Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1955

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

1100-6-56-917664.

The Commonwealth of Massachusetts

Boston, December 7, 1955.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department of the Attorney General for the year ending June 30, 1955.

Respectfully submitted,

GEORGE FINGOLD,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

Attorney General
GEORGE FINGOLD

First Assistant Attorney General
FRED WINSLOW FISHER

Assistant Attorneys General

JASON A. AISNER[1]
SAMUEL H. COHEN
MALCOLM M. DONAHUE
JOSEPH H. ELCOCK, JR.
DANIEL J. FINN
DORICE S. GRACE
SAUL GURVITZ
MATTHEW S. HEAPHY
PHILIP JONES[2]
EDWARD J. KIMBALL[3]
JAMES F. MAHAN
CHARLES F. MARSLAND, JR.
EDWARD F. MAHONY[2]
LOWELL S. NICHOLSON
HARRIS A. REYNOLDS
ARNOLD H. SALISBURY
BARNET SMOLA
NORRIS M. SUPRENANT
ANDREW T. TRODDEN

Assistant Attorney General; Director, Division of Public Charities
HUGH MORTON

Assistant Attorneys General assigned to Department of Public Works

VINCENT J. CELIA
JAMES C. GAHAN, JR.[4]
FLOYD H. GILBERT
MAX ROSENBLATT
CHARLES V. STATUTI[3]
DAVID L. WINER

Special Assistant Attorney General assigned to Department of Public Works
FRANK RAMACORTI

Assistant Attorneys General assigned to Metropolitan District Commission
JOHN V. PHELAN
WILLIAM J. ROBINSON
JOSEPH H. SHARRILLO

Assistant Attorneys General assigned to Division of Employment Security
LAZARUS A. AARONSON[5]
DAVID GORFINKLE[6]
STEPHEN F. LOPIANO, JR.

Assistant Attorneys General assigned to State Housing Board
MILTON I. ABELSON
KEESLER H. MONTGOMERY

Assistant Attorney General assigned to Veterans' Division
FRED L. TRUE, JR.

Chief Clerk to the Attorney General
HAROLD J. WELCH

Assistant Chief Clerk
RUSSELL F. LANDRIGAN

Administrative Legal Consultant to the Attorney General
JAMES J. KELLEHER

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[1] Resigned, March 31, 1955.
[2] Appointed, Apr. 1, 1955.
[3] Appointed, Jan. 19, 1955.
[4] Resigned, Jan. 14, 1955.
[5] Leave of absence, Sept. 1, 1954 to Apr. 3, 1955.
[6] Appointed, Sept. 1, 1954; Resigned, Apr. 1, 1955.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Period from July 1, 1954, to June 30, 1955

Appropriations.

Attorney General's Salary	$12,000 00
Administration, Personal Services and Expenses	297,751 58
Claims, Damages by State Owned Cars	35,000 00
Small Claims	15,000 00
Veterans' Legal Assistance	24,000 00
Total	$383,751 58

Expenditures.

Attorney General's Salary	$12,000 00
Administration, Personal Services and Expenses	285,812 50
Claims, Damages by State Owned Cars	34,991 42
Small Claims	15,000 00
Veterans' Legal Assistance	19,997 13
Total	$367,801 05

Financial statement verified (under requirements of c. 7, § 19, of the General Laws), September 14, 1955.

Approved for publishing.

FRED A. MONCEWICZ,
Comptroller.

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, December 7, 1955.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of G. L., c. 12, § 11, as amended, I herewith submit my report.

The cases requiring the attention of this department during the fiscal year ending June 30, 1955, totaling 17,506, are tabulated as follows:

Extradition and interstate rendition	151
Land Court petitions	143
Land damage cases arising from the taking of land:	
Department of Public Works	975
Metropolitan District Commission	171
Department of Education	1
Department of Mental Health	3
Department of Natural Resources	1
New Bedford Textile Institute	1
Department of Public Utilities	1
Miscellaneous cases, including suits for the collection of money due to the Commonwealth	5,717
Estates involving application of funds given to public charities	1,044
Settlement cases for support of persons in State institutions	55
Pardons:	
Investigations and recommendations in accordance with G. L. c. 127, § 152, as amended	130
Small claims against the Commonwealth	891
Workmen's compensation cases, first reports	5,530
Cases in behalf of Division of Employment Security	513
Cases in behalf of Veterans' Division	3,179

Introduction.

The fiscal year ending June 30, 1955, marked the creation, by me, of two new and highly important divisions in the Department of the Attorney General: the Division of Public Charities and the Youth Division. There were, as well, expanded activities in my previously-established Anti-Communist, Criminal and Land Damage Divisions, and Employment Security and Housing Board units, not to mention the manifold and varied services rendered by my office outside the scope of any of these separate divisions or units.

The Division of Public Charities was set up by statute, as recommended by me, to centralize and coordinate in my office the administration and

supervision of all charities in which there is a public interest. An Assistant Attorney General was designated as director of this division and in the first year more than 2,000 matters were handled before the courts.

Four experts on my staff were assigned, in December 1954, to organize and operate the Youth Division as one of the Commonwealth's most powerful single answers to the disturbing problem of juvenile delinquency. On March 3, 1955, with over 300 persons from throughout the State in attendance, an all-day Conference on Juvenile Delinquency was held in Boston to analyze the situation and discuss remedies and preventatives.

Altogether, in excess of 150 different "categories" of legal work fall within my jurisdiction at present. These run an alphabetical gamut from abatements, accidents and aeronautics to wills, Workmen's Compensation and Youth Service Board. New classifications are constantly being added, but old ones seldom taken away. This means, of course, as I have previously reported, that the grave and already heavy responsibilities of the Attorney General ever continue to increase.

Nor is this necessarily surprising when it is understood that my department is the sole legal representative and custodian of a two billion dollar ($2,000,000,000) business — the Commonwealth of Massachusetts — and thus one of the biggest law offices in the nation and probably the largest in the State.

At the same time, it is a far cry from the modest beginnings of the Massachusetts Attorney General (or "Atturney Generall," as the Colonists originally termed the office and officer). It may interest you to know that this is, indeed, an ancient office, dating back to April 29, 1680, almost a century before the American Revolution. Exactly 275 years ago, one Anthony Checkley was appointed Attorney General by the Colonial Council under the presidency of Joseph Dudley. He was a merchant who had served as attorney in the Colonial courts and his designation was for a limited period and a specific purpose: to try persons charged with witchcraft. That is one category which no longer comes under my responsibilities! But some of the many that have arisen to take its place are discussed herewith.

Anti-Communist Division.

Upon taking office as Attorney General, I established a special Anti-Communist Division, because I felt that this vast field required specialized attention and study. An Assistant Attorney General was assigned to correlate activities in the Commonwealth's campaign against subversives and much solid progress has been made. Some of my moves, outlined here, originated before July 1, 1954, when the last fiscal year began, but are included in this report to give a more comprehensive picture of the relentless war Massachusetts is waging against the Reds.

First of all, I prepared a summary of all laws pertaining to subversive activities, including: (a) anarchy, (b) the State's 1951 act outlawing the Communist Party, and (c) the Teachers' Oath Law. Conferences were held at my office in the State House with all law enforcement agencies and

police chiefs of the Commonwealth. A compendium of all anti-subversive laws was distributed to police chiefs and veterans' organizations throughout the State.

I also sponsored a bill, later enacted by the Legislature, whereby records of the Division of Employment Security are made available to the Attorney General, grand juries and the courts of the Commonwealth for use as evidence in cases involving national defence or subversive activities. Such records can prove valuable in showing contributions to the division by outlawed organizations for the benefit of possible members on their payrolls.

Following an investigation by the Anti-Communist Division, an indictment was obtained by me against Massachusetts' No. 1 Communist, Otis Archer Hood, for becoming and remaining a member of the Communist Party, knowing it to be subversive. He was indicted under our 1951 Anti-Communist Act, but this was the first time this statute, outlawing the Communist Party, had been invoked.

Presently pending, the case of *Commonwealth* v. *Otis Archer Hood* was reported to our Supreme Judicial Court by Justice Murray of the Superior Court on three proposals: (1) whether each of the three indictments is invalid in that it contravenes the Constitution of our Commonwealth; (2) whether each indictment is invalid in that it contravenes the Constitution of the United States; and (3) whether or not the laws of the Commonwealth are superseded by the laws of the United States. This case has already been argued before our State Supreme Judicial Court.

In addition, I filed a brief with the United States Supreme Court upholding the right of States to prosecute Communists. This came about in the following manner: the Commonwealth of Pennsylvania indicted one Steve Nelson for subversive activities. Following the conviction of Nelson and appeal, the Supreme Court of Pennsylvania reversed the conviction. The Commonwealth of Pennsylvania then filed a petition with the United States Supreme Court for the issuance of a writ of certiorari. This action was designed to obtain a decision by that Court on the merits of the decision by the Supreme Court of Pennsylvania.

I filed an amicus curiæ brief with the United States Supreme Court in support of the position of the Commonwealth of Pennsylvania. The United States Supreme Court allowed the issuance of the writ of certiorari, following which I filed an amicus curiæ brief in support of the position of the Commonwealth of Pennsylvania which sought to have upheld the conviction of Nelson. The case is due for argument before the United States Supreme Court in the fall of 1955.

Issues to be decided by the United States Supreme Court in the Nelson case and our State Supreme Judicial Court in the Hood case will determine two vital questions: (1) Whether it is within the constitutional power of the Legislature to proclaim the Communist Party to be a subversive organization; and (2) whether or not the field of prosecution of Communists by a State has been pre-empted by the Federal Government.

I regard it as unlikely, but in the event that the issue of pre-emption should be determined against us, we must not cease our endeavors. We

must root out and uncover the zymotic sources from which are spawned traitors. There is no place in constitutional government or any of its agencies for a "Fifth Amendment" patriot, whether in the business world, in our schools, or otherwise engaged. We must come to the stark comprehension that there is no greater nor more heinous crime than the practice of Communism.

Back in our primary school days we were taught to look upon individual treason as an abominable act. Communism teaches a thousand treasons. It has as its ambition the spiritual and political genocide of our way of life. We have seen the rape of foreign democracies and their conversion into docile concubines of the Kremlin. In decisions of the United States Supreme Court there is reference made to the necessity of there being a "clear and present danger." There was a time when certainly there was a clear and present danger in those foreign democracies. Because they did not act in time and in tune to that danger, they have vanished. I say that now, and every day that passes, presents a clear and present danger.

No one can be unmindful of the fact that the Kremlin has acquired a sovereignty over a vast portion of the world, far greater than was ever envisioned by Kaiser Wilhelm in his famous "*drach Noch Osten,*" or Hitler in his march to the sea. The Red shade on our global maps is constantly spreading as blood spreads on the ground after it has been let. The promise of the future, as I see it, is that we will witness the death of Communism as we have that of Fascism. This will inevitably come in our lifetimes, but can be brought about only by our alertness and vitality as officers and citizens charged with a solemn duty: to recognize the clear and present danger.

That our Massachusetts program to eradicate Communism and other subversive activities has attracted national attention was shown when, in October 1954, I was appointed chairman of a national committee of Attorneys General created to coordinate State prosecution of Communists with the efforts of Federal officials, headed by United States Attorney General Herbert Brownell, Jr. The Attorneys General of Wisconsin, Montana, Louisiana and New Hampshire were named to serve on my committee, and we are mapping strategy for a cooperative fight that promises results.

Criminal Division.

Anti-criminal activities of the Department of the Attorney General continued to be centralized in the special Criminal Division which I found it necessary to establish shortly after taking office in January 1953, because of complaints and requests for assistance received from citizens in many parts of the Commonwealth. Assistants assigned by me to this important phase of my duties as chief law officer are expert investigators and former officers in the State Police, Federal Bureau of Investigation and United States Armed Forces. They have worked effectively and expeditiously, without obtruding on city and town police departments.

Let me hasten to add, however, that I have nothing but praise for the overwhelming majority of police departments, police officers and other local law-enforcement officials now engaged in doing such outstanding service. My confidence in them remains as unshaken as when I first stated it in my initial report to the Legislature two years ago. Almost without exception, they have moved rapidly when I have brought to their attention an apparent laxity in law enforcement. Only in rare cases has it been my decision to step in to a community, after I was convinced the people were being forced to tolerate unhealthy conditions due to a disposition on the part of some local officials *not* to enforce the laws. An example was the series of gambling raids I directed in New Bedford in October 1954.

Seventy State Police from the Department of Public Safety, led by an Assistant Attorney General and a lieutenant in the State Police, entered 21 business establishments and homes in New Bedford and smashed a $1,000,000 bookie operation in that city. Altogether, 45 persons were arrested and charged with 53 offences concerned with gaming, registering bets, lottery and perjury, the latter occasioned when a government witness "choked up" when he could have given evidence to convict in one of the lottery cases prosecuted by my Assistant. Thirty-six of the defendants were found guilty of a total of 40 offences. Three received sentences to the House of Correction and eight others received suspended sentences. Fines and forfeitures aggregated $22,350. In the perjury case, the defendant pleaded guilty to six counts and was fined $3,000 and given a 7½-year House of Correction sentence, suspended for five years. In addition, by invoking a rarely used section of the Massachusetts General Laws, I was able to obtain a forfeiture of $6,000 of the perjury defendant's lottery winnings which my law-enforcement officers had recovered at the time of the raids. This cash was turned over to the State Treasurer.

Other activities of the Criminal Division included investigations at the Charlestown State Prison and the new Massachusetts Correctional Institution at Walpole, cooperation with the State Crime Commission, emergency operation of the office of District Attorney of Plymouth County, and various duties involved in handling defective delinquent cases, charitable solicitations, extradition cases, pardon petitions, and writs of error and writs of mandamus.

Charitable Solicitations. — Under G. L. c. 68, § 17 (inserted by St. 1954, c. 559), most persons or groups soliciting funds or other property for charitable or benevolent purposes are required to provide in advance certain information concerning such solicitation, and then, within 90 days after the period of solicitation, they must file another report giving the total raised and the amount paid for expenses of the drive. Information so filed is available to the general public as a matter of public record. Churches, religious organizations, non-profit charitable hospitals and educational institutions incorporated in this Commonwealth are exempted under the statute, as are solicitations where the fund to be raised is $1,000 or less.

Forms for such charitable solicitations are provided by the office of the

Attorney General, and if the solicitation is to be conducted in more than one city or town, the specified information may be filed with my office, instead of with the clerk of each city or town where the solicitation is to be conducted. During the past fiscal year, 98 such forms were filed with the Attorney General.

Charlestown State Prison Investigation. — On January 18, 1955, the antiquated State Prison at Charlestown was the scene of an armed uprising against the Commonwealth. Four desperate criminals serving sentences for robbery, rape, kidnapping and murder attempted to escape. Failing to accomplish their purpose when their ladder broke, they seized five guards and six other inmates as hostages, placed their lives in jeopardy and for 85 hours staged a revolt in the Cherry Hill section of the prison.

Shortly after the eruption, I went to the institution, at the request of His Excellency, the Governor of the Commonwealth, and advised the rioters that should any of their hostages be killed, I would demand that the maximum penalty be imposed. Fortunately for all concerned, the insurrection was ended without bloodshed. Immediately following its cessation, I assigned six members of my Criminal Division staff to investigate thoroughly the manner in which the convicts effected their escape from their cells and how they obtained the guns in their possession.

Outstanding investigators of the Commonwealth worked around the clock for two and one-half months to gather all available facts. Some 180 prison employees were interrogated orally and a public notice was posted, inviting all personnel to volunteer additional helpful information, "either on or off the record." Three weeks after the investigation began, on February 10, 1955, I first presented evidence to the Suffolk County Grand Jury, and I and my Assistants appeared before that body on several occasions thereafter. All the evidence obtained as a result of the investigation, including the personal testimony of the five hostage guards, was presented for the consideration of the Suffolk County Grand Jury. It was — and is — my firm belief that these vicious criminals who initiated an abortive escape attempt and participated in the subsequent four-day riot, during which they threatened the lives of their 11 hostages, were guilty of grave offences and should have been prosecuted in our courts. But it is solely within the province of the Grand Jury to weigh the evidence presented and determine whether indictments should be returned. In Massachusetts, its power as the accusing body is supreme, and in this case the Grand Jury, in its wisdom, saw fit to return no indictments.

Early in April 1955, I submitted a 45-page report to the Governor, summarizing my investigation of security conditions at the Charlestown State Prison. I made 126 recommendations how to prevent future disturbances at Charlestown and at other State institutions. Thirty-five of these proposals dealt with the Cherry Hill section of the soon-to-be abandoned prison, and the rest with officer and inmate procedure in the main prison. Many of my suggestions were covered in the Governor's special message to the Legislature in June, proposing reorganization of the entire State penal system.

Massachusetts Correctional Institution, Walpole. — In March 1955, it was

alleged certain defects had been found in the walls and buildings of the new and then still-unfinished $9,500,000, 600-prisoner capacity Massachusetts Correctional Institution at Walpole which was scheduled to receive most of the convicts from Charlestown. I assigned four of my Assistants and investigators to seek out any deficiencies in the setup or in materials used in the construction of the institution. I also obtained the services of a construction expert from the Massachusetts Institute of Technology as a guide for my staff, and he tested various sections of the walls and other materials and construction. Following this investigation, I submitted a report to the Department of Correction.

Crime Commission and Wire-Tapping. — On several occasions I have appeared, in a cooperative capacity, before the Special Commission Investigating Organized Crime and Gambling within the Commonwealth. With Assistants from my special Criminal Division, I conferred with members of the Crime Commission on matters concerning the office of the Attorney General and the various District Attorneys' offices in the State.

One special circumstance, which involved a wire-tap of the horse-race track at Suffolk Downs in East Boston, was investigated by the office of the Attorney General and after a conference with the chairman of the Crime Commission, the Hon. Charles C. Cabot, former Judge of the Superior Court, and Attorney Thomas J. McArdle, counsel to the Crime Commission, the entire matter was referred, for purposes of investigation, to the Crime Commission.

Ever since the Crime Commission was established by the General Court (Resolves of 1953, c. 100), the Attorney General's office has constantly been working cooperatively with that special body, and I am always ready to receive and investigate any information forwarded to me by the Crime Commission, and to take appropriate action on any results of its investigation which it feels warrants action by a Grand Jury.

Defective Delinquents, Extradition, Extraordinary Writs, Pardons. — An important function of the Criminal Division continued to be the further detention, the release, or the return to confinement of defective delinquents, although a sharp decline in the total number of cases handled during the past fiscal year proved that the intolerable situation extant when I took office, was effectively being remedied.

It will be recalled that such inmates, in growing numbers, had been obtaining their freedom on writs of habeas corpus on the ground that they had originally been committed illegally; specifically that there was no individual notice of commitment, which the Supreme Judicial Court had held was a deprivation of due process. Courts committing delinquents had kept no records; true circumstances had been impossible to ascertain. Many dangerous persons were being released by the courts and others were due for release, to roam at large in communities which had no facilities for handling the problems they would inevitably create. To protect the public peace, I drafted and guided through the Legislature an emergency act known as the Fingold Law (St. 1953, c. 645). This statute required that every defective delinquent seeking release would have to undergo psychiatric examination to determine his fitness to return to

society. Those found not fit were legally recommitted to our institutions for proper care.

At the time I became Attorney General, there were 379 male and 94 female defective delinquents committed to the State Farm at Bridgewater and other institutions throughout the Commonwealth. Of them, 27 males and one female obtained their releases before the new Fingold Law went into effect on July 11, 1953. In the fiscal year then beginning, my Criminal Division handled the cases of 377 defective delinquents, of whom 131 were denied immediate release, 84 being promptly recommitted. In the fiscal year ending June 30, 1955, the number of defective delinquent cases requiring attention by the Criminal Division dwindled to 37, including habeas corpus proceedings in the Superior Court and petitions for discharge in the Probate Court. Of this number, 24 were granted their release, 12 were recommitted and one defective delinquent was adjudged properly committed.

I believe the menace to the people of the Commonwealth — and to their children — which had been created by the legal loophole freeing those mentally irresponsible, has been eliminated.

The Criminal Division also handled 151 extradition cases, including requests from other States as well as requests by the Commonwealth of Massachusetts to other States. I recommended upon 130 pardon petitions and appeared for the Commonwealth in 17 writs of error and four writs of mandamus.

District Attorney for Plymouth District. — In my last previous report I told how the Supreme Judicial Court had, on May 28, 1954, removed Basil Winslow Flynn from the office of district attorney for the Plymouth District. This official was charged, in essence, with violating his fiduciary obligations to a charitable trust of which he was trustee. Removal proceedings had been instituted by me under the statute making the Attorney General responsible for enforcing the proper application of charitable funds. The Supreme Judicial Court found the charges established by the evidence presented and ordered Flynn removed, whereupon I assigned five members of my staff to take over the district attorney's office in Plymouth County. Subsequently, George L. Wainwright of Brockton was sworn in as Special Assistant Attorney General to aid my staff.

Less than a week after these men began their duties, the Grand Jury met, all cases had been prepared and were presented so sessions could be terminated after only two and one-half days of proceedings. Five days later the first session of Superior Court was opened at the Plymouth Court House and one week afterward a second session of court was conducted at the Brockton Court House. We presented a total of 193 continued, pending and new cases to the first and second sessions of court, and were successful in obtaining verdicts of guilty in 169 of these cases.

There were verdicts of not guilty in 24 of these cases and eight cases were nolprossed for one reason or another. The court gave ten suspended sentences and placed 23 persons on probation. Twenty-eight defendants paid fines in the amount of $1,125 and costs were assessed in

three cases totaling $60. Seven defendants received sentences to the State Prison, two women defendants were sentenced to the Reformatory for Women and 21 defendants were sentenced to the House of Correction. There were two sentences to the Youth Service Board and one nolo plea for a boy was accepted upon payment of costs. Fourteen defendants withdrew their appeals and two cases were dismissed by the court. In ten cases the court ordered that restitution be made to the victims.

One murder case was tried during the regular session of court, eliminating the necessity and costs of a separate trial. With Assistant Attorney General Andrew T. Trodden representing the State, the defendant, Frederick E. Erickson, was tried on charges of murdering his wife by stabbing. On the third day of the trial the defendant changed his plea to guilty to that part of the indictment which included second-degree murder; his plea was accepted by the court after a conference with defence counsel and the prosecution, and Erickson was sentenced to life imprisonment in the State Prison.

We were greatly assisted, during our conduct of the office of district attorney for the Plymouth District, by Clerk of Courts George C. P. Olsson and Chief Probation Officer James A. Carr, Jr., and members of their staffs, as well as Sheriff Charles H. Robbins, the court officers and members of the police departments of Plymouth County. With their cooperation, the court sessions were conducted efficiently, expeditiously and conservatively, and by trying the murder case during the regular court session Plymouth County was saved a substantial sum of money.

Division of Public Charities.

The Attorney General, under G. L. c. 12, § 8, has long been charged with the responsibility of seeing to the proper application of funds or property given or appropriated to public charities, and of preventing breaches of trust in their administration.

By St. 1954, c. 529, the General Court created, as recommended by me, a Division of Public Charities in the Department of the Attorney General. It amended the provisions of said section 8, with respect to administrative procedures, and required all public charities to file annual reports with this new division.

The work of the division during the initial year of its existence has served to demonstrate the wisdom of this step. Administration and supervision of charities in which there is a public interest have been centralized and coordinated. The chances of an estate or gift escaping examination have been materially reduced, and their proper application accordingly made more certain.

The division, under the direction of an Assistant Attorney General, has handled, during the past year, in excess of 2,000 matters involving the interests of the public before the courts. These have ranged from the examination and approval of accounts filed by executors and trustees, appearances with relation to the allowances of wills, petitions for instruc-

tions of various sorts, including the application of the doctrine of cy pres, to the preparation and trial of cases before the full bench of the Supreme Judicial Court.

In one instance, the division was instrumental in bringing to fruition the establishment of a laboratory for surgical research under a gift for that purpose, in excess of $1,000,000, which had been lying idle since 1932. In addition, the interests of the Commonwealth were represented before the courts of Connecticut and New York, and in the administrative field the division established the machinery for dealing with the annual reports of all public charities, which may be expected to reach a volume of more than 3,000 per annum.

Any report with respect to the valuable work of this new Division of Public Charities would be incomplete, I feel, if it did not recognize the outstanding cooperation extended to the division by the bench and bar, and those handling the affairs of the public charities. Such aid and assistance have been invaluable in bringing activities of the division to such a high peak of effectiveness in a comparatively short period of existence.

Land Damage Division.

The prompt and fair disposition of land damage claims continued to be one of the heaviest single responsibilities of this department, requiring the exclusive activities of six Assistant Attorneys General assigned to staff this separate division. However, by close adherence to the system of organization and procedure which I set up shortly after taking office in January 1953, we have again carried forward our record of efficiency and economy, beneficial alike to the Commonwealth and its citizenry.

Our aims in disposing of land damage claims have been three-fold: (1) acceleration of payment of damages to the land owner, (2) prompt termination of interest charges running against the Commonwealth, and (3) restoration of confidence in the equitable handling of such cases.

My original plan to review every current land damage claim was carried out. We created a new, standardized procedure for the investigation, processing, settlement or trial of these claims. Under this procedure we determine a settlement figure by a panel of Assistant Attorneys General; confer with attorneys for the land owners in an effort to reach settlements; attend pre-trial conferences held by Superior Court justices in many counties in a further effort to arrive at settlements, and record every dollar of each settlement reached, in the Superior Court of that county.

In the fiscal year ended June 30, 1955, the Land Damage Division, with the close cooperation of Chief Justice Higgins, arranged special land damage sessions in Worcester, Norfolk, Barnstable and Essex Counties. Working together, we devised what I believe to be the most efficient and practicable method yet. All cases disposed of without trial by jury must be approved by a justice of the Superior Court after the court has heard evidence introduced by the petitioner and the Commonwealth. The justice makes a finding after the introduction of such evidence. Some conception of the need existing for such a direct approach may be gained

from the fact that average land damage cases can be disposed of by actual trial at the rate of about three every two weeks, whereas, under my plan of special land damage sessions without trial by jury, we were able to settle a total of 341 cases this past fiscal year.

Petitioners in these 341 cases requested various sums aggregating $7,340,-433.43. Through compromise with the approval of Superior Court justices, or through trial by jury when other plans proved ineffective, my Land Damage Division was able to dispose of the 341 cases at a total cost of only $4,334,239.04. Thus the difference in what the petitioners sought as damages and what they received amounted to $3,006,194.39. In addition, this division, by its speedy disposition of the 341 land damage cases, has saved the Commonwealth, in interest charges alone, $298,499 from July 1, 1954 to June 30, 1955.

The effectiveness of my over-all program for disposing of land damage claims is clearly shown by figures covering the first two and one-half years of my administration as Attorney General. In this period a total of 1,075 land damage cases has been settled, more than five and one-half times as many as were handled during the four years immediately before I took office. This earlier figure, for a period of a year and a half longer, was 192, or an average of 48 per year, compared with our record of 430 per year.

It is significant to note that, out of the total of 1,075 cases handled by my Land Damage Division, only 67 cases went to the jury. The difference between these cases that went to a jury and the 1,008 claims that were otherwise disposed of by the Attorney General's office would represent, it is estimated, more than nineteen and one-half years of trial work. It is a statistical fact that it costs the Commonwealth approximately $750 a day when a jury is impanelled for trial. Therefore, carrying our figures a step further, it is a fair statement to observe that the disposition of nineteen and one-half years of trial work within a period of two and one-half years has resulted in the saving of $2,500,000.

At the same time, this new approach to the problem of land damage litigation has broken the deadlock on all civil litigation in the Superior Courts of the Commonwealth by clearing clogged court dockets and materially reducing the time lag for other civil matters.

The policy of the Land Damage Division is to speedily dispose of all pending cases either by marking such cases to be advanced for quick trial or by assenting to the same if the motion is made by the petitioner. This division has cooperated with the judges of the Superior Court and with all attorneys who represent petitioners.

In addition to the foregoing, the Attorney General reviewed, during the fiscal year ending June 30, 1955, approximately 864 title abstracts submitted by attorneys throughout the Commonwealth for the Department of Public Works. In this connection, we have rendered some 157 informal opinions to the Department of Public Works. These opinions are usually rendered within a 48-hour period, enabling the rapid clearing of non-contested land damage cases.

Youth Division.

Because of the disturbing problem of juvenile delinquency and the many factors which contribute to and complicate the lives of our oncoming generations of citizens, I created, in December 1954, a special Youth Division and assigned four experts from my staff to this extremely important activity.

To learn about youth work on the local level, I called separate conferences in my office of the nine district attorneys of the Commonwealth, and of officers and members of the Executive Committee of the Massachusetts Chiefs of Police Association. From these meetings many practical procedures were brought to light.

For example, there was considerable discussion of a State curfew, but it was finally determined that, due to the comparatively small percentage of delinquency in Massachusetts, it would be imposing a hardship on the 98 per cent of law-abiding boys and girls. A good suggestion was that a youth division be set up in every police department in cities and in towns of 25,000 or more population. It was also urged that a record should be kept of all offences brought to the attention of the police, even during the youth's early years.

A conference was held with officers of the Massachusetts Youth Service Board to ascertain how the Attorney General could assist and cooperate with the board in meeting the juvenile delinquency problem.

Out of this initial activity emerged a plan to hold an all-day Attorney General's Conference on Juvenile Delinquency, to which would be invited all police chiefs, probation officers, representatives of youth divisions and men and women engaged in working with juveniles. This State-wide seminar was carefully planned and successfully held on March 4, 1955, in John Hancock Hall, Boston. During the conference the 300 persons in attendance had the opportunity of hearing numerous authorities on youth problems, including two experts with national reputations: Richard Clendenen, former executive director of the United States Senate Judiciary Subcommittee which investigated the problem on a national level, and Ralph W. Whelan, executive director, New York City Youth Board, who explained how juvenile delinquency was affecting the larger cities and what was being done to combat the problem.

On the State and local level, John D. Coughlan, chairman, Massachusetts Youth Service Board, outlined the operation of that body, and Judge John J. Connelly, presiding justice, Boston Juvenile Court, explained the role of the judiciary and told of methods used in court. The delinquency problem and its effect on the police department was discussed by Lieutenant Cornelius S. Driscoll of the Worcester Police Department and Captain Arthur O'Leary, representing General Otis M. Whitney, Commissioner of Public Safety and head of the State Police.

This conference was highly successful and was generally regarded as one of the first constructive steps taken to combat — and prevent — juvenile delinquency.

Other activities of my new Youth Division included the holding of

various meetings throughout the year with persons responsible for the selection of music recordings that are broadcast from radio stations in Greater Boston. A cooperative plan was worked out with the broadcasters' "disc jockeys," whereby records that were considered objectionable have been removed from their libraries.

Crime and horror "comic" books, which occupied considerable attention of my office during the previous fiscal year, have appeared in constantly decreasing numbers on our newsstands the past 12 months. A cooperative plan of comic book publishers and distributors is serving effectively to eliminate most of the objectionable magazines from the distributors' lists.

Boston City Hospital — Investigation of Diarrhea Outbreak.

For three months prior to July 12, 1954, numerous cases of diarrhea occurred among infant patients in the Pediatric Building of the Boston City Hospital, resulting in a number of deaths. On that date the Director of the Division of Hospitals in the Department of Public Health was first officially notified of this outbreak and he instituted an immediate survey of the situation, coming to the conclusion that facilities available for the care of infant patients, and certain of the practices employed at the hospital, were in need of improvement.

At the request of the director, I conducted an extensive investigation of the whole matter and caused all the persons most closely concerned with the diarrhea outbreak to be interviewed. Inspection visits were made to the hospital by two of my assistants, who also examined certain records of the institution.

Conclusions reached as the result of the impartial investigation conducted by me, all as set forth more fully in a letter to the director dated November 24, 1954, were, briefly: (1) that the diarrhea outbreak should have been reported to the director some days, at least, before it was, and that failure of the hospital authorities to do so resulted from their misinterpretation of the rule requiring such a report; (2) that the isolation, sterilization and other physical equipment available for the care of infant patients at the hospital was antiquated and inadequate, and (3) that the isolation procedures established for the pediatric wards were not properly carried out, owing to a shortage of nursing personnel.

My recommendations to the director, contained in said letter, were, in part, as follows:

"As the result of my investigation, I have two recommendations to make to you.

"1. The department appears to be principally disturbed by the failure of the hospital authorities to report to it, under its rule, until July 12, 1954. In my opinion, this failure was due to an erroneous interpretation placed upon that rule by the hospital . . . . It seems to me that an immediate conference with the hospital authorities should be arranged with the express purpose of explaining to them what is meant by the department rule, and of impressing on them that its purpose is to prevent the spread of a condition which *might become* epidemic diarrhea, rather than

to assist in controlling an epidemic already existing. Such an agreement, thoroughly understood by all the participants in such a conference, would put an end to any question of interpretation and would prevent any future misunderstanding.

"2. To my mind, however, the most disturbing aspect of the whole situation is that, in the recent past, someone or some group of persons has succeeded in establishing at the Boston City Hospital a policy which has placed the saving of money above the saving of lives. . . . Whatever the actual figures may be, it is undisputed that at least for the year and a half preceding last July no new equipment was purchased for the pediatric service although, as of January, 1953, the opinion of Dr. David McL. Greeley (director of teaching in pediatrics and acting head of the pediatric service at the hospital) was that he couldn't 'imagine any worse equipment in the United States.' During that period, as an example, newborn premature infants in need of incubation were kept in makeshift wooden boxes heated by ordinary light bulbs. When such a patient needed to have oxygen administered, this was done by inserting a piece of tubing through a hole in the bottom of a 'Dixie cup,' so-called, which was then placed upon the baby's face. During this procedure, however, the light bulbs had to be turned off, for fear of explosion: 'You could give them heat or oxygen, but not both at the same time.'

"Repeated requests made to the hospital administration, at least since early 1953, were met with silence. Dr. George Flessas (chief resident in pediatrics until June 15, 1954) stated to my assistants: 'We sent numerous requests to the higher administration, requests for new-type bassinets, more nurses, more equipment, more laboratory equipment, all those things necessary to run an efficient service. I know these requests went in. I saw them in the basket of Mrs. Harrington, the basket next to mine. It obtained through the whole hospital. My experience is, in 20 years they have been cutting corners to show savings. In order to get this hospital up to par, all this money they saved in 10 years has got to be put back. If the Pediatric Department had adequate enough budget so doctors could make recommendations for necessary equipment, I think the whole caliber of the hospital would be better. With nurseries for premature without incubators, you are going to have a full-time job trying to keep them alive.' . . .

"While all the people of Boston would applaud measures of economy designed to eliminate waste in governmental procedures, I cannot believe that they would have approved of any such policy as that which my investigation indicates was adopted with reference to the management of their city hospital. The welfare and safety of sick people, and especially of sick children, should come before the tax rate in the consideration of every thoughtful person.

"My recommendation to you is that the department take all possible steps in the immediate future to bring to the attention of the hospital trustees, and especially to that of the Mayor's office, all of the deficiencies which it has found to exist within the hospital. For this purpose, I should be glad to put at the disposal of the department the source material gathered

during my investigation, all of which indicates the wholehearted agreement of the personnel of the hospital as to the accuracy of your appraisals of its needs. The department should see to it that no one concerned with the acquiring of adequate and proper equipment, and with the appropriation of the necessary monies therefor, can possibly misunderstand the existence of those deficiencies and their responsibilities to remedy them. Not until the Boston City Hospital is once again the great and proud institution which at one time it was, should there be any decrease in the intensity of such a program of constructive criticism."

Cape Cod Hurricane Disaster.

Within hours after Hurricane "Carol" unleashed all her devastating force on southeastern Massachusetts on August 31, 1954, I made a personal survey by automobile, extending the entire length of Cape Cod, consulting the local officials and citizens generally and in every way possible assisting local law enforcement officers in the performance of their heavy duties during the emergency. It was inspiring to see the courage and poise so evident everywhere, and for the most part the situation was kept well in hand in spite of the great destruction that had been wrought.

Subsequently, the General Court, in extra session assembled, made liberal provisions financially and otherwise for alleviating the distress and damage caused by the storm (St. 1954, c. 689, approved September 8, 1954). I and my staff were available and availed of in no small measure by all concerned in the interpretation and administration of the hurricane legislation.

Distress and damage caused by Hurricane "Carol" were, of course, augmented by the succeeding Hurricane "Edna" on September 11, 1955. However, in one way or another, much of the damage caused by "Edna" was handled by chapter 689, supplemented later by further legislation.

Civil Defense.

An Assistant Attorney General sat on the Civil Defense Claims Board which paid medical benefits to those injured in Civil Defense training operations. In addition, various executive and administrative orders relative to making adequate provisions for disaster were approved.

Contributory Retirement Appeal Board.

By virtue of the provisions of G. L. c. 32, § 16, when I first assumed office I assigned one of my Assistant Attorneys General to sit, together with a designee of the Commissioner of Insurance and a representative of the Director of the Division of Accounts, as the Contributory Retirement Appeal Board for the purpose of hearing appeals of persons aggrieved by reason of the decisions of the various Retirement Boards — State, county, municipal and the Teachers' Retirement Board.

The pressure of work upon this board seems to be increasing. Appeals

often involve matters of vital importance, not only to the applicants and the retirement boards, but also to the general public, which contributes generously to the retirement allowances. For the most part, appeals arise when local retirement boards deny applications for accidental disability retirement allowances and accidental death benefits under the provisions of sections 7 and 9 of chapter 32. Allowances under both these sections are substantial. Accordingly, testimony is taken by sound recording instruments and every effort is made to assure that these cases are finally and wholly heard and adjudicated in accordance with the law and the evidence.

Unfortunately, there are few Supreme Judicial Court decisions interpreting sections 7 and 9, and the board has been largely obliged to blaze the trail with its own decisions. Two cases within the last year in which the appeal board affirmed the decisions of local retirement boards were appealed to the full bench of the Supreme Judicial Court. In both cases, after argument, the full court affirmed the action of the appeal board. The case of *Hunt* v. *Contributory Retirement Appeal Board*, 332 Mass. 625, apparently settled one important phase of accidental disability retirement law when, in interpreting the provisions of section 7 relative to applications for accidental disability retirement allowances, it said:

"These provisions make it abundantly clear that there can be no retirement for accidental disability unless the local board finds that the disability is both total and permanent. And before this finding can be made the board must have before them as evidence a certification 'of such incapacity' by the medical panel provided for in § 6 (3). Such certification, it is true, is not binding on the local board (*Cassier* v. *Contributory Retirement Appeal Board*, 332 Mass. 237) but without it the board cannot make a finding that the applicant is 'totally and permanently incapacitated'; it is, in other words, a condition precedent to an accidental disability retirement allowance."

Whether this language will be construed to apply to the appeal board, as well as the local boards, was awaiting decision as the fiscal year closed.

Another serious question of law which has confronted the board is whether the Hart Act (c. 32, § 94) so-called, creating under some circumstances a presumption of service-connected disability, applies to application for death benefits under section 9 of chapter 32. A petition for a writ of certiorari against the board to determine this question is pending in the Supreme Judicial Court. However, a decision adjudicating this question is expected to result from another action due to be argued before the full court in the fall.

The board sits regularly, hearing all appeals and adjudicating them — finding the facts upon the evidence and interpreting and applying the innumerable provisions of chapter 32 relative to contributory retirement allowances.

Cushing General Hospital.

In accordance with chapter 469 of the Acts of 1954, the Department of the Attorney General handled the conveyance of the Cushing General Hospital in Framingham from the United States Government to the

Commonwealth of Massachusetts. The hospital will be operated by the Department of Mental Health for the care and custody of elderly persons exclusively. It will be a unique institution in the Commonwealth.

As a result of many conferences with attorneys for the United States Department of Health, Education and Welfare, conveyance of the former Veterans Administration facility was advanced to January 4, 1955, which will result in accelerating the opening date of the hospital for elderly citizens of Massachusetts.

This completely equipped hospital was valued by the Federal Government at $4,500,000, exclusive of contents. The property consists of a tract of land containing 144.53 acres on which are located numerous hospital buildings, an auditorium, a chapel, a warehouse and a railroad siding. The structures contain a variety of equipment ranging from ice-making machines to motion picture projectors. Not only was the property acquired by the Commonwealth without cost, but a substantial portion of the operating expense of the new facility for the State's aged is to be borne by the Federal Government.

Doctor-Lawyer Fee Splitting.

In the spring of 1954 the Massachusetts Claim Investigation and the Massachusetts Medical Society filed complaints with the Board of Registration in Medicine, charging that certain East Boston and Winthrop doctors had been guilty of fee splitting with a certain lawyer. The fee splitting allegedly was done by the lawyer who collected money from insurance cases involving court claims by patients of the respective doctors. The latter, it was contended, had referred said cases to the lawyer in each instance. Out of the settlement, the lawyer would send to the doctor not only payment for his medical services but also would "kick back" to the doctor part of the lawyer's legal fee.

The Board of Registration in Medicine, acting on such complaints, summoned the doctors before it, charging them with fee splitting as an offence for which their licenses to practice could be revoked or suspended. The board claimed jurisdiction to try the doctors on these charges under G. L. c. 112, § 61, which grants power to the board to suspend or revoke a doctor's license where it appears to the board, after hearing, that he is guilty of "gross misconduct in the practice of his profession."

Early in 1955 one of the doctors brought a petition in the Superior Court for a determination that the board did not have jurisdiction over the case. The petition was reported without decision to the Supreme Judicial Court and was heard by that court in its May 1955 sitting, an Assistant Attorney General arguing the case for the State board. A decision, expected early in the fall of 1955, will determine whether or not the Board of Registration in Medicine has jurisdiction to hear cases involving fee splitting by a doctor with a lawyer.

Division of Employment Security.

Activities of two Assistant Attorneys General assigned to assist the Division of Employment Security have been centered largely in handling cases against employers who were found to have failed to pay their proper quarterly tax contributions into the Massachusetts State Employment Security Fund. At the start of the fiscal year, 440 of the 498 cases on hand were employer contribution cases. Fifteen new referrals raised the total to 513 cases, of which number 185 were closed by the two Assistants before June 30, 1955. In 36 cases payment resulted from litigation; 63 were transferred to other attorneys; 67 were adjudged uncollectible; and 19 were otherwise closed.

In these cases a total of $103,568.91 was collected during the fiscal year. Included was one check for $33,070.10, largest lump sum collection of a delinquent account in the history of the Massachusetts Division of Employment Security and representing full contributions for 13 quarters due the Commonwealth from a large Boston corporation. Some 22 months' activity by members of the Attorney General's unit preceded liquidation of this claim. Involved were a number of legal proceedings in Suffolk Superior Court and personal conferences with four Federal agencies in Washington, D. C. The two Assistants also appeared before the Supreme Judicial Court and the United States Court of Appeals to represent this division.

Guaranty Fire and Marine Insurance Company.

Upon information received that the Guaranty Fire and Marine Insurance Company of South Carolina was about to withdraw from the Commonwealth its assets on deposit with various banks in the city of Boston, which assets substantially represented the collection of premium payments by policyholders of automobile insurance, I brought a bill in equity against the company.

The bill of complaint alleged that the Guaranty Company, although not authorized by the Insurance Commissioner to do business in Massachusetts, was actually issuing policies of insurance on automobiles to Massachusetts residents, all of which was in violation of G. L. c. 175.

The bill in equity sought to and did enjoin the insurance company from withdrawing or negotiating or transferring any and all of its bonds, common stocks, United States Treasury Notes, United States Bonds and cash on deposit with various banks in the city of Boston.

Following a hearing before Justice Morton of the Suffolk Superior Court, he allowed a decree under the terms of which: (a) all Massachusetts policyholders were to be repaid the unearned premiums on their policies; and (b) all claims of Massachusetts policyholders were to be paid from and out of the said funds and assets of the Guaranty Company.

This prompt and summary action prevented the flight of the assets of the corporation which were obtained from citizens of Massachusetts, and insured the payment of all of their just claims as well as reimbursement

of their monies expended for insurance coverage. As a result of this action, no citizen of Massachusetts has suffered loss.

The action proved timely and fortunate, for in June 1955 the Guaranty Fire and Marine Insurance Company was placed in the hands of a receiver in South Carolina because of its unsound methods of operation and financing.

Illegal Dental Advertising.

The General Court in 1954 passed chapter 408 of the Acts of 1954, in substance prohibiting dental laboratories from advertising their services in the newspapers, magazines or by radio or television. This act was passed to alleviate a situation where certain dental laboratories were advertising to the general public inexpensive dental plates. Through such advertising the general public flocked to the doors of the dental laboratories. These laboratories then would refer such prospective customers to a particular dentist or dentists to take the impressions necessary before false teeth could be made by the laboratory.

The dental laboratories involved claimed that the statute was unconstitutional, and shortly after the law was passed brought a petition for a declaratory decree in the Suffolk Superior Court. The case was reported without decision to the full bench of the Supreme Judicial Court upon an agreed statement of facts.

The case was argued before the Supreme Judicial Court at the February 1955 sitting by me, representing the respondents, the State Board of Dental Examiners, after I had filed a brief. In the spring of 1955 the Supreme Judicial Court decided that the statute was constitutional as a reasonable exercise by the Legislature of its police power, in protecting the dental profession against the siphoning of business away from dentists in the community into the hands of a very few dentists because of the advertising by the laboratories and their referral of customers to said one or two dentists. *Perlow* v. *Board of Dental Examiners*, 332 Mass. 682.

In addition, the Supreme Judicial Court found that the new legislation had a reasonable tendency to protect the public health against inferior professional work.

Insurance and Motor Vehicle Appeal Boards.

An Assistant Attorney General was assigned to attend all hearings of the Insurance Appeal Board and the Board of Appeal on Motor Vehicle Liability Policies and Bonds. During the past fiscal year he attended a total of 5,664 hearings before the Motor Vehicle Appeal Board, including 5,450 cancellation and refusal cases, 153 appeals from registrar's decisions, and 61 points cases.

He also sat with the Insurance Appeal Board while it was engaged in establishing rates of insurance premiums.

Massachusetts Highway Safety Committee.

Under chapter 570, Acts of 1953, the Attorney General was appointed a member of the permanent Massachusetts Highway Safety Committee, headed by the Governor of the Commonwealth and the Registrar of Motor Vehicles as permanent chairman. The function of the committee is to arouse and enlist public cooperation in an official traffic accident prevention program in a concerted effort to cut down the appalling toll of motor mishaps. Special emphasis is placed on regulation and control of traffic during the critically hazardous Fourth of July, Labor Day and Christmas-New Year holiday periods.

I assigned an Assistant Attorney General to meet regularly with this large and important committee.

Mental Health.

Collections against estates for claims for maintenance and support of patients in the mental health institutions are handled by the Department of the Attorney General. For the fiscal year from July 1, 1954, to June 30, 1955, exactly 29 cases were settled and the sum of $63,652.01 was collected for the Commonwealth.

Milk Control Commission.

An Assistant Attorney General was assigned to work with the Milk Control Commission to represent the Commonwealth in a United States Department of Agriculture hearing which was conducted from April 18, 1955, through May 5, 1955. Matters under discussion were concerned primarily with the extension of the existing Federal Order Markets in Boston, Worcester and Springfield. An overwhelming number of Massachusetts milk producers, as well as the commission, were in opposition to the proposals which, if allowed, would have included all of the following counties: Suffolk, Middlesex, Worcester, Franklin, Hampshire and Hampden.

All prior hearings of this nature had resulted in the total extensions of the Federal orders as proposed. On this occasion the only extension allowed covered four towns of Middlesex County contiguous to the Boston Federal Order. There presently are exceptions pending to such allowance. On all other matters before the hearing, the United States Department of Agriculture decided favorably, as the Massachusetts milk producers and the Milk Control Commission desired.

I also assigned an Assistant Attorney General to attend all meetings of the Milk Regulation Board, which includes the Chairman of the Milk Control Commission, Commissioner of Agriculture, Commissioner of Public Health, and the Attorney General.

Motor Tort Cases.

All automobile accident cases, involving the operation of Commonwealth-owned motor vehicles by State employees and occurring during the scope of their employment, are handled by the Department of the

Attorney General. Under G. L. c. 12, § 3B, cases of this nature may be settled for a sum no greater than $5,000 per person for injuries or death and a sum no greater than $1,000 for property damage. Where counsel for the plaintiff requests larger payments and refuses settlement, we are obliged to go to trial.

From July 1, 1954, to June 30, 1955, we disposed of a total of 158 motor tort cases either by settlement or trial. Forty additional cases also were closed because of the statute of limitations.

Pollution Abatement.

Following action by the Public Health Council of the Massachusetts Department of Public Health on January 11, 1955, the Commissioner of Public Health referred to me the question of the responsibility of the city of Northampton to provide sewage treatment facilities which the Department of Public Health had held are essential to the purification of the Connecticut River, into which Northampton conveys its waste matter.

As early as August 9, 1888, the then State Board of Health advised the Board of Sewer Commissioners of Northampton relative to the disposal of sewage from that city. In 1945 the Legislature passed a comprehensive stream pollution control law (St. 1945, c. 615) and in 1947 the Department of Public Health asked Northampton for its proposed plans to construct a municipal treatment plant. The city was authorized to borrow up to $400,000 for such a project, plans were prepared and approved, but the city failed to act. On December 7, 1954, the Director of the Bureau of Accounts determined, at a public hearing in Northampton, that the city had the ability to finance a plan for pollution abatement. When no action still was forthcoming, the matter was referred to the Attorney General under G. L. c. 111, § 5, as amended by St. 1945, c. 615.

After conferences with the mayor and city officials of Northampton, I held a meeting at the State House on February 3, 1955, attended by officials of neighboring towns in the Connecticut River Valley, as well as the mayor and city officials of Northampton, and representatives of the Department of Public Health. On April 21, 1955, the Northampton City Council requested legislation authorizing the city of Northampton to borrow up to $1,050,000 for the construction of sewage treatment works. The Legislature passed such a bill and it became St. 1955, c. 462, when it was signed by the Governor on June 23, 1955.

Public Administration.

When a person having property dies without leaving a will, and without being survived by a widow, widower or kindred, his or her estate, after the payment of debts and the expenses of administration, escheats to the Commonwealth under G. L. c. 190, § 3, cl. (7). In the past fiscal year, $55,828.13 was received by the Attorney General as escheats to the Commonwealth.

Such estates are administered and the respective residual sums are paid into the State treasury by 62 public administrators in the Commonwealth,

each appointed for a term of five years. A public administrator owes a solemn duty to administer the estate over which he has control as though he were a private administrator. His appointment imposes a great trust upon him. Immediately, he must arrange for burial of the deceased. Thereafter, he must marshal the assets of the estate and make a diligent search for heirs. Finding none, he must, of course, turn over the remainder of the estate to the Commonwealth. Of late there is a growing tendency on the part of public administrators to consult the Attorney General on various matters.

Since chapter 194, section 4, provides that the State Treasurer must be made a party to a petition for public administration and all subsequent proceedings, and one of my duties is to "appear for the commonwealth and for state departments, officers," etc., I appear in behalf of the Treasurer and Receiver General on public administration matters in connection with the original appointment, the sale of real and personal property, approval of accounts and the question of the genuineness of alleged heirs. I have prepared a brief for hearing before the full bench of the Supreme Judicial Court this fall upon an appeal by alleged heirs.

In addition, I investigate suits for personal services, of which there are a large number.

Public Utilities — Telephone Rate Case.

The Attorney General serves as legal counsel to the State Department of Public Utilities, rendering opinions, appearing before the Single Justice of the Supreme Judicial Court for the Department of Public Utilities, whenever sued, bringing bills in equity to enforce decrees of the Department of Public Utilities and representing the Department on appeals to the Supreme Judicial Court. In the past fiscal year I was successful on every occasion when called on to represent the Department of Public Utilities. Most important single case was the question of increasing telephone rates, which involved some new concepts of law.

New England Telephone and Telegraph Company v. *Department of Public Utilities*, 331 Mass. 604. — This was an appeal by the company under G. L. c. 25, § 5, to review orders of the Department of Public Utilities disallowing a requested rate increase of $10,225,000, filed December 10, 1952. Hearings began February 17, 1953, but final adjudication did not come until during the fiscal year just ended, with every legal question decided in favor of the Department of Public Utilities and the Attorney General. The case was greatly involved.

The Telephone Company, claiming the decision of the Department of Public Utilities to allow it only $7,446,800 was confiscatory and unconstitutional, raised three major points in its appeal to the Supreme Judicial Court: (1) the rate base, (2) rate of return, and (3) debt ratio.

(1) For the first time in this Commonwealth the question was raised as to whether the Department of Public Utilities was obliged to use the original cost (prudent investment) theory in arriving at a rate base, as had been its policy, or whether the department should use, instead, the fair

value or reproduction cost theory on which the Telephone Company based its figure for rate increases. I contended the Department of Public Utilities had a right to use the original cost theory and was not required by our Constitution to use the fair value theory in reaching a rate base. The Supreme Judicial Court upheld my contention. Difference between the original cost and the fair value figure urged by the company was 52.9 percent, resulting in savings to ratepayers running into millions of dollars. In this case, the Attorney General invoked for the first time a new theory of law, namely, the exclusion of any allowance for cash working capital from the rate base, and the Supreme Judicial Court upheld me. This meant a reduction of $2,444,000 from the rate base established by the company, with resultant added savings to ratepayers. In addition, items of $5,391,000 for plant under construction and $136,000 for plant held for future use were deducted from the company's rate base, and the Supreme Judicial Court decided the Department of Public Utilities had a legal right to do so.

(2) As to the rate of return, the Telephone Company asked for 7.33 percent. The Department of Public Utilities allowed 6.313 percent, which the company claimed in its appeal was confiscatory and unconstitutional. Again the Supreme Judicial Court upheld the Attorney General, ruling the 6.313 percent rate was neither confiscatory nor illegal. This meant additional savings to ratepayers in excess of $4,000,000.

(3) In connection with the debt ratio, the Telephone Company had asked 35-percent debt capital and 65-percent equity capital, but the Department of Public Utilities set the ratio at 45-percent debt capital and 55-percent equity capital. Once more the Supreme Judicial Court upheld my contention, on behalf of the Department of Public Utilities, meaning further savings of about $90,000 to ratepayers.

However, although every legal question thus was decided in favor of the Department of Public Utilities and the Attorney General, and the increase allowed by the department would be substantially correct, many factors entered the proceedings after the filing of the rate schedules by the company on December 10, 1952. There were two wage increases of over $2,000,000 each, causing added expenses of over $4,000,000 and decreasing net earnings by $1,500,000; also increased costs for new construction, causing the rate base to be raised to reflect a substantially increased investment. The Supreme Judicial Court further found that the effect of inflation upon the company's earnings was such as to require another and current study of its operating results. Accordingly, it recommitted the case to the Department of Public Utilities to review its findings in accordance with this opinion.

On November 19, 1954, the Telephone Company filed a new schedule of rates, asking for further increase in gross revenues in the sum of $6,500,000. The recommittal and new petition were heard together and the rates filed on December 10, 1952, were allowed, but the request for $6,500,000 was cut to $5,515,000 and the rate of return was reduced from 6.313 percent to 6.25 percent. In order to give the company a $1.00 increase, the Department of Public Utilities must approve a rate raise of

$2.213, because of Federal income tax, which takes 52 percent of the net earnings of the company.

Cambridge Electric Light Company v. *Department of Public Utilities.* — This is another rate case which was appealed to the Supreme Judicial Court under G. L. c. 25, § 5. Issues involved were the same as in the telephone case; namely, rate base (this company also contended we were legally bound to use fair value in arriving at a rate base), debt ratio, rate of return, etc. The decision in our favor in the telephone case caused the Cambridge Company to withdraw its appeal on these issues.

As a result, the only issue now to be tried is whether the Department of Public Utilities is obliged, as a matter of law, to establish rates for the company designed, under reasonably efficient management and in times of normal or better-than-normal business activity, to allow the company sufficient revenues and earnings to maintain a fair market value of each of the company's 90,600 shares of stock outstanding at approximately $150 a share. I have prepared a brief on this case and it will be argued at the October sitting of the full bench of the Supreme Judicial Court.

Greyvan Storage, Inc. v. *Department of Public Utilities, 332 Mass. 712.* — This was an appeal from decision of the Department of Public Utilities dismissing Greyvan's petition for the right to use distinguishing plates on two motor vehicles owned by an independent contractor and operated by him under a contract with the plaintiff. The Supreme Judicial Court found for us, saying it perceived no error in the refusal of the Department of Public Utilities to grant Greyvan's application.

James E. Tatten et als. v. *Department of Public Utilities, 332 Mass. 448.* — This was a bill in equity brought by three owners to review an order of the Department of Public Utilities granting the Algonquin Gas Transmission Company the right to take by eminent domain easements over the property of the aforementioned owners. The bill also sought to review a second order refusing to revoke the first order.

This was a very involved case, because it pertained to a certificate of convenience and necessity issued by the Federal Power Commission, revocation of the certificate by the Court of Appeals, the effect upon the order of the Department of Public Utilities, authority of the Department of Public Utilities to revoke right to take by eminent domain, status of the parties after the decision of the Court of Appeals, etc. The case was argued by me before the full bench on two occasions and the Supreme Judicial Court found for us both times. All issues were decided in our favor and the orders of the Department of Public Utilities were affirmed.

Town of Wenham v. *Department of Public Utilities, 333 Mass. 15.* — This was an appeal from decision of the Department of Public Utilities granting an exemption from the operation of a zoning by-law for the purpose of erecting a gatehouse by the Haverhill Gas Company in a residential district, for distributing gas through its system. The full bench of the Supreme Judicial Court ruled that erection of a gatehouse, as found by the Department of Public Utilities, was reasonably necessary for the convenience and welfare of the public, and affirmed the department's decision.

Real Estate.

The Attorney General represents the interests of the Commonwealth of Massachusetts before the Land Court. From July 1, 1954, to June 30, 1955, I processed a total of 143 Land Court cases. In this connection, I represent the public interest in all cases and the protection of the rights of the public in highways, great ponds, the Massachusetts coastline, harbors, creeks, rivers, public lands, etc.

With the cooperation of justices of the Land Court, I have instituted a new procedural policy: at the present time, before the issuance of decrees which may involve a public interest, the Attorney General is given an opportunity to read the proposed decree for approval and, if necessary, to suggest change or assent thereto. As a result of the new procedure, the processing of Land Court cases in which the Commonwealth is a party has been speeded up.

It is common knowledge that the volume of business in the Land Court has tripled since the close of World War II. Formerly, it was the practice of the Department of the Attorney General simply to answer a Land Court petition in accordance with data from the various State departments. The case then would remain dormant until petitioner's counsel would mark the case for hearing or, under Rule 85 of the court, the case would be marked "Inactive."

Under my new policy, upon receipt of a Land Court citation, I now disseminate copies to those departments which have any potential interest. The departments are requested to furnish me with an adequate report by a specific date or, if they need further time, to inform me of the date I can expect such a report. Upon receipt of the various reports, I draft the answer of the Commonwealth or withdraw if no interest is indicated. With my answer, I usually draft a stipulation which will meet with the Commonwealth's requirements. The stipulation and a copy of the answer as filed in the court are then mailed to petitioner's counsel with a return envelope and a letter setting forth the details. We have received the cooperation of more than 90 percent of Land Court counsel in this matter and in many cases letters indicating their satisfaction with the system have been received. It is my opinion that the relationship between the justices and staff of the Massachusetts Land Court and the Department of the Attorney General is at an all-time high.

In addition to Land Court matters, I have handled the titles and opinions thereto for the erection of new armory buildings throughout the Commonwealth. In this connection I have represented the Military Department of Massachusetts before the National Guard Bureau of the United States Government. As a result of this activity, new armories are either under construction or about to be started in Braintree, Bourne, Chicopee, Gardner, Newburyport, Ware and Webster.

I also drafted the long-range lease of the "Scusset Beach Recreational Area" from the United States Government, Department of the Army, to the Commonwealth of Massachusetts. I render service to all towns of

the State, through town counsel or selectmen, in all matters relating to public lands, highways or waterways.

Splitting Insurance Premiums.

As a result of complaints received by the Attorney General concerning alleged splitting of commissions on insurance policies placed on financed automobiles by and between the financing bank, insurance companies and insurance agents, I caused an intensive investigation to be conducted over a period of three months. Premiums in excess of $1,000,000 yearly were being paid for various insurance coverages.

Following the investigation, I filed a bill in equity on behalf of Insurance Commissioner Joseph A. Humphreys, which named as respondent the National Shawmut Bank, the Pacific National Fire Insurance Co., the Newfoundland American Insurance Co., and the General Agency of OBrion, Russell & Co. This bill in equity alleged that the provisions of G. L. c. 175 were violated in that it was agreed upon by all of the parties respondent, their agents, officers and employees as follows:

"A. That the Pacific Co. issue a master finance policy covering the Shawmut Bank and car purchasers against loss from theft, fire and collision on automobiles financed through and by the Shawmut Bank.

"B. That certificates of insurance would be issued under said master policy to each car purchaser and that the premium for said insurance be added to the amount of the loan with the entire total bearing interest.

"C. That the Shawmut Bank pay by check the total of said premiums charged to the purchasers of OBrion, Russell who would deposit the proceeds thereof in their entirety to the account of Pacific Co. in the Shawmut Bank.

"D. That OBrion, Russell act as disbursing agent for all parties respondent in accordance with the provisions of the agreement among them.

"E. That Pacific Co. receive out of said account an amount equal to 10 percent of the total earned premiums.

"F. That OBrion, Russell receive out of said account an amount equal to 5 percent of the total earned premiums.

"G. That in addition thereto, OBrion, Russell pay out of said account the expenses arising out of the investigation and/or adjustment of claims under said policies, and make payments of settled or adjudicated claims therefrom.

"H. That the Newfoundland Co. receive out of said account an amount equal to 5 percent of the total earned premiums.

"I. That OBrion, Russell pay the remainder of the total earned premiums to the Newfoundland Co.

"J. That the Newfoundland Co remit the same remainder referred to in the previous Paragraph I in its entirety to the Shawmut Bank.

"K. That the Newfoundland Co. execute and deliver an agreement to reinsure the Pacific Co. for any and all losses sustained under the said master policy issued to the Shawmut Bank in excess of 80 percent of the earned premiums up to a ceiling of 300 percent.

"L. That the Shawmut Bank execute and deliver an agreement to pay to the Newfoundland Co. an amount equal to all losses over and above 80 percent of the earned premiums up to a ceiling of 300 percent."

On March 4, 1955, a final decree was allowed and entered by Justice Hudson of the Suffolk Superior Court at Boston, which enjoined rebates from insurance premiums on financed automobile risks. As a result of the action, rebates to financing banks were decreed to be in contravention of the State insurance laws.

Thus notice was served that this type of improper competition with regular licensed brokers would not be tolerated in Massachusetts. The court decree ended the agreement which had deprived individual brokers of the opportunity to write such insurance and share in the annual commissions totaling over $1,000,000.

State Contracts.

During the fiscal year I disposed of 13 contract claims which had been brought against the Commonwealth under G. L. c. 258. Several State departments were involved in these claims by contractors for extras on State jobs. The suits totaled $1,224,245.81, but they were adjudicated for only $118,026.94, representing a net saving of $1,106,218.87 for the Commonwealth; in other words, the amount paid was approximately nine per cent of the total amount of claims. Six of the claims were settled without trial and three during trial. In two of the claims the State paid nothing.

Several other contract claims are pending, and are in various procedural stages. The rate at which new contract actions for additional compensation for alleged extra work are brought, has dropped from an average of about three per month in 1953 to about one per month over the past year. There has also been a decrease, at about the same ratio, in the number of petitions by subcontractors to establish liens under G. L. c. 30, § 39.

John Bowen Company, Inc. — The Bowen Company cross actions, dating back to May 21, 1953, were tried during the past fiscal year before Justice Kirk in the Superior Court without a jury. *Commonwealth* v. *John Bowen Company, Inc.* was a contract action to recover $789,712.20 paid on monthly estimates under contract #1 of the Department of Public Health for construction of the Chronic Diseases Hospital at Forest Hills, which had been held illegal by the Supreme Judicial Court on April 8, 1952, in *Gifford* v. *Commissioner of Public Health*, 328 Mass. 608. The cross action is *John Bowen Company, Inc.* v. *Commonwealth*, a petition under G. L. c. 258, to recover on a *quantum meruit* basis a balance of $633,247.23 alleged to be due after credit of the above $789,712.20 for the fair value of the work done under contract #1 to the date of the Supreme Judicial Court decision. By order of the court, trial was limited to the issue of liability. Justice Kirk found for the defendant in each case. While appeals by both parties were pending, agreement for disposition of the cases on the basis of the findings for the defendants was approved by the Department of Public Health. Releases were exchanged and the Commonwealth released to the Bowen Company a balance of $1,000,000, accrued on contract #1A

for the completion of the Shattuck Hospital, which had been held under G. L. c. 29, § 17, as security for payment of the amount sought to be recovered by the Commonwealth. The Bowen Company's release included a waiver of its claim for interest on the sum so held.

Route 9 Crossover Closings. — A petition for a writ of certiorari was brought by an owner of land in Westborough on the north side of Route 9 to review the action of John A. Volpe, Commissioner of Public Works, and the Associate Commissioners in ordering the closing of a crossover opening located opposite the land of the petitioner, affording him immediate access to the east-bound lane of the divided highway. Justice Hurley of the Superior Court sustained a demurrer and dismissed the petition. The petitioner has taken an appeal to the Supreme Judicial Court, and the case should be heard during the fall of 1955. The case tests the validity of the entire program of crossover closings undertaken as a safety measure to reduce the serious accident rate on Route 9. Justice Hurley's ruling held the closings to be valid.

State Housing Board.

The Attorney General's duties in connection with the State Housing Board were further expanded this past fiscal year as a result of the operation of a new law, chapter 667 of the Acts of 1954, providing for the housing of elderly persons of low income. Section 26VV of this statute authorizes State financial assistance for such housing projects, and it is the responsibility of my office to review and approve contracts for same. During the year five such contracts were reviewed and approved, and one was reviewed and disapproved, subject to correction of defects.

Otherwise, the operations of my special unit, located with the board, fell under six general categories, as previously reported:

1. *Rendering written opinions on general legal problems confronting the board.* — There were 31 opinions prepared and submitted, as well as 43 legal advice memoranda. Opinions have to do with substantive law, usually involving original and novel questions, setting precedents; legal advice memoranda pertain principally to routine advice on administrative matters and reviews. Both are indexed for reference.

2. *Review for approval of title abstracts and other problems involving purchase or sale of land.* — Total of 60 opinions submitted to board.

3. *Administration of organization transcripts of approximately 88 active housing authorities.* My work is to keep all these transcripts in proper form, so the board may be certain the authority is legally organized as an authority whenever it presents a problem for decision of the board. Because of close cooperation on the part of a new board employee handling these transcripts, the number of errors and omissions found in these records was greatly reduced during the year and it was possible to correct many of the deficiencies by informal conferences without the necessity for written memoranda.

4. *Review for approval of original and refunding note and bond issues.* In all, 44 note issues, both original and refunding, involving the borrow-

ing of a cumulative total of $71,976,000, were reviewed and approved. Decrease in the number and amount from last year is due to the fact that last year's approvals included many approvals withheld during prior years because of defects in the organization transcripts of particular housing authorities.

5. *Attendance at or conducting meetings involving contract disputes, making findings and writing decisions.* Total of 348 such hearings and/or conferences attended or conducted, in many of which Assistant Attorneys General assisted in or made findings in behalf of the board and wrote decisions in conformity therewith.

6. *Litigation and trial work.* Six civil service cases, commenced during the prior fiscal year, were completed, being decided favorably. Appeals from the decision of the Civil Service Commission are pending in two of these cases. We also appeared before various courts in a number of matters. We accompanied and assisted the chairman of the board in the conduct of a public hearing held February 11, 1955, in the Gardner Auditorium in connection with the proposed "New York Streets" Redevelopment Project in the city of Boston. And we aided the chairman and advised him with regard to the various legal problems involved in his decision based upon that hearing.

In addition, I appeared before a single justice of the Supreme Judicial Court on behalf of the chairman of the State Housing Board, and before the full bench of the Supreme Judicial Court in the case of *Chairman of the State Housing Board* v. *Civil Service Commission*, 332 Mass. 241. This case was of great interest and importance to the public, various political factions and particularly to the veterans, as it involved the clarification of chapter 30, section 9A, insofar as the commencement of a veteran's tenure of office in order to obtain the protection of the same chapter and section is concerned. Decision of the court was favorable and set a precedent for the guidance of all individuals and State agencies directly affected by this act. An unusual amount of time and effort was required in preparing my brief and argument for the hearing, as it was a question of law never before decided.

Location of my Assistants with the board has resulted in a considerably closer integration with that organization than if we were situated apart, and has made for excellent cooperation and high efficiency in functioning, alike with board officers and attorneys for local housing authorities.

We have sat with the chairman and other officers of the board to consider legislation amending the Housing Authority Law, and we prepared 19 bills which were submitted to the 1955 Legislature.

Sunday "Censorship" of Motion Pictures.

Under G. L. c. 136, § 4, no license granted by local authorities for the holding of a public entertainment on Sunday shall have any effect "unless the proposed entertainment shall have been approved in writing by the commissioner of public safety as being in keeping with the character of the day and not inconsistent with its due observance."

The commissioner refused to give his written approval of the proposed showing of a certain motion picture on Sundays, and the exhibitor thereupon brought a petition for a declaratory judgment against him and the local licensing authorities, seeking a determination as to the commissioner's legal right to prevent such an entertainment by withholding his approval under the statute. The petitioner, relying on *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, and other recent Federal decisions establishing that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments," expressly challenged the constitutionality of said section 4. Thus the Department of the Attorney General was brought directly into the case, under G. L. c. 231A, § 8, and I caused a demurrer to be filed.

This demurrer was sustained and the resulting appeal was argued before the Supreme Judicial Court on May 5, 1955. At the same time, another case, in which the same issues were raised, was also taken under advisement by the court. The decisions in these matters had not come down at the end of the fiscal year; however, on July 6, 1955, they were handed down, and G. L. c. 136, § 4, was declared unconstitutional, as a prior restraint on the freedom of speech and of the press, as applied to the petitioning exhibitor. *Brattle Films, Inc.* v. *Commissioner of Public Safety*, 333 Mass. 58; *Times Film Corporation* v. *Commissioner of Public Safety*, 333 Mass. 62.

While the clear effect of these decisions was to make unnecessary any application to the commissioner for his prior approval of Sunday showings of motion pictures, they left somewhat in doubt the duty of an exhibitor to follow the additional statutory requirement that licenses for such showings be procured from local authorities. This doubt was swept aside, however, by the enactment of chapter 742 of the Acts of 1955,which made clear that, notwithstanding the *Brattle* and *Times Film* decisions, local Sunday licenses must still be procured by motion picture exhibitors.

Town By-laws.

An important service to town voters is rendered by an Assistant Attorney General who promptly processes all town by-laws before they are placed in effect. Citizens affected thus have every assurance of the validity and propriety of local statutes without waiting for possible litigation leading to a court ruling. My policy has been to see that each by-law submitted for approval is carefully studied, acted upon and returned with all possible speed so as to minimize the uncertainty and embarrassment which might result from any delay. In the year ending June 30, 1955, a total of 214 town by-laws were thus processed.

Veterans' Services.

The Veterans' Division of the Department of the Attorney General, during the fiscal year ending June 30, 1955, handled a total of 3,179 cases, advising veterans and their dependents in matters relating to retirement, civil service, tax exemptions, pensions, education and loans. Further

assistance also was given to various veterans' organizations and State and local officials relative to such problems.

As a member of the Korean War Bonus Commission since its inception, I supervised the payment of more than $35,000,000 to our returning servicemen. Exactly 132,327 veterans (or their next of kin or dependents) have received $35,556,200 from the State in the 22 months ending June, 1955. Over 94,000 of these were servicemen who saw overseas duty and who collected $300 each. Disallowed bonus claims totaled only a relatively small two and one-half percent, considerably lower than the disallowed claims during the payment of World War II bonus. In this connection I desire to pay tribute to the close cooperation of local veterans' services officers with an efficient, smoothly operating State Bonus Commission office.

An Assistant Attorney General also sits with the Veterans' Bonus Appeals Board.

Workmen's Compensation.

An Assistant Attorney General appeared before the Industrial Accident Board in approximately 275 cases during the fiscal year ending June 30, 1955. These cases included not only claims by employees of the Commonwealth but also claims arising under sections of the Workmen's Compensation Act dealing with death claims and with reimbursement to insurers under certain conditions.

In connection with workmen's compensation cases, there were processed in the office of the Attorney General the following: employer's first report of injury, 5,530; doctors' bills, 2,500; agreements for compensation, 454; and agreements to resume compensation, 30.

In the payment of workmen's compensation benefits to injured State employees and to doctors and hospitals in the treatment of said employees under the provisions of G. L. c. 152, the Commonwealth expended the following monies: compensation payments, including dependency payments, $450,886.06; payment to doctors and nurses, $79,808.88; and payment to hospitals, $87,110.65.

Conclusion.

With the close of the third fiscal year during my tenure as Attorney General, I wish to reiterate that I am humbly conscious of the great honor and privilege involved in serving the Commonwealth of Massachusetts in the high office of chief law officer, and that I will continue to exert my sincerest efforts in behalf of the best interests of this State and all of our people.

Moreover, I would be remiss indeed if I did not again express my deep appreciation to His Excellency, the Governor of the Commonwealth, to members of the General Court, and to all the other constitutional officers of the State government for their always helpful cooperation and assistance in matters pertaining to Massachusetts.

I also wish to thank the district attorneys and all State and local police officials whose advice and aid have been invaluable in administering the Department of the Attorney General.

Finally, I commend my Assistant Attorneys General and all other employees in my office who have served so faithfully and efficiently, in many cases above and beyond the call of duty.

Only through the combined efforts of all these has it been possible for me to establish this record.

Respectfully submitted,

GEORGE FINGOLD,
Attorney General.

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DEPARTMENT OF THE ATTORNEY GENERAL

OPINIONS.

Rent Control — State Housing Rent Co-ordinator — When his Duties Terminate.

July 15, 1954.

Hon. Paul Goddard, *State Housing Rent Co-ordinator.*

Dear Sir: — You have requested my opinion with reference to the termination of the provisions of chapter 434 of the Acts of 1953 in so far as these provisions concern the powers and authority of the office of State Housing Rent Co-ordinator.

Section 14 of said chapter, the first sentence of which provided for the termination of the act, was amended by chapter 496 of the Acts of 1954, with an emergency preamble, which amendment struck out said sentence and inserted in place thereof the following:

"This act and all powers delegated herein shall terminate on June thirtieth, nineteen hundred and fifty-four; provided, however, that any city or town in which rent controls are in effect may vote to continue the provisions of this act in accordance with section twelve for an added period not exceeding nine months from said June thirtieth."

Section 12 of said chapter 434, to which reference is made, sets forth the procedure by which a city or town may, in the first instance, accept the provisions of the act. Section 14, as amended, provides that the same procedures shall be followed by cities or towns which continue rent controls for a further period.

Upon the basis of the foregoing facts, you request my opinion as to the following questions: —

1. Do the powers, responsibilities, rights and authority of the office of the State Housing Rent Coordinator, as provided for in St. 1953 c. 434, terminate on June 30, 1954?

2. If the answer to the foregoing is in the negative, are the powers, responsibilities, rights and authority of said office, during the period after June 30, 1954 in which cities and towns continue rent controls, identical with the powers, responsibilities, rights and authority which existed before that date?

A careful analysis of said chapter 434 as a whole leads clearly to the conclusion that the Legislature intended that the office of the State Housing Rent Co-ordinator should continue to carry on its duties and responsibilities during the period that cities and towns have rent control under the act.

Section 3 of the act provides for the appointment of a State Housing Rent Co-ordinator. It provides that he may prescribe forms, that "he shall be available, in an advisory capacity, to city and town rent boards," that he shall co-operate with the Federal Government. The general sense is that the Rent Co-ordinator shall serve as a guiding hand to local boards in the handling of their problems. These problems will continue so long as rent controls are in force.

Section 4 (*c*) requires approval and certification by the Co-ordinator before cities and towns can receive reimbursement from the Commonwealth of the forty percent of their expenditures to which the act entitles them. The function of the Co-ordinator in this respect is vital and continuing.

Section 14 of the act, as amended, states that the act shall terminate on June 30, 1954, *provided that any city or town may vote to continue the provisions of this act for a period not exceeding nine months.* Thirty-one cities and nineteen towns, representing a large proportion of the people of the Commonwealth, have so voted.

The words "the provisions of this act," given a natural meaning, must be taken to include *all* the provisions of the act. There is no question as to the authority of the Legislature to delegate its powers in this respect and to leave to cities and towns the question whether they wish to continue these provisions. *Commonwealth* v. *Hudson*, 315 Mass. 335, 342. *Opinion of Justices*, 234 Mass. 597. *Stockus* v. *Boston Housing Authority*, 304 Mass. 507. *Commonwealth* v. *Slocum*, 230 Mass. 180, 190. *Opinion of Justices*, 286 Mass. 611. The Legislature clearly intended that the office of the State Housing Rent Co-ordinator should continue to carry out its duties and responsibilities during the entire period that cities or towns retained rent controls. There is no reason to except from the continuation of the act those provisions relative to the Rent Co-ordinator whose function, so far as the communities which have adopted and continued rent controls are concerned, is a vital and essential one.

It may be noted, also, that the Legislature inserted in its budget for fiscal year 1955 two items — 0473–01 and 2604–01, the first providing for all expenses of the Co-ordinator's office, and the second for the expenses of reimbursement.

In conclusion, the answer to your first question is in the negative, and the answer to your second question is in the affirmative.

Accordingly, the office of the State Housing Rent Co-ordinator, and the Co-ordinator, continue to have and to exercise all the powers, responsibilities, rights and authority originally given to it and to him by said chapter 434, and will continue to have and to exercise, under the present circumstances, such powers, responsibilities and rights until March 31, 1955.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Tenement House Act — Revocation by City of its Acceptance of Act.

JULY 21, 1954.

ROBERT E. ARCHIBALD, M.D., *Deputy Commissioner, Department of Public Health.*

DEAR SIR: — You have recently asked this department for an opinion as to whether the city of Somerville can revoke its acceptance of the "Tenement House Act."

I understand that chapter 144 of our General Laws, entitled "Tenement Houses in Cities," was accepted by the city of Somerville on December 2, 1948, in accordance with section 1 of that chapter which provides for permissive acceptance by a vote of the city council with approval of the mayor.

You request an opinion as to the following question:

"The inquiry is, in the case of Somerville, may that city, having accepted the provisions of this chapter in the past, now by the vote of the City Council, with the approval of the Mayor, rescind that action of acceptance?"

The answer to the above question is in the negative. Even though the city had its choice whether or not it would accept the provisions of this statute, once that acceptance has been duly made, the statute then becomes binding on the city to the same extent that any statute enacted by the General Court is binding on the city. It is clear that no individual city can "rescind" the provisions of any general statute enacted by the Legislature which applies to the city. For the same reason, no city can rescind the provisions of a statute passed by the Legislature which has become applicable to that city by reason of its acceptance of such statute. After such acceptance, the statute is binding upon the city and the provisions of such statute cannot be changed by the city. *Adams* v. *Selectmen of Northbridge*, 253 Mass. 408, 410. *Hurley* v. *Lynn*, 309 Mass. 138, 145.

It is also provided by section 4 of chapter 144 that "no city authority shall have the power to minimize, avoid or repeal any provision of this chapter." This restriction applies both to changes in details of various provisions within the chapter, and also to a omplete rescission of the chapter.

In numerous statutes which provide for permissive acceptance by a city or town, the Legislature has deliberately provided a method by which a city or town may revoke its acceptance. Examples of this permitted method of revoking an acceptance will be found in the following acts: St. 1949, c. 13, § 41; St. 1951, c. 406, § 21; St. 1953, c. 434, § 12. There is no similar provision for revoking an acceptance in chapter 144 which relates to "Tenement Houses in Cities." The failure to include such a provision is a clear indication that the cities which accept the provisions of the act do not have a right, acting only upon their own initiative, to revoke their acceptance.

The Legislature has occasionally permitted a city or town to revoke acceptance of the provisions of chapter 144 (Tenement Houses in Cities) or of chapter 145 (Tenement Houses in Towns). See, for example, St. 1943, c. 20, and St. 1947, c. 7. The title of the latter act is "An Act authorizing the town of Swampscott to revoke its acceptance of certain provisions of law applicable to tenement houses in towns." The provisions of the town act, chapter 145, are substantially similar to the provisions of chapter 144 which relate to cities. It is recognized that towns, in order to rescind their acceptance of chapter 145, must obtain special authority from the Legislature to revoke acceptance. Cities stand in the same position. Once the provisions of chapter 144 have been accepted, that entire chapter is binding upon the city until the Legislature changes the statute or permits the city to consider revocation of its acceptance and the city revokes the acceptance in accordance with such new authority given to it.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Veteran's Non-contributory Retirement — University of Massachusetts — State Employee — Payment from "Revolving Trust Fund."

July 22, 1954.

Hon. Carl A. Sheridan, *Commissioner of Administration.*

Dear Sir: — You have recently requested an opinion from the Attorney General with reference to an application from an employee of the Commonwealth for retirement under G. L. c. 32, § 58.

From your letter I understand that the facts are as follows: The employee in question is now an employee of the Commonwealth by virtue of his position with the University of Massachusetts at Amherst. In his application for retirement, he claims as creditable service the period of time from 1912 to 1936, during the latter portion of which period he was in service for the University of Massachusetts under some of its former names, and during the earlier portion of such period, he was in service with the Massachusetts Agricultural College while it was a charitable corporation and prior to its absorption by the Commonwealth. During this period the applicant for retirement was connected with the Agricultural Experiment Station at Amherst. His services were all related to the testing of cows and certification of cows following such testing. During the period from 1912 to 1936, the applicant was paid by checks signed by the treasurer of the college. The funds used by the treasurer for the salary checks came from a so called Dairy Cattle Certification Revolving Trust Fund. This fund was financed by private dairy cattle interests and such fund was used for the testing of cows at the request of the Jersey, Guernsey and Holstein Cattle Clubs. Fees for services of this kind were paid by private interests and such fees went into this trust fund and the fund was carried on a more or less revolving basis. This fund was handled by the treasurer of the University of Massachusetts and its predecessors. The fund was audited and examined during this period by the State Auditor.

The Dairy Cattle Certification Revolving Trust Fund was discontinued as of July 1, 1936, and an appropriation has been made annually since that date by the Legislature to carry on this work.

You inquire as follows:

"Your opinion is sought on the question whether this employee is to be considered a State employee for the period 1912 to 1936 during which time his salary was paid from the Dairy Cattle Certification Revolving Trust Fund."

The Massachusetts Agricultural College, the predecessor of the present University of Massachusetts, was incorporated by act of the Massachusetts Legislature in 1863 (St. 1863, c. 220) as a public charitable corporation. It was dissolved as a corporation in 1918 (St. 1918, c. 262) and by that same act the dissolved charitable corporation became the Massachusetts Agricultural College. By a series of changes in name, the Massachusetts Agricultural College has become the present University of Massachusetts. The 1918 statute declared that the Massachusetts Agricultural College was a State institution. Section 5 of that statute specified that "All employees of the institution shall be considered state employees." The Agricultural Experiment Station, to which you refer in your letter, has been a part of the University of Massachusetts and of its predecessor

since 1882 (St. 1882, c. 212). It is still a part of the present University of Massachusetts. G. L. c. 75, § 18.

It seems clear from the above statutes that the applicant has been an employee of the Commonwealth from the time in 1918 when the Massachusetts Agricultural College became a State institution. Beyond this, however, your facts present the question whether or not the applicant can claim as creditable service the period during which his salary came from the Dairy Cattle Certification Revolving Trust Fund. In my opinion, this fact does not prevent the applicant from being entitled to this period as a period of creditable service. Since 1918 his compensation has come directly from the Commonwealth, through its officer, the treasurer of the college. The fact that a trust fund from a private source was drawn upon for his compensation does not alter the situation. Since 1918 the Trustees of the Massachusetts Agricultural College have been directed by statute to "manage and administer . . . any gift or bequest of money . . . made to the commonwealth for the use of such institution." St. 1918, c. 262, § 3; G. L. c. 75, § 7. The situation is analogous to the payment of employees of the college from Federal grants. In two instances these payments from Federal grants have been studied by this department and it has been ruled that the employees in question are employees of the Commonwealth, notwithstanding the source of their compensation, and that such employees are eligible for membership in our State Retirement System. VIII Op. Atty. Gen. 191; Op. Atty. Gen. 1948, p. 34.

An entirely different question arises in connection with the claim of the applicant for creditable service from 1912 until the time in 1918 when the college became a State institution and the applicant became a State employee. However, since the applicant's service from 1918 to the present time constitutes more than the thirty years required by G. L. c. 32, § 58, it appears unnecessary to pass upon the applicant's service prior to 1918.

In conclusion, the answer to the question presented, limited to the period from 1918 to 1936, is in the affirmative.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Outdoor Advertising Authority — "Public Records."

JULY 23, 1954.

Mr. WILLIAM F. MCCARTY, *Executive Director, Outdoor Advertising Authority.*

DEAR SIR: — You have recently written to this department inquiring as to the "public records" in the possession of your Authority.

The principal statutes relating to public records are as follows:

G. L. c. 4, § 7, cl. 26:

"Public records" shall mean any written or printed book or paper, any map or plan of the commonwealth, or of any county, city or town which is the property thereof, and in or on which any entry has been made or is

required to be made by law, or which any officer or employee of the commonwealth or of a county, city or town has received or is required to receive for filing, . . ."

G. L. c. 66, § 10:

"Every person having custody of any public records shall, at reasonable times, permit them to be inspected and examined by any person, under his supervision, and shall furnish copies thereof on payment of a reasonable fee. . . ."

The Outdoor Advertising Authority was created by G. L. c. 6, § 60. That section requires you to make an annual report to the Legislature. Such annual report would be a public record.

It is provided by G. L. c. 66, § 6, that every department, board, commission, or office of the Commonwealth "shall enter all its votes, orders and proceedings in books." All such entries are required to be made by law and are therefore public records. In chapter 93, section 29, it is provided that your Authority shall make rules and regulations. Such rules and regulations are required by G. L. c. 30, § 37, to be filed in the office of the Secretary of State. Such rules and regulations are also public records.

Your letter refers specifically to applications and permits for outdoor advertising. Your rules and regulations provide that applications for permits "shall be filed with the Authority." Applications filed with you in accordance with this requirement are papers which are required by law to be filed and which you are required to receive for filing. Accordingly, all such applications are public records. As to permits issued by you, I assume that each permit is issued in accordance with some vote or order or proceeding of your Authority. Since all your "votes, orders and proceedings" are public records (G. L. c. 66, § 6), the permits authorized by such proceedings, and which could not exist apart from such authority, are themselves public records.

There are many cases in Massachusetts relating to public records. The precise question which you have asked, relating to your own Authority, has not been covered specifically. The above opinion, that your records and applications and permits are public records, is consistent with the decisions which have been made and is required by such decisions. The most important of these printed decisions are as follows: *Direct-Mail Service* v. *Registrar of Motor Vehicles*, 296 Mass. 353, 356. *Hurley* v. *Board of Public Welfare of Lynn*, 310 Mass. 285. *Hobart* v. *Commissioner of Corporations & Taxation*, 311 Mass. 341, 348–49. *New England Box Co.* v. *C & R Construction Co.*, 313 Mass. 696, 703. *Op. Atty. Gen.* 1952, p. 39.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Tornado Relief Fund — Continuing Right of Commission on Administration and Finance to make Payments.

Aug. 9, 1954.

Hon. Carl A. Sheridan, *Commissioner of Administration.*

Dear Sir: — You have requested my opinion concerning St. 1954, c. 618.

Your first question is as follows:

"1. Is it legal under chapter 651 of the Acts of 1953, as amended by chapter 618 of the current year, to make payments and reimbursements?"

The 1953 statute to which you refer relates to the appropriation and use of money for the relief of the financial burden imposed on cities, towns and counties by the tornado of June 9, 1953. Section 2 of that chapter provided that funds remaining in your hands on June 30, 1954, "shall be available" for payments thereafter due on bonds issued under the authority of the act. The amendment made by St. 1954, c. 618, merely changes the date at which such remaining funds "shall be available" from June 30, 1954 to June 30, 1955.

The answer to your first question is in the affirmative. The amendment of the current year does not affect in any way your right to make payments and reimbursements under the 1953 act. The 1953 act did not limit your right to make payments and reimbursements to a period prior to June 30, 1954. To the extent that the 1953 act gave you the right to make any payments or reimbursements, that right still continues.

The reference in section 2 of the 1953 act, now amended by the 1954 act, that certain funds remaining in your hands "shall be available" for payment on account of bonds issued under the act, is a permissive provision and not a mandatory one. The only change made by the 1954 amendment is that this permission to use such remaining funds is now extended until June 30, 1955.

Your second question is as follows:

"2. Does the enactment of the above-mentioned chapter 618 affect the bond issue authorized by chapter 651, Acts of 1953?"

The 1954 amendment does not affect in any way the validity of the bond issue authorized by the 1953 statute. It is true that the 1954 amendment affects in a very minor way such bond issue, that is, your permissive authority to use remaining funds for payment on such bonds has now been extended from 1954 to 1955. Except for this delay in the permissive provisions of this act, the 1954 amendment does not affect in any way the bond issue authorized by the 1953 act.

Very truly yours,
George Fingold, *Attorney General.*

Assistant Commissioner of Agriculture — Term or Tenure of Office — Procedure for Removal.

Aug. 17, 1954.

Hon. L. Roy Hawes, *Commissioner of Agriculture.*

Dear Sir: In a recent letter you inquire about the status of the Assistant Commissioner of Agriculture. After referring to section 5 of St. 1954, c. 674, you ask the following questions:

"1. Would an assistant commissioner appointed under St. 1954, c. 674, have permanent tenure?

"2. What procedures would be followed in a removal for cause of an assistant commissioner appointed under the provisions of said law?

"3. Would it be understood that the term of office of an assistant commissioner appointed under the provisions of the above-mentioned law would run concurrently with that of the commissioner who is appointed for a definite number of years?"

The answer to your question No. 1, in my opinion, is in the negative. After providing in section 1, for the appointment of the commissioner "for a term of four years" section 4 of chapter 674 then provides as follows:

"The governor, with the advice and consent of the council, shall appoint an assistant commissioner from a panel of not less than three names submitted by the board and the commissioner shall assign to him from time to time such duties as he may determine."

It cannot be assumed that the failure to provide for a definite term of office of the assistant commissioner was by accident or oversight. On the contrary, all legislation is presumed to result from the rational processes of legislative thought. It must be assumed, therefore, that in failing to provide a tenure of office for the assistant commissioner no term of office as such was intended. Where a term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power. See cases collected in 67 C.J.S. 197. Moreover, it is a well-nigh universal rule that where no definite term of office is fixed by law the power to remove an incumbent is an incident to the power of appointing, in the absence of some constitutional or statutory provision to the contrary. *Adie* v. *Mayor of Holyoke*, 303 Mass. 295, 300.

Relative to your question No. 2, section 9 of chapter 30 of the General Laws provides that

"Unless some other mode of removal is provided by law, a public officer, if appointed by the governor, may at any time be removed by him for cause, and, if appointed by him with the advice and consent of the council, may be so removed with its advice and consent."

The removal, therefore, of the assistant commissioner would be carried out pursuant to the provisions of section 9, after notice of the charges against the assistant and the opportunity to be heard on those charges.

The answer to your question No. 3 is in the negative. While it would be a convenient and probably intelligent arrangement for the term of the assistant commissioner to run concurrently with that of the commissioner, the law fails to so provide. For reasons known to itself, the General Court

in this legislation has provided for a term of office for the commissioner and has provided no term of office for the assistant. The reasons for this method of handling the situation cannot be explored by this department. It is the general rule of common law, apart from specific statutory provisions to the contrary, that a public officer cannot give an appointee a tenure of office beyond his own. *Opinion of the Justices*, 275 Mass. 575, 579. In that case, in dealing with the position of First Deputy Auditor of the Commonwealth, the court said: "No statute in terms fixes the tenure of office of the first deputy. The inference is not permissible that he holds office for life or during good behavior without any statute to that effect." See also *Opinion of the Justices*, 239 Mass. 603. The same rule was applied in the case of the First Deputy Secretary of the Commonwealth in *Howard* v. *State Board of Retirement*, 325 Mass. 211, 213, the court saying: "The petitioner does not come within either category. His situation is simply that his tenure of office ended upon the ending of the tenure of the Secretary of the Commonwealth who appointed him and the qualification of the succeeding Secretary." The Governor appoints the assistant.

Since you have not mentioned the subject, there seems to be no need for a discussion of section 9A of chapter 30 relative to veterans.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By FRED W. FISHER,
Assistant Attorney General.

Veterans' Benefits — Effect of St. 1954, c. 627, on Boston's Retirement System — Credit under State Retirement System — Definition of "Veteran."

AUG. 18, 1954.

His Excellency CHRISTIAN A. HERTER, *Governor of the Commonwealth.*

SIR: You have requested my opinion on the following questions with respect to St. 1954, c. 627, the new veterans' law.

1. What is the effective date of the act?

The effective date of the act is June 10, 1954, the date on which this law, duly enacted by the General Court, was approved by you.

2. Does the law deprive members of Boston's 4% retirement system of the right to retire under G. L. c. 32, §§ 56–58?

No. These rights have not been taken away, in my opinion. The city of Boston, I am informed, properly accepted prior to January 1, 1946, sections 56–59, inclusive, relative to veterans' non-contributory pensions. Section 60 of G. L. c. 32, inserted by section 14 of St. 1954, c. 627, provides that "Sections fifty-six to fifty-nine, inclusive, shall be in effect in any county, city, town or district which accepted them or accepted corresponding provisions of law prior to January first, nineteen hundred and forty-six, by the retiring authority . . ." The law, then, in its present form provides that sections 56–59 shall be in effect in *any* city which accepted them prior to January 1, 1946. A careful examination of chapter 627 discloses no reason, therefore, why sections 56–59 are not in effect in Boston, and I believe they are. Had the General Court intended to except

the city of Boston from the provisions of section 60 it would doubtless have said so. Innumerable instances may be found where the General Court has excepted the city of Boston from the operation of general statutes when it so intended. The omission of any such provision in the present section 60 is significant.

3. Is a person who is killed in action after serving less than ninety days a "veteran" so that his widow would be entitled to civil service preference?

Yes. Such persons are posthumously awarded the Purple Heart and thus are exempted from the ninety-day requirement by G. L. c. 4, § 7, cl. forty-third (*b*), which provides that a veteran must have served "for not less than ninety days' active service, . . . unless for wartime service of a lesser period he was awarded a service-connected disability or a Purple Heart." The "lesser period" refers to the ninety days' not the ten days' wartime service. In such cases only one day's wartime service is needed.

4. Do persons who serve in the armed forces beyond the wartime period receive credit for their military service under the contributory retirement system?

Section 8 of the act amends G. L. c. 32, § 4 (1) (*h*), by providing in part that " . . . Any member who served in the armed forces between January first, nineteen hundred and forty and July first, nineteen hundred and fifty-five, shall have such actual service credited to him as creditable service when reinstated or re-employed in his former position or in a similar position within two years of his discharge or release from such service . . ."

Thus such persons receive credit for time in military service which included any period an employee was compelled to serve beyond the wartime period.

5. Does chapter 627 require removal from Soldier Relief rolls of any individual receiving veterans' benefits?

No. Section 41 of the act provides: "No person actually receiving veterans' benefits or hospital benefits or treatment on the effective date of this act shall be deprived of such benefits because of the provisions of this act."

The word "deprived" means taken away. The new definition applies only to persons who apply or re-apply for veterans' benefits after June 10, 1954.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Election — Primary — Names to be Printed on Ballot — Absence of Certificate that Candidate is Registered Voter.

AUG. 19, 1954.

Hon. EDWARD J. CRONIN, *Secretary of the Commonwealth.*

DEAR SIR: — In your letter of recent date you inquire "as to whether the State Secretary shall place the name of one Annette Glick, a candidate for Representative in the General Court, 13th Suffolk Representative District, on the Democratic ballot to be voted on at the biennial State Primary September 14, in the current year." Referring specifically to

G. L. (Ter. Ed.) c. 53, § 48, you state that "Mrs. Glick did not file the certificate (of her party enrollment) within the statutory time limit," but that you now have "a certificate stating that said Annette Glick was an enrolled member of the Democratic party, signed by the Election Commissioners . . . of Boston, dated August 9, 1954."

You further state that on August 4, 1954, the State Ballot Law Commission ruled that the name of said candidate should not appear upon the official ballot for said primary, and that on August 13, 1954, said Commission ruled that her name should so appear.

Said § 48 provides explicitly that "there shall not be printed on the ballot at a state primary the name of any person as a candidate for nomination for . . . representative to the general court . . . unless a certificate from the registrars of voters of the city or town wherein such person is a registered voter that he is enrolled as a member of the political party whose nomination he seeks is filed with the state secretary on or before the last day herein provided for filing nomination papers . . . ." The date therein referred to was, in the current year, July 27.

If, as you set forth in your letter, the candidate failed to cause such a certificate to be filed with you prior to said date, the answer to your question is obvious: her name cannot be printed on such ballot. In so far as the second of the conflicting decisions of the State Ballot Law Commission mentioned in your letter might be interpreted to decide that the filing of a certificate of party enrollment after July 27, 1954, constitutes a compliance with the provisions of said § 48, I advise you that it is not binding upon you. The governing provisions of a general law cannot so easily be overridden.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Election — Question on Ballot — Pensions to Aged Citizens is Question of Public Policy.

SEPT. 30, 1954.

EDWARD J. CRONIN, *Secretary of the Commonwealth.*

DEAR SIR: — In a recent letter to the Attorney General you state that there have been filed with you several applications for placing the following question on the biennial state election ballot in the current year: "Shall the state senator from this district be instructed to vote for a resolution memorializing the Congress of the United States to enact legislation providing for a pension of not less than $100 per month to all retired citizens at 65 years of age or over?"

You request a determination as to whether or not said question is "one of public policy," all as provided by section 19 of G. L. c. 53. Since the enactment of St. 1925, c. 97, the responsibility of making such a determination has rested upon this department. *Thompson* v. *Secretary of the Commonwealth*, 265 Mass. 16, 18 (1928).

Regardless of the position which particular groups or individuals may take concerning the necessity and feasibility of federal legislation such as

that described in said question, there can be no dispute that every citizen of the Commonwealth has an interest, direct or indirect, in its consideration by the Congress. The words "public policy," as used in said section 19, are not limited or qualified in any way, and are to be construed broadly. VIII Op. Atty. Gen. 490, 493 (1928). In my opinion, the proposed question is one of public policy, and is, as now stated, in proper form for presentation upon the ballot.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Motor Vehicles — License for Charter Service — Issuance of Restricted Charter Licenses.

OCT. 26, 1954.

Hon. DAVID M. BRACKMAN, *Chairman, Department of Public Utilities.*

DEAR SIR: — In reply to your request for an opinion as to whether or not the Department of Public Utilities had authority to issue restricted motor vehicle charter licenses under section 11A of G. L. c. 159A, please be advised that in my opinion the department had such a right.

The restriction attached to charter licenses by the department is in effect granting to the licensee less than the department has the authority to grant. This cannot be construed, in my opinion, as exceeding the authority granted by statute in section 11A.

It is stated in *Higgins* v. *License Commissioners of Quincy,* 308 Mass. 142, on page 147:

"The statute does not in terms provide for the imposition of conditions or for the conditional issue of a license. But if the board did impose certain conditions, *Commonwealth* v. *Willcutt,* 259 Mass. 406; *Leach* v. *State Fire Marshal,* 278 Mass. 159, they do not appear to be included in the vote granting the license or to have been made a part of the records of the board. . . ."

It is stated in *Commonwealth* v. *Willcutt, supra,* on page 408:

"We find nothing unreasonable or beyond the authority of the board of aldermen in the restrictions imposed. They were dealing with the sale of gasoline. They had the right to take into account the hazard from fire and the danger to the public if this space were unprotected by a wall. . . ."

It is also stated in *Leach* v. *State Fire Marshal,* 278 Mass. 159, on page 165:

"In the case at bar both the local licensing authority and the fire marshal have decided that the business may be conducted consistently with the public safety if certain restrictions and conditions are observed. . . ."

Then on page 166:

". . . His right to impose conditions finds support to some extent in the principle stated in *Southern Pacific Co.* v. *Olympian Dredging Co.,* 260 U. S.

205, 208; 'The power to approve implies the power to disapprove and the power to disapprove necessarily includes the lesser power to condition an approval.' "

The fact that section 7 provides that the department may issue a license for partial exercise of the privilege sought does, in my opinion, strengthen rather than militate against the granting of a restricted charter license under section 11A.

It is stated in 50 Am. Jur. page 368:

"In order that effect may be given to every part of an act in accordance with the legislative intent, all the language of the act must be brought into accord. The various provisions of an act should be read so that all may, if possible, have their due and conjoint effect without repugnancy or inconsistency, so as to render the statute a consistent and harmonious whole. . . ."

There is no necessity for answering question 2 as I have answered question 1 in the affirmative.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Waterways — Authority of Department of Public Works to Protect Shores and Harbors — Private Property.

OCT. 27, 1954.

Hon. JOHN A. VOLPE, *Commissioner of Public Works.*

DEAR SIR: — You have requested my opinion relative to certain shore protective and harbor development work.

I have examined the statutes to which you expressly refer in your letter, as well as chapter 91 of the General Laws which relates to "waterways."

You have submitted three certain questions and seek advice as to the sufficiency of legislative authority in the department. The precise questions submitted are as follows:

1. A timber bulkhead retaining wall constructed by the town on town property, abuts Scituate Harbor and is adjacent to a town road and parking area. Said structure is now practically demolished. The town has requested that we replace this structure with a concrete seawall after which they propose to construct timber piers from said wall to deep water some 75 feet therefrom. They propose to contribute 50% of the cost of the proposed seawall.

2. The construction of a seawall or stone bank revetment on private property located at or a short distance landward of the mean high water line.

3. The construction of a seawall or stone bank revetment on public beach property located at or a short distance landward of the mean high water line.

My answers thereto are as follows:

1. By virtue of G. L. c. 91, § 11, the department is authorized to undertake such work for the improvement, development, maintenance and protection of tidal and nontidal rivers, and streams, harbors, tidewaters, foreshores and shores along a public beach as it deems reasonable and

proper. Public hearing is required and the department is to consider such factors as the public advantage and the local interest therein as manifested by municipal or other contributions therefor. The project contemplated comes clearly within the purview of section 11 of chapter 91 and the town of Scituate is making the financial contribution required by Item 2202–05 of St. 1954, c. 453, the general appropriation bill. I therefore answer this question in the affirmative.

2. I answer question number 2 in the negative.

I find no authority in chapter 91 for construction of a seawall or stone bank revetment on private property. Authority is vested in the department, in the pursuance of work authorized by section 11 of chapter 91, to take by eminent domain under chapter 79, or acquire by purchase or otherwise. No construction contemplated by this question should be undertaken until after a taking or acquisition of interest in land as provided for in section 31 of chapter 91. I am mindful of the provisions contained in the general appropriation bill (St. 1954, c. 453, Item 2202–05) which purports to vest in the department authority to enter and construct on private land such works as may be necessary to secure and protect seawalls already built.

3. I answer question number three in the affirmative with the qualification that the department first determine that the proposed construction is located within the limits of the public domain, ascertained beforehand, as provided in section 2 of chapter 91.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By VINCENT J. CELIA,
Assistant Attorney General.

Physicians — Registration — Pre-medical Educational Requirements.

Nov. 4, 1954.

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

DEAR MADAM: — You have inquired concerning the status of a physician who graduated from the Adam Mickiewicz Gymnasium, Pruzany, Poland, in 1938; who attended the Lyceum, Pruzany, Poland, from 1938 to 1940; who attended the University of Marburg, Germany, from 1945 to 1946 for one year of pre-medical work and the University of Georgia for one year of pre-medical work from 1946 to 1947 and who then received the degree of Bachelor of Science from the University of Georgia in 1947. He then attended Emory University School of Medicine, Georgia, from 1947 to 1951, receiving the degree of Doctor of Medicine from Emory University in 1951.

In addition to the facts related in your letter I have ascertained from your department that the transcript of the doctor's record at the University of Georgia shows that he took courses in physics, chemistry and biology as part of his pre-medical work. I have also ascertained from your department that the University of Georgia is a college or university which has been approved by the Approving Authority for Colleges and Medical Schools for the Commonwealth of Massachusetts.

You have inquired as to whether the aforementioned physician comes

within the provisions of c. 112, § 2, requiring that an applicant for registration as a physician must have "completed two years of pre-medical collegiate work including physics, chemistry and biology in a college or university approved by a body constituted as provided in this section." The word "body" in section 2 refers to the above-mentioned Approving Authority for Colleges and Medical Schools of the Commonwealth.

In the opinion of this office the answer is in the affirmative.

The word "completed" in section 2 of chapter 112 is significant. The verb "complete" in common usage means to bring to an end or to conclude. In the opinion of this office the physician you mention has "brought to an end" or "concluded" his pre-medical work in an approved college or university within the meaning of the statute. The statute obviously does not require that the student's entire pre-medical training necessarily be obtained in only one pre-medical college or university.

Clearly, the Legislature was content to presume that any approved college or university which gives a degree to a student covering pre-medical work has satisfied itself with that student's previous record before admitting him, if he is a transfer student, and is further satisfied with his scholastic achievements before giving him a degree.

Accordingly, not only the letter but the spirit of the law is complied with in the instant case; and the provisions of the above-quoted portion of G. L. c. 112, § 2, have been satisfied.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By HARRIS A. REYNOLDS,
Assistant Attorney General.

Division of the Blind — License to Raise Funds for Benefit of Blind — Refusal on Ground License is "not for the Public Interest."

Nov. 16, 1954.

Mr. JOHN F. MONGOVAN, *Director, Division of the Blind.*

DEAR SIR: — You have requested an opinion concerning the powers of the Director and the Advisory Board of the Division of the Blind with reference to fund raising. Your inquiry relates to friends who solicit and raise funds for the benefit of the blind, and you call attention to G. L. c. 69, § 25A, which provides for the issuance of a license to raise funds for such purpose and which further provides as follows:

". . . If the director has reasonable grounds for believing that a violation of law is intended, or that the granting of the license will not be for the public interest, he may refuse to issue the same."

The facts which you state in your letter indicate that a group of individuals have formed a club which is not an incorporated charity. They have now applied for a license to raise funds for the blind. With reference to these plans you state:

"The way in which they purport to help the blind, however, is already provided for the blind by an incorporated charity. Thus, the fund-raising is for a service which, in the eyes of responsible community leaders, is a duplication of effort and as such, wasteful of the public's money."

Upon these facts you inquire whether or not the Director can deny a license.

Under the provisions of section 25A you are authorized to issue licenses in proper cases for the purpose of raising funds for the benefit of the blind. You may refuse the license if there is "a violation of law" or if the issuance of a license "will not be for the public interest." There would be innumerable reasons why the granting of such a license might not be for the public interest. The facts in the case concerning which you are inquiring, however, indicate that the only reason why the granting of a license in this case might be against the public interest is that there is already an organization raising money for this charitable purpose in the same way.

It is my opinion that this single fact, standing alone, does not justify you in refusing to grant a license under section 25A. I think that the addition of another organization seeking to raise money for this charitable purpose cannot be said to be against public interest. I think that if you refuse the license on this single ground your decision might properly be criticized, and it would be likely that your decision would be interpreted as favoritism toward one organization as against another doing exactly the same thing. Under all of the circumstances of this case it is my opinion that upon this one ground (i.e., that another organization is now soliciting funds for such purpose), standing alone, you are not entitled to refuse the application for the license to raise funds.

You have not mentioned other grounds (which may or may not exist) for a decision that the granting of the new license would "not be for the public interest," and of course I have not considered any grounds other than the one indicated above.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Extension of State Fish Pier in Gloucester— Absence of Specific Appropriation — Use of Capital Outlay Funds.

Nov. 17, 1954.

Hon. JOHN A. VOLPE, *Commissioner of Public Works.*

DEAR SIR: — Your recent letter to this department makes reference to money which might be available for the study of the proposed pier extension at the State Fish Pier in Gloucester.

This matter arises under chapter 57 of the Resolves of 1954 which directs your department "to make an investigation and study relative to a proposed pier extension at the state fish pier in the city of Gloucester." Your problem arises because said resolve provides "for said purposes, said department may expend such sums as may be appropriated therefor," and no specific appropriation was made.

Your inquiry to this department is whether or not the funds made available to your department by the 1954 Capital Outlay Act (c. 471, Item 8255–76) may be considered to "be appropriated therefor" to carry out the purposes of chapter 57.

The answer to your inquiry is in the negative. There are four reasons why we would be unable to advise you that the money allocated to you under the Capital Outlay Act could be used for the investigation and study directed to be made by chapter 57. These reasons are as follows:

1. The Capital Outlay Act covers construction rather than investigation and study. There is one exception to this statement in Item 8255–84, in which "the preparation of preliminary plans" is specifically covered. The reading of this entire act (c. 471), including the Governor's message and other House and Senate documents leading to the enactment of this act, and including also the specific reference to "preliminary plans" mentioned above, makes it extremely doubtful whether the money allocated to you in this act can be used for an investigation and study.

2. Further doubt is created by the specific purposes enumerated in Item 8255–76 which relates to services by your department. I consider it doubtful that an investigation and study regarding an extension of the State Pier at Gloucester is included either in the first clause which relates to rivers and harbors, or in the clause making reference to G. L. c. 91, § 11. You call my attention to the third clause in this item which relates to "construction, reconstruction or repair of town or city piers and wharves." Since the pier concerning which you are making inquiry is a State pier, not a town or city pier, this particular clause does not help you.

3. I understand from your letter "that funds for the Gloucester Fish Pier have always in past years been made available by the Legislature, either by special appropriation or bond issue." This past procedure does not assist you in making use of funds under the Capital Outlay Act for this particular project, but on the contrary throws more doubt on such suggested use of the funds.

4. Finally, the reference in the resolve that you "may expend such sums as may be appropriated therefor" seems to imply a direct and specific appropriation. I understand from your letter that no such specific appropriation has been made.

In conclusion, the answer to your inquiry is that the money allocated to your department by Item 8255–76 of the Capital Outlay Act of 1954 may not be used by you for the purposes of the investigation and study directed to be made by chapter 57 of the Resolves of 1954.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Veteran — Eligibility for Hospitalization in Soldiers' Home — Meaning of word "Service."

DEC. 14, 1954.

Mr. JOHN F. BERRY, *Superintendent, Soldiers' Home, Holyoke, Mass.*

DEAR SIR: — You have recently requested an opinion relating to the new chapter 115A of the General Laws.

You state that a question has arisen with regard to one of your patients who served with the armed forces of the United States between October 30,

1929, and June 30, 1930. You inquire whether or not this man is eligible for hospitalization at the Holyoke Soldiers' Home.

The statute controlling this matter is the new chapter 115A of the General Laws, inserted by St. 1954, c. 627, § 42. Section 1 of this chapter provides for hospitalization for two groups of veterans. I understand from your letter that the person in question does not come within subdivision (*a*). The question is whether or not he comes within the provisions of subdivision (*b*). This subdivision permits hospitalization if he has performed "not less than ninety days' active service in any of the campaigns or expeditions enumerated in section two." Subdivision (*g*) of section 2 of this new chapter makes reference to "China Expeditionary Service, between October thirtieth, nineteen hundred and twenty-nine and June thirtieth, nineteen hundred and thirty." This section 2 states that the "service" referred to in subdivision (*b*) of section 1 "shall mean service during any of the" periods enumerated, including subdivision (*g*), but then states: "provided, in any case, that proof of service in the campaign or expedition mentioned is made."

You state that the patient in question was in service in the armed forces of the United States during the period of this campaign yet he did not actually serve in the campaign itself. The mere fact that this veteran was serving in the armed forces within these dates does not entitle him to hospitalization under the provisions of chapter 115A. It is essential, in order to entitle him to the benefits of such chapter, that there must have been active service "in the campaign or expedition" itself. Mere service in the armed forces is not enough.

Therefore, upon the facts stated in your letter, the man in question is not eligible for hospitalization under the provisions of chapter 115A.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Veterans' Housing Project — Abandonment and Liquidation of such Project — Necessity for Legislation.

DEC. 17, 1954.

Mr. DANIEL TYLER, Jr., *Chairman, State Housing Board.*

DEAR SIR: — Your recent communication requests me to advise you on the various questions involved in the abandonment of the veterans' housing project, Medford 200–2, and of the proper legal steps to be taken to consummate the abandonment and liquidation of this project.

The current facts relative to this matter are as follows:

The Medford Housing Authority has voted, subject to the approval of the State Housing Board, to abandon this project because the need for such a project no longer exists.

The State Housing Board, after a thorough and independent investigation, has concurred with the Authority in its conclusion that this project ought to be abandoned and that there no longer exists the need for this project. In reply to the letter requesting approval of the abandonment,

the Chairman of the State Housing Board said: ". . . I am prepared to approve your request for such abandonment subject to appropriation by the Legislature of funds sufficient to liquidate your outstanding obligations on this project.

"I have taken the necessary steps to obtain such an appropriation and should these funds be authorized final approval for abandonment will be issued to you."

On these facts, there can be no question of the right as well as the duty of the State Housing Board to proceed with the process of abandonment of this project.

The remaining questions are therefore:

1. Whether or not under the law, as it stands, the Commonwealth, through the board as agent, may abandon a project without specific legislation?
2. What legislation, if any, is necessary?

These two questions may be treated as one. Section 15 of the contract for financial assistance provides that ". . . None of the provisions of this contract shall be modified or waived at any time after the sale of any of the notes or bonds issued with respect to this project to such extent or in such manner as would impair or prejudice the rights of the holder or holders of such notes or bonds." Since abandonment without any authorization by way of an appropriation by the Legislature to pay off the outstanding obligations issued for the construction of the project would constitute an act which would "impair or prejudice the rights of the holder or holders of such notes or bonds" — $100,000 in notes, unconditionally guaranteed by the Commonwealth, of which there remains approximately $55,000 uncommitted, the balance having been spent or committed for development of the project, having been issued — it therefore appears that any agreement to permit the abandonment of the project without first securing sufficient funds to liquidate the outstanding obligations of this Authority in respect to this project would be a violation of the duty of the board toward holders of such obligations. Therefore, before giving final approval to the Authority for the abandonment, the board should have an appropriation by the Legislature of funds sufficient to liquidate the notes issued by the Authority for the construction of this project.

Further, in the event the project should be abandoned without an appropriation of sufficient funds to pay the deficiency immediately, the Commonwealth, having unconditionally guaranteed the notes issued to finance it, will, by proper legal action, be obliged to pay the deficiency. Should such action on the part of holders be necessary, it is evident that the buyers of such guaranteed obligations will be, in the future, less likely to rely upon such a guarantee. This will not only endanger the credit of the Commonwealth, but also result in an increase in the rates of interest which the State will have to pay in the form of increased subsidy payments on future projects, particularly the projects for housing the elderly.

As to the question of the legality of the guarantee by the State Housing Board as agent for the Commonwealth under the provisions of G. L. c. 121, § 26NN, the *Opinion of the Justices*, 322 Mass. 745, 752 *et seq.*, declares this provision of the law constitutional. In view of this, there can be no

question of the obligation of the Commonwealth to make good its guarantee.

In view of the foregoing, it may be pointed out that the only alternative to an appropriation at this time is to continue refunding the outstanding notes, thereby increasing the ultimate cost to the Commonwealth by the amount of the additional interest charges.

The legal steps to be taken to accomplish the abandonment and liquidation of the veterans' housing project, Medford 200–2, are therefore:

Special legislation or special provision in the regular appropriation act appropriating sufficient funds to liquidate the outstanding notes. In this respect, the appropriation should be made sufficiently large to cover all possible contingencies. For example, it is understood that the amount due the architect under his contract and amounts due him for extra work are in dispute, the board taking the view that he has been overpaid, the architect and Authority claiming that there is still due him approximately $8,500. Since the Authority appears to agree with the architect, the possibility that litigation relative to this claim will be decided in favor of the board appears dim. Care should be taken that all such contingencies are provided for.

This appropriation should also contain authorization of disposal of all assets of the project by the Medford Housing Authority, subject to the approval of the State Housing Board, with a provision that any surplus remaining after settlement of all obligations and disposal of all assets be returned to the Treasurer of the Commonwealth because there is no provision of section 26NN of chapter 121 for abandonment other than the provision of subsection (*f*) authorizing the sale of land (not personal property) no longer required for a veterans' housing project.

An examination of the land acquisition file also reveals one more item that ought to be clarified by the legislative act appropriating funds for this abandonment. The land was acquired by the Authority under the provisions of G. L. c. 92, § 85. Neither the deed nor the vote of the grantor, Metropolitan District Commission, set forth any specific condition as to the use for which the land was sold. However, since the Park Commission of the city of Medford refused to concur with the Metropolitan District Commission in the sale of this land to the Authority, under said section 85 it was necessary to obtain the concurrence of the Governor and Council. This concurrence was obtained. However, the concurrence was specifically "for veterans' housing." The act authorizing the sale of the assets should also therefore clarify this condition, not only because of the specific condition in the vote of the Governor and Council, but also because all land acquired by a housing authority is subject to the implied condition that it be used for housing. This land never having been used for housing, there exists the possibility that the grantor might claim a right to reconveyance. The Legislature may see fit to authorize outright disposal or it may see fit to grant the Metropolitan District Commission an option to repurchase the land for the same sum paid for it by the Housing Authority.

Other provisions of section 26NN dealing with the sale of projects are applicable only to the sale of completed projects. Also, provisions dealing with the disposition of the funds received from such sales by payment into the Housing Authority Sinking Fund and disposition of the proceeds in excess of the total of all obligations of the Authority with respect to such project are applicable only to completed projects. The provision of

said section 26NN contains no authorization to sell an entire project except for the amount of the total of the outstanding obligations with respect to such project. These provisions are therefore not applicable to the abandonment of a project. This appropriation, being for the purpose of meeting a deficiency, should provide that the surplus, if any, after final liquidation should be returned to the Treasurer of the Commonwealth for the General Fund.

Finally, as to the mechanics of the provision for payment of the amount appropriated, it would seem proper that the same provision be made as for payment of the annual contributions which is, under section 26NN, subparagraph (*b*), by the Commonwealth upon approval and certification by the State Housing Board to the State Comptroller.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

State Employee — Veteran — Protection under G. L. c. 30, § 9A — Construction of Statutes.

DEC. 28, 1954.

Col. JOHN J. MAGINNIS, *Director, Civil Defense Agency.*

DEAR SIR: — Your recent letter inquires as to the protection against removal given by G. L. c. 30, § 9A, to a veteran who has been employed in your Agency for more than three years.

Your first question is as follows:

"Do the provisions of G. L. c. 30, § 9A, as presently in force, apply to a person in the employ of this Agency, who is a veteran, as that term is defined in G. L. c. 31, § 21, and who has held the same position in this Agency for not less than three years?"

The Civil Defense Agency was created by St. 1950, c. 639. Section 2 of that act provides:

"The director may . . . appoint such experts, clerks and other assistants as the work of the civil defense agency may require and may remove them. . . . Such employees shall not be subject to chapter thirty-one of the General Laws. . . ." (Chapter 31 contains the laws relating to civil service.)

General Laws, c. 30, § 9A, as amended by St. 1947, c. 242, provides as follows:

"A veteran, as defined in section twenty-one of chapter thirty-one, who holds an office or position in the service of the commonwealth not classified under said chapter thirty-one, other than an elective office, an appointive office for a fixed term or an office or position under section seven of this chapter and has held such office or position for not less than three years, shall not be involuntarily separated from such office or position except subject to and in accordance with the provisions of sections forty-three and forty-five of said chapter thirty-one to the same extent as if said office or position were classified under said chapter. . . ."

I understand from your letter that the veteran in question comes within the specific terms of section 9A and is not excluded by any of the express

exceptions set forth in section 9A itself. Nor is he impliedly excluded from the protection of that section for either of the reasons stated in *Sullivan* v. *Committee on Rules*, 331 Mass. 135, in which our court held that an employee holding a position in "the legislative branch" of the Commonwealth was not protected by that section. The single problem to be considered, therefore, is whether such veteran loses the benefits of section 9A, which section gives him protection against removal by making reference to chapter 31 of the General Laws, because of the provision in St. 1950, c. 639, § 2, that the employees of your Agency "shall not be subject to chapter thirty-one of the General Laws."

The answer to your first question is that the veteran in question is protected by section 9A and can be removed only "subject to and in accordance with the provisions" of sections 43 and 45 of chapter 31 in which are found the removal procedures under our civil service laws.

The provisions of section 9A, which are positive and unequivocal, are that a veteran coming within such section who has held his particular position for not less than three years "shall not be involuntarily separated from such office or position" except in accordance with the procedural requirements of notice and hearing as specified in sections 43 and 45 of the civil service law. This Legislative policy and mandate in section 9A must be followed, except in the instances in which the Legislature has made a contrary declaration. No such contrary declaration exists in the present case.

The fact that the Legislature has stated that the employees of your Agency are not subject to chapter 31 of the General Laws is not equivalent to stating that such employees are not entitled to the protection of section 9A. Section 9A has independent vitality. Its several references to chapter 31 do not place section 9A in chapter 31. Its use of the removal procedure spelled out in chapter 31 does not make section 9A a part of chapter 31. This would appear clearly if, instead of the reference to chapter 31, section 9A had in fact set forth in detail all of the provisions of sections 43 and 45 of chapter 31. The technique of reference to sections 43 and 45, rather than repetition of all of the full provisions of those two sections, does not alter the legal situation. Furthermore, a reading of section 9A — especially such provisions as that it covers positions "not classified under said chapter thirty-one," and that the specified removal procedure is to be followed "to the same extent as if said office or position were classified under said chapter" — makes it clear that section 9A should not be construed to be a part of chapter 31. Therefore, the exclusion of chapter 31 is not the exclusion of section 9A.

Many reasons can be assigned for the Legislature's decision to provide that the employees of the Civil Defense Agency should not be subject to the civil service laws but yet to give to three-year veterans in the service of the Agency the protection furnished by section 9A and through such section by the removal procedure of chapter 31. There are good reasons why your Agency should not be delayed in *obtaining* help in times of emergencies because of the civil service requirements of examinations, classifications, certifications, and the like. It is a very different thing to discharge an employee who is a veteran and who has been serving your Agency continuously for three years or more.

Compliance with the removal procedures of sections 43 and 45 does not appear to be an unreasonable burden even upon an Agency whose prompt work in an emergency is so vital to the public as yours is in our present

troubled times. Under these sections any employee can be suspended upon the instant, without assignment of cause, though not longer than for a period of five days. (§ 43[e].) Any employee can be removed permanently if there is cause for such removal. These sections merely provide that such employee has the right to an assignment of the reasons for his discharge, and a hearing and a review. Such protection to veterans who have been continuously employed in the same position for more than three years is not unreasonable.

At the time your Agency was created in 1950 the provisions of section 9A had been on our statute books for four years. It must be presumed that the Legislature knew about section 9A when it declared that chapter 31 would not apply to your Agency but said nothing to indicate that section 9A was not to apply. *Walsh* v. *Commissioners of Civil Service*, 300 Mass. 244. In that case, speaking with reference to the extension of the civil service laws even to employment not stated to be under civil service protection, the court stated, at page 246, as follows:

"The words 'employ and remove,' or other equivalent phrases standing alone without qualification in statutes respecting public employment, do not ordinarily render inapplicable the civil service laws. It is to be presumed that the General Court, in enacting said c. 134, was not unmindful of the general civil service law. . . . A statute is to be interpreted with reference to the preexisting law. . . . If reasonably practicable, it is to be explained in conjunction with other statutes to the end that there may be an harmonious and consistent body of law. . . . The public policy established by the civil service laws, the promotion of the general welfare arising from the enforcement of those laws, and the advantage to individuals from securing protection in their tenure of employment, are so significant that it would be difficult to reach the conclusion that employment and removal of employees of the Quincy City Hospital by the board of managers were not subject to the civil service laws. . . . If a result of that nature had been intended, explicit words would naturally have been used to make clear the meaning that such power was free from the operation of the civil service laws."

The above words are exactly applicable to the Civil Defense Agency act, with its specific exception of chapter 31, and its significant failure not to except the protection given by section 9A to veterans who have served three years or more.

Our State and legislative policy to prefer and to protect veterans in State service is a clear and ancient one. Section 9A is an implementation of that policy. Such a statute must be given a liberal interpretation in order to carry out this accepted policy of preferment and protection of veterans. Attorney General's Report, 1950, p. 71. See *Opinion of the Justices*, 322 Mass. 745, 751.

I have examined the entire statute under which your Civil Defense Agency was created (St. 1950, c. 639), and all amendments thereof, and I do not find therein any reason for denying a veteran employee the protection given to him by section 9A. I realize the vital role your Agency will play in the event of an emergency resulting from natural disaster or from hostile attack. I note that you yourself are appointed by the Governor to serve only "during his pleasure" (§ 2); that it is the duty of other Commonwealth agencies "to co-operate" with you (§§ 16, 20); that an executive order declaring a state of emergency may override existing provisions

of law (§§ 8, 8A); and that special civil service rules can be set up during such an emergency (§ 9). I note also that your Agency, by the original act, was to continue only for a period of two years (§ 22). These provisions, however, do not, either expressly or by implication, indicate that the protection of veterans given by c. 30, § 9A, is not to apply to such employees in your Agency.

Finally, if the Legislature had intended to deprive the veterans who are employed in the Civil Defense Agency, and who have been employed there in the same position for three years or more, of their protection under § 9A, the Legislature could have said so. There are numerous instances in our statutes, in other acts, where the Legislature has specifically stated that an employee is (or is not) protected both by § 9A and by chapter 31. In these other cases the Legislature has answered the doubt which you have raised in your case by coupling together these two specific statutory references. See, for example, St. 1953, c. 409, § 1 (G. L. c. 23A, § 4), in which it is stated that "the commissioner may appoint such experts as the department [of commerce] may require who shall not be subject to chapter thirty-one or section nine A of chapter thirty." This same double reference is also made to both chapter 31 and section 9A in the following acts: St. 1952, c. 585, § 26; St. 1952, c. 602, § 15; St. 1953, c. 612, § 11; St. 1953, c. 654, § 1 (G. L. c. 14, § 3). When the Legislature in 1953 set up a rent control act and provided for the appointment of "a temporary state housing rent co-ordinator who shall serve at the pleasure of and directly under the governor" (St. 1953, c. 434, § 3 (*a*)), with a provision in the statute that it would expire in one year (§ 14), the Legislature nevertheless made the usual double reference to exempt the employees of the "temporary" rent co-ordinator both from chapter 31 and from section 9A of chapter 30. See § 3 (*a*). In St. 1954, c. 672, § 2, the Legislature made reference to "employees . . . who hold positions classified under chapter thirty-one of the General Laws or are subject to the provisions of section nine A of chapter thirty."

In the act setting up the Civil Defense Agency the Legislature mentioned only chapter 31 in its reference to the statutes to which your employees would "not be subject." This indicates that the Legislature did not intend to take away from your employees the protection which section 9A of chapter 30 gives to veterans who have held positions for three years. Therefore, the answer to your first question is in the affirmative.

The second question in your letter is as follows:

"If your answer to the foregoing question is in the affirmative, would the provision of G. L. c. 30, § 9A, be violated by the involuntary separation of such person from the service of this Agency by virtue of the expiration of the personnel requisition under which such person is presently employed, there being no compliance with the provisions of G. L. c. 31, §§ 43 and 45, and other persons who are non-veterans or veterans junior in service continuing to be employed in the same or similar positions."

The answer to your second question is also in the affirmative. Section 9A gives preference to a three-year veteran, with respect to the same or a similar position, over non-veterans and also over veterans employed after he was employed. This statute states, after providing for involuntary separation only in accordance with sections 43 and 45 of chapter 31, as follows:

". . . If the separation in the case of such unclassified offices or positions results from lack of work or lack of money, such a veteran shall not be separated from his office or position while similar offices or positions in the same group or grade, as defined in section forty-five of this chapter, exist unless all such offices or positions are held by such veterans, in which case such separation shall occur in the inverse order of their respective original appointments."

I understand from the reference in your second question to other persons who are employed "in the same or similar positions" that such persons are employed in offices or positions which are, as stated in section 9A, "in the same group or grade, as defined in section forty-five of" said chapter 30.

The "expiration of the personnel requisition under which such person is presently employed" does not end the protection to a veteran who has held the same office or position in your Agency for not less than three years. The veteran in your case was not appointed for a fixed term. Such a veteran is not to be removed, except in accordance with sections 43 and 45 of chapter 31, "while similar offices or positions . . . exist." Op. Atty. Gen., 1952, p. 27. From your question it is clear that "other persons who are non-veterans or veterans junior in service" are continuing to be employed in your Agency "in the same or similar positions."

Accordingly, the veteran involved in this case cannot be removed except in accordance with sections 43 and 45 of chapter 31, and therefore your second question must also be answered in the affirmative.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

License to Distribute Milk — Non-resident Milk Dealer — Interstate Commerce — Validity of State Requirements.

DEC. 31, 1954.

Mr. HOWARD A. KIMBALL, *Chairman, Milk Control Commission.*

DEAR SIR: — I have your recent letter requesting an opinion in connection with the requirement of a license under the milk control statute upon an out-of-State milk dealer.

Your question is predicated upon the following set of facts:

"A cooperative milk producers association incorporated in an adjoining State and having a milk plant in that State, at such plant receives milk from its member producers and others, which it pasteurizes and bottles or otherwise packages for sale and distribution over a territory which includes many Massachusetts cities and towns in the Merrimac Valley area. This distribution is said to be, and so far as we know, is confined to Massachusetts licensed milk dealers. This milk is loaded on the cooperative's trucks at the cooperative's out-of-State plant, and is transported on such trucks to the several places of business of the cooperative's customers in this Commonwealth, where the bottled or otherwise packaged milk is un-

loaded and delivered to the respective customers. The cooperative contends that all milk placed on the truck on any day has always been ordered by the customer in advance of loading on the truck, and is marked for delivery to the particular customer; that no other, additional or unordered milk is ever carried on the truck and that if a customer should request of the truck driver delivery of a quantity in excess of the amount of his prior order loaded and marked for delivery to him, the driver has no milk on the truck from which he could give any such customer additional, unordered milk, and never does deliver to any customer any amount of milk in excess of the quantity ordered by him in advance of the loading on the truck."

You request an opinion on the following question:

"Is this cooperative, doing business as stated above, required to be licensed as a milk dealer under G. L. c. 94A, §§ 4 and 5?"

The statute in question is G. L. c. 94A, § 4 (*a*), which provides that "no milk dealer . . . shall within the commonwealth . . . sell or distribute milk . . . unless he is duly licensed as provided in this chapter. . . ." Instructions for the application of the license and the duration and renewal of the license are contained in section 5. Provisions as to fees and assessments are contained in section 9. It is clear that the cooperative mentioned in your set of facts comes within the definition of "milk dealer" contained in section 1 of this statute. Accordingly, he must obtain a license if such provision can validly be applied to him.

The facts set forth above present a problem within the field of interstate commerce. However, local regulation of interstate commerce is permissible under certain circumstances. This field of the production and delivery of milk to consumers in the Commonwealth involves matters of health and is within the police power of our State. Federal legislation covers some portions of this field, but there is no Federal regulation inconsistent with the license requirements of section 4 of chapter 94A. It has been recognized by the Supreme Court of the United States that State regulations of this field of the production and distribution of milk are constitutional if they are not inconsistent with any existing Federal law. *Milk Control Board* v. *Eisenberg Farms Products*, 306 U. S. 346, 351. *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 353.

It is not unconstitutional for this State to compel a non-resident milk dealer distributing milk within the Commonwealth to take out a license. The obvious purpose of the license is to provide the commission with a record of milk dealers who are subject to the act. Supervision and enforcement are thus likely to be easier. Such a license requirement has been held to be merely an incidental burden upon interstate commerce and not forbidden by the Constitution of the United States. *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 616. *Hood & Sons* v. *Du Mond*, 336 U. S. 525, 530. There is no discrimination against a non-resident involved in our statute, and therefore no objection can be made on that basis. *Breard* v. *Alexandria*, 341 U. S. 622, 637.

Your question is therefore answered in the affirmative.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Public Building Construction — Bid Statute — Sub-bid "Filed" with Awarding Authority.

Jan. 5, 1955.

Mr. Hall Nichols, *Director of Building Construction.*

Dear Sir: — You have asked for an opinion concerning the award of a contract to a sub-contractor under the following circumstances. A contract for the construction of the Worcester State Hospital was awarded to Farina Brothers Co., Inc. as general contractor. The award is governed by G. L. c. 149, §§ 44A through 44D, as it stood prior to the amendment by chapter 645 of the Acts of 1954. The general contractor listed J. S. Prunier and Sons, Inc. as the sub-contractor for furring, lathing and plastering. Prunier had filed a sub-bid with the Division of Building Construction and was included on the list of sub-bidders sent to the general contractor as required by G. L. c. 149, § 44C (C). After selection of the general contractor, the sub-bids were opened at which time it appeared that Prunier's bid was on the standard form prescribed by chapter 149, section 44C, that it was for the complete work, that it contained no exceptions or reservations, and that it corresponded exactly with the bid as carried in the proposal of Farina, the general contractor. The bid as filed was the lowest of all the sub-bids for furring, lathing and plastering.

One of the other sub-bidders objected to the bid of Prunier and offered to prove that the bid filed by Prunier with the division was not a copy of the bid given to the various general contractors, as required by statute. The applicable statutory language is contained in G. L. c. 149, § 44C (B), which provides in part as follows:

"All principal and such minor sub-contractors as are designated in the proposal form shall deliver or mail to the awarding authority record copies of all bids sent by them to the general contractor. . . . No sub-bids shall be considered in the final selection of sub-bidders, as hereinafter described, except those filed with the awarding authority as above provided."

From the information supplied by you it appears that the sub-bidder sent letters to the various general contractors, rather than sending bids on the standard form, so that the bid as filed was not in fact a copy of the bid sent to the general contractor.

It is our opinion that the bid of the sub-contractor as filed with the division must be strictly adhered to and cannot be varied by any form of extrinsic evidence. *Gifford* v. *Commissioner of Public Health,* 328 Mass. 608, 615.

An examination of the bids in the hands of the division, without resort to other evidence, indicated that the provisions of chapter 149, sections 44A through 44D, had been complied with. Farina Brothers Co., Inc. had filed the lowest bid of all the general contractors and such bid appeared to be regular on its face. It listed J. S. Prunier and Sons, Inc. as the sub-contractor for furring, lathing and plastering. Prunier was included on the list of sub-bidders sent by the division to the general contractors as required by section 44C (2) (*c*). On these facts, the selection of Farina as general contractor at that time appears to have been in order. Thereafter the filed sub-bids were opened and it appeared that the sub-bid of Prunier corresponded exactly with its bid as listed in the proposal of Farina, the general contractor. On this evidence, filed with the division

as required by law, it was proper to conclude that the bidding procedure had been followed and that the award of the contract to the general contractor was in accordance with law.

The division does not award sub-contracts. The sub-bidder's proposal is addressed to the general contractor and when accepted the sub-bidder becomes bound to the general contractor, not to the division. G. L. c. 149, § 44C. *East Side Construction Co., Inc.* v. *Adams*, 329 Mass. 347.

The general contractor is subject to the bid statute in his award of a contract to the sub-contractor, and he should not enter into a contract with a sub-bidder where the dealings between the two parties have not been in accord with the bid statute. But defects which may exist in the award of such sub-contract do not affect the validity of a pre-existing contract between the general contractor and the division.

The division undoubtedly has a duty to determine that the bid statute has been complied with but if its duty of investigating factual matters existing between general contractors and sub-contractors requires it to go beyond the records which have been filed with the division, there thus might arise a stalemate of indefinite duration in the construction or repair of public buildings. *Cf. East Side Construction Co., Inc.* v. *Adams, supra*, at page 355.

It is noted that the bid statute does not give the division the unqualified right to reject sub-bids. There is a limited right to control sub-bids in the following circumstances. By section 44C (D) the general contractor and the awarding authority may jointly consider the substitution of sub-bidders but any substitution must be based on an agreement to substitute. Under section 44E a substitution of sub-bidders is required if the originally selected sub-contractor fails to sign the sub-contract or fails to furnish a performance bond. In addition the awarding authority is given a right to reject all sub-bids on any item provided the bidders agree that none of the sub-bids are from persons competent to perform the work or that only one sub-bid was received and such single bid is unreasonable.

The facts of the present case do not fall within any of the foregoing exceptions. On the contrary, section 44C (B) states that "no *sub-bids* shall be considered in the final selection of sub-bidders, as hereinafter described, except those *filed* with the awarding authority as above provided."

The foregoing provision makes it clear that *filed* bids are all that can be considered by the awarding authority. As again stated by the court at page 350 of the *East Side Construction* case:

"Only subbids filed with the awarding authority can be considered in the final selection of subbidders. . . . The subbids as filed must be strictly adhered to, and cannot be varied by a general contractor."

In conclusion, from the information which the division may consider as provided by the bid statute, it appears that the award to Farina Brothers Co., Inc. as general contractor was proper. It also appears that J. S. Prunier & Sons, Inc. was a sub-bidder who had filed a bid and whose name appeared on the list of sub-bidders sent out by the division. Since there are no facts which would allow a rejection of such sub-bid under section 44C (D) or 44C (E), the division is not in a position to object to the award of a sub-contract by Farina to Prunier. We express no opinion concerning any possible rights of a private nature which may be available to other sub-contractors or to other general contractors because of any

alleged violation of the bidding procedure in the private dealings between any general contractor and any sub-bidder.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By JOSEPH H. ELCOCK, Jr.,
Assistant Attorney General.

State Armories — Non-military Use — Possible Tort Liability of Military Officers — Indemnity Bond.

JAN. 7, 1955.

Col. RALPH T. NOONAN, *State Quartermaster.*

DEAR SIR: — You have requested an opinion regarding certain non-military use of State armories.

I understand from your letter that, under the authority of G. L. c. 33, §122, as amended by St. 1954, c. 590, non-military use of State armories is authorized and is in fact customary. I note that the permitted use includes "athletic contests and social or civic activities conducted by responsible organizations or associations." § 122 (*c*) (1). Compensation for such use is fixed by the same section, and such compensation is required to be "at least sufficient to cover" lighting, heating, guarding, etc. You state that such organizations, including schools, will arrange for the erection of portable bleachers on the armory floor. This creates the possibility of danger of injury to those who occupy the bleachers. Moreover, in the event of such non-military use, there is always the possibility of an injury occurring from other causes to some person coming upon the premises in the course of such non-military use.

Section 15 (*d*) of chapter 33, as most recently amended, imposes upon you the care and control of the State armories. In this chapter there are provisions placing certain responsibilities in connection with State armories upon the Adjutant General and also upon the military custodian of a particular armory. §§ 1 and 123.

Upon this situation you request an opinion on the following matter:

"We are in doubt as to whether there is a possibility or probability of suits in tort for personal injury being filed against any of the three officers mentioned. Your opinion upon this point is requested."

The law is very clear that there is the legal possibility of a suit for tort. There are many decisions of the courts and opinions of this office indicating that an officer, employee or agent of the Commonwealth or of some division of the Commonwealth may be held to be liable for his own affirmative act of negligence. The liability would be based upon negligence, and if such personal negligence were found by a court there would undoubtedly be a personal judgment against such officer, employee or agent. Restatement of Torts, § 888, comment c. VIII Op. Atty. Gen. 618. Opinion of the Attorney General, dated May 8, 1920, to the Commissioner of Correction. Opinion of the Attorney General, dated December 2, 1953, to the Boston Arena Authority. Such liability would be based upon negligence, and in the absence of negligence there would be no personal liability. IV Op. Atty. Gen. 107.

I have answered your inquiry as to whether or not there is a possibility of such suits in tort. I cannot express an opinion upon the probability of such suits being filed.

You also request an opinion as to whether or not, and if so in what manner, your office can require insurance protection against such possibility of suit.

It is provided in section 122 (*f*) of chapter 33 that the organization making non-military use of a State armory shall pay for damage and for personal injury, and the section also provides that "rules and regulations may also require that such organization shall file with the adjutant general a bond in such form and amount and containing such conditions as said rules and regulations may prescribe."

Under this provision of the statute you have full authority to require any school or organization or association making non-military use of a State armory under section 122 to supply you with a "bond" which will give you complete protection against the possibility of any liability in a personal suit against any of the three officers you mentioned based upon any occurrence during the period of such non-military use. Since the statute specifically points out a "bond" as the method of obtaining such protection you should use this method, rather than the method of the ordinary general property liability insurance. I believe there will be no technical difficulty in obtaining and making use of the "bond" form of protection.

If you are going to adopt rules and regulations requiring this protection in the form of a bond, I suggest that you consider whether or not the bond should not also be framed in such a way as to protect, not only the three officers you name, but the Commonwealth as well, all officers, employees and agents of the Commonwealth and also the person or persons who may suffer personal injury.

The requirement of such a bond or liability insurance is a frequent occurrence in other departments and divisions of the Commonwealth. Opinion of the Attorney General, dated June 15, 1935, to the Commissioner of Agriculture. Opinion of the Attorney General, dated December 2, 1953, to the Boston Arena Authority.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

State Employees — Working on or Missing a Holiday — Rules as to Day Off or Extra Pay.

JAN. 13, 1955.

Hon. CARL A. SHERIDAN, *Commissioner of Administration.*

DEAR SIR: — You have propounded ten questions, all but the last of which are intended to present problems concerning the effect of G. L. c. 30, § 24A, upon the rights of State employees. I assume that these problems actually exist, for, as you must know, it is the longstanding policy of this department not to answer hypothetical questions.

Before proceeding to discuss your first nine questions, I feel that your concluding inquiry should be disposed of, since it is concerned with the general legislative policy established by said § 24A.

That statute provides

(1) That any "person employed by the commonwealth" (other than certain ones enumerated in St. 1953, c. 400, the most recent amendment to § 24A) who is required to work on anyone of certain named legal 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." (In the interests of brevity, I shall hereinafter refer to all such persons as "employees," although "officers" are also included within the sweep of the statute; see 1946 Op. A.G. 105). This policy was established by St. 1945, c. 565, which originally inserted § 24A in said c. 30, and has since remained unmodified except by a minor change, presently immaterial, effected by St. 1948, c. 498. It was apparently the intent of the Legislature to make good to a State employee either by giving him a "replacement" holiday or an extra day's pay, any of the designated holidays which he was not able to enjoy because of being required to work; it is completely immaterial, for the purposes of this part of said § 24A, whether the holiday on which the employee works falls on a Saturday or on some other day of the week.

(2) That in the case of a State employee (other than one of those excluded by the 1953 amendment referred to above) "who works five or more days a week and whose regular day off falls on any of the aforementioned holidays *except when such holiday occurs on Saturday*, an additional day off shall be allowed, or payment in lieu of one day off shall be allowed." This policy was established by St. 1946, c. 411, which added a clause to § 24A, and has since remained unmodified except for the changes effected by St. 1948, c. 498, which inserted the italicized exception relating to Saturday holidays, and which also made the privilege created by the statute available to employees who work "five or more" days weekly (theretofore it had been available only to those who regularly worked six days weekly). As expressed in the title of c. 411, as well as in the statute itself, this provision is intended to give an employee who "misses" a holiday because it falls on his regular *day off* either a "replacement" holiday or an extra day's pay. Thus, he is placed on a par with all his fellow employees who are actually excused from a regular working day by the occurrence of a holiday, and who receives for any one week in which a holiday falls one day's pay more than the actual number of days worked. *Cf.* Attorney General's Report, 1948, p. 65. The exception of Saturday holidays may be justified upon the ground that most State employees have Saturday as a regular day off. You will note that this clause of said § 24A becomes operative when an employee *does not have to work* on a particular holiday, whereas the first clause of the statute, discussed above, deals with situations where an employee *is called upon to work on a holiday*. Again, *cf.* Attorney General's Report, 1948, p. 65.

I believe that the foregoing constitutes a sufficient answer to your tenth question. The answers to your others are as follows:

1. You state that an employee whose regular work-week runs from Tuesday through Saturday has been required to work on a Saturday which was one of the legal holidays listed in § 24A. You inquire as to his rights under said section.

Such an employee falls clearly within the scope of the first clause of § 24A: he has been required to work on a holiday. He must, therefore, 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." This will equalize his rights with those of other employees whose regular work weeks are identical with his, who were not required to work on the holiday in question, but who, nonetheless, received a day's pay for that day.

2. You state that an employee whose regular work week runs from Monday through Friday, and who has worked on those days for a total of 40 hours, has been required to work "overtime" on the following Saturday, which was also a legal holiday listed in § 24A. You inquire as to his rights under that section.

You are referred to an informal opinion from this department to you dated August 31, 1953, wherein this precise question was discussed at length. As was stated therein, such an employee must, of course, be paid for his overtime work on the holiday, and, in addition, he is entitled to the benefits accorded to him by § 24A. Op. Atty. Gen., 1954, p. 31.

3. You inquire as to the effect of § 24A upon the above employee's rights if he is not required to work on a Saturday holiday.

In this event, the employee would not be entitled to the benefits of the first clause of the statute because he was not called upon to work on the holiday. He would not be entitled to the benefits of the second clause because the holiday in question fell on a Saturday.

4. You inquire as to the effect of § 24A upon the above employee's rights if a holiday falls on a Saturday during his regular vacation.

Obviously the first clause of the statute has no application: he has not been required to work on the holiday. Nor does the second clause have any effect upon his rights, for two reasons: (1) it never applies where the holiday falls on a Saturday, and (2) it has no application to an employee who does not work five or more days in the week during which the holiday falls.

5. You inquire as to the effect of said § 24A upon the rights of an employee whose regular work week runs from Tuesday through Saturday, but who is on vacation during a week in which a holiday falls on Saturday.

The answer to the preceding question is equally applicable here.

6. You inquire as to the effect of § 24A upon such an employee who is absent on sick leave during a week in which a holiday falls on Saturday.

Again, the answer to your fourth question is applicable.

7. You state that an employee whose regular work week runs from Monday through Friday is out on leave without pay preceding a holiday which occurs on Wednesday. You inquire whether your Rule OE–5, adopted under G. L. c. 7, § 7, conflicts with said § 24A in denying such an employee a paid holiday in this case.

The first clause of § 24A has, obviously, no application, since the employee did no work on the holiday. The second clause never affects the rights of an employee whose "regular day off" is on a day other than that on which the holiday falls. The answer to your question, as I have restated it above, must, therefore, be in the negative.

8. You state that an employee whose regular work week runs from Tuesday through Saturday has been on sick leave during an entire week in which a holiday fell on Monday. You inquire as to the effect of § 24A upon his rights.

The first clause of the statute is inapplicable; the second clause relates only to employees who work five or more days during the week in which the holiday falls. Said § 24A, therefore, does not apply in this instance.

9. You state that an employee whose regular work week runs from Tuesday through Saturday has worked the entire week, except Monday, his regular day off, which was also a legal holiday. You inquire as to his rights under § 24A.

The second clause is fully applicable, since all of the elements required by it are present: (1) the employee has worked five days during the week; (2) the holiday fell on his regular day off; and (3) the holiday did not fall on a Saturday.

In conclusion, and in an effort to simplify the foregoing, I suggest the following tests for you to apply in determining the effect of § 24A upon any given set of facts:

I. *If the employee has been required to work on a holiday* listed in said section, and if he does not fall within any of the classes of "employees" exempted from the operation of the statute by its concluding clause, he is entitled to the benefit of the first clause.

II. *An employee who has not worked on a holiday* is entitled to the benefit of the second clause of the section *only* if *each* of the following inquiries can be answered in the affirmative:

1. Is he an employee other than one of those listed in the concluding clause of this section?
2. Did he work five or more days during the week in which the holiday fell?
3. Was the holiday one of those listed in said section?
4. Did it fall on his "regular day off?"
5. Did it fall on a day other than Saturday?

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Hurricane Relief Fund (1954) — Overtime Pay for Policemen and Firemen.

FEB. 1, 1955.

Mr. HARRY J. TALMADGE, *Executive Secretary, Hurricane Relief Board.*

DEAR SIR: — You have asked whether overtime payments made to regular police and firemen of the town of Arlington for work performed as a result of Hurricane Carol is a reimbursable item.

Section 4 of chapter 689 of the Acts of 1954 provides for the reimbursement of political subdivisions of the Commonwealth for expenditures which were the result of an emergency created by the hurricane. In regard to overtime payments, the Hurricane Relief Board issued a memorandum to political subdivisions in September, 1954, which states in section IIA, subdivision 2, that such expenditures made in connection with emergency work are reimbursable as follows:

"Overtime payments to regular employees for disaster work performed outside of normal working hours, provided that such employees normally receive overtime pay."

The memorandum appears to indicate a proper application of the law to the question at hand. If the police and firemen would ordinarily be paid overtime for work performed outside of their normal working hours, in accordance with the then existing terms of employment, such overtime payments caused by the hurricane would be reimbursable.

The information submitted by the town of Arlington, which you forwarded to me, does not appear, however, to establish the fact that police and firemen are normally entitled to overtime. Town Counsel refers to Article 5 of the special town meeting of June 28, 1948, which authorizes an additional day off or an additional day's pay for police officers required to work on specified holidays. The article has application only on the specified holidays and does not relate to the general question of overtime.

Town Counsel also indicates that the town may have authority to pay overtime to police. We express no opinion as to the legal authority of the town in this matter.

The problem is whether the town owes an obligation to the police and firemen to pay overtime for such work. The obligation in turn depends on the terms of employment existing between the town and the employees in question. It makes no difference that the town might have authority to arrange different terms of employment.

In view of the foregoing, it appears that the Hurricane Relief Board should decline to approve the overtime payments to police and firemen unless and until it is established that the town had an obligation to make such payments because of the terms of employment in existence at the time of the hurricane.

A similar problem arose as a result of the Worcester tornado in 1953. In order to authorize payments of overtime to regular city and town police performing overtime duties where such overtime might not otherwise be authorized, the General Court found it necessary to enact special legislation. (See St. 1954, c. 430.) It is significant that there is not yet any similar legislation applicable to the hurricanes of 1954.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By JOSEPH H. ELCOCK, JR.,
Assistant Attorney General.

Plumbers, Board of Examiners of — Whether Person Holding Master's License can be Appointed to Board as Journeyman.

FEB. 7, 1955.

His Excellency CHRISTIAN A. HERTER, *Governor of the Commonwealth.*

SIR: — This is in answer to your letter of February 2, 1955, requesting my opinion regarding an appointment to the Board of Examiners of Plumbers.

The statute (G. L. c. 13, § 36) provides for three members on that board, as follows: ". . . one shall have had at least ten years' continuous practical experience as a master plumber"; ". . . one shall be a sanitary engineer"; and ". . . one [shall be] a journeyman plumber of at least ten years' practical experience, who is a wage earner."

I understand that the term of appointment of the person who has been

serving as the "journeyman plumber" is now expiring, and that such person, since his appointment to the board, "has acquired a master's license" but "he has not taken advantage of his master's license in his trade."

Your question is:

"I would like to know if a man holding a master's license can legally represent the journeyman appointment on this board."

Your question must be answered in the negative. The clear intent of the Legislature is that the board shall be composed of a master plumber, a journeyman plumber and a sanitary engineer. In my opinion it is clear that the requirement that there be a "journeyman plumber" on the board is not met by the appointment of a "master plumber" even though the latter "has not taken advantage of his master's license in his trade."

A master plumber, by definition (G. L. c. 142, § 1), is "a plumber having a regular place of business and who, by himself or journeymen plumbers in his employ, performs plumbing work." This definition requires only "a regular place of business" and the performance of "plumbing work." A master plumber is not required to work through employed journeyman plumbers; he can do the work "by himself." Even while he is a master plumber, he can do the work of a journeyman plumber. *Burke* v. *Holyoke Board of Health*, 219 Mass. 219. *Commonwealth* v. *McCarthy*, 225 Mass. 192. *Power* v. *Board of Examiners of Plumbers*, 281 Mass. 1. *Attorney General* v. *Union Plumbing Co., Inc.*, 301 Mass. 86. Even though the present incumbent "has not taken advantage of his master's license in his trade," it seems clear that he is a master plumber both because of his license as such and because of the above statutory definition of a master plumber.

But even without consideration of the technical niceties of who is or is not a "master plumber" by definition, it is clear that the Legislature's requirement that one member of the board must be a "journeyman plumber" is not met by the appointment of a "master plumber." For this reason, your question is answered in the negative.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Department of Public Works — Waterways — Protection of Rivers, Shores and Harbors — Incidental Power to Reconstruct Bridges and Culverts.

FEB. 16, 1955.

Hon. JOHN A. VOLPE, *Commissioner of Public Works.*

DEAR SIR: — You have requested my opinion concerning the authority of the Department of Public Works under G. L. c. 91, § 11, as amended by St. 1950, c. 516.

That section provides, so far as is material to the question presented by you, that the Department of Public Works

". . . shall undertake such work for the improvement, development, maintenance and protection of tidal and non-tidal rivers and streams, harbors, tide waters, foreshores and shores along a public beach as it deems reasonable and proper . . . ."

In your letter you state that "during the course of improving stream channels it often becomes necessary to reconstruct bridges and culverts because of the inadequacy of their waterways."

You request my opinion upon the following question:

"Does this department have the authority under G. L. c. 91, § 11, to reconstruct such bridges and culverts and do work incidental thereto?"

I answer your question in the negative. The statute referred to does not by its terms or by implication vest any such power in the department. Legislative enactments cannot be presumed to go beyond purposes manifested by their words.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Department of Public Health — Standards for Human Habitation — Repeal of Health Regulations by Later Amendment of Statute — Statutory Construction.

FEB. 17, 1955.

JEROME PATRICK TROY, Esq., *Attorney, Department of Public Health.*

DEAR SIR: — This department has received your recent request for an informal opinion regarding "Minimum Standards of Fitness for Human Habitation."

I understand that the Department of Public Health in 1949 adopted certain "Minimum Standards of Fitness for Human Habitation" under the authority of G. L. c. 111, § 128, as amended by St. 1947, c. 631, and that by the same authority such regulations were duly adopted in some cities and towns in Massachusetts. This section 128 was repealed by St. 1954, c. 209. The 1954 Legislature, by the same act, enacted new sections 128B, 128C, 128D, and 128F, all of which relate to the same general subject. The 1954 Legislature, at a later date, also adopted penalties for the violation of such new statutes and the penalties are set forth in new section 128F. See St. 1954, c. 447.

The new statutes contain the substance of the provisions of former section 128 which now has been repealed. The new statutes also contain additional requirements, i.e.: a "mobile dwelling place" is now included; certain specific and stated standards must be complied with until and unless regulations are adopted; a local board of health can prepare its own regulations; the scope of the regulations now includes "housing and home safety practice"; the method of giving notice of the adoption of regulations has been changed; and the penalty is now applicable specifically to violations of §§ 128B, 128C, 128D, and not of § 128.

On this situation you request an opinion as to two matters as follows:

1. Are the minimum standards as adopted by this department in 1949 under the provisions of section 128 still in effect or did they die with the repeal of section 128?
2. Are minimum standards of fitness for human habitation adopted locally by cities or towns under the provisions of section 128 still in effect or did they die with the repeal of section 128?

In my opinion the answer to your two questions is that the standards adopted by your department and adopted by cities and towns under the

provisions of section 128, now repealed, are no longer in effect. I do not believe that the rule of statutory construction — to the effect that an amended statute containing substantially the same provisions as an earlier statute, or a new statute enacted simultaneously with the repeal of an earlier statute and re-enacting substantially the same provisions, is to be construed as a continuation of the previous statute and not as new enactments (see McCaffery, *Statutory Construction*, § 79, p. 159, and Sutherland, *Statutory Construction*, § 1933, p. 426) — can be applied in this case. Although the general subject matter of the new statute is the same, and many of the provisions of the old law have been continued, there are many differences between the original section 128 and the provisions of the new section 128C and the other sections which were enacted with section 128C. These differences are important and are of substance. See above examples. The provision in section 128B for the automatic application of certain standards is a new and different approach to the problem. This automatic application of specific standards, in all probability, will cover the needs in this public health field until new standards can be adopted by the department and by cities and towns.

For the reasons set forth above it is my opinion that the regulations adopted under the authority of G. L. c. 111, § 128, became of no effect when that section was repealed. The same answer applies both to the regulations adopted by the Department of Public Health and the acceptance of such regulations by cities and towns.

Very truly yours,
GEORGE FINGOLD, *Attorney General,*
By LOWELL S. NICHOLSON,
Assistant Attorney General.

Department of Public Works — State Highways — Harbor Lines — Encroachment upon Harbor Line under General Power to Build Highways.

FEB. 23, 1955.

Mr. H. G. GRAY, *Acting Commissioner of Public Works.*

DEAR SIR: — Your recent letter requests an opinion regarding the right of your department to place an earth fill outside the Boston "Harbor Line."

You call attention to St. 1952, c. 556, § 6, which provides in part that your department may "take by eminent domain under chapter seventy-nine of the General Laws, or acquire by purchase or otherwise, such public or private lands . . . as it may deem necessary" for the carrying out of the provisions of this special act for the expenditure of bond proceeds in the construction of public highways.

You request an opinion as to whether or not the powers granted under this act are broad enough to enable the department to place an earth fill outside the Boston Harbor Line in connection with the construction of the proposed Southeast Expressway through a portion of Dorchester Bay.

The answer to your question is in the negative. The act mentioned above, authorizing expenditure of certain bond proceeds for an extensive program of highway construction, is not sufficiently specific to authorize you, without more, to encroach upon the Boston Harbor Line for the purpose of construction of roads which are authorized in general terms but

not by specific location. The protection of a harbor line is an important concern of the Legislature. Absolute limits are set forth to prevent such encroachment. Note the provision in G. L. c. 91, § 14, that licenses can be issued by your department for construction below high water mark "but not, except as to a structure authorized by law, beyond any established harbor line . . ." This proposed Southeast Expressway is not "a structure authorized by law" within the meaning of this statute. In section 34 of the same chapter a procedure is established for prescribing harbor lines. Your department may make a "report" relative to harbor lines to the Legislature "for its action, thereon." This section indicates clearly that harbor lines "are established by the general court." This section also provides that no "structure shall thereafter be extended into said harbor beyond such lines, except as provided by section fourteen." As above mentioned, this section fourteen requires that such structure be "authorized by law."

For the reasons stated above it is our opinion that St. 1952, c. 556, § 6, above referred to, does not give your department the right to place an earth fill outside the harbor line upon which to construct the proposed Southeast Expressway. Specific legislative action would be needed for such authority.

Very truly yours,
GEORGE FINGOLD, *Attorney General,*
By LOWELL S. NICHOLSON,
Assistant Attorney General.

Veteran's Non-contributory Retirement — Creditable Service — Service as Special Justice of District Court.

FEB. 23, 1955.

Hon. CARL A. SHERIDAN, *Commissioner of Administration.*

DEAR SIR: — You have requested my opinion with reference to the "creditable service," under G. L. c. 32, § 60, which may be allowed to a veteran who has applied for non-contributory retirement under section 57 of that chapter.

The provision under which this veteran seeks a non-contributory retirement (§ 57) provides as follows:

"A veteran who has been in the service of the commonwealth, or of any county, city, town or district thereof, for a total period of ten years in the aggregate, may, upon petition to the retiring authority, be retired, in the discretion of said authority, from active service . . . if he is found by said authority to have become incapacitated for active service . . . ."

You inform me that the first public service of the veteran in question was as a member of the Massachusetts House of Representatives from 1931 to 1936 — as to which, see Attorney General's Report, 1953, p. 29 — and that his most recent service has been as Superintendent of the State Prison Colony from 1950 to the present time. These two periods of service meet the requirements of section 57 that there be service "for a total period of ten years in the aggregate."

A further requirement as to the length of service for retirement under section 57 was added by an amendment to section 60 of chapter 32 enacted

by the 1954 Special Session (St. 1954, c. 688). It is now provided by section 60 that the retirement benefits under section 57 shall not be available to a veteran —

". . . unless at the time of his retirement the total period of his creditable service is at least equal to twice the time he was not in the employ of the commonwealth or of a county, city, town or district subsequent to the date when his employment by the commonwealth or by a county, city, town or district first began."

In order to meet this new measure of "creditable service" under section 60 the veteran in question requests credit for a period of service, from February of 1938 until May of 1950, during which period he was the duly appointed and qualified and acting Special Justice of the District Court of Western Norfolk.

Upon this state of facts you request an opinion on the following question:

"Is the entire period during which the veteran held the position of Special Justice, from February of 1938 to May of 1950, to be accepted as 'creditable service' under G. L. c. 32, § 60, as amended, or only those dates on which the veteran actually sat as Special Justice?"

It is my opinion that the entire period shall be accepted as "creditable service" under the provisions of section 60.

The provisions relating to the non-contributory retirement of veterans under G. L. c. 32, §§ 56–60, stand together and they must be interpreted as a uniform and consistent whole. They do not rely upon or take their force from any other provisions of the General Laws. These sections make references to "service," "employ," "employed," "employment" and "creditable service." It is clear that these various words are intended to refer to the same thing. All of these references must be considered in determining whether or not the veteran is entitled to credit, as for "creditable service," for the entire period he was a special justice, or only for those days when he actually sat in court.

While it is true that a special justice receives compensation on a *per diem* basis, and only for the days on which he sits as special justice, it is also true that during the entire period he holds the office of special justice he holds personal authority in himself by virtue of such position, even apart from any designation to sit in court for a particular day. He is given duties and privileges and responsibilities by our statutes, even for the days he did not sit. Note the following provisions:

Waiver of five day notice of intention of marriage. G. L. c. 207, § 30.

As "conservator of the peace," with power to order arrests. G. L. c. 220, § 3.

Administration of oath. G. L. c. 218, § 7.

A special justice ". . . may at any time receive complaints and issue warrants and summonses, under his own hand and seal, and . . . may likewise issue search warrants." G. L. c. 218, § 35.

Process for witnesses and defendants. G. L. c. 218, § 37.

"*Powers and Duties of Special Justice.* — A special justice of a district court shall at all times have and exercise all the powers and duties of a justice of such court, so far as to render decisions, make orders, and perform such other acts as he may deem necessary or proper in connection with or relating to matters which have been heard before him." G. L. c. 218, § 41.

A special justice is required to hold himself available for active judicial duties, upon request, or, automatically, upon the absence of the presiding justice of his court. G. L. c. 218, § 40. Furthermore, G. L. c. 218, § 43A, after stating that a special justice is subject to call by the administrative committee, goes on to provide that —

"In the case of the refusal or failure of any . . . special justice . . . to comply with any order of the committee in performance of its duties and powers by this section established, the committee shall report such person or persons to the chief justice of the supreme judicial court . . . and, upon a finding . . . the supreme judicial court shall forthwith make an appropriate order as to the matter involved."

The personal authority of a special justice is distinctly different from the authority given to a member of a group composed of "three or more public officers or other persons" who are given joint authority and who can exercise that authority only by majority action. G. L. c. 4, § 6, cl. Fifth.

The phrase "creditable service" as used in G. L. c. 32, § 60, is not restricted by the meaning given to that phrase in sections 1 to 28 of that chapter, which sections deal with contributory retirement systems. The definition of that phrase in section 1 is specifically limited to sections 1 to 28. It was ruled by a former Attorney General that a State employee was entitled to "creditable service" under sections 56 to 60, even though that employee had been specifically excluded by statute from being entitled to creditable service under sections 1 to 28. Attorney General's Report, 1953, p. 29.

Analogy for the present case is found in G. L. c. 32, § 65B, in which it is provided that a special justice of the district court is entitled to a pension upon retirement after "having served as a special justice for at least ten years." With reference to the presiding justice the words used are "after having served . . . at least ten years continuously." Section 65A. There can be no question but that the "service" under these two statutes runs from the time of appointment until the time of resignation. It is my opinion that the same interpretation must be given in the matter now under consideration.

In conclusion, therefore, the answer to your question is that the veteran who has applied for retirement under the provisions of G. L. c. 32, § 57, under the circumstances of this particular case, is entitled to credit, as for "creditable service" as that phrase is used in section 60 of chapter 32, for the entire period during which he held the position of special justice.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Veteran's Non-contributory Retirement — Creditable Service — Public Officer — Service as Public Trustee of Boston Elevated Railway Company.

FEB. 25, 1955.

Hon. CARL A. SHERIDAN, *Commissioner of Administration.*

DEAR SIR: — You have requested my opinion with reference to the "creditable service" which may be allowed, under G. L. c. 32, § 60, to a

veteran who has applied for non-contributory retirement under §§ 56–60 of that chapter.

You advise me that the veteran in question was formerly a member of the Massachusetts House of Representatives for about twelve years — as to which see Attorney General's Report, 1953, p. 29 — and that for the past six years he has been in the service of the Massachusetts Division of Employment Security. These two periods of service meet the ten-year requirement of sections 56 and 57. Between these two periods of service, however, the veteran served for about nine years (1938 to 1947) as one of the Public Trustees of the Boston Elevated Railway Company under the provisions of Sp. St. 1918, c. 159. Such service was full time, and the compensation was on an annual basis.

You request my opinion as to whether the service as such trustee can be accepted as "creditable service" to meet the requirement of G. L. c. 32, § 60, as amended by St. 1954, c. 688, that the period of service for the Commonwealth must be "at least equal to twice" the time he was not in such service.

On February 23, 1955, I sent you an opinion[1] on a similar question relating to retirement credit under that same section for service as a Special Justice of the District Court. I refer you to that opinion for a discussion of the provisions of sections 56 to 60 of chapter 32, and particularly the meaning of the phrase "creditable service" in section 60. Such discussion is not repeated in this opinion.

The acceptance of credit for the period during which this present veteran was one of the Public Trustees of the Boston Elevated Railway Company depends upon the provisions and interpretation of Sp. St. 1918, c. 159, which created such position. The purpose of that statute was to provide for the "public management and operation" of the railway company. (Title, and §§ 12, 15.) "Its purpose is operation through public officers. . . ." *Boston* v. *Treasurer & Receiver General*, 237 Mass. 403, at p. 412. This purpose was accomplished by the appointment of five Public Trustees who were to "manage and operate" the company and its properties and were to "take and have possession of said properties in behalf of the commonwealth" (§ 2). The trustees were "appointed by the governor, with the advice and consent of the council," and were subject to removal for cause in the same manner (§ 1). They were to be "sworn before entering upon the performance of their duties" (§ 1). The trustees were to regulate fares and services, and in these respects the authority of the trustees was not subject to the approval or control "of any other state board or commission" (§ 2). The statute also provided that the trustees, in their management and operation of the company, "shall be deemed to be acting as agents of the company and not of the commonwealth," and that the company was to be liable for the acts of the trustees "to the same extent as if they were in the immediate employ of the company" (§ 2).

The statute also provided that a deficit caused by operations was to be paid by the Commonwealth (§§ 11, 13), and that upon termination of public management and control the company would "thereafter be subject to public regulation and supervision" (§ 15).

The status of the company and of the Public Trustees has been discussed on numerous occasions by the Supreme Judicial Court.

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[1] Page 78 of this Report.

"The Boston Elevated Railway Company is a public service corporation. . . . Its management and operation have been taken over by the Commonwealth as a public enterprise and exercised through a board of public officers called trustees." (*Opinion of the Justices*, 261 Mass. 556, at p. 594.)

". . . such management and operation are carried on by the Public Trustees in behalf of the Commonwealth, which contracted with the company for such management and operation upon certain specified terms and conditions. . . . Moreover, it is provided expressly by the Public Control Act that the Public Trustees 'shall take and have possession of said properties . . . in behalf of the commonwealth during the period of public operation.'" (*Boston Elevated Railway* v. *Commonwealth*, 310 Mass. 528, at p. 576.)

"The contract between the Commonwealth and the company, embodied in the statute, provided that the Commonwealth, acting through the Public Trustees — who undoubtedly are public officers — should take such possession of the properties of the company and manage and operate them as therein provided. . . . Specific duties are imposed and specific powers are conferred upon the Public Trustees as such." (*Auditor of Com.* v. *Trustees of Boston El. Ry.*, 312 Mass. 74, at p. 78.)

"The control act in effect was a lease by the company to the Commonwealth whereby the possession and control of the company's property were turned over to the trustees on behalf of the Commonwealth. . . ." (*Attorney General* v. *Trustees of Boston El. Ry.*, 319 Mass. 642, at p. 661.)

Because of this judicial interpretation, the Circuit Court of Appeals for the First Circuit held that the salary of the Public Trustees was salary paid to public officers of the Commonwealth of Massachusetts and therefore was not taxable under the then form of the Federal income tax. *Powers* v. *Commissioner of Internal Revenue*, 68 F. 2d 634.

Certain provisions of the 1918 statute, standing alone, might indicate that the service of the Public Trustees was service for the company and not for the Commonwealth. The provisions that the trustees shall be "deemed to be acting as agents of the company" (§2), that they "shall not be considered public officers" within the meaning of St. 1909, c. 514, § 25 (§1), and that they shall not have the benefit of the legal services of the Attorney General (§1), were considered and disposed of in the *Opinion of the Justices*, 261 Mass. 523, at pp. 542–3:

" . . . the Boston Elevated Railway Company, although privately owned, will not be privately managed. On the contrary, it is to be managed, controlled and operated wholly by the board of trustees who are appointed by the Governor, who constitute a public board, who are for all essential purposes public officers although under said c. 159, § 2, 'deemed to be acting as agents of the company and not of the commonwealth,' and whose duties are prescribed by a public statute enacted by the General Court pursuant to its constitutional prerogatives.

"The provision of § 1 of the proposed act, to the effect that the trustees shall not be considered public officers within the meaning of G. L. c. 271, § 40, does not impair or affect the general nature of their duties as public officers. The further provision exempting the trustees from the terms of G. L. c. 12, § 3, has no bearing upon the character of their service as public officers. For all other purposes they are public officers. They perform public functions."

The provision in § 2 that the company shall be liable for the acts of the Public Trustees "to the same extent as if they were in the immediate employ of the company" is itself an implication that the trustees are not in such employ.

The provision in § 1 that the trustees are to receive their annual compensation "from the company" does not change their status as public officers acting in behalf of and for the benefit of and in the service of the Commonwealth. That provision for payment by the hand of the company is merely one of the provisions in the contract for public management between the Commonwealth and the company. This was the conclusion reached in the Federal case of *Powers* v. *Commissioner of Internal Revenue*, above cited. The court there stated (p. 636):

"That the salaries of the trustees were paid in the first instance by the railway company is not important . . . . Moreover, during and at the close of the period under discussion, the railway company was heavily indebted to the commonwealth for operating deficits which had been collected out of taxation. The salaries increased the deficits, and may well be regarded as having been paid by the public."

For certain details of the management of the company's operation the Public Trustees have been treated as the agents of the company and not of the Commonwealth. To discontinue use of the Atlantic Avenue location: *Boston Elevated Railway* v. *Commonwealth*, 310 Mass. 528, at pp. 577–580. To keep accounts of income and disbursements from and for operations: *Auditor of Com.* v. *Trustees of Boston El. Ry.*, 312 Mass. 74, at pp. 79–83. To determine accounting methods for depreciation: *Attorney General* v. *Trustees of Boston El. Ry.*, 319 Mass. 642, at pp. 658–9, 670. But the general purpose of the Public Control Act and the status of the Public Trustees as public officers remain as shown by the quotations given above, some of which come from the three cases cited in this paragraph.

The statute which created the position of the Public Trustees of the Boston Elevated Railway Company must be considered as a whole, in light of the purpose for which it was enacted. That purpose was public management and control. The trustees were the representatives of the Commonwealth; they acted in behalf of the Commonwealth, and in order to protect the Commonwealth, and in order to carry out the provisions of public control; they were appointed by and were subject to removal by the Governor; and they have judicially been held to be "public officers." It cannot be doubted that they were in the service of the Commonwealth.

Under all the circumstances of this particular case, it is my opinion that the veteran whose application for retirement is now being considered must be given credit as for "creditable service," as that phrase is used in G. L. c. 32, § 60, for the period of time he was one of the Public Trustees of the Boston Elevated Railway Company upon appointment by the Governor.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Elevator Regulations — Conflict between General Statutes and Boston Building Code — Statutory Construction — Repeal by Implication.

March 3, 1955.

Board of Elevator Regulations.

In your recent letter you refer to an apparent conflict between the provisions of G. L. c. 143, §§ 71A–71C, inclusive, and those of § 120 of the Boston Building Code (St. 1938, c. 479), and inquire how it may be resolved.

Said §§ 71A–71C, added to c. 143 by St. 1945, c. 626, § 1, provide that no person shall engage in the construction, maintenance or repair of elevators or escalators unless licensed to do so by the Commissioner of Public Safety who is directed to hold "frequent examinations" in certain cities, including Boston, for applicants for such licenses; a criminal penalty is established for any person doing such work without a license.

Section 120 of the Boston Building Code (enacted some seven years before the enactment of §§ 71A–71C) establishes a board of examiners for the city of Boston, and requires it to hold examinations for persons desiring to be registered as qualified "*to have charge or control* of the . . . installation or repair of elevators and escalators", and empowers it to issue licenses to successful applicants who thereafter "shall be entitled *to have charge or control*" of such work (emphasis supplied).

Your specific question is whether or not the provisions of the Boston Building Code above referred to have been impliedly repealed by the later legislative enactment which added §§ 71A–71C to c. 143 of the General Laws. My answer is in the negative.

It has long been the law that "acts in *pari materia* are to be taken together as one law, and are so to be construed, that every provision in them may (if possible) stand. Courts therefore should be scrupulous how they give sanction to supposed repeals by implication." *Haynes* v. *Jenks*, 2 Pick. 172, 176. As was said in *Brown* v. *Lowell*, 8 Metc. 172, 174–175, "It may happen that acts of special legislation may be made in regard to a place, growing out of its peculiar wants, condition, and circumstances. . . . Afterwards, a general act may be passed, having some of the same purposes in view, extending them generally to all the towns of the Commonwealth, with provisions adapted to the condition of all towns. It would be a question depending upon a careful comparison of the two acts, and the objects intended to be accomplished, whether the general act must be deemed an implied repeal of the special prior act. In general, we should think it would require pretty strong terms in the general act, showing that it was intended to supersede the special acts, in order to hold it to be such a repeal." Of course, if the two statutes are plainly inconsistent, the earlier is repealed by the later, even without an express repealing clause. *Commonwealth* v. *Kimball*, 21 Pick. 373, 377; especially is this true of a later statute the clear purpose of which was to cover the whole subject to which it relates. *Homer* v. *Fall River*, 326 Mass. 673, 676.

The provisions of said §§ 71A–71C have a statewide application, and would supersede — would impliedly repeal — such portions of the Boston Building Code as were wholly repugnant to them. But in my opinion, the two statutes can stand without conflict. Under the general law, every person, whether or not acting in a supervisory capacity, who works upon the construction, maintenance or repair of elevators and escalators,

in Boston or elsewhere in the Commonwealth, must have been licensed by the Commissioner of Public Safety. In Boston, a person who is to act in a *supervisory capacity* in such work, must not only have the commissioner's license, but must also hold the license required by § 120 of the Boston Building Code.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Hurricane Relief Fund (9154) — Reimbursement to Town for Repair of Private Way in which Town has Interest — Use of Public Money for Private Purposes — Query as to "Emergency."

MARCH 18, 1955.

Hon. CARL A. SHERIDAN, *Commissioner of Administration.*

DEAR SIR: — You have requested an opinion as to the right of the Hurricane Relief Board to reimburse the town of Fairhaven for repairs on the causeway leading to West Island, which causeway was damaged by the 1954 hurricanes. This request raises a question as to your authority under St. 1954, c. 689, as amended by St. 1955, c. 46. I understand from you that this causeway is a private way leading from that part of Fairhaven which is on the mainland to West Island which is also a part of the town of Fairhaven, and that this causeway is the only connection between the mainland and West Island.

The first question you present is whether or not the town of Fairhaven has such an interest in this causeway that it can lawfully expend public funds to repair hurricane damage to the causeway.

In my opinion the answer to this first question is in the affirmative. The record title of the town includes "the right to use" the causeway as a means of "access" to West Island. This is contained in the taking by eminent domain in 1941 by the town's predecessor in title. The town also has of record the "right to maintain the causeway," in common with all other landowners on West Island. This is established by the decree of 1920 registering title to West Island. In 1953 the town acquired title to beach property at the south end of West Island, under G. L. c. 40, § 5 (25A), and this ownership carries with it a duty to maintain access for town inhabitants to the beach property. The above stated interests of the town are permanent and cannot be taken away from the town without its assent. Furthermore, you report to me that the town "has at all times asserted a municipal interest in and a right on behalf of all persons claiming through it to use the foregoing causeway" and that the town has publicly announced "that all residents of the town of Fairhaven as a matter of right were entitled to access to said town beach by way of said causeway from Jacob's Neck to West Island."

In addition, I understand that the town has used the causeway for public purposes such as servicing a civil defense station on West Island, and furnishing fire protection to the island. Town police have patrolled the causeway. Also, public utility services for electricity and telephone reach

West Island over the causeway. And a substantial number of town residents have built their dwellings on West Island.

The above facts and circumstances make it clear that the town has a right to use public money to make repairs on this causeway. The rule that money raised by taxation can be used only for public purposes and not for the advantage of private individuals would not be violated by this use. In the case which you present the expenditures are to "provide for the accommodation of the public as to means of travel and transportation . . . and are to be made concurrently with the use of ways by the public . . . where the primary purpose of such (repairs) is the benefit of the public to whose use the way is opened." This quotation comes from *Opinion of the Justices*, 313 Mass. 779, at page 785, in a case which related to removal of snow and ice from private ways open to public use. The circumstances in the case which you present, involving record easements in the town as well as substantial and necessary use of the causeway by the town inhabitants, applied under the law set forth in the decision cited, in my opinion justify the expenditure of town money for necessary repairs to the causeway.

Your general question as to the right of the Hurricane Relief Board to reimburse the town of Fairhaven for repairs made to the causeway because of damage caused by the hurricane presents a second problem, that is, your right under the restricted provisions of the Hurricane Relief Act in St. 1954, c. 689, to make such reimbursement. The statute raises a question of fact to be decided at the "discretion" of the Commission on Administration and Finance (section 1) and by "approval" of the three-man board established by section 4. In exercising such discretion and in issuing such approval consideration must be given to the numerous statements in the statute that the only payments which can be reimbursed are payments made "as a result of an emergency created by said hurricanes." This emergency character of the 1954 and 1955 acts is much narrower than the corresponding provisions of St. 1938, cc. 505, 506 and 507, which were enacted following the 1938 hurricane. The emergency characterization of the present statute is emphasized by the memorandum of September 9, 1954, issued by the Hurricane Relief Board. This requirement of an emergency raises a question of fact. The facts themselves have not been presented to me, and therefore there is no question of law upon which I can pass relative to the reimbursement within these restrictive terms of the statute. However, I feel it my duty to call your attention to these general restrictions.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Elevators — Elevator and Building Inspectors — Right to Enter Private Property to Inspect Elevators.

MARCH 23, 1955.

Hon. OTIS M. WHITNEY, *Commissioner of Public Safety.*

DEAR SIR: — You have requested an opinion as to the necessity or advisability of an amendment to § 62 of G. L. c. 143 providing specifically

that inspectors of the division of inspection and local building inspectors may enter upon private property to supervise the installation or alteration of elevators therein pursuant to the provisions of said section.

In my opinion no such amendment is necessary.

Said § 62 imposes upon your inspectors or, in cities and towns having them, upon local building inspectors, the duty of supervising all such work. While the statute does not specifically provide that they may enter private property in the performance of this statutory obligation, there seems to be no doubt that they and their authorized representatives have a legal privilege to do so "so far as may be necessary to discharge properly such duty." *Winslow* v. *Gifford*, 6 Cush. 327, 330. See, also, Restatement, Torts, § 211, and Comment c thereto.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

State Employee — Retirement — Tenure of Office of "Holdover" — Jurisdiction of State Board of Retirement upon "Removal" of Employee.

MARCH 30, 1955.

Hon. JOSEPH A. HUMPHREYS, *Commissioner of Insurance.*

DEAR SIR: — In your recent letters you state that on September 30, 1954, you "suspended," for good and sufficient cause, a person (hereinafter referred to as the employee) who then held the position of Assistant Chief Examiner in the Division of Insurance, and that thereafter, on December 23, 1954, that position "was filled by vote of the Governor and Council." (I assume that the employee's successor was appointed by you, subject to the approval of the Governor and Council, in accordance with the provisions of G. L. c. 26, § 7.) You have never filed with the State Board of Retirement any written notice of your suspension (or removal) of the employee under G. L. c. 32, § 16(2).

It appears that the employee was first appointed to said position on January 6, 1949, by the Commissioner of Insurance then in office; that Commissioner's service ended in February, 1951, and none of his successors, including yourself, ever reappointed the employee to serve as Assistant Chief Examiner. At the time of his "suspension" by you, the employee, a member of the State Employees' Retirement System in Group A, had completed more than twenty years of creditable service.

After the appointment of his successor on December 23, 1954, the employee requested a hearing by the State Board of Retirement "under G. L. c. 32, § 16," and on February 15, 1955, that board purported to hold such a hearing, which culminated in a finding that "the removal or discharge of the petitioner was not justified and . . . that the petitioner should be restored to his position . . . without loss of compensation . . ."

Thereafter, you purported to appeal from this finding to the Contributory Retirement Appeal Board under G. L. c. 32, § 16(4); that "appeal" has not as yet been passed upon by that board.

You inquire as to what action, if any, you should take in connection

with your said appeal, and as to the legal effect of the finding of the State Retirement Board.

Said c. 26, § 7, provides that "The commissioner of insurance may appoint and remove, with the approval of the governor and council, a . . . chief examiner and such additional . . . examiners . . . as the service may require." Any person originally appointed under this provision is, in my opinion, subject to removal from his position in accordance with its terms; it should be noted that there is no requirement that such removal shall be "for cause," so that any kind of "hearing" thereon, at the instance of such an appointee, would serve no purpose beneficial to him. Indeed, the obvious purpose of the statute, which is to allow a commissioner of insurance to surround himself with certain designated assistants and agents of his own choosing (persons appointed under this section are not protected by the civil service laws — see G. L. c. 31, § 5), would be defeated if his removal of any of them were subject to the review of any person or board other than the Governor and Council.

Moreover, the general rule of law is that no public officer can give one of his appointees a tenure of office beyond his own, so that, at best, the employee's right to his position continued only (1) during the term of the commissioner who originally appointed him and (2) during the "period of holdover" between the end of that term and the appointment and qualification of his successor. *Opinion of the Justices*, 275 Mass. 575, 579–580. Upon the happening of that event, at the latest, he no longer had any claim to the position of Assistant Chief Examiner, and had no right to request any hearing under G. L. c. 32, § 16(2). *Howard* v. *State Board of Retirement*, 325 Mass. 211.

It follows, therefore, that your replacement of the employee, whether or not for cause, was proper, and that the "hearing" held by the State Board of Retirement should not have taken place; indeed, said board was informally advised by this department, prior to said "hearing," that it lacked jurisdiction to entertain the employee's request therefor.

An additional reason for this lack of jurisdiction is to be found in the very statute under which said "hearing" was requested. Said § 16(2) provides for a hearing as to the propriety of the discharge or removal of certain members of the State Employees' Retirement System *after a written notice of said removal has been filed with the board* by the employing unit; it does not establish a procedure by which an employee may initiate a review in the absence of such a notice. In cases where no notice has been given, the statute provides that the discharge or removal "shall not become effective," thus affording complete protection to affected employees without the intervention of the State Board of Retirement. One whose employment is so protected can enforce such rights as the statute gives him by appropriate proceedings in the courts, but he is given no recourse to the retirement board, the only function of which, under said § 16(2), is to pass upon the justifiability of a discharge based upon reasons set forth in the notice duly filed with it. The purported "decision" of the board, in the instant case, that "the removal or discharge of the petitioner was not justified," was beyond its powers, since it did not have before it the "written notice . . . containing a fair summary of the facts" required by the statute, and, therefore, was not presented with the only issue which the statute empowers it to decide — whether the discharge or removal, upon the basis of such fair summary, was justified.

In my opinion, the "hearing" held by the State Board of Retirement, and

its subsequent decision, were nullities, and you may properly take or continue any course of action which you would follow had no such hearing been held or such decision rendered.

It follows that the "appeal" taken by you to the Contributory Retirement Appeal Board under G. L. c. 32, § 16(4), is unnecessary, and in my opinion you should withdraw it from the consideration of that board. I do not mean to intimate that any such appeal would be proper, even if it served any presently useful purpose.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Hurricane Relief Fund (1954) — Restrictions upon Payments — Reimbursement to Department of Public Works for Shore Protection Work Abutting Private Property.

MARCH 30, 1955.

Hon. CARL A. SHERIDAN, *Commissioner of Administration.*

DEAR SIR: — You have requested my opinion with reference to reimbursements to towns and counties and to the Department of Public Works under St. 1954, c. 689, as amended by St. 1955, c. 46, for the repair of damage caused by the 1954 hurricanes.

Section 1 of the statute to which you refer provides a fund of twelve million dollars available for transfer by the Commission on Administration and Finance, at its discretion, for four specific purposes. Two of the purposes for which you are authorized to make a transfer of a portion of this fund are as follows:

"(1) To the director of civil defense such amounts as may be necessary to provide for reimbursements and other expenses authorized by section four of this act;

. . . . . .

"(3) To reimburse the appropriation accounts" for the fiscal year 1955 of the Department of Public Works, and other departments, "such amounts as, in the opinion of the commission are necessary and have been expended therefrom for purposes of disaster relief or repair of hurricane damage. . . ."

Section 4 of the act, as amended by St. 1955, c. 46, provides:

"The commonwealth shall reimburse . . . the political subdivisions of the commonwealth affected by" said hurricanes "annually an amount equal to their obligations of repayment of any indebtedness incurred" under St. 1950, c. 639 (which establishes the Civil Defense Agency), or under G. L. c. 35, § 36A, or c. 44, § 8 (9) ". . . and shall reimburse them for any expenditures from available funds and from sums raised by taxation for the purposes authorized" under said St. 1950, c. 639, or under G. L. c. 44, § 31. (Reimbursement under this section is "subject to the approval of a" three-man board set up therein, and is limited to reimbursement on account of "indebtedness" incurred or "expenditures" made "as a result of an emergency created by said hurricanes.")

Your authority to make reimbursements to towns and counties is established by § 1 (1) and by § 4 quoted above. Section 1 (3) spells out your authority to make reimbursements to the Department of Public Works.

In your letter you state that the Department of Public Works, under the authority of G. L. c. 91, has performed some shore protection work abutting private property, and that hurricane damage to such shore protection work must now be repaired. You also state that in shore locations where no such protection work had been performed prior to the hurricanes repairs must also be made because of hurricane damage.

Upon these facts you request an opinion on the following two questions:

"1. In locations where shore protection work abutting private property had been performed under G. L. c. 91, §§ 11 and 31, prior to August 31, 1954, may the Department of Public Works be reimbursed by the Commission on Administration and Finance under subdivision (3) of section 1 of St. 1954, c. 689, for its share of the cost of repairs of such damage, and may reimbursement for the town and county shares of the cost be approved by the Hurricane Relief Board under section 4 of said chapter?

"2. In locations where no such protection work abutting private property had been performed prior to August 31, 1954, but where such work is now essential because of the hurricane, may the same reimbursement and approval for reimbursement be granted?"

In answering these questions a distinction must be made between the *amount of damage* caused by the hurricanes and the *cost of repairs* to be made because of such damage. The statute in question gives you no authority to transfer money on account of the *damage* caused, but only on account of the *repairs* actually made because of hurricane damage. The Hurricane Relief Fund cannot be used to repay the cost of work performed prior to the hurricanes. It can be used only to reimburse actual expenses paid out after the hurricanes in order to repair damage caused by the hurricanes. And such reimbursement, of course, is limited to the repair of *hurricane* damage and cannot be enlarged to include additional and more extensive construction which it may be advisable to make at the same time.

There is the additional restriction upon you that the Hurricane Relief Fund can be disbursed only for the emergency purposes stated in the law. This restriction as to reimbursement to cities and towns is set forth in detail in the last paragraph of my opinion to you dated March 18, 1955 (regarding the town of Fairhaven matter).[1] There are somewhat similar restrictions as to reimbursement by you to the Department of Public Works. See § 1 (3) of the 1954 act. This act permits a transfer in your "discretion" to the Department of Public Works, in such amounts as your commission deems "are necessary and have been expended . . . for purposes of disaster relief or repair of hurricane damage." These requirements — *i.e.*, "approval," determination of "emergency," a decision in your "discretion," and the formation of an opinion that certain amounts are "necessary" for disaster relief or repair of hurricane damage—raise questions of fact. The facts as to the nature of the repair work which may be deemed necessary have not been presented to me and, therefore, there is no question of law upon which I can pass relative to the validity of reimbursement within these emergency and restrictive terms of the statute.

[1] Page 85 of this Report.

This problem is one for your determination and decision as a matter of fact.

Subject to the above distinctions and restrictions, and subject to the several approvals which are required by the 1954 statute, the answers to both of your questions, in my opinion, are in the affirmative. It is immaterial that under Question 1 some shore protection work had been done prior to the hurricanes, and that no such prior work had been done under Question 2. The only material issue is the cost of repairs made after the hurricanes and solely because of the damage caused by the hurricanes.

This opinion is limited to shore protection work "abutting" private property, and it does not cover shore protection work "on" private property.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Search Warrants for Records Belonging to Subversive Organizations — G. L. c. 276, § 1A.

APRIL 7, 1955.

His Excellency, CHRISTIAN A. HERTER, *Governor of the Commonwealth.*

SIR: — You have submitted to me for examination and report enacted bill numbered House 2617, entitled "An Act providing for the Issuance of Search Warrants for Books, Records and Material belonging to Subversive Organizations." [1]

This bill inserts a new section 1A in chapter 276 of the General Laws. This chapter deals generally with search warrants, and the new section which it is proposed to insert provides specific authority to the Superior Court, upon application of the Attorney General or a district attorney, to issue a search warrant for certain property or articles which are described in detail in the sections dealing with subversive organizations, the Communist Party, and the crime of inciting the overthrow of the Government by force or violence. G. L. c. 264, §§ 11, 18, and 21. The present statutes regarding search warrants do not permit a search warrant for the property or articles described in these sections. The special commission on Communism recommended (House No. 2910 of 1954) that the enforcement problems of the statutes against subversive activities, and particularly the issuance of search warrants, be studied and clarified. The bill which has been presented to you for signature has been formulated by the Judicial Council with care that it does not violate the constitutional protections against any unauthorized or unreasonable search warrants. 1950 Report of the Judicial Council, pages 23–28. The act provides that it shall take effect on October 1, 1955.

The bill appears to be in proper form, and if enacted into law would, in my opinion, be constitutional.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

[1] Approved by the Governor on April 11, 1955, to become chapter 272 of the Acts of 1955.

Hospitalization Costs — Rates set by Commission on Administration and Finance not Applicable to Uniformed Police of Department of Public Safety or Metropolitan District Commission.

April 26, 1955.

Hon. Carl A. Sheridan, *Commissioner of Administration.*

Dear Sir: — You have requested an opinion, in connection with the provisions of G. L. c. 7, § 30K, concerning the rates of payment by the Commonwealth for hospitalization of members of the uniformed police in the Department of Public Safety and in the Metropolitan District Commission.

Section 30K of chapter 7 of the General Laws was added to our statutes by St. 1953, c. 636. This section provides in part that the Director of Hospital Costs and Finances in your department shall determine and shall certify to you certain information regarding hospital costs, and the statute then provides that you

". . . shall certify annually to each of the various departments, boards or commissions of the commonwealth purchasing care in such hospitals, sanatoria and infirmaries, or reimbursing cities or towns for such care purchased by them, such rates with respect to each such hospital, sanatorium and infirmary as will reflect reasonable hospital costs or charges made to the general public, whichever is the lower."

The statute then states that

"All departments, boards or commissions of the commonwealth purchasing such service shall pay the rates so certified."

You make inquiry, under the above-quoted statute, with respect to the amount of payment which can be made by the Department of Public Safety under G. L. c. 22, § 7A, or by the Metropolitan District Commission under G. L. c. 92, § 63A, for hospitalization of the uniformed officers of such departments.

It is provided by c. 22, § 7A, with reference to the Department of Public Safety, as follows:

"The commissioner may authorize the payment, out of any appropriation made for traveling or other expenses of the department, of the reasonable hospital, medical and surgical expenses incurred by any trainee, officer or inspector of the department when temporarily or permanently disabled by reason of injuries sustained through no fault of his own while actually performing police service, or while in training."

It is provided by c. 92, § 63A, with reference to the Metropolitan District Commission, as follows:

"The commission may authorize the payment, out of the metropolitan parks or boulevard maintenance funds, of the reasonable hospital, medical and surgical expenses of any permanent member of its police department or of any call officer thereof disabled, either mentally or physically, by injuries sustained through no fault of his own in the actual performance of

his duty, for useful service in the department either temporarily or permanently."

Upon the above statutes and facts you request an opinion as to the following two questions:

"1. Does the Commissioner of Administration have the authority, under St. 1953, c. 636, to set rates for hospitalization of uniformed police in the Department of Public Safety?

"2. Does the Commissioner of Administration have the authority, under St. 1953, c. 636, to set the rates for hospitalization of uniformed police in the Metropolitan District Commission?"

In my opinion, the answer to each question is in the negative. I do not believe that the proper interpretation of § 30K, added by St. 1953, c. 636, includes the hospital services which may be required for the uniformed police of either the Department of Public Safety or the Metropolitan District Commission. The new statute requires that departments and commissions of the Commonwealth "purchasing such service" shall pay the hospitalization rates certified by you. The phrase "purchasing such service" is not the most appropriate for the kind of payment which is made by the department and the commission under the statutes cited above. In c. 22, § 7A, there is authorization to the Commissioner of Public Safety, in his discretion, to pay reasonable hospital expenses "incurred" by an officer of his department. This is clear indication that the hospital expenses have been incurred and purchased by the officer, not by the department. The same interpretation, in my opinion, is required with regard to the discretionary power in the Metropolitan District Commission to pay hospital expenses "of" any member of its police department. This kind of reimbursement is not a "purchase" of hospital service by the department or commission.

An examination of the new § 30K, and of the other statutes adopted at the same time, gives rise to a definite conclusion that these new statutes refer to the support of public welfare and other public assistance patients. In fact, this is the exact title of the statute. This conclusion is reinforced by an examination of the Report of the Joint Standing Committee on Public Welfare Sitting in Recess, 1953 House Document No. 2400, which is the report by which these new acts were proposed and recommended to the Legislature. The report, the title of the act, and the specific language of § 30K, lead to the conclusion that hospitalization services paid for by the Department of Public Safety or the Metropolitan District Commission under the statutes above cited are not included within the provisions of § 30K and are not affected by such provisions.

Because of the above reasons you are informed that, in my opinion, you have no authority, under G. L. c. 7, § 30K, as added by St. 1953, c. 636, to set rates for hospitalization of the uniformed police of the Department of Public Safety or of the Metropolitan District Commission.

Very truly yours,

George Fingold, *Attorney General.*

Public Building Construction — Bid Statute — Addition by Awarding Authority of Addendum to Bid — Authority of Department of Labor and Industries to Investigate.

April 27, 1955.

Hon. Ernest A. Johnson, *Commissioner of Labor and Industries.*

Dear Sir: — You have asked this department for an opinion concerning the award of contract by the city of Cambridge to the Lawrence Plate & Window Glass Company.

You state that the Lawrence Plate & Window Glass Company contends that its bid was improper by virtue of the fact that an addendum to the bid was issued by the city of Cambridge and that such addendum did not come to the attention of the contractor until after its bid was submitted. You state further that the city solicitor for the city of Cambridge has ruled that the bid was complete and unconditional and that therefore the Lawrence Plate & Window Glass Company should be held to its bid as submitted. You have asked whether your department has jurisdiction under G. L. c. 149, § 44E, to investigate the matter as to whether or not the bid is complete.

Under the aforementioned section 44E of chapter 149 the department is given authority to enforce and require compliance with the bid statute relating to the construction of public buildings as embodied in G. L. c. 149, §§ 44A, through 44D. Section 44C (A) provides in part that —

"Bid forms shall be completely filled in. Bids which are incomplete, conditional or obscure, or which contain additions not called for, shall be rejected."

The bid form for general contractors is likewise set out in section 44C, and it contains a space to be filled in whereby the contractor lists addenda, by number, on which he has bid.

In accordance with the foregoing, your department has authority to examine the bid form submitted by the general contractor. Such an examination should indicate whether the contractor's bid was based upon the addendum issued by the city of Cambridge. If the form lists the addendum, then the city of Cambridge was correct in awarding the contract to the Lawrence Plate & Window Glass Company. If the bid form does not list the addendum, then the form is incomplete and should be rejected.

Very truly yours,

George Fingold, *Attorney General,*

By Joseph H. Elcock, Jr.,
Assistant Attorney General.

Appeals in Certain Criminal Cases — Transcripts of Evidence and Filing of Appeals — G. L. c. 278, §§ 33A, 33B.

May 9, 1955.

His Excellency Christian A. Herter, *Governor of the Commonwealth.*

Sir: — You have submitted to me for examination and report enacted bill numbered House 2742, entitled "An Act relative to the Transcripts of Evidence and the filing of Appeals in Certain Criminal Cases."[1]

This bill amends sections 33A and 33B of chapter 278 of the General Laws which have reference to the preparation of transcripts of evidence and the filing of claims of appeals in certain criminal cases. These particular sections permit claims of appeals in certain criminal cases by means of a typewritten transcript of the evidence rather than the usual bill of exceptions. (See §§ 33C, 33E and 33G.) Prior to 1954 the right of an appeal upon a typewritten transcript was limited to cases of murder or manslaughter, with such a privilege being given in other felony cases only if an order to that effect was given by a justice of the Superior Court. In 1954 these two sections were amended (St. 1954, c. 187) to provide that defendants in all felony cases had such a right, and no order of a justice was required. The bill which has now been submitted to you for signature again amends these two sections, retaining the provisions that in every felony case a transcript will be available and that it is a matter of right to obtain a copy of this transcript and to appeal upon the typewritten transcript in a murder or manslaughter case, but providing that the privilege of obtaining such a transcript and of claiming appeal upon the typewritten transcript in other felony cases could be had only by express order of the court. This change has been recommended by the Judicial Council. See its report for 1954, contained in 1955 Public Document No. 144, pages 7–9. The reasons advanced by the Judicial Council for the present recommended change are that it is unwise to extend this "right" to appeal on a typewritten transcript to every felony case (it should be limited to murder and manslaughter and other felony cases in which the court gives permission), and that it is not fair to force a defendant in every criminal felony case to pay for a transcript of the whole evidence if he is willing to accept the more inexpensive procedure of the familiar bill of exceptions. See also a criticism of the 1954 amendment and a recommendation of the bill which has now been submitted to you in "A Serious Change in the Method of Review in Criminal Cases," 39 M.L.Q. No. 2, p. 12 (June, 1954).

The bill before you also makes some changes in phraseology relative to appeals from interlocutory orders and relative to misdemeanor cases which are tried with a felony case, but these provisions do not appear to make any substantive change in the law.

The bill appears to be in proper form, and if enacted into law would, in my opinion, be constitutional.

Very truly yours,

George Fingold, *Attorney General,*

By Lowell S. Nicholson,
Assistant Attorney General.

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[1]Approved by the Governor on May 9, 1955, to become chapter 352 of the Acts of 1955.

"Firearms" — Definition — 22-Caliber Conversion Unit.

May 10, 1955.

Hon. Otis M. Whitney, *Commissioner of Public Safety.*

Dear Sir: — You have asked this department for an opinion concerning the application of the law to 22-caliber Conversion Units and the necessity of a purchase permit for the purchase thereof under the provisions of G. L. c. 140.

A 22-caliber Conversion Unit consists of a slide containing a firing pin and a firing pin spring, a 22-caliber barrel, a barrel lock and slide lock, a recoil spring and barrel bushing.

A 22-caliber Conversion Unit as sold over the counter does not contain the necessary mechanism for firing a shot and, in my opinion, does not come within the definition of a firearm found in G. L. c. 140, § 121, which I quote:

". . .'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, and a machine gun, irrespective of the length of the barrel. . . ."

Very truly yours,

George Fingold, *Attorney General,*

By James F. Mahan,
Assistant Attorney General.

Service of Process on Non-residents doing Business in Commonwealth — G. L. c. 227, § 5.

May 12, 1955.

His Excellency Christian A. Herter, *Governor of the Commonwealth.*

Sir: — You have submitted to me for examination and report enacted bill numbered House 834, entitled "An Act relative to the Service of Process on Certain Non-Residents doing Business in this Commonwealth." [1]

This bill amends chapter 227 of the General Laws, which chapter relates to judicial proceedings against persons not inhabitants of the Commonwealth who do business here. The bill amends section 5 of that chapter which section provides that such non-residents, before they carry on business here, shall appoint an agent in the Commonwealth upon whom legal process can be served. At the present time this section 5 provides that if an individual or partner refuses to appoint such an agent upon whom process can be served, such person "shall forfeit ten dollars, to the use of the commonwealth, for each day during which such person has so acted." The bill which has been presented to you for signature strikes out this sentence regarding forfeiture of ten dollars and inserts in place thereof the provision that if a person or partner fails to appoint an agent as required by this section and thereafter does business in this Commonwealth, in such case "service of process may be made upon the state

[1] Approved by the Governor on May 13, 1955, to become chapter 360 of the Acts of 1955.

secretary." That is, instead of providing a penalty for failure to appoint an agent for service of process, the new bill supplies an agent in the person of the State Secretary upon whom process can be served as it could have been served upon an appointed agent. Such a provision has been held constitutional. *Hess* v. *Pawloski*, 274 U. S. 352. There are other similar provisions in our Massachusetts statutes which have been on the books for a great many years. For example, see G. L. c. 90, § 3A; c. 181, § 3A; c. 227, § 5A.

The bill appears to be in proper form, and if enacted into law would, in my opinion, be constitutional.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Special Commission to Investigate Subversive Activities — Reporting Names of Individuals.

MAY 13, 1955.

His Excellency CHRISTIAN A. HERTER, *Governor of the Commonwealth.*

SIR: — You have submitted to me for examination and report resolve entitled "Resolve reviving and continuing and increasing the Scope of the Special Commission established to study and investigate Communism and Subversive Activities and Related Matters in the Commonwealth." [1]

This resolve revives and continues the special commission which is studying Communism. This commission was established by chapter 89 of the Resolves of 1953, approved July 2, 1953. That resolve directed that the commission file its final report not later than June 30, 1954. The special commission was revived and continued in 1954 by chapter 123 of the Resolves of 1954, approved June 10, 1954. The 1954 resolve called for a final report not later than May 15, 1955. The resolve which has now been submitted to you for signature continues the substance of these two previous resolves, and calls for a final report not later than February 1, 1956.

All three resolves call for an investigation and study —

"of the extent, character and objects of communism and subversive activities and related matters within the commonwealth; the diffusion within the commonwealth of subversive and un-American propaganda that is instigated from foreign countries, or of a domestic origin, and attacks the principle of the form of government as guaranteed by our constitution and all other questions in relation thereto that would aid the general court in enacting any necessary remedial legislation."

The only change made in the resolve which has now been presented to you is the inclusion of a provision that "said commission shall, in the course of its investigation and study, consider the subject matter" of the four current House documents numbered 140, 459, 1571 and 1802, each one of which relates to the general problems being studied by this special

[1] Approved by the Governor on May 13, 1955, to become chapter 52 of the Resolves of 1955.

commission. Except for this reference to these four current House documents, and except for the date when the final report is due, the resolve now before you is identical with the resolve approved in 1954.

Both the 1954 resolve and the one which is now before you contain the following provision:

"Such report shall include the name and all other identifying data available to the commission, of any individual, concerning whom, the commission, during the course of the investigation, has received creditable evidence that such individual was or is a member of the communist party, a communist or a subversive."

The power and the propriety of a study by the Legislature through a special commission such as the present cannot be questioned. In the case of *Attorney General* v. *Brissenden*, 271 Mass. 172, the Supreme Judicial Court stated, at page 177, as follows:

"In the performance of its legislative functions manifestly the General Court may find it needful to acquire information not possessed by its individual members. Investigations of various subjects by legislative committees are often made to the end that facts relating to the enactment of proposed, or the amendment of existing, statutes may be ascertained and presented in available form for the enlightenment of members of the General Court as a basis for legislation. This method of procedure has been so common as not to require the citation of illustrations."

The question of the identity of individuals who believe in Communism was discussed by the United States Court of Appeals for the District of Columbia, in the matter of *Barsky* v. *United States*, 167 F.2d 241 (certiorari denied, 334 U. S. 843). That case involved House Resolution No. 5 of the 79th Congress which related to an investigation of subversive and un-American propaganda. The court, at page 246, stated as follows:

"If Congress has power to inquire into the subjects of Communism and the Communist Party, it has power to identify the individuals who believe in Communism and those who belong to the party. The nature and scope of the program and activities depend in large measure upon the character and number of their adherents. Personnel is part of the subject."

A New Hampshire legislative resolution, very similar to the one now before you, was held constitutional in *Nelson* v. *Wyman*, 99 N. H. 33, 37 (1954).

The resolve appears to be in proper form, and if approved by you would, in my opinion, be constitutional.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Special Legislative Commission — Time at which Commission Ceases to Exist — Certification of Bills for Payment after Expiration of Commission.

MAY 17, 1955.

Mr. FRED A. MONCEWICZ, *Comptroller.*

DEAR SIR: — You have asked my opinion regarding payment of the expenses of a special commission under the circumstances referred to in

your letter. I note your statement that the Legislature annually by resolves establishes special commissions to make studies and investigations, and provides for their filing a final report by a certain date. Appropriations generally are made separately for the purposes of such special commissions. You further state that after filing their final report or after their expiration, whether or not their work is completed, members of such special commissions occasionally certify to your bureau for payment bills which were incurred before the filing of their final report or before the expiration of their special commission.

In this Commonwealth a special commission is established by a resolve passed by both houses of the Legislature and approved by the Governor. The resolve is in effect a statute. *Cabot* v. *Corcoran*, 332 Mass. 44, 46 (December 16, 1954). The resolve specifies the number of members of the special commission and the persons who appoint these members. Such special commission is directed to make a study and investigation of a certain designated matter. The special commission, under the usual resolve, is authorized to "expend for expenses and clerical and other assistance such sums as may be appropriated therefor." The sum which can thus be expended is usually fixed by an item in the supplementary appropriation act. The special commission is also directed by the resolve to "report to the general court the results of said study and investigation, together with recommendations, if any, and drafts of legislation necessary to carry such recommendations into effect, by filing the same with the clerk of the senate (or of the house) on or before the last Wednesday of December in the current year" (or at some other specified time).

The life and authority of a special commission continues until the date set forth in the resolve for the filing of its final report or until the date it actually files its final report, whichever date occurs first. In each of these instances the special commission ceases to exist and its authority to go forward in the matters referred to it is completely dissolved at such date. *Cabot* v. *Corcoran*, *supra*, pages 46–48. This is the practice which has been accepted and followed for many years. Upon the adoption of a legislative order authorizing the filing of the final report at a date later than the date for filing set forth in the original resolve the *only* authority remaining in the commission is that which relates to the filing of its final report.

Upon these facts and principles you make the following request:

"Your opinion is respectfully requested as to whether members of a special commission which has expired can subsequently, after the expiration date of such commission, certify for payment under their signatures invoices covering expenses incurred prior to the expiration date of such commission."

The answer to your question, in my opinion, is in the affirmative, but subject to three obvious qualifications. These qualifications are (1) that the expenses must have been reasonable and proper in connection with the work of the special commission, (2) that the authority to make and incur such expenses must have been exercised by a proper act of the special commission prior to the expiration of the life of the special commission, and (3) that money is available for the payment of such expenses of such special commission.

The fact that certification is made by members of the special commission *after* the date of the filing of the final report does not prevent payment of such expenses. The crucial test is whether the commission had the power

to spend the money at the time such expenditure was authorized. The date of certification is subsidiary and incidental. The purpose of certification is to give assurance or proof to the Comptroller that the expenses were within the scope of the resolve and were authorized by the commission and that they are proper. The commission is not spending money by its certification. This is a mere bookkeeping matter. It amounts to an affidavit "made by the person authorized to incur such obligation" which may be required by the Comptroller under G. L. c. 7, § 13. Certification might be delayed because of illness, absence from the Commonwealth, or on account of other sufficient reasons. For the purpose of such certification the members of the special commission may act and sign the necessary invoice after the date of the filing of the final report by the special commission.

Nor does G. L. c. 29, § 20, prevent payment of such expenses. That section calls for an appropriation which has been "authorized and approved" by the head of the commission. One of the qualifications to my affirmative answer to your question is that the incurring of the expenses certified to you had been authorized and approved by a majority of the members of the special commission while they had power to give such authorization. It is my opinion that such prior authorization and approval furnishes compliance with the provision to which you refer. Certification to you at a later time made by a majority of the members of the special commission and payment upon the authority thereof do not constitute a violation of the provisions of this section.

The claim of a person who has furnished a service or act or material to such a special commission, if based upon an authorized request of the special commission, is a claim under a valid contract authorized by the Commonwealth. There is nothing in the situation outlined above which prevents payment of such a claim.

This conclusion is in accord with the opinion of Attorney General J. Weston Allen, dated January 8, 1921, reported in VI Op. Atty. Gen. 8.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Commonwealth not Bound by Usual License Requirements — Storage of Explosives, Blasting Bond, etc.

MAY 25, 1955.

Hon. OTIS M. WHITNEY, *Commissioner of Public Safety.*

DEAR SIR: — You have inquired whether the provisions of G. L. c. 148, § 13, relative to the granting, by local licensing authorities, of licenses for the keeping, storage, manufacture or sale of explosives and inflammable materials, require the Commonwealth itself to apply for such a license for premises owned by it within a particular municipality.

The answer to this question is in the negative. "There is a well-settled presumption of law that such an exercise of the police power by the Legislature does not apply to property of the Commonwealth, unless the Legislature has clearly manifested an intent that it should do so." Attorney General's Report, 1941, p. 118 (hot water tank requirements). "It is a general principle of law that statutes are not to be interpreted as imposing burdens on the sovereign, the Commonwealth, unless a clear legisla-

tive intent that they should do so is apparent," *ibid*, 1942, p. 88 (land takings by county commissioners). See, also I Op. A.G. 290, 297 (local board of health cannot regulate plumbing and drainage facilities within State Reformatory); II *ibid.* 56 (Metropolitan Park Commission need not obtain local building permit); II *ibid.* 300 (Boston building commissioner has no jurisdiction over State House elevators); IV *ibid.* 537 (no local amusement license necessary for entertainment in armory); Attorney General's Report, 1932, p. 86 (no local plumbing and wiring licenses required for State-owned buildings); *ibid.* 1933, p. 38 (no license required for inmate of state prison colony assigned to operation of steam shovel); *ibid.* 1933, p. 47 (no local amusement license necessary for entertainment in armory); *ibid.* 1933, p. 65 (no approval by county commissioners required for construction of a dam in a State forest); *ibid.* 1934, p. 75 (plumbing at Reformatory for Women not subject to local inspection; *ibid.* 1935, p. 38 (State-owned buildings not subject to general laws relating to the licensing of plumbers); *ibid.* 1939, p. 42 (national guard need not obtain local permit to maintain fires on State land used for military purposes).

You inquire, further, whether the Commonwealth itself is bound by such rules and regulations as may be promulgated by the Board of Fire Prevention Regulations under §§ 9 and 10 of said chapter 148. This question, like your first, and for the same reasons, must have a negative answer.

You inquire, further, as to the Commonwealth's obligation to file a blasting bond under the provisions of § 19 of chapter 148. The answer to this question, also, is in the negative, not only upon the basis of the authorities referred to above, but also because the Commonwealth, in the absence of specific legislation imposing such liability upon it, would not be civilly responsible for damage caused by blasting carried on upon State-owned land, *Burroughs* v. *Commonwealth*, 224 Mass. 28, and therefore cannot be expected to bond itself against such liability.

You inquire, also, as to whether sections 9, 10, 13 and 19 apply to private contractors doing work for the Commonwealth upon State-owned land.

The answers to these questions are likewise in the negative. A private contractor acting for the Commonwealth, and in accordance with the provisions of a contract between them, is no more required to secure local permits or be subject to local regulation than is his principal, the Commonwealth. *Teasdale* v. *Newell, etc. Construction Co.*, 192 Mass. 440. However, it is competent for the Commonwealth, in its contract with such a person, to provide that he shall comply with all State and local laws, rules and regulations in any way affecting the work to be done; for example, such a provision is one of the Standard Specifications for Highways and Bridges promulgated by the Department of Public Works (Article 43).

Your remaining questions relate to the applicability of the foregoing statutes to counties and municipalities. I do not see that your department has any direct official interest in these questions, and therefore will refrain from commenting upon them.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Teacher's Certificate — Requirement of "Bachelor's Degree" — Statutory Construction — Specific Requirement does not Mean "or its Equivalent."

May 31, 1955.

John J. Desmond, Jr., *Commissioner of Education.*

Dear Sir: — You have recently requested an opinion from the Attorney General with reference to certain requirements relative to standards of certification of teachers.

Section 38G of chapter 71 of the General Laws, added by St. 1951, c. 278, and amended by St. 1952, c. 530, and St. 1953, c. 264, provides that the Board of Education shall grant certificates to teachers and others who furnish the board with satisfactory proof that they, among other things, "(4) possess a bachelor's degree or are graduates of a normal school approved by the board."

In connection with this requirement you request an opinion on the following two questions:

"1. Does the requirement 'possess a bachelor's degree' confine the interpretation to a degree so designated or may the Board of Education accept as this requirement a master's degree from an applicant who does not possess a bachelor's degree? The master's degree is a degree more advanced than the bachelor's degree.

"2. May the Board of Education accept the degree 'M.D.', Doctor of Medicine, from an applicant who does not possess a bachelor's degree?"

The statute expresses a clear requirement that an applicant for certification, who is not a graduate of an approved normal school, must "possess a bachelor's degree." As to each of the applicants you mention you state that he "does not possess a bachelor's degree." However, one applicant possesses a master's degree and the other possesses a doctor's degree. Do these advance degrees meet the requirement of G. L. c. 71, § 38G, for a "bachelor's degree"? In my opinion, they do not.

If the Legislature had required "a bachelor's degree or its equivalent," or "a bachelor's degree or more," or "at least a bachelor's degree," these advance degrees probably would be acceptable. But the Legislature did not use such words. The Legislature has set forth a clear and simple and reasonable test. To insert other words, where the Legislature did not use them, would be to draft a different test. Statutes must be accepted and interpreted as they are written. All words must be considered and given some meaning. New words cannot be added.

The requirement of a "bachelor's degree" does not mean a "bachelor's degree or its equivalent." The words "or its equivalent" have not been used by the Legislature. Where the Massachusetts Legislature has meant a particular degree or its equivalent it has so stated. For a physician's license the requirement is "the degree of doctor of medicine, or its equivalent." G. L. c. 112, § 2. For a veterinarian's license the requirement is "the degree of doctor of veterinary medicine or its equivalent." *id.* § 55. In our statute for teachers' certificates the Legislature specified a "bachelor's degree" or graduation from an approved normal school. The Legislature has thus permitted one modification of its requirement of a bachelor's degree. Further modification should be made only by the Legislature, not by executive interpretation. If the words "or its equivalent" were

to be added by interpretation, what should be deemed to be equivalent, and who should make that determination? Such addition would change a simple and exact test to an uncertain and changing fact-finding function by some board, subject always to court review. The stated requirement of a "bachelor's degree" is reasonable. There is no doubt as to what the statute means. It should not be broadened by interpretation.

These same reasons forbid an interpretation of "bachelor's degree" which would make it read "at least a bachelor's degree" or "a bachelor's degree or more."

Furthermore, if an applicant has an advance degree why did he fail to obtain the usual bachelor's degree? Was there something lacking or abnormal in the character or extent or quality of his previous education? Is the so called advance degree not one in fact? These uncertain factual problems do not arise when the requirement of a "bachelor's degree" is applied according to the simple and clear language used by the Legislature. If an applicant for certification has the qualifications for a "bachelor's degree," let him obtain it. If he is not so qualified, then the judgment of the Legislature in forbidding a certificate to such a person seems justified. This requirement will cause no hardships to any city or town because in hardship cases an exemption can be given. See last paragraph of the section in question.

My conclusion that the phrase "bachelor's degree" should not be extended beyond its exact words is confirmed by a study of the legislative history of this statute. When the matter originally came up in 1951 the Legislature had before it several bills among which was one (H. 249) which required merely that the applicant be "a graduate of a college, normal school, or other teacher-preparation institution approved by the department." The Legislature, instead of adopting the provision that an applicant be "a graduate of a college, normal school, or other teacher-preparation institution approved by the department," dropped the reference to "other teacher-preparation institution," included a graduate of an approved normal school, and provided that instead of including college graduates generally the test would be the possession of a "bachelor's degree." This history is confirmatory evidence that the Legislature intended what is technically known as a "bachelor's degree" and that nothing else, even an equivalent or better, will suffice.

After examination of this matter, it is my opinion that the ruling must be that a "bachelor's degree" is required, and that neither a master's degree nor a doctor's degree can be accepted in lieu of the technical "bachelor's degree."

You also request an interpretation of the clause in St. 1951, c. 278, § 2, which states that this act "shall not apply to persons employed or formerly employed by Massachusetts school committees on the effective date of this act." As to this matter you request an opinion on the following question:

"3. May the phrase imply employment or former employment only as 'teachers, principals, supervisors, directors, superintendents and assistant superintendents of schools' as specified in the first paragraph of section 38G; or does the phrase mean employment in any capacity or work?"

In my opinion this paragraph preventing the application of the act to "persons employed or formerly employed" is a protection only to a person employed or formerly employed as a teacher, principal, supervisor, di-

rector, superintendent or assistant superintendent of schools. Each of the six separate bills which were considered by the 1951 Legislature contained a provision protecting present employees. Three of these bills (H. 50, H. 253, H. 737) described this protection in such a way as clearly and specifically to refer only to persons employed as teachers and the like. The phrasing finally adopted, to protect "persons employed or formerly employed by Massachusetts school committees," though much shorter in form, does not necessarily indicate an extension of this protection to persons not teachers. In my opinion it would be an unreasonable interpretation to say that a person formerly employed in any capacity, for example, as a fireman or janitor, would not be required to obtain certification in order to be qualified for a teaching position. The legislative history of this part of the law is entirely consistent with an interpretation limiting the application of this protective provision to persons having been employed as teachers or the like. In my opinion this is the correct interpretation.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Retirement — Member of General Court — Right of Widow of Legislator to Death Benefit notwithstanding 1952 Repeal — Statutory Construction.

JUNE 14, 1955.

State Board of Retirement.

GENTLEMEN: — You have requested an opinion concerning the right of a widow of a former member of the General Court to receive the accidental death benefit provided by G. L. c. 32, § 9, notwithstanding the repeal of legislators' pensions by St. 1952, c. 634.

You report that the facts are as follows:

In 1952 the widow of a State senator and member of the General Court, who had attained membership in the State Employees' Retirement System, was granted an accidental death benefit by this Board on account of the accidental death of her husband. The accidental death benefit was paid to the widow beginning April 24, 1952, the date of her husband's death, through September 15, 1952. Chapter 634 of the Acts of 1952, approved September 16, 1952, in the opinion of this Board, canceled the pension payable to the widow. Section 8 of this chapter reads that no member or former member of the General Court or present or former elected constitutional officer shall receive any pension or retirement allowance for his services performed in discharging the duties of the office to which he was elected; nor shall the term or terms served by such person in the General Court or in any such State office be computed as creditable service in any retirement system in which such person may be a member. The widow contends that chapter 634 does not cancel out the pension payable to her as approved by the State Board of Retirement, and she

further claims that she has a vested right as the widow of a former senator who died as a result of injuries incurred in the performance of his duties.

I assume, from the fact that in 1952 you granted an accidental death benefit to the widow, that the facts in the present case met all of the tests and requirements of G. L. c. 32, § 9. Accordingly, the only question which is presented for inquiry now is whether or not St. 1952, c. 634, deprived the widow of her right to continue to receive such accidental death benefit.

The first seven sections of St. 1952, c. 634, repeal certain specific provisions of law. None of these repealed provisions relates in any way to the accidental death benefit under c. 32, § 9. Therefore, if the widow has lost her right to continue to receive the accidental death benefit, it is because of the general prohibition of § 8 of c. 634. This section reads as follows:

"No member or former member of the general court or present or former elected constitutional officer shall receive any pension or retirement allowance for his services performed as a member of the general court or for services performed in discharging the duties of the office to which he was elected; nor shall the term or terms served by such person in the general court or in such state office be computed as creditable service in any retirement system in which such person may be a member."

The answer to the question presented by you depends upon whether the above § 8 means only that "no member or former member of the general court . . . shall receive any pension," or whether, on the other hand, it forbids payment of any kind which is in any way based upon the service of a member of the General Court or which exists because a person was such a member.

It is clear that § 8, literally, provides only that "no member or former member of the general court . . . shall receive any pension." There is no express repeal of c. 32, § 9, nor of any part thereof. There is no express suggestion that payment of an accidental death benefit to the widow of a former member would be a violation of the prohibition that no "former member . . . shall receive" any payment. Nor is there any express prohibition of payment to a person other than a former member of a pension which, in a sense, derives its validity *through* such a former member. The question, then, is whether such implied prohibitions or implied partial repeal of c. 32, § 9, are required by the terms of St. 1952, c. 634, § 8, which is quoted above.

For several reasons, it is my opinion that § 8 does not prevent payment of the accidental death benefit under c. 32, § 9, to the widow of a former member of the General Court. The first reason for this conclusion is, of course, the fact that the statute does not so provide. If a contrary conclusion is to be drawn from the repeal provisions of § 8 such conclusion can be supported only by an implication deduced from the words actually used. A right to an accidental death benefit is clearly established by c. 32, § 9, even as to the widow of a former member of the General Court. That right is not expressly taken away by section 8. Has the right been taken away by implication? Such an implied deprivation of right is not favored by law. "As there is no express repeal, it is contended that there is a repeal by implication. Such repeals have never been favored by our law. Unless the prior statute is so repugnant to and inconsistent with the later enactment that both cannot stand, then the former is not deemed to have

been repealed." *Commonwealth* v. *Bloomberg*, 302 Mass. 349, 352. In my opinion, there is no implied repeal in the situation you present because the continuance of a right in the widow of a former member of the General Court to receive an accidental death benefit is not necessarily inconsistent with a prohibition on the member himself, while living, to receive a retirement allowance.

Furthermore, the Legislature could have covered this situation specifically, but it failed to do so. If the Legislature had stated, not only that "no member or former member of the general court . . . shall receive any pension," but also that no beneficiary or dependent of such member should receive any payment based upon the service or the position of such member, the answer would be clear. Where the Legislature failed to include words to this effect, we should not add such words. "Statutes must be interpreted as enacted. Omissions cannot be supplied . . ." *Morse* v. *Boston*, 253 Mass. 247, 252. The repealing provisions of § 8 must be accepted and interpreted exactly as they are. Even though it were believed that a widow should be deprived of the continuance of such accidental death benefit we cannot cure the omission of such a provision by interpretation. "Whether that omission was by intention or by oversight we cannot know. We can only interpret according to the common and approved usage of the language the words of the statute without enlargement or restriction and without regard to our own ideas of expediency." *See* v. *Building Com'r of Springfield*, 246 Mass. 340, 343. "We cannot supply a *casus omissus*. We can only interpret the law as it was promulgated . . ." *Arruda* v. *Director General of Railroads*, 251 Mass. 255, 263. The intention of the Legislature is shown by the words used. The words clearly do not take away the widow's right.

Finally, there is nothing inherently unreasonable or illogical in continuing an accidental death benefit to the widow of a deceased former member of the General Court and at the same time forbidding a pension or retirement allowance to a living former member. The one is based upon accidental death of a former member in line of duty; the other exists only during the life of a member after he has completed his services as a member of the General Court. The one belongs to the widow; the other belongs to the member while alive. The right of the widow is different from the right of the member while living. In commenting upon the right given by the Workmen's Compensation Act (St. 1911, c. 751, Part II, § 6) to the widow upon the death of the workman, our court, in *Cripp's Case*, 216 Mass. 586, 589, stated: "The right of recovery expressly given to his widow cannot accrue until his death. Having been created for her benefit, it is independent of his control, and under § 22 can be discharged only by herself where she is the sole dependent, or by those authorized to act in her behalf."

I do not express any opinion as to whether or not the widow's right to the accidental death benefit under G. L. c. 32, § 9, is a vested or a contractual right which cannot be taken away by the Legislature. This question, whether the rights created by §§ 1–28 of c. 32 are made contractual rights by § 25 (4) and (5), has not yet been decided by the Supreme Judicial Court. *Kinney* v. *Contributory Retirement Appeal Board*, 330 Mass. 302, at 307. The question considered in the present case is whether, assuming that it has the power to take away the rights created by § 9, the Legislature has done so. For the reasons set forth above, in my opinion, the Legislature has not annulled or repealed these rights. Therefore, the answer to

your question is that the accidental death benefit granted by you in 1952 to the widow of a former member of the General Court is still a valid right notwithstanding the repeal provisions of St. 1952, c. 634.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Conditional Sales of Personal Property — Payment before Maturity — G. L. c. 255, § 12A — Statutory Construction.

JUNE 16, 1955.

His Excellency CHRISTIAN A. HERTER, *Governor of the Commonwealth.*

SIR: — You have submitted to me for examination and report enacted bill numbered House 2894, entitled "An Act relative to the Prepayment of Contracts of Conditional Sale of Personal Property."[1]

This bill adds new section 12A to chapter 255 of the General Laws. This chapter deals generally with mortgages, conditional sales and pledges. The new section, which is being inserted by the bill awaiting your signature, gives to the vendee under a conditional sale contract and to the mortgagor of a chattel mortgage the right to pay off the obligation before maturity. The bill applies only to conditional sales and chattel mortgages which cover "a sale of personal property for any use other than a commercial or business use (but including all passenger motor vehicles)." Many such contracts provide for specfiic dates of payment or of maturity without the privilege of prepayment. This proposed bill provides that every such conditional sale contract or chattel mortgage, to the extent covered by the bill, shall be subject to the right of prepayment. The bill also provides that, in case of such prepayment, a credit shall be given to the debtor for such anticipation of payments. The amount of this credit is established by a formula which is described in the bill.

It is clear that as to contracts entered into after this law takes effect its provisions are constitutional. But to apply the right of anticipation of payments to a contract now existing, in violation of or in addition to the provisions of such contract, would be unconstitutional in that it would violate Article 1, Section 10 of the Constitution of the United States forbidding any State to pass a law impairing the obligation of contracts. However, under accepted canons for the interpretation of statutes, that interpretation will be adopted which will make the statute constitutional, and the interpretation which will make it unconstitutional will be avoided if that is possible. This rule is applied in many instances by declaring that a statute has only prospective operation, and is not retroactive. Our court, in *Price* v. *Railway Express Agency, Inc.*, 322 Mass. 476, 483–4, stated:

"Statutes dealing with substantive rights are commonly to be construed to deal only with transactions occurring after their enactment unless the legislative intent that they should be applied to past transactions is clearly expressed. . . . To give to § 2A the interpretation that . . . [it is retroactive in effect] would lead to serious constitutional questions. . . . Statutes are to be construed, if reasonably possible, to avoid constitutional objections."

[1] Approved by the Governor on June 20, 1955, to become chapter 455 of the Acts of 1955.

The bill appears to be in proper form, and if enacted into law would, in my opinion, be constitutional.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Public Highways — Use of Highway Funds for Research — Federal Grant — Payment of Grant other than to Treasurer.

JUNE 16, 1955.

Hon. JOHN A. VOLPE, *Commissioner of Public Works.*

DEAR SIR: — You have requested an opinion relative to use of Federal Highway Aid money for research purposes.

You submit the following statement of facts:

The Federal Highway Aid apportionment available to Massachusetts for the fiscal year beginning in 1956 amounts to $16,356,341. Of this total, under the provisions of Federal law, 1½% must be devoted to planning and research in connection with highway construction and maintenance. This 1½% amounts to $245,345. The Federal Government, through its Bureau of Public Roads, and with the co-operation of all the States, and also aided by the automotive industry, is planning to conduct a cooperative road testing project in the State of Illinois. The State of Illinois will pay for all permanent features of the road such as location, right of way, structures, etc. The money contributed by the Federal Government and by the automotive industry and by the other States will be spent for special research aspects in connection with construction and operation and engineering. The results of the entire test will be fully available to Massachusetts, as well as to the Federal Government and to all other States.

The share of Massachusetts for this road test, including similar but very minor tests designated as the "One-Md." and "Washo" tests, will be $87,652. Incidentally, the deduction of this contribution for this special research project will leave a balance available to Massachusetts for its own special planning and research in the amount of $157,693, which sum is a net increase to Massachusetts, after this special contribution, of $4,322 in excess of our gross apportionment for planning and research under the 1952 Federal Aid Act.

You have requested an opinion of this department in connection with two questions presented by the above state of facts. The first question is whether or not the Commonwealth is authorized to spend money for such a research project.

In my opinion, the answer to this question is in the affirmative. The Commonwealth is authorized to spend money available for highway purposes for planning and research in connection with construction and maintenance of highways. The restrictions upon the use of the highway fund permit use of highway fund money for planning and necessary research. Mass. Const. Amend. LXXVIII. G. L. c. 90, § 34. Money obtainedby highway bond issues may also be used for such planning and research purposes. See, for example, St. 1954, c. 403, §§ 1 and 9. You advise us

that it has been a current and extended practice of the Department of Public Works to expend money appropriated for highway purposes for planning and research, and that this plan has been specifically approved by the language of legislative appropriation items. See, for example, Item 2900–38 in the general appropriations act of 1954, St. 1954, c. 453, p. 358. In fact, you inform me it has been the practice of the Department of Public Works to pay $2700 annually to the Highway Research Board for Massachusetts' share of the operation of such agency. This is the same agency which will carry on the road test in Illinois.

It is not only reasonable but it is necessary to spend money for planning and research in connection with the construction and maintenance of highways. Our statutes contain authority for such expenditures. We have a history of spending money for such research. For these reasons, in my opinion, the Department of Public Works is authorized to spend money for the planning and research project described in the facts which you have submitted to us.

You also request an opinion as to the validity of the method which has been suggested by the Federal Government for meeting our share of the costs of the road test in Illinois. This method, as reported by you, is as follows:

There is now in the hands of the Federal Government the sum of $245,345 available to Massachusetts for research. This sum of money is held subject to payment for the account of Massachusetts as a reimbursement on account of actual expenditures by Massachusetts for highway purposes, and also subject to the restriction that this money can be used only for planning and research. The method which has been recommended to us by the Federal Government for use of a portion of this money ($87,652, our share of these various road test projects) is that, instead of Massachusetts using and disbursing money now in our own treasury, and then requesting reimbursement from the Federal Government, we authorize the Federal Government to transfer the amount of our allotment for this research project from the Federal Aid Highway funds now available to us for such purposes direct from the Federal Government to the Highway Research Board. There are numerous advantages to this method. The principal advantage is that if we adopt this method the entire contribution of Massachusetts for this road test project, the full $87,652, will be covered by Federal funds without the use of an equal amount of State funds to match. On the other hand, if the ordinary method of financial transaction is followed, that is, an initial expenditure by us from our own funds, followed by a reimbursement from the Federal Government, we will receive reimbursement only in the amount of half of the money disbursed by us. That is, under the usual method of financing, our allotment in the Illinois test road project will be covered by the use of $87,652 of Massachusetts funds, on account of which we will be reimbursed by the Federal Government only to the extent of $43,826. It will be seen that the adoption of the method suggested by the Federal Bureau of Roads will result in a net saving to Massachusetts of $43,826.

Ordinarily, money belonging to the Commonwealth is deposited by the Treasurer in one of our general or special funds, and when the money is spent it is disbursed by check of the Treasurer. However, I can see no legal obstacle to the adoption of the different method which has been suggested by the Federal Bureau of Roads. I have made a careful exami-

nation of the statutes relating to our acceptance and use of Federal aid money for highway purposes, and I can find no statute which prohibits your adoption of the method which has been suggested by the Federal Government and which is being acted upon by other States. The general statute contained in G. L. c. 81, § 30, specifies that the Department of Public Works "may make all contracts and agreements and do all other things necessary to co-operate with the United States in the construction and maintenance of highways, under an act of congress approved on July eleventh, nineteen hundred and sixteen, entitled 'An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,' as amended and supplemented." The money which is available to Massachusetts in the fiscal year 1956 is available to us under the Federal act of 1954 which is an amendment of the act of 1916 cited in the Massachusetts statute just quoted. This statute also provides that the Department of Public Works "may make any agreements or contracts that may be required to secure federal aid in the construction of highways under the provisions of the act of congress aforesaid, and of all other acts in amendment thereof, or in addition thereto."

There is no statute which I can find which states that the Commonwealth of Massachusetts, or our Department of Public Works, cannot make such an agreement with the National Bureau of Roads. Such an agreement is not forbidden by the provisions of the bond issue of 1954 (St. 1954, c. 403) in which it is provided that the Department of Public Works "shall accept any federal funds available for such projects, and such federal funds when received shall be credited to the Highway Fund." This does not purport to mean that every dollar of Federal funds for highway aid must be received under this particular act adopted in 1954. The language is limited to "such federal funds" which are available for the specific highway projects covered by the 1954 highway bond issue. Of course, there are many other highway projects now going forward and contemplated for the future in this Commonwealth. In fact, these identical words appear in the three preceding highway bond issue statutes. See St. 1949, c. 306; St. 1950, c. 685; St. 1952, c. 556. It is physically impossible to devote all Federal funds received to each of these bond issue acts. Therefore, each bond issue must refer only to the Federal funds which are received for the specific projects covered by that bond issue. This inference is strengthened by the use of the word "such" ["federal funds available for *such* projects"] in indicating that the funds to be so accepted and received and credited are only such funds as are to be used for the particular highway projects covered by that bond issue.

In the absence of some statute forbidding the suggested method of taking advantage of these Federal highway aid funds, it is my opinion that the method suggested by the Federal Bureau of Roads is valid. The broad authorization under the provisions of G. L. c. 81, § 30, seems to require this ruling. The ordinary procedure of having money placed in Commonwealth accounts and then checked out does not seem to apply to this situation, especially where such procedure would cost us the sum of $43,826.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

State Employee — Amounts due on Death of Employee — No Payment without Probate Proceedings.

June 22, 1955.

Jack R. Ewalt, M.D., *Commissioner of Mental Health.*

Dear Sir: — You have inquired whether sums due for services performed by a deceased employee of your department may properly be paid to the spouse or next of kin of such employee if no probate proceedings relative to his estate have been instituted.

Prior to 1953, G. L. c. 149, § 178A, permitted *any* employer to pay wages or salary due a deceased employee directly to the spouse, or to an adult child, or to the father or mother of such employee, provided that the sum so paid was less than one hundred dollars, that the employee had died intestate, and that no petition for administration had been filed. However, § 4, St. 1953, c. 436, amending said § 178A, specifically exempted from its operation any "officer or employee of the commonwealth or of any political subdivision thereof."

This exemption still exists: see St. 1954, c. 562, § 4, most recently amending said § 178A.

Under G. L. c. 35, § 19B, counties are specifically authorized to make similar payments on account of the services of a deceased employee, cities and towns are given specific authority to do so by G. L. c. 41, § 111I, and all "political subdivisions" of the Commonwealth other than counties, cities or towns may do so by virtue of G. L. c. 149, § 178C. But there is presently no statute permitting or requiring such a payment by the Commonwealth itself, and the answer to your question must therefore be in the negative. I advise you that no sums due as salary or wages of a deceased employee of your department should be made to any person other than his duly qualified legal representative. Compare G. L. c. 29, § 31A, which provides for payment "to the *estate* of the deceased" of vacation allowances accumulated by a State employee before his death.

Very truly yours,

George Fingold, *Attorney General,*

By Arnold H. Salisbury,
Assistant Attorney General.

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