

1473 Secretary

Commonwealth of Pennsylvania

MILTON J. SHAPP

Governor

OPINIONS

OF THE

ATTORNEY GENERAL

OF

Pennsylvania

1972

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OPINION EDITOR

Thomas B. Schmidt, III

OFFICIAL OPINION No. 95

Legality of long-term leasing by the Commonwealth—Scranton-Lackawanna Health and Welfare Authority.

1. There is no legal impediment to the Commonwealth's executing a long-term lease as lessee.
2. The proposed contract to lease and the lease submitted to the Department of Property and Supplies by the Scranton-Lackawanna Health and Welfare Authority are valid.

Harrisburg, Pa.
January 4, 1972

Honorable Frank C. Hilton
Secretary
Department of Property and Supplies
Harrisburg, Pennsylvania

Dear Secretary Hilton:

It has been brought to our attention that there is some doubt on the part of certain officials in your department as to the legality of the Commonwealth's entering into a long-term lease as lessee. The question arose in connection with the financing and construction of a Human Services Building in Scranton by the Scranton-Lackawanna Health and Welfare Authority. The building is intended to provide a centralized area for Commonwealth branch offices, involving long-term leases of office space by the Commonwealth as lessee.

You are advised that there is no legal impediment to the Commonwealth's executing a long-term lease as lessee. The proposed contract to lease and the lease heretofore submitted to your department by the attorneys for the Scranton-Lackawanna Health and Welfare Authority are valid and binding and, if the Governor desires to proceed in this fashion, can be entered into by the Commonwealth.

Very truly yours,
J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 96

Pennsylvania Fair Fund—Authority to make expenditures for rural development activities of the Bureau of Rural Affairs and Marketing Services.

1. Payments may be made from the excess of the Pennsylvania Fair Fund for "agricultural research projects." 15 P. S. § 2616.
2. The terms "rural" and "agricultural" are completely interlocked and interwoven.
3. Therefore, funds available under the Pennsylvania Fair Fund for agricultural research projects may be used for the rural development activities of the Bureau of Rural Affairs and Marketing Services.

Harrisburg, Pa.
January 4, 1972

Honorable James A. McHale
Secretary
Department of Agriculture
Harrisburg, Pennsylvania

Dear Secretary McHale:

We have received a request for advice from your department concerning its authority to make expenditures from the Pennsylvania Fair Fund for the rural development activities of the Bureau of Rural Affairs and Marketing Services. We understand that the purpose of the bureau is to emphasize the total needs of the population living in rural Pennsylvania including such diverse areas as environmental resources, housing, rural development, public service employment, health care delivery and transportation system.

It is our opinion, and you are advised, that monies may be expended from the Pennsylvania Fair Fund for the purposes of the Bureau of Rural Affairs and Marketing Services.

The Pennsylvania Fair Fund was established by Section 16 of the Harness Racing Act, Act of December 22, 1959, P. L. 1978, as amended, (15 P. S. § 2616). That section provides that, after certain other payments are made from the fund, payments may be made from the excess "for agricultural research projects, as determined by the Secretary of Agriculture, from the recommendations submitted by a committee appointed by him..."

The question, therefore, is whether or not "rural development activities" as described above come within the meaning of "agricultural research projects."

Webster's Third New International Dictionary defines "agricultural" as follows:

"(1) of, relating to or used in agriculture; (2) characterized by or engaged in farming as the chief occupation; (3) founded or designed to promote the interest or study of agriculture; (4) of or having the characteristics of the farmer or his way of life."

These meanings of "agricultural" convey a broad concept encompassing individuals engaged in farming and their way of life. When we consider agriculture as a science or art involving the production of plants and animals which are useful to man and then branch out to include the preparation of these products for their disposal and man's use, we are approaching a comprehensive phase of activity found in country areas.

The term "rural" is defined by Webster's Third New International Dictionary as follows:

"(1) living in country areas; engaged in agricultural pursuits; (2) of, relating to or characteristic of people

who live in the country; (3) of, relating to, associated with, or typical of the country; (4) of, relating to, or constituting a tenement in land adopted and used for agricultural or pastoral purposes."

It would appear that the terms "rural" and "agricultural," although not synonymous, are completely interlocked and interwoven. Indeed all facets of the term "agricultural" might be deemed to be part of the term "rural." It is easily seen that the rural community is identified most readily by the closeness of the relationship of its people to the land as a source of livelihood.

Accordingly, where funds are available under the Pennsylvania Fair Fund for agricultural research projects, such funds may be used for the rural development activities of the Bureau of Rural Affairs and Marketing Services. In addition, you are further advised that the department's annual appropriations from the General Fund may be utilized for the purposes of the bureau since rural development is necessarily one of the broad concerns of the Department of Agriculture.

Very truly yours,

J. SHANE CREAMER,
Attorney General.

OFFICIAL OPINION No. 97

*Department of Community Affairs—Statutory and constitutional duty to examine restrictions or fees for future Project 500 projects.**

1. The Legislature has given the Department of Community Affairs the statutory authority to regulate concerning access and use of Project 500 facilities.
2. The Department of Community Affairs must follow the Governor's Directive No. 21, September 27, 1971, insofar as it applies to Project 500 facilities, by regulating concerning access and use of such facilities.
3. The Department of Community Affairs is under a constitutional duty not to provide Project 500 funds to municipalities which will proceed to administer the facility in an unconstitutional manner. To prevent such a result, the Department must, in the exercise of reasonable discretion, scrutinize Project 500 applications and promulgate appropriate regulations relating thereto.**

Harrisburg, Pa.
January 13, 1972

Honorable William H. Wilcox
Secretary
Department of Community Affairs
Harrisburg, Pennsylvania

* Editor's note: Certain issues discussed in this opinion are presently before the Commonwealth Court in the case of *Upper St. Clair Township v. Commonwealth of Pennsylvania*, 1090 C. D. 1973.

** Editor's note: See also 3 Pa. B. 1100 (June 9, 1973) for regulations promulgated in accordance with this opinion.

Dear Secretary Wilcox:

You have asked me to review an opinion of John P. Fernsler, former Deputy Attorney General, transmitted in a Memorandum, dated December 17, 1968. I have done so and conclude that it is in error and must be overruled.

That Memorandum dealt with the "authority of the Department of Community Affairs to prescribe to municipalities controls over who may be admitted to recreation facilities and what fees may be charged for use of such facilities," where such facilities have been developed with the financial aid of the Commonwealth pursuant to the "Land and Water Conservation and Reclamation Act," Act of Jan. 19, 1968, P. L. (1967) 996 et seq., 32 P. S. § 5101 et seq. (Project 500 Act.). The Project 500 Act, *inter alia*, provides assistance to local governments through the Department of Community Affairs in the form of grants-in-aid of up to 50% of the cost of land acquisition and development of county and municipal park and recreation lands.

The opinion of December 17, 1968, concluded that the prescription of such controls by Community Affairs was, *in all cases*, unlawful. We now conclude that in certain circumstances the imposition of such controls is lawful and, moreover, certain controls are absolutely required by the law and Constitutions of this Commonwealth and of the United States. While it would be impossible to anticipate in advance all the issues that might be posed concerning regulation of access to and use of the above facilities, the following principals are offered as a guide to the Department of Community Affairs.¹

I. THE LEGISLATURE HAS GIVEN THE DEPARTMENT OF COMMUNITY AFFAIRS THE STATUTORY AUTHORITY TO REGULATE CONCERNING ACCESS AND USE OF PROJECT 500 FACILITIES.

It is perfectly clear that the legislature did not intend the Department of Community Affairs to be simply a "pass-through" agency for the disbursement of Project 500 funds. In the first place, the Act establishing the Department of Community Affairs provided, *inter alia*, that the Department should "coordinate and wherever provided by law . . . supervise or administer the various programs of State and Federal assistance and grants, including but not limited to housing, redevelopment, urban renewal, urban planning assistance, Project 70, . . ." Act of Feb. 1, 1966, P. L. (1965) 1849, § 7(h), 71 P. S. § 670.101. In addition, subsection (1) of that same section provides that "[s]ubject to the limitations of this Act and of law, the Secretary of Community

1 If and when regulations are drafted by the Department of Community Affairs to govern "Project 500" grants, of course, they will be reviewed in the light of these principles by this Department in accordance with § 205 of the "Commonwealth Documents Law," Act of July, 31, 1968 P. L. _____, 45 P. S. § 1205.

Affairs shall, from time to time, establish rules and regulations to better carry this Act into effect.”

It is true that at the time this enabling Act was passed, the Project 500 amendment had not yet become law, but the legislature made no effort to remove Project 500 from the general statutory authority of the Secretary of Community Affairs. On the contrary, the relevant Project 500 programs were specifically given to the Department of Community Affairs to administer. In addition, Project 500 reflects the same policy considerations and goals as Project 70 — a program specifically mentioned in the enabling Act. It is obvious, therefore, that Project 500 comes within the Department’s power to “coordinate . . . supervise . . . administer . . .” and within the Department’s rule-making and regulatory power.

In the second place, Section 16 of the Project 500 Act requires that “development projects shall be submitted to the Department of Community Affairs by the political sub-division in an application which contains *information as may be required by the Department of Community Affairs.*” 32 P. S. § 5116 (4) (iv) (Emphasis added.) It is on the basis of such an application, of course, that a particular project will be approved or disapproved. While no one would suggest that the Department may arbitrarily require all kinds of irrelevant information, certainly the Department may *reasonably* require any information that will help it determine not only if the project fits within the four corners of the Project 500 Act, but also if the proposed project will be in conformity with other relevant state and federal law. Indeed, the Department would be failing in its statutory responsibility, if it did not so inquire.

Finally, and of equal importance, in Section III of this Memorandum it is concluded that, under certain circumstances, the Department of Community Affairs would be acting unconstitutionally, if it attempted to disburse funds as a “pass-through” agency. Since any legislation must be construed to be constitutional, if such construction does not do violence to the essential meaning and purpose of the act, and since the construction we give the Project 500 Act does no such violence, then we must conclude that the legislature did not intend to make the Department of Community Affairs a “pass-through” agency but did intend to give the Department reasonable discretion to inquire as to whether any proposed Project 500 project will violate state or federal law and to make whatever regulations might be reasonably necessary to assure that such projects do not do so.

Without in any way intending to limit the generality of the foregoing, the Department must be reasonably assured that any municipality applying for Project 500 funds will operate any proposed facility in conformity with:

(a) *The Human Relations Act* (Pennsylvania Human Relations Act, Act of Oct. 27, 1955, P. L. 744, as amended, 43 P. S. § 951 et seq.) which provides, *inter alia*, in 43 P. S. § 955 (i)

that it shall be an unlawful discriminatory practice:

"For any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement to

"(1) Refuse, withhold from, or deny to any person because of his race, color, religious creed, ancestry or national origin, *either directly or indirectly*, any of the accommodations, advantages facilities or privileges of such place of public accommodation, resort or amusement. (Emphasis added.)

It is quite clear that any proposed control over recreational facilities or proposed admission fees may "directly or indirectly" violate the Human Relations Act. For that reason, it would certainly be proper—in many cases even required—for the Department of Community Affairs to scrutinize closely admissions and fee policies of municipalities to Project 500 facilities.

(b) *The Civil Rights Act of 1964* (42 U. S. C. § 2000 (a) et seq., P. L. 88-352), which provides, *inter alia*, in 42 U. S. C. § 2000 (a):

"(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

"(b) Each of the following establishments which serve the public is a place of public accommodation within the meaning of this sub-chapter if its operations affect commerce, or if discrimination or segregation by it is supported by state action. . . ."

Recreational facilities are public accommodations within the meaning of the Act. See, e.g., *Daniel v. Paul*, 395 U. S. 298 (1969). Furthermore, most, if not all, recreational facilities contemplated under Project 500 will both "affect commerce" (See, e.g., *Daniel v. Paul*, *supra*, and *Scott v. Young*, 307 F. Supp. 1005 (D. C. Va. 1969); and most certainly will be supported by state action since the municipality will own, operate, and maintain the facility. Under these circumstances, it once again becomes incumbent upon the Department of Community Affairs to assure itself that state funds will not be provided for projects that violate federal law.

(c) *Constitutional Prohibitions* — Section III of this memorandum will deal with the question of whether the act of approving and funding a Project 500 application may be unconstitutional, if such a project is then operated in such a way as to violate the Equal Protection Clause of the United States Constitution. That section will deal with the cases on the subject and determine that, under certain circumstances, admission re-

strictions or admission fee requirements do violate the Equal Protection Clause. That being so, regardless of whether the act of funding such a project by the Department of Community Affairs might be found to be unconstitutional (we conclude that it very well may), the Department of Community Affairs is under a *statutory* duty not to disburse funds that will be used in an unconstitutional manner and to take whatever regulatory steps necessary in order to be reasonably certain that no project receiving funds will unconstitutionally restrict admission to facilities.

Since, as pointed out below, it was not the intention of the legislature to make the Department of Community Affairs a "pass-through" agency in disbursing Project 500 funds, but to be sure that such funds not be used in violation of state or federal law, it surely was the legislature's intention that such funds not be used in violation of the Constitution.

II. THE DEPARTMENT OF COMMUNITY AFFAIRS MUST FOLLOW THE GOVERNOR'S DIRECTIVE NO. 21, SEPTEMBER 27, 1971, INsofar AS IT APPLIES TO PROJECT 500 FACILITIES, BY REGULATING CONCERNING ACCESS AND USE OF SUCH FACILITIES.

On September 27, 1971, the Governor directed the Heads of all Administrative Departments, *inter alia*, to:

"... insure that recipients of State grants do not discriminate ...

"3. Undertake a review of program services, licensing policies, and contract compliance to determine what new organizational arrangements, policies and operational plans are needed to combat intentional or unintentional discriminatory practices. We must ask the question, 'Are any of our present regulations or procedures causing us to fail to serve all segments of one public properly?' "

We have already determined that there is nothing in the Project 500 Act that would prevent the Department of Community Affairs from taking whatever steps are reasonably necessary to assure that state funds are not distributed to projects violating the Governor's directive. There is, therefore, a duty to take such action forthwith in order to impliment the above directives of the Chief Executive Officer of the Commonwealth.

III. THE DEPARTMENT OF COMMUNITY AFFAIRS IS UNDER A CONSTITUTIONAL DUTY NOT TO PROVIDE PROJECT 500 FUNDS TO MUNICIPALITIES WHICH WILL PROCEED TO ADMINISTER THE FACILITY IN AN UNCONSTITUTIONAL MANNER. TO PREVENT SUCH A RESULT, THE DEPARTMENT MUST, IN THE EXERCISE OF REASONABLE DISCRETION, SCRUTIN-

IZE PROJECT 500 APPLICATIONS AND PROMULGATE APPROPRIATE REGULATIONS RELATING THERETO.

Mr. Fernsler's memorandum of December 17, 1968, also must be overruled insofar as it implies not only that the Department of Community Affairs is powerless to regulate regarding municipal controls on admission and fees for Project 500 facilities but also that such municipal controls or fees are likely to be constitutional because "if any state of facts can reasonably be conceived that would sustain [them], there is a presumption of the existence of that state of facts, and the burden of showing arbitrary and unreasonable action rests upon the one who assails the classification."

While it is not necessary, once again, to anticipate every possible factual situation and determine the likely constitutional result, it is necessary to point out at this time that the above passage is a very superficial and misleading statement of the test to be applied when a classification imposed by a municipality is challenged as being violative of the Equal Protection Clause of the Fourteenth Amendment. In that regard the Department of Community Affairs should consider the following:

(a) *Classifications based on Race*: The test suggested in the December 17, 1968, Memorandum is incorrect where a classification—either *directly or indirectly*—has the effect or substantially excluding people because of their race, lineage, or alienage from Project 500 facilities. A racial classification has been termed "suspect" by the Supreme Court of the United States. (See, e.g., *McLaughlin v. Florida*, 397 U. S. 184, 191-2 (1964)) When a classification is "suspect," a "very heavy burden of justification" may be demanded of a state which draws such a distinction. *Loving v. Virginia*, 388 U. S. 1, 9 (1967). As pointed out in an exhaustive law review article on the subject:

"In subjecting these classifications to the most rigid scrutiny, [*Korematsu v. U. S.*, 323 U. S. 214 (1944)] the courts have required that the classifications bear more than a merely rational connection with a legitimate public purpose. Indeed, over the past seventy years, a number of Justices have advanced the view that the Fourteenth amendment prohibits the states from distinguishing between members of different races in *any* state action, regardless of the circumstances or purpose." (Emphasis supplied.) "Developments in the law—Equal Protection" 82 *Harvard Law Review* 1065, 1088 (1969).

In addition, it must be emphasized that classifications, not openly racial, may be subjected to the same close scrutiny if their substantial result is racial exclusion or discrimination. *Hawkins v. Town of Shaw, Mississippi*, 437 F. 2d 1286 (1971), and cases cited therein.

(b) *Classifications based upon wealth*: The test of the December 17, 1968, Memorandum also is misleading insofar as it relates to classifications based on the payment of a fee, i. e., classifications based on wealth. While Supreme Court decisions dealing with the payment of such fees up to now have dealt with what have been described as "fundamental interests" such as voting and rights with respect to criminal procedure, (See e.g., *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1966); *Griffin v. Illinois*, 351 U. S. 12 (1956)), nevertheless, the Supreme Court has now explicitly stated that classification based on wealth is "highly suspect and thereby demand[s] a more exacting judicial scrutiny."

(c) *Constitutional Interest*: Finally, the test suggested by the December 17, 1968, Memorandum is not accurate insofar as any classification imposed by a municipality would penalize the exercise of a constitutional right, e. g., freedom of speech. Such a classification will be struck down as unconstitutional "unless shown to be necessary to promote a *compelling* governmental interest..." *Shapiro v. Thompson*, 394 U. S. 618, 643 (1969).

There can be no other conclusion, therefore, than that municipal admission restrictions or fees may very well raise constitutional questions of the highest gravity. That conclusion not only necessitates appropriate scrutiny by the Department of Community Affairs under its statutory authority outlined in the previous section, but also requires the Department to consider whether the funding of a project that will be unconstitutionally administered by a Pennsylvania municipality is itself an unconstitutional state act.

There have been cases where the courts have found that such funding, especially where the amount is very substantial—as it is here (50%)—is enough, regardless of the *private* character of the recipient, to constitute state action. *Kerr v. Enoch Pratt Free Library*, 149 F. 2d 212 (4th Cir. 1945), *cert. den.*, 326 U. S. 721 (1945); *Griffin v. State Board of Education*, 377 U. S. 218 (1964); *Irvis v. Scott*, 313 F. Supp. 1246 (M.D. Pa. 1970). Here, the recipient is not even a private one, but a municipality created by the State and for purposes of the Fourteenth Amendment, the State itself. Moreover, when one considers the close connection between the Department of Community Affairs and the municipalities in the form of administering and supervising Project 500 grants (as the Department of Community Affairs is bound to do under the enabling legislation), the conclusion is inescapable that the Department of Community Affairs is acting unconstitutionally in funding a project that will, in operation, violate the Constitution. Of special significance on this point is the case of *Ethridge v. Rhodes*, 268 F. Supp 83 (S.D. Ohio, 1967), where the Governor of a state was enjoined from disbursing funds and entering into contracts for state construction projects when the private contractors and labor unions were known to have been discriminating in their hiring practices. See also *Burton v.*

Wilmington Parking Authority, 365 U. S. 715 (1961); *Cooper v. Aaron*, 358 U. S. 1 (1958); *McQueen v. Drucker*, 438 F. 2d 781 (1st Cir. 1971); *Derrington v. Plummer* 240 F. 2d 922 (5th Cir. 1958).

CONCLUSION

The conclusion is inescapable, therefore, that the Department of Community Affairs has both a statutory and constitutional duty to closely examine any proposed admission restrictions or fees for future Project 500 Projects, and to use its reasonable discretion in promulgating regulations relating thereto.

Sincerely yours,

J. SHANE CREAMER,
Attorney General.

OFFICIAL OPINION No. 98

Secretary of Agriculture—Authority to dismiss the director of the State Farm Products Show Commission.

1. Under Section 214 of the Administrative Code of 1929 (71 P. S. § 74) the Secretary of Agriculture possesses the authority to dismiss the Director of the State Farm Products Show Commission.

Harrisburg, Pa.
January 17, 1972

Honorable James A. McHale
Secretary
Department of Agriculture
Harrisburg, Pennsylvania

Dear Secretary McHale:

You have requested an opinion concerning your authority as Secretary of Agriculture to dismiss the Director of the State Farm Products Show Commission. You are advised that you do have such authority.

The Commission was created as a departmental administrative commission in the Department of Agriculture by Section 202 of the Administrative Code of 1929 (71 P. S. § 62). Its composition and duties are set forth in Sections 430 and 1709 of the Code (71 P. S. § 140 and § 449.)

Section 214 of the Administrative Code (71 P. S. § 74) provides, in part, as follows:

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

and of any advisory boards or commissions established in their respective departments."

The power to appoint inherently carries with it the power to remove or suspend, subject to the Civil Service Act where applicable. The Civil Service Act does not affect the appointment or dismissal of the Director of the Commission.

There is certain language in Section 503 of the Administrative Code (71 P.S. § 183) relating to the independence with which departmental commissions shall exercise their powers and duties, but that language does not conflict with the above quoted statutory language expressly relating to the appointment of employees.

Accordingly, it is our opinion, and you are advised, that as Secretary of Agriculture you possess authority to dismiss the Director of the State Farm Products Show Commission.

Very truly yours,

J. SHANE CREAMER,
Attorney General.

OFFICIAL OPINION No. 99

Securities Commission — Insurance Department — Registration of securities issued by insurance companies with the Securities Commission — Regulation by Insurance Department.

1. The issuance of securities by insurance companies does come within the purview of the Securities Act (70 P.S. § 31 et seq.).

Harrisburg, Pa.
January 31, 1972

Honorable Herbert J. Denenberg
Commissioner
Insurance Department

and

Honorable James P. Breslin
Chairman
Pennsylvania Securities Commission

Gentlemen:

You have both requested our opinion as to whether securities issued by insurance companies need be registered with and approved by the Pennsylvania Securities Commission. The Insurance Department takes the position that since it regulates, in certain respects, the issuance of stock by insurance companies, the Securities Commission has no right to regulate such issues. The Securities Commission takes the position that since the Se-

curities Act does not exempt such securities, they are subject to its regulation. The pertinent statutory provisions follow (all emphases are supplied):

The Insurance Company Law of May 17, 1921, P. L. 682, 40 P. S. § 361, et seq., contains the following provisions:

1. Section 215(a), 40 P. S. § 405(a):

"As soon as the entire amount of the authorized capital of a stock insurance company, incorporated under this act, has been paid in, *certificates shall be issued therefor to the persons entitled to receive the same, which certificates shall be transferable upon the books of the company*; and the president or secretary of the company *may be issued* at such price not less than the entire capital and paid in surplus of the company has been paid in, and that it is ready to commence business."

2. Sections 323 through 325, 40 P. S. § § 446-448 give a stock insurance company the power to increase its capital stock under certain circumstances and provide the procedure. Section 326, 40 P. S. § 449 then provides:

"Any increase of capital made by any stock insurance company *may be issued* at such such price not less than par as the stockholders may direct, or as the board of directors may direct under authority conferred by the stockholders. Unless otherwise provided in the charter or articles of agreement, each stockholder shall have the right to first subscribe for the new shares in proportion to his interest in the company; provided, that in any case no stockholder shall have such right to first subscribe for new shares if the stockholders holding the larger amount in value of the stock of the company direct, subject to such equitable regulations as the directors may prescribe, that such new shares shall be issued in exchange for one or more bona fide outstanding shares of another insurance company in which the issuing company is authorized to invest, or partly in such exchange and partly in cash, *and such exchange shall be approved by the Insurance Commissioner as hereinafter provided.*

"The *Insurance Commissioner* shall examine the terms and conditions of such exchange and after holding a hearing at which all persons or parties to whom it is proposed to issue shares in such exchange shall have the right to appear, shall either approve or disapprove the fairness of such terms and conditions.

"Except when such an exchange is to be effected, notice

to the stockholders to exercise their rights to subscribe for and to take the stock at the price so fixed or waive such right, shall be mailed to each stockholder, at the last address of such stockholder appearing on the books or records of the company, thirty days previous to the date fixed by the board of directors for the expiration of the right to subscribe, and shall also be given by publication, once a week for three (3) weeks in a newspaper of general circulation published in the city or county in which the company has its principal office.

"Any stock not subscribed for and taken by the stockholders may be sold and disposed of by the board of directors, in such manner as the stockholders may direct, but no such stock shall be sold or disposed of at a price less than that originally fixed by the stockholders.

"Anything in this section to the contrary notwithstanding, any stock insurance company may issue to its officers or employes or to the officers or employes of any subsidiary corporation or to a trustee on their behalf, such number of its authorized but unissued shares as shall be prescribed by the stockholders having the majority interest. Such shares shall be issued at such times and upon such terms and conditions and in such manner as shall be determined by the board of directors.

"Any such stock authorized to be issued to officers or employes and not taken by those entitled thereto may be sold and disposed of in such manner as the board of directors may determine."

The Insurance Department points to Section 215, which empowers the representatives of the Insurance Commissioner to examine the company and require that it be possessed of funds as claimed before it may begin to write insurance, and to the requirements of Sections 323-326, which allow sale of stock after certain approvals by the Insurance Department; it also correctly observes that nothing in the Insurance Company Act requires additional approval by the Securities Commission. The Insurance Department further states that it makes a careful examination of the financial position of an insurance company before it will allow it to operate.

3. The Insurance Department might also point to the Act of July 11, 1917, P. L. 804, P.S. § § 390-399, which regulates the sale of stock of an insurance company and provides in Section 8, 40 P. S. § 397:

"No person shall issue, deliver, circulate, or publish in this State any advertisement in any newspaper or periodical published in this State, or any circular or prospectus, for the sale of stock of any insurance corpora-

tion, whether organized or proposed to be organized within or without this State, for the purpose of soliciting or securing applications or subscriptions to, or contract for the purchasing of stock in, any such corporation unless—

“(a) *A copy of such circular, prospectus, or other advertisement shall first have been filed in the office of the Commissioner of Insurance:*

“(b) *The same shall contain the name and address of the person issuing, delivering, circulating, or publishing the same, with a consecutive serial number for each separate form of such circular, prospectus or other advertisement.*”

The Pennsylvania Securities Act, 70 P. S. § 31 et seq., on the other hand, provides that no “dealer” who is not registered under the Act may sell any “security.”

The Act defines “dealer” as “any person other than a salesman who engages in this State, either for all or part of his time, directly, or through an agent who is not registered hereunder as a dealer, in selling securities issued by another person,” or in “selling securities issued by such person.” 70 P. S. § 32(f). “Person” includes “a company,” 70 P. S. § 32 (c), and “company” means “a corporation, joint stock company, partnership, association company, syndicate, trust, or unincorporated association.” 70 P. S. § 32 (e).

“Security” is defined as “any bond, stock, collateral trust certificate, transferable share, investment contract, certificate under a voting-trust agreement, treasury stock, note debenture, certificate in or under a profit sharing or participation agreement, subscription or preorganization certificate, fractional undivided interest in oil, gas, or other mineral rights, evidence of indebtedness, certificate of deposit for a security, certificate or instrument representing or secured by an interest in the capital assets or property of a company, other instrument commonly known as a security, or certificate of interest or participation in, temporary or interim certificate for receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.” 70 P. S. § 32(a).

The Act contains no exclusion or exemption for insurance companies or organizations, although it does contain other exemptions from the definition of “dealer,” including “sales to insurance companies authorized by the Insurance Commissioner to carry on an insurance business within this State, banks or to persons registered hereunder,” 70 P. S. § 32(f) (5); “the issuance and sale of its own stock by a building and loan association organized under the laws of this State,” 70 P. S. § 32(f) (15); and the “issuance and sale of its own securities by a corporation not organized and not engaged in business for profit,” 70 P. S. § 32(f) (16).

Upon our review of the foregoing, it is our opinion, and you are so advised, that the issuance of securities by insurance companies and any other companies regulated by the Insurance Department does come within the purview of the Securities Act and that all such companies must register with the Securities Commission. All individuals and companies who participate in the distribution of such securities must meet the "dealer" and "salesman" registration requirements of the Pennsylvania Securities Act. The Securities Act is all pervasive and we hold that the definition of "person" is broad enough to include insurance companies. There is no exemption of insurance companies, even though the Legislature enacted seventeen other specific exemptions which include the stock of a building and loan association and stock sold to insurance companies as authorized by the Insurance Commissioner. Accordingly, it is clear that the Legislature knew how to exempt a specific type of company when it wished to do so and that it considered the specific problem of insurance companies. Moreover, the Securities Act has been amended at least twice since 1959 without a specific exemption of insurance companies.

It is true that the Insurance Company Act does contain several provisions indicating when an insurance company may sell its stock; but this in no way limits the right and duty of the Securities Commission to also regulate the sale of such stock. The Insurance Company Act is concerned with the requirements which an insurance company must meet in order to issue insurance policies which will protect policyholders; the Securities Commission is concerned with making sure that investors in the company are not misled by improper representations. Just because the Insurance Commissioner does his duty, and does it well, will not protect an investor from being subjected to misrepresentations in the sale of securities, misrepresentations which the Securities Act is designed to prevent. Even the Act of July 11, 1917, 40 P. S. § § 390-399, which predated the general regulation of securities by a general securities or "Blue Skies" law, requires only that a prospectus be filed with the Insurance Department. The Department is not required to review prospectuses in order to require full and fair disclosure or to consider these securities offerings as an investment. The Insurance Department argues that none of the Statutory provisions which govern its power over securities mentions concurrent regulation by the Securities Commission. But that is not the legislative scheme. Regulation by the Securities Commission is found only in the Securities Act and includes *all* securities except those specifically exempted. The Legislature did not need to make specific provisions in the Insurance Company Law; it had done so clearly in the Securities Act.

We are confirmed in our analysis by Official Opinion No. 236 of the Attorney General, dated March 2, 1961, where the question was whether a company engaged in the business of issuing

variable annuities, life insurance, and disability insurance in combination is an insurance corporation with the meaning of the Act of July 11, 1917; and whether the provisions of the Act apply to a corporation making a second offering of stock or a new issue several years after it had commenced doing business. The opinion answered "yes" to both questions. After analyzing the Act of 1917 as being passed to protect Pennsylvania investors from overreaching by the promoters of insurance companies prior to the enactment of a Blue Skies Law, the Opinion held, Official Opinions of the Attorney General, 1961-62 (pages 17-18):

"We are therefore of the opinion and you are accordingly advised that a company which sells variable annuity insurance contracts is an insurance corporation within the meaning of the Act of July 11, 1917, and must comply with the provisions of that act and such other acts of the Commonwealth of Pennsylvania (The Pennsylvania Securities Act of July 10, 1941, P. L. 317, as amended) as are pertinent thereto, before it may offer its stock (whether it be original issue or subsequent issue) or variable annuities for sale in Pennsylvania. We do not intend that this opinion be construed to give authority to any company to offer for sale securities, whether they be its stock or variable annuity contracts, in the Commonwealth of Pennsylvania without prerequisite compliance with the Provisions of The Pennsylvania Securities Act, as amended, supra." (Emphasis supplied.)

We note that legislation covering variable annuities was passed after that opinion (Act of August 24, 1963, P. L. 1194, 40 P. S. § 506.2), which was amended by the Act of January 19, 1968, P. L. 1020 to provide that annuities issued thereunder "... shall not be subject to ... The Pennsylvania Securities Act, or to regulation by the Pennsylvania Securities Commission," 40 P.S. § 506.2(j). This legislation in no way detracts from Opinion No. 236, which was applicable to all securities issued by insurance companies. Moreover, it is but another indication of the Legislature's method of stating clearly when it intends to exempt a type of security from regulation by the Securities Commission, an intention it has failed to manifest in connection with other securities issued by insurance companies even when confronting the issue in connection with variable annuities.

To implement this decision effectively, we urge that the Insurance Department and Securities Commission jointly publicize our opinion and make it known to insurance companies, certain of which are apparently under the impression that they are not subject to regulation by the Securities Commission. Additionally, continuing the cooperation which has been evident in the past between the Insurance Department and Securities Commission, and in accordance with Sections 501 and 502 of the

Administrative Code of 1929, 71 P. S. § § 181-182, the Insurance Department shall notify the Securities Commission whenever the prospective issuance of a security by an insurance company comes to its attention; and forward to the Commission any prospectus, offering circular, brochure, or other solicitation materials to be used by such insurance company in connection with the sale or offer for sale of securities in Pennsylvania, all of which must comply with the requirements of the Securities Commission. The Insurance Department, in accordance herewith, shall not give its final approval to the issuance of any securities by an insurance company until it is notified by the Securities Commission that the proposed issue has met all the requirements of the Securities Act.

In conclusion, we stress that our opinion is in no way intended to intimate that the Insurance Department is not capable of carrying out its duties or that it is not doing so. We believe that the Legislature has recognized two separate duties and created two separate agencies to carry them out. We are convinced that each does and will continue to perform these duties in an excellent manner to further the public interest.

Very truly yours,

J. SHANE CREAMER,
Attorney General.

OFFICIAL OPINION No. 100

Good Samaritan Act of 1963 (12 P. S. § 1641) — Commonwealth's liability insurance — Liability of physician who is called to the scene of an emergency.

1. Under the Good Samaritan Act of 1963, a physician who renders emergency care when he has been called to the scene of an emergency by the police or other duly constituted officers of the state or political subdivision is exempt from civil liability.
2. A physician so called cannot be considered an employee of the state and therefore is not covered under the Commonwealth's liability insurance.

Harrisburg, Pa.
February 2, 1972

Honorable Jacob Kassab
Secretary
Department of Transportation
Harrisburg, Pennsylvania

Dear Secretary Kassab:

Under date of December 20, 1971, you asked this Office to render an opinion as to whether the Good Samaritan Act of

1963, P. L. 582, as amended, 12 P. S. §1641, and/or the Commonwealth's liability insurance, protects a physician in a suit for liability when they have been called to the scene of an emergency, rather than "happening" onto the scene of an accident. You have also asked whether such physicians are protected by the Commonwealth's public liability insurance coverage.

The Good Samaritan Act, *supra*, provides for an exemption from civil liability when a physician in good faith renders emergency care at the scene of the emergency in any of the following four situations:

1. When he happens by chance upon the scene of an emergency.
2. When he arrives on the scene of an emergency by reason of serving on an emergency call panel or similar committee of a county medical society.
3. When he is called to the scene of an emergency by the police or other duly constituted officers of the state or other political subdivision.
4. When he is present when an emergency occurs.

You are advised that it is our opinion that a physician is exempt from civil liability under the Good Samaritan Act, when called under items 2 or 3, *supra*, to render emergency care at the scene of the emergency. It is also our opinion that a physician is exempt from civil liability under items 1 and 4, *supra*.

In view of the fact that our opinion on the immunity from liability of physicians under the Good Samaritan Act can, in no way, bind the Courts to rule that physicians are immune from suit in an actual suit, it becomes necessary to examine whether in fact the physicians you refer to are covered by the Commonwealth's insurance policy.

Section 709 (i) of The Administrative Code of 1929, P. L. 177, as amended, 71 P. S. § 249, provides:

"(i) From time to time to determine within what limits the Department of Property and Supplies shall procure liability insurance covering claims for damages against the Commonwealth, and State officers and employes, arising out of the operation of State automobiles or the performance of any other assigned duties and responsibilities by such officers and employes;"

The Executive Board has authority under section 709 (i) to determine within what limits the insurance policy should cover claims.

One policy of insurance covers state employees, except those specifically excluded therefrom. Endorsement #1 to the policy provides that coverage applies to each employee only while acting within the scope of his duties as an employee.

It is our opinion that persons who perform services for the Commonwealth as volunteers without formal engagement by a representative of the Commonwealth acting in an authorized capacity, are not the subject of liability coverage by the Commonwealth under present law.

Persons who are engaged by a representative of the Commonwealth acting in an authorized capacity at a consideration, and subject to Commonwealth direction and control, may be the subject of liability coverage by the Commonwealth's insurance carrier to the extent determined by the Executive Board.

However, Section 214 of The Administrative Code of 1929, P. L. 177, 71 P. S. § 74, provides in essence that the head of a department shall appoint and fix the compensation of employees. Furthermore, Section 709 (i), *supra*, refers only to officers and employees.

Manifestly, the word "employee" in the connection used, means "one who works for wages or salary in the service of an employer." Webster's New International Dictionary. The relation of employer and employee is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts, "express or implied."

A physician cannot be considered to be a special or temporary State employee.

You are advised that there is no coverage in the Commonwealth insurance policy to cover liability on the part of the physician.

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

OFFICIAL OPINION No. 101

*Unemployment compensation—Community college employes—how qualified—
43 P. S. § 911.*

1. Under the Unemployment Compensation Law, 43 P. S. § 911, political subdivisions have the option of covering their employes under unemployment compensation.
2. A community college is a public college operated by local sponsors which are political subdivisions.
3. If the local sponsors of a community college so elect, the college employes may receive unemployment compensation coverage.

Harrisburg, Pa.
February 3, 1972

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

Dear Secretary Smith:

You have inquired as to how employes of community colleges may receive unemployment compensation coverage under the new amendment to the Unemployment Compensation Law, Act No. 108, approved September 27, 1971, the new 43 P. S. § 911. You are advised that employes of community colleges may receive unemployment compensation if the local sponsor of such colleges so elect.

Article XII of that Act allows "any political subdivision... for itself and any instrumentality thereof" the option of electing coverage for "service performed by employes in all of the hospitals and institutions of higher education... operated by such political subdivisions or instrumentalities."

Under the Community College Act of 1963, Act of August 24, 1963, P. L. 1132 (24 P.S. § 5201 et seq.), 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) (Emphasis added).

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 in the establishment and operation of a community college." 24 P. S. § 5202(2)

"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."

Since the extra financial burden of unemployment compensation coverage will largely fall on the local sponsors, and since the local sponsors clearly fit within the above definition of "political subdivision," it is my conclusion that the legislature intended to allow the *local sponsors* the option of covering the employes in its community colleges with unemployment compensation.

This opinion does not, in any way, conflict with any opinion of September 28, 1971, addressed to the Honorable Frank C. Hilton, which, as you have noted, concludes that a community college is a political subdivision for the limited purpose of purchasing supplies and equipment and within the meaning of Act No. 31, approved July 9, 1971, the new 71 P. S. § 633(h). You will recall that this Act permits political subdivisions to purchase materials, supplies and equipment off contracts of the Department of Property and Supplies. There are two factors which make that opinion inapplicable to § 1201(a):

(1) The difference in language which specifically says that the political subdivision will elect coverage for service performed by employes of all of the . . . institutions of higher education . . . operated by such political subdivisions.

(2) That, as a practical matter, coverage of community college employes involves substantial cost to the local sponsors and it is extremely unlikely that the legislature intended that the community colleges be allowed to unilaterally impose such a cost without any bargaining or negotiations.

Sincerely yours,

J. SHANE CREAMER,
Attorney General.

OFFICIAL OPINION No. 102

Project 70—Uses of Project lands—Public utility right of way—Unauthorized use.

1. Primary purpose of Project 70 is to provide and preserve areas acquired under its provisions for preservation, conservation and historical purposes.
2. The Supervisors of Hazle Township are not authorized to grant an 85 foot wide electric power line right-of-way over land purchased with Project 70 funds.

Harrisburg, Pa.
February 7, 1972

Honorable James J. Ustynoski
House of Representatives
Harrisburg, Pennsylvania

Dear Representative Ustynoski:

Your letter, dated January 24, 1972, regarding the authority of the Supervisors of Hazle Township, Luzerne County, to grant a right-of-way over land of the township, acquired under the Project 70 Land Acquisition Assistance Program, has been assigned to me for attention.

You state the proposed right-of-way will have a width of 85 feet and will contain 8.27 acres of land, to be used by the Pennsylvania Power and Light Company.

Section 20(b) of the Project 70 Act does authorize exploitation of the natural resources of certain public utility uses, provided that such uses are under "reasonable regulations . . . consistent with the primary use of such lands for 'recreation, conservation and historical purposes.'"

Court adjudications, and opinions of this department interpreting the Project 70 Act, have held that its primary purpose is to provide and preserve areas acquired under its provisions

for recreation, conservation and historical purposes.

The liberalizing of uses of these land areas for purposes other than those authorized by the Act would naturally tend to thwart, defeat, and destroy the results expressly desired by the General Assembly.

Please be advised that it is the opinion of this department that the Supervisors are unauthorized under present law to grant an 85 foot wide electric power line right-of-way over land of the township purchased with Project 70 funds.

Very truly yours,

RAYMOND C. MILLER

Deputy Attorney General

J. SHANE CREAMER

Attorney General

OFFICIAL OPINION No. 103

Pennsylvania Game Commission—Licensing powers.

1. The Pennsylvania Game Commission has the authority to make rules and regulations concerning the issuance of licenses for the hunting of antlerless deer.

Harrisburg, Pa.
February 9, 1972

Honorable Glenn L. Bowers
Executive Director
Pennsylvania Game Commission

Dear Mr. Bowers:

Your inquiry as to the authority of the Game Commission to make Rules and Regulations concerning the issuance of licenses for the hunting of antlerless deer is in hand.

The Department of Revenue, prior to the December 10, 1970, amendment to the Game Law, had authority to promulgate said Rules and Regulations concerning deer licenses in view of the acquiescence of the Game Commission to both the Department of Revenue and the county treasurers, said Department's agents.

Since the December 10, 1970, amendment, set forth in 34 P. S. § 1311.501, the said licenses are issued with the Game Commission as principal and the county treasurers as said Commission's agents.

The applicable part of § 1311.501, as amended, reads as follows:

“Resident, nonresident, and alien hunters’ licenses and tags for antlerless deer shall be issued only by the

county treasurers in counties where such deer may be hunted and killed, who, for that purpose, are hereby made agents of the commission."

We find in 72 P. S. § 604 an applicable portion of the Act of 1929 wherein the Board of Game Commissioners (now Pennsylvania Game Commission) shall continue to issue special deer licenses, but the Department of Revenue shall assign to the Board an agent, or designate an employe of the Board as agent of the department for the purpose of receiving license fees payable to the Board.

34 P. S. § 1311.305 concerns the supervision in the issuance of licenses. The Act as passed in 1937 provides for the issuance of hunting licenses under the direction of the Department of Revenue which will designate the several county treasurers as issuing agents. Said Act of 1937 was amended December 10, 1970, and it provides that the Commission shall have "direct supervision" of the several county treasurers.

The first paragraph of the amended section is set forth in full, your attention being called to the provision that the Commission:

"may recall the appointment of any county treasurer or other agent at any time, with or without cause . . ."

In view of 34 P.S. § 1311.305, as now amended, there is absolutely no doubt in the Commission having all the rights of a principal who may make rules or discharge its agent (county treasurer) as it sees fit.

Very truly yours,

G. F. STEINROCK
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 104

Public Utility Commission—Overbrook Steam Heat Company hearings—conflict of interest of one Commissioner.

1. A Commissioner who is a customer of a utility which is seeking to discontinue its service through a Public Utility Commission hearing should not participate in the hearing, since the matter will affect a limited number of people and since the granting of the discontinuance would give rise to a substantial expense on the part of the Commissioner involved.

Harrisburg, Pa.
February 18, 1972

Honorable James McGirr Kelly
Commissioner
Pennsylvania Public Utility Commission
Harrisburg, Pennsylvania

Dear Commissioner Kelly:

I have reviewed your letter of February 8, 1972, requesting my opinion whether your participation in hearings, wherein the Overbrook Steam Heat Company of Philadelphia seeks to discontinue service, would constitute a conflict of interest in view of the fact that you are one of its customers. You have advised that if the petition is allowed, each customer will be required to secure another form of heat at an approximate conversion cost of \$2,500.00.

The Act of March 31, 1937, P. L. 160 § 3, 56 P. S. § 454, which applies to the Public Utilities Commission, provides:

"No Commissioner shall participate in any hearing or proceeding in which he has any direct or indirect pecuniary interest . . . If any person employed or appointed in the service of the Commission shall violate any provision of this Section, the Commission shall forthwith remove him from the office or employment held by him."

Consonant with this provision, it is our opinion that you should not participate in the hearing regarding the Overbrook Steam Heat Company because of your pecuniary interest in the result. Even without this provision, you should not participate in a hearing where your pecuniary interest is involved. I, of course, realize that the members of the Public Utility Commission are often affected by the results of hearings in which they participate, as for example, in a rate case. In such cases, where all members regularly participate, the interest of each member is that of the larger public, and the individual pecuniary effect is minimal. But in this case, where the matter affects only a limited number of people and where the result of granting the petition would give rise to a substantial expense on your part, the situation differs substantially from the usual rate case.

Very truly yours,

GERALD GORNISH
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 105

Election of delegates to national party conventions—Casting of lots—discretion of Secretary of the Commonwealth.*

1. Pursuant to Section 915 of the Election Code (25 P. S. § 2875) the casting of lots for positions on the ballot may be conducted in such manner as may be prescribed by the Secretary of the Commonwealth.

* Editor's note: Opinion reversed in *Roth, et al. v. Tucker, Secretary of Commonwealth, et. al.*, 4 Pa. Commonwealth 565 (1972), affirmed in 447 Pa. 343 (1972).

2. It is a reasonable exercise of the Secretary's discretion to prescribe that candidates for delegate to National Conventions who are committed to a particular Presidential candidate shall be considered together as a "slate" for casting of lots.

Harrisburg, Pa.
February 22, 1972

Honorable Ronald J. Pettine
Deputy Secretary for Commissions,
Elections and Legislation
Department of State
Harrisburg, Pennsylvania

Dear Mr. Pettine:

You have requested our opinion as to whether the Secretary of the Commonwealth has the authority to prescribe that candidates for delegate and alternate delegate to the National Convention of a political party who are committed to a particular Presidential candidate shall be considered together as a "slate" when it comes to the casting of lots for positions on the primary ballots or ballot labels. You have furnished us with a proposed regulation which provides that such candidate committed to a Presidential candidate shall draw one lot for the position of the slate on the primary ballot, followed by a second drawing to determine the order of the candidates on the slate.

For example, two delegates and one alternate delegate to the Democratic National Convention who are committed to Senator Muskie will draw one lot to determine whether their names will appear together on the ballot ahead of the delegate and alternate delegate committed to Senator McGovern and those committed to other Presidential candidates. Similarly uncommitted delegates will draw one lot together to determine where they will appear among the slates of committed delegates. Thereafter a second drawing will occur among each slate to determine which of the candidates will appear first on the slate, with the candidate for alternate delegate automatically appearing last.

It is our opinion, and you are advised, that the procedure which you have proposed is properly within the authority of the Secretary of the Commonwealth.

Section 915 of the Act of June 3, 1937, P. L. 1333, known as the Election Code (25 P. S. § 2875) provides, in part, as follows:

"Immediately after the last day fixed for filing of such nomination petitions with them, the Secretary of the Commonwealth or the county board, as the case may be, shall fix a day for the casting of lots, *in such manner as may be prescribed by the Secretary of the Commonwealth*, or county board, as the case may be, for the position of names upon the primary ballots or ballot labels..." (Emphasis supplied.)

The Act of December 22, 1971, (Act No. 165) which provides for the selection of delegates and alternate delegates to National Conventions, allowing for commitment to Presidential candidates, etc., does not provide a procedure for the positioning of names of candidates on ballots or ballot labels. Therefore, the casting of lots for such positions may be conducted in such manner as may be prescribed by the Secretary of the Commonwealth. The procedure outlined above is a reasonable exercise of discretion by the Secretary of the Commonwealth in prescribing the manner for the casting of lots pursuant to the above quoted Section 915 of the Election Code.

Very truly yours,
W. W. ANDERSON
Deputy Attorney General
J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 106

Labor and Industry—Authority of agent, not a member of the Bar, to prosecute wage claim before District Justices.

1. Present law does not prohibit the representation of the Department of Labor and Industry before District Justices by duly authorized laymen prosecuting claims for employees under the Wage Payment and Collection Law (43 P. S. § 260.11).

Harrisburg, Pa.
February 23, 1972

Honorable A. Evans Kephart
State Court Administrator
Supreme Court of Pennsylvania
Philadelphia, Pennsylvania

Dear Mr. Kephart:

You have inquired as to whether a duly authorized representative of the Department of Labor and Industry, who is not a member of the Bar, may prosecute a claim for wages before a District Justice under the Wage Payment and Collection Law, Act of July 14, 1961, P. L. 637, § 11, as amended (43 P. S. § 280.11).

You are advised that a review of the relevant statutory and case law of the subject discloses that such representation is not improper. Furthermore, considerations of public policy lead us to believe that such representation is quite desirable, and that the Supreme Court of the Commonwealth should promulgate a rule affirming such a practice.

Section II of the above Act provides:

"(a) Action by an employee to recover wages and liquidated damages may be maintained in any court of competent jurisdiction (or any magistrate, alderman or justice of the peace) . . ."

"(b) If the Secretary of Labor and Industry determines that wages due have not been payed and that such unpaid wages constitute an enforceable claim, the Secretary shall, upon request of the employee, take an assignment in trust for the assigning employee of such claim for wages without being bound by any of the technical rules respecting the validity of any such assignments and may bring any legal action necessary to collect such claim, subject to any right by the employer to set-off or counter-claim against the assigning employee. Upon any such assignment, the Secretary of Labor and Industry shall have the power to settle and adjust any such claim to the same extent as might the assigning employee."

The Act of March 21, 1806, P. L. 558, § 9 (17 P. S. § 1601) provides:

"In all civil suits or proceedings in any court within this Commonwealth, every suitor and party concerned shall have a right to be heard by himself and counsel or either of them."

It has been held that the words "by himself" in the above Act refer to natural persons and not to corporations. *Industrial Valley Bank and Trust Company v. Miller Realty Development Company, Inc.*, 44 D & C 2d 207 (C. P. Clinton County 1968). See also, e.g., 9 Fletcher, *Cyclopedia Corporations* § 4463 and *Simbrau, Inc. v. United States*, 367 F. 2d 373 (3d Cir., 1966) construing a similar federal statute. Thus, the above cases conclude that corporations may only be represented by members of the Bar.

It might be argued, therefore, that, since administrative agencies of the Commonwealth of Pennsylvania are not natural persons, the same rationale should apply and such agencies consequently may not be heard "by himself." Such an argument may very well apply to any court of record within the Commonwealth but it does not apply to District Justices, because District Justices are not "courts" within the meaning of 17 P. S. § 1601.

Article 5, section 1 of the Constitution of this Commonwealth provides:

"The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Courts, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, *such other courts as may be provided by law and jus-*

tices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system." (Emphasis added.)

This distinction between "courts" and justices of the peace (and District Justices) is uniformly followed throughout the statutory scheme. Title 17, P. S., entitled "Courts" deals with the courts enumerated above in Art. 5, § 1. Justices of the Peace are provided for in Title 42. See also, e. g., the Wage Payment and Collection Law, 43 P. S. § 260.11. quoted above, distinguishing between "courts of competent jurisdiction" and "magistrate, alderman, or justice of the peace."

It is, therefore, quite clear that present law does not prohibit the representation of the Department of Labor and Industry before District Justices by duly authorized laymen prosecuting claims for employees under the Wage Payment and Collection Law. Thus, it certainly would be within the discretion of the Supreme Court to promulgate rules providing for such representation under Article 5, section 10 of the Constitution.

The Department of Justice, furthermore, would urge the adoption of such a rule on the grounds that the prosecution of small wage claims before District Justices is well within the competence of the local professional employees of the Department of Labor and Industry who have already done the investigating work, who deal with many of these cases on a regular basis, and who are not ordinarily called upon to present a very complicated factual or legal claim. Furthermore, to require the Department of Labor and Industry to hire attorneys to prosecute these claims before District Justices will impose a substantial financial burden on the taxpayers of this Commonwealth in a situation where substantial expenditures of this kind do not appear to be warranted.

Sincerely yours,

MARK P. WIDOFF
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 107

Bureau of State Lotteries—Banks which collect funds are not state depositories—Need not collateralize funds.

1. Banking institutions which serve as safekeeping facilities for the Bureau of State Lotteries, Department of Revenue, are not "depositories" and therefore need not collateralize the funds they receive.

Harrisburg, Pa.
February 28, 1972

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

Dear Mrs. Sloan:

You have requested our opinion as to whether banking institutions which will be serving as safekeeping facilities for the Bureau of State Lotteries in the Department of Revenue are state depositories and therefore required to collateralize the amounts they receive under Sections 1, 5 and 7 of the Act of February 17, 1906, P. L. 45, 72 P. S. § § 3771, 3791, and 3793, and Section 505 of the Fiscal Code, as amended, 72 P. S. § 505,

In your letter of January 27, 1972, you have outlined the procedures to be followed under which all lottery licensees will deposit their receipts with such safekeeping facilities each Tuesday afternoon which, in turn, will call the amounts received into a central computer, and which total amounts, by the following afternoon, will be deposited in a state depository bank by a computer check drawn on the account of the safekeeping facility. The purpose of the safekeeping facilities, therefore, is merely to collect and hold the funds twenty-four hours until they can be accounted for and properly deposited in the designated state depository bank.

Confirming our oral advice of February 16, 1972, it is our opinion, and you are hereby advised, that we agree with your view that the safekeeping facilities are not "depositories" and therefore need not collateralize the funds they receive and hold for transmission to a state depository, but that the selected depositories which receive the funds from the safekeeping facilities must collateralize all funds they receive for deposit so long as those funds remain on deposit.

The basic reason for our opinion is that the safekeeping facilities are not serving as depositories. Although no definition of "depository" is contained in the Fiscal Code, it is clear from the procedures set forth in Section 505, 72 P. S. § 505, which speaks in terms of "depositories for the State moneys," and the selection procedure in the Act of February 17, 1906, P. L. 45, 72 P. S. § 3771, et seq., that a procedure of regular long-term deposits is contemplated rather than the brief safekeeping function contemplated under the lottery collection procedures.

In addition, we note that Section 301 of the Fiscal Code, 72 P. S. § 301, provides that your Department is to deposit "all moneys of the Commonwealth *received by it* . . . in State depositories approved by the Board of Finance and Revenue." (Emphasis added.) Under the procedure contemplated, you will not actually *receive* the lottery moneys when they are held by the

safekeeping facilities; you will not receive them until they are, in fact, deposited with a State depository.

Finally, Section 15 of Act 91 of 1971, (State Lottery Law) provides that: "The secretary may make such arrangements for any person, including a *bank*, to perform such functions, activities, or services in connection with the operation of the lottery as he may deem advisable pursuant to this act and the rules and regulations of the department, and such functions, activities, or services shall constitute lawful functions, activities and services of such person." (Emphasis added.) It is our opinion that this provision authorizes arrangements with banks to serve functions in connection with the administration of the State Lottery other than normal depository functions which are covered by the Fiscal Code and Act of February 17, 1906, *supra*. In other words, the use of a bank as something less than a depository, such as the safekeeping facility you have outlined, is specifically authorized by the State Lottery Law, is declared to be lawful, and is not subject to the collateralization requirements of a state depository.

Because of their interest in this matter, we are sending copies of this opinion to the Secretary of Revenue, the Secretary of Banking, and to the Executive Director of the Bureau of State Lotteries.

Sincerely yours,
GERALD GORNISH
Deputy Attorney General
J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 108

*Department of Agriculture—Bureau of Rural Affairs and Marketing Services
—Reaffirming Opinion No. 69 of January 4, 1972.*

1. Under Section 16 of the Harness Racing Act (15 P. S. § 2616), Pennsylvania Fair Fund monies may be expended on "agricultural research projects," which include demonstration projects and feasibility studies in the areas of rural health programs and unemployment projects.

Harrisburg, Pa.
February 29, 1972

Honorable James A. McHale
Secretary
Department of Agriculture
Harrisburg, Pennsylvania

Dear Secretary McHale:

This is with reference to our opinion dated January 4, 1972,

addressed to you, wherein we advised you that monies may be expended from the Pennsylvania Fair Fund for the purpose of of the Bureau of Rural Affairs and Marketing Services.

In that opinion we interpreted Section 16 of the Harness Racing Act, of December 22, 1959, P. L. 1978, as amended, (15 P. S. § 2616), which provides that certain payments may be made from the Pennsylvania Fair Fund *"for agricultural research projects, as determined by the Secretary of Agriculture, from the recommendations submitted by a committee appointed by him..."*, and we concluded that the "rural development activities proposed for the Bureau come within the meaning of "agricultural research projects" as the phrase is used in the act. We conclude that the terms "rural" and "agricultural", although not synonymous, are completely interlocked and interwoven, such that all facets of the term "agricultural" might be deemed to be part of the term "rural".

Recently a question has been raised concerning the use of monies of the Pennsylvania Fair Fund for rural health programs and unemployment projects. Specifically the question is whether these items come within the meaning of "agricultural research projects" as the Legislature intended when it enacted the above quoted Section 16 of the Harness Racing Act. As we advised you on January 4, 1972, and we now reaffirm, the proposed purposes of the Bureau, including public services employment and health care delivery, are proper subjects of "agricultural research projects" in accordance with the Harness Racing Act.

In the past "agricultural research" has been limited to matters involving plants and crop improvement and cultivation. However, the Harness Racing Act confers upon the Secretary of Agriculture broad discretion to determine the agricultural research projects which are to be funded from the Pennsylvania Fair Fund from among the recommendations of a committee appointed by him, which committee must include the dean of the College of Agriculture at the Pennsylvania State University and the dean of the School of Veterinary Medicine of the University of Pennsylvania. 15 P. S. § 2616(e). On March 24, 1971, the committee, known as the Agricultural Research Committee, appointed by the Secretary of Agriculture, authorized the Secretary by resolution to fund agricultural research projects related to rural development and marketing expansion and further provided "that the Secretary of Agriculture arrange for the funding of such projects according to his discretion with the funds available from Fair Funds and/or other sources."

The meaning of the phrase "agricultural research projects" has thus been broadened by the Secretary and the Committee beyond the narrow scope of plants and crops to include projects directly relating to rural people to whom agriculture is a way of life. This broadening is consistent with the wide ranging definition of the term "research" as found in Webster's Third New

International Dictionary, as follows:

“... studious inquiry or examination; esp: critical and exhaustive investigation or experimentation having for its aim the discovery of new facts and their correct interpretation, the revision of accepted conclusions, theories or laws in the light of newly discovered facts, or the practical applications of such new or revised conclusions, theories or laws;”

The proposed program for the Bureau of Rural Affairs and Marketing Services consists of demonstration projects and feasibility studies which are limited in time and scope and are aimed solely at establishing the practicality of conducting particular services. The exploratory nature of the program brings it entirely within the definition of “research” quoted above. The program, which emphasizes the needs of the people living in rural Pennsylvania, including such diverse areas as environmental resources, housing, rural development, public service employment, health care delivery and transportation systems, does constitute “agricultural research” within the meaning of the Harness Racing Act.

Sincerely yours,

W. W. ANDERSON
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 109

Department of Revenue—Recorder of Deeds—Commission on realty transfer tax stamps.

1. A commission of one percent or \$250.00, whichever is greater, is to be allowed to each county from the sale of realty transfer tax stamps.
2. It is the duty of the Department of Revenue to allow deductions of the commission from the amount the Recorder of Deeds remits.

Harrisburg, Pa.
March 3, 1972

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

Dear Secretary Kane:

We have carefully reviewed your request for a formal opinion, dated January 18, 1972, and the questions which are raised in

the various attachments to your letter. These questions relate to the effect of Act No. 113 of 1971 on the salaries of *county* officials in view of the proscription of Article III, Section § 27 of the Pennsylvania Constitution; and how that Act affects *county* officials who received fees which they may now no longer retain under Section 12(b) of the Act. Additionally, a question is raised under Act No. 253 of 1970, 72 P. S. § 3287, as to whether any Recorders of Deeds are entitled to retain the commission allowed for the sale of stamps under the Pennsylvania Realty Transfer Tax Act or whether the Department of Revenue may require the commissions to be turned over to the counties.

The latter question is the only question which seems to relate to the conduct of your Department's affairs or the performance of your official duties, and is therefore the question which we will address ourselves to in this opinion.

Act No. 253 of 1970, 72 P. S. § 3287, provides that a commission is to be allowed to each county for sale of stamps equal to one percent, or \$250.00, whichever is greater. Recorders of Deeds elected or appointed after the November, 1969, elections are required to pay the commission to the general fund of the county. Your duty, therefore, is merely to allow the Recorder of Deeds to deduct the commission from the amount he remits to your Department. It is his duty to remit the commission to the county and you have no duty to determine to whom it belongs. Any disputes regarding the ultimate disposition of the commissions will be for the counties and Recorders of Deeds to resolve.

If there are other questions concerning these statutes which involve your Department's activities, or conduct of its affairs, or the performance of your official duties, we will be happy to answer them.

Sincerely yours,
GERALD GORNISH
Deputy Attorney General
J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 110

Moving expenses—Commonwealth employe—71 P. S. § 76

1. A Department of Public Welfare employe who is on leave while serving as Secretary of the Board of Pardons is entitled to moving expenses.

Harrisburg, Pa.
March 7, 1972

Honorable Helene Wohlgemuth
Secretary
Department of Public Welfare
Harrisburg, Pennsylvania

Dear Secretary Wohlgemuth:

Your request concerning the possibility of reimbursing Gerald A. Gillingham, Secretary of the Board of Pardons, for moving expenses incurred in transporting his household furniture from Waynesburg to Harrisburg was received by us through Secretary McIntosh on February 18, 1972. It is our understanding that Secretary Gillingham is presently on leave without pay status from his former civil position as a Youth Development Counselor III with the Department of Public Welfare. It is our view that Secretary Gillingham can be reimbursed for his moving costs.

Reimbursements by the state for the moving expenses of its employees is authorized by Section 216 of the Administrative Code, Act of April 9, 1929, P. L. 177, Art. II, 71 P. S. § 76, which provides in relevant part:

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

We understand that the Department of Public Welfare would be the agency that would reimburse Secretary Gillingham. He is technically still a member of that Department, on leaving while serving with the Board of Pardons, and has served continuously with the Department more than two and one half years. The only other issue is whether he was "required" to change his residence "... by the head of the department."

We believe these restrictions on reimbursement are entitled to a liberal construction so long as an individual remains within the Commonwealth's employ. Section 501 of the Administrative Code, *supra*, 71 P. S. § 181, requires that "... [t]he several administrative departments ... shall devise a practical and working basis for cooperation and coordination of work ... and shall, so far as practical ... cooperate with each other in the use of employes, land, buildings, quarters, facilities, and equipment. The head of any administrative department ... may empower or require an employee of another such department ... subject to the consent of the head of such department ... to perform any duty which he might require of the employes of his own department...."

In the present situation, Secretary Gillingham was empowered by the Lieutenant Governor and the Attorney General to assume his position on the Board of Pardons, and also was empowered by the Secretary of Welfare to take a leave of absence to fulfill those duties. Whether Secretary Gillingham was required

to change his address by his new department head or the Secretary of Welfare is no legal significance in light of Section 501.

Accordingly, it is our opinion, and you are hereby so advised, that Secretary Gillingham is entitled to reimbursement for his moving costs if, and when, his request is approved in writing by the Governor, as required by Section 216 of the Administrative Code.

Sincerely yours,

ALEXANDER KERR
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 111

Busing of non-public school students—Non-public School Bus Transportation Act—Comprehensive Area Vocational-Technical High Schools.

1. Comprehensive Area Vocational-Technical High Schools are not "special" schools for purposes of Non-public School Bus Transportation Act, the Act of June 15, 1965, P. L. 133, as amended, 24 P. S. § 13-1361.*
2. Bus routes used for transportation of pupils attending comprehensive Area Vocational-Technical High School are "established" within the meaning of 24 P. S. § 13-1361.
3. Non-public school students are eligible to ride buses provided for pupils attending comprehensive Area Vocational-Technical High Schools under 24 P. S. § 13-1361.

Harrisburg, Pa.
March 16, 1972

Honorable John C. Pittenger
Secretary
Department of Education
Harrisburg, Pennsylvania

Dear Secretary Pittenger:

You have requested our opinion as to whether a bus route established for the transportation of students attending a comprehensive Area Vocational-Technical School is an "established public school bus route" within the meaning of Section 1331 of the Public School Code, Act of June 15, 1965, P. L. 133, § 1, as amended (24 P. S. § 13-1361), thus making non-public school children eligible to ride the buses along that route.

You are advised that a bus route established for the transportation of students attending a comprehensive Area Vocational-Technical School is an "established public school bus route" within the meaning of the Act.

*Editor's note: The act of June 15, 1965, P. L. 133 was amended by the act of December 29, 1972, P. L.—(No. 372).

Section 1361 of the School Code provides:

“§ 13-1361. When provided

The board of school directors in any school district may, out of the district, provide for the free transportation of any resident pupil to and from the public schools and to and from any points in the Commonwealth in order to provide tours for any purpose connected with the educational pursuits of the pupils. *When provision is made by a board of school directors for the transportation of resident pupils to and from the public schools, the board of school directors shall also make provisions for the free transportation of pupils who regularly attend non-public elementary and high schools not operated for profit. Such transportation provided for pupils attending non-public elementary and high schools not operated for profit shall be over established public school bus routes.* Such pupils shall be transported to and from the point or points on such routes nearest or most convenient to the school which such pupils attend. The board of school directors shall provide such transportation whenever so required by any of the provisions of this act or any other act of Assembly.

“The board of school directors in any school district may, if the board deems it to the best interest of the school district, for the purposes of transporting pupils as required or authorized by any of the provisions of this act or any other act of the Assembly, appropriate funds for urban common carrier mass transportation authorities to assist the authorities to meet costs of operation, maintenance, capital improvements, and debt service. Said contributions shall not be subject to reimbursement by the Commonwealth of Pennsylvania.

“The State Board of Education shall adopt regulations, including qualifications of school bus drivers, to govern the transportation of school pupils.” (Emphasis added.)

On June 24, 1965, former Attorney General, Walter E. Allesandroni, issued an opinion establishing certain guidelines for the interpretation of § 1361 of the School Code. Two sections of that opinion are particularly relevant for the purpose of answering your question:

“9. Public school bus transportation provided for special situations such as the transportation provided to eliminate racial imbalance, to transport the handicapped and other “special” pupils, is only available for public school pupils being transported on such buses and not to any other pupils. In other words, the Act requires transportation of non-public school pupils only in those cases where transportation is provided for all

public school pupils and not for a special group or for a particular purpose.”

“25. Are Area Vocational-Technical School routes considered established bus routes?”

“Yes, but only for regular or shared time Area Vocational-Technical School pupils.”

Reading Guideline #9 and Question #25 together, it is obvious that the former Attorney General considered Area Vocational-Technical school pupils to be “special” pupils—i.e., “a special group for a particular purpose.” It is our understanding that most Area Vocational-Technical schools remain “special,” because pupils are transported there for only part of the school day at irregular hours. Students attending such schools only receive specialized vocational-technical instruction and then return to their regular schools for the remainder of their academic program. The bus routes for such schools are not, therefore, “established” within the meaning of the School Code.

In some communities, however, *comprehensive* Area Vocational Technical schools have been established where students spend the entire day and receive all their academic instruction. Students attending these schools who ride the “Vo-Tec” buses every day within the normal schedule for all public pupils and go home on the buses every day from the vocational-technical school once again within the normal schedule for all students. Bus routes are normal and regular following fixed routes and schedules each day. It is our opinion, and you are so advised that these bus routes are *not* “special” and are “established” within the meaning of § 1361 of the School Code.

It may be suggested that an “area vocational-technical board” is not a “board of school directors” of a “school district” within the meaning of § 1361, and that, therefore, § 13-1331 on its face is not applicable to Area Vocational-Technical Schools. But it is necessary to point out that “all expenses in connection with the establishment of area vocational-technical schools . . . shall be borne by the *school district* participating therein in the proportions agreed on by the respective districts.” (Emphasis added.) Act of Aug. 14, 1963, P. L. § 7 (24 P. S. § 18-1845).

Section 1361 provides that “[w]hen provision is made by a board of school directors for the transportation of resident pupils to and from the public schools, the board of school directors shall also make provision for the free transportation of pupils who regularly attend non-public elementary and high schools not operated for profit. . . .” It is quite clear, therefore, that the individual school district members of the Area Vocational-Technical School are covered by § 1361 and must provide funds on a proportional basis for non-public school pupils eligible to ride the Area Vocational-Technical buses on the same proportional basis used for covering the expenses of public school students

from its district riding the Area Vocational-Technical buses.

Sincerely yours,

MARK P. WIDOFF

Deputy Attorney General

J. SHANE CREAMER

Attorney General

OFFICIAL OPINION No. 112

Real Estate Brokers—Salesman—Citizenship

1. Sections 6(b) and 7(c) of the Real Estate Brokers License Act, 63 P.S. § § 436(b), 437(c), are unconstitutional in imposing a citizenship requirement for licensure which violates the Equal Protection Clause of the United States Constitution.
2. Opinion to State Board of Veterinary Medical Examiners of December 17, 1971, followed.

Harrisburg, Pa.

March 15, 1972

Mr. Samuel B. Saxton, Chairman
State Real Estate Commission
Harrisburg, Pennsylvania

Dear Mr. Saxton:

You have requested our opinion as to whether an individual who otherwise meets the requirements of Section 7 (c) of the Real Estate Brokers License Act, 63 P.S. § 437 (c), may be refused the right to take the Real Estate Salesman's Examination merely because he is not a citizen of the United States. That Section specifically states:

"No person may be licensed by the department as a real estate salesman, unless such person is a citizen of the United States."

Additionally, Section 6 (b) of the Act, 63 P. S. § 436 (b) states that no person may be licensed as a real estate broker unless such person "... (2) is a citizen of the United States..."

It is our opinion, and you are so advised, that both of the above Sections are unconstitutional and unenforceable on the basis of our opinion to the State Board of Veterinary Medical Examiners of December 17, 1971, a copy of which you have received.

Accordingly, with respect to the specific applicant and all future applicants, citizenship, which plays no part in the ability of

a person to serve properly as a licensee, may no longer be a requirement.

Sincerely,

GERALD GORNISH
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 113

Physicians—Medical Practice Act—Citizenship

1. Section 5 of the Medical Practice Act, 63 P. S. § 405, is unconstitutional insofar as it imposes a citizenship requirement for licensure and insofar as it revokes licensure to an individual who has filed a declaration of intent, but fails to become a citizen within seven years thereafter. These requirements violate the Equal Protection Clause of the United States Constitution.
2. Opinion to State Board of Veterinary Medical Examiner of December 17, 1971, followed.

Harrisburg, Pa.
March 23, 1972

Honorable Vincent J. Fumo
Acting-Commissioner
Bureau of Professional & Occupational Affairs
Harrisburg, Pennsylvania

Dear Mr. Fumo:

You have requested our opinion as to whether an individual who otherwise meets the requirements of the Medical Practice Act of June 3, 1911, P. L. 639, as amended, 63 P. S. § 401 et seq., for licensure, may be denied such licensure merely because he is not a citizen of the United States.

Section 5 of the Act, 63 P. S. § 405, provides in pertinent part:

“Each applicant for licensure under the provisions of this act shall furnish, prior to any examination by the said Board, satisfactory proof that he is a citizen of the United States or has declared his intention of becoming a citizen....

* * * *

“Applicants from countries foreign to the territory of the United States, who desire to be licensed by said Board... shall present a certificate of United States citizenship or a declaration of intention.... The license of

any licensee who fulfills the requirements of this act relating to citizenship by presenting a declaration of intention of becoming a citizen, shall be automatically revoked by the Board if such licensee does not present a certificate of United States citizenship to the Board within seven years after original licensure."

It is our opinion, and you are so advised, that the above requirements are unconstitutional and unenforceable on the basis of our opinion to the State Board of Veterinary Medical Examiners, of December 17, 1971, a copy of which you have received. The above-quoted provision, by denying licensure to an individual who does not take steps to become a citizen, or who cannot qualify to become a citizen, denies that individual equal protection of laws within the meaning of the Fourteenth Amendment to the United States Constitution.

The conclusion we have reached, it may be observed, is even more compelling in this instance than it was in our opinion of December 17, 1971. The Medical Practice Act does not even pretend that there is a compelling state interest in requiring citizenship as a prerequisite for licensure to practice medicine and surgery, since it allows non-citizens to practice up to seven years in this status. It is, therefore, clear beyond doubt that the citizenship requirement is not a necessary or proper qualification prerequisite for licensure, but that it deprives non-citizens of equal protection for no reason. Accordingly, it is unconstitutional and unenforceable.

Finally, we note that this restriction has not served the public interest. As you have stated, and as we have learned from the recent reports by the State Department of Health and the Pennsylvania Medical Society, there is a serious dearth of licensed physicians in Pennsylvania. The removal of this unconstitutional citizenship restriction may, thus, it is hoped, help alleviate this situation and lead to improved health care for the citizens of this Commonwealth.

Sincerely yours,

GERALD GORNISH
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 114

Pharmacy Board—Citizenship—Licensure—Age Requirement

1. Section 3(a) (1) of the Pharmacy Act, 63 P. S. § 390-3(a) (1) is unconstitutional in imposing a citizenship requirement for licensure which violates the Equal Protection Clause of the United States Constitution.
2. Opinion to State Board of Veterinary Medical Examiners of December

17, 1971, followed.

3. Requirement in Section 3 (a) (1) of the Pharmacy Act, 63 P. S. § 390-3 (a) (1), that a pharmacist be not less than twenty-one (21) years old is effective and binding.
4. Where the American Council of Pharmaceutical Education or its successor has failed to accredit a foreign school or college of pharmacy, under Section 3(a) (3) of the Pharmacy Act, 63 P. S. § 390-3(a) (3), the State Board of Pharmacy is authorized to make its own independent determination as to whether the school or college meets the standards generally required of accredited schools.

Harrisburg, Pa.
March 23, 1972

Mr. Sol S. Turnoff
Chairman
State Board of Pharmacy
Harrisburg, Pennsylvania

Dear Mr. Turnoff:

You have requested our opinion on whether the twenty-one (21) year age and United States citizenship requirements of Section 3(a) (1) of the Pharmacy Act, 63 P. S. § 390-3(a) (1) remain in effect and must be adhered to in carrying out its licensing function.

The statutory requirement that a pharmacist be not less than twenty-one years old is effective and binding. You have called to our attention the fact that there has been an amendment to Section 701 of the Pennsylvania Election Code, 25 P. S. § 2811, allowing eighteen (18) year olds to vote (Act No. 29 of 1971). We may also note Amendment XXVI to the Constitution of the United States, which similarly lowers the voting age to eighteen (18) years of age or older. These amendments, however, are limited to and do not extend beyond the right to vote. There have been several other bills recently introduced in the Legislature reducing age requirements, all of which are similarly limited to certain areas. Two of these bills would lower the ages of pharmacists (Senate Bill No. 62 of 1971; House Bill No. 1674 of 1971), but neither has passed even one house of the Legislature. In our opinion, the legislative restriction of licensure to twenty-one (21) years of age and over is a reasonable determination by the Legislature regarding practice of pharmacy, which is a profession requiring maturity and care. The requirement is thus constitutional and enforceable. See *George v. United States*, 196 F. 2d. 445 (9th Cir. 1952), *cert. denied*, 344 U. S. 843 (1952).

With respect to your question regarding citizenship, it is our opinion, and you are so advised, that this requirement is unconstitutional and unenforceable based on our opinion to the State Board of Veterinary Medical Examiners of December 17, 1971, a copy of which you have received, for the reason that it deprives non-citizens of equal protection of laws within the meaning of the Fourteenth Amendment of the Constitution of the

United States. Citizenship is not a valid criterion in determining whether an individual is qualified to receive a pharmacist's license.

We note finally, that Section 3(a) (3) of the Pharmacy Act, 63 P. S. § 390-3(a) (3), requires every pharmacist to hold "a degree in pharmacy granted by a school or college of pharmacy which is accredited by the American Council of Pharmaceutical Education, or its successor." It is our understanding that the Council does not accredit foreign pharmacy schools. Therefore, in some of the applications before your Board, the applicants may not hold a degree in pharmacy from such an accredited school or college of pharmacy. We hold some doubts regarding the propriety of the method of accreditation, since it may be an improper delegation of legislative authority. However, in keeping with the rules of statutory construction, we need not decide the issue, so long as you may exercise your duties properly in any event. Section 52(3) of the Statutory Construction Act of May 28, 1937, 46 P. S. § 552(3); *Rescue Army v. Municipal Court of Los Angeles*, 331 U. S. 549, 575-585 (1947); *Robinson Township School District v. Houghton*, 387 Pa. 236, 128 A. 2d 58 (1956). Accordingly, should this requirement present a problem in any case, we suggest that you request the Council's advice regarding accreditation, and if none exists because the Council has not investigated the institution, it is our opinion, and you are so advised, that you may make your own independent determination as to whether the school or college meets the standards generally required of the accredited schools which you do recognize.

Sincerely yours,

GERALD GORNISH
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 115

Department of Justice—Deputy Attorneys General—Authorization to approve legality of administrative regulations—Amendment of Op. Atty. Gen. No. 89, December 8, 1971.

1. Op. Atty. Gen. No. 89, December 8, 1971, is hereby amended and only Deputy Attorneys General listed today may give approval as to legality of Administrative Regulations as required by Section 105 of the Commonwealth Documents Law, 45 P. S. § 1205.

Harrisburg, Pa.
April 5, 1972

Mr. John R. Gailey, Jr.
Director,
Legislative Reference Bureau
Harrisburg, Pennsylvania

Dear Mr. Gailey:

On December 8, 1971, an opinion was sent to you, Op. Atty. Gen. 89, 1 Pa. B. 2325, listing those Deputy Attorneys General, in addition to the Attorney General and the Executive Deputy Attorney General, who were authorized on behalf of the Department of Justice to approve administrative regulations, in accordance with Section 205 of the Commonwealth Documents Law of July 31, 1968, P. L. _____, No. 240, 45 P. S. § 1205.

The list is hereby amended, and the following are the only persons authorized to approve administrative regulations which require Justice Department approval pursuant to the Commonwealth Documents Law:

J. Shane Creamer, Attorney General
Walter L. Foulke, Executive Deputy Attorney General
Peter W. Brown, Chief of Civil Law
William Anderson, Chief of Property & Natural Resources
Edgar R. Casper, Chief of Human Services
Gerald Gornish, Chief of Commercial, Financial & Governmental Section
Leonard Packel, Chief of Criminal Law
Joel Weisberg, Director, Bureau of Consumer Protection

The Opinion of December 8, 1971, Op. Atty. Gen. No. 89, 1 Pa. B. 2325, and the subsequent memorandum of March 24, 1972, 2 Pa. B. 529, are rescinded insofar as they are inconsistent with the foregoing list.

Sincerely,
J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 116

- Registered Nurses—Practical Nurses—Citizenship Requirement—Licensure.*
1. Sections 6 and 14(9) of the Professional Nursing Law of May 22, 1951, 63 P. S. § 211 *et seq.*, are unconstitutional insofar as they impose a citizenship requirement for licensure and insofar as it revokes licensure to an individual who has filed a declaration of intent, but fails to become a citizen within seven years thereafter. These requirements violate the Equal Protection Clause in the United States Constitution.

2. Sections 5 and 16(9) of the Practical Nurse Law of March 2, 1956, 63 P. S. § 651 *et seq.*, are unconstitutional insofar as they impose a citizenship requirement for licensure and insofar as it revokes licensure to an individual who has filed a declaration of intent, but fails to become a citizen within seven years thereafter. These requirements violate the Equal Protection Clause in the United States Constitution.
3. Opinion to the State Board of Veterinary Medical Examiners of December 17, 1971, Opinion No. 113 followed.

Harrisburg, Pa.
April 4, 1972

Honorable Vincent J. Fumo
Acting Commissioner
Bureau of Professional & Occupational Affairs
Harrisburg, Pennsylvania

Dear Mr. Fumo:

You have requested our opinion as to whether individuals who otherwise meet the requirements of licensure under The Professional Nursing Law of May 22, 1951, 63 P. S. § 211 *et seq.*, and the Practical Nurse Law of March 2, 1956, 63 P. S. § 651 *et seq.*, may be denied such licensure for the sole reason that they are not citizens of the United States.

Both of these laws require citizenship. Section 6 of The Professional Nursing Law, as amended, 63 P. S. § 216, provides that:

"Every applicant, to be eligible for examination for licensure as a registered nurse, shall furnish evidence satisfactory to the Board that he or she is a citizen of the United States or has legally declared an intention to become such..."

Section 14(9) of the Law, 63 P. S. § 224(9), further provides:

"The Board may suspend or revoke any license in any case where the Board shall find that—

* * * *

(9) The licensee having obtained a license upon declaration of intention to become a citizen of the United States, has not become a citizen of the United States within seven (7) years after the date of such declaration of intention."

The Practical Nurse Law contains similar requirements. Section 5 of the Law, as amended, 63 P. S. § 655, provides:

"Every applicant for examination as a licensed practical nurse shall furnish evidence satisfactory to the board that he or she... is a citizen of the United States or has legally declared intention to become such..."

Section 16(9) of the Law, 63 P. S. § 666(9), further provides:

"The Board may suspend or revoke any license in any case where the Board shall find. . .

* * * *

(9) That said licensee having obtained a license or certificate of record upon declaration of intention to become a citizen of the United States has not become a citizen of the United States within seven (7) years from the date of such declaration of intention."

For the reasons set forth in our opinion to the State Board of Veterinary Medical Examiners, dated December 17, 1971, a copy of which you have received, as further amplified in our Opinion No. 113 regarding the Medical Practice Act, the above requirements are unconstitutional and unenforceable. The requirements in both of the laws here in question are similar to those we declared invalid in Section 5 of the Medical Practice Act, 63 P. S. § 405; the reasons for finding these requirements unenforceable are similarly compelling in this case. Accordingly, you should advise and offer licensure to any non-citizen who is within or beyond the seven (7) year period.

We make two further observations. First, having been advised that there is a great shortage of qualified licensed nurses in the Commonwealth of Pennsylvania, we are gratified to know that the removal of this unconstitutional requirement will result in a direct and immediate benefit to the public. Second, we note that since our comprehensive opinion of December 17, 1971, the United States Court of Appeals for the Third Circuit (which includes Pennsylvania) has ruled, in a similar context, that the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits the Virgin Islands from requiring citizenship as a prerequisite to participation in a territorial scholarship fund. *Chapman v. Gerard*, 40 U. S. Law Week, 2565 (1972). Our analysis in this and other recent opinions on the same subject is thus confirmed by the highest federal court having immediate jurisdiction over Pennsylvania.

Sincerely yours,

GERALD GORNISH
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 117

Land and Water Conservation and Reclamation Act—State action to control burning refuse banks—Action permitted only on publicly owned land—Condemnation by the State for purposes of the Act.

1. The State extinguishing burning refuse banks on private land is not in accordance with existing law as such action is limited to publicly owned lands. (32 P. S. § 5116)
2. The State may enter private lands to extinguish burning refuse banks if (a) immediate action is in the public interest, (b) an emergency exists, (c) owners of the property are unknown or not available.
3. Notice should be given to owner, if known, or posted if unknown, before the State has a right to enter and extinguish the fires.
4. In the absence of the owner's agreement, the means of taking by the State must conform to the provisions of the Eminent Domain Code (26 P. S. § 1.101 et seq.). The Commonwealth must (a) file a declaration of taking, (b) give notice within thirty (30) days to the condemnee, and (c) pay just compensation before entering the land; in an emergency, the State may enter without having first compensated the owner so long as a declaration of taking is filed and notice is given to the condemnee.

Harrisburg, Pa.
March 30, 1972

Honorable Maurice K. Goddard
Secretary
Department of Environmental Resources
Harrisburg, Pennsylvania

Dear Secretary Goddard:

You have requested our advice as to procedures which must be followed by the Department of Environmental Resources in implementing the provisions of the Land and Water Conservation and Reclamation Act. In your letter of March 8, 1972 you have expressed concern about the legality of certain practices followed by the former Department of Mines and Mineral Industries in administering the provisions of the Act applicable to the prevention, control and elimination of air pollution from abandoned burning coal refuse banks. Although the Act requires the land and land bank material to be publicly owned or in process of acquisition by the Commonwealth, a county or municipality, it has been the practice of the Department of Mines and Mineral Industries to extinguish burning coal refuse banks which are privately owned provided that a consent lien or other lien was filed with respect to the relevant property.

It is our opinion that the practice of the Department of Mines and Mineral Industries, which you have described, is not in accordance with existing law. Action may not be taken by your Department for the prevention, control, and elimination of air pollution from abandoned burning coal refuse banks on privately owned land unless the Commonwealth, a county or municipality is in the process of acquiring the land.

Our opinion is based upon the express language of Section 16 of the Land and Water Conservation and Reclamation Act, Act of January 19, 1968, P. L. (1967) 996, as amended, 32 P. S. § 5116. Subsection (a) (1) of that section allocates the sum of \$25,000,000 "for the prevention, control and elimination of air

pollution from abandoned burning coal refuse banks provided such land and bank material is publicly owned,..."

The Act further provides, in the same subsection:

"Pending the acquisition by the Commonwealth, a county or a municipality, when necessary, of any land or other property interest required to combat stream pollution, air pollution, subsidence or mine fires, whenever the Secretary of Mines and Mineral Industries makes a finding of fact that:

(i) ...in the public interest immediate action should be taken; and

(ii) ...an emergency exists...

(iii) ...the owners of the property upon which entry must be made...are not known...are not readily available or will not give permission...to enter upon the premises, or the delay entailed in reaching said owners...constitutes a clear and immediate danger to life and property of others.

"Then, upon giving notice to the owners if known or by posting notice upon the premises and advertising once in a newspaper of general circulation in the municipality in which the land lies, and filing with the prothonotary of the court of common pleas of the county in which said premises lies of such intention of entry or taking in conformity with the provisions of the Eminent Domain Code, the Secretary of Mines and Mineral Industries...shall have the right to enter upon the premises to combat the mine fire, refuse bank fire, stream pollution... and to do all necessary or expedient to do so..."

The foregoing language means that in a non-emergency situation, air pollution from an abandoned burning coal refuse bank may only be combatted by the Department if the land is publicly owned, and in an emergency situation, where the property owner has not given permission to enter the premises, the Department must file a declaration of taking with the prothonotary in accordance with the Eminent Domain Code (26 P. S. § 1-101 *et seq.*) and give notice thereof before entry may be made on the land.

Although the Act speaks of filing with the prothonotary "such intention of entry or taking," there is no option with regard to abandoned burning coal refuse banks. They must be publicly owned and the only means of accomplishing this, in the absence of the owner's agreement, is by means of a taking in conformity with the provisions of the Eminent Domain Code. An intention of entry may be filed with the prothonotary in cases of emergency involving stream pollution from mine drainage, surface and underground fires from abandoned mines and surface subsidence above abandoned mine operations. The Department's

activities to combat these occurrences are not limited to publicly owned lands. But for air pollution from burning refuse banks, there must be a taking.

The language, "[p]ending the acquisition by the Commonwealth, a county or a municipality, *when necessary*," is a reference to the air pollution from refuse banks only. Where refuse banks are involved, acquisition of the land is "necessary," since the land must be publicly owned. In the other situations, acquisition by the Commonwealth, etc. is not necessary, and the procedure for filing an intention of entry may be followed.

In view of the foregoing, the following procedure is required before the Department may take any action to extinguish burning coal refuse banks on privately owned lands:

1. In the absence of an amicable agreement to sell the land to the Commonwealth or a political subdivision, by the owner, the Commonwealth or political subdivision must file a declaration of taking with the prothonotary of the county where the land is located. (26 P. S. § 1-402)

2. Within thirty days thereafter, notice of the filing must be given to the condemnee in accordance with the Eminent Domain Code. (26 P. S. § 1-405)

3. The Department may then enter upon the land without the owner's consent, provided that the condemnor has first paid or offered to pay the condemnee the amount of just compensation as estimated by the condemnor. If right of entry is refused, a writ of possession may be obtained from the court of common pleas. (26 P. S. § 1-407)

4. In an emergency where the public interest requires that immediate action be taken, the Department may enter upon the land without the owner's consent and without paying or offering to pay estimated just compensation, provided that a declaration of taking has been filed and notice thereof sent to the owner, if known, or by posting the notice upon the premises and advertising once in a newspaper of general circulation in the municipality in which the land lies. (32 P. S. § 5116)

Sincerely yours,

W. W. ANDERSON

Deputy Attorney General

J. SHANE CREAMER

Attorney General

OFFICIAL OPINION No. 118

Liquor Control Board—Retail Pricing Policy—Differentiation in Markup Between Wine and Distilled Spirits Disapproved

1. "Liquor" as defined by the Liquor Code, 47 P. S. § 1-102, includes wine.

2. Section 207 of the Liquor Code, 47 P. S. § 2-207(b), prohibits the Liquor Control Board from discriminating among classes of "liquor" except to move unsaleable merchandise or where an additional service or handling charge is justified.
3. Neither exception is applicable to the present retail pricing policy. Wine is not unsaleable, and no necessity for a handling charge has been demonstrated.
4. Even if a handling charge were warranted, Section 207 mandates that it be applied to all merchandise in the same comparable price bracket. As some wines now cost as much, if not more than certain distilled spirits, any service charge would have to be applied across the board.
5. Informal Opinion No. 1481 of former Attorney General Herbert B. Cohen is disapproved insofar as it suggests that the imposition of a service charge is justified merely to increase profits and without any consideration being given to the actual cost of handling the merchandise in question.
6. Raising liquor prices and the mark-up on liquor are extreme measures to be undertaken only if justified by substantial evidence.
7. The present retail pricing policy of the Liquor Control Board which imposes a 58% markup on wines but only a 48% markup on distilled spirits is not in accordance with the requirements of Section 207(b) of the Liquor Code in that the Board may not differentiate among its merchandise by "...classes, brands, or otherwise..."

Harrisburg, Pa.
April 27, 1972

Honorable Edwin Winner
Chairman
Pennsylvania Liquor Control Board
Harrisburg, Pennsylvania

Dear Mr. Winner:

You have requested our advice as to whether or not the present retail pricing policy of the Liquor Control Board, which dates back to September 16, 1955, when the Board imposed a 58 per cent markup on wines but only a 48 per cent markup on distilled spirits, is a proper legal exercise of the powers delegated by the General Assembly to the Board in Section 207(b) of the Liquor Code, 47 P. S. § 2-207(b).

In order to interpret the provisions of Section 207 of the Liquor Code pertaining to the price at which the Board shall sell "liquors" it is necessary to determine the meaning of "liquors" as used in the Liquor Code.

Section 102 defines "liquor" as follows:

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

cent of alcohol by volume, except pure ethyl alcohol and malt or brewed beverages." (Emphasis added.)

Although the Liquor Code does not specifically define the word "wine," the word "vinous" used in Section 102 means wine. Therefore it is clear from the above that all types of wine, rum, cordials, brandy and other alcoholic beverages sold in State Stores are included in the word "liquor" for the purposes of the Liquor Code.

The pertinent provisions of Section 207 are as follows:

"Under this act, the board shall have the power and its duty shall be:

* * * *

"(b) . . . to fix the wholesale and retail prices at which liquors and alcohol shall be sold at Pennsylvania Liquor Stores: Provided, that in fixing sale prices, the board shall not give any preference or make any discrimination as to classes, brands or otherwise, except where special sales are deemed necessary to move unsaleable merchandise, or except where the addition of a service or handling charge to the fixed sales price of any merchandise in the same comparable price bracket, regardless of class, brand or otherwise, is, in the opinion of the board, required for the efficient operation of the State store system. . . ."

In view of Section 102 we see no significant distinction between the phrase "liquors and alcohol" and the word "liquors" as used in Section 207. It is apparent from any analysis of Section 207 that the various types of liquors, including all wine and distilled spirits, sold in State Stores constitute classes of "liquor" for the purposes of the Liquor Code. Therefore, in fixing sales prices the Board may not give preference or discriminate among such classes unless one of the exceptions set forth in Section 207 applies.

The exceptions are as follows: (1) items for which special sales are necessary to move unsaleable merchandise and, (2) items for which additional charges to regular prices are necessary to cover service or handling charges. Clearly the first exception would not justify a different markup for distilled spirits (48%) and wine (58%) since we are not dealing with "unsaleable" items for which special price reductions might be necessary.

Turning to the second exception, we note that nothing has come to our attention that indicates that a special service or handling charge has been, or is now being, charged for wine by the Board. In fact, it should be noted that a bottle of wine and a bottle of distilled spirits are treated in exactly the same way: both come packed by the case in fifth of a gallon, quart, or half gallon bottles and are stored similarly on the shelves.

Furthermore, the exception concerning service or handling charges is limited "...to merchandise *in the same comparable price bracket....*" (Emphasis added.) Some wines are now equally, if not more expensive than various brands of distilled spirits, such as vodka, gin, or Canadian whiskey. The statute clearly mandates that any special handling charge which is imposed on wine must be imposed on all merchandise in the same price range.

On August 18, 1955, former Attorney General Herbert B. Cohen issued an informal opinion (No. 1481), authorizing certain service charges to be added to the price of vinous products as long as the same charge was made "...for all merchandise in the same comparable price bracket, regardless of class, brand or otherwise." The price bracket involved was the 69 cents per bottle range. We agree with the opinion to the extent it required uniformity within a given price class.

However, the opinion of former Attorney General Cohen also suggests that the imposition of a service charge is justified merely to increase profits and without any consideration being given to the actual cost of handling the merchandise in question. We are unable to agree with that proposition. Raising liquor prices, and even more importantly, raising the markup on liquor, are extreme measures to be undertaken only if justified by substantial documented evidence, including a meaningful attempt to reduce costs. In this day when prices continue to spiral upward, the consumer's interest in obtaining reasonably priced liquor is the paramount concern. Consequently, the statutorily imposed requisites of uniformity should not be used as support for elevating all prices to the 58% markup on wine; rather the markup on wine should be reduced at least to 48%, and it is our recommendation that all prices on distilled spirits and wine together be substantially reduced.

Therefore you are advised that the present retail pricing policy of the Liquor Control Board which imposes a 58% markup on wines but only a 48% markup on distilled spirits is not in accordance with the requirements of Section 207(b) of the Liquor Code in that the Board may not differentiate among its merchandise by "...classes, brands, or otherwise..." Distilled spirits and wine sold in State stores must be priced in a uniform manner. Even if the markup is intended to be a service charge, to impose a different markup on wine without imposing a similar charge on other merchandise in the same price range constitutes an improper exercise of the Board's discretion.

Sincerely,
J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 119

State civil service—Discrimination in state employment—Legal obligation of the state with regard to employment—Selection standards must be job-re-

lated—Affirmative Action as a remedy for past discrimination.

1. The legal obligation of the State Civil Service Commission with respect to discrimination in government is defined by the Fourteenth Amendment of the United States Constitution, Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, as amended by the Equal Employment Opportunity Act of 1972, the Pennsylvania Constitution, the Pennsylvania Human Relations Act, 43 P. S. § 951 *et seq.*, and the Civil Service Act, 71 P. S. § 741.905.1.
2. The state as employer must take affirmative action to eliminate those employment practices and procedures which are inherently discriminatory as well as those which, although neutral on their face, result in discrimination in their operation and effect.
3. If a standard or procedure for selection of applicants for employment or promotion has the effect of disproportionately disadvantaging a certain group of job applicants, the Civil Service Commission has the burden of showing that this imbalance results from a bona fide selection criteria related to job performance.
4. If the Civil Service Commission cannot establish that a proven statistical disproportion is not the result of a job-related selection standard and consequently illegally discriminatory, the Commission must take all the steps necessary to change the standard and to eliminate the present discriminatory effects of past practices.
5. In order to accord with the state's legal responsibility in the area of government employment:
 - (a) The Commission must continue its efforts to collect racial and sexual employment data in civil service employment.
 - (b) The Commission must validate the civil service examinations.
 - (c) The director may administer examinations to accommodate a demonstrated social requirement for persons who understand and can deal with the problems of the culturally, economically or educationally disadvantaged.
 - (d) The Commission may investigate the operation of civil service hiring and promotion practices and, if evidence of discrimination were found, could temporarily suspend certain provisions of the Act and institute such affirmative action as necessary to correct the effects of past discrimination.
6. A system of remedial affirmative hiring and promotion, temporarily instituted as a remedy for past discriminatory practices, in many instances, may be mandated as the only effective way to overcome the present effects of illegal discrimination.

Harrisburg, Pa.
May 4, 1972

Mr. Henry Adams
Executive Director
Governor's Task Force on Equal Rights
Harrisburg, Pennsylvania

Mr. Richard A. Rosenberry
Executive Director
State Civil Service Commission
Harrisburg, Pennsylvania

Dear Messrs. Adams and Rosenberry:

You have requested my opinion concerning steps which may

be taken by the State Civil Service Commission and its Executive Director to modify existing merit system practices to insure compliance with the mandate of the law and of the Governor's Executive Directives to provide equal employment opportunity for all. The legal obligations of the State Civil Service Commission with respect to discrimination in government employment are defined by the Fourteenth Amendment to the Constitution of the United States, Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e, *et seq.*, as amended by the Equal Employment Opportunity Act of 1972, the Pennsylvania Constitution, the Pennsylvania Human Relations Act, and by Section 905.1 of the Civil Service Act.

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); *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961); *Carter v. Gallagher*, 452 F. 2d 315 (8th Cir. 1972); *United States v. Frazer*, 317 F. Supp. 1079 (M. D. Ala. 1970). The state as employer must take such affirmative action not only to eliminate those employment practices and procedures which are inherently discriminatory, but also those which, although neutral on their face, result in discrimination in their operation and effect. *Carter v. Gallagher, supra*; *Armstead v. Starkville School District*, 325 F. Supp. 560 (N. D. Miss. 1971); *Penn v. Stumpf*, 308 F. Supp. 1238 (N. D. Cal. 1970); *Arrington v. Mass. Bay Transportation Auth.*, 306 F. Supp. 1355 (D. Mass. 1969).

In determining the existence of discriminatory procedures, "statistics often tell much, and Courts listen." *Alabama v. United States* 304 F. 2d 583, 586 (5th Cir.) *aff'd per curiam* 371 U. S. 37 (1962). A *prima facie* case of discrimination is shown if an employment standard, neutral on its face, has the effect of disproportionately disadvantaging a certain group of job applicants. *Carter v. Gallagher, supra*; *Parham v. Southwestern Bell Telephone Co.*, 433 F. 2d 421, 426 (8th Cir. 1970); *Arrington, supra*. Once a *prima facie* case has been made, the burden shifts to the employer to show that the imbalance results from a job-related selection standard. There is no need to show intent to discriminate or lack of good faith. Rather, the employer must show that the given requirement is a bona fide occupational qualification related to job performance. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Carter v. Gallagher, supra*; *Castro v. Beecher*, 334 F. Supp. 930 (D. Mass. 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 a racial minority or female applicants, the burden is upon the Civil Service Commission to justify the discriminatory effect by establishing that the selection criteria are related to the de-

mands of the position and that those demands are in fact accurately measured by success of the applicant in meeting the selection criteria. The Pennsylvania Human Relations Commission has issued guidelines applicable to the Civil Service Commission setting forth procedures by which written employment tests may be measured and validated against this standard. "Guidelines on Employee Selection Procedures," 1 Pa. B. 2005, C. C. H. Emp. Prac. ¶ 5194. Each standard for selection is subject to the same scrutiny and validation as a written employment test. Thus all degree, diploma, certificate or other educational, training, or experience qualifications, if shown to have a disparate effect on minority or female applicants, must be proven to be reasonably related to the tasks to be performed.

If the Civil Service Commission cannot establish that a proven statistical disproportion is not the result of unlawful discrimination, it must then take all the steps necessary to change the standard and to eliminate the present effects of past practices. Present implementation of neutral and nondiscriminatory standards and practices are not always sufficient by themselves to overcome the effects of past discrimination or satisfy the duty imposed by the Constitution. The Commission must also take affirmative steps, including remedial preferential hiring if necessary, to correct past employment discrimination. See, e.g., *Carter, supra*; *Local 53, Asbestos Workers v. Vogler*, 407 F. 2d 1047 (5th Cir. 1969); *NAACP v. Allen*, 340 F. Supp. 703 (M. D. Ala. 1972).

At present, there exist no comprehensive statistical data specifying employees by race in civil service employment. Pursuant to my opinions dated October 18, 1971, to the Hon. Milton J. Shapp, Governor, and November 17, 1971, to Homer C. Floyd, Executive Director, Pennsylvania Human Relations Commission, such information is now being collected and analyzed by the Commission but it will be months before such analysis is completed. Racial information which is available is drawn from a December, 1971, survey of all agency personnel, civil service and non-service, prepared by the Manpower Planning Division, Bureau of Personnel, Office of Administration and a 1969 survey of non-white employment conducted by the Pennsylvania Human Relations Commission. Figures on civil service employment by sex are available and current as of January, 1972.

The information which is 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. In higher level positions, particularly those having salaries in excess of \$10,000 per year, non-whites and women are virtually unrepresented. For all government positions, civil service and otherwise, with salaries between \$7,000 and \$13,000, less than 8% are held by non-whites. Only 5.5% of those holding government positions paying over

\$13,00 are non-white. In some departments staffed entirely through Civil Service, the total number of minority employees is very low. For example, in the Department of Banking only 3.1% of its employees are non-white; Civil Service Commission—6.1%; Department of Insurance—2.9% and the Public Utility Commission—0.9%. In civil service employment, a woman is 4½ times as likely as a man to earn \$5,000 or less and a man is nearly 10 times as likely as a woman to earn \$15,00 or more. In 6 of the 10 job classifications at least 96% of the women employed earned less than \$10,000 whereas this was true of only 2 classes for men. Were the more comprehensive race data and the continued analyses of the statistics on sex to bear out the preliminary conclusions drawn from these present studies, the existence of patterns of race and sex discrimination in civil service employment would be confirmed.

Though specific answers and recommendations in response to the questions posed by the Task Force on Equal Rights often turn on the availability of these statistics and what they reveal, the Commission may or must take the following action as is indicated below:

1. The Commission must continue its efforts to collect racial and sexual employment data in civil service employment. This information is required in order to evaluate existing imbalances in civil service employment, determine and correct the differential effects of employment and promotional standards and procedures upon minority applications and women and to effectuate affirmative action designed to eliminate the effects of past discrimination.

2. The Commission must validate the civil service examinations. Where discriminatory effects are established, e.g. by a disproportionate failure rate among minority applicants, a *prima facie* case of discrimination is made out and the burden is upon the employer to justify the discriminatory effects by establishing that the examination effectively predicts job performance. *Griggs, supra*; *Arrington, supra*. In addition, the Pennsylvania Human Relations Act, 43 P. S. § 950 *et seq.*, and guidelines promulgated thereunder, "Guidelines on Employee Selection Procedures" *supra*, require these tests and all employee selection standards to be validated. 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. As an alternative to validating the written examinations, the Commission could eliminate written examinations and substitute other validated selection criteria which would be without discriminatory effect. In this regard, the Executive Director has broad discretion in the definition of competitive examinations. 71 P. S. § 741.502.

3. The director may administer examinations to accommodate

a demonstrated social requirement for persons who understand and can deal with the problems of the culturally, economically or educationally disadvantaged as long as these examinations are competitive and not limited.¹ The director can also, of course, design examinations to eliminate any racial, ethnic or cultural bias.

The Civil Service Act gives the director broad power to determine the nature and content of all examinations for employment and promotion:

"The tests in such examination may be written or oral, or a demonstration of skill, or an evaluation of experience and education, or a combination of these, which shall fairly appraise and determine the merit, qualifications, fitness and ability of competitors. Such tests shall be practical in character and shall relate to the duties and responsibilities of the position for which the applicant is being examined and shall fairly test the relative capacity and fitness of persons examined to perform the duties of the class of positions to which they seek to be appointed or promoted. . . ." 71 P. S. § 741.502.

In addition, the Act and rules promulgated thereunder give the executive board and the Office of Administration great discretion in preparing job descriptions for the various civil service positions. The director has similar discretion to create and modify examinations in order to accurately and fairly measure such needed skills and knowledges. 71 P. S. § 707; Rules of the Civil Service Commission, §§ 95.12, 95.13, 95.14. Therefore, position descriptions could be written so as to require employees to understand and be able to deal with the cultural, economic or ethnic problems peculiar to the people they would be serving. For example, a classification could include requirements that the applicant show a knowledge of the minority community in which he will serve; demonstrate a familiarity with a minority community or culture; or be able to speak and write Spanish. The director could then design an examination to test these special skills which would be required by the duties and responsibilities of the position.

A credit for life experience could be given where it was shown that such a qualification was job related and would aid the employee in dealing with particular groups such as public assistance recipients, state prison inmates, and state hospital patients.

1. "Such examinations may be written and shall be competitive and open to all persons who may be lawfully appointed to positions within the classes for which the examinations are held." 71 P.S. § 501.

In addition such life experience could be valuable to all jobs relating to the civil service's affirmative action program such as recruiters for minorities and women, job classifiers and standards writers, and test development and validation workers.

4. The Commission may, on its own motion, investigate the operation of civil service hiring and promotion practices and, if evidence of discrimination were found, could temporarily suspend certain provisions of the Act and institute such affirmative action as was necessary to correct the effects of past discrimination.

The Civil Service Act specifically provides that:

"No officer or employee of the Commonwealth shall discriminate against any person in recruitment, examination, appointment, training, promotion, retention or other personnel action with respect to the classified service because of . . . race, national origin or other non-merit factors." 71 P. S. § 905(a).

Non-merit factors include any attributes of a person or group which do not predict the ability to perform the job such as sex, marital or dependency status, arrest record and, for many jobs, education levels and non-job predictive experience.

The Act entrusts to the Commission the responsibility for insuring that all of its provisions are observed including the prohibition against discrimination.

"Duties of commission:

It shall be the duty of members of the commission as a body . . . (3) to make investigation on its own motion and in its discretion, on petition of a citizen concerning any matter touching the enforcement and effect of the provisions of this act and to require observance of the provisions of this act and the rules and regulations thereunder." 71 P. S. § 741.203.

Wide latitude is given to the Commission to assure that the Act is observed.

"Notwithstanding any other provision of this section, the commission may, upon its own motion, investigate any personnel action taken pursuant to this act and, in its discretion, hold public hearings, record its findings and conclusions, and make such orders as it deems appropriate to assure observance of the provisions of this act and rules and regulations thereunder." 71 P. S. 741.951(d).

If the Commission, after proper investigation, determined that operation of certain provisions of the civil service system—including, but not limited to, the continued use of unvalidated examinations—has resulted in discrimination against minority persons and women in violation of the Act, the Commission has

authority to take whatever action it deems necessary to correct such discrimination so that Federal and State constitutional and statutory standards are met. The Commission could, of course, order immediate implementation of non-discriminatory standards and procedures. However, to fully insure compliance with the law and the Constitution, the Commission may have to go further and undertake remedial affirmative action designed to correct imbalances caused by past discriminatory practices. See *Carter v. Gallagher*, *supra*.

For example, if the Commission found that the use of unvalidated examinations for certain employment positions acted so as to exclude a disproportionate number of minority and female applicants and therefore was discriminatory, the Commission could order that these tests be validated as quickly as possible. In the meantime, continued use of the present examinations could be allowed by the Commission as necessary to avoid total confusion in future personnel decisions. However, in order that the results of these examinations would not perpetuate a discriminatory system, the Commission could, as remedial affirmative action, use the test results to establish separate eligible lists for minority persons, women and non-minority persons from which certification to the appointing authority could be made. Certification could then be made from these lists on an alternating or other equitable basis until the past discriminatory effects were eliminated. This continued use of unvalidated tests has been allowed, because of limitations of time and money and to avoid administrative chaos in the interim, where other affirmative action such as ratio hiring is taken to eliminate discrimination. *NAACP v. Allen*, *supra*.

Some form of action would be particularly appropriate with regard to promotion examinations. Unvalidated promotion examinations seem highly suspect because: (1) it appears to be the consensus among personnel administrators that examination procedures have less validity when selecting for higher level executive or supervisory positions; (2) success in supervisory positions would seem to depend less on one's knowledge of his or her duties than on difficult to measure tangible factors such as leadership, sensitivity, and judgment; (3) successive invalid examinations tend to magnify the disparate effect on minority and women applicants. Promotion without examination is permitted by the Act, 71 P. S. § 501, with the consent of the Commission. Director's Letter No. 65, March 23, 1965, sets forth the Commission's guidelines for allowing such promotions. The Commission could revise its guidelines on promotion without examination to encourage its use as a promotion alternative where such use would be affirmative action designed to eliminate the effects of past discriminatory practices.

A system of remedial affirmative hiring and promotion, temporarily instituted as a remedy for past discriminatory practices, is not only permissible but in many instances may be mandated

by the federal Constitution as the only effective way to overcome the effects of illegal discrimination. *U.S. v. Local 86, Ironworkers*, 443 F. 2d 549 (9th Cir. 1971), cert. denied 92 S. Ct. 447 (1971); *Carter, supra*. In fact a recent decision indicates that affirmative action having concrete results in altering the composition of a work force may take preference over, and reduce the need for, strict validation of employment standards. In this decision a Federal District Court in Alabama ordered the Alabama State Troopers to hire one Negro trooper for each white trooper hired until approximately 25% of the trooper force was black. The Court said:

"[T]he courts have the authority and the duty not only to order an end to discriminatory practices but also to correct and eliminate the present effects of past discrimination While further discrimination will be enjoined this Court is not inclined to order new tests or testing procedures Imposition of such a [validation] study would be an undue burden upon the state. Moreover, in light of the affirmative relief which this Court will require, primary concern over the testing procedures is unnecessary." *NAACP v. Allen, supra*.

Though I have addressed myself in this opinion primarily to what the Commission may do to eliminate discrimination in its hiring and promotion practices, the law's mandate is clear. States must affirmatively seek out discrimination in governmental employment and must undertake remedial affirmative action which will effectively eliminate state supported discrimination if it is to fulfill its obligation under the Fourteenth Amendment and Federal and State law. If continued examination and analysis of race and sex employment data reveal a pattern of discrimination in civil service employment, many of the suggestions made in this opinion may become mandatory in order to accord with the state's legal responsibility. If the state, and in this case the Commission, fails to act it may be held accountable for its inaction.

Sincerely yours,

ROBERT P. VOGEL
Assistant Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 120

Philadelphia Housing Authority—City of Philadelphia—Cooperation Agreement.

1. Contract which requires the Philadelphia Housing Authority to "consult" with the City before exercising many of its most important powers and subjects Authority to the direction and control of the City and the Mayor

violates Sections 4(a) and 10 of the Housing Authority's Law, 35 P. S. §§ 1544(a), 1550.

2. The Philadelphia Housing Authority is not an instrumentality of the City where it is located but rather is a public body corporate and politic exercising public powers of the Commonwealth as an agency thereof. 35 P. S. §§ 1544(a), 1550.

Harrisburg, Pa.
May 4, 1972

Mr. James W. Greenlee
Philadelphia Housing Authority
Philadelphia, Pennsylvania

Dear Mr. Greenlee:

You have requested our opinion as to whether the Philadelphia Housing Authority (PHA) may lawfully enter into a proposed agreement (herewith attached and incorporated by reference) with the City of Philadelphia. You are advised that the contract, as presently drafted, is unlawful because its provisions, when taken together, violate Section 4(a) and Section 10 of the Housing Authorities Law, Act of May 28, 1937, P. L. 955, §§ 4(a), 10, as amended, 35 P. S. §§ 1544(a), 1550.

The contract attempts to accomplish two purposes. Some of the contract's provisions (see e.g., paragraphs 1, 2, 3, 18, and 19) appear to be nothing more than an agreement to enter into purchase of service contracts at some future date. The City agrees to provide certain unspecified service, presumably needed by the Authority, and to be later specified, and in paragraph 19, the Authority agrees to pay for them. These provisions standing alone would be perfectly lawful and within the Authority's powers as delineated in Sections 10(d), (f), and (w), 35 P. S. §§ 1550(d), (f), (w).¹

However, the other provisions of this contract require the Authority to "consult" with the City before exercising many of the most important powers conferred on the Authority by Sections 7 and 10, of the Act, such as: the power to hire and fire personnel, (paragraphs 4-6)², the power to establish the responsibili-

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1. Section 10(d) authorizes the Authority "...[t]o cooperate with any city, county, regional, Federal or other agency...."
Section 10(f) authorizes the Authority "...[t]o take over by purchase, lease, or otherwise, any housing project located within its field of operation undertaken by any government...."
Section 10(w) authorizes the Authority "...[t]o make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the Authority...."
 2. Section 7 reads in relevant part: "The members of an Authority shall select from among themselves a chairman and a vice-chairman. The Authority may employ a secretary, such technical experts, and such other officers, agents, and employees, permanent or temporary, as it may require, and may determine the qualifications of such persons." 35 P. S. § 1547.

ties of personnel and to formulate personnel policy (paragraph 4-6)³, the power to contract (paragraph 9)⁴, the power to plan and carry out housing projects (paragraphs 12, 15, and 16)⁵, and the power to formulate policies (paragraph 12, 15, and 16)⁶.

In addition to those provisions requiring consultation before exercising its statutory powers, the contract also directs the Authority to insert a clause in all of its contracts giving the City the right to review the contracts and to audit the "... expenditure, flow or disbursement of funds through said contract." (Paragraph 8) This clause is vague and makes no provisions for what is to occur if the City, in its review and audit, disagrees with the Authority. It is possible that in time the City would come effectively to control the contents of and disbursement of funds pursuant to PHA contracts.

Further, paragraph 16 of the contract requires the Authority to "make use of and avail itself of the advice of the Director of Finance of [the] City with regard to accounting, payroll, and procurement procedures." Such a clause demands more than "consultation" and could be construed to mean that the Director's advice is binding on the Authority.

Finally, paragraph 17 requires the Authority to submit reports in writing "describing progress and activity," and paragraph 14 mandates that the Authority "... give full access to all records, reports, proceedings, contracts, sub-contracts minutes, correspondence, memoranda, data and the like to City..."

While many of the terms used in the "cooperation agreement" are vague, nevertheless, we must conclude that the proposed contract subjects the Pennsylvania Housing Authority to the direction and control of the City of Philadelphia, and specifically to the direction and control of the Mayor, in a manner not only not authorized by the Legislature but in fact, specifically prohibited.

"There are hereby created separate and distinct bodies, corporate and politic, one for each City (as herein defined), and one for each of the counties of the Commonwealth. Each such Authority may be known as the housing authority of the city or the county, as the case may be, *but shall in no way be deemed to be an instrumentality of such city or county or engage in the performance of a municipal function....*" 35 P. S. § 1544(a) (Emphasis added.)

3. See Section 7, *supra* n. 2

4. See Section 10(w), *supra* n. 1

5. Section 10(e) empowers the Authority "...[t]o prepare, carry out, acquire, lease, and operate housing projects, to provide for the construction, reconstruction, improvement, alteration or repair of any housing project, or any part thereof..." 35 P. S. § 1550(e).

6. Section 10(x) authorizes the Authority "...[t]o make and from time to time to amend and repeal resolutions, rules, and regulations not inconsistent with this act, in order better to carry into effect the powers of the Authority..." 35 P. S. § 1550(x).

Section 10, *inter alia*, provides:

"An Authority shall constitute a public body, corporate, and politic *exercising public powers of the Commonwealth as an agency thereof*, which powers shall include all powers necessary or appropriate to carry out and effectuate the purpose and provisions of this act...." 35 P. S. § 1550. (Emphasis added.)

Section 24 provides:

"In addition to any other material which an Authority must file with the Department of Community Affairs according to the provisions of this act, it shall file with said department—

a) A copy of any rules, regulations or resolutions, and amendments thereto, adopted by it from time to time.

b) At least once each year, a report of its activities for the preceding year, and such other reports as said department may require...." 35 P. S. § 1564.

Section 5(b) provides:

"(b) The governing body of any city upon issuing a certificate declaring the need for an Authority to operate in such city or upon receiving notice of the issuance of such certificates by the Governor, shall promptly notify the mayor of such certification. Upon receiving such notice, the mayor, with the approval of the majority of the members of council, shall appoint five citizens, residents of the city, to be members of the housing authority of such city—(1) that in cities of the first class, the mayor shall appoint two members, the city controller shall appoint two members and the four members, thus appointed, shall select a fifth member of such Authority...." 35 P. S. § 1545(b).

These provisions of state law make it abundantly clear that, while the Authority can and should cooperate with the City in every possible way so as to assure the best possible service and programs, it is not intended that the City should exercise the kind of control over every aspect of PHA's operation that this contract provides. The last quoted section, in addition, evidences an intention by the Legislature that PHA's Board be representative of other views than the Mayor's. To implement such a contract would make a nullity of that provision and destroy the kind of independence that the Legislature desires when it creates a public corporation of any kind.

Finally, and of equal importance, this contract so fundamentally alters the relationship of the Authority with respect to both the City and the State as to suggest that this contract is not the proper means for accomplishing the ends apparently desired by

the City and certain members of the Authority. It should be remembered that the Authority is clearly an agency of the Commonwealth, or as the Supreme Court of Pennsylvania has characterized it: "...a 'public body...exercising public powers of the Commonwealth'...an agency which exercises 'police' powers..." *Mitchell v. Chester Housing Authority*, 389 Pa. 314, 320, 132 A. 2d 873, 876 (1957) (citing *Dornan v. Philadelphia Housing Authority*, 331 Pa. 209, 222, 200 Atl. 834, 841 (1938)). Any attempt to effectuate the fundamental changes contemplated by the "cooperation agreement" should be addressed to the General Assembly. The proposed contract in its present form is unlawful as violating both the spirit of the Housing Authority Law as well as the specific sections of the act cited above.

Sincerely,

J. SHANE CREAMER,
Attorney General.

OFFICIAL OPINION No. 121

Voting—Durational Residency as a Qualification for Electors

1. The Supreme Court of the United States declared, in *Dunn v. Blumstein*, 405 U.S. 330 (1972), durational residency requirements are unconstitutional.
2. The Supreme Court, in its discussion, stated that durational residency requirements in excess of 30 days were unconstitutional.
3. The Pennsylvania Constitution and Statutes, Article VII, § 1 (2) (3), 25 P.S. § § 1362 and 2811 provide for durational residency requirements in excess of 30 days and are, therefore, unenforceable.
4. The Secretary of the Commonwealth is advised to instruct local voting officials of the effect of *Dunn v. Blumstein*, 405 U.S. 330 (1972).

Harrisburg, Pa.

May 5, 1972

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

Dear Secretary Tucker:

You have, by letter dated April 14, 1972, requested my opinion as to the effect of the case of *Dunn v. Blumstein* on the durational residency qualifications for electors in Pennsylvania.

You are hereby advised that, as a result of the decision of the United States Supreme Court, in *Dunn v. Blumstein*, 405 U.S. 330 (1972), the present durational residency requirements for qualification of electors in Pennsylvania are unenforceable. You are further advised that, as Chief Election Officer of the Com-

monwealth of Pennsylvania, you are to instruct local election officials to disregard the following presently existing durational residency requirements in registering and qualifying citizens of Pennsylvania to vote:

Article VII, § 1 (2), (3), of the Constitution of the Commonwealth of Pennsylvania insofar as it requires a ninety-day durational residency in the State and a sixty-day durational residency in the election district as a prerequisite to voting.

25 P. S. § 2811 (2), (3), insofar as it requires durational residency of one year in the State and sixty days in the election district as a prerequisite to voting.

25 P. S. § 1362, insofar as it requires durational residency of six months prior to an election as a qualification to voting in a borough election.

In the case of *Dunn v. Blumstein*, *supra*, Plaintiff, being denied the right of registering as a voter in Tennessee, challenged provisions of the Tennessee Constitution and Tennessee Statutes requiring durational residency of 12 months in the State and 3 months in the county as preconditions to voting. See Article IV, Section I of the Tennessee Constitution and Section 2-201, Tennessee Code Annotated. The Supreme Court of the United States stated that durational residency requirements denying some citizens the right to vote are unconstitutional, unless necessary to promote a compelling State interest. The Court found Tennessee's challenged residency provisions unconstitutional as the State had failed to establish a compelling need for such requirements to assure voter knowledgeability or a common interest of voters, nor could the length of Tennessee's durational residency requirements be justified on the grounds of prevention of voter fraud. In drawing the latter conclusion, the Court stated:

"Thirty days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud—and a year, or three months, too much. This is the judgment of Congress in the context of Presidential elections." 405 U. S. at 348.

On the basis of the foregoing ruling by the Supreme Court of the United States, it is clear that the present durational residency requirements in Pennsylvania cannot be enforced. As a result local election officials may not bar citizens and residents of Pennsylvania from voting for failure to meet presently existing durational residency requirements and you, as chief official of this Commonwealth, are advised to so instruct relevant local authorities.

Sincerely yours,

PETER W. BROWN
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 122

*Parent Assistance Authority—Parent Reimbursement Fund—Treasurer's Pre-audit Powers**

1. The Parent Reimbursement Fund, created by Act No. 92 of 1971 (24 P. S. § § 5701-5711), and the Parent Assistance Authority are not subject to the pre-audit functions of the Treasurer.
2. The Legislature, in creating the Fund and the Authority, was deeply concerned and highly aware of the problems of "excessive entanglement" which were determinative of the case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
3. The Authority has its own pre-audit powers and in view of the Legislature's concern over avoiding excessive entanglement, the Treasurer does not have pre-audit responsibilities with respect to the Fund.

Harrisburg, Pa.

May 4, 1972

Honorable Grace Sloan
Treasurer of the Commonwealth of Pennsylvania
Harrisburg, Pennsylvania

Dear Treasurer Sloan:

The question has been raised whether The Parent Assistance Authority is subject to your pre-audit functions as prescribed by Act No. 4 of 1971 (72 P. S. § § 306, 307, 402, 404 and 1501-1504).

You are advised and it is our opinion that The Parent Assistance Authority is not subject to your pre-audit functions and that the moneys constituting the Parent Reimbursement Fund are to be paid over to The Parent Assistance Authority at their request.

The Parent Assistance Authority was created by Act No. 92 of 1971 (24 P. S. § § 5701-5711) in the wake of the decision of the Supreme Court of the United States in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This decision ruled unconstitutional the Nonpublic Elementary and Secondary Education Act, 24 P. S. § 5601 *et seq.*, which permitted the Commonwealth to purchase educational services from nonpublic schools. The rationale of the decision was that the audit requirements of the act and the necessary review by state officials of performance of any educational service contracts perforce enmeshed and entangled officials and agencies of the Commonwealth in the operation of and curriculum planning and content of sectarian schools. The Court ruled, in view of these "excessive entanglements," that the establishment of religion clause of the First Amendment to the United States Constitution had been breached.

To avoid the problem of excessive entanglement, the legisla-

* Editors note: The Parent Assistance Authority Act was declared unconstitutional by the U.S. Supreme Court in *Sloan v. Lemon*, 413 U.S. 825 (1973).

ture enacted Act No. 92 which sets forth a system of partial reimbursement of the cost of tuition to parents of children who have attended non-public schools. See remarks by Senator Sesler at time of final passage, *State Legislative Journal*—Session of 1971, vol. 1, No. 84, at p. 739 and Senator Howard, *supra*, at p. 740 and the remarks of Representative Galfand, *House Legislative Journal*, Vol. 1, No. 69, at pp. 1204, 1206 and 1207.

Act No. 92 itself is replete with provisions which prevent or inhibit the Authority and the Commonwealth from becoming involved in the affairs of sectarian non-public schools.

Section 4 provides, in part, that the authority

“... shall exercise no direction, supervision or control over the policy determinations personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools.”

Section 4 further provides,

“The authority shall have no power, at any time or in any manner to pledge the credit or taxing power of the Commonwealth, nor shall any of its obligations or debts be deemed to be obligations of the Commonwealth.”

Moreover, the legislature created an independent Authority with its own funds and the power to make reimbursement to parents and to audit all requests for reimbursement. Act No. 92, § § 4, 7 and 8.

With this understanding of the basic purposes of this legislation, it is necessary to examine the relationship of the Parent Assistance Authority to your Department.

Act No. 4 of 1971 in general terms requires the Treasurer to pre-audit requisitions by state agencies of funds of the State treasury, Act No. 4, § 2, 72 P. S. § 307. The critical question is, of course, whether the funds of the Parent Assistance Authority are a fund of the state treasury for purposes of subjecting expenditures from these funds to the treasurer's pre-audit.

Section 5 of Act No. 92 creates the Parent Reimbursement Fund and appropriates the fund to The Parent Assistance Authority.

“... to be used solely for the purposes of this act.”

Section 8 of Act No. 92 gives the Authority the power to pre-audit payments from the fund by authorizing the Authority to employ means reasonably necessary to determine the accuracy of statements submitted by parents.

Moreover, 72 P. S. § 302 designates a list of funds to which moneys received by the Treasurer must be credited. The Parent Reimbursement Fund is not one of the funds in § 302 indicat-

ing that the Parent Reimbursement Fund is not a fund subject to the supervision of the Treasurer. ¹

In view of the fact that a separate fund has been appropriated to The Parent Assistance Authority and the Authority has its own pre-audit function it appears that The Parent Reimbursement Fund is not subject to pre-audit by the Treasurer. This interpretation is confirmed by the overriding and deep concern of the legislature to have The Authority and its functions as much divorced from control and supervision of state agencies as possible to avoid the constitutional difficulties identified in *Lemon v. Kurtzman*, *supra*.

Accordingly you are advised that expenditures from The Parent Reimbursement Fund are not subject to your pre-audit. You are further advised that upon request by the Parent Assistance Authority, moneys in The Parent Reimbursement Fund are to be remitted to Authority.

Sincerely yours,
PETER W. BROWN
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 123

*Exclusionary Development Policies—Project 500 Act—Department of Community Affairs**

1. Attorney General's Opinion of January 13, 1972, applies to proposed grants to municipalities under "Land and Water Conservation and Reclamation Act," Act of January 19, 1968, P. L. (1968) 996 (32 P. S. § 5101 et seq.), when such municipalities have exclusionary development policies.
2. Exclusionary development policies may so restrict use of and access to "Project 500" facilities as to make the grant by Department of Community Affairs for such facilities illegal.

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1. It should be noted that § 302 provides that moneys which are to be credited to the listed funds are only those moneys paid to the State treasury and of which the State Treasurer is custodian. Apparently there are other funds not listed in § 302 which have been created by statute, requisitions from which are being pre-audited by the Treasurer. By the same token there are state funds presently being expended and not on the list in § 302, which expenditures are not being pre-audited by the Treasurer, e.g. funds expended by the General State Authority and The Highway Bridge Authority. Suffice for this opinion, The Parent Reimbursement Fund appears more like funds held by G.S.A. than funds not mentioned in § 302 which the Treasurer pre-audits.

* Editors note: Certain issues discussed in this opinion are presently before the Commonwealth Court in the case of *Upper St. Clair Township v. Commonwealth of Pennsylvania*, 1090 C. D. 1973.

Harrisburg, Pa.
May 5, 1972

Honorable William H. Wilcox
Secretary
Department of Community Affairs
Harrisburg, Pennsylvania

Dear Secretary Wilcox:

You have asked whether our opinion No. 97 of January 13, 1972, (attached herewith and hereby incorporated by reference) dealing with the authority of the Department of Community Affairs to regulate concerning access and use of facilities developed with the financial aid of the Commonwealth pursuant to the "Land and Water Conservation and Reclamation Act", Act of January 19, 1968, P. L. (1967) 996, (32 P. S. § 5101 *et seq.*) ("Project 500" Act) is applicable to communities having exclusionary development policies. You have defined exclusionary development policies to mean "zoning and other land-use control practices that effectively preclude construction of dwelling units that could house minority, and low-income and (in some cases) middle-income families, either by direct exclusion or by raising the price of residential development."

Our opinion of January 13, 1972, concluded "that the Department of Community Affairs has both a statutory and constitutional duty to closely examine any proposed admission restrictions or fees for future Project 500 projects, and to use its reasonable discretion in promulgating regulations relating thereto." In particular, that opinion pointed to restrictions on use and access based on race or wealth as being particularly objectionable from the point of view of statutory and constitutional law, and from the point of view of the stated policy of the Governor to eliminate such restrictions from State-supported projects.

You are informed that our opinion of January 13, 1972, does apply to such communities, because exclusionary development policies may have the effect of substantially excluding minority and low-income persons from Project 500 facilities, and, when they do, such exclusionary development policies make Commonwealth funding of such projects illegal for the reasons stated in our opinion of January 13, 1972.

The use of local exclusionary zoning practices has been recognized by three national commissions as being primarily responsible for the exclusion of members of minority groups and low-income persons from the suburbs.¹ The 1959 report of the United States Commission on Civil Rights stated that:

1. *Building the American City*, Report of the National Commission on Urban Problems, H. R. Doc. No. 91-34, 91st Cong., 1st Sess., pp. 211-17; Report of the President's Committee on Urban Housing, "A Decent Home", pp. 135-147 (1968); Report of the U. S. Commission on Civil Rights, p. 338 (1959).

As the suburbs of upper and middle-income families grow and occupy most of the available outlying land, the metropolitan area further divides itself into two cities. *Suburban communities enact zoning regulations to preserve their pleasant residential character. By requiring lots of homes of considerable size, these communities make it difficult for low-cost homes to be constructed outside the central city.* With the suburbs thus forming a practically impenetrable ring around the city, the expanding lower-income population in the city is trapped.² (Emphasis supplied.)

The population trends in the Philadelphia area exemplify the migration of white people from urban centers. From 1960 to 1970, the City of Philadelphia experienced a net loss in population of 48,000 persons, which represented a decrease in white population of 139,000 persons, and an increase in black population of 125,000 persons. The percentage of black persons in Philadelphia was 26.4% in 1960 and 33.6% in 1970. In the suburban areas around Philadelphia, 6.1% of the population was composed of black persons in 1960, and this increased to only 6.6% in 1970.³

These figures, tending to support as they do the conclusions of the Commissions that present suburban zoning regulations create a barrier against blacks and poor people, also suggest that such regulations effectively keep blacks and poor people out of Project 500 facilities located in these communities.

Clearly in those situations where exclusionary zoned municipalities impose residency requirements for use of Project 500 facilities (as we know some presently do), the result in almost all cases will be automatic exclusion of minorities and poor people, since such people, as we have seen, cannot become residents. Appropriate action in such cases by the Department of Community Affairs will be mandated according to the principles laid down in our January 13, 1972 opinion.

Even where residency is not required, furthermore, the Department must determine if exclusionary zoning policies adversely affect access by minorities and the poor to the facility. If minority, low or moderate income persons are not able to find housing in the municipality, how will they obtain access to the recreational facility? Is the available transportation so limited and the cost so excessive as to restrict the use of the facility to those who reside in the community? If so, the conclusion reached in these circumstances should be the same as our conclusion with respect to the use of admission restrictions or fees that have the effect of restricting persons from Project 500 facilities on

2. at p. 338

3. Statistics derived from the statement of Dr. George H. Brown, Director, Bureau of Census, Department of Commerce, before the U.S. Commission on Civil Rights, June 14, 1971.

the basis of race or wealth in violation of State and Federal laws cited in the January 13, 1972 opinion. As we stated in that opinion:

"That conclusion not only necessitates appropriate scrutiny by the Department of Community Affairs under its statutory authority . . . but also requires the Department to consider whether the *funding* of a project that will be unconstitutionally administered by a Pennsylvania municipality is in itself an unconstitutional State act."
2 Pa. B. at 273.

The Department must look carefully at the effect of such exclusionary development practices on the use of and access to recreational facilities. Any restriction that has the effect of restricting the use of a State-funded facility by race or wealth, must receive the Department's closest scrutiny. The existence of such restrictions will be a reason for denial of such funds in appropriate circumstances, for example, if no affirmative programs are established to ameliorate or eliminate the effect of such restrictions on racial minorities or low-income people.

On the basis of the foregoing, it is appropriate and necessary for the Department to promulgate regulations and devise procedures concerning Project 500 grants in conformity with this opinion.

Very truly yours,

MARK P. WIDOFF
Deputy Attorney General

BARRY S. KOHN
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 124

Liquor Control Board—Liability for Invalid Policy—Relationship of Sales Tax, Emergency, and Net Sales Price

1. The Liquor Control Board, in discriminating in its markup policies between wine (58%) and other distilled spirits (48%) was acting on the authority of a former Attorney General's opinion and thus bears no liability for its invalid policy.
2. The requisites of a uniform retail pricing policy required by Op. Atty. Gen. No. 118, April 27, 1972, 2 Pa. B. 829, will have been implemented within a reasonable time if they are included in the scheduled May 31st repricing.
3. The inclusion of the 18% emergency tax in the tax base for purposes of computing the 6% sales tax is mandated by the Tax Reform Code of 1971, 72 P. S. § 7101 *et seq.*

Harrisburg, Pa.
May 9, 1972

Mr. Edwin Winner
Chairman
Liquor Control Board
Harrisburg, Pennsylvania

Dear Mr. Winner:

With reference to our recent opinion, Op. Atty. Gen. No. 118, April 27, 1972, 2 Pa. B. 829, concerning the Liquor Control Board's retail pricing policy and the disparity between the markup on wine (58%) and the markup on other distilled spirits (48%), you have asked to what extent, if any, the Board will be liable for damages.

As you know, former Attorney General Anne X. Alpern issued an opinion, Op. Atty. Gen. No. 206, December 14, 1959, authorizing the Board to mark up the retail price of whiskey using a certain percentage and to mark up the price of wine using a different percentage. Our recent opinion (No. 118) superseded and rescinded former Attorney General Alpern's decision, but since the Board's invalid policy was based on an official opinion, the Board clearly bears no liability for implementing such a policy.

Additionally, you have asked how soon the change mandated by our opinion must be implemented. It is our understanding that a new price schedule will be introduced by the 31st of May. We recognize that certain administrative difficulties are involved in making such a change and a reasonable time must be allowed under these circumstances. The proposed May 31st repricing would be sufficient to satisfy the requisites of our opinion.

Further, you have requested our opinion as to the relationship between the net sales price of liquor, the 18% tax required by the Emergency Liquor Tax, 47 P. S. § 796 (Johnstown Flood 1936), and the 6% sales tax required by the Tax Reform Code of 1971, 72 P. S. § 7101 *et seq.* Specifically, you have asked whether the 6% tax should be collected on the sum of the amount paid to the manufacturer, federal tax, freight and discount, markup, plus the 18% emergency tax, or should the 6% sales tax be computed on the sum of just the amount paid to the manufacturer, federal tax, freight and discount, and markup, thereby excluding the 18% emergency tax from the base on which the 6% sales tax is imposed.

Upon examining the relevant statutes, it appears that the inclusion of the 18% emergency tax in the base for purpose of computing the 6% sales tax is mandated by law. According to the 1971 Act, "purchase price" is defined as:

"The total value of anything paid or delivered, or promised to be paid or delivered, whether it be money or otherwise, in complete performance of a sale at re-

tail, as herein defined, *without any deduction on account* of the cost or value of the property sold, cost or value of transportation, cost or value of labor or service interest or discount paid or allowed after the sale is consummated, *any other taxes imposed by the Commonwealth of Pennsylvania* or any other expense....” Section 72 P. S. § 7201 (g) (1) (Emphasis added.)

The above definition specifically requires that the sales tax be computed on a “total value” that includes “...any other tax imposed by the Commonwealth....”

However, while the Board’s present policy appears to be sanctioned by statute, this does not mean that other equally valid pricing policies could not also be instituted. As you know, the Governor has initiated a study of the entire method of liquor distribution in the Commonwealth. I hope you will continue to direct your attention to developing alternatives to the present system.

Sincerely,

J. SHANE CREAMER,
Attorney General.

OFFICIAL OPINION No. 125

Filing Fees and Court Costs—Wage Payment and Collection Law—Department of Labor and Industry

1. Department of Labor and Industry is not required to pay filing fees or other costs or fees when initiating action under Wage Payment and Collection Law, Act of July 14, 1961, P. L. 637, § 11 (43 P. S. § 260.11).

Harrisburg, Pa.

May 3, 1972

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

Dear Secretary Smith:

You have inquired as to whether the Department of Labor and Industry is required to pay the filing fee or other costs or fees when it initiates legal actions for wages on behalf of employes against employers under the provisions of the Wage Payment and Collection Law, Act of July 14, 1961, P. L. 637 § 11 (43 P. S. § 260.11).

You are advised that the Department of Labor and Industry is not so required and that any attempt by any court or justice of the peace to make the payment of such fees a condition

precedent to the initiation of such a proceeding is unlawful.

Section 11(b) (c) of the Wage Payment and Collection Law (43 P. S., § 260.11(b) (c)) provides:

“(b) If the Secretary of Labor and Industry determines that wages due have not been paid and that such unpaid wages constitute an enforceable claim, the secretary shall, upon the request of the employe, take an assignment in trust for the assigning employe of such claim for wages without being bound by any of the technical rules respecting the validity of any such assignments and may bring any legal action necessary to collect such claim, subject to any right by the employer to set-off or counter-claim against the assigning employe. Upon any such assignment, the Secretary of Labor and Industry shall have the power to settle and adjust any such claim to the same extent as might the assigning employe.

“(c) The court in any action brought under this subsection shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow costs of the action, including costs or fees including reasonable counsel fees of any nature to be paid by the defendant. *The Secretary of Labor and Industry shall not be required to pay the filing fee or other costs or fees of any nature or to file bond or other security of any nature in connection thereto or as a condition precedent to the availability to the Secretary of Labor and Industry of any process in aid of such action or proceedings.* The Secretary of Labor and Industry shall have the power to join various claimants in one claim or lien, and in case of suit to join them in one cause of action.” (Emphasis added.)

The above language is so clear as to leave no doubt that no filing fees or costs may be charged to the Secretary of Labor and Industry for any action brought under Section 11 of the Wage Payment and Collection Law.

Sincerely yours,

MARK P. WIDOFF
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 126

Fuel Use Tax and Liquid Fuels Tax—Entities exempt as the “Commonwealth and every political subdivision”—Effective date of exemption from the Liquid Fuels Tax for such entities—Appropriate provision to be utilized in making refunds due for improper overpayment of the Fuel Use Tax.

1. These entities are now exempt from the Liquid Fuels Tax and the Fuel

Use Tax: "Political subdivisions" of the Commonwealth as defined in the Statutory Construction Act, 46 P. S. § 601; Authorities formed under enabling legislation such as the Municipality Authorities Act of 1945, Act of May 2, 1945, P. L. 382, § 1, *et seq.*, 53 P. S. § 301, *et seq.*; Instrumentalities or agencies of the Commonwealth, unless otherwise provided. Such instrumentalities or agencies of the Commonwealth include the Delaware River Joint Toll Bridge Commission, the Delaware Valley Regional Planning Commission, the Delaware River Basin Commission, the Delaware River Port Authority, the Pennsylvania Turnpike Commission, Clarion State College, and Pennsylvania State University. The Port Authority of Allegheny County is not exempt from either tax.

2. Unless otherwise provided, the Commonwealth of Pennsylvania and its political subdivisions are not entitled to exemption from the Liquid Fuels Tax for purchases made before April 1, 1970.
3. Appropriate refund petitions for tax, penalties or interest improperly paid for the Fuel Use Tax must be made as authorized in Section 16 of the Fuel Use Tax Act, 72 P. S. § 2614.16.

Harrisburg, Pa.
June 6, 1972

Honorable Robert P. Kane
Secretary
Department of Revenue
Harrisburg, Pennsylvania
AND

Honorable Richard M. Wagner
Secretary
Board of Finance and Revenue
Harrisburg, Pennsylvania

Gentlemen:

You have requested our advice regarding the following questions relating to the Liquid Fuels Tax Act, Act of May 21, 1931, P. L. 149, 72 P. S. § 2611(a), as amended, and the Fuel Use Tax Act, Act of Jan. 14, 1952, P. L. (1951) 1965, 72 P. S. § 2614.1, *et seq.*, as amended:

1. In light of the decision of the Supreme Court of Pennsylvania in *Commonwealth v. Erie Metropolitan Transit Authority*, 444 Pa. 345, 281 A. 2d 882 (1971), what entities are entitled to claim exemption from the Fuel Use Tax and Liquid Fuels Tax as "the Commonwealth of Pennsylvania and its political subdivisions?"

2. What is the effective date of the right to exemption from the Liquid Fuels Tax for "the Commonwealth of Pennsylvania and its political subdivisions"?

3. Should refunds for improper payments made for the Fuel Use Tax by "the Commonwealth of Pennsylvania and its political subdivisions" be made as authorized by Section 16 of the Fuel Use Tax Act or as authorized by Section 503(a) (4) of the Fiscal Code, Act of April 9, 1939, P. L. 343, as amended. 72 P. S. § 503(a) (4)?

It is our opinion, and you are advised, as follows:

1. These entities are now exempt from the Liquid Fuels Tax and the Fuel Use Tax:

"Political subdivisions" of the Commonwealth as defined in the Statutory Construction Act, 46 P. S. § 601; Authorities formed under enabling legislation such as the Municipality Authorities Act of 1945, Act of May 2, 1945, P. L. 382, § 1, *et seq.*, 53 P. S. § 301, *et seq.*

Instrumentalities or agencies of the Commonwealth, unless otherwise provided. Such instrumentalities or agencies of the Commonwealth include the Delaware River Joint Toll Bridge Commission, the Delaware Valley Regional Planning Commission, the Delaware River Basin Commission, the Delaware River Port Authority, the Pennsylvania Turnpike Commission, Clarion State College, and Pennsylvania State University. The Port Authority of Allegheny County is not exempt from either tax.

2. Unless otherwise provided, the Commonwealth of Pennsylvania and its political subdivisions are not entitled to exemption from the Liquid Fuels Tax for purchases made before April 1, 1970.

3. Appropriate refund petitions for tax, penalties or interest improperly paid for the Fuel Use Tax must be made as authorized in Section 16 of the Fuel Use Tax Act, 72 P. S. § 2614.16.

The basis for the above conclusions is as follows:

I. Section 4 of the Liquid Fuels Tax Act, 72 P. S. § 2611(d), as amended by the Act of March 3, 1970, P. L. 41, (effective April 1, 1970), specifically exempts "...liquid fuels delivered to the Commonwealth and every political subdivision..." In regard to this Section, the following entities are now construed to be exempt from the Liquid Fuels Tax Act:

A. Entities exempt from the Liquid Fuels Tax Act include those within the meaning of "political subdivision" as defined in the Statutory Construction Act at 46 P. S. § 601, which states:

"'Political subdivision,' [means] any county, city, borough, incorporated town, township, school district, vocational school district and county institution district."

Such is in accord with the decision in *Erie Metropolitan Transit Authority, supra*, at 348.

B. In exempting the Commonwealth, the Liquid Fuels Tax Act likewise exempts authorities formed under enabling legislation such as the Municipality Authorities Act, Act of May 2, 1945, P. L. 382, 53 P. S. § 301, *et seq.* In reaching this conclusion in *Erie Metropolitan Transit Authority, supra*, the Supreme Court of Pennsylvania declared:

"We have concluded that the Fuels Tax Act [Liquid Fuels Tax Act], in exempting the Commonwealth itself

from the tax, likewise exempted Authorities under enabling legislation such as the Authorities Act [Municipality Authorities Act of 1945]." 444 Pa. at 348.

C. Exemption of the Commonwealth from the Liquid Fuels Tax Act creates a presumption against imposition of the tax upon agencies or instrumentalities of the State in their delegated duties. In *Erie Metropolitan Transit Authority, supra*, the Court echoed the holding in *Commonwealth v. Pure Oil Company*, 303 Pa. 112, 154 A. 307 (1931), which construed the Liquid Fuels Tax Act of 1929, Act of May 1, 1929, P. L. 1037, as amended, as follows:

"We have many times said that while the State may, by a general statute, tax subordinate governmental agencies in matters affecting the performance of their governmental duties, the presumption is that this was not intended and nothing short of an express or necessarily implied purpose to tax them will suffice to make them liable therefor." 303 Pa. at 117.

Thus, in the absence of legislative intent to the contrary, the following entities are exempt from the Liquid Fuels Tax in matters relating to the performance of their delegated duties, as the enabling legislation of each declares it to be an instrumentality or agency of the State:

(1) The Delaware River Joint Toll Bridge Commission is exempt. Enabling legislation makes the Commission an instrumentality of the Commonwealth of Pennsylvania. Article I of the Act of June 25, 1931, P. L. 1352, 36 P. S. § 3401.

(2) The Delaware Valley Regional Planning Commission is exempt. Enabling legislation stated that the Commission is an instrumentality of the Commonwealth. Article II, Section 1 and Article VI, Section 1 of the Act of June 30, 1965, P. L. 153, as amended, 73 P. S. § 701. Further, the Commission is specifically exempted from local and State taxes in Pennsylvania. Article IV, Section 3 of the Act of June 30, 1965, P. L. 153, as amended, 73 P. S. § 701.

(3) The Delaware River Basin Commission is exempt. This Commission was created as an agency and instrumentality of the Commonwealth. Article II, Section 2.1 of the Act of July 7, 1961, P. L. 518, 32 P. S. § 815.101. Further, the Commission is specifically exempted from local and State taxes in Pennsylvania. Article 14, Section 14.3 of the Act of July 7, 1961, P. L. 518, 32 P. S. § 815.101.

(4) The Delaware River Port Authority is exempt. The Authority is an instrumentality of the Commonwealth of Pennsylvania. Article I of the Act of June 12, 1931, P. L. 575, as amended, 36 P. S. § 3503.

(5) The Pennsylvania Turnpike Commission is exempt. Enabling legislation creating the Turnpike Commission makes the

Commission an instrumentality of the Commonwealth. Section 4 of the Act of May 21, 1937, P. L. 774, 36 P. S. § 652(d).

(6) Clarion State College is exempt. Section 202 of the Administrative Code, 71 P. S. § 62, provides that the Board of Trustees of Clarion State College is placed under and made a departmental board of the Department of Public Instruction. Further, in Section 1311 of the Administrative Code, 71 P. S. § 361, the powers and duties of the Board's trustees are essentially subject to and limited by the supervision of the Superintendent of Public Instruction. All other references to State colleges throughout the Administrative Code relate to the Department of Public Instruction and the Superintendent of Public Instruction or the Executive Department of the Commonwealth. Thus, Clarion State College qualifies as an instrumentality of the Commonwealth to the same extent as any other board, commission or office, and thus is exempt from the Fuel Use Tax.

(7) Pennsylvania State University is exempt. In a formal opinion by the Attorney General, Pennsylvania State University has been held to be an instrumentality of the Commonwealth for the purpose of determining exemptions from fuel taxes. Op. Atty. Gen. No. 6, December 21, 1921.

D. An instrumentality or agency of the Commonwealth is not exempt from the Liquid Fuels Tax Act if enabling legislation of the entity states that it will be subject to such a tax. Thus, since Section 12 of the Port Authorities In Counties of Second Class Act, Act of April 6, 1956, P. L. (1955) 1414, § 12, as amended, 12 P. S. § 562, states that any Authority created under that Act shall not be exempt from "liquid fuels taxes" or "fuel use taxes," the Port Authority of Allegheny County must pay such taxes.

II. Section 4 of the Fuel Use Tax Act, 72 P. S. § 2616.6, imposes "[A] permanent excise tax . . . on all dealer-users upon the use of fuel within the Commonwealth." The same section establishes the following exemption from the tax: "No tax is hereby imposed . . . upon any fuel used by or sold or delivered to the Commonwealth of Pennsylvania and its political subdivisions. . . ."

Since both the Liquid Fuels Tax and the Fuel Use Tax identically exempt "the Commonwealth of Pennsylvania and its political subdivisions," in the absence of reason to the contrary, entities presumed exempt from one tax are similarly exempt from the other. Thus, the Fuel Use Tax Act should be construed to provide exemptions identical to those provided from the Liquid Fuels Tax Act as indicated in Part I of this opinion.

III. The Act of March 3, 1970, P. L. 41 (effective April 1, 1970), amended Section 4 of the Liquid Fuels Tax Act to provide that the Commonwealth of Pennsylvania and every political subdivision would be exempt. While such entities are properly exempt from the Liquid Fuels Tax as of April 1, 1970, they are

not so exempt for taxable purchases made prior to the effective date of the amendment. This is in accord with sections of the Statutory Construction Act providing that "...new provisions should be construed as effective only from the date when the amendment became effective," 46 P. S. § 573; and that, "[N]o law shall be construed to be retroactive unless clearly and manifestly so intended by the Legislature." 46 P. S. § 556.

IV. Refunds of improper payments for Fuel Use Tax should be made as directed by Section 16 of that Act, 72 P. S. § 2614.16, which reads in pertinent part:

"The Board of Finance and Revenue may refund to dealer-users tax, penalties, and interest provided by this act and paid by them as a result of an error of law or of fact, or both law and fact. Claims for refunds shall be filed with the Board of Finance and Revenue within one year of the date of overpayment and shall be made under the procedure prescribed by the Fiscal Code."

Thus, in all instances, any refund petition for improper payments of tax, penalty, or interest, for the Fuel Use Tax must be filed within one year.

Section 503(a) (4) of the Fiscal Code, Act of April 9, 1939, P. L. 343, as amended, 72 P. S. § 503(a) (4), which generally provides for a five-year limitation on refund petitions, is not applicable to the Fuel Use Tax, since Section 16 of the Fuel Use Tax is both more specific and was enacted later than Section 503(a) (4) of the Fiscal Code. Section 16 is controlling.

This conclusion is in accord with sections of the Statutory Construction Act providing that:

"Whenever the provisions of two or more laws passed at different sessions of the Legislature are irreconcilable, the law latest in date of final enactment shall prevail." 46 P. S. § 566; and that

"Whenever a general provision in a law shall be in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the Legislature that such general provision shall prevail." 46 P. S. § 563.

Also, in this regard, see *Graybill and Bushlong, Inc. v. the Board of Finance and Revenue*, 414 Pa. 70, 198 A. 2d 316 (1964).

Sincerely yours,

BARTON ISENBERG

Deputy Attorney General

J. SHANE CREAMER

Attorney General

OFFICIAL OPINION No. 127

*Secretary of Commerce—Approval—Industrial Development Authority Law
—Public Purpose*

1. The provision in Section 7(f) of the Industrial Development Authority Law of August 23, 1967, P. L. 251, as amended, 73 P. S. § 377(f) that "no bonds shall be issued and sold and the construction of a project shall not be commenced until" the Secretary of Commerce approves the project does not mean that if either of these acts inadvertently occurs the project may not thereafter be approved.
2. The purpose of the requirement in 73 P. S. § 377(f) is to make sure that the public purpose of the Industrial Development Authority Law is not being subverted.
3. Where, in the circumstances of a particular project, the Secretary of Commerce finds that a minimal amount of excavation was done before a project was approved and at a time when the land was owned by a redevelopment authority, the non-compliance was inadvertent, no actual construction took place, no public funds to be expended by the local industrial development authority will pay for the work done, no refinancing of the project will take place, the Secretary of Commerce may approve the project in accordance with Section 7(f) of the Industrial Development Authority Law, as amended, 73 P. S. § 377(f).

Harrisburg, Pa.

June 7, 1972

Honorable Walter G. Arader
Secretary
Department of Commerce
Harrisburg, Pennsylvania

Dear Secretary Arader:

You have requested our advice regarding your authority under Section 7 of the Industrial Development Authority Law ("Law") of August 23, 1967, P. L. 251, as amended, 73 P. S. § 377 (f) under the following circumstances:

You received an application from the Erie County Industrial Development Authority ("Authority") in the usual form, seeking your approval of a commercial development project wherein Urban Associates ("Urban"), a partnership, would acquire a piece of land from the Erie Redevelopment Authority, construct the project at a cost of approximately \$1,700,000.00, and, thereafter, transfer the same to Authority for the sum of \$1,360,000.00. Authority would pay for the project from the proceeds of a first mortgage loan obtained from a local bank in that amount, which mortgage would be secured and limited to the project and a pledge of its rentals and revenues, in accordance with law. Sections 6 and 7 of the Law, as amended, 73 P. S. §§ 376-377; Section 5(b) of the Pennsylvania Redevelopment Area Economic Cooperation and Implementation Act, as amended, 73 P. S. § 335 (b).

Simultaneously with the mortgage transaction, Authority would lease back the project to Urban for a term of years and

rental payments equivalent to those of the mortgage loan, with an option to Urban to purchase the project for \$10.00 at the end of the lease term. In short, the mortgage loan would be repaid from the rentals paid to the Authority and the Authority's liability limited to payment therefrom.

The ownership of the land by the Erie Redevelopment Authority, as noted, arises from the fact that it is located in a designated Urban Renewal Area. Accordingly, the acquisition would come under Section 5 (b) of the Pennsylvania Redevelopment Area Economic Cooperation and Implementation Act of July 6, 1961, as amended by the Act of August 31, 1971 (Act No. 99), 73 P. S. § 335 (b). In your opinion, the project met the criteria of this Act as well as those of the Industrial Development Authority Law, *supra*, as amended by the Act of December 29, 1971 (Act No. 171).

However, it thereafter came to your attention that certain work had commenced on the project prior to the time the application was submitted. You also received an anonymous allegation that your approval of the project would violate Section 6 (d) (2) of the Law, 73 P. S. § 376 (d) (2), which prohibits the acquisition of existing development projects under circumstances which would be primarily for the purpose of directly or indirectly refinancing the obligations of the enterprise.

You have now received affidavits from the Authority and Urban which state that certain work did begin on the land prior to the time that title passed from the Redevelopment Authority, but that this work comprised only a small amount of excavation in order to take advantage of favorable weather conditions; that no refinancing will take place since no previous financing had been arranged other than the bank loan in the amount of \$1,360,000.00 to be secured under the provisions of the Law; that no mechanics' liens could or would be filed, since the work was done by members of the partnership which would own the project; and that none of the cost of the work performed prior to approval would be paid from the mortgage proceeds. The excavation work performed was represented to cost far less than the \$340,000.00 which Urban is required to put into the project, which would mean that such work would be excluded from the mortgage proceeds if the representation is correct.

Upon our review of the above circumstances, it is our opinion, and you are so advised, that if you find the facts to be as stated by the Authority and Urban, you may approve the project.

The purpose of the Law is to provide an additional means of financing the promotion and development of industrial, commercial, manufacturing, and research and development facilities, including the financing of machinery and equipment. Section 2 (5), as amended, 73 P. S. § 372 (5). It achieves that purpose by the creation of local industrial development authorities which have the power to issue tax-free bonds or other obligations pay-

able solely from the revenues derived from the projects they finance. Section 7 (a), 73 P. S. § 377 (a). They are to use this power to enter into agreements for acquisition, lease or sale of industrial development projects. Section 6 (b) (8), (9), (10), as amended, 73 P. S. § 376 (b) (8), (9), (10). Act No. 99 of 1971 further encourages such development in redevelopment areas, 73 P. S. § 335.

Section 7 (f) of the Law, as amended, 73 P. S. § 377 (f), is the provision of the Law which sets forth your duties. It is also made applicable to the Pennsylvania Redevelopment Area Economic Cooperation and Implementation Act, *supra*, under Section 5 (b) (2) of that Act as amended by Act No. 99 of 1971, 73 P. S. § 335 (b) (2). It provides that "no bonds shall be issued and sold and the construction of a project shall not be commenced until" your approval of the proceedings to be undertaken has been obtained. In order for you to be able to do this, the chairman of an authority is required to submit to you certain certifications under seal with relevant documents so that you may determine that:

"(1) The project does not violate Section 6 (d) hereof [73 P. S. § 376(d)]; (2) The lease or agreement of sale is in accordance with Section 6 (b) (9) hereof [73 P. S. § 376 (b) (9)]; (3) The proceedings are in conformity with this act, and (4) The industrial and commercial development project will accomplish the public purposes of this act."

If you find the proceedings to be in conformity with the Law, you are to approve them and certify your approval. If they are not in accordance with the Law, you are to disapprove them and so certify. "Thereafter, it shall be unlawful for such authority to issue any bonds upon such proceedings or commence construction of the project unless the proceedings are corrected and as corrected have been approved by the Secretary." 73 P. S. § 377 (f).

It is to be noted that two things are not allowed prior to your approval: issuance of bonds, and construction. The Law, however, does not say what is to happen if they do occur. If either occurs inadvertently when the proceedings are otherwise in conformance with the Law, it would be a harsh result indeed to prohibit the effective use of the Law by requiring a total disapproval. We believe it significant, therefore, that the Act nowhere states that the proceedings must be irrevocably disapproved under such circumstances. Indeed, the clause which we have quoted contemplates your "disapproval" as a matter which can be rectified. If we were to hold that the slightest bit of work performed inadvertently before your approval of a project destroys its eligibility, it would be impossible to rectify the disapproval.

Therefore, we look closely at the basic purpose of this requirement, which is to warn a local industrial development authority not to finalize and undertake any project without

your approval. Since your approval is a necessary precondition, either of these acts would substantially damage an authority's or applicant's financial condition should your approval not be forthcoming. Another purpose relates to Section 6(d) (2) of the Act, as amended, 73 P. S. § 376(d) (2), which provides that an authority shall have no power to acquire existing projects under circumstances "which would be primarily for the purpose of directly or indirectly refinancing the obligations of or providing working capital or other funds for" any enterprise or related enterprise which would thereafter continue to occupy or utilize the project. That section is a very important one as can be seen by the requirement that you must make a specific finding that it is not violated, under Section 7(f), 73 P. S. § 377(f).

The ultimate purpose of both these sections is to make sure that a "public purpose" is being carried on. It is only this "public purpose" of creating industrial and employment opportunities which allows the government to be involved in these types of projects. In *Bashore v. Hampden Industrial Development Authority*, 433 Pa. 40, 50 (1968), in sustaining the constitutionality of the Law, the Supreme Court stated:

"The taxpayers' main concern is that the party who is really benefiting from this program is the private manufacturer who acquires an industrial plant at a much lower cost than he would have incurred had he built it himself. It is beyond question that private manufacturers receive a very large benefit from this program; however, this fact alone should not invalidate the program. If the legislative program is reasonably designed to combat a problem within the competence of the legislature and if the public will benefit from the project, then the project is sufficiently public in nature to withstand constitutional challenge."

Justice Roberts, in concurring, made the following relevant observation (433 Pa. at 66-67):

"In the instant case, although the immediate beneficiary is intended to be the industrial lessee, it acts solely as a conduit by which the public may realize the ultimate benefit of local economic growth. Here, unlike *Price*, the totality of the projects will be devoted to their state purpose—the reduction of unemployment through the creation of new plant development. While private interests are necessarily aided, the purpose of this aid is to foster a vital public interest. Thus, within the confines of this specific program and its objectives—far more subtle than the direct provision of a public service such as public parking—industrial lessees are functionally only incidental beneficiaries, necessary to the realization of an essentially public objective."

Following the above rationale, the use of authority proceeds

to refinance a going development project would be illegal as a clear diversion of public funds for the benefit of a solely private use. Similarly, where a developer would commence construction and then determine that it might be beneficial to finance the project through an industrial development authority, the public purpose of the Law would likewise appear to be diverted because it would not be clear that the public funds were being used to create employment. The developer, having commenced a project with private financing, could not with any degree of certainty be determined to be eligible for assistance. This is why we believe the Law provides that no construction may begin prior to your approval.

In the present case, however, if you find the facts to be as represented, no such diversion will take place. The public aspect of the project, which is in an Urban Renewal Area, was always contemplated, and the work performed was not indicative of a change in financing, but rather an attempt to "get into the ground." The purposes of the requirement are therefore not being subverted.

Moreover, the amount of excavation work done was so minimal that no public funds (derived from the mortgage proceeds) will be used to pay for such work.

Finally, since the work was carried on at a time when the developer did not even own the land in question, it is difficult to conclude that a private use was contemplated. Had the deal fallen through, Urban's efforts would have redounded to the benefit, if any, of the Erie Redevelopment Authority, which owned the land, not to Urban.

Accordingly, we have rendered our opinion, based on the specific facts of this case. These facts, all of which we find significant, are the inadvertence of the developer's non-compliance, the minimal work done, the fact that no actual construction took place, the fact that the developer did not own the land, the fact that the land was owned by a redevelopment authority, the fact that no public funds will pay for the work done, the fact that there is no refinancing, and your satisfaction as to the veracity of these facts. Our opinion, however, should not and may not be used as a precedent for other cases where work has begun, where a subversion of the purposes of the Law would occur.

GERALD GORNISH
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 128

Pennsylvania Transportation Assistance Authority—General Obligation Bonds
—Pennsylvania Constitution—Commonwealth Credit—Municipal Debt—
Title—Undivided Co-ownership Interest.

1. Pursuant to Article VIII, Section 7 of the Pennsylvania Constitution, the Commonwealth may issue general obligation bonds for capital projects defined by the Pennsylvania Transportation Assistance Authority Act of 1967 (66 P. S. § 1902). The bonds must mature within the useful life of the projects as set forth in Section 11 of the Act (66 P. S. § 1911).
2. The Authority may not be required to repay the Commonwealth or its bondholders for the funds utilized by the Authority to purchase land, equipment and other property in connection with its capital projects.
3. There will not be a violation of Article VIII, Section 8 of the Pennsylvania Constitution if the credit of the Commonwealth is pledged or loaned to the Authority because the Authority is not an individual company, corporation or association.
4. Similarly there will not be a violation of Article VIII, Section 9 of the Pennsylvania Constitution if the Commonwealth assumes the debt of the Authority because the Authority is not a county, city, borough, incorporated town, township, or any similar general purpose unit of government.
5. Funds generated by the sale of general obligation bonds may be utilized for the purchase by the Authority of title to or a fractional or undivided co-ownership interest in land, equipment or other property without violating Article VIII, Section 8 and 9 of the Pennsylvania Constitution.
6. The Authority's interest in any equipment or other personal property should be purchased direct from the manufacturer, and its interest in land, equipment or other property should be leased to the user at a nominal rental.

Harrisburg, Pa.
June 8, 1972

Mr. Robert H. Jones
Executive Director
Pennsylvania Transportation Assistance Authority
Harrisburg, Pennsylvania

Dear Mr. Jones:

We have received an inquiry from M. Mark Mendel, Solicitor for the Pennsylvania Transportation Assistance Authority (the "Authority"), by letter of May 1, 1972, concerning the constitutionality of the Authority's use of funds derived from general obligation bonds of the Commonwealth. Mr. Mendel referred us to the letter of Robert P. Casey, Auditor General, dated April 20, 1972, addressed to you, wherein Mr. Casey asked if the expenditure by the Authority of funds raised by the sale of general obligation bonds violated Article VIII, Section 8, or Article VIII, Section 9, of the Pennsylvania Constitution. It is our opinion, and you are advised that the Authority may expend such funds without violating the Pennsylvania Constitution provided that the funds are used to acquire title to or a fractional or undivided ownership interest in land, equipment or other property.

The Authority proposes to use such funds as matching funds which, together with grants from the Federal Government and other funds raised by the municipalities involved, will enable municipalities to acquire land or equipment or to improve or rehabilitate existing transit facilities in accordance with the provisions of the Pennsylvania Transportation Authority Act

of 1967, (66 P. S. § 1901, *et seq.*). Such projects constitute capital projects specifically itemized in the Capital Budget Act for the fiscal years 1971-1972, Transportation Project Itemization Supplement, Act of January 26, 1972 (Act No. 188), as well as capital budgets for prior years.

Article VIII, Section 7 of the Pennsylvania Constitution authorizes the Commonwealth to incur debt, without the approval of the electors, for capital projects specifically itemized in a capital budget, if the debt will not increase the total Commonwealth debt beyond certain limitations. Such debt must mature within a period not to exceed the estimated useful life of the projects as stated in the authorizing law.

Pursuant to the foregoing section, the Commonwealth may issue general obligation bonds for the capital projects defined by the Pennsylvania Transportation Assistance Authority Act of 1967 (66 P. S. § 1902). The bonds must mature within the period of the useful life of the projects as set forth in Section 11 of the Act (66 P. S. § 1911).

As originally enacted, the Act empowered the Authority to borrow money, make and issue bonds and refunding bonds not exceeding thirty million dollars, but the Act of July 24, 1969, P. L. 183, § 5, repealed this provision, (66 P. S. 1905 (a) (10)), and left the Authority without the ability to issue its own bonds.

In connection with the original provision for the Authority to issue bonds, the Act contains the following provision which has not been repealed:

“(b) The authority shall have no power at any time or in any manner to pledge the credit or taxing power of the Commonwealth or any of its political subdivisions nor shall any of its bonds, obligations or debts be deemed to be obligations of the Commonwealth or any of its political subdivisions nor shall the Commonwealth nor any of its political subdivisions be liable for the payment of principal of, or interest on, such bonds, obligations or debts.” (66 P. S. § 1905 (b)).

Because of this provision the Authority may not be required to repay the Commonwealth or its bondholders for the funds utilized by the Authority to purchase land, equipment and other property in connection with its capital projects. Consequently there should be no provisions for repayment by the users to the Authority or the Commonwealth for the funds provided, except that the Authority's interest in land, equipment and other property should be leased to the users for a nominal rental.

Since the funds will benefit local transit companies and local municipalities, the Auditor General is concerned that the use of general obligation bonds may amount to pledging the credit of the Commonwealth to a private entity in violation of Article VIII, Section 8 of the Pennsylvania Constitution, or assuming

the debt or any part thereof, of a municipality in violation of Article VIII, Section 9 of the Pennsylvania Constitution.

The constitutional provisions in question are as follows:

“§ 8. Commonwealth credit not to be pledged,

The credit of the Commonwealth shall not be pledged or loaned to any individual, company, corporation or association nor shall the Commonwealth become a joint owner or stockholder in any company, corporation or association.”

“§ 9. Municipal debt not to be assumed by Commonwealth.

The Commonwealth shall not assume the debt, or any part thereof, of any county, city, borough, incorporated town, township or any similar general purpose unit of government unless such debt shall have been incurred to enable the Commonwealth to suppress insurrection or to assist the Commonwealth in the discharge of any portion of its present indebtedness.”

There will not be a violation of Article VIII, Section 8 if the credit of the Commonwealth is pledged or loaned to the Authority, because the Authority is not an individual, company, corporation or association. Similarly, there will not be a violation of Article VIII, Section 9 if the Commonwealth assumes the debt of the Authority because the Authority is not a county, city, borough, incorporated town, township, or any similar general purpose unit of government.

The Act authorizes the Authority to acquire by purchase any property necessary or desirable for carrying out the purposes of the Authority. (66 P. S. § 1905(a) (8)). As defined by the Act, the term “property” includes fractional and undivided co-ownership interests. (66 P. S. § 1902 (5)).

If the money raised by general obligation bonds is used to purchase the title to land, equipment or other property, or a fractional or undivided co-ownership interest therein, in the name of the Authority, the credit of the Commonwealth, if it is being pledged or loaned to anyone, is being pledged or loaned to the Authority. The land, equipment or other property or interest therein may then be leased by the Authority to an individual, company, corporation or association.

In *Basehore v. Hampden Industrial Development Authority*, 433 Pa. 40 (1968), the Court held that industrial development authorities were not individuals, companies, corporations or associations within the meaning of Article IX, Section 6 of the former Pennsylvania Constitution, which contains the same language as Article VIII, Section 8 of the new Constitution. The Court's statement, at pages 58-59, is applicable to the present question:

“...The money raised by the bonds will go to the

Authorities and not to the industrial corporations; the Authorities will own the factories; the corporations will lease the plants from the Authorities. Therefore, if credit is being lent to anyone, it is being lent to the Authorities. On several occasions we have held that authorities similar to the Industrial Development Authorities involved in this case were not individuals, companies, corporations or associations within the meaning of Sections 6 and 7."

In the same manner the land, equipment or other property or interest therein may be leased by the Authority to a county, city, borough, incorporated town, township or any similar general purpose unit of government without creating a debt on the part of such municipality. Hence the Commonwealth will not have assumed any debt or part thereof, in violation of Article VIII, Section 9.

In order to avoid possible legal problems arising from the retention of possession by a vendor, the Authority should acquire its title or fractional or undivided ownership interest, in the case of equipment or other personal property, direct from the manufacturer thereof rather than by assignment from the user.

In summary, it is our opinion, and you are advised, that funds generated by the sale of general obligation bonds may be utilized for the purchase by the Authority of title to or a fractional or undivided co-ownership interest in land, equipment or other property in accordance with the purposes of the Act without violating Article VIII, Sections 8 and 9 of the Pennsylvania Constitution. The Authority's interest in any equipment or other personal property should be purchased direct from the manufacturer, and its interest in land, equipment or other property should be leased to the user at a nominal rental.

Sincerely yours,

W. W. ANDERSON

Deputy Attorney General

J. SHANE CREAMER

Attorney General

OFFICIAL OPINION No. 129

Historical Projects—Project 500 Act—Department of Community Affairs.

1. Department of Community Affairs may make grants to political subdivisions under § 16 (a) (4) of "Land and Water Conservation and Reclamation Act," Act of January 19, 1968, P. L. (1967) 996 (32 P. S. § 5116 (a) (4) for historical projects.
2. Attorney General's Opinion of May 1, 1970 overruled insofar as inconsistent with this Opinion.

Harrisburg, Pa.
June 16, 1972

Honorable William H. Wilcox
Secretary
Department of Community Affairs
Harrisburg, Pennsylvania

Dear Secretary Wilcox:

You have asked us to review an opinion of former Attorney General William Sennett, dated May 1, 1970, (herewith attached). That opinion dealt with the question of whether the Department of Community Affairs might lawfully make grants-in-aid to political subdivisions under the "Land and Water Conservation and Reclamation Act," Act of January 19, 1968, P. L. (1967) 996 (32 P. S. § 5101 *et seq.*) ("Project 500 Act") "to finance the development restoration, preservation and conservation of historical sites."

You are informed that while Mr. Sennett's conclusions with respect to the actual project in that Opinion (the North Side Post Office in Pittsburgh) may have been correct—because of the peculiar *indoor* nature of the project involved—his broad negative language responding to the above question is erroneous and must be overruled. Specifically, Mr. Sennett's interpretation of the Project 500 Act as evidencing a legislative intent that only § 16 (a) (3) (32 P. S. § 5116 (a) (3)) funds—i.e., funds allocated to the Department of Forest and Waters, Fish and Game Commissions, and the Historical and Museum Commission—be used for development of structures of historical significance is too restrictive and ignores several sections of the Project 500 Act evidencing a contrary intent.

§ 16(a) (4) (32 P. S. § 5116(a) (4)) provides:

"(4) To the Department of Community Affairs, the sum of seventy-five million dollars (\$75,000,000) for State grants-in-aid to political subdivisions to pay up to fifty percent of the cost (i) of development of county and municipal park and recreation lands including lands acquired under the Act of June 22, 1964, P. L. 131, known as the "Project 70 Land Acquisition and Borrowing Act," to be used for county and municipal park and recreation purposes; (ii) to acquire and develop additional county and municipal park, recreation, and open space lands in those regions where the statewide outdoor recreation plan indicates a need for those lands; and (iii) for studies conducted to determine park and recreational needs and the location of facilities."

While it is true that this section does not include the word "historical," it does specifically make reference to lands acquired

under the "Project 70 Act." Such lands were acquired under the following provision:

(4) For state aid to political subdivisions to pay sixty percent of the cost of lands to be acquired by such political subdivisions for recreation, conservation and *historical* purposes, not to exceed twenty million dollars (\$20,000,000). (Emphasis added) (72 P. S. § 3946.16 (a) (4)).

It is clear, therefore, that "Project 70" lands can be developed with Project 500 funds for historical purposes in those situations where they were acquired for that purpose.

In addition, it is evident that § 16 (a) (4) must relate back to § 2 (4) of the Project 500 Act (32 P. S. § 5102 (4)) entitled "Findings and Declarations of Policy":

"(4) The Commonwealth of Pennsylvania must act 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." (Emphasis added.)

§ 16(a) (4) is the only "Allotment of Monies" section that deals with grants-in-aid to local governments for recreational purposes. § 16(a) (3) deals with the development of *state* recreational areas.

We must conclude, therefore, that the Legislature did intend to make Project 500 funds available to local governments for the development of lands for recreational and historical use and that § 16 (2) (4) is the vehicle by which the Legislature intended to make those funds available. Otherwise the "Allotment of Monies" provision of the Law (§ 16) would be in conflict with the "Findings and Declaration of Policy" section—a conflict that must be avoided if possible. See Statutory Construction Act of May 28, 1937, Art. IV, § 63 (46 P. S. § 536).

Sincerely yours,

MARK P. WIDOFF
Deputy Attorney General

J. SHANE CREAMER
Attorney General

May 1, 1970

To: Honorable Joseph W. Barr, Jr.
Secretary of Community Affairs
From: William C. Sennett, Attorney General
Department of Justice

You have asked whether or not the Department of Community Affairs may utilize the resources of the Land and Water

Conservation and Reclamation Fund to finance the development, restoration, preservation and conservation of historical sites. The specific project which is presented for review is a proposal to restore the 73-year old North Side Post Office for use as an historic museum. The North Side Post Office and attendant real estate has been given to the City of Pittsburgh by the Federal Government conditioned upon the use of this historical landmark as a museum.

The Legislature, through "The Land and Water Conservation and Reclamation Act," Act of January 19, 1968, No. 443, 32 P. S. Section 5101, *et seq.*, known as The Project 500 Act, has found that 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. The Act then goes on to delegate to certain agencies of State government certain responsibilities in implementing the foregoing findings.

Section 16 (a) (4) of the Project 500 Act empowers the Department of Community Affairs to assist political subdivisions with grants-in-aid to develop county and municipal park and recreation lands. Although Section 3 of the same statute defines the phrase "recreation and historical purposes" that phrase is not used in the section applicable to the Department of Community Affairs, instead, the powers of the Department of Community Affairs are limited to providing assistance for the acquisition and development of park, recreation and open space lands.

The development of structures of historical significance is specifically mentioned in Section 16 (a) (3) only in connection with funds allocated among the Department of Forests and Waters, Fish and Game Commissions and the Historical and Museum Commission. The Historical and Museum Commission is specifically given authority over development of historical features and the advisability of such development whenever lands to be planned and developed as public outdoor recreation areas have landmarks, sites or structures of historical significance on them.

Specific mention of historical projects exclusively in relation to the Historical and Museum Commission leads to the conclusion that the Department of Community Affairs lacks the authority to fund such projects. Additionally, it is doubtful that the Historical and Museum Commission would have the authority to fund the North Side Post Office project since the intention of the Project 500 Act is to fund historical restoration projects only when said projects relate to and are a part of a public outdoor recreation area.

OFFICIAL OPINION No. 130

Right of Insurance Commissioner to inspect Blue Shield records concerning payments made to doctors.

1. Under the provision of Section 13 of the Nonprofit Medical, Osteopathic, Dental and Podiatry Services Corporation Act, Blue Shield of Pennsylvania may not refuse to allow the Insurance Commissioner access to records showing the names of doctors or groups of doctors to whom payments have been made as well as the specific amount of such payments.
2. Under the provisions of Section 13 of the Nonprofit Medical, Osteopathic, Dental and Podiatry Service Corporation Act and the Agreement on Coordination of Tax Administration between the Commonwealth of Pennsylvania and the United States Revenue Service, information supplied by Blue Shield to the United States Internal Revenue Service concerning the amount of payments to individual doctors or groups of doctors must also be made available to the Insurance Commissioner.

Harrisburg, Pa.
June 21, 1972

Herbert S. Denenberg
Commissioner
Department of Insurance
Harrisburg, Pennsylvania

Dear Commissioner Denenberg:

You have requested my opinion on the following question: Can Blue Shield of Pennsylvania, a non-profit insurance plan incorporated under the provisions of the Nonprofit Medical, Osteopathic, Dental and Podiatry Service Corporation Act, P. L. 1125, June 27, 1931, as amended, 40 P. S. § 1431, *et seq.*, refuse to allow the Insurance Commissioner of Pennsylvania access to Blue Shield records showing the names of doctors or groups of doctors to whom payments have been made, as well as the specific amount of such payments?

It is my opinion, and you are formally advised that Blue Shield of Pennsylvania may not refuse to allow the Insurance Commissioner of Pennsylvania access to such records.

Section 13 of the Nonprofit Medical, Osteopathic, Dental and Podiatry Service Corporation Act, (40 P. S. § 1443) provides that the Insurance Commissioner shall examine financial affairs and status of Blue Shield, as well as all other similarly empowered corporations. In part, that section reads:

"The financial affairs and status of every such corporation shall be examined by the Insurance Commissioner and his agents *not less frequently* than once in every three years, and for that purpose the Insurance Commissioner and his agents shall be entitled to the aid and cooperation of the officers and employes of the corporation and shall have convenient access to all books, records, papers, and documents that relate to the business of the corporation. . . . Such examination shall be made at such times and with such frequency as the Insurance Commissioner may determine." (Emphasis supplied.)

The amount of payments made to specific doctors and the names of such doctors are so inextricably and unavoidably involved in the financial affairs and status of Blue Shield that the

Insurance Commissioner, under the provision above quoted, has a clear right and duty to examine such records.

Further, all information supplied by Blue Shield to the United States Internal Revenue Service showing the names of doctors or groups of doctors to whom payments have been made, as well as the specific amount of such payments is subject to your examination pursuant to the above-quoted provision as well as the Agreement On Coordination Of Tax Administration between the Commonwealth of Pennsylvania and the United States Revenue Service.

Sincerely yours,

BARTON ISENBERG
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 131

Bureau of Correction psychiatric care, use and operation of ward at State Mental Hospital.

1. The Bureau of Correction is authorized to use a ward at the Norristown State Hospital for care and treatment of residents sentenced to State Correctional Institutions.

Harrisburg, Pa.
June 23, 1972

Mr. Allyn R. Sielaff
Commissioner
Bureau of Correction
Camp Hill, Pennsylvania

Dear Commissioner Sielaff:

You have asked for an opinion concerning the legality of your using a ward at Norristown State Hospital for inpatient care and treatment of residents sentenced to State Correctional Institutions. It is our understanding that the Norristown State Hospital will provide the space necessary for this facility and that the Bureau of Correction will provide all of the personnel necessary for the care and custody of the residents. We also understand that the medical services will be provided by and under the direction of a qualified psychiatrist in the employ of the Bureau of Correction .

The need for such a facility has been apparent for some time. In the population of our State Correctional Institutions there are a number of residents at any given time who are in need of immediate, intensive psychiatric care. Although these residents constitute a very small percentage of the total population,

they do create serious problems for the Correctional Institution in that our institutions do not have adequate medical facilities for the care of such residents and we do not have available the medical personnel who are necessary to care for such residents on a 24 hour-a day basis. Heretofore there were two alternatives available for resolving this problem. One was the transfer of the resident under Section 412 of the Mental Health and Mental Retardation Act of 1966 (50 P. S. § 4412) to a State Mental Hospital under the jurisdiction of the Department of Public Welfare. Such transfer was accomplished without court intervention and while it may have been expeditious, there were doubts about the constitutionality of such procedure. These doubts were expressed in a memorandum of law by this Department in the case of *Commonwealth v. John Ronald Colello*, No. 56 March Session, 1968, Court of Common Pleas, Mercer County, Pennsylvania. As a result of that case new procedures were developed and expressed in Administrative Directive No. 17. This Directive, which was developed with the cooperation of the Department of Public Welfare, essentially required that a court order be obtained prior to the transfer of a resident to a State Mental Hospital. This procedure was virtually identical to the second alternative method of handling such cases.

We have found, however, that this method also presents difficulties. The difficulty is created by the backlog in our courts. Frequently, it has taken weeks or months to obtain a disposition from the courts. During this time the resident's condition may deteriorate and the possibility for his eventual recovery is diminished.

The use of a ward at the Norristown State Hospital constitutes a most constructive solution to the problem. We have been advised that such space is available, that adequate security arrangements can be made, that the Department of Public Welfare is agreeable to this arrangement, that medical personnel presently in the employ of the Bureau of Correction will be available to provide medical supervision, that correctional personnel can be made available to maintain the corrections functions and that this arrangement will provide the intensive 24 hour-a-day care so necessary for the subject residents.

Our laws do not expressly provide for the establishment of such a facility. We believe, and you are hereby advised, that such a facility is implicitly authorized under applicable law and that, therefore, you are authorized to establish the facility with the concurrence and cooperation of the Department of Public Welfare.

The implicit authority to which we refer is provided in both statutory law and in the longstanding practices in this Commonwealth. 61 P. S. § 3, requires that:

"All prisoners who are found to be mentally weak shall be segregated from the other prisoners and not allowed

to be among or mingle with those whose mentality is found to be normal."

This provision applies to the subject residents and we believe that it requires not only segregation but adequate medical treatment for the "mental weakness". As we noted above, it has been most difficult to provide adequate care under the present circumstances, it is therefore incumbent upon you to seek other arrangements to carry out your duties under the above-cited statute.

The following provisions of law recognize your authority to operate off-institution grounds facilities for residents. 71 P. S. § 301 (pocket parts); 71 P. S. § 304.1 (pocket parts); and 18 P. S. § 4309 (pocket parts).

In addition, for many years the Bureau of Correction has operated off-institution grounds facilities such as forestry camps for the employment and rehabilitation of residents. We believe that this well-established practice indicates that you have the implicit authority to operate such a facility at Norristown State Hospital.

In conclusion, I repeat that we believe, and you are hereby authorized, to make the necessary arrangements with the Department of Public Welfare for the use of a ward at the Norristown State Hospital for the care and treatment of residents of our institutions.

Very truly yours,
LEONARD PACKEL
Deputy Attorney General
J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 132

Unemployment Compensation—Pennsylvania State University—State Employees

1. Pennsylvania State University employees are "state employees" within the meaning of the Unemployment Compensation Law, Act No. 108, approved September 27, 1971 (43 P. S. § 891 *et seq.*, *inter alia*).

Harrisburg, Pa.
July 3, 1972

Honorable Paul J. Smith
Secretary
Department of Labor & Industry
Harrisburg, Pennsylvania

Dear Secretary Smith:

You have inquired as to how employees of the Pennsylvania State University may receive unemployment compensation cov-

erage under the new amendments to the Unemployment Compensation Law, Act. No. 108, approved September 27, 1971 (the new 43 P. S. § 891 *et seq.*, *inter alia*). Specifically, you wish to know whether those employees may be considered "state employees" within the meaning of § 1001 of the amendments (43 P. S. § 891).

You are informed that employees of the Pennsylvania State University are state employees within the meaning of the above Act.

Section 1001 (43 P. S. § 891) provides:

"Notwithstanding any other provisions of this act, the Commonwealth of Pennsylvania and all its departments, bureaus, boards, agencies, commissions and authorities shall be deemed to be an employer and services performed in the employ of the Commonwealth and all its departments, bureaus, boards, agencies, commissions and authorities shall be deemed to constitute State employment subject to this act with the exceptions hereinafter set forth in Section 1002. Except as herein provided, all other provisions of this act shall continue to be applicable in connection herewith."

Former Attorney Generals have already ruled that the Pennsylvania State University is an instrumentality of the state in much the same way as those entities known as state "authorities", as opposed to a private state-aided institution—like Temple and Pittsburgh Universities. See Attorney General's Opinions dated December 21, 1921 (Penn State enjoys Commonwealth's immunity from gasoline tax); December 23, 1921 (Penn State enjoys similar immunity from inheritance tax); May 23, 1958 (bonds of Penn State exempt from Capital Stock Tax); May 14, 1964 (Penn State is instrumentality of Commonwealth for social security purposes).

In addition, the following acts of the General Assembly suggest that the Legislature considers Pennsylvania State University to be similar to a state authority: Act of June 27, 1923, P. L. 858, § 1(6), as amended (71 P. S. § 1731(6)) (employees of Penn State are members of State Employees Retirement Fund); Act of May 2, 1949, P. L. 870 (72 P. S. § 3484) (unexpended appropriations to Penn State do not revert to Commonwealth as do funds of State-aided institutions); Act of May 11, 1949, P. L. 1126 (72 P. S. § 3942) (appropriations to Penn State are not entered as liens against it as they are against state-aided institutions); Act of June 1, 1945, P. L. 1242, § 601 (36 P. S. § 670-601) (roads on Penn State campus are built by the State Highway Department).

Taking all these factors into account, it is our opinion, and you are so advised, that the Legislature intended that the employees of Pennsylvania State University be considered "state employees" within the meaning of § 1001 of Act No. 108 (43 P. S. § 891)

and that they may receive unemployment coverage under the Unemployment Compensation Law.

Sincerely yours,

MARK P. WIDOFF
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 133

Authority of a school district and the union representing the employees of such districts to bargain with respect to full or partial salaries should the school close early due to lack of funds.

1. The issue of whether employees of a school district in Pennsylvania should receive full or partial salary if a school district is closed due to lack of funds is bargainable under the Public Employee Relations Act of July 23, 1970, P. L. —, No. 195 (43 P. S. § 1101.101 *et seq.*)
2. Neither 24 P. S. § 11-1121 nor 24 P. S. § 11-1153 of the School Code prevent the employees of a school district in Pennsylvania from bargaining on the issue of whether they should receive full or partial salary if a school district is closed due to lack of funds under the Public Employee Relation Act of July 23, 1970, P. L. —, No. 195 (43 P. S. § 1101.101 *et seq.*).

Harrisburg, Pa.
July 7, 1972

Honorable John Pittenger
Secretary
Department of Education
Harrisburg, Pennsylvania

Dear Secretary Pittenger:

You have asked us if a Pennsylvania School District and the unions representing employees of that District may lawfully bargain with respect to whether or not those employees should be paid their full salary or some reduced salary should the schools be forced to close before the end of the school year because of lack of funds.

You are informed that with respect to both professional and non-professional employees such a subject is bargainable under the Public Employee Relations Act of July 23, 1970, P. L. —, No. 195 (43 P. S. § 1101.101 *et seq.*).

§ 701 of that Act (43 P. S. § 1101.701) provides:

“Collective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employes to meet at reasonable times and confer in good faith with respect to *wages, hours and other terms and conditions of employment*, or the negotiation of an agreement of any question arising

thereunder and the execution of a written contract incorporating any agreement reached but such obligation does not compel either party to agree to a proposal or require the making of a concession." (Emphasis added.)

§ 703 of the Act 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."

It is obvious that the question of whether employees should be paid their full annual salary under the above conditions is a question respecting "wages, hours, and other terms and conditions of employment." In addition with respect to non-professional employees, our research indicates no statute that would conflict with a provision resolving the question either in favor of full salary or against it.

With respect to professional employees our research does indicate certain sections of the School Code of 1949 that might be construed so as to raise a question of such a conflict. However, it is our opinion that no conflict exists.

§ 1121 of the School Code (24 P. S. § 11-1121) provides the form of contract to be entered into between each *tenured* professional employee and each school district. This form provides a space for the term of the contract and the annual salary figure. There is nothing in § 1121, however, that deals with the form of the collective bargaining contract. There is nothing in § 1121, furthermore, that prohibits the term of the contract to be prescribed by that collective bargaining agreement to deal with contingencies like early closing of school because of financial reasons.

§ 1121 also provides that the tenured professional employee contract should contain a clause "that this contract shall continue in force year after year, with the right of the board of school directors (or board of public education) to increase the compensation over the compensation herein stated." It might be argued that the contemplated collectively bargained contingency clause on school closing might constitute a salary decrease in violation of the quoted provision. The courts, however, have not so considered a salary re-arrangement across the board, where the financial condition of a school district requires it. See *Beatty v. Olyphant Borough School District*, 42 D. & C. 195 (1942).

We conclude, therefore, that § 1121 is not in conflict with a resolution of the issue either way.

§ 1153 of the School Code (24 P. S. § 11-1153) provides:

“When a board of school directors is compelled to close any school or schools on account of contagious disease, the destruction or damage of the school building by fire or other causes, the school district shall be liable for the salaries of the teachers of said school or schools *for the terms for which they were engaged*. Whenever a teacher is prevented from following his or her occupation as a teacher, during any period of the school term, for any reasons in this section specified, the school district shall be liable for the salary of such teacher for such period, at the rate of compensation stipulated in the contract between the district and the teacher, in addition to the time actually occupied in teaching by such teacher.”
(Emphasis added.)

We do not believe that this section is applicable to the case of school closing by reason of lack of funds, because the statute is obviously limited to school closings as a result of contagious disease or damage or destruction to school facilities by fire or other causes. The fiscal crisis now facing many of our school districts, not being one of the unforeseen disasters, does not prompt effectuation of this section.

We conclude, therefore, that the above issue is bargainable within the meaning of the Public Employe Relations Act.

Sincerely yours,

MARK P. WIDOFF
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 134

Milk Marketing Board — Bankruptcy — Appropriation — Collateral Bond — Assignment.

1. The Milk Marketing Board is authorized to distribute an appropriation of \$200,000 to creditors of a bankrupt corporation, subject to the assignment of each creditor's rights against the bankrupt estate.
2. The Board may also execute on the bankrupt's collateral bond and pay the proceeds thereof to the creditors to the extent of the bankrupt's debts with any excess being paid into the General Fund.
3. The distribution of the appropriation and the proceeds of the collateral bond may be made prior to the termination of the bankruptcy proceedings.

Harrisburg, Pa.
July 11, 1972

Mr. Harry E. Kapleau
Chairman
Milk Marketing Board
Harrisburg, Pennsylvania

Dear Mr. Kapleau:

You have requested our opinion concerning the authority of the Milk Marketing Board to make payment to milk producers who are creditors of the above company which has filed a petition for arrangement under Chapter XI of the Federal Bankruptcy Act. In this connection the Legislature by the Act of December 17, 1971 (Act. No. 97A) has appropriated \$200,000 to the Board for payment to said producers; said payment to be made into the restricted receipt account with the Milk Marketing Fund known as "Underpayment to Dairy Farmers." In addition the Board has a collateral bond which was posted by the bankrupt company in the face amount of \$200,000, but which has an approximate market value of only \$40,000.

By your letter of May 3, 1972 you have asked the following questions:

1. Is the Board empowered to distribute the entire \$200,000 appropriation regardless of whether a dividend may be subsequently forthcoming to the producers from the bankruptcy court?

2. Is the Board empowered to pay the appropriated sum to the producers and to pay them additionally the proceeds from the sale of the collateral bond?

3. Can the Board make any distribution to Pennsylvania producers at this time prior to an adjudication of the bankruptcy case?

1. You are advised that the Milk Marketing Board is authorized to distribute the entire appropriation of \$200,000 to the producers in accordance with Section 511 of the Pennsylvania Milk Marketing Law (31 P. S. § 700j-511). Since the money was appropriated for the specific purpose of payment to the dairy farmers as evidenced by the Legislative History of Act No. 97A (See "Legislative Journal—House" of December 9, 1971, pages 1902-1904,) there is sufficient authority for the Board to distribute the funds to the producers involved. However, to avoid an overpayment to the producers should they receive a dividend from the bankrupt estate, any payments must be conditioned upon the assignment by the producers to the Commonwealth of their rights as creditors of the bankrupt.

2. The Board may also execute on the collateral bond of the bankrupt and pay the proceeds thereof to the producers. The bond, in the face amount of \$200,000, was filed with the Board

by the Company pursuant to Section 501 of the Milk Marketing Law (31 P. S. § 700j-501), which provides that milk dealers or handlers, licensed by the Board, shall be required to file with the Board a corporate surety, individual surety or collateral bond, supported by United States or Pennsylvania securities, approved by the Board. The bond is required to be in the sum equal to the value of the highest aggregate amount of milk purchased, acquired or received by the dealer or handler from producers in any two months during the preceding calendar year, but shall not exceed \$200,000. The bond must be conditioned for the payment by the milk dealer or handler of all amounts due for milk purchased or otherwise acquired from producers during the license year.

The collateral provided by the above Company is a Commonwealth bond in the amount of \$200,000, payable at maturity in 1992 but which has a present market value estimated to be \$40,000. This deficiency between the amount of bond required by law and the actual value of the Company's bond is what prompted the Legislature to make the appropriation referred to above. The proper procedure for execution on the bond is for the Board first to bring suit on the bond in accordance with Section 509 of the Milk Marketing Law (31 P. S. § 700j-509). Should the proceeds of the board together with the \$200,000 appropriation exceed the amount of the bankrupt's indebtedness to the producers, such excess should be paid into the General Fund of the Commonwealth.

3. The distribution to the producers is not governed by the pendency of the bankruptcy proceedings. Chapter XI proceedings constitute an arrangement with unsecured creditors and have no effect on debts of the bankrupt which are secured. However, after the security has been disposed of and a debt satisfied to that extent, the balance becomes an unsecured debt and the Commonwealth by virtue of its assignments will be an unsecured creditor in the proceedings. Any amounts received by the Commonwealth as a creditor of the bankrupt should be paid into the General Fund. Normally, a Chapter XI petitioner will obtain a Court Order which will prevent any creditor from filing a petition in involuntary bankruptcy against the debtor.

The Board may therefore make distribution of the funds prior to the termination of the bankruptcy proceedings .

Very truly yours,

W. W. ANDERSON
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 135

Communist Party—Eligibility for Ballot Position—General Election

1. Secretary of the Commonwealth should not place the names of candidates for the federal offices of President, Vice-President, Congressman and Presidential Electors who describe themselves as "Communist Party or policy" on the ballot in the general election of 1972.
2. The Federal Communist Control Act, 50 U. S. C. § § 841-844, which supersedes state law in the area of control and regulation of Communist and subversive activities, may be violated if the Secretary of the Commonwealth places the said names on the ballot and therefore she should not do so.

Harrisburg, Pa.
July 20, 1972

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

Dear Secretary Tucker:

You have asked our opinion on the question of whether you should certify as candidates for President, Vice-President, Congressman, and Presidential Electors in the general election to be held on November 7, 1972, persons who describe themselves as representing the "Communist Party or policy" on nomination papers filed with you.¹

When we received your request originally in March, 1972, we concluded that Federal law² superseded state law³ in the area of control and regulation of Communist and subversive activities, based on *Pennsylvania v. Nelson*, 350 U. S. 497 (1956). In that case, the Supreme Court of the United States held that the Smith Act, 18 U. S. C. § 2385, superseded the enforceability of the Pennsylvania Sedition Act, 18 P. S. § 4207, which proscribed the same conduct. After setting forth the tests for supersession

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1. The nomination paper is submitted in accordance with Section 951(a) of the Pennsylvania Election Code, 25 P. S. § 2911(a), which allows, in addition to nominations made by political parties, "...nomination of candidates for any public office...by nomination paper signed by qualified electors of the State..." on forms prescribed by the Secretary of the Commonwealth. Section 952 of the Code, 25 P. S. § 2912, requires that all such nomination papers shall specify "(a) The name or appellation of the political body which the candidates nominated thereby represent, expressed in not more than three words..." The form of nomination paper prescribed by your office in accordance with the above statutory mandates (Form DSBE-110A-10-M-Rev. 10-63) states:

We, the undersigned, all of whom are qualified electors of Pennsylvania and of _____ County, representing the _____ Party or Policy, hereby nominate the following persons, viz:

The papers in question contain the word "Communist" in the second blank space.

2. Communist Control Act, 50 U. S. C. § § 841-844.
3. The pertinent portions of the Pennsylvania Election Code are Sections 801(d) and 976, 25 P. S. § § 2831(d), 2936.

(all of which we found to exist in this case) the Supreme Court concluded (350 U. S. at 509):

“Since we find that Congress has occupied the field to the exclusion of parallel state legislation, that the dominant interest of the federal government precludes state intervention, and that administration of state acts would conflict with the operation of the federal plan, we are convinced that the decision of the Supreme Court of Pennsylvania is unassailable.”

This decision affirmed the similar holding of our own Supreme Court in *Commonwealth v. Nelson*, 377 Pa. 58 (1954), and was further clarified in the case of *Commonwealth v. Dolsan*, 183 Pa. Superior Ct. 339 (1957), a companion case to *Nelson*.

Having determined that Federal law preempts state law in this area, on March 16, 1972, we wrote to the Acting Attorney General of the United States requesting his opinion as to whether Federal law prohibits you from accepting and certifying the nomination papers in question. We did this because in our opinion, the Attorney General of the United States is the highest Executive Authority on the enforcement and interpretation of Federal law.

We have received and analyzed a reply from the United States Department of Justice on behalf of the Attorney General of the United States, dated April 14, 1972, a copy of which is attached. In this letter, the United States Department of Justice points out that Federal law controls, but provides no definitive guidance as to whether or not the Communist Control Act of 1954 would be violated should you certify candidates describing themselves as “Communist Party or policy.”

This in our opinion is a Federal matter. As discussed above, we have requested guidance from the Federal government, and they have not advised us that you should place the names of persons describing themselves as “Communist Party or policy” on the ballot. Therefore, it is our opinion and you are so advised that you may be violating Federal law (in particular the Communist Control Act of 1954) if you place the names of such persons on the ballot.

It is our further advice that you immediately send a letter (with a copy of this letter attached) to all such candidates who filed nomination papers with you notifying them that their names will not appear on the ballot for the general election to be held on November 7, 1972.

Sincerely yours,

J. SHANE CREAMER,
Attorney General.

Washington, D. C.
April 4, 1972

Honorable J. Shane Creamer
Attorney General
Office of Attorney General
Commonwealth of Pennsylvania
Harrisburg, Pennsylvania

Dear General Creamer:

The Acting Attorney General has asked me to respond to your recent letter in which you request this Department's advice as to whether the Secretary of the Commonwealth may accept nominating papers for candidates for President, Vice-President, Congressman and Presidential Electors, who avowedly represent "Communist Party or policy." Specifically, your question is whether Federal law, and especially the provisions of the Communist Control Act of 1954, 50 U. S. C. § § 841-844, prohibit the acceptance of these nomination papers. The Attorney General is, of course, limited by law to furnishing legal advice in formal opinions to the President and the heads of Executive departments and agencies when required in connection with official business. However, the following informal comments will hopefully provide you with some guidance in advising the Secretary of the Commonwealth.

As you note in your letter, in the area of the control and regulation of Communist and subversive activities, Congressional enactments have been held to supersede and pre-empt State legislation. Cf. *Pennsylvania v. Nelson*, 350 U. S. 497 (1956); *McSurely v. Ratliff*, 282 F. Supp. 848 (E. D. Ky. 1967), *appeal dismissed*, 390 U. S. 412 (1968). The provision of Federal law which is most relevant to your inquiry, § 3 of the Communist Control Act of 1954, 50 U. S. C. § 842, provides, in pertinent part:

The Communist Party of the United States, or any successors of such party... whose object or purpose is to overthrow the Government of the United States... by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party... by reason of the laws of the United States or any political subdivision thereof, are terminated...

The Supreme Court has only considered the provisions of this statute on one occasion, in *Communist Party of U. S. A. v. Cath-erwood*, 367 U. S. 289 (1961). In the course of its decision which held that the statute did not require that the Party should no

longer be considered an employer for purposes of taxation under New York's Unemployment Insurance Law, the Court noted:

...there is no legislative history which in any way served to give content to the vague terminology of § 3 of the Communist Control Act. The statute contains no definition, and neither committee reports nor authoritative spokesmen attempt to give any definition, of the clause 'rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the United States or any political subdivision thereof.' (367 U. S. at 392-393).

While the Court in *Catherwood* was not presented with, and consequently did not pass on, the question of the Act's constitutionality, it did note that the statute raised "novel constitutional questions the answers to which are not necessarily controlled by decisions of this Court in connection with other legislation dealing with the Communist Party..." (367 U. S. at 393).

Although neither legislative history, nor the *Catherwood* decision, provide definitive guidance on your inquiry, the question has been dealt with before. In 1968, Communist Party candidates for President and Vice-President of the United States attempted to have their names placed on the general elections ballot in Minnesota. Relying on an opinion of the Attorney General of Minnesota that the Communist Control Act precluded the placing of these candidates on the ballot, the Minnesota Secretary of State refused to accept the nominating papers. The candidates and other interested parties then sought an injunction requiring the Secretary to include the candidates names on the ballot and an order declaring the Act unconstitutional. A three-judge court, after balancing the harm that would befall plaintiffs from a denial of equitable relief against the harm to the State from issuing the injunction requested, issued a temporary restraining order without reaching the merits of the controversy. *Mitchell v. Donovan*, 290 F. Supp. 642 (D. Minn. 1968).

The Court in *Mitchell* did note, however, that its decision was influenced by the position taken by the United States, appearing as *amicus curiae*, that "the Act is meant to disable the Communist Party as a party only and not its members." (290 F. Supp. at 644). In other words, this Department's position was that the Communist Control Act is properly interpreted as applying solely to the Party, and not to its members.

You note in your letter that the nominating papers in question were submitted to the Secretary of the Commonwealth pursuant to provisions of Pennsylvania law which permit the nomination of candidates by obtaining the signatures of a specified number of qualified voters. In *Mitchell*, *supra*, where the nominations were submitted pursuant to similar statutory provisions in Minnesota, this Department argued that "no 'right, privilege

or immunity' of the Communist Party as such is involved in this lawsuit." (290 Supp. at 644-645).

I trust that the foregoing will be of some assistance to you. If you have any further questions, please do not hesitate to contact me.

Sincerely,

ROBERT C. MARDIAN
Assistant Attorney General

OFFICIAL OPINION No. 136

Environmental Hearing Board—State Adverse Interest Act—Environmental Quality Board—State Employee—State Agency

1. A State employe would violate the State Adverse Interest Act by practicing before the Environmental Hearing Board.
2. Such conduct is subject to control by rules and regulations promulgated by the Environmental Quality Board.
3. The definition of "State Agency" by referring to the executive branch of the Government and specifically naming the Pennsylvania Turnpike Commission, the General State Authority or other State authorities, has the effect of excluding other branches of State Government such as the judicial and legislative branches and also all governmental bodies at the local level.
4. The Environmental Hearing Board is a part of the executive branch of the Commonwealth Government and therefore it comes within the definition of State Agency as set forth in the State Adverse Interest Act and the provisions of the Act are applicable to its proceedings.
5. Any officer or employe of any other State agency of the executive branch may not, except in the performance of his duties as such employe, for remuneration, directly or indirectly, represent any other person on any matter pending before or involving the Environmental Hearing Board.
6. This does not apply to State Legislators since the Legislature is not part of the executive branch, but persons employed by any of the departmental boards, commissions and officers listed in Section 202 of The Administrative Code which includes State universities, or who are consultants (for remuneration) or counsel for any of said departmental boards, commissions and offices are affected.

Harrisburg, Pa.
July 28, 1972

Mr. Michael Malin
Chairman
Environmental Hearing Board
Department of Environmental Resources
Harrisburg, Pennsylvania

Dear Mr. Malin:

You have inquired concerning the propriety of State employes practicing before the Environmental Hearing Board. In particular you have asked two questions:

1. Would a State employe violate the State Adverse Interest Act by appearing before the Environmental Hearing Board on behalf of another person?

2. If so, may the Board prohibit the State employe from appearing before it?

It is our opinion, and you are advised, that (1) a State employe would violate the State Adverse Interest Act by practicing before the Environmental Hearing Board; and (2) such conduct is subject to control by rules and regulations promulgated by the Environmental Quality Board.

In arriving at our conclusion we have the benefit of an earlier Attorney General's Opinion reported at 13 D. & C. 2d 420 (1957) which discusses in detail the general applicability of the State Adverse Interest Act.

The pertinent section of the State Adverse Interest Act, Act of July 19, 1957, P. L. 1017 (71 P. S. § 776.7) provides as follows:

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

A State employe is defined by the Act as "an appointed officer or employe in the service of a State Agency, and who receives a salary or wage for such service." (71 P. S. § 776.2(4)).

This covers persons serving at all levels of State Government (i.e. officers at the higher levels, employes at the lower). It includes members of the various boards and commissions, provided they are "State Agencies" as defined in the Act, and the administrative officers and employes thereof. It applies equally to employes who receive per diem compensation, such as members of the State Civil Service Commission, and to those who receive an annual salary, such as members of the Labor Relations Board or Pennsylvania Turnpike Commission.

However, the definition of "State Agency," by referring to the executive branch of the Government and specifically naming the Pennsylvania Turnpike Commission, the General State Authority or other State authorities, has the effect of excluding other branches of State Government such as the judicial and legislative branches and also all governmental bodies at the local level.

The question becomes whether or not the Environmental Hearing Board is a part of the executive branch of the Commonwealth Government.

The Environmental Hearing Board was established by the Act of December 3, 1970 (Act No. 275) (71 P. S. § 180.2). The Act provides that the Board shall consist of three persons appointed by the Governor and further provides that a secretary to the Board shall be appointed by the Secretary of Environmental Resources, with the approval of the Governor.

The Act further provides that the Environmental Hearing Board is a departmental administrative board in the Department of Environmental Resources (71 P. S. § 62).

The Act also established the Environmental *Quality* Board having the power and duty to formulate, adopt and promulgate rules and regulations for the Department of Environmental Resources (71 P. S. § 510-20). In addition the Environmental *Quality* Board is charged with the duty of adopting rules and regulations for the Environmental Hearing Board with respect to the conduct of hearings, including time limits for the taking of appeals, procedures for the taking of appeals, locations at which hearings shall be held and such other rules and regulations as may be determined advisable by the Environmental *Quality* Board (71 P. S. § 510-21(e)).

Since the members of the Environmental Hearing Board are appointed by the Governor and since the Board has been designated as a departmental administrative board in the Department of Environmental Resources, an executive department of Commonwealth Government, subject to rules and regulations of the Environmental *Quality* Board, another departmental administrative board in the Department of Environmental Resources (71 P. S. § 62), the Environmental Hearing Board is a part of the executive branch of the Commonwealth Government. Therefore it comes within the definition of "State Agency" set forth in the State Adverse Interest Act and the provisions of the Act are applicable to its proceedings.

This means that any officer or employe of any other State agency of the executive branch may not, except in the performance of his duties as such employe, for remuneration, directly or indirectly, represent any other person on any matter pending before or involving the Environmental Hearing Board. This would not apply however to State Legislators since the Legislature is not part of the Executive Branch. But persons employed by any of the departmental boards, commissions and officers listed in Section 202 of The Administrative Code (71 P. S. § 62) which includes State universities, or who are consultants (for remuneration) or counsel for any of said departmental boards, commissions and offices are affected.

Since the proceedings of the Environmental Hearing Board are to be conducted in accordance with rules and regulations established by the Environmental *Quality* Board, the manner in which such employes are barred from appearing before the Environmental Hearing Board must be set forth in rules or regulations promulgated by the Environmental *Quality* Board.

Sincerely yours,

W. W. ANDERSON
Deputy Attorney General
J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 137

Special Education Services—Intermediate Units—Private Schools*

1. Primary responsibility for providing special education services rests with local school district under § 1372(3) of School Code of 1949 (24 P. S. § 13-1372(3)).
2. Should school district be unable to provide special education services, Intermediate Unit must devise plan under § 1372(2) of School Code of 1949 looking first to feasibility of providing services through public facilities and then through private facilities.
3. Right to "free program of education and training" for exceptional children under *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, Civil Action No. 71-42, United States District Court (E. D. Pa. May 5, 1972) means private schools may not charge parents for special education services paid for by school district and state, unless parents voluntarily make extra payment.

Harrisburg, Pa.
July 6, 1972

Honorable John Pittenger
Secretary
Department of Education
Harrisburg, Pennsylvania

Dear Secretary Pittenger:

You have asked us to determine what is the proper procedure for the assignment of exceptional children to special education programs under § 1372 of the Public School Code of 1949, as amended (72 P. S. § 13-1372), and specifically what role should be assigned to private schools providing such education.

We understand that it is expected that an increased number of exceptional children will be seeking "a free program of education and training" under the consent agreement and court ruling in *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, Civil Action No. 71-42 in the United States District Court for the Eastern District of Pennsylvania (decided May 5, 1972) and we further understand that there is concern as to how existing private schools (some of which are collecting tuition fees from parents as well as receiving state funds under § 1376 of the School Code (24 P. S. § 1376)) will fit into the "new picture."

Section 1372(2) and (3) provide:

"(2) Plans for Education and Training Exceptional Children. Each intermediate unit cooperatively with other intermediate units and with school districts shall prepare and submit to the Superintendent of Public Instruction, on or before the first day of August, one thousand nine hundred seventy for his approval or disapproval, plans for the proper education and training of all exceptional children in accordance with the

* Editor's note: See also Official Opinion Nos. 56, 69 and 73 of 1973.

standards and regulations adopted by the State Board of Education. Plans as provided for in this section shall be subject to revision from time to time as conditions warrant, subject to the approval of the Superintendent of Public Instruction.

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

There can be no doubt from a reading of the above that the primary duty for providing special education services rests with the *school district* and that in the formulation of the Intermediate Unit Plan for educating exceptional children, the intermediate unit must look first to the school district.

The crucial question then becomes: to whom—in the formulation of the plan—does the intermediate unit look to provide these services, if the local district cannot provide them? It is our opinion, and you are so advised that § 1372(3) answers that question by providing:

“If the approved plan indicates that it is not feasible to form a special class *in any district . . .*” (Emphasis added.)

We construe that phrase, when read in conjunction with the previous languages on “neighboring districts” and the subsequent reference to securing the services “outside the public schools of the district,” to refer to the inability of the intermediate unit to provide special education *in any district* of the intermediate unit under § 1372(4) which provides:

“(4) Classes for Exceptional Children. The intermediate unit shall have power, and it shall be its duty, to provide, maintain, administer, supervise and operate

such additional classes or schools as are necessary or to otherwise provide for the proper education and training for all exceptional children who are not enrolled in classes or schools maintained and operated by school districts or who are not otherwise provided for."

It is then, and only then, that the next phase of § 1372(3) becomes applicable:

"...The board of school directors of the district shall secure such proper education and training...in special institutions..."

We note that this interpretation of the law gives meaning to § 1372(2), i.e., the subsection conferring on the *intermediate unit* the duty to prepare a plan—subject to the approval of the Department of Education—for the education of all exceptional children. A contrary interpretation would establish a "ping-pong" game between the intermediate unit and the school district whereby once a determination has been made that the district cannot provide the necessary services, it is up to the school district to determine if the private school sector is available to provide such services. Such a procedure would, in effect, make a nullity of § 1372(2) and prevent any meaningful planning by the intermediate unit.

We also note that this interpretation of the law harmonizes with the understanding reached by the Commonwealth in the *Pennsylvania Association for Retarded Children* case, cited above, and specifically paragraph 7 of the Consent Agreement which provides as follows:

"7. It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity, within the context of the general educational policy 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 of program of education and training.*" (Emphasis added.)

It must be stressed, however, that nothing in this Opinion should be construed to mean that in determining the feasibility of establishing an intermediate unit program under § 1372(4), consideration should not be given to the availability of existing private facilities and resources in the private school sector, especially when considerable public expense would be necessary to duplicate those resources. On the contrary, the plan should reflect a reasonable consideration of those factors in determining the most rational assignment of exceptional children to special education programs, taking into account the need expressed in

PARC to "normalize" as much as possible the school experience of these children.

Finally, it must be emphasized that unless a parent clearly and knowingly waives his right to a "free program of education and training" under PARC, then no assignment to a private school will be lawful under that decision, if the private school, without the parent's consent, proceeds to make a charge to that parent over and above the payments received from the district and the Commonwealth. Should the private school have supplementary educational services or other services—e.g., non-educational services—to provide its students, then the parent should be advised of the availability of these services and of the charge for same, but such charges may not be made on a mandatory basis.

Sincerely yours,

MARK P. WIDOFF
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 138

Appropriations—Department of Education—Pennsylvania Public Television Network Commission.

1. Department of Education may expend funds from House Bill No. 2275 Appropriation to temporarily maintain Pennsylvania Public Television Network under Authority of § 525(5) of the Public School Code of 1949, P. L. 30, as amended (24 P. S. § 5-525(5)).

Harrisburg, Pa.
August 1, 1972

Honorable Ronald G. Lench
Secretary of Administration
Harrisburg, Pennsylvania

Dear Secretary Lench:

You have asked us whether the Department of Education may expend funds to hire personnel of the Pennsylvania Public Television Network Commission (PPTNC) so as to continue operation of the Pennsylvania Public Television Network.

Such an expenditure is proposed under House Bill No. 2275, Printer's No. 3183, page 21, lines 25-30 which provides:

"for grants or for purchasing, producing, recording and distributing, programming, or providing and processing equipment and auxiliary services in connection with

establishment, operation, and utilization of educational television and radio broadcasting network facilities.”

You have informed us that House Bill No. 2326, appropriating funds for the operation of the Commission has not yet been passed by the Senate and that the Commission is now without authority to expend funds. The Senate is expected to reconvene September 11, 1972 and to consider House Bill No. 2326 shortly thereafter.

You are advised that the above expenditure under House Bill No. 2275 is lawful, because lines 25-30 of page 21, quoted above are intended to provide funds to implement § 523 and 525 of the Public School Code of 1949, P. L. 30, as amended (24 P. S. § § 5-523 and 5-525) and including § 525(5) which provides:

“Whenever funds become available from any source whatever for the purpose of . . . (5) establishing educational network facilities to link educational broadcasting facilities as may be required by the state plan for educational broadcasting or any of these purposes the Department of Public Instruction may expend such funds for such purpose or purposes in amounts to be determined by the Department of Public Instruction in accordance with policies approved by the State Board of Education . . .”

In the past the need for establishing a network under that section has been minimized by the operation of PPTN. Programs like “Sesame Street” have been provided to the school systems of the Commonwealth by making extensive use of the facilities of the PPTNC for the transmission of signals originating in New York and other places. The PPTN relays the signal to various public television channels throughout the state and also records the program and relays it later, so that the schools across the Commonwealth are able to use the program, often two or three times a day.

Should the PPTN go out of operation, the Department of Education under § 525(5) would have to search for alternative “network facilities to link educational broadcasting facilities.” Thus, it clearly has the power to temporarily keep the present network in operation under § 525(5)—in order to conserve present facilities and equipment and avoid a costly overlap of facilities, equipment, and services.

This conclusion is buttressed by the mandate of § 501 of the Administrative Code of 1929 (71 P. S. § 181) which provides:

“§ 181. (Adm. Code § 501). Coordination of work

The several administrative departments, and the several independent administrative and departmental administrative boards and commissions, shall devise a practical and working basis for cooperation and coordination of work, eliminating, duplicating, and overlap-

ping of functions, and shall, so far as practical, cooperate with each other in the use of employes, land, buildings, quarters, facilities, and equipment. The head of any administrative department, or any independent administrative or departmental administrative board or commission, may empower or require an employe of another such department, board, or commission, subject to the consent of the head of such department or of such board or commission, to perform any duty which he or it might require of the employees of his or its own department, board, or commission."

We conclude, therefore, that an expenditure of House Bill No. 2275 funds for the purpose of maintaining a network for the transmission of educational programs is lawful and within the purposes for which the funds were appropriated.

Sincerely yours,

MARK P. WIDOFF
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 139

Sale of Aircraft by PennDOT

This opinion satisfies a requirement in an agreement for the sale of a Commonwealth-owned aircraft that the sale be "approved" by the Attorney General.

Harrisburg, Pa.
August 9, 1972

Honorable Jacob G. Kassab
Secretary
Department of Transportation
Harrisburg, Pennsylvania

Dear Secretary Kassab:

You have requested my opinion concerning the legality of the transaction contemplated by the attached Agreement of Sale between Omni Investment Corporation and the Commonwealth for disposition by the Commonwealth of its Grumman Gulfstream airplane.

I believe that the requirements of the Administrative Code have been satisfied by your solicitation and receipt of competitive bids and the approval of the Secretary of Property and

Supplies. Accordingly, you have my approval for consummation of the transaction.

Sincerely yours,

EDWARD WEINTRAUB
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 140

Constitutional Law—Advertisement of Amendments—Time of Advertisement—Article XI, Section 1 of the Constitution.

1. Publication of amendment at least once during the months of August, September, and October, 1972, the three months prior to the next general election to be held in November, 1972 complies with the language and purpose of Article XI, Section 1 of the Pennsylvania Constitution.

Harrisburg, Pa.
August 11, 1972

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

Dear Governor Shapp:

You have requested an opinion from the Department of Justice regarding the requirement appearing in Article XI, Section 1, of the Constitution of the Commonwealth of Pennsylvania that constitutional amendments be published by the Secretary of the Commonwealth. Specifically, you wish to know whether that section will be complied with by publishing a constitutional amendment at least once during the months of August, September, and October, 1972, the three months prior to the next general election to be held in November, 1972.

Article XI, Section 1, states in pertinent part as follows:

“Amendments to this Constitution may be proposed in the Senate or House of Representatives; and if the same shall be agreed to by a majority of the members elected to each House, such proposed amendment or amendments shall be entered on their journals with the yeas and nays taken thereon, and the Secretary of the Commonwealth shall cause the same to be published three months before the next general election in at least two newspapers in every county in which such newspapers shall be published. . . .”

The language of this section is not unambiguous. One interpretation of this provision could be that the Secretary of the Commonwealth must publish the amendment once at a point in time three months before the election.

Another interpretation of the phrase "three months before the next general election" could be publication once a month during August, September, and October, the three months preceeding such election. The Supreme Court of Pennsylvania in *Commonwealth v. Beamish*, 309 Pa. 510, 514-515, 164 A. 615, 616 (1932) adopted this latter interpretation. The Court there stated:

"A single publication made three months before the election is not sufficient to enable the electorate to be fully advised of the importance and nature of proposed amendments. . . . In view of all the facts and circumstances, we are of opinion that publication once a month for the three months preceding the election is more reasonable and more nearly conforms to the convention's intent, and at the same time provided adequate notice to the public."

Unless the *Beamish* Court added a once-a-month requirement that was not originally in the text of the Constitution, the three month period set forth in Article XI, Section 1, must refer to the times publication is required and does not specify a period before which publication must be completed.

The Court in *Beamish* heavily relied on the underlying policy of this Constitutional provision as enunciated in *Commonwealth v. King*, 278 Pa. 280, 282, 122 A. 279 (1923). The Court there stated that this section has two purposes. One is "to give the electors an abundant opportunity to be advised concerning the proposed amendment" and the other is to give the electors the opportunity "to ascertain the policy of candidates for the General Assembly to be 'next afterwards chosen.'" The *Beamish* Court determined that publication once a month for three months complies with the mandates of Article XI, Section 1, and clearly satisfies these policy goals.

The case of *Tausig v. Lawrence*, 328 Pa. 408, 197 A. 235 (1938) dealt with this section in another context. There the Court held that the term "published" did not mean the actual printing in the newspapers, but rather just the placing of the amendment in the hands of the recognized media. The question which you have asked was not directly decided.

An important element in interpreting the language of Article XI, Section 1, is the definition of the general term "month". The question is whether the drafters of the Constitution intended "month" to mean "calendar month during which a publication must be made" or "a fixed number of days before which publication must be made." The problem with interpreting the word "month" to mean "a fixed number of days before which a

publication must be made" is that elsewhere in the Constitution where an exact period is intended, the drafters stipulated an exact number of days.

Thus in Article IX, Section 14, part of the definition of the word "initiative" is "the filing with the applicable election officials *at least ninety days prior* to the next primary or general election. . . ." (Emphasis added.) Moreover, in the revisions made to the Constitution in 1967, the wording of Article VII, Section 1, was changed from a number of days, i.e., two months became sixty days.

See also, Article III, Section 7 ("notice shall be at least thirty days prior") and Article II, Section 17 ("within forty-five days"; "within thirty days thereafter"; "within fifteen days"; "No later than ninety days after"; "thirty-five day period"; etc.).

I therefore conclude that publication of a constitutional amendment at least once during the months of August, September, and October, 1972, the three months prior to the next general election to be held in November, 1972, complies with the language and the purpose of Article XI, Section 1, of the Pennsylvania Constitution.

Sincerely yours,

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 141

Contract No. 100—Codification of Pennsylvania Code

1. Contractor responsible for delay in the production of the *Pennsylvania Code* under Contract No. 100 is obligated to codify and publish copy delivered before the contract termination date of June 30, 1973, under the price specified in the contract.

Harrisburg, Pa.
August 9, 1972

Honorable John R. Gailey, Jr.
Chairman
Joint Committee on Documents
Harrisburg, Pennsylvania

Dear Mr. Gailey:

You have requested our opinion as to the interpretation of Contract No. 100 between the Commonwealth and Autocode, Inc., relating to the codification of documents under the Commonwealth Documents Law of July 31, 1968 (No. 240), 45 P. S. § 1101 *et seq.*, and the publication of the *Pennsylvania Code* and

its supplement (presently published on a quarterly basis), the *Pennsylvania Code Reporter*.

Contract No. 100, which was executed in 1969 and which expires on June 30, 1973, contemplates two functions: (1) the initial codification and publication of Commonwealth administrative regulations, legislative documents, court rules and related judicial documents, and home rule charters in the *Pennsylvania Code*; and (2) the continuous upkeep of the *Code* by the preparation and distribution of additional and superseding loose-leaf pages.

In 1969, when the contract was executed, it was anticipated that function (1), above, would be completed well before June 30, 1973, and that a renewal contract for the period commencing July 1, 1973 would relate simply to function (2) above. You have now advised us, however, that the contractor has not progressed as rapidly as required under the contract, and that although all of the manuscript material will be in the hands of the contractor by June 30, 1973, the contractor will not have delivered finished binders with respect to all of the Titles of the *Pennsylvania Code* by that time.

You have asked our opinion as to whether the Commonwealth may require the contractor to complete work after June 30, 1973, on manuscript furnished to it on or before that date and, since the contractor is paid only on delivery, make payments therefor at dates subsequent to June 30, 1973, or whether the Commonwealth will be forced to provide in the contract specifications for the contract for the period commencing July 1, 1973, that the successor contractor shall take over all work in progress at June 30, 1973, and complete such work under the terms of the succeeding contract. You point out that in view of price level inflation since 1969 there is a substantial risk that the succeeding contract may be more costly than the present one and that the transfer of work in progress from one contractor to another is an undesirable procedure.

It is apparent from a reading of the contract that delays of the kind which have impeded prompt completion of the initial codification were not anticipated when the contract was signed. It is equally apparent that the intent of the parties was that the *Code* be produced *in toto* by the contractor under the terms agreed upon. Accordingly, we are of the opinion, and you are advised, that all copy for the *Pennsylvania Code* submitted to the contractor under Contract No. 100 on or before June 30, 1973, is covered by that contract; that the contractor under that contract is obligated to codify and publish such copy pursuant to the price specified in the contract; and that where delivery of units of the *Code*, is made subsequent to June 30, 1973, payment by the Commonwealth for such units may also be made subsequent to June 30, 1973.

In accordance with Section 512 of the Administrative Code,

we have received the opinion of the State Treasurer and Auditor General on this opinion and they concur therein.

Sincerely,

GERALD GORNISH
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 142

Sick Leave—Workmen's Compensation

1. Executive Board Regulation at 4 Pa. Code § 35.83 is unlawful and must be rescinded.
2. Sick leave is an incident or benefit provided under the work agreement and not "in lieu of compensation" under § 315 of the Workmen's Compensation Act of June 2, 1915, P. L. 736, as amended (77 P. S. § 602).

Harrisburg, Pa.
August 21, 1972

Honorable Ronald G. Lench
Secretary of Administration
Harrisburg, Pennsylvania
and

Charles S. Solit, Esquire
General Counsel
Department of Labor & Industry
Harrisburg, Pennsylvania

Gentlemen:

You have asked what effect the case of *Temple v. Pennsylvania Department of Highways*, 445 Pa. 539 (1971), has on the following Executive Board Regulation.

"A disabled employe may not receive sick leave and Workmen's Compensation benefits at the same time."
4 Pa. Code § 35.83.

The *Temple* case held that it was unlawful for the State Workmen's Insurance Fund to deduct from the sum of disability compensation ordered to be paid to an employee of the Department of Highways all days of compensation for which the employee had received sick pay.

The Court found that the Department of Highway's only justification for such a deduction — that § 315 of the Workmen's Compensation Act of June 2, 1915, P. L. 736, as amended (77 P. S. § 602) requires it — was inadequate and erroneous.

§ 315 of the Act provides:

“Claims for compensation; when barred

“In cases of personal injury all claims for compensation shall be forever barred, unless, within sixteen months after the accident, the parties shall have agreed upon the compensation payable under this article; or unless within sixteen months after the accident, one of the parties shall have filed a petition as provided in article four hereof. In cases of death all claims for compensation shall be forever barred, unless, within sixteen months after the death, the parties shall have agreed upon the compensation under this article, or unless, within sixteen months after the death, one of the parties shall have filed a petition as provided in article four hereof. Where, however, payments of compensation have been made in any case, said limitations shall not take effect until the expiration of sixteen months from the time of the making of the most recent payment prior to date of filing such petition: Provided, that any payment made under an established plan or policy of insurance for the payment of benefits on account of non-occupational illness or injury shall not be considered to be payment in lieu of workmen’s compensation, and such payment shall not toll the running of the Statute of Limitations.” As amended 1956, Feb. 28, P. L. (1955) 1120, § 1.

The Court found that § 315 of the Act requires only that payments “in lieu of compensation” be deducted from Workmen’s Compensation benefits. It then went on to hold that “sick leave like vacation pay is an incident or benefit provided under the work agreement and is an entitlement like wages for services performed.” Sick leave payments are not, therefore, “in lieu of compensation.”

The Court went on to say:

“It must be remembered that this employee gave up his available sick leave pay for the 41½ day period, so that had he returned to his duties at the end of that period, under the insurance carrier’s view in this case it would have paid him nothing for his disability. Yet, claimant would have lost his sick leave which would otherwise have been available to him for nonwork-incurred disabilities which may have occurred thereafter. We have no hesitation in holding that such a construction of the workmen’s compensation laws was never intended by the Legislature.” 445 Pa. at 544.

There can be no other conclusion, therefore, than that the above-cited Executive Board Regulation is in direct conflict with both the letter and spirit of the *Temple* case. You are according-

ly advised that 4 Pa. Code § 35.83 is unlawful and should be formally rescinded immediately.

Sincerely yours,

MARK P. WIDOFF
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 143

Project 70—Department of Environmental Resources—Department of Community Affairs—Allocation of Funds

1. Project 70 funds that were certified as encumbered by the Department of Community Affairs on December 31, 1970, and were subsequently unencumbered are properly allocable to the Department of Environmental Resources for the acquisition of additional lands for use in accordance with the purposes of the Act.
2. The use of such funds by the Department of Environmental Resources is limited to projects begun prior to December 31, 1970, since that date was intended by the Legislature under Section 16(c) of the Project 70 Act (72 P. S. § 3946.16(c)) to be the cut-off date for all Project 70 projects.

Harrisburg, Pa.
August 3, 1972

Honorable Maurice K. Goddard
Secretary
Department of Environmental Resources
Harrisburg, Pennsylvania

Dear Secretary Goddard:

We have received an inquiry from your Department concerning the proper use of certain funds in accordance with the Project 70 Land Acquisition and Borrowing Act, Act of June 22, 1964, Special Sess., P. L. 131 (72 P. S. § 3946.1 *et seq.*). We have been advised that the Department of the Auditor General, at paragraph 1, subsection (c), page 20, of its audit findings, has objected to the allocation to the Department of Environmental Resources of funds which on December 31, 1970, were encumbered by the Department of Community Affairs, but with respect to which the Department of Community Affairs subsequently abandoned its projects. The Auditor General contends that the funds should have been paid into the Project 70 Land Acquisition Sinking Fund.

It is our opinion, and you are advised, that the funds in question are properly allocable to the Department of Environmental Resources in accordance with the purposes of the Act and that the Act does not authorize the payment thereof into the Sinking Fund.

The funds in question were originally allotted in accordance with Clause (4) of subsection (a) of Section 16 of the Act (72 P. S. § 3946.16(a) (4) for State aid to political subdivisions to pay 50% of the cost of lands to be acquired by such political subdivisions for recreation, conservation and historical purposes.

Section 17(d) of the Act (72 P. S. § 3946.17(d)) provides for the State aid to political subdivisions to be administered by the Department of Commerce. However, Reorganization Plan No. 2 of 1966 (71 P. S. § 752-2) transferred those functions to the Department of Community Affairs.

Some time after December 31, 1970, the Department of Community Affairs abandoned certain of the projects authorized by Clause (4) of subsection (a) of Section 16, mentioned above, and the question is whether the unused funds in support of those projects may be used to fund certain projects of the Department of Environmental Resources for recreation, conservation or historical purposes in accordance with Section 17(a); or whether the funds must be paid into the Project 70 Land Acquisition Sinking Fund which was set up to pay the interest accrued on bonds and notes issued under the authority of the Act and to redeem such bonds at maturity (72 P. S. § 3946.9(c)).

The answer to the question requires an interpretation of subsections (c) and (d) of Section 16 of the Act (72 P. S. § 3946.16).

Subsection (c) of Section 16 provides that:

"On December 31, 1970, all funds still available for expenditure under the provisions of this act and *not certified as encumbered* by the Department of Forests and Waters, Fish Commission, Game Commission and the Department of (Community Affairs) shall be paid into the Project 70 Land Acquisition Sinking Fund, to be devoted to and to be used exclusively for the payment of interest accruing on bonds and the redemption of bonds at maturity." (Emphasis added.)

We have been advised that the funds in question were certified as encumbered by the Department of Community Affairs as of December 31, 1970, although they became unencumbered subsequent to that date. Even though they eventually became unencumbered, the fact that the funds were encumbered on December 31, 1970, means that they could not have been paid into the Sinking Fund as required by subsection (c).

Instead, the proper course of action for unused funds originally allotted for the purposes of Clause (4) of subsection (a) of Section 16, above, is contained in subsection (b) (72 P. S. § 3946.16(b)), as follows:

"Six years after the effective date of this act, the unused or unobligated balance of any amount to be expended pursuant to *clause (4) of subsection (a) of this section 16* shall be allotted to the Department of Forests

and Waters (now the Department of Environmental Resources) for acquisition of additional lands for recreation or conservation purposes in any county, or for historical purposes in any county, as selected by the Department of Forests and Waters (now the Department of Environmental Resources) with the approval of the Governor, in the manner provided by this act." (Emphasis added.)

Since the Act became effective on June 22, 1964, the unused and unobligated funds in question were required on or after June 22, 1970, to be allotted to the Department of Environmental Resources for the acquisition of additional lands for use in accordance with the purposes of the Act. The use of such funds by the Department of Environmental Resources is, of course, limited to projects begun prior to December 31, 1970, since that date was intended by the Legislature under Section 16(c) of the Act to be the cut-off date for all Project 70 projects.

We have brought this opinion to the attention of Auditor General Casey and Treasurer Sloan pursuant to Section 512 of The Administrative Code (71 P. S. § 192). We are advised that Treasurer Sloan concurs in this Opinion and that Auditor General Casey does not concur.

Very truly yours,

W. W. ANDERSON
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 144

Voter Registration—Public Schools—Under 21 Voters

1. Any public school may be used for voter registration under § 16 of Act of April 29, 1937, P. L. 487, as amended (25 P. S. § 951-16(d)).
2. State colleges and community colleges are lawful locations for voter registration. Act of June 3, 1937, § 527, P. L. 133, as amended (25 P. S. § 2727).

Harrisburg, Pa.
August 16, 1972

Honorable John C. Pittenger
Secretary
Department of Education
Harrisburg, Pennsylvania

Dear Secretary Pittenger:

You have asked whether it is lawful to set up voter registration centers in public schools and colleges throughout the Com-

monwealth in order to facilitate voter registration for young people who are eligible to vote for the first time.

You are advised that such action is lawful under § 16 (c) (d) (e) of the Act of April 29, 1937, P. L. 487, as amended (25 P. S. § 951-16 (c) (d) (e)):

"(c) The county election board shall cause any polling place to be open, in proper order for use, as a place of registration, on each day when such polling place may be desired by the registration commission or required by the provisions of this act for use as a place of registration; and the county commissioners shall provide for the payment of all rentals for such polling places upon proper vouchers by the treasurer of the county.

"(d) The board of public education or school directors of each school district shall furnish suitable space in any public school building under its jurisdiction or control, and shall cause the room or space to be open and in proper order for use as a place of registration on each day when such room or space may be desired by the registration commission for use as a place of registration in accordance with the provisions of this act: Provided, that such use shall not interfere with instruction for the conduct of which such board of public education or school directors shall be responsible.

"(e) The proper city of the second class, city of the second class A, city of the third class, borough, town and township authorities shall furnish suitable space in any city of the second class, city of the second class A, city of the third class, borough, town or township hall or other municipal buildings under their jurisdiction or control, and shall cause the room or space to be open and in proper order for use as a place of registration on each day when such room or space may be desired by the commission for use as a place of registration: Provided, that such use shall not interfere with the use for which such room or space is primarily designed."

It is obvious, from a reading of subsection (d) of the above quoted law, that any public school can be used for voter registration. One of the reasons the Legislature enacted this law was undoubtedly to facilitate voter registration for those in the school. This desire will be greatly enhanced by making available field registrars and voting machines for the purpose of demonstrating their use. Encouraging registration is obviously in keeping with the spirit of the statute quoted above.

It is equally clear that state colleges and community colleges, being lawful locations for polling places under § 527 of the Act of June 3, 1937, P. L. 133, as amended (25 P. S. § 2727) (Coun-

ty Board of Education shall, wherever possible, select for polling places schoolhouses, municipal buildings and other *public places*)—are also lawful locations for registration centers under subsection (c) of the above-quoted statute. Furthermore, community colleges may be available as polling places under subsection (e) because of their relationship to their “local sponsor-political subdivision” under the Community College Act of August 4, 1963, P. L. 1132 (24 P. S. § 5201 *et seq.*). See especially 24 P. S. § 5202(2).

It is, therefore, perfectly lawful for registration centers to be set up in public schools and colleges and you are so advised.

Sincerely yours,

MARK P. WIDOFF
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 145

*Eminent Domain Code—Flood Control Projects**

1. “Flood Control Project” as used in § 602 of the Eminent Domain Code of June 22, 1964, P. L. 460, as amended (26 P. S. § 1-602) means any project described by flood control experts as a project which, in addition to other reasons for its implementation, serves a purpose of flood control.

Harrisburg, Pa.
August 28, 1972

Honorable William H. Wilcox
Secretary
Department of Community Affairs
Harrisburg, Pennsylvania

Dear Secretary Wilcox:

You have asked us to construe § 602 of the Eminent Domain Code of June 22, 1964, as amended, October 19, 1967, P. L. 460 (26 P. S. § 1-602) and specifically that paragraph of that section which reads as follows:

“In any case of the condemnation of property in connection with any flood control project, which property is damaged by floods, the damage resulting therefrom shall be excluded in determining fair market value of the condemnee’s entire property interest therein immediately before the condemnation; provided such

* Editor’s note: Section 602 of the Eminent Domain Code has been amended by Act 71 of September 27, 1973. Eligibility for special measure of damages under that Act no longer depends on the taking being “in connection with a flood control project.”

damage has occurred within three years of the date of taking and during the ownership of the property by the condemnee. The damage resulting from floods to be excluded shall include only physical damage to property for which the condemnee has not received any compensation or reimbursement."

Your question relates to the determination of when a particular project might be considered to be "in connection with any flood control project," and how such a determination may be made.

It should be emphasized, firstly, that the project may be designated an "open-space" project, an urban renewal project, a State urban redevelopment project, etc. The source of funding and the name of the program under which such funding takes place is not determinative of whether the project is or is not "in connection with any flood control project."

The term "flood control project," secondly, is not defined by the Act and it must be concluded, therefore, that the Legislature used that term to mean any project that could be so described by the appropriate flood control experts, e.g., Army Corps of Engineers, Pennsylvania Department of Environmental Resources, as a project which, in addition to other reasons for its implementation, serves a purpose of flood control.

While many examples of land needed for flood control come to mind, e.g., land taken in connection with damming a river to reduce the risk of future flooding or land needed to serve as a natural barrier for future floods, the decision in each case must come from the experts involved.

It should be added that the term "flood control project" certainly includes any project developed by the Water and Power Resources Board of the Department of Environmental Resources under the "Flood Control District" Act of August 7, 1936, P. L. 43 (34 P. S. § 653 *et seq.*), as amended, and any project developed by local government under the Act of August 6, 1936, P. L. 95 (53 P. S. § 2861, as amended). Neither of those Acts defines the phrase "flood control project" but use the term freely and describe procedures for carrying out such projects.

Sincerely yours,

MARK P. WIDOFF
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 146

*Liquor Control Board—Municipal Golf Course—Local Option Provisions—Statutory Construction**

1. In defining "municipal golf course" by an amendment to Section 461 of the Liquor Code (47 P. S. § 4-461) it was the Legislature's intent merely to provide a very narrow exception to the local option provisions in cases where municipal golf courses are owned jointly by two or more municipalities.
2. This interpretation is in accordance with the policy of statutory construction that conflicting clauses in a statute must be reconciled if it can be done consistent with the main purposes of the enactment.

Harrisburg, Pa.
September 5, 1972

Alexander J. Jaffurs, Esquire
Chief Counsel
Pennsylvania Liquor Control Board
Harrisburg, Pennsylvania

Dear Mr. Jaffurs:

You have requested our opinion concerning the effect of the 1971 amendment to the Liquor Code, which apparently permits the licensing of a municipal golf course in a dry community. In your memorandum to this Department dated June 19, 1972, you have asked our advice as to whether or not this amendment takes precedence over the local option provisions of the Code.

It is our opinion that the amendment has a very limited purpose, as described below, with respect to which it does take precedence over the local option provisions of the Liquor Code.

The amendment in question is contained in subsection (e) of Section 461 of the Liquor Code as follows:

"(e) 'Municipal golf course' as used in this section shall mean the restaurant facilities at any municipal golf course open for public accommodation, which are owned or operated directly or through lessees by a county, municipality or a municipal authority, severally or jointly with any other county, municipality or municipal authority, *including any such restaurant facilities at any municipal golf course situate in a municipality where by vote of the electors the retail sale of liquor and malt and brewed beverages is not permitted.*" (Emphasis added) Act of September 2, 1971 (Act No. 103) (47 P. S. § 4-461(e)).

This definition of "municipal golf course" is incorporated by reference in Section 404 of the Liquor Code (47 P. S. § 4-404) in the following manner:

"...nor shall anything herein contained prohibit the

* Editor's note: Opinion reversed in *Paxon Maynor, Inc. v. Commonwealth of Pennsylvania Liquor Control Board*, ____ Pa. Commonwealth ____, 312 A.2d 115 (1973).

board from issuing at any time a new license for an airport restaurant, or municipal golf course, as defined in section 461 of this act, for the balance of the unexpired license term in any license district. . . .”

This language appears to authorize the Board to issue a license to a municipal golf course which, according to the definition contained in Section 461, includes a municipal golf course situate in a municipality where by vote of the electors the retail sale of liquor and malt and brewed beverages is not permitted. Such an interpretation would come into conflict with the local option provisions contained in Section 642 of the Code (47 P. S. § 4-472).

However, a close reading of the definition of “municipal golf course” reveals that it was the Legislature’s intent merely to provide a very narrow exception to the local option provisions in cases where municipal golf courses are owned jointly by two or more municipalities. The key words to a proper understanding of the definition are “jointly” and “situate.”

“Municipal golf course. . . shall mean the restaurant facilities at any municipal golf course open for public accommodation, which are owned or operated. . . by a county, municipality or a municipal authority, severally or *jointly* with any other county, municipality or municipal authority, including any such restaurant facilities at any municipal golf course situate in a municipality where by vote of the electors the retail sale of liquor and malt and brewed beverages is permitted.” (Emphasis added.)

The language following the word “jointly” was intended to cover the situation where two or more counties, municipalities or municipal authorities jointly own or operate a municipal golf course which happens to be situate in a dry municipality.

For example, if two municipalities jointly own a municipal golf course, and one of the municipalities is wet and the other dry, but the municipal golf course is situate in the dry municipality, a license may nevertheless be granted. This would not be true if both municipalities were dry nor can a municipal golf course owned or operated solely by a dry municipality, be entitled to a license.

In our opinion, this interpretation of the amendment gives effect to the language thereof in accordance with the intent of the Legislature, while at the same time maintaining the integrity of the local option provisions. This is in accordance with the policy of statutory construction that conflicting clauses in a statute must be reconciled if it can be done consistent with the

main purposes of the enactment. *Cammie v. I. T. E. Circuit Breaker Co.*, 151 Pa. Super. 246 (1943).

Sincerely yours,

W. W. ANDERSON

Deputy Attorney General

J. SHANE CREAMER

Attorney General

OFFICIAL OPINION No. 147

Retirement—Municipal Court Judge—71 P. S. § 1725-401(4)—Section 16(e) of the Schedule to Article V of the Constitution of Pennsylvania of 1968.

1. Morris Starr who became a Municipal Court Judge in 1969 by operation of the provisions of Section 16(e) of the Schedule to Article V of the Constitution of 1968 does not fall within the purview of the Act of June 1, 1959, P. L. 392, art. IV, § 401, as amended by Acts Nos. 230 and 250 of July 31, 1968, 71 P. S. § 1725-401(4), and therefore is not eligible to retire at full pay even if he holds himself available for services for the balance of his unexpired term.
2. Judge Morris Starr has not "served at least one full elected term or ten (10) years in the aggregate as a judge continuously or otherwise...." (71 P. S. 1725-401(4)) and therefore may not receive full salary under this provision.

Harrisburg, Pa.
September 14, 1972

Honorable Joseph R. Glancey
President Judge
Philadelphia Municipal Court
Philadelphia, Pennsylvania

Dear Judge Glancey:

Your letter of June 1, 1972, regarding the eligibility of Judge Morris Starr to retire at full salary under the Act of June 1, 1959, P. L. 392, art. IV, § 401, as amended by Acts Nos. 230 and 250 of July 31, 1968, 71 P. S. § 1725-401(4), has been carefully considered.

It is our opinion that Judge Starr is not eligible to retire at full salary under this Act since he has not "served at least one full elected term or ten (10) years in the aggregate as a judge continuously or otherwise...." (71 P. S. 1725-401(4)) (Emphasis added.)

As you know, Morris Starr was elected in 1965 as a *magistrate* and became a judge in 1969 by operation of the provisions of Section 16(e) of the Schedule to Article V of the Constitution of 1968. That section provides:

"As designated by the Governor, twenty-two of the present magistrates shall become judges of the municipal court and six shall become judges of the traffic court, and their tenure shall not otherwise be affected."

Magistrates becoming judges pursuant to the above-quoted section of the Constitution have not served a full elected term or ten years in the aggregate as a judge.

Although prior to the constitutional changes of 1968 magistrates were occasionally referred to as "judges," they were not judges within the meaning of the Constitution or of the law governing the retirement of state judges learned in the law.

It is therefore clear that Judge Starr does not fall within the purview of the Act of July 31, 1968, which was intended to apply only to those judges who were originally elected and served a full term or served ten years in the aggregate as a judge learned in the law.

For this reason, it is our opinion that Judge Starr is not eligible to retire at full pay even if he holds himself available for services for the balance of his unexpired term.

Sincerely yours,

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 148

Enforcement of election laws of Pennsylvania as mandated by the Federal Voting Rights Act Amendments of 1970: Absentee balloting rights in presidential and vice-presidential elections, Absentee registration rights in presidential and vice-presidential elections, Voting eligibility of an individual who moves from his voting district within thirty (30) days of an election for President and Vice-President, Sanction under Federal law—Secretary of State to issue instructions to local election officials.

1. Any person who is otherwise eligible to vote and who affirms that he or she will be *absent for any reason from the election district* on an election day at which votes cast for President and Vice President must be permitted to vote for President and Vice President by absentee ballot provided that application for such ballot is made not later than seven (7) days prior to such election day and such ballot is returned to the appropriate election official not later than the time of closing of the polls.
2. Any person otherwise eligible to vote absentee for President and Vice President, and who affirms that he or she is *unable to register in person by reason of absence from the election district for any reason*, must be allowed to register absentee for purposes of qualifying to vote as an absentee elector for President and Vice President providing that the application therefor is made not later than thirty (30) days prior to election day.
3. Any person who is otherwise eligible to vote and who affirms that he or she has ceased to reside in an election district in Pennsylvania and *established residence in another election district in Pennsylvania or in another State within thirty (30) days of an election* for President and Vice President, and that because of the recent change of residence is *not eligible to register and vote in his or her new election district or State*, must be allowed to vote for President and Vice President by absentee ballot in the former election district providing that application for such absentee ballot is made not later than seven (7) days prior to such election day

and that such absentee ballot is returned to the appropriate official not later than the time of the closing of the polls.

4. Any voting official depriving any person of any of the above rights secured by the Federal Voting Rights Act Amendments of 1970 is subject to being fined up to \$5,000 or being imprisoned up to five (5) years, or both.

Harrisburg, Pa.
September 15, 1972

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

Dear Mrs. Tucker:

You have asked our advice regarding the effect of provisions of the Federal Voting Rights Act Amendments of 1970, P. L. 91-285, June 22, 1970, § 4, Stat. 314, *et seq.*, 42 U. S. C. 1973aa, *et seq.*, on the enforceability of existing Pennsylvania law regulating absentee balloting and absentee registration for presidential elections by qualified electors. Title II of the 1970 Voting Rights Act Amendments requires voting laws to meet specified nationwide, uniform standards for absentee registration and absentee balloting in presidential and vice-presidential elections. See 202(b) (2) of the Voting Rights Act Amendments of 1970, 42 U. S. C. 1973aa-1(b) (2). Pennsylvania local election officials are required to comply with applicable provisions of the Federal law or face penalties of up to five (5) years imprisonment or fines up to \$5,000, or both.

Because there is no law bringing State and local elections into harmony with federally-established standards for presidential and vice-presidential elections, great administrative burdens will be imposed on Commonwealth election officials. Under the provisions of the 1970 Voting Rights Act Amendments, local and state election officials will be required to follow a completely separate set of standards for numerous Pennsylvania voters who will be qualified only as presidential and vice-presidential electors.

While the Legislature still has an opportunity to avoid these complications by quick enactment of presently-pending Senate Bills 1540, 1541, 1542, 1543 and 1544, the shortness of time before which local election officials must begin processing absentee ballots and absentee registrations, necessitates that all election officials be immediately instructed regarding their duties and liabilities under the 1970 Voting Rights Act Amendments.

Accordingly, you are hereby formally advised and instructed that in accordance with the requirements of the Voting Rights Act Amendments of 1970, the following rights must be extended to all qualified individuals:

A. Any person who is otherwise eligible to vote and who affirms that he or she will be *absent for any reason from the election district* on an election day at which votes are cast for

President and Vice-President must be permitted to vote for President and Vice-President by absentee ballot provided that application for such ballot is made not later than seven (7) days prior to such election day and such ballot is returned to the appropriate election officials not later than the time of closing of the polls. See § 202(d) of the Voting Rights Act Amendments of 1970, 42 U. S. C. 1973aa-1(d).

B. Any person otherwise eligible to vote absentee for President and Vice-President, and who affirms that he or she is *unable to register in person by reason of absence from the election district for any reason*, must be allowed to register absentee for purposes of qualifying to vote as an absentee elector for President and Vice-President providing that the application therefor is made not later than thirty (30) days prior to election day. See § § 202(d) and 202(f) of the Voting Rights Act Amendments of 1970, 42 U. S. C. 1973aa-1(f).

C. Any person who is otherwise eligible to vote and who affirms that he or she has ceased to reside in an election district in Pennsylvania and *established residence in another election district in Pennsylvania or in another State within thirty (30) days of an election* for President and Vice-President, and that because of the recent change of residence is *not eligible to register and vote in his or her new election district or State*, must be allowed to vote for President and Vice-President by absentee ballot in the former election district providing that application for such absentee ballot is made not later than seven (7) days prior to such election day and that such absentee ballot is returned to the appropriate official not later than the time of closing of the polls. See § 202(e) of the Voting Rights Act Amendments of 1970, 42 U. S. C. 1973aa-1(e).

D. Any voting official depriving any person of any of the above rights secured by the Federal Voting Rights Act Amendments of 1970 is subject to being fined up to \$5,000 or being imprisoned up to five (5) years, or both. See § 204 of the Voting Rights Act Amendments of 1970, 42 U. S. C. 1973aa-3.

Existing provisions of the Constitution or laws of Pennsylvania which prevent any of the above rights mandated in the 1970 Voting Rights Act Amendments from being extended to qualified individuals are declared unenforceable insofar as such provisions apply to presidential and vice-presidential elections. Accordingly, the following provisions of Pennsylvania law must be enforced as described below:

1. Section 20 of P. L. 707, August 13, 1963, as amended, 25 P. S. § 3146.1 shall be extended to include as a qualified absentee elector for presidential and vice-presidential elections any qualified elector who will be absent for any reason from his or her voting district on election day.

2. Section 20 of P. L. 707, August 13, 1963, 25 P. S. § 3146.2 shall be enforced as requiring that a qualified absentee elector

for President and Vice-President affirm that he is unable to vote in person because of absence from his or her voting district. Such a qualified voter need only affirm that he or she will be absent from the election district on election day in order to qualify for an absentee ballot for presidential and vice-presidential elections. A right to an absentee ballot for presidential and vice-presidential elections may not be limited only to those cases where the absence of qualified elector is necessitated by military service, governmental service, physical handicap, or other reason specified in § 3146.2, *supra*.

3. Section 1302.1, Article XIII of P. L. 1333, June 3, 1937, as amended, 25 P. S. § 3146.2a shall be enforced as requiring that an application for an absentee ballot for a presidential and vice-presidential election be honored if received in the Office of the County Board of Elections not later than seven (7) days immediately prior to the election.

4. Section 1302.2, Article XIII of P. L. 1333, June 3, 1937, as amended, 25 P. S. § 3146.2b shall be enforced as including as qualified absentee electors for the presidential and vice-presidential election, all voters qualified to vote absentee under the provisions of the Voting Rights Act Amendments of 1970.

5. Section 1302.3, Article XIII of P. L. 1333, June 3, 1937, as amended, 25 P. S. § 3146.2c shall not be construed as preventing local election officials from segregating files and lists of voters eligible to vote only for President and Vice-President, from files and lists of other eligible voters.

6. Section 22 of P. L. 707, August 13, 1963, as amended, 25 P. S. § 3146.3 shall not be construed to prevent local election officials from printing special absentee ballots for individuals qualified to vote only for President and Vice-President.

7. Section 22 of P. L. 707, August 13, 1963, as amended, 25 P. S. § 3146.4 shall not be construed as preventing envelopes for absentee ballots from individuals qualified to only vote for President and Vice-President from being accordingly marked.

8. Section 22 of P. L. 707, August 13, 1963, as amended, 25 P. S. § 3146.5 shall be enforced as requiring that absentee ballots of voters eligible to vote only for President and Vice-President be delivered or mailed in accord with the provisions of this section for applications filed by qualified electors.

9. Section 22 of P. L. 707, August 13, 1963, as amended, 25 P. S. § 3146.6 shall be enforced as requiring the counting of any absentee votes cast for President and Vice-President if the absentee ballot is received before the closing of the polls on election day. This provision shall apply to all absentee votes cast for President and Vice-President, whether the ballot is by absentee electors qualified to vote only for President and Vice-President under the provisions of the Voting Rights Act Amendments of 1970 or absentee electors qualified to vote in all Federal, State and local elections. Any such absentee ballots may be delivered

directly to the County Board of Elections up until the closing of the polls on election day.

10. Section 1306.1, Article XIII of P. L. 1333, June 3, 1937, as amended, 25 P. S. § 3146.6 shall be enforced as requiring that designated assistance be available, when required, to all qualified absentee voters, including those voters qualified only for purposes of presidential and vice-presidential elections. Further, this section shall be enforced as allowing an elector only qualified to vote for President and Vice-President under the provisions of the 1970 Voting Rights Act Amendments to cast such a ballott in person at his or her polling place as directed by the special elections Court of the Court of Common Pleas.

11. Section 24 of P. L. 707, August 13, 1963, as amended, 25 P. S. § 3146.8 shall not be enforced to deprive any individual of rights guaranteed by the Voting Rights Act Amendments of 1970. Further, this section need not be enforced to require the distribution of absentee ballots to the absentee voter's local election district, when such absentee ballots can only contain votes valid insofar as the presidential and vice-presidential elections are concerned. Such absentee ballots must be examined and counted separately from absentee ballots which might contain votes valid for all Federal, State and local elections. Provisions of this section requiring a \$10.00 deposit by any individual challenging an absentee vote before the Election Board shall apply to challenges to absentee ballots of individuals who only claim the right to vote for President and Vice-President. Challenges to absentee ballots of individuals qualified under the 1970 Voting Rights Act Amendments, must be based on provisions of that law.

12. Section 14 of Article VII of the Pennsylvania Constitution shall be extended to include as a qualified absentee elector for presidential and vice-presidential elections any otherwise qualified elector who will be absent for any reason from his or her voting district on election day.

13. The election laws of Pennsylvania shall be enforced as allowing a voter otherwise qualified to cast an absentee ballot for President and Vice-President to register absentee for purposes of qualifying as an absentee elector for presidential and vice-presidential elections, if the individual is unable to register in person by reason of absence for any reason from the election district during the time the registration books are open. Procedures for such absentee registration for purposes of presidential and vice-presidential elections shall be as directed by the Secretary of the Commonwealth, acting as Chief Election Official of Pennsylvania, in accord with the general standards for absentee registrations set forth in § 20.1 of Act of March 30, 1937, P. L. 115, 25 P. S. § 623-20.2 and § 18.1 of Act of April 29, 1937, P. L. 487, 25 P. S. § 951-18.1.

Each of the above provisions, as well as any other affected provision of Pennsylvania law, is declared unenforceable to the

extent that enforcement of that law would conflict with the granting of voting rights enumerated in the Voting Rights Act Amendments of 1970.

You are further advised that the changes in Pennsylvania's election provisions required by the Federal Voting Rights Act Amendments of 1970 pertain only to persons who seek to vote in a presidential and vice-presidential election. The present provisions of State law for elections of candidates for State and local office remain unaffected by the Federal Voting Rights Act Amendments of 1970.

As Chief Election Official of the State of Pennsylvania, you are formally advised to promptly issue complete instructions to election officials to assure that full Federal voting rights are available to all qualified individuals with the minimum possible disruption of election procedures at the local level. Further, you are formally advised to instruct all public officials charged with the administration of the election laws of Pennsylvania or with the conduct of any election, that failure to make these or other Federal voting rights available to qualified voters may make such officials subject to penalties under existing Federal law of fines of not more than \$5,000, or imprisonment of not more than five (5) years, or both.

Sincerely yours,

BARTON ISENBERG
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 149

*Liquor Control Board—Appeals—Department of Justice—The Administrative Code**

1. The Department of Justice is responsible for furnishing legal advice to the Liquor Control Board concerning any matter or thing arising in connection with the exercise of its official powers and for the supervision, direction and control of all its legal business including, in particular, any litigation from the time that it is commenced or about to be commenced.
2. On legal matters the Board is subject to the supervision, direction and control of the Department of Justice at all times and the Board must refer any matter in litigation to the Department of Justice and its designated representative, i.e., the Board's Chief Counsel, to be handled in such manner as the Department of Justice shall determine.
3. The powers given to the Department of Justice by provisions of The Administrative Code override any decisions, judgments, or opinions of the Liquor Control Board, or any member thereof, with regard to any legal matter pertaining to the Board.

* Editor's note: Opinion reversed in *Liquor Control Board v. Kusic*, 7 Pa. Commonwealth 274 (1973).

4. It is the duty of the Department of Justice to determine whether or not an appeal should be taken from the decision of any court or administrative agency regarding a legal matter in litigation. In this regard it is the duty of the Liquor Control Board to refer all decisions concerning appeals to the Department of Justice and its Chief Counsel for determination.

Harrisburg, Pa.
September 22, 1972

Mr. Edwin Winner
Chairman
Pennsylvania Liquor Control Board
Harrisburg, Pennsylvania

Dear Mr. Winner:

We have received an inquiry from Alexander J. Jaffurs, Chief Counsel to the Liquor Control Board, asking us how to resolve a dispute between the Board and the Chief Counsel to the Board concerning two appeals to the Commonwealth Court. In both cases the Chief Counsel has recommended that appeals be taken from Courts of Common Pleas but the Board has directed him not to appeal. In these situations Mr. Jaffurs, in a memorandum to this Office dated July 28, 1972, has asked which decision is controlling, the Board's or that of the Chief Counsel.

It is our opinion, and you are advised, that such matters are required by law to be submitted to the Department of Justice and its designated representative, i.e., the Board's Chief Counsel who is appointed by the Attorney General and is subject to his direction and supervision as hereinafter set forth, for decision. The Board is bound to follow the instructions of the Department of Justice and its Chief Counsel concerning an appeal to the Commonwealth Court or any other court, regardless of whether or not the Board, or any member thereof, agrees with the Department and its designated representative.

The question has arisen in connection with two recent cases referred to by Mr. Jaffurs in his memorandum. In one, the Philadelphia Court of Common Pleas remanded a citation case back to the Board for further proceedings on the ground that the citation was invalid since it failed to itemize the specific details involved in each alleged violation other than the nature and date of the violation. In Mr. Jaffur's judgment an appeal should be taken to the Commonwealth Court because there is no authority for the Court to remand the case to the Board for further proceedings, and also because the requirements imposed by the Court are unnecessary and would place an intolerable burden on the Board. An appeal from the decision was taken by Mr. Jaffurs although shortly after it was filed he was instructed by the Board not to appeal.

In the other case referred to by Mr. Jaffurs, the Court of Common Pleas of Allegheny County directed the Board to permit the transfer of a liquor license to a location within 200 feet of other premises licensed by the Board. The Court interpreted Section

404 of the Liquor Code (47 P. S. § 4-404) in a manner contrary to the Board's or Mr. Jaffurs' interpretation thereof. For this reason Mr. Jaffurs feels that an appeal should be taken, but the Board has instructed him not to appeal.

In both cases, it is our opinion that Mr. Jaffurs' reasons for appealing are sound and that appeals should be taken to the Commonwealth Court.

The powers and duties of the Department of Justice are found in The Administrative Code of 1929, as amended. (71 P. S. § 51 *et seq.*) Section 902 thereof (71 P. S. § 292) provides as follows:

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

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

"(b) To *supervise, direct and control all of the legal business of every administrative department* other than the Department of the Auditor General, *board, and commission of the State Government.*" (Emphasis added.)

In addition, Section 512 (71 P. S. § 192) provides, in part:

"Whenever any department, . . . board, commission or officer of the State Government, shall require legal advice concerning its conduct or operation, or *any legal difficulty or dispute arises, or litigation is commenced or to be commenced*, in which any department, . . . board, commission or officer is concerned . . . it shall be the duty of such department, board, commission or officer to refer the same to the Department of Justice." (Emphasis added.)

In accordance with the foregoing provisions the Department of Justice through appointees of the Attorney General is responsible for furnishing legal advice to the Liquor Control Board concerning any matter or thing arising in connection with the exercise of its official powers and for the supervision, direction and control of all of its legal business including, in particular, any litigation from the time that it is commenced or about to be commenced.

This means that the Board is subject to the supervision, direction and control of the Department of Justice at all times in legal matters and that the Board must refer any matter in litigation to the Department of Justice or its designated representa-

tive. The Chief Counsel, to be handled in such manner as the Department of Justice shall determine.

The powers given to the Department of Justice by the foregoing provisions of The Administrative Code override any decisions, judgements or opinions of the Liquor Control Board, or any member thereof, with regard to any legal matter pertaining to the Board. It is the duty of the Department of Justice to determine whether or not an appeal should be taken from the decision of any court or administrative agency regarding a legal matter in litigation. In this regard it is the duty of the Board to refer all decisions concerning appeals, such as those referred to above, to this Department and its Chief Counsel for determination.

Pursuant to the legal authority of this Department, therefore, it is our determination that appeals should be taken from both cases referred to above and you are accordingly directed, through your Chief Counsel, to pursue the appeal taken from the Philadelphia Court of Common Pleas and to file a timely appeal to the Commonwealth Court from the Court of Common Pleas of Allegheny County.

Very truly yours,

W. W. ANDERSON
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 150

Parole Act—Human Relations Act—Equal Rights—Supervision of Parole Clients of Opposite Sex.

1. The Equal Rights Amendment to the Constitution of Pennsylvania and the Pennsylvania Human Relations Act supersede that portion of the Parole Act which forbids supervision of parole clients by persons of the opposite sex.

Harrisburg, Pa.
Sepeember 27, 1972

Honorable Richard W. Lindsey
Chairman
Board of Probation and Parole
Harrisburg, Pennsylvania

Dear Mr. Lindsey:

You have asked whether you may permit parole officers of one sex to supervise parolees of the opposite sex.

The Parole Act provides:

"The board shall appoint and employ a sufficient number of women as parole officers and supervisors to act as such for the women over whom it shall have power and jurisdiction, and no person of one sex shall be paroled in charge of a parole officer of the opposite sex." 61 P. S. § 331.28.

Article I, Section 27 of the Pennsylvania Constitution 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."

The Pennsylvania Human Relations Act provides:

"It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification..."

"(a) For any employer because of the...sex...of any individual to refuse to hire or employ, or to bar or discharge from employment such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required." 43 P. S. § 955.

Any law passed by the Legislature must, of course, be in accordance with the Pennsylvania Constitution which is the supreme law of the Commonwealth. It should be noted that the questioned provisions of the Parole Act (61 P. S. § 331.28) was passed in 1941 and thus antedates by 30 years Article I, Section 27 of the Pennsylvania Constitution which was approved by the electorate in 1971. To the extent that the Parole Act is inconsistent with the Constitution, of course, the Constitution must take precedence.

Additionally, the Pennsylvania Human Relations Act (by its terms) prevails over any laws inconsistent with it. 43 P. S. § 962(a).

"The provisions of this act shall be construed liberally for the accomplishment of the purposes thereof, and *any law inconsistent with any provisions thereof shall not apply.*" (Emphasis added.)

We recognize that historically the number of female parolees is much smaller than the number of male parolees. As of July, 1972, which are the latest verified figures available, there were 14 women parole officers supervising 470 women parolees or an average caseload of approximately 34 per woman parole officer. There were 219 male parole officers supervising 8,833 male parolees or an average caseload of approximately 40 per male parole officer. This inequality of caseload raises additional questions concerning the validity of Section 331.28 of the Parole Act.

The vastly greater number of male parolees over female parolees has prevailed for many years and can reasonably be anticipated to continue in the future. If the questioned provision of the Parole Act (61 P. S. § 331.28) continues to be given full effect, the Parole Board will be forced to hire much fewer women than men without regard to whether or not an "individual is the best able and most competent to perform the services" of parole officer. See 43 P. S. § 955 *supra*. We believe that such a hiring policy is in violation of the above-cited provisions of the Pennsylvania Constitution and the Human Relations Act. Therefore, Section 331.28 of the Parole Act (61 P. S. § 331.28) limiting the hiring of women parole officers to exclusively supervising women parolees is unenforceable in our opinion.¹

This decision should not be construed as precluding the Board from establishing, by regulation or otherwise, supervision of certain parolees by parole officers of the same sex in appropriate cases. The Board may consider the relevance of the sex of parolees and parole officers on a case-by-case basis just as it considers other factors which relate to a successful parole relationship.

Sincerely yours,
J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 151

Judiciary—Appointment—Justice of the Peace—Retirement—Associate Judge Not Learned in the Law—Death.

1. Under Sections 8 and 12 of the Schedule to the Judiciary Article of the Pennsylvania Constitution, the office of a justice of the peace who had been appointed or elected prior to the effective date of the Judiciary Article who retires before his term has been completed is not to be filled, but the office is abolished upon his retirement.
2. Under Section 9 of the Schedule to the Judiciary Article of the Pennsylvania Constitution, the office of Associate Judge not learned in the law who was appointed or elected prior to the effective date of the Judiciary Article is not to be filled upon his death, but the office is abolished upon his death.

Harrisburg, Pa.
October 4, 1972

Honorable Milton J. Shapp
Governor
Harrisburg, Pennsylvania

Dear Governor Shapp:

From time to time we have received inquiries regarding your appointment power under Article V, § 13, of the Pennsylvania

1. Additionally, we note ambiguity within the Parole Act itself. Section 331.30 provides as follows:

"Wherever in this act the masculine is used it shall include the feminine."

Constitution to vacancies in offices of the minor judiciary. In one instance, we were confronted with the situation of a justice of the peace who had retired with two years remaining in his six-year term. He had been appointed or elected prior to the effective date of the new Judiciary Article of the Pennsylvania Constitution and remained in office by virtue of Section 8 of the Schedule to the Judiciary Article. This section provides:

“Notwithstanding any provision in the article, a present justice, judge, or justice of the peace may complete his term of office.”

We advised under the circumstances of that case that there was no vacancy for you to fill because Section 12 of the Judiciary Article abolished the office of Justice of the Peace once the incumbent completed his term. It was our construction of the Constitution, which we hereby reiterate, that the phrase, “[A]t the completion of *his* term, *his* office is abolished,” (Schedule to Judiciary Article § 12(c)), means that upon completion of the justice’s term, whether by death, resignation, incapacity, or expiration of *his* term, *his* office is abolished and is not to be refilled.

Our opinion has now been requested as to whether an appointment should be made to a vacancy caused by virtue of the death of an “associate judge not learned in the law.” Section 9 of the Schedule to the Judiciary Article provides:

“The office of associate judge not learned in the law is abolished, but a present associate judge may complete his term.”

Following our earlier opinion, it is our opinion that the Constitution clearly intended to do away with the office of Associate Judge and merely to allow those in office at the time the new Judiciary Article took effect to complete their terms. Since the associate judge died, his office is abolished and no one should be appointed to fill his term.

We are sending a copy of this opinion to President Judge Greiner of the 59th Judicial District, who brought the case to our attention.

Sincerely yours,

GERALD GORNISH
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 152

Pennsylvania Industrial Development Authority—Loans to Railroads.

1. Railroad facilities come within the definition of an "industrial development project" under the Industrial Development Act of May 17, 1956, P. L. (1955) 1609, as amended, 73 P. S. § 301, *et seq.*
2. The alleviation of unemployment caused by loss of railroad service damaged by the floods of June, 1972 is within the purpose of the Industrial Development Act.

Harrisburg, Pa.
October 19, 1972

Honorable A. Edward Simon
Office of State Planning & Development
Harrisburg, Pennsylvania

Dear Mr. Simon:

You have requested our opinion as to whether projects for the reconstruction or repair of railroad facilities damaged by Hurricane Agnes and the resulting floods are "Industrial Development Projects" within the meaning of the Industrial Development Authority Act of May 17, 1956, P. L. (1955) 1609, as amended, 73 P. S. § 301, *et seq.*, thereby making such reconstruction and repair projects eligible for loans under the Act. You have pointed out, and we note, that as a result of the hurricane and flood damage to railroad facilities, not only will there be a loss of employment on the damaged railroad lines themselves, but also a loss of employment from industries served by such railroad lines for which such service is critical. We have been further advised that there has already been a detrimental effect on employment in areas where railroads have suffered hurricane and flood damage. Moreover, it is apparent that adequate railroad service is necessary to attract other industries and retain present industry in the Commonwealth of Pennsylvania.

It is our opinion, and you are so advised, that projects to reconstruct or repair railroad facilities damaged by hurricanes and floods are "Industrial Development Projects" within the meaning of the Industrial Development Act, and, assuming all other requirements of the Act are met, are eligible for Industrial Development loans. Sections 5 and 6 of the Industrial Development Authority Act, 73 P. S. § § 305-306. "Industrial Development Project" is defined as:

"...any land, site, structure, facility or undertaking comprising or being connected with or being a part of (i) an *industrial enterprise*, (ii) a manufacturing enterprise, or (iii) a research and development enterprise, established or to be established by an industrial development agency in a critical economic area." Section 3(i), 73 P. S. § 303(i). (Emphasis supplied.)

The term, "Industrial Enterprise," in turn, is defined as:

"...an enterprise *other than a mercantile, commercial or retail enterprise*, which by virtue of its size requires substantial capital and which by its nature and size has created or will create substantial employment opportunities...." Section 3(n), 73 P. S. § 303(n). (Emphasis supplied.)

The definition of "Industrial Enterprise" is certainly broad enough to cover certain railroad facilities. A railroad is "other than" a mercantile, commercial or retail enterprise; by virtue of its size it requires substantial capital; and by its nature and size it may create substantial employment opportunities. Whether a particular project would meet with the other requirement of the Act noted above would, of course, depend on the findings of the Pennsylvania Industrial Development Authority on critical factors such as the level of unemployment in the area in which the project is undertaken, the incidence of public assistance dependency in the area, the number of new jobs created or saved by the project and the financial condition of the borrower.

We shall be pleased to deal with any further issues which implementation of this opinion may entail.

Sincerely yours,

GERALD GORNISH

Deputy Attorney General

J. SHANE CREAMER

Attorney General

OFFICIAL OPINION No. 153

School districts—Students' constitutional rights—Regulating the length and style of students' hair.

1. School board regulations which regulate the length or style of students' hair are unconstitutional and unenforceable except when the length or style of hair (1) causes an actual disruption of the educational process, (2) constitutes a health hazard or (3) constitutes a safety hazard.

Harrisburg, Pa.
October 27, 1972

Honorable John C. Pittenger
Secretary
Department of Education
Harrisburg, Pennsylvania

Dear Secretary Pittenger:

You have asked us what effect, if any, the recent decision of the United States Court of Appeals for the Third Circuit in the

case of *Stull v. School Board of Western Beaver Jr.-Sr. High School*, 459 F. 2d 339 (3rd Cir. 1972), has on regulations now being enforced in some school districts regulating the length or style of students' hair.

The decision in the *Stull* case has to be read together with a previous decision of the Third Circuit dealing also with the constitutionality of such regulations, i.e., *Gere v. Stanley*, 453 F. 2d 205 (3rd Cir. 1971), involving Blue Ride High School in New Milford, Pennsylvania. The plaintiff had grown hair in violation of the high school's regulations. There was testimony in the record that Gere's hair was very dirty and that his fellow students refused to sit near him — thus causing disruption of the educational process. In addition, groups of students approached the Principal of the school complaining about the unhealthy condition of Gere's hair. On the basis of those facts, the Court upheld the regulation on the ground that, although a student might be assumed to have a constitutional right to choose his hair style, the school board had a right and duty to "insure an atmosphere conducive to educational purposes," and considering the evidence of disruption of the educational process by Gere, the regulation was not an arbitrary exercise of that right. (For a full discussion of this case and the conflicting authorities in other jurisdictions, see Judge Becker's Opinion in *Stull*, *supra*.)

The record in the *Stull* case presented none of the evidence of disruption contained in *Gere*. The Court, therefore, struck down the challenged regulations as unconstitutional because "the governance of the length and style of one's hair is implicit in the liberty assurance of the Due Process Clause of the Fourteenth Amendment. . . ."

On the basis of that holding, you are advised that school board regulations regulating the length or style of students' hair are unconstitutional and unenforceable except under the following three (3) narrow factual circumstances:

1. If the length or style of hair causes an actual disruption of the educational process.
2. If the length or style of hair constitutes a health hazard.
3. If the length or style of hair constitutes a safety hazard, e.g., in shop classes.

The above rule would appear to apply not only in the classroom situation, but also in the extracurricular sphere, i.e., except subject to the above exceptions, hair length or style regulations may not be imposed on students, and adherence to those rules may not be made a condition precedent to student participation in extracurricular activities. Regulation of facial hair, furthermore, may be accomplished, again, only under the narrow exceptions stated above.

Because students do have a constitutionally protected right, under *Stull*, to govern the length and style of their hair, it

would be appropriate to consider and exhaust alternative means of dealing with the above-stated factual situations prior to infringing upon this right. In this regard, it might be appropriate to require hair to be clean regardless of length or style; and it might be appropriate to require some type of head covering in shop classes or gymnasium where long hair may create a safety hazard.

It is our hope that this opinion will be of some help and guidance to our school districts and administrators and that future litigation in this area—with the resulting unnecessary expenditure of funds and energy—will be avoided, thereby allowing all in the educational field to devote full time and energy to the improvement and reform of our educational delivery system.

Sincerely yours,

MICHAEL LOUIK
Assistant Attorney General

MARK P. WIDOFF
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 154

Commerce—Disaster Loans—Credit of Commonwealth.

1. The short-term disaster relief loan program of the Department of Commerce is legal.
2. The Department of Commerce may make loans to industrial development authorities as defined in the Industrial and Commercial Development Authority Law of August 23, 1967, as amended, 73 P. S. § 371 *et seq.*, for disaster relief projects pursuant to Section 6(b) (15) of the Law, added by Act No. 2 of First Special Session of 1972.
3. Funds appropriated for emergency and disaster relief under Act No. 18-A of July 7, 1972 may be used to fund the short-term disaster relief loan program.
4. The short-term disaster relief loan program is constitutional as being designed to benefit the public through restoring employment and industry adversely affected by the tropical storm of June, 1972.
5. The short-term disaster relief loan program does not violate Article VIII, § 8 of the Pennsylvania Constitution because no credit of the Commonwealth is pledged where treasury funds are appropriated to fund the program.
6. The short-term disaster relief program does not violate Article III, § 29 of the Pennsylvania Constitution because it does not make an appropriation for pure charities, benevolences or gratuities.

Harrisburg, Pa.
October 27, 1972

Honorable Walter G. Arader
Secretary
Department of Commerce
Harrisburg, Pennsylvania

Dear Secretary Arader:

You have requested our opinion regarding the legality of the short-term disaster relief loan program of the Department of Commerce (hereafter "Department") undertaken as part of the Commonwealth's effort to combat the effects of the tropical storm of June, 1972. It is our opinion, based on the discussion which follows that: (1) the program is legally authorized; (2) the funds used by the Department have been legally appropriated; and (3) the program is constitutional.

A. Background

You have advised that the purpose of the program is to provide assistance to business enterprises within the Commonwealth of Pennsylvania which suffered hurricane or flood damage as a result of the storm. This will be accomplished by loans for a maximum period of 180 days to enable the rehabilitation of such enterprises pending the availability of disaster loans to be made by the Small Business Administration of the United States under its mandate in 15 U. S. C. § 636 and 42 U. S. C. § 4411. These latter loans, which are permanent in nature require an extensive length of time to consummate. Your Department will make the loans to industrial development authorities (hereafter "authorities") as defined in the Industrial and Commercial Development Authority Law of August 23, 1967, as amended, 73 P. S. § 371 *et seq.* (hereafter "Law"). The authorities in turn will lend the proceeds to flood-damaged business enterprises to rehabilitate the damaged or destroyed portions of such enterprises, in accordance with Section 6(b) (15) of the Law, added by Act No. 2 of First Special Session of 1972, approved September 1, 1972. The loan documents provide for an interest rate of two (2%) percent per annum and require as a condition of the loan that the authorities and the enterprises who receive loans from the authorities will diligently pursue the obtaining of permanent loans from the Small Business Administration, and that upon receipt of such loans from the Small Business Administration, the loans made by the Department under this program will be immediately repaid.

Once a loan is made, the proceeds are to be deposited by the authority in an escrow account and may be released only upon approval of work accomplished by the Department, the authority, and the damaged business enterprise. In addition, you will certify each of the loans in accordance with the requirements of Section 7(f) of the Law, 73 P. S. § 377(f).

The note from the authorities to the Department further provides that: "Notwithstanding any other provision herein to the contrary, this Note shall not in any manner pledge the general credit or taxing power of the Commonwealth of Pennsylvania, or any political subdivision, and the obligations hereunder of the undersigned shall be limited to the aforementioned collateral security."

Funds for the program have been made available by the Governor under Act No. 18-A of July 7, 1972.

B. The program is legally authorized

The above program which you have outlined is authorized by law. The Department of Commerce is broadly charged under the Commerce Law of May 10, 1939, P. L. 111, 71 P. S. § 1709-1, *et seq.*, with the power to encourage business, industry and commerce in the Commonwealth of Pennsylvania. Specifically, Section 2, as amended, 71 P. S. § 1709-2 provides for the rehabilitation and expansion of business, industry and commerce. Section 3, 71 P. S. § 1709-3, empowers the Department, *inter alia*, to promote and encourage the protection of the legitimate interests and welfare of Pennsylvania business, industry and commerce; to investigate and study conditions affecting Pennsylvania business, industry and commerce; and to investigate and study conditions of unemployment and recommend specific remedies for, and to aid in, the restoration of employment in communities affected by unemployment. In our opinion, the encouragement, through the short-term loan program, of the rehabilitation of flood-damaged business enterprises, falls clearly within that mandate. There is no doubt that unless such enterprises are rehabilitated, business and industry and commerce in Pennsylvania will suffer greatly with attendant unemployment.

In addition, under Section 2501-B of the Administrative Code of 1929, added May 10, 1939, P. L. 101 § 7, as amended, 71 P. S. § 669, the Department of Commerce is empowered to take any other action authorized or required by law. 71 P. S. § 669(b). Moreover, by Act No. 275 of December 3, 1970, § 26, 71 P. S. § 669(d), the Department is authorized to enter into mutually satisfactory agreements to carry out the objectives of the Department, which includes the making of grants.

The means for the Department to carry out these powers and authorizations with respect to the tropical storm of June, 1972 were provided on September 1, 1972 by the enactment of Act No. 2 of First Special Session of 1972, which amended the Law by authorizing authorities to sponsor "disaster relief projects" pursuant to the provisions of the Law. Section 6(b) (15). "Disaster Relief Project" is defined in Section) (18) of the Law (as added by Act No. 2) as:

"Any undertaking to rehabilitate, repair, reconstruct, clean-up, replace, or otherwise return to economic use

any land, site, structure, or facility, including machinery, equipment and tools damaged or lost due to disaster of flood or fire or other casualty caused by the floods of September 1971 or June 1972 and comprising or being a part of an industrial, commercial, agricultural, utility, manufacturing or research or development enterprise."

On the basis of the foregoing, it is clear that the program of making short-term disaster loans to authorities for use in disaster relief projects in connection with the tropical storm of 1972 falls within the powers granted to the Department.

C. The Department's use of appropriated funds for the program is legal.

Turning next to the source of the loans, we find that the Department is making a legal and proper use of funds. The General Assembly in Act No. 18-A of July 7, 1972, specifically appropriated to the Governor \$113,000,000, "*for emergency and disaster relief especially in connection with the tropical storm and flood damage of June, 1972; for emergency use in the alleviation of human hardships and suffering and for the protection of property.*" (Emphasis added.) As part of this appropriation, the Governor has made available to the Department the sum of \$50,000,000 to carry out the short-term loan program.

We have no difficulty in finding that the program you have outlined is for emergency and disaster relief in connection with the flood. Indeed, the Legislature used the same words to describe the program the Department is funding under Section 6(b) (15) of the Law, which authorizes "disaster relief projects." Additionally, the Appropriation Act allows funds "for the protection of property," the very purpose of these loans.

Moreover, we have no difficulty in finding that the Department may lend appropriated funds to industrial development authorities. Under Section 6(b) (12) of the Law, 73 P. S. § 376 (b) (12), the various authorities are authorized:

"...to borrow money and accept grants from and to enter into contracts, leases or other transactions with any Federal agency, Commonwealth of Pennsylvania or its agencies or instrumentalities, municipality, school district, bank or other financial institution, corporation or other authority." (Emphasis added.)

The specific authorization of an authority to borrow money from the Commonwealth of Pennsylvania must reflect a concomitant right of the Commonwealth of Pennsylvania to so lend the money under appropriate authorization. This authorization, as we have noted, is found under the powers granted to the Department of Commerce.

D. *The program is constitutional*

We further hold that the program within the legal authorities cited is constitutional. See our Opinion No. 128, 2 Pa. B. 1316.

We first note that the Law, under which the program will be undertaken, was specifically held to be constitutional by the Supreme Court of Pennsylvania in *Basehore v. Hampden Industrial Development Authority*, 433 Pa. 40 (1968). In that case, the Supreme Court considered a broad challenge to the Law and held that its provisions constituted a public purpose: to combat unemployment and encourage industrial development. The amendment of the Law to allow funding for disaster relief projects is certainly as important and clearly a public purpose as the original provisions of the Law. The destruction and hardships which the tropical storm of June, 1972, have caused are matters of public concern and are too well known to need further detail here. While individuals may ultimately be benefited, the benefit to the public as a whole of restoring employment and industry to the Commonwealth are certainly the primary purposes of the program and it is therefore constitutional. In the words of the Supreme Court:

"If the legislative program is reasonably designed to combat a problem within the competence of the legislature and if the public will benefit from the project, then the project is sufficiently public in nature to withstand constitutional challenge." 433 Pa. at 50.

In addition, we note that Article VIII, § 7, of the Pennsylvania Constitution specifically provides that the Commonwealth may incur debt without limit to "rehabilitate areas affected by manmade or natural disaster." If the Commonwealth may incur debt for such purposes, it most surely may expend funds for such purposes whether the funds are borrowed or appropriated. The constitutional provisions would be meaningless if the Commonwealth could borrow funds but not expend them in a proper program such as the disaster relief program specifically authorized by law.

We believe that the discussion in *Basehore* also disposes of any challenge to the program under Article III, § 29, of the Pennsylvania Constitution which provides in pertinent part:

"No appropriation shall be made for charitable, educational or benevolent purposes to any person or community"

The predecessor to this section under the Constitution of 1874 was Article III, § 18 which provided similarly that:

"No appropriation, except for pensions or gratuities for military service, shall be made for charitable, educational or benevolent purposes, to any person or community" (The exception for pensions and military service is found further on in present Article III, § 29).

The history of the construction of this section shows a growing limitation upon the scene of its prohibitive effect. In *Busser v. Snyder*, 282 Pa. 440 (1925), for example, an act making grants to the aged was struck down as unconstitutional because it was regarded as pure charity. The defense that it was a "poor person law," and thus part of the recognized business of government was rejected because the recipients of the grants were allowed to have incomes and own property. The Court limited the class of poor people entitled to governmental assistance to those completely destitute. However, seven years later, the Supreme Court modified its position when faced with an attempt to alleviate the widespread unemployment which existed during the depression era. In *Commonwealth ex rel. Schnader v. Liveright*, 308 Pa. 35 (1932), the Court upheld an act which gave an appropriation to the Department of Welfare to be allocated to poor districts for relief of the poor unemployed. The Court there broadened the application of the word "poor" to cover unemployed people who would become a direct charge on the body politic if they were not given relief. The test laid down by the Court for constitutionality of such appropriations was whether they carried out the obligatory public duties of government.

Full circle was reached with *Commonwealth v. Perkins*, 342 Pa. 529 (1941), *aff'd per curiam*, 314 U. S. 586 (1942) which sustained the Pennsylvania unemployment compensation law against a challenge that it violated Article III, § 18, and held that *Busser* no longer reflected the proper application of the constitutional prohibition. The Supreme Court, adopting the opinion of the Court below stated (342 Pa. at 534):

"We now hold that unemployment is a governmental concern and it is a matter of discretion as to how the Legislature shall deal with it.

* * * *

"If appropriations to perform from the obligatory duties are not charities or benevolences [following the *Liveright* case], it would seem to be a refinement to hold where there is a governmental concern with which the Legislature has discretionary power that it would be a benevolence merely because the one is obligatory and the other discretionary."

Finally, in *Loomis v. Philadelphia School District Board of Education*, 376 Pa. 428 (1954), the Court sustained an act allowing public employees to attend Army Reserve training with pay. The Court there set down the rule that the section of the Constitution applies only to charitable gratuities made without any corresponding benefit derived by the public from the class to be benefited. In laying down and applying this test, the Court distinguished *Kurtz v. Pittsburgh*, 346 Pa. 362 (1943), where benefits intended for the wives and children of service men were

held to be a pure gratuity and thus unconstitutional. Since, in *Loomis*, the public did derive benefit in encouraging persons to remain in the Army, it was held that the pay was not a mere gratuity and was therefore constitutional.

Returning again to *Basehore*, we note first, with some interest, that Article III, § 29, of the Constitution was not even raised or discussed in the broad-based challenge presented in that case, an indication that it was not considered to be a serious problem. Moreover, we believe that the discussion of the Court (433 Pa. at 47-54) covers the problem. In that discussion, the Court held that the Law was for a public purpose, specifically that unemployment is a problem that falls within the police power of the state, citing the *Perkins* case. (433 Pa. at 49). In so doing, we believe that the Court implicitly held that the Law, under which the described program will operate, does not violate Article III, § 29, for the reason that *Perkins* specifically made that holding in face of a challenge under the predecessor of Article III, § 29.

We therefore have no hesitation in holding that Article III, § 29, of the Pennsylvania Constitution presents no bar to the short-term disaster relief loan program of the Department. Under either the *Perkins* or *Loomis* tests, the program is valid under Article III, § 29. The problems of unemployment are clearly a concern with which the government has the constitutional power to deal, and there is certainly a benefit derived to the public at large from the class to be benefited by the program. Finally, there is no gratuity or charity involved in the program because nothing is given away. It is not grants which will be made but loans secured by notes and repayable in the near future from the federal loans to which the recipients are entitled.

Finally, we turn to Article VIII, § 8 of the Pennsylvania Constitution under which questions have been raised regarding this program. This section of the Constitution provides:

"The credit of the Commonwealth shall not be pledged or loaned to any individual, company, corporation or association nor shall the Commonwealth become a joint owner or stockholder in any company, corporation or association."

The only case we have found which purports to construe this section or any of its predecessors is the *Basehore* case itself, in which the court quickly laid to rest the constitutional challenge in the following language (433 Pa. at 58-59).

"The Act specifically states that the Authorities shall not have the power to pledge the credit of the Commonwealth or any political subdivision of the Commonwealth. However, we need not rest on the language of the Act alone for there is a fatal flaw in the taxpayers' chain of logic. The money raised by the bonds will go to the Authorities and not to the industrial corpora-

tions; the Authorities will own the factories; the corporations will lease the plants from the Authorities. Therefore, if credit is being lent to anyone, it is being lent to the Authorities. On several occasions we have held that authorities similar to the Industrial Development Authorities involved in this case are not individuals, companies, corporations or associations within the meaning of [Article VIII, § 8 of the Constitution]."

See also our Opinion No. 128, *supra*.

It is clear from *Basehore* and from the words of the constitutional provision that only where the credit of the Commonwealth is involved can there be any question of constitutionality. In this case, similar to *Basehore*, the notes used specifically state that the credit of the Commonwealth is not being pledged. More important, in our opinion, no credit of the Commonwealth is being pledged in this case, and, therefore, the constitutional Section has no application here.

As we have stated, this Section of the Constitution has received scant judicial attention, and no construction on the question of the breadth of the prohibition. However, there is a companion restriction on local governments now found in Article IX, § 9, of the Constitution, the history of which is instructive. This Section denies to a municipality authorization

"...to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual."

This Section not only prohibits the pledge or loan of credit, as does Article VIII, § 8, it also prohibits the "obtaining" or "appropriation" of money for the purposes set forth. By the application of normal standards of construction, we derive from a juxtaposition of Article VIII, § 8, with Article IX, § 9, that the constitutional use of the term, "pledge of credit" means just that and does not include the appropriation of treasury funds which have not been raised by the incurring or guaranty of debt. This conclusion, moreover, is amply supported by historical analysis.

The language of Article VIII, § 8, first appeared in an amendment of 1857 to the Constitution of 1838. 5 *Debates of Constitutional Convention* 291 (1873). It was followed in the 1874 Constitution in Article IX, § 6, with no proposals brought forth to change or repeal it. Pennsylvania Constitutional Convention (1967-1968), *Taxation and State Finance* 33-34. Similarly, Article IX, § 9, first appeared as an 1857 amendment to the 1838 Constitution in order to eliminate municipal subscriptions and debt for local railroads, which had been costly to municipalities. Buckalew, *An Examination of the Constitution of Pennsylvania* 219 (1883); White, *Commentaries on the Constitution of Pennsylvania* 422-425 (1907); 6 *Debates of Constitutional Convention* 141 (1873). Prior to 1874 the appropriation of funds was not

prohibited, just the obtaining of money and loan of credit. Thus, in *Speer v. School Directors of Blairsville*, 50 Pa. 150 (1865), the right of a borough to borrow funds to pay bounties for those volunteering for the Union Army was upheld against a constitutional challenge under this section. The Court first held that the only issue was whether the obtaining of money is involved. "We have before us no...mere loan of credit." 50 Pa. at 162. It went on to hold that the illegal obtaining of money was not involved because the sense of the provision was restricted to the loan of public money or credit to private parties.

The Constitution of 1874 strengthened the section by the inclusion of a prohibition against appropriation of funds.

"The Convention did nothing to weaken the force of the amendment of 1857, and on the contrary added to its strength by inserting the word 'appropriate'...The words 'obtain money for or loan its credit to' applied only to the use of the liability or the credit of the municipality; but the insertion of the word 'appropriate' expanded the effect of the section, so as to embrace money in the treasury itself." *Wilkes-Barre City Hospital v. County of Luzerne*, 84 Pa. 55, 60 (1877).

The Supreme Court thus held that the prohibition against the lending of credit is a limited one. The provision does not prohibit the appropriation and use of public funds, just the borrowing of funds. Specific language is necessary to prohibit a mere appropriation. Accordingly, in this case we conclude that the implementation of the short-term disaster loan program does not constitute a pledge or loan of credit. The Commonwealth has not borrowed money or issued bonds in order to raise the funds used in this case; nor has the Commonwealth guaranteed any repayment of funds.

On the basis of the above analysis, it is our opinion, and we therefore advise you, that the program you have outlined, if carried out in the manner you have set forth and with the use of the documents you have submitted, is legal and is designed to carry out the best interests of the Commonwealth.

Sincerely yours,

GERALD GORNISH
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 155

Busing of nonpublic school students—Measurement of distance for eligibility for reimbursement to the school districts—Significance of nonpublic

school's location outside the student's district—Use of public carrier whose route coincides with public school bus route while in the district but continues outside to the nonpublic school—Possibility of school district recovering prior years' expenditures.

1. The measure of distance for school district eligibility for reimbursement for transporting nonpublic school students is the same under § 1361 of the Public School Code of March 10, 1949, P. L. 30, as amended (24 P. S. § 13-1361)* as it is for public school students one and one-half (1½) miles or more from the student's home to the school he or she is attending, regardless of where the nonpublic school is located.
2. Generally, there is no responsibility on the part of the school district to bus across district lines. However, the school district does have a duty to bus along the established route and, it can be of no consequence to the district where the nonpublic school student disembarks from the public carrier once the bus has left the school district boundaries.
3. The school district will be reimbursed for the purchase of public carrier tickets to transport eligible nonpublic school students to the district line. If that fare will take the student farther, it need not be prorated.
4. If appropriated unexpended funds still remain for the year in question, the Department of Education will reimburse school districts for prior years.

Harrisburg, Pa.
October 27, 1972

The Honorable John C. Pittenger
Secretary
Department of Education
Harrisburg, Pennsylvania

Dear Mr. Pittenger:

You have asked for our advice with regard to a letter dated August 9, 1972 from Peter J. Nolan, Esq., Solicitor for Southeast Delco School District, Delaware County, which raises a number of questions dealing with the proper interpretation of § 1361 of the Public School Code of March 10, 1949, P. L. 30, as amended (24 P. S. § 25-2541).

§ 1361 of the Public School Code provides in part:

"13-1361. When provided.

The board of school directors in any school district may, out of the funds of the district provide for the free transportation of any resident pupil to and from the public schools and to and from any points in the Commonwealth in order to provide tours for any purpose connected with the educational pursuits of the pupils. When provision is made by a board of school directors for the transportation of resident pupils to and from the public schools, the board of school directors shall also make provision for the free transportation of pupils who regularly attend non-public elementary and high schools not operated for profit. Such transportation provided for pupils attending non-public elemen-

* Editor's note: § 1361 of the School Code has been amended by Act 372 of December 29, 1972.

tary and high schools not operated for profit shall be over established public school bus routes. Such pupils shall be transported to and from the point or points on such routes nearest or most convenient to the school which such pupils attend. The board of school directors shall provide such transportation whenever so required by any of the provisions of this act or of any other act of Assembly.” (Emphasis added.)

§ 2541(4) of the School Code provides in part:

“Payments for pupil transportation on account of the school year 1966-1967 and every school year thereafter shall be made only in the following cases:

“(1) To all school districts for the transportation to and from school of elementary school pupils residing one and one-half ($1\frac{1}{2}$) miles or more by the nearest public highway from the school to which the pupils are assigned, including nonresident children who are placed in the home of a resident, or who are residents of an orphanage, or home or children’s home or other institution for the care and training of orphans or other children, and who attend the public schools.

“(2) To all school districts for the transportation to and from school of secondary school pupils residing two (2) miles or more by the nearest public highway from the school to which the pupils are assigned, including nonresident children who are placed in the home of a resident or who are inmates of an orphan asylum or home or children’s home or other institution for the care and training of orphans or other children, and who attend the public schools.

“(3) To all school districts for pupils transported to and from approved consolidated schools or approved joint consolidated schools living one and one-half ($1\frac{1}{2}$) miles or more from the school of attendance.

“Consolidated schools or joint consolidated schools shall so long as they are approved as to organization, control, location, equipment, courses of study, qualifications of teachers, methods of instruction, condition of admission, expenditures of money, methods and means of transportation and the contracts providing therefor, constitute approved consolidated schools or approved joint consolidated schools. As amended 1970, Jan. 14, P. L. (1969) 468, § 83, effective July 1, 1970.

* * * *

“(4) To all school districts for the transportation of exceptional children regularly enrolled in special classes approved by the Department of Public Instruction or

enrolled in a regular class in which approved educational provisions are made for them.

"(5) To all school districts for pupils transported to and from schools used for the purpose of better graduation."

(1) Mr. Nolan asks, first, how the distance is measured for eligibility for reimbursable bussing for non-public school students under § § 1361 and 2541 (4) and whether the location of the non-public school outside the student's district has any legal significance.

On June 24, 1965, former Attorney General Walter E. Alessandroni issued an opinion establishing certain guidelines for the interpretation of § 1361 of the School Code. Question 13 of those guidelines is relevant for these purposes:

"13. Do non-public school pupils have to meet the same distance requirements as prevail for public school pupils?

"Yes. This distance, in the case of the non-public school pupils, is measured from the place where such pupil resides, to the non-public school to which he is assigned by the responsible non-public school authority."

It is our opinion, and you are so informed, that the above-quoted guideline applies regardless of where the non-public school is located. Mr. Alessandroni properly read § § 1361 and 2541 to indicate a legislative intent that bussing be provided to non-public students if the distance from *their* home to their school was sufficiently great and if an established bus route was available. It is that intent that has been uniformly followed when the non-public school was within the student's school district and there is no reason to believe that the legislature intended differently when the non-public school was over the school district line (a line, we note, that can and does often change due to reorganization). To state that public school children living next door to a non-public school student may not receive transportation because their school is close to their home is to state a fact that has existed since 1965 and is a "distinction without a difference." The important fact is that the non-public school student has not been assigned to the public school near his home, because he does not wish to go there and because he has a constitutional right not to go there, if he wishes to attend a properly accredited non-public school. *Pierce v. Society of Sisters*, 268 U. S. 510 (1924).

It must be emphasized, however, that meeting the distance requirement of § 2541 does not automatically mean that a non-public school student must be provided transportation since that student must also be able to take advantage of the "established bus route" provision of § 1361. It is to this consideration that Mr. Nolan's other questions relate and it is to those questions we now turn.

(2) Where a public carrier route coincides with a public school bus route, may a school district provide bus tickets on that carrier to non-public school students, even where the non-public school student will remain on the carrier past the school district lines because their school is located outside the district?

The general rule on cross-district busing has been and continues to be that a school district has no responsibility to provide such busing for public school students. See Alessandroni Guideline #8 and Question #39. That rule must, of course, apply here i.e., there is no responsibility on the part of the school district to bus across district lines. But the logical corollary must also be stated: since there is a duty to bus along the established route, it can be of no consequence or importance to the school district where the non-public school students disembark from the bus once the bus has left the school district boundaries. Thus, bus tickets may be provided to ride along the established route (just as additional school buses may also be provided). If that bus ticket is good for a ride past the district boundary to the non-public school, so much the better. If connections are needed, or additional fare must be provided, that is the responsibility of the non-public students' parents—not of school districts.

(3) Will a school district be reimbursed for the purchase of tickets described in (2) above and, if so, on what basis—prorated or full?

The school district will be reimbursed but only for the cost to get the student to the district line. If that fare will take the student further than the district line, it need not be prorated; but if an additional fare is charged by the carrier once the bus passes the district line, that charge will not be reimbursed and need not be paid by the district.

(4) May school districts recover such costs for prior years, if they have not yet applied?

Although there is a July 1 deadline for reimbursement applications after each school year, the Department of Education will consider late applications if appropriated unexpended funds still remain for the year in question. We see no legal difficulties in such an approach.

Sincerely yours,
MARK P. WIDOFF
Deputy Attorney General
J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 156

1. Loss of part of an elector's registration record is not a basis for refusing to process an absentee ballot application of such an elector if his/her name and address appears on surviving election records as having been properly registered.

Harrisburg, Pa.
November 6, 1972

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

Dear Mrs. Tucker:

You have requested my opinion of whether an elector who has properly registered for the impending election should be denied the right to vote absentee because a part of his or her registration record was lost during the June flood.

It is my opinion, and you are formally advised, that an elector should not be deprived of the right to vote absentee because of the loss of some part of the registration records during the June flood.

Under the circumstances presented, all the voter signature cards and "Permanent Voter Registration" forms of voters in Luzerne County were lost as a result of flooding of the County Court House. A record of the names and addresses of electors who had been properly registered did survive. The Legislature has facilitated replacement of lost records of some registered voters by allowing them to complete such records until the closing of the polls on Election Day. See Act No. 1, Special Session No. 2, 1972, October 6, 1972.

However, the Legislature failed to make any provision to replace the lost records of registered voters who are unable to physically return to the Court House or polling place before Election Day. A number of voters had properly registered before the time the records were destroyed, anticipating they would be unable to return before or on Election Day. Such individuals registered in the knowledge that, once properly registered, existing Pennsylvania Law permits an absentee elector to make application for an absentee ballot and vote by mail. Section 20 *et seq.*, Act of August 13, 1963, P. L. 707, as amended, 25 P. S. § 3146, *et seq.*

There is no legal basis to deprive these individuals, shown to be registered in surviving records, of the right to vote absentee solely because of their present inability to physically return to the voting district to replace records lost through an unavoidable general catastrophe.

Local election officials of Luzerne County are to be instructed that loss of some part of an elector's registration record is not a basis for refusing to process an absentee ballot application

of such an elector, if the elector's name and address appear on surviving election records as having been properly registered. Enclosed with the absentee ballot sent to such voters must be a "Permanent Voter Registration" form and signature card to be filled out by the voter to replace the lost records. Additionally, the voter should be required to affirm that he or she is eligible to vote and will vote only by the enclosed absentee ballot. Such documents must be notarized.

Of course, the regular statutory safeguards to protect the security of the ballot will fully apply to those absentee ballots. For example, see Act of July 25, 1913, P. L. 1043, § 2, as amended, 25 P. S. § 2920; Act of April 29, 1937, P. L. 487, § 20, as amended, 25 P. S. § 951-20; Act of April 29, 1937, P. L. 487, § 36, as amended, 25 P. S. § 951-36; Act of June 3, 1937, P. L. 1333, § 417, as amended, 25 P. S. § 2687; Act of June 3, 1937, P. L. 1333, § 1850 *et seq.*, as amended, 25 P. S. § 3550 *et seq.*

Sincerely yours,

BARTON ISENBERG
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 157

Intergovernmental Cooperation Act—Sheriff—Deputization of Local Police Officers to Serve on Regional Narcotics Task Force.

1. The Sheriff of Allegheny County may lawfully deputize local law enforcement officers from municipalities within said county to serve on a proposed Regional Narcotics Task Force in the capacity of special deputy sheriffs.
2. The policy of the Drug Abuse Office and Treatment Act of 1972, 21 U.S.C. § 1101 obliges the Commonwealth and its political subdivisions to marshal their resources to halt illegal drug trade.
3. One of the findings of the Drug Abuse Office and Treatment Act of 1972, *supra*, is that control and treatment of drug abuse has been hampered by a lack of coordination between Federal, State and local governments.
4. The Sheriff, as chief peace officer of the county, is vested with the power to preserve the peace, quell disorders and suppress riots.
5. It is reasonable and necessary that the sheriff marshal manpower resources to his command to end the clear and present danger which drug abuse represents to the people of his bailiwick.
6. The traditional method, at common law, for the sheriff to command adequate physical force to keep the peace is the *posse comitatus*. However, he is not limited to such method and may adopt all those physical and moral means which may be adapted to the occasion, whether pointed out by the law or not.
7. Those lawful means to protect the peace include the hiring of special deputy sheriffs.
8. Where the sheriff utilized means to keep the peace which are not spe-

cifically authorized by law, the sheriff and not the county is obligated to pay the expenses of employing such means.

9. 53 P. S. § 483 permits municipalities to jointly cooperate with other municipalities in the exercise or performance of their respective governmental powers, functions and responsibilities.
10. To carry out intergovernmental cooperation, municipalities shall enter into such joint agreements as may be deemed necessary for such purpose. 53 P. S. § 483.
11. "Municipality" includes "counties". 53 P. S. § 481.
12. Control of illegal trafficking in drugs is a proper subject for intergovernmental cooperation.
13. A joint agreement to effectuate intergovernmental cooperation may provide that employees of one municipality who are on loan on a detached-service basis to another municipality shall remain the employees of the donating municipality for the purpose of retirement and salaries.
14. Liability for claims under the Workman's Compensation Act in the case of detached officers will depend upon which municipality at the time of an injury is exercising control and direction over an officer's activities.
15. The joint agreement may provide that should the addition of these special deputies cause any change in the insurance rates for the county, the county shall be indemnified or reimbursed by the other municipalities who are parties to the agreement.

Harrisburg, Pa.
November 10, 1972

Mr. E. Drexel Godfrey, Jr.
Executive Director
Governor's Justice Commission
Harrisburg, Pennsylvania

Dear Mr. Godfrey:

You have requested an opinion on whether a Regional Narcotics Task Force proposed by the Sheriff of Allegheny County is lawful.

As explained to me, the purpose of the contemplated task force is to combat illegal drug trade in Allegheny County and the various municipalities within it by means of unifying under the command of the sheriff certain law enforcement officers from the county and from the municipalities within the county. Policy and coordination would be established by a Board of Directors composed of county and local law enforcement officers.

You are advised that the contemplated task force is lawful and that the Governor's Justice Commission may entertain the sheriff's application for a grant-in-aid to help finance the creation and operation of said task force.

"The Congress [of the United States has made] the following findings:

- (1) Drug abuse is rapidly increasing in the United States and now afflicts urban, suburban, and rural areas of the Nation.

(2) Drug abuse seriously impairs individual, as well as societal, health and well-being.

(3) Drug abuse, especially heroin addiction, substantially contributes to crime.

(4) The adverse impact of drug abuse inflicts increasing pain and hardship on individuals, families, and communities and undermines our institutions.

(5) Too little is known about drug abuse, especially the causes, and ways to treat and prevent drug abuse.

(6) The success of Federal drug abuse programs and activities requires a recognition that education, training, treatment, rehabilitation, research, and law enforcement efforts are interrelated.

(7) The effectiveness of efforts by State and local governments and by the Federal Government to control and treat drug abuse in the United States has been hampered by a lack of coordination among the States, and between States and localities, and among the Federal Government, the States and localities, and throughout the Federal establishment.

(8) Control of drug abuse requires the development of a comprehensive coordinated long-term Federal strategy that encompasses both effective law enforcement against illegal drug traffic and effective health programs to rehabilitate victims of drug abuse.

(9) The increasing rate of drug abuse constitutes a serious and continuing threat to national health and welfare, requiring immediate and effective Federal Government response." Drug Abuse Office and Treatment Act, 21 U. S. C. § 1101 (1972).

The policy of this Federal Act is national in scope and the Commonwealth and its political subdivisions are obliged to marshal their resources in order to halt the illegal drug trade which in eroding the well-being, peace and tranquillity of our society.

The sheriff is the chief peace officer of Allegheny County. *Charge to Grand Jury of Venango County*, 23 Pa. County Ct. 667 (1900); *Commonwealth v. Martin*, 7 Pa. Dist. 219, 9 Kulp 69 (1898). Vested in him is the power to preserve the peace, quell disorders and suppress riots. *Commonwealth v. Martin*, 7 Pa. Dist. at 224. As the chief peace officer of that county, it is reasonable and necessary that he marshal manpower resources to his command to end this clear and present danger to the people of his bailiwick.

The traditional method, at common law, for the sheriff to command adequate physical force to keep the peace is the *posse comitatus*. See Sadler, *Criminal Procedure in Pennsylvania*, 2d Ed., Section 94, pp 106-108. However, the Supreme Court of Pennsylvania has recognized that the sheriff is not limited to

use of a *posse comitatus* to keep the peace; but where he deems appropriate, may adopt all those physical and moral means which may be adapted to the occasion, whether pointed out by the law or not. *McCandless v. Allegheny Bessemer Steel Co.*, 152 Pa. 139, 148 (1893). See also, *Clark v. Cook*, 14 Pa. Super. 309 (1900), *aff'd* 197 Pa. 643 (1901).

In the *McCandless* case, the sheriff of Allegheny County was informed by the proprietors of the Bessemer Steel works at Duquesne that a strike at that plant had resulted in considerable disorder and there were threats of violence. They requested him to protect their property and preserve the peace. The court found that a contract was entered into between these parties and the sheriff whereby the sheriff employed and armed special deputies and placed them in charge of the property. It is significant that these special deputies were not approved by the Salary Board of Allegheny County. Nevertheless, the Supreme Court of this Commonwealth held that this contract by the sheriff was lawful and that the defendant company was obligated to repay to the sheriff the money which he actually expended in paying the per diem wages and costs of subsistence of the special deputies which he selected.

We note in your request for an opinion, that the County Solicitor particularly objects to the use on the Task Force of local police from cities, boroughs and townships within the County. In light of the policy of the *Drug Abuse Office and Treatment Act, supra*, the presence of these men on the Task Force seems desirable, in order to coordinate the County and municipal efforts. The use by a sheriff of such forces to keep the peace is not without precedent. In *Carter Curtis, Sheriff v. The County of Allegheny*, 1 Phila. 237 (1851) the sheriff of that county during a riot employed a militia to assist him. The holding of that case is relevant because, although ruling that such method was not specifically authorized by statute, nonetheless, such means to keep the peace was lawful. However, because such means were not specifically authorized by statute, the sheriff and not the county was obligated to pay the expense of employing said militia.

As we understand the proposal for creation of the Task Force, the County will not be paying the salaries of the municipal officers who will be acting as special deputies of the sheriff. Funds for their salaries will be coming from the various municipalities who employ these officers and who benefit by this cooperative effort, and from the contemplated grant by the Governor's Justice Commission.

We should also point out that the Governor recently signed into law a new intergovernmental cooperation act. Act 180 of July 1972, 53 P. S. § 481 *et seq.* (See 53 P. S. § 471 *et seq.* for the

old act which has been completely repealed.) Section 3 of the new act, 53 P. S. § 483, states:

"Two or more municipalities in this Commonwealth may jointly cooperate...in the exercise or in the performance of their respective governmental functions, powers or responsibilities. For the purpose of carrying the provisions of this act into effect the municipalities cooperating shall enter into such joint agreements as may be deemed necessary for such purpose."

The definition of "municipality" in Section 1 of the new act (53 P. S. § 481) includes "counties."

Control of illegal trafficking in controlled substances is a responsibility common to both the County of Allegheny and those cities, boroughs and townships within said county. As such, it is a proper subject of intergovernmental cooperation. Cooperation in, or consolidation of, law enforcement activities is not without legal precedent. In the case of *Barge v. Camp*, 209 Ga. 38, 70 S. E. 2d 360 (1952), a contract between the City of Atlanta and the County of Fulton providing for the City to assume law enforcement services in unincorporated areas of the County was sustained by the Supreme Court of Georgia.

We also note that the county solicitor has raised concerns as to how these local officers serving on the Task Force would be affected by statutes pertaining to the county on such matters as workman's compensation, retirement and arbitration. With one exception, they need not be affected. In drafting the intermunicipal cooperation agreement the signatories can provide that these local officers will remain employees of their respective municipalities and that said officers are being loaned on a detached service basis to the sheriff. (See Section 3 of Act 180, *supra*.) They would, therefore, continue under the retirement program of their own municipalities and matters such as wages would be subject to the laws, ordinances and regulations applying to those local governments.

The one exception is workmen's compensation. The case of *Doyle v. Commonwealth*, 153 Pa. Super. 611, 34 A. 2d 812 (1943) holds that where a municipality loans an employee to another political entity (in that case, the Pennsylvania Department of Highways), that political entity which at the time of injury exercised control and direction over the worker is responsible for any claim for compensation under the Workmen's Compensation Act. Since these local officers, while assigned to the Task Force, would be under the command of the sheriff; therefore, said officers would, as a result, be subject to the insurance covering the sheriff and his employees. This arrangement might cause a change in the rate of insurance to the county. However, that could be satisfied by providing in the intergovernmental cooperation agreement for indemnification or reimbursement by

the local governments or their insurers for any changes in such rates.

Sincerely yours,

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 158

Parole Act—Intensive Parole Centers—Residential Facilities for Parolees

1. The Pennsylvania Board of Probation and Parole is authorized to establish Intensive Parole Centers for parolees under supervision of the Board.

Harrisburg, Pa.
November 14, 1972

Honorable Richard W. Lindsey
Chairman
Pennsylvania Board of Probation and Parole
Harrisburg, Pennsylvania

Dear Mr. Lindsey:

You have recently requested my opinion concerning the statutory authority of the Board with respect to the establishment and operation of Intensive Parole Centers. You have stated that these Centers would provide residential facilities and treatment programs according to the need of selected parolees.

The pertinent statutory authority provides that a parolee's rehabilitation, adjustment, and restoration to social and economic life and activity shall be aided and facilitated by "guidance and supervision" under parolee administration. 61 P. S. § 331.1.

In providing this guidance and supervision, the Board has long recognized a necessity for and has utilized various grades of intensity of supervision according to the needs of each particular parolee. Insofar as the proposed residential Centers with their associated programs would provide another grade of intensity of supervision, through which the Board could better carry out its function, the Board would not be surpassing its statutory grant of authority. For example, an individual who might not otherwise be paroled due to the lack of a suitable home or employment, might be paroled to one of those Centers located in the community, and thereby receive necessary guidance and opportunity to locate or establish a suitable home or employment. Or it may be that an individual, already paroled but having difficulty at home or engaging in activity which might later lead to a violation of parole if not corrected, could be entered into the program through a special condition of his parole and

thereby receive closer guidance and supervision at one of these Centers.

The Board has for quite some time validly utilized similar residential centers and associated programs, but, such centers were sponsored by other groups and organizations. The mere fact that these proposed Centers would be under the dominion and control of the Board in no way alters the Board's authority with respect to the establishment and operation of such programs.

Sincerely yours,

LEONARD PACKEL
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 159

Attorney General—Common Law Powers of Attorney General—Authority of Attorney General to Compromise Claims Referred to Justice Department for Collection

1. Section 903 of the Administrative Code of 1929 provides that the Justice Department shall have the duty to collect, by suit or otherwise, all debts referred to it for collection.
2. Section 512 of the Administrative Code of 1929 provides that accounts due the Commonwealth which remain overdue and unpaid for a period of ninety days shall be referred to the Department of Justice for collection.
3. Section 504 of the Mental Health and Mental Retardation Act of 1966, permits under certain conditions, the Secretary of Public Welfare to compromise and abate claims resulting from the care and maintenance of disabled persons, subject to the approval of the Attorney General.
4. Section 1410 of the Fiscal Code of 1929 empowers the Department of Revenue, subject to the approval of the Auditor General and the Attorney General, to compromise debts due to the Commonwealth in cases involving corporations which have gone into liquidation, are insolvent, or have ceased to carry on business in the state.
5. The authority of the Attorney General is not limited to specific statutory authority, but includes broad common law powers, including the power to compromise and settle claims involving the Commonwealth.
6. The Statutory Construction Act of 1937 provides that in ascertaining the intention of the Legislature, it is presumed that an absurd result is not intended. Where the Attorney General has the clear statutory authority to collect debts due to the Commonwealth, to conclude that such authority does not include the power to compromise and settle such claims would lead to an absurd result.

Harrisburg, Pa.
November 14, 1972

Mr. Allen B. Zerfoss
Deputy Attorney General for Management Services
Department of Justice
Harrisburg, Pennsylvania

and

Mr. Donald C. Ocker
Supervisor
Commonwealth Collections Division
Department of Justice
Harrisburg, Pennsylvania

Gentlemen:

You have requested an interpretation of Section 903 of the Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, Article IX, 71 P. S. 293, which provides:

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

"(a) To collect, by suit or otherwise, all debts, taxes, and accounts, due the Commonwealth, which shall be placed with the Department for collection by any department, board or commission. . . .

"(b) To represent the Commonwealth, or any department, other than the Department of the Auditor General, board, commission, or officer thereof, in any litigation to which the Commonwealth or such department, board, commission, or officer, may be a party, or in which the Commonwealth or such department, required by law to intervene or interplead.

Specifically, you have asked whether Section 903 confers upon the Attorney General the authority to compromise, abate, settle or write-off claims which have been referred to the Department of Justice for collection.

You are hereby advised that the Attorney General does possess such authority, based upon:

1. Court decisions which have held that the broad common law powers of the Attorney General include the power to compromise litigation to which the Commonwealth is a party;

2. Attorney General Opinion No. 419, dated May 11, 1942;

3. The Statutory Construction Act of 1937, Act of May 28, 1927, P. L. 1019 Article IV, 46 P. S. 552, pertaining to the presumptions which are to apply in the interpretation of legislative enactments.

Delinquent accounts are referred to the Department of Justice by authority of Section 512 of the Administrative Code, 71 P. S. 192, which provides in part that:

"... Whenever any taxes or other accounts... due the Commonwealth remain overdue and unpaid for a period of ninety days, it shall be the duty of such department, board, commission, or officer, to refer the same to the Department of Justice..."

Section 902 of the Administrative Code, 71 P. S. 292, gives the Department of Justice the power to:

"... Supervise, direct, and control all of the legal business of every administrative department, other than the Department of the Auditor General, board and commission of the state government."

Specific statutory authority to compromise and abate claims, resulting from the care and maintenance of disabled persons, exists by virtue of the Mental Health and Mental Retardation Act of 1966. Section 504 of that Act, 50 P. S. 4504, provides:

"(a) Whenever any person receives a service or benefit at any facility under the Act wholly or in part at public expense, the secretary is hereby authorized and shall have the power, subject to the approval of the Attorney General, to determine the extent of liability... and to abate, modify, compromise or discharge the liability so imposed provided:

"(1) He is satisfied that the imposition of such liability would:

"(i) result in the loss of financial payments or other benefits from any public or private source which a mentally disabled person would receive, would be eligible to receive or which would be expended on his behalf except for such liability, or

"(ii) result in a substantial hardship upon the mentally disabled person, a person owing a legal duty to support such person or the family of either, or

"(iii) result in a greater financial burden upon the people of the Commonwealth, or

"(iv) create such a financial burden upon such mentally disabled person, as to nullify the results of care, treatment, service or other benefits afforded to such person..."

In addition, statutory authority to compromise claims involving insolvent corporations exists by virtue of the Act of April 9, 1929, P. L. 343, Article XIV, Section 1410, as amended, 72 P. S. § 1410, which provides:

"If any corporation which has heretofore carried on business in this State, and is indebted to the Common-

wealth, shall have gone into liquidation, become insolvent, or ceased to carry on business, or has no known or available property in this or any other state that may be seized in execution by process issued out of any of the courts. . . , or if such property as it owns is insufficient to satisfy the taxes or other debts due from it, the Department of Revenue may, with the approval of the Department of the Auditor General and of the Attorney General, compound or settle any taxes or other debts due. . . to the Commonwealth, on such terms as may be adjudged by said officers to be for the best interests of the Commonwealth, and the lien of the Commonwealth shall be reduced to the amount of taxes or debt as compounded or compromised."

This specific statutory authority to compromise, however, should not be construed so as to limit or restrict the powers of the Attorney General in other types of collection matters, for in addition to the express statutory powers which have been conferred upon him, it is well settled that the Attorney General has broad common law powers. These include the power of prosecuting civil suits to judgment, the compromise of claims, the discontinuance of suits, the satisfaction of judgments and the release, modification or postponement of judgments.

In *Landell Estate*, 8 D. & C. 2d 612 (Phila. Orp. Ct., 1957) the court recognized the power of the Attorney General to compromise a claim of the Commonwealth against an estate. That case involved a decedent's estate in which the decedent, an adopted person, died intestate without heirs in the adopting family. Accordingly, under the provisions of the Intestate Act of 1947, the Commonwealth became heir to the estate. The natural heirs brought suit in the Court of Common Pleas, to which the Commonwealth was a party, to revoke the decree of adoption on the grounds that the adoptee was an adult who was mentally incompetent, and therefore incapable of consenting to the adoption. A compromise agreement was entered into to which the Commonwealth, acting through the Attorney General, was a party. As a result of this agreement, the Commonwealth relinquished its claim to a portion of decedent's estate. The Court, in approving the agreement said:

"By terms of the stipulation, the natural heirs are to receive certain distributions. In approving the stipulation, the Court of Common Pleas recognized the authority of the Attorney General to compromise litigation in which the Commonwealth is a party. This authority is referred to in Attorney General Opinion No. 419 of 1942 as follows: 'It is well settled that the Attorney General, in addition to his statutory powers, has broad common law powers. . . Among these broad common law powers is the power of prosecuting civil suits to judgment, including the compromise of claims, the discontinuation

of suits or satisfactions of judgments. . . ' The Attorney General, however, does not have specific authority to make assignment of property which belongs to the Commonwealth.

"The compromise approved by the Court of Common Pleas in reality recognizes that the natural heirs are proper parties in interest to contest the validity of its decree of adoption. It is implicit in the approval of the stipulation that the Court of Common Pleas recognizes that the natural heirs might have succeeded in having its decree vacated. Had they been successful, the Commonwealth would not be an heir but the entire estate would pass to the natural maternal aunt and cousins of decedent. . . . The agreement of compromise, the terms of which will be fully set forth in awards hereunder, is approved. . . ."

It should also be noted that Section 52 of the Statutory Construction Act of 1937, Act of May 28, 1937, P. L. 1019, Article IV, 46 P. S. 522, provides:

"In ascertaining the intention of the Legislature in the enactment of a law, the courts may be guided by the following presumptions among others:

"(1) That the Legislature does not intend a result that is absurd, impossible of execution or unreasonable; . . ."

To conclude that the Attorney General, while possessing the clear statutory authority to collect debts due the Commonwealth, does not possess the authority to compromise, abate or write-off such claims when he considers such action to be in the best interests of the Commonwealth, would lead to an absurd and unreasonable result. It would mean that a case, once referred to the Attorney General for collection, would have to be pursued to a final adjudication, regardless of any reasonable expectation of recovery, and irrespective of any of the attendant circumstances. Clearly the Legislature could not have intended such an interpretation of the statute.

You are therefore advised that the Attorney General, acting through his duly authorized representatives, does possess the power and authority to compromise, abate, settle and write-off any and all claims which have been referred to the Department of Justice, subject to the statutory limitations referred to above, and subject to the further limitation that such power shall be exercised only when there is a clear indication that such action will be in the best interests of the Commonwealth. In order to insure that the exercise of this authority will in fact be in the Commonwealth's best interests, you are instructed to prepare regulations establishing the conditions under which settlements

or write-offs will be approved, and the guidelines to be followed in such cases.

Sincerely yours,

PAUL J. CAREY, JR.
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 160

Commonwealth Compensation Commission—Time for Legislative Review of Commission Report.

1. The Act of June 16, 1971, P. L. —, Act No. 8, which sets the requirements for reports of the Commission, clearly provides that such reports are not bills which expire at the conclusion of each Legislature.
2. The Legislature convening in January 1973 will have until January 29, 1973 to take action on the report of the Commonwealth Compensation Commission issued on November 30, 1972.

Harrisburg, Pa.
November 30, 1972

The Honorable Milton J. Shapp
Governor
Harrisburg, Pennsylvania

Dear Governor Shapp:

You have asked my opinion as to whether the next Legislature will have an opportunity to act on the report of the Commonwealth Compensation Commission, issued today, November 30, 1972, the last day of this session of the Legislature.

The Act of June 16, 1971, P. L. —, Act No. 8, which established the Commission, directed the Commission to make an exhaustive study of the salaries, emoluments, retirement benefits, etc. of the Governor, cabinet officers, judges and members of the General Assembly. Upon completion of that study, the Commission is required to submit to the Governor, the Chief Justice, the President Pro Tempore and the Speaker

“...its report establishing such salaries, emoluments, retirement benefits, mileage, per diem, travel and other expense allowances... Reports submitted subsequent to the initial report shall take effect and have the force and effect of law... unless within sixty days following the date of submission thereof, the General Assembly shall, by concurrent resolution, reject the said report, in whole or in part, or unless within said period the General Assembly shall enact legislation which estab-

lishes a rate of pay or allowance differing from that recommended by said report in whole or in part.”

Significantly, the act provides in Section 6(b):

“... As soon as is practicable after the effective date of this act for the initial report and thereafter for subsequent reports, *on or before the commencement of each term of the General Assembly* the commission shall submit to the Governor, the Chief Justice, the President Pro Tempore of the Senate and the Speaker of the House of Representatives its report...” (Emphasis supplied.)

Consequently, it is clear from the plain language of the statute that this report of the Compensation Commission is not a bill which would die at the conclusion of this Legislature.

The report has been issued on the last day of the present term of the Legislature, which is clearly before the commencement of the term of the next General Assembly.

You are therefore advised that when the next General Assembly convenes in January, legislative action, in the form of the concurrent resolution, could be taken to “reject the said report, in whole or in part” or the Legislature could enact legislation establishing “a rate of pay or allowance differing from that recommended by said report in whole or in part.” In fact, under the terms of the Act, the General Assembly will have until January 29, 1973, if it so desires, to take action on the Commission’s report.

Sincerely yours,
J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 161

*Parent Assistance Authority—Lemon v. Sloan—Payment of Operating Expenses of an Authority Created by a Statute which has been held Unconstitutional by a Lower Tribunal Pending a Final Appeal.**

1. It is appropriate and legally permissible for the State Treasurer to release checks drawn on the Parent Reimbursement Fund payable to the Pennsylvania Parent Assistance Authority where those checks will be released to cover operating expenses of the Authority.
2. Although a Three-judge Federal Court found the Parent Reimbursement Act for Nonpublic Education unconstitutional and enjoined the Treasurer from paying any funds to parents of children attending nonpublic schools, it did not enjoin the Treasurer from paying operating expenses to the Authority itself.
3. The terms of the injunction entered by the Three-judge Court do not preclude the Treasurer from paying operating expenses to the Authority.

* Editor’s note: The Parent Assistance Authority Act was declared unconstitutional by the U. S. Supreme Court in *Sloan v. Lemon*, 413 U. S. 825 (1973).

4. The decision of the Three-judge Court finding the Act to be unconstitutional is presently on appeal to the United States Supreme Court.
5. Pending a determination of that appeal it is necessary that the Parent Assistance Authority maintain its present operating expenses funded.
6. Opinion No. 433, Official Opinions of the Attorney General, 1941-42, cited and approved.

Harrisburg, Pa.
December 7, 1972

Honorable Grace Sloan
Treasurer
Commonwealth of Pennsylvania
Harrisburg, Pennsylvania

Dear Treasurer Sloan:

You have requested our opinion as to the effect of the Order dated July 21, 1972 in the case of *Lemon et. al. v. Sloan*, Civil Action No. 71-2223, United States District Court for the Eastern District of Pennsylvania, on your authority and duty to release checks payable to the Parent Assistance Authority to cover the cost of certain administrative expenses of that Authority.

You are advised, and it is our opinion that it is appropriate for you and your duty to release checks drawn on the Parent Reimbursement Fund, payable to the Pennsylvania Parent Assistance Authority which checks will be released to cover administrative expenses of the Authority.

A careful review of the history of the case, *Lemon v. Sloan*, *supra*, demonstrates that this action was brought to enjoin the State from paying State funds to parents whose children attended private schools. Plaintiffs claimed that payments to parents in partial reimbursement for costs incurred by them for their childrens' nonpublic school education were violative of the Constitution of the United States.

The United States District Court for the Eastern District of Pennsylvania, by Judges William H. Hastie, Joseph S. Lord III, and John B. Hannum ruled, on July 21, 1972, that the scheme for direct payment or reimbursement of parents of the cost they incur in connection with their childrens' nonpublic school education was violative of the Constitution of the United States. In this ruling the District Court, enjoined you as Treasurer of the Commonwealth and your successors in Office, from "...paying any funds of the Commonwealth...either directly or by way of reimbursement to parents of children attending nonpublic schools." (A copy of this Order is attached to this Opinion.) As you know, this ruling is now on appeal to the Supreme Court of the United States.

Thus, two things are clear at this juncture. In the first place, the three judge court did not enjoin you from paying operating expenses to the Authority. Furthermore, the decision of the three judge court is presently under review by the United States

Supreme Court. Pending a decision and in view of the possibility that the Supreme Court will reverse the ruling below, it is necessary to maintain the present operations of the Parent Assistance Authority. These operations consist of maintaining the present staff of the Authority and having the Authority ready and able to undertake the reimbursement program mandated by the Legislature.

In view of the necessity of maintaining the operations of the Authority, the clear meaning of the Order cited above, and the underlying nature of the legal dispute in this case, it is our opinion that payment by you from Commonwealth funds to the Parent Assistance Authority does not violate the spirit or letter of this Order. As indicated, the payments are made by checks made payable to the Parent Assistance Authority, and not to the parent, and are to be used to cover administrative expenses such as salaries, wages, purchase of office supplies, and the maintenance of the system established by the Authority to fulfill its statutory mandate of pre-auditing claims for reimbursement by parents of nonpublic school children.

There is further support for our conclusion in a 1942 Opinion of the Attorney General wherein Attorney General Claude T. Reno reached the same conclusion we reach today. The facts prompting that Opinion involved the decision of a common pleas court declaring unconstitutional the State Parole Act. The Attorney General was asked by the Auditor General whether he could draw warrants on payroll and other requisitions made by the Pennsylvania Board of Parole pending a final decision by the Pennsylvania Supreme Court on the constitutionality of the statute. There, as here, the funds were available for payment. That Opinion concluded that the decision of a lower tribunal was not binding on the matter of payroll and operating expenses, concluding that "The board, you, and the Commonwealth, are entitled to have the constitutionality of the State Parole Act passed upon by our court of last resort, and that Court is the Supreme Court of Pennsylvania." Opinion No. 433, Official Opinions of the Attorney General, 1941-1942, 217 at 218. Similarly we say to you that the Parent Assistance Authority, the State Treasurer and the Commonwealth are entitled to have the constitutionality of the Pennsylvania Parent Assistance Authority Act passed upon by a court of last resort and that court is the United States Supreme Court.

At the present time, we understand that there is presently before you, a voucher transmittal requesting a check in the amount of \$300,000 payable to the Parent Assistance Authority. We are informed by the Secretary of the Office of the Budget of the Commonwealth of Pennsylvania and we have confirmed through discussions with representatives of the Parent Assistance Authority that the funds represented by the \$300,000 check will be used only for administrative expenses of the Authority.

We have also consulted with the Department of the Auditor General with regard to this Opinion.

Accordingly, you are advised that it is appropriate and lawful for you to issue the check in the amount of \$300,000 payable to the Parent Assistance Authority and, in light of our earlier Attorney General's Opinions, Numbers 122 and 137, regarding the Parent Assistance Authority and your relationship to it, we direct you to do so.

Sincerely yours,

PETER W. BROWN
Deputy Attorney General

J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 162

*The Human Relations Commission to develop a contract compliance program—State construction contracts required to have anti-discrimination clauses—Human Relations Commission has the duty and power along with the experience and expertise to enforce anti-discrimination clauses in construction contracts—Governor's power to administer the Executive Branch—Governor's power to delegate administrative authority to the Human Relations Commission—Statutory ability of the Human Relations Commission to develop and enforce affirmative action contract compliance.**

1. The Human Relations Commission can and should develop a "contract compliance program" for the various agencies of this Commonwealth.
2. Under the Act of July 18, 1935, P. L. 1173 (43 P. S. § 153), all state construction contracts should contain an anti-discrimination clause which the Human Relations Commission, under the Human Relations Act of October 27, 1955, P. L. 744, § 3 (43 P. S. § 953) already has the power, duty and expertise to enforce.
3. The Governor, as the Chief Executive Officer of the Commonwealth, under Art. IV, § 2 of the Constitution and under § 701 of the Administrative Code of 1929 (71 P. S. § 241) has the power and the duty to provide regulations for the administration of the executive branch of government.
4. The Governor, as the Chief Executive, can delegate to the Human Relations Commission the administrative duties to develop an affirmative action contract compliance program that conforms to Administration policy and the policies of this Commonwealth as determined by the General Assembly.
5. The Human Relations Commission may be fulfilling its statutory responsibility as set forth in Section 7 and 9 of the Human Relations Act (43 P. S. 957, 959), in establishing and/or administering an affirmative action contract compliance program.

* Editor's note: See Proposed Notice of Rule Making, 3 Pa. B. 2432 (Oct. 20, 1973) and 3 Pa. B. 2966 (Dec. 29, 1973) for proposed regulations to be promulgated in accordance with the Opinion.

Harrisburg, Pa.
December 18, 1972

Governor's Affirmative Action Council
Governor's Office
Harrisburg, Pennsylvania

Dear Sirs:

You have asked us to determine whether it would be proper for the Governor and the Pennsylvania Human Relations Commission to agree that the Human Relations Commission accept the task of developing and monitoring a "contract compliance program" for the various agencies of State Government.

You are advised that it would be entirely proper for the Governor to do so and, in fact, that the Human Relations Commission already has substantial responsibility in this field delegated to it by the Legislature.

In order to deal with the above question adequately, it is necessary to outline briefly the nature of contract compliance and those actions that would need to be taken by the Human Relations Commission in order to develop and monitor an effective contract compliance program.

First, it should be pointed out that all state construction contracts should have an anti-discrimination clause in them in accordance with the mandate of the Act of July 18, 1935, P. L. 1173, 43 P. S. § 153:

"Every contract for, or on behalf of, the Commonwealth of Pennsylvania or of any county, city, borough, town, township, school district, and poor district, for the construction, alteration or repair of any public building or public work, shall contain in provisions by which the contractor agrees

"(a) That, in the hiring of employes for the performance of work under this contract or any subcontract hereunder, no contractor, subcontractor, nor any person acting on behalf of such contractor or subcontractor, *shall by reason of race, creed or color, discriminate* (emphasis supplied) against any citizen of the Commonwealth of Pennsylvania who is qualified and available to perform the work to which the employment relates;

"(b) That no contractor, subcontractor, nor any person on his behalf, shall, in any manner, *discriminate against* or intimidate *any employe* hired for the performance of work under his contract *on account of race, creed or color* (emphasis supplied);

* * * *

“(d) That this contract may be cancelled or terminated by the Commonwealth or the city,”

To the extent that contract compliance means ensuring that such provisions are in all state contracts and ensuring that such provisions are not violated, the Human Relations Commission is clearly the appropriate agency for carrying out such duties.

In fact, the Commission already has that duty. See Human Relations Act of October 27, 1955, P. L. 744, § 3, 43 P. S. § 953:

“The opportunity for an individual to obtain employment for which he is qualified, and to obtain all the accommodation and of commercial housing without discrimination because of race, color, religious creed, ancestry, age, sex or national origin are hereby recognized as and declared to be civil rights which shall be enforceable as set forth in this act.”

To have any other State agency carry out the above task would, in our opinion, create an unnecessary duplication of services and, undoubtedly, a waste of resources. As the Project Counsel to the Commission has properly pointed out:

“In discrimination cases, speedy relief is essential and the expertise in such cases is an important aid in effective enforcement. The Human Relations Commission has the experience and the expertise to deal effectively with the violation of anti-discrimination laws.”

Secondly, contract compliance involves the establishment of certain minimal goals for the employment of minorities and women and the commitment by contractors with the State to take affirmative action — where appropriate — to meet those goals. While it is not necessary here to detail every step in the procedure of establishing such a program, it should be pointed out that, among other things, the following work must be accomplished:

(1) Accumulate and evaluate data from all State agencies on present contract letting procedures, amounts involved, and firms involved.

(2) Accumulate and analyze statistical employment information in order to arrive at reasonable goals for the employment of minorities and women in various job classifications and in various labor markets.

(3) Develop guidelines for affirmative action programs by employers in order to meet those goals—e.g., recruitment, advertising, promotion, training, etc.

(4) Establish, in cooperation with State agencies, a method for including such affirmative action programs as a condition—where appropriate—for securing State contracts and for allowing flexibility and adequate communication between agency and contractor so that such programs are fair and realistic.

(5) Set up a continuous information gathering system in order to monitor the operation of the programs.

(6) Establish procedures for enforcement of such contractual provisions and for the imposition of appropriate sanctions where necessary.

There can be little doubt that the Governor has the authority to order that the above affirmative action contract compliance program be implemented. As the Chief Executive Officer of the Commonwealth under the Pennsylvania Constitution, Art. IV, § 2 and under § 701 of the Administrative Code of 1929 (71 P. S. § 241), it is the Governor's duty to provide reasonable regulations for the administration of the executive branch of State government, and procedures for the letting out of contracts so that those procedures conform with the stated policy of his administration as expressed in Executive Memorandum # 21 and with the stated policy of the Commonwealth as expressed in the Human Relations Act¹ and the Pennsylvania Constitution.² As the United States District Court said in *Contractors Association of Eastern Pennsylvania v. George D. Schultz*, 311 F. Supp. 1002, 2 EPD 10, 192 (D. C. Pa. 1970):

"Like private individuals and businesses, the government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases...."

Without any consideration of the statutory authority of the Human Relations Commission in this area, it is clear that the Governor may delegate to the Commission the authority to carry out these executive prerogatives.³

1. "The opportunity for an individual to obtain employment for which he is qualified...without discrimination because of race, color, religious creed, ancestry, sex, or national origin [is] hereby recognized as and declared to be a civil right..." § 3 of HRA, as amended.

Section 2 of the Act provides:

"(a) The practice or policy of discrimination against individuals or groups by reason of their race, color, religious creed, ancestry, ..., age, sex or national origin is a matter of concern to the Commonwealth..."

(b) It is hereby declared to be the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their race, color, religious creed, ancestry, sex, ..., age or national origin...."

2. Article 1, Section 26:

"Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil rights, nor discriminate against any person in the exercise of any civil right."

3. Since the Human Relations Commission is in the Governor's Office by operation of 71 P. S. § 753-1, it certainly would be appropriate for the Governor to name the Director of the Human Relations Commission "Director of Contract Compliance." See also the exercise of executive power in this area by the former administration. 1 Pa. B. 60, 1 Pa. B. 41-55, 16 Pa. Code, § 5.151, 4 Pa. Code, § 1.53 and 4 Pa. Code, § 61.13. Cf. also *McSorley v. Penna. Turnpike Comm.*, 390 Pa. 81, 134 A. 2d 201 (1957); Code of Fair Practices, April 19, 1967.

In addition, however, it is appropriate to consider whether the Human Relations Commission might be fulfilling a statutory responsibility in establishing and administering a contract compliance program for State government. Certain sections of the Human Relations Act do evidence an intent on the part of the Legislature for the Human Relations Commission to use affirmative action programs under certain circumstances in order to correct unfair employment practices. § 9 of the Act, as amended (43 P. S. § 959) provides that when the Commission finds that unlawful discriminatory practices exist, it has the authority not only to issue a cease and desist order but also to take "...such *affirmative action* including, but not limited to hiring, reinstatement or upgrading of employees...upon such equal terms and conditions to any person discriminated against or all persons as, in the judgment of the Commission, will effectuate the purposes of this Act, and *including a requirement for report of the manner of compliance...*" (emphasis added.)

In addition, under § 7, as amended, of the Act (43 P. S. § 957) the Commission has been given the following powers:

"(d) To adopt, promulgate, amend and rescind rules and regulations to effectuate the policies and provisions of this act.

"(e) To formulate policies to effectuate the purposes of this act, and make recommendations to agencies and officers of the Commonwealth or political subdivisions of government or board, department, commission or school district thereof to effectuate such policies.

"(f.1) To investigate where no complaint has been filed but with the consent of at least eight of the members of the Commission any problem of racial discrimination with the intent of avoiding and preventing the development of racial tension."

From a reading of the above sections one may reasonably conclude that the Commission might follow the following procedure without any executive directive:

(1) Investigate the hiring practices of contractors with State Government.

(2) Conclude that affirmative action programs were needed and recommend same under § 7(d) and (e) of the Act or

(2) (a) Make a finding of discrimination and order affirmative action under § 9.

In fact, we know that the Commission has presently under investigation many of the same firms that will be affected by the proposed executive action. The conclusion is inescapable that whether or not the Human Relations Commission could undertake on its own a contract compliance program in the exact

manner contemplated under executive action (a conclusion we need not reach here), it could achieve substantially identical results by the use of its present statutory powers. To avoid any such duplication of effort and to avoid an unnecessary confrontation between the Human Relations Commission and the Executive Agencies, the Human Relations Commission can and should be assigned and agree to accept the task of developing and maintaining a contract compliance program.

Sincerely yours,

MARK P. WIDOFF
Deputy Attorney General

ROBERT P. VOGEL
Deputy Attorney General

J. SHANE CREAMER
Attorney General

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