

Commonwealth of Pennsylvania

MILTON J. SHAPP

Governor

OPINIONS

OF THE

ATTORNEY GENERAL

OF

Pennsylvania

1973

ISRAEL PACKEL

Attorney General

ISRAEL PACKEL, ATTORNEY GENERAL

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First Deputy Attorney General

Peter W. Brown

Deputy Attorney General

Office of Civil Law

Benjamin Lerner

Deputy Attorney General

Office of Criminal Law

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Thomas B. Schmidt, III

OFFICIAL OPINION No. 1

Teachers—Tenure—Public School Code—School districts.

1. In order for a teacher to become eligible for tenure, one of the conditions that he or she must satisfy is that he or she must serve two years in one particular school district.

Harrisburg, Pa.
January 8, 1973

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

Dear Secretary Pittenger:

In reference to your memo of November 7, 1972, in which you inquired as to whether a teacher in our public schools must serve two years in one particular school district or two years in one or more school districts in order to be eligible for tenure, you are advised that the applicable provisions of the Public School Code relating to tenure make it necessary for a teacher to serve two years in *one particular school district* in order to be eligible for tenure.

Section 1121 of the School Code provides that:

“Each board of school directors shall hereafter enter into contracts, in writing, with each professional employe who has satisfactorily completed two (2) years of service in any school district of this Commonwealth.” Act of March 10, 1949, P.L. 30, Art. XI, §1121, as amended; 24 P.S. §11-1121.

In order to determine the meaning of “professional employe” as used in Section 1121 of the School Code, it is necessary that Section 1121 be read in connection with Section 1108 of the School Code, which provides that:

“A temporary professional employe whose work has been certified by the district superintendent to the secretary of the school district, *during the last four (4) months of the second year of such service*, as being satisfactory shall thereafter be a “professional employe” within the meaning of this article. The attainment of this status shall be recorded in the records of the board and written notification thereof shall be sent also to the employe. The employe shall then be tendered forthwith a regular contract of employment as provided for professional employes. No professional employe who has attained tenure status in any school district of this Commonwealth shall thereafter be required to serve as a temporary professional employe before being tendered such a contract when employed by any other part of the public school system of the Commonwealth.” Act of March 10, 1949, P.L. 30, Art. XI, §1108, as amended, 24 P.S., §11-1108 (Emphasis added).

It is clear from reading Section 1108 of the School Code that the only lawful way for a "temporary professional employe" to attain the status of a "professional employe" is by serving for two years in a particular school district and then by having the district superintendent to the secretary of that particular school district certify his or her work during the last four months of the two years in which he or she served with the particular school district.

While there are no cases directly on point, there is dicta in *Ralson v. Derry Tp. School District*, 363 Pa. 58 (1949), which indicates that the conclusions set forth above are correct. In that case, appellant was elected as a principal on August 11, 1947, in the defendant school district and on August 14, 1947, he signed a Teachers' Tenure Contract with the defendant school district. On June 14, 1948, his employment was terminated by the school district. Appellant contended that he was entitled to the protection of the Tenure Act and could be dismissed only for cause. The Supreme Court of Pennsylvania decided that he was only a temporary professional employe and was not entitled to the protection of the Tenure Act since he had not fulfilled the conditions necessary for tenure eligibility. The Court stated that tenure was:

"....not to be granted to a new entrant until he has served a probationary period of two years of satisfactory service in *the district*" (363 Pa. at p. 62)
(Emphasis added)

Accordingly, we conclude that in order for a teacher to become eligible for tenure, one of the conditions that he or she must satisfy is that he or she must serve for two years in one particular school district.

Sincerely yours,
LILLIAN B. GASKIN
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 2

State Colleges—Establishment of religion—Accommodations for meetings of religious groups

1. State college facilities may be provided for religious purposes only on a disinterested and equitable basis.
2. The use of State college facilities for religious activities is not in violation of the Establishment of Religion Clause of the United States Constitution when reasonable accommodations are provided at reasonable times which do not interfere with the regular activities of the college; when all groups requesting the use of the facilities are given equal access thereto; when the users are members of the college community; and when payment is made for exceptional expense incurred by the college in providing these facilities.

3. Governmental interrelationships with religion must have a primary effect that neither advances nor inhibits religion.
4. Permissible and impermissible interrelationships between church and State can only be determined on a case-by-case basis.

Harrisburg, Pa.
January 15, 1973

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

Dear Secretary Pittenger:

You have asked our office for a determination concerning whether it is permissible to allow students, faculty or staff to hold organized religious activities on State college campuses. You are advised that such activity is lawful subject to the limitations contained herein.

INTRODUCTION

At the present time, the State colleges of the Commonwealth follow a rather uniform policy of not permitting organized religious activities of any kind by anybody on State college campuses. The resulting inconvenience and even hardship to students attending those institutions who wish to worship are obvious and have been raised again and again by students, professors, and administrators. Most recently, inquiries have been received from or concerns expressed by Clarion, Lock Haven, Bloomsburg, and East Stroudsburg. At Bloomsburg, for example, there are 2,000 Roman Catholic students, many of whom do not wish to worship downtown, because, among other things, they wish the services to reflect their needs and their views rather than those of the older adult community in town.

But there are more substantial difficulties. Of the fourteen State colleges in the Commonwealth, many are in the deepest rural area of the State, where only a small number of denominational institutions are represented and where long distances must be traveled to reach certain churches and/or clerics. Public transportation is, for the most part, non-existent and private transportation unavailable for many. While many students and faculty live and work on campus and find that the campus community provides for many of their needs, they find they must look elsewhere at sometimes great cost and inconvenience to satisfy their spiritual needs. In addition, some students may even be faced with the prospect of violating their religion, if they wish to attend religious services long distances away from the college campus. Consider, for example, the situation of the Orthodox Jew who may not travel on the Sabbath or Holy Days except on foot and not past the town limits. He must either pray alone in his room or violate a stricture of his faith.

While other examples may be provided, it is obvious that the present policy of the State colleges imposes substantial hardship

on many students and faculty, and may even be unconstitutional as violative of the First Amendment of the United States Constitution. As Justice Brennan noted in the case of *School District v. Schempp*, 374 U.S. 203, 296 (1963):

"There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provision for churches and chaplains at military establishments for those in the armed services may afford one such example. The like provision by state and federal governments for chaplains in penal institutions may afford another example. It is argued that such provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause."

We conclude below that we need not reach the issue raised by Justice Brennan of whether the present policy at our State colleges violates the "Free Exercise Clause," because there is no statutory or constitutional requirement forbidding religious activities by students, faculty, or staff at reasonable times and subject to the guidelines set forth below.

IS IT A VIOLATION OF THE CONSTITUTION OR LAWS OF THE UNITED STATES OR OF PENNSYLVANIA TO ALLOW ORGANIZED RELIGIOUS ACTIVITY BY STUDENTS, FACULTY, OR STAFF ON OUR STATE COLLEGE CAMPUSES?

The Pennsylvania Constitution and the U.S. Constitution have clauses relating to the establishment and free exercise of religion. The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), commands that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof. . . ." Chief Justice Burger noted in his majority opinion in *Walz v. Tax Commission*, 397 U.S. 664 (1970), that since both the establishment and free exercise clause are cast in absolute terms. "[t]he Court has struggled to find a neutral course between the two Religion Clauses. . . either of which, if explained to a logical extreme, would tend to clash with the other." *Id.*, at 668.

"The course of constitutional neutrality," the Chief Justice continued, "cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded and none inhibited." The Chief Justice then stated the general principle deducible from the First Amendment, incorporating much of what has been said by the Court in previous cases:

"[T]hat we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts *there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.*" *Id.*, at 669 (Emphasis supplied.)

Chief Justice Burger went on to say:

"Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice." *Id.*, at 669.

It is clear from the language of the *Walz* decision that by refusing to adopt a literal interpretation of the religious clauses of the First Amendment, which would have precluded any interrelationship between church and State, the Court acknowledged that the two clauses are interdependent and therefore require some nexus. Only on a case-by-case basis can the line between permissible and impermissible governmental action be distinguished. Accordingly, any general principles which the Court has formulated in this area were developed in a whole series of cases. Any attempted extraction of isolated language within a single opinion can lead to confusion and misunderstanding of the findings of the Supreme Court in subsequent cases. Mr. Chief Justice Burger recognized the danger of possible contradictions when he stated in *Walz* that:

"The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of the [Religion] Clauses that seemed clear in relation to the particular cases but have limited meaning as general principles." *Id.*, at 668.

The hazard of placing too much weight on a few words or phrases of the Court was emphasized by Chief Justice Burger. He cited *Everson v. Board of Education*, 330 U.S. 1 (1947), where Justice Black writing for the majority said that the First Amendment "means at least this: Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another." The actual result in *Everson* was the upholding of a form of Assistance to church-sponsored parochial schools (reimbursement of bus fares). This was also true in a later decision in which the Court

upheld the loaning of textbooks to children in parochial schools through the use of public funds. *Board of Education v. Allen*, 392 U.S. 236 (1968). See also *Nebraska State Board of Education v. School District of Hartington*, _____, U.S. _____, 93 S. Ct. 220 (1972).

It can thus be seen that the United States Supreme Court has left a gray area between the extremes of the two religion clauses of the First Amendment in which some forms of "aid" will be upheld and others will not. Since the Court determined that the two clauses may overlap, it has fashioned a test for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits. "The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power or is circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *School District v. Schempp*, 374 U.S. 203, 222 (1963); *Everson v. Board of Education*, 330 U.S. 1 (1947).

Keeping this test in mind, it is clear that the use of State college facilities by students, faculty, or staff for religious activities at the State colleges is not in violation of the Establishment Clause when reasonable accommodations are provided at reasonable times which do not interfere with the regular activities of the college; when all groups requesting the use of the facilities are given equal access thereto; when users are members of the college community; and when payment is made for exceptional expense incurred by the college in providing these facilities. To make college facilities available for religious activities is not establishment of religion but rather the "benevolent neutrality" spoken of in the *Walz* decision, because by merely providing a facility for any and all wishing to worship in any way they wish, the State is neither establishing nor inhibiting religion. We must stress, of course, that anything more than the mere provision of physical facilities for worship on a disinterested and equitable basis might very well tip the delicate balance of interests toward an unconstitutional Establishment of Religion.

It has been argued that the Pennsylvania Supreme Court cases of *Bender v. Streabich*, 182 Pa. 251 (1897), and *Hysong v. School District of Gallitzin Borough*, 164 Pa. 629 (1894), require a different conclusion, but it is clear that this is not so. Both of these cases held that school directors had no authority to permit public school buildings to be used for sectarian religious instruction or for other than school purposes. These decisions were based upon a construction of what is now the Act of March 10, 1949, P. L. 30 Act VII, as amended (24 P.S. §7-775).

"§7-775. Use of school buildings for other purposes; arrangements with city, borough, or township

"The board of school directors of any district may permit the use of its school grounds and buildings for social, recreation, and other proper purposes, under such rules and regulations as the board may adopt. The board shall make such arrangements with any city, borough, or township authorities for the improvement, care, protection, and maintenance of school buildings and grounds for school, park, play, or other recreation purposes, as it may see proper. Any board of school directors may make such arrangements as it may see proper with any officials or individuals for the temporary use of school property for schools, playgrounds, social, recreation, or other proper educational purposes, primaries and elections, and may permit the use of any school building for holding official meetings of the governing authorities of corporate or politic, governmental or quasi-governmental bodies, created by authority of any act of Assembly. The use thereof shall not interfere with school programs and shall be subject to reasonable rules and regulations adopted by the board of school directors. . . ."

That statute clearly deals only with school buildings that belong to a school district and not with the buildings at State colleges.

One of the legislative reasons in making such a distinction might very well have been that, as the cases have indicated, the State must be especially careful when providing religious activities for impressionable young children, whereas the same considerations do not apply to young adults, who are more able to defend and protect their own religious views.

But there is another more fundamental reason for the distinction. Students at a State college are in an atmosphere where the State is, to a degree, organizing the intellectual and social life of the community. For four years, students spend a large part of their working *and leisure hours* on the State college campus. To put it another way, the State college campus is the community, whereas the public school is only a small part of the larger community of the public school pupil and his parents. It is proper for the State, in the former situation, to provide for voluntary student religious activity to avoid imposing a serious burden on religious exercise and to provide a full opportunity for community life. See *Katz, Freedom of Religion and State Neutrality*, 20 Chicago L. Rev. 426.

CONCLUSION

For the reasons set forth above, and subject to the limitations expressed above, it is our opinion, and you are so advised, that reasonable accommodation for student, faculty and staff religious

worship, at reasonable hours, on a strictly neutral basis, may be provided at the State colleges and universities.

Sincerely Yours,
MARK P. WIDOFF
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 3

School districts—Compulsory school attendance—First Amendments rights—Freedom of Religion—Amish children.

1. The Department of Education must consider it constitutional to compel Amish children who have completed the eighth grade, to fulfill the statutory requirement of compulsory school attendance since Pennsylvania provides an alternative to formal public and private schools in the form of the Amish Operated School, which does not appear to impinge on the right of Amish children to freely exercise their religion.

Harrisburg, Pa.
January 15, 1973

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

Dear Secretary Pittenger:

You have inquired as to whether you must consider it unconstitutional, under the standards set forth in *Wisconsin v. Yoder*, 92 S. Ct. 1526 (1972), for the Pennsylvania Department of Education to compel Amish children who have completed the eighth grade, to satisfy the statutory requirement of compulsory school attendance (24 P.S. §1327) by attending either: 1) a public school or 2) a private school or 3) an Amish Operated School as provided for in the "Policy for Operation of Home and Farm Projects in Church Organized Day Schools," Commonwealth of Pennsylvania, Department of Public Instruction, January 15, 1956, Harrisburg, Pennsylvania.

I point out preliminarily that the final arbiter as to unconstitutionality of a statute is the judiciary. As Attorney General it is my duty to advise administrative and executive offices whether in the performance of their duties they should treat a statute as unconstitutional. If a governing decision or the nature of the statute makes it manifest that the statute is unconstitutional, it is my duty to indicate that the statute is to be disregarded. Absent clear unconstitutionality, it is your duty and my duty to give effect to a statute. Particularly appropriate to your present inquiry is the point that this office, unlike a court, normally cannot go into specific instances which, because of special

circumstances, might make the application of a statute in that case unconstitutional.

On the basis of *Wisconsin v. Yoder*, Pennsylvania can compel Amish children to satisfy the statutory requirement of compulsory school attendance since Pennsylvania provides an alternative to formal public and private schools in the form of the Amish Operated School, which, unlike formal private and public schools, does not impinge on the right of the Amish children to freely exercise their religion. The Court in *Wisconsin v. Yoder*, decided that a state cannot compel an Amish child to attend a formal public or private school after the child has completed the eighth grade, since to compel an Amish child to do so would gravely endanger the free exercise of his religious beliefs. However, the Court went on to say that a state can "promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the old order Amish or others similarly situated." 92 S. Ct. 1526, 1543 (1972). Furthermore, in footnotes 3 and 23 of the decision (92 S. Ct. 1526, 1530, 1543, (1972)), the Court commented favorably on the Pennsylvania Amish Operated School program which suggests that this plan is constitutional and is to be recommended. Under the Amish Operated School Program, pupils who have completed the eighth grade are enrolled in an Amish Operated School where they satisfy the requirement of compulsory school attendance by taking instruction in English, mathematics, health, and social studies and by doing directed projects in agricultural and homemaking on the farm or in the farm home.

I reiterate the point made earlier. It may well be that there are certain other circumstances where it might be contended that the application of the statute is unconstitutional. Since these circumstances are not presented for review in this opinion we must withhold comment on any action the Department of Education may take in compelling children of persons with certain closely held religious beliefs to attend sectarian private schools in which the instruction would offend such religious beliefs.

In light of the decision in *Wisconsin v. Yoder*, it is constitutional for Pennsylvania to compel Amish children, who have completed the eighth grade, to fulfill the statutory requirement of compulsory school attendance since Pennsylvania provides an alternative to formal public and private schools in the form of the Amish Operated School, a school which does not impinge on the right of the Amish children to freely exercise their religion.

Sincerely yours,
LILLIAN B. GASKIN
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 4

Pennsylvania Higher Education Assistance Agency—Citizenship—Alien's Constitutional right to participate in scholarship program.

1. The citizenship requirement contained in Public Act No. 541, P. L. 1546 (24 P.S. 5154 (a) (1)) is to be considered unconstitutional and unenforceable as a violation of the Equal Protection Clause of the 14th Amendment.
2. Proposed Regulation 100 is to be considered unconstitutional as a violation of the Equal Protection Clause insofar as it conditions eligibility for a state scholarship on United States citizenship or on the intention to obtain such citizenship.

Harrisburg, Pa.
January 15, 1973

Mr. Kenneth R. Reeher
Executive Director
Pennsylvania Higher Education
Assistance Agency
Harrisburg, Pennsylvania

Dear Mr. Reeher:

You have inquired whether proposed Regulation 100, which establishes a citizenship requirement for state scholarships, is lawful. You are advised that proposed Regulation 100 is to be treated as unconstitutional as presently drafted and that, therefore, it cannot be approved until redrafted in conformity with constitutional standards as detailed below. You are further advised that the citizenship requirement contained in Public Act No. 541 of January 25, 1966, P. L., 546 (24 P.S. 5154 §(a)(1)) must also be treated as unconstitutional. Therefore, you are instructed that in the evaluation of any application for a state scholarship you are to disregard the citizenship of the applicant as well as the citizenship of the parents.

Both Regulation 100 and 24 P.S. §5154(a)(1) require that any applicant for a state scholarship either be a citizen of the United States or be taking steps to become a citizen. Thus the regulation and the statute deny state scholarships to any person who has not or will not become a citizen of the United States. Regulation 100, moreover, requires applicants who are under 18 years of age to have a parent or guardian who is a citizen or is taking steps to become a citizen. Because this aspect of Regulation 100 disadvantages aliens by withholding scholarship aid from their children (who may or may not be citizens), it is discrimination based on nationality just as clearly as is the requirement that the applicant himself be a citizen.

Under what are now well-established Constitutional principles, discrimination based solely on nationality violates the requirement of the Fourteenth Amendment that no state "deny to any person within its jurisdiction the equal protection of the laws" unless the discrimination can be properly justified as necessary to achieve an essential governmental interest. *Graham v. Richardson*, 403 U.S. 365 (1971). See *Oyama v. California*, 332 U.S. 633, 644-46 (1948); *Korematsu v. United States*, 323 U.S. 214,

216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 420 (1948). Classifications based on nationality are "inherently suspect." *Graham v. Richardson*, 403 U.S. at 376.

In *Graham v. Richardson*, *supra*, the Supreme Court held that citizenship requirements for public assistance were unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The principle enunciated in *Graham* has been applied in four Attorney General's Opinions. In Opinion 92, a citizenship requirement for licenses to practice veterinary medicine was held to violate the Equal Protection Clause. The same holding was made with respect to a citizenship requirement for licenses to practice medicine (Opinion 113), with respect to a citizenship requirement for licenses to practice pharmacy (Opinion 114), and with respect to a citizenship requirement for licenses to practice nursing (Opinion 116). Moreover, following the Supreme Court's decision in *Graham*, the Third Circuit Court of Appeals held that where state scholarship aid is not restricted to persons who are to hold important official positions, a state scholarship program may not be designed so as to exclude aliens. *Chapman v. Gerard*, 456 F. 2d 577 (1972).

The Court in *Chapman* noted that the scholarship program at issue in that case was intended to achieve a worthy public objective—"to spawn qualified resident professionals." The Court found, however, that "the statutory scheme of exclusion... [is] arbitrary, invidious and without reasonable nexus to the... claimed purpose..." *Chapman v. Gerard* at 578.

Consistently with *Graham*, *Chapman*, and Attorney General Opinions 92, 113, 114, and 116, we conclude that the Constitution requires that applications for state scholarships be evaluated without regard to the citizenship of the resident or his parents and that Act 541 insofar as it conditions scholarship grants on the citizenship of the applicant or his parents or insofar as it conditions eligibility on the intent to become a citizen is to be considered unconstitutional and unenforceable. Accordingly, proposed Regulation 100 will not be approved until it omits any citizenship requirement.

Very truly yours,
ROBERT NAGEL
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 5

Act 372 of 1972—Transportation of public and nonpublic school students—
Effective date of the Act.

1. Act 372, approved December 29, 1972, providing for pupil transportation to public and nonpublic school children, becomes effective, under Section 1703 of the new Statutory Construction Act of 1972, Act 290 of 1972, 1 Pa. S. §§1501, *et seq.*, _____ P.S. §_____, effective December 6, 1972, at the beginning of the fiscal year of the political subdivision affected following December 29, 1972.

Harrisburg, Pa.
January 15, 1973

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

It has been brought to our attention that there is some confusion on the part of school officials as to the effective date of Act 372, approved December 29, 1972, providing for pupil transportation to public and nonpublic school students.

Section 1703 of the new Statutory Construction Act of 1972, Act 290 of 1972, 1 Pa. S. §§1501, *et seq.*, effective December 6, 1972, which governs this situation, provides that:

“Statutes affecting the budget of any political subdivision enacted finally at any regular session of the General Assembly shall be effective on the date specified by that one of the following rules of construction in effect on the date of final enactment of the statute:

* * * *

“(5) Final enactment on or after June 6, 1969.—on the date specified in the statute, or if finally enacted thereafter, or if no date is specified, then at the beginning of the fiscal year of the political subdivision affected following the date of final enactment of the statute.”

Since Act 372 was enacted after the date specified in the statute (July 1, 1972), it becomes effective at the beginning of the fiscal year of the political subdivision affected following December 29, 1972.

Sincerely yours,
MARK P. WIDOFF
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 6

Project 70—Game Commission—Expenditure of encumbered, unused Project 70 funds

1. Project 70 funds that were certified as encumbered by the Game Commission on December 31, 1970, may be expended to complete a project approved prior to that date.

2. Project 70 funds that were certified as encumbered by the Game Commission on December 31, 1970, may be expended to expand a Project 70 project that was begun prior to that date.

Harrisburg, Pa.
January 16, 1973

Honorable Glenn L. Bowers
Executive Director
Pennsylvania Game Commission
Harrisburg, Pennsylvania

Dear Mr. Bowers:

We have received an inquiry from you seeking our advice concerning the expenditure of funds under 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.). Your inquiry, dated November 27, 1972, refers specifically to the Glades Water Fowl Project in State Game Land No. 95. You have initiated this inquiry because of subsection (c) of Section 16 of the Act which provides as follows:

"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 Forest and Waters, Fish Commission, Game Commission and the Department of Commerce, 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." 72 P.S. §3946.16(c).

It is our opinion, and you are advised, that the funds in question are presently allocable to the Game Commission in accordance with the stated purpose of the Act and that the Act does not require the payment thereof into the Sinking Fund.

This question, with respect to whether you are obligated to pay the encumbered but unused funds into the Project 70 Land Acquisition Sinking Fund, was also considered in our Attorney General's Opinion No. 143, 2 Pa. B. 1659 (Aug. 3, 1972). In that opinion we specifically advised that funds were properly allocable to the Department of Environmental Resources in accordance with the purposes of the Act and that the Act did not authorize the payment thereof into the Sinking Fund where the funds 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.

You have advised us that the total funds originally allocated to the Glades Water Fowl Project were \$638,305.88. Of that amount the sum of \$378,305.88 has been expended to date and \$260,000.00 remains encumbered. The Commission now proposes to utilize \$119,100.00 of the encumbered \$260,000.00 to purchase five properties and four flooding easements and the balance of \$140,900.00 to purchase additional properties. The additional

properties will be contiguous to the original project and will expand its boundaries.

Since the expenditures will be from funds that were encumbered on December 31, 1970, they may be used to expand a Project 70 project that was begun prior to that date. The additional acquisitions can reasonably be deemed to be within the contemplation of the original project and are clearly embraced within the specific purposes of the Act. The fact that the funds were encumbered on December 31, 1970, means that they are not required to be paid into the Sinking Fund under Subsection (c) of Section 16 of the Act.

Very truly yours,
EDWARD J. MORRIS
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 7

Game Commission—Appointment of agents

1. The Game Commission has authority to appoint out-of-state agents for the issuance of non-resident hunting licenses.
2. The out-of-state agents, prior to appointment, must furnish a bond pursuant to statute and other safeguards and be authorized to engage in this type of business under laws of their respective states.

Harrisburg, Pa.
January 16, 1973

Honorable Glenn L. Bowers
Executive Director
Pennsylvania Game Commission
Harrisburg, Pennsylvania

Dear Mr. Bowers:

We have received an inquiry from you seeking our advice concerning the authority of the Commission to appoint out-of-state agents for the issuance of non-resident hunting licenses. Your inquiry dated December 29, 1972, refers specifically to a request by a large hunting equipment dealer in New Jersey that is interested in becoming an agent for the Commonwealth of Pennsylvania to issue non-resident licenses. You have indicated that it would be desirable to appoint a limited number of issuing agents in those states bordering the Commonwealth. It would also be a service to these non-residents, would be convenient for them and provide them with accurate information on Pennsylvania hunting regulations.

It is our opinion, and you are advised, that the Commission has authority to appoint out-of-state agents for the issuance of non-resident hunting licenses, providing those agents furnish a

bond as required by statute and that they have authority to conduct a business in their respective states.

The Game Law by necessary implication authorizes the appointment of such out-of-state agents. Section 305 (34 P.S. § 1311.305) provides, in part, as follows:

"The issuance of all hunting licenses shall be under the direct supervision of the commission, which shall designate the several county treasurers and such other issuing agents throughout the Commonwealth *or otherwise as it may find essential* to control the lawful issuances thereof." (Emphasis added.)

The provision for the appointment of agents in the Commonwealth "or otherwise" is totally useless and redundant if it does not provide the authority for the appointment of agents outside of the state where the commission finds that to be essential. The Commonwealth does have agents working for it outside of the state, for example, it operates offices in Washington, D.C.

It is true that the Commonwealth has no extraterritorial authority and that its authority is limited solely to the Commonwealth. However, the Commonwealth is not attempting to regulate activities or individuals within out-of-state jurisdictions. It is merely providing service for individuals who will be coming into the State. A "...state may permit acts to be done outside its borders when the legal consequences of such acts are to take place within the state." (81 C.J.S. States §3, p. 861).

As indicated above, non-resident agents would be required to give a bond to the Commonwealth in such sum as shall be fixed by the commission, but not less than three thousand dollars (\$3,000), prior to receipt of the annual supply of licenses. (34 P.S. §1311.311). Care should be taken relative to the bond requirement so that each bond shall be signed by the principal obligor and by an attorney in fact or resident agent located within the Commonwealth of Pennsylvania and expressly approved by the Insurance Department of the Commonwealth to participate in the issuance of surety bonds effective in Pennsylvania. Also, such out-of-state issuing agents should submit satisfactory proof that they are authorized to conduct this type of business under the laws of their respective states prior to their appointment.

Very truly yours,

EDWARD J. MORRIS
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 8

State colleges and universities—Memberships in learned societies and professional organizations—Administrative Code—Records Management Program—Purchases of filing and record-keeping items

1. The approval of the Governor is not required for a State college or university to become a member of learned societies and professional organizations.
2. State colleges and universities must comply with Administrative Directive No. 78 of October 6, 1970, concerning purchases of filing and record-keeping items.

Harrisburg, Pa.
January 16, 1973

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

Dear Mr. Pittenger:

You have inquired as to two apparent conflicts between the Administrative Code of 1929, P.L. 177, as amended (71 P.S. §§51, *et seq.*) and Act 13 of February 17, 1970, P.L. 24 (24 P.S. §§20-2001, *et seq.*).

I. The first apparent conflict presented in your inquiry concerned a conflict between Section 6(15) of Act 13 and Section 507 (c) (5) of the Administrative Code.

Section 507 (c) (5) of the Administrative Code provides that any department, board, or commission may "...take membership in independent organizations or societies having related functions, but all such memberships shall be approved by the Governor." 71 P.S. §187.

Section 6 of Act 13 states that:

"Subject to the stated authority of the board of State College and University Directors and the boards of trustees, the president of each of the several State Colleges and State Universities shall administer the institution. Each president shall have the power and his duty shall be: '(15) To determine institutional memberships in learned societies and professional organizations which will have significance to the welfare of the institution within the limits established by the Board of State Colleges and University Directors.'" 24 P.S. §20-2004.1 (15).

Taking the commonly-accepted meaning of the words "to determine"—i.e., to fix conclusively or authoritatively, it is clear that the purpose of Section 6(15) is to leave the decision as to whether or not a college should become a member of a professional organization or learned society within the discretion of the President of each State college, within the limits set by the Board of State College and University Directors. It would appear there-

fore that Section 6(15) of Act 13 is in conflict with the Administrative Code provisions which require the approval of the Governor of institutional memberships of state agencies.

However, this conflict, under well settled law of statutory construction, is easily resolved.

The Statutory Construction Act of 1937, May 28, P.L. 1019 §63 (46 P.S. §563), provides that whenever a general provision in a law is in conflict with a special provision in a later enacted law the "...special provision shall prevail and shall be construed as an exception to the general provision."* Since Section 6(15) of Act 13 dealing specifically with state colleges, was enacted after Section 507 (c) (5) of the Administrative Code dealing with state agencies generally, Section 6(15) of Act 13 prevails over and acts as an exception to Section 507 (c) (5). It follows, therefore, that the approval of the Governor is not required for State college memberships in learned societies and professional organizations.

II. Your second question concerns an apparent conflict between Section 6(6) of Act 13 and Administrative Directive No. 78 of October 6, 1970. Directive No. 78 was issued to "establish policies and procedures for the selection, purchase and utilization of filing equipment by all agencies, headquarters and field under the jurisdiction of the Governor." The statutory basis for this records management program is in Section 527 of the Administrative Code.

Section 527 of the Administrative Code states that:

"The Governor shall, from time to time, cause studies to be made of the accumulations of files of correspondence, reports, records and other papers in possession of departments, boards or commissions, and may direct said departments, boards and commissions to comply with the provisions of Sections 524 and 525 of this act. The requisitions, warrants, cancelled checks, books, records, correspondence, and files of the department of the Auditor General, and the Treasury Department, which date back a period of four years or more, shall be expressly covered by the provisions of this section." 71 P.S. §207.

Section 6 of Act 13 states that:

"Each president shall have the power and his duty shall be:

'(6) To purchase instructional materials, educational, technical, administrative, custodial, and maintenance equipment and supplies not in excess of a cost of one thousand five hundred dollars (\$1,500) without competitive bidding with the approval of the Board of

* Statutory Construction Act of 1972, 1 Pa. S. §1933.

Trustees, after notice to the Secretary of Property and Supplies except that such items shall not be bought in series to avoid the dollar ceiling, nor shall any items be included for which the Department of Property and Supplies has contracts, current or proposed." 24 P.S. §20-2004.1(6).

It was not the intention of the Legislature in enacting Section 6(6) of Act 13 to give the colleges or universities powers over the purchase of filing and record-keeping items without regard to Section 527 of the Administrative Code. Instead, our analysis of the two sections indicates that the legislature was concerned with an altogether different question when it enacted that section. Previous to the enactment of Section 6(6) of Act 13, the State colleges could not directly purchase supplies, equipment or other materials because Section 507 of the Administrative Code prohibits the purchase of these items by departments, boards or commissions other than Property and Supplies unless there is a law authorizing the department, board or commission to purchase such materials and supplies or unless the Department of Property and Supplies authorizes in writing a department, board or commission to make purchases in the field, up to a specified amount. 71 P.S. §187 (a), (c).

The intent of the Legislature in enacting Section 6(6) of Act 13 was to give the colleges a limited degree of fiscal autonomy, which was deemed desirable for the better operation of the State colleges. The purpose of Section 6(6) was to allow the colleges to make small purchases without having to go through the procedure of competitive bidding. The *Legislative History*, see 1969 (Pennsylvania House of Representatives) at page 997, indicates that since the colleges are scattered throughout the State, it was thought to be more convenient for the State colleges to be able to make purchases directly, without competitive bidding.

The above analysis indicates, therefore, that effect can be given to both Section 527 of the Administrative Code and Section 6(6) of Act 13 without a conflict arising. Section 63 of the "Statutory Construction Act", *supra*, provides 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 both."

Therefore, effect must be given to both provisions, and you are accordingly advised that the policies and procedures set forth in Administrative Directive No. 78, based on Section 527 of the Administrative Code, are not in any way affected by Section 6(6) of Act 13.

Sincerely yours,
LILLIAN B. GASKIN
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 9

Public School teachers—Citizenship—Right of qualified aliens to teach in the public schools.

1. The restrictions on the access of aliens to the teaching profession contained in Sections 1109 and 1202 of the Public School Code are to be considered unconstitutional and unenforceable as a violation of the Equal Protection Clause of the Fourteenth Amendment.
2. Eligibility to teach in the public schools of Pennsylvania should be determined without regard to the applicant's citizenship or his intention to obtain United States citizenship.

Harrisburg, Pa.
January 16, 1973

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

Dear Mr. Pittenger:

You have requested advice as to how Sections 1109 and 1202 of the Public School Code can be reconciled. Section 1109 states:

"Every teacher employed in the public schools of this Commonwealth must be...a citizen of the United States: Provided, that citizenship may be waived in the case of exchange teachers not permanently employed, and teachers employed for the purpose of teaching foreign languages." 24 P.S. §11-1109.

Section 1202 as amended December 21, 1967, states:

"In the case of a resident foreign national holding an immigrant visa who has declared, in writing, to the Department of Public Instruction the intention of becoming a citizen of the United States, such person shall be eligible for a provisional college certificate." 24 P.S. §12-1202.

Section 1202 appears on its face to authorize the granting of provisional college certificates to certain aliens who are forbidden to teach in Pennsylvania public schools by Section 1109. Nevertheless, even Section 1202 limits the access of aliens to the teaching profession and conditions this limited access on a declaration of intention to become a citizen.

It is our opinion, and you are so advised, that insofar as these provisions prohibit otherwise qualified resident aliens from teaching in the public schools on the same terms as qualified citizens, both provisions should be treated administratively as violative of the Equal Protection Clause of the Fourteenth Amendment and are unenforceable. Accordingly, you are instructed to certify teachers without regard to applicants' citizenship and without regard to intention to obtain United States citizenship.

Previous opinions have held unconstitutional citizenship requirements that restrict access to the practice of veterinary medi-

cine (Opinion No. 92), to the practice of medicine (Opinion No. 113), to the practice of pharmacy (Opinion No. 114), and to the practice of nursing (Opinion No. 116). These opinions were premised on the Supreme Court's decision in *Graham v. Richardson*, 403 U.S. 365 (1971). In *Graham*, the Court held that the Fourteenth Amendment forbids statutory classification based on alienage unless the discrimination can be justified as necessary to achieve essential governmental interest. After *Graham v. Richardson* and after the above mentioned opinions were issued, several lower court decisions have begun to define more specifically the kinds of governmental interests that can justify a citizenship requirement for entry into an occupational field. These decisions are fully consistent with our earlier Opinions. They indicate that aliens may be barred from an occupational field only when loyalty and detailed familiarity with American culture are necessary qualifications for a position closely linked to uniquely governmental functions, such as the administration of justice¹ or the conduct of foreign policy.² On the other hand, when citizenship requirements restrict access to important jobs that are not, however, closely related to necessarily public functions, they are invalidated. For example, a citizenship requirement for positions with the New York Human Resources Administration has been struck down. *Dougall v. Sugarman*, 339 F. Supp. 906 (1971). Teaching, like medicine, is an important profession, but it is not a central governmental function like the operation of foreign policy or the administration of justice. These latter functions, for example, are never entrusted to private institutions as teaching often is in the United States.

We conclude that entry into the teaching profession is not to be restricted on the basis of citizenship. By permitting aliens to teach in public schools as exchange teachers or as permanent teachers of foreign languages, the Public School Code itself implies that the state's interest in keeping aliens from teaching in the public schools is not so compelling an interest as to outweigh other public policies. *Graham v. Richardson* and the lower court cases applying *Graham* require the conclusion that the Constitutional policy of giving equal protection of the laws to citizens and aliens alike outweighs whatever interest the state has in the citizenship requirements in Sections 1109 and 1202.

Sincerely yours,
ROBERT NAGEL
Deputy Attorney General
ISRAEL PACKEL
Attorney General

1. *In Re Griffiths*, 40 L. Wk. 2566 (Conn. Sup. Ct. 1972)

2. *Faruki v. Rogers*, 41 L. Wk. 2193 (U.S. D.C., Dist. Col. 1972)

OFFICIAL OPINION No. 10

Act 112 of June 9, 1972—Statutory Construction Act—Land exchange agreement—Department of Environmental Resources—Department of Transportation.

1. Where Act 112 of June 9, 1972 used the ambiguous reference of "Secretary" in regards to a land exchange agreement between the Department of Environmental Resources and Department of Transportation, "Secretary" must be read as "Secretary of Transportation" in order to avoid an absurd result.
2. Where a statute is susceptible to two interpretations with one being absurd and the other complying with the obvious legislative intent, words necessary and proper for interpreting the statute can be added to insure a proper interpretation of the statute.

Harrisburg, Pa.
January 22, 1973

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

Dear Secretary Kassab:

In an attempt to authorize a land-exchange arrangement between the Pennsylvania Department of Transportation (PennDOT) and the Department of Environmental Resources (DER), the Legislature passed Act 112 of June 9, 1972 which provided as follows:

AN ACT

"Authorizing the Secretary of Environmental Resources with the approval of the Governor, to transfer certain Project 70 lands in Bucks County to the Department of Transportation for a high-way project under certain conditions.

"The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

"Section 1. . . .the General Assembly authorizes the Secretary of Environmental Resources with the approval of the Governor, to transfer the hereinafter described land in Newton Township in Bucks County to the Department of Transportation for a right-of-way for construction of Project L.R. 1141 Section A10 involving construction of Newton By-Pass.

"Such land shall be free of the restrictions on use and alienation prescribed by section 20 of the act of June 22, 1964 (P.L. 131), known as the Project 70 Land Acquisition and Borrowing Act upon:

"(1) The *Secretary* may acquire from any state agency land which the state agency acquired with Project 70 funds: Provided, however; that (I) the state agency . . . by proper resolution . . . approves such acquisition and (II) suitable substitute land may be acquired by the *Secretary* and conveyed to the state

agency...in exchange for the Project 70 land acquired or, if no such suitable land is available, the *Secretary* shall pay to the state agency...the fair market value of the land so acquired."

DER initially bought the land in question with federal subsidization under Title VII of the Housing Act of 1961, as amended, and thereby obligated itself to the federal requirements of Title VII. Such requirements permit a land exchange arrangement of comparable lands but prohibits an outright sale of the land by DER to PennDOT. Consequently, under the federal law, the only remaining alternative for PennDOT and DER is to exchange lands of comparable value as contemplated by Act 112.

Act 112 of June 9, 1972 presents a problem of statutory construction inasmuch as Section 1 (1) uses the designation of "Secretary." The statute, however, involves a transaction between two departments—PennDOT and DER—both headed by their respective Secretary so the usage of the label "Secretary" is ambiguous. The question, therefore, becomes whether the term "Secretary" in Section 1(1) of Act 112 refers to the Secretary of PennDOT or the Secretary of DER. We conclude that the word "Secretary" in Section 1(1) of Act 112 refers to the Secretary of Transportation and must be so constructed.

If "Secretary" in Section 1(1) refers to the Secretary of DER, the statute would, in essence, provide that DER is authorized to transfer certain delineated lands to PennDOT for highway construction upon DER land either 1) paying itself for the land, or 2) obtaining other suitable land and transferring it back to itself. If "Secretary" in Section 1(1) refers to the Secretary of PennDOT, the statute would, in essence, provide that DER is authorized to transfer certain delineated lands to PennDOT for highway construction upon PennDOT either 1) paying DER for the land, or 2) obtaining other suitable land and transferring it to DER. The former interpretation is tautological and absurd; the latter conforms with the obvious legislative intent.

Although the legislative intent in Act 112 is obvious, question is raised whether or not words which were inadvertantly omitted in a statute can be supplied under the ordinary rules of statutory construction. Both Legislature and the Pennsylvania Supreme Court have answered this question in the affirmative.

The recently enacted Statutory Construction Act provides as follows:

"Words and phrases which may be necessary to the proper interpretation of a statute and which do not conflict with its obvious purpose and intent, nor in any way affect its scope and operation, may be added in the construction thereof." Section 1923(c) of the Statutory Construction Act

This same principle was enunciated by Justice Drew more forcefully in *Commonwealth v. Peoples*, 345 Pa. 576 (1942):

"In construing a statute, it should receive the most reasonable and beneficial interpretation...[A]nd when 'necessary...to effectuate (a plain) Legislative intent...additional...words [may be] interpolated.'" 345 Pa. at 580

The instant statute is susceptible to two interpretations: one having the Secretary of DER transferring land to PennDOT in return for the right to transact a land exchange with himself and the other having the Secretary of DER transferring land to PennDOT in exchange for PennDOT returning comparable land to DER. Given this situation the ordinary rules of statutory construction dictate that the missing words can be added and "Secretary" in Section 1(1) of Act 112 of June 9, 1972 must be read as meaning "Secretary of Transportation."

Very truly yours,
RICHARD J. ORLOSKI
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 11

Federal Office of Emergency Preparedness (OEP) Regulations—Completed construction—Requirement of acceptance

1. Under Pennsylvania law construction of a facility, as intended by OEP regulations, is complete when it has been put together and made ready for use.
2. A facility can be considered to have been completed even though not formally accepted by the contractin State agency.

Harrisburg, Pa.
January 25, 1973

Dr. Richard Gerstell
Director of Civil Defense
Harrisburg, Pennsylvania

Dear Dr. Gerstell:

You have requested an opinion as to whether construction of the Rausch Creek Water Treatment Plant can be considered to have been completed at the time of the June flood. This opinion is requested in order to determine how the assistance eligibility provisions of the Federal Disaster Relief Act, 42 U.S.C.A. §4482, and regulations provided in Circular 4000.5c of the Federal Office of Emergency Preparedness (OEP) are to be applied to the Rausch Creek Plant. The Act and OEP regulations provide that reimbursement shall be made in full for any publicly-owned utilities damaged in the flood. (See 42 U.S.C.A. §4482, and OEP Circular 4000.5c, pp 32 and 33). The Acts, however, provide that where a public facility is "under construction" at the time of a natural disaster, Federal reimbursement shall be made

in an amount not to exceed fifty (50%) per cent of the resulting damage.

While the opinion you request appears to turn on an interpretation of Federal statutes and regulations, you have further advised that the Office of Emergency Preparedness, through its Federal Coordinating Officer, Francis X. Carney, has determined that an interpretation of the applicable State law by the Attorney General would effectively settle the question as to what amount of compensation is due under the regulations. A letter from OEP to that effect has been appended to this opinion.

Records of the Department of Environmental Resources indicate that with the exception of four minor, punch list items, all elements of the plant had been completed prior to May 22, 1972, and that the plant itself was successfully operated from June 14 to June 16, 1972. In addition, it appears that all items on the punch list had been completed by June 18, 1972, prior to the June flood. The question you have presented, therefore, is whether the Rausch Creek Plant, which had been completed in every major respect, but had not been formally accepted by the Department of Environmental Resources, was "under construction" at the time of the flood, as intended by the OEP regulations. It is our opinion and you are advised that construction of the Rausch Creek Plant can be considered to have been completed by the date of the flood.

The Pennsylvania Superior Court has ruled that construction is complete "when it [is] lawfully usable for the purpose intended." See *Versailles Township v. Ulm et ux*, 152 Pa. Super. 384, 389 (1943). The Rausch Creek Plant was usable and, in fact, had been operated satisfactorily prior to the flood. In referring to the meaning of construction, an earlier Superior Court decision stated that it meant "putting together, ready for use." *Eichleay v. Wilson*, 8 Pa. Super. 14, 16 (1898). On the date of the flood, the Rausch Creek Plant appears to have been "ready for use" and, consequently, met the Court's definition as to completed construction. In view of these two Pennsylvania court decisions, therefore, it is apparent that the plant had been completed at the time of the June flood.

The Federal courts have reached similar conclusions. In *Clauss v. American Insurance Co.*, 214 F. Supp. 442 (E.D. Pa. 1963), Judge Joseph Lord III ruled, in effect, that construction could be completed without formal acceptance. In that case, plaintiff entered into a contract with the City of Philadelphia to construct a sewer. After work on the sewer had been completed, but before formal acceptance had been made by the City of Philadelphia, an accident occurred near the site where the work had been done. Suit was commenced on an insurance policy covering liability arising from plaintiff's activities with regard to the construction of the sewer. The policy included an exclusionary clause which provided that "products hazards" occurring after

construction had been completed were not covered under the policy. Suit was brought on the policy, and the Court ruled that the work had been completed within the meaning of the insurance policy. Judge Lord ruled that the operation was completed because nothing further was needed in the way of construction. In dealing with the question of acceptance, the Court ruled that this was not a necessary requisite of the insurance policy, since the policy only called for completion and did not refer to acceptance. The OEP regulations, in a similar manner, simply call for completion. No reference is made to formal acceptance. A similar conclusion was reached in *Continental Illinois National Bank v. United States*, 115 F. Supp. 892 (Ct. Cl. 1953), where the Court of Claims ruled that formal acceptance was not a requirement in determining whether construction had been completed.

For these reasons, it is our opinion that the Rausch Creek Plant was not "under construction," within the meaning of the OEP regulations, but rather had been completed in all significant respects. Hence, the Rausch Creek Plant is eligible to receive reimbursement in full for damages caused by the flood of June, 1972.

Very truly yours,
THEODORE A. ADLER
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 12

Real Estate Commission—Rental listing agencies—Real estate broker

1. Rental listing agencies, which assemble lists of apartments and homes for a rent, make them available for a fee, and extensively advertise the availability of such housing, are practicing real estate brokerage within the meaning of Section 2 (a) of the Real Estate Brokers License Act of 1929, 63 P.S. §432(a) and must be licensed in accordance with Section 6 thereof, 63 P.S. §436.

Harrisburg, Pa.
January 25, 1973

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

Dear Commissioner Fumo:

You have requested our opinion as to whether rental listing agencies, several of which have recently appeared in Pennsylvania, must be licensed as real estate brokers. Specifically, you have referred to one such organization, in Philadelphia known as "Homefinders."

It appears that these listing agencies assemble lists or apartments or houses for rent and make them available for a fee to those who wish to consult them. It appears that many of the listings are simply taken from other classified advertisements in the newspapers and are often unavailable for rent when the customer attempts to rent the apartment or house. The listing agencies apparently do not enter into any agreement with the owner or with the customer; they simply make available the list to the customer. They receive no commission when and if a lease is negotiated, nor do they in any way participate in the actual consummation of a lease agreement. They receive only the initial fee, usually in the amount of \$20.00. The agencies advertise extensively in the classified section of the newspapers.¹

Section 2 of the Real Estate Brokers License Act of 1929, 63 P.S. §432(a), contains the definition of a real estate broker.² Section 6 of the Act, 63 P.S. §436, makes it unlawful for any person to act as a real estate broker or in the capacity of a real estate broker without first obtaining a license.

Other states which have faced the same question as that presented have held that the rental listing agency type of operation (specifically, "Homefinders") is practicing real estate brokerage. For example, the Attorney General of Delaware on October 16, 1972 rendered an official opinion holding that "Homefinders" was operating illegally under Delaware law in that it was engaged in the business of a real estate broker or salesman without being registered and without a certificate of registration is-

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1. Sample advertisements are found both in the usual "For Rent" sections or in sections headed "Apartment Services." They advertise listings of apartments and homes generally and specifically (although no actual addresses are listed) and are generally indistinguishable from advertisements by brokers and owners except for the statement of "Fee" or "\$20.00 Fee." One such advertisement states: "Let the Largest Listing Co. in this Area Get Your Next Home or Apartment."
 2. This section provides in pertinent part: "The term 'real estate broker' shall include all persons, copartnerships, associations, and corporations, foreign and domestic, who, for another and for a fee, commission, or other valuable consideration, shall sell, exchange, purchase, or rent, or shall negotiate the sale, exchange, purchase, or rental, or shall offer or attempt to negotiate the sale, exchange, purchase, or rental, or shall hold himself or themselves out as engaged in the business of selling, exchanging, purchasing or renting of any real estate, interest in real estate, the property of another, whether the same shall be located within the State of Pennsylvania, or elsewhere, or shall collect or offer or attempt to collect rental for the use of real estate, the property of another, or shall negotiate or offer or attempt to negotiate a loan, secured or to be secured by mortgage or other encumbrance upon or transfer of any such real estate... One act in consideration of compensation, by fee, commission or otherwise, of buying, selling, renting or exchanging any such real estate of or for another, or attempting of offering so to do, or negotiating a loan upon or leasing or renting or placing for rent any such real estate, or collection of rent therefrom, shall constitute prima facie evidence that the person, copartnership, association, or corporation, so acting or attempting to act, is a real estate broker within the meaning of this act."

sued by the Delaware Real Estate Commission. The Delaware statute in question is similar to Pennsylvania's. Furthermore, as the opinion of the Attorney General of Delaware points out, an injunction was granted in *Texas v. Homefinders of America, Inc.*, No. 72-2559 (District Court of El Paso, Texas). In that case, Homefinders was enjoined from holding out to the public that it was engaged in the business of providing rental real estate.

We are further advised that similar injunctions have been granted in Florida at the behest of the Florida Real Estate Commission. See *Florida Real Estate Commission v. Sgro and Homefinders of Florida*, Case 71-24171 (Circuit Court of Dade County); *Florida Real Estate Commission v. Thompson t/a Homefinders*, Case No. 72-922 (Circuit Court of Duval County); *Florida Real Estate Commission v. Gorson and Garcia t/a Home Rental Service*, Case No. 72-1473 (Circuit Court of Broward County).

We believe that Pennsylvania law is in accord. In the words of the Real Estate Brokers License Act, note 2, *supra*, we believe that these rental listing agencies do "...for another and for a fee, commission, or other valuable consideration...negotiate the...rental, or...offer or attempt to negotiate the...rental, or...hold...themselves out as engaged in the business of...renting of any real estate, interest in real estate, the property of another..."

In *Verona v. Schenley Farms Co.*, 312 Pa. 57, 167 A. 317 (1933), the Court held that a person who had brought to the attention of a prospective buyer the attributes of another's real property which eventually resulted in the consummation of a sale was practicing real estate brokerage within the meaning of the Act, and was therefore not entitled to collect the fee which had been promised him because he was unlicensed. The Court held that his activities, limited though they were, constituted "negotiations" within the meaning of the Act. The Court stated (312 Pa. at 61):

"The Legislature was of course familiar with the great variety of real estate brokerage contracts made from time to time, and the definition of real estate broker must be understood in the light of the common knowledge on the subject; some idea of the varied scope of such contracts may be obtained by examining the cases cited in [citations omitted]."

The Court further stated that the Act was intended to prevent frauds upon the public and, therefore, even though it imposes penalties, it is not to be constructed strictly, but fairly and liberally in order to carry out the intention of the Legislature. *Verona* was followed in *Alford v. Raschiatore*, 163 Pa. Superior Ct. 635, 63 A. 2d 366 (1949) in which an individual who "knew people" found someone interested in the seller's land, brought the parties together, and a sale was consummated.

Suit was brought for a commission promised and plaintiff contended that he had not been acting as a real estate broker since he did not pretend that he had "negotiated" anything but merely brought the parties to each other's attention. The Court nevertheless denied recovery, holding (163 Pa. Superior Ct. at 639):

"We cannot give to the word 'negotiate,' in the sense intended by the Legislature, the strict construction contended for by appellee. If we should so do, it would preclude from the regulatory purpose of the Act a great percentage of brokers and salesmen who normally do no more than acquaint prospective buyers and sellers with the location and price of available property, and who annually comply with the licensing feature of the Act in the belief that they are covered by it."³

Similarly, in this case, the listing of the properties and making such lists available for a fee has as its intention the bringing of parties together in an amicable frame of mind to enter into a lease. We further believe that where a person holds himself out as having rental listings much in the way that a real estate broker usually does, that it was the intention of the Legislature to include such person within the definition and subject him to appropriate regulation. It is therefore our opinion, and you are so advised, that the activities carried on by the various rental listing agencies constitute the practice of real estate brokerage under the licensing act and require that they be appropriately licensed.⁴

In accordance with this opinion, we are prepared to take and bring injunctive action against any of these rental listing agencies which are not licensed and which fail to become licensed which you bring to our attention.

Sincerely yours,
GERALD GORNISH
Deputy Attorney General
ISRAEL PACKEL
Attorney General

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3. The court cited with favor *Baird v. Krancer*, 138 Misc. 360, 246 N.Y.S. 85 (1930), where the Court said that the essential feature of broker's employment is to bring the parties together in an amicable frame of mind so that they may work out the terms of their agreement, but that it is of no importance that the broker participate in working out that agreement.
 4. This opinion is not intended to cover the case of institutions which maintain housing lists for prospective students or employees, or lists maintained by non-profit organizations for the benefit of members or interested parties to accomplish social goals, which do not involve the payments of fees. But in this case, where the work is being done "for a fee, commission, or other valuable consideration," it is clear that the practice of real estate brokerage is being carried on.

OFFICIAL OPINION No. 13

Environmental impact statements—Department of Environmental Resources—National Environmental Policy Act of 1969—Office of State Planning and Development

1. The National Environmental Policy Act of 1969, Public Law 91-190, requires that any comments and views of the Department of Environmental Resources (which is the agency authorized to develop and enforce environmental standards for Pennsylvania) must accompany the Federal agency's detailed environmental statement and in addition advice and information useful in restoring, maintaining and enhancing the quality of the environment must be made available to states.
2. The office of Planning and Research of the Department of Environmental Resources is responsible for overall environmental planning for the Commonwealth Government.
3. Compliance with the Federal Act requires that any revisions of the environmental impact statement made by the preparing State agency must be reviewed and commented on by the Department of Environmental Resources before the statement is resubmitted to the Federal agency.
4. It would be appropriate for the Governor to issue an Executive Directive to all agencies of the Commonwealth Government requiring all agencies preparing environmental impact statements to submit them to the State Clearing House of the Office of State Planning and Development for processing in accordance with the procedures outlined herein.

Harrisburg, Pa.
January 30, 1973

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

Dear Governor Shapp:

We have received a request from Maurice K. Goddard, Secretary of Environmental Resources, concerning the procedures for review of environmental impact statements by the Commonwealth. Secretary Goddard has asked us to consult with you and advise you of the proper procedures which should be followed as a matter of law in order to assure that a total review of environmental impact statements is made in a meaningful fashion. He is particularly concerned that his Department will have an opportunity to review an environmental impact statement prepared by another agency of the Commonwealth whenever there are changes made in the statement after his Department has made its initial review.

Environmental impact statements are required by the Federal Government pursuant to the National Environmental Policy Act of 1969, Public Law 91-190 (42 U.S.C.A., §4331 et seq.). Section 102 of that Act provides that all agencies of the Federal Government shall include in every recommendation on "major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- "(i) the environmental impact of the proposed action,
- "(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

“(iii) alternatives to the proposed action,
“(iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
“(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. . .” (41 U.S.C.A. §4332)

The Act further provides that the responsible official preparing the detailed statement shall consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise and it also provides that copies of such statements shall be accompanied by the *comments and views of the appropriate federal, state and local agencies which are authorized to develop and enforce environmental standards.* (42 U.S.C.A. §4332)

The federal agencies are required by the Act to “make available to states, counties, municipalities, institutions and individuals advice and information useful in restoring, maintaining and enhancing the quality of the environment; . .” (42 U.S.C.A. §4332)

The express language of the Act thus requires that any comments and views of the Department of Environmental Resources (which is the agency authorized to develop and enforce environmental standards for Pennsylvania) must accompany the Federal agency’s detailed environmental statement and, in addition advice and information useful in restoring, maintaining and enhancing the quality of the environment must be made available to states.

The Office of Planning and Research of the Department of Environmental Resources is responsible for overall environmental planning for the Commonwealth Government. In accordance with this duty the Office has developed procedures for the review of environmental impact statements which it has submitted to the State Clearing House of the Office of State Planning and Development for incorporation into certain programs of that Office calling for environmental review.

These procedures provide for copies of an applicant’s draft detail statement to be submitted by the State agency responsible for its preparation (preparing State agency) to the State Clearing House within the Office of State Planning and Development for recording. From there the copies are sent to the Office of Planning and Research which distributes them for comment throughout the Department of Environmental Resources and to other State agencies affected by the proposed Federal action. All comments by the bureaus of the Department of Environmental Resources are summarized into a Departmental position for the Secretary’s signature by the Office of Planning and Research. Comments of other State agencies are either incorporated into the departmental position or appended as separate comments.

This statement of position is then sent to the State Clearing House where it is recorded and attached verbatim to any comments of the Office of State Planning and Development on the project relative to state social and economic policy. These statements are then forwarded to the preparing State agency.

Thereafter the preparing State agency prepares a final environmental impact statement which takes into consideration the comments of the Department of Environmental Resources. The final environmental impact statement is submitted to the Federal agency directly involved and copies thereof are sent to the State Clearing House which then distributes the final statement to the Office of Planning and Research for subsequent distribution to affected State agencies.

Secretary Goddard's concern is with the eventuality of the Federal agency returning the environmental impact statement to the preparing State agency for revision. He suggests that whenever that happens his Department should have an opportunity to review and comment on any revisions in the environmental impact statement made by the preparing State agency.

It is our opinion that compliance with the Federal Act requires that any revisions of the environmental impact statement made by the preparing State agency must be reviewed and commented on by the Department of Environmental Resources before the Statement is resubmitted to the Federal agency.

As mentioned above, Section 102 of the Act specifically provides that copies of statements shall be accompanied by the comments and views of all the appropriate State agencies which are authorized to develop and enforce environmental standards. This means that the statements relative to Pennsylvania cannot contain additional materials or revisions with respect to which the Department of Environmental Resources has not had an opportunity to submit its comments and views.

The procedures set forth in the preceding paragraphs have nowhere been delineated in an Executive Directive. Accordingly, we are of the opinion that it would be appropriate for you to issue an Executive Directive to all agencies of the Commonwealth, for publication in the Pennsylvania Bulletin, requiring all agencies preparing environmental impact statements to submit them to the State Clearing House of the Office of State Planning and Development in accordance with such procedures. The Executive Directive should set forth the procedures outlined above and it is suggested that it contain the following additional language:

"In the event that the Federal Government (1) shall ask the preparing agency for supplemental or additional statements relating to the original Environmental Impact Statement, or (2) shall return the Environmental Impact Statement for additional work by the preparing agency then such preparing agency shall re-submit the Environmental Impact Statement and the

Federal comments thereon together with the new material prepared by the agency to the State Clearing House of the Office of State Planning and Development for distribution to the Department of Environmental Resources' Office of Planning and Research and allow that Department the opportunity to further review and comment upon same, prior to re-submission to the Federal Government."

Please advise if this Office can be of further assistance in this matter.

Very truly yours,
W. W. ANDERSON
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 14

Department of Community Affairs—Bucks County Housing Development Corporation—Use of State Housing Assistance funds under Contract H-91 to pay for legal fees, including cost of litigation, if necessary, is lawful.

1. Under Section 4 (d) of the Housing and Redevelopment Assistance Law of May 20, 1949, P.L. 1633, as amended, (35 P.S. §1664(d)), Contract H-91 funds may be used by the Bucks County Housing Development Corporation for the payment of legal fees including the cost of litigation, should it be necessary, to react in court to the repeal of the zoning ordinance which is necessary for the proposed project qualifying for Federal funds.

Harrisburg, Pa.
February 9, 1973

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

Dear Secretary Wilcox:

In reply to your memorandum of December 14, 1972, asking whether it would be lawful for the Bucks County Housing Development Corporation to use State Housing Assistance funds under Contract H-91 to pay for legal fees "including the cost of litigation, should it become necessary for us to react in court to the repeal of the zoning ordinance. . . ." you are informed that such use of those funds would be lawful.

Funds under the above contract were provided in accordance with Section 4(d) of the Housing and Redevelopment Assistance Law of May 20, 1949, P. L. 1633, as amended (35 P.S. §1664(d)) which provides:

"The Department is hereby authorized within the limitations hereinafter provided, . . . (d) to make capital

grants to governmental agencies or authorities, or non-profit corporations for the purpose of providing funds, which would be otherwise unavailable to initiate, apply for, administer, and *execute* housing projects financed under any Federal housing program. . . ." (Emphasis added.)

The above-quoted section is commonly referred to as providing "seed money" for Federal housing projects. In light of the use of the word "execute" by the Legislature; in light of the clear purpose of Section (d) to provide funds necessary in order to prepare a project and make it eligible for Federal funds; in light of the fact that obtaining the necessary zoning for the proposed project in question is crucial to the qualification of that project for Federal funds, you are informed that Contract H-91 funds may be used by the Bucks County Housing Development Corporation for the payment of legal fees as described above.

Sincerely yours,
MARK P. WIDOFF
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 15

Agreement of Sale of real estate—Effect of agreement on ownership—Federal Disaster Relief Act

1. An executed agreement of sale passes equitable ownership to the buyer of real estate before settlement occurs.
2. The equitable owner bears all loss or benefit that may occur with regard to the property from the time the agreement of sale is executed.

Harrisburg, Pa.
February 26, 1973

Dr. Richard Gerstell
Director of Civil Defense
Harrisburg, Pennsylvania

Dear Dr. Gerstell:

You have requested an opinion concerning ownership and risk of loss responsibility with regard to the public water supply system serving the borough of Blossburg, Tioga County, Pennsylvania. In your letter of February 6, 1973, you have indicated that this opinion is at the request of Assistant Regional Director of the Federal Office of Emergency Preparedness, in connection with the Federal reimbursement for the cost of repairing the Blossburg waterworks which were damaged by the floods of June 23, 1972. Under the Federal Disaster Relief Act, P.L. 91-606, 42 U.S.C.A. §4482, funds are available to reimburse municipalities for the repair of publicly-owned facilities of this nature.

According to your letter, the facts of the situation are as follows. Prior to June 5, 1972, the water system was owned and operated by the Blossburg Water Company, a private corporation. On June 5, the Blossburg Water Company and the Blossburg Municipal Authority, a municipal authority organized and existing under the Act of May 2, 1945, P.L. 382, 53 P.S. §§301, *et seq.*, executed a formal, written agreement of sale by which the company's waterworks facilities were to be sold to the Authority. From the records of the Tioga County Recorder of Deeds, it appears that a formal settlement took place on July 18, 1972. On August 18, 1972, the Borough of Blossburg submitted to the Federal Office of Emergency Preparedness a request for Federal reimbursement in the amount of \$42,559.45, for the cost of repairing the damaged waterworks facilities. The question you have presented, then, is whether the water supply facilities of the Borough of Blossburg were publicly-owned at the time of the June flood. It is our opinion that they were.

The pertinent principles of law are clear. In *Hess v. Vinton Colliery Co.*, 255 Pa. 78 (1916) the law of Pennsylvania regarding this subject was precisely stated. There a question was raised as to the effect of an agreement of sale on the rights and interests of the parties to the agreement. Quoting *Richter v. Selin*, 8 S & R 425, the court stated at p. 83:

"When a contract is made for sale of land, equity considers the vendee as the purchaser of the estate sold, and the purchaser as a trustee for the vendor for the purchase-money. So much is the vendee considered, in contemplation of equity, as actually seized of the estate, that he must bear any loss which may happen to the estate between the agreement and the conveyance, and he will be entitled to any benefit which may accrue to it in the interval, because by the contract he is the owner of the premises to every intent and purpose in equity."

See also *Spratt v. Greenfield, et al.*, 279 Pa. 437 (1929), where the court stated "that the purchaser must bear any loss occasioned to the property occurring after execution of the contract and before delivery of the deed, because. . . [he] becomes the owner of the land."

More recently, the Pennsylvania Supreme Court again restated the rule.

"After a contract for the sale of real estate is duly executed, the purchaser is the equitable owner thereof, entitled to all advantages that may thereafter arise, and responsible for all loss that may befall it." *Synes Appeal*, 401 Pa. 387 (1960).

For the reasons stated, therefore, it is our opinion that the water supply systems of the Borough of Blossburg were, in fact,

publicly-owned at the time of the flood of June, 1972. Consequently the Borough of Blossburg is entitled to Federal reimbursement for the cost of repair of the waterworks facilities in question.

Very truly yours,

THEODORE A. ADLER
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 16

Capitol Police—The Administrative Code—Codified Ordinances of the City of Harrisburg

1. The Capitol Police are authorized to remove and impound motor vehicles for violation of parking regulations on Commonwealth controlled parking areas.

Harrisburg, Pa.
March 1, 1973

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

Dear Secretary Hilton:

You have requested our advice concerning the authority of the Capitol Police to have towed away at the owner's expense for violation of parking regulations on Commonwealth controlled parking areas. It is our opinion, and you are advised, that the Capitol Police do have such authority.

As suggested in your letter of January 31, 1973, the power and duties of the Capitol Police are set forth in Section 2416 of the Administrative Code of 1929 (71 P.S. §646) and the following language is contained in subsection (e):

"To exercise the same powers as are now or may hereafter be exercised under authority of law or ordinance by the police of the cities of Harrisburg, Pittsburgh and Philadelphia;"

Article 545 of the Codified Ordinances of the City of Harrisburg authorizes the removal and impounding of vehicles by the Harrisburg Bureau of Police. Pursuant to Section 2416 (e) of The Administrative Code above, the Capitol Police have the same authority to remove and impound vehicles as is given to the Harrisburg Bureau of Police by said Ordinance.

The mechanics for exercising such authority are contained in Article 545, a copy of which is attached hereto, as follows:

Section 545.02 of the Ordinance provides:

“(b) The Bureau of Police may remove or cause to be removed and subsequently cause to be impounded any motor vehicle parked on any street, highway, public property or private property in violation of any city Ordinance or the Commonwealth Vehicle Code.”

Pursuant to Section 545.04 of the Ordinance, the Capitol Police must arrange for the storage of any automobile so removed or impounded in approved storage garages designated by the Director of Public Safety of the City of Harrisburg.

Section 545.05 requires that notice of removal and/or impoundment shall be sent by the Capitol Police to the owner of record of such motor vehicle within twelve (12) hours from the time of its removal. Such notice must designate the place from which the vehicle was removed, the reason for its removal or impounding and the name and address of the garage to which it has been impounded or the location to which it has been removed.

Section 545.07 (b) requires that anyone reclaiming a vehicle must pay the sum of \$15.00 to the salvor for expenses in removing and towing the vehicle and \$2.00 for each day or any part thereof during which the vehicle is stored to the operator of an approved storage garage.

Section 545.09 permits an offender to pay the charges “under protest” and to have a hearing before a justice or a court of record having jurisdiction; and Section 545.12 requires the Capitol Police to keep a record of all vehicles impounded, which records are available at reasonable times to agents or owners thereof or lien holders thereon.

Very truly yours,
W. W. ANDERSON
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 17

*Land and Water Reclamation and Conservation Fund—Pa. Const. Art. VIII,
§16—Grants-in-aid for recreation projects*

1. The provisions of The Land and Water Reclamation and Conservation Fund, Pa. Const. art. 8, §16, allows the Department of Community affairs to fund indoor park and recreation facilities.
2. The Land and Water Conservation and Reclamation Act, Act of January 19, 1968, P.L. (1967) 996 (32 P.S. §§5101, *et seq.*) does not bar the Department of Community Affairs from making grants-in-aid for the development of indoor recreation projects.

3. This opinion should in no way be read as permitting the Department of Community Affairs to devote substantial funds to the construction of recreation facilities which are solely or primarily indoor in character.

Harrisburg, Pa.

March 2, 1973

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

Dear Secretary Wilcox:

You have requested an opinion as to the legality of a Project 500 grant for the renovation of a structure located on public parklands for use as an indoor-outdoor theater. The structure is an abandoned barn, part of a park site acquired with Project 70 funds. You are advised that, if made in a manner consistent with this opinion, there is no legal bar to such a grant.

The Commonwealth was authorized in 1967 to create The Land and Water Conservation and Reclamation Fund. Pa. Const. Art. 8, §16. The General Assembly, pursuant to the proceeding section enacted 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"). The Department of Community Affairs ("Department") was allocated \$75,000,000 by the Project 500 Act for grants-in-aid to political subdivisions to provide up to fifty percent of the cost of certain park and recreation projects.

Thus far, the constitutional provision and the Project 500 Act have been interpreted to allow the Department to make grants only for indoor park and recreational facilities and integral indoor facilities. Integral indoor facilities are those deemed necessary for proper utilization of a funded outdoor facility, for example, a bath house for an outdoor swimming pool. These opinions have great weight to the conservation and reclamation facets of the state law. Conservation was viewed in a classic "do not disturb" manner. However, as will be discussed below, we think this view of conservation and reclamation is unnecessarily restrictive. Moreover, even assuming that the primary purpose of Project 500 is the creation of relatively undeveloped parks and open spaces, it does not follow that no indoor facilities may be constructed with Project 500 funds. We conclude that previous opinions must be overruled insofar as they absolutely bar the Department from making grants for the development of indoor park and recreation facilities with Project 500 funds.

We begin our analysis with the State Constitution. Project 500 was preceded by the Project 70 program. Project 70 provided primarily for the acquisition of land. Pa. Const., Art. 8 §15. In contrast, the Project 500 Constitutional provision stresses conservation, reclamation and development, in addition to acquisition. The Constitution, Art. 8 §16, provides for:

“[A] Land and Water Conservation and Reclamation Fund to be used for the conservation and reclamation of land and water resources of the Commonwealth, including the elimination of acid mine drainage, sewage, and other pollution from the streams of the Commonwealth, the provision of State financial assistance to political subdivisions and municipal authorities of the Commonwealth of Pennsylvania for the construction of sewage treatment plants, the restoration of abandoned strip-mined areas, the control and extinguishment of surface and underground mine fires, the alleviation and prevention of subsidence resulting from mining operations, and the acquisition of additional lands and the reclamation and development of park and recreational lands acquired pursuant to the authority of article nine, section twenty-four [now art. 8, §15] of this Constitution, subject to such conditions and liabilities as the General Assembly may prescribe.”

This difference in emphasis is substantial and the voters of the Commonwealth should be deemed to have recognized that Project 500 was an expansion of Project 70 in scope.

The broader scope is, however, sufficient to allow Project 500 grants for indoor park and recreation facilities. There are no words in the constitutional provision which limit the funds to outdoor facilities. The phrases following “including” were in a 1970 Attorney General’s Opinion, found not to be a limitation on the preceding constitutional language, but rather an enlargement of the language. Pa. Att’y Gen. Op., May 1, 1970. The mention of development of Project 70 lands is merely an indication of possible sites for development. Moreover, Pennsylvania courts have often held that constitutional provisions such as the one here should be given a broad construction. *Evans v. West Norriton Township Municipal Authority*, 370 Pa. 150, 87 A. 2d 474 (1952). We conclude that Department funding of indoor park and recreational facilities would not violate the provision.

The constitutional provision authorizes the General Assembly to prescribe conditions and liabilities for the Project 500 program. The General Assembly did so in the Project 500 Act cited above. The Project 500 Act in no way dictates that Department development grants may not be made for indoor park and recreation facilities. The Department under the Project 500 Act may 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." 32 P.S. §5116 (a) (4).

The first subparagraph of the preceding allows grants for the distinct purpose of development of park and recreation lands. There is no mention of development of land for *outdoor* park and recreation purposes. The second subparagraph speaks of acquisition as well as development. Only in this subparagraph is "outdoor" mentioned. In this subparagraph, the Legislature demonstrates it was conscious of outdoor recreation programs, indeed a statewide outdoor recreation plan. The third subparagraph, concerned with studies, also makes no indoor/outdoor distinction.

No other portion of the Project 500 Act speaks to an indoor/outdoor distinction for purposes of Department development grants. Recreation is only defined in the phrase, "Recreation and historical purposes" (32 P.S. §5103 (1)), and that phrase is not used in the paragraph of the Project 500 Act directly applicable to the Department. The definition of development does not forbid indoor development, speaking of, "any construction" . . . required for and compatible with the physical development, improvement of land. . . ." 32 P.S. §5103 (3). Park is not defined.

Also, at 32 P.S. §5116(a) (3), Project 500 funds are allocated to the Department of Forests and Waters, Fish and Game Commissions and Historical and Museum Commissions "...for the cost of planning, related administrative expenses and development of public *outdoor* recreation areas. . . ." (Emphasis added.) The General Assembly again here provides explicitly for "outdoor" recreation development. This explicit reference to "outdoor" recreation and the specificity of this paragraph is in sharp contrast to paragraph (4), which allocates Project 500 funds to the Department of Community Affairs. This difference in language would indicate that the General Assembly intended to allow local governments a degree of autonomy and flexibility in planning and developing their Project 500 recreation lands. We, therefore, conclude that neither the language nor the structure of the Project 500 Act would bar Department grants for development of indoor recreation projects.

We must emphasize here that this opinion should in no way be read as permitting the Department to devote substantial funds to the construction of park and recreation facilities which are solely or primarily indoor in character. We have stated that neither the constitutional provision nor the Project 500 Act bar the Department from using Project 500 funds for facilities where such facilities are an integral part of the development of recreation and park lands and where that development is consistent with the purposes of the Project 500 Act. It is clear that Project 500 recreation funds were meant *primarily* to aid outdoor park and recreation programs. This is evidenced by the conservation-

reclamation and non-development themes of both the constitutional provision and the Project 500 Act. *See*, 32 P.S. §5103(2). The development of numerous indoor recreation facilities would be a violation of this intent.

The instant proposal is for the renovation of a building to be used, in part, for indoor theater. There is no question that theater may be deemed recreation. Also, Pennsylvania experience has never found theaters a violation of parks. Thus, consistent with the above, the Department may allow a grant for the renovation.

Sincerely yours,

MARK P. WIDOFF
Deputy Attorney General

ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 18

Act No. 281 (1972)—Deed of conveyance—Discretionary authority of Governor—Approval of transaction

1. The Governor has discretion to transfer less than the total number of acres authorized by Act No. 281 (1972) where the transferee does not require all of the property for public school purposes and where the Act provides for a reversion of land not used for public school purposes.
2. Under the statutory scheme of Act No. 281 (1972) the Governor is vested with discretion to either approve or disapprove the transaction and approve or disapprove the deed of conveyance; this confers upon him the discretionary authority to approve only so much of the conveyance as the Governor deems advisable.

Harrisburg, Pa.
March 5, 1973

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

Dear Governor Shapp:

You have inquired concerning the legality of transferring 42 acres of land to the School District of the City of Harrisburg pursuant to Act No. 281 of December 4, 1972. In your letter of February 2, 1973, you have advised that the Harrisburg School Board has passed a resolution requesting the Commonwealth to transfer to it only 42 of the 46 acres of land authorized for transfer. It is our opinion and you are advised that you can legally transfer only 42 acres of the land described in Act No. 281 and this should be accomplished by a deed of conveyance which is being prepared by this Department and will shortly be forwarded to you for signature.

The resolution passed by the School Board recites the fact that the School District only requires 42 of the 46 acres of land for use for public school purposes and that the School District has no present or future need of the remaining four acres. Since Act No. 281 provides for the reversion to the Commonwealth of any portion of land which is not used for public school purposes, it is our opinion that such reversionary clause is sufficient authority for you to convey only that portion which is intended to be used for public school purposes.

Under the statutory scheme of Act No. 281 you are vested with discretion to either approve or disapprove the transaction. Furthermore you are given explicit authority to approve or disapprove the deed of conveyance. The pertinent provisions of the Act are as follows:

"Section 1. The Dept. of Property and Supplies, *with the approval of the Department of Public Welfare and the Governor*, is hereby authorized and directed on behalf of the Commonwealth of Pennsylvania, to grant and convey to the School District of the City of Harrisburg, the following tract of land. . . .

* * * * *

"Section 3. The deed of conveyance shall be approved by the Department of Justice and shall be executed by the Secretary of Property and Supplies in the name of the Commonwealth of Pennsylvania, *with the approval of the Secretary of Public Welfare and the Governor.*" (Emphasis added.)

As noted in *Brice v. Robertson House Moving, Wrecking & Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439 (1952), and *State ex rel. Pilkinton v. Bush*, 211 Ark. 28, 198 S.W. 2d 1004 (1972), the use of the word "approval" in a statute does not impose a formal or ministerial duty but rather confers upon the party who must give approval the discretionary function of approving the transaction since the word approval connotes the exercise of discretion. Again, in *Commonwealth v. Benedum Trees Co.*, 69 Dauph. 269, 271 (1956), the Court held that the word "approved" refers to an exercise of independent analysis and conclusion.

Consequently, Act No. 281 of December 4, 1972, must be interpreted as giving discretionary authority to grant and convey the land and to approve the deed of conveyance, and you are therefore authorized to approve only so much of the conveyance as you determine advisable based upon all of the surrounding circumstances. Inasmuch as the Harrisburg School District advises that they only have need of 42 of the 46 acres of land described in Act No. 281 for public school purposes and inasmuch as the Board merely requests a conveyance of 42 acres, you are hereby advised that you can, in the exercise of your discretion-

ary authority granted in Act No. 281, grant and convey only 42 of the 46 acres of land described therein.

Very truly yours,

RICHARD J. ORLOSKI
Deputy Attorney General

ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 19

Act No. 94 and 95 of 1970—Capital Facilities Debt Enabling Act—Department of Highways—Motor License Fund—Article VIII, Sections 7 and 11 of Pennsylvania Constitution.

1. Act 94 of 1970 provides for the acquisition of the East Rochester-Monaca Toll Bridge not by purchase but by assuming the outstanding indebtedness of the municipal authority which owns the bridge.
2. Even though Act 94 of 1970 contemplates that the \$5,000,000 in Commonwealth general obligations bonds will be retired from the Motor License Fund, such a refunding procedure does not violate Article VIII, Section 11 of the Pennsylvania Constitution inasmuch as the Commonwealth is not purchasing the bridge but is merely using Motor License Fund for payment of obligations incurred in constructing the bridge.
3. The Commonwealth is not prohibited from assuming the indebtedness of a municipal authority under Article VIII, Section 9 of the Pennsylvania Constitution inasmuch as a municipal authority is not a creature, agent or representative of the municipal corporation which organized it but rather is an independent agent of the Commonwealth and part of its sovereignty.

Harrisburg, Pa.
March 8, 1973

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

Dear Secretary Kassab:

You have inquired regarding the constitutionality of the \$5,000,000 appropriation to assume the municipal authority's indebtedness incurred in constructing, maintaining and repairing of the East Rochester-Monaca Toll Bridge thereby transferring ownership of the bridge to the Commonwealth. It is our conclusion that such an appropriation does not violate either Article VIII, Section 9 or Article VIII, Section 11 of the Pennsylvania Constitution.

Act 94 of March 26, 1970, authorized a capital expenditure of \$5,000,000 as an "acquisition cost" for liquidating the indebtedness of the East Rochester-Monaca Toll Bridge which effects a transfer of the ownership of the bridge from a municipal authority to the Commonwealth by retiring the outstanding indebtedness of the toll bridge. Act 94 of 1970 was passed pursuant to

Article VIII, Section 7(a) (4) of the Pennsylvania Constitution and the Capital Facilities Debt Enabling Act, 72 P.S. §3920.1 *et seq.*, which authorizes the Commonwealth to incur indebtedness without the approval of the electors for capital projects specifically itemized in a capital budget and which thereby anticipated funding of the project by sale of general obligation bonds. Thereafter, pursuant to this constitutional and statutory authority, the Legislature passed Act 95 of 1970 and appropriated the net proceeds of the sale of bonds therein authorized to the Department of Highways in order to fund the toll bridge acquisition project of Act 94 of 1970. In this regard, it is noted that Act 94 is a supplement to Act 133 of November 25, 1969, which provided that the funds of the Capital Budget Act of 1969-70 and supplements thereto shall be restricted to the Motor License Fund. Furthermore, Act 17A of July 7, 1972, provides for debt service reimbursement for general obligation bonds carried by the Department of Transportation out of the Motor License Fund. Consequently, Act 94 of 1970 contemplates that \$5,000,000 in Commonwealth obligation bonds authorized to retire the bonds of the toll bridge would have to be repaid from the Motor License Fund. In view of this refunding procedure, you are concerned that Act 94 of 1970 is unconstitutional under Article VIII, Section 11 of the Pennsylvania Constitution and the rationale of *Peoples Bridge Company of Harrisburg v. Shroyer*, 355 Pa. 599 (1947)

Article VIII, §11 of the Pennsylvania Constitution establishes the Motor License Fund for the following purposes:

“All proceeds from gasoline and other motor fuel excise taxes, motor vehicle registration fees and license taxes, operator’s licenses and other excise taxes imposed on products used in motor transportation...shall be appropriated by the General Assembly...and used solely for construction, reconstruction, maintenance and repair of...public highways and bridges...and expenses incident thereto, and for *payment of obligations incurred for such purposes...*” (Emphasis added.)

In *Peoples Bridge Company v. Shroyer*, *supra*, the Pennsylvania Supreme Court held that this restriction prohibits the Commonwealth from using monies in the Motor License Fund for “purchasing” toll bridges because such monies could only be used for constructing, reconstructing, maintaining and repairing bridges. This restriction, however, is inapplicable to Act 94 of 1970 inasmuch as the Commonwealth is not purchasing the East Rochester-Monaca Toll Bridge but is merely assuming the indebtedness of the municipal authority which owns the bridge. In assuming such indebtedness which has the incidental effect of transferring ownership of the bridge from municipal authority to the Commonwealth, the Commonwealth is assuming obligations incurred in the “...construction...maintenance and repair of...bridges...” “which type of expenditure of Motor Vehicle Fund

monies is expressly authorized by Article VIII, Section 11 of the Pennsylvania Constitution.¹

In view of this conclusion that, under Act 94 of 1970, the Commonwealth is not purchasing the bridge but is merely assuming the indebtedness of the municipal authority incurred in constructing, maintaining, and repairing the bridge, the question is asked whether or not such an assumption of indebtedness is in violation of Article VIII, Section 9 of the Pennsylvania Constitution which restricts the Commonwealth from assuming municipal debts:

“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. . . .”

The East Rochester-Monaca Toll Bridge is not owned by any county, city, borough, incorporated town, township, or any general purpose unit of government but rather is owned by a municipal authority. As noted in *Commonwealth v. Erie Metropolitan Transit Authority*, 444 Pa. 345, 348 (1971), “municipal authorities are not the creatures, agents or representatives of the municipalities which organize them, but rather are ‘independent agencies of the Commonwealth and part of its sovereignty.’” Given this unique status of municipal authorities, the constitutional restriction on assumption of municipal debt as enunciated at Article VIII, Section 9 of the Pennsylvania Constitution does not apply to assumption by the Commonwealth of the debt of a municipal authority.

In summation, it is concluded that Act 94 of 1970 is constitutional inasmuch as it provides for the assumption of debt, not the purchase, of the toll bridge thereby obviating a violation of Article VIII, Section 11 and inasmuch as the Commonwealth

1. In addition, the Court in the *Shroyer* case, as an alternative holding, ruled that the appropriation pursuant to which the toll bridges were to be purchased did not permit the purchase. Moreover, the Court did not discuss the language “maintenance . . . of . . . public highways” of Article VIII, Section 11. In the instant case, state maintained public highways connect at either end of the East Rochester-Monaca Toll Bridge and the highway system established by these two roads can be maintained safely only if the toll bridge itself is maintained, e.g., if the two roads need to be plowed during heavy snows, the bridge must also be plowed and also any unrepaired damage to the bridge impairs the flow of traffic on the two State roads connecting with the bridge. For this reason, acquisition of the bridge serves the purpose of maintaining State highways within the meaning of the language of Article VIII, Section 11 which further makes *Peoples Bridge Company v. Shroyer*, *supra*, significantly distinguishable from the instant case.

can assume the debt of a municipal authority without violating Article VIII, Section 9 of the Pennsylvania Constitution.

Very truly yours,

RICHARD J. ORLOSKI
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 20

Student-parent right to examine student records; Teachers rights to examine school personnel records; Salary records of public, State schools and community colleges are public records.

1. A student and the student's parents—when the student is an unemancipated minor—have a right, under the common law and the provisions of the "Right to Know" Law, Act of June 21, 1957, P.L. 390, as amended (65 P.S. §66.1) to examine records kept by public schools concerning that student. A public school is an "agency" within the meaning of the "Right to Know" Law, and the student's files are "public records" since they become "decisions fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons...."
2. However, the status of a public record is restricted where its release "would operate to the prejudice or impairment of a person's reputation or personal security...." Thus, the records are available only to the student and, where a minor, his parents.
3. A teacher in the public schools has a right under the common law and the provisions of the "Right to Know" Law to examine personal records concerning that teacher.
4. Salary records of employes of the public schools, State institutions and community colleges are public records, within the meaning of the "Right to Know" Law, and, therefore, are available for inspection. Salary records of private institutions of higher learning and State-related colleges and universities are not public records within the meaning of the "Right to Know" Law, and are not available.

Harrisburg, Pa.
March 8, 1973

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

Dear Secretary Pittenger:

You have asked our opinion on several related questions. They are:

- (1) What are the rights of a student and his or her parents to examine records concerning that student kept by the public schools?
- (2) What are the rights of a teacher to examine personnel records concerning that teacher kept by the public schools?
- (3) Are salary records of employes of the public schools and of institutions of higher education receiving public funds avail-

able for public inspection under the Pennsylvania "Right to Know" Law, Act of June 21, 1957, P. L. 390, as amended (65 P.S. §66.1)?

You are advised that:

(1) A student and the student's parents have a right to examine records concerning that student, subject to the limitations stated below.

(2) A teacher in the public schools has a right to examine the personnel records concerning that teacher.

(3) Salary records of employes of the public schools, State institutions, and community colleges are public records, and, therefore, are available for inspection. Salary records of private institutions of higher learning and State-related colleges and universities are not public records and are not available.

The answers to each of these questions are governed by common law and by the provisions of the "Right to Know" Law and related statutes. The "Right to Know" Law provides:

"Every public record of an agency shall, at reasonable times, be open for examination and inspection by any citizen of the Commonwealth of Pennsylvania." 65 P.S. §66.2.

The terms "agency" and "public record" are defined by the Act as follows:

"(1) 'Agency.' Any department, board or commission of the executive branch of the Commonwealth, any political subdivision of the Commonwealth, the Pennsylvania Turnpike Commission, or any State or municipal authority or similar organization created by or pursuant to a statute which declares in substance that such organization performs or has for its purpose the performance of an essential governmental function." (65 P.S. §66.1(1)).

"(2) 'Public Record.' Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property and any minute, order, or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons: Provided, That the term "public record" shall not mean any report, communication or other paper, the publication of which would disclose the institution, progress or result of an investigation undertaken by an agency in the performance of its official duties except those reports filed by agencies pertaining to safety and health in industrial plants; it shall not include any record, document, material, exhibit, pleading, report, memorandum or other paper, access to or the publication of

which is prohibited, restricted or forbidden by statute, law or order or decree of court, or which would operate to the prejudice or impairment of a person's reputation or personal security, or which would result in the loss by the Commonwealth or any of its political subdivisions or commissions or State or municipal authorities of Federal funds, excepting therefrom however the record of any conviction for any criminal act." (65 P.S. §66.1(2)).

"Political subdivision" is defined by the laws of this Commonwealth as follows:

"'Political subdivision'; any county, city, borough, incorporated town, township, school district, vocational school district and county institution district." Act of May 28, 1937, P.L. 1019, as amended (46 P.S. §601).

(1) With respect to your first question you are advised that a student or the student's parents—when the student is an unemancipated minor—have a right to examine records concerning that student kept by public school authorities. This right is derived from the Pennsylvania "Right to Know" Law and the "common law" right to inspect records of a public nature by persons having a sufficient interest in the subject matter therein.

It is clear that a public school, which is an instrumentality of the local school district, is an "agency" within the meaning of the "Right to Know" Law. (See (3) below) It is also clear that student records dealing with reports of teachers, administrators, examination scores, etc. are "public records," within the meaning of the Law, subject to certain limitations discussed below, because those documents do, in fact, become "decisions fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons. . . ."

The availability of a student's records is restricted when such records "would operate to the prejudice or impairment of a person's reputation or personal security. . . ." This restriction does not apply in those situations where a parent or legal guardian of a public school student requests to see records pertaining to the student. As the legally responsible person charged with the care and protection of the student, the release of these records to such parent or guardian must be considered equivalent, for purposes of the "Right to Know" Law, to the release of the documents to the student himself. Under such circumstances, therefore, such release cannot be considered to be to "the prejudice or impairment of a person's reputation or personal security. . . ."

It must be emphasized at this point that the above restriction applies to those situations where persons other than the student or the parents are requesting access to the student's records. Not only would the release of such documents without the consent of the student or of the parents probably violate the "Right

to Know" Law, but liability for defamation or injurious falsehood may arise.

We note in passing that a recent study indicates that 74 per cent of a large cross-section of Pennsylvania public schools have no policies forbidding the release of any part of a student's record in the absence of the parent's or student's consent. Michael J. Barone, *A Survey of School Districts to Determine Local Policy Regarding Maintenance, Release, and Use of Pupil Personnel Information* (Chronicle Guidance Professional Service). See also, Pa. School Journal, pp. 177-179 (1970). This study indicates that guidelines should be prepared for local districts specifying the circumstances when student records should not be released to persons in the absence of student or parental consent.

This office stands ready to cooperate with you and with local school officials in the formulation of such guidelines and directs your attention to "Guidelines for the Collection, Maintenance and Dissemination of Pupil Records," Report of Conference Convened by Russell Sage Foundation, May 25-28, 1969, which could be used as a model approach to these problems. We also stand ready to assist in the preparation of such legislation or regulations as may be found necessary to further protect the privacy rights of students and their parents.

Several courts in recent years have also reaffirmed the common law right of a person to inspect public records when he or she has a sufficient interest in the subject matter of those documents. Specifically, and perhaps most notably, a New York Court in the case of *Van Allen v. McLeary*, 211 N.Y.S. 2d 501 (Sup. Ct., Nassau County 1961) held that a parent has a common law right to inspect his child's school records, and to compel their production by mandamus. See also, *Johnson v. Bd. of Education*, 220 N.Y.S. 2d 362 (Sup. Ct., Kings County 1961). A discussion of the Pennsylvania common law right to inspect public documents by persons having a special interest in them, is provided in a 1913 Attorney General's Opinion, 16 Dauphin 151, and in a 1925 Attorney General's Opinion by Dep. Atty. General Campbell, both affirming that common law right, 6 D & C 383. Recent Pennsylvania cases affirming the common law right that public records are available to the inspection of any citizen at all reasonable times are *Appeal of Simon*, 353 Pa. 514, 518, 46 A. 2d 243, 245 (1946), and *Wiley v. Woods*, 393 Pa. 341, 347-350, 141 A. 2d 844, 848-849 (1958). The *Wiley* case contains a thorough survey of the Pennsylvania cases supporting this right.

(2) With respect to your second question, you are advised that a teacher does have a right to examine personnel records concerning that teacher kept by the public schools for the same reasons that a student has the right to examine his records as discussed above.

(3) With respect to your third question, you are informed that salary records of employes of public schools and of institutions of higher education receiving public funds are subject to the provisions of the "Right to Know" Law, with certain exceptions discussed below.

It is clear from the "Right to Know" Law that the Legislature intended the taxpayers to have access to information concerning how their tax money is being disbursed. Salary information, absent extraordinary circumstances which we cannot perceive at this time, should as a matter of course be released to the public. The Legislature realized, however, that there are times when a disclosure of certain records "would operate to the prejudice or impairment of a person's reputation or personal security. . ." Information such as a persons' previous arrest record or a history of mental instability, which can be found in an employee's personal file, is excluded from public investigation.

The "Right to Know" Law applies to those institutions that would be included in the definition of the term "agency" as it appears in the Act. Only the salary records of an "agency" would be subject to disclosure under the "Right to Know" Law.

A. Public Schools

Public schools are incorporated within a school district, which is a political subdivision under the statutory definition above, and hence are agencies within the Act. Thus, the salaries of employes of public schools which are a disbursement of funds by an agency are "public records."

B. State-Owned Institutions

State-Owned Institutions, i.e., state colleges and universities, are those institutions now existing and those which may hereafter be created or constituted by, in, and for the Commonwealth of Pennsylvania. These institutions are administered by the Board of State College and University Directors which is subject to the regulations of the State Board of Education, (24 P.S. §§20-2001 *et seq.*). The Board of Education is a part of the Executive Branch of the government under the auspices of the Secretary of Education. It is readily apparent that these institutions fall within the statutory definition of agency and hence the salaries of the employes of such institutions are matters of "public record."

C. Community Colleges

The case of *Kegel v. Community College of Beaver County*, 55 D & C 2d 220 (1972) held that a community college created pursuant to the Community College Act of August 24, 1963, P.L. 1132, is an "agency" and that individual salary records of the college employes are "public records" within the meaning and provisions of the "Right to Know" Law.

D. State-Related Commonwealth Universities and Private State-Aided Institutions

In the case of *Mooney v. Board of Trustees of Temple University*, 292 A. 2d 395, 448 Pa. 424 (1972), the Court, with Justice Manderino dissenting, held that although Temple University became a State-related institution by virtue of the Temple University—Commonwealth Act of November 30, 1965, P.L. 843 §43 §2(2), 24 P.S. §2510-2(2), it was not an “agency” subject to the “Right to Know” Law. On the basis of this opinion, State-related institutions are not agencies within the meaning of the “Right to Know” Act and, hence, their salary records are not subject to public access.

Private State-related institutions are not “agencies” under the “Right to Know” Law since they do not come under the definition of a “political subdivision” or of an “agency”.

Sincerely yours,

MARK P. WIDOFF

Deputy Attorney General

ISRAEL PACKEL

Attorney General

OFFICIAL OPINION No. 21

Constables' fees—Pennsylvania Constitution, Article 3, Section 27—Increased compensation under Act No. 344.

1. Article 3, Section 27 of the Pennsylvania Constitution prohibits the payment of legislatively enacted increased fees to constables who assumed office prior to the effective date of the enactment.
2. A constable is a public officer within the meaning of Article 3, Section 27.
3. A constable, alderman or justice of the peace is entitled to receive the fees fixed by law at the time of his election or appointment, and such fees can neither be increased nor diminished by subsequent legislation during the term of office.
4. Mileage allowances are not “emoluments” within the meaning of Article 3, Section 27 of the Constitution. A constable may receive legislatively increased mileage fees regardless of when he assumed office.

Harrisburg, Pa.
March 14, 1973

A. Evans Kephart
Court Administrator of Pennsylvania
Administrative Office of Pennsylvania Courts
Philadelphia, Pennsylvania

Dear Mr. Kephart:

You have requested an opinion as to whether the increased compensation for constables provided for by Act 344 of December 28, 1972, may be paid to constables who assumed office prior to the effective date of that Act.

Article 3, Section 27 of the Pennsylvania Constitution provides that, "No law shall extend the term of any public officer, or increase or diminish his salary or emoluments, after his election or appointment." It has uniformly been held that a constable is a public officer within the meaning of this provision. *Murphy v. Lackawanna County*, 33 D&C 234 (1938); *Noel v. Adams County*, 30 D&C 444 (1937); *Strunk v. Hershey et al.*, 30 D&C 396 (1937); *Kauffman v. Union County*, 31 D&C 212 (1937).

In *Freiler v. Schuylkill County*, 46 Pa. Super. 58, 63 (1911), the Court said:

"The same question was before this Court in *Lyons v. Means*, 1 Pa. Superior Ct. 608, in which we held that a justice of the peace, alderman and constable was entitled to receive the fees fixed by law at the time of his election or appointment, and that such fees can neither be increased nor diminished by subsequent legislation during the term of office."

It is my opinion, therefore, and you are so advised, that the Constitution of Pennsylvania prohibits the payment of the increased fees for performing the particular services designated by Act 344 to constables who assumed office prior to the effective date of the Act.

Act 344, in addition to increasing the fixed flat fees to be paid to constables for performing certain designated services, also increases the mileage rate to be collected by constables for their travel incidental to performing their duties.

"Generally, statutory compensation to a public officer for expenses necessarily incurred in performing the duties of his office is neither salary nor an emolument of the office and is not within a prohibition against increasing or otherwise changing his compensation during his term of office,..." 43 Am. Jur. 2d 371, p. 155. See *Appeal of Loushay*, 169 Pa. Super. 543 (1951), *aff'd* 370 Pa. 453.

While there is no Pennsylvania decision which holds that mileage allowances are not "emoluments" within the meaning of Article 3, Section 27 of the Pennsylvania Constitution, the courts of other jurisdictions have consistently held that they are not.

"...statutory compensation for expenses necessarily incurred in performing the duties of an office is neither salary nor an emolument of the office..." *Taxpayers' League of Carbon County, Wyo. v. McPherson, et al.*, 54 P. 2d 897 (Wyo. 1936). See also *State ex rel. Weldon v. Thomason*, 221 S.W. 491 (Tenn. 1920); *Milwaukee County v. Halsey*, 136 N.W. 139 (Wisc. 1912); *Scharrenbroich v. Lewis & Clark County*, 83 P. 482 (Mont. 1905); *Clark v. Board of County Commissioners*, 267 N.W. 138 (S.D. 1936).

The legislative recognition of the need for payment of an increase in transportation expenses should not be deemed an increase in salary or emoluments.

It is my opinion, therefore, that all constables, regardless of date of taking office, are entitled to the increased compensation for mileage provided for by Act 344.

Sincerely yours,
J. ANDREW SMYSER
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 22

Nonpublic schools—Public School Code—School lunch program.

1. The nonprofit school lunch program has a public welfare purpose which is not a function in any sense associated with religion.
2. The Department of Education may administer a school lunch program for nonpublic schools, using Federal funds designated for that purpose.

Harrisburg, Pa.
March 20, 1973

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

Dear Secretary Pittenger:

You have asked whether the Department of Education may administer a school lunch program for nonpublic schools, using Federal funds designated for that purpose. You are advised that the Department of Education may administer such a program, even though it includes children attending private and parochial schools.

The authority to administer a school lunch program is found in Section 1337 of the School Code, 24 P.S. 13-1337. The main provisions of this statute are as follows:

“(a) Definitions—For the purpose of this section—‘school lunch program’ means a program under which lunches are served by *any school* on a nonprofit basis to children in attendance, including any such program under which a school receives assistance out of funds appropriated by the Congress of the United States. (Emphasis added.)

“(b) Expenditure of Federal Funds—The Department of Public Instruction is hereby authorized to accept and direct the disbursement of funds appropriated by any act of Congress, and appropriated to the states, for use in connection with school lunch programs. . . .

“(c) Administration of Program—The Department of Public Instruction may enter into such agreements with any agency of the Federal Government, with any board of school directors, or with any other agency or person, prescribe such regulations...and take such other action as it may deem necessary to provide for the establishment, maintenance, operation, and expansion of any school lunch program....”

Nowhere in the statute is administration of the program restricted to the public schools. Such a restriction is clearly contrary to the intent of the statute since the program is for “any school”, and the Department “may enter into agreements... with any other agency or person.”

The question of providing aid to children attending nonpublic schools has been raised many times by provisions in the School Code. At present, State aid is given to children, without distinguishing between public and nonpublic schools, for medical, dental and nurse services (Section 1401 *et seq.*); driver safety (Section 1519); food and milk supply (Section 1335); tuition and maintenance of the blind, deaf, and cerebral palsied children (Section 1376); school bus transportation to schools not operated for profit (Section 1361); and the providing of services by the intermediate units (Section 914-A).

The Official Opinion No. 257, January 9, 1963, of the Attorney General advised that under Section 1401 *et seq.* of the School Code, providing for health services, that local school districts may expand local tax funds to supplement State reimbursements in providing school health services to private and parochial school children. Attorney General David Stahl said:

“The protection and preservation of the health of school children is clearly a proper governmental function in the nature of public welfare legislation, whether the children attend public, private or parochial schools, and the use of tax funds for this purpose cannot successfully be attacked on constitutional grounds.”

In the case of *Rhoades v. School District of Abington Township*, 226 A. 2d 53, 424 Pa. 202 (1967), upholding the constitutionality of Act 91 of 1965, 24 P.S. 13-1361, authorizing school bus transportation for children attending parochial schools, Justice Roberts in his concurring opinion said:

“Thus what is ultimately persuasive to me in the instant case is not only that Act 91 is a welfare measure, but also the fact that the transportation of students is, in the phrase of *Everson* [*Everson v. the Board of Education*, 330 U.S. 1 (1947)] ‘so separate and indisputably marked off’ from functions in any sense associated with religion.”

The same issues that authorize the above mentioned legislation also apply to the Department of Education's authority to administer and regulate a nonprofit school lunch program for nonpublic schools. The nonprofit school lunch program has a public welfare purpose—namely seeing that the children of the Commonwealth receive low cost, well balanced nutritional meals—and it is not a function in any sense associated with religion.

Therefore, the Department of Education may receive Federal funds and administer the nonprofit school lunch program for nonpublic schools on whatever terms and conditions it deems necessary. Any contrary opinions heretofore provided to the Department of Education on this subject are hereby overruled.

Sincerely yours,

MARK P. WIDOFF

Deputy Attorney General

ISRAEL PACKEL

Attorney General

OFFICIAL OPINION No. 23

Retirement Board—Student nurses—Retirement benefits

1. The student nurses enrolled at the Danville State Hospital from the late 1920s through early 1940s were also employees of the Commonwealth.
2. An employee is defined as any person holding a state position under the Commonwealth, employed on a yearly or monthly basis in any capacity. 71 P.S. §1725-102 (6) (a).
3. Specific circumstances govern whether an "employer-employee" relationship exists.

Harrisburg, Pa.

March 22, 1973

Honorable Richard L. Witmer
Secretary
State Employees' Retirement Board
Harrisburg, Pennsylvania

Dear Mr. Witmer:

You have requested our advice as to whether certain student nurses enrolled at the Danville State Hospital from the late 1920s through the early 1940s were state employees for purposes of retirement benefits. It is our opinion that such nurses were "employed" at Danville during the period in question and are entitled to full retirement credit for the period served.

In determining the nature of the relationship, we have relied strongly on the documentation¹ supplied to us by your staff. It appears that during the time in question, in order to attract persons into the nursing profession, the Danville State Hospital sponsored a work-training program during which time the student nurse would, for a salary, perform the services normally performed by hospital attendants, such as cleaning and bathing patients. The general duties were the same as those of attendants, with the additional classroom requirement.

The State Employees' Retirement Code, 71 P.S. §1725-102 (6) (a), defines "state employee" to include "any person holding a state office or position under the Commonwealth, employed on a yearly or monthly basis by the State Government of the Commonwealth, in any capacity whatsoever. . . ." This definition is substantially the same as the definition in the Act of June 27, 1923, P. L. 858 which was in effect at the time in question.

The issue raised is the narrow one of whether the evidence is sufficient to support a finding that the students were also employees and within the coverage of the State Employees' Retirement Code. It is evident from reading of the printed portion of the contract and surrounding facts that an "employer-employee" relationship did in fact exist with respect to the student nurses under the program at the Danville State Hospital. The emphasized portion of the contract reflects a degree of control

1. The documentation includes a printed card evidencing a contract of employment dated March 11, 1929. The pertinent printed portion of that card reads as follows: (Emphasis added.)

"Date entering state *service*
Previous *service* with other agencies
Previous *service* with this hospital

"In this agreement concluded this _____ day of _____, 192____, the undersigned *agrees to work for the Danville State Hospital*, Danville, Pa., in the capacity of _____, and further *agrees to obey* the printed and other rules of the Institution, with which she will make herself familiar. She agrees that she will in no respect neglect or maltreat any of the patients and that she will report any such neglect or maltreatment by others to the Superintendent of the Hospital.

"*In consideration of which this hospital agrees to pay the undersigned _____ dollars per month.*"

There is also a brochure dated October 18, 1929 describing the program which includes a "Schedule of Wages While in the Service" of the Hospital. This "Schedule" provides wages for the student nurses. The brochure also contains the following language:

"As the instruction is gratuitous, it is expected and should be considered obligatory that Nurses prepare (sic) for this higher service should make a reasonable return be (sic) *remaining in the employ of the institution.*" (Emphasis added.)

Finally, the brochure concludes with a notice to applicants in the following language:

"Dear _____: Your application for a situation as Nurse in this Hospital is received. Please fill in (in your own handwriting) this blank, and return to me at your earliest convenience."

exercised over, and responsibility assumed by, the student nurses which has been held to be a determining factor as to whether an "employer-employee" relationship existed. *Venezia v. Phila. Electric Company*, 317 Pa. 557 (1935); *American Writing Machine Co. v. Unemployment Compensation Board of Review*, 148 Pa. Superior Ct. 299 (1942); *Blum Unemployment Compensation Case*, 163 Pa. Superior Ct. 271 (1948).

The final paragraph of the printed contract states that the nurses were to receive "consideration" in the form of monetary payment for the services agreed upon in the contract. This is the classic nature of an employment contract. In *Venezia v. Phila. Electric Company*, *supra*, at 559, it was held that "the term employee includes those who perform services for another for a valuable consideration."

Turning to the brochure (Note 1 *supra*) we are of the opinion that the phrase "remaining in the employ of the institution" connotes the idea of continuing in the same status or position. To "remain in the employ" implies that an employer-employee" relationship did in fact exist and the previously existing status is to be continued. The brochure provides that the student nurses will be in the "service of the hospital and will be paid wages.

Furthermore, it should be emphasized that the credibility of these documents is inherent in the fact that they are more than forty years old and were kept in the custody of the appropriate state officials.

We have also considered the interpretation placed upon the arrangement at the time the student nurses were allowed to contribute to the retirement fund and were advised that retirement benefits would be commensurate to their contributions. It was only recently that the question arose as to their eligibility, based on an informal opinion rendered regarding students at a state forestry school. We find that opinion inapplicable because the forestry students were provided by the Commonwealth with board, lodging, laundry and an education, in exchange for payment of \$1.00 per day by the students. The student was not accorded any monetary payment by the Commonwealth as was the case with the student nurses who in fact received monetary payment in amounts between \$40.00 and \$50.00 per month during their student nurse days. We find the student forestry case to be distinguishable from the instant situation.

Accordingly, it is our opinion, and you are advised that student nurse service be properly credited for retirement purposes. Our opinion is based on the specific circumstances of this case and is not to be considered a guideline to be generally applied to future cases. You are instructed to reflect this conclusion on the records of all those individuals whose student nurse time was questioned and who were part of the program. The compensation shall be based on the monthly salary and mainten-

ance allowance received by those employees. Those who had their service time removed should have that time restored and adjusted.

Sincerely yours,
IRA H. KEMP
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 24

Air-conditioning project at Hamburg State School and Hospital—"Maintenance and repair" for budgeting purposes—Non-capital expense.

1. The proposed installation of free-standing air-conditioning units at Hamburg State School and Hospital is within the meaning of "maintenance and repair" of the "Capital Budget Instruction" of the Office of the Budget.
2. An improvement to an existing structure is not a capital expense unless the function of the structure is changed or the usefulness of the structure is increased.

Harrisburg, Pa.
March 27, 1973

Honorable Helene Wohlgemuth
Secretary
Department of Public Welfare
Harrisburg, Pennsylvania

Dear Secretary Wohlgemuth:

You have requested advice as to whether a proposed project to install air conditioning in certain wards of Hamburg State School and Hospital is a capital or non-capital expense for budgeting purposes. I have reviewed the project plans, and you are advised that this project comes within the definition of "maintenance and repair" and can be budgeted on a non-capital basis.

The "Capital Budget Instructions" of the Office of the Budget define "capital project" to mean

"any building, structure, facility, or physical public betterment or improvement; or any land or rights in land; or any furnishings, apparatus, or equipment for any public betterment or improvement; or any undertaking to construct, renovate, improve, equip, furnish, or acquire any of the foregoing; provided that...the project has...an estimated total cost in excess of twenty-five thousand dollars (\$25,000). *Improvements to existing structures must be such as will increase the usefulness or change the use or function.*" p. 35, (Emphasis added.)

The same instructions state that "maintenance and repair" consist of

"normal upkeep or restoration work done to keep a building...in its present condition or state of usefulness...*Examples of maintenance and repairs* [include]; (3) *Alterations that do not change the function or use of the building....*" p. 35 (Emphasis added.)

The project at Hamburg consists of the installation of free-standing air-conditioning units in the non-ambulatory wards; the operation of these units will also require the installation of a new wiring system, including certain over-head lines. The approximate costs of the project are as follows:

Air-conditioning Equipment	\$115,000
Secondary Wiring	38,842
Primary (over-head) Wiring	28,000
Total	<hr/> \$181,842

Traditionally, wiring that runs through existing ducts (as will the secondary wiring in this project) and free standing air-conditioning units can be treated on a non-capital basis. The difficult issue involves the installation of new over-head wiring, which represents about 16% of the total cost of the project. The most significant characteristic of the project is that *the new wiring will not increase the capacity of existing circuits for general use; the increased capacity of the new wiring will be used only to support the operation of the free-standing units.* The function of the air-conditioning and its supportive wiring will be to prevent dehydration of residents during the hot summer months. Thus, the project will make possible the continued use of the non-ambulatory wards for housing certain types of residents. The basic function of the buildings will not be enlarged or changed. Thus, the proposed project will not "increase the usefulness or change the use or function" of the buildings.

A different question would have been presented if the new wiring were designed to increase the usefulness of the institution's general circuits, or if the air-conditioning were to make possible a new function for the non-ambulatory wards, or if the project were intended to make possible an increase in the number of beds in the wards, or even if the cost configuration had been different. However, considering all aspects of the particular facts of this case, I conclude that the proposed project can be budgeted on a non-capital basis.

Very truly yours,
 ROBERT F. NAGEL
Deputy Attorney General
 ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 25

Policemen and Firemen's Collective Bargaining Act, 43 P.S. §217.1, et seq.—Liquor Code, 47 P.S. §2-209—Liquor Control Board—Enforcement personnel as "policemen."

1. Liquor Control Board Enforcement Officers are not "policemen" within the meaning of Policemen and Firemen's Collective Bargaining Act of June 24, 1968, P.L._____, Act No. 111 (43 P.S. §217.1, et seq.) and within the meaning of Article III, §31 of the Pennsylvania Constitution.
2. Provision of Article III, §31 of the Pennsylvania Constitution permitting compulsory arbitration of labor disputes involving policemen and firemen, binding on the Legislature, is a narrow exception to a fundamental principle of representative democracy and must be construed narrowly.

Harrisburg, Pa.
April 23, 1973

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

Dear Secretary Lench:

You have requested our opinion as to whether or not "enforcement officers" of the Liquor Control Board are "policemen" within the meaning of the Policemen and Firemen's Collective Bargaining Act of June 24, 1968, P.L._____, Act No. 111 (43 P.S. §217.1 et seq.). You are advised that they are not "policemen" within the meaning of that Act, and, more importantly, within the meaning of Article III, §31 of the Constitution of this Commonwealth, the implementation of which Act 111 was designed to accomplish.¹

Article III, §31 of the Constitution provides:

"§31. Delegation of certain powers prohibited.

"The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever. *Notwithstanding the foregoing limitation or any other provision of the Constitution, the General Assembly may enact laws which provide that the findings of panels or commissions, selected and acting in accordance with law for the adjustment or settlement of grievances or disputes or for collective bargaining between policemen and firemen and their public employers shall be binding upon all parties and shall constitute a mandate to the*

1. On November 20, 1968, former Attorney General William C. Sennett was called upon to answer the question you have raised and determined that Liquor Control Board Enforcement Officers, *inter alia*, were not policemen within the meaning of the Constitution or of Act 111. We concur in that opinion, but, however, feel it necessary to set forth in a fuller analysis the reasons for ours and Attorney General Sennett's conclusion.

head of the political subdivision which is the employer, or to the appropriate officer of the Commonwealth if the Commonwealth is the employer, with respect to matters which can be remedied by administrative action, and to the lawmaking body of such political subdivision or of the Commonwealth, with respect to matters which require legislative action, to take the action necessary to carry out such findings.” (Emphasis added.)

Act 111 implemented this provision by providing, *inter alia*, for compulsory arbitration—*binding upon the Commonwealth and/or its political subdivisions*—in order to resolve labor disputes involving policemen and firemen, when an impasse in collective bargaining has occurred.

The question of whether a Liquor Control Board Enforcement Officer is a “policeman” within the meaning of the Constitution cannot be fully and convincingly determined solely by looking to dictionaries or even to court decisions which have construed the word “policeman” in other contexts and have found it to encompass certain occupations and not to encompass others. This is because those dictionary definitions and court decisions were not construing the word “policeman” against the background of Article III, §31 of the Constitution. Needless to say, the question you asked us has not been determined judicially.

Thus, we must look to the purpose of Article III, §31 and Act 111 to determine the proper meaning of the term “policeman” in answering the question you pose. See Statutory Construction Act of 1972, P.L. ———, Act No. 290, 1 Pa. S. §1921 (46 P.S. §1921). In that regard, it is clear that the constitutional prohibition against delegation of the tax-levying power to private parties is a fundamental concept of representative democracy and that the above-emphasized portion of Article III, §31 is a narrow exception carved out to prevent the kinds of strikes or work-stoppages by policemen and firemen that leave the citizenry at large unprotected and put its lives and property in imminent danger.

Judged by that standard, we do not believe that a work stoppage by Liquor Control Board Enforcement Officers, while admittedly very damaging to the Commonwealth and its taxpayers, can be placed in the same category as a strike by policemen and firemen. While it is possible that should this question be litigated, a trier of fact might be given the latitude to find otherwise, Cf. *Allegheny v. Venneri*, 5 Comm. Ct. 105 (1972), we do not believe that it was the intention of the people in approving the 1967 amendment to Article III, §31, to cover all “peace officers” having law enforcement responsibilities and powers,² but only

2. This would include at the State level, at least, parole officers, State institution guards, and Capitol Police and Commonwealth Property Police—as well as Liquor Control Board Officers.

those upon whom the general public relies for protection of their lives and property and which lives and property would be placed in imminent peril should a work stoppage occur.

We note that this interpretation is buttressed by the provisions of the Public Employe Relations Act of July 23, 1970, P. L. _____, Act No. 195 (43 P.S. §1101.101, *et seq.*) which provide for a more limited compulsory arbitration proceeding for institutional guards and court personnel. Since these officers have many of the powers of policemen, and since institutional guards are described as "peace officers" elsewhere in the law, it is obvious that the Legislature did not consider all "peace officers" to be "policemen" within the meaning of Act 111. (It should be noted that Act 111 was expressly saved from repeal by §2002 of Act 195 (43 P.S. §1101.202).)

For these reasons, we reaffirm the previous opinion of this Office that Liquor Control Board Enforcement Officers are not "policemen" within the meaning of Act 111.

Sincerely yours,
MARK P. WIDOFF
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 26

Legally responsible relatives—Liability for treatment provided pursuant to the Drug and Alcohol Abuse Control Act (Act 63)—Liability under Article V of the Mental Health and Mental Retardation Act of 1966.

1. Neither minors treated pursuant to Act 63 nor the legally responsible relatives of minors treated pursuant to Act 63 are liable for the costs of that treatment.
2. Legally responsible relatives can be liable for costs of treatment provided under Act 63 if that treatment is provided after a minor attains his majority and if the relative owes a legal duty to support the adult recipient of treatment.
3. Liability of minors and their legally responsible relatives under Act 63 is unaffected by the source of the request for treatment.
4. A major legislative purpose for the liability provisions of Act 63 was to provide maximum incentives for both minors and their relatives to seek out treatment for minors' drug and alcohol abuse problems.

Harrisburg, Pa.
March 30, 1973

Honorable Helene Wohlgemuth
Secretary
Department of Public Welfare
Harrisburg, Pennsylvania
Dear Secretary Wohlgemuth:

In your letter of February 2, 1973, you asked for advice on four questions regarding Section 13 of the Drug and Alcohol Abuse Act (Act 63 of April 14, 1972). Section 13 states:

"Except for minors, all persons receiving treatment under this Act shall be subject to the provisions of Article V of . . . the 'Mental Health and Mental Retardation Act of 1966' in so far as it relates to liabilities and payments for services rendered by the Commonwealth."

I will deal with each of your questions separately:

1. Are the legally responsible relatives of minors treated pursuant to Act 63 liable for the costs of that treatment?

The legally responsible relatives of minors treated pursuant to Act 63 are not liable for the costs of that treatment. Section 13 of the Drug and Alcohol Abuse Control Act, *supra*, provides that liability for treatment offered pursuant to that Act shall be imposed in the same manner as under Section 501 and 502 of the Mental Health and Mental Retardation Act, but Section 13 specifically excludes minors from that liability scheme. Minors, therefore, have no liability for services provided under Act 63. The liability of relatives is determined by Section 502 (50 P.S. §4502):

"...whenever any person admitted, committed or otherwise receiving any service or benefit under this Act shall be unable to discharge the obligation imposed upon him by Section 501, such liability is hereby imposed upon any person owing a legal duty to support the person...receiving services..." (Emphasis added.)

The language of Section 502 is unambiguous; the liability of the relative is contingent upon the existence of an obligation on the recipient to repay expenses as imposed by Section 501. If the recipient has no obligation under Section 501, the legally responsible relative has no obligation under Section 502. Since minors are not liable for the costs of treatment provided under Act 63, their legally responsible relative cannot be liable for these costs under the terms of Section 502 as incorporated into Act 63.

2. Can legally responsible relatives become liable for costs of treatment provided under Act 63 after the minor attains his majority if treatment continues after that date?

Legally responsible relatives can be liable for these costs under certain circumstances. Section 502 imposes liability only upon "any person owing a legal duty to support the person... receiving services..." Therefore, although the general exemption granted minors by Section 13 of Act 63 applies only to costs incurred during minority, relatives would not be liable for services rendered after minority under Section 502 unless they have a legal duty to support the recipient during his majority. The circumstances under which a relative must support an adult are, of course, restricted. In general, the responsible relative

must be financially able to pay¹ and the adult in need of support must be physically or mentally unable to support himself.² In these restricted circumstances, however, the relative would become liable for the treatment provided after the recipient attains his majority.

3. Are relatives exempted from liability for treatment provided a minor under Act 63 even if the parent requests the treatment or a court orders the treatment?

The exemption for minors in Section 13 of Act 63 is without qualification. Therefore, the exemption applies regardless of the source of the request for treatment of the minor. This broad exemption serves the legislative purpose of encouraging to the greatest possible extent both parents and minors to seek treatment for a minor's drug or alcohol abuse problem.

4. What justification exists for exempting relatives from liability for treatment provided minors under Act 63 when relatives of minors treated pursuant to the Mental Health and Mental Retardation Act do not escape liability?

An answer to this question necessarily involves an element of speculation as to the legislature's purpose. The purpose of the exemption for minors contained in Section 13 is clearly to encourage minors to seek treatment. This purpose is reflected in other sections of Act 63. For example, Section 12 provides that minors can give effective consent for their own treatment and that parents need not be informed that the minor is receiving treatment. The liability exemption for minors and their relatives is consistent with Section 12 since minors could not keep their treatment confidential if their parents were made to pay for it. The decision of the legislature not to limit the exemption for minors to situations where the minor seeks confidential treatment also supports the contention that the legislature's highest priority was to encourage minors to get treatment for drug abuse. If the exemption in Section 13 had been so limited, parents would have had an incentive to avoid taking their children in for treatment because parental consent would immediately impose liability on the parent. The statute's terms, then, demonstrate that the legislature's over-riding concern is to seek treatment for the minor's drug abuse problems. The different approach that the legislature has taken toward mental retardation and mental illness can be explained in terms of the unique impact that the drug user has on society—the high probability that drug users will lead others into drug dependence or will commit violent crimes. These considerations informed the legis-

1. See, e.g. *Com. ex. rel. Hampton v. DeVeaux*, 183 Pa. Super. 92 (1957).

2. See, e.g., *Comm. ex. rel. O'Malley v. O'Malley*, 105 Pa. Super. 232 (1932).

lative decision to remove all possible disincentives to the decision to seek treatment for drug abuse.

Sincerely yours,
ROBERT F. NAGEL
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 27

Liability for treatment under Act 63—Commitment procedures under Act 63—Effect of repeal of Act of August 20, 1953.

1. Except as to minors the cost of treatment provided pursuant to the Drug and Alcohol Abuse Act of April 14, 1972 (Act 63) should be paid according to the provisions of Article V of the Mental Health and Mental Retardation Act of 1966 (50 P.S. §4101 *et seq.*)
2. Commitments under the Drug and Alcohol Abuse Act of April 14, 1972, (Act 63) should be made according to the commitment provisions of the Mental Health and Mental Retardation Act of 1966. (50 P.S. §4101 *et seq.*)

Harrisburg, Pa.
March 30, 1973

Richard E. Horman, Ph. D.
Executive Director
Governor's Council on Drug and Alcohol Abuse
Harrisburg, Pennsylvania

Dear Dr. Horman:

You have requested advice regarding two questions, both of which involve the relationship among the following three legislative acts: The Drug and Alcohol Abuse Act of April 14, 1972, (Act 63); the Mental Health and Mental Retardation Act of 1966, 50 P.S. §4101, (MH/MR Act); and the Act of August 20, 1953 (P. L. 1212) entitled in part "An Act providing for the study of the problems of alcoholism; the treatment, commitment, rehabilitation and protection of persons, addicted to the excessive use of alcoholic beverages...." (Act of 1953). Your questions were:

1) Should the cost of treatment provided pursuant to Act 63 be paid by the counties or through the scheme set up by the Mental Health and Mental Retardation Act of 1966?

2) Should commitments made pursuant to Act 63 be made under the procedures set out in the Mental Health and Mental Retardation Act of 1966 or under the provisions set out in the Act of August 20, 1953, P. L. 1212?

1) The Act of August 20, 1953, provided that certain costs of the treatment of alcoholics be paid by the counties. However, Act 63 clearly repeals the liability provisions of the Act of 1953. Section 15(a) of Act 63 states:

"The following acts and parts of acts are repealed to the extent indicated:

"2) Except Sections 1 and 4, the Act of August 20, 1953, (P. L. 1212) . . . absolutely."

Neither Sections 1 nor 4 of the Act of 1953 impose liability on counties. Therefore, the liability provisions of the Act of 1953 are repealed "absolutely."

Act 63 also provides that:

"Except for minors, all persons receiving treatment under this Act shall be subject to the provisions of Article V of the Act of October 20, 1966 (P.L. 96), known as the "Mental Health and Mental Retardation Act of 1966", in so far as it relates to liabilities and payments for services rendered by the Commonwealth." Section 13.

Article V of the MH/MR Act allocates liability for costs of treatment among the patient (50 P.S. §4501), the patient's legally responsible relatives (50 P.S. §4502), and the State and counties (50 P.S. §4503 *et. seq.*). Act 63 incorporates these liability provisions of the MH/MR Act, except as to minors.¹

2) The repealer clause of Act 63 (Section 15(a), *supra*) repeals the commitment provisions of the Act of 1953 because neither Sections 1 nor 4 of the Act of 1953 relate to commitment procedures. Section 5 of Act 63, however, clearly states:

"Admissions and commitments to treatment facilities may be made according to the procedural admission and commitment provisions of the Act of October 20, 1966 (P. L. 96), known as the Mental Health and Mental Retardation Act of 1966."

Therefore, commitments under Act 63 should be made pursuant to the MH/MR Act of 1966, *not* pursuant to the older Act of 1953.

In summary, you are advised that both the allocation of costs for treatment under Act 63 (except as to minors) and the commitment procedures to be used under Act 63 should be governed by the relevant provisions of the Mental Health and Mental Retardation Act of 1966.

Very truly yours,
ROBERT F. NAGEL
Deputy Attorney General
ISRAEL PACKEL
Attorney General

1. Minors and their legally responsible relatives are not liable for the costs of the minor's treatment under Act 63. See Attorney General's Opinion No. 26.

OFFICIAL OPINION No. 28

Federal Disaster Relief Act, 42 USC §4482—Snyder Run Conduit—Town of Bloomsburg—"Public facility"—Conclusive presumption of public ownership.

1. Given the fact that Snyder Run Conduit has been treated and used as within the public domain for all of the twentieth century, given the fact that the private owners of realty through which the culvert passes relied exclusively upon public maintenance and repair of the culvert, and given the fact that substantial portions of the culvert were built with public money and pass through public-owned lands, it is concluded that, under principles of Pennsylvania law, the Snyder Run Conduit is publicly owned by the Borough of Bloomsburg.
2. The Snyder Run Conduit, a publicly owned facility, is eligible for assistance under the Federal Disaster Relief Act inasmuch as it is a flood control facility or other public structure or system which was not used exclusively for recreational purposes.

Harrisburg, Pa.
April 2, 1973

Dr. Richard Gerstell
Director of Civil Defense
Harrisburg, Pennsylvania

Dear Dr. Gerstell:

Receipt is acknowledged of your request for our opinion regarding the status of the Snyder Run Conduit as a "public facility" within meaning of the Federal Disaster Relief Act, 42 USC §4482. It is our opinion, and you are hereby advised that the Snyder Run Conduit which was extensively damaged by Hurricane Agnes is a public facility within meaning of 42 USC §4482.

The Federal Disaster Relief Act, 42 USC §4482, provides for restoration of State and local public facilities which are damaged or destroyed by natural disasters. 42 USC §4482(c) defines public facility within meaning of that section as follows:

"For purposes of this section 'public facility' includes any flood control, navigation, irrigation, reclamation, public power, sewage treatment and collection, water supply and distribution, watershed development, or airport facility, any non-Federal-aid street, road or highway, and any other public building, structure, or system, other than one used exclusively for recreation

In determining whether or not the Snyder Run Conduit structure comes within meaning of this section, the question of public ownership must first be decided.

Available evidence indicates that, in the nineteenth century, Snyder Run was an open creek traversing the Town of Bloomsburg from the present area of Bloomsburg Hospital in the northwest corner of town approximately one and one-half miles long to and under Magee Carpet Company in the southwest corner of town.

An examination of records by Gerald E. Depo, Secretary of the Town of Bloomsburg, reveals that in the late nineteenth and early twentieth centuries, the town council appropriated monies for construction of the culvert over portions of the open run creek. On October 14, 1891, the town council passed Ordinance No. 62 which prevented the deposit of sewage, ashes, dirt or manure in the culvert, and further established building standards for private citizens who wished to contribute to the culvert and dedicate such contributions to the public. Thereafter, the Town of Bloomsburg maintained the Snyder Run Conduit from this 1891 date.

Prior to June, 1972, repair and maintenance was mostly of a minor nature. When problems would occur, it was customary for private owners of property through which the culvert flowed to notify the town repair crews to repair such problems. On those portions of the conduit which flowed underneath public streets and thoroughfares, the town maintenance crew routinely checked for damage and made repairs as was necessary.

As pointed out by the Pennsylvania Supreme Court, where there has been a history of treatment and use of realty as within the public domain even though there is no record title of ownership, such realty is "conclusively presumed" to be publicly owned. *Hoffman v. City of Pittsburgh* 365 Pa. 386, 389 (1950); *Brucker v. Borough of Carlisle* 376 Pa. 330, 336 (1954). Furthermore, where there is substantial evidence indicating maintenance and repair of the facilities by the municipality, the onus of ownership by the municipality is inferred from official conduct. *Agardy v. Borough of Pleasant Hills* 394 Pa. 350 (1958). Given the fact that Snyder Run Conduit has been treated and used as within the public domain for all of the twentieth century, given the fact that the private owners of realty through which the culvert passes relied exclusively upon public maintenance and repair of the culvert, and given the fact that substantial portions of the culvert were built with public money and pass through public-owned lands, it is concluded that, under principles of Pennsylvania law, the Snyder Run Conduit is publicly owned by the Borough of Bloomsburg.

Given such public ownership of the Snyder Run Conduit, the remaining question is whether or not this is a "public facility" within meaning of 42 USC §4482(c). Historically, the conduit was used for channeling surface drainage waters as a means of flood control. Consequently, The Snyder Run Conduit literally comes within the statute:

"'public facility' includes any flood control...facility..., and any other public...structure or system, other than one used exclusively for recreation purposes." 42 USC §4482(c)

It is our opinion, and you are hereby advised that the Snyder Run Conduit is a "public facility" within meaning of 42 USC

§4482, and is, therefore, eligible for federal financial assistance under the Federal Disaster Relief Act.

Very truly yours,
RICHARD J. ORLOSKI
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 29

Department of Property and Supplies—Competitive bidders' good faith money—Investment of bid money—State Depositories—Fiscal Code, 72 P.S. §301 et seq.

1. Bidders' good faith money can be placed in interest bearing State depository accounts even though such money is thereafter returned to the bidders where such provisions are made part of the contractual arrangement entered into between the bidders and the Commonwealth as part of the bidding process.
2. The bailment contract between bidders and the Department of Property and Supplies can be modified in order to provide for the usage of bidders' money by the Commonwealth to earn interest in State depository accounts even though the original bailment contract was silent on such usage.
3. In using bidders' good faith money to earn interest on behalf of the Commonwealth, the Department of Property and Supplies must comply with the requirements of the Fiscal Code, 72 P.S. §304, namely, the money must be deposited in approved State depositories, interest must be payable at the rate provided for by the Board of Finance and Revenue, the requisite bond must be posted by the State depository to secure payment of deposits and interest, and the limitations on the amount of the deposit in designated State depositories must be followed.

Harrisburg, Pa.
April 2, 1973

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

Dear Secretary Hilton:

This is in response to your request for our opinion regarding the legality of depositing certified checks made payable to the Commonwealth in an interest bearing state depository account where such money is given to the Commonwealth not as owner of the money but merely as good faith money in tendering a competitive bid. It is our opinion that such money can be placed in interest bearing accounts with the interest payable to the Commonwealth even though the good faith money is thereafter returned to the bidder. Such a procedure may be followed if it is made part of the contractual arrangement entered into between the bidders and the Commonwealth as part of the competitive bidding process.

The nature of the Commonwealth's possessory interest in bidder's good faith money deposited with the Commonwealth is that of a bailee of bailed property. See, *Scott On Trusts*, 3d Ed., §5.1; and *Bernstein v. Northwestern National Bank in Philadelphia*, 157 Pa. Super. 73 (1945) which characterizes possession of money owned by one party but possessed by another as a bailment. Given this possessory interest, the question involves what usage a bailee can make of bailed property.

As indicated in *Swift v. Green*, 80 D&C 109, 111, 112, 68 Montg. 74 (1952), absent a specific contractual limitation on bailee's usage of bailed property, the law will imply reasonable terms and limitations to the bailee's right to the use of such property. But where there is a specific contractual provision between bailor and bailee regarding the bailee's usage of the bailed property, that contractual arrangement governs. *Loeb v. Ferber*, 346 Pa. 348 (1943); *Kennedy v. R.&L. Co.*, 224 Mass. 207, 112 N.E. 872 (1916); *Wamsley Pontiac v. Glassow*, 47 D & C 2d 337 (1969); and *Kaiser v. Glassow*, 19 Bucks 169 (1969).

Under present procedures, the arrangements between the Commonwealth and competitive bidders are silent on interim usage of good faith money which is thereafter returned to bidders. The prudent course of action would be for the Department of Property and Supplies to incorporate as part of the bidding procedure a reference to depositing such money in an approved interest bearing state depository account with interest being made payable to the State Treasury. This can be done at the time of soliciting bids by advising the bidder as follows:

"Money deposited with the Commonwealth as a statutory prerequisite to competitive bidding shall be placed in authorized state depositories as required by the Fiscal Code, 72 P.S. §301 and interest shall be payable to the State Treasury as mandated by the Fiscal Code, 72 P.S. §304, with the original deposit returned to bidders as soon as practicable."

Under this approach, the Commonwealth, as bailee, would be authorized to deposit the bailed property in interest bearing accounts by the explicit terms of the bailment contract. It is therefore recommended that the Department of Property and Supplies modify its bidding practices to accommodate this new arrangement.¹

1. Section 2409 of the Administrative Code, 71 P.S. §639 addresses the question of return of unsuccessful bidders' money:

"...certified checks of all unsuccessful bidders shall be returned to such bidders as soon as practicable after contracts have been awarded and approved, but not later than sixty days after the date of opening the proposals." 71 P.S. §639.

As indicated in *Mutchler v. Easton*, 148 Pa. 441 (1892), where the bidding procedure refers to return of checks deposited by bidders, it is merely contemplated that the bidder "...is entitled to his check, or its equivalent in money," 148 Pa. at 446. Consequently, under 71 P.S. §639, the Commonwealth is given the option of returning either the certified check as deposited or its equivalent in money.

With regard to the legality of depositing bidders' money held by the Commonwealth prior to the adoption of this new procedure, the parties can legally modify the existing bailment contract in order to provide for the usage of the bailed property by the bailee. *Consolidated Tile & Slate Co. v. Fox*, 410 Pa. 336 (1963). Such a modification can be effected by words or conduct. *Barr v. Deiter*, 190 Pa. Super. 454 (1959); *Muschow v. Schaffner*, 180 Pa. Super. 413 (1956). It is, therefore, recommended that, in order to use bidders' money deposited under the existing bailment contract such bidders should be advised that their money will be deposited in a State depository with interest accruing to the benefit of the Commonwealth unless the individual bidder objects to such usage of his money within 20 days of receipt of the notice to modify the contract. In this manner, any bidder who fails to object will have, in fact, acquiesced in the modification of the contract, and the Commonwealth will then have authority to use the bailed property.

With regard to the proper procedure for opening interest bearing accounts in state depositories, the Commonwealth can deposit such monies in state depositories approved by the Board of Finance and Revenue. Fiscal Code, 72 P.S. §301. The interest from such accounts shall be made payable to the Treasury Department under such rates of interest as the Board of Finance and Revenue shall prescribe. Fiscal Code, 72 P.S. §304. Furthermore, in selecting such deposits, it is imperative that the requirements of the Fiscal Code, 72 P.S. §505, regarding the posting of bond to secure payment of deposits and interest, the payment of interest at the requisite rate, and the limitation on the amount of the deposit in designated state depositories be followed. Under such terms and conditions, the Commonwealth can use bidders good faith money to earn interest for the Commonwealth.

Very truly yours,

RICHARD J. ORLOSKI
Deputy Attorney General

ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 30

Act 212 of 1972—Separation of powers—Article IV, §2 of Pennsylvania Constitution—Special law—Article III, §32 of Pennsylvania Constitution—Power of appointment.

1. The appointment by statute of private citizens as representatives of private organizations on an administrative committee performing an executive function violates Article IV, §2 of the Pennsylvania Constitution which vests executive power in the Governor and includes therein the power of appointment.
2. The appointment by statute of private citizens as representatives of private organizations on an administrative committee performing an executive function violates the constitutional principle of separation of powers.

3. The appointment by statute of private citizens as representatives of private organizations on an administrative committee performing an executive function gives preferential treatment to private organizations and, therefore, violates the stricture on passing special laws found in Article III, §32 of the Pennsylvania Constitution.

Harrisburg, Pa.

April 4, 1973

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

Dear Secretary McHale:

You have requested our opinion as to the constitutionality of those provisions of Act 212 of 1972 which require the appointment of designees of the Pennsylvania State Council of Farm Organizations, The Pennsylvania Cannery and Fruit Processors Association, and the Pennsylvania Association of County Fairs to the committee administering the Pennsylvania Fair Fund. It is our opinion, and you are hereby advised that you must regard as unconstitutional those portions of Act 212 of 1972 which require such appointments. The appointment of private citizens as representatives of private organizations to approve and oversee the expenditure of public funds violates Pennsylvania Constitution, Article IV, §2, and Article III, §32.

Act 212 of 1972 provides, *inter alia*, as follows:

"In the event there is in the Pennsylvania Fair Fund an excess over the amount required. . . ., such excess shall be distributed as follows: ten percent of such excess or seventy-five thousand dollars (\$75,000), whichever amount is greater to be used by the Department of Agriculture for marketing and consumer service programs; and fifty percent of such excess or four hundred thousand dollars (\$400,000), whichever amount is greater for agricultural research projects, as *determined by a committee to include in its membership, the Secretary of Agriculture, the chairman and a minority member of the Agriculture Committee of the Senate, the chairman and minority member of the Agriculture Committee of the House of Representatives, six persons designated by the Pennsylvania State Council of Farm Organizations, the chairman of the State Harness Racing Commission or his designate, one person designated by the Pennsylvania Cannery and Fruit Processors Association, one person designated by the Pennsylvania Association of County Fairs and three persons designated by the Secretary of Agriculture from his staff.*

"There are hereby created subcommittees, the members of which shall consist of the Secretary of Agriculture or his designate, the chairman of the Agricul-

ture Committee or his designate, the chairman of the Agriculture Committee of the House of Representatives or his designate, and a member designated by the group representing the producers involved in the research project which shall meet annually in the month of September to evaluate research projects and report their findings and recommendations to the Secretary of Agriculture and the members of the committee." Section 1 of Act 212 of 1972 (Emphasis added.)

The Pennsylvania Constitution, Article IV, §2, vests the executive power in the Governor:

"The Supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed. . . ."

As indicated by the Pennsylvania Supreme Court in *Bailey v. Waters*, 308 Pa. 309 (1932), the Pennsylvania Constitution applies the theory of separation of powers, and the Legislature cannot encroach upon the powers of the executive directly or indirectly through the power of appointment:

"It is inherent in our scheme of government that the three departments should be independent and that neither department should perform functions belonging to the other *nor exercise influence over persons conducting the affairs of other departments as to control their actions.*" 308 Pa. at 313 (Emphasis added.)

Furthermore, as held by the United States Supreme Court in *Myers v. United States*, 272 U.S. 52, 164, 47 S. Ct. 21, 41, 71 L. Ed. 160 (1926), the vesting of executive power in a chief executive includes the exclusive control of the power of appointment—absent a constitutional provision permitting legislative appointment. Consequently it is concluded that the power of appointment is an indispensable ingredient to the exercise of executive power and that the principle of separation of powers requires that the Legislature cannot appoint persons to serve in the executive branch of government for such a power of appointment would be an unconstitutional exercise of influence by the Legislature on the executive branch. See, also, *Springer v. Government of Philippine Islands*, 277 U.S. 189, 202, 48 S. Ct. 480, 482 (1928).

Although there is the general rule of constitutional law that appointment power rests in the executive and that the Legislature cannot usurp such power through statute, particular reference must be made to the facts of Act 212 of 1972. The private persons whom the Legislature chose to exercise executive power are non-elected private citizens who would act as representatives of private organizations and who would not be subjected to executive control. In *Olin Mathieson Chemical Corp. v. White Cross Stores*, 414 Pa. 95 (1964), the Pennsylvania Supreme Court addressed an analogous situation where legis-

lative power was vested in private citizens under the Pennsylvania Fair Trade Act. There, the Court held that vesting legislative power with non-elected private citizens was unconstitutional under Article II, §1 of the Pennsylvania Constitution:

"Price regulatory power vests only in the elected legislative body. It may in limited ways be delegated to other responsible agencies, such as public service or utility commissions. . . . However, it may not be delegated to private persons. The vesting of a discretionary regulatory power over prices, rates, or wages, in private persons violates the essential concept of a democratic society and is constitutionally invalid [citing cases]." 414 Pa. at 98, 99. (Emphasis added.)

Just as the Legislature cannot constitutionally vest private persons with legislative power under Pennsylvania Constitution, so also an attempt to vest private citizens as representatives of private organizations with executive power where such persons are not subject to control of the Governor is invalid under Article IV, §2 of the Pennsylvania Constitution.

Moreover, Article III, §32 of the Pennsylvania Constitution provides *inter alia*:

"The General Assembly shall pass no local or special law in any case *which has been* or can be provided for by general law. . . ." (Emphasis added.)

In *State Board of Chiropractic Examiners v. Life Fellowship of Pennsylvania*, 441 Pa. 294 (1971), the Pennsylvania Supreme Court held that the preferential treatment accorded Pennsylvania Chiropractic Society in a statute which required that the chiropractors who seek annual renewal of their registration and license demonstrate that they attended an educational conference by the Pennsylvania Chiropractic Society was violative of the restrictions on special laws found in Article III, §32 of the Pennsylvania Constitution. In reaching this result, the Court relied upon the lower court's decision which held that preferential treatment to a private organization—without stating an adequate basis in fact—is a special law which is repugnant to the Pennsylvania Constitution:

"To give power and authority to this private corporation by name with no expressed reason or justification establishes a special law and is repugnant to the constitution." 90 Dauph. at 48, *affirmed*, 441 Pa. at 296.

In Act 212 of 1972, the Legislature named three private organizations—Pennsylvania State Council of Farm Organizations, Pennsylvania Canners and Fruit Processors Association, and Pennsylvania Association of County Fairs—who designate representatives to the committee. In so naming these private organizations, the Legislature expressed no reason or justification for giving these groups such preferential treatment. In addition, it is noted that not only are such groups sharing administrative

power under Act 212 but they may obtain substantial and direct benefits from the decisions of the committee by channeling research monies into projects in which they have a substantial interest. Consequently, it is concluded that Act 212 is a special law which benefits the named organizations. The remaining question is whether or not this special law has been or could have been provided for by general law.

Act 212 of 1972 was preceded by Harness Racing Corporation Act 15 P.S. §2616(e) which provided for the Pennsylvania Secretary of Agriculture performing the functions which are now delegated to the committee which consists of private citizens. It, therefore, is obvious that the functions of the committee pursuant to this special law have previously been performed by a general law, 15 P.S. §2616(e). It must be concluded that Act 212 of 1972 must be treated as unconstitutional insofar as it appoints private citizens as representatives of private organizations to perform an administrative function which can be handled by the executive branch of government without a special law. In appointing private individuals as representatives of private groups to an administrative committee, Act 212 is, therefore, to be regarded as unconstitutional for two reasons: 1) it is a usurpation of the power of appointment which is vested in the executive; and 2) it is a special law in contravention of Pennsylvania Constitution, Article III, §32.

In summation, it is concluded that you must treat Act 212 as unconstitutional inasmuch as it appoints the following members to the committee: 1) six persons designated by the Pennsylvania State Council of Farm Organizations; 2) one person designated by the Pennsylvania Cannery and Fruit Processors Association; and 3) one person designated by the Pennsylvania Association of County Fairs. Consequently, you must refuse to recognize these persons as members of the committee and must deny them any authority to participate in the deliberations of the committee.

Very truly yours,
RICHARD J. ORLOSKI
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 31

Public Employee Relations Act—Public School Code—Sabbatical leave—Collective bargaining

1. Sabbatical leave benefits for public school employes come within the permitted areas for collective bargaining negotiations. However, any provisions of a collective bargaining agreement on sabbatical leave which are in conflict with the statutory requirements on the subject are void and unenforceable.
2. Certain of the statutory provisions on sabbatical leave are non-bargainable since such provisions specifically state in detail the requirements

for eligibility in the granting of leave and specifically spell out the benefits that are to be provided while on leave.

Harrisburg, Pa.
April 9, 1973

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

Dear Secretary Pittenger:

You have asked whether or not the provisions of the Public Employe Relations Act, 1970, July 23, P.L. 563, 43 P.S. §1101.101 *et seq.*, limit the ability of the parties to a collective bargaining agreement to enlarge or modify the sabbatical leave benefits provided by the General Assembly in Sections 1116 to 1171 of the Public School Code of 1949, 24 P.S. §§11-1166 to 11-1171. You are advised that provisions of a collective bargaining agreement on sabbatical leave are void and unenforceable to the extent that they are in violation of, in conflict with, or inconsistent with the statutory provisions on sabbatical leave.

The permitted areas for collective bargaining negotiations under the Public Employe Relations Act are stated in Article VII on "The Scope of Bargaining," Section 702 of the Act:

"Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employe representatives." 43 P.S. §1101.702."

Sabbatical leave benefits come within the permitted areas for collective bargaining negotiations since they qualify as an element of "terms and conditions of employment." However, all of the permitted areas for collective bargaining are subject to the restrictions of Section 703 of the Act which provides that:

"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." 43 P.S. §1101.703

It is clear that the legislature intended Section 703 to refer to and to act as a limitation on the areas open for collective bar-

gaining negotiations found in Section 702 of the Act, since Section 702 is the only section of the Act defining those areas proper for bargaining. Thus, although sabbatical leave benefits come within the permitted areas for collective bargaining negotiations, any provisions of a collective bargaining agreement on sabbatical leave must be examined for a possible conflict with the statutory requirements on that subject. Where a conflict exists, the provisions of the collective bargaining agreement are void and unenforceable.

The non-bargainable nature of certain sabbatical leave provisions is illustrated by the Pennsylvania Supreme Court in the case of *Halco v. Township School District*, 374 Pa. 269, 97 A. 2d 793, 794 (1953). In that case, a teacher first took a leave of absence for one year, and then the school district granted him an extension for two more years. The Supreme Court held that:

"Under the circumstances outlined by the Act he was not entitled to a three year leave of absence in successive periods of one year each. We cannot rewrite the statute: *Commonwealth ex rel. Cartwright*, 350 Pa. 638, 644, 40 A. 2d 30, 155 A.L.R. 1088. Therefore, when the plaintiff was absent for three consecutive years without statutory authority, the seniority rights began only when he was reemployed by the Board, to wit, September 1, 1945."

Sabbatical leave is an employee benefit created by the legislature for employees of the public school system, 24 P.S. §11-1166 to 11-1171. Certain of the statutory provisions on sabbatical leave are quite specific, stating in detail the requirements for eligibility for granting the leave, and spelling out the benefits that are to be provided while on leave. These non-bargainable provisions are as follows:

(1) To qualify for sabbatical leave, a person must complete ten (10) years of satisfactory service in the public school system of the Commonwealth. 24 P.S. §11-1166;

(2) Subsequent to the granting of the first sabbatical leave, one sabbatical leave of absence "shall be allowed after each seven years of service." 24 P.S. §11-1166;

(3) To qualify for sabbatical leave, a person must agree "to return to his or her employment with the school district for a period of not less than one school term immediately following such leave of absence." 24 P.S. §11-1168;

(4) A person on sabbatical leave "shall receive one-half of his or her regular salary" while on sabbatical leave. 24 P.S. §11-1169; and

(5) Applications for sabbatical leave "shall be given preference, according to years of service since the previous sabbatical leave of applicant." 24 P.S. §11-1167.

Other of the relevant statutory provisions leave the board of school directors of a school district certain areas of discretion. The school board has the discretionary power to grant sabbatical leave for purposes other than those specified; to waive the requirement of five years of consecutive service in the local district; and to extend the sabbatical leave up to one full term where the employee becomes ill while on leave, 24 P.S. §11-1166. The school board has the discretionary power to make regulations governing the *granting* of the leave (24 P.S. §11-1167) and requiring compliance with the terms of the leave (24 P.S. §11-1171). In addition, the school board has the power to waive the requirement that the employee must return to service at the completion of the leave, 24 P.S. §11-1168.

You are advised, therefore, that certain of the statutory provisions on sabbatical leave are non-bargainable since such provisions specifically state in detail the requirements for eligibility in the granting of leave and specifically spell out the benefits that are to be provided while on leave. Those provisions on sabbatical leave which give the board of school directors of a school district discretion are bargainable.

Very truly yours,
LILLIAN B. GASKIN
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 32

The Administrative Code—Department of Property and Supplies—Off-Schedule purchases—Security—Duplicate sealed bids

1. The discretion given by the Administrative Code to the Department of Property and Supplies in purchasing unscheduled and unanticipated items must be exercised within reasonable limits.
2. The first twenty-two paragraphs of Section 2409 of The Administrative Code (71 P.S. §639) refer only to the purchase of scheduled articles and not to the purchase of items that were not anticipated when the schedules were prepared.
3. The Secretary of Property and Supplies may, within his reasonable discretion, eliminate security and/or performance bond requirements on purchases that were not anticipated at the time of the making of the schedules.
4. The Secretary of Property and Supplies may within his reasonable discretion, eliminate the requirement that sealed bids on unanticipated purchases be submitted in duplicate, and may accept a single sealed bid.

Harrisburg, Pa.
April 18, 1973

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

Dear Secretary Hilton:

This will acknowledge receipt of your letter of March 30, 1973, wherein you have requested a formal opinion interpreting Section 2409 of The Administrative Code (71 P.S. §639) insofar as it applies to the requirements for security and/or performance bonds for purchases of stationery, paper, fuel, furnishings and supplies that were not anticipated at the time of the making of the department's schedules for those items. It is our opinion, and you are so advised, that the Department of Property and Supplies may purchase unscheduled and unanticipated items without requiring security or performance bonds. However, the discretion given by The Administrative Code to the Department of Property and Supplies in purchasing such items must be exercised within reasonable limits. You have suggested that there be a \$10,000 limitation on the amount of any item purchased which item is unanticipated at the time of preparing the schedules. This limitation meets the standards of reasonableness and there may be other restrictions you may wish to impose such as requirements that bidders submit financial statements to the Department of Property and Supplies prior to bid. Therefore, you are advised to promulgate rules and regulations in the Pennsylvania Bulletin setting forth the procedures for the purchase of non-scheduled unanticipated items which procedures describe reasonable limits on the exercise of your Department's discretion in this area.

We have carefully reviewed Section 2409 of The Administrative Code and we have also reviewed the previous informal Attorney General's Opinion, dated November 14, 1939, to which you have referred in your letter. The question of the requirement of security has been dealt with in an excellent manner in that opinion and we adopt the following language which we have quoted therefrom:

"Since you refer us to Section 2409 of The Administrative Code, as amended, which section deals with the method of awarding contracts for the furnishing of stationery, paper, fuel, furnishings and supplies, we assume your inquiry is confined to those off-schedule articles which you purchase under said section of the Code.

"Section 2409 of The Administrative Code, Act of April 9, 1929, P.L. 177, was amended by the Act of June 21, 1937, P.L. 1885.

"The first twenty-two paragraphs of Section 2409 of The Administrative Code prescribe in detail the method of purchasing scheduled articles. It requires your department to formulate schedules with details and specifications, where necessary, and to advertise said proposals 'for at least three days, the first and last publi-

cation to be at least ten days apart, in not less than six or more than twelve newspapers of extensive general circulation in different parts of the Commonwealth, not more than three of which shall be published in any one county.' It further prescribes that no proposal for any contract shall be considered unless such proposal is accompanied by certified or bank check, to the order of the State Treasurer, in one-fourth of the amount of the estimated contract, or by a bond in such form and amount as may be prescribed by your department. In lieu of the certified or bank check, it authorizes your department, in its discretion, to permit a bidder to file a bond for an annual period to cover proposals that may be made from time to time by such bidder during such period; or, such bidder may file a combination bid and performance bond covering an annual period.

"A careful study of the first twenty-two paragraphs of Section 2409 of The Administrative Code, as amended, has convinced us that they refer only to the purchase of scheduled articles, as they speak repeatedly of 'the articles named in the schedules,' or 'the quantities given in the schedules.'

"Recognizing the fact that it is not always possible to anticipate the need of every particular article or the probability of scheduling the same, Section 2409 of The Administrative Code as amended, contains the following provision:

'In the event that requisitions are made upon the department for any article of furniture, furnishings, stationery, supplies, fuel or any other matter or thing, the want of which was not anticipated at the time of the making of the schedules, the department may, in its discretion, invite proposals from at least two responsible bidders, unless the article can be procured from only one source, and, then one proposal shall be invited, such proposal or proposals, together with such requisition or requisitions, shall be submitted to the Board of Commissioners of Public Grounds and Buildings for approval or disapproval: Provided, however, That the department may, in its discretion, purchase in the open market, without inviting any proposal, any such article costing less than fifty dollars, but all such purchases shall be reported to the Board of Commissioners of Public Grounds and Buildings at its next meeting.'

"It will be noted at once there is a marked difference between the method set up in The Administrative Code

for the awarding of contracts for scheduled articles and those articles which are not scheduled. The scheduled contracts require that they be advertised, whereas all off-schedule articles may be purchased by your department after inviting 'proposals from at least two responsible bidders.' If one proposal for an off-schedule article is received, as where the article can be procured from only one source, then such proposal, together with the requisition, shall be submitted to the Board of Commissioners of Public Grounds and Buildings for its approval or disapproval. Where the article cost less than \$50 your department is authorized, in its discretion, to purchase said article in the open market without inviting any proposal, but such purchase must be reported to the Board of Commissioners of Public Grounds and Buildings at its next meeting. Nowhere in the provision above quoted covering the purchase of off-schedule articles does it appear that the bidder must furnish a certified check or give a bid bond. The reason for requiring a certified check or a bid bond to accompany the bid for a contract to furnish scheduled articles does not exist in the case of the purchase of a single article or a number of articles off-schedule. The performance of a schedule contract covers a period of time, usually six months, whereas, an off-schedule purchase is usually made and completed in one transaction. We are of the opinion, however, that your department, in its discretion, may require a bid check or bid bond to accompany a bid on the furnishing of off-schedule articles where it deems the same necessary for the protection of the Commonwealth, as well as requiring performance bond."

As a result of the foregoing discussion, we are of the opinion and you are accordingly advised that the Secretary of Property and Supplies may, within reasonable discretion, eliminate security and/or performance bond requirements on purchases that were not anticipated at the time of the making of the schedules.

You have also asked whether the Secretary of Property and Supplies may eliminate the requirement that sealed bids on unanticipated purchases be submitted in duplicate. In view of the foregoing opinion you have the discretion to accept a single sealed bid. It should be noted in this regard that the regulations which you have been advised to promulgate by this opinion would, of course, include procedures for sealed bids as well as other matters suggested above.

Very truly yours,
W. W. ANDERSON
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 33

Department of Property and Supplies—Printing—Sworn statements

1. Act No. 455 (1961) will be complied with by the filing with the Department of a sworn statement to be renewed annually covering all printed contracts of the vendor provided that the provisions of Section 1 of Act No. 455 are included as provisions of each contract and the sworn statement is included in each contract by reference thereto.

Harrisburg, Pa.
April 23, 1973

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

Dear Secretary Hilton:

This will acknowledge receipt of your letter of March 30, 1973, wherein you have requested an interpretation of the requirements of the Act of August 21, 1961 (Act No. 455) (71 P.S. §1654 *et seq.*) which requires sworn statements of vendors as a provision of contracts for printing.

Section 1 of Act No. 455 provides as follows:

“Section 1. All contracts for printing for the Commonwealth or any department, board, commission or agency thereof, and all contracts for printing to be paid for wholly or in part with Commonwealth funds, shall contain the following provisions as conditions:

“(1) The person to whom the contract is awarded shall agree as a condition thereof to—

“(i) pay every employe engaged in the performance of said contract the prevailing wage rate, and provide working conditions prevalent in the locality in which the contract is being performed, or execute an affidavit that

“(ii) a collective bargaining agreement is in effect between an employer and employe who is represented by a responsible organization which is in no way influenced or controlled by management, the provisions of which shall be considered as condition prevalent in said locality; and

“(2) An agreement as a provision of the contract to maintain the conditions described in the sworn statement in the performance of such contract.”

You have indicated that the procedure presently followed by the Department requires bidders to file a sworn statement containing the provisions of Section 1 with each bid submitted to the Commonwealth for contract printing. You have suggested that the procedures of the Department will be simplified, and will encourage greater participation in competitive bidding, if a sworn statement is filed by each vendor with the Department of

Property and Supplies to cover all printing contracts of the vendor which statement will be required to be renewed annually. Such statements will be incorporated into each printing contract by reference and the vendor, by signing the contract, will certify that a current sworn statement is on file with the Department.

After a careful review of Act No. 455 it is our opinion, and you are accordingly advised, that Act No. 455 will be complied with by the filing with the Department of a sworn statement, to be renewed annually, covering all printing contracts of the vendor, provided that the provisions of Section 1 of Act No. 455 are included as provisions of each contract and the sworn statement is included in each contract by reference thereto.

Very truly yours,
W. W. ANDERSON
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 34

Department of Property and Supplies—Scheduled contracts—Advertisement

1. The Department of Property and Supplies may, consistent with the Administrative Code, group its scheduled contracts together in a single advertisement on an annual basis, listing all established schedules, the commodities established by each schedule and the bid opening date and time therefor.

Harrisburg, Pa.
April 23, 1973

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

Dear Secretary Hilton:

This will acknowledge receipt of your letter of March 30, 1973, wherein you have requested a formal opinion interpreting Section 2409 of The Administrative Code (71 P.S. §639), insofar as it contains requirements for the advertising of scheduled contracts.

You have advised us that your present procedure is to advertise separately each individually scheduled contract but that you now propose, if it is permitted by The Administrative Code, to group your scheduled contracts together in a single advertisement on an annual basis, listing all established schedules, the commodities established by each schedule, and the bid opening date and time therefor.

The sixth paragraph of Section 2409 provides as follows:

"The department shall, not less than six weeks prior to

the termination of schedule contracts now existing or that may be made in the future, advertise the opening of bids for the annual, semi-annual, or quarterly schedules, by advertising inserted for at least three days, the first and last publication to be at least ten days apart, in not less than six or more than twelve newspapers of extensive general circulation in different parts of the Commonwealth, not more than three of which shall be published in any one county, invite sealed proposals for contracts to furnish all stationery, supplies, paper, and fuel, used by the Senate and House of Representatives, the several departments, boards, and commissions of the State Government, and the Executive Mansion, and for repairing, altering, improving, furnishing or refurnishing, and all other matters or things required for the public grounds and buildings, legislative halls and rooms connected therewith, the rooms of the several departments, boards and commissions, and the buildings connected with the State Capitol and the Executive Mansion. The advertisement shall contain a reference to the schedules so prepared by the department, and, as briefly as practicable, invite bids for the furnishing of articles named in the schedules, and give notice of the time and place where such bids will be received, and when they will be opened."

There is nothing in the above language which requires that each schedule be advertised individually, nor does there appear to be any compelling reason for requiring the schedules to be advertised separately. Moreover, a grouping of the schedules in one advertisement would result in some savings to the Commonwealth.

For these reasons it is our opinion, and you are accordingly advised, that the foregoing language of The Administrative Code permits the grouping of schedules in one advertisement on an annual basis provided that all of the requirements of the Code for advertising are met.

Very truly yours,
W. W. ANDERSON
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 35

Mentally retarded—Access to public education

1. On June 18, 1971, the United States District Court for the Eastern District of Pennsylvania entered an order requiring notice to the parents or guardian and an opportunity to be heard prior to any change in the educational assignment of any child believed to be retarded.

2. Postponement of admission to regular school or class may have a significant effect on a child's education and training and should be deemed a significant change in educational assignment requiring the safeguard of notice and opportunity for hearing.
3. As an additional safeguard, the alternative educational assignment of a postponed child should automatically be re-evaluated every two years.
4. "Children of School Age" as used in Section 1371 of the Public School Code concerning "exceptional children" means children age 6 to 21, and also means all mentally retarded children who have reached an age less than 6 at which pre-school programs are available to others.
5. All mentally retarded children are presumed to be brain damaged as used in Section 1376 of the Public School Code despite the presence of other exceptionalities.
6. When it is found on the recommendation of a public school psychologist and upon the approval of the local board of school directors and the Secretary of Education that a mentally retarded child would benefit more from placement in a program of education and training administered by the Department of Public Welfare than from any program of education and training administered by the Department of Education, the child should be certified to the Department of Public Welfare for timely placement in a program of education and training.
7. It is the responsibility of the Secretary of Education to be sure that every mentally retarded child is placed in a program of education and training appropriate to the child's individual capacities.
8. Homebound instruction should not be denied to a mentally retarded child merely because no physical disability accompanies the retardation or because retardation is not considered to be a short-term disability.
9. Homebound instruction is the least preferable of the programs of education and training administered by the Department of Education and a mentally retarded child shall not be assigned to it unless it is the program most appropriate to the child's capacity. An assignment to homebound instruction should be re-evaluated not less than every three months.
10. A mentally retarded may be suspended for disciplinary reasons pursuant to Section 1318 of the School Code provided that the School District or Intermediate Unit obtains prior approval of the Director of the Bureau of Special Education and that a prompt hearing be held regarding this interim change in educational assignment.

Harrisburg, Pa.
April 23, 1973

Honorable Helene Wohlgemuth
Secretary
Department of Public Welfare
Harrisburg, Pennsylvania

AND

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

Dear Secretary Wohlgemuth and Secretary Pittenger:

On October 22, 1971, pursuant to the Order, Injunction, and Consent Agreement entered on October 7, 1971, in the United States District Court for the Eastern District of Pennsylvania (Civil Action No. 71-42) in the case of the *Pennsylvania Association for Retarded Children, et al. v. Commonwealth of Pennsylvania, et al.*, (hereinafter PARC case), Attorney General's Opinion No. 74 was issued. On May 5, 1972, the Court issued an

Order approving and adopting an Amended Stipulation and an Amended Consent Agreement dated February 14, 1972. In order to comply with the Amended Consent Agreement of February 14, 1972, I am reissuing the Attorney General's Opinion so as to include those sections required by the Amended Consent Agreement and to provide further guidance in the implementation of that document and the Amended Stipulation.

I.

A) The Amended Consent Agreement requires us, and you have asked us, to determine whether Section 1304 of the School Code allows a school district or intermediate unit to deny to a mentally retarded child access to a free program of public education.

Section 1304, dealing with the admission of beginners to Pennsylvania Public Schools, provides as follows:

"The admission of beginners to the public schools shall be confined to the first two weeks of the annual school term in districts operating on an annual promotion basis, and to the first two weeks of either the first or the second semester of the school term in districts operating on a semi-annual promotion basis. Admission shall be limited to beginners who have attained the age of five years and seven months before the first day of September if they are to be admitted in the fall, and to those who have attained the age of five years and seven months before the first day of February if they are to be admitted at the beginning of the second semester. The Board of School Directors of any school district may admit beginners who are less than five years and seven months of age, in accordance with standards prescribed by the State Board of Education. The Board of School Directors may refuse to accept or retain beginners who have not attained a mental age of five years, as determined by the supervisor of special education or a properly certified public school psychologist in accordance with the standards prescribed by the State Board of Education. "The term 'beginners' as used in this section, shall mean any child that should enter the lowest grade of the primary school or the lowest primary class above the kindergarten level."

You are hereby advised that this section means *only* that a school district may refuse to accept into or retain in the lowest grade of the *regular* primary school or the lowest *regular* primary class above the kindergarten level, any child who has not attained a mental age of five years. Any child whose admission to regular primary school or to the lowest regular primary class above kindergarten is postponed, or who is not retained in such school or class, is entitled to immediate placement in a free public program of education and training pursuant to sections

1371 through 1382 (which provide alternative programs of education and training for exceptional children).

B) On June 18, 1971, the United States District Court entered an order in the PARC case (cited above). Essentially, this order requires notice to the parents or guardian and an opportunity to be heard prior to the change in the educational assignment of any child believed to be retarded. Therefore, Section 1304 must be read in such a way as to allow for the following procedure.

Before a child's admission as a beginner in the lowest grade of a regular primary school or the lowest regular primary class above kindergarten may be postponed, the parent or guardian of such a child should receive notice and an opportunity to be heard as set forth in the Court's Order of June 18, 1971. Because postponement of admission to a regular school or class may have a significant effect on the child's education and training, postponement should be deemed a significant change in educational assignment within the Court's Order of June 18, 1971, thereby requiring the safeguard of notice and opportunity for a hearing to insure that postponement is appropriate for the child in question. As an additional safeguard, the alternative educational assignment of a postponed child should be automatically re-evaluated every two years, and, at the request of a child's parent or guardian, should be re-evaluated annually. With regard to each re-evaluation, the child's parent or guardian should receive notice and an opportunity for a hearing in accordance with the Court's Order of June 18, 1971.

II.

In accordance with the Amended Consent Agreement in the PARC case we are required and you have also asked that we determine between what ages a mentally retarded child must be granted access to a free program of public education. Section 1326 of the school code, the definitional section with regard to enforcement of public school attendance, provides in relevant part:

"The term 'compulsory school age,' as hereinafter used shall mean the period of a child's life from the time the child's parents elect to have the child enter school, which shall be not later than at the age of eight (8) years, until the age of seventeen (17) years. The term shall not include any child who holds a certificate of graduation from a regularly accredited senior high school."

This section means *only* that the parents of a child have a compulsory duty, while the child is between eight and seventeen years of age, to assure that the child's attendance in a free public program of education and training. Furthermore, if a parent does not discharge the duty of compulsory attendance with regard to any mentally retarded child between eight and seventeen years of age, then the Department of Education shall take those steps

necessary to compel the child's attendance pursuant to Section 1327, and any compulsory attendance regulations.

However, Section 1326 does not limit the ages between which a child must be granted access to such a program. Section 1301 of the School Code requires that the Commonwealth provide a free public education to all children six (6) to twenty-one (21) years of age. Thus, no school district or intermediate unit can deny access to a free program of public education to any mentally retarded child age 6 thru 21 years whose parents elect to enroll that child in such a program.

Furthermore, in accordance with the provisions of The Amended Consent Decree, the right to access of a mentally retarded child to a free program of public education is not affected by section 1330(2) of the School Code which provides:

"Exceptions to compulsory attendance

"The provisions of this act requiring regular attendance shall not apply to any child who:

"(2) Has been examined by an approved mental clinic or by a person certified as a public school psychologist or psychological examiner and has been found to be unable to profit from further public school attendance, and who has been reported to the Board of School Directors and excused, in accordance with regulations prescribed by the State Board of Education."

This section of the code means only that when a parent elects to voluntarily withdraw a child from public school attendance, that parent may be excused from liability under the compulsory attendance provisions of Section 1326 of the School Code when that parent acquires:

- a. The approval of the local school board
- b. The approval of the Secretary of Education
- c. A finding by an approved clinic or public school psychologist or psychological examiner, that the child is unable to profit from further public school attendance.

Thus, Section 1330(2) does *not* mean that a school district or intermediate unit, contrary to the parent's wishes, can terminate or in any way deny access to a free program of public education to any mentally retarded child.

III.

During the course of the PARC case, it became apparent that many pre-school programs of education and training in Pennsylvania were being operated by the Departments of Education and Welfare for typical children, while few if any comparable programs existed for mentally retarded children. In light of this information the Amended Consent Agreement has required us, and you have requested, an interpretation of the definition of

the phrase "children of school age" as used in Section 1371(1) of the School Code as set forth below:

"The term 'exceptional children' shall mean children of school age who deviate from the average of physical, mental, emotional or social characteristics to such an extent that they require special educational facilities or services and shall include all children in detention homes."

The phrase "children of school age" as used in Section 1371 means children aged 6 to 21. This phrase also means all mentally retarded children who have reached the age less than 6 at which pre-school programs are made available to other children either by the Department of Education through any of its instrumentalities (e.g. local school districts or intermediate units) or by the Department of Welfare, through any of its instrumentalities. This construction should insure that pre-school programs are equally available in Pennsylvania to mentally retarded and typical children, less than 6 years of age.

IV.

A) You have also requested an interpretation of the term "brain damage" as used in Section 1376 of the School Code. This interpretation is compelled by paragraph 55 of the Amended Consent Decree which qualifies the definition of "Brain Damage". See Part IV, subpart B *infra*. Section 1376 of the School Code provides, in relevant part:

"(a) When any child between the ages of six and twenty-one (21) years of age resident in this Commonwealth, who is blind or deaf, or afflicted with cerebral palsy and/or brain damage and/or muscular dystrophy, is enrolled, with the approval of the Department of Public Instruction, as a pupil in any one of the schools or institutions for the blind or deaf, or cerebral palsied and/or brain damaged and/or muscular dystrophied, under the supervision of, subject to the review of or approved by the Department of Public Instruction, in accordance with standards and regulations promulgated by the Council of Basic Education, the school district in which such child is resident shall pay twenty-five per centum (25%) of the cost of tuition and maintenance of each child in such school or institution, as determined by the Department of Public Instruction, and the Commonwealth shall pay, out of funds appropriated to the Department for Special Education, seventy-five per centum (75%) of the cost of their tuition and maintenance, as determined by the Department. . ."

Based on expert testimony in the PARC case, and in part on the legislature's desire to provide for all exceptional children who reside in Pennsylvania, the term "brain damage" as used in

this section and as further defined in the Board of Education's "Criteria for Approval of Reimbursement" includes thereunder all mentally retarded persons. Accordingly, there should now be available to them tuition for day school and tuition maintenance for residential school up to the maximum sum available for day school or residential school, whichever provides the program of education and training more appropriate to the mentally retarded child's learning capacities.

B) As noted above, paragraph 55 of the Amended Consent Agreement also relates to the definition of brain damage. That paragraph provides:

"Any child who is mentally retarded and who also has another exceptionality or other exceptionalities whether blind, deaf, cerebral palsied, brain damaged, muscular dystrophied or socially or emotionally disturbed, or otherwise, *irrespective of the primary diagnosis* shall be considered mentally retarded for purposes of the Agreements and Orders herein."

Thus, mental retardation in any degree qualifies a child for admission to a free public program of education, appropriate to that child's capacities, regardless of the nature and extent of any accompanying or primary exceptionality that child might have.

However, a brain damaged child who does not suffer some degree of mental retardation is not covered by the amended Order and Consent Agreement of the PARC case.

V

Section 1372(3) of the School Code, with regard to homebound instruction, provides in relevant part:

"Special classes of schools established and maintained by school districts. . . If . . . it is not feasible to form a special class in any district or to provide such education for any (exceptional) child in the public schools of the district, the Board of School Directors of the district shall secure such proper education and training outside the public schools of the district or in special institutions, or by providing for teaching the child in his home. . ."

The Amended Consent Agreement requires us to determine and you have asked, whether, under this section, homebound instruction may be denied to a mentally retarded child because no physical disability accompanies the retardation or because retardation is not considered to be a short term disability. You are hereby advised that such a denial may not be made under this section. It is obvious from reading Section 1372(3) that homebound instruction is one of the options available to a school district where placement in a regular public school class is not possible. For a given mentally retarded child, homebound instruction may be the only appropriate method for providing the

free public program of education and training to which that child is entitled.

In this regard, we refer you to Attorney General's Opinion No. 137 issued on July 6, 1972, which set forth the procedure for the assignment of exceptional children to special education programs under Section 1372 of the School Code. That Opinion recognizes, in accordance with the PARC decision, 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. This rationale leads us to conclude that homebound instruction is the least preferable of the programs of education and training administered by the Department of Education, and a mentally retarded child should not be assigned to it unless it is the program most appropriate to the child's capacity. Furthermore, an assignment to homebound instruction should be re-evaluated not less than every three months (90 days from the first date on which the child receives education and training in his home) and notice of the re-evaluation and an opportunity for a hearing in regard thereto should be accorded to the child's parent or guardian as set forth in the Court's Order of June 18, 1971.

VI.

Section VI of this opinion is in response to the request of the Amended Consent Agreement for an interpretation of Section 1375 of the School Code, and your request as to the effect of such an interpretation on the determination of which of your departments is now or will be charged with the responsibility for providing a free program of public education to all mentally retarded children in Pennsylvania. Section 1375 with regard to the exclusion of children from public schools, provides:

"The State Board of Education shall establish standards for temporary or permanent exclusion from the public school children who are found to be uneducable and untrainable in the public schools. Any child who is reported by a person who is certified as a public school psychologist as being uneducable and untrainable in the public schools, may be reported by the Board of School Directors to the Superintendent of public Instruction and when approved by him, in accordance with the standards of the State Board of Education, shall be certified to the Department of Public Welfare as a child who is uneducable and untrainable in the public schools. When a child is thus certified, the public schools shall be relieved of the obligation of providing education or training for such child. The Department of Public Welfare shall thereupon arrange for the care, training and supervision of such child in a

manner not inconsistent with the laws governing mentally defective individuals."

Because all children are capable of benefiting from a program of education and training, Section 1375 means that insofar as the Department of Public Welfare must "arrange for the care, training, and supervision" of a child certified to it, the Department of Public Welfare must provide a program of education and training appropriate to the individual capacities of that child. This section further means that when it is found, on the recommendation of a public school psychologist and upon the approval of the local board of school directors and the Secretary of Education (as reviewed in the due process hearing contemplated by the Court's Order of June 18, 1971,) that a mentally retarded child would benefit more from placement in a program of education and training administered by the Department of Public Welfare than from any program of education and training administered by the Department of Education, the child should be certified to the Department of Public Welfare for timely placement in a program of education and training.

It is the responsibility of the Secretary of Education to assure that every mentally retarded child is placed in a program of education and training appropriate to the child's individual capacities. To this end, the Secretary of Education with the cooperation of the Department of Public Welfare should require reports of annual census and evaluation under Section 1371(2) so that he shall be informed as to the identity, condition, and educational status of every mentally retarded child within the various school districts of the Commonwealth. If it appears that the provisions of the School Code relating to the proper education and training of mentally retarded children have not been complied with, or that the needs of mentally retarded children are not being adequately served by programs of education and training administered by the Department of Public Welfare, the Department of Education should take those steps necessary to provide such education and training, as it is authorized to do pursuant to Section 1926.

The Court Order of June 18, 1971, requires notice to the parent or guardian and an opportunity for a hearing with regard to the significant change in educational assignment which occurs when a child is excluded from programs conducted by the Department of Education and is certified to the Department of Public Welfare. With the cooperation of the Department of Education, the same notice should be accorded the parents or guardian of a mentally retarded child with regard to any change in educational assignment among and between the various programs of education and training administered by and within the Department of Public Welfare. Not less than every two years the assignment of any mentally retarded child to a program of education and training administered by the Department of Pub-

lic Welfare should be re-evaluated by the Department of Education and upon such re-evaluation, notice and an opportunity to be heard should be accorded the parents or guardians of the child in accordance with the Court Order of June 18, 1971.

VII.

The final section of this opinion deals with paragraph 3(v) of the amended stipulation in the PARC case, issued on February 14, 1972, which provides:

"There shall be no change in the child's educational status without prior notice and the opportunity to be heard set forth herein, except that in extraordinary circumstances the Director of the Bureau of Special Education, upon written request to him by the district or intermediate unit setting forth the reasons therefore and upon notice to the parent may approve an interim change in educational assignment prior to the hearing, in which event the hearing will be held as promptly as possible after the interim change. The Director shall act upon any such request promptly and in any event within three (3) days of its receipt."

It has been asked whether this provision is subordinate to Section 1318 of the School Code dealing with suspension and expulsion of students, as set forth below:

"Every principal or teacher in charge of a public school may temporarily suspend any pupil on account of disobedience or misconduct, and any principal or teacher suspending any pupil shall promptly notify the district superintendent or secretary of the board of school directors. The board may, after a proper hearing, suspend such child for such time as it may determine, or may permanently expel him. Such hearings, suspension, or expulsion may be delegated to a duly authorized committee of the board."

It must be recognized that the education of mentally retarded children will create problems that, in a typical child situation, would be governed by Section 1318. However, the suspension of a mentally retarded child under the same circumstances might amount to a punishment for a ramification of the very disability which a public school program of education is attempting to remedy. To avoid such a result, we must first conclude that a suspension or expulsion pursuant to Section 1318 is a change in educational assignment which would, except as provided below, require notice and a due process hearing.

Acknowledging, however, that a disciplinary problem with a mentally retarded child may be so immediate or severe as to require summary action, the parties in the PARC case agreed to the above stipulation. Thus, in those cases which warrant im-

mediate action, and after the approval by the Director of the Bureau of Special Education, an interim change in the educational assignment of a mentally retarded child, in the form of suspension or expulsion, may be made pursuant to Section 1318, so long as there is a hearing as promptly as possible after the interim change.

We have rendered this opinion relevant to the PARC case with the hope of implementing both the letter and the spirit of the Amended Stipulation and Consent Agreement. I would like to take this opportunity to again commend both of you for your efforts to improve the lives of mentally retarded children in the Commonwealth of Pennsylvania.

Very truly yours,

LARRY B. SELKOWITZ
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 36

Department of Property and Supplies—Purchases—Printed forms—Stationery and business cards—The Administrative Code.

1. Section 2406 of the Administrative Code (71 P.S. §636) was not intended to apply to the purchase of such items as printed forms, printed stationery, and business cards; such items should be purchased by the Department of Property and Supplies in accordance with the procedure established in Section 2409 (71 P.S. §639).

Harrisburg, Pa.
April 27, 1973

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

Dear Secretary Hilton:

This will acknowledge receipt of your letter of March 30, 1973, wherein you have asked us for a determination of which section of The Administrative Code is applicable to the purchase of printed forms, printed stationery and business cards: Section 2406 (71 P.S. §636) or Section 2409 (71 P.S. §639). It is our opinion and you are accordingly advised, that Section 2409 is the applicable section.

You have advised us that historically the Department of Property and Supplies has interpreted Section 2409 to apply to all printed matter including the above items. This interpretation has developed as a direct result of the consolidation of all purchases of printing items in the Bureau of Publications which is no long-

er in existence. You have further advised, however, that the Department has not been able to establish scheduled contracts on these items nor has the Department been able to delegate small-dollar purchasing authority which, in turn, has created excessive and uneconomic workloads in the Bureau of Purchases and has caused significant delays in procuring such items.

Section 2409 provides in part:

"The Department of Property and Supplies shall notify the Governor, the several administrative departments, the independent administrative, departmental administrative, and advisory boards and commissions, the chief clerks of the Senate and House of Representatives, and the proper officers of the judicial department, respectively, to furnish, at such times as the Department of Property and Supplies may require, lists of all equipment, furniture and furnishings, stationery, supplies, repairs, alterations, improvements, fuel, and all other articles that may be needed by their respective departments, boards, or commissions, or the Senate, or the House of Representatives, for such periods as the Department of Property and Supplies shall prescribe. . . ."

You have suggested that since Section 2406 makes repeated reference to such items as "publications", "printing and binding", and "laws, journals and department reports", and since Section 2409 specifically mentions "stationery" and "supplies" as separate and distinct from "paper", it is your view that printed stationery items should be procured under Section 2409 and Section 2406 should be applicable only to published books, laws, public documents and reports.

As you have indicated, the difference between sections 2406 and 2409 is that Section 2409 would permit the Department to establish scheduled contracts for printed forms, printed stationery and business cards which it cannot do with respect to printed items covered under Section 2406.

After a careful review of both sections 2406 and 2409 of The Administrative Code, it is our opinion, that Section 2406 was not intended to apply to such items as printed forms, printed stationery and business cards, and that such items should be purchased by the Department of Property and Supplies in accordance with the procedures established in Section 2409.

Very truly yours,

W. W. ANDERSON
Deputy Attorney General

ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 37

Act 183 of 1968—Department of Military Affairs—Adjutant General—Vietnam Conflict Veterans' Compensation Act, 51 P.S. §459.1 et seq.

1. The Vietnam Conflict Veterans' Compensation Act, 51 P.S. §459.10 gives the Adjutant General final and conclusive authority for determining the amount of benefits eligible veterans are entitled to receive under the Act for purposes of computing and ascertaining the amount of service.
2. The Adjutant General has no duty to recover funds paid out under the Vietnam Conflict Veterans' Compensation Act where such payments were made in accordance with the Adjutant General's computation of time of eligible service under 51 P.S. §459.10.

Harrisburg, Pa.
April 27, 1973

Major General Harry J. Mier, Jr.
Adjutant General
Department of Military Affairs
Annville, Pennsylvania

Dear General Mier:

Your letter of April 23, 1973, requests an opinion as to the collection of overpayments of the Vietnam bonus. Materials supplied to this office indicate probable overpayments in 1969 to 953 veterans of approximately \$127,000 of which about \$50,000 has been recouped, and subsequent overpayments in 1969 to 183 veterans of approximately \$17,775 of which there has been no recoupment. The great bulk of the overpayments was in amounts not in excess of \$100.

The overpayments were not due to the fault of the veterans. Mistakes arose, prior to your Administration, in the administrative construction and application of the allowances of \$25 per month for "active service in Vietnam theatre of operations as defined for the award of the Vietnam Service Medal." Act of July 18, 1968 No. 183, Section 3, 51 P.S. §459.3.

The general rule of law is that payments made under mistake of fact or law are recoverable, Restatement, Restitution §§20, 49. However, Section 10 of the aforesaid Act, 51 P.S. §459.10, provides:

"Immediately upon passage of this act, the Adjutant General shall ascertain the individuals who are veterans as defined in section 2 and as to each veteran, the number of months of service as defined in section 3 for which he or she is entitled to receive compensation, and *his decisions shall be final and not subject to review by any court or by any other officer.*" (Emphasis supplied.)

Thus, the General Assembly has declared that decisions of your predecessor were final and not subject to review "by any other officer." Although the Constitution provides that there shall be a right of appeal, Article V, Section 1, it does not bar the General Assembly from providing that administrative determin-

ations shall be binding upon the Administration. The constitutional guarantee of the right to appeal an administrative determination is to give members of the public the right to try to set aside an administrative determination. Here, the issue is whether a subsequent officer can try to avoid a determination by his predecessor. In this situation, the Legislature has spoken and has prohibited any such effort.

Accordingly, you are hereby informed that you have no duty to try to recover any overpayment made by the prior Adjutant General.

Sincerely yours,
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 38

Department of Property and Supplies—Pennsylvania Constitution—The Administrative Code—Maximum prices—Purchases

1. The Department of Property and Supplies is required by Section 2409 of the Administrative Code (71 P.S. §639) to set maximum prices for items purchased under schedule.
2. Rules and regulations may be promulgated by the Department to provide an interpretation of what is a proper maximum price and which will relieve much of the burden that the Department is now experiencing.

Harrisburg, Pa.
May 8, 1973

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

Dear Secretary Hilton:

This will acknowledge receipt of your letter of March 30, 1973, wherein you have requested a formal opinion interpreting Section 2409 of The Administrative Code (71 P.S. §639) insofar as it requires the setting of maximum prices for items purchased under schedule.

You have indicated that the setting of maximum prices is not practicable for any purchases under schedule for the following reasons:

"1. Where maximum price is set close to or below market price, vendors may be unwilling to meet the maximum price set in the proposal. Where no vendors are willing to bid at or below the maximum price, the Department is forced to raise its maximum price substantially above market price, readvertise and rebid the item. Therefore, setting maximum prices near or below market price is impracticable.

"2. Where (as is the current practice) maximum prices are set substantially above market prices, the Department runs the risk if encouraging bids at the inflated price (especially, but not exclusively, in the case of one source items).^{*} Furthermore, an inflated maximum price has no meaning in a competitive bidding environment. For these reasons, setting arbitrarily high maximum prices is also impracticable."

You have also pointed out that the Secretary of Property and Supplies has the right to reject any and all bids when deemed in the best interest of the Commonwealth and that the elimination of maximum prices would place no obligation on the Commonwealth to accept unrealistic prices.

In addition you have observed that the old constitutional requirement for maximum prices has been deleted from the present Constitution.

Before the Pennsylvania Constitution was completely revised and amended in 1967 the following provision was contained in Article III, Section 12:

"All stationery, printing, paper and fuel used in the legislative and other departments of government shall be furnished, and the printing, binding and distributing of the laws, journals, department reports, and all other printing and binding, and the repairing and furnishing the halls and rooms used for the meeting of the General Assembly and its committees, shall be performed under contract to be given to the lowest responsible bidder *below such maximum price* and under such regulations as shall be prescribed by law; no member or officer of any department of the government shall be in any way interested in such contracts, and all such contracts shall be subject to the approval of the Governor, Auditor General and State Treasurer." (Emphasis supplied.)

This section was repealed in 1967 and was replaced by the following provision which is now contained in Article III, Section 22:

"The General Assembly shall maintain by law a system of competitive bidding under which all purchases of materials, printing, supplies or other personal property used by the Government of this Commonwealth shall so far as practicable be made. The law shall provide that no officer or employe of the Commonwealth shall be in any way interested in any purchase made by the Commonwealth under contract or otherwise."

It is noted that the present Constitution does not contain any reference to maximum prices.

^{*} Of course, one source items are purchased through negotiation.

However, Section 2409 has not been repealed and is must be interpreted in accordance with the ordinary rules of statutory construction. The fact that it was originally enacted to implement a constitutional provision which has since been repealed does not in any way affect it.

The second paragraph of Section 2409 reads as follows:

"Upon receipt of such lists, the Department of Property and Supplies shall, *as far as practicable*, consolidate and classify the articles named therein, taking care that there shall be full descriptions given, with make and number of goods when possible, *and proper maximum price fixed*, and shall prepare annual, semiannual, or quarterly schedules threrof, as deemed for the best interest of the Commonwealth. Whenever deemed necessary, it shall have plans, designs, and specifications prepared of any equipment, furniture or furnishings, repairs, alterations and improvements, paying for the preparation of the same out of the funds appropriated to the department." (Emphasis supplied.)

You have suggested that the language of that paragraph requires maximum prices to be fixed as far as practicable. However, such a construction of the paragraph cannot be justified. An ordinary reading of the paragraph discloses that the words "as far as practicable" modify the phrase "consolidate and classify the articles named therein" and that the phrase "taking care" is intended to modify the phrase "and proper maximum price fixed." When the words of a statute are clear and free from ambiguity, the letter of it is not to be disregarded. See Statutory Construction Act of 1972, Section 1921(b). It seems obvious that a department purchasing so many different items for so many different agencies of the Commonwealth Government may have difficulty in consolidating and classifying all of the articles in the schedules and should be given the discretion not to do so where it is not practicable. On the other hand, the Department is certainly able to fix a proper maximum price with regard to each article as it has been doing in the past. While the factors that you have mentioned may make the setting of maximum prices impracticable, the language of Section 2409, as we have indicated, does not allow for the elimination of maximum prices for practical or any other reasons.

However, the phrase "proper maximum prices" leaves room for an interpretation as to what is proper. Rules and regulations may be promulgated by your Department which will provide an interpretation and which will relieve much of the burden that the Department is now experiencing. It has been suggested that the maximum price could be based upon a certain percentage of the lowest bid for the same items during the previous year, such as 125% or 150%, and that the maximum prices could be eliminated from the invitation to bid by having lan-

guage in the invitation to bid which notifies the bidders that information concerning maximum prices is available upon request made to the Department. It is our opinion that a valid regulation could be written which would contain such provisions and it is suggested that the matter be handled in that way.

Very truly yours,
W. W. ANDERSON
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 39

School Code—School directors—Documentation of expenditures.

1. Documentation of expenditures is required under Section 516 of the Public School Code of 1949, P.L. 30, as amended (24 P.S. §5-516.1).

Harrisburg, Pa.
May 25, 1973

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

Dear Secretary Pittenger:

It has come to our attention that there is some confusion in many of our school districts with respect to the meaning and proper implementation of §§516, 516.1 of the Public School Code of 1949, P.L. 30, as amended (24 P.S. §§5-516, 5-516.1).

Those sections provide:

“§5-516. State convention or association; delegates; expenses; membership

“The board of school directors or the board of public education of any school district may appoint one or more of its members, its non-member secretary, if any, and its solicitor, if any, as delegates to any State convention or association of school directors, held within the Commonwealth. It shall be the duty of such delegates to attend the meetings of such convention or association, and each delegate so attending shall be reimbursed for travel, travel insurance, lodging, meals, registration fees and other incidental expenses necessarily incurred. Any such board may become a member of the Pennsylvania School Boards Association, Inc., and may pay, out of the school funds of the district, any membership dues which may be assessed by the association at any State convention of school directors to defray the necessary expenses of maintaining the associa-

tion and of holding the convention. *Such expenses shall be paid by the treasurer of the school district, in the usual manner, out of the school funds of the district, upon the presentation of an itemized, verified statement of such expenses.*" (Emphasis added.)

"5-516.1 Expenses for attendance at meetings of educational or financial advantage to district

"When, in the opinion of the board of school directors or of the board of public education, attendance of one or more of its members and of its non-member secretary, if any, and of its solicitor, if any, at any meeting held within the Commonwealth (other than annual State conventions of school directors and conventions and meetings called by the executive director of an intermediate unit) or the attendance of one or more of its members and of its non-member secretary, if any, and of its solicitor, if any, at the annual convention of the National School Boards Association or any other educational convention will be of educational or financial advantage to the district, it may authorize the attendance of any of such persons at such meeting within the Commonwealth and at the annual convention of the National School Boards Association or any other educational convention, wherever held, not exceeding two meetings in any one school year. Each person so authorized to attend and attending shall be reimbursed for all expenses actually and necessarily incurred in going to, attending and returning from the place of such meeting, including travel, travel insurance, lodging, meals, registration fees and other incidental expenses necessarily incurred, but not exceeding twenty-five dollars (\$25) per day for lodging and meals. Actual travel expenses shall be allowed with mileage for travel by car at the rate of ten cents (\$.10) for each mile in going to and returning from each meeting. *Such expenses shall be paid by the treasurer of the school district in the usual manner out of the funds of the district, upon presentation of an itemized, verified statement of such expenses:* Provided, That advanced payments may be made by the proper officers of the district upon presentation of estimated expenses to be incurred. *to be followed by a final itemized, verified statement of such expenses actually incurred upon return from such conventions, and a refund be made to the district of such funds remaining or an additional payment to be made to meet the verified expenses actually incurred.* (Emphasis added.)

"Each member of an intermediate unit board of directors shall be reimbursed by the intermediate unit for all expenses actually and necessarily incurred in attend-

ing meetings, conventions and other functions of and on behalf of the intermediate unit."

Specifically, in some school districts the words "upon the presentation of an itemized, verified statement of such expenses" have not been construed to mean that documentation of such expenses is required, but merely a list of expenditures must be submitted.

Please be advised that it is our opinion that the above-quoted sections of the School Code do require documentation of expenditures and that the "verification" called for by the statute should be supplied by such things as receipted hotel bills, copies of bus, taxi, airplane tickets and the like, turnpike or parking lot receipts, or affidavits where other verification is not readily available. We note that is standard procedure for verification of expenses and we have no reason to believe that the Legislature intended anything less in the above-quoted sections of the School Code. See *Rules and Regulations Governing the Preparation and Submission of Travel and Subsistence Accounts Payable From Commonwealth Funds*, Executive Board, March 26, 1969, as amended.

Sincerely yours,
MARK P. WIDOFF
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 40

Article VIII, §11 of the Pennsylvania Constitution—Administrative Code §2003(b), 71 P.S. §513(b)—Administrative Code 507(c)(3), 71 P.S. §187(c)(3)—Motor License Fund.

1. The Department of Transportation has the statutory authority to lease an aircraft in conjunction with the performance of its highway construction and maintenance functions and the Department, under Article VIII, §11 of the Pennsylvania Constitution, can expend Motor License Fund monies as part of the "cost and expenses incident thereto" in performance of such function.
2. The Department may incidentally allow its own personnel or other departments to use the aircraft on non-highway matters so long as the Department charges a fair market rental value of such use in order to reduce the charge to the Motor License Fund.

Harrisburg, Pa.
June 1, 1973

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

Receipt is acknowledged of your request for our opinion regarding the authority of your Department to lease an aircraft to

perform its statutory duties of constructing, reconstructing, maintaining and repairing public highways and projects and air navigation facilities. It is our opinion and you are hereby advised that the Department has statutory authority to lease an aircraft in conjunction with the performance of the aforementioned duties and that the Department, under Article VIII, §11 of the Pennsylvania Constitution, can expend Motor License Fund monies as part of the "cost and expenses incident thereto" in performance of such functions.

The Department of Transportation intends to lease an aircraft for the use of Department officials and employees engaged in State highway work in order to expedite and more efficiently carry out the work of the Department as it relates to highway construction and maintenance. Bids for the lease of the aircraft have been solicited from three companies engaged in this business. The bid has not yet been awarded pending this request for legal advice in order that all requisite statutory and constitutional provisions have been followed. The Department also advises that there will be time when the leased aircraft will not be needed for the use of officials or employees on highway business. In order to mitigate the rental costs to the Motor License Fund, the Department proposes to permit its use for non-highway purposes by officials or employees of the Department and charge the organizational budget of such official or employee the fair rental value thereof. Furthermore, if the plane is not needed by Department employees for highway business or for other purposes connected with the business of the Department, the Department suggests that it might be used by other departments charging them the fair market rental value for such use.

Section 2003(b) of the Administrative Code, 71 P.S. §513(b) expressly authorizes the Department of Transportation to purchase aircraft "... to expedite and more efficiently to carry out the work of the department..." Furthermore, Section 507(c) (3) of the Administrative Code, 71 P.S. §187(c) (3) enables the Department to "[r]ent machinery and other equipment and devices..." for the purpose of performing its statutory function. Given the general understanding that the terms "machinery" and "equipment" includes vehicles used for transportation [See, *Franz v. Sun Indemnity Co. of N.Y.*, 7 So. 2d 636, 641, 644 (La. App. 1942); *Dependent School District No. 13 v. Williamson*, 325 P. 2d 1045 (Okla. 1958); *I.C.C. v. Mitchell Bros. Truck Lines*, 250 F. Supp. 636, 638 (D. Ore. 1966); *Dorsett v. State Dept. of Highways*, 144 Okla. 33, 289 P. 298, 302 (1930)], it is our conclusion that Sections 507(c) (3) and 2003(b) of the Administrative Code, 71 P.S. §§187(c) (3) and 513(b) authorize the Department of Transportation to rent aircraft for the purpose of carrying out its statutory function.

With reference to the usage of monies out of the Motor License Fund in order to defray the cost of rental, it is noted that

such monies will be expended for use of the aircraft by the Department only in conjunction with the construction, reconstruction, maintenance and repair of and safety on public highways, bridges and air navigation facilities. In view of this limitation, it is our conclusion that this expenditure of Motor License Fund monies is constitutionally appropriate as "...costs and expenses incident thereto..." within the meaning of Article VIII, Section 11 of the Pennsylvania Constitution.

The only remaining question is whether or not the Department can permit the usage of the aircraft by its own personnel for non-highway maintenance purposes and other administrative departments, boards and commissions where such bodies reimburses the Department at the fair market rental value with the money being returned to the Motor License Fund. Just as the Department has authority to rent an airplane under Section 507 (c)(3) of the Administrative Code, 71 P.S. §187(c)(3), so also other administrative bodies may rent the usage of the aircraft from the Department. Furthermore, the departments "...shall, as far as practical, cooperate with each other in the use of... equipment." Section 501 of the Administrative Code, 71 P.S. §181. Since the Department has the power to lease the aircraft for highway purposes, it has the incidental power to reduce its ultimate costs by receiving compensation for the use of the aircraft for other Commonwealth purposes.

In summation, it is concluded that 1) the Department may lease an aircraft from the lowest responsible bidder; 2) the Department may expend Motor License Funds for leasing an aircraft which is used by its employees in conjunction with highway construction and maintenance; and 3) the Department may incidentally allow its own personnel or other departments to use the aircraft on non-highway matters so long as the Department charges a fair market rental value of such use in order to reduce the charge to the Motor License Fund.

Very truly yours,
RICHARD J. ORLOSKI
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 41

State Athletic Commission—Female boxers and wrestlers—Equal Rights Amendment

1. Section 310 of the State Athletic Code, 4 P.S. §30.310, which bars females from being licensed as boxers or wrestlers, has been repealed by Article I, Section 27 of the Pennsylvania Constitution providing that equality of rights under the law shall not be denied or abridged in the Commonwealth because of the sex of the individual.

Harrisburg, Pa.
June 8, 1973

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

Dear Secretary Tucker:

You have requested our opinion with respect to the apparent conflict between Section 310 of the Pennsylvania Athletic Code, Act of August 31, 1955, P.L. 531, 4 P.S. §30.310 and the Pennsylvania Equal Rights Amendment, Pa. Const., Art. I, §27. It is our belief that this statute is unconstitutional and you are hereby advised not to enforce it.

Section 310 of the Athletic Code, 4 P.S. §30.310 states:

"No female shall be licensed as a boxer or wrestler."

Article I, §27 of the Pennsylvania Constitution, which was adopted on May 18, 1971, 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."¹

Unfortunately, there is no legislative history to the amendment to guide us in determining the Legislature's intent in passing this amendment.² We note, however, that the Federal Equal Rights Amendment was ratified by both Houses of the Legislature by overwhelming majorities.³

The Federal Amendment reads in pertinent part:

"Section I. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

Since the wording of this amendment is virtually identical to the Commonwealth's amendment, we turn to the legislative his-

1. This amendment is self-executing. See generally, *Erdman v. Mitchell*, 207 Pa. 79, 56 A. 327 (1903), holding to be self-executing Section 25 of Article I, a section more general and far-reaching than Section 27. See also *Corso v. Corso*, 120 P.L.J. 183 (1972); *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commonwealth Ct. 231 (1973).

2. For the few instances in which the State Courts have faced the question of the construction of this amendment see *Corso v. Corso*, 120 P.L.J. 183 (1972); *Kehl v. Kehl*, 120 P.L.J. 296 (1972); *Hopkins v. Blanco, et al.*, 224 Pa. Superior Ct. 116 (1973). See also *1971 Opinions of the Attorney General of Pennsylvania*, Nos. 69 and 71; Opinion No. 150, 2 Pa. Bulletin 1916 (1972).

See also *Frontiero v. Richardson*, 411 U.S. 677 (1973) holding as inherently suspect statutory classifications based on sex. In a concurring opinion Justice Powell stated that "The Equal Rights Amendment, which if adopted will resolve the substance of this precise question...." 411 U.S. at 692. Thus, it is apparent that enactment of the ERA involves, at the minimum, the strictest test of judicial scrutiny.

3. The House of Representatives ratified the amendment by a vote of 179-2 on May 2, 1972, and the Senate by a vote of 43-3 on September 20, 1972.

tory of the Federal Amendment in the United States Congress for some explanation of the meaning of both amendments.

Senate Report No. 92-689, 92nd Congress, Second Session, submitted for the majority of the Committee by Senator Birch Bayh, discusses in some detail the intended effect of the Federal Equal Rights Amendment:

"The general principles on which the Equal Rights Amendment rests are simple and well understood. Essentially, the Amendment requires that the Federal Government and all state and local governments treat each person, male and female, as an individual.

"The Equal Rights Amendment...embodies a moral value judgment that a legal right or obligation should not depend upon sex but upon other factors.... This judgment is rooted in the basic concern of society with the individual to develop his own potentiality.

"...The circumstance, that in our present society members of one sex are more likely to be engaged in a particular type of activity than members of the other sex, does not authorize the Government to fix legal rights or obligations on the basis of membership in one sex. The law may operate by grouping individuals in terms of existing characteristics or functions, but not through a vast over-classification by sex."

It is also apparent from a review of the extensive testimony before the Senate Judiciary Committee that most individuals who testified acknowledged that most statutory restraints on women were both archaic and unnecessary.⁴

One of those who testified was Professor Thomas I. Emerson who outlined the conceptual framework of equal rights as a constitutional theory. He declared:

"The basic premise of the Equal Rights Amendment is that sex should not be a factor in determining the legal rights of women, or of men.... Sex is an inadmissible category by which to determine the right to a minimum wage, the custody of children, the obligation to refrain from taking the life of another, and so on.... The fundamental legal principle underlying the Equal Rights Amendment, then, is that the law must deal with the individual attributes of a particular person, not with a vast over-classification based upon the irrelevant factors of sex."⁵

In sum, it is Emerson's position that, "So long as the law deals only with a characteristic found in all (or some) women but no

4. See *Hearings on S.J. Res. 61 #S.J. 231 Before The Senate Comm. on The Judiciary*, 91st Cong., Second Session (1970).

5. 116 Cong. Rec. §17646 (daily ed. Oct. 9, 1970).

men, or in all (or some) men, but *no* women, it does not ignore individual characteristics found in both sexes in favor of an average based on one sex.”⁶

Turning to the State Athletic Commission, we note that there are sufficient standards to guide this body in issuing licenses to boxers or wrestlers, irrespective of sex. 4 P.S. §30.311 requires all applicants to establish that they are:

“(a) of good moral character; (b) of good reputation; (c) physically fit and mentally sound; (d) skilled in [his] profession; (e) of requisite age and experience; and (f) not addicted to the intemperate use of alcohol or to the use of narcotic drugs.”

Coupled with this provision, are additional powers given to the Commission to regulate the conduct of matches or exhibitions, the age of participants and spectators, and the weights, classes, and rules of each sport.⁷ There is also a provision of the Code requiring a physician to be in attendance at every boxing or wrestling contest.⁸

Thus, a summary review of the legislation regulating professional and amateur boxing and wrestling indicates that there are adequate safeguards to protect the safety and well-being of all licensees. The proposition that Section 310 of the State Athletic Code was intended to protect women is, accordingly, not a viable one.

Apart from the above considerations of this question, we also recognize the increased sensitivity of our society to sexual discrimination and the debunking of myths concerning feminine physical capabilities and moral sensitivities. To illustrate, in *Pittsburgh Press Employment Advertising Discrimination Appeal*, 4 Pa. Commonwealth Ct., 448, 462 (1972) the Court wrote in pertinent part:

“To anyone who ever viewed women participants in a roller derby, the argument that all women are the weaker sex, desirous of only the more genteel work, carries little weight. The success of women jockeys is further evidence of which we can take notice. It is no longer possible to state that all women desire, or have an “interest” in, any one type of classification of work. Some women have the desire, ability, and stamina to do any work that men can do.”

Apparently, it was upon the earlier perceptions of a women's role in society that Section 310 of the Athletic Code was enacted—

6. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 893 (1971).

7. See generally 4 P.S. §§30.201—30.213; 4 P.S. §§30.250—30.256.

8. 4 P.S. §30.204.

ed. While there is no available legislative history for this Section, the rationale for it as deduced from judicial interpretations of similarly constructed statutes, would be to protect the health and safety of women who, as the "weaker sex", might be more readily injured than men participating in this same type of contact sport. Modern medical science, however, has disproved this fiction of feminine weakness and shown that women are no more likely than men to be injured while wrestling or boxing. The Chairman of the Commission on Athletic Medicine for the Commission of Athletic Medicine of the Pennsylvania Medical Society has written:

"... There is no physiological reason why women cannot or should not participate in contact sports, I would assume that laws barring women from certain pursuits were not based on existing medical evidence, but rather were based on society's perception of male and female roles...."⁹

In view of the foregoing, it is our opinion, and you are accordingly advised, that Section 310 of the State Athletic Code has been repealed by Art. I, §27 of the Pennsylvania Constitution so that females may be licensed as boxers and wrestlers in the Commonwealth.

Sincerely,
EDWARD I. STECKEL
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 42

Civil Service—"Bumping" rights of furloughed civil service employees

1. Section 802 of the Civil Service Act, 71 P.S. §741.802 does not provide "bumping" rights to furloughed employees.
2. Section 802 provides a furloughed employee with a right of return to a previously held vacant position or to any vacant position in the same or lower grade if he or she meets the minimum qualifications for the position.
3. If a furloughed employee cannot, upon furlough, exercise a right of return, he or she then has a one-year preference for re-employment in the same class of position in the agency in which he or she formerly worked.
4. In addition to a preference, a furloughed employee who cannot, upon furlough, exercise a right of return, is eligible for appointment to a position of a similar class in other agencies.

9. See attached letter from William C. Grasley, M.D. to Barton Isenberg, Deputy Attorney General, July 13, 1972, on file in Pennsylvania Department of Justice.

Harrisburg, Pa.
June 15, 1973

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

Dear Secretary Smith:

You have asked whether Section 802 of the Civil Service Act of 1941, August 5, P.L. 752 Art. VIII, as amended, §802 (71 P.S. §741.802) provides for "bumping" rights for employes who have been furloughed because of a reduction in the work force of a classified service. "Bumping" is the right of an employe to dislodge employes of a lower civil service status and assume the position of the dislodged employe.

The relevant portion of Section 802 reads as follows:

"A furloughed employe shall have the right of return to any class and civil service status which he previously held, provided such class is contained in the current classification plan of the agency; or to any class and civil service status in the same or lower grade, provided that he meets the minimum qualifications given in the classification plan of the agency. [Provided that in both instances there is a vacancy with the same appointing authority.] The appointing authority shall promptly report to the director the names of employes furloughed, together with the date the furlough of each is effective and the character of his service. Under the rules a regular employe furloughed shall for a period of one year be given preference for re-employment in the same class of position in the department from which he was furloughed and shall be eligible for appointment to a position of a similar class in other agencies under this act, provided that in case of a promotion of another employe such preference shall not be effective if it necessitates furloughing such other employe." As amended 1963, Aug. 27, P.L. 1257, §18.

Since 1951, when the bracketed words were removed by the Legislature (Act No. 428, September 29, 1951, P.L. 1636), the Civil Service Commission has never interpreted the above statute to include "bumping." Since that time, the Legislature has had an opportunity to amend the Civil Service Act and has not seen fit to clarify the present language so as to provide for "bumping."¹ In light of the fact that the introduction of "bumping" into the furlough procedure of the Civil Service Commis-

1. It should be noted also that the title to Act 428 in no way suggests that "bumping" was to be authorized. It would appear that such a significant change would have been included in the title if the Legislature had, in fact, intended to authorize "bumping."

sion would have dramatic consequences, dislocating large numbers of otherwise unaffected persons, it is our opinion that no such procedure should be deduced from the statute if the words do not clearly provide for such a procedure. As we analyze the statute below, we do not think the words clearly so provide:

I. Under our analysis, the statute provides a furloughed employe with a right to return to a class or status previously held by him provided the formerly held position still exists. In addition, the furloughed employe has a right to return to *any* class or status in the same or lower grade provided he meets the minimum qualifications for the position. The right of return can be exercised only at the time of furlough. If there are no vacancies available at that point in time the right of return cannot be exercised and it is forever lost. The furloughed employe must then look to the other sections of this statute for alternative placement.

The effect of the 1951 deletion, referred to above, was to provide for greater access by furloughed employes to vacant positions in agencies *other* than the one from which he was furloughed, *not* to eliminate the need that there be a vacancy in whatever position he might be placed. The statute, as we construe it, now provides for a right of return to the same or lower classification as described above, in the classified service anywhere in state government.

Example: If an Administrative Assistant IV is furloughed, and he or she was formerly a Steno III, then he or she may return to any existing vacant Steno III position in the furloughing agency or any other agency. In addition, the furloughed Administrative Assistant IV can return to a vacant Administrative Assistant III, II or I position in the furloughing agency or in another agency. Furthermore, the furloughed Administrative Assistant IV can move to any vacant Clerk III, II or I positions in the furloughing agency or any agency because he or she will meet the minimum qualifications for the position.

II. If a furloughed employe is unable to exercise his right to return he shall be given a one-year preference for the same class of position in the department from which he was furloughed. A preference is the right to be selected for a position from among several applicants of equal qualification. The preference given by the statute is inoperative if its application would necessitate the furloughing of another employe who is being promoted to the vacancy.

Example: If a Steno IV is furloughed and at the time of furlough there is no vacancy in a position of the same or lower grade or in a position he has previously held, he cannot exercise his right to return. Hence, at any time subsequent to his furlough should a vacancy occur, he has the right to apply for any vacant Steno IV, III, II or I position in the agency from which

he was furloughed. If he is equally qualified with the other applicants, he will be granted a preference and the position given to him. The furloughed employee would not be given the position if a current employee faces furlough if he does not get the promotion to the vacant Steno position.

III. The statute further provides that a furloughed employee is eligible for appointment to a similar class in other agencies. Eligible for appointment means that the furloughed employee has the right to be considered along with all other applicants for a position, without taking the civil service examination for the similar position.

Example: A furloughed Steno IV can apply for a Steno IV, III, II or I position in other agencies and have his name placed automatically on the eligibility list with all other applicants.

Accordingly, we are directing the Civil Service Commission, by copy of this opinion, to promulgate appropriate regulations so as to provide for furlough rights under Section 802 of the Civil Service Act in accordance with the analysis contained above.

Very truly yours,
H. MARSHALL JARRETT
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 43

Unemployment Compensation Law—Section 1001—Redevelopment authorities—Employees covered

1. For the purpose of the Unemployment Compensation Law, Act of September 27, 1971 (No. 108) (43 P.S. §891, *et seq.*), a redevelopment authority is a State agency.
2. As employees of a State agency, redevelopment authority employees are provided with coverage under Section 1001 of the Unemployment Compensation Law.

Harrisburg, Pa.
June 15, 1973

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

Dear Secretary Smith:

You have requested an opinion as to whether employees of redevelopment authorities may be deemed State employees, and receive unemployment coverage, under amendments to the Unemployment Compensation Law, Act of September 27, 1971 (No. 108) (43 P.S. §891, *et seq.*). You are advised that redevelopment authorities are included within the scope of the aforesaid

amendments, and, therefore, employes of redevelopment authorities are State employes for purposes of the Unemployment Compensation Law.

Section 1001 of the Unemployment Compensation Law (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.”

Although neither practice nor The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended (71 P.S. §51 *et seq.*), suggest that redevelopment authorities are agencies or authorities of the Commonwealth's Executive Department, Section 1001 speaks in unusually broad terms of agencies and authorities. There is no reason to strictly construe the section so as to include within its purview only the agencies and authorities of The Administrative Code. Statutory Construction Act of 1972, Act of December 6, 1972, §1928(c) (No. 290). The Attorney General has heretofore broadly construed the new section in designating employment at the Pennsylvania State University as state employment. Official Attorney General's Opinion No. 132, 2 Pa. B. 1379 (1972). *See also*, Official Attorney General's Opinion No. 120, 2 Pa. B. 872 (1972).

Section 9 of the Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, §9, as amended, (35 P.S. §1709) describes a redevelopment authority as, “...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 purposes and provisions of this act....” This provision constitutes a legislative determination that, for at least some purposes, a redevelopment authority is an agency of the Commonwealth. *See, Schwartz v. Urban Redevelopment Authority of Pittsburgh*, 411 Pa. 530, 192 A. 371 (1963) (redevelopment authority is an agency of the Commonwealth, and stands in a fiduciary relationship to the public and to taxpayers). In addition, the Act of July 14, 1970, §1 (No. 165), as amended (72 P.S. §4051) which authorizes the removal of limits imposed upon rates of interest and interest costs permitted to be paid upon bonds, obligations and indebtedness, “...issued by the Commonwealth or its agencies or instrumentalities or authorities, and by local political subdivisions or their agencies or authorities...,” applies expressly to bonds, obligations and indebtedness of re-

development authorities. (Emphasis added.) Since redevelopment authorities are, by statute (35 P.S. §1704(a)) not instrumentalities of local political subdivisions, this act suggests a definition of Commonwealth agencies or instrumentalities or authorities which includes redevelopment authorities.

A further indication of the "agency" status of Pennsylvania redevelopment authorities is their receipt from the Commonwealth over the past several years of the bulk of the local share contribution to redevelopment projects. In addition, insofar as redevelopment authorities currently receive operating funds almost entirely from Federal and state governments, any legislative intent to avoid burdening municipalities with contributions under the Unemployment Compensation Law would not be frustrated by including redevelopment authorities within the scope of the aforesaid amendments.

The Redevelopment Cooperation Law, Act of May 24, 1945, P.L. 982, as amended (35 P.S. §1741, *et seq.*), provides, at 35 P.S. §1746.1, that the Commonwealth may designate,

"...a redevelopment authority as its agent within the authority's field of operation to perform or to administer any specified program which the Commonwealth... is authorized by law to do... It is the purpose and intent of this section of the act to authorize the Commonwealth...to do any and all things necessary or desirable to secure the financial aid or cooperation of the Federal government in any of [its] operations."

This section should not be read to mean that only redevelopment authorities so designated are agencies within the scope of Section 1001. Rather, the section indicates that the Commonwealth may establish a closer than usual relationship with redevelopment authorities for specified purposes. The Redevelopment Cooperation Law is "...in addition and supplemental to the powers conferred by any other law." 35 P.S. §1747. The Urban Redevelopment Law, and not the Redevelopment Cooperation Law, should provide the basis for determining the agency status of redevelopment authorities.

Finally, it should be noted that the primary purpose of the Unemployment Compensation laws is to insure employes against loss of earnings due to termination of their employment caused by circumstances beyond the employes' control. The Legislature has determined that such insurance will preserve for a period of time buying power of the unemployed and thereby forestall deep economic recession and, at the same time, will enable unemployed persons to retain a flow of income to make it easier for such persons to obtain new employment. The Legislature has also determined under §1001 of the Unemployment Compensation Law (43 P.S. §891) that the same protections to the economy and employes should be extended to employes of the State and its agencies. The reasons for such an extension are readily under-

standable. The State Government and its agencies are the single largest employers in the Commonwealth. In a period of changing public programs and State dependency on the vagaries of Federal spending programs, the risks of unemployment due to circumstances beyond the control of the public employe are substantial and the concomitant risks of damage to the economy of the Commonwealth caused by public employe lay-offs have increased. In determining that employes of redevelopment authorities are covered by the Unemployment Compensation Law, the purposes of the Legislature are served and the problems caused by loss of employment by public officials are addressed. Moreover, in view of the fact that redevelopment authorities receive most, if not all, of their capital and operating funds from State and Federal sources and their own project operations, the costs of unemployment compensation will not be borne by local political subdivisions.

Taking all these factors into account, it is our opinion, and you are so advised, that employes of redevelopment authorities are to be deemed State employes within the meaning of Section 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

ISRAEL PACKEL

Attorney General

OFFICIAL OPINION No. 44

Uniform Facsimile Signature of Public Officials Act—Applicability to Industrial and Commercial Development Authorities.

1. Industrial and commercial development authorities formed under the Industrial and Commercial Development Authority Law of August 23, 1967, P.L. 251, as amended, 73 P.S. §371 *et seq.*, do not have to comply with the Uniform Facsimile Signature of Public Officials Act of July 25, 1961, P.L. 849, as amended, 65 P.S. §301 *et seq.*
2. The duties of the Secretary of the Commonwealth under the Uniform Facsimile Signature of Public Officials Act are simply to accept for filing those certifications sent to the Secretary by those authorized to do so.

Harrisburg, Pa.

June 19, 1973

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

Dear Secretary Tucker:

The question has arisen regarding your duties under the Uniform Facsimile Signature of Public Officials Act of July 25, 1961,

P.L. 849, as amended, 65 P.S. §301 *et seq.* (hereinafter, "Uniform Act"). Section 2 of this Act, 65 P.S. §302 provides:

of Commonwealth his manual signature certified by
"Any authorized officer, after filing with the Secretary him under oath, may execute or cause to be executed with a facsimile signature in lieu of his manual signature:

"(a) Any public security, provided that at least one signature required or permitted to be placed thereon shall be manually subscribed, and

"(b) Any instrument of payment.

"Upon compliance with this Act by the authorized officer, this facsimile signature has the same legal effect as his manual signature."

It is our opinion, and you are so advised, that your duties under this Act are simply to accept for filing those certifications sent to you by those authorized to do so under the Uniform Act.

The question has been further presented as to whether those bodies which are elsewhere authorized to use facsimile signatures on bonds are required to file with you under the Uniform Act.

Specifically, the question has been raised with respect to industrial and commercial development authorities formed under the Industrial and Commercial Development Authority Law of August 23, 1967, P.L. 251, as amended, 73 P.S. §371 *et seq.* (hereinafter, "Authority Law"). Section 7(b) of the Authority Law, 73 P.S. §377(b), states that the board of any authority shall authorize the issuance of bonds by resolution and gives the board wide discretion in the types of bonds which may be issued. It then provides:

"The bonds shall be signed by or shall bear the facsimile signature of such officers as the authority shall determine, and coupon bonds shall have attached thereto interest coupons bearing the facsimile signature of the treasurer of the authority, all as may be prescribed in such resolution or resolutions. Any such bonds may be issued and delivered, notwithstanding that one or more of the officers signing such bonds or the treasurer whose facsimile signature shall be upon the coupon, shall have ceased to be such officer or officers at the time when such bonds shall actually be delivered."

The above specific provision in the Authority Law is inclusive and self-contained and does not require such authorities additionally to comply with the Uniform Act before they may use facsimile signatures on their bonds.

In our opinion, the purpose of the Uniform Act was simply to clarify or affirm the common law power of public officials to use facsimile signatures, 80 C.J.S., Signatures, §7. ~~The~~ The filing re-

quirement is only applicable where facsimile signatures are not otherwise authorized by specific statutes.

Accordingly, where, as in the case of the Authority Law, the authorized officers are specifically given that authority, we perceive no legislative requirement for the additional compliance with the Uniform Act.

Sincerely,

GERALD GORNISH

Deputy Attorney General

ISRAEL PACKEL

Attorney General

OFFICIAL OPINION No. 45

Act 117 of 1972—Pennsylvania Turnpike Commission—Rights-of-way.

1. Realty owned or leased by the Turnpike Commission, the State Public School Building Authority and the General State Authority shall be included in the inventory of Commonwealth property under 71 P.S. §1661.11.
2. Land designated for highway use which is owned by the Turnpike Commission either in fee simple or by easement shall not be inventoried under Act 117 of 1972.
3. The Turnpike Commission's judgment on real estate classification as rights-of-way or vacant surplus land is conclusive for purposes of conducting the inventory under Act 117 of 1972.

Harrisburg, Pa.
July 2, 1973

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

Dear Secretary Hilton:

Receipt is acknowledged of your request for our opinion regarding the inclusion of real property owned by the Turnpike Commission, the State Public School Building Authority, and the General State Authority in the inventory of Commonwealth property pursuant to 71 P.S. §1661.11. It is our opinion and you are hereby advised that reality owned or leased by the Turnpike Commission, the State Public School Building Authority, and the General State Authority shall be included in the inventory with the exception of rights-of-way owned by the Commission, either by fee simple or easement.

71 P.S. §1661.11 designates the nature of the property to be inventoried by the Department of Property and Supplies:

"The Department of Property and Supplies shall prepare a complete inventory of all State-owned or State-leased real property (other than highway rights-of-way)"

As indicated in the title of the act, the purpose of conducting the inventory is to enable the Legislature to consider the feasibility of a payment-in-lieu-of taxes program for the benefit of local units of government which lose tax revenue because of State-owned tax-exempt property. The accuracy of including or excluding Commonwealth property becomes highly relevant for determining the amount of a grant which local units of government might receive based upon information supplied in the inventory. Consequently, where there is presented a question of exclusion or inclusion of specific portions of properties, the statutory scheme indicates a preference for inclusion rather than exclusion so the Legislature can be guided by such information to the fullest degree possible in considering the desirability of a payment-in-lieu-of-taxes program for the benefit of local units of government.

With this understanding of the purpose for conducting the inventory of "...all State-owned or State-leased real property..." the question of including or excluding the realty of the Turnpike Commission, the State Public School Building Authority, and the General State Authority can be addressed. The Turnpike Commission,¹ the State Public School Building Authority,² and the General State Authority³ are all agencies of the Commonwealth and perform vital governmental functions. Given their status as agencies of Commonwealth performing statewide governmental functions, and given the general mandate to include all State-owned or State-leased real property, it is concluded that realty owned or leased by the Turnpike Commission, the State Public School Building Authority, and the General State Authority shall be inventoried under 71 P.S. §1661.11. It is noted, however, that caution should be exercised to prevent inventorying of property twice in instances where the General State Authority owns buildings which it leases to other State agencies.

71 P.S. §1661.11 affirmatively excludes "highway rights-of-way" from the inventory. Though the term "rights-of-way" technically means an easement or servitude of passage, in ordinary parlance, it refers to the strip of land over which the road way runs as a servitude of passage. *Brightwell v. International Great Northern Railroad Co.*, 41 S.W. 2d 319, 322 (Tex. 1931); *Knox v. Louisiana Railway and Navigation Co.*, 157 La. 602, 102 So. 685 (1926). Given this definition of "rights-of-way" as the land itself, it is concluded that the Legislature intended that all highways either in fee simple or by easement, be excluded from the Commonwealth's real property inventory under 71 P.S. § 1661.11.

1. *Pennsylvania Turnpike Commission v. Smith*, 350 Pa. 355 (1944)

2. *Kline v. State Public School Building Authority*, 78 Dauph. 121 (1962)

3. *Marianelli v. General State Authority*, 354 Pa. 515 (1946)

The only remaining question concerns the proper manner of classifying realty owned by the Commission. The Commission has placed its real property in two categories: 1) rights-of-way; and 2) vacant surplus land. Question is raised concerning the scope of the Department's statutory obligation to determine whether or not such categories actually reflect actual or potential usage of the land.

Under 71 P.S. §1661.11, the Department is charged with the duty of inventorying all real estate except the highway rights-of-way. The Turnpike Commission possesses the statutory authority for determining highway routes, relocations, reconstruction, and restoration. 36 P.S. §§652d, 652.6, 653e, 655.5, 658.6, 660.6, 666.6, 667.6, 668.6, and 669.9. Given such discretionary authority to determine road situs, both actual and anticipated, it is concluded that the Commission's judgment on real estate classification as rights-of-way or vacant surplus land is conclusive for purposes of conducting the inventory under 71 P.S. §1661.11. It is noted that the Turnpike Commission owns buildings and structures which are technically part of the highway rights-of-way but are, in fact, the situs of such physical edifices. Such realty cannot by any definition fall within the category of highway rights-of-way and the Department should obtain from the Turnpike Commission descriptions of all such buildings and structures in order to include such edifices in the inventory in order to accurately reflect ownership on the part of the Commonwealth of such realty.

In summation, it is concluded that 1) the realty of the Turnpike Commission, the State Public School Building Authority, and the General State Authority be inventoried; 2) highway rights-of-way, either in fee simple or by easement, are expressly excluded under the term of 71 P.S. §1661.11; and 3) the Department inventory the Turnpike Commission's real property as categorized by the Commission with the exception of buildings and structures owned by the Commission which must be inventoried.

Sincerely yours,
RICHARD J. ORLOSKI
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 46

Taxation—Tentative tax returns—Penalties—Tax Reform Code of 1971

1. Opinion of March 17, 1971 (unpublished) affirmed.
2. The Auditor General and Department of Revenue and the Board of Finance and Revenue may, consistently with the Opinion of March 17, 1971, remit penalties assessed under Act No. 69 of 1970, 72 P.S. §3385, for

failure to compute tentative tax returns due under the Tax Reform Code of 1971 prior to September 9, 1971 in accordance with Bulletin 73 of the Department of Revenue, where the failure to do so was caused by confusion or lack of knowledge by the taxpayer.

Harrisburg, Pa.
July 3, 1973

Honorable Robert P. Casey
Auditor General
Harrisburg, Pennsylvania
and

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

Dear General Casey and Secretary Kane:

A question has arisen regarding the effect of the opinion of this office of March 17, 1971, on penalties assessed for understatement of tentative tax. In this opinion, a copy of which is attached, Attorney General Creamer advised that the Department of Revenue might properly require taxpayers to compute the 90% tentative tax for 1971 under Act No. 69 of 1970, 72 P.S. §3385, by adding to the 1970 tax base any exemptions or deductions enjoyed in 1970 which were eliminated by the Tax Reform Code of 1971, which has been enacted on March 4, 1971 by Act No. 2 of 1971, 72 P.S. §7101, *et seq.*

Following this opinion, the Department of Revenue issued Bulletin F-73 which was sent to all corporate taxpayers, advising them of this advice and requiring them to disregard the manufacturing exemption and deduction for Pennsylvania corporate taxes paid in 1970 in filing their tentative reports for the year 1971. Most taxpayers complied with this requirement, but many did not, apparently because of the confusion attendant the recent passage of the Tax Reform Code of 1971 and the short time between dissemination of information about this new act by the Department of Revenue and the time for filing the tentative returns.

At the time the opinion was written on March 17, 1971, the Tax Reform Code of 1971 provided in Section 403(b), 72 P.S. §7403(b), that each taxpayer was required on or before April 30, 1971 to transmit an additional tentative report and make payment pursuant to the provisions of Act No. 69 of 1970. Thereafter, on September 9, 1971, by Act No. 105 of 1971, Section 403(b) was amended to read:

"For the purpose of ascertaining the amount of tax payable under this article for the taxable year 1971, and each taxable year thereafter, it shall be the duty of every corporation liable to pay tax under this article, on or before April 30, 1971, and on or before the end of the fourth month after the close of its previous fiscal

year for fiscal year taxpayers, and each year thereafter, to transmit in like form and manner an additional tentative report and make payment pursuant to the provisions of the act of March 16, 1970, P.L. 180: Provided, That in making such report and payment for the calendar year 1971 and each year thereafter and for fiscal years commencing during the calendar year 1971, and each year thereafter the tax base from the immediate prior year, upon which the tentative tax computation is to be made under said act of March 16, 1970 (P.L. 180), shall be computed as if the tax base for such immediate prior year had been determined under the applicable provisions of the act of March 4, 1971 (Act No. 2)."

It is clear from the proviso that the Legislature clarified the Tax Reform Code of 1971 to conform with our opinion of March 17, 1971 construing Act No. 69 of 1970. That Act, 72 P.S. §3385, was also amended on November 12, 1971 by Act No. 142 of 1971 in a manner not pertinent to the question here involved.

The question has now arisen regarding the additional tax or penalty levied by Act No. 69 of 1970 for tentative tax understatement where such understatement was caused by failure of taxpayers to account for the elimination of the manufacturing exemption or to add back certain tax preference items. We note, parenthetically, that the additional tax was held by Attorney General Sennett to be a penalty, and thus strictly construed, by his opinion of May 25, 1970. It has been suggested that if our opinion was correct, then no relief from the penalty may be given either by your departments or by the Board of Finance and Revenue. It has alternatively been suggested that our opinion was incorrect in that it required a legislative act to reach the decision we had made.

Turning to the second of these suggestions, we believe that our opinion of March 17, 1971 was correct. Significantly, the Legislature did not amend the Act which was construed in that opinion (Act No. 69 of 1970), but rather a different Act (Act No. 2 of 1971). This shows that the Legislature was not changing the law, but bringing the Tax Reform Code into harmony with Act No. 69 of 1970 as construed by this office.

If it was unclear from our opinion, it was clear on September 9, 1971 when the Legislature passed Act No. 105 of 1971 that the construction placed on Act No. 69 of 1970 was correct and that taxpayers thereafter were bound to compute their tentative tax "as if the tax base for such immediate prior year had been determined under the applicable provisions of the Act of March 4, 1971 (Act No. 2)." Prior to September 9, 1971, however, the dissemination of information, although conscientiously made by the Department of Revenue may not have reached all taxpayers

and may have confused others, especially those who had already filed their tentative tax returns.

Accordingly, in answer to the first suggestion, since prior to that time there may have been confusion or lack of knowledge by taxpayers, you are hereby advised that we would not deem it a violation of or contrary to the opinion of March 17, 1971 for your departments or the Board of Finance and Revenue to remit the additional tax in cases of confusion or lack of knowledge under the provisions of Sections 503 and 1103 of the Fiscal Code, 72 P.S. §§503, 1103. While our opinion authorized you to require a certain method of filing tentative returns, it did not mean that the good faith, failure of a taxpayer to do so based on mistake or lack of knowledge must inexorably give rise to a penalty for understatement.

I am sending copies of this opinion to the other members of the Board of Finance and Revenue for their information.

Sincerely yours,
GERALD GORNISH
Deputy Attorney General
ISRAEL PACKEL
Attorney General

* * * *

March 17, 1971

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

Dear Secretary Kane:

We have your request to be advised as to whether the removal of certain tax exemptions by the "Tax Reform Code of 1971" is to be considered in determining the base for the tentative tax payment required under Act No. 69, approved March 16, 1970.

A review of the pertinent language in Act No. 69 indicates that the changes in the tax base for 1971 must be considered in determining the amount of the ninety per cent tentative tax for 1971. Act No. 69 provides that the taxpayers "shall pay on account of the tax due for the current year (i.e., 1971) not less than ninety per cent of the amount of said tax (i.e., for 1971)." The foregoing language clearly requires the taxpayer to pay ninety per cent of the 1971 tax as the tentative payment.

The remaining language of Act No. 69 does not effectively change this conclusion. Act No. 69 then states "the said amount (of the tax for 1971) to be computed by applying the current tax rate (for 1971) to ninety per cent of *such* tax base from the

immediate prior year (i.e., 1970) as may be applicable with respect to the tax being reported (for 1971)."

The foregoing language expressly limits the use of the 1970 tax base to that portion which is applicable regarding the 1971 tax. Since the "Tax Reform Code of 1971" eliminated certain exemptions, e.g., the manufacturer's exemption, such an exemption would not be part of the 1970 base applicable to tax year 1971.

Accordingly, you are advised that the Department of Revenue may properly require taxpayers to compute the ninety per cent tentative tax for 1971 under Act No. 69 by using the 1970 tax base without subtracting therefrom any exemptions enjoyed in 1970 which have been eliminated by the "Tax Reform Code of 1971."

Sincerely,
J. SHANE CREAMER
Attorney General

OFFICIAL OPINION No. 47

Human Relations Commission—Sex discrimination—Employment related classified advertising.

1. *Pittsburgh Press Employment Advertising Discrimination Appeal*, 4 Pa. Commonwealth Ct. 448, 287 A. 2d 161 4 FEP Cases 325 (1972), *aff'd* _____ U.S. _____, 93 S. Ct. 2553 (June 21, 1973), is binding precedent for interpretation of the Pennsylvania Human Relations Act, 43 P.S. §951, *et seq.*
2. Segregation by sex of employment related classified advertising is a violation of state law.
3. A newspaper which publishes discriminatory advertising is subject to the same legal sanctions applicable against any other party who violates the Human Relations Act.
4. A newspaper may not limit its legal liability for publishing discriminatory advertisements by prominently displaying on a daily basis a statement disavowing discriminatory intent and informing job seekers that they have a right to non-discriminatory treatment under state, federal and/or local laws.

Harrisburg, Pa.
July 6, 1973

Mr. Homer C. Floyd
Executive Director
Human Relations Commission
Harrisburg, Pennsylvania

Dear Mr. Floyd:

You have requested our opinion as to the legality of the segregation by sex of employment-related classified advertising in newspapers published in Pennsylvania in light of the decision in *Pittsburgh Press Employment Advertising Discrimination Appeal*, 4 Pa. Commonwealth Ct. 448, 287 A. 2d 161, 4 FEP Cases 325 (1972), *petition for allocatur dismissed* (June 21, 1972),

aff'd, sub nom. Pittsburgh Press v. Pittsburgh Human Relations Commission, _____ U.S. _____, 41 L.W. 5055 (June 21, 1973). We have delayed response pending decision in this case by the United States Supreme Court. That decision, affirming the Commonwealth Court, is now before us.

You have asked our opinion on the following matters:

1. What is the applicability of the decision in the *Pittsburgh Press* case to the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 *et seq.*?

2. Is segregation by sex of "Help Wanted" and "Situations Wanted" advertising a violation of state law?

3. Is a newspaper which publishes discriminatory advertisements subject to any legal sanction?

4. May a newspaper limit the legal liability for publishing such discriminatory advertisements by prominently displaying on a daily basis a statement disfavoring discriminatory intent and informing job-seekers that they have a right to non-discriminatory treatment under state, federal, and/or local law?

It is our formal opinion, and you are advised, that the answers to these questions are as follows:

1. The *Pittsburgh Press* case is binding precedent for interpretation of the Pennsylvania Human Relations Act.

2. Segregation by sex of employment-related classified advertising is a violation of state law.

3. A newspaper which publishes discriminatory advertising is subject to the same legal sanctions applicable against any other party who violates the Human Relations Act.

4. A newspaper may not limit its legal liability for publishing discriminatory advertisements by prominently displaying on a daily basis a statement disavowing discriminatory intent and informing job-seekers that they have a right to non-discriminatory treatment under state, federal and/or local laws.

DISCUSSION

I. The Pittsburgh Press case is binding precedent for interpretation of the Pennsylvania Human Relations Act.

The *Pittsburgh Press* case rose out of a challenge by that newspaper of a Pittsburgh Human Relations Commission requiring the paper to cease and desist from maintaining a sex-segregated system of help-wanted advertising, which the Commission found to be violative of the city Human Relations Ordinance (Ordinance No. 75 of 1967, as amended by Ordinance No. 395 of 1969), §8 (j). This order was issued following a public hearing convened as a result of a complaint to the Commission by the National Organization of Women. At the time of the hearing, the *Press* captioned its help-wanted columns "Jobs—Male Interest," "Jobs—Female Interest," and "Male—Female."

The paper also published a disclaimer at the beginning of the male and female want ads, which read as follows:

"Notice to job seekers. Jobs are arranged under male and female classifications for the convenience of our readers. This is done because most jobs generally appeal to more persons of one sex than the other. Various laws and ordinances—local, state and federal, prohibit discrimination in employment because of sex, unless sex is a bona fide occupational requirement. Unless the advertisement itself specifies one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination."

On appeal, the Commission's order was affirmed by the Court of Common Pleas of Allegheny County, 3 FEP Cases 409, 418; 3 EPD ¶8154 (1971), and affirmed again in slightly modified form by the Commonwealth Court, 4 Pa. Commonwealth Ct. 448, 470. Writing for the Court, Judge Kramer observed (4 Pa. Commonwealth Ct. at 463):

"This is not a matter of whether the Pittsburgh Press intentionally conspired with some employer or employers to discriminate against women. What is of importance is that through the use of its arbitrarily selected column headings the Pittsburgh Press "aids" such employers to discriminate. When the Pittsburgh Press arbitrarily arranges and publishes such column headings it is aiding in sex discrimination. The ruling that employment want ad column headings be written asexually is appropriate because it eliminates the difficulties of evaluating sophisticated medical, sociological, and actuarial theories of aggregate differences between the sexes. It is proper because it represents the highest degree of societal commitment to the ideal of legal sexual equality. Perhaps more importantly, asexual employment advertising column headings will aid in guaranteeing women their fundamental right to be hired and judged on the basis of individual characteristics and capabilities."

The Pittsburgh ordinance upon which the *Pittsburgh Press* case was decided reads in pertinent part as follows:

"Section 8. It shall be an unlawful employment practice...except where based upon a bona fide occupational exemption certified by the Commission....:

"(e) For any employer, employment agency or labor organization to publish or circulate or to cause to be published or circulated, any notice or advertisement relating to employment or membership which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth or sex."

“(j) For any person, whether or not an employer, employment agency, or labor organization, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any persons from enforcing or complying with the provision of this ordinance or any rule, regulation or order of the Commission, or any attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice.”

These sections of the Pittsburgh Human Relations Ordinance are substantially identical to Section 5 of the Pennsylvania Human Relations Act; Sections 8(e) and 8(j) of the ordinance being comparable to Sections 5(b)(2) and 5(e), respectively, of the state statute, 3 FEP Cases at 412. In view of the similarity of the ordinance at issue in the *Pittsburgh Press* case to the statute under consideration in this Opinion, you are advised that the Commonwealth Court's decision in *Pittsburgh Press* is binding on the Pennsylvania Human Relations Commission in its enforcement of the state act.

II. Segregation by sex of employment-related classified advertising is a violation of state law.

Section 5(e) of the Pennsylvania Human Relations Act, 43 P.S. §955, prohibits as an unlawful discriminatory practice any action which aids and abets discriminatory practices by an employer, employment agency, or labor organization. Section 5(b)(2) defines as such a practice

“For any employer, employment agency or labor organization...to...

“(2) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification or discrimination based upon race, color, religious creed, ancestry, age, sex or national origin.”

Subsection (g) prohibits the publication by a person seeking employment of an advertisement specifying his or her race, color, religious creed, ancestry, age, sex, or national origin. Thus it is clear that the segregation by sex of the “Help Wanted” and “Situations Wanted” advertising columns in a newspaper is a discriminatory practice under state law. (Sex-segregation of employment-related classified advertising is also illegal under federal law. See 42 U.S.C. §2000(e) *et seq.*, as interpreted by 29 C.F.R. §1604.5 (1972), at 37 Federal Register 6836).

Under these sections it is not segregation by sex alone which is prohibited. Inclusion in integrated columns of advertising which violates §5(b)(2) is also unlawful. Unless sex is a bona fide occupational qualification (BFOQ), advertisements which state

or imply "any preference, limitation, specification or discrimination" are illegal. This includes advertisements which indicate by job title or label that one sex only need apply. For example, advertising for a "salesman," "girl Friday," "counter girl," or "pressman" is discriminatory. (Permissible advertisements for these jobs might read "salesperson," "girl/guy Friday," "counter help," or "press operator.")

Furthermore, the bona fide occupational qualification exemption is exceedingly limited. Federal courts have interpreted this phrase to mean "that all or substantially all women [or men] would be able to perform safely and efficiently the duties of the job involved" (*Weeks v. Southern Bell Telephone and Telegraph Co.*, 408 F. 2d 228, 235 (5th Cir. 1969)); that "discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively" (*Diaz v. Pan American World Airways, Inc.*, 442 F. 2d 385, 388 (5th Cir. 1971)); and that "sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be a basis for the application of the BFOQ" (*Rosenfeld v. Southern Pacific Co.*, 444 F. 2d 1219, 1225 (9th Cir. 1971)).

Guidelines issued by the federal Equal Employment Opportunity Commission prescribes an even narrower range of discrimination justifiable under the BFOQ exemption. See 29 C.F.R. §1604.2 (1972), reported at 37 Federal Register 6836. The term "bona fide occupational qualification" under the Pennsylvania Human Relations Act is intended to be synonymous with, and interpreted in a like manner as, the same term in federal law. *City of Philadelphia v. Pennsylvania Human Relations Commission*, 7 Pa. Commonwealth Ct. 500, 506, 300 A. 2d 97, 101 (1973).

Your own "Guidelines on Discrimination Because of Sex," 1 Pa. Bulletin 707 (Dec. 19, 1970), provide that BFOQ exemptions may only be granted by the Commission on a case-by-case basis. Unless an employer has requested and received your determination that sex is a BFOQ for a particular job, advertising the opening in such a way as to encourage or discourage applicants of only one sex is an unlawful discriminatory practice.

The illegality of sex-segregation of employment-related classified advertising is not mitigated by labels such as "Jobs—Male Interest" and "Jobs—Female Interest." These are just as discriminatory as "Help Wanted—Male" and "Help Wanted—Female." It is the segregation of the columns, and not the captions at their head, that determines illegality.

III. A newspaper which publishes discriminatory advertising is subject to the same legal sanctions applicable against any other party who violates the Human Relations Act.

Section 5(e) of the Pennsylvania Human Relations Act states that it is unlawful discriminatory practice

"For any person, whether or not an employer, employment agency, labor organization or employee, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of this act or any order issuer thereunder, or to attempt, directly or indirectly to commit any act declared by this section to be unlawful discriminatory practice." (Emphasis added.)

A newspaper which publishes advertisements which violate Section 5(b) or Section 5(g) of the Human Relations Act is guilty of aiding and abetting an unlawful discriminatory practice, in violation of Section 5(e). Accordingly, the Commission may deal with such newspapers as it would with any other party found violating the Human Relations Act. If conference and persuasion are not sufficient to make a newspaper change its advertising policies, an order to cease and desist publication of discriminatory advertising may be issued and, if necessary, enforcement by the contempt power of the courts. 43 P.S. §§959-960.

A newspaper should not be found in violation of the Act, however, for its good faith reliance on an advertiser's representation that he is not subject to the Act by reason of the number of his employees or the nature of their work. Exempt advertisers are those excluded from the definition of "employer" in Section 4(b) of the Act, those seeking to employ persons excluded from the definition of "employee" in Section 4(c), or those who have received a BFOQ exemption notice from the Human Relations Commission. Thus, a newspaper may lawfully publish a sex-designated help-wanted advertisement if it has received a written statement by the advertiser that he is exempt from the Act, and stating the specific reason for such exemption. Good faith reliance on such a statement will shield the newspaper from liability if the advertiser is later found to have misrepresented his position regarding coverage under the Act. The newspaper will not, however, be absolved from liability if the advertiser's representations are patently false or if the newspaper had actual knowledge that such representations were false. With regard to the BFOQ exemption, an advertiser's bald statement that the position he seeks to fill falls within the scope of the exemption, absent a showing that such exemption has been granted by the Commission, is inadequate to shield the newspaper from liability. A newspaper may publish an advertisement for a BFOQ position on a sex-designated column *only* if it has received a photocopy of the Commission's notification of exemption for that position.

Newspaper publishers should also be made aware that they may be held liable for discriminatory advertisements published by them in sex-neutral columns if the advertisements were wholly or substantially written by the newspaper's agents or employees. We suggest that you promulgate regulations or guide-

lines regarding permissible and impermissible language for employment-related advertisements in order to clarify the duties of employers, employment agencies, and newspaper in this regard.

It has come to our attention that certain newspapers have already desegregated their "Help Wanted" columns in response to the Supreme Court's decision in *Pittsburgh Press*, but have retained sex-segregated "Situations Wanted" columns. We reiterate that publication of an advertisement by a person seeking employment which specified his or hers race, color, religious creed, ancestry, age, sex or national origin is a violation of Section 5(g) of the Humans Relations Act. A newspaper aids, abets, and, it might be argued, compels a "Situations Wanted" advertiser to violate Section 5(g) by providing only sex-segregated columns for such advertisements. As Mr. Justice Powell, writing for the Supreme Court majority, observed (93 S. Ct. at 2560):

"Nothing in a sex-designated column heading sufficiently dissociates the designation from the want-ads placed beneath it to make the placement severable for First Amendment purposes from the want-ads themselves. The combination, which conveys essentially the same message as an overtly discriminatory want-ad, is in practical effect an integrated commercial statement."

We therefore specifically advise you that sex-segregation of "Situations Wanted" advertising columns is also a violation of law, except where the individual placing the advertisement is seeking employment as a domestic or agricultural worker.

IV. A newspaper may not limit its legal liability for publishing discriminatory advertisements by prominently displaying on a daily basis a statement disavowing discriminatory intent and informing job-seekers that they have a right to non-discriminatory treatment under state, federal and/or local laws.

Daily publication of a statement disavowing discriminatory intent and informing readers that sex discrimination in employment is illegal does not remedy the discrimination inherent in segregated advertising columns. As the Commonwealth Court stated in the *Pittsburgh Press* case (4 Pa. Commonwealth Ct. at 461):

"We have long passed the point in the advancement of civil rights whereby a declaration of intent can be used as a screen or defense for actual discrimination. The "separate but equal" principle is no longer a legitimate argument in civil rights cases. We agree with counsel for the *Pittsburgh Press* when he states. 'The purpose of the statute was to prohibit practices which denied job opportunities to individuals because of sex.' The *Pittsburgh Press* cannot frustrate that purpose by a declaration that column headings are arranged for the reader's convenience and that any recourse to be had by

women lies against those employers who do in fact discriminate.”

So that newspapers may be placed on proper notice, we suggest that the Commission issue a letter to all Pennsylvania newspapers, attaching a copy of this opinion and requesting from each paper a statement as to compliance with the standards contained herein within a specified period of time.

Sincerely,
JENNIFER A. STILLER
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 48

Mentally disabled—Residence for voter registration—Voting

1. A person residing at an institution for the mentally ill or mentally retarded cannot be denied the right to register to vote because of such residency.
2. The mentally retarded or mentally ill cannot be disenfranchised merely because they are undergoing treatment for a mental disability or reside in an institution for the mentally disabled.
3. Denial of an absentee ballot to mentally disabled, institutionalized persons does not prohibit that person from voting at his place of institutional residence.

Harrisburg, Pa.
July 12, 1973

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

Dear Secretary Tucker:

Recent litigation in the Commonwealth of Pennsylvania¹ had led to concern and confusion as to the voting rights of the mentally ill and the mentally retarded who reside in this State. Inquiries from your office and from concerned citizens have focused on two problems:

1. Can a person who is an inmate of an institution for the mentally ill or the mentally retarded claim that institution as his legal residence for purposes of voter registration in the voting district in which that institution is located?

2. Under the Constitution and laws of this Commonwealth, can a mentally ill or a mentally retarded person be denied the right either to register to vote or to vote merely because he or

1. *Commonwealth v. Parkhouse, et al.*, 969 C.D. 1972; *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971).

she is known to be undergoing treatment for a mental disability or is known to be residing in an institution for the treatment of the mentally disabled?

The answer to question #1 is clear. In the recent opinion of the Commonwealth Court in *Commonwealth v. Parkhouse, et al.*, 969 C.D. 1972, the defendants contended that Section 703 of the Pennsylvania Election Code, 25 P.S. §2813, constituted a bar to individuals who were attempting to qualify as registered electors of Montgomery County by claiming Norristown State Hospital as their place of residence. Section 703 provides, in relevant part, as follows:

“For the purpose of registration and voting, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence. . . while kept in any poorhouse or other asylum at public expense.”

Citing *Newport Township Election Contest*, 384 Pa. 474, 121 A. 2d 141 (1956), the court concluded on page 3 of the Opinion that “. . . the defendants should not refuse to open the door of the registration bureau. . . simply because they (the registrants) are currently living at the Norristown State Hospital as patients of said hospital.”

Therefore, it is my opinion, and you are so advised, that no person who resides at an institution for the mentally ill or mentally retarded in the Commonwealth who otherwise meets the residency requirements of Section 704 of the Election Code (25 P.S. §2814) can lawfully be denied the right to register as a qualified elector in the voting district in which the institution is located.

As to question #2, it is my opinion, and you are so advised, that there is no legal basis in this Commonwealth upon which a mentally retarded or mentally ill person can be disenfranchised solely because he or she is undergoing treatment for a mental disability or is known to reside in an institution for the treatment of the mentally disabled.

Article 7, §1 of the Pennsylvania Constitution sets forth the qualifications of electors in Pennsylvania.² Briefly, they are U.S.

2. Article 7, §1—Every citizen, eighteen years of age, possessing the following qualifications, shall be entitled to vote at all elections, subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact. 1. He or she shall have been a citizen of the United States at least one month. 2. He or she shall have resided in the state ninety (90) days immediately preceding the election. 3. He or she shall have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within sixty (60) days preceding the election.

citizenship, Pennsylvania residence, and residency in the election district. Mental health or competency is not a prerequisite to the right to vote. No other provision of the Constitution nor of any state law requires any specified degree of mental health or mental competence as a precondition to the right to vote. The Legislature's silence on this issue may well be an indication of its desire to avoid the inequities, irregularities, and complexities that would surely arise if one attempted to establish arbitrary levels of mental ability or competence below which a person would be disenfranchised. For example, what standard of incompetence is applicable? A person unable to tend to his own business and financial affairs may need a guardian. But that same person may still be quite able to make a considered choice of a candidate.

Nevertheless, it has been argued that the definitional section of the Election Code (25 P.S. §2602(w)(12)) and the section on absentee ballots (25 P.S. §3146.1) express the Legislature's intent in this area. Enacted pursuant to Article 7, §14 of the Constitution³, both of these sections, in identical language, provide the following:

"Provided, however, that the words 'qualified absentee elector' shall in nowise be construed to include persons confined in a . . . mental institution. . . ."

Article XIII, *Voting by Qualified Absentee Electors*, is the title of that section of the Election Code devoted to absentee ballots. Beginning with 25 P.S. §3146.1 through 3146.9, this article contains detailed information on absentee balloting including such things as voter qualifications (3146.1), manner of application (3146.2), date of application (3146.2a), type of envelopes (3146.4), and grounds for challenges (3146.8). These few examples illustrate that absentee voting is a highly regulated process which carefully scrutinizes all attempts to cast an unqualified ballot. These procedures are, of course, necessary to prevent abuses. They do not, however, purport to regulate all voting in Pennsylvania, just the limited right to cast an absentee ballot. Thus, the legislative intention to deny an absentee ballot, which is a qualified right, to all persons confined in mental institutions does not mean that all mentally retarded or mentally ill persons of varying disabilities can be denied the right to vote at the place of their residence. Neither the Constitution nor the Statutes of Pennsylvania provide for such a result. Additionally, the few courts which have considered the issue of mental competency for voting have either dealt with an absentee ballot

3. The Legislature shall, by general law, provide a manner in which and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the State or county of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrences of any election, are unable to attend at their proper polling places because of illness or physical disability, may vote, and for return and canvass of their votes in the election district in which they respectively reside.

situation (*In re 223 Absentee Ballots*, 81 York 137, 431 Pa. 178, 245 A. 2d 265 (1967)), or with a case in which mental competency was not an issue, but which was mentioned in passing by the court without explanation or substantiation. *Thompson v. Ewing*, 1 Brewst. 67 (1861).

It is our suggestion that this opinion be distributed to all local election officials for immediate implementation in an effort to insure that all qualified voters of Pennsylvania have an equal opportunity to cast their ballots in subsequent elections.

Very truly yours,
LARRY B. SELKOWITZ
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 49

Pennsylvania Securities Commission—Security—Whiskey warehouse receipts—Investment contract

1. A whiskey warehouse receipt is a security under the Pennsylvania Securities Act of 1972, 70 P.S. §1-102(t) in that it is an "investment contract" and is "in general, any interest or instrument commonly known as or having the incidence of a 'security.'"
2. Opinion of the Attorney General No. 254 of 1938 superceded.

Harrisburg, Pa.
July 17, 1973

Mr. James P. Breslin
Chairman
Pennsylvania Securities Commission
Harrisburg, Pennsylvania

Dear Mr. Breslin:

The question has arisen whether whiskey warehouse receipts are securities under the Pennsylvania Securities Act of December 5, 1972, 70 P.S. §1-101 *et seq.* You are advised that these receipts are securities under the Act and are therefore subject to its provisions.

A whiskey warehouse receipt is that which is sold to an investor as evidence of ownership of specific casks of grain and malt whiskey lying in bond, most often in Scotland and other foreign countries. Although the brand and age of the whiskey is generally selected by the whiskey broker who sells the receipt, the investor can make a limited selection if he so desires. The investor in the whiskey contemplates that other persons will perform the necessary services that will increase the value of the whiskey and also that they will sell the whiskey at a profit on his behalf. The services provided include whiskey se-

lection, arrangements for warehousing and insurance, and, from time to time, an appraisal of current market conditions.

Section 102(t) of the Pennsylvania Securities Act of 1972, 70 P.S. §1-102(t) provides:

“‘Security’ means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; share of beneficial interest in a business trust; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; *investment contract*; voting trust certificate; certificate of deposit for a security; limited partnership interest; certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease; or, *in general, any interest or instrument commonly known as or having the incidents of a ‘security’ . . .*”
(Emphasis added.)

This definition of security is substantially the same as in Section 2(1) of the Federal Securities Act of 1933, as amended, 15 U.S.C. §77b.

When determining whether an investment is a security, the definition of security should be liberally construed, *Commonwealth v. Yaste*, 166 Pa. Superior Ct. 275, 278 (1950):

“That part of the Securities Act therefore which specifies classes of investments which are within the contemplation of the legislation, is to be liberally construed. And the clear intent of the Act is not to be defeated by a too literal reading of words without regard to their context and the evils which the Act clearly was designed to correct.”

The classical definition of the term “investment contract” is contained in *Securities and Exchange Commission v. W. J. Howey Company*, 328 U.S. 293, 298 (1945): “[A] contract transaction or scheme whereby a person invests money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party.” “Common enterprise” is “[O]ne in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties.” *S.E.C. v. Glenn W. Turner Enterprises, Inc.*, 474 F. 2d 476, 482, n. 7 (9th Cir. 1973). The word “solely” in *Howey* arises from the facts of that case and should not be read as a strict or literal limitation, *S.E.C. v. Glenn W. Turner Enterprises, Inc.*, *supra*, at 481-482.

Whiskey warehouse receipts, as described previously, clearly fulfill all of the above requirements for investment contracts and are therefore securities under the Act. Using similar analysis, at least three courts have come to the same conclusion. *Securities and Exchange Commission v. Lundy Associates*, 362 F. Supp.

226 (D.R.I. 1973); *Securities and Exchange Commission v. Bourbon Sales Corp.*, 47 F. Supp. 70 (W.D. Ken. 1942); *State v. Unger*, 237 Wis. 318, 296 N.W. 629 (1941). As in the Pennsylvania Securities Act, "investment contracts" are included in the definitions of "security" in these jurisdictions.

In addition to the specific interests and instruments enumerated in the definition of "security" in Section 102(t) of the Act, the term includes "in general, any interest or instrument commonly known as or having the incidents of a 'security.'" It can be gleaned from the landmark case of *SEC v. C.M. Joiner Leasing Corporation*, 320 U.S. 344 (1943) that the following elements must be present for an interest or instrument to be classified under the general definition of "security": (a) an investment of money or other property; (b) in return for a property right or interest; (c) when it is assumed that possession or control of the property will be in the hands of others; (d) and that the property will be sold at some point with any profits passing to the investor. The offer and sale of whiskey warehouse receipts which we have outlined above clearly fits each of the elements of an interest or instrument commonly known as a "security" within the meaning of the Pennsylvania Securities Act of 1972.

This office, in Opinion No. 254, 1938 Opinions of the Attorney General, determined that a whiskey certificate was not a "security" within the then definition of the Pennsylvania Securities Act of April 13, 1927, P.L. 273. However, that Act did not include within the definition of "security", "investment contracts" and "instruments having the incidents of a security." As our opinion is predicated on those components of the definition of "security" under the present law, the opinion of 1938 is hereby superseded.

Since it has been said that there is no hard and fast rule by which a determination should be made as to whether a particular instrument or interest is a security, *Commonwealth ex rel. Pennsylvania Securities Commission v. Consumers Research Consultants, Inc.* 414 Pa. 253, 255 (1964), this opinion is limited to the classification of whiskey warehouse receipts as "securities" as opposed to any instrument or interest that may be termed a commodity future. We make this distinction because many commodity futures do not involve investments in a common enterprise or reliance upon the efforts of promoters, employees or any third party. *Securities and Exchange Commission v. Lundy Associates, supra*. We will be happy to address ourselves to the particular facts of any example of such commodity futures that you may care to bring to our attention.

Very truly yours,
GERALD GORNISH
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 49

ADDENDUM

*Pennsylvania Securities Commission—Pennsylvania Liquor Control Board—
Securities—Whiskey warehouse receipts—Distillery bonded warehouse
certificates*

1. Whiskey warehouse receipts are synonymous with distillery bonded warehouse certificates.
2. Both the Liquor Control Board and the Securities Commission can and do regulate the sale of whiskey warehouse receipts in the respective manners provided by law.

Harrisburg, Pa.
August 8, 1973

Mr. James Breslin
Chairman
Pennsylvania Securities Commission
Harrisburg, Pennsylvania
AND

Mr. Gene F. Roscioli
Chairman
Liquor Control Board
Harrisburg, Pennsylvania

Dear Messrs. Breslin and Roscioli:

In our recent Opinion No. 49, we advised the Pennsylvania Securities Commission that whiskey warehouse receipts are "securities" within the definition of the Pennsylvania Securities Act of 1972. A question has now arisen regarding that Opinion in view of the provisions of Article VII of the Liquor Code of April 12, 1951, P.L. 90, as amended, 47 P.S. §7-701 *et seq.*, which we did not refer to in our prior opinion. This section prevents a person from engaging in the sale of "distillery bonded warehouse certificates" without first obtaining a permit. 47 P.S. §7-702. It is our opinion, and you are accordingly advised, that both the Liquor Control Board and the Securities Commission can and do regulate the sale of these certificates in the respective manners provided in the laws by which each agency is governed.

Initially, we note that "whiskey warehouse receipts," as we have defined the term, appear to be virtually synonymous with the definition of "distillery bonded warehouse certificates" in the Liquor Code. See 47 P.S. §1-102. We have further concluded, upon our review of the two acts in question, that the dual regulation does not conflict, but rather complements.

The Liquor Code is concerned with the regulation of the manufacture, possession, consumption, holding in bond and transportation of alcoholic beverages. It is therefore not generally concerned with the nuances of the sale of securities, except to the limited extent that they also involve persons that deal in whiskey warehouse receipts and the sale of whiskey. It is for this

reason that permits are required under the Liquor Code before a person can deal in whiskey warehouse certificates. 47 P.S. §7-702.

The Securities Act, on the other hand, is generally concerned with the registration and sale of all securities and of the persons who offer to sell them in Pennsylvania. The regulation is far more pervasive, stringent and protective of the investor. Both the broker and seller of the securities (70 P.S. §1-301) and the securities themselves (70 P.S. §1-201) must generally be registered or otherwise subjected to review in some way.

Moreover, to a large extent there will be no dual registration of the warehouse receipts which are most prevalent, those involving Scotch whiskey. In order to come within the regulation of the Liquor Code, it appears that the whiskey represented by the whiskey warehouse certificates must be located within the United States. This is evident from the definition of "bonded warehouse":

"...all places and warehouses legally established under the provisions of the acts of Congress and the laws of the government of the United States of America, for the storage, concentration, distribution and holding in bond, (a) of whiskey and any other portable distilled spirits, except ethyl alcohol, when used in Article VII entitled 'Distillery Bonded Warehouse Certificates' and, (b) of alcohol or liquor when otherwise used." 47 P.S. §1-102 (Emphasis supplied.)

Neither Congress nor the Internal Revenue Service has established bonded warehouses in foreign countries. The Internal Revenue Service, by regulation, requires that:

"Scotch, Irish, and Canadian whiskeys, imported in bottles, shall not be released from customs custody for consumption unless the invoice is accompanied by a certificate of origin issued by a duly authorized official of the British, Irish, or Canadian government, certifying (1) that the particular distilled spirits are Scotch, Irish, or Canadian whiskey, as the case may be (2) that the distilled spirits have been manufactured in compliance with the laws of the respective foreign governments regulating the manufacture of whiskey for home consumption, and (3) that the product conforms to the requirements of the Immature Spirits Act of such foreign governments for spirits intended for home consumption." 27 CFR §5.52.

This regulation is not the establishment of a bonded warehouse. Thus these receipts, covering liquor stored outside the United States, would appear to come only under the regulations of the Securities Commission and not the Liquor Control Board because the Securities Act regulates only the securities themselves

and not what they represent. Therefore, it is irrelevant under the Act that the whiskey itself may be located outside the United States.

Finally, to the extent that our opinion requires dual registration, the situation is not unique. See our Opinion No. 99 dated January 31, 1972 holding that the issuance of securities by insurance companies and other companies regulated by the Insurance Department does come within the purview of the Securities Act and that such securities must be registered with the Securities Commission. We urge the Securities Commission and Liquor Control Board to publicize this opinion and cooperate, in accordance with Sections 501 and 502 of the Administrative Code of 1929, 71 P.S. §§181-182, in informing each other about situations requiring registration. To quote from Opinion No. 99, "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."

Sincerely yours,
GERALD GORNISH
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 50

71 P.S. §1661.11—Department of Property and Supplies—Inventory—Unpatented lands—64 P.S. §1 et seq.—Bureau of Land Records in Department of Community Affairs.

1. The inventory pursuant to 71 P.S. §1661.11 did not embrace the mapping of unpatented lands merely technically owned by the Commonwealth inasmuch as the technical ownership of such land is not depriving local units of government of local tax revenue *via* State-exempt property tax exemption.

Harrisburg, Pa.
July 19, 1973

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

Dear Secretary Hilton:

Receipt is acknowledged of your request for our opinion regarding the inclusion of unpatented land owned by the Commonwealth by operation of 64 P.S. §1 in the inventory of Commonwealth property conducted pursuant to 71 P.S. §1661.11. It is our opinion and you are hereby advised that the mandate of 71 P.S. §1661.11 to inventory "...all State-owned or State-leased real property..." does not include unpatented land over which

the Commonwealth enjoys the technical status of landowner without the benefit of recorded title.

71 P.S. §1661.11 provides that the Department of Property and Supplies shall inventory all State-owned or State-leased real property except highway rights-of-way by December 31, 1973 and that \$25,000.00 be appropriated to the Department for completing this project. The purpose for conducting the inventory is to enable the Legislature to consider the feasibility of a payment-in-lieu-of-taxes program for the benefit of local units of government which lose tax revenue because of State-owned tax-exempt property. See, Official Opinion, Pennsylvania Attorney General, No. 45 of July 2, 1973.

In 1779, the Pennsylvania Legislature vested ownership of all real estate within the geographic boundries of the Commonwealth in the name of Commonwealth except for all private estate, lands and hereditaments which were duly recorded on or before July 4, 1776, 64 P.S. §§1, 4. Thereafter, ownership of private land was begun by issuing a patent in the form prescribed by law, 64 P.S. §38, with a patent issued only after the land so patented is warranted through a requisite survey 64 P.S. §604. As pointed out by the Pennsylvania Supreme Court in *Wallace v. Harmstad* 44 Pa. 492 (1863), the statute vesting ownership of all Commonwealth land in the name of the Commonwealth was to insure that Pennsylvania titles be allodial rather than feudal. Technical ownership of unpatented land, therefore, lies with the Commonwealth although, in actual practice, constructive ownership is in the possessors who hold such land with a cloud upon title for want of a patent or the land lies fallow with no recorded title owner. Consequently, the question becomes whether or not the Legislature intended such unpatented lands to be inventoried under 71 P.S. §1661.11 where the inventory is being conducted for the purpose of determining the feasibility of mitigating the loss of local tax revenue because of State-owned tax-exempt property.

It is noted that unpatented land technically owned by the Commonwealth is not tax-exempt because of State-ownership for two reasons: 1) actual possessors with an encumbered title are paying taxes; or 2) the land is tax-exempt as vacant surplus unoccupied land, not as State-owned land. Furthermore, the Legislature has previously commissioned the mapping of all such unpatented lands by the Bureau of Land Records in the Department of Community Affairs under the Pennsylvania Public Lands Act, 64 P.S. §601 et seq.

Given the fact that unpatented land is merely technically owned by the Commonwealth in order that recorded titles be allodial rather than feudal without actually depriving local units of government tax revenue because of State-ownership, that the Legislature has already commissioned an on-going project to

map such unpatented land,¹ and that inventorying such unpatented land in this particular inventory would be a duplication of effort, it is concluded that the inventory pursuant to 71 P.S. § 1661.11 did not embrace a mapping of unpatented land merely technically owned by the Commonwealth. You are, therefore, advised that your statutory obligation to inventory all State-owned or State-leased realty can be fulfilled without reference to unpatented land owned by the Commonwealth.

Very truly yours,
RICHARD J. ORLOSKI
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 51

Legislature—Expenses—Economic Stabilization Program—Commonwealth Compensation Commission

1. The report of the Commonwealth Compensation Commission dated November 30, 1972 allows each member of the General Assembly up to \$5,000 in accountable expenses effective December 1, 1972.
2. Under Phase III of the Economic Stabilization Program members of the General Assembly may receive the full amount of expenses provided in the report of the Commonwealth Compensation Commission dated November 30, 1972 for the federal base year commencing July 1, 1973.

Harrisburg, Pa.
July 20, 1973

Honorable Grace M. Sloan
State Treasurer
Harrisburg, Pennsylvania
Dear Mrs. Sloan:

You have requested our advice as to your ability to implement the report of the Commonwealth Compensation Commission dated November 30, 1972, insofar as it applies to the General Assembly. The portion of the report in question provides:

“Each member of the General Assembly shall be reimbursed for actual expenses incurred for lodging and meals while away from home on official legislative business, official postage, staff and other expenses incidental to legislative duties, not to exceed \$5,000 per

1. Information available to us indicates that mapping unpatented land has been in progress well over a decade and that the process is only 30% to 40% complete with an estimated cost of approximately \$160,000.00 per county. The magnitude of this mapping project further indicates that the Legislature did not expect the Department of Property and Supplies to complete such a project on a budget of \$25,000.00 by December 31, 1973.

year and subject to uniform limitations and procedures established by rules of the Senate and House of Representatives."

In accordance with Section 2 of the Act of June 16, 1971, (Act No. 8), 46 P.S. §6(b), the General Assembly, not having rejected or modified the report within 60 days following the date of submission thereof, the report took effect and had "the force and effect of law at the beginning of the first pay period of the said term of the General Assembly" which occurred on December 1, 1972.

Prior to the time of the report of the Commonwealth Compensation Commission, the General Assembly by law was entitled to reimbursement for such expenses up to the amount of \$2,500 per year. Report of Commonwealth Compensation Commission of June 22, 1972, 2 Pa. Bulletin 1248; as modified by Senate Resolution 100 of 1972, approved August 19, 1972, 2 Pa. Bulletin 1725.

The report of the Compensation Commission is in proper form and therefore is legally effective under Pennsylvania law.

A question, however, has arisen under Federal law in view of the fact that the Pay Board of the Economic Stabilization Program purported to prohibit the prior law allowing expenses up to \$2,500 from going into effect by its order of February 28, 1973. This order, however, was reversed by the Cases and Appeals Panel of the Cost of Living Council on April 24, 1973, which held that "the equitable position of the employees involved, the necessity to preserve ongoing pay practices, and the need to prevent gross inequities . . ." are sufficient to allow the entire expense allowance to be paid. For Federal purposes, this covered the base year of July 1, 1972 to June 30, 1973 and allowed reimbursable expenses up to \$2,500 for that base year. Since December 1972, however, the General Assembly has, under Pennsylvania law, been entitled to \$5,000. Therefore, it is necessary to inquire whether the members of the General Assembly would be entitled to the additional \$2,500 for the Federal base year commencing July 1, 1973. In so doing, we assume for the purpose of this opinion that the Federal government does have the power to regulate the compensation of state officials, including members of the Legislature.

Since January 11, 1973, the Cost of Living Council has been operating the well-known Phase III. Under its rules, a 5.5% increase in wages per annum is the standard, but adjustments in excess of the standard may be made to "reflect qualified fringe benefits or to prevent gross inequities, serious market disruptions or localized shortages of labor." Section 130.12, 38 Fed. Reg. 1480. In addition, the policies and principles used by the Pay Board prior to January 10, 1973, are to be used in applying the standard. Pre-clearance is no longer necessary; the Cost of Living Council may, however, challenge any proceedings which it

believes unreasonably inconsistent with the standards set forth. Section 130.90-.97, 38 Fed. Reg. 1484.

We have reviewed the brief filed on behalf of the General Assembly before the Cost of Living Council with respect to the controversy relating to the original \$2,500 allowance and believe that it amply indicates why the General Assembly is equitably entitled to the additional \$2,500 in accountable expenses. It is important to note that this is not an addition in *salary* but simply allowing reimbursement for expenses involving legislative business for which the members must account. In reviewing the brief, we have further observed that it was clearly submitted to the Cost of Living Council that the amount of accountable expenses for which members of the General Assembly would be reimbursed had been raised to \$5,000 and would take effect as of the next base year. The fact that no challenge has been made to this provision is an indication of Federal approval to this point in time.

We further note that the recent Executive Order of the President No. 11723, 38 Fed. Reg. 15765, implementing a temporary freeze states in Section 4 that the provisions of the order "do not extend to wages and salaries, which continue to be subject to the program established pursuant to Executive Order 11695."

Accordingly, based on the decision of the Cost of Living Council of April 24, 1973, and the fact that there has been no challenge to implementing the additional \$2,500; based further on the implicit finding of the Commonwealth Compensation Commission that the increase is a reasonable one; and based on our understanding of the Federal law and the fact that there is no actual increase in salary but an addition in reimbursable expenses, we hereby advise you that there is no legal impediment to implementing the order of the Commonwealth Compensation Commission of November 30, 1972, and that members of the General Assembly are entitled to reimbursable expenses up to \$5,000 per year.

Sincerely yours,
GERALD GORNISH
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 52

Citizenship—Residency requirement—Constitutionality—Licenses—Public Weighmaster's Act

1. The state residency requirement of Section 4 of the Public Weighmaster's Act, Act of April 28, 1961 (P.L. 135) 76 P.S. §604 is unconstitutional as a violation of the equal protection clause and the privileges and immunities clause of the United States Constitution.

2. The United States citizenship requirement of Section 4 of the Public Weighmaster's Act of April 28, 1961 (P.L. 135) 76 P.S. §604 is unconstitutional as a violation of the equal protection clause of the United States Constitution.

Harrisburg, Pa.
June 20, 1973

Mr. Walter F. Junkins

Director

Bureau of Standard Weights and Measures
Harrisburg, Pennsylvania

Dear Mr. Junkins:

The question has arisen whether Section 4 of the Public Weighmaster's Act is enforceable insofar as it restricts weighmaster licenses to citizens of the United States and residents of the Commonwealth. You are advised that these provisions are unconstitutional and should not be enforced.

A public weighmaster is a person who weighs goods such as sand and gravel usually for large commercial transactions. The buyer of the goods often requires that they be weighed by a public weighmaster to insure that the buyer is obtaining the weight bargained for. Such a person must be licensed under the Act of April 28, 1961 (P.L. 135) also known as the Public Weighmaster's Act. The basic qualifications for such a license is that the person have "the ability to weigh accurately and to make correct weight certificates" (Section 4, 76 P.S. §604) and to pay a \$5.00 fee (Section 7, 76 P.S. §607). Section 4 further provides that in order to obtain a license the person must be "*a citizen of the United States who is a resident of the Commonwealth. . . .*" (Emphasis added.) It is these latter requirements which are questioned.

As a general rule, state statutes or municipal ordinances discriminating against non-residents of the state or municipality, either by refusing to grant licenses to such non-residents or by granting them on different terms, unless required by the police power of the state, are unconstitutional and void. *Mullaney v. Anderson*, 342 U.S. 415 (1952); 51 Am. Jur. 2d, Licenses and Permits, §31; Annotations, "Validity of License Statute or Ordinance Which Discriminates Against Non-Residents," 61 A.L.R. 337 (1928), 112 A.L.R. 63 (1937). These statutes violate Article IV, §2 of the United States Constitution which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." In addition, such statutes often violate the 14th Amendment to the United States Constitution which provides in part that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." *Whipple v. South Milwaukee*, 218 Wis. 395, 261 N.W. 235 (1935).

In accordance with the above legal analysis a \$75 differential in licensure fees between residents and non-residents of Tennessee for railway construction work was declared unconstitutional by the United States Supreme Court as an unlawful discrimination against non-residents of Tennessee. *Chalker v. Birmingham & Northwestern Railway Co.*, 249 U.S. 522 (1918). The Court stated:

"No state possesses the power or authority to pass any law abridging the privileges or immunities of citizens of the several states, nor deny to any person within the state the equal protection of the law." *Id.* at 522.

The Court further stated:

"Statutes which have the effect and operation of discriminating against the citizens of other states are equally as invalid and unconstitutional as those which expressly so discriminate." *Id.* at 522.

In *Toomer v. Witsell*, 334 U.S. 385, 394 (1948), the Court reiterated its view of the Privileges and Immunities clause:

"[I]t was long ago decided that one of the privileges which the clause guarantees to the citizens of State A is that of doing business in State B on terms of substantial equality with citizens of that state."

Pennsylvania cases are in accord. In *Savre Borough v. Phillips*, 148 Pa. 482 (1892), the Court held invalid an ordinance of the Borough of Savre prohibiting all persons from engaging in the business of peddling without a borough license which fixed the price of such license at a figure intended to be prohibitive. All residents of the Borough of Savre were exempted from the operation of the ordinance. The Court stated:

"[T]he business of peddling has been treated as a proper subject for police regulation and control in this state since 1784. Such regulation is an exercise of the police power, and as such is within the scope of municipal control. Such regulation must be directed against the business or practice of peddling, and not against some of the persons engaged in the same trade or pursuit, such statute or ordinance is not a police power but a trade regulation and therefore invalid." *Id.* at 482.

The Court further stated:

"A law that should prohibit all persons peddling goods manufactured or produced in other states, and permit the same persons to peddle goods of the same character manufactured or produced in this state, would be a trade regulation discriminating between the production of this and sister states and would be incapable of enforcement, because in violation of the Constitution of the United States. So a law that should forbid the court to grant a peddler's license to any person resident in

any other state, but should authorize the granting of licenses to citizens of this state would be bad for the same reason." *Id.* at 489. (Emphasis added.)

Fifty years later in *Adams v. New Kensington*, 357 Pa. 557 (1947), the Court, following the principle enunciated in *Sayre Borough v. Phillips*, *supra*, stated:

"[I]t is true that a statute or ordinance may not discriminate between persons engaged in the same trade or pursuit." *Id.* at 565.

The general rule is subject to limitations where the trade or business requires more intensive regulation under the police power of the state or where there are valid distinctions between residents and non-residents which allow or require special treatment. Thus, restricting liquor licenses to residents has been upheld under the state police power, *Hinebaugh v. James*, 119 W. Va. 162, 192 S.E. 177 (1937), and discrimination against non-residents in the issuance of hunting and fishing licenses has been allowed where based on enforcement burdens caused by non-residents or conservation expenditures by taxpaying residents of the state. *Mullaney v. Anderson*, *supra*; *Toomer v. Witsell*, *supra*; *Edwards v. Leaver*, 102 F. Supp. 698 (D.R.I. 1952); *Russo v. Reed*, 93 F. Supp. 554 (D. Me. 1950). Similarly, the Supreme Court has upheld the charging of higher tuitions to non-residents at state colleges and universities. *Starnes v. Malkerson*, 401 U.S. 985 (1971).

Based on our analysis of the above cases and the Act in question, we find no legitimate governmental purpose for prohibiting non-residents from becoming public weighmasters which would outweigh the constitutional barriers. Considering the function and activities of public weighmasters and the nature of the state regulation of such activities, there is no greater burden on or danger to the state inherent in the mere fact that a licensee is a non-resident. Indeed, under Section 16 of the Act, 76 P.S. §616, Pennsylvania will recognize weight certificates issued by weighmasters in other states under most circumstances. We therefore conclude that the public weighmaster license is closely akin to the peddler's license discussed in the dictum of the *Phillips* case *supra*.

We also conclude that the requirement of United States citizenship is unenforceable under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution for the reasons set forth at length in our previous Opinion No. 92, 1971 Opinions of the Attorney General 177; Opinions 112-114 of 1972, 2 Pa. Bulletin 634; and Opinion No. 9 of 1973, 3 Pa. Bulletin 204, all of which have been confirmed by the recent opinions of the Supreme Court of the United States in *Sugarman v. Dougill*, 413 U.S. 634, 41 L.W. 5138 (June 25, 1973) and *In Re Application of Griffiths*, 413 U.S. 717, 41 L.W. 5143 (June 25, 1973).

Accordingly, you are advised that the United States citizenship and state residency requirements for public weighmaster licenses are unconstitutional and should not be enforced.

Very truly yours,

GERALD GORNISH
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 53

Act 120 of 1972—Permits For Sale of Milk Act, 31 P.S. §646 et seq.—Concurrent jurisdiction.

1. Act 120 of 1972 gives local instrumentalities concurrent jurisdiction to administer pre-June 15, 1972 local ordinances providing only for inspection, not licensing of milk dealers where such ordinances establish standards identical with those promulgated by the Commonwealth.

Harrisburg, Pa.
July 24, 1973

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

Dear Secretary McHale:

Receipt is acknowledged of your request for our opinion regarding an interpretation of Act 120 of 1972 which provides for uniform milk inspection standards throughout the Commonwealth in order to facilitate reciprocal agreements between the Commonwealth and other states regarding milk inspection. It is our opinion and you are hereby advised that Act 120 of 1972 gives local instrumentalities concurrent jurisdiction to administer pre-June 15, 1972, local ordinances providing only for inspection, not licensing, of milk dealers where such ordinances establish standards identical with those promulgated by the Commonwealth.

Pennsylvania's Permits For Sale of Milk Act, 31 P.S. §646, provides that no person shall sell milk or milk products within the Commonwealth without first having obtained a permit from the Secretary of Agriculture for selling such products. 31 P.S. §649 originally provided that the Secretary could appoint a department of health, board of health, or health officer of any municipality or county department of health as his agent for issuing such permits under local ordinances which enforced standards as strict or stricter than those promulgated by the State. Section 2 of Act 120 of 1972 amended 31 P.S. §649 to allow the Secretary to employ such local agents only for the purpose of

inspecting such milk dealers but not for the purpose of issuing permits:

"The secretary may constitute as his agent, for purpose of [issuing permits for the sale of] *inspecting* milk or milk products. . . ." Section 2 of Act 120 of 1972.

31 P.S. §660b originally provided that The Permits For Sale of Milk Act could not be construed to repeal existing municipal milk inspection ordinances or to prevent local instrumentalities already participating in the program from enacting *new* ordinances:

"The provisions of this act. . . shall not be taken or deemed to repeal existing municipal ordinances, nor to prevent municipalities or counties which have established or joined in establishing county departments of health from enacting and enforcing *new* ordinances or regulations for the further protection of the public health. . . ." 31 P.S. §660b.

Section 3 of Act 120 of 1972 amended 31 P.S. §660b by allowing local instrumentalities with on-going milk inspection programs to maintain such programs using State uniform standards but by repealing that section which allowed new programs:

" . . . nothing herein contained shall be deemed to prevent municipalities or counties which have established or joined in establishing county departments of health from enforcing such requirements: provided, that no municipality or county health unit shall ordain or enforce requirements related to sanitation other than those enacted herein or promulgated in rules and regulations hereunder." Section 3 of Act 120 of 1972.

The obvious legislative intent in enacting Act 120 was to enable the Secretary of Agriculture to enter into reciprocal milk inspection agreements with other States for the benefit of Pennsylvania milk dealers while at the same time insuring maximum protection for the milk consumer. Prior to Act 120, such reciprocal arrangements were, in practical terms, near impossible because other sovereigns were unwilling to deal with the Commonwealth where local control over milk inspection standards caused a proliferation of varying local requirements. Consequently, Act 120 was offered as amendment to the Permits For Sale of Milk Act, 31 P.S. §646, to establish uniform standards throughout the Commonwealth and to give the Secretary of Agriculture exclusive control over issuing milk permits. In so doing, the Legislature indicated its desire to maintain functioning local programs by retaining for them concurrent jurisdiction with reference to milk inspection only. No provision was made permitting new ordinances in local instrumentalities where there already existed local programs or where there were none. By revoking prior statutory authority for new programs, the Legislature expressly indicated its desire to maintain the

status quo without the proliferation of new local programs. Consequently, it is our opinion and you are hereby advised that 1) only the Secretary of Agriculture can issue milk inspection permits under 31 P.S. §646; 2) the Department can appoint as its discretion dictates local instrumentalities with programs existing prior to June 15, 1972, to act as its agents for purposes of inspection, not for purposes of issuing permits; 3) local instrumentalities in existence prior to the effective date of Act 120 of 1972 can continue to function under local milk inspection ordinances provided that they enforce standards which are identical with those promulgated by the State; and 4) local instrumentalities without local programs on or before June 15, 1972, can no longer enact and enforce such local programs.

Very truly yours,
RICHARD J. ORLOSKI
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 54

*National Guard—State Employees' Retirement System—Adjutant General—
Military affairs—Amendment of orders*

1. The Adjutant General is authorized to amend orders of National Guard technicians that were issued in the early 1950's in order to correct a mistake.
2. Members of the Pennsylvania National Guard are to be considered as furloughed for the duration of their active military service or until such time as they are able to join a reorganized National Guard Unit.
3. The Adjutant General is authorized and responsible for carrying out United States Army Regulations which apply to the issuance, amendment and revocation of orders pertaining to National Guard technicians.

Harrisburg, Pa.
July 24, 1973

Major General Harry J. Mier, Jr.
The Adjutant General
Department of Military Affairs
Annville, Pennsylvania

Dear General Mier:

This will acknowledge receipt of your request for an opinion concerning the authority of the Adjutant General to correct orders of certain National Guard technicians who were assigned to active military duty for the United States during the Korean conflict in the early 1950's. You have advised us that you have issued orders amending the orders of 34 technicians, retroactively to the time of the Korean conflict, to show that they were furloughed from the National Guard during the time of their

active military service. The original orders of some of the 34 men indicated that their service with the National Guard had been terminated while the others indicated no change in status at all. As a result, the State Retirement Board has refused to give them credit for their military service in determining retirement benefits, taking the position that there was a break in their service. You have advised us, however, that the original orders were mistakenly written, that they should have indicated that the men were furloughed, and that your recent orders amending the previous orders were intended to correct such mistakes. It is our opinion, and you are advised, that you, as Adjutant General, do have the authority to issue such amending orders to correct mistakes in the original orders of the National Guard technicians.

National Guard technicians were not included in the State Employees' Retirement System prior to 1968. By the Act of July 31, 1968, P.L. 695 (71 P.S. §1725-102(f)) the Retirement Code of 1959 was amended to include certain civilian employees of the Army National Guard and Air National Guard of the Commonwealth of Pennsylvania, including the 34 technicians who are the subject of your inquiry. These employees were given credit, for the purpose of computing retirement benefits, for all prior State employment without having to make any contributions to the Retirement Fund with respect to such service.

As indicated above, however, the 34 National Guard technicians in question have not received credit from the State Retirement Board for the time that they were on active military duty during the Korean conflict because of the manner in which their orders were written. Immediately following their discharge from active service, all 34 technicians reported, or attempted to report, back to their former National Guard Units. Some of them had to wait until their National Guard Units were reorganized, but they joined the Units immediately thereafter. The State Retirement Board has ruled that the technicians' orders issued at the time of their assignment to active duty reflect a break in their State employment, and for that reason has refused to allow them credit, for retirement purposes, for the time spent in the active military service. However you have met this objection by amending their orders to show that the technicians were furloughed when assigned to active military duty and you are now asking us to confirm that you were legally authorized to do so.

The status of members of the Pennsylvania National Guard during the Korean conflict is governed by Section 829(a) of the Military Code of 1949, Act of May 27, 1949, P.L. 1903 (51 P.S. §1-829) which provides, in pertinent part, as follows:

“(a) When any or all of the units and members of the Pennsylvania National Guard are ordered into the active military service of the United States, they stand

relieved from duty in the Pennsylvania National Guard during the period of such active military service, irrespective of the term of their existing commissions or enlistments. Their prior status as units and members of the Pennsylvania National Guard continues to exist as an underlying and temporarily suspended status of origin to which they may and do return upon relief from the active military service of the United States. When the duration of their active military service of the United States is of such a duration and units and members so intermingled with other organizations and units of the Army of the United States and Air Force of the United States that makes it impracticable for the units and members to return to that prior status as units and members of the Pennsylvania National Guard and it therefore becomes necessary to completely reorganize the Pennsylvania National Guard, former members, who accept a commission or enlist in the reorganized Pennsylvania National Guard under the time limitations and conditions covered in... and any acts covering future emergencies, shall have their service for the purpose of longevity, *State retirement*, medals and awards count as continuous and uninterrupted." (Emphasis supplied.)

The effect of the foregoing provision is that members of the Pennsylvania National Guard are to be considered as furloughed for the duration of their active military service or until such time as they are able to join a reorganized National Guard Unit, and that their National Guard service shall be considered as continuous and uninterrupted for purposes of longevity and State retirement, etc. Since the 34 technicians involved here did return to their National Guard Units upon their release from active duty or as soon thereafter as their units were reorganized, their status is governed by the above section. This means that they are to be considered as furloughed and that their orders indicating some other status, or none, were mistaken.

A mistake in orders issued during the Korean conflict may be corrected by the present Adjutant General by the issuance of orders amending the original orders.

Section 501 of the Military Code of 1949 (51 P.S. §1-501) provides:

"The Adjutant General as head of the Department of Military Affairs is responsible to the Commonwealth for the organization and functioning of said department, and the performance and *carrying out of all the duties, powers and responsibilities given or delegated to the department by law...*" (Emphasis supplied.)

The duties, powers and responsibilities given or delegated to the department by law include the following:

The Department of Military Affairs shall have the power and its duty shall be—

* * * * *

“(2) To perform such duties and employ the power delegated to the department and the State Adjutant General by the laws of the United States and the rules and regulations promulgated thereunder.” (51 P.S. §1-402)

Since the Department is charged by the foregoing State law with authority given to the Adjutant General under laws and regulations of the United States, and the Adjutant General is authorized to carry out the duties of the Department, the Adjutant General is thus authorized by State law to carry out the laws and regulations of the United States.

In Title 32 United States Code 314, Congress has provided:

“(a) There shall be an adjutant general in each State and Territory, Puerto Rico, the Canal Zone and the District of Columbia. He shall perform the duties prescribed by laws of that jurisdiction.”

Title 32 U.S.C. 709 provides:

“(c) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title, to employ and administer the technicians [including the technicians who are the subject of this opinion] authorized by this section.”

Pursuant to the foregoing authority to carry out regulations of the United States and to administer the technicians authorized by Title 32 U.S.C. 709, the Adjutant General is authorized and responsible for carrying out the U.S. Army regulations which apply to the issuance, amendment and revocation of orders pertaining to National Guard technicians.

Under Army Regulations 310-10, Section V: POLICY GOVERNING ISSUANCE OF ORDERS, Subsection 1-13b. provides:

“The adjutant general, adjutant or other military officer responsible for headquarters administration will authenticate, publish and distribute routine orders.”

Subsection 1-17 under the same section provides the following:

“*Amendments and revocations.* a. General orders. Amendments or revocations of a general order will be accomplished by an amending or revoking paragraph published in a subsequent general order....”

* * * * *

“c. Letter orders. Amendments, rescissions, or revoca-

tions of letter orders will be accomplished by publication of a subsequent letter order. . . ."

The orders for the National Guard technicians that we are concerned with here may be considered general orders or letter orders (as opposed to special orders, temporary duty orders or unit orders). The foregoing provisions of subsection 1-17 provide clear authority for the Adjutant General, pursuant to his responsibility, to authenticate, publish and distribute routine orders (Subsection 1-13b., *supra*), to issue orders amending the orders originally issued for the National Guard technicians in the early 1950's. Our research has failed to disclose anything that would place a time limit on such authority to amend orders. For this reason, and because the purpose of the amending orders is to correct mistakes in the original orders, it is our opinion that the Adjutant General is authorized to issue amending orders in the manner and for the purpose that you have suggested.

Very truly yours,

W. W. ANDERSON

Deputy Attorney General

ISRAEL PACKEL

Attorney General

OFFICIAL OPINION No. 55

*Department of Public Welfare—Medical assistance regulations on abortions—
Right to privacy*

1. The present Medical Assistance Regulations of the Department of Public Welfare (D.P.W. Manual 9421.521(e)) place certain restrictions on the right of indigent women to obtain abortions that are not required by any state or federal statute.
2. Revision of these restrictions to bring the Medical Assistance Regulations into accord with the standards set by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973) would be entirely lawful and appropriate.

Harrisburg, Pa.
August 6, 1973

Honorable Helene Wohlgemuth
Secretary
Department of Public Welfare
Harrisburg, Pennsylvania

Dear Secretary Wohlgemuth:

You have asked what effect the recent United States Supreme Court decisions in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973) have on present Department of

Public Welfare Medical Assistance procedures regulating abortions.¹

You are advised that there is no legal impediment to a revision of the present Medical Assistance procedures that would bring those procedures into conformity with the guidelines laid down in *Wade* and *Bolton* (as detailed below). While I offer no opinions as to whether such a revision is *required* under the present law,² it is clear that such a revision would be entirely appropriate and consistent with the principles enunciated by the Supreme Court.

I.

Roe v. Wade, *supra*, involved a challenge to a Texas criminal statute prohibiting all abortions except when necessary to save the life of the pregnant woman. The Supreme Court, in holding the statute unconstitutional, stated:

"We therefore conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests and regulation." (410 U.S. 113, 154).

The Court went on to state that a woman's right of privacy included the right to decide in consultation with her physician and without state interference, to have an abortion during the first trimester of pregnancy. The Court ruled that during the second trimester of pregnancy a balance between the woman's right to privacy and the state's interest to protect the health of the woman permitted regulation to the extent that the state could regulate the qualifications of the person performing the abortion and the place in which it should be performed. During the third trimester or after "viability" of the fetus, the Court held that

1. The Supreme Court of Pennsylvania has decided two cases involving the question of the constitutionality of the Pennsylvania abortion statutes; *Commonwealth v. Page*, and *Commonwealth v. King*, 451 Pa. 331 (1973). In both cases the Court held the Pennsylvania Abortion statutes, Act of June 24, 1939, P.L. 872, §§718-719, 18 P.S. §§4718-4719, unconstitutional. The Pennsylvania Supreme Court relied exclusively on the holdings and guidelines laid down by the United States Supreme Court in *Wade* and *Bolton*. See p. 4-5 of the unreported opinions, *Commonwealth v. Page* and *Commonwealth v. King*, *supra*. For this reason any resolution of the issues posed by your requests necessarily turns on an analysis of *Wade* and *Bolton*, *supra*.

2. This issue is now a matter of some confusion due to the Supreme Court's action in affirming *Ryan v. Klein*, 347 F. Supp. 496 (E.D. N.Y., 1972), while *vacating and remanding Klein v. Nassau County Medical Center*, 347 F. Supp. 496 (1972). See 41 L. Wk. 3634.

But see *Doe v. Rose*, No. C-169-73 (D. Utah, June, 1973) _____. D. _____ where the United States District Court of Utah very recently issued a preliminary injunction prohibiting the defendant state administrator of the Medicaid program from requiring all applications by Medicaid participants to be submitted to the defendant for approval prior to performance of the abortion, and also prohibiting the defendant from requiring that abortions performed on Medicaid recipients be therapeutic. The requirement that the abortions be "therapeutic" was characterized as being a denial of equal protection.

the state could interfere with the abortion decision to protect fetal life up to the point of prohibiting abortion except when medical opinion indicated that bringing the pregnancy to term would endanger the life or health of the woman.

The Court expressly established guidelines in conformity with these conclusions:

"1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the due process clause of the Fourteenth Amendment.

"(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

"(b) For the stage subsequent to approximately the end of the first trimester, the state in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

"(c) For the stage subsequent to viability, the state, in promoting its interests in the potentiality of human life, may, if it chooses, regulate and even proscribe abortions except where it is necessary in appropriate medical judgment for the preservation of the life or health of the mother.

"2. The state may define the term 'physician' as it has been employed in the preceding numbered paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the state, and it may proscribe any abortion by a person who is not a physician as so defined." 410 U.S. 113, 164-65.

In *Doe v. Bolton*, *supra*, the Supreme Court considered the validity of procedural requirements which were imposed by a Georgia Statute regulating abortions.³

3. In *Bolton* both the substantive and procedural provisions of the Georgia abortion statute were challenged in the District Court below. The District Court struck down the substantive provisions of the abortion statute which permitted abortion only in cases where necessary to preserve the life or health of the mother, where pregnancy resulted from forcible or statutory rape and incest, or where the child would be born with a deformity or mental deficiency. The lower Court, however, upheld the procedural requirements for abortion. Defendant in the District Court appealed the decision to the Fifth Circuit Court of Appeals. Plaintiffs appealed that part of the decision of the lower Court sustaining the procedural requirements of the Georgia Abortion Statute directly to the Supreme Court. In view of the separate appeals, the Supreme Court in *Bolton* had before it only the issue of the validity of the procedural requirements of the Georgia statute. However, from the Supreme Court's decision in *Wade*, decided the same day, it is clear that the decision of the lower Court holding the substantive provisions of the Georgia statute unconstitutional was correct and will have to be sustained by the Fifth Circuit of Appeals.

The procedural requirements before the Supreme Court were a residency requirement for women seeking to obtain an abortion under the statute, a requirement that all abortions be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals, that the abortion be approved by a hospital staff abortion committee, and that the performing physician's judgment be confirmed by two other licensed physicians.

The Supreme Court ruled each one of these procedural requirements invalid as being unduly restrictive of the exercise of the right to decide to have an abortion in the first trimester of pregnancy. Although it is not altogether clear as to whether the procedural requirements of the Georgia statutes are valid as they pertain to abortions in the second trimester, it appears from the Supreme Court opinion that regulations as to the qualifications of the physician and the type of facility in which the abortion is performed are permissible. However, it would appear that the accreditation requirements by the Joint Commission, the screening requirements by the hospital committee and two consulting physicians and the residency requirements are not reasonably related to protecting the health of the woman even during the second trimester and hence are invalid.

The Court also stated clearly that a State cannot require a physician to perform an abortion against his principles. Any revision of the Medical Assistance regulations should make the personal right to refuse to perform an abortion clear. *Doe v. Bolton*, 410 U.S. 179, 197-98.

II.

The Federal Social Security Act permits states to undertake a program of providing medical services to the indigent. However, once the State opts to implement a program of medical assistance the Social Security Act requires that the State provide medical assistance to all those deemed eligible, 42 U.S.C. §1396a(10). Medical assistance is defined to include "medical care, or any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law", 42 U.S.C. §1396(a)(6), and "physicians" services furnished by a physician...whether furnished in the office, the patient's home, a hospital, or a skilled nursing home or elsewhere...", 42 U.S.C. 1396(a)(5).⁴ The relevant sections

4. Even before *Wade* and *Bolton supra*, the Federal statute and regulations permitted reimbursement to the states for the cost of abortions. In response to an inquiry as to whether or not the Federal Government reimbursed the states for abortions under the Medical Assistance Program, the Federal Medical Services Administration, which administers the program, replied:

"The following statement may be used to describe M.S.A.'s policy on abortions:

"The position taken by M.S.A. on abortions is that the Social Security Act and the HEW regulations provide for Federal matching of state expenditures for all kinds of medical care and services, including patient and hospital services, out-patient hospital services, physician services, drugs, etc. If the State Medicare Program paid for these services whether for abortion or any other medical services, the Federal Government shared the cost with the state."

of the State Public Welfare Code closely track this Federal provision.⁵

In conformity with the above provision of the Social Security Act the Department of Public Welfare by its own regulations (D.P.W. Pa. Manual §9421.521(e)) has defined "medical services" provided under the Medical Assistance Program as those services performed in accordance with "customary standards of medical practice."

In defining "customary standards of medical practice" prior to the decision in *Wade and Bolton*, the Department recognized the abortion standards of the Pennsylvania Medical Society, the American Medical Association, and the Joint Commission on Accreditation of Hospitals. Accordingly, the Department of Public Welfare's procedures hold that abortions may be performed under the Medical Assistance Program only in the following circumstances:

1. There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother;
2. There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or
3. There is documented evidence that a continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient;
4. Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and
5. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.

However, as discussed above, the Supreme Court of the United States has substantially redefined permissible medical practices for the State of Pennsylvania as well as for every other state. It is clear now, that a woman in the first trimester of pregnancy has a right to decide whether or not to abort pregnancy. Her physician has the right to perform that abortion at her request. The state's only interest in the abortion procedure at this point in pregnancy is that the physician meet a general standard of medical competency and perform the abortion under generally-accepted medical criteria for the performance of similar surgical operations. Similarly, the Supreme Court has dictated medical practice for Pennsylvania as well as the other states for abortions performed on women in the second trimester of pregnancy.

5. The Public Welfare Code requires reimbursement for, *inter alia*: hospital care prescribed by a physician, 62 P.S. §443.1(1); out-patient care consisting of "diagnostic, therapeutic, rehabilitative or palliative services..." 62 P.S. §443.3(1); and physicians services provided in a private office, 62 P.S. §443.3(2)(ii).

III.

SUMMARY

Subsequent to the adoption of the present Medical Assistance provisions on abortions, the United States Supreme Court, in effect, redefined "customary medical practice" by elevating the right to consult a physician with regard to an abortion to constitutionally protected status. Moreover, the Pennsylvania Supreme Court has voided the Pennsylvania abortion statutes as unconstitutional. Nothing in the Federal Social Security Act or in the State Public Welfare Code requires the maintenance of the present Medical Assistance provisions on abortions. Therefore, a revision of these provisions to make State regulations consistent with the standards laid down by the United States Supreme Court (as outlined, *supra*) would be entirely legal and appropriate.

Sincerely yours,
PETER W. BROWN
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 56

1. Mentally retarded children in residential mental retardation facilities licensed by the Department of Welfare and in residence as interim care placements must receive a public school program of education.
2. Mandates of *PARC* require that the Department of Welfare no longer secure education for interim care children from schools which do not adhere to the regulations for special education of the State Board of Education.
3. A private school approved by the Department of Education for the education of the mentally retarded provides a program which satisfies the requirements of the *PARC* case.

August 6, 1973
Harrisburg, Pa.

Honorable Helene Wohlgemuth
Secretary
Department of Public Welfare
Harrisburg, Pennsylvania

AND

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

Dear Secretary Wohlgemuth and Secretary Pittenger:

As you know, the continuing implementation, by your Departments, of the Amended Order, Stipulation and Consent Agreement of the *PARC* Case is being monitored by the Federal Court

through monthly Masters' Hearings. As a result of the discussions held at recent hearings, the Masters have directed this office to clarify the Commonwealth's position relating to the education of mentally retarded children who are residents of interim care facilities under the control of the Department of Welfare. The specific question is, "What educational standard must be followed for mentally retarded children in residential mental retardation facilities subject to licensing by the Department of Welfare."

It is my opinion and you are hereby advised that such children must receive a public school program of education, either directly for the school district or intermediate unit in which the facility is located or from an approved private school.¹ The regulations in Section 5151(e) of the Department of Public Welfare Manual direct private licensed facilities to "arrange for children of school age to attend classes in a public or private school system or provide an organized education program staffed with personnel qualified to organize and conduct an educational program at least equal to that provided in the public school system."

This regulation creates four educational options for children in such a facility:

1. Attend a public school.
2. Attend a private "approved" school.
3. Attend a private licensed school.
4. Attend a residential program equal to a public school program.

Options 1, 2, and 4 require a program that conforms to the State Board of Education Regulation for Special Education (22 Pa. Code §13) and the standards promulgated pursuant thereto. An "Option 3" placement would only require a program that conforms to the Regulations of the State Board of Private Academic Schools (22 Pa. Code §51), a less demanding standard than that provided by State Board of Education Regulations.

However, the *PARC* Case has removed Option 3, at least as it applies to children who are under the care and control of the Commonwealth by virtue of their placement in a private licensed facility for the mentally retarded.

Under both paragraph (g) of the Amended Order of the *PARC* Case (issued on May 5, 1972) and Section II of Attorney General's Opinion No. 35 (issued on April 23, 1973), the Commonwealth must provide access to a free public program of education appropriate to the learning capacities of the mentally re-

1. This opinion deals with the obligation to provide an educational program and does not speak to the issue of responsibility for the tuition to be paid for that program.

tarded child involved. The requirement of a public school program can only be met by an institution which operates in conformity with the State Board of Education Regulations. Private academic schools operating under the licensure of the Board of Private Academic Schools' regulations do not meet this standard and therefore do not have an appropriate program to offer. Therefore, the Department of Public Welfare must immediately notify all interim care facilities that they can no longer arrange for the education of mentally retarded, interim care children through a private academic school, but must make such arrangements with the local public school officials.

In the case of a private licensed facility which is also a private academic school, it can no longer lawfully provide a program of education to interim care children unless it first meets the standards of, and is approved by, the Department of Education applying the rules and regulations for special education of the State Board of Education.

In order to afford all interested educational institutions the opportunity to provide the educational program prescribed by the PARC Case and this Opinion, the Department of Education is currently implementing procedures for the approval of private schools for the mentally retarded. Approval of a private school under these new procedures as a school for the mentally retarded will enable children who are mentally retarded to be placed in such schools in satisfaction of the educational requirements of the PARC Amended Order, Stipulation and Consent Decree.

Sincerely yours,
LARRY B. SELKOWITZ
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 57

State Police—5'6" Minimum height requirement—Disproportionately disadvantages females and Spanish-surnamed applicants—This requirement should be suspended pending validation as job related.

1. Neutral application of a 5'6" minimum height requirement by the State Police disproportionately disqualifies women and Spanish-surnamed applicants.
2. Once a standard for selection of applicants for employment is shown to disproportionately disadvantage certain groups of job applicants, the State, as employer, has the burden of showing that this imbalance results from a selection standard that is substantially related to job performance.
3. As all available evidence tends to show that the 5'6" minimum height requirement is not job-related, the use of this requirement should be suspended pending State Police validation of the height requirement.

Harrisburg, Pa.
August 9, 1973

Col. James D. Barger
Commissioner
Pennsylvania State Police
Harrisburg, Pennsylvania

Dear Col. Barger:

Our opinion has been requested as to the validity of the continued use by the State Police of the 5'6" minimum height requirement for applicants to the force. You have advised us that a great number of women and applicants of Spanish descent have been denied the opportunity to compete for State Police positions due to the minimum height requirement. Though one Spanish-surnamed male, one black female and 10 white females were part of the January, 1973, cadet class of 152, many otherwise well qualified applicants found the minimum height requirement an insurmountable impediment. An analysis of the State Police as of June 30, 1973, reveals that out of a total of 4,170 State Police officers (enlisted personnel) only two are of Spanish ancestry and only twenty-five are women. The Spanish-surnamed State Police officers thus comprise less than 0.05% of the total State Police force as compared to the Spanish American population of Pennsylvania which is 2%. Women comprise less than .6% of the force whereas they form approximately 37% of the Pennsylvania work force.

The impact of the 5'6" minimum height requirement on applicants who are women or of Spanish descent is readily understood and illustrated. While the average height of men in the United States is slightly over 5'8" [United States, Bureau of Census, Statistical Abstract of the United States (1966), hereinafter Statistical Abstract], the average height of women is 5'3" [Statistical Abstract], with Spanish-surnamed Americans averaging approximately 5'4-½" [Rosenquist and Megargee, *Delinquency in Three Cultures*, 387 (University of Texas Press 1969), quoted in CCH EEOC DECISIONS (1973) ¶6304]. Applying the 5'6" height requirement results in widespread ineligibility of women as approximately 80% of adult women are less than 5'5" tall. CCH EEOC DECISIONS (1973) ¶6286. The percentages of Spanish-surnamed male applicants excluded by a 5'6" height requirement is over three times the percentage of white male applicants excluded. Ten State Nutrition Study, Department of HEW, Vol. 3, appendix pages III-47, III-49, III-50.

Thus the conclusion must be drawn that the 5'6" minimum height requirement has a disproportionate impact on Spanish-surnamed and women applicants and operates to their decided disadvantage. This position has been adopted by the Pennsylvania Human Relations Commission. In a letter from Homer Floyd, Executive Director of the Human Relations Commission, to Robert Albert, Executive Director of the Affirmative Action

Council, dated May 25, 1973, Mr. Floyd stated:

"At its last meeting, the Commission adopted a position ...that this requirement [5'6" minimum height for State Police officers] unlawfully discriminates against women and apparently against Spanish-surnamed applicants. We respectfully request that the State Police be asked to remove the minimum height requirement unless they can persuasively demonstrate the need for it."

This conclusion is also supported by Equal Employment Opportunity Commission decisions which have held that minimum height requirements of as low as 5'6" and 5'5" discriminate against women and Spanish-surnamed males. EEOC Decision No. 72-0284, August 9, 1971, CCH Employment Practices Guide ¶6304; EEOC Decision, No. 71-1418, March 17, 1971, CCH Employment Practices Guide ¶6223. Though EEOC interpretations of Title VII of the Civil Rights Act of 1964 (Title VII as amended by the Equal Employment Opportunity Act of 1972, is now binding upon state and local governments as well as private employers) are not binding on federal courts they are given great deference particularly in matters involving professional expertise. *Griggs v. Duke Power Co.*, 401 U.S., 429, 433 (1971).

The law regarding employment discrimination as it has developed under both the Fourteenth Amendment as well as Title VII of the 1964 Civil Rights Act provides that 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. Such a case has been made here. Once this *prima facie* showing 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.*, *supra*; *Commonwealth v. O'Neill*, 473 F. 2d 1029 (3rd Cir. 1973); *Carter v. Gallagher*, 452 F. 2d 315 (8th Cir. 1972); *Castro v. Beecher*, 459 F. 2d 725 (1st Cir. 1972); *Chance v. Board of Examiners*, 458 F. 2d 1167 (2d Cir. 1972); Official Attorney General Opinion No. 119, May 4, 1972.

The burden is thus on the State Police to justify the discriminatory effect of its minimum height requirement by establishing that it is in fact substantially related to carrying out the duties of a State Police officer. This the State Police have failed to do as of yet. In a memorandum dated December 16, 1971, to Mr. Henry Adams, Jr., Director of the Governor's Task Force on Equal Rights, Rocco Urella, then Commissioner of the Pennsylvania State Police, set forth the State Police's justification for the retention of the minimum height requirement: (1) "There is a correlation between size and the number of police officers who suffer attack"; (2) "the need for an officer to be seen in

order to be effective"; and (3) "the cost of equipment inventories to accomodate an organization with no height limitations."

The State Police's rationales were merely stated as conclusions and were not supported by any data whatsoever. In fact, the bulk of evidence is to the contrary. First, in 1971, the Wisconsin State Bureau of Personnel conducted a nationwide survey of 34 law enforcement agencies and found that (a) there do not appear to be any significant factors to support the hypothesis that smaller officers invite attack more frequently than larger officers, (b) there appears to be no proven rationale to justify any height requirements, and (c) there appears to be a general trend toward lower height requirements. Secondly, apart from the obvious necessity that a police officer must be visible, the Police Foundation, a non-profit funding agency that sponsors innovative programs in local police departments stated: "There is no data which conclusively relates height of a police officer to job performance and a great deal of evidence which shows that the presence of a height requirement discriminates against women and certain minorities." Statement of the Police Foundation before the Law Enforcement Assistance Administration in the matter of Proposed Equal Rights Guidelines, Dec. 21, 1972. Thirdly, a mere increase in cost does not rise to the "touchstone of business necessity", the standard decreed by the U.S. Supreme Court in *Griggs, supra. U.S. v. Bethlehem Steel Corp.*, 446 F. 2d 652 (2d Cir. 1971); *Johnson v. Pike Corp. of America*, 332 F. Supp. 490 (C.D. Cal. 1971). Since the burden of proof is on the State Police and as they have yet to meet it, the minimum height requirement should be suspended until such time as the State Police can meet its heavy burden of demonstrating the job relatedness of its minimum height requirement.

The suspension of the minimum height requirement is also in conformity with recent action taken by the Pennsylvania Bureau of Correction which eliminated the height requirement for all state correctional officer applicants but required instead that the applicant be physically and mentally capable of performing the duties of the position. Similarly, valid strength, physical skill and fitness requirements could be substituted for a minimum height requirement for State Police candidates. The elimination of a minimum height requirement for police officer candidates is by no means unique to the Commonwealth of Pennsylvania; Minnesota, Wisconsin, Alaska and Connecticut have all recently eliminated minimum height requirements for their State Police forces. Connecticut's decision was made, in part, specifically to open their State Police force to minority groups. Wisconsin's decision was taken after the nationwide survey conducted by the Wisconsin State Bureau of Personnel mentioned earlier.

The decision to suspend the minimum height requirement is also consistent with the recently enacted equal rights guidelines promulgated by the Law Enforcement Assistance Administration:

"The use of minimum height requirements, which disqualifies disproportionately women and persons of certain national origins and races, such as persons of Mexican and Puerto Rican ancestry, or oriental descent, will be considered violative of this Department's regulations prohibiting employment discrimination.

"In those instances where the recipient of Federal assistance is able to demonstrate convincingly through the use of supportive factual data such as professionally validated studies that such minimum height requirements used by the recipient is an operational necessity for designated categories, the minimum height requirement will not be considered discriminating."

38 Fed. Reg. 6415 (March 9, 1973). The State Police receive two grants from the LEAA totaling \$1,029,000.

In conclusion, the State Police 5'6" minimum height requirement discriminates unjustifiably against Spanish-surnamed and women applicants. It protects no demonstrably valid interest of the Commonwealth. The State Police have not met their burden of demonstrating the job relatedness of such a requirement. Therefore, I am instructing you that the 5'6" minimum height requirement for applicants to the State Police is illegal and should be suspended pending validation.

Very truly yours,

ROBERT P. VOGEL
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 58

Commission on Charitable Organizations—Charitable Solicitation Act, 10 P.S. §160-1 et seq.—Federal preemption—"Supremacy Clause"—Non-Profit corporations, Title 36 of U.S.C.

1. Non-profit corporations created at Title 36 of the U.S.C. by the U.S. Congress 36 U.S.C. §1 *et seq.*, in the exercise of its local legislative powers are regarded as foreign non-profit corporations of the Commonwealth, and as such, are subject to the laws, rules and regulations of the Commonwealth, including, *inter alia* the Charitable Solicitation Act, 10 P.S. §160-1 *et seq.*
2. The creation of non-profit corporations at Title 36 of the U.S.C. by the U.S. Congress as foreign corporations within the Commonwealth is insufficient to apply the doctrine of federal preemption and to immunize such entities from registration under Pennsylvania's Charitable Solicitation Act, 10 P.S. §160-1 *et seq.*

August 10, 1973
Harrisburg, Pa.

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

Dear Secretary Tucker:

Receipt is acknowledged of your request for our opinion regarding the applicability of the Charitable Solicitation Act, 10 P.S. §160-1 *et seq.*, to federally created non-profit corporations engaged in the solicitation of charitable funds within the Commonwealth of Pennsylvania. It is our opinion, and you are hereby advised that federally created non-profit corporations under Title 36 of the United States Code are regarded as foreign non-profit corporations of this State, and as such, are subject to the laws, rules and regulations of this State, including, *inter alia*, the Charitable Solicitation Act, 10 P.S. §160-1 *et seq.*

Ownership of all or part of the shares of a corporation by the United States government is well preceded in American history. See, Oliver Peter Field, "Government Corporations: A Proposal," 48 Harv. L.R. 775 (1935). Government corporations were established by direct acts of Congress, by executive orders authorizing incorporation under State law, or by the purchase of the controlling interests of private corporations. O.R. McGuire, "Some Problems Arising From Government Corporations", 85 U. of Penn. L.R. 778 (1937). With the advent of the New Deal, the trend toward using governmental corporations as an agency for executing the laws of Congress was accentuated. See, Maurice S. Culp, "Creation of Governmental Corporations By The National Government," 33 Mich. L.R. 473 (1935). This process continued unabated until the passage of 31 U.S.C. §869 in the year 1945 which dismantled all existing governmental corporations and prohibited the establishment of new ones "...for the purpose of acting as an agency or instrumentality of the United States, except by Act of Congress or pursuant to an Act of Congress specifically authorizing such action." Such Congressional sanction is often given, and there are in existence governmental corporations created by Congress, e.g., Federal Crop Insurance Corporation, 7 U.S.C. §1503; Federal Deposit Insurance Corporation, 12 U.S.C. §1811; Federal Home Loan Mortgage Corporation, 12 U.S.C. §1451.

In the exercise of its local legislative powers as the Legislature of the District of Columbia, Congress also created a series of non-profit patriotic corporations as a "body corporate and politic in the District of Columbia." Such non-profit patriotic corporations include the American National Red Cross, 36 U.S.C. §1; Daughters of the American Revolution, 36 U.S.C. §18; Sons of the American Revolution 36 U.S.C. §20a; Boy Scouts of America, 36 U.S.C. §31; American Legion, 36 U.S.C. §41; Amvets, 36

U.S.C. §67; Grand Army of the Republic, 36 U.S.C. §71; Ladies of the Grand Army of the Republic, 36 U.S.C. §77; Disabled American Veterans, 36 U.S.C. §902; American War Mothers, 36 U.S.C. §91; VFW, 36 U.S.C. §111; Future Farmers of America, 36 U.S.C. §271; Olympic Committee, 36 U.S.C. §371; National Safety Council, 36 U.S.C. §461; Fund For Medical Education, 36 U.S.C. §601; Legion of Valor, 36 U.S.C. §631; Boys Clubs of America, 36 U.S.C. §691; Veterans of World War I, 36 U.S.C. §761; Congressional Medal of Honor Society, 36 U.S.C. §791; Order of the Purple Heart, 36 U.S.C. §821; Big Brothers of America, 36 U.S.C. §882; Jewish War Veterans, U.S.A. 36 U.S.C. §911; and Blue Star Mothers, 36 U.S.C. §941. Question is raised about the applicability of Pennsylvania's Charitable Solicitation Act, 10 P.S. §160-1 *et seq.*, to such non-profit, federally created, patriotic corporations when such entities are soliciting charitable funds within the Commonwealth of Pennsylvania.

Registration by the federally-created non-profit corporations in order to solicit funds within the Commonwealth is literally required by 10 P.S. §160-3. Any claim for exemption from the operation of the Act must be premised on the status of the corporations as immune under the doctrine of federal preemption.

The doctrine of federal preemption has been applied to invalidate State regulations of governmental corporations where the corporation is carrying out a governmental purpose under extensive federal regulations. In *Easton v. State of Iowa*, 188 U.S. 220, 47 L. Ed. 452 (1902), the United States Supreme Court held that the State could not criminally punish a bank teller of a national bank for accepting a deposit while the bank was insolvent in violation of a State statute because Congress preempted the area by regulating the circumstances under which an insolvent national bank should not accept a deposit. In *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 372, 74 S. Ct. 550, 98 L. Ed. 767 (1954), the United States Supreme Court applied the doctrine of federal preemption and held that a New York statute prohibiting the usage of the "saving" or "savings" in banking business or advertising except for chartered savings and loan associations was invalid as applied to national banks because it conflicted with federal laws expressly authorizing national banks to receive savings deposits and to exercise incidental powers thereto.

In dealing with the non-profit, federally-created, patriotic corporations of Title 36 of the United States Code, however, it is noted that such corporations are created as "body corporate and politic in the District of Columbia." As held by the Supreme Court of Minnesota in *Pierce v. Grand Army of the Republic*, 220 Minn. 117, 20 N.W. 2d 489 (1945), the creation by Congress in the exercise of its powers as local legislature for the District of Columbia of a non-profit corporation establishes such an entity as a domestic corporation of the District of Columbia and a foreign corporation within other jurisdictions in the United

States. See, also, *Ragan v. Dodge County Chapter, American Red Cross*, 36 S.E. 2d 831 (Ga. App. 1946). The distinction between governmental corporations and non-profit patriotic corporations becomes clear. The governmental corporations act as arms of the executive branch of government in enforcing Congressional enactments whereas non-profit patriotic corporations are merely created in the capacity of the United States Congress to act as the local legislature for the District of Columbia with the same effect as the creation of non-profit corporations created under existing State law. Against this background, the question of the applicability of Pennsylvania's Charitable Solicitation Act, 10 P.S. §160-1 *et seq.* to the non-profit patriotic corporations of Title 36 of the United States Code can be addressed.¹

As held by the Court in *ITT Lamp Division of International Telephone and Telegraph Corp. v. Minter*, 435 F. 2d 989 (1st Cir. 1970), a Congressional intent to preempt an area which is historically within the realm of state police powers is not to be inferred lightly:

"Where Congress has not clearly manifested its purpose to exclude state action which has taken the form of exercise of its historic police powers, such state action will not be invalidated under the Supremacy Clause, 'in the absence of persuasive reasons' or unless the administration of state law 'palpably infringes' upon the federal policy." 435 F. 2d at 922, 993

The "test" for determining whether or not a federal statute preempts state legislation regarding the same subject matter was explicitly spelled out in *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497, 502, 504 (1955):

"First, the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."

* * *

"Second, the federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject."

In applying this test to the non-profit corporation of Title 36 of the United States Code it is noted that the creation of such entities was not a regulatory statute but merely an incorporation statute under local legislative powers as the legislature for the District of Columbia so there is no pervasive regulatory scheme indicating that Congress left no room for the State to supplement such legislation. See, Report of the Senate Committee, Senate Report No. 38, February 26, 1947, 1947 U.S. Code Cong.

1. It is noted that certain veterans organizations can obtain a statutory exemption under 10 P.S. §160-4(a)(6) by filing a request for such exemption with the Commission.

Service, at p. 1028 where the legislative history indicates no intent to occupy the field of regulations in reference to the American National Red Cross.

Secondly, the federal interest in creating charitable corporations is not a federal interest so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject but rather the interest is historically one of State police powers of which the federal government enjoys no constitutional parallel. Again, it should be noted that Title 36 of the United States Code provides that bylaws and regulations be ordained and promulgated by such non-profit corporations which are "...not inconsistent with the laws of the United States of America or *any State thereof*." (Emphasis supplied.)² This provision presumptively indicates an intent of the Federal Congress not to occupy the field so as to preclude enforcement of state regulatory statutes.

Just as there is no inherent contradiction when the State creates non-profit corporations in order to allow such entities to accomplish charitable ends and thereafter requires their registration under the Charitable Solicitation Act, 10 P.S. §160-1 *et seq.*, there is no conflict when the federal government charters a charitable entity for charitable purposes, and the State thereafter requires registration of that entity with the State prior to soliciting funds within the State. Congress has not indicated by creating the non-profit corporation under the local legislative powers its clear intention to exclude state action in the exercise of historic state police powers; to wit, legislate for health, safety, and welfare of the citizens of the State by insuring that charitable solicitations with the State are conducted for the public good.³

It, therefore, is concluded that the creation of non-profit corporations under Title 36 of the United States Code by the United

2. See, American National Red Cross, 36 U.S.C. §2; Daughters of the American Revolution, 36 U.S.C. §18a; Sons of the American Revolution, 36 U.S.C. §20c; Boy Scouts of America, 36 U.S.C. §22; Girl Scouts, 36 U.S.C. §32; American Legion, 36 U.S.C. §44; American Vets, 36 U.S.C. §67c; Grand Army of the Republic, 36 U.S.C. §78c; Disabled American Vets, 36 U.S.C. §90d; American War Mothers, 36 U.S.C. §95; VFW, 36 U.S.C. §114; Future Farmers of America, 36 U.S.C. §274; Olympic Comm., 36 U.S.C. §374; Nat. Safety Council, 36 U.S.C. §464; Fund for Medical Ed., 36 U.S.C. §604; Legion of Valor, 36 U.S.C. §634; Boys Club of America, 36 U.S.C. §694; Vets of W.W. I, 36 U.S.C. §764; Medal of Honor Society, 36 U.S.C. §794; Order of Purple Heart, 36 U.S.C. §824; Big Brothers of America, 36 U.S.C. §884; Jewish War Veterans, 36 U.S.C. §914; Blue Star Mothers, 36 U.S.C. §944.

3. Our office has learned that, in 1965, the American National Red Cross was advised in an informal opinion from this office by former Deputy Attorney General Charles A. Woods, Jr., that it was exempt from the Act. A diligent search of the files in our office and files maintained by the Department of State has failed to uncover such an opinion. To the extent that such may have been considered the position of this office, however, that position is herewith overruled.

States Congress as a foreign corporation within the Commonwealth is insufficient to apply the doctrine of federal preemption. Consequently, such non-profit corporations must register under the Charitable Solicitations Act, 10 P.S. §160-1 *et seq.*

Very truly yours,
RICHARD J. ORLOSKI
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 59

Pennsylvania State Police—Expunction of criminal records under Section 19 of Controlled Substance, Drug, Device and Cosmetic Act—Duties of Pennsylvania State Police in complying with expunction orders under Section 19.

1. All expunction orders pursuant to the Drug Act must be served on the Commissioner of State Police.
2. Only those records which will produce a positive reply if a record check is made need be expunged, and investigatory files may be maintained.
3. The Commissioner must file his affidavit within 30 days stating the action he has undertaken pursuant to the Court Order.

Harrisburg, Pa.
August 14, 1973

Colonel James D. Barger
Commissioner
Pennsylvania State Police
Harrisburg, Pennsylvania

Dear Colonel Barger:

You have asked for my opinion on certain questions relating to expunction of criminal records by the State Police pursuant to Section 19 of the Controlled Substance, Drug, Device and Cosmetic Act. Act of April 14, 1972, P.L._____, No. 64, §19 (35 P.S. §780-119).

1. *What is the responsibility of the Pennsylvania State Police regarding expunging such records?*

Subsection (a) of Section 19 requires that, upon receipt of a Court Order issued pursuant to said section, the custodian of Pennsylvania State Police criminal records shall: (1) expunge and destroy the official and unofficial arrest and other criminal records in the custody of the Pennsylvania State Police for the individual and the arrest referred to in said Order; (2) request, insofar as he is able, the return of such records which have been made available to Federal and other State agencies, and destroy such records on receipt thereof; (3) within thirty days of the date of said Order, file with the court an affidavit that such records have been expunged and destroyed, together with the

court's expunction order; and (4) retain no copies thereof.

2. *Where should such court orders be directed?*

The Commissioner of the State Police is the legal custodian of the criminal records of that agency. Therefore, all expunction orders must be served on the Commissioner, no matter who is in actual possession of them. *Commonwealth v. Friday*, 171 Pa. Super. 397, 90 A. 2d 356 (1952).

3. *Must investigatory records also be expunged?*

It is my opinion and you are hereby advised that you are obligated to expunge only those records which will produce a positive record reply if a record check is requested. The intention of this section of the Act is to eliminate any potential disability that a person might have as a result of having been arrested. This will be achieved by expunging those records which would produce a positive response to a record check. If the subject's name appears in investigative records there is no duty to expunge such records. Obviously, it would be virtually impossible to check all State Police investigatory reports to find every place where the subject's name might appear. Furthermore, the mere fact that a name appears in an investigative file is not prejudicial since many persons are referred to in such files who have not been arrested, and who are not suspects, including, for example, the victims of crimes and witnesses.

4. *Which Pennsylvania State Police offices or installations must file the affidavit required by Section 19, and what should such affidavits contain?*

It is sufficient that the affidavit be filed by the Commissioner. The affidavit should be addressed to the Court which issued the expunction order. It should state the name of the individual whose records were expunged, certify that all records required to be destroyed by Section 19 have in fact been destroyed, and be signed, under oath, by the Commissioner or his designee. If the expunction order fails to provide sufficient information to identify the correct records, the Commissioner or his designee should immediately notify the court of the need for additional information.

5. *At times it will take more than thirty days to obtain records from other agencies, such as the F.B.I. In such cases, how does this affect the thirty-day affidavit return requirements?*

Section 19(a) provides in relevant part that the keepers of criminal records shall "require to the extent they are able the return of such records as they have made available to Federal and other State agencies. . . ." (Emphasis supplied.)

Apparently, the Legislature recognized that police departments may have some difficulty in obtaining prompt return of criminal records supplied to other police departments. You are

advised that in order for the Pennsylvania State Police to comply with Section 19, it will be satisfactory to return an affidavit within thirty days after receipt of the expunction order certifying that *all* department records have been expunged and attaching copies of all requests by the Commissioner to other law enforcement agencies for the return of such information as was provided to them by the State Police. When these additional records are returned by other law enforcement agencies to the Commissioner, he should file a supplemental affidavit certifying that such records have in fact been received and destroyed.

Sincerely yours,
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 60

Department of Agriculture—Weights and Measures Act, 76 P.S. §100-1 et seq.

1. Where inspection under the Weights and Measures Act, 76 P.S. §100-1 *et seq.* renders commodities unsaleable but usable by merchants for personal use, this loss which is incidental to enforcement of inspection statutes must be borne by the merchants.

Harrisburg, Pa.
August 24, 1973

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

Dear Secretary McHale:

Receipt is acknowledged of your request for our opinion regarding the obligation of the Department to compensate merchants for merchandise rendered usable, but unsaleable, as the result of inspection under the Weights and Measures Act, 76 P.S. §100-1 *et seq.* It is our opinion, and you are hereby advised that the trifling injury occasioned by using such samples for inspection pursuant to 76 P.S. §100-12 is not a taking of property for public use as to require compensation and such loss is a necessary incident to enforcement of the statute.

The Weights and Measures Act, 76 P.S. §100-12, provides for inspection of commodities which are held by merchants and intended for sale:

“[Inspectors appointed under 76 P.S. §100-16] shall, from time to time, weigh or measure and inspect packages or amounts of commodities kept, offered or exposed for sale, sold or in the process of delivery, to determine whether the same contain the amounts represented. . . .”

In conducting such inspections, representative samples are used

in accordance with the sampling procedures recommended by the National Bureau of Standards as required by 76 P.S. §100-12, and in the process, samples, which are returned to the merchants are rendered unsaleable but usable by the merchants. Thereafter, merchants can consume such products in their own personal use, or in accordance with trade practice, return the items to the manufacturers for credit to their accounts. Question is raised concerning the right of such merchants to receive compensation for this incidental injury to this property.

In *State of Louisiana v. Dupaquien*, 46 La. Ann. 577, 15 So. 502 (1894), the Court addressed a similar question where milk samples were rendered not only unsaleable but also unusable by milk inspectors who tendered no payment for such samples. In holding that the usage of such samples was not an uncompensated taking, the Court noted that the taking and consumption of the product was not compensable inasmuch as the merchant must bear this loss as a cost of conducting business:

"It is that public interest alone in foods generally sold which justifies the public examination of private property. If the public have such interest in the wares. . . , that same public have a corresponding right of access to such wares, to the extent necessary for the preservation of their rights or interests." 15 So. at 504

Other jurisdictions have indicated that the loss occasioned by the actual taking of samples for purposes of inspection and regulation is a necessary incident to the enforcement of such statute and the cost must be borne by the merchant.

"... the trifling injury occasioned by *taking* samples is not such a taking of property for public use as to require compensation to be made therefor. *Such loss is a necessary incident to the enforcement of the statute.*" *State of Missouri v. Bixman*, 162 Mo. 1, 62 S.W. 828, 836 (1901) (Emphasis added.)

"... it would hardly be contended that the trifling injury to property occasioned by taking samples for inspection would be such a taking of private property for public use as to require that compensation be made therefor. *Such an injury to property is a necessary incident to the enforcement of reasonable regulations affecting trade in food.*" *Commonwealth of Massachusetts v. Carter*, 132 Mass. 12, 15 (1882). (Emphasis added.)

In the instance of inspections pursuant to the Weights and Measures Act, 76 P.S. §100-12, there is no actual taking of property from the merchant, and any injury to the property is merely incidental because the property remains usable by the merchant for his personal use or for return to the manufacturers for credit after the package is opened and inspected. Unlike the cases cited above, the inspectors leave the commodity in the physical possession of the merchant and there is not even the semblance of

the taking of property without just compensation. Given this incidental injury, it is concluded that such loss is a necessary incident to the enforcement of the statute, and the loss must be borne by the merchant as a cost of doing business within the Commonwealth.

Very truly yours,
RICHARD J. ORLOSKI
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 61

Department of Education—Section 1361 of the Public School Code—Transportation of resident nonpublic school students beyond school district boundaries.

1. Section 1361 of the Public School Code of 1949, 24 P.S. §13-1361, requires public school districts which provide transportation to public school students to also provide identical transportation to all nonpublic school students who live within the school district and who attend a school not operated for profit which is located within the public school district's boundaries, or outside the district's boundaries at a distance not exceeding ten miles by the nearest public highway.

Harrisburg, Pa.
August 17, 1973

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

Dear Secretary Pittenger:

You have asked whether school districts are required to transport resident nonpublic school pupils beyond the school district boundary lines when free transportation to public school pupils is provided, under Section 1361 of the Public School Code of 1949, P.L. 30, as amended by Act 372 of 1972 (24 P.S. §13-1361). Section 1361 provides as follows:

"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 kindergarten, elementary school, or secondary school in which he is lawfully enrolled, *provided that such school is not operated for profit and is located within the district boundaries at a distance not exceeding ten miles by the nearest public highway*, except that such ten-mile limit shall not apply to area vocational technical schools which regularly serve eligible district pupils or to special schools and classes approved by the Department of Education, and to and from any points in the Commonwealth in order to provide field trips 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 public school pupils to and from such schools or to and from any points in the Commonwealth in order to provide field trips as herein provided, the board of school directors shall also make identical provision for the free transportation of pupils who regularly attend nonpublic kindergarten, elementary and high schools not operated for profit to and from such schools or to and from any points in the Commonwealth in order to provide field trips as herein provided." (Emphasis added.)

Our reading of the above indicates that the intention of the Legislature is clear: When transportation is provided to public school pupils, identical transportation must be provided to all resident nonpublic school pupils attending a school not operated for profit or located within the district boundaries or outside the district boundaries at a distance not exceeding ten miles by the nearest public highway. By providing for such transportation, the Legislature was recognizing that, as a rule, nonpublic school students must travel further to get to school and that attendance zones for nonpublic schools usually do not coincide with school district boundaries.

The word "identical" must be construed so as to refer to such factors as distance from school and hazardous routes under Section 1362 of the School Code. Thus, for example, if public school children who live less than a mile and one-half do not receive free transportation, neither shall nonpublic school students. The word "identical" cannot be construed to refer to the question of school district boundaries, because such a construction would negate and make meaningless the specific language in the statute respecting transportation outside the district boundary—a result that may not be reached under the Statutory Construction Act of 1972, Act 290 of 1972, 1 Pa. S. §1933:

"Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision. . . ."

You are advised, therefore, that provision of transportation outside the district boundaries to nonpublic school students in the circumstances described above is not optional but is required under the language of the Act.

Very truly yours,
MARK P. WIDOFF
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 62

Women's rights to use their own name

1. A married woman has the right to continue to use the name given her at birth or "maiden name" after marriage.
2. A married woman can continue or change her operator's license or vehicle registration in or to her name at birth.
3. A woman need not change her name to her spouse's on the date of marriage.
4. The Pennsylvania Equal Rights Amendment means that the equality of women must be an official fact.
5. The State cannot rationalize sex discrimination based on efficiency.
6. "Actual name" as used in the Vehicle Code means either (1) a name assigned at birth, (2) the surname of a husband if so selected by a married woman, (3) a name changed by court order, or (4) the name by which a person is and has been known as demonstrated by reasonable evidence.

Harrisburg, Pa.
August 20, 1973

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

Dear Secretary Kassab:

We have been asked by Ms. Arline Lotman, Executive Director, Commission on the status of Women, whether a woman, on marriage, must change her operator's license and vehicle registration with the Bureau of Motor Vehicles so as to reflect her husband's surname or "married name" or whether she has the option to continue to use her birth name or so-called "maiden name." We have also been asked whether women who currently have these records in their married names can have them changed to their birth names. It has been suggested that a married woman is compelled to file and have approved a change of name petition in the Court of Common Pleas of the county in which she resides if she wishes to use her birth name.

It is our opinion, and you are so advised, that a married woman has the right to continue to use after marriage the name given her at birth.¹ Accordingly, a married woman may continue

1. It is quite common for professional women to use their "birth names" rather than their married name. Judge Anne X. Alpern before her appointment as Attorney General used her birth name as she presently does as a Judge in Allegheny County. In 1952 she was designated by her name at birth by Governor John S. Fine as a "Distinguished Daughter of Pennsylvania". In *How To Change Your Name And The Law Of Names*, by Lawrence G. Greene (1954), it is stated at p. 56 that

"while a court may be reluctant to change the name of a married woman to a name other than that of her husband, there seems to be no legal bar to her assuming her maiden or any other name without the permission of a court. We see such changes constantly in the entertainment and commercial worlds, where women pursue their careers under their maiden or assumed names."

or change her operator's license or vehicle registration in or to her name at birth provided in fact she uses that name as her actual name.

The Vehicle Code, Act of April 29, 1959, P.L. 58, as amended, 75 P.S. §§407, 612, provides that an operator's license and vehicle registration be in a person's "actual name." "Actual name," in our opinion, means either a woman's name at birth or her married name, at her option. She however should be consistent and not use the names interchangeably.

In reaching this conclusion, we are guided by the canons of statutory construction. Statutes must be interpreted as intended by the legislature. If it intended "legal name", it could have said so. If it intended a person who changes a name by marriage to notify the Motor Vehicle Bureau, it could have done so expressly. For example, *Uniform Vehicle Code*, §3-414(b), which has yet to be enacted in Pennsylvania, provides for a notice of change of name "whenever the name of any such person... is thereafter *changed by marriage* or otherwise such person shall within 10 days notify the department of such former and new name." (Emphasis supplied.)

What is a person's actual name? The sole function of a "name" is to identify the person to whom it is intended to designate. *Department of Public Assistance v. Reustle*, 358 Pa. 111, 114, 56 A. 2d 221, 223 (1948). For the history of names, see, *Petition of Snook*, 2 Pittsburgh Reports 26, 28-35 (1859), a report in this State of a case in the Common Pleas Court of New York. It was reported as it was believed that the discussion of the subject was exhaustive.

A married woman has the option to be identified as she deems fit whether it be by her name at birth or married name. There is no statutory authority mandating that a woman change her name to her spouse's on the date of marriage. It is strictly a social custom that has evolved over the years. At common law the only prohibition against the use of a different name was its use for fraudulent purposes. See, 3 *Freedman Law of Marriage and Divorce in Pennsylvania*, (2nd Ed. 1957), §712, pp. 1335-1336.

The notion that a woman loses her prior identity by marrying is a weed that has flourished too long in this society. It undoubtedly is a vestige of the time when the wife was regarded, along with the children, as part of the husband's property. It had its genesis, we believe, in the following:

"By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the women is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-french a *feme-covert*...under the protection and influence of her husband, her baron, or lord; and her condition dur-

ing her marriage is called her coverture." (Emphasis supplied.) *Blackstone's Commentaries on the Laws of England* 430, 1st Edition 1765).

Coverture or the doctrine of the condition or state of a married woman does not obtain in Pennsylvania. (Act of July 15, 1957, P.L. 969, 48 P.S. §32.1) Justice Black commenting on that doctrine, described as "peculiar and obsolete" in the majority opinion in *United States v. Yazell*, 382 U.S. 341, 15 L. Ed. 2d 404, 86 S. Ct. 500 (1966), stated that:

"...the Texas law of 'coverture' which was adopted by its judges and which the State's legislature has now largely abandoned, rests on the old common-law fiction that the husband and wife are one. This rule has worked out in reality to mean that though the husband and wife are one, the one is the husband. This fiction rested on what I had supposed is today a completely discredited notion that a married woman, being female, is without capacity to make her own contracts and do her own business. I say 'discredited' reflecting on the vast number of women in the United States engaging in the professions of law, medicine, teaching, and so forth, as well as those engaged in plain old business ventures as Mrs. Yazell was. It seems at least unique to me that this Court in 1966 should exalt this archaic remnant of a primitive caste system to an honored place among the laws of the United States." 382 U.S. at p. 361, 15 L. Ed. 2d at p. 415, 86 S. Ct. at p. 511 (dissenting opinion) (Emphasis supplied.)

Here Mrs. Yazell invoked Texas law as a shield against liability on a debt she incurred to the Small Business Administration. This obviously is not the law of Pennsylvania. It is no longer even the law of Texas as the statute involved in the case was repealed and Texas wives now have the capacity to contract.²

2. We do not believe that the common law has been modified by the Act of April 18, 1923, P.L. 75, as amended, 54 P.S. §1 *et seq.* At common law a married woman had the right to use her name before marriage for many purposes. See, *Hanson's Appeal*, 330 Pa. 390, 391 (1938); *Egeter's Appeal*, 32 D.&C. 164, 86 P.L.J. 192, 52 York 40 (1938). The statute does not alter the common law. The purpose of this statutory change of name procedure is simply to secure an official or legal record. 65 C.J.S. NAMES §11(2), p. 27. The cases involving married women using this procedure to obtain a resumption of their name before marriage essentially involved children and the real purpose was to have the name of the children changed and the prime consideration in opposition to the application was the father's alleged right to have his children continue to bear his name.

The divorced woman's right to resume her "birth name" is specifically recognized by the Act of May 25, 1939, P.L. 192, as amended, 23 P.S. §98. It cannot be inferred therefrom that a woman who is married cannot use her birth name. The statute provides for a notice to be filed which would be "...competent evidence for all purposes of the right and duty of such woman to use her maiden name or her prior name thereafter." Clearly this legislation was more of a convenience so as to enable a divorced woman to clarify her new situation rather than a conferring of a right to use her birth name.

The opinion expressed above that women have a choice, to be exercised with consistency, of their birth or married name and that Pennsylvania common law and The Vehicle Code are no bar to such a choice is, moreover, now compelled by the enactment of the Equal Rights Amendment to the Pennsylvania Constitution, Article I, §28. It 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."

A comprehensive article on the implications of the proposed federal equal rights amendment, which is, in effect, virtually the language in the Pennsylvania Constitution, supports the view that under such an amendment a woman would not be required to take her husband's name. "The Equal Rights Amendment: A Constitutional Basis For Equal Rights For Women," 80 Yale Law Journal 871 (April 1971). The article at page 940 states that:

"[T]he Equal Rights Amendment would not permit a legal requirement, or even a legal presumption, that a woman takes her husband's name at the time of marriage. In a case where a married woman wished to retain or regain her maiden name or take some new name, a court would have to permit her to do so if it would permit a man in a similar situation to keep the name he had before marriage or change to a new name. Thus, common law and statutory rules requiring name changes for a married woman would become legal nullities. A man and woman would still be free to adopt the same name, and most couples would probably do so for reasons of identification, social custom, personal preference, or consistency in naming children. However, the legal barriers would have been removed for a woman who wanted to use a name that was not her husband's."

The clear legislative intent of the Pennsylvania Equal Rights Amendment, Article I, §28, was to provide for equality between the sexes. The Amendment means that in Pennsylvania the equality of women must be an official fact, not an academic fact. It is self evident that there can be no such equality if a marriage ceremony abridges a female's right to use the name by which she was always known.

Certainly the state cannot rationalize sex discrimination based on efficiency. In the case of a woman who choose at the time of marriage to retain her birth name in the conduct of her affairs, use of her birth name will serve the interests of administrative efficiency.

"If a woman consistently uses the one name with which she was born, there would be no problems. The woman would hold herself out to the public, commercially and

professionally, as the same person for her entire life. Creditors would in no way be deceived; title of ownership would be easily traced since the name of the woman remains the same even after marriage; and state licensing regulations requiring that the licensee notify the state upon the change of name would not really be applicable since there would be no name change."

"And Then There Were Two," Marija Match Hughes, 23 Hastings Law Journal, 233 (Nov. 1971).³

In the case of a woman who subsequent to her marriage chooses to use her birth name after having used her married name for a period of time, the administrative burdens are minimal at best. As this opinion holds, a woman in making the choice to use her birth name, must use that name consistently in the conduct of her affairs. In so doing she has chosen her birth name as her "actual name" not only for purposes of obtaining a driver's license or registering her automobile but for other activities as well, e.g. owning property, purchasing insurance, applying for social security benefits and entering into contracts and other financial arrangements.⁴ In making the choice to use the name she is known by for purposes of a driver's license or motor vehicle registration she is eliminating the possibility of confusion to the public and to administrative agencies with licensing functions. The administrative burden, if any, occurs when the woman seeks to choose her birth name and to change the name on her driver's license or vehicle registration from that of her married name to her birth name. Appropriately drawn regulations, by requiring production of a birth certificate, check book, property records, social security card or insurance policies or the signing of an affidavit or certificates of intent to use a birth name at the time of application for the license or registration, will assure PennDOT at the time the choice is made by the woman that the name the woman is choosing is the only one by which she is known and will be known.

In view of the slight, if any, administrative burdens imposed by permitting women to use their birth name, a construction of The Vehicle Code, supra, §§407, 612, so as to preclude women from using their names at birth, in our opinion, would be an unconstitutional interpretation. A construction contrary to the one prescribed by this opinion would have the effect of denying to a woman the use of her birth name merely because of the

3. The Congressional Hearings on the Equal Rights Amendment heard specific testimony as to discrimination against women with respect to name. *Discrimination Against Women*, Congressional Hearings on Equal Rights in Education and Employment, Edited by Dr. Catharine R. Stimpson, (1973), "Are Women Equal Under the Law?" (Gene Boyer, May 1970) at p. 386.

4. The Social Security Administration recognizes the right of women to choose their birth name in connection with the Federal Social Security program and insurance companies, banks and other financial institutions do not appear to question the use by a woman of her birth name.

circumstance of marriage while at the same time a man, in the same circumstance of marriage, retains the right to use his birth name. Such an impediment based solely on differences of sex and supported by no compelling or even limited state or administrative interest would violate Article I, §28. The unassailable canon of legislative construction that the General Assembly does not intend to violate the Constitution of the Commonwealth, therefore, compels our interpretation of The Vehicle Code.

We realize that the result we have reached is contrary to *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Alabama N.D. 1971) aff'd without op. 405 U.S. 970, 31 L. Ed. 2d 246, 92 S. Ct. 1197 (1972). That case is clearly distinguishable for three reasons. Alabama's common law expressly held that married women had their husband's surname as their legal name; the Alabama Department of Public Safety had a regulation requiring each driver to obtain a license in the "legal name" and, therefore, required a married female driver's license applicant to use her husband's surname; and Alabama does not have an Equal Rights Amendment which precludes discrimination based on sex. In view of *Frontiero v. Richardson*, 411 U.S. 677, 36 L. Ed. 2d 583, 93 S. Ct. 1764, (May 14, 1973) it is questionable whether there would now be an affirmance. We believe further that the later decision of the Maryland Court of Appeals in *Stuart v. Board of Supervisors*, 266 Md. 440, 295 A. 2d 223 (1972) is sounder and more consonant with today's world. The majority opinion by Chief Judge Murphy held that the mere fact of a marriage ceremony does not by operation of law automatically transfer the husband's surname to his bride.

In conclusion as there has been some confusion as to what "actual name" means in the Vehicle Code, §§407, 612, in areas other than the specific one indicated above, we will synthesize below what we believe is the proper interpretation of this phrase.

Actual name shall mean (1) the name assigned to a person at birth; (2) in the case of a married woman, the surname of her husband, if she so elects; (3) the name appearing in a court order in the case of a person whose name has been changed, pursuant to statute, by judicial action; and (4) in the case of an individual who uses a name other than that which would be determined by one of the above methods, the name by which such person is and has been known as demonstrated by reasonable evidence. While not intended to be inclusive, such evidence may include tax, social security, selective service and voter registration records.

Sincerely,
EDWARD J. MORRIS
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 63

Bureau of Elections—Voting machine ballot positions for cross-filed candidates—Offices of judge and school director

1. Section 1110(f) of the Election Code requires that when a judicial candidate cross-files in a primary on both the Democratic and Republican tickets, and he comes in second on the Democratic ticket and first on the Republican ticket, his name must appear in the second row or column of each ticket at the general election, because his position is to be determined by the number of votes he received as a candidate of the party entitled to priority on the primary ballot, in this case the Democratic party, since its candidate for governor obtained the greater number of votes in the last gubernatorial election.
2. Sections 1003(b) and 1110(f) of the Election Code, when read together, require that the names of the Republican candidate who placed second in the primary be inserted in the first Republican position on the general election ballot, so that no blank spaces appear on either the Democratic or Republican tickets.
3. The requirements of the above Election Code provisions apply to all instances where candidates for the offices of judge or school director have cross-filed and succeeded in obtaining the nomination of more than one party.

Harrisburg, Pa.
August 23, 1973

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

Dear Secretary Tucker:

You have requested our opinion as to the proper positions of successful judicial candidates on the November 1973 voting machine ballot when one of the candidates has cross-filed in the primary election and succeeded in obtaining nominations on both the Democratic and Republican tickets.

In the May 1973 primary, Judge Price won both the Democratic and Republican nominations for Superior Court. Judge Price received the greatest number of votes on the Republican ballot and came in second on the Democratic ballot behind the other successful candidate, Judge Van der Voort. Judge Grifo succeeded in winning the second Republican nomination.

Section 1003(b) of the Election Code, 25 P.S. §2963(b), generally governs the order by which candidates are to be positioned, whether it be on a written ballot or voting machine ballot. It provides:

"In the case of offices for which two or more candidates are to be voted for, the candidates of each party shall be arranged together in the order of the number of votes obtained by them at the primary, beginning with the candidates obtaining the higher number of votes...."

Under this provision standing alone, the order on the Democratic ticket would be Judge Van der Voort followed by Judge Price, while on the Republican ticket Judge Price would appear first, followed by Judge Grifo.

However, this arrangement must be modified in the light of §1110(f) of the Election Code, 25 P.S. §3010(f), which is specifically addressed to voting machine ballots. Section 1110(f) states:

“When the same person has been nominated for the same office by more than one political party, his name shall appear in the rows or columns containing generally the names of candidates nominated by each such party, his position in such rows or columns to be determined by the number of votes he received at the primary in the party entitled to priority on the ballot as determined by the votes obtained in the State at the last gubernatorial election by the candidate for governor.”

Since the Democratic candidate prevailed in the last gubernatorial election, Judge Price's position on the Democratic ticket controls, and consequently his name must occupy the second position on the Republican ticket as well, replacing that of Judge Grifo.

You have informed us that the mechanics of the vast majority of the Commonwealth's voting machines are such that it would be impossible to prevent a voter from voting twice for Judge Price were he second on the Democratic ballot and first on the Republican ballot. However, by moving Judge Price from the first to the second position on the Republican ballot, the second row could be locked in such a way as to allow a voter to vote for Judge Price just once, either on the Democratic row or the Republican row. It is clear that §1110(f) was drafted to accommodate this particular mechanical exigency.

An analogous provision in the Election Code deals with recording paper ballot votes for cross-filed candidates. Section 1003(d), 25 P.S. §2963(d), reads as follows:

“Whenever any candidate shall receive more than one nomination for the same office, his name shall be printed once, and the names of each political party so nominating him shall be printed opposite the name of such a candidate, arranged in the same order as candidates names are required to be arranged. At the right of all the party names or appellations shall be a square of sufficient size for the convenient insertion of a cross (x) or check (✓) mark.”

As construed in *Leitzell Appeal*, 33 D. & C. 2d 324 (1963), this provision was applied to invalidate those ballots on which voters had voted twice for a cross-filed candidate, but to uphold those ballots where the candidate received only one vote, and also to validate the cumulated votes, notwithstanding that the precise form prescribed by the section had not been followed. Both §1003(d) and §1110(f) obviously embody the eminently sensible conclusion that a voter may not vote twice for a cross-filed

candidate, since were he in effect elected twice, he still could only occupy one office.

Nothing in the above discussion should be construed to preclude cumulation of Judge Price's vote on both the Democratic and Republican ballots. Section 1406 of the Election Code, 25 P.S. §3156, states:

"No candidate for public office at any November election whose name, for any reason is printed more than once for the same office on any ballot at any general, municipal or special election, shall be entitled to have cumulated, either by the elections officers, by the county board, or by any court, the votes cast after such different names." (Emphasis supplied.)

As the court observed in *Leitzell Appeal*, supra, the focus of this provision is on preventing fraud by one candidate who obtains two ballot positions by virtue of different spelling or printing of his name. Assuming that Judge Price's name will be spelled identically on the Democratic and Republican ballots, his votes on both tickets will be cumulative.

Having determined that Judge Price's name must be moved to the second position in the Republican row, there remains the question of whether Judge Grifo will inherit the first position or be relegated to the third position on the row. Section 1003(b) of the Election Code, quoted above, states that "the candidates of each party shall be arranged together in the order of the number of votes obtained by them at the primary, beginning with the candidates obtaining the highest number of votes..." Section 1110(f), also cited above, provides that for a candidate nominated for the same office by more than one political party, "his position (is) to be determined by the number of votes he received at the primary in the party entitled to priority on the ballot..." The operative language here is "arranged together" and "position" which, when read *in pari materia*, we conclude to proscribe leaving blank the first space on the Republican row.

As already discussed, Judge Price's position on the Democratic ticket is second, and consequently must be the same on the Republican ticket. We construe "position" to refer to a candidate's placement on the ballot relative to the other candidates on his ticket, given the stricture in §1003(b) that candidates of each party must be "arranged together." Only if Judge Grifo's name occupies the first Republican space will Judge Price's position vis-a-vis his running mates be the same on both tickets, namely second. Were Judge Grifo's name to follow that of Judge Price, the latter would still, in effect, hold the first position on the Republican ticket, and such an arrangement would conflict with the requirement of §1110(f) that Judge Price's position be second on the Republican row or column.

Placing Judge Grifo's name first in an appropriate and reasonable solution because Judge Price is, in effect, running against

himself, and voters who wish to vote for him must decide whether to do so on the Democratic or Republican ballot. By the same token, in interparty terms, Judge Van der Voort is really running against Judge Grifo, and it is proper that their two names be juxtaposed to give voters the clearest opportunity to choose between the two. It is assumed, of course, that in initiating his candidacy and choosing to cross-file, Judge Price was aware of the possibility of the above occurring. We can only further assume that Judge Price's choice took into account the advantage occurring to him should he win the Democratic primary—that advantage being placement on the Democratic row or column which, because of the 1970 gubernatorial vote, would appear first on the ballot.

Finally, we are aware that the circumstances dealt with here are not isolated, and that these questions are recurring ones in light of the fact that many candidates throughout the Commonwealth for the offices of judge and school directors have cross-filed pursuant to §976 of the Election Code, 25 P.S. §2936,¹ and have won on both tickets. The provisions discussed above and applied to Judges Price and Grifo are equally applicable to these other elections, and are all the more compelling since in some instances there may be five or more candidates on each party ticket. In many such instances, were §1003(b) and §1110(f) interpreted to require Judge Grifo's name to be placed after Judge Price's name, the resulting blank spaces would render it difficult if not impossible to devise a ballot to fit the voting machine and meet the requirements of legibility.

In summary, it is our opinion, and you are hereby advised, that Judge Van der Voort should be placed first in the Democratic row with Judge Price second, and Judge Grifo should be placed first in the Republican row with Judge Price second. Furthermore, the same procedure of repositioning the names of successful cross-filed candidates should be followed in other elections for the offices of judge and school director, with candidates' names otherwise being arranged with no blank spaces and according to who obtained the higher number of votes.

Sincerely yours,

MELVIN R. SHUSTER
Deputy Attorney General
ISRAEL PACKEL
Attorney General

1. Section 976 of the Election Code states in part: "No nomination petition, nomination paper or nomination certificate shall be permitted to be filed if—... (d) in the case of nomination petitions, if nomination petitions have been filed for printing the name of the same persons for the same office, except the office of judge of a court of record, or the office of school director in districts where that office is elective upon the official ballot of more than one political party...."

OFFICIAL OPINION No. 64

Auditor General—Act of May 21, 1931, P.L. 185

1. The Act of March 18, 1971, P.L. 109, No. 4 §4, 72 P.S. §404, prohibits the Auditor General from pre-approving any transactions for which he has the responsibility of auditing.
2. The provisions of the Act of May 21, 1931, P.L. 185, require the authorization of the Governor, the State Treasurer and the Auditor General before any expenditures can be made from the Cornwall Furnace Trust Fund.
3. The Statutory Construction Act provides that where two statutes contradict, the one with the most recent date shall prevail.
4. The Act of May 21, 1931, P.L. 185, contradicts the express intent of the Act of March 18, 1971, P.L. 109, No. 4 §4, 72 P.S. §404.
5. Since the purpose and intent of the Act is not defeated by requiring only the authorization of the Governor and the State Treasurer before expenditures can be made, the Act is severable and the valid provisions can remain.

Harrisburg, Pa.
August 23, 1973

Honorable William J. Wewer
Executive Director
Historical and Museum Commission

Dear Mr. Wewer:

We have received your request for an opinion asking whether the Auditor General's approval is required in order to make expenditures from the Cornwall Furnace Trust Fund, created by the Act of May 21, 1931, P.L. 185.

Article VIII, Section 10, of the Pennsylvania Constitution provides:

"Any Commonwealth officer whose approval is necessary for any transaction relative to the financial affairs of the Commonwealth shall not be charged with the function of auditing that transaction after its occurrence."

This section of the Constitution was further clarified by the Act of March 18, 1971, P.L. 109, No. 4, §4, 72 P.S. §404:

"No officer of this Commonwealth charged with the function of auditing transactions after their occurrence shall approve the same transaction prior to their occurrence. Notwithstanding any provisions of any law to the contrary, from and after the effective date of this act, the Auditor General shall not be required or empowered to pre-approve or pre-audit any transaction with respect to which said officer is empowered or required to conduct and audit after the transaction has occurred."

Therefore, it is apparent that any approval by the Auditor General prior to the expenditure of these funds would clearly contradict this statute.

The Statutory Construction Act provides:

“Whenever the provisions of two or more statutes enacted finally by different General Assemblies are irreconcilable, the statute latest in date of final enactment shall prevail.” Act of December 6, 1972, P.L._____, No. 290 §4, 1 Pa. S. §1936.

Since the statute clarifying the powers of the Auditor General was enacted in 1971, it clearly should prevail over any earlier statutes that are contradictory, and, in particular, must prevail over the Act of May 21, 1931, P.L. 185.

The Act of May 21, 1931, P.L. 185, to which you refer, establishes a board of trustees, consisting of the Governor, the Auditor General and the State Treasurer, to manage a fund established for the preservation and maintenance of the Cornwall Furnace historical property in Lebanon County. Although it is no longer lawful for the Auditor General to act as a trustee on this board, this, nevertheless, does not invalidate the Act altogether. The Legislature has stated that every statute enacted shall be severable, provided that the remaining valid provisions are capable of being executed in accordance with the legislative intent. Act of December 6, 1972, P.L. _____, No. 290, §4, 1 Pa. S. §1925. It is clear that the purpose of the Act establishing the Cornwall Furnace Trust Fund is not seriously compromised by the deletion of the Auditor General as a trustee.

Therefore, it is our opinion, and you are so advised, that the Auditor General's approval is no longer required in order to make expenditures from this trust fund, but that the approval of the Governor and the State Treasurer, pursuant to the Act of May 21, 1931, P.L. 185, is sufficient to authorize such expenditures.

Very truly yours,

THEODORE A. ADLER
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 65

Department of Property and Supplies—Contracts—“Escalator clause”—The Administrative Code

1. The Department of Property and Supplies is authorized to enter into a contract containing an “escalator clause.”
2. Although Section 2403 of the Administrative Code (71 P.S. §633) requires a maximum price for liquid fuel contracts, it does not require a firm price as presently contained in the Department's bid proposals.
3. “Escalator clauses,” which consist of provisions that in the event of specific cost increases the seller or contractor may raise the price up to a fixed percentage of the base price, are valid.

Harrisburg, Pa.
August 23, 1973

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

Dear Secretary Hilton:

We have received a request for an opinion from your Department concerning its authority to enter into a contract containing an "escalator clause." It is our opinion, and you are advised, that your Department does have such authority.

The question has arisen in connection with attempts by the Department to secure bids for contracts for the purchase of liquid fuel. At present such contracts are governed by a "firm price" provision in the bid proposals. This provision holds, in effect, that the bid prices are not subject to any increase during the term of the contract. This has caused difficulty for the Department in obtaining bids due to the uncertainty of the liquid fuel market and the high degree of fluctuation in market prices anticipated in the foreseeable future. Fuel companies are refusing to bid unless the "firm price" is eliminated from the bid proposal and they be permitted to bid on a market fluctuation basis.

The law applicable to the purchase of fuel is found at subsection (b) of Section 2403 of the Administrative Code (71 P.S. §633) as follows:

"The Department of Property and Supplies shall have the power, and its duty shall be:

* * * * *

"(b) To enter into contracts for supplying all stationery, printing paper, and *fuel*, used in the legislative and other departments of the Government, and for repairing and furnishing the halls and rooms used for the meetings of the General Assembly and its committees. All such contracts shall be awarded to the lowest responsible bidder below *such maximum price*, and under such regulations as are prescribed by this act, and shall be subject to the approval of the Governor, the Auditor General, and the State Treasurer;" (Emphasis supplied.)

Although the foregoing provision requires a *maximum* price for such contracts, it does not require a *firm* price, as presently contained in the bid proposals. Nor is there any other provision of the Administrative Code that mandates a firm price for contracts for the purchase of fuel and other supplies.

On the other hand, "escalator clauses" which consist of provisions that in the event of specified cost increases, the seller or contractor may raise the price up to a fixed percentage of the

base price, are recognized as valid. At 17 Am. Jur. 2d, *Contracts* §350, it is stated:

"Some contracts contain what is known as an "escalator clause," which is defined as one in which the contract fixes a base price but contains a provision that in the event of specified cost increases, the seller or contractor may raise the price up to a fixed percentage of the base. Attacks on such a clause have usually been based on the claim that, because of the open-price provision, the contract was too indefinite to be enforceable and did not evidence an actual meeting of the minds of the parties, or that the arrangement left the price to be determined arbitrarily by one party so that the contract lacked mutuality. In most instances, however, these attacks have been unsuccessful."

In particular a contract was recognized as valid in *Standard Transformers Co. v. Detroit*, 146 F. Supp. 740 (D.C. Mich., 1956) which fixed a base price for the goods but stipulated that the price charged would be adjusted to that in effect at the time of shipment, any such increase being limited to 10 percent.

Similarly, a contract was upheld in *National Can Co. v. Robert Gair Co.*, 138 Md. 330, 113 A. 858 (1921), which provided for the price to be subject to a revision upward or downward according to the market conditions on 10 days notice by the seller, purchaser to have the option to cancel as to the balance of the contract upon the receipt of the notice of price change.

The case of *Paragon Oil Co. v. New York*, 138 N.Y.S. 2d 905 (1955), involved an escalation clause providing for increases or decreases in the contract price according to changes in the price for similar oil as quoted in a weekly trade paper. See also, Annotation, 63 A.L.R. 2d 1338.

Moreover, Section 2-305 of the Uniform Commercial Code (12A P.S. §2-305) provides:

"(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if"

* * * * *

"(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded."
(Emphasis supplied.)

The phrase "and it is not so set or recorded" means that it is not set or recorded at the time of making the contract but it is to be set or recorded by the third person or agency at some later time, such as the time for delivery.

By virtue of the foregoing authority it is concluded that "escalator clauses" are valid. Your bid proposals for the pur-

chase of liquid fuel may, therefore, be revised to eliminate the "firm price" provision and to allow the price to fluctuate up or down in accordance with market conditions or other standards, as specified in the bidding documents, as long as the ultimate price is below the maximum price prescribed as required by The Administrative Code.

Very truly yours,
W. WILLIAM ANDERSON
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 66

Governor's Office of Administration—Recruiting expenses—Administrative Code

1. Payments may be made to job applicants for the purpose of defraying expenses incurred in traveling to Harrisburg for job interviews.

September 17, 1973
Harrisburg, Pa.

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

Dear Secretary Lench:

You have requested our opinion with respect to whether State and/or Federal funds may be expended for the purpose of defraying the expenses of applicants for employment who must travel to Harrisburg for job interviews. You have indicated that the need for making such payments is particularly acute with respect to applicants for employment under our Affirmative Action Program, and that present inability to make such payments has a serious negative effect on our efforts to implement a meaningful Affirmative Action Program.

You are advised that such payment may be made, if

(1) proper controls and procedures are followed in accordance with applicable law and with regulations that should be promulgated by your office in accordance with §701(e) of the Administrative Code of April 9, 1929, as amended (71 P.S. §241(e)) assuring that payments made are for reasonable expenses necessary in order to travel to and from Harrisburg and to subsist during the period away from the applicant's home; and

(2) the money expended is from appropriations designated specifically for this purpose or appropriated for a general purpose which can reasonably be interpreted to include the cost of recruiting applicants for vacant positions.

Attached we have included a copy of a memorandum dated May 22, 1968 from former Attorney General William C. Sennett which has been relied upon to disallow the payment of expenses to applicants who must come to Harrisburg for interviews. While we agree that §709 of the Administrative Code of April 29, 1929, as amended (71 P.S. §249) is no authority for making such payments, we do not consider it to be authority for denying such payments, and to the extent the opinion so states or implies, it is hereby overruled.

It need hardly be stated that the Legislature has the authority under the Constitution to appropriate monies for any lawful purpose—i.e., any purpose not forbidden by the Constitution. It is beyond question that the Legislature has the power and duty to appropriate funds for the proper operation of government. See, e.g., Art. 8, §15, Pa. Const., and The Appropriations Act of 1973 (Act No. 11A, approved by the Governor July 12, 1973) which provides for the proper administration of all State departments in language similar or identical to the following:

“To the Pennsylvania Historical and Museum Commission

For salaries, wages and *all necessary expenses for the proper administration* of the Pennsylvania Historical and Museum Commission. . . .” (Emphasis added.)

It can hardly be denied that the filling of vacancies in the departments, boards, and commissions of the Executive Branch with the most capable and qualified people possible is a necessary requirement for the efficient operation of government. It is well known, furthermore, that the Commonwealth operates under many handicaps in attempting to compete with private industry in those areas where the job market is competitive—e.g. fixed wage and benefit scales that cannot be raised to meet a private competitor's offer, inability to pay moving costs, lack of job security in some areas, etc. Thus, it is very likely that desirable potential employees have been lost when asked to pay—in addition—their costs for traveling to Harrisburg for job interviews deemed necessary and requested by the hiring agency.

In accordance with §512 of The Administrative Code, the Auditor General and The Treasurer of the Commonwealth have been afforded the opportunity to comment on the question dealt with herein. They have expressed their belief that specific enabling legislation must be enacted before the payments described above may be made. For the reasons stated above, we cannot agree. The proper and efficient day-to-day management of the executive departments cannot possibly be described and authorized in every relevant detail by the Legislature—nor should it be. Our constitutional separation of functions provide otherwise.

We conclude, therefore, that, where a personal interview in Harrisburg is deemed necessary in order to properly fill a va-

cancy, and the applicant must expend monies in order to make that interview, it is altogether reasonable and proper that such expenses be reimbursed, under the appropriate safeguards.

Sincerely yours,
MARK P. WIDOFF
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 67

Labor and Industry—Foreign wage attachments are not entitled to full faith and credit in Pennsylvania

1. Pennsylvania employes may not have their wages garnished by nonresident creditors who obtain judgments in foreign jurisdictions and then attempt to enforce such judgments by serving the employer of the debtor with a foreign garnishment notice where such employer maintains an office in the foreign jurisdiction as well as in Pennsylvania.

Harrisburg, Pa.
October 5, 1973

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

Dear Secretary Smith:

You have requested our opinion on the question of whether wages of Pennsylvania employes may be garnished in Pennsylvania by creditors who obtain judgments in foreign jurisdictions. Specifically, it has been brought to our attention that companies doing business by mail from neighboring states with Pennsylvania residents and attempting to collect on alleged debts have no difficulty in bringing suit and obtaining judgments in such neighboring states. Where the employer of the debtor maintains an office in the foreign jurisdiction as well as in Pennsylvania, the creditors have attempted to enforce such judgments by serving the employer with a foreign garnishment notice. In many instances, we are informed, employers, in compliance with such notice, then proceed to withhold such wages at and through the Pennsylvania location.

You are informed that such garnishment of wages is unlawful, because it is in violation of §5 of the Act of April 15, 1845, P.L. 459 (42 P.S. §886), and the Act of May 23, 1887, P.L. 164, as amended (12 P.S. §§2175, 2176). You are further informed that foreign wage attachments are not entitled to full faith and credit, although, of course, the underlying judgments are. Accordingly, an employer need not and should not comply with foreign wage attachment notices and should, in all cases, refuse to withhold wages of debtor-employes.

The Acts cited above provide as follows:

“§886. Entry of judgment on admission of assets

“If the garnishee in his answers admit that there is in his possession or control property of the defendant liable under said act to attachment, then said magistrate may enter judgment specially, to be levied out of the effects in the hands of the garnishee, or so much of the same as may be necessary to pay the debt and costs:

Provided however, That the wages of any laborers, or the salary of any person in public or private employment, shall not be liable to attachment in the hands of the employer.” (Emphasis added.) 42 P.S. §886.

“§2175. Actions or assignments to defeat exemptions, forbidden; liability

“From and after the passage of this act, it shall be unlawful for any person or persons, being a citizen or citizens of this Commonwealth, to *institute an action on*, or to assign or transfer any claim for debt against a resident of this Commonwealth for the purpose of *having the same collected by proceedings in attachment in courts outside of this Commonwealth*, or to send out of this Commonwealth by assignment, transfer or other manner whatsoever, either for or without value, any claim for debt against any resident thereof, for the purpose or with the intent to deprive such persons of the right to have his personal earnings or property exempt from application to the payment of his debts according to the laws of this Commonwealth, where the creditor and debtor and the person or corporation owing the money intended to be reached by such proceedings are within the jurisdiction of the courts of this Commonwealth; and the person or persons so suing upon, assigning or transferring any such claim, for the purpose or with the intent aforesaid, shall be liable in an action of debt to the person or persons from whom any such claim shall have been collected by attachment or otherwise outside of the courts of this Commonwealth for the full amount of debt, interest and costs so collected, and the defendant or defendants therein shall not be entitled to the benefit of the exemption laws of this Commonwealth upon any execution process issued upon any judgment recovered in any such action.” (Emphasis added.) 12 P.S. §2175.

The courts of the Commonwealth have, over the years, consistently held that a strong public policy exists against the garnishment of wages in favor of preferential treatment of wage earners. See, e.g., the following cases cited in *Guty v. U.S. Steel Corp.* (C.P. Fayette Ctv. No. 2650 in Equity); *Kolber v. “The Cyrkle”*, 433 Pa. 247 (1969); *Resolute Insurance Co., Inc v. Pennington*, 423 Pa. 472, 478 (1966); *Eastern Lithographing Corp.*

v. Silk, 203 Pa. Super. 21 (1964); *Right Lumber Co. v. Kretchmer*, 200 Pa. Super. 335 (1963); *Bell v. Roberts*, 150 Pa. Super. 469 (1942); *Wagner-Taylor Co. v. McDowell*, 137 Pa. Super. 425 (1939); *Pasos v. Ferber*, 263 F. Supp. 877 (M.D. Pa. 1967).

Further, the courts have not looked favorably on any attempts—direct or indirect—to evade the clear purpose of the statutes quoted above and have not hesitated to invoke equitable jurisdiction to prevent such evasion. See, e.g., *Zeiders v. Lewis Apparel Stores, Inc.*, 82 D. & C. 488 (C.P. Blair Cty. 1952) where the court stated the following:

"The purpose of the Act of 1887 was to prevent evasions of the Act of 1845, which provided that wages shall not be liable to attachment in the hands of the employer. Its dominating purpose was 'to afford additional security to the exemption previously granted': *Steel v. McKerrihan*, 172 Pa. 280, 283 (1896). This act provided a right of action at law where payment of wages was made in judicial proceedings in a foreign jurisdiction under the circumstances set forth in the act. The act did not destroy the equity jurisdiction in Pennsylvania to enjoin further proceedings before payment, in violation of the 1845 Act. In *Galbraith v. Rutter*, 20 Pa. Superior Ct. 554, the court said concerning the Act of 1887, as follows:

"The dominating purpose of this legislation (which has been held to be constitutional, *Sweeny v. Hunter*, *supra*) is to prevent evasions of the Act of 1845 declaring that wages of any laborer shall not be liable to attachment in the hands of the employer: *Steel v. McKerrihan*, 172 Pa. 283. It is argued that the remedy furnished by the Act of 1887 is exclusive of all other proceedings which theretofore might have been brought by a debtor against a creditor for conduct covered by the Act. It is true, and it is conceded, that in the absence of the Act, the right to proceed in equity in personam, would obtain, but it is asserted that the existence of the Act denudes the plaintiff of his right to equitable procedure. The effect of the Act is to create a right to an action at law in the case of payment actually made in judicial proceedings in a foreign jurisdiction. It does not express intention to destroy the equity jurisdiction in Pennsylvania by which restraint may intervene before payment. Therefore, this legislation does not furnish an exclusive procedure preventing the filing of a bill to enjoin conduct stamped by legislation as unlawful, and which has not reached consummation in actual payment...."

See also, e.g., *Guty v. U.S. Steel Corp.*, *supra*; "Extra State Evasion of the Exemption of Wages," 1970 Pa. Bar Assoc. Quart. 173.

Two (2) questions, therefore, arise:

1. Is an Order of a foreign court requiring a Pennsylvania employer to withhold wages of a Pennsylvania employe in satisfaction of a debt owed by that employe, entitled to full faith and credit in a Pennsylvania court?

2. Is employer subject to contempt if he refuses to obey?

The "Full Faith and Credit" Clause of the United States Constitution provides:

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State.... Art. IV, §1.

It must be stated, first of all, that the question we now address ourselves to is one that can be resolved with finality only by the United States Supreme Court. That court has frequently stressed the importance of the Full Faith and Credit Clause in our Federal system, see, e.g., *Milwaukee County v. M.E. White Co.*, 269 U.S. 268, 276-7 (1935) (quoted in Restatement (2d) of Conflict of Laws 2d, comment to §103):

"The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." (Stone, J.)

Thus, for example, a valid judgment rendered in a State of the United States must be recognized and enforced in another state even though the original claim could not have been maintained in that state because that claim was contrary to its strong public policy. Restatement of Conflict of Laws 2d, §117 and cases and examples cited therein.

Nevertheless, we feel compelled to express our opinion that the policy expressed above does not apply to the instant situation. The question involved here is not whether Pennsylvania will recognize a valid money judgment of a sister state (which it clearly must under the Constitution); the question is whether a foreign jurisdiction may impose its collection mechanism on a Pennsylvania debtor where the debt was incurred in Pennsylvania by a Pennsylvania citizen to a corporation doing business in Pennsylvania.

In this regard, we must consider the following:

(1) The attempt to evade our wage garnishment exemption is a violation of the civil and criminal law of the Commonwealth. 12 P.S. §2175 (cited above); *Commonwealth v. Stambaugh*, 22 Pa. Super. 386 (1903).

(2) The evasion may be enjoined (see *Galbraith v. Rutter*, 20 Pa. Super. 554 (1902)), and that injunction is both lawful, *Cole v. Cunningham*, 133 U.S. 107 (1890), and entitled to full faith and credit. "Unconstitutional Discrimination in the Conflict of Laws: Equal Protection," 28 U. Chi. L. Rev. 1, 28 (1960).

(3) No foreign jurisdiction should ever issue a wage garnishment order in the situation described above under relevant rules of conflict of law. Restatement (2d) of Conflict of Laws 2d §132 provides:

"The local law of the forum determines what property of a debtor within the state is exempt from execution unless, another state, by reason of such circumstances as the domicile of the creditor and debtor, within its territory, has the dominant interest in the question of exemption. In that event, the local law of the other state will be applied."

Given these circumstances, we do not believe that the Full Faith and Credit Clause applies to wage garnishment orders of a foreign jurisdiction and believe such orders to be unenforceable. It follows, of course, that employers should, and can with probable impunity, refuse to comply with foreign garnishment notices.¹

Sincerely yours,
 MARK P. WIDOFF
 Deputy Attorney General
 ISRAEL PACKEL
 Attorney General

OFFICIAL OPINION No. 68

1973

Statutory Construction Act—Two or more amendments to the same provision, one overlooking the other (1 Pa. S. §1955)—Public School Code of 1949 (24 P.S. §5-516.1)—Tax Reform Code of 1971 (72 P.S. §7401(3)(1))—Act of January 13, 1966, P.L. (1965) 1292 (No. 515) 16 P.S. §11943)

1. Section 1955 of the Statutory Construction Act construed
 2. Amendments to §516.1 of the Public School Code made by Acts 302 and 312 of 1972 must be given effect; inserts and strike-outs of both amendatory acts must be read into the basic statute.
-
1. In the case of *Chicago R.I. & Pac. Ry. v. Sturm*, 174 U.S. 710 (1899) the Court refused to allow an employee (resident of a state not allowing wage garnishment) to recover his wages from an employer who was forced in an extrastate garnishment proceeding to pay a judgment of a creditor against the employee. To have done so, would have been to subject the employer to double liability—an intolerable result. While the decision in *Sturm* was necessary to maintain the integrity of our Federal system, we respectfully submit that an employer who refuses to garnish wages in the situation we have described above should suffer no penalty in the forum state for such refusal. His refusal, of course, would be one way to raise the underlying issue squarely before the courts.

3. Amendments to §401(3)(1) of the Tax Reform Code of 1971 made by Acts 93 and 105 of 1971 must be given effect; inserts and strike-outs of both amendatory acts must be read into the basic statute.
4. Amendments to the act of January 13, 1966, P.L. (1965) 1292 (No. 515) made by Acts 254 and 352 of 1972 must be given effect; inserts and strike-outs of both amendatory acts must be read into the basic statute.

Harrisburg, Pa.
October 10, 1973

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

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

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

Gentlemen:

In recent weeks, you have, by separate requests, asked the Department of Justice to render its formal legal opinion concerning the interpretation of certain statutes. In each case, the interpretation requires the reading of two amendments to the same section of a single statute; neither amendatory act, though passed in the same session of the General Assembly, makes reference to the other. In view of the similarity of the requests, the similarity of the nature of our legal advice, and the similarity of the legal analysis involved, I am taking the liberty of addressing this formal opinion to you jointly, in the belief that a uniform approach to the issues involved will be beneficial in this instance as well as be a guide to future interpretations of statutes.

I. The Statutes in Question

a. Concerning the Department of Education:

Act of December 6, 1972, P.L. _____ (No. 302); 24 P.S. §5-516.1 and act of December 6, 1972, P.L. _____ (No. 312); 24 P.S. §5-516.1, amend. section 516.1 of the Public School Code of 1949, act of March 10, 1949, P.L. 30; 24 P.S. §5-516.1.

b. Concerning the Department of Revenue:

Act of August 31, 1971, P.L. 362 (No. 93); 72 P.S. §7401(3)(1) and act of September 9, 1971, P.L. 437 (No. 105); 72 P.S. §7401(3)(1), amend section 401(3)(1) of the Tax Reform Code of 1971, act of March 4, 1971, P.L. 6 (No. 2); 72 P.S. §7401(3)(1).

c. Concerning the Department of Agriculture:

Act of October 26, 1972, P.L._____ (No. 254); 16 P.S. §11943 and act of December 28, 1972, P.L._____ (No. 352); 16 P.S. §11943, amend section 3 of the act of January 13, 1966, P.L. (1965) 1292 (No. 515); 16 P.S. §11943.

II. *Analysis of the Question*

In general terms, the question involved in each request for a formal opinion is to determine the correct reading of the basic statute as amended. Section 1955 of the Statutory Construction Act, 1 Pa. S. §1955, act of December 6, 1972, P.L._____ (No. 290) is largely dispositive of the issue:

"Section 1955. Two or more amendments to same provision, one overlooking the other.

"Whenever two or more amendments to the same provision of a statute are enacted at the same or different sessions, one amendment overlooking and making no reference to the other or others, the changes in the statute made by each shall be given effect and all the amendments shall be read into each other. If the changes made in the statute are to any extent in direct conflict with each other, the rules specified in section 1935 of this title (relating to irreconcilable statutes passed by same General Assembly) and section 1936 of this title (relating to irreconcilable statutes passed by different General Assemblies) shall govern. The fact that a later amendment (1) restates language of the original statute which was deleted by an earlier amendment, or (2) fails to restate language inserted by an earlier amendment, does not of itself create a conflict between the two amendments. Amendments are in conflict with each other only if the changes in the statute made by each without considering the inserts and strike-outs of the other cannot be put into operation simultaneously."

The application of section 1955 of the Statutory Construction Act to the issues raised in this opinion depends largely on construing the meaning of the 1st sentence of the section. That sentence prescribes the procedure by which it may be ascertained whether or not amendments are in conflict with each other. Direct conflict exists only to the extent that the changes made by each amendatory act cannot be put into operation simultaneously. The last sentence further commands that the changes to the basic statute made by each amendatory act must be applied without considering the "inserts" and "strike-outs" of the other. As such, the question of statutory interpretation presented herein, is whether or not the changes made by each amendatory act to the basic statute are able to be put into operation simultaneously. If so, then the first sentence of section 1955 directs that "the changes in the statute made by each amend-

ment shall be given effect and all the amendments shall be read into each other."

Therefore the application of section 1955 resolves itself to the following simple mechanical procedure:

1) Amend the basic statute as directed by the first amendatory act.

2) Without considering the inserts or strike-outs of the first amendatory act (i.e. *ignoring the first amendatory act*), make the changes directed by the second amendment.

3) Compare the resulting basic statutes to determine if at any point the same words were amended. If so, there is a conflict, and if not, the statute reads as twice amended.

For example, in the materials herein examined, Acts 302 and 312 of 1972 both amended section 516.1 of the Public School Code. Act 302 amended the basic statute by increasing the reimbursable expenses for lodging and meals from \$25.00 to \$30.00 per day and by increasing the reimbursement for mileage from \$.10 to \$.12 per mile. In addition, Act 302 further amended section 516.1 by providing for reimbursement for attendance at meetings called by the intermediate unit board of directors and by limiting the number of said meetings for reimbursement purposes. On the other hand, Act 312 amended said that section 516.1 only to the extent of adding the words "in addition to annual or special conventions of the intermediate unit" and of deleting the phrase "...and conventions and meetings called by the Executive Director of an intermediate unit." Act 312 did not in any way amend the provisions governing per diem and travel expenses. Therefore, by applying section 1955 of the Statutory Construction Act in the manner outlined above, it may be seen that the changes made by both amendatory acts are not in direct conflict and the basic statute must be read as twice amended. The result of this construction is that section 516.1 of the Public School Code now permits reimbursable expenses of \$30.00 per day and \$.12 per mile and attendance at two educational conventions per year in addition to conventions of the intermediate unit.

Also, Acts 93 and 105 of 1971 both amended section 401(3) (1) of the Tax Reform Code. Both make a variety of technical changes to the text of this section. In addition, Act 93 deletes the word "depletion" and hence depletion allowance is no longer to be added back into taxable income for the purposes of computing Pennsylvania Corporate Net Income Tax. Act 105 did not in any way amend the provisions regarding depletion as found in this section of the basic statute but merely retained the word "depletion" from the statute existing prior to Act 93. The principal result of this reading of Acts 93 and 105 is that depletion allowances are not added back into taxable income for Pennsylvania Corporate Net Tax purposes. Once again, by

application of section 1955 of the Statutory Construction Act as per the instructions outlined above, it may be seen that the changes made by these amendments are not in direct conflict and the basic statute must be read giving effect to both amendatory acts.

In the final instance of Acts 254 and 352 of 1972 both amended the act of January 13, 1966, P.L. (1965) 1292 (No. 515), 16 P.S. §11943, which enabled certain counties of the Commonwealth to covenant with land owners for the preservation of land in farm, forest, water supply or open space uses. Act 254 of 1972 amended the basic statute by eliminating court approval, increasing the covenants to ten years, and requiring the assessment appeal board to take into consideration the restrictive covenant on the land. Act 352 of 1972 amends the basic statute by including all counties within the provisions of the act.¹ By application of the reasoning discussed above it may be seen that these two amendments are not in direct conflict and that both amendments must be read into each other with the result that all counties may covenant with land owners to preserve open space, and these covenants may run for ten years, do not need court approval, are effective upon recording in the office of recorder of deeds, and must be considered for tax assessment purposes.

III. Notice to Department of the Auditor General and the Treasury Department

In accordance with section 512 of the Administrative Code of 1929 (71 P.S. §192), you are advised that the Department of the Auditor General and the Treasury Department have been afforded an opportunity to present any views which they may have upon the questions presented herein.

IV. Conclusion

Therefore, it is my opinion and you are each so advised that the statutes discussed in this opinion should be read as attached in appendices A, B and C.

Sincerely yours,
CONRAD C. M. ARENSBERG
Deputy Attorney General
ISRAEL PACKEL
Attorney General

1. Act 352 also replaces the court of quarter sessions with the court of common pleas, which is merely "restating the language of the original statute", although in different form as a technicality. The court of quarter sessions was abolished January 1, 1969 and the jurisdiction of said court is now exercised by the court of common pleas. See Pennsylvania Constitution of 1968. Art. V, Schedule to Judiciary Article, Sec. 4. Therefore any statutory reference to the court of quarter sessions is equivalent to a reference to the court of common pleas. Therefore, there is no direct conflict between Acts 352 and 254 because Act 254 amends the entire provision such that covenants take effect upon "recording in the office of recorder of deeds"; therefore Act 254 must prevail and be given effect.

APPENDIX A

Section 516.1 of the Public School Code should be read as follows:

Section 516.1 Expenses for Attendance at meetings of Educational or Financial Advantage to District.—When, in the opinion of the board of school directors or of the board of public education, attendance of one or more of its members and of its non-member secretary, if any, and of its solicitor, if any, at any meeting held within the Commonwealth (other than annual State conventions of school directors) or the attendance of one or more of its members and of its non-member secretary, if any, and of its solicitor, if any, at the annual convention of the National Schools Boards Association or any other educational convention, will be of educational or financial advantage to the district, it may authorize the attendance of any such persons at such meeting within the Commonwealth and at the annual convention of the National School Boards Association or any other educational convention, wherever held, not exceeding two meetings in any one school year in addition to annual or special conventions of the intermediate unit. Each person so authorized to attend and attending shall be reimbursed for all expenses actually and necessarily incurred in going to, attending and returning from the place of such meeting, including travel, travel insurance, lodging, meals, registration fees and other incidental expenses necessarily incurred, but not exceeding thirty dollars (\$30) per day for lodging and meals. Actual travel expenses shall be allowed with mileage for travel by car at the rate of twelve cents (\$.12) for each mile in going to and returning from each meeting. Such expenses shall be paid by the treasurer of the school district, upon presentation of an itemized verified statement of such expenses: Provided, That advanced payments may be made by the proper officers of the district upon presentation of estimated expenses to be incurred, to be followed by a final itemized, verified statement of such expenses actually incurred upon return from such conventions, and a refund be made to the district of such funds remaining or an additional payment be made to meet the verified expenses actually incurred.

Each member of an intermediate unit board of directors shall be reimbursed by the intermediate unit and each member of a school district board of directors shall be reimbursed by the school district for mileage at twelve cents (\$.12) per mile and for all actually and necessarily incurred in attending meetings, conventions and other functions of and on behalf of the

intermediate unit or the school district provided that reimbursement for attendance at meetings called by the intermediate unit board of directors shall not exceed an average of four (4) per month per annum and provided that reimbursement for attendance at meetings called by the district board of directors shall not exceed an average of four (4) per month per annum.

APPENDIX B

Section 401(3)(1) of the Tax Reform Code of 1971 should read as follows:

(3) "Taxable income."

1. In case the entire business of the corporation is transacted within this Commonwealth, for any taxable year which begins on or after January 1, 1971, taxable income for the calendar year or fiscal year as returned to and ascertained by the Federal Government, or in the case of a corporation participating in the filing of consolidated returns to the Federal Government, the taxable income which would have been returned to and ascertained by the Federal Government if separate returns had been made to the Federal Government for the current and prior taxable years, subject, however, to any correction thereof, for fraud, evasion, or error as finally ascertained by the Federal Government: Provided, That additional deductions shall be allowed from taxable income on account of any dividends received from any other corporation but only to the extent that such dividends are included in taxable income as returned to and ascertained by the Federal Government: Provided further, That taxable income will include the sum of the following tax preference items as defined in section 57 of the Internal Revenue Code, as amended, (i) excess investment interest; (ii) accelerated depreciation on real property; (iii) accelerated depreciation on personal property subject to a net lease; (iv) amortization of certified pollution control facilities; (v) amortization of railroad rolling stock; (vi) stock options; (vii) reserves for losses on bad debts of financial institutions; (viii) and capital gains but only to the extent that such preference items are not included in "taxable income" as returned to and ascertained by the Federal Government. No deduction shall be allowed for net operating losses sustained by the corporation during any other fiscal or calendar year. In the case of regulated investment companies as defined by the Internal Revenue Code of 1954, as amended, "taxable income" shall be investment company taxable income as defined in the aforesaid Internal Revenue Code of 1954, as amended. In arriving at "taxable income"

for Federal tax purposes for any taxable year beginning on or after January 1, 1971, any corporate net income tax due to the Commonwealth pursuant to the provisions of this article shall not be allowed as a deduction and the amount of corporate Federal taxable income under the Internal Revenue Code tax so due and excluded from Federal taxable income under the Internal Revenue Code shall not be apportioned but shall be subject to tax at the rate imposed under this article.

APPENDIX C

Section 3 of the act of January 13, 1966, P.L. (1965) 1292, as amended, should be read as follows:

Section 3. Covenant for Farm, Forest, Water Supply or Open Space Uses.—All counties are hereby authorized to enter into covenants with owners of land designated as farm, forest, water supply, or open space land on an adopted municipal, county or regional plan for the purpose of preserving the land as open space. Such covenants and extensions thereof shall take effect upon recording in the office of recorder of deeds. The land owner may voluntarily covenant for himself and his successors and assigns in right, title and interest that the land will remain in open space use as designated on the plan for a period of ten years commencing with the date of the covenant. The county shall covenant that the real property tax assessment, for a period of ten years commencing with the date of the covenant, will reflect the fair market value of the land as restricted by the covenant. The board to which assessment appeals are taken shall take into consideration the covenant's restriction upon the land in fixing the assessment.

OFFICIAL OPINION No. 69

Department of Education—Policy of this Commonwealth—Child's residence that of his parents or guardian—Non-resident children entitled to education—District of residence liable for tuition—Commonwealth may pay tuition in some cases—Non-Pennsylvanian's tuition to be paid by institution—Parent who waives rights liable for tuition.

1. Public policy of this Commonwealth is that any child living within the State is entitled to attend the public schools (24 P.S. §13-1306).
2. A child is resident of the district in which his or her parents or guardian resides. (24 P.S. §13-1302)
3. Non-resident children are entitled to attend the public schools, with or without tuition, as that board may determine.
4. School district of child's residence liable for tuition payment to district which educates the child. (24 P.S. §§13-1307 and 13-1308)
5. Commonwealth pays tuition for Pennsylvania children whose district of residence cannot be determined.

6. Tuition for non-Pennsylvanian's to be paid by the institution, who should seek re-payment from parents or guardian. (24 P.S. §13-1308)
7. Under PARC, parents who waive right to free public program of education must bear the tuition expense.

Harrisburg, Pa.
October 11, 1973

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

Dear Secretary Pittenger:

In conjunction with and as a result of the Right to Education Program in Pennsylvania, serious problems concerning the residency of exceptional children, for tuition purposes, have arisen. Although many different questions have been posed, they all revolve around the following:

What entity is responsible for the educational expenses of an institutionalized child who does not reside in the district in which the institution is located?

My opinion, of which you are hereby advised, on this and related questions is set forth in the material below, and should be adhered to by your Department when calculating tuition liability for the school districts of Pennsylvania.

I. General Provisions

In general terms, the public policy of the Commonwealth is that any child living within the State is entitled to attend the public schools. This includes children placed in public or private children's institutions. The burden for the educational expense of a child being educated by the public school system is determined by statute, Article XIII of the School Code, 24 P.S. §13-1301 *et seq.*

With regard to children's institutions, including orphan asylums, homes for the friendless, children's homes, or other institutions for the care or training of orphans or other children, including institutions for the mentally retarded, the following rules and guidelines apply for children receiving public education:

1. "A child shall be considered a resident of the school district in which his parents or the guardian of his person resides," 24 P.S. §13-1302. Comment: This provision is important in determining under other sections of the School Code the liability for the education expense of the child.

2. "Every child being a resident of any school district between the ages of six and twenty-one years may attend the public schools in his district, subject to the provisions of this act," 24 P.S. §13-1301. Comment: A child whose parents live in district X, who lives in a children's institution in district X, is entitled to receive a free public education.

II. *Non-Resident Children*

As to non-resident children in a children's institution receiving a public education, the following rules and guidelines apply:

1. The board of school directors of any school district in which there is located a children's institution shall permit any non-resident child therein to attend the public schools either with or without tuition as the board in its discretion may determine. 24 P.S. §13-1306. Comment: This section and its additional provisions make clear that a child in a children's home is entitled to a public education.

2. The school district from which a child in a children's institution is a local resident is liable for the tuition expense of that child's public education. 24 P.S. §§13-1307 and 13-1308.

Comment:

(a) *A child living in an institution in district X whose parents live in district Y. District Y is responsible for the child's public education tuition expense. District X could either accept the child without tuition, or it could set a tuition which district Y must ultimately pay.*

(b) *Same as in (a) above, except that sometime after the child is placed in the institution, the parents move to district Z. The legal residence of the child follows his parents to district Z which becomes responsible for his public education tuition.*

3. The tuition for public education for any child placed in a children's institution shall be paid by the Commonwealth at the request of the school district, when the Secretary of Education determines that the child has a legal residence in Pennsylvania which cannot be fixed in any particular district. 24 P.S. §13-1308.

Comment:

(a) *The child is placed in an institution in district X; the parents live in district Y; then the parents move so that their whereabouts are unknown. When the child was placed in the institution, he had a legal residence in district Y which was responsible for his public education tuition. When the parents left district Y and disappeared, the child was no longer a legal resident of that district, and the district was not liable for the tuition. The child would, nevertheless, still be a legal resident of Pennsylvania and the Commonwealth would pay to district X the tuition. District X, however, has the option of not requesting tuition from the Commonwealth.*

The same rules apply if the parents die and no relative or guardian is found within the state. Should one be found outside of the Commonwealth, the Common-

wealth would pay the tuition until such time as the child is removed.

(b) *The child is abandoned and taken in by an institution.* The child is in effect a ward of the state and the Commonwealth shall pay the tuition. The Commonwealth shall also make every effort to identify and locate the parents.

4. The educational expense for children received from outside of Pennsylvania shall be paid by the institution having the care or custody of said children. 24 P.S. §13-1308.

Comment:

(a) All children within the Commonwealth must be educated. While the Compulsory School Attendance Law refers only to children having a legal residence intent of 24 P.S. §13-1306 that children in children's institutions are *entitled* to attend the public schools. Such children would include those accepted from parents having an out of state legal residence.

The institution is responsible for the public education tuition of out of state children. Therefore, the institution should make arrangements with the parents for the child's educational expense before accepting the child.

If the out of state parents refuse to pay the institution, the institution must bear the expense.

(b) *A child is placed in an institution in district X, parents reside in district Y; parents then move to a known address in another state.* If the parents maintained legal custody of the child when they placed him in the care of the institution, then the parents are liable for the tuition. The legal residence of the child follows his parents to the out of state address. If the parents refuse to pay the tuition, then the institution is responsible for the tuition expense. The institution has the right in such a case to take action against the parents under the Revised Uniform Reciprocal Enforcement Of Support Act, (62 P.S. §2403-1 *et seq.*) or other means for reimbursement for the tuition expense.

If the parents move into Pennsylvania, then the school district in which they reside must pay the tuition.

In these rules and guidelines, reference to parents means the adult legally responsible for the child.

5. PARC Decision

Under the PARC decision, mentally retarded children may be placed in private institutions as part of their public education when the school district is unable to provide facilities for the children. In such circumstances, the school district must pay the educational expenses.

Where both public and private facilities are available and the parents waive their right to a public program of education and place the child in the private institution, the parents will be responsible for the child's education expense; not the school district.

Sincerely,
LARRY B. SELKOWITZ
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 70

Project 70—Federal Funds—Game Commission

1. The balance of Federal Funds originally allocated for certain Project 70 projects may be diverted to new projects consistent with the purposes of the Federal Act, and are not required to be transferred to the Project 70 Land Acquisition Sinking Fund.
2. The Project 70 Land Acquisition and Borrowing Act (72 P.S. §3946.1 *et seq.*) does not govern the expenditure of Federal funds.

Harrisburg, Pa.
October 17, 1973

Honorable Glenn L. Bowers
Executive Director
Pennsylvania Game Commission
Harrisburg, Pennsylvania

Dear Mr. Bowers:

This is in reply to your request for an opinion concerning the disposition of unused federal funds which are presently held in the Project 70 Land Acquisition Fund.

You have advised us that the Game Commission received a grant from the Federal Government for the acquisition of open-space land pursuant to the Act of June 30, 1961, Public Law 87-70, Title VII, as amended, (42 U.S.C.A. §1500 *et seq.*). The grant, which was 50% of the estimated project costs, amounted to \$716,200. Following allowance of the grant an agreement was entered into with the Federal Government, dated November 4, 1970, and subsequently a check for \$538,810.50 was received by the Game Commission for specific amounts relating to the agreement. Out of this sum expenditures of only \$337,533 were made for acquisitions in the Blue Marsh Project and the balance of \$201,277.50 is presently being held in the Project 70 Land Acquisition Fund.

You have asked us to advise you if the Commission is required to transfer the balance of these funds from the Project 70 Land Acquisition Fund to the Project 70 Land Acquisition Sinking Fund. Secondly, you have asked if the Commission is authorized

to expend this money for additional acquisitions in the Blue Marsh area, or to expend the money for new acquisitions relating to other projects within the purview of 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.*). It is our opinion that the Commission is not required to transfer the balance of the federal funds to the Project 70 Land Acquisition Sinking Fund. While our opinion is, of course, not binding on the Federal Government and the disposition of its funds, it is our opinion that the Commission may expend the balance of the federal grant for the purposes that you suggest as long as the purposes are consistent with the Federal Act referred to above.

The Federal Act under which the grant was made, 42 U.S.C.A. §1500a, provides in part as follows:

“(a) The Secretary is authorized to make grants to States and local public bodies to help finance (1) the acquisition of title to, or other interest in, open-space land in urban areas and (2) the development of open-space or other land in urban areas for open-space uses. The amount of any such grant shall not exceed 50 per centum of the eligible project cost, as approved by the Secretary, of such acquisition or development. Not more than 50 per centum of the non-Federal share of such eligible project cost may, to the extent authorized in regulations established by the Secretary, be made up by donations of land or materials.

“(b) No grants under this chapter shall be made to (1) defray ordinary State or local governmental expenses, (2) help finance the acquisition by a public body of land located outside the urban area for which it exercises (or participates in the exercise of) responsibilities consistent with the purpose of this chapter, (3) acquire and clear developed land in built-up urban areas unless the local governing body determines that adequate open-space land cannot be effectively provided through the use of existing undeveloped land, or (4) provide assistance for historic and architectural preservation purposes, except for districts, sites, buildings, structures, and objects which the Secretary of the Interior determines meet the criteria used in establishing the National Register.”

If the acquisition of land to be made with the balance of the federal grant are for open-space land in urban areas and if they comply with the restrictions of the foregoing provision, they may be accomplished in the Blue Marsh area or other areas.

It has been suggested that the balance of the federal funds may not be utilized for additional acquisitions of open-space lands, but must be transferred to the Project 70 Land Acquisition Sinking Fund. This assumes that the funds were not ex-

pending or committed as of December 31, 1970 and therefore are subject to the provisions of Section 16(c) of the Project 70 Land Acquisition and Borrowing Act (72 P.S. §3946.16(c)) as follows:

“(c) On December 31, 1970, all funds available for expenditure under the provisions of this act and not certified as encumbered by the Department of (Environmental Resources), 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 payment of interest accruing on bonds and the redemption of bonds at maturity.”

That Act, however, does not govern the expenditures of federal funds. The Land Acquisition Fund established under the Act, consists of moneys borrowed, either temporarily, or by the sale of bonds, and it is the expenditure of those funds that are governed by the Act. That portion of those funds which have not been encumbered as of December 31, 1970, must be paid into the sinking fund. But there is no reference in the Act to moneys received from the Federal Government pursuant to grants under the aforementioned Federal Act.

Therefore, since the Project 70 Land Acquisition and Borrowing Act, *supra*, does not purport to control the expenditure of moneys received by the Game Commission from federal grants under the aforesaid Federal Act, the balance of federal funds, regardless of whether they are being held in the Land Acquisition Fund, or some other fund, need not be transferred to the Sinking Fund but may be utilized for the purchase of open-space lands in the Blue Marsh area and other areas provided that the lands are to be utilized for the purposes of the Federal Act.

Both the Treasury Department and the Auditor General have been notified of your request for this opinion pursuant to Section 512 of the Administrative Code (71 P.S. §192). The Treasury Department has expressed concern that new federal authorization may be required if the Federal funds are to be diverted to other projects. Also, the Treasury Department and the Auditor General have both suggested that the proposed use of Federal funds may require the expenditure of additional funds on a “matching” basis, which would be governed by the Project 70 Land Acquisition and Borrowing Act, *supra*. You have advised us that no new authorization is required under the Federal Act before the Federal funds may be diverted to other projects and we are further advised that no additional expenditure of Commonwealth funds is necessary.

Accordingly, you are advised that the Commission is not required to transfer the unspent federal funds to the Project 70 Land Acquisition Sinking Fund and may spend the funds for purposes consistent with the Federal Act on open space acquisi-

tion. With regard to this latter opinion, we, however, urge that you obtain an affirmative ruling from the appropriate federal agency before expending the unspent funds on a project other than Blue Marsh.

Very truly yours,
W. WILLIAM ANDERSON
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 71

District Justices—Effective dates for payment of salary increases and expenses—Statutes affecting budgets of political subdivisions

1. Since enacted after the effective date specified therein, those parts of Acts Nos. 68 and 69 increasing the salaries of district justices paid by the Commonwealth are effective 60 days after enactment, or on September 25, 1974, while those parts providing for payment of expenses by the counties are effective at the beginning of the counties' next fiscal year, following the date of final enactment of the statute, or on January 1, 1974.
2. Under §1703(5) of the Statutory Construction Act, 1 Pa. S. §1703(5), statutory provisions completely unrelated to provisions affecting the budgets of political subdivisions may take effect before the beginning of the next fiscal year of the political subdivisions affected following the date of final enactment of the statute.

Harrisburg, Pa.
October 19, 1973

Honorable Grace M. Sloan
State Treasurer
Harrisburg, Pennsylvania

Dear Mrs. Sloan:

You have requested our advice as to when Acts No. 68 and 69 of 1973 take effect. Both of these acts were passed on July 27, 1973. No. 68 amends the Magisterial Districts Act, Act of December 2, 1968, P.L. 1131, 42 P.S. §1301 *et seq.*, by *inter alia*, increasing the salary payable by the Commonwealth to district justices in counties of the third to eighth classes. Similarly, Act No. 69 amends the Magisterial Districts Act for Counties of the Second Class, Act of December, 2, 1968, P.L. 1146, 42 P.S. §1401 *et seq.* by increasing the salary payable by the Commonwealth to district justices in counties of the second class. The acts also authorize the payment of expenses to district justices temporarily assigned to sit outside the political subdivision in which their magisterial district is located. These expenses are payable out of the county treasury.

Each of Acts Nos. 68 and 69 expressly provides that it shall become effective on July 1, 1973. Neither, however, was finally enacted until July 27, 1973. You have inquired as to when the acts will take effect.

In framing our response, we are guided by the provisions of the Statutory Construction Act of 1972, 1 Pa. S. §1501 *et seq.* (hereinafter "Act"). Since Acts Nos. 68 and 69 do not make appropriations for the payment of the increased salaries and expenses, §1702 of the Act, which would make the acts effective immediately on July 27, 1973, is not applicable. If the acts had not included the provisions relating to additional expenses payable by the counties, §1701(b)(2) of the Act would have mandated that all provisions of the acts become effective 60 days after final enactment, or on September 25, 1973.

However, §1703(5) of the Act, which relates to statutes affecting the budget of any political subdivision, delays the effective date of a statute finally enacted after the effective date specified in the statute until "the beginning of the fiscal year of the political subdivision affected following the date of final enactment of the statute." 1 Pa. S. §1703(5). While in *Christian v. Johnstown Police Pension Fund Association*, 421 Pa. 240, 218 A. 2d 746 (1966), the Supreme Court gave this provision a narrow reading, holding that legislation providing for an increment in police pension fund allotments did not affect a city budget, it seems clear that a statute which creates an additional expense payable currently out of the county treasury "affects" the budget of the county within the meaning of §1703(5). Under the Act of July 28, 1953, P.L. 723, §1980, 16 P.S. §4980, and the Act of August 9, 1955, P.L. 323, §1780, 16 P.S. §1780, the fiscal year of counties begins on January 1 of each year.

Accordingly, you are hereby advised that as much of Act Nos. 68 and 69 relates to the payment to district justices from county funds will take effect on January 1, 1974.

The remaining question is whether the joinder of the additional expense item (payable by the counties) with the salary increase item (payable by the Commonwealth) operates to defer the salary increases to the beginnings of the respective fiscal years of the several counties of the Commonwealth. In *In re Borough of Sharpsburg*, 163 Pa. Superior Ct. 84, 60 A. 2d 557 (1948), the Court did not reach the question whether the predecessor provision to §1703 (46 P.S. §504; repealed) "postpones the operation of an entire act or only those parts of it which actually touch upon and affect the budget." 163 Pa. Superior Ct. at 90, 60 A. 2d at 560. At issue in *Sharpsburg* was whether the borough properly employed a method of annexation that had been repealed by the General Borough Code, Act of July 10, 1947, P.L. 1621, 53 P.S. §12221 *et seq.*, which provided a different method. The borough's action was upheld by the Court on the ground that the new Code did not take effect until January 1, 1948, since so many of the Code's provisions affected the budgets of the political subdivisions involved.

The provisions of Act Nos. 68 and 69 have no such uniformly broad effect on the budgets of political subdivisions, and it is far from clear that we would be effectuating the intention of the

General Assembly, as we are bound to do under §1921(a) of the Statutory Construction Act, by holding that §1703 of the Act precludes a provision completely unrelated to one affecting the budget of a political subdivision from taking effect at an earlier date. Under §1921(c) of the Act, we may consider the "mischief to be remedied" by §1703 in interpreting its meaning. The mischief was the legislative addition of new financial burdens on a political subdivision allocated. The salary increase provisions of Acts Nos. 68 and 69 which are payable by the Commonwealth, cannot affect the financial condition of the counties, and hence are not within the mischief at which §1703 is aimed.

Moreover, from a practical point of view, we observe that in considering and passing legislation, the General Assembly does not act with the purposes of the Statutory Construction Act in mind. Had Acts Nos. 68 and 69 been passed before the intended effective date of July 1, 1974, they would have taken effect in the middle of the counties' fiscal year, notwithstanding the additional unanticipated burden on county budgets which §1703(5) is in part designed to prevent. We do not believe that when the General Assembly enacted the Statutory Construction Act, it intended that §1703 would be utilized to frustrate the effectuation of portions of statutes such as those at issue here which have no bearing whatsoever upon the budgets of political subdivisions.

In view of the narrow construction given to the predecessor of §1703 in *Christian, supra*, we believe that its provisions should be limited strictly to those changes in the law to which it was directed, with the effect that §1701 of the Statutory Construction Act is applicable to those portions of Acts Nos. 68 and 69 which do not affect the budget of the counties. We note that under §16(a) of Article V of the Constitution of 1968 there is no constitutional impediment to a September 25, 1973 effective date of the salary increases of the district justices.

Accordingly, it is our opinion, and you are hereby advised, that Acts Nos. 68 and 69 take effect September 25, 1973, except those provisions thereof which affect the budgets of the counties, which will take effect on January 1, 1974. Pursuant to §512 of the Administrative Code, 71 P.S. §192, we have afforded the Department of the Auditor General the opportunity to present any views which it may have upon this question, and we are advised that it is in agreement with the conclusions expressed in this Opinion.

Sincerely yours,

MELVIN R. SHUSTER
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 72

Bureau of Elections—Married woman's surname for purposes of voter registration

1. A married woman may register to vote under her birth name, revert to her birth name from her married name on her registration, or retain her married name on her registration as she chooses, as long as she consistently utilizes that name for purposes of identification.
2. "Surname" as used in the election laws means either (1) a last name assigned at birth, (2) the last name of a husband, if so selected by a married woman, (3) a last name as changed by court order, or (4) the last name by which a person is and has been known as demonstrated by reasonable evidence.

Harrisburg, Pa.
October 25, 1973

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

Dear Secretary Tucker:

You have asked, and Ms. Arlene Lotman, Executive Director, Commission on the Status of Woman, has brought to our attention, the question whether a woman, on marriage, must change her voter registration so as to reflect her husband's surname, or "married name," or whether she has the option to use her birth name, or so-called "maiden name." We have also been asked whether a woman who currently is registered under her married name can have her registration changed to her birth name.

It is our opinion, and you are so advised, that a married woman may register to vote under her birth name, revert to her birth name from her married name on her registration, or retain her married name on her registration as she chooses, as long as she consistently utilizes that name for purpose of identification.

We recently dealt with this same question with regard to what constitutes a woman's "actual name" for purposes of obtaining an operator's license and vehicle registration with the Bureau of Motor Vehicles. In Official Opinion No. 62, dated August 20, 1973, we advised the Secretary of Transportation that a woman is not legally barred from continuing to use her birth name after marriage, and consequently she may continue to use that name on her operator's license or vehicle registration, or revert to that name, provided that in fact she uses that name as her actual name.

That Opinion cited with approval a recent decision of the Maryland Court of Appeals in *Stuart v. Board of Supervisors*, 266 Md. 440, 295 A. 2d 223 (1972). In *Stuart*, the majority opinion by Chief Judge Murphy held that the mere fact of a marriage ceremony does not by operation of law automatically transfer the husband's surname to his bride. Accordingly, the court recognized the right of a married woman to register to vote under her birth name, provided that she had consistently, nonfraudulently and exclusively used that name after marriage.

This proposition has received support in Pennsylvania case law. In *Second Legislative District Election Contest (No. 2)*, 4 D. & C. 2d 93 (1955), the ballot of a woman was challenged on the grounds that, although she had duly registered under her birth name, subsequent to her marriage she continued to vote without changing her registration. The court could find no statutory prohibition against a married woman voting under her "maiden name", found no question as to the registrant's identity, and consequently upheld the validity of her ballot.

Pennsylvania election laws require that every applicant for registration give his or her surname and Christian name or names. Act of March 30, 1937, P.L. 115, §20(c), as amended, 25 P.S. §623-20(c); Act of April 29, 1937, P.L. 487, §18(c) as amended, 25 P.S. §951-18(c). The reasoning of Opinion No. 62, which we hereby fully incorporate by reference, compels the conclusion that, like one's "actual name," a woman's "surname" is the name by which she consistently elects to be identified.

Historically, persons were legally identified only by their given or Christian names, and "because of the relationship between church and state, it was held that a man cannot have two names of baptism as he may have divers surnames: 2 Coke's First Institute, p. 178 (Thomas' Ed. 1836)"; *Bittle's Petition*, 54 D. & C. 329, 332 (1945) (emphasis supplied). Such surnames might reflect the name of the father, place of birth, town of origin, or occupation of the person. In more recent times, one's surname has been defined as "the patronymic derived from the common name of [one's] parents," *Riley v. Litchfield*, 168 Iowa 187, 150 N.W. 81 (1914), and even more broadly as "the last name: the name common to all members of a family." Black's Law Dictionary (Revised Fourth Edition, 1968); *In re Faith's Application*, 22 N.J. Misc. 412, 39 A. 2d 638 (1944).

Given the definitions above, a narrow construction of "surname" might limit its application to the name with which one is born. Were this the case, the ironic effect of such a construction would be to invalidate the registrations of most married women, who have registered in the last name of their spouses and adopted that name for all purposes of identification. Modern custom and usage, however, have broadened the meaning of

"surname" to include not only one's married name, but any last name consistently employed as one's surname.¹

An applicant for registration must give his or her name for the same reason that he or she must provide information as to height, color of hair and eyes, and date of birth: this is the means by which an identity is established, so that the applicant may be assured of the right to exercise the franchise, while the state may guard against any fraudulent exercise of that right. As with these other personal characteristics, a person's name is bound up with his or her identity, and is a "mark or indicium by which he [or she] is distinguished from other individuals." *Riley v. Litchfield*, 168 Iowa at 191, 150 N.W. at 83. In the same way that these other characteristics, being so intimately bound up with one's very existence, are presumed to be consistently applicable to a given individual, so we conclude that a person ought to be identified for certain legal purposes by the name he or she consistently uses and by which he or she is known.

The definitions ascribed to the phrase "actual name" in Opinion No. 62 are equally applicable in this instance, so that "surname" as used in the election laws shall mean (1) the last name assigned at birth; (2) in the case of a married woman, the last name of her husband, if she so elects; (3) the last name appearing in a court order in the case of a person whose name has been changed, pursuant to statute, by judicial action; and (4) in the case of an individual who uses a last name other than that which would be determined by one of the above methods, the last name by which such person is and has been known as demonstrated by reasonable evidence. While not intended to be exclusive, such evidence may include tax, social security, selective service and motor vehicle registration records.

Sincerely yours,
MELVIN R. SHUSTER
Deputy Attorney General
ISRAEL PACKEL
Attorney General

1. Although in *Faith's Application*, supra, a New Jersey Court relied upon the definitions of surname discussed above, it rejected the voting registration of one "Love Faith" because that assumed name did not indicate the applicant's "true name," required by a New Jersey statute "whose major purpose is to determine the past, as well as the present identity, of the individual." 22 N.J. Misc. at 415, 39 A. 2d at 640. The court held that although there was no allegation that the name "Love Faith" had been adopted for a fraudulent purpose, without the addition of the applicant's "true name", the registration authorities would be unable to determine the absence of a fraudulent purpose, such as the desire to hide criminal convictions.

This case is not controlling, since the requirement of Pennsylvania election laws are less stringent: an applicant need only register in his "surname," and a prior criminal conviction does not disqualify from registration an otherwise qualified applicant. Since we view the purpose of Pennsylvania registration requirements to be the determination of an applicant's present identity, we are satisfied that the standards set forth in this opinion promote the achievement of this purpose and adequately guard against registration under a fraudulent name.

OFFICIAL OPINION No. 73

Department of Welfare—Placement of mentally retarded children in Welfare facilities—Educational assignments—Duty to cooperate in planning—Duty to place.

1. Department of Public Welfare must cooperate in determining the appropriate placement of a child who can no longer benefit from a public school program.
2. Department of Public Welfare must place a mentally retarded child in accordance with a hearing officer's recommendations.
3. In deciding on the placement, the Department must consider child and family convenience, nature and size of the facility and the availability of space.
4. Department must, when no other placement is available, place the child into an appropriate facility.

Harrisburg, Pa.
October 30, 1973

Honorable Helene Wohlgemuth
Secretary
Department of Public Welfare
Harrisburg, Pennsylvania

Dear Secretary Wohlgemuth:

The first Administrative Appeal to the Secretary of Education of a due process hearing held pursuant to the amended Consent Agreement of the PARC Case raises the following question:

What are the duties of the Department of Public Welfare in regard to the placement of a child who has been certified by a school psychologist as being in need of a program where the public schools do not offer or who has been found by a hearing officer to be in need of a program which is available in a facility under the supervision or control of your department?

It is my opinion, and you are so advised, that the Department of Public Welfare must cooperate with the school entity involved in determining the placement of a child who has been certified by a school psychologist as being in need of a program which the public schools do not offer. Further, the Department is under the legal obligation to place the child in accordance with the recommendations of a hearing officer when such recommendations are made.

Under the terms of the court's order, the Department of Public Welfare is a party defendant in the continuing implementation of the PARC Consent Agreement.¹ In order to fulfill the

1. Although the Department of Public Welfare, through Administrative Agreement, no longer has the responsibility to directly provide the education portion of an appropriate program, it must still act in such a way so as not to deny any mentally retarded child access to free public program of education and training appropriate to that child's needs.

Department's obligations under this order, the various segments of your Department should be directed to confer with local education officials whenever a program under their auspices may be felt to be appropriate to the education and training needs of a particular child.

Secondly, when requested by local school officials, your Department must assist in the preparation of information about and plans for a particular child whom that school entity proposes to place in a program in which your Department is involved. It must be remembered that the Commonwealth's obligation under the PARC Case is first to find a public program for a child before turning to the private sector.

Also, when a hearing officer recommends that the child be placed in a program which is operated under the supervision or control of the Department of Public Welfare, all steps must be taken to immediately comply with that recommendation, including the actual placement of the child by the Department of Public Welfare. Such a placement must take into account the convenience to the child and his or her family, the nature of the facility and the availability of places in that facility.

The continued cooperation of your Department, the local school districts, parents and children will demonstrate your concern for every child's right to educational opportunities in Pennsylvania.

Very truly yours,

LARRY B. SELKOWITZ
Deputy Attorney General

ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 74

71 P.S. §1661.11—*Department of Property and Supplies—Administrative Code*
§§501, 502, 71 P.S. §§181, 182—*Inventory—Cooperation among departments*

1. The Department of Property and Supplies is charged with the statutory duty of compiling and annually updating the inventory of the Commonwealth's real property, 71 P.S. §§1661.11, 1661.12.
2. The Administrative Code, §§501, 502, 71 P.S. §§181, 182, impose upon administrative departments, boards and commissions a duty to cooperate in securing and exchange of information.
3. The Department of Property and Supplies can expect inter-departmental cooperation in establishing a practical and workable plan for exchange of information regarding land transfers to and from the Commonwealth in order to update the Commonwealth's inventory of real property.

Harrisburg, Pa.
October 30, 1973

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

Dear Secretary Hilton:

Receipt is acknowledged of your request for our opinion regarding the obligation of other departments, boards and agencies within the Commonwealth to cooperate with the Department of Property and Supplies in updating the inventory of the Commonwealth's real property compiled pursuant to 71 P.S. §1661.11 *et seq.* It is our opinion and you are hereby advised that the Administrative Code, §§181, 182 requires interdepartmental cooperation among departments, boards and commissions, thereby authorizing the Department of Property and Supplies to devise a "practical and working basis" for an annual updating of the Commonwealth's inventory of real property.

The Department of Property and Supplies is charged under 71 P.S. §1661.11 with the statutory duty of compiling an inventory of the Commonwealth's real property. Under 71 P.S. §1661.12, the Legislature indicated that the inventory shall be constantly updated to reflect actual ownership of the Commonwealth's realty:

"The department shall constantly update such inventory but by January 15 of each year, the latest inventory shall be available for public inspection in the department's offices."

In order to fulfill this statutory obligation, the Department of Property and Supplies will require the cooperation of other departments, boards and commissions in order to keep track of land transfers to and from the Commonwealth.

The Administrative Code, §§501, 502, 71 P.S. §§181, 182, imposes upon all departments, boards and commissions the obligation of cooperating with each other on a "practical and working basis", which includes the exchange of information among the departments:

"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, . . . and shall, so far as practical, cooperate with each other. . . ." 71 P.S. §181

"Whenever, in this act, power is vested in a department, board, or commission, to inspect, examine, secure data or information, or to procure assistance from any other department, board, or commission, a duty is hereby imposed upon the department, board, or com-

mission, upon which demand is made, to render such power effective." 71 P.S. §182

Given this statutory duty to maintain an update of the Commonwealth inventory of realty, and given the obligation of co-operation among the departments, it is our opinion and you are hereby advised that the Department of Property and Supplies can devise a practical and working basis involving the exchange of information between the Department and other departments, boards and commissions regarding land transfer to and from the Commonwealth in order that the inventory be updated to adequately reflect actual ownership of the Commonwealth's realty.

Very truly yours,
RICHARD J. ORLOSKI
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 75

Pennsylvania Housing Finance Agency—Relationship to Pennsylvania Housing Agency—Section 505 (a) (2) of the Fiscal Code—Section 1938 of Statutory Construction Act.

1. The change of the name of the Pennsylvania Housing Agency to the Pennsylvania Housing Finance Agency does not affect the right to use the bonds of the Pennsylvania Housing Finance Agency as security for Commonwealth deposits pursuant to Section 505(a) (2) of the Fiscal Code, 72 P.S. §505(a) (2).
2. Section 1938 of the Statutory Construction Act, 1 Pa. S. §1938, resolves this question by requiring that Section 505(a) (2) be construed to include the amended name of the Agency, since there has been no substantial change in the function of the Agency under its new name.

Harrisburg, Pa.
November 20, 1973

Mr. John McCoy
Executive Director
Pennsylvania Housing Finance Agency
Harrisburg, Pennsylvania

Dear Mr. McCoy:

You have requested our opinion with regard to whether the Pennsylvania Housing Finance Agency (PHFA) and the Pennsylvania Housing Agency (PHA) are the same body, for the purpose of Section 505(a) (2) of the Fiscal Code, 72 P.S. §505(a) (2).

The Act of December 3, 1959, P.L. 1688, as amended, 35 P.S. §1680.101, *et seq.*, entitled the Housing Agency Law, created the Pennsylvania Housing Agency. That Act was further amended by the Act of December 5, 1972, P.L. _____, No. 282. This amendment changed the name of the original enactment to the

Housing Finance Agency Law. Act No. 282, *supra*, Section 1, 35 P.S. §1680.101. The amendment changed the name of the agency from PHA to the Pennsylvania Housing Finance Agency and gave the PHFA additional powers. Act No. 282, *supra*, Section 1, 35 P.S. §1680.103.

Section 505(a)(2) of the Act of April 9, 1929, P.L. 343, Art. V, as amended, 72 P.S. §505(a)(2), entitled the Fiscal Code, enumerates the agencies and instrumentalities of the Commonwealth whose bonds may be used as security for Commonwealth deposits in various banks throughout the State. Among the agencies of the Commonwealth that the Code enumerates is the Pennsylvania Housing Agency. Since the PHA Act has been amended by changing the name of the Agency to Pennsylvania Housing Finance Agency and the Legislature did not change the name of the Agency in Article V of the Fiscal Code, it is now necessary to determine whether the two agencies are actually the same body in order that PHFA bonds may be pledged as security for Commonwealth deposits.

Section 1938 of the Act of December 6, 1972, P.L._____, No. 290, 1 Pa. S. §1938, entitled the Statutory Construction Act, directly resolves this question. Section 1938 of the Statutory Construction Act, *supra*, provides as follows:

"Section 1938. Reference to public bodies and public officers.

"A reference in a statute to a governmental agency, department, board, commission or other public body or to a public officer includes an entity or officer which succeeds to substantially the same functions as those performed by such public body or officer on the effective date of the statute, unless the specific language or the context of the reference in the statute clearly includes only the public body or officer on the effective date of the statute."

Hence, if the PHFA has retained substantially the same functions as the PHA, the reference to the PHA in Section 505(a)(2) of the Fiscal Code must be read to mean to include the PHFA as the successor entity of the PHA.

As originally enacted, the Housing Agency Law was designed to provide low-cost housing to citizens of the Commonwealth by broadening the market for low-cost housing. To accomplish this purpose, the Act authorized the PHA to make housing loans to qualified mortgagors, to prescribe interest rates and other terms of its housing loans, and, among other things, to borrow money upon its own credit by the issuance and sale of bonds.

The December 5, 1972 amendments to the Act left these powers substantially intact and in two significant instances broadened the powers of the agency while changing the name of the PHA to PHFA. The PHFA was given the additional power to

provide rental and housing purchase programs for low and moderate income housing. In addition the bond provisions of the original enactment were amended to provide increased protection for the bond program and to allow the PHFA to use bond proceeds for the rental and housing purchase programs. These amendments in no way detract or alter the functions of the PHFA as originally intended by the Legislature. The original intention of the Legislature was to provide low-cost housing in a market that was relatively inert. 35 P.S. §1680.102. This function remains substantially the same even though the names of both the Act and the Agency have been changed.

Therefore, it is our opinion, and you are hereby advised, that the PHFA is the same body as PHA for purposes of Section 505(a)(2) of the Fiscal Code. We are sending a copy of this opinion to Honorable Grace M. Sloan, State Treasurer, because of her interest in this question.

Sincerely,
WALTER ROY MAYS, III
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 76

Public Utility Commission—Assessments for expenses—Interest—Restricted accounts

1. Under Sections 1201 and 1204 of the Public Utility Law, as amended by Act No. 33 of March 3, 1972, 66 P.S. §§1461, 1464, all assessments received from public utilities for the expenditures of the Commission are to be deposited in the General Fund in a restricted account and not in a special fund.
2. All interest received on such a restricted account is to be credited to the General Fund rather than to such restricted account in accordance with Section 304 of the Fiscal Code, 72 P.S. §304.

Harrisburg, Pa.
October 26, 1973

Honorable George I. Bloom
Chairman of Commissioners
Public Utility Commission
Harrisburg, Pennsylvania

Dear Mr. Bloom:

You have requested our opinion regarding the right to interest accrued on funds collected but undispersed by the Pennsylvania Public Utility Commission ("Commission") under Section 1201 of the Public Utility Law ("Law"), as amended, 66 P.S. §1461. Specifically, you have requested that we rule that such interest be credited to the account of the Commission as part of its funds.

This section of the Law, as amended by Act No. 33 of March 3, 1972, P.L._____, provides that for fiscal years beginning July 1, 1971, the Commission is to estimate its total expenditures for the forthcoming fiscal year. After they have been approved, as provided in the Law, the Commission assesses a portion of such expenditures upon every public utility in the state in accordance with a formula set forth in the Law. The assessments are to be paid prior to the commencement of that fiscal year.

Section 1204 of the Law, as amended by Section 3 of Act 33 of 1972, 66 P.S. §1464 then provides:

“(a) All assessments and fees received, collected or recovered under this article shall be paid by the commission into the General Fund of the State Treasury through the Department of Revenue.

“(b) All such assessments and fees, having been advanced by public utilities for the purpose of defraying the cost of administering this act, shall be held in trust solely for that purpose, and shall be earmarked for the use of, and are hereby appropriated to, the commission for disbursement solely for that purpose.

“(c) All requisitions upon such appropriation shall be signed by the chairman and secretary of the commission, or such deputies as they may designate in writing to the State Treasurer, and shall be presented to the State Treasurer and dealt with by him and the Treasury Department in the manner prescribed by The Fiscal Code.”

Prior to amendment, Section 1204 simply provided: “All assessments, costs, and fees received, collected or recovered under this article shall be paid by the commission into the General Fund of the State Treasury, through the Department of Revenue.”

Upon our review of the above statute, we can find no justification for requiring the State Treasurer to attribute the interest of these funds to the Commission. It requires only that the assessments collected be used to defray the costs of administering the Law, not the interest accrued on such assessments.

Moreover, it mandates that the assessments received be deposited in the General Fund together with other state revenues. There, they are placed in a restricted account in order to carry out the requirement that they be used only for the purposes set forth in the Law. They are *not*, however, placed in special fund. Indeed, under the Act of May 6, 1927, P.L. 848, 72 P.S. §§3601-3602, all special funds were abolished except for those specifically mentioned in that Act. That act is confirmed by Section 302 of the Fiscal Code of April 9, 1929, as amended, 72 P.S. §302.

Neither of these acts nor Act 33 of 1972, creates a “special fund” for the public utility assessments in question or for other

public utility funds. Accordingly, the crediting of interest is governed by Section 304 of the Fiscal Code, 72 P.S. §304, which provides that the funds placed on deposit with state depositories shall accrue interest and that "interest on deposits shall *in all cases* be credited to the fund upon which the interest was earned...." (Emphasis added.) Since the funds here in question are deposited in the General Fund, the interest on such deposits is to be credited to the General Fund only.

In accordance with Section 512 of the Administrative Code of 1929, 71 P.S. §192, we have referred this matter to the offices of the Auditor General and State Treasurer for their views and they both concur in our opinion. Copies of their memoranda are attached.

Sincerely yours,
GERALD GORNISH
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 77

Department of Justice—Deputy Attorneys General—Authorization to approve legality of Administrative regulations—Amendment of Op. Atty. Gen. No. 115, April 5, 1972

1. Op. Atty. Gen. No. 115, April 5, 1972, is hereby amended and only the Attorney General and Deputy Attorneys General listed today may give approval as to legality of Administrative Regulations as required by Section 205 of the Commonwealth Documents Law, 45 P.S. §1205.

Harrisburg, Pa.
November 30, 1973

Alvin C. Bush
Director
Legislative Reference Bureau
Harrisburg, Pennsylvania

Dear Mr. Bush:

On December 8, 1971, an opinion was sent to you. Op. Atty. Gen. No. 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. 769, (No. 240) 45 P.S. §1205.

Opinion No. 89 has been amended, in turn, by Opinion No. 115, April 5, 1972 and by letter to you, March 20, 1973.

The list is hereby amended, and the following persons, reflected by position title, are the only persons authorized to approve administrative regulations which require Justice Depart-

ment approval pursuant to the Commonwealth Documents Law:*

The Attorney General
First Deputy Attorney General
Director, Office of Civil Law
Director, Office of Criminal Law
Director, Bureau of Consumer Protection
Chief, Property and Natural Resources Division
Chief, Commonwealth Collections Division
Chief, Commercial, Financial and Governmental Services
Division

The following documents are rescinded insofar as they are inconsistent with the foregoing list:

Op. Atty. Gen. No. 89, December 8, 1971
Memorandum of March 24, 1972
Op. Atty. Gen. No. 115, April 5, 1972
Letter of March 20, 1973

Sincerely,
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 78

State Treasurer—Compensation of presiding judges of divisions of the Court of Common Pleas of Allegheny County

1. The term "president judge" of divisions of common pleas court as used in the November 1972 Report of the Commonwealth Compensation Commission is synonymous with the term "presiding judge" of divisions of common pleas court as used in the Act of December 2, 1968, P.L. 1142, No. 357, §5(b), 17 P.S. §235.5(b).
2. Presiding judges of divisions of the Court of Common Pleas of Allegheny County are entitled to the same compensation as provided for "president judges" of such divisions in the salary schedule established by the Commonwealth Compensation Commission in its November 1972 Report.

Harrisburg, Pa.
December 10, 1973

Honorable Grace M. Sloan
State Treasurer
Harrisburg, Pennsylvania

Dear Mrs. Sloan:

You have inquired as to whether the presiding judges of divisions of the Court of Common Pleas Court of Allegheny County are to be considered "president judges" under the salary schedule established by the Commonwealth Compensation Commission in its November 1972 Report. It is our opinion, and you are so advised, that the terms in question are synonymous, and

* Chief, Human Services Division, added to this list by letter of January 4, 1974, Peter W. Brown, First Deputy Attorney General to Alvin C. Bush.

that the "presiding judges" of divisions in Allegheny County are to be compensated in the same manner as prescribed in the Report for "president judges" of said divisions.

Article V, §1 of the 1968 Constitution creates a unified judicial system, and §17 of the Schedule to Article V outlines the divisional scheme of the Allegheny County Court of Common Pleas. Pursuant to §20 of the Schedule, which pertains to Allegheny County:

"Until otherwise provided by law, the trial division, the orphans court division and the family court division of the Court of Common Pleas shall be presided over by a president judge, who shall be one of the judges of such division and shall be elected for a term of five years by a majority vote of the judges of that division. He shall assist the president judge of the court of common pleas in supervising the judicial business of the court and shall be responsible to him. . . ." (Emphasis supplied.)

Although scheduled to become effective January 1, 1969, this provision was superseded by the Act of December 2, 1968, P.L. 1142, No. 357, §5(b), 17 P.S. §235.5(b) which took effect on January 1, 1969, and changed the designation of these judges from "president" judge to "presiding" judge:

"The civil division, the criminal division, the orphans court division and the family division of the court of common pleas shall each be presided over by a presiding judges, who shall be one of the judges of such division and except as hereinbefore provided shall be elected for a term of five years by a majority vote of the judges of that division. Each such presiding judge shall assist the president judge of the court of common pleas in supervising and administering the business of the court and shall be responsible to him. . . ."

Since §20 of the Schedule anticipated subsequent legislation, there is no conflict between the section and Act No. 357. Consequently, since January 1, 1969, judges with supervisory duties over the Allegheny County Common Pleas Court divisions have been properly identified as "presiding judges."

Article V, §16(a) of the Pennsylvania Constitution provides that "justices, judges and justices of the peace shall be compensated by the Commonwealth as provided by law." Pursuant to the Act of June 16, 1971, P.L._____, No. 8, 46 P.S. §6, the Commonwealth Compensation Commission established, *inter alia*, a salary schedule for members of the judiciary in a Report dated November 30, 1972 which took effect January 30, 1973, retroactive to December 1, 1972. The Commission provided a salary of \$40,000 for the judges of the Court of Common Pleas of Allegheny County. With regard to those judges exercising supervisory duties in each of the court's divisions, it provided them with a slightly higher salary of either \$40,500 where the

division has five or less judges, or \$41,000 where the division has six or more judges. However, the commission provided for salaries of "president judges," not "presiding judges," although by the time the Report there no longer existed the office of divisional president judge. It would seem that the Commission, in preparing its Report, referred only to §20 of the Schedule to Article V, and neglected to take cognizance of Act No. 357 which changed the title of this office.

The Act of June 16, 1971 creating the Commission gave its Report the force of law unless rejected in whole or part by the General Assembly. Since November 1972 Report was not rejected, it has the force of law and is subject to interpretation under the Statutory Construction Act of December 6, 1972, P.L.____, No. 290, 1 Pa. S. §1501 *et seq.* Section 1922 of the Act, 1 Pa. S. §1922, permits the presumption that "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." It would certainly be an absurd and unreasonable result to conclude that the Compensation Commission intended to give additional compensation to the president judge of division where no such person existed, especially where there exists a presiding judge.

Furthermore, pursuant to §1932 of the Statutory Construction Act, 1 Pa. S. §1932, we must construe the Report and Act No. 357 *in pari materia*, for it is clear from the language of §20 of the Schedule to Article V, upon which the Report undoubtedly relies, and of Act No. 357 that they both relate to the same class of persons. Application of this rule leads to the unassailable conclusion that the terms "president judge" and "presiding judge" should be considered to be synonymous.

Finally, §1938 of the Statutory Construction Act, 1 Pa. S. §1938 provides:

"A reference in a statute to a governmental agency, department, board, commission or other public body or to a public officer includes an entity or officer which succeeds to *substantially the same functions* as those performed by such public body or officer on the effective date of the statute, unless the specific language or the context of the reference in the statute clearly includes only the public body or officer on the effective date of the statute." (Emphasis supplied.)

This means that, hypothetically, had Act No. 357 been passed after the Commission's Report, the salary schedule for president judges would have continued to apply to presiding judges, since they continued to perform the same functions as were performed by the president judges. *A fortiori*, under the current circumstances, where the change in title already had been enacted by the time the Commission made reference in its Report to "president judges" of divisions of common pleas court, that reference

clearly encompasses the "presiding judges" who succeeded to the same function as those exercised by their predecessors.

We note that the Common Pleas Court of Philadelphia County, like in Allegheny County, is divided into divisions, the presiding judges of which are denominated "administrative judges," a term synonymous with "presiding judges" under Rule 102 of the Pennsylvania Rules of Judicial Administration. The Compensation Commission provided the same salary schedule for those administrative judges in Philadelphia as it did for the president judges in Allegheny County, and it is plain from the Report that the Commission intended to compensate at a higher salary those judges who perform the administrative and supervisory duties in the common pleas court divisions of the two largest counties in the Commonwealth. From this arrangement, it is all the more evident that the presiding judges in Allegheny County are entitled to the salary scale designated in the Report for president judges of common pleas court divisions in Allegheny County.

Pursuant to §512 of the Administrative Code, 71 P.S. §192, we have afforded the Department of The Auditor General the opportunity to present any views which it may have upon this question, and we are advised that it is not opposed to the conclusions expressed in this Opinion.

Sincerely yours,
MELVIN R. SHUSTER
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 79

Property and Supplies—Contracts—Competitive bidding

1. Since it is not practicable to submit contracts for the purchase of fuel to competitive bidding in the present "energy crisis" situation, contracts for the purchase of liquid fuel which are governed by the federal mandatory allocation program are not required to be submitted to competitive bidding.

Harrisburg, Pa.
December 11, 1973

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

Dear Secretary Hilton:

We have received a request for an opinion from your department concerning the purchase of liquid fuel under the mandatory allocation program of the Federal Government. In a

memorandum to this department from Deputy Secretary Hugh M. Carleton we have been asked if the Department of Property and Supplies is legally authorized to make purchases of fuel without competitive bidding in the existing "energy crisis" situation. It is our opinion and you are advised that your department does have such authority.

Under the Mandatory Fuel Allocation Program published by the Office of Oil and Gas, U.S. Department of the Interior, the year of 1972 was assigned as the base for allocations. The following provision is contained in Section 4(a) of the regulations which will be added as Chapter XIII to title 32A Code of Federal Regulations:

"For the duration of this program each supplier will be required to provide supplies of middle distillates to the customers (including firms which have undergone a change in ownership) which he served during 1972."

The regulations further speak in terms of a "Base period" which is defined as the equivalent month of 1972.

The contracts now in effect for the purchase of liquid fuel by your department, however, are on a fiscal year basis and the supplier in each case is the supplier for the prior fiscal year July 1, 1972 to June 30, 1973. This means that in many cases the existing contracts are with suppliers who did not have contracts with the department for the equivalent months in 1972 for the period January through June. Therefore, those contracts will have to be terminated as of December 31, 1973 pursuant to the federal mandatory allocation program and new contracts entered into with the suppliers who furnished fuel to the Commonwealth during the first half of 1972.

Under these circumstances it is not practicable to submit new contracts which will commence January 1, 1974 to competitive bidding. Although there would be sufficient time between now and then, under normal conditions, to follow the bidding procedure, it is evident that there is no possibility of receiving more than one bid because the mandatory allocation program affects all suppliers and prevents them from bidding on a contract if they did not have the equivalent contract during 1972.

Section 2403(b) of the Administrative Code (71 P.S. §633(b)) requires the Department of Property and Supplies to enter into contracts for the purchase of fuel used in the Legislature and other departments of the government and further provides that such contracts shall be awarded to the lowest responsible bidder below such maximum price and under such regulation prescribed by the Act. The reference to the lowest responsible bidder is derived from the requirement of the Pennsylvania Constitution that the State's purchase of materials, printing, and supplies should be submitted to competitive bidding. The applicable provision reads as follows:

"The General Assembly shall maintain by law a system of competitive bidding under which all purchases of materials, printing, supplies or other personal property used by the government of this Commonwealth shall *so far as practicable* be made." (Emphasis supplied.)
Article III, Sec. 22

Since it is not practicable to submit contracts for the purchase of fuel to competitive bidding in the present situation, as described above, it is our opinion, and you are advised that contracts for the purchase of liquid fuel which are governed by the federal mandatory allocation program are not required to be submitted to competitive bidding.

Very truly yours,
W. WILLIAM ANDERSON
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 80

Nonprofit Corporation Law—Degrees—Diplomas—Sections 211 and 312 of the Nonprofit Corporation Law

1. A corporation cannot confer a diploma if that diploma attempts to document that a degree, such as an AA or BA, is being conferred on the student unless the corporation has met the degree-granting requirements as set forth in Sections 211 and 312 of the Nonprofit Corporation Law.
2. However, a corporation can confer a diploma if that diploma goes no further than to document that a student has completed a program and it can do so without first meeting the requirements as set forth in Sections 211 and 312 of the Nonprofit Corporation Law.

Harrisburg, Pa.
December 18, 1973

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

Dear Secretary Pittenger:

You have asked whether a corporation can award diplomas to graduates of their programs without first meeting the degree-granting requirements as set forth in Sections 211 and 312 of the Nonprofit Corporation Law of 1933, as amended (15 P.S. §7211, 15 P.S. §7312).¹

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1. It should be noted that this Department has earlier ruled that the degree-granting requirements of the Nonprofit Corporation Law, *supra*, apply to all corporations and other legally recognized organizations, profit and nonprofit alike. See informal opinion of Deputy Attorney General Harriette W. Batipps, directed to Dr. Warren D. Evans, entitled "Degree Granting in the Commonwealth of Pennsylvania," April 6, 1972.

You are advised that a corporation can confer a diploma if that diploma goes no further than to document that a student has completed a program and it can do so without first meeting the requirements as set forth in Sections 211 and 312 of the Nonprofit Corporation Law. However, you are further advised that a corporation cannot confer a diploma if that diploma attempts to document that a degree, such as an AA or BA, is being conferred on the student unless the corporation attempting to confer the diploma has met the degree-granting requirements as set forth in Sections 211 and 312 of the Nonprofit Corporation Law.

The law is clear that a corporation cannot confer a degree without first meeting the requirements of Section 211 and 312 of the Nonprofit Corporation Law, since Section 3 of the Nonprofit Corporation Law of 1972 provides as follows:

"Every proposed nonprofit corporation which is to have the power to confer degrees in art, pure and applied science, philosophy, literature, law, medicine and theology or any of them shall comply with the provisions of Sections 211 and 312 of the Nonprofit Corporation Law of 1933 in addition to all other requirements of law." Act 271 of 1972.

Therefore, the question that must be answered is whether Section 3 of the Nonprofit Corporation Law of 1972, by prohibiting corporations from conferring degrees without first meeting the degree-granting requirements, also prohibits corporations from conferring diplomas without first meeting such requirements.

It is thus important to determine what a diploma is and what the relationship is between the granting of a diploma and the conferring of a degree.

I. The dictionary definition of the terms "diploma" and "degree" shed some light in this area.

A "diploma" is defined as:

"a document bearing record of graduation from or of a degree conferred by an educational institution." *Webster's Third New International Dictionary*.

A "degree" is defined as:

"a title conferred upon students by a college, university or professional school upon completion of a unified program of study carrying a minimum of credits, passing of certain examinations, and often completion of a thesis or other independent research project." *Webster's Third New International Dictionary*.

Under the definition of a "diploma," it seems clear that a diploma can either be a certificate to demonstrate that a student has completed a program at an institution, or it can go further and be a certificate to evidence that a student has completed a pro-

gram and is being awarded a degree for a completion of that program.

II. The courts have given conflicting definitions of the term "diploma." This seems to be due to the fact that the courts looked to the dictionary definition or common usage of the term at the time each case was decided.

In 1866, the Alabama Courts, relying on the dictionary definition of the term, stated that:

"[A] diploma is an instrument, usually under seal, 'conferring some privilege, honor, or authority; now almost *wholly restricted* to certificates of degrees conferred by universities and colleges.' Worcester's Dictionary." *Halliday v. Butt*, 40 Ala. 178, 183 (1866). (Emphasis supplied.)

In 1884, the Supreme Court of Missouri, relying on the dictionary definition of the term "diploma," stated that:

"[A] diploma is said to be 'a document bearing record of a degree conferred by a literary society or educational institution.' Webster's Dictionary." *State ex rel. Granville v. Gregory*, 83 Mo. 123, 130, 153 Am. Rep. 565 (1884).

These definitions appear to make the issuing of a diploma synonymous with the conferring of a degree.

In the case of *Valentine v. Independent School District*, 191 Iowa 1100, 1105, 183 N.W. 434 (1921), the Supreme Court of Iowa defined a diploma as:

"[T]he written or printed evidence endorsed by the proper authorities that the person named thereon has completed a prescribed course of study in the school or institution named therein." (Mo. App.) 183 N.W. 434, 437 (1921).

This definition does not make the issuing of a diploma synonymous with the conferring of a degree.

The Supreme Judicial Court of Massachusetts construed a statute similar to Section 3 of the Nonprofit Corporation Law of 1972, *supra*, in *Commonwealth v. New England College of Chiropractic, Inc.*, 108 N.E. 895 (1915). In that case, the court dealt with the question of whether a diploma was a degree when that diploma declared a student to be a doctor of chiropractic. The statute construed by the court in this case provided that:

"Whoever, without the authority of a special act of the General Court granting the power to give degrees, offers or grants degrees as a school, college or as a private individual. . . shall be punished. . . ."

The Court held in that decision that a "degree" was

"[A]ny academic rank recognized by colleges and uni-

versities having a reputable character as institutions of learning, or any form of expression composed in whole or in part of words recognized as indicative of academic rank, alone or in combination with other words, so that there is conveyed to the ordinary mind the idea of some collegiate, university or scholastic distinction. While this definition may not include all instances, it is sufficiently accurate for the present case. *The ordinary diploma of public or private schools, simply certifying to the completion of a course of study, does not contravene the statute.* But, when the title like "Doctor," commonly associated with unusual skill acquired by academic or professional study in schools or colleges, is conferred either separately or associated with other words, the statute is violated." At page 897. (Emphasis supplied.)

The implications of this case are that the court does not view the issuing of a diploma to be synonymous with the conferring of a degree.

III. Black's Law Dictionary takes its definition of "diploma" from *State v. Gregory, supra*, and defines a diploma as:

"An instrument given by colleges and societies upon the conferring of any degrees. *State v. Gregory*, 83 Mo. 130, 53 Am. Rep. 565." Black's Law Dictionary 545 (Rev. 4th ed. 1968).

Ballentine's Law Dictionary takes its definition of "diploma" from *Halliday v. Butt, supra*, and defines a diploma as:

"An instrument conferring some privilege, honor, or authority; now almost wholly restricted to certificates of degrees conferred by schools, universities and colleges. *Halliday v. Butt*, 40 Ala. 178, 183." Ballentine's Law Dictionary 349 (3rd ed. 1969).

Consequently, both legal definitions rely on cases which define "diploma" in accordance with the common usage of the term at the time the cases were decided.

IV. Two Attorney General's Opinions in the past advised that the issuing of a diploma was the same as the conferring of a degree. 1903-1904 Op. Atty. Gen. 333, 14 Dist. 322; 1919-1920 Op. Atty. Gen. 33. The opinion of the Attorney General issued in 1904 relied on the common usage of the term "diploma" at the time the opinion was issued and the Opinion of the Attorney General issued in 1920 relied on the definition of "diploma" as found in *State v. Gregory, supra*.

V. In a number of the statutes of Pennsylvania, the Legislature uses the term "diploma" interchangeably with the term "certificate." See 1855, Feb. 22 P.L. 46 §4, 24 P.S. §2534; 1949, March 10, P.L. 30 Art. XX §2007, as amended, 1965 Oct. 21, P.L. 601 §48, 24 P.S. §20-2007; 1963, Aug. 24, P.L. 1132, §13,

24 P.S. §5213. This seems to indicate that the Legislature views a diploma as a written instrument which may or may not purport to confer a degree, depending on language used on the face of the written document.

In light of the above, it is clear that there is conflicting law as to whether the issuing of a diploma is necessarily synonymous with the conferring of a degree or whether the issuing of a diploma can in some situations merely evidence that a student has completed a non-degree program at an institution. In view of this fact, it is appropriate for us to opt for the definition which effectuates the better rule of law. The better rule under these circumstances would be one that recognizes present-day custom and practice and creates little, if any, danger to the public. The present-day common usage of the term seems to indicate that a diploma can either be a certificate to demonstrate that a student has completed a non-degree program at an institution or it can be a certificate to evidence that a student has completed a degree program. This is evidenced by the present-day dictionary definition of "diploma" as well as by the fact that the high schools of the Commonwealth are authorized to and do issue diplomas to persons upon graduation from high school. 22 Pa. Code §5.81.

The danger to the public—in this instance, a deception premised on the use of a diploma for fraudulent or deceitful purposes—is minimal.

First, we hold that a diploma cannot be evidence of satisfaction of degree requirements unless issued by Nonprofit Corporations meeting the degree-granting requirements of Sections 211 and 312 of the Nonprofit Corporation Law. Second, should a diploma be issued which expresses or attempts to create the impression that it is a paper evidencing the completion of a program leading to a degree, when in fact no requirements necessary for the granting of a degree were fulfilled, the Unfair Trade Practices and Consumer Protection Law, 1968, Dec. 17, P.L. 1224, No. 387, §1, 73 P.S. §201, *et seq.* would in most instances prohibit the practice.

Finally, we note that prior to the enactment of the new "Crimes Code," (1972, Dec. 6, P.L._____, No. 334, §1, *et seq.*, 18 P.S. §101, *et seq.*, there existed a statute prohibiting issuance of diplomas purporting to confer an academic degree in certain situations. 1939, June 24, P.L. 872 §674. An examination of that statute indicates that it would probably be difficult, if not impossible, of application and was wisely repealed with the enactment of the new "Crimes Code," *supra*. Research indicates that there were apparently no prosecutions under that particular statute. In this light, the opinion set forth in this letter will not affect the risk of harm to the public and will have the salutary effect of clarifying the law in a manner which will make it comply with present practice.

Consequently, you are advised that a corporation can award a diploma without first meeting the degree-granting requirements if that diploma goes no further than to document that a student has completed a program. If, however, a corporation attempts to award a diploma that confers a degree, such as an AA or BA, it cannot do so unless it first meets the degree-granting requirements of Sections 211 and 312 of the Nonprofit Corporation Law.

Very truly yours,
LILLIAN B. GASKIN
Deputy Attorney General
ISRAEL PACKEL
Attorney General

OFFICIAL OPINION No. 81

Insurance Department—Report to examination—Right to Know—Legislative subpoenas

1. A report of examination of an insurance company under Section 213 of the Insurance Department Act of May 17, 1921, 40 P.S. §51, is a public document under that law and under the Right to Know Law of June 21, 1967, as amended, 65 P.S. §66.1.
2. The report of examination becomes public as soon as any objections to the report made by the company have been resolved to the satisfaction of the Insurance Department.
3. Reports of examination which are not yet public may be turned over to a duly constituted legislative committee, but since it is a confidential document, a subpoena should be required and the Insurance Department should advise the committee of the confidential nature of the report.
4. If an examination discloses that an insurance company is subject to administrative action by the Insurance Department under other statutory authority, the Department may institute immediate administrative action and need not wait until the thirty-day objection period has expired.

Harrisburg, Pa.
December 28, 1973

Honorable Herbert S. Denenberg
Insurance Commissioner
Harrisburg, Pennsylvania

Dear Commissioner Denenberg:

You have requested our opinion with regard to several aspects of Section 213 of the Insurance Department Act of May 17, 1921, P.L. 789, as amended, 40 P.S. §51 ("Act"). This Section provides that the Commissioner shall require companies under the regulatory jurisdiction of the Department to keep books and records in a certain manner in order to be able to ascertain whether such companies comply with the provisions of law; and that certain examinations shall be made by the Department to ascertain compliance with law and assure protection to policy holders. After providing for the nature and type of departmental examination, the Act provides as follows:

"The Insurance Commissioner shall cause to be prepared a report of the examination of any domestic insurance company, association or exchange immediately upon completion of such examination. He shall submit such report to the domestic insurance company, association or exchange examined which shall have the privilege of objecting to any part of such report within thirty days from receipt thereof. In the event any objection shall have been made, the Insurance Commissioner shall grant a hearing to the organization examined before making such report available for public inspection. Thereafter, he may, if he deems it for the interest of the public to do so, publish any such report or the results of any such examination as contained therein in one or more newspapers of the Commonwealth."

Your questions relate to the quoted portion of Section 213 and may be summarized as follows:

1. In the past, the Department has interpreted Section 213 to mean that the Commissioner has discretionary authority to determine whether or not the documents comprising an examination report should ever be made available to the public. You believe that such reports should be made public at all times and question whether, in view of the contrary past interpretation, it would be proper for you to make such reports public as a matter of course while retaining only the discretion whether or not to publish them in newspapers.

2. If after a hearing under Section 213, you determine that the objections are unfounded, may you immediately release the report to the public or must you wait until an appeal period has expired?

3. You ask whether records which are not public (specifically, examination reports prior to the time a hearing has been concluded) may be made available to a duly authorized committee of the Legislature.

4. If an examination discloses that there is an apparent violation of Pennsylvania law, can the Department take immediate administrative action against that company or must it wait the thirty days allowed a company to object to the report of examination under Section 213?

Our opinions follow and you are hereby advised accordingly.

1. It is our opinion that a report of examination, once it has been finalized, is a public document under the so-called "Right to Know Law" of June 21, 1967, P.L. 390, as amended, 65 P.S.

§66.1(2).¹ The Right to Know Law does except those records access to which is otherwise prohibited by law or which disclose the institution, progress or result of an investigation. But we do not believe that either of these exceptions applies because Section 213 allows, rather than prohibits, the dissemination of such records. Simply allowing a company the right to challenge the validity of an examination report during a certain period *before* the record becomes public, does not remove the status of the report as a public record.

This conclusion is further supported by other provisions of the Act. Section 219, 40 P.S. §57, requires the Commissioner to "...preserve, in a permanent form, a full record of his proceedings and a concise statement of the condition of each company, association, exchange, society and order or agency visited or examined." This requirement would be meaningless if that record were to remain locked in files and unavailable to the public. Section 219 additionally requires that the Commissioner make an annual report to the General Assembly showing the conditions of the various companies. Furthermore, Section 207 of the Act, 40 P.S. §45 provides that copies of all documents filed in the office of the Insurance Department shall be admitted in evidence in all courts in the Commonwealth when certified by the Commissioner. There is no restriction as to confidentiality or even a subpoena requirement. Section 207 is thus consistent with the conclusion that such reports are a public record.

The above analysis also proves that the report is not covered by the "investigation" exception. That exception was designed to protect investigative reports which would then be used in agency or court proceedings, or reports which by their very nature otherwise require confidentiality. But, as *Wiley v. Woods*, *supra*, shows, it was not designed to prohibit dissemination of a result of investigation the very purpose of which is to acquire information for the use of the public. Accordingly, we agree with your position and hereby advise that all finalized examination reports are public records under the Right to Know Law and Insurance Department Act, and that your discretion is limited to determining whether or not the results of such reports should be disseminated in the newspapers.

1. The Courts have looked to the broad intent of the statute rather than to each specific item mentioned. *McMullan v. Wohlgenuth*, 453 Pa. 147, 158 (1973), reversing 3 Pa. Commonwealth Ct. 574 (1971) (holding that welfare rolls are public records but otherwise excepted from disclosure by law); *Friedman v. Fumo*, 9 Pa. Commonwealth Ct. 609 (1973); Opinion of Attorney General No. 20 of 1973, 3 Pa. B. 513 (educational records). In *Wiley v. Woods*, 393 Pa. 341 (1958) the Court held that field investigation notes are not public records, but noted that the report made from such notes had been treated as a public record. 393 Pa. at 344. We believe that this is an instructive distinction in regard to this question, where it is the final examination report, after objections have been resolved, and not the preliminary or "investigative" notes which are being held to be a public record.

2. Under the language of Section 213, it is our opinion that the report of examination becomes a public record as soon, after hearing, as the Department resolves, to its satisfaction, the objections filed by any company. If the company believes that the dissemination is harmful, it can seek review of the Department's decision by original action or appeal,² attended by a request for appropriate interlocutory relief.³

3. A duly constituted legislative committee should of course be given any record which is a public record or which is not otherwise prohibited by law, and you should, as we are certain you do, cooperate with such a committee so that it may appropriately carry on its legal functions. Compare Section 502 of the Administrative Code of 1929, as amended, 71 P.S. §182. If, however, such a committee requests a report of examination which has not yet been finalized and is therefore not public, we believe, and it is our opinion, that you should require a subpoena from such committee and specifically advise such committee of the confidential nature of such material so that it will not make it public to the detriment of the company involved. Once the subpoena has been properly issued and is otherwise legal and proper, you should obey it. Constitution of Pennsylvania, Article II, §11; Act of June 13, 1842, P.L. 491, 46 P.S. §61; Penal Code of December 6, 1972, Act No. 334, Section 5110, 18 Pa. S. §5110.

4. The Department is given broad power to take administrative action against insurance companies for violations of law, whenever they come to its attention.⁴ In serious cases, the Department is given power to suspend an insurance company under Section 502 of the Act, 40 P.S. §202 under the circumstances

2. It is unclear whether such a determination constitutes an administrative adjudication under the Administrative Agency Law of June 4, 1945, P.L. 1388, as amended, 71 P.S. §1710.1 et seq. Section 2(a) of that Act, 71 P.S. §1710.2 defines an adjudication as a final determination or ruling by an agency "affecting personal or property rights, privileges, immunities or obligations of any or all of the parties to the proceedings in which the adjudication is made." There are no reported decisions on the question of whether an objection hearing under Section 213 and the decision thereon come within the Administrative Agency Law, and the question is not free from doubt. See *Pittsburgh v. Insurance Department of Pennsylvania*, 448 Pa. 466 (1972), reversing 4 Pa. Commonwealth Ct. 262 (1971); *Fricchione v. Department of Education*, 4 Pa. Commonwealth Ct. 288 (1972). We need not, however, resolve that question. Because of the uncertainty, we hereby advise that you conduct hearings under Section 213 in accordance with the Administrative Agency Law so that, in the event of a test appeal, the Commonwealth Court will be able to face the merits and will not have to remand unnecessarily for the holdings of a proper hearing. We note that you have proposed regulations to expedite such hearings. 3 Pa. B. 2732.

3. See Section 43 of the Administrative Agency Law, 71 P.S. §1710.43 regarding the power of the Commonwealth Court to issue a supersedeas.

4. See, e.g. Section 639 of the Insurance Department Law, as amended, 40 P.S. §279; Sections 337.3, 350, 353 and 354 of the Insurance Company Law of 1921, as amended, 40 P.S. §§459.3, 475, 477a, 477b; Sections 7, 9 and 10 of The Insurance Unfair Practices Act of June 5, 1947, P.L. 455, 40 P.S. §§1157, 1159-1160.

there set forth, all of which evince a danger to the public welfare if the company is allowed to continue to operate.⁵ One method of ascertaining the condition of a company is through the examination required in Section 213. Since the principal purpose of the examination is to determine the nature of the company's operations and whether the company should remain in business, *Commonwealth ex rel. Schnader v. Equitable Casualty and Surety Co.*, 306 Pa. 19, 24 (1931), it would be anomalous to require the Department to wait until even the thirty day period to file objections has passed, should the report disclose immediate serious problems. During that time, if harm is being done to the public, policy holders and creditors, the harm would not lessen but would increase. Section 213 does not, however, require the same delay before any information or facts revealed during the course of an examination can be used as a basis for administrative action by the Department.

It is therefore our opinion that Section 213 may operate independently of other statutory provisions empowering the Department to take administrative action against insurance companies. If information is found during the course of an examination which could be a basis for formal administrative action, the Department may, at its discretion, immediately initiate appropriate action without waiting for the thirty day period to elapse. In pursuing such action, the Department must stay within the provisions of Section 213 by insuring that the examination report document itself is not made public prior to the elapse of the thirty day period. The company is protected by the fact that the Department, regardless of the report of examination, has the burden to prove its case. See *Commonwealth ex rel. Maxwell v. Safeguard Mutual Insurance Co.*, 91 Dauph. 305, 315-316 (1969), 92 Dauph. 307, 309-310 (1970).

Sincerely yours,

GERALD GORNISH

Deputy Attorney General

ISRAEL PACKEL

Attorney General

5. Among the grounds for suspension are insolvency, refusal to obey the laws of the Commonwealth, or where the company "is found, after examination, to be in such condition that its further transaction of business will be hazardous to its policy holders, or to its creditors, or to the public." Mere technical violations are not sufficient for suspension. *Commonwealth ex rel. Maxwell v. Safeguard Mutual Insurance Co.*, 91 Dauph. 305, 341 (1969). For the financial damage such a company may do to the public, see *Commonwealth ex rel. Commonwealth Mutual Insurance Co.*, 450 Pa. 177 (1973), reversing 94 Dauph. 280 (1972).

OFFICIAL OPINION No. 82

Licensure—Age requirement—Architects

1. Under the Act of May 26, 1943, P.L. 607, as amended by the Act of May 2, 1949, P.L. 866, 71 P.S. §1028, a person who is qualified under the Architects Law of July 12, 1939, P.L. 1188, 63 P.S. §21 *et seq.* may be licensed if he is twenty years of age or older.
2. The Act of May 26, 1943, P.L. 607, as amended, *supra*, supersedes Section 7(a) of the Architects Law, *supra*, 63 P.S. §22(a) insofar as the latter requires an age precondition of twenty five years.
3. The Act of May 26, 1943, P.L. 607, as amended, *supra*, undoubtedly has application to other licensing boards whose age requirements should be examined.

Harrisburg, Pa.
December 31, 1973

Honorable Louis P. Vitti
Commissioner
Bureau of Professional and Occupational Affairs
Harrisburg, Pennsylvania

Dear Commissioner Vitti:

From time to time we have had questions as to the validity of age requirements for licensure of the various professional licensing boards under your jurisdiction. The most serious issue has been caused by several of the licensing acts which impose a twenty-five year age precondition for licensure. We have invariably declined to hold age requirements unenforceable and have, in fact, defended them because we are not convinced that they are clearly unconstitutional. See Opinion No. 114 of 1972, 2 Pa. B. 635, 55 D. & C. 2d 491 (1972); *Republican College Council of Penna. v. Winner*, 357 F. Supp. 739 (E.D. Pa. 1973).

However, based on our review of the law, we have concluded that Section 7(a) of the Architect's Law of July 12, 1939, P.L. 1188, 63 P.S. §22(a), has been superseded. It is therefore our opinion, and you are hereby advised, that any person meeting the other requirements of that Act for licensure who is twenty years of age or older may be licensed.

Our basis for this conclusion is the Act of May 26, 1943, P.L. 607, as amended by the Act of May 2, 1949, P.L. 866, 71 P.S. §1028. This act provides:

"Notwithstanding the provisions of any other law, any departmental administrative board within the Department of Public Instruction authorized to administer examinations for licensure or registration to practice a profession, except the professions of medicine, dentistry, osteopathy, and optometry, may admit to examination and authorize the issuance of a license or registration to an applicant who is less than twenty-one years of age but not less than twenty years of age, and who is a citizen of the United States."

At the time the Act of May 26, 1943 was passed, the State Board of Examiners of Architects was a departmental administrative board within the Department of Public Instruction under

Section 202 of the Administrative Code of 1929, 71 P.S. §62. Accordingly, that Act governs architecture and allows licensure of anyone twenty years of age or over. While the Act uses the word "may" rather than "shall," we believe, under the circumstances, that admission to examination is mandatory, not discretionary, because there is no reasonable basis on which discretion could be applied and any other construction would cause the statute to be unconstitutional as a naked delegation of authority. *Seligsohn Appeal*, 410 Pa. 270, 274-275 (1963); *Hotel Casey Co. v. Ross*, 343 Pa. 573, 578-580 (1942); *Lansdowne Bank and Trust Company's Case*, 323 Pa. 380, 385 (1936); *McMullin v. Commonwealth Title Insurance and Trust Co.*, 261 Pa. 574, 578-580 (1918); *Vanderwort v. Department of Civil Service*, 19 N.J. 341, 117 A. 2d 5 (1955); Statutory Construction Act of December 6, 1972 (No. 290), Section 1922, 1 Pa. S. §1922.

We have not applied this act to the registration of professional engineers or landscape architects for the reason that the acts imposing the twenty-five year age requirements for those professions were either passed or amended after 1949. Professional Engineers Registration Law of May 23, 1945, P.L. 913, Section 4, as amended by the Act of November 24, 1967, P.L. 548, 63 P.S. §151(b); Landscape Architects' Registration Law of January 24, 1966, P.L. 1527, Section 6(b), 63 P.S. §907(b). Accordingly, insofar as they either instituted or reenacted a twenty-five year age requirement, that requirement would be in effect.

We suggest that you make this opinion known to all the boards under your jurisdiction. There are undoubtedly boards which were administrative departmental boards in the Department of Public Instruction in 1943, the age requirements for which have not been changed since that time and therefore would properly be age twenty. We will be happy to review any specific questions that any of the boards may have in this respect.

Sincerely,

GERALD GORNISH

Deputy Attorney General

ISRAEL PACKEL

Attorney General

OFFICIAL OPINION No. 83

Bureau of Elections—Time for closing of registration rolls prior to special election under Permanent Registration Act for Cities of the Second Class, etc., Act of April 29, 1937 P.L. 487, as amended

1. No express provision is made for closing registration prior to a special election under the Permanent Registration Act for Cities of the Second Class, etc., Act of April 29, 1937, P.L. 487, as amended.
2. In the absence of such a provision, it is necessary to accommodate the important public interest of making the franchise as broadly accessible

as possible for a special election with the demands the Legislature has placed upon registration commissions to fulfill the various express duties required of them by the Registration Act.

3. Under the Permanent Registration Act for Cities of the Second Class, etc. Act of April 29, 1937, P.L. 487, as amended, electors may register for a special election at the office of their respective registration commissions until the end of ordinary business hours of the fourth day preceding a special election, after which time the registration rolls must be closed.

Harrisburg, Pa.
December 31, 1973

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

Dear Secretary Tucker:

You have requested our opinion as to whether registration of electors must cease thirty days prior to the special election called by the Governor for February 5, 1974 to fill the vacant seat in the 12th United States Congressional District. It is our opinion, and you are hereby advised that, except in the City of Philadelphia, electors may continue to register for a special election at the office of their respective registration commissions until the end of ordinary business hours of the fourth day preceding a special election, and that the registration rolls there-after must be closed.

The days and hours of registration outside the City of Philadelphia are governed by §16(a) of the Permanent Registration Act for Cities of the Second Class, Cities of the Second Class A, Cities of the Third Class, Boroughs, Towns and Townships, Act of April 29, 1937, P.L. 487, as amended, 25 P.S. §951-16(a) ("Permanent Registration Act"). Section 16(a) provides in pertinent part that registration shall be open during the ordinary business hours of each day:

"except Sunday, holidays, the day of each election and each primary, the thirty days next preceding each general, municipal and primary election, and the thirty days next following each election and the five days next following each primary. . . ."

A careful reading of this provision reveals that registration is required to be closed during the thirty days before three specified types of elections: general, municipal and primary elections. However, §2(d) of the Permanent Registration Act, 25 P.S. §951-2(d), defines the term "election" to include four kinds of elections, to wit, "any general, special, municipal or primary election, unless otherwise specified." While the thirty day closure of registration rolls is required by the Legislature for three of the enumerated kinds of elections, §16(a) is silent with regard to the fourth kind of election. Thus, there is no requirement of the Legislature that the registration rolls be closed during the thirty days next preceding a special election.

It is useful to compare §16(a) above with §17(a) of the First Class City Permanent Registration Act, Act of March 30, 1937, P.L. 115, as amended, 25 P.S. §623-17(a). Section 17(a), which applies to the City of Philadelphia, makes the same type of provision for closing of the registration rolls thirty days next preceding general, municipal and primary elections. It does not, however, remain silent as to special elections:

“Provided, however, that in case of a special election within a certain district, (congressional, senatorial or representative), held on a day other than the day of a primary, general or municipal election, the registration of electors shall be discontinued in the wards comprising such a district for the period of thirty-five days prior to and the five days next following such special election.” 25 P.S. §623-17(a).

This clear mandate from the General Assembly to close registration rolls prior to a special election is in sharp contrast to the absence of a corresponding requirement for the closing of registration rolls prior to a special election held outside of the City of Philadelphia. In the absence of such a provision, we must determine whether there exists any other section which forecloses the right to register.

In making this determination, we must bear in mind that we are dealing with the ever important right to vote, a prerequisite of which is registration under Pennsylvania Law. There can be no question that because of the “fundamental” nature of the right to vote, every presumption must be given to securing the right, and the Legislature cannot be deemed to restrict or proscribe the exercise of the right unless it does so in clear and unmistakable terms. *Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995 (1972); *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 89 S. Ct. 1886 (1969); *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079 (1966).

In the present instance, we have legislation which is, at best, silent on the question of time in which to register. Moreover, we are here concerned with special elections, which come about because of some unforeseen event such as resignation or removal from office, or death of the incumbent, as was the case in the 12th Congressional District. Residents of the district for which a special election must be held do not have a statutory fixed date by which they must take steps to insure that they have protected their right to participate in the election. In this circumstance, it becomes most important to make available the longest time possible in which persons can secure the ability to participate in special elections.

While it is apparent that the Permanent Registration Act does not permit county registration commissions to cease registration of electors thirty days before a special election, the Act does not impose upon them the burden of conducting registration up to

and including the day of election. Section 36(a) of the Permanent Registration Act provides that:

"Any person whose name is in the district register of an election district...shall be entitled to vote in such district at any general, municipal or special election...." 25 P.S. §951-36(a).

The importance of the district register is two-fold: it serves as the means for verifying the signatures of electors on the voters' certificates, and later as a ballot check list verifying the number of persons who voted. See 25 P.S. §951-36(a), (g).

Under §35 of the Permanent Registration Act, the registration commission is required to deliver the district register to the election officers of each election district "not later than noon of the third day preceding an election or primary." 25 P.S. §951-35(a). The prescribed physical condition of the district register upon delivery is instructive:

"District registers, when so delivered, shall be contained in *suitable binders so constructed and locked* that the name, address, voting record, and other data on each card may be visible, and that entries may be made on each card, *but that the cards cannot be removed by the election officers*. . . . Said binders shall be enclosed within a case or containers and shall be *locked and sealed* by the commission before delivery." 25 P.S. §951-36(b). (Emphasis supplied.)

Since the district register must be locked in the above fashion, no additions or deletions may be made to the number of registered voters once the register leaves the commission office. Accordingly, no registration of electors can take place at the election districts.

The question still remains whether there are any other provisions of the Permanent Registration Act which require the closing of the registration rolls at some time earlier than shortly before the district register must be delivered to the election districts. Commencing 30 days prior to each election and primary, a registration commission must begin the process of preparing the district register for delivery to the election districts, including the preparation and distribution of street lists. Section 32 of the Act, 25 P.S. §951-32, requires the commission to compare and correct the general and district registers, while §33, 25 P.S. §951-33, requires the preparation of street lists which may be utilized by organized political parties and committees, as well as interested citizens, for the purposes of verifying registration information and forestalling election frauds. In addition, under §34, 25 P.S. §951-34, at any time not later than the tenth day preceding any election or primary, any

qualified elector may petition the commission to cancel or suspend the registration of any registered elector, and if such petition is granted, the general and district registers are to be amended accordingly.

Unlike the locking of the district register and its delivery to the election district, these procedures do not preclude concurrent registration. After the street lists are prepared and circulated, there is no impediment to entering additional names upon the general and district registers. Although such names would not be on the street lists, they would still be subject to challenge at the polls, upon a showing to election officers that the elector "has become disqualified by removal from the district since registration." 25 P.S. §951-36(a). Since the purposes underlying §§32 through 34 of the Act are thereby served, there is no justification for requiring a halt to registration either thirty or ten days prior to a special election. Accordingly, we are constrained to conclude that the only legitimate line to be drawn is at the time the district registers must be secured and delivered to the election districts.

In the context of registration for November elections, the courts have not hesitated to extend the time for registration. In *Sloane v. Smith*, 351 F. Supp. 1299 (M.D. Pa. 1972), a Federal Court ordered the Centre County Commissioners to allow students of the Pennsylvania State University to register for an additional five-day period in October, less than thirty days before the election. Accord, *Fair v. Osser*, Civil Action No. 71-2212 (E.D. Pa. 1971) (three judge court; unreported order). In *Wenners Appeal*, 54 D. & C. 223 (1945) the Court of Common Pleas of Lehigh County required registration officials to keep offices open for the purpose of registering veterans who had returned from active service in World War II but who did not return before the date when registration closed. The court ordered that applications for registration be accepted until the day before the election, observing that despite the inconvenience to the registration commission caused by its ruling, it would present no problems impossible of solution.

The Legislature's silence with regard to closing registration before a special election requires that we interpret the existing provisions of the Permanent Registration Act so as to reconcile in the most reasonable way possible the various competing legal considerations. We have attempted to accomodate the important public interest of making the franchise as broadly accessible as possible for a special election with the demands the Legislature has placed upon registration commissions to fulfill the various express duties required of them by the Registration Act. By permitting registration up to the end of business hours of the

fourth day preceding the special election, i.e., Friday, February 1, 1974, registration commissions will be affording prospective electors an extensive opportunity to register. At the same time, the registration commissions should have sufficient opportunity to prepare and deliver the district registers by noon of the following day.

Sincerely yours,
MELVIN R. SHUSTER
Deputy Attorney General
ISRAEL PACKEL
Attorney General

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