capital assets."

As the term has been defined in this opinion, "capital assets" do not include property which is the "stock in trade of taxpayer" or "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." In this particular instance the taxpayer corporation has reported on its Franchise Tax Report that the "Purpose of the Corporation, etc., as set forth in the Charter" is "generally owning and leasing to others coal and mineral lands." In view of this declaration on the part of the taxpayer and in view of the legal significance of this type of lease, the leasing of coal lands by this corporation constitutes the sale of property "held by the taxpayer primarily for sale in the ordinary course of * * * business, and, therefore, does not constitue the sale of "capital assets."

Our attention has been directed to certain sections of the 1954 Internal Revenue Code which are believed to be relevant to this question, e.g., § 631 (c), which provides that:

> "* * * In the case of the disposal of coal (including lignite), held for more than six months * * * under any form of contract by virtue of which such owner retains an economic interest in such coal, the difference between the amount realized from the disposal of such coal and the adjusted depletion basis thereof * * * shall be considered as though it were a gain or loss, as the case may be, on the sale of such coal. * * *"

This section does no more than provide for the treatment of leases of coal property in a manner similar to that provided for under Pennsylvania law. (But this section of itself does not change the lease into a sale of a "capital asset.")

It is further acknowledged that § 1231 of the 1954 Internal Revenue Code provides that:

> "(a) GENERAL RULE—If, during the taxable year, the recognized gains on sales or exchanges of property used in the trade or business, * * * exceed the * * * losses from such sales * * *, such gains and losses *shall be considered as gains and losses * * * of capital assets held for more than 6 months* * * *.
>
> * * * * * *
>
> "(b) DEFINITION OF PROPERTY USED IN THE TRADE OR BUSINESS—For purposes of this section—
>
> * * * * * *
>
> "(2) TIMBER OR COAL—Such term includes timber and coal with respect to which section 631 applies."
>
> (Emphasis supplied)

The effect of § 1231 (b) (2) is to treat gains and losses from the sale of coal under § 631 as if they were gains and losses of capital assets. This is an express statutory relief provision in the Federal Internal Revenue Code which is in addition to § 1221 which defines "capital assets." It does not change or add to the definition of "capital assets" found in § 1221. Even if Pennsylvania follows Federal law in defining the term "capital assets" in the Commonwealth's Corporate Net Income Tax Act, this particular income from the lease of coal lands would still not be subject to allocation as a gain from the sale of a capital asset.

For the purpose of argument only, granting the broadest possible definition of the term "capital assets" under the Federal Internal Revenue Code as including §§ 631 and 1231 within the concept, the result is merely a characterization of income under Federal law and not a change in the amount of net income as reported to the Commonwealth. Therefore, the Commonwealth is not bound by this definition. Rather, the Commonwealth, in absence of specific legislative authority, must confine the meaning of its statute to the most widely recognized definition of the term "capital asset" so as not to include property which is stock in trade of the taxpayer or held primarily for sale to customers in the ordinary course of business.

Therefore, you are accordingly advised that a corporation may not report net royalties received from the lease of coal lands as gains from the sale of capital assets consisting of tangible property situated outside of the Commonwealth not to be allocated in any part to this Commonwealth, under § 2-2(b) of the Corporate Net Income Tax Act, supra. A corporation must report such net royalty income as other income subject to apportionment under § 2-2(c) of the Corporate Net Income Tax Act, supra.

Yours very truly,

DEPARTMENT OF JUSTICE,

SIDNEY MARGULIES,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

ATTORNEY GENERAL'S OPINIONS CITED

TABLE OF STATUTES CITED

STATUTES BY POPULAR NAME

TABLE OF CASES CITED

A

B

C

L

M

N

O

P

INDEX

A