

COMMONWEALTH OF PENNSYLVANIA

OPINIONS

OF THE

ATTORNEY GENERAL

OF

PENNSYLVANIA

1989-1992

ERNEST D. PREATE, JR.
ATTORNEY GENERAL

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ATTORNEY GENERAL ERNIE PREATE, JR.

Attorney General Ernie Preate, Jr. is a native of Old Forge, near Scranton. He earned his undergraduate degree in economics from the University of Pennsylvania's Wharton School, and earned his law degree at Penn three years later, in 1965. He has committed his entire career to public service.

Following law school, Mr. Preate enlisted in the U.S. Marines—not as a lawyer but as an infantry officer—and volunteered for combat duty in Vietnam. He served three years, rose to Captain and was awarded five medals for combat service.

Mr. Preate began his career as a prosecutor in 1970, when he returned home and went to work as an assistant district attorney in Lackawanna County. His first trial was of a drug dealer. He has been continuously involved in the drug fight ever since.

Also during the 1970's, he served as a pro-bono legal advisor to the fledgling environmental movement that was fighting to clean up Northeastern Pennsylvania from the ravages of decades of mining. He helped draft and spent seven years working for the passage of the Federal Surface Mining Act. He testified before Congress five times on that bill alone.

President Carter recognized Mr. Preate's role by having him at his side in the Rose Garden as the President signed the Surface Mining Act, one of the most important environmental statutes in the history of our nation.

Mr. Preate's continuing concern for the environment is reflected in his action to double the number of field offices of the Attorney General's Environmental Crimes Section.

While serving as an assistant district attorney, Mr. Preate maintained a private practice, and served as a municipal solicitor.

He was elected District Attorney in 1977. His trial record established him as one of the state's leading criminal prosecutors: He won 20 consecutive drug-dealer trials, all 19 homicide cases that went to jury verdict and five death penalty convictions—a record for a district attorney. Mr. Preate has not lost a trial of any kind in more than 14 years.

Mr. Preate is the author of the only reference work on how to prosecute a death penalty case in Pennsylvania, and is in demand nationally as a lecturer on jury selection and trial tactics. In 1992, he lectured on "The Art of Cross-Examination"—in Florence, Italy. He has traveled to Puerto Rico and Columbia to advise Columbian government leaders on the reform of their criminal justice system.

Mr. Preate also is an experienced appellate attorney, having personally handled many of the appeals growing out of his trials.

As Attorney General, he has personally argued four cases: He appeared before the Pennsylvania Supreme Court to defend against Justice Juanita Kidd Stout's challenge to the mandatory retirement age for judges, and before the U.S. Third Circuit Court of Appeals to argue for a prompt election following the tragic death of U.S. Senator John Heinz. And he has had the rare privilege to argue twice before the United States Supreme Court, where

he defended the state's death penalty statute and the Pennsylvania Abortion Control Act. He won all of those cases.

Mr. Preate has been extremely active in shaping legislation, as well as enforcing it. In his first four years in office, the Legislature enacted 48 bills that he initiated or actively supported, among them: mandatory drug education, the Health Club Act, the Charitable Solicitation Act, a crackdown on timeshare promotions and reform of the Criminal History Records Information Act.

He continues to work for reform of Pennsylvania's mental health laws, a campaign to which he's been committed ever since he chaired the advisory committee to the Joint State Government Commission Task Force on Mental Health Laws.

He also has been heavily, personally involved in the campaign for habeas corpus reform, an effort that U.S. Senator Joseph Biden praised in floor remarks, calling Mr. Preate "a leader on this issue," and commending him for having been willing to take "a political risk . . . to try to do something for this country."

Working with the Governor and the Legislature, Mr. Preate has helped put Pennsylvania in the forefront of the war on drugs, with a reform package of 18 new laws; dramatic expansion of local drug task forces from 10 to 55, a 40 percent increase in arrests of major drug dealers, and innovative new programs to combat prison crowding, improve access to treatment, help grass-roots anti-drug groups, strengthen drug-prevention programs and deter workplace drug use.

President Bush recognized Pennsylvania as one of the four leading states in the nation in the drug fight, and former "Drug Czar" William Bennett gave the state an "A" rating for the comprehensive anti-drug program that Mr. Preate, the Governor and the Legislature created.

Mr. Preate also has a long record of service to his profession, as an active member of the Bar Association and professional organizations.

He was for many years a member of the Supreme Court Criminal Procedural Rules Committee. Currently, he is a member of the board of directors of the Association of Government Attorneys in Capital Litigation. He also chaired the Criminal Law Committee of the National Association of Attorneys General (NAAG) from 1991 to 1993, serves as NAAG's representative to the U.S. Justice Department's Executive Working Group on Prosecutorial Relations, co-chairs the Association's Federal Crime Bill Leadership group, is vice-chair of the NAAG Telecommunications Subcommittee, and in addition, serves as the Association's voting delegate to the American Bar Association House of Delegates.

Mr. Preate had the singular honor of being elected by fellow lawyers from throughout the nation to serve as the founding chairperson of the American Bar Association's newest division, the Government and Public Sector Lawyers Division.

It's typical of his dynamic leadership that in less than six months, the new division exceeded its initial membership goal.

Ernest D. Preate, Jr., Attorney General

Walter W. Cohen

First Deputy Attorney General

Deputy Attorneys General

*John M. Abel	*Michael F. Butler
Gregory B. Abeln	*John J. Calabro
Eugene J. Anastasio	Melvin Caplan
John R. Anderson	*John P. Capuzzi
*Janice L. Anderson	Susan S. Cercone
*Robert S. Andrews, Jr.	*Craig A. Chamberlain
*Susan Antonelli	John F. Cherry
*Marc A. Arrigo	*Theodore J. Chylack
J. Douglas Austin	Guy L. Ciarrocchi
Thomas M. Ballaron	*Lawrence N. Claus
Bryan E. Barbin	*Daniel Clearfield
*Linda H. Barr	*Fran B. Cleaver
*Linda C. Barrett	*John J. Condridge
*Lawrence Barth	Melanie G. Cook
Marylou Barton	*Christopher Costantini
*Brian H. Baxter	*Ronald W. Costen
*Mark A. Bellavia	Robert P. Coyne
Kenneth J. Benson	*Jeffrey L. Craig
*John R. Benty	*Eugene B. Creany
Eugene G. Berry	*Joseph A. Curcillo
*George F. Bihn III	*Bartholomew J. DeLuca
*Robin D. Bleecher	*Andrew E. Demarest
*Robert J. Borthwick	Thomas M. Devlin
*Stephen L. Brandwene	*David J. DeVries
*John J. Burfete, Jr.	John G. DiLeonardo
*John J. Butchar	*James J. Dodd-o
Mary E. Butler	Robert M. Doig

- David M. Donaldson
 *James A. Donahue III
 *Charles E. Donohue
 *Nora A. Dowd
 *Daniel J. Doyle
 Barbara S. Drake
 *Michael W.H. Duncan
 *M. L. Ebert, Jr.
 *Robert C. Edmundson
 *John G. Eidemueller
 *Allan E. Ells
 *Robert S. Englesberg
 *Francis R. Filipi
 *Anne K. Fiorenza
 *Jerome T. Foerster
 *Susan J. Forney
 *Anthony W. Forray
 Laura Fredricks
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 Mark E. Garber
 Stephen E. Geduldig
 John F. Gehring
 *Daniel R. Goodemote
 *Brian P. Gottlieb
 Thomas D. Gould
 Robin A. Gower
 *Robert A. Graci
 *Cara B. Greenhall
 Jeffrey H. Gribb
 *Alton G. Grube
 *Frank J. Grzywinski
 *Syndi L. Guido
 *John A. F. Hall
 *Thomas F. Halloran
 Randy K. Hareza
 *Trent Hargrove
 *Jesse F. Harvey
 *Michael L. Harvey
 *William A. Helm
 Jules S. Henshell
 *Randall J. Henzes

 *Renardo L. Hicks
 Anthony R. Himes
 *Carl S. Hisiro
 Bruce C. Johnson
 *Kate M. Johnson
 *William A. Jones, Jr.
 Michael J. Kane
 Yvette P. Kane
 *James P. Kearney
 Ann I. Keck
 *John E. Kelly
 William J. King
 *Dennis A. Kistler
 *John G. Knorr III
 *Calvin R. Koons
 Camille Kostelac-Cherry
 Andrew B. Kramer
 *Barry N. Kramer
 *Letty A. Kress
 *Denise A. Kuhn
 Celeste Y. Lamb
 *Lois H. Lichtenwalner
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 *Cristina S. Papsen
 Aaron D. Parnes
 *Sherri Patchen
 *Richard E. Patton
 Anne E. Perrige
 *Joseph C. Peters
 Robert E. Peterson
 *Joseph A. Petrarca
 Margaret E. Picking
 Mark O. Prenatt
 John C. Rafferty, Jr.
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 Gary S. Reinhardt
 *Joel M. Ressler
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 Joseph S. Sabadish
 Michael C. Santaniello
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 *M. Teresa Sarmina
 *Gerhard Schwaibold
 *Mary B. Seiverling
 *Janet Selden
 *Francis P. Sempa
 *R. Douglas Sherman

Daniel R. Sherzer
 *Richard A. Sheetz, Jr.
 *John O.J. Shellenberger
 Jefferson J. Shipman
 *Michael T. Siegert
 *Mark A. Sindler
 *Ronald H. Skubecz
 Kathryn D. Slade
 *William A. Slotter
 *Beth A. Smith
 *Clinton G. Smith
 *Jessie L. Smith
 Richard W. Sponseller
 *Ronald C. Stanko
 *Jay W. Stark
 *Sandra W. Stoner
 Margaret M. Stuski
 *Michael B. Sutton
 Nels J. Taber
 *Roseann B. Termini
 *Claudia M. Tesoro
 *Prince A. Thomas
 *Gloria A. Tischuk
 *Matthew W. Tomalis
 *Richard R. Tomsho
 *J. Elise Tourek
 *Sue A. Unger
 *Michael W. Untermeyer
 Maria P. Vickers
 *Paul E. von Geis
 Paul E. Waters
 Eugene F. Wayne
 *Eileen M. Weir
 *Thomas L. Welch
 *David R. Weyl
 William J. Wheeler
 Kirk V. Wiedemer
 *Brian Wiley
 *Vicki J. Wilken
 Thomas C. Willcox
 *Ronald T. Williamson

Suellen M. Wolfe
Matthew L. Wolford
William E. Woodside
*Douglas J. Wright
*William J. Yates

Douglas P. Yauger
Thomas B. York
*George R. Zaiser
*Amy Zapp
Thomas C. Zerbe

Irwin A. Popowsky, Consumer Advocate

David M. Barasch
*Zsuzsanna E. Benedek
*Edmund J. Berger
*Craig R. Burgraff
Lois A. Burns
*Susan Jin Davis
*Dianne E. Dusman
*Laura J. Goldberg
*Denise C. Goulet
*Christine M. Hoover
*Mary C. Kenney

Debra M. Kriete
*Philip F. McClelland
*Tanya J. McCloskey
Miles H. Mitchell
*Kent D. Murphy
*Scott J. Rubin
Pamela B. Sarvey
*C. Ann Sheehan
*Barrett C. Sheridan
*Mark J. Shostak
Angelique G. Weeks

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 over three centuries of the life of the Commonwealth makes it 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 Office. 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 reestablished 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 Zimmerman became the first elected Attorney General. And, for the first time in the history of the Commonwealth, the Attorney General became directly accountable to the citizens of the Commonwealth and not the Governor. Zimmerman, who served eight years, successfully structured the Office of Attorney General into a highly respected professional law enforcement agency.

On January 17, 1989 Ernest D. Preate, Jr. was administered the oath of office as Attorney General of the Commonwealth of Pennsylvania. Upon arrival he created a Drug Law Division within the Office of Attorney General, renewed the efforts against hazardous waste violations and broadened the geographical scope of the Office of Attorney General through regional office expansion and placement in an effort to better serve the public.

He was reelected in November 1992 and is now serving his second term.

Attorney General

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 employes 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 per-

formance 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 investigation unit and drug law enforcement program as well as direction of statewide and multi-county 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 Board of Finance and Revenue, the Pennsylvania Commission on Crime and Delinquency, the Pennsylvania Emergency Management Agency, the Civil Disorder Authority, 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:

- Attorney General
- First Deputy Attorney General
- Office of Press Secretary
- Office of Legislative Affairs
- Office of Policy and Planning
- Criminal Law Division
- Drug Law Division
- Civil Law 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.

Office of Press Secretary

The Office of Press Secretary speaks for the Attorney General and the Divisions, Bureaus, and Sections of the Office of Attorney General.

The Press Secretary/Director of Communications initiates and coordinates news coverage by newspapers, radio and television stations on subjects of direct and indirect interest to the Office of Attorney General.

Office of Legislative Affairs

The Office of Legislative Affairs 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 Office 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.

In addition the Office may research and draft testimony for the Attorney General as necessary to comment on pending legislation at both the state and federal levels.

Office of Policy and Planning

The Office of Policy and Planning develops policies and plans for the implementation of new or enlarged programs within the Office of Attorney General. The Office also acts as liaison to public interest groups and citizens on issues of public interest.

The Office reports to the First Deputy and works closely with the Attorney General to prepare public policy positions that address the mandate of the Office of Attorney General.

CRIMINAL LAW DIVISION

The Commonwealth Attorneys Act defines the areas of prosecution available to the Attorney General. This prosecutorial power, except that which relates to drug law enforcement, 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 employes; corrupt organizations; charges referred by a Commonwealth agency; presentments returned by an investigating grand jury 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 may handle criminal appeals as the law provides.

The Division is also responsible for all matters before the statewide investigating grand jury.

The Division comprises:

Criminal Investigation and Prosecution Section

Organized Crime Unit

Environmental Crimes Section

Medicaid Fraud Control Section

Appeals and Legal Services Section

The Criminal Law Division is headed by an Executive Deputy Attorney General who is the Director and has the overall responsibility for 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.

Attorneys in this Division appear 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.

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

Criminal Investigation and Prosecution Section

The Criminal Investigation and Prosecution Section is responsible for all criminal matters involving public corruption of state officials or employes and criminal charges involving corrupt organizations as described in the Corrupt Organizations Act of 1972.

In addition, the Section is responsible for the criminal prosecutions of those persons/companies determined to be delinquent in the payment of their taxes due the Commonwealth, for criminal matters referred by other state agencies, and for 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 serves as liaison to district attorneys and provides information and advice where appropriate. The Section can become involved in matters in which it has been determined that the necessary statutory basis exists to supersede a district attorney.

In the investigation and prosecution of public corruption, close liaison is maintained with other Commonwealth, local and federal law enforcement agencies and the State Ethics Commission to ensure the appropriate exchange of information and the proper exercise of jurisdiction by the respective offices. Cooperation also is offered to those federal agencies having the responsibility to investigate and prosecute organized crime. The Section makes extensive use of the statewide investigating grand juries.

The Section reviews investigative reports, renders opinions on the prosecutorial merits of a case, and prosecutes criminal cases.

The Section has the responsibility of investigating all criminal offenses within the jurisdiction of the Office of Attorney General other than narcotics offenses as defined in Sections 205 and 206 of the Commonwealth Attorneys Act. The Section provides, where possible, aid and support, including material and technical assistance, to other state and local investigative agencies.

Regional offices are located in Norristown, Scranton, Pittsburgh, Greensburg and Erie.

In addition to the above responsibilities, the Criminal Investigation and Prosecution Section supervises the activities of the Organized Crime Unit.

Organized Crime Unit

The Organized Crime Unit consists of a prosecutor and investigators experienced in the pursuit of traditional and nontraditional organized criminal groups. The Unit frequently makes use of electronic surveillance, the investigating grand jury and witness protection in its mission. In addition to prosecutions using the Commonwealth's corrupt organizations statute, the Unit works jointly with police and prosecutors at the federal, state and local levels in meeting its goal of attacking organized crime in Pennsylvania. Its targets range from traditional La Cosa Nostra (LCN) families and other groups with no limit to the nature of their criminal activity to groups that specialize in drug trafficking, gambling or other specific types of crime.

Environmental Crimes Section

The Environmental Crimes Section investigates and prosecutes violations which include, but are not limited to, the Commonwealth's environmental and criminal statutes as they pertain to the generation, transportation, storage and disposal of solid, municipal, residual and hazardous waste. In addition, the Environmental Crimes Section investigates and prosecutes violations of the Clean Streams Law, the Infectious and Chemotherapeutic Waste Disposal Act, the Air Pollution Control Act and the Pennsylvania Crimes Code. The Environmental Crimes Section is headquartered in Harrisburg with regional offices in Pittsburgh, Williamsport, Scranton and Norristown. Each office is staffed with attorneys and agents who prosecute

only environmental crimes. The Department of Environmental Resources provides additional technical staff to take samples and provides the laboratory to analyze samples taken during the course of a criminal investigation.

Medicaid Fraud Control Section

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

Specifically, this Section's attorneys, agents and auditors are responsible for the investigation and prosecution of nursing homes, hospitals, medical supply vendors, and professional personnel (physicians, dentists, pharmacists, etc.) who have committed fraud.

In addition to its Harrisburg office, the Section has regional offices in Norristown and Greensburg.

Appeals and Legal Services Section

The Appeals and Legal Services Section is responsible for representing the Commonwealth in all appeals in criminal matters in which the Office of Attorney General is involved. The Section's attorneys brief and argue appeals in the state's appellate courts as well as the federal courts. The Section also is responsible for advocating the position of the Attorney General on important issues in criminal cases prosecuted by the local district attorneys.

In addition to its responsibilities in appellate matters, the Section provides general legal and research support to the Criminal Law Division. In this regard, the Section is responsible for the preparation and distribution of the *Prosecutor's Update*, a compendium of recent appellate decisions of interest to the state's prosecutors.

The Appeals and Legal Services Section is responsible for coordinating and scheduling all matters to be brought before the statewide investigating grand juries empaneled from time to time at the Attorney General's request. The Section is responsible for all administrative aspects of the grand juries as well as the preparation of appropriate responses to legal issues raised in the context of grand jury proceedings.

The Section supervises the use and application of the Wiretapping and Electronic Surveillance Control Act and provides technical assistance to district attorneys in carrying out their responsibilities under the Act. In addition, the Section is responsible for the preparation of annual reports required by the Act.

DRUG LAW DIVISION

The Commonwealth Attorneys Act provides extensive powers of prosecution to the Attorney General. A portion of this prosecution power rests within the Drug Law Division.

It includes the power to investigate and prosecute criminal matters relating to drug law enforcement, corrupt organizations and presentments returned by an investigating grand jury.

In addition, the Division may supersede a district attorney under certain circumstances, may prosecute upon request of a district attorney, and may concurrently prosecute with a district attorney.

The Division comprises:

Drug Prosecution and Forfeiture Section

Drug Strike Force Legal Services Section

Bureau of Narcotics Investigation and Drug Control

These three components perform the investigative and prosecutorial duties for the Drug Law Division. The Division is the largest segment of the Office of Attorney General.

The Drug Law Division is headed by an Executive Deputy Attorney General who is the Director and has the overall responsibility for 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 has regional offices located throughout the Commonwealth, as specified in the following section descriptions.

Attorneys in this Division appear 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.

Drug Prosecution and Forfeiture Section

The Drug Prosecution and Forfeiture Section is responsible for the criminal prosecution of complex, multi-county drug cases. The majority of these cases emanate from the statewide investigating grand jury. This Section also is responsible for the prosecution of money laundering cases. These cases are often the result of a grand jury investigation and presentment. In addition, this Section handles all the legal aspects of drug asset forfeiture cases pursuant to the Controlled Substances Forfeitures Act. And, this Section is responsible for providing technical assistance concerning complex drug prosecution techniques to local prosecutors.

In addition to their primary responsibilities, the attorneys of this Section also are involved in the training of state and local law enforcement officers. Subject areas include: forfeiture, money laundering, corrupt organizations, automated criminal history record systems and use of force.

The Section is headquartered in Harrisburg, with attorneys also located in Norristown, Philadelphia and Pittsburgh.

Drug Strike Force Legal Services Section

The Drug Strike Force Legal Services Section is responsible for providing legal/investigative assistance and support to the agents of the Bureau of Narcotics Investigation and Drug Control and undercover troopers of the Pennsylvania State Police Drug Strike Force stationed in each of the regional offices. The majority of these attorneys' time is spent in the development of complex drug investigations and resultant prosecutions. More specifically, in addition to ongoing responsibilities for the review and assistance in traditional drug law enforcement techniques, they are primarily responsible for all electronic surveillance and guidance of complex cases through the statewide investigating grand jury.

In addition to their primary responsibilities, the attorneys of this Section are also involved in the training of state and local law enforcement officers. Subject areas include: electronic surveillance and other complex investigatory techniques, search and seizure, corrupt organizations and use of force.

Regional offices are located in Allentown, Butler, Erie, Greensburg, Harrisburg, Philadelphia, State College and Wilkes-Barre.

Bureau of Narcotics Investigation and Drug Control

The Pennsylvania Attorney General's drug law enforcement effort is carried out by the Bureau of Narcotics Investigation and Drug Control. The Bureau is organized into regional strike forces comprising Attorney General's Narcotics Agents and Pennsylvania State Police Troopers and Officers. Office facilities, legal and support staff are provided to the strike forces by the Office of Attorney General.

The primary mission of the Bureau of Narcotics Investigation and Drug Control is to conduct comprehensive investigations into the illegal activities of drug traffickers in the Commonwealth. This is accomplished through the use of statewide investigating grand juries; electronic surveillance; compliance, technical services, criminal intelligence, financial investigative and interdiction units; fishnet operations, reverse undercover operations, and other innovative methods of fighting and identifying drug activity.

Strike Force operational activities can be categorized into two major 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 law through regulatory inspections of the legitimate handlers of controlled substances (pharmacies, hospitals, and medical practitioners).

As importantly, a major commitment of this Bureau is dedicated to the administration, supervision and coordination of the Attorney General's Local Drug Task Forces program. This program provides funds to support municipal police officers working together to combat illegal drug activities in their communities. The Bureau also supports the task forces with supervision provided through a Bureau of Narcotics Investigation and Drug Control agent or a Pennsylvania State Police Trooper, training and equipment.

In addition to its headquarters office in Harrisburg, the strike forces have eight regional offices located in Allentown, Butler, Erie, Greensburg, Wilkes-Barre, Harrisburg, Philadelphia and State College. Two satellite offices are located in Norristown and Reading.

CIVIL LAW DIVISION

The Civil Law Division's primary responsibilities are:

1. To provide legal representation in major litigation involving the Commonwealth, its agencies and officials;
2. To collect, by suit or otherwise, all debts, taxes and accounts due the Commonwealth;
3. To review and approve for form and legality all Commonwealth contracts, deeds, leases and bond documents;
4. To review and approve for form and legality all regulations proposed by Commonwealth agencies; and
5. To provide formal and informal legal advice upon request of the Governor or the head of a Commonwealth agency.

The Division comprises:

- Litigation Section
- Torts Litigation Section
- Tax Litigation Section
- Financial Enforcement Section
- Review and Advice Section

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

In addition to its principal office in Harrisburg, the Division has major offices in Philadelphia (Eastern Regional Office) and Pittsburgh (Western Regional Office) and smaller offices dedicated specifically to tort litigation in Norristown, Allentown and Scranton.

Division attorneys appear before the Courts of Common Pleas, the Commonwealth Court, the Pennsylvania Superior and Supreme Courts, the United States District Courts in Pennsylvania, the Third Circuit Court of Appeals, and the United States Supreme Court.

Litigation Section

This Section defends the Commonwealth, its agencies and officials in lawsuits challenging the constitutionality of state statutes or the legality of agency policies and procedures, as well as in lawsuits seeking monetary damages for alleged civil rights violations by Commonwealth officials or employes. Most of the cases handled by this Section are before federal courts. The Section functions through offices in Harrisburg, Philadelphia and Pittsburgh.

Torts Litigation Section

This Section defends the Commonwealth, its agencies and officials in personal injury actions seeking monetary damages. Most of the cases handled by this Section are before state courts. The Section functions through offices in Harrisburg, Philadelphia, Pittsburgh, Norristown, Allentown and Scranton.

Tax Litigation Section

This Section represents the Commonwealth in all original and appellate actions relating to state taxes. The cases it handles are before the Orphans' Courts, the Commonwealth Court and the Pennsylvania Supreme Court. It functions through offices in Harrisburg, Philadelphia and Pittsburgh.

Financial Enforcement Section

This Section, by various means including the litigation of claims in bankruptcy, collects all debts owed the Commonwealth, the majority of which concern delinquent taxes. Cases handled by this Section are before both state and federal courts. The Section functions through offices in Harrisburg, Philadelphia and Pittsburgh.

Review and Advice Section

This Section reviews and approves for form and legality all Commonwealth contracts, deeds, leases and bond documents, and all regulations proposed by Commonwealth agencies. The Section also provides formal and informal legal advice upon the request of the Governor or the head of a Commonwealth agency. The Section also performs a variety of miscellaneous, non-litigation functions, including response to citizens' calls and correspondence.

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.

The Division comprises:

- Bureau of Consumer Protection
- Antitrust Section
- Charitable Trusts and Organizations Section
- Civil Rights Enforcement Section
- Office of Consumer Advocate

The Office of Consumer Advocate, which represents residents and small businesses in utility rate and service cases, is organizationally attached to this Division, but it has independent policy making authority.

The Public Protection 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 has regional offices located throughout the Commonwealth to carry out its functions. Attorneys in this Division appear before the Courts of Common Pleas, Commonwealth Court, Pennsylvania Superior and Supreme Courts, the federal courts and state and federal administrative agencies.

Bureau of Consumer Protection

The Commonwealth Attorneys Act requires the Attorney General to maintain a Bureau of Consumer Protection and to appoint its director. The Bureau investigates and mediates consumer complaints and takes legal action against companies that engage in unfair business practices where a lawsuit by the Attorney General is in the public interest and would benefit the Commonwealth.

The Bureau is not empowered to act as a legal representative for individual consumers, although it does investigate and mediate individual consumer-business complaints. Mediations require the voluntary cooperation of consumers and businesses. Complaints and, especially, a series of complaints about a particular business or complaints alleging deceptive advertising or policies often lead to investigations and subsequent legal actions if the act or practices are illegal.

The duties of the Bureau include:

1. Investigating allegations of fraud and misleading and deceptive practices in the distribution, financing and furnishing of goods and services which affect consumers, and the use of prosecutions and other legal remedies to eliminate unlawful activities.
2. Conducting studies, investigations and research in matters affecting consumer interests and making information available to the public.
3. Advising the executive and legislative branches on matters affecting consumer interests, including the development of policies and propos-

ing new legislation to protect consumers.

4. Promoting consumer education and publicizing matters relating to consumer fraud, deception and misrepresentation.

The Bureau has seven permanent regional offices: Allentown, Ebensburg, Erie, Harrisburg, Philadelphia, Pittsburgh and Scranton. Bureau personnel conduct monthly outreach programs in all corners of the state. The Bureau also operates a toll-free Consumer Protection Hotline to assist consumers with filing complaints and to provide consumer information.

Antitrust Section

The Antitrust Section helps protect the free enterprise system by detecting anti-competitive practices and taking legal action to stop them.

The Section seeks to ensure that all unlawful restraints are removed from the flow of commerce so that consumers and businesses alike can enjoy the full benefits of open competitions.

To help preserve a “level playing field,” the Antitrust Section files legal actions in federal court to seek to enjoin anti-competitive activities unlawful under the federal antitrust laws, and to recover losses to the Commonwealth, its residents and other governmental agencies from such illegal activity.

The Section also enforces the Pennsylvania Anti-Bidrigging Act, which prohibits conspiring or fixing bids for state or municipal contracts.

The Section works closely with federal enforcement authorities and other agencies of state government as an advocate for competition in the business marketplace and to educate state and local government and the public in antitrust issues and in the economic rights of businesses and consumers.

Charitable Trusts and Organizations Section

The Charitable Trusts and Organizations Section is responsible for ensuring that funds intended for charitable purposes are, in fact, expended for those purposes.

The Section files legal actions against charities, professional fundraisers and non-profit groups that fail to meet the standards of legitimate charities. Fines and penalties are often assessed against violators. Those proceeds are passed along to legitimate charities.

The Section works closely with the Pennsylvania Department of State and its Bureau of Charitable Organizations to assure that charities and charitable solicitors are properly registered and are complying with the reporting requirements of Pennsylvania law as well as to ferret out corrupt or deceptive solicitation practices. New powers of enforcement were granted to the two offices under the Solicitation of Funds for Charitable Purposes Act of 1990.

The Section also reviews court proceedings involving charitable funds such as the accounting of trusts and estates which benefit charities. Excessive

or improper administrative or legal expenditures are challenged to preserve the funds for the charitable purposes for which they were intended.

The duties of the Section include:

1. Reviewing periodic accountings for all estates and trusts in which there is a charitable interest. Such accountings are filed in the Orphans' Courts in Pennsylvania counties.
2. Maintaining federal tax forms which must be submitted to the Attorney General by private foundations.
3. Overseeing the dissolution or diversion of charitable assets from non-profit corporations. This duty is enumerated under the Nonprofit Corporation Law of 1988.
4. Reviewing instances in which charitable requests are not administered in a manner consistent with the specific directions of the testator and taking action to assure compliance, when such action is consistent with the public interest.

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

Civil Rights Enforcement Section

The Civil Rights Enforcement Section assumes a leadership and coordination role in legal actions arising from allegations and complaints of civil rights violations.

This Section works closely with our governmental and law enforcement agencies, including the Pennsylvania Human Relations Commission, federal civil rights agencies and the Inter-agency Task Force on Civil Tension in training law enforcement and municipal governments about the requirements of State Civil Rights and Ethnic Intimidation Laws.

The Civil Rights Enforcement Section is authorized to do the following:

1. Bring actions before the Pennsylvania Human Relations Commission to challenge discrimination in housing, employment and public accommodations (including educational institutions) on the basis of race, color, religious creed, ancestry, handicap or disability, age, sex or national origin, among other bases. Actions in the name of the Attorney General may be brought where the case presents an important legal issue of statewide significance.
2. In consultation with the local district attorney, obtain civil injunctions against continuing acts of ethnic intimidation under the Ethnic Intimidation Civil Redress Statute.
3. Undertake or assist in other civil rights litigation pursuant to state or federal law, to the extent permitted by the Attorney General's standing as *parens patriae*.
4. Issue reports and publicize findings concerning the perpetration of hate crimes and other civil rights abuses in the Commonwealth.

Office of Consumer Advocate

The Office of Consumer Advocate has a budget separate from the Attorney General's which is funded by an assessment on utility companies similar to the process for funding of the Public Utility Commission.

The Commonwealth Attorneys Act directs the Attorney General to appoint a Consumer Advocate who is subject to confirmation by a majority of the State Senate. The Consumer Advocate then acts independently, hiring his own staff (subject to Attorney General approval) and directing resources in the arena of utility rate-setting and regulation.

The Office was formed to represent the interests of consumers before the Pennsylvania Public Utility Commission and comparable federal agencies and focuses primarily on the interests of residential consumers in those proceedings. Until the advent of the Office of Consumer Advocate in 1976, residential customers often went unrepresented in utility rate and service cases.

The Consumer Advocate's Office represents the consumer's interests by providing the technical knowledge and financial resources on utility regulatory issues that individual customers cannot afford to present on their own. The Consumer Advocate also has the authority to appeal Public Utility Commission decisions and has used that authority to represent Pennsylvania consumers in matters rising all the way to the United States Supreme Court.

OFFICE OF MANAGEMENT SERVICES

The Office of Management Services is responsible for the administrative affairs of the Office of Attorney General.

The Office comprises:

- Comptroller Section
- Personnel Section
- Affirmative Action Unit
- Office Services Section
- Law Library Section
- Data Processing Section

The Office of Management Services is headed by a Director who has the overall responsibility for seeing that the functions of the Office are properly administered. In addition, he is responsible for the development, administration and implementation of the Office of Attorney General budget.

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

Comptroller Section

The Comptroller Section is responsible for the proper accounting of all

fiscal transactions executed by the Office of Attorney General and the development, administration and implementation of fiscal policy. These responsibilities include the processing of invoices and payrolls for payment, the receipt of all revenues, the management of all field advancement accounts, the review of all contracts and the fiscal review of all functions within the Office of Attorney General.

Personnel Section

The Personnel Section serves the entire Office of Attorney General by planning, developing, and administering a comprehensive human resource program that provides a continuous array of services that helps all employees carry out the duties of the Office of Attorney General in the most efficient and cost-effective manner possible.

The Personnel Section has the responsibility to:

1. Provide the Attorney General and other top management officials with expertise on effective human resource management in order to maintain a work environment that enhances employee effectiveness and organizational excellence.
2. Provide expertise to managers and supervisors in the areas of recruitment, compensation, motivation, development, discipline, training, labor relations, affirmative action and utilization of employees in order to help the managers and supervisors achieve their respective priorities, goals and missions.
3. Promote a work environment that enhances the quality of work life in order to gain the commitment, ingenuity and energy of all employees.

Affirmative Action Unit

The Affirmative Action Unit develops and promotes programs to ensure compliance with the policy of the Office of Attorney General to grant equal employment opportunities to all qualified individuals without regard to race, color, religion, national origin, age, sex, union membership, sexual preference or non-job related handicap or disability, except where age or sex is a bona fide occupational qualification. It develops, updates and administers the Office of Attorney General affirmative action plan.

Office Services Section

The Office Services Section manages the support functions of mail and messenger services, purchasing, security, graphics, printing and duplicating services, space and facilities management, telecommunications, asset forfeiture administration and the automotive fleet for the Office of Attorney General. The Office Services Section is divided functionally into five areas:

1. Asset Forfeiture Administration—manages and coordinates the maintenance, sale and disbursement of real property, personal property and monies awarded to the Office of Attorney General through the laws governing forfeiture.
2. Facilities Management—coordinates leasing of all Office of Attorney General facilities, manages support contracts and utility billings for those facilities.
3. Purchasing—administers the purchasing of goods and the contracting of services required in the operation of the Office of Attorney General.
4. Telecommunications—coordinates and processes all requests for new installations, relocations and repair of all telephones and pagers used throughout the Office of Attorney General and processes all related billings.
5. Central Services—provides support services by coordinating and managing the automotive fleet, all cellular services, in-house maintenance of the headquarters facility, messenger service, distribution of U.S. mail, postage equipment, copiers and in-house graphic services such as composition, design and high volume document reproduction.

Law Library Section

The Law Library Section is operated and maintained to provide legal 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 from other libraries and sources when necessary.

The library staff also maintains individual office collections and provides advice and aid to the regional and field offices.

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

The library print collection includes federal laws and case reports (Statutes at Large, U.S. Code and Congressional Administrative News, U.S. Code Annotated, U.S. Code Service, Code of Federal Regulations, Federal Register, Supreme Court Reports, Federal Reporter, Federal Supplement, digests), other state references (National Reporter System, Shepard's Citations, American Law Reports), and Pennsylvania statutes, case reports and other relevant legal information (appellate court reporters, side reports, Attorney General opinions, treatises, Purdons Statutes, Pa. Code). Also included are encyclopedias (Corpus Juris Secundum, AmJur 2d, Words and Phrases), legal newspapers, law reviews, legal periodicals and loose-leaf services (CCH and BNA).

Data Processing Section

The Data Processing Section is charged with providing technical support for mainframe and personal computer applications including such activities as electronic mail, word processing and general automated information processing.

Computer support is provided by two mainframe computers located in the Harrisburg headquarters. A statewide data communication network links data terminals and desktop personal computers to the mainframes from all Office of Attorney General regional offices.

Technical and operational support for office filing and record maintenance systems is provided by the records management office of the Data Processing Section.

OFFICIAL OPINION NO. 89-1

Pennsylvania Liquor Control Board—The Liquor Code—Powers of Board—Purchase of Liquor—Check Guarantee System.

1. The Liquor Code gives the Liquor Control Board authority to decide the manner of payment for sales of liquor in state liquor stores.
2. The Board is authorized to establish and make contracts for a check guarantee system to be used in retail liquor stores.

February 16, 1989

James A. Goodman
Chairman of Board
Pennsylvania Liquor Control Board
518 Northwest Office Building
Harrisburg, PA 17124

Dear Chairman Goodman:

On behalf of the Pennsylvania Liquor Control Board (the Board) you have requested my opinion about the Board's authority to contract for check guarantee services. It is my opinion that the Board is authorized by the Liquor Code to make a contract with a vendor to provide check guarantee services.

As you describe the proposal, customers in Board retail stores, upon presentation of proper identification, would receive immediate approval of their personal checks when making purchases. The check guarantee vendor would immediately pay one hundred percent of the check amount to the Board if a check is returned for any reason by the financial institution upon which the check is drawn.

The Liquor Code, which was amended and reenacted as the Act of June 29, 1987, P.L. 32, No. 14, 47 P.S. § 1-101 *et seq.*, provides for Pennsylvania liquor stores to sell liquor both at retail and wholesale. 47 P.S. § 3-305(a) and (b). Section 305(b) specifically provides that a person "entitled to purchase liquor at wholesale prices" may do so by "tendering cash, check or credit card for the full amount of the purchase." 47 P.S. § 3-305(b).

There is no similar provision which specifically names the types of negotiable instrument to be used for the purchase of liquor at retail prices. I note, however, that when the new Liquor Code was enacted, the General Assembly deleted the old Code requirement, also in Section 305(b), that "no liquor shall be sold except for cash..." This limitation immediately followed

the provision that all sales at liquor stores, other than those identified by statute as wholesale, shall be at retail. The removal by the General Assembly of the specific limitation that sales be for cash evinces an intention to permit the Board to decide what manner of payment is to be accepted under the Board's authority to manage the liquor stores as the Board deems necessary or advisable to carry out the purposes of the Liquor Code. 47 P.S. § 2-207(h).

The General Assembly having acted to remove the prohibition on transactions using checks, the proposed action of the Board to obtain coverage by a check guarantee service for any checks which are not paid can provide protection to the Board against loss of revenue and reduce the cost of collection to the Commonwealth. As such, the proposed action is within the realm of activity appropriate for the Board in the exercise of its statutory managerial authority.

It is my opinion and you are hereby advised that the Pennsylvania Liquor Board has the authority to let a contract for services to guarantee the payment of checks presented by customers in Pennsylvania liquor stores.

You are further advised that in accordance with Section 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.

Sincerely yours,

Ernest D. Preate, Jr.
Attorney General

OFFICIAL OPINION NO. 89-2

State Civil Service Commission—Application of Veterans' Preference in Civil Service Examinations.

1. The veterans' preference is authorized by the Pennsylvania Military Code, 51 Pa.C. S. § 7101-7109.
2. Anyone who served in the armed forces of the United States since July 27, 1953, and fulfills the other statutory requirements is eligible for the veterans' preference .

May 12, 1989

Therese L. Mitchell
Chairman
Pennsylvania State Civil Service Commission
12th Floor, State Street Building
Harrisburg, PA 17108-0569

Dear Chairman Mitchell:

On behalf of the State Civil Service Commission, you have requested my opinion on the application of veterans' preferences in civil service examinations. Specifically, you have asked whether the preferences are limited to individuals who served during a recognized period of war or armed conflict. It is my opinion and you are hereby advised that the preference is available to anyone who has served in the armed forces of the United States since July 27, 1953.

The veterans' preference is authorized by Chapter 71 of the Pennsylvania Military Code (Code), 51 Pa.C.S. §§ 7101-7109. Section 7104 of the Code, 51 Pa.C.S. § 7104, provides that a soldier who possesses the requisite qualifications under the Code is entitled to the benefits authorized by the Code.

The term "soldier" is defined in the Code to mean

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

The use of the disjunctive "or" means that any "person who served in the armed forces of the United States" after July 27, 1953, is eligible for veterans' preference if all other qualifications are met. A person who served in the armed forces before July 27, 1953, is not eligible for any preference unless he or she served "during any war or armed conflict in which the United States engaged."

The intent of the General Assembly is that a soldier be given credit, under the Code, "for the discipline and experience represented by his military

training and for the loyalty and public spirit demonstrated by his service for the preservation of his country.” 51 Pa.C.S. § 7102. Neither this section nor Section 7101, *supra*, limits the preference based on the type or place of service. A soldier is anyone who served in the armed forces of the United States after July 27, 1953. *Herskovitz v. State Civil Service Commission*, 111 Pa. Commonwealth Ct. 427, 534 A.2d 160 (1987).

It is my opinion and you are hereby advised that anyone who served in the armed forces of the United States since July 27, 1953, is a soldier for the purposes of the veterans’ preference provisions of the Military Code of Pennsylvania.

You are further advised that in accordance with Section 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.

Sincerely,

Ernest D. Preate, Jr.
Attorney General

OFFICIAL OPINION NO. 89-3

Pennsylvania Department of Education—Transportation of School Students—Free Transportation for Nonpublic School Students on Field Trips.

1. The Public School Code provides generally for the free transportation of school students including transportation for field trips.
2. A field trip program under which private school students, including those attending sectarian schools, will participate in field trips, planned, conducted and paid for by public school districts is constitutional.
3. The Pennsylvania field trip program is distinguished from the Ohio program invalidated by the Supreme Court in *Wolman v. Walter*, 433 U.S. 229 (1977).

May 31, 1989

Honorable Thomas K. Gilhool
Secretary
Pennsylvania Department of Education
333 Market Street, Harrisburg 2
Harrisburg, PA 17126

Dear Secretary Gilhool:

You have asked for my opinion on the constitutionality of an arrangement under which private school students, including those attending sectarian schools, will participate in field trips planned, conducted and paid for by public school districts. It is my opinion and you are hereby advised that such a program, carried out under the Public School Code and the Act of December 29, 1972, P.L. 1726, No. 372, is constitutional.

Act 372 of 1972 amended the Public School Code of 1949, Act of March 10, 1949, P.L. 30, Art. XIII, *as amended*, and, specifically, Section 1361 of the Act, 24 P.S. § 13-1361. This section of the Public School Code provides generally for free transportation of all students to and from school. It also provides, in pertinent part:

When provision is made by a board of school directors for the transportation of public school pupils to and from such schools or to and from any points within or without the Commonwealth in order to provide field trips as herein provided, the board of school directors shall also make identical provision for the free transportation of pupils who regularly attend nonpublic kindergarten, elementary and high schools not operated for profit to and from such schools or to and from any points within or without the Commonwealth in order to provide field trips as herein provided. Such transportation of pupils attending nonpublic schools shall be provided during regular school hours on such dates and periods that the nonpublic school not operated for profit is in regular session, according to the school calendar officially adopted by the directors of the same in accordance with provisions of law. 24 P.S. § 13-1361(1).

In *Springfield School District v. Dept. of Education*, 483 Pa. 539, 397 A.2d 1154 (1979), the Pennsylvania Supreme Court found Section 1361 of the School Code and the providing of free transportation to and from school to be constitutional. The court specifically noted, however, that the field trip provision of Section 1361 was not before the court, and the court did not consider its constitutionality. *Springfield School District v. Dept. of Education*, 483 Pa. 539, at 553, footnote 6. The court further noted that the state Attorney General had ruled the field trip provision to be unconstitutional in its application to sectarian nonpublic schools. 1977 Op. Atty. Gen. No. 15. See also, *McKeesport Area School Dist. v. Penna. Dept. of Education*, 446 U.S. 970, at 973 (1979).

The Attorney General's opinion declared the field trip provision to be unconstitutional because it is substantially similar to an Ohio field trip transportation statute which was declared to be unconstitutional by the

United States Supreme Court in *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977).

The Supreme Court decided that the Ohio statute was defective on several counts:

- 1) The nonpublic school plans and controls the timing, frequency and destinations of the trips and, thus, the program constitutes impermissible direct aid to nonpublic schools, and
- 2) The effect of a field trip is under the control of the teacher conducting it, and “where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable by-product,” and
- 3) Public school authorities would not be able to insure the secular nature of field trips planned and conducted by nonpublic schools without close supervision of the teachers, thus creating “excessive and enduring entanglement between church and state.”

433 U.S. 229, at 253-254.

The constitutional defect which the Supreme Court found in the Ohio statute is based on the possibility of what might happen on any given field trip. Although the Court, quoting *Leman v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), stated that it “need not and [does] not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment,” the Court, nonetheless, invalidated the Ohio field trip transportation statute on its face without considering any evidence as to how the statute had actually been applied. *Bowen v. Kendrick*, 487 U.S. 589, 108 S.Ct. 2562 (1988).

Under the Commonwealth Attorneys Act, the Attorney General is obligated to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction. 71 P.S. § 732-204(a)(3). It is my opinion that *Wolman v. Walter* is not controlling in the context you have raised, notwithstanding that the Supreme Court in *Wolman* declared the Ohio statute invalid on its face.

The Supreme Court has recognized that there is a basis for distinguishing between the validity of a statute on its face and its validity in particular

applications. *Bowen v. Kendrick*, 487 U.S. 589, at 602, 108 S.Ct. 2562, at 2570. Whether or not there was a record in *Wolman* on how the Ohio statute was implemented¹, somewhere along the line the courts in that case made some assumptions about how the statute would be administered. The assumptions were that the timing, frequency, and destination of the trips were under the control of the nonpublic school, that a sectarian teacher might not be able to remain religiously neutral in conducting the field trip and that there was no technique public school officials could use to monitor the field trip program without excessively entangling themselves in the sectarian school's business. The decision in *Wolman* depends on these assumptions.

The opinions authorized by Section 204(a) of the Commonwealth Attorneys Act are advisory, not adjudicatory. Although I do not decide individual cases, no statute or program thereunder can be interpreted and analyzed wholly out of context. In this sense, despite the characterization of the *Wolman* decision as being a facial analysis, the assumptions used by the courts were determinative of the outcome. The assumptions took the place of a record on how the field trip transportation statute would be applied.

This current opinion is based on an analysis of the Pennsylvania statute as applied to the program described in your letter. Based on that information, the problems identified by the Supreme Court in *Wolman* do not attend the program proposed for Pennsylvania schools as set forth in your letter. In contrast to the program contemplated by the Ohio statute declared invalid in *Wolman*, in the Pennsylvania program it is my understanding that the public school will plan and control the timing, frequency and destinations of the field trips and will place public school teachers in control of the trip and its educational content. Because no authority is to be surrendered to the non-public schools, there is no need for the public school officials to entangle themselves in sectarian business.

The activity supported thus is substantially similar to transportation and, as such, is permitted under the authority of *Springfield School District v. Dept. of Education*, *supra*. All planning and implementation of the field trip transportation program must also be conducted according to all other requirements and restrictions set forth in the Public School Code and any other statute or regulation of the Department.

1. The Supreme Court in *Wolman* does not refer to any record on how the statute was to be implemented, and, in *Bowen*, the Court acknowledged there was no such record. 108 S.Ct. 2562, at 2569.

It is my opinion and you are hereby advised that the Secretary of Education may authorize school districts to permit nonpublic school students to join public school field trips under the authority of Section 1361 of the Public School Code. You are further advised that in accordance with Section 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.

Sincerely,

Ernest D. Preate, Jr.
Attorney General

OFFICIAL OPINION NO. 89-4

*Department of General Services—Board of Commissioners of Public Grounds and Buildings—
Sections 402 and 404 of the Fiscal Code—Auditor General.*

1. The Fiscal Code and the Constitution preclude the Auditor General from serving on the Board of Commissioners of Public Grounds and Buildings.
2. Attorney General's Opinion No. 9 of 1977 was correct in its conclusion and is affirmed.

August 18, 1989

Honorable David L. Jannetta
Secretary
Department of General Services
515 North Office Building
Harrisburg, PA 17120

Dear Secretary Jannetta:

You have requested my official opinion on the question of whether the Auditor General may serve as a member of the Board of Commissioners of Public Grounds and Buildings (Board). The Board is made part of the Department of General Services by Section 202 of the Administrative Code of 1929, 71 P.S. § 62. It is my opinion and you are hereby advised that the Constitution and the laws of Pennsylvania preclude the Auditor General from serving and, therefore, from voting as a member of the Board.

This question was addressed in Attorney General's Opinion No. 9 of 1977. In that Opinion, former Attorney General Robert P. Kane determined that Article VIII, Section 10 of the Pennsylvania Constitution and Sections 402 and 404 of the Fiscal Code, as amended by the Act of March 18, 1971, P.L. 110, No. 4, 72 P.S. §§ 402 and 404, together operate to bar the Auditor General from serving on the Board.

Article VIII, Section 10 of the Constitution provides that a Commonwealth officer whose approval is necessary for any Commonwealth financial transaction shall not be charged with auditing that transaction. Section 402 of the Fiscal Code requires the Auditor General, unless otherwise provided by law, to audit all Commonwealth financial transactions after their occurrence. Section 404 provides that no Commonwealth officer charged with auditing transactions after their occurrence shall approve the same transactions prior to their occurrence.

The Auditor General is assigned membership on the Board, along with the Governor and the State Treasurer, by Section 446 of the Administrative Code of 1929, 71 P.S. § 156. The principal function of the Board, however, is "to approve or disapprove all proposed leases for offices, branch offices, rooms and accommodations," Administrative Code of 1929, Section 2413, 71 P.S. § 643; and the Auditor General is clearly required by Section 402 of the Fiscal Code to audit all such leases.¹

The 1977 Opinion thus concluded that because serving on the Board would place the Auditor General in the position of initially approving and thereafter auditing the same transactions, the Constitution and Section 404 of the Fiscal Code bar such service. The Opinion rejected the notion that the approval function should prevail over the audit function. That interpretation, the Opinion observed, would yield the absurd and undesirable result of allowing Board transactions to go unaudited.

It is my opinion that the 1977 Opinion is still a correct statement of the law of Pennsylvania. I am supported in my opinion, moreover, by the subsequent decision of the Pennsylvania Supreme Court in *Lutz Appellate Printers, Inc. v. Commonwealth*, 485 Pa. 559, 403 A.2d 530 (1979), which confirmed that the Constitution and Section 404 of the Fiscal Code preclude the Auditor General from approving any contract or other transaction that the Auditor General is required by law to audit.

1. The Board also approves certain other incidental financial transactions. See Administrative Code of 1929, Section 2409, 71 P.S. § 639. Such transactions are also subject to audit by the Auditor General pursuant to Section 402 of the Fiscal Code.

In *Lutz*, the low bidder on a Commonwealth contract sought to enjoin the award of the contract to another bidder. The plaintiff named the Auditor General as a defendant because Section 2410 of the Administrative Code of 1929, 71 P.S. § 640, provides in part that “all contracts [for public printing and binding] shall be severally void, unless first approved by the Governor, the Auditor General, and the State Treasurer.” The Auditor General argued that the Fiscal Code withdraws the Auditor General’s authority to approve the contract that was the subject of the suit and that, therefore, he was not a proper party.

The Supreme Court agreed. The Court held that the broad language of Sections 402 and 404 of the Fiscal Code, read together, “expressly withdraw the Auditor General’s power under Section 2410 to approve the Department’s award of a ‘public printing and binding’ contract.” *Lutz, supra*, 485 Pa. at 572. The Court viewed as irrelevant that Section 2410 of the Administrative Code (like Section 2413 at issue here) merely directs the Auditor General’s “approval” of the award and does not require “an inquiry into the financial nature of the transaction.” *Id.* at 571-572.

You should further note that the same conclusion reached by me in this Opinion, by the Pennsylvania Supreme Court in *Lutz* and by Attorney General Kane in Opinion No. 9 of 1977 was reached in yet another analogous context by former Attorney General Israel Packel in Opinion No. 64 of 1973. The Act of May 21, 1931, P.L. 185, No. 113, established a board of trustees, consisting of the Governor, the Auditor General and the State Treasurer, to manage a fund established for the preservation of the Cornwall Furnace historical property in Lebanon County. Observing that the Auditor General’s approval of expenditures from the Cornwall Furnace Trust Fund would violate Section 404 of the Fiscal Code, the Attorney General determined that Section 404 prevails over the 1931 Act as the later-enacted statute, Statutory Construction Act, 1 Pa.C.S. § 1936, and that, therefore, the Auditor General is barred from serving as a trustee.

The Statutory Construction Act provides that the provisions of every statute are severable, unless the remaining valid provisions are incapable of being executed in accordance with the legislative intent. Statutory Construction Act, 1 Pa.C.S. § 1925. The 1973 Opinion applied that principle to conclude that deletion of the Auditor General as a trustee is not inconsistent with the purpose of the Act establishing the trust fund and that the approval of the Governor and the State Treasurer is sufficient to authorize expenditures from the fund.

Likewise, it is my conclusion that, for the reasons expressed in this

Opinion, the Auditor General is barred from serving on the Board of Commissioners of Public Grounds and Buildings, that deletion of the Auditor General from the Board is not inconsistent with the purpose of the Board's enabling act and that the approval of the Governor and the State Treasurer is sufficient to authorize leases for offices, branch offices, rooms and accommodations.

Indeed, the severability of the provision for participation by the Auditor General on the Board is manifest in the history of the Board's operation. Ever since then—Auditor General Robert P. Casey, following adoption of the Pennsylvania Constitution of 1968, determined that the law precluded him from serving on the Board, the Board has functioned solely on the votes of the Governor and the State Treasurer, executing the legislative mandate to approve or disapprove the subject Commonwealth lease transactions without any participation by the Auditor General.

Finally, you are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you are required to follow the advice set forth in this Opinion and shall not in any way be liable for doing so.

Sincerely yours,

Ernest D. Preate, Jr.
Attorney General

OFFICIAL OPINION NO. 90-1

Pennsylvania Department of Revenue—The Fiscal Code—The Tax Reform Code—Confidentiality of Tax Records—Official Purposes—Contractor Responsibility.

1. The Department of Revenue, pursuant to the “official purposes” exception to the confidentiality requirements of the Fiscal Code and the Tax Reform Code, is authorized to release information regarding delinquent tax accounts to a centralized information system accessible by authorized agency officials in the context of a contractor responsibility program.
2. The “official purposes” exception to the confidentiality requirements of the Fiscal Code and the Tax Reform Code means official tax administration or tax collection purposes.
3. The use of tax information to collect delinquent tax payments from prospective state contractors is an “official purpose” within the meaning of the Fiscal Code and the Tax Reform Code.

May 9, 1990

Honorable David L. Donahoe
Secretary
Department of Revenue
11th Floor, Strawberry Square
Harrisburg, PA 17120

Dear Mr. Donahoe:

You have requested my opinion on whether the Department of Revenue, consistent with the Fiscal Code and the Tax Reform Code of 1971, may provide information indicating that a taxpayer is delinquent to a centralized information system accessible by authorized agency officials in the context of a contractor responsibility program. It is my opinion and you are so advised that the Department may provide such information without violating the Fiscal Code or the Tax Reform Code.

In your opinion request, you describe the outlines of a contractor responsibility program, one feature of which is the identification of contractors who are seeking to do business with the Commonwealth and who are delinquent in their payment of state taxes. This feature of the program serves the dual interests of assuring that the Commonwealth does business only with financially responsible contractors and aiding the ongoing process of tax collection.

As you know, this Office already operates a contract match program. The Commonwealth Attorneys Act requires us to review for form and legality all proposed state contracts. The Act also requires us to collect, by suit or otherwise, all debts, taxes and accounts due the Commonwealth. Since we maintain computerized dockets for both purposes, we are able to and do electronically match those dockets to identify prospective contractors who owe the Commonwealth money.

In the course of establishing our contract match program, we examined internally essentially the same question on which you have requested my opinion. The Fiscal Code and the Tax Reform Code each require that tax information be kept confidential, except for official purposes. Specifically, the Fiscal Code provides that:

Any information gained by any administrative department, board, or commission, as a result of any returns, investigations, hearings or verifications required or authorized under the statutes of the Commonwealth imposing taxes or bonus for State purposes, or providing for the collection of the same, shall be confidential except for official purposes. . . .

72 P.S. § 731. Similarly, the Tax Reform Code includes the following provisions relating respectively to sales and use, personal income and corporation taxes:

Any information gained by the department as a result of any return, examination, investigation, hearing or verification, required or authorized by this article, shall be confidential, except for official purposes and except in accordance with proper judicial order or as otherwise provided by law. . . .

72 P.S. § 7274.

It shall be unlawful for any officer, agent or employee of the Commonwealth to divulge or to make known in any manner whatever, not provided by law, except for official purposes, to any person, the amount or source of income, profits, losses, expenditures or any particular thereof set forth or disclosed in any return, or to permit any return or copy thereof or any book containing any abstract or particulars thereof, to be seen or examined by any person except as provided by law and it shall be unlawful for any person to print or publish in any manner whatsoever not provided by law, any return or any part thereof or source of income, profits, losses or expenditures appearing in any return. . . .

72 P.S. § 7353(f).

The department, or any agent authorized in writing by it, is hereby authorized to examine the books, papers, and records, and to investigate the character of the business of any corporation in order to verify the accuracy of any report made, or if no report was made by such corporation, to ascertain and settle the tax imposed by this article. . . . Any information gained by the department, as a result of any returns, investigations, or verifications required to be made by this article, shall be confidential, except for official purposes. . . .

72 P.S. § 7408(b). Each of these provisions is enforceable by criminal penalties.

Obviously, my response to your request for advice requires us to determine what is meant by the term “official purposes.” In prior informal opinions rendered by this Office to state agencies, we have consistently interpreted “official purposes” to mean official tax administration or tax collection purposes. Our reasoning has been that if “official purposes” is interpreted to have a broader meaning—if, for example, it is interpreted to mean any purpose within the statutory powers of any state agency—then the requirement of confidentiality would have very little meaning. Tax records would become openly accessible, without judicial review or other protection, for a wide variety of regulatory and investigatory purposes. We are firmly of the view that the General Assembly intended no such result. In our opinion, tax records may be released for a purpose other than tax administration or collection only with the consent of the taxpayer or pursuant to a court order.

Clearly, both your Department and this Office can access tax records for tax collection purposes. But can either or both of our agencies share with other state agencies tax information indicating specifically that a particular taxpayer is delinquent in tax payments? Resolution of that question turns on the purpose for which we are providing the information; and we have no difficulty concluding, both in the context of your contractor responsibility program and our contract match program, that the purpose is predominantly tax collection and exclusively related to the financial responsibility of the prospective contractor.

When we match a prospective contractor with a delinquent tax account, we take several steps aimed at verifying the match and collecting the tax. Among those steps, assuming verification of the match, is to return the contract to the contracting agency without approval, reciting as the reason therefore the prospective contractor’s liability to the Commonwealth. Also

among those steps is to contact the debtor with a view toward obtaining either immediate satisfaction of the debt or agreement to a plan of repayment. Although it may happen that the contracting agency will decline to do business with the contractor or that this Office will decline approval of the contract, such outcomes are not the purpose of our contract match program, which, consistent with our duties under the Commonwealth Attorneys Act, is to collect the debt.

The contractor responsibility program that you describe in your letter obviously has other, albeit related and also important, purposes in addition to the collection of taxes.¹ Our inquiry, however, must focus on that aspect of the program pursuant to which your agency would identify delinquent tax accounts to a centralized information system accessible by authorized officials involved in the contractor responsibility program in other state agencies. The purpose of that aspect of the program, while perhaps not exclusively tax collection, seems clearly to us to be predominantly tax collection. We base that conclusion on your representation that prospective contractors identified as delinquent in their taxes will be afforded an opportunity to satisfy or arrange to satisfy their obligations before they are denied contracts for failure to satisfy such obligations. You further represent that officials allowed access to information on delinquent tax accounts will be instructed that such information may be used only for collection purposes.

We should note that, to the extent that liens are filed of record because of unpaid taxes, information regarding such unpaid taxes is available to the public and, therefore, is not confidential under the Fiscal Code or the Tax Reform Code.

In summary, it is my opinion and you are hereby advised that the disclosure of tax information by the Department of Revenue to a centralized information system for the purposes and in the manner described in your request for legal advice falls within the “official purposes” exception to the confidentiality requirements of the Fiscal Code and the Tax Reform Code. You are further advised that in accordance with Section 204(a)(1) of the Common-

1. The Pennsylvania Supreme Court has consistently held that public officials must exercise sound discretion in selecting a contractor. *McIntosh Road Materials Co. v. Woolworth*, 365 Pa. 190, 208, 74 A.2d 384, 392 (1950). Officials should investigate financial standing, reputation, resources and judgment and should investigate financial standing, reputation, resources and judgment and should “call to their assistance the means of information at hand to form an intelligent judgment.” *Hibbs v. Arensberg*, 276 Pa. 24, 29, 119 A. 727, 729 (1923).

wealth Attorneys Act, 71 P.S. § 732-204(a)(1), you are required to follow the advice set forth in this opinion and shall not in any way be liable for doing so.

Very truly yours,

Ernest D. Preate, Jr.
Attorney General

OFFICIAL OPINION NO. 90-2

Pennsylvania Fish Commission—Game Commission—Compliance with Management Directives—Powers of Governor over Expenditures for Automated Technology.

1. The Commissions are not required to observe the Governor's Management Directives on Automated Technology.
2. The Governor has authority to disapprove specific expenditures of the Commissions for both program-specific and general fiscal reasons.

November 7, 1990

Peter S. Duncan
Executive Director
Game Commission
2001 Elmerton Avenue
Harrisburg, PA 17110-9797

Edward R. Miller
Executive Director
Fish Commission
353 2 Walnut Street
P. O. Box 1673
Harrisburg, PA 17105-1673

Dear Mr. Duncan and Mr. Miller:

You have requested my opinion whether the Fish and Game Commissions

(the Commissions) are required to comply with directives on the management and acquisition of automated technology issued by the Governor's Office of Administration. You have also asked whether the Governor's authority to disapprove estimates of Commission expenditures includes the authority to rescind approval of specific expenditure items in an approved Commission budget.

It is my opinion and you are hereby advised that the Commissions are not required to observe the Governor's management directives on automated technology, but that the Governor is indeed authorized, pursuant to the proper exercise of authority conferred by Section 615 of the Administrative Code, 71 P.S. § 235, and by comparable provisions of the Game and Wildlife and the Fish and Boat Codes, to rescind approval of specific expenditure items in an approved Commission budget.

On November 18, 1988, Governor Casey issued Executive Order 1988-10, the stated purpose of which is "to establish accountability and implement managerial control for the protection of [information] assets, to provide consistency in the acquisition and management of resources, and to introduce automated technology which best serves State government in the delivery of information services." Implementing this executive order, the Secretary of Administration issued Management Directives No. 245.1 and 245.4, which prescribe a procedure by which automated technology multiyear plans are prepared by agencies and submitted to the Office of Administration for approval. By their terms, these management directives are applicable to "all agencies under the Governor's jurisdiction."

As I understand the circumstances that prompted your request for this opinion, Governor Casey, faced midway through the 1989-90 fiscal year with revenue shortfalls, ordered across-the-board spending-cuts focused primarily upon expenditures for automobiles and automated technology. The mechanism through which the Administration implemented the moratorium on automated technology acquisitions was the approval procedure prescribed in the previously-issued management directives on automated technology. Prior to the moratorium, the Commissions had complied voluntarily with the management directives. Presented, however, with disapprovals of expenditures for equipment that the Commissions considered essential for their operations, the Commissions protested that, as independent agencies, they are not subject to the Governor's management directives on automated technology.

The Commissions are established by their respective enabling statutes as "independent administrative commissions." 30 Pa.C.S. § 301(a) and 34

Pa.C.S. § 301(a). In *Shovel Transfer and Storage, Inc. v. Simpson. et al.*, No. 1222 C.D. 1987 (Memorandum Opinion filed June 10, 1988), the Commonwealth Court considered the relationship between the Governor and the “independent” Pennsylvania Liquor Control Board. The Court observed that independence connotes autonomy, but that, as reflected in various provisions of law, the Governor properly exercises some control over Board matters. Reconciling these competing considerations, the Court held that, “[b]ecause the autonomous nature of the Board should be preserved in accordance with the legislative intent,...the Governor’s control and influence over that Board must be limited to those powers expressly conferred to him by statute or constitution.” Mem. Op., p. 6.

Applying the *Shovel Transfer* analysis to the first question presented in your opinion request, we have found no constitutional or statutory provision that expressly authorizes the Governor to exercise administrative control over the management and acquisition of automated technology by the Commissions. The Governor’s General Counsel, nevertheless, has advanced the view that the Governor’s budgetary powers supply the requisite authority. Those powers are described principally in Article VI of the Administrative Code, 71 P.S. §§ 229-240.1, which confers upon the Governor expansive authority with respect to budget preparation and expenditure review and approval.

Section 610 of the Administrative Code, 71 P.S. § 230, authorizes the Governor, through the Budget Secretary, to collect comprehensive and detailed financial and program information from agencies receiving funds from the State Treasury and, after affording such agencies an opportunity to be heard, to approve, disapprove or alter their budget requests. Section 615, 71 P.S. § 235, provides the Governor with ongoing authority to review and approve estimates of agency expenditures. That section provides, in relevant part, as follows:

Each administrative department, board and commission, except the departments of which the Auditor General, the State Treasurer and the Attorney General are respectively the heads, shall from time to time, as requested by the Governor, prepare and submit to the Secretary of the Budget, for approval or disapproval, an estimate of the amount of money required and the levels of activity and accomplishment for each program carried on by each department, board or commission, during the ensuing month, quarter, or such other period as the Governor shall prescribe. All available Federal funds and funds from other sources shall be characterized as such and shall be included in the estimated expenditures which must be

submitted to the Secretary of the Budget before any expenditures therefrom may be made. If such estimates do not meet with the approval of the Secretary of the Budget, it shall be revised as necessary and resubmitted for approval. . . .

Provisions comparable to Section 615 of the Administrative Code are found in the Commissions' enabling statutes. The Game and Wildlife Code provides:

Expenditures from Game Fund.—The commission shall submit to the Governor, for approval or disapproval, estimates of the amount of moneys to be expended from the Game Fund. The State Treasurer shall not honor any requisition for expenditure of any moneys in excess of the amount approved by the Governor. Moneys in the Game Fund shall be paid out upon warrant of the State Treasurer drawn after requisition by the director of the commission.

34 Pa.C.S. § 522(c). The Fish and Boat Code provides:

Expenditures from Fish Fund

(a) Approval of estimated expenditures—Estimates of amounts to be expended under this subchapter, from time to time, by the commission shall be submitted to the Governor for his approval as in the case of other appropriations made to Commonwealth agencies.(b) Expenditures not to exceed approved estimates.—The State Treasurer shall not honor any requisition for the expenditure of any moneys by the commission in excess of the estimates approved by the Governor or in excess of the amount available for the purposes for which the requisition was made.

30 Pa.C.S. § 522.

Expenditures from Boat Fund

(a) Approval of estimated expenditures.—Estimates of amounts to be expended under this subchapter, from time to time, by the commission shall be submitted to the Governor for his approval as in the case of other appropriations made to Commonwealth agencies.

(b) Expenditures not to exceed approved estimates.—The State Treasurer shall not honor any requisition for the expenditure of any

moneys by the commission in excess of the estimates approved by the Governor or in excess of the amount available for the purposes for which the requisition was made.

30 Pa.C.S. § 532. Since those several provisions relate commonly to the Governor's authority to disapprove estimates of expenditures, they are properly read in *pari materia* and construed together as one statute. Statutory Construction Act, 1 Pa.C.S. § 1932.

In the General Counsel's calculus, the Governor merely delegated his power to disapprove estimates of Commission expenditures for automated technology, which he otherwise would exercise through the Budget Secretary, to the Secretary of Administration. Yet, in addition to the authority to approve acquisitions of automated technology, Executive Order 1988-10 delegated to the Secretary of Administration authority to "[e]stablish policies, procedures, and guidelines governing the planning, management, security... and use of automated technology assets."

In my opinion, the Governor's budgetary powers do not authorize the Governor to exercise over independent agencies the administrative control that the Governor delegated to the Secretary of Administration in Executive Order 1988-10. If I were to conclude otherwise, then the Governor's budgetary powers would enable the Governor to exercise virtually limitless control over the management of independent agencies, an outcome manifestly inconsistent with legislative intent. *See Shovel Transfer and Storage, supra; Cloonan v. Thornburgh*, 103 Pa. Commonwealth Ct. 1, 519 A.2d 1040 (1986). Indeed, even assuming that the Governor can delegate his budgetary powers, or some aspect thereof, to the Secretary of Administration, a substantial question remains, which is articulated in the second inquiry of your opinion request, whether the authority to disapprove estimates of Commission expenditures can be targeted to specific expenditure items such as automated technology or automobiles.

Section 615 authorizes the Budget Secretary, at such times as the Governor determines, to review and approve estimates of expenditures for each "program" carried on by the Commissions and, in the event of disapproval, to require revision "as necessary." In my judgment, this authority to disapprove and to require revision of expenditure estimates for particular programs necessarily includes the authority to disapprove specific expenditure items within such estimates.¹ The Budget Secretary might conclude, for example,

1. In view of the ongoing nature of the expenditure review authority conferred upon the Governor by Section 615, there is no analytical difference between an expenditure disapproval and the rescission of a prior expenditure approval.

that the projected cost of a particular item is wholly disproportionate to the program need it is intended to serve. The obvious limit upon this authority is that it must be exercised reasonably in the interest of fiscal oversight rather than program control.

Of course, a categorical spending moratorium is the antithesis of a program-specific expenditure disapproval. Section 615, however, does not limit the Governor's expenditure disapproval authority to disapprovals premised on program considerations. A spending moratorium implemented to mitigate adverse budgetary consequences resulting from projected revenue shortfalls clearly serves important fiscal objectives; and it would be quite anomalous to conclude that the Governor's expenditure disapproval authority may be exercised to assure the fiscal integrity of particular programs but not to serve the broader fiscal interests of state government. Accordingly, it is my opinion that the Governor's authority to disapprove Commission estimates of expenditures includes the authority to disapprove specific expenditure items whether for program-specific reasons or pursuant to measures implemented generally to address fiscal concerns of similarly general scope.²

You are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you are required to follow the advice set forth in this opinion and shall not in any way be liable for doing so.

Very truly yours,

Ernest D. Preate, Jr.
Attorney General

2. Actually, the Governor's moratorium on automated technology acquisitions allowed exceptions based upon special program needs demonstrated by the affected agency and approved by the Secretary of Administration. While I do not subscribe to the General Counsel's view that the Governor's budgetary powers authorize the Governor to assert administrative control over the Commissions' acquisition of automated technology, I see no legal impediment to the Governor involving the Secretary of Administration in the expenditure review process to the extent of evaluating an agency's special need for an item otherwise subject to a categorical spending moratorium.

OFFICIAL OPINION NO. 91-1

State System of Higher Education—Governor's Authority to Reduce System's Appropriation.

1. The Governor does not have the constitutional or statutory authority to order the reduction of the State System of Higher Education's appropriation in aid of efforts to maintain a balanced operating budget for Commonwealth government.
2. The Board of Governors of the State System of Higher Education is authorized to cooperate with the Governor in addressing budget difficulties as long as doing so is not inconsistent with the State System's objectives.

July 9, 1991

F. Eugene Dixon, Jr.
Chairman
Board of Governors
State System of Higher Education
P.O. Box 178
Lafayette Hill, PA 19444

Dear Chairman Dixon:

On behalf of the Board of Governors of the State System of Higher Education, you have requested my opinion concerning the Governor's legal authority to direct the reduction of the System's appropriation after its enactment and the extent of Board members' personal liability should they draw the full appropriation from the State Treasury notwithstanding such direction from the Governor.

The State System of Higher Education is established by statute as "a body corporate and politic constituting a public corporation and government instrumentality. . . independent of the Department of Education." 24 P.S. § 20-2002-A. It consists of the fourteen state-owned universities and is governed by the Board of Governors who are authorized by statute to exercise all of its corporate powers. 24 P.S. § 20-2003-A.1. Funds for the operation of the System and its member universities are appropriated annually by the General Assembly. 24 P.S. § 20-2006-A.

At the request of the Governor, the Board of Governors voted on April 18, 1991, to transfer \$18.1 million to the Commonwealth's General Fund principally by means of a partial lapse of the System's remaining 1990-91

subsidy. The lapse is accomplished by a Board decision not to draw a specified sum from the State Treasury. The amount not drawn returns to the General Fund at the end of the fiscal year.

The Board acted consistent with a legal opinion provided by the System's Chief Counsel who advised the Board that, faced with projected revenue shortfalls, the Governor is authorized to impose a limited budget cut upon the State System as part of an overall effort to maintain a balanced operating budget for all of Commonwealth government. The Chief Counsel interpreted the Pennsylvania Constitution, Article VIII, Sections 12 and 13, to require "the development and maintenance of a balanced operating budget for Commonwealth government" and to "place a corresponding duty upon the three co-equal and independent branches of government to ensure that deficits do not occur." This duty, the Chief Counsel reasoned, confers upon the Governor "implied authority" to adjust the appropriated expenditures of Executive Branch agencies and instrumentalities, including the State System of Higher Education, as necessary to avoid a deficit.

Article VIII, Sections 12 and 13, provide in relevant part as follows:

§ 12. Governor's Budget and Financial Plan

Annually, at the times set by law, the Governor shall submit to the General Assembly:

(a) A balanced operating budget for the ensuing fiscal year setting forth in detail (i) proposed expenditures classified by department or agency and by program and (ii) estimated revenues from all sources. If estimated revenues and available surplus are less than proposed expenditures, the Governor shall recommend specific additional sources of revenue sufficient to pay the deficiency and the estimated revenue to be derived from each source;

§ 13. Appropriations

(a) Operating budget appropriations made by the General Assembly shall not exceed the actual and estimated revenues and surplus available in the same fiscal year.

By their terms, these provisions require the Governor to propose and the General Assembly to enact a balanced operating budget. They say nothing about the "maintenance" of a balanced operating budget following the enactment of operating budget appropriations. Thus, for the Chief Counsel's

opinion to be correct, the duty of the Governor to maintain a balanced operating budget must be implied; and from that implied duty in turn must be implied the authority of the Governor to reduce Executive Branch expenditures.

In my opinion, there is no basis, either in the text of the Constitution or in case law interpreting the Constitution, on which to imply a duty of the Governor (or the General Assembly for that matter) to maintain a balanced operating budget following the enactment of operating budget appropriations. Indeed, the New York Court of Appeals, interpreting comparable provisions of the New York Constitution, squarely held in *County of Oneida v. Berle*, 49 N.Y.2d 515, 404 N.E.2d 133, 427 N.Y.S.2d 407 (1980), that the Governor had no such duty and therefore no inherent constitutional authority to reduce a lawful appropriation. Although obviously not binding upon the Pennsylvania courts, this decision by New York's highest judicial tribunal is, in my judgment, persuasive.

Like the Pennsylvania Constitution, the New York Constitution requires the Governor to propose a balanced budget, which upon passage by the Legislature and approval by the Governor becomes law. N.Y. Const. art. VII, §§ 2 and 4, art. IV, § 7; Pa. Const. art. VIII, § 12, art. IV, § 16. Acting as the Governor's agent, the New York State Budget Director had ordered the reduction of an appropriation for the maintenance and operation of local sewage treatment systems. Describing his action as one part of a comprehensive effort to tighten State spending, the Director argued that the Governor has a constitutional duty to maintain a balanced budget throughout the fiscal year and that such duty implies the constitutional power to reduce duly enacted appropriations. The Court rejected the argument as follows:

The constitutional argument, while simple, is fatally flawed. It is true, as respondents maintain, that opinions of this Court have recognized the Governor's constitutional obligation to propose a balanced budget. But at no time has the Court suggested that, once a budget plan is enacted, revenues and expenditures must match throughout the fiscal year. At any isolated point in time in the spending year, there must, as a practical matter, be some gap between the two. Recognizing this reality, the Court has but recently disclaimed any obligation on the part of the State to maintain a balanced budget. "[I]t is unattainable for any budget plan, perfectly and honestly balanced in advance, to remain in balance to the end of the fiscal year. There must . . . in every year be either a deficit or a surplus." Thus, respondent's premise is untenable.

Given the absence of an obligation to maintain a balanced budget, the constitutional argument falters. For if the Executive Branch is under no duty to reduce expenditures or raise revenues in order to retain an equilibrium as the year progresses, it can hardly possess implied power unilaterally to “reduce” a lawful appropriation. It is not possible to speak of the necessity for implying power to perform a nonexistent duty.

Berle, 49 N.Y.2d at 521-22, 404 N.E.2d at 136, 427 N.Y.S.2d at 411-12 (citations omitted, footnote omitted). The Court further explained that the implication of executive power to impound funds is inconsistent with the constitutional doctrine of separation of powers. *See also Community Action Programs Exec. Dir. Ass’n v. Ash*, 365 F. Supp. 1355 (D.C.N.J. 1973) (executive required to spend funds appropriated for a specific program).

My conclusion that the Governor has no constitutionally mandated duty to maintain a balanced budget should not be read to mean that the maintenance of a balanced budget is not an appropriate goal or that the Governor is powerless to pursue its accomplishment. Again, as the New York Court observed: “From a fiscal standpoint, it may be desirable to attempt to maintain revenues and expenditures in rough balance throughout the year. And it is not suggested that State government is powerless to do so by appropriate and constitutional means.” *Berle*, 49 N.Y.2d at 523-24, 404 N.E.2d at 138, 427 N.Y.S.2d at 412. In addition to the obvious alternative of requesting additional revenues from the General Assembly, the Governor of this State has substantial statutory power to control spending by executive agencies.

As I observed in Official Opinion No. 90-2, Article VI of the Administrative Code, 71 P.S. §§ 229-240.1, confers upon the Governor expansive authority with respect to budget preparation and expenditure review and approval. In particular, Section 615, 71 P.S. § 235, provides the Governor with ongoing authority throughout the fiscal year to oversee expenditures by administrative departments, boards and commissions. Specifically, it authorizes the Budget Secretary, at such times as the Governor determines, to review and approve and to require revision of estimates of expenditures for each program carried on by such departments, boards and commissions. It further prohibits expenditures in excess of the estimates approved by the Secretary. As I concluded in Opinion 90-2, the power conferred by Section 615 is properly exercised not merely to assure the fiscal integrity of particular programs but also to mitigate adverse budgetary consequences resulting from projected revenue shortfalls.

Of critical importance to this Opinion, however, is that Section 615 does not apply to every Executive Branch department, board and commission. By its terms, it does not apply to the Auditor General, the State Treasurer or the Attorney General. And, as provided specifically in the act establishing the State System of Higher Education, “the System shall be subject to Article VI of [the Administrative Code] *except for Section 615.*” 24 P.S. § 20-2006-A(7) (emphasis added).

Since I have found no other source of authority for the Governor to reduce the appropriation of the State System of Higher Education, it is my opinion, and you are so advised, that the Governor has no constitutional or statutory authority to order the reduction of the System’s appropriation after its enactment. You are further advised, in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), that members of the Board of Governors are protected from personal liability if, in the future, the Board decides to draw the full amount of the System’s subsidy from the State Treasury notwithstanding contrary direction from the Governor.

Having concluded that the Governor had no authority to compel the action taken by the Board on April 18, 1991, I would be remiss if I did not further address the issue of whether the Board acted lawfully within its own powers when it voted to lapse a part of the System’s 1990-91 subsidy. The System’s enabling act describes its purpose as “to provide high quality education at the lowest possible cost to the students” and its primary mission as “the provision of instruction for undergraduate and graduate students to and beyond the master’s degree in the liberal arts and sciences and in applied fields, including the teaching profession.” 24 P.S. § 20-2003-A. In fulfillment of that purpose and mission, the Act confers upon the Board of Governors “overall responsibility for planning and coordinating the development and operation of the System.” 24 P.S. § 20-2006-A.

Courts have held that an executive official is authorized to spend less than the full amount appropriated for a particular purpose when the statute describing that purpose confers discretion upon the official to determine expenditures. See *Campaign Clean Water, Inc. v. Train*, 489 F.2d 492 (4th Cir. 1973), *vacated on other grounds*, 420 U.S. 136 (1975) (Water Pollution Control Act conferred discretion on Administrator, in the interest of efficiency and economy, to spend only 45 percent of funds authorized); *Housing Auth. v. HUD*, 340 F. Supp. 654 (N.D. Cal. 1972) (non-mandatory language of Housing Act conferred discretion on Secretary to spend less than amount appropriated). Cf. *State Highway Comm’n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973) (spending discretion conferred by Highway Act did not authorize Secretary to withhold funds for anti-inflationary purposes).

Even absent such express authority, moreover, a compelling case can be made that executive officials have inherent authority, in the interest of efficient and economical management, to spend less than the full amount appropriated when doing so will not frustrate the underlying legislative purpose. *See Opinion of the Justices to the Senate*, 375 Mass. 827, 376 N.E.2d 1217 (1978) (proposed act prohibiting less than full expenditure by executive infringes upon executive prerogative to avoid wasteful spending in circumstances not compromising purpose of underlying legislation).

The power given to the Board of Governors to carry out its statutory responsibility is all but plenary. In provisions particularly relevant to this Opinion, the Board is empowered to establish broad fiscal policies under which the institutions of the System shall operate, to review, amend and approve the annual operating budgets of the individual institutions, to represent the System before the General Assembly, the Governor and the State Board of Education, and generally to do all things necessary to accomplish the objectives of the System. 24 P.S. § 20-2006-A.

While these powers certainly are not without limits, they are sufficient in my judgment to authorize the Board of Governors to cooperate with the Governor in addressing budget difficulties when doing so is consistent with the State System's objectives. In this regard, the Board's vote to lapse part of its 1990-91 subsidy is presumptively lawful and therefore entitled to the protection from liability that results from the request and observance of an Opinion of the Attorney General. 71 P.S. § 732-204(a)(1).

Finally, you are further advised in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act that you are required to follow the advice set forth in this Opinion and shall not in any way be liable for doing so.

Sincerely yours,

Ernest D. Preate, Jr.
Attorney General

OFFICIAL OPINION NO. 91-2

Civil Service Commission—Appointment of Hearing Examiners—Eligibility of Former Commissioners to Serve as Hearing Examiners.

1. The Civil Service Commission has the authority to appoint hearing examiners as designees of the Commission to conduct hearings and submit reports to the Commission.

2. Former Commissioners who are otherwise qualified may be appointed as hearing examiners.

August 28, 1991

Therese L. Mitchell
Chairman
State Civil Service Commission
P.O. Box 569
Harrisburg, PA 17120

Ethel S. Barnett
Commissioner
State Civil Service Commission
P.O. Box 569
Harrisburg, PA 17120

Elizabeth H. Kury
Commissioner
State Civil Service Commission
P.O. Box 569
Harrisburg, PA 17120

Dear Chairman Mitchell and Commissioners Barnett and Kury:

You have asked for my opinion concerning the authority of the Civil Service Commission to appoint hearing examiners. You have also asked whether the Commission may appoint former Commissioners as hearing examiners. It is my opinion and you are hereby advised that the Commission may appoint hearing examiners and that former Commissioners are not disqualified from being appointed as hearing examiners by virtue of their former status.

The Civil Service Commission (the Commission) was created to promote “[g]reater efficiency and economy in the administration of the government of this Commonwealth...” 71 P.S. § 741.2 (1990). Its primary objective is to ensure that qualified individuals of high character and merit are employed by the Commonwealth. *Id.* The Commission has the following specific responsibilities, among others:

- (1) After public hearing, as hereinafter set forth, to establish, adopt

and amend rules, either on its own motion or upon recommendation of the director, for making effective the provisions of this act.

(2) Upon request or on its own motion, as herein provided, in cases of demotion, furlough, suspension and removal to conduct investigations, hold public hearings, render decisions on appeals and record its findings and conclusions.

Id. § 741.203.

An employee in the classified service must receive written notice of any personnel action taken against him or her pursuant to the Civil Service Act. *Id.* § 741.950. For actions of permanent separation, suspension or demotion, such notice must set forth the reasons for the action. *Id.* Any employee in the classified service may appeal an action to the Commission. *Id.* § 741.951(a). Upon receipt of the notice of appeal, the Commission shall promptly schedule and hold a public hearing. *Id.* The Commission may also investigate any personnel action on its own motion and hold hearings thereon. *Id.* § 741.951(d).

The Civil Service Act provides that the Executive Director of the Commission has the power, under the direction of the Commission, “[t]o appoint ...such *examiners*, investigators, clerks and other assistants as may be necessary to carry out this act...” *Id.* § 741.206(1). (emphasis added).

Hearings of the Commission are governed by the General Rules of Administrative Practice and Procedure, 1 Pa. Code §§ 31.1 to 35.251 (1991), which authorize the designation of a “presiding officer” to preside over a hearing, *Id.* § 35.185, and which define the term “presiding officer” as “[a] member of the agency, or one or more trial *examiners* appointed according to law and designated, to preside at hearings or conferences, or other examiner specially provided for and designated under statute to conduct specified classes of proceedings, but not including the agency head when sitting as such.” *Id.* § 31.3 (emphasis added). Clearly, the terms “presiding officer” and “examiner” as used in the Rules are the same as the term “hearing officer” as contemplated in your opinion request. Accordingly, that part of the Civil Service Act which authorizes the appointment of examiners authorizes the appointment of hearing examiners.

The courts of the Commonwealth have addressed the issue of how civil service appeals are heard by the Commission, including questions about how hearings are conducted. These cases have arisen from challenges to the

validity of decisions and actions resulting from hearings held with less than a majority of the Commission present.

In *Siegel v. Civil Service Commission*, 9 Pa. Commonwealth Ct. 256, 305 A.2d 736 (1973), an appellant argued that he was denied due process of law because his hearing on appeal of his demotion was heard by only one member of the three-member panel. The court held that “a hearing conducted by one Commissioner, the record of which is read and considered by the entire Commission, is a proper due process hearing under the Act and the Constitution.” *Id.* at 259, 305 A.2d at 737. See also *Fleming v. State Civil Service Comm’n*, 13 Pa. Commonwealth Ct. 421, 319 A.2d 185 (1974); *Caldwell v. Clearfield County Children & Youth Serv.*, 83 Pa. Commonwealth Ct. 49, 476 A.2d 996 (1984). Although noting that the question of appointing examiners was not before the court in *Siegel*, the court nevertheless observed in that case that the provision of the Act which authorizes hearings (71 P.S. § 741.951) does not prohibit the Commission from designating an examiner to conduct a hearing. *Siegel*, 9 Pa. Commonwealth Ct. at 258-59, 305 A.2d at 737.

The principle established by the cases and embodied in the General Rules of Administrative Practice and Procedure is that the Commission has both the final responsibility for its decisions and the authority to determine the process by which those decisions will be reached within the requirements of the statutes and the Constitution. In this process, the Commission has authority to appoint hearing examiners as designees of the Commission to conduct fair and impartial hearings, to hear evidence, to make findings, and to submit their proposed reports to the Commissioners in accordance with the procedures and requirements set by the Commission under its rulemaking authority or under the General Rules of Administrative Practice and Procedure. 1 Pa. Code §§ 35.185, 35.187, 35.226 (1991).

You have also asked whether the Commission may appoint former Commissioners as hearing examiners. I find nothing in the Civil Service Act itself that prohibits the appointment of former Commissioners as hearing examiners. Nor is such appointment prohibited by the State Ethics Act or the Adverse Interest Act. The Ethics Act prohibits, in pertinent part, “representing a person for actual or promised compensation (before a public body), on any matter with which the public official was associated for one year after leaving that body.” 65 P.S. § 403(g) (Supp. 1991). The Adverse Interest Act prohibits a state employee from representing any person before a state agency. 71 P.S. § 776.7 (1990). These prohibitions obviously concern the representation of persons before state agencies, not the conduct of hearings. Thus, these provisions do not prevent otherwise qualified former Commis-

sioners from serving as appointed hearing examiners.

You are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 731-204(a)(1), you are required to follow the advice set forth in this opinion and shall not in any way be liable for doing so.

Very truly yours,

Ernest D. Preate, Jr.
Attorney General

OFFICIAL OPINION NO. 92-1

State Ethics Commission—Dual Employment of Ethics Commission Members.

1. A member of the State Board of Education is a public official or employee of the Commonwealth of Pennsylvania.
2. Under the State Ethics Law, a member of the Ethics Commission may not serve at the same time as a member of the State Board of Education.

March 13, 1992

Dennis C. Harrington
Chairman
State Ethics Commission
309 Finance Building
Harrisburg, PA 17108

Dear Mr. Harrington:

On behalf of the Ethics Commission, you have requested my opinion on whether a member of the State Ethics Commission, while serving in that capacity, may serve also as a member of the Pennsylvania State Board of Education. It is my opinion and you are hereby advised that an Ethics Commission member may not serve at the same time as a member of the State Board of Education.

The Public Official and Employee Ethics Law, Act of October 4, 1978, P.L. 883, No. 170, as reenacted and amended by the Act of June 26, 1989, P.L. 26, No. 9, provides in Section 6(d) that “[n]o individual, while a member or employee of the commission, shall...(5) be employed by the Commonwealth or a political subdivision in any other capacity, whether or not for compensation.” 65 P.S. § 406(d)(5). Although the Ethics Law does not define the term “employed,” it does define the terms “public employee” and “public official.” A “public employee” is

[a]ny individual employed by the Commonwealth...who is responsible for taking or recommending official action...with regard to:

- (1) contracting or procurement;
- (2) administering or monitoring grants or subsidies;
- (3) planning or zoning;
- (4) inspecting, licensing, regulating or auditing any person;
or
- (5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interests of any person.

A “public official” is

[a]ny person elected by the public or ...appointed by a governmental body, or an appointed official in the Executive, Legislative or Judicial Branch of the State or any political subdivision thereof, provided that it shall not include members of advisory boards that have no authority to expend public funds other than reimbursement for personal expense, or to otherwise exercise the power of the State....

65 P.S. § 402.

In my judgment, the conclusion is inescapable that the prohibition of the Ethics Law on Commission members being “employed” by the Commonwealth means, at a minimum, that no member of the Commission may be a “public employee” or a “public official” as defined in the Ethics Law itself. The essential inquiry, therefore, is whether a member of the State Board of Education is a “public employee” or a “public official.”

The State Board of Education is a part of Commonwealth government. 24 P.S. § 26-2601-B. Members of the State Board of Education are responsible for taking or recommending official action on several of the subjects indi-

cated in the definition of “public employee.” The Board and its members have substantial powers and duties in planning and setting policies and standards for education in Pennsylvania, in administering grants, in promulgating rules and regulations, in managing the State School Fund, and in making reports and recommendations to the Governor and the General Assembly. 24 P.S. § 26-2603-B. Each Board member serves also as a member of either the Council of Basic Education or the Council of Higher Education, which function as committees of the Board. Under the School Code, the Councils have the duty to develop master plans, conduct research, set standards, and formulate policy in all education areas. 24 P.S. § 26-2604-B.

Board members also fit the definition of “public official” because they are appointed officials in the Executive Branch of the state government. Each member is appointed by the Governor and confirmed by the Senate. 24 P.S. § 26-2602-B(a). And there is no question that the Board exercises the power of the State.

Under the School Code, members of the State Board of Education receive no salary but are entitled to reimbursement for travel and other necessary expenses incurred in the performance of their duties. 24 P.S. § 26-2602-B(a). Most public employees and officials are compensated for their services, including Ethics Commission members. 65 P.S. § 406(h). It is clear, however, under the plain language of the Ethics Law, that the dual employment proscribed by the law includes employment without compensation.

I appreciate, as you suggest in your letter requesting this Opinion, that there is likely to be minimal “actual” conflict between service as a member of the Ethics Commission and service as a member of the State Board of Education. Defining “actual” conflict, however, can be difficult in practice. And, more importantly, to be guided by such considerations would be to ignore the clear letter of the Ethics Law in the pursuit of its spirit. 1 Pa. C.S. § 1921(b).

Accordingly, it is my opinion and you are hereby advised that, because a member of the State Board of Education is a public official or employee of the Commonwealth within the meaning of the Ethics Law, a member of the State Ethics Commission, consistent with Section 6(d) of the Law, cannot serve at the same time as a member of the State Board of Education.

Finally, you are further advised in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), that you are

required to follow the advice set forth in this Opinion and shall not in any way be liable for doing so.

Very truly yours,

Ernest D. Preate, Jr.
Attorney General

OFFICIAL OPINION NO. 92-2

Pennsylvania State Police—Wiretapping and Electronic Surveillance Control Act—Disclosure to Federal Officers or Officers of Other States.

1. The Wiretapping and Electronic Surveillance Control Act authorizes disclosure of the contents of lawfully intercepted communications or evidence to officers of other jurisdictions.
2. The disclosure must be appropriate to the proper performance of the official duties of the officers making or receiving the disclosure.
3. The officer receiving the disclosure must be authorized by the law of that officer's jurisdiction to investigate or arrest for an offense in that officer's jurisdiction which is equivalent to an offense enumerated in Section 5708 of the Act.

October 1, 1992

Glenn A. Walp, Commissioner
Pennsylvania State Police
1800 Elmerton Avenue
3rd Floor Department Headquarters
Harrisburg, PA 17110

Dear Commissioner Walp:

You have requested my opinion concerning the scope of a state police officer's authority under Section 5717(a) of the Wiretapping and Electronic Surveillance Control Act¹ ("the Act"), 18 Pa.C.S. § 5717(a), to disclose lawfully intercepted communications or evidence derived therefrom to federal officers and to officers of other states and the political subdivisions of other states.

1. Act of October 4, 1978, P.L. 831, No. 164, as amended, 18 Pa.C.S. §§ 5701 *et seq.*

It is my opinion, and you are so advised, that Section 5717(a) authorizes a Pennsylvania investigative or law enforcement officer to disclose the content of lawfully intercepted communications or evidence derived therefrom to a federal officer or an officer of another state or a political subdivision of another state if such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure and if the officer receiving the disclosure is authorized by the law of that officer's jurisdiction to conduct investigations or make arrests for conduct which, under the law of that officer's jurisdiction, would constitute an offense equivalent to one of the offenses enumerated in Section 5708 of the Act.

Section 5717(a) governs the disclosure of intercepted communications by one investigative or law enforcement officer to another:

Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived therefrom may disclose such contents or evidence to another investigative or law enforcement officer, including another investigative or law enforcement officer of another state or political subdivision thereof, or make use of such contents or evidence to the extent that such disclosure or use is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

Although this provision does not expressly reference federal investigative or law enforcement officers, Section 5702 of the Act, 18 Pa.C.S. § 5702, defines "investigative or law enforcement officer" as:

[a]ny officer of the United States or of the Commonwealth or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offense. . . .

Is it of consequence that the definition of "investigative or law enforcement officer" references federal officers but not officers of other states or political subdivisions of other states? Clearly not. The sentence that introduces the several definitions stated in Section 5702 provides specifically that the words defined shall have the meanings given to them in that section "unless the context clearly indicates otherwise." Not merely the context, but indeed the very words of Section 5717(a) indicate clearly that disclosures may be made to officers of other states and the political subdivisions of other states.

The reference to officers of other states and political subdivisions of other states was added to Section 5717(a) by amendment in 1988.² While the General Assembly, at that time, might have similarly amended the definition of “investigative or law enforcement officer,” such was hardly necessary in view of the introductory language of Section 5702 and the targeted amendment of Section 5717(a).

The definition of “investigative or law enforcement officer” requires that the officer be “empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter.” The “offenses enumerated in this chapter” are the Pennsylvania crimes listed in Section 5708 of the Act, 18 Pa.C.S. § 5708, with respect to which a court order authorizing interception may be issued. Is it of consequence that no officer other than a Pennsylvania officer is empowered by law to conduct investigations of or to make arrests for such offenses? In my opinion, it is not.

Among the most fundamental rules of statutory construction are that the General Assembly does not intend a result that is absurd or impossible of execution and that the General Assembly intends the entire statute to be effective and certain. 1 Pa.C.S. § 1922(1) and (2). By its terms, Section 5717(a) contemplates that a Pennsylvania officer may disclose the content of lawfully intercepted communications or evidence derived therefrom to a federal officer or an officer of another state or a political subdivision thereof if such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure. Those terms would be nullified and their purpose rendered impossible of execution if the definition of “investigative or law enforcement officer” is read to permit only Pennsylvania officers to receive disclosures.

I recognize that officers from other jurisdictions are sometimes deputized by Pennsylvania officers to participate in investigations of possible violations of Pennsylvania criminal laws. It is inconceivable to me, however, that the General Assembly would have used language as expansive as that used in Section 5717(a) to accomplish a purpose so limited as to enable officers from other jurisdictions deputized as Pennsylvania officers to receive communications intercepted by other Pennsylvania officers. Indeed, the specific references in the Act to officers from other jurisdictions would be superfluous if they were meant to refer only to officers from other jurisdictions deputized as Pennsylvania officers, since the very purpose of deputization is to confer

2. Act of October 21, 1988, P.L. 1000, No. 115.

upon the deputized officer the investigatory and law enforcement authority of a Pennsylvania officer.

In my judgment, the conclusion is inescapable that the reference to “offenses enumerated in this chapter” in the definition of “investigative or law enforcement officer” is a reference to the conduct prohibited by the criminal statutes that define such offenses. Accordingly, a Pennsylvania officer is authorized to disclose the content of lawfully intercepted communications or evidence derived therefrom to a federal officer or an officer of another state or a political subdivision thereof if the officer receiving the disclosure is authorized by the law of that officer’s jurisdiction to conduct investigations or make arrests for conduct which, under the law of that officer’s jurisdiction, would constitute an offense equivalent to one of the offenses enumerated in Section 5708.

In rendering this Opinion, I am mindful of the appeal pending before the Pennsylvania Supreme Court in *Boettger v. Miklich*, 142 Pa. Commonwealth Ct. 136, 599 A.2d 713 (1991), *appeal granted*, 530 Pa. 634, 606 A.2d 903 (1992). In that case, the Commonwealth Court held that federal and state revenue agents to whom a Pennsylvania officer had disclosed lawfully intercepted communications were not “investigative or law enforcement officers” within the meaning of the Act because the violations of tax laws for which such officers are authorized to conduct investigations and make arrests are not among the offenses enumerated in Section 5708 of the Act. Interestingly, the Court did not suggest that federal officers could receive disclosures under the Act only if deputized as Pennsylvania officers to investigate possible violations of the crimes specified in Section 5708.

While it is certainly possible that the Supreme Court’s decision in *Boettger* will shed additional light upon the interpretation of the statutory provisions implicated by your opinion request, I believe it highly unlikely that the Court’s decision will undermine the advice that I have here rendered; and I recognize, in any event, the urgency of your need for this advice in the furtherance of ongoing state police investigations.

You are further advised that, in accordance with Section 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.

Sincerely yours,

Ernest D. Preate, Jr.
Attorney General

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