

Commonwealth of Pennsylvania

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OPINIONS

OF THE

ATTORNEY GENERAL

OF

Pennsylvania

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1959-1960

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ANNE X. ALPERN

*Attorney General*

## **OFFICIAL OPINIONS**

**1959-1960**

OFFICIAL OPINION No. 167

*Board of Finance and Revenue—Jurisdiction to consider refunds on Commonwealth checks issued more than seven years ago.*

The Board of Finance and Revenue has no jurisdiction to consider applications for refunds or replacement checks involving Commonwealth checks issued more than seven years prior to the application.

Harrisburg, Pa., January 19, 1959.

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

Sir: We have your request to be advised as to whether applications for refund involving Commonwealth checks issued more than seven years ago may be approved by the Board of Finance and Revenue, and if so, what procedure should be followed.

The Act of July 12, 1935, P. L. 996, 72 P. S. §§ 309-311, provides for the issue of replacement checks in lieu of checks more than two years old and then further provides (Section 2, 72 P. S. Section 310):

“No replacement check shall hereafter be issued for the payment of any claim, where the original check has not been presented to the Treasury Department for the payment within a period of seven years from the date of issue; and all claims against the Commonwealth, for which checks have been outstanding for this period, shall be considered paid. The period of seven years is hereby declared to be the longest period of time during which a check issued by the Treasury Department may be honored, and all sums of money held or appropriated for the payment of such checks not presented within said period are hereby escheated to the Commonwealth.”

Since the sums appropriated for the payment of checks not presented within seven years have been “escheated to the Commonwealth,” it must then be determined whether Section 504 of The Fiscal Code, the Act of April 9, 1929, P. L. 343, as amended, 72 P. S. § 504, permits the Board of Finance and Revenue to make a refund of such sums of money. That section provides that “\* \* \* any moneys escheatable under the provisions of any act of Assembly, which have been heretofore voluntarily paid into the State Treasury, or which may be hereafter so paid, shall be likewise refunded in the same manner in which moneys so paid pursuant to an order of court are refunded under the provisions of this act.”

This escheat language would not apply to the present situation, because these sums of money have not been "voluntarily paid into the State Treasury." On the contrary the money has always been in the State Treasury, and the payee of the check has never become the owner of the moneys represented thereby. It is well settled that a check is not payment of a debt until the check is cashed: *Diskin v. Philadelphia Police Pension Fund Association*, 367 Pa. 273, 80 A. 2d 850 (1951). As noted in the portion of the Act of 1935 quoted above, all claims against the Commonwealth for which checks have been outstanding for seven years "shall be considered paid." This language draws the red line across the page of the account of the payee of the check. He has no further recourse against the Commonwealth.

Accordingly, you are advised that the Board of Finance and Revenue has no jurisdiction to consider applications for "refund" for Commonwealth checks issued more than seven years ago.

Very truly yours,

DEPARTMENT OF JUSTICE,

GEORGE W. KEITEL,  
*Deputy Attorney General.*

HARRINGTON ADAMS,  
*Acting Attorney General.*

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OFFICIAL OPINION No. 168

*Coal mine conveyor belts—Fire resistance standards—Statutory exemption—  
Interpretation—Conveyors now in use—Transfer from one mine to another—  
Act of April 4, 1956, P. L. (1955) 1395.*

Under an interpretation of the Act of April 4, 1956, P. L. (1955) 1395, which provided that conveyor belts thereafter installed in coal mines be efficiently insulated by flame resistant material according to approved standards and providing that conveyor belts in use or on hand at the time the act passed, though not fire resistant, could be used until replacement was necessary, a mine operator may not move a conveyor belt from one of his mines to another when such equipment fails to meet the requirements established by the act.

Harrisburg, Pa., January 29, 1959.

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

Sir: You have requested the advice of this department concerning an interpretation of the Act of April 4, 1956, P. L. (1955) 1395, 52 P. S. §§ 29.1 to 29.5. Specifically, you ask whether a mine operator may move a conveyor belt from one of its mines to another, although this equipment does not meet the requirements established by the act, when by the terms of the act it may be continued in use until replacement is necessary.

The pertinent sections of the act provide as follows:

"It shall be unlawful to operate any conveyor belt in such coal mines, unless such conveyor belt is efficiently insulated by flame resistant material according to standards approved by the Secretary of Mines." (Act of April 4, 1956, P. L. (1955) 1395, § 2, 52 P. S. § 29.2.).

"This act shall become effective the first day of January, one thousand nine hundred fifty-seven: Provided, That an operator of any mine covered by this act, who may, at the time of the effective date of this act, have in use or on hand a conveyor belt which is not fire resistant and which has not been approved by the Department of Mines may use such conveyor belt until replacement is necessary, in which case the new conveyor belt purchased after the effective date of this act shall meet the requirements of this act and the rules and regulations as promulgated by the Department of Mines pursuant to the authority granted herein." (Act of April 4, 1956, P. L. (1955) 1395, § 5, 52 P. S. § 29.5.)

The response to your inquiry hinges upon the definition of the terms "have in use or on hand" and "until replacement is necessary." In other words, does the statute intend that this equipment be in use or on hand in a particular mine or that the equipment be in use or on hand by a particular mine operator?

The purpose of the act was to provide safety for those working in the mines. In order to avoid the financial hardship to mine operators that would have resulted, were it decreed that immediately on the passage of the act all belts would have to be insulated by flame resistant material, certain exemptions were included in the act. However, it would defeat the purpose of the act, and the very act itself, were the exemptions so construed as to unduly expand their scope.

It would appear that if the equipment be "on hand" in a central storehouse serving several mines of one operator, such equipment could be used in any of the mines served by that storehouse since the storehouse is one for *each* of the mines. However, a conveyor belt could have been *in use* on the effective date of the act in only that mine. The act refers to an operator of any mine covered by this act; it uses the singular. The act permits the use to which the belt was put on the effective date of the act to continue until replacement is necessary. It cannot be read further into the act that the use would include use in another mine even if owned by the same or different operators. Once the particular use of the equipment as of the effective date of the act is ended, so ends its exemption status.

You are, therefore, accordingly advised that an operator may not transfer a nonconforming conveyor belt from one of his mines to another.

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON EHRLICH,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 169

*City public school library—Jointure with county library district—Unified library system—Public School Code of 1949—Act of July 20, 1917, P. L. 1143, as amended.*

Under the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, and § 4 of the Act of July 20, 1917, P. L. 1143, as amended by § 2 of the Act of May 13, 1931, P. L. 127, the Erie Public Library may lawfully contract with the County Commissioners of Erie County, acting on behalf of the Erie County Library, to join the county library district and form a unified library system which will serve the residents of the City of Erie and Erie County.

Harrisburg, Pa., February 2, 1959.

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

Sir: You ask to be advised as to whether the Erie Public Library, a public school library supported by the School District of Erie, may contract with the County Commissioners of Erie County, acting on behalf of the Erie County Library, to join the county library district and form a unified library system which will serve the residents of the City of Erie and Erie County.

This question arose in 1925, and in an opinion dated December 9, 1925, 1925-26 Op. Atty. Gen. 423, this office advised that under the law as it then existed, "The Erie Public Library may not enter into an agreement with either individual school districts outside of the City of Erie, unless such districts adjoin the Erie City School District, or with the County Commissioners under which it could extend its services to those who live outside of the Erie City School District in districts not adjoining." The basis for this advice rested upon §§ 2507, 2510 and 2517 of the Act of May 18, 1911, P. L. 309, which provided: (1) in § 2507, that a board of school directors may support and maintain a public school library in its school district; (2) in § 2510, that instead of establishing or maintaining a separate public school library a board of school directors may join with or aid in the maintenance or the establishment and maintenance of a free, public non-sectarian library in the same school district; and (3) in § 2517, that a joint school library may be established and maintained by two or more school districts which are adjoining. Section 2517 incorporated by reference the provisions of § 1801 of the Act of May 18, 1911, *supra*, which provided that joint schools may be established by "two or more *adjoining* school districts." (Emphasis supplied.)

Subsequent legislative action now requires us to reach an opposite result.

Section 8 of the Act of April 11, 1929, P. L. 497, amended § 1801 of the Act of May 18, 1911, *supra*, by deleting the work "adjoining" from the designation of those districts which may form a jointure. Section 1801, with this change, was reenacted as § 1701 of the Public School Code of 1949.<sup>1</sup> Sections 2507 and 2517 were reenacted as

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<sup>1</sup> Act of March 10, 1949, P. L. 30, as amended, 24 P. S. § 17-1701.

§§ 2305 and 2313 in the Public School Code of 1949.<sup>2</sup> Section 2510 was reenacted, with slight changes not here applicable, as § 2307 in the Public School Code of 1949.<sup>3</sup>

In addition, § 2 of the Act of May 13, 1931, P. L. 127, 53 P. S. § 3504, amended § 4 of the Act of July 20, 1917, P. L. 1143, as amended, to provide in pertinent part as follows:

“\* \* \* Any city, borough, town, township, school district or any board of trustees or managers of any endowed library or association library, maintaining such a free, public, non-sectarian library, shall have power to contract with the county commissioners, before the submission of such questions, upon the terms and conditions under which it will become a part of such county library district \* \* \*.

“But where a county library district is established and a municipality has not joined in said establishment, it may, nevertheless, thereafter join said county library district if the municipal authorities, *school district*, or any board of trustees or managers of any endowed library or association library in such municipality enter into an agreement with the county board of library directors to merge its facilities with the county library in the manner herein provided.” (Emphasis supplied.)

The term “municipality” in § 2 of the Act of May 13, 1931, *supra*, is defined in § 1 of the Act of July 20, 1917, P. L. 1143, 53 P. S. § 3501, to mean “any county, city, borough, town, or township, as the case may be, but shall not be interpreted as meaning school district.” The context of the paragraphs quoted above indicates that the word “municipality” in the second paragraph was used inadvertently. The Legislature meant to say “city, borough, town, township, school district or any board of trustees or managers of any endowed library or association library” in accordance with the enumeration contained in the first paragraph. The inclusion of the words “school district” in the second paragraph, however, is sufficient authorization for a school district to join a county library district by agreement.

Under the laws of the Commonwealth as they now exist, a school district is legally empowered to contract to join a county library district once it is established and is not impeded by the fact that the library with which it will merge is neither within its school district nor within an adjoining district.

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<sup>2</sup> *Ibid.*, 24 P. S. § 23-2305 and § 23-2313.

<sup>3</sup> *Ibid.*, 24 P. S. § 23-2307.

We are, therefore, of the opinion and you are accordingly advised that the Erie Public Library may lawfully contract with the County Commissioners of Erie County acting on behalf of the Erie County Library to join the county library district and form a unified library system which will serve the residents of the City of Erie and Erie County.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN III,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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### OFFICIAL OPINION No. 170

*Station wagons—Commercial vehicles—Lighting equipment requirements—Section 801(f) of The Vehicle Code.*

Under the provisions of § 801(f) of The Vehicle Code, the Act of May 1, 1929, P. L. 905, as amended, station wagons bearing commercial registration and having a width in excess of 80 inches at any part must be equipped with two electric clearance lamps located on the extreme left side of such vehicle.

Harrisburg, Pa., February 10, 1959.

Honorable Charles M. Dougherty, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: This department is in receipt of a recent communication from the former Acting Secretary of Revenue wherein it was stated that the Department of Revenue had received information from The Automobile Manufacturers Association that 1959 models of station wagon motor vehicles will exceed 80 inches in width, and you request us to advise you as to the proper interpretation of § 801(f) of The Vehicle Code, Act of May 1, 1929, P. L. 905, as amended, 75 P. S. § 351, as it applies to these vehicles. You ask the following questions:

"1. Do station wagons bearing commercial registration fall within the provisions of Section 801(f) of the Vehicle Code or is this section restricted to commercial vehicles of those

types which are used solely for commercial purposes, that is, trailers, semi-trailers, trucks, etc.?

"2. Does Section 801(f) of the Vehicle Code apply to station wagons bearing commercial registration whose overall width is 80.7 inches, but that which is in excess of eighty (80) inches is composed of bumpers or wheel housings and is not the actual body of the vehicle?"

Section 801(f)1 of The Vehicle Code, supra, 75 P. S. § 351, provides as follows:

"(f) Commercial motor vehicles, trailers, semi-trailers, buses and omnibuses.—*Every* commercial motor vehicle, trailer, or semi-trailer, or other motor omnibus or motor bus, \* \* \*

"1. Electric clearance lamps—*Every such* vehicle, having a width at *any part* in excess of eighty (80) inches, shall be equipped with two (2) electric clearance lamps located on the extreme left side of such vehicle: \* \* \*" (Emphasis supplied)

In § 102 of The Vehicle Code, supra, 75 P. S. § 2, the phrase "station wagon" is not defined. However, under the same section, a commercial motor vehicle is defined as follows:

"'Commercial Motor Vehicle.'—*Any motor vehicle designed for carrying freight or merchandise: \* \* \**" (Emphasis supplied)

Neither the word "freight" nor the word "merchandise" is defined in The Vehicle Code, supra.

The manufacturer designs a station wagon suitable for either passenger or commercial use. When an individual purchases a station wagon, it is that person who clearly designates the station wagon as a commercial or passenger motor vehicle upon the basis of his intended use of the same. If the station wagon is to be used for carrying freight or merchandise, the individual must register it as a commercial vehicle.

You have already been advised by this department that:

"Since station wagons are dually designed motor vehicles it is the only vehicle which the department registers according to its use. \* \* \*

*"Station Wagons*

*"Used for commercial purposes, as well as that of hauling passengers, are properly classified as commercial motor vehicles. If used exclusively for hauling passengers, it shall*

be classified as a passenger motor vehicle. Luggage or baggage shall not be construed as commercial use or transportation of groceries, etc., by independent owner from store or market to residence of owner.

"Station wagons used by salesmen for the transportation of samples, by mechanics for the transportation of tools or equipment, by rural mail carriers for the transportation of mail and by business people for the transportation of radios, etc., must be registered in the commercial classification.

"Station wagons registered in the commercial class are restricted to truck speeds and are prohibited from operating through some of the parkways.

"In order to change the classification of these vehicles it will be necessary that the enclosed form RVT-10 be executed showing the reason for the change is 'to be used for commercial purposes.' The application must be accompanied by the Pennsylvania certificate of title and the difference in the fee between passenger and the commercial rate."

The result of an election to register the station wagon as a commercial motor vehicle subjects that vehicle to all of the provisions of The Vehicle Code, *supra*, relative to commercial motor vehicles. A station wagon registered as a passenger vehicle, of course, is not subject to such provisions.

Section 801(f), *supra*, specifically relates to vehicles having a width *at any part* in excess of 80 inches. In your request you state that the station wagon motor vehicle will exceed 80 inches in width. The excess part is composed of bumpers or wheel housings. But any part of a motor vehicle must necessarily include bumpers, wheel housings, etc. A station wagon having a width in excess of 80 inches comes within the intendment of § 801(f) of The Vehicle Code, *supra*.<sup>1</sup>

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

1. A station wagon bearing commercial registration comes within the provisions of § 801(f) of The Vehicle Code, *supra*, 75 P. S. § 351.

2. A station wagon bearing commercial registration and having an overall width in excess of 80 inches at any part falls within the pro-

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<sup>1</sup> In automobile accident cases, the generally accepted view is that violation of a statutory duty constitutes evidence of negligence. In *Hull vs. E. H. Scott Transportation Co.*, 14 Erie 19, 22 (1939), we have: "\* \* \* The rule that violation of a statute is negligence per se has been applied with respect to statutes covering a large variety of subjects, among which may be mentioned the operation of motor vehicles. See also *Stehle vs. Machine Co.*, 225 Pa. 348."

visions of § 801(f) of The Vehicle Code, *supra*, 75 P. S. § 351, and must, therefore, be equipped with two electric clearance lamps located on the extreme left side of such vehicle.

Very truly yours,

DEPARTMENT OF JUSTICE,

ELMER T. BOLLA,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 171

*Merged school districts—Tuition rate calculation—First year of operation—Section 2561 of the Public School Code of 1949.*

Tuition rate calculation under § 2561 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended, for the first year of operation of a union or merged school district should be based in part upon the combined overhead cost for the combined operations of the component districts during the previous year.

Harrisburg, Pa., February 13, 1959.

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

Sir: You request advice as to whether tuition rate calculation for the first year of operation of a union or merged school district should be based in part upon the combined overhead cost for the combined operations of the component districts during the previous year or upon the separate overhead cost of a particular school within a component district during the previous year.

Section 2561 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended, 24 P. S. § 25-2561, provides the method for computing the tuition rate which a receiving school district may charge for educating pupils who are residents of another school district. In brief, the method is to total certain enumerated operating expenditures of the receiving school district, *e.g.*, salaries and wages,

utility costs, maintenance and ordinary repair costs, but not including such items as insurance premiums and teachers' retirement contributions, and divide this total by the total number of pupils in average daily membership in the receiving district's public schools. The quotient so obtained is designated "overhead cost per pupil." Depending upon the particular schools which non-resident pupils attend, *i.e.*, elementary or high school, "tuition charge per pupil" is determined by calculating "instruction cost per pupil," obtained by adding certain enumerated costs and dividing the sum so obtained by the total number of pupils in average daily membership in the particular level of schools involved of the receiving school district, and adding to it the above overhead cost per pupil and, in the case of elementary pupils, a rental charge of eight dollars (\$8.00), and, in the case of high school pupils, a rental charge of eighteen dollars (\$18.00).

Since it is imperative that tuition rates be available early in the school year, the expenditures and average daily membership of the preceding school year are used.

Union districts are formed under §§ 251 to 254 of the Public School Code of 1949, *supra*, as amended, 24 P. S. §§ 2-251 to 2-254, and merged districts are formed under §§ 261 to 264 thereof, 24 P. S. §§ 2-261 to 2-264. In both cases, when two or more school districts form a union school district, or when two or more school districts or parts thereof form a merged school district, a *single* union or merged school district springs into existence.

In years subsequent to the first year of operation, overhead cost per pupil will be based upon the total expenditures of the union or merged district for the preceding year. There is no difficulty with this method of calculation in years subsequent to the first year of operation. The problem arises with regard to the basis for calculations during the first year of operation of the union or merged district where there is no previous experience as a union or merged district. Obviously, the previous year's expenditures of the component parts of the union or merged district will have to be employed. The question becomes whether the individual school and school district expenditures of the component parts of the union or merged district will be combined to arrive at one overhead cost per pupil figure or whether the overhead cost per pupil factor in computing the tuition cost for non-resident pupils attending a particular school will be based upon that school's individual overhead cost for the previous year. We favor the former view which is supported by reason and logic.

Once a union or merged school district comes into being, it is a separate legal entity. The several districts or parts thereof which unite or merge lose their separate identity as individual school districts and parts thereof. All the assets, debts and liabilities of the several districts become the assets and liabilities of the new district.<sup>1</sup> From the moment the union or merger becomes effective the new district operates in all respects as a combined district. It follows that a single, combined overhead cost should be calculated for the union or merged district, arrived at by totaling the individual overhead expenditures of the component parts of the district and dividing by the total number of pupils in average daily membership in all the schools of the district. The basis for tuition rate calculation should be the same in the first year of operation of a union or merged district as in all subsequent years.

We are, therefore, of the opinion and you are accordingly advised that tuition rate calculation under § 2561 of the Public School Code of 1949, *supra*, for the first year of operation of a union or merged school district should be based in part upon the combined overhead cost for the combined operations of the component districts during the previous year.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN, III,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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#### OFFICIAL OPINION No. 172

*Public assistance—Administrative rules, regulations and standards—State Board of Public Assistance—Department of Public Welfare—Section 2325 of The Administrative Code of 1929—Section 4 of the Public Assistance Law.*

The State Board of Public Assistance has the power to formulate broad policies, outlines and principles for the administration of the Public Assistance Law, the Act of June 24, 1937, P. L. 2051, as amended, under § 4 of said Act. Thereafter the Department of Public Welfare shall make rules and regulations for

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<sup>1</sup>Sections 254 and 264 of the Public School Code of 1949, *supra*, 24 P. S. §§ 2-254 and 2-264.

the administration of this law consistent with those policies, outlines and principles, by virtue of § 2325 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as added by the Act of July 13, 1957, P. L. 852. Rules and regulations as to eligibility for assistance and the nature and extent of assistance are to be recommended by the department or the local boards of public assistance, subject to the approval of the State Board.

Harrisburg, Pa., March 4, 1959.

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

Madam: Your office has requested an opinion of this department as to the extent of the authority of the Department of Public Welfare to make rules, regulations and standards without securing the approval of the State Board of Public Assistance.

The powers and duties of the Department of Public Welfare in the public assistance area are set forth in § 2325 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as added by the Act of July 13, 1957, P. L. 852, § 23, 71 P. S. § 611.5, as follows:

“The Department of Public Welfare shall have power, and its duty shall be:

“(a) To administer and carry out the provisions of the Public Assistance Law, and in so doing, to supervise local boards and to allocate to them on the basis of need and, as may be required for blind pensions, funds with which to provide assistance and funds for administrative expenses.

“(b) To take any other action authorized or required by this or any other law.”

Accordingly, reference must be made to the Public Assistance Law, the Act of June 24, 1937, P. L. 2051, as amended, 62 P. S. §§ 2501-2516, in order to determine what is to be administered and carried out by the Department of Public Welfare. Section 4 of that law, 62 P. S. § 2504, sets forth the duties of the predecessor of the Department of Public Welfare, namely, the Department of Public Assistance:

“(b) To establish, with the approval of the State Board of Public Assistance, rules, regulations and standards, consistent with the law, as to eligibility for assistance and as to its nature and extent: \* \* \*”

Inasmuch as the Department of Public Welfare has taken over the administration of the Public Assistance Law by virtue of § 2325 of

The Administrative Code of 1929, it has the power to establish rules, regulations and standards *as to eligibility for assistance and as to its nature and extent*. However, this power is expressly limited. The language of § 4, subsection (b), quoted above, clearly establishes that the Department of Public Welfare must secure the approval of the State Board of Public Assistance as a prerequisite to the final validity of regulations concerning eligibility for assistance, its nature and extent.

With respect to the Department of Public Welfare regulations concerning matters *other* than eligibility for assistance, its nature and extent, that is, regulations for the administration and execution of the Public Assistance Law, it is necessary to determine if such regulations require State Board approval.

As originally enacted, § 4, subsection (c) of the Public Assistance Law gave the Department of Public Assistance the power:

“(c) To supervise the local boards, and to establish for such boards, rules, regulations and standards, consistent with law;”<sup>1</sup>

At the same time, § 6 gave the State Board of Public Assistance the power:

“\* \* \* to promulgate rules and regulations concerning the administration of this act, including the establishment of standards of eligibility for assistance, and its nature and extent.”<sup>2</sup>

This language gave rule making power to the State Board more extensive than that of the Department of Public Assistance (now merged into the Department of Public Welfare) and did not limit the State Board's regulatory power to the area of eligibility for assistance, its nature and extent. As a general rule of statutory construction, it is perfectly clear that a general grant of power is not limited by a specific illustrative instance.

In this state of the law, the Department of Justice ruled in Informal Opinion No. 1237, dated July 21, 1942:

“From the above provisions of the Public Assistance Law relative to establishment of rules and regulations, it would

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<sup>1</sup> Subsection (c), § 4, the Public Assistance Law, *supra*, 62 P. S. § 2504.

<sup>2</sup> Section 6, the Public Assistance Law, *supra*, 62 P. S. § 2506.

appear that action may be initiated by either the department or State Board, but that before such rules and regulations can be effectively adopted they must be approved by both the department and the Board."

Subsequent to the writing of this opinion, the Public Assistance Law was amended in 1943. The former language of § 6 of this act was completely deleted and was replaced by a new § 6:

"Section 6. Powers and Duties of State Board of Public Assistance. The powers and duties of the State Board of Public Assistance shall be regulatory and advisory, and not administrative or executive.<sup>3</sup> It shall be a policy-making body, determining the outlines and principles of administration upon which public assistance shall be administered by the local boards."<sup>4</sup>

This language clearly removes the power from the State Board to regulate in the administrative and executive field. It clearly establishes the broad policy-making functions of the State Board.

Significantly, § 4, subsection (c) of the Public Assistance Law was also amended by the same 1943 Act.<sup>5</sup> As amended, subsection (c) gave the Department of Public Assistance the power:

"To exercise general supervision of the local boards, and to establish for such boards, rules, regulations and standards, *as to accounting and as to forms, records and reports, so as to effect reasonable uniformity.*" (Emphasis added)

The 1943 amendment reduced the regulatory powers of the Department of Public Assistance as well as those of the State Board. The situation was somewhat remedied when § 4, subsection (c) was further amended in 1953,<sup>6</sup> removing from the subsection the language italicized in the statute cited immediately above. By eliminating the restrictive language in § 4, subsection (c), as to accounting, forms, etc., the Department of Public Assistance's power to regulate was measurably broadened. The 1953 amendment to the Public Assistance Law clearly gave the Department of Public Assistance the power to supervise the local boards and establish rules, regulations and standards for them in the administration and execution of the Public Assistance Law.

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<sup>3</sup> The day to day administration of the Public Assistance Law is the function of the Department of Public Welfare.

<sup>4</sup> Act of May 21, 1943, P. L. 434, 62 P. S. § 2506.

<sup>5</sup> Ibid.

<sup>6</sup> Act of August 24, 1953, P. L. 1361, § 2, 62 P. S. § 2504.

While these changes were being effectuated by amendments of the Public Assistance Law between 1937 and 1953, there remained unamended since their adoption in 1937 §§ 2502a and 2503a of The Administrative Code of 1929, *supra*.<sup>7</sup> Section 2502a provided:

"The Department of Public Assistance shall have the power, and its duty shall be—

"(a) To administer and carry out the provisions of the Public Assistance Law, and in so doing, to supervise local boards and to allocate to them on the basis of need and, as may be required for blind pensions, funds with which to provide assistance and funds for administrative expenses.

"(b) To take any other action authorized or required by this or any other law."

Section 2503a of The Code, *supra*, provided:

"The State Board of Public Assistance shall have the power, and its duty shall be—

"(a) To approve or disapprove and adopt rules, regulations, and standards, consistent with law, recommended by the Department of Public Assistance and local boards, as to eligibility for assistance and as to its nature and extent. *To establish for the department and local boards rules and regulations concerning the administration of this act as provided by law.*

"(b) To study the work of the Department of Public Assistance and, from time to time, to recommend to the Governor changes in administrative policy or in the law.

"(c) To take any other action authorized or required by law." (Emphasis added)

It would seem from the italicized portion of the section immediately above that the State Board was given much the same power to promulgate regulations concerning local boards and departmental administration as was given to the Department of Public Assistance by the 1953 amendment to § 4, subsection (c) of the Public Assistance Law.<sup>8</sup> Thus both agencies, the State Board and the Department of Public Assistance, appeared to have the same power.

What actually happened, however, was that in 1937, on the same day, the Legislature not only enacted the Public Assistance Law but added §§ 2502a and 2503a to The Administrative Code. The provi-

<sup>7</sup> Added June 24, 1937, P. L. 2003, § 3, 71 P. S. §§ 665-666.

<sup>8</sup> See footnote 6.

sions setting forth the regulatory powers of the Department of Public Assistance and the State Board were virtually identical in each act. By the amendments of 1943 and 1953 to the Public Assistance Law the power to promulgate regulations in the administrative and executive field was shifted; The Code provisions were not explicitly amended. However, each amendment to the Public Assistance Law impliedly amended The Code provisions. To hold otherwise would be to say that the Legislature had intended a result "absurd, impossible of execution or unreasonable." The Statutory Construction Act does not permit this.<sup>9</sup>

The merger of the Departments of Public Assistance and the old Department of Welfare into the present Department of Public Welfare does not affect our conclusion. The merger act of 1957<sup>10</sup> merely repealed §§ 2502a and 2503a of The Administrative Code of 1929 and reenacted them as §§ 2325 and 2326 of The Code.<sup>11</sup> Section 8 of the Statutory Construction Act provides:<sup>12</sup>

"A law which re-enacts the provisions of an earlier law shall not be construed to repeal an intermediate law which modified such earlier law. Such intermediate law shall be construed to remain in force and to modify the re-enactment in the same manner as it modified the earlier law."

Moreover, the clear legislative intent of the merger act of 1957 was merely to change the designation of the Department of Public Assistance and the old Department of Welfare to the new department, the Department of Public Welfare. There was no attempt by the Legislature to effect substantive changes in the law.

It is, therefore, the opinion of this department and you are accordingly advised that the State Board of Public Assistance has the power to formulate broad policies, outlines and principles for the administration of the Public Assistance Law. Thereafter, the Department of Public Welfare shall make rules and regulations for the administration of the Public Assistance Law consistent with the policies, outlines and principles of administration established by the State Board of Public Assistance. Rules and regulations as to eligibility for assist-

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<sup>9</sup> Section 52(1), the Act of May 28, 1937, P. L. 1019, 46 P. S. § 552.

<sup>10</sup> Act of July 13, 1957, P. L. 852.

<sup>11</sup> 71 P. S. §§ 611.5 to 611.6. The language of the reenactments was exactly like that of the repealed sections except that the name Department of Public Assistance was changed to Department of Public Welfare.

<sup>12</sup> Act of May 28, 1937, P. L. 1019, 46 P. S. § 583.

ance and the nature and extent of assistance are to be promulgated by the Department of Public Welfare or the local boards of public assistance, subject to the approval of the State Board of Public Assistance.

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 173

*Pennsylvania State Police—Change of residence—Moving expenses—Section 216 of The Administrative Code of 1929.*

The Commissioner of the Pennsylvania State Police may, in his discretion, under the authority of §216 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, allow payment of expenses of moving household goods of members of the Pennsylvania State Police who are transferred from one place in Pennsylvania to another place on orders of superior officers.

Harrisburg, Pa., March 10, 1959.

Honorable Frank G. McCartney, Commissioner, Pennsylvania State Police, Harrisburg, Pennsylvania.

Sir: We are in receipt of a request by your predecessor in office for an interpretation of § 216 of The Administrative Code of 1929.<sup>1</sup> Specifically, you ask whether this provision of law would allow payment of expenses of moving household goods of State Policemen who are transferred from one place in Pennsylvania to another place on orders of superior officers.

Section 216 of the act provides in part as follows:

“\* \* \* Whenever an employe of any department, board, or commission, who shall have been in the employment of the

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<sup>1</sup> The Act of April 9, 1929, P. L. 177, § 216, 71 P. S. § 76.

same department, board, or commission for more than one year, shall be required by the head of the department, or by the board or commission by which he or she is employed, to change his or her residence from one place in Pennsylvania to another such place, such employe may, with the approval of the Governor in writing, receive the expenses of moving his or her household goods to his or her new residence."

Preliminarily, it should be noted that the State Police Force<sup>2</sup> is organized along the lines of a military regiment, subdivided into sixteen troops in four districts. A State Police officer, upon completion of his training at Hershey, is assigned to a specific troop. Single men are required to live at facilities furnished by the Commonwealth. When a man marries, he is allowed to establish his residence any place within the troop area to which he is assigned.

The key to the problem here presented is the determination, when an officer is transferred, as to whether he is "required \* \* \* to change his \* \* \* residence from one place in Pennsylvania to another \* \* \*" Historically, the administrative authorities of the State Police Force have always interpreted this section to mean that a man is required to change his residence only if he is moved from one troop area to another. As a general rule, we find no fault with such interpretation. The purpose of this legislation, obviously, is to allow reimbursement for moving expenses where the distance between two physical points within the Commonwealth is such that the change of residence by a Commonwealth employee would work a financial hardship upon him. Under the established policy of the State Police, above referred to, a State Policeman would be authorized to apply for moving expenses if transferred from Harrisburg (District 2, Troop A) to Lebanon (District 4, Troop C) notwithstanding the fact that approximately only twenty-five miles is involved. But at the same time a transfer between Coudersport and Selinsgrove, both of which are in Troop D of District 2, and involve a distance of approximately one hundred fifty miles, would not authorize the payment of household expenses. We point out this inequitable situation to demonstrate that exceptions may exist to the policy heretofore established. Under such circumstances, we are of the opinion that the Commissioner has authority to determine in each specific instance whether the person transferred is required to change his residence regardless of any arbitrary boundaries heretofore established. In such case, the person so transferred can apply for reimbursement for moving his household goods.

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<sup>2</sup>The State Police Force is considered to be part of the Executive Department: Act of April 9, 1929, P. L. 177, § 201, as amended, 71 P. S. § 61.

We are, therefore, of the opinion, and you are accordingly advised, that under § 216 of The Administrative Code of 1929 the Commissioner may, in his discretion, allow payment of expenses of moving household goods of State Policemen who are transferred from one place in Pennsylvania to another place on orders of superior officers.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 174

*County Department of Health—Delegation of authority to municipalities under their jurisdiction—Local Health Administration Law.*

County Departments of Health, established pursuant to the provisions of the Local Health Administration Law, the Act of August 24, 1959, P. L. 1304, may not delegate any of their authority to municipalities which are subject to their jurisdiction.

Harrisburg, Pa., April 8, 1959.

Honorable Charles L. Wilbar, Jr., Secretary of Health, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether your Department may adopt a rule or regulation prohibiting County Departments of Health created pursuant to the provisions of the Local Health Administration Law, the Act of August 24, 1951, P. L. 1304, 16 P. S. §§ 12001-12028, from delegating to municipalities which are not exempt from the jurisdiction of a County Health Department part or all of the functions of the County Department of Health.

The purpose of the Local Health Administration Law is best set forth in § 2 thereof, which provides as follows:

“Legislative findings and purposes.—

“The General Assembly of this Commonwealth has determined and hereby declares as a matter of legislative finding that:

"(a) The protection and promotion of the health of the people in the furtherance of human well-being, industrial and agricultural productivity and the national security is one of the highest duties of the Commonwealth.

*"(b) This cardinal duty can be performed only when adequate local public health services are available to all the people of the Commonwealth, when these services are maintained at a high level of professional and technical performance, and when they are administered according to units of population sufficiently large to enable full time modern health services to be provided on the most economical basis by local communities working in partnership with the Commonwealth.*

"(c) These aims can best be achieved by empowering counties to establish county departments of health, and by authorizing State grants to county departments of health and to certain municipalities to enable them to reach or maintain a high level of performance of health services." (Emphasis supplied)

As the italicized portion of § 2 of this law clearly indicates, its purpose is to provide for a more economic and efficient administration of the health laws of the Commonwealth. This is accomplished by empowering counties to establish County Departments of Health and endowing such departments with certain powers. These powers are set forth in § 10 of the act, which provides in part as follows:

"After it has been established, the county department of health—

"(a) shall execute the powers and duties vested in it or in local health authorities generally by the laws of the Commonwealth, and the rules and regulations of the State Department of Health and other departments, boards, or commissions of the State government;

"\* \* \* \* \*

Thus, § 10 of the act confers upon a County Department of Health the powers and duties vested in it or in local health authorities generally. We think that the term "local health authorities" as used in this section refers to Departments and Boards of Health of municipalities as defined in clause (h) of § 3 of the Local Health Administration Law.

Whether a County Department of Health may delegate any of its powers to municipalities subject to its jurisdiction must be answered in the negative. Section 13 of the act describes those municipalities

which, upon the establishment of a County Department of Health, becomes subject to its jurisdiction as a matter of law. Section 15 of the act sets forth a procedure by which municipalities not subject to the jurisdiction of a County Department of Health may become subject to its jurisdiction. This section provides in part as follows:

“\* \* \* Upon the enactment of such ordinance, the municipality shall dissolve its department or board of health and cease to exercise the powers vested by law in such department or board, except that the dissolution of the department or board of health of the municipality shall not remove from the municipality the power granted to it by law to erect, purchase, or lease, and administer hospitals, either separately or jointly with another political subdivision.”

We are of the opinion that the above quoted language applies with equal force to those municipalities which are, as a matter of law, subject to the jurisdiction of a County Department of Health. Any other conclusion would be absurd. Thus, the provisions of the Local Health Administration Act do not permit municipalities subject to the jurisdiction of a County Department of Health to maintain their own Boards or Departments of Health. Furthermore, the legislative purpose of the act would be defeated if a County Department of Health were permitted to delegate any of its functions to member municipalities. While it is clear that such delegation is not permissible, nevertheless, your department may adopt a rule or regulation prohibiting such delegation.

We are of the opinion and, therefore, you are accordingly advised that the powers vested in County Departments of Health established pursuant to the provisions of the Local Health Administration Law cannot be delegated to municipalities which are subject to the jurisdiction of a County Department of Health, and further that your department may, in its discretion, promulgate a rule or regulation to this effect.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. COHEN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

## OFFICIAL OPINION No. 175

*Public schools—Attendance of pupils of one school district at high school of another district—Tuition charges—Deduction from moneys due sending district—Certification—Public School Code of 1949.*

1. Under §1607 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, where (1) the district of residence fails to maintain a public high school, (2) maintains no high school other than a vocational high school, or (3) a public high school is maintained, but its program of studies terminates before the end of the twelfth year, residents of such district may attend a high school of another district at the expense of the resident district even though they attend such high school without the consent or over the objections of the resident district.

2. Where a sending district consents to or approves the attendance of a resident pupil at a high school of another district, the sending district is obligated to pay tuition to the receiving district even though a written agreement so to do has not been executed.

3. Where a resident pupil attends high school in a receiving district at the expense of a sending district, the Superintendent of Public Instruction is authorized to withhold appropriations of the sending district and pay such over to the receiving district on account of unpaid tuition.

4. Where a receiving district certifies the admission of pupils to the sending district and the sending district neither assents nor dissents at such time to the payment of tuition for such pupils, the Superintendent of Public Instruction may deduct such tuition from any moneys due the sending district and pay said sum on account of unpaid tuition to the receiving district.

5. The type of certification which will satisfy the provisions of § 2563 of the Public School Code of 1949 is a list of the names of non-resident pupils in attendance at the schools of the receiving district, the classes they are attending, and the amount of tuition due monthly for each pupil based upon data for the preceding year of operation of the receiving school district.

6. Section 2564 of the Public School Code of 1949 permits the Superintendent of Public Instruction to deduct only for tuition charges incurred during the immediate past school year of operation.

Harrisburg, Pa., April 13, 1959.

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

Sir: You raise a number of questions with regard to the attendance of pupils of one school district at a high school of another school district, which involve interpretation of §§ 1607 and 1608 and §§ 2563 and 2564 of the Public School Code of 1949.<sup>1</sup> For purposes of clarity

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<sup>1</sup> The Act of March 10, 1949, P. L. 30, as amended, 24 P. S. §§ 16-1607 and 16-1608, and §§ 25-2563 and 25-2564.

and brevity, we will separate the questions according to the statutory provisions involved, and state them individually.

*Sections 1607 and 1608*

1. May a resident of one school district attend a high school of another school district at the expense of the resident district if he attends such high school without the consent of the resident district?

Section 1607 of the Public School Code of 1949, *supra*, deals with high school attendance in another district (hereinafter called "receiving district") in three situations: (1) where the district of residence (hereinafter called "sending district") fails to maintain a public high school; (2) where the sending district maintains no public high school other than a vocational high school; and (3) where a public high school is maintained in the sending district, but its program of studies terminates before the end of the twelfth year. In the first situation, the section provides that pupils residing in such district "may attend, during the entire term, the nearest or most conveniently located high school of such class as they may desire to attend." In the second situation, pupils residing in such district "may attend, during the entire term, the nearest or most conveniently located academic high school. In the third situation, "pupils who have satisfactorily completed the program of studies there available in other than vocational schools or departments, or have completed a program of studies equivalent to said program of studies in some other school or schools, may attend, at the expense of the school district in which they live, and for the purpose of pursuing academic studies of a higher grade, the nearest or most conveniently located high school of such type as they may desire to attend giving further high school work."

Section 1608 of the Public School Code of 1949, *supra*, provides in *all* situations that pupils "wishing to attend a high school in a district other than the one in which they reside shall obtain the consent of the board of school directors of the district in which such high school is located before attending the same." In none of the above situations, however, is consent of the sending district prerequisite to charging such district with tuition charges for resident pupils attending high school within the receiving district. In *Lansdale School District v. Lower Salford School District*,<sup>2</sup> the following theory is stated:

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<sup>2</sup> 18 Dist. 472 (1909). Accord: *New Castle School District v. School District of North Beaver Township*, 141 Pa. Super. 401, 14 A. 2d 855 (1940).

"If it is the will of the legislature that every child shall have the privilege of a high school if it so desires, then this effort to secure equality in the enjoyment of high school privileges cannot be defeated by the courts, nor is it in the power of any school board to overthrow the legislative enactment.  
\* \* \*

"In the case before us the defendant district had notice of the admission to Lansdale high school. They paid the tuition for the first year, but made no protest to the Lansdale board, nor was any effort made to induce the foreign district to terminate her attendance at the high school. We do not mean to say that such protest would have relieved them from liability. Their liability arose from her attendance at the high school."

Section 2562 of the Public School Code of 1949, *supra*, as amended, 24 P. S. § 25-2562, provides that the receiving district shall bill the sending district, and the sending district shall pay the amount of the tuition charge per pupil. In situations where no public high school or no public high school other than a vocational high school are maintained in the sending district, no prerequisites to liability for tuition charges exist except the fact of attendance at the high school of the receiving district. On the other hand, in the situation where the pupils have completed the program of studies in their own district, or its equivalent in some other school or schools, under § 1608 they must present to the board of their own district, and the board of the district in which they wish to attend, a certificate from the county superintendent who has jurisdiction over the district in which they live, that upon examination they have been found to have satisfactorily completed the equivalent of said program of studies. The necessity of an examination may be dispensed with where the resident district, with the written approval of the county superintendent, enters into a written agreement with the receiving district for the attendance and tuition of the pupils who desire to attend high school within the receiving district and have their tuition paid by the sending district.

Thus, in the above three situations and where the aforesaid necessary prerequisites have been met, residents of one school district may attend a high school of another district at the expense of the resident district without the consent or over the objections of the resident district.

2. If the sending district consents to or approves the attendance of a resident pupil at a high school of another district, is the sending district obligated to pay tuition to the receiving district if a written agreement so to do has not been negotiated?

As we have pointed out above, consent of the sending district is unnecessary in the three situations previously enumerated. In any case where a written agreement has been executed, it will control. Where resident pupils do attend a high school of another district and the facts of one of the above three situations are not present, there will be no liability for tuition charges in the absence of consent or approval of the sending district.<sup>3</sup> Such consent or approval, however, should be evidenced by written agreement, even though written consent is not mandatory. Oral consents are difficult to prove. Consent may be implied from entries in the minutes of the sending district's board of directors if such records are available, payment of tuition charges for years past, or in some other manner. In *Honesdale School District v. Bethany School District*,<sup>4</sup> it was held that consent of the receiving district to the admission of pupils of the sending district might be shown otherwise than by formal motion or resolution of the board of school directors.

We are of the opinion that greater formality should not be required for the consent or approval of the sending district where it is abundantly clear by implication that such district is willing to assume liability for payment of tuition charges. The thrust of this conclusion is strengthened by the fact that the Legislature has not seen fit expressly to require greater formality in the interrelations of school districts.

*Sections 2563 and 2564*

3. If a resident pupil attends high school in a receiving district at the expense of a sending district, is the Superintendent of Public Instruction authorized to withhold appropriations of the sending district and pay such over to the receiving district on account of unpaid tuition?

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<sup>3</sup> In *Cochran School District v. Fairfield Township School District*, 17 Dist. 1098 (1908), the reason for requiring consent in certain situations is stated as follows:

"[School directors] are not required or supposed to levy a tax for the purpose of paying tuition of resident pupils to a foreign district, and it might well happen that the school directors, having made their estimate of the expenses of maintaining the schools of their district for the ensuing year and levied their tax accordingly, find themselves burdened with a debt for tuition of their pupils in other districts of which they had no knowledge, which indebtedness they could not have foreseen, and hence could not have provided for."

<sup>4</sup> 16 Dist. 996 (1907).

Section 2564 of the Public School Code of 1949, *supra*, as amended, specifically provides for deductions from state appropriations as follows:

"If any school district wherein a pupil resides, who is entitled by law to attend an elementary school or a high school or an extension class for which extension class tuition has been approved by the sending district in another district, neglects or refuses to pay any such tuition charge, or sewer charge or sewer rental, the Superintendent of Public Instruction is authorized to deduct from any moneys due any such district out of any State appropriation, the amount due from such district to the district where the pupil attends and pay over said sum to the district entitled thereto."

It should be stressed that § 2564 applies only where a pupil "is entitled by law" to attend a high school of the receiving district. In the three situations, referred to previously, where lack of consent of the sending district is immaterial, the resident pupil is so "entitled by law." Similarly, in a case where the sending district has agreed to assume liability, either orally or in writing, the pupil is "entitled by law" to attend the receiving district's high school.

Whenever the agreement is ambiguous and the subject of reasonable dispute over its terms and conditions, or whenever the sending district disputes the very existence of an agreement, express or implied, the entitlement in law of a pupil to tuition-paid attendance in schools of the receiving district is not established and cannot provide a basis for action by the Superintendent of Public Instruction under § 2564. When and if such dispute is resolved in the courts in favor of the pupil or the receiving district, the entitlement in law is established, and § 2564 becomes operative.

4. If a receiving district certifies the admission of pupils to the sending district, and the sending district neither assents nor dissents at such time to the payment of tuition for such pupils, may the Superintendent of Public Instruction deduct such tuition from any moneys due the sending district and pay said sum on account of unpaid tuition to the receiving district?

Section 2563 of the Public School Code of 1949, *supra*, as amended, provides a procedure for certification of pupils admitted from other districts. The board of school directors of the receiving district shall, upon admission of non-resident pupils, properly certify to the board of school directors of the sending district, the names of all such pupils

and the school or class they are attending, together with a statement of the tuition charge per pupil. Section 2563 continues by providing that the sending school district shall pay such tuition charges monthly to the receiving district.

Clearly, where the sending district neither assents nor dissents to the certification properly submitted to it by the receiving district, it has no cause to complain and the Superintendent, under § 2564, has the right to make deductions from appropriations payable to the sending district and pay such over to the receiving district on account of unpaid tuition charges. Likewise, where pupils are entitled by law to attend the schools of the receiving district, an express refusal or dissent of the sending district is immaterial. Where, however, the fact of liability is in dispute, the Superintendent may not act to deduct appropriations until such time as the dispute is resolved against the sending district.

5. What type of certification will satisfy the provisions of § 2563 of the Public School Code of 1949?

Section 2563 provides that the receiving district shall "properly certify \* \* \* the names of all such pupils and whether they are attending an elementary school or a high school or an extension class, together with a statement of the tuition charge per elementary pupil and the tuition charge per high school pupil and the vocational or other extension tuition charge per pupil hour of instruction." We are of the opinion that the minimum standard for a proper certification would include a list of the names of non-resident pupils in attendance at the schools of the receiving district, the classes they are attending, and the amount of tuition due monthly for each pupil. Since § 2563 contemplates a monthly charge, it is intended to operate prospectively whereby the sending district will pay the receiving district the tuition charges as they accrue each month. Thus, tuition charges will have to be based upon data for the preceding year of operation of the receiving school district.<sup>5</sup> The monthly tuition charge will be an estimated amount, subject to year-end adjustment up or down depending upon the final cost data available at the end of the school year.

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<sup>5</sup> In Official Opinion No. 171, dated February 13, 1959, 1959-60 Op. Atty. Gen. 10, we stated:

"Since it is imperative that tuition rates be available early in the school year, the expenditures and average daily membership of the preceding school-year are used."

The method for computing the tuition rate is provided in § 2561 of the Public School Code of 1949, *supra*, as amended, 24 P. S. § 25-2561.

6. In view of the fact that it is customary for receiving school districts to make requests of the Superintendent of Public Instruction to deduct moneys from the appropriations due sending districts at the close of the school year of operation for which the tuition is owed, may the Superintendent of Public Instruction grant a request by a receiving district to deduct appropriations for unpaid tuition due in years previous to the immediate past school year of operation?

Section 2564, *supra*, together with §§ 2561, 2562 and 2563, provides a method of adjusting the respective rights and liabilities of school districts by means of reimbursements. The import of these provisions is to keep the respective school districts current and to avoid the accumulation of large debts and deficits. Consistent with this intent, we are of the opinion that § 2564 permits the Superintendent to establish a policy of deducting only for tuition charges incurred during the immediate past school year of operation. The duty is incumbent upon the receiving school district to act seasonably in requesting the Superintendent of Public Instruction to make the authorized deductions. This conclusion in no way should be construed to mean that the receiving school district loses its right to reimbursement for accrued tuition charges for previous years. It merely means that the Superintendent, whose duty it is to assist school districts in every way legally possible to properly manage their finances and fiscal affairs in a business-like manner, should not and is not intended to be the instrument whereby undue financial hardship will be imposed upon a sending district when the receiving district has been dilatory in claiming its right to have the Superintendent make deductions. However, in order not to penalize present dilatory districts, we recommend that any policy established to make deductions only for charges incurred during the immediate past year should operate prospectively and not be applied to applications now pending before the Superintendent.

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

1. In certain enumerated situations residents of one school district may attend a high school of another school district at the expense of the resident district even though they attend such high school without the consent or over the objections of the resident district.

2. Where a sending district consents to or approves the attendance of a resident pupil at a high school of another district, the sending district is obligated to pay tuition to the receiving district even though a written agreement so to do has not been executed.

3. Where a resident pupil attends high school in a receiving district at the expense of a sending district, the Superintendent of Public Instruction is authorized to withhold appropriations of the sending district and pay such over to the receiving district on account of unpaid tuition.

4. Where a receiving district certifies the admission of pupils to the sending district and the sending district neither assents nor dissents at such time to the payment of tuition for such pupils, the Superintendent of Public Instruction may deduct such tuition from any moneys due the sending district and pay said sum on account of unpaid tuition to the receiving district.

5. The type of certification which will satisfy the provisions of § 2563 of the Public School Code of 1949 is a list of the names of non-resident pupils in attendance at the schools of the receiving district, the classes they are attending, and the amount of tuition due monthly for each pupil based upon data for the preceding year of operation of the receiving school district.

6. Section 2564 of the Public School Code of 1949 permits the Superintendent of Public Instruction to deduct only for tuition charges incurred during the immediate past school year of operation.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN, III,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 176

*Workmen's compensation—Public assistance recipients assigned to work—Extent of coverage—Act of June 3, 1933, P. L. 1515—The Pennsylvania Workmen's Compensation Act—Act of June 27, 1939, P. L. 1184.*

Public assistance recipients assigned to work under the Act of June 27, 1939, P. L. 1184, are not work relief employees within the definition of the Act of

June 3, 1933, P. L. 1515, and that such persons are covered by the provisions of The Pennsylvania Workmen's Compensation Act, the Act of June 21, 1939, P. L. 520, as amended, to the extent as provided in § 306(e) of that act.

Harrisburg, Pa., April 14, 1959.

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

Madam: You have asked to be advised whether employees assigned to work under the provisions of the Act of June 27, 1939, P. L. 1184, as amended,<sup>1</sup> are covered by Workmen's Compensation to the extent provided in § 306(e) of The Pennsylvania Workmen's Compensation Act, the Act of June 2, 1915, P. L. 736, as amended.<sup>2</sup> We understand that a number of insurance carriers assert that the provisions of the Act of June 3, 1933, P. L. 1515,<sup>3</sup> apply to persons assigned to work under the provisions of the Act of June 27, 1939, *supra*. The basic question thus presented is whether compensation payments for such employees shall begin after the expiration of one week as provided by § 306(e) of The Pennsylvania Workmen's Compensation Act or at the expiration of twenty-six weeks as provided by the Act of 1933.

The Act of June 27, 1939, P. L. 1184, *supra*, provides that persons receiving public assistance from your department may be assigned by County Boards of Assistance to certain types of projects where the value of the wages that they would receive working at such projects would equal the amount of public assistance they receive. Actually, no wages are paid to such assistance recipients under this program but such recipients as are able to work must, as a condition of their continued eligibility to receive assistance, work on those projects to which they are assigned.

In Formal Opinion No. 294, dated August 8, 1939,<sup>4</sup> this department advised the then Department of Public Assistance that the employer of such assistance recipients is responsible for the payment of Workmen's Compensation premiums for such employees and that they should provide a certificate to the County Board of Assistance or to the Department of Public Assistance that such persons are covered by

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<sup>1</sup> 62 P. S. §§ 2521-2528.

<sup>2</sup> 77 P. S. § 514.

<sup>3</sup> 77 P. S. §§ 441-450.

<sup>4</sup> 1939-40 Op. Atty. Gen. 80, 36 D. & C. 17 (1939).

Workmen's Compensation. That opinion did not specify whether such public assistance recipients were covered by § 306(e) of The Pennsylvania Workmen's Compensation Act or by the provisions of the Act of June 3, 1933, P. L. 1515, *supra*.

Section 306(e) of The Pennsylvania Workmen's Compensation Act provides as follows:

"No compensation shall be allowed for the first seven days after disability begins, except as provided in this clause (e) and clause (f) of this section. \* \* \*"

Section 2 of the Act of June 3, 1933, P. L. 1515, *supra*, provides as follows:

"No compensation shall be payable to injured work relief employees during the first twenty-six weeks of disability: Provided, however, That this section shall not apply to injuries compensable under subsections (c) and (e) of section three hundred and six or section three hundred and seven of the act to which this is a supplement."

Section 1 of the 1933 Act reads in part as follows:

"When used in this act, the following terms shall have the meanings ascribed to them by this section, unless the context clearly requires a different meaning:

"(a) The term 'work relief employee' shall mean any person engaged in work for any public or charitable body, corporation or institution, by direction or assignment of the State Emergency Relief Board, or a county emergency relief board, or other agency of the State Emergency Relief Board, in return for cash or commodities furnished by or through the action of the State Emergency Relief Board as unemployment relief."

The term work relief employees is so defined in the 1933 Act as to refer to only those persons who were assigned to work by the State Emergency Relief Board or a County Emergency Relief Board. Since the State Emergency Relief Board was abolished by § 14 of the Public Assistance Law, the Act of June 24, 1937, P. L. 2051, as amended, 62 P. S. § 2514, and since the act creating the State Emergency Relief Board was repealed by § 18 of the Public Assistance Law, *supra*, the definition of work relief employee as it appears in § 1 and the twenty-six week time limitation appearing in § 3 of the 1933 Act have been repealed by implication. Thus, the term work relief employee as defined in the 1933 Act does not apply to those assistance recipients who are assigned to work by County Boards of Assistance pursuant to the provisions of the Act of June 27, 1939, P. L. 1184, *supra*.

We are of the opinion and you are therefore advised that public assistance recipients assigned to work under the Act of June 27, 1939, P. L. 1184, supra, are not work relief employees within the definition of the Act of June 3, 1933, P. L. 1515, supra, and that such persons are covered by the provisions of The Pennsylvania Workmen's Compensation Act to the extent as provided in § 306(e) of that act.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. COHEN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 177

*Appropriations—Rehabilitation center at Johnstown—Vocational Rehabilitation Act of 1945—General Appropriation Act of 1957.*

Funds appropriated by the General Appropriation Act of 1957 relating to the State Board of Rehabilitation and the Bureau of Rehabilitation may be spent for the operation of the Rehabilitation Center at Johnstown.

Harrisburg, Pa., April 28, 1959.

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

Sir: You have requested our opinion on the question of whether Act 95-A approved July 19, 1957, permits money to be spent for the operation of a new rehabilitation center at Johnstown.

The provision of the Appropriation Act in question reads:

“The work of the State Board of Rehabilitation and the Bureau of Rehabilitation as provided in the act of May 22, 1945 (P. L. 849) .....\$3,710,000”

The rehabilitation center at Johnstown has recently opened. This center is designed to provide complete rehabilitation services for those entitled to aid under the Act of May 22, 1945, P. L. 849 (43 P. S. § 681.1), known as the “Vocational Rehabilitation Act of one thousand nine hundred and forty-five.” This is a comprehensive piece of

legislation, which provides, *inter alia*, for the establishment of the State Board of Vocational Rehabilitation and sets out its powers and duties. The Board is the chief supervisory body for vocational rehabilitation. Its general grant of power is contained in § 4 of the Act (43 P. S. § 681.4), which states:

“[The] State board shall provide vocational rehabilitation services to disabled individuals determined to be eligible therefor \* \* \*.”

The Board is also given in this section the duty to administer, supervise and control the Bureau of Rehabilitation which is responsible for the actual execution of the rehabilitation program.

The center at Johnstown is designed to provide a complete integrated rehabilitation service to those persons eligible for treatment and training under the act.<sup>1</sup> It is a vital part of the State Board's program for vocational rehabilitation and its functions clearly come within the purview of the Rehabilitation Act. The Appropriation Act of 1957, which appropriates money for the work of the State Board and the Bureau of Rehabilitation, contains no specific limitation concerning the expenditure of this money. Since the administration and operation of the rehabilitation center at Johnstown is clearly part of the work of the Board and the Bureau, within the meaning of Act 95-A, the disbursement of funds for the center comes within the purview of the appropriation.

Therefore, it is our opinion and you are accordingly advised that funds appropriated by Act 95-A of the 1957 session of the Legislature relating to the State Board of Rehabilitation and the Bureau of Rehabilitation may be spent for the operation of the Rehabilitation Center at Johnstown.

Very truly yours,

DEPARTMENT OF JUSTICE,

DAVID C. HARRISON,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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<sup>1</sup> The center was established pursuant to the authority contained in the Act of July 25, 1953, P. L. 596, § 2 of which authorizes the General State Authority to borrow for construction of a “rehabilitation center for the Department of Labor and Industry, Bureau of Rehabilitation.”

## OFFICIAL OPINION No. 178

*Health—Laboratories licensed by Department of Health—Right to restrict reporting of results to physicians—The Analytical-Biochemical-Biological Laboratory Act—Statutory Construction Act.*

The Department of Health may not restrict laboratories licensed under The Analytical-Biochemical-Biological Laboratory Act, the Act of September 26, 1951, P. L. 1539, from making reports of analyses of material originating in the human body to anyone except doctors of medicine or osteopathy. This would deny the services of such laboratories to members of the healing arts profession who do not come within the definition of the term "physician" as contained in § 101 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019.

Harrisburg, Pa., April 29, 1959.

Honorable C. L. Wilbar, Jr., Secretary of Health, Harrisburg, Pennsylvania.

Sir: You have requested our advice as to the legality of a proposed regulation which would prohibit laboratories under your jurisdiction from making reports of analyses of material originating in the human body to anyone except a physician or a person authorized by the physician to receive such reports.

You also asked to be advised whether an agreement contained in an application for a permit to operate a laboratory under the provisions of the Analytical-Biochemical-Biological Laboratory Act,<sup>1</sup> which restricts the operator of a laboratory from making reports of analyses to anyone except a duly licensed physician or his authorized agent is legal. Thus, we presume the consent of the individual whose material is being analyzed to have the person submitting the material receive the results of such analyses.

Your Department has under its jurisdiction laboratories which are operated by it and laboratories which are licensed by your Department pursuant to the provisions of The Analytical-Biochemical-Biological Laboratory Act, *supra*. The laboratories which your Department operates are not established pursuant to any grant of power by the General Assembly but have been established administratively by your Department for its own convenience and that of the general public. The laboratories licensed by your Department are privately owned and operated and must meet the requirements of The Analytical-Biochemical-Biological Laboratory Act, *supra*.

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<sup>1</sup> The act of September 26, 1951, P. L. 1539, P. S. §§ 2151-2165.

Under the provisions of Section 101 of Article VIII of the Statutory Construction Act<sup>2</sup> "physician" is defined as follows:

" 'Physician,' an individual licensed under the laws of this Commonwealth to engage in the practice of medicine and surgery in any or in all of its branches within the scope of the act, approved the third day of June, one thousand nine hundred eleven (Pamphlet Laws 639) and its amendments, or in the practice of osteopathy or osteopathic surgery within the scope of the act, approved the nineteenth day of March, one thousand nine hundred nine (Pamphlet Laws 46) and its amendments."

Thus, under the existing agreement in the application for a permit operators of laboratories licensed by your Department have agreed not to report the results of analyses to anyone except doctors of medicine or osteopathy or their authorized agents. The net effect of this agreement is to deny the services of laboratories licensed by your Department to members of the healing arts profession who do not come within the statutory definition of the term physician.

Section 5 of The Analytical-Biochemical-Biological Laboratory Act, *supra*, sets forth the contents of an application for a permit. Clause (f) of this section permits your Department by rule or regulation to require any additional information from an applicant as it may require. This is the only reference in the entire act to any rule or regulation that may be adopted pursuant to its provisions. Nowhere in the act is there any provision which would even impliedly suggest that laboratory operators may not give reports of analyses submitted to them to other members of the healing arts professions than doctors of medicine and osteopathy. We must, therefore, conclude on the basis of the act in question that your Department may not legally require operators of laboratories to enter into an agreement similar to the one existing. Furthermore, your Department may not by rule or regulation limit the persons to whom a laboratory can render its services.

Insofar as laboratories operated by your Department are concerned, your Department may by rule or regulation govern the conduct of its laboratory. However, such rules and regulations as your Department may adopt must be reasonable. While this Department can not presume to dictate manners of policy to your Department with respect to the operation of its laboratories, nevertheless we are of the opinion

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<sup>2</sup> The Act of May 28, 1937, P. L. 1019, 46 P. S. § 601, as amended.

that since the legislature has not seen fit in the case of private laboratories to limit the persons to whom those laboratories may serve, any rule or regulation by your Department which would accomplish the type of limitation as above mentioned would be unreasonable.

We are of the opinion, therefore, and you are accordingly advised that laboratories which are licensed by your Department under the provisions of The Analytical-Biochemical-Biological Laboratory Act, *supra*, may not either by regulation or by agreement be limited in any manner as to the persons in the healing arts profession which they may serve. You are further advised that the existing agreement contained in the application for a permit to operate such laboratories, which restrict reporting to physicians or their authorized agents, is invalid as not being sanctioned by law. Furthermore, your Department may not by rule or regulation restrict its services to physicians as defined in the Statutory Construction Act, *supra*.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. COHEN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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#### OFFICIAL OPINION No. 179

*Eastern Pennsylvania Psychiatric Institute—Board of Trustees—Power to appoint qualified director—Act of April 18, 1949, P. L. 599.*

The Board of Trustees of the Eastern Pennsylvania Psychiatric Institute may select and appoint a qualified director as authorized by the Act of April 18, 1949, P. L. 599, and The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, without securing approval.

Harrisburg, Pa., May 5, 1959.

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

Madam: You have requested an opinion of this department concerning the power of the Board of Trustees of the Eastern Pennsyl-

vania Psychiatric Institute to select and appoint a director of that institute. Specifically, you inquire whether the selection by this board of a director for the institute must be submitted to any other authority for approval.

The Eastern Pennsylvania Psychiatric Institute was created by virtue of the Act of April 18, 1949, P. L. 599, 50 P. S. § 581. Section 5 of this act provided that the institute shall be under the management of a board of trustees, consisting of fifteen members appointed by the Governor, who, together with the Secretary of Public Welfare, is an ex officio member of the board. Under § 4 of the act, this board of trustees is given all the powers and duties conferred and imposed upon boards of trustees of State institutions within the Department of Public Welfare, as provided in The Administrative Code of 1929<sup>1</sup>, except as otherwise provided in the 1949 Act creating the institute. This latter act in § 6 empowers the board of trustees to select and appoint a director for the institution. No mention is made for any subsequent approval by any other authority.

Section 2318 of The Administrative Code, *supra*, provided for the powers and duties of enumerated institutions under the direction of the Department of Welfare. These enumerated institutions originally included the State medical and surgical hospitals, the State mental institutions and the State correctional institutions. The board of trustees of each such institution was given the power, *inter alia*, to elect a superintendent, subject to the approval of the Governor. By subsequent amendment<sup>2</sup> the penal institutions and the State mental institutions were removed from the coverage of § 2318. At this same time § 2313.3 was added to The Administrative Code of 1929<sup>3</sup> setting forth the powers and duties of the boards of trustees of the State mental institutions. These powers and duties did not include the power of election of a superintendent. However, the final proviso of § 2313.3 of The Administrative Code, *supra*, specifically exempted the application of this section to the Board of Trustees of the Eastern Pennsylvania Psychiatric Institute.<sup>4</sup> In like manner the Legislature provided for separate operation and management of the Western State Psychiatric Institute and Clinic the superintendent of which is appointed by the Board of Trustees of the University of Pittsburgh.<sup>5</sup>

<sup>1</sup> Act of April 9, 1929, P. L. 177, § 2318, as amended, 71 P. S. § 608.

<sup>2</sup> Act of December 14, 1955, P. L. 853, 71 P. S. § 608.

<sup>3</sup> 71 P. S. § 603.3.

<sup>4</sup> The institute would, however, be subject to monetary control by the Department of Public Welfare. Section 503 of The Administrative Code, *supra*, 71 P. S. § 183.

<sup>5</sup> Act of May 20, 1949, P. L. 1643, 50 P. S. § 575.2.

We must conclude that the Board of Trustees of the Eastern Pennsylvania Psychiatric Institute was given the power to appoint a director without the condition that the appointment be subject to the approval of any outside authority. Since both the Governor and Secretary of Public Welfare are ex officio members of the board, the Legislature, no doubt, concluded that there was sufficient internal control within the board. The 1955 amendment to The Administrative Code, supra, did not diminish the powers of the Board of Trustees of the Eastern Pennsylvania Psychiatric Institute.

It is, therefore, the opinion of this department and you are accordingly advised that the Board of Trustees of the Eastern Pennsylvania Psychiatric Institute may select and appoint a director, qualified under the act, and that such appointment is final without any additional approval.

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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#### OFFICIAL OPINION No. 180

*School districts—State grants—Emergency conditions—Limitations—Section 2604 of the Public School Code of 1949.*

Under § 2604 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, the State Council of Education may properly use the income of the State School Fund as advancements for the purpose of helping school districts meet emergency conditions, which advancements must thereafter be deducted from any appropriations that may be due such districts; however, the council has no authority to make outright grants of such funds to aid school districts, except for equalizing educational advantages.

Harrisburg, Pa., May 6, 1959.

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

Sir: You request to be advised whether the State Council of Education has authority to use the income of the State School Fund for the

purpose of making outright grants to school districts facing emergency conditions without deducting the amount of such grants from any State appropriations that may be due said districts.

The State School Fund is maintained under the authority of Article XXVI of the Public School Code of 1949.<sup>1</sup> All escheated estates in the Commonwealth and all other property or money which in any way accrue, whether by devise, gift, or otherwise, constitute the State School Fund. The Fund is controlled and managed by the State Council of Education which invests the principal thereof. Only the income derived from the Fund may be expended by the State Council of Education.

The purposes for which the income of the Fund may be used are provided in § 2604<sup>2</sup> as follows:

“The State Council of Education is hereby authorized to use so much of the interest, rentals, and other income of the school fund as it deems wise towards equalizing the educational advantages of the different parts of this Commonwealth; to make advancements to school districts temporarily in need and to deduct said advancements from any appropriation that may be due said districts, upon such terms as the districts and the State Council of Education shall agree; and also to use such part of the same as it deems wise to further and promote education in the conservation of natural resources, and education in forestry, agricultural and other industrial pursuits, in the public schools of this Commonwealth. \* \* \*”

Analysis of § 2604 indicates three distinct uses of the income of the State School Fund: (1) equalizing educational advantages; (2) making advancements to school districts temporarily in need; and (3) furthering and promoting education in conservation, forestry, agricultural and other industrial pursuits.

We are of the opinion that school districts facing emergency conditions are “school districts temporarily in need” within § 2604. For purposes of illustration, emergency conditions are created when a school’s boiler is condemned, a school building roof blows off, urgent fire hazards must be corrected, or emergency repairs must otherwise be made to the school building and the school district is unable to provide the necessary funds from current resources or by loans within

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<sup>1</sup> The Act of March 10, 1949, P. L. 30, §§ 2601 to 2607, as amended, 24 P. S. §§ 26-2601 to 26-2607.

<sup>2</sup> 24 P. S. § 26-2604.

its legal borrowing power. Grants of money, therefore, by the State Council of Education from the State School Fund made for the purpose of helping school districts meet emergency conditions must be made as advancements and thereafter deducted from any appropriations that may be due the recipient school district. When the deductions are made, of course, the State School Fund will be credited with the amount advanced.

This opinion, however, should not be construed to mean that the State Council of Education may not expend income of the State School Fund in the form of outright grants to school districts for the purpose of "equalizing educational advantages." On the contrary the power of the State Council of Education to make outright grants for such purpose is not affected by the instant ruling, except to the extent that this opinion holds that grants for the purpose of meeting emergency conditions normally do not serve to "equalize educational advantages" and thus fall within the second purpose of § 2604 which requires that such grants be made in the form of advancements which are to be deducted from future appropriations. We will consider exceptional situations as they arise.

It is, therefore, our opinion and you are accordingly advised that grants of money may not be made by the State Council of Education from the State School Fund for the purpose of helping school districts meet emergency conditions except as advancements which must thereafter be deducted from any appropriations that may be due such districts.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN, III,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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#### OFFICIAL OPINION No. 181

*Insurance—Regulation—Nonprofit out-of-state corporation—Fraternal Benefit Securities Act of 1935.*

A nonprofit corporation formed by the Brotherhood of Railroad Trainmen, an unincorporated association, as a fraternal benefit society under the laws of Ohio, is not exempt from regulation under the exemption provision, § 34 of the Fraternal Benefit Societies Act of 1935, the Act of July 17, 1935, P. L. 1092.

Harrisburg, Pa., May 7, 1959.

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

Sir: You have asked whether certain activities carried on in Pennsylvania by a nonprofit out-of-state corporation are subject to regulation by your department. Specifically, you ask whether the nonprofit corporation formed by the Brotherhood of Railroad Trainmen, an unincorporated association, as a fraternal benefit society under the laws of Ohio, is exempt from regulation because of the exemption provisions in the Fraternal Benefit Societies Act of 1935 of this Commonwealth. This answer is arrived at by an interpretation of the exemption section<sup>1</sup> of the act referred to above.

The section, in so far as is here material, provides:

"Nothing contained in this [Fraternal Benefit Societies Act of 1935] shall be construed to affect or apply to grand or subordinate lodges of purely social or labor organizations, nor to societies which limit their membership to any one hazardous occupation, nor to domestic societies which limit their membership to a particular religion, or to the employes of a particular city or town, designated firm, business house, or corporation, nor to domestic lodges, orders, or associations of a purely religious, charitable and benevolent description which do not provide for a benefit of more than three hundred dollars to any one person in any one year."

We are given to understand that but for this section, the insurance activities of the Brotherhood would be subject to regulation by the Insurance Commissioner. Having set forth the applicable statute law, we turn now to the facts surrounding the question.

The Brotherhood of Railroad Trainmen was formed in 1883 in New York as an unincorporated association. Its purposes are as set forth in its preamble:<sup>2</sup>

"To unite the Railroad Trainmen Bus Employes and Dining Car Stewards, to promote their general welfare and advance their interests, social, moral, political, economic and intellectual; to protect their families by the exercise of benevolence, very needful in a calling so hazardous as ours, this fraternity has been organized."

<sup>1</sup> Act of July 17, 1935, P. L. 1092, § 34, 40 P. S. § 1084.

<sup>2</sup> Constitution, Brotherhood of Railroad Trainmen, as amended at 29th Convention, effective on and after February 1, 1951.

As part of its program it provides for its members a program of death benefits, endowments, annuities, disability benefits and health and accident insurance.

In 1933 this department<sup>3</sup> informally advised the then Commissioner of Insurance, Honorable Charles F. Armstrong, that because of the exemption "for societies which limit their membership to any one hazardous occupation," the Insurance Commissioner had no jurisdiction over the Brotherhood.

In 1936 the Brotherhood established a nonprofit corporation under the insurance laws of Ohio governing fraternal benefit societies to be known as Brotherhood of Railroad Trainmen Insurance Department. That organization now has assets in excess of \$50 million. It issues certificates from \$250.00 to \$10,000.00 in all states and in Canada. Its activities encompass accident and health insurance, disability and life insurance. Its benefit program is available to members, their wives and dependents. Some certificates remain in force after members leave the Brotherhood and the railroad occupations. The membership includes not only brakemen and yardmen but also clerks and porters and members of certain professions on its staff. The total insurance in force exceeds \$125 million. Approximately 8900 policies are in force in Pennsylvania.<sup>4</sup>

The purposes for which this nonprofit corporation was formed are given in paragraph three of its charter:

"As a fraternal benefit society, without capital stock, organized and carried on solely for the mutual benefits of its members and their beneficiaries; and not for profit, and having a lodge system with ritualistic form of work and representative form of government; to make provisions for the payment of death, disability, benevolent and other benefits in accordance with the constitution, rules, regulations and orders of the society, and as may now or hereafter be permitted by the insurance laws of the State of Ohio governing fraternal benefit societies and in general do all things necessary or incidental to the conduct of such business."

We understand that this separate corporation was formed to subject the Brotherhood's insurance activities to regulation by the Ohio

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<sup>3</sup>Letter dated January 4, 1933, to Honorable Charles F. Armstrong, Insurance Commissioner from Harold D. Saylor, Deputy Attorney General. The act involved was the Fraternal Benefit Act of May 20, 1921, P. L. 916, the predecessor to the present act.

<sup>4</sup>Statistics Fraternal Societies, 1956, the Fraternal Monitor (62nd edition).

authorities to afford its members the protection of public regulation; and, in fact, the Brotherhood's Insurance Department is so regulated in Ohio. For the purposes of this opinion we need not consider the questions of whether this organization is a purely social or labor organization and whether its membership is one which now limits its membership to one hazardous occupation.

Referring to the exemption section above, the question then becomes whether the phrase "which do not provide for a benefit of more than three hundred dollars to any one person in any one year" modifies only the immediately preceding generic phrase, or whether it applies to each of the preceding generic classifications. We are of the opinion that it modifies each of the classifications. To construe it otherwise would be to reach an unreasonable result. For example, it would be unreasonable to hold that a domestic society limiting its membership to one religion would be exempt from regulation regardless of the size of the benefit but that a domestic lodge of a purely religious, charitable or benevolent description would be subject to regulation if its benefit exceeded three hundred dollars.

Further, when the part of the section just discussed is considered in relationship to another provision of the same section, additional evidence supporting the above reading of the statute is found. That provision specifies:

" \* \* But any society conducting an insurance branch and issuing certificates and paying death benefits of more than five hundred dollars, such insurance branch of that society shall comply with the provisions of this act."

Manifestly, then, the Brotherhood of Railroad Trainmen Insurance Department, being the insurance branch of that society, is not exempt from the provisions of the act. Finally, in view of the recent national disclosures<sup>5</sup> concerning malpractices in the administration of unsupervised union funds, the interest of the membership would be served by holding these activities subject to regulation.

We call your attention to § 32 of the Fraternal Benefit Societies Act<sup>6</sup> which makes it a misdemeanor for a society subject to the provisions of the act to do business in this Commonwealth without first being certified to do so by the Insurance Commissioner. In view of

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<sup>5</sup> See U. S. Congressional and Administrative News, September 20, 1958, 4813 et seq.

<sup>6</sup> Act of July 17, 1935, P. L. 1092, 40 P. S. § 1082.

the reliance which might have been placed on the aforementioned informal letter of this department, it is our opinion that no action under this penal section would be warranted for past activities of the Brotherhood.

Accordingly, it is our opinion, and you are so advised, that the present activities of the Brotherhood of Railroad Trainmen are not exempt from regulation by your department under the provisions of the Fraternal Benefit Societies Act of 1935.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

ANNE X. ALPERN,  
*Attorney General.*

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#### OFFICIAL OPINION No. 182

*Medical and surgical insurance plans—State employee subscribers—Treasury Department—Deduction and transmittal of premiums—Financial and descriptive publication reports—Federal Welfare and Pension Plans Disclosure Act.*

The activities of the Treasury Department in making Blue Cross and Blue Shield benefits available to departmental employees by deducting from the subscriber's salary the amount of the premium payment and periodically transmitting the same as well as furnishing forms, are not such as to subject the department to the filing and publication requirements of the Federal Welfare and Pension Plans Disclosure Act which requires administrators of employee pension and welfare plans to publish a description thereof and submit annual financial reports.

Harrisburg, Pa., May 13, 1959.

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

Sir: You have requested advice as to whether the provisions of the Federal Welfare and Pension Plans Disclosure Act,<sup>1</sup> effective January 1, 1959, apply to the Treasury Department which, on behalf

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<sup>1</sup> Welfare and Pension Plans Disclosure Act, Pub. L. 85-836, August 28, 1958, 72 Stat. 997, 29 U. S. C. 301-309.

of its employee subscribers, deducts and transmits premiums for the Blue Cross and Blue Shield. You indicate that your department deducts<sup>2</sup> from the subscriber's salary the amount of the premium payment and periodically transmits the same either to Blue Cross or Blue Shield, or both. In addition, your department makes available application forms and payroll deduction authorization forms which are supplied by the local Blue Cross and Blue Shield organizations. Blue Cross and Blue Shield are generic names for organizations which make available insurance covering the medical and surgical cost of illness and injury.

The Federal Welfare and Pension Plans Disclosure Act was enacted to correct existing abuses in the management of private employee pension benefit plans. In some cases the plans were used by the administrators for selfish motives, as is illustrated by cases of embezzlement, exorbitant commissions, improper service fees and other irregular insurance practices. In most cases it appeared to be the exception rather than the rule that any accounting of the financial operations or the reserves in such plans were given to the employees for whom the plans were operated. It was to remedy this condition, among other reasons, that the act was passed.<sup>3</sup>

The act provides that certain employee welfare or pension plans are required to publish a detailed description of the plan and an annual financial report. The employee welfare benefit plan is defined<sup>4</sup> as:

"(1) \* \* \* any plan, fund or program which is communicated to or its benefits described in writing to the employees, and which was heretofore or is hereafter established by an employer or an employee organization, or by both, for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment."

Excepted from the coverage of the federal act are:<sup>5</sup>

"(1) [employee plans if] such plan is administered by the government of a State, by a political subdivision of a State, or by an agency or instrumentality of any of the foregoing \* \* \*."

<sup>2</sup> The Act of July 19, 1951, P. L. 1074, 40 P. S. § 539, requires certain governmental bodies to check off and remit premiums to associations furnishing group insurance when the employees involved authorize it.

<sup>3</sup> U. S. Congressional and Administrative News, September 20, 1958, 4813 et seq.

<sup>4</sup> 29 U. S. C. 302(a) (1).

<sup>5</sup> 29 U. S. C. 303(b)(1).

The administrator of such plans, who is required to publish the description and annual financial report, is defined as:<sup>6</sup>

“(1) The person or persons designated by the terms of the plan \* \* \* with responsibility for the ultimate control, disposition or management of the money received or contributed; or

“(2) In the absence of such designation, the person or persons actually responsible for the control, disposition or management of the money received or contributed, irrespective of whether such control, disposition, or management is exercised directly or through an agent or trustee designated by such person or persons.”

Your department is not within the provisions of this federal act and, accordingly, there is no necessity for complying with its terms. This opinion is based on the following reasons:

1. The arrangement here whereby Treasury Department employees can have the premium payments on Blue Cross or Blue Shield checked off their salary is not an “employee welfare benefit plan” which was “heretofore or hereafter established by an employer or by an employee organization.” The service is available to the employees on an optional basis. Your department has no control over the method of administering the plan or amending its provisions. Your department has no control over the internal affairs of the plan. It acts as a conduit for the premiums collected. Beyond that, it does nothing other than allow the plan to be made available to employees. It would be stretching the language of the act unreasonably to find these activities to be a plan established by an employer, particularly when the Treasury Department is required by the Act of July 19, 1951, *supra*, to deduct and transmit premiums upon the employee’s written authorization.

2. The duty of disclosure and reporting is placed upon the administrator of the plan under § 5(a). The definition of “administrator” as set forth in subsection (b) does not apply to your department. Since in handling the money your department acts simply as a conduit, it again would be an unreasonable classification to find this activity resulting in your department being held the “person with responsibility for the ultimate control, disposition or management of the money” or “the person actually responsible for the control, disposition or management of the money.”

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<sup>6</sup> 29 U. S. C. 304(b)(1) and (2).

3. If, however, your department's limited activity in this area were sufficient to qualify it as administrator of the plan, the specific exclusion appearing in § 4(b) (1), applying to State governments, would relieve you of the obligations of filing and of financial publication.

Accordingly, it is our opinion, and you are so advised, that the Federal Welfare and Pension Plans Disclosure Act does not apply to the Treasury Department in so far as its present activities are concerned.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

ANNE X. ALPERN,  
*Attorney General*

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OFFICIAL OPINION No. 183

*Electric car heaters—Drive-in Theaters—Buildings or structures—Regulation by Industrial Board—Fire and Panic Law.*

A drive-in theater is a building or structure within the meaning of § 2 of the Fire and Panic Law of April 27, 1927, P. L. 465, and electric heaters connected to and deriving their power from wires laid in said theaters which are used to heat cars, are subject to the jurisdiction of the Industrial Board.

Harrisburg, Pa., June 3, 1959.

Honorable Michael J. Cielo, Secretary of the Industrial Board, Harrisburg, Pennsylvania.

Sir: You have requested our advice on whether the Industrial Board has jurisdiction over electric heaters used to heat cars at drive-in theaters. This jurisdiction, if it exists, must be derived from the act of April 27, 1927, P. L. 465, 35 P. S. § 1221, commonly referred to as the "Fire and Panic Law," § 1 of which requires that:

"Every building enumerated in this act, \* \* \* shall be so constructed, equipped, operated, and maintained, with respect to \* \* \* electrical equipment, \* \* \* heating apparatus \* \* \*

and all other fire and panic protection as to provide for the safety and health of all persons employed, accommodated, housed, or assembled therein."

In addition, this section gives the Department of Labor and Industry the power to make, order, amend or repeal rules and regulations for carrying into effect all the provisions of the act.

The electric heater in question is supported by a pole and attached to it by wires, and, in addition, sometimes by a chain or other permanent connection. The wires run from the pole underground to a central electrical source. When in use the heaters are removed from the pole and placed in the car to keep the occupants warm during the time they are watching the motion picture.

Section 2<sup>1</sup> of the act states:

"Classes of Buildings.—The following are the classes of buildings and structures which it is intended that this act shall cover:

Class I Buildings.—Factories, power plants, \* \* \* and all other buildings specified by the department, not enumerated in Classes II, III, IV, and V, wherein persons are employed, housed or assembled.

Class II Buildings.—Theatres and motion picture theatres.

\* \* \* \* \*

Class V Buildings.—Grandstands, stadiums and amphitheatres, and summer theatres."

The issue here is whether a drive-in theater may be considered a building or structure within the above-quoted sections. If it is then it is clear that the Industrial Board has jurisdiction over these heaters since they would then be properly considered electrical and heating apparatus within a building or structure and come within the purview of § 1.

We are of the opinion that a drive-in theater is a building or structure within the purview of this act. The type of structures enumerated under Class V Buildings is significant in that they are normally unroofed. Indeed they are generally not even completely enclosed on their sides. Drive-in theaters are similar to such structures. They normally consist of a large fenced-in area, with asphalt or other solid paving, and a projection room and large viewing screen. There

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<sup>1</sup> Act of April 27, 1927, P. L. 465, as amended, 35 P. S. § 1222.

may also be rest rooms, snack bars and other structures within the enclosure.

A fire in such a setting could be serious in spite of the fact that the persons themselves are enclosed and separated to some extent from each other by their automobile, since automobiles carry gasoline and are subject to explosion when near external fire. Furthermore the large number of automobiles in the area would make quick egress difficult. Should a fire start in an automobile, resulting in an explosion, it is unlikely that nearby cars could escape injury. It is the danger from fire to large numbers of people confined within a limited area that this act is designed to minimize. Since drive-in theaters are similar to structures specifically enumerated in § 2 of the act, and persons in such theaters are subject to the same dangers, it is our opinion that such a theater may properly be considered a "building or structure" under the general coverage of § 2 of the "Fire and Panic Act."

Any doubt must be resolved in favor of broad coverage. Section 58 of the Statutory Construction Act,<sup>2</sup> after enumerating certain types of provisions requiring strict construction states:

"All other provisions of a law shall be liberally construed to effect their objects \* \* \*."

Sections 51 and 52(5), 46 P. S. §§ 551, 552(5) of this act further support a broad construction.

Therefore, it is our opinion and you are accordingly advised that electric heaters connected to and deriving their power from wires laid in drive-in theaters are subject to the provisions of the "Fire and Panic Law," and are subject to the jurisdiction of the Industrial Board.

Very truly yours,

DEPARTMENT OF JUSTICE,

DAVID C. HARRISON,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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<sup>2</sup> Act of May 28, 1937, P. L. 1019, 46 P. S. § 558.

## OFFICIAL OPINION No. 184

*Stairway "inclinator"—Regulation—Elevator Law.*

Stairway "inclinator" designed to raise and lower individuals between levels of a building and running along and on the same angle as the staircase, are "elevators" within the meaning of § 1 of the Elevator Law, the Act of May 2, 1929, P. L. 1518, and may be regulated by the Department of Labor and Industry.

Harrisburg, Pa., June 3, 1959.

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

Sir: You have requested our advice on whether a stairway "inclinator" comes within the terms of the Act of May 2, 1929, P. L. 1518, as amended, 35 P. S. § 1341, commonly referred to as the "Elevator Law."<sup>1</sup>

The inclinator under consideration consists of two seats, attached to a panel which rides on a track running the length of a staircase. Persons using this device sit on this seat, facing each other and by pushing a control button ride up or down the staircase.<sup>2</sup>

"Elevator" as defined in § 1 of the act means:

"\* \* \* 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 \* \* \* escalators, \* \* \* and other lifting and lowering apparatus \* \* \*."

It is proper to regard this apparatus as moving vertically, since its purpose is to lift a passenger between two levels of a building. This view is reenforced by the specific inclusion of escalators which move at essentially the same angle. The machine under consideration also raises and lowers a platform, in this case the seats on which the passengers sit. Thus two of the criteria of an "elevator" are met. The only remaining question is whether or not the platform is raised or lowered "between permanent rails or guides."

The track on which this device moves has a center groove running its length. A wheel runs in this groove to hold it on the track and prevent it from tipping sideways. The device thus does run between

<sup>1</sup> Jurisdiction under this Act for this purpose extends to all elevators except those in coal mines.

<sup>2</sup> There are also smaller, one passenger models in which the passenger rides facing the bottom of the staircase.

permanent guides—the two sides of the groove. These hold the inclinator to a fixed, rigid and permanent path and in this respect it is identical to escalators and the other types of lifting mechanisms specifically mentioned by the act.<sup>3</sup>

Therefore, it is our opinion and you are accordingly advised that an inclinator, designed to raise and lower individuals between levels of a building running along and on the same angle as a staircase, is an elevator within the meaning of the "Elevator Law," and may be regulated by your department.

Very truly yours,

DEPARTMENT OF JUSTICE,

DAVID C. HARRISON,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 185

*Motor vehicles—Drunken driving—Suspension of license following administrative hearing—Subsequent conviction—Effect of suspension on running time of mandatory one year revocation—The Vehicle Code.*

The one year mandatory revocation provided under § 614 of The Vehicle Code, the Act of May 1, 1929, P. L. 905, following a conviction for drunken driving, cannot be changed in time or be in effect reduced by giving credit to the driver for the time his license was suspended for the same violation following an administrative hearing under § 615(b)(1) of the code, which suspension took place before his conviction.

Harrisburg, Pa., June 3, 1959.

Honorable Charles M. Dougherty, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You have requested an opinion concerning the policy to be adopted by the Bureau of Highway Safety, Department of Revenue,

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<sup>3</sup> The situation here is different from that involved in Official Opinion No. 149, 1958 Op. Atty. Gen. 338, in which we ruled that a hoist which ran on a fixed horizontal track but which raised and lowered its load through holes in the floor, without guides, was not an elevator since it was not "raising or lowering \* \* \* vertically between permanent \* \* \* guides."

to be applied to §§ 614 and 615(b)1 of The Vehicle Code, Act of May 1, 1929, P. L. 905, 75 P. S. §§ 191 and 192, with relationship to a same offense by the same person.

On January 20, 1959, a person had his driver's license suspended for a period of nine months for the offense of operating a motor vehicle while under the influence of intoxicating liquor pursuant to an administrative hearing under § 615(b)1, as amended, 75 P. S. § 192, which provides:

“(b) The secretary *may* suspend the operator's license or learner's permit of any person, after a hearing before the secretary or his representative, whenever the secretary finds upon sufficient evidence:

“1. That such person has committed any offense for the conviction of which mandatory revocation of license is provided in this act; \* \* \*” (Emphasis supplied)

However, the Secretary does not actually suspend the license until the receipt of the operator's card, which in this case was on January 31, 1959. The administrative hearing was held after the arrest of the person, but before his conviction, as certified by the court in the criminal case to the Secretary of Revenue on February 6, 1959, showing the conviction of this same person for the same offense. Between the dates of January 31, 1959, and February 6, 1959, the person in question served some of the time of his suspension. Upon receipt by the Secretary of the certification by the court the provisions of § 614, as amended, *supra*, 75 P. S. § 191, became operative. This section provides:

“(a) Upon receiving a certified record, from the clerk of the court, of proceedings in which a person pleaded guilty, entered a plea of *nolo contendere*, or was found guilty by a judge or jury, of any of the crimes enumerated in this section, *the secretary shall forthwith revoke, for a period of one (1) year from the date of revocation, the operating privilege of any such person*, and where such person was convicted, or entered a plea of guilty or *nolo contendere*, of any one of the crimes enumerated in this section, such operating privilege shall not be restored, unless, and until, the fine and costs, imposed in such case, have been fully paid. The clerk of the courts shall, when such fine and costs have been so paid in any such case, certify such fact to the Department of Revenue.

“1. Operating a motor vehicle or tractor while under the influence of intoxicating liquor, \* \* \*” (Emphasis supplied)

In construing § 614 of The Vehicle Code, *supra*, the Court in *Brennan's Case*, 344 Pa. 209, 210, 212, 25 A. 2d 155 (1942), stated:

"\* \* \* This action was taken pursuant to § 614 of the Vehicle Code, Act of May 1, 1929, P. L. 905, as amended by Act of June 29, 1937, P. L. 2329 (75 PS § 191). \* \* \*

\* \* \* \* \*

"\* \* \* For certain definite offenses the secretary is required to revoke the license without hearing and he is given no discretion; \* \* \*"

The question now arises whether or not credit can be given to the driver in question for the time already served on the suspension imposed as the result of the administrative hearing toward the period of the one year mandatory revocation.

The policy to be adopted must be within the limitation allowed by law. It is important to note that the two actions against this person were entirely different and the results were also different, to wit, a suspension and a revocation.

At common law and by statutes courts have inherent power to suspend or change sentences. Under delegated statutory law the Secretary can only do what he is authorized to do.

In The Vehicle Code there is neither a specific, implied nor a discretionary authority to give credit on the period of suspension toward the period of revocation. To allow the Secretary to do so would, in effect, be saying that the one year period provided is of no consequence or certainty and the Secretary can create an end result different from that intended by the Legislature varying in time with the circumstances of each case. Further, to give credit for the period of suspension served prior to the revocation would, in effect, be antedating the mandatory one year to commence at a time prior to the date of the conviction and revocation.

In fact, in the case of *Hynes v. Logan*, 53 Dauph. 381 (1943), the Secretary did change the expiration of a revocation date and the court refused to accept the change. In that case, the court, after renewing the facts stated:

"We are asked to determine the period which the second revocation covers.

\* \* \* \* \*

"Forthwith means 'immediately' or 'without delay.'

"Under the aforesaid section the Legislature has put the duty upon the Secretary of Revenue to deny an operator the

privilege of driving immediately upon receiving a certified record from the Clerk of the Courts.

\* \* \* \* \*

*"It is the operating 'privilege' which the law takes away from the violator. This privilege can be denied him whether at the time it is taken away, he has a license or not. The penalty is not the revocation of the license, but is the denial of the privilege to operate. The Act says that the period for which he shall not have such privilege is one year from the date of revocation. The revocation apparently does not take effect until the Secretary of Revenue acts. It is his duty to act immediately upon receipt of official word from the Clerk of the Court. (Emphasis ours)*

\* \* \* \* \*

*"The actual withdrawal of the operating privilege is not uniform under the practice of the Department. Presumably one person may not have his privilege withdrawn until three months after conviction while another may have his privilege revoked a month and a half later. The result would be in dating the revocation back to the date of conviction that one person's operating privilege may be withdrawn for ten and a half months and another's for only nine months, while the Act provides for one year." (Emphasis ours)*

There must be uniformity in the application of the provisions of § 614 of The Vehicle Code, *supra*, as to all persons, meaning one year for each, no more and no less, regardless of other pertinent related facts.

Since there can be no appeal to a court from a revocation where the action of the Secretary is mandatory,<sup>1</sup> it must necessarily follow that the Secretary, by exercising his discretion, cannot change the one year period after revocation.

We are of the opinion, therefore, and you are accordingly advised that the one year mandatory revocation under § 614 of The Vehicle Code, *supra*, cannot be changed in time or be reduced in effect by giving to a person credit for time served under a suspension under § 615(b)1, of The Vehicle Code, *supra*.

Very truly yours,

DEPARTMENT OF JUSTICE,

ELMER T. BOLLA,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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<sup>1</sup> *Brennan's Case*, *supra*, 344 Pa. 209, 212.

## OFFICIAL OPINION No. 186

*Motor vehicles—Operator's license—Issuance to physically handicapped applicant—Section 604 of The Vehicle Code.*

A person having one arm totally incapacitated and the other arm having a very limited partial use for activities other than operating a motor vehicle, comes within the purview of § 604(b) of The Vehicle Code, the Act of May 1, 1929, P. L. 905, and the Secretary of Revenue has no discretion under § 604(a)(7) to grant an operator's license to such person. An operator's license may not be issued to a person who has lost use of both hands to such an extent that he could not operate an automobile unless it were equipped with automatic foot controls.

Harrisburg, Pa., June 4, 1959.

Honorable Charles M. Dougherty, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You have requested our advice concerning the proper interpretation of § 604 of The Vehicle Code, the Act of May 1, 1929, P. L. 905, as amended,<sup>1</sup> 75 P. S. § 164, and asked the following questions:

"1. Is a person having the following disabilities included under the provisions of Section 604(b); one arm totally incapacitated, the other arm very limited partial use for other activities but cannot use it to operate a motor vehicle.

"2. Is a person who has lost the use of both hands prohibited by law from operating a motor vehicle or is it within the discretion of the Secretary of Revenue to grant him an operator's license?"

Subsection (b) of § 604 of The Vehicle Code, *supra*, 75 P. S. § 164 (b), provides:

"(b) Physical disability includes the loss of the use of both hands."

You have stated that an individual, as a result of polio, has suffered the loss of the use of both hands to the extent that he could not operate an automobile unless it were equipped with automatic foot controls.

The foot controlled automobile operates as follows:

"The foot driving controls can function with absolutely no use of the arms or hands. Steering is accomplished by means

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<sup>1</sup> Now Act of April 27, 1959, P. L. 58.

of a 'wheel' near the floor direct-coupled to the regular steering shaft. The left foot, fitted into a steel slipper, turns this steering disc much the same as a normal person would use a wheel spinner-knob on the regular wheel. A device on the heel of the steel slipper helps hold the wheel rigid at high speeds, both straight ahead and on moderate turns. The right foot operates the gear selector, throttle, and brake. Controls for the horn, turning indicators, dimmer switch, and other accessories are adapted as necessary. Most drivers adjust easily to this method of driving. An automatic transmission and power steering are necessary, of course.

"Adjustments can be made to compensate for weak leg muscles, but to drive with the feet, a person should have normal reactions and command of the muscles needed, as well as the mental stability to meet the requirements of present-day driving. It is very desirable for the driver using foot-steering controls to have 90% of the normal use of the leg muscles, with the ability to raise one leg at a time, and to have good strength in the muscles of the lower back and sides, for stability when turning." (Taken from a description sheet entitled "Automobile Foot-Driving Controls," Kope, Inc., Engineering and Manufacturing, 14660 E. Manning, Parlier, California, lodged in Revenue's file).

The limitation of subsection (b) of §604 of The Vehicle Code, *supra*, describes physical disability as including the loss of the use of both hands, not just the loss of both hands by amputation.

In the instant case, it is obvious that the individual's arms and hands are so affected as to substantially and materially impair the use thereof in the practical performance of the functions of a stock model motor vehicle operator.

There is not much use of a hand without the cooperating function of the use of an arm. The mere fact that a person must have an automobile equipped with foot controls which dispenses with the use of the hands on the steering wheel indicates that there is a loss of the use of both hands necessarily required to operate a stock model motor vehicle.

There is no provision in The Vehicle Code, *supra*, permitting the issuance of a license to such an individual because of the fact that the car is equipped with foot controls.

In the 1957 Session of the Legislature, Senate Bill No. 639 was introduced to amend The Vehicle Code, *supra*, by deleting the prohibition against issuing an operator's license or learner's permit to a

person who has lost the use of both hands. This bill was defeated in the Senate.

In considering your second inquiry, your attention is brought to subsection (a)7 of § 604 of The Vehicle Code, *supra*, 75 P. S. § 164, wherein it is provided that a person shall not be licensed when:

“(a) An operator’s license or learner’s permit shall not be issued to any person under the following conditions:

\* \* \* \* \*

“7. When afflicted with, or suffering from, a physical \* \* \* disability \* \* \* which, in the opinion of the secretary, will prevent such person from exercising reasonable and ordinary control over a motor vehicle \* \* \*.”

We are of the opinion, and you are accordingly advised, that a person having one arm totally incapacitated and the other arm having a very limited partial use for other activities but cannot use it to operate a motor vehicle comes within the provisions of subsection (b) of § 604, *supra*.

Once a determination has been made that a person comes within the provisions of subsection (b) of § 604, *supra*, then the Secretary of Revenue has no discretion to grant such a person an operator’s license under the provisions of subsection (a)7 of § 604 of The Vehicle Code, the Act of May 1, 1929, P. L. 905, as amended, 75 P. S. § 164.

A survey of the fifty states and the District of Columbia reveals that all but Pennsylvania grant discretion to their licensing authority to grant restricted licenses to individuals who have lost the use of both of their hands but can competently operate a foot controlled vehicle like that described above. Of these however, only California (1), Georgia (several), Massachusetts (2), Michigan (1), and New Hampshire (1), have actually issued such licenses to applicants, and New York, North Carolina, Oklahoma, Wisconsin and Vermont indicate that it is unlikely that such an applicant would be licensed.

Very truly yours,

DEPARTMENT OF JUSTICE,

ELMER T. BOLLA,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

## OFFICIAL OPINION No. 187

*Teachers—Sick leave—Accumulation—Section 1154(a) of the Public School Code of 1949.*

Under § 1154(a) of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, professional or temporary employees of school districts may accumulate annually 10 days sick leave with full salary without limitation on total accumulation which may be used at any time during the school year; however, no more than 30 days accumulated sick leave may actually be used in any school year. Section 1154(a) of the act clearly evidences an intent to make available 10 days sick leave with full salary at any time during the school year, even though illness or accidental injury may befall a novice teacher during the first 10 days of the school year.

Harrisburg, Pa., June 10, 1959.

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

Sir: You request an interpretation of subsection (a) of § 1154 of the Public School Code of 1949<sup>1</sup> which provides for payment of full salaries in case of illness or accidental injury to professional or temporary professional employees of school districts in pertinent part as follows:

“(a) In any school year whenever a professional or temporary professional employe is prevented by illness or accidental injury from following his or her occupation, the school district shall pay to said employe for each day of absence the full salary to which the employe may be entitled as if said employe were actually engaged in the performance of duty for a period of ten days. Such leave shall be cumulative from year to year, but shall not exceed thirty (30) days leave with full pay in any one year. No employe’s salary shall be paid if the accidental injury is incurred while the employe is engaged in remunerative work unrelated to school duties.”

You explain that school officials and solicitors throughout the Commonwealth have advanced conflicting interpretations of § 1154(a). One group interprets the provision to mean that an employee may accumulate sick leave at the rate of ten (10) days per year up to but not in excess of a total of thirty (30) days. Another group allows an employee to accumulate sick leave at the rate of ten (10) days per year without limitation on total accumulation. Both groups permit an employee to be absent for sickness without loss of salary

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<sup>1</sup> Act of March 10, 1949, P. L. 30, as amended, 24 P. S. § 11-1154(a).

up to thirty (30) days in any one year provided such number of days has been accumulated.

Specifically, you request advice on the following questions: (1) What is the proper interpretation of subsection (a) of § 1154 as to total accumulation of sick leave? (2) What consequences flow from a situation in which a teacher in the first year of service is absent by reason of illness or accidental injury for ten (10) days at the beginning of the school year?

With regard to the first question § 1154(a) provides that a professional or temporary professional employee shall be paid full salary for each day of absence due to illness or accidental injury up to ten (10) days. This establishes the number of days of sick leave which, if unused, may accumulate each year. The troublesome sentence which has resulted in conflicting interpretations is that which reads: "Such leave shall be cumulative from year to year, but shall not exceed thirty (30) days leave with full pay in any one year." We interpret this sentence to mean that an employee shall accumulate annually ten (10) days sick leave with full salary without limitation on total accumulation but that no more than thirty (30) days accumulated sick leave may be used in any school year. Thus, by way of illustration, a teacher with six (6) years of service who has never used any accumulated leave would be credited with sixty (60) days and could exhaust it by taking thirty (30) days leave with full salary in each of two successive years for illness or accidental injury.<sup>2</sup>

With regard to the second question, the manner in which § 1154(a) is worded clearly evidences an intent to make available ten (10) days sick leave with full salary at any time during the school year, even though illness or accidental injury may befall a novice teacher during the first ten (10) days of the school year. Administratively, this interpretation means that each teacher should be credited with ten (10) days at the beginning of each school year, and deductions for sick leave taken thereafter should be made from the total amount accumulated.

We are, therefore, of the opinion and you are accordingly advised that § 1154(a) of The Public School Code of 1949, *supra*, as amended, must be interpreted to mean that a professional or temporary pro-

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<sup>2</sup> To complete the illustration, the teacher would accumulate an additional ten (10) days in each of his seventh and eighth years of service and would thus have twenty (20) days accumulated leave available during the eighth year.

professional employee shall accumulate annually ten (10) days sick leave with full salary without limitation on total accumulation which may be used at any time during the school year, but that no more than thirty (30) days accumulated sick leave may be used in any school year.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN III,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General*

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OFFICIAL OPINION No. 188

*School districts—Computation of basic account reimbursement fraction—Enrolled public school pupils—Public School Code of 1949.*

Under the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, in computing the basic account standard reimbursement fraction in the case of a school district, teaching units shall be based only upon enrolled public school pupils and may not be based upon all pupils residing in the district attending public, parochial and private schools.

Harrisburg, Pa., June 11, 1959.

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

Sir: You request advice as to whether, in computing the basic account standard reimbursement fraction in the case of a school district, teaching units shall be based upon enrolled public school pupils only or upon all pupils residing in the district whether they attend public, parochial or private schools.

Section 2501(6) of the Public School Code of 1949<sup>1</sup> requires that each school district's basic account standard reimbursement fraction be computed annually in the month of December by the Department

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<sup>1</sup> The Act of March 10, 1949, P. L. 30, as amended, 24 P. S. § 25-2501(6).

of Public Instruction and, for the school year 1957-1958 and for each year thereafter, specifies that this basic account standard reimbursement fraction shall be computed:

"\* \* \* by subtracting from five thousand eight hundred dollars (\$5800), an amount determined by multiplying the school district's valuation per district teaching unit by four and three-eighths one-thousandths (.004 $\frac{3}{8}$ ), and dividing the difference so obtained by five thousand eight hundred dollars (\$5800)."

Section 2501 (2) of the act<sup>2</sup> defines "teaching units" as follows:

"(2) 'Teaching Units' consist of twenty-two (22) high school pupils or thirty (30) elementary school pupils. Fractions thereof shall be fractional teaching units. If a district's pupil-teacher ratio exceeds thirty-three (33), its district teaching unit shall be obtained by multiplying the total number of all teaching units as defined above by thirty-three (33) and dividing the product so obtained by the pupil-teacher ratio of the district."

Your question arises by reason of the fact that elementary and high school pupils referred to in § 2501(2) are not particularly specified to be pupils enrolled in *public* elementary and high schools. On the basis of this absence of particularization you inquire whether the Legislature intended that *all* pupils of a district whether enrolled in public, parochial or private schools, must be considered in your department's calculation of teaching units.

We are of the opinion that the Legislature clearly evinced an intention in the Public School Code of 1949, *supra*, to include only pupils enrolled in the public schools for the purpose of determining teaching units and, hence, the school district's basic account standard reimbursement fraction.

A brief analysis of several related provisions of the Public School Code of 1949, *supra*, sustains this conclusion.

In determining the number of district teaching units for purposes of calculating the basic account standard reimbursement fraction, the definition of "teaching units" in § 2501(2) of the Code, *supra*, is not to be used. Sections 2501(10) of the Code<sup>3</sup> specifically provides for this determination in pertinent part as follows:

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<sup>2</sup> Id., 24 P. S. § 25-2501(2).

<sup>3</sup> Id., 24 P. S. § 25-2501(10).

“\* \* \* A school district’s \* \* \* number of district teaching units for purposes of determination of the basic account standard reimbursement fraction \* \* \* shall be obtained as follows: (i) divide by twenty-two (22) the number of district pupils in average daily membership *in a public high school* during the preceding school term, (ii) divide by thirty (30) the number of district pupils in average daily membership *in a public elementary school* during the preceding school term, and (iii) add the quotients obtained under (i) and (ii) above, except when the pupil-teacher ratio exceeds thirty-three (33), in which case, the sum obtained under (i) and (ii) above shall be multiplied by thirty-three (33) and the product so obtained shall be divided by the pupil-teacher ratio of the district. \* \* \*” (Emphasis supplied)

Section 2501(1) of the Code<sup>4</sup> defines “district pupils” as “all pupils enrolled in the public schools of the Commonwealth.” Section 2501(11) of the Code<sup>5</sup> defines “actual instruction expense per elementary teaching unit” and “actual instruction expense per secondary unit” in terms of elementary and secondary pupils “educated in the district’s public schools.” The mandates for subsidy payments on account of instruction contained in § 2502 of the Code<sup>6</sup> are specifically based upon “all pupils, except kindergarten pupils, who are residents of the district and are in average daily membership in the district’s public schools.”

Our conclusion, drawn from a plain reading of the relevant statutory provisions, is amply supported by legislative history. In connection with the Senate debate on House Bill No. 183, which became Act No. 391 of the Session of 1957, the act of July 13, 1957, P. L. 864, and which made numerous amendments to § 2501 of the Public School Code of 1949, Senator Albert R. Pechan stated:<sup>7</sup>

“I would just like to point out that my home community of Ford City, which is a rural area, has in its public schools eighty-nine teaching units. I am merely talking about a small area. If we added our parochial students, we would have thirty-two more teaching units, which would give us a total of 121 teaching units. *However, we are only being reimbursed for eighty-nine because the parochial students are not counted in the school population.*” (Emphasis supplied)

We are, therefore, of the opinion and you are accordingly advised that in computing the basic account standard reimbursement fraction

<sup>4</sup>Id., 24 P. S. § 25-2501(1).

<sup>5</sup>Id., 24 P. S. § 25-2501(11).

<sup>6</sup>Id., 24 P. S. § 25-2502.

<sup>7</sup>1957 Legislative Journal, p. 3520. See also pp. 3385-3390 and pp. 3521-3522.

in the case of a school district, teaching units shall be based only upon enrolled public school pupils and may not be based upon all pupils residing in the district attending public, parochial and private schools.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN III  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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### OFFICIAL OPINION No. 189

*Schools—Construction of term “closed schools”—Public School Code of 1949.*

The phrase “closed school” or “school permanently closed or discontinued” as used in § 2511 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, means a building formerly used by a school district for the teaching of children which is no longer used for instructional purposes.

Harrisburg, Pa., July 15, 1959.

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

Sir: You request interpretation and construction of the term “closed school” as it is used in § 2511 of the Public School Code of 1949,<sup>1</sup> which provides:

“Every school district of the fourth class and every school district of the third class which is in or coterminous with a township shall be paid by the Commonwealth for every school term, on account of closed schools the sum of two hundred dollars (\$200) for each school permanently closed or discontinued in the district since one thousand nine hundred eleven (1911), or which may hereafter be permanently closed or discontinued, or which was heretofore permanently closed or discontinued under the provisions of the act, approved the twenty-fifth day of April, one thousand nine hundred one

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<sup>1</sup> Act of March 10, 1949, P. L. 30, 24 P. S. § 25-2511.

(Pamphlet Laws 105), entitled 'An act to provide for the centralization of township schools, and to provide high schools for townships.' "

The necessity for interpretation arises from the fact that the Public School Code fails to provide definitions of "school," "closed school," and "school permanently closed or discontinued."

We cannot turn to case authorities for definitional assistance for such are not to be found.<sup>2</sup> Legislative intent, gleaned from the pages of the Legislative Journals of the General Assembly, is similarly unavailable.

The phrase "closed school," or, interchangeably, "school permanently closed or discontinued," therefore, must be construed according to common and approved usage.<sup>3</sup>

Webster<sup>4</sup> provides the following definitions: "school" means "an institution for teaching children"; "closed" means "shut fast, stopped, ended or terminated"; "permanently" means "continuing, lasting, or abiding"; and "discontinued" means "interrupted, stopped, given up, abandoned, or terminated."

It is, therefore, our opinion and you are accordingly advised, that the phrase "closed school" or "school permanently closed or discontinued" as used in § 2511 of the Public School Code of 1949 means a building formerly used by a school district for the teaching of children which is no longer used for instructional purposes. Payments on account of closed schools for the school year 1959-60 and thereafter should be made in accordance herewith.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN III  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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<sup>2</sup> In *Di Rocco Liquor License Case*, 167 Pa. Super. 381, 74 A. 2d 501 (1950), the Superior Court defined "school" in § 403 of the Liquor Control Act of November 29, 1933, P. L. 15, as amended, 47 P. S. § 744-403, to mean "the land owned by a school district for school purposes, and on which a school building is, or may be in process of being, erected."

<sup>3</sup> Section 33 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. § 533.

<sup>4</sup> Webster's New International Dictionary, Second Edition (1946).

## OFFICIAL OPINION No. 190

*Flood control—Construction activities—Conflict of statutes—Jurisdiction—Act of June 5, 1947, P. L. 422—Section 2408 of The Administrative Code of 1929.*

Since the Act of June 5, 1947, P. L. 422, giving the Department of Forests and Waters authorization to act in the flood control field was enacted later than § 2408 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, giving general authorization to the Department of Property and Supplies to engage in construction activities, the Department of Forests and Waters may proceed with the planning and construction authorized by the 1947 flood control statute.

Harrisburg, Pa., July 15, 1959.

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

Sir: You have asked to be advised concerning possible conflict between the Act of June 5, 1947, P. L. 422, §§ 1 to 6, as amended, 32 P. S. §§ 701 to 706, and The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, § 2408, as amended, 71 P. S. § 638. Section 1 of the 1947 act, *supra*, 32 P. S. § 701, authorizes the Department of Forests and Waters to:

“\* \* \* dredge and remove flood waste, deposits, flood water obstructions, gravel, bars and debris from any river or stream or part thereof; to restore or rectify flood damaged or destroyed stream channels, wholly or partly within, or forming part of the boundary of this Commonwealth, except the tidal waters of the Delaware River and of its navigable tributaries; to construct and maintain dams, lakes and other works and improvements, as in the judgment of the department may be necessary to impound flood waters and conserve the water supply of the Commonwealth; and to provide additional recreational areas; and to construct and maintain flood forecasting and warning systems.”

Sections 2, 3 and 6 of the act, 32 P. S. §§ 702, 703 and 706 implement this authorization by granting specific powers to the department to make surveys, prepare plans and enter into contracts and agreements.

Section 2408 of The Administrative Code of 1929, *supra*, 71 P. S. § 638, provides that the Department of Property and Supplies shall

be the agent of the Commonwealth for building construction; and sets forth as follows:

"Whenever the General Assembly shall have appropriated money to the Department of Property and Supplies, or to any other department, or to any administrative board or commission, for the erection of new buildings, or sewage or filtration plants, other service systems, or athletic fields, or other structures, or for alterations or additions or repairs to existing buildings, or to such plants, systems, fields, or structures, to cost more than four thousand dollars (\$4000), the following procedure shall apply, unless the work is to be done by State employes, or by inmates or patients of a State institution or State institutions, or unless the department, board, or commission to which the General Assembly has appropriated money for the foregoing purposes is, by this act or by the act making the appropriation, authorized to erect, alter, or enlarge buildings independently of the Department of Property and Supplies, or under a different procedure:"

It then provides procedures under which the Department of Property and Supplies shall do the work as agent for the affected agency.

It is clear that the General Assembly intended by the 1947 statute to grant specific powers of construction to the Department of Forests and Waters.

Since the latest amendment of § 2408 of The Administrative Code is a decade prior to the 1947 statute, any part of that section which is irreconcilable with the 1947 statute is impliedly repealed.

"Whenever the provisions of two or more laws passed at different sessions of the Legislature are irreconcilable, the law latest in date of final enactment shall prevail." (Act of May 28, 1937, P. L. 1019, § 66, 46 P. S. § 565)

It is our opinion, and you are accordingly advised, that you may proceed with the planning and construction authorized under the 1947 statute. In so far as § 2408 of The Administrative Code is in conflict therewith, it has no effect.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

## OFFICIAL OPINION No. 191

*Escheat—Worthless escheatable personal property—Reporting to Commonwealth—Disposal.*

1. The holder of otherwise reportable escheatable personal property must report such property to the Department of Revenue even though it is of no value.
2. Once escheatable property has come into the possession of the Department of Revenue and has been examined and found worthless, it may be destroyed.
3. When worthless escheatable property is the subject of litigation in a court of record of the Commonwealth, the Commonwealth may enter into a stipulation with the holder of such property agreeing that it be disposed of.

Harrisburg, Pa., July 23, 1959.

Honorable Charles M. Dougherty, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You have requested our advice regarding escheatable personal property which is worthless. Specifically you ask (1) whether the holder of such property must report same to the Commonwealth; (2) if reportable, what disposition the Department of Revenue may make of such property; and (3) if such property is the subject of litigation in a court of record in this Commonwealth, whether the Commonwealth may enter into a stipulation with the holder agreeing to dispose of such property as worthless.

Considering first the question of reporting, the various reporting acts are: Act of June 7, 1915, P. L. 878, § 3, as amended by the Act of July 12, 1919, P. L. 926, 27 P. S. § 262; Act of June 25, 1937, P. L. 2063, § 3, as amended by the Act of May 11, 1949, P. L. 1133, 27 P. S. § 436; "The Fiscal Code," Act of April 9, 1929, P. L. 343, § 1305, as amended by the Act of May 16, 1935, P. L. 190, 72 P. S. § 1305.

Typical of these is the last named act, "The Fiscal Code" which reads in pertinent part:

"(d) Every person . . . or other corporation or association, engaged in the business of receiving . . . property for safe keeping, . . . which has received and holds . . . any other property or estate of another person for storage or safe-keeping or otherwise . . . shall make a report of all such . . . property. . . ."

In none of the reporting acts is the word "property" qualified by any language indicating that it must be property having value above

mere scrap value. Thus, on its face, each of these reporting acts requires that all escheatable property be reported to the Department of Revenue.

One of the important functions of the escheat laws is to safeguard the value of unclaimed property, the same being held for the owner either for three (3) years after an escheat, Act of May 2, 1889, P. L. 66, § 22, as amended by the Act of May 20, 1921, P. L. 946, 27 P. S. § 91, or indefinitely after a taking without escheat, Act of April 9, 1929, P. L. 343, § 504, as amended by the Act of January 24, 1956, P. L. (1955) 943, 72 P. S. § 504. As a logical matter, if the Commonwealth is designated by law as custodian of abandoned property, either for three (3) years or indefinitely, as the case may be, it must have notice of the existence of all such property so that the Commonwealth, not the holder, may evaluate such property.

Therefore, all escheatable property must be reported to the Commonwealth even if the holder believes it to be of no value.

Considering next the problem of what disposition the Department of Revenue may make of escheatable property which is worthless, we find that the escheat laws specifically provide for the disposition of property immediately upon its receipt by selling same and turning over the proceeds to the General Fund or State School Fund, Act of May 16, 1919, P. L. 177, § 1, as amended by the Act of April 21, 1921, P. L. 211, 27 P. S. § 431; Act of June 7, 1915, P. L. 878, § 9, as amended by the Act of April 21, 1921, P. L. 223, 27 P. S. § 283; Act of March 10, 1949, P. L. 30, § 2601, 24 P. S. § 26-2601.

After the sale of escheatable property the owner is entitled only to reclaim its value, Act of May 2, 1889, P. L. 66, §22, *supra*. Hence, it must be implied that if property is worthless and thus not capable of being sold, it can similarly be disposed of immediately upon its receipt by the Commonwealth. This conclusion is supported by the fact that worthless property need not be advertised in an attempt to locate its rightful owner after it is taken by the Commonwealth as escheatable, "The Fiscal Code," *supra*, § 1307.

Accordingly, the conclusion is inescapable that worthless property once escheated or taken without escheat may be disposed of by the Commonwealth immediately upon its receipt.

We next turn to the question of whether worthless escheatable property, the subject of litigation involving an interest of the Com-

monwealth in a court of record of this Commonwealth, may be disposed of upon a stipulation entered into between the Commonwealth and the holder of such property.

If, as above set forth, the Commonwealth has the right to dispose of worthless escheatable property immediately upon its receipt, logically the Commonwealth may dispose of such property once it becomes the subject of litigation. For this not to be true, such property would have to be stored until the litigation was concluded, then shipped to the Department of Revenue and then disposed of. The purpose of requiring reporting of such property is so that the Commonwealth may examine same and determine whether it is of value or not; but once such property has become the subject of litigation, the Commonwealth must know of its existence. Before any stipulation is entered into, however, the Commonwealth must examine such property and determine that it is of no value.

To require such property to be stored until litigation was concluded would be to require a useless act and this the law will not normally do.

We are therefore of the opinion and you are accordingly advised:

1. that the holder of reportable escheatable property must report same to the Department of Revenue whether or not such property is of value;

2. that once such worthless property has come into the possession of the Department of Revenue and has been examined, it may be destroyed if found to be of no value; and

3. that if such property is the subject of litigation in a court of record of this Commonwealth, the Commonwealth may enter into a stipulation with the holder of such property agreeing that it be disposed of.

Very truly yours,

DEPARTMENT OF JUSTICE,

MITCHELL A. KRAMER,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

OFFICIAL OPINION No. 192

*Gas storage leases—Incidental gas production provision—Section 1803(j) of The Administrative Code of 1929.*

A provision in a gas storage lease, designed to provide for any gas that might be discovered as an incident to the storage operation, was within the powers granted to the Secretary of Forests and Waters under § 1803(j) of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended.

Harrisburg, Pa., July 23, 1959.

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

Sir: You ask whether, in leasing gas storage areas under authority of § 1803(j) of the Act of April 9, 1929, P. L. 177, known as "The Administrative Code of 1929," as amended, 71 P. S. § 463(j), you may also lease incidental gas production rights in the same areas, or whether such production leases must be made under § 1802 of The Code, Supra, 71 P. S. § 462.

Under § 1803(j), supra, 71 P. S. § 463(j), the Secretary of Forests and Waters is given authority

"\* \* \* \* \*

"(j) To lease, with the approval of the Governor, State forest lands for the underground storage of natural gas, upon such terms and conditions as the Secretary of Forests and Waters deems to be in the best interest of the Commonwealth."

Under § 1802 of the act, as amended, 71 P. S. § 462, the Department of Forests and Waters is permitted to make mineral leases, but if they exceed \$1,000 they must be advertised and awarded to the highest bidder.

The question arises because you have made a gas storage lease for 39,400 acres of State forest lands, of which 1924 acres considered barren of production possibilities by your mineral experts was never advertised for gas and oil production lease bids. We understand that, in order to protect the Commonwealth in the event minerals should be found on these marginal lands, you provided in your lease for a royalty based upon current industry practice for any minerals that should be discovered incidental to the storage operation.

The wide discretion granted the Secretary of Forests and Waters, under § 1803(j), *supra*, permits such leases when they are incidental to and a minor part of the storage lease itself. Obviously, the storage lease would be of little value if parties foreign to it could interfere with the storage areas in their search for or production of gas or oil. We do not believe the General Assembly intended such a result. We are additionally persuaded in this direction by the fact that the grant of authority to the Secretary of Forests and Waters under § 1803(j), *supra*, was subsequent in time of enactment to the open bid and advertising provisions of § 1802, *supra*, and hence, takes precedence in any situation where they are in conflict.

We are of the opinion, and you are, therefore, accordingly advised, that your lease of marginal mineral rights which arose as incident to the lease of gas storage areas, under circumstances in which a competitively advertised production lease could interfere with the primary object of storage, was legal and proper under the applicable statutes.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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#### OFFICIAL OPINION No. 193

*Limited life insurance companies—Failure to do business—Time limitation on issuance of policies—Dissolution—Section 339 of The Insurance Company Law of 1921—Act of July 15, 1957, P. L. 929.*

The provisions of § 339 of The Insurance Company Law of 1921, the Act of May 17, 1921, P. L. 682, which require dissolution of companies failing to commence business within one year of the date of the grant of their letters patent, do not apply to certain limited life insurance companies formed under the Act of July 15, 1957, P. L. 929. Such companies must begin to issue policies within three months of the date their capital is paid in.

Harrisburg, Pa., July 23, 1959.

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

Sir: You have asked our advice as to whether the provisions of The Insurance Company Law of 1921<sup>1</sup> necessitate action to settle and close the affairs of certain limited life insurance stock companies referred to in your letter.

Specifically, you ask whether companies formed under the Act of July 15, 1957<sup>2</sup> (relating to limited life insurance companies), which fail to begin doing business by the issuance of policies within one year of the date of their letters patent, fall within the provisions of § 339<sup>3</sup> of The Insurance Company Law. That section provides that an insurance company's powers and existence cease if it does not commence to issue policies within one year from the date of its letters patent.

Preliminarily, it should be noted that the act under which these companies were created contained a provision<sup>4</sup> that it would take effect immediately and expire six months after its effective date. The act ceased to be operative on January 16, 1958.

We turn now to a consideration of the facts. Eighteen companies were organized under the provisions of the act. Certificates authorizing the transaction of business were issued to fourteen of the companies. The four remaining companies have not been issued certificates of authority to transact business, and in all cases one year has passed since the date of issuance of letters patent. Two of the companies notified the Insurance Commissioner within one year of the grant of their letters patent that they were ready to commence business, but the organization examination of the companies by the Insurance Department had not been completed until after more than a year had elapsed. One of the two remaining companies has communicated with your department more than a year after the grant of its letters patent to the effect that its authorized capital was paid in prior to the expiration of the year following the grant of its letters patent. The remaining company has advised your department that it had failed to obtain the required capital, that the incorporators determined it

<sup>1</sup> Act of May 17, 1921, P. L. 682, §§ 102-1101, 40 P. S. §§ 362-991.

<sup>2</sup> Act of July 15, 1957, P. L. 929, 40 P. S. §§ 624.1-624.7.

<sup>3</sup> 40 P. S. § 461.

<sup>4</sup> § 7, 40 P. S. § 624.7.

was not desirable to operate this company and that the company never conducted any business. We can eliminate this company from any further consideration in this opinion.

The law pursuant to which these companies were formed provides in § 4<sup>5</sup> that the capital stock be paid for by a payment of 10% at the time of subscription with the balance payable "at such times as the company may direct not exceeding one year from the time of subscription."

Section 2(b)<sup>6</sup> provides that as soon as the entire amount of the capital stock has been paid, the company shall notify the Insurance Commissioner of the fact that it is ready to begin business. The Insurance Commissioner, through his examiners, then examines the company; and if satisfied that it has complied with the provisions of the act, the Commissioner certifies that the company can properly begin doing business. Only at this stage may it issue policies.

It would be unreasonable to conclude that a company taking the full year authorized by law to obtain its paid-in capital would, nevertheless, be subject to termination of its corporate existence if it did. Further, if a company were required to issue policies within a year of the grant of its letters patent, it would not have the benefit of the full time provided by the legislature for obtaining the required paid-in capital. The Statutory Construction Act<sup>7</sup> states as a presumption in ascertaining legislative intent that the legislature does not intend a result that is absurd, impossible of execution or unreasonable.

Under § 205<sup>8</sup> of the Insurance Company Law of 1921 a stock company is given nine months after organization in which to obtain full payment on all shares. Section 215<sup>9</sup> requires the company to notify the Insurance Commissioner who must examine the company before it may issue policies. Section 339<sup>10</sup> requires policies to be issued within one year of issuance of the letters patent. Thus, under the Act of 1921, the company has three months for examination and certification by the Commissioner. To read the law reasonably requires a con-

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<sup>5</sup> 40 P. S. § 624.4.

<sup>6</sup> 40 P. S. § 624.2.

<sup>7</sup> Act of May 28, 1937, P. L. 1019, § 52, 46 P. S. § 552.

<sup>8</sup> 40 P. S. § 385.

<sup>9</sup> 40 P. S. § 405.

<sup>10</sup> 40 P. S. § 461.

clusion that § 339 does not apply to companies formed under the Act of 1957. Since this interpretation removes the time limitation on companies formed under the Act of 1957, we believe that the companies must commence doing business within a reasonable time from the date of certification that their capital is paid in. Analogizing the 1957 Act to the 1921 Act would indicate three months to be a reasonable time. That is the same time as in the Act of 1921.

We understand that all companies have been withholding further action while awaiting this opinion. We believe that the three-months' period should begin to run from the date of the issuance of this opinion, assuming, of course, that your department will so notify the companies immediately upon your receipt of the opinion.

Accordingly, it is our opinion, and you are so advised, that § 339 does not require action by your department to settle and close the affairs of these companies, provided that the companies' capital was paid in within one year of the date of the letters patent and they commence to issue policies within the time limitation specified herein.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 194

*Insurance Commissioner—Right to hold hearing—Mutual domestic beneficial society—Reincorporation as a stock limited life insurance company.*

The Insurance Commissioner has the power to hold a hearing on a proposal of a mutual domestic beneficial society to reincorporate as a stock limited life insurance company. Such a hearing is subject to the provisions of the Administrative Agency Law, the Act of June 4, 1945, P. L. 1388.

Harrisburg, Pa., July 24, 1959.

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

Sir: You have asked our advice<sup>1</sup> as to the legality of holding a hearing on the action of a mutual domestic beneficial society requesting permission to reincorporate as a stock limited life insurance company. You indicate that the proposed reincorporation would terminate the existence of the beneficial society and place all the properties, assets and liabilities thereof into an insurance company established on the stock principle. Approval of the proposed reincorporation may prejudice any legal interest which the members of the mutual domestic beneficial society have in its properties and assets by subjecting such properties and assets to the provisions of the law applicable to stock limited life insurance companies.<sup>2</sup> Under these provisions, portions of the surplus thereof could be distributed in the form of dividends to the stockholders of the proposed stock limited life insurance company, the members of which would not necessarily be the same persons who now constitute the membership of the mutual domestic beneficial society.

Preliminarily, it should be noted that the provisions of the Administrative Agency Law<sup>3</sup> are applicable to your department. Section 51<sup>4</sup> of the act specifies the state agencies to which the act applies and your department is among those enumerated. This law provides that "no adjudication shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard. All testimony shall be stenographically recorded and a full and complete record shall be kept of the proceedings."

Section 1502 of The Administrative Code of 1929<sup>5</sup> provides:

"The Insurance Department is charged with the execution of the laws of this Commonwealth in relation to insurance."

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<sup>1</sup> You base your request upon the provisions of § 36 of the Administrative Agency Law, the Act of June 4, 1945, P. L. 1388, 40 P. S. § 1710.36. "Before notice of any hearing leading to an adjudication is given, the agency shall submit the matter to its representative in the Department of Justice who shall pass upon the legality of the proposed action or defense. Failure of the agency to submit the matter to the Department of Justice shall not invalidate any adjudication."

<sup>2</sup> Act of June 28, 1951, P. L. 941, 40 P. S. §§ 623.1 to 623.6.

<sup>3</sup> Act of June 4, 1945, P. L. 1388, 71 P. S. §§ 1710.1 to 1710.51.

<sup>4</sup> 71 P. S. § 1710.51.

<sup>5</sup> Act of April 9, 1929, P. L. 177, 71 P. S. § 412.

The Insurance Department Act of 1921<sup>6</sup> provides in § 214<sup>7</sup>:

"The Insurance Commissioner may examine into the affairs of any corporation \* \* \* which is engaged in or is claiming or advertising that it is engaged in \* \* \* or in any manner aiding or taking part in the formation or in the business of an insurance company, association or exchange \* \* \*."

Section 216<sup>8</sup> provides:

"For the purpose of any such examinations, the Insurance Commissioner \* \* \* shall have free access to all the books and papers of any such company \* \* \* which relates to its business \* \* \* and may summon \* \* and examine as witnesses [officers or agents of the company] \* \* \* and any other person relative to its affairs, transactions and condition."

Finally, § 2 of the Act of June 28, 1951, *supra*, governing reincorporation as a limited life company, provides:

"The Insurance Commissioner may also conduct such examination of any proposed company as may be deemed necessary, to determine whether the responsibility, character and general fitness for the business of the incorporators and directors named in the articles are such as to command the confidence of the public and to warrant the belief that the business of the proposed company will be honestly and efficiently conducted in accordance with the intent and purpose of this act."

In view of the broad scope of this language, it appears that a hearing upon this proposed reincorporation is properly based in law and encompasses a matter with which your department is properly concerned. Such hearing is subject to the provisions of the Administrative Agency Law, *supra*.

Accordingly, it is our opinion, and you are so advised, that a hearing into this proposed reincorporation of a mutual domestic beneficial society to a stock limited life insurance company is properly based upon and warranted under existing law.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

ANNE X. ALPERN,  
*Attorney General.*

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<sup>6</sup> Act of May 17, 1921, P. L. 789, 40 P. S. §§ 21 to 321.

<sup>7</sup> 40 P. S. § 52.

<sup>8</sup> 40 P. S. § 54.

## OFFICIAL OPINION No. 195

*Veterans—State compensation—Several enlistments by ex-serviceman—Final discharge as undesirable—Qualification—Aggregation of periods of service—World War II Veterans' Compensation Act.*

1. An ex-serviceman who is separated from one period of postwar service under other than honorable conditions is not disqualified from receiving veteran's benefits for prior qualifying periods of wartime service under the World War II Veterans' Compensation Act, the Act of June 11, 1947, P. L. 565, as amended.

2. An ex-serviceman who is separated after a period of wartime service without a characterization of the discharge is not disqualified from receiving the benefits of the act for such period of service.

3. Where an ex-serviceman has served during more than one period of qualifying wartime service, these periods may be aggregated to remove from the minimum 60 days' service limitation.

Harrisburg, Pa., July 24, 1959.

Honorable A. J. Drexel Biddle, The Adjutant General, Harrisburg, Pennsylvania.

Sir: You have requested an opinion of this department regarding the propriety of the Pennsylvania World War II Veterans' Compensation Bureau paying compensation to a particular former serviceman.

This ex-serviceman had the following record of service:

<i>Enlisted or Inducted</i>	<i>Separated</i>	<i>Type of Separation or Discharge</i>
December 7, 1941	May 25, 1942	Honorable Discharge
May 26, 1942	October 31, 1944	Separated from military <sup>1</sup> service without specifica- tion as to the character of the discharge
March 5, 1945	May 1, 1945	Honorable Discharge
April 23, 1946	December 9, 1948	Undesirable Discharge

The World War II Veterans' Compensation Act, the Act of June 11, 1947, P. L. 565, as amended, 51 P. S. §§ 455.1 to 457.10, provides for the payment of compensation to veterans who are legal residents of

<sup>1</sup> This represents the only information available in the files of the Department of the Army.

the Commonwealth at a rate of \$10.00 per month for domestic service and \$15.00 per month for foreign duty. The term "veteran" is defined in § 2 of the act, 51 P. S. § 455.2, as any individual who served in the armed forces of the United States, or its allies, during World War II (December 7, 1941 to September 2, 1945). This section excludes from the definition "any individual at any time during such periods, or thereafter, separated from such forces under other than honorable conditions \* \* \*."

The first question that we must consider, therefore, is whether the undesirable discharge given to the former serviceman in question disqualifies him from receiving the compensation. It should be noted that the undesirable discharge was awarded to the ex-serviceman at the conclusion of a period of service all of which post-dated the actual hostilities of World War II. It has been uniformly held that the type of discharge reflects the administrative determination by the armed forces of the character of service rendered by the serviceman in the particular enlistment terminated by the discharge.

An undesirable discharge does not relate back to taint honorable service in a prior enlistment.<sup>2</sup>

A second problem arises in regard to the period of service from May 26, 1942 to October 31, 1944. Although the ex-serviceman in question was separated from the service on the latter date, there was no specification as to the character of the discharge. We do not believe that this fact is sufficient to disqualify him from receiving the benefits of the act. The man in question initially qualifies under the definition of the word "veteran" by reason of his wartime service in the military service of the United States. In order to bring him within the exception there must be an affirmative showing that the discharge was under other than honorable conditions. This cannot be shown and we should not presume this disqualifying feature. Statutes, such as these, should be liberally construed in favor of the former serviceman: *Dierkes v. City of Los Angeles et al.*, 25 Cal. 2d 938, 156 P. 2d 741 (1945); *Gibson v. City of San Diego*, 25 Cal. 2d 930, 156 P. 2d 737 (1945). Official Opinion No. 35, 1957 Op. Atty. Gen. 154.

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<sup>2</sup> When § 2 of the act excludes from the definition of veteran "any individual \* \* \* thereafter, separated from such forces under other than honorable conditions \* \* \*", we believe that the word "thereafter" was inserted to cover the situation where an enlistment began during the hostilities and was terminated following the close of hostilities by other than honorable discharge. In such case, since a single enlistment is involved, the bad discharge would taint the entire single period of service, i.e., both the wartime and postwar service. In the facts set forth in the request for opinion, however, we have a distinct and separate postwar enlistment and the word "thereafter" should not apply.

One further question remains. Section 3 of the act, 51 P. S. § 455.3, states that "No veteran who served less than sixty (60) days active service shall be entitled to receive any compensation under this act." We note that the third period of wartime service of the ex-serviceman in question was from March 5, 1945, to May 1, 1945, a period of less than 60 days. If this were his only period of wartime service he would clearly be ineligible to receive any compensation. However, as we interpret the quoted sentence the disqualification arises only when the veteran's total wartime service is less than 60 days. Where, as here, there were other enlistments we can combine all of such enlistments<sup>3</sup> to determine if the period of wartime service exceeded 60 days.

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

(1) An ex-serviceman who is separated from one period of post-war service under other than honorable conditions is not disqualified from receiving benefits under the World War II Veterans' Compensation Act for prior qualifying periods of wartime service.

(2) An ex-serviceman who was separated after a period of wartime service without a characterization of the discharge is not disqualified from receiving the benefits of the act for such period of service.

(3) Where an ex-serviceman has served during more than one period of qualifying wartime service, these periods may be aggregated to remove him from the minimum 60 days' service limitation.

(4) Under the facts given above, the ex-serviceman in question would be entitled to compensation under the act for the periods December 7, 1941 to October 31, 1944 and from March 5, 1945 to May 1, 1945.

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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<sup>3</sup> Provided that such enlistments qualify the individual under § 2 of the act, supra, e.g., the individual was not separated under other than honorable conditions.

## OFFICIAL OPINION No. 196

*Federal grants—Public health staff members—Right to use funds for courses in rapid reading.*

The Department of Health may use funds received from the Federal Government to pay for courses in reading comprehension (rapid reading courses) which are conducted for staff members at the level of section chiefs and upwards after regular working hours and, as no State funds are involved, the Auditor General should approve the expenditure of the Federal funds by the Department of Health for such purposes.

Harrisburg, Pa., August 11, 1959.

Honorable C. L. Wilbar, Jr., Secretary of Health, Harrisburg, Pennsylvania.

Sir: You have requested an opinion of this department as to (1) the Department of Health's authority to use funds received from the Federal Government to pay for courses in reading comprehension ("rapid reading courses") which were conducted for members of your staff at the level of section chief and upwards after regular working hours, and (2) the right of the Auditor General to question the expenditure of these funds for such a purpose.

The Federal funds involved are made available to your department pursuant to the Act of July 22, 1958.<sup>1</sup> The relevant provisions of this act are as follows:

"(c) To enable the Surgeon General to assist, through grants and as otherwise provided in this section, States, Counties, health districts, and other political subdivisions of the States in establishing and maintaining adequate public health services, including grants for demonstrations and for the training of personnel for State and local health work, there is authorized to be appropriated for each fiscal year a sum not to exceed \$30,000,000.\* \* \*"

Under this act, your department receives funds for training purposes in accordance with Title 1 of the Health Grants Manual of the Federal Government. Part 14-2 of this manual provides that training may be authorized to provide public health or specialized education to equip such individuals to perform more effective state and local health work. On June 17, 1959, your department received approval from the Regional Office of the United States Department of Health, Education and Welfare for the expenditure of funds received from the Federal government for "rapid reading courses." The Auditor General, however, has disallowed an expenditure for this purpose.

<sup>1</sup> 72 Stat. 400 (1958), 42 U. S. C. A. § 246.

As these funds are received by your department from the Federal Government and as they are not by any legislative act credited to your department's appropriation, these funds cannot be considered part of the general fund of the Commonwealth.<sup>2</sup> Upon receipt of these funds from the Federal Government your department transmits these moneys to the State Treasurer who acts as custodian thereof under the provisions of the Act of December 27, 1933 (Sp. Sess.), P. L. 113.<sup>3</sup> Section 3 of this act provides as follows:

"If any such moneys or securities shall be contributed to or deposited with the Commonwealth directly, they shall be administered and paid out or used by the State Treasurer in accordance with the conditions prescribed by the donor or depositor. If such moneys or securities shall be contributed to or deposited with any officer, department, board or commission of the Commonwealth, the moneys shall be paid out and the securities delivered up by the State Treasurer as custodian, on requisition of such officer, department, board or commission, for the purposes for which any such contribution was made, or upon certification that the purposes of the deposit have been fulfilled."

Thus, the expenditure of these moneys is governed by the provisions of the Federal Act, by the rules and regulations promulgated thereunder and by the provisions of the 1933 Act. As noted above, the appropriate Federal agency has already approved the expenditure questioned. The provisions of the 1933 Act under which the State Treasurer holds these moneys as custodian do not contemplate that the Auditor General may disapprove the expenditure of these funds for the stated purpose.

We are, therefore, of the opinion, and you are accordingly advised, that (1) these Federal funds may be spent in a manner consistent with the Federal statute and the rules and regulations thereunder, and (2) the Auditor General has no legal right to disapprove the expenditure of these funds for "rapid reading courses."

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. COHEN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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<sup>2</sup> See Informal Opinion No. 683 of this department directed to Honorable Guy J. Swope, Budget Secretary, issued March 25, 1936.

<sup>3</sup> 72 P. S. §§ 3832-3835.

## OFFICIAL OPINION No. 197

*Small loans—Paying automobile insurance premiums—Legality—Small Loans Act.*

Companies licensed under the Small Loans Act, the Act of June 17, 1915, P. L. 1012, as amended, may properly make loans to individuals, at interest rates authorized by the act, for the purpose of paying automobile insurance premiums.

Harrisburg, Pa., August 12, 1959.

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

Sir: You have requested the advice of this department as to whether or not a company licensed under the Act of June 17, 1915, P. L. 1012, as amended, 7 P. S. §§ 751 et seq., familiarly known as the Small Loans Act, may legally make loans to individuals, at interest rates authorized by the act, for the purpose of paying automobile insurance premiums.

Sections 1 and 2 of the act, as last amended by the Act of June 2, 1953, P. L. 262, 7 P. S. §§ 751 and 755, provide:

“On and after the passage of this act, it shall be unlawful for any person, persons, partnerships, association, or corporation, within this Commonwealth, to make a loan of money, credit, goods, or things in action, in the amount or of the value of six hundred (\$600) dollars or less, either with or without security, to individuals pressed by lack of funds to meet immediate necessities, and charge, contract for, or receive on, any such loan a rate of interest, discount, fines, charges, or consideration, greater than six per centum (6%) per annum, without first obtaining a license from the Secretary of Banking in accordance with the provisions of this act.

“Any person, persons, copartnerships, association, or corporation who shall obtain a license in accordance with the provisions of section one of this act, shall be entitled to loan money in sums of six hundred (\$600) dollars or less, either with or without security, to individuals pressed by lack of funds to meet immediate necessities, at his, their, or its place of business, for which said license is issued, and to charge the borrowers thereof, for its use or loan, interest at a rate not to exceed three (3) per centum per month on that part of the unpaid principal balance of any loan not in excess of one hundred fifty (\$150) dollars, and two (2) per centum per month on that part of the unpaid principal balance of any loan in excess of one hundred fifty (\$150) dollars but not in excess of three hundred (\$300) dollars, and one (1) per centum per month on any remainder of such unpaid principal balance. \* \* \*”

Your request for advice refers to this department's Informal Opinion No. 662 on January 14, 1936, directed to the Secretary of Banking, which concluded that a company engaged in the business of lending money to individuals for the payment of insurance premiums (including automobile insurance premiums) did not have to secure a license under the Small Loans Act. The necessary implication of the 1936 opinion is that a company which is licensed by the Small Loans Act may not legally make such automobile insurance premium loans, and you have, accordingly requested this department to reconsider the matter.

Informal Opinion No. 662 was based on the premise that a loan to pay an insurance premium is not a loan "to meet immediate necessities" within the meaning of Sections 1 and 2 of the Small Loans Act, *supra*, and in establishing this premise the department relied upon the following reasoning:

"The term 'necessities' is relative. \* \* \* In like manner, while an automobile may be a necessity in some cases, it does not follow that insurance on the automobile is a necessity. Nor does it follow that insurance against damage to persons and property that may be done by an automobile is a necessity. \* \* \*

"Not only must the loan be made to meet necessities, but the necessities must be immediate. From its very nature insurance provides no immediate benefit. It is intended to meet some future loss or contingency. \* \* \*"

It is now the opinion of this department that your request for advice must be answered in the affirmative, and that Informal Opinion No. 662, in so far as it holds to the contrary, must be overruled. Whatever validity the 1936 ruling of this department may have had at the time, it cannot be seriously questioned today that automobile insurance is, for most people, a necessity.

The 1936 opinion conceded that the driving of an automobile was a necessity in some cases. The radical changes that have occurred in our way of life during the past 23 years have placed such heavy emphasis upon the use of the automobile that it has become, for the vast majority of people and especially those who are apt to finance the payment of automobile insurance premiums under the Small Loans Act,<sup>1</sup> a virtual necessity. Documentation of this proposition

<sup>1</sup>It should be recognized that it is only the marginal credit risk that would deal with a small loan company. Most new cars are financed, and automobile insurance premiums are usually included in the financing contract—or the insurance is placed directly with an insurance company of the purchaser's choice. These companies usually permit installment payment of the insurance premium at relatively low rates of interest. It is only the poor credit risk owner who would be forced to borrow money from a small loan company to finance automobile insurance premiums.

is now hardly necessary beyond a reference to the following factors: the spreading of the population into suburban and more distant areas, the concomitant improvement of automobiles and roads, the increasing reliance upon the automobile in the performance of daily work, the breakdown of mass transportation in many areas, and the inevitable substitution of the automobile for other means of transportation.

Today, no prudent person would operate an automobile without insurance. The hazards of modern driving are such that persons in the low and middle income groups, those most likely to borrow money from a company licensed under the Small Loans Act for the payment of automobile insurance premiums, could be made destitute at any moment by an accident. Statistics need not be cited; these facts are a matter of common knowledge.<sup>2</sup>

This demonstrable and well recognized fact has been receiving greater legislative attention. Although Pennsylvania has not yet enacted a compulsory insurance law, a number of other states have done so. However, we do have the Motor Vehicle Safety Responsibility Act, Act of June 1, 1945, P. L. 1340, as amended, 75 P. S. §§ 1277.1 et seq., which, in certain circumstances, requires a motorist as a practical matter to secure insurance before a driving license will be issued or reissued to him.

The remaining question is whether a loan to purchase automobile insurance is a loan "to meet immediate necessities" within the meaning of the Small Loans Act. "Necessaries," which is the equivalent of "necessities," has been defined as "Things indispensable, or things proper and useful, for the sustenance of human life . . ."<sup>3</sup> The word "immediate" in the above phrase is largely redundant. A "necessity" is by definition "immediate"; things "indispensable, etc." are immediately necessary. To the extent, however, that the word "immediate" lends any additional emphasis to "necessities," the views expressed in this opinion are nevertheless applicable. If what has been said before is true, the necessity is immediate, for the moment a driver gets behind the wheel the hazard is present. If the automobile is a necessity, automobile insurance is an immediate necessity.<sup>4</sup>

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<sup>2</sup> No valid distinction can be made between liability and collision insurance; the rationale of this opinion applies to both.

<sup>3</sup> *Black's Law Dictionary, 3rd Ed.* (1944), p. 1226.

<sup>4</sup> There may be instances where automobile insurance is not a necessity, but this could be true with respect to food, clothing, etc. A millionaire may not need automobile insurance. We are not dealing with isolated, non-typical cases.

Accordingly, you are advised that a company licensed under the Small Loans Act, may make loans to individuals, at interest rates authorized by the act, for the purpose of paying automobile insurance premiums. To the extent that Informal Opinion No. 662 holds to the contrary, it is hereby overruled.

Very truly yours,

DEPARTMENT OF JUSTICE,

FREDERIC G. ANTOUN,  
*Deputy Attorney General.*

HERBERT N. SHENKIN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 198

*Pennsylvania Board of Parole—Return of parole violators from sister state—  
Nonresidents acting as agents of the Commonwealth.*

The Pennsylvania Board of Parole may appoint nonresidents as agents of the Commonwealth to return parole violators from a sister state.

Harrisburg, Pa., August 13, 1959.

Honorable Paul J. Gernert, Chairman, Pennsylvania Board of Parole,  
Harrisburg, Pennsylvania.

Sir: We are in receipt of your request for advice relative to the appointment of a nonresident of this State to act as Pennsylvania's agent to return parole violators who are found in a sister state. Further, assuming such appointment can be made, you ask whether a salary can be paid, keeping in mind that the Parole Act<sup>1</sup> requires all employees and agents to be appointed after examination as in civil service classifications.

Although not stated, it is assumed that your request relates both to persons paroled to supervision in a sister state under the Interstate

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<sup>1</sup> Act of August 6, 1941, P. L. 861, 61 P. S. §§ 331.1 to 331.34.

Compact Concerning Parole,<sup>2</sup> and to persons paroled to supervision in Pennsylvania who abscond therefrom.

The Interstate Compact, *supra*, provides, in part:

"That *duly accredited officers of a sending state* may at all times enter a receiving state, and there apprehend and re-take any person on probation or parole. For that purpose, no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto as to such persons. \* \* \*

"That the *duly accredited officers* of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact without interference.

"That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact." (Emphasis supplied)

The Act of December 13, 1955, P. L. 841, 61 P. S. § 331.21(b), (c) and (d), provides as follows:

"Section 1. The chairman of the Pennsylvania Board of Parole is hereby authorized and empowered to deputize *any person* to act as an officer and agent of this State in effecting the return of any person who has violated the terms and conditions of parole or probation as granted by this State. In any matter relating to the return of such a person any agent so deputized shall have all the powers of a police officer of this State.

"Section 2. Any deputization, pursuant to this statute, shall be in writing and any person authorized to act as an agent of this State, pursuant hereto, shall carry formal evidence of his deputization and shall produce the same upon demand.

"Section 3. The chairman of the Pennsylvania Board of Parole is hereby authorized, subject to the approval of the Auditor General, to enter into contracts with similar officials of any other state or states for the purpose of sharing an equitable portion of the cost of effecting the return of any person who has violated the terms and conditions of parole or probation as granted by this State." (Emphasis supplied)

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<sup>2</sup> Act of June 25, 1937, P. L. 2086, 61 P. S. § 321; as to the Board of Parole: Act of August 6, 1941, P. L. 861, § 33, 61 P. S. § 331.33.

Neither the Compact nor the Act of 1955, when speaking of an "agent," requires that he shall be a resident of Pennsylvania. The Act of 1955 specifically states that "any person" may be deputized.

This statute was passed in an obvious attempt to reduce the cost of returning parole violators from distant places,<sup>3</sup> by allowing one or more agents to act for several states on a "pool" basis. In the past, one-half of an agent's journey to another state was unproductive. Under the pool system an agent could take a parole violator from State A to State B, pick up another violator in B for return to State C and there pick up still another violator for return to A. Under Section 3 of the Act of 1955, *supra*, the cost of such transportation would be shared by Pennsylvania and the other states involved. To effectuate the purpose of the pool system, as authorized by the Act of 1955, Pennsylvania might use a resident of any state as its agent in any given case. We therefore conclude that a nonresident may be appointed as agent for Pennsylvania to return parole violators to this State under the provisions of the Act of 1955, *supra*.<sup>4</sup>

Whether such appointment, as hereinafter discussed, is pursuant to Section 2 of said act, or as the result of a contract entered into pursuant to Section 3 thereof, it seems clear that the provisions of the Parole Law relating to "civil service"<sup>5</sup> have no application. Such provisions in our judgment relate to regular and continuing employees and agents of the Board and do not apply to persons who are appointed for a specific purpose upon the fulfillment of which the appointments automatically terminate. We therefore deem the provisions of the Parole Act of 1941, *supra*, relating to "civil service" to have been amended by implication by the Act of 1955,<sup>6</sup> *supra*, in so far as the appointment of agents of the type herein discussed<sup>7</sup> are involved.

If an agent is appointed pursuant to a contract entered into in accordance with the provisions of Section 3 of the Act of 1955, com-

<sup>3</sup>The title thereof states: "An Act authorizing cooperative return of parole and probation violators, and the making of contracts or deputization of persons pursuant thereto."

<sup>4</sup>Such appointment will be effective both in compact cases and where there is a waiver of extradition by the parole violator. Where extradition is required, the name of such nonresident should be submitted to the Governor for appointment as agent for the return of the violator: See Act of July 8, 1941, P. L. 288, § 23, 19 P. S. § 191.23.

<sup>5</sup>See §§ 13 and 14 of said act, 61 P. S. §§ 331.13 and 331.14.

<sup>6</sup>See § 91 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. § 591.

<sup>7</sup>Since many different agents could conceivably be appointed each year, to hold otherwise would effectively nullify the purposes for which the Act of 1955 was passed.

pensation in the form of a salary or fixed fee for such agent would be a matter for which provision should be made in such contract. If the appointment is made under the provisions of Section 2 of the Act of 1955, the matter of expenses, costs and compensation will be determined by the Board, subject to the provisions of the Parole Act regulating compensation of employees.<sup>8</sup>

Very truly yours,

DEPARTMENT OF JUSTICE,

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

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 199

*Eminent domain—Department of Forests and Waters—Right to make advance partial payments for taking—Limitation—Act of May 20, 1921, P. L. 984.*

Advance partial payments may be made by the Secretary of Forests and Waters as a matter of administrative discretion on account of damages sustained by property owners whose property has been condemned under the provisions of the Act of May 20, 1921, P. L. 984, as amended, where the only unresolved question is the amount of the award for the taking.

Harrisburg, Pa., August 27, 1959.

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

Sir: You have requested an opinion as to whether advance partial payments may be made as a matter of administrative discretion on account of damages sustained by property owners whose property has been condemned by your department under the provisions of the Act of May 20, 1921, P. L. 984, as amended, 26 P. S. §§ 261

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<sup>8</sup>Section 29, 61 P. S. § 331.29.

et seq., or whether such advance partial payments are prohibited by § 10 of the act, 26 P. S. § 361, which provides:

“When the amount payable to the owner of such land has been finally determined, the same shall be paid by the Secretary of Forests and Waters, the Executive Secretary of the Board of Game Commissioners, or the Commissioner of Fisheries, as the case may be, from appropriations for such purposes or from the Game Fund or the Fish Fund. All costs in connection with any such proceedings shall be paid by the Commonwealth in like manner.”

The Commonwealth is not subject to the payment of interest in land condemnation awards, or for any other obligations, in the absence of a statute or contract providing for such interest. *Culver v. Commonwealth*, 348 Pa. 472, 35 A. 2d 64 (1944). It is subject to damages for delay in payment of the sum due as reasonable compensation for the property taken. *Fidelity-Philadelphia Trust Company et al. v. Commonwealth et al.*, 352 Pa. 143, 145, 146, 42 A. 2d 585 (1945):

“\* \* \* The Constitution of the State requires that just compensation be first made or secured for the taking of private property for public use. Where that is not first done, i. e., at the time of the taking, the integrity of the constitutional requirement can be respected only by including in the award for the value of the property taken such damage as there may have been (within legally prescribed limits) due to the delay in payment for the property.”

The property owner may not, however, claim damages for detention if he has stubbornly refused to name a price, made exorbitant demands, hindered negotiations or capriciously delayed settlement. *Whitcomb v. Philadelphia*, 264 Pa. 277, 107 Atl. 765 (1919); *Pattison v. Buffalo, Rochester & Pittsburgh Ry. Co.*, 268 Pa. 555, 112 Atl. 101 (1920).

The Commonwealth can minimize its liability for detention damages by early payment, at least in part, pending final determination of litigated cases.

Under § 10 of the act, it is clear that the Commonwealth has no legal liability to make any payment until the amount payable is “finally determined.” May the Commonwealth, in cases where there is no problem of title or other complication and the only open question is one of amount, make advance partial payments?

It is the opinion of this department that such payments are proper. The taking immediately imposes upon the Commonwealth a burden of compensation which it should discharge as early as legally possible. The law recognizes this burden by providing for detention damages pending payment. The statutory language requiring payment "when the amount payable to the owner of such land has been finally determined" merely reaffirms the rule that an award unappealed is an enforceable judgment. Act of March 27, 1903, P. L. 83, § 2, 26 P. S. § 41. It establishes the time when mandamus will lie.

There is no requirement in § 10 of the act that payment be made only at the time the amount payable has been finally determined. Partial payments, followed by payment of the remaining amount at the time of final determination, would in every way satisfy the mandate of the statute.

It should be noted that it is currently the practice in certain departments to make advance partial payments in eminent domain cases. These payments are limited to 75% of the lowest Commonwealth appraisal of the property in question. It would be wise to adopt this practice, and to provide for the excess if the amount finally determined to be due is less than the amount paid. Provision should also be made that no detention damages be awarded in the condemnation proceeding. Title should be approved by the Attorney General before any payment is made.

We are of the opinion, and you are accordingly advised, that in condemnation proceedings under the Act of May 20, 1921, P. L. 984, as amended, 26 P. S. §§ 261 et seq., where the only unresolved question is the amount payable for the taking, you may, in your administrative discretion, make partial payments to the owner of the land prior to the final determination of the amount due.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

## OFFICIAL OPINION No. 200

*Pennsylvania State University—Employees—Compensation—Executive Board approval—The Administrative Code of 1929.*

Sections 215 and 709(c) of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, are not applicable to employees of Pennsylvania State University, and such persons may be employed as consultants, subject to the approval of the Governor, in accordance with the provisions of § 507(4) of The Administrative Code of 1929.

Harrisburg, Pa., August 27, 1959.

Honorable W. L. Henning, Secretary of Agriculture, Harrisburg, Pennsylvania.

Sir: You have requested an opinion concerning your department's employment of full-time Pennsylvania State University employees as special consultants, in view of the State-supported status of that institution, and specifically whether such employment requires Executive Board approval under The Administrative Code of 1929, Act of April 9, 1929, P. L. 177, as amended, 71 P. S. §§ 51 et seq.

Section 215 of the Code, 71 P. S. § 75, provides:

"No employe in any administrative department, independent administrative board or commission, or departmental administrative board or commission, employed at a fixed compensation, shall be paid for any extra services, unless expressly authorized by the Executive Board prior to the rendering of such service."

Section 709(c) of the Code, 71 P. S. § 249, empowers the Executive Board:

"(c) To approve or disapprove, as provided by this act, the payment of extra compensation to employes of administrative departments, boards, or commissions, who are employed at fixed compensation:"

These provisions only apply to employees of an "administrative department, independent administrative board or commission, or departmental administrative board or commission." Pennsylvania State University is none of these; neither the Code nor any other legislation has given Pennsylvania State University such status in the State government.

It is our opinion, and you are accordingly advised, that §§ 215 and 709(c) of The Administrative Code of 1929 are not applicable to employees of Pennsylvania State University, and that you may employ such persons as consultants, subject to the approval of the Governor, in accordance with the provisions of § 507(4) of The Administrative Code of 1929, 71 P. S. § 187(4).

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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#### OFFICIAL OPINION No. 201

*Foreign insurance companies—Capital stock requirements—The Insurance Company Law of 1921.*

The provisions of § 205 of The Insurance Company Law of 1921, the Act of May 17, 1921, P. L. 682, relating to minimum par value of stock, do not apply to foreign insurance companies seeking to do business in Pennsylvania, so that if such companies meet all other statutory requirements for admission they may properly be certified to do business in Pennsylvania even though their capital stock structure provides for no par value stock or stock having a par value of less than \$5.

Harrisburg, Pa., August 27, 1959.

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

Sir: You have requested an opinion as to whether an application by an out-of-state insurance company to do business in this Commonwealth should be granted when such company has stock of a par value of less than \$5.00 or no par value stock.

Section 205 of the Act of May 17, 1921, P. L. 682, as amended, known as the "The Insurance Company Law of 1929," 40 P. S. § 385, provides:

"The capital stock of all stock insurance companies shall be divided into shares of not less than five dollars (\$5) \* \* \*"

The act in question contains eleven articles. The second article in which § 205 is found, relates to the incorporation of insurance com-

panies under the laws of the Commonwealth. The sections immediately preceding and following § 205 make reference to companies organized under this act, i. e., domestic companies. It would appear reasonable to read § 205 in context and apply its provisions only to domestic companies and not to foreign companies.

In Article III of this act, which is entitled "General Provisions Relating to Insurance Companies, Associations and Exchanges," § 301, 40 P. S. § 421, entitled "Requisites for Foreign Companies to do Business," contains no requirement for minimum par value of stock shares. This section protects Pennsylvania citizens who place their insurance with a foreign insurance company by providing, inter alia, that the company must file a statement of its financial condition and business, must satisfy the Insurance Commissioner that it has the requisite amount of capital fully paid up and unimpaired, and furnish such other information as may be required. It is clear that your department has all necessary authority under the act to ascertain the financial stability of the foreign company and to determine whether its capital has been impaired.

Furthermore, the \$5.00 capital stock limitation in § 205 is one with which a foreign company probably would not be familiar at the time of its incorporation. We should not place unnecessary and unrealistic burdens upon foreign companies seeking to do business in Pennsylvania unless there is a valid reason for so doing. We find no such reason here.

Accordingly, it is our opinion, and you are so advised, that the provisions of § 205 above, relating to minimum par value of stock, do not apply to foreign insurance companies seeking to do business in Pennsylvania, and that if such companies meet all other statutory requirements for admission they may properly be certified to do business in Pennsylvania even though their capital stock structure provides for no par value stock or stock having a par value of less than \$5.00.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

ANNE X. ALPERN,  
*Attorney General.*

## OFFICIAL OPINION No. 202

*Motor vehicles—Certificate of title—Related security agreement—Variance in names—Issuing new certificate of title—Fees—The Vehicle Code.*

1. A certificate of title to a motor vehicle need not be issued in the same names as appear on a related security agreement.

2. A fee must be charged for the issuance of a new or duplicate certificate of title in all cases except where such issuance is made necessary because of departmental error in connection with the issuance of the outstanding certificate, and the present practice of the department to make no charge for the correction of an encumbrance on a title where the security agreement is dated within 30 days of the title date must be discontinued.

Harrisburg, Pa., August 31, 1959.

Honorable Charles M. Dougherty, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You have requested our advice on several matters arising under The Vehicle Code<sup>1</sup> provisions which deal with the procedure to be followed when there is an alleged variance between the names on a motor vehicle certificate of title or an application therefor and those on a related security transaction. You ask specifically (1) if title must be issued in the same names as appear on the security transaction and (2) what circumstances permit a correction of a title or recordation of a lien thereon without payment of a fee.

1. The typical situation in which an alleged variance occurs is where A's name appears on the title certificate or an application therefor and a related security transaction comes to the department's attention in which A and B (usually husband and wife) are identified as purchasers of the vehicle in question. Normally, the document evidencing the security transaction is not presented to the department; however, in cases where a title is returned for the noting or correction of an encumbrance, the department requires the submission of a copy of the accompanying security transaction.

Section 102 of the Code defines "owner" as follows:

"A person or persons *holding the legal title of a vehicle*; or, in the event a vehicle is the subject of a chattel mortgage or an agreement for the conditional sale or lease thereof or other like agreement, with the right of purchase upon per-

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<sup>1</sup> Act of April 29, 1959, P. L. 58, Act No. 32.

formance of the conditions stated in the agreement, and with an immediate right of possession vested in the mortgagor, conditional vendee or lessee, then such mortgagor, conditional vendee or lessee shall be deemed the owner for the purpose of this act." (Emphasis supplied)

Section 202(a) of the Code provides, in part:

"Section 202. Application for Certificate of Title.—

"(a) Application for a certificate of title shall be made upon a form prescribed and furnished by the department, and shall be accompanied by the fee prescribed in this act, and shall contain a full description of the motor vehicle, trailer, or semi-trailer, the actual or bona fide address *and name of the owner*, together with a statement of the applicant's title, and of any liens or encumbrances upon said motor vehicle, trailer, or semi-trailer, and whether possession is held subject to a chattel mortgage or under a lease, contract or conditional sale, or other like agreement. . . . The secretary shall use reasonable diligence in ascertaining whether or not the facts stated in said application are true, and, *if satisfied that the applicant is the lawful owner* of such motor vehicle, trailer, or semi-trailer, *or is otherwise entitled to have the same titled in his name*, and that all taxes payable by the applicant under the laws of this Commonwealth on or in connection with, or resulting from the acquisition or use of the motor vehicle, trailer, or semi-trailer have been paid, the department shall issue a certificate of title, bearing the signature or facsimile signature of the secretary, or such officer of the department as he shall designate, and sealed with the seal of the department." (Emphasis supplied)

You state that your department, relying upon the quoted provisions of the Code, has taken the position that A and B, in the illustration above, are the "owners" of the vehicle and that the title should be in *both* their names. You further state that where such a title, in A's name only, is returned to the department for corrective purposes, under circumstances which would not otherwise require the payment of a fee—that the department insists upon including B's name in the title and charging a fee for such correction.

It is our opinion that this practice is unlawful and should be discontinued.

When A and B execute a conditional sale or other type of security agreement for the purchase of a motor vehicle, whether B is identified in the agreement as a "co-buyer" or simply as an obligor, title to the vehicle, *for the purposes of the Vehicle Code*, does not pass from the

seller to A and B. A and B are at liberty to take title in either or both of their names, or, if they wish to make a gift of the vehicle, in the name of C. The designation on the Application For Certificate of Title (Form RVT-1) accomplishes this purpose when the seller, in accordance with the request of the parties, executes the assignment of the certificate. The designee then executes the application. If B, in the case under consideration, wants to have her name on the title she must protect her interests, as in all other legal transactions.

This conclusion is not only the logical interpretation of the transaction but is consistent with the statutory purpose of the requirement that a certificate of title be obtained on a motor vehicle. In Official Opinion No. 28,<sup>2</sup> we cited numerous cases to the effect that a certificate of title creates neither ownership of a vehicle nor conclusive evidence of ownership. We concluded by citing the following passage from *Majors v. Majors et al.*, 349 Pa. 334, 338, 37 A. 2d 528 (1944):

“... We are aware the primary purpose of the act was not designed to establish the ownership or proprietorship of an automobile, but rather to register the name and address of the person having the right of possession, and to furnish persons dealing with one in possession of an automobile a means of determining whether such possession was prima facie lawful . . .”

On pages 8 and 9 of Official Opinion No. 28 we stated:

“... it does not logically follow that the Legislature intended that all persons identified with the original transaction as conditional buyers, lessees or mortgagors should appear as co-owners in the certificate of title. If the conclusions expressed in the [1949] letter of advice are to be followed, the Secretary of Revenue would not be justified in issuing a certificate of title in the first instance unless he examined the original security device to determine that all parties obligated therein are to be included as owners on the certificate of title . . . we cannot allow the policy to continue whereby a certificate of title will be refused where there is an additional party included in the note and security agreement as a joint and several obligor.”<sup>3</sup>

Therefore, we are of the opinion that a certificate of title need not be issued in the same names as appear in the security agreement. In the example noted above, A would be entitled to receive the title certificate in his own name. Nor need a correction be made where

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<sup>2</sup> 1957 Op. Atty. Gen. 129.

<sup>3</sup> *Ibid.* 133.

an existing certificate in the name of A is returned for the notation of an encumbrance which arises from an agreement in which A and B are identified as co-buyers.

2. Section 205 of The Vehicle Code states:

"When it is shown by proper evidence, upon investigation, and good cause appearing therefor, that any certificate of title has been issued in error to a person not entitled thereto, or contains incorrect information due to any cause, the secretary shall notify in writing the person to whom such certificate has been issued and such person shall immediately return such certificate of title within forty-eight (48) hours, together with any other information necessary for the adjustment of the department records, and upon receipt thereof, the secretary shall cancel such certificate and issue a corrected certificate of title without fee.

"Penalty.—Any person violating any of the provisions of this section, shall, upon summary conviction before a magistrate, be sentenced to pay a fine of twenty-five dollars (\$25.00) and costs of prosecution, and in default thereof, shall undergo imprisonment for not more than ten (10) days.

"Limitation.—The provisions of this section are subject to the limitation of actions as set forth in section 1201 of this act."

Section 206 provides for issuance of a duplicate certificate as follows:

"In the event of a lost, destroyed, defaced or illegible certificate of title, or for the purpose of recording a lien against any motor vehicle, trailer or semi-trailer, which lien arises after the original certificate of title has been issued, an application may be made to the department for a duplicate, upon a form prescribed and furnished by the department, which shall be signed by the owner and sworn to before a notary public or other officer empowered to administer oaths, and accompanied by the fee provided in this act. Thereupon, the department shall issue a duplicate certificate of title to the owner or person entitled to receive same under the provisions of this act."

Section 720 sets the fees: for an original certificate, two dollars (\$2.00); for a duplicate certificate, one dollar (\$1.00) except when issued for the purpose of recording a lien in which case the fee is two dollars (\$2.00).

Section 205 has been referred to in two cases. In *Automobile Banking Corporation v. Weicht*, 160 Pa. Super. 422, 431, 51 A. 2d 409

(1947), the court noted that this section provided for correction of a title issued as a result of a mistake. In *Popkin v. Credit Reliance Co. et al.*, 34 Berks 93, 98 (1941), the court in a dictum hinted that the section was intended to apply only where the error occurred in the department; and in its subsequent affirmance on exceptions to the decree nisi, the court states its certainty that this section was not intended to permit the Secretary of Revenue to determine conflicting claims to a title. 34 Berks 141, 142-3 (1941).

We believe that these cases accurately indicate the proper meaning of § 205. Issuance of a corrected certificate without fee should be limited to situations where the department, through its own mistake, transmits a certificate to the wrong person or makes an error in transferring or neglecting to transfer information to a certificate.

Thus, if a title application is submitted and an encumbrance is noted thereon, the title certificate should contain a record of the lien. If the department neglects to record the lien, it must correct the certificate without fee. On the other hand, if the encumbrance is not made known until after the certificate is issued and then returned with a request to record the lien, § 205 does not apply; and a fee should be charged in accordance with § 720. Nothing in the Code justifies any distinction based upon the number of days elapsing between the date of a security agreement and the date title is issued; accordingly, your present use of a 30-day free period must be discontinued. A mistake of the department must be corrected *at any time* without fee; a change not required or requested because of the department's error calls for payment of a fee, no matter when made.

It should be pointed out that the Code makes specific reference to the department's duty when a lien arises *after* issuance of the original certificate of title. Both § 202(b) and § 206 then permit recordation of the lien by application for and issuance of a *duplicate* certificate of title. A new original certificate must be issued, however, when the lien arose prior to the original issuance and was not recorded because of the mistake or neglect of someone other than the department.

For your future guidance, it might be helpful to consider a number of illustrative examples. In each of these cases it is assumed that there has been no departmental error. In all the following cases the department should collect a fee:

1. A, an individual, transfers title or an encumbrance to A and B—or vice versa.

2. A, an individual, dies, and title or encumbrance is transferred to an heir, next of kin, or any other person.

3. A has title or encumbrance recorded in a fictitious name, AB Company, and transfers title or encumbrance to A—or vice versa.

4. A changes her name to AX by court order, or uses AX as an assumed name, and transfers title or encumbrance to AX.

5. A, a corporation, changes its name from A to B, and transfers title or encumbrance to B.

6. A corporation merges with B corporation, and transfers title or encumbrance to B corporation.

7. A corporation assigns its titles or encumbrances, by whatever device or for whatever reason, to B corporation.

We are of the opinion, therefore, and you are accordingly advised that (1) a certificate of title to a motor vehicle need not be issued in the same names as appear on a related security agreement, (2) a fee must be charged for the issuance of a new or duplicate certificate of title in all cases except where such issuance is made necessary because of departmental error in connection with the issuance of the outstanding certificate, and (3) the present practice of the department to make no charge for the correction of an encumbrance on a title where the security agreement is dated within 30 days of the title date must be discontinued.

Very truly yours,

DEPARTMENT OF JUSTICE,

ELMER T. BOLLA,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

## OFFICIAL OPINION No. 203

*Elections—Vacancies of election officers—Municipal election—Filling vacancies—  
Act of April 22, 1959, P. L. 55—Section 405 of the Pennsylvania Election Code.*

Under the Act of April 22, 1959, P. L. 55, amending § 405 of the Pennsylvania Election Code, the Act of June 3, 1937, P. L. 1333, as amended, vacancies of district election officers occurring subsequent to April 22, 1959, and prior to the 1961 municipal election, either by virtue of the death, removal, disqualification or resignation of an election officer or because a proper judicial appointment made prior to April 22, 1959, has expired, must be filled by appointment of a proper person by the court of quarter sessions and such appointed person will serve until the 1961 municipal election.

Harrisburg, Pa., September 18, 1959.

Honorable John S. Rice, Secretary of the Commonwealth, Harrisburg,  
Pennsylvania.

Sir: You have asked to be advised as to the application of Act No. 29 of the 1959 Session of the General Assembly, approved April 22, 1959, P. L. 55, which amends § 405 of the Act of June 3, 1937, P. L. 1333, as amended, 25 P. S. § 2675, known as the "Pennsylvania Election Code," and more particularly you seek advice with regard to its effect upon the action of some county election boards which subsequent to the date of its enactment accepted nominating petitions for the purpose of filling vacancies of district election officers in accordance with provisions of the Code, *supra*, prior to this recent amendment. Furthermore, you request to be advised as to whether Act No. 29 automatically extends, until the 1961 municipal election the appointments which were made to fill the vacancies prior to its enactment and which will, otherwise, expire at the municipal election in 1959 or whether the court of quarter sessions of the proper county will be required to fill such vacancies by appointment for the interim period between the municipal elections which are forthcoming and the 1961 municipal elections.

Prior to February 10, 1956, § 401 of the Pennsylvania Election Code, *supra*, 25 P. S. § 2671, provided that the election officers of each election district were to be elected by the electors at a municipal election and that they were to hold office for a period of two years from the first Monday of January next succeeding their election.

Concurrently, § 405, prior to its amendment by Act No. 29, *supra*, of the Election Code, 25 P. S. § 2675, provided in part that in the

event of vacancies in the election boards resulting from disqualification, removal, resignation or death of an election officer, or from any other cause occurring before the date of a primary or election, such vacancies would be filled by appointment by the court of quarter sessions of the proper county and that such person appointed to fill such vacancies would *serve until a successor was elected at the next succeeding municipal election.*

By the Act of February 10, 1956, P. L. (1955) 1019, § 401 was amended to provide that the district election officers were to be elected and hold office for a term of four years from the first Monday of January next succeeding their election. Such amendment was born of a legislative desire to achieve State-wide election uniformity by eliminating the staggered tenure of these district election officers. Through a legislative oversight, however, no corresponding amendment to § 405 was enacted with regard to the filling of vacancies. Consequently, Act No. 29 was approved during the 1959 session for the purpose of correcting such omission. It is now provided that vacancies in election boards existing by reason of the disqualification, removal, resignation or death of an election officer or from any other cause occurring before any primary election are to be filled by appointment by the court of quarter sessions of the proper county and that the persons appointed to fill such vacancies are to *serve for the unexpired term of the person whose place is filled.*

In so far as there existed certain vacancies which had been filled in accordance with the unamended § 405 and the judicial appointment thereunder would expire at the 1959 municipal elections, such vacancies would have ordinarily been filled by election at such time.

Some county election boards, cognizant of the omission with regard to § 405 and aware that the Legislature would take corrective action, took no steps to fill vacancies and held no nominations and elections during the May 19, 1959, primary election. At least one county election board, however, advertised election officer vacancies and apparently accepted nominating petitions before it learned of the enactment of Act No. 29.

Notwithstanding that Act No. 29 became effective April 22, 1959, such county went ahead with the election to fill vacancies among election officers in the primary election of May 19, 1959. To determine whether or not the vacancies were correctly attempted to be filled on May 19, 1959, we are bound to look at the applicable law effective on that date. Where an act states that it is to become effective im-

mediately upon its approval, its provisions have full force and effect from the date on which the act was approved by the Governor except where the application of the provisions of the act would unjustly impair personal or property rights. Statutory Construction Act, Act of May 28, 1937, P. L. 1019, § 4, 46 P. S. § 504; *Creighan v. City of Pittsburgh*, 389 Pa. 569, 132 A. 2d 867 (1957).

Act No. 29, *supra*, became effective immediately upon its approval by the Governor by virtue of its expressed legislative intent. Having become effective on April 22, 1959, its provisions were to be given full force and effect on May 19, 1959, the date of the primary election, unless the application of its provisions would unjustly impair any personal or property rights. In the instant case, neither personal or property rights are impaired.

Therefore, if any vacancies regarding election officers were to be filled on or after April 22, 1959, such vacancies were to be filled in accordance with the mandates of Act No. 29, and with regard to the legislative intent to achieve uniformity as manifested by the amendment to § 401, *supra*.

Any other method to fill vacancies utilized from the effective date of Act No. 29 must be considered to be ineffectual and a nullity, and the results of the primary held with regard to filling such vacancies in a manner not in accordance with Act No. 29 or the said legislative intent are accordingly void. Any vacancy existing among the election officers subsequent to April 22, 1959, and prior to the 1961 municipal election by reason of removal, resignation or death, etc, was to be, and must now be, filled by the court of quarter sessions of the county, and the persons appointed to fill the vacancies are to hold office until the 1961 municipal election lest the desirable result which is sought will fail of achievement and State-wide election uniformity will remain less than a reality.

With regard to those vacancies which have been filled by appointment under § 405 prior to its amendment by Act No. 29 and which appointments were to extend to the 1959 municipal election, the provisions of Act No. 29 require now that at the expiration of such appointment the court of quarter sessions may either reappoint the incumbents or appoint other proper persons to serve until the 1961 municipal election.

Such appointments having been made under § 405 prior to its amendment by Act No. 29 are effective in accordance with the un-

amended provisions. At the expiration of the appointment made under the unamended § 405, however, the provisions found in Act No. 29 become applicable. No law may be construed to be retroactive unless clear and manifestly so intended by the Legislature and so long as vested rights are not destroyed or impaired. Statutory Construction Act, *supra*, § 56, 46 P. S. § 556; *Anderson v. Sunray Electric, Inc.*, 173 Pa. Super. 566, 98 A. 2d 374 (1953).

There is no conflict between the conclusion set forth above and the mandates of Article III, § 13 of the Constitution of the Commonwealth of Pennsylvania which provides that:

*"No law shall extend the term of any public officer, or increase or diminish his salary or emoluments, after his election or appointment."* (Emphasis supplied)

It is true that our opinion may extend the term of office. It does not, however, extend the term of the appointed district election officer.

Furthermore, the above conclusion is supported by consideration of one of the primary and essential purposes of the Election Code, that is, the assurance that the mechanics of the election process are conducted under bi-partisan supervision. By permitting an election to be held to fill an office of a district election officer made vacant by the expiration of a judicial appointment made under the unamended § 405, we could, for example, very possibly permit the election of an inspector of election who is representative of the minority party to fill a vacancy created originally by the death, disqualification, removal or resignation of an inspector of election who was representative of the majority party notwithstanding that §§ 401 and 1208 of the Code, 25 P. S. §§ 2671 and 3048, expressly contemplate majority and minority representatives thereof.

The procedure as herein set forth will help realize the State-wide uniformity in elections which is as greatly desired as it is desirable, and continues to assure a bi-partisan anticipation in the election mechanics.

We are of the opinion, and you are, therefore, accordingly advised, that the attempt to fill vacancies among election officers at the primary election of May 19, 1959, in accordance with the provisions of § 405 of the Pennsylvania Election Code, Act of June 3, 1937, P. L. 1333, 25 P. S. § 2675, prior to its amendment by Act No. 29, approved April 22, 1959, is a nullity.

Vacancies occurring subsequent to April 22, 1959, and prior to the 1961 municipal election, either by virtue of the death, removal, disqualification, resignation of an election officer or because a proper judicial appointment made prior to April 22, 1959 has expired, must be filled by appointment of a proper person by the court of quarter sessions of the proper county and such appointed person will serve until the 1961 municipal election.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRY L. ROSSI,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 204

*Workmen's compensation—Volunteer fire company—Coverage of members—Acceptance of services by municipality—The Pennsylvania Occupational Disease Act.*

An organization engaged in the fighting of fires is a volunteer fire company within the provisions of The Pennsylvania Occupational Disease Act, the Act of June 21, 1939, P. L. 566, as amended, and its members are entitled to receive compensation in case of injuries received while actually engaged in fighting fires, going to and from fires or performing other duties in connection with fires and fire prevention, provided its services are actually accepted by the municipality, whether or not any act, ordinance or other official pronouncement of the municipality states that it is not recognized as a volunteer fire company.

Harrisburg, Pa., October 28, 1959.

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

Sir: You have requested our advice on the question of whether the members of a volunteer fire company, based upon the facts stated below, are entitled to workmen's compensation coverage under the provisions of the Act of June 21, 1939, P. L. 566, 77 P. S. Section 22a, as amended.

This act specifically grants volunteer firemen workmen's compensation coverage. The coverage extends to the periods in which the firemen are actually fighting fires, riding to and from fires, and performing other duties in connection with fires and fire prevention. However, the phrase "volunteer fire companies" itself is not defined.

The volunteer fire company in question has been in operation since 1946. At least until 1954, it was active in fighting fires. However, this activity was not as a result of calls by the municipality; apparently, members of the company merely appeared at fires of which they had knowledge.

On June 8, 1954, the city passed an ordinance specifically declaring that the fire company in question was not recognized by it as a fire fighting organization and that the only organization "entitled to engage in the fighting of fires" in the city was the paid municipal fire department. The city states that since the date of this ordinance, the volunteer fire company in question has not assisted in combating fires in the city. However, information accompanying your request for advice in this matter indicates that this company is still fighting fires of which it has knowledge, as it was prior to the passage of the ordinance, and, apparently, neither the city nor the municipal fire company has refused this assistance. The advice contained in this opinion is given on the assumption that the volunteer fire company in question is, in fact, still assisting in the fighting of fires, and that this assistance is given with some degree of regularity.<sup>1</sup>

The status of whether an organization is a "volunteer fire company" within the meaning of the Workmen's Compensation Act depends on what it actually does. An ordinance of nonrecognition should not be effective to defeat the intent of legislation where the activities of a municipality itself actually contravene the language of the ordinance.<sup>2</sup> Only in the event that the city in question would actually refuse to accept the services of this volunteer fire company when they were offered, and prevented this company from cooperating with the municipal fire department in fighting fires, would there be an actual non-recognition of the volunteer fire company. Such actual refusal of services is possible by the city, and it can enforce this refusal either by use of police lines or by court action. In the absence of such

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<sup>1</sup> If the company is no longer regularly engaged in fire fighting, it is no longer acting as a volunteer fire company and, therefore, its members are not entitled to workmen's compensation coverage.

<sup>2</sup> Cf. *Bunker Hill Mutual Ins. Co. v. Leslie*, 382 Pa. 356, 115 A. 2d 378 (1955). See also, *Yick Wo v. Hopkins*, 118 U. S. 356, 373-74, 6 S. Ct. 1064, 30 L. Ed. 220 (1886); *Rice v. Elmore*, 165 F. 2d 387, 390 (4th Cir. 1947).

measures, it is proper to assume that the city is benefiting from the assistance of the fire company.

Neither the Act of June 13, 1955, P. L. 173, 53 P. S. Section 3831, dealing with the establishment of paid municipal fire companies or the Act of May 5, 1933, P. L. 289, Section 710, 15 P. S. Section 2851-710, dealing with changes in the corporate purpose of volunteer fire companies conflict with the conclusions reached herein since they are essentially procedural in purpose. Where, as here, the city has utilized the services of a volunteer fire company, these provisions do not affect its duty to afford these firemen the protection of workmen's compensation coverage.

Therefore, it is our opinion, and you are accordingly advised, that an organization engaged in the fighting of fires is a "volunteer fire company" within the provisions of the Act of June 21, 1939, P. L. 566, as amended, 77 P. S. Section 22a, if its services are actually accepted by the municipality, whether or not any act, ordinance or other official pronouncement of the municipality states that it is not recognized as a volunteer fire company.

The effect of this opinion can be avoided if the municipality will refuse to accept the services of the volunteer fire company whenever they may be offered.

Very truly yours,

DEPARTMENT OF JUSTICE,

DAVID C. HARRISON,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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### OFFICIAL OPINION No. 205

*Public funds—Disbursements to institutions—Discrimination on the basis of race, creed or color—Fourteenth Amendment to the Constitution of the United States.*

The Fourteenth Amendment to the Constitution of the United States prohibits the disbursement of public funds to any institution which is founded upon covenants or conditions which discriminate on account of race, creed or color or conducts its affairs in such fashion as to discriminate on account of race, creed or color.

Harrisburg, Pa., December 2, 1959.

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

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

Sir and Madam: You have requested our opinion with respect to the disbursement of public funds to an institution or organization which:

(a) Is founded upon covenants or conditions which discriminate on account of race, creed, or color; or

(b) Conducts its affairs in such fashion as to discriminate on account of race, creed, or color.

An institution administered in such a manner as to discriminate or prefer on the basis of race, creed, or color, even though it has a constitution and by-laws which on their face are nondiscriminatory, must be judged according to its practice: *Rice v. Elmore*, 165 F. 2d 387 (4th Cir., 1947), cert. den. 333 U. S. 875, 68 S. Ct. 904, 92 L. Ed. 1151 (1948). Thus, situations (a) and (b) as set forth in your inquiry are subject to the same legal and constitutional conclusions.

Disbursement of public funds may be either (1) in compliance with a direct appropriation of the General Assembly to designated institutions, or (2) in conformity with a general Act of Assembly permitting payments by the executive branch of the government to institutions or agencies engaged in certain named activities such as mental health and guidance clinics. This opinion does not embrace the legality of appropriations or payments made on a per diem or cost-of-care basis for services rendered by institutions, a matter not within the purview of your requests.

The Fourteenth Amendment to the Constitution of the United States prohibits the states from making or enforcing any laws which shall abridge the privileges or immunities of citizens of the United States. This provision applies to all acts of the states whether executive, legislative or judicial: *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667 (1879), *Missouri v. Dockery*, 191 U. S. 170, 24 S. Ct. 53, 48 L. Ed. 133 (1903), *Voigt v. Webb*, 47 F. Supp. 743 (E. D. Wash. 1942). Racial discrimination by the state or any agency thereof or any commission, board or institution deriving support from the state is pro-

hibited under the Fourteenth Amendment.<sup>1</sup> Religious discrimination is equally prohibited.

The use of public funds by a private corporation or institution brings such institution within the ambit of the Fourteenth Amendment and hence racial or religious discrimination is prohibited: *Kerr v. Enoch Pratt Free Library of Baltimore City*, 149 F. 2d 212 (4th Cir., 1945), cert. den. 326 U. S. 721, 66 S. Ct. 26, 90 L. Ed. 427 (1945); *Commonwealth v. Board of City Trusts*, 353 U. S. 230, 77 S. Ct. 806, 1 L. Ed. 2d 792 (1957). Thus, whether the designation of the institution is made by the Legislature or some other official, it is clear that under the United States Constitution public funds may not be used for institutions or organizations which discriminate on the basis of race, creed or color.<sup>2</sup>

It is our opinion and you are accordingly advised that the Fourteenth Amendment to the Constitution of the United States prohibits the disbursement of public funds to any institution which:

- (a) Is founded upon covenants or conditions which discriminate on account of race, creed, or color, or
- (b) Conducts its affairs in such fashion as to discriminate on account of race, creed, or color.

This Opinion formalizes the written advice given you several months ago.

Very truly yours,

DEPARTMENT OF JUSTICE,

LOIS G. FORER,  
*Deputy Attorney General.*

JEROME H. GERBER,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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<sup>1</sup> Discrimination on the basis of race, creed or color in the employment of personnel is prohibited by State statute: Act of June 27, 1955, P. L. 744.

<sup>2</sup> See also Pennsylvania Constitution, Art. III, Section 18, prohibiting appropriations in support of sectarian institutions. An institution which limits its benefits or gives preference to any particular religious sect would fall within this ban: *Collins v. Martin*, 302 Pa. 144, 153 Atl. 130 (1931); *Constitutional Defense League v. Waters*, 308 Pa. 150, 162 Atl. 216 (1932).

## OFFICIAL OPINION No. 206

*Liquor—Retail price percentage markup—Discrimination—Spirituous liquor and wine—Section 207(b) and 208 of the Liquor Code.*

The action of the Pennsylvania Liquor Control Board in fixing the retail price markup on wines at 58% and the retail price markup on distilled spirits at 48% is based upon a legal exercise of authority delegated by the General Assembly of the Commonwealth to the Board, under §§ 207(b) and 208 of the Liquor Code, the Act of April 12, 1951, P. L. 90.

Harrisburg, Pa., December 14, 1959.

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

Sir: This department is in receipt of your request for advice as to the action of the Liquor Control Board with regard to the markup on wines and liquors.

You state that the retail price markup on wine is 58% while the retail price markup on liquors is 48%. You call attention to the fact that wine is defined in the Liquor Code as "liquor" and that another section of the Code provides that the Pennsylvania Liquor Control Board, in fixing the sale prices of liquor shall not give any preference or make any discrimination as to classes, brands or otherwise. As your department countersigns all liquor purchases, you request advice as to whether or not there has been a discrimination in the fixing of the retail price of spirituous liquor using 48% as a markup, while wine was marked up 58%.

The Act of April 12, 1951, P. L. 90, known as the "Liquor Code," 47 P. S. Sections 1-101 to 9-902, defines in Section 102, 47 P. S. Section 1-102, the word "liquor" as follows:

" 'Liquor' shall mean and include any alcoholic, spirituous, vinous, fermented or other alcoholic beverage, or combination of liquors and mixed liquor a part of which is spirituous, vinous, fermented or otherwise alcoholic, including all drinks or drinkable liquids, preparations or mixtures, and reused, recovered or redistilled denatured alcohol usable or taxable for beverage purposes which contain more than one-half of one per cent of alcohol by volume, except pure ethyl alcohol and malt or brewed beverages."

Section 207 of the Code, 47 P. S. Section 2-207, which deals with the powers and duties of the Board, provides in subsection (b) as follows:

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

\* \* \* \* \*

"(b) To control the manufacture, possession, sale, consumption, importation, use, storage, transportation and delivery of liquor, alcohol and malt or brewed beverages in accordance with the provisions of this act, and to fix the wholesale and retail prices at which *liquors* and alcohol shall be sold at Pennsylvania Liquor Stores: *Provided, That in fixing the sale prices, the board shall not give any preference or make any discrimination as to classes, brands or otherwise, \* \* \**" (Emphasis supplied)

No part of the Code defines the word "classes," nor does the Code divide liquor into classes.

In Section 208 of the Code, 47 P. S. Section 2-208, the Legislature has given the Board authority to make regulations regarding:

"(d) The classes, varieties and brands of liquor and alcohol to be kept and sold in Pennsylvania Liquor Stores.

"(e) The issuing and distribution of price lists for the various classes, varieties or brands of liquor and alcohol kept for sale by the board under this act."

Pursuant to the authority granted in Section 207(i) of the Code, 47 P. S. Section 2-207(i), the Board adopted Regulation 122, which includes Section 122.06. This was done in the following language:

"For the protection of the public, and as it is deemed advisable that there be cooperation between the Federal authorities and the respective states in the adoption of regulations so that they may be uniform, the Pennsylvania Liquor Control Board herewith adopts as its regulation Federal Regulation No. 4 as now or hereafter amended, relating to labeling and advertising of wine, and Federal Regulation No. 5 as now or hereafter amended, relating to labeling and advertising of distilled spirits, insofar as both regulations are applicable to the traffic in wine and distilled spirits within this Commonwealth and not contrary to or inconsistent with the provisions of the laws of Pennsylvania and regulations of the Board."

This regulation, effective as of June 26, 1952, is presently in force.<sup>1</sup> In order to understand the effects of this action by the Board, we turn now to an examination of the pertinent Federal laws.

The Federal Alcohol Administration Act, 27 U. S. C. A. Sections 201 to 211, defines "distilled spirits," "wine" and "malt beverage" separately. It has been held that under the constitutional amendment making it the business of the Federal government to prohibit transportation of intoxicating liquor to any state in violation of the law thereof, the ability on the part of the state to restrict liquor traffic in no way deprives the Federal government of concurrent jurisdiction and that the powers of a state to surveillance over liquor business within state boundaries is plenary and not exclusive. See *Hanf v. United States*, 235 F. 2d 710 (8th Cir., 1956).

The Federal Alcohol Administration Act, unlike the Pennsylvania Liquor Code, treats wine and distilled spirits as different categories, and the regulations of the Bureau of Internal Revenue, 27 C. F. R. Sections 5.20 to 5.22, establish the standards of identity for the several classes and types of distilled spirits as follows: Class 1, neutral spirits or alcohol; Class 2, whiskey; Class 3, gins; Class 4, brandies; Class 5, rum; Class 6, cordials and liqueurs; Class 7, imitations; Class 8, geographical designations; and Class 9, products without geographical designations but distinctive of a particular place. Some of these classes are subdivided into types; for example, whiskey is divided into straight whiskey, straight rye whiskey, blended whiskey, etc.

Part 4 of the regulations, 27 C. F. R. Sections 4.20 to 4.25, establish the standards of identity for the several classes and types of wine as follows: Class 1, Grape wine; Class 2, Sparkling grape wine; Class 3, Carbonated grape wine; Class 4, Citrus wine; Class 5, Fruit wine; Class 6, Wine from other agricultural products; Class 7, Aperitif wine; Class 8, Imitation and substandard wine.

Section 4.30 of Part 4 provides that no person shall sell or ship or deliver for sale or shipment in interstate or foreign commerce any wine in containers unless such wine is packaged and such packages marked d, branded and labeled in conformity with this article. Section

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<sup>1</sup> On May 11, 1936, the Board adopted Regulation No. R-36-05, following the passage of the Liquor Control Act of November 29, 1933, P. L. 15. With the enactment of the Liquor Code this regulation became Regulation 122.

4.34 provides that the class of the wine shall be stated and such statement shall be in conformity with Sections 4.20 to 4.25.

Part 5 of the Federal regulations covers the labeling and advertising of distilled spirits. Section 5.34 requires that the class and the type of the distilled spirits shall be stated in conformity with Sections 5.20 to 5.22. Section 5.32 of the regulations refers to the labeling requirements for distilled spirits and provides:

“§ 5.32 Mandatory label information. There shall be stated:

“(a) On the brand label:

“(1) Brand name, in accordance with § 5.33.

“(2) Class and type, in accordance with § 5.34.”

Section 4.32 of the Federal regulations refers to the labeling requirements for wine and reads:

“§ 4.32 Mandatory label information. (a) Except as otherwise provided in paragraph (c) of this section, there shall be stated on the brand label:

“(1) Brand name, in accordance with § 4.33.

“(2) Class, type, or other designation in accordance with § 4.34.”

These Federal labeling regulations of wine and liquor have been adopted by the Pennsylvania Liquor Control Board, and the Board has by such action adopted the classes established by the Federal government. Twenty-eight states, including New York, New Jersey and Illinois, have also adopted the regulations relating to labeling, and eleven other states have adopted the regulations relating to advertising.

We believe it is apparent that the Commonwealth has not divided by legislative action intoxicating liquors into classes and that the Federal government by legislation in this area and the formulation of rules and regulations has established classes for distilled spirits and wines. This failure on the part of the Legislature is understandable inasmuch as the Federal government by regulation has established classes which are revised from time to time; moreover, the Legislature has authorized the making of rules and regulations as to classes. There would be no point in legislating in this area and duplicating

the Federal regulations and chaotic conditions would follow if the Board established different classes. The impracticability of having one set of classes<sup>2</sup> for interstate business and another for intrastate business is obvious.

The question arises, is the word "classes" as used in the Code a reference to classes as established by the Federal government and adopted by regulation by the Board?

These are the classes used in and familiar to the liquor business. It is of some significance that State Store Price List No. 70, as issued November 17, 1958, follows substantially the classifications as set forth in the Federal regulations. It should also be noted that the Standard Quotation and Specification Form, PLCB-M-12, published by the Board, contains under the heading "Condition of Purchase:"

"All merchandise covered by this quotation must be labeled in accordance with the regulations for the Federal Government. Should any liquor or wine regulations (Federal or otherwise) cause a change to be made on the labels, words added, deducted or changed, thereby affecting its present classification or type, vendor or shipper agrees to take back for exchange or to allow credit at invoice price on any and all of this merchandise which is in our stock at the time such regulations are made."

The word "classes" is meaningless unless it refers to the Federal law and regulations; the Legislature has not defined the word nor divided liquor into "classes," whereas the Federal law and regulations have used the term extensively. The Legislature gave the Board specific authority to make regulations regarding the classes to be kept and sold in the Liquor Stores and the issuing and distribution of price lists for the various classes kept for sale. Its only restriction

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<sup>2</sup> See Russell, "Controls Over Labeling and Advertising of Alcoholic Beverages," 7 Law and Contemporary Problems, 1940 Duke University, at 661:

"The chaotic situation which would result if varying regulations with respect to labeling and advertising were issued by each state agency as well as by the Federal Government early became apparent and, in order to avoid economic waste, to facilitate administration, and to provide consumers with the same protection when buying intrastate products that they receive in the case of interstate products, the Federal Alcohol Administration consistently urged that its labeling and advertising regulations be adopted by the various states as minimum requirements. This effort has received the hearty support of the industry, since it eliminates much of the difficulty and expense involved in advertising and distributing their products throughout the country. It has, moreover, been promoted by the Council of State Governments and by the two associations composed respectively of state liquor administrators for the monopoly and for the license states and proposed uniform bills have been drafted for submission to the state legislatures."

was that there should be no preference or discrimination as to classes. In other words, there can be no distinction between gins, brandies, rum, whiskies, cordials, etc., nor can there be any preference or discrimination between grape wine, citrus wine or fruit wines. The effect is that all distilled spirits would carry the same markup and all wines would carry the same markup. This is a more reasonable and logical conclusion than holding that wines and distilled spirits are to be marked up identically. As a matter of administrative practice, wines have throughout the greater number of years been marked up at a lower percentage than distilled spirits. Prior laws and prior regulations were substantially similar to those presently effective. Legislative acquiescence in the more than 20 years of dissimilar markups of wine and distilled spirits is not without legal significance.

In view of the foregoing, and applying the principles of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. Sections 501 to 602, it is a more reasonable conclusion to hold that the General Assembly intended that whiskey was not to be given preference over some other form of distilled spirits than to hold that whiskey is not to be given a preferable position over wine. In other words, the Board may mark up the retail price of whiskey using a certain percentage and it may mark up the price of wine by using a different percentage, but it may not mark up whiskey and some other form of distilled spirits on different percentage bases. Likewise, the retail price of fruit wine may not be marked up on a percentage basis different than that used in marking up the retail price of grape wine.

We are, therefore, of the opinion and you are accordingly advised that the action of the Pennsylvania Liquor Control Board in fixing the retail price markup on wines at 58% and the retail price markup on distilled spirits at 48% is based upon a legal exercise of authority delegated by the General Assembly of the Commonwealth to the Board.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

## OFFICIAL OPINION No. 207

*Elections — Electorate majority — Votes cast — Registration — Harness racing — Local option.*

The phrase "a majority of the electorate of the county" as used in § 20 of the Act of December 22, 1959, P. L. 1978, providing for local option as to harness race meetings, means a majority of the votes actually cast on the harness racing question in any particular county, and does not mean a majority of the registered or eligible voters in such county.

Harrisburg, Pa., December 29, 1959.

Honorable W. L. Henning, Secretary of Agriculture, Harrisburg, Pennsylvania.

Sir: You have requested this Department to interpret the following language in the recently enacted harness racing legislation, Act No. 728, the Act of December 22, 1959, P. L. 1978, 4 P. S. Sections 301-324:

"Section 20, Local Option (a) The commission shall not consider an application for a license to conduct harness race meetings *until a majority of the electorate of the county in which the racing plant is located shall have voted in favor of locating a racing plant within the county at an election held on that question . . .*" (Emphasis supplied)

The specific question has been raised: Does the above language require a majority of the eligible or registered voters in the county to approve harness racing, or is the statute satisfied if a majority of the votes cast at such an election favor harness racing?

Preliminarily, it should be noted that the use of the term "electorate" in Section 20 must be interpreted to mean "registered voters." See *Aukamp et al. v. Diehm et al.*, 336 Pa. 118, 8 A. 2d 400 (1939).

It is clearly established in most states of this country that, unless there is a clear statutory provision to the contrary, in elections where there are an indefinite number of voters, those who absent themselves from the election are considered as acquiescing in the result declared by a majority of those actually voting. This principle is inherent in our representative form of government and is necessary to the practical working of the elective system. See *I Dillon, Municipal Corporations*, (5th Ed.) Section 383; *Virginian Ry. Co. v. System Federation No. 40 et al.*, 300 U. S. 515, 559, 560, 57 S. Ct. 592, 81 L. Ed. 789 (1937); 131 A. L. R. 1382, and cases there cited.

Pennsylvania is in accord with the overwhelming majority view on this subject. In *Munce et al. v. O'Hara*, 340 Pa. 209, 16 A. 2d 532 (1940), the Supreme Court had before it for interpretation Section 4 of the Act of April 18, 1929, P. L. 549, which provided that:

"Any county, city, borough or township may, by a majority vote of its qualified electors, cast at any general election . . . direct the discontinuance of the use of voting machines at elections held in such county, city, borough or township. . . ." (Emphasis supplied)

The Supreme Court was strongly urged to adopt the view that this language meant a majority of the eligible voters in such an election. It refused to do so, stating (340 Pa. at 210):

"No method having as yet been devised whereby to compel a complete vote by all the voters, the practical working of the elective system necessarily requires that those who abstain from voting be considered as acquiescing in the result declared by a majority of those who exercise the suffrage. As stated in *Cashman v. Entwistle*, 213 Mass. 153, 100 N. E. 58: 'It is a fundamental principle of our system of representative government that the will of the majority expressed according to law must prevail. But the majority of those who actively participate in the affairs of state and not of the entire body of voters, controls. Elections must be settled as a practical matter by those manifesting interest enough to vote. Failure on the part of some of the electorate to take the trouble to express their views by depositing their ballots cannot stop the machinery of government. Apathy is not the equivalent of open opposition. It is in the nature of our institutions that the majority of those who vote must accomplish the avowed purpose of all elections, which is the choice among candidates or the approval of policies.' "

There is almost no dissent from the above principles. However, some jurisdictions adopt the view that the majority of votes cast must be determined on the basis of the highest number of votes cast at the election and not merely on the number of votes cast on the particular question. Pennsylvania, and most other states, refuses to adopt this view, and holds that the majority question must be determined on the basis of the number of votes cast on the particular issue under consideration. In the *Munce* case itself there were 83,368 qualified voters in Washington County, the county involved. The greatest number of votes cast in the election was 51,782 for Governor. On the question of the discontinuance of voting machines, 18,730 voted

for the discontinuance, and 13,805 voted for the continuance. The court stated (340 Pa. at 212):

“And, according to what we regard as the better view, where, as here, a proposition to which such a statutory provision is to be submitted at a general election, the submission of the question is to be regarded as a special election for that purpose, and the votes cast thereon are to be considered separately and apart from any votes cast for candidates for office, or upon other questions . . .”

The language used in Act No. 728 is substantially similar to that used in other statutes that have come before the courts, viz. “a majority of the voters,” “a majority of the legal voters,” “a majority of the qualified voters,” “a majority of the electors.” See *I Dillon, Municipal Corporations*, (5th Ed.), at p. 654; 131 A. L. R. at p. 1392, *et seq.* If the Legislature of Pennsylvania had intended to require over 50% of the registered voters to vote in favor of harness racing in order to authorize it in a particular county, it could have said so in language clear and unambiguous. It has not done this. The language used by the Legislature has been construed by the courts in similar situations to mean a majority of those voting on the subject.

The principles of law set forth above are particularly applicable to the present question, involving as it does a submission of the harness racing question at a primary election. Act No. 728, Section 20(b). It is a well-known fact of political life that far less than 50% of the registered voters cast ballots at a primary election. This was clearly demonstrated in the last three primary elections. In the 1954 primary only 25% of the registered voters in Philadelphia County voted, only 36% in Allegheny County, 34% in Lackawanna County, and 40% in Dauphin County. In the 1956 primary the percentages were about the same: 38% in Philadelphia County, 35% in Allegheny County, 31% in Lackawanna County, and 42% in Dauphin County. The 1958 primary was no different: 32% in Philadelphia County, 43% in Allegheny County, 34% in Lackawanna County, and 49% in Dauphin County.

It cannot be assumed that the Legislature intended a vain thing. It must be taken-for-granted that the Legislature was aware of the general apathy exhibited by voters at primary elections. To interpret the language in the harness racing act, “majority of the electorate,” to mean a majority of the registered and eligible voters would impute to the Legislature an absurd thing, for such a majority of the voters never even cast ballots in primary elections. Section 52 of The

Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. 552, prohibits such an interpretation. This section provides that the Legislature does not intend a result that is absurd, impossible of execution or unreasonable, and that the Legislature does intend the entire statute to be effective and certain.

It would be unfair to those who are opposed to harness racing to lull them into the belief that a majority of all the registered voters in any county is necessary to authorize harness racing, and that harness racing could be defeated by sitting back and not voting. As indicated above, the issue must be determined on the basis of the majority of votes cast on the harness racing question in the particular county, and the registered voters in the county who do not participate in such an election must be presumed to acquiesce in the result reached by a majority of the voters who cast ballots.

It is our opinion and you are accordingly advised that the phrase "majority of the electorate" in Act No. 728, Section 20(a), means a majority of the votes actually cast on the harness racing question in any particular county, and does not mean a majority of the registered or eligible voters in such county.

Very truly yours,

DEPARTMENT OF JUSTICE,

HERBERT N. SHENKIN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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#### OFFICIAL OPINION No. 208

*Legislature—Purchase of supplies—Competitive bidding—Procedure—Act of June 24, 1919, P. L. 579—The Administrative Code of 1929—Constitution of Pennsylvania, Article III, Section 12—Act of October 2, 1959, P. L. 1251.*

1. The articles mentioned in Article III, Section 12, of the Pennsylvania Constitution required by the Legislature must be purchased by means of competitive bidding, and contracts entered into are subject to the approval of the Governor, Auditor General and State Treasurer. Articles not covered by this provision

may be purchased without competitive bidding as provided in § 3 of the Act of June 24, 1919, P. L. 579, and such purchases need not be submitted to the Board of Commissioners of Public Grounds and Buildings for approval.

2. Contracts for printing, stationery or paper for the use of the Legislature must be made in compliance with the provisions of Article III, Section 12, of the Pennsylvania Constitution and § 2410 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, which require approval of the Governor, the Auditor General and the State Treasurer.

3. The procedures for compliance with Article III, Section 12, of the Pennsylvania Constitution are set forth in The Administrative Code of 1929, and must be followed whenever the Department of Property and Supplies is requested to act as the agent of the General Assembly. Where such request is not made, § 42 of the Act of October 2, 1959, P. L. 1251, sets forth the proper procedure.

Harrisburg, Pa., December 30, 1959.

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

Sir: This department is in receipt of your communication with regard to Act No. 38-A, The General Appropriation Act of 1959. You ask the following questions:

"1. Where a purchase is made under the authority of Act 496 of 1959 from the aforementioned appropriations without competitive bidding, will the officers of the House and Senate be required to submit such purchases to the Board of Commissioners of Public Grounds and Buildings for approval or disapproval as provided in Section 2409 of the Administrative Code?

"2. Where a direct purchase of printing, stationery or paper is made under the authority of Act 496 of 1959 from the aforementioned appropriations, are the officers of the House and Senate required to submit such printing, stationery and paper contracts to the Governor, Auditor General and Treasurer, for approval, as required by Section 2410 of the Administrative Code?

"3. If neither of above Sections of the Administrative Code are applicable to purchases made under these appropriations, what procedure shall the Auditor General require of the officers of the House and Senate in order to comply with Article III, Section 12, of the State Constitution?"

Sections 2 and 3 of the Act of June 24, 1919, P. L. 579, as amended by the Act of November 9, 1959, P. L. 1398, 46 P. S. Sections 121 and 122, read as follows:

"Section 2. Each member and the principal officers and employes of the Legislature shall also be entitled to receive the stationery, supplies and equipment necessary for their official use, also such printed or engraved official stationery as may be necessary for the conduct of their offices; and to carry out this provision, the chief clerks of the respective Houses are hereby authorized, when requested in writing so to do from a Senator, Member, or principal officer, of the Legislature, to requisition the Department of Property and Supplies for the official stationery herein authorized, properly printed or engraved, in such quantities as he may deem necessary. The chief clerks of each respective branch of the Legislature shall also have the authority to order such official stationery, properly printed or engraved, from the Department of Property and Supplies, as may be necessary for the use of the employes and committees of each House.

"Section 3. The chief clerks of each House shall be the custodian of all stationery, supplies and equipment and shall have authority to requisition the Department of Property and Supplies, from time to time, for such stationery, supplies and equipment as will be necessary for each House, including members, officers, employes, committee and office work.

"The purchase or rental of electric roll call and public address systems and all purchases of stationery, supplies and other equipment for the use of either House or the members, officers, employes, committees, or office work thereof, that are paid for out of money appropriated to such House, shall be made by direct purchase by the Secretary or Chief Clerk of such House, with the approval of the speaker or president pro tempore thereof, and not through the Department of Property and Supplies, unless purchase by the department is specifically requested by such officer of the House for which the purchase is made."

Turning to your first question, your attention is directed to the provisions of the Constitution of the Commonwealth of Pennsylvania, which provides in Article III, Section 12, as follows:

"All stationery, printing, paper and fuel used in the legislative and other departments of government shall be furnished, and the printing, binding and distributing of the laws, journals, department reports, and all other printing and binding, and the repairing and furnishing the halls and rooms used for the meetings of the General Assembly and its committees, shall be performed under contract to be given to the lowest responsible bidder below such maximum price and under such regulations as shall be prescribed by law; no member or officer of any department of the government shall be in any way interested in such contracts, and all such contracts shall be subject to the approval of the Governor, Auditor General and State Treasurer."

It is fundamental law that a provision of the Constitution cannot be repealed, amended or modified by legislative action. Therefore, the mandate of the Constitution above cited prevails, and the articles covered in said provision of the Constitution must be purchased under competitive bidding. However, the constitutional provision above cited does not cover all purchases and those articles not within the constitutional provision may be purchased without competitive bidding. Since the Department of Property and Supplies is eliminated as the purchasing agent by virtue of Section 3 of the Act of 1919, *supra*, we are of the opinion that those purchases not covered by the constitutional provision need not be submitted to the Board of Commissioners of Public Grounds and Buildings.

With regard to your second question, we call your attention to Article III, Section 12 of the Constitution and the decision of the Supreme Court of Pennsylvania in the case of *Kuhn v. Commonwealth*, 291 Pa. 497, 140 Atl. 527 (1928), wherein it was decided that without the approval of the Governor, the Auditor General and the State Treasurer, any contract relating to State printing is invalid.

We are, therefore, of the opinion and you are accordingly advised that all contracts for printing, stationery or paper made under the authority of the Act of June 24, 1919, P. L. 579, as amended, must be made in compliance with the provisions of Article III, Section 12 of the Constitution and Section 2410 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, both of which provide for the approval of the Governor, the Auditor General and the State Treasurer.

As to your third question, the procedures for compliance with Article III, Section 12 of the Constitution are set forth in The Administrative Code of 1929 and should be followed if the Department of Property and Supplies is specifically requested to act as the agent of the General Assembly. If such a request is not made, then proper procedures must be established to comply with Article III, Section 12 of the Constitution. In this connection, we call your attention to Section 42 of the Act of October 2, 1959, P. L. 1251, which reads as follows:

"The Secretary of the Senate and the Chief Clerk of the House of Representatives acting jointly shall appoint one legislative printing clerk at an annual salary of six thousand dollars (\$6,000) who shall serve until his successor is appointed and qualified and whose duty it shall be to order upon proper requisition all printing required by the Legislature and to

deliver such printing to the Legislature as it is needed. Such printing shall be performed under contract to be given to the lowest responsible bidder and the Secretary of the Senate for Senate printing and the Chief Clerk of the House of Representatives for House of Representatives printing shall have the power to enter into such contracts directly without the intervention of any State department or agency subject however to the approval of the Governor, Auditor General and State Treasurer."

By way of summation, we are of the opinion and you are advised:

1. The articles mentioned in Article III, Section 12 of the Constitution must be purchased by means of competitive bidding. Articles not covered by the constitutional provision need not be submitted to the Board of Commissioners of Public Grounds and Buildings.

2. All contracts for printing, stationery or paper must be made in compliance with the provisions of Article III, Section 12 of the Constitution and Section 2410 of The Administrative Code of 1929, both of which require approval of the Governor, the Auditor General and the State Treasurer.

3. Procedures for compliance with Article III, Section 12 of the Constitution are set forth in The Administrative Code of 1929 in so far as the Department of Property and Supplies is concerned, and in Section 42 of the Act of October 2, 1959, P. L. 1251, in so far as the General Assembly is concerned.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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#### OFFICIAL OPINION No. 209

*Veterans' bonus—Women's Auxiliary Army Corps—Eligibility—Credit for active service—World War II Veterans' Compensation Act—Act of August 7, 1959, 73 Stat. 289.*

Service in the Women's Auxiliary Army Corps between May 13, 1942, and September 30, 1943, by persons subsequently serving in the armed forces, constitutes service as a member of the military forces of the United States within

the meaning of § 2 of the World War II Veterans' Compensation Act, the Act of June 11, 1947, P. L. 565, since the Act of Congress of August 7, 1959, 73 Stat. 289, credits service in the WAAC as active military service for such persons.

Harrisburg, Pa., January 11, 1960.

Honorable A. J. Drexel Biddle, The Adjutant General, Harrisburg, Pennsylvania.

Sir: You ask whether veterans of service in the Women's Auxiliary Army Corps may receive World War II veterans' compensation, in view of the fact that Congress has passed and the President has approved Public Law 86-142, 86th Congress, H. R. 3321, signed August 7, 1959, 73 Stat. 289, which credits service in the WAAC as active military service for those persons who subsequently performed active service in the Armed Forces.

The period of service involved is that between May 13, 1942, and September 30, 1943.

The Pennsylvania World War II Veterans' Compensation Act defines "veteran" as "any individual, a member of the military or naval forces of the United States, or of any of her allies during World War II, between the seventh day of December, one thousand nine hundred forty-one and the second day of September, one thousand nine hundred forty-five \* \* \*"

The new amendment to Chapter 53 of Title 10, United States Code, reads as follows:

"§ 1038. Service credit: certain service in Women's Army Auxiliary Corps

"In computing years of active service of any female member of the armed forces, there shall be credited for all purposes, except the right to promotion, in addition to any other service that may be credited, all active service performed in the Women's Army Auxiliary Corps after May 13, 1942, and before September 30, 1943, if that member performed active service in the armed forces after September 29, 1943. Service as an officer in the Women's Army Auxiliary Corps shall be credited as active service in the status of a commissioned officer, and service as an enrolled member of the Corps shall be credited as active service in the status of an enlisted member."

It is clear that by this amendment Congress has made a determination that service in the Women's Army Auxiliary Corps under the stipulated condition is, legally, active service in the military or naval forces of the United States.

The Pennsylvania statute establishes no criteria as to what makes any bonus applicant a "member of the military or naval forces of the United States." The certification of Federal authorities, based upon Federal criteria, has been accepted as final. There is in fact and in law no other standard available upon which a determination of service could be made. It is, therefore, our opinion, and you are accordingly advised, that service in the armed forces of the United States, as determined by applicable Federal law, is service within the meaning of the Pennsylvania World War II Veterans' Compensation Act, including service in the Women's Auxiliary Army Corps by those subsequently serving in the other armed forces of the United States.

Yours very truly,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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### OFFICIAL OPINION No. 210

*Loans—Transfer of funds from Motor License Fund to General Fund—Insufficient balance to meet expenses—Act of May 26, 1933, P. L. 1088—Article IX, Section 18 of the Constitution of Pennsylvania.*

If the Governor ascertains that the cash balance and the current estimated receipts of the General Fund are insufficient to meet promptly the expenses of the Commonwealth payable from the General Fund, the State Treasurer is authorized and directed to transfer from the Motor License Fund such sum as the Governor shall direct under the provisions of the Act of May 26, 1933, P. L. 1088, and Article IX, Section 18, of the Constitution of Pennsylvania. The period of the loan shall not exceed eight months and such loan shall not be made within the period of one year from any preceding loan and every loan in any fiscal year shall be repayable within one month after the beginning of the next fiscal year.

Harrisburg, Pa., January 20, 1960.

Honorable David R. Baldwin, Budget Secretary, Harrisburg, Pennsylvania.

Sir: You ask to be advised with regard to the authority to borrow money from the Motor License Fund for the General Fund to finance the ordinary expenses of government until such time as the General Fund revenues are sufficient for such purpose.

Official Opinion No. 116, 1958 Op. Atty. Gen. 204, of this department, held that the Secretary of Highways 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. Sections 3568 to 3570.

Section 1 of said act, 72 P. S. Section 3568, reads as follows:

"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."

By the action of the electorate, the Constitution of the Commonwealth of Pennsylvania was amended on November 6, 1945, by the addition of Article IX, Section 18, which reads as follows:

"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 after providing therefrom for (a) cost of administration and collection, (b) payment of obligations incurred in the construction and reconstruction of public highways and bridges shall be appropriated by the General Assembly to agencies of the State or political subdivisions thereof; and used solely for construction, reconstruction, maintenance and repair of and safety on public highways and bridges and air navigation facilities and costs and expenses incident thereto, and for the payment of

obligations incurred for such purposes, and shall not be diverted by transfer or otherwise to any other purpose, except that loans may be made by the State from the proceeds of such taxes and fees for a single period not exceeding eight months, but no such loan shall be made within the period of one year from any preceding loan, and every loan made in any fiscal year shall be repayable within one month after the beginning of the next fiscal year."

The act must be construed with the above constitutional provision as a supplement to it or modification of it, or, in other words, the provisions of the Act of 1933, *supra*, and the constitutional provision must be observed.

We are, therefore, of the opinion and you are accordingly advised that if the Governor ascertains that the cash balance and the current estimated receipts of the General Fund are insufficient to meet promptly the expenses of the Commonwealth payable from the General Fund, the State Treasurer is authorized and directed to transfer such sum as the Governor shall direct. The period of the loan shall not exceed eight months and such loan shall not be made within the period of one year from any preceding loan and every loan in any fiscal year shall be repayable within one month after the beginning of the next fiscal year.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 211

*State School Fund—Use of fund to finance studies concerning school bus transportation and education—Section 2604 of the Public School Code of 1949.*

Under § 2604 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended, the State Council of Education may: (1) use income of the State School Fund to finance a study concerning school bus transportation pursuant to a contract executed on November 4, 1959, between the State Council

of Education and the Department of Public Instruction; and (2) use moneys of the State School Fund to finance education studies in connection with House Resolution No. 99, adopted September 14, 1959.

Harrisburg, Pa., January 20, 1960.

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

Sir: We are in receipt of two requests for advice concerning the use of moneys in and derived from the State School Fund.<sup>1</sup> Your questions may be summarized as follows:

1. May the State Council of Education use income of the State School Fund to finance a study concerning school bus transportation pursuant to a contract executed on November 4, 1959, between the State Council of Education and the Department of Public Instruction?

2. May the State Council of Education use moneys of the State School Fund to finance studies in connection with House Resolution No. 99, adopted September 14, 1959?

We will discuss these questions separately.

*1. Study of School Bus Transportation.*

The contract for a study of school bus transportation was executed in accordance with a resolution of the State Council of Education adopted September 16, 1959. The resolution stated that the study would include, among other things:

“\* \* \* the determination of an index or indices for comparison of transportation costs, the comparison of the costs of contract buses and district-owned buses, the consideration of potential economies in transportation, etc.”

The resolution recited the purpose of the study as follows:

“The purpose of this study is to further eliminate educational inequality due to the distance of a pupil's residence from the site of his school.”

The agreement of November 4, 1959, lists the purpose of the study to be:

“1. Determination of school bus needs and the cost of the same.

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<sup>1</sup>See Official Opinion No. 180, 1959-60 Op. Atty. Gen. 39, which thoroughly describes the Fund.

"2. Comparison of the costs of contract buses and district-owned buses.

"3. Consideration of potential economies in transportation."

You state that the Office of the Auditor General, by letter dated December 21, 1959, has advised you as follows:

"As you are aware, moneys in that fund can only be used to eliminate educational inequality. A study of the comparative costs of contract buses as against district-owned buses has, no relation to educational inequalities in one section of the Commonwealth as against another. Consequently, moneys in the State School Fund cannot be used for this purpose."

Section 2604 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended July 29, 1953, P. L. 977, 24 P. S. Section 26-2604, at the time the contract in question was executed, provided in pertinent part:

"The State Council of Education is hereby authorized to use so much of the interest, rentals, and other income of the school fund as it deems wise towards equalizing the educational advantages of the different parts of this Commonwealth  
\* \* \*

School transportation at the present time requires four and one-half cents out of each State budget dollar for education.<sup>2</sup> The number of children of school age and the costs of education have been rising rapidly. As recently as the school year 1939-40, only 11.1 per centum of the public school pupils in Pennsylvania were transported to school. At that time the Commonwealth bore 43.8 per centum of the total cost of instruction. In the school year 1957-58, the latest year for which data are available, 36.3 per centum of the pupils in the public schools were being transported by buses and the State's share of the total cost of instruction had increased to 78.2 per centum. In the 1957-58 school year, 675,936 pupils were transported at a total cost of \$24,078,-549.00. It is estimated that in the 1968-69 school year, 1,136,111 pupils will be transported at a total cost of \$51,363,578.00.

The State School Fund may be used to "equalize the educational advantages of the different parts of this Commonwealth."<sup>3</sup> The State

<sup>2</sup> All facts are supplied by the Bureau of Research of the Department of Public Instruction, dated January 6, 1959.

<sup>3</sup> On February 8, 1957, the State Council of Education entered into a contract for a study of educational costs; and on December 3, 1957, the Council executed a contract for a study of the school building program. Income of the State School Fund has been used since those dates to pay for the expenses of both studies, and vouchers have been approved by the Auditor General's Department.

Council, acting within its discretion, has found and determined that an inequality exists in the funds available for actual instruction expenditures between school districts which need not transport their pupils and school districts in which transportation is a necessary expense. In the former class of districts, a greater portion of the local tax dollar is available for actual instruction expenses, whereas in the latter class of districts, the amount available for actual instruction expenses is decreased by the necessary outlays for transportation. Since the problem will become more acute in future years, the State Council has determined that a study should be made to determine all the economies possible in order to reduce the cost of school transportation and to make available more money for transportation in districts which have large expenditures for transportation as compared with those districts having little or no transportation requirements.

Obviously, such a study necessitates a thorough analysis of the various types of transportation, equipment, insurance and other necessary charges and possible means of economies. It would include an analysis of more economical routing of vehicles to prevent overlapping and in some cases to eliminate long transportation hauls. Situations might be eliminated in which one school district with crowded facilities transports pupils past school buildings of one or more other school districts which have space for additional pupils, thereby reducing costs in transportation and school building construction. In addition, and incident thereto, the study would contemplate possible savings by means of State-wide purchase of school buses as compared with school district purchases, and possibly more standardization of vehicles within the limits of safety.

In short, the purpose of the study is to achieve a more equitable distribution of the educational dollar. We are of the opinion that the proposed study of school bus transportation is a proper use of the income of the State School Fund towards equalizing the educational advantages of the different parts of this Commonwealth.

## *2. Studies in Connection with House Resolution No. 99.*

On September 14, 1959, the House of Representatives adopted House Resolution No. 99, the complete text of which reads as follows:

"In the House of Representatives, August 3, 1959.

"The present crisis in education will not subside in the foreseeable future unless clear and precise investigation into

the causes therefor are uncovered, and workable plans are made to avoid duplication of past mistakes in the future conduct of the educational system within this Commonwealth.

"In order to formulate far reaching plans for public education, it is necessary to have a fair and impartial study made by experts in the field of education; therefore, be it

"Resolved, That this House of Representatives hereby requests the Honorable David L. Lawrence, Governor of Pennsylvania, to appoint a committee consisting of leaders and other experts in the field of education to study the following problems:

"(1) What are our schools costing us now, what may they cost next year or the year after, and what must we expect to pay for good public education a generation or more hence?

"(2) How can the cost of operating our public schools be reduced without materially affecting their ability to educate our children?

"(3) How should the cost of public education be divided among the people who live in the Commonwealth? Should a taxpayer's contribution be based on his income, his spending, his real estate holdings, the size of his family, or on some other basis?

"(4) What kind of new techniques are being developed throughout the Nation to make teaching swifter and easier and learning commensurately more economical and effective?

"(5) Have new social and economic factors, many of them emerging since World War II, created a need for a new type of education for some segments of our society? And be it further

"Resolved, That this House of Representatives hereby requests the Department of Public Instruction, the Pennsylvania State University, the various State Teachers' Colleges, and other colleges and universities within this Commonwealth, the various school districts throughout the Commonwealth, and the various educators devoting their time and efforts to the various fields of learning to cooperate with and render such aid and assistance as may be necessary to the Governor's committee appointed as recommended herewith; and be it further

"Resolved, That the committee is hereby requested to make a report of its findings and recommendations to the Governor and to the General Assembly of Pennsylvania on or before February 1, 1961; and be it further

"Resolved, That a copy of this resolution be sent to the Honorable David L. Lawrence, Governor of Pennsylvania."

In response to the request of the House of Representatives to educators to "cooperate with and render such aid and assistance as may be necessary to the Governor's committee," the State Council of Education proposes to use moneys in the State School Fund for the purpose of financing studies in connection with the resolution, including paying for salaries, wages, equipment, travel, supplies and all other expenses necessary for the proper conduct of such studies.

On January 7, 1960, the Governor approved Act No. 779, P. L. (1959) 2101 which amends the provisions of the Public School Code relating to the State School Fund. Act No. 779 took effect immediately and thus governs the instant question. Section 2604, 24 P. S. Section 26-2604, as amended, reads as follows:

*"\* \* \* In addition to equalizing educational opportunities throughout the Commonwealth, the State Council of Education may expend moneys from the State School Fund of Pennsylvania for the purpose of paying a part of the costs of repairs and/or alterations to local public school buildings or buildings used by State Teachers' Colleges, which repairs and/or alterations are necessary to satisfy fire and safety standards or requirements and which are required by order of the Department of Labor and Industry; or in those cases in which the Department of Labor and Industry does not have jurisdiction, then by order of another governmental body of competent jurisdiction empowered by law to enforce such orders, including cities of the first class, cities of the second class, and cities of the second class A.*

"As much of the moneys in the State School Fund of Pennsylvania, including principal and income, as may be necessary is specifically appropriated to the State Council of Education to be used for the purposes and in the manner prescribed in this act." (Emphasis supplied)

The portion italicized preserves the power of the State Council to use the State School Fund moneys to equalize educational opportunities throughout the Commonwealth. The amendment, however, abolishes the former authority of the State Council to make advancements and to promote education in conservation.

The question resolves itself into whether the proposed use of money to finance studies in connection with House Resolution No. 99 will serve to "equalize educational opportunities throughout the Commonwealth."

The problems listed in the resolution run the gamut of the educational system: cost factors; curriculum; facilities; organizational structure; and personnel. The legislature has directed a fair and impartial study designed to bring about quality programs of education at reduced costs. We are of the opinion that the State Council of Education may properly find that the proposed study will serve to equalize educational opportunities throughout the Commonwealth.

The study may show that certain areas and programs, generally or in certain geographical locations, need to be modernized to meet present-day high educational standards, such as English, science, foreign languages, libraries, shop facilities, laboratory facilities, quality of personnel and educational leadership. Analysis of all public educational institutions may result in better fiscal operations at all levels of government. The widening gap between advances in technology and the current program of public education may be narrowed. Study may show that equalization of educational opportunities can be realized in the provision of scholarships and student loan programs geared to all students and not limited to the academically talented. Expert inquiry of present fiscal policies and practices of school districts may produce standards which, when applied State-wide, may enable districts to keep pace with the rapid growth of school population, the increased size of administrative units and the increased cost of public education. Study of the present system of school organization, its structure and function, may result in recommendations for improved service and economical operation. Inspection of the school building program may reveal those programs of construction which result in the lowest maintenance costs and provide the best facility for the designated purpose. Further, a fair and impartial study may reveal areas in which non-professional people may make a worthwhile contribution and provide effective service to public education and thereby free professional staff for greater responsibilities in teaching assignments.

We are, therefore, of the opinion and you are accordingly advised that the State Council of Education may:

- (1) Use income of the State School Fund to finance a study concerning school bus transportation pursuant to a contract executed on November 4, 1959, between the State Council of Education and the Department of Public Instruction; and

(2) Use moneys of the State School Fund to finance studies in connection with House Resolution No. 99, adopted September 14, 1959.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN III,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 212

*State liquor stores—Daily receipts—Deposits—Transmittal to State Treasury—Section 208 of the Liquor Code.*

The Liquor Control Board may avail itself of the authority granted in § 208 of the Liquor Code, the Act of April 12, 1951, P. L. 90, and by regulation adopt a procedure for the transmittal of receipts to the State Treasury Department if it makes deposits of the daily collections in banks selected and designated as depositories for State moneys by the Board of Finance and Revenue and upon opening the accounts, the Department of the Auditor General and the Treasury Department are so informed.

Harrisburg, Pa., March 31, 1960.

Honorable David H. Kurtzman, Secretary of Administration, Harrisburg, Pennsylvania.

Sir: We have your request with regard to the legality of a proposed plan of handling the daily receipts of the sales in the stores of the Pennsylvania Liquor Control Board other than the stores located in the Pittsburgh and Philadelphia areas.

Presently, the daily collections are taken to a bank where a certified check is purchased for transmittal to the Liquor Control Board headquarters in Harrisburg and thence to the State Treasury Department. The purchase of certified checks is rather expensive and it is the opinion of the Liquor Control Board's comptroller that substantial savings can be effectuated by altering the procedure of handling the daily collections. The proposed procedure contemplates the establishment of a bank account and the deposit of daily collections therein for each store outside of the metropolitan areas. The store manager

would draw a check against the bank account and transmit it to the Liquor Control Board in Harrisburg.

You ask to be advised as to your legal authority to adopt the proposed plan.

The following provisions of the Liquor Code, the Act of April 12, 1951, P. L. 90, 47 P. S. Section 1-101 et seq., are pertinent:

Section 801, 47 P. S. Section 8-801, which reads:

"(a) The following fees collected by the board under the provisions of this act *shall be paid into the State Treasury through the Department of Revenue into a special fund to be known as the 'Liquor License Fund'*:

\* \* \* \* \*

(Emphasis supplied)

Section 802, 47 P. S. Section 8-802, which reads:

"All moneys, except fees to be paid into the Liquor License Fund as provided by the preceding section, collected, received or recovered under the provisions of this act for license fees, permit fees, filing fees and registration fees, from forfeitures, sales of forfeited property, compromise penalties and sales of liquor and alcohol at the Pennsylvania Liquor Stores, *shall be paid into the State Treasury through the Department of Revenue into a special fund to be known as 'The State Stores Fund.'*

"All moneys in such fund shall be available for the purposes for which they are appropriated by law." (Emphasis supplied)

Section 208, 47 P. S. Section 2-208, which reads:

"Subject to the provisions of this act and without limiting the general power conferred by the preceding section, the board may make regulations regarding:

\* \* \* \* \*

"(i) The place and manner of depositing the receipts of Pennsylvania Liquor Stores and the transmission of balances to the Treasury Department through the Department of Revenue."

The following sections of The Fiscal Code, the Act of April 9, 1929, P. L. 343, 72 P. S. Section 1 et seq., are pertinent:

Section 209, 72 P. S. Section 209, which reads:

"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."

Section 301, 72 P. S. Section 301, which reads:

"All departments, boards or commissions, having in their possession any moneys belonging to the Commonwealth, shall deposit them in State depositories approved by the Board of Finance and Revenue. In all such cases the depositing department, board or commission shall forthwith, upon opening the account, notify the Department of the Auditor General and the Treasury Department of the name of the depository and the nature of the funds to be deposited in the account."

Section 505 of The Fiscal Code, 72 P. S. Section 505, authorizes the Board of Finance and Revenue to select and designate banks as depositories for State moneys.

Assuming that the deposits of the daily collections are made in banks selected and designated as depositories for State moneys by the Board of Finance and Revenue, and that you comply with the provisions of the laws cited herein, we see no legal objection to the proposed plan based upon the authority granted by clause (i) of Section 208 of the Liquor Code, *supra*. After opening the account, the Department of the Auditor General and the Treasury Department should be notified of the names of the depositories and the nature of the funds to be deposited in the accounts.

We are, therefore, of the opinion and you are accordingly advised that the Liquor Control Board may avail itself of the authority granted in Section 208 of the Liquor Code and by regulation adopt the proposed procedure for the transmittal of receipts to the State Treasury Department.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

## OFFICIAL OPINION No. 213

*Elections—Absentee elector—Qualification of students at educational institutions—  
Act of January 8, 1960, P. L. (1959) 2135—Pennsylvania Election Code.*

Students in full time attendance at educational institutions may qualify as "absentee electors" under the provisions of the Act of January 8, 1960, P. L. (1959) 2135, which added a new subsection (y) to § 102 of the Pennsylvania Election Code, the Act of June 3, 1937, P. L. 1333.

Harrisburg, Pa., April 6, 1960.

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

Sir: You request advice whether students in full time attendance at educational institutions may qualify as "absentee electors" within the meaning of Act No. 789, the Act of January 8, 1960, P. L. (1959) 2135, 25 P. S. Section 2602. Section 1 of this act added a new subsection (y) to Section 102 of the Pennsylvania Election Code, the Act of June 3, 1937, P. L. 1333, 25 P. S. Section 2602, defining "absentee elector" as one who "on the occurrence of any election is unavoidably absent from the county of his voting residence by reason of his duties, business or occupation."

Webster's New International Dictionary, 2nd Ed., defines "business" as: "Quality or state of being busy \* \* \* That which busies, or engages time, attention or labor, as a principal serious concern or interest \* \* \*", and "occupation" as: "That which occupies, or engages, the time and attention; the principal business of one's life, vocation; business \* \* \*."

"Business" and "occupation," in comprehensive terms, are commonly defined by the courts to mean activity, energy, capacity, and opportunities by which results are reached, embracing everything about which a person can be employed; the efforts of men by varied methods of dealing with each other to improve their individual economic conditions and satisfy their desires; and that which occupies the time, attention or labor of men for the purpose of profit or improvement. *People ex rel. Attorney General v. Jersin*, 101 Colo. 406, 74 P. 2d 668 (1937); *Norman v. Southwestern R. Co.* 42 Ga. App. 812, 157 S. E. 531 (1931); *State ex rel. Sizemore v. State Election Board*, 203 Okl. 1, 217 P. 2d 805 (1950). We are of the opinion that a student in full time attendance at an educational institution is there by reason of his "duties, business or occupation."

We are, therefore, of the opinion and you are accordingly advised that students in full time attendance at educational institutions may qualify as "absentee electors" within the meaning of Act No. 789 approved January 8, 1960, since they are there by reason of their "duties, business or occupation."

This opinion is not intended to supersede the powers conferred upon the county boards of elections by the provisions of the Pennsylvania Election Code, the Act of June 3, 1937, P. L. 1333, as amended, 25 P. S. Sections 2600 to 4051. The final decision on each application for absentee ballot rests with the county board of election to which the application is presented.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN III,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 214

*Motor boats—Tidal waters—Motor Boat Law—Definition of inland waters—  
Amendatory Act of June 21, 1937, P. L. 1984.*

The Act of June 21, 1937, P. L. 1984, amending § 1 of the Motor Boat Law, the Act of May 28, 1931, P. L. 202, defining inland waters by striking out the exemption of tidal rivers and by extending the act to rivers whether tidal or not, applies to tidal waters within the Commonwealth, and boaters keeping their craft on tide-affected waters are subject to the provisions of the Motor Boat Law.

Harrisburg, Pa., April 6, 1960.

Honorable H. R. Stackhouse, Acting Executive Director, Pennsylvania Fish Commission, Harrisburg, Pennsylvania.

Sir: The Fish Commission's request to the Attorney General for interpretation of the Motor Boat Law specifically asks whether the law covers tidal waters.

Reference is made to the term "non-tidal waters" in the title of the act, as listed in the Fish Commission's fish and boating law booklet. This is from the Act of May 28, 1931, P. L. 202, which in its definitions excluded tidal waters from the application of the law. However, this law was amended by the Act of June 21, 1937, P. L. 1984.

Section 1 of the 1931 law had defined inland waters as:

"Any public stream, artificial or natural body of water, or non-tidal waters of any river within the Commonwealth."

The 1937 amendment changed this to read:

"Any public stream, river, lake, artificial or natural body of water within the Commonwealth."

It will be seen that the General Assembly, by striking out the exemption of tidal rivers, and by extending the act to rivers whether tidal or not, specifically incorporated tidal waters within the purview of the law.

It is noted that the title of the 1937 amendment did not state specifically that the definition of inland waters was to be changed, but did give notice that definition changes were to be made by stating that Section 1 of the Act, which covers all definitions, was to be amended. Even though no specific reference to the definition of inland waters was made in the title, we consider this reference to the affected section adequate.

It is, therefore, our opinion, and you are accordingly advised, that the Motor Boat Law definition of inland waters applies to tidal waters within the Commonwealth, and should be enforced accordingly.

Yours very truly,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

## OFFICIAL OPINION No. 215

*Stream pollution—Fish Law—Act of June 22, 1937, P. L. 1987—Prosecution for offenses under both acts—Repeated prosecutions—Application to municipalities.*

1. There is no conflict between the anti-pollution provisions of the Fish Law, the Act of December 15, 1959, P. L. 1779, and the Act of June 22, 1937, P. L. 1987, as amended, and an offender may be prosecuted under both acts for a single pollution.

2. The Fish Commission is empowered to make repeated or daily prosecutions of continuing pollutions until the pollution is abated.

3. The anti-pollution provisions of the Fish Law, the Act of December 15, 1959, P. L. 1779, do not apply to municipalities; however, the similar provisions in the Act of June 22, 1937, P. L. 1987, do apply as provided therein to any county, county authority, municipal authority, city, borough, town, township, school district or institution.

Harrisburg, Pa., April 6, 1950.

Honorable H. R. Stackhouse, Acting Executive Director, Pennsylvania Fish Commission, Harrisburg, Pennsylvania.

Sir: The Fish Commission has requested an interpretation of corresponding anti-pollution sections of The Fish Law of 1959, the Act of December 15, 1959, P. L. 1779, and the Clean Stream Law, the Act of June 22, 1937, P. L. 1987, as amended 35 P. S. Section 691.1, et seq.

Your questions, and our answers thereto, follow:

1. Are the anti-pollution sections of these two statutes in conflict?

Section 200 of The Fish Law of 1959 states in part:

"No person shall allow any substance of any kind or character deleterious, destructive or poisonous to fish to be turned into or allowed to run, flow, wash or be emptied into any waters within this Commonwealth unless it is shown to the satisfaction of the Commission or to the proper court that every reasonable and practicable means has been used to abate and prevent the pollution of waters in question by the escape of deleterious substances."

Section 202 provides for penalties from \$100 to \$1000. Section 203 specifies that it need not be proved that the polluting substance actually caused the death of any particular fish. Pollution of water in a State fish hatchery is prohibited by Section 204. Section 200 also regulates the use of poisons for catching or killing fish.

The Fish Commission is given responsibility for enforcement of these provisions.

The other major Commonwealth agency concerned directly with water pollution is the Department of Health, which acts as enforcement agent for the Sanitary Water Board, a departmental administrative Board.

The powers of this Board are specified in Section 2110 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended. This section repeats the substantive anti-pollution provisions of the Act of April 22, 1905, P. L. 260, which is an act "for the protection of public health." The criteria established for permissible pollution are in all cases those which will protect public health, and the emphasis is upon water supply and sewage disposal. The Board is given wide general powers. The Administrative Code of 1929 relates to the Clean Stream Act of 1937, cited *supra*. The basic provision of this law is in Section 3, to wit:

"The discharge of sewage or industrial waste or any noxious and deleterious substances into the waters of this Commonwealth, which is or may become inimical and injurious to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, is hereby declared not to be a reasonable or natural use of such waters, to be against public policy and to be a public nuisance."

It will be noted that here the law is broadened to cover not only public health but also pollution injurious to "animal or aquatic life," and this concept is carried throughout the several sections dealing with sewage, industrial wastes, and other forms of pollution, including "petty" pollution, the latter being provided for in Section 401 and being in all essential respects the same as the anti-pollution provisions of The Fish Law of 1959. A major difference, however, is that until 1959 the penalty under The Fish Law was a maximum of \$100, now increased to \$1000, while under the Clean Stream Act, Section 309, it ranges from \$100 to \$5000 and one year in prison.

Summarizing, The Fish Law of 1959 is restricted to pollution "deleterious, destructive or poisonous to fish" (Section 200), while the Clean Stream Law (Section 3) covers pollution "which is or may become inimical . . . to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation. . . ."

Since fish are aquatic life, both laws deal with fish, but the latter has additional and far more extensive coverage. A pollution affecting fish life is a violation under both laws, and therefore each agency, the Fish Commission and the Sanitary Water Board, may prosecute under the terms of the act it administers. Thus a single pollution may subject the offender to two penalties, one under The Fish Law of 1959, and the other under the Clean Stream Act. We do not construe this to involve double jeopardy. The prohibition against double jeopardy in the Fifth Amendment to the Constitution of the United States applies only to Federal offenses, *United States v. Lanza*, 260 U. S. 377, 43 S. Ct. 141, 67 L. Ed. 314 (1922), and hence the due process requirement of the Fourteenth Amendment is also met. The similar provision in Article I, Section 10, of the Constitution of Pennsylvania, does not apply to minor offenses. *Commonwealth v. Markowitz*, 74 Pa. Super. 231 (1920). Thus it is legally possible to proceed under both laws, even though only one act is involved. In this situation both offenses should be charged and prosecuted together, as the penalties may not be pyramided. *Commonwealth v. Ashe*, 290 Pa. 534, 139 Atl. 197 (1927). However, it is doubtful whether this is necessary or desirable, since any pollution so long as the addition of pollutants continues is in fact a series of offenses. Thus it was said in *Commonwealth v. Kwiatkowski*, 89 Pa. Super. 272 (1926), that conviction for a nuisance does not provide immunity from prosecution for continuing the nuisance. It would, therefore, appear logical, if it were desired to charge the offender under both acts, to select violations occurring at different times. There does not appear to be any direct authority indicating how narrow such time divisions may be, but it would be reasonable to say that each day, at least, would constitute a separate offense.

It is, therefore, our opinion, and you are accordingly advised, that there is no conflict with respect to pollution between The Fish Law of 1959 and the Clean Stream Act, and each is required to be enforced by the cognizant State agency. Each, of course, should keep the other advised of violations discovered.

2. Should the Fish Commission make repeated or daily prosecutions where pollution is continuing?

For the reasons stated *supra*, it may make repeated or daily prosecution of continuing pollutions until the pollution is abated, although obviously such drastic remedy should be reserved for flagrant cases.

3. Do the anti-pollution passages of The Fish Law apply to municipalities?

They do not. They apply to any "person" who pollutes, and "person" is defined to include "individuals, copartnerships, associations and corporations." There is no mention of municipalities. The Clean Stream Act, on the other hand, applies not only to any "person" but also to any "municipality" discharging sewage or industrial waste, and "municipality" is defined to include "any county, county authority, municipal authority, city, borough, town, township, school district and institution." It is clear that the Clean Stream Act applies to municipalities and The Fish Law of 1959 does not.

Yours very truly,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,  
*Deputy Attorney General.*

ANNE K. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 216

*School districts—Athletic events—Appropriation for medical expenses—Services of chiropodist—Exclusion from coverage in insurance policy—Section 511(f) of the Public School Code.*

Under § 511(f) of the Public School Code, the Act of March 10, 1949, P. L. 30, as amended, providing that the board of school directors of any district is authorized to appropriate moneys of the district for the payment of medical expenses incurred as the result of participating in athletic events and for the purchase of accident insurance in connection with such participation, the term "medical expenses" encompasses expenses for the services of a chiropodist, and the school board cannot preclude the reimbursement of any medical practitioner who is empowered by law to treat the "covered" physical injuries and whose services result in medical expenses within the meaning of that provision. If the school board chooses to purchase insurance for school athletic accidents which includes coverage for such injuries, it may not exclude from coverage claims of chiropodists which arise out of the treatment thereof.

Harrisburg, Pa., April 29, 1960.

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

Sir: You have asked our advice as to whether a school board may purchase insurance for school athletic accidents without providing coverage therein for the claims of chiroprodists<sup>1</sup> which arise out of the treatment of foot injuries incurred in such accidents.

The propriety of this practice must be measured against the statutory provision under which school boards derive their authority to enter into athletic accident insurance contracts. Section 511(f) of the Public School Code of March 10, 1949, P. L. 30, added as an amendment by the Act of April 26, 1949, P. L. 726, 24 P. S. § 5-511(f) reads in relevant part:

"The board of school directors of any district is hereby authorized to appropriate any monies of the district for the payment of *medical* and hospital *expenses* incurred as a result of participation in such athletic events or games, practice or preparation therefor, or in transportation to or from such athletic events or games, or the practice or preparation therefor, and for the purchase of accident insurance in connection with such participation and transportation." (Emphasis supplied)

In light of the language which would permit a board to appropriate money for "medical expenses," an actual appropriation for such purpose raises two issues:

1. Does the term "medical expenses" encompass expenses for the services of a chiroprodist?
2. If it does, may a school board limit an appropriation under this provision to payment for the services of selected types of medical practitioners rather than of all practitioners whose services result in "medical expenses" within the meaning of this provision?

Section 511(f) contains no definition of the term "medical," and of itself provides no clue as to whether the term "medical expenses" encompasses expenses for the services of a chiroprodist.<sup>2</sup>

<sup>1</sup>"(A) Chiroprody shall mean the diagnosis of foot ailments and the practice of minor surgery upon the feet, the padding, dressing and strapping of the feet, the making of models of the feet and palliative and mechanical treatment of functional disturbances of feet not including the amputation of the leg, foot or toes or the treatment of systemic diseases of the bones, ligaments or muscles of the feet, or any part of the body." Chiroprody Act of 1956, the Act of March 2, 1956, P. L. 1206, 63 P. S. § 42.2.

<sup>2</sup>This statute contrasts sharply with the type of statute exemplified by § 213(e) of the Internal Revenue Code of 1954, as amended, 26 USCA § 213(e). By the express terms of such provision, the expenses for a chiroprodist's treatment would qualify as a medical expense deductible for federal income tax purposes. It reads: "(1) The term 'medical care' means amounts paid—(A) for the diagnosis, cure, mitigation treatment or prevention of disease, or for the purpose of affecting any structure or function of the body . . ."

Where there have been similar definitional omissions in statutes or contracts, the Courts have followed the general rule of construction set forth in *Palmer v. O'Hara*, 359 Pa. 213-222, 58 A. 2d 574 (1948). In that case, the Supreme Court of Pennsylvania was asked to determine whether the practice of osteopathy was included in the term "qualified physician" under The Mental Health Act of 1923.

To establish that it was, the osteopaths pointed to the 1941 amendment to the Medical Practice Act which enlarged the scope of "medical practice" so as, apparently, to encompass the practice of osteopathy. The Court dismissed this argument, saying:

"... Even if it should be held that, under the 1941 amendment, 'osteopathy' is now a branch of 'medicine,' the crucial question would remain as to who were 'licensed to practice medicine' upon the passage of the Mental Health Act in 1923. And, the inescapable answer is that osteopaths were not so licensed, no more than were dentists or pharmacists whose licensure and regulation, just as in the case of the osteopaths, is by virtue of respective independent statutes and not by the *determinative* Medical Practice Act." (Emphasis supplied)

This case therefore stands as authority for the proposition that the meaning of "physician" or "medical" in a particular statute is to be determined by reference to the scope of the Medical Practice Act in the year of passage of such statute.<sup>3</sup>

Applying this principle here, it is clear that the issue of whether a chiroprapist's services are encompassed within the term "medical expenses" in a Public School Code provision enacted in 1949 turns on whether at that time the practice of chiropody was embraced within the scope of the Medical Practice Act.

We need refer for the answer only to the regulations of the Medical Board which were effective in the year 1949. These clearly show that chiropody was a recognized branch of "medicine" and that those who sought to practice it were required to be licensed by the "Medical" Board. Indeed, it was not until the Chiropody Act of 1956, the Act of March 2, 1956, P. L. 1206, 63 P. S. § 42.1 et seq., that chiropradists were removed from the jurisdiction of the Board of Medical Educa-

<sup>3</sup> Cf. *Kahn v. Metropolitan Life Ins. Co.*, 132 N. J. L. 503, 41 A. 2d 329 (1945). In this case, the question before the Court was whether an insured in violation of the terms of his application has failed to give complete information concerning "medical treatments" when he failed to note his treatment by a chiropractor. The Court found chiropractic treatment to be "medical" in nature on the theory that during the years in question "the subject of chiropractic [had] been dealt with by the Legislature" under the general Medical Practice Act. See also *State v. Hayes*, 228 Ind. 286, 91 N. E. 2d 913 (1950).

tion and Licensure and placed under the control of a newly created State Board of Chiropractic Examiners.<sup>4</sup>

Accordingly, it is our view that the term "medical expenses" in Section 511(f) of the Public School Code of 1949 encompasses expenses for the services of a chiropractor.

There remains the further question of limiting an appropriation under this provision to payment for the services of selected types of medical practitioners.

It must be conceded that a school board is under no obligation to make any appropriation of moneys for school athletic injuries; the statute merely "authorizes" such action. Even if the money is appropriated, there is nothing to prevent a school board from omitting insurance coverage for various types of physical injuries. Controversy only arises where a school board would desire to exclude not a class of injuries from the coverage of its insurance but to exclude a class of "medical" practitioners whose scope of practice legitimately encompasses the insured physical injuries.

This department is convinced that in using the term "medical expenses" in connection with empowering school boards to appropriate moneys for such purposes, the legislature did not intend that practitioners whose costs result in medical expense should be accorded dissimilar treatment. An intention to permit discrimination among legitimate "medical practitioners" should not lightly be imputed to the Legislature. It is well established that the powers of school boards are limited to those which the Legislature has expressly granted to them.<sup>5</sup>

This conclusion is reinforced by the analogous way in which the Courts have treated various exclusionary or discriminatory policies of public hospitals in the use of their facilities by medical practitioners. In dealing with such restrictive or exclusionary policies, the Courts have applied the principle that such policies may not be "unreasonable, arbitrary, capricious or discriminatory."<sup>6</sup> This position is based upon the fear of the Courts that, without a rule of reason,

<sup>4</sup>It is interesting to note that under the Chiropractic Act the standards of preliminary and professional education to be met by prospective licensees are substantially higher than they were under the Medical Practice Act.

<sup>5</sup>*Slippery Rock Area Joint School System v. Franklin Township School District*, 389 Pa. 435, 133 A. 2d 848 (1957).

<sup>6</sup>*Findlay v. Board of Sup'rs. of County of Mohave*, 72 Ariz. 58, 230 P. 2d 526 (1951).

patients would be deprived of their free choice of a physician, and certain physicians would to that extent be deprived of the right to practice their profession.

This judicial attitude against the unreasonable deprivation of the patient's freedom of choice of physician recognizes the evil of forcing the patient to take his treatment at the hands of physicians "who would not be familiar with [his] case" and "in whom the patient may lack confidence."<sup>7</sup> It also acknowledges that permitting the unreasonable deprivation or denial of access by physicians to public hospitals might produce widespread harm to the practice of many duly licensed physicians.

The conclusion of the Court in *Alpert v. Board of Governors of City Hospital*, 286 App. Div. 542, 145 N. Y. S. 2d 534 (1955), summarizes the judicial protection now accorded physicians and their patients against the regulatory bodies of public hospitals:<sup>8</sup>

"Nevertheless, respondent [the Hospital] has unreasonable and arbitrarily excluded his [physician] from the use of the hospital, relying upon the lack of any relevant express limitations upon its authority. We conclude that additional limitations are to be implied, partly because of the very nature of a public hospital and partly to furnish constitutional protection to valuable interests."

Such a rule of reason is in order in this case. Even as a selective or exclusionary policy of a public hospital is directed against certain physicians, a public school reimbursement program which discriminates against certain "medical" practitioners strikes at the traditionally direct and consensual relationship between patient and practitioner. The power of a school board to select certain practitioners for reimbursement of athletic injuries is also the power to limit the public's choice of practitioner and, in the process, to injure the practice of unfavored practitioners. Logic dictates that the same rationale which guides the regulatory bodies of public hospitals in their treatment of physicians should also be applicable to the relationship between school boards and medical practitioners in connection with an athletic injury reimbursement program.

Therefore, if a school board chooses to make an appropriation to pay medical expenses, under Section 511(f) of the Public School

<sup>7</sup> *Wyatt v. Tahoe Forest Hospital District*, 174 Cal. App. 2d 709, 345 P. 2d 93 (1959).

<sup>8</sup> Accord: *Findlay v. Board of Sup'rs. supra*; *Wyatt v. Tahoe Forest Hospital District, supra*.

Code, it cannot, without acting arbitrarily, preclude the reimbursement of any medical practitioner who is empowered by law to treat the "covered" physical injuries and whose services result in medical expenses within the meaning of the provision in question. Thus, a school board could not refuse to pay a chiropodist for the same type of treatment for which it would pay if the services were performed by other medical practitioners.

It follows, of course, that any insurance obtained with such an appropriation would have to have coverage for chiropodists as well as other medical practitioners.

It is therefore our opinion, and you are accordingly advised, that if a school board chooses to purchase insurance for school athletic accidents which includes coverage for foot injuries, it may not exclude from coverage claims of chiropodists which arise out of the treatment of such foot injuries.

Very truly yours,

DEPARTMENT OF JUSTICE,

MORRIS J. DEAN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 217

*Foreign life insurance companies—Reinsuring credit life insurance contracts—  
Doing business—Regulation of insurance companies—Taxation.*

A Delaware life insurance company, which in addition to executing reinsurance contracts in Pennsylvania, maintains a bank account in Pennsylvania, receives premiums in Pennsylvania, and has loaned money on mortgages in Pennsylvania, is doing business in Pennsylvania and is, therefore, subject to the insurance company regulatory laws and the tax laws of the Commonwealth.

Harrisburg, Pa., May 3, 1960.

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

Sir: You have asked whether a State of Delaware life insurance company which lists its principal office in Pennsylvania and engages in the single activity of receiving and investing the proceeds of a single "reinsurance treaty" relating to credit life insurance risks assumed in Pennsylvania, which activity represents 100% of the insurance written by said out-of-State company, is engaging in such activity as to require its being licensed by the Insurance Department of the Commonwealth of Pennsylvania and subject to the taxing provisions governing insurance companies in the Commonwealth.

The answer to both of these questions is "Yes."

The facts which you have supplied indicate this insurance company is a satellite of a loan company. The loan company through numerous branches located in southeastern Pennsylvania requires the borrower as additional security for its loans to insure his life in the amount of the loan for the term of the loan naming the finance company as beneficiary. All of these policies are written with an Illinois insurance company which is authorized to conduct insurance activities in the State of Pennsylvania. The insurance in the first instance is taken by application to the employees of the finance company who have insurance agents' licenses and are authorized to represent the Illinois company. All of this insurance then becomes the subject of a "reinsurance treaty" between the Illinois insurance company and the Delaware insurance company, whereunder the risks written by the Illinois company are ceded to and assumed by the Delaware company. The treaty was executed by the Delaware company at Philadelphia and later by the Illinois company in Illinois. The Illinois company pays a reinsurance premium to the Delaware company. The Delaware company does not pay the losses on risks it reinsures. That is done by the Illinois company which reimburses itself by deducting the aggregate monthly amount of such loss payments from the monthly reinsurance premium due to the Delaware company. It remits only the net insurance premium. The Illinois company prepares a monthly statement of reinsurance premium due and losses paid and sends it to the Delaware office of the Delaware company, which is apparently the only other office the company maintains, and a copy, accompanied by its check for the net amount due, to Philadelphia.

Both the Delaware insurance company and the finance company are, for the most part, in effect, beneficially owned by an individual Pennsylvania resident who is a director and president of both corporations and, for practical purposes, controls both,

The Delaware corporation has its own stationery which bears the address of the Pennsylvania resident referred to above. The company maintains a bank account in Philadelphia from which disbursements for routine and minor expenses of the company are paid. The company has no employees other than its three officers, one of whom is the wife of the Pennsylvania resident referred to above. These officers receive "nominal salaries." The Delaware company invests the proceeds of its "reinsurance treaty" in marketable securities, presumably through the Pennsylvania address. The company has made advances to the individual Pennsylvania resident, taking back from him two mortgages, one of which is secured by his residence in Pennsylvania and the other by his summer home in New Jersey. The payments in reduction of the two mortgages are paid into the bank account of the company. This bank account, presumably in Pennsylvania, is in a "street name" partnership which also holds title to the company's funds and investments. The receipt and investment of the net reinsurance premiums and the assumption of obligations under the "reinsurance treaty" are stated to be the substance of the Delaware company's activities.

These above facts lead us unequivocally to the conclusion that the Delaware corporation is "doing business" within the Commonwealth of Pennsylvania for the purposes not only of court jurisdiction over it but also for taxing and regulatory purposes.

The rule of law in this area is set forth in 29 Am. Jur., Insurance, § 68, p. 485 (edit. 1960), as follows:

"It has been stated broadly that the power of a state to regulate the activities of an insurance company, upon the ground that it is doing business in the state, is to be resolved by the application, not solely of conceptualistic theories of the place of contracting or of performance, but also of the realistic considerations arising from the substantial interest of the state in the business of insuring its people or property, such as considerations of the location of the insurance activity before and after the making of the contract, the degree of interest of the state in the object insured, and the location of the properties insured. It has been said in this connection that particular activities of foreign insurance corporations must be judged as a whole, and that the fact that none of the several acts or transactions, considered separately, constitute doing business, is not necessarily conclusive that a combination of such acts or transactions also will not constitute doing business."

See also Ann., What Constitutes Doing Business Within State by Foreign Insurance Corporation, 137 A. L. R. 1128, and Ann., Foreign Insurance Company as Subject to Service of Process in Action on Policy, 44 A. L. R. 2d 416.

In the eleven cases headed by *Connecticut Mutual Life Insurance Company v. Spratley*, 172 U. S. 602, 19 S. Ct. 308, 43 L. Ed. 569 (1899), found at 137 A. L. R. 1139, where a foreign insurer was held to be doing business within another state, the fact that it collected premiums in the state seeking to assert jurisdiction over it was a factor weighed by the court in reaching its decision. A foreign company which, through its agents, invests funds in obligations secured by mortgages on property within the state has been held to be doing business within such state: *John Hancock Mutual Life Insurance Company v. Girard*, 57 Idaho 198, 64 P. 2d 254 (1937). In *State Life Insurance Company v. Dupre*, 19 Tenn. App. 301, 86 S. W. 2d 894 (1935), the making of loans in a state through an agent by a foreign insurance company was held to be doing business within the state. There an Indiana insurance company brought suit to set aside a release on a trust deed, given as security for two promissory notes evidencing loans made through its agent in Tennessee. The court dismissed the bill for failure of the insurance company to be licensed in the state.

While the single act of negotiation outside the state of a contract of reinsurance is not doing business in the state where the insured property is situated and the original risk was assumed: *Morris & Co. v. Skandinavia Insurance Company*, 279 U. S. 405, 49 S. Ct. 360, 73 L. Ed. 762 (1929), the assumption by a foreign insurer of liability under a policy issued by a domestic insurer or by an insurer qualified to do business in the forum is a factor tending to show that the foreign insurer has subjected itself to the jurisdiction of the state for purposes of suit against the latter upon the policy: *North American Union v. Oliphint*, 141 Ark. 346, 217 S. W. 1 (1919), and cases cited at 44 A. L. R. 2d 444. However, the making of a contract of co-insurance, also referred to in the opinion as a contract of reinsurance by a foreign insurance corporation, and its delivery for its signature to the co-insurer in the state in which it later was incorporated and its presentation to the Insurance Commissioner for his approval, and the carrying out of such contract in the latter state was held to constitute engaging in business in such state within the generally accepted meaning of the term: *Lincoln National Life Insurance Company v. Means*, 264 Ky. 566, 95 S. W. 2d 264 (1936), cert. den., 299

U. S. 578, 57 S. Ct. 42, 81 L. Ed. 426 (1936). (In this case deputized service was held proper.)

In *Swing v. Munson*, 191 Pa. 582, 43 Atl. 342, 343, 58 L. R. A. 223 (1899), an action was brought by an Ohio insurance company against a Pennsylvania citizen to recover assessments on an insurance contract. It was stipulated that the Ohio company had not complied with the Pennsylvania insurance statutes but the court assumed that the insurance contract applied for and received by mail had been made in Ohio and was lawful here. The Supreme Court affirmed the court below holding the contract could not be enforced in Pennsylvania. Three factors were stressed: the failure to comply with the Pennsylvania statutes; the Pennsylvania citizenship of the defendant; the location within the Commonwealth of the insured property. The Supreme Court concluded that the writing of the insurance contract, although accomplished in Ohio, was "the attempt of a foreign insurance company to do business in this state in violation of the laws of this state." The statute involved in *Swing v. Munson* was Section 9 of the Act of April 4, 1873, P. L. 20, which has been reenacted as follows in the Act of May 17, 1921, P. L. 789, Section 106, 40 P. S. Section 26:

"It shall be unlawful for any person, company, association, exchange, copartnership, or corporation to negotiate or solicit, within this Commonwealth, any contract of insurance, or to effect the same, or to receive and transmit any offer or offers of insurance, or receive or deliver a policy or policies of insurance, or in any manner to aid in the transaction of the business of insurance, without fully complying with the provisions of this act."

To the same effect *American Universal Insurance Company v. Sterling*, 203 F. 2d 159 (3rd Cir., 1953), from which much of the language of the above case is paraphrased.

In *Bartlett v. Rothschild*, 214 Pa. 421, 63 Atl. 1030 (1906), reversed on other grounds, an action was commenced against the resident agent of a Delaware insurance company not authorized to do business in Pennsylvania under a statute imposing personal liability on the agent for losses on contracts placed through him on behalf of foreign companies not authorized to do business in Pennsylvania. The case held the following to be sufficient facts to show the company was doing business in Pennsylvania:

1. Negotiation for the policy in Pennsylvania.

2. Receipt of the check for the premiums due in Pennsylvania.
3. Location of the insureds and the insured property in Pennsylvania.
4. Transaction of nearly all its business in the agent's office in Pennsylvania.
5. The agent was in point of fact owner of the Delaware Company.

In most of the above cited cases the contacts which the foreign insurance company had with the state seeking to regulate, tax, or subject it to the jurisdiction of the court, were less substantial than those here before us. This fact makes the result here reached even clearer.

The Insurance Company Law of 1921, Act of May 17, 1921, P. L. 682, Section 319, 40 P. S. Section 442, provides, in part:

"(b) Any domestic or foreign \* \* \* insurance company, \* \* \* authorized to transact business in this Commonwealth, may reinsure all or any part of its liability \* \* \* with any \* \* \* insurance company, \* \* \* doing the same or a similar kind of business, \* \* \* if such company, \* \* \* is and remains of the same standard of solvency and other requirements fixed by the laws of this Commonwealth for companies, \* \* \* transacting the same classes of business within this Commonwealth. \* \* \*"

Although the assuming company need not be authorized to do business within the Commonwealth, the Insurance Commissioner would be better able to ascertain the solvency and other requirements fixed by the laws of this Commonwealth for companies if the companies were actually subject to regulation by the Insurance Commissioner. Particularly is this true when, as in this case, most of the insured primarily involved are Pennsylvania citizens. Holding this company subject to regulation by your department furthers the policy of our law to supervise the insurance carried on by foreign insurance companies.

The Act of June 1, 1889, P. L. 420, 72 P. S. Section 2261, as amended, imposes a tax on the gross premiums received by out-of-state companies from business done within this Commonwealth. It provides:

"\* \* \* hereafter the annual tax upon premiums of insurance companies of other states or foreign governments shall be at the rate of two per centum upon the gross premiums of every character and description received from business done within this Commonwealth. \* \* \*"

It is manifest that the company is subject to its provisions.

It is our opinion, and you are so advised, that the Delaware insurance company referred to in your memorandum request of recent date is subject to regulation by the Insurance Department and must meet the licensing and other requirements of the several acts relating to insurance companies. It is also subject to the various taxing provisions of the Commonwealth which apply to corporations doing business within the Commonwealth of Pennsylvania.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 218

*Appropriations—Purposes of redevelopment—Expenditure for administrative purposes—Act No. 37-A of November 12, 1959.*

No part of the redevelopment appropriation of \$5,000,000 made by Act No. 37-A, approved November 12, 1959, to the Department of Commerce for the fiscal biennium beginning June 1, 1959, may be spent for administrative purposes.

Harrisburg, Pa., May 4, 1960.

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

Sir: Reference is made to your request of April 12, 1960, concerning the expenditure of a sum from the 1959 redevelopment appropriation for administration purposes in connection with the Redevelopment Program.

Redevelopment assistance was first provided for by the Act of May 20, 1949, P. L. 1633 (Act No. 493), known as the "Housing and Redevelopment Assistance Law." Section 17 of this act appropriated \$15,000,000 to the Department of Commerce for the use of the State Planning Board and provided that of this amount not more than 3% could be spent for the administration of the act.

The Act of April 12, 1956, P. L. 1449 (Act No. 477), deleted Section 17 of the Act of 1949, *supra*, and made an appropriation of \$5,000,000 for the purposes set forth in Section 4(b) of the Act of 1949, *supra*, and for necessary costs of administration.

Act No. 82-A of the Appropriation Acts of 1957, the Act approved July 15, 1957, appropriated for the two fiscal years beginning June 1, 1957, the sum of \$2,800,000 to the Department of Commerce to be expended by making grants for housing and redevelopment assistance as authorized by the Act of May 20, 1949, P. L. 1633. This appropriation differed from the previous appropriations since it was limited to the two fiscal years commencing June 1, 1957, and made no mention of nor appropriation for the costs of administration of the act. None was in fact needed since there were balances due from the previous acts for this purpose.

Act No. 37-A of the Appropriation Acts of 1959, the Act approved November 12, 1959, appropriated the sum of \$5,000,000 to the Department of Commerce for the fiscal biennium beginning June 1, 1959, to be expended by making grants for housing and redevelopment assistance as authorized by the Act of May 20, 1949, P. L. 1633.

You ask whether the Department of Commerce can utilize funds from this 1959 redevelopment appropriation for the payment of the costs of administration of the Redevelopment Program by your department.

It is noted that no reference is made in Act No. 37-A to the costs of administration. Since the Legislature has followed a pattern of specifically providing for administration costs for redevelopment purposes and as the appropriation is to be expended for grants, no money from this appropriation of \$5,000,000 may be spent for administration expenses.

We are, therefore, of the opinion and you are accordingly advised that no part of Act No. 37-A, approved November 12, 1959, may be spent for administrative purposes.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

## OFFICIAL OPINION No. 219

*School districts—Children living on Federal land—Reimbursement by State—Exclusive, concurrent or partial jurisdiction of Federal government.*

1. The State is not authorized to reimburse school districts for the instruction of children residing on land located within such school districts over which the Federal government has exclusive jurisdiction and as to which the State has not reserved to itself the right to exercise any authority concurrently with the United States, except the right to serve criminal and civil process in the area for activities occurring outside the area, and the right to collect sales and income taxes from persons residing thereon.

2. Under §2502 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, the State is required to reimburse school districts for the education of children living on land owned by the Federal government within the boundaries of the school districts, where all of the State's legislative jurisdiction, such as the power to serve judicial process, criminal jurisdiction, control of adoption and divorce and the general exercise of the police power, is retained by the State, since children living on such land are residents of the school district and are entitled to free public education.

3. If the State and the Federal government concurrently exercise all of the same authority over land within the boundaries of the State, children living on such land are residents of the school district in which the land is located and are entitled to free public education.

4. Where partial jurisdiction may exist in the Federal government and in the State, the question whether the children living on such land are residents of the school district will depend upon the specific facts presented in each case.

Harrisburg, Pa., May 4, 1960.

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

Sir: You request to be advised as to the responsibility of the Commonwealth to reimburse school districts on account of children of school age living on Federal land located within such school districts.

Several sections of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended, bear upon the problem: §1327 (24 P. S. §13-1327) provides that every child of compulsory school age having a legal residence in this Commonwealth is required to attend school; §2502 (24 P. S. §25-2502) provides that State reimbursements to school districts on account of instruction are payable for resident children enrolled in the public schools; and §1302 (24 P. S. §13-1302) provides that a child shall be considered a resident

of the school district in which his parents or the guardian of his person resides.

In *Schwartz v. O'Hara Township School District*, 375 Pa, 440, 99 A. 2d 621 (1953), the Supreme Court of Pennsylvania held that children residing on the grounds of a Veterans' Administration hospital were not entitled to a free education in the public schools of the district in which the Federal area was located. The Commonwealth, by the Act of July 2, 1923, P. L. 987, 74 P. S. §§91, 92, had ceded *exclusive* jurisdiction of the land in question to the Federal government, but retained "concurrent" jurisdiction with the United States within the ceded area for the service of all civil process and of criminal process for crimes committed within the area. The Supreme Court found that "it has long been held that persons living on Federal reservations are not residents of the States wherein such reservations are situated," and then stated at page 447:

"\* \* \* In the present instance, the Federal Government has exclusive jurisdiction of the area of O'Hara Township on which the Veterans Administration Hospital is located: Constitution of the United States, Art. I, Section 8, Cl. 17; and *Fort Leavenworth Railroad Co. v. Lowe*, 114 U. S. 525. Nor is such jurisdiction impaired in the slightest degree by reason of the minor reservation in the act of cession of concurrent state jurisdiction merely for service of process. \* \* \*"

This rule is conceded by the Federal government. In "A Text of the Law of Legislative Jurisdiction," Part II, *Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States* (United States Government Printing Office) (June, 1957), the following discussion is found at page 4:

"The State no longer has the authority to enforce its criminal laws in areas under the exclusive jurisdiction of the United States. Privately owned property in such areas is beyond the taxing authority of the State. It has been generally held that residents of such areas are not residents of the State, and hence not only are not subject to the obligations of residents of the State but also are not entitled to any of the benefits and privileges conferred by the State upon its residents. Thus, residents of Federal enclaves usually cannot vote, serve on juries, or run for office. They do not, as a matter of right, have access to State schools, hospitals, mental institutions, or similar establishments. The acquisition of exclusive jurisdiction by the Federal Government renders unavailable to the residents of the affected areas the benefits of the laws and judicial and administrative processes of the State relating to adoption, the probate of wills and

administration of estates, divorce, and many other matters. Police, fire-fighting, notarial, coroner, and similar services performed by or under the authority of a State may not be rendered with legal sanction, in the usual case, in a Federal enclave."

The question before us becomes whether the rule of the *Schwartz* case applies to all types of Federal properties or is it limited to instances where the Federal government has exclusive jurisdiction. We are of the opinion that the rule must be limited.

The Constitution of the United States provides for two types of Federal landholding: Article IV, Section 3, Clause 2, empowers Congress to regulate land held in trust for the States; and Article I, Section 8, Clause 17, gives power to Congress:

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by cession of particular States and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings;"

Prior to 1875, the Federal government acquired the land it needed by the latter method of purchase with consent of the State. Consent usually contained a reservation of jurisdiction to serve civil and criminal process to prevent the places purchased from becoming a sanctuary for fugitives from justice: *Manlove v. McDermott*, 308 Pa. 384, 162 Atl. 278 (1932). In 1875, the Supreme Court of the United States in *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449 (1875) upheld the right of the Federal government to acquire land by eminent domain. Later, in *Fort Leavenworth Railroad Company v. Lowe*, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264 (1885), the Supreme Court held that when land is acquired other than by purchase with consent, the State, in ceding jurisdiction to the Federal government, can reserve such powers and rights as are not inconsistent with and do not impinge upon the effective use of the property for the purpose intended. More recently, it has been decided that a state may reserve powers other than the right to serve process: *James v. Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155 (1937); and that a state may cede jurisdiction over lands acquired for a purpose not specified in Article I, Section 8 of the United States Constitution. Further, in *Silas Mason Company v. Tax Commission*, 302 U. S. 186, 58 S. Ct. 233, 82 L. Ed. 187 (1937), it was held that even though a

Federal area was acquired with the unqualified consent of a state, the Federal government may refuse to exercise exclusive jurisdiction and may decline to accept such jurisdiction, in which case the area will remain subject to the ordinary jurisdiction of the State.

In *Fort Leavenworth Railroad Company v. Lowe*, supra, where it was expressly recognized that a cession act may contain a reservation of the power to tax private property situated within the Federal area, Mr. Justice Field described Federal landholding in a *proprietary* capacity as follows at page 531:

“\* \* \* The consent of the States to the purchase of lands within them for the special purposes named is, however, essential, under the Constitution, to the transfer to the general government with the title of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the States equally with the property of private individuals.”

In *Collins v. Yosemite Park & Curry Co.*, 304 U. S. 518, 58 S. Ct. 1009, 82 L. Ed. 1502 (1938), the United States Supreme Court said on page 528:

“\* \* \* The States of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, cooperatively adjust problems flowing from our dual system of government. Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification. It is a matter of arrangement. These arrangements the courts will recognize and respect.”

In the *James* case, supra, this significant language appears at page 148:

“\* \* \* The possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the Government expand and large areas within the States are acquired. There appears to be no reason why the United States should be compelled to accept exclusive jurisdiction or the State be compelled to grant it in giving its consent to purchases.”

The quotations above indicate that the extent of jurisdictional control which the Federal government retains or acquires over land may vary from the extreme of exclusive jurisdiction to a mere proprietorial interest in land where the State retains all ordinary legislative jurisdiction over the area and the Federal government controls the land in the same way as any private owner might control his land. The normal situation of dual sovereignty is that of proprietorial jurisdiction where the power of the Federal government is comparatively small and strictly limited. The furthest departure from this norm is found in cases of exclusive jurisdiction where the State is ousted of jurisdiction and a Federal "island" or enclave is formed within the boundaries of the State. Between these extremes lie intermediate variations of dual sovereignty. 2 Story, *Constitution*, §§1214-1235 (5th Ed., 1891).

For statistical purposes, Federal areas are divided into four categories. These categories and their definitions based upon judicial decisions and Federal administrative usage and applications are as follows (Chapter III of Part I of the *Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States*, supra, April, 1956):

*"Exclusive legislative jurisdiction.*—This term is applied when the Federal Government possesses, by whichever method acquired, all of the authority of the State, and in which the State concerned has not reserved to itself the right to exercise any of the authority concurrently with the United States except the right to serve civil or criminal process in the area for activities which occurred outside the area.

*"Concurrent legislative jurisdiction.*—This term is applied in those instances wherein in granting to the United States authority which would otherwise amount to exclusive legislative jurisdiction over an area the State concerned has reserved to itself the right to exercise, concurrently with the United States, all of the same authority.

*"Partial legislative jurisdiction.*—This term is applied in those instances wherein the Federal Government has been granted for exercise by it over an area in a State certain of the State's authority, but where the State concerned has reserved to itself the right to exercise, by itself or concurrently with the United States, other authority constituting more than merely the right to serve civil or criminal process in the area (e.g., the right to tax private property).

*"Proprietorial interest only.*—This term is applied to those instances wherein the Federal Government has acquired some right or title to an area in a State but has not obtained

any measure of the State's authority over the area. In applying this definition, recognition should be given to the fact that the United States, by virtue of its functions and authority under various provisions of the Constitution, has many powers and immunities not possessed by ordinary landholders with respect to areas in which it acquires an interest, and of the further fact that all its properties and functions are held or performed in a governmental rather than a proprietary capacity."

In Pennsylvania the Federal government at present has numerous installations consisting of hundreds of thousands of acres of land. Naturally, the category in which any particular parcel of land falls is a question of fact to be decided on the facts and the law surrounding each parcel and its acquisition by the Federal government.

The various Pennsylvania statutes ceding land and jurisdiction to the United States are collected for the most part in Title 74 of Purdon's Pennsylvania Statutes Annotated (Permanent Edition, 1953). The earliest statutes ceding exclusive jurisdiction to lands not over ten acres for post offices, custom houses, dams and locks, and other structures were the Act of June 13, 1883, P. L. 118; and the Act of May 18, 1887, P. L. 121. Under the Federal law, the Act of June 28, 1930, as amended, 40 U. S. C. A. §255, the acceptance of exclusive jurisdiction becomes effective when the head of the department involved files a notice of acceptance of such jurisdiction with the Governor. These notices are filed with the Department of Internal Affairs.

The question whether residents of a Federal reservation are entitled to free education in the public schools was first raised in *Opinion of the Justices*, 42 Mass. 580 (1841), in which the Justices of the Supreme Judicial Court of Massachusetts stated at pages 582 and 583:

"We are of opinion that persons residing on lands purchased by, or ceded to, the United States for navy yards, forts and arsenals, where there is no other reservation of jurisdiction to the State \* \* \* are not entitled to the benefits of the common schools for their children, in the towns in which such lands are situated."

See also: *Newcomb v. Rockport*, 183 Mass. 74, 66 N. E. 587 (1903).

In order to ameliorate some of the practical consequences of exclusive jurisdiction, Congress has enacted legislation permitting the extension and application of State laws to lands under exclusive aegis of the Federal government. By Act of the Congress of the United

States of October 9, 1940, Public Act 819, 54 Stat. 1059-1061, reenacted by codification July 30, 1947, 61 Stat. 641, 4 U. S. C. §§ 105-106, commonly known as the "Buck Act," the Federal government restored to the States and any duly constituted taxing authority therein, the power to levy and collect sales and income taxes in any Federal area within the States to the same extent and with the same effect as though such area was not a Federal area. Significantly, the "Buck Act" specifically reserved exclusive Federal jurisdiction notwithstanding the authority granted to the States to impose certain taxes.

By the Act of June 25, 1947, P. L. 1145, as amended, 53 P. S. §6851, et seq., the Commonwealth authorized school districts to levy, assess and collect taxes on persons, transactions, occupations, privileges, subjects and personal property within the limits of the school district, except as those are or become subject to a state tax or license fee. The "Buck Act" was a step toward removal of tax inequities caused by the existence of Federal "islands" in the States. The Pennsylvania Act of June 25, 1947, attempted to secure the additional revenue thus made available.

In further recognition of the financial burden imposed upon local and state educational agencies by Federal acquisition of real property, Congress in 1950 enacted legislation to provide financial assistance for local educational agencies burdened by the impact of Federal activities where:

"(1) the revenues available to such agencies from local sources have been reduced as the result of the acquisition of real property by the United States; or

"(2) such agencies provide education for children residing on Federal property; or

"(3) such agencies provide education for children whose parents are employed on Federal property; or

"(4) there has been a sudden and substantial increase in school attendance as the result of Federal activities."

Act of Congress of September 30, 1950, c. 1124, 64 Stat. 1100, 20 U. S. C. §236.

Cases in other jurisdictions are in accord with the *Schwartz* case where exclusive jurisdiction is held by the Federal government: *School Dist. No. 20 v. Steele*, 46 S. D. 589, 195 N. W. 448 (1923);

*State ex rel. Moore v. Board of Education*, 41 Ohio Abs. 161, 57 N. E. 2d 118 (1944); *McGwinn v. Board of Education*, 33 Ohio Op. 433, 69 N. E. 2d 391 (1945); and *Miller v. Hickory Grove School Board*, 162 Kan. 528, 178 P. 2d 214 (1947).

For the rule in cases of other than exclusive jurisdiction, *Tagge v. Gulzow*, 132 Neb. 276, 271 N. W. 803 (1937) is in point. In that case, the Federal government owned certain land in the name of the Nebraska Rural Rehabilitation Corporation which was used for farmsteads for needy persons on relief. The plaintiffs brought suit for an injunction to restrain school officials from preventing children living on such land from attending school without payment of tuition. The record fails to show the type of jurisdiction ceded to the Federal government. The defendants argued that the land was taken in exclusive jurisdiction. In affirming the lower court order granting an injunction, the Supreme Court of Nebraska decided as follows:

"The farmstead lands, like other lands in the school district, are used for agricultural purposes. The occupants of the farmsteads, like other farmers in the school district, are using lands in individual pursuits, not as representatives of the federal government in the exercise of exclusive sovereignty. The agricultural departments of the state and nation, acting jointly, are not exercising exclusive legislative and executive powers of the United States over the lands and occupants in the farmstead area. For the purposes of civil and criminal jurisdiction and of political rights, the state has not lost its jurisdiction over the farmsteads and the occupants thereof. The status of plaintiffs as residents is the same as that of others in the school district. Plaintiffs are residents thereof and their children of school age are entitled to common school privileges without payment of tuition."

See Notes: 17 Neb. L. Bul. 86 (1938); 14 Wash. L. Rev. (pt. 1) 1 (1939); and 17 Tenn. L. Rev. 328 (1942).

Similar questions have been passed upon by other Attorneys General. The rule of the *Schwartz* case has been expressed as the law of several states where Federal lands were under exclusive jurisdiction: Op. A. G., Ind., p. 411, No. 66 (1948); 5 Op. A. G., Md. 129 (1920); 27 *id.* 116 (1942); and Op. A. G., N. J., No. 37 (Nov. 26, 1951). On the other hand, where the Federal government did not have exclusive jurisdiction of Federally owned areas, several Attorneys General have held that children living thereon are entitled to treatment as State residents in relation to public school education: 5 Op. A. G., Md. 136 (1920); Op. A. G., N. M., Sept. 2, 1914; and

Op. A. G., Ohio, p. 193, No. 479 (1949). Compare: Op. A. G., Ill., Nos. 1284 (p. 491, Dec. 16, 1927) and 2722 (p. 363, July 22, 1930).

In response to your inquiry and for the purposes of this opinion, we define the categories of Federal legislative jurisdiction and the extent of the Commonwealth's duty to reimburse school districts for the education of children living on land in each category as follows:

1. *Exclusive jurisdiction*.—This term is applied when the Federal government possesses, by whichever method acquired, all of the authority of the State, and the State has not reserved to itself the right to exercise any of the authority concurrently with the United States, except the right to serve civil or criminal process in the area for activities which occurred outside the area, and, by virtue of the "Buck Act," the right to collect sales and income taxes from persons residing thereon. The rule of the *Schwartz* case applies to this category and the State is not authorized to reimburse school districts on account of children living on land within this category. Responsibility to provide for the education of these children rests with the Federal government.

2. *Proprietorial interest only*.—In this category the only interest acquired by the Federal government is that of ownership or use of land as an ordinary landholder. All of the State's legislative jurisdiction, such as the power to serve judicial process, criminal jurisdiction, control of adoption and divorce and the general exercise of the police power, is retained by the State. Children living on land within this category are residents of the school district in which the land is located and are entitled to free, public education. Reimbursements on account of instruction of these children are payable under §2502 of the Public School Code.

3. *Concurrent jurisdiction*.—This term is applied when the State has retained sovereign legislative authority unimpaired by that given to the Federal government. The State and the Federal governments concurrently exercise all of the same authority. Children living on land within this category are residents of the school district in which the land is located and are entitled to free, public education. Reimbursements on account of instruction of these children are payable under §2502 of the Public School Code.

4. *Partial jurisdiction*.—This category is impossible of general definition since its precise definition will depend upon the specific facts

presented in each case. Where it is contended that partial jurisdiction exists, the facts should be presented to this department for determination.

We are, therefore, of the opinion and you are accordingly advised that where the Federal government retains exclusive jurisdiction over lands within the Commonwealth, children of school age living thereon are not entitled to free, public education; however, where the Federal government holds land under concurrent jurisdiction or has a proprietary interest only in the land, children of school age living thereon are residents of the school district within which such lands are located and are entitled to free, public education and reimbursements on account of instruction of these children are payable under §2502 of the Public School Code. As to lands contended to fall within the category of partial jurisdiction, we will decide each case on its own facts when presented to us for determination.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN, III,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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#### OFFICIAL OPINION No. 220

*Fire insurance—Projects built by The General State Authority—Leases—The General State Authority Act of 1949.*

Projects built under The General State Authority Act of 1949, the Act of March 31, 1949, P. L. 372, may be covered with a \$10,000 deductible fire insurance policy, and a proposal to insure each project built by The General State Authority with such a fire insurance policy is legal.

Harrisburg, Pa., May 5, 1960.

Honorable Andrew M. Bradley, Secretary of Property and Supplies,  
Harrisburg, Pennsylvania.

Sir: Reference is made to your letter of March 23, 1960, in which you request to be advised as to the legality of covering the projects built under The General State Authority with a \$10,000.00 deductible fire insurance policy.

The General State Authority was organized under and by virtue of the Act of March 31, 1949, P. L. 372, known as "The General State Authority Act of one thousand nine hundred forty-nine." Under this act the Department of Property and Supplies leases from The General State Authority various properties called "projects" previously conveyed by the Commonwealth to The General State Authority. The lease specifically provides in Paragraph Seventh for the payment of insurance premiums by the Commonwealth as additional rents.

Paragraphs Fifth and Sixth of the lease read as follows:

"FIFTH: It is understood and agreed that the rent payable hereunder shall continue to be payable at the times and in the amounts herein specified, irrespective of whether or not any or all of the buildings, structures, improvements, equipment or furnishings upon the demised premises shall have been wholly or partially destroyed, and that there shall be no abatement of any rent by reason thereof, excepting insofar as the Department may be entitled to credit on account of rents, by reason of the applications of the insurance moneys on account of rents made by the Fiscal Agent as provided in paragraph SEVENTH hereof.

"SIXTH: The Department agrees that, in addition to the payment of the net rental herein specified, it will keep and maintain the demised premises in a state of good repair making all repairs, major as well as minor without exception, and without cost to the Authority, and will pay all costs and charges necessary for such maintenance and repair and will return such premises to the Authority at the termination of the lease in the condition in which they were received by it, reasonable wear and tear excepted."

Section 8.12 of the Resolution authorizing the issuance of bonds by The General State Authority, adopted June 27, 1949, reads in part as follows:

"The Authority shall, from and after the time when the contractors or any of them engaged in constructing any project or any part thereof shall cease to be responsible, pursuant to the provisions of the respective contracts for the construction of such project or such part, for loss or damage to such project or such part occurring from any cause, and

until all the Bonds issued hereunder and the interest thereon shall have been paid or provisions for such payment shall have been made, maintain or cause to be maintained insurance on each such project, in a responsible insurance company or companies authorized and qualified under the laws of the Commonwealth to assume the risk thereof, against direct physical loss or damage however caused to the extent that properties of a similar nature are usually insured by persons operating such properties in the same or similar localities; provided that the amount of insurance carried shall conform to the requirements of any coinsurance clause set forth in the policies of insurance, so that no such coinsurance clause shall become operative. All such policies shall be for the benefit of the Fiscal Agent and the Authority as their interests shall appear. The proceeds of all such insurance, whether or not initially coming into the possession of the Authority, received in respect of any loss in excess of \$10,000, shall be deposited with and held by the Fiscal Agent as security for the Bonds issued hereunder until paid out as hereinafter provided."

A review of the above cited provisions makes it crystal clear that there is imposed upon the Commonwealth the responsibility to rebuild and repair and that the lease also imposes upon the Commonwealth the duty of paying the rental irrespective of whether the project is wholly or partially destroyed.

Since the covenant in the Bond Resolution as to insurance provides for the purchase of fire insurance on a \$10,000.00 deductible basis, there appears to be no legal basis upon which to contend that the issuance of such policies would be illegal. The fire insurance policies are for the benefit of the fiscal agent and The General State Authority as their interests shall appear. The proceeds of the insurance policies are required to be deposited with and held by the fiscal agent as security for the bonds issued and the proceeds of all insurance policies with respect to any loss in excess of \$10,000.00 are payable to the fiscal agent.

We understand that The General State Authority has been purchasing all risk insurance on a deductible basis. It is contemplated that the proposed \$10,000.00 deductible fire insurance will reduce the premium cost by approximately 25%.

We are, therefore, of the opinion and you are accordingly advised that the proposal to insure each project built by The General State Authority with a \$10,000.00 deductible fire insurance policy is legal.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 221

*Destruction of records—Public records—Papers which have been microfilmed—  
Sections 524 and 525 of The Administrative Code of 1929.*

Documents other than public records may be disposed of by the proper administrator under §524 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177. When microfilm records have been made from files of any correspondence, reports, records or other papers, these files may be destroyed, if the approval of the Executive Board is obtained, in accordance with §525 of The Administrative Code of 1929.

Harrisburg, Pa., August 11, 1960.

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

Sir: Reference is made to your letter of June 21, 1960, with regard to Section 524 of The Administrative Code of 1929 dealing with the disposition of useless records by the various State agencies.

You state that under the present procedures if the administrators of a department decide that records do not have enough importance to be retained for four years they may destroy these records at their own discretion. If, however, they retain the records for four years or more, they must then come to the Executive Board for permission to destroy them.

You ask whether we consider these procedures a correct interpretation of Section 524, and whether or not the provisions of Section 524 apply to Section 525 concerning microfilmed records.

Section 524 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, 71 P. S. Section 204, reads as follows:

"Except as otherwise provided by law, whenever any administrative department, board or commission shall have an accumulation of files of correspondence, reports, records or other papers, which are not needed or useful in the transaction of the current or anticipated future work of such department, board, or commission, and which date back a period of four years and more, it shall be the duty of the head of such department, board or commission to submit to the Executive Board and to the Pennsylvania Historical and Museum Commission a report of that fact, accompanied by a concise statement of the condition, quantity, and character of such papers, which statement shall be sufficiently detailed to identify the papers. If the Executive Board shall be of the opinion that such files of correspondence, reports, records or other papers, or any part thereof, are not needed or useful in the transaction of the current or anticipated future work of such department, board, or commission, and shall so certify and if the Pennsylvania Historical and Museum Commission shall be of the opinion that such files are not of permanent value or historic interest and shall so certify, the head of such department, board, or commission shall place such files, or any part thereof, as the case may be, in the custody of the Department of Property and Supplies, and such department is hereby authorized to dispose of the same as waste paper, in the manner prescribed in this act for the sale of unserviceable property: Provided, however, That the Executive Board, with the approval of the Pennsylvania Historical and Museum Commission, may direct that any such files of correspondence, reports, records or other papers, or any part thereof, that are of permanent value or historical interest be turned over to the Pennsylvania Historical and Museum Commission for preservation for historical and archival purposes or that the Pennsylvania Historical and Museum Commission may negotiate with the head of such department, board, or commission for the transfer of such files."

Section 525 of The Administrative Code of 1929, 71 P. S. Section 205, reads as follows:

"Any administrative department, board, or commission may, with the approval of the Executive Board, have microfilm records made of any correspondence, records or other papers for the purpose of protecting and safeguarding the original correspondence, records or other papers, or for the

purpose of conserving filing space, and such microfilm reproduction shall, when properly identified, be admitted in evidence in any proceedings in place of the original correspondence, records or other papers. In any case where original correspondence, records or other papers are microfilmed under the provisions of this section for the purpose of conserving filing space, the administrative department, board, or commission concerned, may, with the approval of the Executive Board, destroy such original correspondence, records and other papers."

The Act of June 24, 1939, P. L. 872, known as "The Penal Code," provides in Section 323, 18 P. S. Section 4323, as follows:

"Any public officer or other person who fraudulently makes a false entry in, or erases, alters, secretes, carries away, or *destroys any public record*, or any part thereof, is guilty of a misdemeanor, and on conviction, shall be sentenced to pay a fine not exceeding one thousand dollars (\$1,000), or undergo imprisonment by separate or solitary confinement at labor not exceeding two (2) years, or both." (Emphasis supplied)

Turning now to the first question which you have asked, the general rule of law is set forth in 45 Am. Jur., Records and Recording Laws, Section 12, as follows:

"Public records and documents are the property of the state and not of the individual who happens, at the moment, to have them in his possession; and when they are deposited in the place designated for them by law, there they must remain, and can be removed only under authority of an act of the legislature and in the manner and for the purpose designated by law. The custodian of a public record cannot destroy it, deface it, or give it up without authority from the same source which required it to be made. \* \* \*"

In Section 13, *supra*, it is stated:

"It is generally made a crime wilfully and unlawfully to remove, mutilate, destroy, conceal, or obliterate a record, paper, document, or other thing filed or deposited in a public office, or with any public officer, by authority of law.  
\* \* \*"

Administrative agencies have only the powers clearly given or necessarily implied. See *Green et al. v. Milk Control Com. et al.*, 340 Pa. 1, 3, 16 A. 2d 9 (1940), and cases therein cited.

With these principles in mind as we review Section 524 of The Administrative Code of 1929, it seems clear that the language refers only

to those files of correspondence, reports, records or other papers which date back a period of four years and more.

It should be noted that the Penal Code provision is not as broad or as general as The Administrative Code of 1929 provision. In 45 Am. Jur., Records and Recording Laws, Section 2, a "public record" is defined to be:

"\* \* \* one required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done. In all instances where by law or regulation a document is filed in a public office and required to be kept there, it is of a public nature, but this is not quite inclusive of all that may properly be considered public records. For whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of his office, it is not only his right, but his duty, to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document which belongs to the office rather than to the officer. What is a public record is a question of law."

It is obvious that any document not in the nature of a public record is excluded from the prohibition of the Penal Code provision. Since The Administrative Code of 1929 provision covers public records as well as other documents and since it is limited to those documents which are four or more years old, there is no authority for the destruction of public records of less than four years and in view of the Penal Code provision they cannot be considered for destruction until they are four years old and at that time such destruction must be authorized by the Executive Board. It follows, therefore, that documents other than public records may be disposed of by the proper administrator if they are less than four years old, this power or authority being necessarily implied. If documents have been retained for a period of time beyond the four year period, then these documents may only be destroyed with the approval of the Executive Board.

Questions will, no doubt, be raised from time to time as to what are and what are not public records. These questions in the first instance may be decided by the department or departments involved, after ample study and consultation with all State departments and agencies involved and with those outside of State government who may be materially affected by the proposed destruction of such public records. Where doubts remain after following this procedure, these questions may be referred to the Department of Justice.

In answer to your second question, Section 525 authorizes the admittance into evidence of microfilm records made of any correspondence, records or other papers and the section further provides that when microfilm records have been made the administrative department, board or commission may, with the approval of the Executive Board, destroy such original correspondence, records or other papers.

We are, therefore, of the opinion and you are accordingly advised that Section 524 of The Administrative Code of 1929 refers only to those files of correspondence, reports, records or other papers which date back a period of four years and more. The authority to destroy files of correspondence, reports or other documents, other than public records, in existence for less than four years is implied. When microfilm records have been made of any correspondence, reports, records or other papers, the files of correspondence, reports, records or other papers may be destroyed, if the approval of the Executive Board is obtained.

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 222

*State correctional institutions—Prisoners chargeable to counties—Centralized billing system.*

One or more agents may be appointed in the central office of the Bureau of Correction to prepare and submit one invoice to each county covering the proper cost of maintaining all prisoners in all State correctional institutions which are chargeable to such county and to receive and transmit to the State Treasurer such payments by the counties.

Harrisburg, Pa., August 17, 1960.

Arthur T. Prasse, Commissioner, Bureau of Correction, State Correctional Institution, Camp Hill, Pennsylvania.

Sir: We are in receipt of your request for advice concerning changes in the billing system to the various counties for the cost of maintaining inmates in State Correctional Institutions.

You first ask whether it is legal for the Bureau of Correction to establish a uniform rate to be charged to the counties for inmates confined in state correctional institutions of the penitentiary class.<sup>1</sup> The Act of April 25, 1929, P. L. 694, 61 P. S. 344, provides as follows:

"The expenses of keeping the convicts in the State Penitentiaries shall be borne by the respective counties in which they shall be convicted. The said expenses shall be paid to the Department of Revenue, by orders to be drawn by the duly authorized agents of said department at said penitentiaries on the treasurers of the said counties, who shall accept and pay same to the Department of Revenue. Promptly after the last day of each calendar month, the agents of the Department of Revenue shall transmit, by mail, to the commissioners of such of the counties as may have become indebted for convicts confined in said penitentiaries during such calendar month, accounts of the expense of keeping said convicts, which accounts shall be sworn or affirmed to by them; and it shall be the duty of the said commissioners, immediately on receipt of said accounts, to give notice to the treasurers of their respective counties of the amount of said accounts, with instructions to pay promptly to the Department of Revenue the amounts of said orders when presented; and it shall be the duty of such county treasurers to make such payments as instructed by their respective county commissioners:"

It must be remembered that at the time of the enactment of the above law, each penitentiary existed as a separate institution. Each institution, therefore, was required to bill the counties for charges applicable to that institution. In 1953, following the prison riots, the legislature established the Bureau of Correction. All of the State penal and correctional institutions were placed in one Bureau in the Department of Justice. The Commissioner of Correction was required to establish a state-wide plan of operation of all such institutions within the Department of Justice. The Act of July 29, 1953, P. L. 1428, 71 P. S. 302. In fact, such state-wide plan has been effected.

Section 4 of the Act of July 29, 1953, P. L. 1433, 71 P. S. 834, provides that the costs of maintaining prisoners in such institutions shall be borne by the Commonwealth and the several counties to the extent and in the manner provided by law. Under the state-wide

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<sup>1</sup> Philadelphia, Graterford, Rockview, Huntingdon and Pittsburgh.

plan, frequent transfers of inmates do occur and many of the charges incurred by the Bureau, although presently accounted for at a specific institution, are in reality charges properly incurred for the care of an inmate at another institution. Further, many of the charges are of such a complex nature that it is virtually impossible to attribute the same to a specific institution. Lastly, the appropriation to the Department of Justice is in lump sum and not earmarked for a specific institution. Act of November 21, 1959, Act No. 92-A.

We conclude, therefore, that the establishment of a uniform rate for all of the institutions of the penitentiary class—which are operating under the state-wide plan—is not only desirable but is required so as to distribute equitably among the counties the burden of maintaining State prisoners.

You also ask whether it is legally proper for your Bureau to establish centralized billing for all institutions whereby each county would receive one bill each month showing the total obligation of such county for the maintenance of all prisoners sentenced from or chargeable to such county.<sup>2</sup> Your request states, in part:

“Under the present method of invoicing counties, a large county, such as Philadelphia, will receive eight invoices from our Bureau institutions each month as they have inmates in each institution. Some institutions invoice counties more promptly than others, therefore a county cannot pay one institution's invoice before another's is received, especially where transfers are involved, because they must follow through transfers from one invoice to another. Also, they may desire to know the total cost of maintaining inmates in all of our institutions before making payment for budget control and/or other fiscal reasons. . . .”

Your present procedure has been carried over from the time when each institution operated independently and is based upon a number of laws which provide for the placing of “agents of the Department of Revenue” in each State institution where they are charged with the duty of collecting moneys due the Commonwealth.<sup>3</sup> The present procedure is legal, but is not necessarily the *only* legal method by which charges for the care and maintenance of inmates in State penal or correctional institutions may be collected.<sup>4</sup>

<sup>2</sup> Under the Acts of May 27, 1953, P. L. 217, 19 P. S. 1233 and May 17, 1957, P. L. 161, 19 P. S. 1234.1, charges for maintenance of prisoners convicted of prison breach or offenses committed while in prison are chargeable to the county of original conviction.

<sup>3</sup> The Act of April 25, 1929, P. L. 694, Sec. 1, 61 P. S. 344. The Act of April 9, 1929, P. L. 343, Sec. 210 and Sec. 1209, as amended, 72 P. S. Sec. 210 and Sec. 1209.

<sup>4</sup> Money owed to an institution is in fact owed to the Commonwealth. *Commonwealth ex rel. Penitentiary v. Floyd*, 2 Pitts. 342 at 344 (1862).

The legislature, perhaps out of a desire to close all loopholes, has passed many statutes requiring payments to be made to the Commonwealth and setting forth various procedures by which such payments may be made, must be made—or can be compelled. All such laws, however, are designed to insure that “Money owed the Commonwealth shall be paid.”

The Department of Revenue is charged with the primary responsibility of collecting money owed the State and is given almost unlimited authorization to collect it.

Section 206 of The Fiscal Code, the Act of April 9, 1929, P. L. 343, as amended, 72 P. S. 206, provides in part:

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

\* \* \* \* \*

“(c) To collect from counties and the Federal Government amounts due by them respectively for the cost, or their share of the cost, of maintaining prisoners in State penal or correctional institutions;”

Section 210 of The Fiscal Code, *supra*, 72 P. S. 210 also provides in part:

“The Department of Revenue shall have authority to appoint agents in any place within this Commonwealth for the collection of moneys due the Commonwealth, except taxes and fees now collectible by county officers.

“To facilitate the collection of money from persons who are inmates, patients, or pupils of State institutions, or who have business with administrative departments, boards, or commissions, such agents shall be placed in every such institution, including State normal schools and teachers’ colleges, and in offices of such departments, boards, or commissions. \* \* \*”

Section 1209 of The Fiscal Code, *supra*, 72 P. S. 1209, provides in part:

“The Department of Revenue shall place its agent in every State institution for the purpose of collecting all moneys due to such institutions from patients, pupils, inmates, or the estates of such patients, pupils, or inmates, or from any political subdivision of this Commonwealth, including school districts, and poor districts, or from the Federal Government, or from any other person, association, corporation, or public agency whatsoever, for care, treatment, instruction, maintenance, or any other expense, chargeable for or on account of such patients, pupils, or inmates.

"All bills rendered hereunder shall be in the style, 'Commonwealth of Pennsylvania, Department of Revenue, Agent for the Collection of Moneys Owing to (name of institution or its board of trustees).'"

These three sections together authorize the Department of Revenue to place its agents (1) in each State institution, (2) in every administrative department, board or commission, or (3) "any place within this Commonwealth for the collection of moneys due the Commonwealth."

We do not believe that each authorization was intended to be exclusive of the others. If one agent is charged with the responsibility of collecting a specific debt, we do not believe that the legislature thereby intended to restrict the authority of the Department of Revenue so as to prevent the appointment of another agent or agents—whenever they may be physically located to collect the same debt. The paramount and guiding principle here is that so long as money is due to the Commonwealth, the Department of Revenue—by whatever means are effective within The Fiscal Code—may collect it.

We, therefore, conclude that while the statutes refer to the appointment of agents in State correctional institutions, such provisions are directory and not mandatory and provide one method but not the exclusive method by which such money may be collected.<sup>5</sup>

From our knowledge of the subject, we are convinced that the proposed centralized billing system will save both the Commonwealth and the counties considerable money which is now expended in processing, transmitting and paying the cost of maintaining these prisoners, and will facilitate the collection of such debts by the Department of Revenue.

For the above reasons we, therefore, conclude and you are accordingly advised that one or more agents may be appointed in the Central Office of the Bureau of Correction to prepare and submit one invoice to each county covering the proper cost of maintaining all prisoners in all State correctional institutions which are chargeable to such county and to receive and transmit to the State Treasurer such payments by the counties. At the same time, if necessary, agents of the

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<sup>5</sup> The fact that the Acts say that such agents "shall" be appointed is not controlling. In many instances "shall" is construed as "may," and implies no obligation. *Damiani v. Tobasco*, 367 Pa. 1, 79 A. 2d 268 (1951). *Commonwealth ex rel. Bell v. Powell*, 249 Pa. 144, 94 Atl. 746 (1915).

Department of Revenue may be placed in each State correctional institution to collect any additional money owed the Commonwealth for inmate care from whatever source the same is derived.

Respectfully submitted,

DEPARTMENT OF JUSTICE,

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

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 223

*State employees—Civil service status—Political activities—Immediate dismissal—Civil Service Act.*

Employees of the executive departments of the Commonwealth who are subject to the Civil Service Act, the Act of August 5, 1941, P. L. 752, either by virtue of the act itself or by virtue of the Executive Board Resolution of September 10, 1956, and the contracts executed by the various departments with the civil service commission pursuant thereto, are prohibited from engaging in political activities, and any violation of such prohibition must result in the immediate dismissal of the employee, regardless of whether or not the employee has been given a qualifying examination allowing him permanent civil service tenure.

Harrisburg, Pa., September 13, 1960.

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

Sir: You have requested my opinion concerning employees placed under civil service status by virtue of the Executive Board Resolution of September 10, 1956, and the contract executed by you with the Civil Service Commission in pursuance thereof. You specifically inquire whether such employees who have engaged in political activity must be dismissed.

The Civil Service Act, the Act of August 5, 1941, P. L. 752, is designed to include in its coverage positions existing in certain State agencies. The Insurance Department is not one of those agencies designated by Section 3, subsection (c) of the Civil Service Act as

originally enacted in 1941. However, Section 212 of that act provides that the services and facilities of the Commission may be made available to other departments upon such terms and conditions as are prescribed by the rules of the Commission.

The Executive Board Resolution and its amendments directed all executive departments to contract with the Civil Service Commission for the administration of certain enumerated classes of positions. The Resolution provided that no incumbent of such positions, or any person subsequently appointed thereto, would be given permanent tenure without having passed a qualifying examination. Pursuant to the Executive Board Resolution you entered into a contract with the Civil Service Commission for the administration of the designated classes. The contract provided that the services of the Commission would be available to, and accepted by, your department in the performance of all the necessary duties for the administration and maintenance of classification plans, recruitment, the conduct of examinations, preparation of eligible lists and certifications therefrom, training, the maintenance of necessary records and appeals from demotion, furlough, retirement, resignation or removal. This contract went on to provide:

"It is further agreed that in the extension of services and facilities of the State Civil Service Commission, the Civil Service Act, the Act of August 5, 1941, P. L. 752, as amended, and the Rules of the State Civil Service Commission will apply in all matters of personnel administration not specifically mentioned above, with the following exceptions: (a) Recruitment of persons outside the Commonwealth of Pennsylvania will be permissible in these professional and technical positions where recruitment difficulties are known to exist; (b) Where, in the opinion of the appointing authority, scholastic education is a requirement commensurate with the duties and responsibilities of these technical and professional positions, such scholastic education will be stated in the public announcement and will be a requirement for admittance to the tests; (c) The Insurance Commissioner may make appointments at salaries above the minimum of the pay range as set forth in the official Compensation Plan of the Commonwealth in order to attract qualified personnel in technical and professional classes if, in the opinion of the Commissioner and the State Civil Service Commission, such action is in the best interests of the Commonwealth."

It would appear from the above language that the provisions of the Civil Service Act were incorporated into and became an operative part of the contract, except as specifically excluded therefrom.

Section 904 of that act prohibits persons in the classified service from engaging in certain designated types of political activity as follows:

"No person in the classified service shall be a member of or delegate or alternate to any political convention, nor shall he participate at any such convention, except in the performance of his official duty or as a visitor, nor shall he serve as a member of any committee of any political party, or take an active part in political management or in political campaigns, or use his office or position to influence political movements or to influence the political action of any officer or employe in the service of the Commonwealth, nor shall he circulate or seek signatures to any nominations or other petition required by any primary or election law, nor shall he seek or accept election, nomination or appointment as an officer of a political club or organization, or serve as a member of a committee of any such club or organization, nor shall he in any manner participate in or interfere with the conduct of any election or the preparation therefor at the polling place or with the election officers while counting the votes or returning the election material to the place provided by law for that purpose, save only for the purpose of making and depositing his own ballot as speedily as it reasonably can be done, nor shall he be within the polling place or within fifty feet thereof, except for the purpose of carrying out official duties and of ordinary travel or residence during the period of time beginning with one hour preceding the opening of the polls for holding such election and ending with the time when the election officers shall have finished counting the votes and have left the polling place for the purpose of depositing the election material in the place provided by law for that purpose, excepting only police officers who may temporarily approach or enter the polling place in order to make any arrest permitted by law or for the purpose of preserving order and in each case remain only long enough to accomplish the duties aforesaid after which the said officers shall at once withdraw: Provided, however, That the rights of any individual as a citizen are not impaired hereby, and the prerogative to attend meetings, to hear or see any candidate or nominee or, to express one's individual opinion, shall remain inviolate."

Section 906 of the act provides that:

"Any person holding a position in the service of the Commonwealth who violates any of the provisions of this act or of the rules made thereunder shall be immediately separated from the service. It shall be the duty of the appointing authority of the State agency in which the offending person is employed to remove him at once in accordance with the provisions of this act. \* \* \*"

You inform us that the employees in your department under the coverage of the Executive Board Resolution have not, as yet, been given qualifying examinations and, therefore, have not, as yet, acquired permanent civil service tenure. In spite of this they are, nevertheless, within the political prohibition ban of Section 904. Significantly, Section 904 starts with the language "no person in the classified service." Had the Legislature intended to exclude non-permanent employees from this section it could easily have done so. Where the Civil Service Act contemplates different treatment for non-permanent employees, it expressly spells out this difference. Thus, Section 807 of the Civil Service Act applies "to all persons in the classified service, except provisional, temporary and emergency employees, or probationary employees. \* \* \*" No such exclusion was made with respect to the political activities ban under Section 904.

There is no provision for discretionary action. Sections 904 and 906 of the act are clear and mandatory under the express language of the act. Therefore, any employee of your department whose position is covered by the Executive Board Resolution of September 10, 1956 and its amendments, who has engaged in political activity prohibited by Section 904 of the Civil Service Act must be dismissed.

You have called our attention to the fact that the Civil Service Commission, in dealing with employees who were extended civil service coverage by virtue of the Executive Board Resolutions, has adopted a policy of granting the employees an election to resign from either the political activity or the civil service position. We are unable to find any legal basis for the policy adopted by the Commission.

We have carefully examined the records of the statutory civil service agencies to determine whether there was any extensive pattern of administrative conduct in substantial variation with the express prohibition of the Civil Service Act. In response to our request to the various statutory civil service agencies to furnish us with all files relating to cases wherein political activity has been charged against employees, we have received reports and files on only twelve such incidents where dismissals were considered. It is reasonable to believe that there were other cases, but no records were apparently maintained.

Significantly, in only one of these cases was the employee actually dismissed. This case which arose in the Department of Health in 1953 involved an employee who was engaged in partisan political activity. Upon receipt of an opinion from the acting assistant general

counsel of the United States Civil Service Commission that the activity constituted a violation of the Health Act, the employee was notified of the violation and was dismissed.

Nine of the cases furnished to us arose in the Liquor Control Board:

1. 1950—The employee was elected to the office of committeeman of a political party. He apparently took no active part in the campaign which resulted in his election, but did sign a petition permitting his name to be placed upon the ballot. Upon being confronted with the allegation, the employee resigned from the office of committeeman and was permitted to remain in the employ of the Board.
2. 1950—The employee had been elected a committeeman. Upon his resignation from that office no disciplinary action was taken against the employee.
3. 1951—An employee was a candidate for the office of city treasurer. This employee had not circulated any petitions nor taken an active part in the campaign. He was permitted to remain in the employ of the Board.
4. 1953—The employee held the office of court crier and inspector of elections. The assistant attorney general advised that the holding of the office of inspector of elections constituted a violation of the Civil Service Act. The employee resigned from this position and was retained by the Board.
5. 1955—The employee had filed his petition for election to the office of committeeman. He had circulated petitions for other candidates and served as a watcher at the polls. This employee had been previously warned about similar political activity. The assistant attorney general advised that the employee's conduct constituted a violation of the Civil Service Act requiring dismissal. The Board did not proceed against the employee on this ground but dismissed him for other causes.
6. 1958—The employee was actively engaged in political activity. She was warned and instructed to discontinue such activity. The assistant attorney general advised that her conduct constituted a violation of the Civil Service Act and that she should be dismissed. The employee was given a letter of reprimand and ordered to discontinue her political activity. She is still employed by the Board.
7. 1958—The employee served as judge of elections. The assistant attorney general advised that the employee had violated the Civil Service Act and should be dismissed. Earlier this employee had been reprimanded for political activity, but had been told that if he took no further part in politics he would be retained by the Board. After

the second infraction the employee was notified he would be dismissed, but the dismissal was made on grounds other than political activity.

8. 1958—The employee was elected to the office of borough councilman. There was no indication of political activity on the part of the employee relating to his election. The assistant attorney general advised that the mere holding of office did not constitute violation of the Civil Service Act. The Board took no action against the employee.
9. 1958—The employee served as an official at a polling place. The assistant attorney general advised that this constituted a violation of the Civil Service Act requiring immediate dismissal. The Board took no action against the employee.

Two of the cases furnished the Department of Justice arose in the Department of Public Assistance (now Department of Public Welfare):

1. 1944—The employee circulated a political petition. She was given a warning and retained in the service of the Commonwealth.
2. 1955—The employee became a candidate for public office and subsequently was employed by the Department. Immediately upon being advised of political prohibition in the Civil Service Act the employee withdrew from the election and was retained in the service of the Commonwealth.

It is noteworthy that whenever legal advice was sought on the subject, the Department of Justice, through its representative, in all cases where prohibited political activity was found, recommended immediate dismissal of the offending employee. This advice was not always followed.

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

## OFFICIAL OPINION No. 224

*Domestic stock insurance company—Capital structure—Common and preferred shares—Limitations—Redemption—The Insurance Company Law of 1921.*

1. A domestic stock insurance company's capital structure may include both common and preferred stock, provided that each share has a par value of at least \$5.00, that the stock allows the holder thereof voting rights of one vote per share, and that the stock is not callable or redeemable except in compliance with §§328 to 331 of The Insurance Company Law of 1921, the Act of May 17, 1921, P. L. 682.

2. The Insurance Commissioner may require that the articles of agreement of a domestic stock insurance company provide for the time when and conditions under which the company's preferred stock may be redeemed.

Harrisburg, Pa., September 13, 1960.

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

Sir: You have asked our advice as to whether or not a domestic stock insurance company's capital structure may be composed of common and preferred stock. In the event it may, you further ask whether the Articles of Agreement must provide the time when and the conditions under which the preferred stock may be redeemed.

You have informed us that these questions arose in connection with a company to be organized as a stock casualty insurance company for the purpose of engaging in the classes of insurance specified in Section 202, subdivision "c," paragraph 1, of The Insurance Company Law of 1921, the Act of May 17, 1921, P. L. 682, 40 P. S. Section 382. The amount of capital stock of the proposed company is to be \$250,000, divided into 2,325 shares of participating preferred stock, of the par value of \$100 each, and 3,500 shares of common stock of the par value of \$5 each.

Article 5th, Clause 4 of the proposed Articles of Agreement provides:

"The holders of the participating preferred stock and the holders of the common stock shall have one vote for each share of participating preferred stock and one vote for each share of common stock registered in the name of each such holder. In the event of any proposed merger or consolidation or in the event of any proposed amendment to these Articles of Agreement which would affect the capital structure of the company, the holders of the outstanding shares of both classes of stock shall be entitled to vote as a class in respect to any

such proposed merger, consolidation or amendment. The percentage voting in favor of any such proposed merger, consolidation or amendment required to approve the same shall be the same percentage for each class of stock which would have been required if the company had only one class of stock."

Formal Opinion No. 525, 1945-46 Op. Atty. Gen. 15, directed to Honorable Gregg L. Neel, the then Insurance Commissioner, advised that a domestic stock insurance company, its charter permitting, may issue preferred stock provided it has a par value of at least \$5 a share; provided it allows the shareholders voting rights of one vote per share; and provided that the stock is not callable or redeemable except in compliance with Sections 328 to 331, inclusive, of The Insurance Company Law of 1921.

We reaffirm that opinion.

Section 205 of The Insurance Company Law of 1921 provides:

"The capital stock of all stock insurance companies shall be divided into shares of not less than five dollars (\$5). \* \* \*"

It would be unreasonable to hold that "capital stock" is limited to common stock. The term "capital stock" is generic and certainly must include common and preferred.

This interpretation has been judicially supported in *Claim of Barson*, 283 App. Div. 190, 126 N. Y. S. 2d 579 (1953). The court said:

"'Capital stock' in its strict and proper sense means 'the amount of capital contributed by the members for corporate purposes.' *Rensselaer County Agricultural and Horticultural Society v. Weatherwax*, 255 N. Y. 329, 331, 174 N. E. 699; 18 C. J. S., Corporations, § 193, p. 614. When used with reference to the outstanding shares of stock, the term 'capital stock' embraces all classes of stock. \* \* \*"

See also 6 Words and Phrases, Capital Stock, Pocket Part 50 (Permanent Edition).

The Act of April 20, 1927, P. L. 322, as amended, 72 P. S. Section 1827.2 (c), defines as "Capital Shares" or "Capital Stock":

"\* \* \* the units which recognize the stockholders' rights to participate in the control of the corporation or in its surplus or in its profits or benefits or in the distribution of its assets or dividends."

The act of July 11, 1917, P. L. 804, 40 P. S. Section 390, which regulates the sale of stock in Pennsylvania of insurance companies, organized within or without the State, defines "stock" as:

"The term 'stock,' as used in this act, includes bonds and any other evidence of indebtedness or of interest in the profits of any insurance corporation."

We are advised that foreign insurance companies doing business in Pennsylvania have been authorized to do business with capital structures which provide for preferred stock. Certainly, it is a desirable result to permit domestic companies to have the same financial flexibility as foreign competitors.

In our Formal Opinion No. 525 it was noted that Section 302 provided that the stock of each insurance company shall be deemed personal property and that any stockholder shall be entitled to receive a certificate of the number of shares standing to his or her credit on the books of the company. Section 306 provides for transfer of the stock and for voting in person and by proxy. Section 309 provides that in the choice of directors or trustees, each share of stock shall be entitled to one vote. Section 310 provides for cumulative voting for directors. Sections 323 and 324 provide for increase of capital stock. Sections 328, 329, 330 and 331 provide the method for reducing capital stock, and Sections 520 and 607 provide the procedure when capital is impaired. The opinion stated:

"From the foregoing it follows that an insurance company, its charter permitting, may issue preferred as well as common stock. Both common and preferred stock must be at a par value of not less than \$5.00 a share, but they need not have the same par. Each, however, must have voting rights of one vote per share. The preferred stock may not be called or redeemed, except the capital of the company be reduced in accordance with the provisions of sections 328 and 331, inclusive, of The Insurance Company Law of 1921. The preferred stock may be preferred as to dividends or in distribution ahead of common stockholders, but since it represents the capital of the company, it cannot be preferred over creditors or to the reduction of legal reserves. The other sections of The Insurance Company Law heretofore referred to are applicable to both common and preferred stock."

Sections 328 to 331, inclusive, of The Insurance Company Law of 1921 deal with reduction of capital stock but do not deal explicitly with redemption of stock. Implicitly these sections relate to redemption

of stock.<sup>1</sup> Thus, the Commissioner may require the articles to state in detail information relative to redemption provisions.

It should be noted that the provisions in Article 5th, Clause 4, of the proposed Articles of Agreement, quoted above, on page 2, appears to be in conflict with Section 329 relating to the reduction of capital. This section provides the method for obtaining the approval of the stockholders to a reduction of capital stock. In part it provides:

“\* \* \* The judges shall \* \* \* count the number of shares voted for and against such reduction, and declare whether the persons or bodies corporate holding the larger amount of the stock of such company have consented to such reduction \* \* \*”

It also appears to be in conflict with Section 333 which relates to proceedings to merge and consolidate. After detailing the procedure to be followed in obtaining the consent of the stockholders it provides for a vote on the question. It goes on to read:

“\* \* \* If a majority in amount of the entire capital stock \* \* \* of each of said companies shall vote in favor of said agreement, merger, and consolidation, then that fact shall be certified \* \* \*” [to the Insurance Commissioner]

Article 5th, Clause 4, referred to above, gives the holders of outstanding shares of both classes of stock the right to vote as a class in respect to mergers or amendments which affect the capital structures of the company. Thus, the possibility exists that all common shares and 49 per cent. of the preferred shares might favor certain action, which action could be blocked by action of 51 per cent. of the preferred shares. Thus, in the instant company the holders of 1,163 shares of the preferred could overrule action desired by the holders of the 4,662 remaining combined common and preferred shares.

We are of the opinion that the Insurance Commissioner may approve Articles of Agreement for a proposed domestic insurance company the capital structure of which is composed of both preferred and common

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<sup>1</sup> Redemption of preferred Shares (1935), Note, 83 U. of P. Law Review 888, Jones, Redeemable Corporate Securities (1931), 5 So. Calif. L. Rev. 83, Fletcher Cyc. Corp. (1958 rev. ed.), Sections 5148, 5153, 5308.

stock. The instant company should be required to change Article 5th, Clause 4, to comply with our interpretation of The Insurance Company Law of 1921. The limitations expressed in Formal Opinion No. 525 of August 14, 1945, still apply. Finally, the Articles of Agreement may be required to specify the time when and the conditions under which the preferred stock may be redeemed.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 225

*Fraternal benefit societies—Legislative or governing body—Convention requirements—Section 3 of the Fraternal Benefit Societies Act.*

The Supreme Assembly of the Providence Association of Ukrainian Catholics in America is a body whose meetings meet the requirements of § 3 of the Fraternal Benefit Societies Act of July 17, 1935, P. L. 1092, and that a convention of the full membership to be held every four years is not required by the act. The method established by the association for ruling itself does not conflict with the provisions of the Act of April 29, 1874, P. L. 73.

Harrisburg, Pa., September 13, 1960.

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

Sir: You have asked our opinion as to whether The Providence Association of Ukrainian Catholics in America, a fraternal benefit society, incorporated under the Act of April 29, 1874, P. L. 73, is

complying with the Fraternal Benefit Societies Act of July 17, 1935, P. L. 1092, 40 P. S. Section 1051. Specifically, you ask, must the association hold a convention of the full membership every four years to comply with the provisions of Section 3 of the aforesaid act of 1935?

Section 1 of the act provides as follows:

"\* \* \* any \* \* \* society, \* \* \* having a lodge system and representative form of government, \* \* \* is hereby declared to be a Fraternal Benefit Society."

Section 2 provides:

"Any society having a supreme governing or legislative body and subordinate lodges or branches, by whatever name known, into which members shall be admitted in accordance with its constitution, laws, ritual, rules, and regulations, and which shall provide for the holding of periodical meetings, shall be deemed to be operating on the lodge system."

The crucial section, Section 3, provides:

"Any society shall be deemed to have a representative form of government when it shall provide, in its constitution and laws, for a supreme legislative or governing body composed of representatives elected either by the members or by delegates elected, directly or indirectly, by the members, together with such other members as may be prescribed by its constitution and laws: \* \* \* And provided further, That the meetings of the supreme or governing body and the election of officers, representatives, or delegates shall be held as often as once in four calendar years, unless, due to war emergency, the government of the United States of America or any of its agencies has limited or prohibited travel for meeting or convention purposes, in which event, \* \* \* [the Insurance Commissioner may waive the requirements of such meeting]."

The association in question designates its Supreme Assembly as its legislative and governing body. The Supreme Assembly is composed of a Supreme President, Supreme Vice President, Spiritual Director, Supreme Recording Secretary, Supreme Financial Secretary, Supreme Treasurer, six directors and three members of the Auditing Committee,

all of whom are elected directly by the members in a manner particularly provided for in its by-laws.<sup>1</sup> This group meets at least annually.

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<sup>1</sup>"The election machinery for the fifteen members of the Supreme Assembly is set forth in Article VI, Section 82, where there is provision for a primary in the Spring and an election in the Fall. The system operates, as follows:

"(a) Any member who is certified by the branch of which he is a member to have received a minimum of ten votes in such branch as a proposed candidate for any particular office of the Supreme Assembly becomes a candidate for such office on certification of that fact to the Supreme Recording Secretary. Thereafter, the Supreme Recording Secretary causes a list of such proposed candidates for all offices in the Supreme Assembly to be printed in the official organ of 'The Providence.'

"(b) Branch elections take place in the month of March of each election year and certifications are made by the branches not later than April 15th.

"(c) Appropriate ballots for the primary election are then printed containing the names of all candidates certified by branches for each respective office and ballots are mailed to the branches prior to May 31st of each election year. The primary election is then held in the branches during the month of June of each election year. The returns are made to the Election Commission not later than July 15th.

"(d) The Election Commission consists of three members appointed by the Supreme Assembly and its duty is to receive and count all ballots as to the primary and general election, pass on their validity and tabulate the votes.

"(e) After the returns of the primary election is made by the Election Commission, the results are published in the official organ of 'The Providence.'

"(f) Provision is made for withdrawal of candidates, with the person with the next highest number of votes being substituted. The three persons receiving the highest number of votes in the primary election for each respective office, as certified by the Election Committee, are the nominees to run for office in the general election.

"(g) The candidates for office in the general election may avail themselves of the privilege of using the official organ of 'The Providence' to present themselves and their qualifications to the members prior to the election.

"(h) The Supreme Recording Secretary then causes the names of the candidates to be printed on the official ballots for the general election and the ballots to be mailed to the Secretaries of the respective branches before October 1st of the election year. The general elections are held during the month of October.

"(i) Members may only vote for candidates on the official ballot.

"(l) Voting is secret.

"(m) Each member receives only one vote and has only one ballot.

"(n) There is no voting by proxy but only voting by a marked official ballot.

"(o) Provision is made for invalidating irregular ballots.

"(p) Upon the completion of voting, the President and Secretary of the branch collect the ballots from all their members, count them themselves or with the help of the branch election committee elected for that purpose, tabulate and makes a record of the voting. This record is signed by the President and Secretary of the branch and is forwarded, together with all the used and unused ballots to the President of the Election Commission, not later than November 5th of each election year.

"(r) Not later than November 15th the Election Commission tabulates the votes and the candidates receiving the highest number of votes for each respective office are considered elected to that office.

"(s) Procedures are also provided for complaining of voting irregularities."

To restate your question at this time may be of some assistance in clarifying the issue. To comply with the meeting requirements of Section 3, must the entire membership of the association meet in convention at least once every four years?

It is our opinion that the meeting of the Supreme Assembly constitutes compliance with the provisions of Section 3<sup>2</sup> and the entire membership is not required to meet.

The meaning of the word "meetings" is inextricably bound up in the meaning of representative form of government. Section 3 defines "representative form of government" and the meeting is one of the elements which the section requires for a representative form of government. Our examination of the cases in which the phrase "representative form of government" is used in connection with fraternal benefit societies reveals no requirement for a "convention" as an element of a representative form of government.<sup>3</sup>

In none of these cases did the subject of whether or not a convention was deemed essential to a representative form of government appear. In fact, it was not discussed. In the main, the cases were concerned with the method of selecting the Supreme Governing Body. The principle distilled from these cases is that if the method of selection is bona fide election, either directly by the members or indirectly through representatives, the meeting of the Supreme Governing Body will comply with the requirements of the act.

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<sup>2</sup> It is conservatively estimated that the cost of a convention would be upwards of \$100,000.00.

<sup>3</sup> The following cases involve the Knights of Pythias: *Meyer v. Supreme Lodge Knights of Pythias*, 104 Neb. 505, 177 N. W. 828 (1920), reargued *Meyer v. Supreme Lodge Knights of Pythias*, 104 Neb. 505, 180 N. W. 579 (1920), certiorari allowed, and the same case appealed in the United States Supreme Court, *Supreme Lodge Knights of Pythias v. Meyers*, 265 U. S. 30, 44 S. Ct. 432, 68 L. Ed. 885 (1924).

The following cases involved the Royal Highlanders, a fraternal benefit society organized under the laws of the State of Nebraska: *Lange v. Royal Highlanders*, 75 Neb. 188, 106 N. W. 224 (1905), reargued *Lange v. Royal Highlanders*, 75 Neb. 188, 110 N. W. 1110 (1907); *Briggs v. Royal Highlanders*, 84 Neb. 834, 122 N. W. 69 (1909); *Widener v. Sharp*, 111 Neb. 526, 196 N. W. 918 (1924).

Two other cases dealt with other societies, *Order of United Commercial Travelers of America v. Edwards*, 51 F. 2d 187 (10th Cir. 1931), and *State v. Bankers' Union of the World*, 71 Neb. 622, 99 N. W. 531 (1904). See also 37 Words and Phrases 66, Representative Form of Government (Permanent Edition, 1950); Goldin, *The Law of Insurance in Pennsylvania*, Section 1010.

Further, since the provisions of Section 3 fall uniformly on all fraternal benefit societies, large or small, it would be unrealistic to construe Section 3 as requiring a convention of the entire membership.<sup>4</sup>

It is most significant that the section in question uses both the words "meeting" and "convention." Logically, we can presume that the Legislature intended a different meaning to be given to these words.<sup>5</sup>

You have directed our attention to the provisions of the Act of 1874 under which the instant association was chartered. Section 5 provides:

"The by-laws of every corporation created under the provisions of this statute, \* \* \* shall be deemed and taken to be its law, \* \* \* They shall be made by the stockholders or members of the corporation, at a general meeting called for that purpose, unless the charter prescribed another body, or a different mode. \* \* \*"

You have furnished us with a copy of the charter which contains no provision vesting the power to make by-laws in any other body. You have further directed our attention to Section 18, 40 P. S. Section 1068, of the Fraternal Benefit Societies Act of 1935, which provides:

"Any society heretofore organized or incorporated under any act of the General Assembly \* \* \* may exercise after the passage of this act all the rights conferred hereby and all the rights, powers, privileges, and exemptions now exercised or possessed by it, under its charter or articles of incorporation or articles of association, or at its option it may be reincorporated or reorganized hereunder; but no society already incorporated shall be required to reincorporate hereunder nor shall its existence as a corporation nor its right to exercise any corporate rights, vested in it by virtue of its past incorporation, be affected by anything contained herein."

Section 6 of the Fraternal Benefit Societies Act provides as follows:

"Every such society, by its supreme governing or legislative body, shall have power to make, alter, and amend its constitution and laws for the government of the society, the management of its affairs, the admission and classification of its members, the control and regulation of the terms and

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<sup>4</sup>It would well be argued that the annual meeting of the Supreme Assembly of this organization is a convention, since the meaning of the word is by no means precise. See, for example, 9 Words and Phrases, Conventions, 492 (Permanent Edition, 1940). See also Act of June 24, 1931, P. L. 1206, as amended, 53 P. S. Section 55612, which provides for the holding of conventions of county associations of township officers.

<sup>5</sup>The legislative history is not helpful on this subject. See colloquy between Senators Shapiro and Wade, II Legislative Journal, Session 1943, 1448, 1449.

conditions governing the issue of its benefit certificates and the character or kind of benefits or privileges payable or allowable thereunder, the fixing and adjustment of the rates of contribution, fees, or dues payable by its members, and the allotment of the same to the different funds of the society.

\* \* \*

You indicate that if the making of the by-laws can be done only by the full membership, as provided in Section 5 of the Act of 1874, and that the Supreme Governing Body has the power to make and amend the laws for the government of the society, inferentially the full membership is the Supreme Governing Body of the Society or that the exercise of this power by the Supreme Assembly is *ultra vires*.

Preliminarily, it should be noted that the General Corporation Law of April 29, 1874, P. L. 73, was inadequate in so far as insurance companies and societies as this one were concerned. Moreover, the act was rather unfair as it was designed principally to meet the needs of the manufacturing and the commercial industries.<sup>6</sup>

Section 18, referred to above, preserves the rights that an association possessed under the Act of 1874 and was intended to prevent any jeopardy resulting to the association's existence as a result of compliance with the Act of 1935. Section 6 details the powers the supreme governing or legislative body possesses. The two sections can be read consistently. Both the entire membership and the Supreme Assembly possess concurrent power to modify the by-laws. Further, the constitution and by-laws of this society, as promulgated in successive editions in 1921, 1927, 1950 and 1955, specifically provide for the Supreme Assembly, which practice has long been concurred in by the membership.<sup>7</sup>

Accordingly, it is our opinion and you are so advised that the Supreme Assembly of the Providence Association of Ukrainian Catholics in America is a body whose meetings meet the requirements of Section 3 of the Fraternal Benefit Societies Act of 1935 and that a convention

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<sup>6</sup> See Reuschlein and Deasy, *Statutory Regulation of Insurers in Pennsylvania*, 40 P. S. Page 2.

<sup>7</sup> The certified copies of the same filed with your department are *prima facie* evidence of the legal adoption thereof: Section 6 of the act, 40 P. S. Section 1056.

of the full membership to be held every four years is not required by the act. It is our further opinion that the method established by the association for ruling itself does not conflict with the provisions of the Act of 1874.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 226

*Insurance—Mutual benefit society—Reincorporation as stock insurance company—  
Excess surplus—The Insurance Company Law of 1921.*

An application by a mutual benefit society to reincorporate as a stock insurance company of a class known as limited life insurance companies must be refused where it appears that the society is in violation of §429 of The Insurance Company Law of 1921, the Act of May 17, 1921, P. L. 682, in that it has accumulated surplus to the detriment of its members in the form of reserves beyond the amount authorized.

Harrisburg, Pa., September 16, 1960.

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

Sir: You have asked our advice in regards to the State Mutual Benefit Society, hereinafter called the "Beneficial Society," a beneficial society regulated by your department under the act popularly known as the Beneficial Societies Act.<sup>1</sup>

The Beneficial Society seeks to reincorporate as a stock insurance company of the class known as limited life insurance companies in

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<sup>1</sup> Act of June 4, 1937, P. L. 1643, 40 P. S. Section 1101, et seq.

accordance with the procedure set forth in the Act of June 28, 1951, P. L. 941, 40 P. S. Section 623.1, et seq.<sup>2</sup>

You ask advice as to whether any of the constitutional rights of the members of the Beneficial Society will be violated by permitting the reincorporation, and, inferentially, whether any provisions of the law relating to the Beneficial Society have been violated.

As the Society is in violation of a basic provision of The Insurance Company Law of 1921, this application cannot be processed at this time.

The relevant facts are these: The Society was originally organized under the Act of April 29, 1874, P. L. 73. The purposes for which it was organized were stated in its charter to be "for purposes beneficial to the members of the said corporation from funds collected therein to be used in assisting said members in time of sickness or disability and in aiding their families in case of death." The Beneficial Society is now regulated by the Beneficial Societies Act, *supra*.

The Beneficial Society has assets in excess of \$2,000,000. The financial statement as of December 31, 1959, discloses a surplus of approximately \$171,000. In addition to the surplus, the Beneficial

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<sup>2</sup>Section 29, this act, 40 P. S. Section 623.2, provides in part as follows:

"Any such corporation \* \* \* desiring to reincorporate \* \* \* under the provisions of this act, shall proceed in the following manner. \* \* \* the directors of such corporation \* \* \* may make articles of association as provided by law for the incorporation of insurance companies, *upon which articles shall be had the same proceedings as provided by law for the incorporation of new insurance companies; \* \* \**" (Emphasis supplied)

Further, Section 3(D) of the Beneficial Societies Act, 40 P. S. Section 1103, states that every beneficial society shall be run and regulated in accordance with the provisions provided by existing law relating to insurance companies. The Insurance Company Law of 1921, Act of May 17, 1921, P. L. 682, 40 P. S. Section 401, provides that the Insurance Commissioner, if he approves the articles shall submit the articles of agreement to the Attorney General for examination. If the Attorney General finds the articles of agreement to be in accordance with the provisions of this act, and not inconsistent with the Constitution of this Commonwealth and of the United States, he certifies them to the Governor for approval.

Section 211 reads as follows:

"The subscribers to the articles of agreement of any insurance company shall \* \* \* forward the same in duplicate to the Insurance Commissioner, who shall, *in case he approves of the same*, certify in duplicate that all of the requirements of this act in relation to the incorporation of insurance companies have been complied with. The Insurance Commissioner shall submit said articles of agreement to the Attorney General for examination; and if he finds the same in accordance with the provisions of this act, *and not inconsistent with the Constitution of this Commonwealth and of the United States*, he shall certify the same in duplicate to the Governor, with his approval endorsed thereon. \* \* \*" (Emphasis supplied)

Society has voluntarily established certain reserve accounts, not required by applicable statute, of approximately \$375,000. These reserve accounts are not related to reserve liability required to be set up under Section 5, as amended, of the Beneficial Societies Act, 40 P. S. Section 1105.

Many of the members of this Society are from lower income groups in the large urban areas of Philadelphia and Pittsburgh. The maximum benefits payable on a life policy are \$250 and there are other policies with lesser principal sums ranging down to \$50. Most of this insurance is of the type in which the premiums are collected weekly by representatives of the Society, commonly referred to as industrial insurance.

The Beneficial Society has established two general types of policies. The first is characterized as "nonparticipating." Members holding such policies are specifically excluded from participating in the surplus of the Beneficial Society. The other type of policy is silent as to participation by the policyholder in the surplus of the Beneficial Society. Approximately 20 per cent of the policyholders fall into the last-mentioned class.<sup>3</sup>

Section 2 of the reincorporation act, *supra*, 40 P. S. Section 623.2, requires that the officers of the Beneficial Society obtain the consent of the majority of the members to the proposed reincorporation. This has been done through the device of circulating proxies. In response to inquiries from your department, the officers of the Beneficial Society have indicated that, if and when the reincorporation is approved, approximately 20 per cent of the surplus will be distributed to the second class of policyholders referred to above and nothing will be distributed to the first group. In response to further inquiries from your department, these officers have indicated that they will, following reincorporation, preserve the balance of undistributed surplus intact for a period of ten years.

The proposed articles of agreement reveal that substantially all the officers of the Beneficial Society will become the officers of the new

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<sup>3</sup> If the same rate is charged both classes this may constitute unfair discrimination prohibited by Section 353, as amended, 40 P. S. Section 477(a), of The Insurance Company Law. Under this section the Insurance Commissioner may suspend the license of any offending association. The pertinent provision of the act provides:

"Unfair discrimination between individuals of the same class in the amount of premiums or rates charged for any policy of life, health and accident insurance \* \* \* or in the benefits payable thereon, or in any of the terms or conditions of such policy or in any other manner whatsoever, is prohibited. \* \* \*"

stock company. Further, there will be no public offering of the stock of the company being formed either to the public generally or to the members of the Beneficial Society specifically. In the reasonable course of events, it can be anticipated that the officers of the Beneficial Society will become the sole stockholders of the proposed new limited life stock company.

As has been set forth above, the Beneficial Society has voluntarily established reserves beyond those legally required by law of approximately \$375,000. This amount, by action of the board of directors of the new company, could be transformed from reserves to surplus. Thus, on reincorporation, the new company could have a surplus available for distribution to its shareholders of \$550,000. In accumulating these excess reserves the company has violated The Insurance Company Law.

Section 429 of the Act of May 17, 1921, P. L. 682, 40 P. S. Section 614, provides:

"Any mutual life insurance company, incorporated under the laws of this Commonwealth and transacting business therein, may establish and maintain, \* \* \* a surplus \* \* \* not in excess of ten percentum of its reserve, or one hundred thousand dollars, whichever is greater, and the excess of the market value of its securities over their book value."

The act further provides:

"For cause shown, the Insurance Commissioner may, at any time, permit any corporation to accumulate and maintain a surplus \* \* \* in excess of the limit above mentioned for a prescribed period, not exceeding one year in any one permission, by filing in his office a decision stating his reasons therefor and causing the same to be published in his next annual report."

The legally required reserves of the Mutual are \$1,425,501. Ten per cent thereof totals approximately \$143,000. The excess of the market over book value of the securities in which the reserves are invested amounts to \$72,328.05. The permission of the Insurance Commissioner to accumulate surplus beyond that legally authorized has not been sought nor has it been given. Accepting the company's statement of its surplus at its face value of \$170,000, and adding the excess reserves to this figure the violation is evident. This provision of the act was intended to reach exactly this kind of situation which has here developed, namely, the accumulation of surplus to the detriment of the members of the Mutual. As the administrative officer

charged with the execution of the laws of this Commonwealth relating to insurance, you have the duty to force compliance with the violated section of the act. In view of the violation of Section 424 of The Insurance Company Law of 1921, the application for reincorporation should be set aside and your department take appropriate action directed at bringing this company into compliance with the laws governing its operations.

This department deems it necessary to call your attention to its opinion that in any event before "reincorporation" may take place a portion or all of the surplus over and above the allowable 10 per cent not distributed to the policyholders as dividend or rebate, would be escheatable to the Commonwealth, provided, of course, the whereabouts of those policyholders were unknown for the prescribed statutory period of seven years.

Accordingly, it is our opinion, and you are advised that the articles of agreement are not in accordance with the provisions of The Insurance Company Law of 1921, and approval of the proposed reincorporation should be withheld until this condition has been corrected subject to the limitation relating to escheat set forth above.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 227

(Addressed to Honorable Francis R. Smith, Insurance Commissioner, Harrisburg, Pennsylvania, under date of September 20, 1960. Withdrawn and reissued as Official Opinion No. 236, dated March 2, 1961.)

## OFFICIAL OPINION No. 228

*County department of health—Referendum for dissolution—Establishment for five years—Local Health Administration Law.*

1. Under §5.1 of the Local Health Administration Law, the Act of August 24, 1951, P. L. 1304, as added by §2 of the Act of December 16, 1959, P. L. 1847, providing that a county department of health may be dissolved by a referendum, provided that the dissolution petition be circulated no earlier than five years following the date of its establishment, a referendum for such a dissolution may be held in November, 1960, where it appears the Secretary of Health on December 12, 1953, pursuant to §9 of the act, certified to the county commissioners that the county department of health was ready to exercise its powers and duties, and the commissioners then gave notice of the certification to the various boroughs in the county.

2. The fact that the county department of health was established as a "test unit," is immaterial since the Local Health Administration Law makes no provision for a "test unit," and it is immaterial that a referendum was conducted during the five-year period after the department of health was established, in which referendum a large majority voted in favor of its retention.

Harrisburg, Pa., September 28, 1960.

Honorable C. L. Wilbar, Jr., Secretary of Health, Harrisburg, Pennsylvania.

Sir: You have requested our opinion as to whether there can be a referendum in November, 1960, for the dissolution of the Butler County Department of Health, in accordance with the provisions of Section 5.1 of the Local Health Administration Law (LHAL), the Act of August 24, 1951, P. L. 1304, 16 P. S. Section 12005.1, as added by Section 2 of Act No. 676 of the 1959 General Assembly, the Act of December 16, 1959, P. L. 1847. Specifically, this question involves a determination as to whether the Butler County Department of Health has been "established" for five years as required by Section 5.1.

Section 5.1 of the LHAL provides that a single-county department of health may be dissolved by a referendum conducted in accordance with subsection (c) thereof. This subsection, after providing for the form and content of the dissolution petition, states:

" . . . that the said petition shall be circulated no earlier than five years following the date of establishment of said county health department . . ."

Section 3(f) of the LHAL defines the word "Established" as follows:

"A county department of health shall be considered to be established thirty (30) days after the county commissioners . . . have given written notice to all the cities, boroughs, incorporated towns, and townships within the territorial limits of the county or counties which have created the county department of health, that the State Secretary of Health has found, in accordance with section 9 of this act, that the county department of health is ready to exercise its powers and duties."

Section 9 of the LHAL makes it the duty of the State Secretary of Health to determine when each county department of health is ready to exercise its powers and duties. When the Secretary has found that the county department of health has satisfied certain requirements set forth in the Section, he issues a certificate of his finding to the county commissioners. Within five days after the receipt of the certificate, the county commissioners must give notice of the Secretary's finding to all cities, boroughs, incorporated towns, and townships within the county. Section 9 then concludes as follows:

". . . Thirty (30) days after such notice has been given, the county department of health shall be considered to be established and shall begin the exercise of its powers and duties."

You have informed us that the Secretary of Health, on December 12, 1953, in accordance with Section 9 of the LHAL, certified to the Butler County Commissioners that the Butler County Department of Health was ready to exercise its powers and duties. Thereafter, the Commissioners gave due notice of the certification, under Section 9 of the LHAL, to the various boroughs, etc. in Butler County.

It is clear, therefore, that the Butler County Department of Health was duly "established" under the LHAL early in 1954. As more than five years have elapsed since that time, a referendum for the dissolution of the Butler County Department of Health may legally be held at the 1960 general election pursuant to Section 5.1 of the LHAL.

This conclusion is not in any way altered by certain other facts you have called to our attention. The resolution of the Butler County Department of Health, which preceded the Secretary of Health's certification on December 12, 1953, stated that the Department of Health was established as a "test unit." This fact is of no significance to our present problem. There is no provision in the LHAL for a "test unit," and the 1953 certification, which was unqualified and

strictly in conformance with Section 9 of the LHAL, made no reference to any "test unit." Furthermore, and what is for us the determining factor, the Butler County Department of Health has functioned continuously from the beginning; there has been no interruption in its operation from 1953 to the present time.

Nor is our conclusion affected by the fact that a referendum was conducted in 1956 as to whether the Butler County Department of Health should be retained (a large majority voted in the affirmative). This department advised you by letter of May 25, 1956, that Section 5 of the LHAL permitted the creation of county departments of health by resolution or by referendum, or by a combination of these methods. We specifically stated that the prior creation of the Butler County Department of Health, by resolution of the County Commissioners, was no bar to the holding of a referendum under Section 5. The 1956 referendum, therefore, is of no significance with respect to the date of establishment of the Butler County Department of Health.

It is our opinion, therefore, and you are accordingly advised, that the Butler County Department of Health has been established for more than five years, and that a referendum for its dissolution, pursuant to the provisions of Act No. 676 of the 1959 General Assembly, may legally be held in November, 1960.

Very truly yours,

DEPARTMENT OF JUSTICE,

HERBERT N. SHENKIN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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#### OFFICIAL OPINION No. 229

*Minimum wages paid women—Men performing similar work—Right to wages equal to those paid women workers—Equal Pay Law.*

Under the Equal Pay Law, the Act of December 17, 1959, P. L. 1913, in a place of employment where women are receiving straight time and overtime wages in accordance with a mandatory minimum wage order, men performing jobs under comparable conditions and requiring comparable skills must be paid wages equal to those paid to the women provided that the wage rates are not affected by a seniority, training or merit increase system which does not discriminate on the basis of sex.

Harrisburg, Pa., October 18, 1960.

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

Sir: You have asked to be advised concerning the applicability of Act No. 694, the Act of December 17, 1959, P. L. 1913, 43 P. S. Sections 336.1 et seq., known as the "Equal Pay Law," to men performing jobs also performed by women who are covered by a mandatory minimum wage order.<sup>1</sup> Specifically, you ask whether, in a place of employment where women are receiving straight time or overtime wages in accordance with a mandatory minimum wage order, men who perform work requiring comparable skills, under comparable conditions, must be paid wages equal to those paid the women. Section 3 of the act provides:

"No employer shall discriminate in any place of employment between employes on the basis of sex by paying wages to any employe at a rate less than the rate *at which he pays wages to employes of the opposite sex* for work under comparable conditions on jobs the performance of which requires comparable skills, except where such payment is made pursuant to a seniority training or merit increase system which does not discriminate on the basis of sex." (Emphasis supplied)

The "Equal Pay Law" was enacted in place of the Act of July 7, 1947, P. L. 1401, 43 P. S. Section 335.1 et seq., which it repeals. The Act of 1947 also prohibited discrimination because of sex, but differed from the new law in two significant respects. In its language, it was primarily directed at discrimination in the wages paid females; the new act avoids the use of any feminine terminology, merely referring to "employee" or "employes"; whenever a personal pronoun is used, it is the masculine rather than the feminine.<sup>2</sup> Thus, the new act appears to prohibit discrimination in pay rates regardless of which sex is receiving the lower wage.

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<sup>1</sup> A "mandatory minimum wage order" is issued pursuant to the Act of May 27, 1937, P. L. 917, 43 P. S. Section 331(a) et seq., and requires that specified minimum wages be paid women and minors in particular occupations covered by the order. Employers not complying with the provisions of such an order are subject to both civil and criminal penalties.

<sup>2</sup> The only use of the feminine occurs in Section 5(a) of the act where the word "she" is found. This sentence is identical with its counterpart in the previous law. However, the other pronominal references in this section are changed to the masculine and it appears that the retention of the feminine was merely a legislative oversight.

The second difference between the two acts is to be found in the exceptions to the requirement that equal wages be paid both sexes. The prior act permitted variations based upon differences in:

“\* \* \* seniority, experience, skill \* \* \* ability, or differences in duties and services performed, or differences in the shift or time of the day worked or any other reasonable differentiation except difference in sex.”

The new act permits pay differentials only when made “pursuant to seniority, training or merit increase system which does not discriminate on the basis of sex.”

The differences between Act No. 694 and the 1947 Act make it clear that discrimination “on the basis of sex” contemplates a situation in which men are paid lower wages than women, as well as the more usual reverse situation. Without this distinction and the added application of the act to both sexes there would have been no necessity for the repeal of the Act of 1947, and its substitution by the 1959 act, since women were fully protected by the 1947 act. Otherwise, the action by the Legislature would have been meaningless. The chief remaining question is whether there is discrimination on the basis of sex when women are paid at a higher rate of pay due to the existence of a mandatory minimum wage order.

This question is, apparently, one of first impression, and, therefore, it is necessary to examine the purpose of the “Equal Pay Law.” The Act of 1947 was passed as a companion bill to an amendment to the Women’s Labor Law,<sup>3</sup> permitting women in manufacturing establishments to work at nights. The legislative debates of that equal pay law indicate that it was designed to protect the jobs of men by seeking to prevent women from working at lower rates of pay.<sup>4</sup> Consequently, the equality of genders found in Act No. 694 indicates that the new act is designed to prevent all wage competition between men and women. It seeks to guarantee that a woman, being paid a fair minimum wage under the Act of 1947, will not lose her job to a man who might replace her by working at a substandard wage. Payment of such a wage to an employee, only because he is a man, constitutes a clear discrimination on the basis of sex.

Our opinion that this type of pay differential is a prohibited discrimination due to sex is buttressed by the new restrictive language

<sup>3</sup> Act of July 25, 1913, P. L. 1024, 43 P. S. Section 101 et seq. The 1947 amendment is the Act of July 7, 1947, P. L. 1397.

<sup>4</sup> See, e.g., Legislative Journal, 1934, 1936, 3596, 5478 (1947).

in Act No. 694 stating the conditions under which different wages may be paid male and female employees, in place of the long list of factors found in the 1947 act on which a variation could be based, and ending with the words:

"\* \* \* or any other reasonable differentiation except difference in sex."

The new act provides for equal pay:

"\* \* \* except where such payment is made pursuant to a seniority, training or merit system which does not discriminate on the basis of sex."

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

"Exceptions expressed in a law shall be construed to exclude all others."

The inescapable effect of the "Equal Pay Law" is to prohibit discrimination of any kind based upon a difference in sex. The minimum pay law for women cannot be used as a defense to a discrimination against men.<sup>5</sup>

We are of the opinion, and you are accordingly advised, that in a place of employment where women are receiving straight time and overtime wages, in accordance with a mandatory minimum wage order, men performing jobs under comparable conditions and requiring comparable skills must be paid wages equal to those paid the women, provided that the wage rates are not affected by a "seniority, training or merit increase system which does not discriminate on the basis of sex."

Very truly yours,

DEPARTMENT OF JUSTICE,

HERBERT N. SHENKIN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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<sup>5</sup> Act No. 694 does not in any way affect the operation of the Minimum Wage Act, nor amend it *sub silentio*. The laws were enacted to achieve different results: the Minimum Wage Law to guarantee that women will not be paid wages below those necessary for an adequate standard of living; the Equal Pay Law to prevent competition for employment between the sexes. However, these ends are not mutually inconsistent; there are areas for mutual interaction of the two laws.

## OFFICIAL OPINION No. 230

*Incompatible offices—Members of Pennsylvania State Police—Member of a military unit—Status of present members of both organizations—Section 711 of The Administrative Code of 1929.*

Under §711 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, the Commissioner of the Pennsylvania State Police may, by appropriate regulation and with the approval of the Governor, (1) reject applicants for enlistment in the Pennsylvania State Police who are members of the National Guard or an active reserve unit of the United States armed forces, and (2) refuse permission to present members of the Pennsylvania State Police to enlist in such military units. This ruling is prospective in operation and does not affect the status of members of the Pennsylvania State Police who are presently members of a military unit, and the Commissioner is required by law to grant additional leave for training purposes to members of the Pennsylvania State Police who are presently members of a military unit.

Harrisburg, Pa., October 20, 1960.

Honorable Frank G. McCartney, Commissioner, Pennsylvania State Police, Harrisburg, Pennsylvania.

Sir: During the 1959 Session of the General Assembly, you asked for an opinion concerning your authority as Commissioner to reject applicants for enlistment in the State Police Force, who are members of the National Guard or of an active reserve unit (hereinafter called "military unit"). You also asked whether you had authority to refuse present members of the Force permission to enlist in such military unit, and whether you must grant members of the Force who are presently also members of a military unit sufficient time off duty to attend weekly drills.<sup>1</sup>

At that time you indicated that the Adjutant General, Deputy Adjutant General and representatives of your Department had agreed that membership in both the State Police Force and a military unit were incompatible, and that the best interests of the public would be served by permitting membership in only one of the two organizations at the same time.

The Act of April 9, 1929, P. L. 177, Section 711, as amended, 71 P. S. 251, provides in part:

"The Commissioner . . . shall . . . make rules and regulations, subject to the approval of the Governor, prescribing

<sup>1</sup> This Department decided to withhold its opinion at the time pending possible clarification of the law by the General Assembly of 1959. However, it now appears that no new laws were passed covering military leave and the problems which you presented.

qualifications prerequisite to, or retention of, membership in the force; . . . and such other rules and regulations as are deemed necessary for the control and regulation of the State Police Force."

Under this section it is our opinion that the Commissioner has legal authority to reject applicants for enlistment in the State Police Force who are members of a military unit, provided, however, that a regulation is adopted (with the approval of the Governor), which would indicate that membership in such unit is incompatible with membership in the State Police Force.

Under the same circumstances, and pursuant to a further regulation, it is our opinion that the Commissioner has the authority to refuse permission to those already members of the State Police to enlist in a military unit.

This leaves for determination the question of the authority to refuse to allow present members of the State Police Force, who are *already* members of a military unit, sufficient time off for weekly drills.

Preliminarily, it should be noted that as a result of World War II and the Korean War, many of those persons who enlisted in the State Police Force were already members of a military unit at the time they were accepted for employment with the State Police. Others have since joined a military unit, presumably with the knowledge of their superior officers in the State Police.

As to all such persons who are presently members of both organizations, we are of the opinion that it would be unfair to require them, at this late date, to choose one or the other of the two organizations. Any regulation as to incompatibility should be prospective in application only, so as not to destroy existing retirement and other rights which such persons now have.

The Act of May 27, 1949, P. L. 1903, Sec. 839, provides as follows:

"All officers and employes of the Commonwealth of Pennsylvania, members of the Pennsylvania National Guard, shall be entitled to leave of absence from their respective duties without loss of pay, time or efficiency rating on all days during which they shall, as members of the Pennsylvania National Guard, be engaged in the active service of the Commonwealth or in field training ordered or authorized under the provisions of this act."

The Act of July 12, 1935, P. L. 677, Section 1, as amended, 65 P. S. 114, provides as follows:

"All officers and employes of the Commonwealth of Pennsylvania, or of any political subdivision thereof, members, either enlisted or commissioned, of any reserve component of the United States Army, Navy, Marine Corps, Air Force, or Coast Guard, shall be entitled to leave of absence from their respective duties without loss of pay, time, or efficiency rating on all days not exceeding fifteen in any one year during which they shall, as members of such reserve components, be engaged in the active service of the United States or in field training ordered or authorized by the Federal Forces."

Under the first quoted statute, you are required to give leave to members of the force who are also members of a National Guard unit for every day in active service without limitation and for field training. We are informed that field training usually amounts to fifteen days per year.

Under the second quoted statute, you are required to give leave to members of the force who are also members of a reserve component of the specified allied forces not exceeding fifteen days per year so that they can participate in military training without loss of pay. The leave under either statute is in addition to annual vacation leave which is authorized by other provisions of law.

As to members of reserve components of the designated armed forces, in the past, the fifteen day period has been taken by most state employees to coincide with the summer encampment of their military units. Such practice is proper, and leave must be given for the period of the encampment. However, the fifteen day period may also be computed on the basis of weekly drills. Obviously, the summer encampment and the weekly drills together would exceed the fifteen day allotment. You are not required to grant both. You may grant leave without pay for such period in excess of fifteen days, or where practicable, you may arrange the duty hours with the State Police Force so as not to conflict with the weekly drill periods. As stated before, members of National Guard Units are *not* restricted to 15 days.

It is our opinion, therefore, and you are accordingly advised, that you may by appropriate regulation, with the approval of the Governor, reject applicants for enlistment in the State Police Force who are members of a military unit and refuse permission to present members of the State Police Force to enlist in a military unit; and, further, that you are required by existing legislation, as detailed above, to

grant additional leave to members of the State Police Force who are presently members of a military unit.

Respectfully submitted,

DEPARTMENT OF JUSTICE,

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

ANNE X. ALPERN,  
*Attorney General.*

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OFFICIAL OPINION No. 231

*Interest—Revolving credit plan—Retail stores and banking institutions—Monthly charge on unpaid balance—Rate in excess of six percent—General Usury Statute—Small Loans Act—Banking Code.*

1. A revolving credit plan of operation conducted by retail stores in which the buyer is required to pay a monthly charge computed on the unpaid balance of his account at a rate in excess of six percent simple interest violates neither the General Usury Statute, the Act of May 28, 1858, P. L. 622, as amended, nor §6(B) of the Small Loans Act, the Act of June 17, 1915, P. L. 1012, as amended, since both acts refer strictly to the loan or use of money, and the carrying charge or interest rate on the sale of merchandise is not a charge for the loan or use of money.

2. A banking institution which furnishes a revolving credit plan of operation directly to a customer may charge \$6 per \$100 per annum, collectible in advance on the original face amount of the loan on amounts up to \$3,500 where the loan qualifies as an installment loan under §1001A(d) of the Banking Code, the Act of May 15, 1933, P. L. 624, as amended; on amounts over \$3,500, the banking institution may not charge more than six percent simple interest per annum without violating the General Usury Statute.

Harrisburg, Pa., December 6, 1960.

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

Sir: You request our opinion as to the legality of the revolving credit plan of retail merchandising in use by various retail sellers of merchandise in Pennsylvania. Specifically, you ask the following three questions:

1. Does the revolving credit plan of operation conducted by retail stores, in which the buyer is required to pay a monthly charge computed on the unpaid balance of his account at a rate in excess of 6% per year simple interest, constitute a loan in the nature of a forbearance of debt on which charges exceed the maximum rate of 6% per year, established by the General Usury Statute of Pennsylvania?

2. Does the revolving credit plan of operation conducted by retail stores, in which the buyer is required to pay a monthly charge computed on the unpaid balance of his account at a rate in excess of 6% per year simple interest, constitute a "loan, use or forbearance of money, goods, or things in action," or a "loan, use or sale of credit" falling within the purview of Section 6, subsection B of the Small Loans Act approved June 17, 1915, as amended?

3. Does the revolving credit plan of operation in which a banking institution participates in the financing of the sale of goods as described herein constitute a violation by the bank of the General Usury Statute or the Banking Code, Section 1001, Subsection A, Subdivision 4?

Because each question involves different statutes and different plans of operation, each will be discussed separately.

The statute involved in the first question, the Act of May 28, 1858, P. L. 622, Section 1, as amended, 41 P. S. Section 3, reads as follows:

"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: Provided, however, That any loan insured by the Federal Housing Administration, pursuant to the provisions of the National Housing Act, approved the twenty-seventh day of June, one thousand nine hundred thirty-four, its amendments and supplements, may bear such rate of interest or be discounted at such rate as is permitted under the National Housing Act and the regulations promulgated from time to time by the Federal Housing Administration. The first and second sections of the act passed second March, one thousand seven hundred and twenty-three, entitled 'An Act to reduce the interest money from eight to six per cent, per annum' be and the same is hereby repealed."

This statute refers strictly to the loan or use of money. Pennsylvania courts have consistently held that the carrying charge or interest charge on the sale of merchandise is not a charge for the loan or use of money. The Supreme Court in the case of *Equitable Credit and*

*Discount Company v. Geier*, 342 Pa. 445, 455, 21 A. 2d 53 (1941), held:

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

You are, therefore, advised that the revolving credit plan of operation does not come within the purview of Section 1 of the 1858 Act, as amended, *supra*.

The second question is directed to whether or not the revolving credit system as used by individual retail merchants or department stores violates Subsection B of Section 6 of the Small Loans Act, the Act of June 17, 1915, P. L. 1012, as amended, 7 P. S. Section 751 et seq. The title of this act, as originally enacted, specifically set forth:

"Regulating the business of loaning money in sums of three hundred (\$300) dollars or less, either with or without security, to individuals pressed by lack of funds to meet immediate necessities; fixing the rates of interest and charges therefor; requiring the licensing of lenders; and prescribing penalties for the violation of this act."

The title of the act as amended by the Act of June 2, 1953, P. L. 262, reads:

"Regulating the business of loaning money in sums of six hundred (\$600) dollars or less, either with or without security, to individuals pressed by lack of funds to meet immediate necessities; fixing the rates of interest and charges therefor; requiring the licensing of lenders; and prescribing penalties for the violation of this act."

Specifically, you refer to subsection B of Section 6 of the 1915 Act, *supra*, as amended, 7 P. S. Section 759, which reads as follows:

"B. Every person, persons, copartnership, association, or corporation, or any partner, director, officer, agent, or member thereof, who shall, directly or indirectly, as principal, agent, or broker, 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, and, upon conviction thereof, shall be sentenced to pay a fine of not less than five hundred (\$500) dollars or more than five thousand (\$5,000) dollars, or to suffer imprisonment of not less than six (6) months or more than three (3) years, or both, at the discretion of the court."

The revolving credit plan as described is engaged in by individual merchants and department stores at the retail level and involves the sale of merchandise and not the business of lending money. While subsection B, above quoted, *supra*, uses broad terms and refers to the forbearance of debt or the sale of credit, it must be remembered that this is a penal statute and must be strictly construed. In our opinion, a construction of the statute which would extend its application to transactions which do not include the lending of money, as restricted by the title, would not be upheld by the courts.<sup>1</sup>

You are, therefore, advised that the revolving credit plan of operation, as used by retail merchants, does not fall within the purview of subsection B of Section 6 of the Small Loans Act, the Act of June 17, 1915, P. L. 1012, as amended.

The third question is whether or not a banking institution which participates in the financing of the sale of goods on a revolving credit plan violates the General Usury Statute or the Banking Code, the Act of May 15, 1933, P. L. 624, subdivision (4) of subsection A of Section 1001, as amended, 7 P. S. Section 819-1001.

The revolving credit plan by which a bank participates as outlined by the Department of Banking is as follows: The bank sets up a revolving credit plan in a community, the buyer establishes credit at the bank for a maximum amount and an agreed monthly payment. The buyer is then at liberty to make purchases at any one or more of a number of participating stores.

The General Usury Statute has been quoted above. Subdivision (4) of subsection A of Section 1001 of the Banking Code, *supra*, as amended, 7 P. S. Section 819-1001, reads as follows:

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<sup>1</sup>There is no question whatsoever that the Legislature has the right to regulate charges made for credit on the sale of all consumer goods. Many states have done so. However, Pennsylvania has seen fit by specific statutory authority to regulate finance or credit charges on the sale of automobiles only.

"A. In addition to the general corporate powers granted by this act, and in addition to any powers specifically granted to a bank or a bank and trust company elsewhere in this act, a bank or a bank and trust company shall have the following powers, subject to the limitations and restrictions imposed by this act:

\* \* \* \* \*

"(4) (a) To lend money either upon the security of real or personal property, or otherwise; to charge or to receive in advance interest therefor; to contract for a charge for a secured or unsecured installment loan, which in principal amount shall not exceed thirty-five hundred dollars, and which under its terms shall be repayable in substantially equal installments over a period not exceeding three years, which charge shall be at a rate not exceeding six dollars per one hundred dollars per annum upon the original face amount of the instrument or instruments evidencing the loan for the entire period of the loan, and which such charge may be collected in advance: \* \* \*"

This plan differs from the plan discussed in questions 1 and 2 in that in this situation a prospective buyer actually arranges with a bank to pay money on his order to a merchant. The buyer, as far as the bank is concerned, is a borrower. The bank is not a retail merchant selling goods on credit.

You are, therefore, advised that a bank participating in a revolving credit plan, as described in question 2, cannot charge more than \$6.00 per hundred per annum collected in advance on amounts up to \$3,500 without violating Section 1001A(4) of the Banking Code (which is an exception to the General Usury Statute), and cannot charge in excess of 6% per annum simple interest on amounts in excess of \$3,500 without violating the General Usury Statute. This applies to all situations where the consumer deals with the bank and establishes credit at the bank regardless of the terms or conditions which appear on the sales slip or sale contract between buyer and seller. This is not to say that a bank cannot buy commercial paper from retail merchants at a price that will yield earnings or interest in excess of the above amounts; however, the purchase of commercial paper is a transaction between the bank and the merchant or financing company and not a transaction between the bank and a buyer or prospective buyer. In the revolving credit transaction the buyer makes arrangements with the bank, or arrangements are made for the buyer at the bank. The

transaction is between buyer and bank, and this makes the buyer a borrower.

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

1. A revolving credit plan of operation conducted by retail stores, in which the buyer is required to pay a monthly charge computed on the unpaid balance of his account at a rate in excess of 6% simple interest, violates neither the General Usury Statute nor the Small Loans Act.

2. A banking institution which furnished a revolving credit plan of operation directly to a customer may charge \$6.00 per hundred per annum, collectible in advance on the original face amount of the loan, on amounts up to \$3,500, where the loan qualifies as an installment loan under Section 1001A(4) of the Banking Code; on amounts over \$3,500, the banking institution is bound by the General Usury Statute to charge 6% simple interest per annum.

Very truly yours,

DEPARTMENT OF JUSTICE,

FREDERIC G. ANTOUN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

**MEMORANDUM OPINIONS**  
**1959-1960**

## MEMORANDUM OPINION No. 14

*Alcoholic counseling center—Contract with hospital to establish—Nonsectarian institution—Article III, Section 18, Pennsylvania Constitution—Act of August 20, 1953, P. L. 1212.*

The Department of Health may legally contract with a hospital for the establishment of a counseling center for alcoholics, made pursuant to the provisions of the Act of August 20, 1953, P. L. 1212, where its charter provides that the hospital is to be a purely public charity without distinction of race, color and religion, where its board of trustees is selected from community leaders regardless of religious affiliation, at least 50 per cent of whom are non-Catholic, and over three-fifths of its executive committee are also non-Catholic, and where the medical staff and other personnel are selected on the basis of individual training, experience and personal qualification without regard to religious affiliation; such contract would not violate Article III, Section 18 of the Pennsylvania Constitution.

Harrisburg, Pa., January 29, 1959.

Honorable C. L. Wilbar, Jr., Secretary of Health, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request regarding the establishment of a counseling center for alcoholics at Saint Vincent's General Hospital in the City of Erie. You wish to be advised whether, under the provisions of the Act of August 20, 1953, P. L. 1212, 50 P. S. §§2103-2113, your department may contract for the establishment of such a counseling center at that hospital.

Section 1 of the act reads as follows:

"The Department of Health is hereby authorized and required to establish a Division of Alcoholic Studies and Rehabilitation, hereinafter referred to as the 'Division,' to (1) study the problems of alcoholism, (2) treat and rehabilitate persons addicted to excessive use of alcoholic beverages, and (3) promote preventive and educational programs designed to eliminate alcoholism. \* \* \*"

Thus, the Legislature has, by investing your department with certain duties, taken cognizance of the fact that the Commonwealth has a duty to rehabilitate and treat persons afflicted by the excessive use of alcoholic beverages.

The question arises whether the proposed contract with Saint Vincent's General Hospital violates Article III, §18 of the Constitution of the Commonwealth, which prohibits appropriations to sectarian institutions. This section reads, in part, as follows:

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

Since the proposed contract does not provide for the payment to Saint Vincent's General Hospital on a per patient basis,<sup>1</sup> we are of the opinion that such a contract would violate Article III, §18 of the Constitution of Pennsylvania, if Saint Vincent's General Hospital were a sectarian institution.<sup>2</sup>

The Board of Trustees of the hospital is selected from community leaders representing business, industry, professions and labor, regardless of religious affiliation. At least fifty per cent (50%) of the Board of Trustees are non-Catholic. Over three-fifths (¾) of the Executive Committee of the hospital are also non-Catholic. The medical staff is selected on the basis of individual training, experience and personal qualification without regard to religious affiliation. The same is true of other personnel employed at the hospital, including the nurses. Finally, the purpose of the hospital association is to furnish medical and surgical attendance and nursing for the sick and disabled without regard to their race, color or religion. Significantly, the Charter provides that the hospital is to be a purely public charity, without distinction of race, color and religion.

On the basis of all of these facts, and especially in light of the case of *Collins v. Lewis*,<sup>3</sup> 276 Pa. 435, 120 Atl. 389 (1923), it is our opinion that Saint Vincent's Hospital Association is not a sectarian institution.

We are, therefore, of the opinion, and you are accordingly advised, that your department may legally contract with Saint Vincent's General Hospital to provide an alcoholic counseling center in the City of Erie.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOSEPH L. COHEN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

<sup>1</sup> See *Schade v. Allegheny County Institution District*, 386 Pa. 507, 126 A. 2d 911 (1956).

<sup>2</sup> See cases cited in Formal Opinion No. 686, 1957 Op. Atty. Gen. 24, 11 D. & C. 2d 344.

<sup>3</sup> In this case the Supreme Court sustained a finding of the Court below that Saint Vincent's Hospital Association was not a sectarian institution. The relevant facts governing that determination are substantially unchanged at present.

## MEMORANDUM OPINION No. 15

*Contract for psychiatric unit—Bed requirements for patients—Moneys collected on behalf of patients.*

Under the terms of a contract, dated June 1, 1957, between the then Department of Welfare and Mercy-Douglass Hospital of Philadelphia, Pennsylvania, concerning a psychiatric unit, the hospital is required to furnish the necessary care for patients required by the Department of Public Welfare to the maximum extent of 110 beds.

All moneys collected by the hospital from or on behalf of patients housed in its psychiatric unit from any source other than the monthly payments required to be made by the department shall be credited against those monthly payments.

Harrisburg, Pa., June 2, 1959.

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

Sir: You have requested an opinion of this department on the proper interpretation to be placed upon certain paragraphs of an agreement made June 1, 1957, between the Department of Welfare and the Mercy-Douglass Hospital of Philadelphia, Pennsylvania.

In Official Opinion No. 15, 1957 Op. Atty. Gen. 84, addressed to you, we passed on the validity of the contract as a whole. In that opinion we recited the legislative background concerning this hospital and the fact that the building in question was erected by The General State Authority, leased to the Commonwealth and sublet to the Board of Trustees of the Mercy-Douglass Hospital.

Prior to the drafting of the contract in question a psychiatric unit had been provided by the Mercy-Douglass Hospital for patients of the Philadelphia State Hospital. The present contract contemplated a continuation of the prior arrangement.

You specifically inquire as to the interpretation of paragraph (1) of the contract, to wit:

“(1) Mercy-Douglass agrees to operate said psychiatric unit of not less than one hundred ten (110) beds for the mentally ill adults and emotionally disturbed children.”

Our objective in interpreting the provisions of any contract is to determine the intention of the parties. In this connection we can look to the terms of the contract and, in addition, we have been furnished

with a letter, dated May 1, 1959, sent by Dr. John E. Davis, Commissioner of Mental Health to the Executive Director of the Mercy-Douglass Hospital. In his letter, Dr. Davis expressed the department's understanding of paragraph (1) of the contract, as follows:

"The Department's understanding of the above clauses, and what I am confident is the Hospital's understanding as well, is that in using the expression 110 beds the parties were describing, in Hospital nomenclature, the two and one-half floors of the Hospital which had been occupied as a psychiatric unit consisting of two floors capable of being occupied by up to 50 beds each and half of a third floor containing offices and space capable of being occupied by up to 10 beds; that it was not our intention that any specific number of beds should be actually made available or utilized in this space but that whatever patients the Department wishes to refer to the Hospital, up to the capacity of the space (i.e. 110 beds), should be accommodated. \* \* \*"

The Mercy-Douglass Hospital on May 5, 1959, concurred in this understanding. The Deputy Attorney General who was present during the meetings at which the contract was drafted corroborates this interpretation.

In view of the above quoted statement and the provisions contained in the preamble to the June 1, 1957 contract, it is our interpretation that paragraph (1) of the contract in question places upon Mercy-Douglass Hospital the obligation of supplying a psychiatric unit that will meet the needs of the Department of Public Welfare up to a maximum of 110 beds. If, however, the Department of Public Welfare does not have need for the total number of beds, there is nothing in the contract to indicate that the sums of money due Mercy-Douglass Hospital under the contract would be in any way reduced or prorated.

In this respect, we are informed that there has been a very substantial occupancy of the unit. The area in which beds are not set up is being used by the Department of Public Welfare for outpatient examination and treatment, inpatient treatment, occupational therapy, classrooms, dining and patients' recreation. In a psychiatric unit such as this when the goal is short term treatment, 100% bed occupancy is medically impractical. If five patients are discharged, the beds cannot be immediately filled for it is impossible to accurately predict whether one or even all five will return the same day or within a short period of time. A recurrent need for treatment is not unusual.

You next inquire as to the interpretation of paragraph (6) of the contract, to wit:

“Mercy-Douglass agrees to credit against the payments required herein to be made by the Department any sums in excess of nine dollars (\$9.00) per day per patient which Mercy-Douglass may receive from, for or in behalf of patients quartered in the said psychiatric unit, including payments from the Commonwealth of Pennsylvania for or on behalf of such patients.”

Under paragraph (5) of the contract the Department of Welfare agreed to pay Mercy-Douglass Hospital \$29,250.00<sup>1</sup> a month for the psychiatric unit. The sixth paragraph of the contract places upon Mercy-Douglass Hospital the obligation to credit against the paragraph (5) payments received by Mercy-Douglass Hospital from, for or on behalf of patients quartered in said psychiatric unit in excess of \$9.00 a day per patient. These moneys included payments from the Commonwealth of Pennsylvania for or on behalf of such patients.

In the letter exchanged between the Commissioner of Mental Health and Mercy-Douglass Hospital, we find that the language was intended to cover moneys received by Mercy-Douglass Hospital from the patient, his family, Blue Cross, public assistance or any moneys received on account of Appropriation Act No. 81-A, approved July 15, 1957.

Following the execution of the contract this department ruled in Official Opinion No. 15, *supra*, that patients in this psychiatric unit were, in fact, patients of the Philadelphia State Hospital. We ruled at that time that Mercy-Douglass Hospital would not be entitled to any moneys under Act No. 81-A for these patients. We now rule that Mercy-Douglass Hospital must turn over to the Philadelphia State Hospital, by way of credit, whatever sums are received from or on behalf of the patients. Since the inmates of the psychiatric unit are patients of the Philadelphia State Hospital all such collections must, under the terms of the General Appropriation Act of 1957, Act No. 95-A, approved July 19, 1957, be paid into the General Fund of the State Treasury. See Official Opinion No. 103, 1958 Op. Atty. Gen. 159. However, it is certainly beyond the contemplation of paragraph (6) of the contract that Mercy-Douglass Hospital will be obliged to credit against the \$29,250.00 a month figure any portion of that very

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<sup>1</sup> The contract, as originally drafted, called for a monthly payment of \$37,500.00. This figure was reduced at the time of the execution of the contract.

same payment regardless of its relation to the \$9.00 a day per patient recited in paragraph (6) and regardless of any cost factors.

It is, therefore, the opinion of this department and you are accordingly advised that paragraph (1) of the June 1, 1957 contract between the Department of Welfare and Mercy-Douglass Hospital places upon Mercy-Douglass Hospital the obligation of furnishing a psychiatric unit to provide for the necessary care of patients required by the Department of Public Welfare to the maximum extent of 110 beds.

Paragraph (6) of the contract, when interpreted in the light of the intention of the parties and the provisions of the General Appropriation Act of 1957, dictates that all moneys collected by Mercy-Douglass Hospital from or on behalf of patients housed in the psychiatric unit from any source other than the monthly payments made under this contract shall be credited against the monthly payments.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. GERBER,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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#### MEMORANDUM OPINION No. 16

*State armory—Joint use of facilities—Pennsylvania National Guard—Reserve components of the armed forces—Sections 102 and 501(4) of The Military Code of 1949—Section 514(e) of The Administrative Code of 1929.*

Under §§102 and 501(4) of The Military Code of 1949, the Act of May 27, 1949, P. L. 1903, and §514(e) of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, the Department of Military Affairs has legal authority to take the necessary steps to effectuate the joint utilization of State armory facilities by the Pennsylvania National Guard and reserve components of the armed forces of the United States.

Harrisburg, Pa., August 25, 1959.

Honorable A. J. Drexel Biddle, Jr., The Adjutant General, Harrisburg, Pennsylvania.

Sir: Your department has asked our advice concerning a proposal that it permit joint utilization of State armory facilities by the Pennsylvania National Guard, a State organization, and the reserve components of the armed forces, which are Federal organizations.

We understand that certain areas in the armories would be assigned respectively to the Guard and the reserve components, with other areas such as drill halls and assembly rooms used jointly.

The National Guard Bureau, Departments of the Army and the Air Force, have informed you of the following legal objections to such a joint utilization program made by certain states in the past:

1. "State appropriations are restricted for 'State Department uses only' and cannot be used where other than State agencies benefit."
2. "No permissive legislation exists for the State Adjutant General (or other State official) entering into a joint utilization agreement."
3. "Restrictive clause in site transfer to the State by donor, limiting use 'for National Guard purposes' which would preclude a joint utilization agreement."
4. "Statutes require ownership of land by the State (or subdivision thereof) as a requisite to expenditure of State (or subdivision thereof) funds for construction thereon. This differs from Federal provision of a longterm lease-hold interest as well as ownership permitting expenditure of Federal funds for construction."

We have reviewed each of these objections, and hereby advise you that none of them are applicable in this Commonwealth.

Section 102 of the Act of May 27, 1949, P. L. 1903, 51 P. S. §1-102, The Military Code of 1949, provides:

"It is the intent of this act that it shall be in conformity with all acts and regulations of the United States affecting the same subjects, and all provisions hereof shall be construed to effectuate this purpose."

This manifests a legislative design to coordinate the State's military effort with that of the Federal government. In the present instance the "acts and regulations of the United States" contemplate joint utilization of Federal-State erected armories by Federal and State military organizations. 10 U. S. C. §2234(2) (Supp. IV, 1957), 10 U. S. C., §§2233(a), 2236(a), (b), (c) and (d) (Supp. IV, 1957),

as amended, 10 U. S. C. A. §§2233(a), 2236(a), (b), (c), and (d) (1959). See also Department of Defense Directive 1225.2 of March 13, 1956, setting forth procedures, interpretations and requirements under the basic law.

Under §501(4) of The Military Code of 1949, 51 P. S. §1-501(4), the Adjutant General is authorized and directed to "maintain armories, arsenals, military reservations and all property and equipment intended to be taken into the field by troops," without limitation upon the nature of the "troops" involved. Furthermore, your department has the broad power granted by §514(e) of The Administrative Code of 1929, as amended, 71 P. S. §194(e), which provides:

"(e) Subject to the approval of the Governor, any administrative department, board or commission *may, in the interest of national defense*, grant to the United States of America any easement, right of way or other interest over, on or in any real estate belonging to the Commonwealth upon such terms and conditions and for such periods of time as such department, board or commission may prescribe." (Emphasis supplied)

These specific statutory provisions give your department ample authority to enter into the proposed joint utilization program with the Federal government.

We are of the opinion, therefore, and you are accordingly advised, that your department has legal authority to take the necessary steps to effectuate the joint utilization of State armory facilities by the Pennsylvania National Guard and reserve components of the armed forces of the United States.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

## MEMORANDUM OPINION No. 17

*Stadium pads intended for single usage—Applicability of the Bedding and Upholstery Law.*

Stadium pads, intended for single usage and not able to withstand continued use, are not "cushions" within the meaning of the Bedding and Upholstery Law, the Act of May 27, 1937, P. L. 926, as amended, unless it is shown that they constitute a possible health hazard.

Harrisburg, Pa., August 25, 1959.

Honorable Bruce J. Milliren, Secretary of the Industrial Board, Department of Labor and Industry, Harrisburg, Pennsylvania.

Sir: You have requested our advice concerning the power of the Industrial Board to define the scope of the Act of May 27, 1937, P. L. 926, as amended, 35 P. S. §§972-984, commonly called the "Bedding and Upholstery Law." Specifically, your request concerns the applicability of the act to a so-called stadium pad, which consists of a pad made of wood cellulose pulp covered with a clear polyethylene case. It is intended for use by persons sitting on hard benches for extended periods of time. The pad is apparently fire resistant but will disintegrate after repeated usage. These articles are inexpensive and are intended to be used only once. It is understood that the manufacturer plans to sell advertising to be inserted under the covers, and that such advertising may bring in sufficient revenues to cover its costs.

The problem with these pads arises from the fact that, if they are within the coverage of the act, each will require a stamp costing 1.5 cents. This sum is at least equal to the manufacturing cost of each pad, and the manufacturer is of the opinion that it will be uneconomical to manufacture these pads should such stamps be required.

The act applies to:

"... the manufacture, repair, and renovation of all mattresses, pillows, bolsters, featherbeds and other filled bedding of any description, also to cushions and all types of upholstered furniture which are intended for sale or lease in this Commonwealth . . ."<sup>1</sup>

These items are all similar in that they are stuffed articles designed for permanent use. The stadium pads in question are not intended to withstand continued use, and under such conditions will disintegrate. Consequently, they are substantially different from the types of

<sup>1</sup> Act of May 27, 1937, P. L. 926, §1, 35 P. S. §972.

cushions which the act is intended to cover. Unless it can be shown that these pads have the same possibility of health hazards contained in permanent types of upholstered cushions, they do not come within the coverage of this act.

Therefore, it is our opinion and you are accordingly advised that stadium pads, intended for single usage and not able to withstand continued use, are not "cushions" within the meaning of the Act of May 27, 1937, P. L. 926, as amended, unless it is shown that they constitute a possible health hazard.

Very truly yours,

DEPARTMENT OF JUSTICE,

DAVID C. HARRISON,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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#### MEMORANDUM OPINION No. 18

*Abandoned gas well—Liability of property owner who severs vent pipe—Section 206(c) of the Gas Operations Well-Drilling Petroleum and Coal Mining Act.*

The wilful destruction by a property owner of a vent pipe, extending above an abandoned gas well in conformity with the provisions of §206(c) of the Gas Operations Well-Drilling Petroleum and Coal Mining Act, the Act of November 30, 1955, P. L. 756, results in non-compliance with the act, and the Department of Mines and Mineral Industries may then take appropriate steps under §§503 and 504 of the act to have the vent pipe restored.

Harrisburg, Pa., August 26, 1959.

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

Sir: You have requested our opinion for an interpretation of §206(c) of the Gas Operations Well-Drilling Petroleum and Coal Mining Act, the Act of November 30, 1955, P. L. 756, 52 P. S. §2206, particularly whether your department has any cause of action against a property owner who severs a vent pipe extending above an abandoned gas well.

The pertinent section of the act provides as follows:

“(c) Upon abandoning or ceasing to operate any well which passes through a workable coal seam, the owner or operator of said well shall plug the same in the following manner.

“\* \* \* [detailed method of plugging is spelled out] After the inside casing has been drawn, there shall be placed on top of the rock or gravel above the final plug a vent pipe at least two inches in diameter with a bell fitting or other suitable device to carry any free gas into the vent pipe. The vent pipe shall extend above the surface at least six feet and shall be fitted at the top with a tee and two street ells, or similar devices, to prevent debris from entering the vent pipe. The space surrounding the vent pipe and immediately above the bell fitting or other device shall be filled with at least five feet of sand pumpings or fine gravel and, then, the space from this point shall be filled with cement to a point not less than twenty-five feet above the highest workable coal seam. From this point to the surface, the space around the vent pipe shall be filled with sand pumpings or other equally nonporous material. In a storage reservoir subject to section 304, the vent pipe shall be maintained in good repair by the storage operator. If approved by the division pursuant to an application filed under section 207, an alternative method of plugging and venting may be employed.”

The specific situation arises in a case where a well operator, after properly plugging the well, surrenders his lease to the property owner, and the latter thereafter severs the six (6) feet of vent pipe required to extend above the surface.

It is unnecessary for the purposes of answering this inquiry to deal with the question of the property owner's obligation under the act to maintain the vent pipe in good repair. It is perfectly clear that a property owner (or an operator) cannot one day fulfil his statutory obligation with respect to the vent pipe and the next day, or at any later time, destroy the vent pipe with impunity. A wilful destruction of the vent pipe under these circumstances is tantamount to non-compliance in the first place.

It is our opinion, therefore, and you are accordingly advised, that the wilful destruction by a property owner of a vent pipe, extending

above an abandoned gas well in conformity with the provisions of §206(c) of the act, results in non-compliance with the act, and your department may then take appropriate steps under §§503 and 504 of the act to have the vent pipe restored.

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON EHRLICH,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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#### MEMORANDUM OPINION No. 19

*Motor vehicles—Registration—Buses engaged in interstate or partly interstate and partly intrastate transportation—Section 401(c) of The Vehicle Code.*

Section 401(c) of The Vehicle Code, the Act of April 29, 1959, P. L. 58, relating to a special kind of registration by a certificated common carrier for a fleet of five or more buses, applies to two categories of buses, namely, (1) those engaged in interstate transportation exclusively, or (2) those engaged partly in interstate and partly in intrastate transportation, and a fleet of five or more buses may, with the approval of the Secretary of Revenue, be registered under either of these two categories.

Harrisburg, Pa., August 31, 1959.

Honorable Charles M. Dougherty, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You have requested our advice concerning the interpretation of §401(c) of The Vehicle Code<sup>1</sup> which provides:

“Notwithstanding the registration provisions of this act, motor buses and motor omnibuses, consisting of a fleet of five (5) or more, owned by a duly certificated motor bus common carrier of passengers for hire over regular routes between fixed termini, and engaged in interstate, or partly in interstate and partly in intrastate transportation, as a class may, with the approval of the secretary, be registered and fees paid therefor . . .”

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<sup>1</sup> The Act of April 29, 1959, P. L. 58 (Act No. 32).

You particularly inquire whether all motor buses and motor omnibuses engaged in interstate, or partly in interstate and partly in intrastate transportation, are to be considered as one class because of the words "as a class" appearing in that section.

Section 401(c) of the Code provides for a special kind of registration by a certificated common carrier for a fleet of five or more buses. It is a permissive type of registration, subject to the approval of the secretary. It is perfectly clear from the quoted language above that the phrase "as a class" modifies the introductory phrase "motor buses and motor omnibuses, consisting of a fleet of five (5) or more"; the fleet is the "class." The section then specifies certain conditions concerning such fleets, one of which is that the fleet be "engaged in interstate, or partly in interstate and partly in intrastate transportation." (Emphasis supplied.) There are, therefore, two categories of buses eligible for this type of registration, namely, (1) those engaged in interstate transportation exclusively and (2) those engaged partly in interstate and partly in intrastate transportation. The use of the correlative "or", emphasized above, makes this conclusion inescapable, and the secretary may apply the provisions of §401(c) of the Code to either of the categories.

Furthermore, §410 of the Code provides:

"(a) The secretary shall have the authority to make agreements with the duly authorized representatives of other states, exempting the residents of such other states using the highways of this Commonwealth from the payment of all or any taxes, fees or other charges imposed under this act, with such restrictions, conditions and privileges, or lack of them, as he may deem advisable . . ."

The last paragraph of §401(c) of the Code provides:

"The provisions of this subsection (c) shall not affect the right of the secretary to enter into reciprocity agreements as provided for in this act."

It is obvious from these provisions that the Secretary has wide latitude in making reciprocal agreements, thus negating any implication that he must consider all vehicles in one class. To make one class out of the several types of commerce set forth in §401(c) of the Code would seriously interfere with the Secretary's discretion in the execution of the reciprocity agreements, for he would then have to include purely interstate buses with those partly interstate and partly intrastate; fleet owners seeking to register under §401(c)

would be required to register their interstate buses. Pennsylvania has entered into reciprocity agreements with other states so that out-of-state buses moving strictly in interstate commerce over our highways are not required to have Pennsylvania registration. It hardly need be said that a breakdown in these reciprocal arrangements would create havoc, with states resorting to retaliatory measures. The Legislature clearly provided that §401(c) was not to affect these reciprocity agreements, and this section should not be so interpreted unless the language is clear and compelling.

We are of the opinion, therefore, and you are accordingly advised, that you may in your discretion apply the provisions of §401(c) of The Vehicle Code to either of two categories, namely, (1) a fleet engaged exclusively in interstate transportation, or (2) a fleet engaged partly in interstate and partly in intrastate transportation.

Very truly yours,

DEPARTMENT OF JUSTICE,

ELMER T. BOLLA,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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#### MEMORANDUM OPINION No. 20

*Historical Preservation Fund—Transfer of surplus to General Fund—Section 2802-A of The Administrative Code of 1929.*

The Historical and Museum Commission is required to transfer to the General Fund as "surplus" under the provisions of §2802-A of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, only those sums credited to the Historical preservation Fund during any fiscal biennium which exceed the average biennial total amount credited to it from all sources for the two preceding fiscal bienniums.

Harrisburg, Pa., December 29, 1959.

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

Sir: You have requested our interpretation of §2802-A of The Administrative Code of 1929, Act of April 9, 1929, P. L. 177, as amended, 71 P. S. §717, with particular reference to the following language:

“\* \* \* Whenever the moneys credited to the Historical Preservation Fund during any fiscal biennium exceed the average biennial allocation for the above purposes for the two preceding fiscal bienniums, the excess shall be transferred to the General Fund.”

Your question is whether “allocation” refers to the sums in the Historical Preservation Fund, to sums provided by the General Assembly by way of appropriation, or to all Commission funds. The “allocation” clearly cannot be less than the total of the sums provided from all sources for the specified “above” purposes during the designated periods. The question, then is what is meant by “above purposes” in the language quoted, *supra*.

Section 2802-A appropriates the moneys in the Fund for the preservation, care, and maintenance of the historical buildings, museums, grounds, monuments, public records, and antiquities committed to its custody, for the publication and republication of matters of historical or archaeological interests, and for the research and editorial work incidental thereto, and for the purchase of publications, postcards, and other souvenirs of an historical nature for sale at the State Museum and at the historical properties administered by the Commission.

This language appears to be an attempt to make a comprehensive listing of the Commission’s functions, and it is our opinion that it accomplishes that purpose. Even if this were not the intent, or if the language were deemed to have failed in this intent because it was not sufficiently inclusive, it is noted that “above purposes” is not limited to §2802-A, since §2801-A is also “above” and that section spells out in detail all powers and duties of the Commission.

We interpret “above purposes” to mean all activities of the Commission as specified in both §§2801-A and 2802-A. It follows that the “allocation” specified in §2802-A is the total of all funds made available for the Commission’s activities, whether by direct legislative appropriation, or from the Historical Preservation Fund or from any other source.<sup>1</sup>

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<sup>1</sup>It should be noted that on December 8, 1959, the Governor signed Act No. 642 (P. L. 1736), which eliminates the language in §2802-A quoted at the beginning of this Opinion. The amendment makes it perfectly clear that *all* moneys in the Fund are appropriated to the Commission to cover all activities of the Commission set forth in both §§2801-A and 2802-A. This amendment is not retroactive in operation.

It is our opinion and you are accordingly advised that the Historical and Museum Commission is required to transfer to the General Fund as "surplus" only those sums credited to the Historical Preservation Fund during any fiscal biennium which exceed the average biennial total amount credited to it from all sources for the two preceding fiscal bienniums.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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MEMORANDUM OPINION No. 21

*Labor relations—Secondary boycott—Unconstitutional statute—Courts concern for only portion of section.*

Since a court of record expressed its concern for only a portion of §6(2)(d) of the Pennsylvania Labor Relations Act, the Act of June 1, 1937, P. L. 1168, as amended, in holding the section unconstitutional, there is such substantial doubt about the extent of the unconstitutional determination of §6(2)(d) as to warrant the issuance of a complaint by the Pennsylvania Labor Relations Board upon a charge alleging the existence of a secondary boycott.

Harrisburg, Pa., February 11, 1960.

Honorable Michael J. Crosetto, Chairman, Labor Relations Board,  
Department of Labor and Industry, Harrisburg, Pennsylvania.

Sir: You have requested the advice of this Department as to whether the decision of the Supreme Court of Pennsylvania in *Pennsylvania Labor Relations Board v. Chester and Delaware Counties Bartenders, Hotel & Restaurant Employees Union et al.*, 361 Pa. 246, 64 A. 2d 834 (1949) held unconstitutional the entire Section 6(2)(d) of the Pennsylvania Labor Relations Act, the Act of June 1, 1937, P. L. 1168.

Section 6(2)(d) was inserted in the Pennsylvania Labor Relations Act by the amendment of July 7, 1947, P. L. 1445, and provides:

" . . . (2) It shall be an unfair labor practice for a labor organization, or any officer or officers of a labor organization, or any agent or agents of a labor organization, or any one acting in the interest of a labor organization, or for an employee or for employees acting in concert \* \* \*

\* \* \* \* \*

"\* \* \* (d) To engage in a secondary boycott, or to hinder or prevent by threats, intimidation, force, coercion or sabotage the obtaining, use or disposition of materials, equipment or services, or to combine or conspire to hinder or prevent by any means whatsoever, the obtaining, use or disposition of materials, equipment or services."

In the *Bartenders* case, the Board's Complaint alleged, *inter alia*, (1) that the respondents had engaged in a secondary boycott and (2) that the respondents had combined and conspired to hinder and prevent the employer from obtaining the use and disposition of materials, equipment and services necessary for the operation of its business by inducing deliverymen not to deliver such materials, equipment and services, and by maintaining picket lines about the employer's place of business. The Board's Final Order found a violation of the second of the above allegations; the Order did not specifically find that the respondents had engaged in a secondary boycott.

Upon enforcement proceedings in the Court of Common Pleas in Delaware County, enforcement of the Board's Order was denied. In his opinion, Judge Sweney stated that the *only portion of Section 6(2)(d) with which the Court was concerned* was the part that made it illegal,

" . . . to combine or conspire to hinder or prevent by any means whatsoever, the obtaining, use or disposition of materials, equipment or services."

The Court then went on to consider the constitutionality of this section and concluded that:

" . . . Section 6, subsection 2, clause (d) of the Labor Relations Act, is void as an unconstitutional denial of the right of free speech."

The Supreme Court of Pennsylvania affirmed the decision of the Court below in a *per curiam* opinion, adopting the opinion of Judge Sweney.

I understand that the Board now has before it a charge alleging a simple secondary boycott, i. e., secondary pressures exercised by

a union against persons other than the employer in order to persuade the employer to bargain with the union. The specific question, therefore, is whether the secondary boycott provision of Section 6(2)(d) has been held unconstitutional in the *Bartenders* case.

In view of the precise language used by Judge Sweney in restricting his decision to the last clause of Section 6(2)(d), and dispute his broad statement that Section 6(2)(d) was unconstitutional, it could very well be maintained that the prior two clauses in the section were not affected. This conclusion is reinforced by the broad separability provision in Section 14 of the Pennsylvania Labor Relations Act:

"If any clause, sentence, paragraph or part of this act, or the application thereof to any person or circumstances, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this act and the application of such provision to other persons or circumstances, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved. It is hereby declared to be the legislative intent that this act would have been adopted had such invalid provisions not been included."

On the other hand, because of the interrelated nature of Section 6(2)(d), dealing with the various aspects of the secondary boycott question, it could well be argued that Judge Sweney's opinion struck down the section in its entirety.

I do not believe it is the function of the Pennsylvania Labor Relations Board or of this Department to resolve that question. I am firmly convinced that there is such substantial doubt as to the extent of the *Bartenders* holding that there is ample justification for the Pennsylvania Labor Relations Board to present the question to the courts for adjudication on this precise issue. The presumption of constitutionality of a legislative enactment still prevails; and where a charge has been filed with the Board outlining a simple secondary boycott situation, I believe it is the Board's obligation to issue a complaint and proceed to a determination of the question.

It is, therefore, the opinion of this Department, and you are accordingly advised, that there is such substantial doubt about the extent of the unconstitutional determination concerning Section 6(2)(d) of the Pennsylvania Labor Relations Act in the *Bartenders* case as to

warrant the issuance of a complaint by the Pennsylvania Labor Relations Board upon a charge alleging the existence of a secondary boycott.

Very truly yours,

DEPARTMENT OF JUSTICE,

HERBERT N. SHENKIN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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MEMORANDUM OPINION No. 22

*Veterans' bonus—Days when veteran was on nonpay status—Korean Veterans' Conflict Compensation Act.*

Veterans who have spent some of their service during the Korean war on nonpay status for violations of military law are entitled to payment under the Korean Veterans' Conflict Compensation Act, the Act of July 8, 1957, P. L. 569.

Harrisburg, Pa., March 7, 1960.

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

Sir: You have requested advice regarding the propriety of paying, or refusing to pay, compensation under the Korean Veterans' Conflict Compensation Act, Act of July 8, 1957, P. L. 569, to veterans for days on which the veteran was on nonpay status, in most cases due to confinement in either the brig or stockade.

The act contains only one proviso by which payment of compensation can be refused for time served during the applicable period—assuming, of course, that the veteran meets other eligibility requirements. This provision, Section 2(5), forbids payment to veterans who were discharged during the conflict or thereafter under other than honorable conditions. Presumably, the Legislature was aware that some veterans could have spent some of their service during the Korean war on nonpay status for violations of military law, and still have been discharged honorably. Since these men were always subject to Army discipline and could have been sent into combat service at any

time during this period, we cannot assume that the Legislature intended that this service time should not be compensated. As the armed forces did not see fit to discharge these people under other than honorable conditions, the Korean Veterans' Conflict Compensation Act does not require a refusal of payment.

This conclusion is strengthened by the fact that the World War II bonus was paid for time on nonpay status, a fact known to the Legislature when it passed the present act. As there is no prohibition against such payments in the Korean Act, it may be assumed that the omission was deliberate.

We are of the opinion and you are therefore advised that payment under the Korean Veterans' Conflict Compensation Act should be made to veterans for time spent during June 25, 1950 to January 27, 1954, on nonpay status.

Very truly yours,

DEPARTMENT OF JUSTICE,

DAVID E. ABRAHAMSEN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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#### MEMORANDUM OPINION No. 23

*Game law—Juvenile game offenders—Field settlements in lieu of proceedings before justice of the peace—Juvenile court prosecutions.*

Juvenile game law offenders are entitled to make field acknowledgment of guilt and pay their fines to the game protector in lieu of proceedings before a justice of the peace; prosecutions in cases where no settlements are made must be brought in the juvenile court.

Harrisburg, Pa., April 6, 1960.

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

Sir: You have directed our attention to the fact that under this department's Formal Opinion 317, given to your predecessor on Febru-

ary 7, 1940, 1939-40 Op. Atty. Gen. 179 juvenile game law offenders may make a field acknowledgment of guilt and pay their fines to the game protector in lieu of proceedings before a justice of the peace.

This advice appears to be in conflict with Formal Opinion No. 333, given to the Commissioner, Pennsylvania Motor Police, on March 13, 1940, 1939-40 Op. Atty. Gen. 254 to the effect that juveniles charged with summary offenses must be turned over to Juvenile Court.

However, a careful reading of both opinions will indicate that there is a clear distinction between them. The opinion to the Game Commission concerns cases *before* they are brought to the justice of the peace. The opinion to the Motor Police (now State Police) relates to cases that have not been disposed of by field acknowledgment but must go either to the justice of the peace or the Juvenile Court for disposition, and in such situation it is the Juvenile Court which has jurisdiction.

You are, therefore, advised that you may continue to observe Formal Opinion No. 317 with respect to juvenile game law cases settled on field acknowledgments. Where no settlement is made, juvenile game law prosecutions are controlled by Formal Opinion No. 333 and must be brought in Juvenile Court.

Yours very truly,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,  
*Deputy Attorney General.*

ANNE X. ALPERN,  
*Attorney General.*

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