Commonwealth of Pennsylvania

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OPINIONS

OF THE

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OF

Pennsylvania

1974

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OFFICIAL OPINION No. 1

Drugs and Driving

1. An individual in a drug-free treatment program can obtain a driver's license or permit and PennDOT does not have the authority to refuse a driver's license or permit solely on the ground that such an individual is in a drug-free treatment program.

2. PennDOT does not have the authority to suspend the operating privileges of an individual solely on the ground that he or she is receiving treatment in a drug-free program.

3. PennDOT has the authority, and is required, to refuse a license or permit to an individual in an approved methadone program provided the individual is, in fact, addicted to the use of narcotic drugs. The Secretary of PennDOT must afford the applicant an opportunity to have a hearing on the issue of drug addiction and the applicant shall be given the opportunity to show that the drug addiction does not render the applicant incompetent to drive or is not disabling to the extent that it would be unsafe for the applicant to drive.

4. PennDOT has the authority to suspend the operating privileges of an individual receiving treatment in an approved methadone program provided that PennDOT affords the individual an opportunity for a hearing and determines that such a person is incompetent to operate a motor vehicle or is afflicted with mental or physical infirmities or disabilities making it unsafe for such person to operate a motor vehicle.

5. PennDOT should immediately promulgate regulations ensuring that applicants are apprised of their rights.

6. The legislature should reexamine the provision of the Vehicle Code which precludes narcotic addicts in methadone treatment programs from obtaining permits or drivers' licenses in view of the legislative and societal interest in rehabilitating such addicts.

Harrisburg, Pa.
January 11, 1974

Honorable Jacob G. Kassab
Secretary of Transportation
Harrisburg, Pennsylvania

and

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

Gentlemen:

Your agencies have both requested advice concerning the operating privileges of persons licensed to drive in the Commonwealth of Pennsylvania who are in drug-free treatment programs or in approved methadone treatment programs. Four questions have been posed. Can an individual in a drug-free treatment program obtain a driver's license or permit and does PennDOT have the authority to refuse such an individual a driver's license or permit? Does PennDOT have the authority to suspend the

operating privileges of an individual in a drug-free treatment program? Does an individual in an approved methadone treatment program have the right to obtain a driver's license or permit and does PennDOT have the authority to refuse a license or permit to such an individual? Lastly, does PennDOT have the authority to suspend the operating privileges of an individual in an approved methadone treatment program?

It is our opinion, and you are so advised, that (1) an individual in a drug-free treatment program can obtain a driver's license or permit and PennDOT does not have the authority to refuse a driver's license or permit solely on the ground that such an individual is in a drug-free treatment program; (2) PennDOT does not have the authority to suspend the operating privileges of an individual solely on the ground that he or she is receiving treatment in a drug-free program; (3) PennDOT has the authority and is required to refuse a license or permit to an individual in an approved methadone program provided the individual is, in fact, addicted to the use of narcotic drugs. The Secretary must afford the applicant an opportunity to have a hearing on the issue of drug addiction and shall give the applicant the opportunity to show that the drug addiction does not render the applicant incompetent to drive or is not disabling to the extent that it would be unsafe for the applicant to drive; and (4) PennDOT has the authority to suspend the operating privileges of an individual receiving treatment in an approved methadone program provided that PennDOT affords the individual an opportunity for a hearing and determines that such a person is incompetent to operate a motor vehicle or is afflicted with mental or physical infirmities or disabilities making it unsafe for such person to operate a motor vehicle.

The issues presented involve an unfortunate collision of important public policies. Highway safety is of paramount concern to Commonwealth officials. Our citizens must be protected at all times from unnecessary traffic safety hazards. At the same time, this Commonwealth has a serious drug abuse and narcotic addiction problem. As a matter of human compassion, government officials are enjoined to assist people to avoid drug abuse and to overcome narcotic addiction. It is also in the interest of the Commonwealth and its citizens to rehabilitate drug abusers and narcotic addicts who are presently a drain on society through their inability to function and those who commit crimes to satisfy their habit and uncontrollable addiction. We have considered these policies and goals very carefully in formulating this opinion.

The Secretary of PennDOT is required, under Section 604 (a) (5) of the Vehicle Code of April 29, 1959, P.L. 58, as amended, 75 P.S. §604(a) (5), to refuse a permit or license to an applicant:

(5) If he is...addicted to the use of narcotic drugs.

(6) If he has been adjudged insane or an idiot, imbecile, epileptic or feebleminded, until restored to competency by judicial decree, or released from a hospital for the in-

sane, or feebleminded, upon certification by the superintendent or medical director that such person is competent, nor then, unless the secretary is satisfied such person is competent to operate a motor vehicle or tractor with safety to persons and property.

(7) If he is afflicted with, or suffering from, a physical or mental disability or disease, or from a weakness or disability in vision or hearing which, in the opinion of the secretary, will prevent such person from exercising reasonable and ordinary control over a motor vehicle or tractor."

The Secretary also has the discretion to suspend a person's operating privileges if the person is not competent or if it is unsafe for that person to operate a motor vehicle. This may be done in accordance with Section 618 (a) (1) of The Vehicle Code, *supra*, 75 P.S. § 618 (a) (1), which states, in part, that operating privileges may be suspended whenever the Secretary finds upon sufficient evidence:

> "that such a person is *incompetent* to operate a motor vehicle or tractor, *or is afflicted with mental or physical infirmities or disabilities rendering it unsafe* for such person to operate a motor vehicle or tractor upon the highways." (Emphasis supplied).

The Secretary of PennDOT also has the discretion to suspend a person's operating privileges whenever the Secretary finds upon sufficient evidence:

> "that such a person is incompetent or unable to exercise reasonable and ordinary control over a vehicle...." The Vehicle Code, *supra*, Section 618 (b) (5), 75 P.S. § 618 (b) (5).

Sections 618 (a) (1) and 618 (b) (5) have been construed by a series of lower court decisions to require the Commonwealth to establish "incompetency" by sufficient evidence. Invariably, mere illegal use and possession of narcotic drugs have been held insufficient to warrant suspension of a license. See *Commonwealth v. Hillyer*, 120 P.L.J. 219 (1972); *Morath Appeal*, 58 D. & C. 2d 432 (1972) (Use of marijuana not sufficient to prove incompetency); *Commonwealth v. Weiner*, 42 D. & C. 2d 164 (1967); *Bishop Appeal*, 11 D. & C. 2d 311 (1956) (Use of demerol not sufficient). See also *Hancox License*, 30 D. & C. 2d 686 (1963) and *Newmaker License*, 26 D. & C. 2d 779 (1961) on the analogous issue of alcohol use under the same statutes.[1]

A person in a drug-free treatment program receives no narcotic from the program for his or her physical dependencies. Therefore, a person in a drug-free treatment program cannot be presumed addicted to the use of narcotics. Moreover, there is no evidence to

1. Section 616 of The Vehicle Code, 75 P.S. § 616, provides for revocation of operating privileges for one year upon conviction or plea of guilty or nolo contendere to a series of offenses which include operating under the influence of narcotic drugs, unlawful possession or transportation of substances (drugs) controlled under the Controlled Substances Act. Revocation upon conviction or plea is automatic under this section. This opinion assumes that persons in drug-free or methadone treatment programs who seek to obtain or retain a license or permit and are the subject of this opinion, have not been convicted of an offense requiring revocation.

presume that a person in a drug-free treatment program would drive differently than that of the norm of the population or would constitute a traffic safety hazard.

On the basis of the foregoing discussion, we have concluded that there is no basis whatsoever to refuse a license or permit or to suspend the operating privileges of anyone merely because a person is in a drug-free treatment program, and such a practice, if it exists, must cease immediately.

We have received information which indicates that the present policy of PennDOT is to refuse to issue a driver's license or permit to persons in an approved methadone treatment program and to suspend the operating privileges of persons in those programs until such time as they are able to reestablish their "competency" to operate a motor vehicle. Data has been submitted which indicates that methadone is designed to rehabilitate heroin addicts, and that current polices of PennDOT effectively discourage some addicts from seeking rehabilitation offered by an approved methadone treatment program.

There can be no question that a person in such a program who regularly uses or is dependent on methadone is addicted to the use of narcotic drugs. However, there remains a question of statutory interpretation as to whether, pursuant to Section 604 (a) (5) of The Vehicle Code, *supra*, 75 P.S. § 604 (a) (5), a driver's license or permit may be refused to a person in a methadone treatment program solely on the ground that such person is addicted to a narcotic drug. As noted above, Section 604 (a) (5) requires denial of a license or permit on the ground that a person is addicted to narcotic drugs. That provision also requires in subsection (6) and (7) that a license or permit be refused on grounds of incompetency or disability. However, Section 618 of The Vehicle Code, the section describing circumstances under which operating privileges are suspended, makes no provision for suspension merely on the ground of addiction to narcotic drugs. On the contrary, Section 618 requires the Secretary to show incompetency or physical or mental disability.

There is no significant distinction between the refusal to issue a new license or permit to an applicant and the suspension of operating privileges for purposes of highway safety. It would appear that the objections of preventing highway accidents or reducing the risk of highway accidents would require the same tests for new licenses and permits as well as continued use of operating privileges.[2]

2. There is a scintilla of a distinction in that it can be argued that new operators are not experienced drivers, hence the requirements must be more stringent for issuance than suspension. This argument, however, breaks down in view of the fact that new residents of Pennsylvania who are experienced drivers from their states of former residence are required to meet the same written and medical tests as totally inexperienced drivers in order to obtain a Pennsylvania license and can be required to take an operator's examination as well.

There is also, of course, the presumption of constitutionality of all legislation and the concomitant doctrine of statutory construction requiring interpretation of statutes so as to preserve their constitutionality. Such an interpretation is even more compelling in connection with subsection (a) (5) of Section 604 where there is no question that the prohibition against issuance of a license or permit to a narcotic addict or alcoholic bears a substantial relationship to the purpose of promoting highway safety. As we have discussed above, the objections to subsection (a) (5) of Section 604 are that it singles out applicants for licenses and permits and imposes upon them more restrictive impediments to licensing than present license or permit holders, all for no apparent safety purpose.

On the basis of this analysis, there is a serious question whether the more restrictive condition of Section 604, which prohibits issuance if the applicant is addicted to narcotic drugs, can withstand constitutional tests. Firstly, we have a classification — applicants and operators — and difference in treatment of both classes — applicants can be denied a license for addiction to narcotic drugs but the Secretary must show incompetency or physical or mental disability to suspend. Secondly, as noted above, the difference in treatment is only marginally related to legitimate state purposes. Thirdly, in regulating operators' licenses and permits the state is regulating an essential aspect of the individual's daily existence. See *Bell v. Burson*, 402 U.S. 535 (1971). Finally, we question the need for subsection (a) (5) of Section 604 in light of subsections (a) (6) and (7) which clearly require refusal to issue a license if incompetency or physical or mental infirmity is present. Singling out narcotic addiction and habitual drunkenness, as Section 604 (a) (5) does, smacks of punishment and moreover, punishment of a status, which individuals, occupying the status, are helpless to change. The Supreme Court of the United States has held that punishment, in the form of criminal sanctions, of the status of narcotic addiction, is cruel and unusual punishment in violation of the Eight and Fourteenth Amendments. *Robinson v. California*, 370 U.S. 660 (1962); cf. *Powell v. Texas*, 392 U.S. 514 (1968).

In this light we read subsection (a) (5) of Section 604 as requiring the Secretary to refuse to issue a license or permit to an applicant if the Secretary knows or has reason to know that the applicant is a narcotic addict. As we have already indicated, the fact of any applicant's enrollment in a methadone treatment program gives the Secretary reason to believe the applicant is addicted to narcotic drugs.

However, to assure that applicants for licenses and permits are not subjected to impermissibly different standards than present holders of licenses or permits, the Secretary must notify the applicant so denied of his or her right to a hearing on whether a license or permit should issue. Upon hearing, the Secretary will have the burden of proving narcotic addiction and the applicant will have to rebut the evidence of addiction or show that the addiction is such

that the applicant is not incompetent and that the addiction does not rise to the level of a physical or mental disability making it unsafe for the applicant to operate a motor vehicle.

By interpreting Section 604 (a) (5) to require refusal to issue a license or permit in the first instance when the Secretary knows or has reason to know that the applicant suffers from narcotic addiction, due deference is given to the special significance in the statutory scheme of Section 604 (a) (5). At the same time, by providing the applicant with an opportunity to show that the addiction is not disabling, substantially equivalent standards are obtained for both applicants and license and permit holders.

As to the question of suspending the operating privileges of an individual in an approved methadone treatment program, PennDOT must afford notice of a hearing and a hearing on the issue of incompetency prior to suspension. It should be noted, in keeping with the decision in the series of cases, supra, that Section 618 (a) (1) or (b) (5) of The Vehicle Code require a finding that more than some, or irregular and infrequent drug use is required to support a finding that a person is incompetent, afflicted with a mental or physical infirmity or disability, or unable to exercise reasonable and ordinary control over a vehicle.

That there is sufficient evidence to find that a person is not competent, or unsafe, or unable to operate or control a motor vehicle is the only basis for the suspension of that person's operating privileges, and the fact that the person is in a methadone treatment program, by itself is never sufficient evidence to warrant suspension of a license or permit. It should be crystal clear that Section 618 (a) (1) and (b) (5) of The Vehicle Code, 75 P.S. § 618 (a) (1) and (b) (5), may not be interpreted in such a manner as *ipso facto* to deem persons in such approved methadone treatment programs as incompetent, or afflicted, or unsafe or unable as delineated by statute.

Finally, we suggest that there be a legislative reexamination of this aspect of the law. Literature that we have reviewed indicates that there is no difference between the driving records of people on methadone and the ordinary driver. There is no scientific evidence to indicate that driving by a methadone patient is any more dangerous than driving in a drug-free state. Moreover, there is nothing to indicate that a person using methadone would be more likely to have accidents than a control group of average citizens.[3]

Accordingly, overly broad prohibitions against methadone patients receiving licenses or permits do not appear warranted and may be counter-productive.

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3. See the report by Mr. Arthur Moffett, Deputy Chief, Section on Drug and Alcohol Abuse, Pennsylvania Medical College. This is a unit, funded by the Commonwealth, to provide information on drug abuse. See also, the study of Dunlap Associates of Darien, Connecticut for the National Highway Safety Administration. Both reports support the positions indicated above with respect to drugs and driving.

In accordance with foregoing opinion, you are advised: (1) an individual in a drug-free treatment program can obtain a driver's license or permit and PennDOT does not have the authority to refuse a driver's license or permit solely on the ground that such an individual is in a drug-free treatment program; (2) PennDOT does not have the authority to suspend the operating privileges of an individual solely on the ground that he or she is receiving treatment in a drug-free program; (3) PennDOT has the authority, and is required, to refuse a license or permit to an individual in an approved methadone program provided the individual is, in fact, addicted to the use of narcotic drugs. The Secretary must afford the applicant an opportunity to have a hearing on the issue of drug addiction and the applicant shall be given the opportunity to show that the drug addiction does not render the applicant incompetent to drive or is not disabling to the extent that it would be unsafe for the applicant to drive. (4) PennDOT has the authority to suspend the operating privileges of an individual receiving treatment in an approved methadone program provided that PennDOT affords the individual an opportunity for a hearing and determines that such a person is incompetent to operate a motor vehicle, or is afflicted with mental or physical infirmities or disabilities making it unsafe for such person to operate a motor vehicle.

You are also advised to promulgate the necessary and appropriate regulations in accordance with this opinion.

Sincerely yours,

Edward J. Morris
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 2

Coal Contracts — Increased compensation to coal vendors.

1. The Department of Property and Supplies may not negotiate an increase in payments to be paid to coal vendors without receiving additional consideration.

2. The performance of a previously existing legal duty is not consideration.

3. Coal vendors who have contracts with the Commonwealth have a legal duty to deliver coal at the agreed upon contracted price.

4. Article III, §26 of the Pennsylvania Constitution enunciates a policy that discourages the payment of additional compensation once a contract has been made. This policy should be adhered to by the Executive branch of government.

5. A renegotiation of the existing coal contracts would frustrate the intent of Article III, § 22 of the Pennsylvania Constitution, which provides for competitive bidding of such contracts.

Harrisburg, Pa.
January 14, 1974

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

Dear Mr. Hilton:

We have received a request for an opinion from your department asking whether the Department of Property and Supplies can negotiate a price increase for vendors of coal who have contracted to supply coal for the Commonwealth. Since the price of coal has increased substantially in recent months the vendors will sustain losses on their contracts unless the contract prices are renegotiated. It is our opinion, and you are so advised, that a renegotiation of the contract so as to increase the vendor's compensation is not legal.

A renegotiation of a contract implies the creation of a new contractual relationship which changes the rights and responsibilities of all parties involved. In this case, the only changed rights in the contract would involve an increase in compensation to the coal vendors. The vendor would get an increase in his price, while the Department of Property and Supplies would receive nothing in return, other than continued delivery of coal, which the vendors are legally bound to deliver in any event. It is a general principle of contract law that the performance of an act which one party is legally bound to render to another is not legal consideration. *Sum. Pa. Jur.*, *Contracts* §118. An increase in compensation to the coal vendors would result in an expenditure of public funds by the Department of Property and Supplies without the Deparment or the Commonwealth receiving any consideration in exchange.

The only circumstances where a renegotiation of a contract could be considered is where unforeseen circumstances make performance impossible or impractical. In a case such as that, however, a renegotiation of the contract could not result in an increase in compensation, but could only involve a mutual agreement to terminate the contractual relationship.

An increase in expense, such as evidenced by the circumstances facing coal vendors today, is not such a change in circumstances sufficient to warrant a termination of the contractual relationship. In *Commonwealth v. Bader*, 271 Pa. 308 (1921), a vendor sought to be released from his contract because of increased costs due to the outbreak of World War I. The vendor contended that resultant shortages made his performance impractical, if not impossible. The Court ruled that the vendor must supply the goods at the agreed

upon price, and that an increase in costs was not a valid reason for termination of the contractual relationship.

A case somewhat in point is *Dockett v. Old Forge Borough*, 240 Pa. 98 (1913). In that case, a borough entered into a contract with a contractor for construction of a sewer. Shortly after work began, the contractor's employees struck, and eventually obtained an increase in salary. Because of the resultant salary increase, the contractor notified the borough that he could not complete the work. The borough agreed to pay the contractor additional compensation because of these "unforeseen expenses". Suit was brought by a taxpayer to enjoin such payments. The Court ruled that the borough had no right to pay additional compensation, even under the threat of non-performance. The Court went on to say that the contractor had a previously existing legal obligation which the borough could enforce at law, and to expend public funds to insure performance of this previously existing legal obligation was illegal. See also *Quarture v. Allegheny County*, 141 Pa. Superior Ct. 356, 364 (1940), where the Court stated: "When a party merely does what he has already obligated himself to do, he cannot demand additional compensation therefor...."

The question of what constitutes changed conditions that are sufficient to render a contract impossible or impracticable is dealt with in Section 2-615 of the Uniform Commercial Code, 12A P.S. §615. That section, however, does not sanction additional compensation when difficult or changed circumstances arise, but, rather, notes that such changed circumstances can be the basis for delay or nonperformance on the part of a vendor. In addition, Comment 4 to Section 2-615, provides:

> "Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section."

Such is not the case here.

Additionally, Article III, §26 of the Pennsylvania Constitution provides, in part,:

> "No bill shall be passed giving any extra compensation to any...contractor, after services shall have been rendered or contract made...."

Any increase in compensation granted to the vendor would involve additional expenditures by the Department of Property and Supplies. Although Article III, § 26 of the Constitution does not expressly bar the Executive branch from increasing compensation to a contractor after a contract has been made, the policy expressed therein is sound and, in view of the case law cited above, should be adhered to by the Executive branch of government.

Finally, there are, of course, the constitutional and statutory requirements of competitive bidding. See Article III, § 22 of the Pennsylvania Constitution and 71 P.S. § 633. The clear intention of these provisions would be frustrated if vendors would be allowed to renegotiate contract prices in contracts awarded as a result of competitive bids.

In conclusion, therefore, it is our opinion, and you are so advised, that the Department of Property and Supplies may not negotiate an increase in the price of coal to be supplied to the Commonwealth by vendors who have contracts with the State.

Sincerely yours,

Theodore A. Adler
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 3

Department of Environmental Resources — Sewage Treatment Plant and Waterworks Operators' Certification Act (63 P.S. §1001 et seq.) — Professional Engineers.

1. Professional engineers need not be certified by the State Board for Certification of Sewage Treatment Plant and Waterworks Operators in order to qualify to operate a sewage treatment plant, water treatment plant or distribution system.
2. A professional engineer who is competent to perform civil or sanitary engineering services is legally qualified to operate treatment plants and distribution systems of any class without a certificate of any kind from the Board.
3. The eligibility of a professional civil or sanitary engineer is not affected by the Board's regulations categorizing sewage treatment plants as to types.
4. The Board may not make its own determination in the first instance whether a professional engineer is competent to perform civil or sanitary engineering services; his competency in that regard comes under the supervision of the State Registration Board for Professional Engineers.

5. The Board has the right to disqualify a professional engineer who proves to be incapable of operating a particular class or type of plant or who is shown to have willfully neglected his duties in the operation of any such plant or system, or to have disregarded or disobeyed the lawful orders, rules or regulations of the Pennsylvania Department of Environmental Resources or the Environmental Quality Board.
6. A registered professional engineer who is competent to perform professional civil or sanitary engineering services is a "certified operator" within the meaning of the Act, as now amended.
7. Consequently, such professional engineers may be employed by an owner or purveyor and given direct responsibility for the operation of a treatment plant or distribution system in accordance with Section 13 of the Act, 63 P.S. §1013.

Harrisburg, Pa.
January 16, 1974

Honorable Carl W. Fuehrer
Chairman
State Board for Certification of Sewage Treatment
Plants and Waterworks Operators
Department of Environmental Resources
Harrisburg, Pennsylvania

Dear Mr. Fuehrer:

We have received a request for an opinion concerning the interpretation of the Act of June 27, 1973 (Act No. 37). The Act has amended Section 7 of the Sewage Treatment Plant and Waterworks Operators' Certification Act, 63 P.S. §1007, which, prior to the amendment, provided that any professional engineer who has been examined in civil or sanitary engineering or otherwise proves he is proficient, shall be granted a certificate, upon application to the Board, to operate a sewage treatment plant, water treatment plant or distribution system.

We had occasion to interpret Section 7 of the Act prior to the amendment in an official Attorney General's Opinion, dated December 1, 1971. In that opinion we advised you that Section 7 required only that *a* certificate shall be issued to such an engineer, without reference to the classes of certificates delineated in the Act, and we said that it is the duty of the Board to determine the class of the certificate based upon the applicant's demonstration of his knowledge and experience.

It was to overcome the effect of that opinion that the Legislature enacted Act No. 37 which amends Section 7 by the addition of a Subparagraph (b). The entire section, as now amended, reads as follows:

> "(a) Anyone registered under the 'Professional Engineers Registration Law', approved May 23, 1945 (P.L. 913), who has been examined in civil or sanitary engineering or otherwise proves he is proficient shall be granted a certificate upon application to the board.
>
> (b) Subsection (a) of this section or any other provision of this act shall not be construed to require certification and registration for operation of any class of treatment plant or distribution system by a professional engineer registered under the 'Professional Engineers Registration Law' who is competent to perform professional civil or sanitary engineering services."

In view of the somewhat ambiguous language of the amendment, you have asked us to provide you with the answers to certain questions which are summarized as follows:

1. Must a professional engineer still apply to the Board and be certified before he can operate a sewage treatment plant?

2. May the Board classify the operators pursuant to Section 5 and Chapter 303.1 of the regulations adopted by the Board? The classes set forth in the statute are further broken down into three types in the regulations.

3. May the Board take it upon itself, by appropriate means, to determine if the professional engineer "is competent to perform professional civil or sanitary engineering services", which is the last phrase in the Act? If the Board is not authorized to determine if the professional engineer is competent in those fields, who is?

4. Section 2(2) of the Act indicates that a "certified operator" means any operator who holds a valid certificate in accordance with this Act. Other language in the statute requires that a "certified operator" shall have direct responsibility for the operation of the treatment plant (Section 13 (a)). If a professional engineer does not need to be certified pursuant to the amendment, is the professional engineer a "certified operator" within the meaning of this Act so that he may operate a treatment plant?

1. A professional engineer need not be certified by the Board in order to qualify to operate a sewage treatment plant, water treatment plant or distribution system. Subsection (b) of Section 7 above provides that nothing in the Act shall require certification and registration of a professional engineer for operation of any class of treatment plant or distribution system if the engineer is registered under the Professional Engineers Registration Law and if he is competent to perform civil or sanitary engineering services. This means that a professional engineer who is competent to perform civil or sanitary engineering services is legally qualified to operate treatment plants and distribution systems of any class without a

certificate of any kind from the Board.

2. The eligibility of a professional civil or sanitary engineer is not affected by the Board's regulations categorizing sewage treatment plants as to types. While subsection (b) refers to classes and not types, it is evident that the Legislature intended professional civil or sanitary engineers to be able to operate all kinds of treatment plants and distribution systems. The amendment (subsection (b)) refers only to classes because the Act itself refers only to classes. The fact that the Board has by regulation further divided sewage treatment plants into three types does not make any difference.

3. With respect to a professional engineer's qualification as an operator, the Board may not make its own determination in the first instance whether he is competent to perform professional civil or sanitary engineering services. His competency in that regard comes under the supervision of the State Registration Board for Professional Engineers. This means that a professional engineer who is registered under the Professional Engineers Registration Law is entitled to operate a treatment plant or distribution system without a special showing of his competence in civil or sanitary engineering services; his registration carrying with it a presumption in that regard.

Of course the Board would have the right to disqualify a professional engineer who proves to be incapable of operating a particular class or type of plant, or who is shown to have willfully neglected his duties in the operation of any such plant or system, or to have disregarded or disobeyed the lawful orders, rules or regulations of the Pennsylvania Department of Environmental Resources or the Environmental Quality Board relative to sewage treatment plants, water treatment plants or distribution systems. 63 P.S. §1010.

4. A registered professional engineer who is competent to perform professional civil or sanitary engineering services is a "certified operator" within the meaning of the Act, as now amended. Consequently he may be employed by an owner or purveyor and given direct responsibility for the operation of a treatment plant or distribution system in accordance with Section 13 of the Act, 63 P.S. §1013. This is because Section 7(b) above provides that "Subsection (a) of this section *or any other provision of this act* shall not be construed to require certification..." of a professional civil or sanitary engineer.

In summary, the effect of the 1973 Amendment to Section 7 of the Act is to enable professional engineers who have been examined in civil or sanitary engineering to operate sewage treatment plants, water treatment plants and distribution systems of any class or type and to have direct responsibility for their operation without a certificate, subject however to the Board's right to disqualify anyone

under the provisions of Section 10, 63 P.S. §1010.

Very truly yours,

W. William Anderson
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 4

Public Service Institute Board — Legislative Intent.

1. Due to the ambiguity of the legislative intent as to the future of the Public Service Institute Board, the Department of Community Affairs may lawfully carry on the programs of the Public Service Institute Board pursuant to its general powers.

2. The repeal of Section 454 of The Administrative Code of 1929, 71 P.S. §164 makes the legislative intent toward the existence of the Public Service Institute Board ambiguous.

3. The general powers of the Department of Community Affairs, enumerated by the Act of February 1, 1966, P.L. (1965) 1849, No. 582, 71 P.S. §670.101, provide the same kinds of powers which the Public Service Institute Board had previously exercised.

4. Therefore, the functions of the Public Service Institute Board may lawfully be carried on by the Department of Community Affairs.

Harrisburg, Pa.
January 16, 1974

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

Dear Secretary Wilcox:

You have asked for our opinion with respect to whether the functions of the Public Service Institute Board (providing in-service training to state and local officials) may lawfully be carried on by the Department of Community Affairs (DCA) in light of the repeal by the Legislature of Section 454 of The Administrative Code of 1929, 71 P.S. §164 and the resulting inoperation of the Public Service Institute Board.

You are informed that the Department may lawfully do so.

The Public Service Institute Board was originally established by Section 202 of The Administrative Code of 1929, 71 P.S. §62 as a departmental administrative board in the Department of Public Instruction (Education).

Section 1313 of The Administrative Code of 1929, added by the Act of May 13, 1947, P.L. 211, §3, 71 P.S. §363, mandates that:

> It shall be the duty of the Public Service Institute Board to establish, and from time to time revise, a program for the in-service training of State and local officials of Pennsylvania, and to provide for the administration thereof; to prescribe qualifications of specialists, teachers, and other persons employed by the Superintendent of Public Instruction to carry out the program established by the board; to receive funds from other sources, and to have all such powers as may be needed to qualify to receive and expend such funds to carry out its program, and to make a biennial report to the Superintendent of Public Instruction on the progress of the program of in-service training, which report shall be included in the biennial report of the Superintendent of Public Instruction to the Governor.

Reorganization Plan #1 of 1973 transferred the Public Service Institute Board, minus its jurisdiction over the State Firemen's Training School, to the Department of Community Affairs. Thus, DCA has a statutorily-mandated departmental administrative board with the above-quoted duties. There are, however, no statutory guidelines as to the composition of the board.

Section 454 of The Administrative Code of 1929, 71 P.S. §164, added May 13, 1947, P.L. 211, §2, established, *inter alia*, the number of board members, their terms of office and their remuneration. However, Section 454, was repealed by Section 3 of the Act of February 1, 1966 (No. 582), P.L. (1965) 1849. Act 582 established the Department of Community Affairs and enumerated its powers and duties. Section 3 simply states:

> Section 454 of the Act [Administrative Code], added May 13, 1947, P.L. 211, is repealed.

No further mention of the Public Service Institute Board is included in Act 582. Thus, there is no clear method of determining how or with whom to reconstitute the Board.

It is significant that the repeal of Section 454 was accomplished through the Act which created the Department of Community Affairs and which gave DCA the same kinds of powers which the Public Service Institute Board had previously exercised. Section 7 of Act 582 provides, *inter alia*, that:

> The Department of Community Affairs shall have the power, and its duties shall be:
>
> ***
>
> (c) Maintain close contact with all local governments to

help them improve their administrative methods and to foster better municipal government and development.

***

(f) Provide direct consultive services to political subdivisions upon requests and staff services to special commissions, or the Governor, or the Legislature as directed.

***

(i) To furnish assistance to political subdivisions in the preparation of and advice on enforcement of codes and ordinances.

Given these developments, the intention of the Legislature with respect to the future of the Public Service Institute Board is ambiguous, to say the least. Considering the extreme importance of the work involved and the need for it to continue until such time as this ambiguity is removed, we consider it to be both lawful and proper for the Department of Community Affairs to carry on the programs of the Public Service Institute Board. In order to conduct such programs, the Department may supervise present Public Service Institute personnel, operate Public Service Institute programs, and incorporate such into the overall operation of the Department.

Sincerely yours,

Mark P. Widoff
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 5

Public School Buildings—Lease Reimbursements—School Districts—Public School Code—Act 323 of 1972—School District of Philadelphia—Department of Labor and Industry—Permit of Occupancy.

1. The Department of Education cannot reimburse a school district for a lease of a building for school use under Section 2575.2 of the Public School Code of 1949, as amended, if such lease is for a period of time of less than five (5) years.

2. The School District of Philadelphia is not required to obtain a permit of occupancy from the Department of Labor and Industry under Section 703.1 of the Public School Code of 1949, as amended.

3. Prior to approving a lease of a building for school purposes under Section 703.1 of the Public School Code, the Department of Education should require a school district to provide evidence of need for the facility.

4. A school district with an approved lease signed during the period of time between December 6, 1972 and June 30, 1973 would be entitled to be reimbursed under

Section 2575.2 of the Public School Code on such an approved lease for the period of time between the date of signature of the lease agreement and June 30, 1973.

5. In a case where a school district had a lease in effect on December 6, 1972 and subsequent to that date, renegotiates the lease for a period of five (5) years or more, the Department of Education can approve such a renegotiated lease and make reimbursement payments to the school district on the basis of the renegotiated lease, under Section 2575.2 of the Public School Code.

6. In a case where a school district had a lease in effect on December 6, 1972 and the lease is scheduled to run for a period of five (5) years or more from December 6, 1972, the Department of Education can approve the lease and make reimbursement payments to the school district on the lease for the period of time from December 6, 1972, onward, under Sections 703.1 and 2575.2 of the Public School Code.

7. The Department of Education may require a school district to submit architectural drawings for buildings to be leased for school districts prior to the Department's approving the lease for reimbursement purposes under Sections 703.1 and 2575.2, *supra*, of the Public School Code.

Harrisburg, Pa.
January 24, 1974

Honorable John C. Pittenger
Secretary of Education
Harrisburg, Pennsylvania

Dear Secretary Pittenger:

You have asked several questions relating to the approval of the Department of Education of lease reimbursements to school districts under Section 703.1 of the Public School Code of 1949, as amended.

I.

The first question you asked is whether the Department of Education could reimburse a school district for a lease of a building for school use under Section 2575.2 of the Public School Code of 1949, as amended, if such lease is for a period of time of less than five (5) years.

You are advised that the Department cannot make such a reimbursement if the lease in question is for a period of time of less than five (5) years.

Section 2575.2 of the Public School Code, 24 P.S. §25-2575.2, provides as follows:

> The Commonwealth shall pay, annually, for the school year 1972-1973 and each school year thereafter to each school district which leases with the approval of the Department of Education buildings and facilities for school use under the provisions of section 703.1, an amount to be determined

> by multiplying the district's aid ratio by the approved reimbursable annual rental.
>
> In the case of districts eligible under density factor the minimum annual payment shall be no less than fifty per centum (50%) of the approved reimbursable annual rental.

In other words, a school district would be entitled to receive the reimbursement payments provided for in Section 2575.2 of the Public School Code only if the lease that the school district enters into has (1) been approved by the Department of Education, and (2) been entered into under the provisions of Section 703.1 of the Public School Code.

Section 703.1 of the Public School Code, 24 P.S. § 7-703.1, provides as follows:

> The board of school directors of any district is hereby vested with the power and authority to lease for an *extended period of five (5) years or more*, with or without provisions for acquisition of same, buildings or portions of buildings constructed for school use and/or other buildings or portions of buildings altered for school use provided such buildings comply with standards and regulations established by the State Board of Education and the Department of Labor and Industry. (Emphasis added).

It is clear that in order to meet the requirements of Section 703.1, a lease would have to be for a period of five years or more. Any conceivable doubt on this is dispelled by Section 2574.2 of the Public School Code, 24 P.S. §25-2574.2, which provides that:

> For *extended* leases of buildings and facilities for school use authorized under the provisions of section 703.1 which have been approved by the Secretary of Education, the Department of Education shall calculate an approved reimbursable annual rental charge. (Emphasis added).

II.

The second question you asked is whether the School District of Philadelphia is required to obtain a permit of occupancy from the Department of Labor and Industry under Section 703.1 of the Public School Code of 1949, as amended.

Section 703.1, *supra*, does provide that buildings leased by school districts for school purposes under that section of the Public School Code must comply with the standards and regulations established by the Department of Labor and Industry. However, Section 101 of the regulations of the Department of Labor and Industry relating to

building occupancy permits provides that such regulations apply to every building within this Commonwealth except to buildings of cities of the first class, second class and second class A.

Consequently, since the school buildings of the Philadelphia School District are located within a city of the first class, the Philadelphia School District is not required to obtain a certificate of occupancy from the Department of Labor and Industry under Section 703.1 of the Public School Code.

III.

Your next question was whether the Department of Education, prior to approving leases of buildings for school purposes under Section 703.1 of the Public School Code should require a school district to provide evidence of need for the facility.

You are advised that the Department should require a school district to demonstrate evidence of need.

Section 2576(c) of the Public School Code, 24 P.S. §25-2576(c), provides as follows:

> (c) The Department of Public Instruction shall not approve any project for which Commonwealth reimbursement is sought unless an inspection has been made by the department of the location and adequacy of existing school facilities and the determination made that existing facilities are inadequate in terms of prevailing educational standards.

Under this section of the Public School Code, the Department cannot approve reimbursement for a lease unless it is provided evidence which demonstrates that the school district has need for the facility.

IV.

You next asked whether a school district with an approved lease signed during the period of time between December 6, 1972 and June 30, 1973 would be entitled to be reimbursed under Section 2575.2 of the School Code on such an approved lease for the period of time between the date of the signature of the lease agreement and June 30, 1973.

You are advised that a school district would be entitled to such reimbursement.

Section 2575.2 of the Public School Code was enacted as part of Act 323 of 1972, Act of December 6, 1972, P.L. 1445. Section 3 of Act 323 provides that: "This Act shall take effect immediately."

The language used in Section 2575.2 of the Public School Code, *supra*, further evidences that the Legislature clearly intended that reimbursements be made for leases entered into prior to June 30, 1973, since that section of the Code directs the Commonwealth to make reimbursement payments to the school districts annually, for the school year 1972-1973, and each year thereafter. Consequently, you are advised that a school district with an approved lease signed during the period of time between December 6, 1972 and June 30, 1973 would be entitled to be reimbursed under Section 2575.2 of the Public School Code on such lease for the period of time between the date of the signature and June 30, 1973.

V.

The next question you asked deals with a situation where a school district had a lease in effect on December 6, 1972 and subsequent to that date, renegotiates the lease for a period of five (5) years or more and claims reimbursement from the Department of Education for the period of time following the date the renegotiated lease is signed. You asked whether the Department could approve such a renegotiated lease and make reimbursement payments to the school district under Section 2575.2 of the Public School Code, on the basis of such a renegotiated lease.

You are advised that the Department of Education can approve and make reimbursement payments on the basis of a renegotiated lease.

Section 2575.2 of the Public School Code, *supra*, allows the Department of Education to reimburse for any lease which is approved by the Department and which fulfills the requirements as set forth in Section 703.1 of the Public School Code. The intent of the Legislature in Act 323 of 1972 is to aid public schools to provide adequate buildings for school use through participation by the Commonwealth as an active partner in the financing of local school leases of buildings for school purposes. See *Meadville Area School District v. Department of Public Instruction*, 398 Pa. 496 (1960).

Under the rules of statutory construction, the provisions of this type of a statute should be "liberally construed to effect their objects and to promote justice." Statutory Construction Act of 1972, P.L. 1339, §3, 1 Pa. S. §1928(c).

It would seem consistent with legislative intent that the Department of Education would be permitted to approve and make reimbursements on such renegotiated leases of school buildings under Section 2575.2 of the Public School Code, if such reimbursements were being made for the period of time following the date the renegotiated lease is signed.

VI.

Your next question deals with a situation where a school district had a lease in effect on December 6, 1972 that is scheduled to run for an additional period of five (5) years or more from December 6, 1972, and, on the basis of such a lease, the school district claims reimbursement from the Department of Education for the period of time following December 6, 1972. You asked whether the Department could approve such a lease under Section 703.1, *supra*, and make reimbursement payments to the school district under Section 2575.2, *supra*, on the basis of such a lease.

You are advised that the Department of Education can approve such a lease and make reimbursement payments on it for the period of time following December 6, 1972. To do so would be consistent with the reasoning as set forth in Section V of this Opinion.

VII.

You next asked whether the Department of Education may require a school district to submit architectural drawings for buildings to be leased for school purposes prior to the Department's approving the lease for reimbursement purposes under Sections 703.1 and 2575.2 of the Public School Code, *supra*.

You are advised that the Department may require such a submission of drawings as part of its approval procedures.

Section 731.1 of the Public School Code, 24 P.S. § 7-731.1, provides as follows:

> No building facilities for school use authorized under the provisions of section 703.1, shall be leased by any school district until such lease agreement has been approved by the Department of Education. Such approval shall not be given unless the building facilities to be leased meet the standards required to operate public school buildings in use in the Commonwealth.

In order to approve a lease of building facilities, the Department of Education must determine that the building facilities meet the standards required to operate public school buildings such as those standards and regulations established by the State Board of Education and the Department of Labor and Industry. Therefore, the Department of Education may require a school district to furnish any data or plans which the Department reasonably needs in order to make a determination as to whether the building facilities to be leased meet the standards required to operate public school buildings.

Pursuant to Section 512 of the Administrative Code of 1929, 71 P.S. § 192, we have sought the comments of the Treasury and Auditor General as to Parts I, IV, V and VI of this Opinion and are advised that the Offices of the Treasurer and Auditor General concur in our conclusions.

Very truly yours,

Lillian B. Gaskin
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 6

Investment Company Act of 1933—Pennsylvania Securities Act of 1972—Implied Repeal—Section 1971(b) and (c) of the Statutory Construction Act of 1972.

1. The Investment Company Act of 1933, 7 P.S. § 6051 *et. seq.* was not impliedly repealed by the Pennsylvania Securities Act of 1972, 70 P.S. § 1-101, *et seq.*

2. Although the Pennsylvania Securities Act purports to be uniform with regard to the issuance of all securities, it does not regulate investment companies as defined by the Investment Company Act of 1933 with regard to securing the funds of persons who contribute as investors to investment companies. Hence, the Pennsylvania Securities Act of 1972 did not impliedly repeal the Investment Company Act of 1933 under Section 1971 (b) of the Statutory Construction Act of 1972, 1 Pa. S. § 1971 (b).

3. The Pennsylvania Securities Act of 1972 and the Investment Company Act of 1933 are not irreconcilable. Hence, the Investment Company Act of 1933 was not impliedly repealed under Section 1971 (c) of the Statutory Construction Act of 1972, 1 Pa. S. § 1971 (c).

Harrisburg, Pa.
January 28, 1974

Mr. James Breslin
Chairman
Pennsylvania Securities Commission
Harrisburg, Pennsylvania

Dear Mr. Breslin:

You have requested our opinion with regard to whether the Pennsylvania Securities Act of 1972, 70 P.S. § 1-101 *et seq.*, impliedly repealed the Investment Company Act of May 15, 1933, P.L. 788, No. 113, as amended, 7 P.S. § 6051 *et seq.* We are of the opinion that the Investment Company Act was not impliedly repealed by the Pennsylvania Securities Act of 1972.

The Investment Company Act was designed to eliminate certain abuses in the securities industry, abuses that may have contributed

to the 1929 financial crash and the depression of the 1930's. Like the Federal legislation in this area, the Investment Company Act was meant to provide another step toward a return to the understanding that those who manage other people's money are fiduciaries acting for others. A reading of the substantive parts of the Act, coupled with the attendant circumstances under which the Act was passed, reveals that the Legislature intended to provide a comprehensive regulatory scheme to correct and prevent certain abusive practices in the management of investment companies for the protection of persons who contribute money to be invested by such companies on their behalf. The particular form of investment company treated appears to be the "face-amount certificate" company, ancestor of today's mutual funds.

The regulatory scheme devised by the Legislature in the Investment Company Act requires that these investment companies operating within the Commonwealth be licensed by the Pennsylvania Securities Commission. Section 2 of the Act, 7 P.S. § 6053. The Securities Commission is required to investigate each application for licensure, screening the applicant for financial stability. Additionally, the licensee must post a bond of $100,000 in the form of obligations of the United States, the Commonwealth, or any of its political subdivisions to assure that its obligations can be met. Section 3, 7 P.S. § 6053. The Securities Commission can require additional security, if, in its discretion, such is required. Section 7, 7 P.S. § 6057. Moreover, the Act requires that the licensee submit annual reports detailing its financial status (Section 6, 7 P.S. § 6056); and the licensee must make available its business records for the scrutiny of the Commission (Section 8, 7 P.S. § 6058). In the event that a licensee decides to discontinue doing business in the Commonwealth, the Act mandates that the licensee petition the Commonwealth Court for dissolution at which time it must include its assets and liabilities and a complete list of holders of its contracts and obligations. Finally, penal sactions are provided for each violation of the Act.

It is apparent, therefore, that the regulatory scheme of the Investment Company Act is aimed at securing the investment of the contributor by assuring that the investment company will be in a position to fulfill its contracts and obligations at the maturity date of its contributor's certificate. The question that faces us, however, is whether this regulatory scheme has been preempted by the Pennsylvania Securities Act of 1972.

Section 1971 of the Statutory Construction Act of 1972, Act of December 6, 1972, P.L. 1339, 1 Pa. S. §1971, provides in pertinent part:

IMPLIED REPEAL BY LATER STATUTE

* * *

(b) Whenever a general statute purports to establish a uniform and mandatory system covering a class of subjects,

such statute shall be construed to supply and therefore to repeal pre-existing local or special statutes on the same class of subjects.

(c) In all other cases, a later statute shall not be construed to supply or repeal an earlier statute unless the two statutes are irreconcilable."

Hence, if the class of subjects regulated by the Pennsylvania Securities Act of 1972 includes investment companies, then the Investment Company Act is implicity repealed according to Section 1971(b) of the Statutory Construction Act. If the Securities Act does not include investment companies, a determination must be made as to whether the two statutes are irreconcilable, thereby causing a repeal of the earlier statute pursuant to Section 1971(c) of the Act.

The Pennsylvania Securities Act of 1972 was designed to prohibit fraudulent practices in the securities industry by requiring, among other things, the registration of all broker dealers, agents, investment *advisers* and securities. The Act does not purport to regulate investment companies except to the extent that the securities issued by investment companies are necessarily included in the requirement that all securities be registered. Section 201 of the Pennsylvania Securities Act, 70 P.S. § 1-201.

The regulatory scheme adopted by the Pennsylvania Securities Act is directed at prohibiting fraudulent disclosures at the time of issuance of securities. On the other hand, the Investment Company Act is directed at assuring the financial stability of its regulated companies *during* the time that investment contributions are held and at the time of *maturity* of the investment certificates in addition to the time of issuance. Hence, though the Pennsylvania Securities Act of 1972 purports to be uniform with regard to securities, it makes uniform only the law with respect to disclosure made *at the time of issuance* of securities. It therefore does not repeal the Investment Company Act under § 1971(b).

The Investment Company Act regulates those business associations which accept contributions or payments as consideration for the performance of a contract or other obligation to repay said contributions at some fixed maturity date. Simply stated the associations regulated sell face-amount securities to their customers. The securities are for a fixed amount of money to be paid at some future maturity date at a stated rate of interest. The investment company will then invest the money that it has received in other securities to make its profit and to discharge the obligations incurred by the sale of the face-amount securities in the first instance. At the point of issuance of the face-amount securities, the Pennsylvania Securities Act operates to foreclose the possibility of fraudulent or misleading disclosures. However, after issuance is authorized by the Securities Commission, under the Securities Act, there is no further regulation of the investment company designed

solely to assure that the company's obligations will be honored on their maturity date. The Investment Company Act fills this void by requiring licensure of the company, a substantial bond upon licensure, financial reporting requirements during the life of the company, and court supervision upon the discontinuance of the company. The Securities Act does not require that an investment company register itself, only that the investment company register its securities. Hence, it is apparent that while the Securities Act serves to regulate securities, the Investment Company Act serves the function of policing the solvency of face-amount investment companies to insure that these investment companies will not fail without satisfying their contributors.

It has been suggested that an investment company within the contemplation of the Investment Company Act may be an "investment adviser" under the Securities Act of 1972, 70 P.S. § 1-102(j). The Securities Act defines an "investment adviser" as,

> "...any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities." 70 P. S. § 1-102 (j).

As noted above, an investment company within the contemplation of the Investment Company Act does not advise persons with regard to the purchase and selling of securities. On the contrary, it takes contributions from investors for the purpose of investing same without any obligation of informing its contributors with regard to what investments will be made. Hence, an "investment adviser" can not be construed to include an "investment company."

Accordingly, the two acts are not irreconcilable and the Investment Company Act was not impliedly repealed by the Securities Act under Section 1971 (c) of the Statutory Construction Act.

Moreover, the fact that an issuer of face-amount securities is subject to the regulatory schemes of two different acts will not alone render the two acts irreconcilable under Section 1971 (c) of the Statutory Construction Act. On two previous occasions we have sustained the validity of regulatory schemes involving two different statutes. See, Opinion of the Attorney General No. 49 (1972) and Opinion of the Attorney General No. 99 (1972). Additionally, there exists on the national level a similar dual regulatory scheme with regard to investment companies and securities. See Investment Company Act of 1940, 11 U.S.C. §§ 72, 107, 15 U.S.C. § 80a-1 *et seq.* and the Securities Exchange Act, 15 U.S.C. § 77b *et seq.* These two acts have co-existed in recognition of the necessity to regulate these two separate and distinct aspects of an investment company's activities, the issuance of securities and the preservation of the funds of its investors.

For the foregoing reasons, we are of the opinion, and you are hereby advised, that the Pennsylvania Securities Act of 1972 did not impliedly repeal the Investment Company Act of 1933.

Sincerely,

Walter Roy Mays, III
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 7

Department of Banking—Institutions Under the Banking Code—Fictitious Names.

1. Banks are organized as "incorporated institutions" under Sections 1001-1011 of the Banking Code of November 30, 1965, P.L. 847, as amended, 7 P.S. §§ 1001-1011.

2. The Fictitious Corporate Names Act of July 11, 1957, P.L. 783, 15 P.S. §51 *et seq.*, which provides for the registration of fictitious names used by corporations, defines "corporation" so as to include banking institutions.

3. The two laws when construed together permit institutions under the Banking Code to register and do business under a fictitious name.

Harrisburg, Pa.
January 29, 1974

Honorable Carl K. Dellmuth
Secretary
Department of Banking
Harrisburg, Pennsylvania

Dear Secretary Dellmuth:

You have requested our opinion as to whether an institution[1] under the Banking Code of November 30, 1965, P.L. 847, as amended, 7 P.S. §101 *et seq.* ("Banking Code") can register and do business under a fictitious name. For the reasons set forth hereafter, it is our opinion, and you are so advised, that such institutions can conduct their business under a fictitious name.

The Fictitious Corporate Names Act of July 11, 1957, P.L. 783, 15 P.S. §51 *et seq.*, which provides for the registration of fictitious names used by corporations, defines "corporation" as:

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1. The term "institution" is defined by Section 102(r) of the Banking Code, 7 P.S. §102(r), as "an incorporated institution, a private bank or an employes' mutual banking association, except where the definition of the word stated at the beginning of the chapter in which it is used either gives a less inclusive meaning to the word or specifically includes a national bank." "Incorporated institution" is defined by Section 102(a), 7 P.S. §102(a), as "a bank, a bank and trust company, a trust company or a savings bank."

> "Any profit or nonprofit corporation organized under the laws of the Commonwealth of Pennsylvania or of any other jurisdiction." 15 P.S. §52(2).

Since banks are organized as "incorporated institutions" under provisions of the Banking Code[2] they are, in our opinion, corporations as defined in the Fictitious Corporate Names Act, *supra*, and the provisions of that Act are necessarily available to them.

The various provisions of the Banking Code pertinent to corporate names must also be considered in *pari materia* with the Fictitious Corporate Names Act. The two laws must be construed together where possible as one law.[3] Section 802 of the Banking Code, 7 P.S. §802 sets forth limitations on the names permitted to be used by institutions. Subsection (a) (x) incorporates by reference the provisions of the Business Corporation Law of May 5, 1933, P.L. 364, as amended, 15 P.S. §1001 *et seq.*, prohibiting the use of a name the same as or deceptively similar to, the name of a domestic corporation, a foreign corporation authorized to do business in Pennsylvania, an unincorporated association registered with the Department of State, the name of an agency of the Commonwealth, or a name which has been reserved for use by a corporation. Section 805, 7 P.S. §805 prohibits the adoption, use or advertising of certain names, titles and descriptions.[4]

In addition to the above limitations, Section 804, 7 P.S. §804 sets forth the procedure whereby an institution may reserve the exclusive right to use a corporate name. It provides that:

> "Such reservation may be made by filing with the Department of State an application to reserve a specified name executed by the applicant. If the Department of State finds that such name is available, it shall send a copy of the application to the Department of Banking. If the Department of Banking concludes that the use of the name complies with the requirements of Section 802 and is otherwise consistent with the purposes and provisions of this Act, it shall give its written assent to the Department of Sate...." 7 P.S. §804(b).

Based on the foregoing, it is our conclusion, and you are hereby

2. See 7 P.S. §§1001-1011.

3. Section 1932 of the Statutory Construction Act of December 6, 1972, 1 Pa. S. § 1932.

4. Subsection (a), 7 P.S. §805(a), prohibits the use of any name, title or designation which is "deceptively similar to the name of an institution subject to this Act." Subsection (b), 7 P.S. §805(b) prohibits "...any person engaged in a financial business and having an office located in Pennsylvania..." from adopting, using or advertising any name, title or description which contains any of the words "bank", "banking", "banks" or "trust", or their plural, except an institution subject to the Banking Code, national banks and certain corporations created under federal law.

advised, that banking institutions can register and do business under a fictitious name provided that the selected name is not deceptively similar or violative of the sections described above. In the instance you feel it necessary to interpret the existing statutory language, we recommend that you promulgate rules and regulations consistent, of course, with the provisions of the Banking Code.[5]

Sincerely yours,

Edward I Steckel
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 8

Names—Women—Marriage—Right of married women to use other than husband's surname—Professional and Occupational Affairs.

1. For purposes of licensure under the jurisdiction of the Professional and Occupational Affairs, a woman has the right to use the following names: (1) the name assigned 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; (4) in the case of an individual who uses a name other than that determined by one of the above methods, the name by which such person is and has been known as demonstrated by reasonable evidence.

2. Opinions No. 62 and 72 of 1973 followed.

Harrisburg, Pa.
January 31, 1974

Honorable Louis P. Vitti
Commissioner
Professional & Occupational Affairs
Harrisburg, Pennsylvania

Dear Commissioner Vitti:

On several occasions our advice has been requested regarding the name under which a woman may register for purposes of licensure with the various boards and commissions under your jurisdiction. We have already advised the State Board of Nurse Examiners and State Board of Funeral Directors on this subject and, at the request of the Governor's Commission on the Status of Women, we deem it appropriate to advise you formally of our opinion as it is applicable to all such boards and commissions.

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5. This could be done pursuant to Section 202 of the Department of Banking Code of May 15, 1933, P.L. 565, as amended, 71 P.S. §733-202 as well as Sections 1602 and 1603 of the Administrative Code of April 9, 1929, P.L. 177, as amended, 71 P.S. §§422, 423.

In Opinions No. 62 of 1973, 3 Pa. Bulletin 2155 and No. 72 of 1973, 3 Pa. Bulletin 2657, we considered, respectively, the rights of married women to use other than their husband's surname for purposes of motor vehicle registration and voter registration. The conclusion of Opinion No. 62, which we followed in Opinion No. 72, was that a person has the right to use any of the following names:

> "(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."

In Opinion No. 62 we were concerned with the statutory language: "actual name." In Opinion 72 we dealt with the contruction of the word "surname." In both opinions, we concluded, as set forth in the above-quoted portion, that a woman has the right to use that name by which she consistently elects to be identified.

We have reviewed the various licensing statutes under your jurisdiction. They contain no special provisions regarding the name under which a licensee may be registered, with the exception of certain references to fictitious or corporate names which are allowed in certain professions. Insofar as individual licensees are concerned, the statutes refer, generally, to the "name" of the licensee. Accordingly, it is our opinion, and you are hereby advised, that the above opinions are equally applicable to the boards and commissions under your jurisdiction and that individual licensees may be registered under such names as are allowed therein. Please make this opinion known to each such board and commission.

Very truly yours,

Gerald Gornish
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 9

Unemployment Compensation—Pregnancy—Human Relations Act

1. Sections 401(d) (2), 402(b) (1) and 402(f) of the Unemployment Compensation Law of December 5, 1937, as amended, are impliedly repealed by the Human Relations Act of October 27, 1955, as amended, because they unlawfully discriminate against women on the basis of sex.

Harrisburg, Pa.
February 7, 1974

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

Dear Secretary Smith:

We have been asked by the Human Relations Commission to determine whether certain provisions of the Unemployment Compensation Law of December 5, 1937, P.L. 2897, as amended, 43 P.S. §751 *et seq.*, are inconsistent with the sex discrimination provisions of the Human Relations Act of October 27, 1955. P.L. 744, as amended, 43 P.S. §951 *et seq.* and with the Equal Rights Amendment of the Pennsylvania Constitution, Article I, §28.

Specifically, the following provisions have been questioned:

(1) Section 401(d) (2), 43 P.S. §801(d) (2), which provides that a pregnant woman is to be conclusively presumed unavailable for work and ineligible for benefits for a period beginning thirty (30) days prior to the anticipated date of birth and ending thirty (30) days after the birth of the child.

(2) Section 402(b) (1), 43 P.S. §802(b) (1), which provides that voluntary leaving of work without cause of a necessitous and compelling nature shall bar employee eligibility for compensation, and makes voluntary leaving of work because of pregnancy not a cause of necessitous and compelling nature.

(3) Section 402(f), 43 P.S. §802(f), which provides that a pregnant woman laid off by her employer for reason of pregnancy is ineligible for benefits for a period beginning ninety (90) days prior to the anticipated birth and ending thirty (30) days after the birth of the child.

It is our opinion, and you are advised, that all three of these provisions, as they currently stand, unlawfully discriminate against women on the basis of their sex. Such discriminatory provisions are impliedly repealed by Section 12(a) of the Human Relations Act, 43 P.S. §962(a).

Remedial legislation which would specifically repeal these provisions (Senate Bill 1221)* has passed the Senate and been

*Editor's Note — Senate Bill 1221, Printer's Number 2525 was adopted by the General Assembly, as amended in the House, and was approved by the Governor. Act of December 5, 1974, P.L. , No. 261.

referred to the House of Representatives Labor Relations Committee. We strongly support this legislation, in view of our opinion that the present provisions are in conflict with the Human Relations Act and possibly unconstitutional.[1] Specific action by the Legislature would provide a definitive statement of nondiscriminatory intent and would clarify the law by removing inoperable provisions from the statute books.

DISCUSSION

The stated purpose of the Pennsylvania Unemployment Compensation Law (UCL) is to provide financial assistance to persons who become unemployed through no fault of their own. UCL Section 3, 43 P.S. §752. The benefits are financed through taxes or "contributions" paid in varying amounts by employers who are subject to the UCL Sections 301-302, 43 P.S. §§781-782. When an unemployed worker is awarded compensation, his benefits are charged against his former employer's reserve account. UCL Section 302, 43 P.S. § 782. The contribution rate of each employer is determined in part by an "experience factor" which is based upon the average annual benefits claimed against his reserve account. UCL Section 301.1, 43 P.S. § 781.1. Thus, it is in the employer's best interest to insure a low annual benefit drain — and hence lower unemployment taxes—by maintaining full employment capacity and refraining from firing workers without good cause.

In order to receive benefits under the Unemployment Compensation Law, an unemployed person who has been employed long enough and earned enough wages to qualify for compensation must be "able to work and available for suitable work." UCL Section 401(d), 43 P.S. §801(d). A person who is unable to work because of illness or physical or mental disability is ineligible for benefits under this section. "The Unemployment Compensation Law is not and never was intended to be health insurance legislation. Its benefits go only to persons able to work and available for work. It does not provide benefits for an ill employe during the period of his illness." *Antinopoulas Unemployment Compensation Case*, 181 Pa. Superior Ct. 515, 518 (1956).

Sections 401(d) (2) and 402(f) presume that a woman who is in an advanced state of pregnancy, or one who has just been delivered of a child, is in a physical condition which renders her unable to

1. Since we find these provisions impliedly repealed by the Human Relations Act, we need not reach the question of constitutionality under Article I, §28 of the Pennsylvania Constitution. It is apparent, however, that serious questions are raised by the Equal Rights Amendment and by the Fourteenth Amendment of the United States Constitution. See *Cleveland Board of Education v. LaFleur*, 414 U.S. 632. (1974). This possible unconstitutionality buttresses our position that UCL Sections 401(d) (2), 402(b) (1) and 402(f) are repealed by the Human Relations Act, since it is an established rule of statutory construction that the Legislature does not intend an unconstitutional result. See Statutory Construction Act of 1972, 1 Pa. S. §1922(3).

work. This presumption that all pregnant and immediately post partum women are equally disabled is refuted by standard medical practice, which treats each pregnancy as an individual matter. See *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). No such presumption is made regarding any other physical disability or medical condition.

In general, an employee who leaves work voluntarily due to ill health may be eligible for benefits if his disability allows him to do light work and he actively seeks such work. His termination of employment is considered for "good cause" if the job is not within his physical capacity. *Filchock Unemployment Compensation Case*, 164 Pa. Superior Ct. 43 (1949). Similarly, an employee who takes an extended leave of absence from work due to ill health may prevent himself from becoming disqualified for benefits by taking such precautions to guard his job as a reasonably prudent person would take. *Vernon Unemployment Compensation Case*, 164 Pa. Superior Ct. 131, 135 (1949). It is his duty to give his employer timely notice of his illness and to seek a leave of absence or otherwise manifest his intention not to abandon the labor force. *Flannick Unemployment Compensation Case*, 168 Pa. Superior Ct. 606, 610 (1951). A pregnant woman who voluntarily leaves work is, however, totally barred by Section 402(b) (1) from receiving benefits, regardless of whether her leaving is a manifestation of intent to abandon the labor force. Thus, pregnancy is once again treated as qualitatively different from any other physical disability.

The Human Relations Act forbids discrimination in employment on the basis of sex.[2] The Pennsylvania Supreme Court, in *Cerra v. East Stroudsburg Area School District*, 450 Pa. 207 (1973), held that a school district's mandatory pregnancy leave provisions constituted sex discrimination in violation of the Act. The Court said (450 Pa. at 213):

> Mrs. Cerra's contract was terminated absolutely, solely because of pregnancy. She was not allowed to resume her duties after the pregnancy ended, even though she was physically and mentally competent. There was no evidence that the quality of her services as a teacher was or would be affected as a result of her pregnancy. Male

2. In relevant part, the Act provides:

Section 3. "The opportunity for an individual to obtain employment for which he is qualified...without discrimination because of...sex...[is] hereby recognized as and declared to be [a] civil right...."

* * *

Section 5. "It shall be an unlawful practice, unless based upon a bona fide occupational qualification...(a) For any employer because of the...sex...of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment...." 43 P.S. § 955(a).

> teachers, who might well be temporarily disabled from a multitude of illnesses, have not and will not be so harshly treated. In short, Mrs. Cerra and other pregnant women are singled out and placed in a class to their disadvantage. They are discharged from their employment on the basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple.

See also the Human Relations Commission's Guidelines on Discrimination Because of Sex, 1 Pa. Bulletin 707 (Dec. 19, 1970), which forbid employers from penalizing or discriminating against female employees because they require time away from work because of childbirth.

Since it is illegal under the Human Relations Act for an employer to treat pregnant employees any differently than employees otherwise temporarily disabled, the question becomes whether it is permissible for the Commonwealth, through its unemployment compensation program, to so differentiate. We find that it is not.

Section 12(a) of the Human Relations Act, 43 P.S. §962(a), provides:

> The provisions of this act shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provisions hereof shall not apply.

Section 402(f) of the Unemployment Compensation Law is clearly inconsistent with Section 5(a), 43 P.S. §955(a) of the Human Relations Act, in that the employer conduct necessary to bring the exclusion of benefits into play is illegal.[3] UCL Section 401(d) (2), with its conclusive presumption that women eight (8) months pregnant to one month after parturition are unavailable for work, is contrary to the guarantee of sexual equality expressed in Section 3 of the Human Relations Act, in that it treats pregnant women as a class and not as individuals. UCL Section 402(b) (1) is invalid on the same grounds as Section 401(d) (2).

In view of the fact that Section 12(a) of the Human Relations Act of 1955 was enacted after Sections 401(d) (2), 401(b) (1) and 402(f), all three of these UCL provisions are impliedly repealed by Section 12(a). To allow them to stand would be to encourage the very conduct the Human Relations Act condemns. Pregnant women fired because of their condition and/or unable to find work because of employer discrimination would be cut off from benefits intended

3. While we find that Section 402(f) is invalid on the basis of clear inconsistency with the Human Relations Act, it also appears that Section 402(f) is now an anomaly and that as a matter of law no situation could arise in which its application would be appropriate. In either case, as we discuss *infra*., Bureau of Employment Security officials are to disregard Section 402(f) in their administration of the Unemployment Compensation Law.

for *all* members of the work force unemployed through no fault of their own. Discriminatory employers could, absent a complaint by such a woman to the Human Relations Commission, continue to fire pregnant employees at will, assured that no increase in their unemployment taxes would result from such actions.

Accordingly, the Bureau of Employment Security is required henceforth to administer the unemployment compensation system as if Sections 401(d) (2) and 402(f) did not exist. In other words, a pregnant woman should be treated exactly the same as any other member of the work force. When she is physically able to work, she should be considered "able and available;" and when she is not, she should be treated the same as any other ill or disabled person.

Section 402(b) (1) should be administered as if the phrase, "Provided, that a voluntary leaving work because of pregancy, whether or not the employer is able to provide other work, shall be deemed not a cause of necessitous and compelling nature" were deleted.

A pregnant woman who has voluntarily terminated her employment because her doctor has informed her that her condition has made it necessary to seek less strenuous work, shall be considered to have left work for "good cause" if she has requested less strenuous work from her employer and he is unable or unwilling to provide it. *Filchock Unemployment Compensation Case, supra.* She will be entitled to benefits if she registers for, and actively seeks, such work as is within her capability, and such work is available in the area in which she lives. *Filchock, supra,* 164 Pa. Superior Ct. at 46. A woman who has voluntarily left work during pregnancy and seeks to return after her child is born may, like any other employee who takes an extended sickness or disability leave, be reasonably required by the Bureau to manifest her intention not to abandon the labor force by seeking a leave of absence from her employer or otherwise indicating a desire to return to her job. *Antinopoulas Unemployment Compensation Case, supra,* 181 Pa. Superior Ct. at 522. A pregnant woman who is (unlawfully) fired because of pregnancy, or becomes unemployed for statutorily valid reasons unrelated to her pregnancy who is available for work and who manifests an intent to remain in the labor force after the birth of her child, is eligible for benefits as long as she is physically able to work as certified by her doctor. When such a woman who has been unable to work for some period of time is again certified as able to work by her doctor, she may again begin to receive benefits. (If, however, she has not worked during the base year preceding her filing of her claim, she will be ineligible for benefits under Section 401(a)).

In order to facilitate proper application of the guidelines outlined above by Bureau of Employment Security field offices and referees, we recommend immediate promulgation of appropriate regulations which will advise Bureau personnel in detail as to the

effect of this opinion on specific fact situations.

Very truly yours,

Jennifer A. Stiller
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 10

Governor's Council on Drug and Alcohol Abuse—Confidentiality—Patient Records

1. Section 8 of Act 63 of 1972 prohibits the release of the contents of a patient's records even with the patient's consent except in stated circumstances.

2. Section 6(c) of Act 63 of 1972 requires the Governor's Council on Drug and Alcohol Abuse to provide periodic reports on the progress of patients on conditional release status to appropriate local law enforcement officials.

3. Periodic reports under Section 6(c) should be drafted so as to exclude specific information in the patient's record but to include information relating to the patient's progress in treatment so that law enforcement officials can make an informed judgment as to whether the present treatment program should be continued, revised, or ended.

4. Patients on conditional release status may not give effective consent for an employer to receive information as to the patient's continued participation in the treatment program.

Harrisburg, Pa.
February 8, 1974

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

Dear Dr. Horman:

You have requested my advice regarding the meaning of Section 8 of the Pennsylvania Drug and Alcohol Abuse Control Act of 1972 (Act No. 63). Specifically, you have asked:

(1) Whether information from a patient's records can be released to criminal justice officials, such as judges and parole officers, if the patient has entered a treatment program through the criminal justice system;

(2) Whether an employer of a patient in a drug treatment program may be informed by employes of that program as to whether the patient continues to participate in the treatment program.

I shall deal with each of these questions separately.

I.

In order to determine what information may be released to criminal justice officials, it is necessary to interpret two apparently contradictory sections of Act 63. The confidentiality provision of Act 63 provides broad protection against the release of any information in the patient's record and even forbids the release of such information with the patient's consent in most circumstances:

> All patient records (including all records relating to any commitment proceedings) prepared or obtained pursuant to this act, and all information contained therein, shall remain confidential and may be disclosed only with the patient's consent and only (i) to medical personnel exclusively for the purposes of diagnosis and treatment of the patient or (ii) to government or other officials exclusively for the purpose of obtaining benefits due to the patient as a result of his drug or alcohol abuse or drug or alcohol dependence except that in emergency medical situations where the patient's life is in immediate jeopardy, patient records may be released without the patient's consent to proper medical authorities solely for the purpose of providing medical treatment to the patient. Disclosure may be made for purposes unrelated to such treatment or benefits only upon an order of a court of common pleas after application showing good cause therefor....No such records or information may be used to initiate or substantitate criminal charges against the patient under any circumstances. Section 8(b).

As to disclosures from private drug treatment programs, the Act imposes the same requirements except that it does not provide for disclosure for purposes unrelated to treatment or benefits upon an order of a court of common pleas. See Section 8(c). On the other hand, Act 63 also provides:

> The Council shall provide periodic reports and recommendations to the Bureau of Correction and the Board of Probation and Parole and appropriate local agencies on persons being treated pursuant to this section. Section 6(c).

In short, Act 63 provides that, although the information in the "complete medical, social, occupational, and family history" that must be obtained as a part of the patient's records may not be released except in specified circumstances, the Council must, nevertheless, provide periodic reports and recommendations to law enforcement officials on the status of the person being treated. The problem, then, is to determine what information may be included in the periodic report without violating the confidentiality of patient records.

The Statutory Construction Act provides:

> 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. 1 Pa. S. §1933.

Of course, in giving effect to all the provisions of a statute, it is necessary to construe the statute so as to give effect to the legislative intent as expressed, primarily, in the language of the statute. 1 Pa. S. §1921(a), (b).

The purpose of the periodic reporting requirement is clear from the context of that provision. The Bureau of Correction, the Board of Probation and Parole, and appropriate local agencies are authorized in this same provision to "...transfer an offender placed on conditional release from one treatment service to another, depending upon his response to treatment." Section 6(c). The decision whether to revoke or restrict the conditional release status is to be made partly on the basis of whether there has been "failure to conform to a schedule for rehabilitation." *Id.* In short, the periodic report and recommendation requirement is designed to provide criminal justice officials with enough information for an informed determination as to whether the patient should be continued in the present treatment program or should be moved to a correctional setting. Of course, nearly all of the information contained in the patient's records would be useful in making such a determination. However, Section 6(c) must be read in conjunction with the confidentiality section, Section 8. The clear intent of Section 8 is to protect not only the patient (for even the patient may not consent to the disclosure of information for most purposes) but also to protect the integrity of the treatment process itself.

To understand the need for such protection, it is necessary to read Act 63 in conjunction with its companion act, the Pennsylvania Drug and Alcohol Abuse Control Act (Act No. 64 of 1972). Act 64 is a new departure in law enforcement in that it permits diversion from the criminal justice system to the treatment process at a number of points in the judicial process. See, e.g., Sections 17 and 18 of Act 64. This new departure is entirely consistent with the emphasis in Act 63 on viewing drug and alcohol abuse or dependence as a major health problem. See Sections 9 and 10. Read together, then, Act 63 and Act 64 create the potential for an enormous intrusion of the criminal justice system into the medical and psychological treatment process. The Legislature thought it necessary, therefore, to restrict the access of officials of the criminal justice system to information obtained during the treatment process, so that the privacy and candor so necessary for medical treatment or psychological counselling would not be jeopardized.

The Legislature did not intend every caseworker, doctor, or psy-

chologist working in the area of drug treatment to become fact-finding agents of the prosecutor's office or of the committing judge.

The dual legislative purposes expressed by Sections 6 and 8 of Act 63 can both be given full expression if: (1) the Council adopts regulations requiring periodic reporting to appropriate law enforcement agents on the progress that a patient is making in the drug treatment program; and (2) the contents of that report are restricted so that none of the substance of any medical, psychiatric, or counselling interview is revealed.[1] The report should indicate the nature of the treatment program. A general statement as to the patient's progress and prognosis should also be included. For example, such a statement should indicate whether there have been relapses into drug abuse and whether these relapses are frequent; it should also indicate whether the patient is making an effort to meet the demands of the treatment program. In no event should specific information divulged during the treatment process—such as the source of drugs or the nature of the patient's family situation, etc.—be included in the report.

In summary, Act 63 requires the Council to furnish local law enforcement officials with periodic status reports of the patient's treatment program. However, the Council should adopt regulations ensuring that the information provided is conclusory, so that the integrity of the treatment process itself can be protected.[2]

II.

The answer to your second question—whether employers may be informed of the fact that their employes are no longer continuing in the treatment program—is indicated from the above discussion. Section 8(b) states that the patient's records and all information contained in those records may be disclosed "only with the patient's consent *and* only" to medical personnel for certain purposes and to government and other officials only to obtain benefits due the patient. The provision contains no exception for an employer. The fact that a position of employment may have been obtained by way of an explicit or implicit waiver of the right to confidentiality by the patient is irrelevant since even with the patient's consent, the information may be released only for the stated purposes. It should

1. However, if release has been conditioned upon the patient's agreement to periodic urinalysis, the results of that urinalysis may be revealed to the appropriate law enforcement officials. See Section 16(4) of Act 64.

2. This discussion relates only to the reports and records kept as a part of the treatment process. The control of other types of information also falls under the jurisdiction of the Council. Specific provisions of Act 63 relate to the permissible use of such information. I call your attention to the following provisions: as to information obtained pursuant to the Council's coordination of scientific research and experiment, see Section 4(a)(7); as to the gathering and publishing of statistics, see Section 4(e); as to information to be used to initiate or substantiate criminal charges, see the complete prohibition in Section 8(b).

be noted, however, that an employer can find out whether his employe is continuing in the drug treatment program through other sources. For example, he can ask his employe, he can contact the employe's family, he could contact the prosecutor's office or relevant probation or parole officer. Each of these sources would have to decide whether it would be appropriate under the circumstances to divulge the information. However, those treatment programs subject to regulation by the Council may not carve an exception to Section 8 for a patient's employers.

Very truly yours,

Robert F. Nagel
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 11

Office of Administration—Executive Board—Overtime Compensation to State Employees

1. In 4 Pa. Code §27.54 the Executive Board has authorized overtime compensation to State employees under certain stated conditions.

2. The authorization for overtime payments contained in 4 Pa. Code §27.54 is "express" within the meaning of that word, as used in Section 215 of the Administrative Code of 1929, 71 P.S. §75.

3. 4 Pa. Code §27.54(b) does not authorize retroactive payments for overtime work in violation of Article III, §26 of the Pennsylvania Constitution or of Section 215 of the Administrative Code of 1929, 71 P.S. §75.

Harrisburg, Pa.
February 15, 1974

Honorable Ronald G. Lench
Secretary of Administration
Harrisburg, Pennsylvania

Dear Secretary Lench:

You have requested an opinion as to the legality of Section 27.54(a) and (b), Title 4 of the Pennsylvania Code. This provision sets forth rules for the approval of overtime compensation as follows:

(a) If it is not feasible to grant a salaried employee compensatory time off for overtime work and it is desired to pay him monetary compensation instead, a request for the payment of overtime compensation shall be submitted to and approved by the agency head prior to rendering of the overtime services.

(b) The payment of compensation for overtime work may be approved retroactively when an employee has given service in good faith, but any official responsible for an unwarranted delay in submission of such a request may be equivalently surcharged.

You have asked

(1) Whether subsection (a), *supra*, is consistent with Section 215 of the Administrative Code of 1929; and

(2) Whether subsection (b), *supra*, is consistent with either Section 215 of the Administrative Code, or Article III, § 26 of the Pennsylvania Constitution.

You are advised that 4 Pa. Code §27.54(a) and (b) is consistent with both the Administrative Code and the Pennsylvania Constitution.

I.

The Administrative Code states:

> No employee in any administrative department, independent administrative board or commission, or departmental administrative board or commission, shall be paid for extra service, unless expressly authorized by the Executive Board prior to the rendering of such services. 71 P.S. §75.

This section makes express authorization by the Executive Board, prior to the rendering of overtime services by any employee of an administrative department, a prerequisite for payment for those services. Subsection (a) of Section 27.54 clearly provides authorization by the Executive Board for overtime compensation; however, a question exists as to whether this approval can be "express" when the power to approve specific overtime payment is delegated to the agency head. In construing the term "express," it is necessary to employ the following rules of statutory construction:

(1) every statute should be construed, if possible, to give effect to all of its provisions. 1 Pa. S. §1921(a);

(2) when the words of a statute are not explicit, the intention of the General Assembly should be controlling and should be ascertained by considering, among other things, the object of the legislation, and the consequences of a particular interpretation. 1 Pa. S. §1921(c) (4), (6);

(3) in ascertaining the intention of the General Assembly, it is presumed that the General Assembly does not intend a result that

is absurd, impossible of execution, or unreasonable. 1 Pa. S. §1922(1).

If the term "express" is construed to mean specific authorization for each overtime payment made to each particular employee, the Executive Board, which is made up of the Governor and various cabinet officers, will be faced with the task of a detailed review of each proposed overtime payment of every employee throughout the Commonwealth. Such detailed review would be inconsistent with the broad authority conferred on department heads by other provisions of the Administrative Code. See, e.g., 71 P.S. §66. Such a construction of the word "express" would also be at odds with such general objectives of the Administrative Code as the promotion of administrative efficiency and the use of sound management principles. To so construe the term "express," then, would be to presume that the Legislature intended an unreasonable and unworkable result inconsistent with the general objectives of the Administrative Code. 1 Pa. S. §1922(1).

On the other hand, it is possible to construe the term "express" to mean that the Executive Board must clearly and unequivocally authorize overtime compensation in general before any particular employee may be so compensated. This construction is consistent with the general regulatory and policy-making functions of the Executive Board in other areas. See, e.g., 71 P.S. §249.

Since this latter construction of the term "express" is consistent with common usage and with other statutory provisions in the Administrative Code, it is this meaning of the term against which 4 Pa. Code § 27.54 must be judged. In effect, Section 27.54(a) provides that a salaried employee may not be paid for overtime work unless:

(1) It is not feasible to grant the employee compensatory time off for the overtime work; and

(2) The employee has requested payment for the overtime work of the agency head prior to rendering the overtime services.

Other regulations of the Executive Board establish the rate of payment for overtime compensation (4 Pa. Code §27.55); restrictions on overtime compensation that apply to higher level employees (4 Pa. Code §27.56); and special rules for overtime payments to institutional employees (4 Pa. Code §27.57). Taken together, these provisions clearly and unequivocally authorize overtime compensation under stated conditions. In my opinion, these provisions, including Section 27.54, amount to an express authorization by the Executive Board for compensation to salaried employees who do overtime work. The delegation of authority to agency heads for the determination of whether compensatory time off for overtime work is feasible is not an unlawful delegation of authority.

II.

You have also asked whether Section 27.54(b) unlawfully provides for retroactive approval of overtime compensation. Section 215 of the Administrative Code requires that the Executive Board authorize overtime compensation "prior to the rendering of such services." 71 P.S. §75. Section 27.54(b) provides for the payment of overtime compensation "retroactively when an employee has given his service in good faith." The term "retroactively" in subsection (b) does not refer to the authorization by the Executive Board that is expressed in Section 27.54, but to the review of a particular overtime compensation by an agency head. Since Section 27.54 constitutes advance authorization for overtime payments, it is fully consistent with Section 215 of the Administrative Code.

Article III, §26 of the Pennsylvania Constitution states that:

> No bill shall be passed giving extra compensation to any public officer, servant, employee, agent or contractor, after services shall have been rendered or contact made....

Because Section 215 of the Administrative Code prospectively authorizes overtime payments, compensation provided pursuant to Section 215 and to regulations of the Executive Board is not "extra compensation." Such payments are normal compensation for overtime service. Therefore, Section 27.54(b) does not conflict with Article III, §26 of the Pennsylvania Constitution.

In short, because the Executive Board has given proper advance authorization for certain types of overtime compensation in Section 27.54, that section does not provide for retroactive approval of overtime compensation in violation of either Section 215 of the Administrative Code or of Article III, §26 of the Pennsylvania Constitution.

As you note in your letter requesting this Opinion, Section 27.54(a) and (b) provide an appropriate administrative mechanism for meeting emergencies. You are advised that Section 27.54 is not only administratively appropriate, but also conforms to law.

Very truly yours,

Robert F. Nagel
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 12

Older Americans Act—Compensation—Foster Grandparents' Program—Commonwealth Employees

1. Section 611(d) of the Older Americans Act prohibits compensation paid to participants in the Foster Grandparents' Program from being treated as "income."

2. Section 611(d) of the Older Americans Act does not mean that participants in the Foster Grandparents' Program are not employees of the Commonwealth.

3. As employees of the Commonwealth, participants in the Foster Grandparents' Program are eligible for state insurance plans, the State Retirement Program, the State Unemployment Compensation System, and the Workmens' Compensation Program.

Harrisburg, Pa.
February 22, 1974

Honorable Helene Wohlgemuth
Secretary of Public Welfare
Harrisburg, Pennsylvania

Dear Secretary Wohlgemuth:

You have asked me whether participants in the Foster Grandparents' Program should be included in the State Employes' Retirement Program, the Unemployment Compensation System, the Workmens' Compensation System and various state insurance programs. This question arises because a recent amendment to the Older Americans Act provides:

> "Notwithstanding any other provision of law, no compensation provided to individual volunteers under this part shall be considered income for any purpose whatsoever." 42 U.S.C. §3044(b), (d).

Foster grandparents, who are volunteers covered by the Older Americans Act, are assigned to state institutions for the retarded. They work four hours each day for a five-day week. They are paid $2.61 per hour, of which $1.60 is Federal money. You have informed me that the foster grandparents are subject to all state personnel rules and policies and that the Department controls their hours of employment, patient assignments, supervision, evaluation, and other conditions of employment. Nevertheless, since the compensation provided foster grandparents can no longer be considered "income," you have asked whether participants in that program can still be considered employees of the Commonwealth for purposes of the programs listed above. You are advised that participants in the Foster Grandparents' Program are employees of the Commonwealth and are eligible for each of the above-listed programs.

Section 611(d) of the Older Americans Act does not state that

volunteers under the program cannot be considered employees. The term "income" is not synonymous with legal consideration. For example, a personal maintenance fee might not be considered income but could be sufficient consideration to support a contract. It is my opinion that the use of the term "income" rather than a broader term such as "consideration," "compensation," or "wage," indicates that the purpose of Section 611(d) was simply to exempt the income of foster grandparents from state and federal income taxes and social security taxes. Moreover, if the language in Section 611(d) were interpreted to equate "income" with "consideration" so that foster grandparents could no longer be considered employees of the Commonwealth, they would be left without the protection of those insurance policies that cover Commonwealth employees as well as without the protection of the various state programs designed to protect employees. Such a result would conflict not only with the general purposes of the Older Americans Act (see 42 U.S.C. §§3001, 3003), but also with the specific purpose behind Section 611(d) itself—to encourage participation in the Foster Grandparents' Program. In addition, the legislative objectives of the State Workmens' Compensation Act, Unemployment Compensation Act, and the Retirement Code would be frustrated. Neither the language nor the purpose of Section 611(d) compels this result.

Since foster grandparents receive legal consideration in return for services provided and since they are subject to the direction and control of the Department of Public Welfare in the performance of their duties, they fulfill the traditional criteria of employees. Therefore, state insurance programs for which only employees are eligible should be extended to protect foster grandparents. For example, public liability insurance covering all state employees[1] should be considered to extend to foster grandparents. I reach the same conclusion with respect to the State Employes' Retirement Program, the Unemployment Compensation Program, and the Workmens' Compensation Program. I shall discuss these three latter programs in more detail.

A. *State Employes' Retirement Program*

The State Employes' Retirement Code defines "state employee" to mean:

> "(a) Any person holding a State office or position under the Commonwealth, employed on a yearly or a monthly basis by the State government of the Commonwealth, in any capacity whatsoever except any officer or employee employed on a per diem or hourly basis for less than one hundred (100) days or seven hundred fifty (750) hours...." (There follow certain other exceptions not applicable here.) 71 P.S. §1725-102(6) (a).

1. 71 P.S. §634(b).

Obviously, foster grandparents are employees within this definition. Membership in the State Employes' Retirement Program is mandatory for all state employees except for certain exempt categories not relevant here.[2] Therefore, foster grandparents must be considered members of the State Employes' retirement program.

The amount of each employee's contribution to the retirement fund is determined, *inter alia*, according to his salary. Although "salary" is not defined in the act, "compensation" is defined to mean "all compensation received, including all overtime or other extra compensation and maintenance allowances but excluding refunds for expenses incidental to employment...." 71 P.S. §1725-102(15). The compensation paid to foster grandparents falls within this meaning and should be used as a basis for determining proper contribution to the retirement fund.

B. *Unemployment Compensation*

The Unemployment Compensation Law, as amended, September 27, 1971, subjects all state employees to the Unemployment Compensation Act:

> "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 of its departments...shall be deemed to constitute State employment subject to this Act...." 43 P.S. §891.

Since foster grandparents are paid a "remuneration" and provide a service to the Commonwealth under the control and direction of the Department, they must be considered as being in the employ of the Commonwealth. See 43 P.S. §753(1). Therefore, foster grandparents are subject to the Unemployment Compensation Law.

Benefits under this law are figured on the basis of a formula based on the employer's wages. See 43 P.S. §804. The act defines "wages" to mean "all remuneration, (including the cash value of mediums of payment other than cash) paid by an employer to an individual with respect to his employment...." (There follow a number of exceptions not relevant here). 43 P.S. §753(x). Therefore, the compensation paid foster grandparents should be considered wages for purposes of figuring contributions and benefits under this Act.

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2. See 71 P.S. §1725-102.

C. *Workmens' Compensation*

Participation in the Workmens' Compensation Program is voluntary, but eligibility for the program is dependent on an employer-employee relationship. The Act declares "employer"

> "[T]o be synonymous with master, and to include...the Commonwealth, and all governmental agencies created by it." 77 P.S. §21.

The Act defines "employee" as a "servant," which includes

> "[A]ll natural persons, who perform services for another for a valuable consideration...."(There follow exceptions not relevant here). 77 P.S. §22.

Since foster grandparents are paid compensation and are directed and controlled in the performance of their duties by the Commonwealth, there can be little doubt that a master-servant relationship exists between the foster grandparents and the Department of Public Welfare.

Calculation of benefits under the Workmens' Compensation scheme is based upon the concept of wages. See 77 P.S. §§511-541. Nothing in the definition of "wages" in the act would exclude from the meaning of that term the compensation paid to foster grandparents. See 77 P.S. §582.

Therefore, foster grandparents would be considered eligible for the Workmens' Compensation Program and their compensation should be considered "wages" within the meaning of that Act.

SUMMARY

Section 611(d) of the Older Americans Act prohibits the compensation paid to foster grandparents from being treated as "income." But the provision cannot be construed to mean that foster grandparents are not paid legal consideration, remuneration, compensation, salary, or wages, as those terms are used in the various state statutes discussed above. Therefore, you are advised that participants in the Foster Grandparents' Program are state employees eligible for the programs listed, and the rate of contribution or entitlement under the listed programs should be calculated based upon the rate of compensation paid to the foster grandparents. A contrary conclusion would leave foster grandparents without state insurance coverage, would frustrate the legislative objectives of the State Employes' Retirement Act, the State Unemployment Compensation Act, the State Workmens' Compensation Act, and, therefore, the protective objectives of the Older Americans Act. Since this interpretation of Section 611(d) of the Older Americans Act renders that Act compatible with the

state statutes discussed, there is no need to discuss the applicability of the Supremacy Clause of the United States Constitution.

Very truly yours,

Robert F. Nagel
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 13

Education—Teachers—Dress Code—Hair Regulations.

1. School board regulations forbidding teachers from wearing mustaches or beards, or regulating the length of sideburns and hair are illegal and unconstitutional under *Stull v. School Board of Western Beaver Jr.-Sr. High School*, 459 F.2d 339 (3rd Cir. 1972).

Harrisburg, Pa.
February 22, 1974

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

Dear Secretary Pittenger:

You have asked us whether a school board may lawfully impose on teachers a dress code which regulates the length of hair that they may grow. Specifically, the dress code in question (originally imposed on students) forbids mustaches or beards, regulates the length of sideburns and provides that hair may not be grown so that it goes below the collar.

It is our opinion that such regulation is unlawful.

In Official Attorney General's Opinion No. 153, 2 Pa. B. 2168 (Nov. 11, 1972), this office informed the Secretary of Education that the case of *Stull v. School Board of Western Beaver Jr.-Sr. High School*, 459 F.2d 339 (3rd Cir. 1972) stood for the following:

> On the basis of that holding, you are advised that school board regulations regulating the length or style of students' hair are unconstitutional and unenforceable except under the following three (3) narrow factual circumstances:
>
> 1. If the length or style of hair causes an actual disruption of the educational process.

2. If the length or style of hair constitutes a health hazard.

3. If the length or style of hair constitutes a safety hazard, e.g., in shop classes.

Our study of the law indicates that the same basic rule must apply to regulation of hair length and styles of teachers. The court's holding in *Stull* that "governance of the length and style of one's hair is implicit in the liberty assurance of the Due Process Clause of the Fourteenth Amendment..." is as applicable for teachers as it is for students.[1]

In the case of *Ramsey v. Hopkins*, 320 F. Supp. 477 (N.D. Ala. 1970) affirmed 447 F.2d 128 (5th Cir. 1971), a rule that teachers were not to wear mustaches was struck down in the following language (320 F. Supp. at 482):

> This is indeed a gross example of a rule based upon personal taste of an administrative official which is not a permissible base upon which to build rules for the organization of a public institution. See Zachry v. Brown, 299 F. Supp. 1360 (N.D. Ala. 1967). There must be some showing of justification for the rule related to the legitimate purposes of the institution. Griffin v. Tatum, 425 F.2d 201 (5th Cir. 1970); Ferrell v. Dallas Independent School District, 392 F. 2d 697 (5th Cir. 1968); Breen v. Kahl, 419 F. 2d 1034 (7th Cir. 1969). Here there is not the slightest of argument or evidence offered to support the proscription against mustaches—no indication that mustaches had caused, or were likely to cause, any disruption or disturbance; no indication of any health or sanitation problem; no indication of difficulties of any sort with mustaches....(For further relief granted the teacher in this case, see 447 F. 2d 128 (5th Cir. 1971).)

Accordingly, please be advised that it is the position of this office that the regulations in question are unlawful and that they should be rescinded immediately.

Sincerely,

Mark P. Widoff
Deputy Attorney General

Israel Packel
Attorney General

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[1] A number of other cases hold that the length and style of one's hair is a matter of personal liberty protected by the Fourteenth Amendment. See, e.g., *Braxton v. Board of Public Instruction*, 303 F. Supp. 958 (M.D. Fla. 1969); *Lucia v. Duggan*, 303 F. Supp. 112 (D.C. Mass. 1969); *Harris v. Kaine*, 352 F. Supp. 769 (S.D.N.Y. 1972) and *Seal v. Mertz*, 338 F. Supp. 945 (M.D. Pa. 1972). These cases declared invalid hair length regulations for school children and Army Reservists.

OFFICIAL OPINION No. 14

Solicitation of Charitable Funds Act, 10 P.S. § 160-1 et seq.—Public Libraries—Department of Education.

1. Local libraries must be considered charitable educational organizations under the Solicitation of Charitable Funds Act.

2. The Legislature has not granted local libraries an exemption from registering with the Commission on Charitable Solicitations.

3. Local libraries which are controlled by municipalities are also under the control of the Solicitation of Charitable Funds Act.

4. Local libraries which solicit funds from the public must adhere to the requirements of the Solicitation of Charitable Funds Act.

Harrisburg, Pa.
March 20, 1974

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

Dear Secretary Pittenger:

Receipt is acknowledged of your request for our opinion regarding the applicability of the Solicitation of Charitable Funds Act, 10 P.S. § 160-1 *et seq.*, to local libraries which receive state and municipal funds.

There is also a question concerning the applicability of the Solicitation of Charitable Funds Act regulating a local library which is controlled by a municipality. It is our opinion and you are hereby advised that public libraries are subject to the Solicitation of Charitable Funds Act. This opinion is applicable to local libraries which were organized both before and after the enactment of The Library Code, 24 P.S. §4101 *et seq.* It is also our opinion that the status of a local library which is operated in part by a municipality has no bearing on the legislative intent of the Solicitation of Charitable Funds Act and is thereby governed by it.

"Local libraries" as defined by The Library Code include:

> "Any free, public, nonsectarian library, whether established and maintained by a municipality or by a private association, corporation or group, which serves the informational, educational and recreational needs of all the residents of the area for which its governing body is responsible, by providing free access (including free lending and reference services) to an organized and currently useful collection of printed items and other materials and to the services of a staff trained to recognize and provide for these needs."

To help finance the operation and maintenance of library services the local libraries receive funds from local taxes, gifts, endowments and other local sources including fund raising drives for which solicitors may be hired. The local libraries also receive funds from the State Libraries Advisory Council in proportion to the local funds they receive.

The definition of a "charitable organization" as defined by the Solicitation of Charitable Funds Act is "....a person who holds itself to be a benevolent, educational, philanthropic, humane, patriotic, religious or eleomosynary organization...." (10 P.S. §160-2). The term "person" is defined as: "...any individual, organization, trust, foundation, group, association, partnership, corporation, society, or any combination of them." (10 P.S. §160-2). On the basis of the foregoing definitions it is apparent that local libraries are educational organizations subject to the Solicitation of Charitable Funds Act, unless exempted by some other provision of the Act or exempt by virtue of their quasi-public status under present law regulating their activities.

It is contended by the local libraries that they are essentially public agencies and not educational organizations under the Solicitation of Charitable Funds Act. They base their contention on the amount of control that the individual municipal and state authorities have over their activities. Section 411 of the Library Code, 24 P.S. §4411 speaks to the control which municipal governments have over local libraries after the establishment of the "Library Code":

> "The affairs of all local libraries established *after the effective date of this act* and under the provisions of the preceding sections of this article shall be under the exclusive control of a board of library directors to be composed of not less than five nor more than seven members. The municipal officers shall appoint the members and fill any vacancies occurring from any cause: Provided,That where two or more municipalities contribute to the support and maintenance of a local library, they shall each appoint a number of members to serve on the board of library directors as is mutually agreed upon by the said municipalities, the total number not to exceed nine members: Provided further, That when a municipality maintains or aids in the maintenance of a local library established after the effective date of this act by deed, gift or testamentary provision or in any manner other than under the provisions of sections 401 or 496 of this act, it shall be sufficient if the municipal officers appoint the majority of the members of the board of library directors. The first appointees shall be appointed as nearly as may be one-third for one year, one-third for two years and one-third for three years. All appointments to fill the places of those whose terms expire shall be for a term of three years. Vacancies shall be filled

> for the unexpired terms. All members shall serve until their successors have been appointed. No member of the board shall receive any salary for his service as such." (emphasis added).

This section also gives a certain amount of authority to municipalities over the local libraries established before enactment of the "Library Code." It states that:

> "In the case of a local library established by deed, gift or testamentary provision, or by any association, corporation or group, prior to the effective date of this act, this section shall not be construed to require the municipal offices of each municipality aiding in the maintenance of a local library to appoint more than two of the library directors of such local library."

Sections 413 and 414 of the Library Code, 24 P.S. §§4413, 4414 put further emphasis on the control which municipal authorities have over local libraries. Section 413 gives authority to the Library Director to control all funds and to make an annual report to the proper municipal authorities while section 414 requires a copy of the report which contains an itemized statement of all receipts from whatever source and expenditures to the State Library in order for the Library Advisory Council to make a proper allocation of funds.

Article Two of the Library Code, 24 P.S. §4201 *et seq.* gives the State Libraries the authority to oversee the complete operation of libraries throughout the state which includes the promulgation of rules and regulations for the purpose of carrying out the purpose and duties relating to libraries as imposed by the Library Code.

However, none of these controls by municipal and state authorities can exclude local libraries from being charitable educational organizations under the Solicitation of Charitable Funds Act. The Solicitation of Charitable Funds Act has specified those types of organizations which should be exempted. Section 4(a)(1) of the Solicitation of Charitable Funds Act list the educational organizations which are exempt from registration:

> (1) "Educational institutions, the curriculums of which in whole or in part are registered or approved by the State Council of Education of the Commonwealth of Pennsylvania, either directly or by acceptance of accreditation by an accrediting body recognized by the State Council of Education: Provided, That such educational institutions simultaneously file with the Commission on Charitable Organizations duplicates of such annual fiscal reports as are filed with the Department of Public Instruction of the Commonwealth of Pennsylvania." 10 P.S. §160-4(a)(1).

Although the individual public libraries are required to file an-

nual reports with the State Libraries, they cannot be considered within the exception because they are not educational institutions that have curricula which are approved by the State Council of Education.

The Solicitation of Charitable Funds Act also specifically exempts at Section 4(a) (4), hospitals which are non-profit and charitable, and, in many cases, public agencies, if a copy of the annual fiscal report is filed with the Commission on Charitable Organizations.[1]

It is therefore apparent that the Legislature has exempted organizations where sufficient safeguards exist under other laws to prevent abuses of charitable solicitations. However, in this instance, although the State Advisory Council on Library Development has access to the local libraries' financial reports, the Council does not review or regulate the fund-raising activities of libraries.

In addressing the issue of whether a local library that is operated in part by a municipality is controlled by the statute, we must establish what authority that the Legislature has over municipal corporations. It has been a well stated law in Pennsylvania that a municipal corporation possesses only that which the Legislature grants it. In *White Oak Borough Authority Appeal*, 372 Pa. 424, 427 (1953) the Court stated:

"Neither Authorities nor Municipalities are sovereign; they have no original or inherent or fundamental power of sovereignty or of legislation; they have only the power and authority granted them by enabling statutory legislation."

What must logically follow from the Court's statement is that municipal corporations are controlled entirely by the Legislature and are not immune to legislative statutes unless specifically stated. In the matter at hand there is no prohibition against the Legislature regulating the solicitation of municipally controlled libraries. Indeed, as mentioned above, the Solicitation of Charitable Funds Act has specifically excluded those activities which they did not feel needed regulation. Barring any such exemption a municipal corporation does not possess any unique status which would exclude its being covered. This principle is stated most appropriately in *Commonwealth v. Moir*, 199 Pa. 534, 541 (1901):

> "Municipal corporations are agents of the State, invested with certain subordinate governmental functions for reasons of convenience and public policy. They are created, governed, and the extent of their powers determined by the legislature, and subject to change, repeal, or total abolition

1 Other organizations with public trustees such as museums file annually with the Commission on Charitable Solicitation and otherwise comply with the statute and regulations.

> at its will. They have no vested rights in ther office, their charters, their corporate powers, or even their corporate existence. This is the universal rule of constitutional law, and in no state has it been more clearly expressed and more uniformly applied than in Pennsylvania....The fact that the action of the State towards its municipal agents may be unwise, unjust, oppressive, or violative of the natural or political rights of their citizens, is not one which can be made the basis of action by the judiciary."

Accordingly, the Solicitation of Charitable Funds Act does regulate a local library which is under municipal control.

CONCLUSION

Local libraries must be considered charitable educational organizations under the Solicitation of Charitable Funds Act. The Legislature has not granted local libraries an exemption from registering with the Commission on Charitable Solicitations. Local libraries which are controlled by municipalities are also under the control of the Solicitation of Charitable Funds Act. It is therefore concluded and you are hereby advised that any local library which solicits funds from the public must adhere to the requirements of the Solicitation of Charitable Funds Act.

Very truly yours,

Robert J. Dixon
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 15.

Labor Relations—Collective Bargaining—Public Employee Relations Act

1. The granting of a retroactive pay increase in a collective bargaining agreement, where no prior agreement has been reached on the amount of compensation due, is not a violation of Article III, §26 of the Pennsylvania Constitution.

Harrisburg, Pa.
March 25, 1974

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

Dear Secretary Smith:

You have requested our opinion with respect to the following question:

Is the granting of a retroactive pay adjustment in a collective bargaining agreement prohibited as being extra compensation within the meaning of Article III, §26 of the Pennsylvania Constitution which provides in relevant part:

> No bill shall be passed giving any extra compensation to any public officer, servant, employe, agent or contractor after services shall have been rendered or contract made....

In Official Opinion No. 11 of 1974 dated February 15, 1974, 4 Pa. B. 436, a similar question was raised as to whether overtime payments made to State employes and approved *retroactively* under 4 Pa. Code §27.54(b) are a violation of Article III, §26. In that Opinion, we said:

> Because Section 215 of the Administrative Code prospectively authorizes overtime payments, compensation provided pursuant to Section 215 and to regulations of the Executive Board is not "extra compensation." Such payments are normal compensation for overtime service. Therefore, Section 27.54(b) does not conflict with Article III, §26 of the Pennsylvania Constitution.
>
> In short, because the Executive Board has given proper advance authorization for certain types of overtime compensation in Section 27.54, that section does not provide for retroactive approval of overtime compensation in violation of either Section 215 of the Administrative Code or of Article III, § 26 of the Pennsylvania Constitution.

In our judgment, the same rationale applies here. The Public Employe Relations Act of July 23, 1970, P.L. 563, 43 P.S. §1101.101 *et seq.* authorizes the negotiation of collective bargaining agreements by public employers and their employes with respect to wages, hours and other terms and conditions of employment "and the execution of a written contract incorporating any agreement reached...." 43 P.S. §1101.701. It is often the case that agreement cannot be reached until after the date of expiration of the previous contract or, in the case of the first collective bargaining agreement, after the date that the Legislature has duly authorized the negotiation of a collective bargaining agreement. Since it is to the benefit of all concerned that our public employes continue to serve pending final agreement on contract terms, they often do so with the clear understanding that the amount of compensation due shall be determined at a later date.

Given the prior authorization by the Legislature of this procedure in the Public Employe Relations Act and given the fact that the amount of compensation to be paid each employe during such period has not been fixed, so that it can hardly be said that "extra" compensation will be paid, it is our opinion, and you are so advised, that the

granting of a retroactive pay increase in a collective bargaining agreement is not a violation of Article III, § 26 of the Pennsylvania Constitution.[1]

Sincerely,

Mark P. Widoff
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 16

Aliens—Licences—Boiler Law

1. Regulation prohibiting otherwise qualified aliens from becoming licensed inspectors under the Boiler Law, 35 P.S. 1301 *et seq.* is to be treated as violative of the Fourteenth Amendment and is not to be enforced.

2. There is no essential governmental interest to be served by requiring all boiler inspectors to be United States citizens.

3. Regulations on reciprocal certificates are unlawful in that they conflict with the clear terms of the Boiler Law by placing qualifications on the granting of such certificates not authorized nor contemplated by the Act.

Harrisburg, Pa.
March 25, 1974

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

Dear Secretary Smith:

You have requested a formal opinion concerning Section 5 of the Boiler Law, 35 P.S. §1301 *et seq.* Specifically, you asked whether Items 4 and 7 of *Part II, Administration* of the Regulations for Boilers and Unfired Pressure Vessels, promulgated pursuant to the above-cited Act, are lawful. This answer will deal with Items 4 and 7 separately.

I.

Item 4 of *Part II, Administration* of the Regulations, promulgated pursuant to the Boiler Law, reads in part as follows:

> "An applicant for examination shall be a citizen of the United States."

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1 It need hardly be stated, of course, that once the amount of compensation has been agreed upon in a duly executed collective bargaining agreement, such amount may not be later increased retroactively.

It is our opinion, and you are so advised, that this requirement is to be considered unconstitutional and unenforceable, insofar as it prohibits otherwise qualified resident aliens from becoming applicants for the *Examination for Certificate of Competency and Commission as Inspector of Boilers.* This provision should be treated administratively as violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution, as explained *infra.*, and not be enforced.

In the case of *Graham v. Richardson,* 403 U. S. 365 (1971), the Supreme Court held that the Fourteenth Amendment forbids a statutory classification based on alienage unless the discrimination can be justified as necessary to achieve an essential governmental interest.

Cases that have followed *Graham* and further explained its holding have consistently upheld this basic premise. Additionally, previous opinions of the Attorney General (Nos. 92, 113, 114, 116 of 1972 and No. 4 of 1973) have interpreted similar provisions of law to be violative of the Fourteenth Amendment and therefore unenforceable.

One of the cases to follow *Graham* is *Sugarman v. Dougall,* 413 U. S. 634 (1973). In *Sugarman,* the Supreme Court found a New York Civil Service statute prohibiting all aliens from holding a permanent position in the competitive class of the state civil service a violation of the Fourteenth Amendment. The Court acknowledged that a state has a substantial interest in having an employee of undivided loyalty in a position involving the formulation and execution of important state policy. However, the restriction, as it applied to clerical and office workers as examples of nonpolicy positions, was not supported by a substantial state interest and fell before the Equal Protection requirements of the Constitution as an unwarranted discrimination based on alienage.

We can see no substantial governmental interest to be protected by requiring applicants for the examination to be United States citizens. Boiler inspection is not a policy-making position and does not require that degree of loyalty and detailed familiarity with American culture which would justify the requirement of citizenship for all applicants.

Moreover, there is no similar requirement of citizenship in either the Boiler Law or the regulations for those inspectors who receive reciprocal certification when qualified by a test in another state. This additional unequal treatment, a type also present in *Sugarman,* mandates that the regulations be altered.

You are therefore advised to consider the citizenship requirement of Item 4 of Part II of the Regulations as unconstitutional and to see that it is no longer enforced.

II.

Section 5 of the Boiler Law, 35 P.S. §1305 requires inspectors to pass a written examination, except that:

> "...reciprocal certificates of competency may be issued to inspectors qualified in other states, administering examinations of equal standards...under such conditions as may be set forth in rules and regulations of the department."

You have asked whether Item 7 of the Regulations cited above is commensurate with the qualifications and restrictions of Section 5. Item 7 reads as follows:

> A reciprocal commission may be granted by the Industrial Board to a duly qualified boiler inspector in the employ of any state or an insurance company licensed to insure boilers and unfired pressure vessels in the Commonwealth, provided such inspector has passed a written examination in a state administering examinations which, in the opinion of the Industrial Board, are of equal standards, both procedurally and substantively.

It is our opinion, and you are so advised, that Item 7 does not conform to the clear terms of Section 5, conflicts directly with the conditions for reciprocal certification, and should no longer be applied.

The law empowers the department to grant reciprocal certificates to a well-defined group of qualified inspectors. However, the regulations purport to add the additional restrictions of employment by a sister state or by a locally-licensed insurance company. Neither of these conditions is consistent with the terms of the statute. Moreover, neither of them is related to the intent of the Act, which is to have qualified inspectors, as determined by the Act, conduct inspections in Pennsylvania. There is no inherent guarantee of competence merely because an otherwise qualified inspector works for a state government or for an insurance company licensed in Pennsylvania.

The additional conditions which the Department may, by regulation, promulgate, are for the purpose of filling gaps in or explaining the legislation and are not meant to create conditions unrelated to or inconsistent with the express intent of the Legislature. *Lancaster Transportation Company v. Pennsylvania Public Utility Commission.*, 169 Pa. Superior Ct. 284 (1951).

Therefore, as indicated above, these restrictions are not authorized by Section 5 of the Boiler Law and are not to be applied.

Very truly yours,

Larry B. Selkowitz
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 17

Game Commission—Municipal Code—Home Rule Charter and Optional Plan Act.

1. Municipalities generally have the right to pass ordinances dealing with ownership and possession of guns *except* that municipalities incorporated under the Home Rule Charter and Optional Plan Law, 53 P.S. § 1-101 *et seq.*, can in no way restrict the transfer, ownership, transportation or possession of firearms.

2. Even though municipal corporations possess such power to regulate usage of firearms, it does not include the authority to invade the province of the Game Commission, either directly or indirectly, in delineating areas for hunting and prescribing the types of weapons which can be used therein for hunting.

Harrisburg, Pa.
March 25, 1974

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

Dear Mr. Bowers:

We have received an inquiry from your staff concerning the right of municipalities to restrict hunting in areas where the Game Commission permits hunters to engage in their sport. In some cases, there is a conflict between Game Commission regulations and local municipal ordinances and citizens have requested advice about their rights to hunt in areas where the Commission explicitly permits but where local governments, either directly or indirectly, inhibit the right to hunt. It is our opinion, and you are hereby advised, that regulations regarding areas for hunting and weapons to be used in hunting are exclusively within the province of the Commission, and to the extent that local ordinances invade this province, then to that extent such ordinances are invalid.

Our information indicates that municipal corporations are passing two types of gun control legislation: 1) ordinances which explicitly preclude the usage of guns for hunting in their municipalities; and 2) ordinances which absolutely prohibit the

discharge of weapons within the municipalities without specifically mentioning that the effect of the ordinance is to curtail lawful hunting within such municipalities. The question is whether or not such ordinances conflict with the Game Law, 34 P.S. §1311. 703(f), which authorizes the Game Commission to prescribe the use of particular types of weapons in certain designated areas for hunting where such usage would not be inconsistent with public safety.

The Game Commission is authorized to "manage" game, animals, and birds of the Commonwealth, 34 P.S. §1311.210, and is also entitled to establish hunting seasons in the Commonwealth, 34 P.S. §§1311.501 and 1311.601. Furthermore, the Commission is expressly empowered to pass resolutions restricting the usage of weapons and ammunition used in hunting within designated areas of the Commonwealth for the purpose of promoting public safety:

> "It is lawful to hunt...game of any kind only through the use of a gun, pistol, revolver, or bow and arrow...except:
> * * *
> (f) That the commission may, by resolution, prescribe the type of firearms or bow and arrow and the type of ammunition to be used in any designated area of the Commonwealth in the interest of public safety...." 34 P.S. §1311.703

Under this statutory scheme, hunting is elevated to a statutory right subject to regulation by the Game Commission. The question which must be decided is whether or not municipal corporations can, either directly or indirectly, infringe upon this statutory right by passage of ordinances which specifically prohibit hunting or which absolutely restrict the usage of guns even for hunting.

Municipal corporations are merely creatures of the State and do not enjoy the incidents of sovereignty. *White Oak Borough Authority Appeal,* 372 Pa. 424 (1953). Consequently, it is self-evident that a municipal ordinance cannot be sustained to the extent that it is contradicted by or inconsistent with a state statute. *Western Pennsylvania Restaurant Association v. Pittsburgh,* 366 Pa. 374, 380, 381 (1951). Furthermore, as noted in *Commonwealth v. Ashenfeld,* 413 Pa. 517 (1964), a municipal ordinance which provided that hunters must register with the municipality a statement by the landowner where the hunter hunts that such landowner permits such hunting was an invalid invasion of the State's regulatory control of hunting:

> "An examination of [the Second Class Township Code] indicates that its language is most inappropriate and inadequate to evidence any intent on the part of the Legislature to delegate to second class townships vast and extensive police powers; certainly no intent is manifest or evident to grant powers to second class townships to act in areas where the Commonwealth itself, through legislative

> enactments, [i.e., the Game Law], has provided regulation." 413 Pa. at 522

In the matter before us, the Legislature has provided that the Game Commission is authorized to determine what types of lawful hunting activities can be carried out in the State and what restrictions shall be placed on hunters in terms of the types of firearms and ammunition that can be used in designated areas of the State for purposes of promoting the public safety. Inasmuch as State legislation has pre-empted the field in terms of providing regulations by the Game Commission to promote public safety, any attempt by the local municipalities to control or limit hunting within their boundaries, either directly through prohibiting hunting or indirectly through restricting the discharge of firearms within the municipality, must be stricken down as in contravention of the State's regulatory control of hunting through the Game Law, 34 P.S. §1311.101. It is noted, however, that local ordinances which proscribe the discharging of firearms within the municipal boundaries can still be valid so long as they are construed as prohibiting the discharge of firearms within the muncipality *EXCEPT* where the firearm is lawfully used in hunting as provided for by the Game Law and by the rules and regulations of the Game Commission. If construed in this manner, such local ordinances would not conflict with the Game Law and would not, therefore, be invalid.

With reference to the authority of particular local municipalities to enact such ordinances directly or indirectly regulating hunting, an examination of the Municipal Code indicates that the broad grant of power to pass ordinances to promote the general welfare of their citizens would be sufficient authority for such local ordinances absent State pre-emption. Furthermore, there is specific statutory authority granting to cities the authority to regulate the "unnecessary firing and discharge of firearms":

> "The cities of this Commonwealth be, and they are hereby, authorized to regulate or to prohibit and prevent the sale and use of fireworks, firecrackers, sparklers, and other pyrotechnics in such cities, and the *unnecessary firing* and *discharge* of firearms in or into the highways and other public places thereof, and to pass all necessary ordinances regulating or forbidding the same and prescribing penalties for their violations." 53 P.S. §3703.

There are two other firearm regulations which appear within the statutes concerning cities of the second and third class which regulate, prohibit and prevent the discharge of firearms within the city. See 53 P.S. §§23131, 37403(26). It appears clear from these statutes that most cities are given the right to control to a certain extent the discharge of weapons subject to prevailing State law.

With reference to the powers of townships, their police powers include the right to define and prohibit disorderly conduct (53 P.S.

§56509) and the power to take all needful means for securing the safety of persons or property within the township (53 P.S. §56510). It appears that under 53 P.S. §56510 townships have the right to protect the public safety, which includes the right to proscribe discharge of firearms subject, again, to prevailing State law.

With reference to municipalities incorporated under the Home Rule Charter and Optional Plans Act, 53 P.S. §1-101 *et seq.*, it is noted that such municipalities are explicitly restricted by the Legislature from enacting certain types of gun-control legislation:

> "No municipality shall enact any ordinance or take any other action dealing with the regulation of the transfer, ownership, transportation or possession of firearms." 53 P.S. §1-302(e)

In such instances, both the affirmative grant of power by the Legislature to the Game Commission to designate areas for hunting and the types of weapons used therein, and the explicit restriction on the muncipality from passing ordinances dealing with the "...transfer, ownership, transportation or possession of firearms...", indicate that such home rule municipalities are not authorized to restrict hunting or the transfer, ownership, transportation or possession of firearms.

Within this context of the restrictions by State statute on municipal corporations interfering with State regulation of hunting, it is expressly noted that municipal corporations possess the same statutory right to restrict hunting on municipally-owned land just as any other property owner where the provision of the Game Law, 34 P.S. §1311.820, on posting are followed. Consequently, municipal corporations can post municipally-owned parks, land and institutional grounds and thereby prohibit hunting in such areas irrespective of the general authority of the Game Commission to control hunting in all areas of the Commonwealth.

In summation, it is our opinion, and you are hereby advised, that municipalities generally have the right to pass ordinances dealing with ownership and possession of guns *except* that municipalities incorporated under the Home Rule Charter and Optional Plans Law, 53 P.S. §1-101 *et seq.* can in no way restrict the transfer, ownership, transportation or possession of firearms. Even though municipal corporations possess such power, it does not include the authority to invade the province of the Game Commission, either directly or indirectly, in delineating areas for hunting and prescribing the types of weapons which can be used therein for hunting. Where municipal corporations are landowners, however, they possess the same statutory right as all other landowners to post their land and thereby inhibit hunting pursuant to 34 P.S. §1311.820 in municipal

parks, institutional grounds, and such other municipally-owned lands.*

Very truly yours,

Richard J. Orloski
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 18

Insurance—Rate Filings—Right to Examine

1. Certain members of the public have rights to participate in rate hearings under The Fire, Marine and Inland Marine Rate Regulatory Act of June 11, 1947, P.L. 551, as reenacted and amended by the Act of August 23, 1961, P.L. 1053, 40 P.S. §§ 1221-1238 and The Casualty and Surety Rate Regulatory Act of June 11, 1947, P.L. 538, 40 P.S.§§1181-1199.

2. The determination of who may examine rate filings and participate in hearings is within the discretion of the Insurance Commissioner on a case by case basis, but, in any event, an insured whose rates would increase under the filing will always have standing to participate.

3. Under Section 4(a) of the above Acts, 40 P.S. §§ 1224(a), 1184(a), between the time a rate filing is received and the time it becomes effective, the Insurance Commissioner, in his discretion, may make the filing and supporting information available for public inspection to those who would have standing to participate.

4. The Insurance Commissioner in his discretion may, at the request of the insurer, keep confidential portions of the filing information in order to protect legitimate business secrets or to preserve trade secrets or information valuable to competitors.

Harrisburg, Pa.
March 29, 1974

Honorable Herbert S. Denenberg
Insurance Commissioner
Harrisburg, Pennsylvania

Dear Commissioner Denenberg:

You have requested our opinion regarding the right of public inspection of rate filings by insurers under both The Fire, Marine and Inland Marine Rate Regulatory Act of June 11, 1947, P.L. 551, as reenacted and amended by the Act of August 23, 1961, P.L. 1053, 40 P.S. §§1221-1238 ("Fire Rate Act") and the Casualty and

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* Editor's Note: The Uniform Firearms Act of October 18, 1974, 18 Pa.S. §6120 confirms this Opinion in that it prohibits political subdivisions from regulating the lawful ownership, possession or transportation of firearms when carried or transported for purposes not prohibited by the laws of the Commonwealth.

Surety Rate Regulatory Act of June 11, 1947, P.L. 538, 40 P.S. §§1181-1199 ("Casualty Rate Act").

Both of these acts have as a purpose the regulation of insurance rates "to the end that they shall not be excessive, inadequate or unfairly discriminatory." To enforce this goal, both of these acts call for an insurer to file all rates with the Insurance Commissioner with accompanying justification.

Specifically, the Fire Rate Act provides which rates must be filed. 40 P.S. §1224(a). Each filing must be on file for a waiting period of thirty days before it becomes effective, with certain exceptions. 40 P.S. §1224(d). If the Commissioner does not approve the filing, he must hold a hearing with written notice specifying the matters which he finds may not comply with the law. 40 P.S. §1225(a). Thereafter he makes such orders as he may deem appropriate in accordance with the Administrative Agency Law. 40 P.S. §1236(b). Any insurer, rating organization "or person aggrieved" by any adjudication, including a disapproval of a filing or portion thereof, has a right of appeal in accordance with the Administrative Agency Law. 40 P.S. §1236(c).[1]

Both acts provide in Section 4(a), 40 P.S. §1224(a), 40 P.S. §1184(a):

> "A filing and any supporting information shall be open to public inspection after the filing becomes effective."

Your question, in view of the regulatory scheme, is whether the Insurance Commissioner, in his discretion, may make public a rate filing and supporting information between the time it is received by the Insurance Department and the time it becomes effective. The reason for this question is that if a hearing is to be held to consider the merits of a rate filing, members of the public who wish to participate would not have a reasonable basis upon which to do so if they did not have an opportunity to review the filing and its supporting information.

I.

The first problem to which we must address ourselves is whether members of the public have the right to appear in such a hearing. If they do not, then it would not matter whether or not they have access to the filing or supporting information. It is our opinion that certain members of the public do have the right to participate in such hearings. We reach this opinion through a careful reading of §16(c) of the Fire Rate Act, 40 P.S. §1236(c) and §17(c) of the Casualty Rate Act, 40 P.S. §1197(c), which both provide that "any insurer, rating organization or person aggrieved by any adjudication, including a disapproval of a filing or portion thereof under the provisions of Section 5 hereof, shall have a right to appeal therefrom to the Com-

1. Similar provisions are found in the Casualty Rate Act. 40 P.S. § 1184(a), (d), § 1185(a), §1197(b), (c).

monwealth Court and have a judicial review of such adjudication within the time and in the manner and with the same effect as is provided by the Administrative Agency Law...."

If only the insurer or rating organization to which it belongs were to have the right to participate in such a hearing, then there would be no need for the reference to "persons aggrieved by any adjudication." In our opinion, the reference to such persons is intended as a reference to members of the public who have an interest in the rate filing within the meaning of §2(c) of the Administrative Agency Law of June 4, 1945, P.L. 1388, 71 P.S. §1710.2(c). Accordingly, such persons have a right to participate in the rate hearing.[2]

II.

The next question we must answer is who is an aggrieved person within the meaning of the Acts in question. This is not a question which we can or need answer at this time because there are too many factual differentials which may come into play. In our opinion, the Insurance Commissioner has the discretion to determine on a case by case basis who has a legitimate right to participate in a hearing and thus to examine a particular filing.

Whatever the ultimate scope of the Commissioner's discretion, in our opinion, any insured party whose rates would increase under the filing is such a person who would have standing to participate. Such a person is clearly an aggrieved person; moreover such an insured would have the right to intervene under the Rules of Procedure[3] to which you are subject and under which you conduct your hearings.

III.

Given the right of an insured to participate in a rate hearing, we may then turn to the proper interpretation of the quoted provision of §4(a) of the Acts in question. Are these provisions to be interpreted as making the filing and supporting information open to public inspection only after the filing becomes effective? Or are they to be interpreted to *require* the filings to be public information on their effective dates, but public within the discretion of the Insurance Commissioner prior to that time? The most sensible construction, as you have suggested, is that between the time the filing is received and the time it becomes effective, the Insurance Commissioner, in

2. We note that the hearing in question is not the type of hearing discussed by the Court in *City of Pittsburgh v. Insurance Department of Pennsylvania*, 448 Pa. 466 (1972) reversing 4 Pa. Commonwealth Ct. 262 (1971), where intervention by other parties was refused and such refusal was upheld. In that case, under the Non-Profit Hospital Plan Act, it was purely an informational hearing which the Insurance Commissioner was conducting, not a rate hearing as required under the above laws.

3. 1 Pa. Code §31.3, §35.27-.32.

his discretion, may make the filing and supporting information available for public inspection to those who would have standing to participate.

We are confirmed in this conclusion by similar provisions in the banking laws. Section 302 of the Department of Banking Code of May 15, 1933, P.L. 565, as amended, 71 P.S. §733-302 provides that all information filed with the Department of Banking is confidential except as otherwise provided. The Supreme Court in *Conestoga National Bank of Lancaster v. Patterson*, 442 Pa. 289, 299 (1971) held that the divulgement of information filed by a bank seeking to open a branch bank was public information to any bank which wished to contest the branch based on other laws of the Commonwealth, "namely the constitutional right of appeal, as well as pursuant to general requirements of procedural due process." See also *First National Bank of Milford v. Department of Banking*, 4 Pa. Commonwealth Ct. 168 (1972); *First National Bank of Pike County v. Department of Banking*, 7 Pa. Commonwealth Ct. 603 (1973).

Based on the reasoning in the *Conestoga* case, where the Supreme Court held that a broad confidentiality statute is superseded by the due process rights of a protestant, we have no hesitation in concluding in this case that an interested party may have access to the filing and supporting information submitted by an insurer wishing to increase rates.

IV.

You have finally requested our advice as to your discretion should an insurer wish to keep confidential a portion of the information in order to protect legitimate business secrets or to preserve trade secrets or information valuable to competitors. In this regard, we believe you do have such discretion. We refer you specifically to the regulations adopted by the Department of Banking to implement the decisions above referred to. 10 Pa. Code §3.1-3.3. Section 3.3 specifically indicates what portion of a filing shall be deemed confidential and the requirements which must be met for a person to examine that file. We recommend the adoption of similar regulations to implement this opinion.

Sincerely yours,

Gerald Gornish
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION NO. 19

Horse Racing—Appointment of Horse Racing Stewards, Judges and Starters.

1. Stewards, judges and starters of horse race meetings cannot be appointed by the State Horse Racing Commission because the Act of December 11, 1967, P.L. 707, 15 P.S. §2651 *et seq.* only gives the Commission power to approve them.

2. Horse racing officials which are not provided for by statute can be appointed pursuant to regulations of the State Horse Racing Commission.

Harrisburg, Pa.
April 9, 1974

Joseph L. Lecce, Chairman
State Horse Racing Commission
Harrisburg, Pennsylvania

Dear Mr. Lecce:

We have been requested to determine whether the State Horse Racing Commission has the authority to appoint stewards and other officials under the Act of December 11, 1967, P.L. 707, 15 P.S. §2651 *et seq.* It is our opinion, and you are hereby advised that the State Horse Racing Commission does not have the power to appoint stewards, judges and starters who are required to conduct thoroughbred horse race meetings under existing legislation, but only has the right to approve them. It is also our opinion that the Commission does have the power to appoint other individuals who are employed at thoroughbred horse race meetings and not specifically covered by statute.

Section 10 of the aforesaid Act, 15 P.S. §2660 speaks to the hiring of officials at horse race meetings:

> "At all thoroughbred horse race meetings licensed by the State Horse Racing Commission in accordance with the provisions of this act, qualified stewards, judges and starters shall be *approved* by the commission. Such officials shall enforce the rules and regulations of the State Horse Racing Commission and shall render regular written reports of the activities and conduct of such race meetings to the State Horse Racing Commission. The compensation of such judges and starters shall be fixed by the State Horse Racing Commission and paid by the corporation conducting such race meeting." (Emphasis added).

The State Horse Racing Commission has construed this statue as giving them the right to appoint the person(s) who are to be hired by an association to function as stewards, judges and starters.[1] The Horse Racing Commission believes that there can be better control over the conduct of horse racing meetings if they have exclusive control over these individuals who are responsible for the operation of the horse race meetings.

However, from the statutory language cited above, it is apparent that the Legislature delegated to the State Horse Racing Commission only the power of approval over stewards, judges and starters. That the word "approved" should be construed as giving the Horse Racing Commission appointive powers cannot hold under close scrutiny.

The Pennsylvania State Harness Racing Commission, from whose statute[2] the above-quoted provision is derived, has never appointed nor construed its statute as giving it appointive powers. Moreover Webster's New Collegiate Dictionary (1973) defines "approve" as: "to have or express a favorable opinion of; to accept as satisfactory; to give *formal* or *official sanction*". "Appoint" on the other hand is defined as meaning: "to fix or set officially; to *name officially*". Thus the two words have entirely different connotations and applying the Statutory Construction Act cannot be interchanged.

> "(a) Words and phrases shall be construed according to rules of grammar and according to their *common* and *approved* usage; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning or are defined in this part, shall be construed according to such peculiar and appropriate meaning or definition." 1 Pa. S. §1903 (Emphasis added).

The Legislature has used the word "appoint" in giving the State Horse Racing Commission permission to "... appoint such deputies, secretaries, officers, representatives and counsel as it may deem necessary ..." 15 P.S. 2651.

We must assume from this that the Legislature intended the State Horse Racing Commission to have the power of approval only over those positions established by Section 10, 15 P.S. §2660.

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1. The present Rules of Racing and Administrative Rules of the State Horse Racing Commission contain the following regulation: "All *three stewards*, all Veterinarians, Clerks of Scales, Horse Identifiers, *Starters* and *Assistant Starters*, shall be appointed by the Racing Commission. All other racing officials listed in §1602 shall be appointed by the Association subject to the approval of the Racing Commission. In place of a Veterinarian any other suitable person may be appointed by the Commission to supervise the taking of various tests required by the Rules and the Commission. The compensation of all racing officials shall be fixed by the State Horse Racing Commission and paid by the corporation conducting such race meeting." (Emphasis added). Rule 16.03.

2. Section 8 of the Act of December 22, 1959, P.L. 1978, 15 P.S. §2608, reads as follows: "At all harness race meetings licensed by the State Harness Racing Commission in accordance with the provisions of this act, qualified judges and starters shall be *approved* by the commission. No person shall be approved as a judge or starter unless he shall be licensed by The United States Trotting Association as a duly qualified pari-mutuel race meeting official. Such officials shall enforce the rules and regulations of the State Harness Racing Commission and shall render regular written reports of the activities and conduct of such race meetings to the State Harness Racing Commission. The compensation of such judges and starters shall be fixed by the State Harness Racing Commission and paid by the Corporation conducting such race meeting." (Emphasis added).

It should also be pointed out that in states (notably New Jersey and New York) where officials are appointed, there is statutory authority to do so.[3] In Pennsylvania, administrative determinations must have a basis in law and must be within the granted authority. See, 71 P.S. §186.

Therefore, regulations that pertain to the appointment of stewards, judges and starters by the State Horse Racing Commission cannot be sustained under present legislative authority.

Officials, such as veterinarians and horse identifiers, may, however, be appointed by the Commission under the authority given them by Section 12 of the Act, 15 P.S. §7652 which states in pertinent part that:

> "(a) Pursuant to the provisions of this act, the State Horse Racing Commission shall have power to supervise generally all thoroughbred horse race meetings in this State at which pari-mutuel betting is conducted. The commission may adopt rules and regulations not inconsistent with this act to carry into effect its purposes and provisions and to prevent circumvention or evasion thereof."

The appointment pursuant to regulations of the State Horse Racing Commission of a veterinarian and horse identifier, two positions where independence from the corporation conducting a race meeting is paramount, is not inconsistent with the Act.

We therefore conclude, and you are hereby advised, that stewards, judges and starters cannot be appointed by the State Horse Racing Commsission since, under existing legislation, the Act only gives the Commission power to approve them. Officials who are not provided for by statute can be appointed pursuant to regulations of the State Horse Racing Commission when not inconsistent with other provisions of the Act.

Very truly yours,

Robert J. Dixon
Deputy Attorney General

Israel Packel
Attorney General

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3. N.J. S.A. 5:5-37: "The said *commission may designate a steward*, a certified public accountant of this State as supervisor of mutuels, and a veterinarian licensed to practice in the State, to serve at any horse race meeting held under permit issued under this act. The compensation of such representatives shall be fixed by the commission and shall be paid weekly by the holder of a permit at whose horse race track such representatives shall serve...." (Emphasis added).

CL.S. Unconsol. Law. Chap. 101 §9-a: "There shall be three stewards to supervise each running race meeting conducted pursuant to section seven of this act. *One of such stewards shall be the official steward of the state racing commission*, one shall be appointed by the jockey club or by the national steeplechase and hunt association as may be appropriate, and one shall be appointed by the corporation or association conducting such race meeting...." (Emphasis added).

OFFICIAL OPINION No. 20

Fuel Use Tax Act—Liquid Fuels Tax Act—Definition of Distributor

1. The term "distributor" as defined in the Liquid Fuels Tax Act, 72 P.S. § 2611a *et seq.* has a different meaning than "distributor" as it pertains to the Fuel Use Tax Act, 72 P.S. § 2614.1 *et seq.*

2. The term "dealer user" as defined in the Fuel Use Tax Act has a broader scope of application than "distributor" (as defined in the Liquid Fuels Tax Act), since the definition includes not only "distributors" (as defined in the Liquid Fuels Tax Act), but also intermediaries and ultimate consumers, depending upon which of them has used the subject fuel within the definition of "use."

3. The term "distributor" as defined in the Liquid Fuels Tax Act is of no benefit for purposes of collection of the Fuel Use Tax.

Harrisburg, Pa.
April 11, 1974

Honorable Vincent X. Yakowicz
Secretary of Revenue
Harrisburg, Pennsylvania

Dear Secretary Yakowicz:

You have requested our opinion with regard to whether the definition of the term "distributor" as it pertains to the Liquid Fuels Tax Act, 72 P.S. §2611a *et seq.* may be used as the definition of "distributor" as said term relates to the Fuel Use Tax Act, 72 P.S. §2614.1 *et seq.* for the purpose of collection of the latter tax. It is our opinion that the term "distributor" does *not* have the same meaning in both of the above mentioned statutes, since each refers to different operations as they relate to the application of the respective statutes.

The Act of May 21, 1931, P.L. 149, 72 P.S. §2611a *et seq.* entitled the Liquid Fuels Tax Act, imposes taxes on certain liquid fuels"...used or sold and delivered by distributors within the Commonwealth." 72 P.S. §2611d. The Act directs that distributors of the fuels subject to taxation are responsible for paying the taxes. 72 P.S. §2611e. Generally, the Act defines "distributor" as any person who sells or delivers the subject fuels within the Commonwealth or who imports same into the Commonwealth for his or her own use or sale and delivery. 72 P.S. §2611b. Each distributor is required to register with the Department of Revenue and to file monthly reports setting forth the number of gallons of liquid fuels subject to taxation under the act that it has delivered. 72 P.S. §2611f. The Act makes it clear that distributors and distributors only are to pay the Liquid Fuels Tax.

The Act of January 14, 1952, P.L. 1965, 72 P.S. §2614.1 *et seq.* entitled the Fuel Use Tax Act, imposes a tax on all combustible gases and liquids that are not subject to taxation under the Liquid

Fuels Tax Act, supra.[1] 72 P.S. §§2614.2 and 2614.4. The Fuel Use Tax Act directs that "dealer-users," as defined in the Act, are responsible for the payment of this tax. 72 P.S. §2614.5. All "dealer-users" are required to file monthly reports with regard to the amount of fuel they have used. 72 P.S. §2614.6. "Dealer-user" is defined in the Fuel Use Tax as:

> "...any person who delivers or places fuels into the fuel supply tanks or other fueling receptacles or devices of an aircraft or aircraft engine or of a motor vehicle, or who uses fuels within the meaning of the word 'use' as defined in this section." 72 P.S. §2614.2

The term "use" is defined by the Act as:

> "'Use' shall mean and include (a) the importation into this Commonwealth of fuels in the fuel supply tanks or other fueling receptacles or devices of a motor vehicle in excess of fifty (50) gallons, and (b) *the delivery or placing* of fuels into the fuel supply tanks or other fueling receptacles or devices of an aircraft or aircraft engine or of a motor vehicle in this Commonwealth for use in whole or part for the generation of power in the aircraft or aircraft engine or in whole or in part for the generation of power to propel such motor vehicle on the public highways of this Commonwealth." (Emphasis supplied). 72 P.S. §2614.2.

When both definitions are read together, it is clear that a "dealer-user" as contemplated by the Fuel Use Tax Act may either be one who sells or delivers the subject fuel or the ultimate consumer, depending on the circumstances of "use" as defined by the Act.

Accordingly, it is clear that the Fuels Use Tax Act and the Liquid Fuels Tax Act differ at the point of determining who is responsible for the payment or collection of the tax, even though they are similarly structured. It is apparent that the General Assembly intended the term "dealer-user" to have a broader scope of application than "distributor," since the definition includes not only "distributors" (as defined in the Liquid Fuels Tax Act), but also intermediaries and ultimate consumers, depending upon which of them has used the subject fuel within the definition of "use." Hence, the term "distributor" as defined in the Liquid Fuels Tax Act is of no benefit for purposes of collection of the Fuel Use Tax.

Sincerely yours,

Walter Roy Mays, III
Deputy Attorney General

Israel Packel
Attorney General

1. Generally, the Liquid Fuels Tax is imposed on liquid fuels which have a "flash" point of 200 degrees fahrenheit or less and the Fuels Use Tax is imposed on liquid fuels having a flash point in excess of 200 degrees fahrenheit.

OFFICIAL OPINION No. 21

Public Schools—Contracts with Private, Non-Religious Institutions for Vocational Education—Average Daily Membership Reimbursement

1. The School Code provides for a comprehensive program of vocational education primarily in the public schools of Pennsylvania.

2. When the nature of the program, i.e. cost, availability, teacher training, warrants it, programs of vocational education may be secured in private non-religious institutions by contract, using public funds.

3. Pupils attending such a program are enrolled in the public schools and may be included for ADM reimbursement.

Harrisburg, Pa.
April 24, 1974

Hon. John C. Pittenger
Secretary of Education
Harrisburg, Pennsylvania

Dear Secretary Pittenger:

You have requested our advice on posed several related questions concerning the enrollment of public secondary pupils in private schools for vocational education. Specifically, you asked:

(1) Can a public school district, through contracts with private, non-religious training facilities, obtain vocational-technical services for resident public school pupils?

(2) May a public school district use local tax funds to pay tuition to private, non-religious training schools which provide vocational-technical instruction to their resident pupils on a contract basis?

(3) Can pupils from comprehensive high schools who are educated in the above-described manner be included for ADM reimbursement to the public school districts for the portion of time they are enrolled in the private school?

It is our opinion, and you are advised, that such programs, as explained below, are lawful, and the Department may reimburse the school district for the attendance of its students in such programs.

I.

The Public School Code, 24 P.S. §18-1801 *et seq.* and the regulations promulgated by the State Board of Education, 22 Pa. Code §6.1 *et seq.* provide for a comprehensive program of vocational education in every school district. Vocational education is defined in 24 P.S. §18-1801(2) as follows:

(2) "Vocational education" shall mean any form of educa-

> tion of less than college grade, given in school or elsewhere, the purpose of which is to fit an individual to pursue effectively a recognized profitable employment, whether pursued for wages or otherwise.

Section 6.71 of the regulations, 22 Pa. Code §6.71 reads:

> Vocational education shall be part of a comprehensive educational program in every school district to assist in providing career awareness, career exploration and preparation for occupational specialization on the secondary level.

Thus it is the intent of both the Legislature and the State Board to have diverse programs of vocational education in various surroundings so long as the goal of total career educational programming is being served. 22 Pa. Code §6.72.

Of course, the primary responsibility for providing vocational education programs lies with the public schools. The whole scheme of the School Code is designed to have public programs of education take place in the public schools, consonant with the regulations and standards of the State Board and the Department of Education. However, this general rule, absent prohibitory laws or regulations, is subject to exception.

It is quite easy to conceive of a program of vocational education which would help fit an individual to a potential employment situation, of interest to the pupil, and of need to society which, because of its nature, has heretofore been unavailable in the public schools or which cannot be provided efficiently in the public sector. For instance, expensive and technologically complicated equipment might be needed which is available in the private sector but which the public schools cannot afford. Such programs may also require teachers and supportive staff which, due to the nature of the discipline, cannot be secured by the public schools.

In view of the above and after a review of the school laws, we can find no reason why a school district may not lawfully contract with a private, non-religious school for programs as described above. However, the districts must be cautioned to use this tool with reservation so that their primary responsibility to provide programs within the public schools is not ignored.

II.

As to your third question, it is our opinion, and you are advised, that pupils attending a program similar to the type described above are enrolled in the public schools for ADM purposes and may be included for reimbursement computations. By way of explanation, we are including herein our discussion on this subject as

contained in the October 16, 1972 memorandum to Commissioner Carroll, which you have attached to your request.

Section 2501(3) of the Public School Code, 24 P.S. §25—2501(3) provides that Average Daily Membership be computed in accordance with rules of procedure established by the Secretary of Education. These rules are currently set forth in a booklet entitled "Instructions for School Attendance Register," published in 1969 by the Department of Education. In this booklet, ADM is defined as follows:

> "Average Daily Membership is the average number of pupils belonging each day in a classroom (or report group), school or school district for the period of the report."

The key to this definition is the word "belonging." Its use, rather than "present" or "in attendance" is why the contract system should not interfere with ADM reimbursements.

The rules further state that "a pupil belongs from the date of entry in school to the date of withdrawal." Therefore, a student who enters or enrolls in a given school is counted for ADM purposes, whether he is present or not. He no longer belongs only when he withdraws.

The word "withdraws" presents another hurdle. Withdrawal classification W3 of the above-cited rules states: "Promoted or transferred to nonpublic school." "Nonpublic school" is defined as one not supported by taxation. It would then seem that assignment to a private school under contract would be a withdrawal, thus removing the student from the ADM. However, a careful look at the definition of "withdrawal" overcomes this argument. The rules define "withdrawal" as permanently severing connection with classes, grades and schools for the school year. This is certainly not true of the program being considered. The student receives grades, promotion, control, disciplinary sanctions, etc., from the public school. There is no permanent severance contemplated.

In summary, as long as the method of reimbursement is based on pure Average Daily Membership (ADM) and not some measure that takes into consideration the actual physical presence of the student in the public school facility, the use of educational services by contract will not prevent the appropriate school authority from counting the student for purposes of ADM reimbursement.

Very truly yours,

Larry B. Selkowitz
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 22

Courts—Attorney General—Insurance—Accidental Death Benefits Clause

1. Initially, all legal questions of the Insurance Department must be referred to its legal counsel.

2. State agencies must seek the advice of the Department of Justice in matters of great importance, matters that are controversial, and matters in which the outcome is not clear.

3. A decision by the Pennsylvania Supreme Court constitutes part of the law of the Commonwealth.

4. When carrying out its responsibilities under law, the Insurance Department must take cognizance of court decisions that modify interpretations of specific contract language.

5. All time limitations in regard to accidental death clauses in all lines of insurance may be void as contrary to public policy.

Harrisburg, Pa.
April 26, 1974

Honorable William Sheppard
Insurance Commissioner
Harrisburg, Pennsylvania

Dear Commissioner Sheppard:

Our opinion has been requested as to whether the Insurance Department should change its policy in regard to the enforcement of the existing insurance laws of Pennsylvania, including the approval and disapproval of submitted policies, when court decisions are rendered which modify existing interpretations of specific insurance contract language. We have also been asked if such changes should be interpreted by the Insurance Department itself or whether such matters should be referred to the Justice Department for its interpretation. More specifically, what effect *Burne v. Franklin Life Insurance Company*, 451 Pa. 218 (1973) should have on the enforcement of present laws of Pennsylvania, especially in regard to acceptable language for accidental death benefit clauses.[1] In accordance with this request, we submit our opinion.

I.

Periodically, state or federal court decisions are rendered which modify existing interpretations of specific insurance contract language. Decisions of the Supreme Court constitute part of the law of the Commonwealth. *Stitt v. Consolidated Gas Supply Corp.*, 3 Pa. Commonwealth Ct. 482 (1971). It has also been held that

1 A comparable issue was raised in the case of *United Services Automobile Association Appeal*, 227 Pa. Superior Ct. 508, (1974) in which Judge Spaeth held invalid an impact provision which conditioned recovery under uninsured motorist coverage.

decisions of higher courts are binding on lower tribunals. See *In re Townsend's Estate*, 349 Pa. 162 (1944); *Beckham v. Travelers Ins. Co.*, 206 Pa. Superior Ct. 488 (1965); *Hilbert v. Heller*, 13 Leh. L.J. (1930). On the other hand, even though Federal Court decisions may be looked to for guidance, *Ronnie's Bar, Inc. v. Pennsylvania Labor Relations Bd.*, 411 Pa. 459 (1963), state courts are not bound by these decisions unless they are decided upon questions of federal law. *Rader v. Pennsylvania Turnpike Commission*, 407 Pa. 609 (1962).

Sections 354 and 616 of the Insurance Company Law of 1921, 40 P.S. §477b, 751 direct the Insurance Commissioner to approve or disapprove the form of insurance contracts before they are sold. It has been contended that the Department has no authority under this law to approve or disapprove policies based upon court opinions. We find this contention to be without merit. The Commissioner must apply and follow the law of the Commonwealth in approving insurance contracts. This necessarily includes pertinent common law and equity principles as well as constitutional and statutory provisions. The Commissioner thus has quasi-judicial power in determining whether a proposed policy contract violates any law or principle of equity. *Mutual Benefit Life Ins. Co. v. Welch*, 71 Okla. 59, 175 P. 45 (1918). In construing an Oklahoma law nearly identical to Section 354, the Court there held that the Insurance Commissioner must disapprove an insurance contract whenever he determines, in the exercise of his quasi-judicial power, that it is violative of any applicable law, written or unwritten or any principle of equity. More particularly, the Court stated: "The common law, of course, forbids among other things, any 'form' of policy of life insurance which violates the public policy in any respect." 71 Okla. at 62.

In regard to the effect of the disapproval of the form of a contract by the insurance commissioner, the Court stated: "It shall be conclusively unlawful for such company to issue any policy in the 'form' so disapproved, without regard to whether his disapproving decision is correct or erroneous, provided he did not act arbitrarily or fraudulently in the same." 71 Okla. at 63. The above analysis indicates that it would certainly be an abuse of discretion for you to approve contracts containing terms that the Supreme Court has held to be unfair and unenforceable as against public policy.

It has also been contended that no changes need be made in the policies themselves since the Supreme Court has found them unenforceable, and, perforce, lower courts will be bound by that decision in subsequent cases. But, insurance policies containing such terms, even though unenforceable, are likely to cause policyholders to forego meritorious claims in the mistaken belief that the terms are, in fact, enforceable. The general public relies on the Insurance Department's duty to approve policies, and, consequently, terms appearing in policies have a greater appearance of state-sanctioned enforceability than terms appearing in ordinary con-

tracts. While your Department's approval of a policy is not a statement that all terms are in your opinion enforceable, you should act to eliminate indubitably unenforceable terms in order that claimants will not be misled. See *Ice City, Inc. v. Insurance Company of North America*, 456 Pa. 210 (1974). Therefore, when court decisions modify interpretations of specific contract language, the Insurance Department must take cognizance of these changes in carrying out its responsibilities under law.

II.

It next becomes relevant to ask whether the Insurance Department should itself interpret these court decisions or whether such matters should be referred to the Department of Justice. The determination of whether a particular court decision is based solely on the facts of the particular case or whether it is a construction of the law generally applicable is a legal question. Section 902 of the Administrative Code, 71 P.S. §292, provides that:

> "The Department of Justice shall have the power and its duty shall be:
>
> * * *
>
> " (b) To supervise, direct and control all of the legal business of every administrative department...and commission of the State Government."

In carrying out his duty under the law, the Attorney General has assigned assistant attorneys general to various state agencies to be responsible for their day to day legal affairs. Initially, all legal questions of the Insurance Department must be referred to its legal counsel. The advice of the Department of Justice should then be sought in matters of great importance, matters that are controversial, and matters in which the outcome is not clear. Applying these guidelines, the Insurance Commissioner and the assistant attorneys general assigned to the Insurance Department must use their discretion in determining when to submit this and other legal questions to the Department of Justice for its review and determination.

III.

Applying the principles enunciated above, we are of the opinion that the Insurance Department must apply the holding of the *Burne* case to approve or disapprove submitted contracts.

The Pennsylvania Supreme Court in *Burne* dealt with accidential death benefits in a life insurance policy and held that a provision requiring the insured to die within ninety days of an accident for the benefits to be payable is arbitrary and unreasonable when there is no dispute that death was caused by accidential means.

The benefit in question usually provides that the insurer will pay double indemnification to the beneficiary of the insured when the death of the insured is the result of an accident; it is usually qualified, as it was in *Burne*, by a provision which requires that the death occur within ninety days of that accident. In *Burne*, the insured died four and one-half years after the accident, but as a result of the accident. In holding the ninety day provision unenforceable, the Court stated (451 Pa. at 222):

> "To predicate liability under a life insurance policy upon death occurring only on or prior to a specific date, while denying policy recovery if death occurs after that fixed date, offends the basic concepts and fundamental objectives of life insurance and is contrary to public policy."

The Court added:

> "...the decisions as to what medical treatment should be accorded an accident victim should be unhampered by considerations which might have a tendency to encourage something less than the maximum medical care on penalty of financial loss if such care succeeds in extending life beyond the 90th day. All such factors should, whenever possible, be removed from the antiseptic halls of the hospital. Rejection of that arbitrary ninety day provision does exactly that." Id. at 223.

The Court further reasoned in *Burne* that indemnification for premature death resulting from an accident is the primary purpose for obtaining double indemnity accidental death coverage. The ninety day provision is a period imposed by the insurer within which to ascertain whether death did in fact result from an accident. Because of advances in medical science, doctors have acquired the ability to sustain life for long periods of time after a fatal accident. Such advances in medical science rendered the ninety day provision arbitrary and unreasonable when applied in *Burne* because there was no dispute that the accident was the proximate cause of death. Hence, this provision was held unenforceable as it is a general rule of law that provisions in an insurance policy should be disregarded when they cannot reasonably be applied to factual situations. *Grandin v. Rochester German Insurance Company*, 107 Pa. 261 (1884). See also *Tennant v. Hartford Steam Boiler Inspection and Insurance Company*, 351 Pa. 102 (1944); *Norlund v. Reliance Life Insurance Company*, 282 Pa. 389 (1925).

As can be gleaned from the discussion above, the holding in *Burne* was based upon two grounds. Firstly, the Court held that the time limitation of the accidental death benefit clause was unenforceable against the beneficiary under the facts of the case; and secondly, that the time limitation was arbitrary and unreasonable and therefore void as against public policy. Our opinion that the ninety day requirement is generally unenforceable is predicated on the more general grounds of the latter holding.

Since the *Burne* case was concerned with accidental death clauses in life insurance policies, the question arises as to whether the basic principles of that case should be extended to all lines of insurance that include accidental death benefit clauses. The question also arises as to whether any time limitation, no matter how long, is an acceptable provision in an accidental death benefit clause.

There does not seem to be any type of insurance policy which has a double indemnity accijental death benefit clause to which the reasoning of the *Burne* case would not be applicable. Therefore, the basic principle of *Burne* can be extended to all lines of insurance that include accidental death benefit clauses.

The insured in *Burne* died four and one-half years after the accident. By permitting double indemnification after four and one-half years, the Court implicitly held that any time period limitation restricting recovery of accidental death benefits where death is caused by accident is invalid. We are therefore of the opinion that any time limitation, regardless of how long, would be arbitrary and capricious and thus void as against public policy. If there is a contested fact of whether the cause of death was accidental, the issue can be resolved without cutting off the right of the insured on the basis of an arbitrary time limit.

Common sense dictates that approval or disapproval of contract forms calls for the exercise of reasonable discretion. The insurer as well as the insured deserves the protection of the Commissioner in avoiding unlawful provisions. The same reason exists for similar protection in the avoidance of ambiguous or other unwarranted provisions.

The adhesive nature of an insurance contract calls for the sound judgment of the Commissioner to prohibit limiting provisions which are unanticipated and which are not clearly brought to the attention of the insured. Accordingly, irrespective of any contention that *Burne* is being construed too broadly, the Commissioner, in the sound exercise of his discretion, can refuse to approve policies which purport to cut off accidental death benefits by any arbitrary time limit. Of course, as provided in 40 P.S. §477b, notice of such refusal, specifying the reason therefor, must be given, and the issue can be tested by hearing and subsequent judicial review.

In conclusion, it is our opinion, and you are accordingly advised, that all time limitations in regard to accidental death clauses in all lines of insurance can be considered void as contrary to public policy. Insurance policies that have been approved by the Insurance Department containing like clauses may be disapproved to exclude such provisions. By the same token, all new policies that are sub-

mitted to the Insurance Department for its approval should be disapproved if they contain such a clause.

Sincerely,

Jeffrey G. Cokin
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 23*

Liquor Code—Fourteenth Amendment— 42 U.S.C. §1981

1. No action should be taken by the Liquor Control Board to revoke the license of corporate licensees for employing aliens as officers of the corporate licensee in violation of the U.S. citizenship requirements of 47 P.S. §4-403(c) inasmuch as such citizenship requirements are to be treated as unconstitutional under the Fourteenth Amendment and are suspended by 42 U.S.C. §1981.

Harrisburg, Pa.
April 30, 1974

Honorable Gene F. Roscioli
Chairman
Liquor Control Board
Harrisburg, Pennsylvania

Dear Mr. Roscioli:

It has been brought to our attention that certain corporate licensees of the Liquor Control Board may be employing resident aliens as officers of such corporations in apparent contravention of the United States citizenship requirements of the Liquor Code, 47 P.S. §4-403(c). Question is now raised whether or not the Liquor Control Board should invoke its statutory authority to revoke any and all licenses held by such corporations under the provisions of the Liquor Code, §4-403(a) and (c) which authorize the Board to revoke licenses where a corporate licensee has an officer who is not a United States citizen. It is our opinion, and you are hereby advised, that the Board shall not take any action to revoke such licenses on the ground that the licensee has an officer who is a resident alien inasmuch as the citizenship requirement of the Liquor Code, 47 P.S. §4-403, is in contravention of federal law, 42 U.S.C. §1981, and the Fourteenth Amendment.[1]

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*Editor's Note: See Opinion No. 48 *infra*.

1. As early as 1933 and again in 1935, the Attorney General of the State of New York held that similar citizenship requirements in New York's Alcoholic Beverage Control Law were unenforceable under U.S. treaty obligations and the Supremacy Clause of the U.S. Constitution. See, 1933 Op. N.Y. Attorney General 94 (October 9, 1933); and 1935 Op. N.Y. Attorney General 133 (May 15, 1935). Since that time, the United States Supreme Court has used 42 U.S.C. §1981 and the Equal Protection Clause of the Fourteenth Amendment to achieve that same result. Consequently, this opinion will not rely on U.S. treaty obligations in discussing the question of alien rights.

The Liquor Code provides for a United States citizenship requirement for applicants for hotel, restaurant and club liquor licenses and establishes that subsequent violation of such standards is also grounds for revocation of a license already issued:

> "If the applicant is a natural person, his application must show that he is a citizen of the United States....
>
> If the applicant is a corporation, the application must show that ... all officers, directors and stockholders are citizens of the United States, and that the manager of the hotel, restaurant or club is a citizen of the United States." 47 P.S. §4-403(b), (c).

Question is now raised about the validity of such citizenship restriction in light of 42 U.S.C. §1981 and the Fourteenth Amendment of the United States Constitution.

42 U.S.C. §1981 [formerly, 8 U.S.C. §41] provides as follows:

> "All persons within the jurisdiction of the United States shall have...full and equal benefit of all laws...and shall be subject to like punishment, pains, licenses...and to no other."

In *Takahashi v. California Fish and Game Commission*, 334 U.S. 410 (1948), the Court held that, although this statute was originally passed to guarantee black residents equal benefit of the laws, the language of the statute clearly guarantees alien residents the same rights within the states as non-alien residents. See, also, *Whitfield v. Hanges*, 222 F. 745 (8th Cir. 1915); and *Martinez v. Fox Valley Bus Lines*, 17 F. Supp. 576 (N.D. Ill. 1936). The question must now be answered whether or not the Pennsylvania Liquor Code which, in ultimate effect, establishes two sets of standards for applicants for liquor licenses—one for citizens and another for aliens—can stand in light of federal law which mandates that aliens within the jurisdiction of the United States are guaranteed the same benefits of the laws as granted to non-aliens and further provides that alien residents shall be subject to the same licensing laws as non-aliens and to no other.

The effect of Pennsylvania's citizenship requirement in 47 P.S. §4-403 is to provide for an additional requirement for alien applicants for liquor licenses: naturalization pursuant to the terms and conditions as established by the United States Congress. Yet Congress decreed in 42 U.S.C. §1981 that aliens shall not be subjected to different regulatory standards when the States choose to exercise their power to issue licenses under the state police power. 47 P.S. §4-403(b) and (c) inevitably and invariably conflict with federal law regarding the treatment and regulations of aliens as enunciated in 42 U.S.C. §1981. Under the general principle of supremacy and also under the exclusive power of Congress to

legislate for the purpose of controlling immigration, (see *Truax v. Raich*, 239 U.S. 33, 42 (1915)), inconsistent state laws must yield to the wisdom of Congress, and the requirements of U.S. citizenship of 47 P.S. §4-403(b) and (c) for applicants for liquor licenses must be held invalid.

In addition to the provisions of 42 U.S.C. §1981, the United States Supreme Court has consistently held that the Equal Protection Clause of the Fourteenth Amendment is, in itself, sufficient authority to strike down State laws which discriminate against aliens. In *Traux v. Raich*, 239 U.S. 33 (1915), the Court struck down as unconstitutional an Arizona anti-alien labor law which required that employers must employ a work force of at least 80% native-born citizens of the United States. In writing for the majority, Justice Hughes observed that the Fourteenth Amendment guaranteed aliens equal economic opportunity, and an attempt by the State to regulate the rights of aliens to the benefit of its non-alien residents was unconstitutional:

> "[State police power] does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a living. It requires no argument to show that the right to work for a living in the common occupation of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [XIV] Amendment to secure." 239 U.S. at 41.
>
> "The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work." *Id.* at 42.

In the instant case, Pennsylvania law would impinge upon the economic equality of opportunity of aliens to earn a livelihood by dispensing and selling alcoholic beverages pursuant to state law, which prohibition is for the ultimate economic benefit of non-alien residents of the Commonwealth. This economic discrimination cannot stand in light of the holding of *Truax v. Raich, supra*, and 47 P.S. §4-403(b) and (c) must be considered invalid.[2]

In *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948), the Supreme Court held that the California Fish and Game Commission could not lawfully refuse to issue California resident aliens commercial fishing licenses which were otherwise available to non-alien California residents. As Justice Hugo Black observed for the majority:

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2. For other statements by the Supreme Court guaranteeing aliens economic equality, see *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) and *Harrisiades v. Shaughnessy*, 342 U.S. 580 (1952).

"The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide in any state on an equality of legal privileges with all citizens under non-discriminatory laws." 334 U.S. at 420.

More recently, the United States Supreme Court has handed down three landmark decisions regarding resident alien rights under the Equal Protection Clause. In *Graham v. Richardson*, 403 U.S. 365 (1971), the Court struck down Pennsylvania and Arizona statutes which conditioned state welfare benefits on United States citizenship. As observed by the majority, such ethnocentric requirements will be carefully scrutinized by a suspicious judiciary, and only where the state can convincingly demonstrate a compelling state interest will such requirements be upheld:

> "But the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." 403 U.S. at 371, 372.

In *Sugarman v. Dougall*, 413 U.S. 634 (1974), the Court held that New York could not require U.S. citizenship as a condition precedent for employment with the state under the New York civil service law. Again, in *In re Griffith*, 413 U.S. 717 (1974), the Court struck down a Connecticut statute which denied resident aliens the right to take the Connecticut bar examination solely because of alien citizenship as violative of the Fourteenth Amendment:

> "Resident aliens, like citizens, pay taxes, support the economy, serve in the armed forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities. We hold that the Committee, acting on behalf of the State, has not carried its burden." 413 U.S. at 722.

In order to justify the ethnocentric requirements of 47 P.S. §4-403 (b) and (c), the Liquor Control Board must affirmatively demonstrate a compelling state interest in restricting licenses to individual citizens of the United States and to corporations where all officers, directors, and shareholders are citizens of the United States. It appears that the citizenship requirement as it affects all directors, officers and shareholders of a corporation must be stricken down as overly broad on its face. As the citizenship requirement affects managers of a corporate applicant and natural persons applying on their own behalf, it appears that the citizenship requirements should be stricken down *absent* any substantial evidence offered by the Board to indicate that alien managers and bar owners would notoriously violate the Liquor Code after receiving their licenses.[3] Inasmuch as the Board has never contended such to be the case, alien residents should be given

the right to manage corporate establishments licensed by the Board, to own such establishments in their own right, and to serve as officers of corporations licensed under the Liquor Code.[4]

In reaching this result, it is realized that the Twenty-first Amendment recognizes the states' special constitutional interest in regulating the retail sale of liquor. See, *California v. LaRue*, 409 U.S. 109 (1972). As pointed out in Justice Rehnquist's opinion, where there is a high correlation between criminal activity and erotic sexual performance in clubs which serve liquor, the Twenty-first Amendment can be used to prohibit behavior which otherwise would be protected under the free expression of ideas of the First Amendment. As pointed out in Justice Stewart's concurring opinion, however, the Twenty-first Amendment does not permit total irrationality or invidious discrimination in such regulation:

> "This is not to say that the Twenty-first Amendment empowers a State to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders." 409 U.S. at 120.

As indicated by the Supreme Court in *Graham*, *Sugarman* and *Griffith* cases, discrimination against alien residents is obviously irrational and invidious discrimination. Consequently, it must be concluded that the Twenty-first Amendment does not authorize the Legislature to discriminate against alien residents in liquor regulatory legislation.

In summation, it is our opinion and you are hereby advised that no further action shall be taken against corporate licensees who may employ resident aliens as officers or directors or whose shareholders may be aliens in violation of 47 P.S. §4-403(c) inasmuch as such citizenship requirements shall be treated as unconstitutional under the Fourteenth Amendment.

Very truly yours,

Richard J. Orloski
Deputy Attorney General

Israel Packel
Attorney General

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3. See, Veto Message of Governor Milton J. Shapp of March 1, 1974 (Veto No. 1) vetoing a proposed amendment to the Game Law which provided greater penalties for alien residents who violated the Game Law than for citizen residents who performed the same illegal acts.

4 The Pennsylvania Attorney General's Office has consistently advised State agencies that U.S. Citizenship requirements are unenforceable. See, *O.O. No. 92*, Op. Pa. Atty. Gen. 177 (1971) on veterinarians; *O.O. No. 112*, Op. Pa. Atty. Gen., 2 Pa. B. 634 (March 15, 1972) on real estate brokers; *O.O. No. 113*, Op. Pa. Atty. Gen., 2 Pa. B. 635 (March 23, 1972) on physicians; *O.O. No. 114*, Op. Pa. Atty. Gen. 2 Pa. B. 635 (March 23, 1972) on pharmacists; *O.O. No. 116*, Op. Pa. Atty. Gen. 2 Pa. B. 745 (April 4, 1972) on practical nurses; *O.O. No. 4 of 1973*, Op. Pa. Atty. Gen. 3 Pa. B. 201 (Jan. 15, 1973) on scholarship applicants; and *O.O. No. 9 of 1973*, Op. Pa. Atty. Gen. 3 Pa. B. 204 (Jan. 16, 1973) on teachers.

OFFICIAL OPINION No. 24

Taxation—Exemption—Fuel Use Tax—Liquid Fuels Tax Non-public School—Nonprofit

1. A "non-public school" is any school other than a public school within the Commonwealth of Pennsylvania wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of Pennsylvania law.

2. A general definition of school does not include institutions of higher learning.

3. A school not operated for profit is one in which there is no contemplation of pecuniary gain or profit, one which does not pay dividends or distribute any of its income to its owners, officers, or directors, and one in which any incidental profits are not distributed to its owners.

Harrisburg, Pa.
April 30, 1974

Honorable Vincent X. Yakowicz
Secretary of Revenue
Harrisburg, Pennsylvania

Dear Secretary Yakowicz:

Acts Nos. 9 and 10 of 1974, effective February 1, 1974, amended the Fuel Use Tax Act of Januury 14, 1952, P.L. 1965, 72 P.S. §2614.1 and the Liquid Fuels Tax Act of May 21, 1931, P.L. 149, 72 P.S. §2611a *et seq.*, respectively by granting an exemption from these taxes, inter alia, to "non-public schools not operated for profit." As a result of these amendments, you have asked our office to define and construe the terms "non-public school" and "not operated for profit", as applied to the above-mentioned Acts.

I.

A "non-public school" or "private school" has been defined as:

> "One maintained by private individuals or corporations not at public expense, and open only to pupils selected and admitted by the proprietors or governors, or to pupils of a certain class or possessing certain qualifications (racial, religious, or otherwise) and generally supported, in part at least, by tuition fees or charges." Black's Law Dictionary 1512 (Revised 4th Edition 1968).

A "public school", on the other hand, has been defined as a school established and maintained at public expense and comprising the elementary grades and, when established, the grades of high school. *Rankin v. Love*, 125 Mont. 184, 232 P. 2d 998 (1951). That case implies that a private school would be one *not* maintained at public expense; therefore, the definition would be consistent with that quoted from Black's Law Dictionary.

The word "school" itself has been defined as:

> "...a generic term, denoting an institution or place for instruction or education, or the collective body of instructors and pupils in any such place or institution. In the ordinary acceptation of its meaning, a school is a place where instruction is imparted to the young. It is an institution of learning of a lower grade, below a college or a university; a place of primary instruction." *Lawrence v. Cain*, 144 Ind. App. 210, 245 N.E. 2d 663 (1969).

These definitions indicate that institutions of higher learning are not generally included in the definition of school.

In addition, our own General Assembly has twice had recent occasion to define the term "non-public school". Both the Nonpublic Elementary and Secondary Education Act, 24 P.S. §5601 *et seq.* and the Parent Reimbursement Act for Nonpublic Education, 24 P.S. §5702 defined "non-public school" as:

> "Any school, other than a public school within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law." 24 P.S. §5603, 24 P.S. § 5703.

Although both these Acts have been declared unconstitutional by the United States Supreme Court as contrary to the religion clauses of the First Amendment, *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Sloan v. Lemon*, 413 U.S. 825 (1973), the definition of "non-public school" was in no way affected by those cases. Since the General Assembly has twice in recent years defined "non-public schools", we are of the opinion that it is the best definition of "non-public school" in Pennsylvania, notwithstanding the fact that the Acts have been declared unconstitutional for other reasons.[1] As it is not necessary to attend college to "fulfill the compulsory school attendance requirements of law" and since the other cases we have cited define "school" to exclude institutions of higher education, in our opinion, the non-public school exemption of the Fuel Use Tax and the Liquid Fuels Tax would not be applicable to colleges and universities.

II.

The Corporation Not-for-profit Code, 15 Pa. S. §7101 *et seq.* defines "non-profit corporation" as "a domestic corporation not for profit incorporated under Article B of this part...." 15 Pa. S. §7103.

1. Act 194 of July 12, 1972, P.L. 861, which concerns auxiliary services to non-public school children and Act 195 of July 12, 1972, P.L. 863, which concerns the loan of books and equipment to non-public school children both contain a similar definition of non-public school. Neither of these acts has been tested as to its constitutionality.

Article B, known as the Non Profit Corporation Law of 1972, 15 Pa. S. §7301, provides in part that the articles of incorporation must contain the following:

> "A statement that the corporation is one which does not contemplate pecuniary gain or profit, incidental or otherwise." 15 Pa. S. § 7316.

It is this provision which distinguishes a corporation not operated for profit from one that is operated for profit.

Two other provisions of the "Corporation Not-for-profit Code" help clarify exactly what is intended by the words "not operated for profit."

> "All such incidental profits [of a nonprofit corporation] shall be applied to the maintenance and operation of the lawful activities of the corporation, and in no case shall be divided or distributed in any manner whatsoever among the members, directors, or officers of the corporation." 15 Pa. S. §7546. (Insert supplied).
>
> * * *
>
> "A nonprofit corporation shall not pay dividends or distribute any part of its income or profits to its members, directors, or officers." 15 Pa. S. §7553(a).

It is clear from the provisions quoted above, that any profits a nonprofit corporation makes cannot be distributed to its shareholders, members, directors or officers. This basic theory of the Nonprofit Corporation Law would seem to be applicable to any kind of entity not operated for profit. Thus, a school not operated for profit would be one in which there is no contemplation of pecuniary gain or profit, one which does not pay dividends or distribute any of its income to its owners, officers or directors and one in which any incidental profits are not distributed to its owners. By the same token any school "not operated for profit" and not incorporated under the "Corporation Not-for-profit Code" may still fall within the exemption provided by Acts Nos. 9 and 10 of 1974 if it meets the requirements set forth above. The General Assembly has not defined "not operated for profit" except as provided above and it is our opinion that this definition should be applied to Acts in question.

In conclusion, it is our opinion, and you are accordingly advised, that for purposes of Acts Nos. 9 and 10 of 1974, a "non-public school" is any school other than a public school within the Commonwealth of Pennsylvania wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of Pennsylvania law. A "non-public school not

operated for profit" is a non-public school which does not contemplate pecuniary gain or profit, incidental or otherwise.

Sincerely,

Jeffrey G. Cokin
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 25

Welfare—Drug and Alcohol Treatment Centers—G.S.A. Construction

1. It is lawful for the General State Authority to construct drug and alcoholic addiction diagnostic and treatment centers, and in turn to lease the facilities, through the Department of Property and Supplies, to the Governor's Council on Drug and Alcohol Abuse, to use, or contract for the utilization of, the facilities as drug treatment centers.

Harrisburg, Pa.
May 7, 1974

Hon. Helene Wohlgemuth, Secretary
Department of Public Welfare
Harrisburg, Pennsylvania

and

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

Dear Mrs. Wohlgemuth and Dr. Horman:

You have asked us whether or not the General State Authority can construct facilities to be owned by the Commonwealth and used for drug and alcohol treatment centers under existing law.

Article VIII, §7 of the Pennsylvania Constitution provides in part:

> (4) Debt may be incurred without the approval of the electors for capital projects specifically itemized in a capital budget....
>
> * * *
>
> (c) As used in this section, debt shall mean the issued and outstanding obligations of the Commonwealth...."

Pursuant to the foregoing authority, the Legislature passed Act No. 256 of 1970 providing for, *inter alia*, the incurring of debt (in the form of General Obligation Bonds of the Commonwealth) for the financing of a resident treatment addiction center at St. Luke's Hospital and for a diagnostic and rehabilitation center, both to be located in Philadelphia.

Section 4 of the General State Authority Act of 1949, as amended, 71 P.S. §1707.4 provides:

> The Authority is created for the purpose of constructing, improving, equipping, furnishing, maintaining, acquiring, operating...Resident Treatment and Research Centers for Victims of Addictive Diseases operating under the jurisdiction and control of the Department of Public Welfare.[1]

In addition, the General State Authority is specifically authorized "to lease as lessor to the Commonwealth of Pennsylvania...or any agency, department or public body of the Commonwealth...any project at any time constructed by the Authority." 71 P.S. §1707.4(d). Consequently, G.S.A. is authorized to erect the two facilities in question and then lease them to the Governor's Council on Drug and Alcohol Abuse through the Department of Property and Supplies.[2]

If the Governor's Council is not to operate directly the two programs, it may enter into a service purchase contract with St. Luke's Hospital or any other qualified agency to supply the necessary personnel and services. Act No. 63 of April 4, 1972, P.L. 221 71 P.S. §1690.101 *et seq.*

Accordingly, you are formally advised that it is lawful for the General State Authority to construct the facilities in question, in turn to lease the facilities to the Commonwealth through the Department of Property and Supplies, and to have the Commonwealth utilize, or contract for the utilization of, the facilities as drug treatment and diagnostic centers.

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

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1. Reorganization Plan Number 2 of 1973 transferred the functions, powers and duties of the Department of Public Welfare with regard to the supervision and licensing of special and general hospitals to the Department of Health. Subsequently, the "prevention, treatment, rehabilitation, research, education and training aspects of drug and alcohol abuse and dependence problems" were transferred from both the Departments of Health and Public Welfare to the Governor's Council on Drug and Alcohol Abuse. (Reorganization Plan Number 4 of 1973.)

2. The Department of Property and Supplies acts as lessee for all agencies and departments of the Commonwealth as provided for in The Administrative Code of 1929, Section 2402(d), 71 P.S. § 632.

Auditor General and State Treasurer for their views and have duly noted their comments.

Sincerely yours,

Patricia A. Donovan, R.S.M.
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 26

Dog Law Act—Pa. R. Crim. P. 51 — Cruelty to Animals—Humane Society Agents

1. Dog Law enforcement officers and agents may not initiate summary proceedings for violations of the Dog Law by exercising powers of arrest or by issuance of a citation.

2. The power to initiate summary proceedings by arrest or citation may only be exercised by those police officers enumerated in Pa.R. Crim.P. 51C.

3. Fish, Game, and Forestry Wardens may not exercise powers of arrest when enforcing the provisions of the Dog Law.

4. Humane Society agents are not empowered to enforce the provisions of the Dog Law and are to be considered private complainants for purposes of instituting criminal proceedings, but such agents may exercise powers of arrest when enforcing section 5511 of the Crimes Code relating to cruelty to animals.

Harrisburg, Pa.
May 15, 1974

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

Dear Secretary McHale:

You have requested an opinion as to whether Dog Law enforcement agents are empowered to either arrest or issue citations to persons observed in the commission of offenses in violation of the Dog Law of 1965. In an informal opinion rendered on May 22, 1972 we advised your Department that Dog Law enforcement officers were not peace officers and consequently could neither arrest violators of the Dog Law without a warrant nor issue citations in the course of their duties under that Law. It is our opinion, and you are hereby advised, that the advice rendered therein properly defines the law enforcement powers of such officers.

The Dog Law of 1965 was enacted to provide for the regulation, licensing and protection of dogs. Act of December 22, 1965, P.L. 1124, 3 P.S. §460-101 *et seq.* Enforcement of the provisions of the law is vested in police officers which, for purposes of the act, in-

cludes "any person employed or elected by this Commonwealth, or by any municipality, county or township, and whose duty it is to preserve peace or to make arrests or to enforce the law. The term includes State constabulary, game, fish and forest wardens." 3 P.S. §*460-102(7). Article X of the act, 3 P.S.* §460-1001, charges the Secretary of Agriculture, through his officers and agents, with the general enforcement of the Dog Law, and empowers him to employ "all proper means" towards these ends. The act sets forth several such powers which may be employed by enforcement officers, among which are the authority to inspect for violations of the act and to apprehend dogs found running at large.

In constrast to these general enforcement functions which may be performed by dog enforcement officers in an attempt to obtain compliance with the Dog Law, the power to initiate criminal proceedings for the failure or refusal to comply with the law may only be exercised in conformity with the procedures set forth in Chapter 50 of the Pennsylvania Rules of Criminal Procedure regarding the instituting of proceedings in summary cases. Rule 51C, effective January 1, 1974, states that for purposes of that Rule, "a police officer shall be limited to a member of the Pennsylvania State Police Force, a member of the police department authorized and operating under the authority of any political subdivision and any employee of the Commonwealth or a political subdivision having the powers of a police officer when acting within the scope of his employment." Those persons who fall within the scope of the above definition and who have the power to arrest are authorized to initiate summary proceedings by arrest or by citation, depending on circumstances defined in the Rule. Those persons who are not encompassed by the above definition may only institute proceedings by filing a complaint with the proper issuing authority pursuant to Rule 51A(6).

In determining who is and who is not a police officer for purposes of the Rule it is helpful to examine the comments to the Rule and to compare the powers of Dog Law officers with those granted to other enforcement agents. The comments to the Rule state that the definition of police officer in section C excludes constables, county detectives and all other persons exercising police powers other than those enumerated in section C, but that the Rule does not suspend additional procedures set forth in the fish and game laws in connection with violations thereof. This commentary indicates that not all persons exercising certain incidents of police powers are to be considered police officers for purposes of initiating prosecutions, and that the determinative factor in each case is the statutory basis on which the enforcement agent relies for his powers.

In contrast to the general enforcement powers set forth in the Dog Law, the Fish and Game Laws specifically provide that their enforcement personnel have the power to arrest without warrant for violations of the respective acts and that they may exercise a

host of other police powers in the performance of their duties. 30 P.S. §§256, 271, 277; 34 P.S. §§1311.214, 1311.1202. The Administrative Code also provides authority for game wardens, as well as for forest officers, to exercise powers of arrest when enforcing their respective laws. 71 P.S. §§510-10, 510-14, 675. The fact that these enumerated powers are subject in turn to the procedures outlined in Chapter 50 and may only be exercised in the manner prescribed therein does not diminish the statutory authority to act with full police powers in the proper circumstances.

Furthermore both the Fish and Game Laws provide an alternative procedure for out of court settlement of summary violations of those laws known as an "acknowledgement of guilt." 30 P.S. §280; 34 P.S. §1311.1203. These procedures are alluded to in the comment to Rule 51C and remain undisturbed by the limitations imposed by the Rule.

By contrasting the enforcement sections of the Dog Law with those of the Forest, Fish, and Game Laws the significance of the distinction drawn in Rule 51 becomes apparent. Whereas fish, game and forest officers have been granted the powers of arrest, search, seizure and charge normally afforded to peace officers, Dog Law agents lack those incidents of police powers which would elevate them to the same plateau. Their authority is circumscribed by the powers enumerated in the Dog Law, and their proper remedy for apprehending violators of the act is to file a private complaint with the issuing authority, who shall proceed as in other summary cases.

This conclusion gives rise to still another question, viz., whether forest, fish or game wardens may utilize the arrest and citation powers conferred on them by their respective statutes when engaged in the enforcement of the Dog Law. Reference to the Administrative Code Ancillaries is instructive on this point.

The several statutes conferring arrest powers upon the forest, game or fish wardens limit the use of those powers by each respective warden to enforcement of the specific act under which his office was created. Absent any supplemental powers, therefore, a fish warden could utilize his arrest powers only when enforcing the Fish Law, a game warden when enforcing the Game Law, and so forth. However, additional power has been given to forest, fish and game officers by a reciprocal enforcement provision of the Administrative Code, which confers upon each of the wardens the duty to enforce all the laws relating to game, fish and forestry, and extends the powers of each in such a way as to give them full authority to carry out the correlated statutes. Act of April 21, 1915, P.L. 156, as amended by Act of May 29, 1917, P.L. 309, 71 P.S. §766.

These coextensive arrest and citation powers have not yet been extended to these wardens for purposes of enforcing the Dog Law.

As in the case of constables, who no longer have any powers beyond those of a private citizen to effectuate a warrantless arrest, the reference made to these wardens in the Dog Law is simply an avenue for employing their assistance in the general enforcement of the Act and does not confer upon them powers greater than those which may be exercised by other Dog Law officers and agents. Only those police officers who are members either of the State Police or of the police department of a political subdivision of the Commonwealth may utilize the arrest and citation procedures outlined in Pa.R.Crim. P. 51 when enforcing the Dog Law. All other agents must conform to the complaint procedure set forth in Rule 51A(6).

To summarize, officers and agents of the Department of Agriculture are entrusted with the duty to administer the directives of the Dog Law and are authorized to exercise those powers as are set forth in the Act in order to achieve this objective and to determine whether any person is not acting in conformity thereto. However, the power to arrest or issue citations for violations of the Act remains in the exclusive domain of those police officers who are authorized by the Rules of Criminal Procedure to utilize these procedures. Should a Dog Law agent wish to initiate criminal proceedings, he must abide by the procedure prescribed by the Rules for private complainants.

We understand that the stringent requirements of Rule 51 may handicap your efforts to enforce the laws of the Commonwealth. Whether the legal status of Dog Law enforcement agents should be changed in this regard, however, is a matter for the consideration of the Legislature, and we suggest you submit amendatory proposals to that body to effectuate the necessary statutory changes.

You have also requested our opinion as to the enforcement powers of agents of humane societies or associations for the prevention of cruelty to animals. Absent an agreement entered into with the Department of Agriculture pursuant to Section 1001 of the Act, these individuals may not exercise any of the enforcement powers conferred upon Dog Law enforcement agents. Furthermore, for the reasons discussed above with regard to Dog Law personnel, humane agents are not empowered to arrest persons for violations of the Dog Law, but, like other private individuals, they may institute summary proceedings for violations of the Act by filing a complaint with the District Justice.

Despite their status as private complainants under the Dog Law, humane agents are granted certain other police powers for curbing the infractions enumerated in Section 5511 of the Crimes Code relating to Cruelty to Animals Act of December 6, 1972, P.L. No. 334, as amended by Act of December 12, 1973, P.L. 1482, 18 Pa. S. §5511. Since subsection (i) authorizes these agents to arrest on view and bring before a justice of the peace any offender found violating the provisions of the Act, it is clear that the Legislature

intended to confer upon this group of persons the power to terminate conduct which they reasonalby believe to be in violation of the Act. Nevertheless the method of instituting criminal proceedings must conform to the procedures outlined in Rules 51 and 133, which in turn are subject to the provisions of Rule 51C.

As discussed previously, in order to have the status of a police officer for these purposes the agent must either be a policeman or an employee of the Commonwealth or a political subdivision with police powers. The disparity between the definition of a police officer in the Rules and the vocation of humane agents engenders a fragmented construction of the term "arrest", resulting in the dichotomy of sanctioning the humane agent's apprehension of potential culprits while at the same time expressing doubt as to his judgment in deciding which individuals to prosecute.

In conclusion, if we are to give credence to both the statute and the applicable Rules, humane agents may capture and take before a justice of the peace individuals thought to be acting in violation of Section 5511, but the agent must then proceed as a private complainant for purposes of bringing criminal charges.

Recognizing the impracticality of this anomalous state of affairs we are sending a copy of this opinion to the Criminal Procedural Rules Committee with the recommendation that it review the current procedures for instituting criminal proceedings and consider amending them to correspond more directly with the intent of the General Assembly.

Sincerely yours,

Barnett Satinsky
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 27

Competency to Operate a Motor Vehicle—Confidentiality of Patient's Records—Vehicle Code—Pennsylvania Drug and Alcohol Abuse Control Act.

1. Section 8 of the Pennsylvania Drug and Alcohol Abuse Control Act, 71 P.S. §1690, is not necessarily inconsistent with Section 1226 of the Vehicle Code, 75 P.S. §1226.

2. If records filed pursuant to Section 1226 of the Vehicle Code are narrowly restricted to fulfill the purpose of that section, such reports are not prepared or obtained pursuant to the Pennsylvania Drug and Alcohol Abuse Control Act nor need they contain information from records prepared or obtained pursuant to the Pennsylvania Drug and Alcohol Abuse Control Act.

3. Section 1226 of the Vehicle Code is not repealed by Section 8 of The Pennsylvania Drug and Alcohol Abuse Control Act.

Harrisburg, Pa.
May 22, 1974

Hon. Jacob G. Kassab
Secretary of Transportation
Harrisburg, Pennsylvania

Dear Secretary Kassab:

I have been asked to interpret two apparently contradictory statutory provisions regarding the records of individuals who have been institutionalized because of drug or alcohol abuse or dependence. Specifically, I have been asked whether the confidentiality provision of the Pennsylvania Drug and Alcohol Abuse Control Act (Act 63), which was enacted in 1972, repeals the reporting requirement found in Section 1226 of the Vehicle Code, which became effective in 1959.[1] The confidentiality provision of the Drug and Alcohol Abuse Control Act is a general provision intended to protect the confidentiality of patient records that are obtained pursuant to that Act:

> "All patient records (including all records relating to any commitment proceeding) prepared or obtained pursuant to this Act, and all information contained therein, shall remain confidential, and may be disclosed only with the patient's consent and only (i) to medical personnel exclusively for the purposes of diagnosis and treatment of the patient or (ii) to government or other officials exclusively for the purpose of obtaining benefits due the patient as a result of his drug or alcohol abuse or drug or alcohol dependence except that in emergency medical situations where the patient's life is in immediate jeopardy, patient records may be released without the patient's consent to the proper medical authorities solely for the purpose of providing medical treatment for the patient...." Section 8(b).

The same Act requires that a "complete medical, social, occupational, and family history shall be obtained as part of the diagnosis, classification and treatment of a patient pursuant to this Act." Section 8(a).

In contrast, Section 1226 of the Vehicle Code is a very specific reporting requirement designed to aid the Bureau of Traffic Safety in pursuing its responsibilities with respect to licensing drivers:

1. Since January 14, 1974, the Governor's Council on Drug and Alcohol Abuse has taken the position that Section 1226 was repealed by Act 63. That position was undoubtedly influenced by the fact that no adequate procedural safeguards existed to enable the patient to assert competence to drive. Now, however, the Department of Justice is in negotiation to settle *Sharkey v. Kassab*, C.A. No. 73-377, in a manner that will assure full procedural due process. An equitable resolution of this problem is imminent and necessitates a reconsideration of the Council's prior position.

> "The person in charge of every mental hospital, mental institution or mental clinic, shall make a report to the Secretary, of the admission of every person who, upon examination therefor, is found to be suffering from a mental disability which, in the opinion of the examining physicians, would prevent such person from exercising reasonable and ordinary control over motor vehicles or a tractor, and at the completion of treatment or upon discharge, shall inform the Secretary as to such person's ability or inability to exercise reasonable and ordinary control over a motor vehicle." 75 P.S. §1226.

The records referred to in the confidentiality provision of Act 63 are general records kept in order to aid in the patient's treatment. The report required by Section 1226 of the Vehicle Code is a highly specific report, not intended for the patient's treatment program but rather to be a signal to the Bureau of Traffic Safety as to whether a particular patient is able to exercise reasonable and ordinary control over a motor vehicle. This report need not necessarily contain information from general patient records; rather, the Vehicle Code mandates that the report describe the results of a specific examination designed only to identify driving disabilities.

The Drug and Alcohol Abuse Control Act repeals all other acts and parts of acts "insofar as they are inconsistent" with it. Section 15(b). Therefore, Section 1226 of the Vehicle Code is repealed by the Drug and Alcohol Abuse Control Act if and only to the extent that the two sections are inconsistent. In determining whether the two sections are inconsistent, the following rule of statutory construction must be applied:

> "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, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail." 1 Pa. S. §1933.

Because Section 8 of the Drug and Alcohol Abuse Control Act is a general provision and Section 1226 of the Vehicle Code is a specific provision, it is our judgment that effect should be given to both provisions insofar as possible and that Section 1226 of the Vehicle Code should be considered repealed only if the two provisions are clearly irreconcilable and inconsistent.

It is our opinion, and you are so advised, that Section 1226, if narrowly construed, is consistent with the confidentiality provision of the Drug and Alcohol Abuse Control Act. Section 1226 requires

only: (1) a report of the admission to an institution of every person who is found to be suffering from a mental disability that would prevent that person from exercising reasonable control over a motor vehicle or tractor; and (2) a report to the Secretary upon discharge of that person as to his ability or inability to exercise reasonable and ordinary control over a motor vehicle. In practice, these reports have been submitted to the Department of Revenue, Bureau of Traffic Safety, on forms which ask for the following information:

(1) Institution;
(2) Name of patient;
(3) Patient's address;
(4) Patient's date of birth;
(5) Whether the patient has been issued an operator's license and its number;
(6) Date of admission;
(7) Whether, in the opinion of the examining physician, the patient is suffering from a mental disability which would prevent that person from exercising reasonable and ordinary control over a motor vehicle or tractor;
(8) Remarks on the case in detail.

If Question 8 is omitted from the standard reporting form, or revised to narrow its scope, it is obvious that the report provided to the Bureau of Traffic Safety is a brief notice useful only for the initiation of further proceedings to determine whether the patient is competent to operate a motor vehicle. Thus restricted, the report is highly specific and is not designed to aid in the patient's treatment or rehabilitation. There is no provision in the Pennsylvania Drug and Alcohol Abuse Control Act that authorizes the Governor's Council on Drug and Alcohol Abuse or any of its agencies to prepare a report designed only for this limited purpose. Therefore, in my judgment, this report is not a part of "patient records...prepared or obtained pursuant to this Act....". Consequently, unless the report contains substantive information obtained from the patient's treatment records, the report itself is not a subject of Section 8 of Act 63. Therefore, Section 1226 of the Vehicle Code and Section 8 of the Drug and Alcohol Abuse Control Act are not clearly inconsistent. It is our opinion, then, that Section 1226 of the Vehicle Code is not repealed by the confidentiality provision of Act 63 and that it is possible to give effect to both provisions if the report required by Section 1226 does not contain Question 8 as presently stated.

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2. We recommend that Item 8 be revised to ask: "Type of mental disability, if any, that would prevent this patient from exercising reasonable and ordinary control over a motor vehicle or tractor." This change will provide any aggrieved patient with specific notice as to the reason for any proposed license revocation without unnecessary exposure of treatment-oriented information. We understand that this change in form would not change practice since most physicians have in fact answered Item 8 with a one-word statement, such as "alcoholism."

CONCLUSION

In summary, you are advised that if Item 8 on the standard reporting form used to implement Section 1226 of the Vehicle Code is omitted, or appropriately revised, such a report to the Bureau of Traffic Safety would not violate the confidentiality provision of the Pennsylvania Drug and Alcohol Abuse Control Act because that report is not a part of the patient's records prepared or obtained pursuant to the Drug and Alcohol Abuse Control Act, nor would it contain any substantive information from such records.

Very truly yours,

Robert F. Nagel
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 28

Prevailing Wage Act—Industrial Development Authority

1. An industrial development authority, created pursuant to the Industrial and Commercial Development Authority Law of August 23, 1967, P.L. 251, as amended, 73 P.S. §371 *et seq.*, is a "public body" within the meaning of the Prevailing Wage Act of August 15, 1961, P.L. 987, 43 P.S. §165-1 *et seq.*
2. Where an industrial development authority proposes to construct a manufacturing plant with funds derived exclusively from a mortgage executed by the authority to a lending institution and repaid entirely from rent due under a long term lease from the authority to a private business corporation, which the authority will assign to the lending institution, the construction project is covered by the Prevailing Wage Act.

Harrisburg, Pa.
June 6, 1974

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

Dear Secretary Smith:

You have asked us two questions with respect to the applicability of the Pennsylvania Prevailing Wage Act of August 15, 1961, P.L. 987, as amended, 43 P.S. §165-1 *et seq.* to industrial development authorities created pursuant to the Industrial and Commercial Development Authority Law of August 23, 1967, P.L. 251, as amended, 73 P.S. §371 *et seq.*

(1) Is an industrial development authority a "public body" within the meaning of the Prevailing Wage Act?

Section 5 of the Prevailing Wage Act requires that:

> Not less than the prevailing minimum wages as determined hereunder shall be paid to all workmen employed on public work. (43 P.S. §165-5).

"Public work" is defined by the Act to mean "construction, reconstruction, demolition, alteration and/or repair work other than maintenance work, done under contract and paid for in whole or in part out of the funds of a public body where the estimated cost of the total project is in excess of twenty-five thousand dollars ($25,000), but shall not include work performed under a rehabilitation or manpower training program." 43 P.S. §165-2(5).

"Public body" is defined to mean "the Commonwealth of Pennsylvania, any of its political subdivisions, any authority created by the General Assembly of the Commonwealth of Pennsylvania and any instrumentality or agency of the Commonwealth of Pennsylvania." 43 P.S. §165-2(4).

An industrial development authority is defined by the Industrial and Commercial Development Authority Law to mean "a public instrumentality of the Commonwealth and a body politic and corporate, created pursuant to this act." 73 P.S. §373(1).

It is clear, therefore, that an industrial development authority is a "public body" within the meaning of the Prevailing Wage Act.

(2) Where an industrial development authority proposes to construct a manufacturing plant with funds derived exclusively from a mortgage executed by the authority to a lending institution and repaid entirely from rent due under a long term lease from the authority to a private business corporation which the authority will assign to the lending institution, is the construction project covered by the Prevailing Wage Act?

It would seem clear from the above question that the proposed project is a construction project in excess of $25,000. The only issue needing clarification is whether the funds involved are "in whole or in part...funds of a public body."

On this issue, you have informed us that the interest on the above loan will be tax-free in accordance with state and federal law. Furthermore, in order to comply with the provisions of such law, it is abundantly clear that the funds involved *must* be public funds which will further a public purpose. See *Basehore v. Hampden Industrial Development Authority*, 433 Pa. 40, 47 (1968). This would be true regardless of whether, as here, the project were financed by revenue bonds floated by the Authority. Given these facts and given the undisputed fact that the funds will be borrowed by the Authority for which it will pledge its credit and must repay in the event of default by the private business corporation, we conclude,

and you are hereby advised, that a construction project financed and carried out as described above is covered by the Pennsylvania Prevailing Wage Act.[1]

Very truly yours,

Mark P. Widoff
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 29

Interest—Residential Mortgages—Vacation Lot Sales—Act No. 6 of 1974.

1. The sale and financing of land does not come within the requirement of "residential mortgage" in Act No. 6 of 1974 that it be property "on which two or fewer residential units are to be constructed," unless the construction of a residence is included or required in the agreement of sale or is provided for in a separate agreement approximately contemporaneous with the agreement of sale.

2. A "residential mortgage" exists even though the transaction may involve a vacation home or second residence.

3. Article III of Act No. 6 of 1974 (involving financing of residential mortgages) may apply to sales of lots where it is determined that a residence is to be constructed if title is transferred to the buyer and a security document given to the seller or other lender to finance the sale.

4. Articles II and III of Act No. 6 of 1974 do not clearly apply to sales of lots where it is determined that a residence is to be constructed where the lot is sold on an installment sale. Legislation is recommended to rectify this situation.

5. Article III of Act No. 6 of 1964 is not merely an exception to Article II. It also covers transactions such as purchase-money mortgages which do not come under Article II.

6. Where a financial institution is intimately involved in the sale of vacation lots, there may be a loan or use of money, and the Department of Banking is urged to keep a close watch on such transactions and determine whether legislation, regulation or litigation is warranted.

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1 It should be emphasized that the rationale of this Opinion applies only where the local authority is required to let bids and becomes a party to the construction contract or otherwise authorizes the public work through a direct undertaking with the contractor or subcontractor. Where the Authority preforms merely a financing function (like the Pennsylvania Industrial Development Authority, see Official Opinion No. 252 of July 25, 1962), the conclusions of this Opinion are not applicable.

Harrisburg, Pennsylvania
June 7, 1974

Honorable Carl Dellmuth
Secretary of Banking
Harrisburg, Pennsylvania

Dear Secretary Dellmuth:

You have requested our opinion regarding the application of Act No. 6 of 1974[1] to sales of land in the so-called vacation home market. Typically, in this type of transaction, a developer subdivides lots, installs certain amenities and recreational facilities, and sells lots to the public. Three main methods of selling and financing these lots have been brought to our attention by the Pennsylvania Vacation Land Developers Association. These are:

(1) a cash sale where the buyer provides his own financing;

(2) a sale under an installment sales contract where title to the land is held by the developer until final payment; and

(3) a sale where title is immediately transferred to the buyer in return for a note in which the buyer promises to pay the balance of the purchase price in installments.

In cases (2) and (3), the developer will normally discount the note or installment sales contract with a bank or other financing institution.

The purpose of Act No. 6 is to reform the general usury law and deal with problems regarding residential mortgages and liens on residential properties. It contains six articles but the only ones we are concerned with here (aside from Article I which contains definitions) are Articles II and III, the former of which is concerned with interest rates generally, and the latter of which concerns interest on "residential mortgages," as defined in the Act. The basic question to be answered is whether Article III applies to these sales of lots. The key to this question is whether the transaction involves a "residential mortgage." If it does, the maximum interest rate is a flexible one which will normally exceed 6%,[2] provided the

1 41 P.S. §101-605, approved on January 30, 1974. Act No. 6 generally retains 6% as the maximum legal rate of interest for loans or use of money in an amount less than $50 000 (Section 201, 41 P.S. §201) but provides for flexible rates of interest for "residential mortgages" based on Long Term United States Government Bond Yields. Section 301(b), 41 P.S. §301(b). Section 604, 41 P.S. §604, excludes all other acts providing special interest rates from the effect of Act No. 6, and the only Act it specifically repeals is the Act of May 28, 1858, P.L. 622, as amended, 41 P.S. §§3-4.

2 The legal rate of interest for June, 1974 under Article III is 9½%. 4 Pennsylvania Bulletin 949. Section 301(f)(ii), 41 P.S. §301(f)(ii) excepts obligations of $50,000 or less from the maximum interest rates provided by both Articles II and III, which are "evidenced by a security document and secured by a lien upon real property, other than a residential mortgage...."

other provisions of Article III are met. See Sections 301(b), (d), 41 P.S. §§ 301(b), (d).

"Residential mortgage" is defined as "an obligation to pay a sum of money in an original bona fide principal amount of fifty thousand dollars ($50,000) or less, evidenced by a security document and secured by a lien upon real property located within this Commonwealth *containing two or fewer residential units or on which two or fewer residential units are to be constructed* and shall include such an obligation on a residential condominium unit." Section 101, 41 P.S. § 101. (Emphasis supplied).

The fundamental question which must be answered in determining whether the vacation land sale transaction comes within this definition is whether it involves real property "on which two or fewer residential units are to be constructed," because, at the time the property is transferred, it is a vacant lot. While it is normally anticipated that a residential structure or some type of building will be constructed, it is often uncertain as to when this will be done, or whether it will be done, since the buyer may elect not to construct any building on the lot. In addition, a question is raised as to whether a vacation home is in fact a "residential unit."

In our opinion, the determining factor is the interest of the lender or seller in the ultimate construction of a "residential unit." This factor is critical not only in the vacation sale transaction, but in any sale of land. Unless the lender is in some way involved in financing the construction of a residential unit, it would be impossible for the lender to ascertain whether a particular vacant lot would meet the criteria of a residential mortgage. A borrower might certify that a residential unit is or is not to be constructed, but the lender could not hold the borrower to such a certification or the borrower might, in good faith, change his mind. We do not believe that Act No. 6 can operate on such uncertainties. We are therefore of the opinion that the residential mortgage provisions were not intended to cover simple land sales, unless the construction of the residence is included either in the agreement of sale or in a separate agreement approximately contemporaneous with the agreement of sale. We note that the definition of "actual settlement costs" in Section 101, 41 P.S. § 101 allows a service charge, which, "in the case of a construction loan" may be as high as 2% of the original principal amount of the loan. It is therefore clear that a "residential mortgage" exists where a lender finances both the sale of the lot and construction of the residence. Where only the financing of the sale of the lot is involved, a "residential mortgage" would nevertheless exist if the agreement requires that a residence be constructed within a certain period of time or states that the

seller or some other contractor will construct a residence. If, on the other hand, these conditions do not exist, or if the agreement or deed specifically states that no residence is to be constructed,[3] then the requirements of a residential mortgage are not met.

Furthermore, in our opinion, the fact that the buyer might be using the property as his second residence or vacation residence makes no difference. In terms of regulation, it would be impossible to make legal distinctions on this variable. Different persons might purchase the same lot. For one, a rustic, it would be his only residence; for another, it might start out as a second residence and become a primary residence. The application of Article III cannot be practically determined by these factors, nor need it be. The definition speaks in terms of whether a "residential unit" is to be constructed, not whether it is the only residence of the individual. Accordingly, so long as the contemplated structure is a residential-type structure, the requirements of this section are met.

Based on the foregoing observations, which can only be general in nature, we recommend the promulgation of regulations by your Department specifying how a determination may be made whether a "residential unit" is "to be constructed" on land.

We next analyze the three main methods of selling and financing, bearing in mind that before Article III can apply to any of them, they must meet the initial hurdle of constituting land on which a residential unit is to be constructed.

(1) *A cash sale where the buyer provides his own financing.*

Where a buyer pays cash, Act No. 6, of course, has no application. Where however, a buyer or seller arranges financing from other than the seller, the transaction would be subject to Article III under the circumstances discussed in (3) *infra.* If it did not meet the requirements of a "residential mortgage," it would be exempt form both Articles II and III under Section 301(f)(ii), 41 P.S. §§301(f)(ii).

(2) *A sale under installment sales contract where title to the land is held by the developer until final payment.*

Upon our review of this type of transaction, we reluctantly conclude that it does not appear to be covered under either Articles II[4]

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3 We are advised that some vacation land sale developments are for camp sites only and *prohibit* construction. Such developments would not be subject to Article III of Act No. 6, nor would they be subject to the limitations of Article II under Section 301(f)(ii), 41 P.S. §301(f)(ii).

4 Our inquiry into the applicability of Article II is necessary because of our conclusion, *infra.*, that this type of transaction is not "secured by a lien upon real property." Accordingly, the exemption from Article II otherwise provided by Section 301(f)(ii), 41 P.S. §301(f)(ii), is not applicable.

or III of Act No. 6. Article II governs the interest rate on "the loan or use of money." Under cases construing the prior usury law, Act of May 28, 1858, P.L. 622 (found, before repeal, at 41 P.S. §3), our courts construed similar language not to include installment sales of merchandise on credit. See *Equitable Credit and Discount Co. v. Geier*, 342 Pa. 445, 455 (1941); *Equipment Finance, Inc. v. Grannas*, 207 Pa. Superior Ct. 363 (1966); *Lansdowne Finance Co. v. Prusky*, 120 Pa. Superior Ct. 555 (1936); *Personal Discount Co. v. Lincoln Tire Co.*, 67 D. & C. 35 (1949); *Melnicoff v. Huber Investment Co.*, 12 D. & C. 405, 407-408 (1929). These cases have never been overruled in Pennsylvania.

The theory of these cases is found in *Geier, supra:* "[i]t being uniformly held that sellers are free to contract with buyers as to the terms and conditions of sales, the financing of sales of merchandise by the extension of credit has never been considered subject to the prohibition of usury or to regulations applicable to banking and loan transactions." 342 Pa. at 455. The parties may thus "...agree on one price if cash is to be paid and upon as large an addition to cash price as may suit themselves if credit be given, and it is wholly immaterial whether the enhanced price is ascertained by the simple addition of a lumping sum to the credit price or by a percentage thereof." *Melnicoff v. Huber Investment Co., supra* at 408. While these cases involve merchandise, the rationale would apply equally to the sale of real property, and interestingly enough, the seminal case espousing this doctrine did involve the sale of real property. *Hogg v. Ruffner*, 66 U.S. 115 (1861).

We do note, with considerable interest, that the effect of these cases has been considerably limited by legislation. The doctrine no longer applies to installment sales of certain goods and services used primarily for personal family or household purposes,[5] installment sales of goods or rendition of services for home improvements,[6] and installment sales of motor vehicles.[7] An extremely interesting question may be raised as to whether the General Assembly, through the passage of these acts, has in effect changed the Common Law of the Commonwealth so as to abolish the doctrine excluding installment sales from usury. See Landis, *Statutes and the Sources of Law*, Harvard Legal Essays 213 (1934).

In addition, courts in other states have abrogated the doctrine in

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5 See Goods and Services Installment Sales Act of October 28, 1966, P.L. 55, 69 P.S. §1101 *et seq.*

6 See Home Improvement Finance Act of August 14, 1963, P.L. 1082, as amended, 73 P.S. §500-101 *et seq.*

7 See Motor Vehicle Sales Finance Act of June 28, 1947, P.L. 1110, as amended, 69 P.S. §601 *et seq.*

recent years[8] and it is possible that our Supreme Court might also do so. While these interesting speculations may be raised, we believe that in our role as the legal advisor to State government,[9] we are bound by the final decisions of Pennsylvania courts. We therefore conclude that there is not a loan or use of money in such transactions and Article II does not apply.

We next turn to whether the transaction is nevertheless covered under Article III of Act No. 5 as a residential mortgage.[10] We face this question because in our opinion, Article III is not simply an exception to Article II, but is rather an independent section governing "residential mortgages" whether or not the transaction involves the loan or use of money. Our reason for this conclusion is the legislative intent found in Section 301(a), 41 P.S. §301(a) to establish a flexible maximum rate for "residential mortgages." While the heading of Article III is entitled "Exceptions to Maximum Lawful Interest Rate," it is not controlling. Section 1924 of the Statutory Construction Act, 1 Pa.S. §1924. Nor is the language in Section 201(a), 41 P.S. §201(a), controlling. That section simply means that Article III is an exception to certain Article II transactions, not that it applies only in transactions which would come under Article II. Otherwise, purchase money mortgages of residential units, which are clearly within the definition of "residential mortgage" and within the legislative intention, but do not involve the loan or use of money under Article II, would not be covered by Article III. In our opinion, therefore, to read Article III as simply an exception to Article II would frustrate the legislative intent.

Turning to the question, however, it is our opinion that the definition of residential mortgage does not clearly cover this transaction. In addition to the question discussed above regarding the construction of a residential unit, we are of the opinion that the requirement that the obligation be secured by a lien upon real property is not met where the seller simply retains title. While it might be argued that the retention of title is the ultimate lien on real property, the statute

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8 The seminal case is *State v. J.C. Penny Co.*, 48 Wis. 2d 125, 179 N.W. 2d 641 (1970). This case was followed in *Rollinger v. J.C. Penny Co.*, 192 N.W. 2d 699 (S.D. 1971) and *State ex rel. Turner v. Younker Brothers, Inc.*, 210 N.W. 2d 550 (Iowa 1973). Other states have declined to follow Wisconsin. See *Johnson v. Sears Roebuck & Co.*, 14 Ill. App. 3d 838, 303 N.E. 2d 627 (1973); *Standard Oil Co. v. Williams*, 288 N.E. 2d 170 (Ind. 1972); *Sliger v. R.H. Macy & Co.*, 59 N.J. 465, 283 A.2d 904 (1971). The most recent cases are collected in *Cecil v. Allied Stores Corp.*, 513 P. 2d 704, 707-709 (Mont. 1973) and in Annot., "Validity and Construction of Revolving Charge Account Contract or Plan," 41 A.L.R. 3d 682 (1970 and supplements). See also, Annot., "Advance in Price for Credit Sale as Compared with Cash Sale as Usury," 14 A.L.R. 3d 1065 (1965).

9 Sections 512, 902 of the Administrative Code of 1929, 71 P.S. §§192, 292.

10 The discussion of this question assumes that the initial hurdle discussed above — that the transaction involves land upon which a residential unit is to be constructed — has first been overcome.

is ambiguous on this score,[11] and we do not believe that it covers such installment sales of real estate where title does not pass. We are further supported in this conclusion by the title of Act No. 6 which nowhere gives notice that it would cover an installment sale of real estate where title is retained.[12] In view of the abuses that the General Assembly has noted in this type of transaction,[13] we recommend that the General Assembly amend Act No. 6 to clarify this situation since persons purchasing under installment contracts are often the persons who most need protection against an excessive rate of interest.

(3) A sale where title is immediately transferred to the buyer in return for a note whereby the buyer promises to pay the balance of the purchase price in installments.

In our opinion, this type of transaction would be covered by Article III of Act No. 6 if the sale involves real property on which a residential unit is "to be constructed," as we defined that term above. Where a seller conveys title to such property to a buyer and takes back either a note or other form of indebtedness covered under the definition of "security document," in our opinion, a "residential mortgage" is created if the other requirements of the definition are met. This type of transaction meets the other requirements of Article III missing in (2) above.

(4) *Involvement of Financial Institutions.*

In all of the above discussions, we have assumed a simple transaction between a seller and a buyer. It is true in the large majority of cases, the seller will then discount the agreement or note with a bank or other financial institution. Nevertheless, based on the cases we have discussed, the mere sale of such agreements or notes does not convert the transaction to a "loan or use of money." However, there may be instances where the financial institution is intimately involved in the entire transaction, as, for example, where a bank or other financial institution agrees with a developer to buy all the developer's sales agreements or loans; where the

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11 The ambiguity in the statute is further enhanced by the requirement in the definition of "residential mortgage" that the obligation be evidenced by a "security document." "Security document" is defined in Section 101 to mean a "mortgage, deed of trust, *real estate sales contract* or other document creating upon recordation a lien upon real estate." (Emphasis added). Normally, a real estate sales contract does not, upon recordation, create a lien upon real estate. Rather, it evidences an equitable interest in favor of the buyer rather than a lien for the purchase price in favor of the seller. While we recognize this further ambiguity, it does not change our position because there may be instances where real estate sales contracts would or could contain provisions favorable to a seller which possibly could create a lien. We recommend this to the General Assembly for further clarification.

12 See Pa. Const., Art. III, § 3.

13 See Installment Land Contract Law of June 8, 1965, P.L. 115, 68 P.S. § 901 *et seq.*, which, however, applies only to Philadelphia and Allegheny Counties, Section 3(a), 68 P.S. § 903(a).

developer guarantees the loan; where the developer uses the forms of the bank; or where the credit of the buyer must be approved by the bank before the developer will sell the property to him on an installment basis. It may be argued that this type of involvement does convert the transaction into a loan or use of money.

There is no prior Pennsylvania appellate case law on this question. The lower court cases reach different decisions without explaining satisfactorily the basis of those differences. Compare *Medical Dental Business Service of New Jersey, Inc. v. Morrison*, 51 D. & C. 552 (1944) and *Professional Service Credit Association, Inc. v. O'Hara*, 40 D. & C. 291 (1940) with *General Motors Acceptance Corp. v. Freeman*, 63 D. & C. 163 (1946). An attempt to explain these decisions is found in *Weaver, Grose, Langhart & May, Inc. v. Myers*, 17 D. & C. 2d 405 (1958). The Court there stressed the facts of each case as being important determinants and distinguished cases involving subsequent sales of paper from those involving the original creation of obligations.

Accordingly, since the law is not clear, we believe that your Department should keep close surveillance on the involvement of financing institutions in these types of transactions so that appropriate action, by way of legislation, regulations or litigation by this office may be instituted where indicated.

We trust the above discussion has been helpful in setting forth some of the parameters of the transactions which come under Act No. 6. We have no doubt but that there will be additional problems which will arise under the Act, and we stand ready to be of such further assistance as we may be called upon to render.

Sincerely,

Gerald Gornish
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 30

Commonwealth Compensation Commission Reports — Cabinet Officials — Federal Wage and Price Freeze Legislation

1. The Reports issued by the Pennsylvania Compensation Commission on June 22, 1972 and November 30, 1972 require that the salaries of selected cabinet officials be increased.

2. The Secretary of Education is and has been entitled to the increases authorized by the June 1972 Commission Report; the Secretary of Education having been appointed after the effective date of that Report.

3. The Secretary of Banking, the Attorney General, the Commissioner of State

Police, the Secretary of Revenue, and the Commissioner of Insurance are entitled to the increases specified in the November 1972 Report of the Commission.

4. There is no constitutional impediment to the payment of these salaries notwithstanding Federal law under wage-price freeze legislation and regulations barred full payment of the salary increases up to April 30, 1974.

Harrisburg, Pa.
June 5, 1974

Honorable Frank Beal
Secretary of Administration
Harrisburg, Pennsylvania

Dear Secretary Beal:

You have asked our opinion as to the effect of the removal of Federal wage-price restrictions on salaries of cabinet level officials of the Commonwealth of Pennsylvania. Specifically, the question presented is: must the Commonwealth give effect to the initial and November 30, 1972 reports of the Commonwealth Compensation Commission enacted into law now that Federal wage and salary restrictions have been removed?

It is our opinion and you are hereby advised that you are required to give effect to the June and November Reports of the Pennsylvania Compensation Commission and accordingly the salaries of six cabinet level officials assuming office after the effective dates of the reports must be raised to the statutory amount. Because of the dates of their appointments, the Secretary of Education must be paid the salary prescribed by the initial June, 1972 Report of the Commonwealth Compensation Commission and the remaining five cabinet officials must be paid the salaries prescribed by the November 1972 Report of the Commission.

The Commonwealth Compensation Commission was established by Act No. 8 of June 16, 1971, 46 P.S. §§5-6, and had the responsibility and duty of making an exhaustive study of the salaries, emoluments, retirement benefits and expense allowances of the Governor, the Lieutenant Governor, the cabinet officers, the State Treasurer and the Auditor General, the Justices and Judges of the Courts of the Commonwealth, and members of the General Assembly. The Act further provided that the Commission was to issue an initial report as soon as practicable and subsequent reports on or before the commencement of each term of the General Assembly. Section 2(b), 46 P.S. §6(b).

The Act also stated:

> "The initial report shall take effect immediately, unless, within sixty days following the date of submission thereof the General Assembly shall, by concurrent resolution reject the report, in whole or part, or enacts legislation as

hereinafter provided in this section. Reports submitted subsequent to the initial report shall take effect and have the force and effect of law at the beginning of the first pay period of said term of the General Assembly or the date of assumption of office of persons affected thereby after such date, unless, within sixty days following the date of submission thereof, the General Assembly shall, by concurrent resolution, reject the said report, in whole or in part, or unless within said period the General Assembly shall enact legislation which establishes a rate of pay or allowance differing from that recommended by said report in whole or in part. That portion of the report which is not inconsistent with the resolution or legislation so adopted shall have the force and effect of law as herein provided."

In response to this legislation the Commission issued its initial report on June 22, 1972 and a subsequent report on November 30, 1972. In the course of preparation of its reports the Commission held hearings, heard testimony from twenty-six witnesses and interviewed numerous other persons. See Report of the Commonwealth Compensation Commission, June, 1972, pp. viii, 28 & 29. (Hereinafter "Report, June 1972"). With respect to cabinet level officials within the Executive Branch, the Commission found that salaries for cabinet level officials had not been increased since 1967, that salaries of other persons in other fields had increased significantly in response to increased costs of living, and that the responsibilities of cabinet level officials had substantially increased as manifested by a doubling of the state budget and a 35 per cent increase in the number of state employees from 1967 to June 1972. Report, June 1972, at p. 13. The November 1972 report reiterated the Commission's earlier findings.

The June 1972 Report recommended salary increases, among others, for cabinet officials. However, on August 15, 1972 by Senate Resolution 100 concurred in by the House, the General Assembly rejected, in part, the report of the Commission to the extent that it provided for increases in salaries in excess of $2,500 for cabinet officials and judges. 2 Pa. Bulletin 1725.

The November 1972 report issued November 30, 1972 recommended salary increases for cabinet officials as follows:

Attorney General	$40,000
Secretary of Education	$40,000
Secretary of Public Welfare	$40,000
Secretary of Transportation	$40,000
Secretary of Environmental Resources	$37,500
Secretary of Health	$37,500
Secretary of Labor & Industry	$37,500
Secretary of Revenue	$37,500

Commissioner, Pennsylvania State Police	$37,500
Adjutant General	$35,000
Secretary of Agriculture	$35,000
Secretary of Banking	$35,000
Secretary of Commerce	$35,000
Secretary of the Commonwealth	$35,000
Secretary of Community Affairs	$35,000
Insurance Commissioner	$35,000
Secretary of Property and Supplies	$35,000

The November Report, not having been rejected or modified within sixty days by the General Assembly became effective per Section 2(b) of Act No. 8, *supra.*[1]

Although it is not clear, it appears that the effective date of the initial report was August 15, 1972, the date of passage of Senate Resolution 100. As noted, Section 2(b) provides that the initial report takes effect immediately unless rejected or modified in whole or in part. Section 2(b) does not clearly indicate the effective date of a modified report or a report rejected in part, but in view of the fact that the Legislature took affirmative action with regard to the report on August 15, 1972, it is only logical and reasonable to assume the report is effective as of the later date.

The effective date of the November Report is December 1, 1972, that date, under the provisions of Section 2(b) dealing with subsequent reports, being the date on which the terms of service for members of General Assembly commence or, in effect, the first day of the first pay period for the General Assembly. See Article II, §2 of the Pennsylvania Constitution.

Subsequent to the corresponding effective dates of the June and November Reports, six cabinet officials were appointed as follows:

(1) Secretary Pittenger, appointed and confirmed as Secretary of Education, November 30, 1972 (Appointed subsequent to the effective date of the initial report but not subsequent to the effective date of the November Report);

(2) Secretary Dellmuth, appointed as an interim appointee as Secretary of Banking, December 30, 1972;

(3) Attorney General Packel, appointed as an interim appointee, January 2, 1973;

(4) Commissioner Barger, appointed as an interim appointee as Commissioner of State Police, January 2, 1973;

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1 By Act No. 57 of July 27, 1973, the General Assembly repealed those provisions of Act No. 8 establishing the Compensation Commission. Since Act No. 57 was passed subsequent to the effective dates of the June and November Reports, those Reports remain unaffected by the repealer in Act No. 57.

(5) Secretary Yakowicz, appointed and confirmed as Secretary of Revenue, February 4, 1974;

(6) Commissioner Sheppard, appointed and confirmed as Insurance Commissioner, April 30, 1974.

All of the above officials presently hold their respective offices. However, due to the wage-price controls imposed under the Federal Economic Stabilization Act and Executive Orders issued pursuant thereto, all but the Secretary of Education have been barred from receiving the statutorily prescribed salaries as set forth in the June and November, 1972, Reports of the Commission.[2] See 37 C.F.R. §24960 *et seq.*, CCH-Wage and Price Reporter §201.94 *et seq.*, QTC 3791 *et seq.*[3] As of April 30, 1974, the Federal wage-price control program has terminated and. with the exception of petroleum products, there are presently no controls on wages, salaries, or prices.

With the lifting of Federal wage-price controls, the first question is does Act No. 8 of June 16, 1971 authorize and require payment of the increased salaries. A reading of the language of the act, quoted above, clearly indicates that as cabinet officials become eligible for their salary increases they are to be paid.

The language states that Reports submitted after the initial report shall take effect at the beginning of the term of the General Assembly for which the Report was submitted or the date of assumption of office of persons affected thereby after the effective date of a Report. The initial report is to take effect immediately. Moreover, Section 3 of Act No. 8 states that the Act shall be applicable to each officer when permitted by the Constitution of the Commonwealth.

With respect to the Secretary of Education, the initial Report of the Commission, effective June 22, 1972, was applicable to him and required that his salary be increased. With respect to the Secretary of Banking, the Attorney General, the Commissioner of State Police, the Secretary of Revenue, and the Insurance Commissioner, the November, 1972 Report is applicable to them, they having taken office after commencement of the term of the General Assembly commencing immediately after the effective

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2 The salaries are, for the Secretary of Education —$32,500 per year; Secretary of Banking—$35,000 per year; Attorney General—$40,000 per year; Commissioner of State Police—$37,500 per year; Secretary of Revenue—$37,500 per year; and Insurance Commissioner—$35,000 per year. As will be discussed more fully below, the salaries of other cabinet officials are not in issue here because of the constitutional prohibition against increasing salaries of officials during their terms of office.

3 These regulations permitted certain yearly increases for the above listed positions. However, despite these allowed increases, the salaries being paid these cabinet officials, with the exception of the Secretary of Education, did not equal the statutorily fixed amount.

date of the November Report.

The only remaining question involves an interpretation of Article III, §27 of the Pennsylvania Constitution which states:

> "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 been suggested that because of the intervention of Federal wage controls which have prevented increases in the salaries of the six cabinet officials in question, which increases would otherwise have been paid under the terms of Act No. 8, the Commonwealth, upon lifting of the controls, cannot now increase the salaries of the six cabinet officials in view of Article III, §27.

A reading of that section indicates that this suggestion is without basis. First, that section states "no law" shall increase or diminish salaries of officials during their term of office. As pointed out above, Act No. 8, and Commission Reports issued and effective under that Act, did not increase salaries, and were carefully drafted to assure that no increase was authorized by law during the term of office of any affected official. See *Baldwin v. City of Philadelphia*, 99 Pa. 164 (1911).

Secondly, the intervention of a higher authority, i.e., the Federal Government and its economic stabilization program, merely suspended, by virtue of Federal supremacy in the field of wages and prices, the effect of Act No. 8 and Reports issued pursuant thereto. Article III, §27, is concerned with "salary grab" legislation enacted by the General Assembly to increase salaries before the voters have a chance to speak on the subject. See *In re Hadley*, 336 Pa. 100 (1939). Viewed in this light, Article III, §27 does not operate to prohibit salary increases authorized by legislation tailored to avoid the prohibitions of Article III, §27 but suspended by subsequent federal action.

Finally, the Federal Economic Stabilization Program can be viewed as diminishing the salaries of cabinet officials during their term of office, a result, if imposed by state legislation, condemned by Article III, §27. As noted above, six cabinet officers had their salaries properly increased prior to the commencement of their term. The Federal wage controls barred, in part, those salary increases. It would be grossly unfair, and certainly violative of the spirit of Article III, §27 now to say that because of intervention of the Federal Government those salaries must remain at the lesser level.

Pursuant to Section 512 of the Administrative Code, 71 P.S. §192, we have requested comments from the Treasurer and Auditor General. We received their comments which are concerned with the effect of Senate Resolution 100 on the June, 1972 Report and the

effective date of the November Report. We concur in these comments and the opinion has been revised accordingly.

CONCLUSION

It is our conclusion and you are hereby advised that with the termination of Federal wage controls on April 30, 1974 you must carry out the mandates of Act No. 8 of June 16, 1971 and Reports issued pursuant thereto, and increase the salaries, effective May 1, 1974, of the cabinet officials appointed subsequent to the effective dates of those reports.[4]

Very truly yours,

Peter W. Brown
First Deputy Attorney General

OFFICIAL OPINION No. 31

Workmens' Compensation Appeal Board—Reimbursement for Expenses—Approval by Labor and Industry required.

1. The Workmens' Compensation Appeal Board, as a departmental administrative board, must submit requests for expense reimbursement to the Department of Labor and Industry for approval.

2. The Department of Labor and Industry must render its approval decision in accordance with the broad policies of the Executive Board Regulations rather than the specific requirements of these regulations.

3. These broad policies include, inter alia, reimbursement only for amounts actually expended and review and audit by the Department to which a board is assigned.

Harrisburg, Pa.
June 11, 1974

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

Dear Secretary Smith:

You have requested our opinion as to the responsibility of the Department of Labor and Industry for the approval of the expense accounts of the members of Workmens' Compensation Appeal Board (hereafter Board).

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4 The Attorney General being directly affected by this opinion took no part in its preparation or issuance.

It is our opinion that, subject to the restrictions noted below, the Board must obtain the Department's approval before reimbursement can be made.

The Board is a departmental administrative board under Section 202 of the Administrative Code, 71 P.S. §62. As a departmental administrative board, it must turn to the Department of Labor and Industry in all matters involving expenditures of money. This is set forth in Section 503 of the Administrative Code, 71 P.S. §183 which states:

> "But in all matters involving the expenditure of money all such departmental administrative boards and commissions shall be subject and responsible to the departments with which they are respectively connected."

Under Section 216 of the Code 71 P.S. §76 a departmental administrative board must make requisition to the department with which it is associated for expense money and that requisition is subject to the approval of that department. However, the full text of Section 216 of the Administrative Code when read with 4 Pa. Code §40.2 seems to establish a contradiction in the determination of the authority of your department over the expenses of the Workmens' Compensation Appeal Board. Section 216 begins, "Subject to the rules and regulations of the Executive Board, the heads of administrative departments...the members of departmental administrative bodies, boards, and commissions...shall be entitled to receive their travel and other necessary expenses actually incurred in the performance of their public duties...." 4 Pa. Code §40.2 reads:

> "All employees under the jurisdiction of the Governor except...paid and non-paid members of duly authorized boards...are subject to these regulations."

It is the position of the Workmens' Compensation Appeal Board that these two sections exempt the Board from the approval procedures of the Department of Labor and Industry as regards their expense accounts. However, it is our opinion that these two sections do not create such an exemption and, as explained below, the Board is subject to the approval of the Department of its request for expense allowances.

The analysis must begin with a look at several sections of the Administrative Code. Section 503 of the Code, cited above, specifically requires that all departmental administrative boards shall be subject and responsible to the departments with which they are respectively connected in matters involving the expenditure of money. It adds that the departments may inspect records of the boards to enable them to pass upon the "necessity and propriety of any expenditure or proposed expenditure." In Section 216 of the

Code administrative boards are specifically required to make requisitions for expense reimbursements to the department with which they are associated and that department must render its approval of the requisition before payment can be made. In view of this clear requirement of the Administrative Code, we must interpret the qualifying phrase at the beginning of Section 216 of the Code, i.e. "subject to the rules and regulations of the Executive Board" to modify and refer only to the part of the sentence which immediately follows that phrase, and not to the last clause providing for departmental approval.

Chapter 40 of Title 4 of the Pennsylvania Code sets forth Executive Board regulations on the reimbursement for travel and subsistence expenses. Pursuant to the phrase at the beginning of Section 216 of the Code, the Executive Board has exempted members of departmental boards from these regulations concerning expense reimbursement. However, in recognition of the above-quoted sections, which still require the approval of the department with which the board is associated, the Executive Board added Section 40.2(b) which states, "those exempted from these regulations are nevertheless expected to observe the policies set forth in this chapter and to limit requests for reimbursement to reasonable amounts consistent with fulfilling the duties of their position." The policies set forth in this chapter, which the exempted board members are expected to observe, include reimbursement only for amounts actually expended (40.3(b)) and the fact that all travel and subsistence expenses are subject to audit by the department including a review of the propriety of the expenses incurred. (Section 40.5(b)).

The overall scheme of these provisions is as follows. Although members of the Workmens' Compensation Appeal Board, as one of the departmental administrative boards, are not subject to the specific provisions of Chapter 40 of the regulations for reimbursement for travel and subsistence accounts, they are subject to the broad policies set forth in that chapter which include a review and approval by the department to which the board is assigned. In addition, two sections of the Administrative Code require that the department review and approve, if proper, the reimbursement for requisitioned expenses. Therefore, the department has the duty to review the requested expense reimbursement for members of the Board in order to determine whether these expenses are proper in light of the general policies of the Executive Board, keeping in mind that only expenses actually incurred in the performance of their duties may be lawfully reimbursed. The department is not to follow the specific requirements of Chapter 40 in making its determination but should apply a standard of reasonableness as described above. Also any refusal to reimburse must not be made arbitrari-

ly, so that the department must apply with care the above noted policies.

Very truly yours,

Larry B. Selkowitz
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 32

Foster Family Care—Adjudication—Administrative Agency Law—Local Agency Law

1. The decision to terminate a long-term foster placement on the grounds that the foster home is unsuitable, as measured by standards and evaluations required by the Department of Public Welfare, is an "adjudication" within the meaning of the Administrative Agency Law, 71 P.S. §1710 *et seq.* or, in the alternative, the Local Agency Law, 53 P.S. §11302 *et seq.*

2. Reasonable notice of a right to a hearing must be provided long-term foster parents before termination of their status because of the unsuitability of the home for continued placement.

Harrisburg, Pa.
June 11, 1974

Honorable Helene Wohlgemuth
Secretary of Public Welfare
Harrisburg, Pennsylvania

Dear Secretary Wohlegemuth:

The question has been raised as to whether a long-term foster placement may be terminated without affording an opportunity to the foster parents and child of a hearing at which they could challenge the accuracy or sufficiency of the reasons given for the termination and at which the interests of the child in the family relationship can be examined and determined. It is our opinion, and you are so advised, that long-term foster parents and children have sufficient personal and property interests in a continuing family relationship to have a right, as delineated below, to a hearing before a foster child is removed by an agency subject to the jurisdiction of the Department of Public Welfare.

In Pennsylvania, deprived or delinquent children are frequently placed by the court with a public or private child welfare agency. See The Juvenile Act of 1972 (Act 333), 11 P.S. §50-321. These agencies have broad authority to care for the child (11 P.S. §50-327), and they are subject to regulation by the Department of

Public Welfare. See 62 P.S. §§901, 902, 911 and 2301. It is these agencies that commonly place children in foster homes and supervise their care in such homes.

The Department of Public Welfare controls the relationship between the placing agencies and the foster homes by written regulations. Title 4300, "Foster Family Care Under Social Service Auspices." These regulations require agencies to have:

> "[Written] policies and procedures governing the recruitment of foster homes [and] the standards on which homes are evaluated." §4310(a).

Each home must be evaluated as to its suitability as a foster home both before and during placement. Sections 4312(a), (c), (d)(3) and 4331(a). The regulations also require the agency to have a written agreement with the foster parents "setting forth the terms of placement." Section 4341(1). If the foster parents do not meet the requirements of the agency, workers from the agency must assist them to meet agency standards. Section 4342(2). The agency may remove a foster child if it determines the home is unsuitable for continued placement. Sections 4312(e), 4333(6).

Thus, when a foster placement is terminated because the home is found to be unsuitable, the termination is a complex combination of departmental and local agency action. The standards may be defined by the local child welfare agency, and the evaluation may be conducted by this local authority. But the standards and the evaluation are mandated by the Department. In addition, the preparations for the termination are mandated by the Department. Sections 4333(1), (6); 4342(4). It is our conclusion that, whether the action is viewed as an act of the Department or as an act of the local agency, a hearing is required.

If a termination is viewed as an action of the Department, the Administrative Agency Law applies because that Act defines "agency" to mean:

> "[A]ny department, departmental administrative board or commission,...officer or other agency of this Commonwealth, now in existence or hereafter created, having statewide jurisdiction, empowered to determine or affect private rights, privileges, immunities, or obligations by regulations or adjudication...." 71 P.S. §1710.2(b).[1]

This Act provides that:

> "No adjudication shall be valid as to any party unless he shall have been afforded reasonable notice and an opportunity to be heard. All testimony shall be stenographically

1. See also 71 P.S. §1710.50(48).

> recorded and a full and complete record shall be kept of the proceedings." 71 P.S. §1710.31.

A termination of a long-term foster placement is an "adjudication" within the meaning of the Act because that term is defined as follows:

> "...any final order, decree, decision, determination, or ruling by an agency affecting personal or property rights, privileges, immunities or obligations of any or all of the parties to the proceeding." 71 P.S. §1710.2(a).

The termination of an established foster placement is a decision that affects personal privileges, rights and obligations that arise out of the family relationship, contractual rights, and state regulations.[2] See Departmental Regulations cited above. Further, such a termination affects the right to the care, custody and companionship of the child, rights that have long been recognized by the U.S. Supreme Court as fundamental. *May v. Anderson*, 345 U.S. 528, 533 (1953); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972). It also affects the right of the child to a continuing family relationship, a right recognized by state statute and regulation.[3] See 11 P.S. §50-101(b)(1), (3); Title 4300 DPW Manual §4302(a). We do not believe that rights growing out of the fundamental family relationship are less significant merely because the parent is a foster parent rather than a natural parent. A foster parent or a foster child necessarily developes the same feelings of love and loyalty as a natural parent or child, and, indeed, departmental regulations state that a major goal of foster care is to provide "experiences in family living which are essential to the [child's] constructive growth and development when their own parents are unable to provide this." Section 4302(a). Moreover, when the family relationship is at stake, the Supreme Court has looked to the reality of the emotional bonds, not to formalities. *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968). In short, there can be little doubt that a decision affecting a long-term foster placement is a decision that affects "rights, privileges, immunities or obligations," and must therefore be considered an adjudication within the meaning of the Administrative Agency Law.

If the termination is viewed as an action of the local agency, a hearing is required by the Local Agency Law. This Act defines

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2. Agency action that results from an alleged violation of departmental regulations normally gives rise to a right to a hearing when that action directly affects personal rights or privileges. See, e.g., *Commonwealth v. Taylor*, 93 Dauph. 48 (1970); *Sharp's Convalescent Home v. Dept. of Public Welfare*, 7 Pa. Commonwealth Ct. 623 (1973).

3. Although the child welfare agency, as legal custodian, can be expected to attempt to represent the interests of the child, the agency necessarily develops its own interests and perspectives, and the child should not be precluded from asserting his own felt needs.

"local agency" as:

> "Any department,...independent administrative board or commission, officer or other agency of a political subdivision...empowered to determine or affect private privileges, immunities or obligations by adjudication...." 53 P.S. §11302(2).

When the child welfare agency is a county agency, there can be no doubt that it is an agency of a political subdivision within the meaning of this Act. Cf. *Appeal of Bowers*, 219 Pa. Superior Ct. 269 (1971). When the child welfare agency is a private agency, it carries out county functions insofar as it places children in foster homes and terminates such placements because the home is unsuitable. 62 P.S. §§2301(a), (d), (i); 2305; 2309; 2251, 11 P.S. §§272, 303. Because private placement agencies receive public funds and carry out a function assigned by law to the counties, they should be treated as agencies "of a political subdivision" within the meaning of the Local Agency Law insofar as their placement function is regulated by the Department of Public Welfare.

The Local Agency Law defines "adjudication" substantially as does the Administrative Agency Law. 53 P.S. §11302(1). And, in language substantially identical to that of the Administrative Agency Law, the Local Agency Law requires notice and an opportunity to be heard before an "adjudication" of a local agency can be valid. 53 P.S. §11304.

Therefore, we conclude that the Administrative Agency Law and the Local Agency Law require the Department to assure a due process hearing to foster parents before the removal of a foster child because of the alleged unsuitability of the home as measured by departmentally required standards and agreements. We have attached for your convenience a proposed draft of an amendment to the Department's regulations that would fully satisfy the requirements of State law. You will note that we do not believe a truly temporary foster placement necessarily gives rise to a sufficiently direct interest in the foster parent to require a right to a hearing. Nor is a prior hearing required where the child is being abused physically or where his removal is caused by court order.[4]

Although this Opinion is based on the Administrative Agency Law and the Local Agency Law, there is also a serious issue as to whether the due process clause of the Fourteenth Amendment to the United States Constitution also requires notice of the right to a hearing before termination of long-term foster placement. See, e.g., *Perry v. Sinderman*, 408 U.S. 593 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). Compliance with this

4. Only "*reasonable* notice of a hearing and *an opportunity* to be heard" are required by the statute.

Opinion, therefore, will help to prevent needless constitutional litigation against the Department of Public Welfare.[5]

We recognize that this Opinion will require some adjustment in traditional practice and attitude. The Department does, however, have significant experience with the provision of hearings in the area of public assistance benefits, and this experience can easily be of utility in the foster care area. A right to a notice of a prior hearing will remedy many potential abuses. See Levine, "Caveat Parens, A Demystification of the Child Protection System," 35 *U. of Pitts. L. Rev.* (1973). It will cause child welfare agencies to rely only on substantial information and to weigh carefully a decision that affects human feelings and development in fundamental ways. Cf. *Beyond the Best Interests of the Child*, Freud, Goldstein and Solnit (Free Press, 1973). In our opinion, the Administrative Agency Law, or, in the alternative, the Local Agency Law, requires the promulgation by the Department of regulations substantially similar to the proposed rules attached as Appendix "A".

Very truly yours,

Robert F. Nagel
Deputy Attorney General

Israel Packel
Attorney General

APPENDIX A

Title 4300 of the Children and Youth Manual of the Department of Public Welfare, entitled "Foster Family Care Under Social Services Auspices" is amended by the addition of the following provisions:

4335 TERMINATION OF PLACEMENT

A. No child who has been placed in one home for longer than six (6) months shall be removed from that foster home on the grounds that the home is no longer suitable for continued placement unless:

1. The standards for evaluation of homes required by Section 4311(A) have been provided to the foster parents; and
2. Any alleged inadequacies in the home have been specially communicated to the foster parents, and the worker assigned to the foster home has attempted to assist the foster parents in overcoming these inadequacies pursuant to Section 4332(2); and
3. Substantial evidence of inadequacies in the home continue

5. Litigation raising precisely this constitutional issue has been recently filed in Federal court in New York City.

to exist after the efforts required by subsection (2) of this Section; and
4. The requirements of Sections 4333 and 4342(4) have been fully complied with; and
5. The foster parents have been informed in writing that, upon their written request, a hearing before an officer assigned by the Department of Public Welfare pursuant to the Administrative Agency Law, 71 P.S. §1710.1, *et seq.*, will be held in order for the foster parents to challenge the accuracy or sufficiency of the reasons given for the proposed termination. This notice must conform to the form designated by the Secretary and must include:

(a) A statement that the foster parents may be represented by legal counsel or other representative of their choice at the hearing.
(b) A statement as to the purpose of the hearing as defined herein.
(c) The address of the office as designated by the Secretary to which a demand for a hearing must be sent.
(d) A statement that the hearing will be held before the termination of the placement.
(e) A statement that failure to demand a hearing within one (1) week of receipt of the notice will be a waiver of any rights under this Section.

B. Notwithstanding any other provision of these regulations, a child may be removed from a home without a prior hearing if:

1. The removal is necessary because of a condition, limitation, or revision of any Court order authorizing the placement of the child; or
2. The removal is immediately necessary to protect the child from significant physical mistreatment or abuse, and the foster parent is informed of his right to a hearing to be provided after the termination if demanded within one (1) week of the removal.

OFFICIAL OPINION No. 33

Department of State — County Code — County Reclassification —Certification by the Governor

1. The advance in classification of a seventh class county which elects to be a county of the sixth class pursuant to Section 210(6) of the County Code of August 9, 1955, P.L. 323, as amended, 16 P.S. §210(6), is not governed by the procedures set forth at Sections 211(b) and 211(c) of the County Code.

2. For classification purposes, the population of a seventh class county which elects to be a sixth class county pursuant to Section 210(6) of the County Code is to be determined only by reference to the decennial United States Census.

3. Such a change in classification does not require certification by the Governor as provided in Section 211(b) of the County Code, but is effectuated by the passage of an ordinance or resolution by the Board of County Commissioners.

4. Such a change in classification is effective immediately upon passage of said ordinance or resolution.

Harrisburg, Pa.
June 28, 1974

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

Dear Secretary Tucker:

Your office has requested our opinion as to the procedure to be followed in certifying a seventh class county's advance in classification to the sixth class when it exercises its option to so advance pursuant to Section 210(6) of the County Code of August 9, 1955, P.L. 323, as amended, 16 P.S. §210(6). Section 210(6) provides that Sixth Class Counties are:

> "...those having a population of 45,000 and more but less than 95,000 inhabitants and those having a population of 35,000 and more but less than 45,000 inhabitants which by ordinance or resolution of the Board of County Commissioners elect to be a county of the sixth class."

The option for counties with a population of 35,000 but less than 45,000 was added to Section 210 by the Act of September 9, 1971, P.L. 458 No. (107).

Prior to Act No. 107 of 1971, advancement in classification was always automatic for any county whose population, based upon the decennial United States Census, had increased sufficiently to warrant placing it in a higher class. The procedure governing this advance in classification is set forth at Section 211(b) of the County Code, 16 P.S. §211(b):

> "Whenever it shall appear by any such census, that any county has attained a population entitling it to an advance in classification...as herein prescribed, it shall be the duty of the governor under the great seal of this Commonwealth, to certify that fact accordingly, to the board of county commissioners on or before the first day of October of the year succeeding that in which the census was taken or as soon thereafter as may be, which certificate shall be forwarded by the Commissioners to the recorder of deeds and be recorded in his office."

The change of class becomes effective "on the first day of January

next following the year in which the change was so certified by the governor." 16 P.S. §211(c).[1]

Based on the results of the 1970 Census, seven counties qualified to exercise the option accorded by the Act of 1971 to become sixth class counties. Tioga and Huntingdon Counties each passed resolutions in 1971 electing to become sixth class counties, and shortly after each so notified the Commissioner of Elections, the Governor certified the reclassification of sixth class status.

Bedford County passed a resolution on August 22, 1972 electing to become a sixth class county, but heretofore has not so notified the Department of State, and the Governor has not certified its reclassification. Elk County passed a similar resolution on November 2, 1973, and notified the Department of State on February 4, 1974, and by so doing raised the whole question of proper certification procedure. The Governor has consequently not yet certified the change in status of Elk County.

Three counties, Clarion, Clinton and Greene, qualified to exercise the option, but have not done so.

Because Act 107 failed to delineate the exact procedures to be followed by a county which desires to exercise the option, the above circumstances raise the following questions:

1) May a county lacking the requisite population according to a decennial census nevertheless change its classification during a decade if it finds that its population has risen above 35,000?

2) May a qualified seventh class county exercise its option at any time, or is it bound to act in accordance with the time frame established in Section 211(b)?

3) Is certification by the Governor required to effectuate the purpose of Section 210(6)?

4) What are the present classifications of the seven counties whose population according to the 1970 Census entitled them to sixth class status?

---

1 Although Section 211 of the County Code imposes these duties upon the Governor, the Secretary of the Commonwealth obtains the census information and accordingly prepares the county classification certificate for the Governor's signature, pursuant to Section 703 of the Administrative Code, 71 P.S. §243, which reads:

"The Secretary of the Commonwealth shall:...

(c) Keep the seal of the Commonwealth, and shall affix it to all public instruments to which the attestation of the Governor's signature now is or may hereafter be required by law."

In the absence of any language to the contrary in Act 107, Sections 210(6), 210(7) and 211 of the County Code must be read *in pari materia*. Section 1932 of the Statutory Construction Act, 1 Pa. S. §1932, instructs that "(s)tatutes or parts of statutes are in pari materia when they relate to the same persons or things or the same class of persons or things," and therefore are to be construed together. Section 210 mandates the nine classes of counties in the Commonwealth, and Section 211 prescribes by what reference those classes shall be established and the procedure by which a change in classification shall be accomplished.

The language of Section 211(a), which was drafted to deal with the automatic reclassification of counties, is broad enough to encompass the more fluid circumstances arising out of a county's exercise of its option under Section 210(6). The standard of county classification is population size, and the one uniform measuring rod that applies to all counties is the decennial census. Moreover, Section 211(a) is unqualified in its requirement that county classifications "shall be ascertained and *fixed* according to their population by reference from time to time to the decennial United States Census...." (Emphasis supplied.) To be sure, a county's population will change in the course of a decade, but for classification purposes, it is fixed by the census. Only in this way can the General Assembly legislate consistently with regard to any given county from one decennial census to the next. Accordingly, a county is not entitled by Section 210(6) to sixth class status if it acquires the requisite population *after* the census has been taken.

However, we are of the opinion that Section 210(6), rather than Section 211(b), governs the procedure by which a seventh class county exercising the option may acquire sixth class status. Section 211(b) is directed to the more frequent circumstance where the sole criterion for advance in classification is the attainment of the requisite population as measured by the decennial census. The certification of the governor is automatic, and constitutes the final imprimatur of change.

For seventh class counties having a population of 35,000 or more but less than 45,000, the General Assembly has seen fit to provide another procedure: that of local ordinance or resolution. This procedure conflicts with that prescribed by Section 211(b), and requires reference to Section 1936 of the Statutory Construction Act, 1 Pa. S. §1936, which states:

> "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."

Since Act 107 was enacted in 1971, while Section 211(b) became law much earlier, in 1955, the provisions of Section 210(6) must control.

Moreover, unlike Section 211(b), which requires the certification process to be completed by the first day of October of the year following the census, no such restriction is present in Section 210(6). In providing the option to certain seventh class counties, the General Assembly apparently concluded that the decision of whether or not to exercise the option warranted more time than was allotted by Section 211(b), and should be available without restriction as to time. Accordingly, a county which is qualified to exercise the option provided by Section 210(6) is not limited as to when that option must be exercised, and it may pass the appropriate ordinance or resolution at any time during the ensuing decade. As an administrative matter, once such a county exercises its option, it should notify the Department of State so that prior records indicating seventh class status may be brought up to date.

Our conclusion is supported by Pennsylvania case law. In *Commonwealth ex rel. Woodring v. Walter*, 274 Pa. 553, 555-56 (1922), the Supreme Court held that:

> "...Changes in classification are not permissible until there has been a legal ascertainment of the fact of increase (citing cases)....In some instances the way in which this shall be determined is expressly designated, as by a certificate of the governor in case of cities affected by a change in population (Act of May 8, 1889 [P.L. 133]), and similarly in the case of counties, since the passage of the Act of July 10, 1919 (P.L. 887). Some other method may be provided by law, as by a local tabulation...."

For all other counties except those entitled to exercise the option, the Governor's certification constitutes the legal ascertainment of the fact that they are entitled to, and are accordingly granted, an advance in classification. With regard to counties exercising the option, the requisite legal ascertainment is accomplished by the ordinance or resolution of the Board of County Commissioners.

The above reasoning applies as well to the applicability of Section 211(c) regarding the effective date of the change in classification. While Section 210(6) is silent as to effective date, Section 211(c) refers back to Section 211(b) and provides:

> "Changes of class ascertained and certified as aforesaid shall become effective on the first day of January next following the year in which the change was so certified by the governor to the county commissioners...."

Since ascertainment of the classification change at issue is carried out pursuant to Section 210(6) and not Section 211(b), that portion of Section 211(c) dealing with the effective date of change conflicts with Section 210(6) and cannot be said to control. In the absence of any other statutory provision determining the effective date of a change under the option provision, we are constrained to follow the

holding of the Supreme Court in *Commonwealth ex rel. Woodring v. Walter, supra,* which held that "any change becomes effective only as of the date when it is officially ascertained." 274 Pa. at 557. Under Section 210(6), therefore, the change in classification of a county exercising the option becomes effective on the date that the ordinance or resolution effectuating such a change is passed.

In light of the foregoing, the status of the seven counties enumerated above is as follows:

1) Tioga and Huntingdon Counties are sixth class counties, having both passed the resolution required by Section 210(6).

2) Similarly, Bedford and Elk Counties are sixth class counties, the effective dates of the changes in classification being August 22, 1972 and November 2, 1972 respectively, the dates on which the respective resolutions were passed.

3) Clarion, Clinton and Greene Counties remain seventh class counties. However, under the above analysis, these counties retain the right to exercise the option afforded them by Section 210(6) at any time prior to the publication of the next decennial census.

In conclusion, it is our opinion, and you are hereby advised, that changes in county classification pursuant to Section 210(6) of the County Code are subject to the provisions of Section 211(a) of the Code but not governed by the procedures delineated by Sections 211(b) and 211(c). Such changes in classification are implemented by ordinance or resolution of the Board of County Commissioners, effective upon passage, and may take place at any time subsequent to the publication of one decennial census and prior to the publication of the next.

Sincerely,

Melvin R. Shuster
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 34

Optional, Alternate Retirement Program for State Employees — Meaning of "School Employees" — Number of Plans — Authority to Approve — State Employees' Retirement Code, Act No. 31 of 1974, 71 P.S. §5301(a)(12).

1. The term "school employees" within the context of Section 5301(a)(12) of the State Employees' Retirement Code, Act No. 31 of 1974, 71 P.S. §5301(a)(12), encompasses any officer or employee of the Department of Education, State-owned

educational institutions, community colleges, or the Pennsylvania State University.

2. More than one such plan may be established under the authority of this Act.

3. The employing agency head has the authority to approve such an independent retirement program.

Harrisburg, Pa.
July 2, 1974

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

Dear Secretary Pittenger:

You have requested our opinion on two questions in relation to the meaning of Section 5301(a)(12) of the State Employees' Retirement Code, Act No. 31 of 1974, 71 P.S. §5301(a)(12):

> (1) What is the meaning of the words "school employees" within the context of the section?
>
> (2) Does the phrase, "an approved independent retirement program," allow the establishment of more than one plan with different contractors?

You are advised that:

> (1) The term "school employees" encompasses any officer or employee of the Department of Education, State-owned educational institutions, community colleges, and the Pennsylvania State University.
>
> (2) More than one plan may be established under the authority of this Act.

The section in question (Chapter 53, Section 5301) provides:

> "(a) Membership in the system shall be mandatory as of the effective date of employment for all state employes except the following:
>
> * * *
>
> "(12) School employes who have elected membership in an approved independent retirement program, provided that in no case shall the employer contribute on account of such elected membership at a rate greater than the employer normal contribution rate as determined in Section 5508(b)."

Legislation providing for an optional, alternate retirement

program was originally promoted by APSCUF/PAHE on behalf of the faculty members which it represents. The current collective bargaining agreement between APSCUF/PAHE and the Commonwealth, effective during the period of November 2, 1971 to August 31, 1974, provides that, "the parties hereto agree to jointly recommend and support legislation granting FACULTY MEMBERS the option of participating in the TIAA-CREF retirement plan...."

Senate Bill 193 of 1973 was introduced "[to create] an optional alternate retirement program for employes of the Department of Education, Pennsylvania State University, Indiana University of Pennsylvania and State Colleges." Senate Bill 194 of 1973, introduced to amend the Public School Employes' Retirement Code of June 1, 1959, P.L. 350, as amended, 24 P.S. §3201, contained limiting words: "eligibility for which is limited to faculty members and certain other designated employes and officers...." Senate Bill 195 of 1973 was introduced to amend the former State Employees' Retirement Act and contained the same limiting language. All of these bills have stayed in committee.

Act No. 31 is not similarly limited in its language. Section 5301(a)(12) allows the option to "[s]chool employees who have elected membership in an approved independent retirement program...." The term "school employees" is not otherwise defined in the Act. It is defined in the Public School Employes' Retirement Code as a broadly inclusive term, covering any member of the staff of a public school or any person engaged in any work concerning or relating to a public school. Act of June 1, 1959, P.L. 350, as amended, 24 P.S. §3102. But Act No. 31 considers the retirement of State employees only; therefore the term "school employees" is limited in this context by the definition of "State employees" and is not the same as the definition in the Public School Employes' Retirement Code. Section 5102(1), 71 P.S. §5102(1), defines State employees in part as "[any officer or employee of] the Department of Education, State-owned educational institutions, community colleges, and the Pennsylvania State University...." Accordingly, even though this legislation was originally promoted by APSCUF/PAHE on behalf of the faculty members which it represents, we are of the opinion that the scope of the present legislation should be no more limited than it is by the applicable section of the definition of "State employees" under Act No. 31 of 1974.

Concerning the second question you have raised, although the APSCUF/PAHE contract directs itself exclusively to the TIAA retirement system, the legislation is broad in its terms, referring only to "an approved independent retirement program." The word "an" here is used in the context "any." The whole purpose of the section is to allow options and that intention would be frustrated by allowing the establishment of only one such plan, Moreover, no standards are set forth to guide in the choice of the "one." Accordingly,

we conclude that more than one optional retirement program is allowed.

A third question arises with the consideration of the two questions already discussed. That is: Who has the authority to approve such an independent program? The Rules and Regulations proposed by the State Employees' Retirement Board construe approval to be by the employing agency head. 4 Pa. B. 1236. We see no reason, at present, to overrule this proposed regulation.

We hope the above explanation has been of assistance to you and we stand ready to answer further questions if called upon to do so.

Sincerely,

Gerald Gornish
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 35

Education — Physical Education — State Board of Education — Interscholastic Athletics — Intramural Athletics — Jurisdiction.

1. The State Board of Education has the power to promulgate regulations regarding physical education programs in the public schools as part of its authority to promulgate rules and regulations regarding the curriculum to be taught in the public schools. 24 P.S. §§13-1327, 15-1511, 71 P.S. §§367, 369.

2. Section 511 of the Public School Code of 1949 does not confer exclusive jurisdiction in the area of physical education upon local school boards.

3. The authority to regulate in the area of physical education is shared by the local school boards and the State Board of Education.

4. Intramural and interscholastic athletics are an integral part of the physical education program of the public schools, and, as such, are part of the overall curriculum.

5. The intention of the Legislature is manifest that each local governing board is given the authority and discretion to manage the day-to-day operation of our schools in the area of physical education subject to the board principles and standards enunciated by the State Board of Education.

Harrisburg, Pa.
July 2, 1974

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

Dear Secretary Pittenger:

You have asked our opinion with respect to whether certain sections of proposed State Board of Education regulations (recently circulated by the Department of Education as Basic Education Circular No. 93), which would affect physical education programs in our public schools and which would regulate in the area of intramural and interscholastic athletics, may be lawfully adopted by the Board or whether such regulations are beyond the Board's jurisdiction.

I.

In order to answer the question you have raised, it is necessary to consider the relevant statutory background.

Section 511 of the Public School Code of March 10, 1949, P.L. 30, as amended, 24 P.S. §5-511 provides, in relevant part as follows:

> Rules and regulations governing athletics, publications, and organizations
>
> (a) The board of school directors in every school district shall prescribe, adopt, and enforce such reasonable rules and regulations as it may deem proper, regarding (1) the management, supervision, control, or prohibition of exercises, athletics, or games of any kind, school publications, debating, forensic, dramatic, musical, and other activities related to the school program, including raising and disbursing funds for any or all of such purposes and for scholarships, and (2) the organization, management, supervision, control, financing or prohibition of organizations, clubs, societies and groups of the members of any class or school, and may provide for the suspension, dismissal, or other reasonable penalty in the case of any appointee, professional or other employe, or pupil who violates any of such rules or regulations.
>
> (b) Any school or class activity or organization thereof, with the approval of the board, may affiliate with any local, district, regional, State, or national organization whose purposes and activities are appropriate to and related to the school program.

> (b.1) Private schools shall be permitted, if otherwise qualified, to be members of the Pennsylvania Interscholastic Athletic Association.

This section clearly reflects the basic principle reflected throughout the 1949 School Code (see, e.g., §§301, 501) that the day-to-day operation and management of our public schools is vested in the governing boards of our local school districts.

But the Legislature has seen fit to superimpose upon this basic governance structure an administrative body having state-wide jurisdiction in many areas relating to our public schools — namely, the State Board of Education. One of those areas is the regulation of the educational program.

Section 1327 of the School Code provides in relevant part as follows:

> Every child of compulsory school age having a legal residence in this Commonwealth, as provided in this article, and every migratory child of compulsory school age, is required to attend a day school in which the *subjects and activities prescribed by the standards of the State Board of Education are taught in the English language.* (Emphasis added.)

Section 1511 provides:

> In every elementary public and private school, established and maintained in this Commonwealth, the following subjects shall be taught, in the English language and from English texts: English, including spelling, reading and writing, arithmetic, geography, the history of the United States and of Pennsylvania, civics, including loyalty to the State and National Government, safety education, and the humane treatment of birds and animals, health, *including physical education,* and physiology, music and art. *Other subjects shall be taught in the public elementary schools and also in the public high schools as may be prescribed by the standards of the State Board of Education.* (Emphasis added.)

Section 1319 of The Administrative Code of 1929, P.L. 177, as amended, 71 P.S. §369 provides in relevant part:

> (a) The State Board of Education shall engage in a constant review and appraisal of education in the Commonwealth. The board's evaluation shall take into account such matters as educational objectives, alternative organizational patterns, alternative programs of study, and the operating efficiency of the educational system. The chairman of the State Board of Education shall refer all studies and investigations to one of its councils as

hereinafter provided, and shall receive and place on the board's agenda the findings and recommendations of the councils for appropriate action by the board.

(b) The Council of Basic Education shall have the power, and its duty shall be to:

* * *

(3) Investigate programs, conduct research studies and formulate policy proposals in all educational areas not within the purview of higher education including, but not limited to,

* * *

(g) The subjects to be taught and the activities to be conducted in elementary, secondary, adult education and other schools;

Section 1317 of The Administrative Code, 71 P.S. §367 provides:

(a) The State Board of Education shall have the power, and its duty shall be, to review the policies, standards, rules and regulations formulated by the Council of Basic Education and the Council of Higher Education, and adopt broad policies and principles and establish standards governing the educational program of the Commonwealth.

* * *

(b) The State Board of Education shall:

* * *

(4) Make all reasonable rules and regulations necessary to effecutate the purposes of this act and carry out all duties placed upon it by law.

* * *

(g) The State Board of Education shall make all reasonable rules and regulations necessary to carry out the purposes of this act.

Given the above language regarding the powers and responsibilities of the State Board and the specific references to subjects, activities, and educational program, it is clear that those sections of the regulations dealing with "instructional programs" (22 Pa. Code §§5.35, 5.36) are within the State Board's jurisdiction. Indeed, this is an area in which the Board has exercised unquestioned jurisdiction for years. See, e.g., 22 Pa. Code §5.1 *et seq.*

It is also apparent that the sections of the proposed regulations on "intramural programs" and "interscholastic athletic programs" (§§5.37, 5.38) are within the jurisdiction of the State Board carved out by the above provisions.

Firstly, the inclusion by the Legislature of the word "activities" after the word "subjects" in the provisions quoted above evidences to us a clear intent that student activities must be considered part of the educational program. Intramural and interscholastic athletics are equally clearly within the classification of student activities wherever that phrase has been used.

Secondly, the operation of such athletic programs has long been considered an integral part of the educational program. As the Pennsylvania Supreme Court stated in 1938:

> "Various sections of our school law recognize the scope of physical training, or education; it has for many years formed a definite and integral part of the curriculum of the public schools. Section 1607 of the Code, as amended, includes, in the course of study prescribed for the elementary public schools of the Commonwealth, instruction in health, including physical training, as one of the required branches. For high schools, the State Council of Education determines the subjects to be taught based on statutory authority.
>
> Physical training includes organized sports and athletic exercises. Athletics are important to the moral, physical and mental development of students. In *Galloway v. Prospect Pk. Boro School Dist.*, 331 Pa. 48, at page 51, 200 A. 99, at page 101, Mr. Justice Stern speaking for this Court stated: 'Physical education is as much a part of the school curriculum as are subjects of intellectual study, and athletic supplies, therefore, are as "necessary for school use"' as maps, globes, and similar objects. It is not the spirit of our public school system that only children with financial means to purchase their own supplies should have the opportunity of participating in school games and athletic sports.'" *Ganaposki's Case*, 332 Pa. 550, 554.555(1938).

In that case, a properly qualified physical education instructor was assigned by the local school board to coach the basketball team and he refused, contending that coaching basketball was not an integral part of the curriculum so that he had no duty to "teach" it. In the language quoted above, the Court disagreed and held that this refusal to teach was a breach of his duty to the district and grounds for dismissal.

Finally, further support for the view that intramural and interscholastic athletic activities are an integral part of the educational program can be obtained by examining our State reim-

bursement system to local school districts. The basic instructional subsidy has always included payments on account of student activities which have, in turn, included interscholastic and intramural athletic activities. See Section 2501 (11.1) of the School Code, 24 P.S. §25-2501(11.1) and the Pennsylvania School Accounting Manual, p. 2-355(Attachment "A").[1]

In summary, therefore, we have found two sources of regulatory authority relating to the school athletic program — one specific (i.e., Section 511 of the Code) and one general (i.e., the above-quoted sections relating to the powers of the State Board). In our view, as explained in the next section of this Opinion, the two sources are not in conflict, but, on the contrary, evidence an intent on the part of the Legislature that the educational program be developed by both local governing boards and the State Board. Even if one were to view the relevant sources as in potential conflict, it would, of course, be our duty to construe them, if possible, so as to give effect to both. See the Statutory Construction Act of November 25, 1970, 1 Pa. S. §1933.

II.

There is not, in our view, a conflict between the particular grant of authority contained in Section 511 of the School Code and the general grant of authority to the State Board of Education quoted above. On the contrary, the intention of the Legislature is manifest that each local governing board is given the authority and discretion to manage the day-to-day operation of our schools subject to the board principles and standards enunciated by the State Board. Such broad principles and standards provide a mechanism whereby the Legislature has assured that a reasonably acceptable program of education is available to all children in Pennsylvania. Such a mechanism is particularly appropriate, moreover, in the field of education which is fundamentally a State responsibility. (See Art. III, §14 of the Pennsylvania Constitution.)[2]

Given this framework for interaction between our local boards and the State Board, we find the proposed regulations to be a proper general statement of principles and standards which do not unduly restrict or hamper our local boards from carrying out their day-to-day administrative and rule-making responsibilities. We find that

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1 We see no merit to the view propounded by the Pennsylvania Interscholastic Athletic Association as expressed on pp. 5-6 of its Position Paper to the State Board of Education dated May 9, 1974 that Section 511(b.1) expresses a legislative intention that PIAA exercise exclusive autonomy in the area of interscholastic athletics on behalf of local school districts. Certainly that section recognizes, by implication, the existence and legitimacy of PIAA. We do not read the proposed regulations as preempting the PIAA or denying the legitimacy of its role in sponsoring interscholastic athletic programs.

2 For a better perspective on the increase in stature and authority conferred on the State Board by the Act of June 17, 1963, P.L. 143, compare especially 71 P.S. §§118.1, 367, 369 with the former 71 P.S. §§118, 357.

they do provide precisely the kind of guidance and direction that the State Board was created to give. Consistent with that guidance and direction, local boards are still free to determine their own policies and direction — both individually and collectively.

III.

While the above sections of this Opinion, in our view, adequately dispose of the issue you have raised, we feel obliged to point out that the regulations in question were designed, in part, to implement and ensure compliance with Article I, §28 of the Pennsylvania Constitution:

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

As pointed out in Section I of this Opinion, the Commonwealth provides State funds for the operation of the athletic programs sought to be regulated by the State Board. Depending on the aid-ratio of the particular school district, the State aid could be as high as 90% of the cost of the program. See Section 2501(14) of the School Code, 24 P.S. §25-2501(14). It, therefore, seems clear that the Legislature did not intend that the State Board be helpless to insure that State-supported programs provide equality of opportunity to all school children, regardless of sex.[3]

For all the foregoing reasons, it is our opinion, and you are hereby advised that the attached draft regulations would be within the lawful jurisdiction of the State Board of Education, should it decide to adopt them.

Sincerely yours,

Mark P. Widoff
Deputy Attorney General

Israel Packel
Attorney General

Attachment "A"

1000 Series

STUDENT ACTIVITIES are classified as a function and include direct and personal services for public school pupils; such as, interscholastic athletics, entertainment, publications, clubs, band

3 Although we do not find it necessary to address the issue in this Opinion, a strong argument can be made that the Secretary of Education is under an obligation to withhold State subsidies to discriminatory programs. See *Norwood v. Harrison*, 413 U.S. 455 (1973); *Brown v. Board of Education*, 347 U.S. 483 (1954). Those cases, *inter alia*, stand for the principle that a state may not provide significant state aid to support an unconstitutionally discriminatory program — no matter how laudatory the goals of such a program might be. "A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination." *Norwood v. Harrison*, *supra*, at 467.

and orchestra, that are managed or operated by the student body under the guidance and direction of the faculty, not as a part of the regular instructional program, but as a part of the overall educational program of the school system.

Accounting for STUDENT ACTIVITIES involves more than one fund; namely, the General Fund and the combined Student Activities Fund(s). The Student Activities involves more than one fund; namely, the General Fund and the combined Student Activities Fund(s). The Student Activities Fund may consist of several components; such as, Student Organization Fund, Athletic Fund, Merchandise Fund, Publications Fund, etc. The extent of the support of Student Activities by the Board of School Directors ranges from the assumption of responsibility for additional salaries for supervision and direction to total support from the tax resources of the school system. This assistance may be extended by providing leadership, direction, supervision, space, facilities, supplies and equipment, and the transfer of money from the General Fund to the Student Activities Fund(s).

Accounts are provided to record salaries and other current expenses paid directly by the General Fund including recording financial assistance extended by the General Fund. However, direct expenses for Fixed Charges attributable to Student Activities are not allocated to this function, but rather to the FIXED CHARGES function. Furthermore, expenditures for the original acquisition of Student Activities equipment and other capital facilities which are paid for by the General Fund are recorded in the CAPITAL OUTLAY function.

Many Student Activities are chartered to operate as self-sustaining enterprises. However, in the course of operating the activities, some expenses attributable to Student Activities are advanced by the General Fund. If the General Fund is to be reimbursed by the Activity involved, the original expenditure should be charged to Account 3121 — DUE FROM OTHER FUNDS.

The accounts in the 1000 Series of the General Fund are used only when General Fund monies are expended for, or transferred to, any of the Student Activities Fund(s). The exceptions are Fixed Charges and Capital Outlay items as mentioned above.

OFFICIAL OPINION No. 36

Environmental Resources — Pymatuning Lake — Interstate Compact — Constitutional Law

1. An amendment to a compact between Pennsylvania and Ohio which permits boats to be operated on Pymatuning Lake with motors in excess of ten horsepower rating, if such motors are rendered inoperable and the boat is actually propelled by a motor of not more than ten horsepower, does not require the consent of Congress.

2. Article I, Section 10, clause 3 of the United States Constitution does not require Congressional approval of an amendment to an interstate compact if the amendment does not increase the power of the contracting states in encroachment upon or interference with the just supremacy of the United States.

3. It is within the competency of a State to legislate in respect to matters covered by a compact so long as such legislative action is in approbation and not in reprobation of the compact.

Harrisburg, Pa.
July 3, 1974

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

Dear Secretary Goddard:

We have received a request for an opinion from your department asking whether the Act of July 23, 1971, P.L. 233 (No. 49), 71 P.S. §1840(5), is a valid enforceable law, absent the express consent of the Congress of the United States.

Act No. 49, 71 P.S. §1840, is an amendment to a compact with the State of Ohio concerning Pymatuning Lake. It provides as follows:

> "No hydroplanes or aquaplanes nor any type of boat equipped with a motor in excess of a ten horsepower rating shall be permitted anywhere on said lake, except such police or administration motor boats, to the number which shall be mutually agreed upon by the parties hereto. Sail boats, row boats, canoes, and boats equipped with a motor not in excess of ten horsepower shall be permitted, provided the owners first obtain a license from the respective state of which the owner is a resident under such regulations as each party to this agreement may now have or hereafter adopt: Provided, nevertheless, That the use of any type of boats equipped with a motor not in excess of ten horsepower, as defined above, is expressly limited and restricted to that portion of the lake extending from the main dam near Jamestown northwardly to the causeway at or near Linesville: *And provided further, That any boat equipped with a motor in excess of ten horsepower rating may be operated on said lake if such motor is rendered inoperable by removal of the propeller and such propeller is left ashore. After removal of the propeller, a motor of not more than ten horsepower rating may be attached to the boat and used for propelling the boat on said lake.*
>
> "Nothing contained in this subdivision shall be interpreted to effect a change in the level or flow of water as determined or fixed by the Department of Environmental Resources.

> "Any one who violates any of the provisions of this subsection or who operates any boat equipped with a motor on the lake without being authorized to do so under the provisions of this sub-division, shall, upon conviction thereof, be sentenced to pay a fine not to exceed fifty dollars ($50) and costs of prosecution, and, in default of payment of the fine and costs, shall undergo imprisonment not to exceed thirty days." (Amendment emphasized).

The Act amends the prior statute by allowing boats equipped with motors greater than ten horsepower to operate on the lake provided that the motor is rendered inoperable by removing the propeller and leaving it on the shore. Normally such an amendment would present no problems. However, the statute amended here is part of an inter-state compact entered into between the Commonwealth of Pennsylvania and the State of Ohio. The terms of this compact, therefore, are subject to the United States Constitution which provides, *inter alia*, that:

> "No State shall, without the consent of Congress...enter into any agreement or compact with another State." United States Constitution, Article I, Section 10, cl. 3.

The question presented is whether Act No. 49 is the type of amendment or alteration to the original compact which requires the consent of Congress for it to become effective. It is our conclusion that it is not.

In *Henderson v. Delaware River Joint Toll Bridge Commission*, 362 Pa. 475 (1949), *cert. den.* 338 U.S. 850 (1949), our Supreme Court was presented with a question not dissimilar to the one presented here. In that case, a compact between Pennsylvania and New Jersey, creating the Delaware River Joint Toll Bridge Commission came into question. That compact had been enacted in 1934. It provided, in part, that the Commission could "enter upon, use, occupy ... any street, road or highway, located within the limits of any municipality ..., subject however to the consent of the governing body of such municipality ...."

A project was begun by the Commission which provided for the occupation of certain roads located within the City of Easton and the Borough of Morrisville. The City of Easton duly authorized the occupation, while the Borough of Morrisville refused. Nevertheless, the Commission continued its project, alleging that the approval of the Borough of Morrisville was unnecessary. A taxpayer's suit then was filed.

Subsequent to the filing of the suit, the Pennsylvania General Assembly passed Act No. 35, which became effective on March 31, 1949. This Act provided that consent of the municipality was no longer necessary in order for the Commission to occupy lands con-

tained therein. The Commission filed an amended answer to the original complaint, setting up the Act of 1949, supra, as conclusive of the issues adversely to the plaintiffs. The borough responded that the Act was without effect since neither the State of New Jersey nor the Congress of the United States had approved it.

In concluding that the consent of Congress was not necessary in this instance, the Court stated (362 Pa. at 486):

> "Congressional consent is not necessary to every step taken by a State in an effort to carry out a duly approved compact with another State. In *Virginia v. Tennessee*, 148 U.S. 503, 519, Mr. Justice Field, speaking for the Supreme Court, said, — 'Looking at the clause [of the Constitution, Article I, Section 10, cl. 3] in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.' And, in *Stearns v. Minnesota*, 179 U.S. 223, 246, where the doctrine of *Virginia v. Tennessee*, supra, was approved, Mr. Justice Brewer said that '...in the opinion in that case it was intimated that there were many matters in respect to which the different States might agree without formal consent of Congress.' We cite these authorities merely to show that *congressional consent is not slavishly required in respect of each and every matter related to or growing out of a congressionally approved 'compact' or 'agreement' between States*". (Emphasis added).

The court went on to say that the Act in question did not "...increase the political power of the contracting States in encroachment upon or interference with the just supremacy of the United States." 362 Pa. at 486. Furthermore, the Court concluded that it was "...within the competency of a State ...to legislate in respect of matters covered by the compact so long as such legislative action is in approbation and not in reprobation of the compact." 362 Pa. at 448.

Although the Court additionally discussed why New Jersey's consent was unnecessary, we are not confronted with that situation here, since the State of Ohio has previously approved the legislation in question.

Act 49 neither encroaches upon the supremacy of the United States Government; nor is it in "reprobation" of the existing compact. Matters of this nature, which do not go to the substance of the compact itself, do not need the approval of Congress for them to become effective. While it would be preferable for Congress to consent to all such amendments, it is our opinion, and you are so ad-

vised, that such approval is not a necessary prerequisite to the effectiveness of Act No. 49.

Very truly yours,

Theodore A. Adler
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 37

Insurance Department — Mutual Fire Insurance and Mutual Casualty Insurance Companies — Surplus Requirements

1. Mutual fire insurance and mutual casualty insurance companies issuing nonassessable insurance policies as of November 27, 1968 are exempt from the surplus requirements described under Section 806 of the Act of November 27, 1968, P.L. 1118, 40 P.S. §382.

2. This Opinion replaces Opinion No. 42, 1971 Opinions of the Attorney General 73.

Harrisburg, Pa.
July 18, 1974

Honorable William J. Sheppard
Commissioner
Insurance Department
Harrisburg, Pennsylvania

Dear Commissioner Sheppard:

You have requested that we reconsider our previously issued Opinion No. 42, 1971 Opinions of the Attorney General 73, determining the effect of the Act of November 27, 1968, P.L. 1118, 40 P.S. §382 (Act 349),[1] on the surplus requirements of mutual fire insurance and mutual casualty insurance companies issuing nonassessable insurance policies.[2] Our earlier Opinion held that the second Section 7 of Act 349[3] did not exempt such mutual insurance companies, as were in existence prior to the effective date of the Act, from meeting the newly imposed financial requirements added to Section 806 of The Insurance Company Law of 1921, as amended, 40 P.S. §916, by Act 349.

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1 Act 349 amended several sections of The Insurance Company Law of May 17, 1921, P.L. 682, as amended, 40 P.S. §362 *et seq.* Our concern, however, in this opinion will only be with those sections dealing with the financial requirements of mutual insurance companies issuing nonassessable insurance policies.

2 Mutual fire and mutual casualty insurance companies writing only automobile or motor vehicle insurance are specifically not exempt from the minimum capital stock, surplus and other financial requirements of Act 349. See 40 P.S. §382(b)(2), (c)(11).

3 See Historical Note, 40 P.S. §382.

It is our opinion, and you are hereby advised, that, based upon our reconsideration of the above Act, mutual fire insurance and mutual casualty insurance companies writing nonassessable insurance policies, as herein defined, are exempt from compliance with the requirements described under Section 806, *supra.*

The relevant changes made by Act 349 to The Insurance Company Law reads in pertinent part as follows:

> "Section 206. Minimum Capital Stock and Financial Requirements to do Business.—
>
> * * *
>
> "(e) Mutual companies, other than mutual life companies and other than title insurance companies, hereafter organized under this act, shall comply with the following conditions:
>
> * * *
>
> *"(6) Each company writing nonassessable policies shall maintain unimpaired so much of its surplus as is equal to the minimum capital required for stock companies authorized to transact the same class or classes of insurance; ...*
>
> * * *
>
> "Section 806. Premiums.— ...No policy shall be issued for a cash premium without an additional contingent premium, unless the company has *and maintains* a surplus which is not less in amount than the *minimum* capital required of domestic stock insurance companies [transacting] *authorized to transact* the same [kind] *class or classes* of insurance."

These two sections, as amended by Act 349, require that mutual insurance companies writing nonassessable policies shall have and maintain a surplus not less in amount than the minimum capital required of domestic stock insurance companies authorized to transact the same class(es) of insurance.

A proviso clause originally included in Section 806, was deleted by Act 349. This proviso read as follows:

> "Provided, that this section shall not be construed to require a surplus in excess of an amount equal to the unearned premiums on the policies without contingent premiums."

The effect of this clause was to permit a mutual insurance com-

pany to write nonassessable policies by merely establishing a surplus equal to its unearned premium reserve instead of being required to establish and maintain a certain minimum surplus equal to the capital requirements of a stock company. This could result in extending nonassessable authority to a company with a low premium volume and a correspondingly low surplus.

The second Section 7 of Act 349, which immediately follows the amendment to Section 806, clearly provides that mutual insurance companies existing before the effective date of the Act, except companies writing policies upon automobiles, as mentioned therein, need not comply with Act 349's provisions affecting financial requirements of companies. This Section reads in pertinent part:

> "Section 7. No insurance company existing on the effective date of this act, except those writing policies upon automobiles under clause (2), subsection (b) or motor vehicles under clause (11) subsection (c) of Section 202 of this act, shall be required to meet the minimum capital stock, surplus and other financial requirements of this act...."

In our earlier opinion we advised you that the above mentioned section did "not apply to the surplus requirements of a mutual insurance company writing nonassessable (insurance) policies because those requirements are set forth in Section 806, which was not amended by Act 349, and requires compliance with Section 806.1 and not (second) Section 7 of Act 349." It is quite apparent however, that Section 806, as previously shown, was in fact amended by Act 349. It should be further added, contra to our above referenced conclusion, that Section 206, *supra*, also applies to the surplus requirements of a mutual insurance company writing nonassessable policies.

Based on the foregoing, it is our opinion and you are hereby advised, that mutual fire and mutual casualty insurance companies which wrote nonassessable insurance policies and which were in existence before November 27, 1968 are exempt from compliance with the financial requirements as set forth in Act 349 if they meet the surplus requirement for issuance of nonassessable policies in compliance with the previously contained proviso clause of Section 806 which was in effect prior to (and repealed by) Act 349.

This opinion replaces and rescinds Official Opinion No. 42, of 1971.

Sincerely,

Edward I. Steckel
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 38

Act of March 28, 1974 (P.L. , No. 50); House Bill 2317, Printer's No. 3323 session of 1974; Statutory Construction Act of 1972 (1 Pa. S. §1921(a) and §1922 (1)).

The General Assembly by passing an appropriation bill for the Pennsylvania Higher Education Assistance Agency (House Bill 2317) intended to supersede provisions of the Act of March 28, 1974 (P.L. , No. 50) which would provide an appropriation to PHEAA if the General Assembly failed to make appropriation to PHEAA.

Harrisburg, Pa.
July 18, 1974

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

Dear Secretary McIntosh:

You have asked our opinion as to the legal consequences which will flow from the interaction of the Act of March 28, 1974 (P.L. , No. 50) and House Bill 2317, Printer's No. 3323, should the Governor sign the bill.* Please be advised as follows.

House Bill 2317, if enacted into law, would provide an appropriation to the Pennsylvania Higher Education Assistance Agency for the fiscal year July 1, 1974 to June 30, 1975, effective as of the date of the Governor's signature, Section 2 of the bill notwithstanding. 1 Pa. S. §1702(4), Statutory Construction Act of 1972.

The Act of March 28, 1974 (P.L. , No. 50) is not applicable to invalidate any of the provisions of the appropriation act as represented by House Bill 2317 and does not operate to continue the appropriation of the 1973-74 fiscal year, Section 2 of the act of March 28, 1974 notwithstanding. Section 2 of the act of March 28, 1974 provides:

> Section 2. In order to carry out the provisions of section 1 of this act, any appropriation effective during any fiscal year providing moneys to the Pennsylvania Higher Education Assistance Agency for scholarship grants shall, if the General Assembly does not provide by law prior to May 1 of the same fiscal year, to increase, lower or terminate the appropriation, be deemed to be reenacted for the ensuing fiscal year in the same amount and for the same purpose as provided in such appropriation: Provided, however, That the reenacted appropriation shall not be effective until the first day of the ensuing fiscal year.

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* Editor's Note: House Bill 2317 was approved by Governor Milton J. Shapp. Act of July 18, 1974 (P.L. , No. 36-A).

The provision of Section 2 as quoted operates in only two situations: (1) when the Pennsylvania Higher Education Assistance Agency does not submit a budget request to the Governor's Office of the Budget for a certain fiscal year in the future; (2) if the General Assembly chooses to pass no appropriation bill at all in a given fiscal year in the future. In other words, the provisions of Section 2 of the act are operable only when there is no budget for a certain fiscal year in the future or until such time as an appropriation is made for that fiscal year.

The question as to whether House Bill 2317 represents an "increased appropriation" as contemplated by section 3[1] of the act of March 28, 1974 or whether the bill represents the entire appropriation for PHEAA in fiscal year 1974-75 is resolved by application of the Statutory Construction Act as follows. Section 1921(a) of the Statutory Construction Act of 1972 provides: "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly ...." Therefore, the question is stated: "Does House Bill 2317 represent an increase to the appropriation deemed reenacted under Section 2 of Act No. 50 or are the monies enumerated in House Bill 2317 meant to be the entire budget for the fiscal year 1974-75 for PHEAA?" Section 1922(1) of the Statutory Construction Act provides as follows:

> In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:
>
> (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable ....

If the operation of Section 2 of Act No. 50 were to be given effect as well as the provisions of House Bill 2317 the total appropriation "deemed reenacted" and as enacted would be in excess of one hundred forty-four million dollars. Such a result is manifestly "absurd ...or unreasonable." It is unreasonable to believe that absent extraordinary circumstances the General Assembly would virtually double the budget request of a Commonwealth agency. The budget request of the Pennsylvania Higher Education Assistance Agency for 1974-75[2] was as follows:

> Scholarships — $65,440,000
> Reserved for Losses on Guaranteed Loans — $1,800,000
> Student Aid Funds-Matching — $2,000,000
> Administration-Loans and Scholarships — $3,200,000

An examination of Printer's No. 3137 of House Bill 2317, the

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1 Section 3. "Nothing in section 2 of this act shall be construed to prevent the General Assembly from enacting increased appropriations for the State scholarship program at any time whatsoever."

2 1974-75 Budget Submission, Vol. 1, p. 146.

original bill as introduced, shows exactly these figures, indicating that House Bill 2137 as introduced represented the entire budget request for PHEAA. While it is true that during the passage of the bill it was amended to increase three of the four line item appropriations, in no case can it be said that these increases were absurd or unreasonable.

Therefore, it is the manifest intention of the General Assembly that House Bill 2317 shall provide the entire appropriation for the coming fiscal year to PHEAA and that by necessary implication the operation of Section 2 of Act No. 50 of 1974 is not controlling.

Furthermore, 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 State Treasurer have had an opportunity to review this opinion and express their views on its contents.

Sincerely yours,

Conrad C. M. Arensberg
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 39

Acupuncture — Professional Licensing Boards — Lawful Practitioners of Acupuncture in Pennsylvania

1. Doctors, osteopaths, dentists, podiatrists and veterinarians may lawfully practice acupuncture subject to the limitations imposed by their respective licensing boards.

2. Optometrists and chiropractors may not practice acupuncture in Pennsylvania.

Harrisburg, Pa.
July 23, 1974

Honorable Louis P. Vitti, Commissioner
Professional & Occupational Affairs
Harrisburg, Pennsylvania

Dear Commissioner Vitti:

You have requested our advice as to whether the practice of acupuncture is permitted in Pennsylvania and, if so, which if any of the licensing boards under your jurisdiction may allow and regulate the practice of acupuncture by their licensees.

The practice and use of acupuncture is a recent phenomenon on the American scene as an outgrowth of the influence of prac-

titioners from China. The widespread publicity acupuncture has received has resulted in a large number of individuals holding themselves out as competent practitioners of this ancient art. As a result, there has been a significant increase in the risk of fraudulent practices such as useless or harmful treatments. Since the practice of acupuncture is not specifically mentioned in any of the licensing statutes of Pennsylvania, it is our duty to interpret the scope of these statutes in order to determine whether and where the practice is lawful.

Acupuncture is defined in the standard medical dictionary as "the insertion of needles into a part for the production of counterirritation." Doland, *Medical Dictionary* 33 (24 ed. 1965). It has also been defined as "an ancient Chinese system of medicine in which needles are used for the cure of disease." Felix Mann, *Acupuncture Cure of Many Diseases* 1 (London: William Heinemann Medical Books, Ltd. 1971) and as a "Chinese practice of puncturing the body (as with needles) to cure disease or relieve pain." *Webster's New Collegiate Dictionary* 13 (1973). The actual technique may be defined as follows: "Acupuncture, consists ...of the insertion to a depth of some millimetres, of very fine needles into specifically indicated points of skin. These are left in place for some minutes, and then removed." Felix Mann, *Acupuncture* 2 (New York: Vintage Books, 1972). Since acupuncture consists of the insertion of needles into various parts of the body for the purpose of curing disease or relieving pain, it is clearly a form of practice of medicine.

Upon examination of the laws of all the licensing boards under your jurisdiction, it is apparent that only those boards which regulate the practice of medicine, osteopathy, podiatry, optometry, veterinary medicine, dentistry and the chiropractic can possibly be construed to permit the practice of acupuncture. In order to determine which of these professions are appropriate for the practice of acupuncture, the purview of the laws of each must be examined.

Physicians and Osteopaths

Of all health care practitioners, only two, doctors of medicine and osteopathy are authorized to pursue an unlimited practice of the healing arts. The Medical Practice Act, 63 P.S. §401 *et seq.* permits licensed physicians and surgeons to practice "medicine and surgery." That term is defined in the act as:

> "The art and science having for their object the cure of diseases of, and the preservation of the health of, man, including all practice of the healing art with or without drugs, except healing by spiritual means or prayer."
>
> * * *
>
> "(d) The term 'healing art' as used in this act shall mean

> the science of diagnosis and treatment in any manner whatsoever of disease or any ailment of the human body." 63 P.S. §401(c), (d).

It is clear that the use of acupuncture falls within the purview of the law quoted above and therefore may be practiced by doctors of medicine. The State Board of Medical Education and Licensure which regulates the practice of medicine must regulate the practice of acupuncture insofar as it relates to its licensees.

Licensed osteopaths are authorized:

> "to practice osteopathy in all its branches including operative surgery, obstetrics and the use of drugs without restrictions. The phrase 'osteopathy and surgery' as used in this act means a complete school of the healing arts applicable to all types and conditions of diseases and disorders, and practiced as authorized herein by physicians and surgeons possessing the degree of doctor of osteopathy." 63 P.S. §266

Since osteopaths like physicians and surgeons are authorized to pursue an unlimited practice of the healing arts, they too can practice acupuncture with only those limitations imposed by the State Board of Osteopathic Examiners.

Dentists

"The practice of dentistry" is statutorily defined as including a person:

> "who diagnoses, treats, operates on, or prescribes for any disease, pain or injury, or regulates any deformity or physical condition of the human teeth, jaws, or associated structures, or conducts a physical evaluation, or administers anesthetic agents..." 63 P.S. §121.

This definition, limited to the area of the human teeth and jaw, is unlimited as to the nature of the diagnosis and treatment allowed in that area. Thus, a limited practice of acupuncture is permitted under The Dental Law. It is limited in the sense that the practice of acupuncture can only be used by dentists when they are treating those parts of the body specified in the above quoted portion of the law and are practicing within the limitations imposed by the State Dental Council and Examining Board.

Podiatrists

The "Podiatry Act of 1956" sets forth the following definition that is the basis for the use of acupuncture.

> "Podiatry shall mean the diagnosis and treatment including mechanical and surgical treatment of ailments of

> the foot, and those anatomical structures of the leg governing the functions of the foot and the administration and prescription of drugs incidental thereto. It shall include treatment of local manifestations of systemic diseases as they appear on the foot but shall not include amputation of the leg or foot or treatment of systemic diseases of any other part of the body." 63 P.S. §42.2.

As this is a very broad definition, it would certainly include the practice of acupuncture. However, podiatrists may only practice acupuncture when treating ailments of the foot and when practicing within the limitation imposed by the State Board of Podiatry Examiners.

Optometrists

"Optometry" is defined as:

> "the employment of any means or methods, other than the use of drugs or surgery, for the examination of the human eye and the analysis of ocular functions or the prescribing, providing, furnishing, adapting or employing any or all kinds and types of lenses and prisms, visual training or orthoptics, ocular exercises and any and all preventive and corrective methods for the aid, correction or relief of the human eye, its associated structures, appendages and functions, other than the use of drugs or surgery.
>
> "The term 'optometrist' means a person who practices optometry in accordance with the provisions of this act." 63 P.S. §231.

This definition does not permit optometrists to "cure disease or relieve pain" which is the basic purpose of acupunctuce as defined previously. Therefore, optometrists are not permitted to engage in the practice of acupuncture.

Veterinarians

"The Veterinary Law" provides in part:

> "A person engages in the practice of veterinary medicine within the meaning of this act who, for hire, fee, compensation or reward, promise, offered, expected, received or accepted, either directly or indirectly, diagnoses, prognoses, treats, administers, prescribes, operates, or manipulates, or applies any apparatus or appliance for any disease, pain, deformity, defect, injury, wound or physical condition of any animal, including poultry, or for the prevention, or to test the presence of any disease, or who holds himself or herself out as being legally authorized to do so." 63 P.S. §506-2(a).

The practice of acupuncture on animals clearly falls within the purview of the law quoted above. Thus, the State Board of Veterinary Medical Examiners may regulate the practice of acupuncture on animals by veterinarians.

Chiropractors

"The Chiropractic Registration Act of 1951" defines the practice of chiropractic as follows:

> "chiropractic shall mean a limited science of the healing arts dealing with the relationship between the articulations of the vertebral column, as well as other articulations, and the nervous system and the role of these relationships in the restoration and maintenance of health. It shall include chiropractic diagnosis; a system of locating misaligned or displaced vertebrae of the human spine, and other articulations; the examination preparatory to and the adjustment of such misaligned or displaced vertebrae, and other articulations; the furnishing of necessary patients care for the restoration and maintenance of health and in the use of scientific instruments of analysis, as taught in the approved schools and colleges of chiropractic, without the use of either drugs or surgery. The term 'chiropractic' shall not include the practice of obstetrics or reduction of fractures or major dislocations." 63 P.S. §601(b).

This definition indicates that the practice of the chiropractic is a limited science of the healing arts concerned with the relationship between articulations of the vertebral column and other articulations as they relate to the nervous system, and is limited to certain types of treatment.

The basic philosophy of the chiropractic deals with the elimination of cause and not with treatment. Many chiropractors believe that the cause of most body ills stems from an improper or an altered nerve supply control which is responsible for the organism's stability output to its environment. Its failure to adapt successfully to its environment prodices a variety of illness. The function of the chiropractor is to locate that interference with the nerve transmission and to eliminate it, thereby allowing nature or the body to heal itself. Nothing is added or taken away but rather spinal adjustments are practiced in order to remove that interference with the nervous system. Hearings Held To Investigate the Use of Acupuncture in Pennsylvania 135 (March 19 and 20th, 1974).

In *Howe v. Smith*, 203 Pa. Superior Ct. 212 (1964) two licensed chiropractors and the Pennsylvania Licensed Chiropractors' Association attempted to force the Commonwealth to accept certificates from chiropractors concerning the physical fitness of

motor vehicle operators. The Court decided that only licensed physicians had the statutory authority to diagnose diseases and that determining medical disability or diagnosing diseases were activities prohibited to the practice of chiropractic. In their case before the Superior Court, the chiropractors admitted that they had a limited right to treat diseases but claimed general statutory authority to diagnose diseases without limitations. The Court considered the great disparity between the educational requirements for chiropractic and the practice of medicine by stating:

> "Naturally the chiropractors would like to be equated with the medical profession, but neither their recognized field of practice nor the statutes relating to these professions makes such an equation realistic. Chiropractors are engaged in a limited field of the healing arts which requires less education and training of them than is required by those practicing medicine and surgery. They are classified separately by the legislature from physicians in numerous ways." *Id.* at 219

The Court rejected the argument that the Legislature had indicated its intent to authorize chiropractors to diagnose diseases generally. It stated:

> "If it was the intent of the legislature to authorize the chiropractor to diagnose generally it certainly did not spell it out as clearly as it could have and should have. In fact the very use of the word 'preparatory' indicates the examination was to be related to the limited practice of 'adjustment'. The legislature used the expression 'diagnose diseases' in the Medical Practice Act, supra, in a provision which says, 'It shall not be lawful for any person. . . to diagnose diseases. . . excepting those hereinafter exempted, unless he. . . has received a certificate of licensure under the Act....'" *Id.* at 218.

The United States Department of Health, Education and Welfare in late 1968 found it necessary to determine whether or not chiropractic service should be covered in the Medicare program. The conclusion of its report is as follows:

> "Chiropractic theory and practice are not based upon the body of basic knowledge related to health, disease, and health care that has been widely accepted by the scientific community. Moreover, irrespective of its theory, the scope and quality of chiropractic education do not prepare the practitioner to make an adequate diagnosis and provide appropriate treatment. Therefore, it is recommended that chiropractic service not be covered in the Medicare Program. D.H.E.W., "Independent Practitioners Under Medicare", 1967, December 28, 1968.

Therefore, arguments that chiropractors receive a medical education similar to that of doctors seems to be without merit.

Shortly after the *Howe* decision, the definition of chiropractic was amended.[1] However, it is our opinion that the amendment does not change the basic definition of the chiropractic as that definition still indicates that the practice of chiropractic is a limited science of the healing arts and in all other respects, is substantially similar to the definition applicable in *Howe.*

It has also been argued that both the chiropractic and acupuncture rely upon the normalization of the nervous system to maintain and restore health. Although this is clearly true of the practice of chiropractic, it is not necessarily true of acupuncture as there is little but speculation as to how or why acupuncture works. *Acupuncture Therapy* 8 (Phila.: Temple University Press, 1973). Thus the argument that the practice of acupuncture and the chiropractic are interrelated cannot be substantiated.

It should be noted that there are several complications that can occur when a person is treated with acupuncture. For example, the acupuncture needle can puncture a lung, artery or other bodily organ as well as break inside.[2] Although such complications occur infrequently, immediate treatment would seem to be required by a person who is trained to handle such emergencies. The nature of the chiropractic does not include this type of specialized training and is therefore not within the expertise of a chiropractor.

From a careful reading of the definition of the chiropractic, from an understanding of the basic philosophy of the chiropractic, as well as from the reasons discussed previously, it seems clear that to permit chiropractors to insert needles into various parts of the human body to cure disease, as acupuncture requires, would be an over-extension of his or her profession. We therefore conclude, that chiropractors may not practice acupuncture.

Accordingly, it is our opinion and you are so advised that only doctors of medicine and osteopathy may practice acupuncture subject to those limitations imposed by their respective licensing boards. Podiatrists may practice acupuncture as it relates to the foot, dentists as it relates to the mouth and jaw and veterinarians as it relates to animals. Chiropractors and optometrists may not engage in the practice of acupuncture. We strongly urge the

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1. The 1965 amendment inserted in the definition of "chiropractic" the clause beginning with the words, "a limited science of the healing arts"; inserted the words "and other articulations" and "the furnishing of necessary patient care for the restoration and maintenance of health"; and deleted the words "by hand" from the clause "and the adjustment by hand of such. "

2. For a more complete discussion regarding the complications that may arise, see Carron et al, "Complication of Acupuncture," Journal of the American Medical Association, June 17, 1974, Col. 228, No. 12, p. 1552.

boards regulating the above professions to promulgate regulations which will insure that practioners of acupuncture have had proper training.

We are forwarding a copy of this opinion to J. Finton Speller, M.D., Secretary of Health, as well as to the licensing boards under your jurisdiction that are affected by this opinion.

Very truly yours,

Jeffrey G. Cokin
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 40

Heart and Lung Act — Work-related disabilities — State employes — State Workmen's Insurance Fund — State Workmen's Insurance Board — Section 501 of the Administrative Code — Administrative Agency Law

1. It is consistent with the intent of the law to allow the State Workmen's Insurance Fund to make a determination of Commonwealth liability under the Heart and Lung Act for the state agencies covered by the Act.

2. The term "stress and danger" as used in the Heart and Lung Act is not limited to stress and danger which is unique to the occupations covered by the Act.

3. The Commonwealth is under no obligation under the Heart and Lung Act to provide compensation for or to pay medical bills for an employee who suffers a permanent, as opposed to a temporary, disability or incapacity.

4. There is no obligation on the part of the employee, under the Heart and Lung Act, to reimburse the Commonwealth for compensation paid out under the Act in instances where a temporary disability becames permanent.

5. The Commonwealth would continue to be liable for medical bills incurred by a claimant subsequent to his/her return to work, if such bills are the result of a temporary disability for which the claimant has received compensation under the Act prior to his/her return to work.

6. A claimant under the Heart and Lung Act should be permitted to appeal an initial denial of benefits under the Act to the administrative agency involved and to request an administrative hearing in accordance with the Administrative Agency Law.

7. Although claims made under the Heart and Lung Act are free from control of statutes of limitations imposed in other statutes, the law requires the proceedings under the Act to be maintained only if begun within a reasonable period of time in view of all of the circumstances of the case.

Harrisburg, Pa.
August 1, 1974

Honorable Frank S. Beal, Secretary
Governor's Office of Administration
Harrisburg, Pennsylvania

Dear Secretary Beal:

You have asked several questions regarding Act 193 of 1935, P.L. 477, as amended, commonly referred to as the "Heart and Lung Act," 53 P.S. §§637, 638.

The Heart and Lung Act provides that State Police, enforcement officers and investigators of the Liquor Control Board, parole agents, enforcement officers and investigators of the Board of Probation and Parole, policemen, firemen, park guards, and members of the Delaware River Port Authority Police, who are injured in the performance of their duties and temporarily incapacitated from performing their duties, shall be paid their full salary until the disability arising therefrom has ceased, together with all medical bills incurred in connection with such injuries.

The Act further provides:

> In the case of the State Police Force, enforcement officers and investigators employed by the Pennsylvania Liquor Control Board and the parole agents, enforcement officers and investigators of the Pennsylvania Board of Parole, members of the Delaware River Port Authority and salaried policemen and firemen who have served for four consecutive years or longer, diseases of the heart and tuberculosis of the respiratory system, contracted or incurred by any of them after four years of continuous service as such, and caused by extreme over-exertion in times of stress and danger or by exposure to heat, smoke, fumes or gases, arising directly out of the employment of any such member of the State Police Force,/enforcement officer, investigator or parole agent, enforcement officer or investigator of the Pennsylvania Board of Parole, member of the Delaware River Port Authority Police, or policeman or fireman shall be compensable in accordance with the terms hereof;...It shall be presumed that tuberculosis of the respiratory system contracted or incurred after four consecutive years of service was contracted or incurred as a direct result of employment.

I. Your first question is whether it is permissible under the Heart and Lung Act for a state agency to request the State Workmen's Insurance Fund (SWIF) to determine the Commonwealth's liability under the Heart and Lung Act.

You are advised that it would be consistent with the intent of the law to allow SWIF to make such a determination for the agencies involved.

However, such a determination would have to be made specifically on the basis of the criteria for determination of compensable diseases and injuries as found in the Heart and Lung Act as opposed to the criteria found in the Workmen's Compensation Act for compensable diseases and injuries under that Act. (Act of June 2, 1915, P.L. 736, 77 P.S. §1 *et. seq.*). See *Ryan v. City of Erie*, 39 Erie 129 (1959); *Baddorf v. City of Harrisburg*, 65 Dauph. 86 (1953); 99 C.J.S. §208 *et seq.*

The State Workmen's Insurance Fund is a fund made up of sums to be paid by employers "for the purpose of insuring such employers against liability under Article Three of the Workmen's Compensation Act of 1915, and of assuring the payment of the compensation therein provided." 77 P.S. §221. The State Workmen's Insurance Fund is administered by the State Workmen's Insurance Board, which is part of the Department of Labor and Industry. 77 P.S. §221; 71 P.S. §§12, 62.

In most instances, state employees suffering from job-related disabilities who file claims under the Heart and Lung Act, also file claims under the Workmen's Compensation Act of 1915. The procedures followed by the State Workmen's Insurance Fund in investigating and verifying claims filed under the Workmen's Compensation Act are very similar to those that should take place to investigate and verify claims under the Heart and Lung Act. Thus, the work being done by SWIF for claims filed under the Workmen's Compensation Act of 1915 would have to be duplicated by the agencies involved for those claims filed under both Acts.

Section 501 of the Administrative Code provides as follows:

> The several administrative departments, and the several independent administrative and departmental administrative boards and commissions, shall devise a practical and working basis for cooperation and coordination of work, eliminating duplicating and overlapping of functions, and shall, so far as practical, cooperate with each other in the use of employes, land, buildings, quarters, facilities, and equipment. The head of any administrative department, or any independent administrative or departmental administrative board or commission, may empower or require an employe of another such department, board, or commission, subject to the consent of the head of such department or of such board or commission, to perform any duty which he or it might require of the employes of his or its own department, board, or commission. 71 P.S. §181.

It would be consistent with the intent of Section 501 of the Administrative Code to allow SWIF to make a determination for the various agencies involved of Commonwealth liability under the Heart and Lung Act, in light of the fact that to do so would avoid duplication of efforts on the part of the Commonwealth.

Although it would be lawful for the agencies involved to allow SWIF to make a determination of liability of the Heart and Lung Act, the law certainly does not require such a procedure and the Commonwealth may choose to allow the agencies involved to proceed to make such determinations themselves or in concert with other Commonwealth agencies.

II. Your second question is whether the term "extreme over-exertion in times of stress and danger" contemplates coverage under the Act of heart diseases caused by general exposure to stresses and danger to which any employee is subject, regardless of his/her occupation (such as automobile accidents) or whether coverage under the Act is limited to heart diseases caused by stresses and dangers which are unique to the occupations covered by the Act (such as dangers involved in apprehending a criminal).

You are informed that coverage under the Act is not limited to heart disease caused by stress and dangers which are unique to the occupations covered by the Act.

The plain wording of the Act does not indicate that coverage for heart disease under the Act is limited to heart disease caused by stresses and dangers which must be unique to the occupations covered by the Act. The "Statutory Construction Act of 1972" provides that:

> "When the words of a statute are clear and free from all ambiguity, and the letter of it is not to be disregarded under the pretext of pursuing its spirit". 1 Pa. S. §1921.

The courts have held that in order for a claimant to recover compensation for *heart* diseases under the Heart and Lung Act, the claimant has the burden of showing (1) that he/she has heart disease; (2) that such disease has been contracted after four years of continuous service; (3) that the heart disease was caused by extreme over-exertion *in times of stress or danger* or by exposure to heat, smoke, fumes or gases; and (4) that such extreme over-exertion or exposure must have arisen *directly out of the employment of the claimant. Kurtz v. City of Erie*, 389 Pa. 557 (1957); *Creighan v. City of Pittsburgh*, 389 Pa. 569 (1957). We cannot impose an additional burden on the claimant compelling her/him to show that his/her heart disease has been caused by "stress and dangers" unique to the occupations covered by the Act. It is significant to note, however, that it would very seldom be the case that a

claimant could sustain the burden of proving that his/her heart disease was caused by "extreme over-exertion in terms of stress or danger or by exposure to heat, smoke, fumes, or gases" unless he/she was performing a duty which is related to the unique functions performed by persons in the covered occupations.[1]

III. You next ask what a reasonable period of time would be for "stress and danger" to have taken place prior to the occurrence of heart disease. This is a question of fact. Thus, the individual circumstances of each case will have to determine whether the "stress and danger" referred to was the medical cause of the heart disease for which the claimant seeks compensation.

IV. The next question you pose involves a situation in which a person claims compensation for a permanent incapacity under the Heart and Lung Act. You have asked whether the Commonwealth has any obligation under the Heart and Lung Act to provide compensation for such a permanent incapacity, or to pay the medical bills for such a permanent incapacity.

The courts have interpreted the Heart and Lung Act to provide compensation only for temporary and not for permanent disability or incapacity. *Creighan v. City of Pittsburgh*, 389 Pa. 569 (1957); *Kurtz v. City of Erie*, 389 Pa. 557 (1957). The Act "contemplates total disability, but no liability of any kind attaches if the disability is permanent, though from injury in the performance of duty." *Iben v. Borough of Monaca, supra.*

Consequently, you are advised that the Commonwealth has no obligation to provide compensation or medical bills for a permanent incapacity.

V. Your next question involves a situation in which a person has previously been certified by medical authorities to be temporarily incapacitated and has received compensation under the Heart and Lung Act for the incapacity. You ask whether there is an obligation on the part of the employee to reimburse the Commonwealth for compensation paid out under the Act if the temporary disability becomes permanent.

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1. On April 5, 1968, former Attorney General William C. Sennett, in an unpublished opinion, took the position that the Pennsylvania Constitution requires a specific finding in any case of work-related injury that the injury resulted from "the dangerous nature of the employment to which other State employees are not exposed, " in order for the claimant to receive benefits under the Act. For that proposition, he relied on the case of *Iben v. Borough of Monaca*, 158 Pa. Superior Ct. (1945). A reading of that case does not convince us that this result is required. Since the Court, in that case, found that the classification based on occupation created by the Act is constitutional, we think it unnecessary and undesirable to impose any additional conditions on eligibility than the Legislature has specifically imposed. See also *Geary v. Allegheny County Retirement Board*, 426 Pa. 254 (1967); *Baxter v. Philadelphia*, 426 Pa. 240 (1967).

You are advised that there is no such obligation on the part of the employee under the Heart and Lung Act. Of course, such an employee, as is any other state employee covered by the Act, is obligated to turn over to the Commonwealth any workmen's compensation received or collected by him/her for the period he/she receives compensation under the Heart and Lung Act.

The factual situation presented in *Creighan v. City of Pittsburgh, supra,* was similar to the situation presented here by you. An employee claimed compensation for a period of time in which he was temporarily disabled as well as a subsequent period of time for which it was deemed that his temporary disability had become permanent. The Court in that case awarded the employee compensation for that period of time during which the employee was deemed to be temporarily disabled.

VI. You next pose a situation in which a claimant receiving compensation under the Heart and Lung Act returns to work. You ask whether the Commonwealth would continue to be liable for any medical bills incurred by the claimant subsequent to his/her return to work, if such bills are the result of his/her temporary disability.

The Heart and Lung Act provides that all medical and hospital bills "incurred in connection with" the compensable diseases should be paid by the Commonwealth of Pennsylvania.

Under the Statutory Construction Act of 1972, the provisions of the Heart and Lung Act should be "liberally construed to effect their objects and to promote justice." 1 Pa. S. §1928. The wording "in connection with" is broad enough to include medical expenses incurred by the claimant subsequent to his/her return to work, where the expenses result from a temporary disability for which he/she has been receiving benefits under the Act. Thus, you are advised that the Commonwealth continues to be liable, for medical expenses incurred by the claimant, subsequent to his/her return to work if such bills are the result of his/her temporary disability.

VII. You next pose a situation in which SWIF or the relevant agency makes a determination that an injury or "heart and lung"disease is not compensable under the Heart and Lung Act. You ask what appeal route should be open to the claimant.

You are advised that a determination made by SWIF or the agency involved under the Heart and Lung Act is an "adjudication" within the meaning of the Administrative Agency Law. 71 P.S. §1710 *et seq.* "Adjudication" is defined as "any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities or obligations of any or all of the parties to the proceeding in which the adjudication is made, but shall not mean any final order, decree, decision, determination or ruling based upon a proceeding before a court, or

which involves the seizure or forfeiture of property, or which involves paroles or pardons." 71 P.S. §1710.2.

You are advised, therefore, that the claimant should be permitted to appeal a denial of benefits under the Act to the administrative agency involved and to request an administrative hearing in accordance with the Administrative Agency Law.

VIII. You next state that statutes of limitations apply under the Workmen's Compensation Act for both notifying the employer of the injury and for having claims honored after notification or after payment of compensation. You ask whether these limitations would apply to the Act.

You are advised that claims made under the Heart and Lung Act are free from control of statutes of limitations made in other statutes. The Act, being silent on statutes of limitations relating to these matters, requires by law that proceedings under the Act be maintained only if begun within a reasonable time, in view of all circumstances of the case. *Babcock v. General Motors Corp., Oldsmobile Division*, 340 Mich. 58, 64 N.W.2d 917 (1954); *Webb v. Braden & McClure Drilling Co., 150 Kan. 148, 91 P. 2d 576 (1939); Cruse v. Chicago, R.I. and P. Ry. Co.*, 138 Kan 117, 23 P. 2d 471 (1933); *Thomas v. Williams*, 80 Kan. 632, 103 P. 772 (1909).

Given this opinion, if it is foreseen that administrative difficulties will ensue, we stand ready to assist you in drafting legislation to amend the Heart and Lung Act to include specific statutes of limitation for notifying the employer of a work-related disability and for filing a claim under the Act.

Very truly yours,

Lillian B. Gaskin
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 41

Public Utility Commission — Civil Service Commission — Attorney-Examiner — Provisional Appointments — Classified Service

1. Attorney-examiner positions within the Public Utility Commission must be filled in accordance with the Civil Service Act.

2. Provisional appointees serving beyond six months are serving unlawfully. However, they may retain their positions until a proper examination is prepared.

3. The Civil Service Commission must act as promptly as possible to establish the requisite examination and certification procedures for the position of attorney-examiner.

Harrisburg, Pa.
August 1, 1974

Honorable George I. Bloom
Chairman
Public Utility Commission
Harrisburg, Pennsylvania

and

Honorable Grace S. Hatch
Chairperson
Civil Service Commisssion
Harrisburg, Pennsylvania

Dear Commissioner Bloom and Chairperson Hatch:

The question has arisen as to whether attorney-examiners appointed by the Public Utility Commission fall within the jurisdiction of the Civil Service Act of August 5, 1941, P.L. 752 as amended, 71 P.S. §741.1 *et seq.* The question also arises as to whether the Public Utility Commission can appoint individuals to attorney-examiner positions without them first taking a Civil Service examination. In addition, since a Civil Service examination is not available for attorney-examiner positions, can the terms for which such examiners have been provisionally appointed, be extended.

I.

The Civil Service Act provides, *inter alia*, for both "classified" and "unclassified service." 71 P.S. §741.3. Among those positions included in "classified service" are: "All positions now existing or hereafter created under the Public Utility Commission.". 71 P.S. §741.3(b) (11). There are, however, two exceptions which may possibly be construed as exempting attorney-examiners from "classified service." "Unclassified service" includes:

> "Heads of departments of the Commonwealth and the deputy heads thereof and the bureau and division chiefs and all other supervisory personnel whose duties include participation in policy decisions." 71 P.S. §741.3(c) (1).

The power and duties of those persons presiding over hearings held by the Public Utility Commission, which includes attorney-examiners, are clearly delineated in the Public Utility Law.

> "[I]n any investigation, inquiry or hearing, the Commission may designate a special agent or examiner who shall have the power to administer oaths and examine witnesses and receive evidence in any locality which the Commission, having regard to the public convenience and the proper discharge of its functions and duties, may designate." 66 P.S. §458.

It is apparent from the above quotation that attorney-examiners are not "supervisory personnel whose duties include participation in policy decisions."

The Civil Service Act also exempts from "classified service":

> "Such attorneys as the appointing authority shall appoint and the Attorney General shall approve." 71 P.S. §741.3(c)(5).

Since the Attorney General does not approve the appointment of Public Utility Commission attorney-examiners, this exception from classifisd service is likewise not applicable.

In regard to "classified service," the Civil Service Act provides:

> "except as otherwise provided in this act, appointments of persons entering the classified service or promoted therein shall be from eligible lists established as a result of the examinations given by the director to determine the relative merit of candidates. Such examinations may be written and shall be competitive and open to all persons who may be lawfully appointed to positions within the classes for which the examinations are held. . . ." 71 P.S. §741.501.

It is clear then, that positions of attorney-examiner within the Public Utility Commission are positions of "classified service" and must be filled in accordance with the Civil Service Act.

II

There is a provision in the Civil Service Act which permits "classified service" positions to be filled without the requirement of a civil service examination. It provides:

> "Whenever there is great and urgent need for filling a vacancy in any position in the classified service, and the director is unable to certify an eligible for the vacancy, he may authorize the filling of the vacancy by provisional appointment. If he does authorize such appointment he shall certify no more than three qualified persons with or without examination and the appointing authority shall appoint one of the persons so certified. A provisional appointment shall continue only until an appropriate eligible list can be established and certification made therefrom, but in no event for more than six months in any twelve month period. Successive provisional appointments of the same or different persons shall not be made to the same position. The acceptance of a provisional appointment shall not confer upon the appointee any rights of permanent tenure, transfer, promotion or reinstatement." 71 P.S. §741.604.

Thus, when the need is great and an examination is unavailable, a

person may be appointed to a "classified service" position in accordance with the law quoted above. A determination of "great and urgent" public need is, of course, left to the Public Utility Commission to be concurred in by the Civil Service Commission.

III.

We are now presented with the question of whether the "six months in any twelve month period" condition, imposed by the provisional appointment section of the Act, can be extended when there is no civil service examination or other appointment procedure available for attorney-examiner positions. Construing provisional appointment section of the Civil Service Act of 1907, which had only a 90-day limitation but was in all other respects the same for purposes of this opinion, the Pennsylvania Supreme Court held in *McCartney v. Johnston*, 326 Pa. 443 (1937) that:

> ". . .a consideration of the language of this section clearly shows the legislative intendment that no provisional appointments made thereunder can endure 'for a longer period than three months.' In our opinion this provision of the section is mandatory. . . .If we were to hold otherwise the Act would fail of its purpose."

The Court continued:

> "Provisional appointments are provided so that when there is no list of eligibles temporary appointments can be made to meet emergencies until the Civil Service Commission has sufficient time to prepare, advertise and hold competitive examinations for the position to be filled." *Id.* at 448

The Attorney General has had occasion to rule on the legality of the employment of provisional employees serving longer than the provisional appointment sections of the law contemplate, and when there is no examination available for a given position. He stated:

> "Although the employment of provisional employees at the present time is unlawful, nevertheless because of the failure of the proper authorities to comply with the law, lists of eligible appointees are not available at the present time. Therefore, in order that the Unemployment Compensation Law may be administered, it is necessary to continue this unlawful employment. However, such employment should be terminated as soon as possible." 1937-1938 Opinions of the Attorney General 120, 124, (Opinion No. 245.)

Shortly thereafter, the Attorney General once again had occasion to consider this problem and stated:

> "You are also advised that the retention of provisional employees may only be continued for such period of time as is absolutely necessary, and that such employees must be replaced at the earliest possible moment with employees appointed from certified lists of eligibles." 1937-1938 Opinions of the Attorney General 165, 168 (Opinion No. 257.)

The Commonwealth Court recently held that a provisional appointee's continuation in employment beyond the 6 months permissible period is contrary to law. In *Shapiro v. State Civil Service Commission*, 12 Pa. Commonwealth Ct. 121 (1974), Judge Wilkinson, writing for the majority, stated:

> "The legal status of a person who is held over beyond the six months (formerly 90-days) was carefully analyzed by the Attorney General of Pennsylvania, Official Opinion No. 120, dated May 29, 1958, appearing in the bound volumes for 1958, at page 223. In that opinion, the Attorney General advised the Auditor General that the situation was unlawful, and the Civil Service Commission had the duty to hold the examinations with dispatch. . . . We agree with that well-reasoned opinion." *Id.* at 123

Thus, authorities are in agreement that provisional appointees serving beyond the maximum limit, six months under present law, are serving unlawfully. However, they may be retained until the Civil Service Commission can prepare the proper examinations for the positions to be filled.

It is therefore our opinion, and you are accordingly advised, that attorney-examiners within the Public Utility Commission are subject to the "classified service" provisions of the Civil Service Act. Individuals who provisionally fill such positions should not serve longer than 6 months in any 12 month period. Although there should be great reluctance to do so, that period may be extended in situations where the Civil Service Commission has been unable to prepare a proper examination and certification procedure for the position of attorney-examiner. In light of case law and earlier Attorney General's Opinions on point, it is most appropriate and necessary that the Civil Service Commission act as promptly as possible to establish the requisite examination and certification procedures.

Very truly yours,

Jeffery G. Cokin
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 42

Workmen's Compensation Act — Occupational Disease Act — Compromise Settlements Invalid — Public Policy Against Compromises

1. The Workmen's Compensation Act and the Occupational Disease Act render all compromise settlements which vary the benefits of those Acts null and void.

2. Courts have clearly held agreements which alter the benefits of the Acts to be violative of the public policy of the Commonwealth.

3. Agreements which benefit as well as injure claimants are similarly prohibited.

Harrisburg, Pa.
August 21, 1974

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

Dear Secretary Smith:

You have asked whether compromise settlement agreements of claims made under the Pennsylvania Workmen's Compensation Act (77 P.S. §1 *et seq.*) and the Occupational Disease Act (77 P.S. §1201 *et seq.*) are lawful.

It is our opinion, and you are hereby so advised, that such settlements, whether by lump sum or installment payments, are not lawful and may not be approved or condoned by your Department.

The compromise settlement agreements to which we are referring are those used by employers to settle disputed cases without recourse to the full administrative processes of the Acts. For example, the employer might have the injured worker or survivor in a death case withdraw his/her claim and have the record show that the claimant received nothing, when actually, an insurance company did pay the claimant. In another situation that commonly occurs, the insurer illegally refuses or terminates benefits while attempting to force the injured claimant to withdraw the case in return for a lump sum payment. These activities too frequently have a severe and long-lasting effect on the family of the injured worker.

For instance, a compromise settlement of a case which involves medical treatment needed in the future leaves the claimant without means of paying for that treatment.

It also allows attorneys interested in securing a prompt and substantial fee to receive an amount of money they would not have been permitted to collect if the case had been administered under the Act. One recent application of this "system" left a disabled

worker with $9,000 of the $30,000 he should have received, from which the attorney took another $2,500 as his fee.

Compromises such as described herein, and the other types which are practiced, do not serve the claimant's best interest nor the workmen's compensation program goal of income maintenance. Low settlements and high medical costs soon force the claimant and his or her family to turn to public assistance, an alternative which the Act was designed to obviate.

As explained below, these problems should not occur under both the precise language of the Act and the decisions which have interpreted it.

Section 407 of the Workmen's Compensation Act, 77 P.S. §731[1] reads in part as follows:

> On or after the seventh day after any injury shall have occured, the employer or insurer and employee or his dependents may agree upon the compensation payable to the employee or his dependents under this act; but *any agreement* made prior to the seventh day after the injury shall have occured, or permitting a commutation of payments contrary to the provisions of this act, or *varying the amount to be paid or the period during which compensation shall be payable as provided in this act, shall be wholly null and void.* It shall be unlawful for any employer to accept a receipt showing the payment of compensation when in fact no such payment has been made. (Emphasis added).

On the face of this section of the Act, it is obvious that any agreement or settlement which would alter the amount of compensation payable under the Act is "wholly null and void." This applies to agreements to pay amounts both greater and lesser than that required. *Blair v. Laughead,* 108 Pa. Superior Ct. 407 (1933). It has been argued that payments made immediately, even when lower than those allowed by law, confer a great benefit on the claimant with a questionable claim who might ultimately receive nothing through litigation. This argument, however, must yield to the clear words of the statute. *Wahs v. Wolf,* 157 Pa. Superior Ct. 181 (1945).

The courts of Pennsylvania have always interpreted Section 407 in this manner. Beginning with the case of *Ridell v. Penna. R. R. Co.,* 262 Pa. 582 (1918) and continuing through *Temple v. Penna. Dept. of Highways,* 445 Pa. 539 (1971), it has been repeatedly held that it is the public policy of the Commonwealth, as expressed by the language of the Workmen's Compensation Act, that employers cannot alter their liability under the Act by an agreement with the

1. The Occupational Disease Act (77 P.S. §1304) has a substantially similar provision, and this Opinion is equally applicable thereto.

employee or the estate of a deceased employee. See also *Wahs v. Wolf, supra; Blair v. Susquehanna Collieries Co.*, 335 Pa. 266 (1939); *Blair v. Laughead, supra*; *Pinkney v. Erie R. R. Co.*, 266 Pa. 566 (1920). Given this unambiguous interpretation of a statute clear on its face, your Department, through its referees or otherwise, cannot permit compromise settlements of any claim via any method or arrangement which would vary the amounts payable under the Act. This is as true for agreements which would benefit an employee as it is for those which would injure him/her. Only commutations or agreements which do not deny liability and which comport with the terms of the Act may be allowed by your Department.

Very truly yours,

Larry B. Selkowitz
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 43

Public Officials — Emoluments in Office — Pa. Constitution, Article III, § 27 — Executive Board

1. Payment of premiums by the Commonwealth for enrollment of State officials in a prescription drug program constitutes an increase in the emoluments of such officers.

2. Article III, §27 of the Pennsylvania Constitution prohibits only the General Assembly from increasing the emoluments of a public officer after his election or appointment to office.

3. The Executive Board, like a municipal governing body, does not pass "laws" within the purview of Article III, §27.

4. The Executive Board may extend to public officials as well as other non-contractual employees benefits under the plan of prescription drug insurance being offered to Commonwealth empoyees.

Harrisburg, Pa.
August 30, 1974

Honorable Frank S. Beal
Secretary
Office of Administration
Harrisburg, Pennsylvania

Dear Secretary Beal:

You have asked whether elected and appointed officials of the Commonwealth may participate in a non-contributory prescription drug plan which has been approved by the Executive Board for management employees, or whether the participation by these of-

ficers in the program would violate Article III, §27 of the Pennsylvania Constitution. The program calls for the Commonwealth to subsidize the purchase of prescription medicines in much the same way as it already defrays the cost of Blue Cross/Shield and Group Life Insurance Benefits for these officials and other non-contractual and contractual State employees.

It is our opinion, and you are so advised, that such a program does not fall within the prohibition of Article III, §27 of the Pennsylvania Constitution and State officials may participate in the program and receive benefits thereunder.

Article III, §27 states:

> No law shall extend the term of any public officer or increase or diminish his salary or emoluments, after his election or appointment.

With regard to those non-contractual employees who are public officers, their right to receive benefits granted by the Executive Board without running afoul of the constitutional prohibition is contingent upon two separate questions. First, we must determine whether the benefits in question are "salaries or emoluments" of office. Assuming they are, we then must decide whether the action taken by the executive Board in granting those increases constitutes the type of action which would be precluded by Section 27.

There can be little doubt that the Commonwealth's payment of premiums for eligible recipients has a dollar value to those enrolled in the program and that it increases the "emoluments" of a beneficiary. In Black's Law Dictionary, Revised 4th Edition, 1968, "emoluments" is defined as "[t]he profit arising from office or employment; that which is received as compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites; advantage; gain, public or private." Furthermore, as stated in *Sellers v. Upper Moreland Township*, 385 Pa. 278, 282 (1956), "[t]he constitutional provision forbidding an increase in salary or emoluments of a public officer during the term of office is inexorable and may not be avoided by indirection."

A host of cases have manifested agreement with this interpretation. For instance, a law which relieved a tax collector from the obligation to pay the premium on his bond was labeled as an emolument in *Sellers, supra*; a law increasing the expense accounts of county commissioners in an amount grossly disproportionate to their actual expenses was held to be an emolument in *Loushay Appeal*, 169 Pa. Superior Ct. 543 (1951), *aff'd.*, 370 Pa. 453 (1952); and the right of a sheriff to maintain his residence in a county jail was considered an emolument in *Commonwealth v. Elliott*, 40 D. & C. 665 (1941). See also *Apple v. Crawford Co.*, 105 Pa. 300 (1884) and *Berks Co. Inst. Dist. v. Schoener*, 383 Pa. 210 (1955).

As stated previously, however, the characterization of prescription benefits as an increase in emoluments for public officers is not determinative of the overriding issue. In order to pass upon the legality of the proposed benefits as they affect public officials we also must decide whether the resolution adopted by the Executive Board constitutes a "law" within the context of Section 27.

Before subjecting the benefits in question to the second phase of our two-pronged examination, we must understand the composition and overall responsibilities of the Executive Board. The Board is a statutorily created body consisting of the Governor and six members of the cabinet chosen by the Governor whose duties include, among others, standardizing employment conditions for all State employees, arranging the structure of the executive branch, approving extra compensation in certain instances, determining the hours of employment and vacation time, promulgating rules defining reimbursable expenses, designating those persons who must give fidelity bonds or have surety bonds executed on their behalf, approving branch offices of administrative agencies, prescribing the levels of liability insurance which must be maintained by the Commonwealth for its officers and employees, and regulating the purchase and use of vehicles by the Commonwealth. Administrative Code of 1929, section 709, 71 P.S. §249. Within these boundaries the General Assembly has entrusted the Board with the duty to assess the performance of the diverse segments of the executive branch and to establish uniform rights and responsibilities that will best promote the transformation of the divergent and seemingly disparate fragments of State government into an integral whole.

It is against this background that the Constitutional provision must be construed. As the discussion below indicates, the main thrust of Section 27 is to prohibit the Legislature from interfering in the conduct of public officers.[1] The leading case in point is *Baldwin v. City of Philadelphia*, 99 Pa. 164 (1881), where the ordinance of city council altering the salary of the city's chief commissioner of highways was deemed not to conflict with Article III, §13, the forerunner to Article III, §27, of the Pennsylvania Constitution. The ordinance was held to be a mere local regulation which "has perhaps the force of law in the community to be affected by it, but it is not prescribed by the supreme power; it concerns only a subdivision of

1 The language of Article III, §27 should be contrasted with comparable provisions in the United States Constitution, where one of the primary concerns evidenced was that the officers in question should have only one source of income, whatever that source. Furthermore, the proscription against changing that level of compensation was all-encompassing, rather than being limited solely to action by the Congress. Article II, §1[7] states: "The President shall ... receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period *any* other Emolument from the United States, or any of them." (Emphasis added.) Article III, §1 states: "...The Judges...shall...receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." (Emphasis added).

the state, and does not rise to the dignity of law." This conclusion has been cited time and again and remains as valid precedent. See *Sefler v. McKees Rocks Boro*, 72 Pa. Superior Ct. 81 (1919); *Davis v. Homestead Boro*, 47 Pa. Superior Ct. 444 (1911).

Although no case specifically addresses the problem raised here, where the Executive Board is the authority responsible for effectuating the change in employment conditions, two cases did confront similar situations in which the Legislature delegated to some other entity the responsibility for adjusting salaries of public officers. In *McCormick v. Fayette Co.*, 150 Pa. 190 (1892), the Court announced that the salary of the Fayette County Sheriff could be changed after his election to office without violating the constitutional prohibition since the power to allow from time to time such sums (not exceeding a limit set by the Legislature) to be paid as a per capita fee for the boarding of prisoners had been vested in the court of quarter sessions by the General Assembly, and Section 27 of Article III..."is a limitation upon the power of the legislature, and upon that alone.... The word 'law'...has a fixed and definite meaning, and as here used applies only to Acts of the legislature."

In much the same vein is *Emmaus League v. East Penn School District*, 12 D. & C. 2d 103 (1957), where a series of resolutions passed by the board of school directors increasing the salary of the superintendent was deemed to be constitutional. As in *McCormick*, the court held that by vesting in local school districts the discretionary power to change salaries, an Act of Assembly did not *mandate* an increase in salaries, and the legislative action thereby was removed from the constitutional provision.

As expressed throughout these cases, and as developed more fully below, Section 27 is designed to safeguard the principle of Separation of Powers. Whether the evil to be avoided is the promise of monetary gain in exchange for political support or the threat of financial ruin absent political capitulation, the subject of the prohibition remains the General Assembly, and it is the conduct of this body, and this body alone, which is circumscribed by Section 27. The power delegated to the Executive Board, like the authorizations granted in *McCormick* and *Emmaus*, insulates this body from undue legislative interference. Accordingly, the same result must obtain here.

The basis for our reading of Section 27 stems not from historical accident but from a thorough analysis of the intent of the framers, as reflected below.

> "The purpose of the framers of the Constitution in placing limitations upon legislative interference with the compensation received by a public officer for the duties normally incident to the office was to eliminate political or partisan pressure upon the incumbents of office after they had been elected or appointed: 8 Deb. Pa. Const. 332, 333." *Hadley's Case*, 336 Pa. 100, 105 (1939).

> "If the ordinances of a city are not laws within the meaning of this clause in the Constitution, much less so are the orders or agreements of the county commissioners and county auditors in regard to the treasurer's salary. The obvious meaning of the Constitution is, that the General Assembly should regulate — that is, ascertain and publish — the compensation which should be paid to the respective county treasurers, and that therafter 'no law'—that is no Act of Assembly, should increase or diminish their respective salaries during the term for which they were elected." *County of Crawford v. Nash*, 99 Pa. 253, 260 (1881).

See also, Opinion of Attorney General No. 30 (June 5, 1974), 4 Pa. Bulletin 1296; 1 Journal of Proceedings of Pa. Commission on Constitutional Amendment and Revision 74 (1920).

The distinction between Acts passed by the Legislature and those actions with legal effect taken by other governing bodies was also manifested in the 1873 Debates concerning judicial salaries. 8 Deb. Pa. Const. 397 *et seq.* These discussions underscored the fact that the salaries paid to judges by the State were not the sole source of income for judges and were often supplemented by funds from the county treasuries. Both Article V, §18 of the Constitution of 1874[2] and Article V, §16(a) of our current Constitution[3] are illustrative of more stringent constitutional prohibitions against modifying salaries and indicate by contradistinction the limited scope of Article III, §27.

In this context it is clear that the extension of prescription benefits to public officers by the Executive Board is not the type of action at which Section 27 was directed. In contrast with the potentially unbounded discretion of the Legislature, the Executive Board at one and the same time has its regulatory powers derived from and prescribed by the Administrative Code. To the extent that this Board is bound by well-defined law, the likelihood of abuses is reduced proportionally. To the extent that additional retraints become necessary, supplementary legislation can be provided. In either event, the Executive Board is distinct from the General Assembly, and the admonitions of the framers in regard to Article III, §27 do not apply to it.

Finally, we should recognize that in its deliberations during 1971 and 1972 the Commonwealth Compensation Commission took

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2 "The judges of the Supreme Court and the judges of the several courts of common pleas, and all other judges required to be learned in the law, shall at stated times receive for their services an adequate compensation, which shall be *fixed* by law, and paid by the *State*. They shall receive *no* other compensation, fees or perquisites of office for their services from *any* source, nor hold any other office of profit under the United States, this State or any other State." (Emphasis added).

3 "Justices, judges and justices of the peace shall be compensated by the *Commonwealth as provided by law*. Their compensation shall not be diminished during their terms of office, unless by law applying generally to all salaried officers of the Commonwealth." (Emphasis added).

cognizance of the power of the Executive Board to fix uniform leave policies governing department heads, and arrived at its final recommendations on the premise that the Executive Board, not the Commission, was responsible for adjusting employment conditions. In the past the Board has used this authorization to grant hospitalization and life insurance benefits to non-contractual and contractual employees alike. Contractual employees already receive prescription benefits, and the decision reached by the Executive Board to extend these benefits to public officers in the same manner they will be provided to other non-contractual employees is intended to provide an inducement which will help attract from private industry and keep in the ranks of government public servants of high quality. The result is not only necessary but completely harmonious with the intent of the Commission and of the framers.

Pursuant to Section 512 of the Administrative Code of 1929, 71 P.S. §192, we have sought the comments of the Treasurer and Auditor General and are advised that they concur in our conclusions.[4]

Very truly yours

Barnett Satinsky
Deputy Attorney General

Peter W. Brown
First Deputy Attorney General

OFFICIAL OPINION No. 44

Department of Welfare — Facilities for medically handicapped and mentally retarded — Provision of educational space

1. A private facility, licensed by the Department of Welfare, must arrange for the education of children housed therein.

2. The Department of Education is not responsible for the expenses incurred in providing educational space at these facilities.

3. Failure to provide adequate educational space should result in a review of the facility's eligibility for a license.

Harrisburg, Pa.
September 10, 1974

Honorable Helene Wohlgemuth
Secretary
Department of Public Welfare
Harrisburg, Pennsylvania

Dear Secretary Wohlgemuth:

You have asked whether the Department of Education, through

4 The Attorney General being directly affected by this opinion took no part in its preparation or issuance.

school districts or intermediate units, or the Department of Welfare, by virtue of increased fees, must pay for the educational space needed at private licensed facilities which care for medically handicapped, mentally retarded persons.

It is our opinion and you are so advised, that the facility, and by implication the Department of Welfare, must make proper arrangements, including the provision of space, for the education and training of the children housed therein. This is not the responsibility of the Department of Education.

Under Section 9105 of the Regulations for Mental Health/Mental Retardation Inpatient Facilities subject to licensing by the Department of Welfare, a condition of the granting of a license is the provision, by the facility, of a proper education and training program.

Section 9105(A) requires that the facility "arrange for education and training for...school age children incapable of benefitting from education and training provided in public schools" (currently labelled severely and profoundly retarded) and that the program "shall conform with the standards of the Department of Education". The regulations further provide that the facility must make appropriate arrangements with the public school system.

Section 9105 (B) (C) (D) and (H) are even clearer in their requirements that the facility arrange for the education of educable and trainable retarded persons.

These regulations, when read in conjunction with Official Opinion No. 56, August 6, 1973, rendered to yourself and Secretary Pittenger, ineluctably lead us to the conclusion that the facility must arrange for all children who are placed and supported by the Department of Welfare (interim care placements) to be given a program which meets the standards and regulations of the Secretary of Education and the State Board of Education. For purely private placements, the facility may arrange for the delivery of education by a private academic school or, indeed, obtain such a license itself, but it must provide education.

However, no matter what the situation, the facility is responsible for proper educational space as part of its license requirements, and not any branch of the public school system which might be providing the actual education program.

Failure or refusal to make the proper arrangements for education should result in a review of the facility's eligibility for a license in accordance with appropriate Department procedures.

Sincerely yours,

Larry B. Selkowitz
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 45

Department of Banking — Savings Banks — Saving Accounts — Withdrawals

1. Savings banks may lawfully offer accounts to their depositors whereby the depositors may withdraw funds from their account by means of a withdrawal slip and a check which must be countersigned by the bank. In lieu of a passbook, depositors receive monthly statements issued by the bank.

Harrisburg, Pa.
September 10, 1974

Honorable Carl K. Dellmuth
Secretary of Banking
Harrisburg, Pennsylvania

Dear Secretary Dellmuth:

You have asked us to determine whether savings banks operating under the Banking Code of 1965, 7 P.S. §101 *et seq.* may offer depositors a type of savings account which has never been offered previously in Pennsylvania. The account, for the purpose of this opinion, shall be referred to as a WOA account. WOA accounts are statement accounts; i.e., in lieu of the traditional passbook, the account is kept by a series of monthly statements issued by the savings bank to the account holder. Each monthly statement sets forth all deposits to, all interest credited to, and all withdrawals from the account during the month. WOA account holders withdraw funds from their account by presenting to the bank, either personally or by mail, a withdrawal slip together with a withdrawal order which when countersigned by the bank, is made transferrable and negotiable . It is not until the drawee bank countersigns the WOA order that it is a valid instrument of transfer; and once it is so countersigned, it becomes a treasurer's check and the bank debits the WOA account by the amount of that check. The drawee bank then places the amount debited into a demand account for the purpose of honoring the WOA check when it is presented for payment.

As you know, it is customary for savings account holders to withdraw funds from their account by presenting a withdrawal slip together with an account passbook. The bank, after noting the withdrawal in the passbook and upon retaining the withdrawal slip, pays the amount to be withdrawn to the account holder in cash. The account holders may however, if they so wish, receive all or part of the withdrawal in the form of one or more money orders or treasurer's checks. Thus, the distinguishing feature between this traditional account and the WOA account is that depositors receive, in lieu of a passbook, receipts for their deposits and a book of "checks" and withdrawal forms.

The Banking Code of 1965 defines a savings bank as:

"A corporation without capital stock which exists under

> the laws of this Commonwealth and as a savings bank under the Banking Code of 1933 which was authorized to engage in the business of receiving savings deposits on the effective date of this act or which receives authority to engage in such business pursuant to this act." 7 P.S. §102(x).

It should be noted that the term "savings deposits" is not defined in the Banking Code. Clearly, however, savings banks act as depositories and they must as well have a means by which depositors can withdraw their money. The Banking Code provides:

> "A savings bank may receive money for deposit and:
>
> "(a) Provisions for withdrawal — May provide by its articles or by-laws for the terms of withdrawal thereof except that deposits may not be accepted which are legally subject to withdrawal within a period of less than fourteen days,[1]
>
> "(b) Notice in absence of provisions — Shall repay deposits on demand after sixty days' notice in the absence of any requirement of notice in its articles, by-laws or rules or in the event of failure by the savings bank to give any notice required by this act or by its articles, by-laws or rules...." 7 P.S. §503(a), (b).

Since the above quoted provisions of law are the only provisions in the Banking Code of 1965 which discuss the means of withdrawing funds deposited in savings banks, we must interpret them in order to determine whether they permit the kind of withdrawal contemplated by WOA accounts. As savings banks may provide through their by-laws the terms for withdrawal, it is reasonable to conclude that such by-laws may provide for a means of withdrawal as contemplated with a WOA account. Thus, if the WOA account incorporates the requirements of Section 503(a) of the Code, then, except for some minor technicalities (e.g., it is probable that, under Section 108 of the Code, the bank must retain the checks presented for payment, 7 P.S. §108), it would appear that the account is permissible under the Code. Since Federal Law does not prohibit WOA type accounts either, we conclude that such accounts are lawful in Pennsylvania.

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1 It has been suggested that Section 503(a) means that a savings bank may not pay out money deposited until fourteen days after such deposit is made. The commentary to Section 503 of the Banking Code of 1965 indicates, however, that Section 503(a) restates without change that portion of Section 1203(a) of the Banking Code of 1933 which provided that a "savings bank shall not accept any deposits payment of which can be legally required by the depositor within a period of less than fourteen days." Accordingly, it appears that Section 503(a) obligates a bank to do no more than retain the option of refusing to surrender a deposit sooner than fourteen days after it is made. The latter is the interpretation of Section 503(a) that has been universally adopted by savings banks since the Code of 1965 became effective.

Although the WOA account does not seem to be a major departure from traditional savings accounts (indeed, the differences appear to be those of form rather than substance), arguments have been made setting forth the premise that even though there are no provisions in the Code that explicitly prohibit WOA accounts they should still be declared unlawful as they are one step closer to demand deposits which are exclusively within the realm of commercial banks. In this regard, it is necessary to briefly discuss the traditional purposes and functions of savings banks.

The Pennsylvania Supreme Court in *Philadelphia Saving Fund Society v. Banking Board of Pennsylvania*, 383 Pa. 253 (1955) determined that PSFS could open a branch office in a location which was already serviced by several commercial banks. The Court described mutual savings banks by stating that:

> "...[t]he primary purpose of a mutual savings bank is to encourage thrift....The function of such a bank is to receive small but frequent deposits from a large number of individuals. The aggregate of these deposits is then carefully invested, from time to time, in home mortgages, stock and bonds, and the resultant income...is distributed proportionately among the various depositors by way of a dividend....[t]he savings bank offers the small depositor a sound income-producing investment for his modest means and at the same time affords him a convenient opportunity of home financing.
>
> "The distinction between a mutual savings bank and a commercial bank for profit has long been judicially recognized. [Mutual savings banks] are...banks of deposit for the accumulation of small savings belonging to the industrious and thrifty... 'A savings bank is an institution organized to promote prosperity of persons of small means and limited opportunities, wherein earnings may be gained on aggregate small deposits...it is not a bank *in the commercial sense* of the word.'" *Id.* at 261.

Viewed in this light, what appears to be an insignificant variance between the traditional passbook savings accounts and the WOA account, i.e., the difference between a passbook on one hand and a set of deposit slips, withdrawal slips and a checkbook on the other, becomes a matter that can arguably be an unacceptable overreaching of the ultimate purpose of the Banking Code. It is contended that the holders of WOA accounts will view their withdrawal order as a check, regardless of its technical classification, and therefore use it as they would a normal check. This would have great repercussions among the various institutions in the banking community, as quite possibly many depositors would withdraw their funds from commercial banks and deposit them in savings banks, thus upsetting the delicate balance among the various banking institutions.

It should also be noted that the reserve requirements for savings banks are significantly less than those required for commercial banks. 7 P.S. §703. This is true due to the fact that monies deposited in demand deposits have a much higher frequency of withdrawal than monies deposited in savings deposits and thus the need for protection is greater. Since it is a reasonable assumption that WOA accounts will occasion a higher rate of withdrawal than customary passbook savings accounts, it has been suggested that this is further justification for finding WOA accounts unlawful under the Banking Code of 1965.

Although we find these arguments meritorious, we do not deem them persuasive, as WOA accounts are merely a minor variation on what savings banks have traditionally been doing for years, i.e., issuing treasurer's checks. In fact, the Maryland Supreme Court stated that:

> "If...a depositor of the Bank, on making a withdrawal, has the option of requesting cash, or treasurer's check, or of purchasing a money order, it seems abuntantly clear to us that according him a fourth option of drawing a check on his own account, whether or not he presents his passbook, is a distinction without a difference." *Savings Bank of Baltimore v. Bank Commissioner of the State of Maryland*, 248 Md. 461, 475, 237 A.2d 45, 53 (1967).

The *PSFS* case as quoted above, pointed out that savings banks are thrift institutions. That case also states that savings banks are very deeply involved in the home mortgage market. As you are well aware, the home mortgage market is very tight. One of the advantages of savings banks offering WOA accounts will be an influx in savings deposits which will result in the availability of more money for the home mortgage market. Also, the broad dictum in that case supports the policy that savings banks, although serving somewhat different functions, still compete with commercial banks.[2]

As there are no prohibitions against the use of WOA accounts in Pennsylvania, it is our opinion, and you are accordingly advised, that such accounts are lawful. We do suggest however that savings banks offering this type of account should be required to inform their depositors that withdrawals from the account are subject to a minimum of fourteen days notice if the bank should so require.

Very truly yours,

Jeffrey G. Cokin
Deputy Attorney General

Israel Packel
Attorney General

2. In fact, the framers of the Banking Code of 1965 specifically stated that one of the purposes in adopting the Code was to provide for: "*the opportunity for institutions subject to this act to remain competitive with each other*, with financial organizations existing under other laws of this Commonwealth, and with banking and financial organizations existing under the laws of other states, the United States and foreign countries." 7 P.S. §103(a)(v). (Emphasis supplied).

OFFICIAL OPINION No. 46

Act 175 of 1974 — "The Sunshine Law" — Open Meetings — Confidentiality of Investigative Reports and Privacy of Personal Records Maintained

1. Act 175 of 1974, the "Sunshine Law," which is applicable to all state and local agencies, requires that meetings and hearings at which formal action is taken be open to the public.

2. Subcommittees and advisory bodies which take formal action or make recommendations to their parent bodies are subject to the Act.

3. All phases of the deliberations leading up to a vote by agency members are subject to the disclosure provisions of the Act.

4. The open meeting and advertising requirements of the Act do not apply to emergency situations, labor negotiations, disciplinary proceedings against public officers, investigatory reports, or other confidential matters.

Harrisburg, Pa.
September 12, 1974

Honorable Milton J. Shapp
Governor
Harrisburg, Pennsylvania

Dear Governor Shapp:

You have requested that I prepare an opinion to make as clear as possible the full impact and intent of Act No. 175 of 1974, effective September 17, 1974, and known as the Sunshine Law. This opinion, subject to any future judicial order, shall be binding upon department heads, boards, commissions and officers of the Commonwealth as provided by Section 512 of the Administrative Code, but shall be only advisory as to other governmental bodies.

I. AGENCIES SUBJECT TO THE ACT

The Act applies to any state or local public body performing governmental functions, the sole exception being the judicial branch of government. Any public body created by or pursuant to a statute comes within the scope of the Act. Specifically named are the General Assembly, the Governor's Cabinet when meeting on official policy making business, any department, board, authority or commission of the Commonwealth, any municipal, township or school authority, school board, school governing body or commission, the board of trustees of all State-aided, State-owned and State-related colleges and universities, and all community colleges.

Not specifically named but included within the scope of the Act are councils, committees, subcommittees, task forces or other groups of persons to which have been delegated administrative or executive functions. The Legislature intended the full decision-making process of an agency to be revealed to public scrutiny and

this intent may not be subverted by delegating authority to a group claimed to be beyond the scope of the Act. See, *Times Publishing Co. v. Williams*, 222 So. 2d. 470, 475 (Fla. 1971).

Furthermore, if a body which is formally organized by statute, executive order, administrative directive or regulation, is delegated a function, even though wholly advisory, its meetings are also subject to the Act. The collective decisions of advisory boards, commissions and committees often provide the foundation upon which ultimate decisions are made, and the fact that a particular advisory group cannot bind its parent agency does not exempt the former from the Sunshine Law.

PART I ILLUSTRATIONS

(a) Department head X creates a task force to examine certain problems the Department is facing and to take corrective action. Do the open meeting provisions of the Act apply to the task force? Yes.

(b) Commission A is composed of five members with the power to set rates which may be charged in a particular industry. The Commission meets to decide whether to approve a rate increase request. Is this a meeting subject to the requirements of the Act? Yes.

(c) Board B was created by statute to advise the Secretary of a particular Department with regard to certain problems. Do the open meeting provisions of the Act apply to Board B? Yes.

(d) Board C was created by Executive Order of the Governor to advise him with regard to certain problems. Do the open meeting provisions of the Act apply to Board C? Yes.

(e) Board D was created by a Department Head to advise him with regard to certain problems. Do the open meeting provisions of the Act apply to Board D? Yes.

II. APPLICABILITY TO MEETINGS AND HEARINGS

The essence of the Sunshine Law is the open meeting concept, expressed in Section 2 of the Act:

> "The meetings or hearings of every agency at which formal action is scheduled or taken are public meetings and shall be open to the public at all times. No formal action shall be valid unless such formal action is taken during a public meeting."

Section 5 of the Act assures that the public will be advised of these meetings or hearings in sufficient time to allow their attend-

ance by requiring the time, place and date of each such meeting or hearing to be advertised in advance in a newspaper of general circulation in the political subdivision in which the meeting or hearing will be held and posting notice at the principal office of the agency holding the meeting or hearing or at the public building in which it is scheduled to be held.

Since the Sunshine Law contains no definition of the terms "meeting" or "hearing", these words must be construed according to their common and approved usage. Statutory Construction Act of 1972, 1 Pa. S. §1903.

Black's Law Dictionary (1951 Ed.) defines the terms as follows:

> Meeting — "A coming together of persons; an assembly. Particularly in law, an assembling of a number of persons for the purpose of discussing and acting upon some matter or matters in which they have a common interest."
>
> Hearing — "Proceeding of relative formality, generally public, with definite issues of fact or of law to be tried, in which parties proceeded against have right to be heard, and is much the same as a trial and may terminate in final order."

With specific reference to "hearings", this term consists of any proceeding required to be held prior to the rendering of an adjudication pursuant to Section 31 of the Administrative Agency Law, 71 P.S. §1710.31. The term "hearings", also would include other proceedings such as "due process hearings," which are mandated by constitutional due process guarantees, in addition to other proceedings denominated as "hearings" by other statutes or required by case law. As to the adjudicatory decision which follows, whether it is considered to be part of the hearing or a separate meeting, this phase of the proceedings is also open to the public, since, however categorized, the issues being discussed are the proper subject matter for an open meeting.

Thus the hearing and all deliberations leading up to a vote by the agency members are to take place in full public view, unless such proceedings or a portion of them fall within exceptions provided elsewhere in the statute.

Section 2 of the Act, quoted above, requires that any meeting or hearing at which "formal action" is taken or scheduled to be taken must be open to the public. The term "formal action" is defined therein to include either "the taking of any vote on any resolution, rule, order, motion, regulation or ordinance" or "the setting of any official policy."

It is clear from the Act that the Legislature intended "any" vote to be open, not just "formal" votes taken at "formal" meetings. "An

informal conference or caucus of any two or more members permits crystallization of secret decisions to a point just short of ceremonial acceptance." *City of Miami Beach v. Berns*, 245 So. 2d. 38, 41 (Fla. 1971). Thus, even a preliminary vote, a casual manifestation of the manner in which a subsequent vote will be cast, or a collective commitment or informal promise to approve or disapprove a particular matter of public agency business is within the purview of the Act. See, *Board of Public Instruction of Broward Co. v. Doran*, 224 So. 2d. 693, 698 (Fla. 1969). An agency cannot evade its obligations under the Act by agreeing to a course of action which will become effective or finalized at a subsequent formal meeting.

Policy setting would seem to refer to any discussions, deliberations or decisions with regard to the formation, endorsement, ratification or approval of a program or general plan pursuant to which agency business will be conducted or agency decisions made, and would include the promulgation, adoption or modification of rules and regulations setting forth substantive or procedural personal or property rights, privileges, immunities, duties, liabilities or obligations of the public or any part thereof. Read as a whole, therefore, the provisions of Section 2 contemplate that any gathering of those members of an agency with sufficient voting power to make a determination on behalf of the entire agency - i.e., a majority or quorum of the agency - constitutes a meeting or hearing.

This concept does not include a conference or other gathering at which one individual, such as the head of a department, is going to make a determination or is soliciting information or suggestions from other officers, investigators, or employees. Nor does it include meetings among staff members who themselves do not sit on the formal parent body. In either case, the staff members and their counterparts do not participate in the ultimate decision to adopt or reject a particular course of action or suggestion.

To require advance public notice by newspaper advertisement of either such conference or working session and to allow public attendance would unduly infringe upon the ability of the Executive Branch to function as a coequal branch of government. Such a requirement could conflict with Article IV, §2 of the Pennsylvania Constitution, *cf. Bailey v. Waters*, 308 Pa. 309, 313 (1932), and cannot be presumed to reflect the intent of the General Assembly since it could lead to an unreasonable and unconstitutional result. Statutory Construction Act of 1972, 1 Pa. S. §1922(1), (3).

Simply stated, a meeting or hearing of an agency is any assemblage, whether in person or by telephone, among at least a majority or the quorum of the members of an agency, at which the participants enter into an agreement as to the vote or policy matters which will be the subject of subsequent formal action by that agency.

PART II. ILLUSTRATIONS

(a) Department Head X meets with two staff members (or Deputy Secretaries or private citizens) to discuss a certain problem the Department is facing. Do the open meeting sections of the Act apply? No.

(b) Board Member S meets with the Executive Director of the Board to discuss policy problems which will be the subject of discussion and voting at the next board meeting. Is this conference subject to the open meeting requirements of the Act? No.

(c) The deputy secretaries or bureau chiefs of a Department meet on a weekly basis but do not, as a unit, have advisory powers or substantive authority. Is this gathering subject to the open meeting requirements of the Act? No. The meeting is one of convenience where each bureau chief acts separately from the others in funneling information to and advising the Secretary and no joint action may be taken, as decision-making power is vested solely in the Secretary.

(d) Commission E has the power to issue certain licenses. It holds a hearing at which two groups dispute who, if anyone, is entitled to a particular license. After the hearing has concluded, the commission wishes to discuss the case and make a decision. Is the proposed discussion required to be open to the public? Yes. An exception might exist if the discussion included reference to confidential material as in a formal investigation report made in the course of the agency's official duties.

(e) Board F is a five-member, statutorily created board. At breakfast before a regularly scheduled and properly advertised meeting, three board members confer as to policy matters and matters which will come before the board for a vote in the future. Is this gathering subject to the open meeting requirements of the Act? Yes. A majority (and quorum) are present and the gathering falls within the purview of the Act.

(f) The five members of Board F decide that it is inconvenient to meet in person and instead consult by means of a conference call in the course of which they vote on matters before the board. Is this telephonic gathering subject to the open meeting requirements of the Act? Yes. The public has a right to be notified and listen to the "meeting" at each end of the conversation, perhaps by means of a "speakerphone".

(g) A member of Board F invites the other four members of the Board to his home for dinner. They do not discuss policy matters nor, even informally, do they agree as to how they will

vote on matters which may come before the Board. Is this gathering subject to the open meeting requirements of the Act? No.

(h) A member of Board F meets with one other board member to discuss policy problems which will be the subject of discussion and voting at the next board meeting. Is this conference subject to the open meeting requirements of the Act? No. As it is a five-member board, two members are less than a majority or a quorum. CAVEAT. If a séries of meetings of less than a majority or quorum of an agency are used as a subterfuge to avoid the public meeting requirements of the Act, there would be a vioaltion.

III. EXCEPTIONS TO THE OPEN MEETING REQUIREMENTS

There are several exceptions to the general precept that all meetings or hearings at which formal action is scheduled or taken must be open to the public.

A. *Emergencies* — The giving of notice and the right to attend meetings or hearings are not applicable "when an agency holds a meeting to deal with an actual emergency involving a clear and present danger to life or property." §5(e).

B. *Limited Executive Session* — A public meeting may be delayed, adjourned or recessed for a single executive session in order to deal with labor negotiations or with complaints or charges brought against public officers, employees, or agents.[1] Such an executive session may be held upon notification to the public present that for a period not to exceed 30 minutes the meeting will be in recess for one of the two stated purposes.

The time factors expressed in the Act, limiting the subject and duration of executive sessions are aimed primarily at avoiding public inconvenience, by recognizing that if either of these sensitive subjects unexpectedly or unavoidably arise in the course of a regularly scheduled open meeting, a limited adjournment is in order. However, the same subjects can be treated more fully at another time in closed session under principles of confidentiality without inconveniencing members of the public who would not have been permitted to attend such meetings from the start.

C. *Confidential Information* — In Section 10 of the Act, the General Assembly explicitly recognized that the public's right to be present at a meeting or hearing must be weighed against the counterveiling policy of individual right to privacy as protected by specific statutes:

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1 The meeting must be public, however, if the charged person requests that a public hearing be held.

> "All acts and parts of acts are repealed in so far as they are inconsistent herewith, *excepting those statutes which specifically provide for the confidentiality of information.*" (Emphasis added).

In defining the scope of this exception each agency must look to the specific statutes designed to guide its conduct with regard to the release of information concerning business or personal finance and taxes, business trade secrets, and the physical and emotional health of individual citizens.

Quite apart from these individual directory statutes, and of far broader scope, is the existing Right to Know Law, Act of June 21, 1957, P.L. 390, 65 P.S. §66.1, which is in *pari materia* with the Sunshine Law and must be read together with it. Statutory Construction Act of 1972, 1 Pa.S. §1932.

The Right to Know Law requires that:

> "[a]ny account, voucher or contract ... any minute, order or decision[2] by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons ..." shall "be open for examination and inspection by any citizen of the Commonwealth of Pennsylvania."

That Act goes on to *exclude* from its disclosure requirements:

> "... 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* or 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." (Emphasis added).

If we are to give any credence at all to this correlative exclusion and if the confidentiality of investigatory records is to be maintained, then the substance of the reports of any pending investigations, whether conducted under the aegis of a law enforcement agency or a licensing board, are not subject to disclosure, either by direct examination of the records or by attendance at a meeting during which this material is discussed. These matters,

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2 Enrolled bill included the word "action."

like those discussed in Part III-B, *supra*, are non-agenda items that more properly will be considered at a private meeting of the agency in question. See, *Wiley v. Woods*, 393 Pa. 341 (1958).

After discussion of such investigatory material has been concluded and once an investigation results in formal charges being filed or a decision made not to recommend or impose sanctions against the individual who is the subject of the investigation, any subsequent meetings or hearing must be conducted publicly and may be done so without compromising the continuing confidentiality of the actual investigatory documents.

With regard to records or written complaints about an individual who is licensed by the State to practice some profession or occupation, here too, an initial investigation can be conducted without public disclosure and without undue damage to the reputation of an innocent or blameless individual, but once the preliminary decision is made either to seek sanctions or to dismiss the matter, the public has a right to be present if there are subsequent proceedings.

Another provision which insures the confidentiality of discussions regardless of the agency involved is the attorney-client privilege, codified by the Act of May 23, 1887, P.L. 158, §5(d), 28 P.S. §321:

> "Nor shall counsel be competent or permitted to testify to confidential communications made to him by his client or the client be compelled to disclose the same, unless in either case this privilege be waived upon the trial by the client."

There has recently been much discussion in other contexts as to whether there is any attorney-client privilege between government attorneys and the agencies which employ them due to the fact that the public is their real client.[3] The issue must be framed as the question of which communications between government attorneys and their agency "clients", if any, are required to be at open meetings under the Sunshine Law.

This very question was faced by the District Court of Appeal of Florida, Second District, in *Times Publishing Company v. Williams*, 222 So.2d. 470 (1969), in interpreting Florida's "Government in the Sunshine Law." Though not identical, Florida's Sunshine Law is sufficiently like Pennsylvania's to provide a valuable precedent.

In that case, the Court held that the attorney-client privilege,

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3 The Proposed Rules of Evidence for United States Courts includes governmental bodies within the definition of those "clients" entitled to the privilege. See, Rule 5-03, cited at 46 F.R.D. 161, 249 (1969).

subject to some exceptions, has effectively been waived by the Legislature by the Sunshine Law. 222 So.2d. at 475. Citing the section of the Florida Constitution which gives "exclusive" jurisdiction to the Supreme Court of Florida in the matter of disciplining attorneys, the Court stated that "this disciplinary power necessarily includes the exclusive province to proscribe rules of professional conduct the breaching of which renders an attorney amenable to such discipline." The Court held that in matters of pending or impending litigation a conflict could arise where the "ethical obligations of the attorney clearly conflict with the dictates of this statute." 222 So.2d. at 476. The Court held that "[t]he legislature therefore is without any authority to directly or indirectly interfere with or impair an attorney in the exercise of his ethical duties as an attorney and officer of the court." 222 So. 2d. at 475 (citations omitted). The Court stated:

> "This is brought into focus, for example, if we consider the potential effect of extending the 'open meetings' concept to a consultation between a governmental agency and its attorney involving settlement or adjustment of a matter in pending or contemplated litigation. Such settlement or adjustment, in the professional opinion of the attorney, may be fair and favorable to the public and, thus under Canon No. 8, it would be his duty to so advise. It may further be the professional opinion of the attorney, in the best interests of the public (his real client), that such consultation be private and confidential so as not to jeopardize the settlement. Indeed, he may well feel that such advice would be useless if revealed in such a case, and his duty to so advise would be completely compromised by a requirement that this advice be imparted in public. The client may have the right to accept or reject the judgment that settlement is called for, but it does not have the right to render impossible the attorney's duty to so advise; nor does the legislature have the authority to render this judgment sterile. The attorney's dilemma in the fact of such legislation is obvious." *Id.*

In Pennsylvania the situation is virtually the same as in Florida, and it is submitted that the same analysis applicable to Florida's statute is applicable to Pennsylvania.

PART III. ILLUSTRATIONS

(a) Board G is charged with licensing the members of a particular occupation. One of the licensees is accused of a series of criminal acts in violation of the licensing statute. The board's investigators conduct a formal investigation into the charges and submit a written report to the board. The board meets to discuss the investigative report. Must the discussion of the report be held in public view? No.

(b) Board G decides that there is sufficient evidence to

warrant a formal hearing to determine whether disciplinary action should be taken against the licensee. Must the hearing be held in public view? Yes.

(c) At a meeting held by Council H to decide whether to approve a certain grant, the council's staff pass out to the members of the council copies of a confidential investigative report made by a law enforcement agency concerning the entity to whom the proposed grant is to be made. A member of the public demands to see a copy of the report. Must a copy be shown or given to members of the public? No. Nothing in the Sunshine Law requires such action and an investigative report is exempt from disclosure under the Right to Know Law.

IV. PUBLIC PARTICIPATION AT OPEN MEETINGS

Two distinct elements must be considered in determining the right of the public to participate in open meetings. The most obvious aspect of the question concerns public input at such meetings, i.e., the extent to which individuals may voice their opinions.

Recognizing that executive business would be seriously disrupted if every member of the public were given an opportunity to voice his approval or disapproval of agency policy at meetings, the Act imposes *no obligation* on an agency to allow participation at such times, and Section 6 specifically provides that the agency may protect itself from the disruption of its meetings:

> "... [T]he members of the agency conducting the meeting may at the time of any disturbance which would render the ordinary conduct of the meeting unfeasible and when order cannot be restored, authorize the presiding officer, by majority vote, to enforce such rules and regulations to the extent necessary to restore order. Such rules and regulations shall not be made to violate the intent of this act."

The Act, however, does not prohibit participation by members of the public, and in order to maintain the proper decorum it is recommended that each agency adopt rules and regulations, consistent with Section 6 of the Act, setting forth the extent to which members of the public will be permitted to address the issues raised at the meetings and hearings of an agency.

The far more difficult aspect of the participation issue is the extent to which the public is entitled to be instructed about the purpose and significance of the action taken at an open meeting. The Act does not require the agency to conduct meetings in any particular manner or to spell out every move and counter-move taken

by the participants. Furthermore, correspondence and other written materials may be circulated both before and after a public meeting without providing copies to members of the general public, and written materials may be distributed at a meeting for use solely by agency participants, so long as the discussion and votes relevant thereto are not couched in terms to mislead or preclude public understanding.

Finally, in assessing the extent of the burden imposed upon public officials by the open meeting requirements, it is important to note that apart from Section 4 of the Act requiring the recordation and availability of the minutes of a public meeting, the Act does not grant public access to any more documents or records than have been available heretofore. Nor does the Act require formal action to be taken upon any issue, which, prior to passage of the Act, could have been handled without convening a meeting of the agency. This Act contains no requirement that meetings be held, but simply that the public be given notice and allowed to attend *if* a meeting is held.

PART IV. ILLUSTRATIONS

(a) At a public meeting held by Commission I, a member of the public demands to participate in the Commission's discussion. Must the Commission allow such participation? No.

(b) Commission J has completed a hearing as to whether a certain license should be revoked and has assigned to Commission member K the task of reviewing the notes of testimony and drafting an opinion, for consideration of all the members. Commissioner K reviews the evidence and drafts an opinion which is circulated by mail to the other members, who unanimously approve K's well-reasoned work. The opinion then is released as an official adjudication of the commission. Has the action been taken by the commission in accordance with the provisions of the Sunshine Law? Yes.

V. CONCLUSION

This opinion does not purport to resolve all the issues which may arise under the provisions of Act 175. The practical experience of operations under the statute will help guide the judiciary and the administration in definitively interpreting its provisions. In the interim, strict adherence to the letter and spirit of the law, as interpreted by this opinion, will insure protection from personal liability for state officers and help prevent agency decisions from being invalidated due to noncompliance with the requirements of the Act.

Very truly yours,

Israel Packel
Attorney General

OFFICIAL OPINION No. 47

Pennsylvania Election Code — Absentee Registration and Voting — Pretrial Detainees and Convicted Misdemeanants Right to Vote — Equal Protection.

1. The provisions of the Pennslyvania Election Code which prohibit individuals confined in a penal institution from registering and voting absentee do not apply to pretrial detainees and convicted misdemeanants.

2. The Commonwealth does not have a compelling state interest to absolutely disenfranchise pretrial detainees and convicted misdemeanants.

September 11, 1974

Honorable C. Delores Tucker
Secretary of State
Harrisburg, Pennsylvania

Dear Secretary Tucker:

Recent litigation in the Commonwealth of Pennsylvania[1] and rulings by the United States Supreme Court have led to concern and confusion as to the voting rights of untried retrial detainees and convicted misdemeanants who are confined in penal institutions within the State. Inquiries from your office and from county election officials have raised the question of whether or not such classes of individuals may register and vote by absentee procedures prescribed under the Pennsylvania Election Code.

It is our opinion and you are hereby advised that untried pretrial detainees and convicted misdemeanants must be afforded the right to register and vote by officials responsible for administration of the election laws in the Commonwealth of Pennsylvania.

It is self-evident that all persons who are incarcerated are denied the mobility to register and vote in person at the proper polling places. However, under the Election Code, an individual who is absent from his election district may exercise his franchise as a "qualified absentee elector" provided, however, "that the words 'qualified absentee elector' shall in nowise be construed to include persons confined in a penal institution." 25 P.S. §2602(W)(12), 25 P.S. §3146.1. A preliminary reading of this provision of the Code would lead to the inescapable conclusion that convicted misdemeanants and pretrial detainees are effectively precluded from exercising the fundamental right of registration and voting.

Indeed, just such an interpretation of the law has, until recently, resulted in excluding those classes of individuals confined in prison from participating in the election process. In January of this year, the United States Supreme Court held that where as State provides for the absentee registration and voting of certain classes of individuals but denies the same opportunity to pretrial detainees and

1 *Goosby v. Osser*, (No. 71-2380, E. D. Pa. 1974)

convicted misdemeanants then the schematic exclusion of such individuals is in violation of the Equal Protection Clause of the United States Constitution. *O'Brien v. Skinner*, 414 U.S. 524 (1974).

Pennsylvania law provides for absentee registration and voting by numerous categories of voters who may be unable to appear in person at the polls. The Commonwealth permits absentee registration and voting by, *inter alia*, those who are unable to appear personally because of illness or physical disability, or those whose duties, occupation or business take them out of the election district of their residence. Absentee ballots are even available to those who are on vacation outside the country on election day. 25 P.S. §623-20.2; 623-20.3 2602(W) (1); 3146.1; 951-18.1; §951-18.2.

It is clear therefore, that the Commonwealth permits certain categories of individuals to register and vote absentee while prohibiting pretrial detainees and convicted misdemeanants from participating in person or through the use of absentee procedures in the election process. Where the State both physically prevents a class of individuals from going to the polls and denies them alternative means of casting their ballots, then the denial of absentee registration and absentee ballots is effectively an absolute denial of the franchise to these persons. The Supreme Court in *O'Brien, supra*, held that where an electoral scheme discriminates between categories of qualified voters that results in the absolute disenfranchisement of convicted misdemeanants and persons awaiting trial but unable to make bail, then the system denies those individuals the equal protection of the law guaranteed by the Fourteenth Amendment.[2]

Moreover, pretrial detainees and convicted misdemeanants should be allowed to exercise their right to vote by absentee ballot to preserve fundamental fairness within the democratic process. There is no justifiable interest served on behalf of the State by limiting the franchise to those individuals who are free from institutional constraints.[3] Indeed, the Election Code permits a con-

2 In comparing the Pennsylvania Election Code to the provisions of the New York Election Code that were challenged in the *O'Brien* case, the Supreme Court stated that the Commonwealth's electoral scheme also operated as an absolute bar to voting by all prison inmates:

"More recently in *Goosby v. Osser*, 409 U.S. 512 (1973), the Court again considered the problem of inmate voting and concluded that, unlike the voting restrictions in the *McDonald* case, the statute there in question was an absolute bar to the voting because of a specific provision that 'persons confined in a penal institution' were not permitted to vote by absentee ballot. It is clear, therefore, that the appellants here, like the petitioners in *Goosby*, bring themselves within the precise fact structure that the *McDonald* holding foreshadowed." 414 U.S. at 529-530.

3 It should be emphasized that this Opinion does not embrace the very substantial constitutional problems of the statutory disenfranchisement of convicted felons, whether or not they are confined in prison, as was decided in *Richardson v. Ramirez*, 418 U.S. 24 (1974). The Court's ruling in *O'Brien* limited relief to convicted misdemeanants and pretrial detainees and, thereby, the application of this Opinion.

victed felon who has served his sentence or who is free on probation to appear personally and register and vote but denies this fundamental right to a person whose guilt or innocence has not been determined by a court of law and who is confined awaiting trial. This restriction on the exercise of one of a citizen's most protected rights defaces the time honored maxim that one is innocent until proven guilty and, accordingly, possesses all fundamental rights until such a determination. It also operates in an unconstitutionally discriminatory manner to deny a fundamental right to a class of individuals solely on the basis of confinement in a state institution.

Finally, it is essential to the process of rehabilitating individuals confined in penal institutions that they be returned to their roles in society as fully participating citizens upon completion of their period of confinement. The disenfranchisement of misdemeanants is the antithesis of the paramount goals of modern penology.[4]

The rule announced in this opinion is also consistent with the established policy of the Commonwealth to promote the extension of the franchise to those Pennsylvania citizens who have traditionally suffered encumbrances on their rights to exercise voting privileges. See, *Sloane v. Smith*, 351 F. Supp. 1299 (M. D. Pa. 1972) (college students); *Commonwealth v. Parkhouse*, (unreported Commonwealth Court Opinion, 969 C.D. 1972) (mental patients); *Arroyo v. Tucker*, 372 F. Supp. 764 (E.D. Pa. 1974 (Spanish-speaking persons); *Goosby v. Osser*, (No. 71-2380, E.D. Pa. 1974) (pretrial detainees).

Accordingly, you are hereby formally advised and instructed that in accordance with the holding of the United States Supreme Court in *O'Brien v. Skinner, supra*, all convicted misdemeanants and pretrial detainees shall, hereafter, be entitled to register and vote during their period of confinement in a penal institution.[5] Those provisions of the Pennsylvania Election Code which exclude "persons confined in a penal institution" from qualifying as absentee electors shall only apply to inmates convicted for felonies. 25 P. S. §2602(W) (12); 25 P.S. §3146.1.

You are further advised that the procedure for registering and voting by persons confined in penal institutions shall be in accord-

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4 The National Advisory Commission on Criminal Justice Standards and Goals reports that:

> "Loss of citizenship [including] the right to vote . . . inhibits reformative efforts. If corrections is to reintegrate an offender into a free society, the offender must retain all attributes of citizenship. In addition, his respect for law and the legal system may well depend, in some measure, on his ability to participate in that system. Mandatory denials serve no legitimate public interest." National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections, Standard 16.17 (1973 p. 593).

5 A determination of whether or not the crime for which an individual has been convicted is a misdemeanor, shall be based upon the classification of crimes contained in the 1972 Pennsylvania Crimes Code 18 Pa.S. §106.

ance with the provisions of the Pennsylvania Election Code. As will be set forth in detail below, these procedures are sufficiently flexible to enable election officials, based on the resources, needs and particular problems of their respective counties and communities, to provide a number of alternative procedures by which pretrial detainees and convicted misdemeanants are to be registered and to vote.

Registration of inmates whose place of residence is outside of the election district within which the institution is located shall be accomplished by the making of a written request to the Election Commissioners in the manner provided for persons in the Military Service. 25 P.S. §623-20.2; 25 P.S. §951-18.1. Registration of inmates whose place of residence is within the same election district as the institution may be made either by the provisions regarding persons in the military, or by having election officials send a team of traveling registrars to the institution pursuant to 25 P.S. §623-17 and 25 P.S. §951-16.

As to voting by absentee ballot, an inmate whose residence is not in the same election district within which the institution is located, shall make an application for and subsequently vote by absentee ballot in the manner provided for persons in the military service. 25 P.S. §3146.2(a), (b) and (c). An inmate whose place of residence is within the same election district as the institution may vote by absentee procedures provided in 25 P. S. §3146.2(2) (b) and (c); or the election officials may conduct the election at the prison in the same manner that is provided for patients in public institutions. 25 P. S. §3146.2 (f) and (g). The inmates' official residency for voting purposes shall be deemed to be their official residence prior to incarceration and not the institution where they are confined.

Sincerely yours,

David L. Kurtz
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 48

Liquor Code — Constitutional Law — Aliens

1. Section 403(c) of the Liquor Code, 47 P.S. §403(c), must be treated as unenforceable as it is unconstitutional in that it imposes citizenship requirements for corporate applicants.

2. The questioned section has already been deemed unconstitutional as applied to resident aliens, O.O. No. 23, Op. Pa. Atty. Gen. (April 30, 1974), 4 Pa. Bulletin 964, and the language unconstitutionally infirm against resident aliens is so inseparable and intertwined with that as applied against nonresidents that it cannot continue to be enforced by the Liquor Control Board.

3. Requirements that officers, directors and stockholders of corporate applicants for liquor licenses must be citizens of the United States are unconstitutional.

Harrisburg, Pa.
September 18, 1974

Honorable Gene F. Roscioli
Chariman
Liquor Control Board
Harrisburg, Pennslyvania

Dear Mr. Roscioli:

The Liquor Control Board was advised in Official Opinion No. 23, issued April 30, 1974, that the citizenship provision of the Liquor Code 47 P.S. §4-403(c), was unenforceable in that it was clearly unconstitutional and in contravention of Federal Law as applied to resident aliens. Confusion has now arisen in regard to the application of this ruling to the citizenship requirements of foreign corporations having nonresident alien officers and/or stockholders. It is our opinion, and you are hereby advised, that the citizenship requirements of Section 4-403(c) of the Liquor Code must now be treated as unenforceable in their entirety in view of the fact that those provisions which are clearly unconstitutional cannot be separated from the remainder of the legislation in question. Accordingly, you are advised that the Liquor Control Board should take no action to refuse or revoke any license on the basis of alienage of applicants or nationality of the officers or stockholders of corporate applicants.

The provision of the Liquor Code now under examination provides:

> "If the applicant is a corporation, the applicant must show that the corporation was created under the laws of Pennsylvania or holds a certificate of authority to transact business in Pennsylvania, that *all officers, directors, and stockholders are citizens of the United States, and that the manager of the hotel, restaurant or club is a citizen of the United States.*" Act of April 12, 1951, P.L. 90, §403 (c), as amended, 47P.S. §4-403(c). (Emphasis added).

Increasingly, citizenship requirements similar to those found in the Liquor Code have come under attack and the Pennsylvania Attorney General has consistently advised that such requirements are not enforceable, *O. O. No. 23* of 1974, 4 Pa. Bulletin 964 (on liquor license applicants); *O. O. No. 52*, 1973 Op. Pa. Atty. Gen. 140 (on public weighmasters); *O. O. No. 4*, *Id.* at page 10 (on scholarship applicants); *O. O. No. 116*, 1972 Op. Pa. Atty. Gen. 42 (on practical nurses); *O. O. No. 113*, *Id.* at p. 38 (on pharmacists); *O. O. No. 112*, *Id.* at p. 38 (on real estate brokers); *O. O. No. 92*, 1971 Op. Pa. Atty. Gen. 177 (on veterinarians).

In declaring licensing provisions which require citizenship status unconstitutional, the Attorney General has relied heavily on the

constitutional and statutory rights of resident aliens. These rights are protected by the United States Constitution in the Fourteenth Amendment and by Federal Law, 42 U.S.C. §1983. Recent Supreme Court decisions have affirmed the rights of resident aliens beyond question. *In Re Griffiths*, 413 U.S. 717 (1974); *Sugarman v. Dougall*, 413 U.S. 634 (1974); and *Graham v. Richardson*, 403 U.S. 365 (1971).

The instant case differs significantly from those dealt with in previous Attorney General's rulings in that it does not involve resident aliens. The aliens presently under consideration are nonresidents and, thus, are not expressly protected by the Constitution or Federal Civil Rights Acts, 42 U.S.C. §1983.[1]

In this case there is no need to require that the citizenship provisions of the Liquor Code be treated as unconstitutional when independently applied to nonresident aliens. The questioned section has already been treated as unconstitutional as applied to resident aliens, *O. O. No. 23*, Op. Pa. Atty. Gen. (April 30, 1974), and the language unconstitutionally infirm against resident aliens is so inseparable and intertwined with that as applied against nonresidents that it cannot continue to stand.

In order for Section 4-403(c) to remain as against corporations with nonresident alien stockholders or officers it would be necessary to find that the Legislature intended this application to be separable from application to resident aliens and the statute itself must be capable of separation in fact. *Dorchy v. Kansas*, 264 U.S. 286 (1924). *Commonwealth v. Armao*, 446 Pa. 325 (1972); *Saulsbury v. Bethlehem Steel Co.*, 413 Pa. 316 (1964). It appears that both essential elements are lacking.

There is no reason to believe that the Legislature desired that the provision in question read to apply to nonresident aliens. In the first place the provision does not even mention "residency" but refers exclusively to citizenship requirements. At the time of its enactment citizenship classifications were not clearly unconstitutional as they now are in light of recent Supreme Court rulings. To translate for present purposes the term "citizen" to mean "resident" would be to amend the statute rather than to construe it; — a wholly inappropriate activity. See *State Board of Chiropractic Examiners v. Life Fellowship of Pennsylvania*, 441 Pa. 293 (1971); *Wiegand v.*

1 The application of citizenship requirements to foreign citizens may also be in conflict with various treaty provisions between the United States and numerous foreign nations granting to the citizens of signatory nations full commercial trade rights equal to those of American citizens, 1935 *Op. N. Y. Attorney General* 133 (May 15, 1935); 1933 *Op. N. Y. Attorney General* 94 (October 9, 1933). The denial to a foreign citizen of the right to be an officer, director or stockholder of a corporation holding a Pennslyvania liquor license, while United States citizens were not equally restricted, would constitute a breach of such treaties. Where Section 4-404(c) contravenes a United States Treaty obligation it is unconstitutional, U.S. Const., Art. VI, §2.

Wiegand, 226 Pa. Superior Ct. 278 (1973); *Henderson v. Henderson*, 224 Pa. Superior Ct. 182 (1973).

The Liquor Code includes a severability clause as follows:

> "The provisions of this act are severable and if any of its provisions shall be held unconstitutional the decision of the court shall not affect or impair any of the remaining provisions of this act. It is hereby declared to be the legislative intent that this act would have been adopted had such unconstitutional provisions not been included herein." (47 P.S. §1-104(b).

On examination, a significant portion of Section 4-403(c) has been found unable to pass constitutional muster. All applications of this section referring to residency and citizenship are so inseparable and essentially connected that the unconstitutionality of it in one case must necessarily mean its demise in all cases. Accordingly, you are advised that no liquor license should be revoked nor any application for a license refused on the basis of the residency requirements of Section 4-403(c).

In following this legislative direction, you are advised that the unconstitutionality of the citizenship requirements of subsection (c) of Section 4-403 does not affect the remainder of the Liquor Code or the remaining first clause of Section 4-403(c) which requires that corporate licensees demonstrate as a condition for a license that they are incorporated in Pennslyvania or hold a certificate of authority to transact business in Pennslyvania.

Very truly yours,

W. W. Anderson
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 49

Pennsylvania Constitution, Article II, Section 6 — Incompatibility of Offices: State Representative — School District Superintendent — Secretary of Education: Duty to Deny Superintendent's Commission to Member of State House of Representatives.

1. The offices of State Representative and School District Superintendent are incompatible under the provisions of Article II, §6 of the Pennsylvania Constitution and Section 15 of the Act of May 15, 1874, P.L. 186, 65 P.S. §16.

2. The Secretary of Education has the duty to deny the issuance of a School District Superintendent's Commission to a member of the State House of Representatives.

Harrisburg, Pa.
September 18, 1974

Honorable John C. Pittenger
Secretary of Education
Harrisburg, Pennsylvania

Dear Secretary Pittenger:

Recently, a Board of School Directors in the Commonwealth elected as their Superintendent a member of the House of Representatives of the Commonwealth. The term of all members of the House of Representatives expires on December 1, 1974. You have been asked to deliver to the newly elected Superintendent the commission of the office of School District Superintendent. We understand that the newly elected Superintendent intends to serve out the remainder of the term as Representative while undertaking the duties of School Superintendent.

In light of these circumstances two questions arise requiring our response:

(1) Under Article II, §6 of the Constitution of the Commonwealth of Pennsylvania, is the office of State Representative incompatible with the office of School District Superintendent so that one person may not hold the two offices simultaneously?

(2) If so, does the Secretary of Education have the duty to deny the issuance of a District Superintendent's commission to a person who is currently a member of the State House of Representatives?

It is our opinion, and you are so advised, that the offices of State Representative and School District Superintendent are incompatible under the provisions of Article II, §6 of the Pennsylvania Constitution and Section 15 of the Act of May 15, 1874, P.L. 186, 65 P.S. §16, and you, as Secretary of Education, are required to deny the issuance of the Commission to the elected but ineligible School Superintendent.

Article II, §6 of the Constitution of Pennsylvania provides:

> "*No* Senator or *Representative shall,* during the time for which he was elected, *be appointed to any civil office under this Commonwealth to which a salary, fee or perquisite is attached.* No member of Congress or other person holding any office (except of Attorney at Law or in the National Guard or in an Reserve Component of the Armed Forces of the United States) under the United States or this Commonwealth to which a salary, fee or perquisite is attached shall be a member of either House during his continuance in office." (Emphasis added).

In addition, Section 15 of the Act of May 15, 1874, P.L. 186, 65 P.S. §16, states:

> "No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under this commonwealth; and no member of Congress or other person holding any office, except of attorney-at-law or in the militia, under the United States or this Commonwealth, shall be a member of either House during his continuance in office. They shall receive no other compensation fees or perquisites of office for their services from any source, nor hold any other office of profit under the United States, this state or any other state."

The cases and opinions construing Article II, §6 and Section 15 of the Act of May 15, 1874, 65 P.S. §6 make no distinction between the terms "civil office" and "public office".[1] The few cases and the several Attorney General's Opinions have dealt with two issues:

(1) Whether the position involved was an office or an employment; *Emhardt v. Wilson,* 20 D&C 608 (1934) (Supervisor of City Bureau of Weights and Measures was an employee, not an officer); *Packrall v. Lane,* 38 Wash. Co. R., 193 (1958) (a county commissioner if an officer, not an employee); 1937-38 Opinion of the Attorney General No. 9 (position of labor foreman in Works Progress Administration was one of employment and not an office under the United States); and

(2) Whether the office is one under this Commonwealth; *Commonwealth ex rel, Woodrife v. Joyce,* 291 Pa. 82 (1927) (office of poor director is purely municipal and not one under this Commonwealth); 1953-54 Opinion of the Attorney General No. 21 (office of member of Pennsylvania Turnpike Commission is an office under this Commonwealth).

A Civil or Public Office is one which is created specifically either by the Constitution or by statute. Article VI, §1. The definition of "public office" most frequently cited by apellate courts is the one contained in *Richie v. Philadelphia,* 225 Pa. 511, 515, 516 (1909):

> "In every case in which the question arises whether the holder of an office is to be regarded as a public officer within the meaning of the Constitution, that question must be determined by a consideration of the nature of the service to be performed by the incumbent and of the duties imposed upon him, and whenever it appears that those duties

1 The Constitution itself, especially in Article VI (Public Officers) uses the terms "officers," "public officers," and "civil officers" interchangably. As this office has consistently ruled, it is not the adjectives "civil" or "public" with which we are concerned; the controlling word is "office". 1935-36 Opinion of the Attorney General 153, 154.

> are of a grave and important character, involving in the proper performance of them some of the functions of government, the officer charged with them is clearly to be regarded as a public one.... Where...the officer exercises important public duties and has delegated to him some of the functions of government and his office is for a fixed term and the powers, duties, and emoluments become vested in his successor when the office becomes vacant, such an official may properly be called a public officer."

See also *Commonwealth ex rel. Foreman v. Hampson*, 393 Pa. 467 (1958).

The test to be applied in determining who is an officer was summarized in *Alworth v. County of Lackawanna*, 85 Pa. Superior Ct. 349, 352 (1925) as follows:

> "If the officer is chosen by the electorate, or appointed, for a definite and certain tenure in the manner provided by law to an office whose duties are of a grave and important character, involving some of the functions of government, and are to be exercised for the benefit of the public for a fixed compensation paid out of the public treasury, it is safe to say that the incumbent is a public officer within the meaning of the Constitutional provisions in question."

We, therefore, find the following facts to be relevant:

(a) The position of school district superintendent has been created by the Legislature under Article X of the Public School Code of 1949. The General Assembly has provided that "the board of school directors in *every* school district shall...elect a properly qualified person as district superintendent...." 24 P.S. §10-1071(a) (Emphasis added).

(b) The District Superintendent must take an oath of office. 24 P.S. §10-1004. The Superintendent has the power and duty for the duration of a specific tenure, to supervise the public schools within his district. 24 P.S. §10-1081. Minimum salary levels for district superintendents are set by statute. 24 P.S. §10-1075.

(c) The position of school district superintendent is specifically created by statute for a specific period of tenure for each superintendent and the powers, duties and emoluments of the office become vested in the superintendent's successor when the office is vacant.

We must therefore conclude that the position of a School District Superintendent is a civil office within the meaning of Article II, §6 of the Pennsylvania Constitution.

We find further support for this position in an Opinion dated

August 27, 1936, by Attorney General Charles J. Margiotti (Opinion No. 202) in which he determined that the position of an assistant county superintendent in a school was a "civil office under this Commonwealth" within the meaning of the first sentence of Article II, §6 of the Constitution and therefore ruled that a member of the Legislature is prohibited from being appointed as an assistant county superintendent of schools. Since the date of that opinion the position of county superintendent and assistant superintendent have been abolished and many of the functions of these offices have been transferred to the offices of district superintendent and assistant superintendent respectively. It is thus entirely consistent with the earlier opinion of this office to declare the position of a district superintendent of schools as a "civil office under this Commonwealth" and thereby incompatible with the office of a member of the Legislature.

Furthermore, In Opinion No. 568 dated September 3, 1947, Attorney General T. McKeen Chidsey stated that district superintendents are public officers within the meaning of the constitutional provision prohibiting an increase in salary of public officers during the term of their election or appointment.

Finally, the case of *Weiss v. Ziegler*, 327 Pa. 100 (1937) indicates that district superintendents have the status of public officers within the meaning of the present constitutional provisions of Article VI, Sections 1 and 7 referring to the appointment and removal of civil officers of the Commonwealth.[2]

With regard to whether the office of District Superintendent is an office "under this Commonwealth", the general rule is that an office under this Commonwealth is a state office as opposed to a municipal or local office. The fact that the functions of a district superintendent of schools are confined to a single district is not controlling. It has been held a common pleas court judge is a state officer. *Commonwealth ex rel. Woodrife v. Joyce*, 291 Pa. 82 (1927).

A school district is not a constitutional body or a sovereign power. *Barth v. School District of Philadelphia*, 393 Pa. 557 (1958); *School District of Pittsburgh v. Allegheny County*, 347 Pa. 101 (1943). It is a creature or agency of the Legislature to administer the duty, imposed on the legislature by the Constitution, to maintain a thorough and efficient system of public schools. *Wilson v. School District of Philadelphia*, 328 Pa. 225 (1934). A school district is a mere agency of the state for educational purposes ordained by the Legislature.

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2 It should be pointed out that in the case of *Smethport Area School District v. Bowers*, 440 Pa. 310 (1970), the Supreme Court held that a district superintendent was not a public officer for purposes of appellate jurisdiction under the Administrative and Local Agency Laws. However, the Court cautioned in footnote 14, that this decision did not affect their earlier decisions construing the tenure provisions of the School Code where they recognized superintendents as public officers, nor did it change the meaning of public officer in the constitutional sense. 440 Pa. at 318.

Gilberton Borough School District v. Morris, 290 Pa. 7 (1927). Therefore, a school district superintendent, as an officer of a school district, is a person holding an office "under this Commonwealth" within the meaning of Article II, §6 of the Constitution.

In accordance with the above, it is the opinion of this office, and you are so advised, that the offices of State Representative and School District Superintendent are incompatible under the provisions of Article II, §6 of the Pennsylvania Constitution, and Section 15 of the Act of May 15, 1874, P.L. 186, 65 P.S. §16.

We turn now to the Secretary of Education's duty under the circumstances.

The Superintendent of Public Instruction (Secretary of Education) is a constitutional officer. Article IV, §1. Pursuant to Article VI, §3 of the Pennsylvania Constitution he must take an oath to "support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth ...."

Since the offices of Superintendent and member of the State House of Representatives are constitutionally incompatible, it would be a violation of the Secretary of Education's oath of office for him to grant a District Superintendent's commission to a member of the House of Representatives.

In addition, the School Code requires the Secretary to deny the issuance of the commission.

The powers and duties of the Superintendent of Public Instruction are not enumerated in the Constitution. Therefore it is the province of the Legislature to spell out his duties. The Administrative Code of 1929, as amended, 71 P.S. §352 provides that the Superintendent of Public Instruction shall have the powers and duties to administer all the laws of the Commonwealth with regard to the establishment, maintenance, and conduct of the public schools.

Section 1078 of Chapter X of the Public School Code of 1949, as amended, 24 P.S. §10-1078 specifically states:

> "District Superintendents shall be commissioned by the Superintendent of Public Instruction."

A commission is generally defined as a warrant or authority issuing from the government, or one of its departments, empowering a person to do certain acts, or to perform the duties and exercise the authority of an office. (Black's Law Dictionary).

Pursuant to 22 Pa. Code §49.41, the Department of Education issues commissions in the forms of certificates of appointment for a specific term in the school year when the provisions of Article X of the Public School Code of 1949 have been met.

Article X provides, *inter alia*, for the election and appointment of District Superintendents. Section 1071, as amended, 24 P.S. §10-1071 states, *inter alia:*

> "The Board of School Directors in every school district shall, by a majority vote of all the members thereof, elect a *properly qualified person* as District Superintendent . . ." (Emphasis added)

The Legislature has stated that to be properly qualified for purposes of being commissioned a District Superintendent the person must be of good moral character (24 P.S. §10-1002); meet minimal academic requirements (24 P.S. §10-1003); take an oath of office (24 P.S. §10-1004); and be elected in conformity with certain enumerated procedures (24 P.S. §10-1073). However, meeting all these criteria is not necessarily enough to be a qualified person for the position of District Superintendent. In addition, the person must not be prohibited from assuming the office by either a statutory or constitutional disqualification. When a person is ineligible to an office by reason of a disqualification, he or she must discard the disqualification before being appointed. *Commonwealth v. Shoener*, 1 Foster 158 (1873); *Commonwealth v. Pyle*, 18 Pa. 519 (1852).

A person who holds an incompatible office to the one to which he or she is to be appointed is disqualified from being so appointed. *Commonwealth ex rel. Brothers v. McDowell*, 359 Pa. 504 (1948). Therefore, it is our opinion, and you are so advised, that a member of the State House of Representatives is under a disqualification from being appointed to the office of School District Superintendent since the two offices are constitutionally incompatible. With this disqualification, a member of the State House of Representatives could not be a "properly qualified person" within the meaning of Section 1071 of the School Code. Therefore, it is our opinion, and you are so advised, that it is the duty of the Secretary of Education to deny the issuance of a District Superintendent's commission to a member of the House of Representatives.

While, in general, the resignation from one incompatible office will remove the disqualification and will allow the person to assume the other office, this is not the case under Section 6 of Article II of the Pennsylvania Constitution. The beginning of Section 6 states that no Representative shall "during the time for which he was elected" be appointed to any civil office under this Commonwealth. As Attorney General Robert E. Woodside stated in Official Opinion No. 641, dated August 24, 1953:

> "The language of Article II, section 6 of the Constitution leaves no doubt that the prohibition of that section applies whether or not a member of the General Assembly should resign."

Therefore, you are advised that the resignation of a member of the

House of Representatives will not make him eligible for appointment for the Office of District Superintendent during the time for which he had been elected to the General Assembly.

The Constitution provides that the term of service of a State Legislator shall begin on the first day of December next after his election. (Article II, §2). Therefore, the terms of the members of the present General Assembly who have not been reelected to office will expire December 1, 1974, the date when the terms of their successors will commence. (1937-38 Opinions Attorney General No. 201).

Very truly yours,

H. Marshall Jarrett
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 50

Article IV, §15 of Pennsylvania Constitution —Ten Day Rule — Bills Becoming Law Without Governor's Signature — Return of Bills to Originating House by Governor — Computation of Time.

1. Proper computation of the ten-day period given the Governor to act on bills is to exclude the day of presentation and to include the tenth calendar day thereafter, regardless of whether tenth day is a Saturday, Sunday or legal holiday.

2. The Governor may sign or return a bill on the day of presentation.

3. If the Governor takes no action on a bill by the end of the tenth day, the bill becomes law on the tenth day.

4. Attorney General's Opinion of April 27, 1915 (24 Dist. R. 352) overruled to the extent inconsistent herewith.

Harrisburg, Pa.
October 2, 1974

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

Dear Governor Shapp:

You have asked for our opinion regarding the computation of time within which the Governor must take action on a bill before it becomes law without his signature. Article IV, §15 of the Pennsylvania Constitution reads, in part: ". . . If any bill shall not be returned by the Governor within ten days after it shall have been presented to him, the same shall be a law in like manner as if he had signed it . . . ."

It is our opinion that the proper computation of the ten-day period provided for the Governor to act on bills presented to him is to exclude the day of presentation and to include the tenth calendar day thereafter, regardless of whether the tenth day falls on a Saturday, Sunday or legal holiday. The Governor may sign or return a bill on the day of presentation. If the Governor takes no action on a bill by the end of the tenth day, the bill becomes law on the tenth day.[1]

Three bills have become law without the Governor's signature in 1974, as they were neither signed nor returned to their originating House within ten days of presentation to the Governor. The bills and their dates of enactment are:

1. House Bill 1911, Printer's No. 2772; Act of May 2, 1974 (P.L. , No. 76).

2. House Bill 1912, Printer's No. 2773; Act of May 2, 1974 (P.L. , No. 77).

3. House Bill 1661, Printer's No. 2967; Act of June 14, 1974 (P.L. , No. 103).

The first major issue is whether the day of presentation of bills to the Governor is included in computing the ten-day period in which the Governor has to act. "The period of time referred to in any law is computed so as to exclude the first and include the last day of any such period." *Commonwealth v. Kuhn*, 200 Pa. Superior Ct. 649, 654 (1963); *Gibson v. Pittsburgh Transportation Co.*, 311 Pa. 312 (1933); *Cromelien v. Brink*, 29 Pa. 522 (1858); see also, section 1908 of the Statutory Construction Act of 1972, 1 Pa.S. §1908. More specifically, "In computing the period of time within which the chief executive of a state may approve an act of the legislature presented to him, or within which the act, if not returned, will become law, the rule is that the day of presentation is to be excluded and the last day

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1 Note carefully the distinction between the determination of when bills become law and the determination of when acts become effective. This opinion concerns only the former. As to effective dates and times:

> "... the general rule [is] that a day is regarded in the law as an indivisible unit or period of time which begins with its first moment, and, in conformity with that rule, a statute is ordinarily deemed to take effect from the beginning of the day on which it is enacted. It is well established, however, that the rule in question is a mere legal fiction and will be disregarded where its application would unjustly impair personal or property rights, in which case courts will take cognizance of the actual hour or time for the happening of an event, the doing of an act, or the passage of a statute." *In re Grant's Estate*, 377 Pa. 264, 266(1954).

Under this reasoning, the Pennsylvania Supreme Court in *Grant's Estate, supra*, held a statute increasing rates of taxation operative only from the exact instant of its becoming law. The court in *In re Huber's Estate*, 27 Dist. R. 25(1971), however, held another statute operative from the first moment of the day on which it was signed, so that the decedent's estate received the beneficial effect of that statute. See also, 2 Sutherland, *Statutory Construction*, §33.10 (4th Ed., 1973); Statutory Construction Act of 1972, 1 Pa. S. §1501 *et seq.*

included." Annot., 54 A.L.R. 339, 340, citing *Croissant v. DeSoto*, 87 Fla. 530, 101 So. 37 (1924); *State ex rel. Putnam v. Holm*, 172 Minn. 134, 215 N.W. 200 (1927). Therefore, in the computation of the ten days within which the Governor may act, the day of presentation is not counted as the first day.[2]

Secondly, the question is whether in counting the days in which the Governor may act, all calendar days are counted. "Unless expressly excluded . . . intervening Sundays, Saturdays, and legal holidays, that is, such days which fall on neither the first nor last day, are to be included in computing a period of time, even though the period is shorter than a week." 37 P.L.E., *Time* §25 (1961), citing *Hood v. Unemployment Compensation Board of Review*, 398 Pa. 551 (1960); *Edmundson v. Wragg* 104 Pa. 500 (1884); *Balitski v. Springfield Coal Co.*, 46 D.& C. 273 (1943).

As a consequence, the proper computation of days for action on the three above-mentioned bills is made as follows:

1. House Bills 1911 and 1912 were presented to the Governor on Monday, April 22, 1974; the first day was Tuesday, April 23; the tenth and last day for action was Thursday, May 2, 1974.

2. House Bill 1661 was presented to the Governor on Tuesday, June 4, 1974; the first day was Wednesday, June 5; the tenth and last day for action was Friday, June 14, 1974.

You will note that the tenth day within which some action on House Bill 1661 had to take place was Friday, June 14, 1974, a legal holiday (Flag Day). Act of September 21, 1965, P.L. 534, as amended, 44 P.S. §11. This fact presents a third issue as to whether, if the tenth and last day for action falls on Saturday, Sunday or legal holiday, such day shall be included in the computation. It is our opinion that Saturdays, Sundays and legal holidays do not toll the computation of days if the tenth and last day for action falls on one of these days. The Statutory Construction Act of 1972 at 1 Pa.S. §1908 is not applicable in this situation because the mandate of the Constitution as to computation of days is clear and unambiguous on its face. Provisions found elsewhere in the Pennsylvania Constitution are effective regardless of whether a spscified day falls on a Saturday, Sunday or legal holiday. For example, Article II, §4 reads, in part: "The General Assembly . . . shall meet at twelve o'clock noon on the first Tuesday of January each year." Although the first Tuesday of

2 We emphasize at this point that the Governor may sign or return a bill on the day of presentation and, most certainly, need not wait until the first day to take action. The word "within" is "synonymous with 'not later than' or 'any time before' or 'before the expiration of'" and fixes "not the beginning but merely the end of the period in which to act...." *Duddy v. Conshohocken Printing Co.*, 163 Pa. Superior Ct. 150, 154 (1948). That the Governor may sign or return a bill on the day of presentation has centuries of historical precedent and need not be discussed further.

January, 1974 was New Year's Day and a legal holiday, Act of September 21, 1965, *supra*, the General Assembly met on that day in compliance with the Constitution.

The vast majority of state constitutions and the Federal Constitution read, "If any bill shall not be returned by the [chief executive] within [a certain number of] days (*Sundays excepted*) . . . ." (Emphasis supplied). Only the constitution of Colorado is identical to the sentence at issue in Article IV, §15 of the Pennsylvania Constitution. A Pennsylvania Attorney General's Opinion (April 27, 1915; 24 Dist. R. 352) holds that if the last day for action falls on a Sunday, the Governor has until Monday to return or sign the bill. It is our opinion that this holding was unwarranted and, to the extent that it is inconsistent with this opinion, is overruled. The 1915 Opinion offers only one citation in support of its proposition that Sundays are excepted from computation as to the last day for action on a bill: *In Re Computation of Time*, 9 Colo. 632, 21 P. 475 (1886). Other citations given are to cases in states with constitutional provisions dissimilar to our own. The Colorado decision does not cite a single case to justify its holding that because the last day for action on a bill fell on a Sunday, ". . . it follows from reason and principle that the day was continued by operation of law until Monday . . . ." *Id.* Moreover, the Colorado court's finding is based on a premise which does not apply in Pennsylvania. The Colorado opinion notes that the General Assembly not being in session on Sunday, the Governor had no opportunity to communicate with that body. This reasoning is not applicable in this Commonwealth for three reasons. First, nothing in the Pennsylvania Consititution prohibits the General Assembly from meeting, or the Governor from acting, on a Saturday, Sunday or legal holiday. Second, the Governor may sign or veto a bill on a Sunday or any other day. Third, the General Assembly need not be meeting in Harrisburg for the Governor to return a bill to its originating House.[3]

Finally, there is the question of the date of enactment of a bill if the Governor does not take any action on the bill within the ten-day period. The Governor has the power to choose not to sign a bill and allow it to become ". . . a law in like manner as if had signed it. . . ." Pa. Const., Art. IV, §15. If he chooses to sign, he must do so on or before the tenth day, as discussed above. Therefore, since a bill neither signed nor returned becomes law *as if the Governor had signed it*, the day on which it becomes law is the tenth and last day for action. In other words, if no other action has come before, one of three actions must take place on the tenth day:

1. The Governor signs the bill into law.

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3 The common law rule that Sunday is *dies non juridicus* does not apply in this situation, as the Governor's approval or veto of bills is a ministerial rather than a judicial function. *Cooper v. Nolan*, 159 Tenn. 379, 19 S.W.2d 274 (1939). See also 83 C.J.S., Sundays §41 *et seq.* (1963); 79 Am. Jur. 2d, *Sundays and Holidays* §122 (1974).

2. The Governor returns the bill to its originating House.

3. The bill becomes law as if the Governor had signed it.

Therefore, it is our opinion and you are hereby advised that the proper computation of the ten-day period provided for the Governor to act on bills presented to him is to exclude the day of presentation and to include the tenth calendar day thereafter, regardless of whether the tenth day falls on a Saturday, Sunday or legal holiday. The Governor may sign or return a bill on the day of presentation. If the Governor takes no action on a bill within ten days, the bill becomes law on the tenth day.

Sincerely yours,

Conrad C.M. Arensberg
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 51*

Education — Professional Employes — Tenure — Certification

1. The accrual of rights under Article XI of the Public School Code of 1949, P.L. 30, as amended, 24 P.S. §11-1101 *et seq.* is not linked with or dependent upon the obtaining of any particular certificate under Article XII of the School Code.

2. Holders of "intern" or "interim" certificates are qualified to be "temporary professional employes" and "professional employes" within the meaning of the School Code and are entitled to all the rights and privileges which follow from those designations.

Harrisburg, Pa.
October 8, 1974

Honorable John C. Pittenger
Secretary of Education
Harrisburg, Pennsylvania

Dear Secretary Pittenger:

You have requested our opinion regarding the status of teachers who hold valid "intern" or "interim" certificates. Specifically, you ask whether these teachers qualify as "temporary professional employes" or "professional employes" within the meaning of the

*Editor's Note: The holding of this opinion was overruled in *Tyler v. Jefferson County - Dubois Area Vocational Technical School*, — Pa. Commonwealth Ct. —, 341 A. 2d 235 (1975). A petition for allowance of appeal has been filed with the Supreme Court of Pennsylvania.

School Code so as to qualify for the benefits running with those designations — e.g., accrual of tenure, sabbatical leave, sick leave, etc. See, in general, Art. XI of the Public School Code of March 10, 1949, P.L. 30, as amended, 24 P.S. §11-1101 *et seq.*

You are hereby advised, and it is our opinion, that persons presently teaching and holding valid "intern" or "interim" certificates are, depending on the circumstances, either "professional employes" or "temporary professional employes". As such, they are entitled to all benefits running with those designations.

The School Code provides a system whereby the Commonwealth (through the Department of Education) licenses persons to teach. A person may not be hired by a school district to teach unless that person presents a valid certificate issued by the Department (24 P.S. §12-1212). Representing one's self to be a teacher without such a certificate, furthermore, is a misdemeanor (24 P.S. §12-1231). In addition, a school district may be penalized for employing teachers who do not have proper certification. (See 24 P.S. §§10-1005, 25-2518.)

Ordinarily, a person is required to hold a "provisional" or "permanent" certificate in order to teach. (See 24 P.S. §12-1203). However, the State Board of Education is empowered to issue other certificates in accordance with Section 1201 of the School Code (24 P.S. §12-1201).

The Department of Education has been given the authority by the State Board of Education to issue "intern" certificates (22 Pa. Code §49.91). This certificate replaces the so-called "interim" certificate previously authorized. Generally speaking, persons are eligible for intern certificates if they are graduates of approved institutions of higher education and are enrolled in a proper educational program to obtain those credits necessary to obtain an ordinary teaching certificate. Thus, holders of "intern" and "interim" certificates which have not expired are legally entitled to teach in the public schools of this Commonwealth.

Article XI of the School Code spells out a number of rights and privileges for "professional" employes. Among these are the right to tenure after two years of satisfactory service as a "temporary professional employe" (24 P.S. §11-1108), sabbatical leave (24 P.S. §11-1166 *et seq.*), sick leave (24 P.S. §11-1154 (a)).

"Professional" employe is defined in Section 1101 (1) of the Code, 24 P.S. §11-1101 (1), to include "those who are certificated as teachers." Nowhere in the Code is there any language or indication to the effect that such certification must be "provisional" as opposed to "intern" or "permanent" as opposed to "standard limited." In fact, our research indicates no language or authority from which a legislative intent might be deduced to link the accrual of

rights under Article XI to the obtaining of any particular certificate under Article XII.[1] On the contrary, in the case of *Elias v. Board of School Directors of Windber Area*, 421 Pa. 260 (1966), the Pennsylvania Supreme Court was untroubled in according "professional employe" status to holders of "State Standard Limited Certificates," the holders of which were not required to be college graduates.[2]

Thus, we conclude that holders of "intern" or "interim" certificates are qualified to be "temporary professional employes" and "professional employes" within the meaning of the School Code and are entitled to all the rights and privileges which follow from those designations.[3]

Sincerely yours,

Mark P. Widoff
Deputy Attorney General

Israel Packel
Attorney General

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1 "Substitutes" are distinguished from "professional employes" (24 P.S.§11-1101(2) but on the basis of function, not certification.

"Temporary professional employes" are those who have been employed to perform the duties of a professional employe. 24 P.S.§1101(3). Needless to say, no language was found to link that designation with a particular certificate.

However, legal advice contained in a memo from then Deputy Attorney General Warren Morgan to the Honorable David H. Kurtzman, dated February 12, 1970, states that teachers holding "interim" certificates are not and cannot be "professional" or "temporary professional employes" but must be considered to be apprentices. No law was cited in support of this proposition and as the above analysis demonstrates, it flies in the face of clear language conferring certification powers on the State Board (24 P.S.§12-1201) and is not supported by any other provisions of the School Code. This formal opinion, of course, supersedes the memo of February 12, 1970.

2 The State Supreme Court Paper Books for that case show that the adequacy of these certificates for obtaining professional employe status was argued.

3 Of course, it is understood that such a person must complete two years of satisfactory service as a temporary professional employe and that he/she must maintain his/her certification intact. It may very well be that a holder of an "intern" certificate does not complete the requirements necessary for obtaining a provisional and/or permanent certificate within the time allotted. In such a case, he/she may be removed for such cause, but if the designation of "professional employe" has been earned, the applicable removal procedures must be followed. See 24 P.S. §11-1127 *et seq.*

OFFICIAL OPINION No. 52

Commingling of funds — Municipalities — Investment of Municipal Funds

1. A municipality may combine any of its several accounts for investment purposes, provided that: the funds are adequately secured; a clear audit trail is established; earnings for each account are individually computed, credited and recorded; and receipts, disbursements and transfers are processed through separate accounts where required.

2. One or more municipalities may join together for the purpose of enhancing investment opportunities so long as the provisions outlined above are followed.

3. Commingling as a prohibited and unlawful practice is the mingling which occurs where monies are so blended that their separate identity is lost and they thereby become indistinguishable. The combination of various funds for investment is not a prohibited commingling of funds provided that the various funds are distinguishable and the possibility that funds devoted to one purpose might be spent for another is avoided.

Harrisburg, Pa.
October 11, 1974

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

Honorable Jacob G. Kassab
Secretary of Transportation
Harrisburg, Pennsylvania

Dear Secretaries Wilcox and Kassab:

Our opinion has been requested with respect to two related questions:

(1) May a municipality combine any of its several accounts for investment purposes?

(2) May one or more municipalities join together for the purpose of enhancing investment opportunities?

You have explained that yields on investments do depend to a very substantial degree on the minimum balance available for investment purposes. Thus, e.g., certificates of deposit under $100,000 usually cannot earn over 5½% while the interest rate for a certificate of deposit over $100,000 is not limited by Federal regulations and currently may earn as much as 12%. In addition, commission costs can be significantly reduced when securities are purchased in larger lots and in larger denominations. Smaller governmental units, therefore, operate at a disadvantage in obtaining high yields on investments unless they can combine accounts or combine their accounts with those of other governmental units. Furthermore, larger units of government face this same problem with their smaller accounts unless they can combine these accounts with other accounts.

It is understood that the two above questions are predicated upon assurances that:

(1) The funds are adequately secured;

(2) A clear audit trail is established;

(3) Earnings for each account are individually computed, credited and recorded;

(4) Receipts, disbursements and transfers are processed through separate accounts where required.

To further understand the issues, you have provided us with the following proposed example of how investment opportunities would be enhanced by combining accounts for investment purposes:

A local government unit invests $100,000 in U.S. Government Securities:

General Fund	$40,000
Sewer Revenue Fund	20,000
Recreation Park Fund	20,000
Revenue Sharing Fund	10,000
Police Pension Fund	5,000
Liquid Fuel Tax Fund	5,000
	$100,000

Checks in the above amounts would be issued from the various funds in order to make up the total purchase price of the investments. Therefore, the disbursement for investments would be recorded in each fund and the resulting investment would be shown on the books of the particular fund. Upon maturity, the principal invested and the proportionate share of the interest received would then be returned to the respective fund from which the original principal amount came.

Please be advised that it is our opinion that the answers to your two questions should be answered in the affirmative, in accordance with the discussion below.

I. We begin with the proposition that all government units have the duty and responsibility to deposit and invest public funds in such a way as to provide for their security and to maximize the yield to the public treasury. These principles may be reinforced and/or limited by specific statutory provisions,[1] but it is obvious that any functioning public body must collect and disburse funds (and, of course, each has specifically been conferred with such powers by the

1 See Section II of this opinion for a discussion of some of these statutory limitations—namely requirements for separate accounts and prohibiting commingling.

Legislature) and, in order to carry out such functions, must deposit public monies and provide, where possible, for their investment. See, e.g., 53 P.S. §§6780 454, 23650, 56705.

Given such an inherent and necessary power and duty, it is not surprising that we find neither a general grant of authority to combine accounts for investment purposes nor a general denial of such authority. But we do find specific instances where the Legislature has authorized combination of accounts for investment purposes:

> "(e) For the purpose of investment or deposit at interest, all accounts in a sinking fund may be combined and each such combined account shall be entitled to its pro rata share of each deposit or investment."

Local Government Unit Debt Act of July 12, 1972, P.L. 781 (No. 185) Section 1004, 53 P.S. §6780-454. See also 53 P.S. §5652.

While it would be possible to read these specific statutory authorizations as exclusive instances where an otherwise prohibited practice is permitted, we believe it would be improper to do so. In our judgment these authorizations should be read as a significant indication that the Legislature distinguishes a *combination* of accounts for *investment purposes* from the practice of "commingling" separate accounts so that they may be expended *for purposes other than those decreed by the Legislature.* It is the latter, as we shall see in Section II of this opinion, that is unlawful — not the former.

Sound fiscal practice, then, would dictate that within the parameters of authorized secured investments, municipalities have an obligation to seek investments with a high rate of return, and municipalities have the discretion to pursue a variety of investment programs consistent with these principles. A municipality, as administrator of all the funds it holds, may develop an investment program for all of its funds. Such a program may be designed to combine funds for investment purposes so long as such combination does not violate a specific limitation on a municipality's discretion to manage the funds it holds.

Thus, given what we view as the inherent and necessary authority of local government units to deposit and invest public funds, given the clear desirability of such investments yielding the greatest amount possible for the benefit of the public treasury, and given what we view as a legislative recognition of the desirability and propriety of combining accounts for investment purposes, we conclude that municipalities may lawfully combine accounts for investment purposes.

Since under Article IX, §5 of the Pennsylvania Constitution,[2] municipalities are given the broadest possible authority to cooperate with other governmental units in the exercise of any function, it follows that what a municipality may do on its own it may do in concert with other governmental units. See also the Act of July 12, 1972, P.L. 762 (No. 180), 53 P.S. §481 *et seq.*, especially Section 3, 53 P.S. §483, implementing this section of the Constitution.

II. Given this general conclusion, it is necessary to discuss whether combination of accounts as described above constitutes "commingling" as that word is used to describe a prohibited and unlawful practice. See, e.g., section 5(4) of the Act of June 1, 1956, P.L. 1944, 72 P.S. §2615.5(4).[3]

It is clear, as stated above, that the legislative purpose in providing for separate accounts is to assure that funds devoted to one purpose shall not be expended for another. Taking this purpose into account, and considering also that the Legislature has not specifically defined the term "commingle", we consider the generally accepted judicial definition that commingling occurs when funds are so intermingled that the separate identity of the funds is lost. See, e.g., *State of Kansas v. Barrett*, 207 Kan. 178, 483 P. 2d 1106 (1971).

As the Office of the Auditor General has aptly pointed out:

> However, combining monies does not constitute commingling per se. The general principle of law as to the definition of commingling seems to require that monies become so blended so as to become *indistinguishable, Pfau v. State* 148 Ind. 539, and that the *separate identity* of the intermingled monies *be lost. State v. Barnett*, 207 Kan. 178; also *Black v. State Bar of California*, 57 C. 2d 219, 18 Cal. Rptr. 518. If clear and accurate accounting is performed by a political subdivision as to the amount of Liquid Fuel Tax monies invested, it is evident that those monies will not have lost their separate identity nor will they have become indistinguishable.

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2 "A municipality by act of its governing body may, or upon being required by initiative and referendum in the area affected shall, cooperate or agree in the exercise of any function, power or responsibility with, or delegate or transfer any function, power or responsibility to, one or more governmental units including other municipalities or districts, the Federal government, any other state or its governmental units, or any newly created governmental unit."

3 "In order to qualify for its share of the monies herein provided, each city, borough, town, and township, shall

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(4) Establish and maintain a special fund into which the moneys provided in section four, clause (1) of this act shall be deposited and into which no other moneys may be deposited or commingled;"

> Additionally, this conclusion is supported by the principles of accounting. In practice, where separate accounting is followed, the combination of various funds or monies does not constitute commingling. Consultation with Mr. Leo G. Emig, C.P.A., Bureau of Audits, has resulted in an affirmation of this very principle. A "fund" is much nearer in definition to its identity in the books than to its physical location according to actual accounting practice. (Memo of Frederick D. Lingle to Frank P. Lawley, Jr., of May 15, 1974)

It is clear, furthermore, that to combine accounts for investment purposes does not combine them in such a way as to lead to the possibility of monies being *spent* for purposes other than those which are legislatively mandated. The integrity of the accounts remains assured and that, to us, is the crux of the matter. Indeed, the combining of funds for investment purposes may be the most sound fiscal practice. Higher yields benefit all funds without jeopardizing the integrity or security of the individual funds.

In accordance with Section 512 of the Administrative Code, 71 P.S. §192, the Department of the Auditor General and the Treasury Department have been afforded the opportunity to present their views and they have indicated that they concur in this opinion.

Accordingly, we conclude that combining accounts for investment purposes does not constitute commingling and, for the reasons stated above, a municipality may combine any of its several accounts for investment purposes and may join with other municipalities for the purpose of enhancing its investment opportunities.[4]

Very truly yours,

Mark P. Widoff
Deputy Attorney General

Israel Packel
Attorney General

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4 The issue has been raised as to what happens if the investment must be terminated prior to maturity. In our judgment, those accounts which are in need of cash and for which the investment must be terminated should bear the "penalty". Since actually the "penalty" is a reduction in the amount of interest paid, such a procedure would mean that the accounts for which the investment was terminated will earn no interest and the interest earned will be distributed, pro rata, to the other accounts. It is naturally hoped that good management and sound planning will keep such instances to a minimum. In any event, under the formula just described, the accounts not responsible for the termination may still earn more than they would under a separate investment program. In actual practice, furthermore, the obligation would likely be sold to a third party for a small loss.

OFFICIAL OPINION No. 53

Mineral rights — Natural gas — Coal — Title

1. Pennsylvania law does not recognize the absolute ownership of minerals in place.
2. Title to extracted gas cannot be perfected until the extracted gas is brought under control.
3. Only those persons possessing the right to extract gas in place have the right to assert title thereto.
4. Methane gas is a natural gas, and, therefore, the right to extract the gas and assert title thereto belongs to the owner of the gas rights.

Harrisburg, Pa.
October 31, 1974

A. Edward Simon, Director
State Planning & Development
Harrisburg, Pennsylvania

Dear Mr. Simon:

You have advised my office that the Office of State Planning and Development is involved in a comprehensive investigation into the possible use of methane gas as a future source of fuel. Pursuant to this investigation, you have asked my opinion as to the following question: Who has the right to assert legal title to methane gas produced, as between the owner or grantee of existing coal rights and the owner or grantee of existing gas rights? It is our opinion, and you are so advised, that methane gas is a natural gas and, therefore, the owner or grantee of the gas rights has the right to assert legal title thereto.

It has been the law in Pennsylvania that no person, neither land owner, grantee nor lessee, has absolute title to minerals in place. In this sense, minerals are considered *ferae naturae*, like a wild animal, and are not subject to absolute ownership until brought under control. This is particularly true of gas, as was stated by the Pennsylvania Supreme Court in *Westmoreland & Cambria Nat. Gas Co. v. DeWitt*, 130 Pa. 235, 249-250 (1889):

> "Gas, it is true, is a mineral; but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than of the mere decisions. Water also is a mineral; but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedents in regard to flowing, or even to percolating, waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals ferae naturae. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the

> limits of a particular tract is uncertain,' as said by Chief Justice Agnew in *Brown v. Vandergrift*, 80 Pa. 147, 148. They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his. And equally so as between lessor and lessee in the present case, the one who controls the gas, has it in his grasp, so to speak, is the one who has possession in the legal as well as in the ordinary sense of the word."

The situation you have outlined indicates, however, that coal mine operators must remove methane gas from the mine shafts in order to comply with applicable Federal and State mine safety laws. To do this, they force the methane through a ventilating system out of the mine, and into the atmosphere. In this sense, the coal company has control of the methane gas. The question arises, then, as to whether this control gives title to the methane gas to the coal grantee. This question was answered by our Supreme Court in *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 296 (1893), wherein the court stated that the "grantee of coal owns the coal but nothing else, save the right of access to it and the right to take it away." This is not to say, however, that the coal mine operator may not expel methane gas into the atmosphere. To deprive him of this right would, in effect, be depriving him of his access to the coal, since coal cannot be mined without expelling the methane gas from the mine shaft. Thus, the right to mine for coal necessarily includes the right to perform those actions necessary to insure the safety of such mining. Since the coal owner or grantee only retains the right to extract coal, however, the right to access to, and economic control of, the methane gas belongs to the owner or grantee of the gas rights.

Other jurisdictions are, on the whole, consistent with the law in Pennsylvania. In Texas, legal title is qualified, in that it can only be obtained by having the gas under control. See *Halbouty v. Railroad Commission*, 257 S.W. 2d 364 (1962). Oklahoma, while noting this common law principle, recognizes that it can and has been altered by legislative enactments. See *Bingaman v. Corporation Commission*, 421 P. 2d 630 (1966). West Virginia, on the other hand, recognizes absolute title to gas in place, even though said gas is not the subject of possession until extracted. *Bogges v. Milam*, 34 S.E. 2d 267 (1945). The West Virginia interpretation, however, appears to be the exception rather than the rule.

A tangential question you also have raised is whether methane gas is a natural gas in the accepted sense of that term. It is our conclusion that methane gas must be classified as a natural gas. Under the Gas Operations, Well-Drilling, Petroleum and Coal Mining Act,

52 P.S. §2102 (10), gas is defined as "any natural, manufactured or byproduct gas or any mixture thereof." This necessarily includes methane. Furthermore, in *Emerson v. Commonwealth*, 108 Pa. 111, 126 (1884), the court defined natural gas as a gaseous fuel "which may be converted into heat by combustion with atmospheric air." As such, the conclusion is inescapable that methane is a natural gas.

Since methane gas is a natural gas, only those owners and grantees of gas rights have the right of access to, and, therefore, economic control of, methane gas. Any attempt by the owners or grantees of coal rights to convert methane to profitable use could be challenged by those individuals who have acquired the gas rights. This being the case, I must conclude that only those persons who own or have obtained the right to extract gas have the right to assert legal title thereto.

Very truly yours,

Theodore A. Adler
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 54

Military Affairs — Administrative Code — Construction Projects — Statutes in Pari Materia

1. Neither Section 508 nor Section 2408 of the Administrative Code of 1929, as amended, 71 P.S. §§188 and 638 require the Department of Military Affairs to submit for review to the Department of Property and Supplies construction projects that are one hundred per centum (100%) federally funded.

2. Section 508 and Seetion 2408 of the Administrative Code of 1929, as amended, are in pari materia, and are to be construed together.

Harrisburg, Pa.
October 31, 1974

Honorable Harry J. Mier, Jr.
Adjutant General
Annville, Pennsylvania

Dear General Mier:

In a memorandum received by this office, Colonel Paul A. Baltes of the State Armory Board has raised the question of whether or not the Department of Military Affairs is required by law to submit for review to the Department of Property and Supplies contracts, plans and specifications for the construction, repair, or alteration of and additions to buildings when such projects are one-hundred percent

(100%) federally funded. You are advised that the Department of Military Affairs may contract for construction projects independently of the Department of Property and Supplies when such projects are one-hundred percent (100%) federally funded.

The statutory provisions applicable when the Commonwealth is involved in the construction, repair, or alteration of and additions to buildings are Sections 508 and 2408 of the Administrative Code of 1929, as amended, 71 P.S. §§188 and 638. The pertinent portions of these sections provide respectively:

Section 508

"(a) No administrative department, except the Department of Property and Supplies, and no administrative board or commission, shall except as in this act otherwise specifically provided, erect or construct, or contract for the erection or construction of, any new building, or make or contract for making, any alterations or additions to an existing building, involving an expenditure of more than twelve thousand dollars ($12,000), and, in any case in which any other department or any board or commission is by this act authorized to erect or construct buildings, or make alterations or additions involving an expenditure of less than twelve thousand dollars ($12,000), such erection or construction may be generally supervised by the Department of Property and Supplies."

* * * * * * * * *

"(c) All plans and specifications for new buildings, and for alterations or additions to existing buildings, involving an expenditure of more than twelve thousand dollars ($12,000),shall be subject to the approval of the Department of Property and Supplies...."

Section 2408

"*Whenever the General Assembly shall have appropriated money to the Department of Property and Supplies, or to any other department*, or to any administrative board or commission, for the erection of new buildings, or sewage or filtration plants, other service systems, or athletic fields, or other structures, or for alterations or additions or repairs to existing buildings, or to such plants, systems, fields, or structures, to cost more than twelve thousand dollars ($12,000), the following procedure shall apply, unless the work is to be done by State employes, or by inmates or patients of a State institution or State institutions, or unless the department, board, or commission to which the General Assembly has appropriated money for the foregoing purposes is, by this act or by the act of making the appropriation, authorized to erect, alter, or enlarge buildings inde-

> pendently of the Department of Property and Supplies, or under a different procedure:..." (Emphasis added)

Both of these provisions are directly and primarily concerned with the administrative procedure that is to be followed with respect to construction contracts. Thus, the statutes relate to the "same thing" and are said to be in pari materia. In construing statutes in pari materia, reference is made to the Statutory Construction Act of 1972 (1 Pa. S. §1932) which provides as follows:

> "(a) Statutes or parts of statutes are in pari materia when they relate to the same person or things."
>
> "(b) Statutes in pari materia shall be construed together, if possible, as one statute."

Consistent with these principles of statutory construction it is significant that under Section 2408, the Department of Property and Supplies is charged with the responsibility of reviewing the plans, specifications and contracts for the construction, repair, or alteration of and additions to buildings only when the *appropriations* for such projects are authorized by the General Assembly. Projects that are one-hundred percent (100%) federally funded do not involve appropriations by the General Assembly and are not, therefore, subject to review by the Department of Property and Supplies under that section.

Although Section 508 is silent as to the source of appropriations for the construction projects covered by the statute, and, therefore, silent as to what construction projects are subject to review by the Department of Property and Supplies, that section must be construed together with Section 2408. Thus, Section 508 must be construed as requiring the Department of Property and Supplies to review only those construction projects which have been funded by appropriations authorized by the General Assembly. Therefore neither Section 508 nor Section 2408 requires the Department of Military Affairs to submit for review to the Department of Property and Supplies contracts, plans, and specifications of construction projects which are one-hundred percent (100%) federally funded, and the Department of Military Affairs may engage in such projects on its own.

Sincerely yours,

Howard M. Levinson
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 55

Liquor Control Board—Liquor Code—Human Relations Act—Licensees—Discrimination—Public Accommodations—Private Clubs

1. The Liquor Control Board can refuse to issue or renew licenses to, and revoke or suspend licenses of, licensees who discriminate on the basis of race, color, religious creed, sex or national origin in their employment policies or in the provision of facilities, accommodations and services.

2. Considering the deleterious impact discrimination has on the public welfare, as noted by the Legislature in Section 2(a) of the Human Relations Act, as well as the legislative mandate to take appropriate action against discriminating, steps taken by the Board to eliminate discrimination on the part of its licensees is clearly in furtherance of the Liquor Code's policy and the Legislature's intention.

3. People who violate the Constitution or laws of the United States or the Commonwealth of Pennsylvania including, but not limited to, the Pennsylvania Human Relations Act, or the clear public policy expressed against discrimination, cannot be considered individuals sufficiently reputable to receive or continue to hold liquor licenses from the Board.

4. The Liquor Code provides authority for revocation or suspension of a license upon sufficient cause being shown other than a violation of the laws relating to the sale of liquors, such as actions contrary to the public welfare, health, peace or morals. Unlawful discrimination would be such an action.

5. Any attempt to so regulate purely private clubs, in contradistinction to places of public accommodation, may raise constitutional problems; however, the crucial question to be determined in each instance is whether a club, in fact, is distinctly private or is in reality a place of public accommodation.

6. Before a private club can prove its distinctly private nature, it must provide the Liquor Control Board with sufficient information to meet the heavy burden of proving that the accommodation or activity is related to membership in the organization and that the activity or accommodation is distinctly private as to the members of the organization.

Harrisburg, Pa.
November 12, 1974

Mr. Joseph X. Yaffe
Chairperson
Pennsylvania Human Relations Commission
Harrisburg, Pa.

Mr. Gene F. Roscioli
Chairman
Pennsylvania Liquor Control Board
Harrisburg, Pa.

Dear Messrs. Yaffe and Roscioli:

The Pennsylvania Human Relations Commission and the Pennsylvania Liquor Control Board, through their chief counsel, have asked whether the Pennsylvania Liquor Control Board, consistent with the existing provisions of the Pennsylvania Liquor Code and the Pennsylvania Human Relations Act, can refuse to issue or renew licenses to, and revoke or suspend licenses of, licensees who dis-

criminate on the basis of race, color, religious creed, sex, or national origin in their employment policies or in the provision of facilities, accommodations, and services. You have also asked whether the Pennsylvania Liquor Control Board can adopt a regulation prohibiting discrimination by its licensees and setting forth the penalties for violations of such a regulation and of the provisions of the Pennsylvania Human Relations Act. It is our opinion and you are hereby advised that the answer to both questions is yes.

There is no need to detail at length the evil of discrimination and the strong and oft-stated public policy of Pennsylvania and this nation to root it out at every opportunity. The Fourteenth Amendment to the Federal Constitution and the Federal Civil Rights Act of 1964, Title II (Public Accommodations) and Title VII (Employment) prohibit arbitrary and invidious discrimination on the basis of race, color, religious creed, ancestry, sex, or national origin.[1] The Commonwealth policy with regard to discrimination is also clear. Freedom from discrimination is a basic human right guaranteed by the Pennsylvania Constitution. Article I, §26 of that document provides that "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." The right to freedom from discrimination has been recognized by the Pennsylvania Legislature to be such a civil right, as set forth in Section 3 of the Pennsylvania Human Relations Act, 43 P.S. §953:

> "The opportunity for an individual to obtain employment for which he is qualified, and to obtain all the accommodations, advantages, facilities and privileges of any place of public accommodation ... without discrimination because of race, color, religious creed, ancestry, age, sex or national origin are hereby recognized as and declared to be civil rights ...."

The strength of these provisions with regard to discrimination because of sex is further bolstered by Article I, §27 of the Pennsylvania Constitution which mandates that, "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."

The Pennsylvania Human Relations Act, 43 P.S. §§951 *et seq.*, eloquently states the Legislature's deep concern over the detrimental effects and substantive evils of discrimination:

> "The practice or policy of discrimination against individuals or groups by reason of their race, color, religious creed, ancestry...sex or national origin is a matter of con-

1 Title VII prohibits discrimination based on "race, color, religion, sex, or national origin." Title II outlaws discrimination because of "race, color, religion, or national origin."

> cern to the Commonwealth. Such discrimination foments domestic strife and unrest, threatens the rights and privileges of the inhabitants of the inhabitants of the Commonwealth, and undermines the foundations of a free democratic state. The denial of equal employment, housing and public accommodation opportunities because of such discrimination, and the consequent failure to utilize the productive capacities of individuals to their fullest extent, deprives large segments of the population of the Commonwealth of earnings necessary to maintain decent standards of living, necessitates their resort to public relief and intensifies group conflicts, thereby resulting in grave injury to the public health and welfare, ...thereby threatening the general welfare of the Commonwealth and its inhabitants." 43 P.S. §952(a).

In addition, by requiring the Human Relations Commission to refer those licensees found to have discriminated to the appropriate licensing agency for action, see 43 P.S. §959, the Legislature has clearly indicated its desire to subject state licensees to the Act's mandates as well as to require state licensing agencies to be part of the Act's enforcement mechanism.

To further effectuate the clear legislative policy prohibiting illegal discrimination, Pennsylvania Governors have issued numerous executive announcements including the Code of Fair Practices, contract compliance provisions prohibiting discriminatory practices by state contractors, 4 Pa. Bulletin 409, and Governor Shapp's Executive Directives Nos. 13 and 21. In the Governor's Executive Directive 21, September 27, 1971, the Governor urged all departments of state government to take action to "insure that recipients of state grants do not discriminate, insure that disadvantaged persons have equal opportunity to become licensed by the state, and *be certain that licensees of the state provide services on a non-discriminatory basis.*"

The Liquor Control Board has nearly plenary power to regulate the traffic in intoxicating liquor and the conduct and management of its licensees. The police power of the state in this area of human activity has been recognized, consistent with any and all aspects of constitutional limitations, to be the most fulsome embodied in the concept of sovereignty. This position has been reaffirmed by the United States Supreme Court in *California v. LaRue*, 409 U.S. 109, 114 (1972):

> "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals."

This great power of the Board has been broadly interpreted by our State Courts when necessary to carry out the clear policy of the Liquor Code, i.e., the protection of the welfare, health, peace, and morals of the people. See 47 P.S. §§1-104; *Commonwealth v Hilderbrand*, 139 Pa. Superior Ct. 304(1949); *Pennsylvania Liquor Control Board v. Pittsburgh International Dev. Corp.*, 5 Pa. Commonwealth Ct. 393(1972). Considering the deleterious impact discrimination has on the public welfare, as noted by the legislature in §2(a) of the Human Relations Act, as well as the legislative mandate to take appropriate action against discrimination, steps taken by the Board to eliminate discrimination on the part of its licensees is clearly in furtherance of the Liquor Code's policy and the Legislature's intention.

In the case of issuance of licenses to clubs, the Board is given complete discretion. 47 P.S. §§4-404, 4-432(a).[2] In the case of licenses for hotels, restaurants, eating places, and clubs, the Board *must* refuse

2 Pertinent portions of applicable Code provisions:

47 P.S. §4-404: *Issuance of Hotel, Restaurant and Club Liquor Licenses:* Upon receipt of the application... and upon being satisfied ... that the applicant is a *person of good repute*,... the board shall, in the case of a hotel or restaurant...and in the case of a club may, *in its discretion*, issue or refuse a license ... provided further, that the Board shall refuse any application for a new license or the transfer of any license to a new location if, *in the Board's opinion, such new license or transfer would be detrimental to the welfare, health, peace and morals of the inhabitants of the neighborhood. ... (Emphasis supplied)*

47 P.S. §4-432: *Malt and Brewed Beverages Retail Licenses:* Subject to the restrictions hereinafter provided in this act ... the board shall, in the case of a hotel or eating place ... and in the case of a club may, *in its discretion*, issue or refuse the applicant a retail dispensers license.

(b) In the case of hotels and eating places, licenses shall be issued *only to reputable persons* ...

(d) ... The board shall refuse any application for a new license or the transfer of any license to a new location if, *in the board's opinion, such new license or transfer would be detrimental to the welfare, health, peace and morals of the inhabitants of the neighborhood.* ... (Emphasis supplied)

47 P.S. §4-437(c): Licenses shall be granted by the board only to reputable individuals or to associations, partnerships and corporations whose members or officers and directors are reputable individuals.

47 P.S. §4-470: *Renewal of Licenses:* ... unless the board shall have given ten days' previous notice to the applicant of objections to the renewal of his license, based upon violation by the licensee or his servants, agents or employes of any of the laws of the Commonwealth or regulations of the board relating to the manufacture, transportation, use, storage, importation, possession or sale of liquors, alcohol or malt or brewed beverages, or the conduct of a licensed establishment, *or unless the applicant has by his own act become a person of ill repute*, or unless the premises do not meet the requirements of this act or the regulations of the board, the license of a licensee shall be renewed. (Emphasis supplied)

47 P.S. §4-471: *Revocation and Suspension of Licenses:* Upon learning of any violation of this act or any laws of this Commonwealth relating to liquor, alcohol or malt or brewed beverages, or of any regulation of the board adopted pursuant to such laws, of any violation of any laws of this Commonwealth or of the United States of America relating to the tax payment of liquor or malt or brewed beverages by a licensee within the scope of this article, his officers, servants, agents or employes, *or upon any other sufficient cause shown*, the board may, within one year from the date of such violation or cause appearing, cite such licensee to appear before it or its examiner, not less than ten nor more than sixty days from the date of sending such licensee, by registered mail, a notice addressed to him at his licensed premises, to show cause why such license should not be suspended or revoked or a fine imposed. (Emphasis supplied).

an application for a new license, or the transfer of any license to a new location, if it concludes that the new license or transfer would be detrimental to the welfare, health, peace, and morals of the neighborhood. 47 P.S. §§4-404, 4-432(d). The clear policy of the Commonwealth with regard to discrimination, as already outlined, must surely be considered by the Board in the exercise of its discretion with regard to the issuance of club licenses and in determining whether or not a license would be detrimental to the welfare, health, peace, and morals of a neighborhood. In fact, it could be argued that, given the clear finding by the Legislature that "the practice or policy of discrimination ... [threatens] the peace, health, safety, and general welfare of the Commonwealth and its inhabitants"[3] and the Legislature's request that licensing authorities take action against discriminating licensees, to ignore this would be a dereliction of responsibility and an abuse of discretion.

Further, the Board is mandated to allow licenses only to reputable individuals. 47 P.S. §§4-404, 4-432(b), 4-437(c). Certainly people who violate the Constitution or laws of the United States or the Commonwealth of Pennsylvania, including, but not limited to, the Pennsylvania Human Relations Act, or the clear public policy expressed against discrimination, cannot be considered individuals sufficiently reputable to receive or continue to hold liquor licenses from the Board.

This is the position taken by the Maine Liquor Commission and upheld by the Supreme Court of Maine. *B.P.O.E. Lodge No. 2043 v. Ingraham*, 297 A.2d 607 (Me. 1972), appeal dismissed, 411 U.S. 924 (1972), reh. den. 412 U.S. 913 (1973). In Maine, the State Liquor Commission refused to renew liquor licenses to fifteen Elks lodges because they restricted their membership to whites only. Maine's Liquor Code required the Commission to "give consideration to the character of any applicant."[4] The Commission held that the Elks' restrictive membership clause violated Maine's clear and important public policy[5] against discrimination and consequently their "character" disqualified them from receiving or holding their liquor licenses.

This interpretation of the Board's power is consistent with Pennsylvania judicial decisions which traditionally have held that the Liquor Code provides authority for revocation or suspension of a license upon sufficient cause being shown *other than* a violation of

3 Pennsylvania Human Relations Act, 43 P.S. §952(a).

4 While the Maine case deals with "character" and the Pennsylvania Liquor Code is addressed to "reputation" this is a distinction without a difference. "The word character is frequently used interchangeably with the word reputation. In a legal sense it means reputation as distinguished from disposition." *Commonwealth v. Webb*, 252 Pa. 187, 196 (1916).

5 Maine law provides: "No person, firm or corporation holding a license under the State of Maine ... for the dispensing of food, liquor, or for any service . . shall withhold membership, its facilities or services to any person on account of race, religion, or national origin...." 17 M.R.S.A. §1301-A.

the laws relating to the sale of liquors. The Code very wisely does not attempt to catalogue all the causes which it deems sufficient for license revocation or suspension leaving it to the legal discretion of the Board, subject to review by the courts. *See Revocation of Mark's License*, 115 Pa. Superior Ct. 256; *Commonwealth v. Lyons*, 142 Pa. Superior Ct. 54 (1940). "Other sufficient cause" has been interpreted by the courts to include, among other things, violation of the criminal laws of the Commonwealth, *I.B.P.O.E. of W. Valley Lodge No. 294 v. Pa. Liquor Control Bd.*, 163 Pa. Superior Ct. 395 (1948), as well as acts which are *not* violations of Pennsylvania criminal law, laws relating to the sale of liquors, or regulations of the Board, but merely actions contrary to the public welfare, health, peace, or morals. These include permitting the solicitation of patrons for immoral purposes, permitting patrons to act in lewd and indecent manner, permitting patrons to use profane and obscene language, and even merely conducting the premises in a noisy and disorderly manner.[6] *In Re Reiter*, 173 Pa. Superior Ct. 552 (1953); *In Re Petty*, 216 Pa. Superior Ct. 55 (1969).

It would appear that if merely operating in a noisy manner or permitting patrons to curse is considered to be severe enough action contrary to the public welfare, health, peace, and morals as to be sufficient cause for a license revocation then, *a fortiori*, discrimination would be also. This is not too harsh a standard of conduct to expect from our liquor licensees. It must always be remembered that, as stated by Mr. Justice Cohen, "Because of the peculiar nature of this business, one who applies for and receives permission from the Commonwealth to carry on the liquor trade assumes *the highest degree of responsibility* to his fellow citizens." *Commonwealth v. Koczwara*, 397 Pa. 575, 581 (1959) (Emphasis supplied). These precedents provide the Board with the authority to revoke licenses when it finds the licensee in violation of the Human Relations Act. Furthermore, even without an independent investigation of its own the Board may issue citations to show cause why the license should not be revoked based solely on information provided by other agencies, such as the Human Relations Commission, *cf. Commonwealth v. Greenspan* 438 Pa. 129 (1970).

It is for all the above reasons that we conclude that the Liquor Control Board has the authority to refuse to issue or renew licenses to, and revoke or suspend licenses of, licensees who discriminate on the basis of race, color, religious creed, sex, or national origin in their employment policies or in the provision of facilities, accommodations, and services. Note, however, that any attempt to so

6 "There can be no doubt that the operation of a licensed establishment in a noisy, improper and disorderly manner is 'sufficient cause' for the revocation of the license.... Obviously any action which violates the expressed purpose of the act, namely, the protection of the public health, peace and morals is sufficient cause for the suspension or revocation of a license issued and held under the provisions of the very same act. A noisy and disorderly establishment is not beneficial to the health, peace and morals of those persons who live nearby as well as to those who frequent it." *Aquilani's License*, 32 D & C 348, 352 (1938).

regulate purely private clubs, in contradistinction to places of public accommodation, may raise constitutional problems:

> "Prejudice and bigotry in any form are regrettable but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties." *Bell v. Maryland*, 378 U.S. 286, 313 (1964) (Goldberg, concurring, joined by Warren and Douglas)

The crucial question to be determined in each instance, as recognized by the Supreme Court of Pennsylvania in *Commonwealth Human Relations Commission v. Loyal Order of Moose Lodge No. 107*, 448 Pa. 451 (1971), is whether a club, in fact, is "distinctly private" or is in reality a place of public accommodation. This clearly is a factual determination to be made by the Board on a case by case basis. In *Loyal Order of Moose, supra*, the Court stated that whenever an otherwise private club opens its facilities to nonmembers, be they lessees of the club's facilities or guests, the club becomes a place of public accommodation as to those facilities. In addition, Chief Justice Jones suggested in his concurrence that a club's role as the center of community activity is also a factor to be considered in the determination of its purely private nature. *Loyal Order of Moose, supra* at 461, 462. Therefore, before such an organization can prove its distinctly private nature, it must provide the Liquor Control Board with sufficient information to meet the heavy burden of proving that "The accommodation or activity is related to membership in the organization *and* ... [that the] activity or accommodation is distinctly private as to the members of the organization." *Loyal Order of Moose, supra* at 459. (Emphasis in the original).[7] These criteria are listed merely to aid the Board in making its factual determinations as to what clubs are purely private and are not intended to be complete or conclusive.[8]

Thus, the Liquor Control Board can refuse to issue or renew licenses to, and revoke or suspend licenses of, licensees who discriminate on the basis of race, color, religious creed, sex, or national origin in their employment policies or in the provisions of facilities,

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7 The Pennsylvania Supreme Court has underscored this heavy burden by requiring that these questions be resolved in the public interest as opposed to the private interest of the license holder. *Loyal Order of Moose, supra* at 459.

8 The United States Supreme Court's decision in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), in no way limits the authority of the Liquor Control Board. Simply put, that case held that the Fourteenth Amendment of the U.S. Constitution does not *compel* states to refrain from licensing clubs which discriminate in the sale of liquor on the basis of race. It did not hold, and it is not the law, that the Fourteenth Amendment *prohibits* states from doing so. Thus, the action herein proposed, which furthers the Commonwealth's clear public policy, is constitutionally permissible.

accommodations, and services. The method of incorporating this antidiscrimination factor must, of course, be left to the sound discretion of the Board. It is urged, however, that this be accomplished both in a manner similar to the imposition of other requirements for receiving and holding a liquor license, and in a way that will provide all present and potential license holders with adequate notice and explanation of the standard to which they will be held. An appropriate vehicle to accomplish both objectives would be the adoption of a regulation. The Liquor Code authorizes the Board to adopt regulations concerning the issuance of licenses and the conduct and management of the places licensed. 47 P.S. §2-207(d)(h) and (i).

Very truly yours,

Robert P. Vogel
Assistant Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 56

Act 372 of 1972 — Transportation of Kindergarten Children — Nonpublic School Children — Limited Transportation Services.

1. Under Sections 1361 and 1362 of the Public School Code of 1949, P.L. 30, as amended, 24 P.S. §§13-1361, 13-1362, boards of school directors have the discretion to provide or withhold transportation services to public school pupils.

2. Limited transportation services rendered to one grade or class of pupils within the public school system does not discriminate against other pupils in the public school system for whom no such services are provided.

3. If transportation services are provided to one class or grade within the public school system, identical services must be provided for nonpublic school pupils enrolled in schools identified in the statute.

Harrisburg, Pa.
November 13, 1974

Honorable John C. Pittenger
Secretary of Education
Harrisburg, Pennsylvania

Dear Secretary Pittenger:

You have asked us whether a school district which provides a kindergarten program has a legal obligation to transport kindergarten children to and from their kindergarten classes. In addition to this broad inquiry you have also raised the following questions:

(1) If the board of school directors provides only "one-way" transportation to or from kindergarten classes for public school pupils, is this action unreasonably and unlawfully discriminatory in that other public school pupils are given "round trip" transportation both to and from their classes?

(2) If transportation is provided to kindergarten children in public schools, must the board of school directors provide identical services to pupils in non-public schools?

(3) May the board of school directors terminate pupil transportation services as a result of changed financial or other circumstances?

Section 503 of the Public School Code of 1949, P.L. 30, as amended, 24 P.S. §5-503, states, "When established, the kindergarten shall be an integral part of the elementary school system of the district...." The plain meaning of these words appears to be free from all ambiguity. The Legislature clearly intended to make kindergarten classes a constituent part of the public school system and to place kindergarten pupils on an equal footing with other public school pupils.

However, in addressing itself to the question of pupil transportation in the Act of December 29, 1972, P.L. 1726 (No. 372), the Legislature made reference to three distinct classes of pupils 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 ....(24 P.S. §13-1361). (Emphasis added).

It is not clear from the quoted language of Act 372 whether the Legislature intended to permit these three segments of the pupil population to be treated differently by the board of school directors, i.e., distance and safety factors would be evaluated and weighed more or less heavily when establishing transportation services for younger children.

It is clear from the totality of the language of the Act that the Legislature was explicitly authorizing an expenditure of school district funds to provide free transportation for resident pupils to and from public and non-public schools (as defined in the Act) (24 P.S. §13-1361) and made such expenditures subject to partial reimbursement by the Commonwealth of Pennsylvania. 24 P.S. §25-2541 (a) and (c) (1).

In considering Act 372 in its entirety, it appears that the authority of the school directors to provide transportation services to any one class of public school students within the district is discretionary.

The directors may provide transportation services or may choose not to provide such services. It is also within the discretion of the directors to provide the transportation services to one class of students and not to another, i.e., busing may be provided for elementary school children and not to kindergarten or secondary school pupils. Or, in the case of a secondary school or schools, situated at some distance from the geographic center of the district, the directors may decide to provide transportation for pupils attending this school or schools and not to kindergarten or elementary pupils.

The transportation statute cited above makes specific reference to "transportation...to and from the kindergarten, elementary school or secondary school." From this it would appear that the legislators were addressing themselves to "round trip" transportation services. However, since the authority to provide public school transportation is discretionary with the directors and since there is additional language in Act 372 referring to mileage, distance, and hazardous walking conditions (24 P.S. §13-1362), it is reasonable to infer that the legislators intended the following:

(a) School directors have the discretion to provide transportation services to public school pupils.

(b) School directors have the discretion to provide transportation services to one segment of the public school population and withhold it from all other segments.

(c) Transportation services may be "to and from school" but this language is not mandatory and is used in the context of a sentence that begins with a permissive clause.

However, discretionary power vested in a board of school directors is not unlimited and if a board is guilty of a clear abuse of discretion or purely arbitrary action contrary to the public interest, such action is subject to review by the courts. *Myers v. School District of Newtown Township*, 396 Pa. 542 (1959).

The Supreme Court of Pennsylvania has said:

> "The school director's office is important; the director must familiarize himself with the elements of the questions to be solved in order that he may perform his duties intelligently; where the statute vests him with discretion, he must act in good faith and with that diligence, care and skill which ordinarily prudent men would excercise under similar circumstances in their personal business affairs." *McLaughlin v. School District of Borough of Lansford*, 335 Pa. 17, 24 (1939).

School directors, entrusted by the Legislature with the care of pupil-passengers and the custody of public property, have the duty to take reasonable measures for the safety and protection of both. In

this regard, the reasonableness of their actions is to be determined from a consideration of all the circumstances culminating in a decision to provide or deny transportation services to kindergarten pupils. A bare minimum of care would impose a duty to consider the safety of such pupils before considering the cost of transportation services. The purpose of school transportation laws is to provide for the safety and welfare of school children. If school directors can attest to the reasonableness of their actions, to a careful consideration of their duty to all pupil-passengers in their care, and to a compelling interest in limiting the expenditure of district funds, then the conclusions can be drawn that there is no mandatory obligation on the part of school districts to provide transportation services to kindergarten children under the statute as written.

In light of the foregoing, the questions you have asked may be answered as follows:

(1) If the board of school directors provides "roundtrip" transportation to public school pupils in grades which are in continuous session in the morning and afternoon, does the board discriminate against kindergarten children who attend half-day sessions by providing only "one-way" transportation for these pupils?

No. Act 372 specifically distinguishes between "kindergarten, elementary or secondary school" and there is no language in the statute which requires the board to treat each of these segments in an "identical" manner.

(2) If transporation is provided to kindergarten children in public school, must the board of school directors provide identical services to pupils in nonpublic schools?

Yes. Act 372 requires that nonpublic school children be provided with identical transportation service. See, 24 P.S. §13-1361 and Official Opinion #61 Attorney General of State of Pennsylvania, 3 Pa. Bulletin 1809 (1973).

(3) May the board of school directors terminate busing services as a result of changed financial or other practical circumstances?

Yes. There is nothing in the statutory language which commits the district to the continued rendering of transportation services for an indefinite term of years. However, the school board should be careful to give adequate notice when terminating an existing program of transportation services.

(4) If the board of school directors provides "one-way" transportation to kindergarten classes for public school

pupils, must the district provide "round-trip" transportation to nonpublic school children?

No. Act 372 allows the board of school directors to use its discretion in deciding whether transportation will be provided, the segment of the school population to be transported and the extent of the transportation service. If "one-way" transportation is provided to one class of public school pupils, the district is only obligated to provide one-way transportation to nonpublic school pupils in the same class or grade level.

(5) Do the board of school directors in providing "one-way" transportation discriminate against pupils whose parents cannot provide transportation to complete the "round-trip"?

No. The board of school directors is not discriminating against any class of pupils in the district (public or nonpublic) if it provides the same transportation service to all pupils within a single class, grade or group of grades. The fact that the board of school directors busses only kindergarten children does not discriminate against pupils in other grades. The presumption in favor of the local school board is whatever transportation services are provided are being provided because they are necessitated by considerations of distance and safety and they are within the fiscal capability of the district. Absent a showing of arbitrary decision-making, a clear abuse of discretion, or actions contrary to the law there is no inherent discrimination in providing transportation to one grade and not to another, and this decision is within the purview of Act 372. *Landerman v. Churchill Area School District*, 414 Pa. 530 (1964).

In conclusion, the board of school directors acting within the scope of its statutory authority and acting in good faith, may provide public school pupils with whatever transportation services it decides are necessary. Limited transportation services rendered to one grade or class of pupils within the public school system does not discriminate against other pupils in the public school system for whom no such services are provided. Having made the decision to transport public school pupils, the school board must then provide identical transportation services for nonpublic school pupils.

Sincerely yours,

Patricia A. Donovan, R.S.M.
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 57

Commission on Charitable Organizations — Solicitation of Charitable Funds Act — Registration — Fees

1. Independent member agencies of a United Fund or other federated fund raising organizations must register independently with the Commission on Charitable Organizations.

2. Independent member agencies which are included in the registration statement of a federated fund raising organization need not pay a separate registration fee.

Harrisburg, Pa.
December 6, 1974

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

Dear Secretary Tucker:

Receipt is acknowledged of your request for our opinion regarding the application of the Solicitation of Charitable Funds Act, 10 P.S. §160-1 *et seq.*, to federated fund raising organizations and their independent member agencies. Your question is whether member agencies of a United Fund or other federated fund raising organization must register independently with the Commission on Charitable Organizations and pay a separate registration fee.

It is our opinion and you are advised that every independent member agency of a federated fund raising organization is required to comply with the Act's registration requirements but such independent member agencies which are included in the registration statement of a federated fund raising organization need not pay a registration fee. The annual registration fee of a federated fund raising organization shall serve as payment for itself and its member agencies included in the registration statement, unless the member agency independently solicits funds.

A federated fund-raising organization is defined by the Solicitation of Charitable Funds Act:

> "Federated fund raising organization" means a federation of independent charitable organizations which have voluntarily joined together, including but not limited to a United Fund or Community Chest, for purposes of raising and distributing money for and among themselves. . . ." 10 P.S. §160-2(4)

The Act clearly requires that not only the United Fund or other federated fund raising organizations must register with the Commission on Charitable Organizations but also that each individual independent member or component agency must register on its own.

> "An independent member agency of a federated fund raising organization . . . shall comply with the provision of this act independently, unless specifically exempted from doing so." 10 P.S. §160-3(b)

It is both necessary and logical to require such registration. Without the registration of the independent member agencies of a federated fund raising organization it would be impossible to obtain an accounting for the monies and other property solicited by the federated organization and disbursed by the independent member agency. The inability to obtain such information would create a massive loophole in the law and defeat the express intent of the Solicitation of Charitable Funds Act.

> "It is the intention of the Legislature that this shall not be a mere registry statute but an act intended not only to require proper registration of charitable organizations, professional fund raisers and professional solicitors but also to regulate the soliciting of money and property by or on behalf of charitable organizations, professional fund raisers, professional solicitors and *to require proper accounting for the use and distribution of such funds."* 10 P.S. §160-1.1 (Emphasis added).

It would be impossible to carry out the stated legislative intention to require an accounting for the use and distribution of charitable funds unless independent member agencies as well as federated fund raising organizations are required to file and report their use of charitable funds. It is always the object in interpreting a statute "to ascertain and effectuate the intention of the General Assembly." 1 Pa. S. §1921 (a).

As to the question whether member agencies of a United Fund or other federated fund raising agency must submit a registration fee with their mandatory registration form, such payment would conflict with the express language found in Section 3(d) of the Solicitation of Charitable Funds Act:

> "A parent organization filing on behalf of one or more chapters, branches or affiliates and *a federated fund raising organization filing on behalf of its member agencies shall pay a single annual registration fee for itself and such chapters, branches, affiliates or member agencies included in the registration statement."* 10 P.S. 160-3(d) (emphasis added).

This provision exempts member agencies included in a statement filed by a federated fund raising organization from the payment of a registration fee even though such agencies are obligated to file a separate registration statement. Rather, the single fee of the federated fund raising organization serves as payment for itself and all member groups which are included in the federated fund raising

organization's registration statement. No other interpretation can be given to the statute which would give effect to this provision as required by the Statutory Construction Act of 1972, 1 Pa. S. §1921(a).

The result of the exemption of member agencies of federated fund raising organizations from the payment of registration fees will be the use of a substantial amount of money for the charitable purpose for which it was solicited. A typical United Fund with dozens of member agencies could face registration fees amounting to several thousands of dollars if each independent member were required to make a registration payment. However, as the law is written the maximum payment to be submitted by any fund raising organization will be one hundred dollars, unless its component agencies individually solicit charitable funds and become subject to the Act apart from the federated fund raising organization.

As a result of our analysis of the Solicitation of Charitable Funds Act, it is our opinion and you are hereby advised to require registration statements of both federated fund raising organizations and each component member of such organizations. The registration statements of the federated organization must be accompanied by the proper annual registration fee but the statements of the member agencies included in the federated report need not include any payment unless the agency is required to register for funds solicited apart from those collected in conjunction with the federated organization.

Very truly yours,

W. William Anderson
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 58

Act 175 of 1974 — The "Sunshine Law" — Pa. Constitution Article VIII, Sections 7(a)(2) and 7(a)(4) — Administrative Code Sections 201-203

1. The Governor, Auditor General and State Treasurer need not comply with the public notice and open meeting requirements of the Sunshine Law when approving bond issuances pursuant to Article VIII, §7(a)(4) of the Pennsylvania Constitution or when authorizing tax anticipation notes pursuant to Article VIII, §7(a)(2).

2. The Sunshine Law applies only to agencies, as that term is defined in Section 1 of Act 175 and interpreted by Opinion 46 of September 12, 1974.

3. The Governor, Auditor General and State Treasurer do not constitute an "agency" for purposes of approving issuances pursuant to Article VIII of the Pennsylvania Constitution.

Harrisburg, Pa.
December 23, 1974

Honorable Milton J. Shapp
Governor
Harrisburg, Pa.

Honorable Grace M. Sloan
State Treasurer
Harrisburg, Pa.

Honorable Robert P. Casey
Auditor General
Harrisburg, Pa.

Dear Governor Shapp, Mrs. Sloan, and General Casey:

You have requested our opinion whether the meetings between the Governor, State Treasurer and Auditor General which are convened for the purpose of deciding whether to incur debts by or on behalf of the Commonwealth pursuant to Article VIII, §§7(a)(2) and 7(a)(4) of the Pennsylvania Constitution are subject to the "Sunshine Law", Act of July 19, 1974, P.L. , No. 175. It is our opinion, and you are hereby advised, that such meetings are not within the purview of Act 175, and that they need not conform to the requirements thereof.

In order to determine the applicability of the Sunshine Law to the approval procedures which are authorized by Sections 7(a)(2) and 7(a)(4) we must make a threshold determination whether the officials in question constitute "a branch, department, board, authority or commission" as defined in Section 1 of Act 175, to the extent that each of these officers is entrusted with the responsibility of approving bond issuances or authorizing tax anticipation notes. The Constitution, the Fiscal Code and the Administrative Code all make it clear that for the specific purposes enumerated in these two sections, the three named officials do not constitute an "agency" as the term is used in Act 175.

The Constitution states that "[t]he Governor, State Treasurer and Auditor General, acting jointly, may (i) issue tax anticipation notes having a maturity within the fiscal year of issue and payable exclusively from revenues received in the same fiscal year. . . ." Article VIII, §7(a) (2). Unlike those instances in which cabinet level officials are named to serve on various boards and commissions, as where the Secretary of Transportation is made a member of the Turnpike Commission, the Auditor General a member of the Board of Finance and Revenue, and the Attorney General a member of the Crime Commission, the three officials enumerated in Article VIII are delegated special responsibilities solely by virtue of their constitutional offices. No agency has been conceived, no agency has been created, and none exists for this purpose.

Similarly, Section 7(a) (4) of Article VIII authorizes debt to be incurred for capital projects without the approval of the electors under certain limited circumstances. The procedures to be followed when considering and approving these issuances are set forth in the Capital Facilities Debt Enabling Act, Act of July 20, 1968, P.L. 550, as amended, 72 P.S. §§3920.1 *et seq.*, which defines "issuing officials" to mean "the Governor, the Auditor General, and the State Treasurer." 72 P.S. §3920.2(9). As in the case of tax anticipation notes, these officers act in their individual capacities, rather than as an autonomous and tangible governmental agency.

The structure of state government, as reflected in the Administrative Code, lends itself to the distinction drawn above. Sections 201, 202 and 203 of the Administrative Code,71 P.S. §§61-63, indicate the three constituent parts by which the state administration is categorized:

> 201—Executive officers, administrative departments, and independent administrative boards and commissions
>
> 202—Departmental administrative boards, commissions and offices
>
> 203—Advisory Boards and Commissions

Each of the three officials about whom we are concerned, i.e., the Governor, the Auditor General, and the State Treasurer, individually is classified as a member of the "Executive Department," without any specific reference to their responsibilities as "issuing officials". When these officials meet as a department, e.g. when cabinet meetings are held, they are subject to the Sunshine Law. The mere fact that individually they are vested with additional powers by Article VIII, *ipso facto* does not convert them into an "agency" for purposes of either the Administrative Code or the Sunshine Law.

We wish to point out that our opinion today is entirely consistent with the reasoning set forth in Part I of Opinion 46 of September 12, 1974, our initial opinion on this new open meeting law, wherein we stated:

> Not specifically named but included within the scope of the Act are councils, committees, subcommittees, task forces or other groups of persons to which have been delegated administrative or executive functions.

The issue addressed in the above-quoted portion of Opinion 46 was whether a duly constituted agency could delegate certain functions to a limited number of agency members or to a select group of nonmembers in order to circumvent the intent of the law. The situation here presents an entirely different question — whether an "agency" exists in the first instance — a question to which our

response is in the negative. The two questions being separate and distinct, our opinion today in no way vitiates our former conclusion.

Accordingly, it is our opinion, and you are so advised, that when performing the functions enumerated above, the Governor, the Auditor General and State Treasurer are not required to comply with the requirements of the Sunshine Law. We would suggest, however, that whenever feasible the public should be allowed, indeed encouraged, to attend these sessions in order to gain firsthand knowledge of the manner in which the public business is conducted by their elected officials.

Very truly yours,

Barnett Satinsky
Deputy Attorney General

Israel Packel
Attorney General

OFFICIAL OPINION No. 59

State Treasurer — Expenses Payable to Judges Retired Under Act 155 of 1967 When Assigned Duties by the Supreme Court

1. Official Opinions of January 14, 1969 and August 16, 1971 (No. 58) followed.
2. The term "per diem" is *sui generis*, encompassing both compensation for services rendered and reimbursement for expenses incurred, and is not merely a synonym for the term "expenses".
3. The First Report of the Commonwealth Compensation Commission did not increase the per diem for active judges nor provide for a per diem for Act 155 judges.
4. Retired judges serving under Act 155 of 1967 continue to be entitled only to actual expenses incurred in traveling to and from court, and no per diem compensation.

Harrisburg, Pa.
December 31, 1974

Honorable Grace M. Sloan
State Treasurer
Harrisburg, Pennsylvania

Dear Mrs. Sloan:

You have requested our opinion with respect to the entitlement of judges retired under Act 155 of 1967 to payment of per diem allowances and reimbursement for expenses incurred during service rendered upon assignment by the Supreme Court. This question was the subject of previous official opinions issuing from this office, and for the reasons which follow, we adhere to the

previous conclusion expressed therein that Act 155 restricts reimbursable expenses to traveling expenses measured by mileage, and excludes per diem payments.

The Act of October 5, 1967, P.L. 355 (No. 155), added clause (4) to Section 401 of the State Employes' Retirement Code of 1959, 71 P.S. 1725-401, (the "former Retirement Code") relating to service of retired judges. As amended by the Act of July 31, 1968, P.L. 851 (No. 250), that provision, prior to its repeal by Section 2(a) of the Act of March 1, 1974 (No. 31), provided as follows:

[66]Section 401. Superannuation Retirement Allowances.—

* * *

(4) Any member of Class E or E.1 who has retired, who has either actively served in such office by virtue of appointment or election for at least thirty (30) years[1] continuously or otherwise regardless of age, or who has attained the age of seventy (70) years, who has served at least one full elected term or ten (10) years in the aggregate as a judge continuously or otherwise, and who shall hold himself in readiness to advise with his successor and his colleagues of the court of which he had been a member, and to perform such duties as may be imposed upon him as a judge, special master, referee, auditor, or examiner, in such ways as he may reasonably be able to do, as assigned by the Chief Justice of the Supreme Court, may elect to receive during a period of time equal to the unexpired portion of his term or until death, whichever first occurs, a sum equal to the salary he was receiving immediately prior to this retirement. During the period that he is receiving such benefits such member shall not be permitted to practice as an attorney and shall receive no additional compensation for performing any judicial duties except *expenses as are provided for judges when serving outside their judicial district and* retirement benefits as provided herein. Upon expiration of the aforesaid period of time, such member shall be entitled to receive the benefits, provided by the other provisions of this act, which he shall have earned by his service, including in the computation thereof the period of time during which he was receiving the benefits of this section 401(4) and sections 301(5) and 405(5)." (Emphasis supplied.)

The repeal by the Act of March 1, 1974 (No. 31) took effect immediately, except that Section 3(1) of that Act provides that:

"In order to assure an orderly transition, the following

1 Section 401(4) was also amended by the Act of July 31, 1968 (P.L. 695, No. 230), which reduced the required number of years of continuous service from thirty to twenty-five.

provisions of repealed law shall be saved and applicable as specified:

'(1) The rights provided in Section 401(4) of the Act (of June 1, 1959) (P.L. 392, No. 78), relating to additional retirement benefits for certain judges, shall continue to apply to those members of Class E or E-1 who have exercised the option therein contained prior to the effective date of this act.' "

By an Official Opinion of January 14, 1969, the Attorney General ruled that a judge retired under the above-quoted provision was authorized to receive the 10 cents per mile mileage payable under Section 10 of the Act of June 1, 1956, P.L. 1959, 17 P.S. §830.32, to an active judge who served outside his judicial district, but "not other expenses," i.e., not the $50 per diem therein provided. This Opinion was followed in Official Opinion No. 58, dated August 16, 1971, 1971 Op. Atty. Gen. 100.

This question has arisen again in the light of the Commonwealth Court's recent opinion in *Alexander v. Kephart*, 13 Pa. Commonwealth Ct. 168 (1974) that the per diem paid to certain former judges called back to perform duties was not to be construed as "salary" as that term was used in Senate Resolution No. 100 of 1972. It has been suggested that this decision indicates that the per diem paid to active judges serving outside their judicial districts must be "expenses" within the meaning of the above-quoted Section 401(4) of the former Retirement Code, and therefore payable to Act 155 judges. A careful reading of the Commonwealth Court's opinion leads to the contrary conclusion, however, that the term per diem is *sui generis*, encompassing both compensation for services rendered and reimbursement for expenses incurred, and is not merely a synonym for the term "expenses".

It should be noted at the outset that the per diem at issue in *Alexander v. Kephart* was established by Section 6 of the Act of August 31, 1966, P.L. 47, (Special Session) No. 1, 17 P.S. §790.106, as amended by the First Report of the Commonwealth Compensation Commission, 2 Pa. Bulletin 1248. While this Act and the Compensation Commission Report deal with a different category of judge than does Act 155[2], the language at 17 P.S. §790.106 is analogous to that

2 A former judge entitled to compensation under 17 P.S. §790.106 need only have served one term and not have been defeated for reelection. 17 P.S. §790.101. He need not have attained any age before service as a former judge may be rendered. A former judge retains his rights under the Retirement Code, including any pension benefits. 17 P.S. §790.108.
By contrast, a retired judge entitled to compensation under 71 P.S. §1725-401(4) must, as noted above, have actively served as a judge for at least twenty-five years regardless of age, or have attained the age of seventy and served at least one full term or ten years in the aggregate.
It is clear, however, that the Compensation Commission Report amended only the act directed to former judges with respect to per diem. The Commission Report did not increase the per diem for active judges provided for at 17 P.S. §830.32. It
(Cont'd on next page)

at 17 P.S. §830.32 which is incorporated by reference in the former Retirement Code, for the purpose of determining the meaning of the terms "expenses" and "per diem".

In its opinion in *Alexander v. Kephart*, the Commonwealth Court construed the Act of June 16, 1971, P.L. 157, No. 8 as amended, 46 P.S. §8 (repealed), which established the Compensation Commission, as having distinguished between the terms "salary" and "per diem". By the same reasoning, Act No. 8 distinguished "per diem" from the following terms as well: "mileage", and "travel and other expense allowances and reimbursements." However, in rejecting the premise "that any compensation which exceeds actual expenses cannot be considered 'per diem' but must be termed salary", 13 Pa. Commonwealth Ct. at 171, the Court implicity assumed that the per diem payment there at issue did, in fact, go beyond reimbursing the retired judges for the expenses incurred upon being called back to duty. Accordingly, just as the $125 per diem under 17 P.S. §790.106 was viewed as something more than reimbursement for expenses, so we must view the $50 per diem established by 17 P.S. §830.32 as similarly providing compensation beyond the expenses incurred either by active judges or retired judges serving under Act 155.

It is therefore our opinion, and you are hereby advised, that those retired judges serving under Act 155 of 1967 continue to be entitled only to actual expenses incurred in traveling to and from court, and no per diem compensation.

Sincerely yours,

Melvin R. Shuster
Deputy Attorney General

Israel Packel
Attorney General

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2 *(Cont'd)*

provided that "Retired Judges called back to perform duties" would be compensated at a rate of $125 per court day." It also increased the mileage reimbursement of all judges to 12 cents per mile. Regarding other categories of remuneration, the Report stated:

> Silence by the Commission upon the establishment of salaries, emoluments, retirement benefits, mileage, per diem, travel and other expense allowances, and reimbursements of any Commonwealth officer subject to its jurisdiction is intended as a determination that there shall be no change in existing compensation except as may be made by the General Assembly or under executive authority as provided by law." 2 Pa. Bulletin 1250.

The policy of the former Retirement Code was to entitle retired judges in Class E-1 to the same travel expenses as an active judge. If the Commission Report's increase of per diem to $125 affected retired judges serving pursuant to 17 P.S. §1725-401(4), this would have reflected a significant change in policy. In the absence of an explicit statement to that effect, it is highly improbable that such was the Commission's intent. On this basis, we conclude the $125 per diem entitlement runs only to former judges compensated under 17 P.S. §790.106.

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