COMMONWEALTH OF PENNSYLVANIA

OPINIONS

OF THE

ATTORNEY GENERAL

OF

PENNSYLVANIA

1981 - 1984

LEROY S. ZIMMERMAN
ATTORNEY GENERAL

Table of Contents

BIOGRAPHY OF LEROY S. ZIMMERMAN

LeRoy S. Zimmerman, who became Pennsylvania's first elected Attorney General on January 20, 1981, was born December 22, 1934, in the Shipoke section of south Harrisburg.

He grew up over a grocery store owned by his maternal grandfather, Salvador Magaro, a fruit peddler who migrated to Pennsylvania from southern Italy as a stowaway aboard a steamship.

Mr. Zimmerman was raised by his mother, Mrs. Amelia Magaro Zimmerman, after his father deserted the family when Roy was two years old.

As a boy, Roy Zimmerman worked hard delivering groceries and selling newspapers, to help his mother earn a living.

Mr. Zimmerman is a 1952 graduate of Bishop McDevitt High School in Harrisburg, a 1956 economics graduate of Villanova University and a 1959 graduate of the Dickinson School of Law in Carlisle.

At Villanova, his earliest aspirations were to the priesthood, but he later developed a keen interest in business and law. He sold insurance at night to pay his way through law school.

He had been practicing law for about four years when in May of 1963 he was appointed Assistant District Attorney of Dauphin County. Two years later, Mr. Zimmerman was appointed District Attorney by the Dauphin County Court of Common Pleas.

At the age of 30, Mr. Zimmerman was one of the youngest District Attorneys in Pennsylvania. He won election as District Attorney in three successive elections.

In his last two bids for that office, he ran unopposed with the support of both the Republican and Democratic parties.

His career as a District Attorney was marked by vigorous prosecution of criminal activity in Dauphin County as well as leadership activities in various professional, civic and charitable organizations.

Mr. Zimmerman is a past president of the Pennsylvania District Attorneys' Association and has been a long-time member of the Pennsylvania Bar Association's House of Delegates. He also is a member of the Criminal Procedural Rules Committee of the Pennsylvania Supreme Court.

Soon after assuming office as Pennsylvania's chief legal and law enforcement officer, Mr. Zimmerman was named a member of the fed-

eral-state prosecutorial task force of the National Association of Attorneys General and in 1982 was made chairman of the Association's Criminal Law and Law Enforcement Committee.

Most recently, Mr. Zimmerman was named a member of the Board of Trustees of his alma mater, the Dickinson School of Law. He also has been a member of the advisory board of Harrisburg Area Community College, the Historical Society of Dauphin County and the Central Pennsylvania Chapter of the March of Dimes. He is a former member of the Regional Planning Council of the Governor's Justice Commission.

He is admitted to practice law before the Dauphin County Court of Common Pleas; the three statewide courts in Pennsylvania, Commonwealth, Superior and Supreme Courts; the United States District Court for the Middle District of Pennsylvania; the United States Court of Appeals for the Third Circuit; and the United States Supreme Court.

He has made personal arguments before both the Pennsylvania Supreme Court and the Supreme Court of the United States.

His legal professional associations and activities include active membership of the American, Pennsylvania, and Dauphin County Bar Associations, the American Judicature Society and Phi Alpha Delta International Law Fraternity.

In addition to numerous other awards, Mr. Zimmerman has received special awards from the Federal Bureau of Investigation, the Dauphin County Chiefs of Police Association and the Fraternal Order of Police, Lodge 5 (Philadelphia).

He also was the recipient of the 1982 "Man of the Year" award of the Police Chiefs Association of Southeastern Pennsylvania and the 1983 achievement award of the National Italian-American Foundation.

Mr. Zimmerman has been a long-time member of Harrisburg Council 869 of the Knights of Columbus and Capitol Lodge 272 of the Sons of Italy in America. He also is a member of the Order of Italian Sons and Daughters of America.

Mr. Zimmerman served in the U.S. Air Force Reserve with the Pennsylvania Air National Guard from 1959 to 1965, receiving an honorable discharge as airman second class.

He and his wife, Mary, live with their three children, Susan, Mark, and Amy, in Susquehanna Township in suburban Harrisburg.

LEROY S. ZIMMERMAN, ATTORNEY GENERAL

*THOMAS G. SAYLOR, JR.
GAYLOR E. DISSINGER
FIRST DEPUTY ATTORNEYS GENERAL

*MARION E. MACINTYRE
*W. MICHAEL TRANT
ASSOCIATE DEPUTY ATTORNEYS GENERAL

DEPUTY ATTORNEYS GENERAL

*Gregory Abeln
David H. Allshouse
*Eugene J. Anastasio
*William I. Arbuckle, III
Conrad C. M. Arensberg
Alton P. Arnold
*Cynthia A. Baldwin
*Alexis L. Barbieri
*Bryan E. Barbin
*Catherine R. Barone
*Frank P. Barone
Henry G. Barr
*Lawrence Barth
Brian H. Baxter
*William A. Behe
*Eugene G. Berry
Michael W. Bolechowski
*Stephen L. Brandwene
*Marc G. Brecher
*John J. Burfete
*Mary E. Butler
*Michael F. Butler
*Melvin Caplan
Paul J. Carey, Jr.
*Craig Chamberlain
*Marybeth Christiansen (Stanton)
*Lawrence N. Claus
Lon Cobrin
Louis G. Cocheres
Mark N. Cohen
*David E. Cole
*Robert P. Coyne
*Kim D. Daniel
*Jean O. Davin
*Delancey W. Davis
*Bartholomew J. DeLuca
*David J. DeVries
Ernest J. DiSantis
*David M. Donaldson
*Charles E. Donohue
*Vincent J. Dopko
Jerry I. Drew
*Michael W. Duncan
William T. Dyer
*Robert C. Edmundson
John G. Eidemueller
*Robert S. Englesberg
Thomas P. Fay
*Francis R. Filipi
*Jerome T. Foerster

*Incumbent as of June 4, 1984

Sheila M. Ford
*Susan J. Forney
Walter F. Froh
Gary J. Gaertner
*Randall G. Gale
*Mark E. Garber
*Gary B. Gilman
David J. Glassman
Gregg H. Golden
*Daniel Goodemote
*Andrew S. Gordon
*Kelly H. Greensmith
*Jeffrey H. Gribb
*Richard L. Guida
*John A. F. Hall
*Thomas F. Halloran
Alexander Hamer, Jr.
Trent Hargrove
*Peter J. Hart
*Michael L. Harvey
*Kendra L. Heckert
*Jose W. Hernandez-Cuebas
*Carl S. Hisiro
Robert B. Hoffman
Jeremy W. Homer
*Diane S. Hudachek
Margaret H. Hunting
*James R. Ingram
Marlene W. Jackson
Donald E. Johnson
*Maura A. Johnston
John T. Kalita
Michael J. Karasik
John E. Kelly
John J. Kennedy
*Robert L. Keuch
Paul J. Killion
Stephanie V. King
Mary Kay Kisthardt
Gregory H. Knight
*John G. Knorr, III
Carol K. Knutson
*Michael E. Kosik
*Andrew B. Kramer
*Peter J. Kramer
Mary Ellen Krober
*James J. Kutz
*Celeste Y. Lamb
Terry W. Lazin
Mary H. Leedom
Benjamin Levin
Sally A. Lied
*Richard A. Linzer
*Andrew F. Litvin
*Inez G. Lundy
Joseph F. Lynch
*Charles P. Mackin
*Claudia J. Martin
Arvin Maskin
*Elizabeth K. McCoy
*Mollie A. McCurdy
*Robert T. McDermott
*Joseph P. McGowan
*Kathleen F. McGrath
William A. Meehan, Jr.
Elizabeth B. Metz (Butler)
*Joseph U. Metz
*Frank J. Micale
*Marsha Mills
*Donald P. Minahan
Neil Mittelman
*Gary M. Mogil
*Anthony J. Molluso
*Gwendolyn T. Mosley
*Donald J. Murphy
*Thomas D. Nabors
*Gary H. Nash
*Gregory R. Neuhauser
*Dianne I. Nichols
Stuart M. Niemtzow
Herbert L. Olivieri
*Michael J. Pekula
*Joseph C. Peters
John H. Pope

*Incumbent as of June 4, 1984

*Incumbent as of June 4, 1984

THE OFFICE OF ATTORNEY GENERAL IN PENNSYLVANIA

The Office of Attorney General of the Commonwealth of Pennsylvania was created in 1643, before the arrival of English Common Law, in what was then known as New Sweden. The Office owes its earliest loyalty to the King of Sweden, whose authority preceded that of the Dutch and the English.

The heritage of the Office is over three centuries of the life of the Commonwealth and thus it is one of the oldest offices of public trust in the United States of America.

The Office is marked by several significant periods in its history—1643-1681: Attorneys General before William Penn; 1686-1710: the era of David Lloyd; 1717-1776: proprietary Attorneys General; 1776-1838: early Constitutional era; 1838-1915: nineteenth century Attorneys General; 1915-1981: modern Attorneys General; and from 1981: the advent of the elected Attorney General.

The arrival of William Penn in 1681 as Proprietor of Pennsylvania began the period of domination of the Office by David Lloyd. Lloyd, who served from 1686 to 1699 was a champion of the Quakers, and the designer of Pennsylvania's first judicial system.

Andrew Hamilton, who served as Attorney General from 1717 to 1726, helped define the early role of the Office by making significant changes from European systems of justice. Hamilton later defended printer John Peter Zenger in a case that became the foundation for the concept of freedom of the press.

The "proprietary" Attorney General existed until 1776 when the Attorney General first became a constitutional officer of the democratic Commonwealth. The first Attorney General appointed under that Constitution was John Morris.

The new constitutional office continued to grow in importance into the nineteenth century until 1840 when it suffered a period of regression. Various Attorneys General and Governors during this period defined the duties of the Office in different and contradictory ways. By the year 1850, through misdrafted legislation, the Office was stripped of authority at the county level, and was rendered almost powerless in state government.

With the turn of the century and the industrialization of Pennsylvania, the General Assembly established new powers and duties in the Of-

fice. In 1915, the Legislature approved the appointment of more deputies. Beginning in 1923, the Administrative Code, as enacted and modified by the Legislature, made the Attorney General the administrator of the Department of Justice. It also re-established the Attorney General's right to appoint deputies for any city or county and gave the Office power to supersede any District Attorney.

At the primary election in May of 1978, the voters of Pennsylvania approved a constitutional amendment providing for the election of an Attorney General, effective with the general election of 1980.

Article IV, Section 4.1, of the Constitution of the Commonwealth of Pennsylvania was amended to provide "An Attorney General shall be chosen by the qualified electors of the Commonwealth on the day the general election is held for the Auditor General and State Treasurer. He shall hold his office during four years from the third Tuesday of January next ensuing his election and shall not be eligible to serve continuously for more than two successive terms . . . ."

The Constitution further provided that "he shall be the chief law officer of the Commonwealth and shall exercise such powers and perform such duties as may be imposed by law."

This established the Office of Attorney General as an independent office of state government headed by the Attorney General. The constitutional amendment was implemented by a statute called the Commonwealth Attorneys Act of 1980 (Act No. 1980-164), which defined the duties and powers of the Attorney General.

LeRoy S. Zimmerman was administered the oath of office on January 20, 1981 as the first elected Attorney General of the Commonwealth of Pennsylvania, following the general election held on November 4, 1980.

The Commonwealth Attorneys Act directs the Attorney General to appoint a First Deputy Attorney General; a Director of the Bureau of Consumer Protection; a Consumer Advocate, whose appointment is subject to approval by a Senate majority; and such other deputies, officers and employees as necessary to perform the duties prescribed by the Attorney General.

The Attorney General may also establish such bureaus or divisions as may be required for the conduct of the Office, including a criminal investigation bureau.

The fundamental duties of the Attorney General's Office, as provided by the Commonwealth Attorneys Act, are:

> To furnish upon request legal advice concerning any matter or issue arising in connection with the exercise of the official powers or performance of the official duties of the Governor or the head of any Commonwealth agency.

To represent the Commonwealth and all Commonwealth agencies and upon request the Auditor General, State Treasurer, and Public Utility Commission in any action brought by or against the Commonwealth or its agencies.

To represent the Commonwealth and its citizens in any action brought for violation of the antitrust laws of the United States and the Commonwealth.

To collect, by suit or otherwise, all debts, taxes, and accounts due the Commonwealth which shall be referred to and placed with the Attorney General.

To administer the provisions relating to consumer protection as well as appoint the Advisory Committee.

To review for form and legality all proposed rules and regulations of Commonwealth agencies.

To review for form and legality all Commonwealth deeds, leases and contracts to be executed by Commonwealth agencies.

To be the Commonwealth's chief law enforcement officer charged with the responsibility for the prosecution of organized crime and public corruption. This law enforcement effort includes a criminal investigations unit and drug law enforcement program as well as direction of statewide and multicounty investigating grand juries and a Medicaid fraud control section.

The Attorney General, in addition, serves as a member of the Board of Pardons, the Joint Committee on Documents, the Hazardous Substances Transportation Board, the Board of Finance and Revenue, the Pennsylvania Commission on Crime and Delinquency, the Pennsylvania Emergency Management Agency, the Civil Disorder Commission and the Municipal Police Officers Education and Training Commission.

The personnel complement of the Office consists of attorneys, paralegals, legal interns, investigators, management personnel and support staff.

The Office, at this time, is divided into:

Executive Office

Attorney General

First Deputy Attorney General

Associate Deputy Attorney General

Associate Deputy Attorney General/Legislative Affairs
Office of the Press Secretary
Office of Public Affairs
Criminal Law Division
Commonwealth Agencies Legal Services Division
Public Protection Division
Office of Management Services

First Deputy Attorney General

The First Deputy Attorney General serves as the principal advisor to the Attorney General on all legal and administrative matters.

Under the direction of the Attorney General, the First Deputy oversees the development and implementation of policy and serves as liaison between the Attorney General and all deputies and program officials.

In the absence of the Attorney General, the First Deputy heads the Office of Attorney General.

Associate Deputy Attorney General

Associate Deputy Attorney General is the legal policy advisor on civil and criminal law and the criminal justice system. The Associate Deputy Attorney General advises the Attorney General as to constitutional issues, statutory interpretation, and the drafting and review of legislation.

The Associate Deputy Attorney General reports directly to the First Deputy Attorney General and through him to the Attorney General.

The Associate Deputy functions as a member of the executive staff involved in all levels of policy and project design and implementation. The Associate Deputy Attorney General may be designated to act on behalf of the Attorney General.

Associate Deputy Attorney General/Legislative Affairs

The Associate Deputy Attorney General/Legislative Affairs additionally reviews and interprets for the Office of Attorney General activity of the General Assembly, acting as liaison to members of the state Legislature and their staffs.

The Associate Deputy Attorney General/Legislative Affairs reports to the First Deputy and works closely with the Attorney General to prepare legislative initiatives that address the mandate of the Office of Attorney General.

The Associate Deputy Attorney General/Legislative Affairs may re-

search and write testimony for the Attorney General as necessary to comment on pending legislation at both the state and federal level.

Office of the Press Secretary

The Office of the Press Secretary speaks for the Attorney General and the divisions, bureaus, and sections of the Office of Attorney General.

The Press Secretary initiates and coordinates news coverage by newspapers and radio and television stations on subjects of direct and indirect interest to the Office of Attorney General. The Press Secretary works closely with the Office of Public Affairs to assure that the Attorney General's policies are accurately portrayed in all other forms of public communications.

Office of Public Affairs

The Public Affairs Office prepares the executive schedule of the Attorney General, including public appearances outside the Office as well as inter-office appointments and meetings.

The Public Affairs Office researches and writes speeches for the Attorney General as required, delivers speeches and/or makes public appearances to special groups, and handles special correspondence ranging from a letter from an upset citizen to a formal petition from a statewide organization.

In addition, the Office has the responsibility of organizing meetings for specialized groups, acts as liaison for the Office of Attorney General in gathering, processing, and disseminating or publishing information about the Office of Attorney General. It provides technical assistance in matters pertaining to broadcast media, assisting the Office of Press Secretary as needed.

CRIMINAL LAW DIVISION

The Commonwealth Attorneys Act provides extensive powers of prosecution to the Attorney General. This prosecution power rests within the Criminal Law Division.

It includes the power to investigate and prosecute criminal matters relating to the public duties of state officials and employees; corrupt organizations; charges referred by a Commonwealth agency; presentments returned by an investigating grand jury of the Attorney General, and matters arising out of the Medicaid Fraud Control Section.

In addition, the Division may supersede a district attorney under certain circumstances; may prosecute upon request of a district attorney;

may concurrently prosecute with a district attorney, and handle criminal appeals as the law provides.

The Division is responsible for all matters before the statewide investigative grand jury, controls the electronic surveillance equipment of the Office of Attorney General and is responsible for the use of this equipment.

The Criminal Law Division is headed by an Executive Deputy Attorney General who is the Director and has the overall responsibility of seeing that the functions of the Division are properly administered. The Director reports to the First Deputy Attorney General and through him to the Attorney General.

The Division comprises:

Organized Crime and Public Corruption Section
Grand Jury Section
Special Prosecutions Section
  Hazardous Waste Prosecutions Unit
Medicaid Fraud Control Section
Bureau of Criminal Investigation
Bureau of Narcotics Investigations and Drug Control

In addition to the Harrisburg Office, the Criminal Law Division maintains offices in Philadelphia and Pittsburgh. The Division has regional offices for certain of its sections located throughout the Commonwealth, specified in the following section descriptions.

Practice is before the Common Pleas Courts of the Commonwealth, the Pennsylvania Superior Court and the Pennsylvania Supreme Court. Practice may on occasion extend into the Federal Court system.

Organized Crime and Public Corruption Section

This Section is responsible for all criminal matters involving public corruption of state officials or employees as described in the Corrupt Organizations Act of 1972.

The Section also supervises the use and application of the Wiretapping and Electronic Surveillance Control Act of 1978 and provides technical assistance to district attorneys in carrying out their responsibilities under that statute.

In carrying out its responsibilities, the staff of the Section maintains close liaison with the investigative agencies of the Office of Attorney General and with the appropriate investigative agencies at the state and local levels.

This Section reviews investigative reports; renders prosecutive opinions; prepares matters for submission to the grand jury and prosecutes criminal cases in the trial courts of the Commonwealth.

In the investigation and prosecution of public corruption, close liai-

son is maintained with the State Ethics Commission to ensure the appropriate exchange of information and the proper exercise of jurisdiction by the respective offices. Liaison is also maintained with those federal agencies having the responsibility to investigate and prosecute organized crime and with all other Commonwealth law enforcement agencies.

Grand Jury Section

The overwhelming success of Pennsylvania's first Multi-county Investigating Grand Jury (September 24, 1979 through September 24, 1981) proved that the utilization of the grand jury is often the only effective means of investigating and identifying the perpetrators of multi-county organized crime and/or public corruption. The Grand Jury Section is designed to provide the necessary administrative support to the grand jury.

It coordinates and schedules all matters to be brought before the grand jury in order to use the limited time of the grand jury most effectively and efficiently.

This Section also deals with the legal issues arising from the utilization and functioning of the grand jury. It also is responsible for the numerous administrative details necessary to respond to the needs of the grand jury members.

Special Prosecutions Section

The Special Prosecutions Section is responsible for criminal matters referred by other state agencies, and criminal matters which are accepted from the offices of the various district attorneys on the basis of conflict of interest or lack of resources. It is the responsibility of this Section to serve as liaison to district attorneys and provide information and advice where appropriate.

The Section also is involved in matters in which it has been determined that the necessary statutory basis exists to supersede a district attorney.

In addition, this Section is responsible for certain narcotics cases developed by the Division's Bureau of Narcotics Investigations and Drug Control.

Hazardous Waste Prosecutions Unit

This Unit is a subordinate component of the Special Prosecutions Section. The Unit is a special inter-agency task force responsible for investigating and prosecuting instances of illegal disposal of hazardous and industrial wastes.

It places particular emphasis on investigations into the infiltration of organized crime into the disposal industry. The Unit is staffed by em-

ployees of the Office of Attorney General and of the Department of Environmental Resources. These employees bring their disparate knowledge of criminal investigative techniques and environmental analysis abilities into one organization.

Medicaid Fraud Control Section

This Section has the responsibility of investigating and prosecuting providers who participate in the medical assistance program and have committed fraud upon the program. Its function is to insure that money allocated to provide medical assistance services to the needy is properly expended.

Specifically, this Section is responsible for the investigation and prosecution, where appropriate, of nursing homes, hospitals, medical supply vendors, and professional personnel (physicians, dentists, pharmacists, etc.).

In addition to its Harrisburg Office, the Section has an Eastern Regional Office in Norristown and a Western Regional Office in Greensburg.

Bureau of Criminal Investigation

Bureau of Criminal Investigation (BCI) has the responsibility of investigating all criminal offenses within the jurisdiction of the Office of Attorney General other than narcotics and Medicaid fraud offenses, as defined in Sections 205 and 206 of the Commonwealth Attorneys Act.

BCI supports grand jury investigations and conducts other criminal investigations as directed by the Attorney General or the Director of the Criminal Law Division. The Bureau provides, where possible, aid and support, including material and technical assistance, to other state and local investigative agencies. The Bureau also assumes investigative responsibility in instances in which the Office of Attorney General supersedes a district attorney.

In addition to its central office in Harrisburg, the Bureau maintains offices in Philadelphia, Pittsburgh, Scranton and Erie.

Technical Services Unit

Technical Services has been established within the Bureau of Criminal Investigation as the central repository for the Commonwealth's electronic surveillance and wiretap equipment. The Technical Services Unit is responsible for conducting both consensual and non-consensual wire interceptions as approved by the Attorney General or the Pennsylvania Superior Court.

The Technical Services Unit also provides photographic and television surveillance in support of investigative activity of the Criminal Law Division.

Bureau of Narcotics Investigations and Drug Control

In response to the growing availability and abuse of dangerous drugs throughout the Commonwealth, a separate and specialized program whose only mission is the enforcement of drug law was created in 1973 and placed under the direction of the Attorney General.

Pennsylvania's drug law enforcement effort is carried out by the Attorney General's Bureau of Narcotics Investigations and a "Strike Force" from the Drug Law Enforcement Division of the Pennsylvania State Police.

The goals of the Bureau are to immobilize drug traffickers through arrest and prosecution and to reduce the availability of illicit drugs in an attempt to curtail drug abuse in Pennsylvania.

The Bureau's operational activities can be categorized into two functions: 1) to enforce the Controlled Substance, Drug, Device and Cosmetic Act and other drug-related laws through the in-depth investigation and successful prosecution of criminal violations involving controlled substances; and 2) to assure compliance with the drug laws through regulatory inspections of the legitimate handlers of controlled substances (pharmacies, hospitals, and medical practitioners).

Regional offices of the Bureau are located in Allentown, Erie, Greensburg, Kingston, Philadelphia, Reading, State College and Zelienople.

COMMONWEALTH AGENCIES LEGAL SERVICES DIVISION

The Commonwealth Agencies Legal Services Division has five main functions:

1. To conduct litigation brought by and against the Commonwealth;
2. To review with the Attorney General, where appropriate, and approve or disapprove proposed settlements of financial claims by and against the Commonwealth;
3. To review and approve for form and legality all Commonwealth contracts, deeds and other documents and, where appropriate, to develop standardized forms of such documents;
4. To review and approve or disapprove proposed regulations; and
5. To assist the Attorney General in the preparation of formal and informal opinions giving requested advice to the Governor and to Commonwealth Agencies.

To carry out these functions, the Division is composed of four sections: Torts Litigation Section; Tax and Finance Section; Review and Advice Section; and Litigation Section.

The Division is headed by an Executive Deputy Attorney General who acts as the Director and has the overall responsibility for seeing

that the core functions are properly administered. He reports directly to the First Deputy Attorney General and through him to the Attorney General.

The Division has, in addition to its Harrisburg Office, an Eastern Regional Office in Philadelphia and a Western Regional Office in Pittsburgh. Each Regional Office has a Regional Chief reporting to the Executive Deputy Attorney General.

Attorneys in this Division appear before the Courts of Common Pleas throughout Pennsylvania, Commonwealth Court, Pennsylvania Superior and Supreme Courts, and the Federal Courts including, on occasion, the United States Supreme Court.

Review and Advice Section

Section 204(c) of the Commonwealth Attorneys Act imposes on the Attorney General certain responsibilities for reviewing documents and giving legal advice. These responsibilities are carried out primarily through this Section. Its specific duties and functions are as follows:

1. **Opinions and Advice.** This Section receives requests for legal advice and opinions, both formal and informal. It answers such requests and, where appropriate, in conjunction with the Attorney General, prepares legal opinions, either formal or informal. Under the Commonwealth Attorneys Act, formal opinions may be given only to the Governor and to Commonwealth agencies and such opinions are legally binding on the requesting parties.

2. **Contracts.** This Section reviews for form and legality all Commonwealth contracts and is also responsible for the drafting and approval of form contracts. It renders assistance to Commonwealth agencies in the drafting of contracts. Recently, its functions have expanded to include the conduct of affirmative litigation in cases involving Commonwealth agencies contracts.

3. **Regulations.** This Section reviews for form and legality all of the regulations of Commonwealth agencies.

4. **Legislation.** This Section reviews bills introduced into the Legislature which impact upon the authority and responsibilities of the Office of Attorney General and, where appropriate, assists the Associate Deputy Attorney General/Legislative Affairs in preparing legislative initiatives.

This Section conducts research and analysis for the Office of Attorney General with respect to any issue of special concern.

Litigation Section

The Litigation Section is responsible for all litigation involving the Commonwealth, its agencies, its officials and employees, except litigation by the Torts Section, Tax Litigation Unit, Collections Unit, and Antitrust Section.

Generally, the cases handled by this Section involve: (1) constitutional issues, (2) issues of statewide importance, (3) cases involving large amounts of money, (4) cases involving cabinet level officials, and/or (5) complicated procedural issues.

Torts Litigation Section

This Section is responsible for all personal injury actions in which the Commonwealth is a defendant. In 1978, the General Assembly of Pennsylvania reaffirmed the doctrine of sovereign immunity but established eight specific exceptions whereby the Commonwealth can now be sued.

The Torts Section also is responsible for any pre-litigation settlements of tort claims against the Commonwealth.

Tax and Finance Section

This Section supervises and coordinates the activities of the Tax Litigation and Collections Units. In addition, it is responsible for reviewing, approving and completing the documents associated with the issuance of General Obligation Bonds, Tax Anticipation Notes of the Commonwealth, as well as bonds and notes issued by other state agencies, and also for reviewing proposed tax regulations promulgated by the Department of Revenue.

Tax Litigation Unit

This Unit is responsible for the trial and appellate litigation of all lawsuits involving any Pennsylvania tax.

Collections Unit

This Unit collects all debts due the Commonwealth and in conjunction with the Special Prosecutions Section of the Criminal Law Division, is responsible for the criminal prosecution of delinquent taxpayers.

This Unit receives delinquent accounts from approximately 100 agencies of state government pursuant to the Commonwealth Attorneys Act. The types of claims referred include: unpaid taxes to the Revenue Department, money owed to the Public Welfare Department

for maintenance of patients in mental hospitals, claims for damage to state property, tuition owed to state universities and defaults under the Department of Environmental Resources Reclamation Bonds.

Eastern and Western Regional Offices

The Eastern Regional Office is located in Philadelphia in the State Office Building, and the Western Regional Office is located in Pittsburgh in the Manor Building. Attorneys are assigned to the Torts Litigation Section, Collections Unit, and the Litigation Section.

The attorneys' work is assigned by their Section Chiefs in Harrisburg, but day-to-day assistance is given by the regional chief in coordination with the Executive Deputy Attorney General and Section Chiefs in Harrisburg.

The Regional Chiefs also act as the Attorney General's representatives in Eastern and Western Pennsylvania and coordinate the operation of the regional offices.

PUBLIC PROTECTION DIVISION

The Public Protection Division's primary responsibility is to see that the commercial and personal rights of the citizens of the Commonwealth of Pennsylvania are protected and the public interest served.

To carry out this responsibility, the Division is composed of four sections:

Bureau of Consumer Protection
Antitrust Section
Charitable Trusts and Organizations Section
Office of Consumer Advocate

The Public Protection Division is headed by an Executive Deputy Attorney General who has the overall responsibility of seeing that the core functions are properly administered. The Executive Deputy reports to the First Deputy Attorney General and through him to the Attorney General.

The Division has regional offices for certain of its sections located throughout the Commonwealth, specified in the following section descriptions.

Attorneys in this Division appear before the Courts of Common Pleas, including Orphans' Court Divisions, Commonwealth Court, Pennsylvania Superior and Supreme Courts and Federal Courts.

Bureau of Consumer Protection

The Commonwealth Attorneys Act requires the Attorney General to administer a Bureau of Consumer Protection. The duties of this Bureau are to:

Investigate commercial and trade practices in the distribution, financing and furnishing of goods and services for the use of consumers.

Conduct studies, investigations and research in matters affecting consumer interests and make information available to the public.

Advise the executive and legislative branches on matters affecting consumer interests, including the development of executive policies and the proposal of legislative programs to protect consumers.

Investigate fraud and deception in the sale, servicing and financing of consumer goods and products, and strive to eliminate the illegal actions.

Promote consumer education and publicize matters relating to consumer fraud, deception and misrepresentation.

Certain duties and directives of the Bureau are by statutory authority, which in many instances allow for mandatory attendance of witnesses and production of documents for investigatory purposes.

In addition to its primary functions, the Bureau acts as conduit with Commonwealth consumers for the disbursement of consumer education information and materials.

To carry out its responsibility, the Bureau of Consumer Protection has, in addition to its central office in Harrisburg, six regional offices located in Philadelphia, Allentown, Scranton, Harrisburg, Erie, and Pittsburgh.

Antitrust Section

The Antitrust Section acts to protect the free enterprise system by protecting competition and challenging anticompetitive conduct. The Section's goals are to permit commerce to be engaged as free of restraints on trade as possible, with corresponding benefits to quality and prices of goods and services resulting from open competition in the market place.

The Section takes legal action to recover losses to the Commonwealth, its residents, and its governmental units resulting from anticompetitive conduct.

The Section is an advocate for competition and, where appropriate, it works through other departments and agencies to eliminate unnecessary anticompetitive restraints in statutes and regulations.

The Antitrust Section seeks to educate the public in antitrust issues and in the economic rights of businessmen and consumers, in an effort to maintain a free market system within a competitive economy.

Charitable Trusts and Organizations Section

The Charitable Trusts and Organizations Section is responsible for reviewing charitable trusts and organizations to ensure that they are being properly implemented for the benefit of the public.

Pennsylvania Orphans' Court Rules as well as the Attorney General's common law "parens patriae" authority over charitable trusts require that the Section review all estates and trusts in which there is a charitable interest, as well as any periodic accounting filed by a fiduciary in the Orphans' Court in which such an interest exists.

The Section receives, reviews and maintains federal tax forms which must be filed by private and public foundations with the Attorney General of the state in which the foundation operates.

Pursuant to the Not-For-Profit Corporation Act, the Charitable Trusts and Organizations Section may become involved in the dissolution or diversion of charitable assets from non-profit corporations.

In the course of its duties, the Section files objections to, or petitions in support of, a charitable trust, gift or corporation in various orphans' courts of Pennsylvania.

The Section maintains headquarters in Harrisburg with regional offices in Philadelphia and Pittsburgh.

Office of Consumer Advocate

The Office of Consumer Advocate within the Office of Attorney General was established by Act 161 of 1976. As the first Commonwealth agency to come under sunset legislation, it was slated to go out of existence on June 30, 1979, but was extended for five more years to June 30, 1984. By Act 25 of July 20, 1983, the Office of Consumer Advocate was extended for another five years to December 31, 1989.

The Commonwealth Attorneys Act directs the Attorney General to appoint a Consumer Advocate subject to approval by the Senate. Funding of the Office comes not from the state but from assessments on the utility companies which are regulated by the Public Utility Commission, through a formula similar to the process for funding of the Public Utility Commission.

The Office represents residential or small utility consumers who have neither the technical knowledge nor the financial resources available to the large industrial and commercial classes of utility consumers.

Attorneys practice before the Public Utility Commission, Nuclear

Regulatory Commission, Federal Energy Regulatory Commission, Commonwealth Court, Superior Court and Supreme Court of Pennsylvania, and when appropriate, various federal courts.

Civil Rights Task Force

The Civil Rights Task Force is designed to assume a leadership and coordination role in action arising from allegations and complaints of civil rights violations. The structure of the Civil Rights Task Force is as follows:

The Chairman of the Civil Rights Task Force is the Director of the Public Protection Division, located in Harrisburg, with the Directors of both the Eastern and Western Regional Offices serving as Task Force members.

Each office makes use of an investigator whose duties include investigation and/or review of any matters assigned by the Task Force.

The Task Force is authorized to receive complaints of police abuse and complaints of discriminatory treatment by any citizen based on race, religion, sex or national origin.

The Task Force meets at the discretion of the Chairman, but not less than once in every three-month period.

Complaints filed before the Task Force are reviewed to determine appropriate action, which may include contact with local law enforcement authorities in the case of a violation of criminal law. The Task Force serves as liaison to the Pennsylvania Human Relations Commission to ensure referral of appropriate cases and/or action. Where a joint effort is indicated, it shall be undertaken, but the Office of Attorney General will only be involved in litigation in which it is the controlling party and only at the direction of the Attorney General.

The Civil Rights Task Force also is represented, by the Chairman or his designee, at meetings of the Interagency Task Force on Civil Tension.

OFFICE OF MANAGEMENT SERVICES

The Office of Management Services is responsible for the administrative affairs of the Office of Attorney General. It is composed of six sections:

Personnel Section
  Affirmative Action Unit
Budget Planning and Financial Management Section
Office Services Section
  Word Processing Unit
Data Processing Section

Law Library
Security Section

The Office of Management Services is headed by a Director who has the overall responsibility for implementing the functions of the office.

Each section chief reports to the Director of Management Services who, in turn, reports to the First Deputy Attorney General.

Personnel Section

The Personnel Section administers a comprehensive personnel program designed to assist managers and supervisors in making the most efficient use of their employees. The Personnel Section provides advice and represents management in relating program requirements to those employees responsible for their implementation.

This Section also makes available to line and top management the professional expertise needed for selecting, utilizing, motivating, evaluating and disciplining staff. It also trains managers as to their responsibilities, limitations, and authority when managing their personnel. The Personnel Section is divided into four units:

The Affirmative Action Unit identifies those areas of the work force where minorities and women are underutilized and corrects the imbalances through an aggressive program of recruitment and promotion.

The Employment Unit provides the names of qualified applicants for employment to managers and supervisors and assists them with interviewing, selecting, and evaluating those candidates.

The Employee Services and Classification Unit implements the Office of Attorney General's benefits program, which includes retirement, Blue Cross/Blue Shield Hospital and Surgical Insurance or Health Maintenance Organizations Insurance, Workmen's Compensation, Unemployment Compensation, Health and Welfare Fund, Heart and Lung Act, and leave. It reviews and analyzes assigned duties and responsibilities of all positions to ensure proper classification of employees throughout the Office of Attorney General.

The Labor Relations Unit represents the Office of Attorney General in collective bargaining sessions, grievance hearings, meet and discuss sessions with Union representatives. It also assists managers and supervisors in the interpretation and ad-

ministration of the collective bargaining agreements entered into by the Office of Attorney General.

Security Section

The Security Section provides in-house security for the Office of Attorney General through the use of security devices for offices and file rooms, and through the control of an alert alarm system, as well as a digital pad security system for specified OAG offices/rooms.

It supervises the preparation and issuance of photograph identification cards and credentials, and controls the issuance of badges to designated Office of Attorney General personnel.

Reports of businesses and companies are obtained for various units of the Office of Attorney General from Dun & Bradstreet, Inc. Records of these reports are maintained by the Security Section.

The Security Section makes and/or supervises background investigations of prospective employees, and maintains a close association with police departments, law enforcement agencies and staff in an effort to provide effective security to the Office of Attorney General and its employees.

Data Processing Section

The Data Processing Section designs, develops and implements automated information processing systems to assist management, legal and support personnel in the performance of their day-to-day activities.

Data Processing staff train the users of these computer applications in the use of video display terminals to input, retrieve, update and manipulate information stored in the computer.

Computer support is provided by a Sperry 1100 computer located in Strawberry Square, Harrisburg. More than eighty terminals (located in five regional offices, four Commonwealth agencies and Strawberry Square) are linked to the computer by a statewide data communications network.

The Records Management Unit develops and maintains automated and manual systems to facilitate access to open and closed case information.

Budget Planning and Financial Management Section

The Budget Planning and Financial Management Section is responsible for the development, administration and implementation of fiscal policy and procedures; and the procurement of goods and services required by the Office of Attorney General.

Fiscal responsibility includes development of the budget request and development of documentation to defend the budget request before both the Governor's Office Review, and Appropriations Committees. Funding recommendations are made after periodic analysis of expenditure levels based on actual appropriation amount. Office of Attorney General program officials are encouraged to re-allocate funds based on changing requirements and make use of financial controls to prevent over-commitment of available funds.

The procurement responsibility includes the development of policy and procedures, within the laws and regulations of the Commonwealth, for purchasing goods and services required in the operation of the Office of Attorney General; the development, issue and control of purchasing documents; and the management of the stockroom.

In addition, the Budget Planning and Financial Management Section maintains liaison with the Office of Comptroller to facilitate financial accounting and reporting.

Office Services Section

The Office Services Section manages the support functions of word processing, mail and messenger services, graphics, printing and duplicating services, space and facilities management, telecommunications, and the automotive fleet for the Office of Attorney General. The Office Services Section is divided into four units:

The Word Processing Unit supervises a statewide word processing system whereby documents are input to the system, revised and printed, or transmitted in their original form to other OAG regional offices through a communications network. In addition, the system is used for the exchange of information between the Office of Attorney General and certain service bureaus such as news wire services, rating agencies, law firms, and federal and other state agencies.

The Graphics Unit provides high volume document printing/reproduction through the use of in-house equipment or the acquisition of outside vendor services. It is responsible for the placement and monitoring of all duplicating machines throughout the agency, and provides mail and messenger services to all OAG offices through one of the following methods: U.S. mail, inter-/intra-office mail, bonded couriers, messengers, facsimile equipment and common carriers.

The Space and Facilities/Telecommunications Unit handles employees' physical office needs. Through space and facilities management, this area develops space studies, resolves occupancy problems, negotiates and administers leases, coordinates construction and occupancy, and manages all real property occupied by the Office of At-

torney General. In addition, it administers and coordinates the minor repair, major change, and system redesign of circuits, desk phones and radio systems.

The Automotive Unit manages and monitors the assignment, usage, maintenance, repair and replacement of OAG vehicles.

Law Library

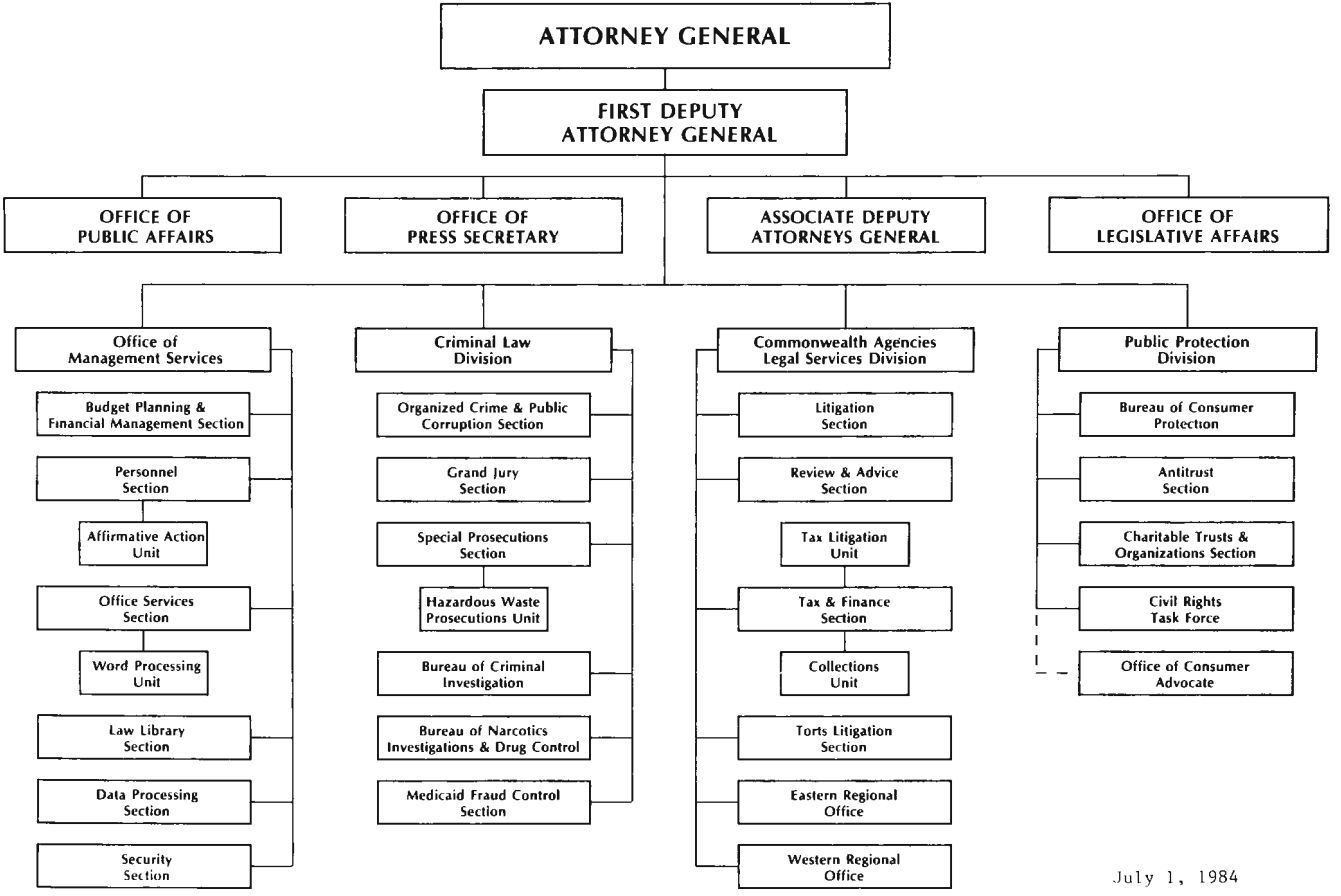
The Law Library is operated and maintained to provide reference and research information necessary for the proper functioning of the Office of Attorney General. The library staff provides this information from print and computer based resources within the library and, when necessary, from other libraries.

The library staff also provides advice and information to Office of Attorney General regional offices.

The library computer resources are LEXIS (full text court decisions from federal and state appellate courts), Shepard's Citations, Auto-Cite (citation verification), and NEXIS (full text library of newspapers, magazines, newsletters and wire services).

The library collection includes federal material (Statutes at Large, USCCAN, USCA, USCS, Federal Register, Supreme Court Reports, Federal Reporter, Federal Supplement, digests), state material (National Reporter System, Shepard's Citations, American Law Reports), and Pennsylvania material (appellate court reporters, side reports, Attorney General opinions, treatises, Purdon's, Pa. Code). Also contained in the library are encyclopedias (CJS, AmJur 2d, PLE), legal newspapers, law reviews, legal periodicals and looseleaf services (CCH and BNA).

OFFICE OF ATTORNEY GENERAL



July 1, 1984

REPORT BY ATTORNEY GENERAL LeROY S. ZIMMERMAN

In 1978, the Office of Attorney General underwent a dramatic change brought about by the will of the people of Pennsylvania and crafted into law by the General Assembly . . . the creation of a new office of state government . . . the creation of an independent, elected Attorney General.

On January 20, 1981, I took the oath of office as Pennsylvania's first elected Attorney General, the state's chief legal and law enforcement officer.

Whether this occasion assumes historical significance, however, depends upon the manner in which I and those who come after me exercise the new responsibilities and broader powers vested in this office.

The concept of what an Attorney General should be is already firmly fixed in the tradition of great lawyers who served under the appointive system established by William Penn when he named David Lloyd in 1686.

My predecessors labored under a handicap—they were at once quasi-judicial officers when they handed down their official opinions and served, too, as the Governor's lawyers.

With Pennsylvania's intense political factionalism from William Penn's time forward, it was sometimes charged and more often thought that rulings of the Attorney General followed the Governor's views instead of being impartial and objective.

I am inclined to believe that such instances over the centuries were infrequent and the great majority of Attorneys General displayed integrity and objectivity in the performance of their duties.

Indeed, David Lloyd displayed such fierce independence of William Penn that he was fired.

The Constitutional change that established the elected Attorney General is wise and sound in its concept but, as with all power, it may only be as wise and good as the individual occupying the office makes it.

Four years ago, I accepted the special responsibility placed upon me by the people of the Commonwealth in their election of me as the first Attorney General designated by direct popular vote. That election brought with it the additional duty of shaping and directing this new

office made independent by the people and defined by the General Assembly.

My role as the chief legal and law enforcement officer for the Commonwealth entails a broad variety of responsibilities, none more important than the Attorney General's responsibility to protect individual citizens, this state's honest working men and women and their families. Prosecuting criminals is the most obvious way an Attorney General protects the people, but there are other ways, too.

Until I took office, no Attorney General had ever filed an antitrust suit unless it was the state government that was being victimized. I am proud to say that I am the first Attorney General in the history of Pennsylvania to use antitrust laws to protect Pennsylvania's citizens.

The Office of Attorney General sued certain Toyota automobile dealers in the state and their distributor because they were forcing people to buy options they didn't need. Because of that action, 13,200 people are in line to get refunds.

My Office is currently involved in two big corporate megamergers, Texaco's buyout of Getty for $10 billion and Chevron's takeover of Gulf for $13 billion. Two thousand jobs in the Pittsburgh area have been affected by this action. The Federal Trade Commission, through the efforts of the Office of Attorney General, has been made aware of the impact of these megamergers on the economy of Pennsylvania.

Last year, my Bureau of Consumer Protection filed 65 percent more legal actions than the year before I took office. The cases involved big businesses, car dealers, loan companies, and department stores. All had one thing in common: ripping off consumers.

I have put special emphasis on the problem of motor vehicle odometer tampering. We stopped 44 used-car wholesalers who had been rolling back odometers, imposing $270,000 in civil penalties. Legislation proposed in 1983 led to a new law, which, for the first time, imposes tough criminal penalties for odometer tampering.

Certainly, it is the responsibiliy of the Attorney General to guard tax dollars. Working with the state Department of Revenue, I started a program of collecting delinquent sales taxes. In many cases, dishonest business people were keeping the 6 percent sales tax to use for their own purposes instead of remitting it to Harrisburg.

The Office of Attorney General has vigorously pursued these tax deadbeats by closing down businesses and holding sheriffs' sales to recover tax dollars owed to the state.

We have taken action against more than 120 businesses, collecting more than $15 million in the process. I also have begun a program to bring criminal charges against tax cheats in Pennsylvania.

In the area of criminal law, the Attorney General has broad new re-

sponsibilities and new tools to do the job. I have statewide jurisdiction, access to investigating grand juries, and the authority, with court supervision, to use wiretapping where it is necessary to go forward with difficult criminal investigations.

We have used these new tools to great advantage in a variety of organized crime and public corruption cases. One case alone involved a $400-million-a-year bookmaking scheme with direct links to Las Vegas. Fifty illegal professional gambling operators, many of them known organized crime figures, were convicted and forced to pay fines and restitution to the state.

In the Susan Reinert murder case, we took charge of a two-year-old investigation that crossed three counties. Many dedicated investigators, including state and local police, three district attorneys, and the FBI, had been unable to put together enough solid evidence to build a case.

We brought the facts to a grand jury and reviewed the evidence in fine detail. William Bradfield is in jail for the rest of his life because the Office of Attorney General prosecuted him for murdering Montgomery County high school teacher Susan Reinert and her two children.

I have focused special attention on the problem of illegal drug abuse in this Commonwealth. The Attorney General's Narcotics Strike Forces have arrested more than 3,500 *drug pushers.* We have been successful in going after upper level dealers who manufacture "speed" in secret labs, people who ship cocaine in from Miami, and people who deal in marijuana by the ton.

And we have been successful in "busting" street dealers as well. As a parent, there is nothing more important to me than fighting the flow of drugs to children at the street level and in the school yard. That is one of the reasons I spoke out against judges who were handing down lenient sentences in drug cases.

The mandate of the Office includes the investigation of public corruption. In 1984, we successfully prosecuted the top deputy in the Auditor General's Office for masterminding a $200,000 job-selling scandal that began in western Pennsylvania.

In the years I have been in office, I personally argued two cases that I thought were important to the safety and protection of all Pennsylvanians.

In a case before the United States Supreme Court, I personally argued to uphold the right of corrections officials to control our state prisons. And in an equally important case before the State Supreme Court, I argued on behalf of the constitutionality of Pennsylvania's death penalty law. I am proud to say that we won both cases.

The foundation that I have put into place for the building of this structure is firmly set in the mortar of integrity, experience, independence, and industry.

But the building of this Office will not be completed in a single term. Rather, it will be a continuing process by legislative refinement, court fiat, and ingenuity and creativity of the holder of the office to meet the ever-changing needs of the people of Pennsylvania.

In meeting my responsibility, I have insisted that I and those who serve with me in this Office adhere to a standard of personal and professional conduct unprecedented in Pennsylvania history. It is a measure that is expected and demanded by the people.

My goal as Attorney General has been to serve in a manner which, when my time is done, will be remembered by every Pennsylvanian as a time when both integrity and justice marked the conduct of the Office.

OFFICIAL OPINION NO. 81-4

General Obligation Bonds—Issue and Sale of—Validity—Full Faith and Credit of the Commonwealth pledged for the Payment of the Principal and Interest.

1. The $75,000,000 principal issuance of Commonwealth of Pennsylvania General Obligation Bonds, First Series S of 1981 have been validly authorized, issued and sold in accordance with Article VIII of the Pennsylvania Constitution and the enabling acts of the Commonwealth.

2. The bonds are lawful, valid, direct and general obligations of the Commonwealth pledging the full faith and credit of the Commonwealth.

3. Under existing law the Bonds, their transfer and the income therefrom are exempt from taxation for state and local purposes.

June 4, 1981

To The Purchasers of the Within Described Bonds:

Re: Commonwealth of Pennsylvania
$75,000,000 General Obligation Bonds,
First Series S of 1981

This opinion* is furnished to you in connection with the issue and sale by the Commonwealth of Pennsylvania on the date hereof of $75,000,000 principal amount of Commonwealth of Pennsylvania General Obligation Bonds, First Series S of 1981 (the "Bonds"), dated May 15, 1981 and maturing serially in varying amounts on November 15 of each year, commencing November 15, 1981. The Bonds have been issued as coupon bonds, registrable as to principal only, in the denomination of $5,000 each. Bonds maturing on and after November 15, 1991 are subject to redemption on and after May 15, 1991 as a whole at any time, or from time to time in part on any interest payment date in the inverse order of their stated maturity dates.

Under Section 7(a)(4) of Article VIII of the Constitution of Pennsylvania (the "Constitution") the Commonwealth may incur debt without the approval of the electors to finance capital projects which have been specifically itemized in a capital budget of the Commonwealth if such debt will not cause the amount of all net debt outstanding (as defined for the purposes of that Section) to exceed one and three-quarters times the average of the annual tax revenues deposited in the previous five fiscal years, as certified by the Auditor General. The Bonds are authorized by and have been issued and sold pursuant to (i) the aforesaid Sec-

*Editor's Note—No. 81-4 is the first opinion issued by LeRoy S. Zimmerman, Attorney General.

tion 7(a)(4) of Article VIII of the Constitution, (ii) the Capital Facilities Debt Enabling Act, being Act No. 217 of the 1968 Session, approved July 20, 1968, P.L. 550, *as amended*, 72 P.S. § 3901.1 *et seq.*, (iii) Act No. 145 of the 1980 Session, approved October 6, 1980, P.L. 784, *as amended*, which Act and its supplements constitute the Capital Budget Act of 1980-1981 Fiscal Year, (iv) certain capital budget acts and debt authorizing acts relating to capital projects (all of the foregoing, being hereinafter collectively called the "Acts") and (v) certain preambles and resolutions adopted by the Governor, the Auditor General and the State Treasurer pursuant to the authority vested in them by the foregoing constitutional and statutory provisions.

I have examined Article VIII, Section 7 of the Constitution, the Acts, a specimen Bond, the preambles and resolutions referred to above, a certificate of the Governor, the Auditor General and the State Treasurer as to the expectations of the issuer with regard to the Bonds as is relevant under Section 103(c) of the Internal Revenue Code of 1954, *as amended*, pertaining to arbitrage bonds, the other certificates delivered today at the Closing and such other matters and documents as I deemed necessary or appropriate.

I am of the opinion that:

1. Section 7 of Article VIII of the Constitution has been duly approved and adopted and has become part of the Constitution of Pennsylvania, and the Acts have been duly and properly enacted.

2. Pursuant to full and adequate legal power conferred upon them by the Constitution and the Acts, the Governor, the Auditor General and the State Treasurer have duly adopted the preambles and resolutions referred to above and have validly taken all other necessary and proper action to issue and sell the Bonds, and the Bonds have been validly authorized, issued and sold pursuant to proper and appropriate action of such officials.

3. The Bonds are lawful, valid, direct and general obligations of the Commonwealth of Pennsylvania, and the full faith and credit of the Commonwealth are pledged for the payment of interest thereon as the same shall become due and the payment of the principal thereof at maturity.

4. Under existing law the Bonds, their transfer and the income therefrom (including any profits made on the sale there-

of) are exempt from taxation for state and local purposes within the Commonwealth of Pennsylvania, but this exemption does not extend to gift, succession or inheritance taxes or any other taxes not levied or assessed directly on the Bonds, their transfer or the income therefrom.

5. The Commonwealth of Pennsylvania has the power to provide for the payment of the principal of and interest on the Bonds by levying unlimited ad valorem taxes upon all taxable property within the Commonwealth and excise taxes upon all taxable transactions within the Commonwealth, uniform on the same class of subjects, except gasoline and other motor fuel excise taxes, motor vehicle registration fees and license taxes, operators' license fees and other excise taxes imposed on products used in motor transportation, the proceeds of which are limited to certain special purposes by Section 11 of Article VIII of the Constitution.

6. If sufficient funds are not appropriated for timely payment of interest on and installments of principal of the Bonds, the Constitution requires the State Treasurer to set apart from the first revenues thereafter received applicable to the appropriate fund a sum sufficient to pay such interest and installments of principal and to apply said sums to such purposes, and the State Treasurer may be required so to set aside and apply such revenues at the suit of the holder of any of the Bonds.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 81-5

Liquor Code—Distributor Licensee—Purchase and Sale of Malt or Brewed Beverages Produced by out-of-state Manufacturers—Geographical Territory granted to the Importing Distributor Licensee.

1. A distributor licensee licensed pursuant to the Liquor Code may sell out-of-state manufacturers' malt or brewed beverages anywhere within the Commonwealth and are not limited to the geographical territory granted to the importing distributor from whom he has purchased such beverages.

October 14, 1981

J. Leonard Langan
Chief Counsel
Liquor Control Board
407 Northwest Office Building
Harrisburg, PA. 17124

Dear Mr. Langan:

You have asked the Attorney General whether a distributor licensee may sell out-of-state manufacturers' malt or brewed beverages outside of the territory granted to the importing distributor licensee from whom the distributor purchased the products of the out-of-state manufacturers. It is our opinion and you are hereby advised that distributors are permitted to sell malt or brewed beverages anywhere within the Commonwealth and are not limited to the geographical territory granted an importing distributor.

The Liquor Code provides:

> "The board shall issue to any reputable person . . . a distributor's or importing distributor's license for the place which such person desires to maintain for the sale of malt or brewed beverages not for consumption on the premises where sold. . .
>
> 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: Provided, That the importing distributor holding such distributing rights for such product shall not sell or deliver the same to another importing distributor without first having entered into a written agreement with the said secondary importing distributor setting forth the terms and conditions under which such products are to be resold within the territory granted to the primary importing distributor by the manufacturer." Act of April 12, 1951, P.L. 90, *as amended*, Section 431(b) (47 P.S. § 4-431(b)). (*emphasis added*)

This section establishes two rules. First, the statute expressly limits the geographical area in which distributor licensees may *purchase* malt or brewed beverages produced by out-of-state manufacturers to that area granted to the importing distributor by the out-of-state manufacturers. Second, the statute specifically provides that malt or brewed beverages produced by out-of-state manufacturers and purchased by distributor licensees from importing distributors may be *sold* by distributor licensees "anywhere within the Commonwealth of Pennsylvania." This provision means that once the distributor licensee purchases, in compliance with the Liquor Code, malt or brewed beverages manufactured out-of-state, he can then sell those beverages at any place within the State. This interpretation is supported by the Statutory Construction Act which provides that "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." Act of December 6, 1972, P.L. 1339, No. 290, § 3 (1 Pa. C.S. § 1921(b)).

Moreover, the interpretation is not changed by any judicial interpretation of the Liquor Code. See, *Commonwealth of Pennsylvania v. Starr*, 13 Pa. Commonwealth Ct. 415, 318 A.2d 763 (1974) *aff'd per curiam*, 462 Pa. 124, 337 A.2d 914 (1975). In interpreting the three paragraphs of Section 431(b) of the Liquor Code which are quoted above, the court in *Starr* set forth a two-part proposition. First, importing distributors who buy from out-of-state manufacturers are prohibited from selling such beverages outside the geographical area designated for them by the manufacturers. Also, secondary importing distributors who buy such beverages from primary importing distributors are limited to the geographical area of the primary importing distributors and must enter into a written agreement with the primary importing distributors regarding such sales in the geographical area. The re-

sult is that all importing distributors, as distinguished from other distributor licensees, are subject to the same limitations.

It was the opinion of the court that "[t]he legislature has determined that every section of the Liquor Code is to be construed liberally 'for the protection of the public welfare, health, peace and morals of the people of the Commonwealth' and in light of that policy it has been decided that all transactions in liquor, alcohol and malt or brewed beverages which take place in the Commonwealth are prohibited *except as otherwise expressly authorized.*" *Id.* at 420, 318 A.2d at 766 (citing Section 104(a) and (c) of the Liquor Code, 47 P.S. § 1-104(a) and (c)). For the instant question of where distributor licensees can sell beverages manufactured out-of-state, the legislature has expressly authorized sales anywhere in the Commonwealth.

Therefore, because it is clearly authorized by the Liquor Code and judicial interpretation of the Code is consistent with this view, a distributor licensee may sell the products of out-of-state manufacturers of malt or brewed beverages outside of the territory granted the importing distributor licensee from whom it purchased the products of the out-of-state manufacturers.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 81-6

Liquor Code—Liquor—Purchase of Liquor by Use of a Credit Card.

1. Section 305 of the Liquor Code does not authorize the Liquor Control Board to accept credit cards to purchase liquor at state stores.

December 30, 1981

The Honorable Daniel Pennick
Chairman
Pennsylvania Liquor Control Board
532 Northwest Office Building
Harrisburg, PA 17124

Dear Mr. Pennick:

We have reviewed your request for an opinion concerning Section 305 of the Liquor Code, 47 P.S. § 3-305, and the proposal that the

Liquor Control Board accept credit cards for purchase of liquor at certain designated state stores.

It is our opinion and you are hereby advised that the requirement in Section 305 of the Liquor Code that "no liquor shall be sold except for cash" does not admit any interpretation which would authorize the Board to permit the purchase of liquor by use of a credit card.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 82-1

Milk Marketing Board—Milk Producers' and Cooperative Security Funds—Security Requirements—New Applicants for Milk Dealers' Licenses—Option to post a Bond or to elect participation in the Security Funds.

1. Under the Milk Producers' and Cooperative Security Funds Act a milk dealer not previously licensed in Pennsylvania may purchase milk from Pennsylvania producers without filing a bond if the dealer participates in the Milk Producers' Security Fund.

2. Pursuant to Section 9(a) of the Act, a milk dealer has the option to post a bond or elect participation in the Security Fund.

May 6, 1982

George R. Brumbaugh, Chairman
Pennsylvania Milk Marketing Board
110 Agriculture Building
Harrisburg, PA 17120

Dear Chairman Brumbaugh:

You have asked our opinion concerning the interpretation of Sections 6, 7 and 9 of the Milk Producers' and Cooperative Security Funds Act, as applied to new applicants for milk dealers' licenses. The question is whether, under the provisions of the Milk Producers' and Cooperative Security Funds Act, Act of July 10, 1980, P.L. 481, No. 104, 31 P.S. § 625.1 *et seq.* (hereinafter Act), milk dealers who have not previously purchased milk from Pennsylvania producers may meet the security requirements of the Act by immediately participating in the Milk Producers' Security Fund instead of by filing a bond. The request arises out of an inquiry from a processing company which has purchased a milk

processing plant in Baltimore and is now seeking to buy milk from Pennsylvania producers. The processing company has never been licensed by the Milk Marketing Board and has never purchased milk from Pennsylvania producers. The processing company is not a cooperative.

Section 6 of the Act (31 P.S. § 625.6), entitled "Payments to Security Funds," provides, in subsection (a), as follows:

> Any milk dealer, except a cooperative, who has not filed a bond or other alternative security pursuant to Sections 9, 10 and 11, and who buys, receives or otherwise handles milk received from producers, shall pay monthly to the board one cent per hundredweight on all such milk purchased, received or handled. Such payments shall be deposited in the Milk Producers' Security Fund established by section 7.

The remaining subsections of Section 6 are of concern only to cooperatives.

The method by which payments are to be made into the Security Fund is specified in Section 7 (31 P.S. § 625.7) which provides, in part, in subsection (c), that:

> At the inception of the Milk Producers' Security Fund, each milk dealer who elects to make payments to such fund shall, while maintaining its existing bond or other form of security, be required to pay to such fund on a date designated by the board one cent per hundredweight of the milk purchased, received or handled from the producers during the three months immediately preceding such date. After the establishment of the Milk Producers' Security Fund, any milk dealer who first elects to make payments to such fund shall make a similar advance payment: Provided, however, That the advance payment shall be computed for no more than three months preceding such date.

Pursuant to Section 7, the Milk Marketing Board has promulgated Section 151.4 of the Milk Marketing Board regulations (7 Pa. Code. § 151.4) to further define the method by which milk dealers begin participation in the Milk Producers' Security Fund. Subsection (b) of Section 151.4 states, in part, that:

> Any milk dealer not licensed on July 10, 1980 who, subsequent to that date, applies for a license and elects to partici-

> pate in the Milk Producers' Security Fund shall make an additional payment in addition to his regular monthly payments, calculated by multiplying the payment for the first full calendar month of operation by three. Such payment shall be received by the Board no later than the 25th day of the third full calendar month of operation by such dealer.

The effect of Sections 6(a) and 7(c) of the statute and Section 151.4 of the Milk Marketing Board regulations is that a milk dealer not previously licensed in Pennsylvania may purchase milk from Pennsylvania producers without filing a bond if the dealer participates in the Milk Producers' Security Fund pursuant to the requirements of the statute and regulations. To participate in the Fund, a new milk dealer must make a monthly payment of one cent per hundredweight on all milk purchased in Pennsylvania and, in addition, must make a payment of three times the payment the first full calendar month of operation by the 25th day of the third full calendar month of operation.

The language in Section 9 of the Milk Producers' and Cooperative Security Funds Act (31 P.S. § 625.9) is not in conflict with our conclusion. That section, which is entitled "Surety Bonds," provides, in part, in subsection (f), as follows:

> A milk dealer or handler purchasing or acquiring or receiving or intending to purchase or receive milk from producers, but not engaged during the preceding 12 months, shall file a bond in a sum to be fixed by the board in accordance with the handler's anticipated purchases from producers and his obligation to a producer settlement or equalization fund.

This section applies only to those milk dealers who elect to file a bond pursuant to the statute. To interpret the language of Section 9(f) to require all new dealers to file a bond would be to read this section of the statute out of context and without regard to the rules of statutory construction. Section 1922 of the Statutory Construction Act of 1972 (1 Pa. C.S. § 1922) provides that, in the enactment of a statute, the General Assembly intends the entire statute to be effective and certain. To read Section 9(f) to mandate that all new dealers must provide a bond would render Sections 6 and 7 superfluous and ineffective. Furthermore, Section 1924 of the Statutory Construction Act of 1972 (1 Pa. C.S. § 1924) states that the title of a statute may be considered in the construction thereof. Section 9 is entitled "Surety Bonds." This indicates that subsection (f) will provide information concerning those surety bonds which may be filed under the statute but does not consti-

tute the sole requirement for how a milk dealer may comply with the statutory purpose of protecting milk producers. Finally, subsection (a) of Section 9 expressly recognizes that a milk dealer has the option to post a bond or to elect participation in the Security Fund.

In conclusion, it is my opinion and you are hereby advised that a milk dealer who has not previously purchased milk from Pennsylvania producers may meet the security requirements of the Milk Producers' and Cooperative Security Funds Act by participating in the Milk Producers' Security Fund in accordance with the statute and regulations.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 82-2

State Board of Medical Education and Licensure—Physician Assistant—Health Care Providers: Registered and Practical Nurses, Pharmacists, and Physical Therapists—Medication and Treatment Order given by a Physician Assistant to Health Care Providers.

1. A nurse or other health care provider is not obliged to administer a medication or treatment order given by a physician assistant as though the order were given by a physician.

2. The Act of June 23, 1978 P.L. 502, No. 79 created a new class of health care provider designated "physician assistant" to assist licensed physicians in providing medical care.

3. The 1978 amendment provided that the care and services rendered by a physician assistant should be rendered only under the supervision and direction of a physician or group of physicians.

July 23, 1982

Dr. Richard C. Lyons, Chairman
State Board of Medical Education & Licensure
Department of State
Room 615, Transportation & Safety Building
Harrisburg, PA 17120

Dear Dr. Lyons:

You have requested through your counsel and the Office of General Counsel our formal opinion regarding certain issues arising from the

promulgation of proposed regulations by the State Board of Medical Education and Licensure.

Specifically, you inquire as to:

1. Whether a nurse and other health care providers must administer a medication and treatment order given by a physician assistant as though the order were given by a physician?
2. Whether nurses and other health care providers such as physical therapists, pharmacists, etc., have the responsibility to inquire into the delegation of authority by the physician to the physician assistant each time a drug or treatment order is received from a physician assistant?
3. Whether in those instances where a nurse or other health care provider believes that the order received from a physician assistant is inappropriate, or is contrary to, or exceeds the physician assistant's delegated authority, the nurse or other health care provider receiving the order may refuse to carry it out?

It is our opinion, and you are so advised, that a nurse or other health care provider is not obliged to administer a medication or treatment order given by a physician assistant as though the order were given by a physician.

In view of the above response to question number one, it is not necessary to reach questions number two and three.

The health care providers which would most obviously be affected by such a proposal would be pharmacists, physical therapists and nurses, both registered and practical. We must, therefore, look not only to the language of the Medical Practice Act of 1974, Act of July 20, 1974, P.L. 551, No. 190, *as amended*, 63 P.S. § 421.1, *et seq.*, but also to the statutes governing the other diciplines affected and, of course, to the general principles of statutory construction and the Statutory Construction Act of 1972, Act of Dec. 6, 1972, No. 290, *as amended*, 1 Pa. C.S. § 1501, *et seq*.

In June of 1978 the legislature amended the Medical Practice Act of 1974 to provide for the examination, certification and regulation of "physician assistants" by the State Board of Medical Education and Licensure (Act of June 23, 1978, P.L. 502, No. 79, 63 P.S. § 421.2, *et seq*.), effective January 1, 1979. In October of 1978, the legislature made identical amendments to the Osteopathic Medical Practice Act (Act of October 5, 1978, P.L. 1109, No. 261, 63 P.S. § 271.1, *et seq*.),

effective immediately. Both of these acts empower the respective boards to adopt and revise such regulations as are reasonably necessary to carry out the purposes of their respective acts (63 P.S. § 271.16—Osteopathic), (63 P.S. § 421.16—Medical).

The State Board of Osteopathic Medical Examiners originally proposed regulations governing physician assistants in October 1979, and after consideration of comments by osteopaths, physician assistants, health care consumers and other professional providers in the health care field, made substantial revisions and adopted final regulations in April of 1982. The regulations of the State Board of Osteopathic Medical Examiners differ from those proposed by the State Board of Medical Education and Licensure in that they require constant physical presence of the supervising physician on the premises, except in satellite operations, and specifically prohibit a physician assistant from writing orders, progress notes or discharge summaries for patients in hospitals. They contain no provisions authorizing a physician assistant to give written or oral orders to other health care personnel.

The State Board of Medical Education and Licensure proposed certain regulations regarding physician assistants in December 1980, and as your memorandum notes there has been dissatisfaction from the State Board of Nurse Examiners, the Pennsylvania Nurses Association, the Pennsylvania Physical Therapy Association and other health care and insurance providers.

"Physician Assistant" is defined in the Medical Practice Act of 1974[1] as:

> A person certified by the board to assist a physician or group of physicians in the provision of medical care and services and under the supervision and direction of the physician or group of physicians. 63 P.S. § 421.2(13).

The Act further provides in pertinent part that:

> . . . Acts of medical diagnosis or prescription of medical therapeutic or corrective measures may be performed by persons licensed pursuant to the Act of May 22, 1951 (P.L. 317, No. 69), known as "The Professional Nursing Law," if authorized by rules and regulations jointly promulgated by the board and

1. The Osteopathic Medical Practice Act contains almost identical provisions and, unless there is a substantial difference between the pertinent provision of the two statutes, we shall hereafter reference only the provisions of the Medical Practice Act of 1974.

> the State Board of Nurse Examiners. Nothing in this act shall be construed to prohibit services and acts rendered by a qualified physician assistant, technician or other allied medical person if such services and acts are rendered under the supervision, direction or control of a licensed physician . . . and
>
> (l) Nothing in this act shall be construed to permit a certified physician assistant to practice medicine without the supervision and direction of a licensed physician approved by the appropriate board, but such supervision and direction shall not be construed to necessarily require the personal presence of the supervising physician at the place where the services are rendered.
>
> (m) This act shall not be construed to prohibit the performance by the physician assistant of any service within his skills, which is delegated by the supervising physician, and which forms a usual component of that physician's scope of practice.
>
> (n) Nothing in this act shall be construed to prohibit the employment of physician assistants by a medical care facility where such physician assistants function under the supervision and direction of a physician or group of physicians . . . . (63 P.S. §§ 421.3 and 421.10(l), (m), (n)).

It is clear from the 1978 amendments that the legislature intended to authorize the use by licensed physicians and hospitals of a new class of health care provider to assist the licensed physician in providing medical care and services to the public. It is equally clear that the legislature recognized the inherently dependent nature of this new class of health care provider in carefully providing that the care and services rendered by such provider should be rendered only under the supervision and direction of a physician or group of physicians.

With respect to the interaction of the new provider with the other affected disciplines we must look not only to the Medical Practice Act of 1974, but also to the statutes governing the discipline affected.

The Medical Practice Act of 1974 provides in pertinent part that the statute: . . .

> . . . shall not apply either directly or indirectly, by intent or purpose, to affect the practice of:
>
> (1) Pharmacy . . .

(7) Professional Nursing, as authorized by the Act of May 22, 1951, (P.L. 317, No. 69) known as "The Professional Nursing Law".[2] 63 P.S. § 421.17.

The Pharmacy Act, Act of September 27, 1961, P.L. 1700, No. 699, *as amended*, 63 P.S. § 390-1, *et seq.*, provides in pertinent part that the State Board of Pharmacy:

. . . shall have power, and it shall be its duty;

(1) to regulate the practice of pharmacy; . . .

(9) To promulgate rules and regulations to . . . regulate . . . the practice of pharmacy . . . 63 P.S. § 390-6(h)(1) and (h)(9).

The Pharmacy Act also defines the "Practice of pharmacy" to mean:

. . . the practice of that profession concerned with the art and science of preparing, compounding and dispensing of drugs and devices, whether dispensed on the prescription of a *medical practitioner* . . . 63 P.S. § 390-2(11). (*Emphasis supplied*)

"Medical practitioner" is defined as:

. a physician, dentist, veterinarian or other person duly authorized and licensed by law to prescribe drugs. 63 P.S. § 390-2(9).

The Medical Practice Act of 1974 provides in pertinent part that:

Nothing in this act shall be construed to permit a physician assistant to independently prescribe or dispense drugs. The Board of Medical Education and Licensure and the State Board of Pharmacy will jointly develop regulations to permit a physician assistant to prescribe and dispense drugs at the direction of a licensed physician. 63 P.S. § 421.10(r).

The legislature, recognizing that:

(a) The power and duty to regulate the practice of pharmacy lies with the State Board of Pharmacy;

2. The definition of the "Practice of Professional Nursing" in the 1951 Act was amended by the legislature just seventeen days prior to the enactment of the Medical Practice Act of 1974 (Act of July 3, 1974, P.L. 432, No. 151, § 1, 63 P.S. § 212(1)).

(b) The statutory definition of the practice of pharmacy precludes a pharmacist from filling a prescription ordered by a physician assistant; and

(c) The Medical Practice Act of 1974 by its own terms is precluded from affecting directly or indirectly the practice of pharmacy;

evidenced its intention to have pharmacists fill prescriptions of physician assistants by providing for joint action by the boards governing the respective disciplines. Thus, pharmacists will be obliged to fill prescriptions of a physician assistant in accordance with, but only in accordance with, such regulations as may be jointly developed by the two boards and duly promulgated in accordance with the provisions of the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, No. 240, *as amended*, 45 P.S. § 1102, *et seq*.

Similarly, The Professional Nursing Law, 63 P.S. § 211, *et seq*., provides in pertinent part that the State Board of Nurse Examiners:

> . . . shall have the right and duty to establish rules and regulations for the practice of professional nursing . . . [3]

and defines the "Practice of Professional Nursing" in pertinent part as:

> . . . diagnosing and treating human responses to actual or potential health problems . . . and *executing medical regimens as prescribed by a licensed physician* or dentist. The foregoing shall not be deemed to include acts of medical diagnosis or prescription of medical therapeutic or corrective measures, except as may be authorized by rules and regulations jointly promulgated by the State Board of Medical Education and Licensure and the Board, . . . , 63 P.S. § 212(1). (*Emphasis supplied*)

Again, the legislature, recognizing that:

(a) The power and duty to regulate the practice of nursing lies with the State Board of Nurse Examiners;

(b) A nurse is precluded from performing acts of medical diagnosis or prescription of medical therapeutic or corrective measures; and

3. Similar provisions with respect to rules and regulations governing the practice of practical nursing and the definition thereof are contained in the Practical Nurse Law. Act of March 2, 1956, P.L. (1955) 1211, *as amended*, 63 P.S. § 651, *et seq*.

(c) The Medical Practice Act of 1974 by its own terms is precluded from affecting directly or indirectly the practice of nursing;

evidenced its intention to have nurses perform such otherwise prohibited acts by providing for joint action by the boards governing the respective disciplines.

The definition of the "Practice of Professional Nursing" encompasses ". . . executing medical regimens as prescribed by a licensed physician or dentist . . ." By negative implication this prohibits the nurse from executing medical regimens as prescribed by anyone other than licensed physician or dentist.

"Physician" is not defined in the Professional Nursing Law, but it is defined in the Medical Practice Act of 1974 as:

> A person who has received formal and recognized training in the art and science of medicine and is qualified to seek or has acquired a license to practice medicine and surgery. 63 P.S. § 421.2(4).

and in the Statutory Construction Act of 1972, 1 Pa. C.S. § 1991.

In this area, unlike pharmacy, the legislature did not provide for physician assistants to prescribe either medical regimens or drugs. The legislature did provide one area in which it permits the prescription of medical therapeutic or corrective measures by other than licensed physicians, i.e., in the area of Certified Registered Nurse Practitioners. Interestingly enough, this provision is contained in the same section of the statute that provides for the rendition of services or acts by a qualified physician assistant, technician or other allied medical person if such services and acts are rendered under the supervision, direction or control of a licensed physician.

It would thus appear that if the State Board of Nurse Examiners, pursuant to its duty and authority to regulate the practice of nursing, were to attempt to publish a regulation directing nurses to execute medical regimens as prescribed by other than a licensed physician or dentist such a regulation would be invalid as contrary to law.

Turning to the pertinent provisions of the Physical Therapy Practice Act, Act of Oct. 10, 1975, P.L. 383, No. 110, 63 P.S. § 1301, *et seq.*, we see the legislature placing in the State Board of Physical Therapy Examiners:

> . . . the duty . . . to pass upon the qualifications of applicants for licensure . . . in proper cases to suspend or revoke the license of any physical therapist . . . and to . . . adopt rules and regulations not inconsistent with law . . . 63 P.S. § 1303.

The Physical Therapy Practice Act further provides in pertinent part that a physical therapist:

> . . . shall not treat human ailments . . . except by the referral of a person licensed in this State as a physician . . . 63 P.S. § 1309.

and declares a violation of this provision to be a misdemeanor.

"Physician" is defined in the Physical Therapy Practice Act as:

> . . . a person who has received formal and recognized training in the art and science of medicine and is qualified to seek or has acquired an unlimited license to practice medicine and surgery as provide by law. 63 P.S. § 1302.

Given the clear legislative language it is not possible to assert that a physical therapist could, without committing a misdemeanor, treat a human ailment by the referral of a physician assistant as though the order were given by a physician.

In summary it appears that the legislature has confined the practice of medicine, with very carefully circumscribed exceptions, to duly qualified and licensed physicians. It further appears that the legislature is aware of how to create and how to circumscribe exceptions to this general rule when it deems it desirable to do so. See, for example, the above cited provisions regarding prescribing of drugs by physician assistants and the prescription of medical therapeutic or corrective measures by nurses.

The obvious legislative format in the regulation of each of the licensed professions is the same. A board is created with exclusive power to establish, within the statutory definition, the rules and regulations governing that specific profession and to discipline errant members of that specific profession. In the normal pursuit of the specific profession there is no authority in one profession to order, by rule, regulation or otherwise, what any other profession may be obligated to do. When the legislature does wish to permit a given profession to perform duties or functions in conjunction with another profession it does so very clearly and carefully and provides for joint regulation of the activity affected.

We would caution you in several respects:

1. Nothing in this opinion is or should be construed to prohibit the *performance* by a physician assistant of any *service* within his skills, which is delegated to him by the supervising physician, and which forms a usual component of that physician's scope of practice, but such service shall not include issuing orders to other health care providers, referring patients for treatment to physical therapists or prescribing or dispensing drugs (other than in accordance with regulations jointly developed by the Boards of Medical Education and Licensure and Pharmacy).

2. Nothing in this opinion should be construed to prohibit a nurse from executing medical regimens as prescribed by a licensed physician or dentist even though such medical regimens may be relayed to the nurse by a physician assistant; provided only that the nurse is certain that the medical regimens were indeed prescribed by the supervising physician and not by the physician assistant. In this connection, it would probably be wise if the State Board of Medical Education and Licensure and State Board of Nurse Examiners could cooperate in developing regulations to be issued by each board establishing the procedures by which such orders may be most expeditiously relayed. The Professional Nursing Law and the Practical Nurse Law do not require that the physician personally issue the order to execute the medical regimens—only that he actually prescribed them.

3. An almost identical cautionary note is applicable with regard to the relaying of referrals by physicians of patients to physical therapists.

Very truly yours,

DONALD J. MURPHY
Deputy Attorney General

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 82-3.

Liquor Control Board—Hearing Examiner may determine exclusion of Television Cameras and recording equipment presence at Hearings.

1. Television cameras and coverage may be excluded from a Liquor Control Board hearing should it be determined that the presence of television would be disruptive, would tend to intimidate witnesses, or would disclose the identity of undercover officers.

2. Television may be excluded from both investigative hearings and adjudicatory hearings.

3. There is no Federal constitutional right to televise proceedings at a trial or hearing.

October 28, 1982

Daniel W. Pennick, Chairman
Liquor Control Board
Northwest Office Building
Harrisburg, PA 17124

Dear Mr. Pennick:

You have requested, through your counsel, an opinion from the Office of Attorney General on whether a hearing examiner presiding over a Liquor Control Board hearing may exclude television cameras and coverage from a hearing if the hearing examiner should determine that televising the hearing would be disruptive, would tend to intimidate witnesses, or would disclose the identity of undercover officers. It is our opinion, and you are advised, that television cameras and coverage may be excluded from a Liquor Control Board hearing should it be determined that the presence of television would be disruptive, would tend to intimidate witnesses, or disclose the identity of undercover officers.

At the outset, we note that you have not asked us to distinguish between investigative hearings, i.e., those hearings conducted by the Liquor Control Board pursuant to its enumerated investigative powers at Section 207 of the Liquor Code, 47 P.S. § 2-207, and adjudicatory hearings, i.e., those hearings wherein charges have been directed against a specific individual and a hearing is held to determine whether the individual has violated the Liquor Code or regulations promulgated thereunder. However, for the purposes of this opinion, the Liquor Control Board need not distinguish between investigative and adjudicatory hearings. Television may be excluded from both types of hearings.

There exists no Federal constitutional right to televise proceedings at a trial or hearing. *Chandler v. Florida*, 449 U.S. 560 (1981); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). In *Chandler*, *supra*, the court quoted with approval a decision by the Florida Supreme Court which, under certain carefully controlled circumstances, *permitted* the televising of certain court proceedings.

> "While we have concluded that the due process clause does not prohibit electronic media coverage of judicial proceedings per se, by the same token we reject the argument of the [Post-Newsweek Stations] that the first and sixth amendments to the United States Constitution mandate entry of the electronic media into judicial proceedings." *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764, 774 (Fla. 1979).

The Sixth Amendment guarantee of a public trial is intended for the benefit of the accused and is satisfied by the right of the press and members of the public to attend the trial and report and observe what has transpired. It confers no special benefit to the press, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978).

The First Amendment guarantees of free speech and freedom of the press are also inapposite. Courts have not interpreted the First Amendment so as to require the presence of television cameras in the hearing room. *Tribune Review Publishing Company v. Thomas*, 254 F.2d 883 (3rd Cir. 1958); *In Re Mack*, 386 Pa. 251, 126 A.2d 679 (1956). See *Nixon v. Warner Communications, Inc.* 435 U.S. 589, 609 (1978).

Further, Pennsylvania has authorized the exclusion of television equipment from the courtroom. *In Re Mack*, 386 Pa. 251, 126 A.2d 679 (1956), upheld contempt citations against various individuals who violated a Westmoreland County Rule of Court by surreptiously photographing a criminal defendant while in court. The Court in *Mack* ruled that the right of the media to photograph or televise during a trial is subservient to the ability of the courts to promulgate rules that will maintain the orderly administration of justice. Also rejected were arguments that the freedom of the press provisions of either the Federal or Pennsylvania Constitutions give rise to a constitutional right to bring television or other recording equipment into a trial.

While most of the case law has involved the presence of television equipment at a criminal trial, other courts have considered the issue of television at administrative or legislative hearings. In *CBS, Inc. v. Lieberman*, 439 F.Supp. 862 (N.D. Ill, 1976), the court refused to enjoin the policy of the Illinois Commerce Commission which refused to admit filming, photographing and tape recording equipment to its hearings. Other cases involving the presence of television or recording equipment at legislative or administrative hearings include: *Sigma Delta Chi v. Speaker*, 270 Md. 1, 310 A.2d 156 (1973), upheld prohibition of taping the Maryland Legislature while in session; *Educational*

Broadcasting Corporation v. Ronan, 68 Misc. 2d 776, 328 N.Y.S. 2d 107 (N.Y. Sup. Ct. 1972), refused to compel the Metropolitan Transportation Company to permit live television broadcasts of rate hearings and *Davidson v. Common Council*, 40 Misc. 2d 1053, 244 N.Y.S. 2d 385 (N.Y. Sup. Ct. 1963), allowed that City Council may prohibit the recording of its legislative sessions.

One Pennsylvania case has considered the issue of whether recording devices may be excluded from municipal meetings.[1] *Commonwealth v. Swank*, 72 D.&C. 2d 754 (1975), invalidated an ordinance of Sugarloaf Township that prohibited the presence of taping devices at township meetings. It was noted that persons may take notes at meetings and that a tape recorder is simply "an advanced device to the same end." Further, the court could perceive of no harm. However, the court was careful to distinguish between a township meeting and a hearing.

> "The decorum requirements, although existent, are not of the same variety or to the same degree of those considered minimal in a courtroom. A judicial proceeding, where the role of the public is that of quiet observer and not participant, is clearly distinguishable." 72 D.&C. 2d at 757.

The rationale applied to exclude television from legislative or administrative hearings is quite the same as that applied in criminal cases. Government bodies may insure the decorum and sŏlemnity of their proceedings. Further, the effect of cameras or recording equipment may influence the proceedings and witnesses.

> "More is involved than the public's right to know, or the right of those who disseminate news to gather it or the need of a public hearing to be free from disruption occasioned by the unwieldy cameras and kleig light of the past. The sensitivities of the participants; the desires of many not to become public spectacles on a mass basis; the public interest that even non-adjudicatory hearings such as those conducted by the Commission not become a stage or platform for the willing witness or counsel who responds enthusiastically to time on the camera, all deserve full ventilation and thoughtful delibera-

1. In *Nevens v. City of Chino*, 233 Cal. App. 2d 775, 44 Cal. Rptr. 50 (5th Dist. 1965) a California Appellate Court held that the Chino City Council rule which absolutely banned tape recording devices from council meetings was "too arbitrary and capricious and too restrictive and unreasonable." However, *Nevens* did explicitly recognize the right of city council to adopt rules which would protect the decorum of its meetings and prohibit the presence of disruptive activities or devices.

tion." *CBS, Inc. v. Lieberman*, 439 F.Supp. 862, 868 (N.D. Ill. 1976).

Finding no Federal or Pennsylvania constitutional right to televise hearings, we turn to the question of whether a statutory right exists.[2] The only statute dealing with the public's and therefore, the media's right to attend a hearing or meeting, is the so-called Sunshine Law, 65 P.S. § 261 *et seq*. However, that statute simply requires that all formal action taken by a government agency must occur at a public meeting. The Act does not speak to media attendance or the presence of electronic equipment, it simply requires that the time and place of the meeting be published and that the public be allowed to attend.

In conclusion, it is our opinion that absent constitutional and statutory mandates, the Liquor Control Board may set its own policy regarding the presence of television or recording equipment at its hearings. The Liquor Control Board, or its hearing examiners, may determine that television equipment would be disruptive to a hearing, might intimidate a witness or reveal the identity of undercover officers. Should a hearing officer make one of the above-enumerated determinations, he may exclude television or recording equipment from the hearings. However, we note that the hearing officer is under no affirmative duty to exclude television equipment from any particular hearing. Each particular decision is one for the hearing officer in conjunction with the Liquor Control Board.

As a final note, we suggest that in order to avoid confusion and perhaps uneven enforcement of any policy regarding the presence of television, the Liquor Control Board may wish to consider adopting regulations on this subject. In this manner the Board might adopt a comprehensive policy with enumerated guidelines rather than relying upon the decisions of hearing officers on a case by case basis.

Sincerely yours,

LEROY S. ZIMMERMAN
Attorney General

---

2. It may be instructive to note that Canon 3A(7) of the Code of Judicial Conduct provides that a judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom during sessions of court except under certain limited circumstances not herein relevant (where the reproduction will be exhibited only after all appeals have been exhausted and used for instructional purposes only).

OFFICIAL OPINION NO. 82-4

Secretary of Revenue—Powers and duties of the Secretary of Revenue with respect to the operation and administration of the State lottery—Payment of prizes to the holders of apparent winning tickets in the Lotto drawing which was declared invalid.

1. The Secretary of Revenue under the provisions of the State Lottery Law may promulgate a regulation which permits the payment of prize monies to holders of tickets bearing the number of a televised Lotto drawing which was declared invalid due to a mistake which occurred during the drawing.

November 15, 1982

Honorable Robert K. Bloom
Secretary
Department of Revenue
11th Floor
Strawberry Square
Harrisburg, PA 17120

Dear Secretary Bloom:

You have requested an opinion from the Office of Attorney General on whether or not you, as Secretary of Revenue, may make payment to holders of tickets bearing the numbers of the October 8, 1982, televised Lotto drawing which was declared invalid due to a mistake which occurred during that drawing.

It is our opinion, and you are advised, that provided sufficient and appropriate lottery funds exist from which to make such payment, the Secretary of Revenue may, after the publication of regulations setting forth with precision the intention to make such payments, proceed to do so.

You are further advised that in accordance with the provisions of Section 204(a)(1) of the Commonwealth Attorneys Act of October 15, 1980, P.L. 950, No. 164, 71 P.S. § 732-204(a), you will not in any way be liable for following the advice as set forth in this opinion.

The powers and duties of the Secretary of Revenue with respect to the operation and administration of the state lottery are set forth in the State Lottery Law, Act of August 26, 1971, P.L. 351, No. 91; 72 P.S. § 3761-1 *et seq*.

Section 6 thereof provides in pertinent part that:

> ". . . the Secretary of Revenue shall have the power and it shall be his duty to operate and administer the lottery, and to

promulgate rules and regulations governing the establishment and operation thereof, including but not limited to:

* * *

(3) The numbers and sizes of the prizes on the winning tickets or shares.

(4) The manner of selecting the winning tickets or shares.

* * *

(6) The frequency of the drawings or selections of winning tickets or shares, without limitation.

* * *

(11) The apportionment of the total revenues accruing from the sale of lottery tickets or shares and from all other sources among (i) the payment of prizes to the holders of winning tickets or shares; . . . (iv) for property tax relief and free or reduced fare transit service for the elderly . . . Provided, however, That no less than thirty per cent of the total revenues accruing from the sale of lottery tickets or shares shall be dedicated to subclause (iv) above.

(12) Such other matters necessary or desirable for the efficient and economical operation and administration of the lottery and for the convenience of the purchasers of tickets or shares and the holders of winning tickets or shares." 72 P.S. § 3761-6(a)(3), (4), (6), (11) and (12).

* * *

The Secretary of Revenue in the exercise of these rule making powers has reiterated almost verbatim the statutory language of Section 6 of the Act, adding, in subsection three "The Secretary may, from time to time, as the circumstances warrant, alter the prize structure set forth herein and advertise such changes through such media available to him consistent with law.", 61 Pa. Code § 803.11(3).

It would thus appear that the Secretary of Revenue, under the rule making powers set forth in the statute and upon the determination that it is necessary and desirable for the efficient and economical operation and administration of the lottery may promulgate a regulation so

finding and declaring that a specified sum be apportioned to the payment of prizes to the holders of the apparent winning tickets in the lottery as it was televised on October 8, 1982.

Such regulation, in our view, could be published effective immediately pursuant to the Commonwealth Documents Law which permits such publication when it is in the public interest, Act of July 31, 1968, P.L. 769, No. 240, Art. II, § 204(3), 45 P.S. § 1204(3).

Sincerely yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 83-1

Board of Probation and Parole—Practice engaged in by judges to authorize the parole of prisoners whose maximum sentences are two years or more.

1. The Governor may direct proper police authorities to arrest prisoners released from prison by court order whose maximum sentence is two years or more.

2. The existing law precludes judges from taking such action.

3. The Board has the power to parole the already released prisoner.

4. The Board does not have the power or the duty to supervise the already released prisoner who has gained "parole" exclusively by the court's action.

5. If the already released prisoner commits a new offense or violates the general conditions of parole, the Board does not have the power or the duty to recommit the prisoner unless he has been released by the Board through a granting of parole.

February 11, 1983

The Honorable Richard H. Glanton
Executive Deputy General Counsel
Office of Governor
Office of General Counsel
Room 238 Main Capitol Building
Harrisburg, Pennsylvania 17120

Dear Mr. Glanton:

You have requested my opinion on behalf of the Board of Probation and Parole (hereinafter Board) in regard to a practice which is ap-

parently becoming more prevalent. That practice, engaged in by some judges for whatever reason, is to authorize the parole of prisoners whose maximum sentences are two years or more. Such action is a violation of statute, the Act of August 6, 1941, P.L. 861, *as amended*, (61 P.S. § 331.1 *et seq.*) (hereinafter the Parole Act) and invades and usurps the authority granted exclusively to the Board to parole and reparole, commit and recommit for violations and to discharge from parole such persons.[1]

The questions presented in your letter in essence are as follows:

1) May the Governor direct proper police authorities to arrest prisoners released from prison by court order whose maximum sentence is two years or more?;

2) What, if any, restrictions exist to preclude judges from taking such action?;

3) Does the Board have the power or the duty to parole the already released prisoner?;

4) Does the Board have the power or the duty to supervise the already released prisoner who has gained "parole" exclusively by the court's action?; and

5) If the already released prisoner commits a new offense or violates the general conditions of parole, does the Board have the power or the duty to recommit the prisoner as if released by the Board through a granting of parole?

I will deal with the issues raised by your letter seriatim.

1) *The Governor may direct the proper police authority to arrest prisoners released from prison by court order whose maximum sentence is two years or more.*

As is noted above, the statute conferring authority to release prisoners whose sentences are two years or more, provides that that authority is expressly vested in the Board. The statute has been inter-

1. This authority granted to the Board to determine who, having a maximum sentence of two years or more, should be released onto parole, granted reparole, committed or recommitted for violations or discharged, cannot be seriously questioned. It is sufficient to note that § 17 of the Parole Act (61 P.S. § 331.17) begins: "The Board shall have exclusive power to parole . . ."

preted by the Commonwealth Court in the case of *Tillman v. Commonwealth of Pennsylvania*, 48 Pa. Commonwealth Ct. 325, 409 A.2d 949 (1980) to rebut any inference that the sentencing court has authority to resentence after the expiration of the term of court in which the sentence was originally imposed or thirty days after sentence was imposed, whichever is the greater and as such a resentencing act is a nullity. The Commonwealth Court also ruled that the purported resentencing does not vacate the original sentence and that the sentencing judge had no authority to parole where the maximum term of sentence vested the decision exclusively in the Board. In conclusion the Commonwealth Court found that the Board had never lost or waived its jurisdiction over the prisoner and that it was correct to require the prisoner to serve additional time on the previous sentence in addition to the sentence imposed which was the cause of the Board declaring him to be a convicted parole violator. In *Tillman* the Commonwealth Court specifically found that the order which released the prisoner forthwith for the purpose of placing him onto parole which it characterized as a "resentencing" was a nullity. Likewise, the court found that the judge's subsequent order placing the "paroled" prisoner under the supervision of the county office of probation and parole and thereby apparently stripping the Board of its jurisdiction was a nullity. The term nullity is defined by Black's Law Dictionary to mean "nothing; no proceeding; an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal force or effect." (citations omitted)

The use of the term nullity found in the dicta of *Robeson v. Philadelphia Tax Review Board*, 13 Pa. Commonwealth Ct. 513, 518, 319 A.2d 201 (1974) is consonant with the definitions found in Black's Dictionary.

The general rule dictated by statute[2] is that the sentencing court is relieved of the authority to modify a sentence once the term of court in which the original sentence was imposed or a period of thirty days from the date of sentencing, whichever is the greater, has expired unless the original sentence is illegal. *Commonwealth v. Daniels*, 210 Pa. Superior Ct. 156, 232 A.2d 247 (1967), *rev'd on other grounds*, 430 Pa. 642, 243 A.2d 400 (1968); *Commonwealth ex rel. Perrotta v. Myers*, 203 Pa. Superior Ct. 287, 201 A.2d 292 (1964); *Commonwealth ex rel. Firmstone v. Myers*, 207 Pa. Superior Ct. 453, 217 A.2d 851 (1966).

2. The Act of July 9, 1976, P.L. 586, No. 142 (42 Pa. C.S. § 5505) and its predecessor, the Act of June 1, 1959, P.L. 342, No. 70 (12 P.S. § 1032).

In the particular situation presented by your letter the prisoner was originally sentenced to a term of not less than one and one-half years nor more than five years less one day. You explained that the court's order releasing the prisoner was imposed outside of the time within which the sentencing court was permitted by statute to modify its previous order. Therefore, whether the court's act is characterized as a "resentencing" or a "parole" is of no relevance inasmuch as the court lacked statutory authority to do either. Such order regardless of characterization is a nullity and illegal.

It has long been the law of this Commonwealth in other applications that a peace officer may arrest the improperly discharged prisoner. This has been found when the release was caused by the county commissioners acting beyond their jurisdiction, *Commonwealth ex rel. Schwamble v. Sheriff*, 1 Grant 187 (Pa. 1854), and when caused by a prison inspector who lacked the authority, *Commonwealth v. Heiffer*, 2 Woodw. 311 (Berks C.P., 1871). In *Schwamble* the Supreme Court speaking through Chief Justice Black noted: "It is well settled, that one who has been detained . . . may be retaken by the very officer who consented to his escape. 6 Hill 349; 1 Neil Gow's N.P. Cas. 99."

Generally, it would fall in the first instance to the district attorney to assure that the original sentence was given full force and effect. However, in the illustrative case there is a substantial unanswered question whether the district attorney acquiesced in the modifying order. Certainly the record is clear that no active appeal was taken to vindicate the efficacy of the original order of sentence. As you have presented the issues, the question which must be answered is what is the Governor empowered to do to reincarcerate a prisoner whose release was caused by the carrying out of a null order. In this regard, it cannot be ignored that the action of the court, taken without statutory authority, is an affront to the Governor's exclusive power to grant clemency. Pa. Const. Art. IV, § 9. See for e.g. *Commonwealth ex rel. Schwamble*, 1 Grant at 189. Further, the authority vested in the Governor is that of "supreme executive power . . . who shall take care that the laws be faithfully executed . . ." Pa. Const. Art. IV, § 2. Consistent with this Constitutional mandate is the language of Section 710 of the Administrative Code of 1929, the Act of April 9, 1929, P.L. 177, Art. VII, § 710, *as amended* (71 P.S. § 250) which provides in relevant part:

> The Pennsylvania State Police shall have the power and its duty shall be:
>
> * * *

(b) To assist the Governor in the administration and enforcement of the laws of the Commonwealth, in such a manner, at such times, and in such places, as the Governor may from time to time request;

(c) With the approval of the Governor, to assist any administrative department, board, or commission, of the State Government, to enforce the laws applicable or appertaining to such department, board, or commission, or any organization thereof;

Therefore, because the modifying order once determined to be outside the authority of the court to issue is a nullity having neither a legal force nor effect, the Governor may direct the Pennsylvania State Police to arrest the released prisoner to "take care that the laws be faithfully executed" and to "enforce the laws applicable or appertaining to such . . . boards."[3]

2) *Available restrictions to preclude judges from taking such action.*

In those cases where the individual is still incarcerated in a state correctional institution at the time the Governor's agents become aware of the null order the immediate restriction to be imposed is to disregard the order as having no legal force or effect.

Specific action directed toward the judge who chooses to disregard statutes includes requested inquiry by the Judicial Inquiry and Review Board.

The Code of Judicial Conduct, Canon 2A, provides:

"A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Therefore, particular occurrences of apparently intentional overreaching of jurisdiction clearly contrary to the statute may be presented the Judicial Inquiry and Review Board of the Pennsylvania Supreme Court for their determination.

3. The determination of when a sentence order has been modified by the court outside of its authority must be made carefully and soberly. However, it is not mandated that the determination be made by judicial decree. See e.g. *Commonwealth ex rel. Schwamble, supra*. Such requirement would foreclose any action in the majority of cases which do not even become known to the Board until the appeal period has run.

3) *The Board has the power to parole an already released prisoner if, and only if, the prisoner has served his minimum sentence. The Board is never obligated to parole the already released prisoner.*

The Board has the power to parole an individual released improperly by court order if the individual has already served his minimum sentence. The Board, however, is not under a duty to parole such inmate but rather may parole when "in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby."[4] See, e.g., *Cunningham v. Pennsylvania Board of Probation and Parole*, 49 Pa. Commonwealth Ct. 216, 410 A.2d 963 (1980); *Barlip v. Pennsylvania Board of Probation and Parole*, 45 Pa. Commonwealth Ct. 458, 405 A.2d 338 (1979).

The question of whether the Board may parole an individual who has been released prior to the expiration of his minimum sentence turns on whether the time spent post-release can be credited to the individual's sentence. There are a few decisions by our appellate state courts to aid in this inquiry. An inmate has the right to serve his sentence continuously. *Robinson v. Department of Justice*, 32 Pa. Commonwealth Ct. 77, 377 A.2d 1277 (1977). However, if he has escaped, the running of the sentence he was then serving is tolled by his actions. *Robinson, supra*. When a release caused by administrative error cannot be termed an escape as defined by statute, its occurrence does not toll the running of the sentence. *Jacobs v. Robinson*, 49 Pa. Commonwealth Ct. 194, 410 A.2d 959 (1980).

Therefore, you are advised that the Board has jurisdiction to parole individuals when the total time passing from the effective date of imposition of sentence exceeds the minimum sentence if, and only if, that individual could not be said to have escaped as defined by statute. It is the commission of an act meeting the definition of escape that controls and no conviction for the offense need be sought or obtained to exclude the time after improper release. See e.g., *Harbold v. Carson*, 24 Pa. Commonwealth Ct. 417, 356 A.2d 835 (1976).

4) *The Board has the power and the duty to supervise the released inmate only if the inmate has been paroled by the Board.*

4. 61 P.S. § 331.21.

The Parole Act of 1941 strongly implies that the Board has authority to supervise a parolee over whom they have exclusive authority to parole, reparole, commit, recommit for violation or to discharge only after the individual has been paroled or reparoled by the Board. For example, the public policy declared by § 1 of the Parole Act (61 P.S. § 331.1) is that persons: *"on release* [from imprisonment] be subjected to a period of parole during which their rehabilitation . . . shall be aided and facilitated by guidance and supervision under a competent and efficient parole administration." (*emphasis supplied*) In Section 17 of the Parole Act *as amended* (61 P.S. § 331.17) the Board's exclusive power to supervise any person placed onto parole by any judge when the court so directs by special order is recognized. The power of the judge to so direct by special order is limited to those individuals "placed on parole (when sentenced to a maximum period of less than two years)." Therefore the Board neither has the power nor the duty to supervise an inmate under their exclusive power to parole unless in fact paroled in accordance with this authority. Such individuals improperly released by a null order should be either returned to confinement or if eligible for parole considered by the Board. Supervision of a person improperly released who has not been subsequently paroled by the Board is simply not possible.

5) *If an already released prisoner commits a new offense during the time he is improperly out of custody the Board may only recommit if it has already paroled the individual pursuant to its authority discussed above.*

As stated above, the individual who has been released exclusively by a null order should be returned to custody as soon as possible unless he is eligible for parole by the Board in which case he may continue at liberty if the Board exercises its discretion to parole him. If the individual commits a new offense or violates one of the general conditions of parole found at 37 Pa. Code § 63.4 it is impossible to declare him a parole violator inasmuch as he was never paroled. This conclusion is true regardless of whether the inmate has "escaped" or merely been released through a null order. The same situation occurs when an inmate escapes from an institution without benefit of court order. Once apprehended the individual is to be returned to custody because he was never properly paroled. The Board cannot nor need take any adjudicative action to authorize the return.

In conclusion it is our opinion and you are hereby advised: (1) the Governor has the power and the duty to cause the apprehension of all

individuals released by null orders who have neither been subsequently paroled by the Board nor had their maximum sentences expire while at liberty; (2) such null orders are to be disregarded; (3) the Board has the power to parole any person regardless of confinement whose maximum sentence is two years or more once his minimum sentence has expired; (4) the Board has neither the power nor the duty to supervise a person who is at liberty exclusively by a null order; and (5) when the individual is illegally at liberty the Board has neither the power to adjudicate him a violator for any act subsequent to his release by reason of a null order nor is such a futile act required to cause his return to custody.

Sincerely,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 83-2

Board of Pardons—Interrelationship between the Governor's authority to issue Warrants for Execution in capital cases and the Board's authority to consider applications for commutation of a capital punishment sentence.

1. The Board does not have the ability to grant a reprieve without the Governor's approval even though the purpose is to provide sufficient time for the Board to carry out a review of an application for clemency.

2. The Board may request the Governor to grant a reprieve.

3. The Governor has authority to grant reprieves unilaterally.

February 14, 1983

Honorable William W. Scranton, III
Lieutenant Governor
Chairman
Board of Pardons
200 Main Capitol Building
Harrisburg, Pennsylvania 17120

Dear Governor Scranton:

On behalf of the Board of Pardons and as its Chairman, you have requested my opinion to numerous questions regarding the interrelationship between the Governor's authority to issue Warrants for Execution

in capital cases as provided by Section 3 of the Act of June 19, 1913, P.L. 528, § 3 (61 P.S. § 2123, pocket part)[1] and the Board of Pardons' authority to consider applications for commutation of a capital punishment sentence. In particular, you have inquired whether the Board has the ability to grant a reprieve without the Governor's approval in order that the Board have sufficient time to carry out a review of an application for clemency and whether a written recommendation should be made to the Governor to commute the sentence. A reprieve is a temporary suspension of the execution of a sentence. For the reasons set forth below it is my opinion and you are so advised that the Board has no authority to grant a reprieve and that the Governor has exclusive authority to grant reprieves.

In order to respond to your request, it was necessary to explore whether the Board has an express constitutional or statutory authority, or an inherent ability concommitant to its constitutional and statutory authority to recommend commutation, to grant reprieves.

A review of the historical constitutional power of the Governor to grant clemency aids in analyzing this issue. In the Constitution of 1776, Section 20 provided to the President (the Governor) with a quorum of the executive counsel the power to grant pardons except in cases of impeachment and limited the power of pardon in cases of treason and murder to the granting of reprieves until the end of the next sessions of the Assembly. This authority to grant reprieves and pardons was vested in the Governor acting alone by the Constitution of 1790, Article II, Section 9, and the limitation on the power to pardon in cases of treason and murder was removed. The Constitution of 1838 repeated verbatim the powers conferred upon the Governor by the Constitution of 1790 (please see Article II, Section 9 of the Constitution of 1838).[2]

---

1. Section 3 of the Act of June 19, 1913 provides:
   After the receipt of the said record, the Governor of the Commonwealth shall issue his warrant, directed to the warden of the Western Penitentiary, commanding said warden to cause such convict to be executed in said penitentiary, within the week to be named in said warrant, and in the manner prescribed by law.

2. The verbatim reiteration found its way into the Constitution of 1838 despite controversy at the constitutional convention over alleged abuse. One delegate spoke of "extensive complaints . . . of the abuse of the pardoning power," and offered an amendment to place the power in the legislature who would be limited to consider only those cases submitted by the Governor. *Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania to Propose Amendments to the Constitution*, (Harrisburg, 1838), Vol. IX, p. 290.

The Governor's exclusive power to grant reprieves and pardons was circumscribed by the adoption of the Constitution of 1874 establishing a Board of Pardons. In the Constitution of 1874, the Governor continued to have unfettered power to remit fines and forfeitures and to grant reprieves, but could only grant pardons and commute sentences upon the written recommendation of the Board of Pardons. This distinction between fines, forfeitures and reprieves on one hand and pardons and commutations on the other, continues in the Constitution of 1968 *as amended* (please see Article IV, Section 9 of the Constitution of 1968).

The Board of Pardons has been granted no constitutional responsibility to consider applications for reprieves and its action is not a limitation on the Governor's power to reprieve. Likewise, Section 909 of the Act of April 9, 1929, P.L. 177, Article IX, *as amended* (71 P.S. § 299) does not grant to the Board the power to reprieve.[3] To the contrary, it provides only "the power to hear applications for . . . the granting of reprieves . . . and to make recommendations in writing to the Governor thereon, *in the manner provided in and under and subject to Article IV, Section 9 of the Constitution* of this Commonwealth." (71 P.S. § 299, *emphasis supplied*) Because no manner is provided by Article IV, Section 9 of the Constitution for the Board to be involved in the decision to reprieve and the intent of the General Assembly in enacting this provision was to make it subject to Article IV, Section 9 of the Constitution, no real authority has been granted to the Board by this section to even hear applications for reprieve much less to grant a reprieve.[4]

Having explored whether there is either specific constitutional or statutory authority to the Board of Pardons to grant reprieves, the only remaining avenue of inquiry is whether the Board has the inherent power to grant reprieves in order to consider an application for commutation which might otherwise be rendered moot by the carrying

3. Section 909 of the Act of April 9, 1929, *as amended*, provides:
The Board of Pardons shall have the power to hear applications for the remission of fines and forfeitures, and the granting of reprieves, commutations of sentence, and pardons, except in cases of impeachment, and to make recommendations in writing to the Governor thereon, in the manner provided in and under and subject to Article IV, Section 9 of the Constitution of this Commonwealth.
The Board of Pardons shall adopt rules and regulations governing its actions and no hearings or recommendations except those involving applicants under sentence of death shall be contrary thereto.

4. This fact is implicitly recognized by the Board in its regulations setting forth the subject matter jurisdiction of the Board. 37 Pa. Code § 81.11.

out of a Warrant for Execution. In this regard, it must be remembered that the Governor has the ultimate authority to grant commutation and may deny a recommendation for clemency submitted to him by the Board of Pardons. Likewise, as discussed above, the Governor has unfettered discretion to grant a reprieve after imposition of sentence and on a case by case basis. Certainly, the available reasons the Governor may grant a reprieve include giving the Board of Pardons the opportunity to consider an application for commutation.

Therefore, because the Board has been granted no constitutional authority to grant reprieves, and to permit it to do so even for the purpose of considering an application for commutation would constitute a derogation of the Governor's constitutional and statutory authority, the Board may not grant reprieves. It is, of course, within the province of the Board to request the Governor to grant a reprieve.

You have also asked if the Governor has authority to grant reprieves unilaterally. This question was reached and answered in considering whether the Board has authority to grant reprieves. The Governor may stay an execution by granting a reprieve.

The remaining questions you have asked in regard to who may apply on behalf of the condemned and whether transcripts of public hearings of the Board should be submitted to the Governor in capital cases, are matters of policy within the sound discretion of the Board to consider. Therefore, I do not find them to be the appropriate subjects of binding legal opinion.

Sincerely yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 83-3

Milk Marketing Board—Procedure for paying claims against the Milk Producers' Security Fund authorized by the Milk Producers' and Cooperative Security Funds Act.

1. The proposed procedure by the Milk Marketing Board for paying excess claims against the Milk Producers' Security Fund on a pro-rata basis is authorized by the Milk Producers' and Cooperative Security Funds Act.

February 24, 1983

George R. Brumbaugh, Chairman
Pennsylvania Milk Marketing Board
2301 North Cameron Street
Harrisburg, PA 17120

Dear Chairman Brumbaugh:

In your letters of January 5, 1983 and January 17, 1983, you have proposed a procedure for paying claims against the Milk Producers' Security Fund and you have asked whether the proposed procedure is authorized by the Milk Producers' and Cooperative Security Funds Act (the Act). This procedure has been established to process total current claims against the Fund which amount to more than the balance in the Fund. You are hereby advised that the procedure is authorized by the Act.

The procedure proposed by the Board consists of the following determinations and actions:

1. The Board shall extend the time period for certification of claims until all claims can be duly examined and certified.

2. At that time, the Board shall determine a percentage figure to apply to all claims by using the following calculation—

$$\frac{\text{Total available funds}}{\text{Total combined claims certified}} \times 100 = \_\_\_\_\_\%$$

3. The Board shall apply the percentage factor to each verified claim.

4. The Board shall then certify these amounts to the appropriate fiscal agent for payment.

5. "Total available funds" under the formula includes monies and accrued interest received by the Milk Producers' Security Fund on or before January 31, 1983.

6. Funds received after January 31, 1983, shall be invested separately to begin rebuilding the Milk Producers' Security Fund.

The Milk Producers' Security Fund is established by the Act of July 10, 1980, P.L. 481, No. 104, the Milk Producers' and Cooperative Security Funds Act, 31 P.S. § 625.1 *et seq*. The Milk Marketing Board is

given the responsibility for administering the Fund. The purposes of the statute and the duty of the Board are to protect milk producers against the loss of payment for milk because of defaults by purchasers, to protect the financial health of the dairy industry and to administer the Act and the Fund in such a way that dairy farmers receive prompt payment for the milk. 31 P.S. § 625.2. Further, it is the Board's duty under the statute to give notice to producers believed to be affected by the default of a licensed milk dealer so that verified claims may be filed against the Fund; to examine the claims; to determine the amounts due upon the claims; and to certify the amounts due each claimant. 31 P.S. § 625.8.

Although we do not find that any court has interpreted those provisions of the current Act which establish the procedure for paying claims, the Commonwealth Court of Pennsylvania has interpreted a similar provision of the previous Milk Marketing Law, the Act of April 28, 1937, P.L. 417, *as amended*. Under Section 511 of the then-existing Milk Marketing Law, if the proceeds of a bond or of collateral posted by a milk dealer were not sufficient to pay in full the amounts due to milk producers who had sold milk to that dealer, the moneys available had to be divided pro-rata among the producers. 31 P.S. § 700j-511. *Eastern Milk Producers Cooperative Assn., Inc. v. Commonwealth, Milk Marketing Board*, 59 Pa. Commonwealth Ct. 168, 429 A.2d 131 (1981). The provisions of the successor statute contain no express provision requiring pro-rata distribution, but the underlying purpose for the new statute is the same objective which gave life to the original Milk Marketing Law; that is, the protection of milk producers as a collective group. The procedures which the Board has proposed constitute reasonable measures designed to carry out these stated purposes of the Act.

It is my opinion, and you are hereby advised, that the Milk Producers' and Cooperative Security Funds Act and the Milk Marketing Law authorize the Board to administer the Milk Producers' Security Fund according to the procedures and in the manner set forth above.

Sincerely yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 83-4

Fish Commission—Use of explosives in waters under the jurisdiction of the Pennsylvania Fish Commission.

1. In considering the grant of a blasting permit under Section 2906 of the Pennsylvania Fish and Boat Code, the Fish Commission is confined to the direct and immediate consequences of the blasting as they relate to fishery and boating resources.

2. Section 2906 cannot be used by the Commission for reviewing the long term effects of an overall project of which the blasting is merely a part.

February 28, 1983

Dennis T. Guise, Chief Counsel
Pennsylvania Fish Commission
3532 Walnut Street
P.O. Box 1673
Harrisburg, PA 17120

Dear Mr. Guise:

You have asked for our advice under Section 402(2) of the Commonwealth Attorneys Act, Act No. 1980-164; 71 P.S. § 732-402(2), as to the scope of your review under Section 2906 of the Pennsylvania Fish and Boat Code (the Code), Act No. 1980-175, 30 Pa. C.S. § 2906. This Section relates to the use of explosives in waters under the jurisdiction of the Pennsylvania Fish Commission and provides in full, that:

> The executive director, with the approval of the Commission, may grant permits for the use of explosives in waters for engineering purposes upon the payment of a fee of $10. The executive director may waive the payment of the fee for Commonwealth agencies and political subdivisions. Any person using explosives under a permit shall make restitution to the Commission for all fish destroyed.

Your request for an opinion is presented in the context of an application, now pending before the executive director, submitted by a contractor who is seeking authority to detonate explosives in the Delaware River as part of the so-called Point Pleasant Diversion Project.

In *Delaware Water Emergency Group v. Hansler*, 536 F.Supp. 26 (E.D. Pa. 1981), *aff'd*, 681 F.2d 805 (3d Cir. 1982), Judge Van Artsdalen provides a summary of the scope of the overall project and its history. Judge Van Artsdalen describes the project as envisioning the construction of facilities for the withdrawal, diversion and use of water

from the Delaware River by means of a pumping station at Point Pleasant, Bucks County, Pennsylvania. A maximum of approximately 95 million gallons per day will be allowed to be pumped from the Delaware River for the use of the nuclear power plant now under construction at Limerick, Pennsylvania, and also by the Neshaminy Water Resources Authority for the purpose of meeting public water supply needs in parts of Bucks and Montgomery Counties. The project has been "(1) subject to almost constant study by many public and private entities for at least fifteen years last past; (2) approved and included in the DRBC [Delaware River Basin Commission] Comprehensive Plan in substantial concept for many years; (3) the subject of at least three FEIS's [Final Environmental Impact Statement] by three different agencies." 536 F.Supp. 26, 35. Agencies that have prepared Final Environmental Impact Statements are the United States Atomic Energy Commission, the United States Department of Agriculture—Soil Conservation Service, and the Delaware River Basin Commission.

On behalf of the Pennsylvania Fish Commission you have asked, with respect to Section 2906 of the Code,

> "whether our scope of review of such applications extends beyond the immediate or short-term effects of the use of explosives to a review of the long-term or permanent impacts of the entire project. In other words, may the Fish Commission properly deny an explosives permit in a case where the short-term impact of the use of the explosives has no substantial impact on fishery or aquatic resources but the overall project is found by the Commission to be not in the best interests of the fishery resources or boating in or on the waters where the explosives are to be used."

In our opinion, the scope of your review is limited to the immediate or short-term effects of the use of explosives and does not embrace the long-term impact of the entire project.

Section 2906, unlike other environmentally sensitive statutes that require a permit before a given activity can be carried out, does not contain specific standards to guide the Commission in its decision-making function. For example, the Clean Streams Law, 35 P.S. §§ 691.4, 691.5; Sewage Facilities Act, 35 P.S. § 750.5; Air Pollution Control Act, 35 P.S. § 4006.1, and the Administrative Code (insofar as it imposes environmentally-conscious duties and obligations upon the Pennsylvania Department of Transportation), 71 P.S. §§ 512(a)(15) and 512(b)(2), enumerate factors which must be considered before a

permit is issued. These statutes are also administered in accordance with, and additional guidance is provided by, Article I, § 27 of the Pennsylvania Constitution[1], the "Environmental Amendment." With no standards affixed to Section 2906, the "Environmental Amendment" and the judicial decisions interpreting it are our sole source of direction.

The Pennsylvania Fish Commission is a trustee of the values that Article I, § 27 seeks to protect. *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973), *aff'd*, 468 Pa. 226, 361 A.2d 263 (1976). As such, however, the Commission is not alone and Article I, § 27 does not "legally operate to expand the powers of a statutory agency" such as the Commission. *Community College of Delaware County vs. Fox*, 20 Pa. Commonwealth Ct. 335, 342 A.2d 468 (1975), *Bruhin v. Commonwealth*, 14 Pa. Commonwealth Ct. 300, 320 A.2d 907 (1974). As the late President Judge Bowman observed in his concurrence to *Fox*:

> " . . . a particular department or agency of our State government enjoys the role of 'trustee' of our natural resources and public estate strictly within the limits of the power and authority conferred upon that particular department or agency by the legislature. Simply by invoking Article I, § 27, neither it nor a third party can enlarge its 'trustee' role beyond the parameters of its statutory power and authority." 342 A.2d 483.

In *Fox*, the principal issue was whether the Environmental Hearing Board (EHB) could require the Department of Environmental Resources (DER) to consider factors that were in addition to those found in the Clean Streams Law and Sewage Facilities Act before DER could issue a permit for the construction of sewer lines. The additional factors were of the kind that would have required and empowered DER to review and expand upon the planning process that had previously been conducted by municipal authorities. The Commonwealth Court stated that DER was not required and not authorized to "second-guess the propriety of decisions properly made by individual local agencies in the areas of planning, zoning and such other concerns of local agencies," and further that "impropriety related to matters determined by those agencies is the proper subject for an appeal from or a direct challenge

1. The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

to the actions of those agencies as the law provides . . . ." 342 A.2d 478. If Section 2906 is used as a vehicle by the Commission for reviewing the long-term effects of the overall project, the Commission would be granted authority to "second-guess" all decisions that have gone before. In *Fox*, the Commonwealth Court indicated that this may not be done.

Thus, the proper scope of review of an explosives permit under § 2906 is limited to consideration of the immediate effects of blasting upon the fishery and boating resources. The blasting is, after all, the "action" that the Commission is being asked to consider. The situation is similar to that found in *Snelling v. Pa. Department of Transportation*, 27 Pa. Commonwealth Ct. 276, 366 A.2d 1298 (1976), where the opening of a medial barrier, the installation of traffic signals, and some road-widening work was opposed on the grounds that it would increase traffic congestion at a nearby Mall. The Court in *Snelling* observed that one "must be mindful that it is the Mall, and not the road improvement program, which will create the additional vehicular traffic in the area." The same may be said of the explosives permit as it is viewed in relation to the Point Pleasant Project. One must bear in mind that the potential negative environmental consequences of blasting are being considered under § 2906 and not the larger project of which the blasting is a mere concomitant part.

"It must be remembered . . . that the power of an administrative agency must be sculptured precisely so that its operational figure strictly resembles its legislative model." *Fox* at 478, *Elias v. Environmental Hearing Board*, 10 Pa. Commonwealth Ct. 489, 312 A.2d 486 (1973); *Zamantakis v. Pennsylvania Human Relations Commission*, 10 Pa. Commonwealth Ct. 107, 308 A.2d 612 (1973). In enacting § 2906 of the Code, the Legislature "sculptured" that section very precisely. The Legislature could have specified if it wished and as it did do with the Clean Streams Law and the other examples noted above, long-term, overall natural resource considerations that must enter into the Commission's deliberations when an explosives permit is requested. It did not.

In conclusion, based on the foregoing, it is our opinion, and you are advised, that in considering the grant of a permit under Section 2906 the Commission is confined to the direct and immediate consequences of the blasting as they may relate to the fishery and boating resources.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 83-5

Pennsylvania State Employees' Retirement System—Constitutionality of Board's investment in limited partnerships or joint ventures.

1. Pennsylvania Constitution, Article VIII, Section 8 is applicable to the State Employees' Retirement Board and the State Employees' Retirement Fund.

2. Pennsylvania Constitution, Article VIII, Section 8 prohibits the Board from making investments in limited partnerships or joint ventures.

3. There is no specific statutory authority permitting the Board to invest in limited partnerships or joint ventures in a constitutional manner; and absent such specific statutory authority, the Board has no power to so invest the moneys of the Fund.

June 17, 1983

William J.Moran
Acting Board Chairman
State Employees' Retirement System
204 Labor and Industry Building
Harrisburg, PA 17120

Dear Chairman Moran:

By letter dated March 2, 1983, the State Employees' Retirement Board (the Board) has asked the Attorney General to give a general opinion on the applicability of Pennsylvania Constitution, Article VIII, Section 8, to the investments of the State Employees' Retirement Fund (the Fund). The request arises from a concern by the Board about the Board's authority to make investments in certain limited partnerships or joint ventures. Although the Board has asked only that we opine on the applicability of the Constitutional provision to the Board and the Fund, the nature and scope of the Board's inquiry implies two questions:

1. Is Pennsylvania Constitution Article VIII, Section 8 applicable to the Board and the Fund?

2. If the Constitutional provision is applicable, does the provision permit the Board to make investments in a limited partnership or joint venture?

It is my opinion that Pennsylvania Constitution Article VIII, Section 8 is applicable to the Board and the Fund and that the Board is not authorized to invest in a limited partnership or joint venture.

I. The Relevant Constitutional and Statutory Provisions

A. Pennsylvania Constitution Article VIII, Section 8, provides:

The credit of the Commonwealth shall not be pledged or loaned to any individual, company, corporation or association nor shall the Commonwealth become a joint owner or stockholder in any company, corporation or association.

B. The State Employees' Retirement Code, (71 Pa. C.S. § 5101 *et seq.*) provides, in pertinent part:

1. Section 5901—The State Employees' Retirement Board.

(a) Status and membership—The board shall be an independent administrative board and consist of 11 members: the State Treasurer, ex officio, two Senators, two members of the House of Representatives and six members appointed by the Governor, one of whom shall be an annuitant of the system, for terms of four years, subject to confirmation by the Senate. At least five board members shall be active members of the system, and at least two shall have ten or more years of credited State service. The chairman of the board shall be designated by the Governor from among the members of the board.

2. Section 5931—Management of fund and accounts.

(a) Control and management of fund—The members of the board shall be the trustees of the fund and shall have exclusive control and management of the said fund and full power to invest the same, subject, however, to the exercise of that degree of judgment, skill and care under the circumstances then prevailing which persons of prudence, discretion and intelligence, who are familiar with such matters, exercise in the management of their own affairs not in regard to speculation, but in regard to the permanent disposition of the funds, considering the probable income to be derived therefrom as well as the probable safety of their capital, and further subject to all the terms, conditions, limitations and restrictions imposed by this part or other law upon the making of investments. The board shall when possible and consistent with the terms, conditions, limitations, responsibilities and restric-

tions imposed by this subsection or other law, invest in any project or business which promotes employment of Pennsylvania residents. Subject to like terms, conditions, limitations and restrictions, said trustees shall have the power to hold, purchase, sell, lend, assign, transfer or dispose of any of the securities and investments in which any of the moneys in the fund shall have been invested as well as the proceeds of said investments and of any moneys belonging to said fund.

* * *

(h) Investment in corporate stocks—Preferred and common stock as defined in subsection (i) of any corporation as defined in subsection (j) organized under the laws of the United States or of any commonwealth or state thereof or of the District of Columbia and preferred and common stock as defined in subsection (i) of any corporation as defined in subsection (j) whose shares are traded in United States dollars on the New York Stock Exchange shall be authorized investments of the fund, regardless of any other provision by law.

* * *

(l) Investment in institutional real estate—Institutional real estate funds shall be an authorized investment of the fund provided that no investment shall be made which, at the time of purchase, would cause the book value of such investments to exceed 15% of the book value of the total assets of the fund.

(m) Additional board power on investments—Regardless of any limitations, conditions or restrictions imposed on the making of investments by this part or other law, the board may, at its discretion, invest a maximum of 10% of the book value of the assets of the fund in any investments not otherwise specifically authorized, provided that such investments are made with the exercise of that degree of judgment, skill and care under the circumstances then prevailing which persons of prudence, discretion and intelligence, who are familiar with such matters, exercise in the management of their own affairs not in regard to speculation, but in regard to the permanent dis-

position of the funds, considering the probable income to be derived therefrom as well as the probable safety of their capital.

(n) Obligation of United States to be authorized investments—Regardless of any other provision of law, obligations of the United States Government and its agencies shall be authorized investments of the fund.

3. Section 5932—State Employees' Retirement Fund.

The fund shall consist of all balances in the several separate accounts set apart to be used under the direction of the board for the benefit of members of the system.

II. The Application of the Constitution to the State Employees' Retirement System

A. The State Employees' Retirement System, the Board and the Fund are created and controlled by acts of the General Assembly.

B. The Constitution of Pennsylvania is the supreme law of the Commonwealth and all acts of the General Assembly and agencies of the government are subordinate to the Constitution. *Pittsburgh Railways Co. v. Port of Allegheny County Authority*, 415 Pa. 177, 202 A.2d 816 (1964), *Miller v. City of Beaver Falls*, 368 Pa. 189, 82 A.2d 34 (1951).

C. The Board and the Retirement System are agencies of Commonwealth government. The State Employees' Retirement System, of which the Board and Fund are part, is established by statute, 71 Pa. C.S. § 5701 *et seq*. The Board is an independent administrative board consisting of 4 members of the General Assembly, 6 members appointed by the Governor and the State Treasurer, 71 Pa. C.S. § 5901(a), with General Counsel as legal advisor of the Board, 71 Pa. C.S. § 5901(e).* The Board submits an annual budget through the Governor for approval by the General Assembly. 71 Pa. C.S. § 5902(c). The Fund is maintained in several accounts in the State Treasury and under the supervision of the State Treasurer. 71 Pa. C.S. § 5932. The maintenance of reserves of the Fund and the payment of all annuities and other benefits are expressly made obligations of the Commonwealth. 71 Pa. C.S. § 5951.

*Editor's Note—Section 502 of the Commonwealth Attorneys Act, 71 P.S. § 732-502, provides that the powers and duties of the Attorney General contained in 71 Pa. C.S. § 5901(e) are transferred to the General Counsel.

Further, the courts have consistently held that the Board is part of the Commonwealth government:

1. The Board is an arm of the state entitled to the 11th Amendment protection. *Flesch v. Eastern Pennsylvania Psychiatric Institute*, 434 F.Supp. 963 (E.D. Pa. 1977).

2. The Fund is an integral part of the Commonwealth and entitled to the constitutional shield of sovereign immunity. *United Brokers Mortgage Company v. Fidelity Philadelphia Trust Company*, 26 Pa. Commonwealth Ct. 260, 363 A.2d 817 (1976).

III. The Powers of the Board and the Constitutional Limitation of Article VIII, Section 8

Article VIII, Section 8 of the Pennsylvania Constitution contains two limitations on the use of Commonwealth funds; that is,

1. That the credit of the Commonwealth shall not be pledged or loaned to any individual company, corporation or association,

2. Nor shall the Commonwealth become a joint owner or stockholder in any company, corporation or association.

Acts of the General Assembly which pledge or loan the credit of the Commonwealth have been extensively reviewed by our courts. There is, however, no similar body of judicial precedent on the actions of the Commonwealth as joint owner or stockholder. We cannot find that any court has been presented with a direct challenge tc a legislative authorization of investments on the basis of this limitation in the Constitution.

It is reasonable to conclude, however, that a court's review of such Commonwealth investment action would follow the same analytical method which has been employed in those cases which have addressed questions concerning action pledging or loaning the credit of the Commonwealth. The courts' decisions in these cases employ the following method of analysis:

1. A determination that a statute authorizes the pledge or loan being made by the authorized agency.

2. An inquiry into whether the authorized pledge or loan is for a public purpose and for a public benefit.

3. A determination that the means employed to carry out the statute are rationally related to the statute's purpose and reasonably designed to achieve its ends. *Tosto v. Penna. Nursing Home Loan Agency*, 460 Pa. 1, 331 A.2d 198 (1975); *Johnson v. Penna. Housing Finance Agency*, 453 Pa. 329, 309 A.2d 528 (1973); *Basehore v. Hampden Industrial Dev. Authority*, 433 Pa. 40, 248 A.2d 212 (1968).

Applying this reasoning to the instant problem, I find that the statutes authorize investments, that the investments are made for a public purpose and that the means employed are related to the statutory purpose.

The requirements are fulfilled as follows:

1. In the matter of the investments of the Retirement System, the members of the Board and the trustees of the Fund are granted exclusive power to invest the Fund pursuant to the requirements and limitations of the Retirement Code and the laws of the Commonwealth. 71 Pa. C.S. § 5931.

2. The purpose of the statute is to establish a comprehensive program for compensating the employees of the Commonwealth. The performance of the Commonwealth's obligation to compensate and protect its employees is a public purpose. *Commonwealth, State Employees' Retirement System v. Dauphin County*, 335 Pa. 177, 6 A.2d 870 (1939); *Retirement Board v. McGovern*, 316 Pa. 161, 174 A. 400 (1934).

3. The Retirement Code sets forth a description of the type of investments which the Board is authorized to make. In exercising that authority, the Board is subject to specific limitations:

a. The full power to invest the Fund is subject to "the exercise of that degree of judgment, skill and care under the circumstances then prevailing which persons of prudence, discretion and intelligence, who are familiar with such matters, exercise in the management of their own affairs not in regard to speculation, but in regard to the permanent disposition of the funds, considering the probable income to be derived therefrom as well as the probable safety of their capital, and further subject to all the terms, conditions, limitations and restrictions imposed by this part or other law upon the making of investments." 71 Pa. C.S. § 5931(a).

b. The members of the board, employees of the board and agents thereof stand in a fiduciary relationship to the members of the system regarding investments of the fund. 71 Pa. C.S. § 5931(e).

c. The Board is limited to investments and deposits of the following types:

(1) deposits in banks or trust companies of the Commonwealth;

(2) preferred and common stock as defined in the statute and subject to the specific limitations on the extent to which the book value of the investments in stock may constitute a percentage of the total assets of the fund. 71 Pa. C.S. § 5931(h), (i), and (j);

(3) real estate subject to a lease to one or more financially responsible tenants which lease shall not require managerial responsibility by the Board. 71 Pa. C.S. § 5931(k);

(4) bonds, notes or deeds of trusts of individuals or corporations which are secured by mortgages on real estate located in the United States or its territories. 71 Pa. C.S. § 5931(k);

(5) institutional real estate funds, provided that no such investment may be made which would cause the book value of investments in institutional real estate to exceed 15% of the book value of the total assets of the fund. 71 Pa. C.S. § 5931 (l);

(6) at its discretion, a maximum of 10% of the book value of the assets of the fund in any investments not otherwise specifically authorized, provided that such investments are made with the exercise of that degree of judgment, skill and care under the circumstances then prevailing which persons of prudence, discretion and intelligence who are familiar with such matters, exercise in the management of their own affairs not in regard to speculation but in regard to the permanent disposition of the funds, considering the probable income to be derived therefrom as well as the probable safety of their capital; 71 Pa. C.S. § 5931(m);

(7) obligations of the United States government and its agencies. 71 Pa. C.S. § 5931(n).

It is the province of the General Assembly to evaluate the alternative approaches to carrying out the legislative purpose and to determine the means necessary. *Basehore, supra*, at 49, 248 A.2d at 217. That determination having been made, the General Assembly has set forth at length the types of investment authorized, the limitations on the Board's exercise of the power to invest and the standard by which the investment decisions will be measured. I conclude that this legislative program is reasonably designed to achieve its stated public purpose and that the investment program set forth in the Retirement Code is wholly within the requirements of the Pennsylvania Constitution.

Your letter expressed concern that the applicability of Article VIII, Section 8 of the Pennsylvania Constitution to the State Employees' Retirement Board and Fund might somehow require the Fund to liquidate its stock portfolio. This concern is not well-founded for two reasons. In the first place, you have express statutory authority for such investments (71 Pa. C.S. § 5931(h)) with the attendant presumption of constitutionality accorded any statute. In the second place, a number of courts in other jurisdictions, interpreting similar constitutional provisions, have held that, although such a provision prevents the state from subscribing to or becoming interested in the stock and obligations of private companies when the transaction is for the purpose of aiding in the construction or maintenance of the company, it does not bar the purchase of well-established corporate securities in the interest of prudent handling of funds when the underlying purpose is to invest for the benefit of the state. Cf. 81A C.J.S. States § 208 and the cases cited thereunder.

IV. The Authority to Invest in Limited Partnerships and Joint Ventures

The final question is whether participation in a limited partnership or joint venture is authorized by the statutory investment program and not in conflict with the Constitution.

Within the confines of the legislative program set forth in the Retirement Code and subject to the Constitution and any laws concerning investments, the Board has discretion to choose the particular transaction to accomplish the investment program set forth in the Retirement Code. This discretion, however, may not be exercised without regard for the general limitations on the Commonwealth's power to make agreements (e.g., there is no authority to make an agreement waiving sovereign immunity) or for the standard of care imposed on the Board and its members to act prudently in its fiduciary capacity. Any pro-

posed investment or transaction must be measured against this larger Constitutional and statutory framework on which Commonwealth government is organized.

A "limited partnership" is an association of two or more persons to carry on as co-owners a business for profit in which one or more persons with unlimited liability manages the partnership, while one or more other persons contribute capital. These latter partners have no right to participate in the management and operation of the business and assume no liability beyond the capital contributed. *Freedman v. Tax Review Bd. of City of Philadelphia*, 212 Pa. Superior Ct. 442, 243 A.2d 130 (1968), *aff'd*, 434 Pa. 282, 258 A.2d 323 (1969). Under Pennsylvania law, parties must comply with the requirements of the Uniform Limited Partnership Act, Act of December 19, 1975, P.L. 524, No. 155 (59 Pa. C.S. § 501 *et seq.*), hereinafter ULPA, in order to form a limited partnership and failure to comply with this statute may result in the parties being treated as general partners as to third persons and creditors. *Ruth v. Crane*, 392 F.Supp. 724 (E.D. Pa. 1975).

A "joint venture" is an association of persons or corporations who, by contract express or implied, agree to engage in common enterprise for their mutual profit. The existence or nonexistence of a joint venture depends on the finding of certain elements in the facts of each case. *McRoberts v. Phelps*, 391 Pa. 591, 138 A.2d 439 (1958). These elements include the terms of the contract, a right to share in profits and a duty to share in any losses, a contribution by each party of capital, material, services or knowledge and active participation by each party in the enterprise being conducted. *Waldman v. Shoemaker*, 367 Pa. 587, 80 A.2d 776 (1951); *Richardson v. Walsh Const. Co.*, 334 F.2d 334 (3rd Cir. 1964); *Beavers v. West Penn Power Co.*, 436 F.2d 869 (3rd Cir. 1971). The nature of a joint venture and the rights of the parties are similar to those in a partnership, but a joint venture usually is designed for the transaction of a single item of business or enterprise and a partnership is a continuing undertaking of transactions. *Bell v. Johnston*, 281 Pa. 57, 126 A. 187 (1924); *Alessi v. Barchester, Inc.*, 14 Chest. 308 (1966), *exception dism.* 15 Chest. 294 (1967). A joint venture is thus a type of partnership with the same basic legal characteristics.

The authority of the Board to invest the assets of the Fund is exclusive but not unlimited. The statutes set forth those investments which the Board is empowered to make and the limitations thereon. The final question for consideration here is whether the general authority to invest carries with it, by implication, the power to become a limited part-

ner or a joint venturer in an association which itself is making investments the Board may or may not be authorized to make directly in its own name.

The Board has no explicit authority to become a limited partner or joint venturer. What is more, there is a constitutional prohibition in that, by definition, a partnership, limited or otherwise, is an association and a partner is a "joint owner" of an association. There is a so-called "basket" provision in the Code which authorizes the Board to "invest a maximum of 10% of the book value of the assets of the Fund in any investments not otherwise specifically authorized" by the statute.[1] But this general power must be exercised within the Constitution and the statutes which control the actions of the agencies of the Commonwealth. In the case of the investments specifically authorized by the Retirement Code, the Board is able to effect any of these investments by means of a deposit of funds, an order to purchase or a promise to pay, all of which actions may be taken without conflict with any statute or Constitutional provision. The essential character of the Board itself is not affected by any of these transactions and all of the Commonwealth's rights and remedies are retained. Compare these actions to what the Board and the Fund must do to effect "investment" in a limited partnership or joint venture. The Board and the Fund must, both by law and by agreement, change their fundamental legal status in order to become a limited partner or a joint venturer. It is this fundamental change in status which is not authorized by statute and which is specifically prohibited by the Constitution.

The Commonwealth is not a person with the same characteristics as an individual or a corporation. The Commonwealth is a sovereign state with its powers distributed among three branches of government. Executive agencies are creatures of statutes enacted by the General Assembly and their authority is statutorily circumscribed. For an agency to assume powers which it considers appropriate in carrying out its duties but which have not been allotted to it by the General Assembly is to attribute legislative powers to the executive branch and disturbs the balance in our system of government. Equally important, however,

1. 1. The specific authorized investments are:

(a) deposits in bank or trust companies,
(b) certain preferred or common stock,
(c) real estate subject to lease,
(d) bonds, notes and deed of trust secured by real estate,
(e) investment in institutional real estate funds,
(f) obligations of the U.S. government and its agencies.

is the protection afforded the beneficiaries of the retirement fund by a system which limits the administrators in their power to abridge the rights and obligations forming the statutory and contractual basis of the members' participation. The Board may not take any action which would fundamentally change the status of the Retirement System and the Fund from that of a Commonwealth agency, with all the rights and remedies fundamental to that status, to that of a different legal entity (be it a partner or joint venturer) which does not retain the fundamental governmental rights and remedies. To the extent that, in order to become a partner or joint venturer, the Board and the Commonwealth would have to agree to change or forego any of their sovereign characteristics, such an agreement is not authorized by the statutes or the Constitution.

Finally, the entire statutory scheme which describes the Fund's investment program is antithetical to the practice and law governing the making of partnerships.

The Retirement Code provisions which instruct the Board on the powers it may exercise with regard to the Fund's investments contain terms which imply the purchase of stock, shares, negotiable instruments or other similar investments. Specifically, the Board has the power to "hold, purchase, sell, lend, assign, transfer or dispose" of any investments. 71 Pa. C.S. § 5931(a). These terms are not appropriate to describe actions taken to become a limited partner or a joint venturer. They do not contemplate the actions required under the Uniform Limited Partnership Act or the agreements necessary to form and participate in a partnership or joint venture. The ULPA does not itself provide for a government or a government agency to become a limited partner.

That the board possesses the powers and privileges of a corporation for the purposes of the retirement statute does not change the governmental nature of the work undertaken. The Fund must partake either of a governmental function or a private enterprise. It certainly is not a private enterprise. Committing the execution of a public function to a separate agency constituted for that one purpose does not impair the governmental aspect of the work. *Commonwealth, State Emp. Ret. System v. Dauphin County, supra*. The Board may act in a corporate capacity for the purposes of the Code. 71 Pa. C.S. § 5901(e). But formation of a partnership is not a purpose of the Retirement Code.

The following are examples of things a limited partnership can or

must do which the Board has no authority to do or is barred from doing or is relieved from doing:

1. Under Pennsylvania law, a partnership is formed for the purpose of carrying on a business enterprise for profit and is created by contract. Mere co-ownership of assets does not constitute a partnership. 59 Pa. C.S. § 311 and § 511.

   Although the Board has the authority to own assets, it has no authority to carry on a business for profit.

2. The name of a limited partner may not appear in the name of the partnership, 59 Pa. C.S. § 515, but the Code requires all the investment business of the Fund to be conducted in the name of the State Employees' Retirement System. 71 Pa. C.S. § 5931(f).

3. A limited partner must surrender control of the business. 59 Pa. C.S. § 521. The Board's fiduciary duties do not permit the surrender of control over the assets of the Fund.

4. A contributor to a limited partnership, except the general partner, is not a proper party to proceedings by or against a partnership except to enforce a limited partner's right against or liability to the partnership. 59 Pa. C.S. § 545. As a result, the Board as a limited partner could not be a party to a suit against the partnership by a third party for the purpose of asserting defenses or rights unique to the Board, such as the defense of sovereign immunity.

The investment authorization provisions of the Retirement Code do not explicitly instruct the Board about whether the Board may form a partnership to effect an investment. The Retirement Code must be construed to ascertain the intent of the General Assembly. We are required to reject an interpretation of the Code which would create a conflict with applicable constitutional provisions, particularly where the language of the statute does not force such a result, and adopt a construction which brings the statutory scheme into harmony with the Constitution. 1 Pa. C.S. § 1922, *Commonwealth v. Hude*, 492 Pa. 600, 425 A.2d 313 (1980), *Evans v. West Norriton Township Municipal Authority*, 370 Pa. 150, 87 A.2d 474 (1952). Further, a statute is never presumed to deprive the Commonwealth of any right, prerogative or property unless the intention to do so is clearly manifest either by express terms or necessary implication. *Hoffman v. Pittsburgh*, 365 Pa. 386, 75 A.2d 649 (1950); Accord, *Pennsylvania Labor Relations Board*

v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975).

Applying these well-known principles to the facts of this issue, I find a specific Constitutional prohibition against the Board or the Fund becoming a joint owner of an association and, second, no statutory authority, either express or necessarily implied, for the Board to form a partnership. Third, I discover that the actions necessary to form a partnership result in a change in the fundamental nature of the Fund which deprives the Board and the Fund of its basic rights and remedies and of the administratively immutable attributes of sovereignty. The State Employees' Retirement Board may not form a partnership. The Retirement Fund may not be a partner.

Your letter indicates the Board's desire to participate in a limited partnership Pennsylvania venture capital fund which is currently being proposed by the MILRITE Council. While the Pennsylvania Constitution precludes the Board's entering into a partnership, the Board is not prohibited from cooperating with the MILRITE Council. It may be possible, in appropriate circumstances and utilizing an appropriate investment vehicle for the Board, in cooperation with the MILRITE Council and in accord with the legislative direction contained in the statute to

> ". . . when possible and consistent with the terms, conditions, limitations, responsibilities and restrictions imposed by this subsection or other law, invest in any project or business which promotes employment of Pennsylvania residents." (71 Pa. C.S. § 5931(a)).

We note, for example, that some states have formed corporations to provide venture capital and others have enacted special authorizing legislation.

In conclusion, based on the foregoing, it is my opinion and you are hereby advised, that Article VIII, Section 8 of the Pennsylvania Constitution is applicable to the State Employees' Retirement Fund and the Board, that there is no statutory authority for the Board to form a partnership and that the Board may not take any action which deprives the Fund of its basic attributes of sovereignty.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 83-6

Pennsylvania Liquor Control Board—Police powers of enforcement officers and investigators under the Pennsylvania Liquor Code.

1. The police powers and the authority of Pennsylvania Liquor Control Board enforcement officers is limited to Section 209 of the Pennsylvania Liquor Code to offenses involving the unlawful sale, importation, manufacture or transportation or the unlawful possession of alcohol or malt or brewed beverages.

2. Liquor Control Board enforcement officers are peace officers with limited police power and not police officers with general powers of arrest.

3. Liquor Control Board enforcement agents do have police powers under the designated crimes regardless of whether the unlawful conduct is designated as criminal by the Pennsylvania Liquor Code, the Pennsylvania Crimes Code or any other statute.

4. Pennsylvania Liquor Control Board enforcement officers may file a police complaint under the Pennsylvania Rules of Criminal Procedures, Rule 133(A) only for the offenses designated by Section 209 of the Pennsylvania Liquor Code.

July 5, 1983

Daniel W. Pennick, Chairman
Liquor Control Board
Northwest Office Building
Harrisburg, Pennsylvania 17124

Dear Mr. Pennick:

You have requested through your counsel an opinion from the Office of Attorney General defining the extent and scope of a Pennsylvania Liquor Control Board enforcement officer's power of arrest during the course of an official investigation on a licensed premise. Specifically, the request involves whether an enforcement officer may arrest on view individuals who are engaged in conduct which, although not violative of the Liquor Code, may be violative of the Pennsylvania Crimes Code. You are advised that the limited police power and authority of Board enforcement officers or investigators is not circumscribed by the statute which makes an offense criminal but by the nature of the crime itself. This police power is set forth in Article II, Section 209 of the Pennsylvania Liquor Code, Act of April 12, 1951, P.L. 90, *as amended*, 47 P.S. § 2-209. It reads as follows:

> "Such employes of the board as are designated 'enforcement officers' or 'investigators' are hereby given police power and authority throughout the Commonwealth to arrest on view, except in private homes, without warrant, any person actually

> engaged in the unlawful sale, importation, manufacture or transportation, or having unlawful possession of liquor, alcohol or malt or brewed beverages, contrary to the provisions of this act or any other law of this Commonwealth."

As you will note from the above section, your enforcement officers do not possess general powers of arrest. Their power to arrest on view is limited to the unlawful sale, importation, manufacture or transportation or the unlawful possession of liquor, alcohol or malt or brewed beverages. Whether or not the observed conduct is a crime under Pennsylvania Liquor Code or the Pennsylvania Crimes Code, the arrest power extends only to the above mentioned violations.

Under the Pennsylvania Rules of Criminal Procedure, Rule 133(A), the filing of a police complaint in misdemeanors or felonies is limited to a police officer as defined in Rule 51(C) which provides as follows:

> "For the purpose of this Rule, a police officer shall be limited to a person who has by law been given the powers of a police officer when acting within the scope of his employment. When the police power given by law is limited, a person is a police officer for purpose of this Rule only when acting within the limits of such power."

In order to avoid any confusion, we should state that this opinion is limited strictly to the power of your enforcement officers regarding arrests and institution of criminal proceedings and in no way refers to their powers of investigation of licensees with regard to violations of the Liquor Code and Liquor Control Board regulations.

You are further advised that in accordance with the provisions of Section 204(a)(1) of the Commonwealth Attorneys Act, Act No. 1980-164, 71 P.S. § 732-204(a), you will not in any way be liable for following the advice set forth in this opinion.

Sincerely yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 83-7

Independent Regulatory Review Commission—Distinction between a "regulation" and a "statement of policy."

1. The Liquor Control Board's statement banning video and audio recordings of its meetings published in the *Pennsylvania Bulletin* on May 7, 1983, at page 1580, is not a regulation within the definition contained in the Regulatory Review Act, Act of June 25, 1982, P.L. 633, No. 181, *as amended*. 71 P.S. § 745.1 *et seq.*

2. The Liquor Control Board's publication is a "statement of policy" within the definition of the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, No. 240, Article I, Section 102, *as amended*. 45 P.S. § 1102(13).

3. A regulation is an exercise of delegated power to make law and is as binding on a reviewing court as a statute, while a statement of policy is merely interpretive, not binding on the reviewing court, but persuasive if it tracks the meaning of the statute.

4. The Liquor Control Board's statement is not an exercise of delegated power to make law but merely a statement expressing what the Liquor Control Board deems to be an appropriate policy for that body to pursue for the conduct of its own meetings.

August 17, 1983

Mary H. Leedom, Chief Counsel
Independent Regulatory Review Commission
333 Market Street
P.O. Box 15130
Harrisburg, PA 17105

Dear Mrs. Leedom:

You have requested a formal Attorney General's opinion as to whether the Liquor Control Board's statement banning video and audio recordings of its meetings (which statement was published in the May 7, 1983 issue of the *Pennsylvania Bulletin* at Page 1580) should have been submitted to the Independent Regulatory Review Commission for review as a "regulation" within the definition contained in the Regulatory Review Act (Act of June 25, 1982, P.L. 633, No. 181, *as amended*, 71 P.S. § 745.1, *et seq.*).

This is to advise you that the Liquor Control Board's statement of policy which appeared at 13 Pa. B. 1580 is a "statement of policy" within the meaning of the Commonwealth Documents Law (Act of July 31, 1968, P.L. 769, No. 240, Article I, § 102; *as amended*, 45 P.S.

§ 1102(13)), and not a "regulation" within the definition contained in the Regulatory Review Act or the Commonwealth Documents Law.[1]

The Regulatory Review Act defines a regulation as:

> Any rule or regulation, or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency, or prescribing the practice or procedure before such agency. The term shall not include a proclamation, executive order, directive or similar document promulgated by the Governor, but shall include a regulation which may be promulgated by an agency, only with the approval of the Governor. 71 P.S. § 745.3.

This definition is not of a great deal of assistance in attempting to decide the question posed in your request.

For guidance, we look to that section of the Regulatory Review Act which provides for submission of proposed regulations to the Independent Regulatory Commission.

Section 5 of the Regulatory Review Act provides in pertinent part that:

> For proposed regulations, submitted after the effective date of this section, at the same time that proposed regulations and any changes thereto are submitted to the Legislative Reference Bureau for publication of notice of proposed rulemaking in the Pennsylvania Bulletin as required by the act of July 31, 1968 (P.L. 769, No. 240), referred to as the Commonwealth Documents Law, the agency proposing the regulation shall forward a copy of such proposal to the commission and the designated standing committee of each House of the General Assembly and additional information including but not limited to the following: . . . 71 P.S. § 745.5(a).

The Commonwealth Attorneys Act (Act of October 15, 1980, P.L. 950, No. 164, *as amended*, 71 P.S. § 732-101 *et seq.*) provides in pertinent part:

1. The statement of policy of the Liquor Control Board does appear to establish an administrative procedure which would be subject to Commission review under Section 5(g) of the Regulatory Review Act. The Commission, therefore, on its own motion may consider whether the administrative procedure is contrary to the public interest and proceed under that section accordingly.

> The Attorney General shall review for form and legality, all proposed rules and regulations of Commonwealth agencies before they are deposited with the Legislative Reference Bureau as required by Section 207 of the Act of July 31, 1968 (P.L. 769, No. 240), known as the 'Commonwealth Documents Law'. 71 P.S. § 732-204(b).

The Commonwealth Documents Law in turn provides in pertinent part that "regulation" shall mean:

> . . . any rule or regulation, or order in the nature of a rule or regulation promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency, or prescribing the practice or procedure before such agency. 45 P.S. § 1102(12).

Similarly, the Commonwealth Documents Law provides a definition of "statement of policy" as:

> . . . any document, except an adjudication or a regulation, promulgated by an agency which sets forth substantive or procedural personal or property rights, privileges, immunities, duties, liabilities or obligations of the public or any part thereof, and includes, without limiting the generality of the foregoing, any document interpreting or implementing any act of Assembly enforced or administered by such agency. 45 P.S. § 1102(13).

The "statement of policy" published by the Liquor Control Board in the *Pennsylvania Bulletin* does not appear to have been promulgated by the Liquor Control Board *under statutory authority in the administration of the Liquor Control* statute nor does it prescribe the practice or procedure before the Liquor Control Board. On the other hand, it does appear to be a document promulgated by the agency setting forth substantive property rights, privileges, immunities, duties, liabilities or obligations of a segment of the public, to wit, the video reporters and audio reporters.

As a statement of policy affecting such rights, it is required to be published and codified* (45 Pa. C.S. § 702).

The distinction between a "regulation" and a "statement of policy" noted by the Commonwealth Court in *Pa. Human Relations Commis-*

*Editor's Note—The LCB's statement of policy is codified at 40 Pa. Code § 17.1.

sion v. Norristown Area School District, 20 Pa. Commonwealth Ct. 555, 342 A.2d 464 (1975), *aff'd*, 473 Pa. 334, 374 A.2d 671 (1977), is that a regulation is an exercise of delegated power to make law and is as binding on a reviewing court as a statute, while a statement of policy is merely interpretive, not binding on the reviewing court, but persuasive if it tracks the meaning of the statute. Applying this test to the situation at hand we reach the same conclusion. The Liquor Control Board statement is not an exercise of delegated power to make law but rather is merely a statement expressing what the Liquor Control Board deems to be an appropriate policy for that body to pursue in the conduct of its own meetings.

The wisdom of such a policy is not for us to decide. The constitutionality of the policy to the extent that it may infringe upon asserted rights of the affected individuals is pending before the U.S. District Court for the Middle District of Pennsylvania and it would be inappropriate for us to comment thereon.

You are further advised that in accordance with the provisions of § 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 83-8

Governor's Office—Constitution—Judicial Vacancy—Appointment by the Governor—Election of Judges.

1. Pursuant to Pennsylvania Constitution, Article V, Section 13, the Governor may appoint a person to fill a judicial vacancy created on June 24, 1983, by the death of a judge running for retention. The term of any person so appointed shall end on the first Monday of January, 1984.

2. An election to fill a judicial vacancy which occurred on June 24, 1983, shall be held in November, 1983, which is the municipal election next preceding the date at which the term of office shall commence.

3. The procedure for nominations to be followed where a vacancy occurs after the time for the primary election but prior to two calendar months immediately preceding the next municipal election is set forth in the Election Law.

August 31, 1983

The Honorable Dick Thornburgh
Governor
Office of the Governor
Main Capitol Building
Harrisburg, PA 17120

Dear Governor Thornburgh:

The letter of August 16, 1983, from the General Counsel, asks that I give my opinion concerning the proper procedure for filling a vacancy on the Court of Common Pleas of Allegheny County which was created by the death of Judge Thomas Harper on June 24, 1983.

The following additional facts are set forth in the letter. Judge Harper had filed a declaration of candidacy for retention pursuant to Article V, Section 15, of the Pennsylvania Constitution. Judge Harper's name was to appear on the ballot in Allegheny County in November, 1983. We note further that Judge Harper's term expires on the first Monday in January, 1984. This series of events raises three questions concerning the vacancy on the Allegheny County Court of Common Pleas:

1. Shall the vacancy be filled by appointment and what is the term for which the appointment is made?

2. When shall an election next be held to elect a judge to this vacancy?

3. How shall the nominations of people to be elected to fill the judicial vacancy be made?

1. *Appointment*

The Pennsylvania Constitution provides that a vacancy in the office of judge shall be filled by appointment by the Governor. Article V, Section 13(b). Any person so appointed "shall serve for a term ending"—and consequently his appointment extends to—"the first Monday of January following the next municipal election more than ten months after the vacancy occurs or for the remainder of the unexpired term whichever is less . . ." Article V, Section 13(b). In the case of Judge Harper, the term expires on the first Monday in January, 1984. The unexpired term is therefore the lesser amount of time under the constitutional formula. Any person appointed by the governor to the court

vacancy created by Judge Harper's death shall serve until the first Monday of January, 1984.

2. *Time of Election*

Under Article V, Section 13(a) a judge shall be elected at the municipal election next preceding the commencement of the term of office. In the instant case, that election is November, 1983. Judge Harper was running on retention because his term was to expire in January, 1984, and, therefore, the normal election process had already been "triggered by the anticipated expiration of the incumbent's term," *Berardocco v. Colden*, 469 Pa. 452, 457, 366 A.2d 574, 576 (1976). An appointment by the governor, should he make one, does not affect the method for determining the time of election. Article IV, Section 8(b) of the Pennsylvania Constitution provides additional direction concerning the requirements for when an election shall be held to fill a vacancy. Under this provision, in the case of a vacancy to which the governor appoints, "a person shall be elected to the office on the next election day appropriate to the office unless the first day of the vacancy is within two calendar months immediately preceding the election day . . ." Further, the provisions of the Election Law which set forth the procedure to be followed for making the nominations apply where a vacancy to be filled occurs more than two calendar months immediately preceding a general or municipal election. 25 P.S. § 2953(c). Since the vacancy occurred on June 24, 1983, the time requirements of both the Constitution and the statute have been met. The commencement of the next term is January of 1984 and the next preceding election is November of 1983. Pa. Constitution, Article V, Section 13(c).

3. *Procedure for Nominations*

The Election Law provides that in all cases where a vacancy shall occur for any cause in an elective public office, including that of judge of a court of record, at a time when such vacancy is required to be filled at the ensuing election (in this case November, 1983), but at a time when nominations for such office cannot be made under any other provision of this act, nominations to fill such a vacancy shall be made by political parties in accordance with party rules relating to the filling of vacancies by means of nomination certificates in the form prescribed and by political bodies by means of nomination papers in accordance with the Election Law. Section 993 of the Election Law, Act of June 3, 1937, P.L. 1333, added by Section 1 of the Act of August 26, 1953, P.L. 1479, *as amended*, 25 P.S. § 2953. The other provision of the Election Law which might arguably apply to this case, namely that provision con-

cerned with revocation, Section 2938.3, need not be analyzed here because the procedure for nominations to fill a vacancy thereby created is the same in that provision as that set forth in Section 2953.

All of the elements set forth in Section 2953 are present in this case, and, therefore, the procedures in the statute shall be followed:

1. A vacancy has occurred.

2. The vacancy has occurred at a time (June, 1983) when the vacancy is required to be filled at the ensuing election. Pa. Constitution Article V, Section 13. See 2 above.

3. The vacancy has occurred at a time which is not within two calendar months immediately preceding the next municipal election. Pa. Constitution, Article IV, Section 8(b) and 25 P.S. § 2953(c).

4. The vacancy has occurred at a time when nominations for such office cannot be made under any other provision of the Election Law. The time for the primary election had passed as of the time of Judge Harper's death.

4. *Conclusion*

The decisions of the Pennsylvania Supreme Court make it clear that the election of judges is preferred to appointment. *Berardocco v. Colden*, *supra*. The Constitutional provisions for election and appointment of judges must be construed together. *Cavanaugh v. Davis*, 497 Pa. 351, 440 A.2d 1380 (1982). The Constitution provides for the filling of a vacancy by appointment, but, in the same section, provides that the term of the appointment shall be "for a term ending on the first Monday of January following the next municipal election more than ten months after the vacancy occurs or for the remainder of the unexpired term, *whichever is less*." The procedure for gubernatorial appointment is a stop-gap measure to fill seats which unexpectedly fall vacant. *Barbieri v. Shapp*, 476 Pa. 513, 383 A.2d 218 (1978). The Constitution clearly directs that a person be elected to fill the vacancy at the earliest time possible under the provisions of Article V and the statutes. In this case, the time is November 8, 1983, and the applicable procedures are set forth in the Election Law.

It is my opinion and you are hereby advised that you may appoint a person to fill the vacancy on the Allegheny County Court of Common Pleas, pursuant to the Constitution, for a term to end on the first Mon-

day of January, 1984. It is also my opinion that the Constitution requires that an election be held in November, 1983, to fill the vacancy. The Secretary of the Commonwealth and the county board of elections, as appropriate, are responsible for carrying out the procedures set forth in the Election Law for the conduct of this election.

You are further advised that in accordance with the provisions of Section 204(a)(1) of the Commonwealth Attorneys Act, Act No. 1980-164, 71 P.S. § 732-204(a), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 83-9

Department of Transportation and the Historical and Museum Commission—Repair and Maintenance of Historic Bridges.

1. The Department of Transportation has the authority and the duty to keep state-owned bridges in repair.

2. The Department of Transportation has the responsibility to consult with and seek the advice of the Historical and Museum Commission concerning that method of repair which will preseve and protect the historic character of state-owned bridges, but the final decision lies with the Department of Transportation.

September 21, 1983

Honorable Thomas D. Larson, P.E.
Secretary of Transportation
1200 Transportation and Safety Building
Harrisburg, PA 17120

Larry E. Tise, Executive Director
Historical and Museum Commission
501 William Penn Memorial Building
Harrisburg, PA 17120

Dear Secretary Larson and Mr. Tise:

You have asked for my opinion concerning possible tort liability for the Commonwealth when any work needed to repair historic bridges is not performed or is performed in a limited fashion after a finding by

the Historical and Museum Commission that proposed work on a bridge will alter or destroy its historic character. It is my opinion and you are so advised that the Department of Transportation has the duty to keep state-owned bridges in repair and the failure to do so, for whatever reason, may subject the Commonwealth to tort liability for damages under the Act of September 28, 1978, P.L. 788, No. 152, *as amended*, 42 Pa. C.S. § 5110, repealed and replaced by 42 Pa. C.S. § 8522 (the Tort Claims Act).

The Historic Preservation Act of November 22, 1978, P.L. 1160, No. 273 (71 P.S. § 1047.1a *et seq.*) established the Pennsylvania Historical and Museum Commission (the Commission) and the Historic Preservation Board (the Board). The powers and duties of the Commission are set out in 71 P.S. § 1047.1e and the powers and duties of the Historic Preservation Board are set forth in 71 P.S. § 1047.1g. The powers of these bodies are limited to advice, review, comment and the making of recommendations. There are no provisions which give either the Commission or the Board direct control or authority over any historic site or structure.

The Historic Preservation Act provides for inter-agency cooperation. These provisions require agencies to consult with and seek the advice of the Commission. Agencies also have a duty to provide for maintenance of historic resources and to institute procedures which will contribute to historic preservation. In the findings and declaration of policies, 71 P.S. § 1047.1b(4), the General Assembly provides that the preservation and protection of historic resources within the Commonwealth promotes the *public health, prosperity, and general welfare.* The preservation and protection of a historic resource is intended to promote the public health, prosperity and general welfare. There is no intention to value historic character over public health and welfare.

The Department of Transportation, under Section 2002 of the Administrative Code, 71 P.S. § 512, has the authority and the duty to build, rebuild, construct, repair and maintain state designated highways and transportation facilities and rights-of-way. The Department of Transportation also has the exclusive authority and jurisdiction over all state designated highways. The sole responsibility, power and authority is vested in the Department of Transportation to determine the rehabilitation, restoration, reconstruction or construction of highways under its authority, including bridges, which form a part of the Commonwealth highway system. The Department of Transportation has the responsibility to consult with the Commission and to seek

advice on possible alternatives to the demolition, alteration and reconstruction of historic bridges, but the final decision and authority with regard to repair or reconstruction of bridges and other transportation facilities lies with the Department of Transportation. 71 P.S. § 512(a)(15), *Payne v. Kassab*, 468 Pa. 226, 361 A.2d 263 (1976).

The Department of Transportation has the authority to determine the type of rehabilitation, restoration and reconstruction that should be initiated in conformity with the departmental guidelines, rules and regulations. It is my opinion and you are hereby advised that any failure to perform such work when funds are available may expose the Department of Transportation to liability under the Tort Claims Act.

You are further advised that in accordance with the provisions of Section 204(a)(1) of the Commonwealth Attorneys Act, Act No. 1980-164, 71 P.S. § 732-204(a), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 83-10

Department of State—Constitutionality of the Act of July 12, 1980, P.L. 649, No. 134, § 4, 25 P.S. § 2913(b), (c).

1. The Act of July 12, 1980, P.L. 649, No. 134, § 4, 25 P. S. § 2913(b), (c) which amended the Pennsylvania Election Code to provide for nominating papers to be filed no later than the second Friday subsequent to the primary is valid and binding upon candidates for political office in Pennsylvania until declared otherwise by a court of competent jurisdiction.

2. The decision of the United States Supreme Court in *Anderson v. Celebrezze*, ____U.S.____, 103 S. Ct. 1564 (1983) which declared invalid a provision of the Ohio Election Code requiring independent candidates to file election papers seventy-five (75) days before the primary election is distinguishable from the provisions of Act 134.

September 27, 1983

Honorable William R. Davis
Secretary of the Commonwealth
North Office Building
Harrisburg, PA 17120

Dear Secretary Davis:

Your memorandum of July 25, 1983, requests my advice on the effect of the United States Supreme Court decision in *Anderson v. Celebrezze*, _____ U.S. _____, 103 S. Ct. 1564 (1983) on Section 953 of the Act of June 3, 1937, P.L. 1333, Art. IX, *as amended*, 25 P.S. § 2913(b). This section reads:

> No nomination paper shall be circulated prior to the tenth Wednesday prior to the primary, and no signature shall be counted unless it bears a date affixed not earlier than the tenth Wednesday prior to the primary nor later than the second Friday subsequent to the primary. Act of June 3, 1937, P.L. 1333, Art. IX, § 953, *as amended*, 25 P.S. § 2913(b).

It is my opinion and you are hereby advised that the Act, *as amended* by the Act of July 12, 1980, P.L. 649, No. 134, § 4, 25 P.S. § 2913(b), is valid and binding upon candidates for political office in Pennsylvania until declared otherwise by a court of competent jurisdiction.

The previous wording of this section required a candidate to file nomination papers no later than the seventh Wednesday *before* the primary election. This filing deadline for independent candidates was challenged and invalidated in *Salera v. Tucker*, 399 F.Supp. 1258 (E.D. Pa. 1975), *aff'd*, 424 U.S. 959 (1976). The Federal Court in *Salera* fixed the twenty-first of August as the filing deadline for independent candidates for ". . . each successive year in which these candidates seek nomination as independents . . . This August 21st date shall remain in effect until the Pennsylvania legislature shall enact a new filing date for nomination papers." *Salera, supra*, at pages 1269-1270.

Apparently, in response to the *Salera* decision, the Pennsylvania legislature amended said section in 1980 to establish a new filing date ". . . on or before the second Friday *subsequent* to the primary." Act of July 12, 1980, P.L. 649, No. 134, § 4, effective January 1, 1981, 25 P.S. § 2913(c).

The 1980 amendment met the condition established by the court in

Salera and the new legislatively enacted filing date replaced the court ordered date of the twenty-first of August.

As your memorandum points out, the next development was that on April 19, 1983, the U.S. Supreme Court, in a five-to-four decision, invalidated a provision of the Ohio Election Code which provided that:

> Each person desiring to become an independent candidate for an office for which candidates may be nominated at a primary election . . . shall file no later than 4:00 p.m. of the 75th day before the day of the primary election immediately preceding the general election at which such candidacy is to be voted for by the voters, a statement of candidacy and nominating petition. . . . Ohio Revised Code Annotated, § 3513.257 (Supp. 1982).

The primary election in Ohio for the year in question fell on June 3, 1980, and the filing deadline for independent candidates was March 20, 1980.

On April 24, 1980, Presidential aspirant John B. Anderson announced that he was an independent candidate for President in the State of Ohio and on May 16, 1980, his supporters tendered a nominating petition to the Secretary of State. The Secretary of State refused to accept the documents because they had not been filed within the time required by the Ohio statute. Action was instituted in Federal Court challenging the constitutionality of the Ohio statute.

The Supreme Court held in *Anderson v. Celebrezze, supra*, that Ohio's early filing deadline placed an unconstitutional burden on the voting and associational rights of presidential candidate Anderson's supporters.

Unlike the *Salera* court, the Supreme Court did not establish a new filing deadline other than to implicitly accept a sixteenth of May date as acceptable for the filing of Anderson's papers.

The Ohio statute established a filing deadline 229 days in advance of the general election versus 196 for the Pennsylvania statute and the Ohio statute established a filing deadline *prior* to the primary whereas Pennsylvania's deadline is subsequent to the primary. Therefore, inasmuch as the 1980 amendment to the Pennsylvania statute was not before the United States Supreme Court and is distinguishable from the Ohio statute, I cannot say as a matter of law that Pennsylvania's pres-

ent statute is constitutionally defective. A legislative enactment enjoys a presumption in favor of its constitutionality and all doubts are to be resolved in favor of a finding of constitutionality. *Parker v. Children's Hospital of Philadelphia*, 483 Pa. 106, 394 A.2d 932 (1978); *Com., Pa. Higher Ed. Assistance Agency v. Abington Memorial Hospital*, 24 Pa. Commonwealth Ct. 352, 356 A.2d 837 (1976), *aff'd*, 478 Pa. 514, 387 A.2d 440 (1978).

I note, however, that the court decisions raise some serious constitutional concerns which the Commonwealth should address.

In *Celebrezze*, the state argued that three separate interests were served by the Ohio early filing deadline for independent presidential candidates. They were: voter education, equal treatment for partisan and independent candidates and political stability. The Supreme Court rejected all three.

The *Salera* court, on the other hand, identified three state interests arguably served by holding the nomination paper circulation period so far in advance. The three interests addressed were voter education, a concern that defeated or disaffected primary candidates not use the independent nomination process to thwart the will of the party majority or to wreak vengeance upon the candidate chosen by the party majority and the need for sufficient time to resolve any challenges to the nomination papers and to prepare the ballots in a deliberate and orderly fashion. The only state interest to which the *Salera* court gave any credence was the last, but the court noted that the Commonwealth does not begin to print the ballots until the latter part of September and that a candidate's name can be added to or removed from the ballots in late September without more than minor inconvenience. *Salera, supra*, at page 1267.

My advice is that, based on the *Salera* and *Celebrezze* decisions and with the next primary scheduled to occur in late April of 1984 (a presidential year) you should apprise the Pennsylvania legislature of the *Salera* and *Celebrezze* decisions and what they appear to portend and request that the statute be amended to provide a time period which would serve the only "state interest" recognized by either the *Salera* or *Celebrezze* courts, i.e., the need for sufficient time to resolve any challenges to the nomination papers and to prepare the ballots in a deliberate and orderly fashion. You are in the best position to provide this information to the legislature in the first instance and to defend the ensuing statutory provisions should they become the subject of attack.

You are further advised that in accordance with the provisions of Section 204(a)(1) of the Commonwealth Attorneys Act, Act No. 1980-164, 71 P.S. § 732-204(a), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 83-11

Public School Employees' Retirement Board—Public School Employees' Retirement Code—Eligibility for Creditable Nonschool Service—Eligibility Credit for an Approved Leave of Absence—Persons Working for Unions—Commonwealth Contributions.

1. Employment with a public school employee labor union is not within the Public School Employees' Retirement Code provisions for creditable nonschool service.

2. An employee otherwise entitled to a one year sabbatical leave can remain an active member of the Public School Employees' Retirement System for that one year under the provisions for an approved leave of absence.

3. Except for a one year sabbatical leave there are no provisions in the Code authorizing payments into the Fund on behalf of an employee of a public school employee union.

4. The Pennsylvania School Employees' Retirement Board should take appropriate steps to refund any contributions made by the Commonwealth, school districts and individuals on behalf of persons who were not eligible to remain active members of the retirement system.

October 19, 1983

Andrew M. Sheffler
Executive Director
Public School Employees' Retirement System
Harrisburg, PA 17108

Dear Mr. Sheffler:

Attorney Herbert C. Goldstein, at the direction and on behalf of the Public School Employees' Retirement Board has by letter of June 9, 1983, requested advice on the specific question of whether or not a person deemed to be "on leave of absence" or "on special assignment" by his local School Board in order to work full-time for a public school employee labor union is entitled to active membership in the Public School Employees' Retirement System.

It is my opinion and you are hereby advised that a person on leave from his or her employment as a public school employee to work full-time for a public school employee labor union is not entitled to active membership in the Public School Employees' Retirement System.

The Public School Employees' Retirement Code (Act of October 2, 1975, P.L. 298) sets forth a comprehensive system whereby school employees (as defined in the statute, section 1; 24 Pa. C.S. § 8102), the employer (as defined in the statute, section 1; 24 Pa. C.S. § 8102) and the Commonwealth of Pennsylvania (§ 1; 24 Pa. C.S. § 8326) each contribute to the fund (§ 1; 24 Pa. C.S. § 8102) designed to provide a member's annuity to each school employee. The amount of such member's annuity is based upon eligibility points and his or her final average salary. Eligibility points are earned or accrued by active members for each year of credited service.

I. *TERMINOLOGY OF THE RETIREMENT CODE*

The Act defines:

"Active member" as a *school employee* who is contributing to the fund or for whom *authorized* contributions are being made to the fund (Emphasis is supplied throughout);

"School employee" as any person engaged in work relating to a public school *for any governmental entity* and for which work he is receiving regular remuneration as an officer, administrator or employee excluding, however, any independent contractor or a person compensated on a fee basis;

"Credited service" as school or *creditable nonschool service* for which the required contributions have been made or for which salary deductions or lump sum payments have been agreed upon in writing;

"School service" as service rendered as a school employee;

"Creditable nonschool service" as service other than service as a school employee for which an active member may obtain credit.

II. *ELIGIBILITY FOR CREDITABLE NONSCHOOL SERVICE*

Applying the terminology of the Retirement Code, the question is whether a school employee who is working for a public school employee labor union is performing creditable nonschool service under the Code which would make the employee eligible both to earn or accrue eligibil-

ity points and to have the Commonwealth contribute to the retirement fund on his or her behalf.

With respect to creditable nonschool service, the Act provides in pertinent part that:

> An active member . . . shall be eligible to receive Class T-C service credit for *creditable nonschool service* as set forth in subsection (b) provided that he is not entitled to receive, eligible to receive now or in the future, or is receiving retirement benefits for such service under a retirement system administered and wholly or partially paid for by any other governmental agency or by any private employer . . . *and* further provided that such service is certified by the previous employer and the manner of payment of the amount due is agreed upon by the member, the employer, and the board.
>
> (b) Limitations on nonschool service.—Creditable nonschool service credit shall be limited to:
>
> (1) Intervening military service.
>
> (2) Other military service not exceeding five years.
>
> (3) Service in any public school or public educational institution in any state other than this Commonwealth . . .
>
> (4) Service as an administrator, teacher, or instructor in the field of public school education for any agency or department of the government of the United States . . .
>
> (5) Previous service as an employee of a county board of school directors which employment was terminated because of the transfer of the administration of such service or of the entire agency to a governmental entity.
>
> (c) In no case shall the total credit for nonschool service . . . exceed the number of years of school service credited in the system . . .
>
> Act of October 2, 1975, P.L. 298, No. 96, § 1, 24 Pa. C.S. § 8304.

Full-time employment with a public school employee labor union obviously does not fit within any of the five (5) categories specifically listed in the statute as creditable nonschool service.

III. *ELIGIBILITY CREDIT FOR AN APPROVED LEAVE OF ABSENCE*

The other possibility would appear to be to include labor union employment within that section of the Act (24 Pa. C.S. § 8302(b)) which provides that:

> An active member shall receive credit for an *approved leave of absence* . . .

Approved leave of absence is defined in the Act (24 Pa. C.S. § 8102) as: "A leave of absence which has been approved by the employer *for sabbatical leave, service as an exchange teacher, or professional study.*" Act of Oct. 2, 1975, P.L. 298, No. 96, § 1.

For each of these "approved leave" categories, the Public School Code specifically provides that the employee shall be considered to be in regular full-time daily attendance in the position from which the leave was granted and shall continue his or her membership in the School Employees' Retirement System. Act of March 10, 1949, P.L. 30, Art. XI, § 1170, *as amended*, 24 P.S. § 11-1170, as to sabbatical; Art. V, § 522, *as amended*, 24 P.S. § 5-522, as to exchange teachers; and Art. V, § 522.1, *as amended*, 24 P.S. § 5-522.1, as to professional study. The only other type of leave of absence which is considered as if the employee was in regular attendance at his other professional duties during such leave is military leave. Act of March 10, 1949, P.L. 30, Art. XI, § 1178; 24 P.S. § 11-1178.

The military leave category is clearly inapplicable here. Nor does taking leave of absence from employment in the public school system to work full-time for a labor union fit within the other legislatively established "approved leave of absence" categories of exchange teacher or professional study. It is possible that, if the individual possesses the necessary qualifications, up to one year of such "approved leave" could be treated by such individual as his or her sabbatical leave. Case law indicates that if a person qualifies for a sabbatical leave and seeks and obtains a leave not in excess of one year the fact that such person did not specifically request a "sabbatical" leave is not controlling: *Fisher v. Warakomski*, 381 Pa. 79, 112 A.2d 132 (1955); *McGurl v. Winton Borough School District et al.*, 82 D. & C. 578 (1952). One cannot, however, accumulate sabbatical leaves and use them as successive periods of one year each. *Halko v. Foster Township School District*, 374 Pa. 269, 97 A.2d 793 (1953).

Finally, I note that the legislature by amendment to the Act in 1980 provided a limited leave of absence without pay for certain school employees elected to public office as county officials and, at the discretion of the board of school directors, to those elected to other public office. Act of Feb. 8, 1980, P.L. 3, No. 2, § 2, 24 P.S. § 11-1182. Leave to work for a labor union is more akin to this type of limited leave, but the General Assembly specifically provided that "no employee on such leave of absence shall be eligible for retirement credit or for purchase of retirement credit at any future date for time spent on leave of absence." 24 P.S. § 11-1182.

I conclude that the action of some school districts in deeming certain employees as "on special assignment" or on "approved leave of absence" for purposes of treating such employees as "active members" of the Public School Employees' Retirement System is without authority in law and must be discontinued.

IV. *PAYMENT INTO THE FUND FOR PERSONS WORKING FOR UNIONS*

You next inquire whether or not there is any other basis upon which payments to the Fund on behalf of such persons can be authorized under the terms of the Public School Employees' Retirement Code.

This is to advise you that, except for the narrow and limited situation noted above wherein the individual is otherwise entitled to a one year sabbatical leave, I can find no authority for payment to the Fund on behalf of such persons.

V. *CONTRIBUTIONS BY THE COMMONWEALTH*

You next inquire:

"Under the terms of 24 Pa. C.S. § 8326, is the Commonwealth of Pennsylvania required to make contributions to the Fund on behalf of persons on such 'leaves of absence' or 'special assignments' for the purposes described above?"

It is my opinion and you are hereby advised that the Commonwealth of Pennsylvania is not required or permitted to make contributions to the Fund on behalf of persons on such "leaves of absence" or "special assignments" for the purposes described above.

The statute provides only that the Commonwealth shall make contributions into the fund on behalf of all active members. As this opinion

states, the persons involved are not active members within the meaning of the statute.

VI. *THE BOARD'S RESPONSIBILITY*

You further inquire:

"If it is found that persons on such 'leaves of absence' or 'special assignments' for the purposes described above are not entitled to active membership in the Fund, what is the Board's responsibility to such persons and what steps must be taken by the Fund to correct the situation?"

As noted in your letter requesting this opinion, the members of the Board serve in a fiduciary capacity for the participants in the system. Therefore, the Board has the responsibility to notify the individuals and the school districts affected that unauthorized contributions have been made by them or on their behalf to the Fund and that appropriate steps will be taken to correct the situation. I am not in a position to advise you what steps should be taken. The proper action should be decided by the Board after it has determined the dimensions of the problem and after due consideration of whatever solutions may be devised. Section 8503(b) of the Code suggests one step which the Board obviously might take in connection with its annual statement to each member. The statute provides in pertinent part that:

> The Board shall furnish annually on or before December 31 a statement to each member showing the accumulated deductions standing to the credit of the member and the number of years and fractional part of a year of service credited in each class of service as of June 30 of that year . . Act of Oct. 2, 1975, P.L. 298, No. 96, § 1, 24 Pa. C.S. § 8503(b).

VII. *REFUND OF COMMONWEALTH CONTRIBUTIONS*

Finally, you inquire:

"If it is found that the Commonwealth is not required to make contributions on behalf of such persons, should steps be taken to refund past contributions made by the Commonwealth?"

It is my opinion and you are hereby advised that steps should be taken to "refund" past contributions made by the Commonwealth. This need not, of course, take the form of an actual cash refund but can be accomplished via appropriate actuarial computations and accounting

procedures. Similarly, such computations and procedures probably can be employed to "refund" overpayments made by school districts. Overpayments made by individuals to their accounts must be made to such persons by way of cash refunds. It is unfortunate that this situation was not discovered and the advice of this office not sought earlier, but, as noted in Informal Opinion No. 1482 dated November 2, 1955, in a somewhat similar situation and as noted by the Pennsylvania Supreme Court in *Halko, supra*, at 272: "We cannot rewrite the statute."

You are further advised that in accordance with the provisions of § 204(a)(1) of the Commonwealth Attorneys Act, Act No. 1980-164, 71 P.S. § 732-204(a)(1), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 83-12

Pennsylvania Crime Commission—Senate Confirmation of Gubernatorial Appointment.

1. The Governor's appointment of a Commissioner to the Pennsylvania Crime Commission does not require Senate confirmation. The appointment was effective at the time the Commissioner was sworn into office.

2. The provisions of the Act of November 8, 1976, P.L. 1109, No. 227, 71 P.S. § 67.1 are not applicable to the present Crime Commission.

3. The Act of October 4, 1978, P.L. 876, No. 169, 71 P.S. § 1190.1, *et seq.*, the Act of November 26, 1978, P.L. 1418, No. 334, 71 P.S. § 179.1, created a new Pennsylvania Crime Commission which is not and has not been the same governmental agency as the former Pennsylvania Crime Commission created by the Act of July 31, 1968, P.L. 754, No. 235.

September 9, 1983

Dean William Roach, Chairman
Pennsylvania Crime Commission
P.O. Box 45
St. Davids, PA 19087

Dear Mr. Roach:

You have requested the opinion of this office relevant to the legal status of Governor Thornburgh's appointment of Henry G. Barr to the

position of Commissioner, Pennsylvania Crime Commission. Specifically, your inquiry is whether the appointment of Mr. Barr to the Commission requires Senate confirmation in order to be effective.

It is our opinion, and you are hereby advised, that the Governor's appointment of Henry G. Barr to the position of Commissioner, Pennsylvania Crime Commission, does not require Senate confirmation and was, therefore, effective upon his being sworn into that office. We further hold that the provisions of the Act of November 8, 1976, P.L. 1109, No. 227, 71 P.S. § 67.1 are not applicable to the present Pennsylvania Crime Commission.

In order to determine whether Act 227, *supra*, is applicable to the existing Crime Commission, we have reviewed the history of crime commissions in the Commonwealth and conclude that the present Crime Commission is not the Pennsylvania Crime Commission as contemplated under Act 227. The first Pennsylvania Crime Commission was created by the Act of July 31, 1968, P.L. 754, No. 235, as a departmental administrative commission under the Department of Justice and consisted of four gubernatorial appointees and the attorney general, *ex officio*, as chairman. Act 235 did not require Senate confirmation of this first commission. On May 20, 1975, the electors of the Commonwealth amended Article IV, Section 8, of the Pennsylvania Constitution to authorize the General Assembly to provide by law whether Senate confirmation of gubernatorial appointments should be by a majority or two-thirds of the Senate. In response to that constitutional amendment, the General Assembly passed the Act of November 8, 1976, P.L. 1109, No. 227, 71 P.S. § 67.1 which eliminated Senatorial confirmation of various gubernatorial appointments, distinguished between those appointments requiring a majority or a two-thirds vote, and added requirements of Senate confirmation for certain positions not previously covered. Section 207.1(d)(2) of the Administrative Code, 71 P.S. § 67.1(d)(2), included the *then existing* Pennsylvania Crime Commission under the requirements of confirmation by a majority vote. Subsequent to the passage of Act 227, by the Act of October 4, 1978, P.L. 876, No. 169, 71 P.S. § 1190.1, *et seq.*, the General Assembly abolished the Pennsylvania Crime Commission created by Act 235 of 1968 and created a new Pennsylvania Crime Commission composed of five members; one appointed by the Governor and one appointed by the President Pro Tempore; one by the minority leader of the Senate; one by the Speaker; and one by the minority leader of the House of Representatives. Section 12 of that Act repealed Act 235 of 1968, thereby abolishing the departmental administrative commission under the De-

partment of Justice, effective in sixty (60) days. Within the sixty-day period, the General Assembly passed the Act of November 26, 1978, P.L. 1418, No. 334, 71 P.S. § 179.1, providing for the transfer of appropriations and personnel of the former Pennsylvania Crime Commission to the new Pennsylvania Crime Commission and providing for a transition between the two commissions.

It appears clear that Pennsylvania Crime Commission presently existing is not and has not been the same governmental agency as the former Pennsylvania Crime Commission created by Act 235 of 1968. In creating the new Pennsylvania Crime Commission the Legislature did not amend Act 235, but rather repealed it. It created a different independent commission rather than a departmental administrative commission. It provided for a different appointment process and it subsequently enacted a separate act to transfer appropriations and personnel from the defunct commission to the new entity. In neither Act 169 of 1978 nor in Act 334 of 1978 did the General Assembly provide for Senate confirmation of appointees to the new Pennsylvania Crime Commission.

It is our opinion, therefore, and you are so advised, that the provisions of Section 71 P.S. § 67.1(d)(2) do not apply to the present Pennsylvania Crime Commission and were effective only with regard to the former and now defunct Pennsylvania Crime Commission.

You are further advised that in accordance with the provisions of Section 204(a)(1) of the Commonwealth Attorneys Act, Act No. 1980-164, 71 P.S. § 732-204(a), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 83-13

Pennsylvania Liquor Control Board—Power of the Board to Sanction One of Its Own Members—Board Power to Limit Access to Confidential Material—Powers of the Chairman.

1. A resolution which prohibits any single member of the Liquor Control Board from having access to confidential material contained in licensing, enforcement or person-

nel files without presenting a request to the Chairman and receiving the approval of a majority of the Board is not valid and no sanctions can be based upon it.

2. The Liquor Code, Act of April 12, 1951, P.L. 90, *as amended*, 47 P.S. § 1-101, *et seq.* envisions three co-equal members of the Board, and the Chairman is distinguished from the other members only by his duty to preside at all meetings of the Board.

3. Each member of the Board must have equal access to and each member must treat information with whatever degree of confidentiality is necessary for the Board to faithfully meet its mandates under the Liquor Code.

December 2, 1983

Daniel W. Pennick, Chairman
Pennsylvania Liquor Control Board
532 North West Office Building
Harrisburg, PA 17124

Dear Chairman Pennick:

You have requested my advice under Section 204(a)(1) of the Commonwealth Attorneys Act, Act No. 1980-164, 71 P.S. § 732-204(a). Specifically, you have asked that I render my opinion as to the question of "what action the [Liquor Control Board] may take to sanction one of its own members for violations of duly enacted Board policy and procedure." You inform me that on January 26, 1983, the Liquor Control Board adopted a resolution to the effect that no one member of the Board may have access to confidential material contained in licensing, enforcement or personnel files without first presenting a request for such information to the Chairman and thereafter having the request approved by a majority of the Board. The resolution further provides that should any Board member not adhere to its provisions regarding prior approval before files can be examined, that member shall be precluded from further access to any confidential information. The resolution also provides that no member shall disclose any information contained in any investigative report nor any information in any personnel file which is not deemed public information under Management Directive 505.18, amended (May 28, 1982). It is my opinion and you are hereby advised, that the resolution of January 26, 1983, is in conflict with the Liquor Code, Act of April 12, 1951, P.L. 90, *as amended*, 47 P.S. § 1-101, *et seq.*, and is therefore unenforceable as against any member of the Pennsylvania Liquor Control Board. This is, since the resolution is invalid, no sanction can be based on it.[1]

1. In the case of the Liquor Code, unlike the Public Welfare Code, 62 P.S. § 101, *et seq.*, §§ 404, 483 and the Vehicle Code, 75 Pa. C.S. § 101, *et seq.*, § 6114, for example, the General Assembly did not include statutory penalties for the mishandling of designated types of records.

The Liquor Code establishes a three member Liquor Control Board; each member being charged with the same statutory powers and duties. 47 P.S. § 2-201; § 2-207. Only one member, the one elected Chairman, is distinguished from the others in any manner and his powers and duties are identical to the other two members except that he shall preside at all meetings of the Board. 47 P.S. § 2-203. The general powers of the Board, including the power to conduct investigations, are enumerated in § 2-207 of the Liquor Code and subsection (h) thereof enpowers the Board " . . . to do all such things and perform all such acts as are deemed necessary or advisable for the purpose of carrying into effect the provisions of [The Liquor Code] and the regulations made thereunder." Obviously, this broad statutory mandate must be read to provide each member of the Board with ready access to Board files in order that each may be fully informed in the discharge of his duties. While it is true that actions or orders of the Board require the approval of at least two members, 47 P.S. § 2-203, it is also true that the Legislature intended the members of the Board to function as equals in fulfilling their responsibilities.

The Liquor Control Board resolution adopted on January 26, 1983, places a procedural obstacle between the Chairman and the other two members and allows for any two members to deny a third access to Board files. In effect, it provides the Chairman with a special power regarding files that is not shared by the other two members and it allows for any two members to delimit the authority of a third member.

The Liquor Control Board is vested with wide discretion in administering the Liquor Code. *Hude v. Commonwealth*, 55 Pa. Commonwealth Ct. 1, 423 A.2d 15 (1980); *Pa. Liquor Control Board v. Kusic*, 7 Pa. Commonwealth Ct. 274, 299 A.2d 53 (1973). However, in exercising this discretion, the Board must be careful, as must any administrative agency, to comport with the Legislature's intent. "Administrative agencies are creatures of the legislature and have only those powers which have been conferred by statute. (citations omitted). An administrative agency cannot by mere contrary usage acquire a power not conferred by its organic statute." *Western Pennsylvania Water Company v. P.U.C.*, 471 Pa. 347, 370 A.2d 337 (1977); *Commonwealth v. American Ice Co.*, 406 Pa. 322, 178 A.2d 768 (1962). The resolution at issue, by conferring its special status to the Chairman and making it possible for two members to deny information to a third, goes beyond the legislative grant envisioning co-equal members. "[T]he power of an administrative agency to prescribe rules and regulations under a statute is not the power to make law, but only the power to

adopt regulations to carry into effect the will of the Legislature as expressed by the statute." *George A. Fuller Co., Inc. v. City of Pittsburgh*, 15 Pa. Commonwealth Ct. 403, 327 A.2d 191 (1974); *Volunteer Firemen's Relief Association of the City of Reading v. Minehart*, 425 Pa. 82, 227 A.2d 632 (1967). The January 26, 1983, resolution rewrites the Liquor Code by making it possible for the members' powers to be distributed unequally and, therefore, the rule the resolution implements is invalid. *Pa. State Education Association v. Pa. Department of Public Welfare*, 68 Pa. Commonwealth Ct. 279, 449 A.2d 89 (1982); *Pa. National Guard v. Pa. Workmen's Compensation Appeal Board*, 63 Pa. Commonwealth Ct. 1, 437 A.2d 494 (1981); *Clough v. Tax Review Board*, 20 Pa. Commonwealth Ct. 464, 342 A.2d 483 (1975).

The subject of the unauthorized disclosure of confidential information in the Board's files is, indeed, an important one. Management Directive 505.18, amended, is designed to set standards that will protect personnel files. Insofar as the Board has adopted this Management Directive as part of its own policy, each member—and I note that each member is afforded access to personnel files by Section 4(m)(2) of the directive—should abide by its terms.

In respect to investigative files, which are vital to the enforcement responsibilities of the Board, no member can be faithfully discharging his duties, especially the duty to carry out investigations, 47 P.S. § 2-207(j), if information that would compromise an investigation or endanger the safety of an investigator is improperly released.

In conclusion, it is my opinion, and you are so advised, that the resolution establishing a system of prior approval by a majority of the Board before a member may view information in licensing, enforcement, and personnel files is contrary to the Liquor Code. There is nothing in the Liquor Code to suggest that the Legislature in any way intended that two members of the Board could adopt a practice that would arrogate unto them the power to deny a third member the information he may require to carry out his responsibilities. Each member must have equal access and each member must treat information with whatever degree of confidentiality is necessary for the Board to faithfully meet its mandate. For any member to misuse confidential information would represent a breach of duty on his part.

You are further advised that in accordance with the provisions of Section 204(a)(1) of the Commonwealth Attorneys Act, Act No. 1980-

164, 71 P.S. § 732-204(a), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 83-14

Pennsylvania Liquor Control Board—Dr. Martin Luther King, Jr. Day—Closing of State Liquor Stores.

1. Dr. Martin Luther King, Jr. Day, January 15, is a legal holiday in Pennsylvania under the provisions of the Act of May 31, 1893, P.L. 188, No. 138, 44 P.S. § 11, *et seq.*, *as amended* by the Act of November 26, 1978, P.L. 1176, No. 275.

2. The provisions of the 1893 Act define legal holiday for the purposes of Section 304 of the Liquor Code, 47 P.S. § 3-304 and, therefore, State Liquor stores should be closed on that day.

December 5, 1983

Daniel W. Pennick, Chairman
Pennsylvania Liquor Control Board
532 Northwest Office Building
Harrisburg, PA 17124

Dear Chairman Pennick:

The Liquor Control Board, through its counsel, has asked whether the designation by the General Assembly of the 15th of January as Dr. Martin Luther King, Jr. Day mandates the closing of state liquor stores on that day. It is my opinion and you are hereby advised that Dr. Martin Luther King, Jr. Day is a day on which state liquor stores shall be closed.

When sales may be made at Pennsylvania liquor stores is determined by the Liquor Code, Act of April 12, 1951, P.L. 90, *as amended*, 47 P.S. § 1-101, *et seq*. Section 304 of the Code, 47 P.S. § 3-304, provides, in part:

> Every Pennsylvania Liquor Store shall be open for business week days, except legal holidays or any day on which a general, municipal, special or primary election is being held, during

> such hours as the board, in its discretion, shall determine, but shall not be open longer than fourteen hours in any one day nor later than eleven o'clock post-meridian . . .

The Liquor Code does not define "legal holiday" or otherwise designate what days are to be considered legal holidays for the purpose of the Liquor Code. Nor is there any comprehensive Pennsylvania statute on what the effect of such a designation shall be on the conduct of business by State Liquor stores. Absent such a statute and absent a definition in the Liquor Code, we turn to the rules of statutory construction to determine the meaning of the term "legal holiday" because, in the interpretation of the Liquor Code, we presume that the General Assembly intends the entire statute to be effective and that, in addition to certain election days and non-weekdays (Sunday), liquor stores shall not be open on legal holidays. 1 Pa. C.S. § 1921(a) and § 1922(2).

The term "legal holiday" is generally taken to mean a day designated in a statute by the legislature on which day ordinary commerce or judicial or other proceedings are suspended or not conducted. The statutes of Pennsylvania contain several provisions which designate specific days as legal holidays for the purpose of suspending or not conducting certain types of commerce or judicial proceedings. The most frequently cited of these statutes is the Act of May 31, 1893, P.L. 188, No. 138 (44 P.S. § 11, *et seq.*) (hereinafter "Act of 1893"). This statute has been amended, partially repealed and reenacted many times. The Act of 1893 was enacted to do two things. The first was to designate "legal holidays." The second was to designate days "for payment, acceptance and protesting of bills and notes." The purposes stated at the beginning of the original Act (Act of May 31, 1893, P.L. 188),[1] and by the following language from the law itself make this dual purpose clear:

> [The named holidays] "shall, for all purposes whatever as regards the presenting for payment or acceptance, and as regards the protesting and giving notice of the dishonor of bills of exchange . . . be treated and considered as the first day of the week, commonly called Sunday, and as public holidays and half holidays."

The second portion of the Act, which contains the language concerning the presentation of bills, notes, drafts, and other instruments, has

1. Designating the days and half days to be observed as legal holidays, *and* for the payment, acceptance and protesting of bills, notes, drafts, checks and other negotiable paper on such days. (*emphasis supplied*)

been repealed as it relates to banks by the Banking Code of 1965, and specific compulsory and optional bank holidays are now designated.[2] Although the "banking language" in the 1893 statute is repeated in subsequent legislation, it no longer has the force and effect of law, having been superseded by the Banking Code.

We are then left with only the language of the Act of 1893 which designates legal or public holidays, along with amendments adding new holidays thereto.[3] Dr. Martin Luther King, Jr. Day was added by the Act of November 26, 1978, P.L. 1176, No. 275.[4]

The statute's original language provided that the designated days were to be regarded as secular or business days "for all other purposes" than those mentioned in the Act (44 P.S. § 17). At the time this language was placed in the Act it had some meaning. Although the days designated were still "legal holidays," they were nevertheless to be regarded as proper for the conduct of business so far as this statute was concerned. However, nothing could prevent a subsequent statute from adopting the named legal holidays and placing further restrictions or limitations on them. It is clear that a statute speaks as of the day it is passed, but obviously cannot prohibit a future Legislature from amending it, altering it or adopting it by reference. When the Liquor Code was first passed, it adopted by reference the legal holidays previously designated by a prior Legislature and require the Liquor Control Board to close the liquor stores on all such days.

Holidays may be created and designated as such by statute, and ordinarily a day cannot become a legal holiday without statutory sanction. In Iowa, in the case of *Brennan v. Roberts*, 125 Iowa 615, 101 N.W. 460 (1904), a similar question arose. Code § 2448, par. 9 (I.C.A. § 128.38) provides that saloons shall not be open nor shall any sales be made on Sunday, or any election day, "or legal holidays." A separate statute, Section 3053 (I.C.A. § 541.85), headed "Holidays" directs that certain days, including the 4th of July, shall be legal holidays for pur-

2. By the Act No. 1982-44 (7 P.S. § 113), Dr. Martin Luther King, Jr. Day, January 15, is made a banking holiday by amendment to the Banking Code.

3. While Dr. Martin Luther King, Jr. Day and Presidents Day were amended into the basic legal holiday statute, other observances, such as Hubert H. Humphrey, Jr. Day (44 P.S. § 39) and Pennsylvania German Day (44 P.S. § 38) were not so designated.

4. A new federal statute, Pub. L. No. 98-144, 97 Stat. 917 (1983), signed into law by the President on November 2, 1983, establishes the third Monday in January as a federal legal holiday in memory of Dr. Martin Luther King, Jr.

poses relating to bills of exchange. The Court there held that the term "legal holiday" as used in Section 2448 relates to the days designated in Section 3053 as "holidays."

The Act of 1893 states that the designated holidays "shall be considered as public holidays . . . for all purposes whatsoever as regards the transaction of business . . ." except for days appointed as bank holidays (44 P.S. § 14). Bank holidays are now designated by a separate statute. It is clear that when the Legislature enacted the provision which later became the 1951 Liquor Code limitation on sales, above quoted, it was referring to those days designated in the Act of 1893 and its amendments as "legal holidays," and the statute remains in effect to the extent it establishes the legal holidays named.

It is, therefore, my opinion, and you are hereby advised, that the fifteenth of January, known as Dr. Martin Luther King, Jr. Day is a legal holiday and, as such, is a day on which state liquor stores shall be closed.

You are further advised that in accordance with the provisions of Section 204(a)(1) of the Commonwealth Attorneys Act, Act No. 1980-164, 71 P.S. § 732-204(a), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 84-1

Board of Pardons—Authority of Board to Recommend to Governor That Fines or Forfeitures Be Remitted—Exclusive Authority of Governor to Grant Forms of Clemency Enumerated in the Constitution of the Commonwealth.

1. Section 909 of the Administrative Code, Act of April 9, 1929, P.L. 177, Article IX, *as amended* (71 P.S. § 299) authorizes the Board of Pardons to hear applications for the remission of fines and forfeitures and to make recommendations thereon to the Governor. The aforesaid Act does not, however, require the Board to hear such applications.

2. The 1968 Constitution of Pennsylvania, *as amended*, vests exclusive authority in the Governor to grant the forms of clemency enumerated in Article IV, Section 9(a) thereof.

March 5, 1984

Honorable William W. Scranton, III
Chairman
Board of Pardons
200 Main Capitol Building
Harrisburg, PA 17120

Dear Lieutenant Governor Scranton:

As Chairman of the Board of Pardons, you have asked my opinion with regard to the authority of the Board to recommend the remission of fines and forfeitures. Your question is prompted by an individual who has applied to the Board for this form of clemency. It is my opinion that the Board may recommend to the Governor that fines and forfeitures be remitted.

Whether or not the Board has the authority to recommend this relief to the Governor is controlled by Article IV, Section 9(a) of the 1968 Constitution of Pennsylvania, *as amended*, and Section 909 of the Administrative Code, Act of April 9, 1929, P.L. 177, Article IX, *as amended* (71 P.S. § 299). In Official Opinion No. 1983-2 (13 Pa. B. 1104), I described the distinction between the remission of fines and forfeitures and the granting of reprieves on the one hand and the granting of pardons and commutations on the other. The power to *grant* all of these forms of clemency is vested exclusively in the Governor. *Commonwealth v. Sutley*, 474 Pa. 256, 378 A.2d 780 (1977). *Com. ex rel. Banks v. Cain*, 345 Pa. 581, 28 A.2d 897 (1942); *Frye v. Lawrence*, 75 Dauph. 168 (1960); *Commonwealth v. Shisler*, 2 Phila. 256, 14 L.I. 92 (1857). Article IV, Section 9(a) of the Pennsylvania Constitution provides:

> In all criminal cases except impeachment, the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, after full hearing in open session, upon due public notice. The recommendation, with the reasons therefor at length, shall be delivered to the Governor and a copy thereof shall be kept on file in the Office of the Lieutenant Governor in a docket kept for that purpose.

Any action by the Governor on a pardon or commutation must be preceded by a recommendation in writing of a majority of the Board of

Pardons. No such recommendation is required before the Governor exercises his power to remit fines and forfeitures or to grant reprieves.

Section 909 of the Administrative Code states, in relevant part, that the Board of Pardons "shall have the power to hear applications for the remission of fines and forfeitures . . . and to make recommendations in writing to the Governor thereon. . . ." This statutory expression of the Board's power is explicit and unambiguous. No construction other than the clear meaning of the words need be given. Statutory Construction Act of 1972, December 6, P.L. 1339, No. 290, 1 Pa. C.S. § 1921(b). The Board has the power to hear applications of this kind but is not required to do so by the statute. Therefore, even though the Governor may remit fines and forfeitures on his own initiative, there is no reason why the Board of Pardons may not hear applications and make recommendations, as long as the Board does not infringe upon the Governor's exclusive authority to grant or deny this form of clemency.

The Board's activity in the area of recommending the remission of fines and forfeitures of individuals, which is an act of clemency, should not be confused with the exoneration of county officials from the collection of fines and costs that have become uncollectible. To avoid any confusion, please be advised that whereas the Courts of Common Pleas once possessed the authority to forgive county officials, Act of December 30, 1974, P.L. 1118, No. 359 (16 P.S. § 1739); *repealed* 1978, April 28, P.L. 202, No. 53 § 2(a), the Department of Community Affairs has been given this function in the Act of July 9, 1976, P.L. 586, No. 142, *as amended*, April 28, 1978, P.L. 202, No. 53, § 10, 42 Pa. C.S. §§ 3502, 3503. The Board does not have a role to play in matters of this kind.

In conclusion, it is my opinion and you are so advised that the Board of Pardons may hear applications and make recommendations to the Governor regarding the remission of fines and forfeitures.

You are further advised that in accordance with the provisions of Section 204(a)(1) of the Commonwealth Attorneys Act, No. 1980-164, 71 P.S. § 732-204(a), you will not in any way be liable for following the advice set forth in this opinion.

Sincerely yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 84-2

State Horse Racing Commission and State Harness Racing Commission—Authority to Regulate Telephone Account Wagering Systems and Telecasting of Live Races.

1. Under the Race Horse Industry Reform Act, Act of December 17, 1981, P.L. 435, No. 135, 4 P.S. § 325.101 *et seq.*, both the State Horse Racing Commission and the State Harness Racing Commission are granted broad supervisory powers over pari-mutuel wagering on races and the racing corporations engaged therein.

2. Telecasting of live races as a part of telephone account wagering is subject to the regulatory authority that each Commission possesses with respect to racing in Pennsylvania.

3. Each Commission may regulate the manner in which the racing corporations under its jurisdiction telecast races from racing enclosures and this may include restrictions as to geographic zones as well as requirements regarding encoded signals.

4. The "state action" exemption to the Sherman Act, 15 U.S.C. § 1 *et seq.*, applies when the challenged activity is 1) clearly articulated and affirmatively expressed as state policy and 2) actively supervised by the state itself.

April 12, 1984

Frank A. Ursomarsco, Commissioner
Pennsylvania State Horse Racing Commission
412 Agriculture Building
Harrisburg, PA 17110

Jesse L. Crabbs, Chairman
Pennsylvania State Harness Racing Commission
306 Agriculture Building
Harrisburg, PA 17110

Dear Commissioner Ursomarsco and Chairman Crabbs:

On behalf of the Commissions you chair, the Office of General Counsel has requested my opinion on the subject of televising live races as a part of the telephone account wagering systems operated by licensed Pennsylvania racing corporations. Specifically, I have been asked to address several questions regarding "the extent of the authority of these commissions to regulate telephone account wagering systems and telecasting by licensed associations." The general question posed is whether the Racing Commissions may require that racing corporations limit the territorial scope of races telecast from their enclosures and whether they may require the use of encoded or scrambled signals. You also ask that I consider the antitrust and constitutional aspects of such regulations being promulgated. It is my opinion, and you are so ad-

vised, that the Racing Commissions have the authority to regulate comprehensively activities associated with pari-mutuel wagering on horse or harness racing and that there are no antitrust or constitutional impediments as long as the Commissions exercise their authority in a clear and reasonable manner.

In 1981, the "Race Horse Industry Reform Act" became effective. Act of December 17, 1981, P.L. 435, No. 135, 4 P.S. § 325.101 *et seq.* (hereinafter the "Reform Act"). The Reform Act established the State Horse Racing Commission with "general jurisdiction over all pari-mutuel thoroughbred horse racing activities in the Commonwealth and the corporations engaged therein", 4 P.S. § 325.201(a), and, similarly, the State Harness Racing Commission was established with "general jurisdiction over all pari-mutuel harness racing activities in the Commonwealth and the corporations engaged therein." 4 P.S. § 325.201(b). The Reform Act defines a corporation as one which has obtained a license from either of the Commissions to conduct thoroughbred or harness horse race meetings at which pari-mutuel wagering is allowed. Licenses are granted and made subject to all conditions, rules, and regulations promulgated by the Commissions in the public interest, 4 P.S. § 325.209(a), (b), (e), and the Commissions may review every contract or agreement which a licensed corporation makes. 4 P.S. § 325.220. In addition to the general jurisdiction with which the Horse and Harness Racing Commissions are vested, each is specifically empowered to supervise meetings of either thoroughbred or harness horse races at which pari-mutuel wagering is conducted and to adopt rules and regulations to effect the purposes of the Reform Act. 4 P.S. § 325.202(a) and (b).

The broad powers which each Commission has were carried forward from the predecessor statutes which governed horse racing and pari-mutuel wagering in the Commonwealth. See, Horse Racing Act, Act of December 11, 1967, P.L. 707, *as amended*, 15 P.S. § 2651 *et seq.* and Harness Racing Act, Act of December 22, 1959, P.L. 1978, *as amended*, 4 P.S. § 301 *et seq.*; 15 P.S. § 2601 *et seq.* Commenting on the previous Horse Racing Act, the Pennsylvania Supreme Court in *Gilligan v. Pennsylvania Horse Racing Commission*, 492 Pa. 92, 422 A.2d 487 (1980) stated: "The Act reflects a clear legislative policy to vest the Commission with broad general supervisory powers over the previously unlawful activity of thoroughbred horse racing." Insofar as the broad supervisory powers that were contained in the prior statutes have been continued in the Reform Act, this legislative policy has not been changed. The legislative policy remains the same and is applicable equally to the Horse and Harness Racing Commissions today.

With the passage of the Reform Act, the Legislature expanded the opportunities for pari-mutuel wagering on horse races by allowing for telephone account wagering systems and interstate simulcasting of horse races. A corporation seeking to conduct either of these activities is required by the Reform Act to obtain approval from the appropriate Commission. Under § 216 of the Reform Act, 4 P.S. § 325.216, the interstate simulcasts are limited to horse races conducted at facilities outside of Pennsylvania which are telecast to race tracks within Pennsylvania and the simulcasts must be in compliance with the provisions of the Federal Interstate Horse Racing Act of 1978. 92 Stat. 1811, 15 U.S.C. § 3001 *et seq*. The Commissions have promulgated regulations to govern interstate simulcasts. Horse Racing Commission, 58 Pa. Code Chapter 167; Harness Racing Commission, 58 Pa. Code Chapter 186.

Telephone account wagering is authorized under § 218(b) of the Reform Act, 4 P.S. § 325.218(b), and made subject to Commission rules and regulations. Your letter indicates that telecasts from Pennsylvania race tracks are to be conducted as an adjunct to and component of telephone account wagering systems. At the present time, only the Horse Racing Commission is regulating the telecasting of racing and that regulation generally prohibits telecasts from racetracks unless prior Commission approval is granted. 58 Pa. Code § 163.35(b). Neither Commission has yet regulated telephone account wagering. It is in acting to control the scope of these activities that the antitrust concerns arise.

In *Euster v. Eagle Downs Racing Association*, 677 F.2d 992 (3d Cir. 1982), *cert. denied*, 459 U.S. 1022, 103 S.Ct. 388, 74 L.Ed. 2d 519 (1982), the Third Circuit Court of Appeals analyzed the authority of the Horse Racing Commission to set jockey fees and assessed the Commission's action in the light of the federal Sherman Act. 15 U.S.C. § 1 *et seq*. The *Euster* Court's antitrust analysis of jockey fees provides the standards to be used in assessing the Sherman Act implications of regulating the scope and manner of telecasting Pennsylvania horse or harness races. The standards for the state action exemption to the Sherman Act, as they have been developed by the United States Supreme Court since its decision in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), and as expressed in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed. 2d 233 (1980), are that "first, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Euster, supra*.

The *Euster* Court accepted the Pennsylvania Supreme Court's explication of the Horse Racing Commission's powers in *Gilligan, supra.*, and agreed that the Legislative purpose was to create "a pervasive system of regulation and supervision . . . and a general rule making power was clearly and unmistakably conferred." Both Courts agreed that "the breadth of the . . . powers is required for the prevention of corruption and the maintenance of high standards and public confidence in racing." The *Euster* Court held that the Horse Racing Commission's setting of jockey fees did not represent a Sherman Act violation even though the statute under which the fees were established did not explicitly provide for their imposition. The jockey fees were a part of the Horse Racing Commission's mandate to exercise general jurisdiction over thoroughbred horse racing and the imposition of jockey fees by regulation was deemed to satisfy the "active supervision" requirement of the *Midcal* test.

Under the Reform Act, each Commission retains its general jurisdiction and the legislative policy of a pervasive system of regulation and supervision continues in force. With telecasting as a part of telephone account wagering, the "active supervision" requirement can be fulfilled by each Commission's exercise of the statutory power to decide whether or not approval should be granted, by the promulgation of appropriate regulations, by making every racing corporation's contract with a telecaster subject to Commission review and by the approval and monitoring of these activities to assure compliance with the regulations. As with jockey fees, the Legislative mandate of the Commissions is not weakened for the purposes of antitrust analysis simply because § 218(b) of the Reform Act does not specifically provide for telecasting horse races as a part of the telephone account wagering system.[1] The United States Supreme Court has confirmed the principle that:

> [I]t is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It

1. The Interstate Horse Racing Act of 1978, 92 Stat. 1811, 15 U.S.C. § 3001 *et seq.*, prohibits interstate off-track wagering unless the various requirements of the Act are met. Interstate off-track wagers are permitted if, *inter alia*, the "off-track racing commission" has consented thereto. 15 U.S.C. § 3004(a)(3). An "off-track racing commission" is the agency or instrumentality of the state "designated by State statute or, in the absence of statute, by regulation, with jurisdiction to regulate off-track betting in that State." 15 U.S.C. § 3002(11). Section 216 of the Reform Act provides the statutory designation that the Federal Act calls for and removes any doubt as to the authority of each commission with regard to interstate simulcasts of horse races. See *Eagle Downs Racing Association v. Commonwealth of Pennsylvania, State Harness Racing Commission*, 73 Pa. Commonwealth Ct. 155, 457 A.2d 1008 (1983).

> will suffice if the challenged activity was clearly within the legislative intent. Thus, [it may be ascertained], from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.

City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434-35 (5th Cir. 1976), *aff'd*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed. 2d 364 (1978), *quoted with approval in Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 49 n. 12, 102 S.Ct. 835, 840 n. 12, 70 L.Ed. 2d 810, 818 n. 12 (1982). The General Assembly added telephone account wagering with the intention that opportunities for pari-mutuel wagering would be thereby increased. Telecasting enhances telephone account wagering and is consistent with the General Assembly's intention to expand pari-mutuel wagering.

Turning now to the constitutional issues, the Pennsylvania Supreme Court has marked the boundary that must be observed to avoid an unconstitutional delegation of Legislative authority to an administrative agency of state government. The Court has held that the Legislature may "confer authority and discretion in connection with the execution of the law; it may establish primary standards and impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the act." The Court has stated, further, that there are two principal limitations on this power. First, the General Assembly must make the basic policy decisions. Second, the statute must contain "adequate standards which will guide and restrain the exercise of the delegated administrative functions." All of the details of administration, however, need not be precisely or separately enumerated in the statute. *Gilligan v. Pennsylvania Horse Racing Commission*, 492 Pa. at 96.

Jockey fees established by regulation but without an explicit statutory reference were found to be within the bounds of this test. Telephone account wagering and telecasting regulations can be crafted to meet these requirements as well. Since the Legislature has given the Commissions a broad supervisory mandate to carry out a clear state policy regarding the integrity and vitality of the racing industry, then, as long as the regulations enacted are reasonable and do not represent an abuse of either Commission's discretion, they should not be open to constitutional attack. *Budzinski v. Department of Public Welfare*, 39 Pa. Commonwealth Ct. 176, 394 A.2d 1333 (1978); *Volunteer Firemen's Relief Association v. Minehart*, 425 Pa. 82, 227 A.2d 632 (1967).

It is beyond the scope of this opinion to suggest any particular item which the regulations must include, but it should be noted that the Federal Communications Commission policy continues to oppose any activity that would assist illegal gambling. 36 F.C.C. 1571 (1964), 41 F.C.C. 2d 893 (1973), 72 F.C.C. 2d 793 (1979). Also, the Communications Act of 1934 prohibits publishing or using intercepted information except broadcasts to the general public. 47 U.S.C. § 605. Along with the Racing Commissions' legislative mandate to protect and enhance racing, due consideration should be given to the federal regulatory framework.

In conclusion, it is my opinion and you are hereby advised, that the Legislature has authorized the Horse and Harness Racing Commissions to supervise horse racing and pari-mutuel wagering in this Commonwealth. The addition of telephone account wagering systems to the permissible activities in this area is subject to the approval and regulatory control of the Commissions. Toward this end, either Commission may, by appropriate regulation, require the racing corporations which it licenses to include in telecasting agreements whatever reasonable terms and conditions that particular Commission deems necessary to protect and promote the public interest with regard to the kind of horse racing over which it has jurisdiction. Such terms and conditions may include geographic zone and signal encoding requirements. Through the regulatory process, each Commission should endeavor to determine that no condition sought to be imposed on a corporation and its telecaster would work to undermine the purpose of the Race Horse Industry Reform Act or conflict with any requirement placed on a telecaster by the Federal Communications Commission.

You are further advised that in accordance with the provisions of Section 204(a)(1) of the Commonwealth Attorneys Act, Act of October 15, 1980, P.L. 950, No. 164, 71 P.S. § 732-204(a), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

Table of Cases Cited

Table Of Statutes and Other Authorities Cited

Opinions Of Attorney General Cited

Index