

Commonwealth of Pennsylvania

MILTON J. SHAPP

Governor

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OPINIONS

OF THE

Attorney General

OF

Pennsylvania

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1976

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COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL  
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ROBERT P. KANE  
ATTORNEY GENERAL

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

Dear Governor Shapp:

I submit to you and to the public in bound form the formal opinions of my office for the year 1976.

All these opinions have previously been published in the Pennsylvania Bulletin, and they are here gathered together and fully indexed for convenient use. I believe that these opinions meet the high standards that you have placed upon your Attorneys General. I am proud to submit them under my name.

I wish to thank the members of my office for the hard work, research and professionalism which have gone into the preparation of these opinions.

Sincerely yours,

Robert P. Kane  
Attorney General

## OFFICIAL OPINION No. 76-1

*Solicitation of Charitable Funds Act—Official Opinion No. 74-57.*

1. Official Opinion No. 74-57 requires a charitable organization which receives money from a federated fund-raising organization and which solicits money on its own to pay a registration fee based only upon those contributions which it solicits and receives itself.

Harrisburg, Pa. 17120

January 26, 1976

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

Dear Secretary Tucker:

You have requested an opinion interpreting Attorney General's Opinion No. 57 of 1974. Specifically, you have asked whether Opinion No. 57 requires a member charity of a federated fund-raising organization, if it solicits and receives money independently of the federated fund raising organization, to pay a registration fee based upon the total amount of contributions solicited that year or only upon the amounts solicited by the charity itself.

Opinion No. 57 of 1974, holds that a member agency of a federated fund-raising organization shall be required to register with the Commission on Charitable Organizations but need not pay a registration fee unless the member agency solicits funds on its own. In effect, the Opinion permits a member charity to avail itself of the exemption in Section 3 of the Solicitation of Charitable Funds Act which states,

"A parent organization filing on behalf of one or more chapters, branches or affiliates and a federated fund-raising organization filing on behalf of its member agencies shall pay a single annual registration fee for itself and such chapters, branches, affiliates or member agencies included in the registration statement." 10 P.S. § 160-3(d).

Once a member charity begins to solicit contributions on its own, however, a federated fund-raising organization may not file on behalf of a charity to the extent of the contributions solicited independently of the federated fund-raising organization. This is because a federated fund-raising organization has no control over, or way of accounting to the Commission for, those contributions solicited and received by the charity itself. However, the charity may still make use of other exemptions in the Act.

Section 4(3) of the Act permits certain charities that do not solicit and receive contributions in excess of \$7,500 a year an exemption from filing a registration statement with the Commission. However, the Act then continues,

"[I]f the contributions *raised from the public*, whether all of such is or is not received by any charitable organization during any calendar year, shall be in excess of seven thousand five

hundred dollars (\$7,500), it shall, within thirty days after the date it shall have received total contributions in excess of seven thousand five hundred dollars (\$7,500), register with and report to the department as required by this act." 10 P.S. § 160-4(3) (Emphasis added.)

The key words are "contributions raised from the public." So long as a charity does not raise more than \$7,500 from the public it is exempt from paying a registration fee. Although the term "public" is nowhere defined in the Act, according to the Statutory Construction Act, 1 Pa. C.S. § 1903(a), words and phrases should be construed according to their natural and approved usage. Defining the term "public" according to its natural and approved usage, it is clearly seen to refer to members of the populace at large and not to a federated fund-raising organization. Therefore, funds received by a member charity from a federated fund-raising organization should not be viewed as contributions raised from the "public"; rather they constitute a separate and distinct fund. Applying the above reasoning to the problem at hand, it is evident that a charity, if it receives money from a federated fund-raising organization and solicits from the public on its own, need not pay any registration fee unless it independently solicits contributions from the public in excess of \$7,500.

If a charitable organization does solicit contributions in excess of \$7,500, then it is no longer exempt under Section 4(3) of the Act and must file a registration statement and pay the applicable registration fee. However, the registration fee provisions of the Act also are written in terms of contributions solicited from the "public". Section 3(d) of the Act provides that every non-exempt charity which solicits less than \$25,000 a year *from the public* shall pay a registration fee of \$25.00. Every charity which solicits and receives *from the public* contributions in excess of \$25,000 shall pay a \$100.00 registration fee. Therefore, even though a member charity may both receive funds from a federated fund-raising organization and solicit contributions in excess of \$7,500, its registration fee is based solely upon amounts solicited independently of the federated fund-raising organization.

In conclusion, it is our opinion, and you are hereby advised, that Official Opinion No. 57 of 1974 requires that a charity which receives funds from a federated fund-raising organization and which solicits contributions on its own need pay a registration fee based only upon those contributions which it solicits and receives on its own.

Very truly yours,

W. WILLIAM ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

## OFFICIAL OPINION No. 76-2

*Liquor Code—Importing Distributors—Foreign Purchase.*

1. Malt and brewed beverages purchased out-of-State may be brought into Pennsylvania and sold anywhere in the State only if the manufacturers of such malt and brewed beverages have not marketed their products in Pennsylvania and for that reason have not established geographical distribution systems as required by Section 431(b) of the Liquor Code, 47 P.S. § 4-431(b).
2. Attorney General's Opinion No. 75-18 clarified.

Harrisburg, Pa. 17120  
January 26, 1976

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

Dear Chairman Kaplan:

In our Attorney General's Opinion No. 75-18 dated June 2, 1975 we concluded that an importing distributor licensed by the Liquor Control Board may purchase malt or brewed beverages from out-of-State retailers and sell them anywhere in Pennsylvania provided that the person from whom they are purchased is engaged in the legal sale of such beverages in the State where the sale has occurred. This was based upon the following language of Section 431(b) of the Liquor Code (47 P.S. § 4-431(b)):

"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.)

We further concluded that other language of the same section, to the effect that out-of-State manufacturers must establish geographical distribution systems whereby importing distributors are given exclusive rights to sell the manufacturer's beverages in given geographical areas of the State, is not applicable where the out-of-State purchases are from persons other than manufacturers. The pertinent language of Section 431(b) is as follows:

"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. . . ."

Since the issuance of Opinion No. 75-18, it has been brought to our attention that our conclusion regarding the last quoted language is very broad and could lead to a breakdown of the orderly marketing of malt and brewed beverages that the geographical distribution system was designed to effect. It has been suggested that our opinion would allow the entire distribution scheme to be circumvented by unscrupulous importing distributors who could buy *any* brands of malt or brewed beverages from out-of-State sources other than manufacturers and sell them anywhere in Pennsylvania in violation of the geographical distribution systems established by the manufacturers in accordance with law. This, it is said, would be contrary to the interpretation of Section 431(b) rendered by the Commonwealth Court in *Commonwealth v. Starr*, 13 Pa. Commonwealth Ct. 415, 318 A. 2d 763 (1974), *aff'd*, 462 Pa. 124, 337 A. 2d 914 (1975), as follows:

"The Legislature having seen fit to regulate the distribution of malt and brewed beverages, by limiting the scope of such distribution to specific areas designated by the manufacturer, has thereby provided an easily traceable transaction readily susceptible to observation and control. The statute must be read so as to preserve this supervisory scheme." (At 420-421, 318 A. 2d at 766-767.)

Of course it was not our intention to allow the circumvention of the distribution requirements of Section 431(b) or to reach a conclusion contrary to that of the Commonwealth Court, although we can see how our opinion, as written, does lend itself to that construction. What we meant to say, and what we do say now, is that malt and brewed beverages purchased out-of-State may be brought into Pennsylvania and sold anywhere in the State only if the manufacturers of such malt and brewed beverages have not marketed their products in Pennsylvania and for that reason have not established geographical distribution systems as required by Section 431(b). This means that if there is no distribution system for a product, an importing distributor would not be bound by any.

To illustrate our conclusion, as now explained, an importing distributor could purchase Coors Beer from an out-of-State retail outlet, provided that the sale is legal in the State where it occurs and sell it anywhere in Pennsylvania since the manufacturer of Coors Beer has chosen not to market its beer in Pennsylvania and has not established a geographical distribution system. However, with regard to the beer of a manufacturer that has established a geographical distribution system in Pennsylvania, the importing distributor would not be permitted to buy it from out-of-State sources and sell it in violation of that distribution system.

Insofar as our Opinion No. 75-18 may have been susceptible of another interpretation, we hereby supplement it so that the conclusion expressed therein shall be read in conformity with this opinion.

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. 76-3

*Preference in Public Employment Act—Veterans—Seniority.*

1. The term "soldier" within the purposes of Chapter 71 of the Military Code means one who has served in the armed forces of the United States or women's organization officially connected therewith during a war or period of armed conflict such as Vietnam, in which the United States is involved.
2. The term "war" within the context of section 7107 of the Military Code, 51 Pa. C.S. § 7107 means either a formally declared war or an undeclared armed conflict.
3. The Military Code, 51 Pa. C.S. § 7107, requires that whenever a reduction in force is necessary in any public position and personnel are discharged according to seniority, the total amount of seniority of any soldier as defined by Chapter 71 of the Military Code shall be determined by adding his amount of seniority in the civil service or public works to his total years of service in the armed forces of the United States or any women's organization connected therewith, during any declared war or armed conflict in which the United States was involved.

Harrisburg, Pa. 17120  
February 23, 1976

Honorable George S. Pulakos  
Acting Secretary of Transportation  
Harrisburg, Pennsylvania

Dear Secretary Pulakos:

We have received a request for an opinion from your department interpreting the Preference in Public Employment Act of May 22, 1945, P.L. 837, 51 P.S. § 492.1 *et seq.*, as amended.<sup>1</sup> Specifically you have asked whether a former soldier in the armed forces of the United States, or member of any women's organization connected therewith, may take advantage of the additional seniority provision of the Act (51 Pa. C.S. § 7107) if he or she served during a time of armed conflict rather than receiving credit for additional seniority only if he served during a time

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1. This statute was codified by the Act of August 1, 1975, P.L. 233, 51 Pa. C.S. § 7101 *et seq.*, without change, and became effective January 1, 1976.

of declared war. You are hereby advised that a former soldier in the armed forces of the United States, or member of any women's organization connected therewith, is entitled to the additional seniority as provided in Section 7107 of the Military Code if he or she served either during a time of armed conflict or of declared war.

Section 7107 of the Military Code reads,

"Whenever a reduction in force is necessary in any public position . . . and personnel are discharged according to seniority, the number of years of service of any soldier shall be determined by adding his total years of service in the civil service or on public works to his total years of service as a member of the armed forces of the United States, or in any women's organization officially connected therewith *during any war in which the United States engaged.*" (Emphasis added.)

There are two issues that must be resolved prior to the resolution of your question; what is the definition of "soldier" within the Code, and what is meant by the term "war" as it is used in Section 7107 of the Military Code.

The term "soldier" was defined in the original 1945 Act as a "person who served in the armed forces of the United States or in any women's organization officially connected therewith, during any war in which the United States engaged, and who has an honorable discharge from such service." In 1955, the Act was amended to insert the words "or armed conflict" after "during any war." In 1966, the Act was amended specifically to include Vietnam veterans. Finally, the Act was amended in 1972 so that the term "soldier" is currently defined as,

" . . . a person who served in the armed forces of the United States, or in any women's organization officially connected therewith, during any war or armed conflict in which the United States engaged, or who so served or hereafter serves in the armed forces of the United States, or in any women's organization officially connected therewith, since July 27, 1953, including service in Vietnam, and who has an honorable discharge from such service." 51 Pa. C.S. § 7101.

It is clear that the term "soldier" within the meaning of the Act, is one who has served or who shall serve in the armed forces or connected women's organizations during a war or armed conflict, such as Vietnam.

The question of what was intended by the word "war" in Section 7107 of the Military Code, poses a more difficult question. Did the General Assembly intend to limit it to a declared war only, or did it intend to include undeclared wars and armed conflicts between the United States and other sovereigns?

General definitions of "war" are not very helpful. Black's Law Dictionary defines "war" as,

"Hostile contention by means of armed forces, carried on between nations, states, or rulers, or between parties in the same nation or state . . . or a contest by force between two or more nations, carried on for any purpose or armed conflict of sovereign powers or declared and open hostilities, or the state of nations among whom there is an interruption of pacific relations, and a general contention by force, authorized by the sovereign." BLACK'S LAW DICTIONARY 1754 (4th ed. 1968).

Such a definition is hopelessly broad and does not relate to the statute in question.

Several Pennsylvania decisions have construed the term "war" in order to decide whether it is limited to declared wars or includes armed conflicts between the United States and other nations. In *Beley v. Pennsylvania Mutual Life Insurance Co.*, 373 Pa. 231, 95 A. 2d 202 (1953) and *Harding v. Pennsylvania Mutual Life Insurance Co.*, 373 Pa. 270, 95 A. 2d 221 (1953), the Pennsylvania Supreme Court considered the question of whether the beneficiary of a life insurance policy could collect double indemnity under a provision of the contract if the insured was killed in the armed forces during a time of war, where the insured was killed in the Korean conflict. In both cases, the court held that the action in Korea was not a war in the constitutional or legal sense of the word. The court implied that only a declared war could, in fact, be considered a war under the terms of the insurance contract. The rationale for the court's decision was that if the definition of "war" were expanded to include armed conflicts, then the courts would have no criteria to determine what was a war and what was merely shooting short of war. The court stated that,

"The existence or non-existence of a state of war is a political, not a judicial, question, and it is only if and when a formal declaration of war has been made by the political department of the government that judicial cognizance may be taken thereof." *Beley v. Pennsylvania Mutual Life Insurance Co.*, 373 Pa. 231, 237, 95 A. 2d 202, 205 (1953).

In *Thomas v. Metropolitan Life Insurance Co.*, 388 Pa. 499, 131 A. 2d 600 (1957), the court again considered a claim by a life insurance beneficiary that he was entitled to an additional payment because the insured was killed in a war: the Korean conflict. The court stated that it was bound by its previous rulings in *Beley* and *Harding supra* on the question of what constitutes a war as defined by the insurance contract. However, the majority took pains to limit its decision to the particular facts of the case. Further, the court in adopting the lower court's opinion admitted that,

"It becomes very clear then that hostilities between nations can become war whether solemnly declared or not. War of the perfect kind, solemnly declared, is called declared war. War of the imperfect kind that has not been baptized with a name by Congress is known as undeclared war." *Thomas v. Metropolitan Life Insurance Co.*, 388 Pa. 499, 507, 131 A. 2d 600, 604 (1957).

The court in *Thomas* interpreted *Beley* and *Harding* as defining two types of war, declared and undeclared. However, when interpreting the language of an insurance contract, for the sake of clarity and uniformity, the court held that the definition should be limited to that of a declared war.

In *Morgan Estate*, 2 D&C 2d 480 (Luz. 1954) the question arose as to the construction of Section 1(b) of the Wills Act of April 24, 1947,<sup>2</sup> (now 20 Pa. C.S. § 2501) which allows a minor in the armed services, in time of war, to dispose of his property by will. The court, after acknowledging the *Beley* and *Harding* cases, announced that it would not be bound by their limited definition of "war". Instead, the court chose to define "war" in its popular sense, that is to include both declared and undeclared conflicts. The court (in an opinion by Orphans' Court Judge Benjamin R. Jones, now Chief Justice of the Pennsylvania Supreme Court) distinguished the previous cases by noting that here it was dealing with an enactment of the Legislature and not with a private insurance contract.

Finally, other states and the federal courts have considered the definition of "war". In *Morrison v. United States*, 316 F. Supp. 78 (M.D. Ga. 1970) the question arose as to whether the Vietnam conflict was a war within the definition of the Federal Tort Claims Act. The Act proscribes recovery for "[a]ny claim arising out of the combatant activity of the military or naval forces or the Coast Guard during time of war" 28 U.S.C. § 2680(j). The court unanimously held,

"While it may be true that a de jure state of war cannot exist without a formal declaration of war, a war is no less a war because it is undeclared." 316 F. Supp. 78, 79 (M.D. Ga. 1970)

Several courts of other states have held likewise. *Langlas v. Iowa Life Insurance Co.*, 245 Iowa 713, 63 N.W. 2d 885 (1954), *Western Reserve Life Insurance Co. v. Meadows* 152 Tex. 559, 261 S.W. 2d 554 (1953), *Stankus v. New York Life Insurance Co.*, 312 Mass. 366, 44 N.E. 2d 687 (1942), *Stanbery v. Aetna Life Insurance Co.*, 26 N.J. Super 498, 98 A. 2d 134 (1953).

The preceding cases, while not controlling, are helpful in our analysis. They acknowledge that war may be interpreted either narrowly or broadly, depending upon the construction which the framer intended.

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2. Repealed by the Act of December 10, 1974, P.L. 867, § 6.

Surveying all of the cases,<sup>3</sup> *Morgan Estate* is clearly the most applicable to the question at hand as it is a Pennsylvania case construing a legislative enactment.

The Statutory Construction Act, 1 Pa. C.S. § 1924, permits the title and preamble of a statute to be considered when interpreting a statute. The original Act, when passed in 1945, was titled,

"Providing for and requiring in certain cases preference in appointments to public position or on public works for honorably discharged persons who served in the military or naval service during any war in which the United States engaged. . . ." Act of May 22, 1945, P.L. 837.

In 1955 the Act was amended. The title to the Act was also amended and the words, "or armed conflict" were included after the reference to "military or naval service during any war." The Act has been amended twice since 1955 and on both occasions the title has included the phrase "or armed conflict." The title of the Act is evidence that the General Assembly intended that veterans of armed conflicts, as well as those of declared wars, should be given seniority preference.

Further evidence of the intent of the Legislature can be had by substituting the definition of the term "soldier" for the word "soldier" in the particular provision. Substituting the definition, the statute reads:

"Whenever a reduction in force is necessary in any public position, or on public works of the Commonwealth . . . the number of years of service of any [person who served in the armed forces of the United States . . . during any war or armed conflict in which the United States engaged] shall be determined by adding his total years of service in the civil service or on public works to his total years of service as a member of the armed forces . . . during any war in which the United States engaged."

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3. Recently Commonwealth Court in *Shank v. Everett Area School District*, 23 Pa. Commonwealth Ct. 90, 350 A. 2d 469 (1976), ruled that a man who volunteered for military service during the Vietnam conflict could not avail himself of section 1176 of the Public School Code, 24 P.S. § 11-1176, which permits a public school employee a leave of absence if he volunteers for duty "in time of war or during a state of national emergency." The court held that during the Vietnam conflict there was no declaration of war or national emergency. The implication in *Shank* is that a conflict must be declared to be a war. However, *Shank* should not be viewed as controlling for several reasons. First, the court in *Shank* dealt with the Public School Code rather than Chapter 71 of the Military Code. This becomes even more significant when one realizes that the reasons for construing "war" to include an undeclared conflict in the Military Code do not exist in the Public School Code, i.e. the language that exists in the title to the Preference in Public Employment Act and the broad definition of the term "soldier" in the Code as are discussed later in the text of this Opinion. Also, the court in *Shank* was never directly presented with, nor did it fully consider, the question of whether the Vietnam conflict fit within the definition of the word "war". Finally, the authorities previously cited in this Opinion far outweigh the implications in *Shank*.

If the term "war" in this section, is construed to include only a declared war, then the section loses its meaning. The statute, when interpreted in the above manner, allows preference for those who served in the armed forces during time of war or armed conflict but only if they served during a declared war. Such an interpretation makes little sense. A far more reasonable construction would allow preference for those who served either during an armed conflict or time of declared war. When seeking the intent of the Legislature, there is always a presumption that the General Assembly did not intend a result which is absurd or unreasonable, 1 Pa. C.S. § 1922(1).

A further question concerns the duration of a war or armed conflict; that is when, for the purposes of the Act, does a conflict begin and end. Decisions that have dealt with the beginning of a war or armed conflict have concluded that a war or conflict begins with the opening of hostilities. *Stinson v. New York Life Insurance Co.*, 167 F. 2d 233 (D.C. Cir. 1948), *New York Life Insurance Co. v. Bennion*, 158 F. 2d 260 (10th Cir. 1946), *Beley v. Pennsylvania Mutual Life Insurance Co.*, 373 Pa. 231, 95 A. 2d 202 (1953), *Darnall v. Day* 240 Iowa 665, 37 N.W. 2d 277 (1949). Therefore, a war or armed conflict begins when the United States becomes involved in the hostilities.

Several courts also have considered the issue of the end of a war or armed conflict. It is clear that a declared war ends upon the cessation of hostilities rather than the signing of a formal peace treaty and Pennsylvania cases have so held, *Beley v. Pennsylvania Mutual Life Insurance Co.*, 373 Pa. 231, 95 A. 2d 202 (1953), *Harding v. Pennsylvania Mutual Life Insurance Co.*, 171 Pa. Superior Ct. 236, 90 A. 2d 589 (1952) affirmed, 373 Pa. 270, 95 A. 2d 221 (1953). The courts of other jurisdictions are in accord, *New York Life Insurance Co. v. Durham*, 166 F. 2d 874 (10th Cir. 1948), *Stinson v. New York Life Insurance Co.*, 167 F. 2d 233 (D.C. Cir. 1948), *Langlas v. Iowa Life Insurance Co.*, 245 Iowa 713, 63 N.W. 2d 885 (1954). Further, although the preceding decisions dealt with declared wars, the language employed by the various courts makes it clear that they would apply the same logic to an undeclared conflict.

"[I]t is the common understanding that a war is no longer a war when the shooting is ended regardless of official pronouncements. . . . War, in the practical and realistic sense in which it is commonly used, refers to the period of hostilities." *Langlas v. Iowa Life Insurance Co.*, 245 Iowa 713, 721, 63 N.W. 2d 885, 889 (1954).

Such a decision only makes sense. If an official pronouncement is not necessary to begin an undeclared war, as is necessary to begin a declared war, there is no reason why an official pronouncement should be relevant to end an undeclared conflict if it is irrelevant to the end of a declared war.

For the purposes of the Military Code a declared war or armed conflict begins with the opening of hostilities and ends with the cessation of the action. Using the above criteria, it is possible to determine the

exact dates, for the purposes of the Code, of recent conflicts involving the United States. World War I began with the declaration of war on Germany on April 6, 1917, and ended on November 11, 1918, with the signing of the peace treaty. World War II began with the attack on Pearl Harbor on December 7, 1941, and ended with the signing of the peace treaty with Japan on September 2, 1945. The duration of the Korean conflict was from June 25, 1950, when the North Koreans attacked to July 27, 1953, which was the date of the cease fire at Panmunjom. The Vietnam hostilities began on August 5, 1964, with the Gulf of Tonkin incident and ended with the signing of the Paris Peace Accord on January 28, 1973.

When attempting to define "war" one must keep in mind a historical perspective. The original Act was passed in 1945. At that time the term "war" had quite a different connotation than it does today. In 1945, World War II had just ended and World War I was still recent history. All large scale conflicts were formally declared wars. Today the large conflicts of recent memory, Korea and Vietnam, were not declared wars, but were waged on a scale and intensity approaching that of previously declared wars.

Finally, when examining the history of the Act, it can be seen that the Act was broadened several times by amendments. The major amendments were in 1955, 1966 and 1972. The 1955 amendment expanded the title of the Act to include armed conflicts and also expanded the definition of "soldier" to include those who served during armed conflicts as well as declared wars. The 1966 and 1972 amendments again broadened the definition of "soldier" to specifically include Vietnam veterans. In short, the General Assembly has acted to expand the coverage of the Act to include each of the major undeclared armed conflicts in the last twenty-five years in which the United States was involved. In order to effect the intent of the General Assembly, and to be consistent with the evolution of the Act, a broad interpretation should be given to the term "war" as it is used in Section 7107 of the Military Code.

In conclusion, it is our opinion, and you are hereby advised, that Section 7107 of the Military Code, 51 Pa. C.S. § 7107, should be interpreted as granting to those veterans who meet the Act's definition of "soldier" additional seniority, to the extent of the time they served in the armed forces of the United States during a declared war or armed conflict in which the United States was involved.

Very truly yours,

BART J. DeLUCA, JR.  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

## OFFICIAL OPINION No. 76-4

*Medical Malpractice—Arbitration Fees—Insurance.*

1. A person defined as a "health care provider" who is licensed in Pennsylvania but does not practice in Pennsylvania does not have to comply with the Health Care Services Malpractice Act of October 15, 1975.
2. "Health care providers" employed by the Federal government do not have to comply with the fee and insurance provisions of the Health Care Services Malpractice Act of October 15, 1975.

Harrisburg, Pa. 17120  
February 25, 1976

Paul Abrams, Esquire  
Administrator for Arbitration  
Panels for Health Care  
Harrisburg, Pennsylvania

Mr. Frank Raab  
Director, Medical Professional  
Liability Catastrophe Loss Fund  
Harrisburg, Pennsylvania

Gentlemen:

Several questions have arisen regarding the Health Care Services Malpractice Act of October 15, 1975 (Act 111 of 1975). We have answered several of these questions informally, but, because of their broad impact, we deem it appropriate to review these questions and herein to submit our official answers to them.

1. Does a person defined as a "health care provider" who is licensed in Pennsylvania but does not practice in Pennsylvania have to comply with the fee and insurance provisions of the Act?

2. Do "health care providers" employed by the Federal government have to comply with the fee and insurance provisions of the Act?

It is our opinion and you are advised that none of the health care providers above mentioned is required to comply with the fee or insurance provisions of the Act.

The purpose of the Act is to make available professional liability insurance at a reasonable cost and to establish a system through which persons who have been injured by medical malpractice may obtain prompt determinations and adjudications of their claims. Section 102. To effectuate the prompt determination and adjudication, an arbitration system has been set up in the Act (Article III) which is to be funded by various fees charged to "health care providers." Section 304(a). Accordingly, the purpose of the fee, which is in addition to the normal licensing fee, is to fund an arbitration system for malpractice actions. If a health care provider is not practicing or conducting himself so as possibly to subject himself to the arbitration

provisions in the event of a malpractice claim, there appears to be no reason that he should be charged a fee. The provisions of the Act are consistent with this position. Section 304(a) charges fees only to those health care providers "practicing in the Commonwealth." Accordingly, those health care providers licensed by the Commonwealth who either practice solely outside of the Commonwealth or who do not actually *practice* medicine, even though they otherwise work in the Commonwealth, would not be liable for the fees.

A more difficult question arises with respect to the malpractice insurance requirement. Section 701(a) does not use the same language as Section 304(a) but rather requires that "every health care provider subject to the provisions of this Act shall insure his liability . . ." for malpractice. Arguably, every "health care provider" as that term is defined in the Act would be "subject to the provisions of this Act." "Health care provider" is defined in Section 103 as:

"A person . . . licensed . . . by the Commonwealth to provide health care or professional services as a physician, including a medical doctor and a doctor of osteopathy and a doctor of podiatry; . . ."

Thus it has been argued that the insurance provisions are mandatory so long as a person is licensed in Pennsylvania even though he or she may not practice in Pennsylvania. However, we believe this would lead to a rather absurd result which the legislature does not intend. See Section 1922(1) of the Statutory Construction Act, 1 Pa. C.S. § 1922(1). Moreover, even though Section 701(a) does not limit its requirement to those *practicing* in Pennsylvania, it does limit the requirement in some way by use of the words "subject to the provisions of this Act." Otherwise, it would not have used those words but would have imposed the requirement upon every "health care provider," which, as we have seen, would include all those *licensed* in Pennsylvania. Therefore, we must give meaning to the words "subject to the provisions of this Act." See Section 1921(a) of the Statutory Construction Act, 1 Pa. C.S. § 1921(a). The only section of the Act which does subject a health care provider to the Act is Article III<sup>1</sup> (the Article requiring the payment of fees). Accordingly, if Article III does not subject a health care provider to the Act (and we have seen above that it does not subject a health care provider who is not practicing in Pennsylvania), then Article VII similarly does not.

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1. None of the other Articles of the Act "subject" any health care provider to the provisions of the Act. Thus, Article I simply sets forth definitions; Article II relates to non-health care providers; Articles IV, V, and VI are related to the arbitration system set forth in Article III; Article VII, as we have just noted, is dependent on other subjectibility; Article VIII is related to the availability of insurance to those required to maintain such insurance under Article VII; Article X is very general in nature. Only Article IX could be argued to subject someone to the provisions of the Act. But Article IX is simply a method of enabling the various medical licensing boards to obtain more money, manpower, and procedures to effectuate the powers they already have. It does not in any way *subject* any health care provider to any further requirement or duty than is otherwise provided in a licensing act.

With respect to Federal employees, a similar analysis would apply. Firstly, under Section 10(a) of The Medical Practice Act of 1973, 63 P.S. § 421.10(a),<sup>2</sup> such positions are exempt from licensure and thus these individuals do not even come within the original definition of "health care provider." We have, however, been advised that under Federal policy those individuals who work for the Public Health Service are required to be licensed by the state in which they practice. Nevertheless, since 42 U.S.C. § 233 provides that the exclusive remedy for malpractice by commissioned officers or employees of the Public Health Service is under the Federal Tort Claims provisions (28 U.S.C. §§ 2671-2680), these individuals would not be subject to the arbitration provisions of the Act. This conclusion would apply to any Federal employee as defined in 28 U.S.C. § 2671 whose liability for malpractice is exclusively governed by the Federal Tort Claims Act. See 28 U.S.C. § 1346(b).

Accordingly, both under the definition of "health care provider" and under our analysis of the Act showing that it is intended to cover only those who would be subject to the arbitration procedures, these individuals would not be required to comply with either the fee or insurance provisions of Act 111.<sup>3</sup>

Because of their interest in these questions, we are sending a copy of this Opinion to the Insurance Commissioner, Commissioner of Professional and Occupational Affairs, and Regional Counsel to the U.S. Department of Health, Education and Welfare.

Sincerely,

GERALD GORNISH  
*Deputy Attorney General*  
*Director, Office of Civil Law*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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2. "Provided, That this section relating to licenses to practice medicine and surgery shall not apply to medical officers in the medical service of the Armed Forces of the United States, or the United States Public Health Service, or Veterans Administration, or physicians employed within Federal services, while in discharge of their official duties;"
  3. In the requests submitted by counsel for the Department of Health, Education and Welfare, our opinion was also requested regarding those physicians licensed in Pennsylvania who are not involved in providing direct health care, but are employed in Federal administrative or research positions. The status of these individuals is covered by our answer to the first question above. If they are not practicing medicine in Pennsylvania, even though they are licensed, they are not required to comply with the fee or insurance provisions of the Act. Thus, if they are simply involved in administrative or research positions they are not practicing and therefore not subject. But if, in addition to their Federal position they are practicing privately, then they must comply with the fee and insurance provisions of Act No. 111 because their private activities would not be covered by the Federal Act.

## OFFICIAL OPINION No. 76-4A

*Appointments—Historical and Museum Commission—Interim Appointments—Constitution.*

1. A person appointed to a temporary interim appointment to the Historical and Museum Commission under the provisions of former Article IV, § 8 of the Pennsylvania Constitution served only until the end of the session of the Senate and not until her successor was appointed and qualified.
2. The former Constitutional provision of Article IV, § 8 governs this question rather than Section 208 of the Administrative Code of 1929, as amended, 71 P.S. § 68, which applies only to permanent appointments.

Harrisburg, Pa. 17120  
February 20, 1976

Honorable Clarence D. Bell  
Senate of Pennsylvania  
Harrisburg, Pennsylvania

Dear Senator Bell:

Your letter of February 11, 1976, addressed to Attorney General Kane regarding Mrs. Ferne Smith Hetrick has been referred to me for reply. Mrs. Ferne Smith Hetrick had been serving as a Member of the Historical and Museum Commission under a recess appointment granted in January, 1975. The Senate has recently voted against confirming her to a full term.

You refer to the Act of June 2, 1965, P.L. 83, 71 P.S. § 104 which provides in part: "Members, other than members of the General Assembly, shall serve for a term of four years and each shall serve until his successor is appointed and qualified." Your letter states that in view of the fact that a successor to Mrs. Hetrick has not been appointed and qualified, it is your opinion that she would have the right under law to continue to serve. We would agree with this position had this appointee been serving under a *permanent* appointment rather than a *temporary* appointment. However, Mrs. Hetrick has been serving under an interim appointment which was made during the recess of the Senate.

Pursuant to the appointing power granted to the Governor by Article IV, § 8 of the Constitution of the Commonwealth of Pennsylvania, the Governor may make *permanent* appointments as provided in Section 8(a) which require the consent of two-thirds of the members of the Senate. Upon confirmation by the Senate, such appointees remains in office for the duration of the term and (where the statute so provides) until a successor shall have been appointed and qualified.

Pursuant to Section 8(b) of the Constitution, the Governor may, during the recess of the Senate, fill vacancies by *temporary* appointments, granting commissions expiring at the end of the Senate sessions.<sup>1</sup>

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1. See: *Frame v. Sutherland*, 459 Pa. 177, 327 A. 2d 623 (1974), for a discussion of recess appointments and dissent re permanent and temporary appointments.

It should be noted that there were a number of appointees in the identical position serving temporary recess appointments, including one Cabinet officer; to wit, James McHale. The provisions of the law are equally applicable to most of such interim appointments.

The Administrative Code of April 9, 1929, P.L. 177, Section 208, as amended by the Act of April 28, 1943, P.L. 94, Section 4, 71 P.S. § 68 contains the identical provision relating to the term of office which is applicable to the vast majority of gubernatorial appointees. That section provides that the terms of office of persons appointed by the Governor shall be as follows: "[e] Except as in this act otherwise provided, the heads of other administrative departments, the Commissioner of the Pennsylvania State Police, the members of independent administrative boards and commissions, of departmental administrative boards and commissions, and of advisory boards and commissions, and departmental administrative officers, shall hold office for terms of four years . . . and until their successors shall have been appointed and qualified. . . ." (Emphasis supplied.)

The statutory provisions must be read in conjunction with the provisions of the Constitution. The Governor's powers with respect to the terms of office of temporary appointments made during the recess of the Senate are limited by Article IV, § 8(b) of the Pennsylvania Constitution, as amended by adoption on May 16, 1967.

Section 8(b) provides: "Except as may now or hereafter be otherwise provided in this Constitution as to appellate and other judges, he [the Governor] may, during the recess of the Senate, fill vacancies happening in offices to which he appoints by granting commissions *expiring at the end of its session.* . . ." (Emphasis supplied.)

This subsection of the Pennsylvania Constitution clearly limits the power of the Governor as to the duration of the terms of office of recess appointments.

This provision of the Pennsylvania Constitution was construed by the Supreme Court of Pennsylvania in *Stroup v. Kapleau*, 455 Pa. 171, 313 A. 2d 237 (1973). In that case Senators Stroup, Frame and Tilghman brought actions in quo warranto challenging the right of the appellees to hold their appointed offices, said appointments having been made by the Governor. In that Opinion, the Supreme Court stated that the Constitution in Article IV, § 8(b) ". . . contains no specific limitation on the authority granted *except as to the time limit of the temporary recess appointment.*" (Emphasis supplied.) 455 Pa. at 177, 313 A. 2d at 240.

The Supreme Court then distinguished between temporary and permanent appointments, and, in construing the Constitution, stated: "It thus appears the Governor is authorized to fill a vacancy temporarily . . . but not for a full or unexpired term. . ." *Id.*, at 178, 313 A. 2d at 241. The Pennsylvania Supreme Court, in that Opinion, makes it abundantly clear, and so concludes, that temporary recess appointments expire at the end of the session of the General Assembly.

The above-referred-to constitutional provision was amended by adoption of the people at the Primary Election of 1975. That amendment precludes the Governor from making any further temporary appointments during the recess of the Senate. Accordingly, all of the temporary recess appointments made by the Governor in January of 1975 expired at the end of the session of the General Assembly at Noon on Tuesday, January 6, 1976. Under the Constitution, the power of appointment by the Governor was limited for such term and all such appointees were precluded from continuing in office subsequent thereto in the absence of further appointment by the Governor and confirmation by the Senate.

Sincerely yours,

VINCENT X. YAKOWICZ  
*Solicitor General*

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OFFICIAL OPINION No. 76-5

*Department of Military Affairs—National Guard—Military Leave—Opinion No. 75-4.*

1. An employee of the Commonwealth or any political subdivision thereof, who is a member of any reserve component of the United States armed forces and as such is engaged in the active service of the United States or in field training ordered or authorized by the federal forces, is entitled to be compensated by his employer in full for a period not exceeding 15 days in any one year.
2. The use of the word "drills" in Opinion No. 75-4 was inadvertent and incorrect. Pay or compensation is only authorized for those employees who are engaged in "active service" or "field training".

Harrisburg, Pa. 17120  
March 17, 1976

Major General Harry J. Mier, Jr.  
Adjutant General  
Annville, Pennsylvania

Dear General Mier:

You have requested an opinion clarifying and correcting Attorney General's Opinion No. 75-4, which relates to payment of salaries for leave of absence for National Guardsmen who are employed by the Commonwealth of Pennsylvania or any political subdivision thereof. It is our opinion and you are hereby advised that the use of the word "drills" in the Opinion was inadvertent and incorrect. It is clear from a complete reading of the Opinion that salary reimbursement is only authorized for those employees who are engaged in "active service" or "field training". It is our opinion and you are hereby advised that any officer or employee in the above mentioned categories who is a member of any reserve component of the United States armed forces is entitled to receive full salary for the amount of time not exceeding fifteen days, while engaged in the active service of the United States or in field training ordered or authorized by the federal forces.

Therefore, Attorney General's Opinion No. 75-4 is hereby amended by deleting the word "drills" in the last paragraph thereof and substituting the following for the entire last paragraph:

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 is a member of any reserve component of the United States armed forces and as such is engaged in the active service of the United States or in field training ordered or authorized by the federal forces is entitled to be compensated by his employer in full for a period not exceeding 15 days in any one year.

Very truly yours,

C. GLENDON FRANK  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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#### OFFICIAL OPINION No. 76-6

*Act of December 8, 1959, P.L. 1718, 61 P.S. §§ 951-952—Widows and Widowers—Death Benefits for Surviving Spouse of Certain Commonwealth Employees.*

1. The Act of December 8, 1959, P.L. 1718, which provides benefits to the widows of certain Commonwealth employes killed in the line of duty, is irrationally discriminatory in violation of the Fourteenth Amendment to the U.S. Constitution and the Equal Rights Amendment of the Pennsylvania Constitution, to the extent that it provides benefits to the surviving spouses of male employes and denies them to the surviving spouses of female employes similarly situated.
2. When a statute as written is clearly contrary to the Constitution, it must be interpreted so as to most nearly effectuate the legislative purpose.
3. Where the prime purpose of a statute which contains an unconstitutional gender-based classification is to provide protection for the families of state employes in dangerous occupations, the legislative intent is most appropriately preserved by reading the statute in such a way as to eliminate the unconstitutional discrimination.

Harrisburg, Pa. 17120  
March 17, 1976

Honorable James N. Wade  
Secretary of Administration  
Harrisburg, Pennsylvania

Dear Secretary Wade:

Your predecessor, in response to an inquiry from the Pennsylvania Commission for Women, requested our opinion on the status of the Act of December 8, 1959, P.L. 1718, as amended, 61 P.S. §§ 951-952, in

light of recent court decisions regarding equal protection based on sex and the Pennsylvania Equal Rights Amendment, Pa. Const. Art. I, § 28.

It is our opinion, and you are hereby advised, that a recent decision of the United States Supreme Court and the mandates of the Pennsylvania Equal Rights Amendment require this statute to be administered to provide benefits to widowers as well as widows of Department of Justice and Department of Public Welfare employees who die of injuries received in any of the circumstances described in the statute.

The Act, as amended, provides:

Any employe of a State penal or correctional institution under the Bureau of Correction of the Department of Justice and any employe of a State mental hospital, or Youth Development Center under the Department of Public Welfare, who is injured during the course of his employment by an act of any inmate or any person confined in such institution or by any person who has been committed to such institution by any court of the Commonwealth . . . and any employe of County Boards of Assistance injured by act of an applicant for or recipient of public assistance and any employe of the Department of Public Welfare who has been assigned to or who has volunteered to join the fire fighting force of any institution of the Department of Public Welfare injured while carrying out fire fighting duties, shall be paid, by the Commonwealth of Pennsylvania, his full salary . . . *The widow and minor dependents of any employe who dies within one year as a result of such injuries shall be paid benefits equal to fifty percent of the full salary of the deceased employe.*

*When a widow and minor dependents not in her custody are entitled to payments, one-half of such payments shall be paid to the widow and one-half to the dependents. In every case the amount payable to minor dependents shall be divided equally among them and be paid to the persons or institutions having custody of them.*

*In the case of a widow or a widow with minor dependents in her custody, such benefits shall terminate when such widow remarries. . . . (Emphasis added.)*

The Act further provides that any benefits received thereunder shall be reduced by the amount of any Workmen's Compensation benefits received or collected by the widow or minor dependents because of the same injury. Furthermore, a widow or minor dependent who is receiving benefits under the Federal Social Security Law is barred from receiving benefits under this Act.

The United States Supreme Court in *Weinberger v. Wiesenfeld* 420 U.S. 636 (1975) recently examined a gender-based distinction mandated by provisions of the Social Security Act, 42 U.S.C. § 402(g), which granted survivors' benefits based on the earnings of a deceased husband and father both to his widow and to his minor children, but granted benefits on a deceased wife's and mother's earnings only to her minor

children and not to her widower. The Court held that this distinction was irrational in that it provided dissimilar treatment for men and women who were similarly situated, and directed that the benefits be paid to the plaintiff-widower. The Court examined the legislative history of the challenged provision, and found that the sex-based distinction was based on the "then generally accepted presumption that a man is responsible for the support of his wife and children." The Court said:

Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. See *Kahn v. Shevin*, 416 U.S. 351, 354 n. 7 (1974). But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support. Section 402(g) clearly operates, as did the statutes invalidated by our judgment in *Frontiero v. Richardson*, 411 U.S. 677 (1973),] to deprive women of protection for their families which men receive as a result of their employment. Indeed, the classification here is in some ways more pernicious. First, it was open to the servicewoman under the statutes invalidated in *Frontiero* to prove that her husband was in fact dependent upon her. Here, Stephen Wiesenfeld was not given the opportunity to show, as may well have been the case, that he was dependent upon his wife for his support, or that, had his wife lived, she would have remained at work while he took over care of the child. Second, in this case social security taxes were deducted from Paula's salary during the years in which she worked. Thus, she not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others. Since the Constitution forbids the gender-based differentiation premised upon assumptions as to dependency made in the statutes before us in *Frontiero*, the Constitution also forbids the gender-based differentiation that results in the efforts of female workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men.

\* \* \*

Given the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of § 402(g) is entirely irrational.

The classification discriminates among surviving children solely on the basis of the sex of the surviving parent. Even in the typical family hypothesized by the Act, in which the husband is supporting the family and the mother is caring for the children, this result makes no sense. The fact that a man is working while there is a wife at home does not mean that he

would, or should be required to, continue to work if his wife dies. It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the "companionship, care, custody, and management" of "the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Further to the extent that women who work when they have sole responsibility for children encounter special problems, it would seem that men with sole responsibility for children will encounter the same child-care related problems. Stephen Wiesenfeld, for example, found that providing adequate care for his infant son impeded his ability to work. . . . 420 U.S. 636, 651-652.

This reasoning is equally applicable to the Act. There is no legislative history to indicate the intent of the Legislature in enacting this statute, but undoubtedly the General Assembly's prime purpose was to provide benefits for the families of certain State employes engaged in high risk occupations who are injured or killed in the line of duty. The original Act 632 of December 8, 1959 dealt only with employes of State penal and correctional institutions. In 1961, the statute was amended to include, other employes as enumerated above (Act of September 2, 1961, P.L. 1224). In making provisions for widows and dependent children in cases where the covered employe was killed, the Legislature was recognizing that many wives are dependent upon their husbands for their support. However, the statute does not require that the widow be or has been incapable of supporting herself and/or her children in order to qualify for benefits.

As written, the benefits would be available equally to a childless widow capable of self-support as well as to a widow with no marketable skills who is the mother of several small children. No provision is made for the widower of a deceased female employe, presumably on the assumption that every man is capable of supporting himself. And yet, a disabled widower, or a working man with small children to support, is in as much need of help as most widows similarly situated. There is, in fact, no possible state interest which could be served by limiting the application of this statute to the surviving spouses of male employes and excluding those of female employes.

A similar result must be reached under the Pennsylvania Equal Rights Amendment, Pa. Const. Art. I § 28. The Commonwealth Court has held that the state ERA is "at least broad enough in scope" to prohibit discrimination proscribed by the Equal Protection Clause of the Fourteenth Amendment. *Commonwealth v. PIAA*, 18 Pa. Commonwealth Ct. 45, 334 A. 2d 839 (1975). And see also *Commonwealth v. Butler*, 458 Pa. 289, 328 A. 2d 851 (1974); *Hopkins v. Blanco*, 457 Pa. 90, 320 A. 2d 139 (1974); *Henderson v. Henderson*, 458 Pa. 97, 327 A. 2d 60 (1974); *Wiegand v. Wiegand*, 226 Pa. Superior Ct. 278, 310 A. 2d 426 (1973).

It is a maxim of statutory construction that the Legislature, in enacting statutes, does not intend an unconstitutional result. 1 Pa. C.S. § 1922(3). When a statute is clearly contrary to the Constitution, courts have attempted to ascertain whether "it more nearly accords with [the Legislature's] wishes to eliminate its policy altogether or extend it in order to render what [the Legislature] plainly did intend, constitutional." *Welsh v. U.S.*, 398 U.S. 333, 355-56 (1970).

Since the prime purpose of the Legislature in enacting 61 P.S. §§ 951-952 was to provide protection for the families of state employes in dangerous occupations, every effort must be made to preserve that intent by giving the statute a constitutional interpretation. We think this can best be done by reading the statute as if the word "widow" also included "widower",<sup>1</sup> until such time as the Legislature clarifies the statute by appropriate amendment.<sup>2</sup>

You are therefore advised that the widower of any female employe of the Department of Justice or the Department of Public Welfare covered by the Act of December 8, 1959, P.L. 1718, as amended, killed in the line of duty, shall receive benefits specified for widows in the statute.<sup>3</sup> As with widows, such benefits shall be terminated upon remarriage of the widower.

Very truly yours,

JENNIFER A. STILLER  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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1. Section 1902 of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1902, provides in part "Words used in the masculine gender shall include the feminine and neuter."

In view of the Equal Rights Amendment, reading the feminine "widow" to include the masculine "widower" is equally appropriate.

2. We note in passing that the Supreme Court in *Wiesenfeld* distinguished the earlier case of *Kahn v. Shevin*, 416 U.S. 351 (1974), on the ground that "mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." 420 U.S. at 648. In addition, the Supreme Court had noted in the *Kahn* decision itself that its holding was dictated largely by its long standing policy that "[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359." 416 U.S. at 355. Since Act 632 is not a tax statute, it is not unlikely that even under a Fourteenth Amendment "rational basis" test, the result enunciated herein would be reached.

3. Your office has advised me that no female employe covered by the Act has ever been killed in the line of duty. Therefore, in practical effect, this Opinion will be prospective only.

## OFFICIAL OPINION No. 76-7

*Residence—Civil Service Act—Civil Service Commission—Appointments and Promotions.*

1. The residency requirements for both initial appointment and promotion of Section 501 of the Civil Service Act of August 5, 1941, P.L. 752, as amended, 71 P.S. § 741.501, do not apply in those circumstances where the job in question is located beyond the borders of Pennsylvania.

Harrisburg, Pa. 17120

March 17, 1976

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

Dear Mr. Rosenberry:

The Secretary of the Department of Labor and Industry has requested our opinion regarding the proper interpretation and application of Section 501 of the Civil Service Act of August 5, 1941, P.L. 752, as amended, 71 P.S. § 741.501. Specifically, the question that has been raised is whether the statutory requirement that all persons applying for positions or promotions in the classified service be residents of the Commonwealth applies in those limited circumstances where fulfillment of the duties of the particular job requires the employee to be permanently located in an office outside of Pennsylvania.

It is our opinion and you are hereby advised that the residency requirements, for both initial appointment and promotion, of the Civil Service Act do not apply in those circumstances where the job in question is located beyond the borders of Pennsylvania.

The Bureau of Employment Security of the Department of Labor and Industry wishes to promote an employee in its Philadelphia district from her present position as an Unemployment Claims Examiner to an Employment Security Specialist. Both positions are classified Civil Service positions. In her new job as an Employment Security Specialist, she would be part of Pennsylvania's pilot interstate unemployment compensation benefits program, and thus would be permanently re-assigned to work in a New Jersey Department of Labor office in Burlington, New Jersey.

The purpose of this pilot program is to speed up the payment of benefits to applicants having claims against the Commonwealth of Pennsylvania while residing in New Jersey. Consequently, an essential element of this pilot program is the out-stationing of Bureau of Employment Security personnel in Department of Labor offices in several New Jersey communities that have high interstate claims loads to supervise and expedite the processing of these claims. The first of these placements is being made in Burlington, New Jersey. In the near future, BES intends to allocate permanent personnel to two other New Jersey offices, in Woodbury and Camden, New Jersey, as part of this pilot program.

The employee involved in the present fact situation was a Pennsylvania resident when she was initially appointed to the BES on February 18, 1952. During the following 23 years, she was employed in several Philadelphia local offices of the BES. At the time of her application for promotion from an Unemployment Claims Examiner to an Employment Security Specialist, she was a resident of Willingboro, New Jersey. Upon inquiry,<sup>1</sup> BES discovered that she was the only qualified worker interested in a transfer and promotion to the New Jersey office in question.

The relevant portion of Article V, § 501 of the Pennsylvania Civil Service Act, 71 P.S. § 741.501, states as follows:

Persons applying for positions or promotions in the classified service shall be citizens of the United States<sup>2</sup> and residents of the Commonwealth.

This section goes on to provide that after evidence has been presented by an appointing authority that there is a lack of sufficient qualified personnel available for appointment to any particular class or classes of positions, the director may waive the residence requirement for such class or classes. In this case, however, evidence has not been produced that would indicate a lack of qualified candidates, and consequently, residency is required for this class.

A literal reading of Section 501 of the Civil Service Act would indicate that every person applying for a position or a promotion in the classified service must be a resident of Pennsylvania at the time of application. However, an interpretation that would bar non-residents from applying for the job in question even though it is outside of Pennsylvania would do violence to the intent of the Legislature.

The statutory preference for Pennsylvania residents was apparently incorporated into the original Civil Service Act of 1941 to promote the economic and social welfare of the Commonwealth's residents whenever feasible. The existence of a residency waiver provision in Section 501<sup>3</sup> for particular classes of positions indicates a legislative

1. According to the BES, a canvas of all qualified staff in the 21 Philadelphia local district offices was conducted. The Bureau of Employment Security interviewed 297 Unemployment Claims Interviewers and Unemployment Claims Examiner I's who met the criteria for the position. None of these persons were interested in the position in its present location. They also indicated that they would not be interested in positions in the New Jersey area in the future.
2. You are further advised that the citizenship requirement of the Civil Service Act is unconstitutional and unenforceable in light of the U.S. Supreme Court's decision in *Sugarman v. Dougall*, 413 U.S. 634 (1973). Earlier opinions of the Attorney General regarding citizenship requirements are consistent with this conclusion (Opinions of the Attorney General of 1973, Opinion No. 4; Opinions of the Attorney General of 1972, Opinions 112, 113, 114, 116).
3. "... whenever an appointing authority finds a lack of a sufficient number of qualified personnel available for appointment to any particular class or classes of positions, he may present evidence thereof to the director who may waive the residence . . . requirements for such class or classes of positions." 71 P.S. § 741.501.

awareness that all classified positions could not always be filled by Pennsylvania residents.

During the intervening years, the growing complexity of State and Federal programs has created certain needs for administrative cooperation among the several states. The Bureau of Employment Security's pilot program for interstate unemployment compensation benefits is the Department of Labor and Industry's response to such a need. Other Pennsylvania agencies may well enter into or expand their interstate contacts in the near future, as adjoining State governments come to realize the efficiency and rationality of interstate cooperation and action.

The Legislature, in initially adopting and subsequently amending the Civil Service Act, apparently did not consider the possibility that it might become advantageous to locate a small number of Pennsylvania civil servants outside this State in order to streamline the administration of interstate matters. To read Section 501 of the Civil Service Act to require that employees commute potentially long distances to out-of-State work locations in order to retain resident status, would be both an uneconomical and unreasonable interpretation of the Civil Service Act.

If public servants are required to be Pennsylvania residents in order to qualify for out-of-State jobs, and the Commonwealth of Pennsylvania continues to have the difficulty finding qualified persons evidenced herein, the Commonwealth will have to retain the necessary personnel on an "on loan" basis. Such an arrangement will be costly since the State would have to pay for travel, lodging and subsistence, in addition to the worker's regular salary.

The courts have long held that a statute need not be read literally if doing so would lead to a result not considered or intended by the Legislature. In *Church of the Holy Trinity v. U.S.*, 143 U.S. 457, 459 (1892), the Court said:

It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.

In so holding, the Court refused to apply a statute, which made it illegal to prepay the transportation of an alien under contract to perform labor or services of any kind in the United States, to the payment of passage for an English minister by a church that had contracted for his services. The statute was clearly not directed at such a situation, although a literal application would have prohibited the church's action. This case has been cited often, as recently as *Quinn v. Butz*, 510 F. 2d 743 (D.C. Cir. 1975), as authority for the proper construction of statutes.

Pennsylvania has applied similar rules of construction in *Secretary of Revenue v. John's Vending Corp.*, 453 Pa. 488, 494, 309 A. 2d 358, 362 (1973):

In order to avoid an absurd and harsh result, a court may look beyond the strict letter of the law to interpret a statute according to its reason and spirit and accomplish the object intended by the Legislature.

In affirming a District Court interpretation of a Pennsylvania statute, the Third Circuit has said:

[I]t has long been a fundamental canon of statutory construction that the intention of the lawmakers is paramount in determining the meaning of an act. A situation not within the intention of the enacting body, though it is within the letter of the statute, is not within the statute. *U.S. v. Bowman*, 358 F. 2d 421, 423 (3rd Cir. 1966).

There is authority for following the letter of the law closely. 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).

Nevertheless, the same Act establishes the presumption "[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." (1 Pa. C.S. § 1922).

To conclude that Section 501 of the Civil Service Act would bar non-residents from applying for positions or promotions where the permanent job location is outside of Pennsylvania would be an unreasonable and absurd result. We can well expect that in the future, the increasingly complex nature of interstate governmental administration will create the need for more out-of-State placement of Pennsylvania civil servants; to require these workers to commute potentially long distances in order to qualify for employment would be a narrow and unfortunate interpretation of the intent of the General Assembly.

While in a particular fact situation it may be possible and even convenient for a worker to reside in Pennsylvania and commute to an out-of-State job, it is our opinion that the Civil Service Act does not require Pennsylvania residence as a prerequisite for application for either a position or a promotion in those limited instances where the permanent job location is anywhere beyond the borders of Pennsylvania.

Sincerely,

DAVID M. BARASCH  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

## OFFICIAL OPINION No. 76-8

*Department of Public Welfare—Southeast Pennsylvania Industrial Area Service Unit (SPIASU).*

1. The Act of December 8, 1959, P.L. 1718, as amended, 61 P.S. § 951 (known as Act 534), provides compensation for employes of State mental hospitals and Youth Development Centers (Y.D.C.s) injured by an inmate or confined person.
2. SPIASU is an administrative creation that provides services to State mental hospitals and Y.D.C.s in the Southeast Pennsylvania Area.
3. Even though SPIASU employes are not employes of State mental hospitals or Y.D.C.s, they are entitled to compensation for injuries under Act 534, since the Act is intended to cover employes of the Department of Public Welfare while on duty at a State mental hospital or Y.D.C.

Harrisburg, Pa. 17120

March 19, 1976

Honorable Frank S. Beal  
Secretary of Public Welfare  
Harrisburg, Pennsylvania

Dear Secretary Beal:

You have asked whether an employe of the Southeast Pennsylvania Institutional Area Service Unit (SPIASU) may be compensated under the Act of December 8, 1959, P.L. 1718, as amended, 61 P.S. § 951, commonly known as Act 534, for injuries inflicted by an inmate or confined person at a Youth Development Center (Y.D.C.) during the course of her employment. Under the statute a person may be compensated for such injury if he is:

“... any employe of a State mental hospital or Youth Development Center under the Department of Public Welfare, . . .”

It is our opinion that you must so compensate such an employe.

A brief description of SPIASU and its formation is necessary to an understanding of the problems involved.

SPIASU did not exist at the time that Act 534 was enacted. SPIASU is an administrative creation organized by agreement between the Secretary of Public Welfare and the Secretary of Administration and Budget Secretary in October, 1967. It is a part of the Department of Public Welfare, not a private organization. It was set up to provide plant maintenance, security, automotive and dietary services for Eastern State School and Hospital and the Youth Development Center at Cornwells Heights and laundry services to another mental hospital and another Y.D.C.<sup>1</sup> The idea was that support services could be more efficiently supplied by a centralized, specialized unit than by each individual hospital or Y.D.C.

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1. Since then the services of SPIASU have been expanded to supply support to other institutions in Southeast Pennsylvania.

When SPIASU was formed, all two hundred and twenty-eight (228) job positions there were made available from existing complements of the participating institutions. That is, workers were reassigned to SPIASU administratively while continuing to supply services for the hospital or Y.D.C. at which they were already employed. SPIASU shares the administrative building of the Y.D.C. at Cornwells Heights and also has kitchen facilities on the grounds of Eastern State School and Hospital.

Since SPIASU receives no direct appropriation, the Comptroller quarterly bills the mental hospitals and Y.D.C.s for the services it provides them. Then the Department of Public Welfare processes a draw and the money is transferred to SPIASU for such purposes as payment of its employes. SPIASU employes are thus employes of the Department of Public Welfare.

The question is whether this administrative change removes the employes from the protection of the act since technically they may have lost their status as employes of a State mental hospital or Youth Development Center under the Department of Public Welfare.

"The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly . . . ." Statutory Construction Act of 1972 (1 Pa. C.S. § 1921(a)). The obvious intent of Act 534 is to give special protection to Commonwealth employes who are endangered in their jobs by constant proximity to disturbed, retarded or mentally ill persons. In our opinion it would thwart that legislative intent for employes of the Department of Public Welfare permanently located at a State mental hospital or a Y.D.C., who were covered by the act when it went into effect, to lose the protection afforded by the act simply because administratively their employe status has changed and they are no longer technically employes of a State mental hospital or a Y.D.C.

In *Krug v. Dept. of Public Welfare*, 9 Pa. Commonwealth Ct. 563, 565, 308 A. 2d 168, 170 (1973), Judge Crumlish, speaking for a unanimous court said:

"Act 534 was designed to assure those who undertake employment at certain state institutions that they would be fully compensated in the event they were disabled as a result of ' . . . an act of any inmate or any person confined in such institution. . . . ' " (Emphasis added.)

In view of this interpretation, we construe the act to mean that any employe of the Department of Public Welfare, while employed at any Department of Public Welfare institution is, for the purpose of Act 534, to be considered an employe of such institution while employed therein.

Accordingly, it is our opinion and you are advised that SPIASU employes who are injured in the course of their work at a State mental hospital or Youth Development Center, by the act of any inmate or

any confined person, are entitled to benefits under Act 534. The same protection is afforded to any employe of the Department of Public Welfare injured by an inmate or confined person while on duty at any Department of Public Welfare institution.

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. 76-9

*Governor's Office—Date of Enactment of Bills Passed Over the Objections of the Governor.*

1. A bill passed notwithstanding the objections of the Governor becomes law on the day of the vote to override the veto in the second house. Article IV, § 15 of the Constitution of Pennsylvania.
2. The certification by the presiding officers of the House and Senate that a bill has passed by a two-thirds majority of each house provides notice to the public, but does not determine the date of enactment of a law.
3. A bill becomes law upon the final constitutional act required.

Harrisburg, Pa. 17120  
March 24, 1976

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

Dear Governor Shapp:

You have asked my formal opinion as to the resolution of the question as to what is the date of enactment of a bill passed over the Governor's veto.

It has been long settled that a bill becomes an act upon completion of the final constitutional requirement for enactment. *Simon v. Maryland Battery Service Co.*, 276 Pa. 473, 120 A. 469 (1923); *Wartman v. City of Philadelphia*, 33 Pa. 202 (1859). Article IV, § 15 of the Pennsylvania Constitution specifically addresses the need for the Governor's approval of legislation and the procedure to be followed in the case of a veto. This section provides that once a vetoed bill has been reconsidered and approved by a two-thirds majority of each House of the General Assembly, " . . . [I]t shall be a law." Because approval by the second House is the final constitutional act required, upon that ap-

proval the bill becomes law.<sup>1</sup> 2 Sands, *Sutherland Statutory Construction* § 33.06 (3rd Ed. 1973).

This question is of particular importance due to the current practice of delaying the certification of bills for several days to more than a week after the vote of approval has been taken.<sup>2</sup> This certification may be dated at a later time and in no way determines the date of enactment. This procedure is similar to the Secretary of the Commonwealth's certification that a bill has become law without the Governor's signature. In that case, the bill becomes law on the tenth day after presentation to the Governor although the Secretary of the Commonwealth may certify that fact at a later date. See 1974 Opinions of the Attorney General, No. 50.

Signing of bills by the presiding officers of each house is constitutionally required only when the Governor's signature is necessary to enact a law. The purpose of Article III, § 8 of the Pennsylvania Constitution is to assure the Governor that a bill is properly before him for his signature. *Speer v. Plank-Road Co.*, 22 Pa. 376 (1853); *Brown v. Morris*, 365 Mo. 946, 290 S.W. 2d 160 (1956). This rationale is not applicable to veto overrides because no gubernatorial signature is necessary to establish enactment. Therefore, in such cases, the sole purpose of certification is to provide notice to the public. Certification for such purposes is not required by the Constitution and is not, therefore, the last act necessary for enactment. This fact is further clarified by the lack of any time limit within which the presiding officers must act; certification could come months after enactment, or not at all. If certification were necessary for enactment, the presiding officers could delay implementation of an act at will. Such veto power is not given to the presiding officers of the House or Senate by the Constitution. Therefore, their signatures are not necessary for enactment.

In 1889, the Supreme Court of Indiana had occasion to address the specific question here in issue. Indiana had a constitutional provision identical in all respects to Article IV, § 15 of the Pennsylvania Con-

1. Accordingly, the five pieces of legislation enacted over the Governor's objections in the past several years became law on the following dates:

Act of September 27, 1972 (P.L. 897, No. 212)  
(certified September 28, 1972)

Act of March 26, 1974 (P.L. 213, No. 46)  
(certified March 26, 1974)

Act of September 10, 1974, (P.L. 639, No. 209)  
(certified September 10, 1974)

Act of February 3, 1976 (P.L. 24, No. 11)  
(certified February 4, 1976)

Act of February 25, 1976 (P.L. 52, No. 21)  
(certified March 1, 1976)

2. When a bill is passed over the objections of the Governor, typically it is certified by certain officers of the House and Senate. In order to avoid confusion on the part of courts, lawmakers and the general public, the wording of the presiding officers' certificates should be revised to read in conformance with 101 Pa. Code § 19.354.

stitution, except that only a majority vote of each house was required for override. The court held that the language of the Constitution was clear in that: (i) signing is required for all bills which have passed the General Assembly, but this mandate refers only to the initial passage of the bill, and (ii) the section governing the veto override procedure specifically provides that approval by the requisite majorities of each house itself transforms the bill into an act. *City of Evansville v. State*, 118 Ind. 426, 21 N.E. 267 (1889).

It is, therefore, my opinion and you are so advised that a bill passed notwithstanding the objections of the Governor becomes law on the day of the vote in the second House.

Sincerely yours,

CONRAD C. M. ARENSBERG  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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OFFICIAL OPINION No. 76-10

*Department of Labor and Industry—Liquefied Petroleum Gas Act—Dealers—Statutory Construction Act.*

1. Registration fees required of dealers in Subsection (c) of Section 3.2 of the Liquefied Petroleum Gas Act may not be charged for each retail facility but only one registration fee may be charged for each dealer.
2. When a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.
3. Attorney General's Opinion No. 75-46 rescinded in part.

Harrisburg, Pa. 17120  
April 28, 1976

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

Dear Secretary Smith:

On December 2, 1975 we issued Attorney General's Opinion No. 75-46, addressed to you, in which we interpreted Section 3.2 of the Liquefied Petroleum Gas Act, Act of December 27, 1951, P.L. 1793 (35 P.S. § 1323.2) relating to registration fees. In that opinion we concluded that registration 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.

Our conclusions were derived primarily from the purpose of a license fee which is to pay for the expense of supervision and regulation conducted by the regulating agency. In this regard, with respect to our conclusion relating to "dealers", we said:

"By construing the statute to include each retail location as a dealer, sufficient funds are produced to cover the costs of inspection".

Since the issuance of Opinion No. 75-46 a decision of the Pennsylvania Supreme Court has been brought to our attention which compels us to reverse our conclusion relating to dealers and to conclude instead that dealers are liable for one registration fee only and are not required to pay a separate fee for each retail facility.

In the case of *Cupp Grocery Co. v. Johnstown*, 288 Pa. 43, 135 A. 610 (1927) an ordinance of the City of Johnstown provided for a license tax to be "levied annually upon all persons, firms and corporations engaged in any trade, business", etc. within the city. It further provided that all grocers, druggists and confectioners classified as *retail dealers would pay a license tax based upon its annual sales volume*. The city argued that the ordinance required a retail dealer to pay a separate license tax for each store operated by the dealer whereas the appellee contended that the tax was on the individual dealer, not the locations. In holding that the city was not entitled to levy and collect a separate tax on each location, the lower court said:

"The language of the act merely refers to dealers and not to places of business. While we believe that this construction of the act is indicated clearly in the language used we also find the ordinance itself confirms such a reading, for example, in the case of the taxation of a street railway company a tax is placed against the company generally and later on a tax is placed upon each car." 288 Pa. at 45, 135 A. at 611.

The language of the instant statute requires a similar construction:

"(a) In the case of bulk plants having the following storage facilities, the fees shall be as follows:

\* \* \*

(b) In the case of industrial and utility users having the following storage facilities, the fees shall be as follows:

\* \* \*

(c) In the case of dealers, the fees shall be as follows: . . ."

Both (a) and (b) specifically refer to storage facilities, but (c) which relates to dealers does not refer to facilities at all. Following the reasoning of the *Cupp Grocery* case, *supra*, it must be concluded that the registration fees required by (c) are applicable only to the individual dealer and not to separate retail facilities.

Since *Cupp Grocery* was decided in 1927, prior to the enactment of the Liquefied Petroleum Gas Act (December 27, 1951), it must be

presumed that the Legislature intended the word "dealers" as used in the act to be interpreted in accordance with the construction placed upon it by the court. The Statutory Construction Act of 1972 (1 Pa. C.S. § 1922) provides:

"In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:

\* \* \*

(4) That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language."

In conclusion, therefore, it is our opinion and you are advised that the registration fees required of dealers in Subsection (c) of Section 3.2 of the Liquefied Petroleum Gas Act may not be charged for each retail facility but only one registration fee may be charged for each dealer. Insofar as Opinion No. 75-46 reached a contrary result, it is hereby rescinded to that extent.

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. 76-11

*Department of Health—Vital Statistics—False Birth Certificates—U.S. Marshal—Protection of Government Witnesses.*

1. The Department of Health is prohibited from providing the U.S. Marshal with false birth certificates for government witnesses and their families.
2. Section 902 of the Vital Statistics Law of 1953 makes it a misdemeanor to furnish false information for inclusion in a birth certificate.

Harrisburg, Pa. 17120

April 28, 1976

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

Dear Dr. Bachman:

You have asked the advice of this Department as to whether the Division of Vital Statistics of the Department of Health may provide the United States Marshal with fictitious birth certificates for the

families of government witnesses who testify in criminal proceedings. Without passing upon the wisdom or desirability of aiding such witnesses in establishing new identities, the simple answer is that the requested action is strictly prohibited by State statute, and any person who wilfully and knowingly participated in issuing false birth certificates would be guilty of a misdemeanor regardless of his motivations.

The U.S. Government Witness Protection Program is established by U.S. Department of Justice Order OBD 2110.2 of January 10, 1975, "Witness Protection and Maintenance Policy and Procedures." The authority for protection of witnesses is provided by Title V of U.S. Public Law 91-452, Oct. 15, 1970, 84 Stat. 922 the "Organized Crime Control Act of 1970."

The program is designed to give protection to witnesses in both state and federal criminal proceedings, especially those involving organized crime. The U.S. Marshal wishes to obtain birth certificates for government witnesses and their families. These certificates would have the correct birthdate but otherwise false information. Only the birth certificates would be false, as the information contained therein would be theoretically kept in a separate file and not made a part of Pennsylvania's vital statistics records.

Neither Public Law 91-452 nor the U.S. Department of Justice Order specifically authorizes the use of false birth certificates or purports to supersede state control of vital statistics, which is within the normal exclusive police power of the states. Nor presumably could a federal statute give immunity from prosecution under a state criminal statute.

The Act of June 29, 1953, P.L. 304, 35 P.S. § 450.101, *et seq.*, known as the "Vital Statistics Law of 1953," places emphasis upon protecting "the completeness and integrity of vital statistics records." Section 205. Specifically Section 902 provides, in relevant part:

Any person (1) who wilfully and knowingly furnishes false information for inclusion in any certificate or record provided for by this act . . . shall be guilty of a misdemeanor, and, upon conviction . . . shall be sentenced to pay a fine of not more than one thousand dollars (\$1000) or undergo an imprisonment of not more than six (6) months, or both, at the discretion of the court. 35 P.S. § 450.902.

Thus, not only the U.S. Marshal furnishing such false information, but also any local registrar or employe of the Department of Health who wilfully and knowingly cooperated, would be subject to criminal prosecution.

Furthermore, Section 201 of the Vital Statistics Law places upon the Department of Health the duty to "administer and enforce the provisions of this act and the regulations made pursuant thereto." It would be an obvious breach of this duty to facilitate or cooperate in the violation of Section 902.

Finally, it may well be argued that aiding witnesses who testify against organized crime to establish new identities is a valid countervailing purpose to preserving the integrity of vital statistics records and certificates and that an exception should be established for this sort of program. However, this argument must be addressed to the General Assembly for clearly no such exception is now recognized in the Vital Statistics Law.

Sincerely yours,

ROBERT E. RAINS  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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### OFFICIAL OPINION No. 76-12

*State Horse Racing Commission—State Harness Racing Commission—Free Passes—Statutory Construction.*

1. Neither the State Horse Racing Commission nor the State Harness Racing Commission is authorized to issue free passes to horse or harness race meetings conducted by corporations licensed by the commissions pursuant to the applicable statutes.
2. The Legislature has granted limited authority to the corporations licensed to conduct pari-mutuel betting at race tracks owned or leased by them to issue free passes to persons fitting within certain well-defined categories for, in most cases, purposes having to do with the actual conduct of the business of racing.
3. Where a provision of an act is expressly stated to apply to named persons or groups, those persons and groups not named are excluded.

Harrisburg, Pa. 17120

May 5, 1976

Honorable Andrew R. Johnson  
Chairman, State Horse Racing Commission  
Harrisburg, Pennsylvania

Honorable Philip Ahwesh  
Chairman, State Harness Racing Commission  
Harrisburg, Pennsylvania

Gentlemen:

We have been asked to determine if the Horse Racing Commission and the Harness Racing Commission are legally authorized to issue free passes for admission to horse or harness race meetings conducted by corporations licensed by the commissions pursuant to the applicable statutes. It is our opinion and you are advised that neither commission has such authority.

The act governing thoroughbred horse race meetings and the act governing harness horse race meetings are in many respects the same and the respective sections relating to free passes are almost identical. The complete texts of the applicable provisions are as follows:

"A corporation licensed to conduct pari-mutuel betting on thoroughbred (harness) horse races run at its race track shall not issue free passes, cards or badges except to persons hereafter described.

(1) Officers and employes of the corporation conducting the race meeting;

(2) Members, officers and employes of the State Horse (Harness) Racing Commission;

(3) Members of thoroughbred (harness) horse racing associations of other states and foreign countries;

(4) Public officers engaged in the performance of their duties;

(5) Persons actually employed and accredited by the press to attend such meetings;

(6) Owners, stable managers, trainers, jockeys (drivers), concessionaires and other persons whose actual duties require their presence at such race track.

The issuance of tax-free passes, cards, or badges shall be under the rules and regulations of the State Horse (Harness) Racing Commission and a list of all persons to whom free passes, cards or badges are issued shall be filed with the State Horse (Harness) Racing Commission." (15 P.S. § 2673) (15 P.S. § 2622) (The numbers in parentheses do not appear in the text of the acts)

By these sections the Legislature has granted limited authority to the corporations licensed to conduct pari-mutuel betting at race tracks owned or leased by them to issue free passes to persons fitting within certain well-defined categories for, in most cases, purposes having to do with the actual conduct of the business of racing. For example, public officers may only be given free passes if the performance of their duties as public officers requires them to be present at the race meeting. This would include a police officer while on duty and an employee of the Pennsylvania Department of Revenue whose duty is to determine and collect the amount of tax due the Commonwealth resulting from the pari-mutuel betting. It would not include, for example, a county commissioner or the mayor of a city attending for recreation or even for entertaining a guest in connection with what might be considered the official duties of a public office but which have no relation to the business of racing. Moreover, the above sections require a list of all persons to whom free passes have been issued to be filed with the commissions.

These are the only provisions in either act dealing with free passes and there are no provisions giving any authority to the commissions to issue free passes. It is a familiar maxim of statutory construction that where a provision of an act is expressly stated to apply to named persons or groups, those persons and groups not named are excluded. *St. Paul Mercury Indemnity Co.'s Appeal*, 325 Pa. 535, 191 A. 9 (1937); See also *Haughey v. Dillon*, 379 Pa. 1, 108 A. 2d 69 (1954). In accordance with this maxim, since the acts name the licensed corporations as those authorized to issue free passes and since the commissions are not named, it must be concluded that the Legislature intended to exclude the commissions from such authority.

Therefore, it is our opinion and you are advised that neither the State Horse Racing Commission nor the State Harness Racing Commission is authorized to issue free passes for admission to horse or harness race meetings conducted by corporations licensed by the commissions pursuant to the applicable statutes.

It has come to our attention that the commissions have already issued and/or have requests for tens of thousands of free passes. We advise that the commissions must immediately cease to issue any passes and such passes as have been issued are *VOID* and the racing associations are prohibited from honoring them.

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. 76-13

*Liquor Control Board—Malt and Brewed Beverages—Transportation.*

1. Section 492 of the Liquor Code authorizes retail licensees, without a special license or permit, to transport their own malt and brewed beverages, provided that:
  - (1) the beverages are in the original containers;
  - (2) the beverages are being transported for the retail licensee itself and not for another;
  - (3) the vehicles in which the beverages are being transported bear the name, address and license number of the licensee on each side of the vehicle;
  - (4) the transportation thereof is in accordance with rules and regulations of the board;
  - (5) the appropriate tax stamps or crowns are affixed to the containers.
2. If the foregoing conditions are met, the Board may, by regulation, authorize retail licensees to transport malt and brewed beverages from distributors' and importing distributors' warehouses to their own licensed premises, without requiring a special license or permit for such purpose.

Harrisburg, Pa. 17120  
May 6, 1976

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

Dear Chairman Kaplan:

You have requested our opinion concerning the legal authority of retail licensees to transport malt and brewed beverages from distributors' and importing distributors' warehouses to their own licensed premises, without an additional license or permit specifically authorizing such transportation. It is our opinion, and you are advised, that the Board may, by regulation, authorize such transportation by retail licensees without a special license or permit.

The transportation of malt and brewed beverages is governed by the following subsections of Section 492 of the Liquor Code (47 P.S. § 4-492):

"It shall be unlawful—

\* \* \*

(8) For any person, to transport malt or brewed beverages *except in the original containers*, or to transport malt or brewed beverages *for another* who is engaged in selling either liquor or malt or brewed beverages, unless such person shall hold (a) a license to transport for hire, alcohol, liquor and malt or brewed beverages, as hereinafter provided in this act, or (b) shall hold a permit issued by the board and shall have paid to the board such permit fee, not exceeding one hundred dollars (\$100), and shall have filed with the board a bond in the penal sum of not more than two thousand dollars (\$2000), as may be fixed by the rules and regulations of the board, any other law to the contrary notwithstanding.

(9) For a malt or brewed beverage licensee, to deliver or transport any malt or brewed beverages, excepting in vehicles bearing the name and address and license number of such licensee painted or affixed on each side of such vehicle in letters no smaller than four inches in height.

(10) For any person, to transport within or import any malt or brewed beverages into this Commonwealth, *except in accordance with the rules and regulations* of the board, or for any person to transport malt or brewed beverages into or within this Commonwealth, unless there shall be affixed to the original containers in which such malt or brewed beverages are transported, stamps or crowns evidencing the payment of the malt liquor tax to the Commonwealth: Provided, however, That this clause shall not be construed to prohibit transportation of malt or brewed beverages through this Commonwealth and not for delivery therein, if such transporting is done in accordance with the rules and regulations of the board.

(11) For any manufacturer, importing distributor or distributor, or his servants, agents or employees, except with board approval, to deliver or transport any malt or brewed beverages in any vehicle in which any other commodity is being transported." (Emphasis added.)

Subsection (8) specifically authorizes any person to transport malt or brewed beverages in the original containers except that the transportation of such beverages *for another* is prohibited unless the person holds a license to transport for hire, as provided in the act, or a permit issued by the Board. Thus, under this subsection a retail licensee is permitted to transport malt and brewed beverages in the original containers for itself but not for anyone else unless it has the requisite license or permit.

Subsection (9) prohibits the transportation of malt and brewed beverages except in vehicles bearing the name, address and license number of the licensee on each side of the vehicle.

Subsection (10) prohibits the transportation of malt and brewed beverages within the Commonwealth except in accordance with rules and regulations of the board and it further prohibits the transportation of such beverages unless the original containers have the appropriate tax stamps or crowns affixed thereto.

Subsection (11) prohibits manufacturers; importing distributors or distributors, their servants, agents or employees, from transporting malt and brewed beverages in any vehicle in which any other commodity is being transported, except with Board approval. Retail licensees are not named in, and therefore are not affected by, this subsection.

To summarize, Section 492 of the Liquor Code authorizes retail licensees, without a special license or permit, to transport their own malt and brewed beverages, provided that:

- (1) the beverages are in the original containers;
- (2) the beverages are being transported for the retail licensee itself and not for another;
- (3) the vehicles in which the beverages are being transported bear the name, address and license number of the licensee on each side of the vehicle;
- (4) the transportation thereof is in accordance with rules and regulations of the board;
- (5) the appropriate tax stamps or crowns are affixed to the containers.

Therefore, if the foregoing conditions are met, the Board may, by regulation, authorize retail licensees to transport malt and brewed

beverages from distributors' and importing distributors' warehouses to their own licensed premises, without requiring a special license or permit for such purpose.

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. 76-14

*Crimes Code—Prohibited Offensive Weapons—Taser.*

1. The device known as the Taser is a prohibited offensive weapon under Section 908 of the Crimes Code. 18 Pa. C.S. § 908.

Harrisburg, Pa. 17120  
May 24, 1976

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

Dear Colonel Barger:

By your memorandum of May 14, 1976, you have requested an opinion as to the use, sale, manufacture and possession within this Commonwealth of the device known as the Taser. The Taser, manufactured by a California firm, Taser Systems, Inc., is composed of a plastic launcher approximately nine inches in overall length, a flash-light, and two cartridges which can be fired rapidly. Each cartridge contains two dart-type projectiles, tipped with small barbs, attached to wires at the side of each projectile. Behind the projectiles are explosive charges which are activated when the trigger is pressed. Upon deployment on the target area pulsed low-amperage current of 50,000 volts is carried to the darts by the insulated wires. The recipient is immobilized by the current.

The Crimes Code makes it a misdemeanor of the first degree to repair, sell or otherwise deal in, use or possess any offensive weapon. 18 Pa. C.S. § 908(a). The term "offensive weapon" is defined at Section 908(c) as follows:

. . . any bomb, grenade, machine gun, sawed off shotgun, firearm specially made or specially adapted for concealment or silent discharge, any blackjack, sandbag, metal knuckles, dagger, knife, razor or cutting instrument, the blade of which

is exposed in an automatic way by switch, push-button, spring mechanism, or otherwise, or other implement for the infliction of serious bodily injury which serves no common lawful purpose.

The Taser, a weapon which has only recently been marketed widely, is not specifically listed in § 908(c). The issue here, then, is whether the Taser is an "implement for the infliction of serious bodily injury which serves no common lawful purpose."

Clearly, the Taser is capable of and intended for the infliction of serious bodily injury. When the weapon is activated and electrical current transmitted to a person of normal health, the nervous system is disrupted and the individual is left totally incapacitated for approximately fifteen minutes or a longer period of time. Moreover, it is not unlikely that death or permanent, serious injury could be the result when the Taser is used against someone of less than average health and physical well-being. Thus, the first element of the definition of an offensive weapon in § 908(c) is satisfied here.

Even though § 908 is based on sections of the former Penal Code,<sup>1</sup> the second element of the definition of an offensive weapon, the phrase "serves no common lawful purpose," is derived from § 5.07 of the Model Penal Code and has only recently been construed by Pennsylvania courts. In *Commonwealth v. Gatto*, 236 Pa. Superior Ct. 92, 344 A. 2d 566 (1975), appellant had been convicted under § 908 for possession of a knife with a blade thirty inches long. Inasmuch as the blade was not "exposed in an automatic way by switch, pushbutton, spring mechanism, or otherwise . . .," the conviction could not stand unless the knife could be termed "an implement for the infliction of serious bodily injury which serves no common lawful purpose." Because the knife was obviously capable of causing severe harm, the issue before the Court was whether it had no common lawful purpose. As Judge Cicone observed for the unanimous Superior Court, the phrase "common lawful purpose" could be interpreted several ways:

(1) it could be so strictly construed that no item would be prohibited by the phrase for, if one looks long enough, a common lawful purpose could be found for everything, metal knuckles, for instance, could be used to crack walnuts; (2) it could be so loosely construed that all items would be prohibited by the phrase; or (3) it could be given a reasonable common sense interpretation.

*Commonwealth v. Gatto*, *supra*, 236 Pa. Superior Ct. at 97, 344 A. 2d at 568. Selecting the third alternative, the Court concluded that the thirty inch knife was indeed a prohibited offensive weapon, and the judgment of sentence was affirmed.

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1. Act of June 24, 1939, P.L. 872, §§ 416, 417, 419, 629; 18 P.S. §§ 4416, 4417, 4419, 4629 (repealed 1973).

In another opinion, the Superior Court has stated that § 908 deals with weapons having no peaceful purpose, whose only conceivable use is for purposes which our society has found to be criminal. *Commonwealth v. Ponds*, 236 Pa. Superior Ct. 107, 345 A. 2d 253 (1975) (inoperable sawed-off shotgun a prohibited offensive weapon). Both *Ponds* and *Gatto* emphasize that each case under § 908 must turn on its particular facts since it is impossible to fashion a *per se* rule based on the term "common lawful purpose". See also *Commonwealth v. Barton*, 88 York 122 (1974) (knife with four inch blade not a prohibited offensive weapon).

The Taser, like a thirty inch knife, metal knuckles, and a sawed-off shotgun, and unlike a butter knife, scissors, or a pack of razor blades, is capable of inflicting serious bodily injury *and* serves no common lawful purpose. Applying the reasoning of the Superior Court in *Gatto* and *Ponds*, we conclude, and you are so advised, that the Taser is a prohibited offensive weapon under § 908 of the Crimes Code.

We note, in so advising you, that the Legislature may well, and should in our opinion, address the problem of the Taser in the near future, by specifically including a weapon such as a Taser under the definition of prohibited offensive weapon or by otherwise stating public policy with respect to such weapons in Pennsylvania.

Sincerely yours,

MICHAEL H. GARRETY  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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### OFFICIAL OPINION No. 76-15

*Department of Environmental Resources—Rules of Criminal Procedure—Citations—Summary Offenses—Police Officers.*

1. When a statute enforced by the Department of Environmental Resources provides for summary criminal penalties, agents of the Department are required to institute such summary proceedings by citation.
2. Citation authority is not dependent upon arrest power nor does citation authority grant the power to arrest.
3. The intent of Rule 51 of the Rules of Criminal Procedure is to vest a wide variety of enforcement officials with the authority to issue citations even though their police powers may be limited.
4. The powers of DER agents which place them in the category of "police officers" are of two general types: (a) the power to investigate without hindrance; and (b) the power to enforce by means of summary prosecution.

Harrisburg, Pa. 17120  
June 7, 1976

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

Dear Secretary Goddard:

You have requested an opinion as to whether field inspectors of the Department of Environmental Resources may institute summary criminal proceedings by the use of citations for violations of the laws administered by the Department of Environmental Resources (DER). It is our opinion, and you are advised, that when a statute enforced by the Department provides for summary criminal penalties, agents of the Department not only may but are required to institute such summary proceedings by citation.

The power to initiate summary criminal proceedings for failure to comply with any law is subject to the procedures set forth in Chapter 50 of the Pennsylvania Rules of Criminal Procedure. Specifically, Rule 51, effective September 1, 1975, sets forth the means for instituting proceedings in summary cases and Rule 51A(3) specifies the means of instituting summary proceedings for violations other than traffic and parking offenses. Pursuant to this Rule, all "police officers" must institute summary criminal proceedings by citation rather than by complaint. Rule 51C defines a police officer: ". . . for the purpose of this Rule, a police officer shall be limited to a person who has by law been given the powers of a police officer when acting within the scope of his employment. When the police power given by law is limited, a person is a police officer for purposes of this Rule only when acting within the limits of such power."

In order to determine who is and who is not a police officer for the purposes of the rule, it is helpful to look at the history of Rule 51, the comments to Rule 51, and the statutory authority of DER's field inspectors. Rule 51, as originally promulgated on September 18, 1973, effective January 1, 1974, provided the means whereby police officers could institute summary proceedings by citation or arrest without warrant. Rule 51C, as effective at that time, defined police officer as ". . . a police officer shall be limited to a member of the Pennsylvania State Police Force, a member of the police department authorized and operating under the authority of any political subdivision and any employee of the Commonwealth or a political subdivision having the powers of a police officer when acting within the scope of his employment." The comment to Rule 51C clearly excluded county detectives and other persons exercising police-type powers from the definition.

On January 23, 1975, the previous version of Rule 51 was rescinded and a new Rule 51 was promulgated which, in Section C, defined a police officer as ". . . for the purpose of this Rule, a police officer shall be limited to a person other than a constable who has by law been

given the powers of a police officer when acting within the scope of his employment." (See 5 Pa. B. 224.) However, before this version of Rule 51 became effective, the rule was again amended, and this time defined police officer as originally quoted in this opinion. (See 5 Pa. B., 1829.) This amended version of Rule 51 became effective September 1, 1975. The primary effects of the last amendment to Rule 51 were to modify the comments to the rule and to expand on the rule's intended effect. Under the original Rule 51 (as effective January 1, 1974) the powers of arrest and citation were coextensive for those persons who came within the definition of police officer, and one who did not have the power of arrest did not have the power to issue citations. However, the current Rule 51 clearly indicates in Section 51C and in the explanatory note that the power of arrest and the power to issue citations are not related. Citation authority is not dependent upon arrest power nor does citation authority grant the power to arrest.

The intent of Rule 51, as amended, is to vest a wide variety of enforcement officials with the authority to issue citations even though their police powers may be limited. Heretofore, the procedure for instituting summary proceedings varied, with different government officials instituting proceedings by different means for violations of the same statute. We have previously characterized this situation as anomalous (see Opinion No. 26 of 1974), and urged the Criminal Procedural Rules Committee to review the rules. Recognizing this anomaly, the Rules Committee has eliminated it by amending the rule to provide for a uniform procedure for instituting summary criminal proceedings to be used by all enforcement personnel. Thus, government enforcement officials charged with the power and duty to administer and enforce various statutes and to use summary proceedings as a means of enforcement are now required to initiate those proceedings by citation.

It is necessary, therefore, to examine the powers of DER field inspectors to determine whether they possess the powers necessary to come within the definition of police officer in Rule 51C. Keeping in mind that such police power need not be full and complete police powers, but may be limited powers, it appears that your personnel do fall within the category of officials intended to be covered by the rule. The powers of DER agents which place them in the category of "police officers" are of two general types: (a) the power to investigate without hindrance; and (b) the power to enforce by means of summary prosecution.

The power to investigate is derived from both general and specific statutory grants of power. Section 1917-A of the Administrative Code (71 P.S. § 510-17) provides that the Department of Environmental Resources; " shall have the power and its duty shall be:

- (1) to protect the people of this Commonwealth from unsanitary conditions and other nuisances, including any condition which is declared to be a nuisance by any law administered by the Department;

(2) to cause examination to be made of nuisances or questions affecting the security of life and health in any locality, and, for that purpose, without fee or hindrance to enter, examine and survey all grounds, vehicles, apartments, buildings, and places, within the Commonwealth and all persons, authorized by the Department to enter, examine and survey such grounds, vehicles, apartments, buildings and places, shall have the powers and authority conferred by law upon constables;  
...

In addition to this general grant of power, which covers many situations, there are also specific grants of power in the statutes administered by the Department. For example, Section 4 of the Air Pollution Control Act provides Departmental personnel with the power to:

“(1) Enter any building, property, premises or place and inspect any air contamination source . . .”.

Similar grants of investigative powers are contained in other statutes. For example, see Sections 5(d)(4) and 604 of The Clean Streams Law (35 P.S. §§ 691.5(d)(4), 691.604); Sections 6(7), (9) and 9(5) of the Solid Waste Management Act (35 P.S. §§ 6006(7), (9) and 6009(5)); Section 10(8) of the Sewage Facilities Act (35 P.S. § 750.10(8)); Section 8 of the Public Bathing Law (35 P.S. § 679); Section 15.3(p) of the Surface Mining Conservation and Reclamation Act (52 P.S. § 1396.15c(p)). Clearly, then, DER agents have the authority to enter property and make the necessary investigations to assure compliance with those laws which the Department is responsible for enforcing.

Supplementing the investigation powers is the power to enforce by use of summary prosecutions. Pursuant to Section 1901-A of the Administrative Code (71 P.S. § 510-1), DER is authorized to exercise the powers provided by law for the programs listed in Section 1901-A. When the statutes provide for summary prosecutions it naturally is within DER's power to institute the necessary proceedings. In addition, the Air Pollution Control Act and Clean Streams Law also contain specific authority to institute prosecutions. (See 35 P.S. § 4004(7) and 35 P.S. § 691.604.) Therefore, combining the power to institute criminal proceedings with the power to enter, inspect and investigate, it is clear that the Department's field inspectors possess sufficient police powers to bring them within the definition of "police officer" as contained in Rule 51C.

In reaching our conclusion, we are mindful of the intent of Rule 51 to provide a uniform procedure for a wide variety of enforcement agents, including those with limited police powers. Again, it is useful to examine the comments to Rule 51. The comments cite examples of enforcement officials empowered to initiate proceedings by citation. These include building inspectors and other municipal code enforcement officials, truant officers and SPCA agents. While many of these officials possess specific statutory grants of arrest powers, other, such

as local enforcement agents, have more limited police powers. For example, building inspectors, while not having arrest powers, are authorized to enter, examine, inspect and institute prosecutions for violations of local housing codes. These powers are essentially the same as those possessed by officers and agents of the Department of Environmental Resources. Thus, agents of the Department of Environmental Resources possess sufficient police powers to bring them within the scope of Rule 51 of the Rules of Criminal Procedure and, therefore, are required to institute summary criminal proceedings by citation.

To summarize, officers and agents of the Department of Environmental Resources have the duty to administer the various statutes entrusted to the Department by Article XIX-A of the Administrative Code and are authorized to exercise the powers set forth in those acts. When an act authorizes the institution of summary criminal proceedings as a means of enforcement, those proceedings must be instituted pursuant to the Rules of Criminal Procedure and specifically Rule 51. Since your personnel come within the definition of police officer for the purposes of the Rule, they are required to institute summary proceedings by citation as set forth in Rule 51A (3).<sup>1</sup>

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. 76-16

#### *Game Commission—Jurisdiction Over Commonwealth Contracts—Department of General Services.*

1. The Department of General Services has jurisdiction over construction and repair contracts funded in a Commonwealth budget which are in excess of twenty-five thousand dollars (\$25,000), and may enforce the rules and regulations provided for in the General Services Act in those contracts over which General Services has jurisdiction.
  2. The General Services Act incorporates the Public Works Contractors' Bond Law and requires performance and payment bonds for every contract awarded by General Services.
  3. The General Services Act will affect Game Commission procedures involving land acquisition and eminent domain, but the Act will not operate to completely exclude the Game Commission's powers in these areas.
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1. The conditions of Rule 51A(3)(b) most closely reflect the circumstances under which your agents operate and, therefore, the citation should be filed with an issuing authority rather than issued to the defendant.

Harrisburg, Pa. 17120  
June 7, 1976

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

Dear Mr. Bowers:

We are in receipt of your request for an opinion concerning the effect which the Act of July 22, 1975, P.L. 75, No. 45, will have on certain procedures of the Pennsylvania Game Commission. Specifically you have asked; (1) what construction and repair contracts will now be controlled by General Services; (2) when the rules and regulations enumerated in the General Services Act will apply to Game Commission contracts; (3) whether the Act will affect contract bond requirements; (4) whether the Act will affect the Game Commission's authority to acquire land; and (5) how the Act will affect the Game Commission's powers of eminent domain. Our opinion is as follows:

### *I. Construction and Repair Contracts*

Previously, the Game Commission was delegated certain responsibilities dealing with construction and repair projects undertaken through the Act of Jan. 19, 1968, P.L. (1967) 996, 32 P.S. § 5101, *et seq.*, known as the Land and Water Conservation and Reclamation Act. The Game Commission exercised these responsibilities pursuant to a Governor's Directive issued on May 27, 1968. The Directive, in turn, relied upon Attorney General's Opinion No. 277 of 1968. That Opinion dealt with the relationship between the Department of Property and Supplies and other agencies in the administration of projects under the Land and Water Conservation and Reclamation Act. After acknowledging that under Section 2408 of the Administrative Code of 1929, the Department of Property and Supplies generally controlled the contract procedures for the construction and repair of Commonwealth projects, the Opinion went on to state,

"However, the authority conferred upon the Department of Property and Supplies must be exercised pursuant to the direction and reasonable control by your Department which has the necessary expertise in this specialized field."

The Governor's Directive made use of this language to authorize the delegation of certain contract procedures to the Game Commission.

The Act of July 22, 1975, P.L. 75, No. 45, has amended the Administrative Code, including Section 2408. This change is reflected in the procedures for awarding contracts in the construction and repair of Commonwealth projects.

Section 9(2) of the Act gives General Services "exclusive authority over all construction of capital public improvement projects . . ." Section 9(3) authorizes General Services "[t]o have exclusive authority over all Commonwealth repair projects. . . ." These two paragraphs

are new and do not replace any previous paragraphs of similar intent. In addition, the General Assembly has authorized General Services to exercise all of the powers and duties which were previously performed by Property and Supplies and the General State Authority. Obviously, the intent of the General Assembly was to grant General Services greater control over construction and repair projects than was permitted either Property and Supplies or the General State Authority. Reading the statute, one is convinced that the General Assembly intended General Services to have complete control over the construction and repair of certain projects undertaken by the Commonwealth. In instances of both construction and repair projects, the Act states that General Services is to have "exclusive authority". Therefore, Attorney General's Opinion No. 277 of 1968, as it pertains to the Game Commission, is superseded insofar as it is inconsistent with the Act of July 22, 1975, P.L. 75, No. 45.

The new procedures to be followed by the Game Commission for the construction and repair of certain Commonwealth projects are to be found in the Act of July 22, 1975, P.L. 75, No. 45. However, it must be determined whether all construction and repair projects are affected by the Act and how the projects are affected.

Section 9 of the Act enumerates the various powers of the Department of General Services and specifies the limits of those powers. With regards to construction projects, Section 9(2) of the Act provides that the Department of General Services shall have exclusive authority over all construction of capital public improvement projects passed in a Commonwealth Capital Budget or other legislation; excluding, however, highways, bridges and other transportation facilities. Section 9(1) of the Act also gives the Department authority over new construction in excess of twenty-five thousand dollars (\$25,000), which was theretofore exercised by the Department of Property and Supplies, or other Commonwealth departments. Reading Sections 9(2) and 9(1) together, it can be seen that the Legislature intended that General Services should control those construction projects authorized in any Commonwealth Capital Budget or other legislation, in excess of twenty-five thousand dollars (\$25,000).

In Section 9(5), the Act explains what type of construction activities will be controlled by General Services,

"... all construction activities which cost in excess of twenty-five thousand dollars (\$25,000), including all aspects of project management, design and construction, such as preplanning and estimating, legal and administrative services, planning, actual construction, repair, alteration or addition to existing facilities."

In the construction of a statute, where general words are followed by words of a particular and specific meaning, the general words shall be construed in light of the particular and given the particular effect. *Paxon Maymar, Inc. v. Pennsylvania Liquor Control Board*, 11 Pa.

Commonwealth Ct. 136, 312 A. 2d 115 (1973); 1 Pa. C.S. § 1933. Therefore, the particular specifically enumerated powers which follow the words "construction activities" are the powers possessed by General Services.

Turning to contracts for the repair of Commonwealth projects, a similar situation exists. Section 9(3) of the Act defines the power of General Services over repair projects.

"To have exclusive authority over all Commonwealth repair projects which cost in excess of twenty-five thousand dollars (\$25,000) funded by appropriations in the operating budget; excluding, however, highways, bridges, and other transportation facilities."

Further, Section 9(1) of the Act provides that General Services shall have jurisdiction over repair projects in excess of twenty-five thousand dollars (\$25,000) which were theretofore completed by Property and Supplies or any other Commonwealth agency.

In answer to your questions concerning the effect the Act will have upon contract procedures involving the Game Commission, several changes will occur. The Department of General Services has jurisdiction over contracts for the construction of Commonwealth projects in excess of twenty-five thousand dollars (\$25,000). Section 9(5) of the Act specifically enumerates the types of construction activities which General Services will control. Likewise, in contracts involving the repair of Commonwealth projects, the Department of General Services has jurisdiction if the amount is in excess of twenty-five thousand dollars (\$25,000). If the construction or repair contract is less than twenty-five thousand dollars (\$25,000) then the procedures previously employed are in effect.

## *II. Application of Rules and Regulations*

Section 9(19) of the Act creates a committee for the selection of architects and engineers seeking contracts with the Commonwealth. The question arises as to the extent and nature of the authority of the selection committee. Section 9(19) admits to no limits on the extent of the committee's authority. However, it is Section 13 of the Act which places the committee's powers within a procedural framework and limits its authority,

"Whenever the General Assembly has made an appropriation or authorized borrowing under the act of July 20, 1968 (P.L. 550, No. 217), known as the "Capital Facilities Debt Enabling Act," . . . for the construction of a capital improvement, or for the repair or alteration of a capital improvement to be completed by the Department of General Services, to cost more than twenty-five thousand dollars (\$25,000), the following procedure shall apply. . . ." Act of July 22, 1975, P.L. 75, No. 45, § 13.

After reading both Sections 9 and 13 of the Act, it is clear that the General Assembly intended that the selection committee would exercise its powers in all cases where General Services has jurisdiction over the project. Therefore, the selection committee will operate in the case of any construction or repair contract in excess of twenty-five thousand dollars (\$25,000).

Section 13(5) of the Act reads,

"The department may make rules and regulations for the invitation of proposals, submission of bids. . . . Provided, That such rules and regulations shall not conflict with the requirements of competitive bidding."

You have asked when the above rules and regulations, and, indeed all of the procedures spelled out in Section 13 of the Act, shall be applied to the Game Commission. The question can best be answered by using the following approach. Section 13 of the Act reads "Procedure for Construction . . . Repairs or Alterations. . . ." Therefore, Section 13 of the Act is primarily a procedural section. Its function is to detail the requirements to be followed once General Services has jurisdiction over a project. In order to determine when General Services has jurisdiction over a contract it is necessary to consult Section 9 of the Act. This section delineates the jurisdiction of General Services, while Section 13 defines the procedures to be followed once General Services has jurisdiction. Therefore, the rules and regulations of Section 13(5) apply whenever General Services acquires jurisdiction over construction or repair contracts, as determined by Section 9 of the Act. The question of when General Services acquires jurisdiction has already been dealt with and need not be repeated.

### *III. Bonding Requirements*

Turning to the issue of how the Act will affect contract bond requirements, the prior law must first be examined. There are actually two bond requirements, each for a separate and distinct type of bond. The Public Works Contractors' Bond Law, Act of December 20, 1967, P.L. 869, 8 P.S. § 191, *et seq.*, requires a performance and payment bond in each Commonwealth contract which exceeds five thousand dollars (\$5,000). The Administrative Code, Section 2408(9), requires a 10% Surety Bond against defective materials and workmanship.

First, dealing with the 10% surety against defective materials or workmanship, the General Services Act makes only one minor change in the prior law. Under the Act, it is the chief counsel of the Department of General Services who will approve individual sureties, instead of the Department of Justice. Whenever General Services acquires jurisdiction over the particular contract, a surety bond must be delivered to the Commonwealth in accordance with Section 13(9) of the Act. Otherwise, the previous procedures of the Game Commission may continue.

The problem involving the performance and payment bond involves a different question. Section 13(10) of the Act reads that *no* proposal for a contract can be considered unless accompanied by a certified or bank check, and that within ten days of the award of the contract, the contractor must substitute a surety performance and payment bond. However, the Public Works Contractors' Bond Law Act of December 20, 1967, P.L. 869, 8 P.S. § 193, requires a performance and payment bond only if the contract is in excess of five thousand dollars (\$5,000). As previously indicated, Section 13 of the Act should be interpreted as a procedure section to implement the powers of the Department of General Services once it acquires jurisdiction over the project. When dealing with performance and payment bonds, the words "no proposal for any contract" should be interpreted as meaning no proposal for any contract over which General Services has jurisdiction. Therefore, the performance and payment bond requirements delineated in Section 13(10) need be followed only when General Services acquires jurisdiction over the construction or repair contract through Section 9 of the Act. However, the Game Commission should be cautioned that the General Services Act does not supercede the Public Works Contractors' Bond Law in those cases where General Services has no authority over the contract.

#### *IV. Land Acquisition Proceedings*

You have also inquired as to whether the Department of General Services will take precedence over existing Game Commission procedures involving land acquisition. The Act will cause certain changes in Game Commission procedures involving land acquisition, but will not operate to completely exclude the Game Commission from this area.

Section 9(4) of the Act permits General Services,

"[t]o acquire land in the name of the Commonwealth by purchase or eminent domain . . . as the department may deem necessary for the project as specifically authorized in a capital budget or other legislation. . . ."

The Act of June 3, 1937, P.L. 1225, 34 P.S. § 1311.901 also allows the Game Commission to acquire land suitable for its needs. However, the land acquisition authority granted by the General Services Act does not propose to be exclusive; it operates only for the acquisition of land for a project specifically authorized in a capital budget or other legislation. Therefore, the Game Commission is free to continue to acquire land on its own for projects other than those authorized in the capital budget or other legislation. In other words, if realty is to be acquired for a project which has been specifically authorized in the capital budget or other budgetary legislation, then General Services shall acquire the land; if not, then the Game Commission is free to purchase the land.

### V *Eminent Domain Powers*

The final question deals with whether the General Services Act precludes the Game Commission from exercising the power of eminent domain under the Eminent Domain Code of 1964. The Department of General Services in Section 11 of the Act is given the power "to purchase or condemn land, with or without buildings thereon, for all projects." This reflects a change in the language from the power of eminent domain granted to Property and Supplies. However, this authority does not preempt the Game Commission's power of eminent domain.

The Act of May 20, 1921, P.L. 984, 26 P.S. § 261, states that whenever the Game Commission desires land for game purposes and a price cannot be agreed upon, or where the owner cannot be found, the Commission may acquire the land by condemnation. The Act of June 22, 1964, P.L. 84, 26 P.S. § 1-101, *et seq.*, known as the Eminent Domain Code, defines the procedures to be followed when condemning lands. The Code states that it "is not intended to enlarge or diminish the power of condemnation given by law to any condemnor", 26 P.S. § 1-303. Thus, the Act of June 22, 1964 continues the Game Commission's eminent domain powers.

Turning to the effect the General Services Act will have on the Game Commission's eminent domain power, it is clear that the statute does not preempt the Game Commission's condemnation authority. In fact Section 11(f) states that,

"The condemnation of land by the department hereunder shall be in the manner provided by the act of June 22, 1964 known as the 'Eminent Domain Code'."

Thus, the Act incorporates by reference the Eminent Domain Code which, in turn, preserves the Game Commission's condemnation authority.

### VI. *Conclusion*

In conclusion, it is our opinion, and you are hereby informed, that the General Services Act will affect and change certain procedures of the Game Commission. The Department of General Services will control the awarding and operation of construction or repair contracts, authorized in a Commonwealth budget, which are in excess of twenty-five thousand dollars (\$25,000). The Department of General Services will also have the authority to promulgate and enforce rules and regulations in those contracts over which it exercises jurisdiction. Further, the Act will incorporate the Public Works Contractors' Bond Law and will require performance and payment bonds for every contract within the jurisdiction of General Services. Finally, the Act will affect the procedures which the Game Commission must follow in order to acquire and condemn land. However, the Act will not operate to com-

pletely exclude the Game Commission's land acquisition power and eminent domain authority.

Very truly yours,

BART J. DELUCA, JR.  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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OFFICIAL OPINION No. 76-17

*Veterans' Preference in Public Employment—Hiring—Promotions.*

1. The 10 point preference to be accorded to veterans on promotion examinations was declared unconstitutional in *Commonwealth ex rel. Maurer v. O'Neill*, 368 Pa. 369, 83 A. 2d 382 (1951).
2. The provision that veterans are to be marked or graded 15% perfect before the quality or contents of their examinations are considered was declared unconstitutional in *Commonwealth ex rel. Graham v. Schmid*, 333 Pa. 568, 3 A. 2d 701 (1938).
3. The mere reenactment of these provisions in the Military Code, 51 Pa. C.S. § 7101, *et seq.*, does not reinvest these provisions with constitutionality and consequently they are still invalid.

Harrisburg, Pa. 17120  
June 15, 1976

Hon. William H. Wilcox  
Secretary of Community Affairs  
Harrisburg, Pa.

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

Dear Messrs. Wilcox and Rosenberry:

We have received a request for a clarification of the Veterans' Preference, Chapter 71 of the Military Code, Act of August 1, 1975, P.L. 233 (No. 92), 51 Pa. C.S. § 7101, *et seq.*, which became effective January 1, 1976. Specifically, we have been asked under what circumstances veterans may receive point preference in civil service examinations. You are hereby advised that the 10 point preference contained in the Code is to be accorded for employment examinations *not* promotion examinations, and that no preference may be accorded veterans until after the examinations are graded and the veteran has achieved a passing score.

Chapter 71 of the Military Code is, by its terms, the exclusive law in Pennsylvania granting preference to soldiers in appointment to, or promotion in, public employment with the Commonwealth and its political subdivisions. 51 Pa. C.S. § 7109. This Code codified, and was derived from, previous veterans' preference statutes. Section 7103(a), "Additional points in grading Civil Service examinations—Commonwealth examinations," is derived from the Act of May 22, 1945, P.L. 837, 51 P.S. § 492.3 (repealed) and Section 7103(b), "Additional points in grading Civil Service examinations—Municipal examinations," is derived from the Act of May 11, 1923, P.L. 203, 51 P.S. § 486 (repealed).<sup>1</sup> A portion of 51 P.S. § 492.3 and of the Act of June 23, 1931, P.L. 932, Art. XLIV (repealed), the operative provisions of which are identical to those of the repealed Act of 1923, 51 P.S. § 486,<sup>2</sup> were declared unconstitutional by the Pennsylvania Supreme Court.

In *Commonwealth ex rel. Maurer v. O'Neill*, 368 Pa. 369, 83 A. 2d 382 (1951), the Supreme Court held that 51 P.S. § 492.3 was unreasonable and class legislation insofar as it attempted to grant veterans a 10 point preference on *promotion* examinations. The Court, while allowing that a preference in hiring examinations for veterans may be legal, held that such a preference in a promotion examination overstated the value of military training and "goes beyond the scope of the actual advantages gained in such service."

In *Commonwealth ex rel. Graham v. Schmid*, 333 Pa. 568, 3 A. 2d 701 (1938), the Court reviewed those provisions of a former veterans' preference act, reenacted in the present Code as § 7103(b), which provided that veterans were to be "marked or graded fifteen per centum perfect before the quality or contents of the examination shall be con-

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1. Proposed Military Code with Source Note and Comments, Joint State Government Commission, May, 1975.

2. 51 P.S. § 486 provided: When any such person shall take any examination for appointment or promotion in the civil service of any of the various municipal agencies within this Commonwealth, as required by any existing law or any law which may hereafter be enacted, such person's examination shall be marked or graded fifteen per centum perfect before the quality or contents of the examination shall be considered. When the examination of any such person is completed and graded, such grading or percentage as the examination merits shall be added to the aforesaid fifteen per centum, and such total mark or grade shall represent the final grade or classification of such person and shall determine his or her order of standing on the eligible list. Act of May 11, 1923, P.L. 203, No. 150, § 2.

Act of June 23, 1931, P.L. 932, art. XLIV provided: When any person who was engaged in the military or naval service of the United States during any war in which the United States engaged, and has an honorable discharge therefrom, shall take any examination for appointment or promotion, his examination shall be marked or graded fifteen per centum perfect before the quality or contents of the examination shall be considered. When the examination of any such person is completed and graded, such grading or percentage as the examination merits shall be added to the aforesaid fifteen per centum, and such total mark or grade shall represent the final grade or classification of such person and shall determine his or her order of standing on the eligible list.

Emphasized portions of the above two statutes are identical.

sidered." After upholding the validity of veterans' preferences in general, the Supreme Court stated (333 Pa. at 579-80, 3 A. 2d at 706-707):

A provision granting veterans a lower passing grade than other candidates, or, what is an equivalent provision, a credit to veterans of a specific number of points aiding them in passing an examination, is in parity with exemption from examination; these provisions will be held unconstitutional as not providing a reasonable relation between the value of military training and its appraisal in public employment. They give undue weight to military service and violate the constitutional provisions against class legislation and special privilege.

\* \* \*

We do not hold that no credit can be given to veterans *who have passed examinations* in addition to the preference when on the eligible list, but the present grading is given to those who do not pass the examination . . . The preference feature is otherwise sustained as constitutional, while the 15% provision is held illegal. (Emphasis in the original.)

This principle, that a credit to veterans of points to aid them in passing civil service examinations is unconstitutional, was reaffirmed by the Supreme Court in *Carney v. Lowe*, 336 Pa. 289, 9 A. 2d 418 (1939). The Court there held again that a veterans' preference was "unconstitutional if it permitted veterans to qualify under less rigorous standards than those prescribed for other applicants." 336 Pa. at 293, 9 A. 2d at 420.

Does the Legislature's reenactment of these two sections, previously declared unconstitutional by the Supreme Court, have the effect of giving them new validity? Simply put, no. It is established beyond peradventure that the Legislature cannot make constitutional that which has been judicially declared unconstitutional merely by re-passage. "The bare legislative reenactment of an unconstitutional statute cannot serve to invest the statute with constitutionality." 73 Am. Jur. 2d, Statutes, § 342. Such reenactment by the Legislature is subject to the same objections which caused the Supreme Court to invalidate the former statutes.

The Statutory Construction Act of 1972, provides "that when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language." 1 Pa. C.S. § 1922(4). Thus, reenactment continues the prior law, including all judicial construction thereof. Consequently, the two provisions in question are still unconstitutional. See *In re Estate of Lock*, 431 Pa. 251, 244 A. 2d 677 (1968); *In re Buhl's Estate*, 300 Pa. 29, 150 A. 86 (1930).

In conclusion, it is our opinion, and you are hereby advised, that Section 7103(a) of the Military Code, providing a 10 point preference to veterans who successfully pass an examination, is invalid as applied

to *promotion* examinations and is not to be followed. Moreover, it is our opinion, and you are hereby advised, that the provision of Section 7103(b) of the Military Code, which provides that a veteran's examination "shall be marked or graded fifteen per centum perfect before the quality or contents of the examination shall be considered," is unconstitutional and is not to be administered. Any additional point preference in the administration of veterans' preference must be given after the examinations are graded and the veteran has achieved a passing score.

Sincerely yours,

ROBERT P. VOGEL  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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#### OFFICIAL OPINION No. 76-18

*Nursing Homes—Reorganization Plan No. 3 of 1975—Department of Public Welfare—Department of Health—Social Security Act—Medicaid.*

1. By Reorganization Plan No. 3 of 1975 the actual issuance of nursing home provider agreements under the Medicaid program was transferred to the Department of Health while supervision of this function remains in the Department of Public Welfare.
2. To retain its status as the Single State Agency in compliance with the Social Security Act, the Department of Public Welfare may either administer or supervise the administration of the plan for medicaid assistance; that is, it may either perform the actual requirements of the program, or it may delegate this to some other entity as long as it retains supervisory control over the delegated activities.
3. The Department of Public Welfare's supervisory responsibilities in the nursing home area will continue to include the authority for exercising administrative discretion in the supervision of the issuance and certification process and the authority to set the policies, rules and regulations for these procedures.

Harrisburg, Pa. 17120  
June 15, 1976

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

Honorable Frank S. Beal  
Secretary of Public Welfare  
Harrisburg, Pennsylvania

Dear Secretary Bachman and Secretary Beal:

We have been requested for an opinion as to whether Reorganization Plan No. 3 of 1975 effected a transfer from the Department of Public

Welfare to the Department of Health of the function of the issuance of nursing home provider agreements in connection with the federally-funded Medicaid program. It is our opinion, and you are advised, that the actual issuance of nursing home provider agreements under the Medicaid program was transferred to the Department of Health, while supervision of this function remains in the Department of Public Welfare.\*

On June 23, 1975, Governor Milton J. Shapp submitted to the Legislature Reorganization Plan No. 3 providing for the transfer, among other things, of certain responsibilities for nursing home licensing and certification from the Department of Public Welfare to the Department of Health. This was authorized by the Reorganization Act of 1955, Act of April 7, 1955, P.L. 23, 71 P.S. §§ 750-1, *et seq.* The Governor's transmittal message to the Legislature stated that he had determined, after investigation, that the proposed transfer "will enhance the efficient operations of government." The Governor further stated that the Department of Health was better equipped to handle these responsibilities. Journal of the Senate, Vol. 1, No. 36, 460 (1975); Journal of the House, Vol. 1, No. 52, 1656 (1975). Reorganization Plan No. 3 became effective on September 1, 1975 (71 P.S. § 756-3).

Section 2 of the Reorganization Plan provides as follows:

"The functions, powers and duties of the Department of Public Welfare as set forth in Articles II, IV, IX, and X, Act of June 13, 1967 (P.L. 31, No. 21), known as the "Public Welfare Code," with regard to the Social Security Act, insofar as it applies to skilled nursing homes' and intermediate care nursing homes' provider agreement certification and issuance, *except those powers necessary for the Department of Public Welfare to retain its status as the Single State Agency* in compliance with the Social Security Act, are hereby transferred to the Department of Health." (71 P.S. § 756-3). (Emphasis added.)

This section transferred certain duties of the Department of Public Welfare in connection with Title XIX of the Social Security Act. Title XIX provides for the funding by the Federal government of the State-administered Medicaid program, a program providing for payment of medical expenses for the poor. Among the medical expenses paid by Medicaid are those for intermediate care and skilled nursing homes. To receive payment for services provided to a Medicaid beneficiary, a nursing home must be certified by the State as meeting the minimum eligibility standards and it must have a current contract with the State to provide Medicaid services. The contract to provide Medicaid services is called the "provider agreement."

The transfer effected by the Reorganization Plan was limited to all "functions, powers and duties of the Department of Public Welfare"

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\*Editor's note: This opinion was overruled by Opinion No. 76-32, *infra*.

as to "provider agreement certification and issuance, except those powers necessary for the Department of Public Welfare to retain its status as the Single State Agency in compliance with the Social Security Act. . . ." Because of this language it is necessary to determine what powers the Department of Public Welfare must retain in order to maintain its status as the Single State Agency.

The applicable section of the Social Security Act which sets forth the requirements a State must meet in order to receive Federal financial participation in its Medicaid program, contains the following provision:

"State plans for medical assistance—Contents

(a) A State plan for medical assistance must— . . .

(5) . . . provide for the establishment or designation of a Single State Agency *to administer or to supervise the administration* of the plan. . . ." 42 U.S.C. § 1396a (Emphasis added.)

The regulation promulgated to supplement this provision provides,

"Section 205.100, *Single State Agency*.

(a) State Plan requirements. A state plan under title . . . XIX of the Social Security Act must:

(i) provide for the establishment or designation of a Single State Agency with authority to *administer or supervise* the administration of the plan."

The statute and the regulation make it clear that the Single State Agency may either administer or supervise the administration of the plan; that is, it may either perform the actual requirements of the program or it may delegate this to some other entity as long as it retains supervisory control over the delegated activities. This conclusion is confirmed not only by the plain meaning of the statute and regulation, but also by subsection (b) of the regulation which details the standards for maintaining supervisory control when the Single State Agency delegates certain of the activities to other entities, 45 CFR § 205.100(b). In addition, this conclusion is supported by the legislative history of the statutory provision. Prior to the 1973 amendments to the Social Security Act, this section had required that a "state plan for medical assistance . . . provide for the establishment or designation of a Single State Agency to administer the plan." Title XIX, § 1902, as added July 30, 1965, Pub. L. 89-97, as amended, 42 U.S.C. § 1396a(a) (5) (1973). In 1973, the provision was amended to provide for the Single State Agency to administer or supervise the administration of the plan. 42 U.S.C. § 1396a(a) (5).

Further confirmation of this conclusion can be found in a Report on the Audit of the Medical Assistance Program administered by the State of Delaware, C.C.H. Medicare and Medicaid Guide ¶ 14,759.81. In

that report, the Department of Health, Education and Welfare found that the failure of the Delaware Department of Public Welfare, the Single State Agency, to exercise supervisory control over the Delaware Blind Commission, to which it had delegated the actual provision of services under the Medicaid program, was a violation of the Single State Agency requirement. The violation was based upon the failure to exercise supervision, not upon the fact that there was a delegation of the carrying out of the various program activities.

Applying these principles to Reorganization Plan No. 3, it is our opinion that the plan transfers to the Department of Health the actual operation of the nursing home program, while retaining in the Department of Public Welfare supervisory responsibilities. Actual operation of both issuance and certification is transferred to the Department of Health, while supervisory responsibility remains with the Welfare Department.

The most important consequence of the Single State Agency requirement is that there exists for Federal purposes, a clearly identifiable unit within the structure of the State government which must be accountable to the Federal agency. This permits the Federal agency, in order to discharge its responsibility, to know who is in a supervisory capacity to carry out the federally assisted program. By Reorganization Plan No. 3, this concept has been retained.

In reaching our conclusion we are not unmindful of the existence of several regulations that make reference to the execution of an agreement with the Single State Agency. See 45 CFR §§ 249.10(b)(4)(i)(B), 249.10(b)(15)(i)(E), 249.33(a)(1), 249.33(a)(2) and 249.33(a)(6). Since these provisions do not deal with the criteria for a Single State Agency but rather deal with other aspects of the Medicaid program, it is evident that the references to an agreement with the Single State Agency are descriptive rather than operative; that is, they should not be construed as *requiring* that the Single State Agency perform the administrative function of executing the provider agreements. Consequently, we find that these indirect references were not intended to modify the clear meaning of the statute and regulation dealing with the duties of a Single State Agency which permit a separation of the supervisory and administrative functions.

Having determined that Reorganization Plan No. 3 transfers to the Health Department the actual operation of the nursing home provider agreement certification and issuance function, it is appropriate to give some guidance as to the functions retained by the Welfare Department. The pertinent regulation, 45 CFR § 205.100(b), contains the conditions for implementing the Single State Agency requirement. Pursuant to this regulation, the Department of Public Welfare's supervisory responsibilities in the nursing home area will continue to include the authority for exercising administrative discretion in the supervision of the issuance and certification process and the authority to set the policies, rules and regulations for these procedures. Accordingly, the

Department of Public Welfare and the Department of Health should promptly develop procedures for meeting these requirements for supervisory control by the Department of Public Welfare.

The pertinent regulations, 45 CFR § 205.100(a)(ii), also require that the Attorney General certify that the Single State Agency has the authority to administer or supervise the administration of the plan. This letter will constitute the requisite certification to the effect that the Department of Public Welfare continues to have the authority as required by 42 U.S.C. § 1396a(a)(5) and the regulation, 45 CFR § 205.100, and that Reorganization Plan No. 3 as interpreted by this opinion is consistent with these requirements.

We are aware that the Governor submitted on September 17, 1975 a request for a waiver of the Single State Agency requirement pursuant to the Intergovernmental Cooperation Act of 1968, 42 U.S.C. §§ 4201-4214. However, we have subsequently been advised that the waiver request has been suspended and that the Department of Public Welfare is now prepared to exercise supervisory control over the program.

In conclusion, it is our opinion that the administration of the provider agreement issuance function for the Medicaid program has been transferred to the Department of Health by Reorganization Plan No. 3, and that the supervision thereof is a function retained by the Department of Public Welfare.<sup>1</sup>

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. 76-19

*State Council of Civil Defense—Township Supervisors—Second Class Township Code.*

1. Township supervisors are ineligible under the Second Class Township Code to serve as local civil defense directors where the civil defense district is an agency, board or commission of the township.

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1. We have been advised that the actual transfer to the Health Department of the function of issuance of provider agreements has not yet occurred pending this opinion. By reason of the conclusion reached herein, the transfer of activities should be implemented in the near future.

Harrisburg, Pa. 17120  
June 16, 1976

Craig A. Williamson, Acting Director  
State Council of Civil Defense  
Harrisburg, Pennsylvania

Dear Mr. Williamson:

You have requested our opinion as to whether township supervisors may serve as duly appointed local civil defense directors. It is our opinion, and you are hereby advised, that supervisors may not hold such appointive office where the jurisdiction of the local civil defense district is coterminous with the township being served.

Section 410 of the Second Class Township Code, 53 P.S. § 65410, provides, in part, ". . . no supervisor shall at the same\* time hold any other elective or appointive township office or position other than township roadmaster or secretary-treasurer." Therefore, no supervisor may simultaneously serve as a local civil defense director where the civil defense director is a township office or position.

The relationship between a political subdivision and the local civil defense council is determined pursuant to The Act of March 19, 1951, P.L. 42, § 3, 35 P.S. § 1909. That section reads, in part:

"Where the jurisdiction of the local or district council of civil defense is coterminous with the political subdivision making an appropriation for the payment of the expenses of the local or district council of civil defense, such local or district council of civil defense shall be an agency, board or commission of the political subdivision, subject to all of the laws governing . . . the employment of persons. . . ."

We have been advised that in the great majority of cases in Pennsylvania, local civil defense districts are coterminous with political subdivisions. Further, such civil defense councils are financed through local government appropriations. Thus, in most instances, township commissioners will not be eligible for appointment as local civil defense directors.

It is our opinion, and you are hereby advised, that township supervisors are ineligible under Section 410 of the Second Class Township Code to serve as local civil defense directors where the civil defense district is an agency, board or commission of the township.

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

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\*Editor's note: The Act of July 16, 1975, P.L. 73 (No. 43) erroneously omitted the word "same" which is therefore omitted in the 1977-1978 Supplement to Purdon's Pennsylvania Statutes Annotated.

## OFFICIAL OPINION No. 76-20

*Incompatible Offices—Board of School Directors—Secretary of School Board—  
Earned Income Tax Officer.*

1. The positions of earned income tax officer and secretary of a board of school directors are not incompatible positions under the Public School Code when the secretary is not an elected member of the board of school directors.

Harrisburg, Pa. 17120  
July 1, 1976

Honorable John C. Pittenger  
Secretary of Education  
Harrisburg, Pennsylvania

Dear Secretary Pittenger:

A board of school directors has appointed its secretary, who is not an elected member of the school board, to the position of earned income tax officer. The board was cited in a school board audit report prepared by the Department of Auditor General for appointing its secretary to serve as the earned income tax officer because the Auditor General considered these positions to be incompatible under Section 433 of the Public School Code of 1949, P.L. 30, as amended, 24 P.S. § 4-433.

As a result of the school board's failure to comply with the Auditor General's recommendation to choose another earned income tax officer, you have asked our opinion as to whether the position of a secretary of a board of school directors, who is not an elected member of the school board, is incompatible with the position of an earned income tax officer. You are advised that the two positions are not statutorily incompatible under the Public School Code. In Section 322 of the Public School Code, as amended, 24 P.S. § 3-322, the Pennsylvania Legislature has enumerated those offices which are incompatible with the position of school director. Under Section 322, the office of tax officer is statutorily incompatible with the office of school director. Thus, a secretary who is an elected school director may not also be a tax officer. This statutory prohibition, however, is inapplicable when the secretary is not a school director. Therefore, in school districts where the secretary is not a member of the school board, Section 322 does not declare the positions of secretary and tax officer to be incompatible. It is our position and you are so advised, that since the Legislature has not declared the two positions to be incompatible, the Office of the Attorney General cannot declare these offices to be incompatible.

The Attorney General cannot do so because the Pennsylvania Supreme Court has concluded that Article VI, § 2 of the Constitution of Pennsylvania grants exclusive authority to the Legislature to decide which offices are incompatible. *Commonwealth ex rel. Waychoff v.*

*Tekavec*, 456 Pa. 521, 319 A. 2d 1 (1974); *Commonwealth ex rel. Fox v. Swing*, 409 Pa. 241, 186 A. 2d 24 (1962); and *Commonwealth ex rel. Schermer v. Franek*, 311 Pa. 341, 166 A. 878 (1933).<sup>1</sup> Article VI, §2, of the Constitution of Pennsylvania provides:

No member of Congress from this State, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this State to which a salary, fees or perquisites shall be attached. The General Assembly *may* by law declare what offices are incompatible. (Emphasis added.)

The Pennsylvania Supreme Court, in *Commonwealth ex rel. Fox v. Swing*, *supra*, stated that the word "may" in this context is used in a mandatory, not a permissive sense; therefore, the Legislature possesses the exclusive authority to determine what offices are incompatible. Further, the court concluded that the inherent power of the courts of common law to hold offices incompatible was completely abrogated by Article VI, § 2 of the Pennsylvania Constitution.

Although the two positions are not statutorily incompatible under the Public School Code, we believe that appointing an individual to simultaneously hold both offices eliminates a valuable and necessary check on the activities of the tax officer. Under the law, the tax officer has the duty to make a written statement to the secretary each month, setting forth the "names of taxables, the amount collected from each, along with discounts granted or penalties applied, if any, and the total amount of taxes received, discounts granted and penalties applied." 72 P.S. § 5511.25. The secretary has the power and duty to report the statement of the school tax officer's accounts to the board and to keep a correct account with the tax officer. 24 P.S. § 4-433(7). As such, it would appear that the secretary would be in a position to discover negligent and/or criminal mishandling of the school district funds on the part of a tax officer and to report such mishandling to the board of school directors. Thus, if a board of school directors chooses to appoint as its tax officer its secretary who is not an elected board mem-

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1. Prior to the Supreme Court Decision in *Commonwealth ex rel. Fox v. Swing*, a number of lower courts used a public policy rationale to declare public offices incompatible. See *Packrall v. Lane*, 38 Wash. 193 (1958); *In re Monroe County Auditors' Report*, 84 D. & C. 278 (1951); *Johnston v. Hennan*, 68 Pa. Superior Ct. 45 (1917).

In *Swing*, the Court stated (409 Pa. at 246, 186 A. 2d at 26):

It is also argued that this Court has entertained jurisdiction in other instances wherein the incompatibility of public offices was involved. While this is true, the cases cited are inapposite. In not a single instance was the matter of common law incompatibility in issue. In some instances, the cases involved the constitutional prohibition contained in the first sentence of Article XII, Section 2 [Now Article VI, § 2] of the Constitution. In others, the facts involved misconduct in office by a public official.

ber, the school directors are placing themselves in a situation where they have a greater burden to carefully review the records of the tax officer.

In light of the fact that we believe that the practice of having the secretary simultaneously serve as wage tax officer eliminates an important check on possible mismanagement of school funds by a wage tax officer, we recommend that your office draft legislation to correct the current law. Our office stands ready to assist you in drafting such legislation.

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. 76-21

*State Treasurer—Payment of Requisitions for Federal Funds—Pennsylvania Constitution, Article III, § 24—United States Constitution, Supremacy and Contract Clauses.*

1. Article III, § 24 of the Pennsylvania Constitution only applies to monies raised by the Commonwealth's taxing powers and does not embrace Federal funds, which are funds appropriated by the Federal Government and allocated by Federal officials and agencies to Commonwealth officials and agencies for expenditure in furtherance of Federal programs in which the Commonwealth is participating.
2. The enactment by the General Assembly of Act No. 117 of 1976 and the Federal Augmentation Appropriation Act of 1976 contravenes the constitutional doctrine of separation of powers embodied in the Pennsylvania Constitution and must therefore be construed as unenforceable.
3. The passage of these Acts by the General Assembly also contravenes the Supremacy Clause of Article VI of the United States Constitution, the Contract Clauses of the Pennsylvania and United States Constitutions, and the Federal laws and regulations pursuant to which Federal funds are appropriated and allocated to the Commonwealth.
4. The State Treasurer is advised and requested to honor the requisitions for Federal funds presented by all proper officials and agencies of the Commonwealth, regardless of whether such funds have been appropriated by the General Assembly.

Harrisburg, Pa. 17120  
July 1, 1976

Honorable Grace M. Sloan  
State Treasurer  
Harrisburg, Pennsylvania

Dear Mrs. Sloan:

The enactment\* by the General Assembly, over the Governor's veto, of Senate Bill 1542, Printer's No. 2068 (Act No. 117 of 1976),<sup>1</sup> and its enactment of the Federal Augmentation Appropriation Act of 1976 (Act No. 17-A of 1976) raise fundamental questions regarding the scope of the Legislature's fiscal powers given the inherent limitations on that authority and the separation of powers between the Legislative and Executive branches of government in the Pennsylvania Constitution, and in light of the Supremacy and Contract Clauses of the United States Constitution. For the reasons which follow, it is our opinion, and you are hereby advised, that the aforementioned Acts are nullities and of no legal effect, and that you should honor all requisitions submitted by proper state officials for Federal funds appropriated and allocated to the Commonwealth pursuant to Acts of Congress, regardless of whether or not such funds were appropriated by the General Assembly.

Act No. 117 of 1976 specifically prohibits the State Treasurer from issuing any warrant for requisitioned funds either derived from Federal funds or to be used as matching funds to Federal funds unless such Federal funds have been specifically appropriated by an Act of the General Assembly. The Federal Augmentation Appropriation Act of 1976 purports to satisfy this requirement and appropriate Federal funds for the multitude of Federally funded programs engaged in by the Commonwealth of Pennsylvania, although the Act itself either omits entirely or underfunds numerous such programs. However, even if all these programs were completely funded, Act No. 117 of 1976 and the Appropriation Act would contravene various provisions of the Pennsylvania and United States Constitutions.

The basis for these Acts and the Legislature's asserted control over Federal funds lies in Article III, § 24 of the Pennsylvania Constitution, which provides, *inter alia*:

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\*Editor's note: In *Shapp v. Sloan*, 27 Pa. Commonwealth Ct. 312, 367 A. 2d 791 (1976), the Commonwealth Court upheld the constitutionality of Act Nos. 117 and 17-A of 1976, holding that Article III, § 24 of the Pennsylvania Constitution empowers the General Assembly to allocate Federal Funds for expenditure by Commonwealth agencies. The Court also held that these acts do not violate the Supremacy or Contract Clauses of the United States Constitution and are consistent with federal law. An appeal was taken to the Pennsylvania Supreme Court, which heard argument on January 20, 1977. At the time this volume is being printed, the Court has not yet rendered a decision.

1. Senate Bill No. 1542, P.N. 2068, was passed by the General Assembly on June 22, 1976, vetoed by Governor Shapp on June 28, 1976, and passed over the Governor's veto on June 29, 1976.

"No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers. . . ."

There is no doubt that State legislative authority is paramount over state funds, subject only to constitutional limitations. See *Commonwealth ex rel. Schnader v. Liveright*, 308 Pa. 35, 161 A. 697 (1932); *Leahey v. Farrell*, 362 Pa. 52, 66 A. 2d 577 (1949). This broad legislative power, however, does not extend to Federal monies—only to state monies, since the Legislature, with respect to its power to appropriate, is only "supreme within the limits of the revenue and moneys at its disposal". *Commonwealth ex rel. Schnader v. Liveright*, *supra* at 67, 161 A. at 707. (Emphasis supplied.)

Interpreting a constitutional provision similar to Pennsylvania's, the Supreme Court of Arkansas stated that such a provision prevented "payment out of, or drawing from, the State Treasury any money raised under the operation of any statute until the same is appropriated. . . ." *Director of Bureau of Legislative Research v. MacKrell*, 204 S.W. 2d 893, 897 (Ark. 1947) (Emphasis supplied.) As a result, mere "[p]ayment of funds into the State Treasury does not necessarily vest the state with title to those funds." *Navajo Tribe v. Arizona Department of Administration*, 111 Ariz. 279, 528 P. 2d 623, 624 (1974); *Ross v. Gross*, 300 Ky. 337, 188 S.W. 2d 475 (1945); *Button's Estate v. Anderson*, 112 Vt. 531, 28 A. 2d 404 (1942). Only monies raised by the operation of some general law become public funds subject to appropriation. *Navajo*, *supra*. The purposes of Article III, § 24 are inapplicable to funds not raised by the Commonwealth.

The mere fact that funds are placed in the State Treasury does not subject them to Article III, § 24. For example, special funds kept in the Treasury for safekeeping are not subject to the constitutional restriction. *Commonwealth v. Dollar Savings Bank*, 259 Pa. 138, 102 A. 569 (1917). More funds may be, and are, placed in the State Treasury by statute than are constitutionally required. *New Jersey Sports & Expo. Auth. v. McCrane*, 61 N.J. 1, 292 A. 2d 545, 553 (1972). Only those funds constitutionally required to be placed in the Treasury must be paid out by appropriation. *Id.*; *Opinion of the Justices*, 212 N.E. 2d 562 (Mass. 1965).

The purposes of Article III, § 24 and similar provisions of other state constitutions indicate that Article III, § 24 only applies to state monies, i.e. monies raised by the taxing power of the Commonwealth. This conclusion is supported by the decision in *Commonwealth v. Perkins*, 41 D. & C. 55 (C.P. Dauph. 1940), *aff'd*, 342 Pa. 529, 21 A. 2d 45 (*per curiam*), *aff'd*, 314 U.S. 586 (1942) (*per curiam*). In the course of upholding the state unemployment compensation law, the lower court in *Perkins* interpreted the word "appropriation" as follows:

"As we understand the word 'appropriation', when used in the constitutional or legislative sense, it means a designation of money raised by taxation. . . ." 41 D. & C. at 66. (Emphasis supplied.)

Since Article III, § 24 applies only to monies subject to "appropriation made by law", this constitutional provision only applies to monies raised by the Commonwealth's taxing (or police) power.

Consequently, the Article III, § 24 requirement of appropriation by law does not embrace Federal funds, since these monies are not raised as a result of state taxes. Rather, pursuant to various Acts of Congress, they are funds appropriated by the Federal Government and allocated by Federal officials and agencies to Commonwealth officials and agencies for expenditure in furtherance of Federal programs in which the Commonwealth is participating. See, e.g., Title I of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, § 100, *et seq.*, June 19, 1968, 82 Stat. 197, as amended, 42 U.S.C. § 3701, *et seq.*; The Library Services and Construction Act, Act of June 19, 1956, C. 407, 70 Stat. 293, as amended, 20 U.S.C. § 351, *et seq.*

Section 1501 of the Fiscal Code, as amended by the Act of July 26, 1973, No. 56, 72 P.S. § 1501, provides in part:

"No money shall be paid out of any fund in the State Treasury . . . until a requisition therefor shall have been presented to or prepared by the State Treasurer. . . ."

This provision then designates the official or agency authorized to present requisitions and receive Treasury funds "for money appropriated". Once again, given the above interpretation of the term "appropriation", this limitation only applies to State funds, and the State Treasurer is free of any constitutional or statutory restriction in paying out Federal funds of the above nature although such funds are not appropriated by the General Assembly.

Since we conclude that the enactment of Act No. 117 and the Federal Augmentation Appropriation Act of 1976 exceeds the scope of the General Assembly's power under Article III, § 24, we call to your attention two additional statutory provisions which presently underscore the right of the State Treasurer to pay out Federal monies without appropriation by the General Assembly. Section 206 of the Fiscal Code, Act of April 9, 1929, P.L. 343, 72 P.S. § 206, provides:

"The Department of Revenue shall have the power, and its duty shall be:

\* \* \*

(f) To receive for transmission to the officer of this Commonwealth, if any, specified in the act of Congress appropriating the money, and if no officer be thus designated, to the State Treasurer, any moneys contributed by the Federal Government to this Commonwealth or any agency thereof for any purpose;"

The Fiscal Code itself provides that the Department of Revenue must transmit federal funds to the officer of this Commonwealth specified in the Act of Congress appropriating the money. Accordingly, it would appear that if such money is deposited in the State Treasury, it is merely for convenience and that such money is held for and on behalf

of such officer of the Commonwealth for the purposes designated in the Act of Congress and is not subject to any appropriation by the Legislature.

Similarly, Section 3 of the Act of December 27, 1933 (Sp. S. 1933-34, P.L. 113, No. 29), 72 P.S. § 3834, states:

“Unless otherwise directed by the donor or depositor, moneys received by the State Treasurer as custodian under this act shall not become a part of the General Fund or of other funds of the Commonwealth, and no appropriation shall be necessary to permit their disbursement.”

Although Section 7 of Act No. 117 specifically purports to supercede this provision, and Section 206 of the Fiscal Code by implication, our conclusion that Act No. 117 is unenforceable leaves these provisions intact. Thus, since the State Treasurer retains in a custodial capacity Federal funds designated for specific Federal programs carried out by the Commonwealth's officers and agencies, you may continue to pay out such funds in the absence of any appropriation by the General Assembly.

Where other state legislatures have sought to take control of Federal funds and appropriate them, state courts in those jurisdictions have uniformly held that “federal contributions are not the subject of the appropriative power of the Legislature”. *MacManus v. Love*, 499 P. 2d 609, 610 (Colo. 1972). *Accord, Navajo Tribe v. Arizona Dept. of Administration, supra; State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 524 P. 2d 975 (1974). Interpreting a state statute providing that Federal funds received by an agency in excess of its appropriation by the state legislature could not be expended without an additional appropriation, the Colorado Supreme Court in *MacManus v. Love* stated:

“... § 2(d) is an attempt to limit the executive branch in its administration of federal funds to be received by it directly from agencies of the federal government and unconnected with any state appropriations. In fact, such funds, to be received in the future, may often be unanticipated or even unknown at the time of the passage of the bill ... § 2(d) is unconstitutionally void as an infringement upon the executive function of administration.” 499 P. 2d at 610-611. *Accord, State ex rel. Sego v. Kirkpatrick, supra*, 524 P. 2d at 986.

Articles II, III, IV and V of the Pennsylvania Constitution also embody the constitutional doctrine of separation of powers, and Article IV delegates the power of the executive to the Governor, not to the Legislature. The enactment by the General Assembly of Act No. 117 and the Federal Augmentation Appropriation Act of 1976 thus contravenes the separation of powers in the Pennsylvania Constitution and must therefore be construed as unenforceable.

The passage by the General Assembly of these Acts also contravenes the Supremacy Clause of Article VI of the United States Constitution, inasmuch as the Federal funds purportedly appropriated by the General Assembly have already been appropriated pursuant to various Acts of Congress for allocation to State officials or agencies to carry out the State's role in the Federal programs. These programs represent what the United States Supreme Court has termed "a scheme of co-operative federalism". *King v. Smith*, 392 U.S. 309, 316, (1968). In *King*, the Court stated, in describing the Social Security Act program at issue:

"It is financed largely by the Federal Government, on a matching fund basis, and is administered by the States. States are not required to participate in the program, but those which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC plan for the approval of the Secretary. . . ." 392 U.S. at 316.

The Court in *King* invalidated an Alabama regulation which established qualifications contrary to the language and intent of the governing Federal statute and regulations. In so doing, the Court observed that the Federal Government "may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid" 392 U.S. at 333, fn. 34. Where Congress legislates in this manner, therefore, Article VI of the Constitution "forbids state encroachment on the supremacy of federal legislative action". *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 295 (1958). *Accord, Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1947).

Congressional determination that Federal funds shall be specifically appropriated and allocated to State officials or agencies to be administered is one such condition, and is exemplified by the provision of Title I of the Omnibus Crime Control and Safe Streets Act of 1968, *supra*.

Section 203 of this Act provides that a grant to a state shall be utilized to establish and maintain a *State planning agency*. Such agency shall be *created or designated by the chief executive* of the State and shall be *subject to his jurisdiction*. The section further provides that such State planning agency shall develop a comprehensive statewide plan; define, develop and correlate programs and projects; and establish priorities.

The provision of law could hardly be written with greater clarity to reflect that the grant is transmitted to the state agency under and subject to the jurisdiction of the Governor and it is the agency which controls the plan and all expenditures thereunder.

Section 302 of the Act provides that a state desiring to participate in the grant program shall establish a state agency as described above and that *such agency* shall develop a comprehensive state plan.

Section 303 of the Act states that the Federal Government shall make grants *to the state agency* and that each such plan shall *provide for the administration of such grants by the state agency*. This section further provides that expenditures shall be made by such agency for the development and implementation of programs and projects in conformity with the state plan. Since the Act of Congress vests all of the powers and duties in the state planning agency and the grant is made to said agency for the specified enumerated purposes, there can be absolutely no question that the Legislature is completely devoid of any power or authority over such grants or their appropriation.

Although the numerous Congressional Acts establishing programs in which the Commonwealth participates vary in language, it is clear that all of the Federal funds covered by the Federal Augmentation Appropriation Act are mandated to be administered by officials and agencies of the executive branch of the Commonwealth. Accordingly, that Act and Act No. 117 can be given no legal effect under these Federal laws and under the Supremacy Clause of the United States Constitution.<sup>2</sup>

Finally, the Federal Augmentation Appropriation Act does not even include funds for all of the Federal programs for which Federal agencies have made or will in the future make allocations to Commonwealth officials and agencies. At the same time, payments under contracts already entered into, between the Commonwealth and private contractors, require the continued flow of Federal funds in order for the Commonwealth to meet its obligations thereunder. Moreover, the submission of State plans and other Commonwealth assurances of conformity with Federal laws, and their approval and acceptance by the Federal Government, also constitute contracts between the Commonwealth of Pennsylvania and the Federal Government. In failing to make certain appropriations, as well as in unilaterally adding the additional term or condition of appropriation by the Legislature, the General Assembly has succeeded in enacting laws impairing the obligation of contracts contrary to Article I, § 10 of the United States Constitution and Article I, § 17 of the Pennsylvania Constitution. *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934); *Beaver Co. Building & Loan Association v. Winowich*, 323 Pa. 483, 187 A. 481 (1936).

For the foregoing reasons, it is our opinion, and you are hereby advised, that Article III, § 24 of the Pennsylvania Constitution neither contemplates nor authorizes the enactment by the General Assembly of legislation such as Act No. 117 and the Federal Augmentation Appropriation Act of 1976, and that these Acts are contrary to the above-cited provisions of the Pennsylvania and United States Constitutions, as well as Federal laws and regulations. You are therefore advised and

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2. This opinion, of course, does not pertain to Federal funds granted by Congress to the States for general public purposes pursuant to the Federal programs commonly referred to as "revenue-sharing". Such Federal monies are deposited in the State Treasury and are subject to appropriation by the General Assembly.

requested to honor the requisitions for Federal funds submitted by all proper officials and agencies of the Commonwealth, regardless of whether such funds have been appropriated by the General Assembly.

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. 76-22

*Payment of Federal Funds to Subgrant State Agency—Acts 117 and 17-A of 1976  
—Federal Funds—Appropriations.*

1. Appropriations made by Act 17-A to a single state agency may be spent by another state agency in accordance with arrangements made pursuant to federal law.

Harrisburg, Pa. 17120  
July 14, 1976

Honorable Milton J. Shapp  
Governor  
Harrisburg, PA

Dear Governor Shapp:

You have asked our opinion as to whether under Acts 117 or 17-A of 1976 a direct appropriation need be made to a state agency which has contracted or otherwise arranged with a single state agency receiving Federal funds before the subgrant agency may spend the funds.

At the outset it should be noted that by this opinion we do not agree with the contention of the General Assembly that it has the power to "appropriate" Federal monies received as grants or otherwise from the Federal government. This office has filed suit in Commonwealth Court to challenge, inter alia, the validity of Acts 117 and 17-A of 1976. *Shapp et al. v. Sloan*, No. 1194, Commonwealth Docket 1976.\* Assuming, arguendo, that the acts in question are valid, we reach the

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\*Editor's note: The Court has ruled in that case that Acts 117 and 17-A of 1976 are valid. *Shapp v. Sloan*, 27 Pa. Commonwealth Ct. 312, 367 A. 2d 791 (1976). An appeal to the Supreme Court of Pennsylvania has been argued and is awaiting decision.

conclusion, by a fair and reasonable interpretation of legislative intent, that requisitions based on subgrants may be paid by the State Treasurer upon your authorization.

The intent of the Legislature in the two acts is to appropriate Federal monies to state agencies. The appropriation serves in effect as approval to begin or continue some activity as arranged between the state agency and the Federal government. If such activity includes the granting, contracting, or otherwise disbursing federal monies under a plan which includes the cooperation of another state agency, it can be assumed that the approval by the General Assembly extends as well to the carrying on of the entire activity. In other words, when Act 17-A appropriates all the Federal monies to the single state agency which has applied for those monies, and that state agency has on file as part of its plan as approved by the Federal authorities the subgranting of that money, it can be assumed that the General Assembly intended that the entire plan be carried out and that it has impliedly approved the subgrants to other state agencies.

By the terms of Act 117, Federal monies may not be spent without specific appropriation by the General Assembly. Act 17-A specifically appropriated these monies to the various state agencies. Therefore, those monies as contained in Act 17-A are available for spending. The manner of the spending is merely an accounting procedure to be handled in accordance with the Fiscal Code, other statutes, and the practices and procedures of the Budget Office, the State Treasurer, and the Auditor General. There is no reason to believe that because the spending of appropriated monies involves another state agency that the other state agency is in a different position from non-Commonwealth vendors, contractors, consultants and the like. There is nothing in the two acts involved which would prevent the relationship of grantor and grantee to arise between two state agencies with respect to the spending of duly appropriated Federal funds.

Accordingly, you are advised that appropriations made by Act 17-A to a single state agency may be spent by another state agency in accordance with arrangements made pursuant to Federal laws, regulations, and plans submitted, and that you may authorize those expenditures and arrange for the accounting details as determined by the appropriate office.

Sincerely yours,

CONRAD C. M. ARENSBERG  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

## OFFICIAL OPINION No. 76-23

*Bureau of Correction—Mentally Disabled Prisoners—Transfers to Mental Institutions—Mental Health and Mental Retardation Act of 1966—Mental Health Procedures Act.*

1. Dangerously mentally disabled prisoners in state penal or correctional institutions may be transferred to mental institutions under Section 412(a)(1) of the Mental Health and Mental Retardation Act of 1966 ("MH/MR Act").
2. The new Mental Health Procedures Act takes effect on September 7, 1976, for mentally ill persons, except those who are subject to court-ordered involuntary treatment prior to that date.
3. Until September 7, 1976, petitions for the commitment of prisoners to mental institutions may be brought under Section 406 of the MH/MR Act, provided that the criteria of Section 301 of the Mental Health Procedures Act are met.
4. Section 408 of the MH/MR Act is available where appropriate.
5. Section 405 of the MH/MR Act is available where appropriate and is not limited to unincarcerated persons.
6. Prisoners and those charged with crime who are lawfully transferred to mental institutions and for whom commitment petitions are filed, should remain in the mental institutions while their emergency mental disability persists, until the court acts upon the petitions or they are ordered released by a court of competent jurisdiction.

Harrisburg, Pa. 17120  
July 23, 1976

Honorable William B. Robinson  
Commissioner of Corrections  
Camp Hill, Pennsylvania

Dear Commissioner Robinson:

You have requested our advice as to whether a person who is detained in a state penal or correctional institution and who appears, by reason of his acts or threatened acts, to be so mentally disabled as to be dangerous to himself or others and in need of immediate care, may be transferred to a mental institution for examination for up to 60 days pursuant to Section 412(a)(1) of the Act of Oct. 20, 1966, P.L. 96, the Mental Health and Mental Retardation Act of 1966 ("MH/MR Act"), 50 P.S. § 4412(a)(1).

It is our opinion and you are so advised that such a transfer is lawful. It is specifically authorized by statute and no court opinion prohibits the following of that section of the MH/MR Act. Statutes must be presumed to be constitutional. *Cali v. Philadelphia*, 406 Pa. 290, 296, 177 A. 2d 824, 827 (1962); *Rubin v. Bailey*, 398 Pa. 271, 275, 157 A. 2d 882, 884 (1960), and cases cited therein.

In the case of *Commonwealth v. Colello*, No. 56 March Sessions, 1968, Court of Common Pleas of Mercer County, April 1, 1971, the defendant challenged his transfer from the State Correctional Institution at Pittsburgh to Farview State Hospital and subsequent commitment there under Section 412. In a Memorandum of Law to the Court,

the Attorney General "submitted that Section 412(a) (1) is an entirely reasonable procedure and one which is primarily for the prisoner's benefit." The court denied all prayers of defendant Colello for relief, including those regarding the constitutionality of Section 412. Thus, in our opinion, transfers under Section 412(a) (1) are lawful.

You have indicated that such transfers will only be arranged where the prisoner is so mentally disabled that he could be committed to a mental hospital on an emergency basis under Section 405 of the MH/MR Act without a prior hearing if he were a civilian. While such a limitation has not been mandated, it should dispel the possibility of an equal protection challenge.

As you are aware, on July 9, 1976, Governor Shapp signed the "Mental Health Procedures Act," P.L. 817, No. 143, 50 P.S. § 7101, *et seq.* This new act "establishes rights and procedures for all involuntary treatment of mentally ill persons. . . ." Section 103, 50 P.S. § 7103. It repeals, among others, Sections 405, 406, 408, 411 and 412 of the MH/MR Act "except insofar as they relate to mental retardation or to persons who are mentally retarded." Section 502, 50 P.S. § 7502.

This Mental Health Procedures Act takes effect within 60 days (on September 7, 1976); except that as to all persons who were made subject to involuntary treatment prior to that date, it takes effect 180 days thereafter. Section 501, 50 P.S. § 7501. It is our opinion and you are so advised that the 180 days extension of the effective date of the act only applies to those who are subject to court-ordered involuntary treatment; administrative action alone will not delay the effective date of the act as to an individual.

Therefore, any prisoner who is transferred pursuant to Section 412(a) (1) of the MH/MR Act, but who has not been committed to a mental institution by a court, will be subject to the procedures in Articles III and IV of the Mental Health Procedures Act as of September 7, 1976.

Next, the question arises: what is the proper action to take after 60 days regarding prisoners who have been legally transferred to mental institutions without court action prior to July 9, 1976, but who still appear by reason of their acts or threatened acts to be so mentally disabled as to be dangerous to themselves or others and in need of immediate care?

Section 411 of the MH/MR Act of 1966 has recently been declared unconstitutional by a Federal Court and is therefore unavailable. *U.S. ex rel. Souder v. Watson*, 413 F. Supp. 711 (M.D. Pa. 1976).

Section 406 of the MH/MR Act was declared unconstitutional in *Goldy v. Beal*, 429 F. Supp. 640 (M.D. Pa. 1976). However, the Court issued a stay order on July 19, 1976, which allows the Department of Public Welfare to accept Section 406 commitments until September 7, 1976, provided that there has been a judicial determination that the person to be committed meets the criteria of Section 301 of the Mental

Health Procedures Act. Such a person must be severely mentally disabled and in need of immediate care. He must pose a clear and present danger of harm to others or to himself.

Therefore, you are advised that you must bring appropriately modified Section 406 petitions for those transferred prisoners whose 60 day transfer will expire before September 7, 1976. We have written to the President Judge of each Court of Common Pleas to explain this interim procedure.

Finally it is appropriate here to clarify some additional related concerns that have been raised.

Section 408 of the MH/MR Act regarding commitment of persons charged with crime and detained in penal or correctional facilities is still available where applicable.

Section 405 of the MH/MR Act regarding emergency detention is also available where applicable. It should be noted here that that section is not limited to civilians, but is also applicable to those in penal and correctional facilities.

In the event that a person charged with crime is committed on an emergency basis under Section 405 of the MH/MR Act and a petition for commitment is brought under Section 408, the prisoner should remain in the mental institution while his emergency mental disability persists until the court acts upon the Section 408 commitment or he is otherwise ordered from the mental institution by a court of competent jurisdiction.

In the event that a prisoner has been transferred to a mental institution per Section 412(a)(1) of the MH/MR Act and a modified Section 406 petition has been filed but not acted upon within 60 days of the transfer, the prisoner should remain in the mental institution while his emergency mental disability persists until the court acts upon the modified Section 406 petition or he is otherwise ordered from the mental institution by a court of competent jurisdiction.

We hope that the above legal guidelines will aid you during the difficult period before full implementation of the Mental Health Procedures Act.

Sincerely,

ROBERT E. RAINS  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

## OFFICIAL OPINION No. 76-24

*Department of Environmental Resources—Contracts—Consideration—Federal Disaster Relief Act of 1974—Grants.*

1. Change orders may be entered into between the department and contractors who have been required by their contracts to restore construction projects damaged by the flood caused by Hurricane Eloise, regardless of the fact that the contractors were required to bear the risk of such loss, in order to comply with the Federal Disaster Relief Act of 1974 and enable the contractors to receive grants to which they are entitled under the Act.
2. The Federal Disaster Relief Act was intended to reimburse contractors for losses sustained due to a flood affecting public facilities under construction which are owned by the State.
3. The interpretation of a Federal statute by an administrator charged with its enforcement, although not controlling, is entitled to considerable weight.

Harrisburg, Pa. 17120

August 4, 1976

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

Dear Secretary Goddard:

You have requested our opinion concerning the legality of obtaining monetary assistance from the Federal government with respect to departmental projects under construction which were damaged by the flood caused by Hurricane Eloise and turning the money over to the contractors who were constructing the projects. Only the Commonwealth can apply for assistance under the Federal act; however, the contracts between the department and the contractors engaged in the construction of departmental projects placed the risk of loss for flood damage on the contractors. This means that in order for the department to pay over the Federal money to the contractors, change orders to the contracts will have to be entered into and the question is whether the change orders, constituting modifications of the contracts, will be legal since they are without consideration on the part of the contractors. It is our opinion that such change orders which will enable the department to pay over to the contractors monetary assistance received from the Federal government pursuant to federal law will be legal.

The standard specifications for construction, Form No. WCE-5, § 5.9, which were incorporated in each contract involved, state that "[t]he work in every respect, from the execution of the Contract and during its progress until final acceptance, shall be under the charge and in care of the Contractor and at his risk. The foregoing sentence is intended to include risks of every kind and description, including fire and flood risks." This provision places the risk of loss due to flood damage on the contractors and would require them to restore the projects to their pre-flood condition at no cost to the Commonwealth. That being the case, the question is whether the Commonwealth can apply for Federal Disaster Assistance and pay it over to the contractors since they are the ones who have sustained the loss.

The applicable section of the Disaster Relief Act of 1974 provides, in part, as follows:

“(a) The President is authorized to make contributions to State or local governments to help repair, restore, reconstruct, or replace public facilities belonging to such State or local governments which were damaged or destroyed by a major disaster.

\* \* \*

(c) For those facilities eligible under this section which were in the process of construction when damaged or destroyed by a major disaster, the grant shall be based on the net costs of restoring such facilities substantially to their pre-disaster condition.

(d) For the purposes of this section; ‘public facility’ includes any publicly owned flood control, navigation, irrigation, reclamation, public power, sewage treatment and collection, water supply and distribution, watershed development, or airport facility, any non-Federal-aid street, road, or highway, any other public building, structure, or system including those used for educational or recreational purposes, and any park.” (42 U.S.C. § 5172).

The facilities involved are owned by the Commonwealth and qualify for grants to the Commonwealth under the above provisions. In a letter<sup>1</sup> from the Regional Office of the Federal Disaster Assistance Administration, the Chief of Public Assistance stated as follows:

“Based on (my) review I have determined that damages to facilities being constructed for DER are not reimbursable to DER. However, costs incurred by the contractor, in restoring the facility under construction to the stage of its completion immediately prior to the disaster are eligible for reimbursement. In order for the contractor to obtain that reimbursement, DER must make application for the contractor.

To elaborate further, neither PL 93-288 nor its implementing regulations provide any prohibition against reimbursement to the contractor when his contract contains a ‘hold and save harmless’ clause from natural catastrophes. Rather, we believe that it is the intent of the law to provide relief from such clauses when wide spread damages of great magnitude cause the President to declare that a major disaster exists.”

This interpretation of the Federal statute by an administrator charged with its enforcement, although not controlling, is entitled to

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1. Letter dated June 8, 1976, addressed to Terry K. Wimmer, Department of Community Affairs.

considerable weight and we agree with it. It is our opinion that the Federal law was intended to reimburse contractors for losses sustained due to a flood affecting public facilities under construction which are owned by the State.

In these circumstances, change orders to the contracts requiring the Commonwealth to pay over monies received from, or to be reimbursed by, the Federal government to the contractors for repairs made as a result of the disaster, need not be supported by consideration. The Commonwealth is not giving up any contractual rights; instead the contractors' risk of loss is being shifted to the Federal government in accordance with Federal law. The change orders are necessary so that the Commonwealth can comply with Federal law and enable the contractors to receive the grants to which they are entitled. It is recommended, therefore, that the change orders contain language similar to the following: "This change order is required to enable the contractor to receive a grant to which he is entitled under the Federal Disaster Relief Act of 1974."

In conclusion, it is our opinion and you are advised, that change orders may be entered into between the department and contractors who have been required by their contracts to restore construction projects damaged by the flood caused by Hurricane Eloise, regardless of the fact that the contractors were required to bear the risk of such loss, in order to comply with the Federal Disaster Relief Act of 1974 and enable the contractors to receive grants to which they are entitled under that Act.

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. 76-25

*Department of General Services—Administrative Code—Insurance.*

1. An employee liability self insurance program qualifies as the procurement of insurance as required by Section 2404 of the Administrative Code.
2. The use of the broader word "procure" in one place and the narrower word "purchase" in another indicates an intent that "procure" be given a broader meaning than "purchase".

Harrisburg, Pa. 17120  
August 11, 1976

Honorable Ronald G. Lench  
Secretary of General Services  
Harrisburg, Pennsylvania

Dear Secretary Lench:

We have been requested to furnish you with an official opinion interpreting Section 2404 of the Administrative Code of 1929 (71 P.S. § 634) insofar as it requires your department to procure automobile liability insurance covering State-owned vehicles and public liability insurance covering all State employees while engaged in the performance of their duties. The pertinent provisions of Section 2404 are as follows:

"The Department of Property and Supplies shall have the power, and its duty shall be:

\* \* \*

(b) To procure automobile liability insurance, covering vehicles owned by the Commonwealth of Pennsylvania or the United States of America or its instrumentalities, which are loaned to and operated by State officers or employes or officers and enlisted men of the Pennsylvania National Guard, the Pennsylvania Reserve Corps or its successor, and to procure public liability insurance covering all State employes, including members of boards and commissions, while engaged in the performance of their duties, and to purchase such insurance on a group basis, or otherwise, and the issuance of such insurance for State employes by any duly authorized insurance company in Pennsylvania, is hereby declared to be lawful, . . .

\* \* \*

All automobile liability insurance procured by the Department of Property and Supplies hereunder shall protect both the Commonwealth and the State officer or employe operating the vehicle, or State officers and employes and officers and enlisted men of the Pennsylvania National Guard, the Pennsylvania Reserve Corps, or its successor operating vehicles loaned by the Federal Government, against claims for damages for injury to person or property, within such limits as the department, with the approval of the Executive Board, shall prescribe."

We have been asked specifically whether the establishment of a self-insurance fund to insure Commonwealth employees against liability while engaged in the performance of their duties satisfies the statutory requirement that the department *procure* public liability insurance for that purpose?

For six years prior to March of 1975, the Commonwealth carried a public liability insurance policy covering State employees while en-

gaged in the performance of their duties. Before the expiration of the policy on March 17, 1975, the Department of Property and Supplies (predecessor to the Department of General Services) contacted hundreds of insurance companies inviting them to bid on specifications for a new public liability insurance policy, but in the end only one bid was received and that bid did not comply with the specifications.

In view of this development, the Department devised a plan for establishing a fund by assessing each department, board and commission of the Commonwealth a certain amount per employee similar to the previous method of assessing each department, board or commission for its pro rata share of the premium paid for the liability insurance policy. The fund is to be used for the payment of the following:

- (a) Judgments and compromises up to \$250,000 for any one occurrence, but excluding claims of \$500 or less for any one occurrence.
- (b) Expenses of servicing claims, including salaries and expenses of investigators, claims adjusters, and attorneys employed by the department, plus supporting personnel (secretarial, etc.).

The question is whether this program which has been labeled the Employee Liability Self Insurance Program (ELSIP) qualifies as the procurement of insurance as required by Section 2404.

The exact statutory direction to the Department is "to *procure* public liability insurance covering all State employes . . . while engaged in the performance of their duties, and to *purchase* such insurance on a group basis, or otherwise . . ." (Emphasis added.) The word "procure" is not synonymous with "purchase". In Webster's Third New International Dictionary "procure" is defined as "to get possession of: obtain, acquire; to cause to happen or be done: *bring about: effect, achieve*,". Similarly, Black's Law Dictionary defines "procure" to mean "to initiate a proceeding; to cause a thing to be done; to instigate; to contrive, bring about, effect, or cause."

In our opinion, the establishment of ELSIP satisfies the requirement to procure insurance within the above definitions and it is in compliance with the statutory provision even though it does not constitute a purchase of insurance. By setting up the self insurance fund, the department has brought about, effected, achieved public liability insurance. By using the word "procure" the Legislature intended the department to bring about, effect or achieve public liability insurance by any proper means, including the purchase thereof, but it did not intend that purchasing insurance was the only means of accomplishing its purpose. The use of the broader word "procure" in one place and the narrower word "purchase" in another indicates an intent that "procure" be given a broader meaning than "purchase"; otherwise,

the broader word serves no purpose. The Statutory Construction Act of 1972 provides: "Every statute shall be construed, if possible, to give effect to all its provisions." (1 Pa. C.S. § 1921).

Further, the word "purchase" was first introduced into Section 2404 by a 1968 amendment which left untouched the prior mandate to procure. It cannot be assumed, therefore, that the word "purchase" was intended to supplant or limit the existing authorization to procure.

The 1968 amendment's authorization to "purchase" insurance on a group basis or otherwise can be effectuated without in any way altering the broad authority to procure insurance. Authority to utilize a group or other basis of insurance is meaningless unless exercised in connection with a purchase. On the other hand, methods of procurement not involving purchase, such as creation of a self insurance fund or establishment of a public insurance corporation, do not necessitate specification of the particular basis for effectuating the coverage.

Finally, it is noted that the statute provides: "The Department . . . shall have the *power*, and its *duty* shall be . . . To procure . . . insurance . . . and to purchase such insurance." (Emphasis supplied.) We recognize that dissecting the statute in this manner it is conceivable to argue that the statute employs the conjunctive word "and", thereby directing both the procurement and purchase of insurance. Even if we were to adopt this construction (which we do not), our conclusion would remain the same for the reasons which follow.

The fundamental underlying purpose of the statute is to protect state officers and employes from liability by providing insurance. The department exerted all effort to purchase insurance without success. Though the purchase of insurance was impossible of performance, it nevertheless continues to be your statutory duty to comply with the statute insofar as possible. Accordingly, since you cannot procure insurance by purchase, you have the duty to procure insurance in any other lawful manner for the protection of state officers and employes from liability, i.e., self insurance.

Therefore, it is our opinion, and you are hereby advised, that Section 2404 of the Administrative Code permits the department to procure public liability insurance by establishing a self insurance fund even though this does not constitute a purchase of insurance.

Very truly yours,

W. W. ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

## OFFICIAL OPINION No. 76-26

*State Treasurer—Certificates of Deposit—Deposit of Moneys—Investment of Moneys.*

1. Section 301.1 of the Fiscal Code neither authorizes nor specifically precludes the placing of Commonwealth moneys by the Treasury Department in secured certificates of deposit.
2. The term "deposit" includes certificates of deposit and, accordingly, Section 301 of the Fiscal Code authorizes the placement of Commonwealth moneys in such certificates by the Treasury Department in order to meet the ordinary needs of the Commonwealth from time to time.
3. To the extent that the certificates of deposit are insured with the Federal Deposit Insurance Commissioner, the depository shall not be required to furnish bond or security.
4. Any amount exceeding that so insured is subject to the same requirements with respect to security as other deposits.

Harrisburg, Pa. 17120  
September 17, 1976

Honorable Grace M. Sloan  
State Treasurer  
Harrisburg, Pennsylvania

Dear Mrs. Sloan:

You have requested our opinion as to whether " . . . secured certificates of deposit are a proper investment for Commonwealth funds" by the Treasury Department.

Section 301 of the Fiscal Code, Act of April 9, 1929, P.L. 343, as amended, 72 P.S. § 301, provides, inter alia, as follows:

"Deposit of moneys

The Treasury Department shall deposit all moneys of the Commonwealth received by it, including moneys not belonging to the Commonwealth but of which the Treasury Department or the State Treasurer is custodian, in State depositories approved by the Board of Finance and Revenue. The Treasury Department shall not be required to deposit or to keep on deposit moneys of the Commonwealth segregated by funds in State depositories."

Section 301.1 of the Fiscal Code, added June 19, 1961, P.L. 468, § 2, as amended June 18, 1968, P.L. 215, No. 102, § 1, 72 P.S. § 301.1, provides under the title "Investment of moneys" that the Treasury Department may invest in direct short-term obligations of the United States government and in prime rated commercial paper. This section makes no reference to certificates of deposit.

The question arises as to whether a certificate of deposit is a "deposit" or an "investment." The answer is that a certificate of deposit which bears interest is both a deposit and an investment.

Black's Law Dictionary, Revised Fourth Edition, defines "DEPOSIT IN BANKING LAW" as:

"'Deposit,' according to its commonly accepted and generally understood meaning among bankers and by the public, includes not only deposits payable on demand and subject to check, but deposits not subject to check, for which *certificates*, whether interest-bearing or not, may be issued, payable on demand, or on certain notice, or at a fixed future time. *Jones v. O'Brien*, 58 S.D. 213, 235 N.W. 654, 659." (Emphasis supplied.)

Black's Law Dictionary further defines "INVESTMENT" as follows:

"INVESTMENT. The placing of capital or laying out of money in a way intended to secure income or profit from its employment. *Securities & Exchange Commission v. Wickham*, D.C. Minn., 12 F. Supp. 245, 247."

In common banking parlance "deposit" includes certificates of deposit. In addition, to the extent that the certificate represents the placing of money intended to secure income, it is also an investment. However, since the Fiscal Code seems to limit "investments" to certain specific types, which do not include certificates of deposit, we are of the opinion that the authority to place Commonwealth funds in certificates of deposit must also be allowed in the legislative authority regarding deposits.

A certificate of deposit is a written acknowledgment by a bank or banker of the receipt of money *on deposit* which the bank or banker promises to pay to the depositor, bearer, to the order of the bearer or to some other person or his order. *In Re Olson's Estate*, 206 Iowa 706, 219 N.W. 401, 403 (1928); *State v. Lively*, 311 Mo. 414, 279 S.W. 76, 80 (1925). It has been held that a certificate of deposit is analogous to a deposit credited to a passbook representing moneys actually left with the bank for safekeeping which are to be retained until the depositor demands them, *Bank of Commerce v. Harrison*, 11 N.M. 50, 66 P. 460 (1901), and that it creates the relationship of debtor and creditor between the bank and the depositor. *Maryland Finance Corp. v. People's Bank of Keyser*, 99 W.Va. 230, 128 S.E. 294, 295 (1925); *Wheelock v. Cantley*, 50 S.W. 2d 731, 734 (Mo. App. 1932). In the case of *Securities & Exchange Commission v. Fifth Avenue Coach Lines, Inc.*, 289 F. Supp. 3 (S.D.N.Y. 1968), the Court held that a certificate of deposit is merely a piece of paper evidencing existence of a *time deposit*. The Supreme Court of Pennsylvania has held: "The basic principles which govern other types of bank deposits are clearly applicable to certificates of deposit." *Elliott Estate*, 378 Pa. 495, 497, 106 A. 2d 453, 454 (1954). Accordingly, it is clear that the generally accepted definition of the term "deposit" includes a certificate of deposit.

In addition, 12 U.S.C. § 1813 provides in part as follows:

“(L) The term ‘deposit’ means—

(1) the unpaid balance of money or its equivalent received or held by a bank in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift account, or which is evidenced by its *certificate of deposit*, or a check or draft drawn against a deposit account and certified by the bank. . . .” (Emphasis supplied.)

In the case of a depositor who is an officer, employe or agent of any state of the United States or of any county, municipality or political subdivision thereof having official custody of public funds and lawfully investing or depositing same in time or savings deposits in an insured bank in the state, the deposit is insured in an amount not to exceed \$100,000 per account. 12 U.S.C. § 1821(2)(A)(ii).

Section 505(a)(2) of the Fiscal Code provides in part that “. . . when any deposit of State moneys is insured with the Federal Deposit Insurance Commissioner or any other corporation hereafter organized by the United States for the purpose of insuring deposits, such depository shall not be required to furnish bond or security to cover the amount of such deposit so insured. . . .”

Accordingly, it is clear that a certificate of deposit does meet the requirements of a “deposit” under law. However, it has been argued that a certificate of deposit does not have sufficient liquidity to meet the statutory requirement of a deposit under Section 301. This argument depends on Section 301.1 which allows “investments” of only those funds “on deposit from time to time in State depositories, as shall have accumulated beyond the ordinary needs of various funds.” 72 P.S. § 301.1(a). Thus, the argument goes, a “deposit” must be available to meet ordinary needs and this requires that it be available on demand.

It is our opinion that the Legislature did not intend to allow only the alternative of demand deposits or investments. “Ordinary needs” do not have to be “day-to-day” needs; they can be monthly or quarterly, for example. Thus, in determining “ordinary needs”, the State Treasurer may consider when in the future certain obligations will be due and place funds in certificates of deposit which bear interest rates higher than those afforded by ordinary deposits, thereby accruing additional interest to the Commonwealth. To preclude the State Treasurer from doing so would be an absurd result, which the Legislature never intends. Statutory Construction Act of 1972, 1 Pa. C.S. § 1922(1). To require an “investment” at a lower interest rate than a “deposit” in the form of a certificate of deposit would indeed be an absurd result.

Accordingly, it is our opinion and you are so advised, that:

- (1) Section 301.1 of the Fiscal Code neither authorizes nor specifically precludes the placing of Commonwealth moneys by the Treasury Department in secured certificates of deposit.
- (2) The term "deposit" includes certificates of deposit and, accordingly, Section 301 of the Fiscal Code authorizes the placement of Commonwealth moneys in such certificates by the Treasury Department in order to meet the ordinary needs of the Commonwealth from time to time.
- (3) To the extent that the certificates of deposit are insured with the Federal Deposit Insurance Commissioner, the depository shall not be required to furnish bond or security.
- (4) Any amount exceeding that so insured is subject to the same requirements with respect to security as other deposits.

Sincerely,

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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OFFICIAL OPINION No. 76-27

*Department of Environmental Resources—Act 118 of 1976—Project 70 Land Acquisition and Borrowing Act.*

1. As to Project 70 land, the Department of Environmental Resources is restricted to granting permits, licenses or leases only in accordance with Section 20(b) of the Project 70 Act as interpreted by Attorney General's Opinion No. 102 of 1972.
2. Since the General Assembly in enacting Act No. 118 of 1976 made no reference to the Project 70 Act, it must be concluded that by authorizing the grant of rights of way to abutting landowners for general purposes, the General Assembly did not intend to abrogate the results with respect to Project 70 lands which it expressly desired in enacting the Project 70 Act.
3. There was no manifest intention that the general provisions of Act 118 of 1976 shall prevail over the special provisions of the Project 70 Act and, therefore, the latter must prevail and be construed as an exception to Act 118.

Harrisburg, Pa. 17120  
October 6, 1976

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

Dear Dr. Goddard:

You have requested our opinion as to whether Act No. 118 of 1976 modifies Section 20(b) of the Act of June 22, 1964, P.L. 131 (72 P.S.

§ 3946.1, *et seq.*), known as the Project 70 Land Acquisition and Borrowing Act.

Act No. 118 amends The Administrative Code of 1929 to authorize your department to grant rights of way to owners of real property abutting land under the department's jurisdiction.

Section 20(b) of the Project 70 Act prohibits use of Project 70 land for purposes other than those prescribed in the Act with certain enumerated exceptions consistent with the primary use of such land for recreational, conservation and historical purposes.

The question is whether the department can lease rights of way under Act No. 118 to owners of land abutting Project 70 land under the jurisdiction of the department for purposes other than recreation, conservation and historical preservation or for purposes other than the enumerated exceptions set forth in Section 20(b).

Section 20(b) provides as follows:

"(b) No lands acquired with funds made available under this act shall be disposed of or used for purposes other than those prescribed in this act without the express approval of the General Assembly: Provided, that the Commonwealth or a political subdivision, as the owner of such lands, may issue permits, licenses or leases for the exploration, development, storage and removal of oil, gas or other minerals, or for the installation and use of water, gas, electric, telephone, telegraph, oil or oil products lines, under reasonable regulations prescribed by such owner consistent with the primary use of such lands for 'recreation, conservation and historical purposes' ". (72 P.S. § 3946.20(b))

In Attorney General's Opinion No. 102, dated February 7, 1972, a proposed right of way over Project 70 land owned by a township was determined to be unauthorized by law even though the proposed right of way was for an electric power line which is one of the enumerated exceptions of Section 20(b). In arriving at this conclusion the Attorney General stated:

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

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

The liberalizing of uses of these land areas for purposes other than those authorized by the Act would naturally tend to thwart, defeat, and destroy the results expressly desired by the General Assembly." (2 Pa. B. 538-539)

Since the General Assembly in enacting Act No. 118 made no reference to the Project 70 Act, it must be concluded that by authorizing the grant of rights of way to abutting landowners for general purposes, the General Assembly did not intend to abrogate the results with respect to Project 70 lands which it expressly desired in enacting the Project 70 Act.

Section 1933 of the Statutory Construction Act of 1972 (1 Pa. C.S. § 1933) provides:

"Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. 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."

Here there was no manifest intention<sup>1</sup> that the general provisions of Act 118 should prevail over the special provisions of the Project 70 Act and, therefore, the latter must prevail and be construed as an exception to Act 118.

It is our opinion, therefore, and you are advised, that as to Project 70 land, your department is restricted to granting permits, licenses or leases only in accordance with Section 20(b), of the Project 70 Act as interpreted by Attorney General's Opinion No. 102, *supra*.

Very truly yours,

W. W. ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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1. Instances in which the General Assembly has manifested such intention are the Acts of June 18, 1975, P.L. 23, July 3, 1974, P.L. 447, June 27, 1974, P.L. 404, May 2, 1974, P.L. 265, March 28, 1974, P.L. 233, March 1, 1974, P.L. 114, June 9, 1972, P.L. 392, June 9, 1972, P.L. 387, and July 25, 1967, P.L. 183. See Pocket Supplement, 72 P.S. § 3946.20.

## OFFICIAL OPINION No. 76-28

*Governor's Council on Drug and Alcohol Abuse—Office of Administration—Administrative Code—Agency—Implied Authority.*

1. Employees of the Governor's Council on Drug and Alcohol Abuse who were directed not to report for work, or who were dismissed early on September 26, 1975, during the flood emergency, may not be charged with leave time for their absence from work on that day.
2. An agent who finds himself in an emergency situation requiring prompt action has implied authority to do whatever is reasonable to meet the emergency.

Harrisburg, Pa. 17120

October 8, 1976

Honorable James N. Wade  
Secretary of Administration  
Harrisburg, Pennsylvania

Dear Secretary Wade:

We have been asked to render an opinion concerning the authority of an agency head to dismiss employees early or to advise employees not to come to work in an emergency situation where in the judgment of the agency head such action is warranted.

On September 26, 1975, the Susquehanna River flooded due to the profusion of rains accompanying Hurricane Eloise. At 7:00 A.M. that morning, Richard Horman, Executive Director of the Governor's Council on Drug and Alcohol Abuse, telephoned the State Council of Civil Defense and learned that the flood was expected to reach the offices of the Governor's Council which are in the flood plain. The offices are located at 2001 North Front Street, 2102 North Front Street, and 2023 North Second Street in Harrisburg.

Mr. Horman determined that the files and fixed assets of the Governor's Council on the first floor of those buildings were in jeopardy and decided to move them to the second or third floors. Since only a certain number of people were needed for this task and any other employees would be in the way, he instructed a number of employees not to come to work if their own homes or personal property were being jeopardized by already flooding creeks. He also instructed a number of employees who did report to work to leave if they were not physically able to help move files and fixed assets to the second or third floors. When employees who were assisting in the move completed their work he told them they could leave in order that they could deal with their own personal flood problems at home.

The Office of Administration has interpreted its own Management Directive 205.1,<sup>1</sup> as amended, to require that any Commonwealth employee who did not report for work on September 26, 1975 would be charged with a day of leave. Mr. Horman has challenged the applicability of the Management Directive to his employees who failed

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1. Copy attached.

to report for work because he, as their supervisor, told them not to come in. Inasmuch as he and the Secretary of Administration have been unable to reach an agreement on this matter, it has been referred to this office for an opinion.

The Executive Board is charged with the responsibility for determining the hours when the administrative offices of the State Government shall open and close. Administrative Code of 1929, Sections 221, 709(d), (71 P.S. §§ 81 and 249(d)). Pursuant to this authority, the Executive Board has delegated to the Governor's Office the authority to dismiss Commonwealth employees early in the Harrisburg area on any day when a snowstorm or other severe weather occurrence causes road conditions to become hazardous, 4 Pa. Code § 30.7(b). This would appear to apply to the situation on September 26, 1975 since the flood was a severe weather occurrence causing road conditions to become hazardous.

Nevertheless, it is an elementary principle of agency law that an agent who finds himself in an emergency situation requiring prompt action has implied authority to do whatever is reasonable to meet the emergency. Thus, in *Short v. Delaware & Hudson Company*, 41 Pa. Superior Ct. 141 (1909) it was held that the emergency caused by an accident or an unusual condition which requires prompt action may invest the representative of the company highest in authority who is present with power to do such things as are reasonable to meet the emergency. See also *Jones v. Pennsylvania Coal and Coke Corporation*, 255 Pa. 339, 99 A. 1008 (1917).

In the circumstances above, Mr. Horman found himself in an emergency situation created by the impending flood and prompt action was required to move the files and fixed assets of the Council to the second and third floors. Since he was the representative of the Commonwealth highest in authority who was present, he was invested with the implied authority to dismiss his employees early or to advise them not to report for work since the presence of all employees would not have contributed to and would have hindered the movement of files and fixed assets.

Accordingly, it is our opinion and you are advised that employees of the Governor's Council on Drug and Alcohol Abuse who were directed by Mr. Horman not to report for work, or who were dismissed by him early on September 26, 1975 during the flood emergency, may not be charged with leave time for their absence from work on that day.

Very truly yours,

W. W. ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

Commonwealth of Pennsylvania  
GOVERNOR'S OFFICE  
MANAGEMENT DIRECTIVE

SUBJECT Partial and Full Day Closings of State Offices

NUMBER 205.1  
Amended

DATE December 6, 1974

DISTRIBUTION F

BY DIRECTION OF

Frank S. Beal, Secretary of Administration

1. PURPOSE. To announce policy and the procedures to be followed whenever State agencies under the Governor's jurisdiction are closed for either a partial or full day. Partial or full day closings of State offices may be authorized because of hazardous road conditions, emergency circumstances or for other reasons.

2. POLICY.

a. The Governor's Office is responsible for authorizing office closings of any duration for the Harrisburg area because of hazardous road conditions, extreme heat or other reasons. Heads of field offices outside the Harrisburg area may be authorized by their agencies to close such offices in cases of hazardous road conditions, extreme heat and other emergency circumstances, as prescribed by the Personnel Rules in Part II of Title 4 of the Pennsylvania Code.

b. Partial and full day closings within the scope of this directive are not holidays.

c. Early Closings.

(1) When an early closing of offices is authorized, employees of such offices who are in nonessential operations will be authorized to leave their places of work. Employees whose offices are closed and who are released early will be compensated at their regular rate of pay for the remaining hours of their work shift. The hours for which employees are paid but do not work because of an early closing will not be counted as hours worked for overtime purposes.

(2) Employees who are in essential operations and are required to work during a period when an early closing has been authorized will be compensated at their regular rate of pay. They will not be given compensatory time off at a later date for hours worked during the period of early closing. If such essential employees do not remain at their place of work during an early closing period, they shall not be paid for the hours they would normally have worked during such

period, unless there is a valid and compelling reason for their early departure. The hours which such essential employees work during the period of early closing will be counted as hours worked for overtime purposes.

(3) Employees on annual, personal or sick leave on a day when an early closing of their offices is authorized will be charged with the period of such leave. The hours of employees on such leave will be counted as hours worked for overtime purposes.

d. Full Day Closings.

(1) When a full day closing of offices is authorized, employees of such offices who are in nonessential operations will be authorized to remain at home. Employees who are scheduled to work but do not work because their offices are closed shall be compensated at their regular rate of pay. Leave with pay will not be charged. The hours for which employees are paid but do not work because of an authorized full day closing will not be counted as hours worked for overtime purposes.

(2) Employees who are in essential operations and are required to work when a full day closing has been authorized shall be compensated at their regular rate of pay. They will not be given compensatory time off at a later date for hours worked during such a period. If such essential employees do not report to their place of work when a full day closing has been authorized they shall not be paid for the hours they would normally have worked during such period, unless there is a valid and compelling reason for their absence. The hours which such essential employees work during the period of a full day closing will be counted as hours worked for overtime purposes.

(3) Employees on annual, personal or sick leave on a day when a full day closing of their offices is authorized shall be charged with the period of such leave. The hours of employees on such leave will be counted as hours worked for overtime purposes.

3. PROCEDURES.

a. Authorization for an early closing will be transmitted to State agencies by the Bureau of Personnel, Office of Administration, in cases where the Governor's Office is responsible for issuing such authorization. This notification will go directly to agency Personnel Officers or their designees, who will notify agency employees of the early dismissal. Notification will include time, date, reason, and any other pertinent information.

b. Authorization for a full day closing is usually transmitted through public communications media.

c. Offices and institutions which require uninterrupted services, such as hospitals and correctional sites, are not subject to partial or full day closings.

4. RESCISSIONS: Administrative Circular 74-3 and previous versions of this Management Directive.

## OFFICIAL OPINION No. 76-29

*Minimum Wage Act of 1968—Applicability to Pennsylvania Public Employees—Legislative Intent.*

1. The Minimum Wage Act of 1968 is not applicable to employees of the Commonwealth and its political subdivisions and instrumentalities.
2. The General Assembly did not intend by its 1974 amendments to the Minimum Wage Act of 1968, deleting the public employee exemption, to thereby extend coverage of the Act to employees of the Commonwealth and its political subdivisions and instrumentalities.
3. The Commonwealth and its political subdivisions and instrumentalities are not included within the definition of "employer" in Section 3(g) of the Minimum Wage Act of 1968, 43 P.S. § 333.103(g).

Harrisburg, Pa. 17120  
October 18, 1976

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

Dear Secretary Smith:

You have requested our opinion as to the applicability of the Pennsylvania Minimum Wage Act of 1968 to employees of the Commonwealth and its political subdivisions and instrumentalities in light of the recent decision of the United States Supreme Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976). It is our opinion, and you are hereby advised, that the Minimum Wage Act of 1968 is not applicable to employees of the Commonwealth and its political subdivisions and instrumentalities.

Your question presents a difficult problem of statutory construction requiring that we summarize, at the outset, the history of legislation and case law pertinent to the application of minimum wage and overtime standards to Pennsylvania public employees.

Pennsylvania's initial foray into the field of wage regulation, the Act of May 27, 1937, P.L. 917, 43 P.S. § 331a, *et seq.*, provided for the establishment of minimum fair wages paid by employers to women and children. The Act empowered the Secretary of Labor and Industry to appoint a Wage Board to classify employments and recommend minimum fair wage rates for different classes of employment. The Act of 1937 did not, however, speak to public employment.

The Minimum Wage Act of 1961, P.L. 1313, 43 P.S. § 333.1, *et seq.*, supplemented the Act of 1937, defining "employee" in Section 3, 43 P.S. § 333.3, as follows:

(6) "Employee" includes any individual employed by an employer, but shall not include any individual:

\* \* \*

(b) Employed by the United States or by the Commonwealth.

The Federal Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, was amended in 1966 to redefine "employer", removing from that definition the exemption previously afforded the states and their political subdivisions with respect to employees of state hospitals, institutions, and schools.<sup>1</sup>

The Minimum Wage Act of 1968, P.L. 11, 43 P.S. § 333.101, *et seq.*, defines "employer" and "employee" in Section 3, 43 P.S. § 333.103, as follows:

(g) "Employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting, directly or indirectly, in the interest of an employer in relation to any employee.

(h) "Employee" includes any individual employed by an employer but shall not include any individual to the extent that he is subject to the Federal Fair Labor Standards Act. . . .

As enacted, the Minimum Wage Act of 1968 also provided in Section 5, 43 P.S. § 333.105, that

(a) Employment in the following classifications shall be exempt from both the minimum wage and overtime provisions of this act:

\* \* \*

(7) In the employ of the United States or the Commonwealth of Pennsylvania or any political subdivision or instrumentality of the Commonwealth of Pennsylvania.

The Fair Labor Standards Act was again amended in 1974, this time to specifically include public agencies within the definition of "employer", 29 U.S.C. § 203(d), and to fully remove the exemption previously afforded the states and their political subdivisions.<sup>2</sup>

Later in 1974, the Minimum Wage Act of 1968 was amended to delete from the Pennsylvania Act the exemption previously afforded the United States, the Commonwealth and its political subdivisions and instrumentalities in Section 5(a) (7), 43 P.S. § 333.105(a) (7).<sup>3</sup>

The United States Supreme Court, in a decision rendered June 24, 1976, held unconstitutional the 1974 amendments to the Fair Labor Standards Act insofar as those amendments extended coverage of the minimum wage and overtime provisions of the Act to employees of the states and their political subdivisions. *National League of Cities v. Usery*, 426 U.S. 833 (1976). The Court, overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968), also struck down the 1966 amendments to the federal Act insofar as those amendments extended coverage of the minimum wage and overtime provisions of the Act to employees of state hospitals, institutions, and schools.

1. 80 Stat. 831, 29 U.S.C. § 203(d) (1964 ed., Supp. II).

2. 88 Stat. 58, 64.

3. Act of December 10, 1974, P.L. 916 (No. 303).

Two separate but interrelated questions are raised by the issue of whether the Pennsylvania Minimum Wage Act of 1968 is now applicable to employes of the Commonwealth and its political subdivisions and instrumentalities. Clearly, in the wake of *Usery*, Pennsylvania public employes are no longer "subject to the Federal Fair Labor Standards Act." 43 P.S. § 333.103(h). Also clear is that the Minimum Wage Act of 1968, as amended, contains neither an affirmative nor negative reference to coverage of public employes. The questions then are these:

1. Did the General Assembly intend, by its 1974 amendments to the Minimum Wage Act of 1968 deleting the public employe exemption, to thereby extend coverage of the Act to employes of the Commonwealth and its political subdivisions and instrumentalities?

2. Even if the first question is answered in the negative, does the definition of "employer" in Section 3(g) of the Act, 43 P.S. § 333.103(g), nevertheless include the Commonwealth and its political subdivisions and instrumentalities?

(1) It is our opinion that the General Assembly did not intend, by the negative act of removing the public employe exemption from the Minimum Wage Act of 1968, to thereby extend coverage of the Act to employes of the Commonwealth and its political subdivisions and instrumentalities. We are rather of the view that, in removing the exemption, the General Assembly intended nothing more than to *entirely* exclude federally covered public employes from the operation of the Pennsylvania Act.

The 1966 amendments to the Fair Labor Standards Act extended coverage of that Act, for the first time, to employes of state hospitals, institutions, and schools. The Minimum Wage Act of 1968, in sharp contrast to the Minimum Wage Act of 1961, specifically excluded from the definition of "employee" individuals "subject to the Federal Fair Labor Standards Act." The effect of that provision, at the time of its enactment in 1968, was to entirely exclude employes of state hospitals, institutions, and schools from operation of the 1968 Act. All other Pennsylvania public employes were exempted from the provisions of the Act under Section 5(a)(7), 43 P.S. § 333.105(a)(7).

The 1974 amendments to the Fair Labor Standards Act extended coverage of that Act to virtually all public employes. Those amendments were widely assumed to be constitutional based on the United States Supreme Court's decision in *Maryland v. Wirtz*, 392 U.S. 183 (1968), upholding the constitutionality of the 1966 amendments to the federal Act. The provision of the Pennsylvania Act excluding individuals "subject to the Federal Fair Labor Standards Act" from its operation now functioned to exclude virtually all employes of the Commonwealth and its political subdivisions and instrumentalities. As such, the specific exemption from application of the Pennsylvania Act for those same employes became unnecessary, and by its 1974 amendments, the General Assembly removed the exemption.

The 1974 amendments to the Fair Labor Standards Act were enacted in April of 1974. The 1974 amendments to the Pennsylvania Act were first referred to committee in the Senate in June of 1974 and were signed into law in December of 1974. The legislative history of the Pennsylvania amendments affords no insight into the Legislature's purpose in removing the public employe exemption. It is however significant that, aware of the 1974 amendments to the federal Act, the General Assembly, in amending the Pennsylvania Act, still left undisturbed the provision excluding from the definition of "employe" individuals "subject to the Federal Fair Labor Standards Act." To argue that the General Assembly intended, in that context, to extend coverage of the Pennsylvania Act to Pennsylvania public employes is to impute to the General Assembly an intent that is unreasonable and absurd. With virtually all employes of the Commonwealth and its political subdivisions and instrumentalities now "subject to the Federal Fair Labor Standards Act", and therefore excluded from operation of the Pennsylvania Act, to whom would the General Assembly be intending to extend coverage? Are we to believe that the General Assembly envisioned the judicially wrought demise of the 1974 amendments to the federal Act and legislated in reliance upon that vision? The answer is clearly no, for it is presumed "... [t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." Statutory Construction Act of 1972, 1 Pa. C.S. § 1922(1).

A comparison of the General Assembly's treatment of the definition of "employe" in the Minimum Wage Act of 1968 with its treatment of the definition of "employe" in the Pennsylvania Equal Pay Act, 43 P.S. § 336.1, *et seq.*, sheds additional light on this discussion. As originally enacted in 1959, the Equal Pay Act defined "employe" in Section 2(a), 43 P.S. § 336.2(a), as

... any person employed for hire in any lawful business, industry, trade or profession, or in any other lawful enterprise.

The Equal Pay Act was amended in 1968,<sup>4</sup> adding to the definition of "employe" in Section 2(a), 43 P.S. § 336.2(a), the following language:

... including individuals employed by the Commonwealth or any of its political subdivisions, including public bodies: Provided, however, That the term "employe" as used in this act shall not apply to any person or persons who is or are subject to Section 6 of the Federal Fair Labor Standards Act. ...

Thus, with affirmative language, the General Assembly made clear in 1968 its intent to extend coverage of the Equal Pay Act to all Pennsylvania public employes not "subject to Section 6 of the Federal Fair Labor Standards Act". The absence of similar affirmative language in the 1974 amendments to the Minimum Wage Act of 1968, when

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4. Act of July 31, 1968, P.L. 869 (No. 262).

considered in light of the similar exclusion of federally covered employes from the definition of "employee" in both acts, lends further support to the conclusion that the General Assembly did not intend, by removing the public employe exemption from the Minimum Wage Act of 1968, to thereby extend coverage of the Act to Pennsylvania public employes.

(2) Although the General Assembly intended nothing more by its 1974 amendments than to entirely exclude federally covered public employes from the operation of the Pennsylvania Act, if the definition of "employer" in Section 3(g) of the Act, 43 P.S. § 333.103(g), is construed to include the Commonwealth and its political subdivisions and instrumentalities, then the combined effect of the 1974 amendments to the Pennsylvania Act and the *Usery* decision is to "leave" the Minimum Wage Act of 1968 in a posture of covering Pennsylvania public employes.

It may be argued that unless the definition of "employer" is read to include the Commonwealth and its political subdivisions and instrumentalities, the public employe exemption deleted from the Act in 1974 was surplusage. Section 1921(a) of the Statutory Construction Act, 1 Pa. C.S. § 1921(a), provides that ". . . [e]very statute shall be construed, if possible, to give effect to all its provisions." Applying that rule, the argument would lead us to conclude that the definition of "employer" in Section 3(g) of the Act, 43 P.S. § 333.103(g), always included the Commonwealth and its political subdivisions and instrumentalities.

The argument is unpersuasive for two reasons: (1) It cannot be reconciled with another applicable and well established rule of statutory construction; and (2) it is "inconsistent with the manifest intent of the General Assembly". Statutory Construction Act of 1972, 1 Pa. C.S. § 1901.

The Pennsylvania Supreme Court has repeatedly declared that

" . . . It is an established principle of statutory construction that an act does not deprive the Commonwealth of any prerogative, right or property . . . unless the Commonwealth is specifically named therein or unless an intention to include the Commonwealth is necessarily implied." (citations omitted). *Keifer Appeal*, 430 Pa. 491, 495, 243 A. 2d 336, 339 (1968).

The Commonwealth is neither specifically named in the Minimum Wage Act of 1968, nor can the intention to include the Commonwealth be necessarily implied from the Act.

An exception to the general rule has been recognized where the statute is an expression of "public policy". *Pittsburgh Public Parking Authority Petition*, 366 Pa. 10, 76 A. 2d 620 (1950). That exception has, however, been strictly limited. As the Court stated in *Keifer Appeal*, 430 Pa. at 496, 243 A. 2d at 339:

... [E]very statute is an expression of public policy to some extent. If the exception is not to swallow the rule, "public policy" must be limited to the clearest cases. . . .

The "test" of whether the "public policy" exception applies may be stated as follows: Does the statute embody a rule so clearly in the public interest that a court is justified in calling it an expression of "public policy" with the effect that the Commonwealth is bound by its operation without being named therein or included by necessary implication? *Keifer Appeal, Id.* The Pennsylvania Supreme Court has stated that

"The right of a court to declare what is or is not in accord with public policy does not extend to specific economic or social problems which are controversial in nature and capable of solution only as the result of a study of various factors and conditions." *Mamlin v. Genoe*, 340 Pa. 320, 325, 17 A. 2d 407, 409 (1941).

While it is clear that the Minimum Wage Act of 1968 is an expression of "public policy" in the broad and general sense, it is equally clear that the specific application of that Act to particular classes of employment involves controversial social and economic questions capable of solution only by consideration of various factors and conditions. See 43 P.S. § 333.101. What is or is not in the public interest in terms of public employment relations and standards has long been a subject of vigorous economic, political, and legal debate. In this setting, the Minimum Wage Act of 1968 is not an expression of "public policy" in the narrow and technical sense that would bind the Commonwealth to its operation. *Keifer Appeal, Id.* The exception is, therefore, inapplicable and the general rule prevails.

"The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. . . ." Statutory Construction Act of 1972, 1 Pa. C.S. § 1921(a). At no time in the history of minimum wage legislation in Pennsylvania has the General Assembly ever displayed the slightest affirmative intent to extend coverage of such legislation to public employees. Moreover, as we have already concluded, the General Assembly did not intend, by the negative act of removing the public employee exemption from the 1968 Act, to thereby extend coverage of the Act to Pennsylvania public employees. Section 1901 of the Statutory Construction Act, 1 Pa. C.S. § 1901, provides that

In the construction of the statutes of this Commonwealth, the rules set forth in this chapter shall be observed, unless the application of such rules would result in a construction inconsistent with the manifest intent of the General Assembly.

It would indeed violate all discernible manifestations of legislative intent to apply Section 1921(a) of the Statutory Construction Act,

1 Pa. C.S. § 1921(a) to construe the definition of "employer" in Section 3(g) of the Minimum Wage Act of 1968, 43 P.S. § 333.103(g) as including the Commonwealth and its political subdivisions and instrumentalities.

For all the foregoing reasons, we conclude that the Pennsylvania Minimum Wage Act of 1968 is not applicable to employes of the Commonwealth and its political subdivisions and instrumentalities.

Sincerely yours,

LOUIS J. ROVELLI  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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OFFICIAL OPINION No. 76-30

*Game Commission—Bonding of County Treasurers—Fish Commission.*

1. County Treasurers need not post a separate bond for the issuance of hunting and fishing licenses. The bonding requirement which exists in the various county codes, 16 P.S. §§ 802, 3802 and 7407, is legally sufficient.

Harrisburg, Pa. 17120  
November 10, 1976

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

Dear Mr. Bowers:

We have received a request from you for an opinion concerning certain matters relating to the bonding of county treasurers. Specifically, you have asked whether county treasurers must obtain a separate bond for the handling of hunting and fishing licenses. It is our opinion, and you are hereby advised, that county treasurers need not obtain a separate bond for the handling of hunting and fishing licenses.

First, with regard to the question of whether county treasurers must obtain a bond specifically for the handling of hunting licenses, the Game Law, 34 P.S. § 1311.305, provides;

"The issuance of all hunting licenses shall be under the direct supervision of the commission, which shall designate the several county treasurers and such other issuing agents throughout the Commonwealth or otherwise as it may find essential. . . ."

Therefore, county treasurers are agents of the Commonwealth for the collection of hunting license fees.<sup>1</sup>

The Game Law also provides for the bonding of issuing agents.

"Every agent designated to issue hunters' licenses, unless already under bond to cover the handling of public funds, shall give bond to the Commonwealth in such sum as shall be fixed by the commission, but not less than three thousand dollars (\$3,000.00). . . ." 34 P.S. § 1311.311.

Therefore, unless already bonded to cover the handling of public funds, an issuing agent of the Game Commission must obtain a bond specifically to handle hunting licenses. However, the County Code, 16 P.S. § 802, does provide for the bonding of county treasurers.

"Each county treasurer shall, before entering upon the duties of his office, give bond with sufficient security . . . for the faithful discharge of all duties enjoined upon him by law in behalf of the Commonwealth, and for the payment according to law of all moneys received by him for the use of the Commonwealth. . . ."

While the above section of the County Code covers only third through eighth class counties, there are similar provisions concerning counties of the second class and second class A, Act of July 28, 1953, P.L. 723, 16 P.S. § 3802, and counties of the first class, Act of April 15, 1834, P.L. 537, 16 P.S. § 7407.

Any county treasurer bonded under the aforementioned provisions need not purchase a separate bond to cover the handling of hunting licenses. The Game Law exempts those individuals already bonded to cover the handling of public funds. The various county codes provide that the county treasurers shall give bond for the faithful discharge of *all* duties enjoined upon them by the Commonwealth. Therefore, the bond provided for in the various county codes is legally

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1. There is an exception for treasurers of counties of the first class. The Act of April 8, 1937, P.L. 256, 16 P.S. § 7414, provides that,

"[c]ounty treasurers in counties of the first class, from and after the effective date of this Act shall cease to be agents of the Commonwealth, any other provision of any Act of Assembly to the contrary notwithstanding . . . for fishing licenses, hunters' licenses, and all other taxes or fees payable to the Commonwealth which it is now their duty to collect."

However, the effect of this Act, insofar as it relates to the bonding procedures of county treasurers, is negligible. The Act also provides that county treasurers shall collect such funds, including hunting and fishing license applications, as was their previous duty. The courts are in accord. *Swartley v. Baird*, 347 Pa. 608, 614, 32 A. 2d 874, 876 (1943). Aside from not being agents of the Commonwealth, the treasurers in counties of the first class perform in the same manner as other county treasurers regarding the manner of the issuance of hunting and fishing licenses.

sufficient to cover the county treasurers for the issuance of hunting licenses.

The second question is whether county treasurers must obtain a separate bond for handling fishing licenses. The Fish Commission has designated county treasurers as issuing agents for fishing licenses. Section 225 of the Fish Law of 1959, 30 P.S. § 225, provides that every issuing agent of the Commission shall be bonded for the issuance of fishing licenses. However, the Fish Law of 1959 has no provision, as does the Game Law, which exempts those issuing agents, who are otherwise bonded, from posting bond. It therefore might appear that the Fish Law of 1959 requires county treasurers to post a separate bond in order to issue fishing licenses. That is not the case however.

As previously stated, the various county codes provide that a county treasurer shall post bond for,

“the faithful discharge of *all* duties enjoined upon him by law in behalf of the Commonwealth, and for the payment according to law of all moneys received by him for the use of the Commonwealth.” 16 P.S. §§ 802, 3802 and 7407. (Emphasis added.)

The issuing of fishing licenses and the collection of fees is a duty enjoined upon county treasurers by law in behalf of the Commonwealth. Section 225 of the Fish Law of 1959 permits the Fish Commission to appoint issuing agents for fishing licenses. The various county codes specifically state that county treasurers are to post only one bond for the performance of *all* their duties for the Commonwealth. Therefore, a county treasurer need not post a separate bond in order to issue fishing licenses.

In conclusion, it is our opinion, and you are hereby advised, that county treasurers need not post a separate bond for the issuance of hunting and fishing licenses. The bonding requirement which exists in the various county codes and is the responsibility of the counties is sufficient.

In accordance with section 512 of the Administrative Code of 1929, 71 P.S. § 192, this opinion has been submitted to the Department of the Auditor General and the Treasury Department for their response and approval.

Very truly yours,

BART J. DeLUCA, JR.  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

OFFICIAL OPINION No. 76-31

*Department of General Services—State Treasurer—Uniform Commercial Code—Bidding—"Signed".*

1. A hand printed signature affixed to a bid proposal by a bidder who intends to execute his bid is legal and the Department of General Services may legally accept bids containing such signatures.
2. A complete signature is not necessary; authentication may be printed, stamped or written; it may be by initials or by thumbprint.

Harrisburg, Pa. 17120  
November 10, 1976

Honorable Ronald G. Lench  
Secretary of General Services  
Harrisburg, Pennsylvania

Dear Secretary Lench:

You have asked whether the Department of General Services can legally accept bid proposals which are signed by the bidders in a manner other than a handwritten signature in script form. You have advised us that in some instances bidders will hand print their signatures on the bid proposals intending thereby to bind themselves to their bids. The Office of the State Treasurer has objected to the acceptance of such bids and insists that the only acceptable method of executing a bid is by a handwritten script signature.

Prior to the adoption of the Uniform Commercial Code, the law in Pennsylvania was that documents, contracts and other papers could be executed by a typewritten, printed or rubber stamped signature provided that such had been properly authorized. See *Tabas v. Emergency Fleet Corporation*, 9 F. 2d 648, 649 (E.D. Pa. 1926), *affd.*, 22 F. 2d 398 (3rd Cir. 1927).

Under the Uniform Commercial Code (12A P.S. § 1-201(39)), the term "signed" is defined as including "any symbol executed or adopted by a party with present intention to authenticate a writing". In the Official Comment to Section 201, the Commissioners noted that this definition was expressly included so as to "make clear that as the term is used in this Act a complete signature is not necessary". They further stated that an "[a]uthentication may be printed, stamped or written; it may be by initials or by thumbprint".

The few cases which have dealt with the issue of what constitutes a signature have endorsed the Comment:

"What is meant . . . is that a complete signature is not necessary. That is, authentication of the document may be accomplished by a printed, stamped or written symbol. . . ." *Plemens v. Didde-Glaser, Inc.*, 244 Md. 556, 224 A. 2d 464, 467 (1966).

and

"A complete signature is not necessary to constitute an authentication as it may be printed and may be on any part of the document. . . ." *Evans v. Moore*, 131 Ga. App. 169, 205 S.E. 2d 507, 508 (1974).

See also *Benedict v. Lebowitz*, 346 F. 2d 120 (2nd Cir. 1965).

It is our conclusion, therefore, that a hand printed signature affixed to a bid proposal by a bidder who intends to execute his bid is legal<sup>1</sup> and the department may legally accept bids containing such signatures.

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. 76-32

*Nursing Homes—Reorganization Plan No. 3 of 1975—Department of Public Welfare—Department of Health—Social Security Act—Medicaid.*

1. The administration of the provider agreement issuance function was not transferred to the Department of Health by Reorganization Plan No. 3 and it continues to be the responsibility of the Department of Public Welfare.
2. Since the Reorganization Plan explicitly limited transfer of nursing home related functions by excepting "those powers necessary for the Department of Public Welfare to retain its status as the Single State Agency in compliance with the Social Security Act" and since the Department of Health, Education

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1. It does not appear, however, that the State Treasurer is questioning the legality of accepting hand printed signatures on bids. Rather, it is the State Treasurer's position that despite their legality, the allowance of hand printed signatures could lead to abuse on the part of dishonest bidders who could disclaim any intent to submit a bid. Such testimony would be difficult to combat in the absence of a written signature. The State Treasurer contends for this reason that sound procurement policy requires that the Commonwealth insist on proper *written* execution of all bids and that acceptance of printed, typewritten or stamped signatures needlessly opens up the possibility of disputes, litigation, delay and expense.

Without deciding one way or the other the question of what constitutes sound procurement policy, it is our opinion that the Department of General Services does have the authority to require all bid proposals to be signed by a handwritten signature in script form. The Department may by regulation require its invitations for bid proposals to include, as one of the specifications, that a bid proposal, to be valid, must be executed by a handwritten script signature. If such a regulation were adopted, it should include a requirement that invitations for bid proposals state very clearly that unless the bids are signed in writing, they will be rejected for failure to follow the specifications. In this manner the abuse contemplated by the State Treasurer will be avoided.

and Welfare has now ruled that the transfer of issuance of nursing home provider agreements would jeopardize that status, the transfer of that function is held never to have occurred as a matter of law.

3. Considerable weight should be given to the federal government's interpretation of federal regulations.
4. Official Opinion No. 76-18 rescinded.

Harrisburg, Pa. 17120  
December 23, 1976

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

Honorable Frank S. Beal  
Secretary of Public Welfare  
Harrisburg, Pennsylvania

Dear Secretary Bachman and Secretary Beal:

On June 15, 1976 we issued Official Opinion No. 76-18 in which we concluded that the issuance of nursing home provider agreements under the Medicaid program was transferred to the Department of Health by Reorganization Plan No. 3 of 1975 while supervision of this function remained in the Department of Public Welfare. The pertinent language of the Reorganization Plan states:

*"The functions, powers and duties of the Department of Public Welfare as set forth in Articles II, IV, IX, and X, Act of June 13, 1967 (P.L. 31, No. 21), known as the 'Public Welfare Code,' with regard to the Social Security Act, insofar as it applies to skilled nursing homes' and intermediate care nursing homes' provider agreement certification and issuance, except those powers necessary for the Department of Public Welfare to retain its status as the Single State Agency in compliance with the Social Security Act, are hereby transferred to the Department of Health." (Section 2; 71 P.S. § 756-3) (Emphasis added.)*

Thus, it can be seen that we were required, in reaching our earlier conclusion, to interpret a federal act, and in particular, certain federal regulations that make specific reference to the execution of an agreement with the Single State Agency. We said that in our opinion those references were descriptive rather than operative and should not be construed as *requiring* that the Single State Agency perform the administrative function of executing the provider agreements.

In issuing such opinion we were not unmindful that the interpretation of federal regulations is more appropriate for federal attorneys. For this reason preliminary drafts of the opinion were submitted to the Department of Health, Education and Welfare prior to its issuance, and informal assurances were received from that department indicating no disagreement.

Now, however, by letter dated November 16, 1976 from Alwyn L. Carty, Regional Commissioner, SRS, Department of Health, Education and Welfare, we have been advised that the federal government disagrees with our opinion and, in particular, disagrees with our interpretation of the federal regulations. On page 2 of the letter Mr. Carty states:

"Additionally, the references made in Federal regulations . . . are not by any means meant to be descriptive rather than operative as stated in the opinion of the Pennsylvania Attorney General."

While we do not necessarily agree with Mr. Carty's legal reasoning, we do recognize that considerable weight should be given to the federal government's interpretation of federal regulations. For this reason we will yield to Mr. Carty's opinion and withdraw the conclusion reached in our prior opinion. It is therefore our opinion now that the administration of the provider agreement issuance function was not transferred to the Department of Health by Reorganization Plan No. 3 and that it continues to be the responsibility of the Department of Public Welfare.

In other words, since the Reorganization Plan explicitly limited transfer of nursing home related functions by excepting "those powers necessary for the Department of Public Welfare to retain its status as the Single State Agency in compliance with the Social Security Act" and since the Department of Health, Education and Welfare has now ruled that the transfer of issuance of nursing home provider agreements would jeopardize that status, we now conclude that the transfer of that function has never occurred as a matter of law.

As a practical matter, the actual transfer to the Health Department has never occurred. Although we urged the transfer to be expedited in a footnote to our prior opinion, the transfer was held up pending the official reaction of the Department of Health, Education and Welfare to our opinion. This is consistent with Section 501 of the Administrative Code, 71 P.S. § 181, which authorizes departments to "devise a practical and working basis for cooperation and coordination of work, eliminating, duplicating, and overlapping of functions. . . ."

Official Opinion No. 76-18 is hereby rescinded.

Very truly yours,

W. W. ANDERSON  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

## OFFICIAL OPINION No. 76-33

*Department of Banking—Regulatory Powers—Savings Banks—Savings Accounts—NOW Accounts—Withdrawals.*

1. Subject to the provisions of the Banking Code of 1965, the Banking Department has the power to adopt regulations which are responsive to changing economic conditions and to changes in banking practices.
2. The Department of Banking has the broad regulatory authority to permit savings banks to issue an account whereby depositors may withdraw funds from their accounts by means of a negotiable order of withdrawal.
3. Savings banks may not pay interest on accounts which are subject to withdrawal of funds by means of a negotiable order of withdrawal.
4. Negotiable order of withdrawal drafts, if authorized by the Department of Banking, must indicate on their face that the bank may require fourteen days notice before making payment on the draft.

Harrisburg, Pa. 17120  
December 27, 1976

Honorable William E. Whitesell  
Secretary of Banking  
Harrisburg, Pennsylvania

Dear Secretary Whitesell:

You have requested our advice concerning whether savings banks operating under the Banking Code of 1965, 7 P.S. § 101, may offer depositors a type of account, referred to generally as a NOW account, which, heretofore, has not been offered in Pennsylvania. Although this type of account, described in detail below, is a departure from traditional savings bank practice in Pennsylvania, it is our opinion, and you are accordingly advised, that you have the regulatory authority to permit NOW accounts.

A NOW account is a non-interest bearing account covered by monthly statements issued by the bank to the depositor. Under the terms of this account, money may be withdrawn by means of a negotiable order of withdrawal which will require the bank to pay the specified sum to a named third party. It is a "payable through" draft which will name a local commercial bank and will clear through the banking system much the same as other drafts. The NOW account is quite similar to a traditional checking account and, therefore, the question of whether savings banks may issue this type of account is of considerable importance to the banking community.

"Savings bank" is defined by the Banking Code of 1965 as:

"... a corporation without capital stock which exists under the laws of this Commonwealth and as a savings bank under the Banking Code of 1933 was authorized to engage in the business of receiving savings deposits on the effective date of this act or which receives authority to engage in such business pursuant to this act." 7 P.S. § 102(x).

Since savings banks may quite clearly act as depositories, they must also have a means by which depositors may withdraw their funds. We do note that the term "savings deposits" is not defined in the Banking Code. The Banking Code provides, in pertinent part:

"A savings bank may receive money for deposit and:

- (a) Provisions for withdrawal—may provide by its articles or by-laws for the terms of withdrawal thereof except that deposits may not be accepted which are legally subject to withdrawal within a period of less than fourteen days,
- (b) Notice in absence of provisions—shall repay deposits on demand after sixty days' notice in the absence of any requirement of notice in its articles, by-laws or rules or in the event of failure by the savings bank to give any notice required by this act or by its articles, by-laws or rules, . . ." 7 P.S. § 503(a), (b).

The provisions of law quoted above, are the only provisions in the Banking Code of 1965 which discuss the means of withdrawing funds deposited in savings banks. There is nothing in those provisions which would prohibit a NOW account. This conclusion, however, does not end our inquiry, for there still remains the question of whether there is anything in the law which permits a NOW account. On this question, it is our opinion that the Secretary of Banking has the broad regulatory authority and power to permit such an account in his discretion, by appropriate regulations.

The following extensive quotes from the Banking Code of 1965 ineluctably lead to this conclusion:

"§ 103. Declaration of purposes; standards for exercise of power and discretion by department

"(a) Purposes of the act—The General Assembly declares as its purposes in adopting this act to provide for:

. . . .

(v) The *opportunity for institutions subject to this act to remain competitive* with each other, with financial organizations existing under other laws of this Commonwealth, and with banking and financial organizations existing under the laws of other states, the United States and foreign countries,

(vi) The *opportunity for institutions subject to this act to serve effectively the convenience and needs* of their depositors, borrowers and other customers, to participate in and promote the economic progress of Pennsylvania and the United States and to improve and expand their services and facilities for those purposes,

(vii) The opportunity for the management of institutions to exercise their business judgment, subject to the provisions of this act, in conducting the affairs of their institutions, to the extent compatible with, and subject to, the purposes recited in the preceding clauses of this subsection (a),

(viii) *A delegation to the department of adequate rule-making power and administrative discretion*, subject to the provisions of this act and to the purposes stated in this subsection (a), in order that the supervision and regulation of institutions subject to this act may be flexible and readily responsive to changes in economic conditions and to changes in banking and fiduciary practices, and

. . . .

(b) Standards to be observed by department—The purposes of this act stated in subsection (a) of this section shall constitute standards to be observed by the department in the exercise of its discretionary powers under this act, in the promulgation of rules and regulations, in the examination and supervision of institutions subject to this act and in all matters of construction and application of this act required for any determination or action of the department. . . .

Comment—Banking Law Commission

. . . .

Clauses (v) through (ix) of subsection (a) recognize that after satisfying the imperatives of safety and soundness *there still remains a broad area in which the policies for banking legislation and regulation may create a progressive rather than restrictive atmosphere*. The premises underlying such policies recognized by this act are that contemporary banking faces, and should have the opportunity fairly to meet, a high degree of competition not only from other banks but also, in virtually all principal functions, from a large number and variety of other financial organizations; that *banking should have the leeway to adapt itself to changing and expanding requirements of the community* in order that it may make its proper contribution to economic progress; that, within the confines of appropriate restrictions to protect depositors and the public, the *private business judgment of management should be free to guide the development of banking institutions*; and that banking legislation should not be overly-detailed but *should permit supervisory authorities to shape regulation*, within statutory standards and guidelines, in order to meet changes in banking and economic conditions without repeated, detailed legislative amendment.

. . . .

Subsection (b) complements the purposes set forth in sub-

section (a). It serves the double function of *giving policy direction to the "department and of providing legislative standards* that restrict the discretion of the department in keeping with constitutional limits on the delegation of authority to administrative agencies. Basic standards, such as those in this section, which provide guidance for an administrative agency in the performance of its functions have been held to avoid any problem of unlawful delegation of legislative authority. See, e.g. *Dauphin Deposit Trust Co. v. Myers*, 130 A. 2d 686, 388 Pa. 444 (1957); *Archbishop O'Hara's Appeal*, 131 A. 2d 587, 389 Pa. 35, 1957; *Comm. of Pennsylvania, Water and Power Resources Board v. Green Spring Co.*, 145 A. 2d 178, 394 Pa. 1, 1958; *Sun Oil Co. v. Zoning Board of Adjustment of City of Pittsburgh*, 169 A. 2d 294, 403 Pa. 409, 1961; *Rieder Appeal*, 188 A. 2d 756, 410 Pa. 420, 1963.

#### § 104. Rules of construction

In the interpretation and construction of this act:

(a) Use of comments—*The comments of the commission which drafted this act may be consulted in the construction and application of its original provisions* but the text of the act will control in the event of a conflict between text and comments.

. . . .

(d) *Construction of statements of powers of institutions*—A power of an institution stated in this act to be subject to regulation of the department may be exercised, subject to the provisions of this act, in the absence of such regulation but a power which is stated to be subject to approval or permission of the department may not be exercised in the absence of such written approval or permission.

. . . .

Comment—Banking Law Commission

. . . .

"Subsection (a) gives a *statutory basis for referring to the comments of the commission* which drafted this act in the construction of its original provisions, although the text will control the comments in the event of conflict. *Reference to the comments is especially important in determining the intention of this act* with respect to changes in pre-existing law since there is extensive rewriting in this act of provisions of the prior Code, even as to matters which are not intended to be changed in substance. It is intended that the *comments be available for reference not only by courts in the event of litigation but also by regulatory authorities*, both state and federal, in the conduct of their regulatory and supervisory functions.

*Subsection (b) gives an 'open-end' effect to most of the statutes and regulations referred to in this act. The purpose of this provision is to help to keep this act current with changes in other laws and regulations without the need for repeated statutory amendments, as was the case under the prior Code. . . .*

. . . .

Subsection (d) . . .

. . . The powers conferred by this act are, accordingly, not dependent on the existence of pertinent regulations *although such regulations when issued will control* the exercise of those powers. . . ." (Emphasis supplied.)

The Act delegates to the Department of Banking broad rule-making power and administrative discretion. The avowed intent of the General Assembly is that such regulatory powers be exercised to provide flexibility and responsiveness to changes in economic conditions and banking practices, to effectively serve the convenience and needs of depositors, to create a progressive rather than restrictive banking atmosphere and to adapt itself to changing and expanding requirements of the community.

Should you decide to promulgate such regulations, we call to your attention our prior opinion holding that the type of account generally referred to as a WOA account was permissible under the same provisions of the Banking Code. 1974 Opinions of the Attorney General of Pennsylvania 171, Official Opinion No. 45.

Insofar as the fourteen day withdrawal requirement is concerned, we held:

"It has been suggested that Section 503(a) means that a savings bank may not pay out money deposited until fourteen days after such deposit is made. The commentary to Section 503 of the Banking Code of 1965 indicates, however, that Section 503(a) restates without change that portion of Section 1203(a) of the Banking Code of 1933 which provided that a 'savings bank shall not accept any deposits payment of which can be legally required by the depositor within a period of less than fourteen days.' Accordingly, it appears that Section 503(a) obligates a bank to do no more than retain the option of refusing to surrender a deposit sooner than fourteen days after it is made. The latter is the interpretation of Section 503(a) that has been universally adopted by savings banks since the Code of 1965 became effective." *Id. at 172.*

In accordance with this interpretation, any regulation must require each NOW account draft to contain language which indicates that the bank may require fourteen days notice before making payment.

We finally note that should you determine to promulgate regulations to permit this type of account, such a decision would not be completely revolutionary. Such decisions have been made in other states with various legal results, depending on the provisions of particular state statutes. See, *Hudson County National Bank v. Provident Institution for Savings*, 44 N.J. 282, 208 A. 2d 409 (1965) (permitting the equivalent of NOW accounts notwithstanding the "traditional" function of saving banks); *Savings Bank of Baltimore v. Bank Commissioner of the State of Maryland*, 248 Md. 461, 237 A. 2d 45 (1968) (permitting NOW accounts); *Androscoggin County Savings Bank v. Campbell*, 282 A. 2d 858 (Me. 1971) (holding that savings banks may not issue checking accounts); *New York State Bankers Association v. Albright*, 38 N.Y. 2d 430, 381 N.Y.S. 2d 17 (1975) (savings banks may not offer NOW accounts); *Consumers Savings Bank v. Commissioner of Banks*, 282 N.E. 2d 416 (Mass. 1972) (NOW accounts are permissible); *Wisconsin Bankers Association v. Mutual Savings and Loan Association of Wisconsin* (Cir. Ct. Milwaukee County 1976) (NOW accounts are permissible). Federal law, moreover, does not prohibit NOW accounts, but they may not bear interest except when issued by banking institutions in New England. 12 U.S.C. § 1832(a).

In conclusion, we are of the opinion that Section 503 of the Banking Code does not prohibit savings banks from issuing NOW accounts and that the broad regulatory authority of your office authorizes you to decide whether they should be allowed. If you decide to allow them, the Department of Banking should prepare and promulgate regulations which detail the permissible methods of operation of NOW accounts.

Very truly yours,

VINCENT X. YAKOWICZ  
*Solicitor General*

JEFFREY G. COKIN  
*Deputy Attorney General*

ROBERT P. KANE  
*Attorney General*

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### OFFICIAL OPINION No. 76-34

#### *Elections—Political Action Committees in Pennsylvania.*

1. 2 U.S.C. § 441b and prior case law permit the formation of political action committees (PACs) by labor unions and corporations.
2. A PAC is an entity, separate and distinct from its sponsoring organization, established for the purpose of soliciting contributions to and making expenditures from a segregated fund, which fund is to be used for political purposes.
3. PACs are "political committees" under sections 1605(c) and 1607 of the Pennsylvania Election Code.

4. Under section 1605(c) of the Pennsylvania Election Code, a corporation or unincorporated association may use its general treasury funds for the establishment and administration of a PAC, and for the solicitation of voluntary contributions to the PAC.

Harrisburg, Pa. 17120  
December 28, 1976

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

Dear Secretary Tucker:

You have requested our advice regarding the interpretation of Section 1605 of the Pennsylvania Election Code, *as amended*, 25 P.S. § 3225 and the possible conflict of that section with the Federal Election Campaign Act of 1971, *as amended*.<sup>1</sup> Specifically, you inquire as to whether a "Political Action Committee", lawfully organized pursuant to 2 U.S.C. § 441b<sup>2</sup> for the purpose of influencing federal elections and using corporate and unincorporated association funds to organize and administer its political fund, can, at the same time, legally contribute to candidates seeking non-federal office in Pennsylvania.

Section 441b of Title 2 of the United States Code provides:

"(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

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1. Federal Election Campaign Act of 1971, Pub. L. 92-225, §§ 301-311, 86 Stat. 11 (1972) as amended by the Federal Election Campaign Act Amendments of 1974, (P.L. 93-443), § 201-407, 88 Stat. 1272, Title 2, U.S.C., and by the Federal Election Campaign Act Amendments of 1976 (P.L. 94-283) as codified in Titles 2 and 26 of the United States Code.
  2. Formerly codified in 18 U.S.C. § 610 by the 1971 Act and the 1974 Amendments. It should be noted that this section was deleted from Title 18 by the 1976 Amendments and added to Title 2. Former sections 608-617 of Title 18 now appear as new sections 441a-441j in Title 2.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section, and section 12(h) of the Public Utility Holding Company Act (15 U.S.C. 79L (h)), the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction.

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such

employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of \$50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from

the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis, and who have policymaking, managerial, professional, or supervisory responsibilities."

This language is a codification of prior case law and has been interpreted to permit the formation of political action committees (PACs) by labor unions and corporations. A PAC is an entity, legally separate and distinct from its sponsoring corporation or labor union, which is established for the purpose of soliciting contributions to and making expenditures from a segregated fund, which fund is to be used for political purposes. *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 401 (1972). A PAC must be separate from its sponsoring corporation or union only in the sense that there must be a strict segregation of its monies. There is no requirement that the PAC be formally or functionally independent of the control of its sponsor organization. *Pipefitters, supra*. Moreover, this provision has been interpreted by the Federal Election Commission (FEC) as authorizing a sponsoring corporation or labor organization to use funds from its general treasury to establish and administer a PAC. *Advisory Opinion 1975-23*, Federal Register, Volume 40, No. 233, December 3, 1975, at

page 56584.<sup>3</sup> Although sponsoring organizations cannot use their general treasury funds to directly contribute to political campaigns, under the Federal Act other primary and general election expenses, (i.e., office space, postage, telephone bills, etc.) can be paid by the corporation or labor organization itself.

The Pennsylvania Election Code of June 3, 1937, P.L. 1333, provides in pertinent part:

The words "political committee" shall include every two or more persons who shall be elected, appointed or chosen, or who shall have associated themselves or cooperated for the purpose, wholly or in part, of raising, collecting or disbursing money, or of controlling or directing the raising, collection or disbursement of money for primary or election expenses. (Section 1601(c), 25 P.S. § 3221(c)).

The words "primary expenses" shall include all expenditures of money or other valuable things made, and liabilities incurred, in furtherance of or in respect to the candidacy of any candidate for nomination at a primary for public office, or to defeat the candidacy of any candidate for nomination to public office, whether such expenditures are made before, during or after the primary. (Section 1601(d), 25 P.S. § 3221(d)).

The words "election expenses" shall include all expenditures of money or other valuable things made, and liabilities incurred, in furtherance of or in respect to the election of any candidate for election to any public office, or to defeat the candidacy of any candidate for election to public office, whether such expenditures are made before, during or after the election. (Section 1601(e), 25 P.S. § 3221(e)).

No candidate or treasurer of any political committee shall pay, give or lend, or agree to pay, give or lend, directly or indirectly, any money or other valuable thing or incur any

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3. Prior to the passage of 2 U.S.C. § 437c reconstituting the Federal Election Commission, the United States Supreme Court stripped the Commission of its enforcement authority because its members were not selected according to the mandate of the United States Constitution, Art. II, § 2, Cl. 2. However, FEC Advisory Opinions issued prior to the date of that decision remain viable. *Buckley v. Valeo*, 424 U.S. 1 (1976). The Court stated:

"It is also our view that the Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date, including its administration of those provisions, upheld today, authorizing the public financing of federal elections. The past acts of the Commission are therefore accorded *de facto* validity, just as we have recognized should be the case with respect to legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan. [citation omitted] *Buckley v. Valeo*, 424 U.S. 1, 142 (1976).

liability on account of, or in respect to, any primary or election expenses whatever, except for the following purposes:

First: For printing and traveling expenses, and personal expenses incident thereto, stationery, advertising, postage, expressage, freight, telegraph, telephone and public messenger service.

Second: For the rental of radio facilities, and amplified systems.

Third: For political meetings, demonstrations and conventions, and for the pay and transportation of speakers.

Fourth: For the rent, maintenance and furnishing of offices.

Fifth: For the payment of clerks, typewriters, stenographers, janitors, and messengers actually employed.

Sixth: For the transportation of electors to and from the polls.

Seventh: For the employment of watchers at primaries and elections to the number and in the amount permitted by this act.

Eighth: For expenses, legal counsel, incurred in good faith in connection with any primary or elections.

Ninth: For contributions to other political committees. (Section 1606, 25 P.S. § 3226).

No corporation or unincorporated association or officer or agent thereof, whether incorporated or organized under the laws of this or any other state or any foreign country, except those formed primarily for political purposes or a political committee, shall pay, give or lend or authorize to be paid, given or lent, either directly or through any other person, or in reimbursement of any such payment, gift or loan by any other person, any money or other valuable thing belonging to such corporation or unincorporated association or in its custody or control, to any candidate or political committee for the payment of any primary or election expenses or for any political purpose whatever. (Section 1605(b), 25 P.S. § 3225(b)).

Neither the provisions of this section, nor the provisions of section 1604(a) nor any other provisions of the laws of this Commonwealth shall be deemed to prohibit direct private communications by a corporation to its stockholders and

their families or by any unincorporated association to its members and their families on any subject; non-partisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families or by an unincorporated association aimed at its members and their families; and the establishment, and administration by a corporation or an unincorporated association of a separate segregated fund which fund is to be created by voluntary individual contributions and to be utilized for political purposes, provided that any such separate segregated fund shall be deemed to be a political committee for the purposes of section 1607 of this act. (Section 1605(c), 25 P.S. § 3225(c)).

The last-quoted section of the Pennsylvania Election Code was recently passed into law.<sup>4</sup> By its terms a PAC is deemed to be a "political committee", and, subject to the general requirements in the Election Code for all political committees, may operate in Pennsylvania. Furthermore, it is apparent from a comparison between 2 U.S.C. § 441b, *supra*, and Section 1605(c), *supra*, that the Pennsylvania Legislature intended to provide for the creation of PACs for state elections that could function in conformity with those created pursuant to Federal legislation.

A comparison of Section 1605(c) and that portion of 2 U.S.C. § 441b which allows for the creation of PACs shows that the two provisions are almost identical, the only difference between them being that Section 441b specifically provides for the solicitation of funds while Section 1605(c) has no such specific provision. However, despite the absence of a specific provision dealing with the solicitation of funds, Section 1605(c) does provide for direct private communications on any subject by a corporation to its stockholders and their families, and by an unincorporated association to its members and their families.

These direct private communications would include solicitations of contributions by corporations from stockholders and their families and solicitations of contributions by unincorporated associations from members and their families; however, they would not include solicitations for contributions by corporations from their employees.

This apparent oversight is resolved by the fact that Section 441b is a codification of prior case law and that "corporations have traditionally solicited their employees for both political and nonpolitical purposes. Absent any express language in the statute or legislative history prohibiting such solicitations, it would be illogical to conclude that corporations could solicit only their stockholders and not their employees." *FEC Advisory Opinion 1975-23, supra*. Furthermore, the

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4. Act No. 124 of July 1, 1976.

word "voluntary" in Section 1605(c) is clearly analogous to the language in Section 441b making it unlawful for a PAC to "make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction." This provision can be relied upon to insure that employee contributions will truly be unconstrained by corporate interference.

As to the solicitation of funds by a corporation's PAC from persons other than its stockholders and their families and by a labor organization's PAC from persons other than members and their families, we suggest that your office advise these organizations to follow the guidelines in Section 441b with regard to statewide as well as Federal candidates. Although Pennsylvania cannot require PACs to follow the Federal law in this regard, the failure to do so would require the formation of separate PACs for Pennsylvania and Federal candidates. In this regard, we note that Congress is becoming increasingly more active in the area of election law, and to the extent that the Pennsylvania Election Code overlaps with the Federal Election Campaign Act, we suggest that compliance with the federal practice be encouraged.

To reiterate, political action committees, as that term is used in the context of 2 U.S.C. § 441b and *Pipefitters, supra*, are political committees within the meaning of the Pennsylvania Election Code, and, subject to the general requirements for all political committees, may operate in Pennsylvania. Furthermore, as the contributions to a PAC are segregated from the general treasury of a corporation or unincorporated association and are created by voluntary contributions to be used for political purposes, a corporation or unincorporated association may use its general treasury funds for the establishment and administration of the PAC, and for the solicitation of contributions to the PAC.

We hope that the above explanation is helpful to you and we stand ready to answer any further questions on this matter if called upon to do so.

Very truly yours,

ALAN M. BREDT  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

OFFICIAL OPINION No. 76-35

*Department of Education—Field Trip Transportation—Nonpublic School Pupils—Act 372 of 1972.*

1. Act 372 of 1972 does not require that nonpublic school pupils be transported on field trips identical to those of public school pupils.
2. A school board may or may not provide field trips for some or all of its pupils.
3. Approximately the same dollar amount per pupil shall be spent on field trip transportation for nonpublic school students as for their public school counterparts in the same district.
4. The public school district's obligation runs to nonpublic school pupils who are residents of that district, not to all those who happen to attend nonpublic schools within that district.
5. Act 372 may be fulfilled by the public school district either by reimbursing nonpublic schools the appropriate amount for field trip transportation or by actually arranging for that transportation.
6. A school district may contract with an intermediate unit to arrange field trip transportation for nonpublic schools.
7. A nonpublic school pupil is eligible under Act 372 if he is a resident of the particular public school district and attends a nonpublic school operated not for profit within the district boundaries or outside the district boundaries at a distance not exceeding ten miles by the nearest public highway, even if that school is in a neighboring state.

Harrisburg, Pa. 17120  
December 30, 1976

Honorable John C. Pittenger  
Secretary of Education  
Harrisburg, Pennsylvania

Dear Secretary Pittenger:

You have requested that we advise you on several questions regarding the interpretation of the "field trip" provisions of Act 372 of 1972\* of the Public School Code of 1949, P.L. 30, as amended, 24 P.S. § 13-1361 (hereinafter "Act 372"), which will be answered seriatim:

(I) Does Act 372 require a school district to provide "identical" field trip transportation for nonpublic school children as is provided for public school pupils?

(II) Is a public school district obligated to provide field trip transportation for all pupils enrolled in the nonpublic schools located within the district or only those pupils who are residents of that same public school district?

(III) May a school district (or districts) contract with an intermediate unit for field trip transportation for nonpublic schools?

- I. Does Act 372 require a school district to provide "identical" field trip transportation for nonpublic school children as is provided for public school pupils?

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\*Editor's note: The efficacy of this opinion as applied to sectarian nonpublic schools is discussed in Official Opinion 77-15, 7 Pa. Bulletin 2674.

A school board may, out of district funds, provide for free transportation of resident pupils to and from any point in the Commonwealth to provide field trips for any purpose connected with the educational pursuits of the pupils.

A field trip may be defined as a nonproprietary excursion authorized as an integral part of the school's instructional program and provided under the planning and supervision of a professional employee of the school district (or, in the case of nonpublic schools, by a qualified nonpublic school employee). Field trips may be provided for one, many, or all segments of the school district's student body.<sup>1</sup> As such, the term field trip shall not include transportation of pupils for activities which are not an integral part of the school's instructional program. For example, pupil-spectators may not be transported to varsity or intermural athletic contests under cover of "field trip" legislation.

Act 372 requires that when field trips are provided for public school pupils they must also be provided for nonpublic school pupils.

When provision is made by a board of school directors for the transportation of public school pupils . . . to and from any points in the Commonwealth in order to provide field trips as herein provided, the board of school directors shall also make *identical* provision for the free transportation of pupils who regularly attend nonpublic kindergarten, elementary and high schools not operated for profit to and from . . . any points in the Commonwealth in order to provide field trips as herein provided. (Emphasis added.)

"Identical" is not defined in Act 372. Absent any definition of this term in Act 372, the normal rules of statutory construction apply and the statute will be read so as "to ascertain and effectuate the intention of the General Assembly . . . [and] to give effect to all its provisions." (1 Pa. C.S. § 1921).

Since nonpublic schools are not required by the state to teach a curriculum geared to specific grade levels, the field trips scheduled for pupils at a certain grade level in public school may not correspond to the curriculum experiences of pupils at the same grade level in nonpublic schools. For example, the directors of a public school district

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1. Field trips may be authorized by the school board for pupils in a single grade, e.g. all fifth graders may be scheduled for field trips related to a study of municipal services. Field trips may be authorized for a single segment of pupils, e.g. all secondary pupils may be scheduled for field trips to art galleries and museums. The local school board has the discretion to schedule some field trips or none. By authorizing field trip transportation for one segment of the public school population, the board does not discriminate against another segment of the public school pupil population for whom no such field trips are scheduled. This is a matter of discretion for the school board. However, if field trip transportation is authorized for one segment of the public school population, then field trip transportation must be scheduled for the comparable segment of the eligible nonpublic school population. (*Accord*, Attorney General's Opinion No. 56 of 1974).

may authorize a field trip to a dairy farm for all public school pupils in the third grade because the third grade science and social studies curricula have a unit of study which focuses on agriculture. However, eligible third graders in nonpublic schools<sup>2</sup> served by the public school district pursuant to Act 372 may have curricula which focus on manufacturing rather than agriculture. Consequently, an "identical" field trip, i.e. a trip to a dairy farm, would be of limited value to the nonpublic school pupils in third grade and in fact, if these pupils were released from their regularly scheduled classes to participate in the field trip, it might even be a disruption of their educational process. Common sense dictates that "identical" need not and probably should not mean the same trip, on the same day, at the same time, to the same place.

For purposes of this act, it is our opinion and you are so advised that "identical provision for free transportation" shall mean that approximately the same dollar amount per pupil shall be spent for nonpublic school students as for their public school counterparts in the same district. This will enable the nonpublic school's professional employees to arrange for transportation for meaningful field trips for their pupils which can be coordinated with their own curriculum offerings. The planning and implementation for these field trips should be effectuated in a way which safeguards the constitutional limitations put on such services by the U.S. Supreme Court in the recent case of *Meek v. Pittenger*, 421 U.S. 349 (1975). This can be done readily by promulgation of Department of Education standards which should be published in the *Pennsylvania Bulletin*.

- II. Is the public school district obligated to provide field trip transportation for all pupils enrolled in the nonpublic schools located within the district or only those pupils who are residents of that same public school district?

Each public school district that provides field trip transportation for its residents who are enrolled in nonpublic schools should do so on a per capita basis. Any given nonpublic school that has pupils who are eligible for field trip transportation pursuant to Act 372 may have a pupil population which is drawn from two or more different public school districts. The obligation of a public school district to provide field trip transportation for nonpublic school pupils benefits the pupils directly and does not accrue to their nonpublic school *per se*. Consequently, the administrators of nonpublic schools, who seek to schedule field trip transportation for their eligible pupils, must look to the individual pupil's district of residence not to the public school district in which the nonpublic school building is geographically situated.

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2. To be eligible the pupil must attend a nonpublic school which is a "... kindergarten, elementary school, or secondary school ... not operated for profit ... located within the [public school] district boundaries or outside the district boundaries at a distance not exceeding ten miles by the nearest public highway. ..." Act 372.

However, the public school district may sponsor a field trip for a nonpublic school located in the district in which all eligible pupils enrolled in the nonpublic school may participate even though the sponsoring district is not their district of residence. In such cases, the district of residence can be back-charged by the district providing the service for the cost of transportation of their students by dividing the number of students participating in the field trip into the total cost of providing such trip. Procedures for this and similar cooperative efforts are spelled out below. However, if the district of residence does *not* provide field trips for public school pupils, it has no obligation to provide or pay for field trip transportation for the nonpublic pupils in question.

III. May a school district (or districts) contract with an intermediate unit for field trip transportation for nonpublic schools?

Public school administrators may provide for the mandated transportation of nonpublic school pupils either by reimbursing (subject to audit) nonpublic schools the appropriate amount for their eligible pupils or by actually arranging for field trip transportation for nonpublic school pupils. In planning field trip transportation for nonpublic school pupils, public school administrators should be cognizant of the fact that nonpublic school pupils frequently are residents of a number of different public school districts as stated above. To make efficient use of public school district resources and to provide nonpublic school pupils with transportation for field trips that are an integral part of their curriculum and instructional program there must be cooperation between the professional personnel of both the public and nonpublic schools.

Furthermore, there is nothing in the School Code to prevent public school district officials from (1) cooperating with one another, (2) hiring a private contractor or vendor, or (3) requesting the services of the local intermediate unit to devise and deliver a program of field trip transportation for nonpublic school pupils.

Some examples to illustrate the kinds of cooperation that are permissible under existing statutes are the following:

*Example 1. Joint action among school districts.*

Where the pupils of a nonpublic school are to take a field trip and these pupils are residents of two or more public school districts, these districts may take joint action to arrange the necessary transportation and each of the several school districts can then share the per capita cost of the field trip. Section 521 of the Public School Code of 1949, P.L. 30, provides:

Each board of school directors shall have power to enter into agreements with other political subdivisions, in accordance with existing laws, . . . in performing governmental powers,

duties, and functions, and in carrying into effect provisions of law relating to said subjects, which are common to all such political subdivisions. (24 P.S. § 5-521).

Thus, the cooperating districts could hire a bus contractor to provide the transportation services and prorate the costs amongst themselves, or one of the cooperating districts could provide the service with district owned equipment and charge back the costs to each of the other cooperating districts. Likewise, the professional service necessary to coordinate the academic planning for the field trip could be provided by one of the cooperating public school districts.

*Example 2. Intermediate units as coordinators.*

Intermediate units may convene a meeting of representatives of member school districts and nonpublic schools to devise a plan for the provision of transportation for field trips for nonpublic school pupils. The School Code is explicit in making this authorization:

Nothing contained herein shall prohibit intermediate units from receiving funds from school districts and other sources including nonpublic nonprofit schools and expending such funds to provide additional services not included in the approved program of services. (24 P.S. Section 9-957).

The intermediate unit can contract for specialized services (24 P.S. § 9-964(8)) such as field trip transportation and may also provide for and conduct programs of services authorized by the State Board of Education, including services performed under contract with component school districts (24 P.S. § 9-964(7)).

IV. Other questions have been raised previously in administering Act 372 and our answers to these also apply to the implementation of the field trip provisions of the statute.

- A. *Question:* If an otherwise eligible nonpublic school pupil is attending a school located outside the boundaries of a public school district but within a ten mile radius of the school district's perimeter, is that pupil entitled to transportation under Act 372?

*Answer:* Yes. The statute makes eligible by specific reference pupils in nonpublic schools located "... outside the district boundaries at a distance not exceeding ten miles. . . ." See *Attorney General's Opinion No. 61 of 1973*.

- B. *Question:* Are pupils attending nonpublic schools located within the ten mile statutory limitation eligible for Act 372 services if the nonpublic school is located outside of Pennsylvania in a neighboring state?

*Answer:* Yes. This question was litigated by the Garnet Valley school district and in an opinion which was affirmed by the Commonwealth Court of Pennsylvania, the court below held:

"... the Act states no requirement that the ten mile limitation upon children attending schools not for profit is limited to the confines of the Commonwealth. Indeed there would be no logic for such a position since the cost base is the same regardless of whether the children are transported from Concord to Chester or to Wilmington (Del.)." *Garnet Valley School District v. Hanlon*, 15 Pa. Commonwealth Ct. 476, 480-481, 327 A. 2d 215, 217 (1974).

- C. *Question:* If a school district provides field trip transportation for public school pupils must it provide field trip transportation for nonpublic school children?

*Answer:* Yes. Act 372 provides for transportation services for nonpublic school children<sup>3</sup> if such services are provided for public school children. However, "[t]he power granted to school districts under this section is plenary, absent a showing of bad faith or abuse of discretion. The Act . . . does not require a school district to provide any free transportation at all to any pupils. All that Act 372 does require is that, if the school board elects to provide busing, it must be provided to public and nonpublic school pupils alike." *Roberts v. Board of Directors of School District of Scranton*, 462 Pa. 464, 470, 341 A. 2d 475, 479 (1975).

In summary, Act 372 requires a school district to provide field trip transportation for nonpublic school pupils if field trip transportation is provided for public school pupils.

Very truly yours,

ROBERT E. RAINS  
*Deputy Attorney General*

VINCENT X. YAKOWICZ  
*Solicitor General*

ROBERT P. KANE  
*Attorney General*

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3. In the *Garnet Valley* case the court said: "At the outset it must be noted that this case does not involve any constitutional considerations whatsoever under the free exercise or anti-establishment clauses of the First Amendment of the Federal Constitution.\* Any constitutional objections to the busing of children to nonpublic schools were disposed of in *Rhoads v. School District of Abington Township*, 424 Pa. 202, 226 A. 2d 53 (1967); cert. denied, 389 U.S. 846, 88 Sup. Ct. 36 (sic), appeal dismissed, 389 U.S. 11, 88 Sup. Ct. 61." *Id.* at 480, 327 A. 2d at 217.

\*Editor's note: But see *Wolman v. Walter*, 45 Law Week 4867 (1977).

## OFFICIAL OPINION No. 76-36

*Act of October 5, 1972, P.L. 2019, (No. 4, First Special Session of 1972)—Department of Community Affairs—Urban Redevelopment Assistance.*

1. The Department of Community Affairs may expend money appropriated by the Act of October 5, 1972, P.L. 2019, (No. 4, First Special Session of 1972) in those areas that were affected by tropical storm Eloise in September of 1975, only if those areas were also affected by either the storms of September, 1971 or June, 1972.
2. The term "areas affected" within the context of Act No. 4, are those areas materially influenced or altered by direct result of the September, 1971 or June, 1972 storms and floodings.
3. "Urban redevelopment assistance" as expressed in Act No. 4 contemplates activities within an urban renewal area carried out in accordance with the provisions of the Housing and Redevelopment Assistance Law, the Redevelopment Cooperation Law, and Urban Redevelopment Law.

Harrisburg, Pa. 17120  
December 30, 1976

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

Dear Secretary Wilcox:

You have asked us the following questions concerning the Act of October 5, 1972, P.L. 2019, (No. 4, First Special Session of 1972).

*Question #1*—May the Department of Community Affairs expend monies appropriated by Act No. 4 for disaster assistance response to the flooding caused by tropical storm Eloise in September of 1975?

*Question #2*—Are the "... areas affected by the Great Storm and Floods of September, 1971 and June, 1972. . . ." those areas of the Commonwealth that were proclaimed as disaster areas by both the Commonwealth and the Federal Government?

*Question #3*—Does the term "urban redevelopment assistance" in Act No. 4 refer to activities within an urban renewal area carried out in accordance with the several redevelopment acts administered by the Department of Community Affairs?

For the reasons set forth below, we are of the opinion, and you are hereby advised, that:

*Answer #1*—The Department of Community Affairs may not expend monies appropriated by Act No. 4 for the sole purpose of disaster assistance to flooding caused by tropical storm Eloise. The Department may use these funds for "urban redevelopment assistance" in "areas affected" by either the storms of September, 1971 or June, 1972, regardless of the effects on those areas by tropical storm Eloise.

*Answer #2*—The "areas affected", within the meaning of Act No. 4, are those areas materially influenced or altered by a direct result of the September, 1971 or June, 1972 storms and flooding; that is, areas where damage due to flooding and rising waters actually occurred.

Answer #3—"Urban redevelopment assistance", as contained in Act No. 4, contemplates activities within an urban renewal area carried out in accordance with the provisions of the Housing and Redevelopment Assistance Act, the Redevelopment Cooperation Law and the Urban Redevelopment Law.

### ANALYSIS

Section 1 of Act No. 4 of the First Special Session of 1972 provides:

"Pursuant to the provisions of clause (1) of subsection (a) of section 7 of Article VIII of the Constitution of the Commonwealth of Pennsylvania, the Commonwealth is hereby authorized and directed to borrow, from time to time, money not exceeding in the aggregate the sum of one hundred million dollars (\$100,000,000), *as may be found necessary to carry out the rehabilitation of areas affected by the Great Storm and Floods of September, 1971 and June, 1972 through urban redevelopment assistance.*" (Emphasis added.)

Section 3 of the Act provides *inter alia*:

"(a) The proceeds from the sale of bonds issued pursuant to the provisions of this act shall be paid to the State Treasurer and be held in a separate fund to be known as the *Disaster Relief Fund*. (Emphasis added.)

(b) The moneys in the Disaster Relief Fund are hereby *specifically dedicated to meeting the costs of rehabilitation of areas affected by the September, 1971 and June, 1972 disaster, for urban redevelopment assistance. The moneys shall be paid by the State Treasurer to the Department of Community Affairs to pay costs at such time as the department certifies the same to be legally due and payable.*" (Emphasis added.)

### Question #1

Section 3(b) of Act No. 4 states that the debt authorization is to be used to rehabilitate "areas affected by the September, 1971 and June, 1972 disaster." Thus the Department of Community Affairs has the power and duty to use the money borrowed and appropriated by authority of Act No. 4, through urban redevelopment assistance, for the purpose of aiding in the rehabilitation of areas affected by the September, 1971 or June, 1972 flood disasters.

Act No. 4 leaves it within the discretion of the Department of Community Affairs to determine the amount of assistance to be granted to each applicant. The Department of Community Affairs must act reasonably, however, and not abuse this discretion by acting in bad faith, fraudulently or capriciously. *Blumenschein v. Pittsburgh Housing Authority*, 379 Pa. 566, 109 A. 2d 331 (1954).

In our opinion, the Department of Community Affairs would be employing a reasonable application of its discretion by providing urban

redevelopment assistance from the Disaster Relief Fund to areas of the Commonwealth affected by either the disaster of September, 1971 or June, 1972 and the disaster of September, 1975 caused by tropical storm Eloise. The Department of Community Affairs may use funds from the Disaster Relief Fund to provide assistance for the rehabilitation of areas affected by tropical storm Eloise, so long as these areas were also affected by the September, 1971 or June, 1972 disasters. However, it should be pointed out that the Department may not refuse to fund certain projects simply because an area was not affected by Eloise.

### Question #2

Act 4 does not define the term "areas affected" by the floods of September, 1971 and June, 1972. However, for the purpose of providing redevelopment assistance, we are of the opinion that the "areas affected" are those areas of the Commonwealth which actually experienced damage due to the storms and floods of September, 1971 and June, 1972.

*Webster's Third New International Dictionary* defines "affect" as "to produce a material influence upon or alteration in". Thus, although Agnes might have somehow affected the entire State, it was the intention of the General Assembly to limit the scope of Act No. 4 to those areas where the storms of September, 1971 or June, 1972 produced a material influence or alteration of the environment, i.e. to those areas where damage occurred as a direct result of the storms and flooding. Furthermore, in order to conform to Article VIII, § 7 of the Pennsylvania Constitution, Act No. 4 must be read to authorize rehabilitation of only those areas of the Commonwealth materially influenced or altered by the storms or floods of September, 1971 or June, 1972.

### Question #3

Act No. 4 states that the debt authorization is to be used for "urban redevelopment assistance". However, the Act does not define that term. The Department of Community Affairs does administer several acts concerned with urban redevelopment assistance, including the Urban Redevelopment Law, 35 P.S. § 1701, *et seq.*, the Housing and Redevelopment Assistance Law, 35 P.S. § 1661, *et seq.*, and the Redevelopment Cooperation Law, 35 P.S. § 1741, *et seq.* Because the aforementioned acts are all concerned with the same subject matter, the Department should read the provisions of the aforementioned acts *in pari materia* with Act No. 4. 1 Pa. C.S. § 1932. In this manner, the Department of Community Affairs may utilize the funds generated by Act No. 4 to accomplish the purposes of the aforementioned acts. The purposes include such matters as contributing to the cost of housing projects offered for occupancy to tenants of limited income, making grants to municipalities or redevelopment authorities for carrying out housing projects and developments, selling or leasing property to redevelopment authorities, furnishing or dedicating recrea-

tional or community facilities and other like activities pursuant to the aforementioned Acts.

### CONCLUSION

In conclusion, it is our opinion that the Department of Community Affairs may expend funds appropriated by Act No. 4 in areas materially influenced or altered by tropical storm Eloise in September 1975, as long as those areas were also affected by the storms and flooding of September, 1971 or June, 1972. The Department may use the funds to effect "urban redevelopment assistance". Those activities constituting urban redevelopment assistance are enumerated in the Urban Redevelopment Law, 35 P.S. § 1701, *et seq.*, the Housing and Redevelopment Assistance Law, 35 P.S. § 1661, *et seq.*, and the Redevelopment Cooperation Law, 35 P.S. § 1741, *et seq.*

Very truly yours,

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VINCENT X. YAKOWICZ  
*Solicitor General*

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### OFFICIAL OPINION No. 76-37

*Department of Agriculture/Farm Show Arena—First Amendment Freedoms—Constitutional Law.*

1. The State Farm Show Arena is a public facility appropriate for the expression of First Amendment rights.
2. The International Movement for Krishna Consciousness and other religious groups have a First Amendment right to proselytize their religious beliefs at the annual Farm Show.
3. The Department of Agriculture may act to limit the activities of the Hare Krishna Movement or other religious groups in the Farm Show Arena in order to promote the interests of the public at large, maintain public order or preserve the essential character and nature of the Farm Show.

Harrisburg, Pa. 17120  
December 30, 1976

Honorable Raymond J. Kerstetter  
Secretary of Agriculture  
Harrisburg, Pennsylvania

Dear Secretary Kerstetter:

You have requested our opinion regarding the right of the International Movement for Krishna Consciousness to distribute literature,

solicit contributions and, in general, propagate their religious beliefs at the Farm Show Complex during the annual Farm Show. Specifically, you have asked whether members of the International Movement for Krishna Consciousness (hereinafter referred to as the Hare Krishna Movement), or other religious groups, may, in the exercise of their First Amendment rights, enter the Farm Show Complex during the Farm Show and circulate generally throughout the Complex without leasing a designated space for their activities. It is our opinion, and you are hereby advised, that members of the Hare Krishna Movement, and other religious groups, do have a First Amendment right to distribute literature and solicit donations in the Farm Show Complex during the time of the annual Farm Show as long as their activities are peaceful, orderly and do not disrupt the Farm Show or destroy the purpose of the Show.

The Farm Show Complex is a State owned building which is controlled by the State Farm Products Show Commission, a bureau within the Department of Agriculture. Among the duties of the State Farm Products Show Commission is the power

“[t]o formulate plans for, and conduct and manage, exhibitions, to embrace exhibits of all agricultural, industrial, and artistic products, including exhibits of all classes of farm products, embracing live stock, dairying, horticulture, all classes of manufacture, industries, and domestic arts, and such other exhibits as will best advance the interests of agriculture and the other industries of the Commonwealth.” 71 P.S. § 449(a)

Pursuant to this authority the Commission annually stages the Farm Show. During the Farm Show, various persons and organizations are invited to enter and lease a specifically designated area within the Complex. Most of the exhibitors are engaged in commercial activities which are related to agriculture. However, various religious and charitable organizations, such as the American Cancer Society and the Pennsylvania State Sunday School Association, have also, in the past, rented space. No exhibitors are allowed to enter the Complex and circulate throughout the premises or enter free of charge. All exhibitors are charged a certain fee for their space, dependent upon the amount of space desired and the location of that space. Furthermore, all exhibitors are subject to the same rules set forth in a standard contract agreement. However, the members of the Hare Krishna Movement contend that they should, in the exercise of their First Amendment rights, be permitted to enter the building without leasing space and circulate throughout the Farm Show Complex to proselytize their beliefs.

It is beyond dispute that the freedoms guaranteed by the First Amendment are fundamental and are applied to the states by the Fourteenth Amendment. It is also beyond dispute that there is sufficient “state action” present to trigger the requirements of the Fourteenth Amendment. The Farm Show Complex is owned and operated

by the Commonwealth of Pennsylvania. The annual Farm Show is operated pursuant to the control and direction of the State Farm Products Show Commission. Therefore, the issue is narrowed to whether members of the Hare Krishna Movement have a constitutional right to enter the Farm Show Complex during the Farm Show and proselytize their beliefs without leasing a designated space within the Complex.

The courts have held that in order for First Amendment rights to attach to State owned property, it must be held open to the public. Several courts have considered the nature of different types of facilities to determine whether they have historically and in actuality been open to the public. The earliest decisions dealt with sidewalks, parks and streets. In *Hague v. CIO*, 307 U.S. 496, 515 (1939), the Supreme Court held:

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. . . ."

See also *Greer v. Spock*, 424 U.S. 828 (1976) and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

Other places which, for at least limited purposes, have been declared public places are: airports, *International Society for Krishna Consciousness v. Dallas-Fort Worth Regional Airport Board*, 391 F. Supp. 606 (N.D. Texas 1975); bus terminals, *Wolin v. Port of New York Authority*, 392 F. 2d 83 (2nd Cir. 1968); public schools, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); a state office building housing an unemployment office, *Unemployed Workers Union v. Hackett*, 332 F. Supp. 1372 (D.R.I. 1971); a State House, *Toward A. Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation*, 417 F. Supp. 632 (D.R.I. 1976); and a municipal auditorium, *Southeastern Promotions Ltd. v. City of West Palm Beach*, 457 F. 2d 1016 (5th Cir. 1972).

Other government owned or controlled facilities have not been held to be open to the public for the exercise of First Amendment rights: prisons, *Adderley v. Florida*, 385 U.S. 39 (1966); mass transit facilities, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); a federal military base, *Greer v. Spock*, 424 U.S. 828 (1976); a city council chamber during a council meeting, *State v. McNair*, 178 Neb. 763, 135 N.W. 2d 463 (1965); and, by way of dicta, hospitals, libraries and office buildings, *Chicago Area Military Project v. City of Chicago*, 508 F. 2d 921 (7th Cir. 1975).

The question of whether the Farm Show Complex itself is a public facility must now be resolved. The Complex is operated by the Commonwealth and is funded with public monies. In addition, the State

Farm Products Show Commission has the authority under Section 1709 of the Administrative Code of 1929, 71 P.S. § 449

"[t]o lease space to exhibitors, including the departments, boards, and commissions of the State Government, and to lease the Farm Show Building, at any time, to individuals, associations, or corporations, for exhibitions, conventions, or other proper purposes. . . ."

To that end, the Commission has leased the building for various meetings, conventions and sporting events regardless of whether they are related to agriculture. Furthermore, as previously indicated, exhibitors during the Farm Show have included organizations which were not necessarily tied to agriculture.

In *Southeastern Promotions Ltd. v. City of West Palm Beach*, 457 F. 2d 1016 (5th Cir. 1972), the court had to determine whether a municipal auditorium was a public place. The court in reaching its decision had little difficulty.

"[T]his municipal facility was constructed by the citizens of West Palm Beach and funded with public monies. In addition, the auditorium is maintained at the expense of the taxpayers, and it is managed by the duly elected and appointed officials of the city. Therefore, it is undisputed that the West Palm Beach Municipal Auditorium is a public facility." 457 F. 2d 1016, 1018-1019 (5th Cir. 1972)

Furthermore, the considerations apparent in those cases where the courts thought government facilities were not open to the public<sup>1</sup> are not evident in this instance. Therefore, it is quite clear that the Farm Show Arena does qualify as a public facility.

Once a facility has been designated as being open to the public, the inquiry does not end. The government still might constitutionally restrict the exercise of First Amendment rights therein. See *Cox v. Louisiana*, 379 U.S. 536, 554 (1965); *Chicago Area Military Project v. City of Chicago*, 508 F. 2d 921, 925 (7th Cir. 1975); and *Toward A. Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation*, 417 F. Supp. 632, 638 (D.R.I. 1976).

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1. In *Adderley v. Florida*, 385 U.S. 39 (1966), the Court relied heavily on the need for security in holding that a prison was not a public place. In *Greer v. Spock*, 424 U.S. 828 (1976), the majority stressed the need for discipline and order in training soldiers; in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the fact that passengers on mass transit vehicles represented a captive audience swayed the Court. Finally, in *State v. McNair*, 178 Neb. 763, 135 N.W. 2d 463 (1965), the decision rested on the fact that plaintiffs had intended to disrupt a municipal council meeting through the exercise of their freedom of speech. It is apparent that the facts which influenced the courts in the preceding cases, such as the overriding need for security and discipline, are absent in the instant matter.

The test for determining when the government may restrict the exercise of First Amendment rights in a public facility was best expressed in *Wolin v. Port of New York Authority*, 392 F. 2d 83, 89 (2d Cir. 1968). The court in *Wolin* held

“[W]here the issue involves the exercise of First Amendment rights in a place clearly available to the general public, the inquiry must go further: does the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance.”

The test, as expressed in *Wolin*, turns on the question of whether the forum is appropriate for the expression of First Amendment rights.

In the present case, the Farm Show Complex consists of a large auditorium (the Arena) and several small surrounding halls and rooms. Movement from one area to another is facilitated by several connecting passageways. During the annual Farm Show, exhibitors lease space in the auditorium and surrounding halls, and the public is invited to enter and view the exhibits. During a normal day several thousand persons will visit the Farm Show and view the exhibits. The essential purpose of the Farm Show, according to Section 1709 of the Administrative Code of 1929, 71 P.S. § 449(a), is the promotion of agriculture and other industries of the Commonwealth. However, as previously indicated, exhibitions not related to agriculture are permitted within the Complex and the invitation is to the public at large.

Utilizing the *Wolin* test, it is evident that the Farm Show is not an inappropriate forum for the expression of First Amendment rights. It is a facility designed so that large numbers of people may move around easily and, indeed, the purpose of the Farm Show is to attract a large segment of the public. Therefore, subject to the subsequently enumerated conditions, the Hare Krishna Movement may proselytize its religious beliefs during the annual Farm Show.

While the Farm Show Complex may be a public place which is appropriate for the expression of First Amendment rights, the Department of Agriculture is not powerless to regulate the nature of the Farm Show and conduct of the Hare Krishna Movement at the Farm Show.

“The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.” *Cox v. Louisiana*, 379 U.S. 536, 554 (1965).

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. . . . The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order." *Hague v. CIO*, 307 U.S. 496, 515, 516 (1939)

Therefore, the right of the Hare Krishna Movement to proselytize its beliefs at the annual Farm Show may be limited by the Commonwealth in order to preserve the interests of the public in general. The question then arises as to how and when the Commonwealth may limit the exercise of First Amendment rights.

Several cases have held that the State may limit the expression of First Amendment rights in order to preserve public peace and protect the general order. *Cox v. Louisiana*, 379 U.S. 536 (1965); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Benson v. Rich*, 448 F. 2d 1371 (10th Cir. 1971). Therefore, the State may act to suppress or to prevent an imminent breach of peace or the disruption of its activities. However, it should be pointed out that one's First Amendment rights may not be abridged because of the possibility of disorder on the part of others. *Brown v. Louisiana*, 383 U.S. 131, 133 (1966); *Wright v. Georgia*, 373 U.S. 284, 293 (1963).

The Department of Agriculture may also act to limit the activities of the Hare Krishna Movement if its activities alone, or combined with the activities of other groups in similar circumstances, threaten the essential nature of the Farm Show.

"The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. State of Florida*, 385 U.S. 39, 47 (1966).

See also *Greer v. Spock*, 424 U.S. 828 (1976) and *Benson v. Rich*, 448 F. 2d 1371 (10th Cir. 1971).

The essential purpose of the Farm Show, as previously indicated, is the advancement of agriculture and other industries of the Commonwealth of Pennsylvania. If the actions of the Hare Krishna Movement, or other groups exercising their First Amendment rights, threaten seriously to impair or destroy the primary purpose of the Farm Show, then the Department of Agriculture may take action to limit the expression of First Amendment rights and preserve the purpose of the Farm Show.

Finally, it should be pointed out that although the Hare Krishna Movement solicits contributions in order to defray its costs, it is of no consequence and does not remove its activities from the protection afforded by the First Amendment. As long as the solicitation of funds

remains incidental to the essential nature of its purpose, the propagation of its religious beliefs, the Hare Krishna Movement may solicit contributions under the protection of the First Amendment. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *International Society for Krishna Consciousness v. City of New Orleans*, 347 F. Supp. 945 (E.D. La. 1972).

In conclusion, it is our opinion, and you are hereby advised, that the Hare Krishna Movement and other religious groups do have a First Amendment right to proselytize their religious beliefs at the annual Farm Show and to solicit donations to defray costs. However, the Department of Agriculture may act to limit the activities of the Hare Krishna Movement in order to promote the interests of the public at large, maintain public order or preserve the essential character and nature of the Farm Show. Prior to taking any action that would limit the activities of the Hare Krishna Movement, or other religious groups at the Farm Show Complex, the Department of Agriculture should consult with the Justice Department.<sup>2</sup>

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

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2. A question does arise as to whether the Department of Agriculture, by permitting members of the Hare Krishna Movement to enter the Complex during the Farm Show and proselytize their beliefs, has violated the Establishment Clause of the First Amendment. A review of decisions involving the Establishment Clause demonstrates that this is not the case.

The test to determine whether certain state activities violate the Establishment Clause is best enunciated in *School District of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963):

"[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

See also *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

In the instant case the purpose and effect of permitting members of the Hare Krishna Movement to proselytize their beliefs at the annual Farm Show, is simply to afford them the same opportunity to exercise their First Amendment rights, in an appropriate place, as would be afforded any other group.

A review of *Keegan v. University of Delaware*, 349 A. 2d 14 (Del. 1975) is instructive. In *Keegan*, the court held that the University of Delaware did not run afoul of the Establishment Clause by allowing a Roman Catholic group to hold religious services in the commons room of a dormitory. The court held that no violation of the Establishment Clause occurred where religious groups were allowed the same rights and privileges attendant the use of the commons room as were accorded other groups. Accepting the decision in *Keegan*, where the court permitted a religious service in the state owned dormitory, the Department of Agriculture, *a fortiori* does not violate the Establishment Clause in this matter where there is no religious service.

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