Public Document No. 12

# The Commonwealth of Massachusetts

# REPORT

OF THE

# ATTORNEY GENERAL

FOR THE

## Year ending June 30, 1948

Publication of this Document Approved by George J. Cronin, State Purchasing Agent

900. 7-'49. 26708.

Public Document No. 12

The Commonwealth of Massachusetts

# REPORT

OF THE

# ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1948

PUBLICATION OF THIS DOCUMENT APPROVED BY GEORGE J. CRONIN, STATE PURCHASING AGENT

900. 7-'49. 26708.

1948

# The Commonwealth of Massachusetts

---

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, January 12, 1949.

*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, 1948.

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*

GEORGE B. ROWELL

*Assistants*

ROGER CLAPP
WILLIAM S. KINNEY
NATHAN B. BIDWELL[1]
CHARLES SHULMAN
JOHN R. WHEATLEY
GEORGE P. DRURY[2]
GEORGE FINGOLD
MICHAEL A. FREDO
DAVID H. STUART
DAVID J. CODDAIRE[3]
SUMNER W. ELTON
FRED W. FISHER
BRINLEY M. HALL
ALFRED E. LOPRESTI
ROGER W. CUTLER, JR.
WM. GARDNER PERRIN[4]
HERBERT D. ROBINSON[5]
NORRIS M. SUPRENANT
ROLAND H. PARKER
WILLIAM H. SULLIVAN
BEATRICE HANCOCK MULLANEY
ERNEST BRENNER
THOMAS F. MCLAUGHLIN
CONDE J. BRODBINE[6]
FLOYD H. GILBERT
RICHARD J. COTTER, JR.[7]

*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

*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

---

[1] Resigned Nov. 30, 1947.
[2] Specially assigned to N. Y., N. H. & H. R.R. case.
[3] Resigned Mar. 9, 1948.
[4] Resigned Jan. 6, 1948.
[5] Resigned Oct. 7, 1947.
[6] Died Nov. 14, 1947.
[7] Resigned Dec. 31, 1947.

## STATEMENT OF APPROPRIATIONS AND EXPENDITURES

### For the Period from July 1, 1947, to June 30, 1948

*Appropriations.*

| | |
|---|---|
| Attorney General's salary | $10,000 00 |
| Assistants and others | 175,730 00 |
| Expenses | 12,308 00 |
| Settlement of damages by state-owned cars (G. L. (Ter. Ed.) c. 12, § 3B) | 8,000 00 |
| Settlement of small claims (G. L. (Ter. Ed.) c. 12, § 3A) | 4,000 00 |
| Veterans' Legal Assistance | 20,000 00 |
| Convention of National Association of Attorneys General | 5,000 00 |
| Total | $235,038 00 |

*Expenditures.*

| | |
|---|---|
| For salary of the Attorney General | $10,000 00 |
| For salaries of assistants and others | 156,730 00 |
| For office expenses | 12,308 00 |
| For settlement of damages by state-owned cars (G. L. (Ter. Ed.) c. 12, § 3B) | 7,989 22 |
| For settlement of small claims (G. L. (Ter. Ed.) c. 12, § 3A) | 3,999 45 |
| For veterans' legal assistance | 16,761 01 |
| For convention of National Association of Attorneys General | 2,364 47 |
| Total | $210,152 15 |

Financial statement verified (under requirements of c. 7, § 19, of the General Laws), December 27, 1948.

By JOSEPH A. PRENNEY,
*For the Comptroller.*

Approved for publishing.

F. A. MONCEWICZ,
*Comptroller.*

December 23, 1948.

# The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 12, 1949.

*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, 1948, totaling 14,851, are tabulated as follows:

| | |
|---|---|
| Corporate franchise tax cases | 1 |
| Extradition and interstate rendition | 111 |
| Land Court petitions | 121 |
| Land damage cases arising from the taking of land: | |
| Department of Public Works | 103 |
| Metropolitan District Commission | 11 |
| Miscellaneous cases, including suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth | 4,826 |
| Petitions for instructions under inheritance tax laws | 5 |
| Estates involving application of funds given to public charities | 905 |
| Settlement cases for support of persons in state hospitals | 73 |
| Pardons: | |
| Investigations and recommendations in accordance with G. L. (Ter. Ed.) c. 127, § 152, as amended | 103 |
| Workmen's compensation cases, first reports | 2,104 |
| Cases in behalf of Division of Employment Security | 1,068 |
| Cases in behalf of Veterans' Division | 5,420 |

Since January 17, 1945, it has been my honor and privilege to serve the people of the Commonwealth of Massachusetts as their Attorney General. During that period of time many important cases of first impression have arisen in the Commonwealth of Massachusetts, some of which have been dealt with in my prior reports.

Since my last report, and in accordance with the authority conferred upon me by the Legislature, I have followed the custom developed in the earlier years of my term in office of conferring with District Attorneys and their assistants. At each of these conferences which have been attended by the District Attorneys and a substantial number of their assistants many important problems in connection with the uniform enforcement of law throughout the Commonwealth have been considered, as well as proposed legislation to be presented for enactment to the General Court. As a result of these meetings held during the years 1947–1948 a substantial contribution has been made by this group to more effective methods of dealing with sex crimes and juvenile delinquency. Certain administra-

tive difficulties which have developed in connection with some of the legislation which has been passed have been called to the attention of the General Court through specific legislation and through proposed legislation submitted to the legislative commissions dealing with these matters. I have had the complete co-operation of the several District Attorneys and their assistants in connection with these important tasks.

The litigation between the Lowell Gas Light Company and the Department of Public Utilities, referred to in my previous report, has been heard by a Master and the questions of law involved argued before the Supreme Judicial Court. It is probable that these matters will be decided during the year 1949.

In my previous report the litigation arising out of the act passed by the 1946 Legislature in connection with the dissolution of the Boston Holding Company was referred to. This matter has now been heard by the Supreme Judicial Court and the constitutionality of this act finally determined in favor of the Commonwealth.

Since the beginning of my administration a Veterans' Division, where the veteran, his widow, orphan or other dependent could receive free legal advice to the end that all of their rights could be protected, has been established and maintained. Two Assistant Attorneys General have devoted their entire time to this division. More than ten thousand veterans, their parents, wives, widows and dependents, have been given legal advice by this Veterans' Division since its establishment. The division has followed closely all legislation passed by the 1948 legislative session, and monthly bulletins have been issued setting forth these new laws as they have been enacted. Current veterans' news of national importance was also published in the bulletin.

The problems confronting veterans change as time goes on, and what might have been a serious situation to them two years ago is no longer an urgent problem. During the past year most of the problems concerning veterans which have come to the attention of the division have involved real estate transactions, tax exemptions on real estate, used car deals, evictions, licenses, reinstatement, civil service, retirement, education and employment. Inquiries made of this division are not only State-wide but also from veterans in other States who consider Massachusetts their home. Many fraudulent practices have been brought to the attention of the division and every effort has been made to check such reports carefully and to see to it that the veteran was protected. I feel that there has been established a legal service of real value to the veterans and sincerely hope that if they are in need of legal advice they will communicate with this division. I recommend the continuance of this Veterans' Division.

The continuance of the development of the Logan International Airport at Boston and the Port of Boston have brought many involved legal problems. Either in person, or through my Assistants, appearances have been made on behalf of the citizens of the Commonwealth before the Civil Aeronautics Board at Washington seeking to secure additional rights for the Boston Airport, and before the Interstate Commerce Commission and other Federal tribunals in connection with the Port of Boston.

During my term of office many intricate problems have arisen in connection with contracts proposed by Federal bureaus in connection with Federal grants-in-aid. There seems to be a growing and dangerous tendency, so far as the States are concerned, in the insistence by Federal authorities that State officials should execute contracts containing terms which substantially give to the Federal authorities the right to control the means and methods to be used in connection with the expenditure of such funds. So long as these Federal requirements do not conflict with the Constitution or laws of the Commonwealth of Massachusetts, it is my feeling that they do harm only to the extent that they require a standardization of procedure where in many instances better results would be obtained if local authorities were permitted to establish their own procedure. In so far as the requirements conflict with States' rights, with the Constitution of the Commonwealth of Massachusetts or with its laws, I have refused to certify such contracts as being in proper form. It is my belief that to do otherwise would not be in the best interests of the Commonwealth of Massachusetts. The practice of the Federal Government taking through taxation from the States more than is needed for the proper functioning of the Federal Government is, I believe, improper. It seems to me that if the States were allowed to raise such funds as are needed for their own use and the Federal Government were allowed to raise such funds as are needed for its use, better results would be obtained. At least, we would have home rule in tax and other matters, and the people of the Commonwealth would not be burdened with administrative costs and Federal rules and regulations in connection with the expenditure of moneys which fundamentally belong to the people of Massachusetts.

As Attorney General I have continuously advised elected officers, department heads and committees of the Legislature, either through formal opinions or more frequently through informal advice. I have sought at all times to conduct this department with high efficiency and high standards in fairness to all the people.

I have not attempted in this report to set forth in detail many of the activities of the department. It is sufficient to say that I have personally, and with the help of my Assistants, acted as the people's attorney throughout my administration. I am deeply grateful to the Assistant Attorneys General and to the members of the department who have, throughout my term of service, carried out their duties with dignity, capacity and ability on behalf of myself and the Commonwealth of Massachusetts.

Respectfully submitted,

CLARENCE A. BARNES,
*Attorney General.*

# OPINIONS.

*Claim against Commonwealth — Form of Release — Lien of Attorney.*

JULY 14, 1947.

Hon. FRED A. MONCEWICZ, *Comptroller.*

DEAR SIR: — Replying to your recent letter in which you have asked my opinion relative to a release and agreement of the releasee, which are in accordance with the provisions of Res. 1947, c. 33, I hereby approve the form of said release and agreement.

Payment appears to be in order, notwithstanding a letter claiming a lien for attorney's fees on money so payable by one Lenzi.

I am of the opinion that participation in any of the proceedings which may have effected the passage by the Legislature of said chapter 33 is not of such a character as to entitle an attorney to a lien upon money granted to one who is his client, under the provisions of G. L. (Ter. Ed.) c. 221, §§ 50–50B.

I am also of the opinion that said chapter 33 is a constitutional exercise of the power of the Legislature, although the release is required as a condition of receiving the grant to agree that no more than ten per cent thereof has or will be paid to his attorney.

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

*Motor Vehicles — Operator under Sixteen Years of Age — Comity.*

JULY 14, 1947.

Hon. RUDOLPH F. KING, *Registrar of Motor Vehicles.*

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

" . . . whether a non-resident less than sixteen years of age, and properly licensed in the state of his residence to operate motor vehicles, may legally operate in Massachusetts a motor vehicle registered in his home state?"

By the provisions of G. L. (Ter. Ed.) c. 90, § 8, as amended, a license to operate motor vehicles may not be issued by you to a person under sixteen years of age, nor under G. L. (Ter. Ed.) c. 90, § 10, may a resident person of that age operate. Under the terms of our reciprocal statute, G. L. (Ter. Ed.) c. 90, § 10, as amended, the applicable portion of which you have set forth in your letter, if you determine that any particular foreign State by

reason of laws permits the operation of motor vehicles by persons less than sixteen years of age, it may be said that such State does not by reason thereof "prescribe and enforce a standard of fitness for operators of motor vehicles substantially as high as those prescribed and enforced in this commonwealth," and consequently that a resident of such State less than sixteen years of age, though properly licensed in his home State to operate motor vehicles, may not legally operate a motor vehicle in Massachusetts irrespective of the ownership of the vehicle.

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

*Port of Boston Authority — Right of Re-entry into Service of Present Authority of One who left the Service of the Predecessor of the Authority to Enter the Armed Forces of the United States.*

JULY 15, 1947.

*Port of Boston Authority.*

GENTLEMEN: — You have asked my opinion with regard to the right of an employee of your predecessor, the Boston Port Authority, who has been serving in the military forces of the United States, to return to his position within two years after leaving such forces.

The right of re-entry into the public service of the present Authority by those who left the service of its predecessor to enter the military forces of the United States has been preserved by St. 1945, c. 619, § 9, subject only to a qualifying civil service examination.

With relation to the said employee of the predecessor of your board seeking to re-enter his position, which is now under the jurisdiction of your board, the sole question appears to be as to whether such employee left the service of the said predecessor board for "the purpose of serving in the military forces of the United States." If so, he is entitled to assume his former position.

It is provided by St. 1941, c. 708, as amended, that a person leaving the service of the Commonwealth to enter the military forces of the United States, during the period applicable to the employee under consideration, shall be deemed to be on leave of absence until the expiration of two years from the termination of his military service. If such employee files a resignation in writing, that "shall be considered a final determination of the reason for leaving the service of the commonwealth, or a political subdivision thereof."

It appears from the facts which you have stated in your letter that the employee in question left the Commonwealth's service without any resignation on April 15, 1941, to enter the military service of the United States and that he did so enter the latter and has remained therein until June 26, 1947. He was specifically granted a leave of absence from April 15, 1941, until March 23, 1942.

On or about April 15, 1942, as his military service was likely to continue for a long time, he asked for and received another specific leave of absence, from April 15, 1942, for an indefinite period.

On November 9, 1942, the employee sent the following letter of resigna-

tion to the Boston Port Authority, more than a year and a half after he had left the Commonwealth's employ. It reads:

"War Department
Army Air Forces, Air Service Command
United Nations Depot No. 8
Newark Airport
Newark, New Jersey.

November 9, 1942.

Mr. Richard Parkhurst, *Chairman, Boston Port Authority, 1600 Customhouse, Boston, Mass.*

Sir: — I tender herewith my resignation as Commerce Assistant, Boston Port Authority, to take effect immediately.

Yours very truly,
s/ Walter McCoubrey,
*Major, Air Corps.*"

At the same time he wrote the following communication to the executive officer of the Boston Retirement Board referring to this letter of resignation and requesting to withdraw his accumulated deductions from the retirement fund:

"United Nations Depot #8
Newark Airport
Newark, N. J.

November 9, 1942.

Mr. W. D. Kenney, *Executive Officer, Boston Retirement Board, Room 65, City Hall, Boston, Mass.*

Dear Sir: — I am attaching herewith a copy of letter addressed to the Chairman of the Boston Port Authority, dated November 9th, 1942, from which you will note that I have resigned as of that date.

It would be appreciated if check to cover the value of my accumulated deductions, with interest, be mailed to me, care of Mr. Richard Parkhurst, Chairman, Boston Port Authority, 1600 Customhouse, Boston, Mass.

In view of the fact that I expect orders for overseas duty, it would be very helpful to me if you would do all possible to expedite delivery of this check to Mr. Parkhurst.

Yours very truly,
(signed) Walter McCoubrey,
*Major, Air Corps.*"

A check covering his accumulated deductions with interest was sent, you state, to the employee by the retirement board; also a letter accepting his resignation of November 9, 1942, was sent him by the chairman of the Authority.

The letter of resignation does not state the employee's "reason for such resignation." The statute, St. 1941, c. 708, § 1, as amended by St. 1943, c. 548, § 1, states that:

"When a person holding an office . . . enters the military or naval service of the United States and files a resignation in writing *stating his reason* for such resignation, the resignation shall be considered a final determination of the reason for leaving the service of the commonwealth, or a political subdivision thereof."

The resignation filed by this employee *stated no reason* for his leaving the Commonwealth's service. His doings before the date of such resignation apparently show beyond doubt that he left for the purpose of entering the military service. It cannot be said that his resignation a year and a half after he entered the army, stating no reason for such resignation, can be considered as rebutting the statutory presumption that he left for the purpose of entering such service.

The fact that it may be inferred that the letter of resignation was written for the purpose of obtaining repayment of his contributions to the retirement fund, such repayment not being permitted to one leaving the Commonwealth's service for the purpose of entering the army until one year after the termination of his military service (St. 1941, c. 708, § 8), does not supply a substitute for the absence of a specific reason for the resignation stated therein. Accordingly, the letter of resignation does not overcome the presumption that by virtue of the employee's entry into the military service of the United States he was on a leave of absence, which leave is still in force and therefore, in my opinion, he is entitled to his former position.

It is true that no payment of accumulated deductions should have been paid to the employee, but the Legislature apparently contemplated that such a mistake might be made and provided that if such accumulated deductions were in fact withdrawn when not due, they might be repaid by the employee in returning to the Commonwealth's service (St. 1941, c. 708, § 9).

The letter of resignation couched in the phraseology employed therein and its acceptance did not deprive the employee of his statutory right to return to his place within the prescribed time after the termination of his military service, nor was such right affected by any action of the Authority based upon such resignation or acceptance. The employee had an absolute right upon the termination of his military service to re-enter the position in the Commonwealth's employ which he left, no contrary reason for such leaving ever having been given. It does not appear that he was appointed for a definite term of years which has expired.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

*General Court — Definition.*

JULY 15, 1947.

MRS. IRENE K. RICHARDS, *Director of Registration.*

DEAR MADAM: — I am in receipt from you of the following letter:

"The Board of Registration of Professional Engineers and of Land Surveyors respectfully request your interpretation as to the meaning of the words 'general court' as contained in Section 81G — 1 (a) Chap. 643, Chap. 13, g. 1.

"The contention has been made that these words apply to the Congress of the United States rather than to the Massachusetts Legislature.

"There is no question in the mind of the Board as to the meaning of this wording, but there seems to be in the mind of a certain applicant and we would like your opinion to support their belief."

The words "general court" whenever used in the statutes of the Commonwealth refer to the Legislature of Massachusetts and not to the Congress of the United States or to any other body, and they are employed in the specific enactments to which you call my attention as meaning the legislative body which is more fully styled the General Court of Massachusetts in the Constitution of this Commonwealth, pt. 2d, c. 1, § 1, *The General Court*, art. I.

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

*Conservation — Authority over Certain Clam Flats Ceded to the United States.*

JULY 15, 1947.

Hon. A. K. SLOPER, *Commissioner of Conservation.*

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

"The clam flats adjacent to the United States Aviation Station at Squantum lie within the boundary of the reservation. Title to the land, including the flats, was obtained by the United States from various owners dating back prior to 1930.

"By St. 1930, c. 333, § 1, *Tract 2*, the Legislature ceded jurisdiction over said land to the United States of America. The clam flats in question are within an area determined by the State Department of Public Health to be contaminated and the said department has prohibited the taking of shellfish for food purposes from this area.

"I respectfully request your opinion as to what authority, if any, the coastal wardens of the Division of Marine Fisheries have to enforce the provisions of G. L., c. 130, § 75, in that area."

Inasmuch as jurisdiction over the flats of which you write was ceded to the United States by the Legislature, St. 1930, c. 333, if the tract in question has not reverted to the Commonwealth under sections 2 and 3 of said chapter 333 by reason of non-user for purposes of military defense by the United States or by reason of failure to file a plan with the State Secretary, the coastal wardens have no authority to enforce the provisions of G. L. (Ter. Ed.) c. 130, § 75, within that area.

All laws, however, relative to transportation, use, possession or sale of contaminated clams may be enforced against those having possession of contaminated clams dug upon the ceded flats when such clams are brought outside such area.

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

*Tax Exemption — Woman who Served in the Armed Forces of the United States — G. L. (Ter. Ed.) c. 59, § 5, as amended.*

JULY 22, 1947.

Hon. FRANCIS X. COTTER, *Commissioner of Veterans' Services.*

DEAR SIR: — You have asked my opinion as to whether a woman who you state "served in the armed forces of the United States in the recent war" is entitled to a tax exemption under the twenty-second clause

of section 5 of G. L. (Ter. Ed.) c. 59, as most recently amended by St. 1947, c. 612.

You have as Commissioner of Veterans' Services no particular duties to perform in connection with the statute in question, which relates to certain exemptions from taxation.

For your guidance, however, let me state that the section of the statute to which you refer, as amended by said St. 1947, c. 612, provides an exemption of two thousand dollars to "soldiers and sailors who served in the military or naval service of the United States" in various enumerated wars, including World War II, who were honorably discharged therefrom and who suffer from certain described disabilities. The statute also includes an exemption to the wives and widows of soldiers or sailors who would be entitled to exemption.

Although the words "soldiers and sailors" are used in the instant statute as they were in the earlier statutes, which have been amended from time to time, nevertheless, I am of the opinion that the words "soldiers and sailors" are capable of embracing women who actually served in the military or naval forces, and that a narrow meaning of the words, which may have been their practical scope when originally used in earlier forms of the present enactment, is reasonably capable of a broader sweep within the legislative intention and now includes both males and females who were members of the military or naval forces of the United States.

In a well-considered case, *United States* v. *Williams*, 59 F. Supp. 300, it is said that the words "soldier in the military service" as used in a United States statute are sufficiently broad in their meaning, without any additional phrase, to include a member of the WAC. I am of the opinion that the word "soldiers" as employed in the statute under consideration should be given a similar construction in this Commonwealth.

It is to be noted that the particular woman to whom you refer, who "served in the armed forces of the United States in the recent war," received an adverse decision from a local board of assessors. In order to protect her rights and to have the matter properly determined by the courts she must carefully perfect her appeal to the Appellate Tax Board and from there go on to the Supreme Judicial Court, if necessary.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

*Massachusetts Aeronautics Commission — Appropriation — Construction.*

JULY 24, 1947.

Hon. LESTER WATSON, *Chairman, Massachusetts Aeronautics Commission.*

DEAR SIR: — You have asked my opinion as to whether the reference to chapter 501 in St. 1947, c. 670, in the appropriation item which reads:

> "*For the Service of the Massachusetts Aeronautics Commission.*
>
> "For the reimbursement to cities and towns for the state share of airport construction as provided in chapter five hundred and one of the acts of the current year, to be available for matching federal funds for the 1947 fiscal year and succeeding years, including the commonwealth's share of projects at the state-owned airport at Bedford . . . $750,000 00"

should be construed as reading chapter "five hundred and ninety-three" instead of "five hundred and one," as it is set forth in the above item.

I answer your question in the affirmative. An examination of both measures shows clearly that the substitution of "five hundred and one" for "five hundred and ninety-three" in the item in question was a clerical error and that the number was intended to read "five hundred and ninety-three."

It appears to be a general rule of statutory construction that a mistaken reference to a title, chapter or section number of a statute in another statute will be disregarded and the reference will be read as if made to the proper title, chapter or section number if enough appears in the statute to indicate properly the legislative intent. (5 A. L. R. 997, and cases there cited; *Tatlow* v. *Bacon*, 101 Kan. 26; 14 A. L. R. 269; 50 Am. Jur., Sec. 233.)

There is enough appearing in the statute itself to show that it referred to chapter 593 and not 501, as erroneously indicated, for chapter 501 does not in any way provide specifically for the State Treasurer's expenditure of matching funds to Federal funds. Fundamentally, chapter 501 provides for the establishment and operation of joint airports by two or more municipalities. One of the six basic requirements of an agreement between the municipalities as set forth therein is the establishment of a joint airport fund into which shall be deposited the proportionate share (of each municipality) of the cost and expenses incident to establishing, maintaining and operating the joint airport, all revenues and "all federal, state and other contributions or loans."

On the other hand, it is obvious that the Legislature by chapter 593 created the vehicle for carrying the appropriated funds to the municipalities which, in accordance with the State Airport Plan, secure grants from the Federal Government to be matched.

Section 2 of chapter 593, inserting a new section 51I in G. L. (Ter. Ed.) c. 90, authorizes the expenditure of funds entirely under Federal laws where the program is financed in whole or in part by Federal moneys.

Section 3 of chapter 593, inserting a new section 51K in G. L. (Ter. Ed.) c. 90, provides that the local airport commission of a municipality seeking Federal funds shall designate the Massachusetts Aeronautics Commission as its agent to receive and receipt for them. It puts the approval of the site in the discretion of the Massachusetts Aeronautics Commission and then proceeds to authorize the expenditure of funds "available therefor, including the appropriation voted and the amount of any gift or bequest, together with the amount or amounts stated in any existing agreements for the allotment or grant of funds by the federal government or commonwealth, or both." Section 3 concludes with the provision for the municipality's borrowing on a short-term loan in anticipation of funds covering that portion of the expense being provided by the Federal Government and the State.

Section 4 of chapter 593, inserting a new section 39F in G. L. (Ter. Ed.) c 90, completes the legislative picture on matching Federal funds by providing the means of conveying the funds from the appropriation in chapter 670 through the Massachusetts Aeronautics Commission to the municipalities participating in the Federally-aided projects. It establishes the proportion to be contributed by the State as being not more than twenty-five per cent, which, together with the appropriation of the municipality, shall equal fifty per cent of the total cost. The amount of the State's contribution, up to that twenty-five per cent, is determined by the Massachusetts Aeronautics Commission and at their request is paid over to the city or town by the State Treasurer from "funds available under this sec-

tion." There are no other funds available than those provided by chapter 670.

In conclusion, it should be noted that a joint airport created and operating under chapter 501 can participate in the Federal aid program and in the State's matching funds to the same extent as any independently municipally owned airport.

In the face of such facts, it would be a clear perversion of the legislative intent to hold otherwise than that chapter 593 was the intended reference in place of chapter 501 in the second item of section 2 of chapter 670.

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

*Retirement — Medical Panel — Finality of Finding.*

AUG. 4, 1947.

DONALD E. CURRIER, M.D., *State Surgeon.*

DEAR SIR: — In answer to your recent letter let me advise you that the decision of a medical panel appointed and acting under G. L. (Ter. Ed.) c. 32, § 6 (1) and (3) (*a*) (*b*) (*c*), as amended by St. 1945, c. 658, is final. There is nothing in the phraseology of the applicable statutes which indicates a legislative intent that an applicant for retirement dissatisfied with the finding of such a medical panel shall be entitled to a re-examination.

I am informed that a construction of the statute similar to that which I have given above has long been applied by the State Contributory Retirement Appeal Board in cases coming before it.

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

*Plumbing — Inspector of Plumbing in Towns — Appointment.*

AUG. 28, 1947.

Mrs. IRENE K. RICHARDS, *Director of Registration.*

DEAR MADAM: — I acknowledge your letter of recent date in which you ask my opinion on the following question:

"Does an inspector of plumbing or his assistants, who are not under an annual salary in towns having the requirement of a stated fee per inspection, have to be reappointed every three years?"

G. L. (Ter. Ed.) c. 142, §§ 9 and 11, contain the provisions of law relative to the appointment of inspectors of plumbing. Section 9 states, in substance, that within thirty days after *rules* have taken effect *as provided in the preceding section*, the local board of health shall appoint an inspector to hold office for three years, and he shall receive from the town compensation to be fixed by the appointing board. The preceding section referred to has to do with plumbing rules formulated by the State Examiners of Plumbers upon petition by a local board of health of a town.

These two sections must be construed together in determining the duration of the term of the plumbing inspector appointed pursuant to section 9. It follows, therefore, that a plumbing inspector appointed by a town board of health under rules formulated by the State Examiners in consequence

of a petition under section 8 holds office for three years, and a new or reappointment must be made every three years.

Section 11, as amended by St. 1945, c. 703, § 11, states, in substance, that the inspector of buildings, if any, otherwise the board of health, of each city and town, shall, within three months after it becomes subject to sections 1 to 16, inclusive (of chapter 142), appoint from the classified civil service list one or more inspectors of plumbing. Such inspector of buildings or board may remove them (inspectors of plumbing) subject to chapter 31, and shall, subject to the approval of the city council or selectmen, fix the compensation of such plumbing inspectors, which compensation shall be paid by the city or town. Plumbing inspectors appointed pursuant to said section 11 hold office indefinitely and may be removed only pursuant to civil service regulations.

You further ask if chapter 49 of the Acts of 1941 abolishes that part of section 9 of chapter 142 relative to the appointment of plumbing inspectors for a period of three years. It is my opinion from what I have stated herein that chapter 49 of the Acts of 1941 does not abolish any portion of said section 9 of chapter 142.

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

*Outdoor Advertising Authority — Compensation of Members — Meetings.*

SEPT. 2, 1947.

*Outdoor Advertising Authority.*

GENTLEMEN: — You have called my attention in a recent letter to the provisions of St. 1946, c. 612, with regard to the compensation of the members of the Outdoor Advertising Authority. You have informed me that the members, sometimes singly and sometimes together, make investigations and perform certain other designated acts in connection with outdoor advertising.

1. With relation to the foregoing you have asked me three questions as follows:

"Does the performance of such necessary duties entitle the members of the Authority to compensation for such services on a per diem basis within the limitations prescribed by the act?

"Can 'board meetings' as set forth within the section be construed to refer to any functions performed by the commissioners that are incumbent upon them as a board to do and perform in the proper performance of their duties prescribed under the act?

"Can 'board meetings' as set forth within the section be construed to refer to any functions performed by the commissioners that are incumbent upon them as a board to do and perform in the proper performance of their duties prescribed under the act, when such functions are a continuing and necessary part of every regular full board meeting, and necessary to carry out the purpose of such full board meetings?"

I answer your first question in the negative.

St. 1946, c. 612, § 2, which you quote in your letter, has set forth explicitly how the members of the Authority shall be compensated. The Legislature has seen fit to provide compensation for them only for "at-

tendance at board meetings." No provision is made for further compensation on a per diem or any other basis for activities carried on outside of such meetings.

I answer your second question in the negative, with this qualification: that a view taken by the board as such, as an integral part of a meeting, may fairly be considered as a part of a board meeting for which compensation is paid.

With regard to your third question, the import of it is not sufficiently clear so that it can be answered categorically. Speaking generally, the words "board meetings" cannot be construed to embrace activities carried on outside of meetings of the board, as the word "meetings" is ordinarily used to denote a formal gathering of a majority of a board for required action upon matters coming before them.

2. You have also asked several questions with respect to the authority of the chairman of the board. The statute is silent as to the extent of his powers or duties. The primary duty of a chairman is to preside at meetings. It may also be said to be within his authority to call meetings for designated times not inconsistent with the times set for regular meetings by vote of the board itself. The chairman is without authority to cancel meetings, either those scheduled by the board or called by himself, irrespective of whether or not he can be present at such meetings.

Two members of this board of three may meet without having been called together by the chairman and transact business without him, provided that he has been duly notified of the meeting by the majority calling the same. Unless the chairman has been duly notified of such a meeting, the presence of the other two members will not constitute a valid board meeting.

The foregoing considerations dispose of your first four queries with relation to the chairman of the board.

Your fifth and sixth queries I answer in the affirmative.

Your seventh query reads:

"In the matter of viewing controversial locations, is it the chairman's prerogative to assign such duties to the board members as he sees fit?"

I am of the opinion that the chairman has not been vested with power to assign duties to the members of the board. Such duties may be assigned by vote of the board itself, or the board might by appropriate action delegate to the chairman the privilege of making assignments.

Your eighth query reads:

"In the matter of viewing controversial locations as voted by the board at a regular meeting, is it necessary that all three commissioners view as a group, or is one or two members sufficient?"

I answer this to the effect that it is sufficient if two members are present at a view, such as you refer to, if only two are present at the meeting and are to pass upon the subject matter involved, but if all three are present at the meeting and are to pass upon the subject matter involved, all should go on the view.

Your ninth query reads:

"It having been voted at a regular meeting to view certain locations, can any one member or two members take it upon themselves to view the same and claim compensation for such services, or must such an assignment be made by the chairman?"

I answer this query to the effect that neither one nor two members may take it upon themselves to take a view voted at a regular meeting as a part thereof except under the conditions outlined in my answer to your eighth query, where the meeting is held by only two members. An assignment of members less than all the board to go on such a view may not be made by the chairman.

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

*Soil Conservation Districts — Liability for Debts.*

SEPT. 2, 1947.

Mr. LESTER T. TOMPKINS, *Acting Commissioner of Agriculture.*

DEAR SIR: — You have asked my opinion relative to the legality of a contract form used by soil conservation districts, which you have laid before me.

The provisions of this contract form appear to be legal.

With relation to the other questions in your letter, let me say that under the provisions of the Soil Conservation Law, St. 1945, c. 531, a soil conservation district is liable for debts contracted on its behalf, and the supervisors of such districts are not personally liable for such debts when contracted for by them when acting within the scope of their authority, nor is the Commonwealth liable for such debts of a district.

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

*Conservation — Leases to Municipalities for Clamming.*

SEPT. 3, 1947.

Hon. ARCHIBALD K. SLOPER, *Commissioner of Conservation.*

DEAR SIR: — You have asked my opinion on the following question:

"Whether the Director of the Division of Marine Fisheries has the authority to grant leases from the Commonwealth to cities and towns in Essex County for the control and regulation of the taking of clams from all flats within any city or town?"

I answer your question in the negative.

St. 1912, c. 710, in its applicable parts, provides that the Commissioners on Fisheries and Game, whose powers and duties have since been transferred in this regard to the Director of the Division of Marine Fisheries, shall, upon the application of any city or town in the County of Essex, issue a lease to said city or town.

St. 1941, c. 598, inserted a new chapter, to wit, G. L. (Ter. Ed.) c. 130. Section 104 of said chapter 130 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, relate to shellfish and shellfisheries and are affected by G. L. (Ter. Ed.) c. 130, the power of the Director of the Division of Marine Fisheries to execute leases is thereby abrogated.

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

*Emergency Housing Commission — Authority — Variances from G. L. (Ter. Ed.) cc. 144 and 145.*

SEPT. 15, 1947.

Hon. A. S. BIGELOW, *Chairman, Emergency Housing Commission.*

DEAR SIR: — By your letter of August 21, 1947, you have asked whether your commission has jurisdiction and authority under St. 1946, c. 592, as amended by St. 1947, c. 609, to grant a variance from the provisions of chapters 144 and 145 of the General Laws, which are building codes.

I answer your question in the negative.

The amending act of 1947 struck from section 4 of the original act of 1946 the following language: "provided, that said commission shall not have the power to alter, amend or repeal any law of the commonwealth relative to the construction or alteration of buildings or other structures, except building codes, so called." This language conceivably was subject to the construction of granting jurisdiction and authority to alter, amend and repeal said chapters 144 and 145, being building codes in the form of laws of the Commonwealth. It is apparent that in striking out this language the Legislature intended not to grant jurisdiction and authority to your commission to so deal with said chapters 144 and 145.

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

*Public Warehousemen — Bonds of Licensed Warehousemen.*

SEPT. 22, 1947.

His Excellency ROBERT F. BRADFORD, *Governor of the Commonwealth.*

SIR: — You have in a recent communication directed my attention to section 2C of G. L. (Ter. Ed.) c. 105, which was inserted in said chapter by St. 1947, c. 499, and reads as follows:

"Notwithstanding the foregoing provisions of this chapter, persons, or corporations established under the laws of, and having their places of business within, the commonwealth, may keep and maintain a public warehouse on the premises of any other person or corporation for the storage therein, under contract, of goods, wares and merchandise of such other person or corporation, without being licensed under this chapter."

In relation to those maintaining the type of public warehouse referred to in said section 2C, you have asked my opinion on the following questions of law:

"1. Is a person or corporation keeping and maintaining a public warehouse under section 2C of chapter 105 required to give a bond to the state

treasurer as provided in section 1 of chapter 105, or any other provision of law pertinent thereto?

"2. Do sections 4, 5 and 6 of chapter 105 apply to a person or corporation keeping and maintaining a public warehouse under section 2C of chapter 105?"

I answer both your questions in the negative.

The provisions of sections 1, 2 and 3 of said chapter 105, which relate to bonds of warehousemen, refer only to bonds of those who are *licensed* warehousemen. Inasmuch as those public warehousemen who operate under said section 2C are not licensed warehousemen, the provisions of the statute with regard to bonds have no application to them.

In like manner the provisions of sections 4, 5 and 6 of said chapter 105 by their terms apply to licensed warehousemen and are not applicable to the unlicensed warehousemen referred to in said section 2C.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

*Civil Service — Reallocation of State Police Detectives — Promotional Examination.*

SEPT. 29, 1947.

Mr. THOMAS J. GREEHAN, *Director, and the Civil Service Commission.*

GENTLEMEN: — You have directed my attention to the reallocation of certain state police detectives and have asked my opinion relative to your duty to give a promotional examination when a reallocation has been made.

There is no matter before you at the present time requiring your consideration relative to reallocation except that of the state police detectives, and I confine my opinion as to the proper performance of your duty expressly to the explicit subject of the state police detectives upon the particular facts relative thereto.

The classes of state police detectives and of state police detective inspectors appear to have been telescoped and to have emerged under the single title of state police detective inspectors, the duties of the new position being virtually the same as of the old position of police detectives, the salary ranges established having the same maximum for the new position as for the old, and allocations of individual salaries being provided under section 6 of the general appropriation bill (St. 1947, c. 219). The number of those now to be called detective inspectors is precisely equal to those formerly termed detectives.

Furthermore, it is to be noted that in the civil service classification, Civil Service Rule 4, the whole detective force of the Department of Public Safety, including detectives and those on detective inspection work, is included in a single grade, namely, Class 13 (a).

In view of the foregoing considerations there has not been a promotion in the case of former detectives, by reason of the foregoing reallocation of positions, which requires you to give a promotional examination to those persons formerly called state police detectives.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

*Public Welfare — Anticipation of Federal Grants — Legislative Authority a Necessity.*

SEPT. 29, 1947.

HON. PATRICK A. TOMPKINS, *Commissioner of Public Welfare.*

DEAR SIR: — In reply to your letter of September 24, 1947, let me say that I am not aware of any statute of the Commonwealth which authorizes you to pay to municipalities from the appropriations which have been made to your department sums in anticipation of allotments which may be paid to them from future Federal grants.

Only by a particular authorization from the Legislature accompanying a special appropriation for the indicated purpose would your department have authority to make such advancements.

In the absence of such legislative authorization the Comptroller is correct in informing you, as you state he has done, "that chapter 29 of the General Laws as amended would not permit the Department of Public Welfare to execute such a plan for advance payments . . . " There is nothing in the provisions of G. L. (Ter. Ed.) c. 118A, § 7, to which you refer, which specifically or by implication would authorize your department to make the advance payments cited by you.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

*Massachusetts Aeronautics Commission — Authority to Accept Certain Realty from United States.*

SEPT. 30, 1947.

MR. CROCKER SNOW, *Director, Massachusetts Aeronautics Commission*

DEAR SIR: — I have your request for an opinion on the extent of statutory authority in your commission to accept, on behalf of the Commonwealth from the War Assets Administrator, title to certain United States Government lands, buildings and equipment thereon which now form a part of the Bedford Army Airfield.

St. 1946, c. 442, approved June 6, 1946, establishes in the Massachusetts Aeronautics Commission authority to maintain and operate Bedford Airport upon its return to the Commonwealth from the Federal Government. Section 6 of that act specifies that prior to the return of the field the Massachusetts Aeronautics Commission on behalf of the Commonwealth may carry on such negotiations with Federal Government officials as may be necessary to effect such return.

Eight days after the passage of the aforesaid act there were passed by the Legislature on June 14, 1946, as emergency laws, revisions of G. L. (Ter. Ed.) c. 90, §§ 39 and 40, by St. 1946, c. 583, § 3, and c. 582, § 1, respectively. As thus revised, section 39 sets forth the general supervisory power of the Massachusetts Aeronautics Commission over aeronautics and in particular the "general supervision of the construction, maintenance and operation of all air navigation facilities and airports, including airport buildings, owned by the commonwealth, except as otherwise provided by law." (The exception relates only to Logan Airport, which is under the control of the Massachusetts Department of Public Works by virtue of St. 1941,

c. 695.) Section 40, among other general powers and duties, delegates to the Massachusetts Aeronautics Commission authority to:

"(1) Co-operate with the federal government and with any agency or department thereof, in the acquisition, establishment, construction, enlargement, improvement, protection, equipment, maintenance and operation of airports and other air navigation facilities within the commonwealth, and comply with the provisions of federal law, and any rules and regulations made thereunder, for the expenditure of federal funds for or in connection with such airports or other navigation facilities; (2) accept, receive and receipt for federal funds, and also other funds, public or private, for and in behalf of the commonwealth or as agent for any subdivision thereof, for the acquisition, establishment, construction, enlargement, improvement, protection, equipment, maintenance and operation of airports and other air navigation facilities within the commonwealth or such subdivisions, or jointly; provided that, if federal funds are received for such work, such funds shall be accepted upon such terms and conditions as may be prescribed by federal law and any rules and regulations made thereunder; (3) advise and co-operate with any political subdivision of this state or of any other state in all or any matters relating to aeronautics. For such purpose the commission may confer with, or hold joint hearings with, any federal or state aeronautical agency in connection with any provision of sections thirty-five to fifty-two, inclusive."

The section continues with the following sentence: "The commission shall enforce sections thirty-five to fifty-two, inclusive, and all orders, rules and regulations made pursuant thereto and other laws of the commonwealth relating to aeronautics, and shall have and may exercise for any or all of such purposes such powers and authority as may be reasonably necessary therefor."

In view of all the foregoing statutes, it would appear that their full intendment, by implication if not by express words, would authorize the Massachusetts Aeronautics Commission to accept the property on behalf of the Commonwealth from the United States Government upon reasonable terms and conditions where such terms and conditions relate to the "maintenance and operation" of the premises as an airport, or are incidental thereto. It is within the commission's sole sphere to maintain and operate Bedford Airport under the General Laws, and the Commonwealth has committed itself to the operation of the premises as an airport.

It is my opinion, therefore, that the Massachusetts Aeronautics Commission has authority (1) to execute the "Application by Lessor" to the War Assets Administrator and to bind the Commonwealth to the terms and conditions thereof, and (2) to accept delivery of the instrument of transfer of the premises at Bedford Airport, thereby binding the Commonwealth to its terms, reservations, restrictions and conditions.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

*Examiners of Electricians — Only One Master Electrician's License under Certain Circumstances.*

Oct. 1, 1947.

*State Examiners of Electricians.*

Gentlemen: — You have asked my opinion as follows:

"Have the State Examiners of Electricians, constituted under the provisions of section 32 of Chapter 13, of the General Laws, the right under Chapter 141 of said General Laws, to issue a 'Certificate A,' known as a master electrician's license, to a person who has qualified by examination, under said chapter and to subsequently issue another 'Certificate A' to a firm of which such person is one of its members or to a corporation of which such person is one of its officers, and upon the basis of the examination of such person, both licenses to be in force concurrently?"

The applicable provisions of G. L. (Ter. Ed.) c. 141, as amended, do not contemplate that more than one "Certificate A" or master electrician's license shall be issued upon the passing of an examination by an applicant. The application to be made, under section 3 (1) of said chapter 141, for a "Certificate A" should state whether it is an application by a person, a firm or a corporation, and the certificate when ultimately granted as a result of an individual's successful passing of an examination is required to "specify the name of the person, firm or corporation" which was the applicant. It is also required by said section 3 (1) that the certificate shall specify the name of the person passing the examination.

It is plain from the foregoing considerations that the Legislature intended that as a result of the efforts of an individual in an examination only one certificate should issue. To whom it should issue will, in view of the provisions of said section 3 (1), depend upon whether the individual applied for the certificate for himself, or for a firm of which he was one of the members, or for a corporation of which he was one of the officers.

Very truly yours,

Clarence A. Barnes, *Attorney General.*

*Minimum Fair Wage Rates — Employees of Profit and Non-Profit Hospitals.*

Oct. 2, 1947.

Hon. Daniel J. Boyle, *Commissioner of Labor and Industries.*

Dear Sir: — You state that a minimum wage board is now studying the matter of recommending minimum fair wage rates under G. L. (Ter. Ed.) c. 151, §§ 4 to 8.

In connection with such study you have asked my opinion upon two questions, which are as follows:

"1. Are the employees of a hospital which is established and conducted on a non-profit basis, included in the description of 'occupation' contained in G. L. c. 151, § 2, and therefore entitled to the benefits of a decree established under the provisions of said chapter?

"2. Are the employees of a hospital which is established and conducted for profit included in the same description of 'occupation' referred to in question #1?"

While the purpose for which my opinion is asked is such that a formal opinion from the Attorney General is not required to be given, nevertheless, for the guidance of the said board in pursuing its studies, I answer your first question in the negative, in view of the opinion of the Supreme Judicial Court in the case of *St. Luke's Hospital* v. *Labor Relations Commission*, 320 Mass. 467.

As to your second question, the Supreme Judicial Court did not pass specifically upon the status of the employees of hospitals run for profit in connection with said chapter 151, nor can its view regarding such status be determined with certainty by any implication from the text of the opinion. In the light of what was said in opinions of Federal courts in other connections in *American Medical Assn.* v. *United States*, 1942, 76 U. S. App. (D. C.) 70, 317 U. S. 519, and in *Jordan* v. *Tashiro*, 278 U. S. 123, and in *National Labor Relations Board* v. *Central Dispensary & Emergency Hospital*, 145 F. (2d) 852, referred to in *St. Luke's Hospital* v. *Labor Relations Commission*, 320 Mass. 467, 474, where the activities of those conducting hospitals for profit are considered as trade or business activities, it may well be that this class of hospital is included within the description of "occupation" referred to in question 1. In the absence of further judicial decisions in the Commonwealth relative to hospitals in the indicated connection, your second question cannot be answered categorically.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

*Summary Process — Power of the Governor.*

OCT. 2, 1947.

His Excellency ROBERT F. BRADFORD, *Governor of the Commonwealth.*

SIR: — In a recent letter Your Excellency has directed my attention to St. 1947, c. 78, in which the Legislature has specifically authorized a stay of judgment and execution by the courts in actions of summary process to recover possession of premises occupied for dwelling purposes "for a period not exceeding four months."

You have asked my opinion as to whether you have the power

"under the Constitution, under G. L. c. 23, § 9H, or under any other law of the Commonwealth to issue regulations authorizing the courts, in their discretion, to grant tenants more time before evictions shall become effective."

Article XLVII of the Amendments to the Constitution of Massachusetts vests in the General Court the power to determine the manner and mode of providing shelter in time of emergency and the officers to provide it.

G. L. (Ter. Ed.) c. 23, § 9H, to which you have referred, provides in its first sentence:

"Whenever the governor shall determine that an emergency exists in respect to food or fuel, or any other common necessary of life, including the providing of shelter, . . . he may, with the approval of the council" designate certain named public officials "to act as an emergency commission, and thereupon the commission shall have, with respect to the neces-

sary or necessaries of life as to which the emergency exists, all the powers and authority granted by the Commonwealth Defense Act of nineteen hundred and seventeen, being chapter three hundred and forty-two of the General Acts of nineteen hundred and seventeen, to persons designated or appointed by the governor under section twelve of said chapter three hundred and forty-two . . ."

However, an examination of the provisions of said St. 1917, c. 342, discloses that no power or authority to deal with judgments and executions in summary process with relation to dwellings was vested in the Governor by said chapter 342, either explicitly or by implication.

Nor, in my opinion, does the power vested in the Governor and Council by said section 9H to make, during an emergency, rules and regulations for the carrying out of the purposes of the section authorize the Governor to extend the time of taking effect of said judgments and executions, for it is plain from the context that such rules are to be exercised only to implement such powers as may be employed by the said emergency commission, such powers flowing, as has been pointed out, from said St. 1917, c. 342. It would seem that rules and regulations were not intended by the Legislature to be such as are to be directed to the courts, since their violation is made punishable by fine or imprisonment, or both, further indicating that they are to be rules for implementing the powers or authority of said emergency commission rather than regulations controlling judicial procedure.

If the power to make rules and regulations were to be construed as general and indefinite in character, unconnected with or limited by the scope of the powers vested in the emergency commission derived from said St. 1917, c. 342, it could only be upon the theory that said section 9H delegates to the Governor a general power to change standing laws, including St. 1947, c. 78, without specifying with necessary particularity the nature of such changes and the objects for which they can be made. Such construction would, in my opinion, render said section 9H invalid (see *Opinion of the Justices*, 315 Mass. 761, 771).

I am not aware of any provision of our Constitution or laws which gives the Governor authority to make such regulations as you refer to.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

*Civil Service — Chief and Deputy Chief of Police of Barnstable — Military Substitute.*

OCT. 7, 1947.

*Commissioners of Civil Service.*

GENTLEMEN: — In a recent letter you have informed me of various facts relative to the positions of chief of police and of deputy chief of police of Barnstable.

With relation to such facts you have asked my opinion as to whether the incumbents of these positions are properly holding office or whether competitive examinations should now be held to fill the positions.

I am of the opinion that the present incumbent of the office of chief of police is properly holding such office but that the present incumbent of the office of deputy chief of police is not properly holding the latter office.

The present incumbent of the office of chief of police was appointed chief as a military substitute for the former chief upon, and retained the office through, a series of temporary transfers, authorized by your division under G. L. (Ter. Ed.) c. 31, § 16A, from his previous position as deputy chief.

The previous chief returned from his leave of absence for military service on January 22, 1943 (see report of your investigator of January 21, 1947). Without having been reinstated he filed a resignation January 5, 1944. Irrespective of the effect, if any, of the resignation, a year had elapsed on January 23, 1944, from the termination of the former chief's military service on January 23, 1943, the period allowed for his reinstatement at that time by St. 1941, c. 708, § 2.

The applicable statute in force on January 23, 1944 (St. 1941, c. 708, § 2), provided in part:

"All appointments, transfers and promotions made on account of such leaves of absence shall be temporary only and the person so appointed, transferred or promoted shall be known as a military substitute; provided, that, notwithstanding any provision of said chapter thirty-one to the contrary, he may continue to serve in such office or position until the incumbent is reinstated therein . . . *and if the incumbent has not been reinstated as provided herein said military substitute shall continue in the position as though regularly appointed and his seniority rights shall date from his appointment as such military substitute.* . . ."

The language of the quoted portion of section 2 is definite and explicit as to the right of the military substitute to hold the office to which he has been elevated, irrespective of the civil service laws, if the former incumbent was not reinstated therein within one year from his discharge from military service.

I cannot read into the quoted language a qualification with regard to the conformity of the military substitute's appointment to certain provisions of the civil service laws. The legislative intent as expressed in said section 2, as that section stood on January 23, 1944, does not warrant such a course.

In the enactment on July 16, 1945, of chapter 610 of that year, amending said section 2, the Legislature did manifest such an intent to limit the tenure of military substitutes and provided with relation to the succession of the substitute to the office or position of the earlier incumbent as follows:

". . . if his appointment as such military substitute was made in accordance with the civil service law and rules governing examination, certification and appointment," (he shall) "continue in the position and his seniority rights shall date from his appointment as such military substitute."

These quoted provisions of said section 2, as contained in its amendment by St. 1945, c. 610, § 1, were not, however, in existence when the present chief of police assumed the office in his own right in 1944 under the authority of said section 2 as it then stood. His title to the office so assumed cannot now, in my opinion, be properly assailed.

The position of the present incumbent of the office of deputy chief of police stands, on the facts which you have laid before me, upon an entirely different footing and he is not, in my opinion, entitled to hold the office in the absence of passing a competitive promotional examination (see G. L. (Ter. Ed.) c. 31, § 20, as amended).

The present incumbent of the office of deputy chief was not, upon the facts of which you have advised me, a military substitute for one who had entered the service of the United States. The deputy chief had not entered the military or naval service on a leave of absence. His former position was merely temporarily without an incumbent and the present deputy was placed in it only by means of temporary transfers of six months each, authorized by your division, from the position of a patrolman. He was not eligible for an appointment or promotion to the higher position except from an eligible list established for promotion by your division (G. L. (Ter. Ed.) c. 31, §§ 15, 20, as amended). If your authorization of temporary six months' transfers under said section 16A has ceased, the present incumbent is not now entitled to hold the office of deputy chief of police.

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

*Conservation — Gypsy Moths — Reimbursement of Municipalities.*

OCT. 16, 1947.

Hon. A. K. SLOPER, *Commissioner of Conservation.*

DEAR SIR: — In a recent letter you have called my attention to certain provisions of the statutes relative to gypsy moth suppression as follows:

"I respectfully request your opinion on the proper interpretation of the law relative to reimbursing cities and towns for gypsy moth work. The law is found in G. L., c. 132, § 14, as amended by St. 1937, c. 415.

"In the third paragraph of the law reference is made to towns having a valuation of less than six million dollars and sets their required spending for moth work at one twenty-fifth of one per cent. The section goes on to say 'The commonwealth shall expend within the limits thereof for the suppression of said moths and tent caterpillars such an amount in addition as the forester, with the advice and consent of the governor, shall determine.'"

With relation to the foregoing you have asked my opinion upon four questions.

1. Your first question, which like all the others relates to the provisions of G. L. (Ter. Ed.) c. 132, § 14, as amended, reads:

"Does this law eliminate towns under six million dollars in valuation from reimbursement by the Commonwealth?"

I answer this question in the affirmative.

2. Your second question reads:

"Is it correct to assume that in such towns such assistance as they may need in moth suppression work is to be given in the nature of direct aid which is supervised by and paid for by the Commonwealth direct?"

I answer this question in the affirmative.

3. Your third question reads:

"If the answer to the foregoing questions is in the affirmative, what is the significance of the last line in said third paragraph of section 14 which reads: 'The commonwealth shall reimburse cities and towns every sixty days'?"

The phrase to which you refer is applicable to those cities and towns mentioned in paragraphs one and two of said section 14 as to which provision is specifically made for reimbursement in such paragraphs.

4. Your fourth question reads:

"If said towns having a valuation under six million are not entitled to reimbursement, does the state forester have supervision of local moth expenditures, as referred to in paragraph four (last line) of said section 14?"

I answer this question to the effect that the provisions in the last line of paragraph 4 of said section 14, to which you refer in your question, relate to the approval by the Forester of sums for which the Commonwealth is to reimburse municipalities. They have no application to the expenditures of sums for which there is to be no reimbursement, such as those in towns of which the valuation is less than six million dollars.

As to sums to be expended by the Commonwealth in such towns, in addition to the municipalities' own expenditures, as provided in the phrase of paragraph 3 which reads ". . . *the commonwealth shall expend* within the limits thereof for the suppression of said moths . . . such an amount . . . as the forester, with the advice and consent of the governor, shall determine," the initial determination of the amount of this latter class of sums rests with the Forester.

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

*Labor — Overtime — G. L. (Ter. Ed.) c. 149, § 33A, as amended.*

OCT. 29, 1947.

HON. DANIEL J. BOYLE, *Commissioner of Labor and Industries.*

DEAR SIR: — I am in receipt of your letter asking several questions as to the interpretation of words and phrases in G. L. (Ter. Ed.) c. 149, § 33A, as inserted by St. 1947, c. 649.

The Attorney General, following a long line of practice and procedure established by his predecessors in office, does not give formal opinions construing statutes or defining words therein when such construction or definition is not related to the performance of some duty presently required of an officer of the Commonwealth.

For your guidance, however, let me say that the employees referred to in said section 33A are not required by its terms to work forty hours in any one week, but their employment is restricted to not more than forty hours in any one week.

The phrase "such additional service shall be compensated for as overtime" does not by the use of the word "compensated" indicate a legislative intent that "time off" may be employed in lieu of overtime pay.

The last sentence of said section 33A indicates a legislative intent that an employee shall receive at least the same amount of pay per week after the acceptance of the said section 33A as he was receiving before such acceptance for a week's work of more hours.

The phrase "unusual emergency" employed in said section 33A appears to refer to an emergency which by its nature could occur but seldom. By

reason of its redundancy, the application of the phrase to any particular event would be somewhat difficult but not impossible upon a consideration of all factual elements involved.

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

*Old Age Assistance — Budget — Standards Invalid — Support by Children.*

OCT. 31, 1947.

HON. PATRICK A. TOMPKINS, *Commissioner of Public Welfare.*

DEAR SIR: — I am in receipt from you of a request for my opinion which reads as follows:

"Your opinion is requested as to whether, as a matter of law, this department has authority under G. L. (Ter. Ed.) c. 118A, as amended, to set up as part of the approved budgetary standard for the use of local boards of public welfare, the following provisions relative to the needs of an Old Age Assistance applicant or recipient who resides in the same household with employed single children:

"'Budgetary needs include food, household supplies and replacements, clothing, personal care, insurance if incurred, verified medical expenses, and special needs. . . . In addition, a prorated share of the common household expenses of rent or carrying charges, fuel and light, is allowed.

"'*Basis of Prorating:* When a recipient lives in the same home with an employable single child(ren), the recipient is allowed a share of the rent as paid up to $50 (monthly) and a share of the fuel and light figure as determined by the State Standard Budget figures; *e.g.*, OAA recipient, one employed child — Recipient's budget includes half of rent and half of State Standard Budget figure for fuel. In case of two employed children, recipient's budget includes ⅓ of these items. When there are two OAA recipients (husband and wife) and one employed child, the recipients are each allowed ⅓ of common household expenses.'"

I am of the opinion that the Department of Public Welfare has no authority to set up the foregoing as part of the approved budgetary standard to which you refer.

In view of the legislative mandate contained in G. L. (Ter. Ed.) c. 118A, § 1, as amended, that assistance to aged persons "shall be on the basis of need," and the provisions relative to determining the resources of aged persons set forth by the Legislature in G. L. (Ter. Ed.) c. 118A, § 2A, as amended, the foregoing part of the budgetary standard is directly contrary to the legislative intent expressed in said sections. In said section 2A the Legislature has dealt comprehensively with the matter of the resources of aged persons in connection with support by children, and the statutory provisions may not be enlarged or supplemented by an administrative department.

Budgetary standards not in accord with statutory provisions are of no validity and may not be set up nor approved by the Department of Public Welfare.

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

*Treasurer — Pay roll Procedure — Weekly Salary Payments.*

Nov. 13, 1947.

Hon. Laurence Curtis, *Treasurer and Receiver General.*

Dear Sir: — I am in receipt of your letter of November 6, 1947, relative to a proposed change in payroll procedure under St. 1946, c. 580, as amended, which calls for certain weekly salary payments.

There is no provision of the statutes nor of your bond which requires that the payroll checks to which you refer must be prepared in your office.

Nevertheless, the fact that such checks are prepared by a department other than your own or that certification as to correctness is made by some other department does not change or modify the duty and the responsibility now resting upon you to disburse only the proper amount of money to each State employee.

The procedure which you outline as followed with regard to certain State institutions which draw their own checks against funds furnished by you pursuant to a warrant (G. L. (Ter. Ed.) c. 29, § 23), and with regard to the Employment Security Division which draws its own checks against funds deposited by you, appears to be proper in view of the provisions of said G. L. (Ter. Ed.) c. 29, § 23, with relation to State institutions, and of St. 1941, c. 685, §§ 52–55, with relation to the Employment Security Division.

Whether such new procedure as you have indicated makes the performance of your duty with respect to signing checks too hazardous, so that the adoption of such procedure would not be proper, is a question of fact peculiarly for your determination, and therefore question A in your letter cannot be answered by me. The whole problem involved would appear to be an administrative one.

I answer your questions B (1) and (2) in the affirmative.

As to your questions C and D, inasmuch as I do not perceive anything illegal in what you have set forth as to the proposed change with relation to payroll checks, though such change has no tendency to relieve you of any liability, nor as to the legality of the prevailing practices which you have outlined with relation to State institutions and the Employment Security Division, I cannot state to you that further legislation is presently necessary or desirable.

Very truly yours,
Clarence A. Barnes, *Attorney General.*

*Pharmacy — Examinations — Veterans.*

Nov. 19, 1947.

Mrs. Irene K. Richards, *Director of Registration.*

Dear Madam: — I am in receipt from you of a request for my opinion upon two questions propounded by the Board of Registration in Pharmacy. Your letter reads:

"The Board of Registration in Pharmacy respectfully requests your opinion relative to St. 1945, c. 502, and St. 1947, c. 511, on the following:

"1. Can the Board give examinations after January 1, 1948 for Assistant Registered Pharmacist?

"2. Does a veteran of World War II have to have his application for examination into this Board on or before January 1, 1948 in order to take advantage of extension given to veterans, and must the veteran applying be a resident of Massachusetts in order to take our examination?"

I answer the first question in the affirmative and both the queries in the second question in the negative.

G. L. (Ter. Ed.) c. 112, § 24, as it previously stood, was amended in 1941 by chapter 52 of that year and as originally amended was to take effect on January 1, 1945. In 1943, by chapter 165 of that year, said chapter 52 was amended so as to take effect on January 1, 1948. By St. 1945, c. 502, said section 24 was again amended in certain unimportant particulars. These last amendments took effect in June, 1945, and it was further provided that the amendments made by said chapter 52 of 1941 and chapter 165 of 1943 should take effect on January 1, 1948.

1. In spite of the various amendments that have been made in G. L. (Ter. Ed.) c. 112, §§ 24 and 24A, ending with St. 1947, c. 511, the phraseology of said section 24 as so amended still provides that "the board may grant *certificates of registration* as *assistants after examination* . . ."

2. No provisions of the said section 24 as amended nor any provisions of said St. 1947, c. 511, or of St. 1946, c. 272, or other applicable statute, require specifically or by implication that a veteran, to be entitled to the advantages of an extension of time for applying for examination, must be a resident of Massachusetts or require that he must make application on or before January 1, 1948.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

*Labor Union — Definition.*

NOV. 21, 1947.

Hon. DANIEL J. BOYLE, *Commissioner of Labor and Industries.*

DEAR SIR: — In accordance with your recent request for my opinion as to whether the Massachusetts Teachers Federation and its affiliated associations, the Citizens Union and the Tool Owners Union, or any one of them, is a "labor union" as the quoted words are used in the law entitled "An Act to provide that labor unions shall file certain statements and reports with the Commissioner of Labor and Industries," which was enacted in 1946 under the initiative process of the Forty-eighth and Seventy-fourth Amendments to the Constitution, I advise you that an examination of the articles of organization, the constitutions and other documents relating to the purposes, objects and affiliations of the above-named organizations indicates that none of them come within the meaning of the words "labor union" as those words are employed in said law.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

*Retirement — Membership of Assistant District Attorneys in State Retirement System.*

Dec. 1, 1947.

Hon. Laurence Curtis, *Chairman, State Board of Retirement.*

Dear Sir: — You have asked my opinion as to whether assistant district attorneys are eligible for membership in the State Retirement System.

I advise you that assistant district attorneys are eligible for such membership.

Although assistant district attorneys serve under district attorneys, the salaries of the assistants are paid by the Commonwealth. Such an assistant falls within the second definition of "employee" set forth in G. L. (Ter. Ed.) c. 32, § 1, as amended, and as such an "employee" is entitled to membership in the State Retirement System under the provisions of G. L. (Ter. Ed.) c. 32, § 3 (2) (ii).

Very truly yours,
Clarence A. Barnes, *Attorney General.*

*Retirement — Eligibility of Certain Employees of University of Massachusetts to Membership in State Retirement System.*

Dec. 1, 1947.

Hon. Laurence Curtis, *Chairman, State Retirement Board.*

Dear Sir: — You have asked my opinion as to the eligibility of certain employees of the University of Massachusetts, whose salaries are paid wholly from Federal grants to the University, to membership in the State Retirement Association.

You have advised me relative to these employees that they are members of the staff of the University, appointed to positions authorized by the General Court and approved by the Division of Personnel and Standardization, which fixes salary ranges. All members of the staff so appointed are employees of the Commonwealth, irrespective of whether they are paid from Federal grants made to the Treasurer of the University, as is the case with the "Purnell, Adams and Hatch grants," or from Federal grants made directly to the Treasurer of the Commonwealth and transmitted from there to the University (see VIII Op. Atty. Gen. 191, 194, 195, referred to in your letter).

According to the facts which you have set before me, these staff employees are not paid directly by the Federal Government but their regular compensation established by the Commonwealth is paid to them respectively by officers of the Commonwealth.

Each of them comes within the second definition of "employee" set forth in G. L. (Ter. Ed.) c. 32, § 1, as amended:

"Persons whose regular compensation is paid by the commonwealth . . ."

"Regular compensation" is declared by the Legislature in said G. L. (Ter. Ed.) c. 32, § 1, cl. 32, to include:

"Any part of such salary, wages or other compensation derived from federal grants."

In my opinion, it follows from the phraseology employed by the Legislature in said section 1 that an employee paid, as is a member of the said staff, directly by the Commonwealth, though from funds derived from a source created by Federal grants, is an "employee in active service" such as is eligible for membership in the State Retirement System under the provisions of G. L. (Ter. Ed.) c. 32, § 3 (2) (ii).

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

*Metropolitan District Commission — Traffic Regulating Signs.*

DEC. 1, 1947.

Hon. WILLIAM T. MORRISSEY, *Commissioner, Metropolitan District Commission.*

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

"Your opinion is respectfully requested as to whether the Metropolitan District Commission is subject to the provisions of G. L. c. 89, §§ 8 and 9, requiring traffic regulating signs, devices or signals to be approved by the Department of Public Works."

The matter is not without some doubt, owing to the nature of the phraseology involved in the applicable statutes, and its ultimate determination may be for the judiciary in a case where a motorist is prosecuted for operating in disregard of a traffic regulatory sign, device or signal erected by the Metropolitan District Commission on ways under its control.

The commission has authority to make rules and regulations governing the movement of vehicular traffic on the ways under its jurisdiction (G. L. (Ter. Ed.) c. 92, §§ 35–38). These include boulevards which are public ways though not State highways (*Medford* v. *Metropolitan District Commission*, 303 Mass. 537, 538), parkways in reservations and connecting roadways or boulevards. None of them are highways, and section 9 of chapter 89, to which you refer, has no application to traffic signs of the Metropolitan District Commission.

As to the traffic regulatory devices or signs erected by the commission on the ways under its control, I am of the opinion that disregard of their signals or directions may become an offense by virtue of some rule or regulation of the commission with relation to obedience to the directions or signals of such devices, irrespective of the approval of such devices by the Department of Public Works under G. L. (Ter. Ed.) c. 89, § 8.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

*Retirement — Eligibility for Membership in State Retirement System of Certain Officers and Employees.*

DEC. 1, 1947.

Hon. LAURENCE CURTIS, *Chairman, State Board of Retirement.*

DEAR SIR: — You have asked my opinion as to eligibility in the State Retirement System of "certain personnel under the jurisdiction of the

Adjutant General" who are paid directly by "the Finance Officer, U. S. Army, First Service Command" from Federal funds allotted to Massachusetts by the National Guard Bureau, a Federal agency.

The positions in question appear from a document dated July 28, 1947, which you have submitted to me, to be those of State Maintenance Officer, Caretakers of Massachusetts National Guard and United States Property Officer for Massachusetts. This latter officer, you inform me, is paid $4,000 from funds allotted to this State by the said National Guard Bureau, a Federal agency, and $1,000 from an appropriation made by our Legislature. You further inform me that the United States War Department and the Federal General Accounting Office have rules that the incumbents of the foregoing positions are not Federal employees.

The holders of the foregoing positions who are paid directly by the Federal Government are not eligible for membership in the Retirement System, irrespective of the fact that they may be in the employ of the Commonwealth. Their regular compensation is not paid to them by the Commonwealth, nor is its source derived from a Federal grant. They do not fall, as do the staff officers of the Massachusetts University, within the definitions of employees eligible for membership in the State Retirement System.

An exception to the foregoing exists in the case of the United States Property Officer for Massachusetts. Upon the facts which you have laid before me, he is an officer of the National Guard and receives regular compensation upon an appropriation by the Legislature directly from the Commonwealth in the amount of $1,000. Irrespective of the fact that he is also paid a further sum by the United States, he is eligible to membership in the State Retirement System, his deductions for contributions thereto to be based upon the said sum of $1,000.

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

*Auditor — Authority — Accounts of Mystic River Bridge Authority.*

DEC. 2, 1947.

HON. THOMAS J. BUCKLEY, *Auditor of the Commonwealth.*

DEAR SIR: — You have asked my opinion as to the authority of the Department of the State Auditor to audit the accounts of the Mystic River Bridge Authority, which was created under the provisions of St. 1946, c. 562.

I am of the opinion that you do not possess such authority.

Although G. L. (Ter. Ed.) c. 11, § 12, in general terms gives to the Auditor authority to audit "the accounts of all departments, offices, commissions, institutions and activities of the commonwealth," the Legislature in said chapter 562 relative to said Mystic River Bridge Authority has by necessary implication excepted such Authority, even if it be considered an activity of the Commonwealth, from the scope of the authority given the Auditor by the general statute relating to his powers and duties above referred to.

The Legislature in section 14 of said chapter 562 has specifically provided that:

". . . The authority shall cause an audit of its books and accounts to be made at least once in each year by certified public accountants and the

cost thereof may be treated as a part of the cost of construction or of operation of the bridge. Such audits shall be deemed to be public records within the meaning of chapter sixty-six of the General Laws. . . ."

In section 19 of said chapter 562, the Legislature has further provided:

"All other general or special laws, or parts thereof, inconsistent herewith are hereby declared to be inapplicable to the provisions of this act."

It is not reasonable to suppose that the Legislature would require the Authority to incur the expense of the audit specifically designated in said section 14 if an audit by the State Auditor were also to be made. Reading the quoted provisions of said sections 14 and 19 together with the whole statute, their context indicates a legislative intent to provide for the audit mentioned in said section 14 in place of an audit by the State Auditor.

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

*Maintenance — Director of Personnel and Standardization — Veterans.*

DEC. 15, 1947.

Hon. THOMAS H. BUCKLEY, *Chairman, Commission on Administration and Finance.*

DEAR SIR: — I am in receipt from you of a letter asking my opinion on the following questions:

"1. Did St. 1945, c. 677, authorize the Director of Personnel and Standardization to establish on its effective date the value of maintenance for those veterans *who had been retired,* under the provisions of G. L. c. 32, §§ 56, 57 or 58, *prior to the effective date of St. 1945, c. 677.*

"2. If the answer to the first question is yes, did St. 1945, c. 677, require the Director of Personnel and Standardization to establish such values for such veterans *who had retired prior to its effective date.*" (Italics ours.)

I answer your first question in the negative.

Accordingly, your second question, as worded, does not require a categorical answer. Prior to 1943, G. L. (Ter. Ed.) c. 32, §§ 56, 57 and 58, provided for the retirement of certain veterans and established as the rate of retirement compensation "one half the regular rate of compensation paid to them at the time of retirement."

By St. 1943, c. 514, an allowance for maintenance as previously received was for the first time added to the amount of the retirement allowance. It was specifically provided by section 4 of said chapter 514 that the chapter should apply to the retirement allowances of veterans subject to said sections 56, 57 and 58 who had been "retired since December thirty-first, nineteen hundred and twenty, and prior to the effective date of this act, as well as to those retired on or after said effective date."

It was held in an opinion of a former Attorney General, with which I concur (1942–4 Op. Atty. Gen. 73, 74), that such change in the amount of retirement compensation as that made by said chapter 514 required by its phraseology a recomputation of the retirement allowances of veterans retired after 1920 so as to increase their compensation after the effective date of said St. 1943, c. 514, but *did not* have such retroactive force as to require a payment to such veterans of the difference between allowances

figured upon the new basis and those figured on the old for years prior to 1943.

In 1945 the Legislature, by an amendment to said G. L. (Ter. Ed.) c. 32, § 56, as previously amended in 1943, decreed the mode by which an allowance for maintenance was to be figured and added to said section 56 as it stood the following paragraph (St. 1945, c. 677):

"Any allowance for maintenance referred to in this section or in section fifty-seven or fifty-eight, if received otherwise than as a cash payment, shall be in an amount equal to the value thereof as fixed by the director of personnel and standardization if the veteran is in the employ of the commonwealth, by the county personnel board if the veteran is in the employ of a county, and by the retiring authority if the veteran is in the employ of a city, town or district."

This amendment did not, like that of St. 1943, c. 514, specify veterans previously retired to whom its terms should apply in any respect. It is most significant that the Legislature employed the verb "is" throughout the quoted amendment, as in the phrases "if the veteran is in the employ of the commonwealth"; "if the veteran is in the employ of a county"; "if the veteran is in the employ of a city . . ."

A statute is not to be interpreted as operating retroactively in the absence of express provisions indicating a legislative intent to that effect. *Hanscom* v. *Malden, etc., Gas Light Co.*, 220 Mass. 1, 2, 3. *O'Donnell* v. *Registrar of Motor Vehicles*, 283 Mass. 375, 379.

In my opinion, the phraseology of the last paragraph of said G. L. (Ter. Ed.) c. 32, § 56, added by said St. 1945, c. 677, does not authorize or require the Director of Personnel and Standardization to establish on the effective date of said St. 1945, c. 677, the value of maintenance for those veterans who had been previously retired, the valuation already set up as to their maintenance remaining without fluctuation, but the said director was authorized and required, after the effective date of said chapter 677, to establish such values for maintenance to be paid as part of the compensation of veterans thereafter retired.

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

*Insurance — Data for Rate-making Purposes — Rate-making.*

DEC. 15, 1947.

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

DEAR SIR: — With relation to St. 1947, cc. 614 and 641, you have asked my opinion upon several questions in regard to the phrase

"Every insurer shall file with the commissioner or his designated representative . . ."

certain specified data used for rate-making purposes.

1. Your first question reads:

"I respectfully request your opinion as to whether the phrase, 'or his designated representative' refers back to the word, 'commissioner'."

I answer this question in the affirmative.

2. Your second question reads:

"If the answer to the above question is in the affirmative and the Commissioner designates a rating organization as his representative, may he require the information that is filed with the rating organization by insurance companies to be available to the public during business hours?"

I am not aware of any provisions of the applicable statutes which authorize the Commissioner to make such a requirement of his "designated representative." The statute itself, in section 6 (*a*), covers the subject of the public's right to inspection and does not appear to require any implementation by the Commissioner.

3. Your third question reads:

"If the Commissioner designates a rating organization as his representative, may he install a representative of the Insurance Department at the office of the rating organization in order that such representative may answer questions, furnish information and otherwise serve the public?"

There does not appear to be any authority vested in the Commissioner to install a representative of the Division of Insurance in the office of his "designated representative" for the purposes described in your question. Whoever the Commissioner elects to designate as his representative should discharge as part of the functions as such representative the tasks mentioned in your question. His principal should not, through some other representative or agent, duplicate the work incidental thereto or perform said work for the "designated representative" which is properly within the scope of the delegated authority which he possesses by virtue of said designation.

With relation to section 7, subdivisions (*a*) and (*b*), of both chapters 614 and 641, which are in the same phraseology and are set forth in your letter, you have asked my opinion on the following questions:

4. Your fourth question reads:

"In order that I may properly administer the provisions of chapters 614 and 641 I respectfully request your opinion as to whether or not the Commissioner is required to take any action on a rate or a rating plan immediately upon its being filed."

I answer this question in the negative. There is nothing in the provisions of said subdivisions which requires the Commissioner to take any action on a rate or a rating plan immediately upon its being filed.

The words used by the Legislature in this connection — "If at any time the commissioner finds that a filing does not meet the requirements of this chapter, he shall, after a hearing . . . issue an order . . ." do not indicate a legislative intent to require of the Commissioner the duty to review every filing immediately upon its receipt or to review upon his own motion at any particular time, or indeed to review it at all unless he has reason to believe that it does not meet the statutory requirements, or unless an application for a hearing with respect to such filing is made to him under the terms of said section 7, subdivision (*b*).

5. Your fifth question reads:

"How long a period of time may elapse after a filing has been made before the Commissioner is obligated to review the filing?"

In view of the opinion which I have expressed in connection with the fourth question, this question cannot be answered categorically. If the Commissioner has no reason to believe that a filing does not meet the statutory requirements, it would not appear to be mandatory that he should review it. If he has reason so to believe, he should act expeditiously.

6. Your sixth question reads:

"May the Commissioner permit a filing to be effective without review unless and until a complaint is made with him in the manner outlined in section 7 (*b*) by any person aggrieved?"

It follows from the considerations which I have expressed that unless the Commissioner has reason to believe that a filing does not meet the statutory requirements, he may, as you phrase it, permit a filing to be effective without review unless and until a complaint is made with him in the manner outlined in section 7 (*b*).

I am confirmed in my opinion with relation to your last five questions by the fact that the Legislature, prior to the passage of the statutes in question, rejected proposed amendments to them which required examinations of filings by the Commissioner within a specific period or as soon as reasonably possible after filing. In the form in which said section 7 was finally enacted by the General Court, it would appear to have been the legislative intent to leave the matter of review of filings to the sound discretion and judgment of the Commissioner except when action was instituted under subdivision (*b*) of said section 7.

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

*Motor Vehicles — Registration Plates — Fire Engines — Apparatus.*

DEC. 19, 1947.

HON. RUDOLPH F. KING, *Registrar of Motor Vehicles.*

DEAR SIR: — You have asked my opinion as to whether you may assign to the Boston Fire & Police Notification Company a special "M" registration plate for a motor vehicle owned and operated by them.

You inform me that the "M" plates are assigned under the provisions of G. L. (Ter. Ed.) c. 90, § 2, which in its applicable part reads:

"The registrar shall furnish . . . to every person whose motor vehicle is registered . . . two number plates . . . provided, that number plates assigned to ambulances, fire engines and apparatus, police patrol wagons and other vehicles used by the police department of any city or town or park board solely for the official business of such department or board may be of a distinctive type or types."

It is not provided in the above-quoted part of said section 2 that "fire engines and apparatus" therein referred to are those used by fire departments, as it is provided with relation to "police patrol wagons and other vehicles" that such vehicles are those "used by the police department of any city or town or park board solely for official business." It would appear, therefore, that the Legislature did not intend to exclude from the privilege of special registration "fire engines and apparatus" privately owned if, in the judgment of the Registrar, their use for the benefit of the general public warranted the granting to them of the privilege of a distinctive type of plate.

Whether in any given instance a particular motor vehicle is of such a character as to come within the meaning of the words "fire engines and apparatus" is a question of fact peculiarly for your determination in the exercise of your best judgment. The Attorney General does not pass upon questions of fact.

If the facts are, as set forth in a communication to you which you have sent me with your letter, that the particular motor vehicle referred to in your letter is "equipped with fire fighting apparatus" as well as short wave radio and in the usual course of its employment responds to fire alarms and at fires gives a protective service to property, it would not be unreasonable to regard such vehicle as falling within the sweep of the words "fire engines and apparatus" as used in said section 2. However, as I have stated, a decision as to just what are the facts relative to the motor vehicle in question and its use is for your determination.

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

*Old Age Assistance — Exemptions — Authority of Department of Public Welfare.*

DEC. 29, 1947.

HON. PATRICK A. TOMPKINS, *Commissioner of Public Welfare.*

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

"Your opinion is requested as to whether the Department of Public Welfare can give written approval, as required in section 4A of Chapter 118A, to a local board of public welfare to bring action under that section against the executor of the estate of an Old Age Assistance client in accordance with the following set of facts:

Recipient received Old Age Assistance from the town of Plympton from 1940 until her death in 1947. Since May, 1942, when section 4A became effective, the client has received $2,900 in Old Age Assistance payments. Under the will, the client bequeathes her real estate, which is assessed for slightly less than $3,000, to a cousin.

The town of Plympton has requested permission to bring action under section 4A. This Department is not clear as to what disposition should be made of the request in view of the language in section 4A:

'. . . If such person or his estate is in possession of funds not otherwise exempted thereunder.' "

Prior to the effective date (April 30, 1942) of St. 1941, c. 729, § 5, which added section 4A to G. L. (Ter. Ed.) c. 118A, there could be no recovery by a town from the estate of a deceased aged person of sums paid such person for old age assistance in the absence of fraud. (See *Worcester* v. *Quinn*, 304 Mass. 276; *Hinckley* v. *Barnstable*, 311 Mass. 600.)

Said section 4A, as so added, reads:

"A person, his executor or administrator shall be liable in contract to any town for expenses incurred by it for assistance rendered to such person under this chapter if such person or his estate is in possession of funds not otherwise exempted thereunder. No action shall be brought under this section in behalf of a town except with the written approval of the department."

From the facts as you have stated them, I assume that the deceased had real estate which, computed on the basis of assessed valuation, did not exceed an average of three thousand dollars during the five years preceding his application for old age assistance.

Whether the deceased held this real estate in fee or whether he had only an equitable interest therein, you do not state in your letter.

No provision of said chapter 118A specifically or by implication exempts ownership in fee of land from the possibility of disqualifying an aged person from receiving assistance.

Ownership of an *equity* in vacant land from which no income is derived and ownership of an *equity* in real estate upon which an applicant resides or is prevented from residing thereon by physical or mental incapacity when such equity "exceeds an average of three thousand dollars in value on the basis of assessed valuation over a period of five years" does not preclude the aged owners of such equities from receiving assistance, if they give a bond (G. L. (Ter. Ed.) c. 118A, § 4, as amended).

Although the precise meaning of the phrase "funds not otherwise exempted thereunder" as used in said section 4A is by no means plain in view of the phraseology of said section 4, I am inclined to the opinion that a parcel of real estate owned in fee by one receiving old age assistance cannot be said upon his death to be outside the sweep of the phrase "funds not otherwise exempted thereunder" as used in said section 4A. (See opinion of Attorney General to Commissioner of Public Welfare, June 24, 1947.)

It follows that if the real estate in question was owned in fee, you are not prohibited as a matter of law from giving your approval under said section 4A to the bringing of an action by a town to recover for expenses incurred by it for assistance rendered to the said aged person while living.

Inasmuch, moreover, as the intent of the Legislature in employing the above-quoted phrase in section 4A, as I have stated, is not plain, and an authoritative construction may well be made by the courts in litigation presented to them, any doubt concerning such construction should be resolved by you in favor of the town so that a suit may be instituted by which the meaning of said section 4A may finally be determined by judicial decision.

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

*Commissioner of Probation — Salary — Step-rate Increases — Rules and Regulations of Commission on Administration and Finance not Applicable.*

DEC. 29, 1947.

*Board of Probation.*

GENTLEMEN: — In a recent letter you have asked me with relation to the Commissioner of Probation, two questions as follows:

"1. When the board of probation has voted to increase the salary of the commissioner of probation, pursuant to the provisions of G. L. (Ter. Ed.) c. 276, § 98, are the governor and council without power to approve such salary at such increased rate in the absence of an appropriation by the General Court providing for the payment of such increase?

"2. Is the office of commissioner of probation subject to classification under the provisions of G. L. (Ter. Ed.) c. 30, § 45, and is the incumbent entitled to the step-rate salary increases provided for by St. 1947, c. 613?"

In answer to your first question, I advise you that the salary of the said Commissioner may be approved when increased by the Governor and Council under G. L. (Ter. Ed.) c. 276, § 98, as amended, but that in the absence of an appropriation covering such increase by the General Court no money will be available for paying the same. Provisions such as are found in St. 1947, c. 261, § 6, have been incorporated by the Legislature in general appropriation bills and perhaps will be in the future, and make plain the non-availability of appropriations for changes in salary ranges not provided for by the Legislature in such bills.

In answer to your second question, I advise you that the position of Commissioner of Probation being one the salary of which is "required by law to be fixed subject to the approval of the governor and council" (see G. L. (Ter. Ed.) c. 276, § 98; c. 30, § 46, as amended), it is not subject to the rules and regulations of the Commission on Administration and Finance as to salary (V Op. Atty. Gen. 287; Opinion of Attorney General to the Governor and Council, Oct. 24, 1927).

The provisions of St. 1947, c. 613, § 2, referring to a step-rate increase in salary for "employees in offices and positions classified under sections forty-five to fifty, inclusive, of chapter thirty of the General Laws, who on the effective date of this act shall have been receiving the maximum salary for the grade they hold . . . ," have no relation to the Commissioner of Probation since, as I have stated, he holds a position not subject to classification for salary regulation by the Commission on Administration and Finance and hence can not come within the statutory description of one "receiving the maximum salary for the grade" held.

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

*Motor Vehicle — Transportation of School Children — School Bus — Authority of Department of Public Utilities.*

DEC. 31, 1947.

HON. EDWARD N. GADSBY, *Chairman, Department of Public Utilities.*

DEAR SIR: — I am in receipt of your letter asking my opinion upon the question of —

"whether a motor vehicle engaged in the transporting of school children can be held to operate under a certificate of convenience and necessity or be engaged in charter service or special service."

I assume that the motor vehicle to which you refer is a school bus operated under a contract with a municipality or a municipal board, as is the usual mode of operating transportation for school children.

It is plain that such a school bus is not now included within the terms "charter service" or "special service." The terms of St. 1947, c. 483, which you quote in your letter, expressly forbid such inclusion. It follows that the jurisdiction which the department has over motor vehicles operated in "charter service" or "special service" (G. L. (Ter. Ed.) c. 159A, § 11A, as amended) does not now exist with regard to such school buses.

The operation of such a school bus does not appear to be described by any of the terms of G. L. (Ter. Ed.) c. 159A, § 1. That being so, it does not require any of the licenses provided for in chapter 159A, sections 1 to 6, and, accordingly, no certificate of public convenience and necessity issued under G. L. (Ter. Ed.) c. 159A, § 7, is required for the operation of the motor vehicle as a school bus.

You have informed me that a certain bus in Greenfield is operated part of the time as a motor vehicle carrying passengers, otherwise than as a school bus, in such a manner as to fall within the terms of said section 1 and so has been licensed and given by your department a certificate of convenience and necessity, but that part of the time the said vehicle is operated as a school bus. I am of the opinion that when operated as a school bus, your department has no authority to deal with the vehicle by virtue of sections 7 and 8 of said chapter 159A.

If it is desired to bring school buses within the jurisdiction of your department, resort should be had to the Legislature.

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

*Board of Collegiate Authority — Powers — School of Pharmacy — St. 1947, c. 652.*

JAN. 14, 1948.

HON. JOHN J. DESMOND, Jr., *Commissioner of Education and Chairman of Board of Collegiate Authority.*

DEAR SIR: — You have asked my opinion as to the authority of the Board of Collegiate Authority formed under the provisions of St. 1947, c. 652, to pass the following vote with relation to an application filed in May, 1947, under the terms of St. 1943, c. 571:

"*Voted:* That the Boston School of Pharmacy complies with the requirements of the Board of Collegiate Authority and is, therefore, authorized to confer the degree of Bachelor of Science in Pharmacy as provided by Chapter 571 of the Acts of 1943."

I am of the opinion that the board did not have authority to act upon the said application or to pass the vote in question.

A Board of Collegiate Authority was established by St. 1943, c. 549, § 1, which inserted a new section 3A in chapter 15 of the General Laws. Under section 3 of said chapter 549, which amended G. L. (Ter. Ed.) c. 69, by inserting a new section 30, a mode was provided by which action through the board upon proposed charters or amendments thereto might be instituted and authority to grant degrees might be obtained by an educational institution after investigation and hearings.

By St. 1943, c. 571, a statute special in its nature was enacted whereby the Boston School of Pharmacy was authorized to obtain authority to grant a degree in science by another and shorter method. Said chapter 571 reads:

"AN ACT AUTHORIZING THE TRUSTEES OF THE BOSTON SCHOOL OF PHARMACY TO GRANT THE DEGREE OF BACHELOR OF SCIENCE IN PHARMACY.

*Be it enacted, etc., as follows:*

"The trustees of the Boston School of Pharmacy, a corporation organized under chapter one hundred and eighty of the General Laws, are hereby authorized to confer

the degree of Bachelor of Science in Pharmacy, if and when said school complies with the requirements of the board of collegiate authority established by chapter five hundred and forty-nine of the acts of nineteen hundred and forty-three."

No action was taken by the Collegiate Authority established by St. 1943, c. 549, upon an application filed with it by said School of Pharmacy indicating that said school had complied with said Authority's requirements.

In 1947, by chapter 652 of that year, effective in September, 1947, the Legislature amended said G. L. (Ter. Ed.) c. 15, by striking out section 3A, which had established a Board of Collegiate Authority, and inserting a new section 3A in its place, which likewise established a Board of Collegiate Authority. The membership of the new Authority so established was not the same as that of the old Authority in that its membership was enlarged, and although its powers are the same as those of the old board it does not appear to have been the legislative intent that it should be a continuation of the old Authority.

The new Authority cannot be said to be the "board of collegiate authority established by chapter five hundred and forty-nine of the acts of nineteen hundred and forty-three" as the quoted words are employed in said St. 1943, c. 571.

Since the Board of Collegiate Authority established by the Acts of 1943 has passed out of existence without action upon the application of said School of Pharmacy under said chapter 571, the present board was without authority to act upon the said application or to pass the said vote.

The said School of Pharmacy having failed to establish its compliance with the requirements of the old Authority before such Authority passed out of existence, it can now obtain the right to grant degrees only by following the method prescribed for all educational institutions under said St. 1947, c. 652.

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

*Veteran — Dependent — Wife — Mother.*

JAN. 21, 1948.

Hon. OTIS M. WHITNEY, *Chairman, Military Affairs Committee of the Executive Council.*

DEAR SIR: — You have asked my opinion as to whether one Catherine Marselis is as a matter of law a "dependent" of her son Oliver who is, I am advised, a veteran of World War II, so that she is entitled as such dependent of her son to veterans' benefits derived from his status under the provisions of G. L. (Ter. Ed.) c. 115, as amended by St. 1946, c. 584.

You have not informed me of any facts which are before you relative to the matter.

I am informed by the office of the Commissioner of Veterans' Services that the said Catherine is the wife of a veteran of World War I; that her husband wilfully neglects and refuses to support her; that her said son Oliver made over to her in 1943 for her support as a "dependent" his allotment from his pay while in the service of the United States Army, which service ended in 1946.

The Attorney General does not pass upon questions of fact. The facts

relative to the present matter are peculiarly for the determination of your committee.

Assuming, however, for the purposes of this communication that the facts are as set forth above and that you further find that the said Catherine is now destitute and without means of support except such as might be derived from her son, I am of the opinion that upon such facts the said Catherine is a "dependent" of her said son and as such is entitled to the benefits flowing from his status as a veteran of World War II under said chapter 115, as amended.

It is true that said Catherine is not entitled to the benefits derived from the status of her husband as a veteran of World War I, since her husband "wilfully refuses and neglects to support her" (G. L. (Ter. Ed.) c. 115, as amended, § 5, par. 3).

Nevertheless, her husband's failure to support her has, I assume, left her destitute of means of sustenance and unable to support herself. If this be the fact, the duty to provide for her support would appear to fall upon her said son Oliver (see G. L. (Ter. Ed.) c. 273, § 20). This being so and it also appearing that her dependency has been recognized by her son, through his providing his said allotment for her as a dependent, I am of the opinion that she is, as a matter of law, to be regarded as the said son's "dependent" and to be entitled as such to veterans' benefits derived from his status as a veteran of World War II, irrespective of the existence of her husband or the nature of the latter's conduct.

A mother is within the definition of "dependent" given in section 1 of said chapter 115 and when destitute, even if such destitution is caused by acts of a veteran husband, is entitled to the benefits provided by said chapter 115 which are occasioned by reason of the status of her son as a veteran.

One of the purposes of said chapter 115, as amended, would appear to be the prevention of the stigma of being upon relief attaching to certain relatives of well-behaved veterans, and it should be construed when possible to effect such purpose.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

*Acting Commissioner of Conservation — Authority.*

JAN. 21, 1948.

HON. EDGAR L. GILLETT, *Acting Commissioner of Conservation.*

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

"Will you kindly advise me whether or not the writer, as Acting Commissioner for the Department of Conservation due to the resignation of former Commissioner Archibald K. Sloper, whose resignation has been accepted by the Governor, has the authority under the law as Acting Commissioner to make either temporary or permanent appointments, or to approve temporary or permanent appointments made by the various Directors within the Department under their statutory powers."

You have informed me that you were the person designated by the former Commissioner of Conservation to act in his stead during absence or disability and that no new commissioner has been appointed since the resignation of the commissioner.

Under the provisions of G. L. (Ter. Ed.) c. 30, § 6, by virtue of which you were so designated, you have "no authority to make permanent appointments or removals." The making of a temporary appointment would be within your power (see 1943 Op. Atty. Gen. 41, 42).

The commissioner is given under G. L. (Ter. Ed.) c. 21, as amended, power to approve or disapprove certain appointments authorized to be made by the directors of various divisions in the Department of Conservation. The giving or withholding of such an approval is not the act of making an appointment or removal and so does not come within the limitation upon the power of an acting commissioner above set forth as described in said G. L. (Ter. Ed.) c. 30, § 6. Consequently, approval or disapproval of such appointments may be given by you.

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

*Department of Correction — Defective Delinquent — Parole.*

JAN. 29, 1948.

Mr. JAMES E. WARREN, *Superintendent, State Farm.*

DEAR SIR: — The Commissioner of Correction has just asked me to reply to your letter to him of January 8, 1947.

Let me say that, irrespective of the decision of the probate court refusing to discharge a defective delinquent, if, in the opinion of two psychiatrists appointed by you, such a delinquent is a fit person for parole, you may present him "to the parole board for consideration for parole by said board" under the provisions of G. L. (Ter. Ed.) c. 123, § 118A, inserted by St. 1947, c. 684.

Said section 118A provides a method of removing defective delinquents from your custody even if a discharge is refused by a probate court.

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

*Veteran — Settlement — Second Enlistment.*

JAN. 30, 1948.

Dr. ALTON L. POPE, *Deputy Commissioner of Public Health.*

DEAR SIR: — In reply to your letter of recent date relative to the settlement of one Arthur M. Kelly, I advise you that if said Kelly *actually resided* in Malden when he was received into the office of an assistant surgeon in the Navy, upon such facts as you have stated, he would, in my opinion, have acquired a settlement in Malden under the provisions of G. L. (Ter. Ed.) c. 116, § 1, cl. 5.

I am informed that one enlisted in the United States Naval Reserve, who is to receive an appointment as an officer, first receives a "Notice of Separation from U. S. Naval Service," which notice is on what is called in the Navy Form 533 and which by its terms purports to be a discharge from the service; that thereafter, upon entering the duties of the office to which he has been appointed, he is sworn into the service afresh.

Although the matter is not entirely plain, since there is no judicial decision in Massachusetts upon the exact question involved, I am of the

opinion that by the re-entry into the service under the appointment as assistant surgeon the sailor may be held to have "enlisted" in the United States service and such return to service to be an "enlistment" as the quoted words are used in G. L. (Ter. Ed.) c. 116, § 1, cl. 5, referred to in your letter. Further, it would appear to be an established principle of law in this Commonwealth that, under a statute such as the one applicable here, a second enlistment from a place of *actual* residence different from that held at the time of a first enlistment establishes a settlement at the place of *actual* residence where the *second* enlistment took place. *Granville* v. *Southampton*, 138 Mass. 256.

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

*Constitutional Law — Governor and Council — Meetings.*

FEB. 6, 1948.

*The Legislative Committee on State Administration.*

GENTLEMEN: — I am in receipt from you, through the clerk of your committee, of the following letter:

"There is now pending before the Committee on State Administration the following bills: House No. 1367 and House No. 1551, copies of which are enclosed and both of which have to do with open meetings of the Executive Council. It has been suggested to this Committee that possibly these bills would be unconstitutional and acting on that suggestion, the Committee has voted to request an opinion from the Attorney General as to the constitutionality thereof in writing.

"We will appreciate your consideration of these matters and your report to us as soon as convenient to you."

The two House bills which you have laid before me are identical in their phraseology and read as follows:

"AN ACT PROVIDING THAT ALL MEETINGS OF THE EXECUTIVE COUNCIL BE OPEN TO THE PUBLIC.

"*Be it enacted by the Senate and House of Representatives in General Court assembled and by the authority of the same, as follows:*

"Chapter 6 of the General Laws is hereby amended by inserting after section 4, as appearing in the Tercentenary Edition, the following new section: —

"*Section 4A.* The general public shall not be excluded from the room or from any place in which the governor shall hold or keep a council as provided by Article I of section eleven of chapter eleven of the constitution."

I am of the opinion that either of these bills if enacted into law would be unconstitutional as an infringement of the powers of the executive branch of the government by the legislative.

The Constitution of Massachusetts, Part the First (called the Declaration of Rights), art. XXX, provides:

"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 execu-

tive powers, or either of them: to the end it may be a government of laws and not of men."

Our Supreme Judicial Court has said with respect to this article:

"In our Constitution the division of the government into three departments, each independent of the other, is provided for in language picturesque and emphatic, 'to the end that it may be a government of laws and not of men.' Declaration of Rights, art. 30."

*Rice* v. *The Governor*, 207 Mass. 577, 578.

Mass. Const., pt. 2d, c. II, § I, describes the Governor as the "supreme executive magistrate."

"The Court is ever solicitous to maintain the sharp division between the three departments of government as declared by art. 30 of the Declaration of Rights."

*Attorney General* v. *Brissenden*, 271 Mass. 172, 183.

Mass. Const., pt. 2d, c. II, § I, art. IV, provides:

"The governor shall have authority, from time to time, at his discretion, to assemble and call together the councillors of this commonwealth for the time being: and the governor with the said councillors, or five of them at least, shall, and may, from time to time, hold and keep a council, for the ordering and directing the affairs of the commonwealth, agreeably to the constitution and the laws of the land."

Mass. Const., pt. 2d, c. II, § III, art. I, provides:

"There shall be a council for advising the governor in the executive part of the government, to consist of (nine) persons besides the lieutenant-governor, whom the governor, for the time being, shall have full power and authority, from time to time, at his discretion, to assemble and call together; and the governor, with the said councillors, or five of them at least, shall and may, from time to time, hold and keep a council, for the ordering and directing the affairs of the commonwealth, according to the laws of the land."

(The number of councillors was reduced to eight by Article XVI of the Amendments to the Constitution.)

It is apparent from the phraseology of said chapter II that the Governor and the Council are both parts of the executive department of the government and that in holding and keeping a council under the provisions of said chapter II, section I, article IV, and said chapter II, section III, article I, both the Governor and the Council are exercising executive powers.

Except for the provisions of article V of said chapter II, section III, which reads as follows:

"The resolutions and advice of the council shall be recorded in a register, and signed by the members present; and this record may be called for at any time by either house of the legislature; and any member of the council may insert his opinion, contrary to the resolution of the majority."

the Constitution does not prescribe the manner in which the meetings of a council so held and kept shall be conducted or carried on, nor the nature

of the place where the Governor "shall assemble and call together the councillors," nor does it grant any power to the Legislature to so prescribe. It appears by necessary implication from the foregoing provisions of the Constitution that the authority to choose and select the place in which a council is to be held and kept and the manner in which its meetings are to be conducted is reposed by the Constitution respectively in the Governor and Council, the executive branch of the government.

To limit such authority by requiring that such meetings of a council must be held and kept only in a place to which the public have access would not appear to be within the power of the legislative branch of the government, since the power to assemble and hold and keep meetings, which carries with it the power to decide upon the place and manner of holding and keeping such meetings, flows to the executive branch of the government from the Constitution itself and not from legislative authority.

The power of the Legislature with relation to authority vested by the Constitution in the executive branch of the government has been considered by the Supreme Judicial Court in relation to the pardoning power. Prior to the adoption of article LXXIII of the Amendments to the Constitution, by which specific authority was granted to the Legislature to prescribe terms and conditions upon which certain pardons might be granted by the Governor, it was said by the Supreme Judicial Court that the only right of the Legislature to enact laws relative to the exercise of the constitutional power then vested in the chief executive alone was to enact laws to render the exercise of such constitutional power efficient and convenient. (*Opinion of the Justices*, 210 Mass. 609, 612.)

It was said by the Supreme Judicial Court in *Kennedy's Case*, 135 Mass. 48, 51, with respect to the pardoning power of the chief executive, the governor:

"This power is not derived from legislation, and it is quite clear that, under any pretence of regulating its exercise, the executive authority could not be deprived of its constitutional rights in relation thereto, but provision may be made by legislation, which shall render the exercise of such a power convenient and efficient."

To deprive the Governor of authority to assemble the Council at a place of his choice in the Commonwealth, or to deprive the Council of authority to regulate its own meetings which it holds and keeps by constitutional authority, as the instant measures in effect would do by prohibiting the holding of any such meeting other than in a place open to the public, is not to make provision for rendering the exercise of the powers vested in the Governor and in the Council "convenient and efficient," but is to limit the exercise of such powers and so to deprive both of authority flowing to them from the Constitution.

I am at a loss to understand the reference to "Article I of section eleven of chapter eleven of the constitution," which appears in both the bills which you have laid before me.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

*Registrar of Motor Vehicles — Department of Public Works — Regulations requiring Approval.*

FEB. 10, 1948.

MR. RUDOLPH F. KING, *Registrar of Motor Vehicles.*

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

"In view of the fact that the Registry of Motor Vehicles is now in effect entirely separate from the Department of Public Works, I respectfully request your opinion whether amended regulations made under authority of said section 7C of G. L. (Ter. Ed.) c. 90, and which are now ready to be promulgated, must be approved by the commissioner and associate commissioners of public works as specified in said section."

I am of the opinion that the proposed rules to which you refer should be approved by the Commissioners of Public Works.

Although G. L. (Ter. Ed.) c. 16, § 5, as amended by St. 1946, c. 234, which you have set forth in your letter, establishes a division of motor vehicles in the Department of Public Works, "in no manner subject to its control," no power is given to the registrar by said section 5 or by any other statutory provision except by G. L. (Ter. Ed.) c. 90, § 7C, inserted by St. 1945, c. 241, to make or alter rules and regulations establishing "minimum standards for construction and equipment of school buses." The authority to make rules and regulations is vested in the registrar by force of said section 7C alone and is therein made subject to the approval of the Commissioners of Public Works. Said section 7C is set forth in your letter.

This particular grant of rule-making power in the particular respect noted, to be exercised with the approval of the said Commissioners, has not been specifically repealed or altered so as to vest it in the registrar without said approval by the said amendment of G. L. (Ter. Ed.) c. 16, § 5. It cannot properly be said to have been so repealed or altered by implication from the terms of said chapter 16, section 5. The approval of the rules in question by the Commissioners of Public Works can scarcely be said to be "control" exercised over the division of motor vehicles as the word "control" is used in said section 5.

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

*Taxation — Veterans' Services Fund.*

FEB. 10, 1948.

His Excellency ROBERT F. BRADFORD, *Governor of the Commonwealth.*

SIR: — I am in receipt from Your Excellency of the following letter:

"Additional taxes, totalling 13 per cent, are assessed on the taxes levied for the Veterans' Services funds.

"Your opinion is requested as to whether or not the additional taxes should be credited to that fund."

I am of the opinion that the additional taxes should be credited to the said Veterans' Services Fund except so much thereof as may be necessary to meet the payments provided for by St. 1945, c. 731.

St. 1946, c. 608, § 1, which establishes the Veterans' Services Fund, says that the fund is to consist "of so much of the proceeds of the taxes assessed under chapter seven hundred and thirty-one of the acts of nineteen hundred and forty-five, as amended, as may not be needed to meet the payments authorized thereby." It then goes on to provide:

" . . . said fund may be used to meet the payments authorized by chapter seven hundred and thirty-one of the acts of nineteen hundred and forty-five, as amended, insofar as the proceeds of the taxes assessed thereunder may be insufficient to meet said payments."

But the use of the fund for the various purposes indicated in the section is regulated by appropriation, since the phrase "subject to appropriation" is used in said section 1.

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

*Plumbers — Plumbing Ordinances under G. L. (Ter. Ed.) c. 142, § 13 — Board of Health — Regulations.*

FEB. 16, 1948.

MRS. IRENE K. RICHARDS, *Director of Registration.*

DEAR MADAM: — The Board of Examiners of Plumbers has, through you, asked my opinion upon the following questions:

"1. Is it mandatory that the City Council of Newburyport pass a plumbing ordinance in accordance with the provisions of G. L. c. 142, § 13, if it has no such ordinance?

"2. Does the last sentence of G. L. c. 142, § 13, authorize the Board of Health of said city to prescribe regulations for the materials, construction, alteration and inspection of all pipes, tanks, faucets, valves and other fixtures by and through which waste water is used and carried, etc., — in lieu of the city council ordinance required by the first sentence of said section."

1. I answer your first question in the affirmative.

The phraseology of the first sentence of G. L. (Ter. Ed.) c. 142, § 13, applicable to Newburyport is, in my opinion, mandatory and by the use of the word "shall" in the context requires the said city to prescribe by ordinance or by-law "regulations," which may fairly be called plumbing regulations from the subject matter to which they must relate described in said section.

2. I answer your second question in the negative.

In my opinion, it was the intent of the Legislature to provide that regulations of the boards of health were to supplement city ordinances and by-laws and were not to stand in place thereof or to constitute a substitute for such ordinances and by-laws which the cities are required to make. That this was the legislative intent appears from the terms of the last sentence of said section 13, which in effect provide that regulations by boards of health relative to plumbing in cities "not inconsistent with any ordinance or by-law made under authority of this section" are not forbidden by the provisions of the section.

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

*Workmen's Compensation — Self-Insurer — Deposit and Bond.*

FEB. 17, 1948.

*Department of Industrial Accidents.*

GENTLEMEN: — I am in receipt of a letter from you setting forth certain facts with relation to a former self-insured corporation.

In this connection you have asked me the following question:

"Is the bond furnished by the Supreme Markets, Inc., for the year ending November 15, 1947 at 12:01 A.M. sufficient security to protect the interests of any of its employees entitled to any of the benefits provided in chapter 152 of the General Laws for injuries incurred during the time Supreme Markets was a self-insurer?"

1. The Attorney General does not pass upon questions of fact. Inasmuch as your department fixed the amount of the bond and did not require an additional one, it is to be assumed that the bond is sufficient in amount. If so, it would appear to be as a matter of law "sufficient security to protect the interests of . . . its" (the corporation's) "employees" as the quoted words are used in your question.

2. Your second question reads:

"Must the Supreme Markets, Inc., make a deposit of securities equal to the sum of the bond or furnish a single premium non-cancellable policy or furnish a surety bond guaranteeing the payment of any liability on its part as provided in the condition of its bond furnished for one year beginning at 12:01 A.M. November 15, 1946?"

It cannot be said as a matter of law that the corporation in question *must* presently make the deposit referred to or do the other acts mentioned in your question. It may be required by your department to do so and if it does, the condition of the bond will be fulfilled.

3. Your third question reads:

"If your answer to the first question is in the affirmative is there any time in the future when the liability of the surety or the principal on the above bond will cease?"

As the surety bond in question is an instrument under seal, the statute of limitations would not bar a suit thereon for twenty years (G. L. (Ter. Ed.) c. 260, § 1) from the date thereof. The surety should be notified of liability arising from the acts of the principal.

4. As the answer to your first question is not in the negative, no answer to this question is required.

5. Your fifth question reads:

"Should the bond effective for a period of one year beginning November 15, 1947 at 12:01 A.M. be returned to the Supreme Markets, Inc.?"

Inasmuch as the corporation in question insured itself, as you state, as of November 15, 1947, so that it never was a self-insurer during the period apparently stated in the bond to which you refer in this question, there would not seem to be any reason as a matter of law for not returning such bond.

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

*Police Officer — Boston — Sick Leave — Injuries.*

Feb. 20, 1948.

Hon. Thomas F. Sullivan, *Police Commissioner of the City of Boston.*

Dear Sir: — You have asked my opinion upon two questions relative to sick leave for police officers. Inasmuch as the authority to grant sick leave with pay is derived directly from acts of the Legislature, the Attorney General may appropriately advise you with relation to such questions (Opinion of Attorney General to Police Commissioner, January 27, 1944).

1. Your first question, which contains more than one query, reads:

"Is time lost by an officer injured in the performance of police duty, or time lost by an officer suffering from contagious disease incurred in the performance of police duty, to be charged against accrued Sick Leave under this law in the same manner as injury and sickness not duty connected?"

St. 1947, c. 146, § 4, which you have set forth in your letter, makes provision for sick leave with pay for members of the Boston Police Department who have served more than six continuous months, not to exceed fifteen working days. It is provided that such sick leave with pay shall be granted only when such members are incapacitated by "sickness, injury, exposure to contagious diseases or by serious illness or death of members of their immediate family."

The statute appears to have been enacted to supplement and make more comprehensive, but not to alter or make substitution for, the provisions of St. 1933, c. 324, and is to be construed in connection therewith.

It is a well-settled rule of statutory construction that an act should be interpreted in the light of an existing statute relating to the same general subject so that the two may, as far as possible, form an harmonious whole. St. 1947, c. 146, does not specifically nor by implication repeal St. 1933, c. 324, nor, as I have said, alter its terms, and consequently should be read in connection with the provisions thereof.

St. 1933, c. 324, provides specifically for compensation by way of indemnification for damages, including loss of pay, for *injuries* received by a member of the Boston Police Department incurred in the performance of his duty. St. 1947, c. 146, does not specifically nor by implication provide that the "sickness" or the "exposure to contagious diseases" referred to therein is to be limited either to service-incurred disabilities or to non-service-incurred disabilities.

I am of the opinion that it was the intent of the Legislature that "sickness" or "exposure to contagious diseases" resulting in lost time should be charged against accrued sick leave, whether contracted in the performance of duty or contracted outside the performance of duty.

I am of the opinion, however, that the Legislature in using the word "injury" in the quoted phrase in St. 1947, c. 146, did not intend to refer to a service-contracted disability, which was specifically provided for by said St. 1933, c. 324, but intended it, supplementing the provisions made by said chapter 324, to refer to non-service contracted injury.

I therefore answer your question categorically to the effect that "an officer injured in the performance of police duty" is not to have his "time lost" "charged against accrued sick leave" but that he is to be compensated under said St. 1933, c. 324. An officer receiving an injury not in the

performance of police duty will be governed in respect thereto by said St. 1933, c. 324, and his time lost charged against accrued sick leave.

An officer "suffering from contagious disease," about whom you also inquire, should have his time lost charged against accrued sick leave, whether such disease be contracted by exposure to it during the performance of police duty or while outside such performance.

2. Your second question reads:

"What is the status regarding pay under said section 4, of officer who has not completed six months' continuous service, and, who is absent because of injury received while performing police duty?"

The phraseology of St. 1947, c. 146, § 4, specifically excludes from its provisions members of the Boston Police Department who have not completed six months of continuous service. Irrespective of that, any police officer of the city of Boston, whether or not he has had six months of actual service, is entitled to the benefits of compensation by way of indemnification provided by said chapter 324 for *injury*, including loss of pay.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

*Police Officer — Boston — Sick Leave — Members of Immediate Family.*

FEB. 24, 1948.

Hon. THOMAS F. SULLIVAN, *Police Commissioner of the City of Boston.*

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

"I am again requesting your opinion regarding interpretation of provisions of St. 1947, c. 146, § 4, pertaining to 'Annual Vacation and Sick Leave Allowances for Police Officers in the City of Boston.'

"The question on which I respectfully request your opinion is as follows:

"1. What relatives should be considered within the meaning of the following words as used in third sentence of said Section 4: 'Members of their immediate family.'"

The words "family" and "immediate family" as used in statutes have been construed in different ways by courts, depending on the purpose of the statute and the particular facts involved in cases presented to them.

The phrase contained in St. 1947, c. 146, § 4, about which you inquire, reads:

"Sick leave with pay shall be granted to said members" (of the Boston Police Department) "only when they are incapacitated for the performance of duties by sickness, injury, exposure to contagious diseases *or by serious illness or death of members of their immediate family.*"

The Attorney General does not pass upon questions of fact. I am of the opinion that the quoted phrase of said section 4 should be interpreted broadly so as to effect its beneficent purpose. In the absence of peculiar facts existing in the specific circumstances of any particular police officer's life, I am of the opinion that the words "immediate family" should be construed so as to include at least his wife and all relatives who are members of his household, as well as such close relatives as parents, children and brothers and sisters who may live outside his household.

There may be circumstances in regard to any particular police officer's way of living or situation with respect to individuals in his own household or with his relatives which might exclude some person from being considered within his "immediate family" or might require that some special one of his kin should be considered as being in his "immediate family," as exceptions to the general rule which I have set forth above for your guidance.

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

*Taxation — Veterans' Services Fund.*

FEB. 27, 1948.

Hon. FRED A. MONCEWICZ, *Comptroller.*

DEAR SIR: — In a recent letter you have asked me if certain receipts which were allocated during the fiscal years of 1946 and 1947 to the Veterans' Services Fund should be transferred to the Old Age Assistance Fund and the General Fund.

I am of the opinion that the receipts in question, which you inform me represent surtaxes imposed upon corporations under various statutes in accordance with St. 1945, c. 731, § 10, as amended, were properly allocated to the Veterans' Services Fund established by St. 1946, c. 608, § 1, and should not now be credited to other funds.

A consideration of the applicable statutes, construed so as to form an harmonious whole, indicates a legislative intent that receipts such as those in question should be credited, as you state they have been, to the Veterans' Services Fund. (See opinion of the Attorney General to the Governor, February 10, 1948.)

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

*Insurance — Endorsement on Accident and Health Policy — Form.*

MARCH 2, 1948.

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

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

"Your opinion is respectfully requested as to whether or not a rider or endorsement form which is to be attached to an accident and health insurance policy and when so attached to constitute a part of the contract is required to have printed thereon the name of the insurance company which proposes to issue the same."

G. L. (Ter. Ed.) c. 175, § 18, to which you have referred in your letter, provides:

"Every company shall conduct its business in the commonwealth in its corporate name, and all policies and contracts . . . shall . . . be headed . . . only by such name."

This section indicates an intent on the part of the Legislature that policies shall be headed by the name of the insuring company, as well as that

such name alone shall so appear in the heading of a policy. That it was intended that a policy should be so headed with the name of the insuring company is further shown by the standard form of fire insurance policy as set forth by the Legislature in G. L. (Ter. Ed.) c. 175, § 99, as amended. G. L. (Ter. Ed.) c. 175, § 108, cl. 1, provides that a policy of accident and health insurance, with such papers as shall be attached thereto, shall constitute the whole contract of insurance, and by section 108 (c) it is provided that every part of such a policy shall be printed in type of a designated size.

All these provisions may be said to be "provisions of law relative to the filing of policy forms with, and the approval of such forms by, the commissioner," and as such, by the terms of section 192 of said chapter 175, as amended, they "apply to riders and endorsements designed to be attached to policy forms."

I am informed that it has long been the interpretation by your department of the statutes under consideration that they required that a rider or endorsement attached to an accident and health insurance policy should have the name of the insuring company printed thereon.

I am of the opinion that your interpretation is correct, inasmuch as it appears from a consideration of the applicable statutes that the legislative intention was to require such printing of the name of the insuring company at the head of riders and endorsements to be attached to policies of accident and health insurance.

There is nothing in section 33 of said chapter 175, as amended by St. 1946, c. 186, which indicates that there should be any different conclusion as to the interpretation of the applicable statutes than the one which I have set forth above.

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

*Board of Collegiate Authority — Power to Act under St. 1943, c. 571, and St. 1946, cc. 340 and 552.*

MARCH 9, 1948.

Hon. JOHN J. DESMOND, *Commissioner of Education.*

DEAR SIR: — In reply to your recent letter, I advise you that the Board of Collegiate Authority has power to act under St. 1946, c. 340, and approve the course of instruction given by the Massachusetts Maritime Academy leading to the degree of Bachelor of Science.

Likewise, the Authority has the power to act under the provisions of St. 1946, c. 552.

In neither of said chapters is authority specifically given by the Legislature only to "the board of collegiate authority established by chapter five hundred and forty-nine of the acts of nineteen hundred and forty-three," as was the case in St. 1943, c. 571, with relation to certain powers of such last-named Authority connected with the Boston School of Pharmacy, referred to in my opinion to you of January 14, 1948. It was with regard to the phraseology and intent of that particular statute alone, wherein the "collegiate authority established by chapter five hundred and forty-nine of the acts of nineteen hundred and forty-three" was specifically referred to, that the new Authority was referred to as not being intended to be a continuation of the older one.

The powers of the new Authority were stated in said opinion to be the same as those of the old board. This being so, the present Authority may exercise the powers given unrestrictedly to the Board of Collegiate Authority by said St. 1946, c. 340, and St. 1946, c. 552.

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

*Department of Public Health — Rules under G. L. (Ter. Ed.) c. 94, § 192.*

MARCH 9, 1948.

VLADO A. GETTING, M.D., *Commissioner of Public Health.*

DEAR SIR: — You have asked my opinion upon certain questions as to the construction of G. L. (Ter. Ed.) c. 94, § 192 "with reference to the adoption by the Department of Public Health of certain rules for the enforcement of sections 186 to 195" of said chapter 94.

The Attorney General does not ordinarily interpret or construe statutes as such unless there be a present duty resting upon an officer to act upon some matter involving an application of the statutes. Nevertheless, in the present instance it would seem appropriate to answer the questions you have put to me relative to the rule-making power of your department as affected by said section 192.

Your questions are as follows:

"1. Is the department empowered to adopt rules and regulations in connection with subject matters upon which no federal regulation has been adopted for the enforcement of federal law?

"2. Is the department empowered to adopt a standard upon a food for which no federal standard has been established?

"3. Is the intent of this section to the effect that all rules and regulations adopted by the department under its provisions are for the purpose of implementation of federal law?"

Although the phraseology of said section 192 is by no means plain, I am of the opinion that it indicates a legislative intent that the rules and regulations made under said section 192 shall be, while not inconsistent with the provisions of our own statutes, for the purpose of implementing the Federal law specifically referred to in said section 192.

This being so, I answer your first and second questions in the negative and your third in the affirmative.

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

*Judiciary — Department — Definitions — G. L. (Ter. Ed.) c. 30, § 52.*

MARCH 10, 1948.

MR. FRED A. MONCEWICZ, *Comptroller.*

DEAR SIR: — In reply to your letter of March 4, 1948, let me advise you that the "judiciary" is not a "department, office or commission" of the Commonwealth, as the quoted words are used in that portion of G. L. (Ter. Ed.) c. 30, § 52, which is set forth in your letter. I assume that the word "judiciary," as employed by you in your letter, refers to the judicial

branch of the government as distinguished from the executive and legislative branches. The judicial, as one of the three main branches or divisions of the government of the Commonwealth, is not comprehended by the words "executive and administrative departments and other activities of the commonwealth," as those quoted words are used in section 51 of said chapter 30, nor by any other words employed by the Legislature in said sections 51 and 52.

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

*Department of Public Works — Rules relative to Motor Traffic in the Logan Airport.*

MARCH 15, 1948.

Hon. WILLIAM H. BURACKER, *Commissioner of Public Works.*

DEAR SIR: — In a recent letter you have asked me the following question:

"Your opinion is requested as to whether G. L. c. 90, § 20A, as amended by Acts of 1938, is or is not applicable to regulations of this Department regulating the parking of motor vehicles at Logan Airport."

The particular portion of said G. L. (Ter. Ed.) c. 90, § 20A, applicable to your question reads:

"It shall be the duty of any police officer who takes cognizance of a violation of any provision of any rule, regulation, order, ordinance or by-law regulating the parking of motor vehicles established by any city or town or by *any commission* or body empowered by law to make such rules or regulations therein, forthwith to give to the offender a notice to appear before the clerk of the district court having jurisdiction . . ."

Your commission is empowered by St. 1943, c. 528, § 6 to make rules and regulations for the "use of the airport or part thereof."

This power is broad enough, in my opinion, to authorize you to make rules relative to motor vehicle traffic within the airport, and since the ways in the airport are not highways dedicated to the use of the public, regulation of such traffic by the use of parking meters governed by such regulations with relation thereto as you have laid before me would appear to be a reasonable exercise of the power vested in you by said section 6.

Although you are not authorized to establish penalties for violations of your rules, I am of the opinion that such violations come within the terms of the portion of G. L. (Ter. Ed.) c. 90, § 20A, quoted above and may be dealt with by police officers in accordance with the terms of said section 20A.

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

*Constitutional Law — Mystic River Bridge Authority — Legislation impairing the Obligation of a Contract.*

March 22, 1948.

*Joint Committee on Highways and Motor Vehicles, House of Representatives.*

Gentlemen: — You have asked my opinion as to the constitutionality, if enacted into law, of Senate Documents 10, 11, 183 and 184 and House Documents 713, 1237 and 1721, all of which relate to the Mystic River Bridge Authority created by St. 1946, c. 562, as amended, whose bonds have already been issued under the provisions of the said chapter.

I am of the opinion that all the foregoing measures, if enacted into law, would be held to be unconstitutional.

Each of the foregoing would be a law impairing the obligation of contract and hence contrary to section 10 of Article I of the Constitution of the United States.

A contract exists between the Authority and the bondholders made under the sanction of the Legislature as expressed in the terms of said chapter 562.

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced, — by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened."

*Louisiana* v. *New Orleans*, 102 U. S. 203, 206. *Opinion of the Justices*, 297 Mass. 582, 586.

"It is commonly not a question of the degree of impairment of the contract. If there is any substantial impairment of the obligation it encounters the prohibition."

*Thompson* v. *Auditor General*, 261 Mich. 624, 640. *Opinion of the Justices*, 297 Mass. 582, 586.

The statute was in effect at the date of the making of the contract with the bondholders and it is well settled that it cannot thereafter be annulled or changed so as to alter the contractual rights of the parties to the detriment of either. *Worthen Co.* v. *Kavanaugh*, 295 U. S. 56. *Clark* v. *Philadelphia*, 196 Atl. Rep. 384.

These proposed measures, by repealing or rendering inoperative said chapter 562, as amended, or by lessening the effectiveness of the Authority to take by eminent domain or by increasing the cost of takings of parks or playgrounds, in contravention of the powers granted under said chapter 562, as amended, or by providing for the construction of a tunnel instead of a bridge, so impair the obligation of the contract with the bondholders as to render such measures unconstitutional, if enacted into law.

The same considerations apply to Senate Document 182, which you have also sent me under separate cover. This measure, like House Document 1237, provides for additional expense in the taking of "public lands, parks, parkways or reservations" which, in my opinion, works an impairment in the said contract which would render the measure unconstitutional.

Very truly yours,

Clarence A. Barnes, *Attorney General.*

*Greylock Reservation Commission — Authority — Television.*

March 30, 1948.

Mr. James E. Wall, *Chairman, Greylock Reservation Commission.*

Dear Sir: — On behalf of the Greylock Reservation Commission you have asked me whether the commission has "the authority to grant permission to a private corporation to place a television antenna on the Reservation and to place a cubicle in the basement of the Lodge."

The Greylock reservation was established and the commission was vested with power "to care for, protect and maintain the same on behalf of the commonwealth" by St. 1898, c. 543. The commission was continued in its existence and its power of maintenance confirmed and enlarged so as to embrace the Mount Greylock War Memorial by St. 1933, c. 336, now G. L. (Ter. Ed.) c. 6, §§ 46, 47.

In my opinion the words "to care for, protect and maintain the same on behalf of the commonwealth" confer no authority upon your commission to grant permission to a private corporation to place a television antenna and cubicle on the reservation. The powers conferred upon your commission appear to have been limited by the Legislature to those necessary to maintain, protect and care for the reservation as a "reservation", with all that the quoted word denotes, for the general benefit and enjoyment of the public therein and, accordingly, you are without authority to grant special privileges of location and user which are not incidental to the use of the reservation by the public.

Very truly yours,
Clarence A. Barnes, *Attorney General.*

*Department of Labor and Industries — Authority — Firearms — Tools.*

March 31, 1948.

Hon. Daniel J. Boyle, *Commissioner, Department of Labor and Industries.*

Dear Sir: — You have requested my opinion on the following questions relating to new tools known as "Drive-it" and "Tempotool":

"1. Does the authority of the Department of Labor and Industries, contained in G. L. c. 149, § 6, extend to this type of equipment, whether or not the same is construed to be 'firearms'?

"2. Are these tools included in the definition of 'firearms,' contained in G. L. c. 140, § 121?"

I answer your first question in the affirmative insofar as it relates to the authority of the Department of Labor and Industries contained in G. L. (Ter. Ed.) c. 149, § 6, over the two new tools known by the names of "Drive-it" and "Tempotool". The latter part of your first question is inapplicable to these tools, as they are not firearms.

I answer your second question in the negative. In regard to your second question, you call my attention to G. L. (Ter. Ed.) c. 140, § 121. The definition of a firearm contained in this section is for the purpose of determining the weapons for which a license to sell, purchase or carry must be

obtained. In my opinion these tools are neither pistols, revolvers, nor weapons from which a bullet or shot may be discharged and are therefore not firearms within the statutory definition.

Yours very truly,
CLARENCE A. BARNES, *Attorney General.*

*Department of Public Safety — Authority — Air Pistol or Rifle — Firearms — Permit.*

MARCH 31, 1948.

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

DEAR SIR: — You have submitted two questions to me and requested my opinion thereon:

"1. Does an air pistol or air rifle with a barrel less than 18 inches in length, not including any revolving, detachable, or magazine breech, capable of discharging a lead pellet or BB shot, come within the provisions of G. L. c. 140, § 121?"

G. L. (Ter. Ed.) c. 140, § 121, provides that in sections 122 to 129, inclusive, —

". . . 'firearms' includes a pistol, revolver or other weapon of any description loaded or unloaded, from which a shot or bullet can be discharged and of which the length of barrel, not including any revolving, detachable or magazine breech, is less than eighteen inches . . . "

The definition includes an air pistol or an air rifle from which a shot or bullet may be discharged, the barrel of which is less than eighteen inches in length.

"2. If so, is a license to carry necessary as provided by section 131 of G. L. c. 140, and also a permit to purchase, as provided in section 131A of the same chapter?"

G. L. (Ter. Ed.) c. 140 §§ 131 and 131A, require that a license to carry or to purchase a pistol or revolver may be issued, etc. Whoever purchases or carries either a pistol or revolver without such a permit violates G. L. (Ter. Ed.) c. 269, § 10. It is to be noted that the only types of firearms for which a license to purchase or to carry is required are pistols and revolvers. An air rifle is neither a pistol nor a revolver and is therefore not within the terms of said sections. A pistol, however, is a short weapon, designed and intended to be fired by one hand and capable of being concealed on the person. Under this definition, an air pistol intended to be discharged by one hand and capable of being concealed on the person is a pistol within the definition of G. L. (Ter. Ed.) c. 140, §§ 131 and 131A, and it is necessary to secure a license to purchase or to carry the same.

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

*Constitutional Law — Proposed Act with Relation to Cemetery Associations — Police Power — Fourteenth Amendment — Declaration of Rights.*

April 6, 1948.

Mr. Newland H. Holmes, *Chairman, Committee on Bills in the Third Reading.*

Dear Sir: — You have requested my opinion as to the constitutionality of Senate Bill 462, entitled "An Act providing that certain persons shall not sell or engage in the business of selling monuments for cemetery lots," which provides as follows: "No cemetery association or other agency owning, maintaining, or operating a cemetery, or any officer, agent, or employee thereof shall sell or engage in the business of selling monuments for cemetery lots." It is my opinion that this bill, if enacted into law, would violate the Fourteenth Article of Amendment (part of section 1) of the Constitution of the United States, and Articles I, VII and X of the Declaration of Rights of the Constitution of Massachusetts.

It may well be said that the business sought to be regulated is not that of operating a cemetery, but of selling monuments for cemetery lots. That business is not one clothed with a public interest. It is not an occupation which any persons can be prohibited from carrying on absolutely or upon terms. *Opinion of the Justices*, 247 Mass. 589, 593. *Wyeth* v. *Cambridge Board of Health*, 200 Mass. 474, 478.

The proposed statute is clearly not a regulation of cemeteries, since it extends to officers, agents and employees of cemeteries or other agencies operating cemeteries.

Even if the bill were regarded as a regulation of cemeteries, it would be invalid.

While cemeteries are, of course, subject to regulation under the police power, it does not follow that any and all regulations of every sort and description with respect to cemeteries can be upheld under this police power. *Gamage* v. *Masonic Cemetery Ass'n*, 31 F. (2d) 308, 309 (reversed on other grounds, 38 F. (2d) 950). *Hume* v. *Laurel Hill Cemetery*, 142 Fed. 552, 562. *Opinion of the Justices*, 247 Mass. 589, 593, 595.

Police power primarily is based upon the necessity of regulation by the sovereign for reasons of public health, safety, morals, comfort and good order. *McMurdo* v. *Getter*, 298 Mass. 363. There is no reason to suppose that the sale of monuments by persons operating cemeteries affects any of these five. There is no reason to deprive such persons of the right to engage in an otherwise lawful business. "Freedom of contract is the general rule and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances." *Wolff Packing Co.* v. *Kansas Court of Industrial Relations*, 262 U. S. 522, 534. *Commonwealth* v. *Boston Transcript Co.*, 249 Mass. 477, 483.

Nothing is more clearly settled than that it is beyond the power of a State, under the guise of protecting the public, arbitrarily to interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 278.

In order to be a valid regulation for the protection of the public health, safety, morals, comfort and good order there must be a reasonable relationship between the protection of "the public against the evil threatened"

and the restriction imposed. In addition to this, the imposed restriction must really tend to accomplish the purpose for which it was enacted. *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 513.

There seems to be no legitimate connection between the proposed restriction and any reason of public health, safety, morals, comfort and good order. The fact that the cemetery corporation is affected with the public interest does not justify a different or other standard. *Wyeth* v. *Cambridge Board of Health*, 200 Mass. 474. *Lochner* v. *New York*, 198 U. S. 45, 57. *Opinion of the Justices*, 247 Mass. 589. *Commonwealth* v. *Ferris*, 305 Mass. 233, 235.

It is to be noted that not only is a cemetery association or other agency owning, maintaining or operating a cemetery prohibited from selling monuments for cemetery lots but so is "any agent, officer or employee thereof." This particular clause is not limited to an officer, agent or employee acting on the business of such a cemetery association or agency but is general in its terms. This seems to be an additional violation of the principles heretofore set forth in this opinion.

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

*Metropolitan District Commission — Authority to Levy Compensation Assessments — St. 1945, c. 705, § 12.*

APRIL 9, 1948.

Hon. WILLIAM T. MORRISSEY, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — You have asked my opinion as to whether or not St. 1945, c. 705, § 12, empowers your commission to make compensatory assessments upon cities and towns which violate the rules and regulations formulated by your commission under the terms of said act, in addition to the amounts assessed upon said cities and towns for apportioning costs as outlined in G. L. (Ter. Ed.) c. 92.

I answer your question in the affirmative.

Chapter 92 provides for ascertaining the proportions which each of the towns belonging in whole or in part to the North Metropolitan and South Metropolitan Sewerage Districts, respectively, shall annually pay to the Commonwealth to meet interest and sinking fund requirements for each year, as estimated by the State Treasurer, and to meet any deficiency in the amount previously paid in as found by him.

St. 1945, c. 705, § 12, provides that the failure on the part of any municipality within either of said districts to comply with any rule or regulation formulated by the Metropolitan District Commission under the authority of said act, lawfully affecting such municipality, shall be sufficient cause for the levying and collecting by said Metropolitan District Commission from such municipality of such additional assessment or assessments as the Metropolitan District Commission may deem necessary to compensate it for the disposal of sewage, drainage, substances or wastes from such municipality.

In my opinion, this assessment is distinct from, and in addition to, the basis of cost to be determined by the State Treasurer.

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

*Police Officer — Boston — Days Off.*

April 16, 1948.

Hon. Thomas F. Sullivan, *Police Commissioner for the City of Boston.*

Dear Sir: — You have written me quoting St. 1948, c. 135, which provides that any police officer of the city of Boston who is required to work on certain holidays shall be given an additional day off, or, if such additional day off cannot be given by reason of a personnel shortage or other cause, he shall be entitled to an additional day's pay, and have asked me two questions with relation thereto.

Your first question is:

"1. Does this statute grant all police officers of the city of Boston a day off on each of the ten holidays mentioned?"

Under the provisions of the statute referred to, a police officer who is required to work on any one of the holidays stated must be given an additional day off or, under the conditions stated, an additional day's pay. The evident purpose of the statute is to put the police officers of the city of Boston upon the same basis as regards holiday leave as were State officers and employees under G. L. (Ter. Ed.) c. 30, § 24A, as inserted by St. 1945, c. 565. The statute contemplates that while the services of some police officers can be dispensed with on the day of the holiday itself, or on the day of its celebration if it falls on a Sunday, it will not be possible to dispense with the services of others on such days, and it is to be assumed by far the larger number of police officers will be included in the latter group. Such police officers are to be given an additional day off to compensate them for the loss of the holiday leave which some of their fellow officers were able to enjoy or, if because of personnel shortages such additional day off cannot be given to them, they are entitled to receive in lieu thereof an additional day's pay.

Your second question is:

"2. In the event an officer's regular day off falls on one of the ten holidays mentioned, is the officer under this statute entitled to an additional day off?"

By the express words of the statute, the only police officers who are to receive additional days off or additional day's pay are those who are "required to work" on the holidays or the days upon which they are celebrated. Plainly, one whose regular day off falls upon a holiday or its day of celebration is not "required to work" thereon, and consequently I must advise you that, in my opinion, an officer whose regular day off falls on one of the ten holidays mentioned is not entitled to an additional day off. Confirmation of the opinion stated is to be found in the fact that St. 1945, c. 565, the original statute providing for an additional day off duty or an additional day's pay for State officers and employees who were required to work on certain holidays, is worded substantially the same as the statute about which you inquire, and that by St. 1946, c. 411, the Legislature considered it necessary to add to the provisions of St. 1945, c. 565, an express provision that a State employee whose regular day off falls on a holiday shall be given an additional day off or an additional day's pay.

Very truly yours,
Clarence A. Barnes, *Attorney General.*

*Insurance — Refund of Fee for Broker's License under G. L. (Ter. Ed.) c. 175, § 14.*

April 20, 1948.

Mr. Edmund S. Cogswell, *First Deputy and Acting Commissioner of Insurance.*

Dear Sir: — In a recent letter you have asked my opinion as to whether or not your department has authority to make a refund of the license fee of twenty-five dollars received by it for the issuance of an insurance broker's license pursuant to the provisions of G. L. (Ter. Ed.) c. 175, § 14, to the estate of a deceased licensee who died on the same day as the effective date of the license issued, assuming that said licensee had never performed any act as insurance broker under the authority of said license.

I answer your question in the negative.

G. L. (Ter. Ed.) c. 175, § 14, provides that the Insurance Commissioner "shall collect from the applicant and pay to the commonwealth charges and fees as follows: . . . for each license or renewal thereof to an insurance broker under section one hundred and sixty-six, twenty-five dollars . . ."

The statute makes no provision for refunds to be made by the Commissioner of Insurance, his authority in this respect being limited to collecting the fee and transmitting it to the Commonwealth. No authority to refund because of lack of actual use of the license arises by implication from the establishment of the license fee.

Very truly yours,
Clarence A. Barnes, *Attorney General.*

*Termination of World War II with Relation to St. 1945, c. 405.*

April 22, 1948.

Mr. Rudolph F. King, *Registrar of Motor Vehicles.*

Dear Sir: — You have asked my opinion as to whether in the present state of World War II St. 1945, c. 405 is to be considered still in effect with reference to the three following instances:

"1. For those individuals who were in the armed services previous to V-E Day, so called, and who have not as yet been honorably discharged.

"2. For those who were in the armed services previous to V-E Day, so called, and who received an honorable discharge and re-enlisted.

"3. For those who since V-E Day have entered the armed services, for the first time, by voluntary enlistment."

I answer your question with reference to each of the three above instances in the affirmative.

It is apparent from the provisions of the amendment of St. 1941, c. 708, made by said chapter 405 that any one of the licenses in each of the three instances referred to in your letter is to be continued in force until sixty days after the President or Congress declares that World War II has terminated, or until the expiration of sixty days after the termination of military service of a licensee by honorable discharge therefrom. Since

World War II has not officially been declared terminated by the President or Congress, such a license remains effective and in force until the occurrence of one of the designated events.

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

*Veteran — Settlement — St. 1946, c. 584, § 6.*

APRIL 23, 1948.

Hon. FRANCIS X. COTTER, *Commissioner of Veterans' Services.*

DEAR SIR: — In a recent communication you state the following case:

"On June 19, 1942, a parent of the veteran left town A and on that date she had a settlement in that town. Since that date she has not lived in any city or town in the Commonwealth for five consecutive years.

"Application was made for Veterans' Benefits on July 29, 1947 because of need of the parent."

and request my opinion as to the effect on the determination of the parent's place of settlement of the amendment to G. L. (Ter. Ed.) c. 116, § 5, contained in St. 1946, c. 584, § 6.

Prior to the amendment of 1946, G. L. (Ter. Ed.) c. 116, § 5, provided in the portion which is material here, as follows:

"The settlement existing on August twelfth, nineteen hundred and sixteen, or any settlement subsequently acquired, of a person whose service in or with the army, navy or marine corps of the United States qualifies him to receive aid or relief under the provisions of chapter one hundred and fifteen, and the settlement of his wife, widow until she remarries, father or mother, qualified by his service to receive relief under said chapter one hundred and fifteen, shall not be defeated, except by failure to reside in the commonwealth for five consecutive years or by the acquisition of a new settlement."

By the amendment contained in St. 1946, c. 584, § 6, that part of G. L. (Ter. Ed.) c. 116, § 5, was amended to read as follows:

"The settlement existing on August twelfth, nineteen hundred and sixteen, or any settlement subsequently acquired, of a veteran eligible to receive veterans' benefits under the provisions of chapter one hundred and fifteen, and the settlement of his wife, widow until she remarries, minor children, father or mother, qualified by his service to receive such benefits, shall not be defeated, except by failure to reside in the commonwealth for five consecutive years or by the acquisition of a new settlement."

After the enactment of the amendment of 1946, the Supreme Judicial Court for the Commonwealth rendered its decision in the case of *Pepperell* v. *Somerville*, Mass. Adv. Sh. (1947) 709, 73 N. E. 2d 850. In that case the court considered the construction of the language contained in G. L. c. 116, § 5, prior to its amendment by St. 1926, c. 292. The latter statute changed the form of said section to that first quoted above. The earlier form of said section 5 extended its benefits only to "soldiers and their dependents eligible to receive military aid or soldiers' relief." The court ruled

in substance that in order to be entitled to the benefits of that provision with regard to settlements of soldiers and their dependents, the soldier must, at the time of the enactment of the statute, have been unable to provide maintenance for himself and his dependents. Only those who were then actually dependent and not those who might thereafter become dependent, it was held, were given settlement by the statute. See also the decision in the case of *Treasurer and Receiver General* v. *Natick*, 320 Mass. 715. The close similarity of the language contained in St. 1946, c. 584, § 6, as to the veterans whose settlements were to be controlled by that section, to wit, "a veteran eligible to receive veterans' benefits," to the language contained in G. L. c. 116, § 5, prior to its amendment by St. 1926, c. 292, is such as to compel me to rule that the provision contained in the 1946 statute must be given the same construction as to the veteran himself as the court in the *Pepperell* case gave to the language of G. L. c. 116, § 5, prior to the amendment of 1926. It thus appears that in making the changes in G. L. (Ter. Ed.) c. 116, § 5, set forth in St. 1946, c. 584, § 6, which it seems clear were intended only as changes in phraseology to bring that section into conformity with the statutes relative to veterans' benefits, those drafting the section inadvertently made a change which is one of substance and which is a retrogression to an earlier and restricted provision with regard to settlements of veterans. Although, as I will have occasion to state hereinafter, the amendment does not operate to deprive the dependents of the veteran of the more liberal provisions with regard to settlements inserted in G. L. c. 116, § 5, by St. 1926, c. 292, you should immediately recommend to the Legislature that the mistake as to veterans themselves be rectified and that the clarifying legislation be made retroactive to January 1, 1941.

As I have indicated above, the harmful consequences of the change in G. L. (Ter. Ed.) c. 116, § 5, resulting from the enactment of St. 1946, c. 584, § 6, is restricted to the veteran himself and not to his stated dependents. This is because of the fact that while the language of the amendment as to the veteran himself is that he be "eligible to receive veterans' benefits," the phrase used with regard to the settlement of his specified relatives is "qualified by his service to receive such benefits." Thus the more liberal provisions of G. L. c. 116, § 5, inserted therein by St. 1926, c. 292, are retained so far as concerns the settlements of the stated relatives of the veteran, but the settlement of the veteran himself is controlled by the much more restricted provision contained in G. L. c. 116, § 5, prior to its amendment by St. 1926, c. 292. In consequence of this difference in language, the situation is that the provisions of G. L. (Ter. Ed.) c. 116, § 5, as amended by St. 1946, c. 584, § 6, will apply to prevent the loss of the settlement in town A of the parent of the veteran referred to by you, because she has not failed "to reside in the commonwealth for five consecutive years", nor has she acquired a new settlement.

Not only did the change in G. L. (Ter. Ed.) c. 116, § 5, effected by St. 1946, c. 584, § 6, result in no change in substance in the provision with regard to the determination of the settlements of the stated relatives of the veteran, but the amendment of 1946 would not have a retrospective effect. See *Town of Lexington* v. *Commonwealth*, 279 Mass. 571, in which it was held that St. 1926, c. 292, was not retrospective in effect. The result is that even under the statute as amended, veterans who had acquired settlements prior to January 1, 1947, under the provisions of G. L. (Ter. Ed.)

c. 116, § 5, as it read prior to the amendment of 1946, could lose such settlements only upon the expiration of the periods of time stated in the section computed from the effective date of the 1946 amendment.

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

*Logan Airport — Lack of Authority in Police Commissioner of Boston to License Sight-seeing Automobiles at the Airport.*

APRIL 23, 1948.

HON. THOMAS F. SULLIVAN, *Police Commissioner for the City of Boston.*

DEAR SIR: — In a recent letter you ask whether the operation of a sight-seeing bus tour exclusively on Logan Airport property would be embraced within the provisions of St. 1931, c. 399, which give the police commissioner for the city of Boston exclusive authority to license in said city sight-seeing automobiles and the persons operating them as drivers.

Inasmuch as Logan Airport is owned and operated by the Commonwealth, it is my opinion that your exclusive licensing authority as above described would not extend to a sight-seeing bus operated exclusively on Logan Airport property.

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

*Metropolitan District Commission — Division of Personnel and Standardization — Employees of Construction Division.*

APRIL 27, 1948.

*Metropolitan District Commission.*

GENTLEMEN: — You have asked my opinion in a recent letter as to whether your commission has authority "to continue employment of Construction Division personnel without the approval of the Division of Personnel and Standardization."

I answer your question to the effect that you have such authority and that the Division of Personnel and Standardization is not authorized to deal with such employees or their classifications or salaries under G. L. (Ter. Ed.) c. 30, §§ 45–50.

St. 1947, c. 583, abolished the Metropolitan District Water Supply Commission and transferred all its "functions, rights, powers, duties, obligations and properties to" your commission as its lawful successor. Among the rights and powers vested in the Metropolitan District Water Supply Commission by St. 1926, c. 375, § 2, was the authority to appoint and to remove such assistants as it deemed necessary to carry on its work and to fix their compensation in accordance with its own rules, approved by the Governor and Council, and such appointments were specifically stated not to be subject to classification under G. L. (Ter. Ed.) c. 30, §§ 45–50. It was also stated that the civil service law should not apply to removals.

This authority to make such appointments and to fix compensation, regardless of the Division of Personnel and Standardization whose powers in this respect are derived from G. L. (Ter. Ed.) c. 30, §§ 45–50, was trans-

ferred to and became vested in your commission and is to be exercised by it in regard to the employees concerning whom you inquire.

With regard to these employees, section 2 of said chapter 583 provided specifically for their transfer as temporary non-civil service employees, without loss of rights, to a Division of Construction within the jurisdiction of your commission. It was specifically provided by this section that none of the provisions of the civil service law should apply to such employees. No new provision concerning the compensation of employees, which might have been taken to have worked a repeal of the power to fix the compensation of the employees vested in the old commission and transferred to your commission, was set forth in said chapter 583.

There is nothing in said chapter 583 to indicate any intent on the part of the Legislature to destroy this particular authority granted to the old commission and transferred to your commission and to place such authority in the hands of the Division of Personnel and Standardization, either by way of original action on the part of such division or by way of approval on its part. In other words, the Legislature has seen fit to place the employees in question outside the sweep of both the civil service law and the provisions of G. L. (Ter. Ed.) c. 30, §§ 45–50.

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

*Veterans — Retirement Allowances — Federal Grant.*

MAY 4, 1948.

Hon. FRED A. MONCEWICZ, *Comptroller.*

DEAR SIR: — Replying to your recent letter relative to retired veterans who, at the time of their retirement, were employed by the Department of Labor and Industries, Division of Employment Security, inasmuch as the applicable statutes, G. L. (Ter. Ed.) c. 32, §§ 56 and 57, provide that the retirement allowance shall be "payable from the same source" as that which paid the veteran's compensation in the grade which he held at the time of his retirement, and as it appears from the facts, set forth in your letter that at the time of retirement the veterans as to whom you inquire had their compensation paid to them in full from a grant from the Federal Government, I am of the opinion that the retirement allowances should be paid likewise from the Federal grant made for the purpose of taking care of the administration of the said Division of Employment Security.

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

*Constitutional Law — Delegation of Power to an Administrative Body Equivalent to Authority to Legislate.*

MAY 13, 1948.

*House Committee on Bills in the Third Reading.*

GENTLEMEN: — I am in receipt from your committee of the following request for my opinion:

"The House Committee on Bills in the Third Reading respectfully requests your opinion in writing as to whether or not House, No. 1973, entitled 'An Act relative to adulteration, misbranding and dangerous

drugs,' would, if passed, violate any provision of the Constitution of the Commonwealth or of the United States, with particular reference to the provisions contained in lines 38 to 44 of section 3 and reading as follows: — 'any other drug deemed by the department of public health, after a public hearing and after consultation with the board of registration in pharmacy to be a harmful drug. The said department shall by rule or regulation make public any such additional drug deemed to be a harmful drug.'"

The provisions of section 3 of House Bill 1973, inserting a new section 187A in G. L. (Ter. Ed.) c. 94, prohibit the sale or dispensing of "*harmful*" drugs to any person other than a physician, dentist or veterinarian except upon written prescription by a physician, dentist or veterinarian. Violation of the terms of section 187A is punishable by fine, imprisonment or both.

The phraseology of the section purports to define the words "harmful drug" as meaning and including certain specifically named drugs and

"any other drug deemed by the department of public health, after a public hearing and after consultation with the board of registration in pharmacy to be a harmful drug. The said department shall by rule or regulation make public any such additional drug deemed to be a harmful drug,"

as set forth in your above letter.

Since this is a statute enforced by penal provisions, the standards of certainty are

"higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness.' . . . There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment,"

as was said by the Supreme Court of the United States in *Winters* v. *New York*, 333 U. S. 507.

The word "harmful" is susceptible of a wide variety of interpretations. Its employment in the quoted phrase of said section 3 does not, even when read in the whole context of the statute, furnish any proper standard to guide the Department of Public Health in determining what is a drug which should be added to the list of particular drugs declared by the Legislature to be so "harmful" or injurious to man or beast as to warrant limitation of their sale. "Harmful" is not a word of definite and precise meaning but may cover widely variant degrees of hurtfulness, ranging from that which barely escapes being innocuous to that which is mortally injurious.

The Legislature may delegate to executive or administrative bodies large discretion to be exercised within defined fields to carry out a specific legislative policy. *Schaffer* v. *Leimberg*, 318 Mass. 396, 400; *Commonwealth* v. *Town of Hudson*, 315 Mass. 335. But it may not delegate to such bodies without the establishment of fixed standards, to which they must conform, the power to create prohibitions of conduct punishable by penal provisions. The general power to legislate cannot be delegated without violating Article XXX of the Declaration of Rights. *Brodbine* v. *Revere*, 182 Mass. 598, 600; *Boston* v. *Chelsea*, 212 Mass. 127; *Opinion of the Justices*, 302 Mass. 605, 614; *Wyeth* v. *Cambridge Board of Health*, 200 Mass. 474.

The matter is not without some doubt but, in my opinion, the portion of said section 3 to which you have directed my attention, by reason of a

lack of sufficiently defined legislative standards in the premises, delegates to the Department of Public Health not merely the power to carry out the details of an expressed and fixed legislative policy but the power to legislate. Hence there would be a violation of Article XXX of the Bill of Rights and a probable violation of the Fourteenth Amendment of the Constitution of the United States with relation to the general provisions of the said section, if the said section were enacted into law as it now stands.

The provisions of said section 3 would appear to be so far independent of and severable from the other sections of the proposed bill that their unconstitutionality would not invalidate the rest of the measure.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

*Probation Officer — County — Salary.*

MAY 13, 1948.

MR. ALBERT B. CARTER, *Commissioner of Probation.*

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

"May County Commissioners refuse to approve *in toto*, despite approval by the Administrative Committee of District Courts, salaries for full-time probation officers, male or female, appointed to act exclusively in juvenile cases pursuant to the provisions of St. 1947, c. 655?"

St. 1947, c. 655, § 1, amending G. L. (Ter. Ed.) c. 276, § 83A, provides in its applicable part that:

" . . . The justices of the courts for which probation officers are appointed under this section shall fix the compensation of such officers in such amounts, not exceeding four thousand dollars per annum each, as may be approved by said administrative committee and the county commissioners. . . ."

Before a salary for a probation officer becomes established, it must have the approval of both the administrative committee and the county commissioners. The county commissioners, in the reasonable exercise of their judgment, may withhold approval of an amount fixed by the justices. The county commissioners may not properly act in an arbitrary fashion or refuse to give approval to any reasonable sum whatsoever. Every effort should be made by the justices and the administrative committee and the county commissioners to agree upon a fair sum for compensation which may be deemed appropriate by all three sets of officials.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

*Gypsy Moths — Superintendent in Towns — Term of Office.*

MAY 27, 1948.

HON. ARTHUR T. LYMAN, *Commissioner of Conservation.*

DEAR SIR: — With relation to the position of moth superintendent in municipalities, you have asked my opinion upon the following questions:

"1. Does St. 1946, c. 69, relieve the town of Manchester from complying annually with the requirements of G. L. c. 132, § 13, with regard to the appointment of a local moth superintendent?

"2. Is the city of Boston relieved from complying with the provisions of said G. L. c. 132, § 13?

"3. If the moth superintendent of a particular town is placed under civil service laws, is the town relieved from making an annual appointment, and is this Department relieved from approving or disapproving such an official?"

1. I answer your first question in the affirmative.

2. No legislation has been called to my attention which relieves the city of Boston from complying with the provisions of G. L. (Ter. Ed.) c. 132, § 13, but inasmuch as you state in effect that the city has not appointed a moth superintendent but permits the work of such a superintendent to be performed by another official in conjunction with the latter's regular duties, no occasion for approval of anyone by the "forester" in your department arises at present.

3. I answer both the inquiries contained in your third question in the negative, assuming that the law to which you have reference, by which the position of moth superintendent is placed under civil service, does not contain specific provisions which change the term prescribed by G. L. (Ter. Ed.) c. 132, § 13, as amended, for such a superintendent.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

*Metropolitan District Commission — Authority to License Motor Vehicles for the Carriage of Passengers in a Parkway.*

MAY 27, 1948.

*Metropolitan District Commission.*

GENTLEMEN: — In a recent letter you advise me that the Department of Public Utilities, by Order DPU 7890L, granted a license to the Metropolitan Transit Authority to operate motor vehicles for the carriage of passengers, authorizing operation on a route including a section of parkway under the jurisdiction of the Metropolitan District Commission.

It appears from your letter that such license was granted after a public hearing, of which your commission was not directly notified, and you ask if such license so granted is valid.

I assume that adequate notice of a general nature by publication or otherwise of the public hearing was given and that particular notice was given to "the mayors of the cities and the chairman of the selectmen of the towns . . . within which the authority may operate under" the "license," in accordance with the provisions of St. 1947, c. 544, § 10. A par-

ticular notice to the Metropolitan District Commission is not required by said section 10.

Authority to grant such a license to the Metropolitan Transit Authority within specified limitations for "the operation on . . . parkways and boulevards" is vested in the Department of Public Utilities by said St. 1947, c. 544, § 10. It appears to have been the intent of the Legislature that such a license when granted should be paramount, and it follows that provisions of earlier statutes requiring permits for the type of transportation covered by the license from the Metropolitan District Commission are impliedly repealed.

In my opinion the license in question is valid.

Similar considerations also apply to possible future grants of licenses and permits to the Metropolitan Transit Authority by the Department of Public Utilities, as to which you inquire, for (a) locations on parkways and boulevards for tracks, poles and wires, (b) for operation on parkways and boulevards of motor vehicles for the carriage of passengers for hire, and (c) for the operation on parkways and boulevards of trackless trolleys with poles and wires, all of which are governed by the explicit terms of said St. 1947, c. 544, § 10.

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

*Secretary of the Commonwealth — Charitable Corporation — Refusal to Issue Certificate of Incorporation.*

JUNE 1, 1948.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — In a recent letter you have asked my opinion as to whether you have the authority to refuse to issue a certificate of incorporation to a certain proposed charitable corporation whose articles of organization provide for the issuance of one thousand dollars of capital stock, in spite of the approval of such articles by the Commissioner of Corporations and Taxation.

With relation to the particular proposed charitable corporation under consideration, the facts of which you have informed me and the documents which you have laid before me show that the corporation was to be organized by virtue of a final decree of a probate court of September 8, 1947, to carry out the charitable intent of a certain testator; that articles of organization, which were adopted September 15, 1947, were received in your office, transmitted to the Commissioner of Corporations and Taxation, approved by him and filed with the required fee in your office, all after September 18, 1947.

St. 1947, c. 559, which by section 1 amends section 3 of G. L. (Ter. Ed.) c. 180, became effective on September 18, 1947.

Said section 3 as thus amended, which you quote in your letter, reads:

"The corporation shall be formed in the manner prescribed in and subject to section thirty of chapter sixty-nine, section nine of chapter one hundred and fifty-five and sections six and eight to twelve, inclusive, of chapter one hundred and fifty-six, except as follows:

"The corporation *shall have no capital stock* and the agreement of association shall omit the statement of the amount of the capital stock and the

share value and number of shares. The fee to be paid to the state secretary upon the filing of the certificate of organization shall be twenty-five dollars."

A portion of G. L. (Ter. Ed.) c. 156, § 12, made applicable to charitable corporations by said section 3, provides:

"The state secretary shall sign the certificate of incorporation and cause the great seal of the commonwealth to be thereto affixed, and such certificate shall have the force and effect of a special charter. The existence of every corporation organized under general laws shall begin upon the filing of the articles of organization in the office of the state secretary."

It is plain that at the time of the approval of the articles of organization by the said Commissioner and of their filing with you, the formation of a charitable corporation with capital stock was prohibited by the provisions of said section 3, and that the approval of the said Commissioner could not properly have been given to them.

Although you are not vested with power to exercise discretion as to the advisability as a matter of fact of the issuance of a certificate after approval of articles of organization by the said Commissioner (see *Elmer* v. *Commissioner of Insurance*, 304 Mass. 194), nevertheless you are not required to perform even a ministerial act which will make certain the accomplishment of a result forbidden by positive law and treated by the Legislature as detrimental to the public welfare.

It is a not unfamiliar principle of law that compulsory action by a public official effectuating a result detrimental to the public welfare is not to be held to be intended by the Legislature merely by implication. *Suburban Light & Power Co.* v. *Boston*, 153 Mass. 200. *Swift* v. *Registrars of Voters*, 281 Mass. 271, 276.

It follows, in my opinion, from the foregoing considerations that, in view of the facts of which you have apprised me relative to the dates of the presentation, approval and filing of the articles of organization, you have the authority and should refuse to issue a certificate of incorporation to the association in question.

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

*Veterans — Benefits — Need Resulting from Strike.*

JULY 19, 1948.

HON. HENRY V. O'DAY, *Commissioner of Veterans' Services.*

DEAR SIR: — You have asked my opinion as to whether veterans' benefits under G. L. (Ter. Ed.) c. 115, as amended, may be paid to a veteran whose need for such benefits arises from the fact that he is engaging in a strike against his employer with consequent cessation of wages.

The Legislature has provided in G. L. (Ter. Ed.) c. 115, § 5, 3rd par., that:

"No veterans' benefits shall be paid to or for any applicant if the necessity therefor is caused by his voluntary idleness or continuous vicious or intemperate habits . . ."

It would seem that to strike and to remain on strike without seeking employment with a new employer is to engage in "voluntary idleness," as the quoted words are used in said chapter 115, and if the necessity for veterans' benefits "is caused by" such "voluntary idleness," under the terms of the statute they may not be paid.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

# INDEX TO OPINIONS