Commonwealth of Pennsylvania

OPINIONS

OF THE

ATTORNEY GENERAL

OF

Pennsylvania

1958

THOMAS D. McBRIDE
Attorney General

OFFICIAL OPINIONS

1958

OFFICIAL OPINION No. 50

State institutions—Collection and disposition of funds—Blue Cross receipts—Payments to roentgenologists.

Where procedure was established at State institutions to place Blue Cross payments on account of X-ray treatments into special fund and thereafter pay 80% to roentgenologists and 20% to general fund, it is held that (1) under General Appropriation Act for 1955-56 biennium Blue Cross receipts should have been paid into general fund and then should be made available to institutions as appropriations and (2) all such moneys collected during the biennium begining June 1, 1957, are similarly to be paid into the general fund; and the exact amount by which all collections at any institution, including moneys collected from the Blue Cross, exceed the amount designated by Act No. 95-A as an estimated collection is to be made available to the institution as an appropriation.

Harrisburg, Pa., January 3, 1958.

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

Sir: You have requested an opinion as to what disposition should be made of funds collected by the State Medical and Surgical Hospitals from the Blue Cross for X-ray services rendered to patients at the State institutions.

You explained in your request that the institutions have contracts with roentgenologists whereby the latter furnish (a) X-ray services to patients, and (b) all materials and personnel necessary to conduct the X-ray services at the institutions. In return the institutions pay the roentgenologists 80% of all the fees collected from Blue Cross on behalf of the patients for these services[1]. You further explain that the Blue Cross was unwilling to make payments for the services on account of the subscribed patients directly to the roentgenologists, but insisted on paying the moneys to the institutions. The institutions, therefore, set up special accounts to receive Blue Cross payments and from these accounts pay 80% to the roentgenologists and 20% to the State Treasurer. You specifically inquire if this procedure was proper under the applicable laws governing during the last biennium and whether the procedure is proper during the present biennium.

In Official Opinion No. 11, 1957 Op. Atty. Gen. 71, addressed to you under date of September 20, 1957, this department discussed, at length,

[1] Patients not covered by Blue Cross are billed by the roentgenologists on an ability to pay basis.

the provisions of the General Appropriation Acts for the 1955-1957 and 1957-1959 biennium.[2]

It is our opinion that the legal principles discussed in Official Opinion No. 11 govern the facts in the instant case. As in the case of the Eastern Pennsylvania Psychiatric Institute discussed in said opinion, every State hospital is, by Act No. 95-A, given a specific appropriation and thereafter an additional appropriation in the amount that its collections exceed a specific estimate of collections set forth in the act.

In addition, the collection of money from the Blue Cross should be made in accordance with § 206 (b) of The Fiscal Code and the disposition of this money should be in accordance with § 9 thereof[3].

It is, therefore, our opinion and you are accordingly advised that (1) all moneys collected from the Blue Cross on account of X-ray treatments to patients in State institutions during the biennium beginning June 1, 1955, were to be paid into the General Fund and made available to the institutions as appropriations 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 all collections at any institution, including moneys collected from the Blue Cross, exceed the amount designated by Act No. 95-A as an estimated collection is to be made available to the institution as an appropriation. Of course, the institution is then free to pay the roentgenologists a fee commensurate with 80% of the collections. This payment should not be made out of the special fund but should be made out of the institution's appropriation.

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

[2] Act No. 146-A, dated June 1, 1956 and Act No. 95-A, dated July 19, 1957.

[3] Act of April 9, 1929, P. L. 343, § 206 (b) and § 209, as amended, 72 P. S. §§ 206 (b) and 209.

OFFICIAL OPINION No. 51

Licenses—Practice of medicine and surgery—Foreign medical school graduates—State Board of Medical Education—Act of June 3, 1911, P. L. 639, as amended.

In considering an application for a certificate of licensure to practice medicine and surgery in Pennsylvania by a foreign medical school graduate, the State Board of Medical Education must determine the qualifications of each medical school from which an applicant has graduated, be that medical school an American or a foreign institution. The standards applied to foreign medical schools must be the same as applied to American medical schools and the board may base its determination on information supplied to it by other reputable agencies in lieu of its own personal investigation.

The board may accept the examination given by the Educational Council for Foreign Medical Graduates in lieu of its own examination.

Harrisburg, Pa., January 3, 1958.

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

Sir: You have requested our advice concerning foreign medical school graduates who apply to the State Board of Medical Education and Licensure (hereinafter called "Board") for a certificate of licensure to practice medicine and surgery in Pennsylvania. A foreign medical school graduate is defined as a citizen of the United States or a subject of a foreign country who has graduated from a medical school located outside the United States and its territories and possessions.

The licensing of physicians and surgeons is governed by the "Medical Practice Act," the Act of June 3, 1911, P. L. 639, as amended, 63 P. S. §§ 401 to 418. Section 2 of that act[1] specifically prohibits a person from practicing medicine unless he has fulfilled the requirements of the act and received a certificate of licensure from the Board. Upon proof of his meeting certain qualifications, an applicant for licensure will be admitted to examination[2]; and upon passage of the examination, he will receive a licensing certificate entitling him to practice medicine and surgery in the Commonwealth of Pennsylvania[3].

One of the proofs which must be submitted by an applicant to the Board is that he attended certain courses in ". . . some reputable and legally incorporated medical school or college, or colleges, recognized as such by the Board . . ."[4] Such proof must be submitted by an

[1] As amended by the Act of August 6, 1941, P. L. 903, 63 P. S. § 401a.
[2] Act of June 3, 1911, P. L. 639, § 5, as amended, 63 P. S. § 405.
[3] Id., § 7, as amended, 63 P. S. § 409.
[4] Id., § 5, as amended, 63 P. S. § 405.

applicant who graduated from a foreign medical school[5] as well as by an American medical school graduate. The Board has the specific duty of determining the qualifications of the various medical schools, both within and without the Commonwealth.[6] As regards the latter, the act[7] states as follows:

> "It shall further be the duty of the board, by inspection and otherwise, to ascertain the facilities and qualifications of medical institutions, colleges, or hospitals, outside this Commonwealth, whose graduates or interns desire to obtain medical licensure in this Commonwealth."

Finally, the act[8] sets forth certain facilities and minimum standards which must be maintained by medical institutions chartered by the Commonwealth and empowered to confer the degree in medicine and requires notification by the Board to any institution failing to meet the standards. Subsequent failure to conform renders graduates of the institution ineligible for licensure[9].

Upon this background the following questions must be considered:

I. What duty does the Board have with regard to the licensure of foreign medical graduates generally?

II. May the Board accept from a foreign medical graduate the passing of an American medical qualification examination given by the Educational Council for Foreign Medical Graduates in lieu of the Board's approval of the medical school from which the applicant graduated and/or in lieu of the Board's own examination of the applicant?

I.

The provisions of the "Medical Practice Act," noted above, do not establish, nor do they authorize the Board to establish, a system of medical licensure which directly or indirectly discriminates against foreign medical school graduates[10] A person who graduates from a foreign medical school is entitled to the same consideration as a person who graduates from a medical school in the United States. This means that if a foreign medical school graduate fulfills all the pre-

[5] Id., § 5, as amended, 63 P. S. § 406.
[6] Id., § 4, as amended, 63 P. S. § 402.
[7] Ibid.
[8] Id., § 4, as amended, 63 P. S. § 403.
[9] Id., § 4, as amended, 63 P. S. § 404.
[10] A law which did so discriminate could, conceivably, be attacked as violative of the equal protection clause found in Amendment XIV to the Federal Constitution.

liminary qualifications, he is entitled to take the examination given by the Board and, if he passes the examination, to be licensed to practice medicine and surgery in Pennsylvania.

The procedure for obtaining a license is carefully set forth in the statute. Nothing therein[11] allows a person to be licensed who has not received his medical education at an approved medical school and who has not passed an examination. The requirements necessarily contemplate that the Board will take steps to determine if a particular medical school should or should not be approved. The Board cannot refuse to act, either intentionally or otherwise, and thus leave a medical school resting in limbo.

It cannot reasonably be argued that the Board's duty to ascertain the qualifications of medical colleges requires personal inspection by members of the Board. Such a requirement plainly would be beyond the physical and financial resources of the Board. However, since the Board itself must pass final judgment on a particular school's acceptability[12], it may obtain determinations and facts from reputable sources such as the Council on Medical Education and Hospitals of the American Medical Association and the Association of American Medical Colleges and base its determination thereupon. Thus, the Board is free to make its decision from information obtained from these agencies; but if it chooses not to do so, it cannot refuse to decide at all. It must then make its own determination as to the qualifications of a medical school, such determination being based on the same standards as are applied to any other medical school.

So, the foreign medical school graduate is entitled to have his credentials considered on the same basis as a graduate of an American medical school. He cannot be refused admission to the medical licensure examination on the ground that the medical school from which he graduated has not been approved by the Board when, in fact, it has not been disapproved either.

II.

The Educational Council for Foreign Medical Graduates represents the joint conclusion of the Federation of State Medical Boards, the Council on Medical Education and Hospitals of the American Medical Association, the Association of American Medical Colleges and the

[11] There are minor exceptions, irrelevant to this opinion, found in § 7 of the act and in § 1 of the Act of August 10, 1951, P. L. 1154, 63 P. S. §§ 409 and 417.
[12] See page 4, supra.

American Hospital Association that the foreign medical graduate problem should be handled at a national level[13]. These interested groups, together with the lay public, are all represented on the Council which will assume[14] primary responsibility for evaluating the credentials of foreign medical graduates. This evaluation would encompass both the rating of the medical school and the examination features of the licensure requirements.

As stated above[15], the final determination of a medical school's qualifications must be made by the Board although the Board may base its judgment on information received from other agencies. In addition, the Board is specifically granted the power to accept for licensure an applicant who has successfully completed an examination given by any medical board considered competent by the Board[16], provided the applicant otherwise qualifies. But examination may not be substituted for approval nor approval for examination. Of course, these two criteria may merge where admission to the examination requires graduation from an approved medical school. Thus, if the Council examines only foreign medical graduates who have studied at schools approved by the Board, no difficulty arises. If the Board, initially, recognizes the Council's ratings and gives its own approval to the Council-approved schools, all problems disappear. The Board, then, need only recognize the Council as a competent examining board.

Thus, while it cannot be said that one's passing of the Council's *examination* may be accepted by the Board in lieu of its own *approval* of the applicant's medical school, such a conclusion begs the question since it fails to meet the facts underlying the situation. The Board may accept the Council's examination in lieu of its own, and it may base its own approval of a medical school on information gained by the Council. These two conclusions, coupled with our initial one that the Board must act on the question of qualification of any particular foreign medical school, should allow the Board to achieve substantial uniformity with other states in its approach to the foreign medical graduate.

In conclusion, therefore, it is our opinion that the State Board of Medical Education and Licensure: (1) cannot apply standards for

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[13] 164 A. M. A. J 417, 445 to 454.

[14] It is anticipated that the Council will begin operating in late 1957 or early 1958. See 164 A. M. A. J. 445.

[15] See page — supra.

[16] Medical Practice Act, § 6, as amended 63 P. S. § 407. We understand that the Board does accord such recognition to the National Board of Medical Examiners. See 1923-24 Op. Atty. Gen. 434.

approval to foreign medical schools which differ from those applied to American medical schools; (2) must determine for itself the qualifications of each medical school, American and foreign, but may base its determination on information supplied it by other agencies in lieu of personal investigation; and (3) may accept the examination given by the Educational Council for Foreign Medical Graduates in lieu of its own examination provided the Council is found to be a competent examining board.

Very truly yours,

DEPARTMENT OF JUSTICE,

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 52

Special Administration Fund—Bureau of Employment Security—Use of fund for construction of public building—Rental-purchase contract.

The Department of Labor and Industry has no authority in law either to enter into rental-purchase contracts for the construction of public buildings or to expend money from the Special Administration Fund of the Bureau of Employment Security in order to take an option on land to be used as a building site.

Harrisburg, Pa., January 6, 1958.

John F. Adams, Executive Director, Bureau of Employment Security, Department of Labor and Industry, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for an opinion with regard to the legality of spending $5,000.00 from the Special Administration Fund of the Department of Labor and Industry or from Title III Funds for the purpose of taking an option on a parcel of land in Philadelphia and then asking for bids for the construction of a new office building for the use of the Bureau of Employment Security on a rental-purchase contract basis.

The Bureau of Employment Security of the Department of Labor and Industry administers the Act of December 5, 1936, P. L. (1937) 2897, known as the "Unemployment Compensation Law." Section 601.1 of said act, 43 P. S. § 841.1, creates the Special Administration

Fund, and § 201, 43 P. S. § 761, refers to the general powers and duties of the Department of Labor and Industry. This latter section was amended by the Act of May 17, 1957, P. L. 153. This amendment deleted from the law the authority of the Bureau of Employment Security to contract for the construction and lease of local or district office space throughout the Commonwealth. The amendment became effective immediately. Legislation (House Bill No. 1028) which was introduced authorizing the Department of Property and Supplies to provide for the construction of public buildings by rental-purchase contracts failed of enactment.

We are of the opinion, therefore, and you are accordingly advised, that there is presently no authority in the law for the execution by your department of rental-purchase contracts and no authority to spend funds from the Special Administration Fund in order to take an option on land to be used as a building site.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 53

Department of Labor and Industry—Regulating operation of machine shop equipment on 11 P. M. to 7 A. M. shift—Validity—Act of May 18, 1937, P. L. 654.

Under the Act of May 18, 1937, P. L. 654, the Secretary of Labor and Industry has the authority to promulgate a regulation prohibiting an employer from having a machinist operate machine shop equipment on the 11 P. M. to 7 A. M. shift without the presence of other personnel in the plant during those hours, provided available information leads the secretary to conclude that the incidence of injuries in machine shops, especially during the shift concerned, warrants special attention and that such injuries can thus be avoided or measurably reduced.

Harrisburg, Pa., January 6, 1958.

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

Sir: You have requested an interpretation of the Act of May 18, 1937, P. L. 654, as amended, 43 P. S. §§ 25-1 to 25-15. Specifically, you ask whether your department may promulgate a regulation prohibiting an employer from having a machinist operate machine shop equipment on the 11:00 P. M. to 7:00 A. M. shift without the presence of other personnel in the plant during those hours.

Section 12 of the Act states that:

> "Rules and Regulations.—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."

You, therefore, have the power to make rules and regulations to carry into effect all the provisions of the act.

However, since there is no specific provision in the act covering this situation, it is necessary to determine whether the contemplated action falls within the purview of one of the act's provisions generally, i. e., whether the proposed regulation would be a proper carrying into effect of one of the provisions of the act.

The aforesaid test must be applied to § 2 (a) of the Act, § 43 P. S. § 25-2 (a) which provides:

> "General Safety and Health Requirements.—(a) All establishments shall be so constructed, equipped, arranged, operated, and conducted as to provide reasonable and adequate protection for the life, limb, health, safety, and morals of all persons employed therein."

Thus, to arrive at a conclusion, we must decide:

(a) whether a machine shop is an "establishment" within the coverage of the act;

(b) whether the act is broad enough to allow regulation of the number of persons required to be present in a machine shop at any particular time; and

(c) whether the regulation itself is reasonable both as to being limited to machine shops and as to requiring the presence of more than one person in the shop on the 11:00 P. M. to 7:00 A. M. shift.

As to (a), § 1 defines "establishment" as follows:

> "Any room, building or place within this Commonwealth where persons are employed or permitted to work for compensation of any kind to whomever payable, except farms or private dwellings, and shall include those owned or under the control of the Commonwealth, and any political subdivision thereof as well as school districts."

Clearly a machine shop falls into such category.

Concerning point (b) above, since a regulation dealing with the minimum number of persons required to be present in a plant involves the manner of *operation* and *conduct* of an establishment, it would be within § 2 (a) of the act.

However, it is well established that "The exercise by an administrative agency of its rule-making function is . . . subject to various limitations arising out of the fact that the authority is a delegated legislative power, and one indispensable requirement is that the regulation shall be reasonable."[1]

It is true that it has been held by the Pennsylvania Supreme Court in interpreting § 2 (a) of the act that:

> "Section 2 (a) of the Act of 1937 is merely declaratory of the common law duty to furnish a reasonably safe place to work. The rule and the reasons on which it is based were well stated by Justice (later Chief Justice) Mitchell in the case of Titus v. Railroad Company, 136 Pa. 618, 626, 20 A. 217, as follows: 'Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger but of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way for which liability shall be imposed.' " Cool v. Curtis-Wright, Inc., 362 Pa. 60, 63, 66 A. 2d 287 (1949).

However, this case, as do others dealing with § 2, merely fixes a standard of care in determining whether the employer has been negli-

[1] Jenkins Unemployment Compensation Case, 162 Pa. Super. 49, 56 A. 2d 686 (1948).

gent in the operation of his establishment. That is not the same as determining a standard of conduct for the *prevention* or amelioration of accidents. It would appear that under the broad general police power—out of which this act stems—the State and its agencies could use not the "ordinary prudent man" test of negligence, but a higher standard of care in an effort both to *avoid* accidents and lessen the severity of an accident. This, it is submitted, is reasonable and in conformity with the stated purpose of the act; for § 2 (a) specifically refers, *inter alia,* to conduct and operation necessary to provide *reasonable* and *adequate protection,* thereby clearly enunciating the test of reasonableness.

You must, considering the statutory and judicial mandate (a) to effectuate the intent of the Legislature, (b) to give a liberal interpretation to a remedial statute, and (c) the basic rule in the promulgation of regulations that they must be reasonable, study the facts in your possession. If the information available leads you to conclude that the incidence of injuries in machine shops as compared with the accident rate in other industries warrants special attention; that the incidence of injuries to machinists is greater in the 11:00 P. M. to 7:00 A. M. shift than during other periods; and, further, that such greater severity or incidence of injuries could be avoided or measurably reduced by having other employees or supervisors present in the plant during those hours (or viewed another way, that the likelihood is that the number and severity of accidents would be reduced were others present); then a regulation to require such additional personnel would be reasonable in carrying out the provision of § 2 (a) of the act.

We are therefore of the opinion, and you are accordingly advised that you have the authority to promulgate such a regulation as you suggest, provided you have made the necessary, supportable factual determinations referred to in the previous paragraph. It is further recommended that you submit such regulation to this department for review as to legality prior to its promulgation, as provided by the terms of § 21 of the Administrative Agency Law of the Act of June 4, 1945, P. L. 1388, as amended, 71 P. S. §1710.21.

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON EHRLICH,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 54

Department of Mines and Mineral Industries—Oil well drilling—Cementing requirements when drilling through coal seams—Sections 204 (a) and 204 (b) of the Act of November 30, 1955, P. L. 756.

When an oil well is drilled through one or more coal seams, it is not necessary to cement both the casing and the liner unless the liner is run as a separate string of pipe; nor need the twenty feet of cementing of the drill hole, required by the Act of November 30, 1955, P. L. 756, be at any particular level as long as it is at least thirty feet below the coal seam.

Harrisburg, Pa., January 6, 1958.

Honorable W. Roy Cunningham, Deputy Secretary of Mines and Mineral Industries, Harrisburg, Pennsylvania.

Sir: You have requested an interpretation of § 204 (a) and (b) of the Act of November 30, 1955, P. L. 756, 52 P. S. § 2204 (a) and (b). Specifically you have inquired:

1. Under § 204 (a) of the Pennsylvania Gas Operations, Well-Drilling Petroleum and Coal Mining Act of 1955, must both the casing and the liner, whether or not the latter is run as a separate string of pipe, be cemented unless an alternate method of protecting the coal seam is approved pursuant to an application filed under § 207 of the Act?

2. Is the same thing true under § 204 (b) where two or more coal seams are involved?

3. Section 204 (a) and Exhibit "A", approved thereunder by the Oil and Gas Division, show that the hole shall be drilled *at least* 30 feet below the coal seam and then cemented to a height of 20 feet, etc. Is it a proper interpretation of this section to say that it permits such 20 feet of cementing 650 feet below the coal seam, instead of within a reasonable distance of the 30 feet mentioned in the law?

The term "casing" is defined in § 102 (13) of the act as " . . . a string or strings of pipe commonly placed in wells drilled for natural gas or petroleum." Though the term "liner" is not defined in the act, we understand that in the industry it has an accepted meaning: "An additional string or strings of pipe enclosing the casing."

The two sections of the act in question read as follows:

§ 204 (a) "When a well is drilled through a coal seam in a location from which the coal has been removed, the hole shall be drilled at least thirty feet below the coal seam and of a sufficient size to permit the placing of a steel pipe liner not less than ten inches in diameter and of at least one-quarter inch wall thickness. The liner shall extend from a point not less than twenty-five feet below the coal seam to a point not less than twenty-five feet above it. The bottom end of the liner shall be fastened and sealed to the casing and the casing shall be centrally located within the liner. The annular space between said casing and liner shall be filled with aquagel, cement or such other equally nonporous material as the division may approve pursuant to an application filed under section 207. The casing shall be raised at least ten feet off the bottom of the hole and cement shall be placed in the well through the casing to a depth of at least twenty feet. After the cement has been placed, the casing shall be lowered to the bottom of the hole. In each case, where cement is used to set such liners or casing strings, sufficient time shall be allowed for the proper setting of the cement before drilling is resumed. The casing string shall be equipped with either an approved packer or casing shoe. A liner may be run and cemented as a separate string of pipe or such alternate method of protecting the coal seam may be employed as the division may approve pursuant to an application filed under section 207. Such representative of the division as the deputy secretary shall have designated and the coal operator shall be given at least seventy-two hours notice by the well operator when the work described above is to be done."

§ 204 (b) "When a well is drilled through two or more coal seams in a location from which the coal has been removed, such liner shall extend not less than twenty-five feet below the lowest seam penetrated and shall extend to a point not less than twenty-five feet above the highest such seam. In such multiple coal seams in a location from which the coal has been removed, the liner may be run and cemented as a separate string of pipe or such alternate method of protecting the coal seams may be employed as the division may approve pursuant to an application filed under section 207. Such representative of the division as the deputy secretary shall have designated and the coal operator shall be given at least seventy-two hours notice by the well operator when the casing is to be cemented through the coal seam."

On the subject of fastening, sealing and cementing, the wording of § 204 (a) requires only that "The bottom end of the liner shall be fastened and sealed to the casing. . . .", that "The annular space between said casing and liner shall be filled with aquagel, cement or such other equally nonporous material as the division may ap-

prove . . .", that "The casing shall be raised at least ten feet off the bottom of the hole and cement shall be placed in the well through the casing to a depth of at least twenty feet.", and that "A liner may be run and cemented as a separate string of pipe . . ."

Therefore, in response to your first inquiry, be advised that cementing is not required for both casing and liner, unless the liner is run as a separate string of pipe. All that is required is that the bottom end of the liner be fastened and sealed to the casing; the manner of fastening and sealing them is not specified. The annular space between the casing and liner must be filled but the filling may be of cement or aquagel or other approved nonporous material. The only point at which cement is required is in the well, to set the casing and when the liner is run as a separate string of pipe.

As to the second question, the only pertinent wording contained in § 204 (b) provides that ". . . the liner may be run and cemented as a separate string of pipe . . ." It would appear, therefore, that this section adds nothing to the cementing, fastening provisions set out in § 204 (a). That the two sections must be read together is clear; that the provisions governing the drilling through one coal seam apply equally to the drilling through two or more coal seams is inescapable from the reading of the sections, for § 204 (b) seems merely to be a continuation of § 204 (a), dealing with a slightly different situation; for example, in the first sentence of § 204 (b) the wording "such liner" appears, obviously referring to the provisions of § 204 (a). Further, it would hardly be logical to assume that precaution provided in dealing with a situation where drilling passes through only one coal seam would be relaxed in the more dangerous situation where two coal seams are pierced. The Statutory Construction Act in such case as is posed here 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.
>
> "When the words of a law are not explicit, the intention of the Legislature may be ascertained by considering, among other matters— * * * (3) the mischief to be remedied; (4) the object to be attained; * * * (6) the consequences of a particular interpretation; * * *" Act of May 28, 1937, P. L. 1019, § 51, 46 P. S. §551.

Therefore, the response to your second question is the same as that for your first query.

Regarding your third question, there is no requirement that the cementing be within a reasonable distance of the thirty feet referred to in the act. All that is required, as you point out, is that the hole must be drilled *at least* thirty feet below the coal seam and then cemented to a height of twenty feet; there is no other restriction distance-wise in this particular matter. There is nothing in this procedure that is contrary to the wording or the primary purpose of the act: safety of personnel and facilities, since you inform me that the procedure in question is safe and will not result in the creation of a dangerous situation. We are therefore of the opinion and you are accordingly advised in this last matter, that the act permits the twenty feet of cementing six hundred and fifty feet below the coal seam.

Yours very truly,

DEPARTMENT OF JUSTICE,

LEON EHRLICH,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 55

State Workmen's Insurance Fund—Annual examination and audit—Insurance Department—Auditor General—Acts of May 1, 1933, P. L. 102, and May 31, 1957, P. L. 237—Repeal by implication.

The Act of May 31, 1957, P. L. 237, does not in any way repeal, modify or limit the duties imposed upon the Insurance Department to examine and audit the State Workmen's Insurance Fund, pursuant to § 1 of the Act of May 1, 1933, P. L. 102.

Harrisburg, Pa., January 7, 1958.

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

Sir: You have requested advice from this department concerning the effect of the Act of May 31, 1957, P. L. 237, Act No. 115, upon

the duty of the Insurance Department to make an annual examination and audit of the State Workmen's Insurance Fund, as provided in the Act of May 1, 1933, P. L. 102, 77 P. S. § 345.

The Fiscal Code, the Act of April 9, 1929, P. L. 343, originally provided in § 402 relating to audits by the Auditor General, inter alia, as follows:

"* * * * * * *

"At least one audit shall be made each year of the affairs of every department, board, and commission of the executive branch of the government, and all collections made by departments, boards, or commissions, and the accounts of every State institution, shall be audited quarterly.

"Special audits of the affairs of all departments, boards, commissions, or officers, may be made whenever they may, in the judgment of the Auditor General, appear necessary, and shall be made whenever the Governor shall call upon the Auditor General to make them.

"* * * * * * *"

The above cited paragraphs of § 402 of The Fiscal Code were amended by the Act of June 3, 1933, P. L. 1474, to read as follows:

"* * * * * * *

"At least one audit shall be made each year of the affairs of every department, board, *except the State Workmen's Insurance Board,* and commission of the executive branch of the government, and all collections made by departments, boards, or commissions, and the accounts of every State institution, shall be audited quarterly.

"Special audits of the affairs of all departments, boards, *except the State Workmen's Insurance Board,* commissions, or officers, may be made whenever they may, in the judgment of the Auditor General, appear necessary, and shall be made whenever the Governor shall call upon the Auditor General to make them." (Emphasis supplied)

At the same session of the Legislature the Act of May 1, 1933, P. L. 102, 77 P. S. § 345, was adopted, imposing a duty upon the Insurance Department to make an annual examination and audit of the State Workmen's Insurance Fund. Section 1 of the foregoing act provides:

"Be it enacted, &c., That the Insurance Department, at least once each year, shall make a complete examination and audit of the affairs of the State Workmen's Insurance Fund,

> including all receipts and expenditures, cash on hand, and securities, investments, or property held representing cash or cash disbursements, to ascertain its financial condition and its ability to fulfill its obligations, whether the State Workmen's Insurance Board in managing the fund has complied with the provisions of law relating to the fund, and the equity of the board's plans and dealings with its policyholders."

Thus, from the time of passage of these Acts until the passage of Act No. 115 of the 1957 session, the sole auditing function relative to the State Workmen's Insurance Fund was delegated to the Insurance Department, the Auditor General having no duties to perform in this area. Act No. 115 removed all language from § 402 of The Fiscal Code which excepts the State Workmen's Insurance Board from the auditing duties of the Department of the Auditor General. As amended by the 1957 Act, the foregoing cited paragraphs of § 402 provide:

> "At least one audit shall be made each year of the affairs of every department, board, and commission of the executive branch of the government, and all collections made by departments, boards, or commissions, and the accounts of every State institution, shall be audited quarterly.
>
> "Special audits of the affairs of all departments, boards, commissions, or officers, may be made whenever they may, in the judgment of the Auditor General, appear necessary, and shall be made whenever the Governor shall call upon the Auditor General to make them."

Thus, Act No. 115 restored the auditing function to its pre-1933 condition as far as the Auditor General is concerned. But Act No. 115 did not expressly repeal the Act of May 1, 1933, P. L. 102, imposing a duty upon the Insurance Department to examine and audit the State Workmen's Insurance Fund.

The enactment of Act No. 115, supra, raises the question whether or not its effect is to repeal by implication the Act of May 1, 1933, P. L. 102, which imposes upon the Insurance Department the duty to examine and audit the State Workmen's Insurance Fund. It is the opinion of this department that Act No. 115, supra, does not have this effect. The Supreme Court of Pennsylvania has held that repeals by implication are not favored, and will not be recognized unless an irreconcilable conflict exists between statutes embracing the same subject matter; *Kelly v. City of Philadelphia,* 382 Pa. 459, 471, 115 A. 2d 238, 244 (1955).

There exists no irreconcilable conflict between § 402 of The Fiscal Code, as amended by Act No. 115, and § 1 of the Act of May 1, 1933, P. L. 102. The two statutes would seemingly require two audits of the State Workmen's Insurance Fund. A requirement that two audits be made of a specific fund does not constitute a conflict in law.

A repeal by implication cannot be inferred on the grounds that the Legislature would not intentionally impose similar or duplicating duties upon two separate governmental agencies. The Legislature may very properly have assumed that the audit performed by the Department of the Auditor General and the examination and audit performed by the Insurance Department would generally serve two distinct purposes. The examination and audit conducted by the Insurance Department, pursuant to the express provisions of the Act of May 1, 1933, P. L. 102, is a complete examination into all of the policies, plans and procedures of the State Workmen's Insurance Board in its management of the fund from the point of view of its insurance aspects and the propriety and soundness of its investments. The audit conducted by the Department of the Auditor General may be as comprehensive and as complete as the Department of the Auditor General deems proper to fulfill the duties of law imposed upon that department by § 402 of The Fiscal Code. The Legislature could reasonably have believed that these two audits would not generally amount to duplication of effort, and they further could have believed that any incidental duplication which might occur would be harmless in comparison to the advantages to be gained by having the affairs and activities of the State Workmen's Insurance Fund audited annually by the Department of the Auditor General and examined and audited by the Insurance Department.

We are, therefore, of the opinion and you are accordingly advised that the Act of May 31, 1957, P. L. 237, Act No. 115, does not in any way repeal, modify or limit the duties imposed upon the Insurance Department to examine and audit the State Workmen's Insurance Fund, pursuant to § 1 of the Act of May 1, 1933, P. L. 102.

Very truly yours,

DEPARTMENT OF JUSTICE,

EDWARD L. SPRINGER,
Deputy Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 56

Elections—Nomination petition—Candidate for United States Senate or Representative in Congress—Filing of loyalty oath—Section 14 of the Act of December 22, 1951, P. L. 1726.

A candidate for the office of United States Senator or Representative in Congress is a candidate for a Federal office and as such is not required by Section 14 of the Pennsylvania Loyalty Act, the Act of December 22, 1951, P. L. 1726, to file a loyalty oath with his nomination petition, paper or certificate.

Harrisburg, Pa., January 28, 1958.

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

Sir: You have asked to be advised whether the provisions of § 14 of the "Pennsylvania Loyalty Act" of December 22, 1951, P. L. 1726, 65 P. S. § 224, require that a candidate for the office of United States Senator or Representative in Congress shall attach a loyalty oath to his nomination petition, paper or certificate.

Section 14 of the Pennsylvania Loyalty Act provides:

> "No person shall become a candidate for election under the provisions of the act, approved the third day of June, one thousand nine hundred thirty-seven (Pamphlet Laws 1333), known as the 'Pennsylvania Election Code', and its amendments, *to any State, district, county, or local public office* whatsoever in this Commonwealth, unless he shall file with his nomination petition, nomination paper or nomination certificate a statement, under oath or affirmation, that he is not a subversive person * * *." (Emphasis supplied)

The only persons required by § 14 of the Act to file a loyalty oath are candidates for "State, district, county, or local public" offices. No loyalty oath is required of candidates for federal offices or for offices other than those enumerated in § 14. If, therefore, a candidate for the office of United States Senator or Representative in Congress is not a candidate for a "State, district, county, or local public office", it follows that he need not attach a loyalty oath to his nomination petition, paper or certificate. It remains, then, to determine whether the offices of United States Senator and Representative in Congress are federal or state offices.

The offices of United States Senator and Representative in Congress were created by the Federal Constitution which also provides for the

number, apportionment, qualifications, election, compensation, and rights and privileges of members of the Congress.[1]

Thus, in *Lane v. McLemore,* 169 S. W. 1073, 1074-1075 (1914), the Texas Court of Civil Appeals found that:

> "A congressman, whether elected from a district or the state at large, is not a state officer, but a federal officer; he is remunerated from the federal treasury, not by the state; the office is created by the federal Constitution, and the officer's duty is to represent his constituency in the federal Congress and to there give consideration to legislation coming solely within the jurisdiction of the federal government. Viewed from every angle, we are unable to perceive any just grounds upon which he could base a claim to be a state officer."

Similarly, in *State ex rel. Carroll v. Becker,* 329 Mo. 501, 45 S. W. 2d 533, 536 (1932), the Supreme Court of Missouri held:

> "A member of Congress is not a state officer. * * * He is a United States officer."

In *Lamar v. United States,* 241 U. S. 103, 36 S. Ct. 535, 60 L. Ed. 912 (1916), the defendant was indicted and convicted under a federal statute making it a crime for anyone to impersonate an officer of the United States with intent to defraud. The indictment charged that the defendant "unlawfully, knowingly, and feloniously did falsely assume and pretend to be an officer of the Government of the United States, to-wit, a member of the House of Representatives of the Congress of the United States of America, * * * with the intent, then and there, to defraud Lewis Cass Ledyard * * *." The Supreme Court of the United States affirmed the judgment of sentence, holding, *inter alia,* that a member of the House of Representatives was an officer of the United States within the meaning of the criminal statute. Speaking for the Court, Mr. Chief Justice White stated (p. 112):

> "* * * [W]hen the relations of members of the House of Representatives of the Government of the United States are borne in mind and the nature and character of their duties and responsibilities are considered, we are clearly of the opinion that such members are embraced by the comprehensive terms of the statute."

The opinion of the Court goes on to point out (pp. 112-113) that if "considered from the face of the statute alone the question was susceptible of obscurity or doubt—which we think is not the case—

[1] U. S. Const. art. I, §§ 2, 3, 6; amend. XIV, § 2; amend. XVII.

all ground for doubt would be removed" because of the "common understanding that a member of the House of Representatives [is] a legislative officer of the United States [as is] clearly expressed in the ordinary, as well as legal, dictionaries", the law requiring members of the Congress to take an oath of office, the "various general statutes of the United States" which assume that a member of the Congress is a "civil officer of the United States", and the "prior decisions of this court" which are in harmony with the "settled conception of the position of members of state legislative bodies as expressed in many state decisions."

We are convinced, on the basis of the foregoing citations of authority, that members of the Congress are federal officers and not state officers. And, since we reach that conclusion, it is unnecessary for us to determine whether our legislature could constitutionally require a candidate for the office of United States Senator or Representative in Congress to file a loyalty oath with his nomination petition, paper or certificate.

It is, therefore, our opinion, and you are accordingly advised, that a candidate for the office of United States Senator or Representative in Congress is a candidate for a federal office and not a "State, district, county, or local public office", and that § 14 of the "Pennsylvania Loyalty Act" does not require such a candidate to file a loyalty oath with his nomination petition, paper or certificate.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. DONNELLY,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 57

Department of Revenue—Fiscal procedures—Verification of receipts with deposit slips prior to transmittal to Treasury Department—Sections 8 and 209 of The *Fiscal Code.*

The Department of Revenue in the handling of money and its transmittal to the Treasury Department must verify the deposit slips delivered with the

money in order to comply with the mandate of the law as set forth in § 209 of The Fiscal Code, the Act of April 1, 1929, P. L. 343, as amended, 72 P. S. § 209, and any release from this duty must be secured from the General Assembly through legislation.

Harrisburg, Pa., January 29, 1958.

Honorable Vincent G. Panati, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your predecessor's request for advice regarding § 8 of The Fiscal Code, the Act of April 9, 1929, P. L. 343, 72 P. S. § 8. This section reads as follows:

> "All payments of bonus, taxes, fees or other moneys, now by law required to be made to the Auditor General or to the State Treasurer, shall, after the effective date of this act, be made to the State Treasurer through the Department of Revenue, no matter by what agency such bonus, taxes, fees or other moneys shall be collected from the person, association, corporation, political subdivision or officer liable to pay them to the Commonwealth or to any officer of the Commonwealth."

He states that certain practices are burdensome with regard to the handling of moneys received by departments and institutions outside the Department of Revenue which are carried or brought into the Revenue Department. Upon the arrival of these receipts, your Cashier's Section of Receipts Accounting opens each bundle of checks and proves the deposit tape which is attached to the bundle of checks. When this is accomplished, the receipts are rewrapped and forwarded to the State Treasury for deposit. After deposit, the State Treasurer returns to the Cashier's Section a receipted copy of said deposit slip. He asks whether the accounting of deposit items by the Cashier's Section may be eliminated since it is but a check of a deposit slip submitted by an agency prior to an official count by the State Treasurer.

Section 209 of The Fiscal Code, as amended, supra, 72 P. S. § 209, reads as follows:

> "All moneys received by the Department of Revenue during any day shall be transmitted promptly to the Treasury Department, and the Treasury Department shall forthwith issue its receipt to the Department of Revenue for such moneys, and credit them to the fund and account designated by the Department of Revenue.
>
> "Detailed statements of all moneys received shall be furnished to the Treasury Department and the Department of

the Auditor General contemporaneously with the transmission of such moneys to the Treasury Department."

It will be noted that the second paragraph of § 209 provides that detailed statements of all moneys received shall be furnished to the Treasury Department and the Department of the Auditor General contemporaneously with the transmission of such moneys to the Treasury Department. It would, therefore, seem that you could not comply with this requirement of the law for a detailed statement if you did not check the deposit tape to verify the receipt of all the items on the deposit tape. The deposit tape and the verification thereof serves as a detailed statement.

We are, therefore, of the opinion and you are accordingly advised that in order to comply with the mandate of the law as set forth in § 209 of The Fiscal Code, the Act of April 9, 1929, P. L. 343, as amended, 72 P. S. § 209, the verification of the deposit slips must be made by your department. Any release from this duty must be secured from the General Assembly through legislation.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 58

School districts—Transportation charges for non-public pupils—Payment from school district funds—Section 2541 of the Public School Code of 1949.

Under § 1361 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended, the board of directors of a school district may not provide free transportation out of school district funds for non-public school pupils, and where school district funds have been expended for such purpose the Department of Public Instruction may not approve such expenditure to permit reimbursement of the school district under § 2541 of the code.

Harrisburg, Pa., January 29, 1958.

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

Sir: You have asked to be advised as to whether the Department of Public Instruction may approve payments reimbursing a school district on account of pupil transportation charges paid for out of school district funds when such transportation charges included transportation for both public school and non-public school pupils. Although you limit your question to the case where the non-public and public school pupils were carried on the same buses, this fact is immaterial to our discussion—i. e., the result is the same whether the pupils were carried on the same or on separate buses.

Section 2541 of the "Public School Code of 1949"[1] provides:

> "School districts shall be paid by the Commonwealth for every school year on account of pupil transportation which * * * have been approved by the Department of Public Instruction, in the cases hereinafter enumerated * * *"[2]

However, the reimbursement contemplated by this section must necessarily be limited to those situations in which the school district has lawfully made payments for pupil transportation within the powers granted to the Board of Directors of the district. Section 1361 of the Public School Code of 1949[3] which deals with this situation states:

> "The board of school directors in any school district may, out of the funds of the district, provide for the free transportation of any resident pupil to and from the *public schools* * * *. They shall provide such transportation whenever so required by any of the provisions of this act or of any other act of Assembly." (Emphasis supplied)

The Supreme Court of Pennsylvania had occasion to construe the counterpart of § 1361 in the prior Public School Code, along with other provisions that dealt with the problem of pupil transportation, in the case of *Connell v. Kennett Township et al.*, 356 Pa. 585, 52 A. 2d 180 (1947). The Court held that the school district could not be compelled to transport any pupils other than public school pupils to and from public schools. This conclusion was based on the Court's finding that the Code gave the Board of Directors of a school district power to provide for the transportation of public school pupils only.

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[1] The Act of March 10, 1949, P. L. 30, as amended, 24 P. S. § 25-2541.

[2] Further clauses enumerate the specific classes of school districts covered and the particular groups of pupils for which reimbursement may be made. For purposes of this opinion it is assumed that the request is within the scope of the cases enumerated in the section.

[3] The Act of March 10, 1949, P. L. 30, as amended, 24 P. S. § 13-1361.

Subsequently, in a very recent decision, in the case of *Robinson Township School District v. Houghton et al.*, 387 Pa. 236, 128 A. 2d 58 (1956), the Supreme Court considered the question inferentially posed in your request for advice; that is, does the Board of Directors of a school district have the "discretionary power to transport in buses of the school district non-public school pupils who, while of compulsory school age, attend schools other than the public schools of the district?" While the decision in the case was based on a procedural point, the opinion of the Court discussed the substantive issue sought to be raised. The *Connell* case was cited with approval, and the Court went on to declare that since the Public School Code of 1949, supra, did not create any power in the school district board to transport non-public school pupils, in the absence of such statutorily created power the board had no inherent power to provide voluntarily such transportation.

In view of the fact that the Pennsylvania Supreme Court specifically discussed the issue raised by your question, this department believes that the interpretation of the Code in the *Robinson* case, although dictum but agreed to by five of the six judges sitting, must control.[4]

Therefore, we are of the opinion and you are accordingly advised that the Board of Directors of a school district has acted without authority of law in providing free transportation out of school district funds for non-public school pupils, and that the Department of Public Instruction may not approve such an arrangement. Reimbursement under § 2541 of the Code, supra, may be made only for that portion of the expenditure which was lawfully incurred in the transportation of public school pupils.

Very truly yours,

DEPARTMENT OF JUSTICE,

SIDNEY MARGULIES,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

[4] In both cases discussed in the text, the Court pointed out that since there was no statutory provision for the transportation of non-public school pupils, the question of whether or not such transportation violated the State or Federal Constitution was not involved.

OFFICIAL OPINION No. 59

Mental health services program—Appropriation establishing center at Morganza—Change of situs to Pittsburgh—Act of July 19, 1957, Act No. 95-A—Statutory construction.

Where administrative difficulties prevented the proper establishment of a mental health center at Morganza, Pennsylvania, as designated by the General Appropriation Act of 1957, Act No. 95-A, approved July 19, 1957, whereas such a center could be established with ease at Pittsburgh, twenty miles distant, the designation in the act of Morganza is held to be directory language only, and it would be proper to establish in the City Pittsburgh the center designated by the act for Morganza.

Harrisburg, Pa., January 30, 1958.

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

Sir: You have requested the opinion of this department concerning the interpretation of a provision of the General Appropriation Act of 1957, Act No. 95-A, approved July 19, 1957. In that act there is an appropriation to the Department of Welfare in the sum of $550,728.00 for a mental health services program, including the establishment and operation of welfare evaluation centers at Morganza, Philadelphia and Selinsgrove for the rehabilitation and treatment of juvenile delinquents and children with mental or behavior problems.

In your request you state that there would be a number of administrative problems in attempting to establish one of these centers in Morganza, Pennsylvania. You indicate there is neither space nor personnel available at the existing State institution at Morganza. On the other hand, the City of Pittsburgh is a center of medicine. A complete complement of professional personnel would be available for this project. In addition, there are suitable hospital facilities in the City of Pittsburgh which would be available for occupancy.

You, therefore, request the opinion of this department as to whether it would be proper to establish in the City of Pittsburgh what the Legislature has designated to be the Morganza center.

The Legislature is free to say where and how the money which it appropriates will be spent. However, the Legislature is aware that it may not legislate in a general appropriation bill, Constitution of Pennsylvania, Article III, Section 15; and its intent not to do so in

the present bill must be presumed. In accordance with this fact the opinions of this office for many years have freely regarded certain conditions in appropriation acts as directory and not mandatory. Such an opinion held that where strict compliance was difficult and would create a hardship, a deviation would be allowed: 1905-06 Op. Atty. Gen. 356. Where the interpretation of an act as mandatory would impair its purpose while its construction as simply directory would preserve its efficiency, the latter construction prevails: *In re McQuiston's Adoption,* 238 Pa. 304, 86 Atl. 205 (1913); *Commonwealth ex rel. Duff v. Eichmann, et al.,* 353 Pa. 301, 45 A. 2d 38 (1946). The mandatory or directory nature of a statute depends on whether the thing directed to be done is the essence of the thing required: *American Labor Party Case,* 352 Pa. 576, 44 A. 2d 48 (1945). Obviously the creation of the welfare evaluation centers and their operation was of paramount concern to the Legislature. Whether one of the centers was to be located in Morganza or twenty miles away in Pittsburgh could hardly be regarded as a critical factor.

It is, therefore, the opinion of this department and you are accordingly advised that it would be proper for the Department of Welfare to establish a welfare evaluation center in the City of Pittsburgh for the rehabilitation and treatment of juvenile delinquents and children with mental or behavior problems. This is so notwithstanding the designation in the General Appropriation Act of 1957 that the center is to be located at Morganza.

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 60

Civil service—Provisional appointees—Permanent status—Reclassification Survey of August 1, 1956—Sections 301-303 of Civil Service Act.

Where an employee with permanent civil service status was serving in a temporary provisional status in a higher grade on August 1, 1956, the date of

the Civil Service Reclassification Survey, the reclassification, pursuant to §§ 302 and 303 of the Civil Service Act, the Act of August 5, 1941, P. L. 752, 71 P. S. §§ 741.302 and 741.303, did not confer upon such employee permanent status in the higher grade. Upon the expiration of the ninety day limitation of provisional tenure such employee would revert to the reclassified equivalent of the lower grade in which he held permanent status prior to the survey.

Harrisburg, Pa., January 31, 1958.

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

Sir: Your office has requested an opinion of this department concerning the effect of the Civil Service Reclassification Survey of August 1, 1956 on certain employees of the Bureau of Employment Security of the Department of Labor and Industry. The employees of the Bureau fell into three categories following the survey:

1. Those who had permanent civil service status when the position was reclassified.

2. Those who had only provisional status prior to August 1, 1956.

3. Those who had provisional status when the position they occupied was reclassified, but who had prior permanent civil service status in a lower grade.

Inquiry is made, as to the third group, whether or not under the provisions of §§ 302 and 303 of the Civil Service Act[1] these persons acquire a different civil service status or grade in the new classification.

Section 301 of the Civil Service Act provides for the establishment of classes of all positions covered by civil service. Such a classification should show the title given to each class; the duties and responsibilities exercised by those holding positions allocated to a class; the minimum qualifications for the satisfactory performance of such duties and the exercising of such responsibilities; and, whenever possible, the lines of promotion to and from the class.

Section 302 provides for the allocation of each position to its proper class. Section 303 provides for the establishment, from time to time, of new classes and the allocation of new positions thereto. The Director of Civil Service may also divide, combine, alter or abolish existing classes and reallocate positions to such classes. It was under §§ 302 and 303 of the Civil Service Act that the Reclassification Survey

[1] Act of August 5, 1941, P. L. 752, 71 P. S. §§ 741.302 and 741.303.

of August 1, 1956 was made regarding the employees of the Bureau of Employment Security. Prior to the survey certain employees of the Bureau held permanent civil service status but these employees were actually working as provisional employees in a higher grade.

Section 604 of the Civil Service Act[2] provides that in certain urgent situations where a vacancy exists in a classified position and the Director of Civil Service is unable to certify a person whose name appears on an eligible list for that position, the Director may authorize the filling of such a vacancy by a provisional appointment. After such authorization the Director should certify not more than three qualified persons (with or without examination) and the appointing authority should then appoint one of these persons to fill the vacancy. The provisional appointment continues until an eligible list can be established and certifications can be made therefrom. But in no event can a provisional appointment continue for more than ninety days in any twelve month period. Section 604 goes on to forbid successive provisional appointments of the same or different persons to the same position and concludes with this caveat:

> "* * * The acceptance of a provisional appointment shall not confer upon the appointee any rights of permanent tenure, transfer, promotion or reinstatement." (71 P. S. § 741.604)

We thus see that the provisional appointment itself conferred no permanent status on the individuals in question. Certainly nothing in §§ 302 and 303 of the Act of August 5, 1941, supra, indicates that the reclassification of positions is designed to confer on a person permanent status in a grade where that person had no such permanent tenure in that grade prior to the reclassification. In fact, we are cautioned by § 501 of said act, supra, as amended, 71 P. S. § 741.501 that:

> "(a) Except as otherwise provided in this act,[3] appointments of persons entering the classified service or promoted therein shall be from eligible lists established as a result of examinations given by the director to determine the relative merit of candidates. * * *"

It is, therefore, the opinion of this department and you are accordingly advised that where an employee of the Bureau of Employment Security had a provisional civil service status in one grade and a permanent status in a lower grade prior to the Reclassification Survey

[2] Act of August 5, 1941, supra, as amended by § 3 of the Act of June 21, 1947, P. L. 835, 71 P. S. § 741.604.

[3] These other provisos are not here pertinent.

of August 1, 1956, following that reclassification such an employee could continue to hold a provisional status in the reclassified equivalent of the higher grade for the remainder of the ninety day statutory period. At the expiration of the provisional appointment the employee in question would be entitled to permanent civil service status in the reclassified equivalent of the lower grade in which he held such permanent status prior to the survey. He would not be entitled to permanent civil service status in the higher grade, however, simply because of the Reclassification Survey.

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 61

Department of Welfare—Establishment of diagnostic clinics and treatment centers in general hospitals—General Appropriation Act of 1957, Act No. 95-A.

Funds appropriated to the Department of Welfare for the establishment of diagnostic clinics and treatment centers in general hospitals by the General Appropriation Act of 1957, Act No. 95-A, approved July 19, 1957, may be used as grants to the general hospitals to assist in the construction of psychiatric units, provided each such unit qualifies either as a diagnostic clinic or a treatment center.

Harrisburg, Pa., February 3, 1958.

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

Sir: You have requested the opinion of this department as to whether under the following provisions of the present General Appropriation Act[1], to wit:

"Establishment of diagnostic clinics and treatment centers in General hospitals ..... $150,000"

[1] Act No. 95-A, approved July 19, 1957.

you may use these funds as grants to the general hospitals in the Commonwealth to assist in the construction of psychiatric units. You state that during the last biennium grants were made at the rate of $1,500 per bed in each newly constructed psychiatric unit to those general hospitals applying for such grants.

The General Assembly, during the previous biennium, appropriated the sum of $143,550,000 for a number of specified expenses of the Department of Welfare[2]. Listed among the specific purposes for which the funds were appropriated we find:

> "* * * for assisting such [publicly or privately operated non-sectarian] hospitals to establish facilities for the care and treatment of the mentally ill such assistance to be limited to one thousand five hundred dollars ($1,500) per bed * * *"

Act No. 146-A then continues to list another item of expense, to wit:

> "* * * for the establishment of diagnostic clinics and treatment centers in general hospitals * * *"

Thus we see that under the prior act there were two distinct programs for which funds were appropriated. By contrast the present General Appropriation Act deals solely with the establishment of diagnostic clinics and treatment centers.

Under these circumstances since the Legislature has evidenced its understanding of the distinction between the programs, we could not hold that the two programs are exactly coextensive. While many aspects of one of the two programs would also qualify under the other program, it would be improper to utilize the present appropriation solely for the assistance of general hospitals to establish facilities for the mentally ill on the basis of $1,500 per bed (that program not specifically designated in the present appropriation act) and at the same time make no effort to establish diagnostic clinics and treatment centers in general hospitals (for which there is specific provision in the present act).

Since there is no procedure spelled out in the act as to how the Department of Welfare should disburse the present appropriation, the question is one for you to determine in the exercise of your executive discretion. However, all such disbursements must be for the specific purpose set forth in the 1957 act. It is not enough that the general hospital requesting the grant is merely establishing facilities

[2] Act No. 146-A, approved June 1, 1956.

for *treating* the mentally ill. Such facilities must truly be capable of utilization as diagnostic clinics or treatment centers. In addition, care should be taken to assure that the hospitals comply with the licensing provisions of The Mental Health Act.

It is, therefore, the opinion of this department and you are accordingly advised that the funds appropriated by Act No. 95-A for the establishment of diagnostic clinics and treatment centers in general hospitals may be granted to such hospitals for new psychiatric units. However, such a psychiatric unit must qualify as a diagnostic clinic or treatment center.

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 62

Fines—Compromise and settlement of prosecutions—Professional and trade licensing laws—Minimum and maximum fines—Act of July 1, 1937, P. L. 2667—Professional Nursing Law.

1. The Department of Public Instruction, subject to and under the provisions of the Act of July 1, 1937, P. L. 2667, 71 P. S. § 354.1, has the authority to compromise and settle prosecutions for amounts ranging from the stated minimum fine to the stated maximum fine where both are provided in the particular licensing or registration laws.

2. Where there exists a stated maximum fine but no stated minimum, the department has the authority to compromise and settle a prosecution for any amount up to and including the stated maximum fine.

3. In the case of the Professional Nursing Law, the Act of May 22, 1951, P. L. 317, 63 P. S. §§ 211 to 225, the department has the authority to compromise and settle a prosecution for a first offense thereunder for an amount ranging from the minimum fine to the minimum fine stated for a second or subsequent offense.

4. All such compromises are subject to the approval of the Department of the Auditor General and Department of Justice and must also be accompanied by the payment of costs by the person charged with a violation.

Harrisburg, Pa., February 4, 1958.

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

Sir: You have requested a clarification of our opinion as stated in a Letter of Advice, dated February 20, 1939, addressed to Honorable Warren R. Roberts, then Auditor General of this Commonwealth which is concerned in part with the application of the Act of July 1, 1937, P. L. 2667, 71 P. S. § 354.1, which provides:

> "Whenever any act of Assembly relating to the licensing or registration of persons engaged in professions, trades, and occupations in the Department of Public Instruction, or any board therein, is violated and prosecution therefor is brought by the Department of Public Instruction, such department is authorized and empowered, with the approval of the Department of the Auditor General and the Department of Justice, to compound, compromise, and settle, without further proceedings, any such prosecution before any justice of the peace, magistrate, or alderman before whom the said prosecution is being brought, upon the payment by each defendant of the minimum fine or penalty and costs provided for in the respective acts."

We stated in the said letter of advice that "under the practice as established by your department (Department of Auditor General) and this department, cases where the fine is, as in this case, that is a fine of not more than five hundred dollars ($500.00), such case cannot be compromised except upon the payment of five hundred dollars ($500.00)." The "fine" under discussion in said letter of advice is the fine imposed against persons who violate the provisions of the Optometry Act, the Act of March 30, 1917, P. L. 21, as amended, 63 P. S. §§ 231 to 244.

Since the date of said letter of advice and for some time prior thereto, your department, in effecting a compromise under the provisions of the Act of 1937, supra, has made a practice of accepting no less than the stated maximum fine set forth in a professional licensing law where only the maximum fine is stated and no expressed minimum amount appears. In addition, it has also been the practice

of your department in compromise matters to accept no more or no less than the minimum fine where one is expressed in a professional licensing law.

In reviewing said letter of advice and the above stated practices of your department with respect to compromises under the Act of 1937, supra, we must affirm your right to compromise violations of the professional licensing laws in the manner stated if you so decide as a policy matter, dependent, of course, upon the continued approval of the Department of the Auditor General and the Department of Justice as required by the act. We believe, however, that this stated inflexible practice may promote hardship and injustice in a particular case and that the act does not bind or obligate your department to follow such practice.

In reviewing the various professional licensing laws, we find that they may be placed in three categories in so far as their penal provisions are concerned.

First, there are those professional licensing laws which provide for a stated maximum fine but no stated minimum fine[1] as in the case of the Optometry Act, supra. In all but the "Beauty Culture Law" which provides for a stated maximum fine of $50.00, the stated maximum fine is $500.00. The Optometry Act, supra, also provides for additional fines for a second and subsequent violations.

Second, there are professional licensing laws which set forth stated minimum fines as well as stated maximum fines[2].

Third, one licensing law, "The Professional Nursing Law", Act of May 22, 1951, P. L. 317, 63 P. S. §§ 211 to 225, provides for a stated minimum fine of $50.00 for the first offense without providing for a

[1] "The C. P. A. Law," Act of May 26, 1947, P. L. 318, 63 P. S. §§ 9.1 to 9.16; "The Dental Law," Act of May 1, 1933, P. L. 216, as amended, 63 P. S. §§ 120 to 130b; "Professional Engineers Registration Law," Act of May 23, 1945, P. L. 913, 63 P. S. §§ 148 to 158; "Optometry Act," supra (first offense); "Beauty Culture Law," Act of May 3, 1933, P. L. 242, as amended, 63 P. S. §§ 507 to 527; "Chiropractic Registration Act of 1951," Act of August 10, 1951, P. L. 1182, 63 P. S. §§ 601 to 624.

[2] "Architect Act," Act of July 12, 1919, P. L. 933, as amended, 63 P. S. §§ 21 to 33; "Medicines," Act of April 4, 1929, P. L. 160, 63 P. S. §§ 171 to 176, "Osteopathic Physicians," Act of March 19, 1909, P. L. 46, 63 P. S. §§ 261 to 271; "Pharmacists," Act of May 24, 1887, P. L. 189, as amended, 63 P. S. §§ 291 to 387; "Medical Practice Act," Act of June 3, 1911, P. L. 639, as amended, 63 P. S. §§ 401 to 418; "Real Estate Brokers License Act," Act of May 1, 1929, P. L. 1216, 63 P. S. §§ 431 to 448; "Veterinary Law," Act of April 27, 1945, P. L. 321, 63 P. S. §§ 506-1 to 506-11; "Barbers," Act of June 19, 1931, P. L. 589, 63 P. S. §§ 551 to 567; "Optometry Act," supra (second and subsequent offenses).

stated maximum fine; a stated minimum fine of $100.00 for a second or subsequent offenses with a stated maximum fine of $200.00.

The Act of July 1, 1937, supra, merely provides that if the Department of Public Instruction wishes to compromise and settle a case, the prosecution of which was instituted by said department for a violation of a professional or trade licensing or registration law, and prior to a disposition thereof by the justice of the peace, magistrate or alderman before whom the prosecution was brought, it may do so provided it obtains the approval of the Department of the Auditor General and the Department of Justice and further provided that the compromise shall not be less than the minimum fine or penalty and costs provided for in the professional or trade licensing or registration law. This act does not prohibit the Department of Public Instruction from compromising a given case for an amount greater than the stated minimum; it merely directs the department not to compromise a given case for less than the minimum amount and costs. Of course, in no case can the compromise amount be greater than the stated maximum fine.

The intention of the Legislature may be ascertained by considering § 51 of the Statutory Construction Act, Act of May 28, 1937, P. L. 1019, 46 P. S. § 551, which provides:

> "* * * (1) the occasion and necessity for the law; * * * (4) the object to be attained; * * *"

The Act of 1937, supra, was designed to penalize persons who have been charged with the violation of the professional or trade licensing or registration laws and, at the same time, avoid where feasible and in the interest of the public, prolonged and expensive litigation. The interest of the public and of justice, however, cannot be aided unless all of the attending circumstances surrounding an alleged violation are taken into consideration. Thus, the nature and extent of the violation, its seriousness and consequences, actual or probable recidivism and extenuating circumstances should be taken into account. Doing so, you may be able to determine a proper reflective and fair compromise amount which falls between the minimum and maximum fines where both are specified, and in so doing still meet the occasion, necessity and the object of the Act of 1937.

In those cases where the particular licensing law states a maximum fine but does not expressly state a minimum fine, the necessary implication and conclusion is that the minimum fine thereunder is the smallest monetary amount available in relation to the maximum fine;

and, consequently, you are authorized to compromise a violation thereunder for any amount not less than the minimum and not more than the maximum fine.

With respect to "The Professional Nursing Law", supra, which provides a stated minimum fine for the first offense but no stated maximum fine, you may compromise a first offense for an amount between the stated minimum fine thereunder and the stated minimum fine for second or subsequent offenses.

It is, therefore, our opinion and you are accordingly advised, (1) that the Department of Public Instruction, subject to and under the provisions of the 1937 act, supra, has the authority to compromise and settle prosecutions for amounts ranging from the stated minimum fine to the stated maximum fine where both are provided in the particular licensing or registration law; (2) that where there exists a stated maximum fine but no stated minimum fine, the department has the authority to compromise and settle a prosecution for any amount up to and including the stated maximum fine; (3) that in the case of "The Professional Nursing Law", supra, the department has the authority to compromise and settle a prosecution for a first offense thereunder for an amount ranging from the minimum fine stated for the first offense to the minimum fine stated for a second or subsequent offenses; (4) that all such compromises are subject to the approval of the Department of the Auditor General and the Department of Justice and (5) that all such compromises must also be accompanied by the payment of costs by the person charged with a violation. To the extent that it is in conflict with this advice, the Letter of Advice of February 20, 1939, is hereby overruled.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY L. ROSSI,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 63

Corporations—Fictitious names—Assuming name of apparent individual—Duty of Secretary of Commonwealth—Combination of entities—Act of July 11, 1957, P. L. 783—Official Opinion No. 3 overruled where inconsistent.

1. Corporations which assume the name of an apparent individual in the doing of business in Pennsylvania must register such name in accordance with the provisions of the Fictitious Corporate Name Act, Act of July 11, 1957, P. L. 783.

2. The duty of the Secretary of the Commonwealth under said act extends only to acceptance of a proper application for registration thereunder and does not include any obligation to inquire into the availability of such fictitious name.

3. Only a single application for registration is required where a corporation in combination with another entity intends to use a single fictitious name in the conduct of a business, providing the application is executed by the proper officers of the corporate parties thereto and by the appropriate responsible individuals of the other noncorporate entities.

4. In so far as it is inconsistent with this opinion, Official Opinion No. 3, 1957 Op. Atty. Gen. 40, is overruled.

Harrisburg, Pa., February 4, 1958.

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

Sir: You have asked for a clarification of Official Opinion No. 3, 1957 Op. Atty. Gen. 40, which discusses generally the Fictitious Corporate Name Act, the Act of July 11, 1957, P. L. 783.

You state that you are not certain as to whether or not corporations are to register under the said act where said corporations do business or propose to do business under a name which appears to be the proper name of an individual. For example, the hypothetical "XYZ, Inc.", a Pennsylvania corporation, or a foreign corporation duly qualified to do business in Pennsylvania may propose to operate its business under the fictitious name of "John Smith's".

It is true, as stated on page 4 of Official Opinion No. 3, that the registration of a name which appears to be the proper name of an individual may, or could, deceive the public into believing that the entity which assumes the name of an individual has unlimited liability. In view of this possibility we stated that, in our opinion, the interests of the public would be better served if no official recognition were given to the use of a name which was either calculated to deceive the public or if the public could be deceived by the use thereof. In reviewing our position as set forth in said opinion, however, we now feel that the opinion must be modified notwithstanding this possibility of deception, and that a proper name of an individual, when used by

a corporation to do business in Pennsylvania, must be registered under the Fictitious Corporate Name Act for the following reason:

Section 5 of the act, supra, recites as follows:

> "Registration.—No corporation alone or in combination with any other entity shall hereafter conduct any business in this Commonwealth under any fictitious name unless such corporation shall have first registered the fictitious name by filing 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 an application on a form supplied or approved by the Secretary of the Commonwealth containing the following information
>
> * * * * * * *"

The phrase "fictitious name" is defined in subsection (6) of § 2 of the act, supra, as follows:

> "(6) 'Fictitious Name' Any assumed or fictitious name style or designation other than the proper corporate name of the corporation using such name."

It is clear that when a corporation does business in Pennsylvania under the name of an individual and not in the proper corporate name of the corporation, the said corporation is assuming a fictitious name. If we do not permit the registration of such a name, because of the reasons contained in Official Opinion No. 3, there would be no reason why a corporation could not use such a fictitious name. The act does not prohibit a corporation from using a fictitious name; it merely requires the registration thereof. If we decide that such a fictitious name is not within the purview of the registration provisions of this act, the corporation may use such name in accordance with the court decisions cited in Official Opinion No. 3 which said court decisions held that corporations can trade under assumed names other than their proper corporate names. Surely the Commonwealth should not be permitted to prosecute a corporation for its use of such a fictitious name under the penal provisions of this act if the Commonwealth prohibits the registration of such a name but not the use thereof.

The public could still be deceived into believing that the corporation using the name of an individual had unlimited liability, notwithstanding that we had not permitted the corporation to register such a name. Indeed, the Commonwealth might well share in the responsibility for such deception by refusing to register such a fictitious name.

Thus, while it may appear true that by prohibiting the registration of such a name, the law would appear to be preventing possible deception, the possibility of such deception cannot in this case outweigh the beneficial policy behind the Fictitious Corporate Name Act, supra. That policy is directed at protecting creditors and other persons who deal with corporations who had heretofore the right to conduct their business under assumed names without registering the same. The act will protect the inquiring public who deal with such corporations by furnishing said public with the information as to the true identity and status of an entity doing business in Pennsylvania under an assumed name. To this extent the act will actually help to prevent deception.

You have inquired further as to the extent of the duties of the Office of the Secretary of the Commonwealth under the provisions of this act. In view of the above stated policy and because of the absence of any statutory expression to the contrary, it must be concluded that the Office of the Secretary of the Commonwealth is purely a recording office under the provisions of this act.

Where a corporation properly applies for registration of a fictitious name thereunder, it is the duty of the Secretary of the Commonwealth to accept such application for registration. In so doing, he has executed all of his duties and responsibilities under this act. It follows that the Secretary of the Commonwealth need not inquire as to the availability of a fictitious name for corporate use. Indeed, he may not even refuse to register a fictitious name because it is the same as, or deceptively similar to, a proper or fictitious name already utilized by another corporation.

It must be presumed that the Legislature had notice that our courts have recognized a right in corporations to assume fictitious names notwithstanding the provisions of the Business Corporation Law, Act of May 5, 1933, P. L. 364, § 202, as amended, 15 P. S. § 2852-202, and the Nonprofit Corporation Law, Act of May 5, 1933, P. L. 289, § 202, as amended, 15 P. S. § 2851-202. See court decisions cited in Official Opinion No. 3. If the Legislature had intended to limit the use of fictitious names in this act, it must be correspondingly presumed that the Legislature would have expressly done so. The doctrine of "expressio unius est exclusio alterius" is applicable.

If a conflict is created by prohibiting a corporation, for example, from using as its proper name the name of another corporation but

not prohibiting it from using as its fictitious name either the fictitious or proper name of another corporation, this conflict is for the Legislature to resolve, not for the Department of Justice.

The use of a fictitious name by a corporation which is the same as, or deceptively similar to, a proper or fictitious name already utilized by another corporation is, furthermore, a matter involving the relative rights and duties between the corporate parties who are at liberty to seek redress for any actionable wrong as a result thereof. Such inquisitorial duties are not presently placed upon the Secretary of the Commonwealth.

Lastly, you request to be advised whether the provisions of § 5 of said act require each entity, acting in combination, to separately register a single fictitious name under which the combination intends to conduct business.

Section 5, hereinbefore set forth at length, requires only that a single application be filed by a corporation which, in combination with another entity, intends to conduct a business under a single fictitious name. No good purpose would be served by requiring separate applications to be filed by the corporation and each entity acting in combination since a single application will furnish the required information and the identity of the combination membership will be fully disclosed therein. Insistence upon separate applications would only tend to burden the recordation procedure and no additional benefits would be derived therefrom.

Of course, the application by such combination must be executed by the proper officers of the corporation as required by § 3 of the act, supra, and by the appropriate responsible individuals of the other entities to the combination. The noncorporate entities are not relieved from registration under other laws of this Commonwealth which also require the registration of fictitious names: See § 22 of the act, supra.

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

1. Corporations which assume the name of an apparent individual in the doing of business in Pennsylvania must register such name in accordance with the provisions of the Fictitious Corporate Name Act, supra.

2. The duty of the Secretary of the Commonwealth under said act extends only to acceptance of a proper application for registration

thereunder and does not include any obligation to inquire into the availability of such fictitious name.

3. Only a single application for registration is required where a corporation in combination with another entity intends to use a single fictitious name in the conduct of a business, providing the application is executed by the proper officers of the corporate parties thereto and by the appropriate responsible individuals of the other noncorporate entities.

4. In so far as it is inconsistent with this opinion, Official Opinion No. 3 is hereby overruled.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY L. ROSSI,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 64

Municipal corporations—The Borough Code—Expiration of terms of members of borough council—Vote to overrule burgess' veto of bond ordinance—Validity.

Terms of members of borough council expire on the first Monday of January next succeeding a municipal election under provisions of The Borough Code, Act of May 4, 1927, P. L. 519, as amended. Action of members of council in overruling a burgess' veto of an ordinance authorizing a bond issue is valid where it was taken at a meeting on the first Monday of January succeeding a municipal election which meeting was concluded prior to the organization meeting of council, although council members who had been defeated in the election or who had chosen not to be candidates for reelection participated in the overriding of the veto.

Harrisburg, Pa., February 5, 1958.

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

Madam: This department is in receipt of your request for advice as to the precise time when the term of office of a borough councilman

expires. This is necessary in order to determine the legality of a bond proceeding which has been presented to you for approval in accordance with the provisions of the Municipal Borrowing Law, the Act of June 25, 1941, P. L. 159, 53 P. S. §§ 6101 to 6703.

You have given us the following facts:

The ordinance authorizing the bond issue was enacted on December 3, 1957, and the burgess vetoed the ordinance on January 6, 1958. On this latter date the members of council who had approved the ordinance on December 3, 1957, overruled the burgess' veto by the necessary two-thirds vote. This meeting began at 7:30 P. M. and concluded at 7:50 P. M. on January 6, 1958, and was held prior to the reorganization meeting commencing at 8:00 P. M. on January 6, 1958. These two meetings followed the custom of long standing and were duly advertised. Among those councilmen who participated in the overriding of the burgess' veto were those who had either been defeated at the last municipal election or who had chosen not to be candidates for reelection.

The Borough Code, the Act of May 4, 1927, P. L. 519, as amended, 53 P. S. §§ 45101 to 48501, provides for the election of councilmen in § 810, as amended, 53 P. S. § 45810. The pertinent part of that section reads:

> "* * * Biennially thereafter, at the municipal election, a sufficient number of councilmen shall be elected, for a term of four years from the first Monday of January next succeeding, to fill the places of those whose terms, under the provisions of this act, shall expire on the first Monday of January next following such election."

Section 811, as amended, 53 P. S. § 45811, provides for the election of councilmen where new wards are created; and the last sentence of said section is identical with § 810 quoted above. Section 804 of The Borough Code, as amended, 53 P. S. § 45804, is concerned with the terms of officers and provides that:

> "Persons elected to borough offices, *other than the office of member of council,* shall serve until their successors are elected and qualified, * * *" (Emphasis supplied)

Thus, the law provides for the commencement and termination of terms of the members of the borough council on the first Monday of January.

These provisions are clarified and fixed precisely by § 1001 of The Borough Code, as amended by the Acts of March 26, 1957, P. L. 24 (Act No. 17), and June 20, 1957, P. L. 351 (Act No. 194), which provides as follows:

> "The borough council shall organize at eight o'clock post meridian on the first Monday of January of each even-numbered year, by electing a president, which shall constitute the organization of council. If the first Monday is a legal holiday, the meeting and organization shall take place the first day following at the hour herein prescribed. * * *"

We are of the opinion and you are accordingly advised that the terms of members of borough council expire at 8:00 P. M. on the first Monday of January next succeeding the municipal election. Therefore, the overriding of the burgess' veto was a legal act by the council; and the bond proceeding may be approved by you provided it otherwise qualifies.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 65

Installation of UNIVAC—Consultation with the Department of the Auditor General—Department of Property and Supplies—The Administrative Code of 1929, section 701 (d) and (e).

It is not necessary for the Department of Property and Supplies to consult with the Department of the Auditor General with regard to the installation of UNIVAC, a data processing machine, as the provisions of section 701 (d) and (e) of The Administrative Code of 1929, Act of April 9, 1929, P. L. 177, do not apply to this type of machine.

Harrisburg, Pa., February 17, 1958.

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

Sir: This department is in receipt of your request for advice with regard to the installation of UNIVAC, a data processing machine, which is presently under contract for use by the Department of Property and Supplies for future installation. The question has been raised as to whether the Auditor General should be consulted concerning the proposed installation in view of the provisions of § 701 (d) and (e) of The Administrative Code of 1929.

Subsections (d) and (e) of § 701 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 241, provide as follows:

> "The Governor shall have the power and it shall be his duty:
>
> * * * * * * *
>
> "(d) To prescribe and require the installation of a uniform system or systems of bookkeeping, accounting, and reporting, for the several administrative departments, boards, and commissions, except for the Department of the Auditor General, the Treasury Department and the Department of Internal Affairs but, before prescribing and requiring such installation, the Governor shall consult with the Department of the Auditor General;
>
> "(e) To prescribe forms for accounts and financial records, reports, and statements, for the several administrative departments, boards, and commissions, except the Department of the Auditor General, the Treasury Department and the Department of Internal Affairs but, before prescribing such forms, the Governor shall consult with the Department of the Auditor General;"

You inform us that the UNIVAC will not affect the accounting system in any way, but that it will be used as a data processing machine for speedy computations. In view of these facts, the quoted subsections of The Administrative Code of 1929 do not apply; and there is, therefore, no necessity to consult with the Department of the Auditor General.

We understand that representatives of both the Department of the Auditor General and the Treasury Department have been apprised of the proposed installation in order that they could, when the installation of UNIVAC has been completed, take advantage of the facility in making any computations which those departments might find it advantageous to make on the machine.

We are, therefore, of the opinion and you are accordingly advised that it is not necessary to consult the Department of the Auditor General with regard to the installation of UNIVAC, a data processing machine.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 66

Oil and gas wells—Requests for conferences concerning locations in coal area—Act of November 30, 1955, P. L. 756.

Under the provisions of the Act of November 30, 1955, P. L. 756, the Oil and Gas Division of the Department of Mines and Mineral Industries must honor requests for conferences concerning proposed oil or gas well locations: (1) Whenever the request involves an operating or projected mine and sets forth (a) that the area in question contains an operating mine or projected mine; (b) that the well, when drilled, will penetrate within the outside coal boundaries of any operating coal mine or projected mine or within 1,000 feet beyond such boundaries; (c) that the well or pillar of coal around the well will unduly interfere with or endanger such mine, and (2) where the request involves an unmined and unmapped coal area and sets forth (a) that the area in question is unmined and unmapped; (b) that the well, when drilled, will involve a matter arising under the act; (c) the specific matter involved.

Harrisburg, Pa., February 17, 1958.

Honorable Joseph Kennedy, Secretary of Mines and Mineral Industries, Harrisburg, Pennsylvania.

Sir: Your office requested our opinion as to the necessity for holding conferences under the Act of November 30, 1955, P. L. 756, 52 P. S. §§ 2101 to 2504, on the question of oil or gas well locations when the particular coal area involved is one in which the coal has either not been mined or mapped.

The act, known as the "Gas Operations, Well-Drilling, Petroleum and Coal Mining Act"[1], is designed, among other things to resolve conflicts arising between coal operators and well operators where the physical location of the well impinges upon the physical location of the mine and vice versa. One of the methods of resolving these conflicts is the conference procedure whereby interested parties and the Oil and Gas Division of the Department of Mines and Mineral Industries meet and attempt to work out the problems through mutual agreement.

Section 201 (a) of the Act, 52 P. S. § 2201 (a), requires a well operator who is about to drill a well passing through a "workable coal seam" to furnish information and to submit a map showing the proposed location of the well. The Oil and Gas Division is to send a copy of this map to any coal owner, lessee and operator who has the right under § 202 (a) to object and who has mapped the affected coal seams. Under § 202 (a) of the Act, 52 P. S. § 2202 (a), an affected coal owner or operator has the right to object to the location of the well if the well, when drilled, would penetrate within the outside coal boundaries of any "operating coal mine"[2] or of any unoperated, but projected and mapped, coal mine or within one thousand feet of such boundaries *and* if the well would interfere with or endanger such mine in the opinion of the mine operator or owner. If objections are filed, the Oil and Gas Division must call a conference as provided by § 202 (b) of the Act, 52 P. S. § 2202 (b), to determine a suitable well location.

A number of specific sections in addition to § 202 (b) require the calling of a conference: these deal with a coal operator's approaching a gas or oil well[3], the use of alternative methods or material[4], the furnishing of information concerning gas storage reservoirs[5], reconditioning gas and oil wells[6], retreat work and the inactivating and reactivating of wells[7] and testing situations[8]. Moreover, § 502 (a),

[1] Act of November 30, 1955, P. L. 756, § 101, 52 P. S. § 2101.
[2] "Operating coal mine" means (i) a coal mine which is producing coal or has been in production of coal at any time during the twelve months immediately preceding the date its status is put in question under this act and any worked out or abandoned coal mine connected underground with or contiguous to such operating coal mine as herein defined and (ii) any coal mine to be established or reestablished as an operating coal mine in the future pursuant to subsection (c) of § 303 of this act.
[3] § 203, 52 P. S. § 2203.
[4] § 207 (b), 52 P. S. § 2207 (b).
[5] § 304 (c), 52 P. S. § 2304 (c).
[6] § 304 (f), 52 P. S. § 2304 (f).
[7] § 304 (j), 52 P. S. § 2304 (j).
[8] § 304 (k), 52 P. S. § 2304 (k).

52 P. S. § 2502 (a), generally allows invocation of the conference procedure where any matter arises under the act in order to resolve it by mutual agreement. Thus, problems may arise in a variety of circumstances which would result in the calling of a conference.

Therefore, whether a request for a conference must be honored depends on whether the application for a conference sets out a problem dealing with one of the sections of the act specifically providing for a conference or whether it spells out a matter covered in other portions of the act. Such a request should set forth the problem about which there is controversy so that the Division may determine whether the problem actually comes within the purview of or arises under any section of the act and if well location is involved, the request should note the specific facts upon which it is based.

Therefore, we are of the opinion, and you are accordingly advised that pursuant to the provisions of the Act of November 30, 1955, P. L. 756, you must honor requests for conferences concerning proposed well locations whenever the request sets forth the points listed below:

1. If the request involves an operating or projected mine:
   (a) that the area in question contains an operating mine or a projected mine;
   (b) that the well, when drilled, will penetrate within the outside coal boundaries of any operating coal mine or projected mine or within 1000 feet beyond such boundaries;
   (c) that the well or pillar of coal around the well will unduly interfere with or endanger such mine.

2. If the request involves an unmined and unmapped coal area:
   (a) that the area in question is unmined and unmapped;
   (b) that the well, when drilled, will involve a matter arising under the act;
   (c) the specific matter involved.

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON EHRLICH,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 67

Licenses—Commercial fish hatchery—Authority of Fish Commission to suspend, revoke or refuse to issue artificial propagation license—The Fish Law of 1925, sections 170 and 180.

The Fish Commission may not suspend, revoke or refuse to issue an artificial propagation license to an applicant who has met the requirements of The Fish Law of 1925, Act of May 2, 1925, P. L. 448, and has not been convicted of violation of the applicable sections of such law.

Harrisburg, Pa., February 17, 1958.

Honorable William Voigt, Jr., Executive Director, Pennsylvania Fish Commission, Harrisburg, Pennsylvania.

Sir: You have asked whether the Fish Commission may refuse to renew the artificial propagation license of a commercial fish hatchery operator on the ground that he has been charged by the Commonwealth with violation of the laws relative to erection of obstructions in streams even though no final disposition has been made of this charge.

The Fish Commission, being a statutory agency, has no powers except those specifically given to it by the Legislature or necessarily implied. The Commission's authority to issue artificial propagation licenses is contained in § 170 of The Fish Law of 1925, the Act of May 2, 1925, P. L. 448, as amended, 30 P. S. § 170, which states:

> "The Board is authorized to issue an artificial propagation license for the propagation of all species of trout and all species of basses, upon a written application therefor signed by the applicant and upon the payment to such Board of the sum of twenty-five dollars; for the propagation of gold fish, the sum of five dollars; and for any other species of fish, the sum of five dollars: Provided, that a person licensed to propagate bait-fish may also propagate and sell fish-bait."

If the applicant meets these requirements, and our review indicates they are the only requirements established by the Legislature, issuance of the license is mandatory and the Commission has no authority to refuse it. The establishment by the Legislature of these criteria, namely signed application and payment, and the absence of any provision in the act giving the Commission additional authority to make regulations respecting such licenses, together serve to exclude any other criteria for issuance of the license. "Expressio unius est exclusio alterius", *Commonwealth ex rel Maurer v. Witkin,* 344 Pa.

191, 25 A. 2d 317 (1942). Further limitation of the Commission's authority is contained in The Administrative Code of 1929 amendment of April 25, 1949, P. L. 729, § 8, which provides that licenses may be issued "under such conditions and upon payment of such fees as may from time to time be authorized *by law*".

The Commission is authorized, under § 180 of The Fish Law of 1925, to revoke licenses under specified conditions. Section 180 reads as follows:

> "Any person violating any provision of this article shall on conviction, in the manner provided by chapter fourteen of this act, be sentenced to pay a fine of one hundred dollars.
> "In addition to such penalty, the license of such person may be revoked for one year for the first offense, and two or more years for the second offense, at the discretion of the Board."

Since the applicant's alleged violation was not charged under The Fish Law of 1925, but under another statute, this provision would not be applicable.

For these reasons it is our opinion, and you are hereby advised, that the Fish Commission has no authority to suspend, revoke or refuse to issue an artificial propagation license to an applicant who has met the statutory requirements therefor and has not been convicted of any offense under the applicable sections of The Fish Law of 1925.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 68

Appropriation—Memorial—Furnishing waiting room for children awaiting hearings in Philadelphia Municipal Court—"memorial" defined—Statutory construction—Common usage of word.

"Memorial" when used in a statute relates to anything, as a monument, intended to preserve the memory of a person or event.

The Act of July 31, 1941, P. L. 653, appropriating $2,000.00 for a "suitable plaque or memorial," to the late Judge Theodore Rosen, permits the furnishing of a room in Philadelphia Municipal Court as such a memorial, provided that a marker of some kind so identifies it for the public.

Harrisburg, Pa., February 26, 1958.

Honorable A. J. Drexel Biddle, Jr., The Adjutant General, Annville R. D. 2, Pennsylvania.

Sir: You have asked whether the Act of July 31, 1941, P. L. 653, appropriating two thousand dollars ($2,000) to the Department of Military Affairs for a memorial to the late Honorable Theodore Rosen of Philadelphia may be interpreted to include the furnishing of a room for children while awaiting their hearing in Municipal Court, as well as the erection of a plaque. The Act authorizes the department "to arrange for the design and permanent display in the City and County of Philadelphia on public grounds of a suitable plaque or memorial to the memory of the late Honorable Theodore Rosen".

The Legislature's use of disjunctive language clearly indicates that any "memorial", not necessarily a plaque alone, will meet the legislative mandate. The question, then, is whether a furnished room for children awaiting Municipal Court hearing, together with a commemorative plaque, may constitute a "memorial" to Judge Rosen within the meaning of the statute.

The Statutory Construction Act, Act of May 28, 1937, P. L. 1019, § 33, 46 P. S. § 533, provides that:

> "Words and phrases shall be construed according to their common and approved usage * * *"

Webster's New International Dictionary, Second Edition Unabridged, defines "memorial" *inter alia* as "Anything, as a monument, intended to preserve the memory of a person or event".

It would appear that it is not the nature of the thing employed, but its identification with the person or event, which constitutes a "memorial". Considering that the individual to be honored was a judge, the furnishing of a room for the use of children awaiting court hearings would appear most appropriate; and there would remain only the requirement that the room as furnished, or the furniture itself be identified (by appropriate markings, plaque, sign or other indicia) as a memorial to Judge Rosen.

It is our opinion, and you are accordingly advised, that the furnishing of a room for children, if properly identified as a memorial to Judge Rosen, would be within the authority granted the Department of Military Affairs under the Act of July 31, 1941, supra.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 69

State employees—Federal levy for delinquent taxes on salaries—Procedure in honoring levies.

In honoring levies for delinquent Federal taxes upon State employees the procedure ordinarily followed calls for the service of all levies on the State Treasurer, the delivery of the delinquent's salary check made out to him as payee to the Internal Revenue Service and the obtaining of his endorsement of the check in settlement.

If the delinquent taxpayer-employee refuses to endorse the check, the Internal Revenue Service should notify the State Treasurer, returning the check to him, whereupon the State Treasurer will request the department, board or commission comptroller involved to prepare a new requisition for presentation to the Auditor General who in turn will issue the warrant for payment to the State Treasurer and the latter will issue a check to the Internal Revenue Service. In the event the amount of the check is in excess of the amount of tax due, two checks will issue, one payable to the Internal Revenue Service for the amount owed it and one check payable to the employee for the remainder.

Harrisburg, Pa., March 5, 1958.

Honorable Robert F. Kent, State Treasurer, Harrisburg, Pennsylvania.

Sir: On May 13, 1955, the Department of Justice promulgated a memorandum opinion concerning the Commonwealth's obligation to honor levies made by the Federal Internal Revenue Service upon the salaries of state employees who are delinquent in the payment of their federal taxes. In that opinion we advised all department heads of a

uniform procedure to be followed thereafter. That procedure called for the service of all levies on the State Treasurer, the deliverance of the employee's salary check (made out with the employee as payee) to the Internal Revenue Service and the obtaining of the employee's endorsement on the check in settlement of the tax delinquency. This procedure was adopted as a matter of comity between the federal government and the Commonwealth.

For the most part the procedure has proved successful. However, in a small number of cases the delinquent taxpayer-employee has refused to endorse the salary check. In these cases the Internal Revenue Service has returned the checks to the Treasury Department and requested that new checks be issued directly to the Service in satisfaction of the employee's obligation. You have asked our advice as to what course of action you should follow in such cases.

Levies for delinquent taxes are made by the Internal Revenue Service under § 6331 (a) of the Internal Revenue Code of 1954. A person holding property subject to levy is required by § 6332 (a) of the Code to surrender it to the Service. That such property is a debt owed to the delinquent taxpayer by the person levied upon rather than property held by the delinquent taxpayer himself involves no different conclusion even where the debt arises because of wages due the taxpayer[1]. Finally, the transfer of the property (physically or by payment of the debt) to the government pursuant to the levy is a complete defense to the person levied upon if he is later sued by the delinquent taxpayer or some third party[2].

In Formal Opinion No. 669[3], promulgated on August 27, 1956, this office ruled that the Commonwealth is not a "person" subject to levy under § 6332 (a) of the Code. That opinion dealt solely with the liability of the Commonwealth to honor levies made by the federal government upon accounts payable by the Commonwealth to vendors and upon refunds due to state taxpayers and did not involve a levy upon salary due a state employee. However, the conclusion reached in that opinion is equally applicable to a salary case.

Thus viewing the present policy of the Commonwealth in cooperating with the federal government as a matter of comity, is there any difference in the Commonwealth's position from that of an individual who

[1] See *United States v. Miller,* 229 F. 2d 839 (3rd Cir. 1956); *Dole v. City of Philadelphia, 337* Pa. 375, 11 A. 2d 163, 767 (1940).
[2] *United States v. Eiland,* 233 F. 2d 118 (4th Cir. 1955).
[3] 1955-56 Op. Atty. Gen. 65.

pays a debt to the federal government pursuant to levy? We think not. The principle noted in the *Eiland* case, supra, simply notes that the effect of a levy is to transfer the debt to the federal government; and this principle is equally as applicable when the state is levied upon even though the state need not honor the levy. If it chooses to pay the money to the federal government pursuant to a valid levy, it is exonerated from any further liability to a vendor, taxpayer or employee, whichever the case may be.

In order that payment to the federal government may be effectuated in accordance with §§ 307 and 1501 of "The Fiscal Code"[4], we advise you that the following procedure should be followed:

1. The procedure outlined in our opinion of May 13, 1955, will continue to govern the initial steps to be pursued.
2. If collection attempts are unsuccessful, the Internal Revenue Service should notify the State Treasurer, returning the check to him.
3. The State Treasurer will request the department, board or commission comptroller involved to prepare a new requisition for presentation to the Auditor General.
4. The Auditor General will issue his warrant for payment to the State Treasurer who will thereupon issue a check to the Internal Revenue Service.

In the event that the amount of the check is in excess of the amount of tax due, two checks shall be requisitioned: one check payable to the Internal Revenue Service for the amount owed it and one check payable to the vendor, taxpayer or employee for the remainder.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY J. RUBIN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

[4] Act of April 9, 1929, P. L. 343, §§ 307 and 1501, 72 P. S. §§ 307 and 1501.

OFFICIAL OPINION No. 70

Civil service appointments—Residence requirements for applicants—Examination as prerequisite for appointment—Civil Service Act—Merit systems in the Department of Health and Pennsylvania Board of Parole.

(1) Persons applying for appointments in the classified service, i. e., offices or positions in the Department of Public Assistance, State Board of Public Assistance and county boards of assistance, in the bureau of the Department of Labor and Industry charged with the administration of the Unemployment Compensation Law, in the Pennsylvania Liquor Control Board, or for an office or position under the State Civil Service Commission and the Executive Director, must be residents of the Commonwealth.

(2) Appointments of such persons to offices or positions in the classified service must be after examination, except in the case of provisional appointments or in the case where the appointment is, in fact, a promotion under § 501 of the Civil Service Act, the Act of August 5, 1941, P. L. 752, 71 P. S. § 741.501.

(3) Opinion should not be construed to control the requirements for eligibility for appointment to an office or position in any department or agency of the Commonwealth not covered by the Civil Service Act. Where such department or agency has contracted with the Civil Service Commission for the administration of a merit system, the prerequisite for appointment must be determined by reference to the contract between the department or agency and the Civil Service Commission.

(4) In the case of the Department of Health and the Pennsylvania Board of Parole additional reference should be made to the specific legislation which establishes merit systems therefor.

Harrisburg, Pa., March 5, 1958.

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

Sir: You have requested the opinion of this department as to whether it is permissible to give civil service appointments to either nonresident persons or to persons who have not taken a civil service examination.

The Civil Service Act, the Act of August 5, 1941, P. L. 752, 71 P. S. §§ 741.1 to 741.1002, provides a comprehensive plan for the procurement of qualified persons as employees of the Commonwealth. The act is specifically applicable to all offices and positions existing at the time of the passage of the act or thereafter created in the Department of Public Assistance, the State Board of Public Assistance and county boards of assistance, in the bureau of the Department of Labor and Industry charged with the administration of the Un-

employment Compensation Law, in all offices of the Pennsylvania Liquor Control Board and in all offices of the State Civil Service Commission. The act itself made provision for future legislative extension to employees of other agencies or departments. However, the Legislature has not seen fit to extend the coverage of the act. Section 501 of the act, supra, as amended[1], states that except as otherwise provided in the act, appointments of persons entering the classified service shall be from eligible lists established as a result of examinations by the Executive Director of the Civil Service Commission. This same section states further that persons applying for a position in the classified service shall be, *inter alia,* legal residents of the Commonwealth. Nowhere in the act is there any provision which would allow the Commission to grant exemptions and allow nonresidents to apply for positions in the classified service.

Although the general rule is that examinations are required as a prerequisite to appointment in the classified service, there appear to be two exceptions set forth in the act. The first of these deals with provisional appointments. Section 604 of the act, supra, as amended[2], provides that where there is a great and urgent public need for filling a vacancy in any position in the classified service and the director is unable to certify an eligible person for the vacancy, he may authorize the filling of the vacancy by provisional appointment. The procedure is then set forth and allows the certification of a qualified person with or without examination. Under these circumstances, it is both proper and permissible to make an appointment to a position in the classified service of a person who has not taken an examination.

The second possible exception to the general rule that a civil service examination is a prerequisite for appointment is found in the terminal portion of § 501 of the act, supra. There it is stated that the Commission may permit promotions to be accomplished by any of three plans. The second plan provides:

> "* * * by appointment without examination, if the person has completed his probationary period in the next lower position, and if he meets the minimum requirements for the higher positions; * * *" (71 P. S. § 741.501)

Although the act speaks of this as an appointment, we believe that in reality it is a promotion and may not fall within the terms of your request for advice.

[1] 71 P. S. § 741.501.
[2] 71 P. S. § 741.604.

It is, therefore, the opinion of this department and you are accordingly advised that persons applying for appointments in the classified service, i.e., office or position in the Department of Public Assistance, the State Board of Public Assistance and county boards of assistance, in the bureau of the Department of Labor and Industry charged with the administration of the Unemployment Compensation Law, in the Pennsylvania Liquor Control Board, or for an office or position under the State Civil Service Commission and the Executive Director, must be residents of the Commonwealth; that the appointment of such a person to an office or position in the classified service must be after examination except in the case of provisional appointments or in the case where the appointment is, in fact, a promotion under § 501 of the act, supra.

Nothing in this opinion should be construed to control the requirements for eligibility for appointment to an office or position in any department or agency of this Commonwealth not covered by the Civil Service Act. In those cases where the department or agency has contracted with the Civil Service Commission for the administration of a merit system, the qualifications for appointment must be determined by reference to the contract between the department or agency and the Civil Service Commission. If the contract does not set forth residence or examination requirements, appointments may be made to positions in the contracting department or agency of nonresidents and without examination. There are also several State agencies which have merit systems under legislation other than the Civil Service Act, i.e., Department of Health and Pennsylvania Board of Parole. In such cases reference should be made to this legislation if any problem arises as to the qualifications for appointment.

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 71

Industrial development agencies—Matching State appropriation—Limitation on specific grants—Additional grants—Industrial Development Assistance Law.

Under the provisions of the Industrial Development Assistance Law, the Act of May 31, 1956, P. I. (1955) 1911, which appropriated $1,000,000 to the Department of Commerce for distribution to local industrial development agencies on a dollar for dollar matching basis, a provision limiting each grant to an amount which should not exceed 10¢ per capita for each inhabitant of the district represented by a particular industrial development agency is not a limitation upon aggregate grants but a limitation upon specific grants. The Department of Commerce may make an additional grant to an industrial development agency which has received prior grants.

Harrisburg, Pa., March 7, 1958.

Honorable William R. Davlin, Secretary of Commerce, Harrisburg, Pennsylvania.

Sir: You have requested the opinion of this department as to whether an industrial development agency, as defined by the Industrial Development Assistance Law, the Act of May 31, 1956, P. L. (1955) 1911, 73 P. S. § 351 et seq., may make application to the Department of Commerce for any additional grants under the aforesaid act after such agency has received in prior grant or grants an amount equal to one-tenth of one dollar for each inhabitant of the county or counties represented by such agency.

The Industrial Development Assistance Law appropriated the sum of one million dollars, or as much thereof as may be necessary, to the Department of Commerce to be used in the making of grants to local industrial development agencies for the purpose of encouraging and stimulating industrial development in the areas served by such agencies. Such grants are to be used specifically in assisting "such agencies in the financing of their operational costs for the purposes of making studies, surveys and investigations, the compilation of data and statistics and in the carrying out of planning and promotional programs."

Under the terms of the aforesaid act an industrial development agency is a nonprofit corporation, association or agency which has been duly designated by action of local communities to serve such communities in the carrying out of the purposes of this act.

The questions which you raise in your request for advice results from the language contained in § 5 (b) of the Industrial Development Assistance Law, supra. Section 5 (b), 73 P. S. § 355 (b), provides:

> "The Department of Commerce is hereby authorized to make grants to recognized industrial development agencies,

to assist such agencies in the financing of their operational costs for the purposes of making studies, surveys and investigations, the compilation of data and statistics and in the carrying out of planning and promotional programs: Provided, That, before any such grant may be made,

* * * * * * *

"(b) The Department of Commerce, after review of the application, if satisfied that the program of the industrial development agency appears to be in accord with the purposes of this act, shall authorize the making of a matching grant to such industrial development agency equal to funds of the agency allocated by it to the program described in its application: Provided, *however, That such State grant shall not exceed an amount equal to one-tenth of one dollar for each inhabitant of the county or counties represented by such agency as determined by the last preceding decennial United States Census.*" (Emphasis supplied)

The question raised by § 5 (b) is whether or not the proviso therein is intended to limit each specific grant to an industrial development agency to an amount equal to one-tenth of one dollar for each inhabitant of the county or counties represented by such agency or whether such proviso is intended to place an overall limitation upon the aggregate amount of grants that any particular industrial development agency can receive under the aforesaid law.

Section 5 (b) places the maximum limitation on the amount of each grant to an industrial development agency. Nowhere in such section or elsewhere in the act is there any provision limiting all grants to a specific agency to an aggregate amount equal to one-tenth of one dollar for each inhabitant of the county or counties represented by such agency. Any interpretation that would limit grants to a local industrial development agency to a specific aggregate amount would be unrealistic since such amount might be substantially less than the minimum amount needed by such agency in carrying out the objects of this act. In this regard it should be noted that § 8 of the Industrial Development Assistance Law, supra, 73 P. S. § 358, states:

"The Department of Commerce is directed to administer this industrial development assistance program with such flexibility as to permit full cooperation between the State and Federal governments, or any subdivision, agency or instrumentality, corporate or otherwise, of either of them, so as to bring about as effective and economical and industrial development program as possible."

The proviso in § 5 (b) serves a useful purpose when interpreted as a limitation only upon any single grant to an industrial development agency. For purposes of effective oversight by the Department of Commerce, it is desirable that each specific grant application cover a proposed program with prescribed limitations. A limitation on the amount of each specific grant is also desirable since its natural effect is to spread the appropriated funds more widely throughout the Commonwealth.

It will be noted that § 7 provides that the department may promulgate rules and regulations and prescribe procedures in order to assure compliance by industrial development agencies in carrying out the purposes for which grants may be made under this act. Through this authority the department can prevent any inequities among communities in making future grants.

It is, therefore, the opinion of this department and you are accordingly advised that the proviso in § 5 (b) of the Industrial Development Assistance Law, the Act of May 31, 1956, P. L. (1955) 1911, 73 P. S. § 351 et seq., is solely a limitation upon the amount of each specific grant to an industrial development agency and is not a limitation upon aggregate grants that may be made to any single agency.

Yours very truly,

DEPARTMENT OF JUSTICE,

EDWARD L. SPRINGER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 72

Motor vehicles—Maximum width of loads—Transportation of concrete pipe—Section 902 of The Vehicle Code, as amended by the Act of July 18, 1957, P. L. 996.

Concrete pipe which can be safely loaded on a vehicle and kept within a maximum width of 96 inches as provided by § 902 of The Vehicle Code, the Act of May 1, 1929, P. L. 905, as amended by the Act of July 18, 1957, P. L. 996, cannot be loaded as to measure 102 inches in width as provided in an exception to said section applying to loads which cannot be adjusted on the vehicle safely so as to be transported within the legal size limitation.

Harrisburg, Pa., March 7, 1958.

Honorable Vincent G. Panati, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You have requested an opinion be rendered interpreting § 902 of The Vehicle Code, the Act of May 1, 1929, P. L. 905, as amended by the Act of July 18, 1957, P. L. 996, 75 P. S. § 452, as it relates to the transportation of concrete pipe. Specifically you asked this question "if this concrete pipe can be loaded safely and kept within the maximum width of 96 inches, can it also be loaded so as to come under § 902 allowing a width of 102 inches."

Section 902 reads as follows:

> "(a) No vehicle, except motor buses, motor omnibuses and fire department equipment, street sweepers, and snow plows, shall exceed a total maximum width, including any load thereon, of ninety-six (96) inches, except that the limitations as to size of vehicles stated in this act shall not apply to vehicles loaded with hay or straw in bulk, nor from daylight to dusk, to vehicles with nondivisible loads, except when on the Pennsylvania Turnpike or the National system of Interstate and Defense Highways. Vehicles with nondivisible loads may be a total width, including any load thereon, of one hundred-two (102) inches on highways twenty (20) feet or more in width on the improved travelable portion exclusive of shoulders, etc.
>
> "Nondivisible loads, as used in this section, mean that portion of the load which cannot be reduced in size, or which is wholly impractical to divide, or which cannot be adjusted on the vehicle safely so as to be transported within the legal size limitations as provided by this act."

The words of the act clearly indicate that if concrete pipe can be loaded safely and kept within the maximum width of 96 inches, provided in § 902, it can not be loaded so as to come under the ex-

ception in § 902 allowing a width of 102 inches for a load which cannot be adjusted on the vehicle safely so as to be transported within the legal size limitation as provided by the act.

Very truly yours,

DEPARTMENT OF JUSTICE,

FREDERIC G. ANTOUN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 73

Corporations—Sale of stock—Use of proceeds to purchase patents, good will or property located outside the Commonwealth—Exemption from registration as dealer—Pennsylvania Securities Act.

A corporation is not entitled to an exemption from registration as a dealer to dispose of its stock under § 2 (f) (8) of the Pennsylvania Securities Act, the Act of June 24, 1939, P. L. 748, as reenacted by the Act of July 10, 1941, P. L. 317, if the corporation desires to exchange the stock certificates or use any part of the proceeds to acquire patents, services, good will or property located outside the Commonwealth.

Harrisburg, Pa., March 7, 1958.

Honorable Frank N. Happ, Chairman, Pennsylvania Securities Commission, Harrisburg, Pennsylvania.

Sir: You have inquired whether a Pennsylvania corporation which wishes to sell its own stock for its sole account must register as a dealer or whether it may apply for and receive an exemption under § 2 (f) (8) of the Pennsylvania Securities Act, the Act of June 24, 1939, P. L. 748, as reenacted by the Act of July 10, 1941, P. L. 317, 70 P. S. § 32, where the corporation conducts a substantial portion of its business outside of the State of Pennsylvania and where admittedly, some of the proceeds from the sale of stock will be used to acquire property outside the Commonwealth of Pennsylvania.

The Pennsylvania Securities Act specifically states in § 3, 70 P. S. § 33:

> "(a) Unless registered hereunder, no dealer shall sell any security in this State * * *"

Section 2 (f), 70 P. S. § 32, defines dealer in part as follows:

> "(f) * * * The term 'dealer' also includes any person other than a salesman who engages in this State, either for all or part of his time, directly or through an officer, director, employe, or agent (such officer, director, employe or agent not being registered hereunder as a dealer) in selling securities issued by such person."

However § 2 (f) exempts persons engaging in certain transactions from the definition, one of these is as follows:

> "(8) Sales wherein the issuer, a company organized under the laws of this State or a company organized under other laws which has at least one-half of its paid-in capital invested, employed or used in this State, disposes of its own securities in good faith and not for the purpose of avoiding the provisions of this act for the sole account of the issuer, without any commission or fee and at a total expense of not more than three percentum of the proceeds realized thereon, and where no part of the issue is used, directly or indirectly, in payment for patents, services, good will, or for property located outside of this State."

The purpose of the Pennsylvania Securities Act is to protect the investing public. *Commonwealth v. Harrison*, 137 Pa. Super. 279, 8 A. 2d 733 (1939); *Commonwealth v. Summons*, 157 Pa. Super. 95, 41 A. 2d 697 (1944). Registration is required of all corporations dealing in securities, with specific exemptions in certain cases. The purpose of registration is to assist in the protection of the investing public. A corporation once exempted from registration of a particular issue of stock is not restricted to a period of the year or any other period of time in which to dispose of the stock. An exemption entitles the corporation to sell the stock for which it has received an exemption over any period of time and with any changing conditions in the corporation without additional review by the Pennsylvania Securities Commission.

Exemptions may not be granted for the sale of any security not specifically exempted in the Securities Act. In granting an exemption, therefore, the Commission must endeavor to carry out the intent and purpose of the Act.

The exemption under § 2 (f) (8) is given to a corporation which desires to dispose of its stock for its sole account as the issuing corporation. In order to obtain this exemption the corporation must sell the stock without expending more than three percentum of the proceeds for expenses and must use no part of the issue directly or indirectly in payment for patents, services, good will or for property located outside of the Commonwealth. There is no question that a corporation desiring to use its *stock certificates* or any portion thereof in payment for the above enumerated items must register as a dealer. The question, therefore, is whether or not the corporation, without registering, may sell the stock for its sole account and with the *proceeds* purchase patents, services, good will or property located outside of the Commonwealth.

Restricting the meaning of the phrase "no part of the issue is used, directly or indirectly in payment etc." as used in this exemption to apply only to *stock certificates* would permit a company that desires to acquire a patent, services, good will or property located outside of the Commonwealth to sell the stock certificates to the general public for cash without registration, and then use the cash to purchase those items which the exemption states can not be bought directly or indirectly with any part of the issue. The Superior Court in *Commonwealth v. Yaste,* 166 Pa. Super. 275, 70 A. 2d 685 (1950), stated at page 278:

> "* * * The Pennsylvaina Securities Act is remedial legislation. Its primary purpose is to protect the investing public. * * * And the clear intent of the Act is not to be defeated by a too literal reading of words without regard to their context and the evils which the Act clearly was designed to correct. * * *"

A use of the cash obtained from the sale of the stock certificates, i.e., the proceeds to purchase any of the four items, would be an indirect use of the issue to acquire that which the company could not directly pay for with certificates.

The public could be injured if stock certificates were given for a patent, service, good will or property outside of the Commonwealth; however, at least as much injury could result if money derived from the sale of certificates were paid for the patent, service, good will or property outside of the Commonwealth. Both practices could be equally harmless or equally injurious to the investing public.

It is therefore, our opinion and you are hereby advised that § 2 (f) (8) of the Pennsylvania Securities Act, the Act of June 24, 1939, P. L.

748, as reenacted by the Act of July 10, 1941, P. L. 317, 70 P. S. § 32, does not permit a company to secure an exemption from registration as a dealer in the sale of its securities, if either the stock certificates or the proceeds of the sale of the stock certificates are to be used to acquire patents, services, good will or property located outside of the Commonwealth of Pennsylvania.

Very truly yours,

DEPARTMENT OF JUSTICE,

FREDERIC G. ANTOUN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 74

Appropriations—Water drainage from anthracite coal formations—Use of funds for engineering work to prepare surface projects—Matching Federal grants.

Moneys appropriated for supervising and administering the program of controlling and draining water from anthracite coal formations including funds derived from a matching Federal grant may be used for the engineering work necessary to prepare surface projects.

Harrisburg, Pa., March 11, 1958.

Honorable Joseph T. Kennedy, Secretary of Mines and Mineral Industries, Harrisburg, Pennsylvania.

Sir: You have requested an interpretation of the Act of July 7, 1955, P. L. 258, 52 P. S. §§ 682 to 685, and of Appropriation Act No. 95-A, approved July 19, 1957. These acts deal with water drainage from anthracite mines. Specifically, you ask whether the moneys provided for in both acts may be used for the engineering work necessary to prepare surface projects provided for by the Act of July 7, 1955[1].

[1] See Official Opinion No. 45, 1957 Op. Atty. Gen. 184, which under similar circumstances holds 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."

You have defined and described engineering work as follows:

> "In order to prepare a surface project for presentation, it is necessary to conduct a study on location, make an accurate survey of the existing surface, calculate the survey data, plot it on the drafting table, and determine from this record the specific location and details of the project.
>
> "A combination of field and drafting room work is then necessary to obtain accurate plans, profiles and cross-sections for the preparation of specifications and for the control of the actual work of installation. A complete set of invitations to bid, bid proposal forms, specifications and contract must be prepared for approval of the State Department of Justice and to accompany the project proposal to the pertinent Federal Agency for consideration.
>
> "All of the above work requires the use of employees skilled in surveying, drafting and engineering. It is to provide for the engaging of such employees for the purpose described above that your consideration was requested."

With this in mind, we may examine the legislation pronouncements involved.

The appropriation act reads as follows:

> "Supervising and administering the program of controlling and draining water from anthracite coal formations in accordance with the provisions of the act of July 7 1955 (P L 258) ..... 150,000"

Section 4 of the 1955 Act, 52 P. S. § 685, reads as follows:

> "The sum of eight million five hundred thousand dollars ($8,500,000), or as much thereof as is necessary, is appropriated to the Department of Mines to match Federal moneys made available for the control and drainage of water from anthracite coal formations in this Commonwealth and to carry out the purposes of this act."

That the moneys of the appropriation act may be used for the purposes contemplated is clear; the engineering work is indispensable to the supervision and administration of the project. The term "administering" has been defined as and is synonymous with "conducting" and "executing"[2].

Turning to the question whether the appropriation in the 1955 Act may be expended for the purposes indicated, it is necessary to consider not only the words of the act but the relationship of that act

[2] Webster's New International Dictionary, 2nd Edition, 1950.

to the appropriation act. It appears that the sums required for engineering work far exceed $150,000, and that the purpose of the additional appropriation was to leave as much of the $8,500,000 as possible to be available for matching Federal funds. However, in the absence of any other means of ascertaining the legislative intent, the meaning of the act must be drawn from the words as enacted.

Section 4 of the act, supra, provides for the use of moneys to match Federal moneys "* * * *and to carry out the purposes of this act.*" The ultimate purposes of the act are spelled out in § 2, 52 P. S. § 683, as follows:

> "In such event the Department of Mines shall construct ditches, flumes, backfill stripping pits and cropfalls, and improve stream beds for the purpose of preventing the flow of surface water into mines, and shall purchase the necessary materials for the same, and also shall purchase and install pumps, pipes, machinery, equipment and materials for the purpose of pumping water from abandoned mines: Provided, however, That the Commonwealth shall not bear any operating and maintenance costs whatsoever and shall not bear the installation costs of any underground facilities."

Engineering fees are not specifically included in the purposes enumerated; but in order to fulfill the goals listed, preparatory engineering work must be accomplished. Furthermore, the act in § 2 prohibits expenditures only for operating and maintaining projects and for installation for underground facilities. Since the act thus prohibits certain expenditures, none of which is the use of moneys for engineering purposes, and authorizes expenditures for carrying out the purposes of the act, it can be concluded that engineering costs may be paid from the $8,500,000, as are necessary to carry out the purposes of the act.

One final matter requires clarification:

Section 1 of the Act of 1955, 52 P. S. § 682, provides:

> "In the event that the Congress of the United States enacts legislation making available Federal moneys on a matching basis for the control and drainage of water from anthracite coal formations, the Commonwealth accepts the grant of Federal aid thereunder subject to the terms and conditions of the grant."

Since the Act of 1955 refers to the Federal moneys and makes the use of Commonwealth funds conditional upon compliance with the terms of the Federal grant, it is necessary to review the Federal legis-

lation[3]. We find nothing in such act limiting the use of the moneys appropriated except that the sums involved may not be used for operating and maintaining projects constructed pursuant to the legislation. Therefore, the views expressed, supra, similarly apply. There being certain prohibitions, not including a prohibition of use for engineering purposes, the moneys may be used for such purposes.

We are of the opinion, and you are accordingly advised, that you may use both sources of funds for engineering purposes as are required.

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON EHRLICH,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 75

Contracts—Validity—Variance in terms—Planting trees other than location specified—Exercise of discretion preventing default by Commonwealth—Bituminous Coal Open Pit Mining Conservation Act, the Act of May 31, 1945, P. L. 1198.

A contract awarded for the planting of trees under the provisions of the Bituminous Coal Open Pit Mining Conservation Act, the Act of May 31, 1945, P. L. 1198, was not voided because owners of some of the areas specified in the contract refused to have the work done on their land and the silviculturist selected other land, of like character and quality, which would have been the subject of future contracts for tree planting. The silviculturist of the Department of Mines and Mineral Industries acted in the exercise of discretion in order to prevent the Commonwealth from being in default.

Harrisburg, Pa., March 11, 1958.

Honorable Joseph T. Kennedy, Secretary of Mines and Mineral Industries, Harrisburg, Pennsylvania.

Sir: You have requested an opinion concerning a variation by officials of your department of the terms of a contract awarded for planting of trees under the provisions of the Bituminous Coal Open Pit Mining Conservation Act, the Act of May 31, 1945, P. L. 1198, 52 P. S.

[3] 69 Stat. 352 (1955), 30 U. S. C. §§ 571, 576 (Supp. III, 1956).

§§ 1396.1 to 1396.20. As presented by you, the circumstances creating this problem are these. A contract was duly advertised and awarded for the planting of trees on 625 specified acres in the bituminous region. Because owners of some of the areas specified in the contract refused to have the work done on their land, the silviculturist selected other land, of like character and quantity, which would have been the subject of future contracts for tree planting by your department. The silviculturist had the contractor plant those areas in substitution of the ones no longer available for planting because of the landowners' position. The contract involved had no cancellation provisions. It appears that the Commonwealth was bound to provide the contractor with the amount of work under the contract; his bid, his planning, his arrangement of time, equipment and materials were all predicated upon doing the work covered by the contract. The Commonwealth would probably have been subjected to penalties were there default on its part. It, therefore, seems that the official acted in the exercise of his discretion in an effort to prevent the Commonwealth from being in default. There is no information before this department or any intimation that the discretion was exercised improperly. I understand from your department that the contractor did no less work than contracted for, that he did work of the same character called for on the original sites, that the lands involved were premises for which the Commonwealth would have had planting obligations in the future, that the Commonwealth had actually backfilled the original sites and the substitute areas pursuant to the provisions of the act, that the contractor did not benefit from the changes made, and that there was no discrimination against any bidders or any parties.

It appears that your department has been able to have fulfilled the terms of the contract as nearly as awarded as possible.

In view of the foregoing, you are advised and the Auditor General is similarly advised that under the specific circumstances described herein the action of the official of your department was proper and the work done by the contractor may be considered in fulfillment of the contract awarded.

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON EHRLICH,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 76

Pennsylvania State Police—Fire hazard—Inspection of occupied dwellings without permission of occupants—Act of April 27, 1927, P. L. 450.

The Pennsylvania State Police may conduct inspections at reasonable hours of all buildings and premises within the Commonwealth where there is a reasonable cause to believe that a fire menace exists, without first obtaining permission of the occupants in order to enforce the provisions of the Act of April 27, 1927, P. L. 450.

Harrisburg, Pa., March 17, 1958.

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

Sir: You have requested an opinion as to the interpretation of the Act of April 27, 1927, P. L. 450, 35 P. S. §§ 1181 to 1194, as it relates to the authority of the Fire Marshal of the Pennsylvania State Police in enforcing the provisions of the act. In particular, you request an opinion as to whether the Bureau of Fire Protection can legally exercise jurisdiction over occupied dwellings owned by the occupant or by any other individual which may be a fire menace or hazard to the occupants thereof or to adjacent property located within seventy-five feet of such menace or hazard and whether the Fire Marshal or other members of the Pennsylvania State Police Force can legally inspect such occupied dwellings without permission of the occupants.

Preliminarily, it must be noted that the Constitutions of both the United States and the Commonwealth of Pennsylvania guarantee freedom from "unreasonable searches and seizures".

Article I, Section 8, of the Pennsylvania Constitution provides:

> "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant."

The Fourth Amendment to the United States Constitution guarantees similar protections through the operation of the Fourteenth Amendment.

Statutory authority giving the Pennsylvania State Police Force the right to inspect buildings and order the removal of dangerous conditions is found in §§ 3 (a) and 4 of the Act of April 27, 1927, supra.

Section 3 (a), 35 P. S. § 1183 (a) provides:

> "The Pennsylvania State Police, or its assistants, upon the complaint of any person, or whenever it or they shall deem it necessary, shall inspect the buildings and premises within their jurisdiction. Whenever any of the said officers shall find any buildings or structures which, for want of repairs or by reason of age or dilapidated condition or accumulation of waste, rubbish, debris, explosive or inflammable substance in any buildings or on premises, constituting a fire menace or hazard, or for any other cause, making it especially liable to fire, and endangering property, and so situated as to endanger other property, it or they shall order the same to be removed or remedied, if the same is reasonably practicable, thereby lessening the danger of fire. Whenever such officer shall find, in any building, combustible or explosive matter, or inflammable conditions, which are in violation of any law or ordinance applicable thereto, or are dangerous to the safety of such buildings, thereby endangering other property, it or they shall order the same to be removed or remedied, and such order shall contain a notice that an appeal therefrom may be taken, and shall forthwith be complied with by the owner or occupant of such premises or buildings."

Section 4, 35 P. S. § 1184, provides in part:

> "The Pennsylvania State Police or its assistants may, at all reasonable hours, enter any building or premises within its or their jurisdiction for the purpose of making an inspection, which, under the provisions of this act, it or they may deem necessary to be made."

Subject to the constitutional prohibition against unreasonable searches and seizures, hereinafter discussed, the above quoted sections authorize the Pennsylvania State Police to inspect at reasonable hours all buildings and premises located within the Commonwealth upon complaint of any person or *whenever it shall deem it necessary,* Whenever conditions exist which create a danger of fire, the Pennsylvania State Police are authorized to order the same to be removed or remedied, if reasonably practicable. The section in no way limits the investigative jurisdiction of the Pennsylvania State Police, the Fire Marshal or the Bureau of Fire Protection to situations wherein the permission of occupants to make an inspection be first obtained.

The act in question is an exercise of the police power of the Commonwealth for the protection of the health, safety and property of the citizens thereof. In *Commonwealth v. Pennsylvania Canal Co.*, 66 Pa. 41 (1870), the Supreme Court of Pennsylvania referred to the police power as "nothing more than the authority to compel all owners of property so to use it as not to injure others". An exercise of the police power is valid when it is reasonable and there exists a reasonable connection with the public welfare: *Commonwealth v. Wormser*, 260 Pa. 44, 103 Atl. 500 (1918). The Act of 1927, supra, seeks to protect the citizens of the Commonwealth from the maintenance of fire menaces and hazards which endanger the safety of property whereon a particular fire menace or hazard is located or of other property. Clearly, the objective of lessening the danger of fire is substantially related to the interests of the public health, safety and welfare. The act, therefore, appears to be a reasonable exercise of the police power which does not violate the prohibition against unreasonable searches and seizures found in Article I, Section 8, of the Pennsylvania Constitution.

This does not mean that the Act of 1927, supra, gives the Pennsylvania State Police Force a *carte blanche* to conduct "inspections". That is, the State Police Force cannot use this act as a vehicle to search a dwelling or other building for stolen property or other contraband.[1] The purpose of the act is to prevent a fire menace. So long as the inspection is confined to the purposes of the act and is based upon probable cause that conditions exist which constitute the building or structure a fire menace, the inspection would not violate the constitutional prohibition. As to what is probable cause, no all-inclusive definition has ever been formulated by any of the cases: 79 C. J. S. 74b. Whether there is probable cause in any given case which would warrant an inspection depends upon the existence of such facts and circumstances as would instill an honest belief in a reasonable mind that the conditions set forth in the act do exist. Probable cause must be found to exist before the State Police Force may act upon the complaint of another person or may itself "deem the inspection necessary".

It is, therefore, our opinion and you are accordingly advised that the Pennsylvania State Police, including the Bureau of Fire Protection, under the specific conditions above set forth, has the power to inspect all buildings or premises located within the Commonwealth, without

[1] A search or inspection for such purposes must be made in accordance with the provisions of statutes relating thereto.

first obtaining permission of the occupants thereof, for the purpose of enforcing the provisions of the Act of April 27, 1927, P. L. 450, as amended. In those instances where the owner or occupants of the premises refuse access to an inspecting officer, a search warrant should be obtained, unless there are circumstances of peculiar emergency (such as a fire next door) which require the inspection without the warrant.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 77

Appropriations—Board of Arbitration of Claims—Payment of expenses as they incur—Disposition of case—Establishing a limited revolving fund.

An appropriation of the Board of Arbitration of Claims may be used to reimburse the expenses of the members of the Board as they incur the expenses instead of awaiting the disposition of the particular case in which the expenses were incurred and a limited revolving fund may be established for this purpose.

Harrisburg, Pa., March 17, 1958.

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

Sir: You have asked if, in the future, your department may utilize the biennial appropriation of the Board of Arbitration of Claims for the purpose of reimbursing the expenses[1] of the members of the Board on a basis contemporaneous with the incurring of the expense.

You have indicated that under the present practice the members of the Board, in some cases, have waited for periods in excess of a year before being reimbursed for their expenses. This situation de-

[1] Here, the term "expenses" does not include the per diem fee of fifty dollars for each member.

velops from permitting the expenses which are assessable costs to accumulate until cases are completed, at which time a lump sum which includes expenses due each member is obtained from the party obliged by the terms of the Board's order to pay costs.

You have indicated that if our answer is in the affirmative, a "revolving fund" would be established as the accounting system for controlling the level of the fund. We understand a revolving fund to be one whereby the costs realized from completed cases would be added to the original money fund, and the costs currently incurred by the members would be subtracted from it. In this way, the inflow of money would tend somewhat to balance off the money flowing out. This fund would be discontinued when its level dropped to a sum equal to fifty percent of the appropriation[2] and, in any event, no later than within six months of the end of the biennium.

The Board of Arbitration of Claims was created in the Department of the Auditor General by the Act of May 20, 1937, P. L. 728, as amended, § 1 et seq., 72 P. S. § 4651-1, to hear and determine contract claims involving the Commonwealth. By the terms of the act, the Board is composed of three members and a secretary, the latter having general charge of the management of the Board office. Each member of the Board is compensated $50.00 per eight-hour day and receives his expenses while engaged in his official duties. The compensation and expenses are assessed as costs of specific proceedings to be paid by the parties as the Board directs.

The General Appropriation Act of 1957, approved July 19, 1957, Act No. 95-A, earmarked $18,500

> "to the Department of the Auditor General * * * [for] administration of the Board of Arbitration of Claims."

It is not subject to reasonable questioning that, absent additional facts, the proper administration of the Board would include the payment of these expenses along with the other operating expenses of the Board. That being so, the biennial appropriation may be used for the purpose stated if your department has the authority to reimburse these expenses.

Section 2 of the act creating the Board provides that the Board and its employees are subject to the Act of April 9, 1929, P. L. 177, § 216, 71 P. S. § 76, known as "The Administrative Code of 1929", which provides:

[2] It would be reactivated when its level rose above fifty percent.

> "* * * *the members of departmental administrative bodies, boards and commissions,* * * * and all persons employed under the provisions of this act, shall be entitled to receive their traveling and other necessary expenses, actually incurred in the performance of their public duties, upon requisition of the head of the appropriate administrative department, or of the appropriate administrative board or commission; but in the case of departmental administrative boards and commissions, such requisitions shall be subject to the approval of the departments with which such boards or commissions are respectively connected." (Emphasis supplied)

The Board of Arbitration of Claims is covered by the language of this section.[3]

This act expressly authorizes your department to reimburse the Board members for traveling and other necessary expenses[4] actually incurred in the performance of their public duties; and for the reasons previously stated, in so doing the biennial appropriation legally may be used for that purpose.

The "revolving fund" suggested appears to be well-suited for the special circumstances here present. Its use should be subject to the caveat that in no event should the balance be reduced beyond a point where there are not sufficient funds to pay the salary of the Board Secretary, which is apparently the major fixed charge payable from it. In the event a surplus balance remains at the end of the biennium, it is anticipated it would lapse into the General Fund and not be carried over to the next biennium.

We call your attention to Informal Opinion No. 1468, directed to The Honorable Weldon B. Heyburn, then Auditor General, by letter dated February 9, 1951, and since modified by the Act of July 19, 1951, P. L. 1079, § 1, 72 P. S. § 4651-1, which states, inter alia, that expenses incurred by members of the Board must be approved by the Auditor General before the member is entitled to reimbursement therefor and that the Board, in making expenditures for compensation, is subject and responsible to the Auditor General.

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[3] Section 1 of the Act of 1937, supra, reads in part: "* * * there is hereby created a departmental administrative board in the Department of the Auditor General, known as the Board of Arbitration of Claim * * *".

[4] In this context, "other necessary expenses" would be limited to expenses authorized by the Act of May 20, 1937, supra. Section 1 states: "* * * [each member shall be entitled to expenses] while in the performance of his official duties, said expenses to include mileage at the rate of five cents per mile for each mile actually traveled from the residence of each member to the place of hearing and return, together with subsistence at the rate of fifteen dollars per day while at the place of hearing."

It is our opinion, therefore, and you are advised, that your department may utilize the biennial appropriation to the Department of the Auditor General for the administration of the Board of Arbitration of Claims in order to establish a limited revolving fund for the purpose of reimbursing, with reasonable contemporaneousness with the event, actually incurred expenses of the members of the Board, which expenses will not include the per diem fee of fifty dollars for each member.

Very truly yours,

DEPARTMENT OF JUSTICE,

MICHAEL J. STACK, JR.,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 78

Education—School districts—Right to establish summer sessions for children of migratory workers—Cost of instruction—Reimbursement for transportation—Public School Code of 1949.

1. A summer school may not be established for the purpose of providing education for the children of migratory workers during the summer months; however, under § 502 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, a school district may establish a summer school and the opportunity to attend must be afforded to all entitled thereto including children of migratory workers.

2. Under § 1327 of the Public School Code of 1949, the cost of instruction for the education of children of migratory workers must be borne by the school district alone and is not reimbursable by the State.

3. Since children of migratory workers are nonresidents and since § 2541 of the Public School Code of 1949, which provides for reimbursement to the school districts for pupil transportation, does not contain any specific provision for reimbursement for transportation of nonresident pupils, the school district cannot receive any reimbursement from the Commonwealth for providing transportation for migratory children going to summer school.

Harrisburg, Pa., March 17, 1958.

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

Sir: You request advice on the following questions relative to the education of children of migratory workers during the summer months:

1. May a school district provide education for the children of migratory workers during the summer months?

2. May the cost of instruction for these children be included when determining the current instructional expense of the school district for any one school year?

3. If the school district provides transportation for these children, may the Commonwealth reimburse the school district for such transportation in the same manner in which it reimburses for the transportation of school children during the regular school year?

1. There is no legal justification that will permit a school district to allow the use of a school plant and facilities for a special summer session by one class of people. This makes for discrimination because it provides a special schooling privilege. Where a school board is financially able to provide for a summer school it should be open to everyone entitled to go to school. Admission to summer school must be predicated on the same provisions of law applicable to admission of pupils to the regular school term.

The school district may provide summer education for all children including those of migratory workers. Section 1326 of the Public School Code of 1949, Act of March 10, 1949, P. L. 30, 24 P. S. § 13-1326, provides, in part, as follows:

> "The term 'migratory child,' wherever used in this subdivision of this article, shall include any child domiciled temporarily in any school district for the purpose of seasonal employment, but not acquiring residence therein, and any child accompanying his parent or guardian who is so domiciled."

In brief, a migratory child is a nonresident. Although a "migratory child" is classified as a nonresident, § 1316 of the Public School Code of 1949, 24 P. S. § 13-1316, provides that a board of school directors may permit nonresident children to attend its public schools.

The power to establish summer schools has been vested in the school directors by virtue of § 502 of the Public School Code of 1949, as amended, 24 P. S. § 5-502, which 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

departments for the education and recreation of persons residing in said district, *and for the proper operation of its schools, namely;*—

* * * * * * *

"Such other schools or educational departments as the directors, in their wisdom, may see proper to establish." (Emphasis supplied)

Thus, a summer school can be established if the school directors in their wisdom deem it appropriate in order to maintain the proper operation of its schools.

Section 1327 of the Public School Code of 1949 requires the compulsory attendance of migratory children during the regular school term. Since the migratory child is usually educationally behind the resident child and must attend during the regular term, it would seem that the operation of a summer school which children of migratory workers could attend to bring them up to the level of education of the same age group would be within the meaning of the phrase "for the proper operation of its schools" expressed in § 502, supra, giving authority for establishment of other schools.

The school district can use its tax money to support such schools. Since this type of school comes under the provisions of § 502, supra, funds for its operation can be secured under § 507, 24 P. S. § 5-507, which provides:

"In order to establish, enlarge, equip, furnish, operate, and maintain any schools or departments herein provided, or to pay any school indebtedness which any school district is required to pay, or to pay any indebtedness that may at any time hereafter be created by any school district, or to enable it to carry out any provisions of this act, the board of school directors in each school district is hereby vested with all the necessary authority and power annually to levy and collect, in the manner herein provided, the necessary taxes required, in addition to the annual State appropriation, and shall have, and be vested with, all necessary power and authority to comply with and carry out any or all of the provisions of this act."

Therefore, a summer school can be established and financed by the school district if the school directors deem it proper for the operation of the district's school system. A summer school may be attended by migratory children.

2. The cost of such instruction must be borne by a school district subject to the provisions of § 1327, supra, and is not reimbursable by the State. Section 1327, 24 P. S. § 13-1327, which defines compulsory school attendance states in part as follows:

> "* * * Such child or children shall attend such school continuously through the entire term, during which the public elementary schools in their respective districts shall be in session, or in cases of migratory children during the time the schools are in session in the districts in which such children are temporarily domiciled. *The financial responsibility for the education of such migratory children shall remain with the school district in which such migratory children are temporarily domiciled.* * * *" (Emphasis supplied)

If the financial burden is imposed on the school district when the migratory children are in compulsory attendance, it is a logical and necessary extension that the district should bear the cost when they voluntarily establish summer schools of this nature.

Further, § 2502 of the Public School Code of 1949, as amended, 24 P. S. § 25-2502, which provides for reimbursement by the Commonwealth to the school districts bases its payment by the average daily membership of pupils, and § 2501, as amended, 24 P. S. § 25-2501 defines pupils as those who are *residents* of the school district, therefore, migratory children being nonresidents do not qualify as pupils the district can be reimbursed for.

Nor do these summer schools fulfill the definition of reimbursable extension education. The establishment of extension schools authorized under § 1902, 24 P. S. § 19-1902, is restricted to residents, and provides in part as follows:

> "The board of school directors of any school district may and upon written application, signed by fifteen or more residents of such *district* * * * shall provide free extension education for said applicants * * *" (Emphasis supplied)

Therefore, the cost of instruction for these migratory children must remain with the school district and is not reimbursable by the State.

3. The school district is only authorized to provide free transportation to resident pupils. Section 1361, 24 P. S. § 13-1361 provides:

> "The board of school directors in any school district may, out of the funds of the district, provide for the free transportation of any resident pupil to and from the public schools and to and from any points in the Commonwealth in order to provide tours for any purpose connected with the educational pursuits of the pupils. They shall provide such transportation

whenever so required by any of the provisions of this act or of any other act of Assembly."

By definition in § 1326, supra, a migratory child is a nonresident, and, therefore, is not entitled to free transportation to attend such summer school.

Further, § 2541 of the Public School Code of 1949, as amended, 24 P. S. § 25-2541, which provides for reimbursement to the school districts for pupil transportation does not contain any specific provision for reimbursement for transportation of nonresident pupils. To the contrary its provisions generally deal with transportation of "pupils residing within any part of the district" and similar expressions requiring residence before reimbursement can be made.

Therefore, the school district cannot receive any reimbursement from the Commonwealth for providing transportation for migratory children going to summer school.

We are of the opinion, and you are accordingly advised, that when a summer session in a public school has been established the opportunity to attend must be afforded to all persons entitled to attend; that under the foregoing provisions a school district may provide education for children of migratory workers during the summer months; that the cost of instruction for the education of children of migratory workers must be borne by the school district alone and is not reimbursable by the State; and that the Commonwealth cannot reimburse the school district for providing transportation for the children of migratory workers going to summer school.

Very truly yours,

DEPARTMENT OF JUSTICE,
ELMER T. BOLLA,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 79

Pennsylvania State Oral School for the Deaf at Scranton—Class for mentally retarded deaf children—Enrollment of children handicapped in other ways—Nonresidents—Lapsing school funds—Public School Code of 1949.

1. The Department of Public Instruction may organize and operate a class at the Pennsylvania State Oral School for the Deaf at Scranton for mentally retarded deaf children, provided that the board of trustees at the school concurs in such a plan, and may maintain such class as a day-care center under § 1372 (5) of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended by the Act of March 29, 1956, P. L. (1955) 1356.

2. Classes for handicapped children other than deaf children may be organized and operated at the school providing the school's facilities are not fully utilized by the enrollment of deaf children.

3. Nonresident children whose maintenance and instruction will be paid by the sending state or parents, may be enrolled, if the facilities of the school are not fully utilized by enrollment of resident deaf children.

4. The Department of Public Instruction may not use any excess of funds which are allocated for the use of the State Oral School, such excess properly lapsing into the General Fund.

Harrisburg, Pa., March 17, 1958.

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

Sir: You have requested our advice on several matters concerning the Pennsylvania State Oral School for the Deaf at Scranton. These matters are set forth below and will be treated separately in this opinion.

I. You state that there are a sufficient number of mentally retarded deaf children presently enrolled at the School to warrant the establishment of a special class for them but that the School's budget is inadequate to permit the hiring of an extra teacher to run the class. You ask if the Department of Public Instruction may organize and operate such a class under the provisions of the "Public School Code of 1949", Act of March 10, 1949, P. L. 30, § 1372 (5), as amended[1], 24 P. S. § 13-1372 (5). You also ask, assuming that such a class may be organized and operated, if the district or county board sending a pupil to the class could pay for board and lodging in the school in lieu of transportation thereto and, if so, could the school district receive state reimbursement therefor.

II. You ask if classes for handicapped children other than deaf children may be organized and operated at the school, the present enrollment not utilizing the school's full capacity.

[1] Act of March 29, 1956, P. L. (1955) 1356, § 4.

III. You ask if it is permissible to enroll out-of-state deaf students at the school, the costs being borne by the students' parents or by the sending states, and, if so, should payments be obtained in advance or by quarterly billing.

IV. You state that moneys collected from local school districts as their share of the cost of maintaining children at the school are returned to the General Fund of the Commonwealth. You ask if such funds, now withheld in accordance with § 1377 of the "Public School Code of 1949", 24 P. S. § 13-1377, may be appropriated to the Department of Public Instruction instead of allowing them to lapse into the General Fund and, if so, what disposition could the department make of them.

Before answering each of these questions, we believe a brief review of the status of the school under Pennsylvania statutes would be helpful. Prior to 1913, the school received moneys from the Commonwealth as a state-aided institution[2]. By the Act of May 8, 1913, P. L. 163, provision was made for the transfer of the school to the Commonwealth for maintenance as a state school and its subsequent governance by a board of trustees. This independent board of trustees was abolished by "The Administrative Code" of 1923[3] and a departmental board created in the Department of Public Instruction by the same act[4]. Organization of the departmental board also was governed by the 1923 Code[5].

Thereafter, these provisions were superseded by those in "The Administrative Code of 1929"[6] which designated the board of trustees of the school as a departmental administrative board in the Department of Public Instruction,[7] provided for its organization[8] and set forth its powers and duties[9]. This status has continued till the present time, and in the General Appropriation Act of the 1957 Session of the General Assembly[10] there was appropriated to the Department of Public Instruction the sum of $345,000 for the "operation maintenance and administration"[11] of the school.

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[2] See, e. g., *Appropriation Acts—Session of 1911,* p. 76.
[3] Act of June 7, 1923, P. L. 498, § 2901, 71 P. S. § 31.
[4] Id, § 2, 71 P. S. § 2.
[5] Id, § 435.
[6] Act of April 9, 1929, P. L. 177, 71 P. S. §§ 51 to 732.
[7] Id, § 202, 71 P. S. § 62.
[8] Id, § 401, 71 P. S. § 111.
[9] Id, § 1311, 71 P. S. § 361.
[10] Act No. 95-A, approved July 19, 1957.
[11] Id, § 2 (Appropriation Acts, Session of 1957, p. 80).

I.

Section 1372 (5) of the Code, supra, provides for the establishment and operation by the Department of Public Instruction of classes and schools for handicapped children where the local school authorities have not provided them.

The heading of that section reads as follows: "Day-Care Training Centers Classes and Schools for the Proper Education and Training of Handicapped Children." Thus, it appears that the provisions of § 1372 (5) contemplate only the maintenance of day-care classes[12] and not an addition to existing boarding facilities. However, nothing precludes the department from establishing such classes at the school and accepting mentally retarded deaf children as students therein provided the board of trustees of the school approves such an arrangement[13]. Such classes could not be limited to children already enrolled at the school; they would have to be open both to enrolled and unenrolled children.

Since the effect of this procedure would be to establish a day-care training class using the physical facilities of the school, all of the provisions of the Code relating to finances of such a class must be adhered to. Tuition must be paid[14] and transportation may be furnished[15] by the school district in which the child attending the class resides. Moreover, the Code specifically deals with payments and reimbursements for board and lodging in lieu of transportation. Such may be furnished by the school district or county board where transportation provision is not feasible[16], and the Commonwealth must reimburse the district or county board therefor[17].

To sum up, the Department of Public Instruction may maintain a day-care class for mentally retarded deaf children using the physical facilities of the Pennsylvania State Oral School for the Deaf, provided the board of trustees of the school approves the arrangement. Such a class, however, cannot be limited to pupils presently enrolled at the school, but must be open to all similarly handicapped children. The class must be operated and financed in accordance with § 1372 (5)

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[12] See "Statutory Construction Act," Act of May 28, 1937, P. L. 1019, § 54, 46 P. S. § 554.
[13] "The Administrative Code of 1929," note 6, supra, § 1311, 71 P. S. § 361.
[14] "Public School Code of 1949." Act of March 19, 1949, P. L. 30, § 1372 (5), as amended, 24 P. S. § 13-1372 (5).
[15] Id, § 1374, 24 P. S. § 13-1374.
[16] Ibid.
[17] Id, § 2542, 24 P. S. § 25-2542.

of the "Public School Code of 1949"[18], and the appropriation to the department for such classes may be used. Finally, the school districts may pay for and be reimbursed for board and lodging in lieu of transportation; but if such board and lodging is to be at the school itself, the board of trustees must approve whatever arrangement is made.

II.

Since 1913 the school has been operated as a state-owned institution[19]. As such, its scope of activity is governed solely by the Pennsylvania Constitution and statutes, its original articles of incorporation no longer governing. Section 1311 of "The Administrative Code of 1929"[20] states that the board of trustees has general direction and control of the property and management of the school.

We find no constitutional or statutory provision which would now prohibit the board from accommodating handicapped children other than deaf children at the school. In view of the fact that the facilities of the school are not fully utilized by its present enrollment, such accommodation seems not only permissible, but desirable.

Therefore, you are advised that the facilities of the school may be used to accommodate handicapped children other than deaf children, provided that the primary obligation of the school to enroll deaf children is maintained and provided necessary action is taken by the board of trustees with the approval of the Superintendent of Public Instruction.

III.

Similarly, nothing in the Constitution or statutes applicable to the school would prevent the enrollment of non-resident deaf children therein. Provided that applicants from Pennsylvania are given preference, it is desirable to permit non-residents to enroll at the school when full use of its facilities would not otherwise be made.

You note that the total costs of maintaining non-resident children at the school would be borne by the sending states or the parents. There is no provision of law governing the method of payment of these costs, and whether they should be paid in advance or upon quarterly billing is within the discretion of the board of trustees.

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[18] 24 P. S. § 13-1372 (5).
[19] See introductory discussion, page 81, supra.
[20] Note 6, supra, 71 P. S. § 361.

IV.

It is difficult to understand how moneys collected from local school districts for their share of the cost of deaf children enrolled at the school have been returned to the General Fund, as you say. Under § 1376[21] of the "Public School Code of 1949" the school district of residence is liable for twenty-five percent of the cost of tuition and maintenance at the school. Under § 1377[22] of the Code the moneys due to such local districts as state reimbursement, instead of being paid to the district, simply are withheld by the Superintendent of Public Instruction to the extent of the district's obligation to the school and are paid directly to the school upon requisition of the Superintendent. These withheld amounts are specifically appropriated to the Department of Public Instruction by § 1377.

Thus, such funds are appropriated to the department in fact although they must then be turned over to the school. Any return of money to the General Fund can occur only if the school does not use the funds received by it, thus allowing a lapse to occur. However, these funds are not available to the department except initially in order to be transferred to the school. Any unused amount properly lapses into the General Fund. If an excess of money is being appropriated for reimbursement in this case, the answer can only be to reduce the amount appropriated in future biennia.

To recapitulate, therefore, the answer to each of your questions is as follows:

I. The Department of Public Instruction may organize and operate a class at the school for mentally retarded deaf children, provided the board of trustees of the school concurs in such a plan. Such a class may be maintained as a day-care center under § 1372 (5) of the "Public School Code of 1949" and may be financed by funds appropriated to the department for use in accordance with that section. However, the class must be open to all similar handicapped students, not limited to enrollees at the school; and sending school districts may pay and be reimbursed for transportation of pupils to the class. If any school district wishes to pay and be reimbursed for board and lodging in lieu of transportation, it may do so; but if the board and lodging is to be at the school itself, the board of trustees of the school must approve of the arrangement.

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[21] 24 P. S. § 13-1376.
[22] 24 P. S. § 13-1377.

II. The primary purpose of the school is to accommodate deaf children. To the extent that the school's facilities are not fully utilized by enrollment of deaf children, the board of trustees, with the approval of the Superintendent of Public Instruction, may act to admit children handicapped in other ways.

III. The primary obligation of the school is toward handicapped children resident in Pennsylvania. If this obligation is met and the school's facilities still are not fully utilized, non-resident deaf children may be admitted, the total costs of their maintenance and instruction to be borne by the sending state or children's parents. These costs may be collected in advance or by quarterly billing as the board of trustees determines.

IV. Moneys due the school by the local sending school districts are transmitted directly to the school by the Department of Public Instruction to the extent that state funds by way of reimbursement are made available to the districts. The department cannot use these funds for any other purpose, and the unexpended balance remaining in the school's hands at the close of the biennium must lapse into the General Fund.

Very truly yours,

DEPARTMENT OF JUSTICE,

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 80.

Mental incompetents—Commitment of mentally ill persons, epileptics and mental defectives—Petition by employee of the Department of Public Assistance—The Mental Health Act of 1951.

Under The Mental Health Act of 1951, the Act of June 12, 1951, P. L. 533, as amended, an employee of the Department of Public Assistance who is familiar with the facts regarding a person or persons sought to be committed, may petition the court for the commitment of mentally ill persons, epileptics and mental defectives, but he may not petition for the commitment of a person who is merely thought to be mentally ill and in need of observation, or of an inebriate.

Harrisburg, Pa., March 18, 1958.

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

Madam: You have requested an opinion regarding the authority of your department to petition for the commitment of alleged mental incompetents, who are either receiving assistance or have made application therefor. Specifically, you desire to know whether an employee of your department who is familiar with the facts regarding the person sought to be committed may petition the Court on behalf of the Department of Public Assistance.

Initially, your question must be rephrased since the Mental Health Act of 1951[1] does not use the term "mental incompetents". In its stead, the Act sets forth in specific detail those persons who may be institutionalized.[2] This section provides as follows:

> "(a) A petition may be presented to a court of the county in which a patient resides or is for the commitment of any—
>
> "(1) Person who is mentally ill, to a mental hospital; or,
>
> "(2) Person who is thought to be mentally ill, for observation, diagnosis and treatment to a mental hospital; or,
>
> "(3) Epileptic, not dangerous to himself or others, to an institution for the care and treatment of epileptics; or,
>
> "(4) Person who by reason of epilepsy is dangerous to himself or others, to a mental hospital or a State institution for epileptics; or,
>
> "(5) Mental defective, to a school; or,
>
> "(6) Inebriate, to a State or other mental hospital or institution for inebriates.
>
> "(b) The petition, which shall be sworn to or affirmed, may be made in the case of—
>
> "(1) A person who is mentally ill or who by reason of epilepsy is dangerous to himself or others, by any responsible person.
>
> "(2) A person who is thought to be mentally ill and in need of observation, diagnosis and treatment, by his guardian, committee, relative or friend.
>
> "(3) An epileptic, not dangerous to himself or others, or a mental defective, by his parent, or guardian, or other responsible person.
>
> "(4) An inebriate, by at least two citizens, who shall be his spouse, parent, child, committee of the estate, or next friends."

[1] Act of June 12, 1951, P. L. 533, as amended, 50 P. S. §§ 1071 to 1672.
[2] Act of June 12, 1951, P. L. 533, § 326, 50 P. S. § 1201.

Your question therefore becomes whether, under the Mental Health Act of 1951, an employee of your department who is familiar with the facts regarding the person sought to be committed may petition the Court on behalf of the Department of Public Assistance. Since § 326 of the Act sets forth with great particularity those persons who may petition the Court to have a person committed, the provisions of the section must be followed. We are of the opinion that an employee of your department is a "responsible person", as the term is used in this section, and may petition for the commitment of those persons covered in paragraphs (1) and (3) of subsection (b).

Therefore, under the provisions of this section, subsection (b), an employee of your department may petition for the commitment of the following persons: mentally ill persons, epileptics, and mental defectives. He may not, however, petition for the commitment of a person who is merely thought to be mentally ill and in need of observation or of an inebriate.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. COHEN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 81

Mines—Purchase of replacement gas analytical equipment—First aid and mine rescue instruction—Section 2 of the Act of May 29, 1945, P. L. 1132.

Under § 2 of the Act of May 29, 1945, P. L. 1132, gas analytical equipment accompanying first aid and mine rescue trucks may be replaced as needed in order to advance the purposes of first aid and mine rescue instruction.

Harrisburg, Pa., March 18, 1958.

Honorable Joseph T. Kennedy, Secretary of Mines and Mineral Industries, Harrisburg, Pennsylvania.

Sir: You have requested an interpretation of § 2 of the Act of May 29, 1945, P. L. 1132, 52 P. S. § 27.2, to determine whether you may purchase replacement gas analytical equipment to be used by

the first aid and mine rescue employees. You also inquire whether such equipment must be permanently located on the mine rescue trucks provided for by that act.

Section 2 of the act reads as follows:

> "The Secretary of Mines, with the consent of the Governor, shall purchase through the Department of Property and Supplies, three trucks equipped with the necessary breathing apparatus, gas masks, first-aid supplies, analytical apparatus and such other chemical and scientific instruments commonly used and necessary in the work of first-aid and mine rescue. One truck shall be used in the anthracite region and two in the bituminous region."

Considering the intent of the act and of this particular section that the equipment to be purchased must further the work of first aid and mine rescue instruction, it would be unreasonable to say that only the equipment which originally accompanied the truck could ever be purchased for use in this activity. So to hold would lead to a conclusion that would prohibit the replacement of supplies and equipment used up in the course of the work. Furthermore, to hold that the equipment could be used only in the truck is clearly not reasonable since the purpose of having such equipment is to use it in furtherance of first aid and mine rescue instruction and not merely to equip a truck.

It would appear that the intention of this section was to provide for (a) a truck to transport the equipment needed in first aid and mine rescue instruction and (b) necessary apparatus, equipment and supplies for that purpose.

We are of the opinion, and you are accordingly advised, that the purchase of gas analytical equipment to be used by the first aid and mine rescue employees in the course of their work is proper and that such a purchase may be made even though the equipment will not be in the truck at all times. However, the items involved must normally be used as part of the equipment of the trucks.

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON EHRLICH,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 82

State mental institutions—Admission of emotionally disturbed children—The Mental Health Act of 1951.

Since § 102 of The Mental Health Act of 1951, the Act of June 12, 1951, P. L. 533, in defining mentally ill persons makes no distinction between children and adults, children who meet the admission requirements may be admitted to the Danville or Embreeville State Hospitals on either an inpatient or outpatient basis. This applies to other State mental institutions unless there is a specific prohibition set forth in section 230 of The Mental Health Act of 1951.

Harrisburg, Pa., March 19, 1958.

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

Sir: You have requested the opinion of this department as to whether, under the applicable law, the Department of Welfare may treat at the Danville and Embreeville State Hospitals emotionally disturbed children who are certified to be mentally ill. You state by way of background that the care of mentally ill minors has not been adequate in the past. The effect of this has been to create unwholesome conditions in the homes and to increase the number of future patients in the adult population of the State mental institutions. Both Danville and Embreeville State Hospitals have, in prior years, received and treated minors requiring such care.

Section 102 of The Mental Health Act of 1951, the Act of June 12, 1951, P. L. 533, 50 P. S. § 1072, defines "mental illness" in subsection 11, as follows:

> " 'Mental illness' shall mean an illness which so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care. The term shall include 'insanity', 'unsoundness of mind', 'lunacy', 'mental disease', 'mental disorder', and all other types of mental cases, but the term shall not include 'mental deficiency', 'epilepsy', 'inebriety', or 'senility', unless mental illness is superimposed."[1]

Subsection 12, 50 P. S. § 1072, defines the word "patient", as follows:

[1] This definition can be contrasted to the definition of "mental defective" found in subsection (9) of § 102 of The Mental Health Act of 1951, 50 P. S. § 1072.

> " 'Patient' shall mean any individual for whom admission is being sought in, or who is under observation, care or treatment in, an institution pursuant to this act."

In § 201 of The Mental Health Act of 1951, 50 P. S. § 1091, the Danville and Embreeville State Hospitals are listed as places where patients shall be treated. Section 230 of the said Act, 50 P. S. § 1140, states that the Department of Welfare shall determine and designate the type of patients to be admitted to and cared for in all State institutions. There are several exceptions listed but these are not pertinent to either the Danville or Embreeville State Hospitals.

Turning to the question of who may be admitted as a patient, we find in § 301 of the Act, 50 P. S. § 1161, that application for voluntary admission as a patient may be made—

> "(1) By any person thought to be mentally ill, * * *"

Section 311 of the Act, 50 P. S. § 1181, provides that application for admission as a patient may be made in the interest of—

> "(1) Any person who appears to be mentally ill or in such condition as to need the care required by persons who are mentally ill, * * *"

The terminal portion of § 311 states that the provisions of said section shall not apply to mentally defective or epileptic children sought to be admitted to any State institution from any judicial district in which there is a municipal court vested with exclusive jurisdiction over proceedings concerning children suffering from epilepsy and nervous and mental defects.

In view of the above, as well as other provisions of The Mental Health Act of 1951, it is obvious that mental hospitals are not restricted to the treatment of adults. The said institutions may treat any person regardless of age if such person falls within the definition of one who is mentally ill.

It is, therefore, the opinion of this department and you are accordingly advised that, assuming compliance with the admission requirements of § 311 of the Act, it would be proper to treat children who are mentally ill, as that term is defined in said act, at the Danville or Embreeville State Hospitals on an inpatient basis[2]. In addition,

[2] This conclusion would apply to other State mental institutions unless there is a specific prohibition set forth in § 230 of The Mental Health Act of 1951, 50 P. S. § 1140.

the provisions of § 221 of The Mental Health Act of 1951, 50 P. S. § 1131, set forth legal authority for the establishment of outpatient services in any State institution to promote prevention, early recognition and treatment of mental illness, mental defect, etc.

Yours very truly,
DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 83

Appropriations—Municipalities—Public roads and streets—Installment allocation—Percentages—Discretion of Secretary of Highways—Act of June 1, 1956, P. L. (1955) 1944.

Under the provisions of the Act of June 1, 1956, P. L. (1955) 1944, which appropriates funds to certain municipalities for maintenance, repair, construction, or reconstruction of public roads or streets, and providing that the money be paid in two installments, the Secretary of Highways at his discretion may include as much as ninety per cent of the moneys allocated in the first installment.

Harrisburg, Pa., March 19, 1958.

Honorable Lewis M. Stevens, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: You have asked if your department, in the first of two installments, may pay over to the governmental bodies entitled thereto as much as ninety percent of the moneys allocated by the Act of June 1, 1956, P. L. (1955) 1944. You indicate that in previous years the money has been paid over in two equal installments.

The Act provides for appropriation of $30,000,000 annually from the Motor License Fund to certain municipalities for:

> "* * * maintenance, repair, construction, or reconstruction of * * * public roads or streets * * *"

Where road or bridge work is performed by the political subdivisions, the moneys so allocated may be used:

> "* * * only for labor, hiring of equipment, payrolls, purchase of material, including repair parts necessary for the maintenance of equipment, small tools, road drags and snow fences."

The Act further provides:

> "The moneys allocated in clause (1) shall be paid over, in the manner provided by law, by the Department of Highways to the respective cities, boroughs, towns and townships, on * * * the first days of April and October * * *."

In this Act, there is no legislative direction as to the percentages which are to be included in each payment; but the Act impliedly refers to the Act of May 1, 1929, P. L. 1046, as amended, 72 P. S. §§ 3561-3572, known as the Motor License Fund, for aid in determining what is "the manner provided by law" in paying over the allocations. Section 7 of that Act provides:

> "* * * Subject to the foregoing provisions, [not here relevant] the moneys of the Motor License Fund shall be paid out of the fund, upon warrant of the Auditor General, drawn after requisition, by * * * the Department of Highways."

Here, again, the Legislature is silent as to a method for determining the percentages to be included in each installment.

It would appear reasonable to conclude that the Legislature, by its silence, intended to leave the method of determining the percentages in the discretion of the Secretary of Highways. This conclusion is buttressed by a reading and comparison of the language of the Act of June 9, 1935, P. L. 637, § 7, 72 P. S. § 3564g.[1] In this act the Legislature specifically directed that amounts appropriated from the Motor License Fund to the Department of Highways to be paid to cities of the first class for the maintenance of streets be paid over to the cities in eight *equal* installments.

At the time the percentage to be included in the first payment is determined, the surrounding facts will show whether it is a proper

[1] "The amounts appropriated to be paid to cities of the first-class, shall be paid over in eight equal installments on the first days of January, April, July, and October of the years one thousand nine hundred and thirty-six, and one thousand nine hundred and thirty-seven, into the treasury of the city entitled thereto, and shall be used in such city by the proper authorities thereof, for the repair and maintenance of such streets therein, as are not now maintained by the Department of Highways under the provisions of any other law."

exercise of discretion. Where there are compelling circumstances, such as a substantial rise in the number of unemployed workers throughout the State or unusually heavy snows causing widespread blocking of highways, an allocation such as indicated in your question would be a proper exercise of discretion.

It is our opinion, therefore, and you are advised that for the reasons stated, on April 1, 1958, you are legally permitted to include in the first of the two installments due the respective cities, boroughs, towns and townships, as much as ninety percent of the moneys allocated to them for the current year.[2]

Very truly yours,

DEPARTMENT OF JUSTICE,

MICHAEL J. STACK, JR.,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 84

Appropriations—Expenditure for portable basketball court—Farm Show Building —Lease of building for basketball games.

Since athletic contests are a "proper" use of the Farm Show Building, it may be rented for such purposes to individuals, associations or corporations, and the State Farm Products Show Commission's authority to pay all expenses necessary to the proper conduct of its work includes the purchase of a portable basketball court, the cost for which is reflected over its life in the rental charged by the Commission.

Harrisburg, Pa., March 19, 1958.

Honorable W. L. Henning, Chairman, State Farm Products Show Commission, Harrisburg, Pennsylvania.

Sir: You ask whether the State Farm Products Show Commission has the authority, if funds are available, to purchase athletic equip-

[2] It should be noted that this money is not relieved of the provisions of § 4 (2) of the Act, which requires that 25% of all money allocated to each municipality be used for construction, reconstruction or widening of roads and streets, bridges and drainage structures.

ment for use in the Farm Show Building. Specifically, you would like to know whether you may legally purchase a portable basketball court to be set up and dismantled as the occasion requires.

The State Farm Products Show Commission is a departmental administrative commission in the Department of Agriculture: Act of April 9, 1929, P. L. 177, § 202, 71 P. S. § 62. It has the power and duty, *inter alia*, "to lease the Farm Show Building, at any time, to individuals, associations, or corporations, for exhibitions, conventions, or other proper purposes * * *": Act of April 9, 1929, P. L. 177, § 1709, 71 P. S. § 449.

Moneys in the State Farm Products Show Fund are appropriated to the State Farm Products Show Commission for several purposes including the following:

> "(f) The payment of all expenses necessary for the proper conduct of the work of the commission." Act of April 26, 1929, P. L. 823, No. 355, § 1, 72 P .S. § 3581.

The Farm Show Building appears to be "appropriate" and the proposed use seems "reasonable". Therefore, it is our conclusion that the State Farm Products Show Commission would be within its legal rights to rent the Farm Show Building for basketball contests. It follows that the appropriating act covers the expenditure required to make the Farm Show Building suitable for basketball contests. If rental of the building for basketball is a part of the "proper conduct" of the Commission's work, then the obtaining of the required equipment is a "necessary" expense within the meaning of the Act of April 26, 1929, *supra*.

It is therefore our opinion, and you are accordingly advised, that the State Farm Products Show Commission has legal authority to purchase athletic equipment for installation in the Farm Show Building, specifically a portable basketball court if funds are available for this purpose. It follows, of course, that the expense incurred must be made up by rental return over the period of the property's life.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 85

Installment sales—Interest rates—Default charges or "late charges" in excess of 6% per year simple interest—Small Loans Act—Usury Statute of 1858.

Default charges or "late charges," which are part of original contracts in connection with the sale of commodities (excluding motor vehicles) and which exceed the equivalent of 6% per year simple interest, do not violate § 6 (b) of the Small Loans Act, the Act of June 17, 1915, P. L. 1012, or the Usury Statute of 1858, the Act of May 28, 1858, P. L. 622, as amended.

Harrisburg, Pa., March 19, 1958.

Honorable Robert L. Myers, Jr., Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have requested the advice of this department as to whether default charges or "late charges", which are part of the original contracts in connection with the sale of commodities (excluding motor vehicles)[1], and which exceed the equivalent of 6% per year simple interest, violate § 6 (B) of the Small Loans Act[2] or the Usury Statute of 1858[3]. As illustrative of the type of charge involved you have quoted a typical provision which states:

> "In the event that any installment is not paid within fifteen days after its due date I hereby agree to pay in addition to such installment a late charge equal to five per cent of the amount of such installment so in arrears, but not to exceed $5.00 * * *."

Before we can discuss the legality of a default charge, it is necessary to understand the relationship of the underlying transaction to the Usury Statute of 1858 and the Small Loans Act.

Although there is law in other jurisdictions to the contrary, the Pennsylvania Supreme Court has stated that[4]:

> "* * * Of course, all sale or lease contracts which extend credit are, to a certain extent, akin to the making of loans,

[1] Specific statutory provision governs this problem in the sale of motor vehicles. See Motor Vehicle Sales Finance Act, Act of June 28, 1947, P. L. 1110, § 21, 69 P. S. § 621.

[2] The Act of June 17, 1915, P. L. 1012, § 6, as last amended by the Act of June 2, 1953, P. L. 262, § 2, 7 P. S. § 759.

[3] The Act of May 28, 1858, P. L. 622, § 1, as amended by the Act of April 20, 1949, P. L. 655. § 1. 41 P. S. § 3.

[4] Dictum in *Equitable Credit & Discount Co. v. Greier*, 342 Pa. 445, 21 A. 2d 53 (1941); also see *Melnicoff v. Huber Investment Company*, 12 D. & C. 405 (1929); *Personal Discount Company v. Lincoln Tire Company*, 67 D. & C. 35 (1949).

> but where a greater charge is exacted in the case of a sale on credit than in a cash sale it is included in the selling price of the article. It being uniformly held that sellers are free to contract with buyers as to the terms and conditions of sales, the financing of sales of merchandise by the extension of credit has never been considered subject to the prohibition of usury or to regulations applicable to banking and loan transactions."

Therefore, in the present situation, the terms of the contract as far as they concern the interest or service charges on the original debt arising out of the sale of commodities are outside the scope of both the Usury Statute of 1858 and the Small Loans Act.

An argument has been advanced that the default charge, although part of the original terms of the contract, constitutes a charge for the forbearance of money and, if in excess of the legally permissible rate of interest, usurious. The argument is based on the belief that once a payment falls due there is an obligation absolutely owing independent of the sale. Any agreement for its extension can be regarded as relating to an independent obligation and, therefore, as constituting a forbearance of a debt or "forbearance of money" within the meaning of the usury laws[5]. While this is a valid legal argument[6], care must be taken in applying it to our factual situation. We grant that where a new agreement is entered into at the time of the maturity of the obligation for the extension of time beyond the due date, a forbearance of a debt or "forbearance of money" has taken place and this statement of the law would be applicable. But the courts have made a distinction between the above set of facts and the situation where, as a part of the original contract, a provision is included providing for a penalty for the failure to pay the amount due on the date due. Then there is no fixed obligation to pay the penalty since it may be avoided by prompt payment. There are no Pennsylvania appellate court decisions on this point, but those courts which have dealt with this factual situation under comparable laws have so decided[7].

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[5] "Every person * * * who shall, directly or indirectly, * * * by any device, subterfuge or pretense whatsoever, charge, contract for, or receive any interest, discount, fees, fines, charges or consideration greater than six per centum (6%) per annum upon the loan, use or *forbearance of money,* goods, or things in action, or upon the loan, use or sale of credit, of the amount or value of six hundred ($600) dollars or less, without having obtained a license under this act, shall be guilty of a misdemeanor, * * *" § 6 (B) of the Small Loans Act. (Emphasis supplied.)

[6] See 91 A. L. R. 1110.

[7] *Florida Land Holding Corporation v. Burke,* 135 Misc. 341, 238 N. Y. S. 1 (1929); *State Mutual Rodded Fire Insurance Co. of Michigan v. Randall et al.,* 232 Mich. 210, 205 N. W. 165 (1925).

Therefore, we must conclude that this provision for a "late charge" is not a forbearance of a debt within the meaning of the words used in the Small Loans Act. Our opinion in this matter is buttressed by the fact that the full title of the Small Loans Act restricts its application to "the business of loaning money in sums of six hundred ($600) dollars or less". Article III, § 3, of the Pennsylvania Constitution provides that a statute shall not contain more than one subject "clearly expressed in its title". Further, § 54 of the Statutory Construction Act[8] provides that the title of the act may be considered in the construction of a statute. In view of the fact that the title refers only to the business of lending money, any interpretation which would expand the act to include the business of selling goods on a credit basis would not only violate one of the canons of statutory construction, but would result in interpreting the act in an unconstitutional manner[9].

Default charges are not within the prohibition of the Usury Statute of 1858. That act states that:

> "The lawful rate of interest for the *loan or use of money*, in all cases where no express contract shall have been made for a less rate, shall be six per cent, per annum: * * *." (Emphasis supplied)

We have already determined that the underlying transaction is not within the Usury Statute of 1858[10], and we have also concluded that the default charge is not a forbearance of a debt[11]. Once again, there is an absence of decisional law in the Commonwealth on this aspect of our problem; but those cases in other jurisdictions previously cited[12] have excluded late charges from their comparable usury laws. Finally, however, the *Restatement of Contracts*, a frequently cited authority in Pennsylvania, in § 536 holds:

> "Unless especially forbidden by statute, a provision in a bargain for a loan that after maturity interest at a higher rate shall be charged than is permissible before maturity, does not render the bargain usurious, unless the parties when entering into it contemplate that the loan shall not be paid at maturity.
>
> *"Comment:*
>
> "a. A provision within the rule stated in the Section is held to be inserted for the purpose of compelling payment at maturity and not to be bargained for in return for the use of money, and therefore the provision is not illegal."

[8] Act of May 28, 1937, P. L. 1019, 46 P. S. § 554.
[9] *Hoffman v. Pittsburgh*, 365 Pa. 386, 75 A. 2d 649 (1950); *Wilkes-Barre v. Pennsylvania Public Utility Commission*, 164 Pa. Super. 210, 63 A. 2d 452 (1949).
[10] Supra, page 96.
[11] Supra, page 97.
[12] Footnote 7, supra.

Therefore, we are of the opinion, and you are accordingly advised, that default charges which are part of the original contract in connection with the sale of commodities and which exceed the equivalent of 6% per year simple interest do not violate either § 6 (B) of the Small Loans Act or the Usury Statute of 1858.

Very truly yours,

DEPARTMENT OF JUSTICE,

SIDNEY MARGULIES,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 86

Pocket knives—Blade opened by motion of the hand or gravity—Operation in "automatic way"—The Penal Code.

A knife having its blade folded in the handle which, by pressing a push button and either by operation of gravity or by a flip of the wrist, is opened, is a knife which opens in an automatic way and is prohibited by § 419 of The Penal Code, the Act of June 24, 1939, P. L. 872.

Harrisburg, Pa., March 26, 1958.

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

Sir: We are in receipt of your communication requesting advice as to whether the sale of certain knives violates § 419 of The Penal Code, the Act of June 24, 1939, P. L. 872, as added by the Act of April 4, 1956, P. L. (1955) 1382, 18 P. S. § 4419. This section provides:

> "Whoever sells, dispenses, gives or delivers or offers or exposes for sale any knife, razor or cutting instrument, the blade of which can be exposed in an automatic way by switch, push-button, spring mechanism, or otherwise, is guilty of a misdemeanor, and upon the conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars ($500), or undergo imprisonment not exceeding one year, or both."

The knives in question, we are informed, are of a type resembling an ordinary pocket knife, that is, when not in use the blade of the knife is folded into the handle. The knife is manufactured in Germany and "the blade is 4¼ inches long and 1 inch wide, concealed in a handle and released by the pushing of a button and flipping the wrist. The blade may also be released by gravity and when extended may be locked in place by releasing pressure on the button".

The crux of the problem here presented is whether, after pushing a button, the blade is exposed in an "automatic way" when either by operation of gravity or a "flip of the wrist" the blade is fixed in an open position for use. In the case of *W. H. Coe Mfg. Co. v. American Roll Gold Leaf Co.*, 199 Fed. 435 (D. C. R. I. 1912) the Court said at page 438:

> "The word 'automatically' may properly be applied to mechanism which is hand-actuated, as well as to mechanism which is actuated by other mechanism. It may mean 'self-regulating,' as well as self-moving. The operator may do something, and the machine may do the rest. So far as the mechanism does what the operator himself was oblgied to do in the prior art, so far as machine parts act in accordance with the law of their organization, and do what otherwise the operator must do himself, so far the word 'automatically' may be properly applied."

Applying the principle of the above quoted case to the instant factual situation, we think it clear that this knife, although hand-actuated, nevertheless operates in an automatic way. The person using the knife pushes the button and the weight of the blade, either by gravity or by motion given to it by the flip of the wrist, "automatically" extends to an open position where it is locked upon the release of pressure on the push button.

We are, therefore, of the opinion and you are accordingly advised that the sale of knives of the type above described violates § 419 of The Penal Code, the Act of June 24, 1939, P. L. 872, as added by the Act of April 4, 1956, P. L. (1955) 1382.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 87

Pennsylvania Turnpike Commission—Authority of Auditor General to conduct audit—Reimbursement for audit—Interpretation of "board or commission of the executive branch"— Section 402 of The Fiscal Code.

The Pennsylvania Turnpike Commission is not a "board or commission of the executive branch" within the meaning of § 402 of The Fiscal Code, the Act of April 9, 1929, P. L. 343, as last amended by the Act of May 31, 1957, P. L. 237, whose affairs shall be audited by the Department of the Auditor General, and quite apart from the nonexecutive nature of the Pennsylvania Turnpike Commission, such Commission would not be required by law to reimburse the General Fund for any disbursements made in conducting an audit by the Auditor General.

Harrisburg, Pa., March 26, 1958.

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

Sir: You have requested our opinion on the following questions: (1) Is the Pennsylvania Turnpike Commission a "commission of the executive branch of the government" whose affairs are subject to an audit by the Department of the Auditor General under the terms of § 1 of the Act of May 31, 1957, P. L. 237, 72 P. S. § 402? (2) If this is the case, would the commission be required by law to "reimburse the General Fund" for any disbursements made in conducting such an audit? (3) If such reimbursement should not be required, would it be unlawful for the Department of the Auditor General to incur costs in conducting an otherwise appropriate audit of the Pennsylvania Turnpike Commission and "have the same charged by indirection to the General Fund"?

In addition, your request indicates that the Turnpike Commission, while acceding to your demand to audit their affairs, has refused to assume any of the audit costs.

We will discuss your questions in order:

> "(1) Is the Pennsylvania Turnpike Commission a 'commission of the executive branch of the government' whose affairs are subject to an audit by the Department of the Auditor General under the terms of § 1 of the Act of May 31, 1957, P. L. 237, 72 P. S. § 402."

Article IV of The Fiscal Code, the Act of April 9, 1929, P. L. 343, as amended, 72 P. S. §§ 401-409, which sets forth the duties and rights

of the Department of the Auditor General in connection with audits, specifies that the following governmental bodies shall be audited:

1. Every department, board, or commission of the executive branch of the government[1].
2. Every state institution[2].
3. Every person, association, corporation and public agency, receiving an appropriation payable out of any fund in the State Treasury or entitled to receive any portion of any state tax for any purpose whatsoever[3].

Omitted from the scope of Article IV are governmental bodies, boards, or commissions which are not a part of the executive branch of government and, by implication, the persons, associations, corporations, and public agencies which neither receive an appropriation payable out of any fund in the State Treasury nor are entitled to receive any state taxes.

Unfortunately, no Pennsylvania judicial authority, statutory provision or treatise exists which sets forth definite standards for determining what commissions are "part of the executive branch". Nor is there any legal precedent to which we can turn for a decision as to whether the Turnpike Commission is a part of the executive branch. Consequently, in an attempt to determine the position of the Turnpike Commission in our system of government, it might be appropriate to contrast its features with those of both the independent commissions which are acknowledged to be a part of the executive branch[4], and the independent public authorities which are not so regarded[5].

In contrast to the independent executive commissions[6], the Turnpike Commission does not construct or operate its facilities with any appropriated fund in the State Treasury[7]. Instead, the Commission obtains its funds solely from its authority to issue revenue bonds[8],

[1] Supra, § 402, 72 P. S. § 402.
[2] Supra, § 402, 72 P. S. § 402.
[3] Supra, § 403, 72 P. S. § 403.
[4] Act of April 9, 1929, P. L. 177, §§ 301-303, and amendments including laws of 1957, 71 P. S. §§ 101-103.
[5] Ibid. at 4. See Dornan v. Phila. Housing Authority et al., 331 Pa. 209, 222, 200 Atl. 834 (1938), "Housing Authorities are not part of the Government"; Tranter v. Allegheny Co. Authority et al., 316 Pa. 65, 82, 173 Atl. 289 (1934), "The word 'municipality' certainly could not have been understood by the voters as including a public corporation like defendant"; Belovsky v. Redevelopment Authority, 357 Pa. 329, 344, 54 A. 2d 277 (1947), "A Redevelopment Authority is not a municipal commission."
[6] Supra, § 302, 72 P. S. § 302.
[7] Act of May 21, 1937, P. L. 774, §§ 2 and 4, 36 P. S. § 652 (b) and (d).
[8] Supra, § 8, as amended, 36 P. S. § 652 (h).

and to fix the turnpike tolls[9]. Such funds, moreover, are deposited not in the State Treasury, but in "banks or trust companies incorporated under the laws of the Commonwealth"[10].

Unlike the independent executive commissions or the public agencies which operate with appropriated funds in the State Treasury[11], the Turnpike Commission need not submit requisitions for disbursements to the Auditor General, has no restrictions on the application of its disbursements other than "to carry out the provisions of the act"[12], is not subject to budgetary and accounting procedural controls[13] and is permitted to authorize audit by private accountants of its operations[14].

Unlike the independent executive commissions, the Turnpike Commission possesses (1) the rights in its own name to sue or be sued, to borrow money and issue evidences of indebtedness to contract on all matters incidental to the performance of its duties and to fix rates and hire personnel; (2) the authority to make all necessary rules and regulations for its own government[15]; and (3) the exemptions from "regular government" controls in such areas as budget submission, purchase of specification materials and personnel administration.

The right to sue and be sued, a major corporate attribute, subjects the Commission to a liability for tort greater than that applicable to the "departments, boards or commissions" of the executive branch and[16], whether it occupies the position of either plaintiff or defendant, empowers the commission to enter into settlements. In addition, the administrative rule-making authority of the Commission decisively takes the government of its affairs outside the scope of The Administrative Code of 1929. In this respect, both the Commission and the independent public authority[17] contrast sharply with the "independent Board or Commission"[18]. As one of the results of the inapplicability

[9] Supra, § 12, 36 P. S. § 652 (i).
[10] Supra, § 10, as amended, 36 P. S. § 652 (j).
[11] Supra, § 1501, § 301, § 402, 72 P. S. § 1501, 72 P. S. § 302, 72 P. S. § 402.
[12] Supra, § 4, 36 P. S. § 652 (d).
[13] Supra, §§ 601-607, 71 P. S. §§ 221-227.
[14] Supra, § 10, as amended, 36 P. S. § 652 (j). Pennsylvania Turnpike Commission is subjected to a periodic private audit in accordance with provisions of Trust Indenture incorporated pursuant to power of commission to make "reasonable and proper" resolutions in indenture to protect the "rights of the bondholder".
[15] Supra, §§ 1-17, 36 P. S. § 652 a-q.
[16] *Ewalt v. Penna. Turnpike Comm,* 382 Pa. 529, 115 A. 2d 729 (1955).
[17] See Act of March 31, 1949, P. L. 372, § 8, as amended, 71 P. S. § 1707.8.
[18] Supra, § 201, 71 P. S. § 61.

of The Administrative Code of 1929, the Commission is not subject[19] to the specification control and central purchasing functions of the Department of Property and Supplies[20]. In the area of personnel administration, the Commission is not subject to the provisions of the State Civil Service Act[21] or any other executive system of personnel selection and "may hire such employees as may be necessary in its judgment"[22].

Thus, with respect to the aforementioned matters, and unlike those executive commissions which gain their titled independence by merely operating outside the jurisdiction and control of any particular executive department, the Turnpike Commission possesses a degree of freedom which places it outside the very structure and control of the regular government of the state. In fact, this kind of freedom in the areas of financing and management distinctly impart to the Commission the character of an independent public authority.

The independent public authority is a body authorized by legislative action to function outside the regular organization of the state government in order to finance, construct and usually to operate revenue-producing enterprises[23]. Their most prominent features lie in their authority to issue their own revenue bonds, to construct facilities without pledging the credit of the state and to levy user charges in order to pay the operational expenses and the interest and principal on their bonds[24]. In the conduct of its business affairs in such areas as personnel administration, accounting, budget and purchasing and financial management, the authorities are more akin to a private business corporation than to an agency of the executive branch[25].

As a result of their financial and managerial autonomy, the independent public authority is not usually regarded as an integral part of any branch of the state government[26].

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[19] The Council of State Governments, *Public Authorities in the States,* at Table V of Appendix B.

[20] Supra, § 2406, 71 P. S. § 636.

[21] Act of August 5, 1941, P. L. 752 § 3, as amended, 71 P. S. § 741.3.

[22] Supra, § 4, 36 P. S. § 652 (d).

[23] The Council of State Governments, *Public Authorities in the States,* 3 (1953).

[24] Id. at 5.

[25] Id. at 37.

[26] See footnote 5, supra.

The various aspects of the Commission's freedom from "regular government" control, when viewed as a whole[27], present a persuasive picture of its independent public authority kind of operation and, at least, of its nonindependent executive commission nature. The courts, in fact, have been prompted to characterize commission variously as a "separate entity"[28], a "distinct legal entity", an "unincorporated association", a "quasi-corporation"[29], a "corporation" and no mere "agent" of the government[30] In any case, it seems apparent that the nature of the Pennsylvania Turnpike Commission is such that it cannot be regarded as an integral part of the executive branch of the government. This conclusion, however, does not detract from the fact that the Turnpike Commission and other similar agencies perform functions which are substantially executive in nature[31]. It simply emphasizes that characterization of the type of function performed by a modern governmental agency does not automatically classify the agency concerned in one of the three traditional branches of government.

It is our opinion, therefore, and you are advised that the Pennsylvania Turnpike Commission is a quasi-public agency which neither receives an appropriation payable out of any fund in the State Treasury nor is entitled to any state tax and is not an integral part of the executive branch of Pennsylvania's government. On these grounds we conclude that the Pennsylvania Turnpike Commission is not a "board or commission of the executive branch" within the meaning of § 402 of The Fiscal Code, whose affairs shall be audited by the Department of the Auditor General.

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[27] Formal Opinion No. 666, 1955-56 Op. Atty. Gen. 55, charges the Department of Highways with the following responsibilities in connection with Turnpike Commission activities:

(1) Approving contracts and agreements relating to the construction of the Turnpike and connecting tunnels and bridges.

(2) Supervision of construction work in connection with the Turnpike and connecting bridges.

(3) Maintenance of the Turnpike.

(4) Approval of locations of the Turnpike and extensions.

(5) Approval of purchase of lands, property rights, rights-of-way easements and other interests in lands deemed by the Commission necessary or convenient for the construction and operation of the Turnpike.

[28] *Eastern Motor Express, Inc. v. Espenshade,* 138 F. Supp. 426 (E. D. Pa., 1956).

[29] *Hunkin-Conkey Construction Co. v. Penna. Turnpike Commission, et al,* 34 F. Supp. 26 (M. D. Pa., 1940).

[30] *Penna. Turnpike Comm. v. Baldwin Bros.,* 44 D. & C. 462 (1942).

[31] This view is consistent with the position taken by this department in recent cases: *Watson v. Pennsylvania Turnpike Commission,* 386 Pa. 117, 125 A. 2d 201 (1957), and *Bowers v. Pennsylvania Labor Relations Board,* 402 Pa. 542, 167 A. 2d 480 (1961).

On this view we should find it unnecessary to consider the other two questions. But even without this view of the nature of the Commission, the next question must be answered in the negative.

Section 408 of The Fiscal Code, 72 P. S. § 408, which provides for the allocation of the costs of audits, is applicable to many of the acknowledged "independent executive commissions" by virtue of their appropriated special operating funds[32] in the State Treasury. It is clearly not applicable to the Turnpike Commission. The Commission does not receive any appropriation of money[33] payable out of any fund in the State Treasury. Indeed, its funds, arising solely out of the proceeds of bonds or revenues, 36 P. S. § 652 (d), may be deposited in any bank or trust company incorporated under the laws of the Commonwealth, 36 P. S. § 652 (j). Moreover, the Commission is directed by the Turnpike Act "to set aside its revenues derived from the Turnpike, except such part thereof as may be required to pay the cost of maintaining, repairing and operating the Turnpike . . . in the sinking fund", 36 P. S. § 652 (i). Finally, the Turnpike Act contains no provision requiring an audit by the Department of the Auditor General or the incurring of expenses in connection therewith.

It is our opinion, therefore, and you are accordingly advised, that quite apart from the nonexecutive nature of the Pennsylvania Turnpike Commission, such Commission would not be required by law to "reimburse the General Fund" for any disbursements made in conducting an audit by the Auditor General.

In view of our opinions on questions 1 and 2, we consider it unnecessary at this time to decide the last question.

Very truly yours,

DEPARTMENT OF JUSTICE,

MORRIS J. DEAN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

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[32] e. g., Game Fund, Act of June 3, 1937, P. L. 1225, § 1402, 34 P. S. §§ 1311.1402: "All such moneys placed in the Game Fund under the provisions of this section are hereby made available immediately and are hereby specifically appropriated to the Commission for the purposes herein specified."

[33] "The word 'appropriation' when used in the constitutional or legislative sense, means a designation of money raised by taxation, to be withdrawn from the public treasury for a specifically designated purpose." *Commonwealth v. Perkins*, 41 D. & C. 55 (1940), affirmed *Perkins v. Commonwealth of Pennsylvania*, 314 U. S. 586, 62 S. Ct. 484, 86 L. Ed. 473 (1941).

OFFICIAL OPINION No. 88

State-aided hospitals—Persons entitled to free services—Indigent nonresidents—Patients with chronic illness—Length of time of hospitalization—Reimbursement.

There is no legal impediment to the Department of Welfare reimbursing State-aided hospitals for their giving free care and treatment to indigent persons who are not residents of the Commonwealth; reimbursement will be allowed for the care of the chronically ill for only the first 90 days of hospitalization unless such hospitalization is in a special hospital or unless the Department of Welfare for special reasons allows reimbursement for additional periods of care.

Harrisburg, Pa., March 26, 1958.

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

Sir: You have requested the opinion of this department concerning the validity of certain regulations of the Department of Welfare prescribing rules for determination of persons entitled to free service in hospitals under the State-aid program.

You inquire whether it is proper to allow reimbursement to State-aided hospitals on account of their giving free care and treatment to nonresidents. Secondly, you state that the provisions of subparagraph 6 of Section B[1] of the regulations are ambiguous and you request an interpretation of this subparagraph. Finally, you inquire as to whether the regulation set forth in subparagraph 6 applies to "mental patients or patients in the hospital with only mental disorders or illnesses".

Section 2316 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 606, gives the Department of Welfare the power and duty:

> "(a) Whenever the General Assembly shall have specifically appropriated money to the department for the purpose, to issue requisitions upon the Auditor General for warrants, to be drawn by the Auditor General upon the State Treasurer, in favor, of such hospitals, homes, and institutions as shall conform to at least the minimum standards of plant, equipment, service, administration, and care and treatment necessary for the proper care and treatment of patients or inmates,

[1] "B. The Commonwealth of Pennsylvania will not accept as a proper charge upon it for hospital care * * *

"6. Patients with chronic illnesses who have been in the hospital over 90 days, except in special hospitals, such as those for the treatment of tuberculosis, epilepsy, cancer, orthopaedic, etc., and those patients who on review are accepted by the Commonwealth for special reasons for a longer period of time."

as required by the rules and regulations of the department, or established by law, in amounts computed upon the per diem rates of payment established by law for free service to indigent persons as follows:

"1. The care and treatment of sick or injured persons in hospitals.

* * * * * * *

"6. The removal of nonresident dependent children,

"7. The placement of dependent children through child-caring agencies,"

Nothing in subsection 1 limits aid to hospitals which have given free service to *resident* sick and injured persons. By contrast, however, subsections 6 and 7, quoted above, make it evident that the Legislature was aware that different results could be attained for residents and nonresidents.

The Legislature has from time to time appropriated money to the Department of Welfare to reimburse State-aided hospitals for giving free care to indigent persons. The present appropriation for this purpose is embodied in Act No. 81-A, approved July 15, 1957. An examination of this act reveals no legal impediment to reimbursing hospitals for free care given to nonresidents.

As to your second inquiry, we find no ambiguity in subparagraph 6 of Section B of the regulations, although it could have, perhaps, been more artfully worded. For example:

"B. The Commonwealth of Pennsylvania will not accept as a proper charge upon it for hospital care * * *.

"6. Patients with chronic illnesses who have been in the hospital over 90 days, except [those patients] in special hospitals, such as those for the treatment of tuberculosis, epilepsy, cancer, orthopaedic, etc., and [except] those patients who on review are accepted by the Commonwealth for special reasons for a longer period of time." (Bracketed words added)

This subparagraph disqualifies as subjects for State aid persons with chronic illness who have been in the hospital over ninety days. Of course, chronically ill persons who have been hospitalized for ninety days or less would not be disqualified. Subparagraph 6 also provides that where a chronically ill person has been hospitalized for over ninety days in a special hospital, the disqualification is inapplicable.

The final clause of subparagraph 6 permits the Department of Welfare to remove the disqualification from persons hospitalized in excess of ninety days when a special reason exists for reimbursement for the additional care and treatment.

Your third inquiry deals with the applicability of subparagraph 6 of Section B to mental patients or patients in the hospital with only mental disorders or illnesses. In our Informal Opinion No. 1500 to the Honorable Harry Shapiro, Secretary of Welfare, dated August 2, 1957, we stated that the money appropriated under Act No. 81-A could be utilized to reimburse hospitals for medical services rendered to and maintenance of mental patients entitled to free service if the institution complies with § 201 (b) of The Mental Health Act of 1951[2]. In that opinion it was stated that the treatment of mental patients comes within the term "medical and surgical services," as used in Act No. 81-A. For this reason we believe that subparagraph 6 of Section B of the regulations in question should be interpreted so as to be applicable to mental patients or patients in a hospital with only mental disorders or illnesses.

It is, therefore, the opinion of this department and you are accordingly advised that (1) it is proper for the Department of Welfare to allow reimbursement to State-aided hospitals on account of their giving free care and treatment to indigent persons who are not residents in this Commonwealth, (2) subparagraph 6 of Section B of the regulations provides that reimbursement will be allowed for care of the chronically ill for only the first ninety days of hospitalization, unless such hospitalization is in a special hospital as designated by the subparagraph or unless the Department of Welfare for special reasons allows reimbursement for additional periods of care, and (3) subparagraph 6 of Section B applies to mental patients or to patients with mental disorders or illnesses.

Very truly yours,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

[2] Act of June 12, 1951, P. L. 533, as amended, 50 P. S. § 1091.

OFFICIAL OPINION No. 89

State institutions—Executive Board—Adding new positions to Commonwealth's classification and compensation plans—Validity.

The action of the Executive Board in adding two new positions (Vocational School Superintendent of Thaddeus Stevens Trade School and Superintendent of Scotland School for Veterans' Children) was valid and founded upon legal authority since the statutes applying to these two positions do not establish classification and compensation plans but simply set minimum salaries.

Harrisburg, Pa., March 27, 1958.

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

Sir: You have requested the opinion of this department concerning the validity of the action of the Executive Board in adding two new positions to the Commonwealth's classification and compensation plans. These positions are Vocational School Superintendent of Thaddeus Stevens Trade School and Superintendent of Scotland School for Veterans' Children. The Auditor General's Department has questioned the legality of the aforesaid action on the basis that separate statutes govern the classification and compensation schedule for employees of these two institutions. Both institutions are under the jurisdiction of the Department of Public Instruction.

Section 1311 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 361, provides that the Board of Trustees of the Scotland School for Veterans' Children and the Board of Trustees of the Thaddeus Stevens Trade School shall have the power and their duties shall be, subject to the approval of the Governor, to elect a president, principal, or superintendent of the institution; to appoint such officers and employees as may be necessary; and to fix the salaries of its employees in conformity with the standards established by the Executive Board.

Section 214 of The Administrative Code of 1929, as amended, 71 P. S. § 74, reads in part as follows:

> "Except as otherwise provided in this section and in the Civil Service Act, the number and compensation of all employees appointed under this section shall be subject to the approval by the Governor, and, after the Executive Board shall have 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, appointed hereunder, shall be fixed in accordance with such standard."

Section 709 of the Code, as amended, 71 P. S. § 249, reads as follows:

> "Subject to the provisions of this act, 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, except the Department of the Auditor General, the Treasury Department and the Department of Internal Affairs. In establishing such standards the board may:
>
> "(1) Take into consideration the location of the work and the conditions under which the service is rendered.
>
> "(2) Establish different standards for different kinds, grades and classes of similar work or service;"

Turning now to the questions raised by the Auditor General, an examination of the Act of July 8, 1957, P. L. 579, 24 P. S. §§ 2661 to 2665, reveals that it is an act establishing minimum compensation and increments for certain members of the faculty and administration of the Thaddeus Stevens Trade School and that it does not set up a classification and compensation plan. Section 3 of the act, 24 P. S. § 2663, provides that nothing contained in the act is to be construed as prohibiting the payment of compensation beyond the salaries prescribed in the act; and it is provided in § 5, 24 P. S. § 2665, that the act is not to be construed as authorizing any decrease in the salary paid any member of the faculty or administration at the effective date of the act.

An examination of the Act of August 5, 1955, P. L. 306, 24 P. S. §§ 2699 to 2703, reveals that this too is an act establishing minimum compensation and increments for administrators and members of the faculty of the Scotland School for Veterans' Children. Section 3 of the act, 24 P. S. § 2701, provides that nothing contained therein shall be construed as prohibiting the payment of compensation beyond the salaries prescribed in the act; and § 5, 24 P. S. § 2703, contains a prohibition against salary decreases as of the effective date of the act.

It is, therefore, obvious that these two acts have no other effect than to establish minimum salaries and they do not establish complete classification and compensation plans and they, therefore, do not supersede the power and authority of the Executive Board.

We are, therefore, of the opinion, and you are accordingly advised that the action of the Executive Board in adding two new positions

to the Commonwealth's classification and compensation plans, comprising that of Vocational School Superintendent of Thaddeus Stevens Trade School and Superintendent of Scotland School for Veterans' Children, is valid and founded upon legal authority.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 90

Housing and redevelopment authorities—Filing operational statistics with Department of Internal Affairs—Requirement.

Housing and redevelopment authorities not subject to the Municipality Authorities Act of 1945, the Act of May 2, 1945, P. L. 382, as amended, can legally be required to file with the Department of Internal Affairs financial and general information relative to their operation in the light of the provisions of Article IV, § 19 of the Pennsylvania Constitution, § 1205 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, and the Act of April 20, 1921, P. L. 193.

Harrisburg, Pa., March 27, 1958.

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

Madam: You have asked our opinion whether certain unspecified housing and redevelopment authorities not subject to the Municipality Authorities Act of 1945[1] may be required to file with your department, on forms furnished by your department, financial and general information relative to their operation. You have indicated that the information on bonds issued by housing and redevelopment authoritites is of economic interest, that the operation of these authorities relates directly to municipalities, and that the operational statistics are of interest to business.

[1] Act of May 2, 1945, P. L. 382, 53 P. S. § 301 et seq., which was amended by the Act of May 31, 1957, P. L. 223, § 1, to require authorities subject to its provisions to file such an annual report with the Department of Internal Affairs.

Article IV, § 19, of the Pennsylvania Constitution, requires your department to establish a bureau of industrial statistics. The Administrative Code of 1929[2] charges your department with the duty and gives it the power:

> "to collect, compile, and prepare for publication, statistics and uniform data and information relating and pertaining to labor, coal mining, oil and gas production, manufacturing industries, commercial operations, public service companies, and other business interests of the state * * *."

In 1921, by legislative act,[3] the Bureau of Statistics and Information was made a part of the Department of Internal Affairs and was directed:

> "[to] collect, compile, and publish all statistics and useful data and information relating to labor, coal mining, oil and gas production, manufacturing industries, commercial operations, public service companies, municipalities, maritime interests and other business of the State; * * *"

In order to facilitate the discharge of these duties, the legislature[4] provided that:

> "* * * All persons, associations, copartnerships, and corporations engaged as herein described within this Commonwealth, and municipal and other public officers, are hereby required to furnish such statistical information as the Secretary of Internal Affairs * * * may require."

To insure cooperation by the above persons and bodies with your department, the legislature[5] further provided that:

> "The Secretary of Internal Affairs, the chief of said bureau, or other person duly authorized by either of them, shall have power to issue subpoenas, administer oaths, hold hearings, and take testimony in all matters relating to the duties herein required of said bureau."

In addition to the last-mentioned powers given to your department, the legislature[6] specified that:

> "Any person, association, copartnership, or corporation, doing business within the Commonwealth, or municipal or

[2] Act of April 9, 1929, P. L. 177, § 1205, 71 P. S. § 335.
[3] Act of April 20, 1921, P. L. 193, § 1, 71 P. S. § 971.
[4] Id., at § 3.
[5] Id., at § 5.
[6] Ibid.

other public officer, who shall neglect or refuse, for thirty days, to answer questions requested by circular, official blanks or personal application, designed to secure the data and information required to be furnished by this act, or who shall refuse to obey the subpoena and give testimony according to the provisions of this act, shall be liable to a penalty of two hundred dollars."

The authority given by the Constitution and the language of The Administrative Code of 1929 and the Act of 1921 is wide in scope. Phrases such as "and other business interests of the state", "all statistices", "all persons, associations, copartnerships and corporations", "or other public official", indicate a legislative mandate not narrowly to be construed. The acts reach both public and private bodies and persons, real and artificial. The organizational structures and powers of public authorities possess many of the characteristics of private corporations and at the same time many of the characteristics of traditional State agencies.[7] Such structures make the categorization of these authorities under one of these established entities difficult. We do not believe, however, for the purposes here contemplated, that such circumstance should materially affect the answer to your question. It is apparent that the language of both acts is sufficiently broad in its terms to include housing and redevelopment authorities not subject to the Municipality Authorities Act of 1945.

Accordingly, it is our opinion, and you are so advised, that housing and redevelopment authorities not subject to the Municipality Authorities Act of 1945 are legally obligated to file with your department, on forms furnished by your department, financial and general information relative to their operation.

Very truly yours,

DEPARTMENT OF JUSTICE,

MICHAEL J. STACK, JR.,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

[7] See *Dornan v. Philadelphia Housing Authority, et al.*, 331 Pa. 209, 200 Atl. 834 (1938); *Belovsky v. Redevelopment Authority*, 357 Pa. 329, 54 A. 2d 277 (1947). The Council of State Governments, Public Authorities in the States 3-4 (1953).

OFFICIAL OPINION No. 91

Highways—Pennsylvania Turnpike right of way—Assessment of damages—Coal lands—State Mining Commission—Representatives—Pennsylvania Turnpike Commission—Department of Highways.

The Department of Highways may not lawfully designate a representative to a State Mining Commission convened to assess damages in connection with lands underlaid by mineable coal acquired by the Pennsylvania Turnpike Commission.

Harrisburg, Pa., March 27, 1958.

Honorable Lewis M. Stevens, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: You have asked our advice whether the Department of Highways as well the Pennsylvania Turnpike Commission may designate representatives to a state mining commission where the roadway involved is that of the Pennsylvania Turnpike Commission.[1]

A commission is convened whenever the Commonwealth acquires lands underlaid by mineable coal. Its functions are to determine the amount of coal to be left in place, to assess damages resulting from such determination and to indicate the parties by whom the damages will be paid.[2]

By the terms of the act, the State Mining Commission is composed of:

1. the president judge of the court of common pleas where the land is located;

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[1] This question was raised without being answered by Mr. Justice Stern, in *Pennsylvania Turnpike Commission Appeal,* 351 Pa. 139, 141, 40 A. 2d 404, 405 (1945).

[2] "Whenever the Commonwealth has heretofore acquired or may hereafter acquire lands, easements or right of ways underlaid by mineable coal, the State Mining Commission created in accordance with the provisions of this act upon application of the Commonwealth, the county or the municipality within which such lands, easements or right of ways are situated or the owner of the coal underlying such lands, or the person entitled to remove the same in case the assessment of damages is desired, or of the owner or person entitled to remove the coal only if the removal of the coal is desired in lieu of damages, is hereby empowered to determine, authorize, and direct the underlying or adjacent coal, if any, to be left in place for the purpose of furnishing vertical or lateral support to said land, easement or right of way, the underlying or adjacent coal, if any, which may be removed, and the material, if any, to be substituted for the coal so removed, together with the method and manner of placing such material in the mine workings, for the purpose of furnishing both vertical and lateral support to such land, easement or right of way and the party or parties by whom the expense thereof shall be paid. * * *" (Act of June 1, 1933, P. L. 1409, as amended, 52 P. S. § 1501.)

2. a member of the Pennsylvania Utilities Commission or an engineer designated by it;

3. the Secretary of Mines or his designated representative;

4. the head of the department, board or commission of the State government owning the lands or his representative; and

5. an engineer designated by the owner of the land taken.

Hereafter, for ease in discussing your question, we will refer to the fourth enumerated commission member as the No. 4 member.

Before examining the question, we believe it will be helpful first to determine the reason for the creation of the State Mining Commission. A direct insight into the legislative mind at the time of the passage of the creating act and its principal amendment is not possible because the sources[3] available indicate no relevant debate or remarks of the legislators at either time. The Supreme Court,[4] however, in construing the same act, indicated the reason for the Commission and the purpose. Speaking[5] through Mr. Justice Stern, the court said:

> "The question as to the amount of coal that should be left in place for the purpose of furnishing support to a highway or other land taken under the right of eminent domain as well as the value of such coal is one that requires enormous technical and expert knowledge and with which ordinary viewers would be utterly unable to cope. The determination of the value of surface lands is something within the intellectual ken of ordinary citizens, but the question of the extent and value of the 'third estate'[6] is a subject requiring a comprehension of scientific principles and their application, and this fact justifies the creation of a different tribunal to deal with that problem. There is no reason why the legislature may not make such tribunal a permanent body and confine its personnel to specialists and experts. * * *"

In another case,[7] Mr. Justice Drew, in construing the same statute, said:

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[3] Although not an authoritative source for determining legislative intent, these sources sometimes are helpful in showing the problems incurred at the time of passage of the acts. *VI, Legislative Journal Appendix 7496* (1933). No debate indicated. *VII Legislative Journal Index 8259* (1935). No debate indicated. *History of House Bills and Resolutions (Final Issue) Session of 1935*, p. 196.

[4] *Glen Alden Coal Company Case*, 350 Pa. 177, 38 A. 2d 37 (1944).

[5] Ibid., 350 Pa. 177, 182, 38 A. 2d 37, 39 (1944).

[6] The "third estate" is a colloquial for the servitude on the underlying coal which must be retained in place for the purpose of support. See *Smith v. Glen Alden Coal Co.*, 347 Pa. 290, 304, 32 A. 2d 227, 235 (1943).

[7] *Glen Alden Coal Company Case*, 339 Pa. 149, 152, 14 A. 2d 76, 79 (1940).

> "In interpreting this legislation, it must be kept in mind that the primary intention of the legislature was the adequate support of public highways. * * * It was for the purpose of retaining needed support with as little guesswork as possible that the * * * commission was created to determine how much coal, if any, could be taken out, so that the owner might mine that not required for support without liability for subsidence, and to relieve as far as possible the county, upon which the expense of condemnation might fall, of the heavy financial burden of paying for the coal unnecessary for adequate support."

Thus, it appears that the dominant legislative intent was for the commission to perform the function of a specialist in assessing damages in this unique area. With that in mind, we can turn to a consideration of the act and the significance of its amendments.

As originally enacted, the act authorized the *Secretary of Highways* to enter into agreements with the owners of the "third estate", specifying the coal to be left in place and the damages to be awarded for so doing. The 1935 amendment changed the act so that, in a particular highway development, instead of the Secretary of Highways agreeing to the value of the "third estate", that function should be taken over by a *Highway Mining Commission.* The composition of the commission was to be the same as presently constituted except that the amendment provided for the presence of the Secretary of Highways or his designated representative instead of the No. 4 member.

The act was amended again in 1941,[8] changing the name from the Highway Mining Commission (which had jurisdiction over easements acquired for State highway purposes) to the State Mining Commission (the jurisdiction of which was extended to all cases of coal underlying lands, easements or rights of way acquired by the Commonwealth). Further, it substituted for the Secretary of Highways the "head of any department, board, or commission of any State government which owned such lands, easements or rights of way or his representative."[9]

Enacted between the amendments of 1935 and 1941 was the Act of 1937,[10] which created the Pennsylvania Turnpike Commission. The inference to be drawn here is clear. The 1941 act was amended to embrace not only the Department of Highways but also the new State

[8] Act of July 3, 1941, P. L., 259, 52 P. S. § 1501.
[9] See *Pennsylvania Turnpike Commission Appeal,* 351 Pa. 139, 141, 142, 40 A. 2d 404, 405 (1945).
[10] Act of May 21, 1937, P. L. 774, 36 P. S. § 652a.

agency invested with the power of eminent domain. The omission of the Secretary of Highways from the amended act here became materially significant. The legislature easily could have allowed the Secretary of Highways to remain a permanent member of the Commission and *added* the "head of the department, board or commission of the State government owning the lands, or his representative." This it did not do. Rather, it *substituted* a new member for the Secretary of Highways. This course of action leads inexorably to the conclusion that the legislature did not intend the Department of Highways to be a permanent member of the Commission.

In one of the cases previously discussed,[11] in answering the objection of nonrepresentation on the Commission raised by a municipality required by the terms of the Commission's award to pay the damages for coal underlying a State highway within the municipal limits, the court stated at p. 183:

> "Nor is there any constitutional objection to the fact that the municipality does not have a representative on the commission. Municipal corporations are merely agents of the state, created, governed, and the extent of their powers determined by the legislature; even though the State's policy in regard to its municipal agents may be unwise or unjust, it cannot be made the basis of action by the judiciary."

This same reasoning applies as forcefully to the Department of Highways as it does to the municipality.

Additionally, the Pennsylvania Turnpike Commission is authorized[12] by the legislature to own real estate and, in fact, takes title in its own name. An entity separate and apart from the Department of Highways acquires the lands. Thus, it is clear from the words "the head of the department, board or commission of the state government owning the land" that the No. 4 member could not statutorily be a representative of the Department of Highways[13] where the land is owned by the Turnpike Commission. It should also be noted that the omission of the Secretary of Highways from the State Mining Commission does not materially prejudice the interests of the Commonwealth. The Supreme Court has already pointed out[14] that:

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[11] *Glen Alden Coal Company Case,* supra, footnote 4.
[12] Act of May 21, 1937, P. L. 774, 36 P. S. § 652d.
[13] But see the Act of May 21, 1937, P. L. 774, § 15, 36 P. S. §652o, which provides that when the Commission's bonds have been retired all property belonging to the Commission shall be vested in the Department of Highways.
[14] Ibid. footnote 11.

> "The Commonwealth itself is represented on the Commission, apart from the President Judge of the Court of Common Pleas of the county, by three of its officials or their nominees. * * *"

There appears to be no real reason for adding yet another Commonwealth representative to the Commission since, in the area of expertness in determining land values, there is no reason to believe that the Department of Highways is more expert than the Pennsylvania Turnpike Commission.

It should be observed that the Secretary of Highways is an ex officio member of the Pennsylvania Turnpike Commission.[15] It must also be borne in mind that proceedings before the State Mining Commission are not a final step. Apart from the inherent power of judicial review by certiorari, the Act of 1941[16] reserves the right of appeal.

It is our opinion, therefore, and you are advised, that where the land, easements or rights of way underlaid by mineable coal involved in proceedings before the State Mining Commission is that of the Pennsylvania Turnpike Commission and the Turnpike Commission has designated its representative, the Department of Highways may not lawfully designate a representative to the State Mining Commission.

Very truly yours,

DEPARTMENT OF JUSTICE,

MICHAEL J. STACK, JR.,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 92

Escheatable funds—Liability of banks and other companies for voluntary payment—Procedure—Act of June 25, 1937 P. L. 2063—Act of June 7, 1915, P. L. 878.

[15] Act of May 21, 1937, P. L. 774, § 4.
[16] Ibid. footnote 1.

Under the Act of June 25, 1937, P. L. 2063, or the Act of June 7, 1915, P. L. 878, banks and other companies voluntarily paying escheatable funds to the State Treasury and receiving an official receipt therefor from the Department of Revenue are relieved of liability to the rightful owners of the funds so paid.

Harrisburg, Pa., April 1, 1958.

Honorable Vincent G. Panati, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You report that the Division of Escheats of the Department of Revenue receives unclaimed funds pursuant to the Act of June 25, 1937, P. L. 2063, as amended, 27 P. S. §§ 434-447, and the Act of June 7, 1915, P. L. 878, as amended, 27 P. S. §§ 241-301. The banks and companies subject to the above acts who are required to report escheatable funds make voluntary payment of such items. You ask whether an official receipt of the Department of Revenue relieves them from any and all liability and responsibility on such items voluntarily paid to the Commonwealth without a court order.

1. The Act of 1937 provides that every company doing business under the laws of this Commonwealth shall report to the Department of Revenue the following categories of items:

1. Dividends or profits declared by it and unclaimed for six or more successive years. Debts and interest on debts due it by any creditor where such payments have been unclaimed for six or more succesive years.

2. Customers advances, tolls or deposits due and owing and unclaimed for six or more successive years.

3. Proceeds of insurance policies awaiting due proof for payment or surrender value of policies which have been surrendered or premiums, dividends and profits or accretions thereon, any of which are held or owing for seven successive years.

4. Stocks or certificates of beneficial interest demandable which have been unclaimed for six or more successive years.

This statute provides that the above items shall be escheatable and establishes a procedure for the enforcement of the escheat. The Act further provides that any person legally entitled to any moneys which have been paid into the Treasury under the provisions of an order of court entered upon petition of the Attorney General for the payment of such moneys into the State Treasury without escheat may

apply at any time for a refund and, upon proof of ownership, shall receive a full refund with interest at the rate of 2% per annum. The statute does not provide for a voluntary payment without court order. It is clear that the items required to be reported are escheatable. Failure to report the items subjects the company to a penalty.

Where the company is willing to make payment voluntarily, there is no reason why it should be forced to take an adversary position. This precise question has never been adjudicated. However, in *Commonwealth v. Dollar Savings Bank,* 259 Pa. 138, 102 Atl. 569 (1917), the Supreme Court of Pennsylvania indicated that the payment to the State as custodian of abandoned property relieves the prior custodian of any liability. In the cited case, the Commonwealth sued to recover unclaimed deposits under the Act of April 17, 1872, P. L. 62, 27 P. S. §§ 302-305. That act, like the Act of 1937, created a presumption of abandonment after a lapse of years. Like the Act of 1937, it also gave the rightful owner an unlimited right to assert his claim of ownership. The bank raised constitutional objections to the statute and further asserted that it would be subject to liability to the rightful owner. The statute provided that a receipt for the amounts paid over to the State Treasurer "shall be a full and sufficient discharge to such saving fund, institution or bank from any further liability to any such depositor." The court pointed out that since the State had jurisdiction to take over custody of apparently abandoned property and since the bank was protected against any claim, there could be no prejudice either to the bank or to the depositor and that the act simply transferred the liability from the original depositary to the Commonwealth of Pennsylvania.

The Act of 1937 does not contain a provision with respect to discharge of liability upon a receipt of the State Treasurer. However, the principles involved in both statutes are identical. Both acts make escheatable deposits which have been dormant for a period of years. Both acts provide that the custody of such property be transferred from the bank or company holding these funds, which clearly are the property of other individuals, to the Commonwealth of Pennsylvania, which then assumes custody of such moneys. Upon proof of ownership, the Commonwealth is required to make payment to the lawful owner. Under the 1937 act, the lawful owner receives not only the face amount of his claim but also 2% interest. A receipt from the Commonwealth as custodian or bailee of these funds to the bank or company which had been holding the funds would certainly serve to protect the bank or company from a claim by the lawful owner who could always assert his claim against the Commonwealth. It should

be noted that this right to reclaim the funds exists only when the payment is made "without escheat". Accordingly, you are advised that when funds are voluntarily paid to the Department of Revenue, under the Act of 1937, as amended, and when such funds are taken by the Commonwealth "without escheat", a receipt of the department for the funds will relieve the company or bank so paying from all liability.

2. The Act of June 7, 1915, P. L. 878, is a similar statute which provides for the reporting by banks, safe deposit companies, trust companies and other corporations, except mutual saving societies not having a capital stock which receive deposits of money. Deposits which have been dormant for seven or more succesive years are made escheatable. Property received for storage or safe-keeping which has remained without access thereto by the owner for ten successive years is made escheatable. With respect to the various types of property made escheatable under this act, specific procedures are provided. The act further provides, in section 8, that at any time within ten years after the payment into the State Treasury of such deposits under the provisions of section 7 of the act, the lawful owners or their heirs may apply to the State Treasury for the moneys so escheated, provided they have not appeared or had actual notice in the proceedings to escheat.

This act, like the other, has no provision for voluntary payment, nor does it provide for a discharge of liability to the company which has had custody of the funds prior to the escheat. It is obvious that if the funds are paid to the State Treasury pursuant to a court order, the company so paying is relieved of all liability to the rightful owner. In like manner, if the funds are voluntarily paid to the State Treasury in obedience to a valid law, the company is relieved of liability to the lawful owner. In *Security Savings Bank v. State of California,* 263 U. S. 282, 44 S. Ct. 108, 68 L. Ed. 301 (1923), the United States Supreme Court, in sustaining the constitutionality of the California escheat law, held:

> "If the deposit is turned over to the State in obedience to a valid law, the obligation of the bank to the depositor is discharged."

See, also, *Philadelphia Electric Company Case,* 352 Pa. 457, 43 A. 2d 116 (1945).

The 1915 act requires notice by publication. This procedure should be complied with so that rightful owners of such property will receive

notice and be able to present their claims either to the company or to the Commonwealth within a reasonable period of time. It should be noted that the rightful owner has only ten years from the date of payment within which to make application for his property and that if he receives notice of such escheat he is deprived of this right. The rightful owner is not disadvantaged by this provision. Without it, he would be subject to the six year statute of limitations which would run from the time the debt was due: See C. J. S. Limitations of Acts, § 109, which states:

> "In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises, or when there is a demand capable of present enforcement; or when there is a remedy available; and whenever one person may sue another a cause of action has accrued and the statute of limitations begins to run, but not until that time. So, whether at law or in equity, the cause of action arises when, and only when, the aggrieved person has the right to apply to the proper tribunal for relief. The statute does not attach to a claim for which there is no right of action, and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained. The true test, therefore, to determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result, regardless of the time when actual damage results; the fact that he might previously have brought a premature or groundless action is immaterial. * * * "

See *Penns Creek Municipal Authority v. Maryland Casualty Company,* 120 F. Supp. 549 (M. D. Pa. 1954). See, also, *Swearingen v. Sewickley Dairy Co.,* 198 Pa. 68, 47 Atl. 941 (1901).

Since, if notice is given, the rightful owners of the escheatable property are not deprived of any rights, it would be a vain and futile act to require the filing of a petition and an answer and an adjudication by the court to accomplish the transfer of admittedly escheatable funds to the State Treasury. It is presumed that the legislature would not intend a result that is absurd. Act of May 28, 1937, P. L. 1019, § 52, 46 P. S. § 552.

The voluntary payment of escheatable funds to the State Treasury constitutes compliance with the escheat laws only to the extent of the sums so paid and does not in any way prevent or estop the Commonwealth from asserting claims to other escheatable funds or property held by such companies.

It is our opinion, and you are accordingly advised, that companies voluntarily paying to the State Treasury escheatable funds "without escheat" under the Act of 1937 and receiving an official receipt of the Department of Revenue are relieved of all liability to the rightful owners of such funds. Companies which give proper notice to the lawful owners of escheatable funds and make voluntary payment of such funds to the State Treasury under the Act of 1915 and receive an official receipt of the Department of Revenue are also relieved of liability to the rightful owners of such funds.

Very truly yours,

DEPARTMENT OF JUSTICE,

LOIS G. FORER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 93

Department of Welfare—Purchase of repairs or repair parts for special windows at Philadelphia State Hospital—"Equipment" defined—Section 507 of The Administrative Code of 1929.

Where it appears that repairs were necessary to special escape-proof windows at the Philadelphia State Hospital and where repair parts could be secured only from the original manufacturer, the windows in question were properly classified as equipment within the meaning of § 507 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177.

Harrisburg, Pa., April 1, 1958.

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

Sir: You have requested the opinion of this department on the validity of Voucher Transmittal No. VT M-69. This document states that the sum of $10,850.00 is due to the named payee. The voucher transmittal was prepared to cover work done by the payee involving repairs to and replacement of parts for windows and screens in isolation rooms of the Philadelphia State Hospital. The Auditor General has objected to payment on the ground that the repairs were purchased without obtaining competitive bids.

It appears that seclusion rooms at the Philadelphia State Hospital were equipped with awning type steel windows and detention screens of a special design and manufacture. The windows and screens were designed to prevent patients from escaping through the window openings. The original installation was done by the payee of the voucher in question. During the passage of years since the original installation, the windows have deteriorated to the point where repair or replacement was required. It was evident that repairing the windows would be far more economical than attempting to replace them[1].

The repair parts were not available through normal channels, but could be obtained only from the manufacturer, the payee. Although the installation of the repair parts could have been effected by a contractor, it was decided that the manufacturer should install them so that a manufacturer's warranty could be obtained.

Section 507 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 187, states that unless otherwise provided all purchases of enumerated items, including supplies and equipment, shall be made through the Department of Property and Supplies. Under the provisions of § 2409 of The Administrative Code of 1929, supra, 71 P. S. § 639, the Department of Property and Supplies is bound to prepare and award contracts for all equipment, furniture or furnishings, repairs, alterations, and improvements on the basis of competitive bids.

The terminal portion of § 507 of the Code, supra, 71 P. S. § 187, provides that:

> "Notwithstanding any of the foregoing provisions of this section, any department, board or commission may:
>
> "(1) Purchase repairs or repair parts for its equipment from the manufacturer of such equipment, or from the manufacturer's authorized dealer;"

It thus appears that if the windows in question are "equipment" as that word is used in subsection (1), quoted above, it would not have been necessary for the Department of Welfare to have purchased the repairs or repair parts through the Department of Property and Supplies; and it consequently would have been unnecessary to require competitive bids (this latter requirement being applicable only to the Department of Property and Supplies purchases).

[1] Repairing the windows rather than replacing them represented an estimated saving of $16,192.00.

The word "equipment" is defined in Black's Law Dictionary, Third Edition, at page 672, as follows:

> "Furnishings, or outfit for the required purposes. In a legacy to be applied toward the rebuilding and equipment of a hospital it was held equipment meant everything required to convert an empty building into a hospital; * * *"

If we were to place in an ordinary empty room a developer, pans, a drying rack, a red light, an enlarger and other photographic apparatus, the ordinary room would then be a dark room. This is so by virtue of the installation of the particular equipment which is, in the words of the definition quoted above, an "outfit for the required purposes." Installation of a washing machine, dryer and mangle in the same empty room would, for the same reasons, result in the creation of a laundry room. Similarly, the installation of awning type steel windows and detention screens are an essential step in converting an ordinary room into one for a specific purpose—an escape-proof seclusion room. These windows are as much "equipment" as the photographic apparatus or the washing machine. Without the windows in question the room would not be "outfitted for the required purposes." Thus, by the installation of the special devices in question what is ordinarily a window and not "equipment" may become, in addition to a window, something as much "equipment" as any other escape-proof devices (e.g., special locks, strait jackets.)

It is, therefore, the opinion of this department and you are accordingly advised that Voucher Transmittal No. VT M-69 is valid. It was not necessary to award a contract for the repairs or repair parts through the Department of Property and Supplies on a competitive bid basis.

Very truly yours,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 94

State employees—Trade union or employee association meetings—Right to hold meetings in Commonwealth buildings—The Administrative Code of 1929—Act of June 30, 1947, P. L. 1183.

Space in Commonwealth buildings during non-working hours may be made available for use by trade unions or employee associations consisting of Commonwealth employees in order that the intent of the General Assembly to provide a grievance procedure with full and adequate governmental facilities for adjustment of such grievances may be carried out.

Harrisburg, Pa., April 1, 1958.

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

Sir: This department is in receipt of your request for advice as to whether existing law would permit the holding of trade union or employee association meetings consisting of Commonwealth employees in State buildings during non-working hours.

An examination of the statutes reveals that neither the Federal nor State labor relations laws include public employees within their coverage. The National Labor Relations Act, 49 Stat. 449 (1935), 29 U. S. C. § 151 (1952), and the Labor Management Relations Act, 61 Stat. 136 (1947), 29 U. S. C. § 141 (1952), expressly except from the definition of the term "employer" the United States and any state or political subdivision thereof. The Pennsylvania Labor Relations Act, the Act of June 1, 1937, P. L. 1168, 43 P. S. §§ 211.1 to 211.13, excludes public employees from its coverage.

In the 1955 proceedings of the Section of Labor Relations Law of the American Bar Association, the Committee on Labor Relations of Governmental Employees reported as follows:

> "Our committee maintains that public employees have an inherent and justifiable right to organize among themselves to serve their own best interests and welfare; and that they should have the right to affiliate with any outside organizations in either the public or private field, except in such rare cases where the protection of the public interest imperatively dictates non-affiliation with outside labor unions. * * *"

Under dates of May 27, 1957, and August 28, 1957, Governor Leader issued an Executive Directive enunciating the policy of the Administration relative to Commonwealth employees and trade unions. The preamble reads:

> "It is the policy of this Administration to encourage a more harmonious and cooperative relationship between the Commonwealth and its employes by providing for fuller implementation of the existing statutory scheme affecting Commonwealth employe relationships through the establishment of procedures which will facilitate free and frequent communication between the Commonwealth and its employes either individually or by and through their authorized representatives and to assure to Commonwealth employes, if they so choose, the right to full freedom of association, self-organization and designation of representatives of their own choosing for the purpose of communicating their views to the Commonwealth on matters related to the conditions of public employment, or the betterment thereof, free from interference, restraint, discrimination or coercion."

The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, authorizes the Governor in § 701 (1), 71 P. S. § 241, to assign space in the Capitol Buildings, or in leased quarters for conduct of work and for storage of records. Subsection (j) of § 2402, 71 P. S. § 632, authorizes the Department of Property and Supplies, from time to time, to rent to persons, associations or corporations, upon such terms as shall be approved by the Board of Commissioners of Public Grounds and Buildings, the auditorium in the South Office Building, Number Two, when it shall not be required for the Commonwealth's use.

The Act of June 30, 1947, P. L. 1183, 43 P. S. §§ 215.1 to 215.5, prohibits strikes by public employees and provides a grievance procedure for public employees. It makes no reference to the use of public buildings.

Subsection (b) of § 1 of this act, 43 P. S. § 215.1, contains a proviso that nothing contained in the act shall be construed to limit, impair or affect the right of any public employee to the expression or communication of a view, grievance, complaint or opinion on any matter related to the conditions or compensation of public employment, or the betterment thereof, so long as the same is not designed to and does not interfere with the proper performance of the duties of employment. The proviso further states that his right to attend meetings, conferences or hearings, relating to such matters, shall not be limited or impaired so long as such attendance is not designed to interfere with the performance of his duties. The act then continues:

> "* * * In order to avoid or minimize any possible controversies by making available full and adequate governmental facilities for the adjustment of grievances, the governmental agency involved, at the request of the public employes, shall within fifteen (15) days of such request, set up a panel of three members, one to be selected by the employes, one by the governmental agency, and the two so selected to select a third member. * * *"

In the case of *Broadwater v. Otto,* 370 Pa. 611, 88 A. 2d 878 (1952), the Supreme Court of Pennsylvania held that a discharged employee does not possess the status entitling him to require and to participate in grievance procedure under the Act of 1947, supra. At page 616 the Court said:

> "Public employes while prohibited from striking are not prevented from the formation of employe unions or restricted from lawful activities therein. * * *"

Since the General Assembly has set up a grievance procedure for Commonwealth employees and has stated its purpose of making available full and adequate governmental facilities for the adjustment of grievances, and the courts have stated that Commonwealth employees are not restricted from the formation of an employee union or lawful activities therein, we are of the opinion and you are accordingly advised that the Department of Property and Supplies may rent to trade union or employee association groups consisting of Commonwealth employees during non-working hours upon such terms as shall be approved by the Board of Commissioners of Public Grounds and Buildings, the auditorium in the South Office Building, Number Two (the Forum, Education Building). Space in other Commonwealth buildings during non-working hours may be made available in order that the intent of the General Assembly may be carried out and that the rights given to the Commonwealth employees may be exercised.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 95

Highways—Erection of stop signs—Establishment of through highways—Secretary of Highways—Local authorities—Section 1112 of The Vehicle Code.

1. The Secretary of Highways may designate highways within his jurisdiction as "through highways" and erect stop signs requiring traffic on the highways intersecting said through highways to stop.

2. Local authorities may designate highways within their jurisdiction as through highways and erect stop signs requiring traffic on the intersecting highways to stop.

3. The Secretary of Highways is also authorized to designate stop intersections on highways within his jurisdiction on one or all approaches to the intersection where none of the highways are designated a through highway.

4. Local authorities are authorized to designate stop intersections on highways within their jurisdiction on one or all approaches to the intersection where none of the highways are designated a through highway.

5. Local authorities are not permitted to designate a through highway or stop intersection which will intersect or affect a state highway without first obtaining approval from the Secretary of Highways.

Harrisburg, Pa., April 2, 1958.

Honorable Lewis M. Stevens, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: You have requested an opinion interpreting § 1112, Article XI, of The Vehicle Code, the Act of May 1, 1929, P. L. 905, as amended, 75 P. S. § 712.

The section provides as follows:

> "(a) The Secretary of Highways of this Commonwealth, with reference to State highways, and local authorities in counties, cities, boroughs, incorporated towns and townships of the first and second class, with reference to highways under their jurisdictions, are hereby authorized to designate through highways, by erecting at the entrance thereto from intersecting highways signs bearing the word 'STOP', the word 'STOP' to be in letters at least six (6) inches in height: Provided, That no stop sign shall be erected at an intersection where, at all times, there is control by either a traffic signal or by a flashing signal.
>
> "(b) The Secretary of Highways of this Commonwealth, with reference to State highways, and local authorities in counties, cities, boroughs, incorporated towns, and townships of the first and second class, with reference to highways under

> their jurisdictions are hereby authorized to designate stop intersections, by erecting at the entrance thereto from intersecting highways signs bearing the word 'STOP' in letters of at least six (6) inches in height.
>
> "(c) Before local authorities in counties, cities, boroughs, incorporated towns, and townships of the first and second class, shall designate any highway as a through highway or stop intersection, which will intersect or affect a State highway, approval of such designation must first be obtained from the Secretary of Highways of this Commonwealth."

This section indicates that the Legislature intended that there be two specific instances in which a stop sign could be used. One, set forth in subsection (a), provides that when the Secretary of Highways or local authorities wish to designate a through highway they may erect stop signs on the highway intersecting said designated through highway. This subsection permits the free flow of traffic on one of the intersecting highways. Prior to the Act of January 14, 1952, P. L. 1931, § 1[1], these signs were designated "thru traffic stop" signs.

The second use of a stop sign which § 1112 permits is set forth in subsection (b), whereby the Secretary of Highways and local authorities may designate certain intersections over which they have jurisdiction as stop intersections. Subsection (b) does not restrict the use of stop signs by the Secretary of Highways or local authorities to highways intersecting through highways but permits them to be erected on any street or highway (not designated a "through highway".) There is no restriction on the number of stop signs which the Secretary of Highways or local authorities may erect at an intersection of two highways if neither is designated a through highway.

Local authorities, however, are not permitted to designate any street or highway a through street or highway if the same will intersect or affect a state highway without the approval of the Secretary of Highways.

You are therefore accordingly advised that:

1. The Secretary of Highways may designate highways within his jurisdiction as "through highways" and erect stop signs requiring traffic on the highways intersecting said through highways to stop.

[1] 75 P. S. § 712.

2. Local authorities may designate highways within their jurisdiction as through highways and erect stop signs requiring traffic on the intersecting highways to stop.

3. The Secretary of Highways is also authorized to designate stop intersections on highways within his jurisdiction on one or all approaches to the intersection where none of the highways are designated a through highway.

4. Local authorities are authorized to designate stop intersections on highways within their jurisdiction on one or all approaches to the intersection where none of the highways are designated a through highway.

5. Local authorities are not permitted to designate a through highway or stop intersection which will intersect or affect a state highway without first obtaining approval from the Secretary of Highways.

Very truly yours,

DEPARTMENT OF JUSTICE,

FREDERIC G. ANTOUN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 96

Firemen's relief fund associations—Audit of accounts and records—Act of June 28, 1895, P. L. 408.

The Department of Revenue may allocate funds to pay the costs incurred by the Department of the Auditor General in auditing the accounts and records of firemen's relief fund associations under the Act of June 28, 1895, P. L. 408.

Harrisburg, Pa., April 3, 1958.

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

Sir: This department is in receipt of your request for legal advice as to the authority for the allocation by the Department of Revenue

of funds to pay the costs incurred by your department in auditing the accounts and records of firemen's relief fund associations which receive moneys derived from the tax on premiums received by foreign fire insurance companies under § 2 of the Act of June 28, 1895, P. L. 408, as amended, 72 P. S. § 2262. The Department of Revenue declined to honor your request for the allocation of funds without the approval of the Department of Justice since it was of the opinion that such allocation did not come within the purview of § 408 of The Fiscal Code, the Act of April 9, 1929, P. L. 343, as amended, 72 P. S. § 408.

Formal Opinion No. 684, 1957 Op. Atty. Gen. 20, held that your department was empowered to audit the accounts and records of firemen's relief fund associations which receive the funds derived from the tax on premiums received by foreign fire insurance companies. This conclusion was based upon § 403 of The Fiscal Code, 72 P. S. § 403, which requires the Auditor General to audit the accounts of every association receiving an appropriation from any fund in the State Treasury or receiving any portion of any State tax.

Section 302 of The Fiscal Code, as amended, 72 P. S. § 302, provides that the moneys paid into the State Treasury, and the moneys of which the State Treasurer is custodian, shall be credited by the Treasury Department to those funds listed therein. The Fire Insurance Tax Fund is one of the many special operating funds listed in this section. This section reads in part as follows:

> "5. Fire Insurance Tax Fund.—All moneys received by the Treasury Department from the Department of Revenue arising from the two per centum tax paid upon premiums received by foreign fire insurance companies from business done within this Commonwealth, shall be credited to the Fire Insurance Tax Fund."

Section 2 of the Act of June 28, 1895, P. L. 408, as amended, 72 P. S. § 2262, as set forth in Formal Opinion No. 684, makes it the responsibility or affair of the State Treasurer to pay to the treasurers of the political subdivisions of the Commonwealth the tax paid upon premiums received by foreign fire insurance companies.

Section 404 of The Fiscal Code, 72 P. S. § 404, requires the Auditor General to audit and examine requisitions calling upon the Auditor General to draw his warrant upon the State Treasurer for the payment of any money out of any fund of the State Treasury.

The approval of the requisition is, to a large extent, based upon the results of the audit as required under Formal Opinion No. 684; the audit of the requisition is incomplete unless the audit of the firemen's relief fund association has been made and is available. The necessity and the reasons for this audit were discussed in Formal Opinion No. 684. Compliance with these statutory requirements forms the basis for the final determination.

Section 408 of The Fiscal Code, as amended, 72 P. S. § 408, reads as follows:

> "In order to reimburse the General Fund for the costs incurred by the Department of the Auditor General in auditing requisitions by departments, boards, or commissions for disbursements out of special operating funds in the State Treasury, and in auditing, annually, periodically or specially, the affairs of any department, board, or commission which are supported out of a special operating fund in the State Treasury, such departments, boards, or commissions, shall be billed at least quarterly by the Department of the Auditor General, upon a cost basis, at such amount as the Department of the Auditor General, with the approval of the Executive Board, shall determine. Amounts payable hereunder for reimbursing the General Fund for the cost of audits shall be credited to the appropriation of the Department of the Auditor General, and shall be paid out of such special operating funds into the State Treasury through the Department of Revenue, and are hereby appropriated to the Department of the Auditor General for that purpose."

We are, therefore, of the opinion, and you are accordingly advised that the Department of Revenue is authorized to make an allocation of funds to pay the costs incurred by your department in auditing the accounts and records of firemen's relief fund associations which receive moneys derived from the tax on premiums received by foreign fire insurance companies under § 2 of the Act of June 28, 1895, P. L. 408, as amended, 72 P. S. § 2262.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 97

Veterans—Application for bonus—Honorable discharge from first enlistment—Dishonorable discharge from succeeding enlistment—Act of June 11, 1947, P. L. 565.

A veteran who had been discharged honorably from his World War II Navy enlistment on January 6, 1946, had reenlisted the next day and had been dishonorably discharged from his second enlistment on July 30, 1949, is entitled to his bonus for the period of his service up to January 6, 1946, but not for his service thereafter.

Harrisburg, Pa., April 9, 1958.

Honorable Anthony J. Drexel Biddle, The Adjutant General, Harrisburg, Pennsylvania.

Sir: Your department has asked whether an applicant for World War II bonus may be paid if he has been discharged honorably from a first enlistment but dishonorably discharged from a succeeding enlistment. Specifically, applicant entered the Navy July 31, 1943, was discharged honorably January 6, 1946, reenlisted the next day and was dishonorably discharged July 30, 1949.

"Veteran" is defined in the statute as a person who has served in the armed forces between December 7, 1941, and September 12, 1945, "but does not include (a) any individual at any time during such periods or thereafter, separated from such forces under other than honorable conditions. * * *" Act of June 11, 1947, P. L. 565, § 2, 51 P. S. § 455.2.

Compensation is provided for service up to March 2, 1946, under § 3.

Obviously, the term "thereafter", with respect to separation, means after the period ending September 12, 1945. Applicant served 29 months up to January 6, 1946, and was then separated honorably. Consequently, "thereafter" applicant was in fact honorably discharged and in law entitled to his bonus. If he had never again served, he would have had an unassailable right to it under the statute.

The only question is whether, having undertaken a new enlistment, his subsequent conduct had the effect of abrogating that right. We do not believe that the Legislature intended the words "or thereafter" to have an effect beyond the time of separation from a person's World War II service, nor is there any language in the statute to that effect.

It is, therefore, our opinion that the second enlistment could have no effect upon a right which had already become fixed before that enlistment began. The clear language of the statute precludes any bonus for the period of the second enlistment.

You are, therefore, advised that if applicant otherwise qualifies under the statute he is entitled to his bonus for the period of service up to January 6, 1946, but not for the service thereafter which terminated in dishonorable discharge.

This opinion is in accord with Informal Opinion No. 499 to the Adjutant General, dated January 3, 1935, in which identical language in the Veterans' Compensation Act of January 5, 1934, P. L. 223, was similarly construed in application to virtually identical circumstances.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 98

Liquid measures—Secretary of Internal Affairs—One-third quart containers for milk—Act of July 24, 1913, P. L. 965—Act of May 5, 1921, P. L. 389.

There is no legal objection to the approval by the Secretary of Internal Affairs of a one-third quart container for the sale of milk.

Harrisburg, Pa., April 11, 1958.

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

Madam: This department is in receipt of your request for advice with regard to the legality of selling milk in one-third quart containers. You call attention to the Act of July 24, 1913, P. L. 965, as amended, 76 P. S. §§ 241 to 250, which in § 1, 76 P. S. § 241, defines

"liquid measure" as the standard United States gallon of 231 cubic inches, or binary sub-multiple thereof, quart, pint or gill. You also cite § 2 of this act, 76 P. S. § 242, which provides:

> "All liquid commodities, when sold in bulk or from bulk, shall be sold by weight or liquid measure. * * *"

For the purposes of answering your inquiry, we shall discuss first your authority to approve or disapprove types of measuring devices.

The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, in § 1206, 71 P. S. § 336, confers upon your department the authority to regulate and maintain uniform standards of legal weights and measures in the Commonwealth to conform with the original standards of weights and measures adapted by the Congress of the United States and verified by the National Bureau of Standards.

The Act of May 5, 1921, P. L. 389, 76 P. S. §§ 101 to 115, specifies in considerable detail the authority of your department to pass upon types of weights and measures. The title of the act reads:

> "AN ACT
>
> "To regulate and control the manufacture, sale, offering for sale, giving away, and use of weights and measures and of weighing and measuring devices in the Commonwealth of Pennsylvania; * * *"

Section 2 of the act, 76 P. S. § 102, reads as follows:

> "The Bureau of Standards of the Department of Internal Affairs is authorized to pass upon each type of weight and measure and weighing and measuring device manufactured, offered or exposed for sale or sold or given away, for the use in trade or commerce, or used in trade or commerce, in the Commonwealth of Pennsylvania, and to approve or disapprove of said type. *The said bureau shall approve each type of weight and measure and weighing and measuring device, submitted to it for approval by any person, if such type is so designed and constructed that it conforms to, or gives correct results in terms of, standard weights or measures or in terms of values derived therefrom, and is reasonably permanent in its indication and adjustment, and does not facilitate the perpetration of fraud, otherwise the bureau shall disapprove the same.*" (Emphasis supplied)

The underlined portion of this section establishes the standards upon which you are to base your approval or disapproval. There is

nothing in this language upon which to base a rejection of a one-third quart container. It is obvious that one-third of a quart is a "value derived" from the standard quart. It is clear, therefore, that your department is authorized to approve or disapprove types of measuring devices.

We turn to the question of your authority to approve the one-third quart containers, as measures, with particular reference to the Act of July 24, 1913, P. L. 965, supra, cited by you. This act regulates the manner of sale of commodities by definite and specified means, including sales from bulk, in bulk, by numerical count and in package form.

Section 2 of the act, 76 P. S. § 242, provides that "All liquid commodities, when sold in bulk or from bulk, shall be sold by weight or liquid measure." This is the provision to which you directed our attention in your request for advice. The language, however, is not applicable to a container with a capacity of one-third quart.

"In bulk" is defined in 12 C.J.S. Bulk § 123, at page 556, as:

> "In a mass, in such shape that any desired quantity may be taken or sold, loose, not enclosed in separate package or divided into separate parts; long understood in commercial circles as contradistinguished from 'package' or 'parcel.' "

Obviously the sale of a one-third quart container is not a sale in bulk. It seems equally clear that it is not a sale "from bulk." Such a sale may be illustrated by the purchase of a commodity from a large container by a customer in a store as was formerly the practice in selling vinegar and kerosene. Therefore, this restriction does not apply to milk sold in the one-third quart containers. However, as above stated, the Act of 1913, supra, regulates the sale of commodities in package form. The definition of "package" in § 1 of the 1913 Act, 76 P. S. § 241, includes container, bottle and jar, and it requires that packages be marked as to weight, measure or numerical count.

Section 7 of the act, 76 P. S. § 247, provides that no person shall distribute or sell or have in his possession with intent to distribute or sell any commodity in package form, unless the net quantity of the contents shall be plainly and conspicuously marked on the outside of the package in terms of weight, measure or numerical count. All packages sold as liquid commodities containing less than one ounce liquid

measure and selling for five cents or less are exempted from this requirement. A marking of the one-third quart container would comply with the provisions of this section.

In the case of *Cott Beverage Corporation v. Horst,* 380 Pa. 113, 110 A. 2d 405 (1955), at pages 119-120, the Supreme Court of Pennsylvania said:

> "It is true that, even if an article is not itself harmful for human consumption, its use may be regulated and restricted, or even wholly forbidden, by legislative authority if involved in its use there is danger of fraud or deception whereby it may be imposed upon the public as a counterfeit article for the genuine. This was the basis for the decisions in such cases as Powell v. Commonwealth, 114 Pa. 265, 7 A. 913, aff. 127 U. S. 678; Commonwealth v. Crowl, 245 Pa. 554, 91 A. 922, aff. 242 U. S. 153; Carolene Products Co. v. Harter, 329 Pa. 49, 197 A. 627; United States v. Carolene Products Co., 304 U. S. 144. But here there is no such danger. * * *"

Since the one-third quart container will be marked as such and since the Pennsylvania Milk Control Commission has issued and published orders fixing the price of milk sold in such containers, it seems clear that every reasonable precaution will be taken to eliminate the danger of fraud or deception being imposed upon the public.

We are, therefore, of the opinion and you are accordingly advised that the act does not forbid your approval of a one-third quart container and we know of no legal reason for withholding your approval of such a measure.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General,

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 99

Packages—Meat products wrapped in cellophane—Processors, wholesalers, packers and distributors—Net weight markings—The Commodity Law.

The Commodity Law, the Act of July 24, 1913, P. L. 965, requires (1) that the net weight of meat and meat products such as bologna and ham butts, when contained in closed cellophane or like-type wrappings, must be plainly marked on each package if the processor, wholesaler, packer or other person makes sale or distribution of them in package form to a retailer, (2) that such net weight need not be marked where the product is weighed in full view of the purchaser, and (3) that a regulation exempting processors, packers, wholesalers or other distributors from complying with marking requirements of point (1) above may only be adopted if it requires the seller to weigh the product in full view of the customer.

Harrisburg, Pa., April 11, 1958.

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

Madam: You ask (1) if the practice of several meat packers in omitting to mark the net weight of the contents on cellophane (or cellophane type material) wrapped smoked ham butts, bologna and similar meat products for sale and delivery to retailers, is a violation of the Act of July 24, 1913, P. L. 965, as amended, 76 P. S. §§ 241 to 250, commonly known as The Commodity Law, and (2) if your department may, by regulation, provide that meat or meat products, when wrapped or encased by the processor, wholesaler, or distributor, for sanitation purposes and so sold to a retailer, are exempt from the packaging requirements of The Commodity Law.

Section 1 of the Act, 76 P. S. § 241 defines the word "package", as follows:

> "The word 'package', as used in this act, shall mean everything containing one or more than one unit of any commodity, tied or bound together, or put up in box, bag, pack, bundle, container, bottle, jar, can or any other form of receptacle or vessel, not considered as an approved measure, except cases, cartons, crates, bundles or bales used for bulk shipping or storage: Provided, That enclosed packages are marked as to weight, measure or numerical count."

The ham butts, bologna and other meat products which are the subject of your inquiry are individually encased in a bag-like cellophane or cellophane type material which is sealed on three sides. The other side is fastened by a metal or other type of closure device so that the contents are sealed off to prevent loss of weight by evaporation.

The name and address of the processor, packer or wholesaler, as well as the brand name, is usually printed on the wrapper; and a space is provided for marking the net weight of the contents thereon.

A meat product which is wrapped as above described comes within the definition of "package" as defined in the statute.

Section 2 of the Act, 76 P. S. § 242 provides, inter alia, as follows:

> "(2) All meat and meat products, poultry and poultry products, except eggs, shall be sold by weight; only eggs may be sold by numerical count."

Section 7 of the Act, 76 P. S. § 247, prohibits the sale, distribution or possession with intent to distribute or sell commodities in package form unless the contents are clearly marked on the outside of the package in terms of weight, measure or numerical count.

Section 7.1 of the Act, 76 P. S. § 247.1 provides that the Secretary of Internal Affairs may adopt regulations necessary to effectuate the Act, provided the regulations are not inconsistent with the Act.

In 1947-48 Op. Atty. Gen. 30, 33 wherein the sale of commodities wrapped in package form was discussed, such as cheese cut from large cakes into small cakes, etc., it was held:

> "Further, it is a violation of section 7 of the Commodities Act for a retail merchant to have in his possession, with intent to sell or distribute, a commodity, as defined in the act, wrapped in package form and unmarked as to net quantity of its contents.
>
> "However, commodities not considered as packages within the meaning of the act, or labeled as to net contents at the time of sale, must be counted, measured, or weighed in full view of the customer, if he is present at the time of sale, and a statement of the result of the counting, measuring, or weighing communicated at once to the purchaser by the person making the sale. If the customer is not present at the time the commodities are counted, measured, or weighed, each commodity must be marked to show its net content in weight, measure, or numerical count, or must be accompanied by a statement clearly indicating such weight, measure, or numerical count."

Under our interpretation of the provisions of The Commodity Law (1) meat products must be sold by weight, (2) meat products when wrapped in cellophane or similar materials in the manner herein de-

scribed constitute a package as defined by the Act, and (3) the Act requires the net weight of the contents to be plainly marked on the package when the product is sold in package form and not by weighing it in front of the customer.

This brings us to the conclusion that a regulation exempting meat packers, wholesalers, processors or other distributors from marking the net weight on cellophane, (or cellophane type material) wrapped smoked ham butts, bologna and similar meat products for sale and delivery to retailers would be inconsistent with the provisions of the Act unless you condition such exemption on the packer, wholesaler, processor or distributor's weighing the product in front of the retailer.

It is our opinion, therefore, and you are accordingly advised that the Act of July 24, 1913, P. L. 965, 76 P. S. §§ 241 to 250, commonly referred to as The Commodity Law, requires (1) that the net weight of meat and meat products such as bologna and ham butts, when contained in closed cellophane or like-type wrappings, must be plainly marked on each package if the processor, wholesaler, packer or other person makes sale or distribution of them in package form to a retailer, (2) that such net weight need not be marked where the product is weighed in full view of the purchaser, and (3) that a regulation exempting processors, packers, wholesalers or other distributors from complying with the marking requirements of point (1) above may only be adopted if it requires the seller to weigh the product in full view of the customer.

These conclusions are equally applicable to sales by retailers to consumers since the Act makes no distinction based on who is making the sale.

Very truly yours,

DEPARTMENT OF JUSTICE,

RAYMOND C. MILLER,
Deputy Attorney General,

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 100

Insurance—Health and accident policies—Approval of rates—Insurance Commissioner—The Insurance Company Law of 1921, as amended.

Under § 616 of The Insurance Company Law of 1921, the Act of May 17, 1921, P. L. 682, as amended by the Act of May 26, 1937, P. L. 885, the Insurance Commissioner has not only the power to approve or disapprove premium rates pertaining to policies of accident and health insurance before such policies are issued, but has the duty and obligation to exercise such authority under the aforesaid law.

Harrisburg, Pa., April 15, 1958.

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

Sir: You have requested an opinion of this department as to whether or not you as Insurance Commissioner have authority under The Insurance Company Law of 1921, Act of May 17, 1921, P. L. 682, as amended, 40 P. S. § 361 et seq., to approve or disapprove premium rates to be charged by insurers for policies of accident and health insurance.

Your powers with respect to the question which you ask are contained in § 616 of The Insurance Company Law of 1921, as amended, 40 P. S. § 751. The aforesaid section provides as follows:

> "No policy of insurance against loss from sickness, or loss or damage from bodily injury or death of the insured by accident, shall be issued or delivered by any insurance company, association or exchange issuing such policies, to any person in this Commonwealth until a copy of the form thereof, and of the classification of risks and the premium rates pertaining thereto, have been filed with and formally approved by the Insurance Commissioner. If the Insurance Commissioner shall notify in writing the company, corporation, association, or other insurer which has filed such form that it does not comply with the requirements of law, specifying the reason for his opinion, it shall be unlawful for any such insurer to issue any policy in such form. The action of the Insurance Commissioner in this regard shall be subject to review by the court of common pleas of Dauphin County."

The above cited language contained in § 616, supra, is unequivocal. It states in as clear terms as the Legislature could conceivably make the statement that no policy of accident and health insurance shall be issued or delivered by any insurance company, association or ex-

change to any person in this Commonwealth until the rates pertaining thereto have been filed with and formally approved by the Insurance Commissioner.

The Statutory Construction Act, in § 51 thereof, Act of May 28, 1937, P. L. 1019, 46 P. S. § 551, requires that when the words of the law are clear and free from all ambiguity the letter of it is not to be disregarded.

Section 616 as originally enacted provided that no policy of accident and health insurance shall be issued or delivered to any person in this Commonwealth "until a copy of the form thereof, the classification of risks and the premium rates pertaining thereto, have been filed with the Insurance Commissioner".

Section 616 of The Insurance Company Law of 1921 was amended by the Act of May 26, 1937, P. L. 885, 40 P. S. § 751, by inserting therein the additional words "and formally approved by" causing the act to read as cited above. This legislative history establishes conclusively that the Legislature intended that after the enactment of the above amendatory act policies, classification of risks and premium rates should not only be filed with the Insurance Commissioner but that he should formally act upon them either by approving or disapproving them.

You have also inquired whether there is a conflict between the substantive requirements of § 616, supra, and the titles of either The Insurance Company Law of 1921 itself or the amendatory act in violation of Article III, § 3 of the Pennsylvania Constitution which provides:

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

The Insurance Company Law of 1921 provides in its title that it is an act:

> "Relating to insurance; * * * and the regulation, supervision and protection of home and foreign insurance companies * * *"

The Pennsylvania Supreme Court in *Commonwealth v. Firemen's Insurance Company*, 369 Pa. 560 (1952), 87 A. 2d 255, stated that

a provision of law is not unconstitutional as being in violation of Article III, § 3 of the Pennsylvania Constitution unless the substantive matter contained therein is entirely disconnected from the subject contained in the title of the law. The Court stated further that it is sufficient to satisfy the constitutional requirement if the title will lead a reasonably inquiring mind into the body of the act. The Court held in the above case that the title of The Insurance Department Act of 1921 by referring to the "regulation" of insurance companies was sufficient to put a person on notice that the act may contain a taxing provision.

Likewise, the title of the amendatory act is sufficiently broad as to apprise any interested person that the substantive provision placed in The Insurance Company Law of 1921 thereby could relate to the approving or disapproving of premium rates.

The title of the amendatory act, Act of May 26, 1937, P. L. 885, states, inter alia, that it is an act:

> "* * * prohibiting the issuance of policies of accident and health insurance to be issued before they are approved by the Insurance Commissioner; * * *"

Since the word "policy" in the context of insurance does not alone refer to the form but is used interchangeably with the basic insurance contract—*Gordon v. Continental Casualty Company*, 319 Pa. 555, 559, 181 Atl. 574 (1935)—the title of the amendatory act would put interested persons on notice that the approval by the Insurance Commissioner provided therein was not confined to the mere policy form but could relate to any feature of the insurance contract including the premium rates charged therefor.

In view of the foregoing consideration, it is the opinion of this department that the provisions of § 616 of The Insurance Company Law of 1921, as amended, in no way violates Article III, § 3 of the Constitution of Pennsylvania.

It is, therefore, the opinion of this department, and you are accordingly advised that under § 616, supra, the Insurance Commissioner has not only the power to approve or disapprove premium rates pertaining to policies of accident and health insurance before such

policies are issued, but has the duty and obligation to exercise such authority under the aforesaid law.

Very truly yours,

DEPARTMENT OF JUSTICE,

EDWARD L. SPRINGER,
Deputy Attorney General,

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 101

Appropriations — County school officers—Travel and meetings expenses—Insufficient funds—Continuing appropriation and source of revenue—Public School Code of 1949, as amended—Article III, section 16 of the Constitution of Pennsylvania.

(1) The compensation provisions of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, for the travel and meeting expenses of County Boards of School Directors and County Superintendents, Assistant County Superintendents and County Supervisors of Special Education are not amended, altered or repealed by the insufficient biennial appropriations.

(2) These compensation provisions are themselves "appropriations made by law" to pay the travel and meeting expenses of the above officials.

(3) After the biennially appropriated sums are exhausted and if sufficient revenues in the form of surplus or borrowed amounts are not available to pay the travel and meeting expenses in question, they shall be paid out of funds which have been reserved by the Constitution for the current expenses of the government of the Commonwealth.

Harrisburg, Pa., April 17, 1958.

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

Sir: You have requested our opinion as to the legality of the action of your department in allocating certain meeting and travel expense moneys authorized by the Public School Code[1] in excess of the amounts appropriated for such expenses by the General Appropriation Act of 1957.

[1] Act of March 10, 1949, P. L. 30.

You state the relevant facts as follows: Section 1068 of the Public School Code of 1949, as amended,[2] provides for the reimbursement of certain "actual and necessary" travel expenses to county superintendents, assistant county superintendents and county supervisors of special education. Section 924 of the Code[3] provides for the reimbursement of meeting expenses of the members of the County Board of School Directors. However, the Legislature in the biennial appropriation act of the 1957 Session of the General Assembly[4] failed to provide sufficient moneys to meet the anticipated travel and meeting expenses of these officials. These facts raise the following questions:

(1) Do the insufficient biennial appropriations herein involved amend or repeal the travel and meeting duties or the compensation therefor of the above officials, and, if they do not, are these officials therefore entitled to reimbursement for expenses incurred in performing such duties?;

(2) are the compensation provisions, of the unrepealed and unmodified permanent Public School Code, appropriations within the purview and meaning of Article III, § 16 so as to provide the additional authority to reimburse the above named officials for expenses incurred pursuant to the above travel and meeting duties?;

(3) if the compensation provisions in question are continuing appropriations, what procedure shall be followed by state fiscal officers to accomplish payment of the meeting and travel expenses in question?

We will discuss these questions in order.

1. On page 81 of the Appropriation Acts of the General Assembly, Session of 1957,[5] the following appropriations are made:

"Payment of traveling expenses of County Superintendents, Assistant County Superintendents and Supervisors of special education as provided in section 1068 of the Public School Code of 1949	280,000"
"Payment of traveling expenses and legal fees of county boards of school directors as provided in sections 924 and 925 of the Public School Code of 1949	40,000"

These appropriations clearly do not provide in express terms for the alteration or elimination of either the duty or the compensation provisions in question. Moreover, even if the appropriations were

[2] Act of March 10, 1949, P. L. 30, § 1068, 24 P. S. § 10-1068.
[3] Act of March 10, 1949, P. L. 30 § 924, 24 P. S. § 9-924.
[4] Act of July 19, 1957, Act No. 95-A.
[5] See footnote 4, *supra*.

regarded as impliedly providing for the repeal or modification of these provisions, such a term would amount to an unconstitutional "rider" to a General Appropriation Bill and would not be given effect.[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; * * *"

It is apparent, then, that the case presents the features merely of an insufficient appropriation for an unmodified, unrepealed, and continuing legally constituted office.[7] In such a case the Supreme Court of the United States has clearly indicated that the "insufficient appropriation does not affect the *right* of the public official" involved to recover his legal "salary and compensation for official services actually performed".[8] The same conclusion was reached later by the Court of Claims of the United States which went on to say:

> "Whether [the salary or compensation] is paid out of one appropriation or another, whether Congress appropriated an insufficient amount or nothing at all are questions vital to accounting officers but which do not enter into a consideration of the case in courts."[9]

It is, therefore, our opinion that the insufficient appropriations herein involved do not in any degree amend or repeal the travel and meeting duties or the compensation therefor of the above officials, and, as a result, do not affect the right of the above named public officials to recover their legal compensation for services actually performed.

2. Article III, § 16 of the Constitution of Pennsylvania requires that:

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[6] Further, if the appropriations were regarded as impliedly providing merely for a reduction in the salaries of the above named officials without a related alteration of the duties thereof, such an implied provision would also violate the constitutional restriction on the diminution . . . of the salary of public officials during their term of office, and on this ground, need not be given effect. Pennsylvania Constitution, Article III § 13.

[7] *French v. U. S.*, 16 Ct. Cl. 419, 422 (1880); *Betts v. State*, 73 Misc. 503, 132 N. Y. S. 448, 453 (1911); 31 Op. Atty. Gen. (U. S.) 570, 576 (1912).

[8] *U. S. v. Langston*, 118 U. S. 389, 394, 6 S. Ct. 1185, 30 L. Ed. 164 (1885).

[9] *Geddes v. U. S.*, 38 Ct. Cl. 428, 444 (1903). Such right to compensation for the actual meeting and travel expenses as provided for by the School code would probably be pursuable before the "Board of Claims" pursuant to its jurisdiction to "adjust and settle claims against the Commonwealth" (72 P. S. § 1003). See *Retirement Board v. McGovern*, 316 Pa. 161, 169, 174 Atl. 400 (1934). ". . . [U]ntil an employee has earned his retirement pay, [it is] but an inchoate right; but when the conditions are satisfied . . . [it] becomes a vested right; it has ripened into a full contractual obligation."

> "No money shall be paid out of the treasury, except upon appropriation made by law."

The constitution does not require that such an appropriation be made with any particular form of expression or with any limitation on its period of obligation and expenditure or from any particular fund or at definite time intervals. Indeed, the Supreme Court of Pennsylvania has indicated that the purpose of the constitutional requirement is "simply" to insure that "public funds will not be expended in any way except as directed by the law-making power".[10] Consequently, an intention to make an appropriation which is clearly evinced in the language of a statute would appear to be sufficient to establish the statute as an "appropriation made by law".

A number of courts have located this kind of clearly evinced intention in permanent public officer compensation acts enacted by legislatures under constitutions which include a prohibition against the diminution of such compensation during the term of office of the official involved.[11] These courts have found such acts to be continuing appropriations within the meaning of a constitutional requirement for "appropriations made by law". As a result, special "current" appropriations were held to be unnecessary to provide the means for paying the compensation allowed by statute.

The opinion of these courts attached great significance to constitutional language which resembles that of Article III, § 13, of the Pennsylvania Constitution which reads:

> "No law shall extend the term of any public officer, or increase or diminish his salary or emoluments, after his election or appointment."

Indeed, such opinions declared that unless the original permanent compensation act were a continuing appropriation, an insufficient "current" appropriation would clearly and with impunity effectuate the unconstitutional diminution of the "salary or emoluments" of the officials involved.[12] Therefore, these opinions have concluded that:

> "The law fixing the [compensation of public officials] becomes immutable in so far as it may affect incumbents, and the Legislature is powerless to cut off by indirection that

[10] *Com. ex rel. Dell v. Powell,* 249 Pa. 144, 156 ,94 Atl. 746 (1915).

[11] *Grimball v. Beattie,* 174 S. C. 422, 177 S. E. 668 (1934). *Riley v. Carter,* 165 Okl. 262, 25 P. 2d 666, 88 A.L.R. 1018 (1933), and cases cited therein; *Humbert v. Dunn,* 84 Cal. 57, 24 Pac. 111 (1890); 164 A.L.R. 928 and cases cited therein.

[12] *Grimball v. Beattie,* 174 S. C. 422, 177 S. E. 668, 672 (1934).

> which it could not do by direct enactment, and hence a statue merely fixing the amount to be received and the times of payment is, in effect, an appropriation of funds which becomes applicable to the discharge of their stated compensation as it becomes due."

The Pennsylvania authorities recognize that the Constitutional salary provision in question serves the important purpose of securing the independence of the public officers of the Commonwealth.[13] But, as the opinions cited above have pointed out, such a purpose can only be served if the Legislature is effectively denied the power to compel the resignations of these public officers by reductions in their compensation without a related reduction of their official duties.[14]

Consequently, the opinions cited above which had been persuasively advanced in other jurisdictions in behalf of compensation provisions of unmodified public official tenure acts as continuing appropriations appear to have validity in this jurisdiction as well.

It is our conclusion, therefore, that a permanent statute fixing the "salary and emoluments . . . of a public officer" within the meaning of Article III, § 13 of the Constitution is a valid "appropriation" for such items of compensation within the meaning of Article III, § 16. On this view, the answer to the question whether the compensation provisions of the Public School Code constitute a continuing appropriation to pay the meeting and travel expenses of the above official will depend on whether:

(1) such officials are public officers within the meaning of Article III, § 16 of the Constitution;

(2) the reimbursement of travel expenses is a part of their salary or an emolument;

(3) there is a permanent continuing statute fixing their salary or emoluments.

Public officers within the meaning of Art. III, § 13 are defined as follows:[15]

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[13] White, *The Constitution of Pennsylvania,* at 268 (1907).

[14] *Collins v. Barton,* 42 D. & C. 340 (1942). "While the salary of a legislative officer may not be diminished during his term of office, a legislative office may be abolished."

[15] *Com. ex rel. Kelley v. Clark,* 327 Pa. 181, 188, 193 Atl. 634 (1937). *In re Bowman,* 111 Pa. Super. 383, 170 Atl. 717 (1934). See also *Richie v. Phila.,* 225 Pa. 511, 74 Atl. 430 (1909), affirming 37 Pa. Super. 190 (1908).

> "The holder of a public position may be regarded as a public officer . . . [within the meaning of the constitutional provision in question] . . . when he exercises important public duties and has delegated to them certain of the functions of government and his office is for a fixed term, and the powers, duties, and emoluments become vested in a successor when the office becomes vacant."

In *Foyle et al., appellants v. Commonwealth,* [16] on a question involving the scope of the Pennsylvania Workmen's Compensation Act, the court held that an Assistant County Superintendent was a public officer as distinguished from an employee of the Commonwealth.

> "His office is created by the legislature, his minimum salary is fixed by law, he takes and subscribes to an oath, receives a commission, and cannot be removed in any method other than that provided by statute. His duties are prescribed by statute and involve judgment, intelligence, discretion, and technical knowledge, and are of such consequence to the public as to place him in a position of such dignity and responsibility that he must be considered a public officer. * * *"

This position description unquestionably satisfies the definition above of a public officer. Moreover, the description accurately characterizes the positions of the other officials in question. Consequently, we do not hesitate to designate these officials as "public officers" within the meaning of Art. III, § 13.

Reimbursement of travel or meeting expenses may be regarded as either an element of salary or an emolument. Our courts have held that an "allowance for expenses . . . in its practical operation and effect . . . [provides] . . . an increase in the salary or emoluments . . . [of public officers] . . .".[17] Of course, the word emoluments, itself, is a more "comprehensive" term than salary and has been held to include "any sums whatever paid as compensation for services, either regular or special."[18]

The statutory provisions which fix the reimbursement for the travel and meeting expenses of the officials involved reads as follows:

> "In addition to the foregoing salaries, [of Section 1066] each county superintendent, assistant county superintendent and each supervisor of special education shall be entitled to

[16] 101 Pa. Super. 412, at 422 (1930).
[17] *Appeal of Loushay,* 370 Pa. 453, 88 A. 2d 793 (1952).
[18] White, *The Constitution of Pennsylvania,* at 268 (1907) and cases cited therein.

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."

"Each member of the county board of school directors shall receive five dollars ($5) for each meeting attended to cover such member's expenses—[of meetings required by Section 923], but shall not exceed sixty dollars ($60) per annum which shall be paid monthly by the State from appropriations made for this purpose or from appropriations for the public schools."[19]

Taken in conjunction with the other provisions of the Public School Code of 1949, these clauses clearly form a part of a permanent statute which has as one of its purposes the fixing of the salaries and emoluments of the officials involved.

It is, therefore, our opinion that the compensation provisions of the unrepealed and unmodified permanent Public School Code are appropriations within the purview and meaning of Article III, § 16, so as to provide the additional means to reimburse the above named officials for expenses incurred pursuant to the above travel and meeting duties.

3. Of course, travel and meeting expenses may be paid out of State treasury funds, to the extent authorized by the General Appropriation Act of 1957, and in accordance with the usual procedure of the Department of Public Instruction. In addition, with respect only to the meeting expenses of the County Board of School Directors,[20] the School Code permits payment "from appropriations made for [this] purpose or from appropriations made for the public schools." Consequently such meeting expenses may also be paid out of the funds appropriated for the public schools to the extent that moneys are available for this purpose and in accordance with the usual procedure of the Department of Public Instruction. However, these biennially authorized and available funds described above may be insufficient to provide reimbursement for the travel and meeting expenses in question. In such an event the continuing appropriation existing in the Public School Code, which provides the balance of the money requirements, may require the following modified method of payment:

[19] 24 P. S. § 10-1068.
[20] 24 P. S. § 9-924.

On the procedure for presenting requisitions to the State Treasurer for the reimbursement of travel expenses, § 1068[21] of the School Code is clear:

> "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 Auditor General, upon the production to him of itemized vouchers in the usual manner."

However, no procedure relating to the presentation of requisitions by County Boards of School Directors for the expenses of regular meetings is set forth in any of their "salary or emolument" provisions in the School Code. Consequently, in this case, with respect to expenses for which no biennial appropriated funds are authorized and available, the procedure described in § 1501 of The Fiscal Code governs.[22]

> "For money appropriated for a purpose without designation of the expending agency, the Department of the Auditor General shall prepare requisitions."

In connection with the procedure to be followed by the Auditor General, his duties are plainly indicated.[23] He must determine whether the meetings in question have been held and the travel in question has been both "necessary" and "actual", whether the requisitions for reimbursement have been properly executed and, if satisfied, must then issue warrants upon the State Treasurer for payment.

A more difficult question arises when there are insufficient funds, in the form of surplus or borrowed amounts, for the expenditures authorized by the continuing appropriations of the Public School Code herein involved. This question involves the determination of the funds out of which the State Treasurer will make payment of the travel and meeting expenses in question.

The Constitution requires that a reserve shall be maintained for the amount required for current expenses.[24] A preferred claim on state revenues has thereby been created for appropriations for current expenses in favor of which, if need be, non-preferred appropriations will abate proportionately.[25] Our courts have held that such "ordinary

[21] 24 P. S. § 10-1068.
[22] Act of April 9, 1929, P. L. 343, as last amended by the Act of August 21, 1953, P. L. 1331, § 1; 72 P. S. § 1501.
[23] 72 P. S. § 1502.
[24] Pennsylvania Constitution, Art. IX § 13.
[25] *Commonwealth ex rel. Schnader v. Liveright,* 308 Pa. 35, 68, 161 Atl. 697 (1932).

current expenses would . . . [include] . . . the expenses . . . of the public schools."[26] Since it is clear that the travel and meeting expenses in question are expenses of the public schools, the continuing appropriation for such expenses have the priority status of an appropriation for a current expense.

It is our opinion, therefore, that if sufficient revenues in the form of surplus or borrowed amounts are not available to pay the travel and meeting expenses described, they shall be paid out of funds which have been reserved by the Constitution for the current expenses of the Government of the Commonwealth.

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

(1) The insufficient appropriations herein involved do not in any degree affect the provisions of the Public School Code establishing the duties and compensation therefor of the named officers and, as a result, do not affect the right of the above named public officers to recover their legal salary and compensation for the services actually performed.

(2) Such unrepealed and unmodified travel and meeting compensation provisions form a part of a permanent, continuing statute, the Public School Code of 1949, and as such constitute a continuing "appropriation made by law" to pay these travel and meeting expenses to which the above named officials are entitled.[27]

(3) After the biennially appropriated sums are exhausted, and if sufficient revenues in the form of surplus or borrowed amounts are not available to pay the travel and meeting expenses in question, they shall be paid out of funds which have been reserved by the Constitution for the current expenses of the government of the Commonwealth.

We are, therefore, of the opinion and you are accordingly advised that your department may legally allocate the travel and meeting expense moneys in question in accordance with the amounts which are set forth in the Public School Code of 1949.

Very truly yours,

DEPARTMENT OF JUSTICE,

MORRIS J. DEAN,
Deputy Attorney General,

THOMAS D. MCBRIDE,
Attorney General.

[26] Id at 67.

[27] A similar conclusion as to the first two points was reached in 1895-96 Op. Atty. Gen. 362, (1878).

OFFICIAL OPINION No. 102

Department of Banking—Credit Union Act of Pennsylvania—Groups within field of membership under act.

Credit unions incorporated under the Credit Union Act of Pennsylvania, the Act of May 26, 1933, P. L. 1076, as amended by the Act of May 18, 1937, P. L. 713, may include within their field of membership the following groups:

(1) Individuals who were formerly eligible for membership by reason of employment and who were members of the credit union as of the date of the termination of that employment, but who are now retired.

(2) Individuals who are employees of the credit union itself and are not otherwise presently eligible for membership.

(3) Individuals who are within the families of persons who, in their own right, are eligible for membership.

The Department of Banking has the administrative authority to promulgate regulations defining the rights of members in credit union associations in order to further the purposes and intent of credit union associations, as set forth in the act.

Harrisburg, Pa., April 22, 1958.

Honorable Robert L. Myers, Jr., Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether credit unions incorporated under the Credit Union Act of Pennsylvania[1] may include within their field of membership the following groups:

1. Individuals who were formerly eligible for membership by reason of employment and who were members of the credit union as of the date of the termination of that employment, but who are now retired.

2. Individuals who are employees of the credit union itself and are not otherwise presently eligible for membership.

3. Individuals who are within the families of persons who, in their own right, are eligible for membership.

You have also asked to be advised whether in the event that any or all of the groups enumerated in the preceding paragraphs may be included in the field of membership of a credit union, the Secretary of Banking has the administrative authority to designate such persons as associate members only and to require the Articles of Incorporation to restrict the activities of such associate members.

[1] Act of May 26, 1933, P. L. 1076, as amended by the Act of May 18, 1937, P. L. 713, 14 P. S. § 201-226.

Specifically, you have asked whether the activities of such associate members may be limited to the purchase and withdrawal of shares and to the borrowing from the credit union on the security of such shares or the shares of other members who may become co-makers, endorsers, guarantors or sureties on such loans.

Lastly you have inquired as to whether your department may require that the Articles of Incorporation of a credit union prohibit an associate member from serving as an officer, director or member of any committee in the credit union.

In § 1 of the Credit Union Act of Pennsylvania[2] the Legislature has indicated that the purposes of a credit union are "twofold": (1) to promote thrift among its members and (2) to provide a source of credit to them at legitimate rates of interest. In order to accomplish these purposes, members of the credit union, who invest their savings in the organization, must have confidence in the ability of the credit union to pay an adequate return on their investments while maintaining a high degree of safety. Members must also be assured of a ready source of credit available to them in case of personal need.

The Legislature has seen fit to promote these objectives by specifically limiting the scope of eligibility for membership in the credit union to those individuals and organizations that have a "common bond of association by reason of occupation within a well defined neighborhood, community or rural district."[3]

These limitations on membership in credit unions have never been interpreted by the courts of this Commonwealth or any other state. We are compelled, therefore, to turn to the statute itself and, bearing in mind the purposes of the act as previously set forth, to determine whether each of the groups enumerated by you in your request meets the requirements of § 4 of the act.

Individuals, both employers and employees, associated in a single enterprise located in one plant or personnel of one branch of the enter-

[2] Act of May 26, 1933, P. L. 1076, § 1, 14 P. S. § 201.

[3] "Credit union membership shall consist of the incorporators and such other persons as may be elected from time to time to membership and who subscribe to at least one share of the capital stock and pay the initial installment thereon, together with the entrance fee. Organizations incorporated or otherwise composed principally of the same general group as the credit union membership may be members. Credit union organizations shall be limited to groups of both large and small membership having a common bond of association by reason of occupation within a well defined neighborhood, community, or rural district." (Act of May 26, 1933, P. L. 1076, § 4, as amended by the Act of May 18, 1937, P. L. 713, § 1, 14 P. S. § 204.)

prise would obviously meet the limitations of a "bond of association by reason of occupation" and geographical area. Organizations, such as union locals composed of employees of single plants, would also come within the statutory limits. Individuals, both employers and employees, who are associated in different enterprises but employed in the same industry or type of endeavor located in one geographical area would, of course, be eligible for membership as would organizations composed of such individuals. These individuals and groups not only are located in the same geographical area, but the "bond of association" is also present. Each potential member knows that all of the other participants are regularly employed under the same conditions as he. He then has the sense of security necessary to encourage him to buy shares in the organization.

Do retired personnel have that "bond of association"? A retired person has been defined as "one who has ended his regular activity because of age or health by arrangement with his employer."[4] The retired individual may have worked many years in the industry. With the expansion of pension plans, he might still be receiving income from his former employer. Generally he would tend to think of himself still as associated with the working force or the management of the firm. His sympathies and loyalties after years of service would enable him to have a bond of association by reason of occupation that would make him eligible to retain his membership. It is a simple question of fact as to whether he is still within the geographical area.

The extension of membership to employees of the credit union itself presents a somewhat different problem. Essentially, the question is whether by reason of their intimate knowledge of the credit union association, and their consequent knowledge of the problems, attitudes and loyalties of members, individuals employed by the credit union itself possess "the bond of association by reason of occupation." Such individuals may have obtained their credit union employment in either of two ways. Some will have been hired directly by the credit union and never held membership in the credit union while previously employed. Others will have previously been members of the credit union, or would have been eligible by reason of employment had the credit union been in existence, who were asked to relinquish their regular employment so that they could work full time for the credit union association. While individuals in the former group could not be held to have ever achieved the common bond of association by reason of occupation, those individuals in the latter group could not

[4] *Watson v. Brower,* 24 N. J. 210, 131 A. 2d 512, 515 (1957).

be said to have lost the common bond of association merely by transferring to the association itself. It is these individuals who do possess a real knowledge of the problems, attitudes and loyalties of members. They have retained their bond of association by reason of occupation which would make them eligible to retain their membership.

Individuals who are within the immediate families (mother, father, brother, sister, spouse or child) of persons who, in their own right, are eligible for membership and who share the same domicile are within one economic unit. Their economic status is also controlled, at least in part, by the fact that one of the household either presently or formerly gained his livelihood from the enterprise involved. The bond of association by reason of occupation is sufficiently elastic to encompass members of the immediate families of persons who, in their own right, are eligible for membership. The problem of geographical location does not arise since membership is to be limited to those of the immediate family who share the same domicile.

While it is our opinion that retired personnel and employees of the credit union association may retain their membership and that the immediate family may become members in credit unions, we are not unmindful of the risks and dangers of our holding. We are aware of the fact that elements of uncertainty in credit investigations and collections are introduced. Working members will no longer have a definite knowledge of the financial position of every other member. The retired personnel and the family members may more readily move out of the geographical area. Collections may be more hazardous. Credit union employees have an opportunity to work with the books and records of the association. Thus, the risks of fraud and defalcation become much greater.

But the inclusion of these groups within the field of membership will enable the association to grow into maturity serving all persons who come within its legitimate sphere of interest. Individuals who gain a technical knowledge of the workings of the credit union will be eligible to hold full time supervisory positions. Working members need not be subject to these risks without limit or restriction. The Department of Banking has administrative authority to promulgate regulations in this area.

The power of the Department of Banking to supervise and regulate every aspect of credit union activity is explicit in the act. Section 2 provides that the department must approve the articles of incorpora-

tion before they may be sent to the Department of State, not only as to form but as to whether the purposes of the act are being met. The proposed by-laws of the association must also be scrutinized by the department. The same section gives the department the same power over any amendments to the articles of incorporation or to the by-laws. "By-laws so made, amended or altered shall not become operative, however, until approved by the Department of Banking" is the language of § 3(X) of the act. Section 5 of the act provides that the credit unions shall be under the supervision of the Department of Banking. Indeed, an examination of the act reveals that almost every section dealing with the activities, rights and duties of the credit unions stipulates that the department shall supervise and regulate.

Therefore, we point out to you that while your department must consider retired personnel, employees of the credit union formerly eligible by reason of occupation, and the immediate families of members, within "the bond of association" and therefore eligible for membership, your department may issue regulations which restrict the rights and privileges of these individuals so that the intent and purpose of credit unions as stated in the act will not be thwarted.

The particular restrictions which you have suggested to us are reasonably related to the maintenance of the intent and purposes of the credit union act. They may be applied to retired personnel, employees of the credit union formerly eligible by reason of occupation, or the immediate families of members, as the Secretary of Banking, in his discretion, deems proper.

The designation of the individuals in the three groups as "associate members", if the designation enables the Secretary to better administer the act, is legally unobjectionable. However, the classification of all three groups within a single category may reduce the flexibility that the department needs to deal with problems not common to all.

Therefore, it is our opinion, and you are accordingly advised that credit unions incorporated under the Credit Union Act of Pennsylvania may include within their field of membership the following groups:

1. Individuals, who were formerly eligible for membership by reason of occupation and who were members of the credit union as of the date of the termination of that employment, but who are now retired.

2. Individuals who are presently employees of the credit union association, but who were formerly eligible for membership by reason of occupation and who were members of the credit union as of the date of their employment by the credit union association.

3. Individuals in the immediate families of persons who, in their own right, are eligible for membership, and who share the same domicile.

You are further advised that the Department of Banking has the administrative authority over credit union associations whereby the department may promulgate regulations defining the rights of members in credit union associations in order to further the purposes and intent of credit union associations as set forth in § 1 of the Credit Union Act of Pennsylvania.

Very truly yours,

DEPARTMENT OF JUSTICE,

SIDNEY MARGULIES,
Deputy Attorney General,

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 103

Department of Welfare—Propriety of paying private nursing home out of appropriation for reimbursement to county institution districts—Collection by private nursing home for care of boarded out mental patients—General Appropriation Act of 1957.

Payment to a private nursing home for the care of boarded out mental patients should be charged against the State hospital appropriation and not against an appropriation for the reimbursement to county institution districts. The State Hospital should then pay the nursing home $5.00 per day per patient and receive in return all moneys (not exceeding $5.00 per day per patient) collected by the nursing home on account of patient care from sources named in the contract between the hospital and the home.

Harrisburg, Pa., April 30, 1958.

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

Sir: You have requested the opinion of this department concerning the validity of Voucher Transmittal No. 164, which requests payment of $6,915.00 to Wissahickon Hall, Inc., a nursing home.

It appears that a contract exists between the Philadelphia State Hospital, a State institution, and Wissahickon Hall, Inc., whereby patients of the State institution are boarded out to the private institution at a prescribed rate. The voucher transmittal in question seeks to charge money due to Wissahickon, on account of the contract, to Account Code 01-21-17-7-260. This code has been assigned to the following appropriation which is contained in the General Appropriation Act of 1957, Act No. 95-A, approved July 19, 1957:

> "Reimbursement to county institution districts for boarded out mental patients and for the care of mentally defective children prior to their admission to State-owned institutions ..... $1,600,000"

You specifically inquire if the contract rates represent a proper charge against the above quoted appropriation or if this money should be taken from the appropriation to the Department of Welfare for the "operation and maintenance" of the Philadelphia State Hospital.

Section 616 of The Mental Health Act of 1951, the Act of June 12, 1951, P. L. 533, as amended, 50 P. S. § 1341, provides for the boarding out of mental patients. Subsection (B) of § 616 states that boarded out patients shall be considered as remaining inmates of the State institution and shall be considered as on leave of absence.

Because Wissahickon Hall, Inc., is not a county institution district, it is not proper to pay such institution out of an appropriation designed to reimburse such a district. Since the patients who are boarded out to Wissahickon Hall are considered as remaining patients of the Philadelphia State Hospital, payments to Wissahickon for the care of such patients should be charged against the appropriation made for the Philadelphia State Hospital.

Having reached this conclusion we may now turn to your next inquiry. Under the contract in question the Philadelphia State Hospital agreed to pay $5.00 per patient per day as a basic charge for care of patients placed in Wissahickon. However, a provision is included whereby the State Hospital will receive a credit against such payments in the amount of money which Wissahickon is able to collect from or on behalf of the patient. You inquire whether the State Hospital should not pay the full $5.00 per day per patient and then

collect the money which Wissahickon has received from or on behalf of the patient. You further ask whether these collections should not then be paid into the General Fund where they will accumulate with all other collections made by the State Hospital until such time as the total collections exceed an amount specified in the General Appropriation Act. Any such excess would then be available to the State Hospital as an additional appropriation.

In our Official Opinion No. 11, 1957 Op. Atty. Gen. 71, we advised the Secretary of Welfare that moneys collected from employees of the Eastern Pennsylvania Psychiatric Institute for meals served to them at the Institute's cafeteria must be paid into the General Fund. We ruled that when the Institute's total collections exceeded the amount set in the General Appropriation Act, Act No. 95-A, all such surplus collections would be available to the Institute as an appropriation. In Official Opinion No. 50, 1958 Op. Atty. Gen. 1, we reached a similar conclusion as to funds paid by the Blue Cross to a State hospital on account of treatment given to patients. We believe that the principles set forth in these opinions govern the instant problem.

It is, therefore, the opinion of this department and you are accordingly advised that payments to Wissahickon Hall, Inc., for boarded out mental patients' care should be charged against the appropriation of the Philadelphia State Hospital. Notwithstanding the contract provisions, the State Hospital should pay Wissahickon $5.00 per day per patient. Wissahickon should then pay the State Hospital all sums (not exceeding $5.00 per day per patient) collected on account of patient care from the sources named in the contract. This money will then be paid into the General Fund and when all collections so paid exceed the amount designated in Act No. 95-A, the excess shall be made available to the State Hospital as an appropriation.

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 104

Rockets and missiles—Launching in violation of the fireworks law—Pennsylvania State Police—Adoption of rules and regulations.

The launching of rockets or missiles by school-supervised students and other persons is in violation of the fireworks law, the Act of May 15, 1939, P. L. 134, unless a permit for a supervised public display is obtained from the governing body of the city, borough, town or township in which the launching is scheduled to take place, and the Pennsylvania State Police has authority to adopt and enforce rules and regulations with regard to the storage, use and keeping of combustible, explosive and inflammable substances or materials.

Harrisburg, Pa., April 30, 1958.

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

Sir: You have requested an opinion as to whether the launching of rockets or missiles by school-supervised students and other persons is in violation of the fireworks law, the Act of May 15, 1939, P. L. 134, as amended, 35 P. S. §§ 1271-1277. Further, you ask whether there is any other act which would give your department authority to adopt rules and regulations governing the launching of such rockets or missiles.

Your request calls attention to recent actions of student groups within the Commonwealth in respect to the launching of rockets or missiles. For example, we are informed that one such group is presently engaged in constructing a rocket measuring eight feet in length, approximately eight inches in diameter, equipped with an engine, radio transmitter and parachute for safe return to earth. In addition to firings by school-sponsored groups, numerous instances of "free-lance" launchings have occurred in recent months, within and without the Commonwealth, several of which have caused serious personal injury and maiming of the youths so engaged.

Section 2 of the fireworks law, 35 P. S. § 1272, prohibits the sale, offering or exposing for sale, use or exploding of any fireworks. Section 1 of the law, 35 P. S. § 1271, provides:

> "The term 'fireworks' shall mean and include any combustible or explosive composition or any substance or combination of substances, or, except as hereinafter provided, any article prepared for the purpose of producing a visible or an audible effect by combustion, explosion, deflagration or detonation, and shall include blank cartridges and toy cannons in which explo-

> sives are used, the type of ballons which require fire underneath to propel the same, firecrackers, torpedoes, skyrockets, Roman candles, Daygo bombs, sparklers or other fireworks of like construction, and any fireworks containing any explosive or flammable compound or any tablets or other device containing any explosive substance. * * *"

The constitutional validity of the fireworks law has recently been upheld by the Superior Court of Pennsylvania in *Commonwealth v. Bristow,* 185 Pa. Super. 448, 138 A. 2d 156 (1958). That case sustained a prosecution for selling toy cannons in which explosives are used to produce a visible or an audible effect. In the course of the opinion, the Superior Court stated:

> "Like all legislation, the Fireworks Law must be interpreted in the light of its general purposes. It was enacted under the general police power of the Commonwealth for the protection of the health, safety, and general welfare of the public. * * *" (138 A. 2d 156, 159)

The question at hand is whether the language of the fireworks law proscribes rocket and missile launchings. We believe it does.

To hold that rockets and missiles are not contained in the definition of "fireworks" supra, requires a conclusion that the specific articles and substances covered by the act were frozen as of May 15, 1939, the date of passage of the act, despite the broad language used, and that subsequent development, sale and/or use of devices covered by this language were not within the prohibitions of the act. In view of the broad purpose of the act cited, supra, we do not believe that application of the act can be so restricted. The specific purpose was to prohibit the sale or use of articles which are combustible or explosive or the purpose of which is to produce a visible effect. Rockets and missiles fall within this prohibition.[1]

Section 2 of the fireworks law, supra, after prohibiting the sale, offering or exposing for sale, use or exploding of any fireworks, however, permits supervised public displays of fireworks:

> "* * * Provided, That the governing body of any city, borough, town or township shall have power, under reasonable rules and regulations adopted by it, to grant permits for supervised public displays of fireworks to be held therein by municipalities, fair associations, amusement parks and other organizations or groups of individuals. Every such display shall be handled by a competent operator to be approved by

[1] The term "skyrocket" also specifically applies.

> the governing body of the municipality in which the display is to be held, and shall be of such a character and so located, discharged or fired as in the opinion of the chief of the fire department or such other officer as may be designated by the governing body of the municipality after proper inspection shall not be hazardous to property or endanger any person or persons. Application for permits shall be made in writing at least fifteen (15) days in advance of the date of the display. After such privilege shall have been granted, sales, possession, use and distribution of fireworks for such display shall be lawful for that purpose only. No permit granted hereunder shall be transferable."

Under this provision it is possible for groups, clubs or school-supervised organizations to launch rockets and missiles provided a permit is obtained from the appropriate municipal authority.

It is apparent, however, that the above provisions of the fireworks law, while prohibiting the actual launching of a rocket or missile, does not proscribe the collection and assembly of materials and component parts of such rockets and missiles.

Section 1 of the Act of April 27, 1927, P. L. 450, as amended, 35 P. S. § 1181, authorizes your department to "adopt and enforce rules and regulations governing the having, using, storage, sale, and keeping of gasoline, naphtha, kerosene, or other substances of like character, *blasting powder, gunpowder, dynamite, or any other inflammable or combustible chemical products or substances or materials*". Under this section your department may promulgate reasonable rules and regulations covering the storage, use and keeping of those combustible or inflammable chemicals, substances or materials used in the construction of rockets and missiles for the purpose of providing propulsion for such rockets and missiles. We do not deem it advisable at this time to enumerate the nature and extent to which such rules and regulations may be promulgated to remedy or control the hazards and ill-effects resulting from construction and assembly of rockets and missiles. These questions involve administrative problems. Prior to final implementation, however, such rules and regulations should be forwarded to this department for review as to legality.

It is, therefore, our opinion and you are accordingly advised that the launching of rockets and missiles is forbidden by the fireworks law[2] unless a permit for a supervised public display is obtained from the

[2] Our conclusion, of course, does not apply to those launchings conducted by officials of the Federal government under Federal authority.

governing body of the city, borough, town or township in which the launching is scheduled to take place. Further, with regard to the storage, use and keeping of combustible, explosive and inflammable substances or materials, your department is authoirzed to adopt and enforce rules and regulations[3] under the provisions of the Act of April 27, 1927, supra.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 105

Agreement—Right of way over State game land—Gaining access to coal on private property—Pennsylvania Game Commission—Section 906 of The Game Law.

Under § 906 of The Game Law, the Act of June 3, 1937, P. L. 1225, the Game Commission may grant a right of way for a road over State game land and may allow less than $500 worth of coal to be removed from State game land without advertising and with the Governor's approval, but it may not allow a private coal operator to construct buildings and install equipment on State game land in order to remove coal from adjacent private land.

Harrisburg, Pa., April 30, 1958.

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

Sir: You ask whether the Game Commission may legally enter into a license agreement with a coal operator, who owns lands adjacent

[3] This opinion in no way conflicts or is intended to conflict with the powers given to the Department of Labor and Industry to regulate the manufacture, process and storage of explosives, by the Act of July 1, 1937, P. L. 2681, §§ 1-14, as amended, 73 P. S. §§ 151-163, and to the Department of Mines to regulate explosives and blasting operations in connection with anthracite mining operations by the Act of June 2, 1891, P. L. 176, rules 26-36, 52 P. S. §§ 421-432, in connection with strip mining operations by the Act of June 27, 1947, P. L. 1095, § 20, 52 P. S. § 681.20, and in connection with bituminous mining operations by the Act of June 9, 1911, P. L. 756, §§ 1-34, as amended, 52 P. S. §§ 1221-1237.

to State game lands, for his use of some three acres of State game lands in order to gain access to and to mine the coal on his own property.

This use would involve a road right of way, construction of necessary buildings and installations for deep mine operations, and removal of coal valued at something less than five hundred dollars from one acre of the State game lands. All buildings and installations are to be removed at the operator's expense when the lease terminates.

Section 906 (e) of The Game Law, the Act of June 3, 1937, P. L. 1225, as amended, 34 P. S. 1311.906, authorizes the Game Commission to grant "licenses for rights of way for roads," and to charge "such remuneration and damages as the commission deems the conditions and circumstances warrant".

Subsection (c) authorizes the Game Commission to sell or lease coal on game lands, with the Governor's approval, no advertising being required if the value of the coal does not exceed five hundred dollars.

This leaves as the only remaining question the Commission's authority to permit construction of buildings and installation of equipment. This is not among the grants of leasing authority specifically enumerated in § 906. However, § 906 (c), since it authorizes sale of the coal under Commission land, carries with it the right to erect such installations as are necessary to carry out the removal of said coal and, therefore, permits erection of a tipple, fan house and other indispensable temporary structures appurtenant to this operation: *Commonwealth ex rel. Cartwright v. Cartwright,* 350 Pa. 638, 644, 645, 40 A. 2d 30 (1945). However, this section does not permit any construction on State game land for the purpose of removing coal from adjacent privately owned land.

The fact that this lease would provide substantial employment and that it would be highly profitable to the Game Commission without detriment to wildlife is a matter which may influence the Game Commission in its decision, but it is not pertinent to the legal questions involved. Under the statute the Commission has authority to grant the license upon such terms as it considers appropriate; and, therefore, the question of a wheelage charge is a matter for Commission discretion. Removal of the coal on the game land should be treated as a sale and handled accordingly.

You are accordingly advised that the Commission may grant a right of way for a road over State game lands to a private coal operator but may not allow said operator to construct buildings and install equipment thereon for the purpose of removing coal from adjacent private land. Further, the Commission may allow the removal of less than five hundred dollars worth of coal from State game land with the Governor's approval and without advertising.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 106

State employees—Hourly employees—Leaves of absence—Annual leave—Meritorious leave—Sick leave—Holidays with pay—The Administrative Code of 1929.

Under § 222 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, hourly employees are not entitled to sick (meritorious) leave with pay, but may receive one day (eight hours) of leave for every two hundred hours that they work. This may be used for vacation, illness or any other purpose. Hourly employees may not be given holidays with pay, but are entitled to pay only for those hours during which they are working, except in the case of leaves of absence.

Harrisburg, Pa., May 2, 1958.

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

Sir: You have requested the opinion of this department concerning the rights of hourly employees of the Department of Highways. You desire to know (1) if such employees are entitled to sick leave with pay, and (2) whether such employees may be given holidays with pay on the days when salaried employees of the Commonwealth are not required to work because of a holiday.

Your request indicates that many of the hourly employees of the Department of Highways work as many as two thousand hours during the course of the year[1].

Section 222 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, 71 P. S. § 82, as originally enacted, provided that persons employed for continuous service shall work during prescribed hours. Such employees shall be entitled to fifteen days' leave of absence with pay per year and, in special and meritorious cases, this leave may be extended up to fifteen additional days in the discretion of the department head. The Executive Board may approve still further extensions.

From this section we find that annual and meritorious leaves were granted to employees "if employed for continuous service." This phrase was interpreted by the Executive Board in *Part IV of the Classification and Compensation System and Personnel Service,* as follows (p. 125):

> "F. In no case shall leaves of absence with pay be granted to employees paid on an *hourly,* daily, or weekly basis." (Emphasis supplied)

The same interpretation was placed upon the phrase by this department in our Informal Opinion No. 1043, dated November 8, 1939. There we defined the word "continuous" as being opposed to temporary or per diem service.

Subsequent to these two interpretations of the act, § 222 was amended by the Act of June 14, 1947, P. L. 609, § 1, 71 P. S. § 82. With this latest amendment § 222 now reads as follows:

> "Work-hours and vacations.—Each employe of an administrative department, of an independent administrative board or commission, or of a departmental administrative board or commission, if employed for continuous service, shall work during such hours as the head of the department or the board or commission shall require but not less than thirty-five hours per week. Such employe shall be entitled, during each calendar year, to fifteen days' leave of absence, with full pay, and, in special and meritorious cases where to limit the annual leave to fifteen days in any one calendar year would work peculiar hardships, the extent of such leave with pay may, in the discretion of the head of the department or of the board or commission, be extended, but any such extension shall not

[1] A salaried employee who worked for fifty-two weeks at forty hours per week would work an almost equivalent number of hours.

be for more than fifteen days, except with the approval of the Executive Board, in the case of employes of departments or of independent administrative boards or commissions, and, in the case of employes of departmental administrative boards or commissions, of the departments with which such boards or commissions are respectively connected. *Each employe of an administrative department of an independent administrative board or commission, or of a departmental administrative board or commission, who receives an hourly or per diem wage shall be entitled to one day's leave of absence with pay for each two hundred (200) hours such employe shall work.* This section shall be construed to mean that the pay of such employe shall cease upon the expiration of the granted leave, regardless of his or her continuation thereafter upon the rolls of the department, board or commission. The annual leave of absence with pay shall be exclusive of Saturdays, Sundays and legal holidays." (Italics denotes 1947 amendment)

Following the amendment of the section the Executive Board promulgated *Personnel Policies for Commonwealth Agencies,* dated October 9, 1956. Part III of the order deals with leaves of absence. It is stated therein that employees will be given fifteen days' annual leave, except that nonsalaried employees will receive one day's leave (eight hours) for each two hundred hours worked. Section B of Part III speaks of fifteen days' meritorious leave and lists as one basis for the granting of such leave the serious illness of the employee. This section makes no distinction between salaried and hourly employees.

While the Executive Board Order may be construed to grant meritorious leave to all employees irrespective of the distinction between salaried and hourly employees, the act itself cannot be so interpreted. Prior to the 1947 amendment, it was clear that hourly employees were not entitled to any leave. The 1947 amendment made provisions for the granting of one day of leave for each two hundred hours of work by each hourly or per diem employee. The amending language followed the complete coverage (including annual and meritorious leave) given to salaried employees. It left the prior language intact and established a completely new provision for hourly and per diem employees. This new provision did not incorporate the previous meritorious leave provisions either explicitly or by reference. It merely set forth that hourly or per diem employees would receive one day's leave for each two hundred hours' work. Although it may appear that this is an inequitable distinction we must bear in mind that the prior law was even less generous to the hourly employees. The Legislature could have given both annual and meritorious leaves to hourly employees. It

did not see fit to do so and we may not substitute our feelings for the Legislature's intention.

You next inquire whether employees may receive holiday leave with pay on those holidays when salaried employees are not required to work. A salaried employee receives an annual wage. In return for this he must be present at all times where his office or place of employment is open for work. This has been designated by the Legislature to include all days except Saturdays, Sundays and legal holidays. If a salaried employee works on all days during which the office is open he has fulfilled his contract and is entitled to his annual wage. On the other hand, the hourly employee is paid not by the year, but for each hour that he works. His work may be required on Saturdays, Sundays and holidays as well as on the other days of the year. If work is available on these weekends and holidays and the employee works, he will be paid for each hour that he works. If work is not available for him on a given day, he cannot work and cannot be paid whether that day is a normal working day or a holiday.

The distinction lies in the basic time unit. The salaried employee's time unit is a year. This is specifically defined to exclude certain days. The hourly employee's basic time unit is the hour, and there is no exclusion provided by the Legislature.

It is, therefore, our opinion and you are accordingly advised that hourly employes are not entitled to sick (meritorious) leave with pay. They may receive one day (eight hours) of leave for every two hundred hours that they work. This may be used for vacation, illness or any other purpose. Secondly, hourly employees may not be given holidays with pay, but are entitled to pay only for those hours during which they are working (except in the case of leaves of absence, as above).

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 107

Departmental agencies receiving separate appropriations or self-supporting—Sharing cost of administrative and accounting services—Department of Labor and Industry.

Agencies receiving separate appropriations and self-supporting agencies within a department may be charged with a fair share of administrative and accounting costs expended in their behalf. Costs should be recovered from the specific appropriations made to these agencies.

Harrisburg, Pa., May 9, 1958.

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

Sir: We have your request for legal advice relative to the cost distribution for administrative and accounting services with regard to the following agencies and funds which receive separate appropriations or are self-supporting:

1. Bureau of Social Security for Public Employes which receives $380,000.00 under the General Appropriation Act of 1957, Act No. 95-A.
2. Fair Employment Practice Commission which receives $225,000.00 under the General Appropriation Act of 1957, ibid.
3. Advisory Board on Problems of Older Workers which receives $100,000.00 under the General Appropriation Act of 1957, ibid.
4. State Workmen's Insurance Fund which is self-supporting.

You ask to be advised as to whether you may apportion on a fair and reasonable basis the administrative and accounting services performed for these agencies by your department, the expense of which is not shared by them. You plan to provide for a pro rata sharing of these services based on the number of employees in the department as compared with the number in each agency.

Since different Acts of the General Assembly are involved, we will take up in the order listed above, the question raised with regard to each agency.

1. Social Security for Public Employes

The appropriation of $380,000.00 is worded as follows:

"Performance of powers and duties relating to social security in connection with the Federal

Social Security Act as provided in the act of January 5 1952 (P L 1833) as amended by the act of June 1 1956 (P L 1973) ..... 380,000"

The Act of January 5, 1952, P. L. (1951) 1833, 65 P. S. §§ 201 to 209, creates what is termed a State agency consisting of the Secretary of Labor and Industry. Section 7 of the act, as amended by the Act of June 1, 1956, P. L. (1955) 1973, 65 P. S. § 207, creates a special fund in the State Treasury known as the Contribution Fund. If this appropriation was made to the Contribution Fund, it would be subject to the restrictions contained in the Act of 1952, supra; but since it was made from the General Fund to the Department of Labor and Industry, it may be used in the performance of powers and duties relating to social security in connection with the Federal Social Security Act including administrative and accounting services.

2. Fair Employment Practice Commission

This appropriation of $225,000.00 is set forth in the General Appropriation Act of 1957 as follows:

"The work of the Fair Employment Practice Commission as provided in the act of October 27 1956 [sic] (P L 744) ..... $225,000"

This Commission was created by the Act of October 27, 1955, P. L. 744, 43 P. S. §§ 951 to 963, as a departmental administrative commission in the Department of Labor and Industry. It is vested with all the powers imposed upon departmental administrative boards and commissions under the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. §§ 51 to 732, known as The Administrative Code of 1929, and is subject to all the provisions of such Code which apply generally to departmental administrative boards and commissions. Section 503 of The Administrative Code of 1929, supra, 71 P. S. § 183, provides that such departmental administrative commissions shall exercise their powers and perform their duties independently of the heads or any other officers of the respective administrative departments with which they are connected; but, in all matters involving the expenditure of money, all such departmental administrative commissions shall be subject and responsible to the departments with which they are respectively connected.

Section 501 of said Code, 71 P. S. § 181, provides for the coordination of work and the cooperation of the various State agencies in the use of employees, facilities and equipment.

Since there are no restrictions in the appropriation act or in the act creating the Commission, we are of the opinion and you are accordingly advised that you have the authority to apportion on a fair and reasonable basis the expenses of the administrative and accounting services which are rendered by your department in behalf of the Fair Employment Practice Commission.

3. Advisory Board on Problems of Older Workers

The appropriation of $100,000.00 to the Advisory Board on Problems of Older Workers appears in the General Appropriation Act of 1957 as follows:

> "The work of the Advisory Board on Problems of Older Workers as provided in section 2209 of The Administrative Code of 1929 as amended by the act of April 11 1956 (P L 1443) ..... 100,000"

This Advisory Board on Problems of Older Workers was created by the Act of April 11, 1956, P. L. (1955) 1443, which amended § 203 of The Administrative Code of 1929, supra, 71 P. S. § 63, and added §§ 465, 2209.2 and 2210.1 to the Code, 71 P. S. §§ 175, 569.2 and 570.1. Since there are no restrictions in the act creating the Advisory Board on Problems of Older Workers or in the General Appropriation Act of 1957, we are of the opinion and you are accordingly advised that you have the authority to apportion on a fair and reasonable basis the expenses of the administrative and accounting services which are rendered by your department in behalf of the Advisory Board on Problems of Older Workers.

4. State Workmen's Insurance Fund

The State Workmen's Insurance Fund was created by the Act of June 2, 1915, P. L. 762, as amended, 77 P. S. §§ 201 to 365, and the Fund, by § 3 of said act, 77 P. S. § 221, was to consist of certain sums to be paid by employers for the purpose of insuring such employers against liability under Article III of The Pennsylvania Workmen's Compensation Act, the Act of June 2, 1915, P. L. 736, as amended, 77 P. S. §§ 1 to 1023. The Fund is administered by the Workmen's Compensation Board. Under § 11 of the Act of June 2, 1915, P. L. 762, as amended, supra, 77 P. S. § 283, the money paid in as premiums by subscribers is made available for the expenses of administering the Fund. This is set forth in part as follows:

> "The money paid in premiums by subscribers is hereby made available for the expenses of administering the fund, * * *"

This clause is sufficient authority to permit allocating part of your administrative costs to the State Workmen's Insurance Fund.

By way of summation, we are of the opinion and you are accordingly advised that you may charge the Bureau of Social Security for Public Employes, the Fair Employment Practice Commission, the Advisory Board on Problems of Older Workers, and the State Workmen's Insurance Fund, which are agencies within your department, with a fair share of administrative and accounting services rendered in their behalf. The costs of these services should be recovered from the specific appropriations made to these agencies.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 108

Taxation—Liquid fuels—Exemption—Federal Reserve Banks—Liquid Fuels Tax Act.

Federal Reserve Banks are exempt from the Liquid Fuels Tax Act, the Act of May 21, 1931, P. L. 149.

Harrisburg, Pa., May 12, 1958.

Honorable A. Allen Sulcowe, Acting Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: Your office has requested this department to render an opinion concerning the eligibility of Federal Reserve Banks to secure an exemption from the Liquid Fuels Tax Act.[1] Specifically, you have asked whether Federal Reserve Banks are covered by the following provision in the Act:

[1] The Act of May 21, 1931, P. L. 149, as amended, 72 P. S. §§ 2611a-2612.

> "* * * excepting liquid fuels delivered to the United States Government on presentation of a duly authorized United States Government exemption certificate or other evidence satisfactory to the department, * * *."[2]

In Official Opinion No. 19, 1957 Op. Atty. Gen. 97, addressed to the Honorable Gerald A. Gleeson, then Secretary of Revenue, this department advised that the Liquid Fuels Tax Act is not an excise tax but a tax on property. Therefore, the imposition of this tax is directly on the consumer, in this instance, the Federal Reserve Bank.

The Federal Reserve Banks were organized under the Federal Reserve Act;[3] and it is now well settled that the Federal Reserve System was validly created under Article I, § 8, cl. 2 and cl. 5 of the United States Constitution.[4] Section 7 of the Federal Reserve Act[5] provides:

> "Federal reserve banks, including the capital stock and surplus therein and the income derived therefrom, shall be exempt from Federal, State, and local taxation, except taxes upon real estate."

Article I, 8, cl. 18, of the Federal Constitution gives Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." An act of Congress insulating an institution created by it against State and local taxation has been held to be "necessary and proper" within the constitutional powers given above.[6]

The Supremacy clause of the Federal Constitution, Article VI, cl. 2, states that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * *, shall be the Supreme Law of the Land; and the Judges in every State

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[2] Supra, § 4, 72 P. S. § 2611d.

[3] 38 Stat. 251 (1913), 12 U. S. C. §§ 221-531 (1952).

[4] Clause 2, "To borrow Money on the credit of the United States."
Clause 5, "To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;" See *Raiche v. Federal Reserve Bank of New York*, 34 F. 2d 910 (2d Cir. 1929); *Federal Reserve Bank of Minneapolis v. Register of Deeds for Delta County*, 288 Mich. 107, 284 N. W. 667 (1939).

[5] C. 6, § 7, 38 Stat. 258 (1913), 12 U. S. C. § 531 (1952).

[6] *Pittman v. Home Owners' Loan Corp.*, 308 U. S. 21, 32, 60 S. Ct. 15, 84 L. Ed. 11 (1939); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95, 102, 103, 62 S. Ct. 1, 86 L. Ed. 65 (1941); *Carson v. Roane-Anderson Co.*, 342 U. S. 232, 234, 72 S. Ct. 257, 96 L. Ed. 257 (1951).

> shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Thus any provision of any Commonwealth statute inconsistent with or repugnant to a Federal statute enacted under the authority of the Federal Constitution is of no effect. Because of the view we take here, it is not necessary for us to decide if Federal Reserve Banks fall within the exception of § 4 of our tax act.

Therefore, it is our opinion and you are accordingly advised that the Federal Reserve Banks are exempt from the imposition of the Pennsylvania Liquid Fuels Tax.

Very truly yours,

DEPARTMENT OF JUSTICE,

SIDNEY MARGULIES,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 109

School districts—Compulsory business management procedures—Payment of teachers' salaries—Deficit financing—Excessive indebtedness—Unauthorized expenditures—Withholding State funds—Public School Code of 1949—Constitution of Pennsylvania.

The Superintendent of Public Instruction may (1) refuse to authorize payment of State funds to a school district until the district provides for the proper payment of teachers' salaries or may use such withheld funds to pay the teachers and (2) may withhold State funds until the district complies with those provisions of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, and the Pennsylvania Constitution, Article IX, § 8, relating to deficit financing, excessive indebtedness and unauthorized expenditures.

Harrisburg, Pa., May 12, 1958.

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

Sir: You asked to be advised as to what authority and what responsibility the Superintendent of Public Instruction has in the

matter of compelling a school district to adopt and to practice proper business management procedures in the administration of its schools, particularly (1) with respect to compelling payment of teachers' salaries; (2) with respect to compelling a school district to cease its practice of deficit financing; (3) with respect to incurring indebtedness in excess of the constitutional and statutory debt limitations; and (4) with respect to expending schools funds for purposes not authorized by law.

1. It is mandatory and imperative that school teachers be paid and be paid on time as per their agreement with the school district. Section 1142 of the Public School Code of 1949, Act of March 10, 1949, P. L. 30, 24 P. S. § 11-1142, provides:

> "Except as hereinafter otherwise provided, all school districts * * * *shall* pay all regular and temporary teachers, * * * the following minimum salaries and increments:
>
> * * * * * * * *"
>
> (Emphasis supplied)

Section 1121 of the Code, supra, 24 P. S. § 11-1121, requires a contract between a teacher and a school district to include a provision for monthly or semi-monthly payment of compensation. Section 1155, 24 P. S. § 11-1155, makes the payroll obligations of a school district preferential claims and authorizes the school board to negotiate short term loans if necessary to meet these obligations. Section 2519, 24 P. S. § 25-2519, finally, authorizes the Superintendent of Public Instruction to have payment of state funds to a school district withheld for any school year in which the school district has failed or refused to pay the full amount of minimum salaries and to continue having such funds withheld until the school district meets its obligations.

You are advised that it is within your discretion to refuse to authorize the payment of any amount payable to a school district and to continue to withhold such requisitions until provisions satisfactory to you have been made by the school district for the payment of the minimum salaries and increments. Your discretion may be exercised by requiring that either the payments to the teachers be paid in full before you release the money or by deciding that the payments be made by you to the school teachers out of the moneys withheld.

Points 2, 3, and 4 may be considered together.

Article IX, § 8 of the Constitution of Pennsylvania, provides:

> "The debt of any * * * school district, * * * except as provided herein * * * shall never exceed seven (7) per centum upon the assessed value of the taxable property therein, nor shall any * * * district incur any debt, or increase its indebtedness to an amount exceeding two (2) per centum upon such assessed valuation of property, without the consent of the electors thereof at a public election in such manner as shall be provided by law. * * *"

The words "debt and indebtedness" used in this section include all contractual obligations and have no technical meaning. They include all floating debts and are not restricted to bonded indebtedness: *Waters v. Tamaqua Borough,* 19 Dist. 1075 (1910); *Appeal of the City of Erie,* 91 Pa. 398 (1879), and *Keller v. Scranton,* 200 Pa. 130, 49 Atl. 781 (1901).

Without repeating verbatim those sections of the Public School Code of 1949, supra, which are relevant, we believe that the Constitution and the Code positively prohibit deficit financing[1], the incurrence of excessive indebtedness[2] and the expenditure of school funds for purposes not specifically authorized by law[3]. In enforcing these prohibitions the Superintendent of Public Instruction has the duty of requiring annual financial reports of school districts to be furnished, including a list of the amount of bonds and other indebtedness, and may withhold state funds from the district until the required information is received[4]. He may also withhold such funds where the district has failed to pay or provide for payment of indebtedness upon maturity[5]. Finally, he must impose such sanction when the district fails to file with the proper authority all reports required by law to be filed and when all of the district's records bearing upon its right to state reimbursement have not been properly submitted[6].

These sections are broad enough in scope to require from the school district compliance with the Superintendent of Public Instruction's request for financial information.

They are also broad enough to allow the Superintendent to withhold all state appropriations that may become due to such school district

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[1] Public School Code of 1949, Act of March 10, 1949, P. L. 30, §§ 635, 639, and 640, 24 P. S. §§ 6-635, 6-639, and 6-640.
[2] id. § 631, 24 P. S. § 6-631; Pa. Const., Article IX, § 8.
[3] id, §§ 609 and 610, 24 P. S. §§ 6-609 and 6-610.
[4] Public School Code of 1949, Act of March 10, 1949, supra, § 633, 24 P. S. § 6-633.
[5] Ibid.
[6] id, § 2552, 24 P. S. § 25-2552.

until such time as he is officially advised that all of the obligations of the school district with reference to any bonds or other evidences of indebtedness that are past due have been met and paid in full or arrangements to pay the same have been satisfactorily made and in the manner approved by the Superintendent. Finally, it is our opinion that these provisions necessarily imply authority in the Superintendent to continue withholding such funds when either the report or audit of a school district shows that the financial practices of the district violate the requirements of the Code with respect to deficit financing, excessive indebtedness and unauthorized expenditures and to condition transmittal of such funds on the discontinuance of such practices.

To sum up, therefore, (1) you may refuse to authorize payment of state funds to a school district until the district provides for the proper payment of teachers' salaries or may use such withheld funds to pay the teachers; and (2) you may have state funds withheld from a school district until the district complies with those provisions of the Public School Code and the Pennsylvania Constitution relating to deficit financing, excessive indebtedness and unauthorized expenditures.

Very truly yours,

DEPARTMENT OF JUSTICE,

ELMER T. BOLLA,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 110

Pennsylvania Industrial Development Authority—Increase of initial loan to local agency—Total loan percentage of cost of particular project—Local agency's investment—Act of May 17, 1956, P. L. (1955) 1609.

Under the Act of May 17, 1956, P. L. (1955) 1609, the Pennsylvania Industrial Development Authority has the power to increase an initial loan to a local industrial development agency provided that the total loan to such agency with respect to such project does not exceed 30% of its cost and provided further that the local industrial development agency has made an investment in such project in an amount not less than 20% of the cost of the project.

Harrisburg, Pa., May 12, 1958.

Honorable William R. Davlin, Secretary of Commerce, Harrisburg, Pennsylvania.

Sir: You have requested the opinion of this department whether under the provisions of the Pennsylvania Industrial Development Authority Act, the Act of May 17, 1956, P. L. (1955) 1609, 73 P. S. §§ 301 to 314, the Pennsylvania Industrial Development Authority has power to increase the amount of a loan made by it to a local industrial development agency under § 6 (a) of the aforesaid act.

Section 6 (a) of the act, 73 P. S. § 306, provides that the Pennsylvania Industrial Development Authority may lend a local industrial development agency an amount not in excess of 30% of the cost or estimated cost of an industrial development project to be established by such agency. As a condition to the making of such loan the State Authority shall first determine that the local agency has sufficient funds or property to provide for 20% of the estimated cost of establishing the project. Under the aforesaid section the State Authority shall also determine that the local agency has obtained from private sources commitments of funds to provide for the remaining cost or estimated cost of the project.

Your request for an opinion of this department is based upon the following specific facts:

On February 19, 1957, the New Bethlehem Area Development Company, a local industrial development agency, received Authority approval of a loan in the amount of $60,000.00 to enable it to establish an industrial development project under § 6 (a) of the Pennsylvania Industrial Development Authority Act. The total cost of the project was $172,000.00. While under the aforesaid act the local agency would have qualified for a loan if its contribution had amounted to only 20% of such cost, it, nevertheless, provided 41% of the project's cost, or $292,000.00.

While the State Authority could have made a loan in an amount not to exceed 30% of the project's cost, or $213,600.00 it, in fact, made a loan which constituted about 8½% of the project's cost.

The New Bethlehem Area Development Company is now desirous of establishing a new project in order to bring to New Bethlehem, a

critical unemployment area, a new industry which is prepared to establish there if facilities are provided. Because of the large contribution which the local agency made toward its first project, it lacks sufficient local funds to establish another project. If, therefore, the amount of the Pennsylvania Industrial Development Authority loan already made to this local agency for its first project could be increased, local funds invested in its first project would be freed and available for reinvestment in a new project.

The power of the Pennsylvania Industrial Development Authority to increase its original loan to the New Bethlehem agency, thereby freeing local funds for the establishment of further projects, must be determined by an examination of the provisions of the Pennsylvania Industrial Development Authority Act and a consideration of the Legislature's intent in enacting this law. It should be recognized that there are no express provisions in the act prohibiting the Authority from increasing its initial loan under § 6 (a) thereof. Section 2 (j) of the act which sets forth a legislative finding is helpful in determining the intent of the Legislature in enacting this law. Section 2 (j), 73 P. S. §302, provides:

> "It is hereby determined and declared as a matter of legislative finding—
>
> * * * * * * *
>
> "(j) That community industrial development corporations in Pennsylvania have themselves invested substantial funds in successful industrial development projects and experience difficulty in undertaking additional such projects by reason of the partial inadequacy of their own funds or funds potentially available from local subscription sources and by reason of limitations of local financial institutions in providing additional and sufficiently sizeable first mortgage loans;"

This finding states, in effect, that the Pennsylvania Industrial Development Authority Act was enacted to enable local industrial development agencies to continue their work of establishing projects where such local agencies are suffering from partial inadequacy of local funds.

If it should be determined that a local industrial development agency could not have an initial loan under § 6 (a) increased, the effect of such determination would be to penalize those local agencies which make the largest contribution of funds. Such agencies would receive a proportionately smaller State loan while making a proportionately larger local contribution as compared with an agency which requested

initially maximum State Authority participation. Such an interpretation could reasonably lead to agencies in all instances requesting Authority loans in maximum amounts.

Furthermore, such a limited interpretation of the act would operate to the detriment of industrial development and would not be consistent with the intent of the Legislature in enacting the Pennsylvania Industrial Development Authority Act. The object of the law is to promote industrial development by local industrial development agencies with the assistance of second mortgage loans by the Pennsylvania Industrial Development Authority. Another object, as stated above, was to encourage industrial development where local agencies have insufficient funds of their own.

In the case under consideration the New Bethlehem Area Development Company is lacking sufficient local funds to establish a new project for the reason that it placed a disproportionate amount of local funds in a previous project. The policy of the law would be carried out if this local industrial development agency should be permitted to free a portion of its local funds for reinvestment in a new industrial development project.

It is, therefore, the opinion of this department and you are accordingly advised that the Pennsylvania Industrial Development Authority, pursuant to the Pennsylvania Industrial Development Authority Act, the Act of May 17, 1956, P. L. (1955) 1609, 73 P. S. §§ 301 to 314, has power to increase its initial loan to a local industrial development agency with respect to a particular project, provided that the total loan to such agency with respect to such project does not exceed the statutory limitations on such a loan as set forth in § 6 (a) of the aforesaid act, and provided further that the local industrial development agency in making a request for such additional loan complies with all the provisions of the aforesaid act.

Yours very truly,

DEPARTMENT OF JUSTICE,

EDWARD L. SPRINGER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 111

School districts—Bond issue approval—Municipal Borrowing Law—Payments due under lease agreement—Constitutional and statutory provisions on creation of debts—Error in election notice.

1. The Municipal Borrowing Law of June 25, 1941, P. L. 159, § 302, imposes upon the Secretary of Internal Affairs the duty of approving the proceedings involved in the borrowing of money by a school district through a bond issue.

2. Payments due by the township school district to the Public School Building Authority under a lease agreement do not violate the constitutional and statutory provisions with regard to the creation of debts.

3. Where an election notice incorrectly gave the amount of the bonded indebtedness as "No Dollars," such misstatement was remedied by another section of such notice which stated that "The purpose of incurring said indebtedness is to fund the temporary indebtedness of the School District in the Amount of $76,000."

4. Where the matter of bonded indebtedness was submitted to the electorate and referred to the figure as $76,000 instead of $70,600, such error cannot form the basis for disapproving the bond issue.

Harrisburg, Pa., May 15, 1958.

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

Madam: You have asked to be advised with regard to the approval of the proceedings involved in the borrowing of money by a school district through a bond issue. This duty is imposed upon your department by the Municipal Borrowing Law, the Act of June 25, 1941, P. L. 159, 53 P. S. §§ 6101 to 6703. More specifically, § 302 of said act, 53 P. S. § 6302, provides that you shall ascertain whether the proposed debt is within the limitations imposed by the Constitution and whether such proceedings are in conformity with existing laws. You present the following facts:

The floating debt of the school district for operating expenses incurred prior to July 1, 1957, was $70,600.00. The school district was obligated to make a rental payment by reason of a lease with the State Public School Building Authority, and you ask whether the balance due on the rental under the lease agreement should be treated as a debt. The lease was entered into in 1954 and calls for annual payments until 1995.

The election notice required by § 205 of the Municipal Borrowing Law, supra, 53 P. S. § 6205, was published in a newspaper in the school district giving the amount of the bonded indebtedness to be incurred, the amount of the assessed valuation, and the present indebtedness of the school district as "No Dollars". The election notice also set forth that the purpose of incurring said indebtedness was to fund the temporary indebtedness of the school district in a certain amount and to issue bonds necessary for the current obligations of the school district. The statement that there was *"no indebtedness"* was, of course, incorrect; the intention, we presume, was to state that there was *no bonded indebtedness.* In other respects the notice was accurate. You ask whether the notice was in substantial compliance with § 205(b) of the Municipal Borrowing Law, supra, 53 P. S. § 6205, which section sets forth in detail the information to be published in the notice.

You call attention to the question which appeared upon the voting machine when the matter of the approval or disapproval of the indebtedness was submitted to the electorate. This read as follows:

> "SHALL bonded indebtedness of the School District of * * * Pennsylvania, be incurred in the amount of Eighty-four thousand dollars ($84,000) for the purpose of funding temporary indebtedness in the amount of Seventy-six thousand dollars ($76,000) and for the furnishing of funds necessary for the current obligations of the School District?"

You ask whether this question was sufficiently clear to the electors to enable them to vote on the question.

We shall first discuss the question as to whether or not the rental payment or the balance under the lease with the State Public School Building Authority is a debt in the constitutional and legislative sense.

"Debt" is defined in § 102(f) of the Municipal Borrowing Law, supra, 53 P. S. § 6102, as:

> " 'Debt', all general obligations of the municipality to pay money either in the present or future, except obligations payable from current revenues, lease agreements not directly or indirectly involving the acquisition of capital assets and contracts for service. A debt evidenced by general obligation bonds shall be deemed to have been incurred by a municipality at the time when the ordinance authorizing such bonds shall become effective."

In the case of *Greenhalgh, Appellant, v. Woolworth et al.*, 361 Pa. 543, 64 A. 2d 659 (1949), it was held that a contract to lease and the lease provided for under the State Public School Building Authority Act, the Act of July 5, 1947, P. L. 1217, 24 P. S. §§ 791.1 to 791.16, do not enable the school district to acquire a capital asset in violation of constitutional inhibitions. At page 552, the Court said that a self-liquidating project may be defined as one wherein the revenues received are sufficient to pay the bonded debt and interest charges over a period of time and that a school building project under the instant Authority Act is self-liquidating if the annual rentals for the building, payable by the school district from current revenues, are sufficient to discharge, over the period of years fixed by the lease, all debt service and the entire debt incurred by the lessor in the construction of the project. At page 556, the Court said that an outstanding factor is the immunity of the school district's property and the inability of creditors to compel payments beyond the sums available for current revenues. Current revenues of the school district appear to be ample to bring the instant case within the definition promulgated by the Supreme Court.

Furthermore, it has been held that the funding or refunding of a debt previously created and existing is not an increase of that indebtedness but is merely a continuation thereof. See *Schuldice, Appellant, v. City of Pittsburgh*, 251 Pa. 28, 95 Atl. 938 (1915).

In *Halpin et al., Appellants, v. Rochester Borough*, 281 Pa. 109, 126 Atl. 241 (1924), the Court said at page 113:

> "The mere fact that the bonds are to be used for the retiring of floating indebtedness is no reason for inhibiting the new issue, and this has been held, though the authorizing ordinance makes no provision for the cancellation simultaneously with the sale of the new securities: * * *"

We, therefore, are of the opinion that the rental payment and the balance due under the lease with the State Public School Building Authority are not such debts as are prohibited by the Constitution or by law.[1]

With regard to the question of the election notice and its reference to "No Dollars", it is to be noted that the notice contained the following sentence:

[1] The cases cited in Official Opinion No. 109, 1958 Op. Atty. Gen. 176., are distinguishable. See *Graham v. Philadelphia et al.*, 334 Pa. 513, 6 A. 2d 78 (1939), at page 524; *Kelley v. Earle et al.*, 325 Pa. 337, 190 Atl. 140 (1937).

> "* * * The purpose of incurring said indebtedness is to fund the temporary indebtedness of the School District in the amount of $76,000 * * *"

Any confusion or misunderstanding caused by the statement of "No Dollars", we feel was offset and clarified by the above quoted statement and the fact that later on in the notice it again referred to the bonded indebtedness being incurred.

In the case of *Ruler, Appellant, v. York County et al.*, 290 Pa. 427, 139 Atl. 136 (1927), the Supreme Court said at pages 433-434:

> "* * * our conclusion is that it is now too late to raise the contention that the voters were misled. No one can know that they were and there is now no way to establish that proposition. We have held in the broader field of constitutional amendment that after a vote has been taken on the adoption of an amendment it is too late to raise questions as to the validity of the submission * * * *and we now decide that questions such as that before us, which go to the preliminaries of a popular submission on a question of increase of municipal indebtedness must be raised before the vote takes place.* If not raised until afterwards, our conclusion must be, as it is on the record before us, that the action of the electorate was intelligently taken, with full notice and knowledge of the resulting burdens assumed, and if in the question voted upon there was sufficient and proper indication of the main purpose intended, as there is in the instant case, effect is to be given to the voter's approval." (Emphasis supplied)

We, therefore, are of the opinion that the reference to "No Dollars" in the election notice is an error which cannot adversely affect the legality of the notice or the bond issue at this time.

Turning now to the question as it appeared upon the voting machine wherein it referred to the indebtedness of $76,000.00, when as a matter of fact it was $70,600.00. In our opinion, this error comes within the principles enunciated and quoted in *Ruler, Appellant, v York County et al.*, supra, and cannot form the basis for disapproving the bond issue.

By way of summation, we are of the opinion and you are accordingly advised that:

(1) The payments due under the lease agreement by the township school district do not violate the constitutional and statutory provisions with regard to the creation of debts.

(2) The reference to "No Dollars" in the election notice cannot adversely affect the legality of the notice or the bond issue at this time.

(3) The question as it was presented on the voting machine was sufficiently clear to enable the electors to vote on the question, and, therefore, the matters to which you have called our attention do not constitute a legal basis for the disapproval of the bond issue.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 112

Handicapped children—Training requirements for supervisory personnel—Expenses for transportation, maintenance and instruction—County board of school directors—Duty to provide furniture and supplies—Legal and auditing expenses of the county board—Homebound instruction for pregnant girls—Sections 925, 927, 929, 1372, 1376, 2509.1 and 2541 of the Public School Code of 1949.

1. The State Council of Education and not the Department of Public Instruction may at its discretion require that personnel employed by county boards of school directors to perform supervisory functions for handicapped children be certified in special education and/or psychology.

2. The Department of Public Instruction may not pay to an approved state or non-state institution expenses for transportation, maintenance and instruction of physically handicapped children who are not blind, deaf or afflicted with cerebral palsy.

3. County boards of school directors should include in their annual estimates of costs of classes or schools for handicapped children, expenses for furniture, apparatus and similar items.

4. County boards have no authority to purchase equipment for transportation of handicapped children and such expenses as they do incur in providing transportation for such children should be paid from the appropriation for pupil transportation.

5. Expenses of auditing accounts of and bonding the treasurer of the county board, compensation of secretary and treasurer of the board and paying for legal services to the board should not be included in the annual estimate of costs of classes and schools for handicapped children.

6. Homebound instruction may not be approved for girls who become pregnant while enrolled in school, but may be approved for mentally retarded children, while approval for children suffering from social and emotional sickness may be approved only if any specific sickness manifests itself in an apparent exceptional physical or mental condition.

Harrisburg, Pa., May 16, 1958.

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

Sir: You have requested our advice on a number of problems arising under the Public School Code of 1949.[1] Since all of these problems relate, in some measure, to the statutory provisions dealing with handicapped children, we shall discuss all of them in this one opinion. The questions you ask are as follows:

I. May the Department of Public Instruction require that personnel employed by county boards of school directors to perform supervisory functions in the program for handicapped children be certified in special education and/or psychology?

II. May the Department of Public Instruction pay to any approved state or non-state institution expenses incurred for transportation, maintenance and instruction of a physically handicapped child who is not blind, deaf or suffering from cerebral palsy?

III. In submitting its annual estimate of the cost of classes or schools for handicapped children for the ensuing school year to the Department of Public Instruction, may the county boards of school directors include expenses for furniture, apparatus and similar capital outlay?

IV. Should the purchase of transportation equipment for transportation of handicapped children by the county board be considered an expense of transportation and paid from the appropriation for general transportation or an item of capital outlay and paid from the appropriation for handicapped children?

V. May the expenses of auditing the accounts of and bonding the treasurer of the county board of school directors, the compensation to the secretary and treasurer of the county board of school directors and the payments for legal services to the county board be included in the estimate of costs for operating classes and schools for handi-

[1] Act of March 10, 1949, P. L. 30, 24 P. S. §§ 1-101 to 27-2702.

capped children submitted annually by the county board of school directors?

VI. May homebound instruction be approved for girls who become pregnant while enrolled in school, for mentally retarded children who are also physically disabled and for children suffering from social and emotional sicknesses?

I.

Section 925 (b) (4) of the Code, 24 P. S. § 9-925 (b) (4), empowers the county board of school directors to employ all the persons necessary to carry out the program for handicapped children and to fix their salaries. However, the program itself can be conducted only in conformity with standards established by the State Council of Education and according to plans submitted for its approval by the county boards.[2] The State Council may also provide for such teaching certificates as are necessary under its rules and regulations.[3] The power of the county boards to employ personnel, therefore, is subject to the standards required by the State Council of Education[4] which may require such certification as it deems necessary to effectuate fully the program for handicapped children.

II.

Section 1376 of the Code, 24 P. S. § 13-1376, provides for payments by local school districts and the Department of Public Instruction to institutions for children who are blind, deaf and afflicted with cerebral palsy, on behalf of residents of Pennsylvania enrolled in such institutions. No similar provision exists with regard to persons handicapped in other ways.[5] Therefore, the Department may not pay expenses for children not blind, deaf or afflicted with cerebral palsy.

III.

Section 2509.1 of the Code, 24 P. S. § 25-2509.1, requires each county board annually to submit an estimate of the cost of classes or schools for handicapped children to be operated by it during the ensuing school year. It is inconceivable that such classes could be maintained without having the furniture, equipment and supplies necessary to accommodate and teach the handicapped. These items clearly are

[2] Public School Code of 1949, § 1372, 24 P. S. § 13-1372.
[3] id, § 1201, 24 P. S. § 12-1201.
[4] Note that this authority is in the State Council, not in the Department of Public Instruction.
[5] We are here construing only the duty and authority of the Department of Public Instruction to pay such expenses.

part of the cost of operation of these classes and should be included in each county board's estimate as an expense of this activity.

IV.

Each county board of school directors, in submitting its annual estimate of costs for the operation of classes and schools for handicapped children, must also include the costs to be incurred by it for transporting pupils to classes and schools for such children.[6] In some instances this transportation will be furnished by the county board even though the local district conducts the class; and § 2509.1 of the Code, 24 P. S. § 25-2509.1, provides for a return by the local district of funds received by it from the state for transportation of handicapped children when the transportation actually is furnished by the county board.

Unlike local districts,[7] county boards have no authority to purchase transportation equipment (e. g. buses) and must necessarily contract for the necessary transportation. Thus, no capital outlay will be incurred by the county board. Since payments to school districts for pupil transportation are the subject of a separate appropriation under § 2541 of the Code, 24 P. S. § 25-2541, which section includes payments on account of transportation of handicapped children, and since school districts must return such payments to the state when the county board furnishes the transportation, it seems apparent that the cost of transportation furnished by the county board is to be paid from the appropriation for transportation expense and not from the appropriation for education of handicapped children. As noted above, however, this cost cannot include the purchase of vehicles by the county board since it has no authority to make such purchases.

V.

Sections 927 and 928 of the Code, 24 P. S. §§ 9-927 and 9-928, require the annual auditing of the accounts of the treasurer of the county board and the bonding of said treasurer. Section 929, of the Code, 24 P. S. § 9-929, authorizes the payment of compensation to both the secretary and treasurer of the county board. Section 925 (10) of the Code, 24 P. S. § 9-925 (10), empowers the county board to employ an attorney for one hundred dollars per year (or for a greater sum if approved by the court of common pleas). No provision is made for payment of the audit, but the costs of the bond and the

[6] Public School Code of 1949, § 2509.1, 24 P. S. § 25-2509.1.
[7] id, § 631, 24 P. S. § 6-631.

compensation are to be paid from the funds of the county board.[8] The legal fees are to be paid from state appropriations.[9] It seems reasonable to conclude that the costs of the audit are also to be paid from the funds of the county board.

The "funds of the county board" are derived primarily from assessments of local districts.[10] It would be inappropriate to use state funds paid to the county board for conducting a program for handicapped children to pay for the normal costs of operation of the county board, such operation being chiefly concerned with services to local districts.[11] Similarly, since the state has expressly assumed payment of legal fees[12] and provides for such payment in the biennial appropriation,[13] there is no authority for paying legal fees from the funds provided for education of handicapped children. Therefore, none of these costs should be included in the annual estimate of costs submitted by each county board for the education of handicapped children.

VI.

Section 2519 of the Code, 24 P. S. § 25-2510, requires payments by the Commonwealth to the local districts on account of, among other things, homebound children; and such payment is made in the biennial appropriation.[14] The education of homebound children is authorized by § 1372 of the Code, 24 P. S. § 13-1372, with regard to handicapped children not provided for by a special class or by a public school in the school district. This homebound educational program is to be implemented in accordance with rules and regulations of the Department of Public Instruction.

The Code contains no definition of "handicapped children." However, § 1371, 24 P. S. § 13-1371, refers to children who are not being properly educated and trained "because of apparent exceptional physical or mental condition." It is our belief that in preparing its standards for the education of handicapped children,[15] the State Council of Education necessarily must base its recognition of the types of handicaps on this phrase and that your question must also be answered in its light.

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[8] Public School Code of 1949, §§ 928 and 929, 24 P. S. §§ 9-928 and 9-929.
[9] id, § 925 (10), 24 P. S. § 9-925 (10).
[10] Public School Code of 1949, § 925 (14), 24 P. S. § 9-925 (14).
[11] id, § 925, 24 P. S. § 9-925.
[12] id, § 925 (10), 24 P. S. § 9-925 (10).
[13] 1957 Appropriation Acts of the General Assembly 81.
[14] 1957 Appropriation Acts of the General Assembly 82.
[15] Public School Code of 1949, § 1372 (1), 24 P. S. § 13-1372 (1).

Thus viewed, pregnant girls cannot be considered as handicapped children; while mentally retarded children who are also physically disabled may be so considered.[16] We cannot answer your last question regarding children suffering from "social and emotional sicknesses" since we do not know what sicknesses are meant by such phrase. However, those sicknesses which manifest themselves in an apparent exceptional physical or mental condition would be such handicaps as would entitle the sufferer to homebound instruction where he is not otherwise provided for; and the State Council may recognize such sicknesses in its regulations. Since this is primarily a medical problem, we cannot answer you in greater detail on this phase of your question.

To summarize our conclusions:

I. The State Council of Education, but not the Department of Public Instruction, may at its discretion require that personnel employed by county boards of school directors to perform supervisory functions in the program for handicapped children be certified in special education and/or psychology.

II. The Department of Public Instruction may not pay to an approved state or non-state institution expenses for transportation, maintenance and instruction of physically handicapped children who are not blind, deaf or afflicted with cerebral palsy.

III. County boards of school directors should include, in their annual estimates of costs of classes or schools for handicapped children, expenses for furniture, apparatus and similar items.

IV. County boards have no authority to purchase equipment for the transportation of handicapped children. Any expenses incurred by them in otherwise providing transportation for such children should be paid from the appropriation for pupil transportation, not from the appropriation for handicapped children.

V. The expenses of auditing the account of and bonding the treasurer of the county board, paying compensation to the secretary and treasurer of the county board and paying for legal services to the county board should not be included in the annual estimate of costs of classes and schools for handicapped children submitted by the county boards.

[16] Physical disability is not necessary, of course. A mentally retarded child, whether or not physically disabled, may receive homebound instruction if not otherwise provided for.

VI. Homebound instruction may not be approved for girls who become pregnant while enrolled in school, but it may be approved for mentally retarded children, whether or not physically disabled. Such approval for children suffering from social and emotional sicknesses may be approved only if any specific sickness so-called manifests itself in an apparent exceptional physical or mental condition.

Very truly yours,

DEPARTMENT OF JUSTICE,

ELMER T. BOLLA,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 113

State Teachers Colleges—Schedule of fees for room, board and other items—Uniformity for all colleges—Board of trustees to establish schedule of fees—Approval—Superintendent of Public Instruction—Public School Code of 1949—The Administrative Code of 1929.

1. It is not mandatory that charges for room, board and/or other necessary fees be charged uniformly by all State Teachers Colleges.

2. It is permissible for board of trustees of each College to establish a schedule of fees for its own College on the approval of the Superintendent of Public Instruction.

3. The Superintendent has the authority to approve a schedule of fees for each College, and in making such an approval he need not consult or obtain the recommendation or the approval of the board of presidents.

Harrisburg, Pa., May 16, 1958.

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

Sir: You ask advice concerning State Teachers Colleges (hereinafter referred to as Colleges) on the following:

1. Is it mandatory that charges to be paid by students for room, board and other necessary fees be made uniform by all Colleges?

2. Is it permissible for the board of trustees of a given College to establish a schedule of fees for its own College for room, board and other necessary items which vary from the schedule adopted by the board of presidents of the Colleges?

3. Does the Superintendent of Public Instruction have authority to approve a different fee basis for a given College with or without the previous approval of the board of presidents?

You state that the board of trustees of one of the Colleges has recommended for your approval an increase in the fee for rooms by $1.00 per week and the fee for other necessities by $28.00 per year, both effective September 1, 1958. The basic fee for necessities is $144.00 for the year. The food charge is $9.00 per week, room and laundry together is $5.00 a week. There are thirty-six weeks in a school year. The total cost to the student for these items is $504.00 per year.

Section 2003 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, 24 P. S. § 20-2003, provides:

> "The colleges shall be a part of the public school system of the Commonwealth, and their purpose the education and preparation of teachers. *The colleges shall provide* proper facilities for instruction in the art and science of teaching, *for the boarding and lodging of students in residence, and other necessary facilities approved by the Superintendent of Public Instruction.*" (Emphasis supplied)

Section 2008 of the Code, supra, 24 P. S. § 20-2008, provides:

> *"The cost of boarding and tuition shall be fixed by the trustees of the several State Teachers' Colleges, with the approval of the Superintendent of Public Instruction* * * * *"* * * *the board of trustees may fix and charge such fees as may be necessary for the proper operation of the college* * * *"* (Emphasis supplied)

In our Formal Opinion No. 103, dated October 17, 1933, 1933-34 Op. Atty. Gen. 80, 19 D. & C. 634, Fees at State Teachers Colleges, we stated:

> "Sections 2008 and 2009 of the School Code (the latter having been last amended by the Act of June 1, 1933, P. L. 1152) direct that the Boards of trustees of the several State Teachers colleges, with the approval of the Superintendent of Public Instruction, shall prescribe the fees to be paid by students."

Section 2008 and 2009 of the present Code are exactly the same as the sections mentioned in this opinion.

Section 1311 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 361,[1] provides as follows:

> "*The boards of trustees of the several State* * * * *Teachers Colleges,* * * * shall have general direction and control of the property and management of their respective institutions. Each of the said boards of trustees shall have the power, and its duty shall be:
>
> * * * * * * * *
>
> "(d) Subject to the approval of the Superintendent of Public Instruction, to make such by-laws, rules and regulations for the management of the institution as it may deem advisable." (Emphasis supplied)

It is apparent from the foregoing that the board of trustees for the individual college provides for and has the right to fix the charges for facilities for board, lodging, etc. with the approval of the Superintendent of Public Instruction.

You further state that for several years the board of presidents has recommended uniform fees which have been approved by the Superintendent of Public Instruction after the board of trustees of each College approved the action of the board of presidents.

Section 2004 of the Code, supra, 24 P. S. § 20-2004, provides:

> "The Board of Presidents of the State Teachers' Colleges shall consist of the presidents of the several colleges and the Superintendent of Public Instruction, who shall be the chairman. * * * *The board shall formulate the educational policies of the colleges,* * * * A majority of all members of the board shall constitute a quorum, and any action favored by a majority of the members shall, when approved by the Superintendent of Public Instruction, be binding upon all of the colleges." (Emphasis supplied)

We do not believe that the phrase "educational policies," as used in this section includes the providing of facilities for or charging fees for laundry, food, room, etc.

The Superintendent of Public Instruction, in approving the recommended schedule by a board of trustees for a given College for the

[1] There are two sections designated as 71 P. S. § 361.

cost of room, laundry, food, etc., may continue to seek the advice of the board of presidents to aid him in his determination. However, he is not obligated to follow the recommendation of **or adopt the** schedule of fees made by the board of presidents. Further, in this matter the recommendation or the adoption of a schedule by the board of presidents need not be submitted to the boards of trustees of all the Colleges for approval.

The Superintendent of Public Instruction is not obligated or mandated to seek the advice or recommendation of anybody in determining his approval of a schedule of fees.

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

1. It is not mandatory that charges for room, board and/or other necessary fees be charged uniformly by all of the Colleges.

2. It is permissible for the board of trustees of each College to establish a schedule of fees for its own College on the approval of the Superintendent of Public Instruction.

3. The Superintendent of Public Instruction has the authority to approve a schedule of fees for each College, and in making such an approval he need not consult nor obtain the recommendation or the approval of the board of presidents.

Very truly yours,

DEPARTMENT OF JUSTICE,

ELMER T. BOLLA,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 114

Counties—Liability for maintenance of inmate subsequently convicted for a crime while in prison in a second county.

The Act of May 17, 1957, P. L. 161, provides that whenever any inmate of a state correctional institution commits a crime while in prison and is subsequently

convicted, the cost of maintenance of such inmate pursuant to such subsequent conviction is to be charged to the county which originally committed the inmate and not to the county in which he was subsequently tried and convicted. The same rule applied prior to the passage of the Act of 1957 by virtue of the Act of June 3, 1893, P. L. 280, in so far as an inmate committed to the Pennsylvania Institution for Defective Delinquents is concerned.

Harrisburg, Pa., May 16, 1958.

Honorable A. Allen Sulcowe, Acting Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: Your office has requested an opinion from this department interpreting the Act of May 17, 1957, P. L. 161 § 1, 19 P. S. § 1234.1. You state the following facts as giving rise to your request for an opinion:

On April 30, 1948, one Alfred J. Nardi, Jr., was committed by the Dauphin County Courts to the Pennsylvania Institution for Defective Delinquents at Huntingdon, Huntingdon County, Pennsylvania. While imprisoned at the Pennsylvania Institution for Defective Delinquents, Nardi committed a murder for which he was tried, convicted and sentenced by the Huntingdon County Courts, on November 19, 1954, to life imprisonment. He is presently confined in the Western State Penitentiary, Pittsburgh, Pennsylvania.

From November 19, 1954 to September 30, 1957, the Huntingdon County Commissioners were billed by and paid your department for the maintenance of Nardi at Western State Penitentiary in the amount of $2,465.77. On October 31, 1957, your department billed the Dauphin County Commissioners in the amount of $2,465.77 for the period November 19, 1954 to September 30, 1957, and credited Huntingdon County for an overpayment in error. Since September 30, 1957, Dauphin County has been and continues to be billed monthly for the maintenance of Nardi.

The Solicitor to the County Controller of Dauphin County and the Solicitor to the Commissioners of Huntingdon County have rendered legal opinions as to which county is liable for Nardi's maintenance since November 19, 1954; and each has concluded that the other county is liable.

We have read the opinions of both Solicitors, reviewed the applicable legal authorities and concluded that your department has acted properly in billing Dauphin County for Nardi's maintenance and crediting Huntingdon County with an overpayment in error.

The Act of May 17, 1957, supra, 19 P. S. § 1234.1, provides:

> "Where a person is confined in a State penal or correctional institution either by virtue of his sentence pursuant to his conviction or plea of guilty to a criminal charge, or by virtue of a commitment issued by any court of the Commonwealth having jurisdiction, and while so confined any such person commits a criminal offense and is subsequently convicted or enters a plea of guilty thereto, expenses of keeping such person in any State penal or correctional institution pursuant to such subsequent conviction or plea of guilty shall be borne by the county in which the person was originally convicted."

This act must be read in conjunction with two other provisions to reveal the legislative pattern for the payment of costs of maintaining prisoners.

1. The Act of April 25, 1929, P. L. 694, § 1, 61 P. S. § 344, provides that the cost of maintaining convicts in state penitentiaries shall be paid to the Department of Revenue by the respective counties in which the persons were convicted.

2. The Act of July 22, 1913, P. L. 912, §§ 2-3, as amended, 19 P. S. §§ 1233-1234, provides, inter alia, that the costs of trying and maintaining an escaped prisoner for the escape or for any crime committed after escaping and before apprehension shall be borne by the county from which the prisoner was originally committed. It also provides that the cost of trying a prisoner for a crime committed on the grounds of the institution shall be borne by the county of original commitment, but contains no provision regarding the maintenance of such prisoner under the new sentence.

Read together, these provisions create a scheme under which the county whose court originally sentences must pay (1) for the maintenance of the prisoner under sentence for such original conviction, (2) for the costs in connection with a prosecution and conviction for an escape and for crimes committed after the escape and before apprehension, and (3) for the trial and maintenance of the prisoner

for a crime committed while confined in a state penal institution under the original conviction or conviction resulting from an escape.

The Solicitor to the Dauphin County Controller relies upon the above provisions and takes the position that the Act of May 17, 1957, supra, is not retroactive; that under the Act of April 25, 1929, supra, the *maintenance* of a prisoner who has been convicted for an offense committed while confined in a state penal institution must be borne by the county from which the person is sentenced for such offense; and that, therefore, Nardi's maintenance expense is properly chargeable to Huntingdon County.

We agree that the Act of May 17, 1957, supra, is not retroactive[1] in the sense that it would allow recovery of costs incurred prior to its passage. We also agree with the interpretation given the Act of April 25, 1929, supra. However, the Act of April 25, 1929, supra, does not govern the instant case. This act supplanted § 9 of the Act of April 23, 1829, P. L. 341, but made no substantive change in the rule as to which county must bear the costs of maintenance of prisoners.

In 1893, however, the Legislature made a specific exception to the rule of the Act of April 23, 1829, supra, by providing in the Act of June 3, 1893, P. L. 280, § 1, 61 P. S. § 501:

> "Whenever any inmate of the Pennsylvania Industrial Reformatory at Huntingdon, not having been sentenced thereto by the court of Huntingdon county, shall be convicted in either of the courts of Huntingdon county of any misdemeanor or felony committed while an inmate of the said reformatory, the costs and expenses of trying such convicted inmate, and of his maintenance, after conviction and sentence either to the county prison of Huntingdon county or either of the penitentiaries of the state, shall be paid by the county from which the said convicted inmate was sentenced."

The Pennsylvania Industrial Reformatory at Huntingdon is now the Pennsylvania Institution for Defective Delinquents, the same institution in which Nardi was incarcerated at the time he committed the crime of murder.

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[1] The Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, § 56, 46 P. S. § 556.

The act of April 25, 1929, supra, did not repeal,[2] alter or amend the Act of June 3, 1893, supra; and, therefore, the latter provision is still effective and controls the instant case. Nor is there any conflict between the Act of June 3, 1893, supra, and the Act of April 25, 1929, supra, which would require the later enactment to prevail.[3]

The Act of June 3, 1893, supra, must be regarded as a special provision and construed as an exception to the general provision of the Act of April 23, 1829, supra, which was supplanted by the Act of April 25, 1929, supra. The Act of June 3, 1893, supra, therefore must be read as an integral part of the broad legislative pattern of designating those counties which must bear the costs of maintenance of prisoners. The Act of May 17, 1957, supra, simply makes applicable to all state penal and correctional institutions the rule previously applicable to the institution at Huntingdon.[4]

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

(1) By virtue of the Act of June 3, 1893, supra, the expenses of Nardi's maintenance in the amount of $2,465.77 for the period November 19, 1954 to September 30, 1957, were properly billed to the Dauphin County Commissioners; and Huntingdon County was properly credited for an overpayment in error in a like amount. Since September 30, 1957, Dauphin County has been and must continue to be liable for Nardi's maintenance.

(2) The Act of June 3, 1893, supra, was not repealed, altered or amended by the Act of April 25, 1929, supra, which supplanted the

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[2] Reference to the Act of June 3, 1893, supra, was made by the Legislature in 1937 in § 2 of the Act of May 25, 1937, P. L. 808, 61 P. S. § 541-2, which provides: "The management and operation of the Pennsylvania Institution for Defective Delinquents and the care and maintenance and employment of persons detained therein, shall be the function of the Board of Trustees of Pennsylvania Industrial School (hereinafter called the board) and the Department of Welfare in the manner provided by the Administrative Code of 1929, and its amendments: Provided, That said board shall thereafter be known as the Board of Trustees of Pennsylvania Institution for Defective Delinquents. The compensation of all officers and employees and all other expenses in connection with the care and maintenance of persons detained in said institution, shall be paid from appropriations made to the Department of Welfare for such purposes, but the Commonwealth shall be reimbursed for all such expenditures by the respective counties, from which such persons were committed, in the same manner and to the same extent *as is now provided by law* in the case of persons committed to the Pennsylvania Industrial School at Huntingdon." (Emphasis supplied.)

[3] See Statutory Construction Act, the Act of May 28, 1937, § 63, 46 P. S. § 563.

[4] A similar provision with respect to the State Industrial Home for Women is contained in § 22 of the Act of July 25, 1913, P. L. 1311, 61 P. S. § 573.

Act of April 23, 1829, supra. The 1893 provision must be treated as an exception to the general rule of the 1829 provision.

(3) The Act of May 17, 1957, supra, provides that whenever any inmate of a state penal institution commits a crime while so imprisoned, and is subsequently convicted, the cost of maintenance of such inmate pursuant to such conviction is to be charged to the county which originally committed the inmate and not the county in which he was subsequently tried and convicted.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN III,
Deputy Attorney General.

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

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 115

Bureau of Correction—Authority to collect prison and judicial statistics.

The Bureau of Correction has express statutory authority to collect county prison statistics under § 4 of Reorganization Plan No. 5, of 1955, P. L. 2048. Authority to collect judicial statistics, while not expressly given by statute, is implied from the general statutory powers of the Bureau.

Harrisburg, Pa., May 16, 1958.

Honorable Arthur T. Prasse, Commissioner, Bureau of Correction, Camp Hill, Pennsylvania.

Sir: You ask whether there is any authority for the Bureau of Correction to collect prison and judicial statistics.

Express statutory authority for collecting *prison* statistics is found in § 1 of the Act of February 27, 1847, P. L. 172, 61 P. S. § 31, which

makes it the duty of inspectors,[1] sheriffs or other persons having charge of any penitentiary or jail, to submit detailed statements of prison statistics.[2] This authority was transferred from the Department of Welfare to the Department of Justice, and thus to the Bureau of Correction, where it presently exists, by § 4 of Reorganization Plan No. 5 of 1955,[3] P. L. 2048, 71 P. S. § 751-5.

Express statutory authority for collecting *judicial* statistics had been found in § 2311(c) of The Administrative Code of 1929.[4] This section, however, was specifically repealed by § 15 of the Act of July 13, 1957, P. L. 852.[5]

Memorandum Opinon No. 2, 1957 Op. Atty. Gen. 208, considered whether the Department of Welfare was required to continue to obtain judicial satistics under § 2311(c) of The Administrative Code of 1929, supra. In view of the repealer in § 15 of the Act of July 13, 1957, supra, we concluded that the Department of Welfare did not have authority to collect judicial statistics after the effective date of the act.

We further noted in Memorandum Opinion No. 2 that under Reorganization Plan No. 5, supra, the Department of Welfare was also relieved of its functions, powers and duties with regard to supervision, visiting and inspection of prisons and jails maintained by counties, cities, boroughs or townships. The collection of statistics authorized by § 2311(c) of The Administrative Code of 1929, supra, is only of value with respect to the functions of supervising and inspecting prisons and jails. We pointed out in that opinion that the Bureau of Correction now collects judicial statistics.

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[1] Boards of Inspectors at the Eastern and Western State Penitentiaries were abolished by Art. I, § 2 of The Administrative Code of 1923, the Act of June 7, 1923, P. L. 498, 71 P. S. § 2, and replaced by Boards of Trustees under § 202 of the same act, 71 P. S. § 12.

[2] These statements were originally transmitted to the Secretary of the Commonwealth. Section 1 of the Act of April 5, 1872, P. L. 42, 61 P. S. § 32, required these statements to be made instead to the Board of Public Charities. This Board was abolished by § 31 of the Act of May 25, 1921, P. L. 1144, 71 P. S. § 1491, and its powers became vested in the Department of Public Welfare by § 32 of the Act of May 25, 1921, supra, 71 P. S. § 1492, changed to the Department of Welfare by Art. II, § 201 of The Administrative Code of 1923, the Act of June 7, 1923, P. L. 498, 71 P. S. § 11.

[3] It should be noted that Act No. 390, the Act of July 13, 1957, P. L. 852, which creates a new Department of Public Welfare, specifically provides in § 28 thereof that: "This bill is not intended and shall not be construed to repeal or affect Reorganization Plan No. 5 of 1955."

[4] The Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 601. The same provision was contained in § 2011(b) of The Administrative Code of 1923, the Act of June 7, 1923, P. L. 498.

[5] This act becomes effective on or before June 1, 1958.

When the Legislature transferred the functions, powers and duties of the Department of Welfare with regard to the supervision, visiting and inspection of prisons and jails to the Department of Justice, it neglected to refer specifically to § 2311 of The Administrative Code of 1929, supra. For this reason no express *statutory* authorization for the collection of *judicial* statistics was transferred to the Bureau of Correction. However, we find that legal authority for collecting judicial statistics is inherent in and arises by implication from the broad statutory powers conferred upon the Bureau of Correction. Statistics relating to the number and kind of crimes reported, the numbers, age, sex, color, nativity, and offenses of criminals and delinquents arrested, tried, and otherwise disposed of, the sentences imposed, the number placed on probation, and so forth, is of inestimable value to those charged with the duty of administering and supervising the prisons. This data relates to the initial phase of the correction program, namely, the cases disposed of by the courts, and affords a useful means of providing a total picture of correction in the initial phases. The Bureau of Correction is the logical agency to collect such information and derives great benefit therefrom in analyzing and developing an overall correctional program in the Commonwealth.

Since no statutory requirement is placed upon any person to furnish such statistics, there is no way that the Bureau of Correction can compel any magistrate, chief of police, sheriff, district attorney, court, judge, probation officer, or other person, to submit periodic reports containing such statistics. The Bureau is limited merely to requesting such data, and submission thereof is purely voluntary. When the Legislature, in Reorganization Plan No. 5 of 1955, supra, transferred the functions, powers and duties of the Department of Welfare with regard to the supervision, visiting and inspection of prisons and jails to the Department of Justice, it apparently overlooked § 2311 of The Administrative Code of 1929, supra. Such legislative oversight can be corrected by the next General Assembly.

It is, therefore, our opinion and you are accordingly advised that the Bureau of Correction has express statutory authority to collect county prison statistics under § 4 of Reorganization Plan No. 5 of 1955, supra, but that with regard to collecting judicial statistics, the authority is not expressly given by statute, but is implied from the general statutory powers of the Bureau. However, reports of such

data by local judicial and law enforcement authorities cannot be compelled as can the county prison statistics.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN III,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 116

Department of Highways—Authority to borrow money on short term basis—Financing construction of highways—Matching program with Federal government.

The Highway Department may legally borrow from other State funds or agencies on a short term basis of less than one year and may request the transfer of funds by the Governor from the General Fund to the Motor License Fund in accordance with the provisions of the Act of May 26, 1933, P. L. 1088.

Harrisburg, Pa., May 26, 1958.

Honorable Lewis M. Stevens, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: You asked to be advised with regard to the authority of the Department of Highways to borrow money on a short term basis to finance the construction of highways. The Federal government will make allocations of money available to the Commonwealth for the construction of highways on the Interstate, Primary, Secondary and Urban Systems. Congress has declared it to be essential to the national interest to provide for the early completion of the "National System of Interstate Highways." The State is required to match the Federal allocations either on a 50-50 or a 10-90 basis, except as to the emergency allocations provided in the Federal Highway Act of 1958, where the ratio is 33⅓% and 66⅔%. In each of the latter two instances the Federal government pays the larger share. You contemplate the largest construction program in departmental history with the award of $250,000,000.00 of contracts this year in order to take full advantage of the Federal funds.

The necessity of obtaining additional funds results from the fact that maximum payments may become due on highway contracts during those periods when the receipts are lowest. Both receipts and payments fluctuate greatly; and it is impossible to project due dates for contract payments which are influenced greatly by weather conditions, construction problems and the aggressiveness of contractors. You ask if you may obtain such funds on a short term basis from other State funds or agencies.

Unlike many departments and agencies, the Department of Highways is not dependent upon appropriations from the General Assembly but is financed through the Motor License Fund. Into this fund are paid all proceeds from gasoline and other motor fuel excise taxes, motor vehicle registration fees and license taxes, operators' license fees and other excise taxes imposed on products used in motor transportation by virtue of the mandate of the people contained in Article IX, § 18 of the Constitution of the Commonwealth. This constitutes a permanent appropriation of these receipts, subject only to a change by the electorate following the passage of resolutions by two successive Legislatures.

The estimated receipts for the present biennium from the sources set forth above are $423,000,000.00, based on monthly receipts checked against estimates.

Sections 1004 and 1005 of the Act of June 1, 1945, P. L. 1242, known as the "State Highway Law," 36 P. S. §§ 670-1004 and 670-1005, read as follows:

> "Section 1004. Aid under Federal Highways Acts.—The secretary shall enter into all necessary contracts and agreements with the proper agencies of the government of the United States, and shall do all other things necessary and proper in order to obtain the benefits afforded under the provisions of the act of Congress, approved the eleventh day of July, one thousand nine hundred sixteen, entitled 'An act to provide that the United States shall aid the States in the construction of rural postroads, and for other purposes,' and its supplements and amendments, or any other act of Congress providing Federal aid for highway purposes.
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> "Section 1005. Federal Grants for Highway Construction and Related Projects.—* * *
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> * * * * * * *
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> "The department shall have authority to make and carry out contracts and to do every other act necessary to carry out

> any project heretofore or hereafter undertaken which is to be paid for in whole or in part from Federal funds, and in every way to conform to the requirements and rules and regulations of the proper Federal authorities with respect to such projects, but no limitation contained in this act shall in anywise dimnish any authority or powers conferred on the department by this act."

These two sections of the Highway Law are broad grants of authority by the General Assembly authorizing the Department of Highways to make and carry out contracts and to do every other act necessary to carry out any project to be paid for in whole or in part from Federal funds. These grants of authority certainly include that of borrowing on a short term basis sums of money to bridge the gap caused by those periods of time when receipts are lowest and payments due contractors highest. This is particularly true since the Highway Department is not dependent upon appropriations from the General Assembly and has its own source of funds with which to repay the short term loans.

Moreover, we call your attention to the Act of May 26, 1933, P. L. 1088, 72 P. S. §§ 3568 to 3570,[1] which provides for the transfer of funds under certain conditions between the General Fund and the Motor License Fund. These funds must be returned or retransferred before the end of the fiscal biennium to the appropriate fund. The act specifically appropriates the moneys in the General Fund and the Motor License Fund for such transfers from time to time under the conditions set forth.

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[1] "Section 1. Whenever the Governor shall ascertain that the cash balance and the current estimated receipts of the General Fund or of the Motor License Fund shall be insufficient at any time during any fiscal biennium to meet promptly the expenses of the Commonwealth payable from either fund, the State Treasurer is hereby authorized and directed, from time to time during such fiscal biennium, to transfer to such fund from the Motor License Fund or the General Fund, as the case may be, such sums as the Governor shall direct. Any sums so transferred shall be available for the purposes for which the fund to which they are transferred is appropriated by law. Transfers shall be made hereunder upon warrant by the Auditor General upon requisitions of the Governor.

"Section 2. In order to reimburse the Motor License Fund or the General Fund, as the case may be, an amount equal to that transferred from such fund during any fiscal biennium under section one of this act shall be transferred to such fund from the other fund before the end of such fiscal biennium, in such amounts and at such times as the Governor shall direct. Such transfers shall be made by the State Treasurer upon warrant of the Auditor General upon requisitions of the Governor.

"Section 3. The moneys in the General Fund and the Motor License Fund are hereby specifically appropriated for transfer, from time to time, as provided in this act."

We are of the opinion, therefore, and you are accordingly advised that your department may properly and legally borrow from other State funds or agencies on a short term basis of less than one year for the purpose of having funds available for full participation in the Federal Highway Aid programs and, more specifically, that you may request the transfer of funds by the Governor from the General Fund to the Motor License Fund in accordance with the provisions of the Act of May 26, 1933, P. L. 1088, 72 P. S. §§ 3568 to 3570.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 117

Capital stock tax assessment—Insurance companies—Reserves in excess of legal requirements considered as part of the equity in tax settlement.

Reserves maintained by an insurance company in excess of the reserves required by law should be considered as part of the equity of the insurance company in the settlement of its capital stock taxes.

Harrisburg, Pa., May 26, 1958.

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

Sir: The Department of Revenue and the Department of the Auditor General have failed to agree within the time limits prescribed by law on the settlements of the capital stock tax of several insurance companies, and, pursuant to § 802 (e) of The Fiscal Code, Act of April 9, 1929, P. L. 343, 72 P. S. § 802 (e), the Department of Revenue has submitted its settlements to the Board of Finance and Revenue to determine in what amounts the settlements should

be made. At the direction of the Board you have submitted the matter to this department for our legal opinion.[1]

The specific issue is whether reserves which certain insurance companies maintain in excess of legal requirements should be considered as a "part of equity," as defined below, or as a legal liability accruing to certain original policyholders for the purpose of assessing the capital stock tax of Pennsylvania.[2]

The first argument advanced by the insurance companies is that they are mutual in nature. This mutual nature it is urged, confers upon policyholders' rights of ownership and control in the excess reserves in question which are such as to create a legal liability accruing to such policyholders.

To support this position one insurance company argues that most of its stock is held by an automobile club, that all persons it insures must be members of the club and that such insured persons constitute a major portion of the club membership. Because of these facts, it is urged that, in effect, a trust of the stock has been established for the benefit of the policyholders. In addition, all three companies advance the view that their mutual nature is established by their by-laws, policy provisions and respective methods of operation.

Alternatively, the companies argue that provisions of their by-laws incorporated in policy contracts have created present fixed contract rights in the policyholders to the excess reserves. This argument is based on their interpretation of the policy provisions as providing not only that the reserves be preserved intact "exclusively for the benefit and protection of the policyholders" but also that such reserves are subject to policyholder rights of apportionment.

Finally, they urge that the reserves are maintained for insurance losses and claims and, under good accounting practice, constitute a genuine liability reserve.

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[1] While the Department of Justice has generally refrained from issuing Formal or Official Opinions to the Board of Finance and Revenue on matters being adjudicated by the Board on a taxpayer petition for review, the present question concerns the administrative functions of the Board in the settlement of taxes. This is an appropriate area for an official opinion of this department.

[2] This determination is necessary to such assessment by virtue of the requirement that the capital stock of a company holding principally marketable securities or other readily realizable assets be valued primarily by the equity of such company. Stradley and Krekstein; *Corporate Taxation and Procedure* in Pennsylvania, at 132 (1952). The equity is comprised of total assets at actual value less liabilities. Mahon, *State Taxation of Corporations in Pennsylvania*, at 24 (1958).

For any one of these three reasons, the companies conclude, the excess reserves in question must be deducted from their assets in arriving at their equity valuations for capital stock tax purposes.

These facts raise the following questions:

1. Are the insurance companies in question "mutual" in nature;

2. If the companies in question are not mutual in nature, do provisions in their by-laws, share certificates or policies confer upon policyholders such present fixed rights in the excess company reserves as would be held to create, for capital stock purposes, a legal liability presently accruing to such policyholders;

3. To the extent that present fixed rights in the excess reserves are not acquired, do the policy provisions respecting fire or casualty liability create in policyholders a contingent interest in such reserves which proper accounting practice would treat as a legal liability accruing to such policyholders.

1. Mutual insurance company policyholders have been held "entitled to participate in any division of profits made by [their] company."[3] Moreover, the mutual insurance characteristic of democratic control and ownership[4] subsumes the fact that these policyholders possess the power to determine the extent of their participation in the company profits. Such policyholders are regarded as possessing a common equitable ownership of the assets of the insurance company which may "at their option be transformed into a legal title and reduced to possession by [company] dissolution."[5] Accordingly, the rights of such policyholders in amounts which their mutual company determines to set aside as a reserve for insurance losses and claims would appear to be subject only to the occurrence of the anticipated loss or claim. Therefore, if the companies in question should be mutual in nature as defined below, their excess reserves would be, for capital stock purposes, a legal liability accruing to their policyholders.

The principles are well established[6] that a mutual insurance company must be "democratically owned and controlled" by its policy-

[3] *McKean v. Biddle,* 181 Pa. 361, 362, 37 Atl. 528 (1897).
[4] *Keystone Automobile Club Casualty Co. v. Commissioner of Internal Revenue,* 122 F. 2d 886 (3rd Cir. 1941).
[5] *Mutual Fire Insurance Co. of Germantown v. United States,* 142 F. 2d 344 348 (3rd Cir. 1944); *Huber v. Martin,* 127 Wis. 412, 105 N. W. 1031, 1135, 3 L.R.A. (N.S.) 653, (1906).
[6] *Penn Mutual Co. v. Lederer,* 252 U. S. 523, 535, 40 S. Ct. 397, 64 L. Ed. 698 (1920) and cases cited therein.

holders and be organized and operated "exclusively" for the purpose of furnishing them "insurance at cost."

These principles received recent restatement in several federal cases[7] involving mutual insurance companies, cases arising under tax statutes in which no specifications for a mutual organization had been provided. In a case applying these principles to one of the companies involved in the present settlement, the Court of Appeals for the Third Circuit found that the company was not democratically owned or controlled by its policyholders and was not, therefore, mutual in nature.[8] The factual situation on which this holding was based was stated in the opinion as follows:

> "First, the percentages of departure from democratic control are substantial; that is on the average 17½% of the policyholders could not vote and conversely, non-policyholders exceeding 20% of the voting policyholders had the right to vote. Second, it was the regular and established policy of the petitioners to permit these departures * * * Finally, the trust [claimed as impressed upon the shares of stock for the benefit of policyholders], assuming it exists, is controlled by members of the * * * Club, as such, and not by the policyholders. The members of the Club indirectly control the shares and can vote them so that club members, as such, may benefit instead of policyholders. The by-laws [are not persuasive on this question] since they can be changed by the club members whose interests are not necessarily consistent with those of the policyholders."

This factual description reveals the characteristics which the Court regarded as essential to a finding of democratic control by policyholders of an insurance company. Each policyholder must have the power to vote for the members of the board of directors of the insurance company, and such voting power must be shared on some equitable basis by each policyholder, be within their direct control, and be regular and established.

The present organizations and operations of the three companies may still resemble closely the above description of the one company as of 1941. Accordingly, to the extent that this description is presently characteristic, the federal opinions, arising out of non-statutory considerations and in accord with widely held conclusions on the nature

[7] *Mutual Fire Insurance of Germantown v. United States* 142, F. 2d 344 (3rd Cir. 1944), and cases cited therein.

[8] *Keystone Automobile Club Casualty Company v. Commissioner of Internal Revenue*, 122 F. 2d 886 (3rd Cir. 1941).

of mutual insurance companies, appear to be controlling on the question of the mutual character of the insurance companies in question.

But even if we assume that the companies in question are democratically owned and controlled by policyholders, they must also satisfy the other fundamental characteristic of a mutual insurance company.

> "It is of the essence of mutual insurance that the excess of premiums over the actual cost as ascertained shall be returned to the policyholders * * * Mutuality implies insurance at cost."[9]

This principle would, therefore, prevent any insurance company from qualifying as mutual in nature which paid dividends to its stockholders out of premiums or the reasonable returns therefrom. Moreover, in applying the principle to income which is held for the payment of losses or claims, it is apparent that such reserves are mutual only when both their origins and purposes are of an insurance nature. Thus, these reserves would not subserve the principle of insurance at cost and would be "non-mutual" if they were retained solely for commercial or general business reasons.[10] The reserves would result in insurance at a profit to policyholders and would be "non-mutual" in the same sense if they were not created from the premium contributions of policyholders or the reasonable returns therefrom.[11]

Non-mutual reserves, as just defined, if they are large enough, may establish the non-mutual character of an insurance company in spite of policyholder control and ownership.[12] Lesser reserves, however, may only result in their being treated for tax purposes as belonging to the "company" or corporation rather than to the policyholder.[13]

The companies in question have admitted to creating their reserves, in part, for the purpose of meeting the requirements for doing business in other states and thereby of expanding their activities. Under similar circumstances, in *Keystone Mutual Casualty Co. v. Driscoll,*[14] the Court declared that although such planning "may have been

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[9] *Driscoll v. Washington County Fire Insurance Co.,* 110 F. 2d 485 (3rd Cir. 1940), cert. denied 311 U. S. 658, 61 S. Ct. 12, 85 L. Ed. 421 (1940).

[10] *Keystone Mutual Casualty Co. v. Driscoll,* 137 F. 2d 907 (3rd Cir. 1943).

[11] *MacLaughlin v. Philadelphia Contributionship,* 73 F. 2d 582 (3rd Cir. 1943).

[12] *Mutual Fire Insurance Co. of Germantown v. U. S.,* 142 F. 2d 344 (3rd Cir. 1944), and cases cited therein.

[13] *Keystone Mutual Casualty Co. v. Driscoll,* 137 F. 2d 907 (3rd Cir. 1943), and cases cited therein.

[14] *Keystone Mutual Casualty Co. v. Driscoll,* 137 F. 2d 907, at 911 (3rd Cir. 1943).

prudent from a commercial viewpoint, it looked toward an expansion of business in other states rather than to the lowered cost of insurance for *existing* policyholders." In addition, the companies have indicated that a portion of their reserves represent not the premiums of policyholders but the paid-in capital of stockholders.

Accordingly, even assuming the insurance companies in question are democratically owned and controlled by policyholders, the portions of the reserve, including those described above, accumulated for non-mutual purposes or from non-mutual sources are to that extent not to be regarded for tax purposes as liabilities to policyholders which arise by reason of their membership in a mutual organization.

2. If the companies in question are not mutual in nature, the pertinent inquiry is whether provisions in their by-laws, share certificates, or policies confer upon policyholders such present fixed rights in the reserves as would be held to create for capital stock purposes, a legal liability presently accruing to them.

The rule is well established that the relation between the policyholder and a stock insurance company and its assets is one solely of contract, measured by the terms of the policy.[15] It should be noted, therefore, that the provisions of the policy contract which may be used to establish the present rights of the policyholders to the amount of excess reserves are the "apportionment" clause and the "earnings held for the benefit and protection of policyholders" clause.[16]

The "apportionment" clause, clearly, does not lend itself to an interpretation to the effect that policyholders acquire rights in the

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[15] *Equitable Life Assurance Society v. Brown*, 213 U. S. 25, 29 S. Ct. 404, 53 L. Ed. 682 (1908), and cases cited therein. See also *White v. Provident Life and Trust Co.*, 237 Pa. 375, 85 Atl. 463 (1912).

[16] Typical provisions are as follows:

"At the expiration of the term for which this policy is written, if it shall so long remain in force, there shall be distributed to the named insured such proportion of the earned divisible surplus as the Directors shall set aside for that purpose. The amount so distributed shall be applied on account of renewal of insurance if the policy is renewed, or if not renewed, the amount shall be refunded to the named insured."

"The Dividends upon the capital stock shall not exceed nine per cent (9%), payable only out of earnings. Any profits over and above the dividends on the stock shall be held for the benefit and protection of the policyholders, and after setting aside such sums as may be necessary under the law or in the judgment of the Board of Directors for contingency funds, shall be apportioned among the policyholders upon the mutual insurance principle, in manner as the Board of Directors shall from time to time direct."

surplus and excess reserves in proportion to their policy investments. Indeed, by-laws of the one company, which were adopted on October 28, 1938, but which were not incorporated in policy contracts, would indicate that at least one of the insurance companies rejected such an interpretation:

> "In the event of final dissolution, the entire proceeds of such dissolution, after reimbursement of the Club of the amounts which it has contributed as capital and surplus shall be divided equitably among the then policyholders of the said company."

By limiting the equitable division of assets to policyholders in existence at time of dissolution, this company makes it apparent that in the course of its active existence it did not intend policyholders to acquire any aliquot share of surplus or excess reserves.

Moreover, an analysis of the apportionment clause makes it apparent that the policyholders did not acquire any rights to have the insurance companies apportion their net profits, surplus, or excess reserves in any "particular" manner except from "time to time." Indeed, the lack of standards for apportionment leaves no doubt that the insurance companies intended their decisions in this area to be conclusive and not the subject of review.[17] The apportionment clause would appear, therefore, to be no more than an illusory promise and unenforceable at law at any time.[18]

In addition, apart from its illusory nature and with respect to the excess reserves in question, the apportionment clause is inapplicable. The apportionment provision becomes operative only after the setting aside of such sums as may be "necessary under law or in the judgment of the Board of Directors for contingency funds." Therefore, the apportionment provision confers no present fixed rights upon the policyholders in connection with the excess reserves.

The other clause of significance reads as follows:

> "* * * Any profits over and above the dividends shall be held for the benefit and protection of the policyholders. * * *"

[17] Accord, *White v. Provident Life & Trust Co.*, 237 Pa. 375, 85 Atl. 463 (1912).

[18] Levin, *Sum. Pa. Jur. Contracts*, § 93 (1955). "If it appears * * * that actually and in reality, nothing which the promisor was not entitled to have independent of his promise, was given or promised to be given in its return, the consideration is said to be illusory or imaginary and is insufficient to constitute a valid consideration (1955)."

An analysis of this language in the context of the entire by-law leads to the conclusion that either (1) the excess reserves of a stock insurance company provide policyholders a non-exclusive benefit and protection that is no different from that accorded them by capital and paid-in surplus and, as a consequence, should be treated no differently for capital stock tax purposes or (2) the clause confers upon the policyholders fixed rights in such reserves to the extent of the actual insurance benefits and protection, as defined below, conferred by such reserves upon the policyholders.

The purpose of capital stock and paid-in surplus in a stock insurance company is to provide the fund out of which extraordinary insurance losses may be met.[19] Such protection gives both the policyholders and stockholders the assurance that the corporation will continue to fulfill the purposes for which it was formed.

The excess reserves in question can only be related in the main, to the possibility of extraordinary losses. Consequently, they afford the "benefit and protection" shared by both policyholders and stockholders which also characterize the capital and paid-in surplus of insurance companies. Indeed, the action of the insurance companies in question, in capitalizing their excess reserves for the issuance of stock dividends to stockholders would indicate that they themselves regard these accounts as serving equivalent purposes. Accordingly, these excess reserves should be treated no differently than capital or paid-in surplus for capital stock tax purposes.

Assuming, arguendo, the facts indicate that the reserves are related to more than the mere possibility of extraordinary losses, the language of the clause makes it clear that the excess reserves amount to a liability to policyholders only to the extent that actual benefits and protection, as defined below, are conferred.

This limitation arises out of the fact that the word "held" is not followed by any modifying words of duration or of irrevocable dedication. Presumably, therefore, profits originally set aside in surplus and excess reserve accounts need not continue to be "held" for the exclusive benefit and protection of the policyholders as a class unless such profits have been conferred upon them by providing actual "protection and benefit."

[19] *Penn Mutual Co. v. Lederer*, 252 U. S. 523, 525, 40 S. Ct. 397, 64 L. Ed. 698 (1920).

The by-law contemplates that such protection and benefit may only be conferred either by "contingency funds" or by *actual* apportionment, as indicated by our interpretation above of the apportionment clause. The reserves in question, of course, would fall into the category of contingency funds."

Furthermore, it is apparent that policyholder "protection and benefit" must have a direct relationship to insurance. If a portion of the "contingency funds" in question were accumulated for the commercial or general business purposes of the company, the protection and benefit to policyholders would be too remote to be considered applicable. In addition, where portions of "contingency funds" created do not consist of premiums or proper returns therefrom, to such extent policyholders should be treated no differently than stockholders of the same company.

Contingency funds, to the extent that their purpose and source are insurance connected, must be related to insurance contingencies which are either determinable as to amount or, where that is impossible, probable as to occurrence. This attribute of a contingency fund is necessary in order to prevent the "protection and benefit" clause from also being regarded as illusory and unenforceable under contract law.

Therefore, except to the extent of the actual insurance benefits and protection, as defined above, conferred by the excess reserves upon the policyholders, no provision in the by-laws, share certificates or policies confers upon the policyholders fixed rights in such reserves.

3. Insurance reserves, even of casualty and fire companies, may be related to types of insurance contingencies which proper accounting, tax and insurance practice would require to be treated as contingent liabilities to the whole group of policyholders.[20] The relation is established when the types of contingencies which are contemplated consist of those for which "payments will probably be made either because of claims already pending or because of *foreseeable* claims for which a calculable basis has been established."[21] Moreover, genuine contingent liability reserves are based on the prospective settlement of these claims in a relatively short time.[22] On the other hand, proper accounting practice also requires that "reserves for contingencies"

[20] 13 A. L. R. 186, supplemented in 78 A. L. R. 562.
[21] W. A. Paton, Accountant's Hand Book, at 976 (3rd Ed., 1947).
[22] Id.

appropriated to cover merely possible future losses should generally be treated as "surplus accounts rather than as liabilities."[23]

Whether the excess reserves in question were created for the purpose of measuring pending or forseeable and calculable claims or of covering merely possible future losses is a question of fact.

Over the period 1929 to date, inclusive, the insurance companies involved accumulated large amounts of assets which were not used in the payment of incurred losses, accrued expenses or for the purpose of reinsuring outstanding policies for their unexpired terms. Indeed portions of the excess reserves of the insurance companies in question were capitalized for the issuance of stock dividends to *stockholders*. This history[24] points unmistakably to the conclusion that the excess reserves in question are nothing but surplus accounts and that it would be improper accounting practice to regard the amounts involved as liabilities.

Consideration of the tax implications also leads to the conclusion that the excess reserves in question be treated as surplus accounts. The companies claim to have created liability reserve accounts for the purpose of meeting insurance losses and claims. However, the companies have not, in fact, charged these "liability" reserves with actual losses and claims but, instead, have charged them directly to current income accounts thus, in effect, the companies claim the right to reduce company equity, for capital stock purposes, not only by the amounts actually paid for insurance losses and claims but also by the total of amounts presumably retained or reserved for such payments as liability accounts. Consequently, in view of the failure of the reserves to be used for loss and claim payments, the inevitable result of sustaining the position of the insurance companies in question would be to duplicate the loss and expense deductions from company assets.

Clearly, no construction of a taxing statute should be made permitting such duplication of deductions.[25] Therefore, for capital stock tax purposes, policy provisions relating to fire and casualty liability have not, in fact, created in policyholders a contingent interest in excess reserves which is such as to create under proper accounting practice a legal liability accruing to such policyholders.

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[23] Id.

[24] *Keystone Automobile Club Casualty Co. v. Comm. of Internal Rev.*, 40 B. T. A. 291, 307 (1939); *Best's Insurance Companies.*

[25] *Ilfeld Co. v. Hernandez*, 292 U. S. 62, 68, 54 S. Ct. 596, 78 L. Ed. 1127 (1934).

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

(1) The companies in question do not appear to be democratically owned and controlled by policyholders and are apparently non-mutual in nature. But even assuming such democratic control to exist, those portions of their reserves accumulated for non-mutual purposes or from non-mutual sources, as defined, are to that extent not to be regarded for tax purposes as legal liabilities accruing to policyholders by reason of their membership in such companies.

(2) No provision of the by-laws or policy contracts of the companies in question warrants, under principles of contract interpretation, a capital stock tax treatment of the excess reserves in question differing from that used for the capital and paid-in surplus of such companies. Assuming, arguendo, the facts indicate that the reserves are related to more than the mere possibility of extraordinary losses, the legal liability accruing to policyholders is limited to the extent of the actual insurance benefits and protection, as defined, conferred by the excess reserves upon the policyholders.

(3) Policy provisions relating to fire and casualty liability have not, in fact, created in policyholders a contingent interest in excess reserves which is such as to create, under proper accounting practice, a legal liability accruing to such policyholders.

Accordingly, reserves maintained by an insurance company in excess of the reserves required by law should be considered as part of the equity of the insurance company in the settlement of its capital stock taxes.

Very truly yours,

DEPARTMENT OF JUSTICE,

MORRIS J. DEAN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 118

Joint municipality authorities—Partial reimbursement to municipalities and municipality authorities—Sewage treatment plants and collection systems—Intercepting sewers—Non-members of joint authority—Appropriation Act. No. 77-A, Approved July 15, 1957.

Under Act No. 77-A, approved July 15, 1957, a special appropriation act designed to partially reimburse municipalities and municipality authorities for the costs of constructing sewage treatment plants and collection systems (1) municipalities which construct intercepting sewers discharging into a sewage system of a joint municipality authority are eligible to be reimbursed for the cost of the intercepting sewers if such intercepting sewers are an integral part of the sewage treatment facilities; (2) the entity which incurs the costs of construction of such sewers is the entity which is to be reimbursed under Act No. 77-A; and (3) for the purposes of Act No. 77-A, no distinction should be made in so far as reimbursement is concerned between member and non-member municipalities of a joint authority.

Harrisburg, Pa., May 29, 1958.

Honorable C. L. Wilbar, Jr., M.D., Secretary of Health, Harrisburg, Pennsylvania.

Sir: We are in receipt of your request for an interpretation of Act No. 77-A, approved July 15, 1957.[1] Specifically, you ask for clarification of the meaning of the language in § 2 thereof, which provides as follows:

> "Within the meaning of this act, the word 'construction' shall include, in addition to the construction of new treatment works, pumping stations and intercepting sewers which are an integral part of the treatment facilities *(including those intercepting sewers of municipalities which collect at least fifty per cent of the sewage of the municipality which enters a public sewage system in the municipality and discharge same into the collection system of the municipality which has constructed the main sewage plant)*, the altering, improving or adding to of existing treatment works, pumping stations and intercepting sewers which are essential to the sewage treatment plant system." (Emphasis added)

In your request, you state that it is not apparent whether municipalities are eligible for grants from the Department of Health

[1] Section 1 of the Act appropriates the sum of $3,200,000.00, or as much thereof as is necessary, to the Department of Health for payments to municipalities and municipality authorities toward the costs, among other items, of construction of sewage treatment plants by municipalities and municipality authorities expended by such entities for the purpose of controlling stream pollution.

for the construction of intercepting sewers where such sewers discharge into the collection system and treatment works of a joint authority comprising several municipalities. The answer to your request involves an interpretation of § 2 of the Act.

Initially, it should be said that Act No. 77-A is an appropriation act implementing the Act of August 20, 1953, P. L. 1217, 35 P. S. §§ 701 to 703 (Pocket Parts). The 1953 Act, in turn, is designed to allow the Department of Health of the Commonwealth to make grants not to exceed two per cent (2%) of the costs for acquisition and construction of sewage treatment plants by municipalities and municipality authorities for the purpose of controlling stream pollution. This act is designed to enable municipalities and municipality authorities more effectively to carry out the provisions of the Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §§ 691.1 to 691.801, commonly known as "The Clear Streams Act of 1937."

Since Act No. 77-A is designed to implement the Act of 1953, supra, and the Act of 1937, supra, its provisions should be interpreted as far as possible to implement the purposes of the other acts.

Your question, herein referred to, relating to discharge into the sewage treatment plants and collection systems of joint authorities, is predicated on the assumption that the words occurring in § 2 limit payment to those municipalities which discharge more than fifty per cent (50%) of their sewage into collection systems of those municipalities which have constructed the main sewage plant. However, the entire phrase occurring between the parentheses in § 2 of Act No. 77-A is merely a further definition of the term "intercepting sewers which are an integral part of the treatment facilities" to provide for a specific set of circumstances. Thus where municipalities discharge into the sewage treatment and collection system of joint authorities,[2] the parenthetical phrase in § 2 of Act No. 77-A is not applicable. The only matter to be decided in such a case with reference to intercepting sewers is whether such sewers are an integral part of the treatment facilities. If such intercepting sewers are an integral part of the treatment facilities of the joint authority, then municipalities which have incurred the costs of construction of such interceptors are entitled to grants under Act No. 77-A.

[2] A joint authority is a municipality authority both within the meaning of the Municipality Authorities Act of 1945, the Act of May 2, 1945, P. L. 382, 53 P. S. §§ 301 to 322, and under § 101 of Article VIII of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, as amended, 46 P. S. § 601.

Under the provisions of Act No. 77-A, payments are made to either municipalities or municipality authorities,[3] whichever incurs the costs of constructing the intercepting sewers. Since only those entities which incur the costs of construction of interceptors may receive payment from your Department, there is no danger that both a municipality and a joint authority will be reimbursed for the costs of construction of such intercepting sewers.

The question of whether a distinction should exist, for the purposes of this opinion, between a member municipality of a joint authority and a non-member municipality must be answered in the negative. The only pertinent inquiry is whether, given the fact that an intercepting sewer is an integral part of a sewage treatment works, the municipality has incurred the costs of constructing such interceptor.

We are of the opinion, and you are accordingly advised, that municipalities and municipality authorities may receive payment under the provisions of Act No. 77-A for the construction of intercepting sewers which are an integral part of the treatment facilities, and that such payment is to be made only to the entity which incurs the costs of constructing such interceptors. We are also of the opinion that the parenthetical language occurring in § 2 of the Act is not applicable to the situation where a municipality discharges sewage into the treatment facilities of a joint authority, and that in such case the language between the parentheses is to be disregarded. Furthermore, for the purposes of this opinion, no distinction may be made between member municipalities of a joint authority and non-members, if the other criteria of the Act are met.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. COHEN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

[3] Since Act No. 77-A distinguishes between municipalities and municipality authorities in § 1 thereof, the term "municipality" does not include "municipality authority" when used in the act.

OFFICIAL OPINION No. 119

Veteran missing for seven years—World War II Veterans Compensation Act—Payment to beneficiary—Proof of death.

After a veteran has been missing for seven years, whether or not he has applied personally, his bonus may be paid to his legally qualified beneficiary, if any one of the following is submitted: (a) proof of actual death, (b) judicial decree of legal death, and (c) determination by Federal authorities, under any act for the payment of Federal benefits, that the veteran is legally dead.

Harrisburg, Pa., May 29, 1958.

Honorable Anthony J. Drexel Biddle, Jr., The Adjutant General, Department of Military Affairs, Harrisburg, Pennsylvania.

Sir: Your department has asked to be advised whether, under the World War II Veterans Compensation Act, the Act of June 11, 1947, P. L. 565, 51 P. S. §§ 455.1 to 455.16:

(a) compensation may be paid to a proper beneficiary when a veteran, after applying but before payment is made, disappears and is not heard of for more than seven years; and

(b) compensation may be paid to a proper beneficiary when a veteran, who qualifies but has never made application, disappears and has not been heard of for more than seven years.

The only difference between (a) and (b) situations is that in (a) the veteran applies personally while in (b) application is made by someone else. This is immaterial, however, since § 7 of the act, supra, 51 P. S. § 455.7, provides that in the event of a veteran's death or mental incompetency a representative may make application in his behalf.

Section 6 of the act, 51 P. S. § 455.6, provides:

> "Whenever, prior to the date of distribution of compensation under the provisions of this act, a veteran entitled thereto shall have died, or if such veteran shall have been or shall be determined to have been legally dead by the Federal authorities under any act for the payment of Federal benefits, or becomes mentally incapable of receiving his or her compensation, payment shall be made by the Adjutant General without proceedings in this Commonwealth:
>
> * * * * * * *"

Under the above section, it is necessary that the veteran shall have died, or that he shall be found "legally dead by the Federal authorities under any act for the payment of Federal benefits."

We construe "shall have died" broadly to include "shall have been found legally dead" by authority of § 10 of the act which specifies its intent that compensation be "paid for the service of veterans whether or not they be living when distribution is made" and also under the Statutory Construction Act, Act of May 28, 1937, P. L. 1019, § 58, 46 P. S. § 558, which includes this type of statute among those to be "liberally construed to effect their objects and to promote justice." Upon a decree of presumption of death by any court of competent jurisdiction, the procedure is the same as if the presumed decedent were proved to be actually dead. *In re Millar's Estate,* 356 Pa. 56, 51 A. 2d 745 (1947).

The Act of April 18, 1949, P. L. 512, § 1201, 20 P. S. § 320.1201, provides for a judicial finding and decree of legal death after seven years of unexplained absence.

It is therefore our opinion, and you are accordingly advised, that after a veteran has been missing for seven years, whether or not he has applied personally, his bonus may be paid to his legally qualified beneficiary, if any one of the following is submitted:

(a) proof of actual death.

(b) judicial decree of legal death.

(c) determination by Federal authorities, under any act for the payment of Federal benefits, that the veteran is legally dead.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 120

State employees—Civil service—Provisional employees retained in excess of 90 days—Responsibility for appointment of eligible personnel—Section 604 of the Civil Service Act.

(1) In accordance with § 604 of the Civil Service Act, the Act of August 5, 1941, P. L. 752, as amended, it is unlawful for any employee to remain in a provisional civil service appointment for a period in excess of ninety days in a twelve month period or to serve in a successive provisional appointment after the expiration of the initial provisional period of employment.

(2) The responsibility for replacing provisional employees rests with the appointing authority who should replace such employee with a person from a list of eligibles compiled by the Civil Service Commission. If no list exists, it is the responsibility of the Civil Service Commission to hold examinations and compile an eligible list with all due dispatch.

(3) The Auditor General may continue to issue warrants for payment of salaries to employees whose provisional civil service appointments have continued beyond ninety days since such provisional employees are in the nature of de facto employees and are entitled to remuneration for the services which they perform for the Commonwealth. Every effort, however, must be made by the Civil Service Commission to furnish appointing authorities with eligible lists. If the same are already available or as soon as they are available, all appointing authorities should immediately appoint persons to replace the now ineligible provisional employees.

Harrisburg, Pa., May 29, 1958.

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

Sir: You have requested the opinion of this department on the validity of provisional civil service appointments which continue for periods in excess of ninety days. Particularly you inquire:

1. Is it proper for various departments and agencies of the Commonwealth to continue to certify employees on provisional civil service appointments of ninety days or more as employees eligible to hold positions classified as civil service positions?

2. Where is responsibility lodged for determining when a provisional employee shall be replaced, the State Civil Service Commission or the appointing department or agency?

3. May the Auditor General continue to issue warrants for payment of salaries to employees whose provisional civil service appointments have continued beyond the statutory ninety day period?

In answer to your first question, the law is quite clear. Section 604 of the Civil Service Act, the Act of August 5, 1941, P. L. 752, as amended, 71 P. S. § 741.604, provides that where there is a great and urgent need for filling a vacancy in a classified position and the Executive Director of Civil Service is unable to certify an eligible person for the vacancy, he may authorize the filling of the vacancy by a provisional appointment. If he does so authorize, he shall certify the names of not more than three qualified persons, with or without examination; and the appointing authority shall appoint one of these three. Such an appointment may continue only until an appropriate eligibility list can be established; but, in no event, may such an appointment last more than ninety days in any twelve month period.[1] Successive provisional appointments of the same or different persons to the same position are prohibited.

It is thus clear that persons who hold provisional appointments in excess of ninety days in any twelve month period are doing so in contravention of the law.

We turn to your second inquiry as to where the responsibility is lodged for determining when a provisional employee shall be replaced. Initially, the Civil Service Commission should make every diligent effort to compile an eligible list from which qualified persons can be certified to the appointing authority. Once that list is compiled, it becomes the obligation of the appointing authority to appoint a certified eligible person. This, however, does not answer the problem of who has the responsibility for removing a provisional employee whose ninety days have expired but who has not been replaced because no eligible list has been compiled. Here the responsibility rests upon all officials concerned to abide by the mandate of the law. This may place an appointing authority in a truly difficult position. He will be faced with the dilemma of removing the provisional employee and thus eliminating an essential service or maintaining the essential service and keeping the provisional employee beyond the ninety day limit.

Since, as you point out in your request, there are over one thousand employees whose ninety days' tenure had expired, an immediate whole-

[1] Except that during the first year after the repeal of the act, the Act of June 4, 1943, P. L. 870, provisional appointments could continue until appropriate eligible lists could be established, and a person might serve in the classified service under provisional appointment until appropriate eligible lists were established and certification made therefrom. The Act of 1943, supra, was repealed by the Act of June 21, 1947, P. L. 835, § 4.

sale removal might well have a devastating effect on the operation of the State government.

A similar problem arose in 1938. According to Formal Opinion No. 245, 1937-38 Op. Atty. Gen. 120, § 208 of the Unemployment Compensation Law, the Act of December 5, 1936, P. L. (1937) 2897, provided for the appointment of employees on the basis of merit, as determined by competitive examinations. The Unemployment Compensation Board of Review was to hold and grade examinations and to certify to the Secretary of Labor and Industry the names of persons receiving passing grades in the order of their accomplishment. The Secretary was then to make appointments from the list of eligibles. At the time of the writing of Formal Opinion No. 245, numerous examinations had been given but there were still between four thousand five hundred and five thousand persons serving as provisional employees. The deadline for the complete installation of civil service and the expiration of provisional tenure had passed.

In Formal Opinion No. 245 we ruled that there must be an immediate replacement of provisional employees by those qualified to hold permanent civil service status. We feel the same result should follow here. In all cases where a provisional employee has been retained beyond the ninety day limit and a certified list of eligibles for the position exists, the appointing authority shall make an immediate appointment. Where no list is in existence, the Civil Service Commission must hold examinations and certify those eligible without delay. Thereafter, appointments shall be promptly made from the lists. Until such lists are prepared and appointments made, the retention of the present provisional employees is justifiable.[2] However, this opinion should not be construed as a condonation for delay in preparing eligible lists; nor should it be construed as approving the practices which caused the accumulation of over one thousand provisional employees whose tenure has expired.[3]

[2] Letter of Advice by Deputy Attorney General M. Louise Rutherford to Honorable George Young, Chairman, State Civil Service Commission, dated April 9, 1949; Formal Opinion No. 257, 1937-38 Op. Atty. Gen. 165.

[3] Some of these provisional employees have enjoyed this status since 1943. In this respect, in fairness to the present Civil Service Commissioners, we stress that there is strong evidence that the number of provisional employees has been reduced in recent months. Also, the Commission has been handling the added work stemming from this Administration's extension of civil service by the Executive Board's Order of September 10, 1956.

Turning to your third question, we find that provisional employees who have continued beyond the statutory ninety day period may receive their salaries since they are, at least, de facto employees who should be reimbursed for services actually performed: Formal Opinion No. 245, supra; Formal Opinion No. 257, supra.

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

(1) It is unlawful for any employee to remain in a provisional civil service appointment for a period in excess of ninety days in a twelve month period or to serve in a successive provisional appointment after the expiration of the initial provisional period of employment.

(2) The responsibility for replacing provisional employees rests with the appointing authority who should replace such employee with a person from a list of eligibles compiled by the Civil Service Commission. If no list exists, it is the responsibility of the Civil Service Commission to hold examinations and compile an eligible list with all due dispatch.

(3) The Auditor General may continue to issue warrants for payment of salaries to employees whose provisional civil service appointments have continued beyond ninety days since such provisional employees are in the nature of de facto employees and are entitled to remuneration for the services which they perform for the Commonwealth. Every effort, however, must be made by the Civil Service Commission to furnish appointing authorities with eligible lists. If the same are already available or as soon as they are available, all appointing authorities should immediately appoint persons to replace the now ineligible provisional employees.

Very truly yours,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 121

Police officers—Power to incarcerate persons suspected of crime—Legality of arrests—Procedure immediately following—Act of April 23, 1909, P. L. 141.

The Act of April 23, 1909, P. L. 141, does not authorize the incarceration of a person suspected of crime for a period of up to 48 hours pending investigation to determine whether a charge should be lodged against the suspect, but merely permits the temporary lodging for a period of up to but not in excess of 48 hours of a person under arrest because of the impossibility or impracticability, due to an emergency situation beyond the control of the arresting officer, of proceeding without unnecessary delay to take the prisoner before a committing magistrate. There is no authority in law for the arrest or detention of a person "on suspicion," nor is "suspicion" a proper charge to be lodged. Arrests must in every case, without exception, be based on probable cause; and the person arrested must be charged with a specific offense.

Harrisburg, Pa., June 2, 1958.

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

Sir: It has come to the attention of the Department of Justice that members of the Pennsylvania State Police are of the belief that the Act of April 23, 1909, P. L. 141, 19 P. S. §§ 4, 5[1] authorizes police officers to incarcerate a person suspected of crime for a period of up to 48 hours, pending completion of an investigation, whether or not a charge has been lodged against the suspect. We have deemed it desirable, in addition to advising you as to the applicability of the Act of 1909, to inform you generally as to the powers and duties of police officers regarding arrests.[2]

The Constitution of Pennsylvania, Article I, Section 8, provides as follows:

> "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or

[1] § 1. "Sheriffs, constables, members of the State constabulary, or other persons authorized by the laws of this Commonwealth to make arrests, hereafter shall have the use, for a period not to exceed forty-eight hours, of borough and township lockups and city or county prisons, for the detention of prisoners until they can be disposed of according to law, if found necessary by the officer in charge."

§ 2. "Boroughs, cities, and townships shall be entitled to receive a compensation of fifty cents per day, of twenty-four hours, for each prisoner so incarcerated, from the treasury of the county having jurisdiction over the prisoner."

[2] This opinion is limited solely to the question of legality of arrests and the procedures immediately following. It is not to be construed to apply to such matters as the admissibility of evidence obtained as a result of an illegal arrest.

> things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant."

"But it is nowhere said, that there shall be no arrest without warrant. To have said so would have endangered the safety of society. The felon who is seen to commit murder or robbery, must be arrested on the spot or suffered to escape. . . . These are principles of the common law, essential to the welfare of society, and not intended to be altered or impaired by the constitution. . . ." *Wakely v. Hart,* 6 Binn. 316, 318, 319 (1814).

"It has long been the settled law in this State that a police officer, or even a private citizen, may arrest for felony without a warrant: . . ." *Commonwealth ex rel. Spencer v. Ashe,* 364 Pa. 442, 445, 71 A. 2d 799 (1950). The authority of a police officer to arrest without warrant is further succinctly stated in 3 Pennsylvania Law Encyclopedia, Arrest § 4:

> "A police officer may arrest without a warrant for a felony if he has reasonable grounds to believe that the felony has been committed and that the person arrested is the felon, or for a misdemeanor if the misdemeanor is committed in the officer's presence."

It cannot be contended with reason that the authority of an officer is greater when he is *not* armed with a warrant than it is where he has in his possession for execution a warrant lawfully issued by proper judicial authority. Arrest without a warrant can be—and is—made lawful by the existence of circumstances which make the procurement of a warrant unfeasible. *Burk v. Howley,* 179 Pa. 539, 36 Atl. 327 (1897); *Wakely v. Hart,* supra; Sadler, *Criminal and Penal Procedure in Pennsylvania,* § 80. Yet a warrant is a command (and an authorization) to the officer to whom it is directed to take the body of the accused and bring him before the issuing magistrate to answer the charge. The command is unambiguous and inexorable,[3] it does not admit of a construction which would allow temporary detention of the prisoner for the officer's own purposes apart from the execution of the warrant. "The warrant having been given to the

[3] Typical of the commands of arrest warrants are those found in the forms suggested by Sadler, op. cit., p. 583:

> ". . . These are, therefore, to command you to take the said E. F. *and bring him forthwith before said justice* to answer the said complaint, and further to be dealt with according to law."
>
> ". . . You are hereby commanded to take the body of C. D. . . *and bring him before me,* J. P., a justice of the peace . . further to be dealt with according to law . . ." (Emphasis supplied.)

constable, it becomes his duty to take the person named therein into custody and to return and produce his body as directed." Sadler, op. cit., Sec. 75. In the case of an arrest without warrant, the duty of the arresting officer is equally clear: ". . . to take the accused before a magistrate for formal accusation and hearing *before he shall have been locked up.*" Sadler, op. cit., Sec. 80. (Emphasis added)

Although there is no prescribed time within which a preliminary hearing must be held [*Commonwealth v. Shupp,* 365 Pa. 439, 446, 75 A. 2d 587 (1950)],[4] the "right of an accused to a preliminary hearing, with certain exceptions,[5] has become a part of the law of this Commonwealth. . . ." *Commonwealth v. O'Brien,* 181 Pa. Super. 382, 393-4, 124 A. 2d 666 (1956). "The arrested person may, of course, be 'booked' by the police" [*Mallory v. United States,* 354 U. S. 449, 454, 77 S. Ct. 1356, 1 L. Ed. 2d 1479 (1957)], and interrogated by them. *Commonwealth v. Shupp,* supra. "The mere questioning of a suspect while in the custody of police officers is not prohibited either as a matter of common law or due process." *Lyons v. Oklahoma,* 322 U. S. 596, 601, 64 S. Ct. 1208, 88 L. Ed. 1481 (1944); *Commonwealth ex rel. Sleighter v. Banmiller,* 392 Pa. 133, 137, 139 A. 2d 918 (1958).[6] But an arrest—with or without warrant—is justifiable *only* if made on probable cause that a specific crime has been committed. The books will be searched in vain for any authority in a police officer or anyone else to detain a person in a prison, jail, stationhouse, or elsewhere "on suspicion" that he is guilty of a crime and pending an investigation to determine whether he should be charged with one. "The police may not arrest upon mere suspicion but only on 'probable cause' . . . It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge

[4] In *Lyons v. Oklahoma,* infra, the Supreme Court stated in footnote 2, pp. 597-8 that ". . . the effect of the mere denial of a prompt examining trial [preliminary hearing] is a matter of state, not of federal law. To refuse this is not a denial of equal protection under the Fourteenth Amendment although it is a fact for consideration on an allegation that a confession used at the trial was coerced." See also: *Commonwealth v. Johnson,* 365 Pa. 303, 74 A. 2d 144 (1950), reversed on another ground sub nom. *Johnson v. Pennsylvania,* 340 U. S. 881, 71 S. Ct. 191, 95 L. Ed. 640 (1950). But semble the denial of a prompt preliminary hearing was an ingredient of the decisions reached in *Watts v. Indiana,* 338 U. S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801 (1949); *Turner v. Pennsylvania,* 338 U. S. 62, 69 S. Ct. 1352, 93 L. Ed. 1810 (1949) and *Harris v. South Carolina,* 338 U. S. 68, 69 S. Ct. 1354, 93 L. Ed. 1815 (1949).

[5] Not here pertinent.

[6] Cf. *Mallory v. U. S.,* supra, where the issue was the application of a Federal Rule which requires that upon an arrest the arrested person shall be taken before a United States Commissioner "without unnecessary delay." There is no comparable rule or statute in Pennsylvania. *Commonwealth ex rel. Sleighter v. Banmiller,* supra, at p. 138; *Commonwealth v. Johnson,* supra.

before a committing magistrate on 'probable cause.'" *Mallory v. United States,* supra. In *Burk v. Howley,* supra, a person was detained at a police station for eight days on "suspicion" without any charge being made against her before a magistrate. The Supreme Court held, at p. 550:

> ". . . No comment is needed on such conduct; that an humble citizen who has always borne a good character can on mere suspicion, at the instigation of a private person, be arrested, locked up and detained in a station house with its disagreeable surroundings for eight days, without information or warrant, and this with the knowledge of, if not with the connivance of two officers of the law, suggests its own comment . . . His purpose was to extort a confession of guilt, a revival in a somewhat milder form of the rack and thumbscrew process to establish crime, and just as flagrantly unlawful. . . ."

The existence of probable cause (or lack of it) is a matter for judicial determination, although a police officer is responsible in the first instance for an evaluation of the information in his possession at the time of arrest without warrant or at the time of his application for a warrant by way of filing an information, in order to satisfy himself of the existence of probable cause. "A preliminary hearing is held primarily to prevent the detention of a person for a crime which was never committed or of a crime with which there is no evidence of his connection. It is primarily to prevent a person from being imprisoned or required to enter bail when there is no evidence to support a charge against him." *Commonwealth v. O'Brien,* supra, at p. 396.

Summing up, then, before an arrest may lawfully be made, the officer should be in possession of credible information which causes him to believe that a crime has been committed and that a certain person or persons committed it, i.e., that there is "probable cause." An officer may not lawfully arrest or detain a person merely "on suspicion."[7] If time and other circumstances permit, he is to present the facts under oath, by way of an information, to a proper judicial officer and thereby procure an arrest warrant. If, however, the exigency of the situation is such that it is impracticable to procure a warrant, he may arrest without one: for a felony, at any time; for a misdemeanor, only on view of its commission. After the arrest has been effected, the officer is under a duty to proceed without unnecessary

[7] There are no such charges as, for example, "suspicion of murder," "suspicion of larceny," etc., known to the law. The only proper and lawful charges are those of the respective crimes themselves.

delay to take his prisoner before a committing magistrate where, if the arrest was made without a warrant, he must file a sworn information. Thereupon, a preliminary hearing may be held at once by the magistrate or a date set for one to be held in the future. At that juncture, however, the disposition of the prisoner becomes the responsibility of the magistrate; the responsibility of the arresting officer, as far as his personal custody is concerned, then ceases.

Turning now to the Act of 1909, it provides that persons authorized by the laws of the Commonwealth to make arrests "shall have the use, for a period not to exceed 48 hours . . . of . . . lockups . . . for the detention of prisoners until they can be disposed of according to law . . ." "Until they can be disposed of according to law" can only mean "until they can be taken to a magistrate for preliminary hearing," since it has been shown that it is the duty of a police officer to take that step following an arrest. Also, it should be noted that the Act does not discriminate between cases of arrests with a warrant and those without one; in the former cases the command of the warrant is plain, that the prisoner be *brought to the magistrate,* not locked up somewhere for as long as 48 hours. However, physical and temporal events may prevent prompt fulfillment of the duty to take the prisoner to a magistrate; extreme weather conditions may make travel to a magistrate's office impracticable or impossible; the prisoner may be in such physical or mental condition that medical or other treatment must be obtained without delay; the hour may be late, or a magistrate simply unavailable immediately. In such (and similar) situations the officer should "have the use" of lockups, jails or prisons for the safekeeping of his prisoner; this use he may lawfully demand for a period of up to but not exceeding 48 hours under the provisions of the Act of 1909, which creates a right-duty relationship between policeman and jailer but in no manner alters the hitherto-outlined relationship between the officer and his prisoner. *Commonwealth v. Deacon,* 8 S. & R. 47, as long ago as 1822, recognized the right of an officer to lodge, and the duty of a jailer to receive a prisoner under circumstances amounting to an emergency:

> "Although the authorities are not decisive on this subject, they go a considerable length to establish the right of a constable to deposit a prisoner, arrested without a warrant, in the common jail, *for safe keeping, till he can be carried before a magistrate* . . . Although it is said, *the safer course is to cause him, as soon as convenience will permit, to be brought before a justice of the peace* . . . This is the sum of what is found in the books on the subject; and without saying what would be the duty of a jailer, in case of an

> arrest by a private person, I think it may fairly be inferred, he is bound to receive a prisoner offered by a constable for safe keeping." (Emphasis added)

The act of 1909 simply limits the length of time during which an officer may lawfully demand the use of a prison or lockup for the safekeeping of his prisoner and provides for compensation for such use. Clearly, it confers no authority to detain a person "on suspicion" pending investigation without making any formal charge.

We are therefore of the opinion, and you are accordingly advised, that the Act of April 23, 1909, P. L. 141, 14 P. S. §§ 4, 5, does not authorize the incarceration of a person suspected of crime for a period of up to 48 hours pending investigation to determine whether a charge should be lodged against the suspect, but merely permits the temporary lodging for a period of up to but not in excess of 48 hours of a person under arrest because of the impossibility or impracticability, due to an emergency situation beyond the control of the arresting officer, of proceeding without unnecessary delay to take the prisoner before a committing magistrate. You are further advised that there is no authority in law for the arrest or detention of a person "on suspicion," nor is "suspicion" a proper charge to be lodged. Arrests must in every case, without exception, be based on probable cause; and the person arrested must be charged with a specific offense.

Yours very truly,

DEPARTMENT OF JUSTICE,

VICTOR WRIGHT,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 122

Liquor violations—Informer—Revealing identity to district attorney, grand jury, defense counsel, or court—Pennsylvania Liquor Control Board.

The identity of a person furnishing information to the Pennsylvania Liquor Control Board as to violations of the Liquor Code, the Act of April 12, 1951,

P. L. 90, may not be disclosed by a court on its own motion, defendant's counsel or grand jury, but such identity must be disclosed upon receipt of a court order or upon request of a district attorney charged with the duty of prosecuting an offense stemming from information communicated by the informer.

Harrisburg, Pa., June 5, 1958.

Honorable Patrick E. Kerwin, Chairman, Pennsylvania Liquor Control Board, Harrisburg, Pennsylvania.

Sir: You have requested our opinion as to whether the identity of a person furnishing information to the Liquor Control Board as to violations of the Liquor Code, the Act of April 12, 1951, P. L. 90, 47 P. S. §§ 1-101 to 9-902, must be revealed upon demand of a district attorney, grand jury, defense counsel, or court.

At the outset, it is necessary to distinguish between communications relating to affairs of state, commonly known as state secrets, and communications to prosecuting officials of the government in regard to alleged crime made by an informer. Your inquiry relates solely to the latter situation, but, due to the similarity of the rules and the possibility of their being confused, we deem it advisable to briefly discuss the former situation.

1. With regard to communications relating to affairs of state, the rule is deep-rooted in the common law that such communications are generally privileged, and the officials of the government may refuse to disclose the contents thereof. The reasons for the rule are twofold: one, publication of state documents may involve danger to the government; and, two, publication might be injurious to government officials as individuals, and their freedom to communicate within the government restricted by the fact that such communications might otherwise become a basis for civil actions in libel or slander.

In *Gray v. Pentland,* 2 S. & R. 22 (1815), this rule was first applied in Pennsylvania when it was held in an action for a libel contained in a deposition made and sent to the governor by a private citizen, charging the plaintiff with misconduct in office, that it was within the governor's discretion to produce or withhold the letter; and parol evidence of its contents was inadmissible. The reasoning for the privilege as to state secrets was adequately expressed by Chief Justice Tilghman at page 81:

> "* * * It is a matter of very delicate concern, to compel the chief magistrate of the state to produce a paper which may have been addressed to him, in confidence that it should be kept secret. Many will be deterred from giving to the Governor that information which is necessary, if they are to do it at the hazard of an action, and of all the consequences flowing from the enmity of the accused. It would seem reasonable, therefore, that the Governor, who best knows the circumstances under which the charge has been exhibited to him, and can best judge of the motives of the accuser, should exercise his own judgment with respect to the propriety of producing the writing. It is not to be presumed, that he would protect a wanton and malicious libeller; and even if he should, it is better that a few of the guilty should escape, than a precedent be established, by which many innocent persons may be involved in trouble. * * *"

Appeal of Hartranft, 85 Pa. 433 (1877) is in accord with *Gray v. Pentland,* supra, in stating the rule that the governor and his cabinet officers are not bound to produce papers or disclose information committed to them in a judicial inquiry, including a grand jury investigation, when in their own judgment the disclosure would on public grounds be inexpedient.

Similarly, in *Totten v. United States,* 92 U. S. 105, 23 L. Ed. 605 (1875), it was held that an action would not lie against the Federal government in the court of claims upon a contract for secret services during the Civil War, made between the President and the claimant, for the reason that it would be necessary to expose dealings between individuals and officers of the government to the serious detriment of the public; that the secrecy which such contracts imposed precludes any action for their enforcement.

In recent years, the application of the privilege as to state secrets has resulted in great controversy in the federal courts in the area of the disclosure of prior statements of a government witness in federal criminal prosecutions. The privilege has often been asserted against defendants in federal criminal prosecutions who seek prior statements of government witnesses from government files for the purpose of impeachment.

Prior to 1957, the law was unsettled as to the basis for ordering disclosure, the procedural requirements necessary to acquire an order

for disclosure, and the extent of the disclosure required.[1] The 1957 decision in *Jencks v. United States,* 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103 (1957), seems to have resolved these problems. In that case, Jencks was convicted of filing a false noncommunist affidavit. Two witnesses who testified concerning his alleged communist activities revealed that they had submitted to the **F. B. I.** contemporaneous reports of their investigations concerning the matters as to which they testified. The defendant demanded that these reports be produced for the judge's inspection and, if any inconsistency appeared between the documents and the testimony of their authors, that they be turned over to the defendant for use in cross-examination. The lower court denied the request on the ground that no showing of inconsistency had been made. The Supreme Court reversed, holding that a prior showing of inconsistency was unnecessary and that the reports must be given directly to the defendant without any prior screening by the judge.

The decision in the *Jencks* case, supra, left one question unanswered, namely, whether portions of a witness' statement, unrelated to his testimony, could be excised from the report prior to examination by the defendant. In an effort ostensibly to clarify the holding of the Supreme Court in the *Jencks* case, Congress enacted Public Law No. 85-269, 85th Cong., 1st Session, 18 U. S. C., § 3500 (Sept. 2, 1957). This statute reasserts the holding of *Jencks* that the defendant is entitled to prior statements relating to the witness' testimony. If the Government claims, however, that a statement contains matter which is not relevant, the statement is to be produced for examination by the trial judge *in camera* who will excise irrelevant material.

This treatment of the privilege for state secrets indicates the true basis for the rule, namely, the interest of the public and the protection of this public interest. In sharp contrast to this is the basis for the rule as to the privilege against disclosure of the identity of

[1] In *United States v. Beekman,* 155 F. 2d 580 (2d Cir. 1946), it was held that institution of a criminal action constitutes waiver of the privilege. *United States v. Reynolds,* 345 U. S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953), contains dictum to the effect that to allow the Government to undertake the prosecution and then invoke a privilege to deprive the accused of anything which might be material to his defense is unconscionable. In *Gordon v. United States,* 344 U. S. 414, 73 S. Ct. 369, 97 L. Ed. 447 (1953), the Supreme Court required disclosure where contradiction was shown between the witness' testimony and the statements. In *Goldman v. United States,* 316 U. S. 129, 62 S. Ct. 993, 86 L. Ed. 1322 (1942), disclosure rested in the discretion of the trial judge. *United States v. Krulewitch,* 145 F. 2d 76 (2d Cir. 1944), followed the practice of requiring the Government to submit requested statements to the trial court for examination *in camera,* and the court would turn over to the defendant any statements admissible for the purpose of impeachment.

informers, namely, the benefit of nondisclosure to the individual that he need not fear the consequences of coming forward with information.

2. The rule of privilege against disclosure of the identity of informers may be stated as follows: Every citizen has a right and a duty to communicate to executive officers any information which he has of the commission of an offense against the laws of his state or country; and such information when given is a privileged confidential communication: *Vogel v. Gruaz,* 110 U. S. 311, 4 S. Ct. 12, 28 L. Ed. 158 (1884); *Worthington v. Scribner,* 109 Mass. 487, 12 Am. Rep. 736 (1872). The rationale of the privilege is that informers will be deterred from aiding law enforcement authorities if their identity is disclosed because of fear of retribution and because of impairment of their existing sources of information.[2] In *Worthington v. Scribner,* supra, in which the Supreme Court of Massachusetts thoroughly reviewed the authorities, the court uttered the following oft-quoted statement of the rule and its foundation at pages 737-738:

> "It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among the secrets of State, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications."

In the recent case of *Roviaro v. United States,* 353 U. S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1956), the United States Supreme Court had occasion to review and apply the rules relating to the disclosure of the identity of a government informer.[3] In holding that the trial court committed prejudicial error in permitting the Federal government to

[2] 8 Wigmore on Evidence (3d Ed.) §§ 2367-2375. At pages 751-752, Wigmore states: "A genuine privilege for communications * * * must be recognized for the communications made by informers to the Government; because such communications ought to receive encouragement, and because that confidence which will lead to such communications can be created only by holding out exemption from a compulsory disclosure of the informant's identity * * * This privilege is well established, and its soundness cannot be questioned."

[3] There is a complete dearth of Pennsylvania authorities dealing with this rule.

withhold the identity of an undercover informer where such informer was the sole participant, other than the accused, in the transaction charged in the indictment and was the only witness who could amplify or contradict the testimony of government witnesses, the Supreme Court stated at pages 59-62:

> *"What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.* Scher v. United States, 305 U. S. 251, 254; In re Quarles and Butler, 158 U. S. 532; Vogel v. Grauz, 110 U. S. 311, 316. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.
>
> "The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.
>
> "A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. *Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.* In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action. * * *
>
> "Three recent cases in the Courts of Appeals have involved the identical problem raised here—the Government's right to withhold the identity of an informer who helped to set up the commission of the crime and who was present at its occurrence. Portomene v. United States, 221 F. 2d 582; United States v. Conforti, 200 F. 2d 365; Sorrentino v. United States, 163 F. 2d 627. In each case it was stated that the identity of such an informer must be disclosed whenever the informer's testimony may be relevant and helpful to the accused's defense.
>
> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible sig-

nificance of the informer's testimony, and other relevant factors." (Emphasis supplied.)

The rule may be thus stated as follows: Agencies and officers of the executive branch of the government may not be compelled to disclose the identity of informers except where, on grounds of due process and fundamental fairness to the defendant in a criminal prosecution, the disclosure must be compelled by a trial court in order to enable the defendant to prepare his defense, to lessen the risk of false testimony or to otherwise properly dispose of the case. This privilege for communications made by informers to the government applies only to the *identity* of the informer and not to the contents of the communication. Obviously, once the identity of the informer is admitted or known, there is no reason for pretended concealment. The privilege applies generally whenever the situation demands the encouragment of informers and where fear of the disclosure of their identity might deter the voluntary reporting of special information.

Applying these rules and principles to the situation of disclosing the identity of informers of the Liquor Control Board, we must differentiate between disclosure to a court, defendant's counsel, district attorney and grand jury.

A court, on its own motion, cannot compel disclosure, where proceedings are not before it. Neither can a defendant's counsel compel disclosure without a court order. However in the course of a trial, either *sua sponte* or upon application of defendant's counsel, where principles of due process and fundamental fairness so require, a trial court may compel disclosure of the identity of one of your informers. When ordered so to do, you must comply with such demand and disclose the identity to trial court or be faced with the dismissal of the prosecution.

A grand jury also cannot compel disclosure. A grand jury considers only those facts presented to it by the prosecution and has no interest in extraneous or other matters or facts. A grand jury may only consider the identity of an informer when the prosecution furnishes it such fact.

Where the identity of an informer is sought by a district attorney a somewhat different situation is presented. We have noted that the rationale of the rule is to encourage informers and dispel fear of consequences of giving information to the government. It may be that in a given case the Liquor Control Board has such interests in pre-

serving the anonymity of an informer that no disclosure either to a court in response to an order or to any other person would be wise. In such a case the Liquor Control Board has no alternative but to refrain from prosecuting.

Where, however, the Board has decided to prosecute and places the case into the hands of a district attorney, it thereby relinquishes the privilege to refuse to reveal the identity of the informer upon the request of such district attorney.

The district attorney, as the public official in charge of the prosecution of the case, cannot be denied this information when he so requests it. As the prosecutor, he is the Government of the Commonwealth—the Commonwealth itself—and must have the information in order to perform his duty of prosecuting fairly. Once furnished such information, the district attorney may decide that disclosure of the information to the court and jury or the defendant is not required in the interests of fairness. He need not volunteer the information where such is the fact. On the other hand, if he finds that the principles of due process and fundamental fairness to the defendant require that the information be disclosed to the court or to the defendant, and that to withhold it would amount to suppression of evidence, he must make such disclosure. Obviously, the district attorney should possess the information in order to make this crucial decision.

We are, therefore, of the opinion and you are accordingly advised that neither a court *sua sponte*, defendant's counsel or grand jury can compel disclosure of the identity of one of your informers, but that you must disclose such fact upon receipt of a court order to disclose or a request of a district attorney charged with the duty of prosecuting an offense stemming from information communicated to you by such informer.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN III,
Deputy Attorney General.

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

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 123

Unemployment compensation—Department of Labor and Industry—Agreement with Federal government to act as agent in payment of additional unemployment compensation—Temporary Unemployment Compensation Act of 1958.

The Secretary of Labor and Industry, the agency charged with administration of the Pennsylvania Unemployment Compensation Law, is authorized under present Pennsylvania law to execute an agreement with the Secretary of Labor of the Federal government whereby the department will act as agent of the Federal government in the payment of compensation provided for under the Temporary Unemployment Compensation Act of 1958, 72 Stat. 171, 42 U. S. C. 1400 (1958).

Harrisburg, Pa., June 6, 1958.

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

Sir: We have your request for an opinion as to whether the Secretary of Labor and Industry is authorized to execute the agreement provided for under § 102 of Public Law 441. We have examined the law, the rules and regulations issued thereunder and the proposed agreement.

On June 4, 1958, the President of the United States signed the bill, known as H. R. 12065, now Public Law 441, 85th Congress, 2nd Session, which has for its purpose the payment of temporary additional unemployment compensation. Section 102 of this act authorizes the Secretary of Labor of the Federal Government to enter into agreements with the state agencies administering state unemployment compensation laws by which such agencies will act as agents of the United States in the payment of compensation provided for by this act. Under the provisions of § 201 of the Pennsylvania Unemployment Compensation Law, the Act of December 5, 1936, P. L. (1937) 2897, 43 P. S. § 761, the Department of Labor and Industry of the Commonwealth of Pennsylvania is charged with the administration of that law.

Section 101 of the Federal act authorizes the payment of temporary unemployment compensation to individuals who have exhausted all rights to unemployment benefits under (a) the unemployment compensation law of a state, (b) Title XV of the Social Security Act, 42 U. S. C. § 1361 et seq., and (c) Title IV of the Veterans' Readjustment Assistance Act of 1952, 38 U. S. C. § 991 et seq. With respect to exhaustees under items (b) and (c), § 103 of the act provides that the Secretary of Labor of the Federal Government is authorized to

extend existing agreements with state agencies. We are advised that there are currently in existence agreements between the Commonwealth and the Federal Government providing for the payment of unemployment compensation under the provisions of these two Federal laws. It appears that under the provisions of § 103, these agreements will be automatically extended, and in that sense the payment of temporary unemployment compensation to exhaustees under these laws is mandatory. However, with respect to exhaustees under a state unemployment compensation law, § 101 (a) (2) further provides that:

> "* * * payment of temporary unemployment compensation under this Act shall be made only pursuant to an agreement entered into under section 102 and only for weeks of unemployment beginning after the date on which the agreement is entered into."

Since the execution of an agreement under § 102 is optional with the individual state agencies, it follows that the benefits of this act will not be extended to exhaustees under a state law unless such an agreement is executed by the respective states.

Section 102 of Public Law 441 provides that:

> "(a) The Secretary is authorized on behalf of the United States to enter into an agreement with a State, or with the agency administering the unemployment compensation law of such State, under which such State agency—
>
> "(1) will make, as agent of the United States, payments of temporary unemployment compensation to the individuals referred to in section 101 on the basis provided in this Act; and
>
> "(2) will otherwise cooperate with the Secretary and with other State agencies in making payments of temporary unemployment compensation under this Act."

The amounts to be paid to the individual states executing agreements under this section, either for the payment of compensation or for the payment of administrative expenses, under the provisions of § 205, are to be determined by the Secretary of Labor. Monies so paid may be used only for the purposes for which paid; and any balances must be returned to the United States Treasury. Similarly, any overpayments of compensation recovered by the state agency must be returned to the United States Treasury. The necessary monies to carry out the purposes of the act are, under § 208 of the act, made available through a general appropriation from the United States Treasury.

We also reviewed the proposed agreement under § 102 of the act. Paragraph I reads as follows:

> "I. The Agency will act as agent of the United States for the purpose of making payments of temporary unemployment compensation under the Act and will cooperate with the Secretary and with other State agencies in making such payments."

This language is substantially identical with that in the agreements between the Commonwealth and the Federal Government currently in effect with respect to the payment of compensation under Title IV and Title XV above referred to.

Section 207 (c) of the Pennsylvania Unemployment Compensation Law, 43 P. S. § 767, as originally enacted, provided that:

> "The department is hereby authorized to enter into reciprocal arrangements and compacts with the proper authorities of other states and the Federal Government for the purpose of carrying out the objectives of the unemployment compensation acts of this and other states, or adopted by the Congress of the United States."

The Act of June 20, 1939, P. L. 458, amended this section by adding thereto subsection (e), which read as follows:

> "The department may afford reasonable cooperation with every agency of the United States charged with the administration of any unemployment insurance law."

Subsequently, the Act of April 23, 1942, P. L. 60, deleted subsection (c), relettered subsection (e) to (d), and added § 312 (43 P. S. § 792), which reads in part as follows:

> "The department is hereby authorized to enter into reciprocal arrangements with appropriate and duly authorized agencies or other states or of the Federal Government, or both, whereby—
>
> * * * * * *
>
> "(b) Potential rights to benefits accumulated under the unemployment compensation laws of one or more states or under one or more such laws of the Federal Government, or both, may constitute the basis for the payment of benefits through a single appropriate agency under terms which the department finds will be fair and reasonable as to all affected

interests and will not result in any substantial loss to the fund."

The foregoing provisions have been heretofore implemented by the execution of agreements by the department with other state unemployment insurance agencies as well as the agreements with the Federal Government hereinabove noted.

The provisions of Public Law 441, also known as the Temporary Unemployment Compensation Act of 1958, as well as the implementing agreement specifically designate the state agency as an "agent of the United States." The funds advanced under the provisions of the act, either by way of compensation or administrative costs, do not lose their identity as Federal funds and must be accounted for, as such, by the individual state agencies. In brief, under the provisions of this act and the supplementing agreement, neither the agency nor the Commonwealth incurs any obligation other than to make payments of compensation in conformity with the provisions of the Federal act and its implementing regulations.

In view of the foregoing, we are of the opinion and you are so advised that the Secretary of Labor and Industry of the Commonwealth of Pennsylvania, the agency charged with the administration of the Pennsylvania Unemployment Compensation Law, is authorized under present Pennsylvania law to execute an agreement with the Secretary of Labor of the Federal Government whereby the department will act as agent of the Federal Government in the payment of compensation provided for in Public Law 441, also known as the Temporary Unemployment Compensation Act of 1958.

Very truly yours,

DEPARTMENT OF JUSTICE,

MORLEY W. BAKER,
Assistant Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 124

Practice of Architecture—Registered professional engineer—Corporations—Advertising on letterhead—Registered architect who is corporate officer or employee—Contracts with Commonwealth or political subdivisions—Architects' Law.

1. A registered professional engineer may perform activities which have been included within the concept of "the practice of architecture" under the Architects' Law, the Act of July 12, 1919, P. L. 933, as amended, when such activity is incidental to, that is, directly and immediately pertinent to or involved in, his engineering work.

2. A corporation may not enter into or perform a contract either directly or indirectly through any officer, employee or agent which involves the practice of the profession of architecture as defined by the Architects' Law.

3. A registered architect who is a corporate officer or employee may perform architectural work without restriction under the Architects' Law for the use of the corporate employer when the corporation does not "render or offer to render [such architectural] services to clients" within § 13 of the act.

4. The Commonwealth and the political subdivisions thereof may contract with registered professional engineers to perform architectural work in conformity with the provisions of the Architects' Law only when such activity is to be incidental to, that is, directly and immediately pertinent to or involved in, their engineering work.

5. The Commonwealth and the political subdivisions thereof may not contract with corporations to perform architectural work.

6. Corporations or engineers may not, in any way, advertise on their letterheads that they perform architectural services.

Harrisburg, Pa., June 18, 1958.

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

Sir: You have asked this department to render an opinion interpreting the Architects' Law[1] in order that the State Board of Examiners of Architects may resolve certain problems before them.[2] We shall state each problem and give our advice in the subsequent paragraphs.

I.

To what extent may an engineer perform architectural work?

[1] The Act of July 12, 1919, P. L. 933, as amended by the Act of April 24, 1933, P. L. 64, and the Act of June 27, 1939, P. L. 1188, 63 P. S. §§ 21-33, 71 P. S. §§ 1181-1185.

[2] Your request listed seven specific requests. This opinion deals solely with the first five. Numbers six and seven shall be answered in a separate opinion to be subsequently issued.

The fifth paragraph of § 13 of the Architects' Law provides:

> "Nothing in this act shall be construed to apply * * * to any person who is qualified under the law to use the title 'registered professional engineer,' but such person may do such architectural work as is incidental to his engineering work; * * *"

The extent to which an engineer may perform architectural work is clearly set forth in the above section. "The practice of architecture" is defined in the second paragraph of § 13 of the act[3] and, therefore, "architectural work" would be the performance of one or more of the activities therein described. It is then solely a question of fact as to whether a particular activity is architectural work within the meaning of that phrase as so defined. In determining whether the particular architectural work being performed is "incidental to his engineering work," you may be guided by the definition of "incident" found in Webster's New International Dictionary, 2nd Ed. (1940):

> "Dependent on, or appertaining to, another thing (the *principal*); directly and immediately pert.[inent] to or involved in, something else, though not an essential part of it."[4]

Therefore, it is our opinion that a registered professional engineer may perform activities which have been included within the concept of "the practice of architecture" under the Architects' Law when such activity is incidental to, that is, directly and immediately pertinent to or involved in his engineering work.

II.

May a corporation legally enter into and perform architectural contracts?

Section 16 of the Architects' Law provides:

> "It shall hereafter be unlawful for any nonregistered person or for any corporation to seek to avoid the provisions of

[3] "*The practice of architecture consists of rendering or offering to render service to clients by consultations, investigation, evaluations, preliminary studies, plans, specifications, contract documents and a coordination of structural factors concerning the aesthetic or structural design and supervision of construction of buildings or any other service in connection with the designing or supervision of construction of buildings* located within the boundaries of the Commonwealth, regardless of whether such persons are performing one or all of these duties, or whether they are performed in person or as the directing head of an office or organization performing them." (Emphasis added.) 63 P. S. § 28.

[4] See *Korr v. Butz et al.*, 156 Pa. Super. 516, 520, 40 A. 2d 699 (1944).

this act by having a representative or employe seek architectural work in their behalf or for them.

"No firm, company, partnership, association or corporation shall be registered as an architect.

"Persons not registered in this Commonwealth as architects shall not claim nor represent their services or work as equivalent to the services or work of a duly qualified registered architect, or that they are qualified for any branch or function of architectural practice, even though no form of the title of 'architect' is used."[5]

In the case of *F. F. Bollinger Co. v. Widmann Brewing Corp.*, 339 Pa. 289, 14 A. 2d 81 (1940), the Pennsylvania Supreme Court held that a contract by a corporation to perform architectural services was in violation of the foregoing section of the act which prohibits a corporation from qualifying as an architect, and, therefore, prevents a corporation from holding itself out as an architect and from entering into the practice of architecture under § 13 of the act.[6] In the course of its opinion the Court held the practice of architecture to be a profession.[7] The ruling of the case was that a contract by a corporation for the performance of architectural services was in violation of public policy and unenforceable.

Therefore, it is our opinion that a corporation which enters into or performs a contract which involves the practice of architecture violates the Architects' Law and is subject to the penalties imposed by § 14 of the act.[9] The contract is unlawful and unenforceable.

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[5] 63 P. S. § 31.

[6] "On and after July first, one thousand nine hundred nineteen, *it shall be unlawful for any person* in the State of Pennsylvania *to enter upon the practice of Architecture in the State of Pennsylvania,* or to hold himself or herself forth as an architect or as a 'registered architect,' or to use any word or any letters or figures indicating or intended to imply that the person using the same is a 'registered architect,' *unless he or she has complied with the provisions of this act and is the holder of a certificate of qualification to practice architecture issued or renewed and registered under the provisions of this act.*" (Emphasis added.) 63 P. S. § 28.

[7] "* * * Architecture and engineering are learned professions with high standards for membership, and it is the intention of the legislature that they should be protected from the encroachments of unauthorized practice, so that the public may not be injured thereby. * * *" 339 Pa. 289, at page 295 (1940).

[9] "Any person violating any of the provisions of this act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced for the first offense to pay a fine of not less than fifty dollars nor more than one hundred dollars, or to undergo an imprisonment in the county jail of not more than three months, either or both, at the discretion of the court; and for a second of any subsequent offense shall be sentenced to pay a fine of not less than two hundred dollars nor more than five hundred dollars, or to undergo an imprisonment in the county jail of not more than six months, either or both, at the discretion of the court." 63 P. S. § 29.

III.

May engineers and architects, employees of corporations, enter into and perform contracts for architectural work in conjunction with such corporations?

A corporation is an artificial person created by statute; it can act only through agents, who are natural persons and who may be its officers or employees. Therefore, the legal significance of our holding that a corporation may not perform architectural work is that no agent, officer or employee of the corporation may enter into such activity on behalf of the corporation. Our Supreme Court, in the leading case of *Neill et al. v. Gimbel Bros., Inc.*,[10] quoted with approval the following statement:

> "* * * The rule is generally recognized that a licensed practitioner of a profession may not lawfully practise his profession among the public as the servant of an unlicensed person or a corporation; and that, if he does so, the unlicensed person or corporation employing him is guilty of practising that profession without a license. * * *"

Furthermore, what the law prohibits may not be done by indirection or subterfuge. A registered architect employed by a corporation may not perform architectural work which is ultimately destined for use by clients of the employer corporation unless certain requisite distinctions are present, regardless of the form in which the transaction takes place. Corporate officers or employees who are registered architects may perform architectural work which is for the ultimate use of their employer without restriction under the Architects' Law since such activity would not be within "the practice of architecture" which the act limits to the "rendering or offering to render services to clients."

Corporate officers or employees, who are registered architects, may perform architectural work as a service to clients for themselves, but they must do so as individuals, self-employed, or as principal members of firms, and they must sign and seal all plans and specifications in their individual capacity. They must receive the compensation for this work and they, as individuals, must bear the legal responsibility for this work. Their work must be performed as independent contractors and not as employees. Arrangements which, on the surface, purport to conform to these legal requirements, but which are part of

[10] 330 Pa. 213, 219, 199 Atl. 178 (1938).

a plan by which a corporation, in fact, receives the benefits and assumes the burdens of the architectural work would violate § 14 of the act.

This opinion, of course, does not deal with any situations which are not in violation of the Architects' Law, but are considered undesirable or unethical among the members of the architectural profession. Such matters are properly within the scope of the professional society and must be dealt with by them.

We have already indicated the extent to which engineers may do architectural work. Our comments and opinion as previously stated are relevant here.[11]

Therefore, it is our opinion that a corporate officer or employee who is a registered professional engineer may do architectural work only if it is incidental to the engineering work performed by the engineer. However, it is our opinion that a registered architect who is a corporate officer or employee may perform architectural work without restriction under the Architects' Law for the use of the corporate employer when the corporation does not "render or offer to render [such architectural] services to clients" within § 13 of the act. Lastly, it is our opinion that when a registered architect performs architectural work for a corporation while an officer or employee of the corporation and when the corporation "renders or offers to render [such architectural] services to clients," both the registered architect and the corporation are acting in violation of the Architects' Law.[12]

IV.

May municipalities, as well as the Commonwealth or agencies thereof, contract with corporations and engineers to perform architectural work?

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[11] See fifth and sixth paragraphs of § 13 of the act, 63 P. S. § 28, for certain other exceptions, not here relevant, which permit certain persons, not registered architects, to perform certain limited types of architectural activities.

[12] In the case of *Baker v. Chambers, et ux.*, 183 Pa. Super. 634, 133 A. 2d 589 (1957), the Superior Court allowed recovery by a plaintiff corporation on a completed contract for architectural services performed by a registered architect. The opinion written by Judge Hirt was, by its own terms, specifically limited to the circumstances of the particular case involved. The case, however, did not expressly state that there was no violation of the Architects' Law, which is all that we are here dealing with.

The only provision in the Architects' Law pertaining to the Commonwealth or its political subdivisions appears in § 17[13] of the act. However, this section in no way enlarges the authority of the Commonwealth or its subdivisions beyond that of a private citizen in its dealings with third parties. The mere fact that the Commonwealth is not otherwise expressly designated in the statute does not mean that the Commonwealth, or its subdivisions, is not affected by it. Where a statute deals with the public good and the prevention of injury and wrong, the Commonwealth is most certainly affected.[14] Therefore, the Commonwealth, its subdivisions, as well as any person, would be entering into a contract which would violate public policy as expressed by the Legislature. Furthermore, in view of the act's specific reliance upon the Commonwealth's police power,[15] there is a duty on the part of any public officer to refrain from entering into any contract which would entail a violation of the act on the part of the other party.

Therefore, it is our opinion that the Commonwealth and the political subdivisions thereof may contract with registered professional engineers to perform architectural work in conformity with the provisions of the Architects' Law only when such activity is to be incidental to, that is, directly and immediately pertinent to or involved in, their engineering work.[16] Further, it is our opinion that the Commonwealth and the political subdivisions thereof may not contract with corporations to perform architectural work.

V.

To what extent may engineers and corporations advertise on their letterheads that they perform architectural services?

Section 13 of the act provides in pertinent part:

> "In order to safeguard life, health and property, no person shall * * * use the title 'architect,' or display or use any

[13] "Nothing in this act shall be construed to prevent the continuation in office by the board of an official of this Commonwealth, or subdivision thereof, who for at least ten years prior to the passage of this amendment to the act, has been called upon to pass on or direct the work of architects whose plans are submitted for approval of any department under the laws of the Commonwealth, even if such official has not qualified as the author of plans and shall not have been in the continuous practice of architecture for profit." 63 P. S. § 32.

[14] See *Pittsburgh Public Parking Authority Petition,* 366 Pa. 10, 14, 76 A. 2d 620 (1950).

[15] Paragraph 4 of § 13, 63 P. S. § 28, *infra* p. 11.

[16] In view of the decision in *Baker v. Chambers* (supra, Footnote 12), we are constrained to hold that all contracts with the Commonwealth or its subdivisions presently being performed by corporations or engineers must be fulfilled according to their terms. However, all future contracts should be entered into in conformity with this opinion.

> words, letters, figures, title, sign, card, advertisement, or other device to indicate that such person practices or offers to practice architecture, or is an architect or is qualified to perform the work of an architect, unless such person shall have secured from the board a certificate of qualification and registration or an affidavit's card in the manner herein provided, and shall thereafter comply with the provisions of the Laws of the Commonwealth of Pennsylvania governing the registration and licensing of architects."

The clear meaning of the above statement precludes the need for any interpretation on the part of this department. Therefore, it is our opinion that corporations or engineers may not, in any way, advertise on their letterheads that they perform architectural services. Such advertisement would violate the Architects' Law and would result in prosecution under § 14 of the act.

SUMMARY.

It is our opinion and you are accordingly advised that:

1. A registered professional engineer may perform activities which have been included within the concept of "the practice of architecture" under the Architects' Law when such activity is incidental to, that is, directly and immediately pertinent to or involved in, his engineering work.

2. A corporation may not enter into or perform a contract either directly or indirectly through any officer, employee or agent which involves the practice of the profession of architecture as defined by the Architects' Law.

3. A registered architect who is a corporate officer or employee may perform architectural work without restriction under the Architects' Law for the use of the corporate employer when the corporation does not "render or offer to render [such architectural] services to clients" within § 13 of the act.

4. The Commonwealth and the political subdivisions thereof may contract with registered professional engineers to perform architectural work in conformity with the provisions of the Architects' Law only when such activity is to be incidental to, that is, directly and immediately pertinent to or involved in, their engineering work.

5. The Commonwealth and the political subdivisions thereof may not contract with corporations to perform architectural work.

6. Corporations or engineers may not, in any way, advertise on their letterheads that they perform architectural services.

Very truly yours,

DEPARTMENT OF JUSTICE,
SIDNEY MARGULIES,
Deputy Attorney General.
THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 125

Handicapped children—Transportation of pupils unable to use school buses—Purchase of equipment—County board of school directors—Section 1374 of the Public School Code of 1949, as amended.

Under § 1374 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended, the board of county school directors is required to furnish transportation for the physically incapacitated or mentally handicapped child who is so physically incapacitated or mentally retarded as to be unable to use free transportation as provided by the usual school bus, and in doing so the county board of school directors may purchase transportation equipment, if necessary.

Harrisburg, Pa., June 19, 1958.

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

Sir: In Official Opinion No. 112, 1958 Op. Atty. Gen. 187, we discussed under heading IV the purchase of equipment for transportation of handicapped children. We held that no authority existed to purchase equipment for such transportation and that continues to be our opinion when the transportation that is furnished by the school district is available and can be used by the physically or mentally handicapped.

We now supplement that opinion by discussing the problem of the physically or mentally handicapped child who is so physically incapacitated or mentally retarded as to be unable to use free transportation provided by the usual school bus.

This situation is provided for by § 1374 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended by the Act

of June 1, 1956, P. L. (1955) 2013, 24 P. S. § 13-1374, the title of which reads in part:

> "* * * requiring the board of county school directors to provide transportation for physically or mentally handicapped children in certain cases, * * *"

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

> "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."

This section contemplates three situations with regard to the physically or mentally handicapped:

(1) The furnishing by the school district of free transportation.

(2) If (1) is not available, the payment of board and lodging by the school district.

(3) If neither (1) or (2) is furnished, *the county board of school directors shall provide the transportation necessary.*

This section was not discussed in Official Opinion No. 112 and it should be understood that we are now discussing the transportation of the physically or mentally handicapped child who is so physically incapacitated or mentally retarded as to be unable to use free transportation as provided by the usual school bus. In this instance and in this instance alone, the duty or responsibility of furnishing the means of transportation is upon the county board of school directors.

The type and means of transportation is not spelled out in detail and this is understandable since special equipment and trained personnel may be necessary in many instances for the type of child we are considering.

The education and training of this child commences with the arrival of the means of transportation at the home of the pupil. The entry

into the automobile, the trip to the school, and his alighting from the automobile are under the supervision of trained personnel and form a part of the education and training of the pupil. Special equipment must be provided in some instances for getting in and out of the motor vehicle. Familiarity with this equipment, getting the pupil accustomed to it and solving the specific and individual problems of each pupil are the responsibilities of trained personnel operating the means of transportation.

We believe the Legislature had in mind the many special situations which may prevail and for this reason gave the county board of school directors broad powers to meet the needs. Whether transportation is provided by purchasing this equipment or renting it is a matter of discretion with the county board. The power and authority to solve the problem is given to them and the responsibility is theirs.

The cost of this transportation, as set forth in Official Opinion No. 112, as well as Official Opinion No. 48, 1957 Op. Atty. Gen. 195, is chargeable to transportation.

We believe this interpretation complies with the constitutional mandate (Article X, § 1) for the maintenance and support of a thorough and efficient system of public schools, wherein it is declared that *all the children of this Commonwealth* above the age of six may be educated.

We are of the opinion and you are accordingly advised that the county board of school directors is required to furnish transportation for the physically incapacitated or mentally handicapped child who is so physically incapacitated or mentally retarded as to be unable to use free transportation as provided by the usual school bus, and that in doing so the county board of school directors may purchase transportation equipment if necessary.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

JAMES M. QUIGLEY,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 126

Workmen's compensation—Claims arising under The Pennsylvania Occupational Disease Act—Payment from lapsed departmental funds—Depletion of appropriation.

Claims arising under The Pennsylvania Occupational Disease Act, the Act of June 21, 1939, P. L. 566, as amended, may be paid from lapsed departmental funds, since these are preferred claims on State revenues and the appropriation made in the General Appropriation Act of 1957 will soon become exhausted.

Harrisburg, Pa., June 23, 1958.

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

Sir: We have your request for an opinion with regard to the payment of claims arising under The Pennsylvania Occupational Disease Act, the Act of June 21, 1939, P. L. 566, as amended, 77 P. S. §§ 1201 to 1603.

You inform us that the appropriation of $13,000,000.00 for the payment of claims under said act, made to the Department of Labor and Industry by the General Assembly in the General Appropriation Act of 1957, Act No. 95-A, will be exhausted on or about August 1, 1958.

We shall first discuss the nature of these payments.

In Formal Opinion No. 51, 1931-32 Op. Atty. Gen. 100, the then Attorney General, William A. Schnader, adopted as applicable to the State government, the definition of "ordinary expenses" set forth in *Brown et al. v. City of Corry*, 175 Pa. 528, 34 Atl. 854 (1896), at page 531, which held:

> "'* * * Any expense that recurs with regularity and certainty, and is necessary for the existence of the municipality or for the health, comfort and perhaps convenience of the inhabitants, may well be called an ordinary expense.'"

Referring to the General Appropriation Act of 1931, the opinion said:

> "Clearly, the items in this act are either for 'ordinary expenses', and therefore valid, or not for 'ordinary expenses' and therefore unconstitutional. There is no middle ground. It would be impossible to abate them as unpreferred appropriations. If they are not for 'ordinary expenses', they are void.

"The Legislature has declared every item in the General Appropriation Act to be for 'an ordinary expense' of the State government. The action of the Legislature is presumed to be constitutional. * * *"

Claims under The Pennsylvania Occupational Disease Act have been recurring with regularity and certainty ever since the act was passed in 1939 and have been paid from the General Appropriation Acts. Act No. 95-A appropriated $13,000,000.00 for the enforcement and administration of The Pennsylvania Occupational Disease Act during the current biennium. They meet the tests, therefore, of preferred claims since they are ordinary expenses.

Article IX, § 13 of the Pennsylvania Constitution requires that a reserve shall be maintained for the amount required for current expenses. A preferred claim on State revenues has thereby been created for appropriations for current expenses in favor of which, if need be, non-preferred appropriations will abate proportionately. See Official Opinion No. 101, 1958 Op. Atty. Gen. 145.

Having concluded that these claims are in the preferred class, the question arises as to the availability of funds for their payment.

As Governor, you are vested in The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. §§ 51 to 732, with budgetary control over current expenditures of administrative departments, with exceptions not pertinent hereto. Section 604 of the Code, 71 P. S. § 224, reads as follows:

"Estimates of Current Expenditures by Departments, Boards, and Commissions.—Each administrative department, board, and commission, except the departments of which the Auditor General, Secretary of Internal Affairs and the State Treasurer are respectively the heads, shall, from time to time, as requested by the Governor, prepare and submit to the Governor, for approval or disapproval, an estimate of the amount of money required for each activity or function to be carried on by such department, board or commission, during the ensuing month, quarter, or such other period as the Governor shall prescribe. If such estimate does not meet with the approval of the Governor, it shall be revised in accordance with the Governor's desires and resubmitted for approval.

"After the approval of any such estimate, it shall be unlawful for the department, board, or commission to expend any

appropriation or part thereof, except in accordance with such estimate, unless the same be revised with the approval of the Governor.

"* * * * * * *"

If you exercise your prerogative and revise the estimates of current expenditures for the remaining portion of the current biennium, the amounts available for those departments will be reduced accordingly. These funds, generally called "lapses," will then become available as reserve or surplus and may be used for current expenses. The General Assembly may, as it has done in the past, restore these funds which have been lapsed.

We understand that lapses have already been made, amounting to $4,782,925.34, and that you will direct the departments to initiate additional economies which will result in subsequent lapses, the total of which will be sufficient to meet the obligations of the Commonwealth under The Pennsylvania Occupational Disease Act, supra.

If the above procedures are followed, it will not be necessary to discuss other procedures for the transfer or borrowing of funds, as was done in Official Opinion No. 116, 1958 Op. Atty. Gen. 204.

We are, therefore, of the opinion and you are accordingly advised that you may legally exercise the authority granted to you by the General Assembly in The Administrative Code of 1929, thereby making available funds for the continuation of the payment of claims under The Pennsylvania Occupational Disease Act, the Act of June 21, 1939, P. L. 566, as amended, 77 P. S. §§ 1201 to 1603.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 127

Bituminous coal mining operation—Department of Mines and Mineral Industries —Extent of jurisdiction with regard to number of employees engaged in the operation—Bituminous Mine Law.

The jurisdiction of the Department of Mines and Mineral Industries under the Bituminous Mine Law, the Act of June 9, 1911, P. L. 756, as amended, extends to every bituminous coal mining operation whether operated with or without employees and regardless of the number of persons engaged in its operations.

Harrisburg, Pa., June 27, 1958.

Honorable Joseph T. Kennedy, Secretary of Mines and Mineral Industries, Harrisburg, Pennsylvania.

Sir: You have requested our opinion whether the Department of Mines and Mineral Industries has jurisdiction of a bituminous mine in whose operation only one person is engaged.

The Act of June 9, 1911, P. L. 756, § 3, Article XXVIII, as last amended by the Act of July 17, 1957, P. L. 977, 52 P. S. § 1393, provides:

> "The provisions of this act shall apply to every bituminous coal mine in the Commonwealth, but no mine employing less than five persons on the inside in any twenty-four hour period need have a mine foreman. A person shall be designated by the operator to be equally responsible as a mine foreman under this act."

The words of the statute as to applicability of its provisions are clear and without ambiguity, and must, therefore, be followed.

This section of the law as originally enacted in 1911 provided that the Bituminous Mine Law would not apply to mines where fewer than ten persons were employed or engaged in work inside the mine in any one period of twenty-four hours. The amendment of 1933 made the act applicable to all mines having five or more persons working within the mine in any one period of twenty-four hours, and further provided that a mine inspector could inspect and act in certain matters in mines where two to five persons were employed or worked. The Legislature in 1956 made the act applicable "to every bituminous coal mine in the Commonwealth." Act of April 4, 1956, P. L. 1396, 52 P. S. § 1393. Since 1956 the only legislative exception allowed is the one permitting

mines employing less than five persons to operate without a mine foreman. But even in allowing this one exception, the Legislature required that someone be required to assume the responsibility which the law imposes on mine foremen.

The objective of the mining laws of the Commonwealth is the safety of not only those persons *employed* but those persons *operating* a mine and statutory construction should favor safety provisions, even were the wording of the act not as clear as it is.

We are of the opinion, and you are accordingly advised, that the jurisdiction of your department under this act extends to every bituminous coal mining operation whether operated with or without employees and regardless of the number of persons engaged in its operations.

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON EHRLICH,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 128

Escheat—Notice requirements of escheatable property.

When property to be escheated or held in custody is reported to the Commonwealth the specific statutes require a complete listing of all names, addresses and amounts or character of property in the newspaper advertisement and where possible the value of the property must be stated specifically. Advertisement of complete lists of some of the local reporting banks in one newspaper and equally complete lists of other local banks in a different newspaper is permitted, provided that there is a specific reference to the fact that the other banks' reports would be advertised on a given date in a given newspaper.

Harrisburg, Pa., July 1, 1958.

Honorable A. Allen Sulcowe, Acting Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: Your department has requested the advice of this department as to the meaning of the notice requirements of three statutes pertaining to the general subject of escheat and/or custodial duties of the Commonwealth.

These three statutes are: (1) the act of June 7, 1915, P. L. 878, § 6, 27 P. S. § 281; (2) the Act of June 25, 1937, P. L. 2063, § 5, 27 P. S. § 438, and (3) The Fiscal Code of April 9, 1929, P. L. 343, § 1307, 72 P. S. 1307. Each of them contains the requirement that there be published, when property to be escheated or held in custody is reported to the Commonwealth, "a true and accurate statement containing the names, addresses, and amounts of money, or character of property, * * *".

You ask three questions.

1. Is there compliance with the above-mentioned statutes by merely advertising that at a particular place a complete list of all names, addresses and amounts or character of property can be examined?

It is the opinion of this department that not to follow the specific provisions of the statute would be unjustified. The obvious purpose of the act is to furnish notice; and where the legislature has provided for such detailed notice, there is no authority in this department to authorize a deviation therefrom.

If the Department of Revenue believes that the method suggested by it would be equally effective, its argument should be addressed to the legislature. It is further believed that the department has complied with the terms of the statute for many years. To now depart from such a policy would be in error.

You are accordingly advised, therefore, that the department must follow the specific provisions of the statute and must advertise as is provided for therein, stating the names, addresses and amounts of money or character of property belonging to the persons entitled to the property or for whose benefit the same is held.

2. May the Department of Revenue advertise items reported under the aforementioned acts by indicating such items under the descriptive category, such as Savings Accounts, Dividends, Insurance Policies, Stocks, etc., without indicating the amount of money or value of such items?

The purpose of all of these acts is to give notice to people who have property being escheated or reported to the Department of Revenue. It is clear, therefore, that the legislature intended to deal with two different types of property, those wherein amounts of money were involved and those types of property wherein the value thereof would be difficult to determine. In effect, it said that, where there is an amount of money involved, it must be specifically set forth. In all other cases, the character of the property will be sufficient to describe it.

You are accordingly advised, therefore, that where the department is to advertise under the above-mentioned acts, it must list amounts of money where possible. In all other cases, the department may describe the property by stating its character.

3. Assuming that there are thirty banks in the City of Philadelphia which would be required to report under the above-mentioned statutes, would it be proper for the department to advertise the complete lists of fifteen banks in one of the newspapers and the remaining fifteen in another newspaper?

In answering this question we have been advised by you that in years past, in compliance with the statute, you have advertised the complete list of all of the reporting banks in the two largest Philadelphia newspapers.

We recognize the economy measures for which you strive. We feel that your purpose is laudable and find nothing contained in the statutes which would prohibit your achieving the desired result.

There is an objection, however, which is occasioned by reason of the long-established procedure of which we have spoken. It is conceivable that people may be misled by a change in procedure at this time. To avoid such a result, we must conclude that you will have to cross reference each advertisement in each newspaper. For example, on the day that you would advertise in one of the newspapers, as a part of that advertisement, and in a prominent place, you must state that on a given date the remainder of the reports of the banks will be advertised in the other newspapers.

You are accordingly advised, therefore, that you may advertise the *complete* lists of fifteen of the banks in one newspaper and fifteen in

the other but that each advertisement must contain a cross reference to the other in the manner indicated in the preceding paragraph.

Very truly yours,

DEPARTMENT OF JUSTICE,

RALPH S. SNYDER,
Deputy Attorney General.
THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 129

Motor vehicles—Fines—Excess weight of commercial motor vehicle or truck—Deduction for 3 per centum tolerance—Section 903 of The Vehicle Code.

Fines levied under § 903 of The Vehicle Code, the Act of May 1, 1929, P. L. 905, as amended, for excessive weight of commercial vehicles and tractors must be based upon the entire amount of weight in excess of the maximum weight allowed for the particular class of vehicle, and in computing the fine no deduction from such amount may be made for the three per centum tolerance.

Harrisburg, Pa., July 9, 1958.

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

Sir: You have requested an opinion from this department interpreting § 903 of The Vehicle Code.[1] In particular, you inquire whether in computing the fine to be paid for excess weight of a commercial motor vehicle or truck tractor, a tolerance of three (3) per centum of the maximum weight allowed must be deducted from the gross excess weight of the vehicle and load. In point of illustration, suppose a commercial vehicle allowed a maximum gross weight of 50,000 pounds is found to weigh 54,000 pounds. By virtue of a tolerance of three (3) per centum, the vehicle may weigh 51,500 pounds and not be subject to the penalties imposed by the Act. Is the operator to be fined on the basis of excess weight of 4,000 pounds or 2,500 pounds?

[1] The Act of May 1, 1929, P. L. 905, as finally amended by the Act of February 18, 1957, P. L. 3, § 1, 75 P. S. § 453.

Section 903 of The Vehicle Code[2] contains schedules of the maximum gross weight in pounds allowable for all classes of commercial motor vehicles and truck tractors. The penalty provision thereof states in pertinent part:

> "Any person operating any vehicle or combination of vehicles, upon any highway, with a gross weight or with weight on any axle or wheel exceeding by more than three (3) per centum the maximum weight allowed in that particular case, shall, upon summary conviction before a magistrate, be sentenced to pay the costs of prosecution and a fine *for each and every pound of excess above the maximum weight allowed* according to the following schedule: * * *" (Emphasis supplied.)

In view of the plain wording of the above quoted statute, it is our opinion and you are accordingly advised that fines levied under § 903 of The Vehicle Code for excessive weight of commercial vehicles and tractors must be based upon the entire amount of weight in excess of the maximum weight allowed for the particular class of vehicle, and that in computing the fine no deduction from such amount may be made for the three (3) per centum tolerance. Thus, in the illustration given above, the operator would be fined on the basis of excess weight of 4,000 pounds.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN III,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 130

Filling of abandoned mines—Flushing projects—Authority of Department of Mines and Mineral Industries to let contracts—Cooperation with Federal and municipal governments.

Contracts pertaining to so-called flushing projects in the filling of abandoned mines may be let by the Department of Mines and Mineral Industries and the department may cooperate with Federal and/or municipal governments to accomplish the projects with certain reservations.

[2] Subsections (a) to (d), 75 P. S. § 453 (a) to (d).

Harrisburg, Pa., July 9, 1958.

Honorable Joseph T. Kennedy, Secretary of Mines and Mineral Industries, Harrisburg, Pennsylvania.

Sir: You have requested an opinion regarding the authority of your department to let certain contracts—specifically those pertaining to the so-called flushing projects. However, it appears that the principles herein involved are also present in other activities of your department: in mine drainage, mine sealing, mine fire extinguishment and strip mining restoration on forfeiture. Therefore, this opinion shall, in so far as applicable thereto, extend to all the items referred to above.

In addition, you seek advice concerning the propriety of your department entering into cooperative agreements with the Federal and municipal governments, as in mine fire extinguishment activities.

The problem posed by you results from the refusal of the Auditor General to honor an invoice presented in a flushing contract on the ground that the Department of Property and Supplies and not your department was the proper agency for the granting of the contract in question.

The Auditor General's position, as set out in a communication to you, in questioning your authority in this sphere, is based on the finding that 90% of the contract for flushing at the City of Arnold represents moneys for labor and flushing in the actual filling operation. He finds that the furnishing of the flushing material is a purchase of materials and that the furnishing of the material is not secondary to the prevention of subsidence which is the primary purpose of the contract. The Auditor General then concludes that the contracts were in fact construction contracts and not service contracts and should have been handled by the Department of Property and Supplies.

It is axiomatic that your activities to be valid ones must depend upon authority granted you by the Legislature. A review of the acts involved to determine not only the existence of authority but the extent of it is, therefore, necessary.

The flushing contracts are for projects conducted with funds provided by and under the authority of Act No. 95-A of the 1957 Session

of the General Assembly (Appropriation Acts of 1957, page 75), which reads as follows:

> "Performance of powers and duties relating to abandoned coal mines as provided in the act of June 30, 1947 (P. L. 1177), for the purpose of sealing and dewatering and flushing of and extinguishment of fires in abandoned coal mines."

No further explanation or elaboration of the foregoing is given in that or any other act.

In your communication seeking an opinion, you inform us that your department, to carry out the mandate of the Legislature, engages in projects for the purpose of filling voids in abandoned coal mines by flushing into them finely divided solid particles by means of water, which drains from the solid particles as gravity settling occurs in the mine void area. Most of the projects are conducted by introducing the flushing material with its carrying water into the voids through vertical boreholes approximately six inches in diameter which are drilled specifically for this purpose. These boreholes are drilled at locations considered most likely to allow the maximum introduction of flushing material per borehole in view of the best information available relative to the abandoned mine. Obviously, such work though predicated upon such information as is available is done without actually seeing the voids or being able to accurately measure them. Therefore, it would appear, as you state in your request for this opinion, that it is very difficult to estimate with any degree of accuracy the amount of flushing material that can be introduced through a borehole.

You write, further, that the casing pipe used in the work is largely recoverable on completion of flushing, that the bringing of material to the opening, mixing it with water and flushing it to the location at which it settles in the mine voids represents by far the greater portion of the charge per cubic yard flushed. It is noted, also, that the volume of carrying water required in the flushing and supplied by the contractor is several times the volume of the solid material flushed. You state that the cost of the solid materials themselves is a proportionately small share per cubic yard flushed, that it is estimated at approximately 15% of the total cost of the flushing operation, and were the drilling of the boreholes considered also as part of the operation, the percentage would be much lower. You state that it is not practical to expect that the party who might do the actual flushing service would undertake such work if another party

were to furnish the required solid materials at the borehole where flushing services were to be conducted. Indeed, you state that this would be duplication of effort. Further, you advise us that this work is under the direction of your own personnel.

The statement of the Auditor General that 90% of the cost of the contract is allocable to labor and materials does not of itself determine the issue here, for that figure in turn is not broken down into percentages for labor and for material. You, on the other hand, as noted supra, indicate that the materials used represent only a small fraction of the project—that the hauling, the mixing of solids and water, the flushing and the furnishing of water constitute the major items of costs involved and make the furnishing of the materials incidential to the entire job. Your further thought that it is not practical to expect the contractual functions to be divided makes it necessary to consider the contract as a whole—the performing of work incidentally involving the use of materials. On the basis of the foregoing, we conclude and you are advised that the contract involved is not to be considered one for the furnishing of materials and hence is not within the scope of the contracting function of the Department of Property and Supplies.

On the conclusion of the Auditor General that the work described is construction rather than service, this department need not and perhaps should not rule at this time because such finding is not necessary to the determination of your problem and also because this issue is involved in a case presently pending: the Turnpike cases referred to and relied upon in the Auditor General's communication. In passing, it should be noted that the Turnpike cases stand on a different basis—the flushing there was incidental to and part of road construction and not, as here, a means itself of accomplishing the mine sealing, fire extinguishment, etc. The issue need not be decided here since even were the Arnold City contract held to be a construction contract, it would still not be one within the purview of the authority vested in the Department of Property and Supplies for the reason set out infra.

There is given to the Department of Property and Supplies in the area of construction the duties and powers as set out in The Administrative Code of 1929, the Act of April 9, 1920, P. L. 177, as amended, 71 P. S. §§ 51 to 732: § 508, 71 P. S. § 188; §2402, 71 P. S. § 632; § 2403, 71 P. S. § 633; § 2408, 71 P. S. § 638; § 2411, 71 P. S. § 641; and also in § 1 of the Act of June 12, 1879, P. L. 170, 71 P. S. § 1611.

In not one of the enumerated sections or acts—or in any other section of the Code or any other act—can be found a statement that *all* construction work must be processed through the Department of Property and Supplies. The only construction referred to is the erection, construction, alteration, additions or repairs of and to State buildings, land and equipment. None of those activities is of the type of work of your department herein described. Therefore, it is the opinion of this department and you are accordingly advised that even were the matters in question considered to be construction work, they are not such construction work as falls within the scope of authority of the Department of Property and Supplies, but are matters within the scope of authority of your department.

The contracts involved in the mine drainage program as provided for though not described in detail by the Act of July 7, 1955, P. L. 258, are of three types: (a) those for the purchase of pumps and accessories; (b) those for the drilling of boreholes and other work and material necessary to installation of the pumps; and (c) the installation of surface drainage facilities. The contracts involved in (a) are handled through the Department of Property and Supplies. Contracts under (b) are boring projects preparatory to installation and the installation itself. Contracts under (c) are in the nature of construction contracts and involve construction work only with the material integrated therein. It appears clear that contracts involved in (b) and (c) similarly stand in the same position as the flushing contracts discussed above and are, therefore, ones which your department may let.

The contracts let in mine sealing and mine fire extinguishment activities, based upon the provisions of the Act of June 30, 1947, P. L. 1177, and the Appropriation Act of 1957, page 75, involve excavating, backfilling, flushing, drilling, hauling, etc., and considering the work involved, are clearly in the same category and have the same legal status as the flushing contracts referred to supra.

The last of the items: the restoration contracts under the open pit mining act (the Anthracite Strip Mining Law, the Act of June 27, 1947, P. L. 1095, as amended, 52 P. S. §§ 681.1 to 681.22 and the Bituminous Coal Open Pit Mining Conservation Act, the Act of May 31, 1945, P. L. 1198, as amended, 52 P. S. §§ 1396.1 to 1396.20), involve backfilling, hauling and planting and are, therefore, similar to the flushing activities and have the same legal status. It might be noted that the trees used in planting are supplied to the contractors

through Commonwealth facilities at a charge of $6.00 per 1,000. In effect, therefore, as to this aspect of the matter, no furnishing of materials is involved such as would require competitive bidding since the trees are furnished by the Commonwealth as a part of its reforestation program.

The final question concerns the cooperation with Federal and/or municipal agencies in the performance of some of the foregoing.

It appears clear that if the department has the authority to engage in a project, it may do so in any manner consistent with the powers granted it by the Legislature. In the mine drainage program the Legislature specifically provided for a matching fund arrangement for the letting of contracts so that no question can exist on that score. In the flushing, mine sealing and fire extinguishment work, no such specific authority exists for matching funds. Where there is no specific legislative direction on that manner of performance of a duty, you, in the exercise of your discretion, must determine the best manner of performing the duties imposed upon your department by the Legislature. Since your department does not have its own personnel to do the work, and if you determine it to be impractical to hire personnel, you may engage others to do it by contracting with them.

It has been held that, "In the absence of any constitutional or statutory inhibition as to certain classes of contracts, the state has power generally to make contracts. * * *" (49 Am. Jur. 274.) See also 81 C. J. S. 1084. In *United States v. Bekins,* 304 U. S. 27, 51-52, 58 S. Ct. 811, 82 L. Ed. 1137 (1938), it was held that "It is of the essence of sovereignty to be able to make contracts * * *" The authority to bind the Commonwealth need not be express but may be implied. 81 C. J. S. 1086. It was held for example in *Oklahoma Tax Commission v. Fortinberry Co.,* 201 Okl. 537, 207 P. 2d 301 (1949), that under a statute governing the registration of motor vehicles and requiring the Tax Commission to issue plates and pay therefor from a fund created by statute, the Tax Commission had implied power to contract for such plates and to pay therefor.

While no case pertaining to the Commonwealth has been found, cases dealing with municipalities by implication make it clear that there can be contracting of work, for it is held that "* * * in the absence of an applicable requirement * * * a city need not let public work to contractors, but may do it through its own officers." (63 C. J. S. 805.)

It cannot be disputed, therefore, that the Commonwealth through its Department of Mines and Mineral Industries, could contract with others to have the flushing work done. There is no specific restriction on the manner of contracting to secure the end sought by the Legislature. It appears and you are advised that you can contract for the accomplishment of the work with either private contractors or with the Federal or municipal governments. Since your department could contract and pay for the flushing entirely with Commonwealth funds, and since you could contract with the Federal or municipal governments to have the work done, you may contract for the sharing of the cost of that work. In *United States v. Bekins,* cited supra at page 53, the Court stated "Nor did the formation of an indestructible Union of indestructible States make impossible cooperation between the Nation and the States through the exercise of the power of each to the advantage of the people who are citizens of both. * * *" We feel that that statement, though arising in a situation where statutory authority for cooperation existed, is applicable in principle to the instant situation. We note also that in the case law on the subject, there is strong language that any such arrangement must not be at the expense of the sovereign powers of the contracting parties. In your contracts with the Federal and State governments, therefore, every precaution must be made to bear this fact in mind.

It would appear that had the department failed to take the steps to conserve Commonwealth funds by having the Federal and municipal governments share the cost of the flushing work, it would be open to severe criticism. You are, therefore, advised that your arrangement to share cost and responsibility for the Arnold project is quite proper.

In particular, the Auditor General questions such cooperative arrangement at Monessen. In view of the emergency character of the work, as detailed in your communication, it appears that the arrangement was an appropriate exercise of your discretion. Had you not acted in the manner reported, it appears that grave consequences would have resulted, that the fire might have burned out of control, to the damage and danger of the community, its people and property. It is to be noted that you have the authority to contract, as noted here, that the emergency condition called forth into play no new powers, but merely the condition to enable you to exercise powers inherent in the legislation under which you were operating—to effect the purpose of the legislation: the extinguishment of mine fires.

It is to be noted, that the foregoing opinion is predicated upon a record before this department revealing advertising for bids, supervision by your department of all the projects, the lack of any charge that the work was done at excessive cost or was done improperly and, further that there was present at the opening of bids representatives of the Auditor General's Office. Thus, every safeguard was present to insure to the Commonwealth the lowest responsible bidder.

It is, therefore, our opinion and you are accordingly advised, that the contracts referred to herein may be let by your department in the manner indicated and that you may cooperate with Federal and/or municipal governments to accomplish the projects described with the reservations set out herein.

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON EHRLICH,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 131

Civil service—Promotion of career employees without examination—Pennsylvania Liquor Control Board—Section 501(2) of the Civil Service Act.

The Pennsylvania Liquor Control Board may promote its career employees without examination under § 501, subsection (2), of the Civil Service Act, the Act of August 5, 1941, P. L. 752, as amended, whenever it is permitted by the Civil Service Commission to effect promotions in this manner.

Harrisburg, Pa., July 9, 1958.

Honorable Patrick E. Kerwin, Chairman, Pennsylvania Liquor Control Board, Harrisburg, Pennsylvania.

Sir: You have requested an opinion of this department whether the Pennsylvania Liquor Control Board may promote its career employees without examination.

The Pennsylvania Liquor Control Board is a State agency subject to the Civil Service Act.[1] Section 501 of this act[2] states generally that, except as otherwise provided in the act, persons promoted in the classified service shall be promoted from eligible lists established as a result of examinations given by the Executive Director of the Civil Service Commission. However, this same section actually lists three methods of promotion, including one exception to the general rule:

> "* * * The commission * * * may permit promotions to be accomplished by any one of the three following plans: (1) by appointment from open competitive lists; or (2) by appointment without examination, if the person has completed his probationary period in the next lower position, and if he meets the minimum requirements for the higher position; or (3) by achieving a place on an eligible list after a promotional examination, such examination having been given at the request of the appointing authority."

The first and third of these methods require examination;[3] the second, of course, does not. The question arises as to whether the utilization of the second method lies within the sole discretion of the appointing authority or whether the final approval of the use of the second method is the prerogative of the commission. Since the act states that "The commission * * * *may permit*", it places the final discretion in the Civil Service Commission.

Section 601 of the Civil Service Act[4] states that when a vacancy is likely to occur, the appointing authority shall submit to the executive director a statement indicating the position to be filled. This section states:

> "* * * *Unless the appointing authority elects to follow one of the alternative provisions of section five hundred one,* the director shall thereupon certify to the appointing authority the names of the three eligibles willing to accept appointment who are the highest on the appropriate promotion list or employment list, whichever is in existence, or from the one, which under the rules of the commission, has priority. * * *" (Emphasis supplied)

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[1] Act of August 5, 1941, P. L. 752, as amended, 71 P. S. §§ 741.1 to 741.904.

[2] 71 P. S. § 741.501.

[3] An open competitive list would contain the names of eligible persons whether or not they were presently holding lower civil service positions. An eligible list compiled as a result of a promotional examination would include only those presently holding lower civil service positions.

[4] 71 P. S. § 741.601.

Because of the underlined portion of § 601, it could be argued that it is the appointing authority and not the Civil Service Commission that is to determine which of the promotional methods will be used. This interpretation would, however, render meaningless the language of § 501 that the *commission may permit* promotions by any of the three enumerated plans.

We are bound to construe a law, if possible, to give effect to all its provisions.[5] In order to reconcile any possible conflict between § 501 and § 601 of the Civil Service Act, we regard the act to mean that when a vacancy is to occur and the appointing authority does not elect to follow one of the three alternative provisions of § 501, the executive director shall certify to the appointing authority the three highest names from either the appropriate promotion or employment list. If, on the other hand, the appointing authority does elect one of the three methods of promotion set forth in § 501, such election shall be subject to the approval of the Civil Service Commission. Should the commission acquiesce, the promotion will be accomplished in accordance with the method selected by the appointing authority. If the commission refuses to allow the selected method, then the appointing authority should select a second alternative and submit it for the commission's approval.

In order to assist appointing authorities in their election of methods it would be appropriate for the commission to promulgate regulations[6] setting forth the criteria under which it will or will not permit the use of one or another alternative method of promotion.

It is, therefore, the opinion of this department and you are accordingly advised that the Pennsylvania Liquor Control Board may promote its career employees without examination under § 501, subsection (2) of the act whenever it is permitted by the Civil Service Commission to effect promotions in this manner.

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

[5] Section 51 of the Statutory Constitution Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. § 551.

[6] Under the powers granted in § 203 of the Civil Service Act, supra, 71 P. S. § 741.203.

OFFICIAL OPINION No. 132

Secretarian institutions—Medical treatment and vocational training of the blind and visually handicapped—State financial assistance—Section 2320 of The Administrative Code of 1929—Constitution of Pennsylvania, Article III, § 18.

The State Council for the Blind may legally make payments to sectarian institutions under the provisions of § 2320 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, for medical treatment of blind persons and for tuition for blind and visually handicapped persons. Such payments would not offend the provisions of Article III, § 18 of the Constitution of Pennsylvania, since they do not represent appropriations for charitable, educational or benevolent purposes but are, in fact, a discharge of the Commonwealth's governmental obligations.

Harrisburg, Pa., July 9, 1958.

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

Sir: You have requested an opinion of this department as to the legality of the State Council for the Blind making payments to sectarian institutions for (1) medical treatment of blind persons and (2) tuition of blind and visually handicapped persons in the Council's vocational rehabilitation program.

This department considered a similar problem in Formal Opinion No. 686, dated April 22, 1957.[1] That opinion, directed to the Honorable Ruth G. Horting, Secretary of Public Assistance, dealt with the propriety of the Department of Public Assistance making direct payments to sectarian nursing homes for care given by such homes to persons eligible to receive financial assistance under the Act of June 24, 1937, P. L. 2051, § 2, amended, 62 P. S. § 2502. The opinion noted a specific appropriation to the Department of Public Assistance for the purpose of providing nursing home care. An examination was then made of the provisions of Article III, Section 18 of the Constitution of Pennsylvania, which provides:

> "No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association: Provided, That appropriations may be made for pensions or gratuities for military services, and to blind persons twenty-one years of age and upwards, and for assistance to mothers having dependent children, and to aged persons without adequate means of support."

[1] 1957 Op. Atty. Gen. 24.

Formal Opinion No. 686 then considered a series of decisions by the Supreme Court of Pennsylvania, particularly the case of *Schade v. Allegheny County Institution District,* 386 Pa. 507, 126 A. 2d 911 (1956). The holding of the *Schade* case was summarized as follows:

> "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."

Formal Opinion No. 686, therefore, concluded that it would be proper for direct payments to be made to sectarian nursing homes for care by such homes of persons eligible under the Public Assistance Law for such care.

We believe that the same result must follow here. The care of the blind does not represent a charity or benevolence on the part of the Commonwealth. The Legislature has recognized that medical care designed to improve, conserve and restore the vision of blind persons is a governmental obligation.[2] Similarly, corrective surgery and therapeutic treatment which will correct or modify any physical or mental condition that could impair a blind person's potential for employment fall within the sphere of a recognized Commonwealth duty.[3] In addition, there is a specific legislative mandate recognizing the governmental duty to train, prevocationally and vocationally, the blind citizens of the State.[4]

As long as the State Council for the Blind contracts with sectarian medical and educational institutions for the treatment and training of blind persons under the provisions of The Administrative Code of 1929,[5] the contractual obligations thus assumed by the Council may be discharged without offending the provisions of Article III, Section 18 of the Constitution of Pennsylvania.

> " '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. * * *' " (*Schade v. Allegheny County Institution District,* supra, at page 512).

[2] Section 2320 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, subsection (i), as amended, 71 P. S. § 610.

[3] Id., subsection (1) (8).

[4] Id., subsection (1) (1) and (2).

[5] Footnotes 2 and 4.

It is, therefore, the opinion of this department and you are accordingly advised that the State Council for the Blind may legally make payments to sectarian institutions under the provisions of § 2320 of The Administrative Code of 1929 for medical treatment of blind persons and for tuition of blind and visually handicapped persons.

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 133

Soil conservation districts—Jurisdiction—Condemning land—Improvements and buying land or easements—Cooperation with other districts—Federal Watershed Protection and Flood Prevention Act—Pennsylvania Soil Conservation Law.

Under the Pennsylvania Soil Conservation Law, the Act of May 15, 1945, P. L. 547, soil conservation districts may not condemn lands; they may use tax funds for improvements within the district only; they may buy land or easements within the district, and while their powers are limited to their own county, they may cooperate with other districts. The local government units have such powers as are given to them generally by the General Assembly.

Harrisburg, Pa., July 9, 1958.

Honorable W. L. Henning, Chairman, State Soil Conservation Commission, Harrisburg, Pennsylvania.

Sir: You have asked whether Pennsylvania local governments and soil conservation districts, which sponsor projects under the Federal Watershed Protection and Flood Prevention Act, Public Law 566, 83d Congress, 68 Stat. 666, as amended by Public Law 1018, 84th Congress, 70 Stat. 1088, may, for this purpose, either within or outside of their own geographical limits (a) condemn land, (b) use tax funds for improvements, and (c) buy land or easements. These questions are asked with respect to (a) flood prevention and (b) other uses under Public Law 566.

The Pennsylvania Soil Conservation Law, Act of May 15, 1945, P. L. 547, 3 P. S. §§ 849 to 864, grants certain powers to each soil conservation district (i. e., any county whose commissioners, by resolution, have declared that county to be a soil conservation district).

Subsection (2) of § 5 of the act, provides:

> "(2) Such a soil conservation district, upon its creation, shall constitute a public body corporate and politic exercising public powers of the Commonwealth as an agency thereof." (3 P. S. § 853)

Under subsection (3) of § 9, the district may carry out engineering and other conservation practices on lands "within the district" and may obtain "the necessary rights or interests in such lands."

Subsection (4) of § 9 authorizes the district to "cooperate or enter into agreements with, and to furnish financial or other aid to, any agency, governmental or otherwise, or any occupier of lands within the district in carrying on erosion control and prevention operations."

The district, in subsection (5) of § 9, is given the right:

> "(5) To obtain options upon, and to acquire by purchase, exchange, lease, gift, grant, bequest, devise or otherwise, any property real or personal or right or interests therein; to maintain, administer and improve any properties acquired; to receive income from such properties and to expend such income in carrying out the purposes and provisions of this act; and to sell, lease or otherwise dispose of any of its property or interests therein in furtherance of the purposes and the provisions of this act;" (3 P. S. § 857)

The right to make improvements is provided in subsection (7) of § 9, as follows:

> "(7) To construct, improve and maintain such structures as may be necessary or convenient for the performance of any of the operations authorized in this act;" (3 P. S. § 857)

In addition to these general grants of power, there is a pertinent provision in subsection (11) of § 9:

> "(11) No provisions with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to a district organized hereunder unless the Legislature shall specifically so state." (3 P. S. § 857)

Cooperation between districts is provided in § 10:

> "The directors of any two or more districts organized under the provisions of this act may cooperate with one another in the exercise of any or all powers conferred in this act." (3 P. S. § 858)

State agencies are authorized to cooperate under § 11:

> "Agencies of this Commonwealth which shall have jurisdiction over or be charged with the administration of State highways, or any State-owned lands and agencies of any county or other governmental subdivision of the State, which shall have jurisdiction over or be charged with the administration of any county-owned or other publicly owned lands lying within the boundaries of any district organized hereunder, may cooperate with the directors of such districts in the effectuation of programs and operations undertaken by the board of directors under the provisions of this act." (3 P. S. § 859)

Appropriations by the county commissioners are provided for in § 13:

> "The county commissioners of the several counties of this Commonwealth are hereby authorized to appropriate annually out of the current revenues of the county, moneys to the soil conservation district, properly organized and functioning under the provisions of this act, and located within the county. The amount appropriated shall be determined as in the case of county appropriations, or appropriations of cities of the first class, as the case may be." (3 P. S. § 861)

From the foregoing, certain conclusions may be drawn with respect to the powers of Pennsylvania soil conservation districts, and you are hereby advised accordingly that:

1. They have not been granted the power to condemn under subsections (5) and (11) of § 9.

2. They may use tax funds for improvements but only within the district, and such improvements are limited to those specified in the Pennsylvania Soil Conservation Law under §§ 9 and 13.

3. They may buy land or easements within the district only under subsection (5) of § 9, as modified and limited by subsections (3) and (4).

4. Their powers are limited to their own county under § 9, but they may cooperate with other districts under § 10.

5. The powers and duties of other governmental subdivisions with respect to the districts are outlined in subsection (4) of § 9, in which the districts are empowered:

> "(4) To cooperate or enter into agreements with, and to furnish financial or other aid to, any agency, governmental or otherwise, or any occupier of lands within the district in carrying on erosion control and prevention operations, including ditching and draining operations for effective conservation and utilization of the lands within the district, subject to such conditions as the directors may deem necessary to advance the purposes of this act: Provided, however, That such agreements are within the limits of available funds or within appropriations made available to it by law;" (3 P. S. § 847)

This language is broad enough to provide great flexibility in working out agreements with local governments as cosponsors of projects for erosion control and prevention. The local governments, of course, have only such powers as are given to them generally by the General Assembly, and are limited accordingly in the extent and nature of their participation.

Yours very truly,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 134

Soil conservation—Obligations of farmers who enter into contracts with soil conservation districts—Section 9 (10) of the Soil Conservation Law.

Farmers who enter into contracts with soil conservation districts under subsection 10 of section 9 of the Soil Conservation Law, the Act of May 15, 1945, P. L. 547, are bound only to what they have voluntarily agreed to do in return for the soil building aid received, and do not thereby open the door to assessments or to new future obligations not provided for in the contract.

Harrisburg, Pa., July 9, 1958.

Honorable W. L. Henning, Chairman, State Soil Conservation Commission, Harrisburg, Pennsylvania.

Sir: You have requested an interpretation of § 9 (10) of the "Soil Conservation Law," Act of May 15, 1945, P. L. 547, 3 P. S. § 857, which provides, with respect to soil conservation districts, as follows:

> "The directors of a soil conservation district shall have the following powers in addition to those granted in other sections of this act:
>
> * * * * * * *
>
> "(10) As a condition to extending any benefits under this act, or to the performance of work upon any lands not owned or controlled by the Commonwealth or any of its agencies, the board of directors may require contributions in money, services, materials or otherwise to any operations conferring such benefits and may require land occupiers to enter into and perform such agreements or covenants as to the long term use of such lands as will tend to prevent or control erosion thereon."

You state that many farmers fear this language may commit them against their will, if they enter into the program, to make future contributions "in money, services, materials or otherwise." They are also concerned that they may be required in the future to practice erosion control methods not now in effect.

It is our understanding that these contributions are not now required under the agreement the farmer signs, and have never been required in the twenty years that soil conservation districts have operated in Pennsylvania. Nor have farmers ever been required to adopt new conservation practices not provided for in the agreements which they signed.

The Soil Conservation Act in no manner authorizes soil conservation districts to require any contributions, or any changes in farming methods, beyond those which the farmer has agreed to in his contract with them. What this particular section is designed to do is to permit the soil conservation district, if it finds such action necessary, to make new contracts with the farmer in which such contributions or farming changes will be required. This has no effect upon contracts already in existence. The farmer is not bound to enter into such new contract unless he wishes to do so. Unless he does so, of course, he will not receive any new advantages contained in the new contract.

We are of the opinion, and you are accordingly advised, that the farmers, therefor, may feel assured, in signing the form of contract

now in effect, that he will not thereby be opening the door under § 9 (10) of the Act of May 15, 1945, P. L. 547, 3 P. S. § 857, to assessment or a new set of rules. He is bound only to what he has voluntarily agreed to do in return for the soil building aid he receives.

Yours very truly,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 135

Liability for cost of barricades ordered by inspector of Department of Labor and Industry as a safety measure—Contractor doing work for Department of Highways.

The cost of erecting barricades ordered by inspectors of the Department of Labor and Industry as a safety measure is properly chargeable to the contractor employed by the Department of Highways as part of the contract cost and not to either the Department of Highways or to the Department of Labor and Industry.

Harrisburg, Pa., July 9, 1958.

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

Sir: You have asked us to resolve a question involving a conflict of jurisdiction between your department and the Department of Highways, namely: Where a contractor doing work for the Department of Highways is ordered by inspectors of your department to erect additional excavation barricades as a safety measure following a fatal fall into an excavation site, to which department should the cost of the barricades be charged?

We note that both departments have the authority to erect barricades. The Secretary of Highways, under The Vehicle Code,[1] has authority to erect barricades or other protective devices for the protection of the public or of workmen during the construction of any highway or bridge. The Administrative Code of 1929 makes it the duty of the Department of Labor and Industry to inspect every place within this Commonwealth where any labor is being performed which is affected by the provisions of any law of this Commonwealth.[2] The same act provides that the department shall issue orders for removing or safeguarding against hazards that may cause accidents to employees.[3] The act further provides that the department shall have the power to make rules and regulations for carrying into effect the laws regulating the labor of persons within this Commonwealth.[4]

Pursuant to this act, your department promulgated Regulations relating to Trenches and Excavations. Rule 8 of the Regulations provides:

> "Substantial fences, railing or solid enclosures shall be provided to protect persons from falling into excavations."

The act also specifies that violation of the Rules can call forth invocation of penal sanctions. Under these Regulations, a contractor cannot lawfully proceed with his work until he is in full compliance with the Rules. As such, the erection of the barricades is a normal incident to the construction and excavation involved and is the full responsibility of the contractor. It is clear that absent an abuse of discretion, and we have no facts before us to show such abuse, the ordering of the erection of the barricades was action properly taken by your department. We believe that the contractor was obligated under its contract with the Department of Highways to furnish these barricades and should have considered this as an element of cost in calculating its bid. For these reasons, the cost of the barricades is properly chargeable to the contractor employed by the Department of Highways.

It is our opinion, therefore, and you are so advised, that the cost of erecting barricades as safety precautions around work being done by a Department of Highways' contractor is properly chargeable to the

[1] Act of May 1, 1929, P. L. 905, § 111.2 as amended, 75 P. S. § 712.2.
[2] Act of April 9, 1929, P. L. 177, § 2202 et seq., 71 P. S. § 562.
[3] Id. § 2202(h), 71 P. S. § 562(h).
[4] Id. § 2205, 71 P. S. § 565.

contractor as part of the contract cost and not to either the Department of Labor and Industry or the Department of Highways.

Yours very truly,

DEPARTMENT OF JUSTICE,

MICHAEL J. STACK, JR.,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 136

Pennsylvania State Police—Administrative officer recovering compensation for heart disease—Heart and Lung Act—Effect of absence on annual leave—Liability for medical and hospital bills.

1. As provided by the Heart and Lung Act, the Act of June 28, 1935, P. L. 477, as amended, a commissioned officer of the Pennsylvania State Police who holds an administrative position may recover compensation when he suffers a heart attack resulting in disease of the heart caused by extreme overexeration in times of stress or danger or by exposure to heat, smoke, fumes or gases, such overexeration or exposure arising directly from his employment.

2. The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, does not prohibit a member of the Pennsylvania State Police from taking fifteen days leave of absence during the calendar year no matter how many days he has been absent from duty under the provisions of the Heart and Lung Act.

3. The Pennsylvania Workmen's Compensation Act, the Act of June 2, 1915, P. L. 736, as amended, does not limit or vary the liability of the Pennsylvania State Police to pay all medical and hospital bills incurred in connection with an injury or disability in the nature of heart and lung disease caused by extreme overexertion in times of stress or danger.

Harrisburg, Pa., July 10, 1958.

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

Sir: You have requested an opinion from this department interpreting the Act of June 28, 1935, P. L. 477, as amended, 53 P. S. §§ 637 to 638, commonly known as the "Heart and Lung Act." Specifically, you present the following questions:

1. May a commissioned officer of the Pennsylvania State Police Force (hereafter referred to as State Police), who holds an administrative position such as that of a bureau head, district inspector or troop commander, and who suffers a heart attack, recover compensation under the provisions of the Heart and Lung Act?

2. Does § 222 of The Administrative Code of 1929[1] prohibit a member of the State Police from taking fifteen days leave of absence during the calendar year where he has been absent from duty for ninety days by reason of temporary incapacity under the provisions of the Heart and Lung Act?

3. Does § 306 of The Pennsylvania Workmen's Compensation Act[2] limit or vary the liability of the State Police to pay all medical and hospital bills incurred in connection with an injury or disability caused by extreme overexertion in times of stress or danger?

I.

The Heart and Lung Act provides that State Police, policemen, firemen and park guards, who are injured in the performance of their duties and temporarily incapacitated from performing their duties, shall be paid their full rate of salary until the disability arising therefrom has ceased, together with all medical and hospital bills incurred in connection with such injuries. The Act further provides:

> "* * * In the case of the State Police Force and salaried policemen and firemen, the diseases of the heart and tuberculosis of the respiratory system, contracted or incurred by any such member * * * after four years of continuous service as such, and caused by extreme overexertion in times of stress or danger or by exposure to heat, smoke, fumes or gases, arising directly out of the employment of any such member * * * shall be compensable in accordance with the terms hereof * * *.
>
> "All payments herein required to be made by the Commonwealth of Pennsylvania shall be made from moneys appropriated to the Pennsylvania State Police."

In order for a commissioned officer of the State Police who suffers a heart attack to recover compensation under the Heart and Lung Act, it must be shown that such heart attack evidences or represents some form of disease of the heart and was caused by extreme overexertion in times of stress or danger or by exposure to heat, smoke,

[1] The Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 82.
[2] The Act of June 2, 1915, P. L. 736, as amended, 77 P. S. §§ 511 to 515.

fumes or gases arising from his employment. This is a question of fact. Thus, the particular circumstances of each case will determine whether the member of the State Police will recover compensation. Normally, one who is in an administrative position, such as that of a bureau head, district inspector or troop commander, would not contract heart disease by exposure to such stress or danger or exposure to such heat, *et cetera*. Since compensation under the Act is dependent upon the determination of such questions of fact, an administrative officer may show that in a given case he was exposed to such stress or danger as would cause extreme overexertion resulting in heart disease or to such heat, *et cetera*, as would cause heart disease. The facts of each particular case will determine whether the activity engaged in by a member of the State Police falls within the provisions and requirements of the Act.

II.

The Heart and Lung Act provides for compensation "until the disability * * * has ceased". As long as the injury or disability is compensable under the Act, no time limit is fixed within which the benefits of the act will cease; nor will absence from regular duty due to temporary incapacity result in a loss of normal sick leave to a member of the State Police. Section 2 of the Act[3] provides:

> "No absence from duty of any such policeman or fireman by reason of any such injury shall in any manner be included in any period of sick leave, allowed such policeman or fireman by law or by regulation of the police or fire department by which he is employed."

Thus regardless of the duration of the period of temporary incapacity, once the member returns to regular duty he is entitled to his regular period of sick leave.

Section 22 of The Administrative Code of 1929, supra, provides that each employee of an administrative department, independent administrative board or commission, or departmental administrative board or commission, shall be entitled, during each calendar year, to fifteen days leave of absence with full pay. It is obvious that such vacation time is not affected by any period of temporary incapacity resulting from heart or lung disease caused by extreme overexertion in times of stress or danger. Full time duty is the basis upon which such vacation time is earned by an employee of the Commonwealth.

[3] 53 P. S. § 638.

Temporary incapacity due to injury or disability in the line of duty is, for these purposes, equivalent to full time duty.

III.

The Heart and Lung Act also provides in pertinent part:

> "* * * All medical and hospital bills incurred in connection with any such injury shall be paid by the Commonwealth of Pennsylvania or by such county, township or municipality. * * *
>
> "All payments herein required to be made by the Commonwealth of Pennsylvania shall be made from moneys appropriated to the Pennsylvania State Police."

Section 306 of The Pennsylvania Workmen's Compensation Act, supra, provides:

> "During the first six months after disability begins, the employer shall furnish reasonable surgical and medical services, medicine and supplies, as and when needed, unless the employee refuses to allow them to be furnished by the employer. The cost of such services, medicines, and supplies shall not exceed four hundred and fifty dollars. * * *"

It is our opinion that the provisions of The Pennsylvania Workmen's Compensation Act above quoted in no way vary or limit the liability of the State Police under the Heart and Lung Act. The liability of the State Police under the Heart and Lung Act may exceed $450.00 and may continue beyond a period of six months after disability begins. The provisions of The Pennsylvania Workmen's Compensation Act merely limit the amount that is recoverable by the employee from the Workmen's Insurance Fund. This interrelation of The Pennsylvania Workmen's Compensation Act and the Heart and Lung Act is made clear by the Heart and Lung Act which provides:

> "* * * During the time salary for temporary incapacity shall be paid by the Commonwealth of Pennsylvania * * * any workmen's compensation, received or collected by a member of the State Police Force * * * shall be turned over to the Commonwealth of Pennsylvania * * * and paid into the treasury thereof, and if such payment shall not be so made by the member of the State Police Force * * * the amount so due the Commonwealth of Pennsylvania * * * shall be deducted from any salary then or thereafter becoming due and owing."

To sum up our conclusions, we are of the opinion and you are accordingly advised that:

1. A commissioned officer of the Pennsylvania State Police Force who holds an administrative position may recover compensation under the provisions of the Heart and Lung Act when he suffers a heart attack resulting in disease of the heart caused by extreme overexertion in times of stress or danger or by exposure to heat, smoke, fumes or gases, such overexertion or exposure arising directly from his employment.

2. The Administrative Code of 1929 does not prohibit a member of the Pennsylvania State Police Force from taking fifteen days leave of absence during the calendar year no matter how many days he has been absent from duty under the provisions of the Heart and Lung Act.

3. The Pennsylvania Workmen's Compensation Act does not limit or vary the liability of the Pennsylvania State Police Force to pay all medical and hospital bills incurred in connection with an injury or disability in the nature of heart and lung disease caused by extreme overexertion in times of stress or danger.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN, III,
Deputy Attorney General.

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

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 137

Bituminous mine inspectors—Authority to administer oaths—Investigations—Restrictions—Act of June 9, 1911, P. L. 756.

The Secretary of Mines and Mineral Industries may grant authority to mine inspectors to administer oaths under such circumstances as he may designate, but only where the Secretary of Mines and Mineral Industries would have that power as provided by § 517 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended.

Article XXVII, § 3 of the Act of June 9, 1911, P. L. 756, limits the authority of a mine inspector to administer oaths to investigations involving a fatal accident.

Harrisburg, Pa., July 10, 1958.

Honorable Joseph T. Kennedy, Secretary of Mines and Mineral Industries, Harrisburg, Pennsylvania.

Sir: You have requested an opinion concerning the authority of a bituminous mine inspector to administer oaths and whether that authority is restricted to a case where he is investigating a fatal accident.

The authority to administer oaths by a mine inspector investigating a fatal accident is found in the Act of June 9, 1911, P. L. 756, Article XXVII, § 3, 52 P. S. § 1357:

> "It shall be the duty of the inspector, upon being notified of any fatal accident as hereinbefore provided, to proceed in person as soon as practicable to the scene of the accident * * * the said inspector shall proceed to investigate and ascertain the cause of the accident, and make a record thereof * * * and to enable him to make the investigation, he shall have power to compel the attendance of persons to testify, and also to administer oaths or affirmations. * * *"

There is a grant of power regarding the administering of oaths in The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, § 517, as amended, 71 P. S. § 197, as follows:

> "The head of every administrative department, all deputy heads of administrative departments, every member of an independent administrative or departmental administrative board or commission, the Commissioner of the Pennsylvania State Police, every workmen's compensation referee, and such officers or employes of the several administrative departments, boards or commissions, as the heads of such departments or such boards or commission shall designate, shall have the power to administer oaths or affirmations anywhere in this Commonwealth, with regard to any matter or thing which may properly come before such department, board, commission, commissioner or referee, or any member of a board or commission, as the case may be."

The authority to administer oaths is an important and powerful device, for looming behind that power is the possibility of prosecution for perjury in the making of false statements. Though the wording of the quoted section of The Administrative Code of 1929 seems broad, it is restricted to matters "* * * which may properly come before such department * * *". What may "properly come before your department" and may require the administering of oaths involves

a determination of the duties or functions of your department. Only if the matter falls within your duties or functions and is one in which the administering of oaths is specifically authorized or is usual and customary (as where you are given authority to hold hearings) may an oath be administered. To hold otherwise would open the door to unbridled, uncontrolled administering of oaths, a situation which, we believe, was not the intent or purpose of the Legislature.

We are, therefore, of the opinion, and you are accordingly advised, that you may grant the power to your mine inspectors to administer oaths under such circumstances as you may designate, but only where you yourself would have that power, as outlined above. As to investigations, however, this power is restricted to cases involving a fatal accident.

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON EHRLICH,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 138

Sewage systems—Permit requirements—Recording—Discharge of treated sewage at new points—Extensions to existing systems—Section 206 of the Act of June 22, 1937, P. L. 1987, as amended.

1. Under § 206 of the Act of June 22, 1937, P. L. 1987, as amended, permits are required for the discharge of sewage into the waters of the Commonwealth in the case of (1) new points of discharge of treated sewage, or (2) extensions of existing sewage systems unless the extension does not result in an additional point of discharge.

2. Where an extension of an existing sewage system does not result in a new point of discharge, the Sanitary Water Board, in an appropriate case, has the power to modify the permit of the existing sewage system.

3. In all cases in which permits are required in accordance with § 206 of the act and in all modifications of such permits, such permits must be recorded.

Harrisburg, Pa., July 11, 1958.

Honorable C. L. Wilbar, Jr., Secretary of Health, Harrisburg, Pennsylvania.

Sir: We are in receipt of your request for an interpretation of § 206 of the Act of June 22, 1927, P. L. 1987, as amended, 35 P. S. § 691.206.

Specifically, you ask whether it is necessary, pursuant to the provisions of § 206, that a new permit be required in the case of extensions to existing sewage systems which discharge untreated sewage into the waters of the Commonwealth. You also ask whether a permit is required for new points of discharge of treated sewage. You ask these question for the purpose of ascertaining whether, in the two above-mentioned situations, such permits need be recorded under the provisions of § 206 of the act.

This section provides as follows:

> "Applications for permits for the discharge of sewage—Upon application duly made to the board by the corporate authorities having by law the charge of the sewer system of any municipality, or by any person, the board shall consider the case of any sewer system or the extension of any existing sewer system otherwise prohibited by this act from discharging sewage into any of the waters of the Commonwealth, and shall, if it finds as a fact that the discharge of sewage is necessary and not injurious to the public health or animal or aquatic life, or for use for domestic or industrial consumption or recreation, stipulate, in a permit, the conditions and the time during which such discharge into the waters of the Commonwealth may be permitted. Such permit before being operative shall be recorded in the office of the recorder of deeds for the county wherein the outlet of said sewer system is located. And in case the municipality or person fails or neglects to record such permit, the board shall cause a copy thereof to be so recorded, and shall collect the cost of recording from the municipality or person. No such permit shall be construed to permit any act otherwise forbidden by any of the laws of the Commonwealth, or by any decree, order, sentence or judgment of any court, or by the ordinances of any municipality, or by the rules and regulations of any water company supplying water to the public, or by laws relative to navigation."

Section 201 of the act[1] prohibits the discharge of sewage into the waters of the Commonwealth except as provided in the act. In § 1 of the act,[2] sewage is defined as follows:

> " 'Sewage' shall be construed to include any substance that contains any of the waste products or excrementitious or other discharge from the bodies of human beings or animals."

Since § 206 of the act does not distinguish between treated and untreated sewage, the definition of sewage in § 1 of the act must be used in construing that term as it appears in § 206. It follows that before any discharge of sewage, treated or untreated, may be permitted, a permit must be obtained in accordance with the provisions of § 206.

Section 206 of the act requires that an application be made for permission to discharge sewage into the waters of the Commonwealth in the case of extensions of existing sewage systems. However, § 208 of the act[3] makes it clear that the permit provisions of § 206, in so far as they apply to extensions, apply only in the case of extensions from which sewage is discharged into the waters of the Commonwealth. Thus, an extension of an existing sewage system requires a permit under the provisions of § 206 of the act only in the case in which the extension results in a new point of discharge.

However, under § 208 of the act, the Sanitary Water Board has authority to revoke, suspend or amend existing permits. Under § 207 of the act[4] the Board has the power to demand all plans, designs and relevant data for the construction of the extension of any existing sewer system. Thus, if it appears to the Sanitary Water Board that an extension of an existing sewage system, although not resulting in a new point of discharge, will substantially alter the conditions under which the original permit to the system was obtained, the Board has the authority to modify the permit by virtue of the provisions of § 208.

Whenever permits are required for the discharge of sewage under the provisions of § 206 of the act, the plain language of this section makes it mandatory that permits be recorded pursuant to the provisions of this section.

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[1] 35 P. S. § 691.201.
[2] 35 P. S. § 691.1.
[3] 35 P. S. § 691.208.
[4] 35 P. S. § 691.207.

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

(1) A permit is required in the case of new points of discharge of treated sewage.

(2) In the case of extensions of existing sewage systems, a permit is required unless the extension does not result in an additional point of discharge. However, even in the case in which an extension of an existing sewage system does not result in an additional point of discharge, the Board has the power, in an appropriate case, to modify the permit of the existing sewage system.

(3) In all cases in which permits are required in accordance with § 206 of the act and in all modifications of such permits pursuant to the provisions of § 208, such permits must be recorded.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. COHEN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 139

Public utility companies—Employees working aloft on utility lines—Use of official caution signs regulating flow of traffic—Section 1008(d) of The Vehicle Code.

Section 1008(d) of The Vehicle Code, the Act of May 1, 1929, P. L. 905, as amended, pertaining to movement of traffic between points indicated by caution signs that men are working on the highway, applies to public utility companies having men working aloft on utility lines and such temporary warning or caution signs must be official signs authorized and approved by the Secretary of Highways.

Harrisburg, Pa., July 11, 1958.

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

Sir: You have requested an opinion from this department interpreting § 1008 (d) of The Vehicle Code[1] which provides:

> "The driver of a vehicle shall not overtake or pass, or attempt to pass, any other vehicle, proceeding in the same direction, between any points indicated by the placing of official temporary warning or caution signs indicating that men are working on the highway."

You ask whether the provisions of this section apply to signs placed on a highway by public utility companies and, if so, whether such signs may be placed where public utility workmen are working aloft on utility lines running parallel or perpendicular to such highway.

Section 1105 of The Vehicle Code[2] gives the Secretary of Highways authority over the type, installation, location, operation and maintenance of all traffic signs, signals and markings on Commonwealth highways and provides that only those signs, signals and markings which conform to uniform regulations promulgated by the Secretary of Highways shall be regarded as official. Section 1107 of The Vehicle Code[3] prohibits unauthorized persons from erecting or maintaining any sign in imitation of, or similar to, any official sign upon or along any highway. Section 1114 of The Vehicle Code[4] declares it unlawful for any person to use any sign, signal or marking unless it is of a type submitted to the Secretary of Highways for test and for which a certificate of approval has been isued.

Section 411 of the State Highway Law[5] requires public utility companies to obtain a permit from the Secretary of Highways before placing lines, poles or other structures upon, over, under or in any portion of a State highway. The placing of such lines *et cetera* and, by implication, the inspection, repair and maintenance thereof, is allowed under this section only under such conditions, restrictions, and regulations, and subject to the payment of such fees for permits as may be prescribed and required by the department. Pursuant to this authority, the department has promulgated Form 945-B (General Provisions and Specifications). Clause 3 of Form 945-B reads in pertinent part:

> "* * * Operation must be conducted at all times to permit safe and reasonable free travel over the roads within the

[1] The Act of May 1, 1929, P. L. 905, as amended, 75 P. S. § 543 (d).
[2] *Ibid,* 75 P. S. § 681.
[3] *Ibid,* 75 P. S. § 683.
[4] *Ibid,* 75 P. S. § 714.
[5] The Act of June 1, 1945, P. L. 1242, 36 P. S. § 670-411.

limits of the work herein prescribed. All safety provisions for the free movement of traffic shall be provided by the permittee."

Since a violation of § 1008 (d) of The Vehicle Code cannot be based on a private utility's view of what is reasonable, however, it is necessary that the Department of Highways implement this regulation in each case by specifying where the official signs shall be placed.

In view of the above provisions, it is our opinion and you are, therefore, accordingly advised that: (1) The Secretary of Highways may permit public utility companies to erect utility lines over State highways and authorize such companies to enter upon State highways for the purpose of inspection, maintenance and repair of such lines; (2) temporary warning or caution signs used by public utility companies must be official signs, authorized and approved by the Secretary of Highways; (3) such official signs may be used when public utility workmen are working aloft on utility lines running either parallel or perpendicular to the State highway; and (4) when such official signs are placed upon a State highway, pursuant to the regulations of the Department of Highways and at places designated by the Department of Highways, the provisions of § 1008 (d) of The Vehicle Code are applicable.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN, III,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 140

Department of Highways—Interference with oil company's easement—Relocation of pipeline—Validity of agreement showing erroneous reference to statutory authority.

An erroneous reference to statutory authority in an agreement between the Department of Highways and a privately-owned oil company does not affect the validity of an otherwise valid agreement relating to the payment by the Department of the cost of relocation of a pipeline resulting from the Department's interference with the oil company's easement.

Harrisburg, Pa., July 11, 1958.

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

Sir: You have asked whether the reference, in an agreement between the Department of Highways and an oil company, to § 412 of the State Highway Law operates to vitiate an otherwise valid agreement relating to the payment by the Department of the cost of relocation of a pipeline resulting from the Department's interference with the oil company's easement.[1]

The agreement in question related to the payment by the Department to an oil company of the cost of relocation of the company's pipeline. The pipeline for which the company owned an easement lay transversely in the bed of a stream. The stream had been widened and deepened by the Department to protect from flood inundation a highway paralleling it. The agreement, inter alia, recited that the Department was required by § 412[2] of the State Highway Law to provide a substitute right of way on another and favorable location and to contribute toward the expense of the transfer or reconstruction of the facilites of the company.

Section 412 provides, insofar as is here relevant, that whenever the Department occupies the right of way of any *public service company* it must provide a substitute right of way and, after the company has transferred its facilities to the substitute right of way, by agreement, contribute toward the expense of such transfer.

We have been advised that this company has not applied to the Public Utility Commission to do business as a pipeline company, nor has a certificate of public convenience been granted it. We assume for the purposes of our discussion, without deciding, that it is not a public service company within the meaning of the Act of May 21, 1943, P. L. 550, as amended, 15 P. S. § 2153, which relates to corporations formed for transportation and storage of petroleum. It is thus readily

[1] Your question as submitted was whether or not the oil company was a public service company and, if not, is the Department of Highways' purchase order, referring to the agreement discussed above, in proper form for payment? We have restated your question without changing its substance both for the purpose of focusing on the legal question involved and for permitting the application of our advice to similar situations.

[2] Act of June 1, 1945, P. L. 1242, § 412, as amended by the Act of September 26, 1951, P. L. 1511 § 1, 36 P. S. § 670-412.

apparent that the reference in this agreement to § 412 is erroneous. However, the statutory authority cited is irrelevant to the underlying facts.

It is elementary to the law of eminent domain that whenever private property is taken for a valid governmental purpose, just compensation must be paid. Pennsylvania Constitution, Article I, Section 10; *Appeal of Lance,* 55 Pa. 16 (1867). An interference with the use of an easement is a taking of private property. *Jones v. Erie and Wyoming Valley R. R. Co.,* 383 Pa. 383, 119 A. 2d 79 (1955); *Gailly v. Wilkinsburg Real Estate & Trust Co.,* 283 Pa. 381, 129 Atl. 445 (1925). The forced relocation of the pipeline was an interference with the oil company's easement, thus entitling the oil company to damages. The Legislature specifically has provided that the Department of Highways may enter into agreements with property owners relating to payment of compensation for damages arising out of eminent domain proceedings. Act of June 1, 1945, P. L. 1242, § 302, 36 P. S. § 302. Considering all of the facts presented, we also believe that the measure of payment provided for is proper.

It appears that the agreement in question meets the formal requirements for the payment of compensation by agreement. The money used is paid from the same fund in either event. The agreement meets the legislative requirements for the payment of damages arising out of the exercise of the power of eminent domain. Consequently, the reference to § 412 of the State Highway Law is unnecessary to the situation embraced by the agreement. The reference is harmless and may be disregarded as superfluous to the agreement.

We have assumed throughout our opinion, of course, that the easement was privately owned. Being in the bed of a stream, the easement may have been on public property under a mere license. If this were so, other conclusions might result.

Accordingly, it is our opinion, and you are so advised, that the reference in the agreement between the Department of Highways and the privately-owned oil company to § 412 of the State Highway Law does not affect its validity; such reference, being irrelevant and unnecessary, may be disregarded as superfluous. However, to insure proper application of Commonwealth funds, we believe that the agreement between the oil company and the Department of Highways should be redrawn and reexecuted so as to exclude reference to § 412 and to include a stipulation that the easement in question is privately owned

by the oil company. An amended purchase order should then be submitted for payment.

Very truly yours,

DEPARTMENT OF JUSTICE,

MICHAEL J. STACK, JR.,
Deputy Attorney General.

THOMAS D. McBRIDE,
Attorney General.

OFFICIAL OPINION No. 141

Sanitary Water Board—Power to order abatement of sewage discharge or industrial waste—Authority to order municipalities to construct sewage treatment plants—Sections 201, 210 and 301 of the Pure Streams Law—Municipalities Authorities Act of 1945.

1. Under §§ 201 and 301 of the Pure Streams Law, the Act of June 22, 1937, P. L. 1987, the Sanitary Water Board may not order abatement or treatment of sewage or industrial waste which is discharged to the underground itself.

2. No strict rule of burden of proof applies in proceedings before the Sanitary Water Board.

3. It is immaterial whether the point of discharge is at or below the ground water level and whether the ground water in the area is actually being used.

4. The Sanitary Water Board has power to order townships of the second class to submit plans for, construct and operate sewage treatment works for the interception and treatment of sewage from public sewers.

5. Townships have power to acquire sites for and finance a sewage treatment works project, to create an authority to finance the project, and to construct sewers in part of the township out of general funds.

6. Whether construction of such project can be prevented by taxpayer's suit or thwarted by the filing of a formal protest is a matter of local concern.

7. Where unsanitary conditions exist due to sewage from private sewage disposal facilities on the ground and in ditches, which does not drain into Commonwealth waters, the Pure Streams Law does not apply. Where such sewage does drain into the State's waters, the Sanitary Water Board cannot order municipalities to construct sewers or treatment plants, but may order abatement of the pollution.

Harrisburg, Pa., July 16, 1958.

Honorable C. L. Wilbar, Jr., Secretary of Health, Harrisburg, Pennsylvania.

Sir: You have requested an opinion from this department interpreting the Pure Streams Law.[1] Specifically, you present the following questions:

1. May the Sanitary Water Board[2] order abatement of sewage discharge or treatment of sewage or industrial waste which is discharged into the underground itself or may the Board only act where such discharges are made into underground waters of the Commonwealth?

2. Where sewage or industrial waste is discharged into underground waters, which party—the Board or the person or municipality discharging the same—must bear the burden of proof on the question of whether such discharge causes pollution?

3. May the Board or the Department of Health acting as enforcement agent of the Board prevent the discharge of untreated sewage or industrial waste where: (1) the point of discharge is at or below the ground water table or level and (a) there are no known uses of the ground water in the area, (b) there are known uses of the ground water in the area, and (c) wells in the area are polluted; and (2) the point of discharge is above the ground water table or level, but the possibility of pollution of underground waters of the Commonwealth exists due to the permeability of the ground or the fact that the rock into which it discharges is likely to be creviced?

4. May the Board order second class townships to submit plans for, construct and operate sewage treatment works for the interception and treatment of sewage from public sewers discharging into waters of the Commonwealth?

5. If the answer to question 4 is in the affirmative, is the Board's power emasculated by limitations placed upon the power of second class townships to acquire sites for and finance the project, to set up an authority to finance the project or to construct sewers in part of the township out of general funds?

6. May the construction of such a project be prevented by petition of taxpaying property owners of the municipality?

7. May the Board order a second class township to construct and operate sewage collection and treatment facilities to serve an area of the municipality which does not have public sewers and in which either of the following conditions prevails: (1) unsanitary conditions

[1] Act of June 22, 1937, P. L. 1987, §§ 1 to 801 as amended by the Act of May 8, 1945, P. L. 435, 35 P. S. §§ 691.1 to 691.801, also known as "The Clear Streams Act of 1937."

[2] Hereinafter called "Board."

due to sewage on the surface of the ground and in ditches created by ineffective operation of private disposal facilities, but the sewage does not drain into the waters of the Commonwealth; (2) unsanitary conditions by which sewage from private sources on the ground, in ditches, or through private sewage drains into waters of the Commonwealth?

We will discuss and answer these questions *seriatim.*

I.

Sections 201 and 301 of the Pure Streams Law[3] flatly prohibit any person or municipality from discharging sewage[4] or industrial wastes[5] into any of the waters of the Commonwealth. The term "waters of the Commonwealth" is defined[6] to include "any and all rivers, streams, creeks, rivulets, lakes, dammed water, ponds, springs, *and all other bodies of* surface and *underground water,* or parts thereof, whether natural or artificial within or on the boundaries of this Commonwealth." (Emphasis supplied.)

These provisions clearly reveal the underlying purpose and intent of the Pure Streams Law to be that of preserving the purity of Commonwealth waters by prohibiting the discharge therein of noxious and deleterious sewage and industrial wastes. The Act declares discharges into the waters of the Commonwealth to be a public nuisance[7] and against public policy as an unreasonable or unnatural use of such waters. The Pure Streams Law does not prohibit discharges of sewage and industrial waste into the underground itself. The Board has no jurisdiction unless it be shown that the polluting substances actually

[3] Act of June 22, 1937, supra, 35 P. S. §§ 691.201 and 691.301.

[4] Section 1 of the Act of June 22, 1937, supra, as amended, 35 P. S. § 691.1, defines "sewage" to include "any substance that contains any of the waste products or excrementitious or other discharge from the bodies of human beings or animals."

[5] *Ibid,* in which "industrial waste" is defined to mean "any liquid, gaseous or solid substance, not sewage, resulting from any manufacturing or industry, or from any establishment, as herein defined, which causes pollution, as hereinafter defined, and silt, coal mine solids, rock, debris, dirt and clay from coal mines, coal collieries, breakers or other coal processing operations."

[6] *Ibid.*

[7] Act of June 22, 1937, supra, § 35 P. S. § 691.3. As long ago as 1913, the courts recognized that drainage of untreated sewage into flowing waters is a menace to public health. In *Commonwealth v. Kennedy,* 240 Pa. 214, 87 Atl. 605 (1913), the Supreme Court of Pennsylvania stated at page 219: "* * * Because sewage is the most efficient medium for the dissemination of infecting germs which do their deadly work in such an infinite variety of insidious ways, not at all dependent upon free access of the public to the stream which the germs pollute, it cannot be said that the 'riparian owners alone have an interest in the stream.' When this deleterious substance pollutes any running stream the public health is endangered thereby. * * *"

reach and are discharged into or pollute the waters of the Commonwealth.

We note in passing that discharges into the underground *per se* might constitute public health hazards or nuisances under other laws, the abatement or removal of which might be ordered and enforced by the Department of Health acting under its general powers.[8]

II.

No attempt will be made to answer your questions as to which party must bear the burden of proving pollution[9] in the terms in which the question is put since we are of the opinion that no strict rule of "burden of proof" operates in this area.

In making its orders, decisions, rules and regulations, the Board's duty is to find all the facts from substantial and legally credible evidence. Upon complaint made in writing by any responsible person, the Board has a duty to investigate any alleged source of pollution.[10] If it institutes an investigation on its own motion, the Board's duty is the same, to investigate thoroughly and consider all the facts in determining whether a given discharge is polluting the waters of the Commonwealth. In either case the Board cannot arbitrarily and capriciously decide that pollution exists. To this extent a problem in the nature of burden of proof is present; that is, there exists an initial burden either on the private complainant or on the Board to produce some credible evidence of pollution. Thereafter, all technical problems of burden of proof disappear and the Board may adjudicate on the basis of substantial evidence, *i.e.* all relevant evidence of reasonable probative value.[11] Thus, except for the initial requirement of producing some credible evidence of pollution, it would be improper to

[8] See, for instance, § 2102 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 532.

[9] Section 1 of the Act of June 22, 1937, supra, as amended, 35 P. S. § 691.1, defines "pollution" as follows: "'Pollution' shall be construed to mean noxious and deleterious substances rendering unclean the waters of the Commonwealth to the extent of being harmful or inimical to the public health, or to animal or aquatic life, or to the use of such waters for domestic water supply, or industrial purposes, or for recreation. The Sanitary Water Board shall determine when the discharge of any industrial waste, or the effluent therefrom constitutes pollution, as herein defined, and shall establish standards whereby and wherefrom, so far as reasonably practicable and possible, it can be ascertained and determined whether any such discharge does or does not constitute pollution as herein defined."

[10] *Id.*, § 604, 35 P. S. § 691.604.

[11] Section 32 of the Administrative Agency Law, the Act of June 4, 1945, P. L. 1388, 71 P. S. § 1710.32. See *Sanitary Water Board v. Anthony*, 66 Dauph. 250 (1954); *Sanitary Water Board v. Stinard*, 68 Dauph. 26 (1955); *Sanitary Water Board v. Eckert*, 71 Dauph. 288 (1958).

say that the Board has the burden of proof of pollution; its duty remains constant in all cases; to act only upon the basis of a finding of fact from substantial evidence of pollution and to conduct its own investigation, if necessary, to ascertain the facts.

Nor would it be proper to say that the person or municipality discharging sewage or industrial waste into the waters of the Commonwealth has the burden of disproving pollution. Proceedings before the Board are quasi-judicial, and the Board is not bound by technical rules of evidence at its hearings.[12] Formal rules of burden of proof and shifting of the burden of going forward with the evidence are inapplicable in such hearings. As we have stated, the Board's duty never changes. It must adduce all relevant facts from evidence of reasonable probative value and base its finding of pollution and adjudication thereon.

The statement of your question would make it seem that pollution must be found in all situations. This is not true, and we deem it advisable at this time to clarify this point.

The question of pollution does not arise where *sewage* is discharged directly into the State's waters. Section 201 of the Act, supra, contains an express prohibition against the discharge of sewage into the waters of the Commonwealth; and no reference to pollution is contained within the definition of sewage.[13]

As distinguished from the foregoing is the situation where a *person* discharges sewage "* * * in such manner as to cause pollution of the waters of this Commonwealth[14] * * *." In the latter instance, the Board may order a discontinuance of such discharge, but prerequisite thereto is the Board's finding that the discharge causes pollution.

On the other hand, where the discharge is that of *industrial waste,* pollution must always be found. The introduction of non-sewage substances into the waters of the Commonwealth must *cause pollution* in order to constitute "industrial waste" within the Pure Streams Law. The Board therefore must make a finding that the discharge causes pollution in order for it to be "industrial waste" within the meaning of the Act, the abatement or removal of which the Board may order

[12] *Ibid.*
[13] See note 4 supra.
[14] Section 202 of the Act of June 22, 1937, supra, 35 P. S. § 691.202.

and enforce by suits at law or in equity,[15] preliminary injunction[16] or summary proceedings.[17]

III.

The aforesaid discussion indicates that from a legal standpoint there is no difference between discharges at or below the ground water table or level and discharges above the ground water table or level. In either case, in order to fall within the prohibition of the Act, the sewage or industrial waste must be introduced "into the waters of the Commonwealth." So long as this requirement is satisfied, the point or level of the discharge is immaterial.

Similarly, it is immaterial whether or not the ground water in the area is being used. The purpose of the Act is to prevent discharges which are or may become inimical and injurious to the public health, or to animal or aquatic life, or to the uses of such water for domestic or industrial consumption, or for recreation.[18] Actual *user* of the water into which sewage or industrial waste is discharged is not required by the Act.

Nor is it important that wells in the area are polluted; the only requirement is that the waters of the Commonwealth are polluted. Where sewage is discharged into the waters of the Commonwealth, pollution need not be proved except in the limited situations discussed above. In the case of industrial waste, the fact that wells in the area are polluted may be sufficient to sustain a finding of pollution. But so long as waters of the Commonwealth are shown to be polluted, it is immaterial whether any wells in the area are polluted.

In this connection we may observe that notwithstanding pollution by other sources, nothing contained in existing law of the Commonwealth prevents the Board from proceeding under the Act against any particular person or municipality discharging sewage or industrial waste.[19]

Furthermore, we call your attention to the requirement that in the case of industrial waste *actual* pollution must be caused. A mere *possibility* due to the permeability of the ground or the fact that the rock into which the waste is introduced is *likely to be* creviced is not suffi-

[15] Section 601 of the Act of June 22, 1937, supra, 35 P. S. § 691.601.
[16] *Id.*, § 602, 35 P. S. § 691.602.
[17] *Id.*, § 603, 35 P. S. § 691.603.
[18] *Id.*, § 3, 35 P. S. § 691.3.
[19] *Id.*, § 606, 35 P. S. § 691.606.

cient to sustain a finding of pollution of Commonwealth waters. More affirmative evidence to establish pollution must be shown.

IV.

The Pure Streams Law provides for the issuance of orders by the Board to municipalities to discontinue discharging sewage from any municipal sewer system into the waters of the Commonwealth.[20] Such orders must provide for the time within which the discharge of sewage must be discontinued, which in the case of a municipality may not exceed two years.[21] Continued discharge after the expiration of the time fixed by the order is declared to be abatable and punishable as a nuisance.[22]

Section 210 of the Act[23] provides that whenever the Board serves an order upon a municipality[24] to abate its discharge of untreated or inadequately treated sewage, which order is not reversed on appeal, such municipality shall take steps for the acquisition, construction, alteration, repair, extension or completion of a sewage system or sewage treatment works or both, as may be necessary for the treatment of its sewage in compliance with such order.

Section 207 of the Act[25] provides that all plans for the construction or extension of a sewer system by a municipality or for the construction of treatment works or intercepting sewers by a person or municipality shall be approved by the Board prior to construction. The section further provides that any construction not approved by the Board or operation of treatment works not in accordance with rules and regulations of the Board is declared to be abatable as a nuisance.

The cumulative effect of these provisions is to empower the Board to order second class townships to submit plans for, to construct and operate sewage treatment works for the interception and treatment of sewage from public sewers discharging into waters of the Commonwealth. The method selected by the Legislature of empowering the Board so to act is admittedly indirect; nevertheless, the clear import of the provisions of the Act, considered as a whole, impels us to the conclusion that the Board has the power to order construction, *et cetera*, of sewage treatment works.

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[20] *Id.*, § 202, 35 P. S. § 691.202.
[21] *Id.*, § 203, 35 P. S. § 691.203.
[22] *Ibid.*
[23] *Id.*, 35 P. S. § 691.210.
[24] *Id.*, § 1, 35 P. S. § 691.1 defines "municipality" to include any township.
[25] *Id.*, 35 P. S. § 691.207.

V.

The power of the Board discussed in IV above is not rendered inoperative by supposed limitations placed upon the power of townships to acquire sites for and to finance the project, to set up an authority or to construct sewers in part of the township out of general funds. No such emasculating limitations exist. On the contrary, townships are specifically empowered by law to accomplish these things.

The Municipality Authorities Act of 1945[26] authorizes municipalities, including any township, to create an authority for the purpose, among other things, of constructing, improving, maintaining and operating sewers, sewer systems or parts thereof, and sewage treatment works, including works for treating and disposing of industrial waste.[27] All powers necessary or convenient to accomplish this purpose are granted to the authority, including the power of eminent domain[28] with which to acquire a site for a project. The power to borrow money, make and issue negotiable notes, bonds, refunding bonds, and other evidences of indebtedness or obligations is also granted for the purpose of financing a project.[29] Section 210 of the Pure Streams Law[30] provides for construction out of general funds of the township where it states *inter alia:*

> "* * * The cost of the acquisition, construction, repair, alteration, completion or extension of the sewer, sewerage system or sewage treatment works, as may be necessary to comply with said order, shall be paid out of funds on hand available for such purpose, *or out of the general funds of such municipality not otherwise appropriated.* * * *" (Emphasis supplied.)

Section 210, supra, continues by providing for additional methods of municipal financing of pollution abatement as follows:

> "* * * If there be no sufficient funds on hand or unappropriated, then the necessary funds shall be raised by the issuance of bonds, such bond issue to be subject only to the approval of the Department of Internal Affairs. If the estimated cost of the steps necessary to be taken by such municipality to comply with such order is such that the bond issue, necessary to finance such project, would not raise the total outstanding bonded indebtedness of such municipality in excess of the constitutional limit imposed upon such indebtedness

[26] Act of May 2, 1945, P. L. 382, §§ 1 to 19, as amended, 53 P. S. §§ 301 to 322.
[27] *Id.*, § 4 as amended, 53 P. S. § 306.
[28] *Id.*, §§ 4 and 11, as amended, 53 P. S. §§ 306 and 314.
[29] *Id.*, § 4 as amended, 53 P. S. § 306.
[30] Act of June 22, 1937, supra, 35 P. S. § 691.210.

by the Constitution of this Commonwealth, then, and in that event, the necessary bonds may be issued as a direct obligation of such municipality and retired pursuant to general law governing the issue of such bonds, if the electors of the municipality shall vote in favor of the increase in indebtedness where the consent of the electors is required. If the amount of such bonds necessary to be issued would raise the total outstanding bonded indebtedness of such municipality above such constitutional limitation on such indebtedness, or if the consent of the electors cannot be secured, or if such municipality by its corporate authorities shall determine against the issuance of direct obligation bonds, then such municipality shall be requested to issue non-debt revenue bonds and provide for the payment of the interest and principal of such bonds from funds to be raised by imposing a sewer rental or charge, in accordance with and as authorized by the act, approved the eighteenth day of July, one thousand nine hundred and thirty-five (Pamphlet Laws, twelve hundred eighty-six) * * *"

VI.

Your inquiry as to whether construction of a sewage treatment works project may be prevented by petition of the taxpaying property owners of a municipality raises a question principally of local concern and generally of no concern to the Board. Whether or not a taxpayer's suit would lie under certain circumstances should make not a particle of difference to the Board in its adjudications. Taxpayers' rights and remedies have no effect upon the power of the Board to order the abatement or removal of a nuisance.

We need not go into detail with regard to the remedies available to taxpayers and the circumstances under which such remedies may be employed. These matters are neither properly before the Board nor, in this instance, an appropriate subject of inquiry to this department. Suffice it to say that under certain circumstances taxpayers have a right to restrain municipal corporations and their officers from transcending their lawful powers or violating their legal duties.[31] In addition, in the case of second class townships, § 1502 of The Second Class Township Code [32] provides that taxpayers of the township or of the affected sewer district whose property valuation for tax purposes amounts to fifty per centum of the total property valuation may sign and file a written protest in the office of the prothonotary of the court of common pleas against the construction of any sewer, drain or system thereof. Once such protest is filed, the Act provides that

[31] 64 C. J. S. §§ 2122 to 2172.
[32] Act of May 1, 1933, P. L. 103, as amended by the Act of July 10, 1947, P. L. 1481, § 31, 53 P. S. § 66502.

sewer construction authorized by resolution or ordinance of the board of supervisors of the township shall not be undertaken or proceeded with.

The aforementioned rights and remedies of taxpayers in no way repeal, alter or amend the anti-pollution powers and duties of the Board. Nor can they or should they affect the Board in its determinations and orders. Questions relating to taxpayers' rights and remedies may be litigated in suits to abate pollutions,[33], on appeal[34] from the order, decision, rule or regulation of the Board, and in any other manner provided by law.

VII.

The aforesaid discussion and citation of authorities amply provides the answer to the first part of your seventh inquiry. The Pure Streams Law only applies where sewage is discharged "into the waters of the Commonwealth." The Board may not order construction of sewage collection and treatment facilities under this Act where unsanitary conditions exist due to sewage on the surface of the ground and in ditches, such sewage not being discharged into the waters of the Commonwealth.[35]

With regard to the second part of your seventh question, the answer is governed by Official Opinion No. 569, dated September 11, 1947.[36]

The precise question considered in Opinion No. 569 was whether the Board has the authority to require the supervisors of a second class township wherein private sewage systems discharge sewage into the waters of the Commonwealth, to abate such discharge or to submit for the approval of the Board plans for the construction of municipal sewers or a municipal sewer system and a municipal sewage disposal works or sewage treatment plant. The opinion concluded that the Pure Streams Law, considered as a whole, did not intend to impose upon municipalities the responsibility for the pollution of the State's waters by private persons discharging sewage into said waters through private sewer lines. The Pure Streams Law expressly imposes liability for such offending discharges upon a municipality only when it is the municipality which "owns and maintains," or "owning, maintaining and using" the particular sewer system or whose corporate authorities

[33] Section 601 of the Act of June 22, 1937, supra, 35 P. S. § 691.601.
[34] *Id.*, § 605, 35 P. S. § 691.605.
[35] See note 8 supra and text discussion related thereto.
[36] 1947-48 Op. Atty. Gen. 51.

have by law "charge of the sewer system" which causes the pollution. Any proceeding taken by the Board on any cause of action arising by reason of any pollution caused by private sewerage disposal must be instituted against the person or persons responsible therefor.

Opinion No. 569 also analyzed the provisions of The Second Class Township Code,[37] and found nothing therein which would impose upon the supervisors of municipalities the duty to abate or to submit plans to the Board for the construction of sewers or treatment plants, or both, which when constructed would bring about abatement of pollution of the State's waters caused by the discharge of untreated sewage into such waters, not by municipal sewerage systems, but by private sewers. Although § 1501 of the Code[38] authorizes townships to construct sewer systems, Opinion No. 569 holds at page 57 that "the mere grant of authority to a municipal corporation to construct sewers does not amount to the imposition of a duty to do it. * * *" And although § 702 of the Code[39] empowers township supervisors to prohibit nuisances and authorizes them "to remove any nuisance * * * on public or private grounds after notice to the owner to do so * * *," the opinion at page 57 states that "in the absence of an appropriate ordinance on the subject, a municipality is under no duty to abate a nuisance for which it is in nowise responsible although it may be authorized by statute to abate the same."

We have reexamined Opinion No. 569 in the light of present legal authorities and, finding no change in the law, hereby reaffirm the conclusions reached therein.

Thus to hold does not place the Board or the Commonwealth in a helpless situation as it might seem at first blush. Suits to abate private pollutions may still be brought. Preliminary injunctions[40] may issue where the circumstances require it or the public health is endangered. Summary proceedings[41] may be brought to enforce the abatement orders of the Board. Finally, the broad powers[42] of the Department of Health in the general health administration to order nuisances detrimental to the public health to be abated will take care of those peculiar situations where the provisions of the Pure Streams Law are inapplicable.

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[37] Act of May 1, 1933, P. L. 103, §§ 101 to 2201, as amended, 53 P. S. §§ 65101 to 67201.
[38] *Id.*, 53 P. S. § 66501.
[39] *Id.*, 53 P. S. § 65712.
[40] Section 602 of the Act of June 22, 1937, supra, 35 P. S. § 691.602.
[41] *Id.*, § 204, 35 P. S. § 691.204.
[42] See note 8 supra.

To sum up our conclusions, we are of the opinion and you are accordingly advised that:

1. The Board may not order abatement or treatment of sewage or industrial waste which is discharged to the underground itself. The Board may only act where such discharges are made into underground waters of the Commonwealth.

2. No strict rule of burden of proof applies in proceedings before the Board. However, since the Board's duty is to find all the facts from substantial and legally credible evidence, and since it cannot arbitrarily and capriciously decide that pollution exists, there is an initial burden either on the private complaint or on the Board to produce some credible evidence of pollution. Pollution need not be found where sewage is discharged, except in the limited situation of a discharge of sewage by a person not into the waters of the Commonwealth which discharge causes pollution of such waters. On the other hand, where industrial waste is discharged the Board must find such discharge causes pollution of Commonwealth waters.

3. It is immaterial whether the point of discharge is at or below the ground water level and whether the ground water in the area is actually being used. Also, a finding of fact that wells in the area are polluted is not essential since pollution may be shown otherwise. In the case of industrial waste, *actual* pollution must be shown.

4. The effect of the provisions of the Pure Streams Law is to empower the Board to order townships of the second class to submit plans for, construct and operate sewage treatment works for the interception and treatment of sewage from public sewers discharging into Commonwealth waters.

5. Townships have the power to acquire sites for and finance a sewage treatment works project to create an authority to finance the project, and to construct sewers in part of the township out of general funds, so as not to render inoperative the power of the Board to order the construction of such project.

6. The question whether construction of such project can be prevented by taxpayer's suit or thwarted by the filing of a formal protest is a matter of local concern and is neither the concern of the Board nor, in this instance, an appropriate subject of inquiry to this department.

7. Where unsanitary conditions exist due to sewage from private sewage disposal facilities on the ground and in ditches, which does not drain into waters of the Commonwealth, the Pure Streams Law

does not apply. Where such sewage does drain into the State's waters, the Board cannot order municipalities to construct sewers or treatment plants, or both, but must rely on other powers and remedies to abate the pollution.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN, III,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 142

Unemployment compensation—Advance of funds under the Federal Social Security Act—Optional methods of repayment—Unconstitutional delegation of legislative authority—Section 607 of the Pennsylvania Unemployment Compensation Law—Article II, section 1, of the Constitution of Pennsylvania.

Although the provisions of § 607 of the Pennsylvania Unemployment Compensation Law, the Act of December 5, 1936, P. L. (1937) 2897, purportedly authorize the Secretary of Labor and Industry to apply for an advance of funds under the provisions of the Federal Social Security Act, the accompanying authority to determine the manner in which such an advance is to be repaid, in light of the optional methods of repayment provided for by the Federal Law, is an unconstitutional delegation of legislative authority under the provisions of Article II, § 1, of the Constitution of Pennsylvania and since the obtaining and repayment of the advance are inseparable features of the proposed action, the Secretary cannot apply for the advance.

Harrisburg, Pa., July 17, 1958.

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

Sir: We have your letter requesting advice as to your authority to apply for an advance of funds under the provisions of Title XII of the Federal Social Security Act, 49 Stat. 620 (1935), 42 U. S. C. § 1321 (1952), under § 607 of the Pennsylvania Unemployment Compensation Law, the Act of December 5, 1936, P. L. (1937) 2897, 43 P. S. §§ 751 to 882. You state that under the qualifying provisions

of Title XII the Commonwealth of Pennsylvania would be eligible to apply for such an advance as of June 30, 1958.

Title XII, entitled "Advances to State Unemployment Funds," was added to the Social Security Act by § 402 of the War Mobilization and Reconversion Act of 1944, 58 Stat. 790 (1944), 42 U. S. C. § 1321 (1952). Section 1201 (a) of this title prescribes the conditions precedent entitling a state to apply for an advance. The manner in which such advances originally were to be repaid was outlined in subsection (c) of this section, which read as follows:

> "(c) Any amount transferred to the account of any State under this section shall be treated as an advance, without interest, to the unemployment fund of such State and shall be repaid to the Federal unemployment account from the unemployment fund of that State to the extent that the balance in the State's account in the Unemployment Trust Fund, at the end of any calendar quarter, exceeds a sum equal to the total contributions deposited in the Unemployment Trust Fund under the unemployment compensation law of the State during that one of the two calendar years next preceding such day in which such deposits were higher. The Secretary of the Treasury shall, after the end of each calendar quarter, transfer from the unemployment account of each State in the Unemployment Trust Fund to the Federal unemployment account the amount required to be repaid from the unemployment fund of such State at the end of such quarter under this subsection."

It is to be noted that under the provisions of this subsection the repayment of any advances obtained pursuant to the provisions of Title XII was determined by a fixed financial formula.

Section 607, 43 P. S. § 847, was added to the Pennsylvania Unemployment Compensation Law by the Act of May 29, 1945, P. L. 1145, to implement the provisions of Title XII. The pertinent language of this section is as follows:

> "The secretary is authorized and directed to apply for an advance of moneys and to accept the responsibility for the repayment of such advance in accordance with the conditions specified in Title XII of the Social Security Act, as amended, in order to secure to this Commonwealth the advantages available under the provisions of such title. * * *"

This section of the Pennsylvania law has not been amended since enactment.

The Act of August 5, 1954, 68 Stat. 668, 672 (1954), 42 U. S. C. § 1322 (Supp. III, 1956), the so-called "Reed Bill," deleted subsection (c), supra, and substituted an entirely different method for the repayment of advances obtained under Title XII. The fixed formula was eliminated and an optional method substituted therefor. Under the present law such advances are to be repaid by:

(1) a transfer from a state's balance in the Unemployment Trust Fund at the option of the Governor of the state (42 U. S. C. § 1322 (a) (Supp. III, 1956)); or

(2) appropriation of the amount collected under the reduced offset provision in § 3302 (c) (2) of the Internal Revenue Code (42 U. S. C. § 1322 (b) (Supp. III, 1956)).

In brief summary, § 3302 (c)(2) of the Internal Revenue Code provides that if after four years there is an outstanding unpaid balance of an advance under Title XII, the offset credit which an employer may take against the tax imposed by the Federal Unemployment Tax Act—normally 90%—is reduced by 5% of the tax imposed. On the basis of the present tax schedule this means a reduction in credit of $4.50 for each employee who has been paid wages of $3,000.00 or more. The offset credit is reduced by an additional 5% for each year a balance of an advance is outstanding. The monies collected by reason of this reduced offset are, of course, credited against the advance; and, in the event an excess is collected in the final year, such excess is credited to the balance in the state's account.

Subsequent to the enactment of the amendments to Title XII, the Legislature of Pennsylvania met in the Sessions of 1955 and 1957. Notwithstanding the fact that the Pennsylvania Unemployment Compensation Law was amended in other particulars at each of these sessions, the Legislature did not amend the provisions of § 607 or specifically reaffirm its provisions. Therefore it stands.

In the light of present Federal and state statutory provisions, you and/or your successor are authorized and directed to do two things under the provisions of § 607, namely:

(1) to apply for an advance under Title XII of the Social Security Act; and

(2) to accept the responsibility for the repayment of such advance in accordance with the conditions set forth in Title XII.

As noted above, at the time this authority was originally granted, the repayment of advances under Title XII was on the basis of a fixed financial formula. There was no area for the exercise of any discretion. This situation no longer prevails under the present provisions of Title XII.

For the purposes of this opinion, it is assumed, without deciding, that the provisions of § 607 of the Pennsylvania Unemployment Compensation Law confer sufficient authority upon you to authorize in your discretion a transfer from the Commonwealth's account in the Unemployment Trust Fund to the Federal unemployment account of a sum sufficient to repay either in whole or in part an advance obtained under Title XII. Under the present provisions of the Pennsylvania Unemployment Compensation Law, employers of one or more persons are subject to the contribution provisions of the law as contrasted to the Federal Unemployment Tax Act, which is applicable only to employers of four or more persons. Furthermore, the contribution rates under § 301 of the Pennsylvania Unemployment Compensation Law, 43 P. S. § 781, vary depending upon the balance in the Trust Fund account as of December 31 of the preceding calendar year. The minimum schedule imposes contribution rates from .5% to 2.7%. The maximum schedule imposes a flat rate of 2.7%. The critical fund balances are $450,000,000.00, $350,000,000.00 and $300,000,000.00.

We are advised that as of June 30, 1958, the Commonwealth of Pennsylvania would be eligible to obtain an advance under Title XII of a sum in excess of $100,000,000.00. In view of the present provisions of law, the following situation could exist: the withdrawal of such a sum from the Commonwealth's account could result in a substantial increase in the contribution rate of all employers subject to the provisions of the Pennsylvania Unemployment Compensation Law but would relieve those employers subject also to the Federal Unemployment Tax Act of any increased liability under that act. On the other hand, failure to withdraw such amount would not increase the contribution rates of employers under the Pennsylvania law but would increase the tax liability of those employers who were subject to both the Federal and state laws. In brief, you would have the discretion to determine whether an increased tax should be imposed upon all Pennsylvania employers under a Pennsylvania statute, or an increased tax imposed upon a limited portion of such employers under a Federal statute.

Article II, § 1, of the Constitution of Pennsylvania provides:

> "The legislative power of this Commonwealth shall be vested in a General Assembly which shall consist of a Senate and a House of Representatives."

It is a fundamental proposition that the power to tax is a legislative power which cannot be delegated. In the case of *Holgate Bros. Co. et al. v. Bashore et al.*, 331 Pa. 255, 200 Atl. 672 (1938), the Court said at page 260:

> "Legislative power in Pennsylvania is vested solely in the General Assembly. Regardless of exigencies which at times arise or of how trying our economic or social conditions become, the powers and duties imposed by the Constitution upon the legislative branch of our government remain steadfast and neither the urgency of the necessity at hand nor the gravity of the situation allow the legislature to abdicate, transfer or delegate its authority or duty to another branch of the government. Our system of checks and balances in the government was wisely instituted by the framers of the Constitution for the protection of all the people of the Commonwealth and has proved an effective method to prevent unwise, hasty and imprudent legislation. So effective has been this system of government no attempt has been made to amend that part of the Constitution and it remains the fundamental law of this Commonwealth."

In a later case, *Archbishop O'Hara's Appeal*, 389 Pa. 35, 131 A. 2d 587 (1957), the Supreme Court said at page 47:

> "A fundamental principle of our constitutional law is that the power conferred upon a legislature to make laws cannot be delegated by that branch of government to any other body or authority: Cooley's Constitutional Limitations, p. 224 (8th ed.); United States v. Shreveport Grain & Elevator Co., 287 U. S. 77, 53 S. Ct. 42; Baldwin Township Annexation Case, 305 Pa. 490, 158 A. 272; American Baseball Club v. Phila., 312 Pa. 311, 167 A. 891; Holgate Bros. Co. v. Bashore, 331 Pa. 255, 200 A. 672; Bell Telephone Co. of Penna. v. Driscoll, 343 Pa. 109, 21 A. 2d 912; Kellerman v. Philadelphia, 139 Pa. Superior Ct. 569, 13 A. 2d 84. * * *"

The provisions of § 607, when construed in the light of the present provisions of Title XII of the Social Security Act, place in the hands of the Secretary of Labor and Industry a complete discretion whether or not tax liability shall be increased and, further, to determine, as between groups of taxpayers, which group shall have its taxes increased.

Your authority under § 607 of the Pennsylvania Unemployment Compensation Law to obtain an advance under Title XII is clearly distinguishable from the considerations involved in Official Opinion No. 123, dated June 6, 1958, holding that you were authorized to enter into an agreement with the Federal Secretary of Labor for the disbursement of funds under the Temporary Unemployment Compensation Act of 1958. While the provisions for the recovery into the Federal Treasury of monies expended under that act are the same as those for the recovery of monies advanced under Title XII, there are substantial differences in these laws. Under the 1958 Act, by its specific terms, you are acting solely in the capacity of an agent in the disbursement of funds which at all times remain Federal funds and which must be strictly accounted for by the Commonwealth. Eligibility for temporary unemployment compensation benefits is controlled by the provisions of the Temporary Unemployment Compensation Act of 1958 and in the event of any conflict between those provisions and the provisions of any state law the Federal provisions must prevail. On the other hand, advances under Title XII become state funds, a part of the state's balance in the Unemployment Trust Fund and need not be accounted for. Where such advances are expended for benefit purposes, the eligibility of recipients is determined solely by the provisions of the law of the state obtaining such an advance. Furthermore, as an agent in the disbursement of Federal funds under the 1958 Act, you have no discretionary authority to transfer any of the Commonwealth's funds in satisfaction of any advancements and charges arising under that act.

There is no duty under the Temporary Unemployment Compensation Act of 1958 to repay the funds, since the advancement is neither a loan nor a grant. The statute makes no mention of or reference to any state obligation or repayment by a state in any manner whatsoever.

Therefore, although under the provisions of § 607 of the Pennsylvania Unemployment Compensation Law you are purportedly authorized to apply for an advance under the provisions of Title XII of the Federal Social Security Act, we are of the opinion that the accompanying authority to determine the manner in which such an advance is to be repaid is an unconstitutional delegation of legislative authority under the provisions of Article II, § 1, of the Constitution of Pennsylvania. Since these provisions are inseparable in their practical operation and one would be ineffective without the other,

we conclude that the application for an advance would also be invalid.

Very truly yours,

DEPARTMENT OF JUSTICE,

MORLEY W. BAKER,
Assistant Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 143

Commodities—Weight of contents—Use of the word "net"—Adoption of regulation—Secretary of Internal Affairs—Section 7 of the Commodity Law—Administrative Agency Law.

After adoption of a proper regulation by the Secretary of Internal Affairs, under the provisions of §§ 7-7.1 of the Act of July 24, 1913, P. L. 965, as amended, known as the Commodity Law, and in compliance with §§ 21-22 of the Administrative Agency Law, the Act of June 4, 1945, P. L. 1388, the word "net" must be included in quantity declarations of the contents of commodities.

Harrisburg, Pa., July 23, 1958.

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

Madam: In answer to your request for our opinion concerning your continuance of the requirement that the word "net" be included in quantity content declarations of commodities under the provisions of § 7 of the Act of July 24, 1913, P. L. 965, as amended, known as the Commodity Law, 76 P. S. § 247, we have reviewed our Formal Opinion No. 615, 1949-50 Op. Atty. Gen. 121, and the opinion of Judge Flood, filed March 8, 1951, in the Court of Quarter Sessions of Philadelphia County, in the case of John Y. Huber, 3rd (Keebler-Weyl Baking Company: Division of United Biscuit Company of America).

Judge Flood's opinion holds that as long as the weight of the net contents is marked on a package of a commodity distributed or sold or in the possession of a person with intent to distribute or sell, there is no necessity of using the word "net" in describing the weight of the contents and a package marked "weight 8 ounces" having a net content of not less than 8 ounces is a sufficient compliance with § 7 of the Commodity Law.

This Philadelphia County opinion is subsequent to and at variance with our Formal Opinion No. 615, wherein we held that the word "net" must be included in all quantity declarations of the content of packages which are subject to the provisions of § 7 of the Commodity Law.

It is our understanding that the Keebler-Weyl Baking Company case is not reported in District and County Reports, and that you had no knowledge of the case until it was brought to your attention by the Keebler-Weyl Baking Company, as authority for its omission of the word "net" on declarations of content of commodities.

Section 5 of the Commodity Law, 76 P. S. § 355.5, provides, inter alia, as follows:

> "The Secretary of Internal Affairs shall have the power to adopt and promulgate such rules and regulations not inconsistent with the provisions of this act as may be deemed necessary to carry into effect the intent and purpose of this act."

For the purpose of clarifying the evident intent of the Commodity Law it is recommended that your department adopt a regulation under the provisions of § 7.1, ante, and in compliance with §§ 21-22 of the Administrative Agency Law, the Act of June 4, 1945, P. L. 1388, 71 P. S. §§ 1710.21-1710.21a, requiring the word "net" to be a part of and included in the designation of the marking of the weight of the contents of packages governed by §7 of the Commodity Law.

After adoption of a proper regulation under § 5 of the Commodity Law, the inclusion of the word "net" in commodity content declarations, must be observed.

It is our opinion, therefore, and you are accordingly advised, that upon adoption by your department of a proper regulation under

§ 5 of the Act of July 24, 1913, P. L. 965, as amended, known as the Commodity Law, 76 P. S. § 247, the word "net" must be made a part of and included in the designation of the marking of the weight of the contents of packages governed by § 7 of the Commodity Law.

Very truly yours,

DEPARTMENT OF JUSTICE,

RAYMOND C. MILLER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 144

Laboratories—Analyses of water samples—Department of Health—Power to regulate laboratory standards—The Administrative Code of 1929.

The Department of Health has no authority to compel laboratories to submit samples or be otherwise approved; however, since the Department does have the power to analyze water supplies, it may establish a program designed to insure that the analyses of water samples it receives are accurate, and any laboratory which does not voluntarily agree to accept these standards or to submit to periodic examinations on a voluntary basis may have its analyses refused by the Department.

Harrisburg, Pa., August 1, 1958.

Honorable C. L. Wilbar, Jr., Secretary of Health, Harrisburg, Pennsylvania.

Sir: You request our opinion as to whether, under existing legislation, the Department of Health has the power to examine and approve laboratories which analyze samples of water in connection with the Health Department's program of public water supply supervision.

We understand that your department issues permits to water works which supply water to the public and that each permit contains a stipulation requiring the permittee to submit at stated intervals the results of bacteriological analyses of samples of water served to the public. You inform this department that the competency of a number

of the laboratories involved in making the aforesaid analyses has been questioned. We assume from the fact that you have not supplied us with additional information relative to the scope of the activities of the laboratories in question that they do not fall within the purview of The Analytical-Biochemical-Biological Laboratory Act, the Act of September 26, 1951, P. L. 1539, 35 P. S. §§ 2151-2165.[1]

Paragraph (b) of § 2109 of The Administrative Code of 1929[2] vests the Department of Health with the power to issue permits to water works and to stipulate therein the conditions under which water may be supplied to the public. The stipulation in such permits that the permittee be required at stated intervals to submit the results of bacteriological analyses of water samples is a reasonable regulation in the interest of public health.

Since the purpose of this stipulation in the permits is to apprise the Department of Health of the degree of purity of water being supplied to the public, it necessarily follows that the Department of Health has an interest in the accuracy of the analyses of water submitted to it. Where the Department of Health has good reason to believe that the procedures followed by a given laboratory are not conducive to the accurate analyses of water samples, the department may refuse to accept the results of analyses of water samples submitted by such laboratory.

The Department of Health may exercise those powers clearly given it or necessarily implied in the grant of power; see *Green v. Milk Control Commission,* 340 Pa. 1, 16 A. 2d 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).

Thus, your department may set up reasonable standards relating to the procedures which such laboratories must follow in order to obtain accurate results of their analyses. After the formulation of these standards, your department may request laboratories to be

[1] Section 2 of the Act defines an "Analytical-Biochemical-Biological Laboratory" as "any place, establishment or institution organized and operated primarily for the performance of all or any bacteriological, biochemical, microscopical, serological, or parasitological tests by the practical application of one or more of the fundamental sciences to material originating from the human body, by the use of specialized apparatus, equipment and methods, for the purpose of obtaining scientific data which may be used as an aid to ascertain the state of health."

[2] The Act of April 9, 1929, P. L. 177, § 2109, 71 P. S. § 539.

examined periodically by your employees to the end that these standards of accuracy be maintained. Should any laboratory refuse either to accept the standards promulgated by your department or to permit your employees to examine the laboratories, your department is under no compulsion to accept the results of analyses of water samples submitted by such laboratories. Neither is any laboratory under any compulsion to accept the standards of your department or to have the employees of your department examine it. Furthermore, your department is not authorized to compel the submission of water samples by a water works to any particular laboratory.

In instituting the program which your department is contemplating, it would be advisable if, in the permits issued to water works, the stipulation with respect to the submission of the results of the analyses of samples states that such results will be considered in compliance with the provisions of the permit only if such results are submitted by laboratories approved by the department in accordance with its rules and regulations.

We are, therefore, of the opinion and you are accordingly advised that your department may set up a program for the approval of laboratories which submit results of bacteriological analyses of water to your department. Such program must be based upon reasonable standards related to the method of obtaining accurate results from the bacteriological analyses of water. Further, you are advised that your department may request that its employees be allowed to examine periodically the laboratories which analyze water samples. Although your department may exert no compulsion upon any laboratory who refuses either to accept the standards promulgated by your department or to submit to periodic examinations, your department may refuse to accept the results of bacteriological analyses of water samples made by those laboratories who refuse to comply with your regulations.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. COHEN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 145

Judges — Seniority — Election of two judges simultaneously — Presiding judge vacancy.

When two or more judges of the Supreme Court, the Superior Court, the courts of common pleas, the orphans' courts and the County Court of Allegheny County are elected for the first time simultaneously, they must cast lots to determine seniority even if one has previously served by appointment. No problem arises concerning the Municipal Court of Philadelphia (the members of which elect the president judge) and the Juvenile Court of Allegheny County (which comprises only one judge).

Harrisburg, Pa., August 4, 1958.

Honorable John S. Rice, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: Your office has asked us to set forth the rules to be applied by your department in determining who shall be commissioned as the presiding judge of a court of the Commonwealth comprising more than one judge when a vacancy occurs.

The questions raised by this inquiry, by and large, are common to all judges of courts of record within the Commonwealth. Excluding the minor judiciary, the Pennsylvania judicial system encompasses seven classes of judges, namely, the judges of the Supreme Court, the Superior Court, the courts of common pleas, the orphans' courts, the County Court of Allegheny County, the Municipal Court of Philadelphia and the Juvenile Court of Allegheny County. For purposes of clarity and analysis we shall treat each class of judges separately in this opinion.

We understand that, on the basis of *Commonwealth ex rel. Reeder v. Pattison,* 109 Pa. 165 (1885), it has been the practice of your department to commission as president judge of a court the judge oldest in the point of continuous service on that court regardless of whether his service commenced as a result of appointment followed by election or of election only. We would naturally be reluctant to overturn this long-standing administrative practice unless that action is clearly required. However, a recent per curiam order of our Supreme Court casts new light on the nature of appointed judicial tenure and emphasizes the necessity of an intensive re-examination of present administrative practices: see *in re: Determination of the President Judge for the 35th Judicial District,* No. 2055 Miscellaneous Docket, Western

District. Accordingly, in considering the request for advice, we have most carefully reviewed the pertinent provisions of our Constitution and its schedules together with relevant statutory and recent decisional law.

At the outset, it is well to note certain provisions of our Constitution which relate to all judges of courts of record within the Commonwealth. The Constitution requires that all judges of courts of record shall be elected by the people.[1] Judges of the Supreme Court are elected for terms of twenty-one years and are ineligible for reelection;[2] all other judges required to be learned in the law are elected for terms of ten years and are eligible for reelection.[3] When, because of "death, resignation or otherwise", a judge does not complete his full elected term, the Governor is authorized to fill the vacancy by appointment.[4] Such appointments by the Governor, however, are not for the unexpired portion of the elected term; these are interim appointments continuing only until such time as a successor, chosen by the electors, is ready to take office, that is, until the first Monday of January next succeeding the first ensuing general or municipal election appropriate to the judicial office.[5] Judges chosen by the people to fill vacancies caused by "death, resignation or otherwise", after election, commence full terms of twenty-one or ten years, as the case may be.

I.

Article V, § 2, of the Pennsylvania Constitution, which ordains that the Supreme Court shall consist of seven judges elected for terms of twenty-one years and ineligible for reelection, also provides, with respect to the office of chief justice, that:

> "The judge whose commission shall first expire shall be chief justice, and thereafter each judge whose commission shall first expire shall in turn be chief justice."

If not more than one judge was elected to the Supreme Court in any one year, there would be no difficulty at all in determining the succession to the office of chief justice. When that office became vacant, the

[1] Pa. Const., Art. V, §§ 2, 15.
[2] Id., Art. V, § 2.
[3] Id., Art. V, § 15.
[4] Id., Art. V, § 25. See, also, id., Art. IV, § 8, and *Buckley v. Holmes,* 259 Pa. 176, 102 Atl. 497 (1917).
[5] Pa. Const., Art. V, § 25. Judges of the Supreme and Superior Courts may be elected at either a general or a municipal election; other judges learned in the law may be elected only at municipal elections: id., Art. VIII, § 3. General elections are held in November of each even-numbered year and municipal elections in November of each odd-numbered year: id., Art. VIII, § 2.

commission of one of the judges would necessarily expire before that of any of his colleagues, and that judge would become chief justice. This is only another way of saying that when the office of chief justice is vacant, the judge of the Court who has served more of his elected term than any other judge—and is, therefore, more experienced in the work of the Court than any of his colleagues—will become chief justice.

This result is not significantly affected even if two or more judges ascend to the bench at the same time as the result of simultaneous election.[6] Article V, § 17, of the Constitution provides that:

> "Should any two or more judges of the Supreme Court * * * be elected at the same time, they shall, as soon after election as convenient, cast lots for priority of commission, and certify the result to the Governor, who shall issue their commissions in accordance therewith."

As a result of the casting of lots and the issuance of commissions in accordance therewith, the relative seniority of the newly elected judges is effectively established and no difficulties can thereafter ensue in determining succession to the office of chief justice.

All of the foregoing discussion proceeded on the assumption that every judge of the Supreme Court commences his term of service as the result of election only. However, not all judges complete their full terms of office; and in the case of vacancies happening by reason of "death, resignation or otherwise", the Governor is empowered to make interim appointments. What, then, are the effects, if any, of appointed service followed by election?

Obviously, if the Governor appoints a judge who is subsequently elected for a full term and no other judge is elected to the Court at the same election, the nature of appointed tenure is immaterial because, whether the judge's seniority is computed from the date of his appointed commission or his elected commission, his place in the order of succession will not be affected. If, however, an appointed judge stands for election at the same time that another judge is to be selected by

[6] Article V, § 16, of the Constitution provides that: "Whenever two judges of the Supreme Court are to be chosen for the same term of service each voter shall vote for one only, and when three are to be chosen he shall vote for no more than two; candidates highest in vote shall be declared elected." In its practical application, this section insures that whenever two vacancies on the Supreme Court are to be filled at the same election one judge shall be chosen from each of our major political parties. Elections of this sort have occurred not infrequently, e.g., in 1956, 1951, 1935 and in other years.

the people, the nature of appointed tenure becomes significant. Do judges who have served by appointment, for however short a period, take seniority automatically over a judge elected at the same election and who commences his elected term at the same time as the appointed judges begin their elected terms? The answer to this question must be in the negative.

Article V, § 17, of the Constitution (quoted at length *supra*) requires that when any two or more judges of the Supreme Court are "elected at the same time, they shall * * * cast lots for priority of commission." The mandate of this section is clear and unambiguous; it is an absolute command which contains no exception for judges previously serving by appointment. The Constitution uses the words "elected" and "reelected" with precision. Thus, since a judge of the Supreme Court may never be "reelected", a direction that two judges "elected" at the same time "shall" cast lots could not be more specific.

That the foregoing is the only proper interpretation of the provisions of Article V, § 17, of the Constitution is attested to by the actual practice of the members of the Supreme Court. Judge Alex Simpson, Jr., of the Supreme Court, died on July 24, 1935, and Honorable H. Edgar Barnes, then Secretary of Revenue of the Commonwealth, was appointed to the Court by the Governor, effective August 12, 1935.[7] The term of Chief Justice Robert S. Frazer was to expire on January 6, 1936. At the September primary of 1935, Judge Barnes received the Democratic Party nomination and Honorable Horace Stern, President Judge of the Court of Common Pleas, No. 2, of Philadelphia County, received the Republican Party nomination for Judge of the Supreme Court; and both were elected to the Court at the municipal election of 1935.[8] Both judges commenced their service under their elected terms on January 6, 1936, *Judge Barnes having already served more than four months on the Court by appointment.*[9] However, prior to taking their oaths of office, the two cast lots to determine priority of commission; and Judge (later to be Chief Justice) Stern prevailed. That these judges cast lots to determine priority of commission appears of record in the files of the Bureau of Commissions and Elections of your department.

The framers of our Constitution, by the use of the phrase the "judge whose commission shall first expire", intended that the judge of the

[7] See 319 Pa. iii (1935).
[8] See Pa. Const., Art. V, § 16.
[9] See 320 Pa. iii (1936).

Supreme Court with the longest elected service on that bench should succeed to the office of chief justice whenever that office should become vacant. If, however, appointed judges possessed precisely the same tenure status as elected judges, the constitutionally ordained plan of succession would be reduced to an absurdity. For example, suppose that in 1935 Chief Justice Frazer resigned his commission prior to the expiration of his elected term but after August 12th of that year. Judge Barnes, having been appointed to the bench on August 12, 1935, under a commission expiring on January 6, 1936, would be the judge of the Supreme Court whose commission would first expire. Applying the mandate of Article V, § 2, literally to an appointed judge would have resulted in the elevation of Judge Barnes to the office of chief justice despite the fact that he had less experience on the Court than any of its other members. Such an anomalous result is neither desirable nor intended by the framers of our Constitution.

We are of the opinion, therefore, that the order of succession to the office of chief justice of the Supreme Court is determined on the basis of priority of *elected* commission resolving simultaneous elections by the casting of lots and disregarding entirely any appointed service.

II.

The Superior Court of Pennsylvania owes its existence not directly to our Constitution (as is the case with the Supreme Court) but to the statutes of the Commonwealth. Nevertheless, the provisions of Article V, § 15 (requiring that all judges learned in the law shall be elected by the people for terms of ten years), and Article V, § 25 (authorizing the Governor to fill vacancies in courts of record),[10] of the Constitution apply with equal force to statutory courts, such as the Superior Court, and constitutional courts, such as the courts of common pleas.

The Superior Court was created by § 1 of the Act of June 24, 1895, P. L. 212, 17 P. S. § 111, and consists of seven judges, learned in the law, elected for terms of ten years and eligible for reelection. The first seven judges of the court were appointed by the Governor in 1895 to serve until the first Monday of January, 1896,[11] and seven judges of the court were elected for full terms at the municipal election of 1895.[12]

[10] See, also, § 1 of the Act of June 24, 1895, P. L. 212, 17 P. S. § 115, and Pa. Const. Art. IV, § 8.
[11] See § 1 of the Act of June 24, 1895, P. L. 212, 17 P. S. § 111.
[12] See § 1 id., 17 P. S. § 112.

With respect to the office of president judge, § 2[13] of the Act creating the Superior Court provides:

> "The rank, title, and position of the president judge of the said Superior Court shall be held by that *elected* member of the court whose commission shall have priority either in time or as the result of the lot." (Emphasis supplied)

Section 2 of the Act also prescribed the method for the selection of the first elected president judge of the court as well as the establishment of the seniority of the judges thereafter by providing:

> "As soon as convenient after the first election [viz., the municipal election of 1895], the successful candidates shall cast lots for priority of commission and certify the result to the Governor, who shall issue their commissions in accordance therewith, and the same course shall be pursued whenever thereafter two or more judges are elected at the same time * * *."[14]

Thus, the order of succession statutorily established for the office of president judge of the Superior Court is precisely that order of succession constitutionally established for the office of chief justice of the Supreme Court.

The president judge of the Superior Court is to be that judge whose elected commission is prior in time to that of any of his colleagues. Once the initial organization of the court was accomplished, the judge whose commission was prior in time almost inevitably has served on the court for a longer period of time than any of his colleagues and would, therefore, be more experienced in the work of the court and better able to handle the administrative problems devolving upon him as the Court's presiding officer. When two or more judges of the Court are elected at the same time, they are required by § 2 of the Act to cast lots to establish relative priority between them. Section 2 of the Act mandates the casting of lots when two or more judges are elected at the same time even when one or more of the judges so elected has previously served on the Court by appointment.

This conclusion is supported by the reasons we have given in reaching a similar conclusion in connection with judges of the Supreme Court and, additionally, by the provisions of the Act of 1895, supra. The first above-quoted portion of § 2 of the Act provides that the

[13] As amended by § 1 of the Act of May 6, 1915, P. L. 263, 17 P. S. § 117.
[14] As amended by § 1 of the Act of May 6, 1915, P. L. 263, 17 P. S. § 116.

office of president judge shall be held "by that *elected* member of the court whose commission shall have priority in time * * *." (Emphasis supplied.) Similarly, the second above-quoted portion of § 2 of the Act requires that after the first election of judges the successful candidates should "cast lots for priority of commission * * * and the same course shall be pursued *whenever thereafter* two or more judges are *elected* at the same time * * *." (Emphasis supplied.) This language does not admit of exceptions for judges previously serving on the court by appointment.

When the legislature employed the term "elected" in the Act of 1895, it did so with care and intended to include within that term any judge elected to the Court for the first time whether or not he had previously served by appointment. This is evidenced by the additional language contained in § 2 of the Act permitting a judge to cumulate his service on the Court if he is successively elected. Section 2[15] of the Act provides that a judge

> "* * * who is *re-eletced* shall not cast lots for priority of commission, but the rank, priority, and seniority of each judge of said court shall be determined by his *continuous* length of service as a member of said court." (Emphasis supplied)

Again, § 2[16] provides that:

> "* * * if the [first] president judge shall be *re-elected*, or if any succeeding president judge shall be *re-elected*, he shall continue to hold the rank, and position [of president judge]." (Emphasis supplied)

Accordingly, in determining the seniority and succession of judges of the Superior Court to the office of president judge, appointed service is not to be computed.

III.

The several courts of common pleas, like our Supreme Court, owe their existence directly to the Constitution: see Article V, §§ 1, 4-6. Article V, § 6, as amended on November 7, 1911, specifically provides for the courts of common pleas of Philadelphia and Allegheny Counties; and Article V, §§ 4, 5, provide for the division of the Commonwealth into judicial districts. Judges of the several courts of common pleas are elected for terms of ten years and are eligible for reelection.

[15] 17 P. S. § 116.
[16] 17 P. S. § 117.

In all counties of the Commonwealth the judges of the courts of common pleas serve additionally as the judges of the courts of oyer and terminer and general jail delivery and the courts of quarter sessions of the peace. Because our trial courts of general criminal jurisdiction are not staffed by a separate judiciary, it is necessary for us to consider only the order of succession to the office of president judge of a court of common pleas.

The body of the Pennsylvania Constitution, as adopted in 1873, made no provision for determining the order of succession to the office of president judge of a court of common pleas. In fact, the office of president judge, as such, was not even recognized in the judiciary article of the Constitution "The omission to provide, in the judiciary article, for succession to the president judgeship is significant and even suggestive of a purpose to change the previously existing system, in that respect, and make provision therefor elsewhere in the Constitution": *Commonwealth ex rel. Reeder v. Pattison,* supra, at p. 170. This provision was made in Schedule No. 1, adopted with the Constitution.[17]

Section 15 of Schedule No. 1, the exact language of which is set forth in the margin,[18] specifically preserved the status of judges learned in the law of any court of record holding commissions in force at the time of the adoption of the Constitution. Section 16 of Schedule No. 1 provided for the succession to the office of president judge in all judicial districts except those comprising Philadelphia[19] and Allegheny[20] Counties, as to which special provision was made. The pertinent language of this section is as follows:

> "After the expiration of the term of any president judge of any court of common pleas, in commission at the adoption of this Constitution, the judge of such court learned in the law and oldest in commission shall be the president judge thereof; * * *."

The president judge of these judicial districts is to be the judge oldest in commission.

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[17] The provisions of Schedule No. 1 relating to the office of president judge constitute a permanent rule for determining the order of succession to that office: *Commonwealth ex rel. Reeder v. Pattison,* supra.

[18] "Judges learned in the law of any court of record holding commissions in force at the adoption of this Constitution shall hold their respective offices until the expiration of the terms for which they were commissioned, and until their successors shall be duly qualified."

[19] See § 18 of Schedule No. 1.

[20] See § 19 of Schedule No. 1.

Separate provisions—producing, however, precisely the same order of succession to the office of president judge as the general succession provision of § 16 of Schedule No. 1—were made for the common pleas courts of Philadelphia and Allegheny Counties. Section 18 of Schedule No. 1 provided for the first organization of the several courts of common pleas of Philadelphia County by identifying by surname the president judges and additional law judges thereof. Section 18 then goes on to state that "thereafter the president judge [of each court] shall be the judge oldest in commission." Similarly, after providing for the first organization of the then separate courts of common pleas of Allegheny County, § 19 of Schedule No. 1 prescribed the identical rule of succession to the office of president judge of those courts as § 18 did for Philadelphia County and § 16 did for the other judicial districts of the Commonwealth, viz., "thereafter the judge oldest in commission shall be president judge." Subsequently, by an amendment to Article V, § 6, of the Constitution, adopted November 7, 1911, the several courts of common pleas of Allegheny County were merged into one court, the president judge of that court to be "selected as provided by law." However, as will be hereinafter demonstrated, this amendment did not alter the basic order of succession. The important consideration is that, despite the separate provisions of Schedule No. 1 with respect to the office of president judge, the same rule of succession applies to the office in every judicial district. That rule is that the judge oldest in commission shall be president judge.

The harmony of the foregoing provisions is emphasized by the related provisions of the Constitution and Schedule No. 1 with respect to the casting of lots to determine priority of commission between two or more judges of the same judicial district elected at the same time. Thus, Article V, § 17, of the Constitution provides:

> "Should * * * any two or more judges of the court of common pleas for the same district, be elected at the same time, they shall, as soon after the election as convenient, cast lots for priority of commission, and certify the result to the Governor, who shall issue their commissions in accordance therewith."

An analogous provision relating to the casting of lots is found in § 16 of Schedule No. 1.[21] The effect of the provisions of Article V, § 17, of the Constitution on appointed service of judges has already

[21] "* * * [W]hen two or more judges are elected at the same time in any judicial district they shall decide by lot which shall be president judge; * * *."

been discussed in connection with judges of the Supreme Court; and, of course, the same policy considerations apply in both instances.

Moreover, here, as in the case of the Supreme and Superior Courts, the term "elected" must be taken to include judges who are elected after having served by appointment. The terms "elected" and "re-elected" are not convertible. This is demonstrated by reference to the provisions of Schedule No. 1 permitting judges of the courts of common pleas to cumulate their successive terms of office in computing their seniority. Thus, § 18 of Schedule No. 1, with specific reference to the courts of common pleas of Philadelphia County, states:

> "* * * [A]ny president judge re-elected in the same court or district, shall continue to be president judge thereof."

An identical provision is contained in § 19 of Schedule No. 1 for the then (1874) courts of common pleas of Allegheny County, and § 16 of Schedule No. 1, applicable to all other judicial districts provides:

> "* * *[W]hen a president judge of a court shall be re-elected he shall continue to be president judge of that court."

In *Commonwealth ex rel. Reeder v. Pattison,* supra, the Supreme Court carefully considered all relevant provisions of the Constitution and its Schedule and, in an opinion written by Judge Sterrett, summarized its conclusion as follows (at p. 171):

> "President judges in commission at the adoption of this Constitution shall hold their respective offices until the expiration of the terms for which they were commissioned, and thereafter the judge, of each court respectively, learned in the law and oldest in commission, shall be the president judge thereof."

The opinion of the Court also stated (pp. 170-171):

> "The most prominent feature of the system is that the judge senior in continuous service in each of said courts shall be the president thereof. In 1877, upon the resignation of the president judge of the Court of Common Pleas Number One of the Fifth District, the question arose, which of the remaining judges should be commissioned to fill the vacancy. The judge holding the more recently dated commission had been longer in continuous service than the other, and the Governor, being advised by the then Attorney General that the phrase 'oldest in commission,' meant 'oldest in continuous service,' without regard to the date of the commission under which he was then serving, issued the commission accordingly. So far as we know, this construction, as to the correctness of which we

> entertain no doubt, has ever since been adhered to by the executive department."

Section 14 of Schedule No. 1 requires the General Assembly to designate the several judicial districts of the Commonwealth after each decennial census.[22] The most recent designation of judicial districts by the General Assembly is contained in the Act of January 8, 1952, P. L. 1844, 17 P. S. § 784. Section 4 of the Act, with respect to the office of president judge, provides:

> "In all districts in which, by the provisions of this act, two or more judges are provided, one of said judges shall be the president judge of said district, and the other or others shall be the additional law judge or judges thereof. The judge of said districts *whose commission shall first expire* shall be the president judge thereof, except when the president judge has been or shall be reelected, in which case he shall continue to be president[23] judge." (Emphasis supplied)

It is immediately apparent that Schedule No. 1 and the designation act employ different methods for determining succession to the office of president judge. The former uses the expression "oldest in commission" and the latter the expression "whose commission shall first expire." If the expression "whose commission shall first expire" in the designation act were intended to produce a result contrary to that mandated by Schedule No. 1, the statutory provision would necessarily fail by reason of the superior force of Schedule No. 1: see 1925-26 Op. Atty. Gen. 229. Upon analysis, however, it will be seen that, despite the contrariety of expression, both methods produce precisely the same result.

As pointed out in the *Pattison* case, "oldest in commission" means "oldest in continuous service". This is because of the uniform practice of permitting judges successively elected to tack their elected terms in determining seniority. We have seen that the judge "whose commission shall first expire" will ordinarily be that judge whose elected experience on a particular court exceeds that of any of his colleagues. The significant difference, for our purposes, between judges of the courts of common pleas and of the Supreme Court is that the latter may not be reelected so that, in applying the test "whose commission shall first expire" to judges of the Supreme Court, it is unnecessary to consider the effect of aggregate service obtained as a result of

[22] See, also, the provisions of § 13 of Schedule No. 1.

[23] 17 P. S. § 787. Identical provisions are found in prior designation acts: see, e.g., § 2 of the Act of May 10, 1921, P. L. 423.

successive terms. Thus, the expression "whose commission shall first expire", as used in the designation act, must be read in the light of the aggregation of services permitted the judges of the courts of common pleas. When read in this way, not only is the essential validity of the designation act preserved, but the order of succession required by the expression "oldest in commission" is made identical with that produced by the expression "whose commission shall first expire". Accordingly, the amendment to Article V, § 6, of the Constitution adopted November 7, 1911, providing that the president judge of the Court of Common Pleas of Allegheny County shall be "selected as provided by law" (viz., the designation act) results in the establishment of the same order of succession to the office of president judge of that court as is mandated for the other courts of common pleas of the Commonwealth.

Until 1953 the Court of Common Pleas for the 35th judicial district had but one judge who was necessarily the president judge of that judicial district. In 1953 the incumbent died; and before the Governor filled the vacancy the Legislature created an additional judgeship for Mercer County. On December 31, 1953, the Governor appointed Herman M. Rodgers as president judge and, on the same day, appointed Leo H. McKay as additional law judge. Both Judges Rodgers and McKay served in their designated capacities and were elected for full terms of ten years at the November, 1955, municipal election. After the election Judge McKay contended that the two should cast lots to determine who would thereafter serve as president judge. The two judges joined in petitioning the Supreme Court to resolve the question and, thereafter, the Supreme Court issued the following Order:

> "AND NOW, to wit, January 4, 1956, the Court having taken original jurisdiction in the above entitled matter, a majority of the Court is of opinion that it is necessary for the petitioners Honorable Herman M. Rodgers and Honorable Leo H. McKay, to cast lots for the office of President Judge of the Court of Common Pleas of the Thirty-Fifth Judicial District of the Commonwealth.
>
> PER CURIAM"[24]

The Order of the Supreme Court resolving the Mercer County question was not accompanied by a written opinion. Since Judges Rodgers and McKay were appointed on the same day and elected for the first time at the same election, the Order of the Supreme Court may mean

[24] See *In re: Determination of the President Judge for the 35th Judicial District*, No. 2055 Miscellaneous Docket, Western District, Supreme Court of Pennsylvania.

that the Court was unwilling to split a single day between two judges in order to determine priority of commission between them. But, more importantly, the Order necessarily emphasizes the fact that, regardless of the length of appointed service of any judge of a court of common pleas or the number of such appointees, the mandate of Article V, § 17, requires that upon election for the first time the judges shall cast lots for priority of commission.

As in the case of the Supreme and Superior Courts, we are firmly of the opinion that, in applying the order of succession to the office of president judge of the courts of common pleas, the appointed service of any one or more judges is to be entirely disregarded.

IV.

Article V, § 1, of the Pennsylvania Constitution recognizes the existence of orphans' courts within the Commonwealth. In many counties of the Commonwealth there is no separate orphans' court; the judges of the courts of common pleas in those counties serve additionally as orphans' court judges. Article V, § 22, of the Constitution requires the General Assembly, in any county where the population exceeds 150,000, and authorizes the General Assembly, in other counties, to establish a separate orphans' court. In most of the counties served by a separate orphans' court, the court comprises only one judge who is necessarily the president judge of that court. However, in Philadelphia and Allegheny Counties, where the separate orphans' courts comprise more than one judge, it is necessary to determine the applicable order of succession to the office of president judge. Section 4 of the Act of January 8, 1952, P. L. (1951) 1844, 17 P. S. § 787, provides as follows:

> "In all districts in which, by the provisions of this act, two or more judges are provided, one of said judges shall be the president judge of said district, and the other or others shall be the additional law judge or judges thereof. The judge of said districts whose commission shall first expire shall be the president judge thereof, except when the president judge has been or shall be reelected, in which case he shall continue to be president judge. The said additional law judge or judges shall possess the same qualifications which are required by the Constitution and laws for the president judge of said district, and shall hold his or their office for a like term and by the same tenure, and shall have the same powers, authority and jurisdiction, and shall be subject to the same duties, restrictions and penalties, as the president judge of said district."

The net effect of the foregoing provision is to make the order of succession to the office of president judge of an orphans' court comprising more than one judge exactly that order which is applicable to judges of a court of common pleas. Thus, the conclusions reached herein with respect to the order of succession to the office of president judge of a court of common pleas apply equally to judges of an orphans' court.

V.

The County Court of Allegheny County is a purely statutory court created by § 1 of the Act of May 5, 1911, P. L. 198, as amended, 17 P. S. § 621. The Court comprises six judges[25] learned in the law elected for terms of ten years,[26] and eligible for reelection. The judges of the Court are elected at municipal elections; vacancies resulting by reasons other than the regular expiration of an elected term are filled by the Governor.[27] The first judges of the Court were appointed by the Governor, who was authorized to designate one of the judges as the presiding judge of the Court and to designate the priorities of the other commissions.[28] Section 2 of the Act of 1911 provides that:

> "* * * [U]pon other judges being elected to said court, for the same term, they shall draw lots for priority or expiration of commission, the result of which they shall certify to the Governor; and the judge holding the original commission first expiring shall, at all times thereafter, be commissioned as the presiding judge of said court."[29]

Here, as in the case of judges of the courts of common pleas, judges elected for the same term are required to draw lots for priority of commission. The judge with the commission "first expiring" shall be commissioned as the presiding judge. It follows, therefore, that the order of succession applicable to judges of the County Court of Allegheny County is precisely that order applicable to the several courts of common pleas. Therefore, the conclusion reached herein with respect to the order of succession to the office of president judge of a court of common pleas are equally applicable to judges of the County Court of Allegheny County.

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[25] Section 1 of the Act of May 5, 1911, P. L. 198, as amended by § 1 of the Act of April 1, 1925, P. L. 109, 17 P. S. § 621.

[26] Section 2 of the Act of May 5, 1911, P. L. 198, as amended, 17 P. S. § 622.

[27] Ibid.

[28] Ibid.

[29] 17 P. S. § 622.

VI.

The Municipal Court of Philadelphia was created by § 1 of the Act of July 1, 1913, P. L. 711, as amended by § 1 of the Act of January 14, 1952, P. L. (1951) 1861, 17 P. S. § 681, and consists of a president judge and thirteen associate judges. The judges of the Court are elected for terms of ten years and are eligible for reelection.[30] As in the case of other judicial vacancies caused by death or otherwise, the Governor is authorized to make interim appointments.[31] With respect to the office of president judge of the Municipal Court, § 2 of the Act of 1913, as amended, provides as follows:

> "On the first Monday of January, one thousand nine hundred and twenty-four, and every five years thereafter, the judges of said court shall elect one of their number as president judge, who shall hold such office for a term of five years."[32]

The office of president judge of the Municipal Court of Philadelphia, unlike the corresponding offices of the other courts of the Commonwealth, does not depend in any way upon length of service on the bench; rather, it depends entirely upon election to that office by the members of the court. Because the office of president judge of this court is, by statute, made an office to be filled by an election of the members of the court itself, there is no occasion for us now to examine the relative seniority of the associate judges of that court.

VII.

The Juvenile Court of Allegheny County was created by § 201 of the Act of June 3, 1933, P. L. 1449, 11 P. S. § 269-201. Inasmuch as the Juvenile Court consists of only one judge, that judge is necessarily the president judge of that Court; and no problems as to seniority or the order of succession to the office of president judge can arise unless and until the General Assembly, at some future date, should see fit to increase the number of judges on that Court.

VIII.

To summarize: On the basis of the foregoing, we are of the opinion, and you are accordingly advised that:

1. The chief justice of the Supreme Court shall be that judge who has served on the court for the longest period of time under an elected

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[30] Section 2 of the Act of July 12, 1913, P. L. 711, as amended, 62 P. S. § 682.
[31] Ibid.
[32] 17 P. S. § 682. See, also, *Commonwealth v. Glass*, 295 Pa. 291, 145 Atl. 278 (1929).

term. When two or more judges of the Supreme Court are elected at the same election, whether or not they have previously served on the court by appointment, they shall cast lots to determine priority of commission and certify the result thereof to the Governor, who shall issue their commissions in accordance therewith.

2. The president judge of the Superior Court, the courts of common pleas, the orphans' courts and the County Court of Allegheny County shall be the judge oldest in the point of continuous elected service on the particular court. The service of judges of these courts who are relected shall be cumulated. When any two or more judges of these courts are elected for the first time at the same time for the same term and the same court, regardless of whether or not they have previously served on the court by appointment, they shall cast lots to determine relative seniority and certify the result to the Governor, who shall issue their commissions in accordance therewith.

3. The president judge of the Municipal Court of Philadelphia is chosen by election by the members of that court for a term of five years. The result of the election is forwarded to the Governor who issues the commission of the president judge in accordance therewith.

4. There being only one judge of the Juvenile Court of Allegheny County, that judge is automatically the president judge of the court.

5. In computing the continuous service of any judge on any court within the Commonwealth (excepting the Supreme Court and the Municipal Court of Philadelphia), a judge who is reelected shall be deemed to have served continuously on the court from the date of his original elected commission; but the service of any judge under an appointed commission shall be disregarded.[33]

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. DONNELLY,
Special Counsel.

THOMAS D. MCBRIDE,
Attorney General.

[33] We note that the conclusions reached herein are to some extent in conflict with the language of *Commonwealth ex rel. Reeder v. Pattison,* supra. However, this conflict is considerably diminished, if not eliminated, by an analysis of the facts of that case. They involved not a dispute between two judges elected at the same time, one of whom had prior service by appointment, but a dispute between two judges elected at two different times, the junior of whom claimed to have been elected directly to the office of president judge. This contention was rejected. Nothing in that decision and this opinion is in conflict, and the holding of that case continues to represent the law of the Commonwealth concerning the relative seniority of judges elected at different times.

OFFICIAL OPINION No. 146

Elections—Condidates for political offices—Filing of expense accounts—Section 1607, Pennsylvania Election Code.

Candidates for political party offices are not required by § 1607 of the Pennsylvania Election Code, the Act of June 3, 1937, P. L. 1333, as amended, to file campaign expense accounts.

Harrisburg, Pa., August 11, 1958.

Honorable John S. Rice, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you if candidates for election to elective political party offices must file the expense accounts required by § 1607 of the Pennsylvania Election Code, Act of June 3, 1937, P. L. 1333, as amended, 25 P. S. § 3227. By "political party offices" you refer to such positions as county committeeman and state committeeman as distinguished from elective public offices such as governor and state senator.

Section 1607 of the Code, supra, requires, in part, that every candidate for nomination or election file an expense account or affidavit within thirty days after the primary or election, as the case may be. The terms "candidate for nomination" and "candidate for election" are specifically defined by § 1601 of the Code, 25 P. S. § 3221, to mean candidates for any *public* offices. If this use of the term "public office" is precise and intended to distinguish public from party offices, we must conclude that candidates for party offices need not file expense accounts. Our study of the applicable statute and case law convinces us that such a conclusion is required.

Section 902 of the Code, supra, 25 P. S. § 2862, requires that all candidates of political parties for the offices of United States Senator and Representative and for "all other elective public offices within this state" shall be nominated and "party delegates and alternate delegates, committeemen and officers" shall be elected at primaries. This section evidences the precision with which the Code was written and the intent to distinguish between public and party offices.

This view is supported by the decision of the Pennsylvania Supreme Court in *Commonwealth ex rel. Koontz and Calhoun v. Dunkle*, 355 Pa. 493, 50 A. 2d 496 (1947), in which the Court affirmed a decision of the lower court on the basis of the lower court's opinion. The lower

court pointed out that public officers and party officers are distinct from each other and that members of a political party committee are not public officers.

We advise you, therefore, that candidates for party offices need not file the campaign expense accounts required by the Pennsylvania Election Code.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY J. RUBIN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 147

Compensation—Members of grievance panel—Expenses incurred—Fee for services rendered.

Under the Act of June 30, 1947, P. L. 1183, which is designed to handle grievances between governmental employees and employers, members of the grievance panel are not authorized payment of a fee for services rendered, but only compensation for actual and reasonable expenses incurred.

Harrisburg, Pa., September 17, 1958.

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

Sir: You have requested our opinion as to the proper interpretation of § 1 of the Act of June 30, 1947, P. L. 1183, 43 P. S. § 215.1. This act is designed to facilitate the adjustment of grievances between governmental employees and the governmental employer and, in so doing, provides for the establishment of a grievance panel of three members to hear the dispute. The act states as follows: "The members of the panel shall be compensated for all necessary expenses by the Commonwealth . . ." You ask if this provision includes both a fee for services rendered by panel members and reimbursement for expenses incurred.

The answer to your question depends upon the breadth of the phrase "necessary expenses." Webster's New International Dictionary, 2nd ed. (1950), defines "expense" as something which is laid out or consumed. The adjective "necessary" would simply limit such outlays to sums reasonably required to fulfill the work undertaken (e.g. travel expense). Thus, the phrase would be limited to reasonable amounts actually expended in the performance of a function and would not include compensation for services rendered. If the panel members are to receive a fee for their work, the General Assembly would have to provide for such explicitly. This it has not done.

We conclude, therefore, that the act does not provide for payment of a fee for services but authorizes payment only of actual expenses incurred.

Very truly yours,

DEPARTMENT OF JUSTICE,

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 148

Industrial development project—Purchase at sheriff's sale by Pennsylvania Industrial Development Authority, as second mortgagee—Foreclosure by first mortgagee—Industrial Development Authority Act.

Under § 5(p) of the Industrial Development Authority Act, the Act of May 15, 1956, P. L. (1955) 1609, the Industrial Development Authority, as second mortgagee, may take title to an industrial development project by purchase at sheriff's sale upon a foreclosure by the first mortgagee.

Harrisburg, Pa., September 17, 1958.

Honorable William R. Davlin, Secretary of Commerce, Harrisburg, Pennsylvania.

Sir: You have requested the opinion of this department as to whether the Pennsylvania Industrial Development Authority, as a second mortgagee, is empowered under § 5 (p) of the Industrial Development Authority Act, the Act of May 15, 1956, P. L. (1955) 1609,

73 P. S. §§ 301 to 314, to take title to an industrial development project by purchase at sheriff sale upon a foreclosure by a first mortgagee.

Section 5 (p) of the Industrial Development Authority Act, supra, 73 P. S. § 305, states:

> "The Authority, as a public corporation and governmental instrumentality exercising public powers of the Commonwealth, is hereby granted and shall have and may exercise all powers necessary or appropriate to carry out and effectuate the purposes of this act, including the following powers, in addition to others herein granted:
>
> * * * * * *
>
> "(p) *To take title by foreclosure to any industrial development project* where such acquisition is necessary to protect any loan previously made therefor by the Authority and to sell, transfer and convey any such industrial development project to any responsible buyer; in the event such sale, transfer and conveyance cannot be effected with reasonable promptness, the Authority may, in order to minimize financial losses and sustain employment, lease such industrial development project to a responsible tenant or tenants; the Authority shall not lease industrial development projects except under the conditions and for the purposes cited in this section." (Emphasis supplied.)

The foregoing section expressly authorizes the Industrial Development Authority to take title to an industrial development project by foreclosure in order to protect a loan previously made by it. Your inquiry is whether or not the Industrial Development Authority, who is usually a second mortgagee with respect to an industrial development project, must itself initiate the foreclosure proceedings in order for it to take title under the above cited section. If the Industrial Development Authority is not permitted to take title at a foreclosure sale where the foreclosure is initiated by the first mortgagee, the Authority in such a case will be powerless to protect its loan. Since a foreclosure sale will divest the mortgaged property of all subsequent mortgage liens, the only protection which the second mortgagee has upon a foreclosure by the first mortgagee is his right to purchase the mortgaged property at such sale.

Any interpretation of § 5 (p) of the Industrial Development Authority Act that would allow the Industrial Development Authority to take title when it forecloses a mortgage but would prohibit it from taking title when the foreclosure was initiated by a mortgagee prior in lien is unwarranted and unrealistic. In the first place the express lan-

guage of § 5 (p) may be reasonably construed so as to encompass both situations. Whether the foreclosure is by the Authority or by a prior mortgagee, the expenditure of funds in any given case which the Authority would have to make to purchase the property would be the same; thus, there would be no financial advantage in so limiting the Authority's power. Finally, such an interpretation might force the Industrial Development Authority in many instances to foreclose a second mortgage where business prudence would otherwise suggest that foreclosure be deferred.

It is, therefore, the opinion of this department and you are accordingly advised that § 5 (p) of the Industrial Development Authority Act, the Act of May 15, 1956, P. L. (1955) 1609, 73 P. S. § 301 et seq., authorizes the Industrial Development Authority to purchase an industrial development project at a foreclosure sale whether such sale results from a foreclosure initiated by the Authority or by a mortgagee prior in lien.

Yours very truly,

DEPARTMENT OF JUSTICE,

EDWARD L. SPRINGER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 149

Hoists mounted on mono-rails having both lateral and horizontal motion—Regulation—General Safety Law.

Hoists mounted on mono-rails having both lateral motion and the ability to lift material between floors through openings in each floor are not "hoists" within the meaning of the Act of May 2, 1929, P. L. 1518; however, they do come under the General Safety Law, the Act of May 18, 1937, P. L. 654, and are subject to the regulations promulgated under that act.

Harrisburg, Pa., September 18, 1958.

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

Sir: You have asked our opinion whether a hoist mounted on a mono-rail giving it lateral motion, which raises or lowers miscellaneous material between floors through an opening in each floor is a "hoist" as that term is used in § 1 of the Act of May 2, 1929, P. L. 1518, as reenacted and amended, 35 P. S. § 1341, and subject to the regulations of your Department covering elevators, escalators, dumbwaiters and hoists or whether it is subject to the Regulations for Cranes, Booms and Hoists, promulgated by your department under the authority of the Act of May 18, 1937, P. L. 654 as amended, 43 P. S. §§ 25-1 to 25-15, commonly referred to as the General Safety Law.

As described, this device appears to accomplish two purposes: it moves material from one point to another on the same level, similar to a power driven overhead crane or carrying device; it also raises or lowers this material from one floor to another like any other hoist.

The term "elevator" is defined in § 1 of the Act as follows:

> " 'Elevator' shall mean all the machinery, construction apparatus, and equipment used in raising and lowering a car, cage or platform vertically *between permanent rails or guides,* and shall include all elevators, dumbwaiters, escalators, gravity elevators, hoists and other lifting or lowering apparatus * * * [excepting elevators used in coal mines, breakers, washeries and cleaning plants.]" (Emphasis supplied.)

Since the term "hoist" is not defined by this Act, its usage in this section must be limited to lifting devices moving between "permanent rails and guides." On the basis of the information submitted with your inquiry, no such guides appear to be used in connection with these hoists.[1] Consequently, these devices do not appear to be guides within the meaning of the Act of 1929 or the regulations issued under its authority.

The General Satety Law is of broader scope and provides safety requirements with respect to numerous types of industrial and construction operations. Provision is made for the issuance of detailed regulations setting more specific standards of operation within the broad outlines of the Act.

[1] Although the lifting position of these devices, between floors, is limited to one particular spot—over the openings in the floor—such openings do not seem to be guides within the meaning of the Act since they cannot keep the lateral swing of hoist's load within the same narrow limits as would rails, on which the load would actually run, or similar restricting guides.

Section 2 (c) of this Act, 43 P. S. § 25-2 (c) states:

> "All cranes, hoists, steam or electric shovels, plant railroads, and other apparatus or devices used for moving, lifting, lowering, and all transporting material shall be designed, constructed, equipped, and operated as to eliminate dangerous conditions."

Pursuant to this section, your department has issued Regulations for Cranes, Booms and Hoists, Section 2 of which reads in part:

> "(k) The term HOIST shall mean an apparatus for raising or lowering the load by the application of a pulling force, and not including a car or platform running in guides."
>
> "(l) The term MONORAIL HOIST shall mean a hoist, with or without an operator's cage, which is suspended on rollers or wheels from an overhead track or rail."

These provisions clearly cover the apparatus about which you inquire.

Therefore, it is our opinion, and you are accordingly advised, that hoists mounted on monorails having both lateral motion and the ability to lift material between floors through openings in each floor are not "hoists" within the meaning of the Elevator Law and cannot be covered by regulations promulgated under the authority of that law. You are further advised that these devices may properly be regulated under the existing regulations for Cranes, Booms and Hoists, promulgated under the authority of the General Safety Law.

Very truly yours,

DEPARTMENT OF JUSTICE,

DAVID C. HARRISON,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 150

Department of Public Instruction—First semi-annual payment to school districts without prior calculation of actual instruction expense—Public School Code of 1949.

The Department of Public Instruction need not calculate actual instruction expense as required by § 2501 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended, prior to making its first semi-annual payment to school districts for the school year 1958-59 under § 2517 of the Public School Code of 1949, where the districts have not been able to furnish the Department with the supporting data in time to allow the necessary calculations to be made prior to the October and November payment dates, but may calculate and make this payment on the basis of the actual amounts paid to the school districts for the preceding school year; however, the calculation of actual instruction expense must be made before the second payment in order that amounts paid will not exceed the amount payable under the formula provided by § 2502 of the Public School Code of 1949.

Harrisburg, Pa., September 19, 1958.

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

Sir: You have requested our opinion as to whether the Department of Public Instruction may make its first payment to the school districts of the Commonwealth for the school year 1958-59 under § 2517 of the Public School Code of 1949, as amended,[1] without a prior calculation of actual instruction expense under § 2501 of the Public School Code of 1949, as amended.[2] In particular, you inquire whether you may pay an estimated amount as the first payment on the basis of one-half of the actual sums paid to such school districts for the previous school year, 1957-58.

You state the relevant facts as follows: The amount payable to each school district for a school year "on account of the instruction of pupils" is computed under the formula provided in § 2502 of the Public School Code of 1949.[3] One of the elements of this formula is the actual instruction expense of enumerated teaching units for the previous school year. Under the provisions of § 2501 of the Public School Code of 1949, as amended by the Act of July 13, 1957, P. L. 864,[4] the Department of Public Instruction must calculate this instruction expense in September of each year, beginning in September, 1958. To make this calculation and to complete the processing of the results by such time, the Department requires an administrative lead time of approximately two months.

[1] Act of March 10, 1949, P. L. 30, § 2517, 24 P. S. § 25-2517.
[2] Id., § 2501, 24 P. S. § 25-2501.
[3] Id., § 2502, 24 P. S. § 25-2502.
[4] 24 P. S. § 25-2501.

Unfortunately, most of the school districts are not able to complete the annual report which forms the basis for this calculation in sufficient time to allow the Department to make the calculation in September. It is, therefore, apparent that this calculation cannot be made within the time provided by law. The Department, however, is faced with the requirement of § 2517 of the Public School Code of 1949[5] that the first semi-annual payment on account of pupil instruction be made to fourth class school districts in October and to first, second, and third class school districts in November. Thus, if the first semi-annual payment must be based on the actual calculation of actual instruction expense, it will be impossible to meet the statutory payment dates.

The principle is well established that where the interpretation of an act as mandatory would impair its purpose while its construction as simply directory would preserve its efficiency, the latter construction prevails: *In re McQuiston's Adoption,* 238 Pa. 304, 86 Atl. 205 (1913); *Commonwealth ex rel. Duff v. Eichmann, et al.,* 353 Pa. 301, 45 A. 2d 38 (1946). The mandatory or directory nature of a statute depends on whether the thing directed to be done is the essence of the thing required: *American Labor Party Case,* 352 Pa. 576, 44 A. 2d 48 (1945). Obviously, prompt payment to the school district in September or October on the basis of reliable and provable, even though not perfectly accurate, calculations was of paramount concern to the legislature. Such calculations, of course, may be made on the basis of the actual amounts paid to the school districts in the previous school year. This procedure would constitute substantial compliance with the terms of the statute.

It is, therefore, our opinion and you are advised that the Department of Public Instruction need not calculate actual instruction expense under § 2501 of the Public School Code of 1949, as amended, prior to making its first payment to the school districts of the Commonwealth for the school year 1958-59 under § 2517 of the Public School Code of 1949, as amended. It may calculate and make this payment on the basis of the actual amounts paid to the school districts for the preceding school year. However, the calculation of actual instruction expense must be made before the second payment in order

[5] 24 P. S. § 25-2517.

that amounts paid will not exceed the amount payable under the formula provided in § 2502 of the Public School Code of 1949, as amended.

Very truly yours,

DEPARTMENT OF JUSTICE,

MORRIS J. DEAN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 151

Materials used in highway construction—Specification in bid proposal for preliminary approval of the source of supply.

The Department of Highways may properly refuse to approve the use of steel in Pennsylvania highways when the steel is manufactured at locations which make it impossible for the department to inspect or test it at its source as outlined by departmental specifications.

Harrisburg, Pa., September 25, 1958.

Honorable Lewis M. Stevens, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: You have requested advice with regard to the use of steel, which has been manufactured in Europe, in the construction of highways for the Commonwealth. Your standard specifications contain the following paragraph:

> "Section 1.6.2—Materials of the Specifications of the Department of Highways, Form 408, 1954, provides:
>
> "'(1) Preliminary Approval. The source of supply of each of the materials shall be approved by the engineer before delivery is started. Representative preliminary samples of the materials, of the character and quality herein described, shall be submitted, when indicated or directed, for examination or test, and written approval of the quality of such samples shall be received by the contractor prior to obtaining materials from the respective sources of supply. Representative samples of all materials requiring laboratory tests will be taken by a Department representative and such materials shall be

> used only after written approval has been received by the Department representative in charge of the work and only so long as said materials comply with the requirements.' "

Recently a contractor who was awarded a highway contract requested permission to use reinforced steel which was rolled in a mill located in Luxembourg, Europe. You have asked us to advise you whether you may legally and properly refuse the incorporation of such material in a highway project pursuant to § 1.6.2 of the specifications as quoted above.

If there are other tests or other inspections which must be made in order to determine the character and quality of the steel, which inspections and tests can only be made at the source or at the time of manufacture, we are of the opinion that the specification referred to is a reasonable one and will be upheld by the courts.

However, if it is not necessary to inspect the steel in the course of its manufacture and at the site of its manufacture, we are of opinion that the courts will hold the specification to be unreasonable and arbitrary in this particular instance and will not sustain your position in the rejection of this material. It must be kept in mind that any specification that tends to eliminate competition must be supported by valid reasons and cannot be based on arbitrary and unreasonable determinations. This is particularly true in the present instance since we understand the Inspection Bureau of your department has tested samples of the steel proposed to be furnished and that the samples submitted were satisfactory.

You have informed us that responsible agencies make records of every Heat that is made by the steel companies. This record is then received by the Department of Highways with respect to any steel used by the general contractor in the performance of his contract. It is a certification that the steel is properly manufactured. Each batch of steel is identified by a Heat number. That number appears upon the invoices when payment for steel is presented to the department. Without it the department would not make payment for that steel.

With respect to foreign steel, the Department of Highways has no similar facility for satisfying itself as to its proper manufacture. While samples of steel may test out after manufacture and found to be adequate, such a test is not so thorough as that at the source. For instance, the sample may not be a correct test of the whole, whereas a test at source covers the entire batch represented by the Heat number.

The American Association of State Highway Officials issues a publication entitled "Standard Specifications for Highway Materials and Methods of Sampling and Testing." Part III, Seventh Edition, of this publication issued in 1958, contains standard specifications for bars for concrete reinforcement, adopted by The American Association of State Highway Officials. Many of these standards agree with those of the American Society for Testing Materials, and this is true of bars for concrete reinforcement.

We call attention to the following excerpts from these specifications which commence on page 55 and which agree with those specifications of the American Society for Testing Materials, known as A15-54T:

"Ladle Analysis

"4. (a) An analysis of each heat of open-hearth or electric-furnace steel shall be made to determine the percentages of carbon, manganese, phosphorus, and sulfur.

"(b) Carbon and manganese determinations shall be made of each blow of bessemer steel, and determinations for phosphorus and sulfur representing the average of the blows applied for each eight-hour period.

"(c) The analyses prescribed in Paragraphs (a) and (b) shall be made by the manufacturer from test ingots taken during the pouring of the heats or blows. The chemical composition thus determined shall be reported to the purchaser or his representative, and the percentage of phosphorus shall conform to the requirements specified in Section 3." (pages 55-56)

"Number of Tests

"9. (a) One tension test and one bend test shall be made from each heat of open-hearth or electric-furnace steel, and from each blow or lot of ten tons of bessemer steel. If, however, material from one heat or blow differs 3/8 in. or more in diameter in the case of plain bars, or by three or more designation numbers in the case of deformed bars, one tension and one bend test shall be made from both the largest and smallest plain bars, and from the highest and lowest designation number of the deformed bars rolled." (page 57)

"Inspection

"13. The inspector representing the purchaser shall have free entry, at all times while work on the contract of the purchaser is being performed, to all parts of the manufacturer's works that concern the manufacture of the material ordered. The manufacturer shall afford the inspector, without charge, all reasonable facilities to satisfy him that the material is being furnished in accordance with these specifications. All tests

> (except check analysis) and inspection shall be made at the place of manufacture prior to shipment, unless otherwise specified, and shall be so conducted as not to interfere unnecessarily with the operation of the works." (page 57)

These specifications are incorporated in the bid proposals.

Section 2.8.2, page 71 (1954), Form 408, Specifications of the Department of Highways, states in part as follows:

> "* * * Reinforcement bars shall conform to the requirements of the A.S.T.M. Designation: A15, * * *"

Since it is deemed by your department that it is essential that the tests by you be made as outlined above and since these tests can only be made during the course of manufacture, we are of the opinion that your specification is reasonable and not arbitrary, and properly included in your specifications and bidding proposals as a condition upon which bids must be submitted.

We are, therefore, of the opinion and you are accordingly advised that your department may properly refuse to approve the use of steel on Pennsylvania highways which is manufactured in locations which make it impossible for you to inspect or test it at its source in accordance with the procedures outlined by your specifications, §§ 1.6.2 and 2.8.2.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 152

Haverford Mental Health Center—Appropriation—Use of its own revenue as an additional appropriation.

The Haverford Mental Health Center may not utilize any portion of its own revenues for the operation of the hospital; although all other mental hospitals

were given a portion of their revenue as additional appropriations, the Legislature failed to so provide in the case of Haverford, and all moneys collected at Haverford are to be paid into the General Fund.

Harrisburg Pa., September 30, 1958.

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

Sir: You have requested the advice of this department on the question whether the income and moneys collected at the Haverford Mental Health Center, hereinafter called Haverford, and paid into the General Fund of the State Treasury, are appropriated to Haverford for operation and maintenance purposes.

The appropriation for the operation and maintenance of Haverford is found in the General Appropriation Act of 1957, Act No. 95-A, approved July 19, 1957. This act appropriated moneys for the operation and maintenance of state mental hospitals by listing the names of the nineteen state mental hospitals and by placing opposite each name a designated sum. The last hospital so listed was Haverford and opposite its name was the sum of $50,000.

Immediately below this appropriation there appears the following:

> "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."

The act then lists eighteen state hospitals, i.e., all those previously listed, *except Haverford,* and a sum of money appears opposite the name of each of these hospitals.

Were we faced with the matter of interpreting the meaning of the additional appropriation to any state mental hospital other than Haverford, our problem would be simple. The language quoted above appropriates to the individual hospital the exact amount by which the institution's collections exceed the amount listed as an estimated collection. See Official Opinion No. 11, 1957 Op. Atty. Gen. 71, and Official Opinion No. 50, 1958 Op. Atty. Gen. 1. However, the Legislature's

omission poses a difficult problem of interpretation. The omission could be construed to mean that Haverford is to receive (1) all of its collections or (2) none of its collections as an additional appropriation.

By way of background, it should be noted that Haverford, unlike the other eighteen state mental hospitals, did not exist as an institution at the time when the General Appropriation Act was passed. The present facility which is now in operation at Haverford consists of a renovated mansion. An outpatient clinic is maintained in this building.[1] It was not until quite recently that even this limited operation commenced. Consequently, unlike the other mental hospitals, there was no experience of collections at Haverford upon which an estimate of income could be based. The Department of Revenue, in fact, made no such estimate of collections.

In the light of the above facts, as we interpret the language of the General Appropriation Act quoted above, the Legislature did not intend that the moneys collected at Haverford should be available as an additional appropriation. The pattern of legislative intent was clear. Each institution was to receive the additional appropriation when, and only when, it had an unanticipated surplus of revenue. To allow Haverford all of its collections without regard to a revenue estimate would be to infer a legislative preference for this institution. This we are not free to do. Had the Legislature truly intended this result, it could easily have listed Haverford with the figure zero representing the revenue estimate, or made some similar notation in the act.

It is, therefore, the opinion of this department and you are accordingly advised that the Haverford Mental Health Center appropriation contained in the General Appropriation Act of 1957 is limited to $50,000. The institution is not entitled to any portion of the income and moneys received by it for service and patient care.

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

[1] The main physical plant, however, a 14½ million dollar hospital, is in the design stage.

OFFICIAL OPINION No. 153

Pennsylvania Tax Anticipation Notes, Series of 1958, dated September 29, 1958, maturing May 29, 1959—Legal status.

Harrisburg, Pa., October 2, 1958.

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 seventy-five million dollars ($75,000,000) Tax Anticipation Notes, Series of 1958, dated September 29, 1958, maturing May 29, 1959.

We have examined the proceedings relative to the issuance by the Commonwealth of Pennsylvania of Tax Anticipation Notes, Series of 1958, in the amount of seventy-five million dollars ($75,000,000).

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 and interest on all notes issued during such fiscal biennium, and that so much of said revenues as may be necessary, are specifically appropriated for such payment, the Department of Revenue being authorized to allocate such revenues to said payment. The act authorizes the Governor, the

Auditor General and the State Treasurer to determine the terms and conditions of the issue, rates of interest and time of payment of interest, provided that the notes shall not mature later than May 31 of the second fiscal year of any current biennium, and shall not bear interest in excess of 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), ten thousand dollars ($10,000), twenty-five thousand dollars ($25,000), fifty thousand dollars ($50,000), and one hundred thousand dollars ($100,000), in bearer form and find that the same are duly and properly executed and conform with the form approved by you.

In conclusion, we have no hesitation in advising you that the seventy-five million dollars ($75,000,000) Tax Anticipation Notes of the Commonwealth of Pennsylvania, Series of 1958, dated September 29, 1958, maturing May 29, 1959, 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 1958, 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 ex-

penditures, 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. 154

Abandoning coal mines—Intention of operator or owner—Responsibility for discharge of wastes and drainage—Procedures of abandoning a mine operation.

1. Whether a mining operation is or is not abandoned involves a factual determination of the intention of the mine operator or owner as ascertained by his conduct or expressions.

2. The only statutory definition of an abandoned coal mine occurs in § 2 of the Coal Mine Sealing Act of 1947, the Act of June 30, 1947, P. L. 1177.

3. The Coal Mine Sealing Act of 1947 governs responsibility for the discharge of wastes and drainage from abandoned mines, while the Act of May 7, 1935, P. L. 141, where not inconsistent, applies to bituminous mines.

4. The discharge of mine drainage constitutes a waste discharge within the jurisdiction of the Sanitary Water Board insofar as water pollution is involved.

5. The requirements concerning the process of abandoning various types of mining operations are covered by the Coal Mine Sealing Act of 1947, the Act of June 30, 1947, P. L. 1177, the Act of June 2, 1891, P. L. 176, the Act of June 9, 1911, P. L. 756, the Anthracite Strip Mining Law, the Act of June 27, 1947, P. L. 1095, the Bituminous Coal Open Pit Mining Conservation Act, the Act of May 31, 1945, P. L. 1198, and the Act of July 7, 1955, P. L. 258.

Harrisburg, Pa., October 14, 1958.

Honorable C. L. Wilbar, Jr., Secretary of Health, Harrisburg, Pennsylvania.

Sir: You have requested an opinion regarding responsibility for drainage from abandoned mines.

Specifically, you present the following questions:

I. What is an abandoned mine?

II. Does our State have a statutory definition of abandoned mine?

III. Who is responsible for the discharge of wastes and drainage from abandoned mines? Is it the owner, the lessor of the mineral rights, or the two jointly?

IV. Does discharge of mine drainage constitute a waste discharge over which the water pollution control agency has jurisdiction?

V. Under what conditions would control of discharges from abandoned mines be a State responsibility?

VI. What requirements does our State have regarding the process of abandoning a mining operation? What is required in the form of terminal activities which have effect on water pollution such as backfilling, reclamation, etc.? Is this covered by permit requirements for operations or by other procedures?

In response to the foregoing, we advise you as follows:

I. To define "abandonment" in the abstract is a difficult task since it involves a factual determination of the intention of the mine operator or owner as ascertained by his conduct or expressions. Whether a mining operation is or is not abandoned, therefore, can be determined only in relation to a given set of facts.

Webster's New International Dictionary, 2nd Ed., 1950, defines "abandonment" thusly:

> "Act of abandoning, or state of being abandoned (in any sense); total desertion;"

"Abandon" is defined as:

> "To relinquish or give up with the intent of never again resuming or claiming one's rights or interests in; to give up absolutely;"

Black's Law Dictionary contains the following:

> "Abandonment. The surrender, relinquishment, disclaimer, or cession of property or of rights. * * *"
>
> "To constitute 'abandonment' of a mining claim, there must be an intention to abandon, coupled with an act by which the

intention is carried into effect." (See 1 Words and Phrases 47 et seq.; 58 C.J.S. Paragraphs 77 and 89.)

Section 2 of the Coal Mine Sealing Act of 1947, the Act of June 30, 1947, P. L. 1177, 52 P. S. § 28.2, defines "abandoned coal mine" thusly:

> "The term 'abandoned coal mine' shall mean any coal mine in which mining operations have ceased because of the complete exhaustion of coal which it is practical to mine within the foreseeable future, or where exemption from taxation has been allowed because of the absence of mineable coal."

It appears that unless a statute defines "abandonment," as does the Coal Mine Sealing Act of 1947, and does so clearly, the matter becomes one of examining the mining operation to determine the intention of the owner or operator. Even the Mine Sealing Act definition leaves open questions in other than the situation where exemption from taxation has been allowed because of the absence of mineable coal, e.g., when is coal completely exhausted? When is coal exhausted to a point where it is not practical to mine within the foreseeable future?

To aid in determining whether the facts indicate abandonment, the following lines of inquiry may be pursued:

A. If the owner or operator has stated in the filing of a notice with the Department of Mines and Mineral Industries or has affirmatively stated in some report filed with that department or any other agency that he intends to abandon his operation, that would be the clearest expression of intention. Such situation should preclude further inquiry, provided that the operator or owner has done nothing inconsistent with his expressions and that there is physical evidence of abandonment to substantiate the affirmative expressions.

B. If the owner or operator has stated in the filing of some report with the Department of Mines and Mineral Industries or in some other manner merely that he intends halting operations, the question remains whether the cessation of operations is equivalent to or is in fact abandonment; a study of the operation itself, in such case, would have to be undertaken.

The factors to be considered and the lines of inquiry to be pursued may be as set out below. It should be pointed out that determining whether a deep mine has been abandoned is a bit easier since there is more physical evidence than in the case of a stripping operation, and some of the following apply to only one of the two methods of operation:

(1) If there was a lease, was it terminated or cancelled? The termination of a lease might indicate abandonment of operations.

(2) Inquiry of taxing authorities for reports filed by operator or owner should be made. Real estate assessment evaluations and appeal statements in regard thereto should be reviewed. Frequently, to invite a reduction of assessment, there may be a statement of abandonment included in the proceedings. If so, that would be a clear expression of intent.

(3) If the operator has ceased to file reports regularly with the Department of Mines and Mineral Industries, that may be taken as an indication of abandonment. If the operation is one of stripping and the operator has permitted his stripping registration to lapse, that would point to abandonment.

(4) Physical facts tending to show abandonment may be ascertained by actual inspection. Thus, evidencing an intent to abandon are the following, some of which items are applicable to only strip operations and some to only deep mining:

a. All mineable coal has been extracted.
b. The workings have been exhausted.
c. Backfilling of stripping operations has been accomplished.
d. The mine has been sealed.
e. Highwall erosion has started.
f. Maintenance of the operation has been discontinued.
g. Ventilating equipment, rails, roadways, machinery and premises have been neglected.
h. Machinery such as pumps, rails, etc. have been removed.
i. The workings have been permitted to seep out water.
j. The roof has been permitted to cave.
k. The workings have been fenced off.
l. The operation has not been fire bossed.
m. The work of maintaining supporting pillars to prevent surface subsidence, etc. has been discontinued.
n. It is impracticable to mine further because of fire, water, gas, or surface hazards.
o. It is impracticable to mine further because of lack of machinery or because of inadequate machinery.

(5) Economic conditions may tend to show abandonment as when (a) the quality of coal is so poor as to make the continuation of the operation inadvisable or economically unsound; (b) the amount of coal remaining is so small in amount as to negate the economic feasibility of operation; (c) the operator lacks capital or credit to con-

tinue the operation; (d) market conditions are such as to negate possible sale of the coal produceable at this particular operation; (e) it is impracticable to continue further mining because of excessive costs; (f) the mining site has been made inaccessible in some fashion.

(6) The time in which an operation remains idle may be evidence of abandonment; there is a strong indication of abandonment if there is a long span of idleness.

To summarize, if the person viewing the operation, on the basis of experience in the field and considering those of the foregoing criteria applicable to the operation, finds as a reasonable conclusion that there has been abandonment, then that conclusion should be respected and the operator called upon to prove otherwise.

II. The only statutory definition occurs in The Coal Mine Sealing Act of 1947, referred to, *supra.*

III and V. As to the responsibility for the discharge of wastes and drainage from abandoned mines, § 3 of The Mine Sealing Act, *supra,* requires an operator (and it would make no difference if the operator were the owner or lessee if those are different parties) in possession of an abandoned mine to seal off openings through which water may flow to Commonwealth streams. Section 4 places responsibility for sealing on the Commonwealth when an operator was not in possession on the effective date of the act, and § 5 requires the Commonwealth to maintain seals on all sealed mines.

In addition, there remains on the statute books the provisions of the Act of May 7, 1935, P. L. 141, 52 P. S. §§ 809 to 813, applicable only to bituminous mines. These provisions place responsibility equally upon the owner, operator or lessee for sealing abandoned mines which are discharging polluted water into streams or rivers of the Commonwealth. In the event of their failure to do so or their being unknown or unlocatable, the Department of Mines is to enter the land and perform the sealing.

Thus, the obligation for sealing is primarily upon the operator (who may be either the owner or the lessee) under the Coal Mine Sealing Act of 1947 but upon the owner, operator or lessee under the Act of 1935. It has not been so determined by any court, but it would appear that the provisions of the Act of 1935 are partially inconsistent with the 1947 legislation; and so, pursuant to § 10 of the Act of 1947 repealing all inconsistent acts and parts of acts, the 1945 Act

should not be relied upon where the question of the pollution of streams is involved.

IV. Whether the discharge of mine drainage constitutes a waste discharge over which the Sanitary Water Board has jurisdiction is answered by the courts in cases arising under the Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §§ 691.1 to 691.701, relating to the protection of public water supply.

In *Commonwealth ex rel. Chidsey v. Black et al.,* 363 Pa. 231, 69 A. 2d 376 (1949), the Supreme Court of Pennsylvania recognized the absolute duty of anyone opening or operating a deep or strip mine to submit a plan for the drainage of the mine to the Sanitary Water Board for appropriate official action. See also *Sanitary Water Board v. Anthony, et ux., t/d/b/a Avis Coal Company,* 66 Dauph. 250 (1954). The section dealing with acid mine drainage makes it unlawful to discharge or permit the discharge of acid mine drainage into "clean waters of the Commonwealth." It would appear, therefore, that such prohibition applies to operating and nonoperating mines.

That the act applies to collieries as well as mines is clear; if the colliery is considered part of the mine, it would be covered by the act under §§ 310 and 311, 35 P. S. §§ 691.310 and 691.311; if the colliery is considered apart from the mine itself, then its operation in this area would be governed by those sections governing the discharge of industrial wastes into waters of the Commonwealth. See §§ 1 and 301 of the act, 35 P. S. §§ 691.1 and 691.301.

It might be well to note that § 200 of the Fish Law, Act of May 2, 1925, P. L. 448, as amended, 30 P. S. § 200, and § 17 of the Act of May 1, 1873, P. L. 89, as amended 30 P. S. § 361, dealing with the pollution of waters and generally considered as part of the fishing laws of the Commonwealth, further restrict pollution and also appear to apply to operating mines or collieries. Section 200 of the Fish Law vests jurisdiction as to the administration of that act in the Pennsylvania Fish Commission.

VI. Regarding your inquiry as to the process of abandoning a mining operation, § 3 of the Coal Mine Sealing Act of 1947, discussed supra, covers the situation generally.

However, there are additional statutory provisions in this area. In regard to anthracite deep mining operations, the Act of June 2, 1891, P. L. 176, 52 P. S. §§ 71 to 617 (in part), contains certain require-

ments. Section 2 of Article XIV, 52 P. S. § 162, requires notice to be given to the district mine inspector where a mine is abandoned or work on an abandoned mine is recommended. Article III, § 3, 52 P. S. § 263, requires surveys of abandoned workings which will be filled with water to be filed with the district inspector. Article IV, § 7, 52 P. S. §412, requires fencing. Article X, § 5, 52 P. S. § 569, and Article XII, § 4, 52 P. S. § 572, impose a duty to keep abandoned mines free from dangerous bodies of gases or water.

Bituminous deep mine operations are subject to similar statutory provisions upon abandonment. These are found in the Act of June 9, 1911, P. L. 756, 52 P. S. §§ 701 to 1393 (in part). Article III, § 5, 52 P. S. § 805, imposes on a mine superintendent the duty of prohibiting the mining of coal within 50 feet of any abandoned mine or an abandoned portion of any mine except under certain circumstances. Article III, § 8, 52 P. S. § 808, requires notice to the mine inspector when work is resumed at an abandoned mine; and Article II, § 6, 52 P. S. § 827, calls for similar notice plus mapping when a mine is abandoned. Various safety provisions re gases, fencing and working near or going into abandoned mines are found in Article IV, § 11, 52 P. S. § 878, Article IV, § 17, 52 P. S. § 884, Article V, § 1, 52 P. S. § 921, and Article XXV, Gen. Rules 26 and 27, 52 P. S. §§ 1306 and 1307.

Anthracite strip mining operations are governed by the Anthracite Strip Mining Law, the Act of June 27, 1947, P. L. 1095, as amended, 52 P. S. §§ 681.1 to 681.22, which provides for registration with the Department of Mines and Mineral Industries and the posting of bonds to assure backfilling and planting of the affected area. Additionally, § 13 of the act, 52 P. S. § 681.13, deals with drainage, as distinguished from backfilling and planting, and requires proper drainage to be provided by the operator where the condition is hazardous.

The Bituminous Coal Open Pit Mining Conservation Act, the Act of May 31, 1945, P. L. 1198, as amended, 52 P. S. §§ 1396.1 to 1396.20, contains substantially similar backfilling and planting requirements for bituminous coal stripping operations. There is no provision in the bituminous act, however, comparable to the one dealing with drainage in the anthracite legislation.

It is to be noted, also, in connection with drainage of water, that the Act of July 7, 1955, P. L. 258, 52 P. S. §§ 682 to 685, has made provision for an extensive program of control and drainage of water from anthracite coal formations to prevent the flow of surface water into mines and for pumping water from abandoned mines.

In conclusion, therefore, we can state only that responsibility for drainage from abandoned mines depends upon the facts of each case. We have outlined the applicable statutory provisions and noted that mine drainage is within the jurisdiction of the Sanitary Water Board in so far as water pollution is involved.

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON EHRLICH,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 155

Schools—Additional payments to professional personnel—Permanent salary increase over mandated maximums—Public School Code of 1949, as amended.

Section 4 of the Act of June 1, 1956, P. L. (1955) 1948, amending the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, and providing for certain additional payments to professional personnel, is sufficiently independent of § 3 of the amendatory act which establishes the minimums and increment scales, that it will be construed as representing a permanent salary increase over the mandated maximums.

Harrisburg, Pa., October 14, 1958.

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

Sir: You request advice concerning the Act of June 1, 1956, P. L. (1955) 1948, amending the Public School Code of 1949, the Act of March 10, 1949, P. L. 30. You refer to the maximum mandated salaries provided under § 3 thereof[1] and to the additional compensation provided for in § 4 thereof,[2] inquiring as follows:

> "Shall this Department continue to construe the provisions of Section 4 of the act as a program for accelerating the time during which the maximum mandated salaries provided for in Section 3 of the act may be attained and as a program for

[1] 24 P. S. § 11-1142.
[2] 24 P. S. § 11-1142 (See note).

> guaranteeing, as closely as is possible within the provisions of Section 3, a certain specified salary increase, over a three year period, to each professional and temporary professional employe, or shall this Department construe the provisions of Section 4 of the act as completely independent of Section 3 and in addition to Section 3?"

Section 1142 of the Code, 24 P. S. § 11-1142, sets forth the minimum salaries and increment scales for the various types of professional personnel. Subsection (2), for example, establishes these figures for teachers holding a college certificate. It provides for a minimum salary of three thousand dollars ($3,000.00) for the school year 1956-57, for successive two hundred dollar ($200.00) increases in the minimum salary until it reaches three thousand, six hundred dollars ($3600.00) for the school year 1959-60 and at least nine annual service increments thereafter of two hundred dollars ($200.00) each until a maximum of five thousand, four hundred dollars ($5400.00) is attained.

Section 1142's present minimums and increment scales were established by § 3 of the amendment of June 1, 1956, P. L. (1955) 1948, supra. Section 4 of that act provides for certain additional payments to professional personnel. Notwithstanding any other provisions of the Code, it authorizes additional payments of one hundred dollars ($100.00) for the school year 1955-56, two hundred dollars ($200.00) for 1956-57, one hundred dollars ($100.00) for 1957-58 and one hundred dollars ($100.00) for 1958-59. Except for the initial one hundred dollar payment,[3] each of these sums is to be paid as part of an increase in compensation in excess of that paid for the previous year, such increase also including the annual two hundred dollar ($200.00) service increment. The concluding sentence of this section states:

> "Said sums, exclusive of the one hundred dollars ($100) paid for the school year 1955-1956, shall be paid in addition to any annual service increment or additional increments to which such employes may be entitled by reason of acquiring a college certificate or Master's Degree and shall thereafter become a part of the regular salary of said employes."

The meaning of § 4 has been questioned, some regarding it simply as a temporary bonus payment for the year in question, others as a permanent addition to the compensation authorized in order to accelerate attainment of the maximum mandated salary, still others as

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[3] In Formal Opinion No. 664, 1955-56 Op. Atty. Gen. 47, this department ruled that that part of § 4 providing the sum of $100.00 for the years 1955-1956 is in conflict with Article III, § 11, of the Pennsylvania Constitution and that any payment thereunder is void.

a permanent and independent addition to the authorized compensation over and above the maximum mandated salary. The first possibility cannot be sustained since § 4 explicitly makes the additional payment a permanent part of the regular salary. Therefore, we need consider only the latter two possibilities.

The difficulties inherent in the problem presented can best be seen by posing several examples, both with and without the additional payments being considered. In each case we shall assume that the employee is a teacher holding a college certificate and that the 1956-1957 school year is about to begin. Five cases can be posed: (1) a new teacher; (2) an experienced teacher who received three thousand, six hundred dollars ($3600.00) in the 1955-1956 school year; (3) an experienced teacher who received four thousand, four hundred dollars ($4400.00) in the 1955-56 school year; (4) an experienced teacher who received five thousand dollars ($5000.00) for the 1955-1956 school year; and (5) an experienced teacher who received five thousand, four hundred dollars ($5400.00) for the 1955-1956 school year. Since the amendment to § 1142 of the Code preceding the present one established a minimum salary of two thousand, four hundred dollars ($2400.00) and a maximum of four thousand, four hundred dollars ($4400.00),[4] it can be seen that the teachers in examples (4) and (5) had been compensated more than the required maximum by action of their school boards. However, we shall assume that each school board now has decided to pay the required compensation and no more and that no future amendments are made to § 1142.

A. Without the additional payments of § 4, the salaries for the 1956-1957 and subsequent school years would be as follows:

	(1)	(2)	(3)	(4)	(5)
1956-1957	$3000	$3800	$4600	$5200	$5400
1957-1958	3200	4000	4800	5400	5400
1958-1959	3400	4200	5000	5400	5400
1959-1960	3600	4400	5200	5400	5400
1960-1961	3800	4600	5400	5400	5400
1961-1962	4000	4800	5400	5400	5400
1962-1963	4200	5000	5400	5400	5400
1963-1964	4400	5200	5400	5400	5400
1964-1965	4600	5400	5400	5400	5400
1965-1966	4800	5400	5400	5400	5400
1966-1967	5000	5400	5400	5400	5400
1967-1968	5200	5400	5400	5400	5400
1968-1969	5400	5400	5400	5400	5400

[4] Act of December 27, 1951, P. L. 1776, § 3.

These figures are necessarily based on an interpretation of § 1142 (2) which does not give independent significance to the minimum number of service increments specified—nine—but regards that specification as a quantity to be added to the final minimum annual salary—$3600.00—so that a teacher will reach at least the mandated maximum salary—$5400.00. Thus, the teacher in example (3), who made $4400.00 in the 1955-1956 school year is entitled only to as many increments—five—as are necessary to bring his salary up to $5400.00. The teacher in example (5), therefore, need not be given any additional increments.

B. 1. With the additional payments of § 4, under an interpretation which does not treat this section independently, the salaries for the 1956-1957 and subsequent school years would be as follows:

	(1)	(2)	(3)	(4)	(5)
1956-1957	$3200	$4000	$4800	$5400	$5600
1957-1958	3500[5]	4300	5100	5500	5700
1958-1959	3800[5]	4600	5400	5600	5800
1959-1960	4000[5]	4800	5400	5600	5800
1960-1961	4200	5000	5400	5600	5800
1961-1962	4400	5200	5400	5600	5800
1962-1963	4600	5400	5400	5600	5800
1963-1964	4800	5400	5400	5600	5800
1964-1965	5000	5400	5400	5600	5800
1965-1966	5200	5400	5400	5600	5800
1966-1967	5400	5400	5400	5600	5800

The effect of the additional payment is thus two-fold: (a) it serves to shorten the period of time in which a teacher will reach his mandated maximum; and (b) for those teachers who have reached this maximum before or do reach it during the three year period of additional payments (1956-1957, 1957-1958 and 1958-1959), it provides a permanent increase in salary even over the maximum.

[5] It could be argued that because § 3 of the act speaks in terms of a rising minimum (in $200.00 steps from $3000.00 to $3600.00) for the 1956-57 through 1959-60 school years rather than increments for teachers receiving the minimum amounts, a new teacher should receive only $3300.00 in 1957-58, $3500.00 in 1958-59 and $3600.00 in 1959-60. That is, he should receive the minimum plus the additional payment only. Since this interpretation would nullify any acceleration effect provided by § 4's additional payments, we view the so-called "minimums" as such only for the first year of teaching and as required increments thereafter. Thus, aside from the § 4 payments, a teacher entering the profession in 1956-57 would receive $3000.00 and *12* required increments thereafter; one entering in 1957-58 would receive $3200.00 and *11* required increments; one entering in 1958-59 would receive $3400.00 and *10* required increments; and one entering in 1959-60 or thereafter would receive $3600.00 and *9* required increments. The teacher entering in 1956-57 would receive $3500.00, therefore, in 1957-58 (previous year's $3200.00 plus a $200.00 increment plus a $100.00 extra payment), not $3300.00 (the $3200.00 minimum plus $100.00 extra payment).

B. 2. Under the interpretation which treats § 4 independently, the following salaries would apply:

	(1)	(2)	(3)	(4)	(5)
1956-1957	$3200	$4000	$4800	$5400	$5600
1957-1958	3500	4300	5100	5700	5700
1958-1959	3800	4600	5400	5800	5800
1959-1960	4000	4800	5600	5800	5800
1960-1961	4200	5000	5800	5800	5800
1961-1962	4400	5200	5800	5800	5800
1962-1963	4600	5400	5800	5800	5800
1963-1964	4800	5600	5800	5800	5800
1964-1965	5000	5800	5800	5800	5800
1965-1966	5200	5800	5800	5800	5800
1966-1967	5400	5800	5800	5800	5800
1967-1968	5600	5800	5800	5800	5800
1968-1969	5800	5800	5800	5800	5800

The effect of the additional payment in this view is also two-fold: (a) it likewise serves to shorten the period of time in which a teacher will reach the mandated maximum salary; but (b) it provides a $400.00 permanent increase in the mandated maximum salary for *all* teachers.

It is apparent that neither interpretation of § 4 fully answers both the legal and equitable questions presented. The first interpretation allows the mandated maximum salary of § 3 to be permanently exceeded by one group of teachers, but it prevents others from exceeding this maximum.[6] The second interpretation allows all teachers to exceed the maximum, of course; but it discriminates against teachers who begin teaching after 1956-1957.[7]

Considering the effects of each interpretation, we believe that § 4 is sufficiently independent of § 3 that is represents a permanent salary increase over the mandated maximums.[8] Thus, we believe it impliedly affects those maximums for teachers in the profession in 1958-1959 and earlier.

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[6] A teacher receiving $4400.00 or less during the 1955-1956 school year would not pierce the $5400.00 maximum even with the additional payments; one earning $4500.00 or more would pierce the maximum.

[7] Thus, while the new teacher of 1956-1957 would work up to a maximum of $5800.00, the new teacher of 1957-58, having entered the profession too late to receive the benefits of the extra $200.00 for 1956-57, could work up only to a maximum of $5600.00. The new teacher of 1958-1959 would lose both the $200.00 of 1956-1957 and the $100.00 of 1957-1958 and could only reach a maximum of $5500.00; while the new teachers of 1959-1960 and thereafter would be limited to the stated maximum of $5400.00.

[8] I.e., Table B.2, would apply to teachers falling under the examples used.

The inequity remaining in the present law can be corrected by legislative action, of course. We would recommend that any future action of this type be integrated and spelled out in one section, however, so that a similar problem of interpretation would not again arise.

Very truly yours,

DEPARTMENT OF JUSTICE,

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 156

Group life, health and accident insurance—Authority of department to enter into contract covering its employees—Appropriation.

Unless moneys are specifically appropriated for such purpose, the Department of Health may not contract with an insurance company for group life, health and accident insurance covering the employees of the Health Department, under the Act of June 22, 1931, P. L. 844, § 1, as amended, which authorizes the Commonwealth or any department thereof to enter into such group life, accident and health insurance contracts.

Harrisburg, Pa., October 15, 1958.

Honorable C. L. Wilbar, Jr., Secretary of Health, Harrisburg, Pennsylvania.

Sir: We are in receipt of your request relative to the authority of your department to enter into a contract with an insurance company for group life, health and accident insurance covering the employees of your department. In that request you state that the department would pay part of the premiums for such insurance while the employees would pay the rest through a payroll deduction plan.

The Act of June 22, 1931, P. L. 844, § 1, as amended, 40 P. S. § 535, specifically authorizes the Commonwealth or any department or division thereof:

> "* * * to make contracts of insurance with any insurance company or nonprofit hospitalization corporation or nonprofit medical service corporation authorized to transact business within the Commonwealth insuring its elected or appointed

> officers and employes or any class or classes thereof under a policy or policies of group insurance covering life, health, hospitalization, medical service or accident insurance, and may contract with any such company granting annuities or pensions for the pensioning of such employes; and, for such purposes, may agree to pay part of all of the premiums or charges for carrying such contracts, and may appropriate out of its treasury any money necessary to pay such premiums or charges or portions thereof.
>
> "* * * * * * * *"

This act also allows for payroll deductions for that part of the premiums which the employees agree to pay.

Section 2404 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 634 (Pocket Part), requires that the Department of Property and Supplies be the purchasing agent for the insurance needs of the Commonwealth. Moreover, Memorandum Opinion No. 8, rendered December 24, 1957,[1] advised your department that insurance cannot be purchased unless an appropriation exists for that type of insurance. This advice was based upon the following provision of § 2404 of The Administrative Code of 1929:

> "The Department of Property and Supplies shall have the power, and its duty shall be:
>
> "* * * * * * * *
>
> "(b) To procure * * * 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."

We see no reason to depart from this conclusion in the instant case.

The Act of 1931 merely authorizes the Commonwealth or its departments to purchase group life, health and accident insurance. This authority does not conflict with the above cited provision of The Administrative Code of 1929, but merely adds to the type of insurance which it is lawful for the Commonwealth to carry.

We are of the opinion and you are, therefore, accordingly advised that unless there is a specific appropriation to your department or to

[1] 1957 Op. Atty. Gen. 219.

the Department of Property and Supplies to purchase the above types of insurance, such insurance may not be purchased. Further, you are advised that the purchase of such insurance, in any case, must be made through the Department of Property and Supplies.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. COHEN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 157

Appropriation—Reimbursement to general hospitals for free patient-care—Prerequisites for entitlement to reimbursement.

Under Appropriation Act No. 149-A, approved June 1, 1956, the Lancaster County Tuberculosis Society is entitled to full State reimbursement for free care given to indigent patients treated at the Rossmere Sanatorium. Although the Lancaster Society had closed the Rossmere Sanatorium on the last day of the 1955-1957 biennium, the Sanatorium had, during the biennium in which the appropriation act was in effect, given a sufficient number of free patient-care days and its closure at the end of the biennium did not disqualify the Society from full reimbursement under the act.

Harrisburg, Pa., October 16, 1958.

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

Sir: You have requested the opinion of this department on the question of the disbursement of the sum of $43,217.34 to the Lancaster County Tuberculosis Society as a reimbursement for free hospital care given to indigent persons during the 1955-1957 biennium.

The background of the problem is as follows:

In 1955 the Lancaster County Tuberculosis Society operated a hospital known as Rossmere. In that same year the legislature, by Act

No. 149-A, approved June 1, 1956, appropriated the amount of $22,213,400.00 to the Department of Welfare for disbursement to State-aided hospitals as a reimbursement for care given by these hospitals to persons entitled to free service. The disbursements were to be made under a formula set forth in § 1 of the act and were not to exceed the sum set for each hospital. The sum established for "Lancaster County Tuberculosis Society, Rossmere" was $115,000.00. Although Rossmere had provided considerably more than $115,000.00 worth of free patient-care, this sum was paid to the society. However, under § 2 of Act No. 149-A, a provision was made that, in the event the initial appropriation was not completely disbursed (because any one or more hospitals did not utilize the full allotment), the unexpended portion could be distributed to those hospitals which were entitled to more than the limit set in § 1. The same formula for such allocation was to be utilized.

By applying the provisions of § 2, Rossmere, because it had provided a sufficient number of free patient-care days, became entitled to an additional allocation of $43,217.34. This is the sum in question. If it were not for the existence of one further fact, it would be obvious that the payment should be made. On May 31, 1957, the Lancaster County Tuberculosis Society closed the Rossmere Sanatorium. All the debts of the hospital were paid in full and Rossmere ceased to exist. The question now arises whether this fact bars the payment of the additional sum of money.

It is apparent from reading § 2 of the appropriation act that the payments to the hospitals are in the nature of reimbursements after care has been given by the hospitals to indigents. Under the present facts the Lancaster County Tuberculosis Society operated its Rossmere Sanatorium throughout the biennium during which the appropriation act was in effect. It met all the prerequisites for payment at that time. The fact that at present the Lancaster Society is not operating its Rossmere Hospital does not alter its right to the allocation which had become established at the time of cessation of its activities. Even though the hospital has closed, the corporate entity and designee in the appropriation act, the Lancaster County Tuberculosis Society, still exists. If the hospital had closed with a deficit the County Society would have been liable. Similarly, if the $43,217.34 payment creates a credit, this should inure to the Society's benefit.

It is, therefore, the opinion of this department and you are accordingly advised that the Lancaster County Tuberculosis Society is en-

titled to the sum of $43,217.34 as an additional allocation under § 2 of Act No. 149-A, approved June 1, 1956.

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 158

Social security taxes—Employees of the Delaware River Joint Toll Bridge Commission—Responsibility for payment of the employer contributions.

Under the Act of January 5, 1952, P. L. (1951) 1833, as amended, the Delaware River Joint Toll Bridge Commission is responsible for the payment of the employer share of Social Security taxes for its employees; however, it may utilize the sums appropriated for the maintenance and operation of the free bridges to meet the employer share of the tax of employees of the Commonwealth, the salaries of whom are currently charged against this appropriation.

Harrisburg, Pa., October 17, 1958.

Honorable Lewis M. Stevens, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: You have requested to be advised where the responsibility should be placed for the payment of Social Security taxes for employees of the Delaware River Joint Toll Bridge Commission.

The Federal Old Age and Survivors Act, the Act of August 14, 1935, known as The Social Security Act,[1] was amended by the Social Security Enabling Act,[2] to authorize state governments to enter into contracts with the federal government to extend the coverage of the Federal Old Age and Survivors Insurance System to certain state employees. In order to make state employees eligible under the federal act, our legislature passed the Act of January 5, 1952, P. L. (1951)

[1] 49 Stat. 620-648 (1935); 42 U. S. C. §§ 401-417 (1952).
[2] 64 Stat. 514 (1950); 42 U. S. C. § 418 (1952).

1833, 65 P. S. §§ 201-209, which authorized the Secretary of Labor and Industry, with the approval of the Governor to enter into agreements which provided that the Commonwealth will pay the tax required of employers under the federal act. The employees' contributions are authorized by the head of each agency to be paid into a fund maintained in the Department of Labor and Industry. The Commonwealth, by appropriation, contributes an amount to this fund sufficient to meet its obligation as an employer. Thus, the tax due the federal government under the federal act is collected into this one fund. Section 204 of the Act of 1952, supra, details the procedure to be followed in entering into agreements with the federal government. The section draws a distinction between state-federal agreements in subsection (a) and interstate instrumentalities-federal agreements in subsection (b). An interstate instrumentality is "any instrumentality jointly created by this Commonwealth and any other state or states * * *." Such instrumentalities must, themselves, enter into agreements directly with the federal government if they wish to qualify their employees for Social Security benefits. The act further provides that when an interstate instrumentality enters into an agreement with the federal government to extend coverage to its employees, it is authorized "to make payments to the federal agency in accordance with such agreement, including payments *from its own funds* and otherwise, to comply with such agreements." (Emphasis supplied.)

The Act of June 25, 1931, P. L. 1352, as amended, 36 P. S. § 3401, which created the Delaware River Joint Toll Bridge Commission, provides that:

> "The Commission shall constitute the public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey for the following public purposes, and shall be deemed to be exercising an essential governmental function in effecting such purpose * * *"

The Commission's responsibility extends over fifteen bridges spanning the Delaware River and connecting the two states. The Commission operates five as toll bridges and uses the tolls to pay operating expenses and to retire the revenue bonds issued to construct those bridges. The remaining ten state-owned bridges are maintained and operated by funds appropriated for that purpose by the two states. The funds which provide for the operation and maintenance of the free bridges are appropriated by the State of New Jersey, after proper request from the Commission each fiscal year; and New Jersey, in turn, is reimbursed for one-half of the actual amount disbursed, such reimbursement being paid by the Commonwealth of Pennsylvania

from the Motor License Fund. All such bridges are free of tolls. Employees of the Commission working on the free bridges are members of the pension systems of both states. See Delaware River Joint Toll Bridge Commission Annual Report (1956), at p. 5.

We believe it is clear from a reading of § 204 of the Act of 1952, supra, that the legislature intended the interstate instrumentalities to be accorded a treatment distinct from intrastate agencies. Under these circumstances, the Commission should collect the employees' contributions and from its own funds supply the employer contribution. Under no circumstances should moneys of the Department of Highways be used to pay employer contributions.

It is our opinion, therefore, and you are so advised, that the Delaware River Joint Toll Bridge Commission is to pay from its own funds the employer share of the Social Security tax. However, it may utilize the sums appropriated for the maintenance and operation of the free bridges to meet the employer share of the tax of employees of the Commonwealth, the salaries of whom are currently charged against this appropriation.

Very truly yours,

DEPARTMENT OF JUSTICE,

MICHAEL J. STACK, JR.,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 159

Appropriations—Housing and Redevelopment Assistance Law—Reenactment of statute—Deletion of section making appropriation.

An appropriation made by § 17 of the Housing and Redevelopment Assistance Law, the Act of May 20, 1949, P. L. 1633, was in no way impaired or repealed by the Act of April 12, 1956, P. L. (1955) 1449, which reenacted and amended the 1949 Act and in doing so deleted § 17, and there is presently available for expenditure by the Department of Commerce the unexpended balance of the initial fund plus the appropriation made by the 1956 Act.

Harrisburg, Pa., October 20, 1958.

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

Sir: We have your inquiry with regard to the availability of funds appropriated by the General Assembly in the Act of May 20, 1949, P. L. 1633, 35 P. S. §§ 1661 to 1676. This act is known as the "Housing and Redevelopment Assistance Law," and § 17 thereof provides as follows:

> "Appropriation.—The sum of fifteen million dollars ($15,000,000), or as much thereof as may be necessary, is hereby specifically appropriated to the Department of Commerce for the use of the State Planning Board for the purposes set forth in this act, and of this amount not more than three per cent shall be spent by the board for administration of this act, including payment to the Department of Property and Supplies for the cost of any services authorized by section 16 of this act."

In 1956 the Legislature reenacted and amended the Housing and Redevelopment Assistance Law. The title to this amending act, the Act of April 12, 1956, P. L. (1955) 1449, reads as follows:

> "AN ACT
>
> "Reenacting and amending the title and the Act of May twenty, one thousand nine hundred forty-nine (Pamphlet Laws 1633), entitled 'An act providing and regulating State assistance for housing, including slum clearance and redevelopment; and making an appropriation,' transferring functions of State Planning Board relating to housing and redevelopment to the Department of Commerce; removing slum clearance and certain restrictions as to capital grants for redevelopment purposes from provisions of act; and making an appropriation."

In its 1956 enactment the Legislature deleted § 17 of the 1949 Act. However, in doing so it specifically provided in § 4, 35 P. S. § 1661 note, as follows:

> "All rights, duties and obligations acquired, imposed upon, or assumed by the State Planning Board, relative to housing and redevelopment, by virtue of any contract, agreement, regulation or ruling, made prior to the passage of this act, are transferred to the Department of Commerce, *as well as any unexpended balance of funds heretofore appropriated* to the Department of Commerce for the use of the State Planning

> Board for the purposes set forth in this act. (Emphasis supplied.)

It is evident from the langauge used in the 1949 Act that the initial appropriation to the Department of Commerce was not the usual biennium appropriation, any unused portion of which would have lapsed at the end of the fiscal year 1950-1951. The funds appropriated in 1949 were "specifically appropriated * * * for the purposes set forth in this act," and there is nothing in the statute which indicates that this appropriation was in any way subject to a time limitation.

That this was the obvious legislative intent is further substantiated by the fact that in the next two legislative sessions no additional appropriation was made to the department to carry on its assignments in the area of slum clearance and redevelopment as required by the Housing and Redevelopment Assistance Law, supra. Moreover, during this same period the department continued to expend money from the original 1949 appropriation.

It was not until 1956 that the Legislature again appropriated any money to the department for the slum clearance and redevelopment program and, as already indicated, before doing this the Legislature specifically saved for the department's use any unexpended balance of funds heretofore appropriated.

Section 5 of the 1956 Act, 35 P. S. § 1661 note, then went on to provide:

> "The sum of five million dollars ($5,000,000), or as much thereof as is necessary, is appropriated to the Department of Commerce for the purposes set forth in section 4 (b) of the act of May twentieth, one thousand nine hundred forty-nine (Pamphlet Laws 1633), and for necessary costs of administration. The allocation of the appropriation to the various areas of the Commonwealth shall be as set forth in section eight of said act, except that prior to January one, one thousand nine hundred fifty-seven, no more than five hundred thousand dollars ($500,000) shall be allocated to cities of the first class, no more than five hundred thousand dollars ($500,000) shall be allocated to cities of the second class, and no more than three hundred fifty thousand dollars ($350,000) shall be allocated to cities of the second class A. After January one, one thousand nine hundred fifty-seven, any funds unallocated or allocated but not under contract may be reallocated as heretofore provided in section eight of said act."

It is thus clear that the Legislature intended to do two things:

1. Transfer for the use of the Department of Commerce any unexpended balance of the original appropriation of $15,000,000.00; and

2. In addition thereto to make an appropriation of $5,000,000.00.

We are, therefore, of the opinion and you are accordingly advised that the original appropriation of $15,000,000.00 was in no way impaired or repealed by the 1956 Act, supra, and there is presently available for expenditure by the Department of Commerce the unexpended balance of the initial fund plus the appropriation of $5,000,000.00 made by the 1956 Act, supra.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

JAMES M. QUIGLEY,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 160

Escheat—Unclaimed funds of former prison inmates.

Unclaimed funds remaining in the Inmates' General Welfare Fund accounts of deceased inmates and former inmates whose present whereabouts cannot be ascertained should be paid into the State Treasury without escheat in accordance with the procedure outlined after the expiration of a reasonable period of time during which lawful claimants to such funds have failed to appear.

Harrisburg, Pa., October 20, 1958.

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

Sir: You have requested our opinion with regard to the proper disposition to be made of unclaimed funds remaining in the Inmates'

General Welfare Fund accounts of deceased inmates and former inmates whose present whereabouts or existence cannot be ascertained.

The Inmates' General Welfare Fund (hereinafter called Fund) was described in Official Opinion No. 26, dated October 24, 1957.[1] In that opinion we stated that the monies in the Fund were held by the Commonwealth "in a fiduciary capacity."

In legal contemplation and context the two fact patterns you present for consideration raise the same question. The procedure hereinafter prescribed, although illustrated by the situation of unclaimed funds remaining in the account of a deceased inmate, applies to unclaimed funds remaining in the accounts of former inmates, except that upon the death of any inmate, all Fund monies credited to his account should be paid according to the terms of his will, or, if he dies intestate, to his personal representative or other known claimants lawfully entitled thereto.

In the event that a reasonable period of time expires without notice being received of the existence of lawful claimants and after reasonable effort has been made to locate such lawful claimants, monies remaining in the account of a deceased inmate should be considered as unclaimed funds. Such unclaimed funds must be paid into the State Treasury without escheat under the provisions of § 3 of the Act of May 2, 1889, P. L. 66, as last amended by the Act of July 29, 1953, P. L. 986, 27 P. S. § 333(d).

Section 1 of the Act of May 16, 1919, P. L. 177, as amended, 27 P. S. § 431, prescribes the procedure by which any "person, firm, association, bank, national bank, trust company, or other corporation" may pay unclaimed funds into the State Treasury without escheat. It is important to note that this act fails to provide for payment by an agency or department of the Commonwealth. We are of the opinion that such omission indicates that the Legislature deemed it unnecessary to prescribe a definite procedure whereby the Commonwealth would transfer to the State Treasury escheatable funds which it holds in a fiduciary capacity. This conclusion is consistent with the legislative policy in establishing a system for the payment of escheatable unclaimed funds into the State Treasury without escheat. Section 1. of the Act of June 25, 1937, P. L. 2063, as amended, 27 P. S. § 434, states in part:

[1] 1957 Op. Atty. Gen 122.

> "* * * That it is both necessary and desirable to provide specific, appropriate methods for the recovery of such money and property by the Commonwealth and the payment thereof into the State Treasury, subject to being refunded without the necessity of instituting and prosecuting the proceedings for a formal decree of escheat thereof by the court having jurisdiction of said moneys and property. * * *"

The following simplified procedure is recommended for the actual payment of unclaimed funds into the State Treasury: (1) report the existence of escheatable funds to the Division of Escheats of the Department of Revenue; (2) await receipt of a request by the Division of Escheats for the transfer of such funds into the State Treasury; (3) upon the transfer of such funds into the State Treasury, receive from the Division of Escheats a written receipt evidencing such transfer and relieving you from further liability for the custody of the transferred funds.

We are, therefore, of the opinion and you are accordingly advised that unclaimed funds remaining in the Inmates' General Welfare Fund accounts of deceased inmates and former inmates whose present whereabouts or existence cannot be ascertained should be paid into the State Treasury without escheat in accordance with the procedures outlined after the expiration of a reasonable period of time during which lawful claimants to such funds have failed to appear.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN, III,
Deputy Attorney General.

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

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 161

Public library service in rural areas—Program administering expenditure of Federal grants—Federal Library Service Act—The Administrative Code of 1929.

Under the Library Services Act, 70 Stat. 293, 20 U. S. C. §§ 351 to 358 (1957), and § 1305 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, the State Librarian has authority: (1) to expend Federal funds for direct public library service to rural areas by placing books, periodicals, supplies, equipment, personnel, and necessary related items, in rural areas where library services should either be inaugurated or improved; and (2) to make use of an existing library serving a city of more than 10,000 population, as a base of operations for extending library service to rural areas, and to reimburse such base library for wear and tear on its collection and facilities by adding books, personnel or equipment on extended loan.

Harrisburg, Pa., October 20, 1958.

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

Sir: You have requested us to advise you with regard to the authority of the State Librarian to expend federal funds for direct public library service to rural areas.

You advise us that your department has received federal funds and has others due it under the federal Library Services Act.[1] The State Librarian, as the person in charge of the responsibilities of your department relating to libraries, proposes that a program administering these funds be inaugurated. This program would involve placing books, periodicals, supplies, equipment, personnel, and necessary related items, in rural areas[2] where library service should either be inaugurated or improved. In addition, you explain that in some instances the most effective course would be to make use of an existing library serving a city of more than 10,000 population as a base of operations for extending library service to rural areas. In those cases, and only with the approval of the Library Services Branch, Office of Education, Department of Health, Education and Welfare, the State Librarian proposes to make some type of reimbursement to the base library for wear and tear on its collection and facilities, in the form of adding books, personnel or equipment on extended loan. Specifically, you request our opinion as to the legality of the proposals made by the State Librarian.

At the outset, since the Pennsylvania State Plan for Further Extension of Public Library Services to Rural Areas was approved by

[1] 70 Stat. 293 (1956), 20 U. S. C. §§ 351 to 358 (1957).

[2] Section 9 of the Act, supra, as amended, defines "rural area" as follows: "The term 'rural area' does not include an incorporated or unincorported town having a population of more than ten thousand persons."

the Federal Commissioner of Education and federal monies were duly paid into the State Treasury of Pennsylvania for the administration of such plan, we assume that all requirements and conditions of the Act, supra, have been satisfied.[3] The Superintendent of Public Instruction had specific authority to submit a State plan and apply for federal funds under the Act of May 11, 1949, P. L. 1202, 24 P. S. §§ 2811 to 2813.

The question becomes whether the State Librarian, as the designee of the Superintendent of Public Instruction, has adequate authority under State Law to expend funds generally for the extension of public library service to rural areas.

Section 1305 of The Administrative Code of 1929[4] sets forth the library powers of the Department of Public Instruction as follows:

> "The Department of Public Instruction shall have the power, and its duty shall be, to exercise the powers and perform the duties heretofore by law vested in and imposed upon the State Library and Museum, and the several divisions thereof, in so far as the same shall in any manner relate to the State Library, or the law library or to the following powers, duties and functions. The Superintendent of Public Instruction may designate the person in charge of the work to which this section refers, as the State Librarian.
>
> "The department shall have the power, and its duty shall be:
>
> * * * * * *
>
> "(c) To give advice and counsel to all free libraries in the State, and to all communities which may propose to establish free libraries, in the selection of books, cataloguing, and other details of library management, and as to the best means of establishing and administering such libraries;
>
> "(d) Generally, to supervise and inspect free libraries, to require reports in such manner as may be deemed proper, and to establish and maintain a system of traveling libraries as far as possible throughout the Commonwealth."

[3] Section 5 of the Library Services Act, supra, 70 Stat. 293, 20 U. S. C. § 354 (a) (1), requires that the State plan point out the authority under State law of the State Librarian to administer the plan in accordance with the provisions of the Act. The approved State plan made reference to applicable provisions of Pennsylvania law.

[4] The Act of April 9, 1929, P. L. 177, as amended by the Act of June 6, 1945, P. L. 1398, 71 P. S. § 355.

The language "and to establish and maintain a system of traveling libraries" of subsection (d) of this section applies precisely to the instant situation. The declared policy of the Library Services Act is to promote the further *extension* of public library services to rural areas. The method selected by the State Librarian of implementing this policy and administering the approved State plan is to furnish books, equipment, personnel, and related items, which will move about, as, for instance, a "Bookmobile," or be moved about occasionally from place to place as local needs and conditions require. Such provision and promotion of library service would *also* plainly fall within the authorization of subsection (c) of the above quoted section: "To give advice and counsel to all free libraries in the State, and to all communities which may propose to establish free libraries . . . and as to the best means of establishing and administering such libraries."

With regard to the State Librarian's proposal to reimburse base libraries in nonrural areas for wear and tear on its collection and facilities by adding books, personnel or equipment on extended loan, the Library Services Act, supra, specifically authorizes such use of the federal allotment. Section 6 of the Act[5] provides that no portion of any money paid to a State shall be used, directly or indirectly, to provide or improve library services in any area other than a rural area, "except that nothing contained herein shall be construed to prohibit the utilization of such money by public libraries in nonrural areas for the exclusive purpose of extending public library services to rural areas, if such utilization has been provided for in an approved State plan covering the areas affected." We have examined the approved State plan and find that such utilization has been provided for in § 3.2 thereof.

It is, therefore, our opinion and you are accordingly advised that the State Librarian has the necessary legal authority: (1) to administer federal funds provided under the Library Services Act by placing books, periodicals, supplies, equipment, personnel, and necessary related items, in rural areas where library services should either be inaugurated or improved; and (2) to make use of an existing library serving a city of more than 10,000 population, as a base of operations for extending library service to rural areas, and, with the approval of the Office of Education, Department of Health, Education and Wel-

[5] Supra, as amended August 1, 1956, 70 Stat. 911, 20 U. S. C. § 355 (f).

fare, to reimburse such base library for wear and tear on its collection and facilities by adding books, personnel or equipment on extended loan.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN, III,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 162

Junk dealers—Authority of Pennsylvania State Police to inspect books and records.

The Pennsylvania State Police may inspect the books and records of junk dealers and the like under the provisions of the Act of April 11, 1899, P. L. 37, within any city, but such power does not extend to any such business establishment located outside of a city.

Harrisburg, Pa., October 22, 1958.

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

Sir: We are in receipt of your communication requesting an interpretation of the Act of April 11, 1899, P. L. 37, 53 P. S. §§ 4431 to 4433. Specifically, you ask whether the act is applicable to the Pennsylvania State Police Force. Section 1 of said act, 53 P. S. § 4431, requires junk dealers and the like *in any city* to keep books recording purchases of certain materials. Section 2, as amended, 53 P. S. § 4432, provides:

> "Every owner of such junk shops and second hand stores shall provide and constantly keep a book, in which shall be fairly written down in the English language, at the time of every purchase of any such material, a description of all articles so purchased, the name and residence of the person from whom such purchase was made, and the day and hour of such purchase, and such books shall at all times be open to the inspection of any and every member of the police and detec-

> tive forces of such city. Compliance with the provision of this section shall be evidence of the innocence of a junk shop keeper or second hand dealer of any crime of receiving stolen goods, notwithstanding the fact that the articles may in fact be stolen. Nothing contained in this section shall be interpreted as limiting, or interfering with, the title to, or right of, possession of the lawful owners of the articles."[1]

It should be noted first, that the act has applicability only to junk shops and the like within any "city." No provision is made for such business establishments which are located in rural areas, townships, or boroughs. Accordingly, unless there is a local ordinance supplementing this Act of Assembly,[2] the act can only be applied to dealers in a city of the Commonwealth. Section 2, above quoted, indicates that such books shall be open for inspection at all times by "any and every member of the police and detective forces of such city."[3] At first blush, the act would appear to eliminate State Police from its operation. However, it must be remembered that at the time this legislation was passed the State Police Force had not been created. Upon such creation in 1905,[4] the State Police Force was given broad powers for the enforcement of laws within the *entire* territorial jurisdiction of the Commonwealth, which are presently supplied by §§ 710 and 712 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. §§ 250 and 252.

Section 710 provides, in part, that the State Police Force shall have the power and its duty shall be:

> "(b) To assist the Governor in the administration and enforcement of the laws of the Commonwealth, in such manner, at such times, and in such places, as the Governor may from time to time request;
>
> * * * * * * *
>
> "(d) Whenever possible, to cooperate with counties and municipalities in the detection of crime, the apprehension of criminals, and the preservation of law and order throughout the State.
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> * * * * * * *

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[1] Section 3 of the act (53 P. S. § 4433) provides penalties.

[2] The police power of a political subdivision may be invoked to regulate business of junk dealing in addition to and not inconsistent with the above statute: *City of Pittsburgh v. Streng,* 90 Pa. Super. 288 (1927).

[3] This act is constitutional: *Commonwealth v. Mintz,* 19 Pa. Super. 283 (1902).

[4] Act of May 2, 1905, P. L. 361.

"(f) To collect and classify, and keep at all times available, complete information useful for the detection of crime, and the identification and apprehension of criminals. Such information shall be available for all police officers within the Commonwealth, under such regulations as the Commissioner of Pennsylvania State Police may prescribe."

Section 712 provides ,in part:

"The various members of the Pennsylvania State Police are hereby authorized and empowered:

"(a) To make arrests, without warrant, for all violations of the law, including laws regulating the use of the highways, which they may witness, and to serve and execute warrants issued by the proper local authorities. They shall have all the powers and prerogatives conferred by law upon members of the police force of cities of the first class[5], and upon constables of the Commonwealth;"

By reason of the broad powers above conferred, it is our opinion that the powers given to the city police officers under the Act of 1899 are extended by operation of the law to members of the Pennsylvania State Police Force.

It is our opinion, therefore, and you are accordingly advised that members of the State Police Force may inspect the books and records of junk dealers and the like under the provisions of the Act of April 11, 1899, P. L. 37, 53 P. S. §§ 4431 to 4433, within any city. Such power does not extend to any such business establishment located outside of a city.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

THOMAS D. MCBRIDE,
Attorney General.

[5] This reference to the powers of police in cities of the first class does not restrict the State Police to exercising such powers within such cities. Rather, it describes the extent of State Police power which may be exercised throughout the Commonwealth.

OFFICIAL OPINION No. 163

Pennsylvania Securities Commission—Basis for denial of applicant for registration as a securities dealer—Section 6 of The Pennsylvania Securities Act.

Under § 6 of The Pennsylvania Securities Act, the Act of June 24, 1939, P. L. 748, as reenacted and amended by the Act of July 10, 1941, P. L. 317, the authority of the Pennsylvania Securities Commission in examining all matters pertaining to an applicant for registration as a securities dealer does not extend to a private dispute which involves contractual obligations and as such is not a ground for denial of registration.

Harrisburg, Pa., October 27, 1958.

Honorable Frank Happ, Chairman, Pennsylvania Securities Commission, Harrisburg, Pennsylvania.

Sir: You have requested an opinion as to whether or not the breach or alleged breach of an employment contract entered into between an applicant and his former employer, a security dealer, wherein applicant agreed not to compete with employer for a period of two years if his employment was terminated, is sufficient to deny an applicant registration as a securities dealer.

Section 6 of The Pennsylvania Securities Act, the Act of June 24, 1939, P. L. 748, as reenacted and amended by the Act of July 10, 1941, P. L. 317, 70 P. S. § 36, specifically provides:

> "* * * The commission, after hearing, may by order deny registration of an applicant if the commission finds that the applicant is not of good repute or that the proposed plan of business of the applicant is unfair, unjust or inequitable or that the applicant is not of sufficient financial responsibility to deal safely with the public. * * *"

It is our opinion that the Commission has full authority to examine all matters pertaining to the applicant for registration and to the officers of a corporation applying for registration as a security dealer and, after taking all factors and evidence into consideration, to refuse to register an individual or corporation as a dealer if the Commission concludes after hearing that the applicant is not of good repute or that the proposed plan of business of the applicant is unfair, unjust or inequitable or that the applicant is not of sufficient financial responsibility to deal safely with the public.

Such an inquiry, however, is limited to matters which may fairly raise a question as to whether the applicant meets these qualifications. Here the question arises as to the application to the facts submitted of the criterion that the "proposed plan of business of the applicant is unfair, unjust or inequitable. . . ." It is our conclusion that this criterion for refusal does not apply to a private dispute which involves contractual obligations such as those alleged here. The applicant may have a valid legal defense to the former employer's allegation. See *Herman v. Dixon,* 393 Pa. 33, 141 A. 2d 576 (1958). If so, the Securities Commission should not be placed in the position of denying registration for a reason which might later be rejected by the courts in a suit between the applicant and his former employer.

The Commission is not empowered to enforce the contractual obligations of any parties; and, therefore, it cannot refuse registration of an applicant on the basis of a breached or allegedly breached employment contract. The contract is one between individuals and the enforcement thereof, disputes arising thereunder and defenses thereto are matters which are placed by law within the jurisdiction of, and must be decided by, the courts of the Commonwealth.

The good repute of an individual consists of many things, but any implication of ill repute based upon a broken contract should not be considered by the Commission until the issue has been determined by the Courts.

You are therefore informed that if the application for registration is proper in all respects except for an objection based upon an employment contract between the applicant for registration as a securities dealer and a former employer, the applicant may be registered.

Very truly yours,

DEPARTMENT OF JUSTICE,

FREDERIC G. ANTOUN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 164

Schools—Audit of accounts and records—Conflict of statutes—Auditor General—Costs of audit program—Section 403 of The Fiscal Code—Section 2553 of the Public School Code of 1949.

The Department of the Auditor General has the power and duty to audit the accounts and records of every school district within the Commonwealth under § 403 of The Fiscal Code, the Act of April 9, 1929, P. L. 897, and the audit power may be exercised as far as may be necessary to satisfy the Auditor General that Commonwealth moneys have been or are being expended in accordance with law and the purposes for which it was paid.

The audit power of the Department of the Auditor General has not been superseded or impliedly repealed by § 2553 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as added by the Act of July 13, 1957, P. L. 897.

The costs of instituting and conducting such an audit program may be charged to the General Fund appropriation made to the Department of Auditor General.

Harrisburg, Pa., December 1, 1958.

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

Sir: We have your request to be advised concerning the following questions:

1. Does the Department of the Auditor General presently have the power and the duty to audit the accounts and records of school districts within the Commonwealth?

A. If such a power and duty did exist:

(1) What was its scope?

(2) Was it superseded or impliedly repealed either by Article XXIV of the Public School Code of 1949[1] or by § 2553[2] thereof?

2. May the costs of instituting and conducting such an audit program be charged to the General Fund appropriation made to the Department of the Auditor General?

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[1] Act of March 10, 1949, P. L. 30, §§ 2401 to 2462, as amended, 24 P. S. §§ 24-2401 to 24-2462.

[2] Added by the Act of July 13, 1957, P. L. 897, 24 P. S. § 25-2553.

Section 403 of The Fiscal Code of 1929[3] empowered the Department of the Auditor General[4] to audit public agencies receiving State aid as follows:

> "The Department of the Auditor General shall have the power, and its duty shall be, to audit the accounts and records of every * * * public agency, receiving an appropriation of money, payable out of any fund in the State Treasury, * * * 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. * * *"

Although the question whether a school district is a "public agency" within § 403 of The Fiscal Code, supra, has never been judicially determined, the reports of the appellate courts of Pennsylvania abound with holdings that school districts are public agencies generally. For instance, in *Wilkinsburg Borough v. Wilkinsburg Borough School District*[5], Mr. Justice Horace Stern, speaking for an unanimous Supreme Court, stated (p. 257):

> "While a school district is not, of course, an independent sovereignty, it does constitute a body corporate, a quasi-municipal corporation, *which is an agency of the Commonwealth for the performance of prescribed governmental functions,* being created and maintained for the sole purpose of administering the Commonwealth's system of public education * * *." (Emphasis supplied)

Similarly, in *Slippery Rock Area Joint School System v. Franklin Township School District*[6], the Supreme Court filed an opinion *per curiam* which states in part (p. 442):

> "Within that school system, a school district is an *agency of the State,* created by law for the purpose of promoting education, deriving all of its powers from the statute, and discharging only such duties as are imposed upon it by statute. The school district is an *agency of the State* charged with the sovereign duty of building and maintaining the schools within its particular territory and with the further duty of securing, managing, and spending the necessary funds in the interest of public education. * * *" (Emphasis supplied)

It might be argued that a school district is not a "public agency" within § 403 of The Fiscal Code, supra, since it does not receive an "appropriation" of money out of any fund in the State Treasury.

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[3] Act of April 9, 1929, P. L. 343, 72 P. S. § 403.

[4] Hereinafter called "Department."

[5] 365 Pa. 254, 74 A. 2d 138 (1950).

[6] 389 Pa. 435, 133 A. 2d 848 (1957).

The ground for this argument would be that the appropriation is made to the Department of Public Instruction, which department disburses the appropriated funds to the school district in accordance with legal requirements, and not to the school district. This argument, while it has technical appeal, must succumb to the reality of the fact that Commonwealth moneys are being paid to school districts by an arm or agency of the Commonwealth. We recognize that the Department of Public Instruction is much more than a mere conduit through which Commonwealth monies move to school districts. However, the interposition of a State agency, here the Department of Public Instruction, between the State Treasury as the source and the school districts as the recipients of the funds, does not convince us that the status of the funds as an appropriation is changed thereby. Therefore, we conclude that Commonwealth moneys received by school districts from the Department of Public Instruction constitute an "appropriation of money, payable out of any fund in the State Treasury" within § 403 of The Fiscal Code, supra.

Further support for this conclusion is to be found in our holding in a somewhat analogous situation reached in Formal Opinion No. 684[7], dated April 12, 1957, where we ruled that under § 403 of The Fiscal Code, supra, the Department is empowered to audit the accounts and records of firemen's relief fund associations which receive moneys derived from the premium tax on foreign fire insurance companies, and, in the course of the opinion, stated:

> "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 * * * [T]he relief fund associations and not the municipalities are, in fact, the recipients of such funds."

On the basis of these authorities and reasoning we conclude that school districts are public agencies receiving appropriations of money from the State Treasury within the meaning of § 403 of The Fiscal Code, supra, and that the Department has the power and since 1929,

[7] 1957 Op. Atty. Gen. 20.

unless superseded or repealed, has had the duty to audit the accounts and records of school districts within the Commonwealth.

The scope of the audit power is broadly defined in § 403 of The Fiscal Code, supra, where it provides that the Department shall audit "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." The plain meaning of this language is that the audit power may not be used to audit all aspects of the financial operations of school districts. There is no power, for instance, to audit for the purpose of satisfying the Department that *local* moneys were expended or are being expended for the purposes for which the monies came into the hands of the districts. This is the function of the local auditors, as hereinafter discussed. The extent of the Department's power is to audit as much of a school district's accounts and records as is necessary for the purpose of satisfying itself that *Commonwealth* moneys were expended or are being expended for proper purposes.

We must also point out, with regard to the scope of the audit power, if such power presently exists, that the Department's duty is to audit *every* school district in the Commonwealth. The performance of the statutory duty to audit may not be limited to auditing selected school districts or districts chosen at random. Such an audit program would be in direct contravention of § 403 of The Fiscal Code, supra.

We come now to the question whether subsequent legislation has superseded or impliedly repealed this power and duty of the Department to audit school districts. We shall first consider the effect of Article XXIV of the Public School Code of 1949, supra.

Article XXIV provides for local auditing of school finances. The relevant section of the Article is § 2401[8] which states by whom each school district's accounts and finances shall be audited: for example, depending upon the classification of the district, audits shall be conducted by the school controller, the auditor of the municipality, a certified public accountant, court-appointed auditors, or county auditors. The manifest purpose of Article XXIV is to require local auditing of school districts for the protection of the district. Such audits, however, fail to protect the interests of the Commonwealth which annually distributes huge sums of money to the school districts for the support of the public schools. For its own protection,

[8] Supra, 24 P. S. § 24-2401.

the Commonwealth should have the power to audit school districts which receive such moneys to insure that such funds are spent according to law. The power to audit is of such vital importance that it would be unreasonable to conclude that by providing for local auditing the Legislature was expressing an intention to supersede or impliedly repeal the power granted to the Department in The Fiscal Code, supra. Moreover, repeals by implication are not favored in the law and will not be recognized in the absence of irreconcilable conflict between statutes embracing the same subject[9]. We are unable to find any positive repugnancy between Article XXIV of the Public School Code of 1949, supra, and § 403 of The Fiscal Code, supra. Any apparent supersession or implied repealer is reconciled by construing the statutes as providing for separate audits designed to protect the respective interests of the school districts and the Commonwealth. The two enactments, thus viewed, are perfectly capable of standing together.

We next consider the effect of § 2553 of the Public School Code of 1949, supra, on the audit power of the Auditor General as granted by § 403 of The Fiscal Code, supra.

Section 2553, as added to the Public School Code of 1949 by the Act of July 13, 1957, supra, provides:

> "Audits and Verifications of Rights to Reimbursements.—The comptroller of the Department of Public Instruction shall perform regular audits and field audits and, in his discretion, may perform special audits and field audits of accounts of all school districts, examining all records of receipts and expenditures and such facilities, supplies and materials as may be necessary to verify records of receipts and expenditures, and *shall examine and verify allocation of receipts and expenditures among and within programs and reimbursement accounts.* The department shall require each school district to submit to the department all of its records bearing on its rights to reimbursements on uniform forms prescribed by the department, and the department shall require each school district to make available all pertinent records and supporting data or materials to the comptroller." (Emphasis supplied)

The legal issue here raised sharply differs from that raised as to Article XXIV. There it was a question whether the Legislature was in effect *releasing* the state's audit power over school districts and delegating it to local auditors. Here the question is whether the

[9] *Petition of H. C. Frick Coke Co.*, 352 Pa. 269, 42 A. 2d 532 (1945).

Legislature is in effect *transferring* the Commonwealth's audit power over school districts from the Department to the Comptroller of the Department of Public Instruction.

The Act of July 13, 1957, P. L. 897, supra, which added § 2553 to the Public School Code of 1949, was passed by the General Assembly as a companion measure to the Act of July 13, 1957, P. L. 864, which amended various sections of Article XXV of the Public School Code of 1949. Among other things, the latter act changed the basis of the maximum payment on account of instruction from a flat rate to "actual instruction expense per teaching unit" up to a stated limit. With the introduction of the concept of cost into the reimbursement structure, it was evident that it would be necessary to provide some assistance to the Department of Public Instruction in making and verifying the reimbursement computations. The latter act also provided that the submission of reports from school districts and joint school boards be checked at the source in the field. The obvious reason the function was given to the Comptroller of the Department of Public Instruction to "examine and verify allocations of receipts and expenditures among and within programs and reimbursement accounts" is that the auditing function is intimately connected and bound up with the educational programs and activities of the school districts. Not only do school audits assure honesty in handling public money and provide the public with a record of how and for what its money was spent, but school audits (1) furnish information to school officials for determining educational policies, (2) supply data which will aid school officials in measuring the efficiency and results of their policies and activities and (3) assist school officials in measuring the efficiency of school employees. In addition, successful auditing of school districts requires detailed knowledge of and expertness with the manifold school laws which establish various formula for reimbursement for such things as instruction, extension education, extension recreation, special education of handicapped pupils, homebound instruction, tuition of non-resident pupils, vocational education, rentals and sinking fund payments, driver education, medical, dental and nurse services, and aid to financially handicapped districts. The Legislature undoubtedly sought to capitalize on the proficiency of the Comptroller of the Department of Public Instruction to perform regular and systematic school audits.

We thus face squarely the question whether the Legislature, by delegating the responsibility of conducting audits and verifications of rights to reimbursements to the Comptroller of the Department

of Public Instruction thereby superseded or impliedly repealed the power and duty of the Department of the Auditor General to audit the accounts and records of school districts, and, in effect, transferred the power and duty to the Department of Public Instruction. On the basis of the reasoning and conclusion of Official Opinion No. 55[10], dated January 7, 1958, we conclude that it did not.

The question involved in Official Opinion No. 55 was whether a 1957 amendment to The Fiscal Code[11], removing language which excepted the State Workmen's Insurance Board from the auditing duties of the Department, repealed by implication a 1933 statute[12] which imposed a duty upon the Insurance Department to make an annual examination and audit of the State Workmen's Insurance Fund.

In concluding that the 1957 amendment did not repeal the 1933 statute by implication, Official Opinion No. 55 stated:

> "There exists no irreconcilable conflict between § 402 of The Fiscal Code, as amended by the Act No. 115, and § 1 of the Act of May 1, 1933, P. L. 102. The two statutes would seemingly require two audits of the State Workmen's Insurance Fund. A requirement that two audits be made of a specific fund does not constitute a conflict in law.
>
> "A repeal by implication cannot be inferred on the grounds that the Legislature would not intentionally impose similar or duplicating duties upon two separate governmental agencies. The Legislature may very properly have assumed that the audit performed by the Department of the Auditor General and the examination and audit performed by the Insurance Department would generally serve two distinct purposes. The examination and audit conducted by the Insurance Department, pursuant to the express provisions of the Act of May 1, 1933, P. L. 102, is a complete examination into all of the policies, plans and procedures of the State Workmen's Insurance Board in its management of the fund from the point of view of its insurance aspects and the propriety and soundness of its investments. The audit conducted by the Department of the Auditor General may be as comprehensive as the Department of the Auditor General deems proper to fulfill the duties of law imposed upon the Department by § 402 of The Fiscal Code. The Legislature could reasonably have believed that these two audits would not generally amount to duplication of effort, and they further could have believed that any incidental duplication which

[10] 1958 Op. Atty. Gen. 15.

[11] The Act of May 31, 1957, P. L. 237, 72 P. S. § 402.

[12] Act of May 1, 1933, P. L. 102, 77 P. S. § 345.

> might occur would be harmless in comparison to the advantages to be gained by having the affairs and activities of the State Workmen's Insurance Fund audited annually by the Department of the Auditor General and examined and audited by the Insurance Department."

Applying this language to the instant situation, we conclude that the audit power of the Department has not been superseded or impliedly repealed by § 2553 of The Public School Code of 1949, supra, since even though two audits of every school district would seemingly be required, such a requirement does not constitute an irreconcilable conflict in law indicating supersession or repeal by implication. Although the audit to be conducted by the Comptroller of the Department of Public Instruction would seem to cover all items of receipts and expenditures and all programs and activities that are auditable, the "Legislature may very properly have assumed that the audit performed by the Department of the Auditor General and the examination and audit performed by the * * * [Comptroller of the Department of Public Instruction] would generally serve two distinct purposes". Strong indeed would the implication have to be to oust a constitutional officer of his constitutional statutory and traditional duties, even though such duties are largely those delegated by statute.

The audit to be conducted under § 2553 of The Public School Code of 1949, supra, is a comprehensive audit which conceivably leaves little residue of financial operations of a school district not audited. Independently conducted, complete audits of school districts by the Department, therefore, might involve extensive duplication of effort with resultant waste of public assets and much confusion in case of conflicting requirements as to records to be kept and reports to be made. We suggest that the Legislature has set forth a clear mandate, germane to the present situation, in § 501 of The Administrative Code of 1929[13], which provides in relevant part:

> "The several administrative departments * * * shall devise a practical and working basis for cooperation and coordination of work, eliminating, duplicating and overlapping of functions, and shall, so far as practical, cooperate with each other in the use of employes, land, buildings, quarters, facilities, and equipment. * * *"

Under this mandate, we advise that the Department of the Auditor General cooperate with the Department of Public Instruction as far as possible by coordinating auditing work, eliminating duplication

[13] Act of April 9, 1929, P. L. 177, 71 P. S. § 181.

and overlapping of functions, and, above all, by avoiding the appearance of undue harassment by the Commonwealth of local school districts. To the extent that these potential evils of waste, confusion, duplication, overlapping of functions and harassment of school districts cannot be shunned, the overall problem of school district auditing might well be reconsidered by the Legislature with a view to amending the law to provide a solution.

We turn now to a consideration of your final question. The audit program of school districts which the Department contemplates is a matter concerning the administration of the Department. Section 2 of the General Appropriation Act of 1957[14] specifically appropriated to the Department for the current biennium the sum of $2,730,000.00 for the salaries, wages and all other expenses necessary for "Administration of the Department of the Auditor General as provided in sections 706 and 1001 of The Administrative Code of 1929". Section 1001[15] of The Administrative Code of 1929, supra, provides that "the Department of the Auditor General shall exercise its powers and perform its duties as provided in the Fiscal Code and other applicable laws". We conclude that the costs of instituting and conducting an audit program of school districts may be charged to the General Fund appropriation made to the Department.

It is, therefore, our opinion and you are accordingly advised that: (1) the Department of the Auditor General has the power and the duty to audit the accounts and records of every school district within the Commonwealth; (2) the audit power may be exercised as far as may be necessary to satisfy the Auditor General that Commonwealth moneys have been or are being expended in accordance with law and the purposes for which it was paid; and (3) the costs of instituting and conducting such an audit program may be charged to the General Fund appropriation made to the Department of the Auditor General.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN, III,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

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[14] Appropriation Acts, Session of 1957, Act No. 95-A.
[15] 71 P. S. § 311.

OFFICIAL OPINION No. 165

Rabies control program—Rules and regulations regarding vaccination and immunization of animals—Jurisdiction—Disease Prevention and Control Law of 1955.

Under § 16(a)(6) of the Disease Prevention and Control Law of 1955, the Act of April 23, 1956, P. L. (1955) 1510, the Advisory Health Board may promulgate rules and regulations relative to the immunization and vaccination of animals in furtherance of a proposed rabies control program; however, the Department of Agriculture also has responsibilities in this area and the two departments should consult in order to avoid any conflict.

Harrisburg, Pa., December 5, 1958.

Honorable C. L. Wilbar, Jr., Secretary of Health, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for advice whether the Department of Health may promulgate rules and regulations with regard to the vaccination and immunization of animals in connection with a proposed Rabies Control program. In that request you refer to Informal Opinion No. 1487, dated April 3, 1956, in which this department advised as follows:

> "* * * the Department of Health may inaugurate a rabies control program which does not in any way interfere with the smooth functioning of any program which the Department of Agriculture may inaugurate under its powers of quarantining, and that it cannot institute a program which will operate upon the dog population."

Subsequent to this advice, on April 23, 1956, the Disease Prevention and Control Law of 1955[1] was enacted. Section 16(a)(6) of this act gives the Advisory Health Board the power to issue rules and regulations with respect to the immunization and vaccination of persons and animals.

In so far as Informal Opinion No. 1487 advised your department that it had no power to vaccinate dogs as part of a Rabies Control program, it is superseded by the Disease Prevention and Control Law of 1955, supra. Nevertheless, the Department of Agriculture, as was stated in that opinion, has the power to establish quarantine and

[1] The Act of April 23, 1956, P. L. (1955) 1510, 35 P. S. §§ 521.1-521.21.

provide for the muzzling of dogs in areas of quarantine on account of the prevalence of rabies[2].

Thus, both your department and the Department of Agriculture have jurisdiction in so far as the control of rabies in the dog population is concerned. This being the case, it is advisable for your department, prior to inaugurating a Rabies Control program, to consult with the Department of Agriculture to avoid any possible areas of conflict.

We are of the opinion and you are, therefore, accordingly advised that the Advisory Health Board may promulgate rules and regulations relative to the immunization and vaccination of animals in furtherance of the Rabies Control program. Further, you are advised that prior to the promulgation of such rules and regulations, it is advisable to consult with the Department of Agriculture to avoid possible area of conflict, since there seems to be a division of responsibility in this area.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. COHEN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

OFFICIAL OPINION No. 166

Silicosis control and prevention program—Department of Health—Authority to enter coal mines and take dust counts—Section 2102 of The Administrative Code of 1929—X-rays of coal miners—Confidential information—Section 15 of the Disease Prevention and Control Law of 1955.

The Department of Health has the authority to inaugurate a silicosis control and prevention program and that, for this purpose, it may enter coal mines and take dust counts under § 2102 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended.

Under the provisions of § 15 of the Disease Prevention and Control Law of 1955, the Act of April 23, 1956, P. L. (1955) 1510, the results of X-rays of coal miners are confidential and protected from voluntary disclosure.

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[2] The Act of April 17, 1929, P. L. 533, § 1 et seq., 3 P. S. § 341 et seq.; the Act of March 27, 1903, P. L. 100, § 1 et seq., 3 P. S. § 542 et seq.

Harrisburg, Pa., December 5, 1958.

Honorable C. L. Wilbar, Jr., Secretary of Health, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for advice whether your department may enter coal mines to take dust counts in furtherance of a silicosis control and prevention program.[1] You further request advice whether X-rays of coal miners taken by your department for the purpose of the aforementioned program must be kept confidential.

The purpose of the aforementioned program is to collect statistical data relative to the causal connection between the amount of dust in coal mines and silicosis. The Department of Health wishes such data in order to determine whether adequate standards can be developed to prevent the high incidence of silicosis in coal miners.

Section 2102 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 532, gives the Department of Health the following power:

> "(a) To protect the health of the people of this Commonwealth, and to determine and employ the most efficient and practical means for the prevention and suppression of disease;
>
> "(b) To cause examination to be made of nuisances, or questions affecting the security of life and health, in any locality, and, for that purpose, without fee or hindrance, to enter, examine and survey all grounds, vehicles, apartments, buildings, and places, within the Commonwealth, and all persons, authorized by the department to enter, examine and survey such grounds, vehicles, apartments, buildings and places, shall have the powers and authority conferred by law upon constables;"

Section 16 (a) (11) and (12) of the Disease Prevention and Control Law of 1955, the Act of April 23, 1956, P. L. (1955) 1510, 35 P. S. §§ 521.1 to 521.21, provides as follows:

> "(a) The [Advisory Health] Board may issue rules and regulations with regard to the following:
>
> * * * * * * *

[1] Your request for advice refers to the fact that Leon Ehrlich, Deputy Attorney General, has advised the Department of Mines and Minerals that any entrance into the coal mines for the study of disease should be undertaken by the Health Department and not by the Department of Mines.

"(11) the prevention and control of non-communicable diseases; and

"(12) any other matters it may deem advisable for the prevention and control of disease and for carrying out the provisions and purposes of this act."

The provisions of § 2102 of The Administrative Code of 1929, supra, confer ample authority upon your department to enter any of the named places within this Commonwealth for the purpose of examining such places when the health of the public is involved. This authority to enter "grounds" and "places" certainly extends to entering coal mines.[2]

Under the provisions of the Disease Prevention and Control Law of 1955, supra, the Advisory Health Board may make rules and regulations regarding the control of non-communicable diseases. Thus, your department may validly institute a silicosis control program and utilize the powers given to it to enter mines by The Administrative Code of 1929, supra.

We are of the opinion that the inauguration of a silicosis control program may be predicated upon the authority of the Disease Prevention and Control Law of 1955, supra, and that the provisions of § 2102 of The Administrative Code of 1929, supra, are authority for your department to enter coal mines.

Since the authority to inaugurate such a program will be based on the Disease Prevention and Control Law of 1955, supra, the provisions of § 15 of that act with regard to the confidentiality of information obtained under the authority of that act extend to the information obtained from the X-ray examination of coal miners. This section provides as follows:

"State and local health authorities may not disclose reports of diseases, any records maintained as a result of any action taken in consequence of such reports, or any other records maintained pursuant to this act or any regulations, to any person who is not a member of the department or of a local board or department of health, except where necessary to carry out the purposes of this act. State and local health authorities may permit the use of data contained in disease reports and other records, maintained pursuant to this act, or any regulation, for research purposes, subject to strict

[2] We do not believe that the principle of ejusdem generis in any way requires a different conclusion.

supervision by the health authorities to insure that the use of the reports and records is limited to the specific research purposes."

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

(1) Under the provisions of the Disease Prevention and Control Law of 1955, supra, your department may institute a silicosis prevention and control program;

(2) Your department may make provision for taking dust counts in coal mines, and may use the authority conferred in § 2102 of The Administrative Code of 1929 to enter coal mines for that purpose; and

(3) Data received by your department from X-ray examinations of coal miners is confidential and protected from voluntary disclosure[3] by § 15 of the Disease Prevention and Control Law of 1955 except as provided in that section.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. COHEN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

[3] The Act does not, of course, immunize this data from judicial process. Only voluntary disclosure is prohibited.

MEMORANDUM OPINIONS
1958

MEMORANDUM OPINION No. 10

Deeds—Coal and mining rights exception and reservation—Erroneous name reference to land tract—Validity.

A deed to the Commonwealth excepting and reserving the coal and mining rights in a so-called "James Martin" tract, where the correct name is "John Martin" tract, did not invalidate the reservation and the deed effectively excepted the coal actually located in the "John Martin" tract.

Harrisburg, Pa., February 17, 1958.

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

Sir: You have asked this department's advice concerning the effect of a conveyance of coal underlying a tract of game land owned by the Commonwealth in Reade Township, Cambria County.

You state that the deed recorded March 17, 1943, vested the title in the Commonwealth subject to an exception and reservation set out in the deed, as follows:

> "Excepting and reserving the coal and mining rights conveyed to Bellefield Coal & Coke Company and H. L. Binnix, as appears by two deeds, recorded in Cambria County, in Deed Book, Volume 454, page 3, and Deed Book Volume 439, page 526, and two agreements, recorded in said County, in Deed Book Volume 454, pages 520 and 522."

The areas referred to in the two agreements recorded in Cambria County Deed Book, volume 454, pages 520 and 522, and the deed recorded in Cambria County Deed Book, volume 454, page 3 referred to in the above exception and reservation are not involved in your question, but the deed, dated October 5, 1931, and recorded October 8, 1931 in Cambria County Deed Book, volume 439, page 526, conveys the estate in the "E" seam of coal "in, under and upon" 30 acres, more or less, "known as James Martin" and designates the area, as follows:

> "Also all the bituminous coal in the geological bed or seam known as the 'E' seam in, under and upon the following described:
>
> * * * * * * *
>
> "Tract in Reade Twp., known as James Martin containing 30 acres, more or less."

You have determined that there is no warrant officially known as "James Martin" at the location, but the correct name is "John Martin" although for some 20 years, or more, the tract was assessed as "James Martin" and the erroneous name of "James Martin" was carried into the deed, from the assessment record.

You desire to have this department's advice on the validity of the conveyance by a predecessor in title to the Commonwealth's grantor of the "E" seam of coal in the John Martin Tract when the coal deed refers to the "James Martin" Tract.

It is this department's opinion that (1) since the facts, as stated by you, disclose that the particular coal has been assessed as in the "James Martin" warrant for some 20 years or more, (2) since you have determined that the particular warrant which is properly known as the "John Martin" warrant has been referred to locally, by custom, as the "James Martin" warrant and (3) because of the language in the coal deed quoted above, the Commonwealth was on sufficient notice at the time the conveyance was made to it in 1943 that the 30 acres, more or less, of coal in the warrant had been excepted and reserved before the Commonwealth took title and that the tract in Reade Township known as "James Martin" was and is in fact the same warrant which has a proper name of "John Martin".

It is our further opinion, and you are accordingly advised, that under the facts related by you, the deed to the Commonwealth excepting and reserving the coal and mining rights, as recited in Deed Book, volume 439, page 526, effectively excepted 30 acres of coal, more or less, actually located in the "John Martin" warrant even though the coal was designated as lying in the tract known as "James Martin".

Very truly yours,

DEPARTMENT OF JUSTICE,

RAYMOND C. MILLER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

MEMORANDUM OPINION No. 11

School districts—Construction projects—Requirement for Commonwealth reimbursement—Sections 2571 to 2580 of the Public School Code of 1949, as amended.

Under §§ 2571 to 2580 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended by the Act of March 22, 1956, P. L. (1955) 1315, a letter of approval as to the form of a lease does not constitute the approval required by law to make a school construction project eligible for reimbursement and that any rental payment made by a school district prior to the approval for reimbursement purposes by the Department of Public Instruction may not be reimbursed from Commonwealth funds.

Harrisburg, Pa., May 16, 1958.

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

Sir: You have requested our advice as to the present status of the ruling in our Formal Opinion No. 648, dated May 6, 1954, 1953-54 Op. Atty. Gen. 44.

In that opinion, we advised the then Superintendent of Public Instruction that he might still approve additional projects for school construction where the state limit on reimbursement had been reached but could not approve the leases between the school districts and the authority since approval of the lease itself would render the project reimbursable and cause the limit to be exceeded.

You are now presented with the following situation: a school building project was approved by the Department. The lease between a school district and an area school authority was submitted to the Department for review. The Department approved the *form* of the agreement of lease, noting that reimbursement would be extended upon approval by the Department of an executed copy of the agreement of lease when the lease came up in its turn for approval. Approval of this executed lease for reimbursement purposes subsequently was given. Prior to this approval but after the approval of the form of the lease, the school district made a rental payment under the lease. The district now claims that this payment is reimbursable. You ask the following questions:

1. Is the rental payment made prior to the approval for reimbursement purposes nevertheless reimbursable?

2. Is a letter of approval as to form only, with a specific notation that the project is approved but not the Agreement to Lease itself, sufficient to comply with the Act of March 22, 1956, P. L. 1315, 24 P. S. §§ 25-2572 to 25-2580?

3. How shall any other cases arising under similar circumstances, i.e., where the project has been approved but the Agreement to Lease has not been approved for reimbursement, be disposed of?

Since we wrote Formal Opinion No. 648, § 2511.1[1] (relied upon therein) has been repealed by the Act of March 22, 1956, P. L. (1955) 1315; and the same act enacted in lieu thereof §§ 2571 to 2580 of the Public School Code, Act of March 10, 1949, P. L. 30, 24 P. S. §§ 25-2571 to 25-2580. Section 2575 of the Code, supra, 24 P. S. § 25-2575, provides that the Commonwealth shall make annual payments to each school district on account of buildings for which the lease is approved subsequent to March 22, 1956. Section 2576 of the Code, supra, 24 P. S. § 25-2576, provides that no payment shall be made to any school district unless and until such lease is approved by the Department of Public Instruction. Section 2577 of the Code, 24 P. S. § 25-2577, sets forth the monetary limitations on approval of projects for reimbursement purposes and further provides that the Department of Public Instruction shall determine reimbursement eligibility of all projects submitted for approval prior to March 22, 1956, in the order of the date of filing of applications for project approval with the Department.

The provisions of old § 2511.1, as amended, thus are essentially carried over into the new §§ 2571 to 2580.

Therefore, you are advised as follows:

1. The ruling in our Formal Opinion No. 648 and the provisions of §§ 2571 to 2580 of the Public School Code, supra, 24 P. S. §§ 25-2571 to 25-2580, provide that the Commonwealth can only pay reimbursement after the school district has entered into a lease approved by the Department of Public Instruction. It adds that when the lease is so approved the project then becomes a reimbursable project from the date of approval and that only those payments that are made subsequent to the date of the approval of the lease are reimbursable. Since the payment of September 15, 1956, was made prior to the date

[1] Prior to repeal, this section was amended by the Acts of January 21, 1952, P. L. 2195, August 21, 1953, P. L. 1223, August 26, 1953, P. L. 1466, and August 26, 1953, P. L. 1471.

of the approval of the lease on February 4, 1957, such payment is not reimbursable.

2. While there is nothing in the Code which requires your approval of the form of the lease, there is nothing which prohibits it either; and it may be considered good practice to review the form prior to execution on order to achieve some uniformity among the various districts. Nevertheless, your letter approving the form of the lease in question specifically calls attention to the fact that the rentals will become reimbursable when an executed copy of the lease is approved and can in no way be considered an approval for reimbursement purposes. Since nothing in the Act of March 22, 1956, supra, or in Formal Opinion No. 648 requires approval of the form of lease a letter of approval as to form only is not "sufficient" to comply with the statute. That is, such a letter simply represents an added aspect of the Department's review and has nothing to do with reimbursement to the school district.

3. All other cases arising under similar circumstances may be disposed of as is now done or without making any specific approval of the *form* of lease.

Very truly yours,

DEPARTMENT OF JUSTICE,

ELMER T. BOLLA,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

MEMORANDUM OPINION No. 12

Mental health services program—Situs of administrative offices of evaluation center at Morganza—Official Opinion No. 59 clarified.

Official Opinion No. 59, 1958 Op. Atty. Gen. 26, held that although the General Appropriation Act of 1957 had designated funds for a welfare evaluation center at Morganza (because of insurmountable difficulties in utilizing the actual site at Morganza) it would be proper to locate the treatment facilities in nearby Pittsburgh. The same difficulties do not exist as to the administrative aspects of the center and because the entire operation is an integral part of the functions of Morganza, these administrative functions should all be centered at the existing State institution in Morganza.

Harrisburg, Pa., May 28, 1958.

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

Sir: You have requested a clarification of our Official Opinion No. 59, 1958 Op. Atty. Gen. 26, wherein we stated that "it would be proper for the Department of Welfare to establish a welfare evaluation center in the City of Pittsburgh for the rehabilitation and treatment of juvenile delinquents and children with mental or behavior problems." You now inquire as to the proper location of the administrative headquarters of this operation, i.e., should it be at the site of the evaluation center in Pittsburgh or at the site of the Pennsylvania Training School at Morganza.

In Official Opinion No. 59 we noted that the General Appropriation Act of 1957, Act No. 95-A, approved July 19, 1957 spoke of the establishment of an evaluation center at Morganza. However, because of lack of space and the lack of qualified professional personnel at Morganza, we stated that it would be possible to geographically locate the treatment facilities in Pittsburgh where there would be adequate space, personnel and a proximity to the patients to be serviced. We considered in our opinion the location of the treatment facilities themselves and that opinion was based on the peculiar problems that pertained to such facilities.

You now inquire about the administrative headquarters and inform us that the problems that pertained to the treatment facilities do not arise. Our Official Opinion No. 59 contemplated and it is our opinion now that every aspect of the center's operation must be administered through the Pennsylvania Training School at Morganza and under the superintendence of that institution. The evaluation center's treatment facilities may be geographically separated from Morganza; but if the administrative headquarters of the center can be located at Morganza itself, it should be so located. This means that, subject to the approval of your department, all personnel of the evaluation center will be employed through the existing institution at Morganza and that promotions and other personnel action will be similarly handled. Purchases will be made, vouchers prepared and budgeting and accounting operations will be conducted at the existing institution. The operational head of the evaluation center will have his offices at Morganza.

We hold, therefore, that even though the designation in the General Appropriation Act is deemed directory, every effort should be made to locate the administrative headquarters and management at Morganza itself. The combined effect of this opinion and Official Opinion No. 59 should be the establishment of a welfare evaluation center which is, in essence, a branch operation of the existing institution at Morganza.

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

MEMORANDUM OPINION No. 13

Packages—Individually wrapped meat contained in bulk container—Net weight marking—The Commodity Law.

Bulk shipments or deliveries of meat from wholesalers or packers to retailers, consisting of one or more pieces of meat in individual cellophane or like-type wrappings, each piece of meat, so individually wrapped or contained, constitutes a package under the provisions of the Commodity Law, the Act of July 24, 1913, P. L. 965, as amended, and must be separately marked as to net weight content.

Harrisburg, Pa., July 11, 1958.

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

Madam: You ask if wholesalers of meat and meat products, under the provisions of the Act of July 24, 1913, P. L. 965, as amended, 76 P. S. §§ 241 to 250, known as the Commodity Law, are required to mark the weight on each individual piece of packaged meat contained in a bulk container so long as the bulk container is plainly marked as to the aggregate net weight of the contents.

You cite as an example the practice of a packing company shipping or delivering to retailers various sized bulk boxes, each containing from two to four pieces of ham, each piece ranging in weight from eight

to twenty pounds, without marking the net weight on each piece of ham, but marking the net weight of the aggregate net weight on the bulk container.

Official Opinion No. 99 of the Department of Justice, 1958 Op. Atty. Gen. 138, held that the net weight of meat and meat products, such as bologna and ham butts, when contained in closed cellophane or like-type wrappings, must be plainly marked on each package if the processor, wholesaler, packer or other person makes sale or distribution of them in package form to a retailer. You now ask if the contents of the bulk container cannot in itself be considered as a package and if there has been a sufficient compliance with the provisions of the Commodity Law as long as the bulk container is plainly marked as to the net weight of the contents.

The word "package" is defined for purposes of the Commodity Law, as follows (76 P. S. § 241):

> "The word 'package', as used in this act, shall mean everything containing one or more than one unit of any commodity, tied or bound together, or put up in box, bag, pack, bundle, container, bottle, jar, can or any other form of receptacle or vessel, not considered as an approved measure, except cases, cartons, crates, bundles or bales used for bulk shipping or storage: Provided, That enclosed packages are marked as to weight, measure or numerical count."

The proviso in this definition of the word "package", in our opinion, supplies the answer to your question. In other words, as long as a bulk shipment of meat or meat products contains a number of packages of meat or meat products, each enclosed package must be marked as to content in terms of net weight.

A whole or a portion of ham, if wrapped in the customary manner in a sealed cellophane or like-type wrapping as is used in present day sales practice, would constitute a package, under the interpretation of the Commodity Law as expressed in Official Opinion No. 99, and if one or several such packages is included in a bulk shipment, each individual package must be marked as to net weight content.

It is our opinion, therefore, and you are accordingly advised that in bulk shipments or deliveries of meat from wholesalers or packers to retailers, consisting of one or more pieces of meat, in individual cellophane or like-type wrappings, each piece of meat, so individually wrapped or contained, constitutes a package under the provisions of

the Act of July 24, 1913, P. L. 965, as amended, 76 P. S. §§ 241 to 250 and must be separately marked as to net weight content and that the requirements of the Commodity Law are not met by marking the aggregate net weight of the several pieces of packaged meat on the bulk container in which the several packages are enclosed.

Yours very truly,

DEPARTMENT OF JUSTICE,

RAYMOND C. MILLER,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

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