Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1945

Publication of this Document Approved by the Commission on Administration and Finance.

900. 4-'46. 18434.

Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1945

Publication of this Document Approved by the Commission on Administration and Finance.

900. 4-'46. 18434.

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 9, 1946.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the department for the year ending June 30, 1945.

Very respectfully,

CLARENCE A. BARNES,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

State House

Attorney General

CLARENCE A. BARNES

First Assistant Attorney General

J. J. SPIEGEL

Assistants

ROGER CLAPP
NATHAN B. BIDWELL
WILLIAM S. KINNEY
CHARLES SHULMAN
GEORGE P. DRURY [1]
MICHAEL A. FREDO
DAVID J. CODDAIRE
ALFRED E. LOPRESTI
WILLIAM GARDNER PERRIN
HERBERT D. ROBINSON
WILLIAM H. SULLIVAN
CONDE J. BRODBINE
BEATRICE H. MULLANEY
VINCENT J. PANETTA [2]
THOMAS F. MCLAUGHLIN

Assistant Attorneys General on Leave of Absence

WILLIAM G. ANDREW [3]
ERNEST BRENNER [4]

Assistant Attorneys General assigned to Veterans' Division

NICHOLAS DELEO
JOEL L. MILLER

Assistant Attorneys General assigned to Division of Employment Security

SAUL GURVITZ
JOSEPH S. MITCHELL

---

[1] Specially assigned to N. Y., N. H. & H. R.R. and Boston Elevated Railway cases.
[2] Resigned July 31, 1945.
[3] On leave of absence because of duties as associate county commissioner.
[4] On military leave of absence.

Chief Clerk to the Attorney General
HAROLD J. WELCH

List Clerk to the Attorney General
JAMES J. KELLEHER

Director of Division of Collections
W. FORBES ROBERTSON

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Period from July 1, 1944, to June 30, 1945

Attorney General's salary	$ 8,000 00
Assistants and others, salaries	138,900 00
Expenses	11,000 00
Settlement of damages by state-owned cars (G. L. (Ter. Ed.) c. 12, § 3B)	8,000 00
Settlement of certain claims (G. L. (Ter. Ed.) c. 12, § 3A)	3,000 00
Transfer for temporary salary increases	1,360 00
	$170,260 00

Expenditures.

For salary of the Attorney General		$ 8,360 00
For salaries of assistants and others:		
Actual expenditures	$133,778 23	
Amount reserved	6,121 77	
		139,900 00
For office expenses:		
Actual expenditures	$9,223 63	
Amount reserved	1,755 37	
		10,979 00
For settlement of damages by state-owned cars (G. L. (Ter. Ed.) c. 12, § 3B)		4,795 72
For small claims (G. L. (Ter. Ed.) c. 12, § 3A)		2,996 48
Total expenditures		$167,031 20

Financial statement verified.

By J. D. MacDONALD,
For the Comptroller.

Approved for publishing.

FRANCIS X. LANG,
Comptroller.

November 6, 1945.

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 9, 1946.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws (Tercentenary Edition), as amended, I herewith submit my report.

The cases requiring the attention of this Department during the fiscal year ending June 30, 1945, totaling 8,451, are tabulated as follows:

Corporate franchise tax cases	96
Extradition and interstate rendition	115
Land Court petitions	71
Land damage cases arising from the taking of land:	
Department of Public Works	46
Metropolitan District Commission	2
Metropolitan District Water Supply Commission	10
Miscellaneous cases, including suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth	3,715
Petitions for instructions under inheritance tax laws	6
Estates involving applications of funds given to public charities	733
Settlement cases for support of persons in state hospitals	26
Pardons:	
Investigations and recommendations in accordance with G. L. (Ter. Ed.) c. 127, § 152, as amended	100
Workmen's compensation cases, first reports	1,994
Cases in behalf of Division of Employment Security	1,537

To preserve the dignity of the individual, carrying with it all of the implications of freedom, liberty and justice, is to my mind one of the paramount duties of the chief law enforcement officer of the Commonwealth.

To preserve that dignity men and women throughout the world have suffered beyond the power of words to describe. To preserve that dignity countless millions have sacrificed their lives.

Upon assuming the office of Attorney General of Massachusetts, I resolved upon a course of conduct for this Department that would preserve the dignity of the individual — that would be devoid of ballyhoo and sensation. I resolved that all matters would be carefully and painstakingly investigated. I realize fully the power of the criminal indictment, and how, all too easily, the reputation and standing of respectable citizens

in the Commonwealth could be irreparably damaged by the careless use of this power.

To that end this Department has worked harmoniously with the District Attorneys throughout the Commonwealth and they have had an open door to consult with either my assistants or myself on all matters affecting the public welfare.

The Attorney General has continuously counseled the many department heads of the Commonwealth and frequently informal advice has been given. I have endeavored at all times to conduct this Department efficiently and with a high standard of administration, ever remembering that the citizens of the Commonwealth are entitled to able legal representation.

I pledged the people of Massachusetts when I assumed the office of Attorney General that I would immediately establish a veterans' division which would freely advise and act in behalf of the veteran, his widow, orphans and other dependents. This has been done. Two assistants devote their entire time to this division. A complete file of the work of the division is kept in a card index containing a record of the applicant's problem and a notation of the advice given and work done. In addition there have been innumerable personal requests for information and advice — many by telephone. Many letters are received in which requests are made for information. Month by month an increasing number of town and city officials, department heads and legislators seek advice or information. Many veteran organizations have made use of this division. The division is expanding and we are constantly seeking means and adopting plans which will enable the division to function at the highest peak of efficiency.

I should like to illustrate briefly the varied cases that have come before this division:

A father of a discharged disabled veteran was very much distracted about his son out West who had become involved in a confused court situation. This division enabled the father to contact the proper authorities and was able to straighten out the case in such a manner that the boy is now home and in happy surroundings with his parents.

A veteran who was a doctor prior to entering the service became disabled while in combat areas, engaged in hospital work, and desired to resume his practice upon his discharge from the service. There was some difficulty regarding his doctor's certificate and license as he had changed his name while in the service and there were complications relative to his going back into practice under the changed name. This division went into the case very thoroughly and as a result he was given a new certificate and license under his present legal name and was thereby enabled to resume his practice.

A mother of a son who was killed in action sought advice on the situation where there was a divorce. The wife filed an appeal before a decree became absolute, while the son was in the service. There was a question of custody of the children and a very much involved probate situation. The family had a lawyer who suggested that the veteran angle be looked into. This division actively co-operated with the attorney and a final adjustment was made.

The development of the airport at Boston is of paramount importance to all of the citizens of Massachusetts. On behalf of the Massachusetts Aeronautics Commission and in conjunction with the city of Boston, I argued the case of the Civil Aeronautics Board (Federal) North Atlantic Route before the Civil Aeronautics Board in Washington, seeking to have Boston's Logan International Airport certificated as a terminal on the proposed air routes to Europe. The Board's decision has placed Boston as a co-terminal on all the named routes to Europe.

This report does not detail the many activities of the Department. Our work in the courts — state and federal — has proceeded without fanfare. Contracts of various departments have been examined and approved, settlements of inheritance taxes approved, state note issues approved, hearings have been attended and conducted on behalf of various state boards by the Department, bond issues have been approved, leases have been approved, conferences held with and advice given to state commissions, boards and divisions, consultations held with the Division of Civil Service, and interviews and consultations with city solicitors, town counsel, members of the Legislature and attorneys.

I sincerely thank the Assistant Attorneys General and the other members of the Department for their services and loyalty, not only to myself, but to the Commonwealth of Massachusetts.

Respectfully submitted,

CLARENCE A. BARNES,
Attorney General.

OPINIONS.

Walden Pond State Reservation — Powers of Commission — Lack of Authority to Restrict.

July 18, 1944.

Walden Pond State Reservation Commission.

Gentlemen: — You have asked me whether the Walden Pond State Reservation Commission is within its proper jurisdiction in restricting boating on Walden Pond and requiring that privately-owned boats be removed from the pond and reservation after being used.

It is my opinion that your Commission has no authority to restrict boating on the pond or to require the removal of privately-owned boats therefrom, but that you may make reasonable rules and regulations for the removal of privately-owned boats from the reservation after they have been used.

The Walden Pond State Reservation was acquired by gift and is defined by St. 1922, c. 499, as "certain lands and rights therein situated on the shores of Walden pond in the towns of Concord and Lincoln." The statute further provides that "the title to such land shall be and remain in the commonwealth of Massachusetts." It is significant that the statute refers only to lands and rights therein and does not mention Walden Pond.

Your Commission is given full power and authority over the Walden Pond State Reservation (St. 1922, c. 499, § 3), is authorized to make rules and regulations for the government and use of the reservation (St. 1925, c. 26, § 1), and, accordingly, may require the removal of boats from the reservation after they have been used, but may not restrict the use of boats on Walden Pond, since it is no part of the area committed to its control.

Very truly yours,
Robert T. Bushnell, *Attorney General.*

Department of Mental Health — Transfer of Surplus Supplies from one State Hospital to Another Unauthorized.

Aug. 11, 1944.

Dr. Clifton T. Perkins, *Commissioner of Mental Health.*

Dear Sir: — You have asked my opinion as to whether the Department of Mental Health may transfer a surplus of supplies or equipment from one institution to another institution within the department at a price determined by the department.

I answer your inquiry in the negative.

St. 1943, c. 344, § 2, amended chapter 7 of the General Laws by inserting therein a new section, 25A, which reads as follows:

"The state purchasing agent may provide for the transfer of supplies from one state agency to another when, in his opinion, such transfer is for the best interests of the commonwealth, and may provide for the making of suitable adjustments on the state comptroller's books on account of

such transfer. He shall also have authority to approve the amount or quantities of all supplies and materials purchased by state agencies, notwithstanding that such agency has conformed to the regulations relative to such purchases and that an appropriation is available therefor. In case an application by a state agency is not approved by the state purchasing agent, such agency may appeal in writing to the commission, whose decision shall be final."

The foregoing section makes the transfer of supplies from one state agency to another subject to provisions made or to be made by the state purchasing agent. The price to be paid for such supplies or "the making of suitable adjustments on the state comptroller's books on account of such transfer" is within the scope of such provisions. A transfer of equipment or supplies from one institution to another within the same department may fairly be said to be a "transfer of supplies from one state agency to another," as the quoted words are used in said section 25A.

It would appear that the disposal of agricultural products is regulated by the provisions of G. L. (Ter. Ed.) c. 7, § 22 (11), which is as follows:

"The commissioners of the commission, sitting as a board, shall, subject to the approval of the governor and council, make rules, regulations and orders which shall regulate and govern the manner and method of the purchasing, delivering and handling of, and the contracting for, supplies, equipment and other property for the various state departments, offices and commissions, except when they are for legislative or military purposes. Such rules, regulations and orders shall be of general or limited application, and shall, so far as practicable, be uniform, shall be in conformity with existing laws relative to the purchase of articles and materials made by inmates of penal institutions and articles and supplies made by the blind except that such purchase shall be made by or under the direction of the state purchasing agent subject, however, to such approval by the board as would be required if the purchase were made from some other source, and shall include provision for the following:

. . . . . .

(11) The use and disposal of the products of state institutions;"

You have directed my attention to that part of G. L. (Ter. Ed.) c. 123, § 7, which reads as follows:

"The department shall provide for the efficient, economical and humane management of the state hospitals. It shall establish by-laws and regulations, with suitable penalties, for the government of said state hospitals. . ."

In view of the specific provisions of said sections 25A and 22 (11), quoted herein, it is apparent that the matter of the transfer of supplies and products from one state hospital to another within the department is not included within the scope of that part of said section 7 set forth above.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Old Age Assistance — Waiver of Rights — Contributions by Children.

Aug. 11, 1944.

Hon. Arthur G. Rotch, *Commissioner of Public Welfare.*

Dear Sir: — You have asked my opinion on two questions relative to the administration of G. L. (Ter. Ed.) c. 118A, entitled "Adequate assistance to certain aged citizens."

Your first question asks "whether or not a recipient (applicant) may waive his or her rights to the *full* amount of assistance rather than have action taken against a son or daughter to secure a reasonable contribution."

I answer this question in the affirmative.

The assistance provided by said chapter 118A is available upon the filing of an application therefor, provided the proposed recipient possesses certain prescribed qualifications. Unless and until an application is filed with the proper authority assistance may not be extended under said chapter. I find nothing in the law which would prevent the withdrawal of an application once filed or the rejection of assistance that has been awarded, regardless of the reason or motive for such withdrawal or rejection. Hence I advise you that an applicant for old age assistance or a recipient thereof may at any time withdraw his application therefor or entirely forego the assistance provided by law which has been awarded him, and to which he would otherwise be entitled.

Your second question inquires as to whether a recipient of old age assistance may waive such amount thereof for which a son or daughter is liable in order to protect the son or daughter from prosecution for failure to provide such amount of assistance. I answer this question in the negative.

Section 1 of said chapter 118A provides that adequate assistance to deserving citizens in need of relief and support, who meet certain enumerated requirements, shall be granted under the supervision of the Department of Public Welfare, and further provides that assistance shall be on the basis of need, and the amount thereof shall be determined in accordance with budgetary standards established by the local board of public welfare and approved by the department. Minimum rates of assistance for individuals living within or outside of a family group are established.

Section 2 of said chapter provides that each local board of public welfare shall, for the purpose of granting adequate assistance and service to such aged persons, establish a division thereof to be designated as the Bureau of Old Age Assistance, which in the performance of its duties is made subject to the supervision of the Department.

Said petition further provides that in determining the need for financial assistance, said bureaus shall give consideration to the resources of the aged person. In considering such resources section 2A sets up a schedule to be followed relative to the financial ability of a child to support such person. In connection with the granting of assistance, section 2 confers authority on the local board of public welfare, "with the approval and upon the direction of the department," to prosecute a child of the aged person who is of sufficient ability but who neglects or refuses to contribute to the support and maintenance of said person. It is also provided by said section that until such prosecution is completely adjudicated *and the resource in question is actually available* to the aged person or persons

otherwise eligible, assistance to him or them *shall not be refused or reduced* by reason of such resource.

In clear language the General Court has charged the Department with the duty of seeing to it that certain aged persons receive adequate assistance and has provided that the amount of such assistance is to be computed on the basis of need, subject to a definite minimum fixed by law. In determining this need resources of the aged person are to be considered and among these resources is the financial ability of a child to contribute to the support of his parent. But the General Court has expressly provided that the amount of assistance the aged person is entitled to receive shall not be reduced by reason of such resource until it is actually available to the aged person.

Hence I advise you that it is the duty of the Bureau of Old Age Assistance and of the Department to provide the assistance awarded in any given case, reduced only by such resources as are actually available to the aged person, and that there is no authority in law for the payment of a lesser amount to the aged person, even with his consent. The payment of a lesser amount would not be the granting of adequate assistance, as those words are used in the law, and would not conform to or be consistent with the obvious purpose of the law.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Milk Control Board — Orders of Board — Violations — Licenses.

AUG. 16, 1944.

Milk Control Board.

GENTLEMEN: — You state that:

"From time to time during the period 1939 to 1942, inclusive, certain orders of the Board were after hearing revised and modified. In each instance, either by provision in the revised and succeeding order, or by separate order, the previous orders covering the same subject matter were rescinded. None of these rescinding orders and no other rescinding order at any time issued by this Board contained any specific saving clause with reference to acts in violation of the preceding orders."

With reference to the foregoing you have requested my opinion on two questions.

Your first question reads:

"May a milk dealer now be subjected to any action under G. L. c. 94A, §22, as amended by St. 1943, c. 164 (or under St. 1934, c. 376, § 11, as amended by St. 1937, c. 428, § 2), on account of an act or omission made or committed by him in violation of an order which was lawfully adopted by the Board and in force at the time of such act or omission, but which has since been rescinded?"

I answer your question in the affirmative.

Chapter 94A of the General Laws creates a new Milk Control Board and provides for the regulation of the milk marketing industry in Massachusetts, and was substituted for chapter 376 of the Acts of 1934, which was an emergency measure providing for a Milk Control Board and for the regulation of the milk marketing industry. Section 22 of said chapter

94A, as amended, and section 11 of said chapter 376, as amended, referred to in your first question, are the sections which prescribe penalties for violation of the respective acts and of rules and regulations made thereunder.

It is clear that violation of a valid order of an administrative board, for which a penalty is provided by the statute creating the board and giving the board its powers, makes the offender subject to prosecution or punishment even though the order has been rescinded prior to the time the action is taken against the violator, notwithstanding the fact that the rescinding order contains no saving clause.

In the recent case of *United States* v. *Hark et al.*, 320 U. S. 531, the Court (in reversing a decision of the District Court for the District of Massachusetts quashing an indictment for a violation of a Maximum Price Regulation issued pursuant to the Emergency Price Control Act, the regulation which the appellees were charged with violating having been revoked prior to the return of the indictment) says at page 362:

"We hold that revocation of the regulation did not prevent indictment and conviction for violation of its provisions at a time when it remained in force. The reason for the common law rule that the repeal of a statute ends the power to prosecute for prior violations is absent in the case of a prosecution for violation of a regulation issued pursuant to an existing statute which expresses a continuing policy, to enforce which the regulation was authorized. Revocation of the regulation does not repeal the statute; and though the regulation calls the statutory penalities into play, the statute, not the regulation, creates the offense and imposes punishment for its violation."

So long as the statute which prescribes the penalty remains in force, or, if in the event that it is repealed, there is a saving clause in the repealing act, the violation can be made the basis of punitive action. (As to the existence of provisions for imposing a penalty, see opinion of the Attorney General to the Milk Control Board, dated March 29, 1944, Attorney General's Report for the year ending June 30, 1944, p. 148.)

It is my opinion, therefore, that the amenability of a milk dealer to prosecution or other authorized penalty for the violation of an order made by your Board or its predecessor, committed while said order remained in force, is not affected by the fact that the order was subsequently rescinded by an order containing no saving clause. Such violations are now subject to prosecution or other action by the Board whether the orders which were violated and subsequently rescinded were adopted under the provisions of G. L. c. 94A, or of St. 1934, c. 376.

Your second question reads:

"May the Board now decline to grant or renew a license applied for by any milk dealer or revoke a license of any milk dealer pursuant to the provisions of paragraph (12) or (13) of section 6 of said chapter 94A on account of an act or omission made or committed by him in violation of an order which was lawfully adopted by this Board and in full force at the time of such act or omission, but which has since been rescinded?"

I answer your question in the affirmative.

G. L. c. 94A, § 6, provides that the Board may decline to grant or renew a license or may suspend or revoke a license already granted when it is satisfied of the existence of any of the following reasons:

"(12) That he knowingly purchased, received, processed, sold or otherwise handled milk within the commonwealth in violation of any of the applicable laws, or of the rules, regulations and requirements of the board; or

(13) That he has violated any provision of this chapter or of similar provisions of earlier laws, or of an order, rule or regulation of the board made under authority thereof or of section nine of chapter twenty."

The Board may use as the basis for action against a dealer under either of these paragraphs the violation of an order lawfully adopted by the Board and in force at the time of the act or omission made or committed by him. The Board may proceed under these paragraphs although action is not taken until after the order has been rescinded and notwithstanding the absence of a saving clause in the rescinding provision.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Authority of Director — Seniority of Employees.

AUG. 23, 1944.

Hon. WILLIAM H. BIXBY, *Chairman, Civil Service Commission.*

DEAR SIR: — You have informed me that it has been the custom of the Division of Civil Service to keep a record of the seniority dates of employees in the various departments under the Civil Service Law and you have set forth the manner in which these dates are computed.

You have informed me further that in the city of Springfield it was necessary to reduce the number of clerks in the Department of Public Welfare from five to four in order to live within the budget of that department. The Board of Public Welfare inquired of the Director of Civil Service as to the employee who was junior in point of seniority according to the computation of the Director of Civil Service, and upon receipt of this information demoted that employee. The employee so demoted has appealed to the Civil Service Commission.

With reference to the foregoing you have requested my opinion on two questions.

Your first question reads:

"Has the director the authority to compute seniority dates of employees in the classified public service which will bind appointing officers in determining the order of layoffs or demotions or reinstatements after layoffs or demotions, under the provisions of G. L. c. 31, § 46G?"

I answer this question in the negative.

G. L. (Ter. Ed.) c. 31, § 46G, provides:

"If the separation from service of persons in the classified service becomes necessary through no fault or delinquency of their own, they shall be separated from the service, and reinstated therein in the same position or in a position in the same class and grade as that formerly held by them, according to their seniority in the service so that the oldest employees in point of service shall be retained the longest, and reinstated first and before any reinstatement under section forty-six C or the certification of new names. Nothing in this section shall prevent reinstatements under

section forty-six D or impair the preference provided for disabled veterans by section twenty-three."

I find nothing in the above-quoted section, in chapter 31 generally, or in the rules and regulations made thereunder, which confers upon the Director the authority to determine the seniority of persons in the classified service in case of their separation from the service through no fault or delinquency of their own, which determination is made binding upon appointing officers. Such computation may be made by the appointing officer himself.

It is to be noted that section 38 of said chapter 31 provides:

"If, in the opinion of the director, a person is appointed or employed in the classified public service in violation of any provision of this chapter or of any rule or regulation made thereunder, the commission or the director shall, after notice in writing mailed to the appointing or employing officer, department, board or commission, and to such person, notify in writing the treasurer, auditor or other officer whose duty it is to pay the salary or compensation of such person, or to authorize the drawing, signing or issuing of any warrant therefor; and the payment of any salary or compensation to such person shall cease at the expiration of one week after the mailing of the notice to such treasurer, auditor or other officer, and no such officer shall pay any salary or compensation to such person, or draw, sign or issue, or authorize the drawing, signing or issuing, of any warrant therefor, until the legality of such appointment or employment is duly established."

Rule 23 of the Civil Service Rules, entitled "Reappointment and Reinstatement", section 2, authorizes the "Commissioner", now called the "Director", to place on a "Special List" the name of any person who is separated from the service without fault or delinquency on his part, if the applicant so requests in writing, and his name shall remain on such "Special List" for a period of two years from the date of such separation. "Thereafter, on requisition to fill any position, which in the judgment of the Commissioner can be filled from such Special List, the Commissioner, before certifying from the regular eligible list, may certify from the Special List the names of persons then standing thereon *in the order of the dates of their original appointment*, and appointment shall be made from the names so certified."

The foregoing provisions of law implicitly authorize the Director to make computations of the seniority date of employees who are subject to the Civil Service Law and the rules and regulations made thereunder, for the purpose of discharging the duties incumbent upon him, but I find no authority for the proposition that computation so made shall be binding upon appointing officers in determining the order of layoffs or demotions or reinstatements after layoffs or demotions.

The purpose of the foregoing provisions of law is that "supervision of reinstatement of those separated from the public service" may be maintained. *Police Commissioner of the City of Boston* v. *Commissioner of Civil Service*, 278 Mass. 507, at 509.

Your second question reads:

"If the director has authority to make such a binding computation and no particular plan is required by law, is the manner in which the director

computes seniority for the purpose above referred to subject to review by the Civil Service Commission?"

My answer to your first question makes it unnecessary to answer your second question.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Supervising Boiler Inspector in Department of Public Safety not Classified.

AUG. 29, 1944.

HON. THOMAS J. GREEHAN, *Director of Civil Service.*

DEAR SIR: — You have asked my opinion as to whether or not the designation and assignment of a Boiler Inspector as Supervising Boiler Inspector by the Commissioner of Public Safety is subject to the provisions of G. L. (Ter. Ed.) c. 31, and the Rules and Regulations made thereunder.

I answer your question in the negative.

In an opinion of the then Attorney General to the Director of Civil Service on October 14, 1943 (Attorney General's Report for the year ending June 30, 1944, p. 89), it was decided that the Commissioner of Public Safety could designate and assign permanently to the position of Supervisor of the State Police Detective Bureau one of the State Police Detective Inspectors without the approval of the Division of Civil Service. The considerations set forth in that opinion govern the present inquiry.

The position of Supervising Boiler Inspector has not been specifically placed under the Civil Service Law either by legislative enactment or by rule of the Division of Civil Service. It is not included within the established classifications of Rule 4 of the Civil Service Rules. That rule contains references to "boiler inspectors" and "inspectors." The position of Supervising Boiler Inspector, like the position of Supervisor of the State Police Detective Bureau, is one of supervisory duties and powers, as its name implies, and hence is different from that of "boiler inspector" or "inspector." The fact that the salaries of the two positions of Boiler Inspector and Supervising Boiler Inspector are different does not, in and of itself and as a matter of law, make a change of position from the one to the other a promotion within the meaning of said chapter 31 or the Rules and Regulations made thereunder.

As stated in the opinion of October 14, 1943, above referred to, the Civil Service Commission may, if it feels that the public interest so requires, amend its rules in accordance with law to include this position within those subject to the Civil Service Law and Rules.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

War Emergency Fund — Transfer of Funds — Authority of Governor.

AUG. 29, 1944.

HON. WALTER S. MORGAN, *Comptroller.*

DEAR SIR: — You request my opinion on three questions relative to the "limitation on expenditures from the War Emergency Fund as set

forth in St. 1943, c. 370, § 10." You have informed me concerning the practical operation of this fund, and state that:

"Upon request and recommendation as provided in the statute, the Governor and Council have made the funds available to the spending agencies (a) by transfer to an existing appropriation or (b) by authorization in all other cases. When such transfers and authorizations have been made by the Governor and Council they are recorded in appropriate accounts on the Commonwealth's books to show the funds are available to the amount and for the purpose designated."

Your first question reads:

"In your opinion can the Governor and Council legally make such transfers and authorizations after January 3, 1945?"

I answer this question in the negative.

Section 10 of chapter 370 reads:

"To provide for divers emergency expenditures which may be necessary to meet any emergency which may arise by reason of the exigencies of the existing state of war and to meet deficiencies in existing appropriations, there may be expended under the direction of the governor sums not exceeding seven million dollars in the aggregate, and for said purposes there is hereby appropriated from the General Fund the sum of two million dollars and from the Highway Fund the sum of two million dollars which amounts shall be available for expenditure on and after July first in the current year, and said amounts, together with any unexpended balance remaining from the funds previously provided under chapter eighteen of the acts of nineteen hundred and forty-two, are to be credited on the books of the commonwealth to a fund to be known as the War Emergency Fund. All expenditures hereinbefore referred to shall be subject to the approval of the council. Requests for any such expenditures shall be referred by the governor to the commission on administration and finance, which, after investigation of the need of such expenditure, shall forthwith submit to the governor its written recommendation of the amount of funds required, together with pertinent facts relative thereto. All expenditures authorized under this section and the employment of persons whose positions have been created by reason of money made available by this section shall cease not later than thirty days after the governor, with the advice and consent of the council, shall have proclaimed that the existing emergency has ended, and no new obligations may be authorized after January third, nineteen hundred and forty-five."

The authority of the Governor to expend sums from the War Emergency Fund, subject to the approval of the Council, whether by transfer to an existing appropriation or by authorization, is limited by express provision in said chapter 370 that —

". . . no new obligations may be authorized after January third, nineteen hundred and forty-five."

Each request for expenditure relates to a "new obligation," whether or not the subject matter of the request remains the same as that set forth in a previous request. Therefore, the limitation as above set forth may be interpreted as though it read:

". . . no obligations may be authorized after January third, nineteen hundred and forty-five."

Read in this manner, it is clear that the intent of the Legislature was to empower the Governor and Council to make authorizations and transfers for expenditures from the War Emergency Fund up to and including January 3, 1945, but not thereafter.

Your second question reads:

"In the cases where such transfers and authorizations shall have been made up to January 3, 1945, will the funds so made available be available for expenditure, subject to allotment, for the same purposes as before until such funds are exhausted?"

I answer this question in the affirmative, subject to the limitation hereinafter set forth. It is apparent from the entire context of chapter 370 that the Legislature intended that funds previously allocated to a spending agency should in the interest of the public welfare be available after January 3, 1945, as well as prior thereto. The time within which the allocated funds must be expended is limited by two provisions of law:

(*a*) The act itself provides that the Governor, with the advice and consent of the Council, may proclaim that the existing emergency has ended, and all expenditures authorized must cease not later than thirty days thereafter; and

(*b*) G. L. (Ter. Ed.) c. 29, § 14, in its pertinent part, provides:

"An appropriation for any purpose other than ordinary maintenance, . . . shall not be available for more than two years after the effective date of the appropriation act . . . In either case payments to fulfill contracts and other obligations entered into within the said two years may be made thereafter."

Funds allocated to spending agencies whether by transfer to an existing appropriation or by authorization may be expended not later than two years subsequent to June 1, 1943, the effective date of the act setting up the War Emergency Fund, except that payments to fulfill contracts and other obligations entered into within the said two years may be made thereafter.

Your third question reads:

"Or beginning January 3, 1945, will such funds be restricted to the payment of liabilities previously incurred, or in any other way?"

I answer this question in the negative for the reasons set forth in my answer to your second question.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Milk Control Board — Public Announcement of Prices to be Paid by Individual Milk Dealers.

SEPT. 18, 1944.

MR. LOUIS A. WEBSTER, *Acting Chairman, Milk Control Board.*

DEAR SIR: — You have informed me concerning the three existing price plans established by the Milk Control Board to regulate the purchase

of milk by milk dealers from producers: the Flat Price Plan, the Composite Price Plan, and the Base Rating Plan. You have explained that under either of the latter two plans as now administered each dealer calculates his own *composite* or *base and excess* price, subject to later correction by the Milk Control Board, so that he may, after payment to his producers in accordance with his own calculations, be called upon to make further supplemental payments if the Board finds his computations to have been too favorable to himself.

You have informed me further that, "In many milk marketing areas administered by other milk control agencies . . . each dealer using a composite or base rating plan is required promptly after the close of each delivery period to report to the controlling agency his receipts and sales of milk for the period. On the basis of such reports the agency, prior to the date when payment is due, computes and makes public announcement of the composite or base and excess prices the dealer should pay for such period. The Lowell-Lawrence market is at present so administered under joint Federal-State control.

"It has been repeatedly urged upon this Board by producer organizations and by some dealers that the principal secondary markets of Massachusetts should be placed on the same basis by order of the board, and each dealer's composite or base and excess prices be calculated by the Director of Milk Control and announced in advance of the date on which payment is due."

With reference to the foregoing, you have asked my opinion upon the following questions:

If the Division of Milk Control were to make periodic public announcements, as to any marketing area, of the names of all dealers purchasing milk for distribution in such area, adding "after the name of each dealer who is purchasing milk either on the flat or on the composite price plan, the flat or composite price per hundredweight which such dealer should pay for all milk received from producers during such period, and after the name of each dealer who is purchasing milk on a base rating plan, the base and excess prices per hundredweight which such dealer should pay respectively for all base and all excess milk received by him from producers during such period,"

(1) Would such an announcement be violative of G. L. (Ter. Ed.) c. 94A, § 13 (*d*), as to dealers purchasing milk on the composite price plan, having in mind that the publication of such a dealer's *composite price* would disclose the percentages of his receipts of milk disposed of for Class I use (milk to be distributed for beverage purposes) and for Class II use (milk disposed of for the manufacture of dairy products)?

(2) Would such an announcement be violative of said section 13 (*d*) as to dealers purchasing milk on the base rating plan, having in mind that the publication of such a dealer's *base and excess price* would disclose (*a*) whether his Class I sales were greater or less than his "base milk receipts" (the "base" being an arbitrary daily quota assigned to each producer, usually equal to that percentage of his average daily delivery of milk during the prior "base period" which was, during such period, sold by the dealer as Class I), (*b*) if they were greater, the percentage of excess milk (milk delivered by the producer in excess of his daily base) sold as Class I, and the percentage sold as Class II, and (*c*) if they were

less, the percentage of his receipts of base milk sold as Class I and the percentage sold as Class II?

I answer your question in the affirmative.

G. L. (Ter. Ed.) c. 94A, § 13 (*d*), provides that "The information obtained by any inspection authorized or reports required by this chapter or by similar provisions of earlier law shall be treated as confidential and shall not be disclosed by any person except as may be required in the proper administration of this chapter; provided, that the board may use such information together with other similar information, for compilation and publication of statistics of the milk industry in this commonwealth. Such statistics shall not contain the name of, or disclose, by inference or otherwise, information obtained from the books and records of any milk dealer."

Your letter states that the basis for any such public announcement as you describe would be "either through inspection authorized by said chapter 94A . . . or through a report required . . . by order of the board issued under said chapter." It is, of course, obvious that such an announcement would effect a disclosure of the information so obtained. Unless, then, the publication of such information can be said to be "required in the proper administration of this chapter," within the clause of the statute excepting such matters from its operation, said section 13 (*d*) prevents the execution of the plan described in your letter.

The statutory prohibition against disclosure of information exists or does not exist, in any particular case, quite apart from the question of the *quantum* of the harm to any individual resulting from the disclosure; hence, it is immaterial whether a dealer operates on the composite price plan or upon the base-rating plan. The publication of any information concerning him, obtained by inspection or report, when not "required in the proper administration of this chapter," falls within the ban of the statute.

It is not apparent from the substance of your letter that the practice proposed by you is "required in the proper administration of this chapter." While there may be little question that the Board's official predetermination of prices would be most salutary and little argument that notification of such determination should be given to each dealer prior to the date of payment, it does not appear that the *public announcement* of prices to be paid by each named dealer in each marketing area should be necessary to effectuate this result. Nothing in the statute, of course, would prevent the Board from notifying each dealer of the results of its computation of prices to be paid *by him.*

Again, the plan for price announcements outlined in your letter calls for the periodic publication of the names of individual dealers as well as of information obtained from their books and records. Since the proposed announcements would be, in a very real sense, "statistics of the milk industry," compiled and published by the Board, the second sentence of said section 13 (*d*) affords a complete and affirmative answer to your first two questions.

The answers to the foregoing questions being in the affirmative, it becomes unnecessary to consider your third question relative to the propriety of publishing the proposed announcement in the event that either of the foregoing questions be answered in the negative.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Department of Public Health — Transportation of Shellfish — Certificate of Foreign Board.

Sept. 19, 1944.

Dr. Vlado A. Getting, *Commissioner of Public Health.*

Dear Sir: — You have asked my opinion as to whether you may approve certificates for the transportation into the Commonwealth of shellfish from Canada, for consumption as food, in a form which I assume complies with that required as to the purity of shellfish by G. L. (Ter. Ed.) c. 130, § 81, as amended, issued by the Department of Pensions and National Health of Canada.

Said section 81 forbids the transportation into the Commonwealth of shellfish, unless there is on file with your department a certificate approved by it from a state board of health or other board or officer having like powers of the state, country or province in the areas outside Massachusetts from which the shellfish were dug or taken.

Section 81 also provides with regard to such certificate that —

"No such certificate shall be approved by the department of public health which does not meet the provisions of the laws, rules, regulations and requirements of the United States as to interstate commerce in shellfish."

You inform me that the United States authorities advise you that they have no authority to submit an "approved list" so far as Canadian certificates are concerned.

The United States authorities under the Federal Food and Drug Act, U. S. C. A. Title 21, as amended, have authority to require the withdrawal from interstate commerce of imported articles of food which are likely to be injurious to the public health. If, as appears from the communications which you have submitted to me, the United States authorities permit the importation and shipment of shellfish from Canada, it would seem that a certificate from a Canadian authority having the powers of a board of health for Canada certifying the facts required by said section 81 with relation to the purity of such shellfish could not be said "not" to "meet the provisions of the laws, rules, regulations and requirements of the United States as to interstate commerce in shellfish."

Accordingly, if the Department of Pensions and National Health of Canada is such a board as is specified in said section 81, you would have authority to approve its certificates if in compliance with the other provisions of said section 81.

Very truly yours,
Robert T. Bushnell, *Attorney General.*

Insurance — Group Annuity Policy — Dividends — Terms of Insurance Contract.

Sept. 29, 1944.

Hon. Charles F. J. Harrington, *Commissioner of Insurance.*

Dear Sir: — You have informed me that heretofore the Division of Insurance has required:

"each contributory group annuity policy form to contain, among other provisions required by law, a stipulation which in substance requires the

policyholder to distribute the dividends received under such contract to the premium payers in the same proportion in which premium contributions to the contract were made . . .

A domestic mutual life insurance company having had a policy form approved, said form containing a provision in substance which required the holder of the master policy to distribute dividends equitably to the premium payers in the proportion to which they had contributed to the same, has now submitted to the Department a form of rider to be attached to the previously approved form of group annuity contract, thereby constituting a part of the contract, said rider form amending the aforementioned provision in the policy form by substituting therefor the following:

'The company (issuer) shall annually ascertain and apportion any divisible surplus accruing under contracts of this class. Any such divisible surplus apportioned to this contract shall be applied toward the payment of employer's future service contributions or past service considerations falling due hereunder, unless retirement annuity purchases hereunder have been discontinued in accordance with Section 6 of Article 3 in which event any such divisible surplus shall be paid in cash to the employer.' "

You have advised me that the contract to which you refer is one issued to an employer through a master policy covering employees to whom certificates showing their interest therein are issued.

With relation to the foregoing you have asked my opinion upon the following question:

"Is the Commissioner authorized under sections 4, 132 and 192 of chapter 175 to disapprove the rider form outlined above on the ground that the proposed dividend stipulation is not equitable in that it does not require the policyholder to disburse the dividends to the premium payers in the same proportion in which the premium contributions to the contract were made?"

Whether or not the proposed stipulation that the dividend surplus which may be apportioned to an annuity group insurance contract shall be applied toward the payment of the premiums due from the employer, the holder of the master policy, without distribution by him to the various employees, members of the group who are covered by the policy and who also pay premiums, is fair and equitable, is a question peculiarly for the determination of the Commissioner, involving, as it does, numerous factual considerations.

Inasmuch as the provisions of G. L. (Ter. Ed.) c. 175, § 4, as amended, require the Commissioner to ascertain "the equity of" a domestic insurance company's "dealings with its policyholders," he has by implication the authority to refuse to give the approval, which a company must seek from him under G. L. (Ter. Ed.) c. 175, §§ 132 and 192, of annuity contracts and riders, to those contracts and riders which he determines to be unfair and inequitable toward policyholders.

Various factual matters exist which must be taken into consideration in relation to the fairness of the proposed stipulation. You have informed me that the expense of bookkeeping and distribution involved in paying over small proportions of an allotted portion of dividend surplus to numerous and scattered premium payers under a group annuity contract is often so great that it may absorb the employer's entire share of the divi-

dend or even exceed it. In forming your determination this consideration is to be weighed by you, with other facts connected with the relation of the parties to a group contract of this character. The Attorney General does not pass upon questions of fact. Although the mode of distribution provided by the proposed rider does not on its face appear to be equitable, there may be factual considerations involved which will affect your determination. A mode of distribution similar to that provided by the proposed rider has been specifically authorized by the Legislature of New York (N. Y. Const. L. c. 628, § 216, par. 2).

In answer to your question I advise you that if you determine that the provisions of the proposed rider are unjust to employees covered by the group annuity contract and unfairly enrich the employer, you should not approve the rider. If, on the other hand, you find that under all the circumstances they are fair and equitable, you should give your approval.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Custodian of Contraband in Department of Public Safety — Failure to Classify.

SEPT. 29, 1944.

Hon. JOHN F. STOKES, *Commissioner of Public Safety.*

DEAR SIR: — You have asked my opinion as to whether the position of "Custodian of Contraband and Evidence" in the Department of Public Safety is subject to the Civil Service Law and Rules.

I am of the opinion that the position is not subject to the Civil Service Law and Rules.

You inform me that the position in question was formerly called "Contraband Handler" and that in 1943 its title was changed to that of "Custodian of Contraband and Evidence" and was classified, apparently under G. L. (Ter. Ed.) c. 30, § 45, by the Division of Personnel and Standardization, with the approval of the Governor and Council, in the following manner:

	Base Salary Range.	Salary Range under c. 170, 1943.
"Custodian of Contraband and Evidence" . .	1800–2280	2070–2622

Definition of Class: Duties: Under direction to collect money, goods or other property which has been stolen, lost, abandoned or taken from a person under arrest; to identify and act as custodian of evidence obtained and held at department headquarters pending court trial or other legal disposition; to assist in or be in charge of transportation of such property, and evidence and of forfeited liquor, firearms and other confiscated dangerous weapons; to represent the Commissioner of Public Safety in taking of warrants and disposing of forfeited articles; to assist in the sorting and destruction of forfeited liquor and otherwise to help in its final disposition in accordance with the law; and to perform related work as required."

By G. L. (Ter. Ed.) c. 22, § 6, the Commissioner of Public Safety is authorized to appoint and remove "assistants" in his department. There is nothing in its phraseology which would appear to indicate an intention

on the part of the Legislature that the positions of such assistants, of whom the "Custodian of Contraband and Evidence" is one, should be outside the sweep of the Civil Service Law.

However, with the exception of certain positions which have been definitely specified by the Legislature (G. L. (Ter. Ed.) c. 31, § 4), only such positions in the public service as are brought thereunder by the rules and regulations of the Civil Service Commission (G. L. (Ter. Ed.) c. 31, § 3) are subject to the Civil Service Law.

Rule 4 of the Civil Service Rules provides:

"1. All persons performing duties or rendering service in any of the offices and positions and classes of positions classified by statute, or in any of the following offices and positions and classes of positions, or performing duties or rendering service similar to that of any such offices or positions and classes of positions, under whatever designation, . . . are subject to the Civil Service Law and Rules, and the selection of persons to fill such appointive offices or positions in the government of the Commonwealth . . . is subject to the Civil Service Law and Rules.

The following classes . . . apply to both the Commonwealth and the several cities thereof: —

. . . . . .

Class 24. Janitors, custodians, and persons employed in the care of schools, or other public buildings."

The Civil Service Commission has set up no class of custodians of personal property. It is obvious from the "Definition of Class" set up by the Division of Personnel and Standardization, already quoted, that the incumbent of the position under consideration is a custodian of personal property only and is not employed in the care of public buildings.

It is apparent from the phraseology employed in describing "Class 24" that the "custodians" therein referred to, like the other employees mentioned therein, are persons having the care of schools or other public buildings and that persons having the care of personal property only do not render the same or similar service to that required of those employees mentioned in Class 24 and are not comprehended as members of such class.

I am informed that it has recently been the contention of the Division of Civil Service that the position in question falls within Class 24. Such a contention is not as a matter of law a reasonable one, in view of the phraseology used by the makers of the rules in describing the employees who constitute this class.

There is no other class established by the rules which can reasonably be said to include a custodian of personal property having such duties as are set forth in the quoted "Definition of Class" set up by the Division of Personnel and Standardization.

It follows that the position in question has not been so classified by the Civil Service Commission in its rules as to bring it within the provisions of the Civil Service Law.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Municipalities — Public Assistance — Amounts Payable for Hospitalization.

Oct. 13, 1944.

Hon. Arthur G. Rotch, *Commissioner of Public Welfare.*

Dear Sir: — You have asked my opinion upon the five following questions with relation to the limit which is placed by the statutes upon the amount which cities and towns may pay for hospital services rendered recipients of public assistance.

"1. May a town pay more than $4.00 per day for hospitalization either by contract or in the absence of a contract?

2. If the town does so pay, may it collect the full amount from the town of settlement or the Commonwealth if unsettled, as the case may be, if the patient is not settled in the town where aided?

3. If the town in any case is limited to payment of $4.00 per day for hospital care, may the town pay an additional amount for so-called extras such as operating room fees, laboratory fees, X-ray services, or private room charges?

4. May the town of settlement or this department, as the case may be, reimburse for such extras in excess of $4.00 per day?

5. If question 4 is answered in the negative, may a town pay and be reimbursed for unusual items procured by the hospital especially for the patient such as special nursing services, blood, blood plasma, penicillin, oxygen, and special serums?"

Questions 1 and 3 relate solely to the authority of cities and towns to make expenditures and are not connected with reimbursement by the Commonwealth. You have no duties to perform with relation to such expenditures and as these two questions are hypothetical as far as concerns your office, I must respectfully decline to answer them in accordance with the long-continued practice followed by my predecessors in office with relation to hypothetical questions.

In answer to your second question, I advise you that a city or town may not collect from the Commonwealth in reimbursement for payments made by it for hospital services rendered to unsettled persons or to those settled in another town a greater amount than $4.00 a day for such services.

G. L. (Ter. Ed.) c. 122, § 18, as amended by St. 1943, c. 476, provides in its applicable part:

"Reasonable expenses incurred by a town under section seventeen (which relates to the hospitalization of certain sick persons) . . . shall be reimbursed by the commonwealth . . . There shall be allowed for the support of a person in a hospital such amounts, *not exceeding four dollars a day*, as may be provided by rules and regulations. . . ."

The context of section 18 indicates that the amount to be "allowed for support" refers to the amount to be paid by the Commonwealth as reimbursement to a town for the hospital expenses of persons liable to be maintained by the Commonwealth. It is plain from the phraseology of the section that the Commonwealth may in no event reimburse a town for expenses of hospitalization greater than $4.00 a day.

In answer to your fourth question, I advise you that the Commonwealth may not reimburse a town for any charge or charges in excess of

$4.00 a day connected with hospitalization such as you have described in your third question.

I refrain from answering that part of question 2 and question 4 which refers to the amount which may be collected from the town of settlement, for the reasons set forth in my answer to questions 1 and 3.

In answer to your fifth question, I advise you that the Commonwealth may not reimburse a town for any charge or charges in excess of $4.00 a day for any of the items mentioned in the fifth question. The only exception to the statutory limitation of reimbursement to $4.00 a day is that contained in the last sentence of the amendment of said section 18 as set forth in said St. 1943, c. 476, namely, that there shall be reimbursement for the expense of tonsil and adenoid operations to the extent of $15.00, which amount is payable irrespective of the expenditure per day.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Workmen's Compensation — Self-Insurer — Bonds.

OCT. 23, 1944.

MRS. EMMA S. TOUSANT, *Chairman, Department of Industrial Accidents.*

DEAR MADAM: — You have informed me that a self-insurer of workmen's compensation, licensed under the provisions of G. L. (Ter. Ed.) c. 152, § 25A, notified your department that it would cease to do business on January 17, 1944, and that your department revoked the license as of that date. You further state that in accordance with said section 25A (2) (*b*), demand was made upon the self-insurer for a deposit; that the self-insurer failed to comply with the notice and made no demand for a hearing to which he would have been entitled under said section 25A (3), if he had requested it within ten days after the receipt of such notice; and that thereafter similar demand was made upon the surety on the bond given by him under said section 25A (2) (*b*).

It would appear from the statements in the letter which you have written me that this self-insurer qualified as such by furnishing to the State Treasurer a corporate surety bond in the amount of $20,000 upon the condition (as required by said section 25A (2) (*b*):

"that if the license of the principal shall be revoked . . . the principal shall upon demand fully comply with sub-paragraph (*a*) of this section relative *to the deposit of securities* or a single premium non-cancellable policy."

The self-insurer, therefore, did not qualify, as he might have done under said subparagraph (*a*), "by keeping on deposit . . . *such amount of securities* . . . as may be required by the department, said securities to be in the form of cash, bonds, stocks or other evidences of indebtedness."

You have directed my attention to said section 25A (4) which reads:

"Such expenses as shall be determined by the department of administration and finance as necessary to carry out the provisions of this chapter relating to self-insurance shall be assessed against all self-insurers, including for this purpose employers who have ceased to exercise the privilege of self-insurance but whose securities are retained on deposit in accordance with the rules of the department. The basis of assessment shall be the

proportion of such expense that the total securities deposited by each self-insurer or penal sum of bond or bonds furnished by each self-insurer at the close of each fiscal year bears to the total deposits and bonds of all self-insurers. All such assessments when collected shall be paid into the state treasury."

— and you have informed me that you have determined and assessed as against the said self-insurer who has ceased to exercise the privilege of self-insurance the proportionate part of the total expense of carrying out the provisions of chapter 152 relating to self-insurers.

You have asked my opinion as to whether your mode of determining the amount to be assessed against the said self-insurer is correct as a matter of law.

Before passing upon this question it is necessary to determine whether this self-insurer, who has qualified under subparagraph (*b*) and not under subparagraph (*a*) and has on deposit only a corporate surety bond and not cash, bonds, stocks or other investments which are evidences of indebtedness, is within the class of employers who have ceased to exercise the privilege of self-insurance but who, notwithstanding, are to be assessed a proportionate part of the expenses of administration because they have "securities . . . retained on deposit in accordance with the rules of the department."

When this employer ceased to be a self-insurer on January 17, 1944, he had no securities which have been retained on deposit, and he has deposited none since, unless the corporate surety bond which he furnished in lieu of the deposit of "securities" referred to in subparagraph (*a*) is to be considered as a security such as is comprehended by the word "securities" in the phrase "securities retained on deposit" as used in said subsection (4).

I am of the opinion that such a bond is not to be considered as one of the "securities" comprehended by the words "securities . . . retained on deposit" in said subsection (4). Consequently, an employer who has ceased to be a self-insurer and has on deposit nothing but a corporate surety bond furnished by him under subparagraph (*b*) is not to be included among those upon whom the expenses of administration may be assessed after the date when he has ceased to be a self-insurer.

I am confirmed in my opinion by the fact that in said subsection (4) when making provision for the basis of an assessment of administration expenses, the Legislature has clearly differentiated between "securities" deposited by self-insurers and the "bonds" such as the corporate surety bond under consideration, furnished by self-insurers, and that a similar differentiation appears to have been made by the Legislature throughout the phrases of said subparagraphs (*a*) and (*b*) when the words "security" or "securities" and the words "bond" or "bonds", referring to corporate surety bonds, are used.

Accordingly, I advise you that in my opinion you may not assess any part of the expenses of administration against an employer who has ceased to be a self-insurer and has on deposit nothing but a corporate surety bond given under the provisions of said subparagraph (*b*), for a period subsequent to the revocation of his license as such self-insurer.

Very truly yours,

Robert T. Bushnell, *Attorney General.*

Public Officers — Salaries while in Military Service.

Oct. 24, 1944.

Hon. Francis X. Hurley, *Treasurer and Receiver General.*

Dear Sir: — You have asked my opinion upon the following question:

"Will you kindly advise me if a register of probate who enters the military service, his place being filled under the provisions of section 11C of chapter 708 of the Acts of 1941 inserted by section 5 of chapter 548 of the Acts of 1943, is entitled to receive his salary while in said service?"

I answer your question in the affirmative.

St. 1941, c. 708, § 1, as last amended by St. 1943, c. 548, § 1, provides in part:

" . . . any person who . . . shall have tendered his resignation from an office or position in the service of the commonwealth, or any political subdivision thereof, or otherwise terminated such service, for the purpose of serving in the military or naval forces of the United States and who does . . . so serve . . . shall . . . be deemed to be . . . on leave of absence; . . ."

It is not provided that officers generally shall be deemed to be on leave of absence without compensation, and, in the absence of an applicable provision specifically taking away or reducing the salary of a public officer on leave of absence, the ordinary principle of law that the salary attached to a public office is incident to title to the office itself and not to the exercise of the functions of the office applies. 46 C. J. p. 1015; *Fitzsimmons* v. *Brooklyn*, 102 N. Y. 536. The fact that a public officer has not performed the duties of his office does not deprive him of the right to receive his salary (46 C. J. pp. 1015, 1016; *Leonard* v. *Terre Haute*, 48 Ind. App. 104) unless his failure of performance is so great as to amount to an abandonment of the office (see *Phillips* v. *Boston*, 150 Mass. 491, 493; Attorney General's Report, 1941, pp. 56, 59). Any possibility of such an abandonment by one leaving his office for the purpose of entering the military service of the United States is precluded by the provisions of said chapter 708, section 1, which create a presumption of a leave of absence under such circumstances.

With respect to certain officers, the Legislature has specifically provided by applicable provisions that their military leaves of absence shall be without full compensation. Among these are certain elected municipal officers (St. 1941, c. 708, § 10A, as amended), certain town officers (said c. 708, § 11, as amended), and certain elected district officers (said c. 708, § 11A, as amended).

The Legislature has also specifically provided by applicable provisions of said chapter 708, section 11B, that elected county officers on such leaves of absence shall be without full compensation, their salaries being reduced by one-half while on such leave. The Legislature appears to have made a determination in said section 11B that registers of probate are county officers, but has by express provision excluded them from the scope of the provisions reducing salaries. No provision applicable to them appears in the statute whereby their military leaves of absence are established as leaves without full salaries.

In its pertinent part said section 11B reads:

"In case an elected county officer, *other than the register of probate*, is unable to perform the duties of his office by reason of said military or naval service, a board . . . may . . . appoint an acting officer. . . .

. . . The salary or compensation paid to the elected official on leave of absence shall be one half of the amount fixed for the office . . ."

Section 11C of said chapter 708, as amended, provides for the appointment of a temporary register of probate to perform the duties of the register while the latter is on a military leave of absence, sets the compensation of such temporary register as the same salary fixed for the position of register, and makes no provision for any lessening of the compensation of the register while the latter is on military leave of absence.

Accordingly, I advise you, as I have already indicated, that a register of probate who leaves his office for the purpose of entering the military services of the United States is entitled to receive his salary, which, under the provisions of G. L. (Ter. Ed.) c. 217, § 35, is to be paid by the Commonwealth.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Old Age Assistance — Husband and Wife Owning Real Estate in Common — Security for Reimbursement of Municipality.

OCT. 24, 1944.

HON. ARTHUR G. ROTCH, *Commissioner of Public Welfare.*

DEAR SIR: — You have asked my opinion as to whether a husband and wife owning in common real estate upon which they reside, having an equity of $5,030, are required to execute a bond and mortgage in the amount of $2,030, to reimburse a municipality for old age assistance to be given them.

I am of the opinion that they are not required to execute such a bond. G. L. (Ter. Ed.) c. 118A, § 4, provides in part:

"The ownership of an equity in vacant land from which no income is derived or in real estate upon which an applicant actually resides shall not disqualify him from receiving assistance under this chapter; provided, that if such equity, . . . exceeds an average of three thousand dollars during the five years immediately preceding his application, the board of public welfare of the town rendering such assistance, or the bureau of old age assistance . . . shall . . . require such applicant to execute a bond in a penal sum equal to the amount of the equity in excess of three thousand dollars, . . . conditioned on repayment . . . of all amounts of such assistance, without interest, such bond to be secured by mortgage upon the applicant's real estate. . . ."

It cannot reasonably be said that the equity owned by one of the tenants in common in such a parcel of real estate exceeds $3,000 because the total equity therein is greater than such sum. The words "the ownership of an equity . . . in real estate upon which an applicant actually resides shall not disqualify him" refer to equitable rights which enrich a particular applicant and as to these there is an exemption in his favor in the amount

of $3,000. A tenant in common cannot be said to be enriched by that share of the total equitable rights in a piece of real estate which inure to the other tenant.

If the Legislature had intended to provide that in the case of tenants in common or in the case of such ownership by husband and wife the exemption of equitable rights to the extent of $3,000 should not apply it would doubtless have used language appropriately expressing an exception to the general rule set forth in said section 4.

It follows that a city which has furnished old age assistance to both a husband and wife owning real estate, upon which they reside, having a value of $5,030 above the amount of a mortgage, without taking a mortgage bond from them, is entitled to reimbursement for the assistance so furnished under the provisions of section 8 of said chapter 118 A.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Metropolitan District Commission — Transfer of Supervision of Mystic Lakes — Lack of Authority.

NOV. 8, 1944.

Hon. EUGENE C. HULTMAN, *Commissioner, Metropolitan District Comission.*

DEAR SIR: — You have asked me whether your Commission may transfer "the supervision and maintenance of the Mystic Lakes in Arlington and Winchester from the Water Division to the Parks Division."

You state that these lakes were originally a source of water supply. I assume from what you further state that although not used for such purpose for many years they could again be so used after reconstruction.

I am informed by your department that these lakes were acquired by the old Metropolitan Water Board, of which your department is the successor, under the provisions of St. 1895, c. 488, which authorized the acquisition of waters for the purpose of water supply.

It is a general principle of law that real property "appropriated to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that end." *Higginson* v. *Treasurer, &c. of Boston,* 212 Mass. 583, 591.

It would seem, therefore, that these lakes, acquired for water supply purposes, cannot now by a departmental order or ruling be converted into parks or portions of parks as such.

Heretofore they have been, you advise me, under the control of the Water Division established in your department. The precise scope of the authority of the divisions in your department is not defined by the statutes.

If these lakes can be maintained as potential sources of water supply when supervised and maintained by the Parks Division in your department as effectually as when supervised and maintained by the Water Division, and there are appropriations available to the Parks Division for such purpose, there would appear to be no objection as a matter of law to the exercise of such supervision and maintenance of the lakes as a potential source of water supply by the Parks Division.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Fire Department of West Springfield — Call Firemen — Classified Service.

Nov. 8, 1944.

Hon. Thomas J. Greehan, *Director of Civil Service.*

Dear Sir: — You have informed me that in 1917 the Town of West Springfield accepted the provisions of Spec. St. 1916, c. 350, entitled "An Act to extend the provisions of the civil service laws to the members of the fire department of the town of West Springfield"; that at the time of such acceptance there were no *call firemen* in the service of the town, and you desire my opinion as to whether by force of such acceptance *call firemen* employed by the town thereafter come within the provisions of the Civil Service Law.

I am of the opinion that such *call firemen* are within the sweep of the Civil Service Law.

In 1916, when the Legislature enacted this special act applicable only to West Springfield, the Revised Laws were in effect, and chapter 19, section 37, contained general provisions substantially corresponding to those now embodied in G. L. (Ter. Ed.) c. 31, § 48, that in a town which accepted the provisions of the existing Civil Service Law relating to the fire forces of cities except Boston such provisions should "apply to all members of the regular or permanent . . . fire forces, or to the call fire force, or to either of said forces. . . ."

By acting under said section 37, a town could determine for itself whether or not call firemen should be included within the protection of Civil Service or whether such protection should be limited to members of the regular and permanent fire force only. It is with relation to this mode of acceptance that G. L. (Ter. Ed.) c. 31, § 48, provides that:

". . . a town which has accepted this section or the corresponding provisions of earlier laws as to regular firemen may afterward accept it as to call firemen. . . ."

The Legislature, however, by enacting said special act of 1916 provided for West Springfield a mode of acceptance of the Civil Service Law which did not permit an inclusion of regular and permanent firemen and an exclusion of call firemen. By its terms all members of the town fire department were to be brought under Civil Service if the voters accepted the act.

The first section of the said special act reads:

"The provisions of chapter nineteen of the Revised Laws (the Civil Service Law), and all acts in amendment thereof and in addition thereto, are hereby made applicable to all present and future members of the fire department of the town of West Springfield."

No provision for the inclusion or exclusion from the acceptance of the special act with regard to any branch or division, regular or call, of the firemen of West Springfield was contained in the special act. The special act unlike said section 37 of chapter 19 of the Revised Laws afforded the voters of West Springfield, if they accepted it, no opportunity to express an intent to exclude either regular or call firemen from the protection of Civil Service.

In view of the existence of the general provisions of said section 37 it is apparent that unless the Legislature intended that acceptance of the special act should draw into the Civil Service both regular and call fire-

men alike there would have been no occasion for its enactment, and the measure would have been of no practical effect, as its terms otherwise make no material variation from those of said section 37.

The words "fire department" comprehend at least the fire-fighting forces of a town (see *Elliott* v. *Fire Commissioner of Boston*, 245 Mass. 330, 332). Call firemen are a part of such forces. In certain statutes the phraseology indicates a legislative determination that call firemen are members of the fire departments of cities (G. L. (Ter. Ed.) c. 32, §§ 80, 82) and of towns (G. L. (Ter. Ed.) c. 32, § 85A; c. 48, § 42). In an opinion of the Attorney General to the Director of Civil Service of December 31, 1941 (Attorney General's Report, 1942, p. 49), it was stated:

"Call firemen are a part of the 'fire forces' of cities and towns which employ them."

To construe the words "fire department" as used by the Legislature in the special act under consideration as not embracing both the regular and call firemen would be to give them an unusual meaning and, moreover, would result in an interpretation of the special statute which, for reasons that I have suggested, would render it an unnecessary duplication of existing legislation, barren of any accomplishment.

As was stated by Chief Justice Rugg in *Flood* v. *Hodges*, 231 Mass. 252, 257:

"A legislative act ought to be interpreted, whenever permitted by its words, so as to make it effective toward a substantial end and not devoid of vitality. Barrenness of accomplishment cannot be imputed to the legislative department of government."

An intention to pass an ineffective statute should not be imputed to the Legislature. *Boston Elevated Railway Co.* v. *Commonwealth*, 310 Mass. 528, 548; *MacInnis* v. *Morrissey*, 298 Mass. 505, 509; *B. & A. R.R.* v. *Boston*, 275 Mass. 133, 135.

It follows that by the acceptance of the special act of 1916 the Town of West Springfield brought all those who were or should thereafter become call firemen within the provisions of the Civil Service Law.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Public Safety; Inspection of Places of Assembly; Regulations; G. L. (Ter. Ed.) c. 143, § 3B.

NOV. 13, 1944.

Hon. JOHN F. STOKES, *Commissioner of Public Safety.*

DEAR SIR: — You have asked my opinion as to whether the following proposed regulation is a proper one to be made under G. L. (Ter. Ed.) c. 143, § 3B:

"SECTION 103. The duty of inspecting existing places of assembly is placed by section 3A of Chapter 143 upon the local municipal officer or Board and all action by inspectors of the Department acting under authority granted such State inspectors by other sections of Chapter 143 shall therefore, be taken by such State inspectors through the municipal officer or board acting under section 3A as the Commissioner's authorized representative."

In my opinion, this proposed regulation is not a proper one. G. L. (Ter. Ed.) c. 143, § 3B, provides:

"The commissioner of public safety, herein and in the six following sections called the commissioner, subject to the approval of the board of standards and appeals shall, and said board of its own motion may, make rules and regulations relating to the construction, reconstruction, alteration, repair, demolition, removal, use and occupancy, and to the standards of materials to be used in such construction, reconstruction, alteration, repair, demolition, removal, use and occupancy of any building or portion thereof which, under section one, may be deemed to be a place of assembly; and such rules and regulations shall be in accord with the generally accepted standards of engineering practice and not inconsistent with law. . . ."

The duty of inspecting places of assembly has been placed upon state inspectors as well as upon various municipal officers, and the duty of taking appropriate action to remedy faulty conditions discovered by state inspections in places of assembly has been placed by the Legislature upon the state inspectors as well as upon municipal officers (see G. L. (Ter. Ed.) c. 143, as amended, §§ 15, 21, 28, 31, 36, 37, 38, 54, 55).

The proposed regulation purports to relieve the state inspectors from full compliance with these duties placed upon them by the Legislature and to destroy their power to perform fully such duties themselves by providing that they shall take action to compel the remedy of faulty conditions discovered by them in places of assembly through municipal officers. Although certain municipal officers, acting as representatives of the Commissioner of Public Safety under G. L. (Ter. Ed.) c. 143, § 3A, have duties of inspection and enforcement with relation to places of assembly as do state inspectors, this fact does not lessen the obligation of the state inspectors to perform their corelative duties in person nor enable them to escape responsibility by a delegation of their authority of enforcement to municipal officers.

It is apparent, therefore, that the provisions of the proposed regulation limiting the exercise of that authority, which has been vested in the state inspectors, by requiring that their actions necessary to the enforcement of the laws relative to places of assembly shall be taken through municipal officers, are repugnant to the intent of the Legislature with regard to the duties and powers of such inspectors as expressed in said chapter 143.

The exercise of the rule-making power by an administrative department or officer does not authorize the making of a rule or regulation in opposition or repugnant to the legislative intent as expressed in a statute of general application. The authority vested in officers or employees by the Legislature may not be reduced by a departmental rule or regulation as would be the case under the proposed regulation. *Wyeth* v. *Cambridge Board of Health*, 200 Mass. 474, 481. *Commonwealth* v. *McFarlane*, 257 Mass. 530. *Commonwealth* v. *Johnson Wholesale Perfume Co.*, 304 Mass. 452, 457.

It follows that the proposed regulation is not a proper one and, if adopted, would be without validity.

I see no objection to the legality of the compromise proposed by you. Whether this compromise should be adopted as a rule is a question of policy on which I express no opinion.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Promotions in Clerical Service of Municipal Fire Department — G. L. (Ter. Ed.) c. 31, § 15 or § 20.

Nov. 27, 1944.

Hon. Thomas J. Greehan, *Director of Civil Service.*

Dear Sir: — You have asked my opinion as to whether promotions in the clerical service of the fire departments of cities and towns are regulated by G. L. (Ter. Ed.) c. 31, § 15, or § 20.

Section 15 of said chapter 31, as amended, sets forth general provisions regulating promotions in the official service. However, it provides that such provisions shall apply "except in police and fire *departments*."

Section 20 of said chapter 31, as amended, sets forth provisions regulating promotions, somewhat different from those of said section 15, applicable to "promotions in such police forces and fire forces of cities and towns as are within the classified civil service."

The answer to your request depends upon the construction which should be put upon the word "departments" as used in the quoted phrase of exclusion contained in said section 15.

I am informed that in the administration of the Civil Service Law your division has construed the word "departments" in said section 15 as embracing only those members of the police who engage in actual *police duty as such* and those firemen who are employed in *fire fighting forces*: that is, you have interpreted the word "departments" in said section 15 as being synonymous with the word "forces" in said section 20.

I am of the opinion that this construction which you have adopted is correct.

The word "department" is susceptible of different meanings with relation to police and fire organizations. According to the context in which it is employed, it may comprehend all the activities associated with the administration of a municipal police or fire organization, or it may be restricted so as not to include the clerical and auxiliary employees of such an organization. *Elliott* v. *Fire Commissioner of Boston*, 245 Mass. 330. *Fickett* v. *Firemen's Relief Fund*, 220 Mass. 319. *Nolan* v. *Boston Firemen's Relief Fund*, 236 Mass. 420.

The word "forces" in the statute as applied to firemen has an accepted meaning as designating the employees engaged in fire fighting (*Elliott* v. *Fire Commissioner of Boston*, 245 Mass. 330, 332) and as applied to policemen, it would appear to signify those engaged in the duty of policing as such.

Said section 20 as originally enacted (St. 1920, c. 368) was made applicable to "police forces." Its provisions were extended to "fire forces" by an amendment made by St. 1939, c. 419, § 3.

The said provisions of section 15, excluding "police and fire departments" from the general requirements made by that section for promotions in the official service, were first enacted by St. 1939, c. 506, § 2.

It is to be assumed that the Legislature when making a new enactment is familiar with pre-existing statutory provisions related to the same subject matter (*Devney's Case*, 223 Mass. 270; *Kneeland* v. *Emerton*, 280 Mass. 371), and intended that the new and old provisions should be parts of an harmonious whole, especially when the new and the old are enacted in the same year. *Commonwealth* v. *King*, 202 Mass. 379, 388.

Inasmuch as no provisions are to be found in section 20 with regard to the promotions of any employees of a police or fire department other than

those of employees in the "police or fire forces," clerical and auxiliary employees would be left without statutory provision for promotions if the word "departments" in section 15 were not employed in the same sense as the word "forces" used in section 20.

It cannot reasonably be thought that the Legislature intended to produce such a result. It follows that the word "departments" should be construed in its limited sense as synonymous with "forces" in order that an effectual, reasonable and harmonious interpretation may be given to the statute (G. L. (Ter. Ed.) c. 31) as a system of Civil Service Law.

"A statute as a whole ought, if possible, to be so construed as to make it an effectual piece of legislation in harmony with common sense and sound reason."

Morrison v. *Selectmen of Weymouth*, 279 Mass. 486, 492.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

•

Emergency Public Works Commission — Postwar Projects — Port of Boston.

Nov. 30, 1944.

Emergency Public Works Commission.

DEAR SIRS: — You have asked my opinion upon the following question:

"Is the Emergency Public Works Commission empowered by chapter 517 of the Acts of 1943 to prepare plans and specifications for the construction as a postwar project of the piers authorized by chapter 714 of the Acts of 1941, provided the funds for such plans and specifications are made available from the Governor's Emergency War Fund?"

I answer this question in the negative.

St. 1943, c. 517, authorized the Emergency Public Works Commission "to prepare a program of post-war public works which may be undertaken by the commonwealth, and to submit such program to the governor." It was provided that the program "shall include provisions deemed desirable for the preparation, during the continuance of the war, of plans, surveys and other information needed to permit prompt, effective and economical action in the period immediately following the termination of the existing states of war. . . ."

It does not appear from the phraseology employed to have been the intent of the Legislature in enacting said chapter 517 to entrust to the Emergency Public Works Commission authority to prepare, as a part of its postwar program, plans and specifications for particular public works for which the Legislature has already provided by vesting the authority to construct in a specified department of the Commonwealth.

St. 1941, c. 714, is entitled "An Act authorizing the department of public works to acquire certain waterfront properties in the city of Boston, to construct a pier thereon and to lease the same."

By its terms the Department of Public Works is authorized, for the purpose of improving the pier facilities in the Port of Boston, to acquire so much of certain designated real properties as might be necessary to construct ramps and their accessories essential to the development of a waterfront terminal, with highway and railroad connections. The department is also authorized to construct a pier, with sheds, tracks, roadways

and other appurtenances, to "dredge berths and approaches thereto and provide such other accessories as it may deem desirable," and to lease the property to a responsible party.

Plainly the duty and the authority to prepare plans and specifications for the construction of the ramps, piers and accessories which the department is authorized by said chapter 714 to construct in the development of a waterfront terminal had been entrusted to the Department of Public Works before the enactment of said St. 1943, c. 517. Whether the construction which the said department is empowered to undertake is a project presently to be carried out or is one which of necessity becomes a postwar project, it is clear that the authority to make plans and specifications and to do other similar necessary work incident to such construction or to the preparation for such construction is vested in the said department.

There is nothing in the provisions of said St. 1943, c. 517, authorizing the Emergency Public Works Commission to prepare a postwar program of public works, which operates to repeal St. 1941, c. 714, or which indicates that the Legislature intended that said Commission in preparing a postwar program should take over or duplicate work already entrusted to another agency of the Commonwealth in connection with a scheme for development and construction specifically authorized by the Legislature, and as a part of which the adoption and execution of the detail of the work have been entrusted to the discretion of such agency.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Insurance — Group Annuity Contracts — Approval — Options — Particular Provisions.

DEC. 1, 1944.

HON. CHARLES F. J. HARRINGTON, *Commissioner of Insurance.*

DEAR SIR: — You have asked my opinion upon four questions with relation to the form of a group annuity contract, which you have laid before me.

You inform me that for many years the Department of Insurance has required life insurance companies issuing such contracts to file them for the purpose of your approval.

1. Your first question reads:

"Is the approval of the Commissioner of a group annuity contract necessary before such contracts may be issued in the Commonwealth?"

I answer this question in the affirmative.

In an opinion which the Attorney General rendered to you on September 29, 1944 (*ante*, p. 22), it was held that you had the authority and the duty to approve or disapprove a form of group annuity contract.

G. L. (Ter. Ed.) c. 175, § 132, as amended, provides that:

"No policy of life or endowment insurance and *no annuity*, survivorship annuity or pure endowment *contract shall be issued . . . until a copy* of the form thereof *has been on file for thirty days with the commissioner, unless* before the expiration of said thirty days *he shall have approved* the *form* of the *policy or contract in writing;* nor if the commissioner notifies the company in writing, within said thirty days, that in his opinion the form

of the policy or contract does not comply with the laws of the commonwealth, specifying his reasons therefor, . . ."

I am of the opinion that the words "annuity contract" as employed in said section are sufficiently broad to include a group annuity contract. Although the Legislature has seen fit to define a group life insurance policy in section 133 of said chapter 175, as amended, and has specifically provided for its approval by the Commissioner in section 134 of said chapter 175, as amended, and has omitted similar specific provisions with regard to group annuity contracts, nevertheless, in view of the general legislative design of subjecting contracts of life insurance companies to the approval of the Commissioner, as shown in said chapter 175, such omission cannot well be taken as showing a legislative intent to exclude annuity contracts issued to a group from the safeguard of effective scrutiny by the Commissioner, which is required by said section 132 for annuity contracts generally as well as for life policies.

2. Your second question is:

"Have the rules and regulations and the applicable provisions of section 134 which are used by the Department in examining group annuity contract forms the force of law, and, in the event of disapproval of a group annuity contract form, are they sufficient to comply with the statutory requirement that the Commissioner specify his reasons whereby the contract does not comply with the laws of the Commonwealth?"

I answer this question in the negative.

G. L. (Ter. Ed.) c. 175, § 132, as amended, provides that if the Commissioner does not approve the form of a contract of annuity, he is to notify the insurance company that in his opinion it does not comply with the laws of the Commonwealth and specify his reasons therefor.

Section 134 of chapter 175, as amended, contains no provisions which relate to or are applicable to annuity contracts. Its standard provisions are specifically made applicable to group policies of life insurance. They are not laws of the Commonwealth with which annuity contracts of any type must comply.

No authority to make rules and regulations with regard to the form of annuity contracts has been vested in the Commissioner of Insurance. Any so-called rules and regulations which may have been made in this respect can be nothing but directives for the guidance of the department and the insurance companies. They are not "laws of the commonwealth" with which annuity contracts of any type must comply. It follows that lack of conformity to the said provisions of section 134 or to the said "rules and regulations" as such could not furnish proper "reasons" for an opinion that a group annuity contract "does not comply with the laws of the commonwealth," as the quoted words are used in said section 132.

3. You have informed me that a group annuity contract which has been filed with you —

"contains a provision which has an option available to the annuitant when he reaches age 60. By availing himself of this option when he reaches the age 60, the annuitant, if he then retires from work, may have the amount of the annuity to which he would otherwise be entitled at that age increased by the amount which will be payable to him at age 65 under the Federal Social Security Act and a proportionate deduction will be made to the amount otherwise payable to him under the group

annuity contract at age 65. The amount which will be payable to him under the Federal Social Security Act cannot, of course, be known at the time when the policy is issued, and the calculation of the amount of the annuity which will be payable should this option be adopted by the annuitant in the future cannot be known at the time when the policy is issued."

And with relation to this contract your third question reads:

"May the Commissioner approve a form of group annuity contract containing such an option since the contract itself does not contain sufficient information so that the annuitant can know at its date of issue the amount of future benefits which will accrue to him if he adopts such an option when he reaches the age 60?"

I answer this question in the affirmative.

The Legislature has not, as I have already said, made the standard provisions concerning life policies in said section 132 or those relating to group life policies in said section 134 applicable to annuity contracts.

It has set forth certain requirements with relation to the form and contents of annuity contracts in general. G. L. (Ter. Ed.) c. 175, § 130, prohibits incorrect dating of such a contract. Section 129 requires that "a plain description . . . so fully defining its character, including dividend periods and other peculiarities, that the holder thereof shall not be likely to mistake the nature or scope of the contract," shall be borne in bold letters on the face of the contract. Section 120 prohibits discrimination "in favor of individuals between insurants of the same class and equal expectation of life in . . . the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts." Section 22 forbids the inclusion in an annuity contract of certain provisions depriving the courts of jurisdiction or limiting the time for commencing action against a company to a period of less than two years or making the company's agent the agent of the annuitant. Section 22B forbids the inclusion in a contract of any provision for a waiver by an annuitant of any of the provisions of said chapter 175, except as authorized therein.

There is no provision of the statutes that the applications and the contract as written shall constitute the entire contract between the parties, as has been specifically provided by said section 134 for group life insurance policies, nor is there any statutory provision of similar import. Since this is so, there is no requirement that the form of an option, such as you have described, in a contract of group annuity, should contain sufficient information so that the annuitant can know at the date of issue the amount of future benefits which will accrue to him if he later chooses to adopt the option.

The option is plainly for the benefit of the annuitant and the amount which will be received under the option is capable of being calculated at the time when the annuitant considers whether he desires to avail himself of it.

The provisions of this option do not appear to be contrary to any law of the Commonwealth, and there does not appear to be anything in their nature calculated to mislead the annuitant, or to lead to any discrimination or to any unfair practice.

4. You have also informed me with regard to the group annuity contract which has been filed with you that —

"The group annuity contract form referred to above contains a provision whereby the annuity payments to individual employees in the upper salary brackets may be reduced and the payments to individual employees in the lower salary brackets may be increased proportionately if the contract is discontinued in less than ten years. The amount of this reduction cannot be determined at the time of issuance of the policy, and, therefore, it cannot be known to or be computed by a proposed annuitant from any terms appearing in the contract.

The reason for inserting this provision allowing for the reduction of some of the annuity payments and the increase in others upon discontinuance within ten years is that the Federal Government will not give credit to an employer for his share of premium payments on the annuity contract as a deduction from his income taxes unless the premium payments in such a contract continue for more than ten years or unless the contract contains this provision for the indicated redistribution of annuities upon such discontinuance."

And with relation to this contract you have asked my opinion upon the following question:

"May the Commissioner approve a group annuity contract allowing the reduction of annuity payments to individual employees in the upper salary brackets with a proportionate increase in the annuity payments to individual employees in the lower salary brackets upon discontinuance of the policy as outlined above?"

The fact that the amount of reduction in the annuity payments to individual employees in the higher brackets which will occur if the contract is discontinued within ten years cannot be computed at the time of issue does not render its provisions unlawful since, as I have said, the statutes do not require that an annuity contract must contain within the applications and the contract form all the provisions of the contract.

If the terms of the contract describing what will occur upon its discontinuance within ten years are set out therein so plainly as not to fall within the prohibition of said section 129 so "that the holders thereby shall not be likely to mistake the nature and scope of the contract," it would not appear to be contrary to any specific provision of law concerning annuity contracts nor would it appear to be inequitable or discriminatory since this mode of dealing with annuity payments upon a discontinuance is a part of the agreement knowingly entered into by all the parties at the time of its issue.

If the Commissioner determines upon an inspection of the contract, as a matter of law, that its terms are set out in the manner indicated in the preceding paragraph, and that no others of its terms are in violation of statutory provisions, I am of the opinion that he may properly approve the contract.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Workmen's Compensation — Self-Insurance — Reinsurance — Catastrophe — Service Company.

Dec. 13, 1944.

Department of Industrial Accidents.

Dear Sirs: — You have informed me that your Department, acting under the provisions of G. L. (Ter. Ed.) c. 152, § 25A, required a self-insurer to furnish a policy reinsuring its compensation risk against catastrophe in accordance with subparagraph (*c*) of subsection (2) of said section 25A.

You have laid before me a policy furnished by the self-insurer in accordance with your requirement containing an endorsement, and with relation thereto you have asked my opinion upon two questions:

Your first question is:

"(1) Is the policy referred to one which 'reinsures self-insurers' compensation risk against catastrophe' within the meaning and as required by G. L. (Ter. Ed.) c. 152, § 25A, subsection (2), subparagraph (*c*) as enacted by St. 1943, c. 529?"

I answer this question in the affirmative.

Your second question relates to the endorsement which is attached to the policy laid before me, and is as follows:

"(2) If your answer to the foregoing question is in the affirmative, do the provisions in the endorsement attached to said policy that the services described in paragraph (2) and section J of the policy shall be performed by the nominee of the reinsurer violate provisions of section 25D of said chapter 152, as enacted by chapter 529 of the Acts of 1943?"

My answer to this question is in the negative.

(1) G. L. (Ter. Ed.) c. 152, § 25A, subsection (2) subparagraph (*c*), reads:

"As a further guarantee of a self-insurer's ability to pay the benefits provided for by this chapter to injured employees, the department may require that a self-insurer reinsure his compensation risk against catastrophe, and such reinsurance, when so required, shall be placed only with an insurance company admitted to do business in this commonwealth."

The insurer in this policy agrees, among other things, "to reinsure this Self-Insurer against all loss *in excess of seventy per cent* (70) of the Self-Insurer's 'Normal Premium,' or the sum of $7,000, whichever may be the greater, for Workmen's Compensation . . . by reason of his liability for damages on account of such injuries to such of said employees as are legally employed, and within the contemplation of the Workmen's Compensation Law. . . ."

This form of agreement is similar to that in a proposed policy form considered by the Supreme Judicial Court in *Friend Brothers, Inc.* v. *Seaboard Surety Co.*, 316 Mass. 639. In its opinion in that case the court held that such a form of agreement "is in reality a contract for reinsurance," treated it as creating insurance against "catastrophe," and stated that such a contract "is not offensive to our laws or public policy."

In the light of that opinion the policy which you have laid before me must be taken to reinsure a self-insurer's compensation against catastrophe.

(2) The endorsement of the policy in question to which you refer in your second question in its pertinent part reads:

"In consideration of the premium charged for this policy, it is understood and agreed that the services described in paragraph 2 and section 'J' of the policy to which this endorsement is attached shall be performed by a nominee of the reinsurer."

Paragraph 2 of the policy referred to in the endorsement reads:

"*That this contract* is issued to the Self-Insurer on the express condition that this Self-Insurer undertakes at all times to utilize the services of . . . , hereinafter referred to as the 'Service Organization', which services shall comprise, in accordance with their usual practices, the following duties:

(*a*) The strict discharge of the Employer's Workmen's Compensation and/or occupational disease obligations to his employees;

(*b*) The maintenance of accurate records of all details incident to such payments;

(*c*) The furnishing of complete inspection and safety engineering services; and

(*d*) Furnishing of monthly claims' records on an approved form;

the acceptance of which services shall be a condition precedent to any liability which may attach to the Company in accordance with the terms and conditions of this Contract."

Section J of the policy referred to in the endorsement reads:

"J. The services contemplated under this Contract to be rendered through the aforesaid Service Organization shall include frequent inspection of the Self-Insurer's plants; the rendering of adequate engineering services; the compilation and filing of all notices and reports required under the Workmen's Compensation and/or Occupational Disease Law; the furnishing of a full and complete monthly report to the Self-Insurer and to the Company of all accidents, and a tabulation of all payments made and reserves set up for benefits and expenses on account of liability for injuries sustained by employees; the attendance on behalf of the Self-Insurer at all scheduled hearings before the Workmen's Compensation Board; and a general administration of all other details looking to the effectual discharge of the Self-Insurer's obligations towards his employees."

G. L. (Ter. Ed.) c. 152, § 25, inserted by St. 1943, c. 529, reads:

"Section 25D. No self-insurer or attorney acting in its behalf shall engage a service company or like organization to investigate, adjust, or settle claims under this chapter or to represent it in any matter before the department. Any violation of this section shall constitute reasonable cause for revocation of the license of a self-insurer under section twenty-five A of this chapter."

The provisions of said paragraph 2 and of said section J of the policy are broad enough to include within the work to be performed by the "Service Organization," therein referred to, investigation, adjustment and settlement of claims under said chapter 152. The performance of such acts on behalf of a self-insurer by "a service company or like organization" are prohibited by said section 25D. If the nominee of the insurer under the

endorsement is "a service company or like organization," its employment to do the work described in paragraph 2 and section J of the policy by the self-insurer will be in violation of the terms of said section 25D, and will require the revocation of the self-insurer's license.

Although the phraseology of said paragraph 2 and section J seems to indicate that the employment of "a service company or like organization" is contemplated by the parties to the contract, nevertheless the insurer might, under the terms of the endorsement, choose to nominate for employment an individual who functions in such a manner that he could not be deemed to be "a service company or like organization." For this reason the endorsement as it stands, even when read in conjunction with paragraph 2 and section J of the policy, cannot presently be said to be unlawful as requiring a violation of said section 25D.

If and when by force of the terms of the endorsement the self-insurer employs, directly or indirectly, a "service company or like organization" to perform the services described in said paragraph 2 and section J an unlawful act will have been committed and the self-insurer's license will be subject to revocation.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Conservation — Shellfish — Permits — Municipal Leases — Non-residents — Director of Division of Marine Fisheries.

DEC. 14, 1944.

Hon. RAYMOND J. KENNEY, *Commissioner of Conservation.*

DEAR SIR: — You have asked my opinion on three questions with relation to so-called leases from the Commonwealth to cities and towns in Essex County "of the right to control and regulate the taking of clams from all flats within" the borders of such municipalities under the provisions of St. 1912, c. 710, as amended by St. 1927, c. 307. You state that your request for an opinion is occasioned by a controversy over the rights of certain shellfishermen holding "master digger's permits" to take shellfish in contaminated areas from the waters of cities and towns to which such leases have been issued.

Your first two questions are:

"Has such a city or town the right to exclude non-residents of its city or town holding the type of permits heretofore mentioned from taking clams from the waters of said city or town?

Has the Director of the Division of Marine Fisheries the authority to issue valid permits of the type above mentioned to non-residents of any city or town in Essex County holding such a lease to take clams from contaminated areas in said city or town?"

I answer your first question that by virtue of such a lease such city or town has the right to exclude non-residents, with the exception of those mentioned in section 6 of said chapter 710, as amended, from taking clams from its waters, except that when an area within its borders has been determined by the State Department of Public Health to be a *contaminated* area under the terms of G. L. (Ter. Ed.) c. 130, § 74, it may not exclude any person to whom a "master digger's permit" or a "digger's permit" to take shellfish from such a contaminated area has been

issued by the Director of Marine Fisheries under the provisions of G. L. (Ter. Ed.) c. 130, § 75.

I answer your second question to the effect that the Director of Marine Fisheries has authority to issue permits to take clams from an area determined to be contaminated by the State Department of Public Health to non-residents of a town in Essex County within whose borders the area lies irrespective of the fact that the town has a lease issued under said St. 1912, c. 710, as amended.

St. 1912, c. 710, in its applicable parts, provides:

"SECTION 1. Any city or town in the county of Essex may take from the commonwealth a lease of the right to control and regulate the taking of clams from all the flats within its borders.

SECTION 2. The commissioners on fisheries and game shall issue a lease as aforesaid to each city or town in said county which makes application therefor, for a term of ten years, at an annual rental of five dollars a year, to be paid into the treasury of the commonwealth.

. . . . . .

SECTION 4. All rights granted to a city or town under a lease as aforesaid shall be held by the city or town for the benefit of its citizens.

SECTION 5. After acceptance of this act, cities through their city governments and towns at any annual or special meeting duly called for the purpose, may make rules and regulations in regard to the taking of clams, and may authorize the granting of permits to citizens of such cities and towns to take clams, and may prescribe the time and methods of such taking.

. . . . . .

SECTION 8. All acts and parts of acts inconsistent herewith are hereby repealed.

SECTION 9. This act shall take effect in any city upon its acceptance by the city council or corresponding body of such city, and in any town upon its acceptance by a majority of the voters of such town present and voting thereon at any annual town meeting, or at any special town meeting duly called for the purpose."

Section 6 of said chapter 710, as amended by St. 1927, c. 307, reads:

"SECTION 6. Any inhabitant of the commonwealth may, without a permit, take clams, not exceeding one bushel, including shells, in any one day, for the use of his own family from the waters of his own or any other city or town in the county of Essex, and may so take from the waters of his own city or town clams for bait, not exceeding three bushels, including shells, in any one day, subject to the general rules and regulations adopted by cities and towns, respectively, in the manner specified in the preceding section as to the time, place and methods of taking clams. Whoever, without a permit, takes any clams from the flats within the borders of any city or town holding a lease from the commonwealth under section two, except as permitted by this section, shall forfeit not less than five nor more than fifty dollars for such offence."

In 1912, when chapter 710 was enacted, the statutes of the Commonwealth provided that the State Department of Public Health might determine that areas of tidewater and flats were contaminated; that the Commissioners on Fisheries and Game should prohibit the taking of shellfish

from such areas, and that anyone taking shellfish from such areas might be punished by a fine, R. L., c. 91, §§ 113, 114.

The authority of the State under the police power to make and enforce a plan established by the Legislature whereby contaminated areas might be determined by a State department and the taking of shellfish from such areas prohibited has been held to be constitutional. *Commonwealth* v. *Feeney*, 221 Mass. 323. Such a plan was in existence when St. 1912, c. 710, was passed by virtue of the provisions of R. L., c. 91, §§ 113, 114, and said chapter 710 should be interpreted in the light of the then existing legislation. As so construed, said chapter 710 constitutes a grant of regulatory powers to cities and towns, subject to the paramount authority of the Commonwealth under its police power to regulate contaminated areas for the protection of the public health.

This general plan was reenacted in various forms and now appears in G. L. (Ter. Ed.) c. 130, §§ 74, 75, as most recently amended by St. 1941, c. 598. Specific provision is now made in said section 75 for the granting of permits ("master digger's permits" and "digger's permits") by the Director of Marine Fisheries to persons to take shellfish from areas determined to be contaminated upon condition that such shellfish be purified in an approved plant. See G. L. (1921) c. 130, §§ 137–140; St. 1926, c. 370; St. 1928, c. 266; St. 1929, c. 372, § 25; G. L. (Ter. Ed.) c. 130, §§ 137, 138, prior to amendment by St. 1941, c. 598.

The provisions of said section 75, whereby permits may be issued by State officials authorizing persons to take shellfish from contaminated areas upon condition of the purification of the shellfish in approved plants, are mere details incident to the plan for state regulation of the taking of shellfish from contaminated areas as a public health measure under the police power.

The authority of the State under the police power to make all laws necessary to secure the health of the community can neither be abdicated nor bargained away. Accordingly, any grants and all contract rights are held subject to its exercise. *Opinion of the Justices*, 261 Mass. 523, 553. Instruments containing a grant of power from the Commonwealth, such as the leases authorized by St. 1912, c. 710, should, as a general principle of law, be construed if possible so as to preserve their validity as impliedly reserving the right to the State to exercise its police power. *Boston El. Ry.* v. *Commonwealth*, 310 Mass. 528, 552. See *Commonwealth* v. *Alger*, 7 Cush. 53, 84, 85; *Commonwealth* v. *Bailey*, 13 Allen, 541, 544. Moreover, it is a principle of law that a grant from the State is to be construed strictly against the grantee. *Attorney General* v. *Jamaica Pond Aqueduct Co.*, 133 Mass. 361, 365, 366; *Stoneham* v. *Commonwealth*, 249 Mass. 112, 117.

In so far as the regulation of uncontaminated areas or of contaminated areas as to which the authorized State officials have made no determination is concerned, a city or town may make, and enforce under a lease, regulations relative to the digging of shellfish, and may exclude non-residents from so digging except for the particular purposes set forth in said St. 1912, c. 710, § 6, as amended by St. 1927, c. 307. See *Commonwealth* v. *Hilton*, 174 Mass. 29.

Your third question is:

"Whether or not the Department of Conservation or the Division of Marine Fisheries has authority to execute new leases including renewal of existing leases under the provisions of chapter 710 of the Acts of 1912 in

view of the General Laws, chapter 130, section 104, as inserted by chapter 598 of the Acts of 1941?"

I advise you that the Director of the Division of Marine Fisheries is now the officer authorized by the statutes to execute leases and renewals under St. 1912, c. 710.

The offices of Commissioners on Fisheries and Game, who were empowered by St. 1912, c. 710, to issue the leases under consideration, were abolished by Gen. St. 1919, c. 350, pt. III, § 39. By a series of enactments the powers which they formerly exercised with relation to marine fish, including shellfish, have been vested in an official called the Director of the Division of Marine Fisheries (Gen. St. 1919, c. 350, pt. III, § 43; G. L. (Ter. Ed.) c. 21, § 6; St. 1929, c. 372, § 1; St. 1939, c. 491, §§ 1, 8; St. 1941, c. 598, § 6, c. 599, § 3).

The authority to make the leases under consideration has now vested in the Director of the Division of Marine Fisheries. This authority is not affected by the provisions of G. L. (Ter. Ed.) c. 130, § 104, inserted by St. 1941, c. 598, to which you refer in your question. Section 104 reads:

"This chapter shall not be deemed to affect any provisions or penalties contained, or any privileges granted, in any special statute relating to fisheries in any particular place, except such provisions thereof as relate to shellfish and shellfisheries and to the alewife fisheries."

Since the provisions of said St. 1912, c. 710, which are affected by G. L. (Ter. Ed.) c. 130, as amended, are provisions relating to shellfish and shellfisheries, such effect is not modified by the terms of this section.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Architects — Registration — "Residence" — "Prior" — St. 1941, c. 696 § 3.

DEC. 27, 1944.

Mrs. HAZEL G. OLIVER, *Director of Registration.*

DEAR MADAM: On behalf of the Board of Registration of Architects you have asked my opinion upon two questions relating to registration of architects.

1. The first question reads:

"What is considered a person's *legal residence?*"

Inasmuch as the words "legal residence" do not occur in the statutes relating to the duties of the said Board nor in the "Application for Certification as a Registered Architect," prepared by the Board, and because a construction of said words is not germane to the performance of any duty required of the Board, the question appears to be hypothetical and is, therefore, one which the Attorney General following a long line of practice does not answer (Attorney General's Report, 1935, p. 31).

For the guidance of the said Board, I inform you that the words "legal resident of Massachusetts," as used by said Board in section 4 (g) of the "Application" are not synonymous with the words "citizens of the commonwealth" as employed by the Legislature in St. 1941, c. 696, § 3, concerning an applicant for registration.

2. Your second question reads:

"Does the word 'prior' in the following quotation from the Board of Registration of Architects' Law mean 'immediately' prior? Section 3, chapter 696, Acts of 1941.

'Any person complying with section sixty D of chapter one hundred and twelve of the General Laws, inserted by section two of this act, who applies to the board of registration of architects prior to January first, nineteen hundred and forty-three, and has been a citizen of the commonwealth for at least *two years prior* to date of application, shall be given a certificate of registration if qualified as follows: —'"

The reference to "section sixty D" appearing in said section 3, is plainly a typographical error and was intended to read section C, or B, for unless so read it is without meaning.

Reading the statute in the latter manner, I answer your question in the affirmative.

The word "prior" may be used in more than one sense. It may refer, as it most commonly does, to any time antecedent to a particular event or it may refer only to a time which occurred just before an event. Its precise meaning in any instance is to be gathered largely from the context. When used, as in said section 3, with "to" in conjunction with a phrase such as "at least two years" it may be construed as meaning "immediately prior to." *Commonwealth* v. *Stephens*, 345 Pa. 436. It would appear from the phraseology of the provision made by the Legislature in said section 3 with regard to citizenship that it was intended that the benefits of said section were to inure to persons who were citizens of the Commonwealth at the time of application for registration, not to persons who were no longer citizens at such time though possessing citizenship at some previous period. In order to effectuate such intent, it was also provided that the necessary citizenship existing at the time of application should have a continuous status for two years before such application was made. This intent was expressed by employing the words "and has been a citizen of the commonwealth for at least two years prior to date of application."

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Old Age Assistance — Husband and Wife — Tenancies.

DEC. 27, 1944.

HON. ARTHUR G. ROTCH, *Commissioner of Public Welfare.*

DEAR SIR: — You have asked my opinion upon two questions of law which are as follows: —

"(1) Where husband and wife own real estate upon which they reside, having an equity of $5,030 as joint tenants. If husband is receiving assistance, should he be required to execute a bond; or if wife is receiving assistance, should she be required to execute a bond; and what is the requirement, if any, as to bond and mortgage where both are receiving assistance?

(2) The same questions raised in (1) where the real estate is held as tenants by the entirety."

1. In answer to your first question, I advise you that in my opinion when husband and wife own real estate as joint tenants, upon which estate they reside and have an equity therein of $5,030, if the husband or wife receives old age assistance, he or she may not be required to furnish a bond and mortgage under G. L. (Ter. Ed.) c. 118A, §4, upon the theory that he or she owns an equity in such estate exceeding $3,000. The same principle applies if both are receiving assistance.

G. L. (Ter. Ed.) c. 118A, § 4, provides in part:

"The ownership of an equity in vacant land from which no income is derived or in real estate upon which an applicant actually resides shall not disqualify him from receiving assistance under this chapter; provided, that if such equity, . . . exceeds an average of three thousand dollars during the five years immediately preceding his application, the board of public welfare of the town rendering such assistance, or the bureau of old age assistance . . . shall . . . require such applicant to execute a bond in a penal sum equal to the amount of the equity in excess of three thousand dollars, conditioned on repayment . . . of all amounts of such assistance, without interest, such bond to be secured by mortgage upon the applicant's real estate. . . ."

In an opinion rendered you on October 24, 1944 (*ante*, p. 30), I stated that when real estate upon which husband and wife resided, owned by them as tenants in common, had an equity of $5,030, neither one nor both of them upon receiving old age assistance were required to furnish a bond and mortgage under said chapter 118A, section 4, because "a tenant in common cannot be said to be enriched by that share of the total equitable rights in a piece of real estate which inure to the other tenant."

The same considerations apply when the estate is held by husband and wife as joint tenants.

A joint tenancy and a tenancy in common are alike to the extent that in both cases the co-tenants hold by unity of possession. They differ in that joint tenants hold by one joint title and in one right, whereas tenants in common hold by several titles and several rights. 33 Corpus Juris 901.

The feature of joint tenancy which chiefly distinguishes it from tenancy in common is the right of survivorship which exists in joint tenancy but not in tenancy in common.

It has been stated by the Supreme Judicial Court that "the doctrine of survivorship is the distinguishing incident of title by joint tenancy" (*Morris* v. *McCarty*, 158 Mass. 11, 12, 13), but the right of survivorship does not enable one to say of a joint tenant any more than of a tenant in common that he is "enriched by that share of the total equitable rights in a piece of real estate which inure to the other tenant."

2. The foregoing principles apply also with relation to real estate of tenants by the entirety, and I am of the opinion that a bond and mortgage may not be required of such tenants receiving old age assistance in any of the instances outlined in your second question.

A tenancy by the entirety is a tenancy by a husband and wife with right of possession in the husband, and, as has been said by the Supreme Judicial Court:

"An estate in entirety is an estate in joint tenancy, but with the limitation that during their joint lives neither the husband nor the wife can

destroy the right of survivorship without the assent of the other party." *Morris* v. *McCarty*, 158 Mass. 11, 12.

Palmer v. *Treasurer and Receiver General*, 222 Mass. 263; *Pray* v. *Stebbins*, 141 Mass. 219, 221.

An estate or tenancy in entirety is in its nature a joint tenancy and the feature which chiefly distinguishes the former from the latter tenancy in no real sense indicates an enrichment of one tenant by that share of the total equitable rights which inure to the other tenant any more than if they were tenants in common. It follows, therefore, that a bond and mortgage should not be required in the situation which you have set forth.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Insurance — Classification of Fire Risks by Domestic Fire Insurance Companies — Contracts made outside the Commonwealth.

JAN. 16, 1945.

Hon. CHARLES F. J. HARRINGTON, *Commissioner of Insurance.*

DEAR SIR: — You have asked my opinion upon three questions of law relating to the classification of fire insurance risks by domestic mutual companies under G. L. (Ter. Ed.) c. 175, § 80, as amended.

1. Your first question reads:

"May a domestic mutual fire company apportion any of its fire insurance risks *located in the Commonwealth and insured under contracts made in Massachusetts* into classifications other than such classifications as are definitely specified in section 80?"

I answer your question in the negative.

Said section 80 in its applicable portions provides: (1) that the directors of a mutual fire company may fix the percentages of dividend or expiration return of premium to be paid on expiring or cancelled policies which may, with the approval of the Commissioner of Insurance, be different from policies insuring against the different kinds of risks specified in section 47 of said chapter 175 which may be written by such a company; (2) with regard to policies *insuring against loss by fire* the section specifically provides that such percentage may be different for "farm risks, fireproof risks, . . . manufacturing or storage risks, or manufacturing or storage risks confined to lumber and woodworking only" from "that for policies insuring other risks against fire for the same term." The section further provides that "policies insuring *risks in this commonwealth* in the same classification shall have an equal rate of dividend or return of premium."

Inasmuch as the Legislature in the foregoing terms of said section 80 has specifically designated the classes of *fire risks* which may be given percentages of dividend or expiration return of premium different from the percentage established for *other fire risks*, it has shown an intention that such designated classes of fire risks shall be exclusive of any other *fire risks* and has not accorded authority to domestic mutual fire companies to add to such classes or to apportion *fire risks* for the purposes of giving

different percentages into other classifications than those set forth in the said section.

As a principle of construction, express mention of one or more matters in a statute is generally held to exclude by implication other similar matters not mentioned. *Boston & Albany Railroad* v. *Commonwealth*, 296 Mass. 426, 434; *Spence, Bryson, Inc.* v. *China Products Co.*, 308 Mass. 81, 88.

2. Your second question reads:

"Does the requirement of section 80 that classifications of risks be approved by the Commissioner apply to classifications of risks which are *located outside the Commonwealth and insured under contracts made outside Massachusetts?*"

I answer this question in the negative.

A contract of insurance made outside the Commonwealth is governed by the laws of the State in which it is made. *Bottomley* v. *Metropolitan Life Ins. Co.*, 170 Mass. 274. *Dolan* v. *Mutual Reserve Fund*, 173 Mass. 197. *Johnson* v. *Mutual Life Ins. Co.*, 180 Mass. 407, 408, 409. *Stone* v. *Old Colony Street Railway*, 212 Mass. 459.

Fire policies written outside Massachusetts conforming in their terms concerning classification for percentages of dividend or expiration return of premiums with the laws of the State in which the contract is made are valid. In making the various provisions respecting such classifications, including approval by the Commissioner of Insurance, the Legislature would appear to have been regulating the making of such contracts of fire insurance only as are executed within the Commonwealth. As to these, the provisions of said section 80 govern contracts made in Massachusetts by both domestic mutual fire companies and by foreign mutual fire companies (G. L. (Ter. Ed.) c. 175, § 150) irrespective of the laws of the States where such foreign companies are situated, but as to contracts made outside Massachusetts by domestic and foreign companies alike, the provisions of said section 80 do not apply.

If the Legislature had intended to impose a prohibition in this connection upon domestic companies with respect to risks outside Massachusetts, it doubtless would have used words indicating such an intent, such as, referring to the risks designated in section 80, "wherever located", as was done in the amendment of R. L., c. 118, § 20, by St. 1907, c. 576, § 20, now embodied in G. L. (Ter. Ed.) c. 175, § 21, with respect to the insurable limits of a single risk.

The provision in section 80 that "policies insuring risks in this commonwealth in the same classification shall have an equal rate of dividend or return of premium" and the further provision that "every policy placed in any classification made under this section shall, when issued, bear an endorsement, satisfactory to the commissioner, to the effect that it is so classified" indicate that the Legislature intended by the terms of section 80 to regulate the classifications therein provided for contracts made in Massachusetts and did not intend in respect to such classifications to attempt to regulate contracts made outside the Commonwealth.

3. Your third question reads:

"May a domestic mutual company apportion any of its risks *located outside the Commonwealth and insured under contracts made outside Massachusetts* into classifications other than such classifications as are specified in section 80?"

I answer this question to the effect that such a company may apportion risks located and insured outside the Commonwealth into classifications other than those specified in said section 80 if the law of the State where the contract of insurance is made permits such classifications.

The same considerations which were applicable to your second question also apply to the third and make it apparent that the implied prohibitions contained in said section 80 of classifications other than those specified therein are not applicable to contracts of fire insurance made outside the Commonwealth.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Workmen's Compensation — Director of Division of the Blind — "Officer" — "Employee".

JAN. 31, 1945.

Industrial Accident Board.

DEAR SIRS: — You have asked my opinion upon three questions of law regarding the application of the Workmen's Compensation Act to the Director of the Division of the Blind.

1. Your first question reads:

"Is the Director of the Blind, appointed under G. L. (Ter. Ed.) c. 15, § 13, an 'employee' within the provisions of St. 1936, c. 403, amending G. L. (Ter. Ed.) c. 152, § 69?"

I answer this question in the negative.

It is apparent from a consideration of the statutes concerning the place of the said Director that such place is an office, not an employment, in the service of the Commonwealth so that the incumbent is an officer and not an employee.

The distinction between an officer and an employee is a well-recognized one and has often been made by the Legislature and recognized by the Supreme Judicial Court.

There are certain criteria which have been said by our courts to distinguish an office from an employment: the holder of an office has entrusted to him some portion of the sovereign authority of the state, his duties are not merely clerical but must be performed in the administration of authority bestowed by law, a tenure defined by statute, a selection of the holder by appointment under statute rather than by a contract, a salary fixed by law rather than by a contract of hiring. *Attorney General* v. *Tillinghast*, 203 Mass. 539, 543–545.

Judged by an application of this test, the place in question is an office. The Director of the Division of the Blind is appointed by the Governor, with the advice and consent of the Council, for a term of five years, at a salary fixed by them (G. L. (Ter. Ed.) c. 15, § 15); he is the head of the division (G. L. (Ter. Ed.) c. 69, § 17), and is vested with authority to appoint and remove subordinate officers, agents, teachers and clerks, with the advice of the advisory board in such division (G. L. (Ter. Ed.) c. 15, § 16); he is empowered to administer the law relative to the blind and expend public moneys for the establishment of workshops and for the relief of blind persons (G. L. (Ter. Ed.) c. 69, §§ 14, 16, 24).

It follows that the Director, who is the executive and administrative head of the Division of the Blind, is an officer. See *Robertson* v. *Commissmissioner of Civil Service*, 259 Mass. 447, 449, and cases there cited.

2. Your second question reads:

"Is the language contained in the amendment (chapter 403 of the Acts of 1936) to the effect that the terms laborers, workmen and mechanics shall include 'other employees . . . , regardless of the nature of their work,' to be construed broadly as expressing the legislative intent that all 'persons' in the employ of the commonwealth, as the governor and council may determine, may be made subject to the provisions of sections 69 to 75, both inclusive, of chapter 152 of the General Laws, as amended?"

I answer this question in the negative.

G. L. (Ter. Ed.) c. 152, § 69, as amended, in its applicable parts provides:

". . . The terms laborers, workmen and mechanics, as used in sections sixty-eight to seventy-five, inclusive (which sections relate to workmen's compensation) shall include all employees of any such city or town, except members of a police or fire force, who are engaged in work being done under a contract with the state department of public works, and shall include other employees except members of a police or fire force, regardless of the nature of their work, of the commonwealth or of any such county, city, town, district or county tuberculosis hospital district, to such extent as the commonwealth or such county, city, town or district, acting respectively through the governor and council, county commissioners, city council, the qualified voters in a town or district meeting, or the trustees of such county tuberculosis hospital district, shall determine, as evidenced by a writing filed with the department."

The terms "laborers, workmen and mechanics" indicate *employees* of a certain type. When the Legislature by an amendment of section 69, as previously written by St. 1936, c. 403, added the words, as to which you inquire, "other employees . . . regardless of the nature of their work," it did not indicate an intention to embrace officers of the Commonwealth within the sweep of the Workmen's Compensation Law.

It is a general principle of statutory construction that a word used in a statute is to be construed in connection with the words with which it is associated. *Commonwealth* v. *Dec*, 222 Mass. 184, 186; *Leavitt* v. *Leavitt*, 135 Mass. 191, 193; *In re Schouler*, 134 Mass. 426, 427.

So the words "other employees," employed by the Legislature in said section 69 in association with the terms "laborers, workmen and mechanics," all of which terms refer to employees, are not to be construed as being used in so broad or loose a sense as to comprehend officers as well as employees.

The General Court has in other statutes employed the words "officers" and "employees" as having distinct and separate meanings. *Cf.* G. L. (Ter. Ed.) c. 31, § 5. If, in relation to the statute under consideration, the Legislature had intended to make its provisions applicable to officers as well as to employees of the Commonwealth, it doubtless would have so indicated by using the word "officers" in addition to "employees" in the sentence of said section 69 under consideration.

3. Your third question reads:

"Is the language 'other employees . . . regardless of the nature of their work' as used in said chapter 403 of the Acts of 1936 to be construed

in a restricted sense as limiting its application to those who may accept in 'employees,' in the narrow sense, as that term is distinguished ion 4 of from the word 'officers,' as so used?" d by

The same considerations which required me to answer your second question in the negative make it necessary for me to answer this question in the affirmative.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Civil Service — Preference of Veterans in Promotional Examinations.

FEB. 5, 1945.

Civil Service Commission.

DEAR SIRS: — You have informed me that:

"A competitive promotional examination, provided for in the second sentence of section 15 of the General Laws, chapter 31, has been held by this Division to establish an eligible list from which a promotion might be made of a superintendent of sewers of the Metropolitan District Commission. Several of those who took the examination are veterans, and some are also disabled veterans. The Director of Civil Service was requested to give one of the disabled veterans who passed this promotional examination preference as a disabled veteran. The Director denied the request on his finding that there was no provision therefor in the Civil Service Law or Rules. This action of the Director has been appealed to the Civil Service Commission."

You have asked my opinion "as to whether or not preference to disabled veterans can be allowed by the Director in preparing a list of eligibles for promotion to the position to which reference is made."

I advise you that in my opinion a preference in *promotion* as a result of a competitive promotional examination such as you have described may not be given a disabled veteran.

The second sentence of the last paragraph of G. L. (Ter. Ed.) c. 31, § 15, as amended, to which you refer, provides with relation to promotions in the classified Civil Service other than a special type of promotion mentioned in the first sentence, that:

". . . any promotion shall be made after a competitive promotional examination open to the next lower grades in succession in the service of the same department, board or commission until a sufficient number of applicants to hold a competitive examination is obtained."

It is provided in G. L. (Ter. Ed.) c. 31, § 23, that:

". . . A disabled veteran shall be *appointed* and *employed* in preference to all other persons, including veterans."

This provision was introduced into said section 23 in 1922 by chapter 463 of that year.

Section 23 also provides a preference for veterans to positions in the classified Civil Service, limited to preference in "*appointment*" only. The distinction between these two forms of preferences, involving the added advantage given the disabled veteran by preference in "employment" as well as in *appointment*, is well recognized. *Younie* v. *Director of the Divi-*

It follo*employment Compensation*, 306 Mass. 567. *McCabe* v. *Judge* head *District Court*, 277 Mass. 55.

*mi*ne Legislature has not by specific enactment provided a preference in *omotion* for veterans or disabled veterans.

It has by implication made provision so that such a preference in promotion may come into existence, for by G. L. (Ter. Ed.) c. 31, § 3, it has provided with relation to the Rules of the Civil Service Commission that:

". . . Such rules . . . shall include provisions for the following: —

. . . . . .

(*f*) Preference to veterans in appointment and promotion, not inconsistent with this chapter."

The terms of G. L. (Ter. Ed.) c. 31, § 3 (*f*), were contained in G. L. (Ter. Ed.) c. 31, § 3, when said St. 1922, c. 463, was enacted. *Younie* v. *Director of the Division of Unemployment Compensation*, 306 Mass. 567, 571.

The legislative provision, however, is not self-executing by its terms; it requires to be implemented by the rule-making power of your Commission. This power your Commission has never exercised and in spite of the requirement that the rules formulated by the Commission "shall include" provisions concerning veterans' preferences, both in *appointment* and *promotion*, no rule or regulation with regard to preference of veterans in promotions has ever been made.

From the manner of employment by the Legislature in said chapter 31 of the words "appointment", "employment" and "promotion" as distinct and separate terms, it is clear that none of the three words was used as embodying the meaning of either of the others.

It follows that at the present time, since no rule with relation to veterans' preferences in promotion has been made by your Commission, no provision of law exists whereby in a competitive examination for promotion from a position in one class or grade to a position in a higher grade or class, held under the terms of the second sentence of the last paragraph of said section 15, preference may be given to a disabled veteran.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Civil Service — Custodian of Municipal Building — "Officer" — "Employee".

FEB. 9, 1945.

HON. THOMAS J. GREEHAN, *Director of Civil Service.*

DEAR SIR: — You have asked my opinion as to whether the position of custodian of the G. A. R. Memorial Building in Lynn is subject to the provisions of the Civil Service Law.

I answer your question in the affirmative.

By the terms of the Civil Service Rules (Rule 4.1.) made under authority of G. L. (Ter. Ed.) c. 31, § 3, the position of custodian of a municipal public building would appear to have been made subject to the Civil Service Law by the establishment through said Rule of Class 24 of the classified Civil Service. This class is described in said Rule as consisting of:

"Janitors, custodians, and persons employed in the care of schools, or other public buildings."

By Spec. St. 1919, c. 220, the City of Lynn was authorized to accept in trust a conveyance of the said Grand Army building, and by section 4 of said chapter 220 an unpaid board of seven trustees, to be appointed by the mayor with the approval of the city council, was created by the statute and empowered:

"to have charge and care of the building subject to the approval of the mayor and city council."

Provision was made in said section 4 for a custodian of the building and authority for his appointment and removal was given as follows:

"They (the trustees) shall appoint a custodian therefor, and shall fix his compensation but the custodian may at any time be removed by the trustees, or a majority of them, without such approval. The trustees may appoint other necessary officers or employees for the care of the building, and may fix their compensation."

The duties of the custodian are not set forth in the statute and there is nothing to indicate that his position is other than an employment. There is nothing about the position of a custodian of a building, as the word "custodian" is ordinarily used, which tends by necessary implication to carry with it a grant of any part of the authority of the state or municipality as such, so as to raise the position to the status of an "office." The use of the words "other necessary officers or employees" in the last sentence of said section 4 above quoted, does not indicate a legislative intent to make the place of custodian an office.

It follows that the place in question is not an office and the incumbent not an "officer" as the word "officer" is used in G. L. (Ter. Ed.) c. 31, § 4, exempting certain "officers" from the sweep of the Civil Service Law in the following language:

"No rule made by the (civil service) commission shall apply to the selection or appointment of any of the following:

. . . officers whose appointment is subject to confirmation by the . . . city council of any city; . . ."

The place in question does not fall within any of the other exemptions from the Civil Service Law provided for in said section 5.

There is nothing in the phraseology of said section 4 of chapter 220 with relation to the place which by implication indicates a legislative intent to exempt it from the force of the Civil Service Law. The provision in said section 4 that "the custodian may at any time be removed by the trustees . . . without such approval" (i.e. approval by the mayor and city council), while providing that removal from the position may be made by the trustees without the necessity of obtaining approval of their action from the mayor and council, as might otherwise have been thought to be required by the phrase in said section 4, "the trustees shall have charge and care of the building and of its maintenance and use, subject to the approval of the mayor and of the city council," does not vest the trustees with power to remove in any other fashion than that required by the Civil Service Law in G. L. (Ter. Ed.) c. 31, § 43.

It has not been held that an intent on the part of the Legislature to exclude a position from the benefits of the Civil Service Law can properly be said to arise by implication from the wording of a statute except when a

specific provision relative to appointment or removal directly contrary to the general terms of G. L. (Ter. Ed.) c. 31, has been set forth, a provision, for example, authorizing removal at "pleasure." Opinion of the Attorney General to the Civil Service Commission (Attorney General's Report for year ending June 30, 1944, p. 144). No such provision with relation to the place in question has been made by the Legislature.

Unless a place in the public service has been specifically or impliedly excluded by the Legislature from the control of the Civil Service Law and Rules, or is within some group of places which has been so specifically or impliedly excluded, it is within the sweep of those measures and is governed by them when, like the place under consideration, it falls within a classification established by the Civil Service Commission. *Wells* v. *Commissioner of Public Works*, 253 Mass. 416, 419.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Civil Service — Promotions — G. L. (Ter. Ed.) c. 31, § 15.

FEB. 26, 1945.

HON. THOMAS J. GREEHAN, *Director of Civil Service.*

DEAR SIR: — In a recent letter you have written me as follows:

"I have been requested to approve the promotion of an employee who is the fifth oldest employee in point of service in the next lower grade, in a case where the oldest and second oldest employees are unwilling to be considered for the promotion.

The question has arisen as to whether the words quoted mean the oldest, second oldest or third oldest who are willing to accept such promotion.

I would, therefore, respectfully request your opinion on the point raised, all the other conditions for approval of promotion being present except that of determining the meaning of these words."

G. L. (Ter. Ed.) c. 31, § 15, as amended, in its applicable parts reads:

". . . an appointing official may with the approval of the director promote in the official service an employee in one grade to the next higher grade; provided, that such employee has been employed at least three years in the lower grade, is the *oldest employee*, the *second oldest employee* or the *third oldest employee* therein in point of service, and that such employee passes a qualifying examination . . ."

The phraseology used by the Legislature in the quoted sentence is explicit as to the employees who may be promoted in the manner described. Such specific provision by a well-recognized rule of statutory construction excludes the inclusion therein of employees not designated in view of the fact that such a construction is not opposed to the purposes of the Civil Service Law, and there appears to be nothing in the statute to indicate a legislative intent to give the privilege of promotion without a competitive examination to anyone but the three employees in the appropriate grades who are actually the three oldest "in point of service." Words such as "who are willing to accept such promotion" cannot properly be read into the statute.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Food — Sale of Canned Lobster Meat — Label.

March 5, 1945.

Mr. Ralph H. Osborn, *Director, Division of Marine Fisheries.*

Dear Sir: — You have asked my opinion as to whether it is legal to sell in the Commonwealth canned lobster meat derived from "crustacea of the species *genus palinurus*" labeled with various trade names and with the word "lobster" preceded by the word "rock."

I am of the opinion that a sale of such lobster meat so labeled would be in violation of G. L. (Ter. Ed.) c. 130, § 51.

Said section reads:

"No person shall sell, or represent for the purpose of sale, any lobster as a native lobster unless the same shall have been originally caught or taken in the coastal waters; nor shall any person so sell, or represent for the purpose of sale, any crustacean as a lobster unless the same is of the species known as Homarus americanus; *nor shall any person so sell, or represent for the purpose of sale, any meat as lobster meat unless such meat is wholly from crustaceans of such species.* Violation of any provision of this section shall be punished by a fine of not less than ten nor more than fifty dollars."

It would appear that the described labeling represents the canned meat to be "lobster meat." Neither the trade names nor the use of the word "rock" can reasonably be said to alter the nature of such representation. You have stated the fact to be that the canned meat in question is not from a lobster of the species known as "Homarus americanus." This being so, its sale as "lobster meat" is contrary to the provisions of said section 51.

Section 46 of said chapter 130 permits the sale of canned "lobster meat" when certified by health authorities under certain designated circumstances but the provisions of section 46 do not authorize the sale of canned "lobster meat" of a kind forbidden by the specific provisions of said section 51. The sections of said chapter 130, as of all statutes, are to be read together so as to form as far as possible an harmonious whole (*Killam* v. *March*, 316 Mass. 646; *Fluett* v. *McCabe*, 299 Mass. 173, 178.).

Very truly yours,

Clarence A. Barnes, *Attorney General.*

Insurance — Fraternal Benefit Society — By-Laws — Delegation of Authority — Election of Officers.

March 9, 1945.

Hon. Charles F. J. Harrington, *Commissioner of Insurance.*

Dear Sir: — You have informed me that:

"In connection with a recent examination conducted by this Department of the affairs of a domestic fraternal benefit society incorporated on the Lodge System, a question has arisen as to the power of the society to enact a by-law authorizing its executive committee which has the powers of directors to appoint the supreme treasurer and the supreme secretary."

and you have asked my opinion as follows:

"Will you please advise us as to whether or not a society of this kind may by by-law delegate to its executive committee the right to appoint its supreme treasurer and its supreme secretary."

I am of the opinion that such a society may not by by-law delegate to its executive committee the right to appoint its supreme treasurer and secretary.

The method of organizing such a society at its first meeting is set forth in G. L. (Ter. Ed.) c. 176, § 7. The third sentence of said section 7 reads:

". . . At such first meeting, including any reasonable adjournment thereof, an organization shall be effected by the choice by ballot of a temporary clerk, who shall be sworn, and by the adoption of by-laws, and the election by ballot of directors, president, secretary and treasurer, or other officers corresponding thereto, with powers and duties similar to those of such officers, and such other officers as the by-laws may provide for; but at such election no person shall be eligible as a director or other officer who has not subscribed the agreement of association."

Section 3 of said chapter 176, as amended, reads as follows:

"Any such society shall be deemed to have a representative form of government when it shall provide in its constitution and by-laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and by-laws; and provided, further, that the meetings of the supreme or governing body and *the election of officers, representatives or delegates shall be held as often as once in four years*, and that a complete stenographic record of the proceedings of each such meeting, so far as it relates to matters within the jurisdiction of the commissioner of insurance, shall be filed in the home office of the society within thirty days after the adjournment of such meeting. The members, officers, representatives or delegates of a fraternal benefit society shall not vote by proxy."

Section 32 of said chapter 176, as amended, relative to the constitution and by-laws of such a society, provides:

"Every society may, subject to this chapter, make a constitution and by-laws for its government, admission of members, management of its affairs, and the fixing and readjusting of the rates and contributions of its members from time to time, and may amend its constitution and by-laws, and it shall have such other powers as are necessary or incidental to carry into effect its objects and purposes. The constitution and by-laws may prescribe the officers and elected members of standing committees, who may be ex officiis directors or other officers corresponding thereto, and may, with the approval of the commissioner, provide for a system of absent voting, other than proxy voting, under which absent members entitled to vote may vote in the election of the officers and directors or similar governing body; provided, that the commissioner shall not approve any provision for such a system of absent voting unless the society submitting such provision for approval satisfies the commissioner that absent voting is necessary in order to have an adequate representation of the membership of the society at its elections."

St. 1901, c. 422, from which the provisions of said sections 3, 7 and 32 stem, provided in its section 4 for the election at the first meeting of such a society for organization of officers by ballot, and in section 6 provided that:

"Officers chosen as required in section four shall hold office until the next meeting of the corporation for the election of officers. . . . At the said meeting, and thereafter at least biennially, the officers shall be chosen, and shall hold office until their successors are elected and qualified. . . ."

Section 5 of said chapter 422 provided with relation to by-laws in part as follows:

"The by-laws may prescribe, *where no other provision is specially made*, the manner in which and the officers . . . by whom the purposes of the corporation shall be carried out; . . . "

Similar provisions, including one for the election of a secretary at the first meeting, appear likewise in the revision of the law relative to such societies in St. 1911, c. 628.

In said chapter 422, section 3, the Legislature made plain its intent that the officers elected at the first meeting of such society were to be thereafter elected by the members, and by said section 5 made clear that the by-laws might prescribe the manner of election of officers only in such instances as had not been provided for by statute.

I am of the opinion that in the compilation of the law relative to such societies in said chapter 176 of the General Laws, the Legislature in requiring the election of the designated officers at the first meeting and "the election of officers . . ." thereafter "as often as once in four years," provided the manner of such election, and that the power to make by-laws given by said section 32 of chapter 176 was not intended to grant any authority to make by-laws with relation to the manner of election of officers when such provision had been specifically made by the Legislature itself, as in said sections 3 and 5.

Verbal changes in the re-enactment or codification of earlier statutes are to be treated, by a familiar principle of statutory construction, as not altering the meaning of such statutes but as continuations of the previous law. *Delaney* v. *Grand Lodge A.O.U.W.*, 244 Mass. 556, 563. *Davis* v. *School Committee*, 307 Mass. 354, 361, 363.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Constitutional Law — Alcoholic Beverages — Sales — Aliens — Treaty with Great Britain.

MARCH 9, 1945.

His Excellency MAURICE J. TOBIN, *Governor of the Commonwealth.*

SIR: — Your Excellency has advised me of the case of a British subject who was discharged from her position, which I assume from what you have written, to have been that of a waitress, serving alcoholic beverages in a restaurant licensed under the provisions of G. L. (Ter. Ed.) c. 138, as amended, by her employer because he was threatened with prosecution under G. L. (Ter. Ed.) c. 138, § 31, as amended, for employing her since she was not a citizen of the United States.

You have asked my opinion as to whether said section 31 is repugnant to the terms of the existing Treaty between the United States and Great Britain made in 1815, and with minor changes still in force.

Statutes which are in opposition or repugnant to treaties of the United States are of no more force than unconstitutional statutes. *Todok* v. *Union State Bank*, 281 U. S. 449, 453; *In re Wyman*, 191 Mass. 276. Statutes, however, are to be construed whenever reasonably possible so as to give them an interpretation which will prevent their being invalid or ineffective (*Lehan* v. *North Main St. Garage*, 312 Mass. 547, 559).

Construed so as to prohibit the employment of a British subject to serve liquor in a licensed restaurant, the said section would in my opinion be repugnant to said Treaty.

To be valid and enforceable, the section is to be construed as having no application to aliens who are British subjects.

Said G. L. (Ter. Ed.) c. 138, § 31, reads:

"No person, except a citizen of the United States, shall sell, serve or deliver any alcoholic beverages or alcohol on any premises covered by a license, permit or certificate of fitness issued under this chapter, and no holder of such a license, permit or certificate of fitness shall, directly or through any agent, employ or permit any such person to sell, serve or deliver any alcoholic beverages or alcohol upon the premises covered by such license, permit or certificate. No holder of a transportation permit issued under this chapter shall, directly or through any agent, employ or permit any person, except such a citizen, to transport any alcoholic beverages or alcohol. Whoever violates any provision of this section shall be punished by a fine of not less than twenty-five nor more than one hundred dollars, and such a violation, if committed by the holder of a license, permit or certificate of fitness issued under this chapter, shall be sufficient cause for the revocation or suspension thereof."

The applicable portion of the existing Treaty between the United States and Great Britain (8 Stat. 228) reads:

"Article I.

There shall be between the territories of the United States of America, and all the territories of His Britannick majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports, and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively."

Although it is true that not every gainful occupation in which a British subject may engage while in the United States can reasonably be said to be so related to "commerce" as to be within the guaranties of the said Treaty for security to carry on commerce (*Clark* v. *Deckerbach*, 274 U. S. 392), yet a liberal rather than a narrow construction should be given to

the phraseology of the Treaty (*In re Wyman*, 191 Mass. 276, 278; *Tucker* v. *Alexandroff*, 183 U. S. 424, 437; *Asakura* v. *City of Seattle*, 265 U. S. 332, 342), to effectuate what under present-day conceptions would appear to be the intent of the treaty makers, namely, to accord the same liberty to pursue commercial affairs to British subjects as to citizens of the United States.

To sell alcoholic beverages in a licensed restaurant or to assist in selling by serving them as a waiter or waitress is, as has been held by one of my predecessors in office (Attorney General's Report, 1938, pp. 56, 57), to perform commercial work and to carry on commercial affairs so related to "commerce" as to be comprehended by the quoted word as used in the said Treaty and to bring the person so employed within the sweep of the words "merchants and traders" as set forth in the Treaty.

It follows that the said section 31 does not prohibit the employment of British subjects to perform the work described therein in connection with the sale, service or delivery of alcoholic beverages.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Military Leave of Absence — Resignation — United States Public Health Service.

MARCH 14, 1945.

Hon. CLIFTON T. PERKINS, *Commissioner of Mental Health.*

DEAR SIR: — You have asked my opinion upon the following question with relation to the specific case of Dr. Irene O. Grandmont, formerly Assistant Physician at the Foxborough State Hospital:

"Does an Assistant Physician who enters the United States Public Health Service come under the provisions of Chapter 708 of the Acts of 1941, when the physician in question was assigned to duty immediately with the United States Coast Guard, according to data submitted by her?"

You have informed me that Dr. Grandmont did not file a written resignation when leaving the service of the Commonwealth at some time prior to December 7, 1944, but gave only an oral notice of resignation to the superintendent of the said hospital; that at the time of giving such notice she informed the superintendent that she was leaving to enter the United States Public Health Service; that subsequently she did enter the Public Health Service; that immediately thereafter she was detailed to serve in the United States Coast Guard.

The United States Public Health Service (U. S. C. Title 42) is not as such a part of the naval or military forces of the United States. The personnel of the United States Coast Guard is a part of the naval forces of the United States (U. S. C. A. 14, 1943, Pub. Law 184, c. 298) by virtue of an executive order of the President (Exec. Ord. Nov. 1, 1941, Fed. Reg. Vol. 6, p. 215).

St. 1941, c. 708, § 1, as amended by St. 1943, c. 548, provides that:

". . . any person who . . . shall have tendered his *resignation* from an office or position in the service of the commonwealth, . . . *for the purpose of serving in the military or naval forces* of the United States and

who does so serve . . . shall . . . be deemed to be . . . on leave of absence; . . .

. . . . . .

. . . If no written resignation is filed, *entrance into the military or naval service* of the United States . . . *shall be prima facie evidence* that his service to the commonwealth . . . is terminated for the purpose of entering said military or naval service."

As appears by the foregoing statutory provisions, the fact that Dr. Grandmont did not enter the naval forces of the United States in the Coast Guard after resigning, is prima facie evidence that she left the service of the Commonwealth for the purpose of entering such forces.

The Attorney General does not pass upon questions of fact.

Upon the facts as you have presented them to me, it cannot be said, as a matter of law, that the mere statement of Dr. Grandmont to the superintendent, that she was leaving to enter the Public Health Service (a service from which she might be detailed to the Coast Guard) is in itself evidence of a lack of intent to enter the naval forces at the time of resignation sufficient to overcome the presumption arising by force of the statute from her actual entry into such naval forces. It may well be that at the time of resignation she knew that by prior arrangement she was to enter the Coast Guard through the medium of induction into the Public Health Service.

It follows that upon the facts of which you have informed me Dr. Grandmont should be regarded as upon a leave of absence such as is mentioned in said section 1, commonly called a military leave.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Division of the Blind — Vocational Rehabilitation — Federal Funds.

APRIL 5, 1945.

Hon. JULIUS E. WARREN, *Commissioner of Education.*

DEAR SIR: — You have asked my opinion upon three questions in the following communication:

"The Division of the Blind, Department of Education, is about to embark upon a program for the blind which contemplates participation in the benefits made available under Public Law 113, 78th Congress, and the rules and regulations promulgated thereunder.

Therefore, I respectfully request your opinion on the following questions which relate to the conduct of the above-mentioned program.

1. Is the Division of the Blind, State Department of Education, authorized to provide vocational rehabilitation for the adult blind?

2. If so, is said division authorized to expend state funds for this purpose?

3. If so, may federal funds be received and expended as provided for in the vocational rehabilitation act, amendments of 1943, and the regulations issued pursuant thereunder."

1. "Vocational rehabilitation" is defined by Congress in the Vocational Rehabilitation Act of June 2, 1920, as amended by Public Law 113 of the 78th Congress, to which you refer, as "any services necessary to render a

disabled individual fit to engage in a remunerative occupation." The words appear to be used in the same sense in G. L. (Ter. Ed.) c. 15, § 6A, and I assume that they are so employed in your letter.

Although broad powers are given to the Director of the Blind to ameliorate the condition of the blind, authority to engage in "vocational rehabilitation" is not specifically conferred. Doubtless vocational rehabilitation may be the result in some instances of the exercise by the division of its power to ameliorate the condition of the blind, and since this is so such incidental "vocational rehabilitation" and the expenditure of funds which make it possible are within the authority of the Division of the Blind, so that I answer your first two questions in the affirmative.

2. It does not follow, however, that the Division of the Blind is authorized "to embark upon a program for the blind which contemplates participation in the benefits made available under Public Law 113, 78th Congress," as suggested in your letter.

Public Law 113 of the 78th Congress (57 Stat., pt. 1, c. 190) amends "An Act to provide for the promotion of vocational rehabilitation of persons disabled in industry or otherwise and their return to civil employment", approved June 2, 1920 (U. S. C., title 29, c. 4, §§ 31–45B) so as to make the benefits of the act applicable to "war disabled civilians."

By the enactment of G. L. (Ter. Ed.) c. 15, § 6A, as amended, the Legislature has created the State Board of Vocational Education and has specifically empowered such Board to co-operate with a federal agency in the administration of said Congressional act of June 2, 1920, and acts in amendment thereof, of which acts in amendment said Public Law 113 is one. The said Board is also authorized by said section 6A to expend "any funds received by the state treasurer from the federal government under the provisions of said act or acts" of Congress.

Moreover, by G. L. (Ter. Ed.) c. 74, § 22A, as amended, said State Board is fully empowered to do all things necessary to carry out a broad program for "vocational rehabilitation" of persons disabled in industry or otherwise, with the use of federal funds, a program which may embrace specific training for the "vocational rehabilitation" of the blind.

Consequently, since the said Board has been so specifically authorized to act in conjunction with the federal authorities in carrying out the federal act as amended and to expend the money receivable under the act, no authority, by implication or otherwise, is vested in the Division of the Blind with respect to the administration of the federal act or the expenditure of the funds paid to the State under it.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Constitutional Law — Rules and Regulations of State Departments — Encroachment of Legislature upon Authority of the Executive Branch of the Government.

APRIL 13, 1945.

Hon. CHARLES F. HOLMAN, *Chairman, Legislative Committee on Departmental Rules and Regulations.*

DEAR SIR: — You have asked my opinion on behalf of said committee as to the constitutionality, if enacted into law, of a proposed measure, entitled "An Act establishing a Joint Standing Committee of the General

Court to act with respect to rules and regulations of state departments, commissions, boards and officials."

I am of the opinion that this proposed measure, if enacted into law, would not be constitutional since it provides for the exercise by the legislative department of the government of executive powers in contravention of the prohibitions of Article XXX of Part the First of the Constitution of the Commonwealth. Furthermore, the manner provided for the establishment of the committee which is to administer the provisions of the measure would appear to be in violation of Article LXVI of the Amendments to the Constitution.

A proposed act similar in all material respects to the instant measure was submitted in 1943 by the House Committee on Ways and Means to the then Attorney General, and the latter, on May 26, 1943 (Attorney General's Report for the year ending June 30, 1944, p. 51), rendered an opinion to that committee to the effect that the proposed act would be unconstitutional and set forth at length the reasons which induce a conclusion that such a measure is not constitutional. I am in accord with that opinion.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Insurance — Domestic Stock Liability Insurance Company — Increase of Capital — Commissioner's Approval.

APRIL 16, 1945.

Hon. CHARLES F. J. HARRINGTON, *Commissioner of Insurance.*

DEAR SIR: — In a recent communication you have written me that:

"A domestic stock liability insurance company which has voted to increase its capital by a transfer from its surplus in the manner outlined in G. L. c. 175, § 70, has forwarded to the Department within the prescribed time the documents executed in connection with such proposed increase.

Previous to taking this vote the company's capital, surplus and liabilities were as follows:

Capital	$350,000.00
Surplus	$400,000.00
Liabilities	$2,135,626.02

The proposed stock dividend which is in the amount of $150,000 would increase the company's capital to $500,000 and decrease its surplus to $250,000 but would not change the total amount available for the protection of policyholders, although it would remove from the free surplus a substantial sum which otherwise would be available in the future if adverse circumstances were encountered."

In connection with the foregoing facts you have asked my opinion on two questions. Your first question reads:

"In taking action under section 70 is the Commissioner's duty merely a ministerial act in which he is limited to ascertaining that the increase in capital has been made in accordance with the certificate filed with him within thirty days after the issuance of the new stock and which sets forth the proceedings thereof and the amount of such increase and that

such certificate has been signed and sworn to by the president, secretary and a majority of the directors of the company and also to passing upon the form of the documents presented to him for approval?"

1. I answer your first question in the affirmative.

It is to be noted that the Legislature has enacted no requirement as to the amount of surplus which such an insurance company as you refer to must have nor established any provision as to any ratio which must be maintained between the capital of such a company and its surplus or between surplus and outstanding liabilities.

As you have yourself pointed out in your letter, the proposed increase in capital under consideration, although involving a change in the amount of capital and surplus, respectively, does not change the total amount of the company's capital and surplus available for the protection of policyholders.

G. L. (Ter. Ed.) c. 175, § 70, sets forth in some detail the two ways in which a domestic stock insurance company may increase its capital and the various steps which must be taken by a company to effect such increase. (These ways were considered at length in an opinion of October 17, 1930, by one of my predecessors in office, given to the then Commissioner of Insurance. Report of the Attorney General, 1930, p. 120.) After setting forth specifically the steps necessary to be taken by a company to effect an increase of capital, said section 70 provides:

"In whichever mode the increase is made, the company shall, within thirty days after the issue of such certificates, submit to the commissioner a certificate setting forth the proceedings thereof and the amount of such increase, signed and sworn to by its president and secretary and a majority of its directors. If the commissioner finds that the increase is made in conformity to law, he shall endorse his approval thereon; and upon filing such certificate so endorsed with the state secretary and the payment of a fee of one twentieth of one per cent of the amount by which the capital is increased for filing the same, the company may transact business upon the capital as increased, and the commissioner shall, upon payment of the fee prescribed by section fourteen, issue his certificate to that effect."

The phrase "if the commissioner finds that the increase is made in conformity to law, he shall endorse his approval thereon," as employed in said section 70, does not indicate a legislative intent to vest the Commissioner with discretion to determine the amount of surplus which must be available following an increase in capital, but merely to require him to ascertain whether in making an increase in capital the company has taken those steps and fulfilled those requirements which the Legislature has specified in said section 70 as necessary prerequisites to such an increase.

The Commissioner is not authorized to withhold his approval to an increase in capital, or the certificate that a company may transact business upon such an increased capital, because of his own views as to the desirability of such an increase.

Said section 70, in its provision for an approval by the Commissioner of Insurance of an increase in capital voted by a company, does not contain a phrase such as is to be found in section 71 of said chapter 175, whereby with relation to the Commissioner's approval of a *reduction* of capital stock it is provided:

"If the commissioner finds that the reduction is made in conformity to law *and that it will not be prejudicial to the public*, he shall endorse his approval thereon."

The general provisions of section 47 of said chapter 175, to which you refer, which relate to examination of insurance companies and inspection of their affairs, business meetings and dealings with their policyholders, do not enlarge the scope of the particular authority to approve or disapprove an increase of capital stock given to the Commissioner by said section 70, nor do the terms of section 72 of said chapter 175 have such an effect.

Said section 70 specifically provides that "if the commissioner finds that the increase is made in conformity to law, he *shall* endorse his approval thereon." "Shall" as so used is a mandatory word inconsistent with the idea of discretion. The phraseology of section 70 requires that if the Commissioner finds that the law specifically applicable to the ways and manner in which a company may increase its capital has been complied with, he "shall" endorse his approval and thereafter "shall" issue a certificate. There is no suggestion in the language of the section that the Commissioner may approve some increases of capital stock made in conformity with the particular provisions of said section 70, and reject others so made, according to his own opinion as to desirability. See *Elmer* v. *Commissioner of Insurance*, 304 Mass. 194, 196.

2. Your second question reads:

"Is it the duty of the Commissioner to make an inquiry into the general financial condition of an insurance company proposing to increase its capital under section 70 and may he use the discretion of a reasonably prudent man in determining whether such action is in the interest of policyholders and the public to approve or disapprove such increase?"

I answer this question in the negative for reasons which have been set forth in my answer to your first question.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Insurance — Fraternal Benefit Society — Annual Meeting — Officers Holding Over — Authority of Commissioner.

APRIL 24, 1945.

Hon. CHARLES F. J. HARRINGTON, *Commissioner of Insurance.*

DEAR SIR: — You have written me with relation to the approaching annual session of the High Court of the Massachusetts Catholic Order of Foresters, an incorporated fraternal benefit society, and have informed me that the Order is having difficulty in obtaining the necessary permission from the Federal "War Committee on Conventions" to hold such session.

You have directed my attention to Public Law 15, section 2, enacted by Congress and signed by the President on March 9, 1945, which in its applicable part reads:

"SECTION 2. (*a*) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(*b*) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . ."

In this connection you have asked my opinion upon the two following questions:

"1. In view of the requirement of the Society's Constitution and By-Laws that the Annual Session of the High Court be held annually between May 15 and May 31, may the Commissioner of Insurance order the Society to hold said Annual Session?

2. Does section 2 of Public Law 15 signed on March 9, 1945, repeal or supersede the Rules and Regulations of the Director of War Mobilization and Reconversion governing the War Committee on Conventions thereby rendering such Rules and Regulations inapplicable to the Business of Insurance and persons engaged therein and placing the responsibility for the supervision of the insurance business upon the supervisory officers of the several states?"

1. I answer your first question in the negative.

The laws of the Commonwealth embodied in G. L. (Ter. Ed.) c. 176, as amended, with relation to fraternal benefit societies, of which the Massachusetts Catholic Order of Foresters is one, do not empower you to order or direct such societies to hold annual meetings. Said Public Law 15 does not purport to enlarge the powers of the Commissioner of Insurance in the various states, nor does it appear to have been the intent of Congress in passing such law to increase the authority of those entrusted by the states with the administration of the insurance laws.

2. I answer your second question in the negative.

The provisions of said section 2 of Public Law 15 do not repeal or supersede "the Rules and Regulations of the Director of War Mobilization and Reconversion governing the War Committee on Conventions." Such rules are of general application, as they affect the holding of conventions and do not invalidate or impair state laws regulating insurance as such.

You have also asked third and fourth questions which read:

"3. Since the Constitution provides that officers shall be elected annually and makes no provision for their continuance in office until their successors are elected, will the officers be regarded as holding office legally beyond the period for which they were elected?

4. Will the acts of the officers performed after the date of expiration of the terms for which they were elected be legal and valid in every respect without a proclamation by the Governor under his War Emergency powers, or a special act of the Legislature?"

3. I answer both these questions to the effect that under the circumstances set forth in your letter, if officers of the Order cannot be elected at the annual meeting, the present officers would, as a matter of law, like public officers, be regarded as holding over until their successors are chosen. The acts of such officers when so holding over as at least *de facto* officers would be treated as valid as concerns the public and third persons dealing with them and, since under the stated conditions no factional controversy with relation to title to the offices would exist, as concerns the Order and its members. *Stratton Mass. Gold Mines Co.* v. *Davis*, 222 Mass. 549, 553, 564. Thompson on Corporations, Vol. 2, §§ 1555, 1557, and cases there cited.

You have also asked me four other questions relative to possible contingencies which might arise in the future if the annual session of the society in question is not held.

These questions relate to matters with regard to which you are not presently required to perform any official duties, are based on speculation as to possible future factual contingencies, and are hypothetical in character. Consequently, they are such as the Attorney General is not required to answer. Attorney General's Report, 1935, p. 31; I Op. Atty. Gen. 273, 275; II Op. Atty. Gen. 100; III Op. Atty. Gen. 425.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Division of Fisheries and Game — Authority of Officers to enforce Game Laws on Public Lands including Area of Quabbin Reservoir.

APRIL 26, 1945.

Hon. RAYMOND J. KENNEY, *Commissioner of Conservation.*

DEAR SIR: — You have asked my opinion as to the extent of the authority of officers of the Division of Fisheries and Game to enforce the game laws on land of the Commonwealth in the Quabbin Reservoir area, in view of the provisions of G. L. (Ter. Ed.) c. 131, §§ 4, 18 and 89, as amended, and of St. 1941, c. 599, § 5A.

All lands and waters acquired for the purposes of the Quabbin Reservoir and the water supply needs of the Metropolitan Water District in connection therewith are maintained and operated and under the control of the Metropolitan District Commission (St. 1926, c. 375, § 1, St. 1927, c. 321, § 2) and constitute "land or waters of said commission," as the quoted words are used in St. 1941, c. 599, § 5A, and said Commission has "the control and charge" of such land within the meaning of G. L. (Ter. Ed.) c. 131, § 89, as amended by said St. 1941, c. 599.

The various provisions of said G. L. (Ter. Ed.) c. 131, as amended, and of the amending act, said St. 1941, c. 599, are to be read together so as to form as far as possible an harmonious whole, in accordance with the established rule of statutory construction (*Platt* v. *Commonwealth*, 256 Mass. 539, 542; *Moloney* v. *Selectmen of Milford*, 253 Mass. 400, 402).

Section 18 of said chapter 131, as amended, in its pertinent portion, reads:

"The director (of the Division of Fisheries and Game), conservation officers, deputies, wardens and members of the state police shall enforce the laws relating to fish, birds and mammals."

Section 4 of said chapter 131, to which you refer, empowers such officers to enter upon private lands in the performance of their duties. This section has no direct applicability to public lands and no specific provision in the statute was necessary to authorize public officers to enter upon state lands; such authority being implicit in the grant of power to them in said section 18 to enforce the game laws. Nor is such authority curtailed by the terms of said section 5A in the amending act of 1941, chapter 599, which, with reference to the amended provisions of said chapter 131 therein contained as well as to certain other provisions, provides as follows:

"Nothing in this act shall be construed as authorizing any person, without a permit from the metropolitan district commission, to enter or go upon the land of the water division of said commission . . ."

"Person" by itself is an equivocal word. It has no fixed and rigid signification, but has different meanings dependent upon contemporary conditions, the connection in which it is used, and the result to be accomplished. See *Commonwealth* v. *Welosky*, 276 Mass. 398, 404, 406.

The word "person" in the quoted phrase is not to be construed as embracing public officers charged with the enforcement of the laws of the Commonwealth as are those officers of the Department of Conservation named in said section 18 of chapter 131 whose power of enforcement is further implemented, though not enlarged, by section 6A of G. L. (Ter. Ed.) c. 21, inserted by St. 1941, c. 599, § 3, providing:

"There shall be in the division a bureau of law enforcement, under the charge of a chief conservation officer. All conservation officers, deputy conservation officers and fish and game wardens of the division shall be assigned to duty in said bureau. The director shall, subject to the provisions of section three, enforce chapter one hundred and thirty-one and all other provisions of law relative to inland fisheries, birds and mammals and in the enforcement thereof may act through said bureau. The director shall, subject to the provisions of section three, have general supervision of all such enforcement officers."

The provisions of said section 5A of chapter 599, accordingly, do not bar the said officers of the Department of Conservation from entering upon the said lands under the control of the Metropolitan District Commission for the purpose of performing their duties to enforce the game laws.

Section 89 of said chapter 131, in its material part reads:

"No person shall hunt, or in any manner molest or destroy, any bird or mammal within the boundaries of any state reservation, park, common, or any land owned or leased by the commonwealth or any political subdivision thereof, or any land held in trust for public use, except that the authorities or persons having the control and charge of such reservations, parks, commons or other lands may, with such limitations as they may deem advisable, authorize persons to hunt within said boundaries any of the unprotected birds named in section fifty-three, or the fur-bearing mammals mentioned in section sixty-eight, or foxes, weasels or wildcats. Such an authorization shall be by written license, revocable at the pleasure of the authority or person granting it. *The boards, officials and persons having control and charge of such reservations, parks, commons or lands owned or leased or held for public use shall enforce this section.*"

Said section 18, already referred to, empowers and directs designated officers of the Division of Fisheries and Game to "*enforce* the laws relating to fish, birds and mammals." Said section 18 stems directly, through various re-enactments of the game laws, from R. L., c. 91, § 4, which authorized the then Commissioners on Fisheries and Game and their deputies to arrest any person whom they found violating any of the game laws.

Said section 89 stems directly, in like manner, from St. 1909, c. 362, § 1, which in its provisions material to the instant matter is similar to section 89 and empowers and requires public officers in charge of reservations and lands held for public use, as in section 89, "to *enforce*" the provisions

of said chapter 362, which provisions were, as I have pointed out, similar to those now appearing in section 89.

In 1920 Attorney General Allen, in an opinion to the Department of Conservation, with which I concur (V Op. Atty. Gen. 628), held that while St. 1909, c. 362, placed upon those in charge of public lands the duty of preventing any killing of game within the boundaries of such lands, whether such killing was or was not done in violation of the game laws, the duty of enforcing the general game laws on such lands still rested upon the officers of the Division of Fisheries and Game.

The fact that R. L., c. 91, § 4, and St. 1909, c. 362, have been reenacted by amendment of the game laws from time to time and their provisions consolidated in the reenactment of G. L. (Ter. Ed.) c. 131, in 1941, does not show an intent upon the part of the Legislature to alter their meaning. It is rather to be presumed that the Legislature intended to employ them with the meaning which they originally had. *Great Barrington* v. *Gibbons*, 199 Mass. 527, 529. *Main* v. *County of Plymouth*, 223 Mass. 66, 69. *Commonwealth* v. *Bralley*, 3 Gray 456, 457.

Accordingly, I advise you that the officers of the Division of Fisheries and Game, referred to in G. L. (Ter. Ed.) c. 131, § 18, as amended, have the power and the duty of enforcing the game laws on the public lands, including those of the Quabbin Reservoir under the control of the Metropolitan District Commission, and have the right to enter upon such lands when necessary for the purpose of such enforcement.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Constitutional Law — Incompatibility of Offices of Representative and Member of Governor's Council.

APRIL 30, 1945.

Hon. FREDERICK B. WILLIS, *Speaker of the House of Representatives.*

DEAR SIR: — I am in receipt from you of the following communication:

"Will you please advise the members of the House of Representatives if Carl A. Sheridan who was elected yesterday as Councillor in the 3rd Councillor District by the House of Representatives and the Senate may continue to serve as a Representative in the General Court in addition to discharging his duties as a Councillor, provided he accepts only one salary — that of Councillor."

I advise you that in my opinion the acceptance by the Representative, to whom you refer, of the office of member of the Governor's Council and his qualification as such a Councillor will, as a matter of law, act as a resignation of his seat in the House of Representatives.

The Constitution of the Commonwealth, chapter II, section III, provides:

"Article I. There shall be a council for advising the governor in the executive part of the government, . . ."

Such council is beyond all doubt a part of the executive department of the government of this Commonwealth, and as such the exercise of its

powers is restricted by Article XXX of Part the First of the Constitution, which reads:

"In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

It was said by one of my predecessors in office (I Op. Atty. Gen. 233) that Article 30 of the Declaration of Rights has no application to an individual member of the Legislature; that "the limitations of the individual members of the several departments are carefully guarded by other porvisions in the Constitution, to wit, c. 6, art. 2, and Amendments, art. 8. The specific prohibitions contained in the articles quoted would be plainly unnecessary if art. 30 of the Declaration of Rights was intended to apply to individuals rather than to departments."

The opinion was to the effect that a senator might lawfully hold the office of a member of the then Board of Education, which was assumed to be an office in the executive branch of the government, and was not stated to be of such a nature by reason of its duties as to make it incompatible with the office of a senator.

With this opinion I concur; but it does not follow that because the Constitution has not specifically prohibited the holding of two particular offices by one incumbent, a single incumbent may occupy both, if the offices are of such a nature as to be incompatible.

The Constitution has in said chapter VI, article II, and Amendments, article VIII, set forth in detail specific provisions prohibiting incumbents of various offices of the Commonwealth from holding other designated offices. None of these relate to members of the Executive Council, except as they prohibit a judge of the Supreme Judicial Court or a judge of probate from accepting a seat in the Council and prohibit a Councillor from accepting the office of either of such judges.

Nevertheless, I am of the opinion that if the duties of the offices of a Councillor and a member of the House of Representatives, such offices being in the executive and legislative departments of the government, respectively, are incompatible, they may not be occupied by the same incumbent. *See Opinion of the Justices*, 307 Mass. 613, 620.

The House of Representatives is by constitutional provision the judge of the qualifications of its own members (Const. c. I, § III, art. V). However, the acceptance of an office incompatible with one already held by an officer works a resignation of the prior office. *Commonwealth* v. *Hawkes*, 123 Mass. 525, 529, 530.

In my opinion, the duties of the office of a member of the Executive Council and that of a member of the House of Representatives are of such a nature as to render the respective offices incompatible.

As has been said by the Supreme Judicial Court, the framers of our Constitution, warned by experience of the dangers which had arisen "from the vesting of incompatible powers in the same persons under the royal government while this state was an English province, have made most careful provision for separating the three great departments of government" (*Case of Supervisors of Elections*, 114 Mass. 247, 249), and as it has been the endeavor of the people of Massachusetts since colonial times to

guard against the vesting of powers and duties of more than one branch of the government in a single officer, the assertion of a right to hold offices in more than one of such branches should always be subject to the most careful scrutiny.

The duties of the governor of the Commonwealth as the chief executive officer, having the power of veto and the authority to prorogue and adjourn the Legislature and to call it together again (Const. c. II, § I, art. IV), are plainly of such a nature as to render his office incompatible with that of a member of the House of Representatives even if the Constitution, c. VI, art. II, had not prohibited him from holding another office. The duties of a councillor are those of an adviser of the governor (Const. c. II, § III, art. I), and the advice and consent of the council, by legislative enactment, have been made necessary for the performance of a wide variety of executive duties by the governor. In a remote but very real sense the councillor's functions are similar to those of the governor.

The members of the council share in the governor's power to prorogue, adjourn and recall the Legislature, in that his power in such respect can only be expressed when implemented by the advice of the council (Const. c. II, § I, art. V). The councillors are required to take their oath of office "in the presence of the two houses of assembly." The representatives are required to take their oath of office in the presence of five members of the council (Const. c. VI, art. I). The Legislature divides the Commonwealth into districts from which the individual councillors are to be chosen. Vacancies in the council, when the General Court is in session, are filled by the Legislature (Const. Amend. art. XXV). The salaries of the councillors are fixed by the Legislature (G. L. (Ter. Ed.) c. 6, § 3).

These duties, some of which are required to be performed by representatives and some by councillors, appear to me to be such that they may not properly be performed by the same person, since the performance of each of such duties would either affect the person himself in one or the other of two capacities or might require him to act in different capacities at one and the same time.

This being so, the two offices in question are, in my opinion, incompatible and may not be held simultaneously by one person.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Banks — Credit Unions — Acquisition of Shares of One Credit Union by Another.

MAY 1, 1945.

Hon. F. EARL WALLACE, *Commissioner of Banks.*

DEAR SIR: — In a recent letter you have advised me as follows:

"The Lynn Police Credit Union, a corporation recently chartered under General Laws, chapter 171, and now qualified and ready to commence business, was organized and is now requested to assume the share liabilities and acquire all of the assets of the Lynn (Mass.) Policeman's Federal Credit Union, a credit union chartered under the Federal Credit Union Act, U. S. C. A. Title 12, Sections 1751–1770. The members of the two credit unions are or will be substantially the same. It is expected that all of the assets of the Lynn (Mass.) Policeman's Federal Credit Union will

meet the statutory requirements governing investments of shares and deposits of credit unions incorporated in this State."

In relation to the foregoing facts, you have asked my opinion upon the following question:

"whether or not a credit union incorporated under General Laws, chapter 171, may assume and undertake to pay the share liabilities of a federally chartered credit union and in the process purchase and acquire all of the assets of such a credit union."

G. L. (Ter. Ed.) c. 171, § 10, in its applicable part provides with regard to the capital stock of a credit union as follows:

". . . Shares of capital stock may be subscribed for and paid for in such manner as the by-laws shall provide; provided, that the par value of the shares shall be five dollars. . . ."

Assuming from the statement of facts which you have set forth that the proposed mode of paying for the shares of a domestic credit union, which it would appear are to be issued to the members of a federal union, is authorized by the by-laws of the domestic union and that the assets of the federal union used as such payment are, as you have stated, such as meet statutory requirements and that other requirements of said chapter 171 affecting the domestic union are not violated by the acquisition of said assets, I answer your question in the affirmative.

No prohibition of the acquisition of shares and assets of one credit union by another has been set up by the Legislature. The fact that the shares to be acquired are those of a federal as distinguished from a domestic union is immaterial.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Warehouseman — "Public Warehouseman" — License.

MAY 4, 1945.

To the Executive Council.

GENTLEMEN: You have asked my opinion upon the following question of law:

"Whether or not one who is engaged in storing the merchandise of one customer as security for a loan must seek a license as a Public Warehouseman in compliance with G. L. c. 105?"

G. L. (Ter. Ed.) c. 105, § 1, as amended, provides in its first sentence:

"The governor, with the advice and consent of the council, may license suitable persons, or corporations established under the laws of, and having their places of business within, the commonwealth, to be public warehousemen. . . ."

I answer your question in the affirmative.

It is true that there is a well-recognized distinction in law between a *public* warehouseman, who like a common carrier holds himself out as maintaining a public service for all who may resort to him, and a *private* warehouseman, who furnishes storage only to a particular person or per-

sons. *Security Machinery Co.* v. *Hand*, 143 Fed. 32, 40. *Citizens' Bank* v. *Willing*, 109 Wash. 464.

The words "public warehouse" and "public warehouseman" may be given a distinctive meaning by statutory provisions so that such words will not only embrace the warehouseman who holds himself out as doing business with the general public, but also include any person who maintains a warehouse for hire, irrespective of whether he does business with a particular person or class of persons or with the general public. *Gulf Compress Co.* v. *Harris*, 158 Ala. 343, 350. *Gray* v. *Central Warehouse Co.*, 181 N. C. 166. *State Public Utilities Commission* v. *Monarch Refrigerating Co.*, 267 Ill. 528. *Longwell Transfer* v. *Elliott*, 267 S. W. 346.

Said chapter 105, as now contained in the Tercentenary Edition of the General Laws, is composed of two parts which, in the main, spring from separate and distinct sources.

Sections 1 to 6 of said chapter were first enacted by St. 1860, c. 206, and were codified in substantially their original form in Revised Laws, chapter 69. The rest of the sections of said chapter 105, with a few minor exceptions, but in substantially their present form, derive from an entirely separate source, St. 1907, c. 582. This latter portion of chapter 105 was part of a uniform law regarding warehouse receipts, and deals, in the main, with such receipts and the liabilities of warehousemen.

St. 1907, c. 582, defined "warehouseman," for the purposes of that act, as "a person lawfully engaged in the business of storing goods for profit" so that it would seem that the word "warehouseman," as used in the latter part of chapter 105, would have a broader significance than as used in its first part, especially in section 1, where it is made to refer to *public* warehousemen. This would be so if chapter 105, as it now stands, was *only* a combination of the terms of said R. L. c. 69, and said St. 1907, c. 582, but in 1915, the Legislature, by chapter 98 of that year, by amendment added to the provisions of R. L. c. 69, definitions of the words "public warehouse" and "public warehouseman" which brought them in harmony with the definition of "warehouseman" contained in said St. 1907, c. 582, and by their terms enlarged the meaning of "public warehouse" and "public warehouseman" as employed in reference to said chapter 69, section 1, whose phraseology is now embodied in G. L. (Ter. Ed.) c. 105, § 1, as amended. Said R. L. c. 69, was amended by Gen. St. 1915, c. 98, as follows:

"The words 'public warehouse', as used in this chapter, shall mean any building, or part of a building, kept and maintained for the storage of goods, wares and merchandise as a business; and the words 'public warehouseman' shall mean any person, corporation, partnership, association or trustees keeping and maintaining a public warehouse as defined in this section."

When the compilers of the General Laws of 1921 set forth said chapter 105 they dropped the particular definition of "warehouseman" which was set forth previously in said St. 1907, c. 582, and in place thereof inserted in section 7 of chapter 105 the definitions of "public warehouse," "warehouseman" or "public warehouseman" which had been added to chapter 69 of the Revised Laws, and which were of the same general effect as the particular definition contained in said St. 1907, c. 582. These definitions, by the phraseology of said chapter 105, section 7: "The following words as used in this chapter, unless the context otherwise requires,

shall have the following meanings:" now apply to and govern the meaning of "public warehousemen" and "warehouse" as contained in section 1 of chapter 105; there being nothing in the context of the chapter which requires otherwise.

This being so, it follows that a person or corporation which maintains a building for the storage of goods, wares and merchandise as a business, even if it is so maintained for the purpose of storing the merchandise of one particular customer only, is a "public warehouseman" and is required to be licensed by virtue of the provision in the first sentence of said section 1 of chapter 105, since by the definition of the words "public warehouseman" such person is brought within the requirements of said section 1.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Settlement — Member of United States Military Forces — Executive Order No. 32 — G. L. (Ter. Ed.) c. 116, § 1.

MAY 9, 1945.

Hon. ARTHUR G. ROTCH, *Commissioner of Public Welfare.*

DEAR SIR: — You have informed me of the following facts in connection with questions relative to the settlement of one James Joseph Kelley:

"James Joseph Kelley was born in Charlestown May 24, 1900; to Malden when young and enlisted World War I from Malden and on active duty April 9, 1917, until his honorable discharge March 14, 1920. Two years after his discharge he removed to Boston and resided at 7 Polk Street, Charlestown until his marriage November 29, 1932; then Medford, Charlestown and Somerville with no five years' residence anywhere. He enlisted in World War II from Somerville on October 19, 1942; called to active duty January 25, 1943, and received an undesirable discharge on October 11, 1943, due to his misconduct.

Somerville notified Boston on February 19, 1944, and Boston denied on March 9, 1944, claiming that although this man may have acquired a Boston settlement by his residence there from 1922 to 1932, his enlistment in World War II gave him a settlement in Somerville per Executive Order No. 32, thus wiping out his Boston settlement."

It appears from the facts which you have set forth that prior to October 19, 1942, the said Kelley had a settlement in Boston, which had not been defeated.

Executive Order No. 32, issued by the Governor on August 20, 1942, to which you refer, provided that:

"Any person who serves as a member of the military or naval forces of the United States at any time during the present war . . . shall be deemed to have a settlement in the place where he actually resides or resided at the time of his induction, enlistment or entry into such service."

G. L. (Ter. Ed.) c. 116, § 1, cl. fifth, by force of St. 1943, c. 455, § 13, amending section 1 in a certain immaterial detail and reenacting it, effective September 8, 1943, contained a provision to a like effect. If the quoted provision had been set forth in said Executive Order or had been set forth in said chapter 116, section 1, as amended, without any qualifying provision, the settlement gained by said Kelley in Somerville by virtue of his

enlistment in the military or naval service of the United States in World War II while actually residing in Somerville, under the terms of the said Executive Order or of said chapter 116, section 1, as amended, would have defeated his prior settlement in Boston.

However, both the said Executive Order and said chapter 116, section 1, as amended, contain provisions qualifying the quoted provision and the similar provision, already referred to, in said chapter 116, section 1, respectively, which, since the discharge of said Kelley from the military or naval service of the United States, was not, according to the facts as you have stated them, "an honorable discharge or an honorable release" or "by reason of disability," prevent the acquisition of a settlement in Somerville by Kelley.

The qualifying provisions of said Executive Order 32 read:

"The provisions of this order shall not apply to any person who has been proved guilty of wilful desertion or who left the service otherwise than by reason of disability, an honorable discharge or an honorable release."

The qualifying provision of said chapter 116, section 1, cl. fifth, as amended, reads:

"But these provisions shall not apply . . . to any person . . . who left the service otherwise than by reason of disability or an honorable discharge."

Accordingly, I am of the opinion that, upon the facts which you have stated, the said Kelley did not acquire a settlement in Somerville and that, consequently, the settlement which he had gained in Boston was not defeated so that his settlement is in Boston, and he cannot be said to be a person without a settlement as you say has been suggested.

In your letter you asked me three specific questions relative to said Kelley's settlement, which are as follows:

"1. When did the man gain a settlement in Somerville?
2. When did his settlement in Somerville end?
3. What settlement, if any, does he hold at present?"

In view of the opinion which I have already expressed, the answer to the first question is never. Since such is the answer to the first question, no answer is required to the second question. The answer to the third question is, a settlement in Boston.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Metropolitan District Commission — Lack of Authority to Transfer Land to a State Department.

MAY 10, 1945.

Metropolitan District Commission.

DEAR SIRS: — In a recent letter you have asked my opinion "as to the rights of the Commission to release about ten acres of land acquired for parkway purposes to the State Department of Public Health for the construction of a chronic disease hospital."

I answer your question to the effect that your Commission has no "rights" or authority so to do.

It is a general principle of law that land appropriated to one public use cannot be diverted to another inconsistent public use without plain and explicit authorization by the Legislature. No legislation exists at the present time, giving your Commission authority, or "rights", "to release" land for the purpose referred to in your letter. The provisions of G. L. (Ter. Ed.) c. 92, § 84, which authorize your Commission to *sell* land acquired under sections 33 to 35, do not give your Commission authority in this respect.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Contracts for Postwar Projects — St. 1943, c. 370, § 10.

MAY 10, 1945.

HON. FRANCIS X. LANG, *Comptroller.*

DEAR SIR: — You have asked my opinion as to whether you may certify for payment the amounts shown by various vouchers for architectural and engineering services rendered under contracts for the preparation of "postwar projects."

You advise me that funds ample to take care of these payments have been made available by transfer "from the War Emergency Fund for the purpose of Emergency Public Works Commission plans — Postwar Projects." You also inform me that payments for similar services so rendered have been made in the past from such funds.

The preparation of *postwar projects*, including architectural and engineering services incident thereto, are "emergency expenditures" of a type "which may be necessary to meet any emergency which may arise by reason of the exigencies of the existing state of war" within the sweep of the quoted words as they have been employed by the Legislature in the authorization of the expenditures contained in St. 1943, c. 370, § 10, to which you refer.

The emergency for which postwar project expenditure is to provide is obviously one which "may arise" by reason of the exigency of the existing state of war. It is not necessary that an emergency growing out of the war should be actually upon us before provision may be made under said section 10 to meet it. It is a matter of common knowledge that unemployment is an inevitable accompaniment of the demobilization of large numbers of servicemen. At the close of a war such an emergency will in part be met by opportunities for employment on public works but unless possible public works are projected beforehand, such opportunities will not exist and the emergency will not be met.

Consequently, I advise you that expenditures from the funds, to which you refer, to meet correct charges for architectural and engineering services connected with the preparation of bid plans and specifications for postwar projects under properly drawn contracts would be valid.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Public Works — Entry on Private Property to Make Survey for Future Highway Projects.

May 17, 1945.

Hon. Herman A. MacDonald, *Commissioner of Public Works.*

Dear Sir: — You have requested my opinion as to the right of your department to enter upon private property to make surveys for future highway projects without permission from the owners, and where in one particular case the owner has refused such permission. You state that in this particular case the taking will be made under G. L. (Ter. Ed.) c. 81, § 7. This section provides:

"If it is necessary to acquire land for the purposes of a state highway outside the limits of an existing public way, the department (meaning the Department of Public Works) may take the same by eminent domain in behalf of the commonwealth under chapter seventy-nine. . . ."

We find in the case of *Willar* v. *Commonwealth*, 297 Mass. 527, 528, some significant language by the court:

"We think that when the Legislature gave to the department power to take land by eminent domain 'under chapter seventy-nine' it intended to give to the department full and complete power to carry the necessary proceedings through to a final termination, . . ."

While this reference is to the statutory procedure, it is fair to construe the language of this case and those referred to hereinafter as giving the department full power of initiating the taking by way of preliminary surveys. It is true that this act does not expressly provide that the members of the department and their agents shall not be liable for trespass, as has been provided in other similar statutes of the Commonwealth in reference to forest wardens and militia, but such surveys and incidents thereto are justified by the authority given to the department by the act.

A statute of this character grants power incidental to the carrying out of its provisions. VIII Op. Atty. Gen. (July 19, 1927) 344, 345. *Winslow* v. *Gifford*, 6 Cush. 327. When an act of the Legislature imposes duties upon a public officer, it confers upon him by implication whatever authority is necessary for the performance of such duties. I Op. Atty. Gen. (Dec. 19, 1896) 403, 404.

The department and its agents are public servants authorized by statute to acquire land when necessary for the purposes of a state highway, and in the discharge of these duties it may become necessary to enter temporarily upon private lands to make surveys. If this entry is reasonable, intended in good faith, temporary in its nature, and attended by no unnecessary damage, it does not constitute actionable trespass. *Winslow* v. *Gifford*, 6 Cush. 327. *Cavanagh* v. *Boston*, 139 Mass. 426, 435. *Brigham* v. *Edwards*, 7 Gray 359, 363.

In *Winslow* v. *Gifford* the court held that there was no trespass where under authority of a statute the commissioners entered upon the lands of the plaintiff and made certain surveys, with the view of ascertaining the boundaries of a tract of land devoted to public purposes, where no compensation was provided for such apparent trespass. This case has been followed and approved several times in Massachusetts and has been cited by the United States Supreme Court in *Montana Co.* v. *St. Louis Mining and Milling Co.*, 152 U. S. 160, 167.

From other cases it seems to be well settled that general rights in property have their limitations, in that entry upon such private property may be made by public officers for the protection of public welfare, and that such entry is not an exercise of the right of eminent domain nor permanent appropriation of this property to the exclusive use of another, the entry being made for the public welfare and subject to the limitations in *Winslow* v. *Gifford*.

It seems, therefore, clear that such survey may be made if the taking of the land is necessary for highway purposes, if the entry is reasonably necessary, intended in good faith, a temporary one, and accompanied by no unnecessary damage.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

State College — Tuition — Non-Resident Students — Trustees.

JUNE 14, 1945.

Mr. ROBERT D. HAWLEY, *Treasurer, Massachusetts State College.*

DEAR SIR: — You have asked my opinion as to the legality of the tuition charges of $110 per semester made by the Massachusetts State College by vote of its trustees for students who are not residents of Massachusetts.

In my opinion these charges are legal and valid. The charges were put into effect by the following vote of the Board of Trustees on January 19, 1933:

"*Voted:* That tuition for all students, residents of Massachusetts, be increased to $100 per year and the tuition for students who are not residents of Massachusetts be increased to $220 per year and that these tuition charges include present student fees: laboratory fees, $12; health fee, $4.50; matriculation fee, $5, which are now separately charged."

The trustees of the college have been vested by the Legislature with the powers of management, administration and government of the college, and the authority to determine and regulate instruction therein. G. L. (Ter. Ed.) c. 75, §§ 9–11.

It has been held by one of my predecessors in office, with whose opinion I agree, that the trustees may establish such rates of tuition as they may deem reasonably necessary. II Op. Atty. Gen. (1899) 84.

In the recent case of *Lynch* v. *Commissioner of Education*, 317 Mass. 73, the Supreme Judicial Court has held that when power of general management of a college is conferred by the Legislature on a public authority, it carries with it a grant of power to such an authority to establish reasonable tuition fees.

The Board of Trustees of the Massachusetts State College is such a public authority, serving in the Department of Education, its members being persons holding certain designated offices in the service of the Commonwealth, acting *ex officio* as trustees, and persons appointed as trustees by the Governor.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Towns — Members of Fire Department — Payments for Death — G. L. (Ter. Ed.) c. 48, § 83.

June 21, 1945.

Hon. Francis X. Lang, *Comptroller.*

Dear Sir: — You have informed that the Town of Hingham has submitted a claim under G. L. (Ter. Ed.) c. 48, § 83, for the payment of $2,500 to the use of persons mentioned in said § 83 as a result of the death of a fireman of said town, who, I assume, had served for more than a year preceding the first of May prior to his death.

You have advised me of certain material facts and, in your first question, have asked my opinion, based upon them, as to whether as a matter of law the Commonwealth is liable for such payment under said § 83.

I answer this question in the negative.

G. L. (Ter. Ed.) c. 48, § 83, in its pertinent parts provides that if a fireman dies as a result of injuries received in the performance of his duties, upon certification of the relevant facts to the Comptroller, the latter shall certify for payment to the executor or administrator of the deceased $2,500 for the use of certain persons connected with the deceased, in a manner designated in the section. It is, however, specifically provided in the last sentence of the section as follows:

"No payments shall be made under this section on account of the death of a member of the fire department of a city or town in respect to which compensation is payable under section eighty-nine of chapter thirty-two."

Section 89 of chapter 32 provides in its applicable portions that if a "member" of a "fire force" dies from injuries received in the performance of his duties, the town which employed him shall pay certain specified annuities to designated persons connected with the deceased, and that the total amount of all annuities shall not, except in instances not here material, exceed the annual rate of compensation received by such person at his death. Provision is also specifically made for payment by the town of annuities to call and reserve firemen.

It appears from the facts of which you have advised me that the deceased, though a "volunteer" fireman, was a member of the regular "fire force" or fire department of Hingham.

The nature of the employment and duties of a "volunteer" fireman as they appear from the facts of which you have informed me in connection with the Hingham fire department and as they exist in relation to some other fire departments of rather antiquated kinds in various towns, differentiate the status of the "volunteer" firemen from that of a "call fireman" or of a reserve fireman.

The regular fire force or fire department of Hingham appears from said facts to be made up of two types of firemen, one of which is called "permanent" and receives a substantial annual compensation; the other is called "volunteer" and those included therein are governed by the terms of G. L. (Ter. Ed.) c. 48, § 38, which provide that:

"Enginemen or members of the fire department who have served for one year preceding May first in any year, shall receive from the town a sum equal to the poll taxes paid by or for them and such further compensation as the town determines."

This "further compensation" consists in the Town of Hingham of pay at a per-hour rate for all time spent at wood fires and for work at a building fire after two hours of attendance thereat.

That the payment by the town to a fireman of a sum equal to the amount paid for or by him by way of poll tax is "compensation" for his services appears to be settled by the language employed by the Supreme Judicial Court in *Greenough* v. *Wakefield*, 127 Mass. 275, 277, where it considered the phraseology of Gen. St. c. 24, § 18, from which said G. L. (Ter. Ed.) c. 48, § 38, is derived. See also II Op. Atty. Gen. 253.

It follows, then, that the deceased, as a member of the fire department of Hingham, receiving such compensation annually from the town, was one on account of whose death compensation is payable to persons designated by the town in said section 89.

It is true that since the amount of the deceased's annual compensation as a fireman, being based upon the poll tax paid, is very small, and as it may not be exceeded by the annuities payable to the beneficiaries, such annuities would appear to be totally inadequate. The remedy for such a situation lies with the Legislature. Your second question is hypothetical in character and in relation to the subject matter of your letter concerning the death of said fireman, in view of my reply to your first question, requires no answer.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

INDEX TO OPINIONS

PAGE

Architects; registration; "residence"; "prior"; St. 1941, c. 696, § 3 . . 46
Banks; credit unions; acquisition of shares of one credit union by another . 72
Blind, Division of the; vocational rehabilitation; federal funds . . . 62
Civil service; authority of Director; seniority of employees . . . 15
Custodian of Contraband in Department of Public Safety; failure to classify 24
Custodian of municipal building; "officer"; "employee" . . . 54
Fire Department of West Springfield; call firemen; classified service . 32
Preference of veterans in promotional examinations 53
Promotions; G. L. (Ter. Ed.) c. 31, § 15 56
Promotions in clerical service of municipal fire department; G. L. (Ter. Ed.) c. 31, § 15 or § 20 35
Supervising boiler inspector in Department of Public Safety not classified . 17
Conservation; shellfish; permits; municipal leases; non-residents; Director of Division of Marine Fisheries 43
Constitutional law; alcoholic beverages; sales; aliens; treaty with Great Britain 59
Incompatibility of offices of representative and member of Governor's Council 70
Rules and regulations of state departments; encroachment of Legislature upon authority of the executive branch of the government . . 63
Contracts for postwar projects; St. 1943, c. 370, § 10 77
Emergency Public Works Commission; postwar projects; Port of Boston . 36
Fisheries and Game, Division of; authority of officers to enforce game laws on public lands, including area of Quabbin Reservoir . . . 68
Food; sale of canned lobster meat; label 57
Insurance; classification of fire risks by domestic fire insurance companies; contracts made outside the Commonwealth 49
Domestic stock liability insurance company; increase of capital; Commissioner's approval 64
Fraternal benefit society; annual meeting; officers holding over; authority of Commissioner 66
Fraternal benefit society; by-laws; delegation of authority; election of officers 57
Group annuity contracts; approval; options; particular provisions . . 37
Group annuity policy; dividends; terms of insurance contract . . 22
Mental Health, Department of; transfer of surplus supplies from one state hospital to another unauthorized 10
Metropolitan District Commission; lack of authority to transfer land to a state department 76
Transfer of supervision of Mystic Lakes; lack of authority . . . 31
Military leave of absence; resignation; United States Public Health service . 61
Milk Control Board; orders of board; violations; licenses 13
Public announcement of prices to be paid by individual milk dealers . . 19
Municipalities; public assistance; amounts payable for hospitalization . 26
Old age assistance; husband and wife owning real estate in common; security for reimbursement of municipality 30
Husband and wife; tenancies 47
Waiver of rights; contributions by children 12
Public Health, Department of; transportation of shellfish; certificates of foreign board 22
Public officers; salaries while in military service 29

PAGE
Public Safety; inspection of places of assembly; regulations; G. L. (Ter. Ed.) c. 143, § 3B 33
Public works, entry on private property to make survey for future highway projects 78
Settlement; member of United States military forces; Executive Order No. 32; G. L. (Ter. Ed.) c. 116, § 1 75
State college; tuition; non-resident students; trustees 79
Towns; members of fire department; payment for death; G. L. (Ter. Ed.) c. 48, § 83 80
Walden Pond State Reservation; powers of commission; lack of authority to restrict 10
Warehouseman; "public warehouseman"; license 73
War Emergency Fund; transfer of funds; authority of governor 17
Workmen's compensation; Director of Division of the Blind; "Officer"; "Employee" 51
Self-Insurance; reinsurance; catastrophe; service company 41
Self-insurer; bonds 27