

**Commonwealth of Pennsylvania**

**MILTON J. SHAPP**

*Governor*

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**OPINIONS**

**OF THE**

**ATTORNEY GENERAL**

**OF**

**Pennsylvania**

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**1971**

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**J. SHANE CREAMER**

*Attorney General*

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J. SHANE CREAMER

*Attorney General*

## ABOUT J. SHANE CREAMER

When J. Shane Creamer was appointed Attorney General of Pennsylvania, he announced his intention to make the Justice Department a Public Interest Law Firm. He said then, "Unfortunately, too many governmental agencies are controlled by special interest groups. Our special interest group will be the people of Pennsylvania. We will be aggressive in our attempts to move constructive forces for positive social change."

Attorney General Creamer has been true to his word. This volume of 94 opinions issued since he took office covers many important aspects of life in Pennsylvania—consumer protection, voting rights, working conditions, prison reform, capital punishment, guidelines for use by police, employment discrimination and environmental control.

This is not a new stance for Attorney General Creamer. He has a long history of working for citizens without regard to the political regime in power at any given time. For instance, he served as a Federal attorney under both Robert Kennedy and John Mitchell. And he has worked under both Republican and Democratic state administrations.

Of this volume, Attorney General Creamer commented, "The Justice Department is becoming, in truth, a law firm of the people. The wide range of problems discussed in these opinions affect all of us who live in Pennsylvania and this is only the beginning. We intend to touch as many areas of human existence as we can in our efforts to improve the quality of life and justice for all Pennsylvanians."

I recommend your reading these 94 opinions of Shane Creamer. They reflect some of the efforts of this administration to make State government more effective in its role as the advocate of the people.

MILTON J. SHAPP,  
*Governor of Pennsylvania*

## OFFICIAL OPINION No. 1

*Constitutional Law—Death penalty—Previous Attorney General's declaration of unconstitutionality rescinded.*

1. Under present state of law, Attorney General of Commonwealth of Pennsylvania should not rule on constitutionality of death penalty.
2. The opinion of preceding Attorney General that death penalty was unconstitutional is rescinded.
3. Abolishment of death penalty should be by Legislature.
4. Electric chair should not be reinstalled.
5. Prisoners under sentence of death being held in solitary confinement should be returned to prison population as soon as possible.

Harrisburg, Pa.,  
January 27, 1971

Commissioner Allyn Sielaff  
Bureau of Correction  
Box 200  
Camp Hill, Pennsylvania

Dear Commissioner Sielaff:

I have carefully reviewed my predecessor's letter on the constitutionality of the death penalty.\* In addition, I have examined the law on this subject, including decisions of the United States Supreme Court, especially *In Re Kemmler*, 136 U. S. 436 (1890), *Trop v. Dulles*, 356 U. S. 86 (1958), *Weems v. United States*, 217 U. S. 349 (1910), and *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459 (1947); decisions of the United States Court of Appeals for the Third Circuit, including particularly *United States ex rel. Melton v. Hendrick*, 330 F. 2d. 263 (1964), and decisions of the Pennsylvania Supreme Court, particularly *Commonwealth v. Howard*, 426 Pa. 305, 231 A. 2d 860 (1967), *Commonwealth v. Smith*, 405 Pa. 456, 176 A. 2d 619 (1962), and *Commonwealth v. Sterling*, 314 Pa. 76, 170 Atl. 258 (1934).

Further, I am aware of the two cases currently pending before the Supreme Court of the United States involving the constitutionality of the death penalty, *McGautha v. California*, No. 203 and *Crampton v. Ohio*, No. 204, 39 U. S. L. W. 3209.

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\* See pp. 3-7 *infra*.

It is my opinion that under the state of the law as it now exists and bearing in mind the fact that no prisoner under the death sentence in Pennsylvania is currently scheduled for execution, the Attorney General of the Commonwealth of Pennsylvania should not rule on the constitutionality or the unconstitutionality of the death penalty in Pennsylvania at this time.

Although philosophically I agree with Mr. Speaker's position on capital punishment, this remains with me a personal view and one which cannot influence my judgment as chief law enforcement officer of the Commonwealth sworn to uphold the law. I am not deciding whether the death penalty is constitutional or unconstitutional and I am not prepared to say at this time that under other circumstances the Attorney General would not be within his legal rights in declaring an act of the State Legislature unconstitutional and unenforceable. I am simply stating that I am rescinding the opinion of my predecessor insofar as he assumed to rule on the broad question of the constitutionality of the death penalty.

If the death penalty in Pennsylvania is to be abolished at this time, such action should be taken, either by the Legislature by repeal or by a court of competent jurisdiction declaring the death penalty unconstitutional.

With regard to the dismantling of the electric chair at Rockview, it is my understanding that this has already been done. The death sentence has not been imposed in Pennsylvania for nearly a decade, and since the death penalty is presently being litigated before the U. S. Supreme Court, there is clearly no immediate necessity or legal requirement for maintaining the electric chair at Rockview. Accordingly, no useful purpose would be served by reinstalling the chair.

I am informed that the 24 prisoners presently under the death sentence in Pennsylvania are now being held in solitary confinement, purportedly under the authority of the Death Sentence Act of June 19, 1913, P. L. 528, 19 P. S. § 1121 et seq., but that Act mandates solitary confinement for convicts sentenced to be executed only at such time as the Governor's warrant is received by the appropriate warden. After inquiry, I have been informed that at the present time there are no outstanding valid warrants issued by any Governor in accordance with that Act. Accordingly, since it is clear that the Death Sentence Act provides no legal authority for holding prisoners who are under the sentence of death in solitary confinement until such time as a valid Governor's warrant shall

issue, the 24 prisoners now held in maximum security should be returned to the general prison population as soon as possible providing the same is safe and practical. I direct you to provide copies of this opinion within a reasonable time to the 24 prisoners who are presently under the sentence of death and to report to me at your earliest possible convenience the action that you take in each case.

All opinions or directives of any previous Attorney General are hereby rescinded insofar as they are not consistent with this opinion and directive.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

*Opinion of Former Attorney General Fred Speaker*

Harrisburg, Pa.,  
January 19, 1971

Mr. Joseph Mazurkiewicz, Superintendent  
Rockview State Correctional Institution  
R. D. #3  
Bellefonte, Pennsylvania

Dear Warden Mazurkiewicz:

You are directed to remove the Electric Chair from the Execution Room at Rockview State Correctional Institution and begin conversion of the room into an office.

This is another step toward a more rational and humane correctional policy and is intended to build upon the verbal instructions previously given you not to hire a new Public Executioner.

These steps can be justified purely on the basis of economy. There have been no executions during the past two Administrations, and public pronouncements by Governor Shapp indicate that no electrocutions will be permitted in the foreseeable future. Because of the critical need for additional office space and because of the continued irrational expense of paying an inactive Executioner, sound management principles would indicate the wisdom of this decision.

But I am not content to base this directive on economics alone. I am convinced that the imposition of the death penalty constitutes "cruel and unusual punishment" prohibited by the Eighth and Fourteenth amendments to the United States Constitution and perhaps is one of the

“cruel punishments” proscribed by Section 13 of the Pennsylvania Declaration of Rights.

The question of constitutionality of capital punishment has seldom been considered by the Supreme Court of the United States. Indeed, the scope of the “cruel and unusual punishment” clause has been substantially reviewed by the Court less than a dozen times.

“The Court, however, has never held directly that the death penalty is or is not cruel and unusual punishment. It has heard argument on the issue only once, and then decided the case on other grounds. Three opinions contain short statements, made in the course of decision on related issues, which suggest that capital punishment is constitutionally permissible. Yet more recent doctrinal developments have not only undermined these statements, but also indicated growing concern among the Justices with the operation of the death penalty. The basic eighth amendment question now hangs in an uncomfortable limbo.” (Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 Harv. L. Rev. 1773, 1775 (1970).)

The failure of the Supreme Court to act does not preclude state executive action. On the contrary, the Attorney General’s oath “to support, obey and defend the Constitution” obliges him to determine and act upon a constitutional mandate when the Court remains silent. (See, e.g., *Ex Parte La Prade*, 289 U. S. 444, 458 (1932) where the Court said that the state Attorney General might hold “. . . that the statute is unconstitutional and that, having regard to his official oath, he rightly may refrain from effort to enforce it.”)

Upon examination of the applicable constitutional proscriptions and after logical reflection, I am of the opinion that imposition of the death penalty in the Electric Chair is both “cruel” and “unusual” punishment. Accordingly, the portions of the Act of June 19, 1913, P. L. 528, providing for a sentence of death by electrocution are unconstitutional and unenforceable.

Execution by electrocution is cruel. An early opinion of the United States Supreme Court stated that:

“. . . Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.” (*In re: Kemmler*, 136 U. S. 436, 447 (1890).)



Can any one read the description of an electrocution by former Pennsylvania Supreme Court Justice Curtis Bok and believe that savagely-inflicted lingering death not to be "inhuman and barbarous"?

"He started, painfully and uncertainly, to lower himself into the chair, but now the guards were swift. They lifted him deep into the seat and adjusted the electrodes at calves and wrists.

"Then they fastened a thick belt across his chest and lowered over his head the heavy wired leather mask.

"It hid all but the tip of his nose and his lips. He was making efforts to quiet them by biting his tongue, the best that he could do, against his racing mind and heart, to keep control and to sit erect . . .

"The guards stepped back. The Warden, who had stood by with arm raised, lowered his hand. It had taken a minute and thirty-seven seconds.

"There was a low whine and a short loud snap, as of huge teeth closing.

"Roger's head flew back and his body leaped forward against the confining straps. Almost at once smoke arose from his head and left wrist and was sucked up into the ventilator overhead. The body churned against the bonds, the lips ceased trembling and turned red, then slowly changed to blue. Moisture appeared on the skin and a sizzling noise was audible. The smell of burning flesh grew heavy in the air.

"Roger was being broiled.

"The current went off with a distinct clap after about two minutes and Roger slumped back into his seat, his head hanging. No one moved. Then came the second jolt and again the body surged against the restraining straps and smoke rose from it. The visible flesh was turkey red.

"Again the current slammed off and this time the doctor stepped forward to listen, but he moved back again and shook his head. Apparently Roger still clung faintly to life.

"The third charge struck him, and again the smoking and sizzling and broiling. His flesh was swelling around the straps.

"The doctor listened carefully and raised his head.

"I pronounce this man dead,' he said, folding up his stethoscope. It was seven minutes after Roger had been seated in the chair." (Bok, *Star Wormwood*, 114-15 (1959).)

The method of execution by electrocution was adopted as a humane device, intended to kill instantly. But Justice Bok tells us that intention fails. And the very language of the Pennsylvania statute implicitly acknowledges that the death may be lingering:

“. . . Such punishment, in every case, must be inflicted by causing to pass through the body of the convict a current of electricity of intensity sufficient to cause death, *and the application of such current must be continued until such convict is dead.*” (Emphasis added.) (Act of June 19, 1913, P. L. 528, § 1.)

Even if some new form of immediate electrocution or other device of instantaneous death could be developed by inventive modern technology, I am convinced it would be constitutionally defective under evolving and enlightened humanitarian standards. The United States Supreme Court has recognized that Eighth Amendment standards change. What once was permissible no longer is. (See, e.g., *Trop v. Dulles*, 356 U. S. 86, 101 (1958): “The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”; *Weems v. United States*, 217 U. S. 349, 378 (1910): “The clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”)

Death by electrocution is constitutionally prohibited also because it is unusual. Under our evolving standards of decency and humane justice, the imposition of the death penalty has become unusual in the extreme. In the first five years of the last decade, 181 men were executed in the United States. That total dropped to ten in the next two years; and no one was executed in the last three. In Pennsylvania there have been no executions since 1962. To kill a convict now, in the face of this progressive evolution would be so unusual as to merit constitutional condemnation.

I have found no Pennsylvania Supreme Court case expressly upholding the constitutionality of the death penalty under the Pennsylvania Constitution, although it is implied by dictum in *Commonwealth v. Howard*, 426 Pa. 305 (1967). But even if I had, Pennsylvania is obliged to follow the proscriptions of the Eighth Amendment to the federal constitution as imposed by the Fourteenth Amendment. (See *Robinson v. California*, 370 U. S. 660 (1962).)

The Fourteenth Amendment suggests one other ground for invalidating the death penalty. That portion which mandates "equal protection" has been grossly offended by the imposition of the death penalty. In the words of the former United States Attorney General Ramsey Clark:

"... It is the poor, the sick, the ignorant, the powerless and the hated who are executed.

"Racial discrimination is manifest from the bare statistics of capital punishment. Since we began keeping records in 1930, there have been 2,066 Negroes and only 1,751 white persons put to death. Negroes have been only one-eighth of our population. Hundreds of thousands of rapes have occurred in America since 1930, yet only 455 men have been executed for rape—and 405 of them were Negroes. There can be no rationalization or justification of such clear discrimination. It is outrageous public murder, illuminating our darkest racism." (Clark, *Crime in America*, 335 (1970).)

This directive is intended to constitute both an administrative order to you as an employee of the Justice Department and a formal opinion of the Attorney General. It is intentionally issued during that brief period after the termination of Governor Shafer's incumbency but before I leave office as Attorney General. The Administrative Code of April 9, 1929, P. L. 177, gives the Attorney General the power to furnish legal advice, imposes the duty to comply upon Commonwealth departments and officers, and provides that he remains in office until a successor is "appointed and qualified." It is, openly and candidly, an attempt on my part to reach into the future.

I believe deeply that our practice of killing criminals is both a disgusting indecency and demeaning to the society that tolerates it. In conscience I am compelled to speak out and to do what I can to stop it.

The Death Room is an obscenity. Hopefully legislation to abolish the death penalty will be enacted this year. In the meantime I am unwilling to leave intact, as I depart my office, a cruel instrument of public vengeance.

Sincerely,

FRED SPEAKER,  
*Attorney General.*

## OFFICIAL OPINION No. 2

*Elections—Duration of term of judge appointed to fill vacancy.*

1. Judge appointed to fill vacancy in Commonwealth Court cannot hold office for a term longer than the unexpired term of his predecessor, who resigned to assume a position of Associate Justice on the Supreme Court.
2. Secretary of the Commonwealth is instructed to certify to the county board of elections that an election shall be held for this office on November 2, 1971.\*

Harrisburg, Pa.,  
February 24, 1971

Honorable C. DeLores Tucker  
Secretary of the Commonwealth  
Third Floor, South Wing  
Main Capitol Building  
Harrisburg, Pennsylvania

Dear Secretary Tucker:

We have your request of January 21, 1971, for our opinion as to whether an election should be held on November 2, 1971, for the seat on the Commonwealth Court now held by Judge Theodore O. Rogers.

Judge Rogers was appointed to the Commonwealth Court on January 4, 1971, to fill the vacancy created by the resignation of Judge Alexander F. Barbieri. Judge Barbieri's term would have expired on the first Monday of January, 1972, had he not resigned. In the normal course, Judge Barbieri would have stood for election on November 2, 1971.

Article V, Section 13(a) of the Constitution of Pennsylvania provides:

“Justices, judges and justices of the peace shall be elected at the municipal election next preceding the commencement of their respective terms of office by the electors of the Commonwealth or the respective districts in which they are to serve.”

Section 13(a) is a general election provision for judicial offices and provides that such elections shall be conducted at the next municipal election day. Since Judge Barbieri's appointive term under the Commonwealth Court Act of 1970 would have expired on the first Monday

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\* Rev'd—see *Rodgers v. Tucker*, 443 Pa., 509, 279 A. 2d 9 (1971).

of January, 1972, the next municipal election day in this case is November 2, 1971.

Section 13(b) provides the appointing mechanism for the Governor in the case of a vacancy in a judicial office. Construing Section 13(a) and (b) together the appointment to fill the vacancy under Section 13 cannot extend beyond the unexpired portion of Judge Barbieri's original appointive term.

It would be unacceptable and in our opinion illegal to allow Judge Rogers to hold office for a term longer than that of Judge Barbieri without being required to stand for election. See *Commonwealth ex rel. King v. King*, 85 Pa. 103 (1877), cited with approval in *O'Neil v. White*, 343 Pa. 96, 22 A. 2d 204 (1941).

Accordingly, it is our opinion and you are advised that pursuant to the certification mandate of Section 905 of the Election Code, 25 P. S. § 2865, you should certify to the County Boards of Election that an election shall be held for this office on November 2, 1971.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION No. 3

#### *Workmen's Compensation—Qualifications for position of referee.*

1. Previous ruling of Department that appointment by the Governor to the position of Workmen's Compensation Referee should be made only to practicing attorneys is rescinded.

Harrisburg, Pa.,  
March 1, 1971

Honorable Paul J. Smith  
Secretary of Labor and Industry  
1700 Labor and Industry Building  
Harrisburg, Pennsylvania

Dear Secretary Smith:

Thank you for your letter of February 16, 1971. I have given serious thought to your suggestion that the position of Workmen's Compensa-

tion Referee be not restricted to individuals admitted to the practice of law.

There is no requirement in the Pennsylvania Workmen's Compensation Act, as amended, 77 P. S. § 1 et seq., that Referees be attorneys. I am of the opinion that there are many qualified persons who could serve effectively as Workmen's Compensation Referees who are not necessarily lawyers. Accordingly, the previous ruling of this Department that appointments by the Governor to the position of Workmen's Compensation Referee should be made only of individuals admitted to the practice of law is hereby rescinded.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 4

*Pension Funds—House Bill 190—Effect on firemen's and police pension funds.*

1. House Bill 190 repeals present Gross Premiums Tax, Act of February 21, 1971, P. L. 33\*.
2. Act of June 28, 1895, P. L. 408, as amended, 72 P. S. § 2262 and Act of May 12, 1943, P. L. 259, 72 P. S. § 2263.1 provide that the two percent tax paid upon premiums by foreign fire insurance companies shall be paid to local municipalities for firemen's pension funds, and the two percent tax paid upon premiums by foreign casualty insurance companies should be paid to state and local police pension funds.
3. Section 8 of Gross Premiums Tax is surplusage, and premiums obtained from fire insurance companies and foreign casualty insurance companies can be paid to various pension funds as provided by separate statute without the necessity of a section in the tax bill specifically disposing of the proceeds of the tax.
4. To hold that the State Treasurer cannot distribute the taxes on foreign fire and casualty insurance companies as mandated by statute merely because the taxing statutes fail to specifically dispose of a portion of the proceeds would lead to an unreasonable and absurd statutory result.

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\* The first Income Tax was held to violate the Uniformity Clause of the Pa. Const., Art. VIII, Sec. 1, see *Amidon v. Kane*, 444 Pa. 38, 279 A. 2d 53 (1971).

Harrisburg, Pa.,  
March 1, 1971

Honorable William G. Sesler  
State Senate  
Room 352, Main Capitol Building  
Harrisburg, Pennsylvania

Dear Senator Sesler:

You have requested advice as to whether under House Bill No. 190, Printer's No. 445, payments to local firemen's pension funds pursuant to the Act of June 28, 1895, P. L. 408, as amended, and payments to state and local police pension funds pursuant to the Act of May 12, 1943, P. L. 259, as amended, will cease.

Initially, it is to be noted that House Bill 190, in Article IX, part V, Section 905, specifically repeals the Act of February 21, 1971, P. L. 33, known as the Gross Premiums Tax. However, such repeal does not extend to either the Act of June 28, 1895 or the Act of May 12, 1943. The present Gross Premiums Tax, 72 P. S. § 2270.1 provides in Section 8 as follows:

"The taxes paid by foreign fire insurance companies under this act shall continue to be distributed and used for firemen's relief pension or retirement purposes, as provided by section two of the act, approved the twenty-eighth day of June, one thousand eight hundred ninety-five (Pamphlet Laws 408), as amended; and the taxes paid by foreign casualty insurance companies under this act shall continue to be distributed and used for police pension, retirement or disability purposes as provided by the act, approved the twelfth day of May, one thousand nine hundred forty-three (Pamphlet Laws 259), as amended.

All other taxes received under this act shall be credited to the General Fund for general revenue purposes."

House Bill 190, Printer's No. 445 does not incorporate a similar section as Section 8 quoted above. House Bill 190 does in Article IX continue the Gross Premiums Tax on insurance companies at the same rate and generally under the same terms, expanding the definition of insurance companies to bring within the act additional taxpayers.

The Act of June 28, 1895, P. L. 408, as amended, 72 P. S. § 2262 and the Act of May 12, 1943, P. L. 259, 72 P. S. § 2263.1 provide, in

part, that the two percent tax paid upon premiums by foreign fire insurance companies shall be paid to local municipalities for firemen's pension funds and the two percent tax upon premiums by foreign casualty insurance companies should be paid to state and local police pension funds. Pertinent language in each statute is as follows:

“ . . . there *shall* be paid by the State Treasury to the treasurers of several cities, towns, townships, and boroughs within the Commonwealth, the entire net amount received from the two percentum tax paid upon premiums by fire insurance companies . . . ”

“ . . . there *shall* be paid by the State Treasury to the treasurers of the several municipalities and counties within the Commonwealth, and to the State Employees Retirement Fund for State Police pension and retirement purposes, the entire amount received from the two percentum tax paid upon premiums by foreign casualty insurance companies . . . ” (Emphasis supplied.)

The question thus raised is the effect, if any, of the omission in House Bill 190 of a specific provision relating to the partial disposition of the Gross Premiums Tax.

It is the opinion of this Department that Section 8 of the present Gross Premiums Tax, *supra*, is surplusage and that the premiums tax obtained from foreign fire insurance companies and foreign casualty insurance companies can be paid to the various pension funds as provided by separate statute without the necessity of a section in the tax bill specifically disposing of the proceeds of the tax.

Both the Act of 1895 and 1943 state that the State Treasurer “shall” pay the proceeds to the various pension funds. Thus, a mandatory duty is placed upon the State Treasurer and not one of discretion. The Pennsylvania Supreme Court in interpreting the Acts of 1895 and 1943 have consistently referred to this duty as mandatory with little discretionary powers in State government even as to the utilization of the proceeds. In *Firemen's Relief Association of Washington v. Minehart*, 430 Pa. 66, 241 A. 2d 745 (1968), it was initially stated by the court:

“Foreign fire insurance companies in Pennsylvania are assessed a tax of two percent on premiums collected by them in this Commonwealth. Under the Act of June 28, 1895, P. L. 408, § 2, as amended, 72 P. S. § 2262, there *must be paid*



annually to the treasurers of the various municipal subdivisions in Pennsylvania a portion of this tax money corresponding to the amount of foreign fire insurance written in the receiving municipality . . . ." (Emphasis supplied.)

To the same effect, see *Volunteer Firemen's Relief Association of the City of Reading v. Minehart*, 425 Pa. 82, 227 A. 2d 632 (1967). For a similar decision relating to the payment of monies to the police pension funds, see *Hanover Township Police Pension and Benefit Fund Association Case*, 396 Pa. 313, 152 A. 2d 705 (1959). In each case, the Pennsylvania Supreme Court refers solely to the Acts of 1895 and 1943 without specific reference to the taxing statutes or specific reference to Section 8 of the Gross Premiums Tax. The decisional language of the Supreme Court, albeit dicta, is mandatory in nature and without a statutory reference to the source of the funds.

The omission of a similar Section 8, partially disposing of the tax funds, in House Bill 190 does not remove the mandatory duty of the State Treasurer appearing in other acts to dispose of funds to a particular group in a particular manner. As long as the funds are properly appropriated by the Legislature in accordance with Article 3, Section 24 of the Pennsylvania Constitution, the State Treasurer must transmit to the various pension funds the amounts so provided by the Acts of 1895 and 1943.

To hold that the State Treasurer cannot distribute the taxes on foreign fire and casualty insurance companies as mandated by statute merely because the taxing statutes fail to specifically dispose of a portion of the proceeds would lead to an unreasonable and absurd statutory result. This the Statutory Construction Act, Section 52 (1), 46 P. S. § 552(1), specifically forbids.

We are of the opinion, therefore, and you are accordingly advised, that House Bill 190, Printer's No. 445 does not repeal or restrict the disposition of the Gross Premiums Tax proceeds collected from foreign fire and foreign casualty insurance companies in accordance with the Act of June 28, 1895 and the Act of May 12, 1943.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

## OFFICIAL OPINION No. 5

*Schools—Membership, board of directors of Intermediate Unit 18—Effect of reorganization—Applicability of Intermediate Unit Act.*

1. Thirteen present directors of Intermediate Unit 18 were properly elected originally, and requirement of Section 910-A(a) of Intermediate Unit Act, 24 P.S. § 9-960(a), that when there are fewer than thirteen school districts within an intermediate unit there shall be at least one director from each school district, does not invalidate their election.
2. Having been properly elected and having assumed office, present directors shall hold office until law declares a vacancy to exist.
3. No vacancies exist at present, and each member of existing intermediate board is entitled to serve out the term for which he was elected.
4. As vacancies occur involving the districts with multiple representation, those vacancies must be filled by members of the boards of directors of the presently unrepresented districts.

Harrisburg, Pa.,  
March 3, 1971

Dr. David H. Kurtzman  
Secretary of Education  
Department of Education  
Harrisburg, Pa.

Dear Dr. Kurtzman:

This is in response to your inquiry of February 17, 1971, regarding the membership of the board of directors of Intermediate Unit 18.

At the time the present board was elected, there were 21 separate school districts and each of the 13 directors elected was from a different district as required under Section 910-A(a) of the Intermediate Unit Act, 24 P. S. § 9-960(a). Due to reorganization, effective July 1, 1971, a number of these districts will be merged under Act No. 150 (1968), *infra*, so that there will be a total of only 12 districts in Intermediate Unit 18. As a result, three directors will be from one of the new districts and two from another and three districts will have no representation on the Intermediate Board.

The question arises as to whether this is proper in view of Section 910-A(a) which provides that when there are fewer than 13 school districts within an intermediate unit there shall be at least one director from each school district elected to the intermediate unit.

The first fact to be noted is that the 13 present directors were properly elected at that time. It therefore appears that, having been properly elected and having assumed office, these gentlemen shall hold that office to such time as the law declares a vacancy to exist.

Section 910A(d) provides that vacancies on an intermediate unit board of directors occur upon "the death, resignation, or removal of an intermediate unit director, or when he no longer holds office as a school director."

Act of July 8, 1968, P. L. \_\_, No. 150, Section 8(a), 24 P. S. § 2400.8(a) provides "All school directors of the component school districts forming an administrative unit . . . shall serve out the terms of office for which they were elected."

As the gentlemen in question continue to be school directors under the above, no vacancies exist and each member of the present intermediate board is entitled to serve out the term for which he was elected to that board. Of course, as vacancies do occur involving the districts with multiple representation, those vacancies must be filled by members of the boards of directors of the presently unrepresented school districts.

Sincerely yours,

J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION No. 6

*County Government—Vacancy in position of Sheriff—Validity of commission issued by Governor—Duration of term.*

1. Article IX, Section 4 of the Pennsylvania Constitution requires that all vacancies for county offices such as sheriff shall be filled as provided by law.
2. The applicable law is Section 409 of the County Code of August 9, 1955, P. L. 323, 16 P. S. § 409, which specifically directs that the person appointed by the Governor to fill a vacancy, including that of county sheriff, shall continue therein and discharge the duties thereof for the balance of the unexpired term.
3. The sheriff appointee shall hold office until the first Monday of January, 1974.

Harrisburg, Pa.,  
March 3, 1971

John N. Scales, Chairman  
Pennsylvania Democratic State Committee  
510 North Third Street  
Harrisburg, Pennsylvania

Dear Mr. Scales:

This will follow up my letter to you of March 1, 1971 concerning the vacancy in the position of Sheriff of Juniata County.

We have extensively researched the question as to said vacancy and whether the commission, as issued by the Governor, to run for the unexpired term of the deceased incumbent, was proper.

Article IX, Section 4 of the Constitution requires that, for county offices such as these, all vacancies shall be filled in such manner as may be provided by law. The applicable law in this regard is Section 409 of the County Code of August 9, 1955, P. L. 323, 16 P. S. § 409, which specifically directs that the person appointed by the Governor to fill the vacancy, including that of sheriff, shall continue therein and discharge the duties thereof for the balance of the unexpired term.

Accordingly, it is our opinion that the sheriff appointee shall hold office until the first Monday of January, 1974.

Sincerely yours,  
J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 7

*Reapportionment—Certification of census—Time available to municipalities to complete reapportionment.*

1. Article IX, Section 11 of Pennsylvania Constitution requires that reapportionment take place “. . . within the year following that in which the Federal decennial census is officially reported as required by Federal law.”
2. The critical year is the one in which the Secretary of Commerce reports the census count to the President and not the year in which the certified figures are made available.

3. The Secretary of Commerce reported the tabulation of total population by States to the President on November 30, 1970.
4. Under Article IX, Section 11, municipalities have the full year of 1971 in which to complete reapportionment.

Harrisburg, Pa.,  
March 4, 1971

Honorable Donald O. Oesterling  
173 Main Capitol Building  
Harrisburg, Pennsylvania 17120

Dear Senator Oesterling:

This is in response to your letter of February 11th concerning our interpretation of Article IX, Section 11, of the Pennsylvania Constitution relative to certifying census figures. We are of the opinion that the critical year is the year in which the Secretary of Commerce reports the census count to the President and not the year in which the certified figures are made available.

Article IX, Section 11, provides that reapportionment shall take place "within the year following that in which the Federal decennial census is officially reported as required by Federal law."

On November 30, 1970, the Secretary of Commerce "reported" to the President "the Tabulation of total population by States as required for the apportionment of Representatives." In doing so, he acted pursuant to the *mandate* contained in the Act of August 31, 1954, c. 1158, Section 1, 68 Stat. 1019, as amended, 13 U. S. C. A. § 141(b) (Supp. 1970). There is no *requirement* in the Federal census law as to any other form of reporting of the census figures. There is a provision in the Federal law to the effect that the Secretary of Commerce *may* furnish census information to State and local officials. However, this provision is not mandatory, and it seems clear that our Constitutional provision refers to the requirement that the Secretary of Commerce report the census count to the President.

Thus, it is our opinion that 1970 is the year "in which the Federal decennial census *was* officially reported as required by Federal law," Pa. Const., Art. IX, Section 11. This being the case, it becomes academic whether the language "Within the year following that" is interpreted as "within the year following the *date* on which the census is officially

reported" or "within the year following the year in which the census is reported." In the former case, the "cut-off" date would be November 30, 1971; in the latter, December 31, 1971.

Nevertheless, we believe that, as a matter of construction, the latter interpretation is correct. Therefore, under Article IX, Section 11, municipalities would have the full year of 1971 (January 1, 1971, through December 31, 1971) in which to complete reapportionment.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 8

##### *Schools and school districts—Maternity leave.*

1. School Districts are bound by regulations of the Human Relations Commission regarding maternity leave and the rehiring of teachers following such leave.
2. Maternity leaves are to be handled in the same manner as sabbatical, military, and other leaves—that is, that a substitute be employed to replace the pregnant teacher during the period of maternity leave.
3. The problem of what happens to the replacement teacher is thereby solved since she is employed only for the period of the leave.

Dr. David H. Kurtzman  
Secretary of Education  
Department of Education  
Harrisburg, Pa.

Dear Dr. Kurtzman:

This is in response to your inquiry of February 16, 1971.

As stated in the advisory of January 21, 1971, the school districts are bound by the regulations of the Human Relations Commission regarding maternity leave and the rehiring of the teacher following such leave.

It would appear proper that maternity leaves be handled by the school districts in the same manner as sabbatical, military and other leaves. That is that a substitute be employed to replace the pregnant teacher during the period of the maternity leave. By this procedure, the problem of what happens to the replacement teacher is solved since she is employed only for the period of the leave.

As to the pending case, the Commission's regulation is binding.

Sincerely yours,

J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION No. 9

*Tax—Liquid fuels—Constitutionality of refund to Fish Commission from taxes paid on fuel consumed in the operation of motorboats.*

1. Act of July 15, 1969, 72 P. S. § 2611q amending the Liquid Fuels Tax Act, by authorizing the Fish Commission to obtain a refund of Liquid Fuels Taxes paid on fuel consumed in the operation of motor boats on waterways within the Commonwealth or bordering the Commonwealth, does not violate Article VIII, Section 11, of the Pennsylvania Constitution.
2. Official Opinion of the Attorney General dated December 23, 1970 is reaffirmed.
3. Passage of Senate Bill No. 352, Printer's No. 354, Act No. 2 A of March 2, 1971, P. L. —, which specifically appropriates monies from the Motor License Fund to refund to the Fish Commission taxes paid on fuel consumed in the operation of motor boats gives added weight to constitutionality of Act of July 15, 1969.

Harrisburg, Pa.,  
March 10, 1971

Honorable Grace M. Sloan  
State Treasurer  
Commonwealth of Pennsylvania  
Harrisburg, Pa.

Dear Mrs. Sloan:

This is in reply to your letter dated January 27, 1971, concerning the Act No. 65 of July 15, 1969, P. L. 161, Sec. 1, 72 P. S. § 2611q which amends the Liquid Fuels Tax Act by authorizing the Fish Commission

to obtain a refund of Liquid Fuels Taxes paid on fuel consumed in the operation of motor boats on waterways within the Commonwealth or bordering the Commonwealth.

As you state, this Department issued an opinion on December 23, 1970, to Robert J. Bielo, Executive Director of the Fish Commission, holding that the Act of July 15, 1969, is constitutional and not in violation of Article VIII, Section 11 of the Pennsylvania Constitution. I have reviewed this opinion and concur in its conclusion. As you point out in your letter, there are additional sources of precedence to sustain the constitutionality of the act in question. I have examined the sources mentioned in your letter and concur with your thought that these would give added weight to the opinion of the Attorney General and would be proper to support the constitutionality of the act in any court proceedings.

As additional support for the act, the General Assembly has recently passed Senate Bill No. 352, Printer's No. 354, Act No. 2 A of March 2, 1971, P. L. \_\_, which specifically appropriates monies from the Motor License Fund to refund to the Fish Commission taxes paid on fuel consumed in the operation of motor boats. Since the Legislature has now seen fit to reiterate its position that the Fish Commission should obtain these monies and has, in fact, funded the program, added weight is given to the constitutionality of the Act of July 15, 1969.

This office appreciates your concern as to the proper disposition of tax monies and it is the opinion of this Department that you may properly issue to the Commission a check in accordance with the action of the Board of Finance and Revenue.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 10

*Conflict of interest—Incompatibility of offices of Recorder of Deeds and County Commissioner in counties of the fourth class.*

1. Pursuant to Article VI, Section 2 of the Pennsylvania Constitution, the General Assembly may, by law, declare what offices are incompatible.



2. Section 1302(a) of the County Code, Act of August 9, 1955, P. L. 323, 16 P. S. §1302(a) provides that, in counties of the fourth class, one person shall hold the office of recorder of deeds.
3. No statutory authorization exists for a person to hold county offices simultaneously for third and fourth class counties, whereas such authorization does exist for counties of the fifth through eighth classes.
4. The offices of recorder of deeds and county commissioner in fourth class counties are incompatible, both in law and in fact.

Harrisburg, Pa.,  
March 11, 1971

Honorable C. DeLores Tucker  
Secretary of the Commonwealth  
Room 308, Capitol Building  
Harrisburg, Pennsylvania

Dear Mrs. Tucker:

Following is our opinion relative to the incompatibility of one person holding the offices of recorder of deeds and county commissioner.

Article VI, Section 2 of the Constitution provides that: "The General Assembly may, by law, declare what offices are incompatible." Section 1302(a) of the County Code of August 9, 1955, P. L. 323, 16 P. S. § 1302(a) provides that, in counties of the fourth class, one person shall hold the office of recorder of deeds, whereas other provisions of Section 1302 provide that one person may hold two enumerated county offices. This is further evidenced by Sections 1550-1555 of the County Code, 16 P. S. § 1550-1555, which specifically identify, in counties of the fifth through eighth classes, those offices which may be simultaneously held by one person. No such statutory authorization exists for a person to hold two county offices simultaneously for third and fourth class counties. Even where there is dual office holding, none of this duality includes the office of county commissioner. Therefore, the offices of county commissioner and recorder of deeds are statutorily incompatible.

In addition, one can easily cite an example which demonstrates that such offices are incompatible in fact. On budgetary and salary matters, it would be incongruous, indeed, to have the same person approve a budget and appropriate money as a county commissioner, as well as spend it to perform the functions of the office of recorder of deeds.

Therefore, it is my opinion that the offices of recorder of deeds and county commissioner in fourth class counties are incompatible, both in law and in fact.

Very truly yours,  
J. SHANE CREAMER,  
*Attorney General.*

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OFFICIAL OPINION No. 11

*Tax—Realty transfer—Effect of Act No. 253 of 1970.*

1. All commissions paid to the Recorders of Deeds from the sale of State Realty Transfer Tax stamps must be paid over by the recorder of deeds to the general fund of the county after the effective date of this Act.
2. The Act does not apply to the commissions paid on the sale of Realty Transfer Tax stamps of any political subdivision.

Harrisburg, Pa.,  
March 15, 1971

Honorable A. J. DeMedio  
Member  
House of Representatives  
205 Fifth Street  
Donora, Pennsylvania 15033

Dear Representative DeMedio:

Receipt is acknowledged of your letter dated March 11, 1971, requesting our opinion with respect to "Senate Bill No. 919, Printer's No. 1883." This bill was enacted as Act No. 253 of the 1970 Session of the General Assembly.

All commissions paid to the recorders of deeds from the sale of State Realty Transfer Tax stamps must be paid over by the recorders of deeds to the general fund of the county after the effective date of this Act. The Act does not apply to, and in no way affects, the commissions paid on the sale of Realty Transfer Tax stamps of any political subdivision.

Sincerely yours,  
J. SHANE CREAMER,  
*Attorney General.*

## OFFICIAL OPINION No. 12

*State government—Relationship of offices—Relationship of Commissioner of Professional and Occupational Affairs to the Secretary of the Commonwealth.*

1. Section 810 of the Administrative Code, 71 P. S. § 279.1 establishes the Commissioner as the chief administrative officer of the professional licensing boards housed in the Department of State.
2. Such authority is limited by the provisions of Section 503 of the Administrative Code, 71 P. S. § 183, which provides that commissions are responsible to the departments with which they are respectively connected in all matters involving the expenditure of money.
3. The Commissioner of Professional and Occupational Affairs is subject to those administrative controls regarding personnel, budgeting and other management and accounting matters as may be duly imposed thereon by the Secretary of the Commonwealth and the Governor's Office.

Harrisburg, Pa.,  
March 17, 1971

Honorable C. DeLores Tucker  
Secretary of the Commonwealth  
Department of State  
Harrisburg, Pa.

Dear Secretary Tucker:

You have requested our advice as to the relationship of the Commissioner of Professional and Occupational Affairs (Commissioner) with that of the Secretary of the Commonwealth.

Section 810 of the Administrative Code of April 9, 1929, P. L. 177, as amended, 71 P. S. § 279.1 sets powers and duties of the Commissioner as the chief administrative officer of the professional licensing boards housed in the Department of State. Subsection 8 thereof imposes upon him the responsibility of handling the administrative affairs of each of the professional and occupational examining boards and coordinating their activities. Such authority is limited to compliance with the provisions of Section 503 of the Administrative Code, 71 P. S. § 183.

That section provides that all departmental administrative bodies, boards, and commissions, within the several administrative departments,

including the Commissioner's office, shall exercise the powers and perform the duties independently of the heads or any other officers of the respective administrative departments with which they are connected, "*but, in all matters involving the expenditure of money, all such departmental administrative boards and commissions shall be subject and responsible to the departments with which they are respectively connected.*" Such departments shall, in all cases, have the right to make such examinations of the books, records, and accounts of their respective departmental administrative boards and commissions, as may be necessary to enable them to pass upon the necessity and propriety of any expenditure or proposed expenditure." (Emphasis supplied.)

Therefore, in all matters involving the expenditure of money, the Commissioner must comply with Section 503 of the Administrative Code and be responsible to the Department of State. In that regard, his position is no different from that of any other executive officer in State government subject to this statutory provision.

In view of the foregoing, it is our opinion, and you are accordingly advised, that the Commissioner of Professional and Occupational Affairs is subject to those administrative controls regarding personnel, budgeting and other management and accounting matters as may be duly imposed thereon by the Secretary of the Commonwealth and Governor's Office.

Sincerely yours,  
J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION No. 13

*Labor relations—Working conditions—State employees—Leave occasioned by injury suffered in State employment—Payment for legal holidays.*

1. Section 2 of Act of December 8, 1959, P. L. 1718 as amended, 61 P. S. § 952 provides that no absence from duty of any State employe by reason of injuries suffered in State employment shall be deducted from any period of leave allowed the employe by law or by regulation.
2. The above section provides that an employe shall not have deducted from his or her pay any period of leave allowed the employe by law, including legal holidays.
3. State employes are entitled to be paid for legal holidays occurring during leaves occasioned by injuries suffered during State employment.

Harrisburg, Pa.,  
March 18, 1971

Honorable Helene Wohlgemuth  
Secretary of Public Welfare  
333 Health and Welfare Building  
Harrisburg, Pennsylvania 17120

Dear Secretary Wohlgemuth:

We have your letter request of March 4, 1971 for advice as to whether a former employe of your department, Norma M. Grevera, is entitled to be paid for legal holidays which occurred during her period of leave occasioned by an injury suffered in the course of her employment.

The pertinent provision for our review is Section 2 of the Act of December 8, 1959, P. L. 1718, as amended, 61 P. S. § 952, which provides:

“No absence from duty of any State employe . . . to whom this act applies by reason of any such injury shall in any manner be deducted from any period of leave allowed the employe by law or by regulation.”

It is our understanding that the Department's Office of Personnel Management has maintained an administrative practice of not paying for legal holidays for those employes who are injured and are being paid benefits under the aforesaid act. However, that section clearly provides that an employe shall not have deducted from his or her pay any period of leave allowed the employe by law, including the legal holidays occurring during Mrs. Grevera's leave.

Accordingly, it is our opinion, and you are advised that she is entitled to be paid under the aforesaid act for the legal holidays occurring during her leave.

Sincerely yours,

J. SHANE CREAMER,  
*Attorney General.*

## OFFICIAL OPINION No. 14

*Condemnation—Department of Transportation—Powers under Project 70 Land Acquisition and Borrowing Act.*

1. The Project 70 Act, 72 P. S. § 3946.20 directs the Commonwealth to both acquire and assist local governments to acquire lands for recreation, conservation and historical purposes and to protect such lands against future uses inconsistent with this purpose.
2. Section 20(b) of the Act indicates that the only exception to these purposes involves exploitation of natural resources or certain public utility uses, and then only under reasonable regulations consistent with the primary use of such lands for recreation, conservation, and historical purposes.
3. The exceptions, by excluding use for public highways, clearly demonstrates that land is not to be taken for that purpose without the approval of the General Assembly.
4. It is a necessary implication that the General Assembly intended that this restriction include a ban against acquisition of Project 70 Act lands through condemnation by eminent domain.
5. Accordingly, the Department of Transportation is prohibited from acquiring by exercise of the power of eminent domain any lands acquired through the use of Project 70 Act funds.

Harrisburg, Pa.,  
March 22, 1971

The Honorable Maurice K. Goddard  
Acting Secretary  
Department of Environmental Resources  
Room 518, South Office Building  
Harrisburg, Pennsylvania

Dear Dr. Goddard:

You have requested our advice as to whether or not the Department of Transportation may condemn lands acquired under the authority granted by the Act of June 22, 1964, Special Session, P. L. 131, No. 8, § 20, 72 P. S. § 3946.20, commonly called the Project 70 Land Acquisition and Borrowing Act, after referred to as "Project 70 Act."

Specifically, you have requested an interpretation of Section 20(d) of the Project 70 Act as it affects the Department of Transportation's

present intention of taking a portion of that land known as "Duff Park" and belonging to the Franklin Township Park Commission, Westmoreland County.

The facts are briefly that Duff Park was acquired by the Franklin Township Board of Supervisors at a cost of approximately \$50,000. Of that amount, \$22,500 was paid by the Department of Community Affairs, pursuant to Sections 16(a)(4) and 17(d) of the Project 70 Act.

Section 20(b) reads as follows:

"No lands acquired with funds made available under this act shall be disposed of or used for purposes other than those prescribed in this act without the express approval of the General Assembly: Provided, That the Commonwealth or a political subdivision, as the owner of such lands, may issue permits, licenses or leases for the exploration, development, storage and removal of oil, gas or other minerals, or for the installation and use of water, gas, electric, telephone, telegraph, oil or oil products lines, under reasonable regulations prescribed by such owner consistent with the primary use of such lands for 'recreation, conservation and historical purposes'."

The Project 70 Act directs the Commonwealth to both acquire and assist local governments to acquire lands for recreation, conservation and historical purposes and to protect such lands against future uses inconsistent with this purpose.

Section 2(4) of the Project 70 Act, 72 P. S. § 3946.2(4) provides as follows:

"The rapid growth of population in Pennsylvania urban and suburban areas requires the acquisition of land for recreation, conservation and historical purposes before such lands are lost forever to urban development or become prohibitively expensive."

Section 20(b), set forth in full above, indicates that the only exception to these purposes contemplated by the legislature involved exploitation of the natural resources or certain public utility uses, provided that such use was "under reasonable regulations . . . consistent with the primary use of such lands for 'recreation, conservation and historical purposes'." The exceptions, by excluding use for public highways, clearly demonstrates that land is not to be taken for that purpose without the approval of the General Assembly.

Not only is this made clear in Section 20(b) but Section 20(f) of the Project 70 Act specifically contemplates that acquisition of land for the purposes set forth in the Act may, in fact, eliminate or substantially alter any public road or highway within such land. The section in relevant part is as follows:

“Whenever any acquisition of land shall cause a dead-end public road or highway or whenever a public road or highway is cut off or terminated, suitable substitute public roads and highways shall be provided if the need therefor is determined by the governing body of the city, borough, town or township where such dead-end or cut off occurs . . .”

The General Assembly intended to give the acquisition of park land priority over construction of highways.

It is the necessary implication that the General Assembly intended that this restriction include a ban against acquisition of Project 70 Act lands through condemnation by eminent domain. Such a restriction on the exercise of the right of eminent domain by the Commonwealth is valid. Where the intention to do so is clearly set forth, the legislature may deprive the Commonwealth of the power to exercise the right of eminent domain for specific purposes. *Interstate Cemetery Company Appeal*, 422 Pa. 594, 222 A. 2d 906 (1966).

Accordingly, we are of the opinion, and so advise you, that the Department of Transportation is prohibited by Section 20 of the Project 70 Act from acquiring by exercise of the power of eminent domain any lands acquired through the use of Project 70 Act funds.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 15

*Public employer—Definition—Public Employee Relations Act of 1970.*

1. The Governor and his Executive Board constitute the employer of all persons employed in agencies under the Governor's jurisdiction, namely the independent administrative boards and commissions that make up the executive branch of State Government, except the Department of the Auditor General and the Treasury Department, and excluding such special agencies as



the General State Authority, the State Public School Building Authority, the Pennsylvania Turnpike Commission, and the Higher Education Assistance Agency.

2. The possession by the Governor and the Executive Board of such very clear authority over basic conditions of employment of persons working in the executive agencies under the Governor's jurisdiction granted by the Administrative Code, 71 P. S. § 51 et seq., constitute the Governor and his Executive Board as the public employer.
3. It would require very clear language in the Public Employe Relations Act of 1970, 43 P. S. § 1101.301(1) to shift such basic authority from the central executive to the individual agency heads.
4. The Public Employe Relations Act confirms the role and status of the Governor as public employer.
5. The contention that each administrative department, board and commission should be construed as a separate public employer ignores the fact that the Governor and the Executive Board are alone invested by law with the authority to determine basic conditions of employment and that this authority is not delegable to the individual executive agencies. It would also violate public policy against over-fragmentization due to excessive proliferation of bargaining units and the policy in favor of recognizing broad, identifiable employe communities of interest.

Harrisburg, Pa.,  
March 26, 1971

Honorable Ronald G. Lench  
Deputy Secretary of Administration  
Governor's Office  
Main Capitol Building  
Harrisburg, Pennsylvania 17120

Dear Mr. Lench:

In your memorandum of March 8, 1971, you request our opinion as to the definition of public employer under Section 302(1) of the Public Employe Relations Act of 1970, as this term applies to the Commonwealth.

You point out that it is and has been the consistent position of the Commonwealth that the Governor and his Executive Board constitute the employer of all persons employed in agencies under the Governor's jurisdiction, namely the independent administrative boards and commissions that make up the executive branch of the state government,

except the Department of the Auditor General and the Treasury Department, and excluding such special agencies as the General State Authority, the State Public School Building Authority, the Pennsylvania Turnpike Commission and the Higher Education Assistance Agency. However, this concept of a single Commonwealth employer has been challenged in recent years before the Pennsylvania Human Relations Commission, and representatives of various labor organizations have contended that each administrative department, board and commission should be construed as a separate public employer.

Under the Administrative Code of 1929, as amended, Act of April 9, 1929, P. L. 177, 71 P. S. § 51 et seq., it is clear that the authority for determining basic conditions of employment of persons employed in executive agencies under the Governor's jurisdiction rests with the Governor and the Executive Board and not with the heads of individual agencies. Section 214, 71 P. S. § 74, provides that the number and compensation of all employees appointed by the executive agencies under the Governor's jurisdiction shall be subject to the approval of the Governor and, after the Executive Board shall have fixed the standard compensation for any kind, grade, or class of service or employment, the compensation of all persons in that kind, grade, or class, shall be fixed in accordance with such standard.

Pursuant to Sections 709, 215, 216, 221, and 222, 71 P. S. §§ 249, 75-76, 81-82, the Executive Board has the authority to regulate the payment of extra compensation, the reimbursement of employees for travel expenses, the fixing of hours when state offices shall open and close, and the granting of vacations, sick leave and paid holidays. This authority of the Executive Board with respect to Civil Service employees is specifically confirmed by Sections 707 and 708 of the Civil Service Act, the Act of August 5, 1941, P. L. 752, as amended by the Act of August 27, 1963, P. L. 1257, 71 P. S. §§ 741.707 and 708.

The possession by the Governor and the Executive Board of such very clear authority over basic conditions of employment of persons employed in the executive agencies under the Governor's jurisdiction, constitutes the Governor and the Executive Board, rather than the individual agency heads, the public employer.

It would require very clear language in the Public Employee Relations Act of 1970 to shift such basic authority from the central executive to the individual agency heads. There is no such language in the act and, on the contrary, the Governor, as public employer, would be precluded

from voluntarily delegating such authority, for collective bargaining purposes, to the heads of the individual agencies under his jurisdiction, by Section 703 of the Public Employe Relations Act, 43 P. S. § 1181.703 which provides:

“The parties to the collective bargaining process shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of the Commonwealth of Pennsylvania or the provisions of municipal home rule charters.”

Indeed, the Public Employe Relations Act confirms the role and status of the Governor as the public employer in very positive fashion. Section 604, 43 P. S. § 1101.604 provides in part:

“The Board [Pennsylvania Labor Relations Board] shall determine the appropriateness of a unit which shall be the public employer unit or a subdivision thereof. In determining the appropriateness of the unit, the board shall:

“(1) Take into consideration but shall not be limited to the following: (i) public employes must have an identifiable community of interest, and (ii) the effects of overfragmentization.

\* \* \* \* \*

“(4) Take into consideration that when the Commonwealth is the employer, it will be bargaining on a Statewide basis unless issues involve working conditions peculiar to a given governmental employment locale. This section, however, shall not deemed to prohibit multi-unit-bargaining.”

This statutory scheme, with the Governor and the Executive Board as the public employer with respect to persons employed in executive agencies under the Governor’s jurisdiction, allows the Pennsylvania Labor Relations Board full flexibility in the determination of appropriate units for bargaining, including statewide and other units crossing agency lines in terms of identifiable employe community of interest.

The contention that each administrative department, board and commission should be construed as a separate public employer, on the other hand, ignores the fact that the Governor and the Executive Board are alone invested by law with the authority to determine basic conditions of employment and that this authority is not delegable to the individual

executive agencies. It would preclude statewide bargaining and bargaining across agency lines and would thus offend against two clearly stated public policies:

1. The policy against over-fragmentization by way of an excessive proliferation of bargaining units which would spell havoc to the collective bargaining process. See Rock, *The Appropriate Unit Question in the Public Service: The Problem of Proliferation*, 67 Mich. L. Rev. 1001 (1969) and Moskow, Lowenberg and Koziara, *Collective Bargaining in Public Employment*.

2. The policy of recognizing broad identifiable employee communities of interest, across agency lines, in terms of families of occupations. See Opinion of the New York Public Relations Board, *In the Matter of State of New York and New York State Employees Council 50, American Federation of State, County and Municipal Employees, AFL-CIO, et al., and Civil Service Employees Association, Inc.*, Case Nos. C-0002, et al.

For the reasons above stated, it is our opinion, and you are hereby advised, that the Governor and the Executive Board constitute the "public employer," within the meaning of Section 301(1) of the Public Employee Relations Act of 1970, with respect to all persons employed in agencies under the Governor's jurisdiction.

Yours truly,

J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION No. 16

*Schools and school directors—Intermediate units—Board of directors—Filling of new vacancies.*

1. The original intermediate unit board of directors comes into existence when elected.
2. Section 910-A (c) of Act No. 102, 24 P. S. § 9-960 (c) providing that the Board shall serve as a planning committee until July 1, 1971, is merely a statement as to the board's duties and does not affect its status.
3. There being no provision in the Act for an election in April, 1971, the first election will be held in April, 1972, and directors appointed to fill vacancies in accordance with Section 910-A (d), 24 P. S. § 9-960 (d) of the said Act shall serve until April, 1972 convention.

Harrisburg, Pa.,  
March 29, 1971

Dr. David H. Kurtzman  
Secretary  
Department of Education  
Harrisburg, Pennsylvania

Dear Dr. Kurtzman:

This is in response to your request for advice dated March 26, 1971, relative to the filling of vacancies on intermediate unit boards of directors.

It is our opinion that the original intermediate unit board of directors comes into existence when elected and that the provision in Section 910-A(c) of Act No. 102, 24 P. S. § 9-960(c), approved May 4, 1971 to the effect that it shall serve as a planning committee until July 1, 1971 is merely a statement as to its duties and does not affect its status.

However, the Act does not provide for any election in April, 1971 and, in fact, by the language of Section 910-A(b) provides that there shall not be an election in April, 1971, since it states that "Except for the initial election, directors shall be elected annually in April . . ." There being no provision for election in April, 1971, the first election will be held in April, 1972, and directors appointed to fill vacancies in accordance with Section 910-A(d) of the said Act shall serve until the April, 1972, convention.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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OFFICIAL OPINION No. 17

*Schools and school directors—Intermediate units—Selection of a Chief School Administrator for vocational technical schools.*

1. Although Act 192, 24 P. S. § 10-1001 et seq., does not specifically amend Section 1850.1(b)(5) of the School Code, it was clearly the intent of that Act to replace county boards with the Boards of Intermediate Units set up under Act 102, 24 P. S. § 9-951 et seq.
2. The Office of County Superintendent is abolished as of July 1, 1971.

Harrisburg, Pa.,  
March 29, 1971

Dr. David H. Kurtzman  
Secretary  
Department of Education  
Harrisburg, Pennsylvania

Dear Dr. Kurtzman:

This is in response to your request for advice of March 23, 1971, regarding intermediate units and the selection of a chief school administrator for vocational-technical schools.

Although Act No. 192, approved January 14, 1970, 24 P. S. § 10-1001 et seq. does not specifically amend Section 1850.1(b)(5) of the School Code, it was clearly the intent of that Act to replace county boards with the boards of intermediate units set up under Act No. 102, approved May 4, 1970, 24 P. S. § 9-951 et seq. In fact, Section 29 of Act No. 192 repeals all provisions of the School Code relating to the election of county superintendents. This certainly indicates an intention that that office be abolished.

In view of the above, inasmuch as the office of county superintendent is abolished as of July 1, 1971, items 2 and 3, bottom of page 18 of the Department Bulletin, *Establishing the Intermediate Unit* are correct.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 18

*Emergency Funds—Use of, by Governor, for relief in cases of natural disaster or civil disorder.*

1. Under the State Council Civil Defense Act, Act of March 19, 1951, P. L. 28, as amended, 71 P. S. § 1689.101, whenever the Governor finds a natural disaster or civil disorder threatens or has occurred and conditions of extreme emergency exist in all or a part of Pennsylvania, he has the power to transfer any unused funds which may have been appropriated for the ordinary ex-

penses of the Government in the General Fund to such state agencies as he may direct to be expended for the relief of disaster or civil disorder.

2. The total of such transfer shall never exceed \$1 million in any one year except by Acts of the General Assembly.
3. "Extreme emergency" as used in the Act means conditions which affect seriously the safety, health, or welfare of a substantial number of citizens of the Commonwealth or of such magnitude or severity as to render essential State supplementation of county and local efforts, or have been caused by forces beyond the control of man.
4. To carry out the provisions of this Act, the Governor must officially proclaim that conditions of extreme emergency exist and such conditions shall be deemed to continue to exist until such time as the Governor shall officially proclaim that they have ceased to exist.

Harrisburg, Pa.,  
March 31, 1971

Honorable Milton J. Shapp, Governor  
Commonwealth of Pennsylvania  
State Capitol Building  
Harrisburg, Pennsylvania 17120

Dear Governor:

Recently you requested my opinion as to your authority to use emergency funds in emergency situations handled by Civil Defense, particularly relating to a situation which arose two weeks ago when you ordered Dr. Gerstel to move families out of 12 or 14 houses that were sliding down a hillside which had become unstable due to heavy rains and an improper highway cut which did not allow for proper drainage.

Under the State Council of Defense Act of 1951, the Act of March 19, 1951, P. L. 28, as amended, August 8, 1969, P. L. —, No. 92, § 1, 71 P. S. § 1689.101, it is provided that:

"Whenever the Governor finds as a fact that a natural disaster or civil disorder threatens or has occurred and that conditions of extreme emergency exist in all or a part or parts of Pennsylvania, he shall have power to transfer any unused funds which may have been appropriated for the ordinary expenses of the government in the General Fund to such State agencies as he may direct to be expended for relief of disaster or civil disorder in such manner as the Governor shall approve, and such funds are hereby appropriated to the Gov-

error for such purpose. The total of such transfers shall never exceed one million dollars (\$1,000,000) in any one year except by action of the General Assembly.”

Extreme emergency, as used in the Act, means conditions which

“ . . . (i) affect seriously the safety, health or welfare of a substantial number of citizens of the Commonwealth . . . ; (ii) be of such magnitude or severity as to render essential State supplementation of county and local efforts or resources exerted or utilized in alleviating the danger, damage, suffering or hardship faced; (iii) have been caused by forces beyond the control of man . . . or by factors not foreseen and not known to exist when appropriation bills were enacted. 71 P. S. § 1689.102.”

In order to carry out the provisions of this Act, with regard to the transfer of funds in emergency situations, the Governor must officially proclaim that conditions of extreme emergency exist and such conditions shall be deemed to continue to exist until such time as the Governor shall officially proclaim that they have ceased to exist. 71 P. S. § 1689.103.

Yours truly,

J. SHANE CREAMER,  
*Attorney General.*

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## OFFICIAL OPINION NO. 19

### *Judges—Retirement benefits.*

1. Article V, Section 16 (b) of the Constitution of Pennsylvania which became effective on January 1, 1969, continued the distinction previously contained in the law between “former judges” and “retired judges.”
2. Retired judges fall into two basic classes as set forth in the Act of July 31, 1968, 71 P. S. § 1725-401 (4) for the purpose of compensation: (1) those who have served a collective total of 25 years; and (2) those who have attained the age of 70 and have “served at least one full elected term or ten (10) years in the aggregate as a judge continuously or otherwise” and who hold themselves available for assignment.
3. Judges falling under class 2 as outlined above are eligible to receive a sum equal to the salary they were receiving immediately prior to their retirement upon attaining the age of 70.



Harrisburg, Pa.,  
April 2, 1971

Honorable Benjamin W. Schwartz  
Court of Common Pleas  
516 City Hall  
Philadelphia, Pennsylvania 19107

Dear Judge Schwartz:

I have given careful consideration to your inquiry concerning the retirement benefits you are entitled to upon reaching the age of 70 which you attained on November 27, 1970.

At the Municipal Election in November, 1969, you were elected by the voters of Philadelphia County for a second term of ten years to commence on the first Monday of January 1970.

Additionally, you have advised the Chief Justice of the Supreme Court of your availability for assignment since November 27, 1970, and have, in fact, continued to serve in the Family Court in Philadelphia pursuant to your assignment there by the Chief Justice.

Article V, Section 16(b) of the Constitution of Pennsylvania which became effective on January 1, 1969, provides:

“Justices, judges and justices of the peace shall be retired upon attaining the age of seventy years. Former and retired justices, judges and justices of the peace shall receive such compensation as shall be provided by law.”

It is clear that the new Constitution continued the distinction previously contained in the law between “former judges” and “retired judges.”

A former judge may be designated and assigned by the Chief Justice of the Supreme Court to serve temporarily in a court of record and may be compensated under the Act of August 31, 1966, P. L. 47, 17 P. S. § 790.101 et seq. provided, among other things (none of which are here relevant) that he has served at least one term and has not been defeated for re-election. Nowhere does the Act of August 31, 1966, refer to the age of a former judge.

Retired judges, on the other hand, fall into two basic classes as set forth in the Act of July 31, 1968, 71 P. S. § 1725-401(4) for the purpose of compensation: (1) those who have served a collective total of 25 years; and (2) those who have attained the age of 70 and have “served at least one full elected term or ten (10) years in the aggregate

as a judge continuously or otherwise" and who hold themselves available for assignment. Your case falls under class (2) as outlined above.

Your letter of November 27, 1970, to former Attorney General Fred Speaker indicates that, having held yourself available for assignment as required by law, you chose to exercise the election available to you under the Act of July 31, 1968, 71 P. S. § 1725-401(4) which provides that a retired judge:

" . . . may elect to receive during a period of time equal to the unexpired portion of his term . . . a sum equal to the salary he was receiving immediately prior to his retirement."

Accordingly, you are advised that you are eligible to receive a sum equal to the salary you were receiving immediately prior to your retirement which occurred on November 27, 1970, when you attained the age of seventy.

Sincerely yours,

J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION NO. 20

*State colleges and universities—Liability insurance for board of directors.*

1. Under the Administrative Code, Act of July 20, 1968, P. L. —, 71 P. S. § 634, the Department of Property and Supplies has the power to procure liability insurance covering all State employees.
2. The Department of Property and Supplies has liability insurance covering all State employees and is presently checking with the carrier to be certain that the Board of State College and University Directors is covered under the present policy.

Harrisburg, Pa.,  
April 5, 1971

Dr. David H. Kurtzman  
Secretary of Education  
Department of Education  
Harrisburg, Pennsylvania

Dear Dr. Kurtzman:

This is in response to your request of March 16, 1971, regarding liability insurance for the members of the Board of State College and University Directors.

Under The Administrative Code as amended by the Act of July 20, 1968, P. L. \_\_, No. 215, Section 2, 71 P. S. § 634, the Department of Property and Supplies has the power to procure public liability insurance covering all State employes, including members of boards and commissions, while engaged in the performance of their duties.

The Department of Property and Supplies has liability insurance covering all State employes and is presently checking with the carrier to be certain that the Board of State College and University Directors is covered under the present policy.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION NO. 21

*Veterans—Benefits under Vietnam Conflict Veterans' Compensation Act.*

1. Under the Vietnam Conflict Veterans' Compensation Act, 51 P. S. § 495.1 et seq., compensation is payable to any member of the armed forces of the United States eligible to receive the Vietnam Service Medal.
2. Department of Defense Instruction, 1348.15, Section V, defines those eligible to receive the medal as all members of the Armed Forces of the United States serving in Vietnam and contiguous waters, or the air space thereover, after July 3, 1965, and before a terminal date when announced, and also as members of the Armed Forces of the United States in Thailand, Laos, or Cambodia or the air space thereover, subsequent to July 3, 1965, serving in direct support of operations in Vietnam.

Major General Richard Snyder  
The Adjutant General  
Department of Military Affairs  
Indiantown Gap Military Reservation  
Annville, Pa.

Dear General Snyder:

I have reviewed the material which you submitted in your memorandum of March 17, 1971, the Vietnam Conflict Veterans' Compensation Act, 51 P. S. § 459.1 et seq. and DOD Instruction 1348.15.

Section 3 of the Act makes the compensation payable to “any veteran” as defined by the Act, 51 P. S. § 459.3.

Section 2 of the Act clearly defines “veteran” as any member of the Armed Forces of the United States “eligible to receive the Vietnam Service Medal,” 51 P. S. § 459.2.

DOD Instruction 1348.15, Section V defines these eligible to receive the Medal as follows:

*“General. All members of the Armed Forces of the United States serving in Vietnam and contiguous waters, or the air space thereover, after July 3, 1965 and before a terminal date when announced. Members of the Armed Forces of the United States in Thailand, Laos, or Cambodia or the air space thereover, subsequent to July 3, 1965 and before a terminal date when announced and serving in direct support of operations in Vietnam are also eligible for this award.”*

It is my conclusion that your interpretation is correct and that you are authorized to approve payment to any person who is eligible as defined in the quoted materials.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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## OFFICIAL OPINION NO. 22

### *Taxes—School Code—Definition of personal property.*

1. While ordinarily “personal property” includes all property that is not real property, Section 674 of the School Code, 24 P. S. § 6-674 provides that the School Taxes shall be levied upon real and personal property as contained in the tax assessment of the city, borough, and incorporated town or township in which the school district is located, or as contained in the assessment made for county tax purposes.
2. The Act of 1913, P. L. 507, Section 1, as amended, 72 P. S. § 4821 specifies those classes of personal property which are taxable, such as mortgages owing by solvent debtors, shares of stock, and only those classes of personal property are taxable under Section 674 of the School Code.

Harrisburg, Pa.,  
April 7, 1971

Dr. David H. Kurtzman  
Secretary of Education  
Department of Education  
Harrisburg, Pennsylvania

Dear Dr. Kurtzman:

This is in response to your request of February 25, 1971, regarding a definition of "personal property" under Section 674 of the School Code, 24 P. S. § 6-674.

Ordinarily, "personal property" includes all property that is not real property. However, Section 674 provides that school taxes shall be levied upon real and personal property as contained in the tax assessment of the city, borough, incorporated town or township in which the school district is located or as contained in the assessment made for county tax purposes. The said section therefore limits the property tax to that which is taxable by the city, borough, incorporated town or township or county. The provision defining personal property which is subject to taxation for county and city purposes is contained in the Act of 1913, P. L. 507, Section 1, as amended, 72 P. S. § 4821. This latter Act sets forth specifically those classes of personal property which are taxable, such as mortgages, moneys owing by solvent debtors, shares of stock, etc. Only those classes of personal property set forth as taxable in this Act would be taxable under Section 674 of the School Code.

Very truly yours,  
J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION NO. 23

*Schools and school directors—Intermediate units—Contracts for instructional materials services program.*

1. Section 914-A (7) of Act No. 102, 24 P. S. § 9-964 (7) clearly establishes a legislative intent to transfer to the intermediate units all rights and obligations of the present county boards under existing contracts regarding instructional material programs.

Harrisburg, Pa.,  
April 7, 1971

Dr. David H. Kurtzman  
Secretary of Education  
Department of Education  
Harrisburg, Pennsylvania

Dear Dr. Kurtzman:

This is in response to your inquiry of March 1, 1971, regarding instructional materials services program of intermediate units.

The specific question is what happens to the present contracts between the school districts and the county school boards on July 1, 1971 when the county boards are replaced for the purpose of the instructional materials program by the intermediate units.

Section 914-A(7) of Act No. 102, approved May 4, 1970, 24 P. S. § 9-964(7) provides:

“(7) To provide for and conduct programs of services authorized by the State Board of Education, including services performed under contract with competent school districts. Except as otherwise provided by law, all powers and duties of county boards of school directors in regard to classes and schools for exceptional children, educational broadcasting, audio-visual libraries, instructional materials centers, area technical schools and area vocational-technical schools are hereby transferred to and conferred upon intermediate unit boards of directors. An intermediate unit may contract with school districts to provide services on behalf of the intermediate unit.”

It is clear from the language of the above Act that the Legislative intent was to transfer to the intermediate units all rights and obligations of the present county boards under existing contracts regarding instructional materials programs.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

## OFFICIAL OPINION NO. 24

*Schools and school directors—Intermediate units—Provision of additional services.*

1. Under Section 914-A of Act No. 102, 24 P. S. § 9-964 when a service is desired from the intermediate unit by a majority of the component districts and is approved by the majority, such service becomes a part of the overall activity of the intermediate unit, and the cost of such service would be reflected in the budget.
2. If a proposed program is not approved by a majority of the component districts, but is desired by some of the districts, the intermediate unit may provide such service under agreement with the districts requesting it under Section 920-A (b) of Act No. 102. In this case, the cost would not be reflected in the general budget of the intermediate unit.

Harrisburg, Pa.,  
April 7, 1971

Dr. David H. Kurtzman  
Secretary of Education  
Department of Education  
Harrisburg, Pennsylvania

Dear Dr. Kurtzman:

This is in response to your request for advice dated March 1, 1971.

Section 914-A(5) of Act No. 102, approved May 4, 1970, 24 P. S. § 9-964(5) provides:

“ . . . Each additional service to be provided shall be first approved by a majority of all the boards of school directors comprising the intermediate unit at a meeting called by the intermediate unit board of directors for the express purpose of approving or disapproving any such additional service. . . . ”

Under this section, when a service is desired from the intermediate unit by a majority of the component districts and is approved by the majority, such service becomes a part of the overall activity of the intermediate unit. The cost of such service would be reflected in the budget and the cost thereof would be borne by all component districts in accordance with Section 920-A(a) of Act No. 102, 24 P. S. § 9-970(a).

If a proposed program is not approved by a majority of the component districts, but is desired by some of the districts, the intermediate unit may provide such service under agreement with the districts

requesting it under Section 920-A(b) of Act No. 102, 24 P. S. § 9-970(b). In this case, the cost would not be reflected in the general budget of the intermediate unit. Note that it is only in these cases of supplying services desired by less than a majority of the component districts, that the cost is separate from the general budget.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION NO. 25

*Schools and school directors—Intermediate units—Authority to purchase buses for the transportation of special education pupils.*

1. Section 914-A of Act 102, 24 P. S. § 9-964, sets forth the powers of an intermediate unit board of directors, and nowhere in this section is granted the power to purchase or hold title to personal property, except that an intermediate unit board of directors has all powers and duties of county boards of school directors in regard to classes and schools for exceptional children.
2. The powers of county boards in this regard were determined by two official opinions of the Attorney General: No. 112, dated May 16, 1958, held the county boards had no authority to purchase equipment for transportation of handicapped children; No. 125, dated June 19, 1958, modified Opinion No. 112, by holding the county board had authority to purchase transportation equipment but only for those children so physically incapacitated or mentally retarded as to be unable to use the free transportation provided by the usual school bus.
3. An intermediate unit board of directors has no power to purchase school buses except for the one very limited purpose set forth in the Official Opinion No. 125, dated June 19, 1958.

Harrisburg, Pa.,  
April 8, 1971

Dr. David H. Kurtzman  
Secretary of Education  
Department of Education  
Harrisburg, Pennsylvania

Dear Dr. Kurtzman:

This is in response to your request for advice dated April 1, 1971 regarding the power of intermediate units to purchase buses for the transportation of special education pupils.



Section 914-A of Act No. 102, 24 P. S. § 9-964 approved May 4, 1970, sets forth the powers of an intermediate unit board of directors. Nowhere in this section is the power to purchase or hold title to personal property granted. The only provision relative to the problem presented is in Section 914-A(7), 24 P. S. § 9-964(7), which provides that the intermediate unit board of directors shall have "all powers and duties of county boards of school directors in regard to classes and schools for exceptional children."

From the above, we conclude that the Legislature intended the intermediate unit board of directors to have only such powers in this regard as the county board of school directors had. The powers of county boards in this regard were determined by two Official Opinions of the Attorney General, the first, Opinion No. 112, dated May 18, 1958, held that county boards had no authority to purchase equipment for transportation of handicapped children; the second, Opinion No. 125, dated June 19, 1958, modified Opinion No. 112 by holding that the county board had authority to purchase transportation equipment but only for those children so physically incapacitated or mentally retarded as to be unable to use the free transportation provided by the usual school bus.

Hence, an intermediate unit board of directors has no power to purchase school buses except for the one, very limited, purpose set forth in Official Opinion No. 125, above. In this one situation, the cost of the special transportation equipment would be charged to transportation.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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## OFFICIAL OPINION NO. 26

### *State colleges and universities—Waiver of fees.*

1. Act No. 13, 24 P. S. § 20-2001 et seq. established the Board of State College and University Directors for the purpose of establishing broad, uniform fiscal, personnel and educational policies which would then be applicable to all state colleges and universities.
2. Individual boards of trustees, in exercising their specific powers, must act within the limits of that broad policy.

Harrisburg, Pa.,  
April 12, 1971

Dr. David H. Kurtzman  
Secretary of Education  
Department of Education  
Harrisburg, Pennsylvania

Dear Dr. Kurtzman:

This is in response to your request for legal opinion dated April 6, 1971, regarding waiver of certain fees at State Colleges and Universities.

It is clear that Act No. 13, approved February 17, 1970, 24 P. S. § 20-2001 et seq., established the Board of State College and University Directors for the purpose of establishing broad, uniform fiscal, personnel and educational policies which would then be applicable to all States Colleges and Universities. When the Board has acted and adopted such policies, the individual boards of trustees, in exercising their specific powers, set forth in sections 2008.2 and 2008.3 of Act No. 13, must act within the limits of that broad policy.

Hence, the department staff's assumption as set forth in your request is correct.

Very truly yours,  
J. SHANE CREAMER,  
*Attorney General.*

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## OFFICIAL OPINION NO. 27

### *Bonds—Issuance of General Obligation Bonds.*

1. In connection to the issuance sale today by the Commonwealth of Pennsylvania of \$50 million principal amount of Commonwealth of Pennsylvania, General Obligation Bonds, Second Series of 1971, and \$50 million principal of Commonwealth of Pennsylvania, General Obligation Highway Bonds, Third Series T of 1971, the constitutional provisions and statutes in such other matters and documents including specimens of the bonds, the preambles and resolution adopted by the Governor, the Auditor General, and the State Treasurer and the Certificates delivered today at the closing have been examined.
2. Section 7 of Article VIII of the Constitution of Pennsylvania has been duly approved and adopted and has become part of the Constitution of Pennsylvania and the Acts have been duly and properly enacted.

3. The Governor, the Auditor General, and the State Treasurer have, pursuant to the full and adequate legal power conferred upon them by the amendment and the Acts, validly taken all necessary and proper action to issue and sell the Bonds, and the Bonds have been validly authorized, issued and sold pursuant to proper and appropriate action of such officials in accordance with the Amendments and the Acts.
4. The Bonds are lawful, valid, direct and general obligations of the Commonwealth of Pennsylvania, and the full faith and credit of the Commonwealth are pledged for the payment of interest thereon as the same shall become due and the payment of the principal thereof at maturity.
5. The Bonds are exempt from taxation for state and local purposes within the Commonwealth of Pennsylvania, except succession or inheritance taxes.
6. The Commonwealth of Pennsylvania has the power to provide for the payment of the principal of and interest on the Bonds by levying unlimited ad valorem taxes upon all taxable property within the Commonwealth and excise taxes upon all taxable transactions within the Commonwealth, except certain excise taxes and fees which are specifically limited to special purposes by Section 11 of Article VIII of the Constitution.
7. If sufficient funds are not appropriate for the timely payment of interest upon and installment of principal of the Bonds, the Constitution requires the State Treasurer to set apart from the first revenues thereafter received applicable to the appropriate fund a sum sufficient to pay such interest and installments of principal and to apply said sum to such purposes; the State Treasurer may be required so to set aside and apply such revenues at the suit of the holder of any of the Bonds.

Harrisburg, Pa.,  
April 15, 1971

TO THE PURCHASERS OF THE WITHIN DESCRIBED BONDS:

*Re: \$50,000,000 Commonwealth of Pennsylvania, General Obligation Bonds, Second Series S of 1971*

*\$50,000,000 Commonwealth of Pennsylvania, General Obligation Highway Bonds, Third Series T of 1971*

This opinion is furnished to you in connection with the issue and sale today by the Commonwealth of Pennsylvania of \$50,000,000 principal amount of Commonwealth of Pennsylvania, General Obligation Bonds, Second Series S of 1971 (the "Series S Bonds"), and \$50,000,000 principal amount of Commonwealth of Pennsylvania, General Obligation Highway Bonds, Third Series T of 1971 (the "Series T Bonds", and, together with the Series S Bonds, the "Bonds"), dated April 15, 1971, and maturing serially in varying amounts on October

15 of each year, commencing October 15, 1973 and ending October 15, 2000. The Bonds have been issued as coupon Bonds, registrable as to principal only, in the denomination of \$5,000 each. Bonds are subject to redemption on and after April 15, 1981 as a whole at any time, or from time to time in part on any interest payment date in the inverse order of their stated maturity date.

The Bonds are authorized by and have been issued and sold pursuant to (i) Section 7 of Article VIII of the Constitution of Pennsylvania, (ii) Acts Nos. 217, 218, 220, 221 and 222 of the 1968 Session, all approved July 20, 1968, Act No. 348 of the 1968 Session, approved November 27, 1968, Act No. 360 of the 1968 Session, approved December 2, 1968, Act No. 4 of the 1969 Session, approved March 26, 1969, Act No. 7 of the 1969 Session, both approved July 24, 1969, Act No. 114 of the 1969 Session, approved October 24, 1969, Act No. 133 of the 1969 Session, approved November 25, 1969, Acts Nos. 16 and 17 of the 1970 Session, both approved February 18, 1970, Acts Nos. 94 and 95 of the 1970 Session, both approved March 26, 1970, Act 127 of the 1970 Session, approved June 22, 1970, Act No. 227 of the 1970 Session, approved November 24, 1970, Act No. 256 of the 1970 Session, approved November 27, 1970, Act No. 267 of the 1970 Session, approved November 30, 1970 (the "Acts"), and (iii) certain Preambles and Resolutions adopted by the Governor, the Auditor General and the State Treasurer, which among other things, authorized the issuance and sale of the Bonds and prescribed the form thereof, the manner of bidding therefor, and forms of the bidding documents used in connection with the issue and sale of the Bonds.

The Bonds have been issued to finance public improvement projects (Series S Bonds), and highway projects (Series T Bonds), specifically itemized in a capital budget. Subsection 7 (a) (4) of Article VIII of the Constitution authorizes the incurring of debt for such purpose if such debt will not cause the amount of all net debt outstanding to exceed one and three-quarters times the average of the annual tax revenues deposited in the previous five fiscal years as certified by the Auditor General.

I have examined such constitutional provisions and statutes and such other matters and documents, including specimens of the Bonds, the Preambles and Resolutions adopted by the Governor, the Auditor General and the State Treasurer, and the certificates delivered today at the Closing as I have thought necessary or appropriate.

I am of the opinion that:

1. Section 7 of Article VIII of the Constitution of Pennsylvania has been duly approved and adopted and has become part of the Constitution of Pennsylvania, and the Acts have been duly and properly enacted.

2. The Governor, the Auditor General and the State Treasurer have, pursuant to the full and adequate legal power conferred upon them by the Amendment and the Acts, validly taken all necessary and proper action to issue and sell the Bonds, and the Bonds have been validly authorized, issued and sold pursuant to proper and appropriate action of such officials in accordance with the Amendment and the Acts.

3. The Bonds are lawful, valid, direct and general obligations of the Commonwealth of Pennsylvania, and the full faith and credit of the Commonwealth are pledged for the payment of the principal thereof at maturity.

4. The Bonds are exempt from taxation for state and local purposes within the Commonwealth of Pennsylvania, except succession or inheritance taxes.

5. The Commonwealth of Pennsylvania has the power to provide for the payment of the principal of and interest on the Bonds by levying unlimited ad valorem taxes upon all taxable property within the Commonwealth, except certain excise taxes and fees which are specifically limited to special purposes by Section 11 of Article VIII of the Constitution.

6. If sufficient funds are not appropriated for the timely payment of interest upon and installments of principal of the Bonds, the Constitution requires the State Treasurer to set apart from the first revenues thereafter received applicable to the appropriate fund a sum sufficient to pay such interest and installments of principal and to apply said sum to such purposes; the State Treasurer may be required so to set aside and apply such revenues at the suit of the holder of any of the Bonds.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 28

*Bureau of Correction—Inmates—Authority to operate motor vehicles in connection with work assignments.*

1. Properly licensed inmates have been operating licensed motor vehicles on public roads in connection with their work assignments in various institutions for many years.

2. Numerous worthwhile programs would be seriously impeded if licensed inmates were not permitted to operate motor vehicles.
3. Liability coverage for the inmates exists under the Commonwealth's master fleet insurance.
4. Under Section 2407 of the Administrative Code of 1929, as amended, 71 P.S. § 637, inmates are employees of the Bureau of Correction while operating such vehicles with permission.
5. The Bureau may continue to permit inmates who are properly licensed to operate motor vehicles in connection with their job assignments.

Harrisburg, Pa.,  
April 30, 1971

Stewart Werner  
Deputy Commissioner  
Bureau of Correction  
Camp Hill, Pa.

Dear Commissioner Weaver:

I have reviewed your memorandum of April 13, 1971 in which you inquire as to whether it is appropriate for the Bureau to permit inmates who are properly licensed to operate licensed motor vehicles on public roads in connection with their work assignments in the various institutions.

It is my understanding that licensed inmates have been operating such vehicles for many years. It is also my understanding that a good many very worthwhile programs would be seriously impeded if licensed inmates were not permitted to operate motor vehicles.

We have reviewed the Commonwealth's Master Fleet Insurance and we are convinced that there is liability coverage. We also note that the insurance carrier has agreed that inmates are covered by the policy.

I have also reviewed Section 2407 of the Administrative Code of 1929, as amended, 71 P. S. § 637. It is my conclusion that for the purposes of that section, inmates are employees of the Bureau of Correction while operating such vehicles with permission.

I, therefore, conclude that the Bureau may continue to permit inmates who are properly licensed to operate motor vehicles in connection with their job assignments.

Sincerely yours,

J. SHANE CREAMER,  
*Attorney General.*

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OFFICIAL OPINION No. 29

*Escheat—Handguns—Disposition of, by Secretary of Revenue.*

1. Fiscal Code of 1929, 72 P. S. § 1310.1 provides that the Secretary of Revenue may convert any escheatable property into cash.
2. The statute does not, however, mandate such conversion into cash.
3. All handguns which escheat to the Commonwealth may legally be destroyed and need not be converted into cash.

Harrisburg, Pa.,  
May 4, 1971

Honorable Robert P. Kane  
Secretary of Revenue  
Commonwealth of Pennsylvania  
Harrisburg, Pennsylvania

Dear Secretary Kane:

We have reviewed your letter of April 14, 1971, concerning the operation of your Escheats Division. In that letter you asked our advice on whether handguns which have escheated to the Commonwealth may be legally destroyed.

You indicate in your letter that the sale of handguns has produced an infinitesimal amount of revenue to the Commonwealth, that the records of your Department disclose that not a single person claiming to be the owner of an escheated gun has made a claim for the return of that gun, and that in your judgment the sale of handguns results in further distribution of these weapons which may be used in the perpetration of violent crimes against the public.

We have given careful consideration to your request for advice and have concluded that the Department of Revenue may legally destroy any and all handguns which may escheat to the Commonwealth.

The law governing the sale of escheatable property by the Secretary of Revenue is found in the amendments of the Fiscal Code of 1929 of

December 22, 1951, P. L. 1721, and the Act of July 28, 1953, P. L. 654, 72 P. S. § 1310.1. That statute provides in relevant part:

“Whenever the Secretary of Revenue shall come into the possession of any escheatable property other than cash or real estate, either by escheat or without escheat, it shall be lawful for him to convert such property into cash in the following manner”:

The statute goes on to provide the specific manner in which escheatable property is to be converted into cash. The statute does not, however, mandate such conversion into cash. Accordingly, you are advised that all hand guns which escheat to the Commonwealth may legally be destroyed and need not be converted into cash.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION No. 30

#### *Justice Department—Authority of agents to carry firearms.*

1. Decisions of the Pennsylvania Courts have made it clear that the Attorney General has broad law enforcement powers and duties.
2. The Administrative Code sets forth in Section 704, that the Attorney General is the Chief law officer of the Commonwealth. 71 P. S. § 244.
3. The law enforcement duties and the powers of the Attorney General and every agent duly commissioned by him for that purpose include every duty and power of any law enforcement officer, including but not limited to powers to serve subpoenas and other processes, to carry firearms without licenses, and to make searches and seizures, and to arrest.
4. The designation of agents to exercise those duties and powers may take any form which establishes the intent of the Attorney General to make such a delegation.
5. Agents designated to exercise the Attorney General's law enforcement powers are “law enforcement officers” under the Uniform Firearms Act, 18 P.S. § 4628(e), and can carry firearms without licenses.



Harrisburg, Pa.,  
May 5, 1971

Mr. Owen Morris  
Executive Director  
Pennsylvania Crime Commission  
Department of Justice  
Harrisburg, Pennsylvania

Dear Mr. Morris:

You have requested our opinion with respect to the extent of any authority possessed by agents of the Department of Justice to carry firearms without licenses and to exercise the other powers and duties of law enforcement officers.

Decisions of the Pennsylvania courts have made it clear that the Attorney General has broad law enforcement powers and duties. See, e.g., *Commonwealth v. Freed*, 424 Pa. 508, 228 A. 2d 382 (1967); *Commonwealth v. Fudeman*, 396 Pa. 236, 158 A. 2d 425 (1959); *Matson v. Margiotti*, 371 Pa. 188, 53 A. 2d 572 (1952); *Commonwealth ex rel. Margiotti v. Orsini*, 368 Pa. 259, 81 A. 2d 891 (1951); *Margiotti Appeal*, 365 Pa. 330, 75 A. 2d 465 (1950); *Dauphin County Grand Jury Investigation Proceedings* (No. 1, 2, 3) 332 Pa. 289, 342, 358, 2 A. 2d 783, 802, 804 (1938); *Commonwealth ex rel. Miner v. Margiotti*, 325 Pa. 17, 188 A&P. 524 (1936); *Commonwealth v. Lehman*, 309 Pa. 486, 104 A&P. 526 (1932); *Commonwealth v. Bardascino*, 210 Pa. Superior Ct. 202, 232 A. 2d 236 (1967); *Commonwealth ex rel. Gryger v. Burke*, 173 Pa. Superior Ct. 458, 98 A. 2d 380 (1953). In addition, the Administrative Code sets forth in Section 704 that the Attorney General is the chief law officer of the Commonwealth, 71 P. S. § 244. Furthermore, Section 904 of the Administrative Code, 71 P. S. § 294, provides that:

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

"(a) To investigate any violations, or alleged violations, of the laws of the Commonwealth which may come to its notice;

"(b) To take such steps, and adopt such means as may be reasonably necessary to enforce the laws of the Commonwealth."

The law enforcement duties and powers of the Attorney General and every agent duly commissioned by him for that purpose include, there-

fore, every duty and power of any law enforcement officer or "peace officer," including but not limited to powers to serve subpoenas and other process, carry firearms without licenses, and make searches, seizures and arrests. The designation of agents to exercise those duties and powers may take any form which establishes the intent of the Attorney General to make such a delegation.

With specific reference to the authority of agents to carry firearms without licenses, the Uniform Firearms Act, 18 P. S. § 4628(e), forbids any person to carry a firearm in any vehicle or concealed on or about his person, except in his place of abode or fixed place of business, without a license, with certain exceptions, including one pertaining to "constables, sheriffs, prison or jail wardens, or their deputies, policemen of the Commonwealth or its political sub-divisions, or other law enforcement officers." Agents designated to exercise the Attorney General's law enforcement powers are "law enforcement officers" within the meaning of that exception, and can carry firearms without licenses.

It is therefore our opinion and you are advised that agents of the Attorney General who have been so designated possess the full range of powers of a law enforcement officer or "peace officer," and are charged with the duty of the proper exercise of those powers.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 31

*Historical Preservation Fund—Inclusions of moneys collected from the sale of publications, souvenirs, and other sales at Valley Forge State Park and Washington Crossing State Park.*

1. Under Section 2802-A of the Administrative Code of 1929, 71 P. S. § 717, moneys collected from the sale of publications, souvenirs, other sales, fees, and admissions at Valley Forge State Park and Washington Crossing State Park may be deposited with the State Treasury and credited to the Historical Preservation Fund.

Harrisburg, Pa.,  
May 6, 1971

S. K. Stevens, Executive Director  
Pennsylvania Historical & Museum Commission  
Harrisburg, Pa.

Dear Mr. Stevens:

You have inquired as to whether or not moneys collected from the sale of publications, souvenirs and other sales, fees and admissions at Valley Forge State Park and Washington Crossing State Park may be deposited with the State Treasury and credited to the Historical Preservation Fund created by Section 2802-A of the Administrative Code of 1929, P. L. 177 and amendments, 71 P. S. § 717, and used in accordance with the provisions of that Section.

Section 2802-A provides as follows:

"All moneys collected by the Department of Property and Supplies from the sale of publications for the Pennsylvania Historical and Museum Commission, and all moneys collected by the commission from fees from the sale of its publications and other sales, shall be paid into the State Treasury through the Department of Revenue and credited to a fund to be known as the "Historical Preservation Fund," which is hereby created. All moneys in the fund from time to time are hereby appropriated to the Pennsylvania Historical and Museum Commission for the preservation, care and maintenance of the historical buildings, museums, grounds, monuments, public records and antiquities committed to its custody, for the publication and republication of matters of historical or archaeological interest, and for the research and editorial work incidental thereto, and for the purchase of publications, post-cards and other souvenirs of an historical nature for sale at the State Museum and at the historical properties administered by the commission, and for any other purpose prescribed in section 2801-A of this act. (Added June 28, 1951, P. L. 591; Amended May 27, 1957, P. L. 204; and December 8, 1959, P. L. 1736.)

We have examined the pertinent provisions of Act No. 275 of 1970, in particular Sections 9, 27 and 31 of said Act No. 275, 71 P. S. §§ 145, 146, 148, 510-102, 718-1 to 718-3 (Supp. 1971) and it is our opinion and you are so advised, that the moneys so collected from sale, fees and admissions may be so deposited and used for the purposes stated in Section 2802-A.

In particular, Section 31 (d) of the Act provides as follows:

“All personnel, allocations, appropriations, equipment, files, records, contracts, agreements, obligations, and other material which are used, employed or expended in connection with the powers, duties or functions transferred by this act to the Pennsylvania Historical and Museum Commission are hereby transferred to the Pennsylvania Historical and Museum Commission with the same force and effect as if the appropriations had been made to and said items had been the property of the Pennsylvania Historical and Museum Commission in the first instance and as if said contracts, agreements and obligations had been incurred or entered into by said Pennsylvania Historical and Museum Commission.”

This language would seem to make it clear that these moneys should be so received, deposited and used as if appropriated to and used by the Pennsylvania Historical and Museum Commission in the first instance, and if any contracts resulting in such sales had been incurred or entered into by the Pennsylvania Historical and Museum Commission. This language would thus apply to existing contracts for sales.

Accordingly, our answer to your inquiries is in the affirmative in all respects.

Sincerely yours,  
J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION No. 32

*State colleges and universities—Commonwealth Documents Law—Application to regulations adopted by boards of trustees.*

1. Section 102 of the Commonwealth Documents Law of 1968, 45 P. S. § 1102 makes it clear that the Act is applicable to the rules and regulations adopted by boards of trustees of State-owned colleges and universities.
2. However, the rules here in question may be deemed to fall within the exception provided in Section 204 of the Act, so long as the State Board of Education and/or the Board of State College and University Directors has issued Rules and Regulations covering the subject and the requirements of the said Section 204.

Harrisburg, Pa.,  
May 12, 1971

Dr. David H. Kurtzman  
Secretary of Education  
Department of Education  
Harrisburg, Pennsylvania

Dear Dr. Kurtzman:

This is in response to your request for advice dated April 27, 1971, regarding the applicability of the Commonwealth Documents Law of 1968, 45 P. S. § 1101 et seq. to rules, regulations and policies adopted by boards of trustees of state-owned colleges and universities.

The definitions contained in Section 102 are so broad as to make it clear that the Act is applicable to the rules and regulations in question. However, it is our opinion that the rules in question may be deemed to fall within the exception provided in Section 204 of the Act so long as the State Board of Education and/or the Board of State College and University Directors has issued rules or regulations covering the subject and the requirements of the said Section 204 are carried out.

Very truly yours,  
J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 33

*Schools and school districts—Additional penalties for not fulfilling 180-day requirement.*

1. There is no provision the School Code authorizing the Department of Education to impose penalties, other than the change in reimbursement, upon school districts which do not fulfill the 180-day requirement.

Harrisburg, Pa.,  
May 12, 1971

Dr. David H. Kurtzman  
Secretary of Education  
Department of Education  
Harrisburg, Pennsylvania

Dear Dr. Kurtzman:

This is in response to your request for legal advice of May 10, 1971, regarding "additional" penalties to school districts which do not fulfill the 180-day requirement even though able to do so.

It is our opinion, and you are so advised, that there is no provision of the School Code authorizing the Department of Education to impose penalties, other than the change in reimbursement, in such case.

Possibly resident taxpayers could bring an action under Section 318 of the School Code against the school directors for neglecting to perform their duty of providing 180 days of education, however, we pass no opinion on the propriety of such action at this time.

The portion of Section 2552 of the School Code to which you refer is not applicable to this situation since it is restricted to those cases in which the law violated is for the purpose of preserving "the health or safety of pupils." Being punitive in nature, this section must be strictly construed. The 180-day requirement would not appear to be related to health or safety.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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OFFICIAL OPINION No. 34

*Schools and school districts—Authority to borrow funds.*

1. Under Section 634 of the School Code, a school board has the power to borrow funds for current expenses and debt service so long as the amount borrowed does not exceed the statutory limits and other requirements of the Act.

Harrisburg, Pa.,  
May 20, 1971

Dr. David H. Kurtzman  
Secretary of Education  
Department of Education  
Harrisburg, Pennsylvania

Dear Dr. Kurtzman:

This is in response to your request for advice dated May 5, 1971, concerning Neshaminy School District.

It is our opinion that under Section 634 of the School Code, 24 P. S. § 6-634, the school board has the power to borrow funds for current

expense and debt service. So long as the amount borrowed does not exceed the statutory limits and the other requirements of Section 634 are met, we find nothing in the Code to prevent the school district from proceeding with its plans.

We would mention that this is a local matter to be resolved between the school, its solicitor and the bank from which the loan is to be made. The above paragraph should not be interpreted as anything more than a statement as to our understanding of the law.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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OFFICIAL OPINION No. 35

*Blind persons—Exclusion from places of public accommodation due to guide dogs.*

1. 1967 amendments to the Human Relations Act, 43 P. S. § 951 et seq. concerning findings and declaration of policy, recognized broadly the practice of discrimination against individuals or groups by reason of their race, color, or religious creed, ancestry and use of guide dogs because of the blindness of the user is a matter of concern to the Commonwealth, and that it is the public policy of the Commonwealth to safeguard all the individuals all their rights at places of public accommodation.
2. It is to be noted that Section 5(i), 43 P. S. § 954(1), of the Human Relations Act setting forth unlawful discriminatory practices with respect to places of public accommodation, resort, or amusement, was not amended so as to include a reference to these guide dogs. Thus, in order to achieve a fully and forcible policy, an amendment of Section 5(i) would be desirable.

Harrisburg, Pa.,  
May 25, 1971

∴ The Honorable Ernest P. Kline  
∴ Lieutenant Governor of Pennsylvania  
Room 200—Main Capitol  
Harrisburg, Pennsylvania 17120

Dear Governor Kline:

Thank you for your letter of May 13th attaching Mr. McMichael's letter to you of May 11th.

Mr. McMichael's concern, and yours, relating to his exclusion from a place of public accommodation because he was accompanied by his guide dog, is understandable. The trouble arises from the peculiar wording of the amendments relating to guide dogs made to the Human Relations Act, Act of October 27, 1955, P. L. 744, 43 P. S. § 951 et seq., by the Act of August 11, 1967, P. L. 208, 43 P. S. 953.

While this Act amends Section 2 of the Human Relations Act concerning Findings and Declaration of Policy by recognizing broadly that the practice of discrimination against individuals or groups by reason of their race, color, religious creed, ancestry and *use of guide dogs because of blindness of the user*, etc., is a matter of concern to the Commonwealth, and that it is the public policy of the Commonwealth to safeguard all individuals their rights at places of public accommodation; and to secure commercial housing regardless of race, etc., and use of guide dogs because of blindness of the user, the following guide dog amendments appear to limit the civil right to the use of guide dogs because of blindness of the user to accommodations and advantages with respect to commercial housing. See Sections 3, 5(a)(1), (3), (5) and (6).

It is to be noted that Section 5(i), 43 P. S. § 954(2), setting forth unlawful discriminatory practices with respect to places of public accommodation, resort or amusement, was not amended so as to include a reference to the use of guide dogs.

I have asked Mr. Ralph E. Beistline, Acting Director of the Bureau of the Visually and Physically Handicapped, Department of Public Welfare, to contact the Belmont Lounge to request the owner to comply with the policy of the Commonwealth relating to the use of guide dogs as expressed in the Human Relations Act.

However, in order to achieve a fully enforceable policy, I suggest that an amendment of Section 5(i) would be desirable, and your expression of interest in such an amendment would, I am sure, be most helpful.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*



## OFFICIAL OPINION No. 36

*Food—Sale of pre-packaged food in non-tamperproof containers.*

1. The use of non-tamperproof containers which can be opened and then reclosed without visible evidence that they have been opened is unlawful with the sale of pre-packaged foods in the Commonwealth of Pennsylvania.
2. The Pennsylvania General Food Law, Act of May 13, 1909, P.L. 520, as amended, 31 P. S. § 1 et seq. provides for the protection of the Public Health and prevention of fraud and deception by prohibiting the manufacture or sale of "adulterated" food.
3. Section 3(a)(6) provides that, for purposes of the Act, an article of food is deemed to be adulterated if it is an animal or vegetable substance "produced, stored, transported, exposed, or kept in a way or manner that might tend to render the article diseased, contaminated, or unwholesome."
4. The use of non-tamperproof containers is unlawful because the food therein is exposed and "kept in a way or manner that might tend to render the article diseased, contaminated or unwholesome."
5. Existing regulations of the Department of Agriculture also effectively prohibit the use of non-tamperproof containers.
6. Pursuant to Section 8 of the Act, the Department of Agriculture is empowered to enforce the Act and thus may take the appropriate action against manufacturers, wholesalers and retailers to borrow the continued use of non-tamperproof containers.

May 25, 1971  
Harrisburg, Pa.,

Honorable James A. McHale  
Secretary of Agriculture  
2301 North Cameron Street  
Harrisburg, Pennsylvania

Dear Mr. McHale:

You have informed us that the Department of Agriculture is in receipt of numerous citizen complaints and reports from its own inspectors to the effect that food items are currently being sold in the Commonwealth in non-tamperproof packages, i.e., packages which can be opened and then reclosed without visible evidence that they have been opened.

Furthermore, you have informed us that the use of non-tamperproof packages creates a health hazard because such containers can be opened to admit pathogenic micro-organisms and reclosed without any evidence of the opening whereby the food becomes contaminated and can cause

illness when ultimately purchased and consumed by an unsuspecting individual. It also appears that such packages may permit the entry of filth or other foreign matter when opened and reclosed prior to sale to an unsuspecting consumer, thus presenting another hazard. Also, you have informed us that there is a potential for economic fraud because portions of the package can be lost by spoilage or pilferage prior to the sale, again without any warning to the ultimate consumer.

We have carefully reviewed the use of non-tamperproof containers and the hazards presented thereby, as described above, and have concluded that such containers may not be lawfully used with the sale of pre-packaged foods in the Commonwealth of Pennsylvania. This opinion is based upon specific provisions of the Pennsylvania General Food Law, Act of May 13, 1909, P. L. 520, as amended September 1, 1967, P. L. —, No. 121, 31 P. S. § 1 et seq. and regulations thereunder.

Thus, the General Food Law provides for the protection of the public health and the prevention of fraud and deception by prohibiting the manufacture or sale, the offering for sale or the having in possession with intent to sell, "adulterated" food. Section 3(a)(6), 31 P. S. § 3(a)(6) provides that, for the purpose of the Act, an article of food is deemed to be adulterated if it is an animal or vegetable substance "produced, stored, transported, exposed, or kept in a way or manner that might tend to render the article diseased, contaminated, or unwholesome . . ."

It is our opinion that the use of non-tamperproof containers is unlawful because the food therein is exposed and "kept in a way or manner that might tend to render the article diseased, contaminated or unwholesome."

Existing regulations of the Department of Agriculture also effectively prohibit the use of non-tamperproof containers. Thus, Section 103(c) of the Department of Agriculture regulations adopted November 28, 1966, implements Section 3(a) of the Act and states that "all foods produced, transported, exposed, or kept in a way or manner that might tend to render the article diseased, contaminated or unwholesome are deemed to be adulterated." Furthermore, Section 104 of the regulations provides that "foods must at all times be properly protected from flies, other insects, rodents, animals, dust, dirt, and all other means whereby the food might become contaminated or adulterated."

Section 3(b) of the General Food Act makes it unlawful for any person manufacturing articles of food or selling articles of food, whether

at wholesale or retail, to have in his possession or to transport adulterated food. Pursuant to Section 8 of the Act, the Department of Agriculture is empowered to enforce the Act and thus may take appropriate action against manufacturers, wholesalers and retailers to bar the continued use of non-tamperproof containers.

Accordingly, it is our opinion that the Pennsylvania General Food Law and regulations thereunder prohibit the use of non-tamperproof containers for pre-packaged food sold in the Commonwealth and that the Department of Agriculture is empowered to enforce violations of the Act.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION No. 37

*State government—Relationship of Commissioner of Professional Occupational Affairs to the Secretary of the Commonwealth—Substantive areas of responsibility—Amplification of Op. Atty. Gen. No. 12, March 17, 1971.*

1. Op. Atty. Gen. No. 12, March 17, 1971, concerning the relationship between the Secretary of the Commonwealth and the Commissioner of Professional and Occupational Affairs was primarily directed to matters of monetary expenditures.
2. The Commissioners authority and discretion as to non-administrative matters is extremely broad under Section 503 of the Administrative Code, 71 P. S. § 183.
3. The delegation of authority to the Commissioner by the Governor for substantive matters under his jurisdiction appears plenary, since there is no indication elsewhere in the Administrative Code, that the legislature intended to limit the Commissioner's power by subordinating his discretion to review by the head of the Department of which he is a part for administrative purposes, although of course coordination and cooperation to avoid overlapping function is required. 71 P. S. § 279.1.
4. The Secretary of the Commonwealth has administrative authority over the Commissioner in the area of money expenditures and auditing procedures and the Commissioner has independent authority over the substantive areas of responsibility which have been delegated to him pursuant to statute.

Harrisburg, Pa.,  
May 26, 1971

Honorable C. DeLores Tucker  
Secretary of the Commonwealth  
308 Capitol  
Harrisburg, Pennsylvania

Dear Secretary Tucker:

On March 17, 1971 we sent you a memorandum opinion dealing with certain aspects of the relationship between your office and that of the Commissioner of Professional and Occupational Affairs. This memorandum was sent in response to your request for a legal opinion of March 9, 1971.

Subsequently, the Commissioner of Professional and Occupational Affairs has noted that our March 17th memorandum was primarily directed to the matter of monetary expenditures which we concluded were subject to the jurisdiction of the department head pursuant to Section 503 of the Administrative Code, 71 P. S. § 183.

By amendment to Section 202 of the Administrative Code, the Commissioner was made a departmental administrative commission under the Department of State, 71 P. S. § 62. Thus, for administrative purposes, such as the audit procedures dictated by Section 503, the Commissioner is responsible to the Department of State.

On the other hand, it appears that the Commissioner's authority and discretion as to non-administrative matters is extremely broad. Thus, pursuant to Section 503 of the Administrative Code, 71 P. S. § 183, departmental administrative bodies such as the Commissioner are directed to "exercise their powers and perform their duties independently of the heads or any other officers of the respective administrative departments with which they are connected . . ." Moreover, pursuant to Section 310 of the Administrative Code, 71 P. S. § 279.1, the Commissioner is appointed by the Governor and has broad powers of administration over the area of professional and occupational affairs and over the various boards and bodies thereunder. Such delegation of authority to the Commissioner for substantive matters under his jurisdiction appears plenary, since there is no indication elsewhere in the Code that the Legislature intended to limit his power by subordinating his discretion to review by the head of the department of which he is a part for administrative purposes. Of course, Section 501 of the Code, 71

P. S. § 181 requires coordination and cooperation to avoid overlapping of functions, etc., but this is clearly designed for implementation by mutual consent, especially in connection with any requests for the use of personnel employed by the Commissioner.

After a careful review of the various statutory sections which pertain to the subject, it is our general conclusion that the Secretary of the Commonwealth has administrative authority over the Commissioner in the area of money expenditures and auditing procedures, and that the Commissioner has independent power over the substantive areas of responsibility which have been delegated to him pursuant to statute.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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OFFICIAL OPINION No. 38

*Information—Banks and banking—Disclosure of information concerning liquidation of City Bank of Philadelphia to the Philadelphia Inquirer.*

1. Section 302 of the Department of Banking Code, 71 P. S. § 733-302 prohibits the disclosure of certain information requested by the Philadelphia Inquirer concerning the liquidation of the City Bank of Philadelphia.

Harrisburg, Pa.,  
May 26, 1971

Mr. Donald L. Barlett  
Editorial Rooms  
The Philadelphia Inquirer  
400 North Broad Street  
Philadelphia, Pennsylvania 19101

Dear Mr. Barlett:

I have reviewed your letter to G. Allen Patterson, Secretary of Banking, and your letter to David Jewell of this office concerning disclosure of certain information requested by the Inquirer on the liquidation of the City Bank of Philadelphia.

We regret that the law prohibits disclosure of the information which is being sought by the Inquirer. The pertinent provisions of the law are found in Section 302 of the Department of Banking Code, 71 P. S. § 733-302.

This Section prohibits the disclosure of such information by the Secretary, any Deputy, Examiner, Clerk or other employe of the Department.

Section 302 reads as follows:

“Disclosure of Information Forbidden; Penalty; Exceptions.—

“A. Neither the secretary, nor any deputy, examiner, clerk, or other employe of the department, shall publish or divulge to anyone any information contained in or ascertained from any examination or investigation made by the department, or any letter, report, or statement sent to the department, or any other paper or document in the custody of the department, except when the publication or divulgement of such information is made by the department pursuant to the provisions of this act or of any other law of this Commonwealth, or when the production of such information is required by subpoena or other legal process of a court of competent jurisdiction, or when it is used in prosecutions or other court actions instituted by or on behalf of the department.

“B. A violation of the provisions of this section by the secretary, or by any deputy, examiner, clerk, or other employe of the department, shall be sufficient ground for his removal from office. In addition the secretary, deputy, examiner, clerk or other employe committing such violation shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be subject to imprisonment for a period not exceeding one year, or a fine not exceeding one thousand dollars, or both.”

Accordingly, by copy of this letter, I am advising Secretary Patterson that in our opinion the above cited law prohibits disclosure of the information concerning the City Bank of Philadelphia being sought by the Inquirer.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

## OFFICIAL OPINION No. 39

*Pennsylvania Crime Commission—Banks and banking—Request for files on City Bank of Philadelphia.*

1. In accordance with Section 908 of the Administrative Code, 71 P. S. § 298, the Secretary of Banking is requested to make available to the Attorney General and his staff those portions of the files of the Department of Banking concerning the City Bank of Philadelphia which contained information as to the Bank's business transactions and practices. It is also requested that the appropriate examiners and auditors be made available to the Attorney General's staff for informal discussions of particular transactions of the City Bank of Philadelphia.

Harrisburg, Pa.,  
June 2, 1971

Honorable G. Allen Patterson  
Secretary  
Department of Banking  
430 Education Building  
Harrisburg, Pennsylvania

Dear Secretary Patterson:

As you know, the Department of Justice, through the Pennsylvania Crime Commission, has undertaken an investigation of infiltration by organized crime into legitimate business in the Philadelphia area. Several individuals and business entities of significance to this investigation have been noted to have had transactions with the City Bank of Philadelphia and with Martin Decker, a director of the City Bank.

In order to obtain the information necessary for the proper conduct of this investigation—and in accordance with Section 908 of the Administrative Code, 71 P. S. § 298—I request by this letter that you make available to me and my staff those portions of the files of the Department of Banking concerning the City Bank of Philadelphia which contain information as to the Bank's business transactions and practices. Reports of the examinations and audits of the City Bank conducted since the chartering of the bank in 1968 are of particular importance.

I would also request that the appropriate examiners and auditors be made available to my staff for informal discussions of particular transactions and practices of the City Bank of Philadelphia.

I appreciate your interest in the significant problem of racketeer influence in business and financial institutions in the Commonwealth, and I am sure that through the cooperative efforts of the agencies of the Commonwealth, progress toward solution will be forthcoming.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION No. 40

#### *Schools and school districts—Contracts with school employes.*

1. A contract with a temporary teacher should be for a one year term with a provision for a renewal of an additional year, subject to satisfactory ratings in accordance with Section 1108 and 1123 of the Public School Code, 24 P. S. § 11-1123.
2. A contract with an employe holding an emergency certificate must terminate June 30th following the date of issuance, said date being the expiration of an emergency certificate pursuant to Section 10-640 of the State Board of Education Regulations.
3. Contract with an applicant holding the college interim certificate cannot exceed a 5-year term.
4. Substitute teachers can only be employed "to perform the duties of a regular professional employe during such period of time as a regular professional employe is absent on sabbatical leave or for other legal cause authorized and approved by the Board of School Directors or to perform the duties of a temporary professional employe who is absent."
5. Special teachers, as referred to in Section 1107 of the School Code, 24 P. S. § 11-1107 refers specifically to teachers qualified, and any contract is governed by Section 1101 of the Code, as amended, 24 P. S. § 11-1101, relative to professional employes.
6. Section 1121 of the School Code, 24 P. S. § 11-1121, providing the form of the contract, refers solely to professional employes. Business managers, public relations directors, and administrative assistants are non-mandated positions, and do not require certification under Section 1101, and their contracts should be prepared on an individual basis.
7. Contracts made with part-time teachers should be made in accordance with the contract form provided in Section 1121 of the Code, and should contain reference to the particular number of days and/or hours of employment and the salary based thereon.



Harrisburg, Pa.,  
June 9, 1971

Dr. David H. Kurtzman  
Secretary of Education  
Room 317, Education Building  
Harrisburg, Pennsylvania

Dear Dr. Kurtzman:

In reply to your inquiry of April 16, 1971, relative to contracts with school employees, response is herewith made to the specific numbered questions raised in said memorandum.

1. A contract with a temporary teacher should be for a one year term, with a provision of a renewal for an additional year, subject to satisfactory ratings in accordance with Sections 1108 and 1123 of the Public School Code, 24 P. S. §§ 11-1108, 11-1123.
2. A contract with an employe holding an emergency certificate must terminate on June 30th following the date of issuance, said date being the expiration of any emergency certificate, pursuant to Section 10-640 of the State Board of Education regulations.
3. A contract with an applicant holding a college interim certificate cannot exceed a five year term, same being the expiration date of such certification unless revoked, in accordance with Section 10-244 of the State Board of Education regulations.
4. Substitute teachers can only be employed "to perform the duties of a regular professional employe during such period of time as the regular professional employe is absent on sabbatical leave or for other legal cause authorized and approved by the board of school directors or to perform the duties of a temporary professional employe who is absent." Section 1101(2), 24 P. S. § 11-1101(2) of the Public School Code. Accordingly, any contract for this type of employment can only apply to contingencies that may arise during a school year, and therefore cannot include any provision of permanence.
5. Special teachers, as referred to in Section 1107 of the School Code, refers specifically to teachers qualified and, accordingly, any contract is governed by Section 1101, 24 P. S. § 11-1101 of the Code, as amended, relative to professional employes.

6. Section 1121 of the School Code, 24 P. S. § 11-1121, providing the form of contract, refers solely to professional employes, as defined in Section 1101 of the School Code, as amended. Business managers (as noted in query No. 6), personnel directors (query No. 8), public relations directors (query No. 9) and administrative assistants (query No. 10) are non-mandated positions, and do not require certification under Section 1101. Accordingly, contracts involving the above should be prepared on an individual basis by the local school solicitor based upon the specific arrangements for employment and should include duties, salary, and terms of employment.
7. Contracts made with part-time teachers, duly certificated, should be in accordance with the contract form provided in Section 1121 of the Code and should contain reference to the particular number of days and/or hours of employment and the salary based thereon.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 41

*Land and Water Conservation and Reclamation Act—Purchase of original equipment and furniture—Authorization.*

1. Section 9(b) of the Land and Water Conservation and Reclamation Act, Act of January 19, P. L. (1967) 996, 32 P. S. § 5109(b) establishes general standards for the disposition and use of all the proceeds of \$500,000,000 authorized indebtedness.
2. Section 9(b) also provides that “the moneys in the Development Fund are hereby specifically dedicated to meeting the cost of development of lands for conservation and reclamation purposes, and for recreation and historical purposes and the Commonwealth’s administrative expenses thereof . . .”
3. The portion of the funds to be used for recreation projects are set aside in Section 16(a) (3), 32 P. S. § 5116(a) (3) which allots \$125,000,000 for the cost of planning, related administrative expenses, and the development of public outdoor recreation areas.
4. The term “administrative expenses” as used in Section 9(b) and 16(a) is defined in Section 3(4) of the Act, 32 P. S. § 5103(4). The types of expenditures which the definition includes are so varied and dissimilar that they cannot be said to express a generic limitation.

5. The definition of "administrative expenses" certainly includes the cost of furniture and other original equipment or fixtures necessary to make a park or other recreation project functional.
6. The Land and Water Conservation and Reclamation Act is meant to be a comprehensive program of action to throw open public lands as soon as possible.
7. The Act clearly does not envision the partial completion of projects, nor can it be said to favor the delays and problems which might arise by requiring separate funding for furniture, equipment, and fixtures. In light of the policy expressed in the Act itself, it would be logical to infer such a restriction in the absence of specific language.

Harrisburg, Pa.,  
June 16, 1971

Honorable Charles P. McIntosh  
Secretary of the Budget  
Commonwealth of Pennsylvania  
Harrisburg, Pennsylvania

Dear Secretary McIntosh:

Please accept my sincerest apologies for the delay in answering your request for an opinion which we received on February 3, 1971. Due to certain administrative uncertainties accompanying the change of administration your request was not properly channeled.

You have requested from me an opinion on the legality of purchasing original equipment and furniture for projects constructed under the Land and Water Conservation and Reclamation Act from the funds authorized under that act. Your inquiry was confined to those projects developing land for recreation purposes.

The Land and Water Conservation and Reclamation Act, Act of January 19, 1968, P. L. (1967) 996, 32 P. S. § 5101, et seq., authorizes the issuance of bonds in the amount of five hundred million (\$500,000,000) dollars for various conservation, reclamation and recreation purposes. (This bond issue is sanctioned by Article VIII, Section 16 of the Constitution.) Section 9(b) of the Act, 32 P. S. § 5109(b) sets general standards for the disposition and use of all of the proceeds of the five hundred million (\$500,000,000) dollar authorized indebtedness. That section provides that the "moneys in the Development Fund are hereby specifically dedicated to meeting the cost of development of lands for conservation and reclamation purposes, and for recreation

and historical purposes and the Commonwealth's administrative expenses thereof as herein authorized and defined and shall not be expended except in accordance with the terms of this act." The portion of the funds to be used for recreation projects are set aside in Section 16(a)(3), 32 P. S. § 5116(a)(3). This section allots one hundred twenty-five million, (\$125,000,000) "for the cost of planning, related administrative expenses and development of public outdoor recreation areas including lands acquired with Project 70 funds."

The term "administrative expenses," as used in Sections 9(b) and 16(a), is defined in Section 3(4) of the Act, 32 P. S. § 5103(4), to mean "any expenditures of funds to accomplish the purposes of this act, including but not limited to expenditures of the Commonwealth agencies for their studies, planning, development, appraisal, investigation, engineering, legal and construction costs." The types of expenditures which the definition includes are so varied and dissimilar that they cannot be said to express a generic limitation. Furthermore, the definition provides that the term is "not limited to" the list of examples. Thus, their listing cannot be deemed to call for application of the maxim that *expressio unius est exclusio alterius*. The definition provides that "administrative expenses" can mean any expenditures so long as they accomplish the purposes of the act. This definition certainly includes the cost of furniture and other original equipment of fixtures necessary to make a park or other recreation project functional.

Section 2 of the Act, 32 P. S. § 5102, expresses the Legislature's finding that "the rapid growth of Pennsylvania's urban and suburban population requires the development of park, recreation and open space lands so that these public lands may be immediately open, available and used by the citizens of Pennsylvania." And, further, "the Commonwealth of Pennsylvania must act to develop and to assist local governments to develop lands that have been acquired for recreation, conservation and historical use so that the public may have access and enjoyment of these facilities at the earliest possible time." The urgency expressed in this declaration of policy makes it clear that the Land and Water Conservation and Reclamation Act is meant to be a comprehensive program of action to throw open public lands as soon as possible.

The act clearly does not envision the partial completion of projects nor can it be said to favor the delays and problems which might arise by requiring separate funding for furniture, equipment, and fixtures. In light of the policy expressed in the act itself, it would be illogical to infer such a restriction in the absence of specific language.

You mentioned the Capitol Facilities Debt Enabling Act, the Act of July 20, 1968, P. L. —, No. 217, 72 P. S. § 3920.1 et seq. as providing some guidance for the use of funds under the Land and Water Conservation and Reclamation Act. The acts are not related and arise from separate provisions in the Constitution. Indeed, the definition of “capital project,” to which you refer, is specifically limited to its use in the Debt Enabling Act alone. The term “capital project” is not used at all in the Land and Water Conservation and Reclamation Act. Nevertheless, it may be noted that the Capital Facilities Debt Enabling Act does not draw a distinction between the use of funds for a facility and the furnishings and equipment which might be necessary to place it in service.

In conclusion, it is clear that the Legislature did not intend to restrict the use of funds authorized by the Land and Water Conservation and Reclamation Act in a manner that would preclude the completion of the projects under the act. The act does authorize the use of its funds for the purchase of original equipment and furniture necessary to place the facility in operation.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 42

*Insurance—Surplus requirements for issuance of non-assessable insurance policies—Effect of Act No. 349 of 1968.*

1. Purpose of Act 349 of 1968, 40 P. S. § 382 was to provide that the Mutual Casualty Insurance Companies not only have a surplus at the time of application to raise non-assessable policies, but also to require a minimum capital, equal to that of a stock company, be maintained without fluctuation. A mutual insurance company is now required to have and maintain a surplus equal to the capital stock of an insurance company writing the same type of business.
2. Section 7 of Act 349 excepting insurance companies existing on the effective date of the Act from certain minimum capital stock, surplus, and other financial requirements does not apply to the surplus requirement of a mutual insurance company writing non-assessable policies.

Harrisburg, Pa.,  
June 17, 1971

Honorable Herbert S. Denenberg  
Insurance Commissioner  
108 Finance Building  
Harrisburg, Pennsylvania 17120

Dear Commissioner Denenberg:

This is in reply to your request for an opinion as to the effect of Act No. 349 of 1968, 40 P. S. § 382 on the surplus requirements for issuance of nonassessable insurance policies by mutual fire insurance companies and by mutual casualty insurance companies.

Under the Insurance Law prior to Act 349 a mutual insurance company could not write nonassessable policies unless it had a surplus in an amount not less than the capital required of a domestic stock insurance company transacting the same type of insurance. The law, however, provided that the surplus was not required to be in excess of an amount equal to the unearned premiums on the policies without contingent premiums. The effect of the proviso was to permit the surplus of a mutual insurance company selling nonassessable policies to fluctuate depending on the volume of policies sold.

The purpose of Act 349 in this portion of the amendment to past law was to provide that the mutual companies not only have the surplus at the time of application to write nonassessable policies and also require that a minimum capital equal to that of a stock company be maintained without fluctuation. For this reason the proviso was removed and the amendment added to the word "have" the requirement that the company "have" and "maintain" a surplus. This portion of the amending procedure of Act No. 349 of 1968 is clear and a mutual insurance company is now required to have and maintain a surplus equal to the capital stock of a stock insurance company writing the same type of business.

The question arises as a result of Section 7 of Act 349, which provides as follows:

"No insurance company existing on the effective date of this act except those writing policies upon automobiles . . . shall be required to meet the minimum capital stock, surplus and other financial requirements of this act."

Incidentally, the act has two Section Sevens, the other of which is not here relevant.

Section 7 does not apply to the surplus requirements of a mutual insurance company writing nonassessable policies because those requirements are set forth in Section 806, which was not amended by Act 349, and requires compliance with Section 806.1 and not Section 7 of Act 349.

You are, therefore, advised that a mutual casualty and a mutual fire insurance company must comply with Sections 806 and 806.1 without regard to Section 7 of Act 349.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION No. 43

*Welfare—Distribution of monies—Mailing of checks to banks and public assistance offices for distribution to recipients.*

1. Section 1503 of the Fiscal Code, Act of April 9, 1929, P. L. 343, Art. XV, as amended, 72 P. S. § 1503, makes it mandatory that the State Treasurer mail checks directly to the payee, but does not specify the address to be used by the Treasury Department.
2. The Treasury Department may pursue alternative avenues in order to comply with Section 1503, either by signing and mailing checks to the order of the recipient as payee and addressing those checks in care of the bank located within the appropriate area, or making the bank the payee and sending the check directly to the bank. The difference in these two methods is that in the first instance, the recipient's check will be sent to the bank, and the second, one check will be issued to the bank to include all recipients in that area.
3. Whichever method is used, it is assumed that the Treasury Department and the Welfare Department will agree upon how, when, and where a Welfare recipient will receive his assistance.

Harrisburg, Pa.,  
June 17, 1971

Honorable Grace M. Sloan  
State Treasurer  
129 Finance Building  
Harrisburg, Pennsylvania

Dear Mrs. Sloan:

We have your request of June 8, 1971, for advice as to whether welfare checks may be mailed to banks and public assistance offices for

distribution to the recipient. We understand that the distribution of welfare assistance through established banking and welfare facilities will help prevent certain inequities and abuses which have come to your attention.

Section 1503 of the Fiscal Code makes it mandatory that the State Treasurer mail checks directly to the payee but does not specify the address to be used by the Treasury Department. The pertinent provision is Section 1503(b) of the Act of April 9, 1929, P. L. 343, Art. XV, § 1503; as amended June 6, 1939, P. L. 261, § 6, 72 P. S. § 1503 which provides:

“Upon receipt of this warrant, the Treasury Department shall sign and mail the checks to the payees designated thereon.”

We believe that the Treasury Department may pursue alternative avenues in order to comply with Section 1503 of the Fiscal Code. First, the Treasury Department can sign and mail checks to the order of the recipient as payee and address those checks in care of the bank located within the appropriate area. The other avenue which can be pursued is to make the bank the payee and send the check directly to the bank. Nothing in Section 1503 of the Fiscal Code limits who may be designated a payee by the Department of Public Welfare. The difference in these two methods is that in the first instance each recipient's check will be sent to the bank, while in the second, one check will be issued to the bank to include all recipients within that area. The latter system reduces the amount of time and work that the Treasury Department will have to allocate to this particular subject. In addition, it is noted that Section 1503(a) allows the State Treasurer to determine the form and method of issuing such checks. Whichever method is used, it is assumed that the Treasury Department and the Welfare Department will agree on how, when and where a welfare recipient is to receive his assistance.

Accordingly, it is our opinion, and you are advised that welfare checks may be sent to the various banks and welfare facilities within the State where recipients may obtain their assistance.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*



## OFFICIAL OPINION No. 44

*Schools and school districts—School Code—Reimbursement for transportation cost.*

1. Previous interpretation of Section 1365 of the School Code, 24 P. S. § 13-1365 to the effect that there must be a contract filed with and approved by the Department of Education, for each pupil transported in a given vehicle, is incorrect.
2. The intent of the legislature in passing Section 1365 was to prohibit drivers or owners of vehicles transporting students from demanding, requesting or accepting any compensation for transporting pupils in excess of the compensation stipulated in the contract filed with and approved by the Department of Education.
3. However, contrary to the prior interpretation, Section 1365 does not prohibit the transportation of pupils not covered by contracts filed and approved by the Department of Education, even though the same vehicle may also carry pupils, this transportation is pursuant to the Department of Education approved contracts.

Harrisburg, Pa.,  
June 24, 1971

Dr. David H. Kurtzman  
Secretary of Education  
Department of Education  
Harrisburg, Pennsylvania

Dear Dr. Kurtzman:

On January 29, 1971, Mr. Paul L. Bark, Director of School Administrative Services sent a letter to Dr. Allen C. Harman, Superintendent of Montgomery County Schools, in which reference was made to an interpretation of Section 1365, 24 P. S. § 13-1365 of the School Code. Such interpretation was based upon prior advice of the Justice Department.

We recently have had an opportunity to review the aforesaid interpretation of Section 1365 in connection with the transportation of pupils for Special Schooling pursuant to Section 1374 of the Code, 24 P. S. § 13-1374. Upon such review, we have concluded that the prior interpretation of Section 1365 to the effect that there must be a contract filed with and approved by the Department of Education for each pupil transported in a given vehicle was not the intention of the Legislature, and is, therefore, not correct.

Section 1365 provides as follows:

“Section 1365: Extra Compensation for Transporting Pupils Unlawful. It shall be unlawful for any driver or owner of a vehicle transporting under a contract with a school district, or for any member of or board of school directors, to demand, request, or accept any compensation for transporting pupils, other than the compensation stipulated in the contract filed with and approved by the Department of Education.”

The intent of the Legislature in passing the above was to prohibit drivers or owners of such vehicles from demanding, requesting or accepting any compensation for transporting pupils *in excess* of the compensation stipulated in the contract filed with and approved by the Department of Education. However, contrary to the prior interpretation, Section 1365 does not prohibit the transportation of pupils not covered by contracts filed and approved by the Department of Education, even though the same vehicle may also carry pupils whose transportation is pursuant to Department of Education approved contracts.

The Vanguard School of Haverford, Pennsylvania, arranges for transportation of its pupils. Some of these pupils are transported pursuant to contracts approved by the Department of Education, but others are carried pursuant to contracts which are not so approved. However, in accordance with the present opinion, the fact that the same vehicle is utilized to transport both groups of pupils, has no legal significance and does not render the transportation in violation of Section 1365.

We trust that you will convey this opinion to Dr. Harman, to the Vanguard School, and to any other institution which has raised this question.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 45

*State colleges and universities—Community colleges—Authority of Board of Trustees to rent college facilities.*

1. There is no provision in the Community College Act, 24 P. S. § 5201 et seq. that invests any power in the Board of Trustees to rent or permit the use of the college facilities or rooms for private gain or use.
2. The public nature of the institution precludes its use by any individual for personal gain, even though he might render personal services to the institution at a cost less than the normal charge for the same.

Harrisburg, Pa.,  
June 29, 1971

Dr. David H. Kurtzman  
Secretary of Education  
Department of Education  
Harrisburg, Pennsylvania

Dear Dr. Kurtzman:

There is no provision in the Community College Act that vests any power in the Board of Trustees to rent or permit the use of the college facilities or rooms for private gain or use.

The public nature of the institution precludes its use by any individual for personal gain, even though he might render personal services to the institution at a cost less than the normal charge for the same.

The employment of the dentist in the dental technology course should be at a salary within the reasonable range of the value thereof and is to be included in the annual budget as a teaching salary.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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OFFICIAL OPINION No. 46

*Schools and school districts—Intermediate units—Authority to hold title to real estate.*

1. The ruling issued on September 15, 1970, by the Department of Justice is a proper and legal interpretation of the power of an intermediate unit to hold title to real estate.
2. Component school districts can create an authority to acquire a site and construct a building thereon for rental to the intermediate unit, subject, however, to the right of approval invested in the Department of Education.
3. It is within the province of the Department of Education to formulate policy guidelines, and thereby help to clarify any questions that may be raised by local school districts and intermediate units.

Harrisburg, Pa.,  
July 12, 1971

Dr. David H. Kurtzman  
Secretary of Education  
Room 317, Education Building  
Harrisburg, Pennsylvania

Dear Dr. Kurtzman:

In reply to your inquiry of June 11, 1971 relative to an intermediate unit headquarters building, this is to advise that the ruling issued on September 15, 1970 by the Department of Justice is a proper and legal interpretation of the power of an intermediate unit to hold title to real estate.

In accordance with said opinion of the Department of Justice, the component school districts could create an authority to acquire a site and construct a building thereon for rental to the intermediate unit, subject, however, to the right of approval vested in the Department of Education. This includes not only approval of construction, but also approval of the lease. Payment by the Commonwealth is based on the aid ratio, Section 919-A of Act 102, 24 P. S. § 9-969. The component school districts would be responsible for any deficit in lease payments resulting therefrom, pursuant to Section 920(a) and (d), 24 P. S. § 9-970.

In view of the responsibility of the Department of Education as the Commonwealth agency to make reimbursement to school districts and allocations to intermediate units, it is definitely within the province of the Department of Education to formulate policy guidelines, and thereby help to clarify any questions that may be raised by local school districts and intermediate units.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 47

*Firearms—field investigators of Bureau of Cigarette and Beverage Taxes—Designation as peace officers.*

1. Section 909 of the Pennsylvania Cigarette Tax Act, approved July 22, 1970, P. L. —, 72 P. S. § 3169.909 provides that Revenue employees officially designated as field investigators by the Secretary are declared to be peace officers.

2. Such field investigators are "law enforcement officers" under the Uniform Firearms Act, 18 P. S. § 4628(e), and are exempt from the prohibition against carrying a concealed firearm without a license.

Harrisburg, Pa.,  
July 12, 1971

Honorable Robert P. Kane  
Secretary of Revenue  
Finance Building—Room 207  
Harrisburg, Pennsylvania

Dear Mr. Kane:

Thank you for your letter of July 6, 1971, requesting our approval for your proposal to designate field investigators of the Bureau of Cigarette and Beverage Taxes as peace officers, and to issue handguns to them.

Section 909 of the Pennsylvania Cigarette Tax Act, approved July 22, 1970, P. L. \_\_\_, (Act No. 178), 72 P. S. § 3169.909 (Supp.) to which you refer, provides in part:

Such employes of the department as are officially designated by the Secretary of Revenue as field investigators of the bureau, and who carry identification of such capacity, are hereby declared to be peace officers . . .

I agree that this section provides authority for your proposed action. I might add as a technical matter that, as I read this section, your action would be to designate employes of your choice as field investigators, and to provide them with identification to that effect. All such field investigators acquire the status of peace officers by operation of this section.

Section 909 does not expressly provide authority for issuing handguns to field investigators. However, under the Uniform Firearms Act, "law-enforcement officers" are exempt from the prohibition against carrying a concealed firearm without a license. See 18 P. S. § 4628 (e). In my opinion, field investigators designated in accordance with Section 909 of the Pennsylvania Cigarette Tax Act fall within this exception, and may therefore be issued handguns by your office.

On the basis of the foregoing, you have my approval for the proposed program.

Very truly yours,  
J. SHANE CREAMER,  
*Attorney General.*

## OFFICIAL OPINION No. 48

*State colleges and universities—Specific grants for federal funds—Statutes—Relationship between Section 206 of the Fiscal Code, and Act No. 13 of 1970, 24 P. S. § 20-2004.1.*

1. Section 206 of the Fiscal Code, 72 P. S. § 206 invests power in the Department of Revenue to collect all amounts payable by all or for pupils for instruction and maintenance, and this clause is not in conflict with Act 13 of 1970, 24 P. S. § 20-2004.1 by reason of the distinct nature and purpose of the funds in question.
2. Article IV, § 52 of Act of May 28, 1937, P. L. 1019, 46 P. S. § 552 provides that there is a presumption that the legislature does not intend a result that is absurd, and impossible of execution, or unreasonable.
3. It is assumed that the legislature knew the language and the provisions of existing law when Act 13 was enacted. Section 206 is therefore still applicable to all federal funds, except in a specific grant of such a fund when awarded to a State college or university for a research or educational project.

Harrisburg, Pa.,  
July 12, 1971

Honorable Charles P. McIntosh  
Budget Secretary  
425 Main Capitol  
Harrisburg, Pennsylvania 17120

Dear Secretary McIntosh:

On February 11, 1971, William G. Williams, Deputy Attorney General, issued an opinion memorandum to Dr. David H. Kurtzman, Secretary of Education, whereby State colleges and universities could accept grants from Federal and State agencies, foundations, industrial corporations, or any other source in the prosecution of research or educational projects including purchase of equipment, with the power to bank and use such grants as directed by the grantor, in accordance with the provisions of clause 7 of Act No. 13 of 1970, 24 P. S. § 20-2004.1(7).

Your inquiry relative to Section 206 of the Fiscal Code, 72 P. S. § 206 and the possibility of conflict with Act 13, *supra*, is resolved by the wording of said Section 206, wherein (in clause (d)) it vests the

power in the Department of Revenue, to collect all amounts, *payable by or for pupils, for instruction and maintenance*. This clause is not in conflict with Act 13, by reason of the distinct difference in the nature and purpose of the funds in question.

Clause (f) of the Fiscal Code refers specifically to Federal funds and the receipt thereof by the Department of Revenue. If this provision is construed as over-all coverage, then the legislative intent as expressed in Act 13 would be meaningless.

Article IV, § 52, of the Act of May 28, 1937, P. L. 1019, 46 P. S. § 552 provides that there is a presumption that the Legislature does not intend a result that is absurd, impossible of execution, or unreasonable.

It is assumed that the Legislature knew the language and provisions of existing law when Act 13 was enacted. It is reasonable to assume that the Fiscal Code, in its reference to Federal funds, was all encompassing. Act 13 is specific, and, being bound by the Statutory Construction Act, Act 13 creates an exclusion from the provisions of the prior existent Fiscal Code.

Clause (f) is therefore still applicable to all Federal funds, excepting a specific grant of such a fund when awarded to a State college or university for a research or educational project.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 49

*Schools and school districts—Maternity leave—Employees—Non-tenured and non-professional.*

1. Section 2(D) of the Pennsylvania Human Relations Commission Guidelines filed December 18, 1970, providing that employers must provide a female employee who becomes pregnant with a reasonable maternity leave, with or without pay, includes all female employees of the school district and is not limited to professional, tenured employees.

Harrisburg, Pa.,  
July 16, 1971

Dr. David H. Kurtzman  
Secretary of Education  
Room 317, Education Building  
Harrisburg, Pennsylvania

Dear Dr. Kurtzman:

In response to your request dated March 29, 1971 for advice and direction in responding to a letter from Norman L. Levin, Esquire, dated March 19, 1971, on the above matter, it is our opinion that Section 2(D) of the Pennsylvania Human Relations Commission guidelines filed December 18, 1970, which provides that employers must provide a female employe who becomes pregnant with a reasonable maternity leave, with or without pay, includes *all* female employes of the school district, and is not limited to professional tenured employes.

Although this interpretation may cause financial or administrative hardship in the districts in some instances, the regulation is clear and mandatory in the absence of an exemption by the Commission from the regulation. Such exemption, based on a bona fide occupational qualification, will not be given unless the person seeking such exemption can demonstrate an overriding need for it.

It is our further opinion that maternity leave granted a provisional or non-tenured teacher would neither contribute probationary service toward tenure nor service toward permanent certification.

Very truly yours,  
J. SHANE CREAMER,  
*Attorney General.*

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OFFICIAL OPINION No. 50

*Bureau of Cigarette and Beverage Taxes—Disposition of cigarettes not bearing proper Pennsylvania Tax Stamps—Department of Revenue.*

1. 72 P. S. § 3169.1001(e) provides that the Department of Revenue shall dispose of cigarettes not bearing the proper Pennsylvania Tax Stamps.



2. Philadelphia Judges following old custom of ordering distribution of contraband cigarettes to institutions or other entities are undoubtedly unaware of this statute.

Harrisburg, Pa.,  
July 20, 1971

Honorable Joseph R. Glancey  
Judge, Municipal Court  
One East Penn Square Building  
Philadelphia, Pennsylvania 19107

Dear Judge Glancey:

The Bureau of Cigarette and Beverage Taxes has been faced with a recurring problem in the Philadelphia Municipal Court regarding the final disposition of cigarettes, not bearing the proper Pennsylvania tax stamps.

72 P. S. § 3169.1001(e) (Supp. 1971) provides that the Department of Revenue of the Commonwealth of Pennsylvania shall dispose of cigarettes forfeited under the provisions of this Act.

The Bureau reports to us that several of the judges in the Municipal Court have taken the position that they may order distribution of contraband cigarettes to institutions or other entities. The agents of the Bureau of Cigarette and Beverage Taxes are thus faced with the problem of obeying the judge and disobeying the law or disobeying the judge and obeying the law.

I am sure that the judges are not aware of this statute and that they are following what I realize is an old custom in Philadelphia.

Could you make this matter known to the judges in your Court so that we may cooperatively remedy this problem.

Very truly yours,  
J. SHANE CREAMER,  
*Attorney General.*

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OFFICIAL OPINION No. 51

*Banks and banking—Proposed loan by Citizens' Bank.*

1. Proposed sale of loans with a book value of \$929,000 for a consideration of \$500,000 would not constitute a violation of the Banking Code.

2. Opinion is based on required compliance with subparagraphs (i) and (ii) of Section 1416(a) of the Banking Code, 7 P. S. § 1416.
3. As the result of the intended sale, rather than having to write off these loans in their totality, the Bank can realize the sum of \$500,000.
4. The terms of sale must be no less favorable than the terms offered to other persons, and if it is determined that no better offer is practicably obtainable from an outside source, then there has been compliance with subparagraph (i).
5. There must also be compliance with subparagraph (ii) which provides for Director approval by a majority of Directors other than a director having a direct or indirect personal interest in the transaction since it is not an irregular course of business, and if Director approval is less than unanimous it should be scrutinized carefully for compliance.
6. Should compliance be found with the Banking Code, as outlined above, there would be no reason to prosecute under § 2102(a) of the Code, 7 P. S. § 2102(a).
7. Certain provisions of the agreement of sale should be noted. Such as paragraph 9(i); consent for approval of any state regulatory agency. This opinion is not to be regarded as such a consent or approval, and the Department of Justice will be free to take any action warranted by any wrongful acts constituting any part of the transaction.

Harrisburg, Pa.,  
July 20, 1971

Honorable G. Allen Patterson  
Secretary of Banking  
Harrisburg, Pennsylvania

Dear Mr. Patterson:

This is in reply to your letter of July 15, 1971 regarding The Citizens' Bank and to the specific question of whether the proposed sale of loans to Mr. Field with a book value of \$929,000.00 for a consideration of \$500,000.00 would constitute a violation of The Banking Code. We wish to advise that under the facts set forth in your letter and the attachments thereto, no objectionable violation would occur.

As you observe, Section 1416 of The Banking Code of 1965, 7 P. S. § 1416 is the relevant section. This section provides:

“(a) An institution shall not purchase any asset from, or sell any asset to, any director, trustee, officer, employe or

attorney of the institution or of an affiliate of the institution except:

“(i) Upon terms not less favorable to the institution than those offered to other persons, and

“(ii) With the prior approval of a majority of all of the directors or trustees or members of an executive or other committee, other than a director or member of a committee having a direct or indirect personal interest in the transaction, unless the transaction is made in the regular course of business.

“(b) A violation of this section shall be subject to the penalty provisions of this act.”

We first note from the representation in paragraph 6(k) of the Agreement of Sale that Mr. Field does not appear to be a “director, trustee, officer, employe or attorney” of The Citizens’ Bank. We do not, however, rest our opinion on this uncertain fact in view of the close relationship and identification of both Mr. Field and his wife to The Citizens’ Bank and Mrs. Field’s current status as a director of the Bank.

Our opinion is rather based on the required compliance with subparagraphs (i) and (ii) of Section 1416(a) which your letter indicates is intended. We note your order of April 12, 1971, which required the Bank to write off loans aggregating \$955,675.00 as worthless. It now appears that, as a result of the intended sale of Mr. Field’s stock, rather than having to write off these loans in their totality, the Bank can realize the sum of \$500,000.00 by the sale of these loans to Mr. Field. The law states that these terms of sale must be no less favorable than those *offered* to other persons. From your letter and our discussion, it appears that literal compliance with this provision is not possible because these loans cannot practicably be *offered* for sale to outside persons. If you find, however, that no better offer is practicably obtainable from an outside source—and your letter does indicate such a finding in view of your determination that the loans are worthless—then you may conclude that there has been compliance with subparagraph (i).

There must also be compliance with subparagraph (ii), which provides for director approval by a majority of directors other than a director having a direct or indirect personal interest in the transaction since it is not in the regular course of business. In view of the broad personal interests in the transaction giving rise to this proposed sale of

loans, if the director approval is less than unanimous, it should be scrutinized carefully for compliance. In addition, you might wish to require shareholders' approval.

Should you find compliance with The Banking Code, as outlined above, you are advised that there would be no reason to prosecute under Section 2102(a) of the Code, 7 P. S. § 2102(a). We are guided in this opinion by Section 2102(a)(iv) of the Code which requires, as part of any penalty, that a fine be assessed upon a guilty party in the amount of any profit which he receives on the transaction. Since your Department has found the loans in question to be worthless, the likelihood of such profit should be non-existent.

We also note that Section 1413 of The Banking Code of 1965 is not applicable to this question because the only possible applicable portion of that provision, in paragraph (a)(iii), refers to a "promissory note or other evidence of indebtedness issued by the institution." The evidences of indebtedness here are issued by the various borrowers, not the Bank.

We discern from your letter that the intended transaction will have the purpose of keeping the Bank viable by enabling it to comply with your order of April 12, 1971, through the introduction of new management, the injection of new capital and the conversion of worthless assets into one-half million dollars. This result by your exercise of discretion, is in keeping with the purposes of The Banking Code (Section 103). We call to your attention the following provisions of the Agreement of Sale in this regard:

1. No exhibits were attached to the copy we received and we assume that you will wish to examine these exhibits.
2. Paragraph 4 provides that Mr. Field may sue in the Bank's name. You may not wish to have this apparent identity of interests.
3. Paragraph 5 calls for the resignation of five directors, the election of thirteen new directors, and a possible amendment to the By-Laws. Neither our opinion nor your approval of the transaction should be construed as an affirmation of the legality of this paragraph nor, for that matter, of any other aspects of the transaction which we have not examined.
4. Paragraph 6(k) refers to an Option Agreement which we have not examined.

5. Paragraph 9(i) calls for consent or approval of any State regulatory agency. This letter is not to be regarded as such consent or approval and the Department of Justice will be free to take any action warranted by any wrongful acts constituting any part of the transaction.

We trust that the foregoing complies with the request in your letter.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

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OFFICIAL OPINION No. 52

*Department of Transportation—Seismic surveys in search of oil—Use of State roads.*

1. Under Section 420 of the Act of June 1, 1945, 36 P. S. § 670-420 Secretary of Transportation is empowered to make reasonable rules and regulations governing the use of all state highways, and the Secretary could approve and regulate seismic explorations for oil under this provision.
2. Previous Attorney General's opinion dated August 22, 1934, prohibiting oil companies from using dynamite to test geological strata on State roads is distinguished.

Harrisburg, Pa.,  
July 21, 1971

Honorable Jacob G. Kassab  
Secretary, Dept. of Transportation  
Room 120  
Transportation and Safety Building  
Harrisburg, Pennsylvania 17120

Dear Mr. Kassab:

Several oil companies have requested permission from the Department of Transportation to make seismic surveys in search of oil within the limits of highway right-of-ways. Unlike the dynamite methods used in the 1930's, these tests are made with seismic instruments that project sound waves through the earth's crust. The tests will be made along the side of highways, not on the berm or roadway itself, and will cause no damage to the roadway, berm, or sidewalk. Due to traffic levels and excessive truck usage of Limited Access Highways, the oil companies would use only State roads as testing sites.

You have asked us whether use of State roads for this may be permitted by the Department of Transportation. Under Section 420 of the Act of June 1, 1945, 36 P. S. § 670-420, the Secretary of Transportation is empowered "to make reasonable rules and regulations governing the use of all State highways." The Secretary could approve and regulate seismic explorations for oil under this provision.

Other relevant highway provisions do not restrict the Secretary's power to grant approval for these explorations. Although Section 411 of the Act of June 1, 1945, 36 P. S. § 670-411, very strictly conditions and regulates use of State highway right-of-ways by public utility companies, the parties that would use the roads in this case are not public utilities. In addition, the prohibition against any "commercial enterprise or activity" found in Section 2391.3 of the Act of May 29, 1945, 36 P. S. § 2391.3, pertains solely to Limited Access Highways, and should not be applicable if the oil companies test on other State roads.

It should be noted that an informal Attorney General's opinion was rendered on August 22, 1934, which discussed a similar problem. A request by oil companies to test the geological strata by use of dynamite on State roads prompted the Attorney General in that instance to advise the Secretary of Highways that such testing was prohibited. The testing to be conducted by the oil companies in the present instance differs substantially from, and is much less damaging than, the dynamite testing procedures described in the earlier opinion. Insofar as Informal Opinion No. 437 took the position that all testing of whatever nature is prohibited from State roads, it is in error and is superseded by this opinion.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 53

*Civil Service—Substituting advanced billing for use of an appropriation.*

1. Since the practice of substituting the advanced billing for the use of an appropriation does not entail the defiance of legislative mandate, there is no need for any immediate corrective action and any differences of opinion or policy should be explored by the Commission and the Governor's Office of Administration.

Harrisburg, Pa.,  
July 23, 1971

Mr. John A. M. McCarthy, Commissioner  
State Civil Service Commission  
317 South Office Building  
Harrisburg, Pennsylvania 17120

Dear Mr. McCarthy:

Please excuse the delay in replying to your letters of June 14th and July 6th.

It is not too clear whether the present fiscal mechanisms of the Commission—substituting advanced billing for the use of an appropriation—deviates from the procedures provided for by Section 212 of the Civil Service Act, 71 P. S. § 741.210. However, while the legislature is certainly entitled to prescribe specific fiscal mechanisms with respect to an agency, it is also entitled to waive insistence on the implementation of such mechanism, which apparently the legislature has done by failing to make an appropriation to the Commission. Since, therefore, the practices in question do not entail defiance of legislative mandate, I see no need for any immediate corrective action and suggest that any differences of opinion or policy be explored by the Commission and the Governor's Office of Administration with such proposals for legislative change as may be necessary or advisable.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION NO. 54

*Pennsylvania Fish Commission—Department of Environmental Resources—Sale or Lease of Mineral in Streams and bodies of water—Royalty to Fish Commission—Relationship of Act of July 31, 1970, P. L. —, No. 225, 71 P. S. § 468 and an Act of December 3, 1970, P. L. —, No. 275, 71 P. S. § 150-1 et seq..*

1. The Act of July 31, 1970, P. L. —, No. 225, 71 P. S. § 468 authorized the Pennsylvania Fish Commission to collect a royalty on minerals dredged out of Commonwealth's streams and waterways.
2. The Act of December 3, 1970 P. L. —, No. 275, 71 P. S. § 510-1 et seq. created the new Department of Environmental Resources and transferred the functions of other agencies and boards to it.

3. Act No. 275 was under consideration when the prior Act No. 225 was passed but through inadvertence in the drafting Act No. 275, the provisions of Act No. 225 were omitted.
4. Whether the omission of the amendments provided by Act No. 225 was inadvertent or otherwise, Act No. 275 only repealed those Acts in so far as they were inconsistent.
5. Since Act No. 275 makes no reference to royalties to be paid on sand, gravel, and minerals to be excavated, it would appear there is nothing inconsistent between the two Acts, and effect must be given to each under Article V, Section 75 of the Statutory Construction Act, 46 P. S. § 575.

Harrisburg, Pa.,  
August 3, 1971

Honorable Robert J. Bielo  
Executive Director, Fish Commission  
Joseph Bonitz Building  
3532 Walnut Street  
Harrisburg, Pennsylvania

Dear Mr. Bielo:

#### *FACTS*

On July 31, 1970, "The Administrative Code of 1929" as amended, was further amended by Act 225, dated July 31, 1970, 71 P. S. § 468(d), to provide as follows:

"In the case of sand and gravel wherever located; and minerals deposited in pools created by dams, the agreement shall be a permit granting the permittee the nonexclusive right and privilege of dredging, excavating, removing, and carrying away the merchantable sand and gravel or other minerals subject to a royalty payment by the permittee to the Pennsylvania Fish Commission of ten cents (10¢) per adjusted dry ton of two thousand pounds or, alternatively, fifteen cents (15¢) per cubic yard. . . ."

On December 3, 1970, a further amendment (Act 275) to "The Administrative Code of 1929", as amended, 71 P. S. § 510-1 et seq. was enacted creating the new Department of Environmental Resources and transferring the functions of other agencies and boards, thereafter abolishing said agencies and boards.

It would appear that Act 275 was under consideration when the prior Act 225 was passed and, through inadvertence in the drafting of Act 275, it failed to incorporate the above cited amendment provided by Act 225.



### *QUESTION*

Are the provisions of Act 225 inconsistent with the provisions of Act 275, so as to cause Act 225 to be void?

### *DISCUSSION*

From a review of Section 1908-A of Act 275, the functions of the former Water and Power Resources Board have been transferred to the new Department of Environmental Resources. Paragraph (3) of Section 1908-A provides for the right to enter into agreement to sell, lease, or otherwise dispose of sand, gravel and other minerals that may be found in or beneath the beds of navigable streams or bodies of water within the Commonwealth. This paragraph is identical with Section 1808(d), Act of April 9, 1929 (P. L. 177), added September 16, 1961 (P. L. 1348), but fails to incorporate the amendments to Section 1808(d) as provided for by Act 225, as cited above.

Whether the omission of the amendments provided by Act 225 was inadvertent or otherwise, Section 36 of Act 275 would seem to control the question of whether or not the amendments of Act 225 are still in effect. Section 36 of Act 275 provides as follows:

“All acts and parts of acts, general, local and special, are repealed in so far as they are inconsistent herewith,”

The amendments of Act 225 provide for a royalty to be paid to the Pennsylvania Fish Commission for excavating, etc. sand and gravel wherever located and minerals deposited in pools watered by dams. Since Act 275 makes no reference to royalties to be paid on sand, gravel and minerals to be excavated, it would appear that there is nothing inconsistent between the two acts. Moreover, the two amendments are reconcilable and effect must be given to each under Article V, Section 75 of the Statutory Construction Act, 46 P. S. § 575.

### *OPINION*

Based upon the foregoing facts and discussion, it is the opinion of the Attorney General of the Commonwealth of Pennsylvania that nothing contained in Act 225, dated July 31, 1970, is inconsistent or irreconcilable with Act 275, dated November 19, 1970, and the Pennsylvania Fish Commission is within its rights, and its responsibility shall be to collect the royalties due under Act 225 from permittees who dredge,

excavate, remove and carry away merchantable sand, gravel or other minerals subject to the royalty payment provided for by Act 225, dated July 31, 1970.

Sincerely yours,

J. SHANE CREAMER,  
*Attorney General.*

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OFFICIAL OPINION NO. 55

*Prisoners—Furloughs—Inmates of county prisons.*

1. 19 P. S. § 1179.1 provides that persons sentenced to county jails may be permitted upon an order of the court, to leave the jail during necessary and reasonable hours for the purpose of working at their employment, but states nothing about authorizing furloughs for other purposes.
2. 61 P. S. § 409 authorizes the Warden of the County Prison to make rules and regulations for the Government and Management of the Prison, but is not broad enough to permit the Warden to grant furloughs.

Harrisburg, Pa.,  
August 5, 1971

Major John D. Case  
Warden  
Bucks County Prison  
Doylestown, Pennsylvania 18901

Dear Warden Case:

Sometime ago you discussed with me the question of whether you are authorized by present law to grant furloughs to inmates in your institution.

19 P. S., § 1179.1, provides that persons sentenced to county jails may be permitted to leave the jail during necessary and reasonable hours for the purpose of working at their employment, conducting their own business or other self-employed occupation, including, in the case of a woman, housekeeping and attending to needs of her family, seeking employment, attendance at an educational institution or securing medical treatment. This permission may be granted to an inmate upon an order of the Court. This statute says nothing about authorizing furloughs for other purposes. 61 P. S., § 409, authorizes the warden of a county prison to make rules and regulations for the government and management of the prison and the safekeeping, discipline and

employment of the prisoners as may be deemed necessary. This section might possibly be construed to permit furloughs by the warden, but it is my judgment that you are not authorized by this section to permit furloughs. You will note that 61 P. S. § 1052(b), which governs the Bureau of Correction, provides for wider latitude in permitting release or furloughs of inmates.

In view of this I think it would be well for us to seek legislation giving the warden of county prisons expanded authority with regard to furloughs.

Very truly yours,  
J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION NO. 56

*Justices of the Peace—Commitment of persons who fail to pay fines.*

1. In *Tate v. Short*, 401 U. S. 395 (1971) the United States Supreme Court held that the equal protection clause of the U. S. Constitution prohibits a State from imposing a fine as a sentence and then automatically converting it into a jail term, solely because the defendant is indigent and cannot forthwith pay the fine in full.
2. That decision is binding on the Courts of this Commonwealth, and they must avoid the imposition of prison sentences upon persons solely because they are unable by reason of indigency to pay a fine imposed by the court.
3. Act No. 57, enacted July 29, 1971, 75 P. S. § 1206.1 provided that any resident of Pennsylvania convicted of violating the Vehicle Code and sentenced to pay a fine is not deemed in default for seven (7) days after the date of sentence.
4. The Act of May 17, 1917, P. L. 199, 19 P. S. § 953 authorizes a court to permit installment payments of fines, the time for payment being within the discretion of the court up to a period of twelve months.
5. If a defendant has been given an opportunity to make installment payments, and the fine remains unpaid, the following steps are appropriate: (1) the defendant should be given an opportunity to explain the reasons for his failure to pay the fine; (2) if he is unable to establish justification by a preponderance of the evidence, he should be committed for failure to pay the fine; if he is able to establish by a preponderance the evidence that he is unable to pay the fine, he shall not be committed and the matter shall be referred to the solicitor of the county or municipality or to the Attorney General for collection by civil process. In cases involving violations of the Motor Vehicle Code a report may be made to the Secretary of Revenue or possible suspension of the defendant's operator's license.

Harrisburg, Pa.  
August 10, 1971

Honorable A. Evans Kephart  
State Court Administrator  
Supreme Court of Pennsylvania  
558 City Hall  
Philadelphia, Pennsylvania 19107

Dear Mr. Kephart:

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By letter dated July 14, 1971, you requested an opinion concerning the powers and duties of justices of the peace with regard to the commitment of persons who fail to pay fines. We are pleased to comply with your request.

On March 2, 1971, the Supreme Court of the United States decided the case of *Tate v. Short*, 401 U. S. 395 (1971). The holding in that case was that the Equal Protection Clause of the United States Constitution "prohibits the State from imposing a fine as a sentence then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." *Tate v. Short*, supra at 398.

The decision of the Supreme Court is binding on the courts of this Commonwealth. It is therefore incumbent upon the courts of the Commonwealth that they avoid the imposition of prison sentences upon persons solely because they are unable by reason of indigency to pay a fine imposed by the court immediately upon imposition of the fine.

On July 29, 1971 House Bill No. 79, Act No. 57, was signed by the Governor. This bill partially implements the *Tate* decision, at least with regard to cases under the Vehicle Code. The Bill provides as follows:

"Section 1206.1. Imprisonment for Nonpayment of Fines and Costs.—(a) Except as otherwise provided in subsection (b), any resident of the Commonwealth of Pennsylvania who is convicted of violating any of the provisions of this act in a summary proceeding and is sentenced to pay a fine and costs of prosecution, shall not be deemed in default for seven (7) days after the date of sentence, and may not be imprisoned for nonpayment of fine and costs during such period.

(b) The provisions of subsection (a) shall not apply when the court determines from the defendant's record that he has previously failed to pay or has been delinquent in paying any fine and costs imposed for violating a summary offense under this act.

Section 2. This act shall take effect immediately."

This Bill makes no provision for cases other than those under the Vehicle Code and it makes no provision for those cases where a fine imposed under the Vehicle Code is not paid within seven days. However, there is legislation in Pennsylvania which is most helpful.

The Act of May 17, P. L. 199, 19 P. S. § 953, provides as follows:

"§ 953. Any person sentenced to pay a fine or to pay the costs of any criminal proceeding against him, either in addition to or without a term of imprisonment, under any act of assembly or municipal or borough ordinance, may, in the discretion of the sentencing authority, be given leave to pay such fine or costs by instalments.

"§ 954. In giving leave under the foregoing section, the sentencing authority shall fix the amount of each instalment and the dates of payment; but no order giving such leave shall prescribe a period longer than twelve months for the completion of payment of the entire fine or costs.

"§ 955. Upon default in payment of any one instalment, under any such order, the entire unpaid balance of the fine or costs shall at once become due and payable.

"§ 956. An order under section one of this act, giving leave to pay a fine or costs by instalments, shall not bar the sentencing authority from issuing a warrant of commitment against the defendant, but the execution of such warrant shall be stayed, until default occurs in the payment of any instalment."

In cases in which the defendant is unable by reason of indigency to forthwith pay a fine, it would be appropriate for the courts to permit instalment payments in accordance with the above act.

The time for payment of a fine is within the discretion of the court except that the above statute limits the time for payment to twelve months. In cases in which the fine is small, it will probably reduce the administrative burden if the time for payment does not exceed 60 days.

Unfortunately, the decision of the Supreme Court gives no guidelines in handling cases in which the fine is not paid after the defendant has been given an opportunity to make instalment payments. We conclude that the following steps are appropriate if the fine is not paid.

1. The defendant should be given the opportunity to explain the reasons for his failure to pay the fine.
2. If he is unable to establish justification by a preponderance of the evidence then he should be committed for failure to pay the fine in the same manner as heretofore.
3. If he is able to establish by a preponderance of the evidence that he is unable to pay the fine he shall not be committed. In place of commitment, the following alternatives are permissible:

(a) Referral of the matter to the solicitor for the county or municipality or to the Attorney General for collection by civil process;

(b) In cases involving violations of the Motor Vehicle Code a report may be made to Secretary of Revenue for possible suspension of the defendant's operator's license as permitted by the Act of April 29, 1959, P. L. 58, § 618(b)(6), as amended, 75 P. S. § 618(b)(6).

I hope this opinion will be of assistance to you.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

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OFFICIAL OPINION NO. 57

*Firearms—Parole Agents—Authority to bear arms without a license.*

1. Parole Agents are "peace officers" and therefore come under the "law enforcement officers" exemption to the Uniform Firearms Act requirement that parties be licensed before being permitted to carry firearms, 18 P. S. § 4628, (e).

2. An agent should not be permitted to carry a firearm until he has taken and passed an approved firearms course given by a law enforcement agency, and permission to carry a firearm should only be given by a district supervisor in accordance with strict criteria.

Harrisburg, Pa.  
August 12, 1971

Honorable Richard W. Lindsey  
Chairman, Pennsylvania Board  
of Probation and Parole  
3101 N. Front St.  
Harrisburg, Pennsylvania

Dear Chairman Lindsey:

You have requested my opinion in regard to the arming of Parole Agents. An evaluation of the relevant statutes convinces me that Parole Agents may legally carry firearms while conducting their official duties.

18 P. S. § 4628(e) exempts "law enforcement officers" from the Uniform Firearms Act requirement that parties be licensed before being permitted to carry firearms. While Parole Agents are not specifically defined as law enforcement officers, they are described as "peace officers" and are "given police power and authority throughout the Commonwealth" with regard to parolees and probationers, 61 P. S. § 331.27. It seems clear, therefore, that Parole Agents fall within the exemption to the licensing requirement noted above.

I strongly urge, however, that the controls on the carrying of firearms which you proposed in your letter be adopted. An Agent should not be permitted to carry a firearm until he has taken and passed an approved firearms course given by a law enforcement agency. Permission to carry a firearm should be given only by a District Supervisor and then only in accordance with strict criteria. We would be most willing to work with you in establishing regulations in this area.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

## OFFICIAL OPINION NO. 58

*Expenses—Retired judges—Reimbursement for serving outside judicial district.*

1. Op. Atty. Gen. of December 9, 1968, denying allowance of reimbursement for meals, lodging, mileage, etc. payable to judges retired under authority of Act No. 155 of 1967, 73 P. S. § 701, serving outside their judicial districts, is reaffirmed.

Harrisburg, Pa.,  
August 16, 1971

Honorable Henry Ellenbogen  
President Judge  
Court of Common Pleas  
Pittsburgh, Pennsylvania 15219

Dear Judge Ellenbogen:

We have now had an opportunity to review the opinion of my predecessor, dated December 9, 1968, with respect to the allowance of reimbursement for meals, lodging, mileage, etc. payable to judges retired under authority of Act No. 155 of 1967 who serve outside their judicial districts.\*

We have received a letter from Judge McKay explaining his situation in detail and setting forth certain legal points. We have considered your request and the request of Judge McKay in depth and we have searched for a way to be both true to the law and ease the burden on Judge McKay and other similarly situated judges. Unfortunately, we have been unable to do so. But there are two bills now in the Legislature (SB 738 and 753) which if adopted would remedy this condition.

Although we sympathize with the plight of Judge McKay and other judges who may be in the same position, unfortunately we believe the opinion of Attorney General William C. Sennett is consistent with the stated intention of the Legislature in enacting Act No. 155 of 1967.

Accordingly, we must confirm the opinion of former Attorney General William C. Sennett.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

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\* See pp. 101-02 *infra*.



*Opinion of Former Attorney General William C. Sennett*

December 9, 1968

Honorable Grace M. Sloan  
Auditor General  
Commonwealth of Pennsylvania  
Harrisburg, Pennsylvania

Dear Mrs. Sloan:

I have your request for advice with regard to the allowance of reimbursement for meals, lodging, mileage, etc. payable to judges retired under authority of Act No. 155 of 1967 who serve outside their judicial districts.

Act No. 155 of 1967 established a new system for the payment of retirement to certain judges retiring from office prior to the end of their terms. It authorizes the payment of retirement to judges qualifying thereunder in an amount equal to their full salary from the date of their retirement and for the remainder of their term or until their death which ever first occurs. The purpose of that act was to encourage judges not able to perform their judicial functions completely and efficiently to retire without financial loss. Upon such retirement the appointment of an additional full-time judge was made necessary with the result that two full salaries were required to be paid for the performance of the duties of one office.

Act No. 155 specifically directed that a judge retired under its terms "shall receive no additional compensation for performing any judicial duties." This proviso denying such judges any compensation for the performance of judicial services was amended by Act No. 250 approved July 31, 1968. That act provided that judges "shall receive no additional compensation for performing any judicial duties *except expenses as are provided for judges when serving outside their judicial districts.*" It is significant to note that the amendatory act limited allowable expenses to those prescribed by existing law. Its language is clear and free from all ambiguity. Accordingly, the letter of the law is not to be disregarded under the pretext of pursuing any suggested spirit thereof. Statutory Construcion Act of 1937, P. L. 1219, § 51, 46 P. S. § 5517.

The Act of June 1, 1956, P. L. 1955, 17 P. S. § 830.32 specifically defines the meaning of the phrase "expenses as are provided for judges when serving outside their judicial districts." It prescribes

that such judges shall receive the sum of \$50 per day and their *actual traveling expenses not to exceed ten cents for each mile traveled*. This language unequivocally restricts traveling expenses to mileage. It contemplates expenses incident to actual traveling and not those incurred after reaching their destination. Such expenses are in addition to the \$50 payment made by the statute for services rendered by visiting judges. It is to be presumed that the Legislature was fully aware of the meaning of the precise language of the statute to which it referred and intended the only result that such language would justify.

The suggestion that the term "expenses" was intended to include items in addition to mileage completely ignores the plain language of the act. Clearly the payment of \$50 a day for lodging and meals in addition to mileage would be exorbitant. Comparison with the maximum expense allowance of approximately \$20 a day allowed to state employees by the Executive Board makes this conclusion most apparent.

It is therefore our opinion that the provision of Act No. 250 approved July 31, 1968, that judges retiring pursuant to Act No. 155 approved October 5, 1967, shall receive "expenses as are provided for judges when serving outside their judicial districts" authorizes the payment of ten cents per mile for each mile traveled and not other expenses.

Respectfully,

WILLIAM C. SENNETT,  
*Attorney General.*

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#### OFFICIAL OPINION NO. 59

*Welfare—Delivery of checks instead of mailing.*

1. Section 1503 of the Fiscal Code, 72 P. S. § 1503, does not mandate that Public assistance checks be sent through the United States Mail as long as at least as direct and secure a method is used as the mail.
2. Delivery by special courier or armed truck will be in compliance with the directory language of the statute.

Harrisburg, Pa.,  
August 17, 1971

Honorable Grace M. Sloan  
State Treasurer  
Commonwealth of Pennsylvania  
Harrisburg, Pennsylvania

*Re: Public Assistance Checks*

Dear Mrs. Sloan:

In response to your letter of June 25, 1971, concerning the appropriateness of delivering checks to public assistance offices or private banks rather than mailing them, we are of the opinion that Section 1503 of the Fiscal Code, 72 P. S. § 1503 does not mandate that public assistance checks be sent through the United States Mail.

We construe the word "mail" as used in Section 1503 to mean a method of delivery at least as direct and secure as the mail. In our view any equal or superior method of delivery such as delivery by special courier or armored truck would be in compliance with the directory language of the statute.\*

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

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OFFICIAL OPINION NO. 60

*Escheat—Firearms—Issuance of escheated weapons to Cigarette and Beverage  
Taxes Bureau Strike Force.*

1. Although Fiscal Code of 1929, 72 P. S. § 1310.1 provides the specific manner in which escheatable property is converted into cash, statute does not mandate such conversion into cash.
2. Firearms which escheat to the Commonwealth may legally be issued to the Cigarette and Beverage Taxes Bureau Strike Force enforcement personnel.

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\* See also Op. Atty. Gen. No. 61, August 31, 1971.

Harrisburg, Pa.,  
August 25, 1971

Honorable Vincent X. Yakowicz  
Deputy Secretary for Taxation  
Department of Revenue  
209 Finance Building  
Harrisburg, Pennsylvania 17120

Dear Mr. Yakowicz:

This is in response to your letter of August 3, 1971, in which you request approval to issue escheated firearms to members of the Cigarette and Beverage Taxes Bureau "Strike Force."

The law governing the sale of escheatable property by the Secretary of Revenue is contained in the amendments to the Fiscal Code of 1929 of December 12, 1951, P. L. 1721, and the Act of July 28, 1958, P. L. 654, 72 P. S. § 1310.1, which provides in pertinent part as follows:

"Whenever the Secretary of Revenue shall come into the possession of any escheatable property other than cash or real estate, either by escheat or without escheat, it shall be lawful for him to convert such property into cash in the following manner. . . ."

The statute goes on to provide the specific manner in which escheatable property is to be converted into cash. The statute does not, however, mandate such conversion into cash. Consequently, it is our opinion, and you are hereby so advised, that firearms which escheat to the Commonwealth may legally be issued to the Bureau's Strike Force enforcement personnel.

Your attention is directed to the fact that legislation has been introduced in the Pennsylvania House of Representatives (House Bill 937, 1971 Session), which provides that all pistols, revolvers and other hand guns which escheat to the Commonwealth "shall be destroyed." Of course, passage of this Bill would appear to preclude continued issuance of such firearms to the Strike Force.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

## OFFICIAL OPINION NO. 61

*Welfare—Delivery of checks instead of mailing.*

1. It is proper for the Treasurer of the Commonwealth of Pennsylvania pursuant to Section 1503 of the Fiscal Code, 72 P. S. § 1503, to deliver public assistance checks to banks by special courier or armored truck.
2. Section 1503 of the Fiscal Code is directory in nature and does not mandate mailing of checks. The Treasurer of the Commonwealth may select a method of delivery of public assistance checks as efficient and secure as the delivery by mail.
3. The intention of the legislature in enacting Section 1503 was to provide an efficient and secure means of making and delivering public assistance checks.
4. Personal delivery of legal papers initiating legal proceedings is required by considerations of due process, and service by mail is permitted only in exceptional circumstances.

Harrisburg, Pa.,  
August 31, 1971

Honorable Grace M. Sloan  
State Treasurer  
129 Finance Building  
Harrisburg, Pa. 17120

Dear Mrs. Sloan:

You have requested, by letter dated August 20, 1971, a formal Attorney General's opinion concerning an interpretation of Section 1503 of the Fiscal Code, 72 P. S. § 1503. The question raised by your request is whether the provision of Section 1503(b), which states that the Treasury Department "shall sign and mail" checks payable to public assistance recipients, permits delivery of checks to public assistance recipients which method of delivery will be as efficient and secure as delivery of public assistance checks by mail.

Your request is prompted by a program proposed by the Department of Public Welfare whereby the Department of Public Welfare desires to deliver public assistance checks to banks by armored trucks or special courier for subsequent delivery to public assistance recipients by the banks. As you know, this program has been proposed by the Department of Public Welfare to avoid problems created by the

fact that many public assistance recipients live in dwellings where there are no adequate and secure mail receiving devices. A failure to maintain adequate mail receiving devices renders public assistance checks susceptible to theft or loss necessitating issuance of duplicate checks at additional administrative expenses to the Commonwealth and exposing the Commonwealth to public liability for the proceeds of checks on which there is a forged endorsement of the payee's name.

It is our formal opinion that it is proper for the Treasurer of the Commonwealth of Pennsylvania under the following interpretation of Section 1503 of the Fiscal Code to deliver public assistance checks to banks by special courier or armored truck.

This opinion is based on our interpretation that the above quoted language of Section 1503 is directory in nature and does not mandate mailing of the checks. Given the directory nature of the statute involved it is within the approved discretion and the authority of the Treasurer of the Commonwealth to select a method of delivery of public assistance checks which is as efficient and secure as delivery by mail.

In a recent case, *Francis v. Corleto*, 418 Pa. 417, 211 A. 2d 503 (1965), the Supreme Court of the Commonwealth stated that in determining whether statutes were mandatory or directory it was the intention of the Legislature that governs. According to Court, Legislative intent is ascertained by considering the entire act and the nature, objection and consequences that would result from construing the statute one way or the other. See also *Pleasant Hills Borough v. Carroll*, 182 Pa. Superior Ct. 102, 125 A. 2d 466 (1956), laying down similar rules of construction.

It is clear that the intention of the Legislature by the enactment of Section 1503 was to provide efficient and secure means of making and delivering public assistance checks. As set forth above, the problems created by mailing checks, given present housing facilities of many public welfare recipients, demonstrates that mailing checks may not be, in many circumstances, the most efficient and secure means of delivering checks to public welfare recipients. In view of these facts and the evident intention of the Legislature to assure that public welfare recipients receive checks and to alleviate, to the extent possible, administrative expenses and public liability of the Commonwealth on such checks, it is appropriate, in light of the cases cited above, to construe the language in question as directory and not mandatory.

Moreover, your attention is called to procedures followed by courts throughout this Commonwealth with regard to delivery of legal

papers initiating lawsuits. The Federal Rules of Civil Procedure, Rule 4, requires personal delivery of legal papers initiating lawsuits on all defendants, and only in exceptional cases permits delivery of such papers by mail. The Rules of Civil Procedure for Common Pleas Courts throughout the Commonwealth and applicable to the Commonwealth Court similarly requires personal delivery and similarly permits delivery by mail only in exceptional circumstances. See Rule 1009 of the Pennsylvania Rules of Civil Procedure. To a large extent personal delivery of legal papers initiating legal proceedings is required by the due process clauses of the Federal and State Constitutions, however, these requirements underlie a practical concern that a defendant in litigation will be reasonably assured of receiving notice of legal proceedings. See similarly *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950).

You are further advised that this opinion is binding on you and absolves you from any independent responsibility for action you take pursuant to it. See Section 192 of the Administrative Code, 71 P. S. § 192 and *Commonwealth, ex rel Shockley v. Ross*, 52 Dauph. 329 (1943) and *Commonwealth, ex rel. Sennett v. Minehart*, 88 Dauph. 279, 44 D. & C. 2d 657 (1967).

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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## OFFICIAL OPINION NO. 62

*Department of Environmental Resources—Surety bonds—Authority to approve.*

1. Under Section 1901-A of the Administrative Code, 71 P. S. § 510-1(2) Department of Environmental Resources has succeeded to the Department of Mines and Mineral Industries and has the power to see that the mining laws of the Commonwealth are faithfully executed, 71 P. S. § 510-15(1).
2. The authority of the Department of Environmental Resources to approve the bonds is found in the Bituminous Coal Open Pit Mining Conservation Act, Act of May 31, 1945, P. L. 1198, 52 P. S. § 1396.4(g).
3. In carrying out your duties you have the right and the duty to make sure that any surety bond used under the aforesaid Act has been placed by a com-

pany licensed to do business in the Commonwealth, but is a responsible surety company and one whose bond becomes effective.

4. All bonds must be conditioned upon the operator faithfully performing all the requirements of the Act, the liability shall be for the duration of open pit mining and for a period of 5 years thereafter.

Harrisburg, Pa.,  
September 2, 1971

Honorable Maurice K. Goddard  
Secretary  
Department of Environmental Resources  
519 South Office Building  
Harrisburg, Pennsylvania

Dear Secretary Goddard:

You have requested our opinion as to whether you would have the right to approve the surety bonds submitted by mining companies guaranteeing bituminous stripmine restoration. You specifically referred to an underwriter by the name of Guy C. Read, of Guy C. Read, Inc., who had been affiliated as attorney in fact with five (5) insurance companies which had become insolvent and had caused the loss of \$1 million to the Commonwealth of Pennsylvania.

Your authority to approve bonds is found in the Bituminous Coal Open Pit Mining Act of May 31, 1945, P. L. 1198, 52 P. S. § 1396.4 (g). This provides that the operator shall file with the Department of Mines and Mineral Industries a bond for each operation “. . . on a form to be prescribed and furnished by the Department.” The Act further provides that the amount shall be determined by the Secretary of Mines and Mineral Industries, but shall be not less than \$500 nor more than \$1,000 per acre, and that the bond shall be executed by the operator and a corporate surety licensed to do business in the Commonwealth. Under Section 1901-A of The Administrative Code, you have succeeded to the Department of Mines and Mineral Industries and have taken over the functions theretofore imposed upon the Department. 71 P. S. § 510-1(2). Moreover, the Department of Environmental Resources has the power to see that the mining laws of the Commonwealth are faithfully executed. 71 P. S. § 510-15(1).



In carrying out your duties, you have the right and the duty to make sure that any surety bond used under the aforesaid act not only has been placed by a company licensed to do business in the Commonwealth of Pennsylvania, but is a responsible surety company and one whose bond will be effective. Therefore, if you have found that the unreliability of Mr. Read on the basis of past performance will subject the Commonwealth to the possibility of further loss, you may in your discretion, refuse to accept bonds through surety companies for which he is attorney in fact unless you are convinced that the surety companies are and will be solvent insurance companies. We note that all bonds must be conditioned upon the operator faithfully performing all the requirements of the Act and that liability shall be for the duration of open pitmining and for a period of five (5) years thereafter. Accordingly, it is of the utmost importance that the company be an established company with a reasonable expectancy that it will remain in business and not become insolvent.

Under your power to prescribe the form of the bond, you can prescribe requirements which will provide such assurance and if the result is to exclude a company represented by Mr. Read, that is within your discretion.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION NO. 63

*Department of Labor and Industry—Reports on safety and health—Release to public.*

1. Passage of Act No. 9 of June 17, 1971, amending the "right to know" law of June 21, 1957, P. L. 390, 65 P. S. § 66.1 et seq. by changing the definition of "public record" to authorize the disclosure of those reports filed by agencies pertaining to safety and health in industrial plants.
2. Under Act No. 9, Department of Labor and Industry must now make available completed reports pertaining to safety and health in industrial plants, such as hazardous working conditions, defective machinery, industrial facilities which heretofore were not within the public realm.

Harrisburg, Pa.,  
September 9, 1971

Honorable Paul J. Smith  
Secretary of Labor and Industry  
1700 Labor and Industry Building  
Harrisburg, Pennsylvania

Dear Secretary Smith:

We have your memorandum request for advice with respect to the obligation of the Department of Labor and Industry to make public those reports filed by agencies pertaining to safety and health in industrial plants.

This request is prompted by the passage of Act No. 9 of June 17, 1971, which amends the "right to know" law of June 21, 1957, P. L. 390, 65 P. S. § 66.1, by changing the definition of "public record" to authorize the disclosure of those reports filed by agencies pertaining to safety and health in industrial plants.

Prior to this amendment, certain records were excluded from public disclosure. They were the publication of the institution, progress or results of an investigation undertaken by an agency in the performance of its official duties, or records which would operate to the prejudice or impairment of a person's reputation or personal security. The amendatory language of Act No. 9 no longer provides such a broad exclusion. Your Department, under Act No. 9, must now make available completed reports pertaining to safety and health in industrial plants, such as hazardous working conditions, defective machinery, and industrial fatalities which, heretofore, were not within the public realm. This should not include disclosure of the institution or progress of an investigation, but merely the conclusion of the investigating agency.

In view of the foregoing, it is our opinion, and you are accordingly advised, that those reports pertaining to safety and health in industrial plants must be made public to the extent outlined above.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

OFFICIAL OPINION NO. 64

*Voting—College students—Residence.*

1. Subject to certain durational residency citizenship requirements, college students are permitted under State law to register to vote in the locality in which they are attending a college or university.
2. Students have a commitment and an intention to spend an indefinite period of time at the university or college of their choice, and also to establish a number of permanent relationships with various local institutions.
3. Because general elections fall in the first Monday in November in the middle of the first semester, students are unable to return or are seriously hindered in returning to the locality where their parents live to register and vote.
4. It is the spirit and intention of the 26th Amendment to remove any procedures which would substantially hamper or impose special burdens on persons 18 years or older in the exercise of the franchise. The use of an absentee ballot is a special burden.
5. Article VII, Section 1 of the Pennsylvania Constitution, establishes durational residency and citizenship requirements for electors.
6. In the past, State employes have been permitted to choose between one of two residences for voting purposes: residence where they live during the period of their employment or the residence where they lived prior to State employment to which they intend to return upon termination of their employment. Federal law appears to confer the same options on military personnel stationed at or in military installations.
7. There is little distinction, if any, for voting residency purposes between state employes and military personnel on the one hand, and students on the other.
8. To discriminate between students on the one hand and state employes and military personnel on the other by barring students the choice of one or another voting residence would violate the clear intent to the 26th Amendment and recent case law on the subject.
9. Section 2813 of the Election Code, 25 P. S. § 2813 intended to eliminate the factor of "presence" at an institution of learning for purposes of obtaining a residence for voting.
10. The student who takes up a residence in his college town has acquired a habitation, or place where he pursues his vocation and keeps his personal possessions, as he intends to pursue his vocation there for an indefinite period of time. His habitation becomes "permanent" and it is presumed that he intends to return whenever he is absent.
11. The student has the choice, as with state employes and military personnel, of maintaining a voter residence at his last prior residence or where he is attending college.

Harrisburg, Pa.,  
September 9, 1971

Hon. C. DeLores Tucker  
Secretary of the Commonwealth  
Department of State  
308 Main Capitol  
Harrisburg, Penna. 17120

Dear Mrs. Tucker:

You have requested an opinion as to whether the laws of the Commonwealth of Pennsylvania permit college students attending colleges and universities in Pennsylvania to register to vote where their university or college is located.

You are advised by this opinion that, subject to certain durational residency citizenship requirements established by the Constitution of the Commonwealth of Pennsylvania, Pa. Const. Article 7, Section 1 hereinafter discussed, that college students are permitted under State law to register to vote in the locality at which they are attending a college or university.

As of 1970 there were some 390,000 students enrolled in public and private, two and four year colleges and universities located within the Commonwealth of Pennsylvania. These figures, of course, do not include those students enrolled in vocational and technical institutions. *The 1970 Pennsylvania Statistical Abstract*, pages 142-143. From the time the students are first enrolled at their college or university they are engaged in the vocation of pursuing and obtaining an academic degree or some other form of recognition by the academic community. The time the student will reside in the academic community is indefinite in that his period of residency will extend over the time needed by the student to fulfill the requirement for his academic degree and, in that once having obtained a degree, he may seek additional academic credentials at the same institution. In addition to the student's commitment and intention to spend an indefinite period of time at the university or college of his choice, the student also establishes a number of permanent relationships (permanent in the sense that the relationship will last for an indefinite period of time), with various local institutions, businesses and persons. In most instances, students open bank accounts and charge accounts at local banks and retail establishments, enter into leases with local landlords and in many instances pay

local taxes and are employed by local businessmen. Students also live in a variety of dwellings in the area of the college or university of their choice. These dwellings range from the typical on-campus dormitory to the private home owned by a married student. To all of these dwellings the students bring their personal possessions for use during the period of their studies. Students may or may not intend to return, upon termination of their studies, to their last residence prior to enrollment.

Of crucial significance also is the fact that the general elections fall on the Tuesday next following the first Monday in November, a date which comes in the middle of the first semester of the school year. Because of their studies and because no recesses or vacations are scheduled at that time students are unable to return or seriously hindered in returning, to the locality where their parents live to register and to vote. Therefore, should students be compelled to vote in the localities where their parents live, they will be forced to utilize the cumbersome procedure of the absentee ballot. The experience of electors utilizing this procedure where they are compelled to do so (e.g. servicemen stationed overseas) demonstrates that only a small percentage of the persons compelled to vote by absentee ballot exercise their franchise by this means.

The 26th Amendment to the Constitution of the United States provides:

“The right of citizens of the United States, who are 18 years of age or older, to vote shall not be denied or abridged by the United States or by any state on account of age.”

As the report of the United States Senate regarding the 26th Amendment clearly indicates, it is the spirit and intention of this Amendment to remove any procedures which would substantially hamper or impose special burdens on persons 18 years and older in the exercise of the franchise guaranteed by this Amendment.

“Moreover, forcing young voters to undertake *special* burdens—obtaining absentee ballots or travelling to one centralized location in each city for example—in order to exercise their right to vote might well serve to dissuade them from participating in the election. This result and the election procedures that create it, are at least inconsistent with the purpose of the Voting Rights Act, which sought to encourage greater political participation on the part of the young; such segregation might even amount to a denial of their 14th Amendment right to equal protection of the laws in the exercise of the franchise.” Senate Judiciary Committee, Senate Report No. 92-96, 92nd Congress, First Session (emphasis supplied).

It is obviously a violation of the spirit of the Amendment to compel students to utilize the cumbersome, absentee ballot procedure. Secondly, it is a clear violation of the provisions of the Amendment to impose greater burdens on young people seeking to exercise their franchise than are otherwise imposed on older citizens seeking to exercise their franchise. In two cases arising in other states, *Wilkins v. Bentley*, 385 Mich. 670, 184 N. W. 2d 423 (1971) and *Tabilio v. Mihaly*, 96 Cal. Rptr. 697, 488 P. 2d 1 (1971) courts in California and Michigan declared certain statutes imposing special burdens on young people in their exercise of their franchise unconstitutional. In the Michigan case a statute creating the presumption that a student is not a resident of the campus town where the college of his choice was located was declared unconstitutional and in the California case an Attorney General's opinion barring unmarried persons under the age of 21 from establishing a residence for voting purposes different from their parents was held violative of California law and the United States Constitution. Attorney General's opinions which have been issued from the States of Massachusetts, Florida, Idaho, Georgia, Louisiana and Washington hold that no special barriers can be erected to the exercise of the franchise by younger citizens.

Article 7, Section 1 of the Pennsylvania Constitution establishes among other requirements, durational residency and citizenship requirements for electors. These requirements are that the elector shall have been a citizen of the United States at least one month, he shall have resided in the State 90 days immediately preceding the election and he shall have resided in the election district for at least 60 days immediately preceding the election.\*

The Election Code, 25 P. S. § 2813 and § 2814, establishes rules for determining residency in the Commonwealth and the election district for voting purposes.

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\*In addition to the durational residency requirements of Article 7, Section 1 requires that every citizen be 21 years of age in order to vote. As a result of ratification of the 26th Amendment to the United States Constitution this provision is no longer valid. However, invalidation of the 21 year old age requirement of Section 1, on the basis of well accepted rules of statutory construction, does not render the durational residency requirements of that Section invalid. Moreover, Act 29, 71 Session, recently enacted into law and repealing in part § 2811 of the Election Code, 25 P. S. § 2811, extends the franchise to persons 18 years old or older subject to the same durational citizenship and residency requirements of Article 7, Section 1.

Section 2813 of Title 25 in part provides:

“For the purpose of registration and voting no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while employed in the service, either civil or military, of this State or of the United States . . . nor while a student of any institution of learning . . .”

Section 2814 of Title 25 further provides:

“In determining the residence of a person desiring to register or vote the following rules shall be followed so far as they may be applicable:

(a) That place shall be considered the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning.

(b) A person shall not be considered to have lost his residence who leaves his home and goes into another state or another election district of this State for temporary purposes only, with the intention of returning.

(c) A person shall not be considered to have gained a residence in any election district of this State into which he comes for temporary purposes only, without the intention of making such election district his permanent place of abode.

(d) The place where the family of a married man or woman resides shall be considered and held to be his or her place of residence, except where the husband and wife have actually separated and live apart, in which case the place where he or she has resided for two months or more shall be considered and held to be his or her place of residence.”

Two questions are raised by the foregoing statutory provisions. Firstly, do these statutory provisions by operation and court interpretation establish special categories of electors who may have the option of choosing between one or two residences for voting purposes. Secondly, do students who reside in their campus towns obtain a residence under the rules established by these provisions. The answer to the first question is critical in that if it has been established that certain electors have the choice of maintaining a residence for voting purposes at one of at least two locations, then Pennsylvania law has established a special category of electors for purposes of facilitating the exercise of their franchise. If such a category of voters is established under present law, serious constitutional questions are presented, if by operation of the same law, students, who occupy a similar situation are not permitted to make such a choice. The answer to the first question, in

light of the constitutional questions raised, of course, bears directly on the answer to the second question.

In the case of *Newport Township Election Contest*, 384 Pa. 474, 121 A. 2d 141 (1956) votes in a municipal election of State employees who lived in state owned housing facilities and who, under state law, were required to move from these facilities, upon termination of State employment were challenged. The Supreme Court of Pennsylvania, in denying the challenges held:

"A person employed by the Commonwealth may, *if he sees fit*, establish his domicile and gain residence at his place of employment by taking the proper and appropriate steps to do so—as these voters did". Id. at 478, 121 A. 2d at 143 (emphasis supplied.)

In so ruling, the Court permitted State employees to choose between one of two residences for voting purposes, i.e., the residence where he lives during the period of his employment or the residence where he lived prior to State employment and to which he intends to return upon termination of his employment. Permitting this choice has been the practice in this State. In an Attorney General's opinion by Attorney General Margiotti, Op. Atty. Gen. No. 225 (1937), the predecessor provision of 25 P. S. § 951-18(g) which provides that "state employees shall be registered as of the district wherein he or she shall have resided immediately prior to entering such service" was construed to be directory and not mandatory on State employees. Such a construction meant that State employees, if they chose to register at their prior residence, were to be registered but, just as explicitly, meant that they could register at their place of employment if such was their choice.

In addition to State employees, who are permitted by operation of Pennsylvania law a choice of voter residence, Federal law appears to confer the same options on military personnel stationed at or in military installations. In *Carrington v. Rash*, 380 U. S. 89 (1965), the Supreme Court invalidated a provision of the Texas Constitution which barred servicemen from voting at their residence on or near a military installation and required them to vote at their last residence prior to entering the service. In so holding the Court stated:

"We deal here with matters close to the core of our constitutional system. 'The right to choose,' . . . that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State. . . . By forbidding a soldier ever to controvert the pre-



sumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment. '[T]here is no indication in the Constitution that . . . occupation affords a permissible basis for distinguishing between qualified voters within the State.' . . ." Id. at 96 (citations omitted).

There is also a provision of Federal Law, 50 U. S. C. 1453, which recommends that states permit military personnel to vote in the state where his or her military installation is located. The obvious result of the above cited Federal law, as with the instance of State employees, is to permit, military personnel the choice of registering to vote at the place where they are serving the tour of duty or at their last residence prior to military service to which residence they intend to return after their tour of duty.

There is little distinction, if any, for voting residency purposes between State employes and military personnel on the one hand and students on the other. Each class moves to a place away from a place where he or she has customarily maintained a home. Each moves for the purpose of pursuing a vocation be it state employment, military service or studies. Each intends to remain for an indefinite period of time or, in a legal sense, "permanently";—in the case of a State employe until he or she resigns, is removed from office or there is a change of administration, in the case of military personnel until his or her tour of duty is completed, cessation of hostilities or discharge from the service, and in the case of a student until his degree requirements are fulfilled, he is terminated from enrollment or withdraws voluntarily. With regard to either the State employe, the serviceman or student, he or she may intend to return to the last residence prior to employment, military service or pursuing studies at a college or university.

As pointed out previously to discriminate between students on the one hand and State employees and military personnel on the other by barring students the choice of one or another voting residence would violate the clear intent of the 26th Amendment and recent case law on the subject. It follows from well established tenets of statutory construction that the question of whether students meet the standards of residing set forth in Section 2813 and 2814 of the Election Code must be decided in light of these constitutional considerations.

In construing Section 2813 of Title 15, the intent of that provision is to eliminate the factor of "presence" at an institution of learning for purposes of obtaining a residence for voting. The case of *Newport*

*Township Election Contest*, *supra*, decided this point directly. There the Pennsylvania Supreme Court stated:

“To give these provisions [Section 2813] the construction and application to facts contended for by contestants [those parties claiming that the votes of the State employes were valid] would be to lead to an absurd and unreasonable result. They were not intended to, nor do they, preclude establishment of a domicile where the State employe works. They mean only what they state,—that their residence cannot be changed *merely* by reason of their employment. As stated in 29 C. J. S., Elections, § 24, page 48: ‘The fact, however, that a person does not gain or lose residence *merely* by reason of his presence or absence while in the service of the government does not preclude him from otherwise gaining a residence at the place so employed.’ . . .” 384 Pa. at 478, 121 A. 2d at 143.

Having eliminated the factor of presence for purpose of a voting residence the rules for determining residence established in Section 2814 becomes critical. The operative language of Section 2814 is contained in clauses (a) and (b). As quoted at page 5 of this opinion, clause (a) defines voter residence as a fixed habitation to which the person intends to return whenever he is absent. The student who takes up a residence in his college town has acquired a habitation, i.e., a place where he pursues his vocation and keeps his personal possessions. See *Lesker Case*, 377 Pa. 411, 418, 105 A. 2d 376 (1954). In view of the fact that he intends to pursue his vocation for an indefinite period of time, his habitation becomes “fixed” or “permanent” and hence by being “permanent” it is presumed that he intends to return whenever he is absent. See *Lower Oxford Contested Election*, 1 Chester Co. 253 (1875) in which the Court defined permanency as not meaning “absolute permanency” and *Parrish v. Hainlon*, 124 Col. 229, 236 P. 2d 115 (1951) where the Colorado Supreme Court defined “permanency” in terms of an indefinite period of time necessary to pursue a vocation or an objective.

Clause (b) of Section 2814, on its face may properly be applied to the situation where a student takes up residence at a college or university and intends to return to his last prior residence upon completion of his studies. This clause, preserves to the student, as is the case with State employes and military personnel, the option of maintaining a voter residence at his last prior residence.

By construing the Sections 2813 and 2814 in the foregoing manner the constitutional problems previously described are obviated. By this interpretation, a student will have the same choice of voter residence as the State employe and serviceman.

It is necessary at this point to call your attention to a very early Pennsylvania Supreme Court case, *Fry's Election Case*, 71 Pa. 302 (1872). That case involved an election contest which challenged the validity of votes cast by college students at their college residence. At the time that that decision was rendered, the provisions of Section 2813 and Section 2814 of Title 25 had not been enacted. However, there was a provision of the Constitution of 1838 applicable to that case which was similar to the present Section 2813. As noted above, Section 2813 and, of course, the analogous earlier constitutional provision, merely state that presence in a campus town is not a factor to be considered for determining residency. At the time that the *Fry's Election Case* was decided there were, however, no rules, similar to those contained in present Section 2814, which established criteria for determining residence for voting purposes. In the absence of such rules, the Court in *Fry's Election Case* was compelled to resort to the restrictive concept of "domicil" to determine whether the college students in that case obtained a residence for voting purposes. With constitutional changes, including ratification of the 26th Amendment, and the enactment of the statutory provision, Section 2814, since the decision in the *Fry's Election Case*, it is clear that the rules for determining residence for voting purposes are not based on the restrictive "domicil" test. Rather these rules as discussed above, are based on practical considerations of alternative means to exercise the franchise and the intention of the elector and his ties to the community in which he seeks to exercise the franchise. For the foregoing reasons we find that the decision in *Fry's Election Case* is distinguishable and does not govern present conditions.

Very truly yours.

J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION No. 65

*Contracts—Motor Vehicles Sales Finance Act—Buyers Defenses.*

1. Under the Motor Vehicle Sales Finance Act, 69 P. S. § 601 et seq., any defense a buyer of a motor vehicle may have against the vehicle seller is effective against the financing agency.
2. Only a court may decide that the individual has a defense against the seller which he may invoke against the financing agency.

Harrisburg, Pa.,  
September 10, 1971

Mr. A. W. Bruestle  
5812 N. 6th St.  
Philadelphia, Pennsylvania 19120

Dear Mr. Bruestle,

I am in receipt of your letter of August 26, requesting information concerning your legal rights under the State Motor Vehicle Sales Finance Act, 69 P. S. § 601 et seq.

Under the law Pennsylvania, and almost every other state, when a seller of a product transfers the buyer's contract to pay for that product to a bank or finance company, that bank or finance company becomes, in most instances, entitled to payment for that product even if the buyer has a complete defense against the seller. The law requires that the buyer pay the financing agency and then sue the seller. The Motor Vehicle Sales Finance Act specifically changes this situation for sales of motor vehicles in Pennsylvania. Any defense which the buyer of the motor vehicle may have against the vehicle seller is effective against the financing agency and the buyer need not pay that agency if he has a defense against the seller.

This provision, however, does not operate automatically. Only a court may decide if the individual has a defense against the seller which he may invoke against the financing agency. You, the individual asserting this defense, are responsible for proving it before a court of law. If you cease payment on your contract obligation and inform the bank or finance company of your intention to halt further payment, that agency may repossess your automobile and force you to go to court to assert your rights for the return of that automobile. This action between you and your financing agency is a civil one and is not within the jurisdiction of the Department of Justice. As stated by Mr. Weisberg in his letter to you, only private counsel can effectively advise you as to the strength of your defense in this particular matter.

I trust that this information will answer the questions presented by your most recent letter. If you have further questions, please feel free to write again

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

OFFICIAL OPINION No. 66

*Students—Voting registration—Extension of period.*

1. Local registration officials shall keep open voter registration offices to permit students to register to vote for a reasonable time beyond September 13, 1971.
2. There is official discretion to determine what is a reasonable period of time beyond September 13, 1971, the criteria for the exercise of this discretion being what period of time, on the basis of present information, is adequate to permit all students so desiring to register in time for the election in November, 1971.

Harrisburg, Pa.,  
September 13, 1971

Honorable C. DeLores Tucker  
Secretary of the Commonwealth  
Commonwealth of Pennsylvania  
Harrisburg, Pennsylvania

Dear Secretary Tucker:

You have requested an opinion as to whether local election officials shall keep open registration offices for purposes of voter registration beyond September 13, 1971. This request is prompted by my opinion issued September 9, 1971, in which opinion I ruled that students of colleges and universities may register to vote at the locality of their college or university.

You are advised that local registration officials shall keep open voter registration offices to permit students to register to vote for a reasonable period of time beyond September 13, 1971.

Section 623-17 of the Election Code, 25 P. S. § 623-17, applies to cities of the first class and sets forth time periods for registration of various classes of electors:

“The [Registration] Commission or any commissioner, employee or clerk . . . shall . . . [within fifty days of the next election] . . . receive personal applications from persons who claim that they are entitled to be registered as electors of the city and who appear for registration.”

An almost identical provision applies to localities other than cities of the first class, 25 P. S. § 951-16.

In a case directly on point, *Wenner's Appeal*, 54 D. & C. 223 (1945), the Court of Common Pleas of Lehigh County ruled that predecessor provisions to the above cited provisions were directory and not mandatory and required registration officials to keep offices open for the purpose of registering veterans who had returned from active service in World War II but who did not return before the date of fifty days preceding the next election.

The Court stated:

"The act does not expressly forbid registration on the excepted days and we believe that the merits of veterans' claims to the right to vote far outweigh any inconvenience that may result from their late registration and that their votes thus cast will surely count in the election and that, therefore, their apparent right to vote will not be a mere idle gesture. No one questions the right of this group to a share in our government, and therefore, although higher courts might later declare our decision to be an erroneous interpretation of the Registration Act, we will nevertheless not have permitted anyone to vote who did not possess a constitutional right to do so. Furthermore, our solution of the problem places the responsibility squarely on this court and will not subject others to any penalties.

"One cannot expect veterans to register on the date of their discharge or before becoming oriented to civilian responsibilities. The particular veteran involved in this appeal was discharged after September 15, 1945, the date when the registration books had closed, but we believe the privilege of registration should also be granted to all veterans discharged on or after September 1, 1945, and that registration of veterans discharged after September 1, 1945, should be kept open up to election day itself. We have no doubt that this decision will cause inconvenience to the registration commission and board of elections, but will present no problems that are impossible of solution."

The facts before the Court in *Wenner's Appeal*, *supra*, do not differ in any material respect from the facts upon which this opinion is based. The Attorney General's lengthy ruling of September 9, 1971, came four days before September 13, 1971, the day on which election officials had scheduled to close registration offices under the guidelines established by relevant statutes. Theretofore a great deal of confusion existed with regard to whether students were permitted to register to vote at the locality of their college or university. In almost every instance election officials had denied students permission to register. With the opinion of September 9, 1971, it is now clear that Pennsylvania law permits, and

the United States Constitution compels registration of students to vote at the locality of their college or university. To preserve and further the fundamental right to vote under these circumstances and in light of the opinion in *Wenner's Appeal*, supra, it is appropriate to extend the period of time to register to vote for a reasonable period beyond September 13, 1971.

This advice, of course, leaves it to official discretion to determine what is a reasonable period of time beyond September 13, 1971. The general criteria for the exercise of this discretion is what period of time, on the basis of present information, is adequate to permit all students so desiring to register in time for the election in November, 1971. Specific time period are suggested in the statutes dealing with registration periods which time periods may be helpful in deciding this question.

For instance in registering for special elections, the registration rolls are scheduled to close 30 days prior to the special election, permitting an extension of time to 20 days beyond the close of the rolls and in primary elections, the rolls are closed five days before the primary election indicating that a 45 day extension is permitted. See Sections 623-17(a) and 951-16(a) supra. Similarly, for persons who become citizens of the United States within the two month period immediately preceding an election, the registration rolls may be kept open until thirty (30) days prior to the election. See Section 623-17(a). Finally, in *Wenner's Appeal*, supra, the Court ordered that applications for registration be accepted until the day before the election.

Very truly yours.

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 67

*Conflict of interest—Possible incompatibility of positions of Hazleton City Councilmen and Solicitor for Hazleton Border Authority.*

1. Possible incompatibility of Positions of Hazleton City Councilmen and Solicitor for Hazleton Border Authority is a local matter over which the Justice Department lacks authority to act.

Harrisburg, Pa.,  
September 13, 1971

Louis G. Feldmann, Esquire  
Feldmann and Ciotola  
Northeastern Building  
Hazleton, Pennsylvania 18201

Dear Mr. Feldmann:

I have your letter of August 3, 1971, with respect to the possible incompatibility of the positions of City Councilman of the City of Hazleton and Solicitor for the Hazleton Water Authority.

You surely realize that this is a local matter over which this office lacks authority to act. However, notwithstanding our prior correspondence in this matter, I believe that these positions are governed by Section 1001 of the Third Class City Code, 53 P. S. § 36001, which sets forth the qualifications of councilmen in the following specific language:

“The councilmen shall be at least twenty-five years of age, and shall be elected by the electors at large. They shall have been residents of the city wherein they shall be elected throughout one year next before their elections, and shall reside therein throughout their terms of service. No officer of the United States or of the Commonwealth of Pennsylvania (except notaries public or officers of the militia), nor any county officer, nor any officer of any school district embraced in the territory of said city, nor any officer or employe of said city, or of any department thereof, nor any member or employe of a municipality authority of which the city is a member, shall serve as a councilman during his continuance or employment, except as hereinafter provided.”

We have analyzed the opinion of City Solicitor McCullough and although we normally do not comment on such matters, under the circumstances here present we offer the following observations:

1. The language of the statute quoted above is mandatory.
2. The clear intent of the statute is to prevent a councilman from being placed in a potential conflict of interest situation.
3. The question of whether or not the solicitor for the authority is an “employe” of the authority within the meaning of the above quoted statute does no seem to us to be free from doubt.



Although we cannot give binding legal advice in this situation, there are, of course, other legal avenues open to those who wish to dispute the ruling of the city solicitor.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

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OFFICIAL OPINION No. 68

*Statutes—Effective date.*

1. When an act contains a proviso that it will become "effective immediately," the act becomes effective the moment the Governor appends his signature to the statute.
2. Op. Atty. Gen. No. 101, April 17, 1958, ruling that insufficient appropriations did not in any way amend or repeal an act of the legislature previously signed by the Governor is reaffirmed.

Harrisburg, Pa.,  
September 24, 1971

The Honorable Herbert Fineman  
Speaker, House of Representatives  
Room 139, Main Capitol  
Harrisburg, Pennsylvania

Dear Speaker Fineman:

We have reviewed the letter of Mr. Robert C. Stevens, Regional Director of the Office of Emergency Preparedness, to the State Treasurer, Mrs. Sloan, dated September 17, 1971, concerning Act No. 8 (House Bill No. 777, Printer's No. 1330) signed by the Governor on June 16, 1971. That letter raises, among other things, the question of the effective date of a state law.

It is our opinion that Act No. 8 of 1971 became effective when signed by the Governor on June 16, 1971, and its validity was not negated by subsequently enacted appropriations bills.

The Act of June 16, 1971, provided that it should become "effective immediately." This provision has been interpreted by our courts

as meaning that the act becomes effective the moment the Governor appends his signature, cf. *Grant Estate*, 377 Pa. 264, 268, 105 A. 2d 80 (1954).

Nor is our conclusion concerning the effective date of the Act of June 16, 1971, in any way affected by the subsequent passage of two stopgap appropriations bills. (House Bill No. 1282 enacted June 30, 1971, and Senate Bill No. 951 enacted August 6, 1971) or the passage of the "General Appropriation Bill," Act No. 27-A signed by the Governor on August 31, 1971.

In our opinion Act No. 8 of June 16, 1971, created an obligation of the Commonwealth on that date (Op. Atty. Gen., 9 Dauph. Co. Rep. 14, 1903). Therefore, it seems clear that the two stopgap appropriations enacted on June 30, 1971, and August 6, 1971, in no way affected the underlying obligation imposed by the Act of June 16, 1971.

This Department has had occasion previously to issue an opinion on a similar point of state law. In 1953 former Attorney General Thomas D. McBride ruled that insufficient appropriations did not in any way amend or repeal an Act of the Legislature previously signed by the Governor. See Op. Atty. Gen. No. 101, April 17, 1958, and authorities cited therein.

This opinion is not intended to express any view as to the pertinent federal law under the President's directive where an obligation is created on June 16, 1971, but becomes payable thereafter.

Sincerely yours,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 69

*Cosmetologist—Authority to treat men's hair.*

1. The Beauty Culture Act, 63 P. S. § 507 et seq., by its terms precludes males from employing the services of Cosmetologists; as such it cannot stand in the light of the recent amendment to the Pennsylvania Constitution providing that equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.

Harrisburg, Pa.,  
September 27, 1971

State Board of Cosmetology  
279 Boas Street  
Room 403  
Harrisburg, Pennsylvania

State Board of Barber Examiners  
279 Boas Street  
Room 301  
Harrisburg, Pennsylvania

Gentlemen:

The question has been raised whether a cosmetologist is either allowed or required to cut the hair of male patrons. In light of the recent Constitutional amendment to the Pennsylvania Constitution barring discrimination based on sex, it is the opinion of this office that cosmetologists must be permitted to treat men's hair.

To place the question and our opinion in proper perspective, it is necessary to examine the two Licensing Acts involved. The Barber License Law was enacted in 1931, 63 P. S. § 551 *et seq.* The Beauty Culture Act was enacted in 1933, 63 P. S. § 507 *et seq.*

Speaking for the Pennsylvania Supreme Court in the *Department of Licenses and Inspections v. Weber*, 394 Pa. 466, 470, 147 A. 2d 326, 328 (1959), Justice Musmanno has stated:

“ . . . The Barber License Law and the Beauty Culture Law are in effect legislative Siamese twins. It is true they were born two years apart, but in the life of a commonwealth, and certainly in the life of the general welfare of a people, two years may be but a moment. The kinship between these two creatures of the Legislature was recognized in the Beauty Culture Act by the language: ‘Nothing in this [Beauty Culture] act is intended to be inconsistent with the [Barber] act . . . ’ (Act of May 3, 1933, P. L. 242, Section 17, 63 P. S. Section 523.)”

It seems clear that the two acts must be read in *pari materia*. Thus, when the Barber Act, 63 P. S. § 563, defines barbering as including the ability to “cut hair”, and the Beauty Culture Act speaks in terms of “embellishment, cleanliness and beautification of *women's* hair”, an obvious legislative distinction was intended to be drawn. It is clear that the intent of the Legislature was to limit the work to be performed by cosmetologists to work on female patrons' hair only.

Thus, this section of the Beauty Culture Act, by its terms, precludes males from employing the services of cosmetologists. As such it can-

not stand in the light of the recent amendment to the Pennsylvania Constitution which provides: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Const. Art. I, Section 27.

If a male desires to have his hair fashioned in the way in which cosmetologists are trained and licensed to fashion hair, his sex alone should not preclude him from having this service performed, just as a woman's sex has never precluded her from availing of the services of a barber.

Sincerely yours,

J. SHANE CREAMER,  
*Attorney General.*

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OFFICIAL OPINION No. 70

*Community colleges—Classification as political subdivisions.*

1. The community college is a political subdivision within the meaning of Act No. 31, approved July 9, 1971, permitting subdivisions and authorities to purchase materials, supplies, and equipment off contracts of the Department of Property and Supplies.

Harrisburg, Pa.,  
September 28, 1971

Hon. Frank C. Hilton  
Secretary  
Department of Property and Supplies  
5th Floor, North Office Building  
Harrisburg, Pennsylvania 17120

Dear Secretary Hilton:

You have inquired as to whether or not a community college is a political subdivision within the meaning of Act No. 31, approved July 9, 1971. The Act permits political subdivisions and authorities to purchase materials, supplies and equipment off contracts of the Department of Property and Supplies. This arrangement will result in substantial savings to those who participate, by enabling them to take

advantage of more favorable terms that the Department can secure by virtue of the greater quantities involved, rather than having to submit their smaller contracts to competitive bidding.

You are advised that a community college is a political subdivision within the meaning of the Act.

“Political subdivision” is defined in the Statutory Construction Act, Act of May 28, 1937, P. L. 1019, 46 P. S. § 601 (88) as “any county, city, borough, incorporated town, township, school district, vocational school district and county institution district.”

Under the Community College Act of 1963, Act of August 24, 1963, P. L. 1132, 24 P. S. § 5201 et seq. a “municipality” is defined as “any city, borough, town, township or county.” 24 P. S. § 5202(1).

A “local sponsor” is defined by the said Act as “a school district or a *municipality* or a county board of school directors or any combination of school districts, municipalities or county boards of school directors which participate or propose to participate in the establishment and operation of a community college.” 24 P. S. § 5202(2).

A “community college” is defined as “a public college or technical school which is established and operated in accordance with the provisions of this act by a *local sponsor* which provides a two year, post-secondary, college-parallel, terminal-general, terminal-technical, out of school youth or adult education program or any combination of these. 24 P. S. § 5202(4).

Since a community college is, by definition, established and operated by a *local sponsor* which must consist of a school district, municipality (i.e. city, borough, town, township or county) or county board of school directors or any combination thereof, each of which is included within the definition of a political subdivision, under the Statutory Construction Act, *supra*, it follows that, for purposes of purchasing materials, supplies and equipment off contracts of the Department of Property and Supplies, community colleges are political subdivisions within the meaning of Act No. 31.

Very truly yours.

J. SHANE CREAMER,  
*Attorney General.*

## OFFICIAL OPINION No. 71

*Equal opportunity—Child labor—Minor girls working as newspaper carriers.*

1. Section 7 of the Child Labor Law, 43 P. S. § 48, bars female minors, ages 12-21, from distributing or selling newspapers.
2. Such discrimination is no longer permitted as a result of the ratification of Article I, Section 27 of the Pennsylvania Constitution barring discrimination because of the sex of the individual.

Harrisburg, Pa.,  
October 15, 1971

Honorable Paul J. Smith  
Secretary  
Department of Labor and Industry  
1700 Labor and Industry Building  
Harrisburg, Pennsylvania 17120

Dear Secretary Smith:

We have your memorandum request for advice with respect to the apparent conflict between Section 7 of the Pennsylvania Child Labor Law, 43 P. S. § 41 et seq., and the recent May 18, 1971, amendment to Article I of the State Constitution.

The specific factual situation which has highlighted this conflict is the refusal of newspaper publishers to employ minor girls between the ages of 12 and 21 years as newspaper carriers.

Section 7, 43 P. S. § 48 of the Child Labor Law states:

“No male minor under twelve years of age, and *no female minor*, shall distribute, sell, expose, or offer for sale any newspaper, magazine, periodical or other publication, or any article of merchandise of any sort, in any street or public place . . .”.

On its face the statute permits male minors, ages 12-21, to distribute newspapers but bars female minors of the same age group from such employment. You are advised that such discrimination is no longer permitted as a result of the ratification of § 27 of Article I of the Pennsylvania Constitution.

On May 18, 1971, the electors of the Commonwealth adopted the provision of Section 27 of House Bill No. 14, Printer's No. 53, Session of 1971, which amended Article I of the Constitution of the Commonwealth of Pennsylvania by adding at the end thereof a new section to read:

"Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."

Both the Pennsylvania Human Relations Act enacted in 1955, 43 P. S. § 951 et seq., and Title VII of the Federal Civil Rights Act approved July 2, 1964, prohibit discrimination in private employment based on sex, in addition to the usual grounds of race, color, religion, and national origin.

Since the passage of the Civil Rights Act of 1964, questions have arisen concerning the relationship of its Title VII and State protective labor legislation. Title VII, 42 U. S. C. 2000 prohibits discrimination on the basis of sex in employment. However, State protective labor legislation including restrictions on the employment of females in certain occupations, on the lifting or carrying of weights in excess of prescribed limits, on hours of employment by its very nature, requires different treatment of individuals on the basis of their sex. Thus, the issue arises as to whether observance of this legislation involves a conflict of Title VII. On August 19, 1969, the Federal Equal Employment Opportunity Commission revised guidelines on discrimination because of sex stating:

"The Commission believes that such state laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and *will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of a bona fide occupational qualification exception.*"

In view of the foregoing, it is our opinion, and you are accordingly advised, that the provision of Section 7 of the Child Labor Law cited

above has been impliedly repealed by the May 18, 1971 amendment to Article I of the State Constitution so that female as well as male minors, may distribute newspapers or otherwise obtain employment in the Commonwealth.

Moreover, in view of the bar against sex discrimination in private employment in the Pennsylvania Human Relations Commission Act and Title VII of the Federal Civil Rights Act, the practice of refusing to hire minor girls between the ages of 12 and 21 years is declared to be illegal and should henceforth be prohibited.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 72

*Relocation assistance—Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970—Federal funding available to redevelopment authorities—Housing authorities and other agencies and political subdivisions of the Commonwealth—Eminent domain.*

1. Under present law, redevelopment and housing authorities will be able to receive 100 percent federal funding for such assistance prescribed by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894.
2. New legislation is needed to enable other municipal authorities and other agencies with the power of eminent domain to receive any federal funding after July 1, 1972.
3. Federal funding for relocation assistance will not be available to a state after July 1, 1972, unless that state's laws require the payment of relocation assistance at least to the same or greater extent than called for under the federal Act.
4. The Eminent Domain Code will have to be amended to comply with the Federal Act, because municipal authorities and other agencies other than redevelopment and housing authorities will not be eligible to receive federal funding. The most significant amendments should concern the amounts of relocation assistance money payable to a relocated family or business.
5. The proposed legislation in existence that will properly amend the Eminent Domain Code in accordance with requirements of the Federal Act must be passed prior to July 1, 1972, to enable municipal authorities and other agencies with the power of eminent domain to continue to receive federal funding.



Harrisburg, Pa.,  
October 18, 1971

Hon William H. Wilcox  
Secretary  
Department of Community Affairs  
216 South Office Building  
Harrisburg, Pennsylvania 17120

Dear Secretary Wilcox:

You have asked this office to render an opinion as to whether redevelopment authorities, housing authorities and other agencies and political subdivisions of the Commonwealth are eligible under Pennsylvania law for 100% federal funding of relocation assistance under the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. You are advised that under present law, redevelopment and housing authorities will be able to receive 100% federal funding for such assistance as prescribed by the said Act. However, new legislation is needed to enable other municipal authorities and other agencies with the power of Eminent Domain to receive any federal funding after July 1, 1972.

Sections 210 and 305 of the Federal Act, 42 U. S. C. A. § 4630, 4655, provide, in effect, that federal funding for relocation assistance will not be available to a state unless that state's laws require the payment of relocation assistance at least to the same or a greater extent than called for under the Federal Act. However, Section 221 of the Federal Act, 42 U. S. C. A. § 4601 (note) suspends the operation of Sections 210 and 305 until July 1, 1972. The effect of the suspension is to enable a State temporarily to receive federal funding for relocation expenses to the extent allowable under State law. But after July 1, 1972, all funding will be cut off by the Federal Government unless the State's laws comply fully with the Federal Act. Thus, those states whose laws do not comply with the requirements of the Federal Act are given a grace period until July 1, 1972 to set their houses in order by the passage of appropriate legislation.

Under existing Pennsylvania law, redevelopment authorities, and housing authorities are eligible to receive full federal funding for the maximum relocation expenses allowable under federal law. Section 18

of the Urban Redevelopment Law, Act of May 24, 1945, P. L. 991, § 18, as amended, 35 P. S. § 1718, enables redevelopment authorities "to do any and all things necessary or desirable to secure the financial aid or cooperation of the (Federal) Government in any of its operations." Section 22 of the Housing Authorities Law contains substantially the same language with regard to housing authorities, Act of May 28, 1937, P. L. 955, as amended, 35 P. S. § 1562. This means that whatever assistance is provided in the federal act may be paid by redevelopment and housing authorities regardless of the state of other legislation pertaining to the matter. In particular, redevelopment and housing authorities are not limited by the Eminent Domain Code, Act of June 22, 1963, P. L. 84, as amended, 26 P. S. § 1-101 et seq., which does not comply with the Federal Act.

The Eminent Domain Code will nevertheless have to be amended to bring it into compliance with the Federal Act, because municipal authorities and agencies other than redevelopment and housing authorities will not be eligible to receive federal funding after July 1, 1972, unless the Code is brought into line. There are various amendments that must be made, the most significant of which have to do with the amounts of money payable to a relocated family or business for relocation assistance.

For example, under the present Code displaced homeowners may now receive up to \$5,000 for replacement housing and displaced tenants may receive up to \$1,500 to be applied toward the rental or acquisition of another dwelling. The Federal Act calls for payments of \$15,000 for replacement housing and \$4,000 to a tenant. Thus, unless the Eminent Domain Code is amended to increase the replacement housing payment from \$5,000 to \$15,000 and the payment to a tenant from \$1,500 to \$4,000, no federal funding will be available at all to municipal authorities and agencies after July 1, 1972, for any kind of relocation assistance set forth in the Federal Act.

There is proposed legislation in existence that will properly amend the Eminent Domain Code in accordance with the requirements of the Federal Act. House Bills Nos. 1095 and 1096 (Printer's Nos. 1220 and 1221), both of which were referred to the Committee on Judiciary on June 2, 1971, together with a bill to be proposed by the Joint State Government Commission, will accomplish this purpose.

It is important that all three of the bills be passed prior to July 1, 1972, to enable municipal authorities and other agencies with the power

of Eminent Domain to continue to receive federal funding after that date. Moreover the sooner the bills are enacted, the sooner municipal authorities and other agencies may also be eligible to take advantage of the full federal benefits available under the Act.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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OFFICIAL OPINION NO. 73

*Equal opportunity employment—State government—Evidence of discrimination on basis of race and sex.*

1. Statistical information available indicates that minority persons and women are represented in state employment in proportion to their numbers in the Commonwealth only in menial, clerical, and entry-level positions.
2. If more comprehensive race and sex reporting were to bear out the conclusions drawn from the Pennsylvania Human Relations Commission and the State Civil Service, the existence of a pattern of race and sex discrimination in government employment would be confirmed.
3. The 14th Amendment requires that states take affirmative action to eliminate vestiges of discrimination in all state supported activity.
4. The only affirmative action program which meets the Constitutional standard for eliminating state supported discrimination is that which has the practical rather than the theoretical effect of eliminating established discrimination.
5. The legal responsibility of the state as employer to eliminate discrimination in its own employment practices, is clear, and the affirmative action contemplated by the 14th Amendment must be designed to eliminate not only those practices which on their face are inherently discriminatory but also those practices which although neutral on their face result in discrimination in their operation and effect.
6. Comprehensive reporting by race and sex of all applicants to state positions of existing state employes is required in order to evaluate existing imbalances; only then would it be possible to isolate those standards and procedures which have a disproportionate exclusionary effect upon minority and female applicants.
7. All state agencies having responsibility for employment and promotional criteria should be directed to evaluate existing selection standards and procedures to determine the existence of cultural bias, the degree to which the standards purport to reflect the demands of the employment position, and

the extent to which the selection procedures in fact measure or correlate with the required job qualifications.

8. Only if the selection criteria correlate positively with bona fide occupational qualification will the selection techniques withstand Constitutional and statutory scrutiny.
9. Upon completion of comprehensive statistical reporting and validation analysis of hiring and promotional criteria, it will be incumbent upon the Commonwealth to eliminate or modify all employment procedures which exclude disproportionate numbers of minority and female applicants without a justifiable relation to bona fide occupational qualifications.
10. Available statistics demonstrate that procedures under the Veterans' Preference Act, 51 P. S. § 492.1 et seq., could apparently have a significant discriminatory effect upon female applicants for government employment in direct conservation of the provisions of the Pennsylvania Human Relations Act. The Veteran's Preference Act will be further evaluated to determine its effect upon the hiring and promotion of minorities and women in state employment, and a more detailed opinion at a later date may be necessary.

Harrisburg, Pa.,  
October 18, 1971

Honorable Milton J. Shapp  
Governor  
Commonwealth of Pennsylvania  
Harrisburg, Pennsylvania

Dear Governor Shapp:

Pursuant to your requests and those of various state agencies and citizens' groups, the Department of Justice has undertaken a comprehensive review of the employment procedures of the Commonwealth of Pennsylvania to determine what evidence exists of race and sex discrimination in state government employment, and to determine the procedures mandated by law to rectify past discrimination and eliminate discrimination in the future. To this end, we have reviewed existing statistical information concerning the present proportions of members of minority groups and women in state employment and have discussed employment procedures with representatives of the Office of Administration, the State Civil Service Commission, the Pennsylvania Human Relations Commission and the State Police.

At present, there exists no comprehensive statistical data specifying employes by race and sex in all state employment. The information which is available is drawn from a 1969 survey of non-white employment conducted by the Pennsylvania Human Relations Commission and

from a 1971 analysis of male and female employment in state civil service positions conducted by the State Civil Service Commission. That information indicates that minority persons and women are represented in state employment in proportion to their numbers in the Commonwealth only in menial, clerical and entry-level positions. In higher level positions, particularly those having salaries in excess of \$10,000 per year, non-whites and women are virtually unrepresented. If more comprehensive race and sex reporting were to bear out the conclusions drawn from the PHRC and SCSC studies, the existence of a pattern of race and sex discrimination in government employment would be confirmed.

The legal obligations of the Commonwealth with respect to discrimination in government employment are defined by the Fourteenth Amendment to the Constitution of the United States, by the Pennsylvania Human Relations Act and by the Recent Amendment to the Pennsylvania Constitution. The Fourteenth Amendment requires that the several states take affirmative action to eliminate vestiges of discrimination in all state supported activities. See., e.g., *Louisiana v. United States*, 380 U. S. 145 (1965), *Anderson v. Martin*, 375 U. S. 399 (1964); *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961). The only affirmative action program which meets the constitutional standard for eliminating state supported discrimination is that which has the practical rather than theoretical effect of eliminating established discrimination. *Henry v. Clarksdale*, 409 F. 2d 682 (5th Cir. 1969), *United States v. Jefferson County Board of Education*, 372 F. 2d 836 (5th Cir. 1969). The legal responsibility of a state as employer to eliminate discrimination in its own employment practices is clear, and the affirmative action contemplated by the Fourteenth Amendment must be designed to eliminate not only those practices which are on their face inherently discriminatory, but also those practices which, although neutral on their face, result in discrimination in their operation and effect. *Monroe v. Board of Commissioners*, 391 U. S. 450 (1968); *Whitner v. Davis*, 410 F. 2d 24 (9th Cir. 1969); *Penn v. Stumpf*, 309 F. Supp. 1233 (N.D. Cal. 1970); *Arrington v. Massachusetts Bay Transportation Authority*, 306 F. Supp. 1355 (D. Mass. 1969).

The Pennsylvania Human Relations Act, 1955, Oct. 27, P. L. 744, as amended, 43 P. S. § 951 *et seq.*, includes the Commonwealth of Pennsylvania within the definition of "employer" and, *inter alia*, prohibits discrimination on account of race or sex in any aspect of employment. 43 P. S. § 954(b), § 955. The PHRA also provides that any laws of the Commonwealth inconsistent with the provisions of the

PHRA shall not apply. 43 P. S. § 962(a). The prohibition against sex discrimination set forth in the PHRA was given constitutional dimension by the recent amendment to the State Constitution. Pa. Const., Article I, Section 27. In recognition of the constitutional and statutory responsibilities of the Commonwealth as employer, you have pledged your administration to the implementation of equal opportunity for all in state employment. Executive Directive No. 13, June 2, 1971.

Each standard and procedure for selection of applicants for employment or promotion is subject to scrutiny to determine its effect upon classes of applicants. If it is shown statistically that the standard or procedure excludes a disproportionate number of racial minority or female applicants, the burden is upon the Commonwealth as employer to justify the discriminatory effect by establishing that the selection criteria are related to the demands of the position and that those demands are in fact accurately measured by success of the applicant in meeting the selection criteria. *Arrington v. Massachusetts Bay Transportation Authority*, *supra*. The PHRC has issued guidelines applicable to all employers within its jurisdiction setting forth procedures by which written employment tests may be measured against this standard. Affirmative Action Guidelines for Employment Testing, C.C.H. Emp. Prac., Pa. § 27, 295. These guidelines are similar in purpose and effect to guidelines issued by the Federal Equal Employment Opportunities Commission. Guidelines on Employment Testing Procedures, C.C.H. Emp. Prac., § 16, 904. Each standard for selection is subject to the same scrutiny and validation as a written employment test.

In my opinion, the following procedures are necessary if the Commonwealth is to meet its constitutional and statutory responsibilities as an employer:

### *Reporting Procedures*

Comprehensive reporting, by race and sex, of applicants to all state positions and of existing state employees is required in order to evaluate existing imbalances in state employment and to determine the differential effects of employment and promotional standards and procedures upon minority applicants and women. A directive should issue forthwith requiring such reporting by each state agency for its present employees and requiring race and sex notations for all future applicants for employment and promotion in state government. Only when comprehensive statistical information is available will it be possible to isolate those standards and procedures which have a disproportionate exclusionary effect upon minority and female applicants.

### *Validation of Standards*

In preparation for receipt of comprehensive statistical data, all state agencies having responsibility for employment and promotional criteria should be directed to evaluate existing selection standards and procedures to determine (1) the existence of cultural bias inherent therein, (2) the degree to which the standards purport to reflect the demands of the employment position and (3) the extent to which the selection procedures in fact measure or correlate with the required job qualifications. This procedure will require both an analysis of each state employment position and a study of the validity of the selection process in predicting satisfactory job performance.

Only if the selection criteria correlate positively with bona fide occupational qualifications will the selection techniques withstand constitutional and statutory scrutiny in the event that statistics demonstrate a disproportionate exclusion of women and minority persons. See *Arrington v. Massachusetts Bay Transportation Authority*, *supra*; *Penn v. Stumpf*, *supra*; 43 P. S. § 955; PHRA Affirmative Action Guidelines for Employment Testing Procedures, *supra*.

### *Affirmative Action Programs*

Upon completion of comprehensive statistical reporting and validation analysis of hiring and promotional criteria, it will be incumbent upon the Commonwealth to eliminate or modify all employment procedures which exclude disproportionate numbers of minority and female applicants without a justifiable relation to bona fide occupational qualifications. Implementation of non-discriminatory standards and procedures will have the long range effect of promoting equal employment opportunity within state government. It is necessary to go further, however, and undertake affirmative action programs designed in the short run to correct imbalances caused by past discriminatory practices. See, e.g., *Carter v. Gallagher*, \_\_\_ F. Supp. \_\_\_, (No. 4-70 Civ. 399, D. Minn. Nov. 15, 1970).

For each employment position which is demonstrated to have excluded disproportionate numbers of minority and female applicants it will be necessary for the Commonwealth to institute recruiting and training programs to assure that the existing imbalances are corrected by bringing applicants of the class discriminated against into those positions in significant numbers. To this end, each state agency should be made responsible for initial promulgation of affirmative action programs designed to attract applicants from the class formerly discriminated

against as well as to assure that the applicants are given fair opportunity through selection and training procedures to perform adequately in the job and qualify for advancement. A centralized coordinating body should be designated to review and approve all affirmative action programs in the interest of a consistent and comprehensive approach to equal opportunity in government employment.

### *Veterans' Preference*

The Veterans' Preference Act was enacted in 1945 to give preference in government employment to veterans in recognition of their service to the country. 1945, May 22, P. L. 837, 51 P. S. § 492.1, *et seq.* As applied to state government employment, the Veterans' Preference Act results in a veteran receiving an additional ten points upon any qualification examination score *and* in the veterans being preferred in employment or promotional selection over non-veterans of equal qualifications. The veterans' preference is not related by statute or practice to any bona fide occupational qualification, although such relation is required by the Pennsylvania Human Relations Act. 43 P. S. § 955.

In the absence of statistical data relating to the effect of the veterans' preference upon males of different races, it is impossible to determine whether any racially discriminatory effect results from the veterans' selection procedure. Available statistics do demonstrate, however, that the veterans' preference procedure could apparently have a significant discriminatory effect upon female applicants for government employment, in direct contravention of the provisions of the Pennsylvania Human Relations Act.

We are continuing to evaluate the effect of the Veterans' Preference Act upon the hiring and promotion of minorities and women in state employment. This scrutiny is with reference both to constitutional issues and to the Statutory Construction Act of May 28, 1937, P. L. 1019, as amended, 46 P. S. § 591, and the stated repealer in the Pennsylvania Human Relations Act of October 27, 1955, P. L. 744, § 12, as amended, 43 P. S. § 962(a), as it relates to the 1966 sex discrimination amendments to the P.H.R.A. At this time, I anticipate the need for a more detailed opinion at a later date concerning the legality of continuation of the preference procedures currently mandated by the Veterans Preference Act.

In order to implement Executive Directive No. 13 and to comply with the legal requirements set forth herein, I stand ready to assist you



and your representatives in reviewing, and providing additional opinions pertaining to the various employment standards and procedures utilized by the Commonwealth of Pennsylvania.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION NO. 74

*Mentally retarded—Access to public education.*

1. On June 18, 1971, the United States District Court for the Eastern District of Pennsylvania entered an order requiring notice to the parents or guardian and an opportunity to be heard prior to any change in the educational assignment of any child believed to be retarded.
2. Postponement of admission to regular school or class may have a significant effect on a child's education and training and should be deemed a significant change in educational assignment requiring the safeguard of notice and opportunity for hearing.
3. As an additional safeguard, the alternative educational assignment of a postponed child should automatically be re-evaluated every two years.
4. "Children of School Age" as used in Section 1371 of the Public School Code concerning "exceptional children" means children age 6 to 21, and also means all mentally retarded children who have reached an age less than 6 at which pre-school programs are available to others.
5. "Brain damage" as used in Section 1376 of the Public School Code is construed to include all mentally retarded persons, and tuition for day school or tuition and maintenance for residential school should be available to them up to the maximum sum.
6. When it is found on the recommendation of a public school psychologist and upon the approval of the local board of school directors, and the Secretary of Education that a mentally retarded child would benefit more from placement in a program of education and training administered by the Department of Public Welfare than from any program of education and training administered by the Department of Education, the child should be certified to the Department of Public Welfare for timely placement in a program of education and training.
7. It is the responsibility of the Secretary of Education to be sure that every mentally retarded child is placed in a program of education and training appropriate to the child's individual capacities.

8. Homebound instruction should not be denied to a mentally retarded child merely because no physical disability accompanies the retardation or because retardation is not considered to be a short-term disability.
9. Homebound instruction is the least preferable of the programs of education and training administered by the Department of Education and a mentally retarded child shall not be assigned to it unless it is the program most appropriate to the child's capacity. An assignment to homebound instruction should be re-evaluated not less than every three months.

Harrisburg, Pa.,  
October 22, 1971

Hon. Helene Wohlgemuth  
Secretary of Public Welfare  
333 Health & Welfare Building  
Harrisburg, Pennsylvania 17120

Hon. David H. Kurtzman  
Secretary of Education  
317 Education Building  
Harrisburg, Pennsylvania 17120

Dear Mrs. Wohlgemuth and Doctor Kurtzman:

Pursuant to the Order, Injunction and Consent Agreement (attached hereto and marked "Exhibit A")\* entered on October 7, 1971 in the United States District Court for the Eastern District of Pennsylvania (Civil Action No. 71-42) in the case of the Pennsylvania Association for Retarded Children, *et. al.* v. Commonwealth of Pennsylvania *et. al.*, (hereinafter PARC Case), you have requested an opinion with regard to certain sections of the Public School Code. The Consent Agreement in the case was intended to provide all mentally retarded children in Pennsylvania access to a free public program of education and training appropriate to their individual learning capacities. All of the statutory references in this opinion, unless noted to the contrary, are to the Public School Code of 1949, as amended, 24 P. S. Section 1-101, *et seq.*

Section 1304, 24 P. S. § 13-1304 dealing with the admission of beginners to Pennsylvania Public Schools, provides as follows:

"The admission of beginners to the public schools shall be confined to the first two weeks of the annual school term in districts operating on an annual promotion basis, and to the first two weeks of either the first or the second semester of the school term in districts operating on a semi-annual promotion basis. Admission shall be limited to beginners who have attained the age of five years and seven months before

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\* The Consent Agreement and Order were amended on May 5, 1972, pursuant to which new opinions were issued, see (1972) Opinions of the Attorney General.

the first day of September if they are to be admitted in the fall, and to those who have attained the age of five years and seven months before the first day of February if they are to be admitted at the beginning of the second semester. The board of school directors of any school district may admit beginners who are less than five years and seven months of age, in accordance with standards prescribed by the State Board of Education. The board of school directors may refuse to accept or retain beginners who have not attained a mental age of five years, as determined by the supervisor of special education or a properly certificated public school psychologist in accordance with the standards prescribed by the State Board of Education.

“The term ‘beginners,’ as used in this section, shall mean any child that should enter the lowest grade of the primary school or the lowest primary class above the kindergarten level.”

This section means *only* that a school district may refuse to accept into or retain in the lowest grade of the *regular* primary school or the lowest *regular* primary class above the kindergarten level, any child who has not attained a *mental age* of five years. Any child whose admission to regular primary school or to the lowest regular primary class above kindergarten is postponed, or who is not retained in such school or class, is entitled to timely placement in a free public program of education and training pursuant to sections 1371 through 1382 (which provide alternative programs of education and training for exceptional children).

On June 18, 1971, the United States District Court for the Eastern District of Pennsylvania in the PARC case entered an Order (attached hereto and marked “Exhibit B”). Essentially, this Order requires notice to the parents or guardian and an opportunity to be heard prior to the change in the educational assignment of any child believed to be retarded. Regarding Section 1304, before a child’s admission as a beginner in the lowest grade of a regular primary school or the lowest regular primary class above kindergarten may be postponed, the parent or guardian of such child should receive notice and an opportunity to be heard as set forth in the court’s Order of June 18, 1971. Because postponement of admission to regular school or class may have a significant effect on the child’s education and training, postponement should be deemed a significant change in educational assignment within the court’s Order of June 18, 1971, thereby requiring the safeguard of notice and opportunity for a hearing to insure that postponement is appropriate for the child in question. As an additional safeguard, the alternative educational assignment of a postponed child should be auto-

matically re-evaluated every two years and, at the request of a child's parent or guardian, should be re-evaluated annually. With regard to the automatic re-evaluation, the child's parent or guardian should receive notice and an opportunity for a hearing in accordance with the Court's Order of June 18, 1971.

Section 1326, 24 P. S. § 13-1326 the definitional section with regard to enforcement of public school attendance, provides in relevant part:

"The term 'compulsory school age,' as hereinafter used shall mean the period of a child's life from the time the child's parents elect to have the child enter school, which shall be not later than at the age of eight (8) years, until the age of seventeen (17) years. The term shall not include any child who holds a certificate of graduation from a regularly accredited senior high school."

During the course of the PARC case, it became apparent that many pre-school programs of education and training in Pennsylvania were being operated by the Departments of Education and Welfare for typical children, while few if any comparable programs existed for mentally retarded children. Section 1371(1), defining exceptional children, provides:

"The term 'exceptional children' shall mean children of school age who deviate from the average in physical, mental, emotional or social characteristics to such an extent that they require special educational facilities or services and shall include all children in detention homes."

The phrase "children of school age" as used in Section 137, means children aged 6 to 21 and also, whenever the Department of Education through any of its instrumentalities (e.g. local school districts or intermediate units) or the Department of Public Welfare, through any of its instrumentalities, provides a pre-school program of education and training for children below the age of 6, whether called kindergarten or however called, further means all mentally retarded children who have reached the age of less than 6 at which pre-school programs are available to others. This construction should insure that pre-school programs are equally available in Pennsylvania to mentally retarded children and typical children, less than 6 years of age.

Section 1376 provides essentially for payment by the Commonwealth (75%) and the school district of residence (25%) of the cost of tuition and maintenance with regard to exceptional children between the ages of 6 and 21, who are blind, deaf, afflicted with cerebral palsy

and/or brain damage and/or muscular dystrophy. Based in part upon expert testimony given in the PARC case, the term "brain damage" as used in Section 1376 and as further defined in the Board of Education's "Criteria for Approval of Reimbursement" is construed by this opinion to include thereunder all mentally retarded persons. Accordingly, there should now be available to them tuition for day school and tuition and maintenance for residential school up to the maximum sum available for day school or residential school, whichever provides the program of education and training most appropriate to the mentally retarded child's learning capacities.

Section 1372(3), with regard to homebound instruction, provides in relevant part:

**"Special Classes of Schools Established and Maintained by School Districts.**

... If . . . it is not feasible to form a special class in any district or to provide such education for any (exceptional) child in the public schools of the district, the board of school directors of the district shall secure such proper education and training outside the public schools of the district or in special institutions, or by providing for teaching the child in his home . . ."

Because all children are capable of benefiting from a program of education and training, Section 1375 means that insofar as the Department of Public Welfare must "arrange for the care, training, and supervision" of a child certified to it, the Department of Public Welfare must provide a program of education and training appropriate to the individual capacities of that child. This section means that when it is found, on the recommendation of a public school psychologist and upon the approval of the local board of school directors and the Secretary of Education (as reviewed in due process hearing contemplated by the Court's Order of June 18, 1971), that a mentally retarded child would benefit more from placement in a program of education and training administered by the Department of Public Welfare than the child would benefit from any program of education and training administered by the Department of Education, the child should be certified to the Department of Public Welfare for timely placement in a program of education and training.

It is the responsibility of the Secretary of Education to assure that every mentally retarded child is placed in a program of education and training appropriate to the child's individual capacities. To this end,

the Secretary of Education with the cooperation of the Department of Public Welfare should require reports of annual census and evaluation under Section 1371(2) so that he shall be informed as to the identity, condition, and educational status of every mentally retarded child within the various school districts of the Commonwealth. If it appears that the provisions of the School Code relating to the proper education and training of mentally retarded children have not been complied with, or that the needs of mentally retarded children are not being adequately served by programs of education and training administered by the Department of Public Welfare, the Department of Education should take those steps necessary to provide such education and training, as it is authorized to do pursuant to Section 1375(5).

The Court Order of June 18, 1971, requires notice to the parent or guardian and an opportunity for a hearing with regard to the significant change in educational assignment which occurs when a child is excluded from programs conducted by the Department of Education and is certified to the Department of Public Welfare. With the cooperation of the Department of Education, the same notice should be accorded the parents or guardian of a mentally retarded child with regard to any change in educational assignment among and between the various programs of education and training administered by and within the Department of Public Welfare. Not less than every two years, the assignment of any mentally retarded child to a program of education and training administered by the Department of Public Welfare should be re-evaluated by the Department of Education and upon such re-evaluation, notice and an opportunity to be heard should be accorded the parents or guardian of the child in accordance with the Court Order of June 18, 1971.

Homebound instruction should not be denied to a mentally retarded child merely because no physical disability accompanies the retardation or because retardation is not considered to be a short-term disability. The purpose of Section 1372(3) would be frustrated if the absence of physical disability were a precondition to the eligibility of a mentally retarded child for homebound instruction. For a given mentally retarded child, homebound instruction may be the only appropriate method for providing the free public program of education and training to which that child is entitled. In the PARC case, the Commonwealth recognized a presumption that among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class, and placement in a special public school

class is preferable to placement in any other type or program of education and training. In addition to this presumption, it must be recognized that homebound instruction, which should involve a program of education and training for at least five hours a week, may well be the most expensive method of providing for a child's education and training. Accordingly, homebound instruction is the least preferable of the programs of education and training administered by the Department of Education, and a mentally retarded child should not be assigned to it unless it is the program most appropriate to the child's capacity. Furthermore, an assignment to homebound instruction should be re-evaluated not less than every three months (90 days from the first date on which the child receives education and training in his home) and notice of the re-evaluation and an opportunity for a hearing in regard thereto should be accorded to the child's parent or guardian as set forth in the Court's Order of June 18, 1971.

Section 1375, with regard to the exclusion of children from public schools, provides:

"The State Board of Education shall establish standards for temporary or permanent exclusion from the public school of children who are found to be uneducable and untrainable in the public schools. Any child who is reported by a person who is certified as a public school psychologist as being uneducable and untrainable in the public schools, may be reported by the board of school directors to the Superintendent of Public Instruction and when approved by him, in accordance with the standards of the State Board of Education, shall be certified to the Department of Public Welfare as a child who is uneducable and untrainable in the public schools. When a child is thus certified, the public schools shall be relieved of the obligation of providing education or training for such child. The Department of Public Welfare shall thereupon arrange for the care, training and supervision of such child in a manner not inconsistent with the laws governing mentally defective individuals."

I have rendered this opinion relevant to the PARC case with the hope of implementing the letter and spirit of the Consent Agreement. I would like to take this opportunity to again commend both of you for your efforts to improve the lives of mentally retarded children in the Commonwealth of Pennsylvania.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

## OFFICIAL OPINION NO. 75

*Cosmetologists—Authority to cut hair of male patrons—Op. Atty. Gen. No. 69, September 27, 1971, affirmed.*

1. The apprenticeship requirement for barbers which does not exist for cosmetologists does not constitute an illegal discrimination in favor of cosmetologists because there are still differences in the extent of services which may be rendered by barbers and cosmetologists, e.g. shaving.
2. The matter should be referred to the State Legislature for appropriate legislation either by removing the apprenticeship requirement from the Barber's Act or by adding such requirement to the Beauty Culture Act.
3. Op. Atty. Gen. No. 69, September 27, 1971, holding that Cosmetologists may treat men's hair, is reaffirmed.

Harrisburg, Pa.,  
November 1, 1971

State Board of Barber Examiners  
279 Boas Street  
Rm. 301  
Harrisburg, Pennsylvania

Gentlemen:

I have reviewed the letter from Daniel L. R. Miller, counsel for the Pennsylvania Barber School Association written to you under date October 13, 1971, which you have made available to our office, relating to our opinion of September 27, 1971. That opinion, was, of course, mandated by Article I, Section 27 of the Pennsylvania Constitution, as Mr. Miller acknowledges, but Mr. Miller points out several possible inequities which may result from the ability of cosmetologists to treat men's hair because of certain differences in the Beauty Culture Law, 63 P. S. § 507 et seq. and Barber's Act, 63 P. S. § 551 et seq. He refers principally to the apprenticeship requirement for barbers which does not exist for cosmetologists and predicts the opening of shops by cosmetologists specializing in the treatment of men's hair who will not have to undergo the same training as barbers. This would work unfairly to barber students and barber apprentices.

However, none of the differences in the two laws in our opinion constitute an illegal discrimination in favor of cosmetologists, because there are still differences in the extent of services which may be rendered by barbers and cosmetologists, e.g., shaving. We, therefore, do



not find that the apprenticeship requirement for barbers, which is at least forty years old, is unconstitutional.

We do recommend that the Pennsylvania Barber School Association and any other organization of barbers which feels similarly treated, should refer the matter to the State Legislature for appropriate legislation either removing the apprenticeship requirement from the Barber's Act or adding such a requirement to the Beauty Culture Act. Certainly, your Board, the various barbers' organizations, and the Cosmetology Board have the expertise to recommend appropriate legislation, and our office will support and even assist in drafting appropriate legislation.

As Mr. Miller and the organization he represents must understand, it was not our intention to eliminate the institution of licensed barbers in favor of licensed cosmetologists. Our opinion, as stated, was constitutionally mandated. Any inequities which exist between barbers and cosmetologists have existed for forty years and should have been corrected long before now. If our opinion has served to highlight the inequities and if they can be removed by legislation, then our opinion will not only have satisfied the constitutional requirement, but will have served to make the legislation regarding licensing of barbers and cosmetologists much more equitable, and having a twofold desirable effect.

I have asked my Deputy to send copies of this letter to Mr. Miller and any other interested parties and we stand ready to meet with your Board, the Cosmetology Board, the Legislature, and any other interested parties in order to discuss and draft appropriate legislation in this matter.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION NO. 76

*State Lottery Commission—Expenses and per diem allowances—Source of payment.*

1. The expenses and per diem allowance of the State Lottery Commission are to be paid from the revenues from the State Lottery.
2. Pending the receipt of lottery revenues, the Commissioners who will undoubtedly be incurring expenses and earning per diem allowances may be

paid from the \$1,000,000 appropriation provided for in Section 16 of the State Lottery Law, Act No. 91 of 1971.

3. The Governor's Office is only the paying agency and not the source of payment.

Harrisburg, Pa.,  
November 4, 1971

Honorable Charles P. McIntosh  
Budget Secretary  
Room 425 Main Capitol  
Harrisburg, Pennsylvania

Dear Secretary McIntosh:

You have requested our opinion as to whether the expenses and per diem allowance of the State Lottery Commission are to be paid from the budget of the Governor's Office or from the revenues collected by the State Lottery. For the reasons set forth hereafter, it is our opinion, and you are so advised, that the expenses and per diem allowance are to be paid from the revenues of the State Lottery.

The State Lottery Law (Act No. 91 of 1971), approved on August 26, 1971, established a lottery to be operated by the Commonwealth. It created within the Department of Revenue a division of the State Lottery, which includes the State Lottery Commission (Section 4). The Commission consists of a chairman and four members. Section 4 of the Law further provides:

"The members of the commission shall receive actual and necessary expenses incurred by them in the performance of their duties, together with a per diem allowance to be paid by the Governor's Office for each day spent in the performance of their duties."

It is to be noted that this provision does not state that the payment is to be made out of the budget of the Governor's Office, but merely "paid by the Governor's Office." A review of the entire Law, moreover, shows that the intention is not to require that such payments be made out of the budget of the Governor's Office, but rather from the revenues of the State Lottery.

Thus, Section 6(a)(11) of the Law provides that the Secretary of Revenue is empowered to apportion the total revenues accruing from the sale of lottery tickets among, inter alia, "(ii) the payment of costs incurred in the operation and administration of the lottery, *including the expenses of the division . . .*" (Emphasis added). Since the Law

provides that the "division" includes the State Lottery Commission, the "expenses of the division" include the expenses of the Commission. Section 12(a) of the Law similarly provides that the moneys received from the operation of the State Lottery shall be used for "operating expenses," and Section 12(b) provides that moneys in the State Lottery Fund shall be appropriated "(2) for the expenses of the division in its operation of the Lottery." The intention is thus clear in the Law that all expenses of the Commission, including per diem, are to be paid out of lottery revenues.

Pending the receipt of lottery revenues the Commissioners, who will undoubtedly be incurring expenses and earning per diem allowances, may be paid from the \$1 million appropriation provided for in Section 16 of the Law. This appropriation covers the "establishment of . . . the Division of the State Lottery," which, as we have said, includes the State Lottery Commission.

Accordingly, the Governor's Office under Section 4 of the Law is only the paying agency, not the source of payment. Implementation of Section 4 is an administrative matter which may be achieved by either (1) the Governor's Office drawing vouchers for the expenses and per diem of the State Lottery Commission on the Department of Revenue for payment out of the lottery revenues; or (2) appropriations by the Department of Revenue to the Governor's Office out of lottery revenues to cover the expenses and per diem of the State Lottery Commission. This should be coordinated between the Governor's Office and Department of Revenue.

In accordance with Section 512 of the Administrative Code, 71 P. S. § 192, we have notified the Department of the Auditor General and the Treasury Department of your question and have received the views of these Departments.

Therefore, it is our opinion, and you are so advised, that the actual and necessary expenses incurred by the members of the State Lottery Commission in the performance of their duties, together with a per diem allowance for each day spent in the performance of their duties, are to be paid from the revenues derived from the sale of lottery tickets and not from the budget of the Governor's Office.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

## OFFICIAL OPINION NO. 77

*Judges—Retirement—Actuarial procedures.*

1. There is no deprivation of an employe's rights under presently accepted actuarial procedures in reducing the funds necessary to pay the retirement allowance of a person in later years because of the age of the annuitant when he enters upon his annuity.

Harrisburg, Pa.,  
November 8, 1971

Isidor Ostroff, Esquire  
Ostroff & Lawler, P.A.  
37 South 20th Street  
Philadelphia, Pennsylvania 19103

Dear Isidor:

We have had an opportunity to review your letter with respect to the question raised by Judge Bolger as to "shrinking" present value because of his age.

It is conceivable that there is a point in time when, actuarially, the funds necessary to pay the retirement allowance of a person in later years is reduced because of the age of the annuitant when he enters upon his annuity.

You, of course, are questioning the actuarial determination with respect to the calculation of present value. Particularly, in Judge Bolger's case, if we assume that he would retire on July 1, 1971, the present value would be calculated by multiplying the cost of a life annuity of \$1.00, and would amount to \$279,966.14. Were he to retire six months later, on January 1, 1972, his present value would be \$279,824.61. As you can see, this shrinkage is quite minimal, at best. There is, currently, a bill in the Senate Finance Committee (Senate Bill No. 129), which would preserve the present value at the maximum so that there would be no shrinkage.

In any event, I have reviewed this problem extensively, and believe that its solution is a legislative one. I fail to see that any deprivation of an employe's rights exists under presently accepted actuarial procedures

which are followed, not only in this retirement program, but in most public and private programs actuarially funded on a sound basis.

Thank you for calling this to our attention.

With kindest regards and best wishes.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION NO. 78

*Pennsylvania Higher Education Assistance Agency—Delinquent loans—Authority to use services of Private collection agency.*

1. Under the Act of creating the Pennsylvania Higher Education Assistance Agency, 24 P. S. § 5101 et seq., and Op. Atty. Gen. No. —, December 6, 1963 and Op. Atty. Gen. No. —, January 25, 1967, the powers given to the Board of Directors are sufficiently broad to authorize its hiring of a private collection agency to see that money owed to it is collected.

Harrisburg, Pa.,  
November 16, 1971

Kenneth R. Reeher, Executive Director  
Pennsylvania Higher Education Assistance Agency  
Towne House Apartments  
660 Boas Street  
Harrisburg, Pennsylvania 17102

Dear Mr. Reeher:

We have your request of October 29, 1971, for advice as to whether the Pennsylvania Higher Education Assistance Agency may utilize the services of Company Adjustors, Inc. to collect delinquent loans. We understand that your agency makes every effort to collect these delinquent loans, and after failure of these repeated attempts, the agency employs the services of the Company Adjustors which receives a certain percentage of the delinquent loans they collect.

A clear understanding of the powers, duties and responsibilities of the Pennsylvania Higher Education Assistance Agency is set forth in the Act of August 7, 1963, P. L. 549, 24 P. S. § 5101, et seq.

Under the powers given to the Pennsylvania Higher Education Assistance Agency, it may

“perform such other acts as may be necessary or appropriate to carry out effectively the objects and purposes of the agency as specified in this act.” 24 P. S. § 5104(7)

In reflecting upon the purpose of the agency, 24 P. S. § 5102, to guarantee loans made to such persons to assist them in meeting their expenses of higher education, it is our understanding that the agency may, accordingly, in compliance with 24 P. S. § 5104(7), perform those duties which it feels are necessary to insure the granting and repayment of those loans.

In reviewing two (2) Attorney General's Opinions, one written on December 6, 1963 (copy enclosed), it was asserted that the agency herein is a public corporation distinguishable from being part of the Executive Department. On January 25, 1967 (copy enclosed), an Attorney General's Opinion confirmed that the Pennsylvania Higher Education Assistance Agency is autonomous and not a body of the Executive Department of the Commonwealth “for if it were a part of the Executive Department, it could have no power to guarantee loans without violating the prohibitions of the act and the Constitution against pledging the credit of the state.”

Although the agency is autonomous, it must adhere to Sections 601 and § 602 of the Administrative Code, 71 P. S. §§ 221, 222, only if the agency receives money from the Commonwealth. These sections, however, do not bear upon the question raised.

In review of the Act creating the Pennsylvania Higher Education Assistance Agency and the Attorney General's Opinions referred to, we, accordingly, advise you that the powers given to the Board of Directors are sufficiently broad to authorize its hiring of a private collection agency to see that money owed to it is collected.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

## OFFICIAL OPINION NO. 79

*State Employees—Administrative Leave—Public Employee Relations Act of 1970, 43 P. S. § 1101.201 et seq. Annual Conventions of employe unions.*

1. Agency heads may grant administrative leave to those employes who serve as official delegates to the Annual Conventions of Employee Unions and organizations as set forth in Section 1303 of the Personnel Rules (4 Pa. Code § 34.31) without being limited by the Public Employee Relations Act, 43 P. S. § 1101.101 et seq.

Harrisburg, Pa.

November 17, 1970

Honorable Ronald G. Lench  
Secretary of Administration  
Harrisburg, Pa.

Dear Secretary Lench:

You have requested our advice with respect to those circumstances under which Administrative Leave may be granted to employes to "serve as official delegates to the annual conventions of employe unions and organizations," and whether the Public Employee Relations Act of 1970, 43 P. S. § 1101.101 et seq. has any bearing on the question. Such leave is now available pursuant to Section 222 of the Administrative Code, 71 P. S. § 82, under Section 1303 of the Personnel Rules (4 Pa. Code, § 35.31).

We are advised that, prior to the passage of the Public Employee Relations Act, it was common practice for agencies under the Governor's jurisdiction to approve the use of such leave for these purposes in accordance with the Personnel Rules. We have reviewed Article VI of the Public Employee Relations Act with regard to certified employe representatives. That section deals with the selection and recognition of certified employe representatives only within the appropriate bargaining unit. As such, it provides an example of a union for which an employe who is an official delegate could be given Administrative Leave to attend annual conventions. But the Act places no limitations on the Personnel Rules or Pennsylvania Code provisions which predate it, and does not restrict leave to members of those unions only.

Accordingly, it is our opinion, and you are advised, that agency heads may grant Administrative Leave to those employes who serve as official delegates to the annual conventions of employe unions and organizations as set forth in Section 1303 of the Personnel Rules (4 Pa. Code, § 35.31) without being limited by the Public Employee Relations Act.

J. SHANE CREAMER,  
*Attorney General.*

## OFFICIAL OPINION No. 80

*Pests—Department of Environmental Resources—Department of Agriculture—Jurisdiction.*

1. The Department of Environmental Resources has jurisdiction with respect to the protection of forests from gypsy moths and other pests, and the Department of Agriculture is responsible for the protection of nursery stock, orchards, and other trees which are separate and apart from the forest.

Harrisburg, Pa.  
November 17, 1971

Honorable Louis F. Waldmann  
Deputy Secretary  
Department of Environmental Resources  
517 South Office Building  
Harrisburg, Pennsylvania

Dear Secretary Waldmann:

You requested an opinion concerning which department has jurisdiction over the control of gypsy moths and other pests which affect the forests of the Commonwealth, the Department of Environmental Resources or the Department of Agriculture. You have indicated that there is a disagreement between your Department and the Department of Agriculture in this regard. You are advised that your Department has jurisdiction with respect to the protection of forests although the Department of Agriculture is responsible for the protection of nursery stock, orchards and other trees which are separate and apart from forests.

Section 1902-A of The Administrative Code, 71 P. S. § 510-2, delegates to the Department of Environmental Resources the power and the duty:

“(4) . . . to administer, *protect*, develop, utilize and regulate, the occupancy and use of the lands and resources of the State forest, to protect all forest land in the State from forest fires, *fungi, insects, and other enemies*, . . .”

This section clearly gives the Department of Environmental Resources the responsibility to protect forests against gypsy moths and other pests.



The responsibility of the Department of Agriculture is contained in Section 1703 of The Administrative Code, 71 P. S. § 443, which delegates to the Department the power and the duty:

“(a) To inspect any nursery, orchard, farm, garden, park, cemetery, or any private or public place, which may become infested or infected with harmful insects or plant disease, to establish and enforce quarantines, to issue and enforce orders and regulations and make investigations for the control of said pests, *wherever they may exist within the Commonwealth*, and to perform such other duties relating to ‘plants’ and ‘plant products’ as may seem advisable and not contrary to law;” (Emphasis added.)

While it is arguable that the italicized phrase is intended to extend the jurisdiction of the Department of Agriculture for pest protection to State forests, any such interpretation is obviated by the specific language of Section 1902-A above pertaining to insects and other enemies of State forests.

Section 2(d) of the Pennsylvania Plant Pest Act of 1937, Act of April 21, 1937, P. L. 318, 3 P. S. § 214-2(d), provides that the terms “plants” and “plant products” shall mean any plant, or portion thereof, *including trees*, shrubs and vines for fruit and seeds whether living or dead.”

A reading of the Act makes it clear that its principal applicability is to nurseries and nursery stock. While it is arguable that its provisions were intended to apply to forests, by virtue of the above language including trees within the definition of plants, it is evident that the Legislature, for the reasons stated above, intended that the protection of forests be accomplished by the Department of Environmental Resources.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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### OFFICIAL OPINION No. 81

*Bonds—Bid instead of cash or performance—Acceptance by Department of Property and Supplies.*

1. Under present law, the Department of Property and Supplies may accept bid-performance bonds, which are the equivalent of bid bonds, in receiving bids for contracts for the leasing of trucks.

2. Due to confusion, Section 2409 of the Administrative Code, 71 P. S. § 639, should be amended to permit the Department to accept surety bid bonds or combination bid-performance bonds in receiving bids in such contracts.

Harrisburg, Pa.,  
November 17, 1971

Honorable Milton H. Shapp  
Governor  
Commonwealth of Pennsylvania  
225 Main Capitol  
Harrisburg, Pennsylvania 17120

Dear Governor Shapp:

You have requested an opinion as to whether the Department of Property and Supplies may accept bid bonds in lieu of cash or performance bonds in receiving bids for contracts for the leasing of trucks which the Department of Property and Supplies leases for itself and other departments. You are advised that under present law the Department of Property and Supplies may accept bid-performance bonds, which are the equivalent of bid bonds, but for the reasons given below amendatory legislation is desirable.

We understand your inquiry was prompted by the fact that many small lessors of trucks are effectively barred from submitting bids on truck leases if they are required to post cash or a performance bond, the premium on which is substantial, in submitting their bids.

The Department of Property and Supplies is governed by Section 2409 of The Administrative Code, Act of April 29, 1929, P. L. 177, § 2409, 71 P. S. § 639. That section is entitled "Method of awarding contracts for stationery, paper, fuel, repairs, furnishings and supplies". The section also applies to the purchase or rental of equipment and trucks. The tenth paragraph of the section provides:

"Except as hereinafter provided, no proposal for any contract shall be considered unless such proposal is accompanied by a *certified or bank check*, to the order of the State Treasurer, *in one-fourth the amount of the estimated contract*, or by a bond in such form and amount as may be prescribed by the department. *Any such bond shall be conditioned for the faithful performance of the terms of the contract, if awarded*, and shall have as surety one surety company authorized to act as surety in this Commonwealth, or two individual sureties approved by the Department of Justice." (Emphasis added.)

The portion italicized indicates that only cash in a substantial amount or a performance bond is permitted. Pursuant to this section the Department of Property and Supplies has issued a regulation to the effect that bid bonds are not permitted.

The section has been repealed, in part, insofar as it is inconsistent with the Public Works Contractors' Bond Law, Act of December 20, 1967, P. L. 869, 8 P. S. § 200, which requires that a contractor furnish a payment bond (i.e. a labor and material bond) in addition to a performance bond. Such a requirement does not affect this opinion. The section has also been repealed insofar as it is inconsistent with the Commonwealth Documents Law, Act of July 31, 1968, Act No. 240, 45 P. S. § 1413. With respect to contracts for printing or reproduction of certain documents, regulations may be prescribed for bidding procedures and such regulations could permit bid bonds for that type of contract. To date no such regulations have been promulgated.

However, it appears that the problem is not in the above quoted language of Section 2409. Rather the problem is with the lack of familiarity on the part of most bonding companies with anything other than a bid bond as security for a bid.

United States Fidelity and Guaranty Company writes what it calls a bid-performance bond, which in every respect is treated as a bid bond until such time as its customer receives a contract award. At that time the bond becomes a performance bond and the usual performance bond premium is charged. In this manner the company complies with the language of Section 2409 and with the Department's regulation concerning bid bonds, but without requiring a performance bond until a contract is actually awarded.

Most bonding companies are not familiar with this problem since Pennsylvania is the only State in the Union that has a requirement such as the above provision of Section 2409. Consequently, these companies will only write a performance bond and charge the full premium.

To eliminate the confusion it is recommended that Section 2409 be amended to permit the Department to accept surety bid bonds or combination bid-performance bonds, in receiving bids on such contracts.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

## OFFICIAL OPINION No. 82

*Equal opportunity employment—Necessity of gathering reliable race and sex information—Pennsylvania Human Relations Act, 43 P. S. § 951 et seq.*

1. The prohibition of Section 5 (b) of the Pennsylvania Human Relations Act, 43 P. S. § 951 et seq. against racial and sexual record keeping for state employes or for applicants for state employment is not enforceable against the Commonwealth of Pennsylvania when such record keeping is part of a bona fide effort to analyze and correct discriminatory effects of standards and procedures for state employment or to effectuate an affirmative action program designed to eliminate the effects of past discrimination and to bring women in minorities into state government employment in more representative numbers as mandated by the 14th Amendment of the United States Constitution.

Harrisburg, Pa.,  
November 17, 1971

Mr. Homer C. Floyd  
Executive Director  
Pennsylvania Human Relations Commission  
100 North Cameron Street  
Harrisburg, Pennsylvania 17120

Dear Mr. Floyd:

On November 11, 1971, you requested my opinion concerning the apparent conflict between Section 5(b) of the Pennsylvania Human Relations Act, Act of October 7, 1955, P. L. 744, as amended, 43 P. S. § 951, *et seq.*, and the portion of my opinion dated October 18, 1971 to the Hon. Milton J. Shapp, Governor, which stated the necessity for gathering reliable race and sex information concerning applicants for state employment as part of the Commonwealth's effort to eliminate race and sex discrimination in government employment.

The obligation of state government to act affirmatively to eliminate discrimination in government employment derives from the Fourteenth Amendment to the United States Constitution. Case law makes clear not only that a state as employer must act affirmatively to eradicate invidious discrimination in employment, see e.g., *Arrington v. M.B.T.A.*, 306 F. Supp. 1355 (D. Mass. 1969), but also that the constitutional mandate for affirmative action in areas of state-supported discrimination will be tested against the standard of practical rather than theoretical impact. See, e.g., *U. S. v. Jefferson County Bd. of Ed.*, 372 F. 2d 836 (5th

Cir. 1966). Affirmative action guidelines promulgated by the Pennsylvania Human Relations Commission, CCH Emp. Prac., Pa. ¶ 27, 295, as well as by the federal Equal Employment Opportunity Commission, CCH Emp. Prac., Parag. 16, 904, make abundantly clear that standards and procedures for employment cannot be evaluated for discriminatory effects absent comprehensive and reliable statistics evidencing the impact of each such standard and procedure upon minority groups. Accordingly, the mandate of the Fourteenth Amendment that state government act affirmatively and to positive practical effect in eliminating discrimination in its employment cannot be satisfied without the gathering and retention of reliable information by race and sex for applicants to state employment and for existing state employees. To the extent that Section 5(b) of the Pennsylvania Human Relations Act conflicts with the constitutional prescription, the latter must prevail.

This is not the first occasion on which the Department of Justice has considered the impact of Section 5(b) upon record keeping by state government designed to eliminate discrimination. On March 26, 1968, in a memorandum opinion from Deputy Attorney General Raymond Kleiman to the Hon. John K. Tabor, Acting Secretary of Labor and Industry, it was stated:

In view of all the foregoing, it is our opinion, and you are accordingly advised, that racial record-keeping, as it relates to documents required to be completed by governmental agencies which include racial identification therein, and which serve to promote the elimination of discrimination, does not come within the prohibitive activities set forth in Section 5 of the Pennsylvania Human Relations Act.

This opinion was cited by Deputy Director Milo A. Manley of the Human Relations Commission in a September 10, 1968 letter to Harry P. Griffiths, Executive Director, State Civil Service Commission approving the recordation of racial identity in the performance of statistical and research analyses designed to evaluate the possible discriminatory effect of written employment tests upon certain segments of society.

In view of the foregoing, I am of the opinion, and you are so advised, that the prohibition of Section 5(b) of the Pennsylvania Human Relations Act against racial and sexual record keeping for state employees or for applicants for state employment is not enforceable against the Commonwealth of Pennsylvania when such record keeping is part of a *bona fide* effort to analyze and correct discriminatory effects of standards and procedures for state employment or to effectuate an affirmative

action program designed to eliminate the effects of past discrimination and to bring women and minorities into state government employment in more representative numbers. The foregoing notwithstanding, I invite your careful consideration of the appropriate procedures for gathering and retaining records in such fashion as to preclude their inadvertent or deliberate use for discriminatory purposes, as well as to avoid possible misinterpretation by existing state employees and applicants for state employment of the purposes for which such data will be used.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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OFFICIAL OPINION No. 83

*Bureau of Corrections—Manufacturing Fund—Funding of vocational and other programs.*

1. The Bureau of Corrections pursuant to Section 915(h) of the Administrative Code, 71 P. S. § 305(h), may use the monies in the manufacturing fund to finance vocational and other programs within the Bureau of Correction for the rehabilitation of the inmates.

Harrisburg, Pa.,  
November 19, 1971

Allyn R. Sielaff  
Commissioner of Correction  
Bureau of Correction  
Harrisburg, Pa.

Dear Commissioner Sielaff:

In a memorandum dated November 12, 1971, Albert P. Jones, Director of Administrative Services, Bureau of Correction, requested, on your behalf, an opinion as to the legality of using Manufacturing Fund monies to fund vocational and other programs within the Bureau of Correction.

The monies in the Manufacturing Fund constitute the excess of income over expenditures realized by Correctional Industries. Section

915(h) of the Administrative Code, 71 P. S. § 305(h), authorizes the Bureau of Correction:

(h) "To pay out of the Manufacturing Fund all expenses necessary for the proper conduct of the work of the Department of Justice pertaining to the establishment, maintenance and carrying on of industries in the State penal and correctional institutions *and the rehabilitation of the inmates thereof.*

Estimates of the amounts to be expended from the Manufacturing Fund shall be submitted to the Governor, from time to time, for his approval or disapproval, as in the case of other appropriations, and it shall be unlawful for the Department of the Auditor General to honor any requisition for expenditures or moneys out of this appropriation in excess of the estimates approved by the Governor. Subject to this provision, the Department of the Auditor General shall, from time to time, draw warrants upon the Treasury Department for the amounts specified in such requisitions, not exceeding, however, the amount in the Manufacturing Fund at the time of the making of any such requisitions." (Italics ours.)

The above quoted language, particularly the italicized portion, indicates that the use which you propose to make of these funds is proper.

In addition to the above quoted statute, we have reviewed Informal Opinion No. 1448 of the Attorney General Chidsey dated December 8, 1947, a copy of said Opinion is attached hereto. In that Opinion, Attorney General Chidsey referred to 71 P. S. § 602(h), which governed the disposition of monies in the Manufacturing Fund at that time. It should be noted that the earlier statute relating to Manufacturing Fund monies did not have the language authorizing the money to be used for "the rehabilitation of the inmates thereof." I conclude that this language was added by the legislature specifically to permit the type of use which you propose.

Of course, prior to utilizing the funds, as you indicate, you should comply with the second paragraph of § 915(h) in submitting your estimates for approval by the Governor.

J. Shane Creamer  
Attorney General

## OFFICIAL OPINION No. 84

*Statutes—Relationship of Acts 92 of 1971, and Act 109 of 1968.*

1. There is no basis for concluding that Act 92 of 1971 repeals Act 109 of 1968, 24 P. S. § 5601 et seq.

Harrisburg, Pa.,  
November 22, 1971

Honorable E. Mac Troutman  
United States District Court  
Eastern District of Pennsylvania  
5002 United States Courthouse  
Philadelphia, Pennsylvania 19107

Dear Judge Troutman:

At the conference held October 22, regarding the above captioned case, we were asked to submit our position as to whether Act 92 of 1971 repealed Act 109 of 1968, 24 P. S. § 5601 et seq.

It is obvious that nothing on the face of Act 92 expressly repeals Act 109. The question then is whether Act 92 repeals Act 109 by implication. Had repeal been prominently in the minds of the legislators, it would have been quite logical that they would have made a recital to that effect in Act 92. This they omitted to do.

We find no basis for concluding that Act 92 repeals Act 109. The cases clearly establish that whether an act is repealed by implication is exclusively a question of legislative intent, and they further repeatedly state that repeals by implication are not favored. The comments appearing in the legislative record do not disclose an intent to repeal. In the absence of a clear resolution by both Houses, or of the formal and specific raising, in debate, of the question whether Act 92 was intended to repeal Act 109, it would not be possible for us to conclude that a repeal was intended. No such resolution or question was presented. Obviously comments here and there, that Act 92, like Act 109, is aimed generally at "helping relieve the nonpublic education crisis" cannot be taken as any expression of intent to repeal, or as the expression of the dominant voice in the General Assembly.

Sincerely yours,

J. SHANE CREAMER,  
*Attorney General.*



## OFFICIAL OPINION No. 85

*Minor Judiciary—Fines—Transmittal of partial payments.*

1. District justices must transmit partial payments in exactly the same manner as they transmit payments in full under present law. Legislation could be drafted which would simplify the problem for the district justices.

Harrisburg, Pa.,  
November 26, 1971

Honorable A. Evans Kephart  
State Court Administrator  
Supreme Court of Pennsylvania  
558 City Hall  
Philadelphia, Pennsylvania 19107

Dear Mr. Kephart:

This is in response to your letter of November 4, 1971. In your letter you point out that recent changes in the law have required in many cases that district justices collect fines in installments. It appears that a number of the district justices are concerned as to whether they must transmit the partial payments or installments when received, or whether they must wait until the entire fine is collected before they transmit it.

The law concerning the time for transmittal of fines, penalties and forfeitures collected by the minor judiciary is set out in 42 P. S. § 735.1. A copy of that provision of the law is attached hereto. It does not appear that the law makes any special provision for the transmittal of partial payments. It thus appears that the district justices must transmit the partial payments exactly as they transmit payments in full. You will note that the Act provides that such payments to the counties shall be made on a quarterly basis and those to the Commonwealth and to the political subdivisions, other than a county, are on a monthly basis.

We can appreciate the fact that this creates difficult bookkeeping problems for the district justices. It might be that legislation could be drafted which would simplify the problem for the district justices. If you have any ideas along this line, please let us know and we will try to be of whatever assistance we can in drafting and submitting such legislation.

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

## OFFICIAL OPINION No. 86

*Sewage Treatment Plant and Water Works Operators Certification Act, 63 P. S. § 1007—Civil and sanitary engineers—Certification by State Board.*

1. Section 7 of the Sewage Treatment plant and Water Works Operators' Certification Act, 63 P. S. § 1007 requires a certificate to be granted to a registered civil or sanitary engineer but it is the duty of the State Board to determine the class of the certificate based upon the applicant's demonstration of his knowledge and experience.
2. The State Board's proposed amendment to Section 205 of its rules and regulations is consistent with Section 7 of the Act.

Harrisburg, Pa.,  
December 1, 1971

Hon. Carl W. Fuehrer  
Chairman  
State Board for Certification of Sewage Treatment  
Plants and Waterworks Operators  
Department of Environmental Resources  
P. O. Box 2351  
Harrisburg, Pennsylvania 17120

Dear Mr. Fuehrer:

By its letter of November 15, 1971, signed by Georgine Adams, Secretary, your Board has requested an opinion concerning the interpretation of Section 7 of the Sewage Treatment Plant and Waterworks Operators' Certification Act, Act of November 18, 1968, Act No. 322, 63 P. S. § 1007. The question arose as a result of objections to proposed rule making filed by the Pennsylvania Society of Professional Engineers when the Board proposed an amendment to Section 205 of its Rules and Regulations. You are advised that the proposed amendment to Section 205 is proper and is consistent with and in accordance with Section 7 of the Act.

Section 7 provides as follows:

"Anyone registered under the 'Professional Engineers Registration Law,' approved May 23, 1945 (P. L. 913), [63 P. S. §§ 148 et seq.] who has been examined in civil or sanitary engineering or otherwise proves he is proficient shall be granted a certificate upon application to the board."

Section 205 of the Board's Rules and Regulations, including the proposed amendment, implements Section 7 of the Act by providing that certificates of the lowest class designated in the Act shall be issued to registered professional engineers in the absence of a demonstration of proficiency in the operation of sewage treatment plants, water treatment plants, or distribution systems, which would justify the grant of a higher class certificate.

The Pennsylvania Society of Professional Engineers contends that the language of Section 7 requires the Board to issue a certificate of the highest class to any registered professional engineer who has been examined in civil or sanitary engineering without any further evidence of the applicant's proficiency.

However, Section 7 requires only that *a* certificate shall be issued to such an engineer, without reference to the class of certificate. In view of the very specific requirements of the various classes of certificates set forth in Sections 5 and 6, it is apparent that the Legislature intended that sewage treatment plants, water treatment plants, and distribution systems be operated by qualified persons who know how to operate them, and charged the Board with the responsibility of examining the qualifications, experience and knowledge of all applicants before granting certificates.

Consequently, it is our opinion, and you are advised, that Section 7 of the Act requires a certificate to be granted to a registered civil or sanitary engineer, but that it is the duty of the Board to determine the class of the certificate, based upon the applicant's demonstration of his knowledge and experience.

We have examined the objections to proposed Section 205(b) presented to the Board by the Pennsylvania Society of Professional Engineers bearing the date October 18, 1971, and the letter of the Society dated November 2, 1971. We have also examined the statement of the Board, dated November 15, 1971, and the letter of the Water Pollution Control Association of Pennsylvania, dated November 18, 1971, supporting the Board's position. After due consideration of all arguments presented, we have concluded that the Board is correct and that its proposed amendment to Section 205 of its Rules and Regulations is authorized by the Act.

Very truly yours,  
J. SHANE CREAMER,  
*Attorney General.*

## OFFICIAL OPINION No. 87

*Civil Service—Status of bituminous mine inspectors.*

1. Act No. 275, 71 P. S. § 510-105, brings bituminous mine inspectors within the purview of the Civil Service Act.
2. While mine inspectors are not employees of the Department of Environmental Resources, they occupy positions within that Department, because they are subject to the direction of the Secretary of Environmental Resources, and their certificates of qualification are issued by that same Department.
3. The provision of Sections 105 through 109 and Section 116 of the Pennsylvania Bituminous Coal Mine Act, 52 P. S. §§ 105-109, 116 which deal with the qualifications, examination and removal of mine inspectors are repealed by Section 36 of Act No. 275 insofar as they are inconsistent.
4. Section 502 of the Civil Service Act, 71 P. S. § 741.502 gives the Civil Service Director complete discretion in preparing the examinations and in citing the qualifications for the positions for which applicants are being examined. He may adopt some of the provisions of the Pennsylvania Bituminous Coal Mine Act which have been repealed in establishing procedures pertaining to the qualification and examination of mine inspectors.

Harrisburg, Pa.,  
December 1, 1971

Honorable Maurice K. Goddard  
Secretary  
Department of Environmental Resources  
509 South Office Building  
Harrisburg, Pennsylvania

Dear Dr. Goddard:

In your letter of October 27, 1971 you have asked if bituminous mine inspectors are now covered by the Civil Service Act by virtue of the provisions of Act No. 275. You are advised that Act No. 275 does bring bituminous mine inspectors within the purview of the Civil Service Act.

Section 32 of Act No. 275, 71 P. S. § 510-105 provides that:

“All positions in the Department of Environmental Resources shall be deemed to be included in the list of positions set forth in clause (d) of Section 1 of the Act of August 5, 1941 P. L. 752), known as the Civil Service Act, [71 P. S. § 741.3 et seq.] and the provisions and benefits of that act shall be applicable to the *employees of, and positions in, the department.*” (Emphasis supplied.)

While mine inspectors are not employees of the Department of Environmental Resources, they so occupy positions in the department, as demonstrated below.

Section 9 of Act No. 275, which amends Section 438 of The Administrative Code, 71 P. S. § 148, abolishes the Examining Board for the Bituminous Coal Mines of Pennsylvania and provides that bituminous mine inspectors shall be appointed from among persons holding valid certificates of qualification issued by the Department of Environmental Resources. Prior to the passage of Act No. 275 the certificates of qualification were issued by the examining board.

Although mine inspectors are appointed by the Governor in accordance with Section 105 of the Pennsylvania Bituminous Coal Mine Act, Act of July 17, 1961, P. L. 659, 52 P. S. § 701-105, Section 20 of Act No. 275, 71 P. S. § 510-16, provides that they shall continue to exercise the powers and perform the duties by law vested in and imposed upon them under the direction of the Secretary of Environmental Resources.

Since mine inspectors are subject to the direction of the Secretary of Environmental Resources, and since their certificates of qualification are issued by the Department of Environmental Resources, they occupy positions in the department, and are brought within the coverage of the Civil Service Act by the express language of Section 32 above. This interpretation is reinforced by the fact that the Legislature, in Section 9, has abolished the examining board.

The provisions of Section 105 through 109 and Section 116 of the Pennsylvania Bituminous Coal Mine Act, *supra*, 52 P. S. §§ 105-109, 116 which deal with the qualifications, examination and removal of mine inspectors are repealed by Section 36 of Act No. 275 insofar as they are inconsistent with Act No. 275 and the Civil Service Act.

However, Section 502 of the Civil Service Act, Act of August 5, 1941, P. L. 752, as amended, 71 P. S. § 741.502, gives the Civil Service Director complete discretion in preparing examinations and in setting the qualifications for the positions for which applicants are being examined. This means that the procedures of the examining board and some of the provisions of the Pennsylvania Bituminous Coal Mine Act which have been repealed may be adopted by the Civil Service Director in establishing procedures pertaining to the qualification and examination of mine inspectors, except to the extent that they may be inconsistent with the Civil Service Act.

Very truly yours,  
J. SHANE CREAMER,  
*Attorney General.*

## OFFICIAL OPINION No. 88

*Reapportionment—Secretary of the Commonwealth—Responsibilities in publishing preliminary reapportionment plan.*

1. Framers of the Pennsylvania Constitution in Article II, Section 17, meant to insure that any reapportionment plan, be it preliminary, revised, final, or court ordered be published to the extent necessary to keep the public informed and afford the public the opportunity to voice objection to the plan.

Harrisburg, Pa.,  
December 3, 1971

Honorable C. DeLores Tucker  
Secretary of the Commonwealth  
Commonwealth of Pennsylvania  
Harrisburg, Pennsylvania

Dear Secretary Tucker:

You have requested our opinion on your constitutional responsibilities pertaining to the publishing of the preliminary legislative reapportionment plan.

The method for reapportioning the Legislature is provided for in Article II, Section 17 of the Constitution of Pennsylvania of 1968. Subsection (c) provides that the Legislative Reapportionment Commission shall file a preliminary reapportionment plan with the Secretary of the Commonwealth who under the law is the "elections officer of the Commonwealth."

Subsection (c) further provides that the Commission shall have thirty days after filing the preliminary plan to make corrections in the plan. In addition the Constitution states:

"Any person aggrieved by the preliminary plan shall have the same thirty-day period to file exceptions with the commission in which case the commission shall have thirty days after the date the exceptions were filed to prepare and file such with elections officer a revised reapportionment plan."

It should be noted that the constitutional scheme contemplates exceptions to the preliminary plan being filed by "any person." It is clear that the reference to "any person" in Subsection (c) was intended by the framers of the Constitution to mean any member of the public.

Subsection (h) of Article II, Section 17 provides in relevant part as follows:

“Any reapportionment plan filed by the commission, or ordered or prepared by the Supreme Court upon the failure of the commission to act, shall be published by the elections officer once in at least one newspaper of general circulation in each senatorial and representative district . . .”

The normal purpose of a publication clause is to ensure that the public has notice of some contemplated official action. In this case it appears clear that the framers of the Constitution intended that the public be aware of a reapportionment plan in order to have an opportunity to voice objection to it, or, in the language of the Constitution, “file exceptions” to it.

Although there may be some ambiguity in Subsection (h) arising from the use and placement of the phrase “any reapportionment plan,” it is my opinion that the framers of the Constitution meant to ensure that *any* reapportionment plan, be it preliminary, revised, final, or court ordered, should be published to the extent necessary to keep the public informed. The right of the public to know and be kept informed of governmental action, particularly action affecting the franchise, is especially important.

Accordingly, you are advised that the Constitution requires that you publish the preliminary reapportionment plan in accordance with the specifications of Article II, Section 17(h).

Sincerely,

J. SHANE CREAMER,  
*Attorney General.*

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## OFFICIAL OPINION No. 89

*Department of Justice—Deputy Attorneys General—Authorization to approve legality of administrative regulations—Commonwealth Documents Law.*

1. Only Deputy Attorneys General who are in the Department of Justice and appropriately authorized may give the approval as to legality of administrative regulations as required by Section 205 of the Commonwealth Documents Law, 45 P. S. § 1205.

Harrisburg, Pa.,  
December 8, 1971

Mr. John R. Gailey, Jr  
Director  
Legislative Reference Bureau  
Room 641, Main Capitol

Dear Mr. Gailey:

It has come to our attention that the approval required by Section 205 of the Commonwealth Documents Law of July 31, 1968, P. L. —, 240, 45 P. S. § 1205, is, in many cases being given by assistant attorneys general who are not in the Department of Justice. Section 205 clearly provides:

“All administrative regulations and changes therein shall be approved as to legality by the Department of Justice before they are deposited with the Legislative Reference Bureau pursuant to Section 207. . . .”

It is our opinion, and you are hereby advised, that only deputy attorneys general who are in the Department of Justice are authorized and delegated to give such approval on behalf of the Department of Justice. The practice of having assistant attorneys general who are not in the Department of Justice give such approval is not to be continued and you should not accept any such documents.

Following are the deputy attorneys general designated in addition to the Attorney General and his Executive Deputy, Walter L. Foulke:

W. William Anderson	Raymond C. Miller
Harriette W. Batipps	Thomas J. Oravetz
J. Justin Blewitt	Leonard Packel
Elmer T. Bolla	Curtis M. Pontz
Peter W. Brown	Barry A. Roth
Edgar R. Casper	Fred G. Steinrock
Salvatore J. Cucinotta	Edward Weintraub
Gerald Gornish	Marke P. Widoff
Lawrence T. Hoyle	Charles A. Woods

This list will be amended from time to time as may be necessary.

Insofar as your rules, 1 Pa. Code, Section 13.12 and 13.14, are inconsistent with this opinion, they should be amended.

In addition, there is uncertainty as to whether approval by the Department of Justice is required when notices of proposed rule-making



are filed or when they are finally promulgated. We suggest that as a practical matter, the approval should be required at the time the notice of proposed rule-making is filed to avoid the possibility of the Department of Justice ruling certain regulations illegal after they have been published and discussed. This will also give the Department of Justice an opportunity to study the rules thoroughly before publication and expedite our approval. We therefore suggest that your rules be amended to require approval by the Department of Justice at the time notice of proposed rule-making is filed under Section 201 of the Commonwealth Documents Law, 45 P. S. § 1201.

Very truly yours,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 90

*Valley Forge Park Commission—Regular meetings—Attendance of public and press—Governor's Executive Directive No. 14 of June 2, 1971.*

1. A review of the legislation creating the Valley Forge Park Commission discloses no provisions barring public access to the regular meetings of the Commission.
2. The Governor's Executive Directive No. 14 of June 2, 1971, pertaining to public information policies and practices, charges each agency of state government with the responsibility of developing and maintaining effective communications with the public in furtherance of the administration policy of providing, as far as humanly and legally possible, citizen access to the facts about state government.
3. Since the Valley Forge Park Commission is an agency of state government, the Commission, to be consistent with Executive Directive No. 14, must permit the public to attend its regular meetings.

Harrisburg, Pa.,  
December 8, 1971

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

Dear Dr. Stevens:

By your memorandum of September 7, 1971, you requested an opinion on the legality of the policy of Valley Forge Park Commission to limit attendance at its regular meetings to individuals specifically

invited, excluding members of the public and of the press. You are advised that regular meetings of the Commission are required to be open to the public and the press.

We have examined the legislation creating the Commission and governing its operations. We note that it was created by the Act of May 30, 1893, P. L. 183, 32 P. S. § 1041, and amendments thereto, originally to consist of 10 citizens in the State to be appointed by the Governor, later increased to 13 citizens by the Act of April 26, 1921, P. L. 323, No. 161, and lately amended to consist of the Chairman of the Pennsylvania Historical and Museum Commission *ex officio* and 13 other persons, by the Act of December 1970, P. L. —, No. 275, Section 9, 71 P. S. § 146 (Supp.). On the basis of our review of this legislation and other statutes we find no provisions barring access to the public to these meetings.

We are, therefore, compelled to examine executive policy on the subject of access of citizens of this Commonwealth to government processes and information. The Governor's Executive Directive No. 14 of June 2, 1971, pertaining to Public Information Policies and Practices, charges each agency of state government with the responsibility of developing and maintaining effective communications with the public in furtherance of the administration's policy of providing, as far as is humanly and legally possible, citizen access to the facts about state government.

In view of the fact that the Valley Forge Park Commission is an agency of state government, the Commission, to be consistent with the Executive Directive No. 14, must permit the public to attend its regular meetings.

Very truly yours.

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 91

*Data processing equipment—Insurance—Availability of coverage for equipment Owned or leased by Commonwealth—Office of Administration—Guidelines for physical security of computer installations.*

1. Section 2404(b) of the Administrative Code, 71 P. S. § 634(b) authorizes the Department of Property and Supplies to purchase fire and extended coverage from private insurance carriers for loss or drainage to state buildings and their contents, including data processing equipment, whether owned or leased.

2. State agencies are not restricted to the use of the Insurance Fund to insure owned equipment.
3. Insurance coverage in excess of \$100,000 may be purchased from private insurance carriers though the Department of Property and Supplies, a broker for loss or damage to state buildings and contents.
4. All state agencies, including all state colleges having jurisdiction and control of Commonwealth property, are authorized to use the Insurance Fund.
5. Commercial Insurance may be purchased to cover both owned and leased equipment subject to the deductible amount of \$100,000 which is covered by the Insurance Fund with respect to owned equipment.
6. Coverage up to \$100,000 may not be purchased for leased equipment, nor may payments be made from the Insurance Fund for loss or damage to leased equipment under \$100,000.

Harrisburg, Pa.,  
December 9, 1971

Honorable Ronald G. Lench  
Secretary of Administration  
Room 425, Main Capitol  
Harrisburg, Pennsylvania

Dear Secretary Lench:

You have requested an opinion concerning the availability of insurance protection for the Commonwealth with respect to owned or leased data processing equipment. In your letter of October 13, 1971, you have asked for instructions in connection with guidelines that the Office of Administration is developing for the physical security of computer installations, and you have asked five specific questions pertaining to the Insurance Fund and The Administrative Code.

As you have indicated in your letter, the Insurance Fund Act, Act of May 14, 1915, P. L. 524, as amended, 72 P. S. §§ 3731 et seq., created a fund for the "rebuilding, restoration, and replacement of any structures, buildings, equipment or other property, *owned* by the Commonwealth of Pennsylvania, and damaged or destroyed by fire or other casualty. . . ." (Emphasis supplied.) Although the initial appropriation to the fund was \$1,000,000, it has been reduced by budgetary action to \$300,000.

The Commonwealth is not limited to the Insurance Fund for such protection, however. Section 2404(b) of The Administrative Code, Act of April 9, 1929, P. L. 177, 71 P. S. § 634(b), authorizes the Department of Property and Supplies to procure "excess fire insurance on state buildings, and any other kind of insurance which it may be lawful for the Commonwealth, or any department, board, commission, or officer thereof, to carry and for which an appropriation has been made . . ." Pursuant to this section the Department of Property and Supplies may purchase from private insurance carriers fire and extended coverage for loss or damage to state buildings and contents, whether owned or leased.

The Commonwealth's present policies on the buildings and contents at the Capitol Building and Capitol Complex for fire and extended coverage amount to \$129 million dollars with 90% co-insurance applicable carried with participating companies including endorsements attached covering perils of windstorm, hail, explosion, riot, riot attending a strike, civil commotion, air craft, vehicles and smoke, as well as vandalism and malicious mischief and public and institutional property replacement cost, subject to the deductible amount of \$100,000 as indicated on accompanying Exhibit "A" attached hereto and made a part hereof.

The answers to the specific questions raised in your letter are as follows:

- (1) State agencies are not restricted to use of the Insurance Fund to insure owned equipment.
- (2) Insurance coverage in excess of \$100,000 may be purchased from private insurance carriers through the Department of Property and Supplies, as broker for loss or damage to state buildings and contents. Inquiry should be made of the Department of Property and Supplies, Bureau of Real Estate and Insurance, concerning coverage desired and arrangements made with the Bureau for such additional coverage as is regarded necessary.
- (3) All state agencies, including state colleges having jurisdiction and control of Commonwealth property are authorized to use the Fund.
- (4) Commercial insurance may be purchased to cover both owned and leased equipment subject to the deductible amount of \$100,000 which is covered by the Insurance Fund with respect to owned equipment.

Coverage up to \$100,000 may not be purchased for leased equipment, nor may payments be made from the Insurance Fund for loss or damage to leased equipment under \$100,000. Therefore, insurance coverage should be provided by the lessor of all leased equipment up to \$100,000.

- (5) The relevant statutory provisions pertaining to potential loss of owned or leased equipment are referred to above.

Very truly yours.

J. SHANE CREAMER,  
*Attorney General.*

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OFFICIAL OPINION No. 92

*Veterinarians—State Board of Veterinary Medical Examiners—Licensing of non-citizens.*

1. Citizenship requirement in Section 3(c) of the Veterinary Law, 63 P. S. § 506-3(c) is unconstitutional and the State Board of Veterinary Medical Examiners is instructed to issue a license to practice veterinary medicine to applicants who meet all other requirements except for citizenship.
2. Basis of this decision is the 14th Amendment to the United States Constitution, which applies not only to citizens of the United States but to aliens as well.
3. A state may classify on the basis of citizenship, but each classification must be reasonable and are inherently suspect and subject to close scrutiny.
4. If a state may not withhold from aliens its tax revenues for welfare, public works, and civil service expenditures, nor its resources from lawful exploitations, and it may certainly not deny to an alien the right to practice his lawful profession for which he is otherwise well qualified.
5. The citizenship requirement is an unjustifiable discrimination, for it protects no valid interest of the Commonwealth.

Harrisburg, Pa.,  
December 17, 1971

Charles J. Hollister, D.V.M.  
Secretary  
State Board of Veterinary Medical Examiners  
279 Boas Street  
Harrisburg, Pennsylvania

Dear Dr. Hollister:

You have requested our advice as to whether your Board may license to practice veterinary medicine an applicant who meets all the requirements of The Veterinary Law of April 27, 1945, P. L. 321, 63 P. S.

§ 506, except for the citizenship requirement in Section 3 of the Law, 63 P. S. § 506-3(c), which requires that a licensee be “a citizen of the United States.” Your Board has advised my Deputy that it knows of no reason inherent in the practice of Veterinary Medicine in this Commonwealth why a practitioner should need to be a citizen of the United States, and that the particular applicant meets all the other requirements of licensure.

It is our opinion and you are so advised that the citizenship requirement in Section 3(c) of the Law is unconstitutional and you are therefore instructed to issue a license to practice veterinary medicine to the particular applicant and to any other non-citizen applicants who meet all other requirements.

In view of the significance of this decision not only to The Veterinary Law, but to other statutes of the Commonwealth requiring citizenship, we are setting forth at some length the basis of our decision. At this time, we are ruling only on the citizenship requirement in The Veterinary Law and are doing so expeditiously so that the license may be issued forthwith. We expect to deal with other similar restrictions in subsequent opinions as the issues are brought to our attention.

In brief, the basis for our decision is the Fourteenth Amendment to the United States Constitution which provides: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal protection of the laws.*” (Emphasis added.)

It has long been held that the above-quoted Equal Protection Clause applies not only to citizens of the United States, but to aliens as well. *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1886). This does not mean that a state may not classify on the basis of citizenship, but that such classifications must be reasonable and when based on alienage, they “are inherently suspect and subject to close scrutiny.” *Graham v. Richardson*, 403 U. S. 365, 372 (1970).

Thus, in *Truax v. Raich*, 239 U. S. 33 (1915), the Supreme Court held unconstitutional an Arizona law which required employers of more than five workers to employ at least eighty per-cent qualified electors or native born citizens on the ground that it violated the rights of aliens to equal protection. The Court stated that the broad range of legislative discretionary power to classify “does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood.” 239 U. S. at 41. The Court continued that the right to work in the com-

mon occupations "is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." *Id.* The fact that the law allowed a twenty percent quota of aliens did not save it because the State had no right at all to enact any restraint in the area.

The next landmark case on this subject is *Takahashi v. Fish and Game Commission*, 334 U. S. 410 (1948). That case involved a California law which restricted commercial fishing licenses to persons who were citizens or eligible for citizenship. This meant that Japanese citizens, who were not eligible for United States citizenship, were prohibited from obtaining such licenses. California justified the law on the ground that fish were a natural resource of the state which it had the right to protect and that it had made a reasonable classification in denying the privilege of fishing to aliens. The Court struck down the law as unconstitutional holding (334 U. S. at 420):

"The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."

In *Purdy & Fitzpatrick v. State*, 79 Cal. Rptr. 77, 456 P. 2d 645 (1969), the Supreme Court of California struck down a law prohibiting the employment of aliens on public works as arbitrarily discriminatory under the Fourteenth Amendment. It specifically rejected an argument that the state has the right to protect its own citizens from competition from aliens, even where the disbursement of public funds is involved. The objective of favoring citizens of the United States is not a valid compelling state interest which permits such discrimination.

The most recent Supreme Court decision on the subject is *Graham v. Richardson*, 403 U. S. 365 (1970) which struck down statutes (including the Pennsylvania statute) denying welfare benefits to aliens. The Court construed *Takahashi* as casting doubt on the continuing validity of the special state interest doctrine in all contexts. It held that the justification of limiting costs to the state invalid and unreasonable. As to the issue of whether welfare is a privilege rather than a right, and thus not subject to the same protection, it dismissed the issue reaffirming earlier holdings that constitutional determinations no longer turn on this distinction. *Sherbert v. Verner*, 374 U. S. 398, 404 (1963).

Finally, we note the very recent case of *Dougall v. Sugarman*, 330 F. Supp. 265 (S. D. N. Y. 1971) holding invalid a New York law pro-

hibiting aliens from civil service positions. The justifications raised to support constitutionality—loyalty and efficiency—were rejected. The Court also rejected the argument that citizens were more likely to remain in the civil service as career employees, thus saving the cost of retraining, and held that even if this were so, it could not justify the discrimination in face of the Fourteenth Amendment.

Despite these cases, there still remain many statutes in all states imposing restrictions upon aliens. These have been justified by the proprietary interest and police power of the state, but they are clearly based on a prejudiced mistrust of aliens and a desire to protect citizens from competition. This can be seen from a review of one decision which did strike down such a restriction. In *State v. Ellis*, 184 P. 2d 860 (Ore. 1947), the Court held that a citizenship requirement to be a barber was unconstitutional, following an earlier Michigan case which had ruled similarly. *Templar v. State Board of Examiners*, 131 Mich. 254, 90 N. W. 1058 (1902). The significance of *Ellis*, however, is not so much what it did (in view of the *Takahashi* decision), but the distinction it attempted to make from older decisions holding citizenship requirements to be constitutional. It distinguished cases preventing aliens from engaging in occupations subject to possible abuses or attended by harmful tendencies, such as pool rooms or peddlers, *Ohio ex rel. Clarke v. Deckebach*, 274 U. S. 392 (1927); *Comm. v. Hana*, 81 N. E. 149 (Mass. 1907); or involving public safety, such as pharmacists or lightning rod salesmen, *Sashihara v. State Board of Pharmacy*, 46 P. 2d 804 (Cal. 1935); *State v. Stevens*, 99 Atl. 723 (N. H. 1916). Rather than noting the rejection of the rationales in those cases, the Court in *Ellis* continued to reflect a prejudice to aliens which is inimical to the Fourteenth Amendment by attempting to distinguish those cases.

The validity of any of the justifications and of the cited cases was, however, cast into doubt even before the Court's statement in *Graham v. Richardson*, 403 U. S. at 374-376, in an excellent Note, "Constitutionality of Restriction on Aliens' Right to Work," 57 Colum. L. Rev. 1012 (1957). The authors of the Note observed that exclusions from the professions continue even though some changes have been brought about in other areas such as barbers. They conclude that no justification in the professional area exists:

"The connection between citizenship and medical competency, for example, is not at all clear. Although the rationalization for such statutes is the inferiority of foreign education or the inability to accurately check an alien's qualifications, there has been no convincing show of reasonableness in such



legislation since standards adequate to protect the public could be set up for the admission of foreign physicians." *Id.* at 1026.

We note, parenthetically, that not even that justification exists in the current case where the applicant has been trained at the only, and, perforce, the best, school of veterinary medicine in the Commonwealth of Pennsylvania, has passed the examination, and complied with the other prerequisites for licensure.

Under the recent cases, the citizenship requirement in The Veterinary Law cannot stand. Though none of the cases deal with this specific question, in our opinion they mandate this decision *a fortiori*. If a state may not withhold from aliens its tax revenues for welfare (*Graham v. Richardson*), public works (*Purdy & Fitzpatrick*), and civil services expenditures (*Dougall v. Sugarman*), nor its resources from lawful exploitation (*Takahashi*), then it may certainly not deny to an alien the right to practice his lawful profession for which he is otherwise qualified.

The citizenship requirement discriminates unjustifiably. It protects no valid interest of this Commonwealth. It does nothing to further the public welfare. It is not related to any valid licensing requirement. It does not result in better veterinary standards. As an attempt to prevent competition it is clearly invalid. As an attempt to protect the public, which is the only real justification, it is still invalid. The safeguards of education and examination are sufficient to cover this valid policy. Citizenship adds nothing. The mere fact that the state may legitimately regulate licensure does not mean that it may do so on the basis of improper classification.

It should also be pointed out that lack of citizenship is no bar to service in the Armed Forces of the United States Government. The Selective Service Law provides that male aliens entering the United States must register for the draft (32 CFR § 1611 et seq.) and it is common for alien doctors to be drafted for medical service with the Armed Forces. Under such circumstances, it would be anomalous, to say the least, to require that doctors who treat horses must be citizens, but doctors who treat men need not.

Although the above is sufficient to lay the basis of our decision, we note that the cases have also relied on the supremacy of federal action involving aliens. In other words, Congress under the authority of the U. S. Constitution (Article I, Section 8), has relegated to itself the regulation of aliens through the enactment of comprehensive immigration laws. 8 U. S. C. § 1101 et seq. Federal law, therefore, determines who

will be allowed a visa to work in this country. Indeed, preference is given to "qualified immigrants who are members of the professions." 8 U. S. C. § 1153(a)(3). In addition, federal law determines employment desiderata. 8 U. S. C. § 1184. In light of the federal occupation of the area of law, state restrictions on ability to obtain certain types of employment and welfare have been stricken down on the additional ground that such restrictions improperly interfere with the federal power. "State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." *Takahashi v. Fish and Game Commission*, 334 U. S. 410, 419 (1947). See also *Graham v. Richardson*, 403 U. S. 365, 377-379 (1971); *Truax v. Raich*, 239 U. S. 33 (1915); *Purdy & Fitzpatrick v. State*, 456 P. 2d 645, 649-653, (1969); 42 U. S. C. §§ 1981-1983.

Sincerely yours,  
J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 93

*State Lottery Fund—Secretary of the Budget—Transfer of monies to General Fund.*

1. Proposal of the Secretary of the Budget to treat all lottery transactions on a fiscal year basis, depositing all ticket sales revenue and paying prizes and operating expenses from the state lottery fund during the 1971-1972 Fiscal Year, and making a final transfer of the entire balance of the state lottery fund as of the close of business on June 30, 1972, to the General Fund, comports with the requirements of the State Lottery Law, Act No. 91 of 1971.

Harrisburg, Pa.,  
December 29, 1971

Honorable Charles P. McIntosh  
Secretary of the Budget  
420 Main Capitol Building  
Harrisburg, Pennsylvania

Dear Secretary McIntosh:

We have reviewed your memorandum of November 26, 1971, seeking our advice on the propriety of your proposal regarding the transfer of moneys in the State Lottery Fund to the General Fund.

As you observe, the State Lottery Law (Act No. 91 of 1971) provides in Section 12 that all moneys in the State Lottery Fund shall be transferred to the General Fund through June 30, 1972. You propose to treat all transactions on a fiscal year basis, depositing all ticket sale revenues and paying prizes and operating expenses from the State Lottery Fund during the 1971-1972 fiscal year, and making a final transfer of the entire balance of the State Lottery Fund as of the close of business on June 30, 1972. In addition, there would be monthly transfers from the State Lottery Fund to the General Fund during the course of the year.

We have reviewed your proposal and it is our opinion, and you are hereby advised, that the proposal is proper and comports with the requirements of the State Lottery Law.

Sincerely yours,

J. SHANE CREAMER,  
*Attorney General.*

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#### OFFICIAL OPINION No. 94

*Police officers—Use of force.*

1. The application of force by police officers is not warranted except when necessary to effect a lawful arrest, to prevent escape, or to overcome the resistance of an individual subject to arrest or lawfully in custody.
2. In attempting to effect a lawful arrest, the use of force must be predicated upon resistance or attempted flight.
3. If met with physical resistance, an officer need not retreat but may employ that degree of force, short of deadly force, which is both necessary and reasonable under the circumstances to overcome the resistance and to effect the arrest.
4. If met with flight as distinguished from resistance, only that degree of force short of deadly force necessary to terminate the flight and to detain the fleeing individual is permitted.
5. Whether deadly force may lawfully be applied in any situation will depend in all instances upon the nature of the offense for which the arrest or the prevention of a crime is sought, the officer's knowledge thereof, the degree of resistance met, and the degree of physical threat to the officer.
6. An officer may never employ deadly force to prevent a misdemeanor or to effect the arrest of a misdemeanant except when necessary to protect himself from death or great bodily injury.

7. In limited circumstances a police officer may exert deadly force to effect the arrest or prevent the escape of a known felon. Three factors must co-exist: the felony must be one which normally causes death or great bodily injury or involves the breaking and entering of the dwelling place; the officer is not justified in the application of deadly force to arrest or detain for felony unless the felony was in fact committed, and the officer knows or reasonably believes that the suspect he is attempting to arrest or to detain committed the particular felony in question.
8. Where resistance to arrest takes the form of a violent attack upon the police officer which is likely to cause death or great bodily harm, the use of deadly force is privileged only if necessary to self-defense.

Harrisburg, Pa.,  
December 31, 1971

TO: All Law Enforcement Officials of the  
Commonwealth of Pennsylvania

Gentlemen:

The basis for public support and confidence in modern law enforcement is founded in large part upon scrupulous adherence by police officers to the right of citizens to be secure from unlawful interference with their constitutional freedoms. Of paramount importance in this regard is the citizen's right of protection from unnecessary force or summary punishment by police officers in the conduct of their lawful duties. In response to requests to the Attorney General for clarification of the limitations upon the lawful exercise of force by police officers in effecting arrests and in protecting themselves from attack, this opinion is being issued to all law enforcement and prosecutorial agencies in the Commonwealth. It is intended to serve as a guide in the instruction of police officers and to evaluate complaints of unwarranted violence, as well as to determine appropriateness of prosecution of offending police officers.

### I. *The Use of Force*

#### A. When Allowed

The application of force by police officers is not warranted except:

- 1) When necessary to effect a lawful arrest; *Commonwealth v. Duerr*, 158 Pa. Super. 484, 45 A. 2d 235 (1946); *Commonwealth v. Crowley*, 26 Pa. Super. 124, 135 (1904); *Commonwealth v. Rhoads*, 23 Pa. Super. 512, 517 (1903); or

- 2) To prevent the escape or to overcome the resistance of an individual subject to arrest or lawfully in custody; *Commonwealth v. Rhoads*, 23 Pa. Super. 512, 517 (1903).

## B. Limitations

The use of force by police officers in the above instances is subject to the following limitations:

- 1) In attempting to effect a lawful arrest, the use of force must be predicated upon resistance or attempted flight; *Commonwealth v. Rhoads*, Pa. Super. 512, 517 (1903).
- 2) If met with physical resistance, an officer need not retreat but may employ that degree of force, short of deadly force, which is both necessary and reasonable under the circumstances to overcome the resistance and to effect the arrest. "Necessary and reasonable" force is that degree of force which is essential to overcome the resistance actually encountered. All lesser degrees of force must be exhausted or unavailable. Once resistance ceases, no further force may be exerted by the officer. *Commonwealth v. Crowley*, 26 Pa. Super. 124, 135 (1904); *Commonwealth v. Rhoads*, 23 Pa. Super. 512, 517 (1903), *Baum Admr. v. Pa. R.R. Co.*, 108 P. L. J. 195 (1955).
- 3) If met with flight, as distinguished from resistance, only that degree of force, short of deadly force, necessary to terminate the flight and detain the fleeing individual is permitted, unless physical resistance is encountered when the flight ceases. *Commonwealth v. Loughhead*, 218 Pa. 429, 67 Atl. 751 (1907); *Commonwealth v. Rhoads*, 23 Pa. Super. 512 (1903).

## II. Employing Deadly Force

### A. Preliminary Considerations

Whether deadly force—that is, physical force readily capable of causing death or great bodily injury—may lawfully be applied will depend, in all instances, upon (a) the nature of the offense for which an arrest or the prevention of a crime is sought, (b) the officer's knowl-

edge thereof, (c) the degree of resistance met, and (d) the degree of physical threat to the officer.

### B. When Not Allowed

An officer may never employ deadly force to prevent a misdemeanor or to effect the arrest of a misdemeanant *except* when necessary to protect himself from death or great bodily injury. *Commonwealth v. Crowley*, 26 Pa. Super. 124, 126 (1904); *Commonwealth v. Rhoads*, 23 Pa. Super. 512, 517 (1903).

Accordingly, deadly force may never be applied

- a) to arrest the flight of a misdemeanant, or
- b) to overcome resistance to a lawful arrest for a misdemeanor, unless that resistance takes the form of a violent attack upon the arresting officer, i.e. that amount of resisting force likely to cause death or great bodily injury.

### C. When Deadly Force is Permitted

In limited circumstances, a police officer may exert deadly force to effect the arrest or prevent the escape of a known felon. To permit the application of deadly force, three factors must coexist:

- 1) The felony must be one which normally causes death or great bodily injury, or one which involves the breaking and entering of a dwelling place. Other felonies, such as larceny of an automobile, will not lawfully empower the officer to exert deadly force to effect an arrest or prevent an escape. *Commonwealth v. Duerr*, 158 Pa. Super. 484, 45 A. 2d 235 (1946).
- 2) Although an officer is permitted to arrest for a felony without a warrant on suspicion based on reasonable grounds, an officer is not justified in the application of deadly force to arrest or detain for felony *unless* (a) a felony was in fact committed and (b) the officer knows or reasonably believes that the suspect he is attempting to arrest or detain committed the particular felony in question. Absent such circumstances, an officer may exert only that degree of force which is permitted in the case of a misdemeanor. *Commonwealth v. Duerr*, 158 Pa. Super. 484, 490-92, 45 A. 2d 235, 238-39 (1946).

- 3) The application of deadly force will be justified only if it is necessary; i.e. lesser degrees of force must have been exhausted or not reasonably required by the circumstances. *Commonwealth v. Micuso*, 273 Pa. 474, 117 Atl. 211 (1922).

#### D. Self-Defense

Where resistance to arrest takes the form of a violent attack upon the police officer which is likely to cause death or great bodily harm, the use of deadly force is privileged only if necessary to self-defense. *Commonwealth v. Crowley*, 26 Pa. Super. 124, 126 (1904).

### III. Conclusion

Although it is impossible to set down precise rules which would govern a police officer's conduct in the myriad situations confronting law enforcement officers in this Commonwealth every day, these principles of Pennsylvania law relating to the use of force by police set forth clear general guidelines for every law enforcement officer to follow.

Sincerely yours,

J. SHANE CREAMER,  
*Attorney General.*

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