Commonwealth of Pennsylvania

MILTON J. SHAPP

Governor

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OPINIONS

OF THE

# Attorney General

OF

# Pennsylvania

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# 1977

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## OFFICIAL OPINION NO. 77-1

*Public School Employes' Retirement Board—Independence from Governor's Office*

1. The Public School Employes' Retirement Code, 24 Pa. C.S. § 8101, *et seq.*, designated the Public School Employes' Retirement Board as an "independent administrative board" and thereby repealed those sections of the Administrative Code of 1929 which previously placed the Board within the Department of Education.
2. Board members, as trustees of the pension fund, are designated as fiduciaries and may contract for certain professional services, with the exception of independent legal counsel, without the necessity of obtaining approval from other than the Board's counsel and its comptroller.
3. The Governor's Office is merely a conduit for the two budgets of the Board and may not exercise any approval or disapproval authority over the proposed expenditure. The Board has complete control, subject only to legislative approval, of its budgetary requirements.
4. Notwithstanding the Board's independence, it must comply with those sections of the Administrative Code pertaining to independent administrative boards, and to the extent that the Office of Administration is involved in implementing those provisions, the Board should adhere to Office of Administration guidelines and objectives.
5. The Board acts primarily in a proprietary capacity with exclusive control over the Public School Employes' Retirement Fund and its investments and derives its administrative expenses from excess earnings of the Fund. As such, it cannot be characterized as a General Fund agency.

Harrisburg, Pa. 17120
February 1, 1977

Fred M. Heddinger, Chairman
Public School Employes' Retirement Board
Harrisburg, Pennsylvania

Dear Mr. Heddinger:

You have requested our advice as to whether the Public School Employes' Retirement Board (PSERB or Board), as an independent administrative board under the Public School Employes' Retirement Code, Act 96 of 1975, 24 Pa. C.S. § 8101, *et seq.*, is subject to the jurisdiction of the Governor's Office with regard to budgetary matters and the awarding of professional service contracts.

Answering these questions requires a reading of the Retirement Code and its impact upon the Administrative Code of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 51, *et seq*. Under prior law, and especially Sections 202, 410 and 1308 of the Administrative Code (71 P.S. §§ 62, 120 and 358), the PSERB was a departmental administrative board in the Department of Public Instruction, now known as the Department of Education. In this capacity the Board was subject to departmental control as provided in Section 503 of the Administrative Code, *supra* 71 P.S. § 183. This status was also confirmed by the Public School Employes' Retirement Code of June 1, 1959, P.L. 350, *as amended*, 24 P.S. § 3101, *et seq.*, (repealed). However, Act 96 of 1975, *supra*, effective October 2, 1975, designated the PSERB, in Section

8501 thereof, as an "independent administrative board". While there exists no Attorney General's opinion or any Pennsylvania statutory or judicial authority which defines the legal relationships of independent boards to the Executive branch of state government, it is clear that Act 96 specifically repealed Sections 410, 1308 and that portion of Section 202 of the Administrative Code which previously placed the Board within the Department of Education.

Under the provisions of Act 96, the function of managing the Public School Employes' Retirement Fund is uncontrovertably one which the Board exercises independent of any control by the Governor's Office. The Board members, as trustees of the pension fund, are designated as fiduciaries (Section 8521(e) ) and may contract for certain professional services as they deem advisable, with the exception of independent legal counsel, without the necessity of obtaining approval from other than the Board's counsel and its comptroller.

The only references to the Governor which appear in Act 96 are found in Sections 8330(a) and 8502(c), both of which deal with the submission of a budget. Section 8330(a) requires that the Board prepare and submit annually, through the Governor to the General Assembly, amounts necessary to be appropriated by the Commonwealth out of the General Fund to fund the Commonwealth's share as an employer for the payment of various retirement benefits accruing during the fiscal period beginning July 1 of the following year. Similarly, Section 8502(c) requires the Board, "through the Governor [to] submit to the General Assembly annually a budget covering the administrative expenses. . . ." Expenses approved by the General Assembly are to be paid from excess investment earnings of the Retirement Fund, "except that if in any year such earnings are not sufficient the balance required shall be appropriated from the General Fund."

Prior law, Article V of the Public School Employes' Retirement Code of 1959, *supra,* 24 P.S. § 3501(3) and Section 601 of the Administrative Code of 1929, *supra,* 71 P.S. § 221, specifically provided for a review and approval of the Board's budget by the Governor's Office. The absence of any language in Act 96, expressed or implied, giving the Governor approval or disapproval authority over the Board's budgets, whether for administrative expenses or for annual employer contributions, indicates that the Governor no longer has such authority. Section 1971, Statutory Construction Act of December 6, 1972, P.L. 1339, *as amended*, 1 Pa. C.S. § 1971. In fact, Section 8502(k), providing for certification by the Board of the percentage of members' payroll necessary to fund employer and Commonwealth contributions, provides that "These certifications shall be regarded as final and not subject to modification by the Budget Secretary." To further emphasize this point, Section 8330(b) mandates that the General Assembly make an appropriation sufficient to provide for the Commonwealth's obligations, with such amounts to be paid quarterly by the State Treasurer through the Department of Revenue. The plain meaning of these sections is that

the Governor's Office is merely a conduit for the two budgets of the Board and may not exercise any approval or disapproval authority over the proposed expenditure. The Board has complete control, subject only to legislative approval, of its budgetary requirements.

Notwithstanding the foregoing, we wish to caution you that independent administrative boards under the Administrative Code are charged with varying responsibilities, not the least of which is that they must coordinate their work and cooperate with other departments, boards and commissions. Section 507 of the Administrative Code, *supra*, 71 P.S. § 187, establishes purchase parameters with which an independent administrative board must comply, but provides, as an exclusionary provision, the authority for an independent board to make certain repair purchases, to contract for utility service, to employ professional or skilled labor and to subscribe to certain periodicals and memberships in governmental associations. It is clear that an administrative board, such as the PSERB, must comply, to the extent applicable, with those sections of the Administrative Code dealing with records, microfilming, records systems, repairs of buildings, placing various insurance coverages, providing for the disposition of unservicable property and equipment, and the other activities enumerated in Article V of the Administrative Code. The Board should also comply with those provisions of Section 701 of the Administrative Code, *supra*, 71 P.S. § 241, which authorize the Governor to prescribe and implement a uniform system of accounting and financial reporting, as well as the provisions of Section 709, 71 P.S. § 249, relating to the powers of the Executive Board. Likewise, the Board is obligated to comply with the provisions of Article II of the Administrative Code, insofar as those provisions are applicable to all independent administrative boards. These situations are indicative of the Board's duty to comply with the Administrative Code, and, to the extent that the Office of Administration is involved in implementing those provisions of the Code, the Board should adhere to the Office of Administration guidelines and objectives.

Finally, it must be recognized that the PSERB administers a pension program which is not within the ordinary sphere of governmental activity. It acts in a primarily proprietary capacity for and on behalf of public school employes. Section 8521(a) of Act 96 provides that members of the Board shall be trustees of the Public School Employes' Retirement Fund, with exclusive control and management authority over the Fund and its investments, subject to other limitations imposed by law which are not relevant to this inquiry. This specific duty obviates the application of that provision of Section 701 of the Administrative Code, *supra*, which authorizes the Governor to approve or disapprove all investments. While the Commonwealth meets its obligations by paying one-half of the employer's share for retirement benefits, nevertheless, once that obligation is satisfied and the money deposited in the Retirement Fund for investment and other statutory purposes,

that money loses its identity as Commonwealth funds and becomes trusteed funds earmarked for a particular purpose. Also, one cannot ignore the fact that the PSERB, operating within its statutory mandate, pays its administrative expenses from the excess earnings of the Fund it administers and, in essence, is self-supported to the extent that such earnings are sufficient to cover them. Consequently, the PSERB cannot be categorized as a General Fund Agency.

It is hoped that the views outlined above sufficiently describe the relationship of the PSERB to the Governor's Office. This is admittedly a complex area and we suggest that if, in the process of further determining the relationship of the PSERB to the Executive branch, you have any specific questions regarding the independent status of the Board, please feel free to consult this office. We will endeavor to advise you as to those specific questions.

Very truly yours,

ALAN M. BREDT
*Deputy Attorney General*

VINCENT X. YAKOWICZ
*Solicitor General*

ROBERT P. KANE
*Attorney General*

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## OFFICIAL OPINION NO. 77-2

*Certain monies transferred from the Navigation Commission for the Delaware River to the Pennsylvania Fish Commission.*

1. The net fines, fees and penalties collected under the Motor Boat Law have been transferred from the Navigation Commission for the Delaware River to the Pennsylvania Fish Commission.
2. Section 6 of the act of July 9, 1976 (P.L. 980, No. 197) construed.
3. Section 11 of the act of May 28, 1931 (P.L. 202, No. 121), 55 P.S. § 486 (h), known as the Motor Boat Law, construed.

Harrisburg, Pa. 17120
February 18, 1977

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

Dear Mr. Abele:

You have asked our opinion as to whether the net fines, fees and penalties collected under the Motor Boat Law have been transferred from the Navigation Commission for the Delaware River to the Pennsylva-

nia Fish Commission by the act of July 9, 1976 (P.L. 980, No. 197). Please be advised as follows.

The Motor Boat Law[1] provides that all fees, fines and penalties collected by the Fish Commission on boats owned by residents of Bucks, Delaware, and Philadelphia counties are "appropriated" to the Navigation Commission for that Commission's use in administering its responsibilities under that act. These responsibilities include, as to the counties of Bucks, Delaware and Philadelphia, the maintenance of the Delaware River for use by recreational crafts. These duties have been transferred to the Pennsylvania Fish Commission by the Act of July 9, 1976 (P.L. 980, No. 197). Section 6(a) of that act states in pertinent part that "personnel, files, records, equipment (including patrol boats) and all appropriations and allocations relating to recreational craft or to the proper maintenance of the Delaware River for use by recreational craft . . . shall be transferred to the Pennsylvania Fish Commission." The appropriations and allocations so transferred are the fees, fines and penalties collected under the Motor Boat Law because these are the monies formerly used by the Navigation Commission for the maintenance of the Delaware River for recreational craft. Since these responsibilities are now lodged in the Pennsylvania Fish Commission, the monies identified with them must be the monies intended to be transferred under section 6 of Act 197. Furthermore, since these are the only monies associated with the Navigation Commission for the maintenance of the Delaware River, and since this function is transferred to the Fish Commission, the General Assembly clearly intended to transfer the monies as well as the duties. In other words, where Act 197 speaks of transferring appropriations and allocations relating to recreational craft or the proper maintenance of the Delaware River for use by recreational craft, it could only have meant the net fees, fines and penalties collected under the Motor Boat Law. The General Assembly could hardly have meant to transfer the functions to the Fish Commission while leaving the monies identified with that function in the Navigation Commission without attendant similar duties.

This result is also correct insofar as the Motor Boat Law is repealed to the extent it is inconsistent with Act 197. The Motor Boat Law is inconsistent with Act 197 because it calls for the fees, fines and penalties to be appropriated to the Navigation Commission while Act 197 says that they are transferred to the Fish Commission. Therefore, Act 197 clearly supersedes the Motor Boat Law by providing that these appropriations are transferred to the Fish Commission.

In accordance with section 512 of the Administrative Code of 1929, 71 P.S. § 192, you are advised that the Department of the Auditor General and the State Treasurer have had an opportunity to review this opinion and express their views on its contents.

1. The act of May 28, 1931 (P.L. 202, No. 121), § 11, as amended, 55 P.S. § 486(h).

In conclusion, please be advised that the net fees, fines and penalties collected by the Fish Commission under the Motor Boat Law shall be retained by the Fish Commission for use in its new duties as transferred to it by Act 197 of 1976.

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. 77-3

*Item Veto by Governor—Law Passed by General Assembly Over Veto—Resulting Action Constitutes One Law—Form of Citation.*

1. Article IV, § 16 of the Pennsylvania Constitution construed.
2. Article III, § 1 of the Pennsylvania Constitution construed.
3. Governor's item veto of Senate Bill 1599, Printer's No. 2017 (1976) construed and analyzed.
4. The act of July 9, 1976 (P.L. 1461, No. 53-A) construed.

Harrisburg, Pa. 17120
February 18, 1977

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

Dear Secretary Tucker:

You have asked my opinion as to the legal consequences arising from the action of the General Assembly in overriding Governor Shapp's item veto of Senate Bill 1599, Printer's No. 2017.

Senate Bill 1599 was finally approved by the General Assembly and transmitted to the Governor on June 30, 1976. The bill provided a 4.5 million dollar appropriation to the Western Psychiatric Institute and Clinic. On July 9, 1976, the Governor exercised his item veto power pursuant to Article IV, § 16 of the Pennsylvania Constitution, by reducing the amount of the appropriation to four million dollars and approving the bill in that amount.[1] The General Assembly voted on Sep-

1. Governor Shapp indicated his reasons for the item veto in a message sent to the Senate on July 9, 1976. He stated that he withheld ". . . approval from the balance of this appropriation because funds in excess of $4,000,000 were not included in my 1976-77 budget for this purpose."

tember 21, 1976 to restore the five hundred thousand dollars disapproved by the Governor.

Article IV, § 16 of the Constitution provides, inter alia, that ". . . items of appropriation disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of other bills over the Executive veto." In the case of Senate Bill 1599, the bill was forwarded to the State Department in accordance with law for safekeeping and printing, and notice of the partially disapproved item was given the Senate by gubernatorial communication. The bill was removed from the table in the Senate on September 20, 1976, and a motion to override Governor Shapp's item veto was adopted on the same day by a vote of 47—0. The bill was then forwarded to the House of Representatives, which adopted a motion to override the item veto on September 21, 1976, by a vote of 191—3. Clearly, the constitutional requirements for enactment have been satisfied and the additional five hundred thousand dollars is available to the Western Psychiatric Institute and Clinic.

The remaining question concerns the relation of the item passed over the Governor's veto to the bill as approved by the Governor. The Constitution provides in Article III, § 1 that "No law shall be passed except by bill . . . ." Since only one bill is involved in the present case, only one law or act has been passed. Therefore, the act should be cited with reference to the original date of approval by the Governor; in this case Senate Bill 1599 is the Act of July 9, 1976 (P.L. 1461, No. 53-A). Of course, the appropriation item finally approved by the override vote was not enacted on July 9; that item became law on September 21, the day of the vote to override in the second house. (See, Official Opinion of the Attorney General 76-9). Therefore, in order to avoid any confusion in cases where the date of enactment of a particular item is critical, Senate Bill 1599 should be cited as "the act of July 9, 1976 (P.L. 1461, No. 53-A) with items restored by vote of the General Assembly, September 21, 1976." This form should be used in the future for any appropriation acts containing items repassed over the Governor's veto.

It is, therefore, my opinion and you are so advised that the portions of an appropriation bill approved by the Governor, together with any items which have been repassed over the Governor's veto, constitute one act. You are further advised that any act containing items repassed over a gubernatorial veto shall be cited with reference to the date of the Governor's partial approval and the date of the override vote.

Sincerely yours,

CONRAD C. M. ARENSBERG
*Deputy Attorney General*

VINCENT X. YAKAWOCZ.
*Solicitor General*

ROBERT P. KANE
*Attorney General*

## OFFICIAL OPINION NO. 77-4

*Department of Public Welfare—Mental Health Procedures Act of 1976 (Act 143)—Mental Health and Mental Retardation Act of 1966—Mentally Ill Persons Not Yet Recommitted Under Act 143—Persons Committed Under MH/MR Act of 1966 Who Are Not Covered by Act 143*

1. Persons in State mental hospitals committed under the Mental Health and Mental Retardation Act of 1966, for whom recommitment petitions have been filed under Act 143 of 1976, on which the courts have not acted, should be kept in custody and treatment pending court action.
2. Repeal of prior legislation does not invalidate court orders entered under that prior legislation.
3. Subsequent legislation cannot invalidate a judicially imposed mandate on the Department of Public Welfare to provide care for a mentally ill person.
4. The treatment provisions of Article I of Act 143 of 1976 are applicable to all mentally ill individuals in state mental hospitals as of March 6 , 1977.
5. Act 143 of 1976 does not apply to persons who are mentally retarded, senile, alcoholic or drug dependent unless they are also diagnosed as mentally ill. Therefore Act 143 does not mandate the release or segregation of such individuals committed to state mental hospitals under the MH/MR Act of 1966 for whom appropriate discharge plans have not been formulated by March 6, 1977.
6. The Department of Public Welfare owes such individuals a judicially imposed duty of care.
7. The Department of Public Welfare should vigorously continue its efforts to implement appropriate discharge plans for the senile, alcoholic and drug dependent population of its state mental hospitals because of the clear legislative mandate that such persons not be committed in the future.
8. The Department of Public Welfare has no obligation to discharge the state mental hospitals' mentally retarded population in the absence of any legislative intent that commitments of the mentally retarded cease.

Harrisburg, Pa. 17120
March 1, 1977

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

Dear Secretary Beal:

By letter dated February 17, you have asked our opinion on several interrelated questions concerning implementation of the Mental Health Procedures Act of July 9, 1976, P.L. 817, No. 143, 50 P.S. § 7101, et seq., (hereinafter "Act 143"). Because of the nearness of March 6, 1977, the effective date of the Act as to those already undergoing involuntary treatment, I am issuing this opinion treating the first two questions which involve the Department's responsibilities as of then. The answers to the other questions will be forthcoming.*

* Editor's Note: The other questions were subsequently withdrawn by Secretary Beal by letter dated Nov. 15, 1977.

1. What action must be taken regarding mentally ill persons in state mental facilities who were legally committed under the Mental Health and Mental Retardation Act of 1966 Act of Oct. 20, 1966 Special Sess. No. 3, P.L. 96, 50 P.S. § 4101, et seq., (hereinafter "MH/MR Act of 1966") for whom recommitment petitions are filed under Section 304 of Act 143, which petitions have not been adjudicated by the courts as of March 6, 1977?

Any committed person in this category, who in the opinion of the superintendent of the state mental hospital meets the commitment criteria of Act 143, should be kept in custody and treatment pending court action.

Your request indicates that these individuals were committed under Sections 406, 408, 410 or 411 of the MH/MR Act of 1966. Section 502 of Act 143 purports to repeal those sections, among others, of the MH/MR Act, "except so far as they relate to mental retardation or to persons who are mentally retarded."

Section 501 of Act 143 provides:

> Effective Date and Applicability.—This act shall take effect 60 days after its enactment and shall thereupon apply immediately to all persons receiving voluntary treatment. As to all persons who were made subject to involuntary treatment prior to the effective date, it shall become applicable 180 days thereafter.

The sixtieth day was September 7, 1976, and the one hundred and eightieth day thereafter will be March 6, 1977. Thus, on March 6, 1977, the sections of the MH/MR Act under which this group of patients were committed are repealed, and Act 143, by its terms,

> "establishes rights and procedures for all involuntary treatment of mentally ill persons . . . ." Section 103.

Under Act 143, the mentally ill may be committed by a court of common pleas for treatment for periods not to exceed ninety days. Section 304.[1] Act 143 therefore mandates repeated hearings in the case of the long term mentally ill, rather than indefinitely long commitments.

Your request indicates that the Department of Public Welfare's state hospitals have been re-examining patients and filing petitions for recommitment under Section 304 if continued custody and treatment are indicated under the standards established by Act 143. Approximately 7,000 involuntarily committed patients have been re-examined as part of this process. You add, "I am assured that all such petitions will be filed by March 1, 1977, with most filed substantially earlier." This action is an entirely proper effort on the part of the Department to effec-

1. Individuals who have been charged with certain crimes may be committed for a period not to exceed one year under Section 304(g).

tuate Section 103 of Act 143 to make the act applicable to committed individuals.

You expect that court action to grant or deny these petitions will be taken in the vast majority of cases prior to March 6, 1977. However, some cases may not be adjudicated by that date. The practical question then will be: Does the repealer of the commitment sections of the MH/MR Act of 1966 void commitments made thereunder so that the state hospitals must release persons who have not been recommitted?

The answer is, simply, no. Subsequent legislation does not retroactively vitiate proper judicial orders entered under previous legislation. Not only would the legislative overturning of judicial acts violate the principle of separation of powers, but it is also specifically proscribed by the Statutory Construction Act:

> The repeal of any civil provisions of a statute shall not affect or impair any act done, or right existing or accrued . . . . 1 Pa.C.S. § 1976(a).

Furthermore, there is no indication in Act 143 of an intention to void prior commitments.[2]

In a memorandum, dated February 14, 1977, urging all President Judges to schedule Act 143 hearings as rapidly as possible, the Honorable Alexander F. Barbieri, Court Administrator of Pennsylvania, addressed this issue as follows:

> If the petitions have been filed but have not been heard by that date [March 6, 1977], an appropriate petition would have to be filed by the presently committed person to challenge his continued custody, as Act 143 must be interpreted to insure continuity of treatment. Further, in line with the principle that the Legislature would not intend to create an absurd result, the automatic release of all previously involuntarily committed persons should not occur. The same result would apply when the Legislature repeals a criminal statute after persons are convicted and sentenced under it. Such persons do not obtain release without undertaking appropriate legal proceedings to challenge custody . . . .
>
> Further, the Legislature cannot nullify previously entered judicial orders authorized by statute when entered, as it can

2. It should be noted that *Goldy v. Beal,* 429 F. Supp. 640, (M.D.Pa. 1976) which declared unconstitutional Section 406 of the MH/MR Act, similarly does not require the release of persons committed thereunder. "Plaintiffs . . . are not asking this Court to order their release from custody . . . . (T)hey merely seek a declaration that the statute under which they were committed is unconstitutional and an injunction enjoining defendants from enforcing and executing the statute in its present version; if this Court rules in their favor, they will then seek release in state court." *Id.* at 645.

> only impose reasonable limitations on the coordinate branch of government, the Judiciary.[3]

We concur in this view.

The language of Section 501, that Act 143 is applicable on March 6, 1977, to all persons previously subject to involuntary treatment is not wholly self-executing. Act 143 provides commitment procedures that only the courts can apply to the mentally ill. Until a court does so, a prior commitment under the MH/MR Act remains applicable.

The Department is mandated to do all it can to make Act 143 applicable by March 6, 1977 to the mentally ill involuntarily within its state hospitals. It does this by bringing petitions under Act 143 for their recommitment. Further, Section 501 requires the Department to apply the treatment provisions in Article I of Act 143 to all involuntarily committed mentally ill patients, including those who have not yet been recommitted under Act 143, as of then.

Accordingly, you are advised that such lawfully committed mentally ill individuals remain subject to the custody and treatment of the Department in state hospitals after March 6, 1977, pursuant to their commitments under the MH/MR Act of 1966, until such time as there is further court action regarding them. Indeed the original commitment orders imposed a duty upon the Department to provide necessary care for such individuals.

2. What action does Act 143 mandate regarding persons who are presently in state mental hospitals under the MH/MR Act of 1966 who are mentally retarded, senile, alcoholic or drug dependent but who are not mentally ill?

Nothing. Act 143 has no effect upon such people. Act 143, as its title states, is a procedures act which tells the Department of Public Welfare how to deal with the mentally ill. As noted above, Section 103 of Act 143 provides:

> Scope of Act—This act establishes rights and procedures for all involuntary treatment of mentally ill persons, whether inpatient or outpatient, and for all voluntary inpatient treatment of mentally ill persons . . . .

Persons who are not mentally ill are specifically excluded from any coverage under Section 102 of Act 143:

> Persons who are mentally retarded, senile, alcoholic, or drug dependent shall receive mental health treatment only if they are also diagnosed as mentally ill, but these conditions of themselves shall not be deemed to constitute mental illness.

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3. A copy of this memorandum is attached.

Act 143 has no requirements regarding such individuals. It does not require state mental hospitals to separate them from the hospitals' mentally ill population. Nothing in Section 105, "Treatment Facilities", suggests that such facilities must treat the mentally ill exclusively and may not also house and treat other individuals. Thus it does not require the removal from State hospitals of properly committed individuals.

Individuals who are mentally retarded, senile, alcoholic or drug dependent could not be committed under Act 143 unless they are otherwise mentally ill. Also, Section 502 of Act 143 prevents future commitments under the MH/MR Act of 1966 of persons in these categories, except the mentally retarded. However, for all the reasons set forth in the answer to Question 1, above, Act 143 does not invalidate past commitments under the MH/MR Act of 1966 of these individuals nor exempt the Department from its duty to care for such individuals.

You indicate that state hospitals are now in the process of identifying such persons and actively preparing discharge plans, which includes the difficult task of identifying appropriate alternative settings for such persons, and that no recommitment petitions will be filed for such persons. It is our opinion and you are so advised, that by their commitments of these individuals under the MH/MR Act of 1966, the courts have imposed upon the state hospitals the duty to continue to provide care and treatment for such persons after March 6, 1977, pending effectuation of discharge plans.

It is entirely proper for the Department to be discharging from its state mental hospitals the senile, alcoholic and drug dependent population who are not otherwise mentally ill because the General Assembly has indicated in Act 143 that such people should not be committed in the future. This is a clear legislative indication that the Department is supposed to get out of the business of providing custodial care for such persons in its mental hospitals. Accordingly the Department should vigorously continue its efforts to discharge them to appropriate alternative placements.

However, we can find no legal reason for the discharge of the mentally retarded inasmuch as Section 502 of Act 143 specifically preserves the provisions of the MH/MR Act of 1966 regarding them. Therefore, you are further advised that Act 143 cannot be read to mandate any shift in the mentally retarded population in the state mental hospitals.

Sincerely,

ROBERT E. RAINS
*Deputy Attorney General*

VINCENT X. YAKOWICZ
*Solicitor General*

ROBERT P. KANE
*Attorney General*

SUPREME COURT OF PENNSYLVANIA
ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS
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ALEXANDER F. BARBIERI
*Judge*
*Court Administrator of Pennsylvania*

*Deputy Court Administrators*
CARLILE E. KING, *Esquire*
GERALD W. SPIVACK, *Esquire*
LARRY P. POLANSKY, *Esquire*

February 14, 1977

TO: All President Judges

FROM: Alexander F. Barbieri,
Court Administrator of Pennsylvania

RE: The Mental Health Procedures Act, Act 143 of 1976

The Mental Health Procedures Act, Act 143 of 1976, 50 P.S. 101, et seq., provides a new set of commitment procedures which become effective on March 6, 1977 as to all persons involuntarily committed before September 8, 1976. All involuntarily commitments thereafter ordered must be for a term certain not to exceed 90 days in most instances but renewable for subsequent 90-day periods after appropriate hearing.

Most involuntary commitments under the Mental Health and Mental Retardation Act of 1966, most notably under Section 406, were for indefinite terms. All individuals who were committed involuntarily under the 1966 Act must be made subject to a new commitment proceeding under Act 143. The Department of Public Welfare has filed those petitions in advance of the effective date of the new act. Your court should make every effort to dispose of those petitions before March 6, 1977.

If the petitions have been filed but have not been heard by that date, an appropriate petition would have to be filed by the presently committed person to challenge his continued custody, as Act 143 must be interpreted to insure continuity of treatment. Further, in line with the principle that the Legislature would not intend to create an absurd result, the automatic release of all previously involuntarily committed persons should not occur. The same result would apply when the Legislature repeals a criminal statute after persons are convicted and sentenced under it. Such persons do not obtain release without undertaking appropriate legal proceedings to challenge custody. The Department of Public Welfare has requested an opinion from Attorney Gener-

al Kane as to the authority of that Department to hold previously committed individuals after March 6, 1977 when a new commitment order has not yet been entered.

Further, the Legislature cannot nullify previously entered judicial orders authorized by statute when entered, as it can only impose reasonable limitations on the coordinate branch of government, the Judiciary. Hearings conducted pursuant to Act 143 involving petitions for continued involuntary commitments for persons already institutionalized should be scheduled as rapidly as is possible, consistent with the other demands on your court. As to persons involuntarily committed under the new act since September 8, 1976, for a limited period, your court should cooperate with the Department of Public Welfare to give priority to these hearings.

ALEXANDER F. BARBIERI
*Court Administrator*
AFB:bf *of Pennsylvania*

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## OFFICIAL OPINION NO. 77-5

*Public Utility Realty Tax Act—Applicability of Sections 1001 and 802 of Fiscal Code of 1929—Settlement by Department of Revenue, subject to approval by Department of Auditor General—Appropriate rate of interest on delinquent accounts.*

1. Section 1001 of the Fiscal Code is applicable to the Public Utility Realty Tax Act (PURTA), and imposes a duty on the Department of Revenue to settle the tax and transmit the settlement to the Auditor General for approval, pursuant to the procedure set forth in Section 802 of the Fiscal Code.
2. No lien arises under Section 1401 of the Fiscal Code until after settlement by the Department of Revenue and approval by the Auditor General.
3. Since the provisions of the Fiscal Code and PURTA are inconsistent insofar as they relate to the accrual of interest on delinquent accounts, the provisions of PURTA prevail by virtue of the Statutory Construction Act, 1 Pa. C.S. § 1936, which provides that where the provisions of two statutes enacted by different General Assemblies are irreconcilable, the statute latest in time shall prevail.

Harrisburg, Pa. 17120
March 15, 1977

Honorable Milt Lopus
Secretary of Revenue
Harrisburg, Pennsylvania

Dear Secretary Lopus:

You have requested our opinion concerning the administration of the Public Utility Realty Tax Act, Act of March 10, 1970, P.L. 168, No. 66, 72 P.S. § 3271, *et seq.* (hereinafter referred to as PURTA), and the applicability of the Fiscal Code, Act of April 9, 1929, P.L. 343, as amended, 72 P.S. § 1, *et seq.*, to that Act. Specifically, you have asked

whether Section 1001 of the Fiscal Code is applicable to the administration of PURTA so as to impose a duty on the Department of Revenue to settle such tax subject to the Auditor General's audit and approval.

PURTA imposes a tax on certain real estate owned by public utilities, and provides for the revenues to be paid into the State Treasury. The only reference in the Act to collection of the tax is found in Section 3(c), 72 P.S. § 3273(c), wherein it is provided:

> "Payment of the tax hereby imposed may be enforced by any means provided by law for the enforcement of payment of taxes to the state . . . ."

The Commonwealth Court has ruled that this language regarding the enforcement of payment of the tax refers to the provisions of the Fiscal Code. *Heller v. Depuy,* 2 Pa. Commonwealth Ct. 196, 217, 277 A.2d, 849, 861 (1971). Therefore, it is necessary to examine the Code to determine the appropriate procedure in enforcing payment of the tax.

Section 1001 of the Fiscal Code, 72 P.S. § 1001, provides:

> "In all cases in which any person, association, corporation, public officer, or other party, is indebted, or is believed to be indebted, to the Commonwealth, and no other method for the collection of such debt is provided by law, it shall be the duty of the Department of Revenue to state and settle an account with the debtor, and transmit the original settlement, with the papers appertaining thereto, to the Auditor General for audit and approval, as in the case of tax settlements, and the subsequent procedure shall be the same as in the case of tax settlements."

It should be noted that Section 1001 is applicable when no other method for collection is provided by law. Although it has been suggested that Section 1401 of the Fiscal Code, 72 P.S. § 1401, provides such an alternative method, we disagree. Section 1401 provides, in pertinent part:

> "All state taxes imposed under the authority of any law of this Commonwealth, now existing or that may hereafter be enacted, and unpaid bonus, penalties, and all public accounts settled, assessed or determined against any corporation, association, or person . . . shall be a first lien upon the franchises and property, both real and personal, of such corporation, association, or person, from the date of settlement, assessment or determination . . . ."

Both the statutory language and the existing case law indicate that Section 1401 provides for the creation of a lien only after a settlement, assessment or determination of the tax has been made. In *Frola's Petition,* 52 D. & C. 357 (C.P. Mercer, 1943), the Court, in ruling that a judgment entered by the Commonwealth against a recipient of public

assistance did not result in the creation of a lien under Section 1401, stated:

> ". . . section (1401) clearly requires a settlement as a condition precedent to the lien . . . .
> It seems altogether clear that, unless there be a settlement, no lien arises by virtue of section 1401 . . . ." *Id.* at 371.

Thus, the crucial issue is whether the action of the Department of Revenue in the establishment of the liability of PURTA taxpayers constitutes a "settlement, assessment or determination." You have advised us that tax liability is reported on a form entitled "Public Utility Realty Tax Report." On one side of the form there are spaces for the taxpayer to provide information concerning the taxable value of its real estate and a calculation of its tax liability. On the reverse side of the form there is a section entitled "Work Sheet for Tax Settlement," wherein space is provided for the Department to insert its own determination of the value of the real estate subject to the tax and to adjust the liability reported by the taxpayer. In some instances, an adjustment is made as a result of a mathematical error on the part of the taxpayer in computing the liability. In other cases, an adjustment may be due to the Department's disallowance of an exemption claimed by the taxpayer, or its increase in the value of the real estate reported by the taxpayer. In such cases, the taxpayer is notified and, through an informal procedure, is given an opportunity to justify the figures as reported. Following this, if the Department affirms its previous adjustment it sends a Delinquent Statement and a letter informing the taxpayer of its additional tax liability. Inasmuch as there is no formal settlement, the taxpayer is not afforded the opportunity of filing a Petition for Resettlement.

It is our opinion that the procedure outlined above does not constitute a "determination" within the context of Section 1401 of the Fiscal Code.[1] We believe that the Legislature, in using the words "settlement, assessment or determination," contemplated the usual and customary procedure for the establishment of tax liability. That procedure includes an ascertainment of the amount of the liability by the Department of Revenue, subject to audit and approval by the Auditor General. Any other interpretation would result in the denial to PURTA taxpayers of the right to file petitions for resettlement or to pursue any of the remedies available to other taxpayers to obtain administrative review of the Department's establishment of liability. To deprive PURTA taxpayers of those provisions of the Fiscal Code which are

1. In *Commonwealth v. Erdenheim Farms Co.,* 55 Dauph. 17 (1944), in discussing the definition of the word "settlement" as used in the Fiscal Code, the Court defined it as an "administrative *determination*" of the amount due, and went on to say:

> "Certainly the first step, namely, that of ascertaining the amount by the Department of Revenue, does not constitute a *'determination'* ". *Id.,* at 23. (Emphasis in original.)

available to all other taxpayers would be arbitrary and discriminatory. We do not subscribe to the notion that the Legislature intended such a result.

We have carefully reviewed the Fiscal Code, and find no other provision which would be applicable to the collection of taxes under PURTA. Accordingly, it is our opinion, and you are hereby advised, that Section 1001 of the Fiscal Code is applicable to PURTA, and imposes a duty on the Department of Revenue to settle such tax subject to the Auditor General's audit and approval, pursuant to the procedure set forth in Section 802 of the Code. Subsequent to the settlement, the provisions of Section 1401 of the Fiscal Code become applicable as in the case of all other tax settlements.

The above discussion raises the ancillary question of the appropriate rate of interest to be charged on delinquent accounts. Section 1002 of the Fiscal Code, 72 P.S. § 1002, provides:

> "All moneys for which settlements shall have been made under (Section 1001) of this act . . . shall bear interest at the rate of six per centum per annum, unless paid within sixty days after the date of the settlement."

This section is in conflict with Section 3 of PURTA, 72 P.S. § 3273, which provides:

> "(c) . . . If the tax hereby imposed is not paid by the date herein prescribed, or within any extension granted by the department, the unpaid tax shall bear interest at the rate of one percent per month, and shall in addition be subject to a penalty of five percent of the amount of the tax . . . ."

The resolution of this conflict may be found in the Statutory Construction Act of 1972, 1 Pa. C.S. § 1936, which provides:

> "Whenever the provisions of two or more statutes enacted finally by different General Assemblies are irreconcilable, the statute latest in date of final enactment shall prevail."

Since PURTA was enacted subsequent to the Fiscal Code, Section 3 of PURTA supersedes Section 1002 of the Fiscal Code insofar as the questions of rate of interest and penalty for nonpayment are concerned.

Very truly yours,

PAUL J. CAREY, JR.
*Deputy Attorney General*

VINCENT X. YAKOWICZ
*Solicitor General*

ROBERT P. KANE
*Attorney General*

## OFFICIAL OPINION NO. 77-6

*Board of Finance and Revenue—Petition for Review—Section 1103 of Fiscal Code, 72 P.S. § 1103—Filing affidavit of non-delay as jurisdictional requirement.*

1. Generally, where a statute establishes an appeal period and provides that the appeal shall be accompanied by an affidavit, an affidavit in substantial compliance with the requirements of the statute is essential to the allowance of the appeal.
2. There has been a recent tendency on the part of the courts to relax, wherever possible, the harsh rule of strict statutory compliance in appellate proceedings, so as to emphasize substance rather than form.
3. Inasmuch as Section 1103 of the Fiscal Code provides for the filing of an amended petition for review at any time prior to hearing, an affidavit or amended affidavit may be filed at any time prior to the actual hearing date, even though the ninety-day appeal period has expired.

Harrisburg, Pa. 17120
March 21, 1977

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

Dear Mr. Wagner:

You have asked whether the affidavit required to be filed with a petition for review pursuant to Section 1103 of the Fiscal Code, 72 P.S. § 1103, is such an essential part of the petition that the failure to submit one within the ninety-day appeal period, or the submission of one which does not substantially conform to the provisions of the Act, renders the petition void, or whether the Board may act on such petition provided the affidavit is supplied prior to the actual hearing date of the petition.

Section 1103 of the Fiscal Code provides, in pertinent part:

> "Within ninety days after the date of mailing of notice . . . . of the action taken on any petition for a resettlement . . ., the party with whom the settlement was made . . . may, by petition, request the Board of Finance and Revenue to review such action.
>
> Every petition for review . . . shall be supported by affidavit that it is not made for the purpose of delay, and that the facts therein set forth are true . . . . A petition for review may be amended by the petitioner at any time prior to the hearing thereon . . . ."

Generally, where a statute provides that an appeal shall be accompanied by an affidavit, an affidavit in substantial compliance with the requirements of the statute is essential to the allowance of the appeal. P.L.E., Appeals, § 196; C.J.S., Appeal & Error, §§ 473, 475(b).

This issue was first considered by the Pennsylvania Supreme Court in 1818, in the case of *Thompson v. White,* 4 S. & R. 135 (1818). In that case, an appeal was filed pursuant to the Act of March 10, 1810, entitled "An Act Regulating Arbitration." The Act required an affidavit stating that the appeal was not entered for the purpose of delay, but because appellant firmly believed injustice had been done. The Court held that the affidavit filed by appellant, which omitted the word "firmly", did not comply with the provisions of the statute, and the appeal was therefore dismissed.

In 1913, in the case of *Butler Engine & Foundry Co. v. Butler Borough,* 238 Pa. 180, 85 A. 1112 (1913), the Supreme Court again considered the issue, and once again ruled, on the authority of *Thompson v. White, supra,* that the statutory requirement that an affidavit be filed in conformity with the statute is a condition essential to the jurisdiction of the Court to hear the appeal. The Court stated that the underlying reason for requiring strict compliance with the statute lay in the fact that the right of appeal is a purely statutory remedy, and that to give the statute a more liberal construction "would leave the question of jurisdiction so elastic that it could never be determined by fixed standard." *Butler, supra* at 184, 85 A. at 1114. The Court also held that the defect could not be cured by amendment after the time allowed for the appeal, citing *Proper v. Luce,* 3 P. & W. 65 (1831).

Lower court cases which have adopted the same principle of strict compliance with the statute are *Orban v. Makarczyk,* 166 Pa. Superior Ct. 523, 72 A.2d 606 (1950); *Brittain v. Troy Coal Company,* 29 Luz. Reg. 23, 22 D. & C. 152 (C.P. Luz. 1934); *Bredbenner v. Sorber,* 25 Luz. Reg. 283 (C.P. Luz. 1929).

Despite the cases cited above, there has been a recent tendency on the part of the courts to relax, wherever possible, the draconian rule of strict statutory compliance. Thus, if it is at all possible to distinguish *Thompson*[1] and *Butler Engine* from the case at hand, the court will do so. It was on that basis that the Court permitted the filing of an appeal in the case of *Kochis v. Bertoncini,* 40 West. 269, 17 D. & C. 2d 503 (C.P. West 1958), holding that the affidavit filed by appellant, while "not in exactly the form as prescribed by the . . . act . . . did substantially conform . . ." *Id* at 270, 17 D. & C. 2d at 504

In *Clements v. Miller,* 20 Pa. C.C. 270 (C.P. Tioga 1898), the Court noted that the statute in question provided that no appeal would be *entertained* until an affidavit was filed. This made the case distinguishable, said the Court, from those cases involving a statute which pro-

1. The decision in *Thompson* was described in dictum as "shocking" by Judge Packel in *Meta v. Yellow Cab Co. of Philadelphia,* 222 Pa. Superior Ct. 469, 294 A.2d 898 (1972). He noted:

> "Eventually our courts recognized that the harshness created by the hypertechnical application of these procedural rules was effecting more injustice than serving any substantial purpose." *Id.* at 472, 294 A.2d at 900.

vided that *before* an appeal was granted, an affidavit must be filed. Such obviously strained reasoning is illustrative of the lengths to which the courts have gone to circumvent the rulings in *Thompson* and *Butler Engine.* See also *Linhart v. Cunningham*, 6 Dist. 788 (C.P. West. 1897); *McNair v. Rupp,* 3 Lack. L.N. 269 (C.P. York 1897).

One further indication of this trend toward liberalization is the fact that in some instances the courts have attempted to distinguish between those statutory provisions which are mandatory, and those which are jurisdictional. For example, in *B. & B. Inc. v. Home for Accepted,* 233 Pa. Superior Ct. 518, 335 A.2d 722 (1975), the Court stated:

> "We now . . . hold that the requirement that record costs be paid during the appeal period is mandatory—but with the caveat that a valid attempt to make such timely and full payment, coupled with substantial though incomplete compliance with the requirement should not result in the harsh finality of an order quashing an appeal . . . . Rather, our courts should examine the appellant's attempts at compliance in order to determine whether an honest effort has been made to meet the requirements of the statute." 233 Pa. Superior Ct. at 522, 335 A.2d at 724

Some courts have simply ignored *Thompson* and *Butler Engine.* For example, in *Cassidy v. Vandegrift,* 58 Del. 549, 50 D. & C. 2d 717 (C.P. Del. 1970), the affidavit omitted the words "because he firmly believes injustice has been done." The Court permitted appellant to file an appeal in proper form *nunc pro tunc,* declaring that the case should be decided in accordance with the liberal spirit of *Beth Allen Sales Co. v. Hartford Insurance Group,* 217 Pa. Superior Ct. 42, 268 A.2d 203 (1970). That case did not involve a defective affidavit, but rather the failure to file a recognizance with sufficient surety. The Court decided that although the recognizance was defective, the appellant should be afforded the opportunity of filing an amended recognizance *nunc pro tunc.* The decision, said the Court, was "based on the belief that where a party has made an honest effort to file his appeal in accordance with the statute, and has substantially complied with the requirements, justice will not permit his appeal to be dismissed with prejudice." 217 Pa. Superior Ct. at 47, 268 A.2d at 206. The Court added that "to quash the appeal in these circumstances would result in a return to the supremacy of form over substance and the exaltation of technical detail over justice, an approach which courts in all areas have been opposing for many years." *Id.,* at 48, 268 A.2d at 206

However, despite the recent relaxation of the rules regarding statutory compliance in appellate proceedings, it is, nevertheless, a fundamental principle that where the provision of a statute goes to the question of jurisdiction, failure to comply with that provision renders the proceeding void. *Commonwealth v. Yorktowne Paper Mills, Inc.,* 419

Pa. 363, 214 A.2d 203 (1965). It is also settled that parties may not stipulate appellate jurisdiction in disregard of statutory procedures. *Foley Bros. Inc. v. Commonwealth,* 400 Pa. 584, 163 A.2d 80 (1960). And, as noted above, the filing of an affidavit where required by statute is an integral and essential part of the appeal process, and has been held to go to the question of jurisdiction. *Butler Engine, supra.* Thus, in the final analysis, the determination of the issue depends upon the conclusion reached with respect to the question of the Legislature's intent in including in Section 1103 the words, "a petition for review may be amended . . . at any time prior to the hearing thereon . . . ." Without these words, it seems clear that a petition filed without affidavit or with a defective affidavit would be void. It is even more clear, however, that since the appeal process is a purely statutory remedy, the Legislature may, if it wishes, provide for the filing of the affidavit, or an amendment to the affidavit, or an amendment to the petition itself, subsequent to the period established for the filing of the original petition. The only queston to be resolved, therefore, is whether the Legislature so intended when it drafted Section 1103.

In attempting to answer this question, it is necessary to apply certain rules of construction as enunciated in recent court decisions. As noted above, the courts in recent years have exhibited a clear tendency to construe statutes dealing with the appellate process in a liberal fashion, so as to give emphasis to substance rather than to form. *Beth Allen Sales Co. v. Hartford Insurance Group, supra.* It should also be noted that as recently as December 9, 1976, in the case of *Coshey v. Beal,* 27 Pa. Commonwealth Ct. 440, 366 A.2d 1295 (1976), the Commonwealth Court permitted the filing of a petition for refund before the Board of Finance and Revenue despite the fact that the filing was beyond the two-year limitation contained in Section 503 of the Fiscal Code. The Court noted that although the timeliness of an appeal goes to the jurisdiction of the body appealed to and its competency to act, the "extraordinary combination of inexplicable behavior on the part of agents of the Commonwealth demands an extraordinary remedy." 27 Pa. Commonwealth Ct. at 444, 366 A.2d at 1297.

One final consideration which militates against a rule of strict compliance in this case is the fact that the Board of Finance and Revenue is a statutory body created for the purpose of providing relief to persons who have paid monies to the Commonwealth to which the Commonwealth is not entitled. In a sense it is an equitable tribunal. In many cases, persons filing petitions with the Board are not represented by counsel. To insist upon strict technical compliance with the statute would not be productive of either equity or justice.

Therefore, it is our conclusion that the courts would give a liberal interpretation to Section 1103, and that so long as the petition has been filed within the ninety-day appeal period, it is proper for the Board of

Finance and Revenue to accept the filing of an affidavit or an amended affidavit at any time prior to hearing.

Sincerely,

PAUL J. CAREY, JR.
*Deputy Attorney General*

VINCENT X. YAKOWICZ
*Solicitor General*

ROBERT P. KANE
*Attorney General*

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## OFFICIAL OPINION NO. 77-7

*Act 111 of 1975—"Health Care Services Malpractice Act"—Definition of Health Care Provider Does Not Include Professional Corporations.*

1. "Health care provider," as defined by the Health Care Services Malpractice Act does not include professional corporations.
2. Professional corporations are not required to carry professional liability insurance. Nor are they entitled to participate in the excess insurance coverage provided by the Medical Professional Liability Catastrophe Loss Fund; therefore, they are not liable for payment of the ten percent (10%) surcharge levied by the Fund.

Harrisburg, Pa. 17120
March 31, 1977

William K. Myrtetus
Director, Medical Professional
Liability Catastrophe Loss Fund
Harrisburg, Pennsylvania

Dear Mr. Myrtetus:

You have requested our opinion as to whether professional corporations, as defined in the Professional Corporation Law of July 9, 1970, P.L. 461, 15 P.S. § 2901, *et seq*. are health care providers as defined in Section 103 of the Health Care Services Malpractice Act of October 15, 1975, P.L. 390, 40 P.S. § 1301.103 (Act). Your question arises from the fact that only health care providers, as defined by the Act, are required to carry professional liability insurance and are entitled to participate in the Medical Professional Liability Catastrophe Loss Fund (Fund) established by said Act.

It is our opinion, and you are so advised, that professional corporations are not health care providers as defined by the Act. This being so, professional corporations are not required to carry professional liability insurance. Nor are they entitled to participate in the excess insurance coverage provided by the Fund; therefore, they are not liable for payment of the ten percent (10%) surcharge levied by the Fund.

Section 103 of the Act defines "health care provider" as follows:

> "Health care provider" means a primary health center or a person, corporation, facility institution or other entity *licensed or approved by the Commonwealth to provide health care or professional medical services* as a physician, an osteopathic physician or surgeon, a podiatrist, hospital, nursing home, and except as to Section 701(a), an officer, employee or agent of any of them acting in the course and scope of his employment. (Emphasis supplied.)

Professional corporations are neither licensed nor approved by the Commonwealth to provide health care or professional services. The State Boards of Medical Education and Licensure, Osteopathic Examiners and Podiatry Examiners make no review or investigation of any prospective professional corporation; they take no action whatsoever with respect to licensure or approval of professional corporations. Rather, the professional corporation is effectuated either by direct incorporation under the Professional Corporation Law (15 P.S. § 2907) or, in the case of a professional association, by filing a certificate with the Department of State which includes the following:

(1) The name and address of the professional association;

(2) The name of the county in the office of the prothonotary of which the initial articles of association of the association were filed; and

(3) A statement that the associates of the professional association have elected to accept the provisions of this act (the Professional Corporation Law) for the government and regulation of the affairs of the association. (15 P.S. § 2904(b)).

In no way does the Department of State make any kind of evaluation concerning licensure or approval of the professional corporation. The Professional Corporation Law itself makes no mention of licensure or approval. All that it is intended to do is "authorize . . . licensed persons to render professional services by means of a professional corporation . . . " (15 P.S. § 2903).

The conclusion that professional corporations were not intended to be included under the Act is substantiated by the 1976 amendments to the C.P.A. Law of May 26, 1947, P.L. 318, 63 P.S. § 9.1, *et seq*. One of the amendments specifically mandates that professional corporations carry professional liability insurance or maintain unimpaired capital in accordance with regulations promulgated by the State Board of Examiners of Public Accountants (63 P.S. § 9.8d(7)). No such provision exists in the Health Care Services Malpractice Act or the amendments thereto.

Moreover, the aforementioned amendments added the following to the definition section of the C.P.A. Law:

> "Corporations" Professional corporations and professional associations as defined by the act of July 9, 1970 (P.L. 461, No. 160), known as the "Professional Corporation Law," and the act of August 7, 1961 (P.L. 941, No. 416), known as the "Professional Association Act," and any amendments thereof.

That definition was included in addition to the definition of "certified public accountant". Although the definition of health care provider in the Act was amended six months after the passage of the Act, no similar addition of professional corporations was made.

To summarize, a professional corporation is not a health care provider within the meaning of the Act. Therefore, a professional corporation is not required to carry professional liability insurance, or to pay the ten percent (10%) surcharge levied by the Fund, nor may it participate in the excess insurance coverage provided by the Fund.

Very truly yours,

LINDA S. LICHTMAN
*Deputy Attorney General*

VINCENT X. YAKOWICZ
*Solicitor General*

ROBERT P. KANE
*Attorney General*

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## OFFICIAL OPINION NO. 77-8

*Act 216 of 1976—PUC Employees—Power of PUC to Enter into Contracts for Consultants and Other Employees Without Prior Approval of Governor.*

1. The Governor's authority over the various departments, agencies and commissions, including the authority to approve the hiring practices of such agencies, is derived from the Pennsylvania Constitution, the Administrative Code of 1929 and regulations promulgated pursuant thereto.
2. Such authority may be restricted by the Legislature, provided there is no encroachment upon the Governor's constitutional duty to see that the laws are faithfully executed.
3. Although Act 216 of 1976, which amended the Act of March 31, 1937, P.L. 160, 66 P.S. 452, *et seq.*, pertaining to the Pennsylvania Public Utility Commission, removed the provision of gubernatorial approval of PUC employees, the Governor retains limited approval power by virtue of Sections 214 and 507 of the Administrative Code of 1929, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §§ 74 and 187.
4. With respect to permanent employees, the Governor retains the authority to approve the number of persons employed by the PUC and their compensation.
5. In the case of professional or skilled labor employed on a temporary basis, the Governor possesses the additional authority to approve the job classifications of such employees.

Harrisburg, Pa. 17120
April 18, 1977

The Honorable Charles P. McIntosh
Budget Secretary
Harrisburg, Pennsylvania

Dear Secretary McIntosh:

This is in reply to your inquiry regarding the effect of the Act of October 7, 1976, P.L. 1075, No.216, (Act 216) on the power of the Pennsylvania Public Utility Commission (PUC) to enter into contracts for consultants and other employees without the prior approval of the Governor.

The Governor's authority to exercise control over the various departments, agencies, boards and commissions of state government is derived from Article IV, § 2 of the Pennsylvania Constitution, which vests in the Governor the Supreme executive power; the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 51, *et seq.* (Code); and regulations duly promulgated pursuant thereto.

The Legislature, of course, may restrict or diminish the broad, general powers accorded to the Governor, provided such restrictions do not unduly encroach upon his constitutional authority to insure that the laws are faithfully executed. Whether it has done so with respect to the Governor's right of review and approval of PUC employees requires an examination of the relevant acts of assembly.

The powers and duties of the PUC have been established by the Act of March 31, 1937, P.L. 160, 66 P.S. § 452, *et seq.* (Act of 1937). Inasmuch as Act 216 does not totally repeal the Act of 1937, but is merely an amendment thereto, the provisions of that act remain in effect, except to the extent that they have been modified or repealed by Act 216.

Section 6(b) of the Act of 1937, 66 P.S. § 457(b), has been repealed in its entirety. That section provided:

> "The Commission, *with the approval of the Governor*, shall have the power to appoint and fix the compensation of such officers, experts, engineers, statisticians, accountants, inspectors, clerks and employes as may be necessary for the proper conduct of the work of the Commission: Provided, that the compensation of such persons shall be fixed in accordance with the standards of compensation fixed by the Executive Board of this Commonwealth." (Emphasis added.)

In lieu thereof, Act 216 has substituted a new section, Section 6.1, which provides:

> "The Commission shall have the power to appoint, fix the

compensation of, authorize and delegate such officers, consultants, experts, engineers, statisticians, accountants, inspectors, clerks and employes as may be appropriate for the proper conduct of the work of the Commission: Provided, that the total compensation paid to consultants in any fiscal year shall not exceed four per centum of the Commission's budget. The Commission shall keep records of the names of each consultant, the services performed for the commission, and the amounts expended for each consultant's services." 66 P.S. § 457.1

The apparent effect of this substitution is a rescission of the Governor's power of approval of PUC employees. However, in order to ascertain whether the Legislature intended to abolish all of the gubernatorial power with respect to such employees, a review of Act 216 in its entirety is required. We note that Act 216 neither repealed nor modified Section 12 of the Act of 1937, 66 P.S. § 463, which provides:

"Subject to the provisions of this act, the Pennsylvania Public Utility Commission shall . . . be subject to all the provisions of . . . [The Administrative Code] which apply generally to independent administrative boards and commissions."

In view of this provision in Section 12, not only is Act 216 relevant, but also the Administrative Code as it pertains to the hiring of personnel by departments, agencies and independent commissions.

Section 214 of the Code, 71 P.S. § 74, provides, in pertinent part:

"Except as otherwise provided in this section and in the Civil Service Act, the . . . independent administrative boards and commissions, shall appoint and fix the compensation of such . . . assistants and employes as may be required . . .

Except as otherwise provided in this section and in the Civil Service Act, the number and compensation of all employes appointed under this section shall be *subject to the approval by the Governor,* and, after the Executive Board shall have fixed the standard compensation for any kind, grade, or class of service or employment, the compensation of all persons in that kind, grade or class appointed hereunder, shall be fixed in accordance with such standard." (Emphasis added.)

Section 507 of the Code, 71 P.S. § 187, is also relevant to the issue. It provides, in pertinent part:

". . . any department, board or commission may:

. . .

(4) Employ professional or skilled labor, on a temporary basis . . . but all such employment *shall be approved by the Governor* . . . ." (Emphasis added.)

While Section 214 of the Code is applicable to permanent employees, Section 507 is limited to persons employed on a temporary basis. The Governor's authority with respect to such positions, however, is broader in scope, for not only does Section 507 give the Governor the right to approve the number of employees and their compensation, but also the right to approve the particular classifications of employment, such as economists, statisticians, etc.

It is significant that although Act 216 makes reference to the Administrative Code, and specifically repeals Sections 303 and 709 thereof, no reference is made in Act 216 to either Section 214 or 507 of the Code. It is our opinion, therefore, that insofar as the number and the compensation of PUC employees is concerned, the approval of the Governor is still required, and that with regard to temporary employees, gubernatorial approval of the job classifications is also required. To conclude otherwise would require us to find that Sections 214 and 507, although not expressly repealed or modified, have been repealed by implication insofar as they pertain to the PUC. In determining whether a prior act has been so repealed, "the question is exclusively one of legislative intent. Repeals by implication are not favored and will not be implied unless there be an irreconcilable conflict between statutes embracing the same subject matter." *Kelly v. City of Philadelphia*, 382 Pa. 459, 471, 115 A.2d 238, 244 (1955).

It would be pure sophistry to suggest that there is an "irreconcilable conflict" between Act 216 and either Section 214 or Section 507 of the Code. There is, in fact, no conflict. Act 216 is silent as to gubernatorial approval, whereas Sections 214 and 507 provide for such approval under certain circumstances. Furthermore, to conclude that those sections have been repealed by implication would violate the rule of construction enunciated by the Supreme Court in *Appeal of Yerger*, 460 Pa. 537, 333 A.2d 902 (1975). There the Court held that where two sections of an act "are capable of a construction which allows both to operate . . . (i)n the absence of a manifestly contrary intention on the part of the Legislature, such a construction is mandatory." *Id.* at 543, 333 A.2d at 905. Although in this particular case two separate acts are involved, they must be considered *in pari materia.* Statutory Construction Act of 1972, 1 Pa. C.S. § 1932. As the Court stated in *Kelly v. City of Philadelphia, supra,* "statutes *in pari materia* should be considered concurrently whenever possible and if they can be made to stand together effect should be given to both as far as possible." 382 Pa. at 473, 115 A.2d at 245.

Accordingly, it is our opinion that Sections 214 and 507 of the Administrative Code have not been repealed or modified insofar as they pertain to the PUC. You are therefore advised that the Governor, although no longer possessing the right to approve the actual persons to be employed by the PUC, retains the right to approve the number of employees and their compensation. In the case of professional or skilled labor employed in a temporary basis, the Governor possesses

the additional authority to approve the job classifications of such temporary employees.

Very truly yours,

PAUL J. CAREY, JR.
*Deputy Attorney General*

VINCENT X. YAKOWICZ
*Solicitor General*

ROBERTP. KANE
*Attorney General*

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## OFFICIAL OPINION NO. 77-9

*Auditor General—Board of Commissioners of Public Grounds and Buildings—Article VIII, § 10 of the Pennsylvania Constitution—Administrative Code—Fiscal Code—Audit—Approval—Statutory Construction Act*

1. Inasmuch as the Auditor General is statutorily required to conduct audits of all transactions after their occurrence that have been approved by the Board of Commissioners of Public Grounds and Buildings, Section 404 of the Fiscal Code and Article VIII, § 10 of the Pennsylvania Constitution prevent him from pre-approving those same transactions.
2. Since the only function that the Board has is to pre-approve leases, it follows that the Auditor General is barred from serving as a member of the Board.

Harrisburg, Pa. 17120
April 18, 1977

Honorable Al Benedict
Auditor General
Harrisburg, Pennsylvania

Dear General Benedict:

We have received a request for an opinion as to the legality of the Auditor General serving as a member of the Board of Commissioners of Public Grounds and Buildings in view of the proscription in Article VIII, § 10 of the Pennsylvania Constitution that a Commonwealth officer may not post-audit a transaction that he himself has previously approved. It is our opinion and you are hereby advised that this constitutional provision precludes the Auditor General from serving as a member of the Board.

The Board of Commissioners of Public Grounds and Buildings was created by The Administrative Code of 1929, Section 446, 71 P.S. § 156 and consisted of the Governor, the Auditor General and the State Treasurer. The powers and duties of the Board are set forth in Section 2413 of The Administrative Code, 71 P.S. § 643 as follows:

"The Board of Commissioners of Public Grounds and Buildings shall have the power, and its duty shall be:

(a) To approve or disapprove all proposed leases for offices, branch offices, rooms and accommodations;"

On the other hand, Section 402 of the Fiscal Code, 72 P.S. § 402 provides, in part, as follows:

"Except as may otherwise be provided by law it shall be the duty of the Department of the Auditor General to make all audits of transactions after their occurrence, which may be necessary, in connection with the administration of the financial affairs of the government of this Commonwealth, with the exception of those of the Department of the Auditor General. It shall be the duty of the Governor to cause such audits to be made of the affairs of the Department of the Auditor General."

The latter provision charges the Auditor General with the duty to audit after their occurrence all leases which have been approved by the Board of Commissioners of Public Grounds and Buildings. Thus, if both provisions were to be effective the Auditor General would be in the position of having to post-audit certain transactions which he has previously approved in his capacity as a member of the Board of Commisioners of Public Grounds and Buildings. His dual function in this regard would violate Article VIII, § 10 of the Pennsylvania Constitution (as approved by the electorate in 1968), which provides:

"The financial affairs of any entity funded or financially aided by the Commonwealth, and all departments, boards, commissions, agencies, instrumentalities, authorities and institutions of the Commonwealth, shall be subject to audits made in accordance with generally accepted auditing standards.

*Any Commonwealth officer whose approval is necessary for any transaction relative to the financial affairs of the Commonwealth shall not be charged with the function of auditing that transaction after its occurrence."* (Emphasis added)

The second paragraph of this provision was implemented by an amendment to Section 404 of the Fiscal Code, 72 P.S. § 404, which provides:

"No officer of this Commonwealth charged with the function of auditing transactions after their occurrence shall approve the same transactions prior to their occurrence. Notwithstanding any provision of any law to the contrary, from and after the effective date of this act, the Auditor General shall not be required or empowered to pre-approve or pre-audit any transaction with respect to which said officer is empowered or required to conduct an audit after the transaction has occurred."

Inasmuch as the Auditor General is statutorily required to conduct audits of all transactions after their occurrence that have been approved by the Board of Commissioners of Public Grounds and Buildings, Section 404 of the Fiscal Code and Article VIII, § 10 of the Pennsylvania Constitution prevent him from pre-approving those same transactions. Since the only function that the Board has is to pre-approve leases, it follows that the Auditor General is barred from serving as member of the Board.

The alternative would be to have the Auditor General serve as a member of the Board,and thereby be precluded from post-auditing the Board's transactions. This would be an undesirable and absurd result because the Legislature has not presented an alternative method of post-auditing the Board's transactions (such as it has done in the case of the Auditor General's own office), and thus the transactions of the Board would remain without audit. Such an absurd result is not to be countenanced. Section 1922 of the Statutory Construction Act, 1 Pa. C.S. § 1922. Moreover, this conclusion is further supported by Section 1936 of the Statutory Construction Act, 1 Pa. C.S. § 1936. Section 402 of the Fiscal Code was amended by the Act of March 18, 1971, P.L. 110 and clearly requires the Auditor General to audit the financial transactions of all boards of the Executive Branch of Government (which would include the Board in question). There has been no similar re-enactment or amendment of Section 446 of The Administrative Code to show a legislative intent that the Auditor General should continue to sit as a member of the Board despite the fact that he may no longer post-audit the transactions. Accordingly, we may conclude that the Legislature intended to place the auditing function of the Auditor General (his primary function) ahead of his membership on the Board.

This office has reached a similar conclusion with regard to the Auditor General's approval of expenditures from the Cornwall Furnace Trust Fund. O.O. No. 64, Op. Pa. Atty. Gen. 182 (1973). In addition, the former Auditor General was of the legal opinion that the Constitution precluded him from serving as a member of the Board for the reasons we have set forth herein, and he therefore declined to do so.

We are sending copies of this opinion to the other members of the Board for their information.

Very truly yours,

W. W. ANDERSON
*Deputy Attorney General*

VINCENT X. YAKOWICZ
*Solicitor General*

ROBERT P. KANE
*Attorney General*

## OFFICIAL OPINION NO. 77-10

*Liquid Fuels Tax Act—Vehicle Code—Department of Transportation—Buses—Mass Transportation Systems—Fees—Statutory Construction Act*

1. Section 10 of the Liquid Fuels Tax Act requires that amounts equivalent to the entire annual registration fees for buses provided for in Section 709 of the Vehicle Code be withheld from the monies paid to counties from the Liquid Fuels Tax Fund and that the amounts so withheld be paid into the Motor License Fund.
2. Since Section 710.1 of the Vehicle Code has been repealed and there is no longer a registration fee charged for mass transportation system buses, the difference between the fee charged in Section 709 and the fee charged in Section 710.1 is the difference between the 709 fee and zero, in other words, the entire 709 fee.
3. Since there is nothing in Section 10 of the Liquid Fuels Tax Act to indicate that the sections of the Vehicle Code referred to therein were limited to the sections of the Vehicle Code that were in force on the effective date of the Liquid Fuels Tax Act, Section 1937 of the Statutory Construction Act requires that the sections of the Vehicle Code referred to in Section 10 are as they exist now following the amendments to the Vehicle Code.

Harrisburg, Pa. 17120
June 10, 1977

Honorable James B. Wilson
Secretary of Transportation
Harrisburg, Pennsylvania

Dear Secretary Wilson:

We have a request for an opinion from your department concerning the effect of the 1975 amendments to the Vehicle Code on the payments to be made from the Liquid Fuels Tax Fund into the Motor License Fund as provided for in Section 10 of the Liquid Fuels Tax Act. The question is whether the payments are to be discontinued as a result of the 1975 amendments to the Vehicle Code.

Section 10 of the Liquid Fuels Tax Act, as amended, 72 P.S. § 2611j provides, in part, as follows:

> "(a) One-half cent per gallon of the permanent tax collected under the provisions of this act shall be paid into the Liquid Fuels Tax Fund of the State Treasury; and such moneys, paid into said fund, are hereby specifically appropriated for the purposes hereinafter set forth.
>
> The moneys so paid into the Liquid Fuels Tax Fund, . . . shall be paid to the respective counties of this Commonwealth, *less such amounts as represent the difference between the annual fees prescribed in sections 709 and 710 of 'The Vehicle Code' and those fees charged pursuant, to section 710.1 of 'The Vehicle Code' for annual registration of each motor vehicle operated by mass transportation systems,* on the first day of June and December of each year . . . Such amounts as represent the difference between the annual fees prescribed in sections 709 and 710 of 'The Vehicle Code' and those fees charged pursuant

to section 710.1 of 'The Vehicle Code' shall be paid into the Motor License Fund." (Emphasis added)

Prior to the amendments of December 16, 1975, the pertinent sections of the Vehicle Code of 1959, 75 P.S. §§ 709, 710, 710.1, contained schedules of annual registration fees for buses. Section 709 set forth the fees for buses with pneumatic tires; Section 710 set forth the fees for buses with solid rubber or cushion rubber tires; and Section 710.1, which was an exception from Sections 709 and 710, set forth the fees for buses operated by mass transportation systems. The fees in Section 709 ranged from $25 to $300, depending upon the number of passengers; the fees in Section 710 ranged from $37.50 to $400, depending upon the number of passengers; and the fee in Section 710.1 was a flat $16.00.

The formula in Section 10 of the Liquid Fuels Tax Act (represented by the underlined portion above) specifies that the difference between the fees charged in Sections 709 and 710 and the fees charged in Section 710.1 shall be withheld from the amounts paid to counties and paid instead into the Motor License Fund. For example, in the case of the minimum fees required by Sections 709 and 710, which are $25.00 and $37.50 respectively, the amounts paid into the Motor License Fund would be the difference between those amounts and the $16.00 fee charged in Section 710.1, or $9.00 and $21.50 respectively.

The 1975 amendments to the Vehicle Code made several pertinent changes:

(1) The fees required by Section 709* were increased;

(2) Section 710 was repealed. (Buses no longer use solid rubber or cushion tires.)

(3) Section 710.1 was repealed and a new Section 729(a)(3)** was enacted exempting mass transportation system buses from registration fees entirely.

As affected by these amendments, the formula of Section 10 of the Liquid Fuels Tax Act requires that the entire registration fees for buses with pneumatic tires are to be paid into the Motor License Fund. Since Section 710.1 has been repealed and there is no longer a registration fee charged for mass transportation system buses, the difference between the fee charged in Section 709 and the fee charged in Section 710.1 is the difference between the 709 fee and zero, in other words, the entire 709 fee.

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* Editor's Note: Section 709 was repealed by Act of June 17, 1976, P.L. 162, effective July 1, 1977. The subject-matter of the repealed section is covered by 75 Pa. C.S. § 1917.

** Editor's Note: Section 729(a)(3) was repealed by Act of June 17, 1976, P.L. 162, effective July 1, 1977. The subject-matter of the repealed section is covered by 75 Pa. C.S. § 1901(b)(1).

This result is required by Section 1937 of the Statutory Construction Act, 1 Pa. C.S. § 1937, provides:

> "(a) A reference in a statute to a statute or to a regulation issued by a public body or public officer includes the statute or regulation with all amendments and supplements thereto and any new statute or regulation substituted for such statute or regulation, as in force at the time of application of the provision of the statute in which such reference is made, unless the specific language or the context of the reference in the provision clearly includes only the statute or regulation as in force on the effective date of the statute in which such reference is made."

Since there is no specific language in Section 10 of the Liquid Fuels Tax Act to indicate that the sections of the Vehicle Code referred to therein were limited to the sections of the Vehicle Code that were in force on the effective date of the Liquid Fuels Tax Act, it must be concluded that the sections of the Vehicle Code referred to in Section 10 are as they exist now following the amendments to the Vehicle Code.

Therefore it is our opinion, and you are advised, that Section 10 of the Liquid Fuels Tax Act requires that amounts equivalent to the entire annual registration fees for buses provided for in Section 709 (See Editor's Note Page 32) of the Vehicle Code be withheld from the monies paid to counties from the Liquid Fuels Tax Fund and that the amounts so withheld be paid into the Motor License Fund.[1]

This opinion has been submitted to the State Treasurer and the Auditor General in accordance with Section 512 of the Administrative Code, 71 P.S. § 192, and they concur in the result. However, both of them disagree with our footnote below that overpayments in 1976 may be recouped in 1977. We have reviewed the reasons for their disagreement and have concluded that they are not based in law but on policy considerations. However, the question is a legal one and we find that the law is quite clear that the funds are to be paid into the Motor License Fund. To effectuate this for 1976 the department is required to recoup the overpayments from the counties.

Very truly yours,

W. W. ANDERSON
*Deputy Attorney General*

VINCENT X. YAKOWICZ
*Solicitor General*

ROBERT P. KANE
*Attorney General*

1. You have advised us that in 1976 such payments were not withheld from counties as required. These overpayments may be recouped by withholding a like amount from the payments to the counties in 1977 over and above the bus registration fees attributable to 1977.

## OFFICIAL OPINION NO. 77-11

*Arbitration Awards—State Police—State Employees' Retirement Code—Pension Benefits.*

1. An arbitration award that conflicts with law must not be given effect.
2. With limited exceptions, the State Employees' Retirement Code determines the pension rights of all State employees.
3. A legislative appropriation cannot be construed to repeal substantive law.

Harrisburg, Pa. 17120
June 30, 1977

Paul J. Chylak, Commissioner
Pennsylvania State Police
Harrisburg, Pennsylvania 17120

Dear Commissioner Chylak:

You have asked our office to determine whether certain State Police arbitration awards (hereinafter referred to as the Gershenfeld Awards), coupled with an appropriation enacted nearly three years later, authorize the State Police to make payments in compliance with those awards. It is our opinion and you are accordingly advised that the Gershenfeld Awards conflict with the State Employees' Retirement Code and, as a result, no payments can be made pursuant to those awards.

The Gershenfeld Awards in question are both dated December 27, 1973, but were not to be effective until July 1, 1974. They provide:

> "14. Non-service-connected disability benefits. The Board of Arbitration awards a disability benefit of 70% of final average salary (as presently calculated for disability purposes) to officers who are totally and permanently disabled as the result of a non-service-connected disability. The disability must be one which disqualifies the officer from the performance of any gainful employment. Pension benefits for such officers shall be provided on the same basis as those granted officers in connection with total and permanent service-connected disability. Other non-service-connected disability is to continue to be compensated as at present.
>
> 15. Survivor Benefits. If an officer dies, and his death is non-service connected, his family shall receive benefits on the basis of 50% of final average salary (as presently calculated for disability purposes)." (4 Pa. B. 190-191)

These awards were the result of binding arbitration and are authorized by Act 111 of 1968, 43 P.S. § 217.1, *et seq.* Since legislative enactments are often necessary to fund an arbitrator's decision, Act 111 provides the following mandate:

> "(b) With respect to matters that require legislative action for implementation, such legislation shall be enacted, in the case of the Commonwealth, within six months following publication of the findings. . ." 43 P.S. § 217.7(b).[1]

Thus, in order to give full effect to the Gershenfeld Awards, the Legislature would have had to act within the time period prescribed by the statute. However, it was not until 1976 that the legislature passed the following appropriation:

> "To the Pennsylvania State Police for the payment of non-service connected death benefits pursuant to the Gershenfeld Awards but payable only for fiscal year 1976-1977 ... $80,000." (Act 55-A, 1976, Supplemental Appropriation Act of 1976)

Since this was the first legislative enactment with regard to the Gershenfeld Awards, no benefits have ever been paid and the effect of the 1976 appropriation is now in question.

The State Employees' Retirement Code, 71 Pa. C.S. § 5101, *et seq.*, was enacted on March 1, 1974, mid-way between the time the arbitrator wrote his decisions and the effective date of the awards. It provides in part:

> "Pension rights to State employees shall be determined solely by this act or any amendment thereto, and no collective bargaining agreement between the Commonwealth and its employees shall be construed to change any of the provisions herein.
>
> The provisions of this code insofar as they are the same as those of existing law are intended as a continuation of such laws and not as new enactments. The provisions of this code shall not affect any act done, liability incurred, right accrued or vested, or any suit or prosecution pending or to be instituted to enforce any right or penalty or to punish any offense under the authority of any repealed laws" 71 Pa. C.S. § 5955.

The question arises as to whether the Gershenfeld Awards are inconsistent with this provision of the Retirement Code and, if so, what effect, if any, must be given to those awards.

A pension is defined as "a payment, not wages, made regularly to a person (or to his family) who has fulfilled certain conditions of service" ... 2nd College Edition Webster's New World Dictionary p. 1052 (1972). Since the Gershenfeld Awards mandate regular yearly pay-

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1. This statute, enacted in accordance with Art. III § 31 of the Pennsylvania Constitution raises a number of complex legal issues in addition to those issues discussed in this opinion. However, it is not necessary for us to discuss those issues as the Gershenfeld Awards have been in conflict with the State Employees' Retirement Code *ab initio*.

ments due to the condition of death or disability, the Awards are pension benefits. It is also clear that the benefits are inconsistent with the Retirement Code's provision concerning death benefits. 71 Pa. C.S. § 5707. The awards were not scheduled to take effect until July 1, 1974, even though they were written more than six months prior to that time. The July 1, 1974 effective date of the awards was selected in order that it would coincide with the collective bargaining agreement eventually entered into between the Pennsylvania State Police and the Fraternal Order of Police as well as the beginning of the Commonwealth's fiscal year. In addition, the July 1, 1974 effective date was again enunciated by a Resolution of the Executive Board dated January 21, 1974, 4 Pa. B. 189. Thus, the key date of the awards are their effective date and we cannot construe the mere writing of the awards as an "act done" before that date. Also, since the first claims pursuant to the awards did not arise until the death of an officer on September 17, 1974, no debt could have been incurred by the Commonwealth nor could any rights have accrued or vested before the effective date of the awards. As a result, due to the enactment of the Retirement Code on March 1, 1974, the exceptions specified in the second paragraph of the above-quoted provision of the code do not apply and, therefore, the awards cannot be given effect as they are inconsistent with the Retirement Code.

It is well settled that an arbitration panel may not require the performance of an unlawful act. The Pennsylvania Supreme Court, in *Washington Arbitration Case,* 436 Pa. 168, 259 A.2d 437 (1969), stated:

> "In spite of the fact that neither the relevant constitutional provision nor the enabling legislation clearly delineates the power of the arbitration panels, *we are of the opinion that such panels may not mandate that a governing body carry out an illegal act." Id.* at 176, 259 A.2d at 442. (Emphasis added).

This same principle has been enunciated more recently in *Allegheny County Firefighters v. County of Allegheny,* 7 Pa. Commonwealth Ct. 81, 299 A.2d 60 (1973), and in *Matter of Arbitration Between Montgomery Twp. Police Department and Montgomery Twp. Board of Supervisors,* 22 Pa. Commonwealth Ct. 653, 349 A.2d 917 (1976). Therefore, since the Gershenfeld Awards regarding non-service connected survivor benefits are in conflict with the Retirement Code and since arbitration awards may not conflict with a statute, the awards are invalid.

The question does arise as to the effect of the legislative appropriation quoted above. Although it can be argued that this appropriation impliedly repealed the death benefits provision of the Retirement Code insofar as State Police are concerned, we find this argument to be without merit. Article III, § 11 of the Pennsylvania Constitution provides that appropriation bills shall embrace nothing but appropriations. Therefore, if the appropriation for payments pursuant to the

Gershenfeld Awards is to be construed as an implied repealer of that section of the Retirement Code, it would, of necessity, deal with more than just appropriations and hence, be unconstitutional. For a complete discussion of this principle, see 1961 Opinion of the Attorney General No. 237 and 1957 Opinion of the Attorney General No. 16.

Even though Act 111 purportedly mandates that the Legislature take action within six months following publication of an arbitration award, the Legislature in the case at bar failed to take action. However, the failure of the Legislature to act does not affect the conclusions contained in this opinion.

Since the Gershenfeld Awards concerning nonservice connected survivor benefits conflict with the Retirement Code provisions concerning such benefits, and since the Retirement Code provides that it alone contains the pension rights of all state employees, absent a substantive legislative enactment to the contrary, you are not authorized to make any payment pursuant to the Gershenfeld Awards.

Pursuant to Section 512 of the Administrative Code of 1929, 71 P.S. § 192, we have referred this matter to the Auditor General and State Treasurer for their review and have duly noted that both the Auditor General and State Treasurer disagree with the conclusions expressed in this Opinion.

Very truly yours,

JEFFREY G. COKIN
*Deputy Attorney General*

VINCENT X. YAKOWICZ
*Solicitor General*

ROBERT P. KANE
*Attorney General*

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## OFFICIAL OPINION NO. 77-12

*Governor's Energy Council—Solar Heating and Cooling Demonstration Act of 1974—Federal funds—Appropriations—Grants—Pennsylvania Constitution, Article III, § 29—Act No. 117 of 1976—U.S. Constitution, Art. VI, cl. 2 (Supremacy Clause).*

1. The Governor's Energy Council may enter into a contract with the Department of Housing and Urban Development to administer a Federal grant program in Pennsylvania and make grants of $400.00 to persons installing solar hot water heating systems in their residences.

2. An appropriation by the General Assembly providing for grants of Federal funds to persons who install solar hot water heating systems in their homes would not violate Article III, § 29 of the Pennsylvania Constitution, which prohibits appropriations made for charitable, educational or benevolent purposes.

3. The Pennsylvania Constitution has no control over an act of the United States Congress.

4. The Pennsylvania Constitution cannot have been intended to prohibit the General Assembly from spending Federal funds in accordance with a duly enacted Federal statute.

Harrisburg, Pa. 17120
July 5, 1977

Honorable William B. Harral
Executive Director
Governor's Energy Council
Harrisburg, Pennsylvania

Dear Mr. Harral:

You have requested our opinion as to the legality of a Federal grant program to be administered by the Governor's Energy Council whereby the Council will be making grants of $400.00 to persons installing solar hot water heating systems in single family residences. The issue is whether this program is violative of Article III, § 29 of the Pennsylvania Constitution, which prohibits, *inter alia,* appropriations for charitable and benevolent purposes.

Pursuant to the Solar Heating and Cooling Demonstration Act of 1974, 42 U.S.C. § 5501, *et seq.,* the United States Department of Housing and Urban Development has established a grant program which will make Federal funds available to certain selected states, including Pennsylvania, to be used for grants to individuals or families who install solar hot water heating systems in single family residences during 1977. Pursuant to the Federal statute and applicable regulations, the Department of Housing and Urban Development proposes to enter into a grant agreement with the Governor's Energy Council whereby the Federal funds will be turned over to the Council and the Council will make the $400.00 grants to individuals or families who qualify. It should be emphasized here that the funds involved are 100% Federal funds (including administration costs) and that no matching State or local funds are required. If State matching funds were involved, they could not be paid because of the prohibition against appropriations for charitable or benevolent purposes contained in Article III, § 29 of the Pennsylvania Constitution. However, even though the monies involved are purely Federal, there is nevertheless an issue concerning whether the Governor's Energy Council can legally enter into the grant agreement with HUD in view of the constitutional prohibition.

Article III, § 29, provides, in pertinent part, as follows:

> "No appropriation shall be made for charitable, educational or benevolent purposes to any person or community. . ."

Although the payment of Federal grants to individuals by the Governor's Energy Council pursuant to a contract with HUD may not appear at first glance to involve an "appropriation", the General Assembly has

legislated, in Act No. 117 of 1976, that all Federal funds, whether designated as grants, augmentations, credits or otherwise, received from the Federal government in any fiscal year, shall be deposited into the General Fund and that they may not be paid out by the State Treasurer unless pursuant to a specific Appropriation Act of the General Assembly. This Act has been upheld as constitutional by the Commonwealth Court in the case of *Shapp v. Sloan,* 27 Pa. Commonwealth Ct. 312, 367 A.2d 791 (1976)*. Assuming that the case is affirmed by the Pennsylvania Supreme Court, the question is whether an appropriation providing for grants of Federal funds to persons who install solar hot water heater systems in their homes would violate Article III, § 29, which prohibits appropriations made for charitable, educational or benevolent purposes.

Although, as noted above, an appropriation of State funds for such purpose would violate the constitutional provision, the appropriation of Federal funds in accordance with a Federal statute is a different matter. First of all, the Pennsylvania Constitution has no control over an act of the United States Congress. U.S. Const. Art. VI, cl. 2 (Supremacy Clause). Secondly, even though the Federal funds are required to be appropriated by the General Assembly pursuant to Act No. 117 of 1976, they are still Federal funds and do not become State funds by virtue of the legislative appropriation. The Pennsylvania Constitution cannot have been intended to prohibit the General Assembly from spending Federal funds in accordance with a duly enacted Federal statute. As the Commonwealth Court said in *Shapp v. Sloan, supra.*

> "Our Pennsylvania forefathers did not frame our Constitution with Federal aid in mind or even dreamed of." (27 Pa. Commonwealth Ct. at 322, 367 A.2d at 797).

Moreover, the Supreme Court of Pennsylvania, in interpreting the equivalent provision of the Constitution of 1874 (Article III, § 18), said:

> "What the Constitution prohibits is the establishment of any such policy which causes an appropriation of *State moneys* for benevolent purposes to a particular class of its citizens. . ." *Busser v. Snyder,* 282 Pa. 440, 451, 128 A.80, 84 (1925) (emphasis added).

The same Federal grant program could have been designed without involving the State government at all. It could have provided for the grants to be made directly from the Federal agency (HUD) to individuals and families located in Pennsylvania. The involvement of the Governor's Energy Council in this program is as an agent of the Federal government to carry out the Federal program utilizing Federal funds

* Editor's note: Affirmed by Pennsylvania Supreme Court; *Shapp v. Sloan,* No. 214 January term 1977; No. 586 January term, 1976; and No. 4 January term, 1977. (Pa. Supreme Ct. filed July 19, 1978) (Appeal to United States Supreme Court filed)

pursuant to Federal law. The fact that the appropriation machinery of the Pennsylvania General Assembly comes into play does not alter the character of the fund. It must be concluded that the Pennsylvania Constitution was not intended to prohibit the General Assembly from making an appropriation in this manner where such is required to implement a Federal program.

For the foregoing reasons, it is our opinion and you are advised, that the Governor's Energy Council may enter into a contract with HUD to administer the Federal grant program in Pennsylvania and make grants of $400.00 to persons installing solar hot water heating systems in their residences.

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. 77-13

*Recent developments concerning the so-called Sunshine Law, Act of July 19, 1974, P.L. 486, No. 175; 65 P.S. §§ 261-269.*

1. The provisions of section 7 of the Sunshine Law are conclusive regarding what functions of the General Assembly are subject to the open meeting requirement.
2. That section of Official Attorney General's Opinion No. 46 of 1974 which concluded that the Sunshine Law does not require disclosure of legal advice by agency counsel concerning pending or impending litigation or other legal proceedings is affirmed.
3. The activities of deliberation, discussion and preliminary decision which lead to formal agency action are not within the statutory definition of formal action and therefore need not be conducted at an open meeting.

Harrisburg, Pa. 17120
July 5, 1977

Honorable Milton J. Shapp
Governor
Harrisburg, Pennsylvania 17120

Dear Governor Shapp:

You have asked our opinion as to the legal consequences of recent developments concerning the so-called Sunshine Law, Act of July 19, 1974, P.L. 486, No. 175, 65 P.S. §§ 261-269. Please be advised as follows:

1. The provisions of section 7 of the Sunshine Law are conclusive re-

garding what functions of the General Assembly are subject to the open meeting requirements. Only committee meetings where bills are considered, hearings where testimony is taken, and the sessions of the House of Representatives and the Senate are subject to the Sunshine Law.

2. That section of Official Attorney General's Opinion No. 46, of 1974, which concluded that the Sunshine Law does not require disclosure of legal advice by agency counsel concerning pending or impending litigation or other legal proceedings is affirmed. The reasoning contained in that opinion is modified, however, and a new basis for the conclusion is formulated on rules of statutory construction.

3. The activities of deliberation, discussion and preliminary decision which lead to formal agency action are not within the statutory definition of formal action and therefore need not be conducted at an open meeting.

MEETINGS OF THE GENERAL ASSEMBLY

In *Consumers Education and Protective Assn., Int'l., Inc. v. Nolan,* 21 Pa. Commonwealth Ct. 566, 346 A.2d 871 (1975), aff'd. 470 Pa. 372, 368 A.2d 675 (1977), suit was brought alleging that the failure of the defendants to provide prior public notice of a meeting of the Senate's Rules and Executive Nominations Committee invalidated that Committee's action in reporting the PUC nomination of Dr. Denenberg to the Senate floor. The plaintiffs also contended that all actions subsequent to that meeting were similarly invalidated, including the Senate vote not to confirm Denenberg and the refusal of the PUC to allow him to continue to participate on the PUC.

The Commonwealth Court rejected plaintiffs' contentions, holding that the meeting was not required to be open under the provisions of section 7 of the Sunshine Law. That section reads as follows:

> For the purpose of this act, meetings of the Legislature which are covered are as follows: all meetings of committees where bills are considered, all hearings where testimony is taken, all sessions of the House of Representatives and the Senate. Not included in the intent of this act are party caucuses.

The Court concluded that this section is conclusive in terms of enumerating what legislative functions must conform to the Sunshine Law. It rejected the contention that the last sentence of the section, dealing with party caucuses, in any way affects this interpretation. The Court also rejected a contention that because the committee did consider several bills during the same meeting, the meeting was one "where bills are considered" and therefore within the ambit of section 7. It concluded that while this fact may affect the validity of any future action taken with regard to those bills, it could not affect the validity of the committee's action regarding the Denenberg nomination.

Accordingly, we conclude, based on the Commonwealth Court decision in this case, that section 7 of the Sunshine Law is conclusive in its enumeration of what functions of the General Assembly are subject to the Sunshine Law. Thus, only the following legislative acts need conform to the open meeting requirements: (1) committee meetings wherein bills are considered; (2) hearings where testimony is taken; (3) all sessions of the House of Representatives and the Senate.[1]

ATTORNEY-CLIENT PRIVILEGE

In Attorney General's Opinion No. 46 of 1974, it was concluded that the Sunshine Law does not require disclosure of legal advice by agency counsel concerning pending or impending litigation or other legal proceedings. This conclusion was based on the premise that the Pennsylvania Supreme Court has "exclusive" jurisdiction in the matter of disciplining attorneys, and the Legislature is without authority to interfere with or impair an attorney in the exercise of his duties as an officer of the court. While Opinion No. 46 was correct in its conclusion in this regard, there is an additional basis for that conclusion.

Section 10 of the Sunshine Law saves from repeal certain statutes. It reads:

> All acts and parts of acts are repealed in so far as they are inconsistent herewith, excepting those statutes which specifically provide for the confidentiality of information.

Disciplinary Rule 4-101(C)(2) compels disclosure of confidential information when *required by law.*

If section 10 is to be given any meaning at all, it must be that the intent of the General Assembly is to continue to recognize the concept of confidences as it was known at the time of enactment and thereafter. In other words, the concept of confidences as found in the Code of Professional Responsibility was meant by the Legislature to be continued notwithstanding the enactment of the Sunshine Law. This theory is correct if one recognizes that the Code of Professional Responsibility has the effect of statutory law. Rules of practice promulgated by the Supreme Court have the effect of statute and must be followed, *Dombrowski v. Philadelphia,* 431 Pa. 199, 203, 245 A.2d 238, 241 (1968); *In re Morrissey's Estate,* 440 Pa. 439, 269 A.2d 662 (1970); 10 P.L.E. "Courts" § 54. Disciplinary rules promulgated by the American Bar Association become as effective as statutes when adopted by the Supreme Court as rules governing practice. "The Supreme Court shall have the power to prescribe general rules governing practice. . . . All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions." Pa. Const., Art. V., § 10(c).

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1. It should be noted that Act 11 of 1976 modified the public notice provisions required of the General Assembly. This act was passed over the Governor's Veto. (Governor's Veto No. 20, December 3, 1975)

Because rules of practice have the effect of statutes and because of policy considerations in favor of the attorney-client privilege, section 10 of the Act should be read as specifically excluding the attorney-client privilege of the Code of Professional Responsibility from the prohibitions of the Sunshine Law.

Alternatively, if the term "statutes" in section 10 of the Act is narrowly interpreted to mean an Act of Assembly, the attorney-client privilege of the Code of Professional Responsibility is still excepted from the restrictions of the Sunshine Law by established principles of statutory construction.

An analysis of the Sunshine Law reveals that it does not on its face address the ethical problem of whether the Act requires the disclosure of confidential information protected by the Code of Professional Responsibility. The ambiguity of the Act was widely recognized at the time of its enactment and controversies over it prompted remarks in the House Journal on eleven different occasions. In enforcing the Act its shortcomings have become obvious. "In certain areas the Sunshine Law has proved unreasonably strict, while in others misleading and vague. Yet, even more critically, the law does not address a whole range of problems." Gubernatorial Veto No. 20, December 3, 1975.

When an act is ambiguous it must be interpreted in light of established rules of statutory construction. The public disclosure mandates of the Sunshine Law and the attorney-client privilege of Canon 4 both concern the subject of the public availability of certain types of communications and are therefore in pari materia. Under the Statutory Construction Act, statutes or parts of statutes are in pari materia when they relate to the same persons or things or to the same class of persons or things. 1 Pa. C.S. § 1932. See also, Pa. R.C.P. 131. "Statutes are to be construed in connection and in harmony with the existing law, and as part of a general and uniform system of jurisprudence." *Erie School District Appeal,* 155 Pa. Superior Ct. 564, 573, 39 A.2d 271, 275 (1944).

Being in pari materia the rule and the Act must be construed together. 1 Pa. C.S. § 1932. When statutes are in pari materia they should be considered concurrently whenever possible, and if they can be made to stand together, effect should be given to both as far as possible. *First National Bank of Millville v. Horwatt,* 192 Pa. Superior Ct. 581, 162 A.2d 60 (1960). Thus, attorneys should not be considered as being *required* to disclose confidential information absent an explicit provision in the Act to this effect.

A second rule of statutory construction is that particular provisions control general provisions. The Statutory Construction Act reads:

> 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. . . 1 Pa. C.S. § 1933. *See also,* Pa. R.C.P. 132.

The Sunshine Law deals broadly with the conduct of meetings of agencies in various situations. The attorney-client privilege of Canon 4 addresses more limited situations. The privilege is not limited by the Sunshine Law; rather the Sunshine Law is limited by the privilege. When two statutes deal with the same things, a particular provision in one will control when the other statute is silent as to the matter. *Millersville Annexation Case,* 2 Pa. Commonwealth Ct. 587, 279 A.2d 349 (1971).

In conclusion, it is our opinion, and you are hereby advised, that the Sunshine Law does not require disclosure of legal advice by agency counsel concerning pending or impending litigation or other legal proceedings. This conclusion is based upon an interpretation of section 10 which rests on the policy consideration in favor of the attorney-client privilege. This conclusion is also based upon those rules of statutory construction which require that two statutes covering the same subject matter be interpreted in pari materia and that particular provisions in one law will control over general provisions in another law when each cover the same subject matter.

## DELIBERATIONS, DISCUSSIONS AND PRELIMINARY DECISIONS

In *Judge v. Pocius,* 28 Pa. Commonwealth Ct. 139, 367 A.2d 788 (1977), the Commonwealth Court held that the activities of deliberation, discussion and preliminary decision which lead up to affirmative formal action are not within the statutory definition of formal action, and therefore need not be conducted at an open meeting. In this case, six citizens and taxpayers of the City of Scranton sought to have declared as illegal certain actions taken by the Scranton School Board. The acts attacked were those taken by the Board at a "work session" called by the Superintendent of Schools, this session not having been publicized. The Court of Common Pleas of Lackawanna County found that no official policy had been set and no official final decision had been reached as to any of the matters discussed at the meeting. Based on these findings, the Commonwealth Court held that there was no violation of the Sunshine Law, since no formal action was taken or scheduled to be taken.

To a limited extent this decision contradicts certain conclusions reached in Official Attorney General's Opinion No. 46 of 1974. In that opinion, it was held that:

> Policy setting would seem to refer to any discussions, deliberations or decisions with regard to the formation, endorsement, ratification or approval of a program or general plan pursuant to which agency business will be conducted or

> agency decisions made, and would include the promulgation, adoption or modification of rules and regulations setting forth substantive or procedural personal or property rights, privileges, immunities, duties, liabilities or obligations of the public or any part thereof.

Since this language would seem to include the preliminary activities discussed in *Judge v. Pocius, supra,* and held in that case not to be within the ambit of the Sunshine Law, Opinion No. 46 must be revised to the extent that it conflicts with *Judge v. Pocius.* Accordingly, it is our conclusion, and you are so advised, that the activities of deliberations, discussion and preliminary decision which lead up to affirmative formal action are not within the scope of the Sunshine Law. If, however, the agency involved either sets, or intends to set, official policy at the meeting involved, or if formal decisions are set, or scheduled to be set, at the meeting, then it must be publicized in accordance with the Sunshine Law regardless of the preliminary nature of the activities involved at the meeting.

In addition, it is believed that those sections of Opinion No. 46 which deal with the terms "meeting" and "hearing" are still correct, and are therefore affirmed. In addition, the following section of Opinion No. 46, relating to formal action, is also believed to be a correct interpretation of the Sunshine Law despite the Commonwealth Court's ruling in *Judge v. Pocius:*

> It is clear from the Act that the Legislature intended "any" vote to be open, not just "formal" votes taken at "formal" meetings. "An informal conference or caucus of any two or more members permits crystallization of secret decisions to a point just short of ceremonial acceptance." *City of Miami Beach v. Berns,* 245 So. 2d, 38, 41 (Fla. 1971). Thus, even a preliminary vote, a casual manifestation of the manner in which a subsequent vote will be cast, or a collective commitment or informal promise to approve or disapprove a particular matter of public agency business is within the purview of the Act. See, *Board of Public Instruction of Broward Co. v. Doran,* 224 So. 2d. 693, 698 (Fla. 1969). An agency cannot evade its obligations under the Act by agreeing to a course of action which will become effective or finalized at a subsequent formal meeting.

## CONCLUSION

This opinion does not purport to resolve all the issues which have arisen under the Sunshine Law since the promulgation of Opinion No. 46. It does serve to inform you of the impact of certain court decisions, and how those decisions affect the conclusions reached in Opinion No. 46. It is our belief that despite the narrow interpretation given the Sunshine Law in certain court decisions, adherence to the letter and spirit

of the law will continue to ensure protection from personal liability for state officers and help prevent agency decisions from being invalidated due to noncompliance with the requirements of the Act.

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. 77-14

*Department of Environmental Resources/State Parks—First Amendment Freedoms—Constitutional Law.*

1. The various state parks of the Commonwealth of Pennsylvania are public facilities appropriate for the expression of First Amendment Rights.
2. The International Society for Krishna Consciousness and other groups generally have a First Amendment right to propagate their religious beliefs within state parks.
3. The Department of Environmental Resources may act to regulate as to time, place and manner the religious activities of the International Society for Krishna Consciousness. Furthermore, the Department of Environmental Resources may prohibit the propagation of religious beliefs in areas of specialized activities where the government has an important and substantial interest in protecting the health and safety of citizens of the Commonwealth. Such areas, including cabins, campgrounds, boating and swimming areas, are inappropriate for public expression.

Harrisburg, Pa. 17120
August 29, 1977

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

Dear Secretary Goddard:

You have requested our opinion regarding the right of the International Society for Krishna Consciousness to distribute literature, solicit contributions and, in general, propagate their religious beliefs in the state parks. You have also asked whether the International Society for Krishna Consciousness (hereinafter referred to as the Hare Krishna Movement) may be prohibited from entering specific portions of parks, such as camping or boating areas. It is our opinion, and you are hereby advised, that members of the Hare Krishna Movement do have a First Amendment right to distribute literature and solicit donations in state parks subject to reasonable restrictions concerning time, place and

manner. However, certain areas of state parks such as campgrounds, cabins, swimming areas and boating areas are inappropriate for the propagation of religious beliefs. Because of overriding governmental interests, members of the Hare Krishna Movement have no right to exercise their activities in these areas.

We have previously considered a similar question. In Official Opinion No. 37 of 1976 we were asked whether members of the Hare Krishna Movement had a First Amendment right to enter the State Farm Show Arena during the annual Farm Show. At that time, we determined that, subject to certain limitations and restrictions, the Hare Krishna Movement does have the right to enter the Farm Show Arena and proselytize. Reference was made to Official Opinion No. 37 of 1976 in the preparation of this Opinion.

The state parks are generally under the control of the Department of Environmental Resources. Pursuant to section 1906-A of the Administrative Code of 1929, 71 P.S. § 510-6, the Department is charged with the authority "[t]o supervise, maintain, improve, regulate, police, and preserve, all parks belonging to the Commonwealth."

The Department of Environmental Resources includes the Bureau of State Parks. The stated policy and objective of the Bureau of State Parks is "to promote and provide healthful outdoor recreation and environmental education to the citizens and guests of the Commonwealth", 25 Pa. Code § 11.202. In order to carry out its objectives, the Bureau of State Parks has enumerated forms of recreation available to those persons utilizing state parks. The approved forms of recreation include,

> ". . . family camping, swimming, environmental education, fishing, hunting, pleasure driving, hiking, backpack camping, snowmobiling, ski touring, trail bike riding, nature study, horseback riding, trapping, boating and picnicking." 25 Pa. Code § 11.203(a).

Generally, the public is invited to enter the parks free of charge and engage in any one of the aforementioned activities. However, certain areas of specialized use, such as camping and cabin areas along with boating areas, have been specifically set aside. These are areas where only the respectively enumerated activities are permitted. Furthermore, these areas are generally not held open for all members of the public to use free of charge. Rather the Bureau of State Parks, through various regulations, has provided for reservation and rental fees for use of these specialized areas. The Hare Krishna Movement contends that it has a First Amendment right to enter these areas, as well as areas of general use, in order to proselytize.

It is beyond dispute that the rights and 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 suffi-

cient "state action" present for the Fourteenth Amendment to bind the Commonwealth of Pennsylvania to the requirements of the First Amendment. The Commonwealth of Pennsylvania owns each of the state parks. The parks are supervised and regulated by the Department of Environmental Resources whose personnel carry out the supervision and regulation. Therefore, the matter is narrowed to two issues. First, do members of the Hare Krishna Movement have a First Amendment right to enter state parks for the purpose of propagating their religious beliefs. Secondly, does the Commonwealth of Pennsylvania have the right to regulate these First Amendment activities and, if so, what is the permissible extent of such regulations.

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. Official Opinion No. 37 of 1976, enumerated several cases which determined whether certain government properties were public places.[1] Other decisions have specifically dealt with parks. The courts are in unanimous agreement, that parks are and have been open to the public.

> "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. . . ." *Hague v. CIO*, 307 U.S. 496, 515 (1939)

> "The use of parks for public assembly and airing of opinions is historic in our democratic society, and one of its cardinal values. Public assembly for First Amendment purposes is as surely a 'park use' as any tourist or recreational activity." *A Quaker Action Group v. Morton*, 516 F.2d 717, 724 (D.C. Cir. 1975).

See also *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

It is evident that Pennsylvania State Parks are public places which generally are appropriate areas for First Amendment activities. Therefore, members of the Hare Krishna Movement do have a right to enter the parks, solicit contributions[2] and proselytize. The Department of Environmental Resources may not absolutely forbid the use of state parks for these activities.

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1. See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Southeastern Promotions Ltd. v. City of West Palm Beach*, 457 F.2d 1016 (5th Cir. 1972); *Wolin v. Port of New York Authority*, 392 F.2d 83 (2nd Cir. 1968), and *International Society for Krishna Consciousness v. Dallas-Fort Worth Regional Airport Board*, 391 F.Supp. 606 (N.D. Texas 1975).

2. The fact that members of the Hare Krishna Movement solicit contributions incidental to their religious activities does not remove their activities from the protection afforded by 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).

The question now arises as to whether the Department of Environmental Resources may regulate members of the Hare Krishna Movement in the exercise of their First Amendment rights and the permissible nature and extent of any such regulation.

In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), the Court considered the problem of regulating First Amendment activities. Quoting from *Hague v. CIO*, 307 U.S. 496 (1939), the court held that the

> ". . . use of streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. 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; but it must not, in the guise of regulation, be abridged or denied." 394 U.S. at 152.

The government may also act to preserve the nature and use of its property.

> "[T]he state has the power to protect and preserve its property for the use to which it was dedicated, and there is no constitutional right to distribute pamphlets or leaflets whenever or wherever one pleases." *Benson v. Rich,* 448 F.2d 1371, 1373 (10th Cir. 1971).

See also; *Greer v. Spock*, 424 U.S. 828, 833 (1976) and *Adderley v. Florida*, 385 U.S. 39, 47 (1966).

More to the point, several cases have considered the right to engage in First Amendment activities in public parks. In each decision the courts have stated the regulations as to "time, place and manner" are permissible if they allow for no discrimination and very limited discretion on the part of park officials. *Kunz v. New York*, 340 U.S. 290 (1951); *A Quaker Action Group v. Morton*, 516 F.2d 717 (D.C. Cir. 1975); *Women Strike for Peace v. Morton*, 472 F.2d 1273 (D.C. Cir. 1972), *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F.Supp. 575 (D.D.C. 1972), *aff'd. mem.*, 409 U.S. 972 (1972); *Washington Free Community Inc. v. Wilson*, 334 F. Supp. 77 (D.D.C. 1971).

In determining the permissible nature and extent of any regulation limiting alleged First Amendment activities, the courts have adopted a test enumerated in *United States v. O'Brien*, 391 U.S. 367 (1968).

> "[R]estrictions on expression are valid if (1) the '[regulation] furthers an important or substantial governmental interest', (2) the 'governmental interest is unrelated to the suppression of free expression' and (3) the incidental restriction on alleged First Amendment rights is no greater than is essential to the

furtherance of that interest." *A Quaker Action Group v. Morton*, 516 F.2d 717, 725-726 (D.C. Cir. 1975).

In order to restrict the religious activities of the Hare Krishna Movement within state parks, the Department of Environmental Resources must use the guidelines set forth in *O'Brien*. The Department should keep in mind the fact that *O'Brien* is basically a balancing test. Therefore, the governmental interest must outweigh the chilling effect upon First Amendment freedoms.

The nature and form of any regulations must be left to the Department of Environmental Resources. However, certain areas of state parks are designed and intended only for certain specialized activities. Because of the nature of these specialized activities there exists an important and substantial governmental interest in protecting the health and safety of persons using these specialized areas of the state parks. These areas are therefore inappropriate for the dissemination of religious philosophies.

Boating areas are designed for and indeed may only be fully utilized for boating. There are also overriding considerations of safety. The launching, docking and handling of watercraft are delicate activities which require the utmost concentration and care. The required care would not be possible if boating areas become a forum for the expression of religious beliefs.

It is evident that similar safety considerations also dictate that areas especially reserved for swimming may be regulated as to use. In order to maintain an acceptable safety standard in swimming areas, the Department must ensure that it retains complete control and discipline over the activities within the area.

There also exists an important and substantial governmental interest in protecting the health and safety of persons using campgrounds and cabin areas. These areas have been planned and designed with only one activity in mind. The use of these areas for other purposes is inappropriate and inconsistent with safety considerations. Several decisions including *Adderley v. Florida*, 385 U.S. 39 (1966), have held that the state may preserve its property for the use to which it is dedicated.

Furthermore, several cases involving the use of parks for First Amendment activities have stated that the government may reserve certain park areas for a specific park use. In *A Quaker Action Group v. Morton*, 516 F.2d 717, 724-725 (D.C. Cir. 1975), the court stated:

> "It may be that certain parks can reasonably be reserved for specific park uses; First Amendment activity might be inappropriate for a wilderness area such as Yellowstone Park."

The court in *Women Strike for Peace v. Hickel*, 420 F.2d 597 (D.C. Cir. 1969), while ruling that the United States Park Service could not completely exclude antiwar demonstrators from a park, did indicate that:

> "It may well be that a sound park policy could accommodate the use of some park areas for public expression, and the reservation of certain park areas for other purposes." 420 F.2d at 601.

Therefore, it seems clear that the Department of Environmental Resources may prohibit members of the Hare Krishna Movement from proselytizing in those areas of state parks specifically dedicated for a certain specialized activity such as camping.

Other considerations are also present. Campgrounds and cabin areas are sections of the park that become especially crowded and congested. They are specifically designed to accommodate a large number of people only for their respective purposes. Therefore, the need to maintain order becomes quite important.

More importantly, public safety is also an issue. These areas are also used extensively for cooking. With the possibility of a large number of open fires in a confined area, which often is congested, it becomes necessary to limit other activities within the area.

In conclusion, it is our opinion, and you are advised, the members of the Hare Krishna Movement do have a First Amendment right to proselytize and solicit donations within state parks. However, the Department of Environmental Resources may, in accordance with the requirements of *United States v. O'Brien*, 391 U.S. 367 (1968), regulate the areas where members of the Hare Krishna Movement are permitted to proselytize. Furthermore, the Department may prohibit the exercise of these activities in campgrounds, cabin, boating and swimming areas. Because of the specialized design and use of these areas, which give rise to an important and substantial governmental interest in protecting the health and safety of persons using the specialized areas, they are not an appropriate forum for the dissemination of religious philosophies.

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. 77-15

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

1. The United States Supreme Court has ruled that public payment for field trip transportation for sectarian school pupils is an unconstitutional violation of the separation of Church and State. *Wolman v. Walter*, 433 U.S. 229 (1977)
2. This decision renders Act 372 of 1972 and Attorney General Opinion 1976-35 void as regard field trip transportation for sectarian nonpublic schools.
3. Act 372 of 1972 and Attorney General Opinion 1976-35 remain in effect for nonsectarian, nonpublic school pupils.

Harrisburg, Pa. 17120
September 1, 1977

Honorable Caryl Kline
Secretary of Education
Harrisburg, Pennsylvania

Dear Mrs. Kline:

On December 30, 1976, we addressed Attorney General Opinion 76-35 to your predecessor, the Honorable John C. Pittenger. That opinion answered several questions posed by Secretary Pittenger regarding the interpretation of the field trip transportation provisions of Act 372 of 1972, which amended the Public School Code of 1949, 24 P.S. § 13-1361 (hereinafter Act 372). In that opinion, we provided guidelines to enable school districts to make "identical provision" for field trip transportation for nonpublic school students. It was our intention to provide a workable definition of that statutory phrase which would be in accordance with applicable rules of law.

However, since the promulgation of that opinion, a similar field trip transportation statute in the State of Ohio has been ruled unconstitutional by the United States Supreme Court, as violative of the First Amendment's doctrine of separation of Church and State. In *Wolman v. Walter*, the Supreme Court of the United States ruled:

> Funding of field trips, therefore, must be treated as was the funding of maps and charts in *Meek v. Pittinger, supra,* the funding of buildings and tuition in *Committee for Public Education v. Nyquist, supra,* and the funding of teacher-prepared tests in *Levitt v. Committee for Public Education, supra;* it must be declared an impermissible direct aid to sectarian education. 433 U.S. 229, 254 (1977)

The Ohio statute in question is substantively identical to the field trip transportation provision in Act 372. The section in question, Section 3316.06, authorized expenditures of funds: "(L) To provide such field trip transportation and services to nonpublic school students as are provided to public school students in the district. School districts

may contract with commercial transportation companies for such transportation service if school district busses are unavailable." *Ibid.*[1]

The Supreme Court found this provision unconstitutional on the ground that the public school authorities would be unable adequately to insure secular use of the field trip funds without close supervision of the nonpublic teachers, and that supervision would create excessive entanglement. *Ibid.*

In light of the Supreme Court's action in *Wolman v. Walter*, we hereby retract Attorney General Opinion 76-35 as it pertains to sectarian, nonpublic schools. Furthermore, it is our opinion, and you are hereby advised, that the field trip transportation provisions of Act 372 as applied to sectarian, nonpublic schools are unconstitutional and void in light of the United States Supreme Court decision in *Wolman v. Walter, supra*. Accordingly, we advise you to direct the school districts of Pennsylvania to make no further expenditures for field trip transportation for sectarian, nonpublic school pupils pursuant to Act 372. However, in accordance with the doctrine of severability as enunciated in *Commonwealth v. The First School*, 471 Pa. 471, 370 A.2d 702, (1977), you are advised that Act 372 and Opinion 76-35 remain valid as to field trip transportation for students at nonsectarian, nonpublic schools.

Sincerely,

ROBERT E. RAINS
*Deputy Attorney General*

VINCENT X. YAKOWICZ
*Solicitor General*

ROBERT P. KANE
*Attorney General*

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## OFFICIAL OPINION NO. 77-16

*Liquor Control Board—Liquor Code—Distributors and Importing Distributors—Purchase—Sale*

1. The purchase from an importing distributor of malt or brewed beverages by a distributor whose licensed premises are outside the importing distributor's area as designated by an out-of-State manufacturer of such beverages is unlawful, as well as the sale by the importing distributor.

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1. Pennsylvania's Act 372 reads in relevant part:
"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."

2. Although Section 431(b) of the Liquor Code does not itself contain language that would declare the purchaser in violation of the Act when the importing distributor sells beverages to someone whose licensed premises are outside his geographical area, Section 441(e) makes such a purchase by a distributor unlawful.
3. The Statutory Construction Act requires that every statute shall be construed, if possible, to give effect to all its provisions.

Harrisburg, Pa. 17120
September 1, 1977

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

Dear Chairman Kaplan:

You have requested our opinion as to whether a citation may be issued against a "distributor" of malt or brewed beverages for making a purchase of such products manufactured out-of-State from an "importing distributor" when the distributor is not located within the geographical area for which the importing distributor has been given distributing rights by the out-of-State manufacturer. It is our opinion, and you are advised, that the Board may issue citations against distributors making such purchases.

The applicable provisions are found in Section 431(b) of the Liquor Code (47 P.S. § 4-431(b)) as follows:

> "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 distributors, have been purchased only from persons licensed under this act as manufacturers or importing distributors, and 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.
>
> 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: . . .*" (emphasis added)

It is further provided in Section 441(e) of the Liquor Code (47 P.S. § 4-441(e)):

"(e) No distributor or importing distributor shall purchase, sell, resell, receive or deliver any malt or brewed beverages, except in strict compliance with the provisions of subsection (b) of section 431 of this act."

Under Section 431(b), a distributor is authorized to purchase malt or brewed beverages only from Pennsylvania manufacturers and importing distributors. Importing distributors may purchase such beverages from manufacturers and other persons out-of-State as well as from manufacturers and importing distributors in the State. In the case of out-of-State manufacturers, importing distributors are prohibited from selling their beverages to anyone whose licensed premises are outside the geographical area designated for such importing distributor by the out-of-State manufacturer.

Your question relates to a case where an importing distributor illegally sells to a distributor whose licensed premises are not located within the geographical area designated for the importing distributor by the out-of-State manufacturer. In such a case, is the *distributor* in violation of the law and may he be cited by the Board?

Under the precise language of Section 431(b), it is the importing distributor who is prohibited from selling to such distributor, but there is no equivalent language prohibiting the distributor from making the purchase. The distributor is limited to making purchases from licensed Pennsylvania manufacturers and importing distributors but he is not restricted by that section to any geographical area.

Section 441(e) quoted above, however, provides in pertinent part that: "[n]o distributor . . . shall purchase . . . receive . . . any malt or brewed beverages, except in strict compliance with the provisions of subsection (b) of section 431 of this act." This clearly indicates a legislative intent that Section 431(b) shall be strictly complied with and that a distributor, in particular, shall not purchase or receive malt or brewed beverages in circumstances wherein Section 431(b) is violated. Thus, although Section 431(b) does not itself contain language that would declare the purchaser in violation of the Act when the importing distributor sells beverages to someone whose licensed premises are outside his geographical area, Section 441(e) makes such purchase by a distributor unlawful.

While it can be argued that Section 441(e), calling for strict compliance with Section 431(b), was merely intended to emphasize that Section 431(b) means what it says, such an interpretation would not add anything to what the language of 431(b) had already said and its inclusion in the Liquor Code would be meaningless. The Statutory Construction Act requires that every statute shall be construed, if possible, to give effect to all its provisions. (1 Pa. C.S. § 1921).

It has been suggested that the result we have reached here would require a distributor to know the contents of the agreement between the

importing distributor and the out-of-State manufacturer and this would impose upon him an unreasonable burden. On the other hand, the importing distributor is in a position to protect himself since Liquor Control Board regulations require that all persons transporting malt or brewed beverages under the authority of a license or permit issued by the Board shall have painted or affixed on each side of the vehicle(s) used, their names, addresses and license numbers in letters no smaller than four inches in height. 40 Pa. Code § 9.21. In this manner, the importing distributor has readily available to him the information required to determine if the distributor to whom he sells malt or brewed beverages is located outside the area assigned to him by an out-of-State manufacturer. When the distributor comes to the importing distributor's place of business, the importing distributor can determine the location of the distributor's licensed premises by reading the letters on either side of the distributor's truck.

We agree that the distributor who comes to the importing distributor's place of business is required to know the contents of the importing distributor's agreement with the out-of-State manufacturer if he is to protect himself. This means that he must request the importing distributor to show him the agreement and should the importing distributor fail to do so, he will have to refrain from making the purchase and go elsewhere. This situation would be relieved considerably, however, if the Board were to promulgate a regulation, under its general regulatory power, requiring importing distributors to post in a conspicuous place on their licensed premises a schedule of the territorial restrictions placed upon them by the various out-of-State manufacturers with whom they have agreements giving them distributing rights. The regulation should also require copies of all such agreements to be filed with the Board. These requirements, however, would not thereby relieve importing distributors of the responsibility to assure that the distributors' licensed premises are not outside their territory.

In conclusion, it is our opinion, and you are advised, that under the Liquor Code, the *purchase* from an importing distributor by a distributor whose licensed premises are outside the importing distributor's area as designated by the out-of-State manufacturer, is unlawful as well as the *sale* by the importing distributor. It is suggested that the Board promulgate regulations requiring the importing distributors to post a schedule of their territorial limits in a conspicuous place at their business premises and to file copies of their agreements with out-of-State manufacturers with the Board in order that distributors are better able to protect themselves from such violations of the Act.[1]

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1. The same reasoning applies to the situation where a secondary importing distributor buys beverages manufactured out-of-State from a primary importing distributor and then sells to a distributor. In such a case, the Board regulation should require the secondary importing distributor to post the territorial limits that were given to the primary importing distributor by the out-of-State manufacturer. See *Pennsylvania Liquor*

In view of the fact that the absence of regulations requiring notice to distributors may present doubts as to the constitutional validity of criminal convictions of distributors, it is suggested that prosecutions against distributors for violations of Section 431(b) that are presently pending be withdrawn, and that no further prosecutions be brought against distributors for such violations until the recommended regulations have been adopted and are in effect.

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. 77-17

*Governor's Council on Drug and Alcohol Abuse—Department of Public Welfare*—Act 1976-148—Liability for Commitments to Drug and Alcohol Abuse Facilities—Approval of Drug and Alcohol Abuse Facilities

1. The Department of Public Welfare is liable, pursuant to Act 1976-148 for one-half of the actual costs of the placement and care of juveniles committed by a court, under the Juvenile Act, to a drug or alcohol treatment facility ("D/A facility") approved by the Department.
2. Commitment of a juvenile adjudicated delinquent or dependent to a D/A facility is a proper commitment under the Juvenile Act.
3. Where drug or alcohol abuse or dependency underlies an adjudication of delinquency or dependency, the Court, pursuant to the Juvenile Act, may properly commit a juvenile to a D/A facility.
4. A D/A facility may lawfully accept juveniles committed under the Juvenile Act.
5. The recipient D/A facility may be approved by the Department within the meaning of Section 2(a)(4) of Act 1976-148.
6. The Department of Public Welfare should promulgate regulations consistent with Section 102(12) of the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, No. 240, *as amended,* to establish the basis on which it will approve D/A facilities for purposes of Section 2(a)(4).

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*Control Board v. Starr,* 13 Pa. Commonwealth Ct. 415, 318 A.2d 763 (1974), *aff'd. per curiam,* 462 Pa. 124, 337 A.2d 914 (1975). Also, in the event that the secondary importing distributor's licensed premises are outside the primary importing distributor's territory, the secondary importing distributor is liable to prosecution for violating Section 431(b) as is the primary importing distributor.

Harrisburg, Pa. 17120
September 22, 1977

Mr. Gary Jensen
Executive Director
Governor's Council on Drug
and Alcohol Abuse
Harrisburg, PA

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

Dear Mr. Jensen and Secretary Beal:

The Governor's Council on Drug and Alcohol Abuse (hereinafter referred to as "the Council") has requested our opinion as to whether the Department of Public Welfare (hereinafter referred to as "the Department") is liable, pursuant to the Act of July 9, 1976, P.L. 846 (1976-148) for one-half of the actual costs of placement and care of juveniles committed by a court under the Juvenile Act, Act of December 6, 1972, P.L. 1464, *as amended,* 11 P.S. § 50-101, *et seq.,* to a drug or alcohol treatment facility. It is our opinion that the Department is liable, pursuant to Act 1976-148 for one-half of the actual costs of the placement and care of juveniles committed by a court, under the Juvenile Act, to a drug or alcohol treatment facility approved by the Department.[1]

The cornerstone of the Department's liability for juveniles committed under the Juvenile Act is found in Section 2(a)(4) of Act 1976-148 (62 P.S. § 704.1(a)(4)) as follows:

> (a) The department (of Public Welfare) shall reimburse county institution districts or their successors for expenditures incurred by them in the performance of their obligation pursuant to this act and the act of December 6, 1972 (P.L. 1464, No. 333) known as the "Juvenile Act", in the following percentages:
>
> * * *
>
> (4) *Fifty percent (50%) of the actual cost of care and support of a child. . .committed by a court pursuant to the. . .(Juvenile Act) to the legal custody of a. . .private agency approved. . .by the department. . .* (Emphasis added).

To determine whether a commitment to a drug or alcohol treatment facility (hereinafter referred to as a D/A facility) establishes the Department's liability under this section, two questions must be answered: 1) Is a commitment of a juvenile adjudicated delinquent or dependent to a D/A facility a proper commitment under the Juvenile Act? 2) May the recipient D/A facility be considered a "private agency approved by the Department" within the meaning of Section 2(a)(4)? We conclude that both questions must be answered in the affirmative.

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1. The county must, of course, assume the other half of these costs pursuant to Section 2(a) of Act 1976-148.

1) Commitment of a Juvenile Adjudicated Delinquent or Dependent to a D/A Facility is a Proper Commitment Under the Juvenile Act.

In concluding that the first question must be answered affirmatively, we have focused on two facets necessary to the commitment: a) the propriety of the court's action in committing a juvenile to a D/A facility; and b) the ability of the D/A facility to receive the juvenile so committed.

a) Where Drug or Alcohol Abuse or Dependency Underlies An Adjudication of Delinquency or Dependency, The Court, Pursuant to the Juvenile Act, May Properly Commit a Juvenile To a D/A Facility.

A juvenile may be committed under the Juvenile Act only if he has been adjudicated "delinquent" or "dependent". 11 P.S. §§ 50-321, 322. When a court, acting pursuant to the Juvenile Act, commits a juvenile adjudicated delinquent or dependent to a D/A facility, it does so because of its findings that the course of conduct which gave rise to the adjudication of delinquency or dependency was caused, in whole or in part, by the juvenile's abuse of or dependency upon drugs or alcohol and that the juvenile will receive, at the D/A facility, treatment for the abuse or dependency underlying the delinquency or dependency.[2] The selection of the D/A facility to receive the juvenile must be seen as an effort by the court to match the cause of the delinquency or dependency with commitment to a facility which will effectively treat that cause. This matching of treatment to causation is consistent with the purposes of the Juvenile Act as enunciated in Sections 1(b)(1), and (2) of that Act:

> (1) . . . (T)o provide for the *care, protection and wholesome mental and physical development of children* coming within the provisions of this act;
>
> (2) Consistent with the protection of the public interest, to remove from children committing delinquent acts the consequences of criminal behavior, and *to substitute therefor a program of supervision, care and rehabilitation.* (emphasis added). 11 P.S. §§ 50-101(b)(1), (2).

and with the purposes of delinquency and dependency commitments as enunciated in Sections 24 and 25 of the Act:

2. It must be emphasized that the juvenile is being committed because of the adjudication of delinquency or dependency under the Juvenile Act. Even though drug or alcohol abuse or dependence may underlie that delinquency or dependency, the juvenile is *not* being committed because of his status as a "drug abuser" or "drug dependent person". Thus, he is not being committed pursuant to Section 5 of the Pennsylvania Drug and Alcohol Abuse Control Act, Act of April 14, 1972, P.L. 221, No. 63, 71 P.S. § 1690.105, nor is he being committed pursuant to any other law, including the Mental Health and Mental Retardation Act of 1966, Act of October 20, 1966, P.L. 96, No. 3, 50 P.S. § 4101, *et seq.* or the Mental Health Procedures Act of 1976, Act of July 9, 1976, P.L. 817, No. 143, 50 P.S. § 7101 *et seq.*

> If the child is found to be . . . dependent . . . the court may make any of the following orders of disposition *best suited to the protection and physical, mental and moral welfare of the child* . . . . (emphasis added). 11 P.S. § 50-321.
>
> * * *
>
> If the child is found to be . . . delinquent . . . the court may make any of the following orders of disposition *best suited to his treatment, supervision, rehabilitation, and welfare* . . . . (emphasis added). 11 P.S. § 50-322.

Furthermore, we note that in selecting the facility to receive the juvenile, the court has a great deal of discretion in selecting the one most appropriate to the needs of the juvenile. *In re Gardini*, 243 Pa. Superior Ct. 338, 365 A.2d 1252 (1976); *Janet D. v. Carros*, 240 Pa. Superior Ct. 291, 317, 362 A.2d 1060, 1073 (1976). We conclude, therefore, that the court's action in committing a juvenile, adjudicated delinquent or dependent, to a D/A facility, where the course of conduct which gave rise to the adjudication of delinquency or deprivation was caused, in whole or in part, by the juvenile's abuse of or dependency on drugs or alcohol, is lawful and proper.

b) A D/A Facility May Lawfully Accept Juveniles Committed Under the Juvenile Act.

In determining whether a D/A facility may lawfully receive a juvenile committed pursuant to the Juvenile Act, Sections 24 and 25 of the Act must be examined. Those provisions allow the court to commit juveniles adjudicated "delinquent" or "dependent" as follows:

> (a) If the child is found to be a *dependent* child, the court may make any of the following orders of disposition best suited to the protection and physical, mental, and moral welfare of the child;
>
> * * *
>
> (2) . . . (T)ransfer temporary legal custody to any of the following:
>
> * * *
>
> (ii) *an agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child* . . . . (emphasis added). 11 P.S. § 50-321(a)(2)(ii).
>
> * * *
>
> If the child is found to be a *delinquent* child, the court may make any of the following orders of disposition best suited to his treatment, supervision, rehabilitation, and welfare:
>
> (1) *Any order authorized by Section 24 for the disposition of a dependent child.* (emphasis added). 11 P.S. § 50-322(1).

Thus, the question to be resolved is whether a D/A facility is "an agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child". We conclude that it is.

A D/A facility is established, according to Section 4(a)(14) of the Pennsylvania Drug and Alcohol Abuse Control Act, 71 P.S. § 1690.104(a)(14), for the purpose of providing drug and alcohol treatment services to, among others, juveniles adjudicated delinquent or dependent. Prior to June 7, 1977, a D/A facility had to be licensed or otherwise authorized by the Department, pursuant to Articles IX and X of the Public Welfare Code, Act of June 13, 1967, P.L. 31, No. 21, 62 P.S. §§ 901-922, 1001-1059, to, *inter alia*, receive and provide care for children. However, Reorganization Plan No. 2 of 1977 provides that as of June 7, 1977, the effective date of the Plan, the Council will license or otherwise authorize D/A facilities to, *inter alia*, receive and provide care for children. Since these facilities were established with the purpose of providing care for juveniles adjudicated delinquent or dependent and since they were "licensed, etc.," by the Department and are now "licensed, etc.," by the Council, it is our opinion that they comport with the phrase "an agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child". Thus, they may properly and lawfully receive custody of a juvenile committed by the court pursuant to Sections 24 and 25 of the Juvenile Act.

Having established that the court may properly make commitments to D/A facilities, and that these facilities may lawfully receive juveniles so committed, we conclude that such commitments are proper commitments under the Juvenile Act.

2) The Recipient D/A Facility May Be Approved By the Department Within the Meaning of Section 2(a)(4) of Act 1976-148.

Section 24 of the Juvenile Act speaks in terms of "an agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child", 11 P.S. § 50-321(a)(2), whereas Section 2(a)(4) of Act 1976-148, 62 P.S. § 704.1(a)(4) speaks in terms of "a public or private agency approved . . . by the Department of Public Welfare".[3] We have established above that a D/A facility is "an agency or other private organization" referred to in Section 24 of the Juvenile Act. However, this does not necessarily mean that it is a "public or private agency approved by the Department" as referred to in Section 2(a)(4) of Act 1976-148, 62 P.S. § 704.1(a)(4). The fact that the Council has licensed or otherwise authorized by law a D/A facility to, *inter alia,*

3. Section 24 of the Juvenile Act speaks in terms of a transfer of *temporary legal custody*, 11 P.S. § 50-321(a)(2), whereas Section 2(a)(4) of Act 1976-148 speaks only in terms of a transfer of *legal custody*. We find that the phrase "legal custody" includes "temporary legal custody". As such, transfer of temporary legal custody under Section 24 of the Juvenile Act is a transfer of legal custody for purposes of Section 2(a)(4) of Act 1976-148.

receive and provide care for children does not necessarily mean that the Department is ultimately liable, under Section 2(a)(4), to pay for onehalf the actual costs of the care and support of children committed to that facility under the Juvenile Act. This conclusion stems from the distinction we perceive between approval, under Section 2(a)(4), and licensure or other legal authorization, under Articles IX and X of the Public Welfare Code as transferred to the Council by Reorganization Plan No. 2 of 1977.

The license or other authorization granted to a D/A facility by the Council, pursuant to Articles IX and X and the Reorganization Plan, represents the D/A facility's right to operate as a facility offering drug and/or alcohol abuse treatment services to children. Approval by the Department under Section 2(a)(4) is over and above the facility's right to operate. Approval by the Department under Section 2(a)(4) grants to the facility the additional right to have the Department ultimately pay one-half the actual cost of the care and support of juveniles committed pursuant to the Juvenile Act.

The distinction is consistent with other third party payment programs in which the provider, i.e., the D/A facility, must meet additional standards of the third party payor, i.e., the Department, in order for it to receive persons the cost of whose care and support will ultimately be paid, in whole or in part, by the third party payor, notwithstanding the fact that the provider is otherwise authorized by law to operate. Further, the distinction is appropriate because it gives to the Department the means to assure that it will be paying for the care and support of juveniles committed to a D/A facility only if the facility is operated in a fashion consistent with the Juvenile Act. For example, it allows the Department to insure that the D/A facility does not commingle delinquent and dependent children in contravention of Section 24(b) of the Act.

We conclude, therefore, that a D/A facility, otherwise authorized by the Council, pursuant to Articles IX and X of the Public Welfare Code and Reorganization Plan No. 2 of 1977, to receive and care for children, may be a "public or private agency approved by the Department" if that D/A facility has received the approval of the Department issued pursuant to Section 2(a)(4) of Act 1976-148.

The Department should immediately begin taking the necessary steps to promulgate regulations consistent with Section 102(12) of the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, No. 240, *as amended,* to establish the basis on which it will approve D/A facilities for purposes of Section 2(a)(4). These regulations must insure that D/A facilities receiving juveniles committed under the Juvenile Act operate consistently with the Juvenile Act. The Department must not infringe upon the Council's right to regulate these institutions pursuant to Articles IX and X and the Reorganization Plan. We suggest,

therefore, that the Council and the Department work together in this regard.

Sincerely,

PAUL SCHILLING
*Deputy Attorney General*

VINCENT X. YAKOWICZ
*Solicitor General*

ROBERT P. KANE
*Attorney General*

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## OFFICIAL OPINION NO. 77-18

*Liquor Control Board—Alcoholic Beverages—Liquor Code—Prices*

1. The imposition of a flat, across the board, price increase added to the existing 48 per cent mark-up on alcoholic beverages would violate Section 207 of the Liquor Code (47 P.S. § 2-207) by giving a preference to, or discriminating in favor of, more expensive classes or brands of liquor inasmuch as the brunt of the price increase would fall on the less expensive classes or brands.
2. On the other hand, a flat 15 cent service or handling charge added to the selling prices of all wines, liquors and alcohol across the board would be legitimate. The limitations on such a charge are that it must apply to all merchandise in the same comparable price bracket regardless of class, brand, or otherwise, and it must bear some relationship to the actual cost of handling the merchandise.

Harrisburg, Pa. 17120
October 5, 1977

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

Dear Mr. Kaplan:

We have received your request for an opinion concerning the Board's authority to increase the prices of alcoholic beverages sold by State stores. You have asked whether prices can be increased by a certain number of cents across the board applicable to all wine, liquor and alcohol, and, if not, whether essentially the same thing can be accomplished by adding a service or handling charge in the same amount applicable to all such beverages. It is our opinion, and you are advised, that the Board does not have the authority to increase prices in the manner suggested, but it does have the authority to impose a service or handling charge.

The applicable provision of the Liquor Code is Section 207(b), 47 P.S. § 2-207(b), which provides, in part, as follows:

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

* * * * * * * * * * * * * * * * * * * *

(b) To control the manufacture, possession, sale, consumption, importation, use, storage, transportation and delivery of liquor, alcohol and malt or brewed beverages in accordance with the provisions of this act, and to fix the wholesale and retail prices at which liquors and alcohol shall be sold at Pennsylvania Liquor Stores: *Provided, That in fixing the sale prices, the board shall not give any preference or make any discrimination as to classes, brands or otherwise*, except to the extent and for the length of time necessary to sell such classes or brands in compliance with any Federal action freezing or otherwise controlling the price of said classes or brands, or except where special sales are deemed necessary to move unsaleable merchandise, *or except where the addition of a service or handling charge to the fixed sales price of any merchandise in the same comparable price bracket, regardless of class, brand or otherwise, is, in the opinion of the board, required for the efficient operation of the State store system*."

(Emphasis added).

At present, the Board has applied a 48 per cent mark-up added to the cost of all wine, liquor and alcohol sold in the State stores. Since the same percentage is applied to all beverages regardless of class, brand, or otherwise, it meets the requirement of Section 207 that in fixing sale prices the Board shall not give any preference or make any discrimination as to classes, brands, or otherwise. If the Board were now to add a flat 15 cent additional mark-up to the existing 48 per cent mark-up, the question is whether this would constitute a preference in favor of or discrimination against a class, brand, or otherwise. For example,a bottle of wine costing $1.00 would be marked up 48 percent, or 48 cents, plus 15 cents, for a total selling price prior to taxes of $1.63; a bottle of liquor costing $10.00 would be marked up 48 per cent, or $4.80, plus 15 cents, for a total selling price prior to taxes of $14.95. From one point of view there is no preference or discrimination because the same charge is added to both. However, from a different perspective, the combined mark-ups constitute discrimination against the bottle of wine because the total mark-up on the bottle of wine is a larger percentage than the total mark-up on the bottle of liquor.

It is our opinion that the imposition of a flat, across the board, price increase added to the existing 48 per cent mark-up would violate Section 207 of the Liquor Code by giving preference to, or discriminating in favor of, more expensive classes or brands of liquor inasmuch as the brunt of the price increase would fall on the less expensive classes or brands.

On the other hand, a flat 15 cent service or handling charge added to the selling prices of all wines, liquors and alcohol across the board would be legitimate. The limitation on such a charge is that it must apply to all merchandise in the same comparable price bracket regardless of class, brand, or otherwise. Since the charge suggested is to apply to all merchandise in all price brackets, it satisfies that criterion.

The above provisions of Section 207 were the subject of an Attorney General's Opinion issued by Attorney General J. Shane Creamer on April 27, 1972. Op. Atty. Gen. No. 118, 2 Pa. B. 829. Prior to that time, based upon an earlier opinion of Attorney General Anne X. Alpern, Op. Atty. Gen. No. 206, December 14, 1959, the Board had been fixing the price of wine on a basis different from that of liquor. The mark-up on wine was 58 per cent and the mark-up on liquor was 48 per cent. Attorney General Creamer reasoned that since wine is included in the definition of "liquor" set forth in Section 102 of the Liquor Code, it followed that wine is a class of liquor and cannot be discriminated against by the Board in fixing the sale prices of liquor and alcohol. He went on to conclude that the additional 10 per cent mark-up for wine could not be considered a service or handling charge because it was not applicable to all merchandise in the same comparable price bracket. Unless the service or handling charge was added to all liquors in the same comparable price bracket as the wines, it would be invalid. He further stated that the imposition of a service charge must have some relationship to the actual cost of handling the merchandise.

The conclusion we have reached here is consistent with Attorney General Creamer's opinion inasmuch as wine and liquor are treated alike and the service or handling charge, if added to all merchandise in all price brackets, will satisfy the requirement that it be applicable to all merchandise in the same comparable price bracket. As long as the charge to be added bears some relationship to the actual cost of handling the merchandise, that is, as long as it makes up part or all of such cost, but does not exceed it, it is authorized by Section 207 of the Liquor Code.

In conclusion, it is our opinion and you are advised that a 15 cent mark-up may not be added to the sale price of wine, liquor and alcohol above the already existing 48 per cent mark-up, but that a 15 cent service or handling charge may be added as long as it bears some relationship to the actual cost of handling the merchandise.

Very truly yours,

W. WILLIAM ANDERSON
*Deputy Attorney General*

VINCENT X. YAKOWICZ
*Solicitor General*

ROBERT P. KANE
*Attorney General*

## OFFICIAL OPINION NO. 77-19

*No-Fault Act—Self-Insurers and Obligated Governments Are Not Required to Participate in The Assigned Claims Plan or Bureau.*

1. Self-insurers and obligated governments are not required to participate in the Assigned Claims Plan or Bureau.
2. "Obligor insurer" means obligors other than self-insurers and obligated governments.

Harrisburg, Pa. 17120
October 6, 1977

Honorable James B. Wilson
Secretary of Transportation
Harrisburg, Pennsylvania

Dear Secretary Wilson:

In March of 1977, Acting Secretary of Transportation, George Pulakos, requested an opinion concerning whether obligated governments and self-insurers are required to participate in the Pennsylvania Assigned Claims Plan (Plan) and the Pennsylvania Assigned Claims Bureau (Bureau), estblished by Section 108 of the No-Fault Act (Act), 40 P.S. § 1009.108. We have determined that obligated governments and self-insurers are not required to participate in the Plan and the Bureau.

Section 108 (b)(1) provides:

> "Obligors other than self insurers and governments providing basic loss insurance in this Commonwealth shall organize and maintain, subject to approval and regulation by the commissioner, an assigned claims bureau and an assigned claims plan and adopt rules for their operation and for assessment of costs on a fair and equitable basis consistent with this act. If such bureau and plan are not organized and maintained in a manner considered by the commissoner to be consistent with this act, he shall organize and maintain an assigned claims bureau and an assigned claims plan. Each obligor insurer providing basic loss insurance in the Commonwealth shall participate in the assigned claims bureau and the assigned claims plan. Costs incurred shall be allocated fairly and equitably among the obligors."

The Insurance Department has taken the position that self-insurers and obligated governments are required to participate in the Bureau and the Plan. It bases this contention on the last sentence of Section 108(b)(1) of the Act which states, "Costs incurred shall be allocated fairly and equitably among the obligors." Since it is inconsistent with the Rules of Statutory Construction to read that sentence in a vacuum, we cannot agree with the Insurance Department's position.

In order to properly interpret Section 108(b)(1), it is helpful to review the section sentence by sentence. In the first sentence, it is clear that

self-insurers and obligated governments are excluded from organizing and maintaining the Bureau and the Plan. The third sentence of Section 108(b)(1) is addressed to "each obligor insurer." And therein lies the confusion.

The terms "obligor" and "insurer" are defined in Section 103 of the Act, 40 P.S. § 1009.103. The term "insurer" is defined as

> "A legally constituted entity, *other than a self-insurer or an obligated government*, which is authorized under state law to provide security covering a motor vehicle in such state." (Emphasis supplied.)

"Obligor," on the other hand, is defined as

> "An insurer, self-insurer or obligated government providing no-fault benefits in accordance with this act."

The discrepancy is readily apparent. The term "obligor" includes self-insurers and obligated governments; the term "insurer" specifically excludes those entities. Since the two words are used together, it behooves us to interpret them such that each term has meaning. *See Commonwealth v. White Star Lines, Inc.*, 74 Dauph. 119 (1959), in which it was held that the construction of a statute will be favored which renders every word operative rather than one which makes some words idle and negative. The terms "obligor" and "insurer" are capable of construction which affords meaning to both. "Obligor" includes three entities; insurers, self-insurers and obligated governments. "Insurer," obviously is one of those entities. This being so, the only interpretation of the term "each obligor insurer" which satisfies the relevant rules of statutory construction excludes self-insurers and obligated governments from the provisions of Section 108(b)(1). "Obligor insurer" is another way of saying "obligors who are insurers," that is "obligors other than self-insurers and obligated governments." Such an interpretation is consistent with the first sentence of the Section, wherein the language "obligors other than self-insurers and governments" is used. The word "insurer" could have been used to say the same thing, but it was not. The Legislature chose, instead, to use other means of expressing the term "insurer" in the first sentence and acted similarly in the third sentence.

As noted, the Insurance Department has included self-insurers and governments in the Bureau and the Plan on the basis of the last sentence which refers to "the obligors." However, the use of the article "the" denotes reference back to the "obligors other than self-insurers and governments" and "obligor insurers" referred to in the previous sentences of Section 108(b)(1). To construe the fourth sentence of Section 108(b)(1) to apply to all obligors would result in an interpretation which would render the article "the" as mere surplusage. Such an interpretation abrogates Sections 1921(a) and 1922(2) of the Statutory Construction Act, 1 Pa. C.S. §§ 1921, 1922. Section 1921(a) of the

Statutory Construction Act provides, *inter alia*, that "every statute shall be construed, if possible, to give effect to all its provisions." Section 1922(2) of the Statutory Construction Act provides "that the General Assembly intends the entire statute to be effective and certain." Further, the emphasis given the fourth sentence of Section 108(b)(1) of the Act by the Insurance Department contravenes the rules of Statutory Construction as articulated in *Lynch* v. *O. J. Roberts School District*, 430 Pa. 461, 469, 244 A.2d 1,5 (1968), where it was stated:

> "It is a well established doctrine of statutory construction that a statute must be read to give effect to *all* of its language . . . And the Legislature is presumed not to have intended its laws to contain surplusage."

Therefore, the only reasonable interpretation of the fourth sentence of section 108(b)(1) is that the article "the" modifies the word "obligor" and refers to "obligor insurer" and "obligors other than self-insurers and governments" previously referred to in that section who are required to participate in the Bureau and the Plan.

The provisions of Section 1932(a) of the Statutory Construction Act, 1 Pa. C.S. § 1932(a) also mitigate against the Insurance Department's interpretation of the last sentence in Section 108(b)(1). Section 1932(a) provides:

> "Statutes or parts of statutes are in pari materia when they relate to the same persons or things or to the same class of persons or things."

It is abundantly clear that the first three sentences of Section 108(b)(1) are related to the last sentence of that section and that, for this reason, all of the sentences of that section must be read together. In construing the section as a whole, it is obvious that the words "the obligors" in the fourth sentence refers to the obligor insurers of the third sentence and the obligors, other than self-insurers and governments referred to in the first sentence. To construe the section otherwise is to ignore the import of the section as a whole.

There is a dicta in the case of *Schimmelbusch* v. *Royal-Globe Insurance Company,* 247 Pa. Superior Ct. 28, 371 A.2d 1021 (1977), decided by the Superior Court, which substantiates our position on the subject. In referring to the composition of the Assigned Claims Plan, the Superior Court stated:

> "Claims under the Assigned Claims Plan are allocated equitably among all *insurance companies* licensed in Pennsylvania to write auto insurance." (Emphasis supplied.) 247 Pa. Superior Ct. at 30, 371 A.2d at 1022

and,

> "The logic of the situation suggests that a claimant carrying no insurance on her car or herself should have a claim only

> through the Assigned Claims Bureau. In this way the cost of payments made to uninsured claimants is spread equitably among all the *carriers* in the Plan." (Emphasis supplied.) 247 Pa. Superior Ct. at 34, 371 A.2d at 1024

In that case the Superior Court assumed that the costs incurred by the Bureau and the Plan, as delineated in Section 108(b)(1) of the Act, are to be allocated fairly and equitably only among obligor insurance companies licensed in Pennsylvania to write insurance.

On the basis of the foregoing, you are hereby advised that obligated governments and self-insurers are not required to participate in the Plan or the Bureau. Therefore, any money which has been collected from self-insurers by the Plan and the Bureau should be refunded as soon as possible.

Due to the fact that this opinion impacts on the Insurance Department's self-insurance regulations (31 Pa. Code Chapter 66) which provide at § 66.6-2 that self-insurers must certify that they have entered into an agreement with the Plan to pay their fair share of the claims, costs and expenses of the Plan, we are sending a copy of this opinion to the Insurance Commissioner and directing him accordingly.

Sincerely,

LINDA S. LICHTMAN
*Deputy Attorney General*

VINCENT X. YAKOWICZ
*Solicitor General*

ROBERT P. KANE
*Attorney General*

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## OFFICIAL OPINION NO. 77-19-A

*Senate Bill No. 1187 of 1977, Printer's No. 1538—Act No. 14-A of 1977—Article III, §§ 1, 3, 4, 8, 9, 11, 24 of the Pennsylvania Constitution—Article IV, §§ 15, 16 of the Pennsylvania Constitution—Article VIII, § 12 of the Pennsylvania Constitution.*

1. General appropriation bills may not automatically reenact the existing General Appropriation Act for the succeeding fiscal year.
2. Senate Bill No. 1187, Printer's No. 1538 is such an impermissible automatic reenactment.

Harrisburg, Pa. 17120
December 20, 1977

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

Dear Governor Shapp:

You have requested our advice with respect to the effect of signing Senate Bill No. 1187, Printer's No. 1538, which has passed both houses of the Legislature.*

The bill amends the Act of August 20, 1977 (No. 11-A), known as the "General Appropriation Act of 1977" by reducing a number of items heretofore appropriated by the aforesaid Act. In addition, the bill purports to amend the Act by providing that in the event a general appropriation bill is not finally enacted by the first day of the fiscal year to which it relates, the General Appropriation bill finally enacted for the preceding fiscal year shall be reenacted and remain in effect until the General Appropriation Act for the next succeeding year takes effect subject to any amendments and subject to the availability of revenues. The bill further provides procedures for the implementation of this process.

It is our opinion that the amendments purporting automatically to reenact the existing General Appropriation Act for the succeeding fiscal year and providing procedures for such implementation are unconstitutional and therefore have no effect whatsoever.

These amendments to the General Appropriation Act of 1977 violate the following provisions of the Constitution.

Article III, § 1 of the Constitution provides, "No law shall be passed except by bill, and no bill shall be so altered or amended, on its passage through either House, as to change its original purpose."

The automatic reenactment of an appropriation bill violates this provision in that it would constitute a law passed without a bill.

Article III, § 3 of the Constitution provides, "No bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof."

The amendment violates this provision in that it is not expressed in the title. The title merely gives notice of "changing certain appropriations" for the fiscal period July 1, 1977 to June 30, 1978. As noted by Justice Mitchell in *Commonwealth v. Gregg,* 161 Pa. 582, 29A.297

* *Editor's Note:* Signed by the Governor on December 21, 1977, as Act No. 14-A of 1977.

(1894), "the history and purpose of that section are well known. It was aimed at the objectionable practice of putting a measure of doubtful strength on its own merits, into the general appropriation bill . . . in order to compel members to vote for it or bring the wheels of government to a stop. The same constitutional intent is embodied in Section 16 of Article IV giving the Governor power to disapprove separate items of appropriation bills." 161 Pa. at 586-587, 29A. at 297.

Article III § 4 provides that every bill shall be considered on three different days in each House. It further provides that no bill shall become law unless on its final passage the vote is taken by yeas and nays, the names of persons voting for and against it are entered on the journal, and a majority of the members elected to each House is recorded as voting in its favor.

The automatic reenactment of the appropriation bill violates this provision in that no bill would be considered in each House; no vote would have been taken nor the names recorded of the persons voting for and against such reenactment; and a majority of the members elected to each House would not have voted in favor thereof.

Article III, § 8 provides that the presiding officer of each House shall sign all bills passed by the General Assembly and the signing shall be entered on the journal.

An automatic reenactment without a bill violates this section of the Constitution.

Article III, § 9 of the Constitution provides that every order, resolution or vote to which the concurrence of both Houses may be necessary, except on the question of adjournment, shall be presented to the Governor and before it shall take effect be approved by him, or being disapproved, shall be repassed by two-thirds of both Houses.

The automatic reenactment of the appropriation bill violates this provision of the Constitution in that it purports to take effect without submission to or approval by the Governor. The amendment would have the effect of abrogating the constitutional power of the Governor to veto legislation.

Article III, § 11 of the Constitution provides that the general appropriation bill shall embrace nothing but appropriations for the Executive, Legislative and Judicial departments of the Commonwealth.

The automatic reenactment of the appropriation bill which further provides for the implementation of procedures violates this provision of the Constitution. See Official Opinion of Attorney General No. 16 (1957).

Article III, § 24 of the Constitution provides that no money shall be paid out of the Treasury except on appropriations made by law.

The automatic reenactment of the appropriation bill would not be an appropriation made in accordance with the Constitution and laws of

this Commonwealth and violates this provision. The amendment to the Act states that such reenactment shall be sufficient authority for the State Treasurer to make disbursements of funds. Such amendment in the bill is absolutely void insofar as it attempts to supersede the constitutional provision controlling this issue.

Article IV, § 15 of the Constitution provides that every bill which shall be passed by both Houses shall be presented to the Governor. If he approves, he shall sign it, but if he shall not approve, he shall return it with his objections to the House in which it shall have originated. If it is returned with his objections (veto), it may become law if approved by two-thirds of the members elected to each House.

The automatic reenactment of the appropriation bill violates this section in that it would have the effect of abrogating the constitutional power of the Governor to veto and the requirement of a vote approved by two-thirds of the members elected to each House to override such veto.

Article IV, § 16 provides that the Governor shall have the power to disapprove of any item or items of any bill making appropriations of money and further requiring a two-thirds vote of the members of each House to override the Executive veto.

The automatic reenactment of the appropriation bill violates this provision of the Constitution granting the Governor the power of item veto of appropriation bills and the requirement of a vote of two-thirds of the members of each House to override such item veto.

Article VIII, § 12 of the Constitution provides that annually, at the time set by law, the Governor shall submit to the General Assembly a balanced operating budget for the ensuing fiscal year setting forth in detail proposed expenditures classified by department or agency and by program and estimated revenues from all sources. It further provides that if estimated revenues and available surplus are less than proposed expenditures, the Governor shall recommend specific additional sources of revenue sufficient to pay the deficiency.

The automatic reenactment of the appropriation bill vitiates the purpose and effect of this provision of the Constitution.

This provision and the other provisions of the Constitution envision that each Governor in each year shall present a budget; that that budget shall be considered by the Legislature and that each Legislator shall have the power, duty and responsibility of voting for or against appropriations; that such bill must have a majority of the members of each House voting in favor thereof and their names and votes recorded; that such appropriation bill in each year shall be submitted to the Governor, who, pursuant to the Constitution, possesses the power to veto or item veto; and that the Legislature and each member thereof possesses the power to vote for or against the override of such veto.

The amendments which purport automatically to reenact an appropriation bill vitiate and abrogate so many of the aforementioned provisions of the Constitution of the Commonwealth of Pennsylvania that the amendments are in our opinion clearly and palpably unconstitutional and therefore have no effect whatsoever.

Sincerely,

VINCENT X. YAKOWICZ
*Solicitor General*

For: ROBERT P. KANE
*Attorney General*

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## OFFICIAL OPINION NO. 77-20

*Department of Environmental Resources—Water Obstructions Act—Administrative Code—Navigable Rivers and Streams*

1. An applicant for a water obstruction permit for facilities extending below the low water mark of a navigable river or stream must first obtain an easement or other interest in the submerged land below the low water mark from the General Assembly of the Commonwealth by a duly enacted statute.
2. Title to land located above the ordinary high water mark of a navigable river or stream is in the riparian owner of such land absolutely. The riparian owner also holds a qualified title to the land located between the ordinary high water mark and the ordinary low water mark. The title to the land below the low water mark is in the Commonwealth.
3. The Water Obstructions Act is a regulatory statute, the purposes of which are to preserve the public's right of navigation; to protect life and property from hazards created by unsupervised placement of water obstructions; to control the obstruction of flood flows; and to protect the regimen of streams.
4. Section 514 of the Administrative Code requires that specific authority from the General Assembly must be obtained for the grant of an easement, right of way, or other interest over or in land owned by the Commonwealth except a license for a public service line to a State building or State institution.

Harrisburg, Pa. 17120
December 30, 1977

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

Dear Secretary Goddard:

This is in response to your request for an opinion concerning the issuance of permits under the Water Obstructions Act for facilities to be located below the low water mark of a navigable river or stream. Since the Commonwealth owns the bed of the river or stream below the low water mark, you have asked if it is necessary for an applicant for a

water obstruction permit to obtain an easement or other interest in the land from the Commonwealth before the permit can be granted. It is our opinion, and you are advised, that an applicant for a water obstruction permit for facilities extending below the low water mark of a navigable river or stream must first obtain an easement or other interest in the submerged land below the low water mark from the General Assembly of the Commonwealth by a duly enacted statute.

To illustrate the problem, you have provided us with an example of a recent application to construct a mooring facility in the Ohio River in Beaver County. The facility would consist of a sheet pile cluster and seven pile clusters on one hundred feet centers placed parallel to and thirty feet from the normal pool shore line and would extend for a distance of nine hundred feet. The structure located below the low water level of the river would amount to a permanent and exclusive use of submerged lands of the Commonwealth. Although the permit has been denied on other grounds, the application has brought to your attention the question, which will recur, as to whether the department can legally grant a permit for such an obstruction without the applicant having first obtained an interest in the land below the low water mark from the General Assembly of the Commonwealth.

Title to land located above the ordinary high water mark of a navigable river or stream is in the riparian owner of such land absolutely. The riparian owner also holds a qualified title to the land located between the ordinary high water mark and the ordinary low water mark. *Pursell v. Stover,* 110 Pa. 43, 20 A.403 (1885). This qualified title is subject to a public navigation servitude. *Fulmer v. Williams,* 122 Pa. 191, 15 A.726 (1888). While the riparian owner may erect wharves, docks, piers and similar structures between the high and low water marks, he cannot interfere with the public's right of navigation. *Bailey v. Miltenberger,* 31 Pa. 37 (1856). That right is protected by the Department of Environmental Resources pursuant to the Water Obstructions Act of June 25, 1913, P.L. 555, as amended, 32 P.S. § 681, *et seq.*, which provides for the issuance of permits. Similarly, the riparian owner has no right to construct docks, wharves, etc. beyond the low water mark unless he obtains the permission of the Commonwealth. *Naglee v. Ingersoll,* 7 Pa. 185 (1847).

These rights have been summarized by the Pennsylvania Supreme Court in *Philadelphia v. Pennsylvania Sugar Company,* 348 Pa. 599, 604, 36 A.2d 653, 655, 656 (1944):

> "(a) . . . a riparian landowner has no property rights qua landowner beyond low-water mark; (b) . . . the title to the land below low-water mark is in the Commonwealth; (c) . . . the title to the land of the riparian owner between high-water mark and low-water mark is subject to the control of the police power of the state; (d) . . . the control below low-water mark is in the state, both because of its police power control over navi-

> gable water highways and also its ownership of the land under the water; and (e) . . . whatever easement rights (private or public) exist or may be acquired in and over navigable waters and the lands under them are subject to the control of the police power of the state (we are ignoring the control of the United States), so far as the navigable water is over lands in private ownership, and to the added control of the state as a landowner below low-water mark . . . ." (Quoting *United States v. Pennsylvania Salt Manufacturing Co.,* 16 F.2d 476, 481 (1926).

Thus, the Commonwealth has control over the construction of mooring facilities and other water obstructions between the high and low water marks by virtue of its police power and below the low water mark by virtue of its police power and also because of its ownership in the bed of the river or stream.

The police power of the Commonwealth in this regard is exercised by the Department of Environmental Resources pursuant to the Water Obstructions Act of June 25, 1913, P.L. 555, as amended, which provides in Section 2 thereof (32 P.S. § 682):

> "Except as provided herein . . . it shall be unlawful for any person . . . to construct any dam or other water obstruction; . . . or in any manner to change or diminish the course, current, or cross section of any stream or body of water . . . without the consent or permit of the [Department of Environmental Resources] in writing, previously obtained, upon written application to said [Department] therefor."

As to the exercise of the Commonwealth's ownership over the river bed or stream bed, it is governed by Section 514 of the Administrative Code of 1929 (71 P.S. § 194) which provides in part:

> "(a) Except as otherwise in this Act expressly provided, a department, board, or commission, shall not sell or exchange any real estate belonging to the Commonwealth, or grant any easement, right-of-way, or other interest over or in such real estate, without specific authority from the General Assembly so to do, but a department, board, or commission may, with the approval of the Governor, grant a license to any public service corporation to place upon, in, or over, any dry or submerged land or bridge of or maintained by the Commonwealth, any public service line, if such line will enable any State building or State institution to receive better service, . . ."

The Water Obstructions Act is a regulatory statute, *Commonwealth v. Pennsylvania Railroad Co.*, 78 Pa. Superior Ct. 389 (1922), the purposes of which are to preserve the public's right to navigation; to protect life and property from hazards created by unsupervised placement

of water obstructions; to control the obstruction of flood flows; and to protect the regimen of streams. See *Water and Power Resources Board v. Green Springs Company*, 394 Pa. 1, 145 A.2d 178 (1958). But before an applicant for a water obstruction permit can be issued a permit for an obstruction below the low water line, he must secure the permission of the Commonwealth as owner of the land below the low water line. Section 514 of the Administrative Code, quoted above, requires that specific authority from the General Assembly must be obtained for the grant of an easement, right-of-way, or other interest over or in such land except a license for a public service line to a State building or State institution. It follows that an act of the General Assembly granting an easement, right-of-way, or other interest in land must be enacted authorizing the exclusive use of such land below the low water mark as a condition precedent to the securing of a water obstruction permit from the Department of Environmental Resources for facilities to be located below the low water mark of a navigable river or stream.

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. 77-21

*School Districts—National School Lunch and School Breakfast Programs—Authority to Employ Food Service Management Companies.*

1. Subject to conditions and limitations imposed by the National School Lunch Act and the Child Nutrition Act of 1966, by Federal regulations promulgated pursuant to those Acts, and by the Pennsylvania Public School Code, Pennsylvania school districts participating in the national school lunch and school breakfast programs may lawfully employ food service management companies in their feeding operations.
2. Section 210.8(d) of the United States Department of Agriculture school lunch regulations and Section 220.7(d) of the USDA school breakfast regulations authorize school districts participating in the school lunch and school breakfast programs to employ food service management companies.
3. The national school lunch and school breakfast programs are implemented in Pennsylvania by Section 1337 of the Public School Code, 24 P.S. § 13-1337.
4. Where meals served pursuant to the national school lunch and school breakfast programs are prepared in school cafeterias, Section 504 of the Public School Code, 24 P.S. § 5-504, requires that personnel employed in the preparation and service of such meals be school employes.
5. Pennsylvania school districts have no authority to contract with management companies for the service of food having no relation to Federally-assisted school food programs.

Harrisburg, Pa. 17120
December 30, 1977

Honorable Caryl M. Kline
Secretary of Education
Harrisburg, Pennsylvania

Dear Secretary Kline:

You have requested our opinion as to whether a Pennsylvania school district participating in the national school lunch program may lawfully employ a food service management company in its feeding operations. It is our opinion, and you are so advised, that, subject to conditions and limitations set forth in this opinion, a Pennsylvania school district participating in the national school lunch program may lawfully employ a food service management company in its feeding operations.

I. Authority to Contract

The national school lunch and related child nutrition programs are administered, pursuant to the National School Lunch Act, as amended, 42 U.S.C. § 1751, *et seq.* (1969 & Supp. 1977), and the Child Nutrition Act of 1966, as amended, 42 U.S.C. § 1771, *et seq.* (1969 & Supp. 1977), by the United States Department of Agriculture (USDA) and by the Pennsylvania Department of Education acting as the "State educational agency" within the meaning and for the purposes of the National School Lunch and Child Nutrition Acts. 42 U.S.C. §§ 1760(d)(2) and 1784(b).

Congress adopted the National School Lunch Act in 1946 to safeguard the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities by assisting the States in the establishment of school lunch programs. 42 U.S.C. § 1751. The Act requires that school lunch programs receiving assistance under the Act be operated on a nonprofit basis. 42 U.S.C. § 1758(c). The Act does not, however, define "nonprofit", and clearly, a food service management company contracting with a school district to manage a school lunch program in one or more of the district's schools is motivated in doing so by the prospect of making a profit. We are, therefore, first confronted with the issue of whether the nonprofit requirement of the School Lunch Act prohibits school districts participating in the national school lunch program from employing management companies.

While voluminous legislative history accompanies the School Lunch Act, the Child Nutrition Act, and the many amendments to both acts, that history sheds little or no light on the nonprofit issue. Rather, the principal commentary on this issue is a 1956 Opinion of the General Counsel of the USDA, Op. Gen. Coun. No. 27, May 2, 1956, which concludes that the School Lunch Act does not prohibit the employment of

a food service management company where: (1) the School Food Authority[1] retains control over the quality, extent, and general nature of the program and the prices charged to the children; (2) the School Food Authority is responsible for all costs of, and entitled to all receipts from the program, the management company performing its contractual functions, e.g., purchasing food, employing personnel, etc., on a reimbursable basis; (3) the management company receives only a reasonable fixed fee for its services and the benefit of any cost savings accrues to the program and not the company; (4) all income accruing to the program remains in the program and is used solely to cover the cost of operating and improving the program or reducing the cost of lunches to the children; and (5) the School Food Authority determines that under contractor operation, as compared with self-operation, the total program cost will decrease without increased meal prices and without sacrifice in the quality of service.

The essential thrust of the General Counsel's Opinion is that a food service management company receiving only a reasonable fixed fee for its services is not able to operate the shool lunch program for its own account. The nonprofit requirement of the School Lunch Act is not violated, in the General Counsel's view, because the fixed fee "represents an expenditure similar to that made under a contract for the purchase of goods. In both cases, the vendor may make a profit, but the expenditure represents only a cost of operating for the vendee."

Despite the 1956 General Counsel's Opinion, USDA regulations prior to 1969 prohibited participating school districts from employing food service management companies. *See, e.g.:* 28 Fed. Reg. 1249, § 210.8 (c) (1963). In 1969, the USDA, faced with expanding the school lunch program to inner city schools lacking space and equipment for food preparation, amended its regulations to permit the employment of food service management companies on a pilot experimental basis where the effect would be to "extend food service to needy children not previously benefiting from the program." 34 Fed. Reg. 807, § 210.8 (c) (3) (1969).

In 1970, the USDA again amended its regulations, this time to eliminate completely the prohibition against employment of food service management companies. 35 Fed. Reg. 3900, § 210.8 (d) (1970). The USDA regulation currently in force, 7 C.F.R. § 210.8 (d), provides as follows:

> Any School Food Authority may employ a food service management company, nonprofit agency or nonprofit organization in the conduct of its feeding operation, in one or more of

1. The term "School Food Authority" does not appear in the General Counsel's Opinion. It is, however, the term currently in use in USDA regulations and, as defined in USDA regulations, it is generally synonymous with "school district." *See:* 7 C.F.R. § 210.2 (p).

its schools. A School Food Authority that employs a food service management company shall remain responsible for seeing that the feeding operation is in conformance with its agreement with the State Agency or the FNS Regional Office. The contract between the School Food Authority and the food service management company shall expressly provide that:

(1) The food service management company shall maintain such records (supported by invoices, receipts, or other evidence) as the School Food Authority will need to meet its responsibilities pertaining to the financial management system and any other requirements prescribed by the State agency;

(2) Any federally donated commodities received by the School Food Authority and made available to the food service management company shall inure only to the benefit of the school's feeding operation and be utilized therein; and

(3) The books and records of the food service management company pertaining to the school feeding operation shall be available, for a period of 3 years from the date of submission of a final Financial Status Report, for inspection and audit by representatives of the State agency, of the Department, and of the General Accounting Office at any reasonable time and place, except that, if audit findings have not been resolved, the records shall be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit.

The Secretary of Agriculture is authorized to "prescribe such regulations as he may deem necessary to carry out. . . the National School Lunch Act. . ." 42 U.S.C. § 1779. Though not dispositive in a judicial determination of the meaning of the School Lunch Act, USDA regulations do carry weight, *Davis V. Robinson,* 346 F. Supp. 847, 856 (D. R. I. 1972), and are entitled to deference unless it can clearly be demonstrated that they violate the Act.

In our opinion, it cannot be clearly demonstrated that Section 210.8 (d) of the USDA school lunch regulations violates the National School Lunch Act. In 1968, Congress amended the School Lunch Act to add the special food service program providing food on a year-round basis to children in service institutions such as day care and recreation centers. In 1975, Congress amended the Act to separate the special food service program into the summer food service program, 42 U.S.C. § 1761, and the child care food program, 42 U.S.C. § 1776. Both programs, like the school lunch program, must be operated on a nonprofit basis. 42 U.S.C. §§ 1761 (a) (1) and 1776 (a) (1). With respect to the summer program, however, the Act specifically provides that "[s]ervice institutions may contract on a competitive basis. . .with food service management companies registered with the State in which they

operate for the furnishing of meals or management of the entire food service under the program. . . ." 42 U.S.C. § 1761 (l) (1).

While the absence of a similar provision in the sections relating to the school lunch program might be construed as an indication that Congress intends to prohibit contracting in the school lunch program, the more logical construction, in our view, is that the presence in Section 1761 of both the nonprofit requirement and the provision permitting contracting is an indication that Congress does not view the nonprofit requirement and contracting with management companies as inconsistent or mutually exclusive. This interpretation is further supported by the fact that subsection (l) was added to Section 1761 in 1975, five years after the USDA amended its school lunch regulations to lift the prohibition against contracting with management companies. If Congress had intended to prohibit the employment of management companies in the school lunch program, it could have specifically amended the school lunch sections of the Act in the same fashion that it amended Section 1761 to specifically permit contracting in the summer program.

We conclude that the nonprofit requirement of the National School Lunch Act does not operate as a blanket prohibition against the employment of food service management companies and that, therefore, Section 210.8 (d) of the USDA school lunch regulations is Federal authority for school districts participating in the national school lunch program to employ food service management companies in their feeding operations.

Section 210.8 (d) is not, however, sufficient in itself to authorize participating Pennsylvania school districts to contract with food service management companies. A Pennsylvania school district is a creation of the General Assembly having only the powers conferred upon it by State statute. For a Pennsylvania school district to have the power to contract with a food service management company, there must be either State statutory authority or a State statute implementing the Federal grant of authority.

Two sections of the Pennsylvania Public School Code, Act of March 10, 1949, P. L. 30, as amended, 24 P. S. § 1-101, *et seq.*, relate to the operation of food services in Pennsylvania schools. Section 504, 24 P. S. § 5-504, confers upon boards of school directors the power to operate school cafeterias. Section 1337, 24 P. S. § 13-1337, authorizes the operation in Pennsylvania schools of Federally-assisted school food programs.

Section 504 provides as follows:

> The board of school directors in any school district shall have power to establish, equip, maintain, and operate cafeterias in any of the schools under its jurisdiction, whenever in its judgment it is deemed advisable to do so, and shall

have power to appoint such *directors, supervisors, or other employes* as are necessary, and set and pay their salaries.

The cost of housing, equipping and operating such cafeterias may be charged against the funds of the school district.

The food served shall be sold to the pupils, teachers, and *school employes of the cafeterias* at such price as will not materially exceed the cost of operation.

It shall be legal for boards of school directors to authorize the proper *school employe* to purchase perishable food supplies for cafeterias without advertising for bids.

There shall be a separate cafeteria fund, and all payments from said fund shall be made upon a special order drawn by the *school employe* authorized to purchase food supplies. Said employe shall present each month to the board of directors, for approval, a statement of receipts and expenditures.

The accounts shall be subject to examination by the auditors of the school district in like manner as other accounts of the school district. Any balance of funds accruing from the operation of the cafeteria must be used only for the improvement or maintenance of the cafeteria and may not be used for other purposes. (Emphasis added.)

Section 504 confers no power whatsoever upon boards of school directors to contract with food service management companies or otherwise to operate school food services through any agent other than school employes.

Section 1337 provides, in relevant part, as follows:

(a) Definitions. For the purpose of this section—"school food program" means a program under which food is served by any school on a nonprofit basis to children in attendance, including any such program under which a school receives assistance out of funds appropriated by the Congress of the United States.

(b) Expenditure of Federal Funds. The Department of Education is hereby authorized to accept and direct the disbursement of funds appropriated by any act of Congress, and apportioned to the State, for use in connection with school food programs. The Department of Education shall deposit all such funds received from the Federal Government in a special account with the Treasurer of the State who shall make disbursements therefrom upon the direction of the Department of Education.

(c) Administration of Program. *The Department of Education may enter into such agreements* with any agency of

the Federal Government, with any board of school directors, or with any other agency or person, *prescribe such regulations,* employ such personnel, *and take such other action as it may deem necessary to provide for the establishment, maintenance, operation and expansion of any school food program, and to direct the disbursement of Federal and State funds in accordance with any applicable provisions of Federal or State law.* The Department of Education may give technical advice and assistance to any board of school directors in connection with the establishment and operation of any school food program, and may assist in training personnel engaged in the operation of such program. The Department of Education, and any board of school directors, may accept any gift for use in connection with any school food program.

(d) Boards of School Directors. *Pursuant to any power of boards of school directors to operate or provide for the operation of school food programs in schools under their jurisdiction, boards of school directors may use therefor funds disbursed to them under the provisions of this section,* gifts and other funds, received from sale of school food under such programs.

* * *

(Emphasis added.)

Section 1337 confers no additional powers on boards of school directors other than the power to use funds disbursed to them under that section for school food program purposes. Section 1337 does, however, confer broad powers on the Pennsylvania Department of Education to enter into agreements, prescribe regulations, and take such other action as the Department deems necessary "to provide for the establishment, maintenance, operation and expansion of any school food program, and to direct the disbursement of Federal and State funds in accordance with any applicable provisions of Federal or State law." Section 1337 thus implements the national school lunch program which, as we have seen, includes a Federal grant of authority for school districts participating in the program to employ food service management companies.

Accordingly, it is our conclusion that, subject to conditions and limitations imposed by Federal and State law, and subject to such other conditions and limitations as the Department of Education may, by regulation and/or agreement, impose,[2] a Pennsylvania school district participating in the national school lunch program may, in accordance with Section 210.8 (d) of the USDA school lunch regulations, employ a food service management company in its feeding operations.

2. A USDA regulation, 7 C.F.R. § 210.19 (b), specifically provides that "[n]othing contained in this part [Part 210-National School Lunch Program] shall prevent a State agency from imposing additional requirements for participation in the Program which are not inconsistent with the provisions of this part."

II. Conditions and Limitations

The conditions and limitations currently imposed by Federal and State law are (1) those specified in Section 210.8 (d) of the USDA school lunch regulations, (2) those inherent in the nonprofit requirement of the National School Lunch Act, and (3) those imposed by provisions of the Public School Code.

The conditions and limitations inherent in the nonprofit requirement of the School Lunch Act are basically those set forth in the 1956 USDA General Counsel's Opinion. *See:* Section I, *supra.* The school district must control the prices charged for meals and must be responsible for all costs of, and entitled to all receipts from, the program. A contract permitting the food service management company to operate the program on a straight profit or loss basis, where the company incurs all costs of furnishing meals and receives all income from sales plus Federal and State reimbursements, is clearly prohibited.

The contract between the school district and the food service management company must provide, in effect, that the company shall receive, as profit, *only* a reasonable fixed management fee, and as cost reimbursement, *only* the amount actually expended by the company in the payment of salaries and the purchase of food supplies and other items necessary for the preparation of meals. The contract must not permit the company to manipulate costs for the purpose of increasing its profit over and above the fixed fee. All savings derived as a result of prompt payment, local billing, and national trade discounts, advertising allowances, intracompany procurements, and other cost reduction mechanisms must accrue to the program and not to the company.

If, in any fiscal year, the program's receipts from sales and government subsidies exceeds the program's expenditures, whether or not the school district employs a food service management company, the resulting net income must remain in the program and be used either to offset future operating costs, to improve services, or to reduce the cost of lunches to the children.

Finally, a school district seeking to employ a food service management company must determine, in advance of initial contract and of each contract renewal, that operation under contract as compared with self-operation will result in total program cost reduction without increased meal prices and without sacrifice in quality of service.

Although the foregoing conditions and limitations are not specifically set forth in USDA regulations, it is clear from various informal USDA communications supplied to us that the USDA applies the conditions and limitations set forth in the 1956 USDA General Counsel's Opinion in auditing the school lunch program in school districts that employ food service management companies. Furthermore, Section 1337 of the Public School Code, 24 P.S. 13-1337, authorizing Pennsylvania's participation in the national school

lunch program, also requires that school food programs be nonprofit. Therefore, conditions and limitations of the sort prescribed in the USDA General Counsel's Opinion are applicable, as a matter of State law, to Pennsylvania school districts employing food service management companies.

Additional limitations on the employment of food service management companies by Pennsylvania school districts participating in the national school lunch program are imposed by Section 504 of the Public School Code, 24 P.S. § 5-504. As previously observed, Section 504, conferring upon boards of school directors the power to operate school cafeterias, confers no power whatsoever upon school boards to contract with management companies or otherwise to operate school food services through any agent other than school employes. While a Federal regulation authorizes school districts participating in the national school lunch program to employ food service management companies to manage school lunch programs, that regulation is silent with respect to the status of personnel employed in the preparation and service of school lunches. May personnel employed to perform the non-management functions of preparing and serving school lunches be management company employes, or does Section 504 require that personnel employed to perform non-management functions be school employes despite the employment of a management company to perform management functions? This is a difficult question, the answer to which depends, in our view, on *where* the lunches are prepared.

Section 504 of the School Code applies *only* to school cafeterias, and clearly, lunches provided under the national school lunch program need not be prepared in school cafeterias. Where the lunches are prepared on management company premises and then delivered to the school for distribution, as may occur, for example, with respect to schools having no facilities for food preparation, the personnel employed in the preparation and delivery of those lunches may be, and inevitably would be, management company employes. Where, on the other hand, the lunches are prepared and served in school cafeterias, albeit under management company supervision, Section 504 requires, in the absence of Federal law to the contrary, that personnel employed in the preparation and service of those lunches be school employes. In fact, several Pennsylvania school districts already operate school lunch programs in accordance with the latter arrangement. They employ management companies to perform management functions while retaining as school employes the personnel employed to perform the non-management functions of preparing and serving school lunches.

Section 504 of the School Code imposes a further limitation on the employment of food service management companies applicable to Pennsylvania school districts that participate in the national school lunch program, but also operate school cafeterias in which food having no relation to the school lunch program is prepared and sold to pupils,

teachers, and other school employes. By "food having no relation to the school lunch program," we mean food for which there is no Federal or State reimbursement; we do not mean food which is provided pursuant to other Federally-assisted school food programs.

The Federal regulation that authorizes a school district participating in the national school lunch program to contract with a food service management company for the operation of *the school lunch program* cannot, and does not, authorize a participating Pennsylvania school district to contract with a management company for the service of *food unrelated to the school lunch program*. With respect to food service having no relation to the school lunch program, Section 504 clearly requires that school cafeterias be operated by school employes. Thus, a Pennsylvania school district employing a management company to operate the school lunch program, but continuing to provide unrelated food service must maintain a complement of school employes to operate that service including at least one employe responsible for purchasing, accounting, and coordinating operation of the unrelated food service with the management company's operation of the school lunch program.

We have, in this opinion, confined our discussion to the employment of food service management companies in the national school lunch program. We should, however, point out that the conclusions provided in this opinion with respect to the school lunch program are also applicable to the employment of food service management companies in the national school breakfast program. The Child Nutrition Act of 1966 requires that school breakfast programs receiving assistance under the Act be nonprofit, 42 U.S.C. § 1773 (a), and a USDA school breakfast regulation, 7 C.F.R. § 220.7 (d), in language substantially identical to that of Section 210.8 (d) of the USDA school lunch regulations, authorizes school districts participating in the school breakfast program to employ food service management companies. Section 1337 of the Public School Code, 24 P. S. § 13-1337, implements the school breakfast program. Accordingly, subject to the foregoing conditions and limitations, a Pennsylvania school district participating in the national school breakfast program may lawfully employ a food service management company in its feeding operations.

In conclusion, we are fully aware that the complexity of this matter may give rise to difficulties in the implementation of this opinion. We,

therefore, stand ready to assist the Department of Education should the Department find itself in need of further guidance.*

Sincerely yours,

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* Editor's Note—Subsequent to the issuance of this Opinion, the Pennsylvania General Assembly, by the Act of July 1, 1978, P.L. ____, No. 105, amended Section 504 of the Public School Code, 24 P. S. § 5-504, to specifically authorize Pennsylvania school districts ". . . to contract for any services necessary for the operation of a food service program. . .". By virtue of that amendment, Pennsylvania school districts are now authorized to contract with food service management companies for the operation—either with school or management company employes—of both federally assisted and non-federally assisted school food services.

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