Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1958

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The Commonwealth of Massachusetts

Boston, December 3, 1958.

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, 1958.

Respectfully submitted,

EDWARD J. McCORMACK, Jr.,
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

SAMUEL H. COHEN
JOSEPH H. ELCOCK, JR.
SAMUEL W. GAFFER
DORICE S. GRACE
SAUL GURVITZ
MATTHEW S. HEAPHY
EDWARD J. KIMBALL
EDWARD F. MAHONY
CHARLES F. MARSLAND, JR.
JOSEPH P. MCKAY
GEORGE MICHAELS
LOWELL S. NICHOLSON
HAROLD PUTNAM[1]
ARNOLD H. SALISBURY
BARNET SMOLA
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Assistant Attorney General; Director, Division of Public Charities
HUGH MORTON

Assistant Attorneys General assigned to Department of Public Works

VINCENT J. CELIA
FLOYD H. GILBERT
FRANK RAMACORTI
MAX ROSENBLATT
CHARLES V. STATUTI
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Assistant Attorneys General assigned to Metropolitan District Commission

WILLIAM J. ROBINSON
JOSEPH H. SHARRILLO

Assistant Attorneys General assigned to Division of Employment Security

GEORGE BROOMFIELD
STEPHEN F. LOPIANO, JR.

Assistant Attorneys General assigned to State Housing Board

KEESLER H. MONTGOMERY
HAVILAND M. SUTTON

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

Chief Clerk to the Attorney General
HAROLD J. WELCH

Attorney
JAMES J. KELLEHER

Head Administrative Assistant
RUSSELL F. LANDRIGAN

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[1] Appointed, March 18, 1958.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Period from July 1, 1957, to June 30, 1958

Appropriations.

Attorney General's Salary	$15,000 00
Administration, Personal Services and Expenses	320,416 00
Veterans' Legal Assistance	18,600 00
Claims, Damages by State Owned Cars	75,000 00
Small Claims	15,000 00
Total	$444,016 00

Expenditures.

Attorney General's Salary	$15,000 00
Administration, Personal Services and Expenses	317,629 83
Veterans' Legal Assistance	18,397 50
Claims, Damages by State Owned Cars	74,999 67
Small Claims	14,999 87
Total	$441,026 87

Approved for publishing.

JOHN A. RONAN,
Acting Comptroller.

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, December 3, 1958.

To the Honorable Senate and House of Representatives.

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

The cases requiring the attention of this department during the fiscal year ending June 30, 1958, totaling 17,880, are tabulated as follows:

Extradition and interstate rendition	114
Land Court petitions	212
Land damage cases arising from the taking of land:	
Department of Public Works	1,262
Metropolitan District Commission	151
Civil Defense	3
Department of Mental Health	1
Department of Natural Resources	17
Department of Public Utilities	1
Massachusetts Maritime Academy	1
Massachusetts Turnpike Authority	3
Miscellaneous cases, including suits for the collection of money due the Commonwealth	5,075
Estates involving application of funds given to public charities	1,352
Settlement cases for support of persons in State institutions	21
Pardons:	
Investigations and recommendations in accordance with G. L. c. 127, § 152, as amended	124
Small claims against the Commonwealth	450
Workmen's compensation cases, first reports	5,781
Cases in behalf of Division of Employment Security	298
Cases in behalf of Veterans' Division	3,014

Introduction.

Attorney General George Fingold passed away August 31, 1958, at his home in Concord, approximately two months after the close of the fiscal year which this report covers. It devolves, therefore, upon me, as his successor, to make the report for the fiscal year 1957–1958.

The arduous duties of the Department of the Attorney General continued without letup during this fiscal year. Serious transportation and other statewide problems have augmented the usual workload ordinarily passing through the office.

Eminent Domain Division.

The continued road construction program of the Commonwealth, entailing as it does the examination of titles to parcels of land, and the preparation and defense of land damage suits, goes on as usual. With the

courteous cooperation of the bench and bar, disposition of land damage claims has proceeded with commendable speed. The detailed workings of this division and its advantages to all have been set forth in the report for the fiscal year 1956–1957.

Division of Public Charities.

In addition to bringing the charitable funds of the Commonwealth and those responsible for their administration closer to an understanding and cooperative public agency, the Division of Public Charities has actively participated in numerous proceedings for the application of the doctrine of *cy pres* to many charitable trust funds. I believe the work of this division to be most important. To see that the plans and hopes of charitably minded men and women, many of whom are not here to speak for themselves, are fairly and faithfully carried out, is a high and heavy responsibility. I shall use every effort to see that this is met. For the cooperation of the bench and bar in this endeavor, I am grateful.

Criminal Division.

This division has continued to function well in all the different phases of its activities.

Division of Employment Security.

The Division of Employment Security has continued to handle its innumerable cases with efficiency and dispatch.

Town By-Laws.

As usual, between 250 and 300 town by-laws submitted to this office for action under the provisions of G. L. (Ter. Ed.) c. 40, § 32, were dealt with. All except a very small portion were approved. Of course, it became necessary to disapprove by-laws submitted where in truth and in fact they were illegal and void. It has been the continued policy of this office to read submitted municipal by-laws sympathetically and understandingly. Zoning by-laws still present serious problems which require careful thought and attention. The General Court, in the exercise of its wisdom, has seen fit to surround the enactment of zoning by-laws and amendments with careful prerequisites designed primarily to provide the town meetings with enlightened advice and assistance from the various planning boards before they are acted upon. It is interesting to note in connection with the enactment of zoning by-law amendments that a two-thirds vote is required. No such provision appears in relation to original zoning provisions. This situation was probably intentionally devised in order that the various towns in the State might be encouraged to enact zoning by-laws by requiring only a majority vote. At the same time it was made more difficult to alter and amend the zoning by-laws by requiring a two-thirds vote. The office has continued to exercise every effort to

expedite the processing of town by-laws when submitted. Inasmuch as by statute the annual town meetings in the Commonwealth take place in the months of February, March and April, it should be readily understood that heavy pressure is exerted during that period and for some time after that. Be that as it may, one and sometimes two of the Assistants experienced in municipal work have been assigned to scrutinize by-laws submitted and report to the Attorney General for his action.

Springfield Office.

Two of the Assistants, with a secretarial staff, have handled the activities of the Springfield office during the current year. Both have been busy handling the pending duties assigned to them. At least one has attended all the hearings of the Motor Vehicle Insurance Appeal Board, both in Springfield and in Worcester. Eminent domain cases covering the entire Western Massachusetts area have been prepared and disposed of by the Assistants, either by settlement or by a trial. These Assistants have also handled motor tort cases and workmen's compensation cases for their area. This office and the Assistants in charge have been glad to lend their experience and wisdom to many of the surrounding towns in the solution of their problems. This office has also exercised every effort to serve the members of the bar in Western Massachusetts in their relations with the office of the Attorney General in Boston. It has also assisted in the investigation of numerous civil and criminal matters for the Commonwealth.

Motor Tort Cases.

By virtue of the provisions of G. L. (Ter. Ed.) c. 12, §§ 3B and 3C, the Attorney General has the responsibility of adjusting or engaging in trial in the defense of suits against officers or employees of the Commonwealth for property damage or personal injuries, including death, resulting from the operation of State-owned motor vehicles. During this fiscal year, 304 cases have been prepared, scrutinized and disposed of either by settlement or trial.

Contributory Retirement Appeal Board.

The activities of this office in this connection are set forth in G. L. (Ter. Ed.) c. 32, § 16 (4), and have been previously described in earlier reports of the Attorney General. The work involved is increasing continually. The cases arising out of claims for accidental disability and death under the provisions of G. L. (Ter. Ed.), c. 32, §§ 7 and 9, become increasingly important, both in number and the amounts involved. A careful and proper adjudication of these appeals is essential both to the members of the retirement systems and their families and to the public in general, which assumes a substantial financial responsibility in these matters. The questions of law arising on these appeals are not always simple and require a study of the law before decisions are rendered. More often than not, the decisions of the board are supported in the courts. However that may be, it has been the studied policy of the board to endeavor to adjudicate all appeals on a basis of sound law applied to proper findings

of fact. The appeals arising from the so-called "heart cases" are perhaps more difficult than others, inasmuch as they pose serious medical as well as legal problems. The decisions of our Supreme Court in retirement cases are not numerous. Accordingly, it is not infrequently the responsibility of this board to blaze the legal trail in its decisions relative to these matters. Reference has been heretofore made in the reports of this department to the great need for added facilities for this board to enable it to keep pace with its burdens.

State Housing Board.

In view of the increasing responsibilities of the State Housing Board and the activities of this office in relation thereto, two Assistant Attorneys General have been assigned to that board. Their activities are numerous and varied. They have rendered written opinions on legal problems confronting the board; reviewed for approval all title abstracts and other problems involving purchase or sale of land resulting from the activities of the local housing authorities; the administration of organization practices of approximately 106 active housing and redevelopment authorities; the reviewal after approval of original and refunding note and bond issues of housing authorities; attendance at or conducting hearings involving contract controversies and writing decisions relating thereto; review for approval of contracts for financial assistance; review and revision of forms. Relating to the foregoing, 19 informal opinions and two formal opinions on general legal problems confronting the board were prepared and submitted; also 17 legal memoranda. Moreover, 82 note issues, both original and refunding, involving the borrowing of a total of $88,829,000 have been reviewed for approval.

Conclusion.

As stated above, my predecessor's death occurred on August 31, 1958. This report, although for the period ending June 30, 1958, was, under the applicable statute, not to be filed until December 3, 1958, and naturally preparation of it had not been commenced at the time of Mr. Fingold's death. Had he been spared, because of his personal and intimate knowledge of the work of the office during the period, he would undoubtedly have prepared a report of broader scope than that I have been able to prepare from the materials in the office files.

Attorney General Fingold handled the affairs of the office during the period of this report according to its highest and best traditions. In the report to be filed for the year ending June 30, 1959, of which period my predecessor served two months and I served the remainder, first as his successor elected by the Legislature on September 11, 1958, and from January 21, 1959, because of my election at the 1958 State election for the regular two-year term beginning on that date, I shall have something more to say about the career of my honored predecessor.

Respectfully submitted,

EDWARD J. McCORMACK, Jr.
Attorney General.

OPINIONS.

Licensing of entertainments on Lord's day, where proposed entertainment may be changed.

July 15, 1957.

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

Dear Sir: — You have requested an opinion concerning the amendment to G. L. c. 136, § 4, effected by St. 1957, c. 300.

The 1957 amendment makes but a single change in the previously existing law: whereas, formerly, an *annual* local license for Sunday entertainment might be granted only for the exhibition of motion pictures, the use of television or radio, or for mechanical musical entertainment, such a license may now be granted for any form of entertainment as long as it is "for the benefit of patrons in a public dining room."

You inquire, first, whether this amendment prohibits you "from requesting a license in lieu of an annual license when the proposed entertainment . . . is to be changed by the licensee."

Your powers relative to Sunday entertainments of all kinds, except such as may fall "within the free-speech, free-press area protected by our Constitution," remain exactly as they have been for many years. I refer you to my letters to you dated August 22, 1955, and June 27, 1956, relative to the effect of the decision in *Brattle Films Inc.* v. *Commissioner of Public Safety*, 333 Mass. 58 (1955), upon your duties under the statute. Local licenses for such entertainments, whether issued for a single day or for an annual term, are ineffective unless the licensed entertainment has been approved in writing by you. Since the basis of such approval must be your belief that the proposed entertainment is "in keeping with the character of the day and not inconsistent with its due observance," you might properly refuse to approve, in advance, of entertainment the nature and form of which might later be so materially changed, at the will of the annual licensee, that it would no longer meet the tests which the statute empowers you to apply.

Your second inquiry, as to the circumstances under which entertainment in a public dining room on the Lord's day might not be for the benefit of its patrons, I must respectfully refuse to answer. It has for many years been the policy of this department not to attempt to state hypothetical cases, some or most of which might never actually arise, and advise State departments of their duties in such instances. Of course, if you have a specific question as to an existing factual situation concerning which you presently have some official interest, advice will gladly be given.

Very truly yours,

George Fingold, *Attorney General,*

By Arnold H. Salisbury,
Assistant Attorney General.

Check representing advance for traveling expenses of employee of State Auditor is a check of the Commonwealth which must be cashed by the State Treasurer.

JULY 25, 1957.

Hon. THOMAS J. BUCKLEY, *State Auditor.*

DEAR SIR: — You have requested my opinion as to whether or not a certain check is "a check issued by the Commonwealth of Massachusetts."

You present the following information. Money is received by the Department of the State Auditor from the State Treasurer for the purpose of providing, in certain instances, traveling advances to various employees of the Department of the State Auditor. This special fund is deposited by the Department of the State Auditor in the National Shawmut Bank of Boston, in an account entitled: "The Commonwealth of Massachusetts, Department of State Auditor, Imprest Fund." By arrangement with the bank, withdrawals from this account can be made only by checks signed either by the State Auditor or the First Deputy Auditor. The arrangement with the bank, which has been followed in the past, is that such withdrawal checks are signed by one of the two persons designated, with an indication that the check is against the deposit of the "Department of State Auditor, Imprest Fund."

You further advise me that a check of this nature was issued to an employee of your department, and was presented at the State Treasurer's office, and that the State Treasurer declined to cash the check upon the ground that such check "was not a check of the Commonwealth of Massachusetts but that it was a personal check of the First Deputy Auditor."

You request my opinion (1) as to whether or not such check is a check issued by the Commonwealth of Massachusetts, and (2) whether or not the State Treasurer is required to cash such a check.

I answer both your questions in the affirmative. In my opinion, since the check in question was drawn upon funds of the Commonwealth, for official purposes, and was signed by a State officer, in the name of his department, with a designation of the "Imprest Fund," there can be no answer other than that the check is a check issued by the Commonwealth of Massachusetts against funds owned by the Commonwealth. Under these circumstances, it is also my opinion that the State Treasurer is required to cash such a check, in the same manner and under such reasonable regulations as apply to the cashing of other Commonwealth checks.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

The designation of persons to act in "line of succession" to State officers, in case of disaster, may be better solved under Civil Defense Act (St. 1950, c. 639) than under G. L. c. 30, § 6.

JULY 25, 1957.

Mr. THOMAS J. DONNELLY, *Director, Civil Defense Agency.*

DEAR SIR: — Your predecessor in office has made reference to G. L. c. 30, § 6, providing for the designation by the head of a department or division of other persons in his department or division to perform the duties of

such head during his absence or disability. He has asked whether the statute contemplates the designation of a single individual to perform such duties or whether a series of alternative designations may be made setting up, in effect, "a line of succession."

The statute in question is as follows:

"If during the absence or disability of a commissioner or head of an executive or administrative department or of a director or head of a division in a department, his duties are not specially authorized by law to be performed by another person, the commissioner or head of such department may designate another person in his department to perform the duties of such person in case of and during such absence or disability, but a person so designated shall have no authority to make permanent appointments or removals. Every such designation shall be subject to approval by the governor and council, and shall remain in force and effect until revoked by the commissioner or head of such department or by the governor and council."

As a matter of administrative practice, designations under the above statute have ordinarily been designations of a single individual. In some instances, however, the Governor and Council have approved designations where alternate persons have been named.

The requirement for approval by the Governor and Council, of course, places a very definite limitation on the right of a department head to act under the statute in question.

You state that the possibility of atomic attack makes it important that "a line of succession" be established extending through several persons. It is suggested that the problem of "a line of succession" in the event of a disaster as referred to by you may better be solved by reference to the Civil Defense Act (St. 1950, c. 639, as amended from time to time) rather than by resort to § 6 of c. 30. Under the Civil Defense Act the Governor has broad powers during an emergency and may issue executive orders or regulations in preparation for such emergency. These powers undoubtedly include the right to establish "a line of succession."

Very truly yours,

George Fingold, *Attorney General,*

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

Commissioners of Correction and Mental Health were not authorized to establish "Treatment Center for Sex Offenders" under G. L. c. 123A, § 2, as enacted by St. 1954, c. 686, where no determination has been made under § 2 of c. 686 that the Center was adequately staffed.

July 31, 1957.

Hon. Arthur T. Lyman, *Commissioner of Correction.*

Dear Sir: — The former Commissioner of Correction has inquired whether or not, under G. L. c. 123A, § 2, as appearing in St. 1954, c. 686, the Commissioner of Mental Health may establish a treatment center at the correctional institution at Concord.

A short answer to the question is that the 1954 legislation to which he

refers is not presently in effect. Section 2 of said c. 686 expressly provides that the entire chapter shall not become operative until the Commissioner of Mental Health shall have determined that "the treatment center" established for the care, treatment and rehabilitation of sex offenders "*is adequately staffed to carry out the purposes for which it is established.*" I have today been officially informed by the Commissioner of Mental Health that he has not made and could not properly make any such determination, since the "center" which he purported to "establish" at Concord last May is not so "staffed" and since no other "center" exists.

I do not mean to intimate that, even if it were "adequately staffed," any such treatment center as is provided for by said c. 686 could legally be operated at any existing correctional institution of the Commonwealth.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

It is not a violation of the competitive bidding statute to authorize overruns on unit price items or "extra work" when such work is incidental and subsidiary to that under a construction contract for a public work.

AUG. 8, 1957.

MR. FRED A. MONCEWIEZ, *State Comptroller.*

DEAR SIR: — You have asked for an opinion regarding a contract between the Department of Public Works and the New England Dredge and Dock Co. relating to the dredging of a channel in the Ipswich River in the town of Ipswich. You have questioned the legality of a proposed "alteration" whereby item one of the contract calling for the removal of an estimated 19,000 cubic yards of material at a unit price of $2.29 for a total of $43,510 is to be increased by 6,500 cubic yards at the same unit price, thus increasing the cost of item one by $14,885. You have asked several questions as to whether the approval of the proposed "alteration" would constitute a violation of the bid statute as embodied in G. L. c. 29, § 8A.

Your questions cannot be answered from the brief information contained in your letter. For this reason, I have obtained a copy of the contract in question and have consulted with members of the Department of Public Works concerning the exact nature of the work to be performed under the alteration. The additional pertinent information may be summarized as follows:

The contract, in the total estimated amount of $43,830, consists of two items, the first of which calls for the dredging and removal of an estimated 19,000 cubic yards of material, as stated by you, and the second of which calls for the removal of an estimated 10 cubic yards of rock at $32 per cubic yard for an estimated amount of $320.

The actual scope of the dredging work is set forth in the special provisions of the contract at page 3 which states in part that "The contractor shall dredge the areas shown on the plan to a depth of six (6) feet at mean low water."

Reference to the plan shows that four distinct areas in the river channel have been marked in red and such areas are marked "Location of proposed work shown in red to be dredged to six feet at M. L. W." Markings on the chart showed that the remaining portions of the channel already were at a depth of six feet at mean low water.

The Department of Public Works states that the "alteration" in the amount of 6,500 cubic yards represents approximately 4,000 cubic yards of material to be removed from the four areas outlined in red and approximately 2,500 cubic yards of material to be removed from a portion of the river bed not outlined in red but lying between two of the outlined areas.

I am informed that "shoaling" which has occurred between the time soundings were initially made and the time the contract was awarded have made the removal of the additional quantities necessary in order to achieve a six-foot depth at mean low water.

It would appear, therefore, that 4,000 of the 6,500 cubic yards in question was material removed from areas specified under the contract in order to reach the depth required by the contract. The contractor was required by the terms of the contract to remove such material and is entitled to to be paid for such removal at the unit price set forth in the contract. The removal of such material constituted no change in the original contract. As such, payment for the removal under the terms of the contract does not constitute a violation of the bid statute as embodied in G. L. c. 29, § 8A. Where the contract requires dredging in a particular spot to a specified depth under a unit price contract, dredging at such spot to such specified depth may be paid for at the contract unit prices irrespective of a variation between estimated quantities contained in the original bid and actual quantities removed as required by the contract. As stated in your letter, the contractor bid on the estimated quantities on the express understanding that actual quantities required by the contract might be more or less than the estimates.

The contractor's right to recover where actual quantities exceed estimated quantities is, of course, limited by G. L. c. 29, § 26, providing that officers of the Commonwealth may not impose obligations on the Commonwealth in excess of appropriations. It is assumed that funds have been encumbered against this contract based upon estimated quantities. When it appears that actual quantities may exceed estimated quantities, the department in question should take action to encumber additional available funds. The "alteration" in the present instance, at least in so far as it relates to the 4,000 cubic yards required to be removed under the contract, may be merely an attempt to encumber additional funds. To this extent such alteration would not constitute a violation of the bid statute.

Reference must also be made to the remaining 2,500 cubic yards of material to be removed from an area not covered by the original contract. The removal of such material constitutes a change in the original contract. It requires additional work which the contractor could not be forced to perform under the terms of the original contract. As such, it constitutes "extra work" within the meaning of G. L. c. 29, § 20A, and requires a "notice of intent" to be filed with the Comptroller irrespective of the fact that unit prices for the removal of similar material are contained in the original contract. (See Opinion of the Attorney General to the Commissioner of Administration, dated August 12, 1955.)

The issuance of an "extra work order" is, of course, subject to the

availability of appropriations, as previously mentioned. Such extra work orders may be issued only if the change in the contract or the addition to the contract is within reasonable limits, and is made to remedy incidental defects and to improve the work in minor details. The extra work must be such in nature, magnitude and expense as to bear a reasonably subsidiary relation to the work originally covered by the contract. *Morse* v. *Boston*, 253 Mass. 247, 253–254. An extra work order causing a major or substantial change would violate the bid statute as set out in G. L. c. 29, § 8A. It is a question of fact whether the removal of the extra 2,500 cubic yards of material at an estimated additional cost of $5,725 is within reasonable limits and is to remedy incidental defects. On all the facts it appears that the department would be justified in reaching a determination that such extra work is within reasonable limits. If such determination is reached, then an extra work order or claim may be approved, provided there has been compliance with G. L. c. 29, § 20A.

You have asked several additional questions of a general nature concerning the applicability of the bid statute to extra work orders under various circumstances. The policy of this department in relation to such questions is contained in a printed opinion from Attorney General Dever to the State Racing Commission dated February 14, 1935, in which the following language appears:

"The long-continued practice of this department and the precedents set by my predecessors in office indicate, what is undoubtedly the correct rule of law, that it is not within the province of the Attorney General to determine hypothetical questions which may arise, as distinguished from questions relative to actual states of fact set before the Attorney General, upon which states of fact public officials are presently required to act; nor is it the duty of the Attorney General to attempt to make general interpretations of statutes or of the duties of officials thereunder, except as such interpretations may be necessary to guide them in the performance of some immediate duty."

In view of the foregoing I must respectfully decline to answer your remaining questions.

Very truly yours,

George Fingold, *Attorney General.*

Application, under G. L. c. 69, §§ 30, 31, by Junior College, to Board of Collegiate Authority to drop description "Junior." "College," "Junior College" defined.

Aug. 12, 1957.

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

Dear Sir: — In your recent letter relative to Endicott Junior College you pose the three following questions:

"1. Does the term 'college' imply that a standard four-year college course is offered?

"2. Does the term 'junior college' imply that a two-year course of study on a collegiate level or a two-year terminal course of study of a vocational or semi-professional training is offered?

"3. Is it legal for an institution to be known as 'college,' and not 'junior college,' if it offers only two-year courses?"

Relative to your question No. 1, while the word "college" appears in numerous provisions in our statutes, I know of no definition of the word in the opinions of the Supreme Court of this Commonwealth except in the case of *Stanwood* v. *Peirce*, 7 Mass. 458, not now helpful. The best definition which I have found is in the case of *In Re Kelley's Estate*, 285 N. Y. 139, in which the court said "The word 'college' is not a word of art which, by common understanding, has acquired a definite, unchanging significance in the field of education. Its meaning varies with its context. Though at times it is used to denote any institution of higher learning, including institutions for professional or post-graduate study, it is frequently used, perhaps I should say ordinarily used, in this country, to denote an 'undergraduate' school for instruction in liberal arts having a course of study commonly requiring four years for completion and leading to a bachelor's degree."

In my opinion, the language above quoted is or should be the law. I believe it states a definition of the word as understood by the average person. Curiously enough, I find no statutory requirements for a "college." G. L. c. 69, § 31, contains innumerable qualifications for a junior college before its approval by the Board of Collegiate Authority. The qualifications cover personnel, environment and working programs in great detail. Section 31 presupposes the existence of "standard four-year colleges," but refers to them only in dealing with the qualifications of junior colleges. Apparently the whole subject of the approval of colleges is left to the investigation and determination by the Board of Collegiate Authority which is required to report its findings to the Commissioner of Corporations and Taxation.

To the ordinary person, I believe, the term "college" implies a standard four-year college. However, in view of the omission of the General Court to place any academic requirements upon colleges, while providing such detailed qualifications for junior colleges, I am constrained to answer this question in the negative. Possibly there are "colleges" without a four-year course requirement.

Question No. 2 I answer in the affirmative because by the express provisions of § 31, the Board of Collegiate Authority is bound to disapprove the papers of a "junior college" unless, among other things, it offers "either (*a*) a two-year course of study on a collegiate level, equivalent in content, scope and thoroughness to that offered in the standard four-year colleges and universities, or (*b*) a two-year terminal course of study of a vocational or semi-professional training, or both."

Without the approval of the board, the Commissioner of Corporations cannot approve the incorporation of a junior college.

In view of the foregoing, a dogmatic answer to your question No. 3 might be misleading if not, indeed, inaccurate. Be that as it may, I am of the opinion that the Board of Collegiate Authority may very properly take into consideration the subject matters which I have heretofore discussed in determining whether it should approve or disapprove.

Very truly yours,

George Fingold, *Attorney General*,

By Fred W. Fisher,
Assistant Attorney General.

Part-time employment of school adjustment counselor for a single town cannot be approved by the Director of Youth Service.

Aug. 12, 1957.

Mr. John D. Coughlan, *Director, Division of Youth Service.*

Dear Sir: — You have requested an opinion as to whether you have the power under G. L. c. 71, § 46G, to approve the employment of a part-time school adjustment counsellor in a single town. In my opinion, the answer must be in the negative.

Section 46G discloses a clear legislative intent on the part of the General Court to underwrite the employment of school adjustment counsellors whose duties are set forth in detail. Primarily, they are to counsel, advise and help neglected, maladjusted and emotionally disturbed children and to re-establish and rehabilitate them in order, in the language of § 46G "to assist in the prevention of such children becoming juvenile delinquents." It is obvious that the Legislature understood the delicate problems involved and the need for well-educated and understanding counsellors. No person, it is provided, shall be employed under this section unless his *professional* and *personal* qualifications have been approved by the Commissioner of Education and the Director of the Division of Youth Service. It is, therefore, readily seen that the counsellor must be a well-educated and trained person of highest integrity. The General Court had in mind that some of the smaller towns in the Commonwealth might not have need for a full-time counsellor. However, I discern an understandable reluctance on the part of the General Court to permit the delicate problems confronting the counsellors to be handled by part-time personnel, perhaps on a more or less haphazard basis, because provision is made for the joint employment of a counsellor where the individual municipal need is insufficient to justify a full-time counsellor. "Any town or regional school district not requiring the services of a school adjustment counsellor on a fulltime basis may join with one or more other towns or regional school districts in employing a school adjustment counsellor . . ."

In my opinion, the whole purpose of this legislation, which is to provide trained and understanding counsellors of the highest calibre to advise and help rehabilitate children with potential criminal tendencies, will be frustrated by the employment of perhaps meagerly trained part-time counsellors dealing with important and delicate situations. In this connection, it is to be noted that the positions in question are not administered under the provisions of G. L. c. 31.

Very truly yours,

George Fingold, *Attorney General,*

By Fred W. Fisher,
Assistant Attorney General.

Death of low bidder after acceptance of proposal and award for State building contract — assent to assignment of contract by personal representative.

Aug. 16, 1957.

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

Dear Sir: — You have asked for advice based on the following facts: On May 2, 1957, one Vincent Caira submitted a proposal for the construction of an aircraft maintenance shop at Hanscom Field, Bedford. The bid was approved by the Commission on Administration and Finance on May 27, 1957, and the Director of Building Construction notified the bidder of the award by letter dated May 28, 1957. On June 6, 1957, contract forms were forwarded to the bidder for execution but he died on June 7, 1957, just prior to receipt of the documents. A special administratrix of the bidder's estate has been appointed and you ask whether your division may assent to an assignment of the contract by the administratrix to one Alphonsus L. Walsh.

Upon the foregoing facts, it appears that a bid was submitted by the contractor and accepted by the Commonwealth, thus creating a contractual obligation between the two. A contractual obligation existed even though the formal contract document had not been signed. *John J. Bowes Co.* v. *Milton*, 255 Mass. 228 (1926).

The present contract, relating to a public building, is governed by the provisions of G. L. c. 149, §§ 44A through 44L. Section 44A makes specific reference to "the agreement to execute a contract" which exists after an award but before execution of the formal documents. Section 44B provides in part that the bid deposit shall become the property of the Commonwealth as liquidated damages on failure to execute such agreement.

It is noted, further, that the proposal submitted by the bidder is on a form which includes all the terms of the document to be finally executed. Where all the terms of the formal document are agreed upon, and where the parties are bound by agreement at the time the proposal is accepted by an award, then the execution of the formal document is a mere memorial of an agreement already existing. Restatement of Contracts, sec. 26.

The death of a party to a contract does not ordinarily terminate the contract unless the contract is one for personal services where the personal skill and taste of an individual is required. *Stearns* v. *Blevins*, 262 Mass. 577.

The present contract, calling for the construction of a building according to detailed plans and specifications, does not appear to be a personal service contract and is not terminated by death of the contractor. *Jepson* v. *Killian*, 151 Mass. 593. Amer. Jurisprudence, Vol. 9, Building and Construction Contracts, sec. 58.

In respect to assignment of such contract, it is noted that the formal document accompanying the proposal contained the following language in Art. XV:

"The Contractor shall not assign by power of attorney or otherwise, or sublet, the work or any part thereof without the previous written consent of the Division and shall not, either legally or equitably, assign any of the moneys payable under this agreement, or his claim thereto, unless by and with the like consent of the Division whether said assignment is made

before, at the time of, or after the execution of the contract. The Contractor, if an individual or individuals, shall give his or their personal attention constantly to the faithful prosecution of the work; and if a corporation, shall cause the same to be given by its chief managing officer, whose name the Contractor shall communicate forthwith in writing to the Division."

The assignment, then, may be made if the division assents thereto. Such assent should not be given unless the division is satisfied as to the capacity and ability of the assignee, and unless the necessary performance and payment bonds are obtained by the assignee.

In the event that the division declines to assent to the assignment, it is noted that G. L. c. 149, § 44B (2), requiring that the bid deposit shall become the property of the Commonwealth, contains an exception where the deposit may be returned in the event of death, disability, or other unforeseen circumstances.

Very truly yours,

George Fingold, *Attorney General.*

Board of Conciliation and Arbitration is not required to state reasons for its decision.

Aug. 19, 1957.

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

Dear Sir: — You have requested the opinion of this office as to whether the Board of Conciliation and Arbitration is required, by G. L. c. 150, § 5, to give reasons or opinions in connection with awards or decisions made in arbitration matters.

In my opinion, no such reasons or opinions are required by the statutes. The second sentence of § 5 requires the board to "advise the respective parties what ought to be done or submitted to by either or both to adjust said controversy . . ." This same sentence thereupon requires the board to "make a written decision thereof . . ." It is clear that the written decision refers to the advice which your board gives to the respective parties to the arbitration as to what they or either of them ought to do to adjust said controversy. This requirement to make "a written decision thereof" is a requirement relating to the action which you advise the parties to take, and it does not require that any reasons be included in the written decision rendered.

I agree with the statement in your letter that the board may give reasons, in its discretion, but such reasons are not a required part of the written decision to be made by the board under § 5.

Very truly yours,

George Fingold, *Attorney General,*

By Lowell S. Nicholson,
Assistant Attorney General.

Power of police officer to arrest without warrant following upon intrastate or interstate teletype alarm.

SEPT. 4, 1957.

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

DEAR SIR: — You have requested an opinion as to "the validity of the police powers of arrest on the strength of teletype alarms received over intrastate and interstate police teletype transmissions . . . especially . . . teletype alarms . . . from interstate teletype systems requesting the arrest of a subject in this state which would possibly require the issuance of a fugitive from justice warrant." I note that you make the inquiry in your capacity as chairman of the Board of Teletype Regulations (G. L. c. 22, § 9F), and that the teletypewriter communication system of the state police is presently connected with similar systems in other States as authorized by § 2 of c. 474 of the Acts of 1953.

I. *Arrests (without warrant) following upon intrastate teletype alarms.*

Under our well-established rules of law, a Massachusetts police officer may properly arrest without a warrant one who actually commits *in his presence* either a *felony* (because he then obviously has that reasonable belief as to its commission mentioned below) or a *misdemeanor which amounts to a "breach of the peace," Muniz* v. *Mehlman*, 327 Mass. 353, 357 (1951); otherwise he may not make such an arrest unless it is specifically authorized by statute. *Commonwealth* v. *Wright*, 158 Mass. 149, 158–159 (1893). These authorities, of course, have no bearing upon your present question, which relates only to offences concerning which the officer has no personal knowledge.

As to such question, our cases and statute law establish two rules:

1. An officer may arrest without a warrant a person charged with *a misdemeanor* only if (a) a warrant for that person's arrest has then in fact issued, and (b) the officer has actual knowledge thereof. G. L. c. 276, § 28.

2. An officer may arrest without a warrant one whom he has "reasonable grounds" to believe has committed *a felony. Commonwealth* v. *Phelps*, 209 Mass. 396, 404 (1911). His suspicion may properly be based upon "facts communicated to him by others," if such facts give him a "reasonable ground to believe that the accused has been guilty of felony." *Commonwealth* v. *Carey*, 12 Cush. 246, 251 (1853).

The fact that the arresting officer obtains his information from a teletype communication does not, of course, change these fundamental rules. If the offence charged is *a misdemeanor*, the cited statute requires the actual issuance of a warrant for the arrest of the accused, and the arresting officer's actual knowledge of this fact, before any lawful arrest may be made. However, if the teletype alarm has to do with the commission of *a felony*, and if its source and contents, properly communicated to him, are such as to give the arresting officer reasonable grounds to suspect that the accused has committed such an offence, the consequent arrest would be lawful. The question would be one of fact upon the special circumstances of each case, but in the usual instance, where the arresting officer

knows that the alarm has been duly authorized, and has no reason to suppose that it is not based upon credible and substantial evidence of the guilt of the accused, it is my opinion that his reliance upon it would be wholly justified. In any event, it seems perfectly clear that a teletype alarm, like a telephone conversation (*Commonwealth* v. *Phelps*, 209 Mass. *loc. cit.* 405) may, in proper circumstances, give rise to that *reasonable suspicion* which validates a felony arrest based upon such transmitted information; indeed, since it is to be presumed that official teletypewriter communication systems are at all times under the supervision and control of authorized police personnel, information emanating from them should, in the usual case, be deemed more accurate and trustworthy than that from most other sources.

II. *Arrests (without warrant) following upon interstate teletype alarms.*

Presumably no such arrests would be requested except in cases where interstate rendition proceedings were contemplated by the originating State. Indeed, Art. 4.05 (e) of the "Police Teletype Net Operational Guide" requires interstate messages to state whether "extradition" is contemplated, and Art. 7.13 provides that the mere request for the arrest of a fugitive will not be honored unless "extradition" is to follow.

In this area, there is no distinction between *felony* arrests and *misdemeanor* arrests. The governing statute, G. L. c. 276, § 20B, draws the line between (1) crimes punishable by death or by imprisonment for more than one year, and (2) all other crimes. As to the latter class, no arrests without warrant are legal. *Picking* v. *Pennsylvania R.R. Co.*, 151 F.2d 240, 249 (C. C. A. 3, 1945). As to the former, which will, of course, include many misdemeanors, the rule is that a Massachusetts police officer may arrest an accused without a warrant upon "reasonable information" that he stands charged in the demanding State with such an offence.

All that has been said above concerning the propriety of relying upon teletype alarms to form a *reasonable suspicion of the commission of a crime* applies with even more force when all that need arise from such reliance is *reasonable information that the fugitive is wanted* by the demanding State. It is difficult to conceive of an authorized interstate communication requesting the arrest of an alleged fugitive from justice which would not necessarily constitute such "reasonable information." When an arrest is made at the request of another police agency, any doubts concerning the reasonableness of the arresting officer's information are resolves in his favor. *Johnson* v. *Reddy*, 163 Oh. St. 347, 352 (1955). The problem which disturbed the court in *Simmons* v. *Van Dyke*, 138 Ind. 380, 26 L.R.A. 33 (1894), is made non-existent by the provision of said § 20B that, following his arrest here upon such "information," the accused "shall be taken with all practicable speed before a court" which may then determine his rights.

Very truly yours,

George Fingold, *Attorney General,*

By Arnold H. Salisbury,
Assistant Attorney General.

Resubmission of applications for unapproved Boston urban redevelopment projects is required. A separate urban redevelopment authority for Boston can be established with the consent of the Boston Housing Authority.

SEPT. 10, 1957.

Mr. JOHN E. MALONEY, *Chairman, State Housing Board.*

DEAR SIR: — You request my opinion upon three questions relating to the Urban Redevelopment Program proposed by the Boston Housing Authority, West End, UR Mass. 2–3.

The West End Urban Redevelopment Project was originally proposed by the Boston Housing Authority. In accordance with the requirements of G. L. c. 121, § 26KK, the Boston Housing Authority applied to the State Housing Board for approval of such project. This statute requires your board to hold a public hearing upon such project if certain described requests are made to you. The statute also forbids approval by you of such a project unless you make affirmative findings upon certain matters of fact specified in the statute. The statute also forbids the housing authority to undertake any such project without your written approval. In connection with your approval or disapproval of such an application, the statute provides as follows:

"The housing board shall, within thirty days after submission of the application, give written notice to the authority of its decision with respect to such project."

You inform me that on July 29, 1957, the Boston Housing Authority submitted to the State Housing Board an application for approval of its West End Urban Redevelopment Project. You also inform me that the State Housing Board made a decision disapproving such project, and gave written notice to the Boston Housing Authority of such disapproval by letter dated August 28, 1957.

Your first question is as follows:

"1. Must the Authority resubmit the application as though it were again applying for review under § 26KK or can it merely apply for approval after submitting additional information requested by the Chairman?"

The power of the State Housing Board, under G. L. c. 121, § 26KK, in the circumstances of this case, was to approve or disapprove the project submitted to you by the Boston Housing Authority; and you were required to make your decision and give notice within thirty days after submission of the application to you. Your decision disapproving the application, as set forth in your letter of August 28, 1957, created a final termination of the application for approval. Accordingly, in my opinion, while the Boston Housing Authority may resubmit the application to you as though it were again applying for review under § 26KK, it cannot "merely apply for approval after submitting additional information requested" by the State Housing Board.

Although your letter of disapproval recited that the application "is hereby not approved as submitted," and you requested resubmission of the project with additional information, the only effect which can be given to

your letter under the statute is a final decision of disapproval. The reference in the statute (at the end of § 26KK), that

"A project which has not been approved by the housing board when submitted to it may be again submitted to it with such modifications as are necessary to meet its objections,"

does not indicate that a resubmission of the application for approval can be treated other than as a formal application which requires compliance with all the provisions of the section.

Although in some instances an administrative body may rescind an order adopted by it, this power is not available to your board at a time after the expiration of the thirty days within which you must reach a final decision of approval or disapproval of the proposed project.

Your second question is as follows:

"2. If the answer above is in the affirmative as to formally resubmitting the application or requesting approval based on additional information, would a formal hearing have to be held if so requested by either the Mayor, the City Council, or 25 taxable inhabitants of the City of Boston?"

I have stated above, in answer to your first question, that the resubmission of the application of the Boston Housing Authority is equivalent to the filing of an original application for approval. Because of this, all the conditions of the statute must be complied with upon such resubmission. These conditions include a formal hearing if the required request is made therefor. This conclusion is confirmed by the reference at the end of § 26KK that an application may be resubmitted "with such modifications as are necessary . . . ." Since the resubmitted application is a modification of the original application, fairness requires that interested persons have an opportunity to present their views to you in connection with the new and changed plan.

Furthermore, since a project of this sort may contemplate investment by members of the public in bonds to be issued, strict compliance with all the provisions of the statute is necessary in order to insure marketability and validity of the bonds.

Your third question is as follows:

"3. If a separate Redevelopment Authority for the City of Boston is formally organized under the provisions of c. 121, § 26QQ, could such Authority formally present the West End Redevelopment Project to the State Housing Board assuming that all parties involved under the statute have given their consent to the newly established Redevelopment Authority to assume, exercise, continue, perform and carry out all undertakings, obligations, duties, rights, powers, plans and activities of the Boston Housing Authority relating to such project? Will a public hearing be required if presented by a new Authority under § 26KK?"

I answer both parts of this question in the affirmative. The inquiry in the first part of your question is answered in the affirmative by § 26QQ, to which you refer. The second part of your question requires an affirmative answer for the reasons set forth above in connection with my answers to your first two questions.

Very truly yours,

George Fingold, *Attorney General.*

Proration of United States pension of more than $1,000 for wartime and non-wartime service, in applying $1,000 limitation on income from sources other than United States pension for war service, to the entitlement of veteran in the service of the State to a non-contributory pension.

SEPT. 12, 1957.

HON. FRANCIS X. LANG, *Commissioner of Administration.*

DEAR SIR: — You request my opinion as to the eligibility of a State employee to retire under the non-contributory retirement provisions available to certain veterans by G. L. c. 32, §§ 56 and 57. In your letter you state that this employee is eligible for retirement under these sections except for the fact that he receives an annual sum from the Federal Government in excess of $1,000. You state that this amount is retirement allowance for military service of twenty years or more, given to the employee by §§ 301 and 302 of Public Law 810, c. 708, passed in 1948 by the Congress. See now, U. S. Code, Title 10, § 1036, *et. seq.*

There is no right to retirement under G. L. c. 32, §§ 56 and 57, if the applicant has a total income from all other sources in excess of $1,000. But, in computing this income from other sources, it is provided that "any sum received from the government of the United States as a pension for war service" shall not be counted. In the present case the Federal pension received by the employee is based upon an aggregate of more than twenty years of military service between 1918 and 1956, including periods during the First world war, the Second world war, the Korean emergency, and other periods. Some of this service was in active Federal duty, and some was in an active status in a reserve group.

The fact that the pension received by the applicant from the Federal Government is based upon length of service, and not upon disability incurred in service, does not require a ruling that the applicant is not entitled to the benefit of the exclusion provisions in §§ 56 and 57. In my opinion, "a pension for war service" received from the Federal Government includes the pension for longevity now being received by this applicant, but only to the extent that such pension is based upon "war service." For this purpose, the pension can be prorated between periods of "war service" and other periods.

There are two problems in the present case. One is the determination of the legal meaning of the word "war" in the phrase used in §§ 56 and 57 excluding "a pension for war service." The other problem is one of computation as to whether or not the amount of his present pension which is not to be considered a pension for war service exceeds $1,000.

The terms "war" and "war service" are ambiguous. See *Stankus* v. *New York Life Ins. Co.*, 312 Mass. 366, and *Gudewicz* v. *John Hancock Mutual Life Ins. Co.*, 331 Mass. 752. See also the many cases digested in Words and Phrases, vol. 44, under "war," and the cumulative pocket part. Some uses of these terms refer to declared wars; other uses refer to actual though undeclared wars. For some purposes these phrases include only a period of actual combat; and for other purposes the phrases include the period during which the legal war continues after cessation of hostilities until the official treaty of peace. These terms are not used or defined in the Federal pension laws. The common understanding of the phrase "war

service" suggests merely military service in a time of war, declared or undeclared. This common understanding is the basis of our statutory definition of "wartime service." G. L. c. 4, § 7, cl. 43rd. This definition is adopted and expanded in G. L. c. 31, § 21. It is also referred to in G. L. c. 32, § 58A, which relates to the amount of creditable service which can be allowed under §§ 56 and 57 which are the precise sections under which the present employee has applied for retirement. In view of the ambiguous meaning of the terms "war" and "war service," standing alone, and in view of our statutory definition of "wartime service," and particularly in view of the reference to this statutory definition of "wartime service" in c. 32, § 58A, it is my opinion that the meaning of "war service" in §§ 56 and 57 is controlled by the definition of "wartime service" now appearing in c. 4, § 7, and c. 31, § 21.

Accordingly, in my opinion, a portion of the pension now being received by the employee in question from the Federal Government is to be excluded in computing his outside income, but this exclusion only applies to that part of such pension as is based upon "war service" within the dates specified in the statutory definition of "wartime service." G. L. c. 4, § 7, cl. 43rd; c. 31, § 21. The computation of the period of "war service" and the prorating of the pension now being received by the employee are matters of fact which must be determined by you.

Very truly yours,

George Fingold, *Attorney General.*

Veteran of World War I discharged on June 15, 1917 is not within provision granting bonus for service terminating after June 15, 1917.

Sept. 12, 1957.

Hon. John F. Kennedy, *State Treasurer.*

Dear Sir: — You have requested an opinion relative to a veteran's claim to the sum of $100 by virtue of the provisions of St. 1956, c. 393.

An examination of that chapter indicates that the sum mentioned is payable ". . . to any man who had enlisted in the regular army, navy or marine corps and who served therein during World War I and whose term of enlistment *did not expire until after June fifteenth, nineteen hundred and seventeen* . . . ." The applicant referred to in your letter was, I understand from your letter, discharged *on* June 15, 1917. Chapter 393 does not provide for the payment to such person.

The Supreme Judicial Court has distinctly stated in the case of *Bigelow* v. *Wilson*, 1 Pick. 485, 495, "no moment of time can be considered to be 'after' a given date until that day has expired." This rule of law has been stated and applied in numerous cases. The applicant's term of enlistment did not expire "after" June 15. He was discharged on June 15. He therefore does not qualify for the payment.

Very truly yours,

George Fingold, *Attorney General,*

By Fred W. Fisher,
Assistant Attorney General.

Youth Service Board — Construction of statutory provision authorizing Board to act as guardian of children in its charge.

SEPT. 13, 1957.

Mr. JOHN D. COUGHLIN, *Chairman, Youth Service Board.*

DEAR SIR: — You have requested advice from this department relative to the powers of the Youth Service Board to act as guardians of a child in its charge, under G. L. c. 120, § 23.

1. *The general question.*

Said § 23 gives your board the *right*, to be exercised in its discretion, to act "as guardians" for any of its charges, and specifically provides that, while so acting, it shall have all the power and authority conferred (upon persons duly appointed guardians by probate courts) by G. L. c. 201. The statute, however, delimits the granted power: *it does not exist* if the ward has a living parent or a court-appointed guardian; *it comes to an end* if and when a guardian is appointed by a court.

Notwithstanding its use of the plural word "guardians," as chairman of the Youth Service Board, you have the power alone (or by your designee) to "exercise and perform" the guardianship "powers . . . granted to . . . the board by" § 23. G. L. c. 6, § 66. In other words, if you determine that one of your charges is for any reason in need of the services of a guardian, *and if he is then an orphan not under legal guardianship*, you may cause the board to assume guardianship powers under the statute, to be exercised by you "or any official or employee of the division of youth service" whom you may designate or assign, *until a legal guardian has been duly appointed for him under said c. 201.*

Your determination of the advisability or necessity of the board acting as such an interim guardian must necessarily rest upon the circumstances of each case as it arises, but a general review of the functions, and of the consequent responsibilities, of a guardian appointed under c. 201 may be of help to you in considering whether the Youth Service Board should undertake to assume them.

Such a guardian "shall have the care and management of all . . . [the] estate" of the ward. G. L. c. 201, § 4. This includes the responsibility to pay the ward's just debts, and to "demand, sue for and receive all debts due to" the ward, appearing and representing the latter "in all actions, suits and proceedings," unless another person has been duly appointed as *guardian ad litem* or *next friend* by the court in which any such action, suit or proceeding may be pending. The guardian's power to "compromise" a claim of his ward and to "give a discharge to the debtor," however, can be exercised only "with the approval of the probate court." G. L. c. 201, § 37. And, where there is no surviving parent (which would of necessity be true in all cases of the board's interim guardianship under said § 23), the guardian "shall have the custody of [the] . . . person [of the ward] and the care of his education." G. L. c. 201, § 5.

The right of your board to assume interim guardianship under § 23 in no way depends upon any preliminary probate court action, nor, for that matter, upon the giving of such a bond to the court, or upon the filing of such an original inventory with the court, as are required of a court-

appointed guardian by G. L. c. 205, § 1, "before entering upon the duties of his trust." Hence, no probate court would have any such supervisory powers over the board, as interim guardian, as it normally exercises over guardians appointed by it. Indeed, nothing in the law would seem to require the board to file annual or other accounts of its doings as guardian with any authority. None the less, as indicated above, it would seem that, so far as the compromise of its ward's claims are concerned, the board, like any other guardian, would have to procure probate court "approval," since its powers are only those "conferred by chapter two hundred and one." G. L. c. 120, § 23.

This lack of general court supervision should be a factor for you to consider before causing the board to assume the authority allowed to it by § 23 in any particular case; the provisions of G. L. cc. 201 and 205 relative to such supervision afford no small measure of protection to a fiduciary, since they permit him to make his doings a matter of public record and to escape such later criticism of his performance of his trust as might otherwise ensue. It may be that, in any case where you feel one of your charges is in need of a guardian, you should take steps to procure the appointment of the board[1] as guardian *in accordance* with c. 201, and that any action taken under § 23 should be taken only in emergencies, and should be followed, in any event, by a petition for appointment in due course under the general statute. Of course, you might properly petition for such an appointment *whether or not the ward be an orphan.*

2. *The specific questions.*

You inquire as to the board's powers, under said § 23, in the matter of a boy who has a claim for personal injuries as the result of being struck by a motor vehicle in December, 1955. You state that "the boy's father is living . . . ."

In these circumstances, the provisions of § 23 do not clothe your board with any authority. As pointed out above, it is only when the child has "neither parent living" that the statute has any effect.

You also inquire, as to a minor who has no known living parents, whether your board has the *power* or *obligation* to act as his guardian for the purpose of objecting to the appointment of his grandmother as administratrix of his mother's estate.

No *obligation* is fastened upon your board by § 23. In the circumstances which you state, however, the statute would permit your board to act as the minor's "guardian" until another fiduciary has been appointed under c. 201. As suggested above, it might be wiser for the board immediately to petition for the regular appointment of a guardian under said chapter.

Very truly yours,

George Fingold, *Attorney General,*

By Arnold H. Salisbury,
Assistant Attorney General.

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[1] The probate courts in the several counties might not take a uniform view as to the proper form for such a petition. In Essex, for example, I am told that the judges would probably not be willing to appoint the board itself under c. 201, although the appointment of some individual suggested by the board might be in order. Before filing any such petition, you should discuss the problem with the register of the court having jurisdiction of the matter.

Limited registration of interne for service at Homburg Infirmary of the Massachusetts Institute of Technology is not authorized.

Sept. 16, 1957.

Mrs. Hazel G. Oliver, *Director of Registration.*

Dear Madam: — You request an opinion as to whether the provisions of G. L. c. 112, § 9 authorize limited registration to one otherwise qualified who has been or wishes to be appointed at the Homburg Infirmary.

I answer your question in the negative. Limited registration under § 9 may only be granted to an interne, fellow or medical officer (a) in a hospital or other institution maintained by the Commonwealth or by a county or municipality thereof, or (b) in a hospital or clinic which is incorporated under the laws of the Commonwealth, or (c) in a clinic which is affiliated with a hospital licensed under G. L. c. 111, § 71, or (d) in an out-patient clinic operated by the Department of Mental Health.

The Homburg Infirmary, in my opinion, is not a hospital maintained by the Commonwealth or a county or municipality, nor is it a hospital or clinic incorporated under the laws of the Commonwealth, nor is it a clinic affiliated with a hospital licensed by the Department of Public Health, nor is it an out-patient clinic operated by the Department of Mental Health. My information is that the Homburg Infirmary is associated with the Massachusetts Institute of Technology. The express provisions of § 9 do not authorize limited registration for service in the Homburg Infirmary.

Very truly yours,

George Fingold, *Attorney General,*

By Fred W. Fisher,
Assistant Attorney General.

Alien graduate of approved foreign medical school registered in New York after written examination cannot be registered without examination in Massachusetts.

Sept. 16, 1957.

Mrs. Hazel G. Oliver, *Director of Registration.*

Dear Madam: — You have requested an opinion relative to the registration by the Board of Registration in Medicine of a foreign applicant.

May an alien graduate of an approved foreign medical school who has been registered in the State of New York upon a written examination be eligible for registration in Massachusetts as a physician under the reciprocal provisions of G. L. c. 112, § 2?

The answer to your question must be determined from a careful examination of the provisions of G. L. c. 112, § 2, relative to the examination and registration of physicians by the Board of Registration in Medicine.

This requires an examination of two different paragraphs of § 2 dealing with two different phases of the subject of examination and registration of applicants. One paragraph deals with the subject of alien applicants and the other provides for applications for registration in this State of registered physicians in another State. In accordance with the usual rules of statutory construction, both must be read together if possible so as to make a harmonious whole. Section 2 provides unequivocally that "the

board shall examine an applicant who is an alien *only* if he presents . . ." evidence of his declaration of intention to become a citizen. In such case, if the applicant is subsequently registered, he must within five years present to the board, under penalty of revocation, papers showing his citizenship. These provisions do not apply to limited registration nor to any alien physician of distinguished merit and ability duly licensed to practice his profession in any foreign country with requirements not lower than those in this Commonwealth, while he is temporarily teaching in this Commonwealth in an approved medical school. This language is plain and unambiguous. It shows a clear legislative intent to bar an alien from an examination unless he produces evidence of his intention to become a citizen. It is also clear from the foregoing that examination is compulsory in the case of aliens. The above construction is borne out by St. 1957, c. 329, approved April 30, 1957, and effective 90 days thereafter. This chapter amends § 2 by inserting a provision requiring an applicant graduated from a foreign medical school to furnish the board with satisfactory documentary evidence that his education meets its requirements and such other evidence as the board may require as to his qualifications to practice medicine. He is further required to take an examination offered periodically by a national board, which must certify to the Board of Registration in Medicine that the applicant has successfully passed such examination. If the board is satisfied as to his education and qualifications "then the board shall, upon payment of twenty-five dollars by the applicant, *admit him to the examination for licensure.*" So the last legislative word on the subject adds new and stringent conditions precedent to the admission of aliens for *examination.*

Turning to the subject of reciprocal registration, § 2 provides that the Board of Registration in Medicine may "*without examination,* grant certificates of registration as qualified physicians to such persons as shall furnish with their applications satisfactory proof that they have the qualifications required in the commonwealth to entitle them to be examined and have been licensed or registered upon a written examination in another state whose standards, in the opinion of the board, are equivalent to those in the commonwealth; provided, that no person shall be so registered without an examination if he has attempted unsuccessfully to secure registration in the commonwealth or if he is a graduate of a medical school not approved by the approving authority." I am assuming that the applicant referred to in your letter has not unsuccessfully attempted to secure registration in this Commonwealth and that he is a graduate of a medical school approved by the approving authority.

Reading the two paragraphs together, one relating to the registration of aliens and the other relating to registration under the reciprocal provisions, two conclusions are inevitable: (1) that an alien must in any event be examined, and (2) that a reciprocal applicant does not have to be examined. To permit aliens to be registered under the reciprocal provisions without an examination would circumvent and frustrate the declared intent of the Legislature.

I therefore answer your question in the negative.

Very truly yours,

George Fingold, *Attorney General,*

By Fred W. Fisher,
Assistant Attorney General.

Board of Registration in Medicine may register graduates of unapproved schools who matriculated prior to Jan. 1, 1941, who meet certain requirements.

Oct. 24, 1957.

Mrs. Hazel G. Oliver, *Director of Registration.*

Dear Madam: — You have requested an opinion, in behalf of the Board of Registration in Medicine, relative to the registration of physicians who are graduates of unapproved schools.

The conditions, in general, upon which the Board of Registration in Medicine may register physicians are set forth in the second sentence of G. L. c. 112, § 2. The present wording of this sentence appears in St. 1945, c. 396, § 1. This present statute requires that applicants for registration as physicians shall have completed certain required collegiate work in a college or university and in a medical school, both approved by the approving authority established by such section.

However, in the past, some of our statutes relating to increased requirements for the registration of physicians have preserved rights under prior laws for registration in certain cases of graduates of unapproved schools. Because of this, you request an opinion upon the following question:

"Is the board correct in assuming that applicants matriculating in med ical school prior to January 1, 1941, may still apply for registration even though graduates of unapproved schools?"

I answer your question in the affirmative. The requirement for attendance at and graduation from an "approved school" was first contained in St. 1936, c. 247, which became effective (see St. 1938, c. 259) on January 1, 1941. In the statutes the right of persons to apply for registration if they had complied with the provisions of G. L. c. 112, § 2, as it stood prior to January 1, 1941, even though they had not graduated from an approved school, was retained. St. 1936, c. 247, § 3. St. 1938, c. 259, § 1.

There is another situation in which graduates of unapproved schools may possibly be entitled to registration. An applicant who "was, on March tenth, nineteen hundred and seventeen, a matriculant" of certain legally chartered medical schools, is still entitled to registration under the provisions of the law in effect prior to May 9, 1933. The right of such person has been protected by St. 1933, c. 171, § 2, and also by the saving clauses in the statutes adopted in 1936 and 1938, cited above.

A third situation under which it may be possible for you to register graduates of unapproved schools is set forth in St. 1947, c. 369. It is provided in such section that

". . . any person who was a resident of the commonwealth for a period of five years prior to July first, nineteen hundred and forty-one, who matriculated at any medical school in the commonwealth prior to said date, and who has since received a degree of doctor of medicine therefrom, shall be eligible to be an applicant for registration as a qualified physician, ..."

In summary, therefore, I advise you that the Board of Registration in Medicine may register as physicians graduates of unapproved schools who

had matriculated prior to January 1, 1941, and who meet the requirements set forth in St. 1933, c. 172, § 2, or St. 1938, c. 259, § 1, or St. 1947, c. 369.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Prior approval of Governor is not required for travel outside the Commonwealth on official business by State Auditor or members of his staff.

Nov. 14, 1957.

Hon. THOMAS J. BUCKLEY, *State Auditor.*

DEAR SIR: — You have requested my opinion as to whether or not the provision in G. L. c. 6, § 10, relating to prior authorization by the Governor for leave to travel outside the Commonwealth, applies to you and to the officers and employees in your department who travel outside the Commonwealth under your direction and upon the official business of your department.

You inform me that one of your confidential employees recently traveled to Hartford, Connecticut, on official business connected with the activities of your department, and that a voucher covering the cost of this travel in the amount of $32.25 was returned to you, by the Comptroller's Bureau, without its approval, for the reason that previous authorization for this travel had not been given by the Governor. The statute involved (G. L. c. 6, § 10) relates to delegates to conventions, and also to travel outside the Commonwealth by a State "officer or employee." By an amendment added in 1920 (St. 1920, c. 253), this statute now provides as follows:

". . . No officer or employee of the commonwealth shall travel outside the commonwealth at public expense unless he has previously been authorized by the governor to leave the commonwealth, and in applying for such authorization the officer or employee shall specify the places to be visited and the probable duration of his absence."

It was ruled, in 1921, by one of my predecessors, that this particular provision of § 10 did not apply to the person holding the position of Attorney General or to those in his department acting under the direction of the Attorney General in the discharge of their official business. VI Op. Atty. Gen. p. 138. (Opinion to the Governor and Council, April 20, 1921.) The reasons assigned for this ruling were that the Attorney General was a constitutional officer, to which position he was elected directly by the people of the Commonwealth, and that the nature of his duties required him to travel outside the Commonwealth. That opinion stated:

"Proper discharge of his [the Attorney General's] duties may require him to travel beyond the borders of the Commonwealth — for example, to represent the Commonwealth before the Supreme Court of the United States. The occasion for his presence in Washington, or elsewhere, to represent the Commonwealth may arise suddenly, under circumstances which would preclude him from applying to the Governor before he starts.

If the statute should be held to apply to him he could not discharge his duty to the Commonwealth if the Governor could not be reached or should refuse his approval." (Pages 139–140)

In my opinion, the nature of the position of State Auditor, and the constitutional and statutory duties of the Department of the State Auditor (G. L. c. 11) bring you, and your employees acting upon your direction in the discharge of their official duties, within the scope of this 1921 ruling. You are a constitutional officer, elected by the people, and not directly subject to the Governor. The duties of your department are investigatory in character and, inevitably, in this modern age — our numerous inter-relationships with Federal departments and bureaus form merely one example of your increasing and enlarging responsibilities — your duties require investigations beyond the borders of our own Commonwealth. Because of common knowledge of the extent and character of the required duties of your department, and the clear expectation of the occasional need for sudden or temporarily secret investigations, it is my opinion that this statute, as interpreted by the 1921 ruling, does not apply to you nor to the officers and employees in your department who travel outside the Commonwealth upon your direction and in the discharge of their official business.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

Form of certification of medical panel where death of Metropolitan District police officer is due to hypertension or heart disease.

NOV. 19, 1957.

Hon. FRANCIS X. LANG, *Commissioner of Administration.*

DEAR SIR: — You have requested an opinion as to the duties of the medical panel required in case of a retirement under G. L. c. 32, § 89A, and the effect of § 94 of that chapter upon the duties of said panel.

You inform me that a lieutenant in the Metropolitan District Police was retired in 1952 because of permanent disability caused by hypertension or heart disease, that such lieutenant has since died, that his death was due to heart disease, and that the lieutenant's widow has applied for an annuity under the provisions of G. L. c. 32, § 89A.

You refer to the requirement in § 89A for the appointment of a medical panel, and you also call attention to § 94 of said chapter. You request the opinion of this department, in view of these two statutes, upon the following question:

"Your opinion is requested as to the form of certification that should be submitted by the medical panel and as to the type of statement that should be contained in such a certification."

It is provided in § 89A that, if an employee of the Commonwealth dies as a result of certain stated injuries, and if certain facts are found to exist, an annuity shall be paid to the widow. Among the facts which this section requires are the following:

(1) that the employee's death "was the natural and proximate result of an accident occurring, or of undergoing a hazard peculiar to his employ-

ment, while he was acting in the performance and within the scope of his duty, ..."; and

(2) that a majority of a medical panel "shall certify . . . that the death was the natural and proximate result of said injury or hazard . . . ."

In cases of hypertension or heart disease, the requirements of § 89A quoted above are modified by the provisions of § 94 that

". . . any condition of impairment of health caused by hypertension or heart disease resulting in total or partial disability or death . . . shall . . . be presumed to have been suffered in line of duty, unless the contrary be shown by competent evidence."

I do not find that your precise question has been covered by any of the decisions of the courts of this Commonwealth, nor by any prior rulings by this department. However, related questions have been covered by such decisions. In *Selectmen of West Springfield* v. *Hoar*, 333 Mass. 257, the court held that the Heart Act, § 94, applied to a claim for an annuity under § 89A, and the court also stated that "there must be a certificate by a majority of a board of three physicians, to be designated as provided in the section [§ 89A] within thirty days after the filing of an application, 'that the death was the natural and proximate result of the said injury or hazard.' "

But in *Mathewson* v. *Contributory Retirement Appeal Board*, 335 Mass. 610, in which the court considered directly the form of certification by a medical panel under G. L. c. 32, §§ 6 and 7, the statement was made that ". . . it is our opinion that as a result of § 94 the further requirement that the medical panel certify 'whether or not the disability is such as might be the natural and proximate result of the accident or hazard undergone' no longer applies as a condition precedent to hypertension or heart disease cases." A somewhat similar situation was covered in an opinion of the Attorney General to the State Board of Retirement (dated November 21, 1956) in which it was ruled that the board (no reference was made to a medical panel) was not required to make a finding, in cases in which § 94 applied, that the heart disease was sustained "at some definite place and at some definite time."

Because of the unresolved uncertainties which appear in official rulings and decisions relating to this matter, and because of the specific requirement in § 89A that the medical panel shall make a definite certification, it is our opinion that, in a case to which § 94 applies, the certification by the medical panel should be, in substance, somewhat as follows:

"We certify that the employee died because of hypertension or heart disease; and we further certify, under the presumption created by G. L. c. 32, § 94, that the death of the employee was the natural and proximate result of the injury received or hazard undergone while in the performance of his duty; and we further certify that we know of no evidence contrary to this presumption."

Very truly yours,

George Fingold, *Attorney General,*

By Lowell S. Nicholson,
Assistant Attorney General.

Contributions from municipalities or others on account of waterway projects under Capital Outlay Appropriation Act of 1957 are not required.

Dec. 5, 1957.

Mr. Rodolphe G. Bessette, *Director, Division of Waterways, Department of Public Works.*

Dear Sir: — You have requested my opinion regarding your right to make expenditures from the Capital Outlay Appropriation Act of 1957 (St. 1957, c. 763) for waterways improvement and protection on the rivers, harbors and shores of the Commonwealth.

Item 8258–79 of this statute provides for an appropriation of $5,000,000 to be used by the Department of Public Works, Division of Waterways, for the improvement, development, maintenance and protection of rivers, harbors, shores, tidewaters, dams, piers, drains, etc. Specifically included in this appropriation item are the projects authorized by ten enumerated acts enacted during the 1957 session. You call my attention to one clause of this appropriation item which, following the general provision for improvement, development and protection of waterways, provides that expenditures are to be:

". . . as authorized by section eleven of chapter ninety-one of the General Laws, to be used in conjunction with any federal funds made available for the purpose, to be expended with contributions from municipalities or other organizations and individuals; . . . ."

Said § 11 of c. 91 is the statute which authorizes your department to undertake work for the improvement, development and protection of waterways. In selecting the places to do such work, this statute directs that your department "shall consider . . . the local interest therein as manifested by municipal or other contributions therefor . . . ." This § 11 does not *require* a local contribution in order for your department to be authorized to do necessary work on State waterways, but it does require that you "consider" the existence or nonexistence of such a contribution when you make selection of the places to do waterways work.

You request my opinion, with reference to this requirement in the appropriation item that the funds appropriated are "to be expended with contributions from municipalities or other organizations and individuals," as to whether or not your department can expend such funds if there are no contributions from municipalities or other organizations and individuals.

I answer your question in the affirmative. In my opinion, you can expend such funds even though there are no contributions from municipalities or other organizations or individuals on account of the project involved. My reasons for coming to this conclusion are set forth below.

Reading this "contributions" clause only within the context of the appropriation item itself, it appears merely to give authority to your department to accept contributions, over and above the $5,000,000 appropriated, and to use such contributions for the special projects to be performed. Such clause does not appear to contain any prohibition of a project if there are no local contributions on account of such project. Ordinarily, a department of the Commonwealth is expected to use Commonwealth funds for the work it carries on, and in the instances where a department is to accept and use

funds other than from the Commonwealth, authority to accept and use such funds is given by statute. Such a purpose and interpretation seem the reasonable ones to apply to the language in this appropriation item. However, the language used in this appropriation item is sufficiently ambiguous, standing alone, to require that circumstances beyond the context of the item itself be considered.

You call my attention to the fact that, in similar Capital Outlay Appropriation Acts of prior years, this corresponding item appropriated funds for waterways purposes, "to be expended either with or without contributions . . . ." The change of language in the 1957 act is one circumstance to be considered in the interpretation of this provision, but it is not conclusive. All pertinent circumstances bearing upon the intent of the Legislature in passing this appropriation item also must be considered.

Looking further, there are other circumstances which negative any suggestion that no waterways work can be done unless there is a contribution by some local municipality or organization or individual. The following circumstances, in my opinion, lead to such conclusion:

(1) The Legislature, when it so intends, can express very clearly a requirement that no money shall be spent unless there is a local contribution. See the appropriation item immediately preceding the one here in question, wherein it is provided that the Commonwealth's share "shall not exceed fifty per cent of the total cost . . . ." See also St. 1954, c. 453, Item 2202–05, carried forward to the present year by St. 1957, c. 402, § 2A, and relating to this same § 11 of c. 91, wherein it is provided that the appropriation there made "shall be upon condition that at least fifty per cent of the cost is covered by contributions . . . ." No such requirement appears in the appropriation item concerning which you have inquired.

(2) The present appropriation item specifically includes the projects authorized by ten enumerated 1957 acts, five of which provide for a local contribution (cc. 340, 341, 376, 591, 607), and five of which do not call for a local contribution (cc. 476, 479, 501, 509, 510). An interpretation that every project performed under this entire appropriation item must have local contributions is not reasonable in view of the different approaches to this problem in the ten enumerated and included acts.

(3) A ruling that none of this $5,000,000 could be used for any project unless there were a local contribution, not only is not consistent with the words used in G. L. c. 91, § 11, but would operate as an absolute bar to the performance of any waterways work by the Commonwealth under § 11, however urgent, unless some local municipality or organization or individual chose to make a contribution. The improvement and maintenance and protection of rivers, harbors, shores, tidewaters, dams, piers, drains, etc., are of vital general interest; much of this work is essential irrespective of local contribution. It would create an unreasonable situation, in my opinion, to say that no such protection of waterways could be performed by your department unless some local contribution were made. Such a drastic conclusion should not be reached in the absence of clear and positive language on the part of the Legislature.

(4) Another circumstance to be considered is the fact that, in the current appropriation, unexpended money appropriated in prior years, under statutes permitting waterways improvements to be done "either with or with-

out contributions," has been made available for current projects. It would seem to be both difficult and unreasonable to differentiate, with respect to a single project, between the $5,000,000 appropriated this year and the money carried forward from other years. As to the use of such unexpended balances, it does not seem possible to rule that the present act was intended to create new restrictions thereon.

(5) The vague requirement of "contributions," without any formula as to amount or percentage (should $1.00 be deemed a compliance?), does not seem reasonably applicable to a total prohibition of authority in the absence of such "contributions." On the other hand, such an undefined word is entirely appropriate to confer upon the department the right to accept and use such "contributions," however large or small they might be.

I have given consideration to the language of the appropriation item, and to the various circumstances affecting such item. It is my conclusion that your department can expend funds from this Capital Outlay Appropriation Item even though there are no contributions from municipalities or other organizations or individuals on account of the project undertaken.

Very truly yours,

George Fingold, *Attorney General.*

State Employees' Group Insurance Commission — A portion of the dividends received from insurers on group insurance policy for State employees should be credited to the Federal Government on account of premiums charged to it for employees of the Division of Employment Security.

Dec. 16, 1957.

Mr. William A. Burke, *Executive Secretary, State Employees' Group Insurance Commission.*

Dear Sir: — You state that the Division of Employment Security has asked that your commission return to its administration account a pro rata share of the dividend received by the Commonwealth as a result of the contributory group life, accident and hospitalization insurance policies negotiated by the commission under authority of St. 1955, c. 628.

In respect to the premiums paid on these policies, section 8 (*a*) of said act provides that fifty per cent of such premium be withheld from the wages of participating employees and that the Commonwealth shall contribute the remaining fifty per cent.

In the case of the Division of Employment Security and other similar agencies having Federal funds allocated for insurance purposes, the commission has been directed by each subsequent annual appropriation act to charge such division a portion of the cost of the program as it determines should be borne by such funds. (See item 0448–02 in St. 1956, c. 501, and the same item in St. 1957, c. 438.)

In each case the appropriation item contains the following language:

"For the commonwealth's share of the state employees' group insurance; provided, that the employees' group insurance commission shall charge the division of employment security and other departments and divisions which have federal funds allocated to them for this purpose for that portion of the

cost of the program as it determines should be borne by such funds, and shall notify the comptroller of the amounts to be transferred, after similar determination, from the Highway, Inland Fisheries and Game, and Metropolitan District Commission Funds, and amounts received in payment of all such charges shall be credited to the General Fund."

Although your letter does not so state, it is assumed that the insurance companies involved have declared a dividend to the Commonwealth. The Division of Employment Security apparently has requested that a pro rata share of such dividend be returned to its account, calling attention to the Employment Security Manual, Part IV, Fiscal Management, relating to Group Insurance Coverage of State Agency Employees. The Manual states that funds granted by the Federal Government may be used for payment of the State agency's proper share of the cost of group insurance for the benefit of eligible State employees and provides, among other things, that:

"Any refunds for the State agency's proportionate share of any dividends are returned to the State agency and deposited in the administration fund."

The General Court of Massachusetts considered the problem of dividends in connection with the group insurance program and by St. 1955, c. 628, inserted the following language in G. L. c. 32A, § 9:

"Any dividend or other refunds or rate credits shall inure to the benefit of the commonwealth, . . . and shall be deposited by the commission with the treasurer and receiver-general of the commonwealth and shall be applied to the over-all cost of such insurance."

It is noted that the foregoing section requires that dividends be applied to the cost of such insurance. These words are particularly significant in view of the history of the legislation as pointed out in a letter to you from Arthur L. Hinchey, Assistant Director, Division of Employment Security, dated September 5, 1957. Mr. Hinchey calls attention to the fact that an initial draft of the legislation, as embodied in House Document 2843, contained a similar provision relating to dividends but provided that such dividends shall be deposited "to the credit of the general fund." At the request of the Division of Employment Security, the words as appearing in the House Document were changed to provide for applying such dividends to the cost of the insurance as those words appear in § 9 as quoted above.

In general it would appear, therefore, that dividends received by the Commonwealth from the insurance companies should be used to reduce the cost of the insurance. Accordingly, a pro rata share of such dividend should be credited to the Federal Government. Where the Commonwealth has accepted funds from the Federal Government to be applied to the cost of group insurance on the understanding that the Federal Government receive a pro rata credit for any dividends, and where the act setting up the insurance program contains a specific provision that dividends shall be applied to the cost of such insurance, it is incumbent on officials of the Commonwealth handling such funds to insure that the rights of the Federal Government are protected. It is suggested, therefore, that your commission consult with the Comptroller concerning the mechanics of crediting the dividend to the Federal Government. The request of the Director of the Division of Employment Security that the amount in question be cred-

ited to its Administration Account is one method of accomplishing this result.

It is noted also that your commission has authority to determine the proportion of the cost of the insurance premiums which should be borne by Federal funds in accordance with the appropriation act which is passed each year as described above. In determining the cost to be borne by Federal funds, your commission may take into consideration any dividends which have been paid by the insurance companies. By this indirect manner, the Federal Government may be credited with dividends due it.

In conclusion, it is our opinion that dividend credits must be given to the Federal Government where the insurance company has declared and paid a dividend to the Commonwealth. The actual mechanics of paying such credit may be worked out in several different ways as may be agreeable to the parties concerned.

Very truly yours,

George Fingold, *Attorney General,*

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

Tenure rights of acting Assistant Superintendent of Danvers State Hospital.

Dec. 31, 1957.

Jack R. Ewalt, M.D., *Commissioner of Mental Health.*

Dear Sir: — You have requested the opinion of this department regarding the tenure rights of a person who has been acting Assistant Superintendent of the Danvers State Hospital.

I understand that this is not a civil service position, therefore the incumbent acquires no tenure rights under c. 31 of the General Laws. Since the incumbent is a veteran, he may acquire tenure rights under either § 9A or § 9B of c. 30 of the General Laws. Determination of such rights can be made only upon consideration of the exact details in this case.

Your inquiry relates to the position of Assistant Superintendent at the Danvers State Hospital and particularly to the tenure rights of the Senior Physician who has been "acting Assistant Superintendent," upon annual temporary appointments during the past eight years. You provide further details in this matter, as follows:

". . . Assistant Superintendents of our hospitals have the function, powers, and authority of a Superintendent when the Superintendent is ill, disabled or absent from the hospital. The department has, for many years, taken the stand that the Assistant Superintendent should have basically the same training and qualifications as the Superintendent. In revising the laws governing our personnel and in re-describing the jobs by the Division of Personnel in what is usually referred to as the Barrington Report, the position of Assistant Superintendent contains among its qualifications the statement 'certification as a Diplomate in Psychiatry by the American Board of Psychiatry and Neurology' . . . . [The person who has been 'acting Assistant Superintendent' does not hold such a 'certification,' but

he] has held this position on temporary appointment, having been reappointed temporarily, annually, since July 24, 1949. He holds a permanent appointment as a Senior Physician at the Danvers State Hospital and his successor in that position is appointed temporarily in order that the permanent block may be preserved . . . ."

Upon the above facts you inquire whether or not the Department of Mental Health and the Superintendent of the Danvers State Hospital, the appointing authority in this case, can demote the Senior Physician, a veteran, who has been such "acting Assistant Superintendent," to his permanent block of Senior Physician.

Upon the exact facts in this case, I believe your question should be answered in the affirmative. In my opinion, the tenure protection under G. L. c. 30, §§ 9A and 9B, does not extend to a person who has been given temporary appointments to become an "acting" Assistant Superintendent. The protection in § 9B is for persons "permanently" employed. I do not see how there is any permanent employment, in the facts you state, of the Senior Physician either as the Assistant Superintendent or as the acting Assistant Superintendent. Nor do I believe there is any protection under § 9A which gives tenure, under certain circumstances, to veterans who have held an office or position in the service of the Commonwealth for not less than three years. Upon the facts stated by you, I do not believe the Senior Physician has "held" the position of Assistant Superintendent; his designation as "acting" Assistant Superintendent is a denial that he is the Assistant Superintendent; therefore, he cannot be said to have "held" such position. Furthermore, I do not believe that the duties of an "acting Assistant Superintendent," performed by a Senior Physician under temporary designations, can be said to constitute "an office or position" under the protection of § 9A. I find no cases or ruling to the effect that a person who is "acting" in the performance of some position acquires tenure rights either to the position itself or to the status of an "acting" officer holding such position. In my opinion, such a ruling would be an unwarranted extension of these tenure statutes.

The protection to veterans under G. L. c. 30, § 9A, and to other public officers and employees under § 9B of that chapter indicates the declared policy of the Commonwealth toward its employees. Such statutes should be liberally construed to carry out the protective measures intended by such acts. On the other hand, the protection given by these statutes cannot, by interpretation, be extended beyond the clear words of the statute as enacted by the Legislature. Notwithstanding the declared purpose of these statutes, I do not see how they can be extended to create tenure rights in favor of an employee who is carrying on some of the duties of another office by virtue of a temporary designation as an "acting" officer.

The above opinion denying the tenure rights in the present case is based entirely upon the exact and unusual facts which have been presented by you in this matter.

Very truly yours,

George Fingold, *Attorney General,*

By Lowell S. Nicholson,
Assistant Attorney General.

Board of Registration of Professional Engineers and Land Surveyors — The "confidential file" of the Board is not open to public inspection.

DEC. 31, 1957.

Mr. EDWARD H. BARRY, *Chairman, Board of Registration of Professional Engineers.*

DEAR SIR: — You have requested an opinion regarding access of the public to your so-called "confidential file."

You state that the Board of Registration of Professional Engineers and of Land Surveyors is charged with the duty of issuing certificates of registration as a professional engineer or land surveyor to properly qualified applicants; and that for the purpose of obtaining necessary information to enable the board to evaluate his qualifications, each applicant is required to submit a description of his educational background and a detailed account of his professional experience, and to give the names of five references, three of whom are familiar with his work. You further state that it is the practice of the board to write a letter to each person named by the applicant as a reference, requesting certain information, and in such request the board advises each reference that his reply will be held in confidence.

Your letter further states that a record book is kept in which the disposition of every application is recorded, and such record book is available for public inspection. However, the record book does not give the reasons for the board's action, and the record book does not contain information of a confidential nature from a number of sources, including personal references, which information is kept in a "confidential file" pertaining to each application.

You request an opinion on the following:

"Is the board correct in refusing access to this confidential file by unauthorized persons?"

I answer your inquiry in the affirmative.

The information and records which constitute "public records," and which must be open to public inspection, relate only to books or papers or entries which are "required to be made by law," or papers which a public body "is required to receive for filing." G. L. c. 4, § 7, cl. 26. Persons having custody of such "public records" shall permit them to be inspected and examined by members of the public. G. L. c. 66, § 10.

The statute relating to your board indicates in detail the records which must be kept of your proceedings and of the applications for registration received by you. G. L. c. 112, § 81H. Such items are "public records," and shall be open to public inspection. Neither this statute, nor any other statute I know of, requires that information submitted to you from references of applicants must be open to public inspection.

In the absence of positive declarations of statutes, information obtained by you merely to aid you in the administration of your duties, which information is not required to be filed with you by statute, is not "public records" and is not open to public inspection. *Gerry* v. *Worcester Consolidated Street Railway*, 248 Mass. 559, 567. III Op. Atty. Gen. 136; *id.*, 351.

Accordingly, in my opinion, the "confidential file" pertaining to appli-

cations made to you, containing items of a confidential nature from a number of sources, including educational institutions, registration boards in other States, and personal references, are not required to be open to the inspection of members of the general public.

You also make the following additional inquiry:

"What persons, other than members of the board and authorized employees in its office, have the authority to inspect these confidential files?"

I think this subsidiary inquiry is answered by the opinion set forth above. I know of no other persons who have the authority to inspect your confidential files. If your second inquiry relates to some specific officer or position, I can give you a more direct answer if you will give me full details. But it seems to me that the opinion expressed above as to your first inquiry will be sufficient to take care of you in connection with this subsidiary matter.

Very truly yours,

George Fingold, *Attorney General,*

By Lowell S. Nicholson,
Assistant Attorney General.

County Commissioners may not require District Attorney to submit requisitions or purchase orders prior to incurring expenses for services or supplies.

Jan. 7, 1958.

Hon. James L. O'Dea, Jr., *District Attorney, Northern District.*

Dear Sir: — You have requested an opinion ". . . as to whether the county commissioners may require the district attorney to submit requisitions or purchase orders prior to the contracting by the district attorney for necessary services or purchase of necessary supplies."

At the outset it may be noted that by G. L. c. 35, § 29, "the expenditure of money by the several counties shall be in accordance with the appropriations of the general court, which shall specify as separate appropriations the several items of expenditure, as prescribed by the director of accounts."

By G. L. c. 12, § 24, it is provided:

"A district attorney . . . may contract such bills for stationery, experts, travel outside of the commonwealth by witnesses required by the commonwealth in the prosecution of cases . . . and for such other expenses as may in his opinion be necessary for the proper conduct of office in the investigation of or preparation and trial of criminal causes; and all such bills shall be paid by the county for the benefit of which they were contracted upon a certificate by the district attorney that they were necessarily incurred in the proper performance of his duty, and upon approval of the auditor of Suffolk county if the bills were incurred for said county, otherwise upon the approval of the county commissioners or of a justice of the superior court."

In referring to this section in the case of *Rooney* v. *County of Essex*, 292 Mass. 473, at 475, the court said:

"This is a comprehensive statute. It covers the entire field of necessary expenses of a district attorney in administering his office, unless and so far as included within G. L. (Ter. Ed.) c. 213, § 8. . . . It affords a remedy which must be followed by one employed pursuant to its terms. The plaintiff, not having received the certificate of the district attorney to his bill nor the approval thereof by the county commissioners or by a judge of the court, does not comply with the *conditions precedent* imposed on him by that statute. He cannot recover on any view of his declaration."

Referring to the same section in the case of *J. Stewart Rooney, Petitioner*, 298 Mass. 430, at 433, the court said:

"This statute gives to a district attorney the power to contract bills for services and expenses necessary to the proper performance of his duties but prescribes *conditions which must exist before bills so contracted may be paid from a county treasury.* It is a *condition precedent* to such payment that the district attorney certify that such bills were 'necessarily incurred in the proper performance of his duty.' . . . Under the provisions of the statute as amended, a bill for services or expenses contracted by a district attorney and certified by him becomes, upon the approval of the county commissioners alone, payable from a county treasury without any approval by a judge of the Superior Court or even without any knowledge by any judge of the court that such a bill existed. . . .

"The statute requires an 'approval' either of the county commissioners or of a judge of the Superior Court to a bill certified by a district attorney but no court order for such payment is required. The word 'approval' when it appears in our statutes generally means an affirmative sanction by one person or by a body of persons of precedent acts of another person or body of persons. . . . We think that is the meaning which must be given to the word 'approval' in the statute under consideration and that a judge of the Superior Court is not authorized to give his approval to a bill for services or expenses contracted by a district attorney unless the bill has been certified by the district attorney as required by the statute. . . .

". . . We think the statute adequately manifests the intention that since its passage a bill for services or expenses contracted by a district attorney may no longer be properly paid merely upon its allowance by and on the order of a judge of the Superior Court and that the county treasurer is now authorized to pay a bill contracted by a district attorney only upon his certificate in conformance with the statute and upon the approval by either the county commissioners or a judge of the Superior Court, of a bill so certified."

Section 25 of c. 12 does, of course, provide for money to be advanced by the Treasurer under the direction of a district attorney "upon the presentation of a certificate signed by the district attorney and approved in a manner provided in the preceding section for approving bills incurred by district attorneys . . . ."

Moreover, § 25A of c. 12 provides for advances by the county treasurer to an amount not exceeding $2,000 in any one month for necessary expenses to be incurred in the performance of the duties of a district attorney in relation to any investigation or proceeding, but only "upon the presentation of a certificate signed by him certifying that such amount is necessary for use as aforesaid. Every sum so advanced shall be accounted for by the

said district attorney within two months after such advance and such accounts shall be approved in the manner provided in section twenty-four for approving bills incurred by district attorneys; . . ."

General Laws c. 35, § 11, provides in relation to the county treasurer that:

"No payments, except payments for expenses in criminal prosecutions, of expenses of the courts . . . shall be made by a treasurer except upon orders drawn and signed by a majority of the county commissioners, certified by their clerk and accompanied, except in Suffolk county, by the original bills, vouchers or evidences of county indebtedness for which payment is ordered, stating in detail the items and confirming the account. Said clerk shall not certify such orders until he has recorded them in the records of the commissioners. . . ."

General Laws c. 213, § 8, provides that "the courts shall, respectively, receive, examine and allow accounts for services and expenses incident to their sittings in the several counties and order payment thereof out of the respective treasuries."

General Laws c. 35, § 34, must, of course, be read together with and in the light of the foregoing. From the foregoing I come to the conclusion and it is my opinion that a district attorney may contract for and incur proper expenses in the performance of his duties according to the several provisions of the various statutes relating to the same, but only on the terms and conditions set forth in such statutes.

In view of the foregoing it is my opinion that under the provisions of the above statutes the authority is in the district attorney, in the first instance, to incur obligations for necessary and proper services and expenses. The responsibility is then upon the county commissioners to act when the requisitions, purchase orders or other papers come to them for action.

Very truly yours,

George Fingold, *Attorney General,*

By Fred W. Fisher,
Assistant Attorney General.

Proposed partnership of physicians to operate medical service plan for profit would not be within statutes applicable to plans operated by non-profit medical service corporations.

Jan. 13, 1958.

Hon. Joseph A. Humphreys, *Commissioner of Insurance.*

Dear Sir: — You have outlined a plan whereby a group of physicians propose to organize a partnership for profit for the purpose of providing medical and surgical services to individuals at a fixed fee for a fixed period of time.

You have stated that opinions of former Attorneys General have determined that such arrangements do not constitute contracts of insurance within the control of your department. You ask whether the "Medical

Service Plan" briefly outlined above may now be under the supervision of your department in view of G. L. c. 176B regulating medical service corporations and c. 176C regulating non-profit medical service plans.

The applicable provision of c. 176B is § 16, providing in part that:

"It shall be unlawful for any person, firm, corporation or association, except a medical service corporation, to establish, maintain or operate a non-profit medical service plan; . . ."

The proposed partnership referred to by you is organized for profit and is therefore not within the prohibition of said section which refers only to non-profit plans.

In respect to c. 176C, § 2 thereof provides in part as follows:

"Any medical service plan, and any medical service corporation or medical organization operating in connection with a medical service plan, under the laws of the commonwealth, shall be governed by this chapter . . ."

A medical service plan is defined in § 1 of c. 176C as "any plan or arrangement whereby members of the public pay regular subscription amounts and are entitled in return therefor to medical services."

The proposed partnership appears to contemplate the operation of a medical service plan as defined in said § 1. The remaining provisions of the chapter, however, relate to the operation of such plans by non-profit medical service corporations or by medical organizations agreeing with such corporations to provide medical services to subscribing members.

A medical organization is defined as "any medical society or partnership of physicians whose members are members of the Massachusetts Medical Society or other recognized association of physicians, or whose members are members of the staff of any hospital approved by the American College of Surgeons, and which agrees to provide medical services to the subscribing members of a medical service plan." It is noted that the definition covers only those organizations providing services to "subscribing members." A subscribing member is defined as "any member of the public who is accepted as a subscribing member, with or without dependents, by a medical service corporation and who pays regular subscription dues to such corporation."

The proposed partnership may, in one sense, be classified as a medical organization, but it apparently does not contemplate an agreement with a medical service corporation to provide services to subscribing members of such corporation. Its activities, therefore, as outlined by you, are not ones which are regulated either by G. L. c. 176B or c. 176C. As physicians engaged in the practice of medicine, the activities of such a partnership are, of course, subject to such statutes, rules and regulations as may affect the medical profession.

Very truly yours,

George Fingold, *Attorney General,*

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

Licenses cannot be issued for running horse racing meetings at tracks located within one mile of each other, if one of the tracks is a licensed mile track.

JAN. 23, 1958.

MR. LAWRENCE J. LANE, *Secretary, State Racing Commission.*

DEAR SIR: — You have requested an opinion of this department relative to the effect of G. L. c. 128A, § 3(*h*), upon two applications now pending before your commission for licenses to conduct running horse racing meetings in the Commonwealth.

The two applications are for meetings (1) at an existing one-mile track at Suffolk Downs, in East Boston and Revere, and (2) at a proposed five-eighth mile track in Shirley. Your letter indicates that these locations are less than fifty miles apart.

The situation which you present is controlled by G. L. c. 128A, § 3(*h*). This statute provides:

"(*h*) No licenses shall be issued to permit running horse racing meetings to be held or conducted, except in connection with a state or county fair, at the same time at more than *one race track* within the commonwealth, nor at any time at *a race track* located within fifty miles of *another race track* within the commonwealth, one mile or more in circumference; provided, that licenses may be issued to permit such meetings to be held or conducted at the same time at not more than two race tracks if such tracks are seventy-five miles apart." (This is the present version of this paragraph, as last amended by St. 1935, c. 454, § 4. Emphasis is supplied.)

After presenting the facts relating to these two applications, you request an opinion as follows:

"Will you kindly advise the commission whether or not under the provisions of G. L. c. 128A, § 3 (5) (*h*), if the Commission grants a license for a running horse racing meeting at a *mile track* (Suffolk Downs) is the commission restrained by the provisions of said clause (*h*) from granting a license for running horse racing at any track regardless of the size of that track located within fifty miles of a licensed mile track, or

"Does G. L. c. 128A, § 3 (5) (*h*), permit the commission to grant a license for a running horse racing meeting at a track of *less than one mile*, located within fifty miles of a *licensed mile track*, provided that the dates granted to the track of *less than one mile* are different from the dates granted to the *mile* track?"

I believe the above two paragraphs are merely different statements of a single question.

The statute cited above contains an absolute prohibition of horse racing meetings "at any time at a race track located within fifty miles of another race track," but subject to modification by the phrase "one mile or more in circumference" which follows the prohibition. Because of this added phrase the prohibition itself cannot be considered to be absolute, but the statute is not clear in stating the exact nature or extent of the modification

of the prohibition. The phrase "one mile or more in circumference" refers to a race track or to some race tracks. In this clause (*h*) three race tracks are mentioned, as follows: "one race track," in line 4 of the paragraph; "a race track," in line 5 of the paragraph; and "another race track," in lines 5 and 6 of the paragraph. It is not clear to which race track or race tracks this qualifying phrase relates. Even if we were to disregard the first reference ("one race track," in line 4), it is still uncertain as to whether the reference to the length of the track refers to the second track ("a race track," in line 5), or to the third track ("another race track," in lines 5 and 6), or whether it means *either* the second *or* the third track, or whether it means *both* the second *and* the third tracks.

An affirmative answer to your inquiry (second paragraph) could be given only if the qualifying phrase of "one mile or more in circumference" could be held to refer only to "a race track" as used in line 5, or if it could be held that this measure of circumference must apply both to "a race track" in line 5 and also to "another race track" in lines 5 and 6. The statute is not sufficiently clear so that such an interpretation can be reached.

In fact, it is my opinion that the statute is so ambiguous, with relation to the application of this measure of circumference, that, in the interpretation of the law, a consideration of the entire paragraph, and section, and even of the entire chapter, is required. From such a consideration it is apparent that the Legislature intended, not an unlimited right to conduct racing meetings at any time or place, but rather a restrained and restricted and regulated operation of such racing meetings. In § 3 itself there are references to competition, and to restrictions upon the places of meetings, the times of meetings, and the lengths of meetings. In my opinion, the statute as a whole shows an intention to restrict racing meetings rather than to increase or expand them.

If your question were answered in the affirmative, it would permit an unlimited number of racing meetings on small tracks in the immediate vicinity of a track one mile or more in circumference. Such a result would be in violation of the general intention of limited meetings shown by the statute as a whole.

Examination of the problem from another point of view is enlightening. If the limiting phrase of "one mile or more in circumference" were applied only to "a race track" in the fifth line (this would be the proposed Shirley track, on the facts you present), such interpretation would permit the issuance of licenses for both racing meetings. But the opposite conclusion would be reached if a license were first issued to the small track, thereby forcing the one-mile track into the position of "a race track" in line 5, which situation would prevent the issuance of a license to the large track. It does not seem to me that this clause should be interpreted in such a way as to permit inconsistent results depending solely upon which track happened to receive the first license.

Upon consideration of all matters relating to your question, it is my opinion that the prohibition against the issuance of a license "at any time at a race track located within fifty miles of another race track within the commonwealth, one mile or more in circumference" is applicable if either track is one mile or more in length. This interpretation would apply the statute uniformly to all race tracks, regardless of the order in which licenses might be issued, and it would restrain rather than increase competition. It is my opinion, therefore, that your commission cannot grant licenses for running

horse racing meetings at tracks located within fifty miles of each other if one of those tracks is a licensed mile track.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Approval of Cushing Hospital as a "public medical institution," or as a "hospital."

JAN. 24, 1958.

A. DANIEL RUBENSTEIN, M.D., *Director, Bureau of Hospital Facilities, Department of Public Health.*

DEAR SIR: — You have requested an opinion of this department regarding the "approval" by your department of Cushing Hospital, maintained by the Department of Mental Health, as a "public medical institution."

"Cushing Hospital" was established by St. 1954, c. 469, § 2. This section declares that the hospital was established "for the care and custody of elderly persons." The section further states that the hospital shall be operated as a "public medical institution" as defined in G. L. c. 118A, § 1B. In said § 1B reference is made to "accepted standards" applicable to a "public medical institution," and also to additional or different standards if such an institution is a "hospital," and authority to establish such standards is given to your department.

Although a "license" is not required either for a public medical institution or for a hospital which is maintained and operated by a department of the Commonwealth (G. L. c. 111, § 71, and Attorney General's Report, 1942, p. 123), I know of no reason why "approval" of such a public medical institution or hospital cannot be given by your department if the requisite standards are met. It seems to me that such approval might be of practical value from various points of view, and that it would also constitute a service to the members of the public who are cared for in such an institution.

You inquire as to whether or not the Cushing Hospital must meet the standards established for a hospital rather than the standards established for a public medical institution. Since the statute declares that the Cushing Hospital shall be operated as a public medical institution, it is my opinion that approval can be given to it as a public medical institution if the standards established for such an institution are met. If it is planned that the Cushing Hospital shall have the facilities which are ordinarily found in a hospital and not in a public medical institution, approval as a hospital would also be permissible at such time as the standards established for a hospital are met. These two approvals could be given at separate times.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Board of Trustees of University of Massachusetts — Authority of Trustees to grant increases in excess of step-rate increases authorized by general salary schedule for State employees.

FEB. 13, 1958.

Mr. JOSEPH W. BARTLETT, *Chairman, Board of Trustees of the University of Massachusetts.*

DEAR SIR: — You have requested my opinion relative to the authority of the Trustees of the University of Massachusetts to give increases to members of the faculty in excess of the annual step-rate increases authorized by the general salary schedule of the Commonwealth under G. L. c. 30, § 46.

Ever since the University of Massachusetts has been maintained by the Commonwealth as a State institution, up until 1953, the Trustees of the University have had broad authority in fixing the salaries of the teaching staff. This power, as expressed in G. L. c. 75, § 13 (1921 edition), was as follows:

"The trustees shall elect the president, necessary professors, tutors, instructors and other officers of the college and fix their salaries and define the duties and tenure of office."

But in 1953 the authority to "fix their salaries" was taken away from the Trustees. St. 1953, c. 538.

With reference to this 1953 statute, you comment as follows:

"The effect of the 1953 amendment was to bring University appointments and salaries under the general salary schedule provisions of § 46 of c. 30, with result that a new employee could be hired by the Trustees only at the minimum rate for his classification, increases were limited to annual step-rates, and employment, promotion and increases were subject to the detailed approval of the Division of Personnel and Standardization. Operation of a rapidly growing State institution of higher education under these restrictions proved impracticable, since the Trustees were unable to hire qualified new professors at the minimum rates nor to keep them at the regular annual step-rates nor to promote them as the Trustees found it desirable.

"As a remedy a bill was filed in 1956 to restore to the Trustees substantially the authority they had possessed prior to 1953. It retained the framework of job classifications and the range of salary-rates scheduled for the respective job groups, but was intended to restore to the Trustees complete authority (subject, of course, to appropriations) to hire at rates above the minimum for the job group, to promote and to increase salaries without promotion, and as the Trustees deemed it wise."

The 1956 Legislature, after consideration of several forms of bills relating to this situation, enacted St. 1956, c. 556, amending said c. 75, § 13, to provide as follows:

"Notwithstanding the provisions of paragraph (4) of section forty-six of chapter thirty, the trustees shall have full authority to grant or to withhold

as therein provided step-rate increases for officers and professional employees; . . . ."

Following the effective date of the 1956 amendment, the Trustees have authorized step-rate increases to certain members of the faculty. You mention two cases as examples of these various increases. In one case an associate professor was given a step-rate increase from step 4 in the general salary schedule to step 6, and this increase was given less than twelve months following an earlier step-rate increase. In the other case another associate professor was first placed in salary step 1 of the general salary schedule, and five months later he was increased to step 5.

These various increases in compensation, which are illustrated by the two cases mentioned above, have been disapproved by the Comptroller upon the grounds that St. 1956, c. 556, did not permit an increase in salary greater than from one step-rate in the general salary schedule to the next higher step-rate, and did not permit any step-rate increase at all until there had been a minimum of one year of service in the prior step of salary rate.

You request my opinion upon the following question:

"Had the Trustees of the University of Massachusetts authority to approve, and the University Treasurer to pay, the stated step-rate increases in the two cases herein stated and in other cases involving analogous exercise of authority?"

I answer your question in the affirmative. My reasons for this opinion are set forth in the following paragraphs.

Although the amendment of c. 75, § 13, by St. 1956, c. 556, provides that "the trustees shall have full authority to grant or to withhold . . . step-rate increases for officers and professional employees," such new authority is qualified in two ways. First, this authority is given to the Trustees "notwithstanding the provisions of paragraph (4)" of § 46 of c. 30. On the other hand, this authority to grant increases is stated to be authority to grant increases "as therein provided," that is, as provided in said c. 30, § 46 (4). Obviously, therefore, some provisions of said paragraph (4) are still applicable, while other provisions of said paragraph are not applicable to the powers of the Trustees. The question you present requires an inquiry into the meaning of these two apparently inconsistent qualifications of the authority given to the Trustees to grant increases.

A history of these changes is pertinent to our inquiry. Prior to 1953 the trustees had complete authority to grant increases, without any of the restrictions which were applicable to increases to other employees of the Commonwealth. The amendment in 1953 (St. 1953, c. 538), as you state in your letter, placed the University salaries under the general salary schedule provisions set forth in G. L. c. 30, § 46. The amendment made by St. 1956, c. 556, appears to have restored substantially complete authority to the Trustees. This 1956 amendment places six paragraphs in c. 75, § 13. The first paragraph is a continuation of the authority of the Trustees to elect university officers. The second paragraph grants "complete authority" with respect to appointments, dismissals and promotions. The third paragraph authorizes hiring at a rate above the minimum. The fourth paragraph provides for employment of temporary professional employees. The fifth paragraph gives to the trustees "full authority" to grant step-rate increases, with the two qualifications mentioned in the above para-

graph. The sixth paragraph authorizes payment of extra compensation for summer services.

Both from the nature and from the comprehensiveness of these increases in authority granted to the Trustees by St. 1956, c. 556, it can be said, in general, that a legislative intent is shown to restore to the Trustees substantially full authority as it existed prior to the restrictive amendment of 1953.

To restrict the fifth paragraph, which gives the Trustees "full authority to grant" step-rate increases, to a single step-rate increase, rather than to a multiple increase, and to such a single step-rate increase only after service of a minimum of one year at the preceding rate, does not seem reasonable. Such plan of increase in compensation is the exact plan which was in effect immediately prior to the adoption of St. 1956, c. 556. Such an interpretation would prevent this fifth paragraph from making any change in the compensation and increases in compensation theretofore available to the professional staff at the University of Massachusetts.

Furthermore, such a restrictive interpretation seems directly contrary to the provisions in this fifth paragraph that "the trustees shall have *full* authority to grant . . . step-rate increases . . . ."

It is to be noted that, shortly after St. 1956, c. 556, was adopted, the Legislature made a complete overhaul of the salary pay plan of the Commonwealth. St. 1956, c. 729. Although such later act provides (§ 5) that an employee must render a minimum of one year of service in one salary step before he can be moved into the next higher step-in-range of the same salary group, the act also provides (§ 20A) that nothing in the act "shall be construed to limit or contravene" the provisions of c. 556 adopted a few months earlier.

The interpretation sustaining broad authority in the Trustees to give increases to the professional staff is confirmed by the legislative history of the 1956 act. See provisions in House No. 798 of 1956, § 2, lines 9–11 and 25–28, and in House No. 2878 of 1956, § 2, lines 26, and 33–34, and § 5, lines 11–14. These earlier provisions indicate a purpose to give the Trustees full authority in connection with increases which they may deem desirable for members of their professional staff. A study of this entire legislative history, in my opinion, leads to the conclusion that the final act as adopted, although expressed in slightly different words, reflects the broad intention expressed in the earlier versions of the statute.

Some meaning, of course, must be given to the limiting phrase "as therein provided." That is, the provision that the Trustees shall have full authority to grant increases is limited in some way by c. 30, § 46 (4). This subdivision (4), as it existed at the time of the enactment of St. 1956, c. 556, is set forth in St. 1955, c. 643, § 1. As there appearing, this subdivision (4) contains six separate paragraphs and covers many terms. Effect can be given to many of the provisions in these six paragraphs, and at the same time interpret the 1956 amendment as authorizing the Trustees of the University of Massachusetts to grant increases in the types of cases you have outlined. In this way it is possible to give ample meaning to the restriction on such authority produced by the words "as therein provided," without going to the unreasonable extreme of saying that no increase can be given by the Trustees beyond the single and annual increase theretofore permitted.

As stated above, it is my opinion that the Trustees of the University of

Massachusetts, subject to appropriations, have authority to grant the increases in compensation involved in the two cases you have stated and in other cases involving analogous exercise of authority.

Very truly yours,

George Fingold, *Attorney General.*

Approving Authority for Schools for Nurses may, in proceedings under the State Administrative Procedure Act, change its rules so as to authorize approval of schools with two-year, rather than three-year, courses of training.

March 24, 1958.

Mrs. Hazel G. Oliver, *Director of Registration.*

Dear Madam: — In your recent letter you pose two questions concerning Approving Authority for Schools for Nurses and Schools for Practical Nurses. The questions referred to are:

"(a) May the Approving Authority make an exception and grant full approval to graduates of this program, permitting them to take the examinations given by the Board of Registration in Nursing?

"(b) Under chapter 30A of the General Laws, requiring all boards who change their rulings to hold a public hearing, — will it be necessary for the Approving Authority to hold a public hearing before granting approval to the above-mentioned program?"

Your question (a) cannot be answered dogmatically "Yes" or "No" because in the final analysis the question is one of executive judgment rather than one of law, as you will see. The pattern of the legislation relative to the Approving Authority indicates a clear legislative intent to rely upon it, in the first instance, to, by careful oversight, see that schools for nurses and schools for practical nurses provide sufficient curriculums under properly qualified teachers to insure complete and sufficient training for their students, to the end that when they apply for registration or licensure, as the case may be, they will be adequately equipped to properly perform the important, often delicate and sometimes dangerous duties which they will be called upon to perform in the treatment and care of sick or injured persons.

For example, under G. L. c. 112, § 74, applicants for registration in nursing are required, among other things, to furnish satisfactory proof that they are graduates "of a school for nurses approved by the approving authority for schools for nurses . . ." established by § 15A of c. 13 of the General Laws. Likewise, under the provisions of G. L. c. 112, § 74A, applicants for licensure as practical nurses must furnish satisfactory proof that they are graduates "of a school for practical nurses approved by the approving authority" before examination. The fact that recent legislation has made some exceptions to the above provisions does not in any way alter what has been said.

In referring to examinations in G. L. c. 112, § 75, the General Court has provided that they shall be wholly or in part in writing and shall be limited "to such subjects as are included in the curriculum established by the ap-

proving authority . . ." And in § 76 of the same chapter, dealing with reciprocity registration, the General Court has provided for registration or licensure without examination of "any person who has been registered as a nurse or licensed as a practical nurse . . . in another state under laws which, in the opinion of the board, maintain standards substantially the same as those of this commonwealth for nurses or for practical nurses . . ."

General Laws c. 13, § 15A, provides in some detail for the organization of the Approving Authority. The General Court evinces therein a serious concern to the end that the members of the Authority should be thoroughly equipped with a sound knowledge of the professional requirements of nursing and teaching and training of nurses. General Laws c. 112, § 80B, in defining the phrase "professional nursing," refers to services in caring for the ill, injured or infirm "which are commonly performed by registered nurses and which require specialized knowledge and skill *such as are taught and acquired under the established curriculum in a school for nurses* duly approved in accordance with this chapter." Moreover, in the same section "practical nursing" is defined to include the performance of services in observing and caring for the ill, injured or infirm "which are commonly performed by licensed practical nurses and which require specialized knowledge and skill *such as are taught and acquired under the established curriculum in a school for practical nurses* duly approved in accordance with this chapter."

General Laws c. 112, § 81A, grants to the Approving Authority power to supervise and inspect schools for nurses or for practical nurses, to the obvious end that students graduating therefrom will be competent to perform their professional and statutory duties. Section 81C of c. 112 provides broad regulatory power in the Authority over the school, which I have referred to. Its language should not be overlooked because the intent is disclosed. It provides that the Approving Authority *may* make such rules and regulations consistent with law relative to *procedure* under §§ 81A and 81B as it deems expedient, and *shall* make reasonable rules and regulations concerning the general conduct of approved schools, including the qualifications of the principals and the teachers therein, requirements for admission of students, *the curriculum to be taught therein*, the teaching equipment, the care of the health of the students and their housing.

The provisions to which I have referred leave no doubt in my mind of the purpose of the General Court to have properly trained graduates of adequately equipped schools take the examinations for registration and licensure. Now for your question (a), I assume from your letter that the Approving Authority at the present time has a properly enacted rule or regulation under the provisions of § 81C requiring a nursing course of three years. You have now been requested to approve a two-year course. You can readily understand that this office is without professional knowledge of either the length of time or the courses needful or needed to properly equip nurses to meet their responsibilities. It may well be that by working longer hours and with a more intensive program, the same work carried on at present by a three-year course might conceivably be accomplished by a two-year course. The Approving Authority will of necessity have to be the judge of that. The Commonwealth obviously looks to the Approving Authority to see that the graduates of these schools are competent to perform their professional duties. Whether a two-year course can be so arranged as to accomplish that result, remains to be determined by the Authority. If it can, in my opinion, it has the right to amend its rules and

regulations by authorizing two-year courses which will produce the proper result. If not, it should not. Section 81A does not attempt to limit or define the length and nature of the curriculum needed to accomplish the purposes which this legislation seeks to achieve. It has delegated sufficient regulatory power to the Authority by rules and regulations under § 81C.

In conclusion, it is my opinion that if the present regulations of the Authority require a three-year course, amendments will have to be made to justify the approval of schools providing only two-year courses. I do not feel that with a three-year course required, the board has power to make special exceptions in individual cases approving a school or schools which provide for a two-year course. Any amendment of existing rules or regulations concerning the length or nature of the curriculum will, of course, have to be made under the applicable provisions of G. L. c. 30A.

Very truly yours,

George Fingold, *Attorney General,*

By Fred W. Fisher,
Assistant Attorney General.

The Minimum Wage Commission does not have authority to add to the report of a Minimum Wage Board a provision requiring payment of time and one-half an employee's regular wages for overtime.

April 8, 1958.

Mr. William J. Fallon, *Chairman, Minimum Wage Commission.*

Dear Sir: — You have requested an opinion relative to the report of the wage board which was appointed to report upon the establishment of minimum fair wage rates for employees in the dry cleaning occupation and the administrative regulation of your commission relating thereto.

It appears from your letter that the wage board has reported basic wage rates for each hour up to and including 44 hours in any one week, 90¢ per hour; for each hour worked in excess of 44 hours in any one week, $1.35 per hour; and basic wage rates effective September 16, 1958, as follows: for each hour up to and including 42 hours in any one week, $1.00 per hour; for each hour worked in excess of 42 hours in any one week, $1.50 per hour. It further appears that your commission has proposed an administrative regulation in connection therewith deemed by the commission to be necessary or appropriate as a further safeguard to the said minimum fair wage rates reading as follows: ". . . Overtime shall be paid for at the rate of time and a half the regular hourly rates." The effect of the administrative regulation will be to require payment of wages at the rate of time and a half the regular hourly rate paid instead of time and a half the basic wage rates recommended where the rate paid exceeds the minimum rate recommended.

You ask my opinion as to the "right of the commission to make this change in the face of the refusal of the wage board to do so." In my opinion, your commission has not the right to do this.

In the first place, it should be noted that G. L. c. 151 does not attempt to regulate the amount of wages. It concerns itself with the subject of

minimum fair wages. Section 1 of that chapter provides "a wage of less than one dollar per hour in any occupation, as defined in this chapter, shall be conclusively presumed to be oppressive and unreasonable, wherever the term 'minimum wage' is used in this chapter, unless the commission has expressly approved or shall expressly approve the establishment and payment of a lesser wage under the provisions of section seven, eight and nine." The commission administering the minimum wage law is named "the minimum wage commission." The duties of a wage board constituted under the provisions of c. 151 include the making of recommendations "as to *minimum* fair wage rates. . ." G. L. c. 151, § 7. Section 7 also authorizes wage boards to recommend "*minimum* fair wage rates varying with localities. . ." A wage board is further authorized by § 7 to recommend a suitable scale of rates for learners and apprentices less "than the regular *minimum* fair wage rates recommended for experienced persons in such occupation or occupations." Moreover, under said section a wage board may separately recommend administrative regulations ". . . to safeguard the *minimum* fair wage rates recommended in its report."

Section 9 authorizes the Minimum Wage Commission to issue special licenses to persons whose earning capacity is impaired by age or physical or mental deficiency, authorizing employment at such wages less than "such minimum fair wage rates." Moreover, the words "minimum wage = living wage" are defined in Webster's Collegiate Dictionary, 5th Ed., as "a wage agreed upon or fixed by legally conferred authority as the *smallest* wage payable to an employee of a specified class."

Even a hurried reading of §§ 5, 7 and 8 indicates a clear legislative intent to place the responsibility for fixing of minimum fair wage rates upon the wage boards, and for good reasons. The wage boards are to consist of not more than three persons to represent the employers, an equal number to represent the employees and not more than three disinterested persons to represent the public. This is probably the fairest arrangement which could be made to insure a proper adjudication of the subject matter under their control.

Section 7 manifests an intent that the wage boards, and not the Minimum Wage Commission, have the control over minimum wages, both regular and overtime. The wage board is to submit a report with its recommendations. If the report is not submitted within 90 days or an extension, a new wage board shall be constituted. The wage board recommends appropriate minimum fair wage rates. The wage board recommends overtime rates for all hours in excess of 40 hours in any week.

By the express terms of § 8 a wage board shall submit its report and proposed *administrative* regulation to the commission "which shall within ten days thereafter *accept* or *reject* such report. During such ten days the commission *may* confer with the wage board *which* may make such changes in the report or proposed administrative regulations as *it* may deem fit. If the report is *rejected* the commission shall *resubmit* the matter to the *same* wage board or to a new wage board. If the *report* is accepted it shall be published, together with such of the *administrative* regulations recommended by the board and such amendments and rescissions thereof as the commission may approve, and together with such additional *administrative* regulations as the commission may deem necessary or appropriate as a further safeguard to the *minimum fair wage rates.* Such *administrative* regulations may include among others regulations *defining* . . ." overtime or

part-time rates. The commission may provide in such regulations *without departing from the basic minimum rates recommended by the wage board* such modifications or reductions of or additions to rates in or for special cases or classes of cases herein enumerated as it may find appropriate to safeguard the basic minimum rates established. The commission shall give notice of a public hearing on the recommendations of the wage board or to proposed administrative regulations. Within ten days after such hearing the *commission shall APPROVE or DISAPPROVE the report of the wage board.* If the *report* is disapproved the commission shall resubmit the matter to the same wage board or to a new wage board. If the *report* is approved *the commission shall transmit it to the commissioner, who SHALL* issue a *mandatory order* which shall define minimum fair wage rates in the occupation or occupations *AS RECOMMENDED IN THE REPORT OF THE WAGE BOARD.*

Section 12 contains provisions for the reconsideration of wage rates by "the same wage board or . . . a new wage board. . ." The report of such wage board shall be dealt with in the manner prescribed in §§ 7 and 8.

Section 13 authorized *the commission to modify or add to any ADMINISTRATIVE REGULATIONS without reference to a wage board.*

A very significant sentence is found in § 2 of c. 151 in the definition of "a fair wage." The second sentence reads in part as follows: "In establishing a minimum fair wage for any service or class of service under this chapter the *commissioner and the wage board* . . ." without being bound by any technical rules of evidence or procedure may take into account various circumstances therein stated. It is to be noted that there is no reference to the commission in this sentence. The commissioner and the wage board are the ones vested with jurisdiction.

From a reading of the minimum fair wage law as a whole, several conclusions, it seems to me, are inescapable. First, the minimum wage rates, both regular and overtime, are based upon need. The constitutionality of the act perhaps depends upon that fact. Unhealthy and undernourished citizenry, of course, spell ultimate disaster for the Nation. The commission regulation is based upon a wholly different concept — ability to pay. The minimum wage law was intended to require a living wage for those who work, to be paid by those who hire. The commission regulation you refer to penalizes the generous and humane employer and provides a premium to those who are compelled to pay a living wage to their employees. The effect of the commission regulation is to make those who pay most pay more, and those who pay least pay less. The net result of such a situation may well be to discourage, if not destroy, the more generous employers and make it difficult, if not impossible, to continue in competition with their more economy-minded competitors. This indeed would be a complete perversion of the purpose of the General Court, in my opinion. That the commission has power to approve ". . . such additional administrative regulations . . ." as it may deem necessary, does not alter the situation.

Raising the minimum overtime rates on those who pay more than required by law is not an "administrative" regulation, but in fact a fixing of rates which, in my opinion, the commission has no power to do. That the commission may "deem" it necessary to safeguard the minimum fair wage rates seems to me beside the point. Although the commission may "deem" it necessary, it may not for that reason legislate upon a subject jurisdiction over which has been committed into other hands.

The case of *Lane* v. *Holderman*, 23 N.J. Rep. 304, has been called to my attention. A rational construction of our Massachusetts legislation upon the subject matter forces me to a different conclusion.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Two medical or hospital service corporations such as Blue Cross and Blue Shield may join together to purchase real estate, as tenants in common, for their joint occupancy.

APRIL 10, 1958.

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

DEAR SIR: — You have requested advice on the following facts. Massachusetts Hospital Service, Inc., commonly known as Blue Cross, is a charitable corporation organized under the provisions of G. L. c. 176A, as a non-profit hospital service corporation. Massachusetts Medical Service, commonly known as Blue Shield, is also a charitable corporation organized under the provisions of G. L. c. 176B, as a non-profit medical service corporation. You state that these two corporations have purchased land as tenants in common to be used for home office purposes.

General Laws c. 176A, § 16, relating to Blue Cross, provides in part that:

"Such a corporation may invest in real estate necessary for its convenient accommodation in the transaction of its business in an amount not in excess of ten per cent of its invested assets, including cash in banks."

There is a similar provision in G. L. c. 176B, § 10, relating to Blue Shield, which provides that:

". . . It shall have the right to acquire and own real estate to be occupied by itself in the transaction of its business . . . ."

It is noted that c. 176B does not contain an express limitation that the investment in real estate for purposes of self occupancy be limited to ten per cent of invested assets, but by the terms of the same § 10, the funds of such medical service corporation shall be invested only in such securities as are permitted by c. 175, relating to the investment of capital of insurance companies. Section 64 of said c. 175 provides in part that no such insurance company shall invest in real estate except to the extent that may be necessary for its convenient accommodation in the transaction of its business and then only to an amount not exceeding ten per cent of the invested assets.

It would appear, therefore, that each of the foregoing corporations may invest in real estate to be occupied for the transaction of its business, provided that such investment is limited to ten per cent of invested capital.

The remaining question is whether these two corporations, in acquiring such real estate, may join together and purchase the land as tenants in common.

Chapter 176A, § 5, and c. 176B, § 3, specifically authorize a corporation organized under one of such chapters to contract with a corporation organized under the other for the joint or cooperative administration of their business. The occupation of premises for the transaction of corporate business appears to be one of those matters relating to administration of the business where joint activity is expressly authorized. For the foregoing reasons, it is our conclusion that the purchase of land by Blue Cross and Blue Shield, as tenants in common, for the foregoing purposes, is authorized by the provisions of G. L. cc. 176A and 176B. In view of this express legislative authorization, for hospital and medical service corporations, it is not necessary to consider other statutes referred to by you, such as G. L. c. 175, § 66, whereby ordinary life insurance companies may be prohibited from making joint purchases of property.

Very truly yours,

George Fingold, *Attorney General.*

Acting Commissioner of Correction — Status of person committed to center for treatment of sex offenders after termination of sentence.

April 16, 1958.

Mr. Raymond R. Gilbert, *Acting Commissioner of Correction.*

Dear Sir: — In your recent letter you inquire as to the status of a person committed, after the termination of a sentence of imprisonment theretofore imposed upon him, to the center for the care, treatment and rehabilitation of "sex offenders," under the provisions of G. L. c. 123A, § 5.

General Laws c. 123A, § 2, as amended by St. 1957, c. 772, § 1, requires the Commissioner of Mental Health to establish such a center "at a correctional institution approved by the commissioner of correction." This he has done, at Massachusetts Correctional Institution, Concord, and, likewise with the approval of the Commissioner of Correction, he has designated the principal officer of that institution to serve as "director" of the center so established, with instructions to keep all persons committed to the center "in his custody and subject to his orders." As such "director," however, and with respect to persons committed under said § 5, the principal officer is accountable solely to the Department of Mental Health, since the statute specifically provides that any such commitment shall be to that department, which must then "safely keep and treat the person so committed."

The commitment concerning which you inquire was not, therefore, a "criminal" commitment. However, in the light of the directive to the principal officer of the institution to serve as "director" of the center, and to hold persons committed thereto "subject to his orders," no reason appears why such persons may not be treated, in most respects, like inmates of Massachusetts Correctional Institution, Concord. Thus, they may, if the Department of Mental Health approves, be placed in the general prison population, assigned to work by the officers in charge of the institution, required to conform to general institutional rules and regulations, and punished for any infraction thereof in the same manner as an inmate of the Reformatory.

The several specific questions contained in your letter do suggest, however, two instances in which the status of such persons differs from that of prisoners actually serving criminal sentences within the institution:

(1) Since they have been committed to the custody of the Department of Mental Health, they are not "inmates of the correctional institutions of the commonwealth" as that phrase is used in G. L. c. 127, § 48A; accordingly, there would seem to be no presently existing statutory authorization to compensate them for good and satisfactory work performed by them while at the treatment center.

(2) For the same reasons, the statutes relating to escapes and attempted escapes from penal institutions (G. L. c. 268, §§ 15 *ff*) have no application to persons committed under said c. 123A to the Department of Mental Health. Hence, as the law now stands, no statutory crime is committed by one who escapes, or attempts to escape, from the sex offender center, so that the well understood rules permitting a peace officer to arrest without a warrant would likewise seem to have no application. Moreover, it is doubtful that the provisions of G. L. c. 123, § 95, permitting the arrest without warrant of escaped inmates of mental institutions, would apply to an escaped sex offender.

It is suggested that you consider the advisability of taking such steps as may be necessary to have the General Court clarify these matters by the enactment of appropriate legislation.

Very truly yours,

George Fingold, *Attorney General,*

By Arnold H. Salisbury,
Assistant Attorney General.

The provisions of the act establishing the Plymouth County Mosquito Control Project as to assessments on taxable property by assessors, and the provisions for assessments on participating towns by State Treasurer, are not in conflict.

April 16, 1958.

Hon. Charles H. McNamara, *Commissioner of Agriculture.*

Dear Sir: — You have called my attention to St. 1957, c. 514, an act establishing the Plymouth County Mosquito Control Project, and have asked my opinion in regard to certain language therein requiring the assessment of costs upon the participating cities and towns.

You state that the members of the State Reclamation Board are in doubt as to the proper interpretation of the financing provisions of § 1 of the act, and ask if "there is a conflict in the wording of this act."

My answer is in the negative.

It may be helpful if I divide this section into three parts to emphasize the duties imposed, first, upon the Plymouth County Mosquito Control Project, secondly, upon the State Treasurer, and thirdly, upon the local assessors of the participating cities and towns.

First, the project shall expend "annually from the state treasury, subject to appropriation, sums equal in the aggregate to twenty-five cents on each one thousand dollars of taxable valuations of all cities and towns"

participating. This clause determines the maximum amount which can be expended annually by the project, if appropriated.

Secondly, the State Treasurer shall assess the total cost as determined above on the participating cities and towns as follows:

a. "one-half in proportion to their said valuations," and

b. "one-half in proportion to their respective areas."

This formula determines the amount to be paid by a particular city or town.

Thirdly, when the amount to be charged a participating city or town has been determined through the use of the preceding formula, then "the state treasurer shall issue his warrant requiring the assessors of said towns concerned to assess a tax to the amount of the sums so expended in proportion to their said valuations."

It is my opinion that this language is not in conflict with the formula as set forth in the second clause above. The language of clause two above determines how much shall be paid by a participating city or town. The language in clause three above determines the amount to be added to the local tax rate for assessment "in proportion to valuations."

A formula based upon valuation alone would place the burden of mosquito control costs upon the heavily-developed communities, to the advantage of the more rural towns with low valuations but with large mosquito-breeding areas.

It is obvious that the Legislature felt that a formula containing one factor for valuation and one for area would be fairer when applied to all participating communities than one based upon their respective valuations alone. But once a community's share has been determined by the two-factor formula, its cost must be divided among local taxpayers in the same manner in all communities, namely, in proportion to local valuations.

Therefore, it is my opinion that the existing language of St. 1957, c. 514, carries out the intent of the Legislature, and that its financing provisions are not "in conflict," and are not unworkable.

Very truly yours,

George Fingold, *Attorney General,*

By Harold Putnam,
Assistant Attorney General.

Electric wiring in Commonwealth Armory in Boston is not within the jurisdiction of the Superintendent of Wires of the City of Boston.

April 16, 1958.

Ralph T. Noonan, *Colonel, QMC, Mass. NG, State Quartermaster.*

Dear Sir: — You have called my attention to G. L. c. 33, § 122, which controls the use of State armories, and have asked the following question:

"Does the Superintendent of Wires, City of Boston, have jurisdiction for inspection of any electric wiring in the Commonwealth Armory, when this building is rented for public purposes?"

The authority of the Superintendent of Wires, City of Boston, is contained in G. L. c. 166, § 32, which states that he "shall supervise every

wire over or under streets or buildings in such city, town or district and every wire within a building designed to carry an electric light, heat or power current."

The use of a State armory is controlled by c. 33, §§ 117 through 128. The statute makes plain the primary use of the armory facilities for military purposes, but permits a wide variety of secondary uses so long as they do not interfere with the military usage. The Legislature intended extensive community utilization of these large and unique structures, and made no provision for their control or supervision or inspection by local authorities.

On the contrary, the language of c. 33 makes clear the intention of the Legislature that a State armory be free from control of any local authorities. It shall be "subject only to rules and regulations promulgated by the commander-in-chief." c. 33, § 122. "Every officer whose unit occupies, or assembles or drills in any armory . . . shall have control of such premises during the period of occupation." c. 33, § 123.

The inspection of electric wiring is a police power, and the fountain of police power is the Legislature, acting under the authority of the State Constitution. The Legislature has delegated a portion of its power in this respect to the Inspector of Wires of the City of Boston, but there is an implied exception of State property from the property over which he has supervision. Any other interpretation would be inconsistent with the sovereignty of the Commonwealth. It cannot be assumed that the sovereign will disobey his own laws.

It is well settled that local ordinances, regulations and by-laws are not to be construed as applying to the Commonwealth, its officers and institutions, unless it clearly appears that it was the intention of the Legislature that they should so apply. State property and State officials are not to be burdened by the licensing power of local officials. *Teasdale* v. *Newell & Snowling Construction Co.*, 192 Mass. 440; I Op. Atty. Gen. 290, 297; II Op. Atty. Gen. 56, 399; IV Op. Atty. Gen. 537, 539; V Op. Atty. Gen. 128; Attorney General's Report, 1932, p. 86; Attorney General's Report, 1935, p. 39; Attorney General's Report, 1933, p. 47; Attorney General's Report, 1949, p. 29.

Therefore, my answer to your question is in the negative.

Very truly yours,

George Fingold, *Attorney General,*

By Harold Putnam,
Assistant Attorney General.

Rules of Board of Examiners of Plumbers as to plumbing work in buildings owned and used by the Commonwealth are not applicable to buildings of the Massachusetts Turnpike Authority.

April 17, 1958.

Mrs. Hazel G. Oliver, *Director of Registration.*

Dear Madam: — You have requested an opinion on the following questions:

"Do the provisions of G. L. c. 142, § 21, as amended, apply to buildings under the following conditions?

"(*a*) Buildings erected on land owned by the Commonwealth by funds of the Building Association of the University of Massachusetts?

"(*b*) Buildings not owned by the Commonwealth, erected on land owned by the Commonwealth?

"(*c*) Buildings erected on the Massachusetts Turnpike by the Massachusetts Turnpike Authority?

"(*d*) Buildings owned by the Commonwealth and leased or rented to non-State agencies?

"(*e*) Buildings erected by the counties?"

I am unable to answer all your questions, because I lack a statement of all the facts, and there is no evidence that a public official is confronted with a doubtful legal situation upon which he is required to act.

While this office is anxious to be helpful, our position is best explained by the opinion of the late Attorney General Paul A. Dever, as follows:

"The long-continued practice of this department and the precedents set by my predecessors in office indicate, what is undoubtedly the correct rule of law, that it is not within the province of the Attorney General to determine hypothetical questions which may arise, as distinguished from questions relative to actual states of fact set before the Attorney General, upon which states of fact public officials are presently required to act; nor is it the duty of the Attorney General to attempt to make general interpretations of statutes or of the duties of officials thereunder, except as such interpretations may be necessary to guide them in the performance of some immediate duty." See Attorney General's Report, 1935, p. 31.

For the foregoing reasons, I must limit the scope of this opinion to an answer to sub-section (*c*) of your question; which inquires about the application of G. L. c. 142, § 21, to "buildings erected on the Massachusetts Turnpike by the Massachusetts Turnpike Authority."

Section 21 reads:

"The examiners shall formulate rules relative to the construction, alteration, repair and inspection of all plumbing work in *buildings owned and used by the commonwealth*, subject to the approval of the department of public health, and all plans for plumbing in such buildings shall be subject to the approval of the examiners."

Your question is whether buildings erected on the Massachusetts Turnpike by the Massachusetts Turnpike Authority are "buildings owned and used by the commonwealth," in which case they would be subject to § 21.

My answer is in the negative.

The Legislature did not intend that the Massachusetts Turnpike Authority be considered a political sub-division of the Commonwealth. The act which created the Authority says that "its revenue bonds . . . shall not constitute a debt of the commonwealth or of any political subdivision thereof." St. 1952, c. 354. If the Authority were considered a political subdivision, it would not be responsible for its own debt, obviously not the intent of the Legislature.

This office has ruled previously that the Massachusetts Turnpike Authority is not a political subdivision of the Commonwealth. Attorney General's Report, 1956, p. 53.

It follows that since the "buildings erected on the Massachusetts Turnpike by the Massachusetts Turnpike Authority" are not "buildings owned and operated by the commonwealth," the provisions of c. 142, § 21, do not apply.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By HAROLD PUTNAM,
Assistant Attorney General.

Travel expenses of District Attorneys and their assistants are not subject to rules and regulations of Director of Personnel and Standardization.

APRIL 23, 1958.

Hon. FRANCIS X. LANG, *Commissioner of Administration.*

DEAR SIR: — You have requested my opinion relative to traveling expenses of district attorneys and of assistant district attorneys.

You call attention to G. L. c. 30, § 25, which relates to expenses of State officers, and also to the rules and regulations regarding travel expenses which have been adopted by the Director of Personnel and Standardization under the authority of G. L. c. 7, § 28. These rules and regulations are not applicable to persons "whose expenses while performing their duties are expressly provided for by law in manner other than by rules and regulations of the Director of Personnel and Standardization." Rule G–5. You also make reference to G. L. c. 12, §§ 23 and 24, which contain specific provisions for the traveling expenses of district attorneys and assistant district attorneys.

You request an opinion upon the following question:

"1. Do the district attorneys and their assistants, by virtue of the provisions of G. L. c. 12, §§ 23 and 24, meet the requirements to qualify as exempted persons under said Rule G–5, or are they subject to the provisions of G. L. c. 30, § 25, and subject to rules on travel regulation promulgated under G. L. c. 7, § 28?"

The provisions of G. L. c. 12, §§ 23 and 24, cover the subject of travel expenses of district attorneys and assistant district attorneys to such an extent that these officers, in the words of Rule G–5, are persons "whose expenses while performing their duties are expressly provided for by law in manner other than by rules and regulations of the Director of Personnel and Standardization." Accordingly, such officers are not subject to the rules on travel regulations promulgated under the authority of G. L. c. 7, § 28. A contrary ruling is not required by G. L. c. 30, § 25. While § 25 prohibits reimbursement of travel and living expenses incurred in the ordinary, daily travel between home and office, it clearly authorizes, as do §§ 23 and 24 of c. 12, payment of expenses involved in official travel, other than the routine home-to-office-and-return travel.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

Inspectors of elevators have power only to post a notice of dangerous condition on an elevator found to be unsafe and prohibit the use thereof; they are not authorized to take physical measures to prevent the operation of the elevator.

April 23, 1958.

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

Dear Sir: — You have called the attention of this department to G. L. c. 143, §§ 62 through 71E, concerning the installation, inspection and operation of elevators in the Commonwealth, and have asked its opinion on the following question:

"May duly appointed elevator inspectors, state or local, take reasonable physical measures to insure that an elevator posted as in a dangerous condition (as set forth in § 65) not be operated?"

As examples of what you term "reasonable physical measures," you have cited the following:

"1. Pulling the main line switch and/or removing the fuses therefrom.
"2. Sealing the main line switch after removing fuses.
"3. Disconnecting any electrical device pertaining to the operation of the elevator.
"4. Advising the local power company to remove the meter on the elevator power line."

If an elevator is found by an inspector to be unsafe, he must resort to § 65 for his authority:

". . . the inspector shall immediately post conspicuously upon the entrance or door of the cab or car of such elevator, or upon the elevator, a notice of its dangerous condition, and shall prohibit the use of the elevator until it has been made safe to his satisfaction. No person shall remove such notice or operate such elevator until the inspector has issued his certificate as aforesaid."

Any person failing to obey § 65 is punishable under § 71:

"Any person . . . failing to comply with any provision of sections sixty-two to seventy, inclusive, or of any regulation established thereunder shall be punished by a fine of not more than five hundred dollars."

The authority of the elevator inspectors is set forth in the statute, and is limited to such powers. The sections in question contain police powers, granted by the Legislature for the protection of the public safety.

Such statutes are construed strictly, it being presumed that the Legislature understood the problem and drafted its legislation to solve it. The well settled rule is stated as follows: "Legislative enactments cannot be presumed to go beyond the purpose manifested by their words, . . . and if the words in the statute are clear and explicit, there is no room for speculation" as to the meaning thereof. *Corcoran* v. *S. S. Kresge Co.*, 313 Mass. 299.

The words of these sections in question are clear. Elevator inspectors who discover dangerous conditions are limited to:

1. Posting a notice of the dangerous condition on the cab or car. § 65.
2. Prohibiting the use of the unsafe elevator. § 65.
3. Filing a complaint calling for the penalty set forth in § 71.

There being no ambiguity in the statutory authority of the elevator inspectors, their powers are limited to those enumerated above. If additional powers are required to protect the public safety, it is for the Legislature to determine the necessity for any such additional grant of power.

Hence, my answer to your question is in the negative.

Very truly yours,

George Fingold, *Attorney General,*

By Harold Putnam,
Assistant Attorney General.

Installation of wiring on state property is not subject to the jurisdiction of local inspectors of wires.

April 25, 1958.

Hon. Francis X. Lang, *Commissioner of Administration.*

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

"Under the provisions of G. L. c. 166, § 32, does the inspector of wires in a city or town have jurisdiction over the installation of wiring by the Commonwealth in and on property of the Commonwealth?"

The inspection of electric wiring is a police power, and the fountain of police power is the Legislature, acting under the authority of the State Constitution. The Legislature has delegated a portion of its power in this respect to the inspectors of wires in local municipalities, but there is an implied exception of State property from the property over which they have supervision. Any other interpretation would be inconsistent with the sovereignty of the Commonwealth. It cannot be assumed that the sovereign will disobey his own laws.

It is well settled that local ordinances, regulations and by-laws are not to be construed as applying to the Commonwealth, its officers and institutions, unless it clearly appears that it was the intention of the Legislature that they should so apply. State property and State officials are not to be burdened by the licensing power of local officials. *Teasdale* v. *Newell & Snowling Construction Co.*, 192 Mass. 440; I Op. Atty. Gen. 290, 297; II Op. Atty. Gen. 56, 399; IV Op. Atty. Gen. 537, 539; V Op. Atty. Gen. 128; Attorney General's Report, 1932, p. 86; Attorney General's Report, 1935, p. 39; Attorney General's Report, 1933, p. 47; Attorney General's Report, 1949, p. 29.

Therefore, my answer to your question is in the negative.

Very truly yours,

George Fingold, *Attorney General.*

Remedies of Commonwealth in the event of defective performance contracts for construction of State highways; sinking of abutments of Roy C. Smith bridge.

April 25, 1958.

Hon. Anthony N. DiNatale, *Commissioner of Public Works.*

Dear Sir: — You have asked my opinion in regard to legal issues arising out of the sinking of the abutments to the Roy C. Smith Bridge across the Neponset River at the Boston-Milton line.

The contract for this work was awarded to Marinucci Brothers, Inc., on November 23, 1954, for the sum of $1,449,351.50, and is numbered 5992. The original date for completion was May 27, 1957, but this date has been extended by your department at least once, and possibly twice, and we are now informed that the latest termination date has not yet been reached.

Your first question is as follows:

"Is the contract herewith enclosed (No. 5992) in full force and effect?"

My answer is in the affirmative.

According to the information supplied this office by your department, this work has not been approved, no final payment has been made, related work under this contract is still in progress, and completion of the bridge has been held up by a dispute as to liability for the sinking of the bridge abutments.

In a situation of this nature, the rights of the Commonwealth appear to be adequately protected by Articles 74 and 75 of the Standard Specifications for Highways and Bridges adopted by the Commissioner of Public Works under date of January 26, 1954, and incorporated by reference into Contract No. 5992.

Article 74 makes it "an essential part of this contract that the Contractor shall perform fully, entirely and in an acceptable manner, the work required within the time stated in this contract." Extensions of time may be granted within the discretion of your department, and apparently such extensions have been granted.

Article 75 provides penalties upon the contractor if he fails to perform within the time agreed, and most importantly it provides that if extensions of time are granted to the contractor, they "shall in no wise operate as a waiver on the part of the (Commonwealth) of any of its rights under the contract."

No evidence has been brought to the attention of my department indicating that this contract has been terminated. Therefore, it is my opinion that it is still in full force and effect.

Your questions numbered 2 and 3 are as follows:

"2. Must the Public Works Commissioner engage the contractor named in this contract to perform the work and furnish the materials in order to correct the condition caused by the sinking of these abutments?

"3. If your answer to Question No. 2 is in the negative, please advise this department as to what procedure should follow in entering into a new contract."

I answer the questions together, because a review of the Commonwealth's

rights appears to be in order, prior to my recommendations as to the best procedure to be followed to protect the interests of the Commonwealth and its taxpayers.

Impressive engineering evidence is at hand indicating that the cause of the sinking of the abutments was the failure of the contractor to remove all "unsuitable material" before placing the compacted fill on which the abutments are founded.

Two New York engineering firms of international reputation report that "not one of the seven borings taken during this investigation (into the cause of the sinking) indicated the complete absence of the unsuitable material which underlaid this area."

They find:

1. "The settlement of the various parts of the structure and the damage resulting therefrom have been caused almost entirely by the presence of the compressible or otherwise unsuitable material under the backfill.
2. "The presence of voids in the fill, while poor construction, is not in our opinion a major contributing factor.
3. "Settlement may continue . . . to an extent that should cause no particular concern as to the future stability, if the recommendations for rehabilitation are carried out.
4. "The horizontal movements of the piers occurred, as did the settlement of the abutments, largely during construction."

These firms stated categorically on December 20, 1957:

"It is established conclusively that the organic silt recovered by the recent borings from below the granular fill is the identical material that existed in this location prior to construction and that this material was left in place by the dredging operation. . . . The settlement of the abutments is due exclusively to consolidation of a layer of organic silt under the approach fills which was not excavated prior to placing of fill as required by the plans and specifications.

"In our opinion, the placing of large boulders in the approach fills and particularly the placing of boulders in pockets or nests in such a way that open voids exist around or between the boulders does not represent good construction practice."

The contract itself and the Standard Specifications incorporated therein purpose to protect the rights of the Commonwealth in the present situation.

The depth of the peat was not guaranteed by the department, and the burden of removing more peat than shown on the plans was on the contractor, if it proved deeper than expected. Contract, p. 5.

The contractor was ordered: "in no case shall gravel borrow be placed on other than firm material." Contract, p. 16.

The contractor agreed "to receive as full compensation for everything furnished and done by the Contractor under this contract . . . including all loss or damage . . . or from any delay or from any unforeseen obstruction or difficulty encountered in the prosecution of the work, and for all expenses incurred by or in consequence of the suspension or discontinuance of the work as herein specified, and for well and faithfully completing the work, and the whole thereof, as herein provided, such unit prices as are set out in the (contract)." Contract, clause 3.

The Standard Specifications provide additional protection for the Commonwealth.

"All repairs and renewals due to defective work shall be done at the expense of the Contractor." p. 214.

"The Contractor shall do . . . such additional, extra and incidental work as may be considered necessary to complete the work in a substantial and acceptable manner. . . . He shall complete the entire work to the satisfaction of the Engineer, and in accordance with the specifications and drawings for the work, at the prices agreed upon." Article 20.

"Failure to reject any defective work or materials shall not in any way prevent later rejection when such defect is discovered, or obligate the Department to make final acceptance." Article 36.

All defective work shall be made good at the expense of the contractor. If the contractor refuses to make good, "the Engineer may cause such defective work to be remedied, removed and replaced, and such unauthorized work to be removed, and to deduct the costs therefor from any moneys due or to become due the Contractor." Article 37.

If any part of the work is not acceptable, the department shall notify the contractor of the defects. If he fails to remedy the defects promptly, then the Commonwealth may take the necessary steps to remedy the fault, and deduct the cost from any moneys due the contractor. Article 38.

The contractor shall bear all losses resulting from the nature of the land, and shall make good damages to any portion of the work at his own expense. Article 60.

Neither the inspection by a State employee or agent, nor an order or certificate of a State engineer shall operate as a waiver of any rights of the Commonwealth. Article 62.

In view of these extensive protective features which have been written into the contract and the Standard Specifications for the benefit of the State, and which have been agreed to by the contractor, my opinion is as follows, based upon such information as is now available to this department:

The contractor should be ordered to repair and make good the defective work, as provided in Article 38 of the Standard Specifications. Copies of this order should be sent by certified mail to the three surety companies under the contract, namely: the Maryland Casualty Company, the Aetna Casualty and Surety Company and the Standard Accident and Insurance Company.

If the contractor refuses to make good the work within a reasonable time, the department may proceed as outlined in Articles 37, 38, 75 and 76. The foregoing articles give the Department of Public Works a wide discretion in the manner in which it may proceed, and it is not the function of this department to make recommendations in regard to engineering details. But in view of our conclusion that the contractor may be required to remedy the defect in question under the existing contract, an extra work order should not be issued.

If the contractor fails to make good and the department determines to have the work done by another contractor, it is suggested that new plans and specifications be drawn up and approved by the Department of Public Works, that the work be rebid, that the cost of the new contract be deducted from the moneys due or to become due the contractor under Contract No. 5992, and that the department take such other appropriate action as may be required.

It is not the province of this office to adjudicate facts nor predict with certainty the outcome of any litigation. It is my opinion, however, that the foregoing is a proper disposition of this matter if the facts found are as recited heretofore.

Very truly yours,

George Fingold, *Attorney General.*

Inspector of elevator, and not owner, must provide equipment for, and make, the tests of elevators required by statute.

April 28, 1958.

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

Dear Sir: — You have asked this department whether the provisions of G. L. c. 143, § 64, place the burden of elevator inspection upon the owner of the elevator being tested or upon the inspector.

Specifically, you ask:

1. "Is the responsibility on the owner to provide a licensed elevator repairman and the necessary weight for capacity-load safety test?
2. "Is it the responsibility of the inspector to make this safety test, providing the necessary weight, etc.?
3. "Is it the responsibility of the owner to have this annual test made?
4. "Is it the responsibility of the inspector to be present and supervise such test?"

Answers to your other questions are not necessary, in view of the opinions we are prepared to render on your first four questions.

The authority for elevator safety inspections is contained in § 64, which reads as follows:

"All elevators shall be thoroughly inspected and a practical test made of the safety devices required therefor at intervals of not more than one year, and at such other times as may be deemed necessary by the inspector having jurisdiction thereof. . . ."

A Board of Elevator Regulations has been created in the Department of Public Safety by G. L. c. 22, § 11, and has been granted the power to "frame amendments to the regulations relating to the construction, installation, alteration and operation of all elevators." G. L. c. 143, §§ 68 and 69.

These amendments to regulations are contained in ELV–1 Revised, dated July 26, 1956, and amendments thereto dated October 30, 1956, and ELV–2, dated February 28, 1955, both being publications of the Department of Public Safety and being entitled: "Elevator and Escalator Regulations."

Only the following reference is found therein as to practical safety tests of elevators and § 64:

"A contract-load test under the supervision of the authorized inspector shall be made of every power elevator. This test shall be made with contract load in the car. The machine brake, machine automatic terminal

stop mechanism, hatch limit switches, slack rope or safety switch, emergency car switch or stop buttons, automatic stop valves, care gate and hoisting door interlocks, or any latching device and electric contacts, shall be caused to function properly in each test, and approval of any elevator shall be granted only upon satisfactory completion of such test."

Elevator inspectors of the Department of Public Safety are operating under the police power of the State for the protection of the public safety. Their authority is grounded in the statutes, and can be detailed in reasonable rules and regulations. But they have no authority to act beyond the limits of the statutes, nor to speculate on their meaning, if the meaning is clear. *Corcoran* v. *S. S. Kresge Co.*, 313 Mass. 299.

These statutes appear to this department to be clear. If they cause undue hardship to elevator inspectors in the performance of their public duties, the only remedy is in a change in the law. But § 64 can only be interpreted to place the burden of making the inspection on the inspector, not the owner of the elevator.

Your attention is called to the distinction in our statutes between the motor vehicle laws in c. 90 and the elevator inspection provisions in c. 143. The former says: "No vehicle shall be registered" without meeting certain strict requirements. G. L. c. 90, § 1A.

"No person shall operate any school bus" unless the owner or custodian has met several requirements. G. L. c. 90, § 7B.

No person shall operate a motor vehicle without a license. G. L. c. 90, § 10.

The intent of the motor vehicle statutes is to bar owners from the highways unless they comply with all reasonable requirements. The owners must satisfy several conditions precedent, before being granted the privilege of using the public ways.

No such prohibitions upon the owner can be found in the statutes governing elevator inspections. The command of § 64 of c. 143 is directed to the inspectors, not to the owners of the inspected property.

If the Legislature had intended to place the burden of inspections on elevator owners, as it did upon motor vehicle owners, it should have said: "No owner of an elevator within the commonwealth shall permit said elevator to be operated unless it has been inspected and approved within the past twelve months."

This department has ruled already, in an opinion dated March 23, 1955, that your inspectors, and local inspectors in communities having them, "may enter private property in the performance of" their statutory obligations. This is necessary for the proper performance of their public function. But nothing in the statutes gives them the power to require further assistance from the owner.

In view of the foregoing, my answer to your Question No. 1 is in the negative, to your Question No. 2 in the affirmative, to your Qestion No. 3 in the negative, and to your Question No. 4 in the affirmative.

Very truly yours,

George Fingold, *Attorney General,*

By Harold Putnam,
Assistant Attorney General.

Damage to bridge from leakage from water pipe broken by flood waters as caused by flood within meaning of St. 1955, c. 699.

May 7, 1958.

Mr. Harold J. Greene, *Executive Secretary, Flood Relief Board.*

Dear Sir: — You state that as a result of the 1955 floods a 6″ pipe crossing under the abutment of the Morgan Street Bridge in the town of South Hadley was broken. The Flood Relief Board, under the provisions of St. 1955, c. 699, allocated $3,000 to the town of South Hadley for relaying a new pipe.

You state that the town of South Hadley now informs the board that water erupting from the broken water main during the flood caused damage to the arch of the Morgan Street Bridge, and the town has requested an allocation of additional funds to repair such damage. You ask whether the damage caused by water erupting from the broken pipe can be considered flood damage within the meaning of St. 1955, c. 699.

From the information available to us it appears that the floods caused the break in the pipe in question, and therefore the damage caused by water flowing out of the pipe may be considered as having been caused by the floods of 1955. In accordance with the foregoing, the board may, if it desires, allocate additional funds to South Hadley for purposes of repairing said damage.

Very truly yours,

George Fingold, *Attorney General,*

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

Jurisdiction of Department of Public Health of appeal from renewal of assignment by local board of location for a piggery.

May 7, 1958.

Samuel B. Kirkwood, M.D., *Commissioner of Public Health.*

Dear Sir: — You have stated that the Medway Board of Health has renewed a license to one Louis G. Lombard to operate a piggery on Oakland Street in Medway. Within sixty days after said renewal an appeal was filed with the department by a person purporting to be aggrieved by the said renewal. You ask whether the appeal from the renewal authorizes the department to conduct a hearing and to proceed as provided in G. L. c. 111, § 143. The first paragraph of said section authorizes the local board of health to assign locations where trades or employment dangerous to public health or attended by noisome and injurious odors may be conducted. The second paragraph of said § 143 provides as follows:

"The department shall advise, upon request, the board of health of a city or town previous to the assignment of places for the exercise of any trade or employment referred to in this section, and any person, including

persons in control of any public land, aggrieved by the action of the board of health in assigning certain places for the exercise of any trade or employment referred to in this section may, within sixty days, appeal from the assignment of the board of health to the department and the department may, after a hearing, rescind, modify or amend such assignment."

You have not stated the details concerning the assignment initially made by the local board of health involved. Since you state that a renewal license has been granted by the local board, it is assumed that the initial assignment was for a limited period of time and that a new assignment for an additional period of time has now been granted. In view of the foregoing, it appears that the so-called renewal of a license does constitute a new assignment within the meaning of G. L. c. 111, § 143. In accordance with the foregoing, the department may proceed to conduct a hearing and to act under the provisions of said § 143.

Very truly yours,

George Fingold, *Attorney General,*

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

Weekly payment of wages statute requires payment at least once in every seven days.

May 15, 1958.

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

Dear Sir: — You have called my attention to the fact that several corporations within the Commonwealth are now paying their employees semi-monthly, instead of the statutory method of weekly payments, and have asked the following question:

"Does the word 'weekly' in the first line of the first sentence of G. L. c. 149, § 148, require that payments be made once every seven days?"

The section in question reads as follows:

"Every person having employees in his service shall pay weekly each such employee the wages earned by him to within six days of the date of said payment if employed for five or six days in the week, . . .

"No person shall by a special contract with an employee or by any other means exempt himself from this section or from section one hundred and fifty. . . ."

Legislation on this subject was first enacted in this Commonwealth in 1879, and was born of the oppressive and irresponsible conduct of some employers. The conditions which prompted this statute are not so common today, when a considerable body of law protects the rights of working people and when they have organizations of their own choosing to protect their interests.

But, despite the industrial and labor changes wrought by time, the section must be interpreted according to the language that remains.

The purpose of the statute was to require employers to pay help at least once weekly, and not to permit any employer to owe an employee who worked five or six days in one week any more than pay for five or six days.

You advise me that some employers are now paying employees every other week, and some pay each employee for one week of work just performed and one week of work not yet performed. While this would appear to be beneficial to employees, and not objectionable or oppressive, it does not conform to the existing statutory requirement that such wages be paid "weekly."

This section is grounded in the State Constitution, which gave the General Court full power to pass such laws "as they shall judge to be for the good and welfare of this Commonwealth." Mass. Const., pt. 2nd, c. I, § I, Art. IV.

And it has been upheld as constitutional. *Opinion of the Justices*, 163 Mass. 589.

No opinion seems to have been rendered by our Supreme Judicial Court upon the timing of the required payments. But it is my opinion that the Legislature intended to require payments "weekly" — at least once in each seven days — and therefore I answer your question in the affirmative.

There may be new reasons for the payment of wages less often than weekly, including the multiple payroll deductions now authorized, better family financial security than existed in 1879, the payment of many family obligations on a monthly basis, and the greater financial responsibility of most employers.

But whether or not such less frequent payments are to be permitted is for the Legislature to say.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By HAROLD PUTNAM,
Assistant Attorney General.

Approving Authority for Medical Schools and Colleges no longer authorized to approve foreign medical schools.

MAY 19, 1958.

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

DEAR MADAM: — You have asked the opinion of this department in regard to the powers of the Approving Authority for Medical Schools in view of the enactment of St. 1957, c. 329.

Specifically, you ask:

"Does the Approving Authority for Colleges and Medical Schools have the authority to continue to approve foreign medical schools under G. L. c. 112, § 2, since the enactment of St. 1957, c. 329?"

My answer is in the negative.

An opinion of this department dated June 27, 1956, stated that you did have the power at that time to approve foreign medical schools, under G. L. c. 112, § 2, as then written.

But since that date, the section in question has been amended to set forth new requirements as to applicants from a foreign medical school:

"An applicant who has received from a medical school legally chartered in a sovereign state other than the United States or Canada a degree of doctor of medicine or bachelor of medicine or its equivalent, shall be required to furnish to the board such documentary evidence as the board may require that his education is substantially the equivalent of that of graduates of medical schools in the United States and such other evidence as the board may require as to his qualifications to practice medicine, and shall be required to take an examination offered periodically by the National Board of Medical Examiners of the United States and if the National Board of Medical Examiners of the United States shall certify to the board that the applicant has successfully passed said examination, and if the board shall be satisfied as to his education and his qualifications, then the board shall, upon payment of twenty-five dollars by the applicant, admit him to the examination for licensure." St. 1957, c. 329.

This statute was approved on April 30, 1957, and, having an emergency preamble, became effective at once.

It appears to state a legislative intent that all applicants seeking to practice medicine in Massachusetts and having a medical degree from a foreign school be required to take the national screening examination. The use of the word "shall" makes this obligation upon the applicant mandatory, and permits no discretion in the Approving Authority.

Therefore, for the Approving Authority to continue granting approval to certain foreign medical schools would be both unnecessary and ineffectual. Such approval would be of no benefit to approved foreign schools nor to their graduates, because the requirements of the 1957 statute would still apply.

Very truly yours,

George Fingold, *Attorney General,*

By Harold Putnam,
Assistant Attorney General.

Requirements for approval of schools for training of medical laboratory technologists by Approving Authority for Schools of Medical Technology, as applicable to schools for medical secretaries teaching courses in medical technology.

May 22, 1958.

Mrs. Hazel G. Oliver, *Director of Registration.*

Dear Madam: — You have asked this department whether an organization for the training of medical secretaries, but which offers courses in anatomy, physiology, pathology, hygiene, urinalysis, blood chemistry, basal metabolism and electrocardiograph, comes under the jurisdiction of the Approving Authority for Schools of Medical Technology.

Specifically, you ask:

"Does the Approving Authority for Schools of Medical Technology have the authority to approve or disapprove the teaching of medical technology to medical secretaries and any other para medical groups?"

The powers of the Approving Authority are set forth in G. L. c. 112, § 2B, as follows:

"No person shall operate or maintain a school for training medical laboratory technologists unless such school has been approved in writing by the approving authority established by section two. . . .

"A school for training of medical laboratory technologists shall mean a school maintained or classes conducted for the purpose of training two or more individuals to perform or assist in the performance of various medical laboratory procedures used in the diagnosis, treatment and study of disease, but shall not be construed to apply to duly accredited colleges and graduate schools teaching courses in physiology, biochemistry, bacteriology, clinical pathology or the various other medical sciences.

"The provisions of section two relating to the inspection and approval of colleges, universities and medical schools by the approving authority shall apply to schools for the training of medical laboratory technologists."

Section 2B prohibits the operation of a school for training medical laboratory technologists without the approval of the Approving Authority.

And the same section defines a "school for training medical laboratory technologists" as one in which classes "are conducted for the purpose of training two or more individuals to perform or assist in the performance of various medical laboratory procedures used in the diagnosis, treatment and study of disease."

Whether or not the medical secretary institution which prompted your question is such a school is a question of fact, to which the above yardstick should be applied. If the Approving Authority finds that students are being trained "to perform or assist in performing" the foregoing laboratory functions, then the institution cannot operate without the approval of the Authority created by § 2B.

The form of your question presents some difficulty, because a school primarily for medical secretaries could impart some knowledge of the medical sciences without intending that its graduates become medical laboratory technologists. Conceivably, this ancillary knowledge could result in better medical secretaries, without sending them forth to accept responsibility for critical laboratory work.

A direct answer to your question would have to be in the negative, because there is no prohibition in our statutes against teaching "medical technology" to anyone. The prohibition of § 2B is against "training medical laboratory technologists" without your approval.

The intent of the Legislature was to forbid the training of medical laboratory technologists at any but approved or duly accredited institutions. And your Authority must look to the facts in each case to determine if an institution meets the definition set forth in the statute.

The Approving Authority could find that a medical secretary school was not "a school for training medical laboratory technologists," and hence not subject to § 2B approval.

But if, in the opinion of the Approving Authority, a school is "for training medical laboratory technologists," regardless of what name or description may be given it, then such a school cannot operate without the approval of said Authority.

Very truly yours,

George Fingold, *Attorney General,*

By Harold Putnam,
Assistant Attorney General.

Sale, by State Treasurer, of bonds representing investments of funds of retirement systems for State employees and teachers requires approval of Investment Committee for systems but not that of the Governor.

June 9, 1958.

Hon. John F. Kennedy, *State Treasurer.*

Dear Sir: — In your recent communication you pose two questions relating to the funds of the State Employees' Retirement System and the Teachers' Retirement System:

"(1) Are these bonds held in these retirement systems, bonds belonging to the Commonwealth?

"(2) Do the provisions of G. L. c. 29, § 35, require the Investment Committee and the State Treasurer to obtain the written approval of the Governor prior to the sale of bonds held in these retirement systems?"

Our courts, to my knowledge, have not had occasion to answer question (1) categorically. While some of the bonds in these systems may have been acquired in whole or in part with the monies deducted by or paid to the State Treasurer representing the Commonwealth, the bonds, I am advised, are acquired in the name of the Commonwealth of Massachusetts, and for the purpose of answering your question (2) I answer question (1) in the affirmative. In doing so, I have in mind that G. L. c. 29, § 38, dealing with the investment of funds of the Commonwealth was amended by St. 1945, c. 658, § 7, by the exclusion from its operation of "funds of the state employees' retirement system or of the teachers' retirement system . . ."

Your question (2) I answer in the negative. State finances have for many years been the subject of careful legislation by the General Court. One entire chapter of the General Laws (G. L. c. 29) has been devoted to that subject. Many of its provisions have been in effect in one form or another for a century or more. Section 35 of c. 29 expressly provides that "No bond or security belonging to the commonwealth shall be transferred except with the written approval of the governor." I assume, for the purposes of this opinion, that the bonds referred to in your question (1) belong to the Commonwealth.

In c. 658 detailed provisions are found dealing with the control of the investment and reinvestment of the funds of the State Employees' Retirement System and of the Teachers' Retirement System. These are now found in G. L. c. 32, § 23. It is provided that "There shall be an unpaid investment committee which *shall have general supervision of the investment and reinvestment of the funds of the state employees' retirement system and of the teachers' retirement system.*" The committee is to consist of the State Treasurer who shall serve as chairman; the Commissioner of Banks; and a third to be selected by those two or, in default thereof, by the Governor. The State Treasurer is to be the treasurer-custodian of the State Employees' and of the Teachers' Retirement Systems and shall have the custody of the funds and securities of each such system. It is further provided that "Subject in each instance to the approval of the investment committee established under the provisions of paragraph (*a*) of this subdivision, the state treasurer *shall invest and reinvest such funds*, to the extent not required for current disbursements . . ." The funds of each such system are to be invested separately.

So, it appears from the amendment to § 38 and the detailed provisions of § 23, that complete control over the investment and reinvestment of the funds of these two systems has been placed by the General Court in the hands of the State Treasurer, subject to the general supervision of the Investment Committee. In each instance, the approval of the Investment Committee is required for the investment and reinvestment by the State Treasurer.

I am of the opinion that the enactment of § 23 of c. 32 providing completely and in detail for the investment and reinvestment of the funds of the Teachers' Retirement System and the State Employees' Retirement System by the State Treasurer with "in each instance . . . the approval of the investment committee" vests in him and is subject to the other applicable provisions of c. 32 the control referred to in those sections. *Expressio unius est exclusio alterius. Godfrey* v. *Building Commissioner of the City of Boston*, 263 Mass. 589, 592. *Boston and Albany Railroad* v. *Commonwealth*, 296 Mass. 426, 434. *Iannello* v. *Fire Commissioner of Boston*, 331 Mass. 250.

In conclusion, as above stated, it is my opinion that the funds of the systems to which you refer in your questions are subject to and must be held under the provisions of § 23.

Very truly yours,

George Fingold, *Attorney General*,

By Fred W. Fisher,
Assistant Attorney General.

Statute making it mandatory that time spent in confinement before and during trial shall be credited as served on sentence to certain institutions is prospective in effect only.

June 20, 1958.

Hon. Raymond R. Gilbert, *Acting Commissioner of Correction.*

Dear Sir: — You have requested my advice as to whether G. L. c. 279, § 33A, as amended by St. 1958, c. 173, "will apply to any person who was sentenced prior to its effective date."

Formerly, said § 33A *permitted* a court, on imposing a sentence of commitment to a correctional institution of the Commonwealth, to order that the prisoner "be deemed to have served a portion of said sentence . . . *not to exceed* the number of days spent by the prisoner in confinement . . . awaiting and during trial." The 1958 amendment now makes it *mandatory* for the court to enter such an order, and specifies that the portion of his sentence deemed to have been served by the prisoner shall be *the number of days* spent by him in confinement prior to the sentence.

The new statute clearly is only prospective in effect, and has no application to sentences imposed prior to its effective date.

Very truly yours,

George Fingold, *Attorney General*,

By Arnold H. Salisbury,
Assistant Attorney General.

Chairman of State Housing Board may change limit of one percent of rental income of housing authorities on compensation of members to limit of one percent of gross income of authority.

June 24, 1958.

Mr. John E. Maloney, *Chairman, State Housing Board.*

Dear Sir: — Your recent communication requests an opinion regarding the basis for payments to members of housing authorities as compensation as provided in G. L. c. 121, as amended, and the standard form of the Contract for Financial Assistance as it affects State-Aided Veterans Housing Projects. And, specifically, that the opinion deal with the basis of compensation which might be paid to members of the Boston Housing Authority under the provisions of § 26O of said c. 121 and § 17 of the Consolidated Contract for Financial Assistance for State-Aided Project, Boston 200–C and other provisions of the housing law and contract so far as they are apt.

My answer must necessarily be confined to the specific case. It is my understanding that to date each member of the Boston Housing Authority, other than the chairman, has received five thousand dollars per year, and the chairman seven thousand dollars per year, as compensation out of funds provided by the city of Boston, and that the City Council has refused to include the amount of such salaries in the city's budget for the next fiscal year. Also, that the members of the Boston Housing Authority have notified you that it is their intention to claim as compensation, as a matter of right, the maximum amount allowable under the statute from the gross income of the authority.

The statute (G. L. c. 121, § 26O), so far as pertinent, reads:

"A housing authority may compensate its members for each day spent in the performance of his duties and for such other services as he may render to the authority. Such compensation shall not exceed twenty-five dollars a day for the chairman and twenty dollars a day for a member other than the chairman, provided that the total sum paid to all the members in any one month or year shall not exceed one per centum of the gross income of the housing authority during such month or year respectively, nor shall the total sum paid in any year exceed seven thousand dollars in the case of the chairman or five thousand dollars in the case of a member other than the chairman . . ."

Section 17 of the Consolidated Contract for Financial Assistance, State-Aided Housing Project, Boston 200–C, dated December 4, 1956, so far as pertinent, reads:

"No member of the Authority shall be paid for his services or receive compensation as such member out of the proceeds of any of the notes and/or bonds, or the revenues, annual contributions, or other funds of the Authority, received in connection with the development or administration of the project; provided however, that upon approval by the Chairman, any such member may receive compensation for his services to the Authority and reimbursement for the actual and necessary expenses, including travel expenses, incurred in the discharge of his duties as such member in connection with the development or administration of the project within the limits established by section 26O of the Housing Authority Law."

The statutory provision *permits* a housing authority to compensate its members within limits which are: First, that such compensation may not exceed one per cent of the gross income of the housing authority in any one month or year. Second, that such compensation shall not exceed seven thousand dollars in the case of the chairman or five thousand dollars in the case of a member other than the chairman.

These limits are further restricted by the provision in the contract between the Commonwealth of Massachusetts and the Boston Housing Authority forbidding compensation to Authority members except with the approval of the chairman of the State Housing Board. Such approval was given by the chairman in a directive of August 1, 1951, but approved compensation was limited to one per cent of "rental income." This directive appears to be in full force and effect, and operates as a blanket approval to all authorities permitting payment of compensation to members to the extent stipulated.

Whether the chairman can approve compensation in excess of one per cent of "rental income" can only be determined by a definition of the words "gross income" as used in G. L. c. 121, § 26O.

In the accepted sense, "gross income" means all income received by the Authority from all sources. But there is one type of income which cannot be used to compensate Authority members, namely, the annual contribution from the Commonwealth. These contributions must be used for "the payment of interest on, and principal of, notes and/or bonds of the housing authority." G. L. c. 121, § 26NN (*b*).

However, it is my opinion that no other type of revenue of a housing authority should be excluded from "gross income" in computing the allowable compensation for authority members.

The Legislature barred the use of the State contributions for the payment of compensation to housing authority members. But it did not bar the use of any other type of income. Therefore, it may be inferred that in using the words "gross income," the Legislature intended that the one per cent allowed for compensation of members be based upon all revenue other than the State subsidy.

Therefore, it is my opinion that if the chairman wishes to replace the August 1, 1951, directive with one re-defining "gross income" to be more than "rental income," but not to include the State subsidy, he may do so.

Very truly yours,

George Fingold, *Attorney General,*

By Harold Putnam,
Assistant Attorney General.

A hospital claiming payment for care of a veteran, now deceased, has no right of appeal to the Governor and Council from an adverse decision of the Commissioner of Veterans' Services.

June 24, 1958.

To His Excellency the Governor and the Honorable Council.

Gentlemen: — Your recent letter requests an opinion relative to "veterans' appeals."

A hospital has attempted to appeal to the Governor and Council from the decision of the Commissioner of Veterans' Services that a dishonorably discharged veteran, now deceased, was not entitled to hospital services under G. L. c. 115.

You inquire whether the hospital is entitled to appeal. G. L. c. 115, § 2, as amended by St. 1951, c. 590, § 3, provides, in part:

". . . He [the Commissioner of Veterans' Services] shall decide all controversies between any applicant and a veterans' agent relative to the validity or amount of a claim for such benefits, and, upon the complaint of any person that the city or town *in which such person resides* is granting such benefits contrary to the provisions of this chapter, shall forthwith make an investigation of such complaint, and a determination of the amount of such benefits, if any, to be granted. A final appeal from such decision or determination may be taken by such claimant, veterans' agent or *resident*, within ten days after his receipt of notice of the same, to the governor and council. . . ."

The hospital may not appeal to the Governor and Council.

The word "resident" refers to a person who has complained that the city in which the complainant resides is granting veterans' benefits contrary to the provisions of c. 115. The hospital is not such a "resident."

Very truly yours,

George Fingold, *Attorney General,*

By Fred L. True, Jr.,
Assistant Attorney General.

INDEX TO OPINIONS

PAGE

Adjutant General. See Commonwealth Armory.
Administration, Commissioner of:
Travel expenses of District Attorneys and their assistants are not subject to the rules of the Division of Personnel and Standardization . . . 63
Installation of wiring on State property is not subject to jurisdiction of local inspector of wires 65
Administrative Procedure Act; application to changes in rules of State Board . 52
Agriculture, Department of; provisions of act establishing Plymouth County Mosquito Control Project for assessments by local assessors, and provision for assessments by State Treasurer on towns, are not in conflict . . 59
Appropriations; Capital Outlay Appropriation Act for 1957. See Waterways, Division of 35
Approving authority for medical schools; for School of Medical Technology. See Medical schools; Medical technology, schools of.
Armories, State. See Commonwealth Armory.
Arrest; power of police officer to, upon teletype alarm 21
Blue Cross: Blue Shield. See Insurance; Hospital Service Corporation; Medical service corporation.
Bonds; sale of, held by State retirement systems, approval of 76
Bonus; for veteran of World War I whose service terminated after, not available when discharged on, June 15, 1917 26
Boston:
West End urban redevelopment project; Urban Redevelopment Authority . 23
Electric wiring in Commonwealth Armory in, is not within jurisdiction of Inspector of Wires of Boston 60
Building Construction, Division of; assignment of State contract with low bidder dying after award 19
Capital Outlay Appropriation Act of 1957. See Waterways, Division of.
Civil defense agency; designation of persons to act in line of succession to State officers in case of disaster 12
Collegiate Authority, Board of; application by junior college to drop designation "junior" 16
Commonwealth; buildings of, application of local regulations. See Commonwealth Armory; Commonwealth, property of.
Commonwealth Armory; electric wiring in, is not within jurisdiction of Inspector of Wires of Boston 60
Commonwealth, officers and employees of. See State officers and employees.
Commonwealth, property of; installation of wiring on, not subject to jurisdiction of local inspector of wires 65
Competitive bidding statute; "extra" and additional work on State contracts as subject to 14
Conciliation and Arbitration, Board of; not required to state reasons for decisions 20

PAGE

Contracts:
"Extra" and additional work under State contract as subject to competitive bidding 14
Assignment of State contract by personal representative of low bidder dying after award 19
Remedies of Commonwealth in event of defective performance of State highway construction contract 66
Correction, Department of:
Authority to establish "Treatment Center for Sex Offenders" under St. 1954, c. 686 13
Status of person committed to Treatment Center for Sex Offenders, after termination of sentence 58
Mandatory provision for deduction from sentences to certain institutions, of time in confinement before and during trial, is prospective in effect only 77
County Commissioners; District Attorneys not required to submit requisitions, etc., to, before incurring expenses 42
Cushing Hospital. See Hospitals.
Danvers State Hospital; tenure rights of Acting Assistant Superintendent of 39
District Attorneys:
Not required to submit requisitions, etc., to County Commissioners before incurring expenses 42
Travel expenses of, and assistants, are not subject to the rules of the Division of Personnel and Standardization 63
Education, Department of; application of junior college to drop designation "junior" 16
Electric wiring. See Commonwealth, property of; Commonwealth Armory.
Elevators:
Powers of inspectors of, as to preventing operation of elevators found to be unsafe 64
Inspector of elevators, and not owner, must provide equipment for, and make, tests of elevator 69
Employment Security, Division of; credit to Federal Government of portion of dividends on group insurance policy on State employees . . . 37
Flood relief; damage to bridge from leakage from water pipe broken by flood waters, as caused by flood within meaning of St. 1955, c. 699 . . . 71
Governor; State Auditor, etc., not required to have prior approval of, for travel outside Commonwealth 32
Governor and Council; no appeal to, from decision of Commissioner of Veterans' Services refusing a hospital payment for care of a dishonorably discharged veteran 79
Group insurance for State employees; dividends; credit of portion of, to Federal Government for premiums paid for employees of Division of Employment Security 37
Guardian; construction of provision authorizing Youth Service Board to act as guardian 27
"Heart law." See Retirement; pension.

PAGE

Highways. See State highways.
Homburg Infirmary at M. I. T.; limited registration as interne at, not authorized 29
Horse racing. See Racing, State Commission.
Hospital:
Limited registration of interne at Homburg Infirmary at M. I. T., not authorized 29
Approval, by Director of Hospital Facilities, of Cushing Hospital as a "public medical institution," or as a "hospital". 48
No appeal by, to Governor and Council from decision of Commissioner of Veterans' Services refusing payment for care of a dishonorably discharged veteran 79
Hospital Service Corporation, such as Blue Cross, may join with medical service corporation such as Blue Shield, to purchase real estate in common for joint occupancy 57
Housing authorities. See Housing, State Board of.
Housing, State Board of:
Resubmission of Boston, West End urban redevelopment project; formation of Boston Urban Redevelopment Authority 23
Chairman of, may change basis of limitation on compensation of members of housing authorities for percentage of rental income, to percentage of gross income, of authority 78
Insurance, Commissioner of:
Statutes as to medical service plans of non-profit medical service corporations are not applicable to partnership of physicians to operate such a plan for profit 44
Two medical or hospital service corporations, such as Blue Cross and Blue Shield, may join together to purchase real estate in common for joint occupancy 57
Junior college; definition; application to drop description "junior" . . 16
Labor and Industries, Department of:
Board of Conciliation and Arbitration not required to state reasons for decisions 20
Minimum Wage Commission cannot add provision for time and one-half of regular wage for overtime to the report of a Minimum Wage Board 54
Weekly payment of wages statute requires payment at least once in every seven days 72
Licenses:
For entertainment on Lord's day 11
State Racing Commission cannot issue licenses for running horse racing meetings at tracks located within one mile of each other, if one is a licensed mile track 46
Lord's day; licensing of entertainment on 11
Massachusetts Turnpike Authority; buildings of, plumbing in 61
Medical schools; approving authority for, and colleges, no longer authorized to approve foreign medical schools 73

PAGE

Medical Service Corporation, such as Blue Shield, may join with hospital service corporation such as Blue Cross to purchase real estate in common for joint occupancy 57

Medical service plan; partnership of physicians to operate for profit is not within statutes applicable to plans operated by non-profit medical service corporations 44

Medical technology, schools of; requirements for approval of, by approving authority for, as applicable to schools for medical secretaries teaching courses in medical technology 74

Medicine, Board of Registration in:

Limited registration of interne at Homburg Infirmary at M. I. T., not authorized 29

May not register alien graduate of foreign medical school without examination 29

Registration of graduates of unapproved schools who matriculated prior to January 1, 1941 31

Mental Health, Department of:

Authority to establish "Treatment Center for Sex Offenders," under St. 1954, c. 686 13

Tenure rights of Acting Assistant Superintendent of Danvers State Hospital 39

Approval, by Director of Hospital Facilities, of Cushing Hospital as a "public medical institution," or as a "hospital" 48

Metropolitan District Commission; police officers, pension for death. See Retirement.

Minimum Wage Commission; cannot add provision for time and one-half of regular wage for overtime to the report of a Minimum Wage Board . 54

Mosquito Control, Plymouth County Project; provisions of act establishing Plymouth County Mosquito Control Project for assessments by local assessors, and provision for assessments by State Treasurer on towns, are not in conflict 59

Nurses, Approving Authority for Schools for; may change rules so as to authorize approval of schools with two-year courses of training . . . 52

Pension; veteran, non-contributory, for disability; $1,000 income limitation; proration of U. S. pension 25

For death of police officer, where death due to hypertension or heart disease. See Retirement.

Personnel and Standardization, Division of; travel expenses of District Attorneys and their assistants are not subject to the rules of the Division 63

Physicians:

Limited registration as interne at Homburg Infirmary at M. I. T., not authorized 29

Alien graduate of foreign medical school may not be registered without examination 29

Registration by Board of Registration in Medicine of graduates of unapproved schools who matriculated prior to January 1, 1941 31

PAGE

Partnership of to operate a medical service plan for profit is not within statutes applicable to such plans operated by medical service corporations 44
Approving authority for medical schools and colleges no longer authorized to approve foreign medical schools 73
Piggery; jurisdiction of Department of Public Health of appeal from renewal by local board of assignment of location for a piggery 71
Plumbers; rules of Board of Examiners of, as to work in State buildings, are not applicable to buildings of Massachusetts Turnpike Authority . . . 61
Police officer; power to arrest upon teletype alarm 21
Professional Engineers and Land Surveyors; "Confidential File" of Board of Registration of, not open to public inspection 41
Public Health, Department of:
Approval, by Director of Hospital Facilities, of Cushing Hospital as a "public medical institution," or as a "hospital" 48
Jurisdiction of, of appeal from renewal by local board of assignment of location for a piggery 71
Public Safety, Department of:
License for entertainment on Lord's day 11
Powers of inspectors of elevators as to preventing operation of elevators found to be unsafe 64
Inspector of elevators, and not owner, must provide equipment for, and make, tests of elevator 69
Public Works, Department of:
"Extra" and additional work, under contract as subject to competitive bidding 14
Remedies of Commonwealth in event of defective performance of State highway construction contract 66
Racing, State Commission; cannot issue licenses for running horse racing meetings at tracks located within one mile of each other, if one is a licensed mile track 46
Registration, Director of:
Limited registration of interne at Homburg Infirmary at M. I. T., not authorized 29
Alien graduate of foreign medical school may not be registered without examination by Board of Registration in Medicine 29
Registration by Board of Registration in Medicine of graduates of unapproved schools who matriculated prior to January 1, 1941 . . . 31
Approving Authority for Schools for Nurses may change rules so as to authorize approval of schools with two-year courses of training . . . 52
Rules of Board of Examiners of Plumbers, as to work in State buildings are not applicable to buildings of Massachusetts Turnpike Authority . . 61
Approving Authority for Medical Schools and Colleges no longer authorized to approve foreign medical schools 73
Retirement:
Non-contributory pension for veteran for disability; $1,000 income limitation; proration of U. S. pension 25

PAGE

Pension for death of police officer, form of certificate of medical panel where death due to hypertension or heart disease 33
Retirement systems, State and teachers; sale by State Treasurer of bonds of, requires approval of Investment Committee for systems, but not of Governor 76
Roy C. Smith bridge; contract for construction of; remedies of Commonwealth for defective construction 66
School adjustment counselor; employment of part-time by single town cannot be approved by Director of Youth Service 18
Schools. See Education; Medical schools; Medical technology, schools of.
Sentence:
Status of person committed to treatment center for sex offenders, after termination of sentence 58
Mandatory provision for deduction from sentence to certain institutions of time in confinement before and during trial, is prospective in effect . . 77
Sex offenders:
Treatment Center for. Authority to establish under St. 1954, c. 686 . . 13
Status of person committed to Treatment Center for Sex Offenders, after termination of sentence 58
State Auditor; and members of his staff, not required to have prior approval of Governor for travel outside Commonwealth 32
State highways; contract for construction of; remedies of Commonwealth for defective construction 66
State officers and employees:
Check in reimbursement for travel expenses is a "check issued by the Commonwealth" 12
Designation of persons to act in line of succession to State officers in case of disaster 12
Travel outside Commonwealth by State Auditor, etc.; prior approval of Governor not required 32
Group insurance of; dividend on policy, credit to Federal Government for premiums paid for employees of Division of Employment Security . . 37
Tenure rights of Acting Assistant Superintendent of Danvers State Hospital 39
Authority of trustees of the University of Massachusetts to grant increases in excess of step-rates authorized by general salary schedule for State employees 49
Travel expenses of District Attorneys and their assistants are not subject to the rules of the Division of Personnel and Standardization . . . 63
State Quartermaster. See Commonwealth Armory.
State Treasurer:
Sale by, of bonds of State retirement systems, requires approval of Investment Committee for systems, but not of Governor 76
"Check issued by the Commonwealth," payment 12
Teletype alarm; as basis for exercise of power of arrest 21
Travel:
Outside Commonwealth, by State Auditor, etc., prior approval of Governor not required 32

PAGE

Expenses of District Attorneys and their assistants are not subject to the rules of the Division of Personnel and Standardization 63

Treasurer and Receiver General. See State Treasurer.

University of Massachusetts; authority of trustees to grant increases in excess of step-rates authorized by general salary schedule for State employees . 49

Urban redevelopment; resubmission of Boston, West End, project to State Housing Board; formation of Boston Authority 23

Veteran:

Non-contributory pension for disability; $1,000 income limitation, proration of U. S. pension 25

Bonus to, of World War I, whose service terminated after, not available when discharged on, June 15, 1917 26

Tenure rights of Acting Assistant Superintendent of Danvers State Hospital 39

Veterans' benefits; no appeal to Governor and Council from decision of Commissioner of Veterans' Services refusing a hospital payment for care of a dishonorably discharged veteran 79

Veterans' Services, Commissioner of; no appeal to Governor and Council from decision of, refusing a hospital payment for care of a dishonorably discharged veteran 79

Wages, weekly payment of. See Labor and Industries.

Waterways, Division of; contributions by municipalities, etc., not required for projects under Capital Outlay Appropriation Act of 1957 . . . 35

Weekly payment of wages. See Labor and Industries.

Wiring. See Commonwealth Armory; Commonwealth, property of.

Youth Service, Director of:

Cannot approve part-time employment of school adjustment counselor for single town 18

Construction of provision authorizing Board to act as guardian . . . 27

STATUTES CITED.

PAGE

UNITED STATES CODE.

Title 10, § 1036 (et seq.) 25

MASSACHUSETTS CONSTITUTION.

Part 2nd, c. 1, § 1, Art. IV 73

STATUTES.

1920, c. 253 32
1933, c. 171, § 2 31
—— c. 172, § 2 32
1935, c. 454, § 4 46
1936, c. 247 31
—— —— § 3 31
1938, c. 259 31
—— —— § 1 . . . . . 31, 32
1945, c. 396, § 1 31
—— c. 658, § 7 76
1947, c. 369 . . . . . 31, 32
1950, c. 639 13
1951, c. 590, § 3 80
1952, c. 354 62
1953, c. 474, § 2 21
—— c. 538 . . . . . 49, 50
1954, c. 453 36
—— c. 469, § 2 48
—— c. 686 . . . . . 13, 14
—— —— § 2 14
1955, c. 628 . . . . . 37, 38
—— —— § 8(a) 37
—— c. 643, § 1 51
—— c. 699 71
1956, c. 393 26
—— c. 501 37
—— c. 556 . . . . . 49, 50, 51
—— c. 729 51
—— —— §§ 5, 20A 51
1957, c. 300 11
—— c. 329 . . . . . 30, 73, 74
—— c. 402, § 2A 36
—— c. 438 37
—— c. 514 . . . . . 59, 60
—— —— § 1 59
—— c. 763 35
—— c. 772, § 1 58
1958, c. 173 77

PAGE

GENERAL LAWS.

c. 4, § 7 26
—— —— cl. 26 41
—— —— cl. 43 26
c. 6, § 10 32
—— § 66 27
c. 7, § 28 63
c. 11 33
c. 12, §§ 23, 24 63
—— § 24 42
—— §§ 25, 25A 43
c. 13, § 15A 52, 53
c. 22, § 9F 21
—— § 11 69
c. 29 76
—— § 8A 14, 15, 16
—— § 20A 15, 16
—— § 26 15
—— § 35 76
—— § 38 . . . . . 76, 77
c. 30 39
—— § 6 . . . . . 12, 13
—— §§ 9A, 9B 39, 40
—— § 25 63
—— § 46 . . . . . 49, 50
—— § 46(4) 49, 50, 51
c. 30A 52, 54
c. 31 . . . . . 18, 39
—— § 21 26
c. 32 77
—— §§ 6, 7 34
—— § 23 . . . . . 76, 77
—— §§ 56, 57 . . . . . 25, 26
—— § 58A 26
—— §§ 89A, 94 . . . . . 33, 34
c. 32A, § 9 38
c. 33, §§ 117–128 61
—— § 122 60
c. 35, § 11 44
—— § 29 42
—— § 34 44
c. 66, § 10 41
c. 69, § 31 17
c. 71, § 46G 18
c. 75, § 13 . . . . . 49, 50
c. 90, § 1A 70
—— § 7B 70

PAGE

c. 90, § 10 70
c. 91, § 11 . . . . . 35, 36
c. 111, § 71 . . . . . 29, 48
—— § 143 . . . . . 71, 72
c. 112, § 2 . . . . . 29, 30, 31, 73
—— § 2B 74, 75
—— § 9 29
—— §§ 74, 74A 52
—— § 75 52
—— § 76 53
—— § 80B 53
—— § 81A 53, 54
—— § 81B 53
—— § 81C 53, 54
—— § 81H 41
c. 115 80
—— § 2 80
c. 118A, § 1B 48
c. 120, § 23 . . . . . 27, 28
c. 121 78
—— § 26O 78, 79
—— § 26KK 23, 24
—— § 26NN(b) 79
—— § 26QQ 24
c. 123, § 95 59
c. 123A 59
—— § 2 . . . . . 13, 58
—— § 5 58
c. 127, § 48A 59
c. 128A, § 3(h) 46
—— § 3(5)(h) 46, 47
c. 136, § 4 11
c. 142, § 21 . . . . . 61, 62, 63
c. 143 70
—— § 62–71E 64, 65
—— § 64 . . . . . 69, 70
—— § 68, 69 69

PAGE

c. 149, §§ 44A–44L 19, 20
—— § 148 72
c. 150, § 5 20
c. 151 . . . . . 54, 55
—— § 1 55
—— § 2 56
—— § 5 55
—— § 7 . . . . . 55, 56
—— § 8 . . . . . 55, 56
—— § 9 55
—— § 12 56
—— § 13 56
c. 166, § 32 . . . . . 60, 65
c. 175 57
—— § 64 57
—— § 66 58
c. 176A 57, 58
—— § 5 58
—— § 16 57
c. 176B 45, 57, 58
—— § 3 58
—— § 10 57
—— § 16 45
c. 176C 45
—— § 1 45
—— § 2 45
c. 201 . . . . . 27, 28
—— § 4 27
—— § 5 27
—— § 37 27
c. 205 28
—— § 1 28
c. 213, § 8 . . . . . 43, 44
c. 268, §§ 15ff 59
c. 276, § 20B 22
—— § 28 21
c. 279, § 33A 77