

Commonwealth of Pennsylvania

MILTON J. SHAPP

Governor

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OPINIONS

OF THE

Attorney General

OF

Pennsylvania

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1975

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ROBERT P. KANE

Attorney General

I am pleased to publish the 46 official opinions of my office for the year 1975. Since these opinions represent the output of my first year as Attorney General, a brief foreword is in order.

It should first be noted that this is not the first time these opinions have appeared in print. For several years, we have arranged to have our official opinions published in the Pennsylvania Bulletin shortly after they are issued, and they are also sent to the news media and various national media with concern in this legal area.

These 46 formal or official opinions are merely the tip of the iceberg of the legal advice and opinions rendered by the Department of Justice. I, the Solicitor General, and the various deputy attorneys general daily render informal legal advice by way of letter, memorandum or telephone conversation. The reason and purpose for the opinions which appear in this publication is to make public those opinions which are not routine, which require considerable legal research, which advise state agencies generally regarding their legal duties or powers, and which will have an impact on the public through the way the law is construed by the state agency. While these opinions receive the designation of "formal" or "official," and therefore are published, all opinions of this office are public and are made available to the public upon request.

Finally, a word should be said about the effect of an attorney general's opinion. It is not, as some have thought, the "law" until overruled by a court. It is rather the best legal answer my office and I am able to give to our clients—the executive branch of state government—on an important issue concerning their legal duties, responsibilities or powers. Once issued, it is the law for those agencies. It is public, subject to scrutiny and criticism, and usually subject to court review if deemed to be incorrect. It thus represents another example of the attempt of state government to act openly, a policy with which I am in full accord.

In conclusion, in submitting these opinions to the public, I wish to thank my staff for the diligence, erudition and hard work which have gone into the preparation of these opinions.

ROBERT P. KANE  
*Attorney General*

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ROBERT P. KANE  
Attorney General

## OFFICIAL OPINION No. 75-1

*Contracts—Utilities—Street lighting systems—Bidding requirements—The Administrative Code—"Utility services"—Public Utility Law—Department of Property and Supplies—Department of Public Welfare.*

1. The general bidding requirements as set forth in The Administrative Code do not apply to contracts entered into with a public utility when the contract is for installing street lighting systems in those instances where the cost of the system is in excess of normal installation costs and such costs cannot be justified by the revenue estimated to be derived therefrom. However, the Department of Public Welfare should request the Public Utility Commission to direct any such contract to be bid if it would be in the public interest to do so.

Hon. Frank S. Beal, Secretary  
Department of Public Welfare  
Harrisburg, Pennsylvania

Harrisburg, Pa.  
January 9, 1975

Dear Secretary Beal:

You have requested our opinion with respect to the validity of the Department of Public Welfare entering into non-bid contracts with public utilities for the installation of street lighting systems when the systems will be installed on State hospital grounds in those instances where the cost of the street lighting system is in excess of normal installation costs and cannot be justified by the revenue estimated to be derived therefrom so that the public utility can refuse to absorb the construction costs.

You are advised that the general bidding requirements, as set forth in The Administrative Code (71 P. S. § 1, *et seq.*) do not apply to contracts entered into with the utility servicing the locale of a State hospital when the contract is entered into in the situation you describe. Under the provisions of Sections 2408 and 2409 of The Administrative Code, 71 P. S. §§ 638-639, the Department of Property and Supplies has the duty to prepare and award contracts on the basis of competitive bids for (1) 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);"\* and (2) "all equipment, furniture and furnishings, stationery, supplies, repairs, alterations, improvements, fuel and all other articles."

Section 507 of The Administrative Code, 71 P. S. § 187, provides that unless otherwise provided, all purchases of stationery, paper, printing, binding, ruling, lithographing, engraving, envelopes, or other printing or binding supplies, or any fuel, supplies, furniture, furnishings, or equipment shall be made through the Department of Property and Supplies. However, Section 507(c)(2), 71 P. S. § 187(c)(2), further provides that:

Notwithstanding any of the foregoing provisions of this section, any department, board or commission may:

\* \* \*

\*Editor's note: This amount was raised to \$25,000 by the Act of July 22, 1975, P. L. 75, § 13.

(2) Contract for *utility services* furnished by public utility companies, political subdivisions, authorities and electric co-operative corporations. (Emphasis added.) [See also 62 P. S. § 307.]

There is no statutory requirement in The Administrative Code that contracts for utility services be bid.

The term "utility services" is defined by the Public Utility Law in terms inclusive enough to include contracts for the installation of a street lighting system. The Public Utility Law defines "utility services" as follows:

"Service" is used in this act in its broadest and most inclusive sense, and includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities, or contract carriers by motor vehicle, in the performance of their duties under this act to their patrons, employes, other public utilities, and the public, as well as the interchange of facilities between two or more of them, but shall not include any acts done, rendered or performed, or any thing furnished or supplied, or any facility used, furnished or supplied by public utilities or contract carriers by motor vehicle in the transportation of voting machines to and from polling places for or on behalf of any political subdivision of this Commonwealth for use in any primary, general or special election, or in the transportation of any injured, ill or dead person, or in the transportation by towing of wrecked or disabled motor vehicles, or in the transportation of pulpwood or chemical wood from woodlots. 66 P. S. § 1102(20).

Thus, under Section 507(c) (2), *supra*, a contract for the installation of a lighting system entered into with the utility servicing the locale of a State hospital would be exempted from the bidding requirements set forth in The Administrative Code. This finding is consistent with the duties prescribed for each utility under the Public Utility Law.

Section 401 of the Public Utility Law, 66 P. S. § 1171, gives each utility the duty to "furnish and maintain adequate, efficient, safe, and reasonable service and facilities," and to "make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employes, and the public."<sup>1</sup>

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1. Article III, § 22 of the Pennsylvania Constitution requires competitive bidding in connection with the purchase of materials, supplies and other personal property when practicable. Insofar as this provision enunciates a well-considered public policy of the Commonwealth to seek competitive bidding in State contracts, agencies of the Commonwealth should seek competitive bids in all contracts where practicable. However, as noted here, because of the nature of services purchased, i.e., construction of utility facilities to be operated by a public utility having exclusive franchise rights granted by the Public Utility Commission, it is impracticable to require competitive bidding.

Irrespective of the failure of The Administrative Code to require a utility service contract to be bid, we are of the opinion that if the public interest so dictates, future contracts should be let for bids. The Department of Welfare should request the Public Utility Commission to direct that future contracts be bid under Section 417 of the Public Utility Law, 66 P. S. § 1187. That section provides as follows:

Whenever the commission deems that the public interest so requires, it may direct, by regulation or order, that any public utility shall award contracts or agreements for the construction, improvement, or extension, of its plant or system to the lowest responsible bidder, after a public offering has been made, after advertisement and notice: Provided, That any such public utility may participate as a bidder in any such public offering. The commission may prescribe regulations relative to such advertisement, notice, and public letting.

Very truly yours,

LILLIAN B. GASKIN  
*Deputy Attorney General*

ROBERT P. KANE  
*Attorney General*

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### OFFICIAL OPINION No. 75-2

*Governor's Office; Loyalty Oath to be treated as unconstitutional.*

1. The state may not forbid or proscribe mere advocacy of the doctrine of forceful overthrow of government.
2. The Pennsylvania Loyalty Oath is defective in its prohibition of advocacy which fails to distinguish between advocacy of action and advocacy of abstract doctrine.
3. The Pennsylvania Loyalty Oath is impermissibly overbroad in that it proscribes all of the aims, legitimate included, of an organization to which an applicant belongs.
4. The Pennsylvania Loyalty Oath may no longer be administered as a condition of employment in any appointing authority over which the Governor has jurisdiction, nor by the Civil Service Commission.

Harrisburg, Pa.  
January 10, 1975

Honorable Samuel Begler  
Secretary  
Governor's Personnel  
Harrisburg, Pennsylvania

and

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

Dear Messrs. Begler and Rosenberry:

Each year as the Commonwealth and its political subdivisions implement the Pennsylvania Loyalty Act, 65 P. S. § 212 *et seq.*, this

office receives many inquiries as to the constitutionality of the legislatively prescribed loyalty oath set forth in Section 214 of the Act (65 P. S. § 214). This loyalty oath is incorporated in the application forms that are provided by both the Governor's personnel office and the Civil Service Commission and are filled out by all applicants for state employment. It is our opinion, and you are so advised, that the loyalty oath above mentioned should be regarded as unconstitutional and it may no longer be a requirement that all applicants for Commonwealth employment and all potential appointees to Commonwealth positions must sign such an oath before assuming their duties.

The Pennsylvania Loyalty Oath reads, in relevant part, as follows:

And I do further swear (or affirm) that I am not knowingly a member with the specific intent to further the aims of any organization that advocates, the overthrow of the Government of the United States or of this Commonwealth by force or violence or other unconstitutional means . . .

In recent years a number of Supreme Court decisions have declared loyalty oaths substantially similar, if not identical to, the Pennsylvania loyalty oath unconstitutional and have narrowly prescribed the states' power to require such oaths as conditions of public employment. The most recent case in this line of decisions is *Communist Party of Indiana v. Whitcomb*, 414 U. S. 441 (1974).

In *Whitcomb*, any new political party which desired a place on the Indiana ballot was required to sign an oath or affidavit that "it does not advocate the overthrow of local, state or national government by force or violence . . ." The Court found that this broad oath embraced "advocacy of abstract doctrine as well as advocacy of action" and added that "this court has held in many contexts that the First and Fourteenth Amendments render invalid statutes regulating advocacy that are not limited to advocacy of action." *Whitcomb*, at 447. Additionally the Court rejected the position that any group that advocates violent overthrow as an abstract doctrine must be regarded as necessarily advocating unlawful action.

This principle, that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce action," *Whitcomb*, at 448, applies not just to statutes that directly forbid advocacy, or to voting and ballot situations as in *Whitcomb*, but also to regulatory schemes that determine eligibility for public employment. See *Keyishian v. Board of Regents*, 385 U. S. 589 (1967); *Cramp v. Board of Public Instruction*, 368 U. S. 278 (1961).

A salient defect of the Pennsylvania oath lies in the phrase "advocates the overthrow of the government . . . by force or violence."



This is nearly the exact language of the oath struck down in the *Whitcomb* case, *supra*, which the Court found contains an overbroad prohibition of advocacy of abstract doctrine as well as advocacy of action. Citing *Noto v. United States*, 367 U. S. 290, 297-8 (1961), the Court added (414 U. S. at 448):

the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action. . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.

The Pennsylvania oath, in its prohibition of advocacy in total, fails to draw the necessary and constitutionally required distinction between advocacy of abstract doctrine and advocacy of action intended to incite and foment immediate change. This overbreadth cannot pass constitutional muster.

A second defect in the oath is the phrase, "the specific intent to further the aims." Originally conceived as a narrow provision which would mandate permissible restrictions, it is also, under existing case law, impermissibly overbroad. A careful reading reveals that although it does require "specific intent," it is overly broad in that it forces applicants who desire employment to forego all of the aims of any organization, some of which would be lawful, constitutional aims and therefore protected, and others which might be unlawful and subject to regulation. In this regard the Supreme Court has made it very clear that a statute which would condemn speech, which under the Constitution the government may not control, cannot stand the test of the First and Fourteenth Amendments. See *Yates v. United States*, 354 U. S. 298 (1957). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *N. A. A. C. P. v. Button*, 371 U. S. 415, 438 (1963). Because the Pennsylvania oath would deny employment to applicants who desire to further the legitimate aims of the organization, the oath is overbroad and should not be applied.

Based on the above discussion, you are advised that the oath set forth in the Pennsylvania Loyalty Act should no longer be required of an applicant for state employment or of a state employee and the oath should no longer be incorporated in employment application forms issued by either the Governor's personnel office or the Civil Service Commission.

Very truly yours,

LARRY B. SELKOWITZ  
*Deputy Attorney General*

ROBERT P. KANE  
*Attorney General*

## OFFICIAL OPINION No. 75-3

*Public Utility Commission—Commissioner—Vacancy—Governor—Interim Appointment Power.*

1. An interim appointee as a Commissioner of the Public Utility Commission serves lawfully even though he had been nominated for that position previously and the Senate failed to act on that nomination.
2. An appointee as a Commissioner of the Public Utility Commission is authorized to exercise the duties of that office immediately upon his appointment.

Harrisburg, Pa.  
January 17, 1975

Public Utility Commission  
c/o George I. Bloom, Chairman  
Harrisburg, Pennsylvania

Dear Sirs:

We have been asked by Herbert S. Denenberg to determine whether he has been duly appointed as a Commissioner of the Public Utility Commission and whether he, as a gubernatorial appointee to the Commission, may exercise the duties of that office as of the time of his appointment. It is our opinion, and you are accordingly advised, that Herbert S. Denenberg is duly appointed as Commissioner to the Public Utility Commission and may begin to serve the duties of that office immediately.

Mr. Denenberg was nominated by Governor Shapp to the position of Commissioner of the Public Utility Commission during the session of the Senate expiring on November 30, 1974. The Senate neither approved nor rejected his appointment. On January 6, 1975, Mr. Denenberg was appointed Commissioner of the Public Utility Commission by Governor Shapp while the Senate was not in session.

The relevant provision of the Public Utility Law provides:

"When a vacancy shall occur in the office of any commissioner, a commissioner shall, in the manner aforesaid, be appointed for the residue of the term. If the Senate shall not be in session when any vacancy occurs, any appointment made by the Governor to fill the vacancy shall be subject to the approval of the Senate, when convened. No vacancy in the commission shall impair the right of a quorum of the commissioners to exercise all the rights and perform all the duties of the commission." 66 P. S. § 453.

In *Commonwealth ex rel. Schnader v. King*, 312 Pa. 412, 167 A. 309 (1933), the Court determined that an interim gubernatorial appointee to the Public Service Commission serves from the date of his appointment, *unless rejected by the Senate* at its next convened session, until the end of the session. If approved by the Senate, he serves until the end of the full term to which he was appointed.

In *Commonwealth ex rel. Woodruff v. Stewart*, 286 Pa. 511, 134 A. 392 (1926), the Supreme Court ruled that an interim appointee whose appointment is neither approved nor rejected during an immediately

preceeding session of the Senate may be duly reappointed during a recess of the Senate to serve during the next session of the Senate. Under the facts of this case, the first time Stewart's name was sent to the Senate for confirmation, the Senate failed to act. After the Senate adjourned, the Governor reappointed Stewart to hold the office of Public Service Commissioner until the end of the next session of the Senate. When the Senate reconvened, it approved Stewart for the residue of the unexpired term. The Pennsylvania Supreme Court held that Stewart had good title to the office of Commissioner and hence the Governor may lawfully reappoint an individual who has not previously been acted upon by the Senate.

The *King* case stands for the proposition that when an appointment is made to fill a vacancy on the Public Service Commission when the Senate is not in session, such appointment is subject to approval when the Senate is next convened, and, if not approved by the Senate during its next session, it is nugatory after the expiration of the session of that body. It is clear from the *King* case, that such an appointment is not rendered invalid because the Senate does not act immediately on the nomination. *King* merely states that if the Senate does not act on the Denenberg appointment in its next session, his appointment expires at the end of the session. If the Senate approves the Denenberg appointment at any time during the next session, then that approval is for the residue of the expired term.<sup>1</sup>

In 1938, the then Attorney General determined that an interim appointee to the Public Utility Commission *who has previously been rejected by the Senate*, may not lawfully serve an interim appointment as Public Utility Commissioner. Opinion No. 266, Opinions of the Attorney General 198 (1938). However, that very opinion held that the Governor may renominate such a rejected individual who may serve if subsequently approved by the Senate. Since Opinion No. 266 concerns an individual who had previously been *rejected* by the Senate, it is not dispositive of the issue at hand.

Accordingly, consistent with the clear language of the law and the cases cited above, it is our opinion that Herbert S. Denenberg is duly appointed Commissioner to the Public Utility Commission and is authorized to exercise the duties of that office immediately. The approval of the Senate, although necessary for Mr. Denenberg to serve the full unexpired term, is not required before he may become a Commissioner and lawfully exercise his duties.

Very truly yours,  
JEFFREY G. COKIN  
*Deputy Attorney General*  
ROBERT P. KANE  
*Attorney General*

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1. The language of the appointment provisions of the enabling legislation for the predecessor Public Service Commission is indistinguishable for purposes of this opinion from the language of the appointment provisions contained in 66 P. S. § 453, *supra*.

## OFFICIAL OPINION No. 75-4

*Department of Military Affairs—National Guard—Military Leave.*

1. An employee of the Commonwealth or any political subdivision thereof who participates in National Guard drills is entitled to be compensated by his employer in full for a period not exceeding 15 days in any one year.

Harrisburg, Pa.  
January 28, 1975

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

Dear General Mier:

Receipt is acknowledged of your request for our opinion concerning the payment of salaries for a leave of absence to National Guardsmen who are officers and employees of the Commonwealth of Pennsylvania or of any political subdivision thereof. It is our opinion and you are hereby advised that any officer or employee of the above mentioned categories is entitled to receive full salary for the amount of time, not exceeding fifteen days, while on active military duty.

The question is concerned with the interpretation of the language of 65 P. S. § 114 which reads as follows:

"All officers and employes of the Commonwealth of Pennsylvania, or of any political subdivision thereof, members, either enlisted or commissioned, of any *reserve component*<sup>1</sup> of the United States Army, Navy, Marine Corps, Air Force, or Coast Guard, shall be *entitled to leave of absence from their respective duties without loss of pay, time, or efficiency rating* on all days not exceeding fifteen in any one year during which they shall, as members of such reserve components, be engaged in the active service of the United States or in field training ordered or authorized by the Federal forces." (Emphasis added.)

This provision has been interpreted by at least one political subdivision to allow a governmental unit to subtract the wages an employee receives from the National Guard from the salary he would

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1. Those units which are considered as reserve components are listed at 10 U. S. C. § 261.

- (a) The reserve components of the armed forces are:
  - (1) The Army National Guard of the United States.
  - (2) The Army Reserve.
  - (3) The Naval Reserve.
  - (4) The Marine Corps Reserve.
  - (5) The Air National Guard of the United States.
  - (6) The Air Force Reserve.
  - (7) The Coast Guard Reserve.

ordinarily be paid by the governmental unit. Such an interpretation does not hold weight under analysis.

There is no indication in the statute that the Legislature contemplated setting off a governmental employee's salary by the amount he receives from the National Guard. The phrase "entitled to leave of absence without loss of pay" indicates that a National Guardsman was to receive his full compensation from his governmental position. To attempt to derive any other explanation from these words would seriously misread the statute. As the Statutory Construction Act states at 1 Pa. C. S. § 1921(b):

"When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."

Even if, *arguendo*, the statute could be considered inexplicit, the Statutory Construction Act at 1 Pa. C. S. § 1921(c) provides a means for properly ascertaining the intention. Among the data that one should inspect is the "Legislative and administrative interpretations of such statute." (1 Pa. C. S. § 1921(c)(8)).

At 4 Pa. Code § § 35.61-35.62,\* the Executive Board of the Commonwealth has prescribed regulations concerning leave with pay for National Guard or Military Reserve. They read as follows:

"In accordance with the act of July 12, 1935, P. L. 677 (No. 255) (65 P. S. § 114), all salaried, hourly and per diem employees of the Commonwealth who occupy permanent positions and who are members of any reserve component of the United States Army, Navy, Marine Corps or Air Force shall be entitled to a leave without loss of pay, time or efficiency rating on all working days not exceeding 15 days in any calendar year during which they are, as members of reserve components, engaged in the active service of the United States or in field training ordered or authorized by the Federal forces.

"Officers and employees of the Commonwealth who occupy permanent positions and who are members of the Pennsylvania National Guard shall be entitled to leave with pay on all days during which they shall, as members of the National Guard, be engaged in the active service of the Commonwealth or in field training ordered or authorized under the provisions of the Pennsylvania Code of Military Justice (51 P. S. § 1101 *et seq.*).

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\*Editor's note: These regulations have been amended and renumbered as 4 Pa. Code § § 30.111-30.112.

"Absence from work under these provisions shall be granted to salaried, hourly and per diem employes without regard to the length of service with the Commonwealth of the employe."

The Commonwealth, therefore, has interpreted 65 P. S. § 114 as granting the employee his full salary as well as that which is provided by the National Guard.<sup>2</sup>

Furthermore, the case of *Loomis v. Board of Education of School District of Philadelphia*, 376 Pa. 428, 103 A. 2d 769 (1954) has provided us with some judicial insight into the meaning of the Act. In *Loomis* a teacher who was in a reserve component sued the Philadelphia School District to recover pay for 15 days in each of two years in which he was engaged in field training. The Supreme Court rejected the argument by the School District that the statute was invalid as special legislation and the opinion strongly implies that an employee is to receive full compensation.

"... It may be pointed out that military leave of absence for 15 days with *full* pay is quite analogous to sick leave without loss of pay as an incident or condition of employment. . . . We cannot consider the 15 day leave of absence granted to reservists as unreasonably protracted in duration. . . . It may be noted that sick leave or limited vacation relates solely to the well being or comfort of the employe, whereas military leave confers a benefit upon the public employer and taxpayer in the quality of service rendered. At the same time it is in the interest of national defense. . . ." (376 Pa. at 435-436) (Emphasis added.)

For a considerable period of time, the statute has been construed and interpreted by officers of the Commonwealth, and at the very least by implication of the Supreme Court of Pennsylvania, as meaning *full pay*. As stated by the Supreme Court of Pennsylvania in *Loeb Estate*, 400 Pa. 368, 162 A. 2d 207 (1960):

"... the contemporaneous construction of a statute by those charged with its execution and application, especially when it has long prevailed, is entitled to great weight and should not be disregarded or overturned except for clear language in the Act itself or very strong cogent and convincing reasons."

It is our opinion, that it would require a legislative amendment to the statute in order to permit a governmental unit to subtract the wages an employee receives from the National Guard from the salary he would ordinarily be paid by the governmental unit.

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2. It should be noted that the Act of May 27, 1949, P. L. 1903, 51 P. S. § 1-839 specifically grants to Commonwealth employees who are members of the Pennsylvania National Guard that which was generally granted to them and other members of reserve components in 65 P. S. § 114.

Thus from the above analysis it is our opinion and you are hereby advised that an employee of the Commonwealth or any political subdivision thereof who participates in National Guard drills\* is entitled to be compensated by his employer in full for a period not exceeding 15 days in any one year.

Very truly yours,

ROBERT J. DIXON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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OFFICIAL OPINION No. 75-5

*Fish Commission—Administrative Law and Procedure—Rules and Regulations.*

1. The Fish Commission does not have the authority to promulgate regulations respecting lobsters or hard-shell clams as the Legislature has not delegated a rule-making power to the Commission as to either of these forms of aquatic life.

Harrisburg, Pa.  
February 4, 1975

Ralph W. Abele  
Executive Director  
Pennsylvania Fish Commission  
Harrisburg, Pennsylvania

Dear Mr. Abele:

You have requested our opinion on whether or not the Fish Commission may promulgate regulations with respect to lobsters and hard-shell clams. It is our opinion, and you are so advised, that the Fish Commission does not have the authority to promulgate regulations respecting lobsters or hard-shell clams as the Legislature has not delegated a rule-making power to the Commission as to either of these forms of aquatic life.

To be valid, a rule or regulation adopted by a public administrative body must be within the authority delegated to such body. *Pennsylvania Human Relations Commission v. Uniontown Area School Dist.*, 455 Pa. 52, 313 A. 2d 156 (1973); P. L. E. Administrative Law and

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\*Editor's note: This opinion was amended by Official Opinion No. 76-5 of March 17, 1976. The use of the word "drills" was inadvertent and incorrect. Pay or compensation is only authorized for those employees who are engaged in "active service" or "field training." See 6 Pa. Bulletin 796.

Procedure § 33. The statutory laws from which the Fish Commission derives its authority do not vest in the Commission rule-making authority respecting lobsters or hard-shell clams.

It has been suggested that Sections 30 and 40 of the Fish Law of 1959 (30 P. S. § § 30, 40) authorize the Commission to promulgate regulations respecting various forms of aquatic life. These sections do vest in the Fish Commission rule-making authority; however, this authority extends only to the forms of aquatic life mentioned in the statutes. There is no support in the statutory language for the position that the rule-making authority extends to forms of aquatic life other than those mentioned by statute.

In view of the above, legislation is needed in order to authorize the Fish Commission to regulate lobsters and hard-shell clams.

Very truly yours,

HOWARD M. LEVINSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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### OFFICIAL OPINION No. 75-6

*State Treasurer—Custodial Investment Account—State Depositories.*

1. It is legal for the State Treasurer to establish "custodial investment accounts" in the Commonwealth's depository banks under which excess funds would be invested by the banks in short-term investments for the account of the Commonwealth which would be liquidated as Commonwealth checks are presented to the banks for payment.

Harrisburg, Pa.  
February 4, 1975

Honorable Grace M. Sloan  
State Treasurer  
Harrisburg, Pennsylvania

Dear Mrs. Sloan:

You have requested our opinion as to whether it would be legal for the Commonwealth to establish a "custodial investment account." The reason for this proposal, as outlined in the letter of your Office, is that substantial periods of time frequently pass between the time Commonwealth checks are issued and the time they are presented to the Com-



monwealth's various depository banks for payment. As a result, there is often a substantial amount of idle cash in the depository banks which accrues no earnings to the Commonwealth. Under your plan, the Treasury Department would establish custodial investment accounts in each such bank under which it would authorize and instruct the bank to withdraw a substantial portion of the checking account balance, transfer that amount to the custodial investment account, and use those funds for the purchase of short-term obligations in which the Commonwealth may legally invest for the account of the Commonwealth. The bank would also be authorized to liquidate those securities or any part thereof necessary to cover Commonwealth checks presented at the bank for payment. In this manner, the Commonwealth would at all times have sufficient monies and securities in possession of the bank to cover all outstanding checks and at the same time would be earning income on a portion of such funds.

We have reviewed state laws on this subject and can find no legal impediment to the adoption of such a procedure provided the depository bank, if state-chartered, is a bank and trust company under the Banking Code of 1965, 7 P. S. § § 102(g), 401. Section 402 of the Code, 7 P. S. § 402, authorizes such banks and trust companies to act in the manner described. Federally chartered banks may be granted similar authority. 12 U. S. C. § 92a. We can find no other state law which would prohibit this plan.

One question which arises under Federal law is whether this would be a violation of Federal Reserve Regulation Q, 12 C. F. R. § 217.2 and the corresponding regulation of the Federal Deposit Insurance Corporation (12 C. F. R. § 329.2), which forbid any bank which is a member of the Federal Reserve System or bank insured by the FDIC to pay interest on demand deposits. As confirmed in a letter we have received from Hilary H. Holloway, Vice President and General Counsel of the Federal Reserve Bank of Philadelphia, dated January 29, 1975, with respect to Regulation Q, your plan would not violate any of these regulations. The bank will not, directly or indirectly, pay any interest on the funds; the bank, in fact, will pay nothing. The investments are the property of the Commonwealth of Pennsylvania. Any interest accruing to the Commonwealth would be paid by the obligor on the securities, not by the bank. The bank would merely act as a fiduciary in accordance with the laws we have cited.

Accordingly, it is our opinion and you are so advised that we find no legal impediment to entering into the "custodial investment account" program as outlined to us.

*Sincerely,*

GERALD GORNISH  
*Deputy Attorney General*

ROBERT P. KANE  
*Attorney General*

## OFFICIAL OPINION No. 75-7

*Environmental Quality Board—Authorized Representative.*

1. Only a named deputy may represent a department head on the Environmental Quality Board.
2. A named deputy means a deputy secretary, deputy commissioner, or other similar official.

Harrisburg, Pa.  
February 14, 1975

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

Dear Dr. Goddard:

You have asked our opinion as to whether the Secretary of the Department of Transportation, a member of the Environmental Quality Board, may name an employee of his department to serve in his stead on the Board, even though said employee is not a deputy secretary to the Department. It is our conclusion that such representation would be improper.

The Environmental Quality Board was created by the Act of December 3, 1970, P. L. 834 (No. 275, § 20), 71 P. S. § 510-20. Section 14 of the Act, 71 P. S. § 180-1 prescribes the membership of the Board.

"The Environmental Quality Board shall consist of the Secretary of Environmental Resources, who shall be chairman thereof, the Secretary of Health, the Secretary of Commerce, the Secretary of Transportation, the Secretary of Agriculture, the Secretary of Labor and Industry, the Secretary of Community Affairs, the Executive Director of the Fish Commission, the Executive Director of the Game Commission, the Chairman of the Public Utility Commission, the Executive Director of the State Planning Board, the Executive Director of the Pennsylvania Historical and Museum Commission, five members of the Citizens Advisory Council, and four members of the General Assembly. The Citizens Advisory Council members shall be designated by, and serve at the pleasure of, the Citizens Advisory Council. One of the General Assembly members shall be designated by, and serve at the pleasure of, the President Pro Tempore of the Senate, one by the Minority Leader of the Senate, one by the Speaker of the House of Representatives and one by the Minority Leader of the House of Representatives.

Eight members of the board shall constitute a quorum."

The Act itself does not authorize the attendance of alternate members. Nevertheless, Section 213 of the Administrative Code (Act of April 9, 1929, P. L. 177, Art. II § 213, as amended by the Act of December 18, 1968, P. L. 1232 (No. 390), § 5, 71 P. S. § 73) provides, in part, as follows:

“With the approval of the Governor in writing, the head of any department may authorize a named deputy to serve in his stead on any board or commission, except the Board of Pardons of which such department head is a member ex-officio. One of the Deputy Adjutants General shall possess the same qualifications in all respects as are required by law for the Adjutant General of the Department of Military Affairs.”

We conclude that the words “named deputy to serve in his stead” refer only to a deputy department head, i.e. deputy secretary, deputy commissioner, or other similar official. Therefore, it is our opinion, and you are so advised, that there is no statutory basis for an employee of the Department of Transportation, other than a deputy secretary, to represent the Secretary of Transportation on the Environmental Quality Board.

Very truly yours,

THEODORE A. ADLER  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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## OFFICIAL OPINION No. 75-8

*Department of Health—Bureau of Vital Statistics—Registration of Birth.*

1. Attorney General's Informal Opinion No. 780, October 8, 1936, is overruled to the extent that it prohibits the Department of Health from allowing the child of a married woman to be registered on its birth certificate as the illegitimate child of another man with the other man's surname.
2. Birth records can reflect that a child of a married woman was fathered by a man other than the married woman's husband if the following conditions are met:
  - (a) Acknowledgement of the natural father by the mother.
  - (b) Acknowledgement of the child by the natural father.
  - (c) Permission from the mother's husband;  
Provided, however, that if the mother's husband is notified by registered mail return receipt requested, sent to his last known address and he makes no response within 10 days of receipt, or if the postal service is unable to effect delivery, his consent shall not be necessary to the registration.

Harrisburg, Pa.  
February 19, 1975

Honorable Leonard Bachman, M.D.  
Secretary of Health  
Harrisburg, Pennsylvania

Dear Dr. Bachman:

You have asked whether the Department of Health has authority to promulgate regulations which would allow the child of a married woman to be registered on its birth certificate as the illegitimate child of another man, with his surname, when all of the following conditions are met:

1. Acknowledgement of the natural father by the mother.
2. Acknowledgement of the child by the natural father.
3. Permission from the mother's husband;  
Provided, however, that if the mother's husband is notified by registered mail return receipt requested, sent to his last known address and he makes no response within 10 days of receipt, or if the postal service is unable to effect delivery, his consent shall not be necessary to the registration.

You are hereby advised that the Department of Health can legally promulgate regulations to enact such policies.

## I. PRESENT POLICY

The Department of Health is authorized to specify what information should be included on a birth certificate. Vital Statistics Law of June 29, 1953, P. L. 304, § 204 (35 P. S. § 450.204). At the present time, all children of married women must be registered at birth as the legitimate children of their mothers' husbands. ("Important Notice to Pennsylvania Hospitals and Physicians," Department of Health, Division of Vital Statistics, May 17, 1967.) The legal basis for this policy is Attorney General's Informal Opinion No. 780; October 8, 1936. The then Attorney General stated that:

There is a well established presumption to the effect that children born to a married woman are legitimate. . . . Ordinarily, neither the husband nor the wife will be allowed to deny the legitimacy of their child. . . . [Since] the Bureau of Vital Statistics is in no position to take testimony and decide whether the presumption has been adequately rebutted . . . the child should be shown upon the birth certificate as legitimate and the mother's husband named as its father. . . .

The Opinion, then, rests upon two grounds: first, that the presumption of legitimacy may not be rebutted except in the course of some kind of a formal hearing; and second, that the presumption may not be rebutted by the testimony of the mother or her husband in any case.

The continuing validity of this Opinion has in recent times been called into question. Changing social conditions have made it necessary to re-evaluate the longstanding policy in this area. Marriages dissolve and new relationships are formed. It is understandable that in such cases a mother may want her child to bear the name of his or her natural father rather than the name of a man he or she may never see. In order to determine whether her wishes can be accommodated, however, it is necessary to reexamine the grounds upon which Opinion No. 780 is based.

## II. PRESUMPTION OF LEGITIMACY

Informal Opinion No. 780 rests in part upon the strength of the presumption of legitimacy, but the presumption of legitimacy rests in turn upon a set of assumptions concerning the legal and social consequences of being illegitimate.

In an earlier century, those assumptions might have been accurate. "At common law, a bastard was not even entitled to a name unless he gained one by reputation," Attorney General's Informal Opinion No. 780, at 3. In today's context of rapidly changing customs, mores and attitudes, however, the parties involved are better suited to know the attitudes of their social environment toward illegitimacy than is the government. They know, better than we, "what the neighbors will say," or whether they will say anything at all, and their judgment, at least at the administrative level, should prevail.

Nor is the legal status of the illegitimate child as bleak as it was in the past, at least where paternity has been established. Under the Crimes Code of December 6, 1972, P. L. 1482, (No. 334), § 1 (18 Pa. C. S. § 4323), neglecting to contribute to the support of a child one has fathered is made a misdemeanor. The Supreme Court, in *Gomez v. Perez*, 409 U. S. 535 (1973), has gone so far as to hold that, under the Fourteenth Amendment's Equal Protection Clause, a state may not grant legitimate children a right to support from their father while denying it to illegitimate children.

In *Gomez*, the Court cites its decision in *Levy v. Louisiana*, 391 U. S. 68 (1968), holding that a state may not create a right of action for the wrongful death of a parent while excluding illegitimate children from its exercise; and *Weber v. Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972), holding that illegitimate children must share equally with other children in workmen's compensation benefits for the death of a parent. The Supreme Court of Louisiana has recently held that, under the principles of these decisions, a child may recover for the death of her biological father even though she was legally the legitimate child of her mother's husband, *Warren v. Richard*, 296 So. 2d 813 (La. 1974). Another case, *New Jersey Welfare Rights Organization v. Cahill*, 411 U. S. 619 (1973), held that a state may not withhold welfare benefits from an otherwise eligible household merely because the children are illegitimates.

But the cases most likely to affect illegitimates are those which deal with their rights to receive Social Security benefits. In *Jimenez v. Weinberger*, 417 U. S. 628 (1974), the Supreme Court held that illegitimate children could not be conclusively denied the opportunity to establish a claim to benefits for the disability of a parent. In *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd mem.* 409 U. S. 1069 (1972), the court upheld a challenge to sections of the Social Security Act (42 U. S. C. § § 403(a), 416(h)(3)) under which an illegitimate child received only residual death benefits upon the death of a parent—that is, whatever money was left after the spouse and legitimate children had received their maximum benefits allowed. *Davis* held that an illegitimate child must participate in those death benefits as though he is legitimate, providing that he had been supported or otherwise acknowledged by his father. *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd mem.* 409 U. S. 1069 (1972), faced the same issue with the same result. On the crucial issue of support, then, a child may be as well off (or better) as the acknowledged out-of-wedlock child of a father who is present than as the legitimate son of his mother's husband, who may be absent.

In short, recent United States Supreme Court decisions have gone far in securing rights for illegitimate children and in striking down state and federal legislation that has relegated illegitimate children to the status of non-persons.<sup>1</sup> You are advised, therefore, that changes in public policy toward illegitimates are such that the presumption of legitimacy may be modified to reflect true facts for purposes of birth registrations under the conditions you have outlined. The legal effects of such registrations are subject, of course, to the limitations of the Vital Statistics Law of June 29, 1953, P. L. 304, § 810 (35 P. S. § 450.810), discussed in part III of this Opinion.

### III. THE NON-ACCESS RULE

The second reason given by the Attorney General's Opinion for the present policy is the common law rule that in a suit where paternity is in issue, neither the husband nor the wife may testify to the non-access of the husband to the wife. The reasoning is that if a wife may not bastardize her child under oath in a courtroom, she should not be allowed to do it on a birth certificate.

Whatever may be the merits of that argument, the "non-access rule" itself has come under severe attack, and the present trend in the law is to move away from it or to abolish it entirely. Wigmore, 7 *Evidence* § 2063 criticizes both the legal origins and the policy behind the rule,

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1. It should be noted that the Pennsylvania Legislature in recent years has removed from several statutes references to "bastards" and "illegitimates" and substituted the term "born out of the wedlock." See, e.g., Act of June 17, 1971, P. L. 175 (No. 17), 48 P. S. § 167; Act of June 17, 1971, P. L. 178 (No. 20), 20 P. S. § 301.14; and Act of June 17, 1971, P. L. 179 (No. 21), 20 P. S. § 1.7 (the last two of which have been superseded by the Probate, Estates and Fiduciaries Code, 20 Pa. C. S. § § 6114 and 2107, respectively).

contending that it originated in an unsupported dictum of Lord Mansfield, and that it was adopted in England and the United States without careful analysis. The rule has been overturned by statute in England, Matrimonial Causes Act of 1950, 14 Geo. VI, c. 25 § 32, and in Tennessee, St. 1955, March 15, c. 186, § 6; and by the courts in the District of Columbia, *Peters v. District of Columbia*, 84 A. 2d 115 (D. C. Mun. Ap. 1951), in Mississippi, *Moore v. Smith*, 178 Miss. 383, 172 So. 317 (1937), in New Mexico, *Melvin v. Kazhe*, 83 N. M. 356, 492 P. 2d 138 (1971), and in New York, *Oliver v. England*, 264 N. Y. S. 2d 999 (1965).

In Pennsylvania, the rule came under attack in *Commonwealth ex rel. Leider v. Leider*, 210 Pa. Superior Ct. 433, 233 A. 2d 917 (1967). Judge Hoffman and President Judge Ervin in the Superior Court and Justice Roberts in the Supreme Court argued for its abolition. The court did not reach that point since it was not necessary to dispose of the case, but modified the rule to allow the wife's testimony where she had subsequently married the putative father, and her testimony could not bastardize the child, *Commonwealth ex rel. Leider v. Leider*, 434 Pa. 293, 254 A. 2d 306 (1969), *rev'g* 210 Pa. Superior Ct. 433, 233 A. 2d 917 (1967).

Statutory provisions have also eroded the non-access rule. In those adoption cases where paternity becomes an issue because of the necessity for a married father's consent, Pennsylvania law provides that "The natural mother shall be a competent witness as to whether the presumptive father is the natural father of the child," Adoption Act of July 24, 1970, P. L. 620 (No. 208), § 313, 1 P. S. § 313. In divorce actions, the plaintiff is competent to prove all the facts, Divorce Law of May 2, 1929, P. L. 1237, § 50, 23 P. S. § 50, including non-access, *Krick v. Krick*, 39 Berks 76 (1946), although *Williams v. Williams*, 46 D. & C. 481, 59 Montg. 58 (1942), holds the contrary. Similar exceptions limit the application of the rule in many other states. (7 Wigmore, *Evidence* § 2063, n. 13). Finally, the Revised Uniform Reciprocal Enforcement of Support Act of December 6, 1972, P. L. 1365 (No. 291), § 22, 62 P. S. § 2043-24, does away with the rule altogether: "Husband and wife are competent witnesses and may be compelled to testify to any relevant matter . . . including parentage." While its provisions are not relevant in a support proceeding not brought under its terms, *Commonwealth ex rel. Ranjo v. Ranjo*, 178 Pa. Superior Ct. 6, 112 A. 2d 442 (1955), the Act, which has been adopted in 50 states, clearly shows the direction in which the law is moving.

In view of the evident change occurring in this area of the law, it is appropriate for us to reconsider the earlier Attorney General's Opinion and to decide which is the better rule. You are advised that the provisions of the non-access rule are not applicable to birth registrations. The rules which may be appropriate for a finding of fact in a trial are not appropriate here, especially where the rule, like the non-access rule, has fallen into disrepute and decay. A birth registration does not constitute *prima facie* evidence of paternity in any proceeding, such as

a support proceeding, in which paternity is in issue, unless the alleged father is married to the child's mother, Vital Statistics Law of June 29, 1953, P. L. 304, § 810, 35 P. S. § 450.810. Statements as to the paternity of the child by the mother or the mother's husband are therefore acceptable for purposes of birth registration.

You are further advised that the provisions you have outlined for notice to the mother's husband are adequate for your purpose. When the rights of the presumptive father may be affected, even in the limited fashion contemplated by this procedure, it is essential that some effort be made to notify him of the proposed action. The notification provisions that you have submitted are identical to those prescribed for notice to an absent father in adoption proceedings, Adoption Act of July 24, 1970, P. L. 620 (No. 208), § 313, 1 P. S. § 313. Personal service is not necessary in such cases; the parent must keep his whereabouts known or risk court proceedings affecting his rights, *Adoption of Turner*, 92 Montg. 186 (1969). The same level of protection for the husband in birth registrations is perfectly proper.

Birth registration in accordance with this option will not preclude a subsequent court challenge by a husband or child who believes that he has been adversely affected by the administrative record and who wishes to establish paternity in a court of law.

Consequently, you are advised that, under the conditions you propose, the Department of Health is empowered to promulgate regulations to allow children of married women to be registered as the illegitimate children of their natural fathers with the surname of the natural father.

Attorney General's Informal Opinion No. 780, October 8, 1936, is hereby rescinded insofar as it is inconsistent with this Opinion.

Very truly yours,

H. MARSHALL JARRETT  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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### OFFICIAL OPINION No. 75-9

*Court Administrator—Representation of State Judicial Officers By the Department of Justice—Separation of Powers.*

1. The Judicial Branch is not a department, board or commission of the Commonwealth within the meaning of Section 903 of the Administrative Code, 71 P. S. § 293.



2. The Constitutional doctrine of separation of powers requires that the total independence of each of the three branches of government be protected and maintained.
3. Representation of state judicial officers by the Department of Justice violates the constitutional doctrine of separation of powers.
4. The Court Administrator of Pennsylvania has authority under Article V, § 10(b) of the Constitution of the Commonwealth of Pennsylvania to hire attorneys to represent the judiciary.

Harrisburg, Pa.  
February 24, 1975

Honorable Alexander P. Barbieri  
Court Administrator of Pennsylvania  
Philadelphia, Pennsylvania

Dear Judge Barbieri:

In the past, the Department of Justice, when requested to do so, has represented members of the judicial branch of the government of the Commonwealth in litigation to which they have been parties. The basis of this policy has been Section 903(b) of the Administrative Code, 71 P. S. § 293(b), which requires the Attorney General to "represent the Commonwealth, or any department . . . board, commission, or officer thereof, in any litigation to which the Commonwealth or such department, board, commission, or officer, may be a party, or in which the Commonwealth or such department, board, commission, or officer, is permitted or required by law to intervene or interplead." After reconsidering this policy, it is our opinion, and you are so advised, that the judicial branch is not such a department, board or commission of the Commonwealth as is contemplated by the statute and, further, that members of the judiciary are not such officers as are within the statutory language. It is our opinion that any other interpretation of the statute would violate the Constitutional principle of separation of powers and, that, therefore, our prior practice of representing the judicial branch and members thereof in litigation must be discontinued.

Under our Constitution, the powers of the government are divided between three independent co-ordinate branches: the legislature, the executive and the judiciary. The Supreme Court of Pennsylvania has made it clear that the principle of separation of powers was established to maintain and protect the independence of the three branches. For example, in a discussion of the constitutional provisions referring to the compensation of judges the Court said:

"They are independent and co-ordinate, because distinct rights, powers and privileges are assigned to them by the Constitution. Each is entitled to the free, unbiassed, uninfluenced and independent exercise of all their rights, powers and privileges in as ample extent as the Constitution allows." *Commonwealth v. Mann*, 5 W. & S. 403, 407 (1843); Accord. *Commonwealth v. Mathues*, 210 Pa. 372, 59 A. 961 (1904).

That Court has also observed that:

"in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honours, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction of either the strength or of the wealth of society, and can take no active resolution whatever. It may be truly said to have neither *force* nor *will*, but merely judgment, and to be ultimately dependent upon the aid of the executive arm for the efficacious exercise even of this faculty. This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is, beyond comparison, the weakest of the three departments of power; that it can never attack with success either of the other two, and that *all possible care is requisite to enable it to defend itself against their attacks*. . . .

. . . liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; . . . the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation, . . . from the natural feebleness of the judiciary it is in continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches. . . . The complete independence of the judiciary is a fundamental principle of the Constitution, designed mainly for the protection of public and private rights. . . ." *Commonwealth v. Mann*, *supra* at 410-11.

In *Mathues*, relying in substantial part on the *Mann* holding, the Supreme Court of Pennsylvania held that members of the judicial branch were not "public officers" within the meaning of the term as used in a Constitutional provision barring an increase in the salary of such officers during their terms of office, concluding that to hold otherwise would violate a specific provision of the Constitution guaranteeing the judges "adequate compensation" and, more importantly, the general Constitutional principle of separation of powers which, according to the *Mann* decision, that provision was intended to protect. *Commonwealth v. Mathues*, *supra*.

It is our opinion that this same constitutional theory of separation of powers excludes members of the judicial branch from the coverage of 71 P. S. § 293(b), as it is a theory which requires the existence of a certain tension between the separate branches of government which the legal representation of one branch by another tends to eliminate.

Such a relationship of dependency by one branch on another creates just that possibility of influence of which the Court spoke in *Mann*.

In saying this, we do not mean to indicate that this relationship has been or will be improperly used. However, as the Supreme Court noted in *Mann*, it is not intentional disrespect to either the judicial or executive branches of government to suppose it possible that cases may arise where successful resort may be had to the potential lever of influence in order to accomplish executive goals. See, *Commonwealth v. Mann*, *supra* at 409. It is this very potential for conflict and influence which, in itself, violates the constitutional doctrine of separation of powers and which must, therefore, be eliminated.

In passing, we should also note that the Department of Justice and agencies whose legal matters it controls employ over 350 attorneys who are involved in litigation in all the courts of the Commonwealth on a continuing basis; thus, the possibility that the Department might be representing a judge in litigation to which he is a party and at the same time be involved in litigation before him is not insubstantial. This potential conflict of interest, while apparently not explicitly barred by the Canons of Ethics, borders on the improper and may, in itself, justify the termination of any representation of judges by the Department of Justice.

Accordingly, you are hereby advised that the Department of Justice will no longer represent in litigation either individual judges or the judiciary itself. In this regard, we believe, and you are so advised, that under Article V, § 10(b) of the Constitution of the Commonwealth of Pennsylvania you, as Court Administrator, have the power to hire an attorney or attorneys to represent the judiciary who would be independent of the control of either the executive or legislative branches of government.

Very truly yours,

ALLEN C. WARSHAW  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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#### OFFICIAL OPINION No. 75-10

*Liquid Fuels Tax Fund—Incidental Expenses—County Engineer—Reimbursement to County Treasury.*

1. The Liquid Fuels Tax Fund may be used to pay for costs and expenses incident to the construction, reconstruction, maintenance and repair of public highways.

2. A county engineer's services related to public highways are costs and expenses incident thereto.
3. A county engineer is not a public officer since he does not have functions of government delegated to him and does not exercise any power of sovereignty.
4. A county engineer is an employee of the County.
5. A county treasury may be reimbursed for payments to a county engineer in connection with his work related to public highways.

Harrisburg, Pa.  
February 24, 1975

Honorable Jacob G. Kassab  
Secretary of Transportation  
Harrisburg, Pennsylvania

Dear Secretary Kassab:

You have asked whether that portion of the salary of a county engineer attributable to his work in connection with the construction, reconstruction, maintenance and repair of roads, highways and bridges may be paid from the County Liquid Fuels Tax Fund. It is our conclusion, and you are so advised, that such an expenditure would be proper.

The Liquid Fuels Tax Fund was created in order to assist counties in the construction and maintenance of public highways, bridges and similar such structures. The Fund was provided for in Article IX, § 18 of the old Pennsylvania Constitution, and now is contained in Article VIII, § 11. This section provides that proceeds from the Fund are to be used:

“ . . . solely for construction, reconstruction, maintenance and repair of and safety on public highways and bridges and air navigation facilities and *costs and expenses incident thereto*, . . . ” (Emphasis added.)

The emphasized section was added in the Constitution of 1968. The county engineer's services attributable to roads, highways and bridges fall into the category of costs and expenses incident thereto. The question remains, however, as to whether that portion of the county engineer's time which is spent on such services may be paid for out of the Liquid Fuels Tax Fund.

In Attorney General's Opinion No. 235, dated February 16, 1961, we concluded that public officers whose salaries came out of the county treasury could not be reimbursed from the Fund. That opinion dealt with the reimbursement of the County Board of Viewers in connection with the condemnation of land for highways. The Board of Viewers at the time were appointed by the Court of Common Pleas to serve for a fixed term, and the compensation of the Board was paid from the county treasury. Act of August 9, 1955, P. L. 323, § 1101, *et seq.*, 16 P. S. § 1101, *et seq.* Since the members of the Board were public officers

whose salaries were paid from the county treasury, the Attorney General in Opinion 235 ruled that the Liquid Fuels Tax Fund could not be used to pay any portion of the Board members' compensation.<sup>1</sup> The issue which we have been asked to resolve by this opinion is whether a county engineer is a public officer as contemplated in Attorney General's Opinion No. 235 of 1961.

In determining who is, and who is not, a public officer—the following standard was set down by our Superior Court in *Alworth v. County of Lackawanna*, 85 Pa. Superior Ct. 349, 352 (1925):

"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. . . ."

More recently, the Pennsylvania Supreme Court cited the *Alworth* case, *supra*, in support of its conclusion that county solicitors are not public officers. In *Commonwealth ex rel. Foreman v. Hampson*, 393 Pa. 467, 143 A. 2d 369 (1958) the Court noted that a public officer is one "upon whom grave and important duties are imposed for a fixed term, and who, for the proper performance of the same, have, during the term of their election or appointment, delegated to them some of the functions of government." It went on to say that "an office is a public one within the meaning of the constitution if the holder of it exercises grave public functions and is clothed at the time being with some of the powers of sovereignty."

The county engineer does not have a definite tenure, but rather serves at the discretion of the county commissioners. This is evidenced by the language of the statute authorizing his appointment:

"The county commissioners of any county may appoint a professional engineer in civil engineering, who shall be styled the county engineer. *Such engineer shall serve at the pleasure of the commissioners.*" Act of August 9, 1955, P. L. 323, § 1002, renumbered § 1001 by Act of November 26, 1968, P. L. 1099, No. 341 § 2, 16 P. S. § 1001. (Emphasis added.)

No functions of government are delegated to him. Nor does he exercise any powers of sovereignty. He is, in effect, an employee of the county, whose duty it is to advise the county on engineering matters. This contrasts sharply with that of the board of viewers which was dealt with in Attorney General's Opinion No. 235 of 1961. There the board members were appointed by the Court of Common Pleas for a fixed

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1. Subsequently the Liquid Fuels Tax Act has been amended to provide for such payment. Act of May 21, 1931, P. L. 149 § 10, as amended by the Act of May 20, 1963, P. L. 43, § 1, 72 P. S. § 2611j.

term, and there were provisions for filling vacancies on the board. Act of August 9, 1955, P. L. 323, § 1101, *et seq.*, 16 P. S. § 1101, *et seq.* Under those circumstances, we concluded that the Board members were public officers. Given the circumstances herein described we conclude that county engineers are not public officers as contemplated by Attorney General's Opinion No. 235 of 1961.

It is our conclusion, therefore, and you are so advised, that a county engineer is not a public officer, and that the Liquid Fuels Tax Fund may be used to pay that portion of the county engineer's salary which is attributable or incidental to the "construction, reconstruction, maintenance and repair of and safety on public highways and bridges and air navigation facilities."

Very truly yours,

THEODORE A. ADLER  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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### OFFICIAL OPINION No. 75-11

#### *Game Commission—Land Acquisition—Condemnation—Purchase Price.*

1. The \$100 per acre maximum purchase price of Section 903 of The Game Law, 34 P. S. § 1311.903, does not apply to property acquired by condemnation.
2. Condemnation actions are governed only by the Eminent Domain Code, 26 P. S. § 1-101 *et seq.*
3. The \$100 per acre maximum purchase price of Section 903 applies exclusively to land obtained by the Game Commission by purchase.

Harrisburg, Pa.  
February 27, 1975

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

Dear Mr. Bowers:

You have requested our opinion as to the limits on allowable acquisition costs of lands acquired through condemnation by the Game Commission for game land purposes. Particularly you have inquired

whether the one\* hundred dollar per acre maximum purchase price provision of Section 903 of The Game Law, as amended, 34 P. S. § 1311.903, is applicable to state game land condemnation proceedings. It is our opinion, and you are hereby advised, that Section 903 does not apply to taking by condemnation and that there is no statutorily prescribed maximum per acre price restricting the Game Commission in eminent domain acquisitions.

Section 901 of The Game Law, 34 P. S. § 1311.901, provides for several methods by which the Game Commission may acquire title to lands:

“The Commission may acquire title to or control of lands and/or buildings within the Commonwealth, or the hunting rights or other rights on lands . . . by purchase, gift, lease or otherwise.

The Commission may also acquire title to lands by condemnation proceedings in the same manner as provided for the condemnation of lands for State Forests. . . .”

If the Commission acquires land for State Game Lands by purchase, the maximum purchase price is regulated by Section 903, 34 P. S. § 1311.903:

“For land to be used as State Game Lands the Commission may pay what it considers a fair and reasonable price not exceeding one hundred dollars per acre. . . .”

This provision applies, however, only when land is being acquired by purchase. It does not come into play when the method of acquisition is by condemnation. Rather, the procedure for acquisition by condemnation is controlled by the Eminent Domain Code of 1964, 26 P. S. § 1-101 *et seq.*

The Eminent Domain Code manifestly states that it governs condemnations and that it controls without reference to other statutes:

“It is intended by this act to provide a *complete and exclusive procedure and law* to govern all condemnations of property for public purposes and the assessment of damages therefor. . . .”  
26 P. S. § 1-303. (Emphasis added.)

This unambiguous decree of legislative intent cannot be disregarded. Statutory Construction Act of 1972. 1 Pa. C. S. § 1921(b).

Accordingly we are of the opinion, and you are advised, that the Game Commission is not restricted to a maximum purchase price per acre by Section 903 of The Game Law, *supra*, in condemnation actions but rather is governed only by the Eminent Domain Code, 26 P. S.

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\*Editor's note: The maximum per acre purchase price was increased to \$200.00 by Act No. 163 of July 9, 1976. That amendment does not affect the conclusion reached in this opinion.

§ 1-101, *et seq.* in matters of acquisition cost. You are further advised that the one hundred dollars per acre maximum price of Section 903 applies exclusively to land obtained by purchase.

Very truly yours,

W. W. ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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OFFICIAL OPINION No. 75-12

*State Treasurer—Entitlement of New Judge Whose Election is Certified After Recount to Back Compensation Measured from the Beginning of His Term.*

1. The term of office of a common pleas judge commences on the first Monday of January next succeeding his election and he is commissioned accordingly.
2. A judge whose election is certified after recount proceedings is commissioned as of the statutory commencement of his term.
3. A judge whose election is certified after recount proceedings is entitled to back compensation measured from the beginning of his term, his salary being an incident of the office to which he was elected.
4. Similarly, since a judge is a public officer, there may be no set-off of any income earned during the period of the recount proceedings against the back compensation owed.

Harrisburg, Pa.  
March 10, 1975

Honorable Grace M. Sloan  
State Treasurer  
Harrisburg, Pennsylvania

Dear Mrs. Sloan:

You have requested our opinion as to whether a common pleas court judge whose election was certified only after protracted recount proceedings is entitled to compensation as of the beginning of the term for which he was elected, or as of the date he was sworn into office and commenced performing his judicial duties. It is our opinion, and you are hereby advised, that a judge's salary is an incident of his office, the title to which office vests at the moment the election is closed.\*

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\*Editor's note: This opinion was followed in *Reed v. Sloan*, 25 Pa. Commonwealth Ct. 570, 360 A. 2d 767 (1976), which is on appeal before the Supreme Court of Pennsylvania.



Accordingly he is entitled to his salary from the outset of the term, notwithstanding the delay in his assuming office occasioned by the proceedings to recount the ballots cast in the election.

In the municipal election of November 6, 1973, there were three candidates for judge of the court of common pleas of the 36th Judicial District (Beaver County) and two vacancies in that office to be filled. The candidates were Robert C. Reed, Joseph S. Walko and H. Beryl Klein. Election recount petitions were filed by Robert C. Reed and Joseph S. Walko. Both candidates involved in the recount stipulated that H. Beryl Klein should assume office since he received a clear majority of votes. After the recount of ballots on December 28, 1973, Robert C. Reed emerged the winner in the recount. After proceedings on challenged ballots in the court below, Robert C. Reed again was the winner. The case was appealed to the Pennsylvania Supreme Court and by opinion dated July 1, 1974, the Supreme Court remanded the case to Beaver County for the counting of the paper ballots with corners on. On September 23, 1974, the ballots with corners on were counted and, once more, Robert C. Reed was the winner. Reed's commission was recorded on October 21, 1974, and was dated as of January 1, 1974. Robert C. Reed took the oath of office on October 21, 1974, and has performed the duties of his office since that date.

Article V, § 15(a) of the Pennsylvania Constitution specifies that "the regular term of office of justices and judges shall be ten years . . .," while Article V, § 16(a) provides:

"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."

The salary of common pleas court judges was set statutorily, 17 P. S. § 830.26, as amended, and more recently by the First and Second Reports of the Commonwealth Compensation Commission, authorized under the Act of June 16, 1971, No. 8, 46 P. S. § 6 (repealed).

The relevant constitutional and statutory provisions are clear that the terms of office of common pleas court judges shall commence the first Monday of January next succeeding their election, and they shall be commissioned accordingly. 17 P. S. § 9, 793. Pursuant to 17 P. S. § 8, the Governor is directed to grant those persons elected their respective commissions "as soon as practicable." This language apparently recognizes the possibility of recount proceedings or an election contest, and therefore Judge Reed's commission was issued as of January 1, 1974. See *Goodwin v. Allegheny County*, 182 Pa. Superior Ct. 28, 125 A.2d 640 (1956).

Pennsylvania case law clearly supports Judge Reed's claim to compensation payable from the date of his commission. Most directly on point is *Rink v. City of Philadelphia*, 15 W. N. C. 345 (1884), *aff'd*, 17 W. N. C. 136 (Pa. Supreme Ct. 1886). The case involved a magistrate's

election in 1880, the result of which indicated that Rink lost to his opponent, Barr. Barr was given a certificate of election and was duly commissioned in that year for a five-year term. Rink filed a petition contesting the election, and after three years of litigation, Rink was declared to be the winner. Rink then filed suit against the city to recover his salary, practically all of which had been paid to Barr. The lower court granted relief, saying (at 346-47):

"[Rink] was the *de jure* officer, whose title dated back to the time when he and not Barr was elected.

"It is well settled in Pennsylvania that none but a *de jure* officer can claim compensation for official services. . . . Some one had a constitutional right to this salary . . . and when the question is asked, to whom does this salary belong, the answer must be, to the person who was elected a magistrate at the proper election, whose *title* was then perfect, although subsequently maintained and declared perfect, and who has done all in his power to assert and sustain rights which became vested the moment the election closed.

". . . The salary is annexed to the office of a magistrate, and to the person who holds the *title* . . . and [not to a] *de facto* officer.

". . . When the Governor very properly commissioned . . . Rink 'to have and to hold this commission, and the office hereby granted unto you for the term of five years from the first Monday of April, 1880 [the beginning date of the term of office]', he conferred by a constitutional right a title which carried with it 'the emoluments to a magistrate lawfully belonging, or in any wise appertaining by virtue of the Constitution and laws of this Commonwealth.'

". . . To say to an elected officer, you have a constitutional title to an office, . . . and yet you shall be deprived of that to which the law gives you a vested right, is to assert a principle which we think even the legislative department of the government could not do . . . so long as it protects the right of a citizen to his own property. . . ." (Emphasis in original.)

The *Rink* decision has been cited with approval in subsequent cases, to support recovery by a *de jure* school tax collector against both his *de facto* counterpart, *Jones v. Dusman*, 246 Pa. 513, 92 A. 707 (1914), and against the school district itself, *Tarner v. Chambersburg Boro. Sch. Dist.*, 338 Pa. 417, 12 A. 2d 106 (1940); *Marshall v. Uniontown Boro. Sch. Dist.*, 262 Pa. 224, 105 A. 78 (1918).

—Although the instant case does not involve *de jure* versus *de facto* rights to office, the *de jure* cases are relevant because they highlight the fact that the emoluments of an elective office are an integral part of the office itself, and belong to the person whose rightful office it should have been as of the date of the election or the date when the

commission for that office issues. The compensation is not for services performed, but rather an incident of the office itself. In all of the above cases, the governmental unit was required to pay the *de jure* officer as of the date he would have taken office by reason of his election. The prevention of the performance of his duties because of post-election disputes has been held to have no effect upon the payment of the compensation mandated by the elective position.

*Rumberger v. Horvath*, 52 D. & C. 2d 177 (C. P. Northumberland County, 1970) is the most recent case to address directly the issue here involved. The factual circumstances in the case, as far as relevant, related to a county official who was adjudged re-elected as a county commissioner after the resolution of an election dispute with his opponent. Because the official was involved in an election dispute, the former board of county commissioners was held over. Prior to the commencement of the new term and the subsequent certification of the contestant's re-election, an act increasing the salary incident to the position took effect. After his certification, the official claimed the increase in the compensation from the effective date of the act, that is, he claimed the difference between what he should have been paid under the new act and what he was paid as a result of his holdover status. Relying largely on *Rink, supra*, the court agreed with the official and awarded him the difference in compensation.

In addition to the above case law, prior administrative precedent exists for paying Judge Reed. In Informal Opinion No. 519 of the Attorney General dated January 10, 1935, the Department of Justice advised the Auditor General that under the *Rink, Marshall* and *Jones* decisions, *supra*, the ultimate winner of a contested judicial election held in 1933 was entitled to be paid by the Commonwealth an amount equal to the salary paid to his commissioned opponent, the ultimate loser of the election contest. Similarly, in a memorandum dated December 18, 1967, the Chief Counsel to the Auditor General authorized payment to the winner of a contested judicial election of his salary from the outset of his term to the date when he finally assumed office after the contested election twice had reached the Supreme Court. See *In re Cullen Appeal*, 392 Pa. 602, 141 A. 2d 389 (1958) and 394 Pa. 256, 146 A. 2d 831 (1958).

The question remains whether there should be a set-off against any income earned by Judge Reed between January 1 and October 21, 1974. In *Vega v. Burgettstown Borough*, 394 Pa. 406, 147 A. 2d 620 (1958), the Supreme Court considered the question of whether a police officer improperly suspended from his office was entitled to full back pay or whether a set-off was required in the amount of the income earned from other sources during the period of his suspension. In answering this question, the Court distinguished between a public officer and a public employee, stating:

"The distinction is based on the theory that no contractual relationship exists between the governmental unit and a public official, and that the compensation, being incidental to the

office which the official holds, is governed by the right to the office, and cannot be diminished by the application of the doctrine of mitigation of damages which is based on the existence of a contractual relationship. See: *Seltzer v. Reading*, [151 Pa. Superior Ct. 226, 30 A. 2d 177 (1943)]; *Coble v. Metal Township School District*, 178 Pa. Superior Ct. 301, 116 A. 2d 113; Note, 150 A. L. R. 100." 394 Pa. at 410, 147 A. 2d at 622.

See also, *Smethport Area School District v. Bowers*, 440 Pa. 310, 269 A. 2d 712 (1970); *Snyderwine v. Craley*, 434 Pa. 349, 254 A. 2d 16 (1969); *Naef v. Allentown*, 424 Pa. 597, 227 A. 2d 888 (1967).

The Court determined in *Vega* that the police officer in question was a public employee rather than a public officer and, therefore, that there must be a set-off for the income he earned during his suspension. However, in doing so, the Court made clear that where the individual in question is a public officer, he is entitled to his salary without such a deduction. Since judges are considered to be public officers under Article VI of the Pennsylvania Constitution,<sup>1</sup> no set-off of any income earned during the recount should be made against the amount due to Judge Reed.<sup>2</sup>

Based on the foregoing, it is our opinion, and you are hereby advised that Judge Reed is entitled to the full amount of the salary payable to him from January 1 to October 21, 1974 without any set-off. Pursuant to Section 512 of the Administrative Code, 71 P. S. § 192, we have afforded the Department of the Auditor General the opportunity to

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1. A judge is clearly a public officer under the test approved by the Supreme Court in *Commonwealth ex rel. Foreman v. Hampson*, 393 Pa. 467, 473-4, 143 A. 2d 369, 372 (1958) and followed in *Vega*, *supra*:

"The test to be applied in determining a public officer was summarized in *Alworth v. County of Lackawanna*, 85 Pa. Super. 349, 352, 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.'" 394 Pa. at 412, 147 A. 2d at 623.

2. 17 P. S. § § 1607 and 1607.1, which prohibit a judge of a court of record from practicing as an attorney or performing the duties of an arbitrator, are inapplicable here as a basis for a set-off. Although Judge Reed's commission is retroactive to the beginning of his term, the purpose of these provisions is to preclude a sitting judge from engaging in activities which constitute a potential or actual conflict of interest, whereby a matter in which he so participates may later come before him, or be subject to influence exercised by virtue of his judicial office. Since Judge Reed did not assume the duties of his office until October 21, 1974, no occasion for such a conflict could arise, and he was not a "judge" as the term is used in these provisions.

present any views which it may have upon this question, and we are advised that it is in accord with the conclusions expressed in this Opinion.

Sincerely yours,

MELVIN R. SHUSTER  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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OFFICIAL OPINION No. 75-13

*Fish Commission—Resident Fishing Licenses—Resident Alien—Citizenship Requirements.*

1. The citizenship requirements for a resident fishing license of Section 220 of the Fish Law of 1959, 30 P. S. § 220 should be treated as unconstitutional.
2. No application for a resident fishing license should be denied on the basis of alien status.

Harrisburg, Pa.  
April 7, 1975

Honorable Ralph W. Abele  
Executive Director  
Pennsylvania Fish Commission  
Harrisburg, Pennsylvania

Dear Mr. Abele:

We have received an inquiry from an alien resident concerning the constitutionality of the statutory requirement that resident aliens purchase more expensive "Non-Resident Fishing Licenses" rather than the less expensive "Resident Fishing License" available to citizen residents. The question presented is whether a resident alien may constitutionally be charged a higher fish license fee merely because of his non-citizen status.

It is our opinion and you are hereby advised that the citizenship requirements for a resident fishing license found in Section 220 of the Fish Law of 1959, 30 P. S. § 220, should be treated as unconstitutional. No applicant for a resident fishing license should be denied a license on the basis of his or her alien status.

Subsection (a) of Section 220 provides substantially as follows:

"... every person . . . upon application to any issuing agent within the Commonwealth, or to the Commission, and upon the establishment . . . that he has been a bona fide resident of this Commonwealth for a period of sixty days next preceeding his application and was born in the United States, and in the case of naturalized foreign-born residents, the production of such applicant's naturalization papers, shall, upon the payment to the issuing agent or the Commission of a license fee of seven dollars fifty cents (\$7.50) . . . and in the event that the license is issued by an issuing agent, a fee of twenty-five cents (25¢) for the use of the issuing agent, be entitled to the license herein referred to as a 'resident fishing license.'" 30 P. S. § 220(a).

The application of a Pennsylvania resident-alien, qualifying in all other respects for a resident fishing license, would be denied on the basis of the failure of the applicant to meet citizenship qualifications. In order to obtain a license the applicant would be required to apply for a non-resident license, in accordance with Section 221(a) of the Act which provides in pertinent part:

"For the purposes of this article, every person . . . upon application to any issuing agent within the Commonwealth or to the Commission and the presentation of proof that he is an alien or a non-resident of this Commonwealth, shall, upon the payment to the issuing agent or the Commission of the sum of twelve dollars fifty cents (\$12.50), and in the event the license is issued by an issuing agent, the payment of twenty-five cents (25¢) for the use of the issuing agent, be entitled to the license herein referred to as a 'non-resident fishing license.'" 30 P. S. § 221(a).

The impact of the two quoted provisions of the Fish Law is that a resident alien must pay five dollars (\$5.00) more than a citizen resident for the same fishing rights. This results in unequal opportunity to share in the rights or privileges afforded by the grant of a fish license and is discriminatory as to resident aliens.

The Fourteenth Amendment provides, "[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." A resident alien has long been held to be a person within this amendment, *Truax v. Raich*, 239 U. S. 33 (1915); *Yick Wo v. Hopkins*, 118 U. S. 356 (1886). Recent Supreme Court decisions have made it clear that the constitutional rights of a resident alien<sup>1</sup> are abridged when he is discriminated against by the State unless the State has satisfied the heavy burden of showing that the discrimination

1. A State may validly classify non-residents of the State in a manner so as to require a reasonable additional license fee from them over the amount charged residents. The United States Supreme Court thus upheld a fee charged non-resident fishermen in *Haavik v. Alaska Packers Ass'n*, 263 U. S. 510 (1924).

is necessary to accomplish a permissible and compelling interest. *In Re Griffiths*, 413 U. S. 717 (1973); *Sugarman v. Dougall*, 413 U. S. 634 (1973); *Graham v. Richardson*, 403 U. S. 365 (1971). See also *Chapman v. Gerard*, 456 F. 2d 577 (3rd Cir. 1972).

In *Takahashi v. Fish and Game Commission*, 334 U. S. 410 (1948), the Supreme Court held California's purported ownership of the fish off its shores did not constitute such an interest as would justify excluding aliens from commercial fishing licenses while permitting such licenses to other State residents. Justice Black wrote:

"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.

The Attorney General of the Commonwealth of Pennsylvania has frequently been called on in the last four years to render advice as to the validity of similar citizenship requirements and has always responded that such requirements are unenforceable.<sup>2</sup> The instant classification presents no reason to alter the advice which has heretofore been customary. There is no compelling purpose to differentiate between alien and non-alien residents for fishing licenses. Since both are granted licenses, the only purpose for the difference that can be argued is the increase in resulting revenue, hardly a compelling purpose in light of the small amount of monies involved.

After examination, it is our conclusion that the citizenship requirements for a resident fish license set forth in Section 220 of the Fish Law of 1959, 30 P. S. § 220, are contrary to the Fourteenth Amendment and United States Supreme Court cases directly on point. You are therefore advised that such citizenship requirements are to be treated as unenforceable and no license application should be refused due to the non-citizen status of the applicant.

Very truly yours,

W. WILLIAM ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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2. *O. O. No. 48*, Op. Pa. Atty. Gen. (Sept. 18, 1974) concerning corporate liquor licenses; *O. O. No. 23*, Op. Pa. Atty. Gen. (April 30, 1974) concerning individual liquor licenses; *O. O. No. 52*, Op. Pa. Atty. Gen. (June 20, 1973) concerning public weighmasters; *O. O. No. 4*, Op. Pa. Atty. Gen. (Jan. 15, 1973) concerning state scholarship applicants; *O. O. No. 116*, Op. Pa. Atty. Gen. (April 4, 1972) concerning registered and practical nurses; *O. O. No. 114*, Op. Pa. Atty. Gen. (March 23, 1972) concerning pharmacists; *O. O. No. 113*, Op. Pa. Atty. Gen. (March 23, 1972) concerning physicians; *O. O. No. 112*, Op. Pa. Atty. Gen. (March 15, 1972) concerning real estate brokers; *O. O. No. 92*, Op. Pa. Atty. Gen. (Dec. 17, 1971) concerning veterinarians.

## OFFICIAL OPINION No. 75-14

*Eminent Domain Code—Damages—Flood Insurance—Just Compensation.*

1. Under the Eminent Domain Code, the proceeds received by a condemnee from flood insurance on real property are considered "compensation or reimbursement" within the meaning of Section 602(e) of the Code.
2. In determining the measure of damages under Section 602, such insurance proceeds are ordinarily deducted from the pre-flood value of the condemned property.
3. To the extent that the insurance proceeds, or any portion thereof, are used to restore the damage caused by the flood to the real property, such proceeds are not "compensation or reimbursement" within the meaning of Section 602(e) and therefore are not deducted from the pre-flood value of the condemned property.

Harrisburg, Pa.  
April 11, 1975

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

Dear Secretary Wilcox:

You have requested an opinion as to the measure of damages that a flood victim is entitled to under Article VI of the Eminent Domain Code (Code). More specifically, your inquiry is directed to the question of whether or not under Section 602 of the Code (26 P. S. § 1-602) the proceeds received from flood insurance on real property are to be deducted from the pre-flood value of the property that is being acquired. It is our opinion, and you are so advised, that the pre-flood value of the property being acquired is reduced by any compensation or reimbursement, including flood insurance, that the flood victim receives for actual physical damage to his real property, except to the extent that such compensation or reimbursement, or a portion thereof, is used to restore the damage caused by the flood to the real property.

Article VI of the Code (26 P. S. § 1-601 *et seq.*) provides in general terms that a condemnee is entitled to just compensation for the taking, injury or destruction of his property. Section 602 (26 P. S. § 1-602) sets forth the formula that is used to determine the measure of just compensation, as follows:

"(a) Just compensation shall consist of the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected thereby and the fair market value of his property interest remaining immediately after such condemnation and as affected thereby, and such other damages as are provided in this code.

\* \* \*

(c) In case of the condemnation of property in connection with any program or project which property is damaged by



floods, the damage resulting therefrom shall be excluded in determining fair market value of the condemnee's entire property interest therein immediately before the condemnation.

\* \* \*

(e) Subsections (c) and (d) are applicable only where the flood damage has occurred within three years prior to the initiation of negotiations for or notice of intent to acquire or order to vacate the property and during the ownership of the property by the condemnee. *The flood damage to be excluded shall include only actual physical damage to the property for which the condemnee has not received any compensation or reimbursement.*" (Emphasis added.)

Thus, in the case of property damaged by flood, the condemnee is entitled to the pre-flood value of his property less any compensation or reimbursement received by the condemnee for actual physical damage to the property. For example, if a \$30,000 home is damaged by flood waters, the acquiring authority, under Section 602 of the Code, would pay the flood victim the pre-flood value of the property (\$30,000) provided that the owner has not received any compensation or reimbursement for the flood damage. However, if it is assumed that the flood victim has received \$9,000 in flood insurance, then the acquiring authority would pay him the pre-flood value of the property (\$30,000) less the amount of the insurance (\$9,000) or a total of \$21,000, provided that he has not used the insurance or any portion thereof to make repairs to his real property.

In the case of a property owner who has used his insurance money to repair the flood damage to his real property, and has thereby put such money into the property, the compensation he has received in the form of insurance is not used to reduce the pre-flood value of the property. This means that in the previous example, if the owner of the property had used his insurance proceeds to make \$9,000 worth of repairs to his real property, the condemning authority would pay him \$30,000, the pre-flood value, without any reduction for the insurance proceeds.

This result is derived from the obvious legislative intent in enacting Section 602 of the Code which is to provide the owner of the condemned property with the same amount of money with which to buy a new property that he would have received if there had been no flood. If he were required to deduct the proceeds received from his real property insurance from the pre-flood value, when he has used the insurance proceeds to repair the flood damage, he would not be in the same position as he would have been had there not been a flood. Thus, in the prior example, he would only have \$21,000 to purchase a new property, whereas he would have received \$30,000 had there not been a flood.

In light of this clear legislative intent, the emphasized portion of subsection (e) above must be taken to mean "compensation or reimbursement" that has not been put back in the property, i.e. compensation or reimbursement that can be used for the purchase of another

property, so that the compensation or reimbursement when added to the reduced pre-flood value of the property will provide the owner with the equivalent of its pre-flood value. In the example above, should the owner have received \$9,000 from his real property insurance but only have used \$4,000 of this amount to make repairs to the real property, the difference of \$5,000 would be deducted from the pre-flood value of the property and the owner would receive \$25,000 from the condemning authority. This amount, when added to the insurance proceeds that have not been used to repair the property, will give him the equivalent of the pre-flood value of the property with which to purchase a new property.

In view of the foregoing, it is our opinion that proceeds received from flood insurance on real property are to be deducted from the pre-flood value of property being acquired by the condemning authority except to the extent that they are used to make repairs to the flood damaged property.

You are further advised that a State grant or an SBA forgiveness loan, or any portion thereof, which a flood victim receives on account of loss caused by a flood to real property, is considered "compensation or reimbursement" within the meaning of Section 602(e) and should be calculated as part of the just compensation to which a condemnee is entitled in the same manner as flood insurance proceeds.

Very truly yours,

HOWARD M. LEVINSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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### OFFICIAL OPINION No. 75-15

*Department of Revenue—Escheats—Disposition of Abandoned and Unclaimed Property Act—Institutions Exempted from Escheats—Nonprofit Hospitalization Corporations.*

1. The escheat provision of the Act of August 9, 1971, P. L. 286, 27 P. S. § 1-1, *et seq.*, known as the Disposition of Abandoned and Unclaimed Property Act does not apply to nonprofit insurance companies that provide hospitalization or medical service insurance.
2. The phrase "nonprofit hospitalization corporations" in Section 29 of the Act denotes insurance corporations rather than nonprofit hospitals.

Harrisburg, Pa.  
April 11, 1975

Honorable George W. Mowod  
Secretary of Revenue  
Harrisburg, Pennsylvania

Dear Secretary Mowod:

You have requested our advice regarding the correct interpretation of Section 29 of the Act of August 9, 1971, P. L. 286, 27 P. S. § § 1-1, *et seq.*, known as the "Disposition of Abandoned and Unclaimed Property Act." That section provides:

The provisions of this act shall not apply to *nonprofit hospitalization corporations* or *nonprofit medical service corporations*. (Emphasis added.)

Controversy has arisen as to precisely what corporate institutions are meant to be thus excluded. It is our opinion, and you are so advised, that this language is meant to exclude only nonprofit insurance corporations that provide hospitalization or medical service insurance, rather than nonprofit hospitals.

Any doubt about the meaning of these terms in the Act must be resolved in a manner consistent with prior legislation. 1 Pa. C. S. § 1921(c)(5). The exact language of Section 29 has been used previously by the General Assembly to refer to insurance corporations in Section 1 of the Act of July 16, 1968, P. L. 358, as amended, 24 P. S. § 5-513(a):

Section 513. Group Insurance Contracts—(a) Any school district may make contracts of insurance with any insurance company, or *nonprofit hospitalization corporation*, or *nonprofit medical service corporation*, authorized to transact business within the Commonwealth, insuring its employes, their spouses and dependents and retired employes, or any class or classes thereof, under a policy or policies of group insurance covering life, health, hospitalization, medical service, or accident insurance, and may contract with any such company granting annuities or pensions, for the pensioning of such employes, and may contract with *any such company insuring* members of the school board under policies of travel and accident insurance while on the official business of the board, including travel to and returning from meetings of the board or committees thereof, and for such purposes may agree to pay part or all of the premiums or charges for carrying such contracts, and may appropriate out of its treasury any money necessary to pay such premiums or charges or portions thereof. No contract or contracts of insurance authorized by this section shall be purchased from or through any person employed by the school district in a teaching or administrative capacity. (Emphasis added.)

Thus it must be assumed that the General Assembly meant to denote insurance institutions by the term "nonprofit hospitalization corporation and nonprofit medical service corporations" in the Disposition of Abandoned and Unclaimed Property Act, as it did explicitly when it used the terms with respect to group insurance contracts.

Furthermore, the term "nonprofit hospital" has also been previously used and defined by the General Assembly in the Act of July 5, 1947, P. L. 1335, 35 P. S. § 441.3(f), repealed by the Act of August 5, 1965, P. L. 300:

"Nonprofit Hospital" means any hospital owned and operated by a corporation or association, no part of the net earnings of which inures, or may lawfully inure to, the benefit of any private shareholder or individual.

Surely if the Legislature had sought to exempt nonprofit hospitals from the Disposition of Abandoned and Unclaimed Property Act, it would have used the same direct terminology previously used and defined, rather than the convoluted phrase in question.

Since the Legislature has previously used both phrases, "nonprofit hospitalization corporation" and "nonprofit hospital," its subsequent use of the term "nonprofit hospitalization corporation" must be construed in accord with its earlier use of the former rather than the latter phrase.

Finally our construction of the exclusion is consistent with sound legislative policy, as is mandated by 1 Pa. C. S. § 1922(1). The only abandoned property that could be held by a health insurance corporation would be the premium for an unexpired policy, at most one or two hundred dollars. The expense of computing and escheating this money would probably not be justified. Thus it is sensible that these corporation were exempted. On the other hand, a nonprofit hospital might retain extremely valuable possessions, such as jewelry, of a former patient. To allow such valuables to escape escheat would be to provide large windfalls to nonprofit hospitals. Such property is normally escheatable to the Commonwealth. It must be presumed that—absent a specific intent to the contrary—the General Assembly meant for the Commonwealth to continue to receive the benefit of such windfalls rather than have them go to nonprofit hospitals, as it is always presumed "that the General Assembly intends to favor the public interest as against any private interest." 1 Pa. C. S. § 1922(5).

For all of the above reasons, you are advised that Section 29 of the Disposition of Abandoned and Unclaimed Property Act does not exclude nonprofit hospitals from the purview of that Act.

Sincerely,

ROBERT E. RAINS  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

## OFFICIAL OPINION No. 75-16

*Governor's Office—Human Relations Commission—Human Relations Act—Abortion and Sterilization in Public Hospitals—Public Hospitals Defined—Right of Medical Personnel Not To Participate.*

1. Sections 51.31-33 of "Proposed Regulations on Discrimination With Respect to Abortion and Sterilization" implement Section 5.2 of the Human Relations Act in an unconstitutional manner, as they would permit public hospitals not to provide abortions and sterilizations.
2. Section 5.2 of the Human Relations Act must be given the same reading that the U. S. Supreme Court gave to a substantially identical statute in *Doe v. Bolton*, 410 U. S. 179 (1973).
3. Federal Courts have unanimously ruled that public hospitals must make their facilities available for abortions and sterilizations.
4. Medical personnel have the right not to participate in these procedures.
5. Public hospitals must hire staff who will perform these procedures.
6. Public hospitals are state hospitals or hospitals controlled by governmental agencies.
7. Denominational hospitals are private and need not perform these services.
8. At this time, mere receipt of Federal Hill-Burton funds will not make a hospital public.
9. Patients seeking abortions or sterilizations need only be admitted on the same basis as other patients.

Harrisburg, Pa.  
May 12, 1975

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

Dear Mr. Floyd:

You have asked this department to review as to legality "Chapter 51, Proposed Regulations on Discrimination With Respect to Abortion and Sterilization." It is our opinion and you are advised that Sections 51.31-33 implement Section 5.2 of the Pennsylvania Human Relations Act of October 27, 1955, as amended, 43 P. S. § 951 *et seq.*, (the Act) in a manner that is contrary to the U. S. Constitution. The unconstitutional aspect of the regulations is that they would allow public hospitals to adopt a "stated ethical policy" that their facilities are not available to doctors to perform abortions or sterilizations.<sup>1</sup>

Section 5.2 of the Act reads in relevant part:

No hospital or other health care facility shall be required to, or held liable for refusal to, perform or permit the performance of abortion or sterilization contrary to its stated ethical policy.

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1. § 51.41 of the Proposed Regulations must also be somewhat modified as will be discussed *infra*.

Sections 51.31-33 of the Proposed Regulations would apply this language without distinguishing between public and private hospitals.

As is well known, the U. S. Supreme Court ruled in *Roe v. Wade*, 410 U. S. 113 (1973) that:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. *Id.* at 164-165.

Thus, the Supreme Court greatly restricted the ability of states to interfere with a woman's abortion decision. A state may no more do so in the hospitals it controls than in its criminal statutes. This is made explicit by the companion case of *Doe v. Bolton*, 410 U. S. 179 (1973). That case dealt with a Georgia abortion statute and specifically with a section thereof *substantially identical with Section 5.2* of the Pennsylvania Act. The Court allowed to stand § 26-1202(e) of the Georgia abortion statute which reads in relevant part:

"Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion." *Id.* at 205.

However, the Court specifically limited the impact of this section, stating:

"These provisions obviously are in the statute in order to afford appropriate protection . . . to the denominational hospital." *Id.* at 198.

The Court's clear import was that a statute (such as Pennsylvania's) allowing hospitals not to perform abortions would violate the abortion right if it applied to public hospitals. Because *Roe* and *Doe* are meant to be read together, *Roe v. Wade*, *supra* at 165, it is clear that a state or lesser governmental unit may not proscribe doctors from using its hospital facilities for abortions (except elective abortions after viability, which is defined by the Court at 24-28 weeks, *Id.* at 160). As noted above, however, the abortion procedure may be regulated in the public hospital facility in ways that are reasonably related to maternal health after the end of the first trimester.

Federal Courts have unanimously interpreted *Roe* and *Doe* as requiring public hospitals to make their facilities available to doctors for the performance of "elective" and "therapeutic" abortions. *Nyberg v.*

*City of Virginia*, 495 F. 2d 1342 (8th Cir. 1974); *Orr v. Koefoot*, 377 F. Supp. 673 (D. Neb. 1974); *Doe v. Poelker*, 515 F. 2d 541 (8th Cir. 1975); *Doe v. Hale Hospital*, 500 F. 2d 144 (1st Cir. 1974); *Doe v. Mundy*, 378 F. Supp. 731 (E. D. Wis. 1974), affirmed per Circuit Rule 28, 514 F. 2d 1179 (7th Cir. 1975); *Santiago v. Colon*, Civil No. 74-862, (D. P. R. Aug. 6, 1974). See also *Doe v. General Hospital*, Civil No. 573-70 (D. D. C. Consent Decree April 8, 1974). These opinions are based upon the reasoning of *Roe v. Wade*, *supra*, that the abortion decision (except for elective abortions after viability) is a private one between a woman and her doctor, with which the state may not interfere. The same logic applied *a fortiori* in the sterilization context: a public hospital may not close its facilities to doctors who wish to perform sterilizations. *Hathaway v. Worcester City Hospital*, 475 F. 2d 701 (1st Cir. 1973), cited in *Nyberg v. City of Virginia*, *supra*.

One lower state court ruled contra the position that public hospitals cannot prohibit abortions. *Roe v. Arizona Board of Regents*, No. 149243 (Superior Court, Pima County, Arizona, Feb. 6, 1975). That decision was overturned on appeal. The higher court, addressing the precise point in issue here, held:

As for A. R. S. § 36-2151, in view of the foregoing discussion, the first sentence thereof ("No hospital is required to admit any patient for the purpose of performing an abortion.") is overbroad and unconstitutional when applied to public hospitals. *Roe v. Arizona Board of Regents*, 534 P. 2d 285, 288 (Ariz. 1975).\*

Thus, the state of the law regarding the duty of public hospitals in this area is clear.

Since it is incumbent upon the Human Relations Commission to enforce Section 5.2 of the Act so as to give the law a constitutional interpretation, 1 Pa. C. S. § 1922(3), it is clear that the Commission may not allow public hospitals to prohibit abortions and sterilizations. This may be done by reading the Act to mean that, while hospitals need not permit abortions or sterilizations contrary to their stated ethical policy, public hospitals may not adopt such a policy.

Both the Act and the Proposed Regulations protect the right of individual medical personnel not to assist in abortions or sterilizations if such procedures are repugnant to them. This protection is not only proper, but also constitutionally mandated. *Doe v. Bolton*, *supra*, at 198. Nevertheless, public hospitals must provide staff who will perform these services. A public hospital:

has the duty to obtain the services of responsible physicians and other necessary personnel whose personal views on abor-

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\*Editor's note: Reversed on appeal, 549 P. 2d 150 (Ariz. 1976). But see *Doe v. Bridgeton Hospital Association, Inc.*, 45 L. W. 2277 (12/7/76), in which the New Jersey Supreme Court ruled that New Jersey's "conscience law," which is similar to Pennsylvania's, cannot "empower non-sectarian, non-profit hospitals to refuse to permit their facilities to be used for elective abortions."

tion do not prohibit them from providing an abortion. It must also provide the necessary equipment and facilities to accomplish the goal. *Doe v. Poelker*, *supra* at 546.

Section 51.41 of the Proposed Regulations, "Supplementary Interpretations Regarding Bona Fide Occupational Qualification Standards" should be rewritten to reflect this duty (not option) of public hospitals.

The above discussion raises the difficult question of defining what is meant by "public hospitals." Certainly nonproprietary municipal and county hospitals that are community controlled, such as Philadelphia General Hospital, are perforce public. So are hospitals controlled by our state related universities<sup>2</sup> and also the State General Hospitals that are regulated by the Act of June 13, 1967, P. L. 31, § 321, 62 P. S. § 321, *et seq.* See *Foster v. Mobile County Hospital Board*, 398 F. 2d 227 (5th Cir. 1968). On the other hand, denominational hospitals are explicitly non-public in this context according to the cited language of *Doe v. Bolton*, *supra*. In the present state of the law, mere receipt by a denominational or other private hospital of federal funds under the Hill-Burton Act (Hospital Survey and Construction Act), 42 U. S. C. § 291 *et seq.*, will not make that hospital so public as to compel it to provide abortion facilities. *Chrisman v. Sisters of St. Joseph of Peace*, 506 F. 2d 308 (9th Cir. 1974); *Doe v. Bellin Memorial Hospital*, 479 F. 2d 756 (7th Cir. 1973); *Taylor v. St. Vincent's Hospital*, 369 F. Supp. 948 (D. Mont. 1973)\*; *Watkins v. Mercy Medical Center*, 364 F. Supp. 799 (D. Id. 1973).

Nevertheless, an otherwise private hospital may be deemed public and subject to constitutional standards if, in addition to receiving Hill-Burton funds, it has other indicia of state action. For instance a "private" hospital may be imbued with state action if its commission members are appointed by a public body, it receives Hill-Burton funds, and it is the only hospital in the area. *Meredith v. Allen County War Memorial Hospital Commission*, 397 F. 2d 33 (6th Cir. 1968). Other factors imbuing a private hospital with state action include the leasing of facilities from the county for a nominal fee. *O'Neill v. Grayson County War Memorial Hospital*, 472 F. 2d 1140 (6th Cir. 1973). In the absence of such special factors, a private hospital will fall within the provisions of Section 5.2 of the Human Relations Act, allowing it to adopt a stated ethical policy that it will not provide abortions or sterilizations.

2. These universities are Temple University (*Isaacs v. Board of Trustees of Temple University*, 385 F. Supp. 473, 489 (E. D. Pa. 1974)), the University of Pennsylvania (*Rackin v. University of Pa.*, 386 F. Supp. 992, 1004 (E. D. Pa. 1974)), the University of Pittsburgh (*Braden v. University of Pittsburgh*, 392 F. Supp. 118 (W. D. Pa. 1975)), and Pennsylvania State University (*a fortiori*). Additionally, a medical facility controlled by any state-owned institution of higher learning that performs gynecological surgery may not prohibit its physicians from performing abortions and sterilizations.

\*Editor's note: Cert. denied (7-2), —U. S. —, 47 L. Ed. 2d 355 (March 1, 1976).



One important caveat must be added. The constitutional requirement that public hospitals may not prohibit doctors from using their facilities for abortions and sterilizations is not meant to raise these procedures to favored status. The law is simply that if a public medical facility does general surgery, then it must perform abortions and sterilizations. A public hospital is still free

“to make hospital facilities available to persons seeking elective abortions only on the same terms and subject to the same conditions as those imposed upon other would-be users of the hospital facilities.” *Doe v. Hale Hospital, supra* at 147.

We are returning your proposed regulations regarding discrimination with respect to abortion and sterilization, so that the Commission may amend Sections 51.31, 51.32, 51.33, and 51.41 in a manner consistent with this opinion. The remaining sections of these regulations are acceptable to this Department in their present form.\*

A copy of this Opinion is being forwarded to the Honorable Frank S. Beal, Secretary of Public Welfare, so that he may, in his role of regulating state general hospitals, implement the provisions of this Opinion regarding those hospitals.

Sincerely,

ROBERT E. RAINS  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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### OFFICIAL OPINION No. 75-17

#### *Liquor Code—License—Penalty.*

1. The Liquor Control Board does not have the legal authority to continue a fine in addition to imposing a suspension or revocation when a licensee fails to pay the fine within the 20 day period.

Harrisburg, Pa.  
May 15, 1975

Honorable Henry H. Kaplan  
Chairman  
Pennsylvania Liquor Control Board  
Harrisburg, Pennsylvania

Dear Chairman Kaplan:

Receipt is acknowledged of the request of the Liquor Control Board concerning an interpretation of Section 471 of The Liquor Code (47

\*Editor's note: The regulations, as revised in accordance with this opinion, have been adopted. 7 Pa. Bulletin 699.

P. S. § 4-471) which provides for the suspension, revocation, or fining of licensees for violations of the Code. More specifically, the question is whether a fine imposed under the general provisions of Section 471 will continue as a penalty against the licensee after the Board has suspended the license where the fine has not been paid within the twenty day period. It is our opinion, and you are hereby advised, that when a licensee fails to pay a fine within the prescribed period of time, the Board has the power, under Section 471, to suspend or revoke the license but may not require the payment of the original fine as a continuing penalty.

The relevant portion of Section 471 of The Liquor Code (47 P. S. § 4-471) reads as follows:

"Upon such hearing, if satisfied that any such violation has occurred or for other sufficient cause, the board shall immediately suspend or revoke the license, or impose a fine of not less than fifty dollars (\$50) nor more than one thousand dollars (\$1,000), notifying the licensee by registered letter addressed to his licensed premises. In the event the fine is not paid within twenty days of the order the board shall suspend or revoke the license, notifying the licensee by registered mail addressed to his licensed premises."

It is clear from the wording of the statute that upon a violation of The Liquor Code the Board has the discretion to exercise one of three alternatives. It may suspend *or* revoke *or* fine the licensee. Thus the penalties are disjunctive. The language does not permit a conjunctive interpretation; that is, the Board may not fine *and* suspend, nor may it fine *and* revoke. Once the license is suspended or revoked, the fine is no longer in effect.

Accordingly, it is our opinion, and you are advised that the Board does not have the legal authority to continue a fine in addition to imposing a suspension or revocation when a licensee fails to pay the fine within the twenty day period.

Very truly yours,  
ROBERT J. DIXON  
*Deputy Attorney General*  
VINCENT X. YAKOWICZ  
*Solicitor General*  
ROBERT P. KANE  
*Attorney General*

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OFFICIAL OPINION No. 75-18

*Liquor Code—Importing Distributors—Foreign Purchase.*

1. Importing distributors may purchase malt or brewed beverages outside the Commonwealth of Pennsylvania from any person engaged in the legal sale of such beverages, including retail vendors and manufacturers.

2. Beverages lawfully purchased outside the Commonwealth by importing distributors, whether obtained from retail vendors, manufacturers or others, may be imported into the Commonwealth and offered for resale, in compliance with The Liquor Code.

Harrisburg, Pa.  
June 2, 1975

Honorable Henry H. Kaplan  
Chairman  
Pennsylvania Liquor Control Board  
Harrisburg, Pennsylvania

Dear Chairman Kaplan:

You\* have requested our opinion as to the legality of licensed importing distributors purchasing beer from foreign retailers and importing the same into the Commonwealth of Pennsylvania for resale without obtaining distribution rights from the manufacturer. It is our opinion, and you are hereby advised, that importing distributors may purchase alcoholic beverages from the manufacturer or other persons, including retailers, outside of the Commonwealth of Pennsylvania and there is no ban to such beverages being resold without a manufacturer's distribution grant.

This question arises due to the current popularity of Coors beer and the unwillingness of its manufacturer to market its product east of the Mississippi River. As a result of this situation importing distributors licensed in Pennsylvania have been making retail purchases of the beverage in one of the thirteen states where its manufacturer supplies it to retail vendors and are having it shipped to Pennsylvania for resale.

Section 102 of The Liquor Code, 47 P. S. § 1-102, defines "importing distributor":

"'Importing Distributors' shall mean any person licensed by the board to engage in the purchase from manufacturers and *other persons* located outside this Commonwealth and from persons licensed as manufacturers of malt or brewed beverages and importing distributors under this act, and the resale of malt or brewed beverages in the original sealed containers as prepared for the market by the manufacturer at the place of manufacture, but not for consumption on the premises where sold. . . ." (Emphasis added.)

As defined, an importing distributor may purchase alcoholic beverages outside the State from others as well as manufacturers. If the purchase were from the manufacturer for resale by the purchaser after transfer to Pennsylvania there would be no question as to its propriety. The statute allows purchase from either the manufacturer or others, which includes retail vendors. Thus the transaction is equally proper whether the seller is a manufacturer or a retail outlet.

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\*Editor's note: This opinion was supplemented by Official Opinion No. 76-2, 6 Pa. Bulletin 301.

Section 431(b) of The Liquor Code, 47 P. S. § 4-431(b), further specifies the right of importing distributors to purchase controlled beverages outside of the Commonwealth from persons not manufacturers. The cited section provides, in part:

“Except as hereinafter provided, such license shall authorize the holder thereof to sell or deliver malt or brewed beverages in quantities above specified anywhere within the Commonwealth of Pennsylvania which, . . . in the case of importing distributors, have been purchased from manufacturers or *persons outside this Commonwealth engaged in the legal sale of malt or brewed beverages* or from manufacturers or importing distributors licensed under this article.” (Emphasis added.)

Clearly importing distributors are not restricted to manufacturers in making foreign purchases of beer. Rather such licensees may make foreign purchases from any person legally offering malt or brewed beverages.

Section 431(b) continues:

“Each out of State manufacturer of malt or brewed beverages whose products are sold and delivered in this Commonwealth shall give distributing rights for such products in designated geographical areas to specific importing distributors, and such importing distributor shall not sell or deliver malt or brewed beverages manufactured by the out of State manufacturer to any person issued a license under the provisions of this act whose licensed premises are not located within the geographical area for which he has been given distributing rights by such manufacturer. . . .”

Nothing in this section prohibits importing distributors from making foreign purchases from non-manufacturing sources. The direction to give distributing rights to designated geographical areas is addressed to foreign manufacturers, not importing distributors. The remainder of the quoted section pertains only to “such importing distributors” as are previously given distributing rights by the manufacturer. Further, the restrictions on those importing distributors granted distributing rights pertain to the distribution of the manufacturer’s product rather than its acquisition.

Normally a foreign manufacturer will welcome the opportunity to market his beer in Pennsylvania so that, when there is a consumer demand, he will name distributing importers and designate their geographical districts for distribution. In the usual course of business it will be unprofitable to purchase the same manufacturer’s products at foreign retail markets and import them to Pennsylvania for resale. But where, as your inquiry indicates, the manufacturer does not choose to market his product in Pennsylvania and it is profitable to purchase the product outside the State from retail vendors and transport it here for resale, The Liquor Code does not prohibit importing distributors from so doing.

We conclude that persons outside the Commonwealth engaged in the legal sale of malt or brewed beverages, not limited to manufacturers but including retail vendors, are proper sources of supply for importing distributors. It is our opinion, and you are hereby advised, that importing distributors may purchase alcoholic beverages from foreign retail sources and import the purchased beverages into Pennsylvania for resale.

Very truly yours,

W. WILLIAM ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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### OFFICIAL OPINION No. 75-19

*Named Deputy—Environmental Quality Board—Authorized Representative—Designee.*

1. "Named Deputy" as used in Section 213 of the Administrative Code includes responsible department personnel, not limited to actual deputies.
2. The Secretary of the Department of Transportation may authorize designated responsible employees to serve in his place on the Environmental Quality Board.
3. Official Opinion No. 75-7, issued February 14, 1975, is reversed.

Harrisburg, Pa.  
June 6, 1975

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

Dear Dr. Goddard:

Sometime ago you asked our opinion as to whether the Secretary of the Department of Transportation may name an employee of his department to serve in his stead on the Environmental Quality Board even though such employee is not a deputy secretary of the Department. In response we advised you that such representation would be improper and that only a deputy department head could represent the Secretary on the Environmental Quality Board, O. O. No. 75-7, Op. Pa. Atty. Gen., 5 Pa. B. 423.

Since the issuance of that opinion we have reviewed the question presented and have decided our earlier response was in error. It is now our opinion, and you are hereby advised, that the head of a department

may delegate someone in a responsible position in his department, not necessarily a deputy secretary, to serve in his place on a board or commission. Specifically, it is our conclusion that the Secretary of the Department of Transportation may name a responsible employee of the Department of Transportation to serve in his stead on the Environmental Quality Board, even though the designated employee is not a Deputy Secretary of Transportation.

The Secretary of Transportation is made a member of the Environmental Quality Board by statute, Section 471 of the Administrative Code of 1929, 71 P. S. § 180-1, and the statute does not itself authorize substitution of designees by the named Board members. However, Section 213 of the Administrative Code of 1929, 71 P. S. § 73, provides in part:

“With the approval of the Governor in writing, the head of any department may authorize a named deputy to serve in his stead on any board or commission. . . .”

The crux of the problem is the exact meaning of the term “named deputy”. In our earlier opinion we concluded these words referred only to a deputy department head, i.e. deputy secretary, deputy commissioner, or other similar official. We now reverse our earlier interpretation and find the words “named deputy” refer to any responsible department employee designated by the head of the department and approved by the Governor.

Normally words and phrases used in statutes should be construed according to their common and approved usage, Section 1903 of the Statutory Construction Act of 1972, 1 Pa. C. S. § 1903. A deputy, as defined by Webster’s Third New International Dictionary, is a person appointed, nominated, or elected as a substitute of another and empowered to act for him, in his name, or in his behalf. Applying this definition, a deputy would include individuals named to act or substitute for the head of a department even though not holding the official title of deputy.

This issue was brought before the courts in *William H. Beard, Inc. v. State Board of Undertakers*, 65 Dauph. 364 (1953), *aff’d*. 387 Pa. 261 (1956). The petitioner appealed from the State Board of Undertakers’ revocation of his corporate undertaker’s license. The statute creating the Board made the Secretary of Health an ex officio member and required three members to constitute a quorum. At several of the meetings considered by the Court the Secretary of Health had sent the Director of the Bureau of Vital Statistics, not a Deputy Secretary of Health, to represent him on the Board and this designated representative had been the third member. The Court cited Section 213 of the Administrative Code in holding that the Director properly sat as the representative of the Secretary.

"The Board of Undertakers and the Bureau of Vital Statistics are subdivisions of the Department of Health; therefore, the Director of the Bureau of Vital Statistics is a 'deputy' of the Secretary of Health within the purview of the above cited statute and, as such, is duly qualified to serve as a member of the State Board of Undertakers when so directed by his superior, the Secretary of Health, to serve 'in his stead' as provided in the statute." 65 Dauph. 364 at 367.

Furthermore, there is precedent for the head of a department executing his official duties as mandated by statute through responsible employees, not necessarily deputies. In *Commonwealth v. Walkinshaw*, 373 Pa. 419, 96 A. 2d 384 (1953), the Court recognized the validity of a notice signed by the Administrative Assistant to the Director of Highway Safety issued under a statute granting power to the Secretary. The Court found no substance to the contention that such delegation of power was without authority noting "... There is nothing in the statute to indicate a requirement that every notice be signed by the Secretary personally." 373 Pa. 419 at 421. See also *McIntosh Road Materials Co. v. Woolworth*, 365 Pa. 190, 74 A. 2d 384 (1950).

We conclude that "named deputies," as used in Section 213 of the Administrative Code, includes responsible department personnel, not limited to actual deputy department heads. It is therefore our opinion, and you are hereby advised, that a department head may authorize designated responsible deputies, including responsible employees not actually deputy department heads, to serve in his stead on boards and commissions.

Very truly yours,

W. WILLIAM ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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## OFFICIAL OPINION No. 75-20-A

*State Art Commission—Department of Transportation—Jurisdiction—Bridges.*

1. The Department of Transportation has exclusive authority and jurisdiction over all State designated highways. Section 2002 of the Administrative Code, 71 P. S. § 512.
2. The Department of Transportation need not receive State Art Commission approval over the design or location of bridges which are a part of the State highway system.

Harrisburg, Pa.  
June 10, 1975

Honorable Ronald G. Lench  
Secretary of Property and Supplies  
Harrisburg, Pennsylvania

Dear Secretary Lench:

You have requested our opinion as to the jurisdiction of the State Art Commission over bridges to be constructed through the Pennsylvania Department of Transportation. It is our opinion, and you are hereby advised, that the Pennsylvania Department of Transportation is not required to receive the approval of the State Art Commission on the design or location of its bridges.

This question arises from two provisions of the law:

"From and after the approval of this act, no public monument, memorial, building, or other structure shall become the property of the Commonwealth or any subdivision thereof, by purchase, gift, or otherwise, unless a design for the same, and the proposed location thereof, shall have first been submitted to, and approved by, the State Art Commission.

"No construction or erection of any public monument, memorial, building, or other structure, which is to be paid for, either wholly or in part, by appropriation from the State Treasury or from any subdivision of the State, or for which the State or any subdivision is to furnish a site, shall be begun unless the design and proposed location thereof shall have been approved by such commission.

"No monument, memorial, building, or other structure, belonging to any person or corporation, shall be erected upon or extend over any highway, stream, lake, square, park or other public place, within any subdivision of this State, except the design for and the location thereof shall have been approved by such commission." Act of May 1, 1919, P. L. 103 § 5 (71 P. S. § 1672).

"Subject to any inconsistent provisions in this act contained, the State Art Commission shall have the power, and its duty shall be, to examine and approve or disapprove the design and proposed location of all public monuments, memorials, buildings or other structures, except in cities of the first or second class, in accordance with the [above] act. . . ." Administrative Code of 1929, P. L. 177, § 2414, as amended by the Act of June 21, 1937, P. L. 1865, § 1, 71 P. S. § 644.

The issue is whether the jurisdiction of the Art Commission embraces bridges built through the Department of Transportation as part of Pennsylvania's highway system. If it does, this jurisdiction would



appear to conflict with that granted by the Legislature to the Department of Transportation. Section 2002 of the Administrative Code reads in part:

"(a) The Department of Transportation in accord with appropriations made by the General Assembly, and grants of funds from Federal, State, regional, local or private agencies, shall have the power, and its duty shall be:

"(1) To develop and maintain a continuing, comprehensive and coordinated transportation planning process;

\* \* \*

"(8) To mark, build, rebuild, relocate, fix the width of, construct, repair, and maintain State designated highways and transportation facilities and rights of way;

\* \* \*

"(10) To have exclusive authority and jurisdiction over all State designated highways;

\* \* \*

"(12) To enter into contracts for designing, constructing, repairing, or maintaining, State designated highways, and other transportation facilities and rights of way, airports or any parts thereof, as may now or hereafter be provided by law;"

The resolution of the apparent conflict between the grant of authority to the State Art Commission and the Department of Transportation is aided by the introductory clause of Section 2414 of the Administrative Code, which makes the Art Commission power subject to any inconsistent provisions in the Administrative Code. Section 2002 of the Administrative Code, in its grant of power to the Department of Transportation, is inconsistent and prevails.

Further, the object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly in passing the law. Section 1921 of the Statutory Construction Act of 1972, 1 Pa. C. S. § 1921. In ascertaining the intention of the Legislature it is presumed that an absurd or unreasonable result is not intended. Section 1922(1) of the Statutory Construction Act of 1972, 1 Pa. C. S. § 1922(1).

In the instant case it would be absurd to require the Department of Transportation to adhere to the direction of the State Art Commission in the location of its bridges. Rather, it is a far more reasonable interpretation of the statutes involved that the design and location of all highway components, including bridges, are under the exclusive authority of the Department of Transportation, where the expertise to control such authority is present.

It is therefore our opinion, and you are hereby advised, that the State Art Commission does not have jurisdiction over the design or

location of bridges constructed through the Pennsylvania Department of Transportation as part of the State highway system.

Very truly yours,

W. WILLIAM ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

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*Attorney General*

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OFFICIAL OPINION No. 75-20-B

Harrisburg, Pa.  
August 5, 1975

The Honorable Robert P. Casey  
Auditor General  
Commonwealth of Pennsylvania  
Harrisburg, Pennsylvania  
Dear General Casey:

Reference is made to your letter dated May 14, 1975, addressed to the Attorney General regarding the Governor's and Lieutenant Governor's use of the state's owned and leased aircraft during calendar year 1974 and one trip in 1973. Since the Attorney General was Campaign Manager during 1974 for the re-election of the Governor and Lieutenant Governor, it was deemed appropriate that he should not participate in the consideration, review of the factual circumstances, analysis or response.<sup>1</sup> Accordingly, your letter was referred to me with the understanding that the matter would be approached objectively and analytically.

The delay in responding to your letter was unavoidable inasmuch as it was time consuming obtaining as much detail as possible. In my opinion, it was more important to be thorough than to be prompt in the replication to the issues you raise.

Various sources of information reflect the following:

*April 25, 1974*—(Harrisburg — Pittsburgh — Reading — Harrisburg) Governor flew to Pittsburgh to attend Western Pennsylvania Regional Governor's Health Conference; received the National Consumer Health Association award presented to both him and Hubert Humphrey; met with Consul General of Yugoslavia. Left Pittsburgh for Reading; attended fund-raising cocktail party for Shapp-Kline at the River Edge; attended retirement dinner for Bill Horine, retiring Superintendent of Schools, and presented him with a citation for his many years of dedicated service. Returned to Harrisburg.

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1. This opinion is issued under the authority of the Act of March 22, 1917, P. L. 11, 71 P. S. § 762.

*April 26, 1974*—Flew from Harrisburg to Erie; drove to Edinboro State College to attend the Educational Congress of Northwestern Pennsylvania where he was the main speaker; toured Soldiers' and Sailors' Home, Erie, with General Mier, a facility of the Department of Military Affairs which was scheduled to go out of existence and they were looking for funding; visited the Martin Luther King Neighborhood Center funded by the Department of Community Affairs; attended Shapp-Kline fund-raising function at Mercyhurst College; returned to Harrisburg.

*May 6, 1974*—Governor was in Pittsburgh attending a Senior Citizens' Day at the Pittsburgh Civic Arena; also attended a testimonial dinner for I. W. Abel, United Steelworkers.

*May 7, 1974*—Attended a Gubernatorial Press Conference in Pittsburgh; conferred with Duquesne Light officials and toured their Philips Power Station; drove to Beaver County and then to Butler County and did campaigning there; drove to Mercer County and attended Mercer County Democratic Dinner; plane picked him up in Youngstown and returned him to Harrisburg so that he could be back in the office for the conduct of official business.

*May 29, 1974*—Harrisburg to Wilkes-Barre) Governor drove to Wilkes-Barre to attend a Shapp-Kline fund-raising function at the Treadway Inn at Wilkes-Barre. The plane flew to Wilkes-Barre that evening to pick him up and bring him back to Harrisburg to resume official business.

*July 31, 1974*—Flew to Washington County; had a live radio interview on WJPA; attended Senior Citizens' Rally which preceded Senior Citizens' Day in Washington County; attended Mon-Valley J. C.'s Banquet where he was the main speaker.

*August 1, 1974*—(Harrisburg — Indiana — Clarion — Altoona — Harrisburg) Spoke at United Mine Workers Constitutional Convention at New Stanton; had interview with the Valley News Dispatch Editorial Board; drove to Indiana where he met with Editorial Board of Evening Gazette; spoke at Senior Citizens' Day of Indiana County; left Indiana by plane for Clarion; attended Shapp-Kline fund-raiser at Wolf's Den, Clarion; flew to Altoona.

*August 2, 1974*—Altoona—Opened Ford for Congress headquarters; accompanied Representative Bixler to Huntingdon County Democratic Luncheon in Huntingdon; returned to Altoona and toured Juniata Locomotive Shops; attended dinner for John Milliron, legislative candidate; returned to Philadelphia (Merion) by plane; plane returned to Harrisburg.

*August 7, 1974*—Flew to Bradford to attend a Shapp-Kline reception at Henry Satterthwaite's residence; attended McKean County Democratic Dinner.

*August 8, 1974*—Met with Dr. MacDowell at University of Pittsburgh Bradford Campus re funding; drove from Bradford to Lock Haven

and attended a Shapp-Kline reception in Lock Haven; returned to Harrisburg by plane.

*August 29, 1974*—Lt. Governor Kline—Harrisburg to Erie. Labor leaders breakfast, AFL-CIO.

*September 13, 1974*—Governor was scheduled to be the main speaker at Indiana University convocation—anniversary of founding of the University—but because of the exigencies of official business requiring him to remain in Harrisburg, Mrs. Shapp made the speech. While in Western Pennsylvania, she went by car to Westmoreland County to a Shapp-Kline function and then to Butler; drove back to Johnstown Airport and returned by plane to Harrisburg.

*October 5, 1974*—(Harrisburg—Allegheny County—Somerset County—Hagerstown, Maryland—Philadelphia) Governor flew from Harrisburg to Pittsburgh where he had a meeting with students at University of Pittsburgh; attended the World Hunger Conference sponsored by University of Pittsburgh Graduate School of Public Health; left at 3 p.m. for Somerset; went to the Shapp-Kline headquarters opening; had an interview at WBSC Radio; went to Bedford where he had a press conference and attended Bedford County Democratic Dinner; left Bedford and drove to McConnellsburg to attend a Democratic Dinner; drove to the airport and returned to Philadelphia by plane.

*October 9, 1974*—Lt. Governor Kline—Harrisburg to Erie. Attended criminal justice conference at Edinboro; Precept 101 Educational Program; attended political rally at Edinboro Campus.

*October 11, 1974*—(Harrisburg—Philadelphia—Johnstown—Philadelphia) Governor was in Philadelphia. Plane flew from Harrisburg to pick him up and fly him to Johnstown for a TV taping at WJAC-TV (news panel show); went to University of Pittsburgh Johnstown Campus for a student meeting; toured facilities at Johnstown Rehabilitation Center (Bureau of Vocational Rehabilitation facility); attended Shapp-Kline reception at Sunnyhaven Country Club; returned to Philadelphia by plane.

*October 11, 1974*—Lt. Governor Kline—Harrisburg—Beaver—Harrisburg. United Steelworkers District 20 Legislative Leaders Dinner.

*October 18, 1974*—(Harrisburg—Erie—New Castle—Harrisburg) Flew from Harrisburg to Erie where he spent the day at General Electric plant, attended a management luncheon and toured the plant, attended news conference at Shapp-Kline headquarters; taped a TV program for WJET-TV and the radio show "Contact" for WWYN Radio; attended a labor cocktail party at the Holiday Inn; attended Erie County Democratic Dinner; flew to New Castle and stayed over night.

*October 19, 1974*—At New Castle the Governor dedicated the new Vital Statistics Building; did a radio show at WMBA; left for Beaver Falls by car.

*October 19, 1974*—Lt. Governor Kline—Harrisburg—Mt. Pocono—Clarion—Bradford—Harrisburg. Mt. Pocono—spoke at National Secretaries Association; Clarion—Autumn Leaf Festival; McKean political meeting in evening.

*October 21, 1974*—(Harrisburg—Philadelphia—Wilkes-Barre) Governor was in Philadelphia to do Joel Spivak radio show for WCAU; had an interview with Editorial Board; had an interview with Editorial Board of Philadelphia Tribune; was guest speaker at Temple University Downtown Club luncheon; presented a check to Reverend Leon Sullivan for O. I. C.; left by plane for Wilkes-Barre where he attended the ribbon-cutting for Shapp-Kline headquarters in Scranton; taped a TV show at WVIA-TV; attended the Luzerne County Democratic Dinner in Wilkes-Barre; next morning (*October 22, 1974*) he officiated at the ground-breaking ceremonies for Sherman Terrace Housing Project sponsored by the Pennsylvania Housing Finance Agency; left by car for Allentown.

*October 26, 1974*—Lt. Governor Kline—Harrisburg—Beaver—Harrisburg. Duquesne University mock union convention.

*October 28, 1974*—Lt. Governor Kline—Harrisburg—Butler—Philadelphia—Harrisburg. Political activities during the day and non-political (Local 1199 hospital workers, present at contract ratification).

*October 30, 1974*—Lt. Governor Kline—Philadelphia—Pittsburgh. Political.

*October 31, 1974*—Peter Yaffe plus three (Flannery, Evock, Prozzillo—State Police officers) (Harrisburg—Wilkes-Barre). Governor in Pittsburgh; traveled to Rostraver Township; had lunch at cafeteria at Fox Groceries and made a few remarks; went to Brownsville to Retired Senior Volunteer Program for press conference; had walking tour of Connellsville with the Mayor; left Rostraver for Wilkes-Barre where he attended Lackawanna County Democratic Dinner.

*November 2-3, 1974*—(Harrisburg—Philadelphia—Erie—Pittsburgh—Philadelphia) Governor flew to Erie from Philadelphia to be main speaker at Golden Anniversary Dinner of East Side Federation; went to Millcreek Mall where he attended a benefit for the Erie Philharmonic Orchestra. Next day (*November 3*) he left Erie for Pittsburgh and attended the Pittsburgh Steelers-Philadelphia Eagles game at Three Rivers Stadium; flew back to Philadelphia and did a radio interview at WKAP.

*October 20, 1973*—McAlister Park, Mifflin County; attended Clearfield Democratic barbeque with Senator Ammerman.

In each case the Commonwealth was reimbursed for the full cost of the trip by the Pennsylvania's for Shapp-Kline Committee.

The majority of cases reflect that normal governmental purposes were involved. While interviewing individuals having intimate knowledge with the campaign, it was learned that the Committee would

ascertain the schedule of the Governor in the conduct of his official duties and then attempt to schedule a political appearance to coincide with his official duties. This appears to be adequately verified by the activities on many of these trips, to wit, the predominant purpose of the particular trip was for official purposes and the personal-political function was secondary. In my judgment this would constitute a proper use of the aircraft and reimbursement to the Commonwealth was unnecessary and constituted a gratuity.

In questioning the reason for the Committee reimbursing the Commonwealth, it was learned that though it believed that such trips did not legally mandate reimbursement, it was the policy that reimbursement would be made where any political activity was conducted so as to stay "above reproach or criticism."

### *PRIOR AND OTHER PRACTICES*

I have reviewed numerous Daily Flight Logs and other documents, as well as interviewed several individuals, in an effort to ascertain prior practices under former Governors. Although it is not possible to determine with absolute certainty, it appears that state aircraft had been used on numerous occasions for trips involving both public and private or political purposes and in some cases there appears to be a high probability that predominant use was not related to official business. I could find no record of reimbursement to the Commonwealth under prior Governors. It was the opinion of those involved that the use of the aircraft was justified so long as it also involved some official function.

Our research indicates that the President's use of "Air Force I" is not specifically authorized by statute. This conclusion was confirmed by Barry Roth, staff attorney for the President. Mr. Roth informed us that when the President uses "Air Force I" for purely political purposes, the Republican Party pays the bill. When the plane is used for governmental purposes, the Federal government pays the bill. When a trip involves mixed purposes, the costs of the trip are shared between the Federal government and the Republican Party with each paying an amount that reflects the extent to which the plane was used for either governmental or political purposes.

### *SAFETY AND SECURITY*

Several of the reasons for the use of state aircraft deal with the safety and security of Governors. The same basic reasons were submitted to me by those familiar with the use of the aircraft by the present Governor and past Governors. It had been submitted to me for consideration that Governors do not stop being Governors while making political or personal appearances, and for reasons of safety, security and exigencies of time, the use of the aircraft is and/or should be permissible provided that the state is reimbursed where the trip is for purely or predominantly political or personal use.

I have been advised that State Police protection is more efficiently afforded a Governor when he uses state aircraft.

Several crashes of small aircraft killing high state government officials during recent years have caused concern with respect to a Governor flying in such aircraft. The state aircraft is considered safer than private commercial aircraft for the following reasons.

1. All state aircraft are part of an FAA approved continuous maintenance program.
2. State aircraft are inspected after every fifty (50) hours of flying time, whereas twin engine commercial aircraft are generally inspected only after every one hundred (100) hours of flying time.
3. Pilots flying state aircraft are required to participate in an ongoing pilot proficiency training program. As part of this program state pilots are given a proficiency flight check every six months. Commercial pilots are not required to participate in ongoing training programs.
4. Pilots flying state aircraft are required to have an Airline Transport Pilot's Certificate. This is the highest rating obtainable by a pilot. Pilots who fly commercially need not achieve this rating.
5. Pilots flying state aircraft must pass a Class 1 physical examination every six months. In contrast, commercial pilots need only pass a less stringent Class 2 physical examination every year.
6. Commercial pilots may only have the minimum amount of flying time as required by law before being authorized to assume the responsibility for safely transporting passengers. In contrast, pilots flying state aircraft are required to have much more than the minimum amount of flying time as required by law before being given the responsibility for safely transporting passengers.
7. Pilots operating state aircraft have flown the aircraft in training and are thoroughly familiar with its operation. In contrast, commercial pilots may not be as familiar with the aircraft they fly.

### *COSTS AND CHARGES*

I am advised by the Department of Transportation that charges to the users of the aircraft include apportioned and allocable costs of aircraft rental, fuel, oil, radio repair and maintenance, engine and prop overhaul, salaries, insurance and employe benefits. The charges also include pilot trip expenses. Accordingly, the full cost of use was and is charged by the Department of Transportation and no pecuniary advantages inure to the benefit of the users or their agencies.

Inquiry of private aircraft companies revealed that for several similar trips, which were checked for purposes of analysis, the rates charged are closely comparable to those assessed by PennDOT. Since it may be safely assumed that private aircraft companies would charge

full costs, this information substantiated and verified PennDOT's information that charges were based on computation of full operational expenses.

I was further advised by PennDOT that since pilots' salaries and employe benefits are paid whether the pilots are flying or sitting in the flight shed, the Commonwealth monetarily benefits from increased use of aircraft.

### *ANALYSIS OF STATUTORY PROVISIONS*

The only statutory provision which we have been able to find or which has been brought to our attention regarding state aircraft is Act 157 of May 31, 1947, P. L. 348, § 1. This act provides as follows:

"Section 526. Aircraft for Official Use.—All aircraft required for the proper conduct of the business of the several administrative departments, boards and commissions, and the officers and authorized agents of the General Assembly, or of either branch thereof, shall be purchased and maintained by the Pennsylvania Aeronautics Commission. The use of such aircraft shall be charged by the commission to the using agency. The amount of such charge shall be paid into the Motor License Fund and be credited to the amounts appropriated therefrom for the use of the Pennsylvania Aeronautics Commission. All amounts so credited are hereby appropriated to the Pennsylvania Aeronautics Commission for the same purposes as other appropriations out of the Motor License Fund for the use of the commission."

This provision was enacted as an amendment to the Administrative Code of April 9, 1929, P. L. 177. It was subsequently amended by Act 120 of May 6, 1970, P. L. 356, § 9. This amendment deleted the words "Pennsylvania Aeronautics Commission" and added in lieu thereof the words "Department of Transportation."

The provision is an amendment to Article V of The Administrative Code which Article is entitled "Powers and Duties In General." It is strikingly similar to Section 515 of the same Article dealing with automobiles which provides:

"Automobiles.—All automobiles required for the proper conduct of the business of the several administrative departments, boards, and commissions, shall be purchased and maintained by or under the supervision of the Department of Property and Supplies, except that the Department of Highways may continue to maintain automobiles purchased for it by the Department of Property and Supplies as purchasing agency."

These sections do not specifically authorize or proscribe the use of state aircraft or automobiles. They do not address that issue. They



serve as the statutory authority for the Department of Transportation to purchase aircraft and the Department of Property and Supplies to purchase automobiles respectively.

We were unable to find any legislative history which would be helpful and accordingly, our construction was predicated upon the legislative intent as expressed in the preamble to The Administrative Code, to wit, "... defining the powers and duties of the Governor and other executive and administrative officers . . .", the title to Article V, the purposes expressed in the Section 500 series of the Code and the clear meaning of the words in the specific section itself.

Having found no other statutory provisions relating to the issues you raise, Section 526 of The Administrative Code may be susceptible to construction by negative implication that to the extent there is not specific statutory sanction for the use of the state aircraft for purely personal use, it may not be so used.

### CONCLUSIONS

1. There being no specific statutory authority sanctioning the use of state aircraft for purely personal (non-official business) reasons, the aircraft may not be so used.

2. Where a governmental purpose is involved, the use of state aircraft is authorized by Section 526, though the trip may concurrently involve a personal (non-official business) purpose.

3. Your letter refers to the "illegal" use of the aircraft. Insofar as that term connotes criminality, I found no prosecutable offense committed. In addition, my interviews with various individuals involved in the use of the aircraft disclosed a total absence of any requisite "criminal intent." The individuals were candid and forthright and uniformly expressed the opinion that they thought the use of the state aircraft was legal and proper in each instance. I was persuaded as to the truthfulness of these statements by the fact that the use of the aircraft was not "sub-rosa." Information and records as to the use of the aircraft and the payments therefor were made, kept and available for any person's inspection, and payments made to PennDOT were made public throughout 1974.

4. Technically, the Commonwealth may sue for the fair value of the use of the aircraft. As heretofore expressed, my findings show that the Department of Transportation billed the user for each trip, the bills were computed upon the fair value of the use of the aircraft and the bills were paid by the Committee. In view of the fact that no monetary damages were suffered by the Commonwealth and that a suit would undoubtedly involve a counterclaim for the return of the moneys paid for the trips involving official business, I would deem bringing such suit as inadvisable.

5. There being a virtual absence of statutory provisions with respect to the use of the state aircraft, this office intends to recommend remedial

and clarifying legislation. Finding the reasons of safety and security persuasive, consideration should be given to codifying into law the non-statutory practice with respect to the Chief Executive's use of "Air Force I." Although concurrent mixed use (official business and personal) would involve subjective judgment both qualitatively and quantitatively, such legislation in my opinion would nevertheless be an improvement over the present vacuum of precise statutory provisions governing the use of state aircraft.

Thank you for bringing these issues to our attention. I shall be pleased to meet with you and/or your staff to discuss any matters on this subject.

Sincerely,

VINCENT X. YAKOWICZ  
*Solicitor General*

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### OFFICIAL OPINION No. 75-21

#### *Education—Scotland School for Veterans' Children—Adopted Children.*

1. Adopted children are eligible for admission to the Scotland School for Veterans' Children.

Harrisburg, Pa.  
June 12, 1975

Honorable John C. Pittenger  
Secretary of Education  
Harrisburg, Pennsylvania

Dear Secretary Pittenger:

You have requested an opinion concerning the eligibility of adopted children to attend the Scotland School for Veterans' Children. Specifically, you have asked us the following question:

Is an adopted child of an honorably disabled male war veteran eligible for admission to the Scotland School for Veterans' Children?

Children of veterans of wartime service who have died while in the service or who have been honorably discharged therefrom are eligible for admission to the school under the Act of May 21, 1943, P. L. 302, § 1 as amended, 24 P. S. § 2695. The Act goes on to list preferences in admission but does not exclude any particular class of children (e.g. adopted or illegitimate).

In an Opinion of the Attorney General dated November 29,\* 1905, reported at 15 District 377, it was held that adopted children were ineligible for admission. This Opinion concerned a veteran who adopted his grandchildren hoping to secure their admission to the School. Hold-

ing that grandchildren were not included in the category of orphans and children as per the Act, the Opinion further discussed the ineligibility of adopted children based on adopted children's property rights in estates.

Though the question at hand is not necessarily one of property rights, the proper resolution or answer evolves from decisions concerning property rights of adopted children. In a recent case, the controlling law, at present, was stated by Chief Justice Jones:

"The rule of construction we today recognize equates the rights of natural children and adopted children and executes the legislatively mandated equality so clearly and unequivocally expressed in the statutes of adoption, i.e., that the adopted person 'shall have all the rights of a child and heir of' the adopting parents. This rule does not preclude nor prevent any testator who desires to distinguish between natural and adopted children as recipients of his bounty from doing so; an expression of such intent in his will accomplishes that result." *Tafel Estate*, 449 Pa. 442, 452, 296 A. 2d 797, 802 (1972).

It is clear that in recognizing a policy of equality under the law, the legislative intent is to encourage a complete assimilation of adopted children into the adoptive family and that adopted children of their adoptive parents be treated no differently than natural born children of their natural parents, unless specifically distinguished by statute.

The Scotland School gives relief to veterans and their estates from the economic hardships of support and education where justified. Since veterans are charged and obligated to support their adopted children in the same manner as natural children, it would be inconsistent with the school's purpose to deny admission to adopted children.

Accordingly, it is our opinion and you are advised that adopted children are eligible for admission to the Scotland School for Veterans' Children. Of course, an adoption secured for the purpose of circumventing the eligibility requirements of the School should not be deemed to satisfy those requirements and every effort should be made by the School to screen out such applicants.

Very truly yours,

EARL DAVID GREENBURG  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

## OFFICIAL OPINION No. 75-22

*Insurance Department—Legality of Minimum Premium Agreements and Administrative Service Plans under State Insurance Laws and Federal Pension Reform Act.*

1. Employer-sponsored insurance plans which assume part or all of the risk of indemnity to employees do not constitute the transaction of insurance under Pennsylvania insurance laws and are not subject to regulation by the Insurance Department.
2. The Federal Pension Reform Act specifically regulates such plans and exempts them from state regulation.
3. Engaging in an administrative service plan would be incidental and auxiliary to an insurance company's business, and is therefore proper under Pennsylvania insurance laws.
4. The Federal Pension Reform Act contemplates the administration of employer-benefit plans by insurance companies and subjects the companies to federal regulation insofar as they act in that capacity.
5. The Insurance Department retains the authority under the Federal Pension Reform Act to regulate contractual relationships between employee-benefit plans and insurance companies including approval of forms and establishment of standards for solvency.

Harrisburg, Pa.  
June 30, 1975

Honorable William J. Sheppard  
Insurance Commissioner  
Harrisburg, Pennsylvania

Dear Commissioner Sheppard:

You have requested our advice as to the legality of two types of transactions engaged in by insurance companies: minimum premium agreements and administrative service plans. It is our opinion, and you are hereby advised, that the self-insurance aspect of these programs does not constitute the transaction of insurance business, and that insurance companies may legally enter into minimum premium agreements and administrative service plans under applicable state and federal laws.

Minimum premium agreements are basically insurance contracts with large deductibles. Such contracts are usually offered to large industrial concerns. For example, a large company may provide accident and health insurance to its employees. In purchasing that insurance, the company may wish to allow for a very large deductible and thus become a self-insurer to that degree. In this situation, deductibles of \$10,000 to \$100,000 are not uncommon. The insured saves considerable amounts of money on the premiums through self-insurance, while the insurance company relieves itself of liability for most claims. Another result of such an arrangement is the loss to the Commonwealth of certain premium taxes, since the self-insured deductible is not taxed.

Administrative service plans are often, but not necessarily, tied in with minimum premium contracts. In their pure form, these plans are agreements entered into by insurance companies whereby they underwrite none of the risk for an insured, but only do the administrative work of processing claims. Thus, an insurance company might contract with a large industrial self-insurer to process claims for that company. Usually, the insurance company would be compensated on a service fee basis per claim processed. The insured in that case would be a self-insurer and would assume the actual loss itself. Where the administrative service plan is tied in with the minimum premium agreement, the insurance company would agree to underwrite only losses beyond the large deductible but would administer the lesser losses for the insured.

The magnitude of the deductible in a minimum premium agreement raises the question of whether the self-insuring company is acting as an unlicensed insurance company. In regard to administrative service plans, the question arises whether such a plan is a proper function for an insurance company, since that function is not specifically authorized by the Pennsylvania insurance laws. Involved in the analysis of both questions is the impact of the recently enacted federal Employee Retirement Income Security Act of 1974 (Pension Reform Act), Pub. L. No. 93-406 (September 2, 1974), 29 U. S. C. § 1001 *et seq.*

## I

Although Pennsylvania courts have not passed upon the question, the courts of several other jurisdictions have held that employer-sponsored insurance benefit programs do not constitute the transaction of insurance business. In *State ex rel. Farmer v. Monsanto Co.*, 517 S. W. 2d 129 (Mo. 1974), the Missouri Supreme Court reversed a lower court decision granting the Insurance Superintendent's suit for an injunction to prohibit Monsanto Company from paying sickness and disability benefits directly to its employees. The Supreme Court rejected the lower court's conclusion that such payments constituted the transaction of insurance business under Missouri law, emphasizing that participation in the insurance plan was optional with each employee. The plan was not made available to the public, and Monsanto did not seek to make either a profit or accumulate a surplus from the operation of its sickness and medical benefit plan. This same reasoning was adopted in a similar case by the Arkansas Supreme Court in *West & Co. of La., Inc. v. Sykes*, 515 S. W. 2d 635 (Ark. 1974).

Both the *Monsanto* and *West* opinions rely heavily upon a parallel line of cases holding that the contributions of employers to employer-sponsored benefit programs are not subject to the various states' taxes on gross insurance premiums. In *Mutual Life Ins. Co. v. New York State Tax Comm.*, 32 N. Y. 2d 348, 298 N. E. 2d 632 (1973), the Court of Appeals determined that the New York tax on "all gross direct premiums" was a corporate franchise fee and was not applicable to the contributions of an insurance company to a program for its own em-

ployees because the program lacked the characteristics of solicitation of business or accumulation of profit. The Court concluded that:

"The relationship involved, then, is not commercial, nor one of seller and purchaser, with profit or contribution to surplus accruing to the former; rather, it is an incident of its employer-employee relationship, no different from that of any other employer not subject to . . . the taxing provision of section 187. Such *employer-sponsored programs do not constitute the doing of an insurance business within the meaning of the statute.* . . ." (Emphasis added.) 298 N. E. 2d at 635.

Similarly, in *Danna v. Commissioner of Insurance*, 228 So. 2d 708 (La. 1969), the Louisiana Supreme Court ruled that the contributions of a noninsurance company to its employer benefit programs were not subject to a gross premiums tax:

"Payments on a group policy issued by an insurer-employer to its own employees is not business in the usual, ordinary and customary manner. . . . Here there is in effect no purchase of insurance because the contract is not founded on a purchaser-seller basis. Rather, its foundation is primarily the employer-employee relationship, the rationale of which is that mutual interests of each, independent of the coverage provided, will thereby be enhanced for reasons having no direct relationship to the insurance business as such." 228 So. 2d at 713.

See also: *California-Western States Life Ins. Co. v. State Bd. of Equalization*, 312 P. 2d 19 (Cal. App. 1957); *State Tax Commission v. John Hancock Mutual Life Ins. Co.*, 170 N. E. 2d 711 (Mass. 1960); *Williams v. Massachusetts Mutual Life Ins. Co.*, 427 S. W. 2d 845 (Tenn. 1968). It is noteworthy that in none of these cases was the loss of premium tax revenues considered any justification for categorizing the programs in question as a species of insurance.<sup>1</sup>

The rationales of the above cases are equally applicable to Pennsylvania insurance laws, which nowhere define the term "insurance." The Insurance Department Act of 1921 applies "to all companies, associations, and exchanges transacting any class of insurance business," 40 P. S. § 23, while the Insurance Company Law of 1921 prohibits "the doing of any insurance business in this Commonwealth" except as provided in that act. 40 P. S. § 367. Lacking any specific definition of the term "insurance," the Pennsylvania Supreme Court has held that the word must be applied as generally understood in the law of the state, and has recognized that the scope of Pennsylvania insurance laws focuses upon the *commercial* activity of selling insurance. *Comm. ex rel. Schnader v. Fidelity Land Value Assur. Co.*, 312 Pa. 425, 167 A. 300 (1933); *Commonwealth v. Equitable Beneficial Association*, 137

1. Section 902(a) of the Tax Reform Code of 1971, 72 P. S. § 7902(a), imposes upon every insurance company transacting insurance business in the Commonwealth a tax at the rate of two percent of the gross premiums received from business done within the Commonwealth during each calendar year.

Pa. 412 18 A. 1112 (1890). From the foregoing, we conclude that employer-sponsored insurance plans which assume part or all of the risk of indemnity to employees do not constitute the transaction of insurance business under Pennsylvania insurance laws, and are not subject to regulation by the Insurance Department.

Moreover, the recently enacted Pension Reform Act, *supra*, specifically regulates employer-sponsored programs and exempts them from regulation under state insurance laws. Section 3(1) of the Act, 29 U. S. C. § 1002(1), defines such a program as an "employee welfare benefit plan,"<sup>2</sup> while section 4(a), 29 U. S. C. § 1003, subjects such plans to regulation under the Act. Section 514(b) (2) (B), 29 U. S. C. § 1144(b) (2) (B) provides:

"Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies."

Accordingly, where an employer assumes full responsibility for paying out benefits, the plan would be governed completely by the Pension Reform Act. Where a minimum premium agreement is in operation, the employer's liability under its own plan would be regulated by the Pension Reform Act, but the premium agreement and any other contractual relationships between an employee benefit plan and an insurer would remain subject to regulation by state law, as would any act or omission involving an employee benefit plan which occurred before January 1, 1975. See Section 514(b) of the Pension Reform Act, 29 U. S. C. § 1144(b).

## II

The question with respect to the operation of administrative service plans is whether such an activity falls within the scope of an insurance company's charter. Section 208(a) of the Insurance Department Act of 1921, 40 P. S. § 46(a), requires an insurance company to obtain a

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2. "The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." Pension Reform Act, § 3(1), 29 U. S. C. § 1002(1).

certificate of authority from the Insurance Commissioner before it may engage in the business of insurance. Section 202 of the Insurance Company Law of 1921, 40 P. S. § 382, delineates the various classes of insurance that may be offered in the Commonwealth, but nowhere authorizes only the administration of claims in an insurance program provided by another organization.

The test for determining whether a particular corporate act is proper under the corporate charter or is *ultra vires* was stated in *Malone v. Lancaster Gas. Light & Fuel Co.*, 182 Pa. 309, 37 A. 932 (1897). In *Malone*, the Supreme Court held that a company chartered to manufacture and supply illuminating and heating gas might properly engage in the sale of appliances designed to use such gas, stating:

"In considering such questions, much weight must be allowed to the judgment of the parties most interested,—the officers and stockholders of the corporation itself; and while they will not be permitted, as against the Commonwealth or a dissenting stockholder, to go outside of their legitimate corporate business, yet, *where the act questioned is of a nature to be fairly considered incidental or auxiliary to such business, it will not be unlawful because not within the literal terms of the corporate grant.*" 182 Pa. at 322, 37 A. at 933. (Emphasis supplied.)

This line of reasoning was employed by the Supreme Court to uphold real estate transactions conducted by a life insurance company, notwithstanding a prohibition under Article XVI, § 6 of the 1874 Constitution against any corporation engaging in a business other than that expressly authorized in its charter. *Levis v. New York Life Ins. Co.*, 358 Pa. 57, 55 A. 2d 801 (1947).

In the normal course of transacting insurance business, insurance companies administer the payment of claims, and they would clearly do so in minimum premium agreements for those claims in excess of the liability assumed by the employer-insurer. For an insurance company to administer the payment of claims for the employer-insurer as well, whether as part of a minimum premium agreement or as a separate contract with an employer insuring 100% of a benefit plan, would simply be an extension of its normal business function, and would properly be termed "incidental or auxiliary" to its insurance business. Not only would the same facilities of the insurance company be utilized, but such activity might reasonably be expected to conserve, if not increase, the group life and accident and health business already transacted by such company. Consequently, it is our opinion that it is proper under Pennsylvania insurance laws for insurance companies to engage in administrative service plans.

Moreover, the Pension Reform Act contemplates the administration of employer-benefit plans by insurance companies, and subjects the companies to federal regulation insofar as they act in that capacity. Section 3(21) of the Act, 29 U. S. C. § 1002(21), provides in relevant part:



“(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c) (1) (B).”

Part 4 of Title I of the Act establishes the scope and standards of fiduciary responsibility. It requires that every employee benefit plan place all the assets of an employee benefit plan in trust, to be administered by one or more fiduciaries named in the written plan instrument. See Section 403(a) (1) and 402(a) (1), 29 U. S. C. § § 1103(a) (1), 1102(a) (1). Section 404, 29 U. S. C. § 1104, delineates the duties of fiduciaries, while Section 405, 29 U. S. C. § 1105, establishes the liability for breach of such responsibility.

The application of Section 403(a) (1) does not extend “to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State.” 29 U. S. C. § 1103(b) (1). This exemption, however, only relieves certain employers from placing the assets of an employee benefit plan in a trust, but does not remove the obligation of an employer or insurance company to adhere to the fiduciary responsibility requirements of the Pension Reform Act. A minimum premium agreement or administrative service plan may be viewed as part of the overall employee benefit plan, and to the extent that such a contract is involved in a benefit plan, the Pension Reform Act standards of fiduciary responsibility are applicable to insurance companies.<sup>3</sup> At the same time, existing state laws and regulations governing the activities of insurers, including, but not limited to, approval of forms and the responsibility of the Insurance Commissioner to insure that no insurance company undertakes activities that would impair its solvency or its ability to pay claims under its policies, continue to apply to insurers in their dealings with employee benefit plans.<sup>4</sup>

In summary, it is our opinion, and you are hereby advised, that employer-sponsored benefit programs and attendant minimum premium agreements and/or administrative service plans are legal under Pennsylvania insurance laws and the Pension Reform Act, and that the

3. As noted above, *supra*, note 2, the term “employee welfare benefit plan” covers any plan or program providing specified benefits “through the purchase of insurance or otherwise.” (Emphasis supplied).

4. Section 514(b) (2) (A), 29 U. S. C. § 1144(b) (2) (A), provides: “Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities.”

federal act preempts state regulation with respect to employee benefit plans and their administration, except with regard to any contractual agreement between such a plan and a bank, insurance company or other entity whose activities are regulated by any statute or agency of this Commonwealth.

Sincerely,

MELVIN R. SHUSTER  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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OFFICIAL OPINION No. 75-23

*Article IX, § 9 of Pennsylvania Constitution—Municipalities—Power to Undertake Housing Rehabilitation—Act 292 of 1974—Use of Housing and Redevelopment Authorities and Private Non-Profit Corporations as Agents.*

1. Pennsylvania municipalities have the power, pursuant to Act 292 of 1974, to undertake programs of rehabilitation of low to middle income housing within their boundaries.
2. Article IX, § 9 of the Pennsylvania Constitution does not prohibit such housing rehabilitation programs.
3. Municipalities may authorize public bodies such as redevelopment authorities and housing authorities to act as their agents in implementing housing rehabilitation programs.
4. Non-profit corporations may be authorized by municipalities to assist in housing rehabilitation programs only to the extent of providing such administrative services so as not to contravene the constitutional prohibition of the delegation of public power.

Harrisburg, Pa.  
July 25, 1975

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

Dear Secretary Wilcox:

You have asked us to determine whether:

1. Pennsylvania municipalities may legally undertake programs of rehabilitation of low and middle income housing; and
2. If they may, can they authorize, as their agents, either (a) the local redevelopment authority; (b) the local housing authority; or (c) a local non-profit corporation, to implement such a program?

For the reasons more specifically set forth below, it is our opinion, and you are hereby so advised, that Pennsylvania municipalities do have the power and authority to undertake programs of rehabilitation of low and middle income housing, and may appoint public bodies, such as redevelopment authorities and housing authorities, subject to the conditions explained below, to act as their agents in performing this governmental function. Local non-profit corporations may be used only to the extent of providing such administrative services so as not to contravene the constitutional prohibitions on the delegation of public powers.

### FACTUAL BACKGROUND

At the beginning we take note that both the Governor and the President have proclaimed the provision of adequate, safe, sanitary and decent housing for each of our citizens to be of the utmost priority. This priority may be accomplished in two ways. The first would be the encouragement of more housing through new construction. Second would be the rehabilitation of those houses in our current stock which are presently substandard.

We are also aware that many Pennsylvania municipalities will be receiving federal funds beginning this year under the new Housing and Community Development Act of 1974, 42 U. S. C. § 5301 *et seq.* These Community Development funds are specifically authorized to be used by municipalities for, *inter alia*: the acquisition of real property which is appropriate for rehabilitation; code enforcement in deteriorated areas; and rehabilitation of buildings and improvements (including interim assistance and financing of rehabilitation of privately owned properties). See 42 U. S. C. § 5304.

You have informed us that many municipalities wish to use these Community Development Funds along with any other federal, state or local funds available, to undertake various programs of rehabilitation of low and middle income housing within their geographical limits. Many questions have been raised by citizens and local solicitors as to the legality, under state law and Constitution, of our municipalities undertaking these functions.

In general, the municipalities have proposed rehabilitation programs which would employ one or both of the following methods:

1. To acquire (by means other than eminent domain) housing which is presently sub-standard, to rehabilitate it, and then to re-sell it to private ownership;
2. To make grants or loans to low and middle income persons who own and reside in their own homes so that these homes may be rehabilitated to meet existing code standards.

### ENABLING LEGISLATION

As a general rule, it is beyond dispute in this Commonwealth that a municipality has no power to enact ordinances except as authorized

by the legislature. *Taylor v. Abernathy*, 422 Pa. 629, 222 A. 2d 863 (1966)<sup>1</sup> Therefore, in order for Pennsylvania municipalities to legally undertake programs of rehabilitation of housing we must find a specific legislative enactment authorizing them to do so.

In our opinion, the Act of December 10, 1974, P. L. 790 (No. 292), 53 P. S. § 5421 *et seq.*, is such a specific statute. Section 1 of the Act provides:

"Every municipality may, by passage of an ordinance by its governing body, *in any year expend* all or part of any moneys received as payment to local governments pursuant to Title I of Public Law 92-512, the 'State and Local Fiscal Assistance Act of 1972,' or *its general municipal funds for social service programs for the poor, the disabled, and the aging*, provided such programs do not duplicate although they may expand programs of the Commonwealth or of the United States Government. Nothing contained herein shall prohibit the use of the funds in the matching of local funds with State or Federal funds in so far as permitted by law or regulation. Unless contrary to Federal statutes and regulation, no person shall be denied participation in, or the benefits of social service programs so funded because said person is not a public assistance recipient." (Emphasis added.)

Section 4 of the Act defines "municipality" to include a "county, city, borough, incorporated town, township. . . ."

Section 4 also defines "social service programs" to mean, *inter alia*:  
". . . rehabilitation of low to middle income housing. . . ."

While it was the principal intent of Act 292 of 1974, to enable Pennsylvania municipalities to expend Federal revenue sharing funds for social services programs, the General Assembly also granted the municipalities the power to expend monies from their general municipal funds for the same programs. It is our opinion, and you are so advised, that for the purposes of Act 292 of 1974, "general municipal funds" include all funds received by the municipal treasurer and subject to the general provisions of the municipal codes for distribution and auditing, whether received from local, state or federal sources, and whose expenditures are not limited by state or federal law for a specific purpose other than "social service programs." This in our opinion includes Federal Community Development Funds, which, once deposited with the municipal treasurer, become "general municipal funds" for the purposes of Act 292 of 1974. Therefore, these funds may be lawfully expended for the rehabilitation of low to middle income housing,

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1. It would appear that for home rule communities this presumption is reversed so that they may exercise any powers not specifically denied them by the Constitution, their home rule charter, or the General Assembly. See Pennsylvania Constitution, Article IX, § 2. However, this is not essential to our discussion here, especially since Act 292 of 1974 mentions home rule communities specifically.

and for such other "social service programs" which are consistent with the allowable use of funds under the Housing and Community Development Act of 1974.

### PENNSYLVANIA CONSTITUTION

Having established that Pennsylvania communities have been granted, as a governmental function, the power to undertake programs of rehabilitation of low to middle income housing, pursuant to Act 292 of 1974, we now turn to the Pennsylvania Constitution which in some ways limits the exercise of this public power.

Article IX, § 9 of the Pennsylvania Constitution provides:

"The General Assembly shall not authorize any municipality or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual. The General Assembly may provide standards by which municipalities or school districts may give financial assistance, or lease property to public service, industrial, or commercial enterprises if it shall find that such assistance or leasing is necessary to the health, safety, or welfare of the Commonwealth or any municipality or school district. Existing authority of any municipality or incorporated district to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual, is preserved."

The first sentence of this provision is identical with Article IX, § 7 of the Pennsylvania Constitution of 1874, except that the word "municipality" has been substituted for the enumeration of all the specific municipal titles. The second and third sentences were added in 1968 when the provision was made into the present Section 9 of Article IX.

The first sentence is very broad and at first reading appears to prohibit the authorization of grant and loan programs for the rehabilitation of an individual's housing. It would also seem to prohibit the municipalities from appropriating their money to such corporations as redevelopment authorities or housing authorities in the furtherance of housing rehabilitation. Excerpting the sentence to read "The General Assembly shall not authorize any municipality . . . to obtain or appropriate money for, or to loan its credit to, any corporation . . . or individual," would seem to imply that Act 292 of 1974 is an unconstitutional delegation of authority from the General Assembly to the municipality. However, the history of this constitutional provision as traced through the opinions of our state Supreme Court demonstrates otherwise.

Our Supreme Court in *Wheeler v. Philadelphia*, 77 Pa. 338 (1875) adopted the interpretation of the Supreme Court of Ohio in an opinion construing an identical provision of the Ohio Constitution, as follows:

"The mischief which this section interdicts is a business partnership between a municipal or subordinate division of the state, and individuals or private corporations or associations. It forbids the union of public or private capital or credit in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders, nor furnish money or credit for the benefit of the parties interested therein. As this alliance between public and private interests is clearly prohibited in respect to all enterprises of whatever kind, if we hold that these municipal bodies cannot do on their own account what they are forbidden to do on the joint account of themselves and private partners, it follows that they are powerless to make any improvement however necessary, with their own means, and on their own sole account. We may be very sure that a purpose so unreasonable was never entertained by the framers of the Constitution." 77 Pa. at 355-356. See also *Commonwealth ex rel. v. City of Pittsburg*, 183 Pa. 202, 38 A. 628 (1897).

In holding that an ordinance adopted by the City Council of Philadelphia, pursuant to enabling legislation, which made a reasonable appropriation to a corporation organized to create a pension fund for city policemen did not violate Article IX, § 7 (now Article IX, § 9) the Supreme Court stated:

"It is unnecessary to even outline the history of the constitutional prohibition above quoted. It had its origin in the amendment of 1857, which was prompted by the growing evils of reckless and extravagant municipal subscriptions to railroads, plank roads, etc. Those evils were so aggravated that it became necessary to interfere and prevent by a constitutional prohibition all future pledges of municipal faith and property for such purposes under the sanction of the legislature, which alone possessed the power to grant the proper authority. . . . (Citations omitted.)

It is evident from an examination of our cases on the subject, that no strictly legitimate municipal purpose was intended to be prohibited. The evident purpose of the prohibition was to confine municipalities to the objects for which they were created and to restrain the legislature from authorizing any perversion of them. . . ." (Emphasis added.) *Commonwealth ex rel. v. Walton*, 182 Pa. 373, 38 A. 790 (1897).

In overturning a lower court opinion which held that the Act of April 27, 1925, P. L. 305 (which authorized school districts to insure their buildings with any mutual fire insurance company) was violative of Article IX, § 7 (now Article IX, § 9) of the Pennsylvania Constitution, the Supreme Court stated, *inter alia*:

"To remedy the evils incident to subscriptions by municipalities to stock of railroads and like enterprises, the constitutional prohibition against purchases of securities, and pledges of credit, was introduced first into the constitution of 1857 and repeated in that of 1874. . . . The thought was not to prevent the municipal corporation from entering into engagements *to carry out a proper governmental purpose*, though the incurring of indebtedness results. . . ." (Emphasis added.) *Downing v. Erie School District*, 297 Pa. 474, 147 A. 239 (1929).

In 1938 the Pennsylvania Supreme Court upheld the constitutionality of the Act of June 24, 1937, P. L. 27, which provided for a uniform and comprehensive system of institutional care for the poor, by abolishing poor districts and establishing sixty-seven (67) County Boards of Assistance. In so doing the court noted:

"It is urged that the act violates the constitution because it provides for appropriations for those who are not dependents and to outside agencies. . . . The conclusive answer, however, is that the act has but one subject and embraces only the indigent. It is admitted that there is no prohibition against the use of public moneys, for the care and maintenance of such persons. (Citations omitted.) Furthermore, poor relief being admittedly a proper governmental function, Article IX, Section 7, does not forbid appropriations to other agencies that aid in carrying it out. . . ." (Citations omitted.) *Poor District Case (No. 1)*, 329 Pa. 390, 407, 197 A. 334, 342 (1938).

Thus, it is clear that Article IX, § 9 of the Pennsylvania Constitution does not prohibit the General Assembly from granting to municipalities the authority to make appropriations for and to implement such programs as the Legislature deems appropriate, whether or not an individual or a corporation benefits therefrom, so long as the program undertaken carries out a proper governmental function. In addition, the Supreme Court has held that this Section applies only to transactions with a purely private enterprise, and does not prohibit the appropriation of money to, or the lending of credit for, a public corporation or institution. *Rettig v. Board of County Commissioners of Butler County*, 425 Pa. 274, 228 A. 2d 747 (1967).

The prohibitions imposed by Article IX, § 9 of the Constitution may be better understood in light of the following analysis. As noted above, the case of *Commonwealth ex rel. v. Walton*, 182 Pa. 373, 38 A. 790 (1897) held that municipal contributions to municipal employees pension funds were not prohibited by Article IX, § 9. However, compare *Walton* to the case of *Francis v. Neville Township*, 372 Pa. 77, 92 A. 2d 892 (1952). Neville Township passed an ordinance, allegedly pursuant to the First Class Township Code (which authorizes pension systems), which provided for a pension to only one named individual who had recently retired from his position of Township Secretary. In striking down the ordinance of an unconstitutional appropriation of money

to an individual (rather than a constitutional pension system for a class of public employees) the Supreme Court noted:

"Knowing the evils inherent in individual power and authority, the framers of all written democratic constitutions aim at prohibiting grants, monetary or otherwise to single persons. Unbridled financial chaos would result if municipal bodies were permitted to monetarily reward specific individuals, no matter how praiseworthy their services and how profound their devotion to the welfare of the particular township, board or city." 372 Pa. at 80, 92 A. 2d at 893-894.

In 1928, the City of Philadelphia passed an ordinance granting \$25,000 dollars to a private corporation called the Civic Opera Company. The Opera Company did not contract to give any performances nor was the city given in return for the grant any voice in the management of the company, in the participation of its profits, or any right to audit the funds. The Supreme Court concluded that the appropriation was not made to sustain any municipal purpose and therefore it was an unconstitutional appropriation of public money for the benefit of a private corporation, in contravention of Article IX, § 7 (now Article IX, § 9). *Kulp v. Philadelphia*, 291 Pa. 413, 140 A. 129 (1928). However, the Supreme Court has held that it is not a violation of Article IX, § 9 of the Constitution for a city to lease its public auditorium for a nominal rental for limited periods, as authorized by statutes, to a private opera association, even though an admission charge is required. The city was expressly held immune from liability for any deficits that may arise in the course of the conduct of the operatic performances. *Bernstein v. City of Pittsburgh*, 366 Pa. 200, 77 A. 2d 452 (1951).

### PROPER GOVERNMENTAL PURPOSE

It is clearly the intention of the Legislature, as evidenced by its passage of Act 292 of 1974, that the rehabilitation of low to middle income housing be considered a proper governmental purpose to be undertaken by municipalities. Although subject to judicial review, such legislative intention is entitled to a prima facie acceptance of its correctness by the court. *Dornan v. Philadelphia Housing Authority*, 331 Pa. 209, 200 A. 834 (1938). In addition, the Legislature has determined in both the Housing Authorities Law, Act of May 28, 1937, P. L. 955, as amended, 35 P. S. § 1541 *et seq.*, and the Urban Redevelopment Law, Act of May 24, 1945, P. L. 991, as amended, 35 P. S. § 1701 *et seq.*, that it is a legitimate public purpose for the health, safety and welfare of the citizens of the Commonwealth to remove the blighted conditions of unsafe, unsanitary, inadequate, or overcrowded dwellings by such means as the rehabilitation of those dwellings. This public purpose has been constitutionally upheld by our Supreme Court. See *Dornan v. Philadelphia Housing Authority*, *supra*; *Belovsky v. Redevelopment Authority of the City of Philadelphia*, 357 Pa. 329, 54 A. 2d 277 (1947).



Therefore, it is our opinion that the rehabilitation of low to middle income housing by Pennsylvania municipalities is a proper governmental purpose, pursuant to the authorization of Act 292 of 1974, which does not contravene Article IX, § 9 of the Pennsylvania Constitution.

### REDEVELOPMENT AUTHORITY

You have asked us whether Pennsylvania municipalities may empower local redevelopment authorities to act as agents in implementing programs of housing rehabilitation in their communities. It is our opinion that they may do so.

Under the Urban Redevelopment Law, redevelopment authorities are empowered to undertake programs of "redevelopment." "Redevelopment" is defined to include "... carrying out plans for a program of voluntary repair, rehabilitation, and conservation of real property, buildings or other improvements in accordance with the redevelopment area plan." Therefore, redevelopment authorities are empowered to undertake housing rehabilitation. However, these activities are restricted to redevelopment areas and in accordance with the redevelopment area plan. 35 P. S. § 1703(m).

Section 9(d) of the Urban Redevelopment Law, 35 P. S. § 1709(d) empowers Redevelopment Authorities to "act as agent of the State or Federal Government or any of its instrumentalities or agencies for the public purposes set out in this act. . . ."

In addition, Section 6.1 of the Act of May 24, 1945, P. L. 982, known as the "Redevelopment Cooperation Law," provides *inter alia*:

"The Commonwealth, any State public body or private entity by written agreement approved by the governing body of the city or county, as the case may be, may designate a redevelopment authority as its agent within the authority's field of operation to perform any specified activity or to administer any specified program which the Commonwealth, such State public body or private entity is authorized by law to do. Provided, however, that any such activities or programs shall be in furtherance of the public purposes specified in the Urban Redevelopment Law of this Commonwealth. Such activities may include, without being limited to, redevelopment, renewal, *rehabilitation, housing*, conservation, urban beautification or comprehensive programs for the development of entire sections or neighborhoods. . . ." (Emphasis added.)

The above cited sections, in our opinion, provide ample authority for Pennsylvania municipalities to authorize local redevelopment authorities to act as their agents in carrying out their power under Act 292 of 1974 to provide programs of housing rehabilitation. Pursuant to the powers of the municipalities, these programs may be undertaken on a community wide basis and therefore are not limited to redevelopment areas.

Redevelopment authorities have been held to be purely administrative bodies and not "special commissions" or "private corporations" within the meaning of Article III, § 31 of the Pennsylvania Constitution, which prohibits the Legislature from delegating to any special commission or private corporation any power to make, supervise, or interfere with any municipal improvement or to perform a municipal function. *Belovsky v. Redevelopment Authority of the City of Philadelphia, supra*.

### HOUSING AUTHORITIES

You have also asked us whether Pennsylvania municipalities may authorize local housing authorities to be their agents in undertaking their powers of housing rehabilitation under Act 292 of 1974. It is our opinion that they may do so.

Section 2 of the Act of May 28, 1937, P. L. 955, known as the Housing Authorities Law, 35 P. S. § 1541 *et seq.* provides, *inter alia*, that one of the public purposes for which housing authorities are established is:

"The providing of safe and sanitary dwelling accommodations for persons of low income through new construction or the reconstruction, restoration, reconditioning, remodeling or repair of existing structures. . . ."

Section 22.1 of the Act, as added by the Act of June 5, 1947, P. L. 449, 35 P. S. § 1562.1, provides *inter alia*:

"In addition to the powers conferred upon an Authority by other provisions of this act, an Authority is empowered to act as agent of the State, or any of its instrumentalities or agencies, for the public purposes set out in this act."

In addition, the Act of May 26, 1937, P. L. 888, known as the Housing Cooperation Law, 35 P. S. § 1581 *et seq.*, authorizes Pennsylvania municipalities to expend such of their funds as they deem appropriate in aiding and cooperating with housing authorities in the exercise of the work or undertakings of any such authority.

Like redevelopment authorities, housing authorities have been held not to be special commissions or private corporations within the meaning of Article III, § 31 of the Pennsylvania Constitution. *Dornan v. Philadelphia Housing Authority, supra*.

Therefore, Pennsylvania municipalities may lawfully authorize local housing authorities to act as their agents in undertaking their programs of housing rehabilitation.

### NON-PROFIT CORPORATIONS

You have asked us whether a municipality may lawfully authorize a non-profit corporation to undertake the housing rehabilitation program. Our answer to this question would depend on the specific factual situation of each municipal program. In general, private corporations may only be authorized to undertake the mere details of administration.

Article III, § 31 of the Pennsylvania Constitution provides *inter alia*:

"The General Assembly shall not delegate to any special commission, private corporation or association any power to make, supervise, or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever."

This section has been held to extend to municipal governments as well as the General Assembly, *Robinson v. City of Philadelphia*, 400 Pa. 80, 161 A. 2d 1 (1960), and to apply to proprietary as well as governmental functions, *Lighton v. Township of Abington*, 336 Pa. 345, 9 A. 2d 609 (1940).

In general, the non-profit corporation would only be able to undertake fact finding and other purely administrative functions. The program itself should be conducted under the direct supervision of a public body or public officer. Adequate standards must be established for the implementation of the program by the legislative body of the municipality and all acts must have the required approval of that elected body.

We would suggest that the solicitor for the municipality carefully scrutinize any plans which would include the use of a nonprofit corporation in undertaking a program of public housing rehabilitation to insure that it does not violate the terms of Article III, § 31.

### **SPECIFIC PROGRAMS**

We do not attempt herein to outline or discuss the details of the many possible means by which municipalities may decide to implement their programs of housing rehabilitation. The specific details of each program should be reviewed by the municipal solicitor for other legal difficulties and requirements. We do note that all Pennsylvania municipalities have the power, pursuant to their municipal codes, to acquire and sell (by means other than eminent domain) real property. However, in so doing, the municipalities must follow the procedural requirements of their enabling legislation.

In addition, we note that rehabilitation of housing is authorized only for low and middle income citizens. Therefore, municipal programs of housing rehabilitation must have reasonable income limitation standards.

To alleviate other possible legal problems, we recommend that rehabilitation loan and grant programs be limited to owner occupied dwellings.

### **CONCLUSION**

For the above stated reasons, we are of the opinion, and you are hereby advised:

(1) That Pennsylvania municipalities have the power, pursuant to Act 292 of 1974, to undertake programs of rehabilitation of low to middle income housing within their boundaries;

(2) That Article IX, § 9 of the Pennsylvania Constitution does not prohibit such housing rehabilitation programs;

(3) Municipalities may authorize public bodies such as redevelopment authorities and housing authorities to act as their agents in implementing housing rehabilitation programs; and

(4) Non-profit corporations may be authorized by municipalities to assist in housing rehabilitation programs only to the extent of providing administrative services.

Very truly yours,

WILLIAM J. ATKINSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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#### OFFICIAL OPINION NO. 75-24

*Controlled Substance, Drug, Device & Cosmetic Act—Burden of Establishing Whether One who Delivers Controlled Substances is Exempt from Penalties Because of Being Licensed.*

1. The Commonwealth does not have the burden of establishing that a defendant who delivered a controlled substance did so without a license.

Harrisburg, Pa.  
July 30, 1975

Colonel James D. Barger  
Commissioner, Pennsylvania State Police  
Harrisburg, Pennsylvania

Dear Colonel Barger:

You have inquired as to whether the Commonwealth is required, in prosecutions under the Controlled Substance, Drug, Device & Cosmetic Act of April 14, 1972, P. L. 233, § 13(a) (30), 35 P. S. § 780—113(a) (30) (hereinafter The Controlled Substance Act), to plead and prove that the defendant is not registered under the Act or licensed as a practitioner by the appropriate State board.

You are advised that the Commonwealth is not so required and that Section 21 of The Controlled Substance Act places the burden of proving such status upon the defendant.

The Pennsylvania Supreme Court's decision in *Commonwealth v. McNeil*, 461 Pa. 709, 337 A. 2d 840 (1975), that lack of a license to carry a firearm is an element of the criminal offense defined by Section

628(e) of the Uniform Firearms Act of June 24, 1939, P. L. 872, § 628(e), as amended, 18 P. S. § 4628(e), which must be proved by the Commonwealth, does not control the issue of the burden of proof under The Controlled Substance Act.

It is important to note that in *McNeil* the Court did not overturn, either expressly or *sub silentio*, prior Pennsylvania cases under the Drug, Device & Cosmetic Act of 1961 and the Anti-Narcotics Act of 1917, which cases placed the burden of proving any exemption or exception on the defendant. *Commonwealth v. Aikens*, 179 Pa. Superior Ct. 501, 118 A. 2d 205 (1955); *Commonwealth v. Higgs*, 51 Luz. Reg. 223 (1961); *Commonwealth v. Buck*, 33 Northumb. L. J. 42 (1960).

The Court was persuaded to reach its conclusion in *McNeil* on the basis of the structure of the statute and the nature of the prohibition. Both points distinguish the two acts; therefore, the *McNeil* holding is limited to the Uniform Firearms Act.

Section 628(e) of the Uniform Firearms Act, 18 P. S. § 4628(e),<sup>1</sup> provides:

"No person shall carry a firearm in any vehicle or concealed on or about his person, except in his place of abode or fixed place of business, without a license therefor as hereinafter provided."

Section (13(a)(30) of The Controlled Substance Act, 35 P. S. § 780-113(a)(30) prohibits:

"... the ... delivery ... of a controlled substance by a person not registered under this act, or a practitioner not registered or licensed. . . ."

Although both statutes exempt a certain class of persons of a particular status, i.e., license-holders, from the operation of the statute, Section 21 of The Controlled Substance Act, 35 P. S. § 780-121 further provides:

"In any prosecution under this act it shall not be necessary to negate any of the exemptions or exceptions of this act in any complaint, information or trial. The burden of proof of such exemption or exception shall be upon the person claiming it."

The Uniform Firearms Act contains no provision which expressly allocates the burden of proving statutory exceptions and exemptions to the defendant. In the area of proving a license to possess controlled substances, Section 21 puts into statutory form what had been the common law rule. See *9 Wigmore on Evidence* (3rd ed.), Section 2512,

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1. This section is now located at 18 Pa. C. S. § 6106(a).

n. 4, p. 417. The reasoning is based upon the proposition that the burden of proof ought to be allocated to the party in the best position to prove the fact. Under most circumstances, and under Section 13(a)(30), the person pleading an affirmative defense is in the best position of proving the existence of that defense.

The Section 21 exemptions and exceptions are not to be confused with elements of the crime for which the Commonwealth clearly has the burden of proof. *Commonwealth v. Stoffan*, 228 Pa. Superior Ct. 127, 323 A. 2d 318 (1974). In *Stoffan*, the Superior Court held that the Legislature had not intended to include actual elements of a crime within the "exceptions" clause of Section 21. Section 13(a)(14) prohibits the prescription of controlled substances "except after a physical or visual examination . . . or except where the practitioner is satisfied by evidence that the person is not a drug dependent person." According to the Superior Court, these "except" clauses do not define defenses, but rather define necessary elements of the crime of unlawful prescription which the Commonwealth must prove.

However, the Section 13(a)(14) "except" clauses are distinguishable from the license or registration exception in Section 13(a)(30), a distinction which Judge Spaeth recognized in his opinion in *Stoffan*. Section 13(a)(30) involves a question of mere status, while Section 13(a)(14) involves a practitioner's method of practice, a much heavier burden for a defendant to carry.

The test applied in *Stoffan* was adopted from *Commonwealth v. Neal*, 78 Pa. Superior Ct. 216 (1922) which held that where an exception is incorporated in a statute defining an offense, if the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, then an indictment must allege enough to show that the accused is within the exception. Otherwise, reference to it may be omitted. *Id.* at 219. By application of this test, the offense in Section 13(a)(30) could be accurately and clearly described without reference to the license-holder exception. But without reference to the standards by which prescriptions must be based, the offense in Section 13(a)(14) could not be.

Therefore, Section 21 applies to the license exception in 13(a)(30) which sufficiently distinguishes it from the Uniform Firearms Act interpreted in *McNeil*, *supra*.

The nature of the prohibition in the Uniform Firearms Act, Section 628(a), 18 P. S. § 4628(e), is also distinguishable from that in The Controlled Substance Act, Section 13(a)(30), 35 P. S. § 780-113(a)(30). The legislative intent in the former is not to prohibit generally the possession of firearms, but rather to encourage the licensing of firearms. But since the latter contains an outright proscription of possession with intent to deliver and delivery of controlled substances and is not primarily designed to compel registration, the exceptions to the outright proscription need not be negated by the

Commonwealth. See *U. S. v. Young*, 422 F. 2d 302, n. 11 (8th Cir. 1970).

The correct statement of law on this point is to be found in *Commonwealth v. Williams*, 74 Lack. Jur. 150 (1973), in which it was held that the defendant had the burden of proving Section 13(a) (30) exceptions on the basis of Section 21.

The federal cases are in accordance with this reasoning. Exceptions to general provisions defining the elements of an offense need not be negated by the government and one who relies upon such an exception must set it up and establish it. *McKelvey v. U. S.*, 260 U. S. 353, 357 (1922). Prior to 1970, the federal drug laws contained no provision analogous to Section 21. Nevertheless, the federal courts interpreted statutes analogous to Section 13(a) (30) as allocating the burden of proving exceptions of status to the defendant. *U. S. v. Rowlette*, 397 F. 2d 475 (7th Cir. 1968) (interpreting 21 U. S. C. § § 360a(c), 360a(d) (3). Exceptions for personal use, administration to animals, and for physicians. Repealed. Pub. L. 91-513, Title II, Section 701(a), Oct. 27, 1970, 84 Stat. 1281).

See *U. S. v. Undetermined Quantities of Depressant or Stimulant Drugs*, 282 F. Supp. 543, 545 (D. Fla. 1968), interpreting the same provisions, where the court wrote:

"... it is unreasonable in the absence of a statutory command to force the government to negative possible exemptions of all potential and perhaps unknown claimants when the facts concerning exemptions are particularly within the knowledge of potential claimants."

See also, *Tritt v. U. S.*, 421 F. 2d 928 (10th Cir. 1970); *U. S. v. Reiff*, 435 F. 2d 257 (7th Cir. 1970); and *U. S. v. White*, 463 F. 2d 18 (9th Cir. 1972) (defendant must affirmatively plead valid physician's prescription).

21 U. S. C. § 885(a) (1) now provides that the defendant has the burden of going forward with the evidence on exceptions and exemptions under The Controlled Substances Act, Pub. L. 91-513, Title II, October 27, 1970, 84 Stat. 1242 *et seq.*, 21 U. S. C. § § 801-904. 21 U. S. C. § 885(b) provides specifically that the burden of going forward with evidence as to being a holder of an appropriate registration or order form is on the defendant under The Controlled Substances Act.

Allocating to the defendant the burden of proof as to exceptions and exemptions does not violate the defendant's Fifth Amendment privilege against self-incrimination, since he may prove his license by means other than testifying himself. *Rowlette, supra*; *U. S. v. Kelly*, 500 F. 2d 72 (7th Cir. 1974).

Accordingly, you are advised that the Commonwealth is not required to plead or prove that a defendant under Section 13(a) (30) of The

Controlled Substance Act is not registered under the act or licensed as a practitioner by the appropriate State board.

Sincerely yours,

JOSEPH H. REITER  
*Special Deputy Attorney General*  
*Director, Office of Drug*  
*Law Enforcement*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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OFFICIAL OPINION No. 75-25

*Department of Transportation—Bureau of Accident Analysis—Fair Credit Reporting Act.*

1. The Bureau of Accident Analysis of the Pennsylvania Department of Transportation is a consumer reporting agency under the Federal Fair Credit Reporting Act.
2. The Bureau must comply with the requirements of the Act.

Harrisburg, Pa.  
August 7, 1975

Honorable Jacob G. Kassab  
Secretary of Transportation  
Harrisburg, Pennsylvania

Dear Secretary Kassab:

You have requested our opinion as to whether The Fair Credit Reporting Act is applicable to the Bureau of Accident Analysis and, if so, whether the Bureau is in compliance with the provisions of that law. It is our opinion, and you are hereby advised, that the Bureau of Accident Analysis is covered by The Fair Credit Reporting Act and the Bureau has failed to comply with the Act as required by law.

The Fair Credit Reporting Act, 15 U. S. C. § 1681, *et seq.*, applies to consumer reporting agencies. Section 603(f) of the Act, 15 U. S. C. § 1681a(f), defines the term "consumer reporting agency" as:

"Any person which, for monetary fees, dues, or on a co-operative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."



The term "person," as used in The Fair Credit Reporting Act, includes a "... government or governmental subdivision or agency or other entity." Section 603(b), 15 U. S. C. § 1681a(b).

The Act defines a consumer report as:

"Any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing; credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes. . . ." Section 603(d), 15 U. S. C. § 1681a(d).

The Operator Information Service, Bureau of Accident Analysis, PennDOT, has been set up to supply information to the public under Section 1402 of the Vehicle Code, Act of April 29, 1959, P. L. 58, as amended, 75 P. S. § 1402, which mandates the sale of operator records to the general public. According to a report by that Bureau dated May 3, 1974, 97 per cent of all requests are large volume users, corporations, large agencies and companies. These large volume users sell the information to insurance companies, credit agencies, and employers. The major users are automobile insurance companies which use this data to evaluate insurability and to establish premium rates. In Pennsylvania, the purpose of collecting information on consumers by the Operator's Information Service results in the distribution of such information to third parties engaged in commerce.

The Federal Trade Commission, whose duty it is to administer The Fair Credit Reporting Act, has rendered an advisory interpretation on the applicability of the Act to State agencies charged with the duty of compiling and disseminating motor vehicle reports. 16 C. F. R. § 600.1-600.6 (Federal Register, Vol. 39, No. 37, 4945, February 23, 1973). In part the opinion states:

"(b) It is the Commission's view that, under the circumstances in which such a State motor vehicle report contains information which bears on the 'personal characteristics' of the consumers; that is, when the report refers to an arrest for drunk driving, such reports sold by a department of motor vehicles are 'consumer reports' and the agency is a 'consumer reporting agency' when it sells such reports.

\* \* \*

(d) We believe that there is no basis for granting State motor vehicle departments an exemption from the definition of 'consumer reporting agency.' (Section 603(f).) The reports clearly contain information 'bearing on a consumer's . . . character, general reputation, personal characteristics, or mode of living,' and when they are used 'as a factor in establishing the consumer's eligibility for . . . insurance' (Section 603(d)), the FCRA should apply."

The important consideration is not the purpose of gathering the information, but the nature of the information furnished and the sources to which it is communicated. An Oregon Attorney General Opinion, dated April 30, 1974, makes the same distinction and finds its motor vehicles division qualifying as a "consumer reporting agency." It is improbable that Congress intended to exempt state agencies from compliance with the Act in an area where careless or inaccurate reporting could have such detrimental effects on the consumer.

The purpose of The Fair Credit Reporting Act is to protect consumers from the circulation of inaccurate or arbitrary information bearing on the individuals prospects for employment, credit or insurance. *Porter v. Talbot Perkins Children's Services*, 355 F. Supp. 174 (S. D. N. Y. 1973.). In keeping with this purpose, it is our determination that the Bureau of Accident Analysis is a consumer reporting agency governed by The Fair Credit Reporting Act.

The Bureau must comply with several statutory mandates in order to satisfy the requirements of the Act. Upon request of any consumer, it must disclose the nature and substance of any information it maintains on that consumer at that time, the recipients of that information and, in most cases, the source of the information, Section 609(a), 15 U. S. C. § 1681g(a); a trained person must be provided by the Bureau to explain to the consumer any information required to be furnished to him, Section 610, 15 U. S. C. § 1681h(c); if the accuracy of the information is disputed it must comply with the Act's reinvestigation procedures, Section 611, 15 U. S. C. § 1681i; meet the obsolescence requirements limiting arrest records to seven years, Section 605, 15 U. S. C. § 1681c(a)(5); establish and follow procedures assuring maximum possible accuracy of information, Section 607(b), 15 U. S. C. § 1681e(b); restrict access to reports to qualified users and qualified purposes, Section 607, 15 U. S. C. § 1681e(a). You have informed us that several of these requirements are not now being satisfied.

In conclusion, it is our opinion that the Bureau of Accident Analysis of the Pennsylvania Department of Transportation is a consumer reporting agency under The Fair Credit Reporting Act and, therefore, governed by its provisions. Accordingly, the Bureau must either discontinue its activities as a consumer reporting agency by ceasing the practice of supplying driver information for a charge, or if it continues such activities it must comply with the statutory mandates of the Act.

Very truly yours,

W. WILLIAM ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

## OFFICIAL OPINION No. 75-26

*Workmen's Compensation—Children's Benefits—Illegitimates—Department of Labor and Industry—Constitutional Law—Equal Protection.*

1. The denial of Workmen's Compensation benefits to illegitimate children who cannot show dependency on the decedent employe violates the Equal Protection Clause of the United States Constitution where no such showing is required of legitimate children.

Harrisburg, Pa.  
August 25, 1975

Honorable Paul Smith  
Secretary of Labor & Industry  
Harrisburg, Pennsylvania

Dear Secretary Smith:

There is currently pending in the United States District Court for the Eastern District of Pennsylvania a case which challenges the constitutionality of Section 307 of the Workmen's Compensation Act, Act of June 2, 1915, P. L. 736, 77 P. S. § 562, which provides:

"compensation shall be payable under this section to or on account of any child, brother or sister, only if and while such child, brother or sister, is under the age of eighteen. . . . If members of decedent's household at the time of his death, the terms 'child' and 'children' shall include step-children, adopted children and children to whom he stood in loco parentis. . . ."

The suit alleges that this section has been applied so as to discriminate against illegitimate children. It is our opinion and you are so advised that it is a violation of the Equal Protection Clause of the United States Constitution to treat illegitimates differently from legitimates under Section 307, and that henceforth awards should be made without regard to this factor.

In the past this section has been interpreted (without a determination as to constitutionality) to mean that legitimate children are entitled to compensation without regard to residence with or dependence upon the decedent. On the other hand, illegitimates cannot receive compensation without a showing that the decedent stood in *loco parentis* to such child and that the child was a member of decedent's household at the time of death. *Cairgle v. American Radiator & Stand. San. Corp.*, 366 Pa. 249, 77 A. 2d 439 (1951); *Irby Construction Co. v. Workmen's Comp. App. Bd.*, 9 Pa. Commonwealth Ct. 591, 308 A. 2d 924 (1973).

A similar issue was raised in the case of *Jimenez v. Weinberger*, 417 U. S. 628 (1974). The court there determined that a presumption in favor of the dependency of legitimates for determination of eligibility for Social Security benefits could not constitutionally be denied to illegitimate children. Quoting from the earlier case of *Weber v. Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972), the court in *Jimenez* noted that:

"The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. . . . Court are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where . . . the classification is justified by no legitimate state interest, compelling or otherwise." 417 U. S. at 632.

The practical effect of Pennsylvania law as presently construed is to establish a similarly limited presumption in workmen's compensation cases. A legitimate child need not show actual dependence on the support of its natural father. Certain classes of illegitimates, however, must show such dependence or that the father stood in *loco parentis*. This reading of the effect of Section 307 places the statute in direct conflict with the holding in the *Jimenez* case.

However, the policy underlying Section 307 appears to be divorced from the question of dependency. Ordinarily a workmen's compensation claimant must prove dependence; however, "[a] child's right to receive compensation arises from his status as a child of the employe and actual dependency upon the deceased is not required." *Mohan v. Publicker Industries, Inc.*, 202 Pa. Superior Ct. 581, 583, 198 A. 2d 326, 327 (1964); *Nordmark v. Indian Queen Hotel Co.*, 104 Pa. Superior Ct. 139, 143, 159 A. 200, 202 (1932). Thus, the purpose to be served is much broader than the protection of dependents. The Pennsylvania court have stated that a person's status as a child is independently the basis upon which the Legislature has decided to provide compensation. Faced with this broad policy statement no reasonable state interest can be advanced by the distinction made between legitimates and illegitimates. The state has announced as its public policy the provision of workmen's compensation benefits for children without regard to dependency; and one's status as a child is not affected by the failure of his parents to undergo a marital ceremony.

Thus, both the practical and the theoretical applications of Section 307 conflict with the holding in the *Jimenez* case. Therefore, so long as the Commonwealth does not make dependency a condition for the receipt of workmen's compensation benefits by legitimates it may not impose such a condition on such receipt by illegitimates.

Very truly yours,

LAWRENCE SILVER  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

## OFFICIAL OPINION No. 75-27

*Liquor Code—Distributors and Importing Distributors.*

1. The Liquor Control Board does not have the discretion to refuse the issuance or transfer of a distributor's or importing distributor's license if the conditions of Section 431(b), 47 P. S. § 4-431(b) and other provisions of the Liquor Code are met.
2. With regard to such licenses, the Board may not consider evidence of the proximity of the premises to other licensed premises, or to charitable institutions, or of the effect of the licensed premises on the welfare of the neighborhood.

Harrisburg, Pa.  
September 2, 1975

Honorable Henry H. Kaplan  
Chairman, Liquor Control Board  
Harrisburg, Pennsylvania

Dear Mr. Kaplan:

We have a request for an opinion from the Chief Counsel of your Board as to whether the Board has discretion to refuse the grant of a new distributor's or importing distributor's license or the transfer of an existing license if the location of the premises to be licensed (1) is within 200 feet of other licensed premises; (2) is within 300 feet of a church, hospital, charitable institution, school or public playground; or (3) would be detrimental to the welfare, health, peace and morals of the neighborhood within a radius of 500 feet of the place to be licensed. It is our opinion and you are advised that the Board does not have such discretion.

Section 431(b) of the Liquor Code, 47 P. S. § 4-431(b) provides:

"(b) The board *shall issue* to any reputable person who applies therefor, pays the license fee hereinafter prescribed, and files the bond hereinafter required, a distributor's or importing distributor's license for the place which such person desires to maintain for the sale of malt or brewed beverages, not for consumption on the premises where sold. . . . And provided further, That the board shall have the discretion to refuse a license to any person or to any corporation . . . [who] shall have been convicted or found guilty of a felony within a period of five years immediately preceding the date of application for the said license."

The language quoted is not discretionary language (except with regard to an applicant convicted of a felony) but requires the Board to issue the license if all of the conditions are met. There are no 200 foot, 300 feet, or 500 feet criteria applicable to distributors or importing distributors. Such criteria are applicable only to hotels, restaurant or club liquor licenses (47 P. S. § 4-404) and to malt and brewed beverages retail dispensers' licenses (47 P. S. § 4-432(d)).

In the case of *In Re Obradovich's Appeal*, 386 Pa. 342, 126 A. 2d 435 (1956) the court held that where an applicant for a restaurant liquor license met all the requirements of the Code both as to the physical aspects of the licensed premises and the reputation and fitness of the applicant, the Board did not have the discretion to consider matters other than the requirements set forth in the Code. Therefore, the Board could not refuse the transfer of the license because of the protests of the neighbors or other considerations. The Court went on to say that the Board's discretion in approving or disapproving the transfer of a license is no greater than its discretion with regard to the original issuance of the license.

Accordingly, it is our opinion, and you are advised, that the Board does not have the discretion to refuse the issuance or transfer of a distributor's or importing distributor's license if the conditions of Section 431(b) and other provisions of the Code are met and the Board may not consider evidence of the proximity of the premises to other licensed premises, or to charitable institutions or of the effect of the licensed premises on the welfare of the neighborhood.

Very truly yours,

W. W. ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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#### OFFICIAL OPINION No. 75-28

##### *Liquor Control Board—Licenses—Limited Wineries.*

1. A limited winery may be licensed to produce wine at more than one location.
2. The transportation of bulk wine in bond between two locations of the same limited winery is lawful.

Harrisburg, Pa.  
September 2, 1975

Honorable Henry H. Kaplan  
Chairman, Liquor Control Board  
Harrisburg, Pennsylvania

Dear Mr. Kaplan:

You have asked whether limited wineries licensed by the Liquor Control Board may have more than one licensed premises and whether the limited winery licensee may move bulk wine in bond from the

original premises to a remote location which is owned by the same company and covered by the license. Our answer is yes to both questions.

The Liquor Code defines a "limited winery" to be "a winery with a maximum output of one hundred thousand (100,000) gallons per year." 47 P. S. § 1-102.

The term "winery" as defined by the Code "shall mean and include any *premises and plants* where any alcohol or liquor is produced by the process by which wine is produced, or *premises and plants* wherein liquid such as wine is produced; and shall include the manufacture by distillation of alcohol from the by-products of wine fermentation. . . ." 47 P. S. § 1-102. (Emphasis supplied.)

Thus, a limited winery constitutes premises and plants where wine and other alcoholic liquids are produced by the wine making process up to 100,000 gallons per year.

Section 505 of the Liquor Code, 47 P. S. § 5-505, authorizes the Liquor Control Board to issue "a license to engage in, (a) the operation of a limited winery or a winery; . . ." Section 505.2 of the Liquor Code, 47 P. S. § 5-505.2, permits the holder of a limited winery license to "[s]ell wine produced by the limited winery on the licensed premises, under such conditions and regulations as the board may enforce, to the Liquor Control Board, to individuals and to hotel, restaurant, club and public service liquor licensees."

Section 511 of the Liquor Code, 47 P. S. § 5-511 provides:

"Every license issued under the provision of this article shall specify by definite location *every place to be occupied or used* in connection with the business to be conducted thereunder. It shall be unlawful for the holder of any license to occupy or use any place in connection with any business authorized under a license other than the *place or places designated therein*." (Emphasis supplied.)

It is evident from the language of Section 511 that the Legislature contemplated that activities authorized by a licensee could be carried on at more than one location. "Every place to be occupied or used" implies more than one place as does the reference to "place or places designated therein." Similarly, the definition of a "winery" quoted above refers to "premises and plants" where wine, etc. is produced. Additionally, Section 504, 47 P. S. § 5-504 requires an application for a license to set forth:

"2. The exact location of said place of business and of every place to be occupied or used in connection with such business. . . ."

Accordingly, it is our opinion that a limited winery may carry on its activities at more than one location as long as its activities at all locations constitute the production of wine or other alcoholic liquids by the wine making process and as long as the total production at all locations does not exceed 100,000 gallons per year.

With regard to the transportation of bulk wine in bond from one location to another, Section 491 of the Liquor Code, 47 P. S. § 4-491, provides in part:

‘It shall be unlawful—

\*                      \*                      \*

(2) Possession or Transportation of Liquor or Alcohol. For any person, except a manufacturer or the board or the holder of a sacramental wine license or of an importer’s license, to possess or transport any liquor or alcohol within this Commonwealth which . . . has not been purchased from a Pennsylvania Liquor Store or a licensed limited winery in Pennsylvania. . . .”

While technically the transportation of wine from one location to another of the same limited winery may be said to come within the prohibition of Section 491, since the wine is not purchased from a Pennsylvania Liquor Store or licensed limited winery, the same thing could be said of the possession by a limited winery of its own wine. It is absurd to think that the Legislature intended to make unlawful the possession by a limited winery of its own wine because it was not purchased from a Pennsylvania Liquor Store or a licensed limited winery. We believe that the Legislature also did not intend to prohibit the transportation of wine between different locations of the same limited winery. This means that wine may be produced at more than one location and that one location could be utilized by the licensee pursuant to Section 505.2 for the sale of wine produced at all locations.

In conclusion, it is our opinion and you are advised that a limited winery may be licensed to produce wine at more than one location and the transportation of bulk wine in bond between two locations of the same limited winery is lawful.

Very truly yours,

W. W. ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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### OFFICIAL OPINION No. 75-29

#### *Liquor Control Board—Limited Partnership—Residence.*

1. A limited partnership (as well as a general partnership) is classified neither as a natural person nor a corporation for purposes of the residence requirements of hotel, restaurant or club licenses and for such licenses there are no residence requirements applicable to partnerships at all.
2. Where a corporation is the general partner in a limited partnership, the provisions of Section 403(c) of the Liquor Code are not applicable.



Harrisburg, Pa.  
September 23, 1975

Honorable Henry H. Kaplan  
Chairman, Liquor Control Board  
Harrisburg, Pennsylvania

Dear Mr. Kaplan:

You have asked for our opinion as to whether a limited partnership is considered a natural person or a corporation with respect to the residence requirements of Section 403 of the Liquor Code, 47 P. S. § 4-403. It is our opinion that a limited partnership is not considered a natural person or a corporation for such purpose and that there are no residence requirements for limited partnerships at all.

Section 403 of the Liquor Code sets forth the requirements of applicants for a hotel liquor license, restaurant liquor license or club liquor license or for the transfer of an existing license. Subsections (b), (c) and (d) of Section 403 provide:

“(b) If the applicant is a natural person, his application must show that he is a citizen of the United States and has been a resident of this Commonwealth for at least two years immediately preceding his application.

“(c) If the applicant is a corporation, the application 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.

“(d) Each application shall be signed and verified by oath or affirmation by the owner, if a natural person, *or in the case of an association by a member or partner thereof*, or, in the case of a corporation, by an executive officer thereof or any person specifically authorized by the corporation to sign the application, to which shall be attached written evidence of his authority.” (Emphasis supplied.)

Since partnerships are not mentioned with respect to residence or citizenship<sup>1</sup> requirements, it must be determined whether the Legislature intended partnerships to be considered as a collection of natural persons, all of whom must meet the two year residence requirements, or whether it intended partnerships merely to register in Pennsylvania and meet the citizenship requirements applicable to corporations, or whether it intended no residence, citizenship or registration requirements to apply to partnerships at all.

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1. The citizenship requirements of subsections 403(a) and (c), 47 P. S. § 4-403(a) & (c), were determined by the Attorney General to be unconstitutional. See Official Opinions Nos. 23 and 48 of 1974, 4 Pa. Bulletin 964, 2152.

The key to the legislative intent is found in subsection (d) above, which makes a distinction between a natural person, an association and a corporation for purposes of executing the application.<sup>2</sup> An association is defined in the Liquor Code as follows:

“‘Association’ shall mean a partnership, limited partnership or any form of unincorporated enterprise owned by two or more persons.” 47 P. S. § 1-102.

Since subsection (d), which treats associations as distinct from natural persons and corporations, follows closely on the heels of subsections (b) and (c), which provide residence and citizenship requirements for natural persons and corporations, it must be presumed that the Legislature intended to exclude associations from residence or citizenship requirements; otherwise it would have specifically provided for them. And since an association is defined to include partnerships and limited partnerships, it follows that there are no residence or citizenship requirements with respect to hotel, restaurant or club licenses for partnerships or limited partnerships. While it may be difficult to understand why the Legislature would impose residence requirements on natural persons and not partnerships, we cannot say it intended to do so when by the plain language of the statute it did not. When the words of a statute are clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. Statutory Construction Act of 1972, § 1921(b), 1 Pa. C. S. § 1921(b).

Therefore, it is our opinion, and you are advised, that a limited partnership (as well as a general partnership) is classified neither as a natural person nor a corporation for purposes of the residence requirements of hotel, restaurant or club licenses and for such licenses there are no residence requirements applicable to partnerships at all.<sup>3</sup>

In addition, to answer your related question, where a corporation is the general partner in a limited partnership, the provisions of Section 403(c) are not applicable. Section 403(c) is applicable only where the applicant is a corporation, but where the applicant is a limited partnership, it does not apply even if a corporation is one of the partners.

Very truly yours,

W. W. ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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2. See also subsection 403(e) which specifically allows an applicant to be an association but makes no provision regarding the residence requirement of its members.

3. Because of the lack of uniformity with natural persons, we suggest the matter be submitted to the Legislature for possible amendment.

## OFFICIAL OPINION No. 75-30

*Act of May 14, 1909, P. L. 838, § 2, 61 P. S. § 55—Right of Official Prison Visitors to Interview Inmates in State and County Correctional Institutions—Equal Rights Amendment.*

1. The statutory provision allowing official prison visitors to interview only inmates of the same sex as the visitor is incompatible with the Equal Rights Amendment of the Pennsylvania Constitution (Article I, § 28).

Harrisburg, Pa.  
September 22, 1975

William B. Robinson, Commissioner  
Bureau of Correction  
Camp Hill, Pennsylvania

Dear Commissioner Robinson:

You have inquired as to whether the Act of May 14, 1909, P. L. 838, § 2, 61 P. S. § 55 is constitutional inasmuch as it forbids an official prison visitor from interviewing an inmate of the opposite sex. You are hereby advised that the statutory provision in question is unconstitutional.

Article I, § 28 of the Pennsylvania Constitution (hereinafter referred to as the Equal Rights Amendment) requires 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.”

Since the adoption of the Equal Rights Amendment in Pennsylvania on May 18, 1971, the Courts of this Commonwealth have consistently and emphatically rejected statutes which discriminate against one sex or the other. In *Conway v. Dana*, 456 Pa. 536, 318 A. 2d 324 (1974), the Pennsylvania Supreme Court set aside a statutory provision which required the father, because of his sex, to bear the principal burden of financial support of minor children. The Court held that such support is a responsibility of both parents and that the Equal Rights Amendment mandated a disregard for any presumption that the father, solely because of his sex, should be liable for the support obligations.

In *Hopkins v. Blanco*, 457 Pa. 90, 320 A. 2d 139 (1974), the Court invalidated the common law principle that only a husband has the right to recover damages for loss of consortium and extended the same right of recovery to the wife. The Court stated that:

“The obvious purpose of the Amendment was to put a stop to the invalid discrimination which was based on the sex of the person. The Amendment gave legal recognition to what society had long recognized, that men and women must have equal status in today’s world.” 457 Pa. at 93, 320 A. 2d at 140.

In *Henderson v. Henderson*, 458 Pa. 97, 327 A. 2d 60 (1974), the Court in a *per curiam* opinion, struck down a statutory provision which

allowed payments of alimony *pendente lite*, counsel fees, and expenses only to the wife-party in a divorce action as violative of the Equal Rights Amendment:

"The thrust of the Equal Rights Amendment is to insure equality of rights under the law and to eliminate sex as a basis for distinction. The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities. The law will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman." 458 Pa. at 101, 327 A. 2d at 62.

In *Commonwealth v. Butler*, 458 Pa. 289, 328 A. 2d 851 (1974), the Court held unconstitutional a section of the Muncy Act which prohibited trial courts from imposing minimum sentences on women convicted of crimes. The Court stated:

"That the purpose of this constitutional provision was to end discriminatory treatment on account of sex is clear. . . . In this Commonwealth, sex may no longer be accepted as an exclusive classifying tool." 458 Pa. at 296, 328 A. 2d at 855.

Most recently, in *Commonwealth v. Pennsylvania Interscholastic Athletic Association*, 18 Pa. Commonwealth Ct. 45, 334 A. 2d 839 (1975), the Commonwealth Court declared sections of the Pennsylvania Interscholastic Athletic Association By-Laws unconstitutional on their face under the Equal Rights Amendment and ordered the PIAA to permit girls to practice and compete with boys in interscholastic athletics. The Court ruled that:

"If any individual girl is too weak, injury-prone, or unskilled she may, of course, be excluded from competition on that basis but she cannot be excluded solely because of her sex without regard to her relevant qualifications." *Id.*, at 52, 334 A. 2d at 843.

Furthermore, in previous Official Opinions of the Attorney General, we have held various statutes that have language similar to the provision here in question to be violative of the Equal Rights Amendment.

*Official Opinion No. 69*, September 27, 1971, held that the Beauty Culture Act, 63 P. S. § 507 *et seq.*, which by its terms precludes males from employing the services of a cosmetologist, cannot stand under the Equal Rights Amendment.

*Official Opinion No. 71*, October 15, 1971, held that sections of the Child Labor Law violated the Equal Rights Amendment by permitting male minors, but not female minors, to distribute newspapers.

*Official Opinion No. 150*, September 27, 1972, held that a portion of the Parole Act which barred persons of one sex from being paroled under the supervision of a parole officer of the opposite sex was unconstitutional under the Equal Rights Amendment.

*Official Opinion No. 41*, June 8, 1973, held that a section of the State Athletic Code which prevented females from being licensed as boxers or wrestlers was violative of the Equal Rights Amendment.

In light of the above cases and opinions of the Attorney General, please be advised that it is our opinion that the questioned provision of 61 P. S. § 55 is incompatible with the Equal Rights Amendment and, therefore, void and unenforceable in all state and county correctional institutions in the Commonwealth of Pennsylvania. Official prison visitors may interview inmates of either sex.

Sincerely yours,

GLENN GILMAN  
*Deputy Attorney General*

ROBERT P. VOGEL  
*Assistant Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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### OFFICIAL OPINION No. 75-31

*Governor—Act 18-A of 1972—Emergency and Disaster Relief—Department of Public Welfare Assistance Appropriation.*

1. Unexpended funds appropriated by Section 1 of the Act of July 7, 1972, No. 18-A, as amended, are legally available for emergency and disaster relief in connection with the current state of extreme emergency caused by flooding and tropical storm disaster.
2. No other funds appropriated by Act 18-A of 1972 may be used in the current crisis.
3. The Department of Public Welfare is mandated to use funds from its current assistance appropriation for administrative, legal, medical, and other assistance expenses in the current emergency.

Harrisburg, Pa.  
September 26, 1975

Honorable Milton J. Shapp  
Governor  
Harrisburg, Pennsylvania

Dear Governor Shapp:

You have asked us to determine whether you may use funds appropriated by the Act of July 7, 1972, No. 18-A, as amended, for general purposes of emergency use in connection with the current state of extreme emergency which you have announced in your Proclama-

tions of Extreme Emergency dated September 25, 1975 and September 26, 1975. It is our opinion, and you are so advised, that those funds appropriated by Section 1 of that Act that have not been expended, are available for use in the current crisis; however, any residual funds appropriated by other sections of the Act may not be used at this time.

The Act in question is entitled "making appropriations for emergency and disaster relief in connection with flooding and tropical storm disaster in the Commonwealth." The Act contains several appropriation sections that clearly are tied to the flood and tropical storm disaster of June 1972 and are not now available. The touchstone of statutory construction is that:

"When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C. S. § 1921(b).

However, as indicated by its title, the entire Act is not so limited to the June 1972 emergency. Specifically, Section 1 gives several different purposes for which the appropriations may be used. In addition to "transportation and for the payment of bills incurred in connection with the above purposes [i.e. tropical storm and flood damage] in the fiscal year ended June 30, 1972," Section 1 states several other available uses of the appropriation, all of which apply to the current flood emergency.

First, Section 1 states that its appropriation is "for emergency and disaster relief *especially* in connection with the tropical storm and flood damage of June, 1972." (Emphasis added.) It must be assumed that the General Assembly added the word "especially" for some reason. The word "especially" is defined in *Websters' Third New International Dictionary* thus: "in a special way: PARTICULARLY NOTABLY, EXCEPTIONALLY." That is, the word "especially" in this context gives one example of a proper use, but does not limit proper use of the funds appropriated. The phrase gives only one notable example of emergency and disaster relief for which the funds may be used.

Second, funds under Section 1 may be used "for emergency use in the alleviation of human hardship and suffering and for the protection of property."

Third, funds under Section 1 may be used "for the reimbursement to various departments and agencies of the Commonwealth for their participation in disaster relief activities, including, but not limited to, materials, supplies, services, food, clothing, equipment, drugs and medicines, channel enlargement, rectification, realignment and side slope protection."

All other appropriations made by the Act are specifically limited to aid in the June 1972 emergency and may not be used at this time. However, as noted above, the failure to tie all of Section 1 to the June 1972 emergency clearly indicates a legislative intent to make an appropriation for emergency and disaster relief in just such a situation as now confronts the Commonwealth.

Furthermore, it should be noted that Section 3 of Act 18-A, which is not an appropriation itself, mandates the Department of Public Welfare to "allocate funds from time to time from the assistance appropriation for administrative expenses of the several county boards of assistance, for such administrative expenses incurred by the department which are chargeable to such boards and for the payment of attorney's (sic) fees and court costs necessary for the proper conduct of the public assistance programs and for the several assistance programs including medical assistance." As this section also is not limited to June 1972, it too applies to the present situation necessitating emergency and disaster relief. That is, the Department of Public Welfare is directed to use its appropriation for the current fiscal year (1975-76) for these specified purposes.

Sincerely,

ROBERT E. RAINS  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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### OFFICIAL OPINION No. 75-32

*Department of Labor and Industry—Wages—Attachment.*

1. The Department of Labor and Industry may not challenge the attachment of the wages of a citizen of Pennsylvania when the citizen has entered into an obligation within a jurisdiction wherein his wages may be legally attached.

Harrisburg, Pa.  
September 30, 1975

Honorable Paul Smith  
Secretary of Labor and Industry  
Harrisburg, Pennsylvania

Dear Secretary Smith:

We have been asked to answer the question of whether to allow the attachment of a Pennsylvania debtor's wages when the debt arises in a foreign jurisdiction wherein the wages may be lawfully attached. In a recent case, a Pennsylvania citizen who incurred a debt in New Jersey requested, in accordance with the Wage Payment and Collection Law, Act of July 14, 1961, P. L. 637, 43 P. S. §§ 260.8, 260.9, that the Pennsylvania Department of Labor and Industry disallow the attachment of his wages earned in Pennsylvania by his employer who does business in both New Jersey and Pennsylvania.

In an Official Attorney General Opinion dated October 5, 1973, 3 Pa. B. 2445, it was determined that it is unlawful for creditors doing business in Pennsylvania to garnish or attach wages of Pennsylvania

employees by obtaining judgments in foreign jurisdictions. Such garnishments are an attempt to circumvent the laws of the Commonwealth and are in violation of Section 5 of the Act of April 15, 1845, P. L. 459, 42 P. S. § 886, and the Act of May 23, 1887, P. L. 164, as amended, 12 P. S. § § 2175, 2176. The latter Act states:

"[I]t shall be unlawful for any person or persons being a citizen or citizens of this Commonwealth, to institute an action on, or to assign or transfer any claim for debt against a resident of this Commonwealth for the purpose of having the same collected by proceedings in attachment in Courts outside of this Commonwealth. . . ."

The Opinion further stated that these "foreign wage attachments" are not entitled to recognition under the Full Faith and Credit Clause of the Constitution, although the underlying judgments are. These "foreign wage attachments" which attempt to circumvent the Pennsylvania Law are dissimilar from the instant case.

Where a debt is incurred by a Pennsylvania citizen, collection of the debt by attachment or garnishment of the debtor's wages by a creditor doing business outside the Commonwealth and in a state wherein there are no laws prohibiting the attachment of wages is lawful. *Bolton v. Pennsylvania Company*, 88 Pa. 261 (1878). In this case, the law of the forum wherein the legal action for attachment is brought is controlling. *Bolton, supra* has been followed in the recent case of *Caddie Homes, Inc. v. Falic*, 211 Pa. Superior Ct. 333, 235 A. 2d 437 (1967), where the Superior Court stated "[I]t has long been the general rule in Pennsylvania and elsewhere that the laws of attachment and exemption are governed by the law of the forum, not the law of the state where the debt arose. The applicability of this doctrine, insofar as it has affected Pennsylvania residents may best be demonstrated by reference to two older cases." The two older cases include *Bolton, supra*.

The law of the forum wherein the legal action takes place determines whether attachments are permitted. Pennsylvania's sister state, New Jersey, allows the attachment of the wages of its citizens. As such, Pennsylvania must give Full Faith and Credit to the law of New Jersey, by honoring the attachment of a Pennsylvanian's wages when his wages are subject to attachment in New Jersey, when the creditor is doing business in New Jersey, and when an action to attach wages is brought in New Jersey. In *Massachusetts Mutual Life Insurance Company v. Central-Penn National Bank of Philadelphia*, 300 F. Supp. 1217 (E. D. Pa. 1969), where an employee's wages were attached in Massachusetts, the federal court discussed the issue at hand. Judge Kraft, in that case, stated that "Pennsylvania will not exempt from attachment wages earned by and due a citizen of Pennsylvania even though all the work was performed in Pennsylvania, where the attachments are valid under the law of such sister state." He cited the *Bolton* case as authority for his decision. In *Massachusetts, supra*, the wages, though earned in Pennsylvania, were paid by the creditor doing business in Massachusetts where wage attachments are lawful.



Section 132 of the Restatement (2d) Conflict of Laws says that in matters of exemption, it is the law either of the "state of the forum" and/or the "state which has the dominant interest" which controls:

"The local law of the forum determines what property of a debtor within the state is exempt from execution unless another state, by reason of such circumstances as the domicile of the creditor and the debtor within its territory, has the dominant interest in the question of exemption. In that event, the local law of the other state will be applied."

Pennsylvania law and policy is consistent with the Restatement. If both debtor and creditor are residents of or doing business within the Commonwealth, then the domiciliary state has the dominant interest and its laws would govern. This principle was well demonstrated in *Bolton, supra* and detailed in the Attorney General Opinion cited above. In the instant case, the creditor is doing business in New Jersey and the debtor's wages are subject to attachment in New Jersey. Therefore, the usual case of the state of the forum being the state which has the dominant interest applies and its laws govern.

Accordingly, it is our opinion and you are hereby advised that the Department of Labor and Industry, which is charged with the enforcement of the Commonwealth's anti-garnishment statute, may not challenge an attachment of the wages of a Pennsylvania citizen when the citizen has entered into an obligation with a creditor in a jurisdiction wherein the wages may be legally and are, in fact, attached. Such recognition and enforcement of another state's garnishment statutes does not violate the intent or the provisions of the Pennsylvania statutes.

EARL DAVID GREENBURG  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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### OFFICIAL OPINION No. 75-33

*Governor's Office—Governor's Power to Fill Judicial Vacancies Occurring Within Ten Months of Next Municipal Election.*

1. Article V, § 13(b) of the Pennsylvania Constitution gives the Governor the power to fill judicial vacancies occurring within ten months of the next municipal election.
2. The Governor may exercise this power regardless of whether or not the vacated office has been or would have been ascertained to be an office to be filled at the ensuing municipal election, as long as such municipal election has not taken place.

3. The term of a district justice who has died or resigned ends upon the occurrence of the vacancy, and the term of the successor appointed by the Governor extends to the first Monday of January following the next municipal election more than ten months after the vacancy occurs.
4. Where a judicial office is filled for a regular term prior to the commencement or completion of the appointment process established by Article V, § 13(b), there no longer exists a "vacancy" in said office as contemplated by Article V, § 13(b).
5. Where vacancies have occurred in district justice offices within ten months of the November 1975 election and have been filled pursuant to the power conferred by Article V, § 13(b) of the Pennsylvania Constitution, the first municipal election at which candidates may be elected to fill said offices is the November 1977 election.

Harrisburg, Pa.  
October 1, 1975

Honorable Milton J. Shapp  
Governor  
Harrisburg, Pennsylvania

Dear Governor Shapp:

You\* have requested our advice regarding the power of the Governor under Article V, § 13(b) of the Pennsylvania Constitution to fill a vacancy in a judicial office occurring within ten months of the next municipal election, and his power to fill such a vacancy once the election machinery has begun to operate.<sup>1</sup> It is our opinion, and you are so advised, that Article V, § 13(b) gives the Governor the power to fill the kind of judicial vacancy described in that section, and that where the Governor has exercised this power and the Senate has confirmed his nominee, any election to fill that office prior to the next municipal election more than ten months after the vacancy occurs would be a nullity.

Article V, § 13(b) provides:

"A vacancy in the office of justice, judge or justice of the peace shall be filled by appointment by the Governor. The appointment shall be with the advice and consent of two-thirds of the members elected to the Senate, except in the case

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\*Editor's note: This opinion was rejected by the Supreme Court of Pennsylvania in *Berardocco v. Colden*, — Pa. —, 366 A. 2d 574 (1976), *rehearing denied* August 17, 1976.

1. This question was raised before the Supreme Court in *Commonwealth ex rel. Berardocco v. Colden* (No. 446; Misc. Docket No. 20), an action in quo warranto brought against your appointee to a vacancy in a district justice of the peace office in Delaware County. After oral argument on September 25, 1975, the Supreme Court issued a *per curiam* order later on the same day dismissing the relator's action in quo warranto. This decision of the Supreme Court is not inconsistent with the conclusions expressed in this opinion, although the Court did not specifically address the merits of the case in its order. Because the question is a recurring one in light of the numerous judicial vacancies which have recently occurred, and given the urgency for a legal opinion due to the nearness in time of the municipal election, we find it necessary to issue this opinion at the present time.

of justices of the peace which shall be by a majority. The person so appointed shall serve for an initial term ending on the first Monday of January following the next municipal election more than ten months after the vacancy occurs."

Pursuant to the constitutional amendment adopted by electorate on May 20, 1975, Article IV, § 8 now requires the Governor to nominate a person to fill a vacancy within ninety days of its occurrence, and requires the Senate to act upon the nomination within twenty-five legislative days of its submission. This procedure applies to appointments to fill judicial vacancies as well as other offices specified in Article IV, § 8.

You have presented us with three factual situations, all involving vacancies in the office of justice of the peace which occurred after January 4, 1975, i.e., within ten months of the next municipal election.<sup>2</sup> You filled the vacancy in District 17 of Delaware County with the nomination of Richard Colden, Jr., who was confirmed by the Senate and subsequently sworn in on June 24, 1975. A second vacancy in District 3 of Crawford County has been filled in a similar fashion by the nomination and subsequent confirmation on June 10, 1975 of Robert J. Leonhart. A third vacancy recently occurred in District 1 of Cumberland County, and on September 9, 1975 you nominated James W. Spotts to fill that vacancy, which nomination has not yet been confirmed by the Senate.

In each instance, the terms of the former district justices were to expire on the first Monday of January, 1976, and the respective county boards of election determined that these were offices to be filled at the November 1975 election and for which candidates were to be nominated at the May 1975 primary. Nomination petitions for these offices were filed in each county, candidates for nomination appeared on the primary ballots, and nominees were selected at the primary.<sup>3</sup> Your inquiry raises the question of whether the operation of this election machinery in any way precludes your exercise of the appointment power conferred by Article V, § 13(b).

The decision of the Pennsylvania Supreme Court in *Rogers v. Tucker*, 443 Pa. 509, 279 A. 2d 9 (1971), is dispositive of this issue. In that case, Governor Raymond P. Shafer appointed the Honorable

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2. District Magistrate Frank T. Hazel of Delaware County resigned on March 10, 1975, District Magistrate Wesley Sliten of Crawford County died on April 5, 1975, and District Magistrate Donald Endres of Cumberland County died on August 7, 1975.
  3. In Delaware County, Richard Colden, Jr. is the Democratic candidate on the November ballot. In Crawford County, Robert J. Leonhart received the nomination of both the Democratic and Republican nominations for district justice. In Cumberland County Donald Endres not only was the incumbent district justice, but had also received the nomination of both parties to appear on the November 1975 ballot. As the following analysis will demonstrate, none of these factual circumstances alters the fundamental constitutional questions regarding the exercise of the Governor's appointment power and the length of the appointee's term.

Theodore O. Rogers to a vacancy on the Commonwealth Court which occurred on January 4, 1971, just two days less than ten months prior to the next municipal election, at which time the seat would have been up for election. The Supreme Court affirmed the lower court decision upholding Judge Roger's actions in mandamus and equity to compel the Secretary of the Commonwealth not to certify his office as subject to election in 1971, and to compel the county commissioners to remove the office from the 1971 municipal election ballot.

Writing for the Court, Chief Justice Jones framed the question in the *Rogers* case as follows:

"What is the date of election for the vacancy on the Commonwealth Court which was created by and occurred at the resignation of Judge Alexander F. Barbieri?" 443 Pa. at 510, 279 A. 2d at 10.

The Court, observing that this presented a close constitutional question, nevertheless rejected the Commonwealth's argument that an appointment by the Governor to fill a judicial vacancy cannot extend beyond the existing term of a resigned judge without infringing on the right of the people to elect judicial officers. In meeting this argument, the Court distinguished between the terms for judge and for executive officers,<sup>4</sup> and stated:

"We do not deny the right of the people to elect a judge of their choice, we merely fixed, in accordance with the Constitution, the time of election when the people shall exercise their choice." 443 Pa. at 517, 279 A. 2d at 14.

Concluding that Article V, § 13(b) is clear and unambiguous, the Court held:

"It follows expressly or by necessary implication that the election to fill the judicial vacancy which occurred on the resignation of Judge Barbieri on January 4, 1971, must be held at the municipal election in November 1973." 443 Pa. at 518, 279 A. 2d at 14.

Similarly, in *Simmons v. Tucker*, 444 Pa. 160, 281 A. 2d 902 (1971), contemporaneously decided with *Rogers*, *supra*, the Supreme Court affirmed the dismissal of an action in mandamus brought to compel the acceptance of a judicial candidate's properly executed nomination papers. The Court held that since a vacancy occurred within ten months of the 1971 municipal election, no election was required that year to fill that office, which had been already filled by gubernatorial appointment.<sup>5</sup>

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4. Compare *Commonwealth ex rel. King v. King*, 85 Pa. 103 (1877).

5. Supreme Court construction of prior constitutional provisions for filling judicial vacancies is in accord with this position. See *Buckley v. Holmes*, 259 Pa. 176, 102 A. 497 (1917); *Commonwealth v. Maxwell*, 27 Pa. 444 (1856). In *Maxwell*, the Court referred to an analogous constitutional provision as: "... the whole, the only provision which this amended article makes for filling vacancies—and it is by executive appointment, and not by popular election." 27 Pa. at 457.

The fact that candidates have been nominated to run for the district justice offices in each of these counties does not affect our conclusion that the Governor may fill the vacancies. The Election Code is the mechanism established by the General Assembly to govern the election process, pursuant to Article VII, § 4 and 6. However, as the Supreme Court recognized in *Buckley v. Holmes, supra*, specific provisions control over those of general application, and Article V, § 13(b) specifically empowers the Governor to fill judicial vacancies for a constitutionally specified term.<sup>6</sup>

Precisely this view recently received judicial approval in *Ernst v. Lehigh County Board of Elections*, (No. 43 June Term 1975; September 17, 1975). In that case, in which the Attorney General intervened on behalf of the Commonwealth, plaintiff was appointed as district justice by the Governor to fill a vacancy which had occurred within ten months of the November 1975 municipal election. He was commissioned for an initial term to expire on the first Monday of January 1978, although his office otherwise would have been up for election in November 1975. Plaintiff was not confirmed by the Senate until June 2, 1975, and he ran in the primary on both tickets, winning the nomination of both the Republican and Democratic parties, which, for all practical purposes, assured his election in November.

Subsequent to plaintiff's confirmation, the Secretary of the Commonwealth advised the Lehigh County Board of Elections that his name should be removed from the November ballot, since the office was no longer subject to election until November 1977. The local board of elections complied, and plaintiff brought suit to compel the board to place his name on the ballot. In dismissing plaintiff's suit, the Court held that plaintiff's appointment by the Governor filled the prior vacancy and installed plaintiff for a term to end in January 1978. The Court relied specifically upon Article V, § 13(b), *Rogers v. Tucker* and *Simmons v. Tucker* in arriving at this result. It is clear, therefore, that even where the Governor's appointee is also the candidate of both major parties, as in the case of Crawford County, the occurrence of the primary election does not preclude the exercise of the appointment power conferred by Article V, § 13(b).

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6. The occurrence of a vacancy terminates the judicial term in progress. In *Firing v. Kephart*, 18 Pa. Commonwealth Ct. 578, 336 A. 2d 470 (1975), a justice of the peace who retired at the mandatory retirement age of 70, but before the completion of his full six-year term, sought to be compensated for the balance of that term. The Court sustained the Commonwealth's preliminary objections, holding that the justice's term "expired on the date when he reached the constitutionally mandated retirement age." 336 A. 2d at 473. See also *DiNubile v. Kent*, 19 Pa. Commonwealth Ct. 438, 338 A. 2d 722 (1975).

Since a vacancy created by resignation or death is filled in the same way as one created by mandatory retirement, i.e., by operation of the provisions of Article V, § 13(b), the term of a resigned or deceased judicial officer must similarly end. Accordingly, the former incumbent's term is not extended by gubernatorial appointment in the situations described above. Rather, the appointee himself enters upon a wholly new term, constitutionally delimited so that it will end on the first Monday of January following the next municipal election more than ten months after the vacancy occurs.

As long as a judicial vacancy exists, the appointment power may be exercised by the Governor and the Senate. However, we are not unmindful of the fundamental tension which exists between the several competing constitutional provisions discussed above. The closer in time that a judicial vacancy occurs to a municipal election, the greater the possibility that the election will actually take place before the completion of the appointive process under Article V, § 13(b). In order to accommodate the electorate's constitutional right of suffrage, it is our opinion that where a municipal election occurs prior to the completion of the appointment process to fill a judicial vacancy, the election process supersedes the appointment process. At that point, the absence of anyone serving in the judicial office would not constitute a "vacancy" within the contemplation of the language of Article V, § 13(b), since a successor to the incumbent would already have been constitutionally designated.

Nowhere in the language of Article V, § 13(b) is appointment by the Governor, with the advice and consent of the Senate, made the sole and exclusive method for filling a vacant judicial office, although that process may certainly supersede the electoral process as we have discussed above. Unlike the primary election, at which candidates are only selected to run in the November election, the municipal election truly represents the exercise of the popular will, and in our view, must be upheld.

This conclusion is consistent with the Supreme Court decisions in *Rogers v. Tucker* and *Simmons v. Tucker*, *supra*. It is noteworthy that in both of those cases, the Supreme Court ruled upon factual situations in which judicial vacancies occurred during the recess of the Senate. Unlike those appointments, which were immediately effective as interim appointments by then Governor Shafer, the appointments to the vacancies in question all require Senate confirmation. Such confirmation was obtained for District Justices Colden and Leonhart, thereby filling the judicial vacancies in Delaware and Crawford Counties.<sup>7</sup> As a result, these offices are no longer subject to be filled at the municipal election to be held November 4, 1975.

With respect to the vacancy in Cumberland County, on September 9, 1975 you nominated James W. Spotts and forwarded his nomination to the Senate. Pursuant to the amendment to Article IV, § 8 of the Pennsylvania Constitution adopted by the electorate at the May 1975 primary, the Senate is mandated to act upon this nomination within twenty-five legislative days of its submission. Assuming that the Senate confirms your nomination of James W. Spotts prior to the 1975 municipal election, the office of district justice for District I in Cumber-

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7. Appointment by the Governor and confirmation by the Senate suffice to fill a judicial vacancy, and the appointee's "initial term" commences upon confirmation, and not upon taking the prescribed constitutional oath. See Article V, § 3; *Commonwealth ex rel. Kelley v. Keiser*, 340 Pa. 59, 16 A. 2d 307 (1940). The vacancy in Crawford County has thus been filled by the appointment of Robert Leonhart, notwithstanding that he has yet to be sworn in.

land County would also be filled until January 1978 and thus would no longer be subject to election in November 1975.

It is therefore our opinion, and you are hereby advised, that the Governor has the power to fill the vacancies in the offices of justice of the peace in Delaware, Crawford and Cumberland Counties. It is further our opinion that in Delaware and Crawford Counties, and in Cumberland County as well if your nominee is confirmed, the first municipal election at which candidates may seek these offices will be held in November 1977, which is the first municipal election more than ten months after these vacancies occurred. We are forwarding a copy of this opinion to the Secretary of the Commonwealth for her information and guidance, and so that she may advise all county boards of election in accordance with legal conclusions expressed herein.

Sincerely yours,

MELVIN R. SHUSTER  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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#### OFFICIAL OPINION No. 75-34

*Department of Education—Community Colleges—Inmates of State Correctional Institutions—Residence of Inmates Attending Community Colleges—Tuition of Inmates.*

1. Inmates at State correctional institutions may claim as their residence for purposes of attending a community college that place within the Commonwealth from which they came prior to their incarceration and to which they intend to return after their release, provided that, prior to their incarceration, they established a legally-recognizable domicile in that place.
2. The amount of tuition which inmates whose terms of incarceration permit them to attend community colleges pay depends upon the place where they are determined to reside.
3. The concept of residency as used in the Community College Act, Act of August 24, 1963, P. L. 1132, § 8, 24 P. S. § 5208, can be used interchangeably with the concept of domicile as that concept has been developed by the courts in interpreting the divorce and election laws of the Commonwealth.
4. Once established, residence is presumed to continue and the burden of proving a change in residence is upon the party asserting the change.

Harrisburg, Pa.  
October 6, 1975

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

Dear Secretary Pittenger:

You have asked for our opinion as to whether inmates of State correctional institutions who wish to attend community colleges in the

Commonwealth<sup>1</sup> may claim as their residence the place within the Commonwealth from which they came prior to their incarceration and to which they intend to return after their release. The determination of an inmate's residency is crucial to the determination of how much tuition he must pay. It is our opinion that inmates may lawfully claim such places as their legal residence, provided that, prior to their incarceration, they had established a legally-recognizable domicile in that place. The effect of such a claim of residency on the amount of tuition these inmates pay is as follows:

Normally, a student at a community college pays as tuition one-third of the actual cost of his education. Community College Act, Act of August 24, 1963, P. L. 1132, § 9(a), 24 P. S. § 5209(a). The local sponsor, if he is a resident of a member thereof, assumes one-third of the cost of his education. 24 P. S. § 5209(a) and (c). The Commonwealth reimburses the college for the remaining one-third. 24 P. S. § 5214(b).

If a student enrolls in a community college who is not a resident of a member of the local sponsor of that college, he must pay as tuition two-thirds of the actual cost of his education. 24 P. S. § 5209(c). Of course, the college is still entitled to one-third through reimbursement. 24 P. S. § 5209(c). However, if the student is not a resident of a member of the local sponsor of the college which he is attending, but is a resident of a member of a local sponsor of another community college and has enrolled in the first college with the permission of the board of trustees of the college where he resides, the board of trustees of his home college must pay to the college in which he is enrolled one-third of the cost of his education. 24 P. S. § 5209(b). Again, the student pays one-third and the Commonwealth reimburses one-third.

You have related to us that, under the program in question, certain community colleges are refusing to permit inmates to claim as their residence that place within the Commonwealth from which they came prior to their incarceration. These inmates are thereby denied the benefit of having the board of trustees of their home community college pay one-third of the cost of their education. Therefore, they must pay as tuition two-thirds of the cost of their education instead of the one-third they would have paid had they been allowed to claim as their residence the place from which they came prior to incarceration.

To restate, it is our opinion that inmates may lawfully claim as their legal residence that place from which they came prior to incarceration and to which they intend to return upon their release, provided that prior to their incarceration, they had established a legally-recognizable domicile in that place. As such, if prior to their incarceration such inmates were residents of a member of a local sponsor of a community college, and subsequent to their incarceration they enrolled in another community college with the permission of the board of trustees of the

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1. We assume, of course, that such attendance is consistent with the terms of their confinement.



college where they previously lived, they are entitled to have the board of trustees of their home college pay one-third of the cost of their education. Naturally, they will pay one-third and the Commonwealth will reimburse the college which they are attending for the remaining one-third.

The Community College Act, Act of August 24, 1963, P. L. 1132, § 8, 24 P. S. § 5208 provides that:

"Any resident of the Commonwealth may apply for admission to any community college established under this act. . . . The State Board of Education may prescribe standards for determining the place of residence of students and applicants for admission to community colleges."

The Act contains no definition of the terms, "resident" or "residence," and the courts of the Commonwealth have had no occasion to construe these terms as they are contained in the Act. The courts have had occasion to examine the legal import of the term "residence" in regard to questions arising under election laws and the divorce laws of the Commonwealth. They have consistently held that the concept of residence as used in these statutes can be used interchangeably with the concept of domicile. *E.g., In Re Lesker*, 377 Pa. 411, 105 A. 2d 376 (1954) (construing electoral requirements as contained in Article II, § 5 of the Constitution of 1874, as amended, Article VII, § 1 of the Constitution of 1968); *Horne v. Horne*, 191 Pa. Superior Ct. 627, 159 A. 2d 239 (1960) (construing the residency requirements of the Divorce Law, 23 P. S. § 16); *DiMilia v. DiMilia*, 204 Pa. Superior Ct. 188, 203 A. 2d 382 (1964) (Divorce Law).<sup>2</sup> It is therefore our opinion that the term "residence" as used in the Community College Act can be used interchangeably with the concept of domicile as that concept has been used by the courts in construing the election laws and the divorce laws of the Commonwealth.

The courts have determined that there are two (2) elements necessary to establish domicile. The first is that a person have in the place claimed as his domicile, a fixed, permanent and principal abode. The second is that he have the intent to make that place his domicile such that whenever he leaves it, he always has the ultimate intention to return to it. *E.g., In Re Lesker, supra; Horne v. Horne, supra.*

Once established, domicile is presumed to continue unless there is some affirmative action on the part of the individual to change it. To make such a change, an individual must change both the physical location of his principal abode, and he must also change his *intention* to claim that place as his domicile. *In Re Lesker, supra.*

By reason of an inmate's incarceration, it can be said that his home or principal abode has changed from the community in which he was

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2. The courts of the Commonwealth in interpreting these laws have also used domicile interchangeably with legal residence and bona fide residence.

formerly living to the institution in which he is incarcerated. However, in order to show that his domicile has changed, it must also be established that he has abandoned his intent to return to his former home. Further, although this question of the intent of a particular inmate is a question of fact which can be established through the use of a wide variety of evidence,<sup>3</sup> the burden of proving that an inmate's domicile has changed rests upon the party asserting that change.<sup>4</sup> Until it is demonstrated that the inmate has abandoned his intent to claim that place as his domicile, it is *presumed* that his prior domicile continues. See *In Re Lesker, supra*; *Horne v. Horne, supra*.

In conclusion, it is our opinion and you are advised that inmates at State correctional institutions may lawfully claim as their residence for purposes of attending a community college that place within the Commonwealth from which they came prior to incarceration and to which they intend to return after their release, provided they had established a legally-recognizable domicile in that place prior to their incarceration.

The consequences which our conclusion has on the amount of tuition which such inmates actually pay are as noted above.

Very truly yours,

W. WILLIAM ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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3. Regulations regarding the determination of legal residency or domicile have been issued by the Department of Education for students at State colleges, 22 Pa. Code § 153.11, *et seq.* The regulations set forth several factors which may be used in determining the legitimacy of an out-of-State student's intent to be domiciled in Pennsylvania. However, the question herein is the intent of an inmate who is already a citizen of the Commonwealth to claim as his domicile a particular place within the Commonwealth.
  4. At this time, we do not reach the question of whether an inmate may claim as his legal residence the institution in which he is incarcerated. However, were an inmate to make such a claim, the burden of proving this claim would rest with the inmate as the party asserting the change. (This burden would be the burden of going forward with the evidence establishing such residency rather than the burden of persuasion.) When determining the inmate's residence, the community college could not impose upon the inmates as a class a procedural or evidentiary burden to prove residency which is imposed upon no other group of students. Constitutional requirements of equal protection dictate that the residence of all students, whether inmate or not, must be determined on the basis of the same set of factors uniformly applied. Compare *Samuel v. University of Pittsburgh*, 375 F. Supp. 1119 (W. D. Pa. 1974), *appeal dismissed*, 506 F.2d 355 (3rd Cir. 1974) with *Sloane v. Smith*, 351 F. Supp. 1299 (M. D. Pa. 1972).

## OFFICIAL OPINION No. 75-35

*State Employee—Licenses—Ordinance.*

1. A State employee who performs electrical work in the City of Harrisburg on behalf of the Commonwealth is not subject to the licensing provisions of a city ordinance, and is not required to pay the licensing fees set forth in the ordinance.
2. It is a general rule of statutory construction that words are to be taken in their ordinary sense, unless from a consideration of the whole act it appears that a different meaning was intended.
3. The word "person" does not in its ordinary or legal signification embrace a State or government.
4. With regard to ordinances, the general rule has always been that in the absence of a statute to the contrary, public property used for public purposes is exempt from taxation and no express exemption law is needed; this reasoning applies to licensing ordinances as well.

Harrisburg, Pa.  
October 7, 1975

Honorable George J. Mowod  
Secretary of Revenue  
Harrisburg, Pennsylvania

Dear Secretary Mowod:

You have requested our opinion on the question of whether or not employees of the Department of Revenue who perform electrical services on behalf of the Commonwealth in the City of Harrisburg, Pennsylvania, are required to comply with the licensing provisions contained in City Ordinance No. 11 of 1974, signed July 10, 1974 (Ordinance). You have also inquired as to whether or not the Commonwealth is required to pay the licensing fees for electricians according to the fee schedule set forth in the Ordinance. It is our opinion, and you are so advised, that an employee of the Department of Revenue who performs electrical work in the City of Harrisburg on behalf of the Commonwealth is not subject to the licensing provisions of the Ordinance. As to the license fees, since the Commonwealth is not subject to the Ordinance, it is not required to pay the license fees.

As there is no specific provision in Ordinance No. 11 which states that its provisions apply to State employees or the Commonwealth, it is necessary to refer to Section 1703.14(1) of the Ordinance in order to determine who is subject to its provisions. This section contains not only a statement of proscribed conduct, but more importantly points out to whom the proscriptions apply.

"No *person* shall engage in the performance of electrical work in the City of Harrisburg either on his own behalf or on the behalf of *another person* without first obtaining a license from the Bureau." (Emphasis supplied.)

It is clear from the language of the above quoted section that the Ordinance applies to "persons" and that a state employee who performs work on behalf of the Commonwealth of Pennsylvania, through the Department of Revenue, is not required to obtain a license unless the Commonwealth is considered a "person" within the meaning of Section 1703.14(1). As the analysis below indicates, the term "person" does not include the Commonwealth, and, therefore, a state employee who performs electrical work in the City of Harrisburg on behalf of the Commonwealth need not first obtain an electrician's license from the Bureau of Code Enforcement.

The question of whether or not the term "person" includes the Commonwealth was dealt with in *Baker v. Kirschnek*, 317 Pa. 225, 176 A. 489 (1935). In *Baker* it was argued that the Commonwealth through the Liquor Control Board was prohibited from establishing a store for the sale of liquor in the Borough of Media, Pennsylvania, because of a borough statute which provided that no "person" should sell vinous, spirituous, or other intoxicating liquors within limits of the Borough. In rejecting this argument, the court quoted the following statement from *Jones v. Tatham*, 20 Pa. 398, 411 (1853):

"Words of a statute applying to private rights do not affect those of the state. This principle is well established, and is indispensable to the security of the public rights. The general business of the legislative power is to establish laws for individuals, not for the sovereign; and, when the rights of the Commonwealth are to be transferred or affected, the intention must be plainly expressed or necessarily applied [sic]."

In addition to the above legal authority, the Court in *Baker*, also relied on the general rule of statutory construction that words are to be taken in their ordinary sense, unless from a consideration of the whole act it appears that a different meaning was intended, and concluded, in view of this rule of statutory construction, that the word "person" does not in its ordinary or legal signification embrace a State or government. See also *Petition of City of Pittsburgh*, 376 Pa. 447, 103 A. 2d 721 (1954); Statutory Construction Act, 1 Pa. C. S. § 1991.

Even if the Ordinance in question did include a specific provision designed to apply to State employees or to the Commonwealth, the Ordinance would, nevertheless, not apply. With regard to ordinances, the general rule has always been that in the absence of a statute to the contrary, public property used for public purposes is exempt from taxation and no express exemption law is needed. *Commonwealth v. Erie Metropolitan Transit Authority*, 444 Pa. 345, 281 A. 2d 882 (1971); *Commonwealth v. Dauphin*, 335 Pa. 177, 6 A. 2d 870 (1939). This reasoning applies to licensing ordinances as well. See *Philadelphia v. SEPTA*, 8 Pa. Commonwealth Ct. 280, 289, 303 A. 2d 247 (1973).

In view of the above, you are advised that a State employee who performs electrical work in the City of Harrisburg on behalf of the Commonwealth is not subject to the provisions of Ordinance No. 11.

As to the license fees, since the Commonwealth is not subject to the Ordinance it follows that the Commonwealth is not required to pay such fees.

Very truly yours,

HOWARD M. LEVINSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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OFFICIAL OPINION No. 75-36

*Department of Community Affairs—Housing and Redevelopment Assistance Law  
—Power to Make Grants Under Sections 4(b) and 4(c)—“Redevelopment”—  
“Prevention and Elimination of Blight.”*

The Department of Community Affairs may make grants pursuant to the Housing and Redevelopment Assistance Law as follows:

1. To redevelopment authorities, under Section 4(b), for the purpose of “redevelopment” as defined in the Urban Redevelopment Law. Grants may only be made after the applying authority demonstrates to the Department: (a) that the proposed project is one which the authority is authorized to undertake by the Urban Redevelopment Law;
2. To redevelopment authorities under Section 4(c) where they are acting as the authorized agent of a governmental unit in undertaking a recognized governmental function for the prevention and elimination of blight; and
3. To municipalities under Section 4(c) where the applicant demonstrates that in the exercise of its municipal duties, or in its use of eminent domain for its public purposes, the municipality is, or will be, preventing or eliminating blight, pursuant to the definition thereof in Section 2(a) of the Urban Redevelopment Law.

Harrisburg, Pa.  
October 27, 1975

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

Dear Secretary Wilcox:

You have asked us to determine the legal parameters of the power of the Department of Community Affairs to grant funds to municipalities and redevelopment authorities pursuant to Sections 4(b) and 4(c) of the Housing and Redevelopment Assistance Law, Act of May 20, 1949, P. L. 1633, No. 493, as amended, 35 P. S. § 1661 *et seq.*

The Department of Community Affairs (DCA), for the reasons stated below, may make grants pursuant to the Housing and Redevelopment Assistance Law as follows:

(1) To redevelopment authorities, under Section 4(b) for the purpose of "redevelopment" as defined in the Urban Redevelopment Law. Grants may only be made after the applying authority demonstrates to DCA: (a) that the proposed project is one which the authority is authorized to undertake by the Urban Redevelopment Law; and (b) that the applicant has complied with the Urban Redevelopment Law;

(2) To redevelopment authorities under Section 4(c) where they are acting as the authorized agent of a governmental unit in undertaking a recognized governmental function for the prevention and elimination of blight; and

(3) To municipalities under Section 4(c) where the applicant demonstrates that in the exercise of its municipal duties, or in its use of eminent domain for its public purposes, the municipality is, or will be, preventing or eliminating blight, pursuant to the definition thereof in Section 2(a) of the Urban Redevelopment Law.

#### I. In General

The Housing and Redevelopment Assistance Act is legislation through which appropriations are made to the Department of Community Affairs, to be expended under the authorization of the procedures of the act throughout the Commonwealth, so as to promote, aid or stimulate the erection of housing or the effectuation of redevelopment. The Act is enabling legislation for the Department of Community Affairs. It is not an act which provides any substantive powers in the field of housing or redevelopment to municipalities or authorities. The underlying power and authority of municipalities and redevelopment authorities to undertake projects for the prevention and elimination of blight and for redevelopment are to be found elsewhere.

Section 4 of the Housing and Redevelopment Assistance Law, 35 P. S. § 1664 provides, *inter alia*:

"The Department (of Community Affairs) is hereby authorized, within the limitations hereinafter provided, . . . (b) to make capital grants to redevelopment authorities in the furtherance of redevelopment, (c) to make capital grants to municipalities or to redevelopment authorities for the prevention and elimination of blight. . . ."

The relevant definitions found in Section 3 of the Act, 35 P. S. § 1663 are:

(e) "Redevelopment authority" a public body corporate and politic, organized and existing by virtue of the Urban Redevelopment Law, the Act of May 24, 1945, P. L. 991;

(g) "Redevelopment," any work or undertaking of a Redevelopment Authority created pursuant to the Urban Redevelopment Law

of this Commonwealth, including comprehensive programs for the development of entire sections or neighborhoods;

(h) "Municipality," any county, city, borough, incorporated town or township.

## II. Section 4(b) TO MAKE CAPITAL GRANTS TO REDEVELOPMENT AUTHORITIES IN THE FURTHERANCE OF REDEVELOPMENT

Redevelopment authorities are public bodies, corporate and politic established and operating pursuant to the provisions of the Urban Redevelopment Law, Act of May 24, 1945, P. L. 991, No. 385, as amended, 35 P. S. § 1701 *et seq.* "Redevelopment" is any work or undertaking of a redevelopment authority. Therefore, to determine the legality of any grant by the Department of Community Affairs to a redevelopment authority we must look to the Urban Redevelopment Law to ascertain whether the activities to be undertaken are within the power of the redevelopment authority.

The Urban Redevelopment Law defines "redevelopment" as:

"Undertakings and activities for the elimination of blighted areas. Such undertakings and activities may include the planning, re-planning, acquisition, rehabilitation, conservation, renewal, improvement, clearance, sale, lease or other disposition of real property, buildings or other improvements in blighted areas, or portions thereof, the relocation of businesses and families affected thereby into or outside of a redevelopment area, or any combination of such undertakings and activities, the installation, construction or re-construction of streets, utilities, parks, playgrounds and other improvements necessary for carrying out in the blighted area the objectives of this act in accordance with the Redevelopment Area Plan, and carrying out plans for a program of voluntary repair, rehabilitation, and conservation of real property, buildings or other improvements in accordance with the Redevelopment Area Plan." (35 P. S. § 1703(m)).

A "redevelopment area" is defined as "any area, whether improved or unimproved, which a Planning Commission may find to be blighted because of the existence of the conditions enumerated in Section 2 of this Act, so as to require redevelopment under the provisions of this Act." (35 P. S. § 1703(n)).

The "blighted conditions" whose existence justify redevelopment are outlined in Section 2 "Findings and Declarations of Policy" as follows:

"(a) That there exist in urban communities in this Commonwealth areas which have become blighted because of the unsafe, unsanitary, inadequate or overcrowded condition of the dwellings therein, or because of inadequate planning of the area, or excessive land coverage by the buildings thereon, or the lack of proper light and air and open space, or because of

the defective design and arrangement of the buildings thereon, or faulty street or lot layout, or economically or socially undesirable land uses."

In our opinion, based on the above, when a redevelopment authority is an applicant for State funds, under Section 4(b), no grants may be made by the Department of Community Affairs to such authority for redevelopment activities unless they adhere both in substance and procedurally to the provisions of the Urban Redevelopment Law.

The Urban Redevelopment Law dictates that a redevelopment authority may undertake redevelopment activities only within certified redevelopment areas in accordance with the redevelopment area plan. (35 P. S. § 1710). The procedure by which an area is to be declared blighted is specifically set forth in the Urban Redevelopment Law. It is only within the procedural safeguards of the Urban Redevelopment Law that a redevelopment authority may undertake "redevelopment."

Because of the broad language of the Act and the awesome power of eminent domain given to the redevelopment authority, the courts of this Commonwealth have demanded strict compliance by redevelopment authorities with the procedural safeguards outlined in the Urban Redevelopment Law. See *Faranda Appeal*, 420 Pa. 295, 216 A. 2d 769 (1966). Therefore, in order for the Department of Community Affairs to validly grant funds under Section 4(b) of the Housing and Redevelopment Assistance Law the legal authority for the grant proposal must be found within the confines of the Urban Redevelopment Law.

### III. Section 4(c) TO MAKE CAPITAL GRANTS TO MUNICIPALITIES OR TO REDEVELOPMENT AUTHORITIES FOR THE PREVENTION OR ELIMINATION OF BLIGHT.

The Housing and Redevelopment Assistance Law does not define "the prevention and elimination of blight." Section 4(c) was added to the Law by the Act of November 24, 1967, P. L. 541, No. 265. Act 265 of 1967 also amended and added to Section 2 of the Act, entitled "Declaration of Policy." The pertinent provisions of Section 2 provide:

"It has been determined by the General Assembly of this Commonwealth:—

"(e) *That it has been found and declared in the Urban Redevelopment Law that there exists in urban communities in this Commonwealth areas which have become blighted, that such conditions are beyond remedy or control by regulatory processes in certain blighted areas or portions thereof and cannot be effectively dealt with under existing law without additional aid, and that the public interest requires the remedying of these conditions.*

(f) *That certain blighted areas, or portions thereof, may require total acquisition, clearance and disposition, subject to continuing controls as provided in this act, since the prevail-*



ing condition of decay may make impracticable the reclamation of the area by rehabilitation or conservation, and that other blighted areas, or portions thereof, through the means provided in this act, may be susceptible to rehabilitation or conservation or a combination of clearance and disposition and rehabilitation or conservation in such manner that the conditions and evils hereinbefore enumerated may be eliminated or remedied.

*"(g) It is hereby found, that concentrated enforcement of building, housing, plumbing, electrical, fire and zoning codes will also promote the public health, safety, convenience and welfare.*

*"Therefore, it is declared to be the policy of the Commonwealth of Pennsylvania to promote the health, morals, safety and welfare of its inhabitants by providing for State assistance to tenants of limited income through a contribution to the cost of housing projects to be erected and offered for occupancy at moderate rentals as a means of making such housing available to them at rentals within their ability to pay, and by assisting the communities of this Commonwealth in remedying the conditions set forth in the Urban Redevelopment Law and for carrying out comprehensive programs for the development of entire sections or neighborhoods by making grants to municipalities or redevelopment authorities."* (35 P. S. § 1662) (Emphasis added.)

It is evident from Section 2, that the Legislature intended to define "the prevention and elimination of blight" in terms similar to those expressed in the Urban Redevelopment Law. Since the Housing and Redevelopment Assistance Law and the Urban Redevelopment Law relate to the same general subject matter, they may be read *in pari materia*. (1 Pa. C. S. § 1932). Therefore, the Department of Community Affairs may look to the criteria, cited above, in Section 2(a) of the Urban Redevelopment Law in determining what constitutes blighting conditions. However, the Department should be careful to distinguish between the term "prevention and elimination of blight" and the term "redevelopment."

Redevelopment "elimination of blight" must be undertaken within a certified redevelopment area and pursuant to the procedural safeguards of the Urban Redevelopment Law. This area-wide approach to the elimination of blight envisages the economic and social redevelopment of such areas in conformity with the comprehensive general plan of the respective municipalities for residential, recreational, commercial, industrial and other purposes.

#### IV. Section 4(c) MUNICIPALITIES COMPARED TO REDEVELOPMENT AUTHORITIES

The Housing and Redevelopment Assistance Act does not grant to municipalities or redevelopment authorities any power which they do

not already have under other State statutes and the Pennsylvania Constitution. Therefore, the Section 4(c), "prevention and elimination of blight" which municipalities and redevelopment authorities undertake must be done within the confines of the enabling legislation of either the municipality or the authority.

One of the primary differences of the powers between municipalities and authorities is the public use of the power of eminent domain. The Pennsylvania Constitution provides that no private property shall be taken for public use without just compensation. Article I, § 10. The power to take private property is vested in the sovereignty of the United States and the Commonwealth of Pennsylvania. Private property may only be taken through eminent domain for a "public use." It is a matter of settled law that property cannot be taken by government without the owner's consent for the mere purpose of devoting it to the private use of another. *Belovsky v. Redevelopment Authority of the City of Philadelphia*, 357 Pa. 329, 54 A. 2d 277 (1947). Since the power of eminent domain is vested in the state, only the Legislature may empower municipalities or authorities, through enabling legislation, to exercise the power of eminent domain. The Pennsylvania Legislature has given the power of eminent domain to redevelopment authorities for the public purpose of "redevelopment." The public purpose use of the power of eminent domain in the Urban Redevelopment Law is for the elimination and rehabilitation of the blighted sections of municipalities in the Commonwealth. See *Belovsky*. The authority to undertake this public purpose has only been given to redevelopment authorities in Pennsylvania and not to municipalities. Therefore, the power of municipalities to prevent and eliminate blight must be within the confines of the public purposes established in their enabling legislation. That it was these more conventional, limited means of the "prevention and elimination of blight" which the Legislature envisioned when it enacted Section 4(c) is evident by its simultaneous inclusion of subsection (g) in Section 2 of the Housing and Redevelopment Assistance Law, quoted above.

## V. REDEVELOPMENT AUTHORITIES

Redevelopment authorities already have the power to eliminate blight under the provisions of the Urban Redevelopment Law. Therefore, in most cases, redevelopment funds should be granted to them under Section 4(b).

Redevelopment authorities do not have the power to "prevent" limited instances of blight. They may only "eliminate" blight from certified areas. However, authorities may, pursuant to the Redevelopment Cooperation Law, be designated agents of the Commonwealth or its political subdivisions to perform authorized governmental functions which are consistent with the policy and purposes of the Urban Redevelopment Law. See Act of May 24, 1945, P. L. 982, § 6.1, as amended, 35 P. S. § 1746.1. Thus, grants may be made to redevelopment authorities under Section 4(c) only where they are acting as

the authorized agent (as evidenced by resolution, cooperative agreement or contract) of a governmental unit (federal, state or municipal) in carrying out a recognized governmental function for the prevention and elimination of blight.

## VI. MUNICIPALITIES

It is clear that Section 4(c) was not intended to supplant Section 4(b) or to allow municipalities to circumvent the procedural mandates of the Urban Redevelopment Law. This office has already stated, in Official Opinion No. 280 of 1968, that the Department of Community Affairs under Section 4(c) has the power to provide assistance to municipalities for concentrated enforcement of building and other codes, and for the demolition of unsafe structures, which activities are authorized municipal functions.

Municipalities may exercise eminent domain powers for acquiring land which will then be used for public purposes, such as the erection of municipal buildings. Municipalities also have the power and duty to provide many municipal services such as the charting and laying of streets, curbs, sewer lines and bridges. Under certain circumstances these activities may be determined to be undertaken for the prevention and elimination of blight.

*Therefore, where it can be demonstrated that in the exercise of its public duties, or in its use of eminent domain for its public purposes, a municipality is or will be, by the terms of the proposal, preventing or eliminating blight within its boundaries, pursuant to the definition thereof in Section 2(a) of the Urban Redevelopment Law, the Department of Community Affairs may make grants under Section 4(c) of the Housing and Redevelopment Assistance Act to such municipality.*

## VII. ADMINISTRATIVE PROCEDURE

The Housing and Redevelopment Assistance Act does not provide any of the procedural safeguards for determining when blighting conditions exist, as the Urban Redevelopment Law does. However, Section 14 of the Act, as amended, states that the Department of Community Affairs has the duty to review municipal proposals for funding under Section 4(c) to ensure that it is in accordance with the purposes of the Housing and Redevelopment Assistance Act. (35 P. S. § 1674). Therefore, an administrative procedure must be established by the Department of Community Affairs to review applications that are submitted to determine:

- (1) Whether or not proposals under Section 4(c) adequately demonstrate that the conditions involved are blighting;
- (2) Whether the municipality has the power to prevent or eliminate that blight under existing law.

The Department of Community Affairs must not be arbitrary, capricious or discriminatory in determining whether or not the project area under a Section 4(c) proposal is blighted or whether the proposed

project will prevent potential blight. The Department should in all cases have at its disposal adequate and necessary empirical data to show the condition of the land involved, or the nature of the project to be funded, so that an objective review of that information would lead a reasonable person to conclude that under the conditions outlined in Section 2(a) of the Urban Redevelopment Law the proposal is one which a municipality has the power to undertake and which does prevent or eliminate blight.

We recommend that the Department of Community Affairs promulgate specific regulations, pursuant to the authority found in Section 8 of the Housing and Redevelopment Assistance Law, outlining the criteria under which grants will be made to municipalities under Section 4(c) and the duties which will be required of those municipalities by the Department. These regulations should, of course, be in conformance with this opinion. The Department of Justice will be available for consultation and review.

### VIII. WHAT IS BLIGHT?

To assist you in implementing the administrative review of Section 4(b) and (c) proposals, we have prepared below a discussion of the principles established by the Supreme Court of Pennsylvania in connection with the administrative procedure of defining what is a "blighted area." The cases cited all construe the actions of redevelopment authorities under the Urban Redevelopment Law. They would therefore be directly binding on the Department of Community Affairs' actions pursuant to Section 4(b) of the Housing and Redevelopment Assistance Act. They will be instructive, and in some cases controlling, on the issue of the Department's determination of blight under Section 4(c) of the Housing and Redevelopment Assistance Act.

#### *Review Must Not Be Arbitrary*

Under the terms of the Urban Redevelopment Law, the power of discretion over what areas are to be considered blighted is fully within the power of the authority. "The only function of the courts in this matter is to see that the authority has acted not in bad faith; to see that the authority has not acted arbitrarily; to see that the authority has followed the statutory procedures in making its determination; and finally, to see that the actions of the authority do not violate any of our constitutional safeguards." *Crawford v. Redevelopment Authority*, 418 Pa. 549, 554, 211 A. 2d 866, 868 (1965).

It has been held that a condemnee under a redevelopment proposal must be given the opportunity, through testimony and evidence, to prove that a certification of blight is arbitrary or capricious. *Faranda Appeal*, 420 Pa. 295, 216 A. 2d 769 (1966). The rationale is that there must be an effective showing of blight or there can be no public use or public purpose under which the authority or a municipality could undertake a project for the prevention and elimination of blight. Once there is a demonstration of objective evidence that the conditions outlined in Section 2(a) of the Urban Redevelopment Law exist, it is

within the discretion of the redevelopment authority to claim the area as blighted. The courts will not substitute their discretion for that of the legislatively granted discretion of the planning commission and redevelopment authority. *Simco Stores v. Redevelopment Authority*, 455 Pa. 438, 317 A. 2d 610 (1974).

Likewise, the Department of Community Affairs, in its exercise of its discretion in determining whether a proposal submitted under Section 4(c) is for the prevention and elimination of blight, will have its decision reviewed by the courts to ascertain only whether the Department abused its discretion by acting in bad faith, fraudulently, capriciously, or in an abuse of its power. It will not inquire into the wisdom of such actions or into the details of the manner adopted to carry them into execution. *Blumenschein v. Pittsburgh Housing Authority*, 379 Pa. 566, 572, 573, 109 A. 2d 331, 334, 335 (1954).

### *Defining Blight—In General*

The Pennsylvania Supreme Court in its several decisions on the propriety of redevelopment proposals has established several general principles under which a determination of blight will be upheld, provided the specific factual data for the area is available.

In upholding the constitutionality of the Urban Redevelopment Law, the Supreme Court found that Section 2(a) of the Act "... contains as definite a description of what constituted a blighted area as it is reasonably possible to express . . .," *Belovsky v. Redevelopment Authority of the City of Philadelphia*, 357 Pa. 329, 342, 54 A. 2d 277, 283 (1947).

The court has stated by way of dicta, although the fact situation has never specifically arisen, that, "... for the Planning Commission to certify an area as blighted it is not necessary that each and every one of the conditions specified in the statute (Section 2(a)) should exist, but that any one of them is sufficient to warrant such certification and the adoption of a redevelopment project." *Oliver v. Clairton*, 374 Pa. 333, 340, 98 A. 2d 47, 51 (1953). Again, we would emphasize that the cases do show several of the conditions under Section 2(a) of the Urban Redevelopment Law to have been met where projects have been approved as legally valid.

In upholding the validity of the commercial redevelopment of the existing commercial district known as "The Golden Triangle" in the City of Pittsburgh, the court stated:

"... the Urban Redevelopment Law was obviously intended to give wide scope to municipalities in redesigning and rebuilding such areas within their limits as, by reason of the passage of years and the enormous changes in traffic conditions and types of building construction, no longer meet the economic and social needs of modern city life and progress. Such needs exist, even if from a different angle, as well in the case of industrial and commercial as of residential areas." *Schenck v. Pittsburgh* 364 Pa. 31, 37, 70 A. 2d 612, 615 (1950).

In noting that the Urban Redevelopment Law does not limit the certification of blighted areas to improved property, the court stated:

"Redevelopment Authorities have the power therefore, *where the conditions prescribed in the act are found to exist, to exercise* the right of Eminent Domain pursuant to a Redevelopment proposal even though the redevelopment area may be predominantly open, vacant, or unimproved." *Oliver v. Clairton*, 374 Pa. 333, 342, 98 A. 2d 47, 52 (1953). (Emphasis added.)

### *Defining Blight—Specific Cases*

The administrative determination that an area is blighted, or a project is for the prevention or elimination of blight, must, in order not to be arbitrary or capricious, be substantiated by empirical data. See *Faranda Appeal*, *supra*. For instance, the Supreme Court cited the following findings of the Pittsburgh City Planning Commission in agreeing that the Golden Triangle was, in fact, blighted:

"... that the area certified by it had been laid out on a street pattern which dated from the year 1784, and which was wholly unsuited to the needs of a modern city because of poorly located street space and failure to provide for the ever increasing traffic; that the area was marred by too great a building density; and that the commercial and industrial uses of the buildings thereon were in large part economically undesirable, as shown by a continuous reduction in the appraised values of the properties for tax purposes." *Schenck*, *supra*, at p. 36, 70 A. 2d at 614.

In approving the redevelopment of basically vacant land for industrial use the Supreme Court found the following conditions to justify determination of blight:

"... The Chancellor found that the five acres constituting this redevelopment area had long been zoned as 'heavy industrial,' that the ground consisted of fifty-eight residential lots which however, were not actually laid out with open streets, that there were seven small buildings in the area, that over 90% of the land was vacant and unimproved, that the assessed valuations in the decade from 1940 to 1950 revealed nine decreases and not a single increase, that fifteen of the lots have unpaid city and school taxes going back as far as 1930, and that the ownership of the lots was divided among approximately twenty-two individuals and there were fifteen individual or multiple owner units holding the various titles."

In addition the evidence showed:

"... that over 50% of the dwelling units were substandard or 'slum' quality grade, that there were no lots of adequate width and area to accommodate a minimum manufacturing plant for which use the area was zoned, that an inspection of

the area and an examination of the land use map showed that industry, commerce and residences were closely mixed and intermingled to the great detriment of all, and that there was no doubt that the area was socially and economically undesirable." *Oliver v. Clairton, supra*, p. 340, 98 A. 2d at 51-52.

In upholding the Redevelopment Authority of Philadelphia's determination that a large section of center city Philadelphia was blighted the Court stated:

"... The (planning) Commission made its determination after eleven years of traffic studies, economic studies and studies of land value and use." *Simco Stores v. Redevelopment Authority*, 455 Pa. 438, 443, 317 A. 2d 610, 613 (1974).

### *Application of the Cases*

Therefore, in the first instance, the Department of Community Affairs, when it is requested to make a grant under Section 4(c) of the Housing and Redevelopment Assistance Law, must exercise its administrative discretion to determine, under the evidence presented to it by the applicant, whether the application actually is for the "prevention and elimination of blight," as defined by Section 2(a) of the Urban Redevelopment Law, Section 2 of the Housing and Redevelopment Assistance Law, the case law in the area, and this opinion.

In addition, the Department may only issue grants to applicants who demonstrate the legal authority in themselves to undertake projects for which they have submitted the proposal. The one exception to this criterion would be if the applicant would submit a valid inter-governmental cooperation agreement between itself and another governmental unit which would have the power, and would agree by the terms of the cooperation agreement, to undertake the proposed project.

We trust this opinion is responsive to your inquiry.

Very truly yours,

WILLIAM J. ATKINSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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## OFFICIAL OPINION No. 75-37

*Right to Know—Lists of State Employees—Secretary of Administration.*

1. Lists of Commonwealth employees maintained by the Office of Administration are public records and must be made available for inspection by the public.
2. Copies of lists need not be furnished to the public, but rather access and the right to copy.

Harrisburg, Pa.  
November 5, 1975

Honorable James N. Wade  
Secretary of Administration  
Harrisburg, Pennsylvania

Dear Secretary Wade:

You have requested our advice regarding the applicability of the "Right to Know Law" to computer printouts which the Office of Administration prepares listing:

- (a) Commonwealth employees and their salaries,
- (b) Commonwealth employees and their salaries in specific counties,
- (c) Commonwealth employees, their salaries, and voting and employment addresses.

In your request, you further observed that requests for such material originate from private citizens, state legislators, and other governmental officials, some of whom are willing to pay for the cost of such materials.

The so-called "Right to Know Law" is the Act of June 21, 1957, P. L. 390, 65 P. S. § 66.1 *et seq.* This Act defines "public record" and the agencies to which the Act applies (Section 1, 65 P. S. § 66.1) and then provides that every public record of an agency shall be open for examination and inspection by any citizen of the Commonwealth (Section 2, 65 P. S. § 66.2), who shall have the right to take extracts or make copies thereof and to make photographs or photostats of the same while the records are in the possession, custody and control of the lawful custodian thereof (Section 3, 65 P. S. § 66.3). The lawful custodian of the record has the right to adopt and enforce reasonable rules governing the making of such extracts, copies, photographs, or photostats. (Section 3, 65 P. S. § 66.3).

It is clear by definition that the Right to Know Law applies to your Office as a "department, board or commission of the Executive branch of the Commonwealth." It is equally clear that lists of Commonwealth employees and their salaries are public records since they are "... account[s] . . . dealing with the receipt or disbursement of funds by an agency. . . ." 65 P. S. § 66.1(2); *Moak v. Philadelphia Newspapers, Inc.*, 18 Pa. Commonwealth Ct. 599, 602-603, 336 A. 2d 920, 922-923 (1975). In *Moak*, the Court held that payroll records of the Philadelphia Police Department were public records. See also *Young v. Armstrong School District*, 21 Pa. Commonwealth Ct. 203, 344 A. 2d 738 (1975) affirming *Wiles v. Armstrong School District*, 66 D. & C. 2d 499 (1974) (names and addresses of kindergarten students); *Kanzel-meyer v. Eger*, 16 Pa. Commonwealth Ct. 495, 329 A. 2d 307 (1974) (payroll registers and attendance records); *Kegel v. Community College of Beaver County*, 55 D. & C. 2d 220 (1972) (salary records).

The nature of the lists your Office maintains is, of course, to some extent discretionary with your Office. But such lists as you do maintain containing the information outlined in your request are clearly public records and must be available for public inspection. Thus, we



are informed that your office does maintain a copy of the list required under Section 603 of the Administrative Code of 1929, as amended, 71 P. S. § 223, which requires that each department, board or commission prepare and transmit lists of employees and such information as required by the Governor to various public officials including the Budget Secretary. Such information is specifically denominated "public information." Your Office not only maintains this list, but through the Central Management Information Center (CMIC) actually prepares such lists through a computer for the various state agencies. This computer list currently includes the name, job class, salary, voting county (coded), headquarters county (coded), birth date, sex, adjusted appointment date, and whether civil or non-civil service of all employees. This list is published annually and updated periodically. This list is a public record and since it is in your custody it must be available for public inspection.

The foregoing does not mean that you are required to give *copies of the computer list*, whether it be free or for payment, to anyone. The "Right to Know Law" simply requires that persons have the right to inspect such records as you maintain and to copy them. The facilities maintained for copying are obviously a matter up to each agency depending on the nature of the records it maintains. Certainly an agency such as the Corporation Bureau, one of whose principal functions is to supply copies, should maintain sufficient copying services whereas an agency which would have little occasion to provide copies need not. The Commonwealth Court pointed out in *Friedman v. Fumo*, 9 Pa. Commonwealth Ct. 609, 612, 309 A. 2d 75, 76 (1973) that all the agency was required to do was make a list available for examination. "The Department is not required to prepare and furnish lists or other excerpts of its records. . . ." And in *Young, Moak, and Kanzelmeyer*, only access to the records was involved, not the furnishing of copies.

Accordingly, the decision as to how these records are to be made available is one for reasonable administrative discretion. In this regard, we recommend the promulgation of rules under Section 3 of the Act, 65 P. S. § 66.3, so that the public will be aware of the means of access and so that all parties who wish to examine such records will have equal access.

We note finally that there appears to be some contention that the records will be used for political or commercial purposes. Once the determination is made that a record is public and not subject to any of the exceptions in the Act, the use of which it will be made becomes irrelevant. *Friedman v. Fumo*, *supra*; *Moak v. Philadelphia Newspapers, Inc.*, *supra*.

Sincerely,  
GERALD GORNISH  
*Deputy Attorney General*  
VINCENT X. YAKOWICZ  
*Solicitor General*  
ROBERT P. KANE  
*Attorney General*

## OFFICIAL OPINION No. 75-38

*Coal and Clay Mine Subsidence Insurance Board—Insurance Department—Auditor General—Post-Audit.*

1. By virtue of Article VIII, § 10 of the Pennsylvania Constitution, the Insurance Department may not carry out its statutory duty to post-audit the Coal and Clay Mine Subsidence Insurance Fund, since the Insurance Commissioner is a member of the Board administering the fund and is called upon to pre-approve its transactions.
2. The function of the Insurance Department as auditor not only conflicts with the Insurance Commissioner's primary duty to administer the fund, it is also unnecessary because the same post-audit function is required to be performed annually by the Auditor General.

Harrisburg, Pa.  
November 5, 1975

Honorable Maurice Goddard  
Chairman, Coal and Clay Mine Subsidence  
Insurance Board  
Harrisburg, Pennsylvania

Dear Chairman Goddard:

We have received your request for an opinion as to the legality of the Insurance Commissioner serving as a member of the Coal and Clay Mine Subsidence Insurance Board while at the same time being responsible for examining and auditing the Coal and Clay Mine Subsidence Insurance Fund, administered by the Board. It is our opinion, and you are hereby advised, that the Insurance Commissioner cannot properly audit the fund which he is responsible for administering as a member of the Board.

The Coal and Clay Mine Subsidence Insurance Board was created by the Legislature, Act of August 23, 1961, P. L. 1068 § 3, 52 P. S. § 3203, and consists of the Secretary of Environmental Resources, the Commissioner of Insurance, and the State Treasurer. The problem arises due to the audit function required of the Insurance Department by Section 14 of the aforesaid Act (52 P. S. § 3214):

"The Insurance Department at least once each year shall make a complete examination and audit of the affairs of the fund including all receipts and expenditures, cash on hand and securities, investments or property held representing cash or cash disbursements to ascertain its financial condition and its ability to fulfill its obligations, whether the board in managing the fund has complied with the provisions of law relating to the fund and the equity of the board's plans and dealings with its policyholders. . . ."

The validity of requiring a member of the Coal and Clay Mine Subsidence Insurance Board to audit the fund which he, as a member of the Board, shares in controlling is called into question by Article VIII, § 10 of the Pennsylvania Constitution:

"The financial affairs of any entity funded or financially aided by the Commonwealth, and all departments, boards, commissions, agencies, instrumentalities, authorities and institutions of the Commonwealth, shall be subject to audits made in accordance with generally accepted auditing standards.

"Any Commonwealth officer whose approval is necessary for any transaction relative to the financial affairs of the Commonwealth shall not be charged with the function of auditing that transaction after its occurrence."<sup>1</sup>

The Insurance Commissioner as a member of the Coal and Clay Mine Subsidence Insurance Board exercises a one-third control of the fund and his vote in favor of an expenditure of the fund represents its approval, thereby invoking the constitutional prohibition against post-auditing the same transaction.

The function of the Insurance Department as auditor not only conflicts with the Insurance Commissioner's primary duty to administer the fund, it is also unnecessary. The post transaction audit performed by the Department is identical in nature and purpose to the post transaction audit performed by the Auditor General. Section 13 of the Act, 52 P. S. § 3213 requires, in part:

"The Auditor General through such agents as he may select shall, during the calendar year, make a complete examination and audit of the fund including all receipts and expenditures, cash on hand and securities, investments or property held representing cash or cash disbursements. . . ."

This language is almost identical with that of the statutory provision giving the auditing responsibility to the Insurance Department.

Therefore, since the auditing function of the Insurance Commissioner as head of the Insurance Department is prohibited by the Pennsylvania Constitution in view of his membership on the Board, and since the Auditor General is charged with the same duty to audit the fund annually, it must be concluded that the Insurance Commissioner retains his position as a member of the Board but he must give up the auditing duties of his department.

Accordingly, it is our opinion, and you are advised, that the Insurance Department may no longer conduct audits of the Coal and Clay Mine Subsidence Insurance Fund.

This opinion has been discussed with counsel to the Auditor General who concurs in our conclusion. A copy of the opinion will be forwarded

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1. The following statutory provision was passed to implement the second paragraph of Article VIII, § 10: "No officer of this Commonwealth charged with the function of auditing transactions after their occurrence shall approve the same transactions prior to their occurrence." Act of March 18, 1971, P. L. 110, 72 P. S. § 404.

to Insurance Commissioner Sheppard. A similar opinion concerning the Insurance Commissioner's statutory responsibility to audit the State Workmen's Insurance Fund is being submitted to Commissioner Sheppard reaching the same result.\*

Very truly yours,

W. W. ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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### OFFICIAL OPINION No. 75-39

#### *Education—School Code—Expenses.*

1. Section 516 of the Public School Code, 24 P. S. § 5-516.1 does not permit members of the boards of school directors to be reimbursed for lost wages resulting from attendance at educational conventions.

Harrisburg, Pa.  
November 5, 1975

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

Dear Secretary Pittenger:

You have requested our opinion as to whether members of boards of school directors are entitled to reimbursement for lost wages in instances where they attend educational conventions. It is our opinion, and you are advised, that school directors are not entitled to reimbursement for lost wages resulting from attendance at educational conventions. Section 516 of the Public School Code, as amended, 24 P. S. § 5-516.1 permits members of boards of school directors to be reimbursed "for all expenses actually and necessarily incurred in going to, attending and returning from the place of such meeting, including travel, travel insurance, lodging, meals, registration fees and other incidental expenses necessarily incurred, but not exceeding thirty dollars (\$30.00) per day for lodging and meals."

In order to reach an opinion on the question you raised, it becomes important to determine the meaning of the terms "all expenses actually and necessarily incurred" and "other incidental expenses necessarily incurred."

I. The Statutory Construction Act of 1972 provides that words and phrases shall be construed "according to their common and approved usage." (1 Pa. C. S. § 1903). The dictionary definitions of the terms

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\*Editor's note: See Opinion No. 75-44, *infra*.

"expenses" and "incurred" shed some light in this area. The word "expenses" is defined as:

"The act or practice of expending money; the act or process of using up; something expended to secure a benefit or bring about a result; financial burden or outlay; the charges incurred by an employee in connection with the performance of his duties; an item of business outlay chargeable against revenue for a specific period; a cause or occasion of expenditures; a sacrifice." Webster's Third New International Dictionary.

The word "incur" is defined as: "To become liable or subject to." Webster's Third New International Dictionary. These dictionary definitions suggest that, according to common usage, a person has "incurred expenses" when he has "become subject to or liable to a laying out or using up of money or other resources."

II. The courts have given a number of definitions to the term "expenses incurred." In general, these have echoed the dictionary definitions, defining "expense" to mean an outlay of funds made in connection with an enforceable legal obligation to pay. In the case of *Municipal Housing Authority v. Levine*, 136 N. Y. S. 2d 197, 198 (1954), the Schenectady County Court of New York summarized the general definition of "expense" followed by State and Federal courts and relied on the Webster's Dictionary definition of "expense" as meaning that which is "expended, laid out or consumed; cost; outlay; charge. . . ." In the case of *U. S. v. St. Paul Mercury Indem. Co.*, 133 F. Supp. 726, 732, 733 (D. Neb. 1955), the Court stated that "expenses are not incurred . . . unless the legal obligation to pay them has arisen." A person has "incurred expenses" when he "has run into an obligation to pay out money." The Court emphasized that, to qualify as an expense in any legal sense, there must have been a "real and substantial, not a fictitious, ostensible or merely philosophical 'running into the obligation to pay.'"

A somewhat broader definition of "expense" has been set forth in two recent decisions. The Court of Civil Appeals of Texas in the case of *Travelers Ins. Co. v. Varley*, 421 S. W. 2d 478, 481 (1967), stated that the term "expense" means "money spent; cost; charge; money to pay for charges; cost with the idea of loss, damage or sacrifice; drain on one's finances; outlay; burden of expenditure." The Supreme Court of Minnesota in the case of *Local 1140, Intern. Union of Elec., Radio and Mach. Workers, AFL-CIO v. Massachusetts Mut. Life Ins. Co.*, 282 Minn. 455, 165 N. W. 2d 234, 236 (1969), stated that the word "expense" may include, in addition to monetary payment, the employment and consumption of time and labor or the expenditure of other resources. The *Travelers Insurance* and *Local 1140* cases represent an enlargement of the definition traditionally used by the courts, and may lend some credence to the position that a school director's lost wages should be included as an expense of the type designated as an "other resource," i.e., of his or her job as a source of income. However, in

both cases the definition of "expense" still carries with it the connotation of an enforceable legal obligation to pay the commodity being expended (whether money, time or other resources). School directors do indeed suffer a real loss of wages when they leave their regular occupations to attend educational conventions. However, they cannot be said, by the act of going to such a convention, to render themselves subject to a legal obligation to pay out or expend the amount of wages they would have received had they not attended the convention. Those particular wages would only become the property of the school directors had they worked instead of attending the convention, and performed the services for which the wages were to be paid. In no real sense can the school directors be said to have "laid out," "spent" or committed themselves to pay wages which, by virtue of their attendance at an educational convention, they never earned and thus never possessed. Thus, lost wages would not fall within the definition of an "expense incurred," so that no legislative intent may be inferred that school directors should be reimbursed for wages lost as a result of attendance at educational conventions. The Statutory Construction Act of 1972 provides that: "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C. S. § 1921(b).

III. Even if we were to assume *arguendo* that the meaning of expenses is ambiguous, we would still not be able to construe Section 516 as authorizing school directors to be reimbursed for wages lost as a result of attendance at educational conventions. In the construction of laws, where general words are followed by words of a particular and specific meaning, the courts have held that "such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." *Abeles v. Adams Engineering Co., Inc.*, 64 N. J. Super. 167, 165 A. 2d 555, 560 (1960). See also 1 Pa. C. S. § 1903(b). In Section 516.1, the general words, "expenses actually and necessarily incurred" are followed by the following words of particular and specific meaning:

"Travel, travel insurance, lodging, meals, registration fees and other incidental expenses necessarily incurred."

The term "lost wages" is not of the same general kind or class as the terms "travel, travel insurance, lodging, meals, registration fees and other incidental expenses." Therefore, the loss of wages could not be construed as an "expense incurred" within the meaning of Section 516 of the Act.

IV. Section 321 of the Public School Code of 1949, as amended, 24 P. S. § 3-321 specifically states that all persons elected or appointed as school directors shall serve without pay. Read in conjunction with Section 516, it may be inferred from Section 321 that the Legislature did not envision school directors receiving compensation from the State—either directly as a salary or indirectly in the form of compensation for wages lost—in return for the performance of their duties as school directors.

These conclusions are reinforced by the fact that, where the Legislature has wished to compensate public officials for wages lost in the performance of their duties, it has done so explicitly by statute. The Legislature specifically provided (in a statute more recent than Section 516) that members of the Professional Standards and Practices Commission shall be reimbursed for expenses and for lost wages while attending Commission meetings. That statute provides as follows:

"Members of the Commission shall receive no compensation for their services, but shall be reimbursed for their actual and necessary expenses incurred in the performance of official Commission business. A member of the Commission who is an employe of an agency of the Commonwealth, or any of its political subdivisions including school districts, shall be permitted to attend Commission meetings and perform other Commission duties without loss of income or other benefits. A member of the Commission who is employed by a private employer shall be reimbursed for any income lost as a result of attendance at Commission meetings or performance of other official Commission duties." 24 P. S. § 12-1257.

The contrast between the above language and that of Section 516 of the Public School Code makes it clear that if the Legislature had determined that school directors should be reimbursed for lost wages, the latter section would have specifically provided for such reimbursement.

V. There remains, however, a question as to whether the spirit, if not the letter, of Section 516 may be interpreted as including lost wages among the "expenses incurred" for which school directors are to be reimbursed. In *Cheatem v. Fallowfield Township*, 6 D. & C. 2d 350, 354 (1955), the court, by way of dicta, noted that "a loss of wages might properly be included as coming within the spirit of the Act authorizing the repayment of the expense incident to the attendance of the school directors at such meetings." The language in *Cheatem* was cited by the Washington County Court in *In Re Burgettstown Area School District Audit Report*, 45 Washington County Reports 185, 189 (1965). In *Burgettstown*, the court expressed the opinion that the spirit of Section 516 encompassed reimbursement to school directors for wages lost in the performance of their duties. The reason the statute provided for the allowance of trip expenses, explained the court, "is so that the directors, unsalaried as they are, will not have to dip into their own pocketbooks to actually carry on the business of the school district. It matters not at all to the directors how their financial loss comes about—but only that they were forced to lose money while attending to necessary school work."

It is important to stress, however, that the *Burgettstown* decision held only that reimbursement to the school directors of lost wages was permissible under the spirit of the statute, not that the statute clearly mandated such reimbursement. Moreover, the *Burgettstown* opinion was apparently based on the erroneous belief that the dicta in *Cheatem*, quoted above, represented a controlling principle. It is true, as the

*Burgettstown* court states, that the spirit of Section 516 seems directed toward ensuring that school directors will suffer no financial loss as a consequence of performing their duties. However, this understanding of the spirit of the statute does not justify overlooking the clear evidence of the Legislature's intention to exclude lost wages from among the expenses to be reimbursed: evidence provided by the list of typical expenditures, by the language of Section 321 that school directors shall serve without compensation, and by the fact that the Legislature has provided for compensation for lost wages for members of the Professional Standards and Practices Commission explicitly in another statute. The Statutory Construction Act provides that "when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C. S. § 1921(b).

In *In Re Appeal from Controller's Report of Olyphant School District*, 61 Lackawanna Jurist 197 (1960), the sum of \$50.00 was paid to each of four school directors for alleged expenses for a meeting with representatives of the Department of Education in Harrisburg. Judge (now President Judge) Robinson said (beginning at page 204):

"... The purpose of the trip was to secure funds with which to pay accrued teachers' salaries. *The directors seek to justify the payments on the ground that they are entitled to reimbursement for wages lost at their regular employment* and that there existed a custom to pay each director \$100 for convention purposes. Of course, these contentions possess no merit. *"The law looks with a jaundiced eye whenever school district funds are traceable to the school directors' pockets.* Where a director seeks lawful reimbursement of moneys expended for district purposes he must strictly comply with the letter of the School Code. Under the Code, as amended, June 28, 1957, P. L. 408, section 1, 24 P. S. § 5-517, expenses are properly allowed to directors for attending meetings and conventions *providing that such expenses have been actually and necessarily incurred and presented to the district in a written itemized statement. . . .*" (Emphasis added.)

We believe that the *Olyphant* case correctly stated the intention of Section 516 and that the *Cheatem* and *Burgettstown* cases, *supra*, did not.<sup>1</sup>

In conclusion, it is our opinion that Section 516 of the School Code does not permit reimbursement to school directors for wages lost due to their attendance at educational conventions.

1. In *Appeal from Audit of East Allegheny School District*, C. P. Allegheny County, 85 April Term (1972) (page 2, slip opinion), the Court of Common Pleas of Allegheny County stated that: "Wages lost by school directors when absence from their occupation is required to fulfill duties of school directors are not specifically covered by the School Code." However, the court found that in the extraordinary circumstance where school directors were ordered by the court to attend conferences regarding a teachers' strike, they could be reimbursed for wages lost.



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 conclusion.

Very truly yours,

LILLIAN B. GASKIN  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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### OFFICIAL OPINION No. 75-40

*Hospitals—Physicians—Spousal Consent—Voluntary Sterilization—Department of Health.*

1. There is no case law or statutory law that imposes liability on a physician or hospital for performing a voluntary sterilization operation on a married person without obtaining his/her spouse's consent.

Harrisburg, Pa.  
November 5, 1975

Dr. Leonard Bachman  
Secretary of Health  
Harrisburg, Pennsylvania

Dear Secretary Bachman:

You have been asked whether the law requires that a hospital and/or doctor obtain spousal consent before performing a voluntary sterilization operation on a married person. You indicate that many hospitals and physicians in Pennsylvania have a policy of requiring spousal consent before performing a sterilization operation on a married individual, and that the Department of Health has received numerous complaints from the public regarding this practice. It is our opinion, and you are so advised, that there is no statutory or case law in Pennsylvania that requires a hospital or doctor to obtain spousal consent before performing a voluntary sterilization operation on a married person. In addition, no court in the United States has held a hospital or physician civilly or criminally liable for performing a voluntary sterilization operation without the consent of a married patient's spouse when a patient has given his or her informed consent for the operation.<sup>1</sup>

#### I. Statutory Law

There is no statutory law in Pennsylvania requiring spousal consent for voluntary sterilization. Some states do have such statutes; how-

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1. Of course, informed consent of the patient would be necessary under Pennsylvania law before any medical procedure—including a sterilization operation—may legally be performed. See *Planned Parenthood Association v. Fitzpatrick*, *infra.*; *Dunham v. Wright*, 423 F. 2d 940 (3rd Cir. 1970).

ever, their constitutionality appears to be questionable. A number of recent court decisions have invalidated statutorily-imposed spousal consent provisions in the area of abortion. See *Doe v. Bellin Memorial Hospital*, 479 F. 2d 756 (7th Cir. 1973); *Planned Parenthood Association v. Fitzpatrick*, 401 F. Supp. 554 (E. D. Pa. 1975); *Gerstein v. Coe*, 376 F. Supp. 695 (S. D. Fla. 1973), *app. dism. and cert. den.*, 417 U. S. 279 (1974); *Doe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973). In one case, although a spousal consent provision in a statute was not invalidated, the Supreme Court did order a stay of enforcement of the statute. See *Planned Parenthood of Central Missouri v. Danforth*, 392 F. Supp. 1362 (E. D. Mo. 1975), *stay granted*, 420 U. S. 918 (1975).\*

In general, the courts have found that a spousal consent provision in an abortion statute violates the constitutional right of privacy of a pregnant woman. By analogy, a statute requiring spousal consent for voluntary sterilization would also appear to be unconstitutional.

## II. Case Law

A. There is no case law in Pennsylvania which imposes liability on a hospital or physician for having performed a voluntary sterilization operation without having obtained the consent of the patient's spouse. The few non-Pennsylvania cases which have been decided in this area have held the physician not liable to the patient's spouse for performing a voluntary sterilization operation. In the case of *Murray v. Vandevander*, 522 P. 2d 302 (Okla. Ct. of App. 1974), a husband who did not consent to the performance of a hysterectomy on his wife brought action against a physician for damages to his right of consortium and right to produce another child. The Court of Appeals of Oklahoma held that the consent of the husband was not necessary where the wife was capable of giving her own consent, and that the husband was not entitled to recover damages of any kind for the performance of an operation to which he did not consent. The court stated that:

"The natural right of a married woman to her health is not qualified by requiring that she have the consent of her husband in order to receive surgical care from a physician." At page 303.

In *Kritzer v. Citron*, 101 Cal. App. 2d 33, 224 P. 2d 808 (1950), a patient's husband sued a hospital to recover damages resulting from a sterilization operation which was performed on his wife without his consent. The action was brought on a legal theory of assault. The court held that there is no requirement that a husband consent to a voluntary sterilization performed on his wife since the informed consent of the patient alone is sufficient to authorize the operation.

A number of cases involving surgery other than voluntary sterilization have reaffirmed the principle that physicians who have given

\*Editor's note: On July 1, 1976, the Supreme Court vacated the order of the lower court, holding that "the State may not constitutionally require the consent of the spouse . . . as a condition for abortion during the first 12 weeks of pregnancy." 49 L. Ed. 2d 788, 805.

medical treatment or performed surgery on married persons without the consent of their spouses are not liable to the spouse for damages since the consent of a married person who is a competent adult is sufficient for medical treatment, and additional consent by a spouse is not necessary. *Burroughs v. Crichton*, 48 App. D. C. 596 (1919); *State, to Use of Janney v. Housekeeper*, 70 Md. 162, 16 A. 382 (1889); *Rytkonen v. Lojaco*, 269 Mich. 270, 257 N. W. 703 (1934); *Rosenberg v. Feigin*, 119 Cal. App. 2d 783, 260 P. 2d 143 (1953); *Barker v. Heaney*, 82 S. W. 2d 417 (Tex. Civ. App. 1935).

B. There is non-Pennsylvania case law holding that a woman has a constitutional right to obtain a sterilization operation without the consent of her husband. In the recent case of *Ponter v. Ponter*, 135 N. J. Super. 50, 342 A. 2d 574 (1975), the New Jersey Superior Court decided that a married woman has a constitutional right to obtain a sterilization operation without the consent of her husband. The court stated that:

"Women have emerged in our law from the status of their husband's chattels to the position of 'frail vessels' and now finally to the recognition that women are individual persons with certain and absolute constitutional rights. Included within those rights is the right to procure an abortion or other operation without her husband's consent. A natural and logical corollary to those rights is a right to be sterilized without her husband's consent." 342 A. 2d at 577.

In addition, in the case of *Hathaway v. Worcester City Hospital*, 475 F. 2d 701 (1st Cir. 1973), the court held that a city hospital's prohibition of sterilization operations violate the equal protection clause of the U. S. Constitution. The court stated that:

"... it is clear under *Roe* and *Doe* that a complete ban on a surgical procedure relating to the fundamental interest in the pregnancy decision is far too broad when other comparable surgical procedures are performed." 475 F. 2d at 706.

Thus, where a public hospital performs other types of elective surgery at comparable risk and complexity without spousal consent, it would be unconstitutional to require spousal consent for elective sterilization.

### III. Summary

In conclusion, you may inform the hospitals under your jurisdiction that there is no case law or statutory law in Pennsylvania imposing liability on a physician or hospital for performing a voluntary sterilization on a patient without obtaining the consent of his or her spouse.

Very truly yours,  
LILLIAN B. GASKIN  
*Deputy Attorney General*  
VINCENT X. YAKOWICZ  
*Solicitor General*  
ROBERT P. KANE  
*Attorney General*

## OFFICIAL OPINION No. 75-41

*Public Utility Commission—Insurance Department—Self-Insurance—Statutory Construction—Motor Carriers—Insurance.*

1. The Public Utility Commission rather than the Insurance Department has the authority to set the self-insurance requirements for motor carriers.

Harrisburg, Pa.  
November 5, 1975

Honorable William J. Sheppard  
Commissioner  
Department of Insurance  
Harrisburg, Pennsylvania

Honorable Louis J. Carter  
Chairman  
Public Utility Commission  
Harrisburg, Pennsylvania

Dear Commissioners Sheppard and Carter:

You have requested our opinion regarding whether the Insurance Department may impose certain self insurance requirements upon motor carriers in connection with the Pennsylvania No-fault Motor Vehicle Insurance Act or whether the authority to regulate such carriers lies with the Public Utility Commission. For the reasons discussed hereinafter, it is our opinion and you are accordingly advised that the Public Utility Commission has exclusive jurisdiction to impose self-insurance requirements upon motor carriers.

There does not seem to be any question that regulated common carriers are subject to the requirements of Section 104 of the No-fault Law (40 P. S. § 1009.104) establishing mandatory security for no-fault benefits. The question is who is to set the minimum insurance coverage requirements as well as supervise compliance. Should it be the Public Utility Commission, by incorporating the specific obligation of self-insurance with the general obligations of a regulated common carrier for protection of the public, or should it be the Department of Insurance, joining regulated common carriers with all other obligors, treating all alike and assuring the necessary security for the fulfilling of the special requirements of the No-fault Law?

By virtue of its authority under the Pennsylvania No-fault Motor Vehicle Insurance Act, Act of July 19, 1974, Act No. 176, 40 P. S. § 1009.101 *et seq.*, the Insurance Department has promulgated regulations, which, *inter alia*, specify that any entity wishing to obtain a self-insurance certificate must post certain minimum collateral with the Department of Transportation. The regulation also describes the type of securities which will be accepted as collateral (31 Pa. Code § 66.6 *et seq.*), as well as requiring a proposed self insured to enter into an agreement with the assigned claims plan and to pay its fair share of the claims and expenses of the plan. The assigned claims plan is organized and maintained by insurance companies and is regulated

by the Insurance Commissioner. It was established to provide no-fault benefits under certain conditions including the situation in which any obligor is financially unable to provide the required coverage. (40 P. S. § 1009.108).

On the other hand, the Public Utility Commission is authorized to regulate self-insurance requirements for motor carriers by virtue of a provision of the Public Utility Code which provides in pertinent part that:

"The Commission may, as to motor carriers, prescribe, by regulation, or order such requirements as it may deem necessary for the protection of persons or property of their patrons and the public including the filing of surety bonds, the carrying of insurance, *or the qualifications and conditions under which such carriers may act as self insurers with respect to such matters.*" 66 P. S. § 1355. (Emphasis added.)

In order to effectuate this statutory provision, the Public Utility Commission promulgated Rule 7 entitled "Insurance Requirements Of Bus And Taxicab Regulations." This regulation, most recently amended on August 24, 1970, sets forth, *inter alia*, the minimum self-insurance requirements for taxicabs. Since the regulations promulgated by the Public Utility Commission and the Insurance Department impose inconsistent self-insurance requirements upon motor carriers, the question of whose law and regulations take precedence must be resolved.

Although the two somewhat conflicting statutes (66 P. S. § 1355 and 40 P. S. § 1009.104) are part of two larger codes, each of which deal with separate subjects of regulation, i.e., Public Utility Law and Insurance Law, they both contain language which indicates that the purpose of these particular sections is to regulate the subject of self-insurance for motor vehicles. However, the Public Utility Law specifically states that the Commission may prescribe, by regulation, such requirements that it deems necessary when motor carriers act as self insurers. The No-fault Law is much less direct in its grant of authority as it only states that self-insurance requirements for owners of motor vehicles which operate in the Commonwealth are subject to the approval of the Commissioner. Since directly conflicting statutes are disfavored by law and courts strain to give effect to both, *City of Wilkes-Barre v. Public Utility Commission*, 164 Pa. Superior Ct. 210, 63 A. 2d 452 (1949), *Duquesne Light Company v. Monroeville Borough*, 449 Pa. 573, 298 A. 2d 252 (1972), the provision of the Statutory Construction Act which provides that specific provisions of law prevail over the more general provisions must be given its full weight. The Statutory Construction Act provides that:

"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 provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail." 1 Pa. C. S. § 1933.

The No-fault Law provides that, regardless of fault, an individual involved in an accident shall be "made whole" by the insurance company which insures the individual's vehicle. This is the general intent of the No-fault Law and is not irreconcilable with the provision of the Public Utility Law specifying self-insurance for motor carriers. These two laws can be read *in para materia* in order that the particular provision of the Public Utility Law which provides that the Commission may set the self-insurance requirements for motor vehicles prevails.

Further support of this doctrine can be found in a recent case which held that a taxicab company is under the jurisdiction of the Public Utility Commission which has the authority to prescribe insurance requirements for the company in order to protect the public. *Johnson v. Yellow Cab Company of Philadelphia*, 456 Pa. 256, 317 A. 2d 245 (1974). The issue in this case was whether the Yellow Cab Company came under the jurisdiction of the Insurance Department insofar as the Uninsured Motorist Act is concerned, 40 P. S. § 2000, or whether Yellow Cab came within the exclusive jurisdiction of the Public Utility Commission and its self-insurance requirements. The Act specifically provided that a motor carrier under the jurisdiction of the Public Utility Commission had the right to reject uninsured motorist coverage in writing. 40 P. S. § 2000(a)(2). Although the case was decided on rather technical grounds, our Supreme Court held that the Yellow Cab Company was not subject to the Uninsured Motorist Act. The Court stated:

"The legislature has provided under the Public Utility Code for the Public Utility Commission to prescribe insurance requirements for motor carriers in order to protect the public. Act of May 28, 1937, P. L. 1053, § 915, as amended, 66 P. S. § 1355. The appellee, Yellow Cab, as a motor carrier is under the jurisdiction of the Public Utility Commission. Under its Statutory Authority, the Public Utility Commission has issued rule 7 of its Insurance Requirements Of Bus And Taxicab Regulations. That rule, prescribing the insurance requirements applicable to the appellee does not require motor carriers, such as the appellee to purchase an insurance policy containing uninsured motorist coverage; nor does the rule require the appellee to protect its passengers in any other way from uninsured motorists. . . ." *Id.* at 261-262, 317 A. 2d at 248-249.

Thus, even though the case was decided on other grounds in favor of Yellow Cab, the Court indicated that the Public Utility Law would supersede the Insurance Department Law regarding uninsured motorists. Accordingly, the same rationale would apply for self insurance.

To give total effect to the No-fault Law would be to impliedly repeal the Public Utility Law insofar as it is concerned with self insurance for motor vehicles. It has often been held that implied repealers are in great disfavor. *City of Wilkes-Barre v. Pennsylvania Public Utility Commission*, *supra*, and *Pittsburgh v. Public Utility Commission*, 3 Pa. Commonwealth Ct. 546, 284 A. 2d 808 (1971). We can, therefore, assume that the Legislature did not intend to render the self insurance provision of the Public Utility Law a nullity by impliedly rejecting it.

The *Wilkes-Barre* case amply demonstrates this principle as it held that the term "all bridges" in a Department of Transportation Law did not include a more specific category of bridges subject to Public Utility Commission regulations. This case provides support for the contention that the clauses contained in the No-fault Motor Vehicle Insurance Act dealing with the "every owner of a motor vehicle," 40 P. S. § 1009.104(a) and "any owner of a passenger vehicle," 40 P. S. § 1009.601 did not override the more specific grant of authority to the Public Utility Commission for "motor carriers" (as defined in 66 P. S. §§ 1102(13), 1355); see also *Turkey Run Fuels, Inc., Appeal*, 173 Pa. Superior Ct. 76, 95 A. 2d 370 (1953) and *Paxon Maymar, Inc. v. Pa. Liquor Control Board*, 11 Pa. Commonwealth Ct. 136, 312 A. 2d 115 (1973).

The courts of Pennsylvania have held time and again that when conflicting statutes seem to occur and the subject is an area of regulation of public utilities, the conflict must be decided in favor of the Public Utility Commission. In examples of cases where conflicts of statutes have occurred, we have found that the Public Utility Law has been upheld in: conflict with ordinance enacted under the Borough Code, *Duquesne Light Co. v. Monroeville Borough*, *supra*; statutes authorizing county planning commissions, *Chester County v. Philadelphia Electric Company*, 420 Pa. 422, 218 A. 2d 331 (1966); statutes authorizing city ordinances, *York Water Company v. York*, 250 Pa. 115, 95 A. 396 (1915); statutes granting authority to the State Department of Transportation, *Pennsylvania Public Utility Commission v. Souderton Borough*, 210 Pa. Superior Ct. 22, 231 A. 2d 875 (1967).

For the reasons outlined above, it is our opinion that the Public Utility Commission has jurisdiction over the self-insurance requirements of motor carriers. However, since the Insurance Department has its expertise in the field of insurance, it may be wise for the Public Utility Commission to conform its requirements as closely as possible to the minimum self-insurance requirements as contained in the No-fault Law and the regulations adopted thereunder.

Very truly yours,

JEFFREY G. COKIN  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

## OFFICIAL OPINION No. 75-42

*Insurance Department—Insurance Commissioner—Human Relations Act—Licenses—Discrimination.*

1. The Insurance Commissioner 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.
2. 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 licenses from the Insurance Department.

Harrisburg, Pa.  
November 12, 1975

Honorable William J. Sheppard  
Insurance Commissioner  
Harrisburg, Pennsylvania

Dear Commissioner Sheppard:

A question has arisen regarding whether the Pennsylvania Insurance Department 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. The Department has also asked whether it can adopt a regulation prohibiting discrimination by its licensees and setting forth the penalties for violations of such a regulation. It is our opinion and you are hereby advised that the answer to both these questions is yes.

The public interest has long included the prevention of arbitrary and invidious discrimination in employment practices on the basis of race, color, religious creed, national origin or sex. Thus, both the federal and state legislatures have enacted laws to prohibit employment discrimination, 42 U. S. C. § 2000(e) and 43 P. S. § 951 *et seq.* The Commonwealth's policy regarding employment discrimination was clearly enunciated by the Pennsylvania Legislature in enacting the Human Relations Act. "The opportunity for an individual to obtain employment for which he [or she] is qualified . . . without discrimination because of race, color, religious creed, ancestry, . . . sex or national origin [is] hereby recognized as and declared to be [a] civil right. . . ." 43 P. S. § 953.

The law regulating insurance companies should be liberally construed to effect the object of protecting the public interest. *Goodwin v. Hartford Life Insurance Company*, 359 F. Supp. 20 (W. D. Pa. 1973) *rev'd on other grounds*, 491 F. 2d 332 (3rd Cir. 1974). Since the prevention of arbitrary employment discrimination is within the public interest, it is clear that construing the Insurance Company Act of 1921, 40 P. S. § 361 *et seq.* to impose a condition upon insurance companies doing



business in the Commonwealth of non-discrimination in employment is an appropriate method of protecting the public interest.<sup>1</sup>

In April of 1974, the Attorney General advised the Insurance Commissioner that:

"... 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. . . ."

"... The above analysis indicates that it would certainly be an abuse of discretion for [the Commissioner] to approve contracts containing terms that the Supreme Court has held to be unfair and unenforceable as against public policy." Opinion of the Attorney General No. 22, April 26, 1974.

While the opinion deals with the approval of certain contract forms, the reasoning applies with equal force to the instant situation. If the Commissioner must apply and follow the law of the Commonwealth in approving contracts, then he is unquestionably under the same obligation in approving licenses. Just as certain contract terms are unenforceable as against public policy, employment discrimination is prohibited as being against the public interest of this Commonwealth.

The Pennsylvania Human Relations Act, 43 P. S. § 951 *et seq.* makes it unlawful for any employer to discriminate in its employment policies because of race, color, religious creed, ancestry, age, sex or national origin, unless based upon a bona fide occupational qualification. The term "employer" includes *any* person employing four or more persons within the Commonwealth. Thus, any insurance company which employs four or more persons within the state must comply with the Human Relations Act's prohibition against employment discrimination.

Violation of this Act by an insurance company is grounds for suspension of its business in this Commonwealth. This duty is imposed upon the Commissioner by the Insurance Department Act:

"The Insurance Commissioner shall suspend the entire business within this Commonwealth of any insurance company

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1. On the basis of similar reasoning, the Pennsylvania Liquor Control Board was advised by the Attorney General that it 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. In addition, the Board was advised that it can adopt a regulation prohibiting discrimination by its licensees and setting forth the penalties for violations of such a regulation and of provisions of the Human Relations Act. Opinion of the Attorney General No. 55, November 12, 1974.

... of another state or foreign government during its non-compliance with any provision of law obligatory upon it. . . ."  
40 P. S. § 201.

The Act further provides that:

"... [w]henever any domestic insurance company . . . has wilfully violated its charter or *any law of the Commonwealth* . . . the Insurance Commissioner . . . may suspend any such organization. . . ." 40 P. S. § 202(f). (Emphasis added.)

The above reasoning applies with equal force to all other licensees under the Insurance Department Act of 1921, 40 P. S. § 1 *et seq.*, as well as the Insurance Company Law of 1921, 40 P. S. § 361 *et seq.*

The Insurance Department Act provides for the licensing of agents, 40 P. S. § 233, and of brokers, 40 P. S. § 252, and sets forth the requirements for obtaining such licenses. The licensee must be "of good business reputation" and "worthy of a license." A licensee may have his license "revoked by the Insurance Commissioner for cause." The Pennsylvania Code provides for the revocation, suspension or non-renewal of a license "upon finding, after a hearing, that such agent or broker has engaged in conduct which would disqualify him for initial issuance of a license. Such conduct includes *but is not limited to the indicated bases for initial denial of a license provided in § 33.7 of this Title.*" 31 Pa. Code § 33.18. (Emphasis added.)

Construing the above provisions of the Insurance Department Act and of the regulations of the Department, agents and brokers who violate the Human Relations Act's prohibition on employment discrimination clearly are not "of good business reputation;" and are not "worthy of a license." Hence, the licenses of brokers and agents who engage in such conduct prohibited by the laws and public interest of Pennsylvania may be revoked for cause. To conclude otherwise would be in contradiction of the oft-stated public policy of Pennsylvania to root out discrimination at every opportunity. Moreover, if the insurance company itself is required to be in compliance with the laws of the Commonwealth, then it is clear that in order to effectuate that requirement, its representatives, such as agents, must also be in compliance with those very same laws.

A similar conclusion was reached in Attorney General's Opinion No. 55 to the Liquor Control Board. There, it was declared that "... the Board is mandated to allow licenses only to reputable individuals. 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."

The above rationale applies equally to managers and exclusive general agents, who are licensed under section 651 of the Insurance

Department Act which provides in part that a licensee must be one who possesses a "... good business reputation and has the responsibility, general character and fitness for the business which are such as to command the confidence of the public and to warrant the belief that the applicant's activities will be honestly and efficiently conducted. . . ." 40 P. S. § 291. The Insurance Commissioner "may, in his discretion, suspend or revoke or refuse to renew the license" of any licensee who is disqualified by section 651, 40 P. S. § 293. It seems, therefore, that a licensee under 40 P. S. § 291 who is in violation of state laws and strong public policy against discrimination fails "to command the confidence of the public."

To obtain a license, a public adjuster must possess "trustworthiness and competency to transact the business of public adjusters in such a manner as to safeguard the interests of the public." 40 P. S. § 304. One clearly does not exhibit the capacity to "safeguard" the interests of the public when one engages in discriminatory practices prohibited by the laws and public policy of this state. The Insurance Commissioner is authorized to revoke the license of public adjusters who have "violated any provisions" of the Insurance Department Act. 40 P. S. § 306.

In summary, the Insurance Commissioner can refuse to issue or renew licenses to, and revoke or suspend licenses of licensees under the Insurance Department Act and Insurance Company Law, who discriminate on the basis of race, color, religious creed, sex or national origin in their employment policies. Since the Insurance Commissioner has the duty to insure that the insurance laws of this Commonwealth are observed, he should adopt regulations which will implement this opinion. We urge that such regulations be promulgated at the earliest possible date and that they be drafted in a manner which will provide all current and potential license holders with adequate notice and explanation of the standards to which they will be held.

Sincerely yours,

MARGRET E. ANDERSON

*Assistant Attorney General*

JEFFREY G. COKIN

*Deputy Attorney General*

VINCENT X. YAKOWICZ

*Solicitor General*

ROBERT P. KANE

*Attorney General*

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#### OFFICIAL OPINION No. 75-43

*Department of Agriculture—Grants—Reimbursements—Harness Racing Act of 1959—County agricultural societies, independent agricultural societies, and other organizations conducting annual agricultural fairs—Sex discrimination—Fourteenth Amendment—Article I, § 28 of the Pennsylvania Constitution.*

1. The Fourteenth Amendment to the United States Constitution and Article I, § 28 of the Pennsylvania Constitution prohibit the disbursement of State funds pursuant to Section 16 of the Harness Racing Act of 1959 to any organization conducting an annual agricultural fair when that organization discriminates in membership on the basis of sex.

Harrisburg, Pa.  
November 12, 1975

Hon. James A. McHale  
Secretary of Agriculture  
Harrisburg, Pennsylvania

Dear Secretary McHale:

You have asked our office whether the Department of Agriculture can legally award grants and make reimbursements pursuant to Section 16 of the Harness Racing Act of 1959, as amended, 15 P. S. § 2616(d)(e.1) to county agricultural societies, independent agricultural societies, and other organizations conducting annual agricultural fairs when those organizations discriminate in membership on the basis of sex. It is our opinion, and you are advised, that the Department of Agriculture may not award such grants and reimbursements to such organizations that discriminate in membership on the basis of sex.

The Pennsylvania Department of Agriculture is responsible for awarding grants and making reimbursements to county agricultural societies, independent agricultural societies and other organizations conducting agricultural fairs as defined by the Act. In carrying out this responsibility, the Secretary of Agriculture must comply with the requirements of the State and Federal Constitutions. As the Supreme Court of the United States stated in *Cooper v. Aaron*, 358 U. S. 1, 18 (1958):

"No state legislator or executive or judicial officer can war against the constitution without violating his undertaking to support it."

Chief Justice Marshall spoke for unanimous court in saying that:

"If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery. . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The courts have held that the "Fourteenth Amendment prohibits state discriminatory action of every kind, including state participation through any arrangement, management, funds or property." *Arrington v. City of Fairfield, Alabama*, 414 F. 2d 687, 688 (5th Cir. 1969). See also *Norwood v. Harrison*, 413 U. S. 455 (1973); *Cooper v. Aaron*, *supra*. Specifically, the courts have held that providing financial assistance to organizations which unlawfully discriminate in their membership constitutes

state action within the meaning of the Fourteenth Amendment and, thus, the State is forbidden from providing financial assistance to such organizations. *Falkenstein v. Department of Revenue For the State of Oregon*, 350 F. Supp. 887 (D. Ore. 1972), *stay den.*, 409 U. S. 1032 (1972), *app. dism.*, 409 U. S. 1099 (1973); *Pitts v. Department of Revenue for State of Wisconsin*, 333 F. Supp. 662 (E. D. Wis. 1971). Discrimination in membership solely on the basis of the sex of the individual by organizations receiving state funds to conduct agricultural fairs is clearly the kind of discrimination prohibited by the Fourteenth Amendment. (See *Reed v. Reed*, 404 U. S. 71 (1971)).

The Constitution of Pennsylvania sets forth the policy of the Commonwealth with regard to discrimination in general. Article I, § 26 of the Pennsylvania Constitution 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."

With specific regard to sex discrimination, Article I, § 28 of the Pennsylvania Constitution (hereinafter referred to as the Equal Rights Amendment) provides 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." Thus far, when deciding cases under the Equal Rights Amendment, the courts of Pennsylvania have consistently refused to uphold any difference in treatment on the basis of sex wherever there is State involvement. For example, see *DiFlorido v. DiFlorido*, 459 Pa. 641, 331 A. 2d 174 (1975); *Commonwealth v. Butler*, 458 Pa. 289, 328 A. 2d 851 (1974); *Henderson v. Henderson*, 458 Pa. 97, 327 A. 2d 60 (1974); *Hopkins v. Blanco*, 457 Pa. 90, 320 A. 2d 139 (1974); *Conway v. Dana*, 456 Pa. 536, 318 A. 2d 324 (1974); *Commonwealth v. PIAA*, 18 Pa. Commonwealth Ct. 45, 334 A. 2d 839 (1975); *Percival v. City of Philadelphia*, 12 Pa. Commonwealth Ct. 628, 317 A. 2d 667 (1974); *Wiegand v. Wiegand*, 226 Pa. Superior Ct. 278, 310 A. 2d 426 (1973); *Commonwealth ex rel. Lukens v. Lukens*, 224 Pa. Superior Ct. 227, 303 A. 2d 522 (1973); *DeRosa v. DeRosa*, 60 D. & C. 2d 71, 60 Del. Co. 259 (1972); *Corso v. Corso*, 59 D. & C. 2d 546, 120 P. L. J. 183 (1972).

The Commonwealth Court stated in the decision of *Commonwealth v. PIAA*, *supra*, that "since the adoption of the Equal Rights Amendment in the Commonwealth of Pennsylvania, the courts of this state have unfailingly rejected statutory provisions as well as case law principles which discriminate against one sex or the other." 334 A. 2d at 841. The court also stated that "the concept of 'equality of rights under the law' is at least broad enough in scope to prohibit discrimination which is practiced under the auspices of what has been termed 'state action' within the meaning of the Fourteenth Amendment to the United States Constitution." 334 A. 2d 842.

Thus, the Equal Rights Amendment would prohibit the State from discriminatory action of every kind "including state participation

through any arrangement, management, funds or property." See *Arrington v. City of Fairfield, Alabama*, *supra*. The making of a state grant to an organization which denies a person membership in that organization because of the person's sex clearly constitutes that kind of unlawful discrimination.

Therefore, it is our opinion, and you are advised, that both the Fourteenth Amendment to the United States Constitution and the Equal Rights Amendment to the Pennsylvania Constitution prohibit the disbursement of State funds to organizations conducting annual agricultural fairs when those organizations discriminate in membership on the basis of sex.

Very truly yours,

LILLIAN B. GASKIN  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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#### OFFICIAL OPINION No. 75-44

*State Workmen's Insurance Fund—Audit by Insurance Commissioner.*

1. The Insurance Commissioner cannot properly audit the Fund which he is responsible for administering as a member of the Fund.
2. Article VIII, § 10 the Pennsylvania Constitution precludes charging any Commonwealth officer whose approval is necessary for any transaction relative to the financial affairs of the Commonwealth with the function of auditing that transaction after its occurrence.

Harrisburg, Pa.  
December 1, 1975

Honorable William J. Sheppard  
Insurance Commissioner  
Harrisburg, Pennsylvania

Dear Commissioner Sheppard:

We have your request for an opinion as to the legality of your serving the State Workmen's Insurance Fund in a dual capacity as a member of the board under the provisions of the Act of June 2, 1915, P. L. 762 § 2, 77 P. S. § 211, and conducting an audit of the fund under the provisions of the Act of May 1, 1933, P. L. 102 § 1, 77 P. S. § 345 in light of the provisions of Article VIII, § 10 of the Pennsylvania Constitution. It is our opinion, and you are hereby advised, that the Insurance Commissioner cannot properly audit the fund which he is responsible for administering as a member of the Fund.

The present wording of the Act of May 1, 1933, P. L. 102 § 1, as amended by the Act of July 26, 1961, P. L. 902, No. 387 is:

"The Insurance Commissioner shall every three years or oftener if deemed to be necessary, personally or by his deputy, actuary or examiners visit the State Workmen's Insurance Fund and make a complete inspection and examination of the affairs of the State Workmen's Insurance Fund to ascertain its financial condition and its ability to fulfill its obligations, whether the State Workmen's Insurance Board in managing the Fund has complied with the provisions of law relating to the Fund, and any other facts relating to its business methods and management, and the equity of the Board's plans and dealings with its policyholders."

Article VIII, § 10 of the Pennsylvania Constitution provides in part:

"Any Commonwealth officer whose approval is necessary for any transaction relative to the financial affairs of the Commonwealth shall not be charged with the function of auditing that transaction after its occurrence."

No similar section appeared in the original Constitution of 1874.

The Act of April 9, 1929, P. L. 343, Article IV, Section 402, 72 P. S. § 402 provided in part:

"It shall be the duty of the Department of the Auditor General to make all audits, which may be necessary in connection with the administration of the financial affairs of the government of this Commonwealth, with the exception of those of the Department of the Auditor General. It shall be the duty of the Governor to cause audits to be made of the affairs of the Department of the Auditor General.

"At least one audit shall be made each year of the affairs of every department, board, and commission of the executive branch of the government, . . ."

The Act of June 3, 1933, P. L. 1474, § 1 amended the second paragraph quoted above to read:

"At least one audit shall be made each year of the affairs of every department, board, except the State Workmen's Insurance Board, and commission of the executive branch of the government, . . ." apparently because of the Act of May 1, 1933, P. L. 102 directing the Insurance Commissioner to conduct an audit of that fund.

The Act of March 18, 1971, P. L. 109, No. 4, § § 3 and 4 amending the Act of 1929 and implementing Article VIII, § 10 of the Constitution presently reads:

"Except as may otherwise be provided by law it shall be the duty of the Department of the Auditor General to make all

audits of transactions after their occurrence, which may be necessary, in connection with the administration of the financial affairs of the government of this Commonwealth, with the exception of those of the Department of the Auditor General. It shall be the duty of the Governor to cause such audits to be made of the affairs of the Department of the Auditor General.

"At least one audit shall be made each year of the affairs of every department, board and commission of the executive branch of the government, . . ." thus removing the exception pertaining to the State Workmen's Insurance Fund.

"No officer of this Commonwealth charged with the function of auditing transactions after their occurrence shall approve the same transactions prior to their occurrence. . . ."

Thus, in addition to the duplication which your auditing of the Fund would constitute, the above provisions from the Constitution and implementing legislation actually preclude you from auditing the Fund.

Accordingly, we conclude and you are so advised that the Constitution and implementing legislation

- (1) supersede the Act of May 1, 1933, P. L. 102 § 1, as amended;
- (2) proscribe and preclude the Insurance Commissioner from auditing the State Workmen's Insurance Fund; and
- (3) confer the power and impose the duty upon the Auditor General to conduct the audits of the Fund.

This matter has been discussed with the Counsel for the Auditor General who has expressed agreement herewith.

Very truly yours,

DONALD J. MURPHY  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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#### OFFICIAL OPINION No. 75-45

*Governor's Council on Drug and Alcohol Abuse—State Adverse Interest Act—County Commissioners—State Employee.*

1. A county commissioner whose county receives funds from the Governor's Council on Drug and Alcohol Abuse may not be a member of the Council.



2. Since a county commissioner is a party to the grant agreement entered into by his county, he has an adverse interest in such agreement.
3. Members of the Governor's Council on Drug and Alcohol Abuse are State officers as defined by the State Adverse Interest Act.

Harrisburg, Pa.  
December 1, 1975

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

Dear Dr. Horman:

You have asked whether appointment of a county commissioner by the Governor to serve as a member of the Governor's Council on Drug and Alcohol Abuse would violate the State Adverse Interest Act.

The Governor's Council on Drug and Alcohol Abuse was created by the Act of April 14, 1972, P. L. 221, No. 63, 71 P. S. § 1690.101 *et seq.* In Section 3(b) of the Act, the composition of the Council is described.

"The Council shall be composed of the Governor, who shall serve as chairman of the Council, and six other members at least four of whom shall be public members who shall be appointed by the Governor and who shall have substantial training or experience in the fields of drug or alcohol education, rehabilitation, treatment or enforcement. Officers and employes of the Commonwealth may be appointed as members of the Council."

Pursuant to the *State Plan* for alcohol abuse and dependence problems, the counties throughout the Commonwealth are established as the "primary contractor/grantee for funds allocated by the Governor's Council to the county or provider." 4 Pa. Code § 256.6. In order to receive funds from the Council, each county must enter into a grant agreement with the Council. These agreements are executed by the county commissioners of the various counties throughout the Commonwealth. Thus, any county commissioner serving on the Council would necessarily be a party to a contract entered into between the Council and the county wherein the commissioner serves.

Section 5 of the State Adverse Interest Act provides that:

"No state employe shall have an adverse interest in any contract with the state agency by which he is employed."  
(71 P. S. § 776.5).

A state employe, for the purposes of the Act, is defined as "an appointed officer or employe in the service of a state agency and who receives a salary or wage for such service." The members of the Council are appointed by the Governor, receive a signed commission from the Department of State and their compensation for service is established by the Executive Board. Consequently, it is our opinion that Council members are state officers as defined by the Act.

Under the Adverse Interest Act, an adverse interest is defined as being "a party to a contract . . . or a stockholder, partner, member, agent, representative or employe of such party." Since a county commissioner is a party to the grant agreement entered into by his county, he has an adverse interest in such agreement.

In view of this, it is our opinion, and you are advised, that a county commissioner whose county receives funds from the Governor's Council on Drug and Alcohol Abuse may not be a member of the Council.

Very truly yours,

W. WILLIAM ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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#### OFFICIAL OPINION No. 75-46

*Department of Labor and Industry—Liquefied Petroleum Gas Act—License Fees.*

1. The Liquefied Petroleum Gas Act, Act of December 27, 1961, P. L. 1973, No. 475, 35 P. S. § 1321 *et seq.* requires the payment of a registration fee for each separate bulk plant and each separate retail installation in the Commonwealth.
2. The Act requires the owner of a bulk plant who is also a dealer to pay both of the registration fees.

Harrisburg, Pa.  
December 2, 1975

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

Dear Secretary Smith:

You\* have requested our opinion concerning the Liquefied Petroleum Gas Act, Act of December 27, 1951, P. L. 1793 as amended, 35 P. S. § 1321 *et seq.* (LPGA). You have asked specifically: (1) whether the fee to be paid by the owner of bulk plants must be paid as to each bulk plant facility; and (2) whether the fee paid by a dealer must be paid for each retail facility he owns; and finally (3) whether the owner of a bulk plant who is also a dealer must pay both the bulk plant and the dealer registration fees.

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\*Editor's note: This opinion was overruled in part by Official Opinion No. 76-10, 6 Pa. Bulletin 1080.

In response to your inquiry, it is our opinion that the LPGA does require the payment of a separate registration fee for (1) each separate bulk plant and (2) each retail installation in the Commonwealth. Further, the LPGA requires (3) the owner of a bulk plant who is also a dealer to pay both of the registration fees. This determination is based on a finding that the fee imposed by this statute is a license fee. Our opinion is also based upon an interpretation of the LPGA and the use of the term "dealer" as it appears in this statute.

The Supreme Court of Pennsylvania set out the characteristics of a license fee in *National Biscuit Company v. Philadelphia*, 374 Pa. 604, 98 A. 2d 182 (1953) as the following:

"The distinguishing features of a license fee are (1) that it is applicable only to a type of business or occupation which is subject to supervision and regulation by the licensing authority under its police power; (2) that such supervision and regulation are in fact conducted by the licensing authority; (3) that the payment of the fee is a condition upon which the licensee is permitted to transact his business or pursue his occupation; and (4) that the legislative purpose in exacting the charge is to reimburse the licensing authority for the expense of supervision and regulation conducted by it." 374 Pa. at 615-616.

These standards have been applied by Pennsylvania courts in later cases without alteration. See *Philadelphia Tax Review Board v. Smith, Kline and French Laboratories*, 437 Pa. 197, 262 A. 2d 135 (1970); *Philadelphia v. Southeastern Pennsylvania Transportation Authority*, 8 Pa. Commonwealth Ct. 280, 303 A. 2d 247 (1973).

An additional characteristic of a license fee was established by the court in *Philadelphia Coca-Cola Bottling Company v. Philadelphia*, 382 Pa. 299, 115 A. 2d 207 (1955). According to the Court, in determining whether a charge is a license fee, the question is not whether the cost of enforcement against one person may exceed the amount of the fee, but whether the aggregate fees collected from the industry are sufficient to pay the cost of regulating the industry as a whole.

The fees charged by the Commonwealth pursuant to the Act (35 P. S. § 1321 *et seq.*) are license fees. As the standards set forth in *National Biscuit Company* require, the fees charged under this Act apply exclusively to the liquefied petroleum gas industry which is subject to the supervision and regulation of the Department of Labor and Industry, the licensing authority. 35 P. S. § 1321 *et seq.* The payment of the registration fee is a condition upon which the dealer of liquefied petroleum gas is permitted to transact business and it is also required for the bulk plant owner to pursue his occupation. 35 P. S. §§ 1323.1-1323.2. Finally, for reasons discussed below, the legislative purpose in exacting the fees is to reimburse the Department of Labor and Industry for the expense of supervision and regulation conducted

by it.<sup>1</sup> Therefore, the fee enforced by this Act conforms to the four-fold test established in *National Biscuit Company* for a license fee.

35 P. S. § 1323.2(c) applies expressly to dealers of liquefied petroleum gas. To define "dealer" for the purpose of the Liquefied Petroleum Gas Act, it is necessary to consider the language of the Act itself. The first section of the Act requires the Department of Labor and Industry to inspect installations for safety. The second section requires each dealer to maintain adequate records as to the installation addresses of all customers served and such other information necessary to carry out inspections in the proper manner. 35 P. S. § 1323.4-1323.5. The inspections are required to insure that the safety of the citizens of the State is not endangered. By construing the statute to include each retail location as a dealer, sufficient funds are produced to cover the costs of inspection. It should be noted that the inspection of a retail facility differs from that of a bulk plant facility.<sup>2</sup>

Therefore, in accordance with the test for a license fee set forth in the *Philadelphia Coca-Cola Bottling Company* case, *supra*, the term "dealer" as used in the Liquefied Petroleum Gas Act, applies to the owner of each retail outlet within the Commonwealth.

Section 3.2 of the LPGA, 35 P. S. § 1323.2 sets out the amounts to be paid as registration fees for owners of bulk plants and dealers with retail installations. The section distinguishes between bulk plants and retail establishments. Bulk plants are charged a license fee according to the gallons of liquefied petroleum gas which they have in storage facilities; dealers are required to pay a license fee based on the number of customers of each retail installation. The bulk plant which is also a retail establishment must have its storage and retail facilities inspected to become licensed. The cost of this inspection is greater than the inspection of a facility which has a singular function. Therefore, it must be concluded that the owner of a bulk plant who is also a dealer would have to pay both license fees in accordance with the criteria for license fees set forth above.

The fees imposed by this statute have in the past been applied by the Department of Labor and Industry to the owner of each separate

1. Section 204(e) of the Fiscal Code, 72 P. S. § 204(e) gives the Department of Revenue the power to receive for transmission to the State Treasury license fees such as those provided for under the LPGA. The monies collected are placed in the General Fund. Therefore, it is not required that the license fees be paid into a special fund. Furthermore, the Legislature has regularly appropriated money from the General Fund approximately equal to the amount collected in license fees to the Department of Labor and Industry to meet the cost of inspection of the liquefied petroleum gas industry.
2. When inspecting a bulk plant, the inspector examines the type of tank in which the liquefied petroleum gas is stored. In the larger bulk plants, the piping is also checked for safety. The inspection of a retail establishment includes an examination of the cylinder used in the sale of liquefied petroleum gas. The process by which the dealer fills the cylinder is observed and also the installation where the liquefied petroleum gas is kept by the dealer and customer is examined for safety.

bulk plant and retail installation; also the owner of a bulk plant who is a dealer has been required to pay both registration fees. Each year the Department of Labor and Industry has collected approximately one hundred thousand dollars from the liquefied petroleum gas industry as a result of the collection of these fees. Manpower to inspect the many liquefied petroleum gas installations across the state costs about eighty-five thousand dollars a year. The expense of billing and collecting the license fees is met by the remaining fifteen thousand dollars. The aggregate fees collected from the industry have thus been sufficient to pay the cost of supervision and regulation of the industry.<sup>3</sup> Therefore, the fees imposed by the statute, when applied to the owner of each separate bulk plant and retail installation, make up a reasonable sum to meet the expenses incurred by the licensing authority.

In conclusion, it is our opinion and you are advised that license fees must be paid:

1. by bulk plant owners, as to each bulk plant facility;
2. by dealers for each retail facility;
3. for both types of facilities by bulk plant owners who are also dealers.

Very truly yours,

BEVERLY A. NELSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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3. As noted earlier, the monies collected under LPGA are paid into the general fund from which they are appropriated to the Department of Labor and Industry to meet this cost.

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