Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1959

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The Commonwealth of Massachusetts

BOSTON, December 2, 1959.

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, 1959.

Respectfully submitted,

EDWARD J. McCORMACK, JR.
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

Due to the untimely death of Attorney General George Fingold on August 31, 1958, this portion of the report, devoted to staffing, has been set up in three sections covering (1) the period July 1, 1958, to August 31, 1958, during the regular term of George Fingold, (2) the period September 12, 1958, to January 20, 1959, during the interim term of Attorney General Edward J. McCormack, Jr., as the electee of the Legislature, and (3) the period January 21, 1959, to June 30, 1959, during the regular term of Attorney General Edward J. McCormack, Jr. During the hiatus from September 1, 1958, to September 11, 1958, the office of Attorney General was vacant.

July 1, 1958 to August 31, 1958

Attorney General
GEORGE FINGOLD[1]

First Assistant Attorney General
FRED WINSLOW FISHER

Assistant Attorneys General

EDMUND BURKE
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.[2]
JOSEPH P. MCKAY
GEORGE MICHAELS[3]
LOWELL S. NICHOLSON
HAROLD PUTNAM[4]
ARNOLD H. SALISBURY
BARNET SMOLA
NORRIS M. SUPRENANT
HAVILAND M. SUTTON

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
DAVID L. WINER

Assistant Attorneys General assigned to Metropolitan District Commission

WILLIAM J. ROBINSON
JOSEPH H. SHARRILLO

[1] Deceased, Aug. 31, 1958.
[2] Terminated, July 2, 1958.
[3] Terminated, Sept. 5, 1958.
[4] Terminated, Aug. 31, 1958.

Assistant Attorneys General assigned to Division of Employment Security
GEORGE BROOMFIELD STEPHEN F. LOPIANO, JR.

Assistant Attorney General assigned to State Housing Board
KEESLER H. MONTGOMERY

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

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Period from July 1, 1958, to June 30, 1959

Appropriations.

Attorney General's Salary	$15,000 00
Administration, Personal Services and Expenses	324,062 00
Claims, Damages by State Owned Cars	90,000 00
Small Claims	15,000 00
Veterans' Legal Assistance	18,600 00
Salary, Deceased Attorney General	5,796 00
Total	$468,458 00

Expenditures.

Attorney General's Salary	$14,488 64
Administration, Personal Services and Expenses	323,991 82
Claims, Damages by State Owned Cars	89,994 91
Small Claims	15,000 00
Veterans' Legal Assistance	18,594 92
Salary, Deceased Attorney General	5,795 45
Total	$467,865 74

Approved for publishing.

FREDERICK J. SHEEHAN,
Comptroller.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, December 2, 1959.

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, 1959, totaling 16,538, are tabulated as follows:

Extradition and interstate rendition	136
Land Court petitions	152
Land damage cases arising from the taking of land:	
Department of Public Works	1,287
Metropolitan District Commission	140
Civil Defense	2
Department of Mental Health	1
Department of Natural Resources	16
Department of Public Safety	1
Department of Public Utilities	1
Massachusetts Maritime Academy	3
Massachusetts Turnpike Authority	2
State Reclamation Board	1
Miscellaneous cases, including suits for the collection of money due the Commonwealth	4,794
Estates involving application of funds given to public charities	1,294
Settlement cases for support of persons in State institutions	12
Pardons:	
Investigations and recommendations in accordance with G. L. c. 127, § 152, as amended	98
Small claims against the Commonwealth	302
Workmen's compensation cases, first reports	6,035
Cases in behalf of Division of Employment Security	242
Cases in behalf of Veterans' Division	2,019

INTRODUCTION.

At the commencement of this fiscal year my predecessor, George Fingold, held the office of Attorney General (having first been inducted into office in January, 1953) for a third term. He passed away at his home in Concord on August 31, 1958.

Before continuing this report, I deem it proper to record for the future some facts about George Fingold. He was a faithful and courageous public servant. He brought to the office unusual talents. He was an excellent trial lawyer and a fine administrator. He was devoted to his State and the men, women and children comprising it.

His determination to justify the confidence reposed in him by the people of the Commonwealth prompted him to add a Criminal Division to the other heavy burdens of the office. I shall continue the Criminal Division as a permanent function of the office. The day has passed, I think, when an Attorney General can consider himself primarily a corporation counsel for the various State departments, officers, boards and commissions. He is, as the Supreme Court described him in the case of *Commonwealth* v. *Kozlowsky,* 238 Mass. 379, the "chief law officer" of the Commonwealth. I can think of no more serious responsibility than that of preserving law and order in this Commonwealth.

Mr. Fingold also organized an Eminent Domain Division to handle the increasing volume of land damage cases and provided it with separate quarters and a group of Assistant Attorneys General trained and equipped to handle the preparation and trial of land damage suits. This separate division, which I have continued and augmented, makes it possible for property owners, who had been damaged because of land taking by the Commonwealth necessary to construct its road building programs, to obtain a speedy trial or settlement of their cases.

To properly serve the people of this State, I have added to the many other functions of the office, as administered by my predecessors and supplemented by Mr. Fingold, two other divisions: a Division of Civil Rights dedicated to the protection of and maintaining the fundamental constitutional rights of all, particularly the weak and oppressed; a Consumers Council, under the control of an eminently qualified Assistant Attorney General, for the primary purpose of protecting the rights of the general public in hearings and proceedings affecting the prices of essential commodities.

From the date of Mr. Fingold's death, August 31, 1958, until I was chosen by the General Court on September 11, 1958, as Attorney General for the balance of his term, the work of the office was continued by Attorney General Fingold's Assistants under his First Assistant, Fred W. Fisher. After my election by the General Court as Attorney General, and in order to have the work of the department carried on with the least interruption possible during the remainder of my *ad interim* term, appointments to serve under me were offered to all of Mr. Fingold's Assistants. Almost to a man the Assistants whose commitments were such that it would be most difficult to have their cases and assignments handled by others agreed to continue. To fill the places of those who did not continue, I appointed some of Attorney General Fingold's legal assistants and others as Assistant Attorneys General.

Upon taking office under the Constitution on the third Wednesday in January, 1959, for the term for which I was elected by the people at the State election in November, 1958, I selected my staff of Assistant Attorneys General and legal assistants. They are men and women of the highest character and legal ability, including three of Mr. Fingold's Assistants, and others who served under him and other Attorneys General.

The duties and responsibilities of the Attorney General are not generally known. In addition to those specifically enumerated in chapter 12 of the

General Laws, he is vested with innumerable duties under the provisions of statutes scattered throughout the General and Special Laws of Massachusetts. In addition to his statutory powers, he is vested with vast common law powers inherent in the office of the Attorney General to institute and prosecute such proceedings as the welfare of the people of the Commonwealth requires. He has been described by our Supreme Judicial Court as the "chief law officer" of the State. He has complete control, when he deems it necessary, of all criminal proceedings in the Commonwealth in all its courts. Except in a few instances, he has the full duty and responsibility of advising the various constitutional officers, the Legislature, and all the State officers, boards and commissions in legal matters pertaining to their official duties, of representing them in the courts when it becomes necessary. Having in mind the vast duties and responsibilities of the Governor, the General Court, all the constitutional officers, and the more than 150 State boards, divisions and commissions, and departments, altogether expending a total of over $450,000,000 annually, some idea may be gained of the scope of the work which a proper administration of his department by an Attorney General requires. There follow under separate headings more detailed statements of some of the more important aspects of the work in the office during the fiscal year.

Division of Civil Rights and Liberties.

On the assumption that protection of the civil rights and liberties of our citizens is as much the function of the chief law officer as prosecution in violation of the law, I created a permanent Division of Civil Rights and Liberties immediately upon my assumption of the office of the Attorney General in September, 1958.

Since this Division represented an entirely new concept in the functioning of the Attorney General's office, I set up a completely non-partisan committee of dedicated educators and leaders in community life to aid me in delineating the exact scope of the activities to be covered by the Division, and to advise me in appointing the Assistant Attorney General to be its Director.

Serving on the committee are: Herman Snyder, *Chairman*, a prominent Boston attorney; Reverend Robert J. Drinan, S.J., Dean of Boston College Law School; Elwood Hettrick, Dean of Boston University Law School; Erwin N. Griswold, Dean of Harvard Law School; Professors Mark Howe and Albert Sacks of the Harvard Law School; Monsignor Francis J. Lally, Editor of *The Boston Pilot;* Dr. Alexander Brin, Editor of *The Jewish Advocate;* Erwin Canham, Editor of *The Christian Science Monitor;* Dr. Carl S. Ell, President of Northeastern University; Attorneys LaRue Brown, Richard Mintz, Marion Miller, Henry M. Leen, Richard H. Nolan and Morris Michelson; Reverend Samuel Tyler, Assistant Rector, Trinity Church; Ruth M. Batson, prominent community leader; Joseph Salerno, Labor Authority; Thomas Curtin of the Massachusetts Department of Education; and Judge David A. Rose.

On their recommendation I appointed Gerald A. Berlin, a Boston lawyer

with extended experience in this field, as the Assistant to head up the Division.

The Division has been active in the field of legislation, police complaints, and in the processing of individual cases.

It was instrumental in drafting and effecting the passage of legislation to impose curbs on unrestricted wire tapping. It has played a key role in attempting to provide a statutory basis for aid to indigent defendants in criminal trials, and was in the forefront of the successful effort to enact legislation prohibiting discrimination on account of race, creed or color in the sale or rental of private housing. The Division's program also includes studies of the problem of admission of illegally obtained evidence, of the possibility of double jeopardy stemming from prior convictions in the Federal courts for the offenses arising out of the same acts for which a defendant might have been prosecuted in the State courts.

A considerable amount of effort has gone in to help to establish a prototype administrative agency to handle civilian complaints involving policemen. As a result of negotiations with the Division, the Boston Police Department has set up a Hearing Board consisting of three Captains to review such complaints, the proceedings of which are open to the press and public.

The Division has laid the groundwork for a comprehensive research program in racial and religious tensions caused by changing neighborhoods and the migration of minority groups in and out of the cities and suburbs. Working with the Division in this research will be the Boston University Human Relations Centre, the Division of City Planning of Harvard College and Massachusetts Institute of Technology, and the Department of Sociology of Springfield College.

As might be expected, a large number of individual cases alleging deprivation of a civil right or liberty have come into the office, and these are processed by the Division. Many of these cases concern acts of vandalism or personal violation against Negroes who have moved into a previously all-white neighborhood. Effective police and community relations work in this tense area has had considerable success.

Opinions.

Complying with the requests of the various State officials for opinions as to legal questions is one of the most difficult, and one of the most important, duties of the Attorney General.

The questions asked are very rarely easy to resolve. In practically every instance the question is a novel one and very frequently arises out of such an involved factual situation as to require that the opinion expressed be restricted either to the facts reported to us, or that the official concerned be advised as to what the law is as to what he may determine the facts to be. Of necessity, the Attorneys General who served in this office before me laid down a rule, which I have adhered to, of making only determinations of law, and of not making determinations of fact.

In addition to rendering written opinions on questions asked by State

officials, each of the staff members daily furnishes to the officials of the governmental agencies whose problems they handle a very considerable amount of assistance, in discussion and conference, as to the law applicable in cases coming before such officials.

The questions upon which written opinions are requested are, as stated, almost never of little difficulty, and most of them are of more than considerable difficulty, and require extensive research and careful attention. A very large amount of the time of four Assistants is devoted to work on the written opinions. An opinion drafted by one of the Assistants assigned to prepare written opinions must be reviewed by one of the other Assistants so assigned, and submitted to the Attorney General before being sent out.

The more important opinions rendered during the fiscal year covered by this report are printed hereinafter.

Criminal Division.

The Criminal Division is one of the most important divisions of the Attorney General's Department. It is organized to carry out the statutory and common law duties of the Attorney General. The Attorney General has ultimate control of all criminal cases and can assume control of any criminal matter at any stage thereof. Mass. G. L. c. 12, § 27. *Kozlowsky, petitioner,* 238 Mass. 532.

The Criminal Division is staffed by attorneys and members of the State Police. Their principal duty is to investigate complaints and answer requests for assistance from district attorneys, law enforcement agencies and citizens. The Division also works with law enforcement agencies of the Federal Government and other States. The attorneys of the Criminal Division represent the Commonwealth in criminal matters before the United States Supreme Court, the Federal Courts, the Supreme Judicial Court and the other State courts.

Full Bench Decisions. — Several criminal matters were determined by the full court of the Supreme Judicial Court in which the Department appeared as of counsel or in which the Department was interested. Of more than usual interest were the following decisions which made far reaching changes in the law:

Metcalf v. *Commonwealth,* 338 Mass. 648. In that case a youth who was aged 13 years, nine and one-half months, at the time of the alleged crime in 1956 was indicted for first degree murder. A plea of guilty of murder in the second degree was accepted by the Superior Court. The Supreme Judicial Court held that the acceptance of the plea of the lesser offense established that the child was guilty of conduct constituting delinquency within G. L. c. 119, §§ 52–63, as amended, but not of a crime, so that thereupon the power of the Superior Court to sentence him ceased and a further proceeding in a District Court under §§ 52–63, dealing with delinquent children, *i.e.* "juvenile delinquents," was in order. The youth was then released from prison and treated as a delinquent child. As a result of the decision in this case there may be a non-criminal disposition

of the case involving youthful offenders between the ages of seven and seventeen years even after an indictment for first degree murder.

John Giles v. *Commonwealth*, 339 Mass. 410. The petition for a writ of error in this case was based upon the ground of a denial or reasonable opportunity to procure counsel. The petitioner had been convicted of breaking and entering with the intent to commit larceny. In granting the writ the court held that the petitioner was not entitled to be discharged from custody but must be retried properly. This case made two reforms in the law. First, the court distinguished it from a long line of cases where the petitioner was discharged because there was error at the trial. Second, the absence of assistance of counsel at the trial of a felony was conclusively reaffirmed as a ground for a writ of error.

Page Case. — The case of *Commonwealth* v. *Arthur A. Page, Jr.*, 339 Mass. 313, was tried prior to my becoming Attorney General. However, the holding of that case has given rise to a substantial number of cases during my tenure with similar facts. The court held in the *Page* case that persons committed under G. L. c. 123A as sex offenders were to be discharged because in fact there was no separate treatment center created for said offenders at the Massachusetts Correctional Institution, Concord. Further, although said statute regarding sex offenders was nonpenal in nature, the persons treated were housed with the general prison population. As a result of this case several sex offenders who had been committed prior to the date of the decision by the Supreme Judicial Court have been discharged. In each of these instances the public interest was protected by having the persons involved examined to determine whether they were presently mentally ill and, thus, committable under G. L. c. 123.

Campbell v. *Commonwealth*, 339 Mass. 695. The petitioner had appealed a sentence for the term of eighteen months for larceny from the person. He subsequently withdrew his appeal and an indeterminate sentence, which under statute is treated as a maximum five-year sentence, was imposed. It was held that G. L. c. 278, § 25, which prohibits an increase in sentence after appeal from a District Court, applied, and that the original sentence stood.

Guerin v. *Commonwealth*, 339 Mass. 731. The petitioner had been found guilty of various sex offenses. He had been defended by an experienced attorney. On writ of error the petitioner claimed that he had been prejudiced during the trial by being shackled in the prisoner's dock and had been denied by his guard the right to consult with his attorney. It was held that the defendant had not been denied his right to counsel because he could have spoken to his lawyer before or after trial or during the recesses.

Another important function of this Division is that of having the State Police Detectives assigned to my office conduct investigations and other activities in connection with criminal and related activities. Among the matters calling for investigations were two instances of improper granting of college degrees; eighteen matters relating to various charities, hospitals or trusts; four civil-liberties investigations; three Consumer Council probes in connection with bait advertising; the special milk-price investigation; as well as many other investigations in connection with

various crimes, petitions for writs of error, and miscellaneous matters. The State Police Detectives assigned to my office have rendered invaluable service to me in the carrying out of my statutory duties and responsibilities.

During the course of the year the Criminal Division also did a great deal of legal research in connection with cases before the courts and the many legal opinions requested by various State officials connected with law enforcement and prison administration.

Consumer Council and Division of Consumer Counsel.

As previously stated, upon taking office as Attorney General, I appointed an Advisory Consumer Council consisting of 10 leading economists and experts in the field of consumer problems. As a result of the work of this Council, a Division of Consumer Counsel, under Assistant Attorney General Nathan S. Paven, was established. The Division appeared in hearings before the Department of Public Utilities with relation to the following matters:

Boston & Maine Railroad discontinuance cases.
Boston & Albany Railroad discontinuance cases.
New York, New Haven & Hartford Railroad discontinuance cases.
Boston Edison rate increase hearing.

We have appeared before the Interstate Commerce Commission in connection with the following discontinuance cases:

New York Central discontinuance.
New York, New Haven & Hartford Railroad discontinuance.

There have been a number of cases arising out of the action of the Milk Control Commission in fixing the retail price of milk in which the Division has been concerned. We have appeared in the Suffolk Superior Court in opposition to the action of the Commission, and have also appeared in opposition to the action of the Commission in filing a bill in equity without the authorization of this office. In the latter case Judge Fairhurst has dismissed the petition of the Milk Control Commission in reliance upon G. L. c. 12, § 3, which gives to the Attorney General the sole authority to institute actions on behalf of the various State agencies. This action has not been appealed.

The Division has also brought action against an unlicensed school under the provisions of G. L. c. 112, § 2 (*b*), which action is still pending in the Suffolk Superior Court.

In addition to the court actions referred to, the Division has taken action against, among others, knitting machine rackets and trading stamp companies operating without filing a bond as required by statute. The Division also held two Consumer Conferences during the period covered by this report.

The Consumer Council has had referred to it various matters relating to restrictive trade practices and deceptive schemes which are still pending.

The Assistant in charge of the Division also handled the cases hereinafter set out:

The action of *Joseph Salerno* v. *The Justices of the Superior Court* arose out of a labor dispute. Mr. Justice Ronan vacated the restraining order on the grounds that a labor dispute existed and that the field was preempted by the Federal Law. By agreement of the parties the action was dismissed, and a final decree entered in accordance with Mr. Justice Ronan's opinion.

The Division appeared in behalf of the Department of Public Utilities in the following actions in the Supreme Judicial Court:

Boston and Albany Railroad v. *Department of Public Utilities*
(Parmenter Street Crossing case)
Decision of the Department affirmed and final decree entered.

Retail Store Delivery v. *Department of Public Utilities*
(United Parcel case)
Decision of the Department affirmed and final decree entered.

City of Newton v. *Department of Public Utilities*
(Boston and Albany Railroad Co. case)
The demurrer challenging the standing of the city of Newton as an interested party sustained and final decree entered affirming decision of the Department.

Various cases concerning the *Eastern Mass. Street Railway Company* licenses are still pending in the Supreme Judicial Court.

Old Colony Railroad Matters

The Division appeared in the Federal District Court in Connecticut and obtained extensions of the expiration date of the option granted in the reorganization of the New York, New Haven & Hartford Railroad Company.

The Division has also appeared in assistance of the legislative committee on transportation, and assisted the Mass Transportation Commission in formulation of its plans for the operation of passenger service, if the option is completely exercised.

Division of Public Charities.

The past year's activity of the Division of Public Charities was highlighted by the complete reorganization of the Division and its State-wide probe of charitable trusts.

Form 12, upon which all public charities report their activities, has been greatly expanded to include the reporting of more detailed financial items. The additional information so obtained enables the Division to ascertain with greater certainty whether or not charitable funds are being duly applied. Organizations failing to report have been contacted, and reports obtained from the delinquents. During the past year 2,313 reports were processed, bringing in $6,939, and it is expected that the following year will show a substantial increase as a result of the efforts of the Division.

A charitable purpose index is now in the process of preparation, and when

completed, the Division will be in a position to assist persons and organizations in need of funds by giving them the names of foundations and trusts having money available for their specific purposes.

A revision is now being studied of Forms 9, 10, and 11, which are presently required to be filed by charitable organizations conducting solicitations.

Included in the work of this Division was the examination, and approval or disapproval, of 1,294 matters pending in the probate court, involving allowance of wills, petitions for instructions, petitions for license to sell, allowance of executors' and trustees' accounts, petitions for appointment of trustees, and petitions for the application of the *cy pres* doctrine.

Some 1,318 petitions involving the appointment of public administrators, receivers, etc., the allowance of their accounts, and petitions for the sale of assets of estates of individuals leaving no heirs, were also under the scrutiny of the personnel of the Division of Public Charities. Great care has been taken to preserve the assets of such estates so that the largest amount possible might escheat to the Commonwealth.

During this term, the Franklin Foundation came up for consideration again. Chapter 596 of the Acts of 1958 was passed, which in effect called for the distribution of the Benjamin Franklin Fund for the benefit of Franklin Technical Institute. This fund, on February 28, 1959, amounted to $1,578,098. A bill in equity was filed to implement said statute, and this presented a very interesting problem. As counsel for the Commonwealth in a case to which it is a party, the Attorney General must carry out the policy of the General Court as approved by the Governor, and to defend the constitutional efficacy of the statute in question. On the other hand, as the officer charged by statute with the defense of public charities, the Attorney General has the responsibility of defending the due application of the fund and resisting any contemplated breach of trust in its administration. A thorough examination was made of the various aspects of this twofold problem and appropriate pleadings were filed in the case, which laid the groundwork for future argument before the Supreme Court of Massachusetts.

At the request of certain distinguished recipients of degrees from Harvard University and the wife of a graduate, I permitted an information in equity to be filed in order to obtain a court adjudication on the Arnold Arboretum controversy. The President and Fellows of Harvard College, trustees of the Arnold Arboretum institution, removed the library and herbarium from the Arnold Arboretum to a central building in Cambridge, and a question arose as to whether or not there was a breach of trust. This matter is now pending in the Supreme Judicial Court.

In Bristol County, the Division commenced an investigation of the Acushnet Hospital Association. The investigation resulted in the complete reorganization of the hospital which will, under new management, seek to comply with the requirements of the Department of Public Health, and open its doors to the public.

The Division's work in Plymouth County resulted in the discovery of a large amount of dormant funds. Application has been made to appoint new trustees of these funds and to apply them to their charitable purposes.

In Essex County, the Division was successful in preventing the trustees of the estate of David Smith from retaking the Rowley Town Hall and was successful in having the probate court order the Town Hall turned over to the town of Rowley.

In Middlesex County, the Division successfully defended a petition brought by the heirs of Mary D. B. Hooper to terminate her trust established for the care of Aged Protestant Couples in Cohasset. This matter is now being appealed by the heirs to the Supreme Judicial Court.

The Division also conducted investigations of the Prospect Hill Cemetery Association in Nantucket County, the Bristol County Veterans Charitable Foundation in Bristol County and the George E. Keith Foundation in Plymouth County.

In Norfolk County, the Division was successful in preventing a trustee of the estate of Henry Lawton Blanchard, which estate amounted to over $300,000 for the establishment of a museum in the town of Avon, from selling his property at an exorbitant price to the trust. An investigation of this estate culminated in the filing of a petition for the removal of the trustee and in the discovery of a misappropriation of funds in the estate of Antonia H. Bogardyn.

A petition for the removal of the trustee was also filed in the Bogardyn estate.

The work of the Division of Public Charities has just begun and there is a large amount of investigation still in the initial stages. The revision of the forms and office procedures is not yet completed. The Division has encountered areas in which legislation will be necessary, and proper legislation is now being drafted.

The rapidly growing field of charitable trusts is one that requires careful attention and promises to require more as the development continues in the future.

Eminent Domain Division.

The duties of the Division have continued to expand greatly during the year, and it is now experiencing the heaviest case load in the history of the Division. Since July 1, 1958, the Division has disposed of 171 cases throughout the Commonwealth through trial. The petitioners in these cases had claimed a total of $4,538,544.29. Awards to them, either by verdict or settlement, totalled $2,701,761.91. The difference of $1,836,782.38 reflects a substantial saving to the Commonwealth. There should be added to this the large amount of interest which would have been payable to the petitioners if all of these cases had gone to trial. Of the 171 cases disposed of, 129 were disposed of from January 21, 1959, to June 30, 1959.

It has been my expressed conviction since assuming office that, whenever possible, the Commonwealth should make a *pro tanto* payment to the condemnee as soon as possible after the taking has been made and thus effect a substantial saving of interest, and that has been the policy of the Division.

When a petition for the assessment of damages is referred to the Division, an appearance and interrogatories are filed immediately. Shortly there-

after, a request is made by the Division to the department or agency which has made the taking, to forward any and all material, including appraisals and written memoranda of conferences with the condemnee or his attorney, in its files. Upon the receipt of the material, one of the Assistant Attorneys General assigned to the Division reviews the file. Invariably, a conference is then held between Assistant Attorney General Joseph F. Lyons, in charge of the Division, and the attorney for the petitioner. At the conference, the petitioner's attorney will usually disclose the amount of his appraisal, the elements of damage considered by his appraiser and the value placed thereon. We then review our own appraisals for the purpose of seeing whether or not all of the elements claimed by the petitioner have been considered by the Commonwealth's appraisers. If any elements claimed by the petitioner have been overlooked by the State's appraisers, a conference is held with the appraisers. Following this, if an amount cannot then be agreed upon which my office and the petitioner's attorney consider fair and equitable, a pre-trial conference with a justice of the Superior Court is normally scheduled. Inasmuch as land damage cases are entitled to precedence as far as trial is concerned, this usually occurs very shortly after the office conference. At the pre-trial conference the presiding justice in the county goes over the case with the Commonwealth and the petitioner. This conference method frequently results in an amount being agreed upon.

In cases involving takings by the Department of Public Works, which constitute the bulk of the case load, if, at either the office or court conference, an amount is agreed upon which the Commonwealth feels is fair and equitable, the Division then computes its figures for judicial consideration. At the court's convenience one of the Assistant Attorneys General in the Division appears before a justice of the Superior Court at a jury-waived trial and makes a full disclosure of the area taken, the amounts of the Commonwealth's appraisals and the figure placed on the case by the Board of Review, and suggests to the court that the amount previously agreed upon would be a fair and just award. The Assistant then offers to the court the computations showing how the agreed figure was arrived at. The attorney for the petitioner also presents evidence either through his appraiser or his petitioner, or both, as to the amount of damages the petitioner claims he suffered as a result of the taking. After hearing from both sides in the above manner, the court orders judgment in the case.

I wish to stress that the Commonwealth and the petitioner at this jury-waived trial merely suggest to the justice presiding that the figures agreed upon would appear to be fair, equitable and just to both parties. The judgment is, however, ordered by the court. The judge can order judgment in a greater or lesser amount than that suggested by the Commonwealth and acceptable to the petitioner, inasmuch as the parties have actually placed the case before the court for its final decision.

The jury-waived procedure described is followed in every case where the amount agreed upon exceeds the Review Board figure, or the agreed figure is in excess of $2,500 and the case has no Review Board figure because the Department of Public Works' appraisal was under $2,500.

The procedure followed has resulted in substantial savings to the Commonwealth by making it unnecessary to impanel and pay juries and retain real estate experts to testify for the Commonwealth. It has also greatly lessened the congestion of the Superior Court dockets of the various courts throughout the Commonwealth.

It is my feeling that the Division has been successful in effecting the quickest and most efficient settlement or judicial disposition of land damage claims, and it has done so in the way most consistent with the best interest of the Commonwealth and its taxpayers. The Division will continue this policy in order that inconvenience to property owners will be minimized as much as possible and in order to save the expense to the Commonwealth of interest payments over extended periods of time.

I would like to expressly mention the fine co-operation that has been extended to the Division by the Chief Justice and the Justices of the Superior Court in the handling and disposition of these matters.

Town By-Laws.

Pursuant to the provisions of G. L. c. 40, § 32, I have, as is usually the case, had between 250 and 300 town by-laws or amendments thereto submitted to me for approval or disapproval. The functions vested in me under that section are not perfunctory for the reason that no town by-law becomes effective unless and until it has been approved by the Attorney General and published according to said G. L. c. 40, § 32. Two of the members of my staff experienced in such matters examine each by-law submitted for procedural and substantive defects before they are handed to me for my action. Zoning by-laws and amendments thereto require special scrutiny as the General Court has provided statutory procedural requisites to valid action by the towns. The requirements for planning board hearings in G. L. c. 40A, § 6, and a two-thirds vote in cases of zoning amendments, make it imperative that care be taken to see that these proceedings have been complied with.

I have endeavored to protect the towns in the Commonwealth in these matters. The Legislature, by an amendment to G. L. c. 40A, § 6, contained in c. 317 of the Acts of 1959, has required at least twenty-one days' prior published notice of planning board hearings on proposed zoning by-laws. Prior to this legislation, the law had required only due notice of such hearings. Usually the towns have provided for seven to ten days', and occasionally fourteen days', notice, which was probably sufficient. Anticipating that some of the towns might be unaware of the enactment of c. 317, I caused a letter to be dispatched to the various towns in the Commonwealth before the effective date of c. 317, notifying them of the change. Despite this precautionary measure, a small number of towns have acted under the earlier law after c. 317 became effective. This, of course, compelled disapproval in those cases where improper notices were given. However, fortunately, these instances were few. I do not anticipate many more.

Contributory Retirement Appeal Board.

The Contributory Retirement Appeal Board is provided for in G. L. c. 32, § 16 (4). It is composed of three members, an Assistant Attorney General designated by me, a designee of the Director of the Bureau of Accounts and a designee of the Commissioner of Insurance. There has been no development of a comprehensive retirement system under a single management to handle all administrative problems. On the contrary, there are 99 contributory retirement boards throughout the Commonwealth, each administering its own local system.

A person aggrieved by a decision of any one of these local boards in questions relating to membership in the system, creditable service, rights to retirement, or issues dealing with any of the aspects of the retirement laws, may appeal to the Appeal Board for a final determination. Under G. L. c. 32, § 16 (4), the Board "shall pass upon the appeal, and its decision shall be final and binding upon the board involved and upon all other parties in interest, and shall be complied with by such board and by such parties."

There are great advantages to the general public in a well-designed retirement system which is properly administered. Such provisions improve the quality of the governmental service and systematically provide support to employees retiring for superannuation, as well as those who, because of ordinary disability due to disease, or other causes, or because of accident, are prevented from fulfilling the requirements of their positions.

The Contributory Retirement Appeal Board devotes much time in hearing appeals emanating from the various systems. In addition, time must be spent in conferences, legal research and in preparation of written decisions adjudicating the rights of the parties appearing before it.

Proceedings before the board are subject to the provisions of the Administrative Procedure Act, G. L. c. 30A. Any party aggrieved by a decision of the Board may have his case reviewed in the Superior Court, with a right of appeal to the Supreme Judicial Court. The Board's decision must be accepted as final if supported by evidence and not tainted by error of law. It is, therefore, properly required that the Board shall deal with cases before it in such a manner that when a certified copy of the record is presented to the courts, they may be able to determine with reasonable certainty whether or not correct rules of law have been applied to facts as found.

The Board has been blazing its own legal pathway because of the paucity of authoritative precedents. There have been several decisions of our Supreme Judicial Court touching upon certain phases of the retirement system. The body of decisions rendered does not yet form an adequate background for determination of legal issues such as exist under the Workmen's Compensation laws. The issues coming before the Board are numerous and important; many appeals are pending in the Superior Court which will finally be determined in the Supreme Judicial Court.

In all the cases before the courts, proper preparation must be made for

presentation of the issues, and briefs must be submitted before the Superior and Supreme Courts, in order that the rights of any aggrieved party may be fully considered before final decision of our highest tribunal.

A great portion of the time of this Board is taken up in consideration of appeals dealing with accidental disability provisions under § 7 of said c. 32 and under § 9 dealing with accidental death benefits. These sections provide retirement allowances for members in the various systems, and for their widows and children in cases of death, where total and permanent incapacity has resulted from personal injuries sustained during the performance of public duties. Two recent Supreme Court decisions have demonstrated the distinction between the provisions of the retirement system, G. L. c. 32, and those of the Workmen's Compensation law, G. L. c. 152, with regard to injuries due to accident. The court pointed out the restrictive language of the Retirement Act, requiring disability to be one arising out of and in actual performance of duty, and not merely arising out of and as an incident of duty, and held that in the latter instance accidental disability allowances cannot be granted. An increasing work load of cases coming before this Board may be expected. Its duty, of course, is to weigh the evidence carefully and deal fairly between the member (or his dependents in the event of his death), on the one hand, and the local retirement boards, on the other.

The general public substantially underwrites the various retirement systems, and, consequently, careful consideration should be given to the Board's needs for proper functioning. It is my recommendation that this Board should be set up with necessary machinery for the adequate performance of its function. It should be provided with an investigator to help the board in obtaining information and facts where an investigation is indicated. It should be provided with the necessary clerical service and quarters for its sole use. The board should be put on a permanent basis, provided with ample time to do its work, funds to defray its own administrative expenses, and given independent facilities in order that it may expeditiously and properly handle all appeals coming before it in accordance with the provisions of the Retirement Act and the safeguards provided under c. 30A, the Administrative Procedure Act.

State Housing Board.

The functions of the Assistant Attorneys General assigned to the State Housing Board fall under nine general categories:

1. Rendering written opinions and giving oral opinions on general legal problems confronting the Board.
2. Review for approval of title abstracts and other problems involving purchase or sale of land.
3. Administration of Organization Transcripts of approximately 128 active Housing and Redevelopment Authorities.
4. Review for approval of original and refunding note and bond issues of Housing Authorities.

5. Attendance at or conducting hearings involving contract disputes, making findings and writing decisions.
6. Litigation and trial work.
7. Review for approval of contracts for financial assistance.
8. Review and revision of forms.
9. Legislation.

In addition to their other duties, the Assistants assigned prepared and submitted in writing to the State Housing Board, at its request, 28 informal opinions and legal advice memoranda on legal problems confronting the Board. Nine hearings were attended and 122 oral opinions were given to the Board following conferences. Questions relating to the purchase and sale of land, and review of the abstracts and eminent domain matters, resulted in 20 memoranda, 22 oral opinions, 24 conferences and attendance at two hearings.

A file of the organization transcripts of approximately 103 Housing Authorities and 25 Redevelopment Authorities is kept current. All these assist in keeping the Authorities on a sound legal basis. In this connection 13 legal memoranda were submitted and 27 oral opinions given.

Note issues, both original and refunding, involving borrowing totaling $108,668,000 were approved, entailing 22 oral opinions and 88 written memoranda.

Many hearings were attended, conferences held and oral opinions given relative to questions arising out of bids received and contracts disputed. An appearance was entered as *amicus curiae* in the Land Court relating to land taking in Woburn.

We have reviewed and revised various forms of contracts used by the State Housing Board resulting in some oral opinions and 26 written memoranda. Conferences have been held and requested drafts of legislation have been prepared and submitted, including one relative to taking by the Medford Housing Authority for the Elderly Project and to other matters concerning the Housing Authority Law.

A complete study has been made of c. 626 of the Acts of 1958, which is the so-called "open meeting" law, and advice given to the State Housing Board and the local Housing Authorities as to its application to their proceedings. We have been in contact with both the Board and attorneys of the local Authorities supplying advice and help wherever requested.

Division of Employment Security.

On January 21, 1959, a review of the Division's legal docket was made with the Division Chief Counsel, his legal staff and the Assistant Attorneys General assigned to the Division. Conferences were held by the Assistant Attorneys General with the Assistant Directors of the Division, the Chief Counsel and his staff, to determine policy and procedure and areas of responsibility.

After these preliminary conferences, the Attorney General met with the Director of the Division, and it was determined that only the Assistant

Attorneys General assigned to the Division should represent the Director in the following courts:

1. Massachusetts Supreme Judicial Court.
2. Massachusetts Superior Courts.
3. United States District Court.
4. United States Appellate Court.
5. United States Supreme Court.
6. Municipal Courts — Criminal, and such other matters as may be brought to the attention of the Attorney General from time to time.

Two cases were handled before the full bench of the Supreme Judicial Court:

(1) *Estey* v. *Director* — decision in favor of the Commonwealth (156 N. E. 695; 338 Mass. 797).
(2) *Western Electric Company* v. *Director* (Decision pending).

One hundred and fourteen cases were forwarded to the Attorney General for legal proceedings in the Superior Court in equity. In all these cases I requested appointment of receivers to protect the interest of the Commonwealth. Receivers were appointed and an accounting was made by the said receivers to the Commonwealth. This accounting enabled the Commonwealth to recover sums, previously deemed unrecoverable.

A problem between the Commonwealth of Massachusetts and the United States Government has arisen from the question of priority of liens. In numerous instances liens have been placed by both the Commonwealth and the United States. Special attention is being given by the Assistant Attorneys General relative to the position of the Commonwealth as opposed to that of the Director of Internal Revenue in these instances.

An active program has been conducted as to delinquent contributions involving criminal violations. Before proceeding with criminal complaints under G. L. c. 151A, § 47, repeated warnings were given to all delinquents and all remedies to ensure compliance were completely exhausted by means of thorough investigation. After all other methods and means were exhausted and the delinquent contributors who had been given every opportunity to make payments on their taxes still neglected to do so, criminal complaints were filed against them.

One hundred and sixty-four complaints were issued and in all cases findings of guilty were made. As a result of this program, substantial sums were recovered by the Commonwealth.

The Chief Counsel and his staff, as well as the technical staff of the Division, have been of invaluable assistance to me and the Assistants in the preparation and conduct of matters before the courts. The Director and his assistants also have been most co-operative in all matters within the scope of my duties, and I am grateful for their assistance and co-operation.

Land Title Cases.

The Attorney General protects the rights of the public in the lands owned by the Commonwealth, and protects the rights of the Commonwealth and its people in lands owned by private individuals where public rights are involved.

In the past year approximately 208 petitions for registration of title to land entered in the Land Court involved interests of the general public or of the Commonwealth. It is my duty as Attorney General to see that decrees of registration of title to land registered are subject to the rights of the Commonwealth, or of the general public, whenever such rights and interests appear. The interests to be protected are varied and include those acquired for the promotion and protection of the general public health as well as the rights of the public in the tidewaters of the Atlantic Ocean, and the waters of great ponds of the Commonwealth, for fishing, fowling and navigation, as well as many other public rights.

Deeds of acquisition of land for the Commonwealth by the various State departments and offices for the many public purposes the departments and offices are designed to provide are approved as to form by the Attorney General and the title report is reviewed.

In addition to acquiring titles to real estate for highways and other public purposes, the Commonwealth also conveys land and leases, or makes other grants of rights in lands of the Commonwealth. The deeds, leases and other documents, in large numbers, are submitted to the Attorney General for approval as to form or for assistance in drafting.

These matters all involved a great deal of the time of this office during the fiscal period covered.

Veterans' Division.

When I assumed the office of Attorney General I determined that it was of great importance that the Veterans' Division should continue to function efficiently in furnishing legal advice to the thousands of veterans and their dependents who have need of its services. To that end, I staffed the Division with personnel who by training, background and experience were especially equipped to handle problems relating to veterans. Veterans in need of legal advice are referred to the Division by veterans' organizations and Federal, State, county, city and town officials. In addition, countless inquiries come from out of State and from servicemen on active duty with the armed forces of the United States.

The problems which continue to plague veterans are in many cases complex and oftentimes come to the attention of our Division after all other remedies and sources have been exhausted. They involve problems of taxation, real estate, veterans' benefits, domestic relations, licenses, civil service, retirement, education, employment and many other areas in which veterans become involved.

Most of the cases of the Veterans' Division are handled through personal interviews, although many letters and telephone calls are received not only

from veterans and their dependents but from veterans' organizations and State, city and town officials seeking information on matters which affect veterans.

The volume of business has been gratifying to me as Attorney General because it demonstrates that the work of the Division is so well known to veterans and those concerned with their problems that the Veterans' Division continues to serve both a useful and indispensable function.

Insurance.

During the year the Liberty Mutual Fire Insurance Company filed a petition for review in the Supreme Judicial Court for an order of the Commissioner of Insurance which denied the application of Liberty for a deviation from certain windstorm insurance rates, rules and schedules which had been filed by the New England Fire Insurance Regulatory Association, to which Liberty was a subscriber. The litigation involved an interpretation of G. L. c. 174A, known as the fire, marine and inland marine rate regulatory law, which became effective on October 1, 1947. The controversy resulted in part from the absence in the statute of a definition of the word "deviation." No decision of the Supreme Judicial Court, or the highest court of any other jurisdiction had considered the point in issue.

A single justice of the Supreme Judicial Court decided that the word "deviation" was synonymous with "variation" and ordered the Commissioner of Insurance to hold further hearings. As this involved subject matter is one of great importance to insurance regulatory officials, I approved the taking of an appeal from the ruling of the single justice of the full bench of the Supreme Judicial Court in order to obtain a fully authoritative clarification of the statute for the future guidance of the Division of Insurance.

Workmen's Compensation.

In accordance with the provisions of G. L. c. 152, § 69A, this office must give written consent for all payments made by the Commonwealth under the chapter. This includes all compensation payments to injured employees, doctor bills, hospital bills, payments to insurance companies on petitions brought by them under § 37A of c. 152 for payments to be made out of the special fund established by § 65N of c. 152, and all payments made to insurance companies on petitions brought by them under § 37 to be paid out of the special fund established by § 65. All claims made by the Commonwealth under §§ 65 and 65N against insurance companies are brought by this office.

For the fiscal year July 1, 1958, to June 30, 1959, 5,709 first reports of injury involving employees of the Commonwealth were received at the Attorney General's office. Seven hundred and eighty-six injured employees claimed compensation from the Commonwealth. Agreements for compensation for 762 of such employees were approved. The claims of the other 24 employees were not approved for various reasons. On the basis

of the 5,709 first reports of injury, 2,290 hospital and medical bills were submitted and were approved.

The total amount spent by the Commonwealth under c. 152 for Workmen's Compensation payments, including hospital and medical bills, is as follows:

Compensation payments made to injured employees, $780,745.25.

Hospital bills paid for injuries sustained by employees, $168,999.15.

Medical bills paid for treatments of injuries to Commonwealth employees, $140,000.88.

The total amount spent — $1,089,745.28.

General Industrial Accident Fund.

This office collected $8,025 from insurance companies on claims brought by the Commonwealth against the insurance companies under the provisions of G. L. c. 152, § 65. Balance in this fund as of December 1, 1959, was $46,696. During the fiscal year July 1, 1958, to June 30, 1959, payments of $18,828 were made to insurers under G. L. c. 154, § 37.

Veterans' Industrial Accident Fund.

This office also was able to effect settlements with the insurance companies in the amount of $72,275. This amount was collected from July 1, 1958, to June 30, 1959, for the Commonwealth under G. L. c. 152, § 65N. During this same period of time $56,959 was paid out of this Veterans' Industrial Accident Fund under § 37A. The balance on hand as of June 30, 1959, was $365,938.

The above payments made to insurance companies were made on petitions brought by the insurance companies under G. L. c. 152, §§ 37 and 37A. During the fiscal year 1958, 137 appearances were made by this office before the Industrial Accident Board for various hearings and conferences on matters pertaining to employee's rights, disputed hospital and doctor bills, settlements of claims against insurance companies under §§ 65 and 65N, and on petitions brought by insurance companies under the above said §§ 37 and 37A.

State Tax and Other Departments and Certain Boards and Commissions.

During the year the Attorney General and the Assistant Attorneys General, in compliance with the provisions of G. L. c. 12, and other pertinent provisions of law, appeared in the courts of the Commonwealth for the State Tax Department and other departments and have rendered legal services and advice to various boards and commissions including the following boards of registration: Architects; Medicine; Nursing; Chiropody and Podiatry; Optometry; Professional Engineers and Land Surveyors; Pharmacy; Barbers; Hairdressers; Electrologists; State Examiners of

Electricians, Plumbers, and others, either in the prosecution or defense of suits and other proceedings or in consultation.

In a great number of proceedings the acts of such departments or boards are called in question, particularly by petitions for review in, or by way of appeal to, the Superior Court and the Supreme Judicial Court.

The various boards which have been set up for purposes of regulating professions and occupations have received much attention from this Department. The right to follow a chosen profession free from unreasonable government interference comes within the "liberty and property" concepts of the United States Constitution and within the purview of the Bill of Rights, and consequently whenever these agencies have been confronted with proceedings for adjudicating the legal rights, duties or privileges of anyone to be registered for his chosen profession, or when determining questions of suspensions or revocations of registrations to practice the various professions, the Department of the Attorney General has rendered assistance and legal advice to the boards involved, to the end that the rights of all parties may receive the protection that is due and required by our laws.

In addition to rendering formal and informal written opinions, oral opinions have also been rendered by the Assistant Attorneys General, for the purpose of aiding the various boards in the sound performance of their duties. Assistance has also been given by conferences and personal appearances of designated Assistants to sit with these administrative boards in the course of investigations or hearings, and advising them as to the law with reference to such hearings for the purpose of adjudicating and making decisions on matters before them, and as to the prosecution or defense of any proceedings for review by, or appeals to, the courts.

There has been a continuing increase in the number of administrative boards and commissions about which the office must constantly concern itself, requiring, for proper efficiency in the administration of our laws, the assignment to these special duties of a number of Assistant Attorneys General. The requirements of these new boards and commissions have placed additional burdens and demands on the staff and have greatly increased the work load of the office, without a corresponding increase in the staff of this office. This situation will soon require that the Legislature authorize additional personnel to satisfy those burdens and demands.

Collections.

A large number of claims is referred to the Attorney General for collection. Included are claims for support of patients in State institutions, damage to State property, etc.

During the fiscal year covered by this report $123,925.65 was collected and remitted to the referring departments.

Chapter 626 of the Acts of 1958.

Chapter 626 of the Acts of 1958, popularly known as the "Open Meeting" law, in general provides for notice of public meetings of State, county and municipal officers, boards and commissions, public access thereto and proper records thereof. There are some stated exceptions to this law. This legislation, and the demand for it, are indications of a wholesome increase of interest in public affairs. Numerous requests have been made to me by State officers, boards and commissions for opinions relative to the construction of this statute. It has been my purpose to construe it liberally, consistent with what I feel was the legislative intent.

Conclusion.

To my staff, His Excellency the Governor, the members of the General Court, the various State officers, boards, commissions, department heads and employees, and the public at large who have done so much to help me in the administration of this period of my first term in office goes my deepest gratitude. I shall do everything in my power to execute the duties of this office in accordance with its highest traditions.

Respectfully submitted,

EDWARD J. McCORMACK, Jr.,
Attorney General.

OPINIONS.

An increase of penalty for an offense is not applicable to one whose sentence, under a law in an earlier form, was suspended.

JULY 9, 1958.

Hon. ARTHUR T. LYMAN, *Commissioner of Correction.*

DEAR SIR: — You have requested an interpretation of the law under the following circumstances:

A person convicted on April 6, 1957, in the Boston Municipal Court of two misdemeanors and of violation of G. L. c. 94, § 211, as amended by St. 1938, c. 321, § 1, was sentenced to the Massachusetts Correctional Institution, Framingham, the Reformatory for Women, for an indefinite sentence.

The penalty for violation of said § 211, possession of narcotic drugs, is imprisonment for not more than three and one half years in the State prison.

This offense is a felony, G. L. c. 274, § 1.

Since the maximum penalty was for not more than five years, the Boston Municipal Court had jurisdiction. G. L. c. 218, § 26, as amended by St. 1938, c. 265.

The place of confinement was the Reformatory for Women, which is not a State prison and does not involve infamous punishment. *Moulton* v. *Commonwealth*, 215 Mass. 525, 527. Therefore, trial by jury and indictment by a grand jury were not required by the Twelfth Article of the Declaration of Rights. See *Jones* v. *Robbins*, 8 Gray 329, 342, 350.

She may be held at the Reformatory for not more than five years. G. L. c. 279, § 18, as amended by St. 1956, c. 715, § 24. *Platt* v. *Commonwealth*, 256 Mass. 539.

At the time of her sentencing, April 6, 1957, sentence was suspended and she was placed on probation.

While on probation, St. 1957, c. 660, was enacted, effective January 1, 1958. This made the first two offenses also felonies.

On February 24, 1958, the court revoked the suspension of sentence and she was committed.

The increase in penalty does not affect her since it is the penalty in effect at the time the crime was committed that should be imposed. To increase the penalty after a crime has been committed would be to enact an *ex post facto* law in violation of Article XXIV. *Murphy* v. *Commonwealth*, 172 Mass. 264, 277.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By FRED L. TRUE, Jr.,
Assistant Attorney General.

Day off, or compensation, for officers and employees of the Commonwealth working on Saturday holidays.

JULY 30, 1958.

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

DEAR SIR: — You have requested my opinion as to the effect of G. L. c. 30, § 24A, in certain instances where a legal holiday falls on a Saturday.

As stated in an opinion from this department to the Commissioner of Administration on January 13, 1955 (Attorney General's Report, 1955, pp. 70, 71), said § 24A provides:

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

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

tions where an employee *is called upon to work on a holiday.* Again, *cf.* Attorney General's Report, 1948, p. 65."

As also therein stated (Attorney General's Report, 1955, pp. 70, 73), the following tests may be applied in order to determine the effect of the statute in any given set of facts:

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

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

"1. Is he an employee other than one of those listed in the concluding clause of this section?

"2. Did he work five or more days during the week in which the holiday fell?

"3. Was the holiday one of those listed in said section?

"4. Did it fall on his 'regular day off'?

"5. Did it fall on a day other than Saturday?"

The four factual instances concerning which you inquire are as follows:

1. A legal holiday falls on a Saturday during the vacation period of an employee whose regular days off are Tuesday and Wednesday.

2. A legal holiday falls on a Saturday during the vacation period of an employee whose regular days off are Sunday and Monday.

3. A legal holiday falls on a Saturday; the employee (not on vacation) has Tuesday and Wednesday as his regular days off, and

(*a*) He is required to work on the holiday.

(*b*) He is not required to work on the holiday.

It is immediately apparent that only in your third hypothetical case (#3a) should we concern ourselves with the first clause of said § 24A, since only in this instance has the employee been required to work on a legal holiday. In construing this clause of the statute, as stated in the opinion of January 13, 1955, "it is completely immaterial . . . whether the holiday . . . falls on a Saturday or on some other day of the week." Accordingly, applying the first of the "tests" suggested by that opinion, it is clear that the employee is entitled to the benefit of § 24A.

In each of the other three hypothetical cases put by you, the employee has *not been required to work on a legal holiday;* hence, in each, it can be only the second clause of the statute which governs the employee's right. That clause *never has any application in a situation involving a Saturday holiday.* Your attention is called to the second of the "tests" suggested by the 1955 opinion; the answer to the fifth question of that "test" would necessarily be in the negative in each of your three assumed factual situations (#1, #2, #3b).

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Department of Public Works has authority to contract by an extra work order for acceleration of the completion date of a highway contract upon its determination that the change is incidental, is in the public interest, the cost is reasonable, and the notice required by G. L. c. 29, § 20A, is filed.

Aug. 1, 1958.

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

Dear Sir: — You have requested my opinion concerning the authority of the Department of Public Works to issue an extra work order accelerating the completion date of a highway contract. You state that several sections of the new Southeast Expressway, which will run from Columbia Circle in South Boston to Route 128 in Hingham, are now completed and open to traffic and that two additional sections will be completed in September of this year providing a completed highway from Freeport Street in Dorchester to a point in Braintree, a distance of about six miles.

You also state that the access and egress roads at the southerly or Braintree end of the aforesaid six miles are now in process of construction under a contract calling for completion in November of 1959, some fourteen months after completion of the six-mile area described above. The contract relating to the access and egress roads is in the amount of $1,635,329 and is currently about twenty-five per cent completed. You state that the contract for completion of such access and egress roads could be completed before the end of the current year, but in such event the contractor's costs would be increased by $126,500 because of overtime payments and premium charges that would be incurred.

Advancing the completion date from November of 1959 to sometime in the latter part of 1958 would constitute an amendment to the contract. Such amendments may be made only if there is no conflict with the bid statute as embodied in G. L. c. 29, § 8A. As set forth in the case of *Morse* v. *Boston*, 253 Mass. 247, 253–254, such amendments must be within reasonable limits, must be made to remedy incidental defects or to improve the work in minor details, and such amendments must also bear a reasonable subsidiary relation to the work originally covered by the contract. Whether the amendment presently contemplated complies with the foregoing tests is a question of fact to be determined by your department.

In addition to the case of *Morse* v. *Boston*, as referred to above, your department should, of course, make a determination that the additional expenditure of public money as involved in such amendment is in the public interest and that the actual cost of such increased work is fair and reasonable. These determinations, again, are questions of fact to be determined by your department.

Subject to the foregoing limitations, it would appear that the department does have authority to contract for the change in the completion date of the contract. To the extent that such change may call for the payment of additional monies by the Commonwealth, there must be compliance with the terms of G. L. c. 29, § 20A, relating to extra work orders.

Very truly yours,

George Fingold, *Attorney General,*

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

Price, while important, is not the only factual determination to be made in connection with the acceleration of the completion date of a highway contract. If, considering price and other factors involved, the necessary affirmative determinations are made, the Department of Public Works has authority to execute an extra work order to accelerate the completion date of the contract.

Aug. 7, 1958.

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

Dear Sir: — You have asked for further information concerning the authority of your department to issue an extra work order accelerating the completion date of a highway contract. In our previous letter to you, it was stated that if your department made certain derterminations of fact, then it would have the authority to issue the extra work order. The factual determinations included determinations that the change was in the public interest, that the cost was reasonable and that the change was an incidental one within the meaning of *Morse* v. *Boston*, 253 Mass. 247.

You state that your department has determined that the change is in the public interest and that the cost is reasonable. In addition, in order to comply with the *Morse* case, you must also answer each of the following questions in the affirmative:

1. Is the change within reasonable limits?
2. Is the change one which is incidental to full execution of the work described in the contract and not a major change?
3. Does the change bear a reasonable subsidiary relation to the work originally covered by the contract?

If the foregoing questions are answered in the affirmative, then it is our opinion that your department has authority to issue the extra work order in question.

In your letter you have made reference to the fact that the dollar value of the change constitutes only 7½ per cent of total contract price, an amount which you state is incidental to such total price. Price is certainly one of the important elements to be considered in reaching your conclusion, but it is only one of many facts to be considered by the department. This office is not in a position to determine these facts for you. We may assist you in connection with matters of law but it is the function of your department to decide the facts.

To repeat, if you can answer the suggested questions in the affirmative, considering price together with the other factors involved, then you have authority to issue the extra work order in question under the terms of G. L. c. 29, § 26A.

It is noted that your letter states that the contract in question is not to be amended, whereas, in our previous letter to you we referred to the proposed transaction as an amendment. By using the word "amendment," we referred to the technical change in the contract as to price and as to completion date which would be brought about by the issuance of the extra work order described by you.

Very truly yours,

George Fingold, *Attorney General,*

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

An extra work order accelerating the completion date of a highway contract can be on a lump sum or unit price basis if the Department of Public Works makes the necessary factual determinations, fixes a definite termination date in the order, and complies with G. L. c. 29, § 20A, and the contract provisions, as to such order. An offer to do work on a lump sum or unit price basis, divided to show various costs, etc., can be required by the department. Only after extra work is actually performed, whether on a lump sum or unit price basis, is payment, or partial payment, to be made.

AUG. 18, 1958.

MR. FREDERICK J. SHEEHAN, *Comptroller, Commission on Administration and Finance.*

DEAR SIR: — You have asked for further information concerning an extra work order which has already been the subject matter of two letters from this office to the Commissioner of Public Works. The extra work order in question would advance the completion date of a highway contract from November of 1959 to the Fall of this year. Your letter states that the Department of Public Works has answered in the affirmative the three questions listed in our letter of August 7, 1958. Based on the foregoing, you ask whether the extra work order may be based on a lump sum payment.

In the first instance, please note that the letters from this office to the Department of Public Works raise questions in addition to the three quoted by you. It is assumed for the purpose of answering your question that the department has also made proper factual determinations concerning these other questions. Your letter also states that the proposed extra work order advances the completion date of the contract in question from November of 1959 to the Fall of the current year (1958). If the completion date is changed from a particular time in November of 1959 to an earlier date, certainly, the earlier date for completion should be specified more particularly than merely by reference to "the Fall of 1958." Such a completion date would be too indefinite.

Subject to the foregoing, it would appear that the issuance of orders for extra work or materials is governed by the provisions of G. L. c. 29, § 20A. The provisions of this chapter as to approval, notice, public inspection, and the like must, of course, be followed. In addition to the statute, the department in issuing an extra work order relating to a particular contract should, of course, comply with the terms in said contract as they may affect the issuance of extra work orders. You have not supplied this office with a copy of the contract or of the extra work order involved. Assuming that the contract is on the standard form employed by the Department of Public Works and is subject to the Standard Specifications for Highways and Bridges issued by that department, then your attention is called to Article 23 of said Standard Specifications relating to extra work which provides in part as follows:

"The Contractor shall do any work not herein otherwise provided for when and as ordered in writing by the Engineer, such written order to contain particular reference to this article.

If the engineer directs, the Contractor shall submit promptly in writing to the Engineer an offer to do the required extra work *on a lump sum or*

unit price basis, as specified by the Engineer. The stated price shall be divided so as to show that it is the sum of: (1) the estimated cost of direct labor, materials, and use of equipment, plus 10 per cent of this total for overhead; (2) plus the estimated cost of Workmen's Compensation and Liability Insurances, Social Security deductions, and Unemployment Compensation benefits; (3) plus 6 per cent of the total of (1) and (2) for profit; (4) plus the estimated proportionate cost of surety bond," (emphasis supplied).

Standard Specifications also include detailed provisions in Articles 77 through 83 as to the method of payment of amounts due under the contract including amounts to be paid under extra work orders. These provisions protect the Commonwealth so that the actual payment of money to a contractor, whether under a lump sum or a unit price agreement, takes place only after the work for which payment is being made has actually been performed. Subject to the foregoing comments, it appears that an extra work order issued by the Department of Public Works may be based on a lump sum method of payment or on a unit price method. The selection of one method as opposed to the other is a question of judgment to be exercised by the department in light of the public interest involved.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

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

A permanent promotion after January 1 and before October 1, 1956, following an earlier temporary promotion, is the employee's "most recent promotion," within St. 1957, c. 753, § 2.

AUG. 27, 1958.

Mr. ANTONIO ENGLAND, *Director, Division of Employment Security.*

DEAR SIR: — You have requested the opinion of this department with reference to the salary status of an employee who was temporarily promoted to a higher salary grade on February 14, 1955, and who was given a permanent promotion to that grade on January 17, 1956. You particularly inquire as to the effect of St. 1957, c. 753, § 2, upon such employee.

Many salary changes and changes in classifications and allocations were made by St. 1956, c. 729 (which was based upon the so-called Barrington Plan), to become effective on October 1, 1956. In order to correct certain inequities in the fixing of salaries under the 1956 act, the Legislature amended that act by adopting St. 1957, c. 753, § 2 of which reads as follows:

"Any employee whose step-in-range in the general salary schedule provided for in this act [*i.e.,* the 1956 act] would be less because of his most recent promotion occurring after January first, nineteen hundred and fifty-six, to his present grade than the step-in-range to which he would have been entitled if his promotion had not occurred until on or after October first, nineteen hundred and fifty-six, shall receive the step-in-range which

he would have received if his promotion had been deferred until October first, nineteen hundred and fifty-six."

The question which you present involves the interpretation of the phrase "his most recent promotion" appearing in the 1957 act. The facts which you present, to which this 1957 act must now be applied, and upon which the present opinion is based, are as follows: The employee in question, on February 14, 1955, was assigned to the position of Head Interviewer in your division, but only on a temporary basis. He was given the title "Temporary Head Interviewer." No civil service examination was taken by the employee; in fact, no civil service examination had ever been held for the position, and the employee had no civil service protection in his temporary position and could have been removed at the will of the appointing officer. After this temporary assignment, and on April 30, 1955, the first civil service examination for the position of Head Interviewer was given, and the first civil service list for such position was established on October 30, 1955. The employee in question was on this list, and on January 17, 1956, he was given a permanent appointment as Head Interviewer.

Applying the 1957 statute to this situation, it is my opinion that this employee's "most recent promotion" occurred on January 17, 1956. Accordingly, the employee is entitled to the benefit of § 2 of the 1957 statute, and he should be placed in the step-in-range to which he would have been entitled if his promotion had occurred on or after October 1, 1956.

I do not agree with the ruling of the Division of Personnel and Standardization that, in a case such as this, the only "promotion" occurs at the time the employee is temporarily assigned to a new position and a salary increase takes place. There are many legal differences between a temporary appointment and a permanent appointment. The rights of the incumbent are greatly increased when he holds a position on a permanent status following a civil service examination. Because of these differences, it is my opinion that the "most recent promotion" of the employee now being considered, so far as the benefits of the 1957 act are concerned, took place on January 17, 1956, when he became Head Interviewer on a permanent basis following a civil service examination. This conclusion is required by the use of the word "promotion" in the 1957 statute.

A question has been raised as to whether the conclusion reached above does not prohibit a temporary promotion received between January 1, 1956, and October 1, 1956, from also being treated as a promotion within the meaning of St. 1957, c. 753, § 2. No such result follows. While a permanent promotion received in the period stated, following an earlier temporary promotion, is to be considered to be the "most recent promotion" within the meaning of the 1957 act, a temporary promotion is also a promotion; and if the temporary promotion is the only promotion received by an employee in the period from January 1, 1956, to October 1, 1956, it is, for that employee, his "most recent promotion" within the meaning of the 1957 act, and such temporary promotion entitles him to the benefits of that act. Rule No. 11 of the Division of Personnel and Standardization (effective October 1, 1956), which states that every person who is changed to a position of higher grade "will be *deemed* to be promoted," manifests an intent that employees only temporarily allocated to positions of higher grade shall be treated in all respects as if they had received permanent promotions. There is nothing in the provisions of St. 1957, c. 753, § 2,

which would forbid such a rule nor prevent it from operating so as to give to persons who received temporary promotions in the period from January 1, 1956, to October 1, 1956, the same benefits that a person receiving a permanent promotion in that period would receive under the provisions of such act. Rule No. 11 operates to provide that a person who receives a temporary promotion shall be deemed to have been promoted and shall be entitled to the salary which he would be entitled to if he then received a permanent promotion, and as applied to a person who received a temporary promotion in the period from January 1, 1956, to October 1, 1956, who is to be "deemed" to have been promoted, it operates to give him the benefits provided for by the provisions of the 1957 act. This result is not forbidden by the 1957 act, nor by the interpretation in the present opinion that the 1957 act also includes, as a promotion, a permanent assignment to a position which had previously been held on a temporary basis.

The particular question you ask, of course, does not involve an interpretation of Rule No. 11 of the Division of Personnel and Standardization. On the single question you present, applying your exact set of facts to the provisions of St. 1957, c. 753, § 2, it is my opinion that the employee in question is entitled to the benefits of the 1957 act.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Death of party convention nominee for Governor before primary — sticker nomination of person whose name appears on ballot as candidate for nomination to another office.

SEPT. 26, 1958.

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

DEAR SIR: — You have requested my opinion concerning the nominee of the Republican party for the office of Governor in the election to be held in November of the current year. You call attention to the fact that the late Attorney General George Fingold was the nominee of the Republican party to be voted for at the September primary seeking the party nomination for the office of Governor. As such nominee Mr. Fingold's name was printed on the primary ballot. His untimely death a few days prior to the primary caused a vacancy in this nomination. The ballots as used at the primary listed Mr. Fingold's name but carried the name of no other candidate for such party nomination.

You state that at the Republican State Primary there were sticker or write-in votes for Charles Gibbons of Stoneham in a sufficient number to qualify him for nomination, and that Mr. Gibbons received a plurality of the votes cast. There were also a sufficient number of sticker or write-in votes for John A. Volpe of Winchester, but Mr. Volpe did not receive a plurality of the votes cast.

You state further that Mr. Gibbons' name appeared on the ballot as a candidate for the Republican nomination for the office of State Senator from the Seventh Middlesex District, Mr. Gibbons having previously filed

nomination papers for this position and having accepted said nomination, all as provided in G. L. c. 53.

Based on the foregoing facts you have asked, first, whether Mr. Gibbons was a candidate for the Republican nomination for the office of Governor at the same time that he was a candidate for the State Senate within the meaning of G. L. c. 53, § 46, which contains a provision therein that "no person shall be a candidate for nomination for more than one office . . ."

The precise question presented by you is whether Mr. Gibbons was a "candidate for nomination for more than one office" within the meaning of this provision.

Within certain sections of G. L. c. 53 the words "candidate for nomination" are used in connection with persons who are candidates for nomination by nomination papers as those words are used within the provisions of § 44; in other provisions they are used to refer to candidates for nomination who are seeking such nomination by stickers or write-in votes (as in § 40).

In the present case it appears that Mr. Gibbons cannot be said to be a candidate by nomination papers or their equivalent within the provisions of c. 53, § 49, in view of the fact that the Republican State Committee failed to comply with the provisions of G. L. c. 53, § 15, relating to the filing of a nomination certificate with the Secretary of State and the written acceptance of such nomination by the candidate nominated. Said § 15 provides as follows:

"When a nomination is made to fill a vacancy caused by the death, withdrawal or ineligibility of a candidate, the certificate of nomination shall, in addition to the other facts required, state the name of the original nominee, the fact of his death, withdrawal or ineligibility, and the proceedings had for filling the vacancy; and the presiding officer and secretary of the convention or caucus, or the chairman and secretary of an authorized committee, shall sign and make oath to the truth of the certificate, and it shall be accompanied by the written acceptance of the candidate nominated. Such certificate shall be filed with the state secretary in the case of state elections and with the city or town clerk in city or town elections."

At most, it may be contended that Mr. Gibbons was a "candidate for nomination" by way of stickers within the meaning of G. L. c. 53, § 40.

The question then arises as to whether the prohibition contained in G. L. c. 53, § 46, against being a candidate for nomination for more than one office is applicable to Mr. Gibbons as a sticker or write-in nominee. In view of the unusual circumstances which surround the present case, it is my belief that the prohibition does not so apply. An unduly legalistic interpretation of the words "candidate for nomination" should not be here applied. A liberal interpretation of the words should be given in order to comply with the intent of the Legislature, as well as the will of the voters as expressed at the recent primary election. Any other interpretation of the limitation in question would have the effect of negating the express intent of the voters as shown at the primary election and would result in a perversion of the intent of the election laws. The right of the electorate to select a candidate for Governor under these conditions by sticker or write-in vote should not be easily nullified.

In general, the provisions of c. 53 did not envision the precise question which is here presented for determination. For this reason, the general

intent of the statute in light of the particular facts is best served by applying a broad interpretation to the words "candidate for nomination." It is noted that the provision providing that a person shall be a candidate for nomination for only one office is included in a section which is otherwise completely devoted to the regulation of nomination papers. The section governs the time of filing such papers, the place of filing, the number of signatures, and the like. It relates to nomination by nomination papers as provided in § 44.

This is an unusual case. George Fingold, the only duly qualified candidate for Governor, died on the eve of the primary election. The opportunity and right of the voters in the Republican primary were on the verge of being eliminated. To deprive the voters of one of the major political parties of their right to express their choice for a gubernatorial nominee is in violation of deep-rooted constitutional principles. No provision of the statutes should be construed to accomplish such a result. It is clear beyond peradventure that the General Court never intended such a result.

Under the circumstances of the present case, it is my opinion that Mr. Gibbons was duly nominated at the recent primaries as the Republican nominee for the office of Governor and that his name should be printed on the ballots to be used at the November election. The limitation of § 46 is not applicable to the case before me.

In reaching this conclusion I have given due weight to the fact that the only name printed on the ballot was that of George Fingold and that a vote for Mr. Fingold, who had died prior to the primary, would not be a valid vote (*Madden* v. *Board of Election Commissioners*, 251 Mass. 95 [1925]). In order for the voters to express their preference a sticker or write-in vote was necessary. The intent as there expressed should be followed.

In this connection you have asked whether perhaps Mr. Volpe may have been nominated by virtue of the fact that he had sufficient votes to obtain nomination, if the votes for Mr. Gibbons were invalid. In view of the conclusion I have reached, it is unnecessary to answer this question. However, the inescapable conclusion from the language in the *Madden* case, cited above, is that Mr. Volpe could not be considered the nominee even if the votes for Mr. Gibbons were invalid. To rule out the sticker nomination of Mr. Gibbons would therefore completely thwart the expression of the voters at the recent primaries.

I also have in mind the fact that the Superior Court for the County of Suffolk, prior to the primary election, while not ruling on the merits, declined after hearing to issue a preliminary injunction restraining Mr. Gibbons from being a so-called sticker candidate. All of the foregoing factors lead to the conclusion which I have expressed above. In view of what has previously been said, it becomes unnecessary to answer your additional questions.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

The provision added to G. L. c. 262, § 53, by St. 1958, c. 422, allowing arresting officers witness fees for first attendance at court, is not applicable to State police officers, in view of provisions of G. L. c. 262, § 53B, pertaining to State police officers and provision therein that no witness fee be paid arresting officer for first day of attendance.

Oct. 2, 1958.

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

Dear Sir: — You have requested my opinion relative to the application of c. 422 of the Acts of 1958. In it you pose the following question:

"Does G. L. c. 262, § 53, as most recently amended by St. 1958, c. 422, apply to State Police officers of the Department of Public Safety?"

I answer your question in the negative. The subject of witness fees and travel allowances has been dealt with by the General Court, in G. L. c. 262, § 53B. This section was amended by the provisions of St. 1957, c. 605, which dealt in some detail with the subject matter of witness fees and travel allowance for State Police officers of the Department of Public Safety. It provides specifically that "Any officer of the detective branch or of the uniformed branch of the division of state police in the department of public safety, appointed under section six or nine A of chapter twenty-two, on duty at night, or on vacation or furlough, or on a day off, who attends as a witness in a civil or criminal case pending in a district court or in the superior court shall be allowed a witness fee in the amount of three dollars for each day's attendance *except his first attendance as arresting officer* . . ." The title of c. 605 is also significant. It describes the chapter as "An Act providing travel allowance for State Police officers attending court as witnesses in criminal cases."

On the other hand, c. 422, inserting a new section, 53, in c. 262 of the General Laws is entitled "An Act relative to the payment of witness fees to *certain police officers* in criminal cases" and provides for witness fees for "any police officer, or employee of the registry of motor vehicles having police powers . . ." under the conditions therein stated, and particularly provides for a witness fee" in the amount of three dollars for each day's attendance, *including his first attendance as arresting officer in the case* . . ." This provision is exactly opposite to the provisions appearing in c. 605 relating to witness fees and travel allowance for State Police officers which, as I have said, provides for a witness fee in the amount of three dollars for each day's attendance "except his first attendance as arresting officer."

It is quite clear to me that the General Court intended the subject of witness fees and travel allowances for State Police officers to be covered by § 53B of c. 262. Section 53, in the form included by c. 422 of the Acts of 1958, in my opinion, does not apply to State Police officers.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General,*

By Fred W. Fisher,
Assistant Attorney General.

A veteran on strike is not to be considered to have available to him amounts held for his benefit in an employee's savings and retirement fund which can be paid to him only on certain conditions.

Oct. 15, 1958.

Mr. Charles N. Collatos, *Commissioner of Veterans' Services.*

Dear Sir: — You have requested my opinion as to whether a veteran, who is lawfully on strike and who is a member of a savings and retirement fund at his place of employment, is entitled to veterans' benefits under c. 115 of the General Laws.

As a general proposition, any veteran who is participating in a lawful strike is entitled to receive veterans' benefits provided he satisfies the requirements of the statute. The question in this particular case is whether such a veteran is entitled to such benefits where he is a participant in a savings and retirement fund, inasmuch as § 5 of c. 115, provides in part: "such benefits shall not be paid to or for any person able to support himself, or who is in receipt of income from any source sufficient for his support."

As I understand from your letter, the veteran in question has approximately $500 in savings in the fund, but it is not clear what, if any, credits he has resulting from employer contributions. You state that the veterans' agent has determined that these savings are assets, available to the applicant on request, and that they are sufficient for his present needs and that he is presently able to support himself.

The agreement creating the Boston Gear Works Division Savings and Retirement Fund, dated December 29, 1939, with all appurtenant amendments thereto, provides that the trustee in its discretion and with the approval of the advisory committee may make loans to an employee not exceeding his contribution to the fund, and that the advisory committee "may make such rules and conditions regarding the making of such loans, interest to be charged thereon, and participation in the fund during the existence of loans . . ." (Article 11). The agreement further provides that an employee who has attained his sixty-fifth birthday and who has completed ten or more years of continuous service may be permitted a partial withdrawal by the advisory committee (Article 12). Article 19 of the agreement provides that an employee who ceases to make contributions to the fund or who does not comply with all the terms of the agreement or the rules and regulations promulgated by the trustee and the advisory committee shall cease being a member of said fund and shall be treated as having resigned from the company.

In view of the above, it appears that the veteran in question has but two courses of action, either to apply to the trustee for a loan, or to inform the trustee that he intends to make no further contributions. Being under sixty-five, according to the provisions contained in the aforesaid agreement, he cannot even apply for a partial withdrawal. Failure by him to contribute to the fund while on strike, in my opinion, does not end his participation therein. Despite the provisions of Article 19, which provide for cessation of membership when an employee ceases to contribute, as a general proposition, failure to contribute ordinarily means a voluntary desire on the part of the employee not to contribute. It does not mean that where an employee is unable to contribute due to his being out ill or due to his being on strike, he ceases to be a member. Any loan, of course, is

contingent upon the approval of the trustee and the advisory committee and hence the employee does not have an absolute right to it.

Therefore, I am of the opinion that the said veteran is not able to support himself nor has he available to him a source of income sufficient for his support. Ability to support does not require the incurring of debts in order to effect such support, and, legally, money received from borrowing has never been considered to constitute income. It is true that the said veteran's account in the fund is an asset. But it is not an asset in the sense that a savings account is an asset, nor is it available to him on request. For him to realize the value of his account, he must either resign his employment, or must violate the terms of the agreement, or manifest to the trustee his intent no longer to be a participant in the fund. In any of these situations he would jeopardize various advantages which would otherwise accrue to him.

Furthermore, this plan is predicated upon the proposition that a certain percentage of employees will participate. Therefore, it is quite possible that forcing a number of employees to withdraw from the fund in order to maintain themselves while on strike may very well contribute to the destruction of the entire savings and retirement plan.

Thus, I conclude that the veteran is entitled to receive veterans' benefits pursuant to the provisions of c. 115 of the General Laws.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General,*

By L. JOHNSON CALLAS,
Assistant Attorney General.

The Secretary of the Commonwealth is to determine whether provisions as to public policy questions have been complied with.

OCT. 17, 1958.

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

DEAR SIR: — In your recent letter you state that it has been alleged that the two petitions numbered 061 and 187 (relating to an application for submission to voters of questions of public policy in the 9th Suffolk Representative District) are irregular in form and that they have been altered.

You ask for an opinion as to whether or not the so-called "sweepstake public policy" question should be printed on the ballot for Ward 9 in Boston in view of the facts "herein" presented.

I have examined the certified photostatic copies of said petitions numbered 061 and 187, a letter dated October 16, 1958, from David Lasker, Chairman of the Boston Board of Election Commissioners, and a letter dated October 9, 1958, from Attorney Francis E. Kelly.

The pertinent provisions of law relating to "questions to be submitted to the voters" are to be found in G. L. c. 53, §§ 18–22, inclusive.

It is provided in § 19 that "Upon the fulfilment of the requirements of this and the two following sections the state secretary shall place such

question on the official ballot to be used in that . . . representative district at the next state election." Section 20 reads: "The provisions of law relative to the signing of nomination papers of candidates for state office, and to the indentification and certification of names thereon and submission to the registrars therefor, shall apply, so far as apt, to applications submitted under section nineteen." (See G. L. c. 53, §§ 6 and 7.) I find no provisions of law relating to objections (to State Ballot Law Commission) in matters involving applications for submission of questions of public policy to the voters. I do find, however, that the Legislature has on several occasions made provision for the filing of objections to nomination papers and certificates of nomination (G. L. c. 53, §§ 11, 12 and 27) (see also *Madden* v. *Secretary of the Commonwealth*, 337 Mass. 758) and two initiative and referendum petitions (G. L. c. 53, § 22A) where language similar to said § 20 also appears (see *Compton* v. *State Ballot Law Commission*, 311 Mass. 643) and in connection with the filing of certain other petitions requiring signatures of voters and certification by the local election registrars. It is manifest that the Legislature intentionally made no provision for objections to the State Ballot Law Commission in matters involving applications for submission of questions of public policy to the voters. Under G. L. c. 53, § 19, it is the duty of the State Secretary to place such question on the official ballot to be used in that representative district at the next State election (only) upon fulfilment of the requirements of said § 19 and the two following sections. I am therefore of the opinion that it is the duty of the State Secretary to decide whether or not the requirements of G. L. c. 53, §§ 19, 20 and 21, have been fulfilled and to place such question on the official ballot only if he makes such determination.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By SAMUEL W. GAFFER,
Assistant Attorney General.

The provision of c. 29 of the Resolves of 1946 providing for doing certain work, subject to appropriation, and that municipalities provide 50 per cent of local contribution for certain work to be done by the Federal Government therein, was superseded by provisions of 1958 Capital Outlay Bill that municipalities pay 25 per cent of amount appropriated thereby for the work.

Nov. 7, 1958.

MR. RODOLPHE G. BESSETTE, *Director, Division of Waterways, Department of Public Works.*

DEAR SIR: — You have requested my opinion relative to the Hyannis-Duxbury Harbors Project. In c. 29 of the Resolves of 1946 it is provided:

"That, subject to the conditions hereinafter imposed, the following projects for the improvement of harbors and waterways in the commonwealth, already adopted by the Congress of the United States, when federal funds are available therefor, are hereby authorized: — Manchester Harbor,

Salem Harbor, Marblehead Harbor, Duxbury Harbor, Hyannis Harbor, Cape Cod Canal (Onset Bay), Nantucket Harbor, Westport River. Subject to appropriation, the department of public works is hereby authorized to pay to the secretary of war of the United States on his demand the contribution required from local interests, as specified by the Congress with respect to each project, and to give to said secretary of war the assurance required for such project; provided, that in each instance the municipality in which the project lies shall have deposited with the state treasurer one half of such contribution . . ."

You advise me that St. 1958, c. 650, § 2, Items 8259–94 and 8259–95, contain appropriations for the projects you refer to providing that the local municipalities provide twenty-five per cent of the required local interest contributions.

Clearly, therefore, the appropriation statutes providing funds for these projects, upon the provision that the local municipalities provide twenty-five per cent of the required local interest contributions, are inconsistent with the original resolve of 1946 authorizing these projects, which specifically requires one half of the local interest contributions.

It should be further borne in mind that the provisions referred to in c. 650 described the contributions for these projects as the municipalities' shares. You assure us that there is nothing in the terms of the Federal legislation relative to this subject matter which interferes in any way with the change in the amount of the municipalities' contributions.

Under the ordinary rules of statutory construction, both c. 29 and c. 650 should be read together so as to produce a harmonious whole. Chapter 650, as far as it is inconsistent with c. 29, repeals or amends to that extent, and no further, the earlier legislation.

You are correct in understanding that it is my opinion that the twenty-five per cent provision in c. 650 controls c. 29 as far as it is consistent therewith. Again, I am assuming what you have told me, that this amendment in no way affects nor violates the Federal legislation relative to this subject matter.

Very truly yours,

EDWARD J. MCCORMACK, Jr., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The prohibition in G. L. c. 266, § 89, of the use of the word "college," is not applicable to use of "college" by a "Barber College," as referred to in G. L. c. 112, § 87P.

Nov. 13, 1958.

Hon. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR SIR: — Your recent letter poses the following question, in substance:

Whether the use of the name "Dalbec Barber College" is a violation of the provisions of G. L. c. 266, § 89.

In my opinion, the answer must be in the negative. True enough, § 89 provides that:

"Any individual, school, association, corporation or institution of learning, not having lawful authority to confer degrees, using the designation of 'university' or 'college' shall be punished by a fine of one thousand dollars; but this shall not apply to any educational institution whose name on July ninth, nineteen hundred and nineteen, included the word 'university' or 'college.'"

However, G. L. c. 112, § 87P, provides:

"Any school or college where tuition or fees are charged for teaching the occupation of barbering shall be considered a barber school or barber college under sections eighty-seven F to eighty-seven R, inclusive, and all said schools or colleges shall keep prominently displayed at the entrance a sign 'Barber School' or 'Barber College,' as the case may be. Any person desiring to operate or conduct a barber school or barber college within this commonwealth shall first secure from the board a permit to do so."

Section 87P further provides: "After receipt of an application for a permit to operate a barber school or barber college, the board [of registration of barbers] shall make investigation as to the reliability of the applicant or applicants, the qualifications of the instructors of the school or college and the equipment, appliances and sanitary conditions thereof and if these conditions are found to be satisfactory, a permit to operate or conduct a barber school or barber college shall be granted."

Section 87P further provides: "All . . . [barber] schools or [barber] colleges shall keep prominently displayed at the entrance a sign 'Barber School' or 'Barber College,' as the case may be."

The further requirements of § 87P provide detailed control by the Board of Registration of Barbers of the barber schools and barber colleges. As your letter furnishes me with no evidence that the concern you refer to has lawful authority to confer degrees, I assume to the contrary. At first glance it would seem as though there is an inconsistency between § 89 and § 87P. Section 89 apparently makes it a criminal offense to use the designation "college" unless the concern using the name has "lawful authority to confer degrees . . . ." On the other hand, § 87P clearly confers upon *barber schools or barber colleges* the right to operate by express legislative permission under the name "Barber School" or "Barber College" under the restrictions, limitations and conditions specifically referred to in § 87P, none of which requires the authority to confer degrees as a condition.

The cardinal principle of statutory construction in matters of this kind is to construe the statutes, so far as possible, as one harmonious whole.

It is clear, it seems to me, that § 89 covers institutions not specifically covered by § 87P. It is also clear to me that the institutions covered by § 87P have the right to operate within the limitations of that section independently of § 89. Section 87P explicitly requires the institutions covered therein to display a sign "Barber School" or "Barber College" presumably for the benefit of the general public. It would not be sensible to suggest that institutions covered by § 87P are expressly authorized to do business under the name of "Barber College" subject to the provisions of that section, and at the same time to say that such a business or institution should be punished by a fine of one thousand dollars for the use of the word

"College" when § 87P makes no provision for the issuance of degrees to such a business and does authorize their operation without degrees.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The portion of profit paid by concessionaires of the student commuters' cafeteria at Westfield State Teachers' College must be paid into the Treasury of the Commonwealth.

NOV. 20, 1958.

MR. PAUL W. KNIGHT, *Business Agent, Department of Education.*

DEAR SIR: — You have requested my opinion relative to a contractual agreement concerning the operation of Student Commuters' Cafeteria at State Teachers' College, Westfield, by a private concessionaire to remit to the college certain percentages of the operating profits.

For the purposes of your letter I am assuming that your department, under the power vested in it by virtue of G. L. c. 73, § 1, giving it "general management of the state teachers colleges," has the power to enter into the arrangement you refer to.

The General Court has made detailed provisions for school luncheon programs, see G. L. c. 71, § 72, and St. 1948, c. 548, as amended. These provisions do not, however, apply to state teachers' colleges. Therefore, the disposition of any proceeds from the operation of a cafeteria under the arrangement you refer to is controlled by G. L. c. 29, § 2, which provides that "All revenue payable to the commonwealth shall be paid into the general fund. . . ."; see also Article LXIII of the Amendments of the Constitution of Massachusetts which reads as follows:

"All money received on account of the commonwealth from any source whatsoever shall be paid into the treasury thereof."

The profits, therefore, from such an undertaking would be funds, in my opinion, belonging to the Commonwealth and should be turned over to the Treasurer. The profits are not available to the college for expenditure unless there is an appropriation for this purpose.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Limitation of land use along Rt. 128 in Danvers, Lynnfield and Peabody under St. 1950, c. 491, to that then permitted under certain local zoning laws, cannot be changed by local amendments of zoning laws; only by State.

Nov. 21, 1958.

Hon. ANTHONY N. DINATALE, *Commissioner of Public Works.*

DEAR SIR: — In your recent letter you state that your department laid out and constructed during the 1940's the Northern Circumferential Highway (Route 128) in Danvers, Lynnfield and Peabody without limitation of access. You refer to St. 1950, c. 491, restricting the use of lands abutting the Yankee Division Highway and further state that in the years 1954 and 1955 the department limited the access on Route 128 in Danvers, and no access can now be allowed to any property abutting the State Highway location.

In the light of these facts you state that the town of Danvers now desires to rezone the use of the 200-foot strip and wishes to know whether enabling legislation is necessary to permit such rezoning. In my opinion it is.

You will notice further that the area referred to is subjected by c. 491, among other things, to such structures and uses "as are permitted under the zoning ordinances and by-laws of the city of Peabody and the towns of Lynnfield and Danvers *in effect immediately prior to the effective date of this act. . . .*"

Your letter does not advise us as to the nature and extent of the limitations of the access orders which you refer to in the third paragraph of your letter, nor do you advise us as to the applicable zoning provisions of the town of Danvers at the effective date of c. 491.

Naturally, lawful orders of your department superimpose themselves upon existing local by-laws insofar as they are inconsistent with them. So far as reasonably possible, complete effect should be given to both. From the information contained in your letter I am unable to say that your limitation of access orders have repealed c. 491. That act subjected the land therein referred to to the then existing by-laws of Danvers.

Further legislation, in my opinion, is necessary to authorize changes in those by-laws.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Emergency employees are not entitled to full pay under sick leave rules of the Division of Personnel and Standardization.

Nov. 24, 1958.

Mr. JOHN D. COUGHLIN, *Director, Division of Youth Service.*

DEAR SIR: — Your recent letter poses the following question:

"Is a person employed by the Commonwealth on an emergency appointment entitled to receive for the period in which she was unable to work

due to an accident covered by Industrial Accident Insurance the difference in pay between her regular compensation and the amount of the Industrial Accident award?"

Under the circumstances set forth in your letter, supplemented by the information given by you to me over the telephone, in my opinion the answer is "No."

As you doubtless are aware, under the rules and regulations governing vacation leave, sick leave, travel, overtime, military leave, court leave, other leave, charges to State personnel and accident prevention, emergency employees are apparently excluded from Rule LV-1. They are also excluded from sick leave Rules and Regulations LS-1. Moreover, the word "Person" is defined in G-7 as follows:

"Person": "Shall mean any individual who is not included in the definition of 'Officer' in Rule G-6, and an employee of the Commonwealth other than an emergency employee."

I have found no rule nor regulation nor statutory provision authorizing make-up payments on top of compensation benefits to emergency employees. The only provision which I have found is the provision in the last paragraph of sick leave Rules and Regulations LS-15 based apparently upon the provisions of G. L. c. 7, § 28. You advise me that the lady you refer to does not come within the provisions just above referred to as her accident did not result "from acts of violence" of any patient or prisoner in her custody.

Very truly yours,

EDWARD J. MCCORMACK, Jr., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

A sentence for escape cannot be ordered to commence on date of sentence, by statute it must begin on expiration of sentence being served at the time of escape.

Nov. 25, 1958.

Hon. ARTHUR T. LYMAN, *Commissioner of Correction.*

DEAR SIR: — In your recent letter you requested an opinion relative to the sentences of two inmates of the Massachusetts Correctional Institution at Framingham.

I note from your letter that on July 2, 1958, the inmates you refer to escaped from said institution while serving sentences there, and that on September 4, 1958, they were sentenced in the Middlesex Superior Court on a charge of robbery and a charge of escape, these sentences to be served concurrently.

Your letter does not state what sentences they were serving at the time of their escape. However, I further note from the copy of the letter of the assistant clerk of the court to your Mr. Dwyer that the judge intended that the sentences imposed by him should begin on the date of imposition

of the sentences. You now ask our advice "as to when the sentence for escape from the Massachusetts Correctional Institution should begin."

In my opinion, the General Court has answered your question in the last sentence of G. L. c. 268, § 16A, where it is stated that:

"Such sentences *shall* begin upon the expiration of the sentence which said prisoner was serving at the time of escape or attempted escape."

In my opinion, the judge's intention cannot amend nor rescind the mandate of the General Court. The Legislature has determined, in its wisdom, in cases such as these the sentences for escape begin at the expiration of the sentence being served at the time of escape.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

A review ordered by the Governor under G. L. c. 94A, § 12, of a minimum retail price order of the Milk Control Commission requires the same notice, hearing and publication, as on the original order; the review is not a mere extension of the original record, but is a separate proceeding, in which the original record may be considered.

Nov. 28, 1958.

Mr. PARK CARPENTER, *Secretary, Milk Control Commission.*

DEAR SIR: — In your recent letter you state that the Milk Control Commission has adopted General Order No. G17–505 relating to the fixing of minimum milk prices and that said order was adopted after notice, hearing and consideration of evidence received. You further state that the Governor has ordered the commission to review its action in accordance with the provisions of G. L. c. 94A, § 12. You have requested an opinion concerning the procedure to be followed in connection with said review.

You ask first whether a notice of review should be published in the manner set forth in G. L. c. 94A, §§ 17(*a*) and 19(*a*).

The provisions of G. L. c. 94A, § 12, relating to the fixing of wholesale and retail minimum milk prices following the declaration of a state of emergency provide for the fixing of such prices "after public hearing held after due notice." The section also contains the following language:

"The commission may in like manner at any time alter, revise, amend or rescind the prices so fixed. Any such action taken by the commission shall be reviewed by the commission at least once in each year thereafter, and, if not thus reviewed, the orders issued shall terminate upon the expiration of the period of one year after the date of the issuance of such orders, and any action may likewise at any time be thus reviewed on the order of the governor, or on the request of the milk regulation board. Due notice shall be given of any such review. Any price fixed pursuant to this section, and any alteration, revision or amendment thereof shall be fair, just and reasonable and shall be published as provided in section nineteen."

The foregoing provisions thus require notice and hearing. The provisions relating to the time of giving notice of a hearing in connection with the adoption of a rule or regulation are set forth in G. L. c. 94A, § 17. It is my opinion, therefore, that you should follow the provisions of said §17(*a*) in carrying out the review ordered by the Governor.

It is also noted that the last sentence of § 12 quoted above requires specifically that there be publication in accordance with § 19. My answer to your first question, therefore, is "Yes."

You ask, secondly, if a review should be had by general hearing as provided in § 16(*b*) of said chapter. Said § 16(*b*) provides as follows:

"Before adopting, altering or rescinding any general order, rule or regulation, the commission shall hold a general hearing upon the subject matter thereof, and afford all persons interested an opportunity to offer evidence pertinent thereto."

In accordance with said section, my answer to your question is "Yes."

You ask, finally, whether the record of such review will be an integral extension of the original record or that of a separate proceeding. The provisions for review quoted above indicate that the commission shall review any action taken under § 12 at least once in each year and if not thus reviewed, the orders so issued shall terminate upon the expiration of one year. It is apparent from the foregoing that a review is not merely a re-examination of the matters presented at the original hearing but is a proceeding designed to re-examine the entire question as to whether the general order should continue, should be revised, or should be allowed to expire. It also appears from the above-quoted language that the Governor may order such a review at any time, and the review so ordered by the Governor would not be any less restricted in scope than the review which should be made by the commission at least once in each year.

In view of the foregoing, it would appear that a review is not merely an extension of the original record. It is a separate proceeding in which, of course, the original record may be considered.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

Option (d) under the Contribution Retirement Law, is not applicable to State police.

DEC. 3, 1958.

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

DEAR SIR: — You have requested an opinion relative to the application of St. 1958, c. 614, to members of the State Police and pose the following question:

"Do the provisions of St. 1958, c. 614, apply to the members of the State Police (Uniformed Branch) in the Department of Public Safety?"

The retirement allowances of members of the State Police in the Department of Public Safety, in the contributory retirement system, are controlled largely, if not wholly, by G. L. c. 32, § 26. They are specially

classified under the provisions of § 3(2) (*f*) in a separate group by themselves. They are not referred to in § 5 of c. 32, dealing with superannuation retirement, nor in § 6 of that chapter, dealing with ordinary disability retirement, but are included in the provisions of § 7, dealing with accidental disability retirement insofar as they are not covered by subdivision (2) of § 26.

An examination of the provisions of c. 614 indicates that that chapter endeavors to broaden the benefits of option (*d*) of subdivision (2) of § 12 of c. 32 of the General Laws. Section 1 of c. 614, in part, reads as follows:

"Option (*d*) of subdivision (2) of section 12 of chapter 32 of the General Laws, as most recently amended by chapter 494 of the acts of 1955, is hereby further amended by adding at the end the following paragraph: — . . ."

The second paragraph of § 2 of c. 614 provides that:

"A surviving eligible widow may elect to receive allowances under this section or to receive the survivor benefits as provided under option (*d*) of subdivision (2) of section twelve."

Section 12 of c. 32, which creates the option (*d*) referred to in c. 614, reads in part as follows:

"Any member who is retired for superannuation under the provisions of section five or who applies for a retirement allowance under the provisions of section ten, may elect to have his allowance paid in accordance with the terms of any one of the three options specified in subdivision (2) of this section. *Any member who is retired for disability under the provisions of sections six or seven or who is retired under the provisions of section twenty-six, may elect to have his allowance paid in accordance with the terms of either option (a) or option (b) of subdivision (2) of this section. . . .* "

It is therefore readily seen that, by inadvertence or otherwise, the benefits of options (*c*) and (*d*) are not, for some reason, made applicable to the members of the State Police who come within the purview of § 26. I am constrained, therefore, to answer your question in the negative.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

An elected official, who is a veteran, remaining in service after attaining the maximum age for retirement, may retire thereafter as a veteran despite his election of option (c) applicable to the contributory retirement system.

DEC. 10, 1958.

Hon. CHARLES FRANCIS MAHONEY, *Commissioner of Administration.*

DEAR SIR: — You have requested an opinion relative to the eligibility of a certain elected official, who is a veteran, to retire under the provisions of G. L. c. 32, §§ 56 to 60, inclusive.

I note that the term of office of the applicant, which is held by election by popular vote, terminates in January, 1959, and that he attained the maximum age for his group in November, 1957. I note further that under date of November 15, 1957, he elected to have his retirement allowance paid under Option (*c*), as contained in G. L. c. 32, § 12, subdivision (2). Under the same date, by letter, he notified the State Board of Retirement that he was electing to continue to serve in his office after attaining the maximum age until the expiration of the term for which he was elected, as provided by § 5(1) (*d*) of c. 32. In view of these facts which you have recited you ask my opinion "is he at this time eligible to apply for retirement as a veteran under the provisions of §§ 56 to 60, inclusive, of said c. 32?" In my opinion he is.

In the first place, humane legislation of this kind is to be construed broadly in order to encourage high-minded and capable people to enter into the public service. Moreover, § 25 makes it clear that the General Court is especially solicitous of veterans who have served their country in time of need. The applicant in question is a duly elected public official by popular vote and is accorded unusual rights under the provisions of G. L. c. 32, §§ 1 to 28, inclusive. As a holder of office by popular election, he is accorded the right to continue in his office after attaining the maximum age for his group until the expiration of the term for which he was elected by the express provisions of G. L. c. 32, § 5 (1) (*d*). As a veteran, the General Court has accorded him special privileges, denied to others, to elect when he retires as to whether he wishes to attain his contributions back and be retired under the noncontributory provisions of G. L. c. 32, §§ 56 to 60A, inclusive, or to receive his superannuation retirement allowance under the provisions of G. L. c. 32, § 5. The foregoing must be borne in mind in determining the applicant's rights.

The right of election of a veteran is clearly set forth in the broadest terms in G. L. c. 32, § 25 (3) (*a*). Therein it is provided that:

"Any member in service classified as a veteran referred to in sections fifty-six to sixty A inclusive . . . shall have *full and complete rights* either under the system of which he is a member or under the provisions of sections fifty-six to sixty A inclusive, *whether or not he may have signed a waiver of his rights under such sections . . . anything to the contrary in the provisions of this chapter or in similar provisions of earlier laws notwithstanding. Such rights shall be in the alternative and shall be exercised only at the time of his retirement. . . .* "

Moreover, it is provided that if a member is retired under the provisions of §§ 56 to 60A he shall, upon his written application on a prescribed form filed with the board in which he waives all his rights under §§ 1 to 28 inclusive, be paid the amount of the accumulated total deductions credited to his account in the annuity savings fund of the system on the date of his retirement. This same section further provides that "*nothing contained in this subdivision shall permit the withdrawal of any such veteran from membership in such system except upon termination of his service.*"

Since the rights given under § 25 (3) (*a*) are to a veteran "member in service," it may be well to turn to the definition of that phrase which is found in G. L. c. 32, § 3 (1) (*a*) (i), which reads in part as follows:

"(i) *Member in Service.* — Any member who is regularly employed in the performance of his duties . . . Any member in service shall continue as

such during any period of authorized leave of absence with pay or during any period of authorized leave of absence without pay if such leave is due to his mental or physical incapacity for duty. *In any event the status of a member in service shall continue as such until his death or until his prior separation from the service becomes effective by reason of his retirement, resignation, failure of re-election or reappointment, removal or discharge from his office or position, or by reason of an authorized leave of absence without pay other than as provided for in this clause. . . . "*

It should be noted carefully, in this connection, that the status of a member in service continues until his death or his prior *separation from the service.* Therefore, it naturally follows that the status of a member in service does not terminate in this case until the applicant is separated from the service in which he is engaged. Of course, this means the end of his tenure of office, which does not end until January, 1959. The provisions of § 3 (1) (*c*) are another indication of the solicitude of the General Court to make it clear beyond peradventure that members of the contributory retirement systems are not to be deprived of their full and complete rights by technicalities.

Conceivably it might be argued that the applicant's indication under date of November 15, 1957, to have his retirement allowance paid under Option (*c*) as contained in § 12 and electing to continue to serve in his office until the expiration of his term, in some way barred him from exercising the express election given him under the provisions of § 25. I am convinced that this is not so for the reasons already stated and which I shall add to. Under § 25 (3) a veteran member in service as aforesaid stated is accorded complete protection in his right of election, despite any prior written waiver. His rights are in the alternative and shall be exercised only at the time of his retirement. Since he is a "member in service" as defined by § 3 (1) (*a*) (i), and since a "member in service" continues as such "until his prior separation from the service becomes effective by reason of his . . . failure of re-election," and since his "separation from the service" does not take place until January, 1959, I am persuaded that the applicant is well within the provisions which I have referred to. Moreover, it is to be noted that an election of the provisions of Option (*c*) contained in § 12, if made, is not final. As stated in § 12 (1): ". . . Election of an option shall be made by such member in writing on a prescribed form filed with the board, and *once made may be changed from time to time by making a new election in a similar manner; . . . "* Section 12 (1) envisions the fact that there may be an election or several elections, or a revocation of all, when it states in the last sentence: "If no election of an option is made *or if none is in effect as provided for in this section,* the retirement allowance of such member shall be paid in accordance with the terms of option (*b*) of subdivision (2) of this section."

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

The provision of St. 1958, c. 617, that any teacher who remained in service after reaching retirement age should receive the allowance which would have been granted if St. 1957, c. 661 (eff. 8/13/57), had been in effect at time of retirement, entitles a teacher who attained maximum age after 9/1/56, and remained in service, to the allowance so computed from 7/1/57.

DEC. 15, 1958.

Hon. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR SIR: — You have requested an opinion relative to the retirement allowance rights of a school teacher under the provisions of St. 1958, c. 617, and pose the following questions:

"(1) Does chapter 617 apply only to teachers who attained the age of 70 AFTER January 1, 1957, and remained in service to the end of the school year June 30, 1957, or does it apply to teachers who attained the age of 70 after September 1, 1956, and remained in service to the end of the school year June 30, 1957?

"(2) In the case of persons entitled to the increased retirement allowance, shall the increased rate be effective from July 1, 1957, or shall payment at the increased rate be made only from the effective date of St. 1958, c. 617, — January 1, 1959?"

I assume from your letter that the teacher you refer to attained the age of 70 after September 1, 1956, and prior to May 1, 1957, and remained in service to the end of the school year under the provisions of G. L. c. 32, § 5 (1) (*f*), inserted by St. 1954, c. 348.

Chapter 348 is entitled "An Act permitting teachers under certain conditions to remain in service until the end of the school year in which the maximum age is attained," and has an emergency preamble reciting, in part, that the act "is to make certain provisions of law relative to retirement of teachers become effective for the present school year . . . " The new paragraph (*f*) provides, in part:

"Notwithstanding any other provision in paragraph (*a*) of this subdivision, *any teacher who attains the maximum age for retirement in any school year* may, upon the written request for the continued employment of such teacher . . . filed . . . not more than ninety days and not less than thirty days prior to the attaining of such maximum age, remain in service until the end of said school year, whereupon said service shall cease and retirement shall then become effective; . . . Any member who . . . is permitted to remain in service beyond the maximum age shall . . . upon his written application . . . be retired for superannuation as of a date which shall be specified in such application . . . but in no event later than the end of the school year in which he attains the maximum age. The retirement allowance from the date of retirement of a person who remains in service under this paragraph beyond the maximum age shall be at an annual rate equal to that to which he would have been entitled had retirement taken effect at said maximum age."

Chapter 661 of the Acts of 1957, approved by the Governor August 13, 1957, is entitled "An Act changing and simplifying the computation of the amount of superannuation retirement allowance for employees under the contributory retirement law," and contained a preamble that its purpose

is to "provide forthwith for a simplified superannuation retirement formula and *to extend the benefits thereof to certain career employees . . .*"

Chapter 617 of the Acts of 1958, approved by His Excellency the Governor on October 3, 1958, is entitled "An Act relative to the retirement of certain teachers who after reaching the age of retirement remained in service at the request of the school committee for the continued employment of such teacher until the end of the school year." It provides that:

"Any teacher who was permitted to remain in service after January first, nineteen hundred and fifty-seven under the provisions of paragraph (*f*) of subdivision (1) of section five of chapter thirty-two of the General Laws, as in effect prior to the effective date of this act, and remained in such service until the end of the school year in nineteen hundred and fifty-seven, shall, *notwithstanding any provision of law to the contrary*, receive the retirement allowance to which he would have been entitled if chapter six hundred and sixty-one of the acts of nineteen hundred and fifty-seven had been in effect on the date he attained the age of seventy."

The teacher you refer to, I assume from your letter, "was permitted to remain in service after January first, nineteen hundred fifty-seven under the provisions of paragraph (*f*)" and I also assume from your letter "remained in such service until the end of the school year in nineteen hundred and fifty-seven" and is therefore entitled under the express provisions of c. 617 to "receive the retirement allowance to which he would have been entitled if chapter six hundred and sixty-one of the acts of nineteen hundred and fifty-seven had been in effect on the date he attained the age of seventy."

Chapter 661 contained an emergency preamble and would therefore become operative on the date of its approval, August 13, 1957.

The pattern of the legislation which I have referred to indicates a legislative intent to provide a retirement allowance for teachers completing their work until "the end of the school year in nineteen hundred and fifty-seven," computed upon the formula provided by St. 1957, c. 661, as applied to the date "he attained the age of seventy."

In my opinion, as I have indicated, the purpose of c. 617 is to extend the benefits of c. 661 to teachers permitted to remain in service after January 1, 1957, until the end of the school year in 1957. I see nothing in the legislation to which I have referred indicating any intention to bar a teacher with an extension of service in accordance with the statute and completing the school year in 1957, and having attained the age of seventy after September 1, 1956, from being entitled to the benign benefits of c. 617.

It is my opinion, therefore, that the answer to your Question (1) is that c. 617 applies "to teachers who attained the age of 70 after September 1, 1956, and remained in service to the end of the school year June 30, 1957."

I answer your Question (2) by saying that according to the express language of c. 617, the teacher you refer to is entitled to "receive the retirement allowance to which he would have been entitled if chapter six hundred and sixty-one of the acts of nineteen hundred and fifty-seven had been in effect on the date he attained the age of seventy," from July 1, 1957.

Very truly yours,

EDWARD J. McCORMACK, Jr., *Attorney General.*

By FRED W. FISHER,
Assistant Attorney General.

The indemnification benefits provided under G. L. c. 16 §§ 4D and 4E, are granted without deduction for any part of an individual's accumulated sick leave.

Dec. 16, 1958.

Mr. Clement A. Riley, *Registrar of Motor Vehicles.*

Dear Sir: — In your recent letter, relative to the construction of St. 1956, c. 654, you pose the following question: Is a person who is entitled to indemnification under the provisions of c. 654 (now G. L. c. 16, §§ 4D and 4E) entitled to the benefits thereof without deduction for the whole or any part of his accumulated sick leave under the rules and regulations governing sick leave authorized by G. L. c. 7, § 28, as now in effect?

In my opinion he is. These sections, in accordance with the usual rules of construction, having a beneficent purpose, are to be construed broadly in order to effectuate the intent of the General Court. It seems clear that the indemnification provisions are for wholly different purposes than the vacation leave rules and regulations. The former is to protect the person benefited from injury and damage caused by or resulting from the hazards of his occupation. Sick leave provisions afford some protection from the vicissitudes of life. It would tend to frustrate the purpose of the General Court in enacting these indemnity sections to hold that accumulated sick leave is or may be deducted from the benefits under those sections, when in truth and in fact the General Court carefully omitted any such provision in the legislation. In this connection it may be noted that the amount of indemnity under both sections is, as a practical matter, more or less under the control of the Registrar. Section 4D provides that the "registrar of motor vehicles *may* authorize the payment." Section 4E provides that "the registrar of motor vehicles shall, subject to appropriation, indemnify an employee in the registry of motor vehicles . . . to an amount not more than the *amount recommended by said registrar* . . ."

Very truly yours,

Edward J. McCormack, Jr., *Attorney General,*

By Fred W. Fisher,
Assistant Attorney General.

St. 1958, c. 605, providing an independent board for setting up community colleges, and repealing G. L. c. 73, § 9, terminated the authority of Department of Education under the section to continue the operation of the Community College at Fitchburg established thereunder.

Dec. 16, 1958.

Hon. Owen B. Kiernan, *Commissioner of Education.*

Dear Sir: — You have requested an opinion relative to the Community College program now operating in Fitchburg and pose the following question:

"My specific question to you is whether St. 1958, c. 605, § 4, in any way modifies the action of the Board of Education in the conduct of the Community College program now operating in Fitchburg?"

I answer in the affirmative. The operation of the Community College you refer to stems from, as you are aware, G. L. c. 73, § 9, which provides that:

"The department, in its sole discretion, may at any time and place establish a community college . . . providing a program of general and vocational education designed to serve the educational needs of one or more communities . . . A community college may be established as a division of any existing state teachers college. Such community colleges may have differing forms of organization and may provide curricula of varying lengths."

I have noted carefully your statement that: "The Community College at Fitchburg has been in operation since the college year 1956–57 and students are advancing toward the completion of sixty semester hours which we believe qualifies them for the awarding of an associate in arts or associate in science degree."

A reading of St. 1958 c. 605, makes it quite clear that the General Court intended by this legislation to create a new independent board for the purpose of determining

". . . the need for education at the community and junior college level *throughout the commonwealth*, and the development and execution of an over-all plan to meet this need. The board shall then establish and maintain regional community colleges at suitable locations in accordance with this plan."

The legislation further provides that the board established is in the Department of Education, "but not subject to its control."

I note also that § 4 completely wipes out, by express repealer, § 9 of c. 73, upon which the Department of Education formerly relied for its authority to establish a community college. It is my opinion that upon the effective date of c. 605 no power longer remains in the Department of Education to operate a community college which in your letter is described as "a community college at the State Teachers College at Fitchburg." The General Court had the power to grant the authority in your department to establish a community college. It has equal power to terminate it, I am constrained to rule.

In this connection, I do not understand that the Community College you refer to was established as a money-making or commercial venture. I assume that the authority was granted and the college organized in recognition by the Commonwealth of its governmental obligation to assist in the education of its people. While it might appear that there is a serious moral obligation upon the State to continue the operation of the Community College until its present students, at least, may complete their courses and obtain degrees, I see no legal obligation to do so. Some means should be found administratively to deal with the situation.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

A veteran, employed both by the State and a city during the same period, is entitled to credit for such period only for a single veteran's pension either from the State or the city.

DEC. 17, 1958.

Hon. CHARLES FRANCIS MAHONEY, *Commissioner of Administration.*

DEAR SIR: — In your recent letter, relative to the Secretary of the Board of Registration in Medicine, you pose the following questions:

"1. May the twenty years of creditable service in Boston which the city of Boston is using in computing the employee's thirty years of service again be applied in computing the applicant's creditable service on his request to the State for retirement under the same § 58 of G. L. c. 32?

"2. May the applicant retire as a veteran from both the Commonwealth and the city of Boston under the provisions of G. L. c. 32, § 58?"

You state that the secretary has applied to be retired as a veteran under the provisions of G. L. c. 32, § 58. I assume that this person is a "veteran" within the meaning of § 58 and other applicable provisions of law.

I notice from your letter that he has ten years of creditable service with the Commonwealth and thirty-three years of service with the city of Boston as the surgical member of the Medical Panel in the city's Retirement Board and that as already stated the last ten years of service with both city and State have been concurrent. I further note that in processing the veteran's retirement you are adding twenty years (1928–1948) of creditable service in Boston to his ten years of State service to meet the thirty-year requirement prescribed by § 58.

Section 3 (7) of c. 32 deals with contributory retirement allowances (with which the Secretary has had nothing to do); in this subdivision rather elaborate and complete provisions are made for the retirement of persons employed by two or more governmental units. Section 58, under which retirement is sought in this matter, dealing with noncontributory retirements, contains no such provisions. This omission should not be looked upon as a legislative oversight. I am more inclined to believe that it was intentional inasmuch as, generally speaking, a superannuation retirement now has certain contractual benefits going with it; whereas the right to a noncontributory veteran's retirement allowance appears to be more or less discretionary.

General Laws c. 32, § 56, provides for a veteran's retirement allowance "with the consent of the retiring authority." A veteran's retirement allowance is provided for in G. L. c. 32, § 57, wherein it is provided that "A veteran . . . who has been in the service of the commonwealth . . . for a total period of ten years in the aggregate, *may*, upon petition to the retiring authority, be retired, *in the discretion of said authority*, ..."

Again, G. L. c. 32, § 58 provides that "A veteran who has been in the service of the commonwealth, or of any county, city, town or district, for a total period of thirty years in the aggregate, shall, at his own request, with the approval of the *retiring authority*, be retired from active service . . . ."

In other words, superannuation allowances under the provisions of G. L. c. 32, §§ 1–28, inclusive, are now more or less a matter of right, while veterans' retirements under the provisions of G. L. c. 32, §§ 56–60 are, generally speaking, a matter of grace.

It is my opinion that this lack is due to the fact that retirements, such as I have said, under § 58 are largely, if not wholly, in the discretion of the retiring authority under all the circumstances of the particular case.

In answer to your question 2, it is my opinion that under the circumstances you have stated, the applicant may retire as a veteran from the service of the Commonwealth.

In answer to your question 1, it is my opinion that the applicant is not, as a matter of law, entitled to use the same periods of time in making up the "total period of thirty years in the aggregate" for the purpose of obtaining two retirements, the first from the employ of the Commonwealth and the second from the city of Boston. Whether the city of Boston determines to award this gentleman a retirement allowance under § 58 after his retirement by the Commonwealth is a matter to be determined by the proper authorities of the city.

Very truly yours,

EDWARD J. McCORMACK, Jr., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Whether an extra work order should be issued largely depends upon the determination of questions of fact, and the Attorney General does not review such factual determination and does not render opinions on which public officials are no longer required to act.

DEC. 17, 1958.

HON. ANTHONY N. DINATALE, *Commissioner of Public Works.*

DEAR SIR: — Your letter to the late Attorney General George Fingold concerning an extra work order issued by your department in connection with contract No. 5992 has been referred to me for reply. The contract provides for construction of a portion of the Southeast Expressway, including the Roy C. Smith bridge over the Neponset River at the Boston-Milton line. The extra work order relates to said bridge.

You call attention to a letter to you dated April 25, 1958, from Attorney General Fingold advising your department in regard to certain legal issues arising out of the sinking of the abutments of the said Roy C. Smith bridge. Based on information then made available to the Attorney General, he advised that the contractor might be required to remedy the defect and that an extra work order should not be issued.

You now state that your department has engaged the services of Spencer, White and Prentice, of New York City, specialists in foundation work. You state that this firm has recommended that the original design and specifications for support of the abutment be altered because such design and specifications were, in their opinion, inadequate. It was recommended that steel caissons filled with cement be driven to support the abutments in place of the compacted fill specified in the original contract.

You state that on May 27, 1958, you issued an extra work order to the contractor calling for the use of such steel caissons, and that the Comp-

troller has requested that such extra work order be approved by the Attorney General in view of the aforesaid opinion dated April 25, 1958.

This office has re-examined in detail the opinion of the late George Fingold relating to this matter. In commenting on the conclusions there expressed, Mr. Fingold added the following words of caution:

"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."

You now state that the decision to issue the extra work order in question was based on the report and recommendation of the aforesaid engineering firm, which report was not available to the then Attorney General at the time he rendered his opinion. The decision of your department to issue the extra work order was based on facts other than those originally submitted to the Attorney General. For this reason we have reviewed the matter in the light of present events and note the following additional pertinent facts.

Your department submitted to the Comptroller in August of 1958 two so-called "alterations" relating to the abutments in caissons of the Roy C. Smith bridge. These alterations appear to cover the work here in question. The first alteration was in the approximate amount of $240,000, and the second in the approximate amount of $300,000. By September 18, 1958, the first alteration had been certified by the Comptroller, approved by the Governor and Council, and, except for a minor amount, paid to the contractor. By this same date the second alteration had been similarly certified and approved, and approximately one-half of the amount due thereunder had been paid to the contractor. An additional $80,000 was paid to the contractor on this second alteration by October 9, 1958.

In effect, then, the extra work order which you now seek to have approved by the present Attorney General has already been processed through channels to payment by means of the aforesaid alterations. Under these circumstances there is no longer a question before you concerning which the Attorney General might be asked to render an opinion. It has been a long-standing practice of this department to aid officers of the Commonwealth in the performance of their official duties by advising them in respect to matters on which they are then required to act. It is not the practice to render opinions in respect to matters on which public officials are no longer required to act. It is noted also that the question of whether or not an extra work order should be issued in the present circumstances depends largely on a determination of fact to be made by your department. It is not the function of this office to review such factual determinations. In the absence of any indication to the contrary, it will be presumed that public officials have performed the duties incumbent upon them.

Very truly yours,

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

The escape clauses of mosquito control projects date from enactment of statute.

DEC. 18, 1958.

Mr. CHARLES F. SHELNUT, *Acting Commissioner of Agriculture.*

DEAR SIR: — In your recent letter, relative to the Bristol County and Essex County Mosquito Control Projects, you pose the following questions:

1. Are the escape provisions of those acts [St. 1958, cc. 432 and 516] to be computed from their effective date or from the date when funds are made available thereunder?

2. May the two organizations referred to in those acts carry on the ground work of setting up the projects prior to the initial appropriations?

Both these acts apparently were intended to become operative upon their effective dates, although at the same time it was provided that the monies to be expended thereunder "were subject to appropriation." In this connection I note your remark that no funds were appropriated during the 1958 session. However that may be, the framework of the acts apparently envisions forthwith operation. The escape clauses, in my opinion, date from the effective dates of the acts, namely, July 1, 1958, and August 11, 1958.

You will note in this connection the phrases "one year from the effective date of this act" and "within such time" and "prior to the expiration of one year from the effective date of this act."

I answer your question 2 by stating that the board, of course, is without power to incur liabilities before there is an appropriation of funds. I know of no prohibition against such preliminary volunteer unpaid work as may be undertaken in order to accelerate actual operation of the act.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The 1958 initiative act for the refund of excess of pension and earnings over salary of persons retired for disability, impliedly repealed the similar 1957 legislative act and the provision of the latter as to filing of statements of 1958 income.

DEC. 23, 1958.

Hon. CHARLES FRANCIS MAHONEY, *Commissioner of Administration.*

DEAR SIR: — You have called my attention to the provisions of G. L. c. 32, § 91A, as inserted by c. 766 of the Acts of 1957. Said section provides in effect that persons pensioned or retired for disability shall refund a portion of such pension in the event that the pension, together with other earnings of such disabled person, shall exceed the salary to which the person would have been entitled had he not been pensioned for disability.

You also call attention to an initiative petition which resulted in a question being placed on the ballot at the last State election on November 4, 1958. Said initiative petition proposed that G. L. c. 32 be amended by inserting a § 91A, which also provided that persons pensioned or retired

for disability should refund a portion of the pension under the same terms as described above.

The pension provision as it stood prior to the initiative petition related only to persons pensioned or retired after the effective date of the act, that is, ninety days after September 21, 1957. The amendment brought about by the initiative petition, on the other hand, provided that it be applied to all persons, whether retired before or after its effective date (December 3, 1958), except that as to persons retired prior to said effective date the refund provisions would not apply to income earned during the year 1958 or prior years.

You ask, first of all, whether § 91A of c. 32 of the General Laws, as approved at the State election on November 4, 1958, supersedes and takes the place of § 91A, as inserted by c. 766 of the Acts of 1957. I answer your question in the affirmative. Section 91A, as contained in the initiative petition, covers almost the identical subject matter as that covered by the original § 91A. Although ordinarily the repeal of a statute by implication is not favored by law, it is a recognized principle that the enactment of a statute which seems to have been intended to cover the whole subject to which it relates, impliedly repeals all existing statutes touching the subject and supersedes the common law. *Homer* v. *Fall River,* 326 Mass. 673, 676 (1951). The new § 91A, inserted by the initiative petition, does appear to cover the entire subject matter and therefore should be considered as having repealed by implication the prior provisions of § 91A.

You ask, secondly, whether a person retired for disability between the effective date of c. 766 of the Acts of 1957 and the effective date of the statute approved in the recent election must file a statement of income from gainful occupation before January 1, 1959. My answer to this question is in the negative. The requirement that such persons file a statement of income for the period prior to January 1, 1959, was contained in the earlier provisions of § 91A which, as stated above, have now been repealed. The new statute specifically exempts income earned prior to January 1, 1959.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General.*

Increase in quantity over that estimated for an item under a unit price contract, is permissible under G. L. c. 29, § 8A (Competitive Bidding Law).

Jan. 8, 1959.

Mr. Frederick J. Sheehan, *State Comptroller.*

Dear Sir: — You have requested an opinion regarding contract # 1871 entered into by the Department of Public Works with the New England Dredge & Dock Co. relating to proposed harbor improvements and dredging basin at Little Harbor, Marblehead. You have questioned the legality of a proposed "alteration" whereby Item 3 of the contract, calling for an estimated quantity of ledge removal and disposal of 20 cubic yards at a unit price of $75 per cubic yard for a total of $1500, has been increased to 2,008 cubic yards at the same unit price, thus increasing the cost of Item 3 to $150,600. You have asked two questions, more or less hypothetical in nature, but which are assumed to refer to the specific problem proposed

by your entire letter, 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 letter, containing a copy of a letter written by your office to the Department of Public Works on December 5, 1958, and their reply dated December 9, 1958, as well as a copy of the contract and plan in question, have been considered, and members of the Division of Waterways, Department of Public Works, have been consulted concerning the exact nature of the work performed under the "alteration." It is necessary to consider all the special provisions of the contract as well as those indicated in your letter.

The special provisions of the contract refer to a plan entitled: "Proposed Harbor Improvements, Dredging Basin, Little Harbor, Marblehead," dated February, 1958, and marked ACC 03459. Reference to the plan shows certain defined areas marked in red with a statement on the plan as follows: "Location of Proposed Work Shown in Red To Be Dredged To Six (6) Feet at Mean Low Water." The work to be done, according to your letter and the contract, calls for the dredging of the basin to a depth of six feet at mean low water. It is also provided on page 1 of special provisions of the contract that "all work shall be done in accordance with the plans and directions given from time to time by the Engineer."

Under the special provisions on page 5 of the contract relative to Item 3 it is provided:

1. Ledge or boulders in excess of five cubic yards in volume encountered within the dredging limits shall be removed and disposed of, upon direction of the Engineer.

2. Material removed under this item shall be removed at least down to the payment limit (*i.e.* one foot below the dredging depth specified).

3. Ledge encountered within the dredging limit. but allowed to remain, upon the direction of the Engineer shall have all overlying material removed and the ledge shall be left bare.

4. The contractor will be paid the contract unit price per cubic yard for ledge removed and disposed of, as therein specified, which unit price shall include all tools, labor and equipment and all incidental work.

5. The quantity to be so paid for shall be based upon measurements taken by the Engineer. Payments under this item will be allowed for material removed down to eight feet below mean low water.

It seems clear that the ledge removed and disposed of was material in areas shown on the plan, and specified under the contract, and required to be removed in order to reach the depth required by the contract. The contractor was required by the terms of the contract to remove such ledge and is entitled to be paid for such removal and disposal at the unit price set forth in the contract.

The removal of such ledge constituted no change in the original contract, and was removed and disposed of at the direction of the Engineer in accordance with the provisions of the contract. The contract required the removal and disposal of whatever ledge was within the limits of the area to be dredged, and shown on the contract plan to a specific depth under a unit contract price. The payment for such work at the unit contract price is not a violation of the bid statute as embodied in G. L. c. 29, § 8A. The contractor bid on the proposed work on the basis of estimated

quantities on the express understanding that actual quantities under the contract might be more or less than the estimates as indicated in your letter and on page 1 of the special provision.

This is clearly stated in Article 3 of Standard Specifications of the Department of Public Works which is quoted as follows:

"A. All bids will be compared on the estimate of quantities of work to be done, as shown in the Proposal.

"These quantities are approximate only, being given as a basis for the comparison of bids, and the Party of the First Part does not expressly or by implication agree that the actual amount of work will correspond therewith, but reserves the right to increase or decrease the amount of any portion of the work, as may be deemed necessary or expedient by the Party of the First Part."

Section B of Article 3 states in part: "Parts of the work have been divided into classes and items in order to enable the bidder to bid on different portions of the work in accordance with his estimate of their cost, so that in the event of an increase or decrease in the quantities of a particular class of work the actual quantities executed may be paid for at the bid price for that particular class of work."

It does not appear that the work performed in the removing and disposal of ledge was beyond the scope of the work contemplated by the contract; that is, to create a basin in a specified area, to a specified depth by removing all material within the specified area, including ledge. If material or ledge was removed beyond the limits specified in the contract and plan it might then constitute "extra work" as stated in the opinion of the Attorney General to the Commissioner of Administration dated August 12, 1955, to which you referred in your letter.

The principle of law involved in this matter is basically the same principle that was the subject of an opinion of the Attorney General to Fred A. Moncewicz, State Comptroller, on August 8, 1957. The precedent of that opinion is consistent with the facts of this case and must be followed.

Whether the Division of Waterways of the Department of Public Works could or should have taken additional soundings, surveys or made borings before letting this contract, or whether, having become aware during the progress of the work, that a substantial amount of ledge was present within the area to be dredged, it might have terminated the contract, and possibly should have terminated the contract, is a matter of fact, judgment and discretion based on all the circumstances. The office of the Attorney General is not a fact-finding or determining agency and cannot by hindsight suggest what might have been the preferred procedure, after the acts have been completed.

The difference between the estimated cost of the work and the actual cost is substantial and possibly contrary to good practice. There does not, however, appear to be a violation of the bid statute as embodied in c. 29, § 8A, because the work performed is within the terms of the contract and the provision of the Standard Specifications, particularly the article above quoted, and the special provisions of the contract.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By CHARLES E. FRAZIER, JR.,
Assistant Attorney General.

An exemption by the Board of Education to a local school committee under G. L. c. 71, § 38G (Teacher Certification Law), is for all teaching positions in the local system, not for individual teachers.

JAN. 8, 1959.

Hon. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR SIR: — In your recent letter you request an opinion relative to an interpretation concerning exemptions under the Commonwealth's Teacher Certification Law and pose the following question, in substance:

Are the local school committees entitled to be exempt from the requirements of § 38G [of G. L. c. 71] in general as to employments within the meaning of said section, or are the local school committees required to obtain special approval of the Board of Education for each individual employment?

Your enclosures state that the superintendent of schools has substantially submitted this question to your local corporation counsel and has received his opinion, a copy of which was enclosed. I cannot disagree with the opinion of the corporation counsel. The statute does not purport to deal with individual employments. Not at all. It simply provides that:

". . . a school committee may upon its request be exempt from the requirements of this section . . . for any one school year when compliance therewith would in the opinion of the department constitute a great hardship in the securing of teachers for the schools of a town. . . ."

Under this statute, as I interpret it, the Board of Education *may* upon request exempt the local school committee from the requirements of G. L. c. 71, § 38G, for any one school year when compliance therewith would, in the opinion of the Department of Education, constitute a great hardship. The department determines the great hardship. The statute authorizes the employments necessary to meet the hardship.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Buildings transferred to the Massachusetts Port Authority are not owned by the Commonwealth within G. L. c. 142, § 21.

JAN. 8, 1959.

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

DEAR MADAM: — You have requested an opinion on the following question:

"Does G. L. c. 142, § 21, apply to buildings under the control of the Massachusetts Port Authority in accordance with the provisions of St. 1956, c. 465?"

Acts of 1956, c. 465, § 6, headed "Port Properties," reads in part as follows:

"Upon the issuance of revenue bonds under the provisions of section eight and the application of the proceeds of said bonds as provided in said section eight (1), (2), (3) and (4), *title* to the port properties shall be vested in the Authority and the possession of the port properties shall be transferred to the Authority; . . ."

I am therefore of the opinion that § 21 does not apply to any properties owned by and under the control of the Massachusetts Port Authority, inasmuch as § 21 applies only to "plumbing work in buildings *owned* and *used* by the commonwealth." Generally speaking, buildings owned by the Port Authority are not owned by the Commonwealth.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Under G. L. c. 271, § 47, as amended, (1) a gaming violation prior to the effective date of the 1958 amendment should not be considered; (2) reinstallation of a telephone before such date is not within the section; (3) a transfer of a telephone is not a reinstallation.

JAN. 16, 1959.

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

DEAR SIR: — You have requested an opinion relative to the phraseology of G. L. c. 271, as most recently amended by the addition of § 47 by St. 1958, c. 347.

The questions upon which you seek advice, and the answers thereto, are as follows:

"1. Is a gaming conviction prior to the effective date of the statute, a conviction within the meaning of the statute?"

The answer to this question must be in the negative, because consideration of a conviction prior to the effective date of the statute would constitute an *ex post facto* application increasing the penalty for such previous conviction.

"2. If a telephone has been removed from premises prior to the effective date of the statute, does the reinstallation at the same premises within one year come within the provisions of the statute?"

The answer to this question is also in the negative for the same reasons indicated in the answer to question No. 1. In addition, the entire context of the statute indicates that it was the intent of the Legislature to have the act operate prospectively, and application of the criminal sanction of the recent act would operate in an *ex post facto* manner.

"3. If a telephone is requested to be transferred by a subscriber who has a prior conviction for a gaming offense, is such reinstallation at a new address one that comes within the purview of the statute?"

The answer to this question is also in the negative, and conceivably the assumed situation may not come within the purview of the statute at all since the first part thereof applies to installation and the second part only to the premises from which the telephone was removed.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JOSEPH C. DUGGAN,
Assistant Attorney General.

A single notice of the time and place of the regular meetings of the State Public Works Commission is sufficient under St. 1958 c. 626 (Open Meetings Law).

JAN. 27, 1959.

Hon. ANTHONY N. DINATALE, *Commissioner of Public Works.*

DEAR SIR: — You have requested my opinion relative to the notification of meetings of your board under the provisions of St. 1958, c. 626. You pose the following question, in substance:

May a single notice of the time and place of regular meetings in the future of your board constitute a compliance with the provisions of St. 1958, c. 626?

As you know, the second paragraph of § 2 of c. 626 of the Acts of 1958 provides as follows:

"Except in an emergency, no meeting of any state board or commission subject to this section shall be held unless a notice of such meeting has been filed with the secretary of state, and copies thereof posted in the public office of the commissioner of administration and finance at least twenty-four hours prior to the time of such meeting. . . ."

Construed strictly, a reading of this provision would seem to indicate a statutory notice of each meeting. However, if you find it impossible to comply literally with the statute and wish to handle it on a single notice basis, I would respectfully suggest that the notice be limited as to time. That is the least that should be done. For instance, it might be well to word your notice so as to cover the year 1959 unless other notice was given in the meantime. I do not recommend this practice, but it seems to be the only solution to your problem. You will observe that under the provision above referred to, the notice is "filed" with the Secretary of State *and* copies thereof posted in the public office of the Commissioner of Administration and Finance at least twenty-four hours prior to the meeting.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

A corporation may be licensed under G. L. c. 111, § 51, to operate a clinic.

JAN. 27, 1959.

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

DEAR SIR: — In your recent letter you referred to an earlier letter to the late Attorney General George Fingold, and have asked for an opinion on the question you stated in the earlier letter, which question reads as follows:

". . . Whether the licensing of a corporation under [G. L. c. 111] § 51 by the Department of Public Health and whether the granting of a charter for such a corporation by the Commissioner of Corporations and Taxation is a legal procedure."

I answer your question in the affirmative. Chapter 111 provides two weapons for your department, both designed for the protection of the health, safety, and welfare of sick, decrepit or invalid members of society. Reasonable legislation for such purposes is, in my opinion, well within the police power of the Commonwealth. General Laws c. 111, § 56, provides a criminal penalty for any person who advertises, conducts, manages or maintains a dispensary unless it is duly licensed under § 53 of that chapter.

Section 53 requires the licensing by your department of a dispensary. A dispensary is defined in G. L. c. 111, § 51 as ". . . any place or establishment, not conducted for profit, where medical, surgical or dental advice or treatment, medicine or medical or dental apparatus, is furnished to persons not residing therein; or any place or establishment, whether conducted for charitable purposes or for profit, advertised, announced, conducted or maintained under the name 'dispensary' or 'clinic', or other designation of like import; except that it shall not include a clinic conducted by a hospital, which is licensed under section seventy-one, as an integral part of such hospital."

The license issued under § 53, as I view it, is not intended to deal with the professional relations which may exist between the physician and his patient. It is a license to a person to conduct a "place or establishment." I take it that the applicant may be an individual or a corporation.

I see nothing improper in the requirements of § 53. Chapter 441 of the Acts of 1958 supports the conclusion to which I have come. In addition to the licensing provisions given your department by the above sections, another weapon has been given you for the protection and safety of those to whom I have referred. It consists of an entirely new § 2B in G. L. c. 155 which relates to the corporation laws of this Commonwealth, and provides among other things that "before approving articles of organization in connection with the proposed *incorporation of a . . . clinic* . . . or like institution requiring a license from the department of public health or before approving an amendment to such articles of organization of an existing corporation which will give it such power . . ." the Commissioner of Corporations must refer the proposed article of amendment to your department, which must make an investigation as to the applicants for incorporation, the corporation or the petitioners as the case may be, and the purposes thereof, "and of all material facts, including facts tending to show that the probable purpose is to cover any illegal business, or that the

applicants, corporation or petitioners are not suitable persons from lack of financial ability or from any other cause, and facts as to the present need for an organization with such purposes at the time and place and with respect to the special circumstances set forth in such articles, amendment, or petition. . . ." Your department must then give the applicant a public hearing after notice. After the hearing the Commissioner of Public Health shall make findings of fact and "shall approve or disapprove such articles, amendment or petition" and the Commissioner of Public Health must then report his findings and action to the Commissioner of Corporations and Taxation. If any doubts about the subject referred to in your letter have existed, they are, in my opinion, dispelled by a careful reading of c. 441; that chapter clearly envisions the incorporation of a clinic.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The Milk Control Commission in proceedings on a review ordered by the Governor must comply with all provisions applicable to the original order.

FEB. 2, 1959.

Mr. PARK CARPENTER, *Secretary, Milk Control Commission.*

DEAR SIR: — On November 28, 1958, an opinion from this office was sent to you concerning certain aspects of G. L. c. 94A, § 12. The opinion was prepared as the result of a request submitted by you by letter dated November 25, 1958, in which you stated that the Governor had ordered your commission to review its action relating to the fixing of minimum milk prices. Minimum prices had been adopted by the commission under General Order No. G 17–505. The Governor had ordered the review under the provisions of G. L. c. 94A, § 12. The prior opinion related to whether notice of the review should be published, whether there should be a general hearing, and whether the record of the initial proceedings would be a part of the review proceedings.

Subsequent to the aforesaid opinion, questions have arisen between your commission and the office of the Attorney General concerning other aspects of the review being conducted by your commission. In confirmation of my oral statements concerning this matter please be informed that the review being conducted by your commission under § 12 should in all respects comply with the detailed provisions of said section as they relate to the original price-fixing action of the commission undertaken in accordance therewith. Upon the filing of a petition by milk producers, as described in the section, the commission was initially directed by its provisions to make an examination and investigation, and to hold a public hearing. Subject to the approval of the Milk Regulation Board, the commission might then declare that a state of emergency existed and thereafter was authorized to issue orders, rules and regulations fixing the minimum wholesale or retail price of milk. The statute specifically re-

quires that any alteration, revision or amendment of the prices so fixed shall be carried out in like manner as was the initial setting of the prices. It is my opinion that the procedure followed by the commission in initially setting the price, based upon the petition filed by milk producers, must also be followed by the commission in carrying out the review of its action as ordered by the Governor.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

The Civil Defense Claims Board is bound by St. 1958, c. 626 (Open Meetings Law).

FEB. 4, 1959.

MR. JOHN J. DEVLIN, *Director of Civil Defense.*

DEAR SIR: — You have requested my opinion relative to the status of the Civil Defense Claims Board under the provisions of St. 1958, c. 626.

As you are aware, G. L. c. 30A, § 11A, inserted by St. 1958, c. 626, § 2, provides in part that "*All meetings* of *every* state board and commission shall be open to the public and to the press unless such board or commission shall vote to go into executive session."

Under the provisions of St. 1951, c. 547, it is my opinion that the Civil Defense Claims Board is a very important State board and comes within the purview of c. 626. You are doubtless aware of the waiver of notice provisions of § 11A in "cases of emergency." Also the impounding of the records of any executive session if "their publication would defeat the lawful purposes of the executive session . . ."

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Automobile warranty certificates are contracts of insurance.

FEB. 6, 1959.

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

DEAR SIR: — In a letter you sent to the late Attorney General George Fingold you enclosed a photostatic copy of two contracts relating to automobile warranty certificates and requested "advice and opinion" on the following:

"1. Do either or both of the attached documents constitute an insurance contract within the meaning of G. L. c. 175, § 2?

"2. Does either the issuance or sale of such documents constitute the transaction of insurance business in the Commonwealth of Massachusetts?"

You further stated that these so-called "warranties" or "guarantees" are sold in Massachusetts by independent inspection companies unrelated to the automobile dealer. These warrantor organizations purport to inspect and test the automobile prior to the sale of the "warranty" and then promise, for a consideration, to bear the auto purchaser's cost of repair and replacement of designated parts in the event of failure thereof during a specified period.

In a letter under date of December 29, 1958, you renewed this request.

My answer is in four parts:

I. Legal definitions of the terms "contract of insurance," "warranty" and "guarantee" together with interpretive cases and text.

II. A comparison of the three terms noting similarities and differences.

III. Application of the legal principles involved to the documents and situation in question.

IV. Conclusion.

I. *Legal definitions of the terms "contract of insurance," "warranty" and "guarantee" with interpretive cases and text.*

A. *Contract of Insurance.* — The definition of a "contract of insurance" is contained in G. L. c. 175, § 2. "A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do an act valuable to the insured, upon the destruction, loss or injury of something in which the other party has an interest."

This section was adopted in 1887, and constituted a declaration of the common law definition of insurance, which was already the law in Massachusetts. *Commonwealth* v. *Wetherbee*, 105 Mass. 149. *Claflin* v. *U. S. Credit System Co.*, 165 Mass. 501.

The court in *Commonwealth* v. *Wetherbee*, 105 Mass. 149, at page 160, said: "A contract of insurance is an agreement, by which one party, for a consideration, . . . promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest . . . . All that is requisite to constitute such a contract is the payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract."

Vance on Insurance (3d Ed.), at page 2, says the contract of insurance is distinguished by the presence of five elements:

1. The insured possesses an interest of some kind susceptible of pecuniary estimation, known as an insurable interest.
2. The insured is subject to a risk of loss through the destruction or impairment of that interest by the happening of designated perils.
3. The insurer assumes that risk of loss.
4. Such assumption is part of a general scheme to distribute actual losses among a large group of persons bearing similar risks.
5. As consideration for the insurer's promise, the insured makes a ratable contribution to a general insurance fund, called a premium.

Vance states further: "A contract possessing only the three elements first named is a risk-shifting device, but not a contract of insurance, which is a risk-distributing device; but, if it possesses the other two as well, it is a contract of insurance, whatever be its name or its form."

B. *Warranty.* — An express warranty is defined in G. L. c. 106, § 2–313 (1) (*a*): "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."

According to *Black's Law Dictionary* (4th Ed.), on page 1758, a warranty is defined as follows: "A statement or representation made by the seller of goods, contemporaneously with and as a part of the contract of sale, though collateral to the express object of it, having reference to the character, quality, or title of the goods, by which he promises or undertakes that certain facts are or shall be as he then represents them."

"A 'warranty' is a collateral obligation accompanying a contract of sale, relating to the character or fitness of the article sold." *Crane Co.* v. *Collins,* 167 N. Y. 48.

C. *Guarantee.* — "A guarantee is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who, in the first instance, is liable to such payment or performance." *Black's Law Dictionary* (2nd Ed.) page 550.

"The word 'guarantee' appearing in the memorandum suggests, not a primary, but a collateral undertaking. The ordinary meaning of the word is that someone else is primarily liable for a debt and that the guarantor will pay it if the primary debtor does not." *Charlestown Five Cents Savings Bank* v. *Wolf,* 309 Mass. 547, 549.

II. *Relationship among contract of insurance, warranty and guarantee.*

Vance on Insurance (3d Ed.), at page 5, expresses concisely the relationship among insurance, warranty and guarantee:

"In every contract of risk-shifting, three elements are conspicuously present: First, one party possesses an interest susceptible of pecuniary estimation; secondly, that interest is subject to some well-defined peril or perils, the happening of which will destroy or impair it, thereby causing loss to the risk-bearer; thirdly, there is an assumption of this risk of loss by the other party to the contract. Thus, in a contract of guaranty, of indorsement, or of warranty on a sale of goods, an interest possessed by the creditor, the note holder, or the vendee, is exposed to impairment by the happening of contingent events, and the risk of the interest owner is assumed by the guarantor, indorser, or warranting vendor. But these are not contracts of insurance, which are more than risk-shifting devices. For the insurance contract, additional elements are required; that is, the contract for assuming the risk must be an integral part of a general scheme for distributing a loss that may be suffered by any individual interest owner among a considerable group of persons exposed to similar perils, and the insured must make a ratable contribution, called a premium, to the general insurance fund. The same idea is expressed when we say that an indemnitor becomes an insurer only when he goes into the business of indemnifying. While a policy under seal for no premium paid would at common law be enforceable as an indemnity bond, it could scarcely be considered a proper insurance contract."

It has been stated that a warranty promises indemnity against defects in the article sold, while insurance indemnifies against loss or damage re-

reulting from perils outside of and unrelated to defects in the article itself. *State ex rel. Duffy* v. *Western Auto Supply Co.* (Ohio) 16 NE2d 256, 259. But the Ohio Court in *State ex rel. Herbert* v. *Standard Oil Co.*, 35 NE2d 437, while refusing to overrule the *Duffy* case, stated its doctrine was not to be extended beyond the facts of that case.

According to *Patterson on Essentials of Insurance Law* (2nd Ed.), at page 10, "A warranty (commonly called a guaranty) of the qualities of goods or services is distinguished from an insurance contract by the degree of control that the promisor has over the happening of the contingent event."

The Attorney General of New York in a recent opinion (N. Y. Attorney General's Report, 1957, p. 221) which supports the contention that the activity in question does not constitute insurance seemed to rely on *Patterson* when he stated that the warranty company "contends that since its inspection is designed to determine whether the parts warranted will operate as expected, its obligation is not dependent upon a fortuitous event but is limited to matters essentially within its control. Thus, the underlying issue is whether National, [the warranty company] upon its inspection of a vehicle, can be said to have performed an act constituting an exercise of control sufficient to eliminate the fortuitous event element. If yes, the warranty is not insurance; if no, it is." Control, however, does not appear in the usual definition of warranty or insurance, and in my opinion "control" is not the determinative test. This is like saying that a medical examination of a person eliminates the fortuitous event of his physical impairment or death.

III. *Application of the legal principles involved to the documents and situations in question.*

The information you supplied in your letter, together with an examination of the documents under consideration, reveal that a typical used car warranty business operates in the following way:

A corporation enters into a contract with a dealer. The dealer agrees to sell "warranty" certificates on certain cars reconditioned by him. He agrees to send a certain amount to the corporation for each certificate he sells. Part of this amount is retained by the corporation to cover its expenses and the balance is retained by the corporation as a reserve fund to cover claims under the "warranty." The corporation agrees to make necessary repairs on the "warranted" parts of each car which are impaired or destroyed within the "warranty" period. It agrees to return to the dealer a percentage of the reserve fund remaining after claims have been paid. There are certain provisions for making up losses in excess of the reserve fund and for cancellation of the contract.

The dealer then sells "warranty" certificates to the purchasers of certain reconditioned cars for a certain fee. The certificate states that the car has been reconditioned by the dealer and that the corporation will indemnify the purchaser for the cost of repairs on specified parts which become impaired within the "warranty" period.

The corporation reserves the right to determine the necessity for repair or replacement. Cars used for commercial purposes are excluded by the terms of the "warranty." Liability for personal injury or property damage caused by defective parts of the car; the cost of tune-ups or adjustments; repairs arising out of or revealed by collision; and repairs resulting from

neglect, misuse, acts of God, or major alteration not recommended by the manufacturer are also excluded.

The certificate is neither transferable nor assignable. It contains a statement that it is not an insurance policy and is not to be construed as such.

Applying the Massachusetts statute (G. L. c. 175, § 2), which admittedly is very broad, to the operation of the used-car "warranty" business we find as follows:

1. There is an *agreement* between the company issuing the "warranty" and the purchaser of it.
2. The purchaser pays a *consideration* for the agreement. The fact that the payment may be made indirectly is of no consequence, since the money for the "warranty" comes from the purchaser of the car in the final analysis.
3. The company *promises to pay money or to do some act of value to the insured.*
4. The company promises to pay the money or perform the act *upon the destruction or injury of something in which the purchaser has an interest.*

The five necessary elements constituting a contract of insurance outlined by *Vance* may be applied as follows:

1. Does the insured possess an insurable interest?

Yes. He owns an equity in the car which is the subject of the "warranty" contract.

2. Is the insured subject to a risk of loss through the destruction or impairment of that interest by the happening of designated peril?

Yes. The "warranted" parts of the car may be injured or destroyed through normal use of the car.

3. Does the insurer assume that risk of loss?

Yes. He promises to indemnify the purchaser for all or part of the cost of repairs.

4. Is this assumption part of a general scheme to distribute actual losses among a large group of persons bearing somewhat similar risks?

Yes. The company seeks to issue these "warranties" to the purchasers of all cars which meet age and inspection requirements.

5. Does the insured make a ratable contribution, called a premium, to a general insurance fund?

Yes. He pays a fee either directly or indirectly to the company which retains a certain part of it to cover losses and expenses.

IV. *Conclusion.*

In order to ascertain the true nature of the documents in question it is necessary to go beyond the language and form and examine them in the light of all the attendant circumstances. The language itself is not controlling. Thus, although the word "guarantee" does appear frequently, these contracts cannot properly be considered guarantees since they fail to answer for the debt or obligation of another. It should also be noted that consideration must be given to the fact that we are dealing here with a third party unrelated to the vendor of the automobile who has as the other party of the contract the purchaser of the automobile.

The basic test in the instant case is whether or not these documents

come within the meaning of G. L. c. 175, § 2, as stated above, which sets out the requirements of an insurance contract. In my opinion, these documents come within the statute and therefore are insurance contracts. In every case they agree, for a consideration, to do an act valuable to another upon the loss or injury to specified parts of an individual's car.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JOSEPH C. DUGGAN,
Assistant Attorney General.

A police officer having approved part-time private employment requiring that he carry a revolver is not required to have a license to carry, etc., the weapon.

FEB. 10, 1959.

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

DEAR SIR: — You have requested an opinion as to whether police officers of a city or town who accept outside employment with the permission of their chiefs may carry weapons, under the provisions of G. L. c. 41, § 98.

It appears from your letter that these officers, as I have said, have the permission of their superior to accept such employment. Naturally, the officers under those circumstances are not paid by municipalities.

You ask my opinion as to whether the right to carry weapons under G. L. c. 41, § 98, extends to the situation of an officer carrying a weapon under such circumstances, or whether he must be licensed under G. L. c. 140, § 131.

In my opinion, G. L. c. 41, § 98, does extend far enough to allow a police officer to carry weapons in the above circumstances.

I have come across no case in this State answering the question you refer to. Accordingly, we must examine the history of § 98 to determine the legislative intent.

The third sentence of § 98 of c. 41, as it appears in the Tercentenary Edition of the General Laws, provides that police officers ". . . *when on duty* carry such weapons as the mayor or selectmen shall determine . . ." A significant change was made by the General Court by the provisions of St. 1954, c. 162. This was an act entitled "An Act authorizing police officers to carry weapons when *off duty*." Section 1 of that chapter amends § 98 of c. 41 by striking out the third sentence therein, which I have referred to above, and inserting the following sentence: "They may carry *within the commonwealth* such weapons as the mayor or selectmen, the city or town manager, shall determine."

This very significant change of language indicates clearly that, as stated in the title of c. 162, it was intended to extend to police officers the right to carry weapons "when off duty." The third sentence of § 98 remains in the same form so far as this sentence is concerned and still contains the phrase "within the commonwealth" in place of the former words "when on duty." It is my opinion, therefore, that the statute in its present form

is broad enough to include the carrying of weapons in the above circumstances under § 98, without the necessity of compliance with G. L. c. 140, § 131.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

A person employed in September, 1958, in a teaching position at the University of Massachusetts who contracted tuberculosis is not entitled to the maximum two-year leave with pay provided for under G. L. c. 71, § 55B, for teachers, etc., in "public schools," contracting tuberculosis.

FEB. 10, 1959.

Hon. J. PAUL MATHER, *President, University of Massachusetts.*

DEAR SIR: — In your recent letter you refer to a teacher in the university, who is a new employee with very little sick leave credit accumulated under the State sick leave provisions, and inquire whether, under the provisions of G. L. c. 71, § 55B, as amended by St. 1958, c. 15, —

"1. This individual is entitled to sick leave with pay for up to two years, as stated in the statute, even though he has insufficient accumulated sick leave credits, or

"2. He is entitled only to sick leave credits he has earned prior to his illness."

I answer your question 1 in the negative. You will notice carefully that the first portion of the sentence you refer to in § 55B, as it appears in St. 1958, c. 15, provides that "Any teacher, *other than a teacher in the public schools,* or any other employee excluded or removed from employment on account of tuberculosis in a communicable form shall be carried on sick leave with pay *for such period as he may be entitled to under the regulations of the school committee or other school officers; . . .*" The sentence then goes on, as set forth in your letter, ". . . and any teacher *in a public school . . .* shall, if excluded or removed from employment on account of tuberculosis in a communicable form be carried on sick leave with pay *for the entire period of such exclusion or removal,* but in no case for more than two years, and for such further additional period as he may be entitled to under the regulations of the school committee or other school officers."

It seems quite clear, whatever the reasons may be, that the General Court dealt with the teachers in two different ways. In the first portion of the sentence we are discussing, provisions are made for "*any teacher, other than* a teacher in the public schools . . ." and then proceeds to deal with ". . . any teacher *in a public school.*" The words "public school" have long since had a very definite connotation as distinguishing them from other institutions of learning. In the case of *Lynch* v. *Commissioner of Education,* 317 Mass. 73, the Supreme Court in this connection said: "Public schools never have been understood to include higher institutions

of learning like colleges and universities." The court went on to say further: "In *Kayser* v. *St. Louis Board of Education*, 273 Mo. 643, 657 it was held that a teachers college is not a public school in the sense of a grade or high school in spite of the fact that it is supported by public funds." The court further said in this case: "'Common schools' or 'public schools' embrace only the grade schools and high schools. These terms 'are never applied to the higher seminaries of learning, such as incorporated academies and colleges.'" Moreover, the Supreme Court in its *Opinion of the Justices*, 214 Mass. 599, at p. 601, said: "Public schools never have been understood to include higher institutions of learning like colleges and universities."

I am constrained, therefore, to advise you that the provisions set forth in your letter for the benefit of "any teacher in a public school, or other employee therein . . ." do not include a teacher in the University of Massachusetts. Whether the person you refer to has any rights under the first part of the sentence referred to, I offer no observation as none is requested.

Very truly yours,

EDWARD J. MCCORMACK, Jr., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Meetings of the South Essex Sewerage District Board are subject to the provisions of G. L. c. 39, § 23A (Open Meetings Law).

FEB. 10, 1959.

Mr. ELIHU A. HERSHENSON, *Treasurer and Clerk, South Essex Sewerage Board.*

DEAR SIR: — You have requested my opinion, in substance, whether your board is subject to the provisions of St. 1958, c. 626. In my opinion, it is.

General Laws, c. 39, § 23A, inserted by St. 1958, c. 626, § 4, provides that:

"All meetings of every district, city and town board . . . shall be open to the public and to the press unless such board . . . shall vote to go into executive session. Such executive session may be held only for the purpose of discussing, deliberating or voting on those matters which by general or special statute, or federal grant-in-aid requirements, cannot be made public, and those matters which if made public might adversely affect the public security, the financial interest of the district . . . or the reputation of any person."

The second and third paragraphs of § 23A, with which you are doubtless familiar, provide for giving notice of such meetings except in cases of "emergency" as therein defined, and the keeping of accurate records of such meetings and making the same available promptly. The records of such meetings shall become a public record and available to the public.

The South Essex Sewerage District, as you know, was created under the provisions of St. 1925, c. 339, which provides in § 1 that "A sewerage district to be known as the South Essex Sewerage District . . . is hereby created and shall include all of the territory of the cities of Salem, Peabody and Beverly and of the town of Danvers . . ." Section 2 provides: "Said South Essex Sewerage District shall be managed by a board, which is hereby created and which shall be known as the South Essex Sewerage Board, hereinafter called said board, and shall consist of seven members, except as hereinafter provided." The last paragraph of § 2 provides that: "Said district shall have such powers, not inconsistent with the provisions of this act, as are given by law to fire, water, light and improvement districts and such other powers as may be specifically given by this act."

There is obviously, then, created by c. 339 a sewerage district managed by a board known as the South Essex Sewerage Board. Since the new § 23A of c. 39 relates to "all meetings of *every* district . . . board," I see no reason why your board does not come under its provisions and recommend a careful reading of this legislation and a close adherence to its provisions.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

St. 1958, c. 626 (Open Meetings Law) is not applicable to Office of Commissioner of Veterans' Services nor to local veterans' offices or districts.

FEB. 10, 1959.

HON. CHARLES N. COLLATOS, *Commissioner of Veterans' Services.*

DEAR SIR: — You have requested my opinion relative to the provisions of St. 1958, c. 626, and ask the following question:

"Whether the subject law applies to the office of the Commissioner of Veterans' Services or to any of the municipal subdivisions of the Commonwealth including districts formed under St. 1946, c. 599."

Your question involves two phases of your activities and those of the local subdivisions of the Commonwealth, the first relating to the status of papers and records in your hands and those of the local officials, and secondly the status of the records of meetings.

These sections of c. 626 providing for notice of meetings and records of the same are directed clearly to "state boards and commissions." I do not understand that the Commissioner of Veterans' Services has either a "board" or a "commission."

Moreover, as you well point out, G. L. c. 66, § 18, expressly provides:

". . . nor shall declarations, affidavits and other papers filed by claimants in the office of the commissioner of veterans' services, or records kept by him for reference by the officials of his office, be public records."

I find no repealer of § 18 in c. 626, and do not believe that such was intended. The General Court seems to have gone to great pains to protect the private affairs of needy veterans from public scrutiny. This is made clear by the provisions of § 18 of c. 66, already referred to, and is further illustrated by the provisions of G. L. c. 40, § 51, which I shall refer to hereafter.

This purpose is further illustrated by the new § 11A of G. L. c. 30A, inserted by c. 626, § 2. This provides, among other things, that an "executive session may be held only for the purpose of discussing, deliberating or voting on those matters which by general or special statute . . . cannot be made public, and those matters which if made public might adversely affect . . . the reputation of any person."

Section 2 further provides that:

"A summary of all matters voted shall be made available with reasonable promptness after each meeting; provided, however, that votes taken in executive session may remain secret so long as the publication would defeat the lawful purposes of the executive session, but no longer."

Section 4 of c. 626 inserts a new § 23A of c. 39 of the General Laws, which provides in part as to district, city or town boards that:

"All board meetings shall be open to the public and to the press unless such board, commission or school committee shall vote to go into executive session. Such executive session may be held only for the purpose of discussing, deliberating or voting on those matters which by general or special statute . . . cannot be made public . . ."

Section 23A further provides that:

"The records of each such meeting shall become a public record and be available to the public upon being approved; provided, however, that the records of any executive session may remain secret so long as their publication would defeat the lawful purposes of the executive session, but no longer."

I note further that § 11 of c. 626 provides that:

"Upon the effective date of this act, the provisions of all *special acts* which are inconsistent with the provisions of this act shall, only to the extent that they conflict with this act, become null and void."

Section 18 of c. 66 is not a special act. It is a general act enacted in 1945, obviously to protect the affairs of distressed and needy veterans who fought for their nation in a time of stress. Such provisions of one kind or another primarily for the benefit of veterans are not unusual nor improper. Quite the contrary, as the Supreme Court said in its *Opinion of the Justices*, 175 Mass. 599, at page 601, in discussing the propriety of veterans' pensions after a war.

"The soldiers have been paid all to which they are entitled, yet the State may grant them a partial or total support for disabilities contracted in service. Such a gift may be intended primarily for an object which is no more private than is a memorial hall. . . . It may be meant to bring home to all minds by visible facts that now, as of old, the courage of the

battlefield is honored, and that if a man will risk his life for his country, his country afterwards will not necessarily hold him to the letter of his generous bond and deem him fully paid at thirteen dollars a month."

Now a word as to the local set-up. The local official in charge of "veterans' benefits" is not a ". . . district, city or town board . . .", within the provisions of c. 626. He is an individual and cannot conveniently hold a meeting with himself. He is described in § 3 of c. 115 as a "veterans' agent." He is required under the provisions of c. 115, § 4, to forthwith transmit applications filed with him to the Commissioner of Veterans' Services.

General Laws, c. 115, § 10, authorizes the creation of districts comprised of adjoining municipalities for the purpose of administering the provisions of c. 115. Section 12 of c. 115 authorizes appointment of "an unpaid advisory board" in the various cities and towns and districts to "render such assistance to the director of veterans' services of the municipality or district relative to the provisions of this chapter, except as to sections one to nine, inclusive, *as said director may request.*"

It is my opinion that said advisory board acting only for such assistance as the Director of Veterans' Services may request, is not a "district . . . board . . ." within the provisions of c. 626.

The conclusions to which I have already come are re-enforced by the provisions of G. L. c. 40, § 51, which contain a special reference to the subject matter we are discussing by prohibiting under substantial penalty the publication of:

"Any report for general distribution to the public or to its citizens . . . the names of any persons residing in such town who received benefits under chapter one hundred and fifteen. . . ."

And further providing that:

"No department, board or commission, or agent thereof, of a town providing aid, guidance or advice solely to persons who are in active military or naval service during the time of war, or who were formerly in such service, or to the dependents of any such persons, shall furnish any records or information to any social service index, so called, or exchange information with any other agency, except as hereinbefore provided."

It is therefore my opinion, for reasons outlined above, that the subject law does not apply to the office of the Commissioner of Veterans' Services nor to any of the municipal subdivisions of the Commonwealth including districts formed under St. 1946, c. 599.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

A lumbar puncture cannot be forced on a person under indictment committed to a State Hospital for observation under G. L. c. 123, § 100 (The Briggs Law), without his consent.

FEB. 17, 1959.

JAMES W. DYKENS, M.D., *Assistant Commissioner of Mental Health.*

DEAR SIR: — In your recent letter you pose a question in the following form:

"A question has arisen as to the legality of performing a lumbar puncture on patients sent to the State hospitals for observation under G. L. c. 123, § 100."

I note in your letter that it is sometimes difficult to get permission from the patient to perform this operation. I notice also that you make the following observation:

"Would it be possible to say that the performing of a lumbar puncture, for example, to rule out brain tumor or nervous system infection, would be included in 'determination as to any mental illness?'"

I assume, in view of your question and observation, that you wish an opinion as to whether a lumbar puncture can be forced upon a patient under § 100 against his will. In my opinion it may not.

This question is not a new one to this department. In IV Op. Atty. Gen. 531 substantially the same question was posed to the then Attorney General by the State Board of Insanity. In ruling that an involuntary lumbar puncture could not be imposed upon a patient, the Attorney General concluded his opinion with the following sentence:

"While the State undoubtedly has broad power over its insane wards, it is unnecessary to consider whether the Legislature could provide for compulsory lumbar punctures, as, in my judgment, no act relating to the treatment of the insane indicates an intent on the part of the Legislature so to provide."

This opinion was written in 1916. In view of the use of force with its resulting impact upon the liberty of the citizen, under the usual rules of statutory construction § 100 should be construed strictly. *Libby* v. *New York, New Haven & Hartford Railroad*, 273 Mass. 522, at 525.

It should be observed in reading this section that it provides for the commitment of persons under indictment or complaint. If it is necessary for the patient's "*proper care or observation* pending a determination as to any mental illness . . ." the court may commit him to a State hospital. Section 100 then goes on to authorize the court to employ experts in mental illness to "*examine*" the person complained of. The phrase "care or observation" and the word "examine" have been in this statute for about half a century in one form or another. They were in St. 1909, c. 504, § 103, at the time of the earlier opinion of this office above referred to and were doubtless in the mind of the Attorney General when he said that "no act relating to the treatment of the insane indicates an intent on the part of the Legislature so to provide," referring to compulsory lumbar punctures. The General Court in limiting the activities of the experts in mental illness

referred to in § 100 "to *examine* the person or child complained of," by implication delimited as well as defined their power. *Expressio unius est exclusio alterius.*

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The person licensed to operate a clinic or hospital is responsible for the care of the records when the clinic ceases operation, and the responsibility is still his though he transfers the records to a transferee of clinic.

FEB. 17, 1959.

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

DEAR SIR: — You have requested my opinion relative to the disposition of hospital and clinical records and you pose, in substance, the following question: Who is responsible for keeping and disposing of the records referred to in G. L. c. 111, § 70? In this connection you state that:

"The question I am faced with at the present time concerns the responsibility for maintaining these records and whether this responsibility falls upon the last holder of the license or whether it is transferred to the person or persons who subsequently assume ownership."

General Laws, c. 111, § 70, provides that:

"Hospitals, dispensaries or clinics, and sanatoria licensed by the department of public health shall *keep* records of the treatment of the cases under their care and the medical history of the same."

This section then goes on to describe the manner in which such records are kept, and further provides that:

". . . the licensee, upon notifying in writing the supervisor of public records referred to in chapter sixty-six, may destroy the original records. . . . Such records and similar records kept prior to April twenty-fifth, nineteen hundred and five, shall be *in the custody of the licensee.* Section ten of chapter sixty-six shall not apply to such records; provided, that such records and similar records *kept by the licensee* . . ." may be inspected by the patient or his authorized attorney.

A careful reading of this section discloses, in my opinion, quite clearly the intent of the General Court. Each licensee must keep records of the treatment of the cases under his care and the medical history of the same. You will notice with reference to the various records the use of the words "shall be in the custody of the licensee" and "similar records kept by the licensee." Accordingly, it is my opinion that each licensee must keep the

records of the treatment of the cases under his care and the medical history of the same. Whether he keeps the records in his own custody or transmits them to a transferee of the institution licensed, is in his own hands. The responsibility, nevertheless, is his. Section 70 contains specific provision for the destruction of original records, provided copies have been photographed or microphotographed and notification in writing is given to the Supervisor of Public Records, referred to in c. 66. Since the General Court has laid down particularly the circumstances under which the records referred to in § 70 may be destroyed, according to the usual rules of statutory construction they may not otherwise be so disposed of. *Expressio unius est exclusio alterius.*

The statutes do not adequately, however, deal with the subject matter you have in mind and I would respectfully suggest that those interested should have a simple amendment made to § 70 clarifying the subject matter you write about.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

A person serving a sentence at the Massachusetts Correctional Institution, Concord, given a "forthwith" sentence to the Walpole Institution, is to be discharged at the expiration of the latter sentence.

MARCH 3, 1959.

Hon. ARTHUR T. LYMAN, *Commissioner of Correction.*

DEAR SIR: — You have requested my opinion regarding the following facts:

On May 19, 1953, a person was sentenced to the Massachusetts Correctional Institution, Concord, following his conviction for assault with intent to rape. He was sentenced to a term of nine years and was paroled on February 5, 1957. While on parole he committed a crime and on July 11, 1958, his parole was revoked and a warrant issued upon which he was returned to the same institution on October 20, 1958. On January 12, 1959, he was brought before the Suffolk Superior Court, on a writ of habeas corpus, charged with assault with intent to rape and sentenced to Massachusetts Correctional Institution, Walpole, for a term of ten to twelve years, forthwith, and notwithstanding sentence then being served at the Concord institution.

You inquire: If the result of St. 1955, c. 770, § 98, amending § 28 of G. L. c. 279 by striking out the sentence — "The convict shall thereupon be removed accordingly, and shall be discharged at the expiration of his sentence thereto" — is not that the Walpole sentence wipes out the Concord sentence, how, upon the expiration of the forthwith sentence, may the return of the convict to the Concord institution be effected?

In my opinion, although the Legislature struck out the aforementioned sentence, it may well be assumed that the Court intended, having knowl-

edge of the pendency of another sentence, that the ordinary result should follow. Ordinarily, two or more sentences run concurrently, in the absence of specific provisions in the judgment to the contrary. In the instant case the court was well aware of the pendency of the previous sentence, a writ of habeas corpus having been issued to bring the defendant from Concord.

We must also bear in mind that the defendant, having been returned to custody after the revocation of his parole, was serving his sentence, and it would appear that said sentence would not be suspended while he served another sentence unless he, by his own conduct, committed some act to remove him from either actual or constructive custody under the first sentence. (*Harding* v. *State Board of Parole*, 307 Mass. 217, 220.)

It has been held on numerous occasions that where a defendant is already in execution of a former sentence and where the second sentence does not state that the term is to begin at the expiration of the former, the second will run concurrently with the first in the absence of a statute providing a different rule. Accuracy in the statement of the terms of the sentence is a right which is accorded every defendant. *Ex Parte Lamar*, 274 F. 160, 170.

It is therefore my opinion that the defendant in the instant case should be discharged at the expiration of his term at Walpole.

Insofar as the opinion herein rendered is distinguishable from the opinion previously rendered on September 22, 1958, the former is hereby modified.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JOSEPH C. DUGGAN,
Assistant Attorney General.

A person committed by a District Court after a finding that he was a "sex offender," prior to the revision of G. L. c. 123A, by St. 1958, c. 646, determined after examination as provided in § 3 of the 1958 act to be "a sexually dangerous person," may be continued in custody at a treatment center, although his original sentence has expired.

MARCH 5, 1959.

Hon. GEORGE F. MCGRATH, *Commissioner of Correction.*

DEAR SIR: — Your predecessor requested an opinion concerning the status of an inmate at the treatment center for sexually dangerous persons established under G. L. c. 123A, § 2, as appearing in St. 1958, c. 646.

Said inmate was originally committed by the Haverhill District Court for a sixty-day observation period, after which the psychiatrists concluded that he was "a sex offender." He was then sentenced to serve a six-month term in the house of correction and at the same time adjudicated a "sex offender" by the court. Subsequently he was transferred to the treatment center where he was re-examined and determined to be a sexually dangerous person. Although his original six-month sentence has run, he is presently being held solely on the basis that he is a sexually dangerous person.

Two questions have been posed by the Superintendent:

(1) Can he be retained as a sexually dangerous person on a court order specifying him to be a sex offender?

(2) Is his present retention as a sexually dangerous person procedurally proper?

In answer to the first question, it would appear that he can be retained as a sexually dangerous person despite the fact that the court order specifies him to be a sex offender.

Section 2 of St. 1958, c. 646, specifically provides for just this type of situation. Although the body of c. 646 establishes a new procedure in committing individuals who have been involved in sex crimes, the legislative intent seems to be that § 2 of this act was an attempt to catch all such individuals who were committed under c. 123A and not the present act. The new statute states in part that "any person who was committed to the treatment center for sexual offenders . . . under the provisions of chapter one hundred and twenty-three A of the General Laws as in effect immediately prior to the effective date of this act, shall, within sixty days after said effective date, be given a psychiatric examination by the department of mental health. . . . If such examination shows that such a person is a sexually dangerous person . . . he shall have the privilege of subjecting himself to the provisions of section nine of said chapter one hundred and twenty-three A, as so appearing." Section 9 of c. 123A simply provides the parole and discharge procedure.

Even under the old act he could be held as a sex offender until discharged as a result of an examination which indicated that the individual was no longer a "sex offender."

All the new act has done is to provide that sex offenders be given new examinations within sixty days for the purpose of a new classification and to entitle them to broader examination and discharge rights.

As to the second question, whether or not his present retention as a sexually dangerous person is procedurally proper, in view of the restriction placed upon district courts by § 3 of c. 646, such retention would appear to be procedurally proper. Chapter 646, § 3, is inapplicable. Since the defendant in the instant case committed an offense long before the effective date of c. 646, his conviction and commitment were controlled by the law then in effect.

Although the facts do not indicate when the new examination showing that the inmate was a sexually dangerous person took place, it is assumed, for purposes of this opinion, that it was made within the required sixty days after the effective date of the new act.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JOSEPH C. DUGGAN,
Assistant Attorney General.

A New Hampshire trucker, with an office or telephone and loading platform here, can be held to have a place of business in Massachusetts, within G. L. c. 90, § 3, providing for the registration of vehicles of non-residents operated in connection with such places.

March 13, 1959.

Mr. Clement A. Riley, *Registrar of Motor Vehicles.*

Dear Sir: — You have requested an opinion relative to the construction of G. L. c. 90, § 3.

In your letter, after setting forth a portion of § 3 relative to the registration of motor vehicles of non-residents, you pose the following question:

"What, under this section, constitutes a place of business? . . . We have held in our dealings that if a New Hampshire trucker, even though he garages his vehicles in New Hampshire, maintains an office or telephone and a loading platform in this Commonwealth, he has a place of business here."

The provision you refer to provides, in substance, for the registration of a motor vehicle or trailer owned by a non-resident and used in direct connection with "a place of business" of such non-resident within this Commonwealth.

Provision is further made for the registration of a portion of the vehicles of a non-resident where his vehicles are used both in direct connection with "his place of business" in this Commonwealth and in connection with a place of business outside the Commonwealth. It goes on to provide that:

"For the purposes of such registration, the registrar may determine what vehicles or what proportion of vehicles owned by such non-resident are so used."

At the outset it may be noted that the portion of § 3 you refer to does not contain the words "principal place of business." It merely refers to "a place of business" and "his place of business" and again "a place or places of business."

As stated by the Attorney General in VIII Op. Atty. Gen. 402:

"The word 'business' and the phrase 'place of business,' when used in statutory enactments, may have, respectively, more than one meaning, depending largely upon the context and the purpose and design of the statutes wherein they occur, as the latter throw light upon the legislative intent in employing the words. In its general or broadest sense the word 'business' denotes the employment or occupation in which a person is engaged to procure a living, and that irrespective of whether such person be in the service of another or not. . . . Such general meaning should be given to the word as used in the phrase 'place of business' unless the context or the design of the statute wherein it occurs indicates that the word is to be interpreted in a more restricted sense . . ."

Generally speaking, whether a person has a place of business may be a question of fact or a question of law. This office does not adjudicate questions of fact.

In the case of *Collector of Taxes of Boston* v. *New England Trust Co.*, 221 Mass. 384, our Supreme Court, in interpreting the phrase "principal place of business," used the following language:

"'Business' is 'anything which occupies the time and attention and labour of a man for the purpose of profit. . . . It is a word of extensive use and indefinite signification.' Jessel, M. R., in *Smith* v. *Anderson*, 15 Ch. D. 247, at page 258. And a person has a place of business where he 'has an office or known or settled place of business for the transaction of his monied concerns.' *Sussex Bank* v. *Baldwin*, 2 Harrison, 487, 488. A person may have a place of business which is not exclusively his own, when he is allowed to occupy the office of another where he receives business calls and directs them to be made. *West* v. *Brown*, 6 Ohio St. 542."

In my opinion, a court could properly find that a non-resident who maintained an office or telephone and a loading platform in this Commonwealth comes within the purview of that portion of § 3, of c. 90 to which you have referred.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

A license for the sale of firearms may be issued only to an individual and not to a corporation, and each license may be exercised at only one location.

MARCH 13, 1959.

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

DEAR SIR: — You have requested my opinion "as to the right of a mail-order firm to sell firearms, rifles or shotguns, utilizing the facilities and services offered by branch offices located in different cities and towns of the Commonwealth, and operating under the one license issued to the General Manager at the main office or plant."

I note that you say that the mail-order firm you refer to "has many 'catalog and telephone offices' located in different cities and towns in the Commonwealth." I note also your reference to the fact that orders for firearms are received at the various branch offices and that conditional sales agreements are made out by an agent and signed by the customer, partial or full payment made and the order is then referred to the main office for approval or disapproval.

I note also that you say "on final approval the firearm desired by the customer is delivered in any one of several manners depending on the wishes of the customer."

It may be delivered directly to the customer's home by mail, by common carrier or by trucks, or it may be delivered at the branch office of the firm to be picked up by the customer.

General Laws, c. 140, § 122, provides that:

"The chief of police or the board or officer having control of the police . . . may, after an investigation, grant a license to any *person* . . . to sell, rent or lease firearms. . . . Every license shall specify the street or number, if any, of the building where the business is to be carried on, *and the license shall not protect a licensee who carries on his business in any other place.*"

Section 122 further provides that the licensing authority shall cause a copy of the applicant's fingerprints to be forwarded to the Commissioner

of Public Safety who shall thereafter advise the authority in writing of any criminal record of the applicant.

Section 122A provides for the keeping of record books for all licenses issued under § 122. Section 123 contains a full page and a quarter of conditions of said licenses which shall be expressed to be and are subject to such conditions. The second condition provides that:

"Every licensee shall before delivery of a firearm make or cause to be made a true, legible entry in a sales record book to be furnished by the commissioner of public safety and to be kept for that purpose, specifying the complete description of the firearm, including the make, number, type of firearm, type of ignition, if any, whether sold, rented or leased, the date of such sale, the sex, residence and occupation of the purchaser, renter or lessee, and shall before delivery, as aforesaid, require the purchaser, renter or lessee personally to write in said sales record book his full name . . ."

Section 124 provides that such licenses shall expire on April 30th of each year. Section 125 provides for the forfeiture or suspension of such licenses for violation of any condition thereof or the violation of any law.

This statute indicates very clearly an intent on the part of the General Court to employ every conceivable means of preventing deadly weapons in the form of firearms coming into the hands of evildoers. The legislation should be construed with that object in mind. Technicalities or hypertechnicalities ought not to be received with sympathy.

In my opinion, a careful reading of the provisions above referred to indicates a clear legislative intent that each and every source of supply of firearms must be licensed and by an individual.

As Attorney General Paul A. Dever said in an opinion dated June 30, 1936, to Hon. Paul G. Kirk, Commissioner of Public Safety (Attorney General's Report, 1936, p. 74):

"The entire context of the provisions relative to licenses or permits to carry and to purchase or sell pistols, revolvers and machine guns, as embodied in G. L. (Ter. Ed.), c. 140, §§ 121–131, indicates that the Legislature did not intend that the words 'person' or 'persons,' as used with relation to the purchaser or possessor of such firearms, who might receive a license to carry or a permit to buy, rent or lease should apply to a corporation . . ."

This is not a statute to tax the sale of a firearm. It must run to an individual and not a corporation. Each license is good for one location only. In the circumstances you set forth, one corporation is pouring out instruments of destruction through various sources at various locations. Whether these sources are operated by agents or not, the fact remains the same. Instruments of destruction are being fed to the public from many different sources.

In my opinion, compliance with the sections I have referred to requires a personal license for each source of supply.

Very truly yours,

EDWARD J. MCCORMACK, Jr., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The Commission Against Discrimination cannot under the penal provision of G. L. c. 151B, § 7, that employers, etc., post certain notices explaining that chapter, require persons operating places of public accommodation to post notices as to the effect of G. L. c. 272, §§ 92A and 98.

March 18, 1959.

Mrs. Mildred H. Mahoney, *Chairman, Massachusetts Commission Against Discrimination.*

Dear Madam: — In your recent letter you refer to a notice prepared by the Commission Against Discrimination to be displayed in places of public accommodation, and state that certain proprietors have challenged the commission's authority to require that the notice be posted. The notice referred to, as shown by the sample enclosed with your letter, takes the form of a printed card on which under the seal and name of the Commonwealth are printed in varying sizes of type statements evidently intended to express the effect of the provisions of G. L. c. 272, §§ 92A and 98, prohibiting discrimination.

You state that the commission was given jurisdiction over said §§ 92A and 98, by St. 1950, c. 479, § 4.

You ask whether the posting requirements of G. L. c. 151B, § 7, apply to places of public accommodation.

Said § 7 reads as follows:

"Every employer, employment agency and labor union subject to this act, shall post in a conspicuous place or places on his premises a notice to be prepared or approved by the commission, which shall set forth excerpts of this chapter and such other relevant information which the commission deems necessary to explain the act. Any employer, employment agency or labor union refusing to comply with the provisions of this section shall be punished by a fine of not less than ten dollars nor more than one hundred dollars."

It is apparent from a reading of the section that it specifically refers only to employers, employment agencies and labor unions. It is a criminal statute which imposes a penalty, and as was said in *Libby* v. *New York, New Haven and Hartford Railroad,* 273 Mass. 522, 525, 526:

"Penal statutes must be construed strictly 'and not extended by equity, or by probable or supposed intention of the legislature as derived from doubtful words; but that in order to charge a party with a penalty, he must be brought within its operation, as manifested by express words or necessary implication.' *Cleaveland* v. *Norton,* 6 Cush. 380, 383."

Section 4 of St. 1950, c. 479, to which you refer and by which, you state, "the Commission was given jurisdiction of the Public Accommodations Law (G. L. c. 272, §§ 92A and 98)," amended § 5 of G. L. c. 151B, to provide that the commission should receive, initiate and take action on complaints for alleged violations, among others, of §§ 92A and 98 of G. L. c. 272. There is nothing in the section referred to, or in any other section of said c. 479, expressly referring to the provisions of § 7 of G. L. c. 151B, as to the posting by employers, employment agencies and labor unions of the notices referred to, or extending the operation of said § 7 to places

of public accommodation. In the absence of any such express provision and in view of the fact that as a penal statute the section must be construed strictly and not extended by implication, it is my opinion that the penal provisions of the section would not be applied to make the refusal by a proprietor of a place of public accommodation to post the notice prepared by the commission punishable by fine as therein provided.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JAMES J. KELLEHER,
Assistant Attorney General.

The Massachusetts Port Authority is required to bargain collectively with its employees but is not subject to supervision by the Labor Relations Commission.

MARCH 18, 1959.

Mr. MARTIN F. FAY, *Chairman, Labor Relations Commission.*

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

"Does the State Labor Relations Commission have jurisdiction to adjudicate all the issues raised by the petitions for certification of representatives for certain employees of the Massachusetts Port Authority including the authority to conduct any and all elections necessary to determine the question of representation?"

The petitions referred to by you are two petitions filed by the same person, for different locals of the same international union. The petition for one local seeks certification as bargaining agent for all, except supervisory, employees of the Massachusetts Port Authority, evidently including even those employees who are members of the other local of the same union. The petition for the other local seeks certification of that local as bargaining agent only for the persons employed in the power house and pumping station and excludes clerical and supervisory employees and all other persons employed by the employer.

It is specifically provided in G. L. c. 150A, § 2 (2), that the term "employer" as used in that chapter "shall not include the commonwealth or political subdivision thereof."

In the *Opinion of the Justices to the Senate,* under date of June 19, 1956, 334 Mass. 721, speaking of a bill providing for the creation and establishment of the Massachusetts Port Authority, with similar powers and duties to those contained in St. 1956, c. 465, the Justices stated, at page 735, "We regard the Authority as a purely public corporation for public purposes — an arm of the State — analogous to a municipal corporation."

As pointed out in the opinion cited, it is expressly provided in the act creating the Authority that "it is constituted 'a public instrumentality,' and the exercise" by the Authority of the powers conferred by this act "shall be deemed and held to be the performance of an essential governmental function."

In view of the fact that, as pointed out by the court, the Massachusetts Port Authority is a purely public corporation — an arm of the State — analogous to a municipal corporation, and the provision in G. L. c. 150A, § 2, (2), that, as used in the chapter, "employer" should not include "the commonwealth or political subdivision thereof," I am of the opinion that the commission does not have jurisdiction to adjudicate the issues raised by the petitions referred to and does not have the authority to conduct elections.

The conclusion that the Port Authority is excluded from the operation of the act is supported by the decision made by the Labor Relations Commission in 1951 that the Mystic River Bridge Authority, an Authority similar in many respects to the Port Authority, was excluded from G. L. c. 150A, under the provision that the term "employer" should "not include the commonwealth" on the ground that the Authority was a part of the Commonwealth and to be excluded as such. That decision of the commission is in complete accord with the later expression of the *Opinion of the Justices*, referred to above, that authorities such as the Port Authority are to be regarded as purely public corporations for public purposes, *are arms of the State* and analogous to municipal corporations. I do not mean to intimate that the exclusion could not be put on the ground that the Authority is excluded from the operation of G. L. c. 150A, under the latter part of the provision of cl. (2) of § 2 of the chapter that the term "employer" should not include "the commonwealth or *political subdivision thereof*" (emphasis supplied). In this connection it should be pointed out that the language quoted from G. L. c. 150A, § 2 (2), was evidently taken from the similar provision of the National Labor Relations Act and under that act it has been held that an Authority is a "political subdivision" of a State. See *Abad* v. *Puerto Rico Communications Authority*, 88 F. Supp. 34. The decision cited illustrates that "political subdivision" can be taken as meaning a subdivision of political authority of the State as well as a territorial division of the State.

As far as the decision of the Labor Relations Commission that the Metropolitan Transit Authority was not excluded from the jurisdiction of the commission under definition of "employer" in G. L. c. 150A, § 2 (2), is concerned, it clearly appears from the copy of that decision submitted to me that the commission based the decision on the ground that it was provided by the act creating the Metropolitan Transit Authority that the term "employees" should apply in the same manner and to the same extent as though the Authority were a street railway. The fact that the act relating to the Massachusetts Port Authority contains no provision remotely resembling the provision relied on by the commission in the Metropolitan Transit Authority case entirely differentiates the decision of the commission with regard to the Transit Authority from the situation of the Port Authority.

Section 24 of St. 1956, c. 465, provides that the Massachusetts Port Authority shall have authority to bargain collectively with labor organizations representing employees of the Authority and to enter into agreements with such organizations. It is then provided that the employees of the Authority shall submit all grievances and disputes to arbitration pursuant to the arbitration provisions in agreements existing or subsequently entered into, or, in the absence of such provisions, to the State Board of Conciliation and Arbitration or other board or body having similar powers and duties whose decision should be final and binding.

The provisions referred to are entirely consistent with the conclusion that the Port Authority is not subject to the jurisdiction of the State Labor Relations Commission. The authority given to the Port Authority to bargain collectively with organizations representing employees of the Authority, in view of its public nature and the status of its employees as public employees, includes the power in the Authority to determine the representative character of any organization seeking to enter into collective bargaining agreements with the Authority, and that power and authority is not in any way subject to the supervision of any other public officials.

The provisions as to the submission of grievances and disputes to arbitration expressly state that such submission shall be pursuant to the provisions of collective bargaining agreements, and only in the absence of provisions as to submission in such agreements, that is, agreements already entered into, is submission to the Board of Conciliation and Arbitration or other board or body having similar powers and duties required. It is only after agreements have been entered into by the Authority with organizations representing its employees that the State Board of Conciliation and Arbitration, or any other body, can have any jurisdiction, and even then the said board will only have jurisdiction if the agreement does not contain provisions for arbitrating disputes and grievances in some other way.

It is clearly implied from the declaration of labor relations policy for the Authority contained in the first paragraph of § 24 of St. 1956, c. 465, establishing the Authority, that it is not merely permitted, but is required, to enter into collective bargaining agreements with organizations representing its employees, and is required to protect the exercise by its employees of full freedom of association, self-organization and designation of representatives of their own choosing.

The members of the governing board of the Authority are appointed by and are removable for cause by the Governor with the advice and consent of the Council. They are public officers. The labor policy declared by the Legislature was a labor policy which the members of the Authority were to carry out as public officers and there is no reason for implying they should be subject to the members of the State Labor Relations Commission, who are also public officers, in the exercise of the duties of the Authority in carrying out the labor policy declared for it by the Legislature. If there had been any such legislative intention it could easily have been expressly set forth.

In the performance of its duties in carrying out the labor relations policy required, the Authority can make its own arrangements as to the designation by its employees of representatives of their own choosing or, if it deems it advisable to do so, may request the services of the commission.

The authority has now been in actual operating existence for only about a month, and the petitions filed with the State Labor Relations Commission, to which reference has been made, were filed about two weeks after the Authority began actual operation of the facilities transferred to it. Undoubtedly the members of the Authority are fully cognizant of their duties with regard to according recognition to the representatives of its employees and to bargain collectively with those representatives and are taking steps to fulfill their duties and responsibilities in that regard. As was said in *Mayor of Gloucester* v. *City Clerk of Gloucester,* 327 Mass. 460, 464, 465, "It is not to be assumed that . . . public officials will not carry

out their duties under the law." See also *City Manager of Medford* v. *Civil Service Commission*, 329 Mass. 323, 331.

In the event that there should arise occasion to do so, the Legislature, of course, retains complete authority to remedy any failure by the Massachusetts Port Authority to execute the labor relations policy ordained for the Authority in the act creating it.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

The same person may not be paid the salaries provided by statute for the offices of Commissioner of Public Health and State Surgeon.

MARCH 23, 1959.

Mr. FREDERICK J. SHEEHAN, *State Comptroller.*

DEAR SIR: — You have requested an opinion as to whether the payment of the salary fixed by G. L. c. 17, § 2, for the Commissioner of Public Health, and the payment of the salary fixed by G. L. c. 33, § 15, for the State Surgeon, to the same person, would be a violation of the restriction contained in G. L. c. 30, § 21.

Said G. L. c. 30, § 21, reads as follows:

"A person shall not at the same time receive more than one salary from the treasury of the commonwealth."

General Laws c. 33, § 15 (*e*), provides for the appointment of a State Surgeon, as a member of the State Staff, to act as adviser to the Military Division on all matters pertaining to the medical services of the armed forces of the Commonwealth. Paragraph (*j*) of said § 15 provides that except when ordered on duty under certain sections of the chapter the officers of the State Staff shall receive the salaries set forth, and the salary for the State Surgeon is fixed at the sum of $2,500. Provision is also made that he may receive additional compensation up to a maximum of $1,200 per annum for services rendered to the Commissioner of Veterans' Services in cases of State or military aid and soldiers relief.

General Laws c. 17, § 2, as amended, providing for the appointment of the Commissioner of Public Health expressly states, "The commissioner shall receive a salary of fourteen thousand dollars."

Each of the provisions of the General Laws referred to creates an office and attaches a salary thereto, and in each case the salary is payable from the treasury of the Commonwealth. I therefore am constrained to advise you that G. L. c. 30, § 21, quoted above, would forbid the payment to the same person of the salary for the office of Commissioner of Public Health and the salary for the office of State Surgeon.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JAMES J. KELLEHER,
Assistant Attorney General.

Department of Public Safety has no authorization or jurisdiction over wrestling matches shown on television since no licenses are required by the Mayor's office because no admission fee is charged.

March 26, 1959.

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

Dear Sir: — You have requested my opinion as to whether or not the Department of Public Safety has any jurisdiction with respect to wrestling matches shown on television from stations within the Commonwealth.

It would appear that there is no statutory law regulating wrestling in this Commonwealth.

With reference to the wrestling matches which are being conducted in Boston, this office has been advised that the office of the mayor of the city of Boston issues licenses for those wrestling matches to which an admission fee is charged. However, insofar as the television wrestling matches are concerned, we are advised that in view of the fact that no charges are made for such, no licenses are required by the mayor's office. It would therefore appear that no control is being exercised over television wrestling at the present time by any licensing authority and that the Department of Public Safety has no authority or jurisdiction over the same.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General,*

By Joseph C. Duggan,
Assistant Attorney General.

The provisions of Article 82 of the Standard Specifications for Highway Contracts entitling a contractor to payment on account of extra work as it is done is applicable to such an order for accelerating the completion date of a contract for a fixed sum, and entitles the contractor to periodical payments on account of such sum as the work progresses; where it is not provided that the fixed amount is to be paid only if the new date is met the extent of liability in the event of failure can be determined only after breach. The desirability of issuing extra work orders and the methods of payment thereunder are for the contracting department to determine.

March 27, 1959.

Mr. Frederick J. Sheehan, *State Comptroller.*

Dear Sir: — You have requested my opinion concerning an extra work order issued by the Department of Public Works.

You state that a voucher has been submitted to your office which includes an amount representing a partial payment on a lump sum extra work order providing for the acceleration of the completion date of a contract. In connection therewith you ask the following questions:

"1. Can the Commonwealth make a partial payment in the amount of $46,902.31 on Extra Work Order #10 for $673,033 which is a lump sum for advancing the completion date from February 23, 1960, to June 30, 1959?

"2. Can payment be made only in the full amount of the lump sum in accordance with Extra Work Order #10 after June 30, 1959?

"3. If the work is not completed in accordance with Extra Work Order #10 on June 30, 1959, would the Commonwealth be liable to pay the contractor any amount under said Extra Work Order?"

The question of the authority of the Commissioner of Public Works to issue a lump sum extra work order providing for the acceleration of the completion date in a contract has been the subject matter of several communications from the office of my predecessor, the late George Fingold, directed both to the Commissioner of Public Works and to you. Those communications indicated that a lump sum payment for the purposes stated could be issued subject to the various limitations set forth therein. In the letter from the former Attorney General to you, dated August 18, 1958, reference was made to Standard Specifications for Highways and Bridges isssued by the Department of Public Works.

Article 23 of those specifications was referred to as allowing a lump sum extra work order. Articles 77 through 83 were referred to as controlling the method of paying amounts due under contracts, including amounts to be paid under extra work orders. Your attention is specifically invited to the last sentence of Article 82 which provides as follows:

"For any item for which the payment is made on a lump sum basis, the Engineer will determine at any stage before completion the proportionate amount of work that has been done and for which payment may be allowed if the Contractor requests partial payment on such an item."

In accordance with the foregoing sentence, the answer to your first question is in the affirmative.

Having answered your first question in the affirmative, the answer to your second question must of necessity be in the negative.

Your third question raises the problem of contract damages in the event of non-compliance with the work order. A conclusive answer to this question cannot be given unless the contract, the extra work order and other documents relating thereto are examined in detail. For present purposes, however, it appears from a reading of the two letters accompanying your request that the extra work order, as accepted by the contractor, constitutes an amendment to the contract by accelerating the completion date. It does not appear that the extra work order provides for a bonus which is to be paid only in the event of satisfactory performance. Under these circumstances, the change in the completion date of the contract imposes an obligation on the contractor to complete the work involved as of the accelerated date. In the event of failure to so complete the contract, the contractor would be in default under his contract and would suffer the consequences thereof. The scope of such potential liability cannot be determined until actual facts surrounding any such breach have been ascertained.

The foregoing opinion is limited to a determination of the legal issues raised by your questions in light of the facts presented. The desirability

of issuing the extra work order and the selection of the method of making payments under it are matters within the discretion and judgment of the Department of Public Works.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

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

A physician employed on a temporary basis at the Soldiers' Home was not within the provision of G. L. c. 30, § 9A, providing tenure for certain veterans, since he did not have the required period of active service, nor of G. L. c. 30, § 9B, since the latter is applicable only to "permanent" employees who are not rendering professional service.

MARCH 31, 1959.

Mr. JOHN P. HARRINGTON, *Superintendent, Soldiers' Home, Holyoke, Mass.*

DEAR SIR: — You have requested my opinion relative to the status of Dr. Charles H. Shamlian. In it you state that Dr. Shamlian has been employed at the Soldiers' Home in Holyoke as an assistant physician on a temporary basis from October 4, 1953, to the present time, part of the time to provide coverage during the leave of absence of Dr. Dwyer and latterly to fill a vacancy caused by the retirement of Dr. Bostick. He was first employed under Personnel Requisition 46136 October 4, 1953, to June 30, 1954; extensions from July 1, 1954, to June 30, 1955, and from July 1, 1955, to December 31, 1955, were approved by the Division of Personnel and Standardization. He was further employed, with the approval of the division, for the periods of January 1, 1956, to June 30, 1956, from July 1, 1956, to June 30, 1957, from July 1, 1957, to June 30, 1958, and from July 1, 1958, to June 30, 1959. You further state that Dr. Shamlian was on active duty as a Lieutenant U. S. N. R. from April 11, 1941, to June 2, 1941, a total of not more than 53 days, and that his total service was from February 28, 1941, to July 1, 1941, a total of not more than 124 days.

Under these circumstances you pose the following questions:

1. Is Dr. Shamlian, as a temporary employee on a yearly basis, entitled to the benefits of G. L. c. 30, § 9A?
2. Is Dr. Shamlian entitled to the benefits of G. L. c. 30, § 9B?

General Laws c. 30, § 9A, provides for "a veteran, as defined in section twenty-one of chapter thirty-one, who holds a . . . position in the service of the commonwealth not classified under said chapter thirty-one, other than . . . an appointive office for a fixed term . . . and has held such office . . . for not less than three years . . ." the benefits of G. L. c. 31, §§ 43 and 45. At the outset it is necessary to determine whether Dr. Shamlian is a "veteran" within the provisions of § 9A. It is to be noted that only veterans as defined by § 21 of c. 31 are entitled to the protection of § 9A. Section 21 of c. 31 defines the word "veteran" as meaning any citizen who "(1) (*a*) is a veteran as defined in clause Forty-third of section seven of chapter four . . ." and further qualifications therein set forth.

General Laws c. 4, § 7, cl. 43rd, defines the word "veteran" as meaning "any person, male or female . . . who served in the . . . navy . . . *for not less than ninety days' active service*, provided that ten days thereof was for wartime service . . ." "Wartime service" shall mean service performed by a "World War II veteran" during any of the periods of time described in cl. 43rd. "World War II veteran" shall mean any veteran who performed such wartime service between September 16, 1940, and December 31, 1946.

So it seems that one of the statutory prerequisites for qualifying as a veteran is "not less than ninety days' active service, provided that ten days thereof was for wartime service . . ." Dr. Shamlian's record does not indicate that he had at least ninety days' active service. His record, which you enclose from the Department of the Navy, states that he "had active duty: from 11 April 1941 to 2 June 1941." I therefore answer your Question No. 1 in the negative.

Moreover, had Dr. Shamlian complied with the statute in the respect above referred to, it is not at all clear that, in view of the fact that he has never been permanently appointed but has been holding under successive terms of appointment approved by the Division of Personnel and Standardization, he would be holding "an appointive office for a fixed term . . ." thus excluding him from the benefits of § 9A.

Replying to your second question as to the application to this gentleman of the provisions of § 9B of c. 30, it is clear that the Legislature has given him no protection. That section applies to persons "permanently employed . . . in the soldiers' homes in Massachusetts . . . except an employee . . . rendering professional service, who is not classified under chapter thirty-one . . ." Dr. Shamlian, according to your letter, was never "permanently employed" and he is clearly "an employee . . . rendering professional service . . ." He has been, therefore, excluded by the General Court from the benefits of § 9B for two reasons: first, he is not a permanent employee and, secondly, he is an employee rendering professional service.

Very truly yours,

EDWARD J. McCORMACK, Jr., *Attorney General*,

By FRED W. FISHER,
Assistant Attorney General.

The towns maintaining a district vocational school are not entitled to the additional reimbursement provided by G. L. c. 70, § 3B, to towns comprising a regional school district.

MARCH 31, 1959.

Hon. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR SIR: — You have requested my opinion as to whether G. L. c. 70, § 3B, which provides that each town comprising a regional school district shall be paid an additional amount equal to fifteen per cent of the amount which such town would have been entitled to under the chapter if the regional school district had not been formed, is applicable to vocational districts.

Although you do not so state, and it is not clearly so stated in the letter to you from the superintendent of schools in the town of Weymouth which you enclosed in your letter to the Attorney General, it would appear that the "South Shore Regional Vocational School" referred to in the superintendent's letter is maintained by the member towns as a vocational school district established under the provisions of G. L. c. 74, § 4, as amended, and is not a regional school district established under the provisions of G. L. c. 71, §§ 15 to 16I, inclusive.

It is clear from the provisions of G. L. c. 70, § 3B, as amended by St. 1953, c. 547, § 2, and particularly from the reference in said amendment to "the regional district school committee" and from the provision added to § 4 of said c. 70 by § 1 of the 1953 act, that only a town which is a member of a regional school district established under §§ 14 to 16I, inclusive, of G. L. c. 71 is entitled to the additional reimbursement provided for in G. L. c. 70, § 3B. I must advise you, therefore, that a town which is one of several towns maintaining a district vocational school under the provisions of G. L. c. 74, § 4, but which is not a member of a regional school district established under G. L. c. 71, §§ 14 to 16I, inclusive, would not be entitled to the additional reimbursement provided for by G. L. c. 70, § 3B.

Very truly yours,

EDWARD J. McCORMACK, Jr., *Attorney General,*

By JAMES J. KELLEHER,
Assistant Attorney General.

The provision added to G. L. c. 75A, § 12, providing tenure for persons having completed three years of creditable service is applicable to those who had such service on the effective date of the amendment.

APRIL 13, 1959.

Mr. MARTIN J. LYDON, *President, Lowell Technological Institute.*

DEAR SIR: — In your recent letter you have requested my opinion relative to the effect of the provisions of St. 1958, c. 538, § 3. Your letter poses the following question:

"Would you please tell us if the provisions of c. 538 become immediately applicable, after a 90-day period following the date of approval of the act, to those teachers who will have completed three or more years of creditable service as defined in the act on that date; or, do the teachers begin on such date to accrue service toward the three-year requirement for tenure of office?"

Prior to the enactment of c. 538, G. L. c. 75A, § 12, provided that "The trustees shall elect the president, the necessary professors, tutors, instructors, teachers and other officers and assistants of the institute and shall define the duties and tenure of office in accordance with the appropriate laws of the commonwealth. . . ." Section 3 of c. 538 amended § 12 by

adding after the word "commonwealth" the words "provided, that a professor, tutor, instructor or teacher, who is not employed in a position classified under chapter thirty-one, *and who has served as such for three consecutive school years*, shall not be dismissed from such employment except for *just* cause, and for reasons specifically given him in writing by the trustees." Further protection is afforded by a requirement for a full hearing, proper notice thereof being given and right to answer charges either personally or by counsel. Chapter 538 was approved by His Excellency the Governor on August 15, 1958. Accordingly, at the expiration of ninety days after that time G. L. c. 75A, § 12, provided that a professor, tutor, instructor or teacher referred to in that section "who has served as such for three consecutive school years, shall not be dismissed from such employment except for just cause, . . ." There seems to be no ambiguity in this section. On and after the effective date of c. 538 the protective measures therein contained are thrown around the teachers you refer to, regardless of whether such three-year period of service was obtained before, after, or partly before and partly after such effective date.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General*,

By FRED W. FISHER,
Assistant Attorney General.

The provisions of G. L. c. 58, § 20A, and c. 59, § 20, requiring the deduction of amounts due the Commonwealth from sums distributable to municipalities, do not impose conflicting duties on the State Treasurer.

APRIL 17, 1959.

Hon. JOHN F. KENNEDY, *Treasurer and Receiver General.*

DEAR SIR: — You have requested my opinion concerning your duty to withhold moneys due to various cities and towns in circumstances where the cities and towns owe moneys to the Commonwealth. You state that assessments have been made in the city of New Bedford, the town of Falmouth, the town of Nantucket and the County of Dukes County to cover deficiencies created by the operation of the Nantucket Steamship Authority. The provisions of St. 1956, c. 747, authorize such assessments. You state that the County of Dukes County has made only a partial payment on its assessment and the town of Nantucket has made no payment on its assessment.

You call my attention to a part of § 20 of G. L. c. 59 providing as follows:

"The state treasurer may deduct at any time from any moneys which may be due from the commonwealth to any city or town, the whole or any part of the sum so assessed or any other sum or sums which may be due and payable to the commonwealth from such city or town with the interest accrued thereon."

You state that the foregoing section contains the words "may deduct." Although you do not so state, it appears that you have considered the statute as being permissive and have not made the deduction authorized. You also refer to G. L. c. 58, § 20A, which provides:

"If, at the time any tax is distributable to any city or town pursuant to section eighteen or twenty or at the time any other sum is payable by the commonwealth to any city or town, there is due to the commonwealth any sum from such city or town, for any service or cause whatsoever, such sum so due to the commonwealth shall be deducted by the state treasurer from the amount so distributable or payable to the city or town, and shall be applied to the payment of the sum so due to the commonwealth."

The foregoing section provides that moneys "shall be deducted by the treasurer." You ask what procedure to follow in light of the apparent conflict between the two statutes — one being permissive, and one being mandatory.

In my opinion the statutes in question do not impose any conflicting duties upon you, as treasurer. It is apparent that the last quoted section above (§ 20A of c. 58) imposes an obligation on the treasurer to deduct from amounts distributable any sum which such municipalities in turn owe the Commonwealth. If you, as treasurer, carry out this obligation you will also in turn be complying with the provisions of c. 59, § 20. The excerpt which you have quoted from § 20 of c. 59 constitutes only a single sentence from a section dealing with the method of making assessments on cities and towns. If such assessments are not paid, it is provided that the treasurer "may" file an information in court to collect the assessment and "may" make a deduction at any time for moneys otherwise due such defaulting city or town. The treasurer is thus given two means of collecting moneys due the Commonwealth from municipalities. Although the word "may" is used in the section, such word "embodies a requirement and imposes (a) duty . . ." *Commonwealth* v. *N. Y. Central and H. R.R. Co.*, 206 Mass. 417, 424 (1910).

It would appear from the foregoing that the two statutes each impose similar obligations on the treasurer requiring that he effect an offset between sums due from the Commonwealth to municipalities against sums due from municipalities to the Commonwealth. It is my opinion that these statutes impose no conflicting duties on you as treasurer.

It is noted that the statutes above mentioned concern only cities and towns but do not extend to counties. A similar offset may be achieved in relation to counties by proceeding in accordance with the provisions of G. L. c. 29, § 17. Although this section allows the Commonwealth to make an offset against sums due from the Commonwealth to "persons," the word "persons" as there used would undoubtedly be interpreted as extending to counties. *Cf. Lowell* v. *Oliver*, 90 Mass. (8 Allen) 247 (1864).

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

April 17, 1959.

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

Dear Sir: — Forwarded to you, herewith, is my opinion relating to the issuance of special hauling permits on State highways. Your attention is called to the fact that Federal funds are involved in this case. I must caution you that in giving the opinion which you have requested, I have made an interpretation of a Federal statute.

For any final determination concerning such Federal statute reference should, of course, be made to the proper Federal officials.

It is suggested that you take no action on my opinion until you have first obtained an opinion from the Federal authorities.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General.*

The issuance by the Department, and the Massachusetts Turnpike Authority, of permits for the operation of certain vehicles on interstate highways, similar to permits being issued on or before July 1, 1956, would not result in the loss to Massachusetts of any federal aid highway funds.

April 17, 1959.

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

Dear Sir: — You have requested my opinion concerning the right of the Commonwealth through the Department of Public Works and the Massachusetts Turnpike Authority to issue special hauling permits allowing the operation of trucks on State highways and on the Massachusetts Turnpike. In particular, you call attention to U. S. Code, Title 23, § 127, which provides that Federal funds to be allocated to the States under the Federal-Aid Highway Act of 1956 shall be withheld in the event that a State allows the interstate highway system to be used by vehicles with a weight in excess of certain maximum weights specified under that section or in excess of maximum weights permitted under State laws or regulations established by appropriate State authority in effect on July 1, 1956, whichever is greater.

In respect to the maximum weights allowed under State law as of July 1, 1956, you call attention to the provisions of G. L. c. 85, § 30 and G. L. c. 90, §§ 19 and 19A. These sections allow the operation of vehicles on State highways with a maximum weight somewhat in excess of the maximums set forth under U. S. Code, Title 23, § 127, referred to above. These statutes also provide that vehicles in excess of the maximum weights therein set forth may still operate on State highways provided a permit so to operate has been obtained from the Department of Public Works. You ask first whether the continued issuance of such special permits by the department would affect the Commonwealth's right to Federal funds in the light of the limitations set forth in the sections of the Code referred to above. It is my opinion that your department may continue to issue special permits similar to those which were being issued on or before July

1, 1956, without causing the Commonwealth to lose Federal-Aid Highway Act funds.

You ask, secondly, whether the issuance of special permits by the Massachusetts Turnpike Authority would affect the Commonwealth's right to Federal funds under the aforesaid provisions of Title 23, in view of the fact that the Massachusetts Turnpike was first opened to public traffic on May 15, 1957. It is my opinion that the issuance of such permits similarly would not affect the Commonwealth's right to Federal funds. It is noted that the Massachusetts Turnpike Authority was established by St. 1952, c. 354, and by special legislation was given full authority to issue regulations concerning the use of the Massachusetts Turnpike. Under such legislation, the Authority has established regulations concerning the issuance of special hauling permits. It is noted also that the Turnpike Authority was instituted as a public instrumentality performing an essential governmental function; and that the Turnpike has been designated and approved by the Federal Government as part of the interstate highway system here in Massachusetts. It has been placed in the Department of Public Works; and upon retirement of the bonds issued by the Authority, the Authority will go out of existence, but the Turnpike will remain in your department. It would appear from the foregoing that the Massachusetts Turnpike Authority is a State agency in the Department of Public Works, and did have authority as of July 1, 1956, to issue special hauling permits. Under these circumstances it would appear that the issuance of such special permits by the Authority would not jeopardize the Commonwealth's right to Federal funds.

I call your attention to a letter from C. W. Enfield, General Counsel of the Federal Bureau of Public Roads, dated January 29, 1959, directed to the Superintendent of the Department of Public Works for the State of New York. In such letter he states that the issuance of special permits by the New York Thruway Authority would not jeopardize the apportionment of interstate funds to the State of New York because of the fact that the right to issue such permits in New York existed as of July 1, 1956. It is my opinion that a similar ruling would be forthcoming in respect to the rights of the Commonwealth, through its Department of Public Works and its Turnpike Authority, to issue such special permits.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General.*

On the facts presented, the per diem rate established by the Director of Hospital Costs and Finances to be paid by public bodies was based upon substantial evidence and did not appear to have been set improperly.

APRIL 17, 1959.

MR. FREDERICK J. SHEEHAN, *State Comptroller.*

DEAR SIR: — You have requested my opinion concerning the validity of a rate established by the Director of Hospital Costs and Finances under the provisions of G. L. c. 7, § 30L, governing the payment of Commonwealth funds to certain nursing or convalescent homes. You enclose copy of a letter with memorandum attached from the director in which he out-

lined briefly the procedure followed by him in establishing the rate. In that memorandum the director states that only 50 per cent of the 599 nursing homes involved submitted financial reports. Of the reports submitted only 49 per cent could be used. You state that the director apparently reviewed financial statements of only 20 per cent of the nursing homes and yet established a rate of $6.50 per diem for all nursing homes. You ask the following questions relative to these facts:

"1. Did the Director of Hospital Costs and Finances determine the rate in accordance with the law?"

In order to answer this question it would be necessary for me to review many facts in addition to those which you have presented. For example, the statutory provisions authorizing the director to set rates require that he conduct a hearing and issue a "regulation" in accordance with the provisions of G. L. c. 30A, § 1 (5). I have no way of determining, on the information submitted to me, whether there has been compliance with c. 30A. It is assumed that you are seeking advice only in relation to the factual situation outlined in your request. The problems posed by these facts are better answered in connection with the remaining questions:

"2. Was the rate which was established by the Director of Hospital Costs and Finances supported by substantial evidence when he states that only 20% of the financial reports of the nursing and convalescent homes were usable in determining the rates?"

I have examined the copy of the memorandum submitted by the director relating to his adoption of the rate in question. Page 1 of the memorandum indicates that he conducted three different public hearings. Page 2 of the memorandum indicates that there was evidence submitted to the director, both in the form of exhibits and also in the form of oral testimony. In connection with the exhibits the director has listed six different items that were submitted. The second of the six items relates to a summary of financial reports filed. In the absence of any information to the contrary, it would appear that this item covers the reports described in your letter. In addition to the one item relating to a summary of the financial reports filed, there were five additional exhibits and fifteen additional items listed under oral evidence. The memorandum does not purport to summarize the evidence, but instead is described in a letter from the director to you as a memorandum which briefly outlines certain information.

It would appear from the foregoing that the determination of the director was not based only upon a survey of the financial reports submitted by the nursing homes, but was also based on additional evidence presented to him. From the facts submitted I cannot say that the determination of the director was not supported by substantial evidence.

"3. Does the Director of Hospital Costs and Finances have authority under law to establish a uniform rate for all nursing and convalescent homes?"

The first sentence of G. L. c. 7, § 30L, under which the rates in question were established provided as follows:

"The director of hospital costs and finances shall, after hearing, determine at least as often as annually, the per diem rate or rates to be paid to nursing or convalescent homes, as defined in section seventy-one of

chapter one hundred and eleven, by the various departments, boards or commissions of the commonwealth, or by the various subdivisions of the commonwealth receiving reimbursement therefor, in whole or in part, from the commonwealth and may establish fair and reasonable classification or classifications of such rate or rates."

The foregoing language authorizes the director to establish either a single rate or multiple rates. The answer to question No. 3 is "Yes." Although the director may establish a single rate it is noted that the section in question requires that rates be adequate and reasonable and shall include a fair return on invested capital. In the event that the rate for any nursing or convalescent home is inadequate or does not include such fair return for that particular nursing home, the statute contains provisions for an appeal to the director, and thereafter for an appeal to the courts.

"4. Does the law require that the Director of Hospital Costs and Finances examine the books of each nursing and convalescent home in order to determine the rate to be paid to such homes?"

The second paragraph of the aforesaid § 30L contains the following sentence:

"The director shall have the power to examine the books and accounts of any such nursing or convalescent home, if in his opinion such examination is necessary to determine such rates."

The foregoing sentence authorizes the director to examine the books of nursing homes but does not require that he examine all of them. Such examination is made "if in his opinion such examination is necessary."

"5. If your answer to Question No. 1 is in the negative, can the Commonwealth, through its agencies, reimburse the nursing homes at the rate of $6.50 per diem for services rendered up to and including the date on which it is determined that the rate was not properly established?"

From the facts presented it does not appear that the rates have been adopted improperly. For this reason an answer to question No. 5 is not required.

It is noted that the Director of Hospital Costs and Finances was first authorized to set rates by c. 696 of St. 1956 and then by c. 480 of St. 1958. These two sections authorize the director to establish only a minimum rate. Thereafter, St. 1958, c. 600, for the first time authorized the director to set rates which would include a fair return on invested capital for each particular nursing or convalescent home. It may be that eventually a whole series of varying rates may be established in order to comply with this section, but the action of the director in initially establishing a single rate does not appear improper.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General,*

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

A person convicted in the Superior Court of a sex offense who is found to be a "sexually dangerous person" can be sentenced, or committed for treatment, and if sentenced the Commissioner of Correction is not required to transfer him to the Treatment Center.

April 21, 1959.

Hon. George F. McGrath, *Commissioner of Correction.*

Dear Sir: — You have renewed a request for an opinion asked by your predecessor on questions concerning the imprisonment of a person referred to by him.

The person referred to was adjudicated to be a sexually dangerous person in the Plymouth Superior Court on January 19, 1959. However, the court did not commit him to a sex treatment center for an indeterminate period, but instead sentenced him to the Massachusetts Correctional Institution for assault to rape a child under sixteen.

The questions asked are as follows:

"1. Should the notice to the Commissioner of Correction of the court's *finding* that the person referred to is a 'sexually dangerous person' be regarded as an 'order' from the court which requires the Commissioner to *transfer* the person to a treatment center or branch for the purpose of treatment and rehabilitation?

"2. If the answer to our first question is in the affirmative, should he be confined thereafter as a sexually dangerous person for an indeterminate period of one day to life unless released in accordance with the provisions of § 9?"

In answer to the first question it is necessary to decide exactly what G. L. c. 123A, § 5, as appearing in St. 1958, c. 646, § 1, authorizes the court to do. In my opinion this section empowers the court to do four things as follows:

1. If the court decides that a person is not sexually dangerous, it will proceed against him criminally.

2. If the court finds he is a sexually dangerous person, it may commit him indefinitely to a center for treatment.

3. Although the court decides a person is sexually dangerous, it still may, in its discretion, sentence him criminally.

4. The court may order that a person receive outpatient treatment such as recommended by the Department of Mental Health.

In the case you present, the court elected to select the third possibility as stated above. Since said G. L. c. 123A, § 5, says the court "may, in lieu of the sentence required by law for the original offense, commit such person . . .", such commitment is discretionary with the court. Therefore, it had the authority to sentence him as a criminal rather than commit him.

The word "order," as set forth in § 5 of c. 123A of the General Laws, refers exclusively to commitment orders. The provisions relating thereto apply only if the court elects to commit a prisoner. However, the court in the case presented, elected instead to sentence him criminally. Therefore, the commissioner was not required to transfer the person to a treatment center.

In answer to the second question, it logically follows that the prisoner should not be confined as a sexually dangerous person for an indefinite period but on the contrary should merely serve out his sentence.

Two other questions listed below as 3 and 4 were also asked by your predecessor and I have enclosed a copy of an opinion which I sent to the Commissioner of Mental Health [opinion dated April 16, 1959] which covers the law on this subject.

"3. Does the Commissioner of Correction or Commissioner of Mental Health, or both, have the authority to transfer a committed sexually dangerous person from one sex treatment center or branch to another

(*a*) established within a Department of Correction institution?

(*b*) established in a Department of Mental Health institution outside the Department of Correction?

"4. Does the Commissioner of Correction or Commissioner of Mental Health, or both, have the authority to transfer a person who has been temporarily committed for observation as a potentially sexually dangerous person from one sex treatment center or branch to another

(*a*) established within a Department of Correction institution?

(*b*) established in a Department of Mental Health institution outside the Department of Correction?"

Briefly, the answer to the third question section (*a*) is that the Commissioner of Correction has the authority to transfer sexually dangerous persons to an institution within the Department of Correction. The answer to section (*b*) is that the Department of Mental Health has the authority to transfer individuals within institutions in the Department of Mental Health.

The answers to the fourth question, sections (*a*) and (*b*), are the same as the answers to the respective sections of question 3.

It should also be noted that when there is an interdepartmental transfer by the Department of Mental Health and the Department of Correction, then the approval of both commissioners would be necessary. The power to so transfer is implied in the construction of the statutes dealing with transfers.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JOSEPH C. DUGGAN,
Assistant Attorney General.

A member of a retirement system cannot, by make-up payments, obtain credit for service as a temporary employee of less than six months' duration during which period he could not have become a member of the applicable system under the provisions of G. L. c. 32, § 3 (2) (a) (iv).

April 21, 1959.

Hon. Owen B. Kiernan, *Chairman, Teachers' Retirement Board.*

Dear Sir: — In your recent letter you have requested my opinion relative to make-up payments for a former temporary employee.

You state that one of your regular teachers, prior to his employment as such, was employed as a temporary senior statistical machine operator in the State Division of Employment Security from June 1, 1954, to August 4, 1954, and during this service he lost pay for eight days. You further state that this gentleman was not enrolled at the time of his temporary service as a member of the State Employees' Retirement System and that no deductions were made from his salary for said system and that he now wishes to be allowed to pay for and receive credit for this temporary service.

In view of the foregoing, you pose the following question:

"The Teachers' Retirement Board would like your opinion as to whether or not this teacher should be permitted to pay and receive credit for his temporary service from June 1, 1954 to August 4, 1954."

In my opinion the answer to your question must be in the negative, because your man had no right and could not become a member of the contributory retirement system while serving not over one month and three days as a temporary employee in the State Division of Employment Security.

The General Court in 1945 went to great pains to provide for eligibility for membership in the contributory retirement system. G. L. c. 32, § 3 (2) (*a*) (iv), provides specifically for the status of temporary employees; it says that,

". . . any such person who becomes regularly employed, as determined by the board as provided for in paragraph (*d*) of this subdivision, on a part-time, provisional, *temporary*, temporary provisional, seasonal or intermittent basis *shall* become a member in service, if he is to be classified in Group 1, *upon the completion of six calendar months of service*, and any other such person shall become a member in service upon his entry into service; . . ."

The General Court doubtless had in mind in enacting this provision that many, many instances might come up where temporary employees were employed for a short period of time. The Legislature doubtless knew that great confusion might well ensue if every temporary employee, however long or short his period of service, must be taken into the retirement system only to be removed from the system after a comparatively short time. Confusion alone would result from such a situation.

That is doubtless the reason why it was provided that temporary employees should become members of retirement systems only "upon the completion of six calendar months of service." Such a period of employ-

ment served to stabilize, to a certain extent at least, the status of the employee.

The General Court, I am sure, had a serious purpose in providing for this period of employment for temporary employees before permitting them to become members of the contributory retirement system. That purpose should not be frustrated.

Since the gentleman you inquire about would not and could not become, as a temporary employee, a member of a contributory retirement system when employed only slightly over a month, it naturally follows that he is not entitled to be credited for such service and thus obtain the benefits of G. L. c. 32, §§ 1 to 28, inclusive.

In this connection it may be further noted that by the provisions of § 3 (2) (*d*), the retirement boards have full jurisdiction to determine an employee's eligibility for membership if his service is on a temporary basis.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

A penalty provision of a lease with the United States would impose no liability upon the Commonwealth in the absence of an appropriation authorizing payment of such penalty.

APRIL 22, 1959.

MR. ELWOOD S. MCKENNEY, *Executive Secretary, Governor's Council.*

DEAR SIR: — In your recent letter you have requested my opinion concerning a proposed lease between the Commonwealth of Massachusetts (Air National Guard) and the United States of America (Department of the Army — Corps of Engineers). The lease as initially submitted to this office was not approved as to form because of language contained in paragraph 12 thereof which might impose an obligation on the Commonwealth to pay a penalty to the United States Government. I have been unable to find any appropriation which would authorize the payment of any such penalty. For this reason the lease cannot impose such a liability on the Commonwealth in view of G. L. c. 29, § 26, which provides in part as follows:

"No obligation incurred by any officer or servant of the commonwealth for any purpose in excess of the appropriation or allotment for such purpose for the office, department or institution which he represents, shall impose any liability upon the commonwealth."

A conference was arranged by representatives of this office which was attended by an Assistant Attorney General; Colonel Ralph T. Noonan, State Quartermaster; Colonel John F. Kane, U. S. A., United States Property and Fiscal Officer for Massachusetts; and Mr. O. F. Humphrey, Realty Officer, Corps of Engineers, U. S. A. During the conference telephone communications were also had with Mr. Frank V. Bonzagni, Chief of the Legal Section, Corps of Engineers, U. S. A.

The limitations on the authority of the representatives of the Commonwealth to enter into the lease in question were explained to these various officials. The Federal officials, in turn, called attention to provisions of Federal statutes requiring that the language in question be inserted in all Federal contracts calling for the expenditure of money. (Public Law 719, Ch. 458, 83rd Congress.)

Where it appears that the Federal Government has been warned as to the limitations of the State officials in connection with the instrument in question, and where such officials are still willing to proceed with the transaction, it would appear that there is no legal obstacle to the lease being executed at the present time.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

A proposed form of "license" agreement between the Civil Defense Agency and the town of Wilbraham for the purpose of erecting model air raid shelters is a lease within the provisions of G. L. c. 8, § 10A.

APRIL 24, 1959.

Mr. JOHN S. NOLAN, *State Superintendent of Buildings.*

DEAR SIR: — In your recent letter you have requested my opinion concerning an agreement by and between the Commonwealth of Massachusetts, acting through its Director of Civil Defense, and the town of Wilbraham. You asked whether or not this agreement constitutes a lease and comes within the provisions of G. L. c. 8, § 10A.

Under this agreement the town of Wilbraham purports to "license" to the Commonwealth for a period of five years a certain plot of land (of vague legal description) for the purpose of erecting and maintaining a so-called model family air raid shelter with signs, entrance and walks. This agreement provides for no rent or assumption of liability by the Commonwealth, which agrees to keep the premises in a neat and orderly condition at all times and to do other things indicative of a possessor of land.

The "license" purports to be irrevocable during the five-year term of this agreement, but gives either party a right to terminate upon the giving of 90 days' notice.

The fact that the agreement refers to itself at various places as a "license" does not convert it into a license. That is to say, the responsibilities and relationship created between the parties are controlling rather than the name assigned to the agreement by the parties.

The distinction between a lease and a license is plain although at times it is difficult to classify a particular instrument.

A lease of land conveys an interest in land and transfers possession. A license simply excuses acts, done by one on land of another, which would constitute trespass without such license, and conveys no interests in the land.

The controlling question raised by the agreement would seem to be "which party will be in possession of the land during the term of the agreement?" The agreement places upon the Commonwealth the responsibility for keeping the premises in a neat and orderly condition at all times,

to clear the sidewalk adjacent to the premises of ice and snow, and cut the grass on the premises. It gives to the Commonwealth the right to erect a structure with identifying signs, entrance and exit walks. It compels the Commonwealth upon termination of the agreement to restore the premises to substantially the condition they were in at the commencement of the agreement.

It would seem that the attached agreement constitutes a lease. *Baseball Publishing Co.* v. *Bruton*, 302 Mass. 54.

The answer to your question is as follows: The attached agreement constitutes a lease and comes within the scope of G. L. c. 8, § 10A.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By LEO SONTAG, *Assistant Attorney General.*

A license can be issued under G. L. c. 94, § 65H, for manufacturing frozen desserts on a mobile unit.

APRIL 30, 1959.

HON. ALFRED L. FRECHETTE, *Commissioner of Public Health.*

DEAR SIR: — In your recent letter you requested an opinion relative to the operation and effect of the provisions of G. L. c. 94, § 65H, as to the licensing of "plants" for the manufacture of frozen desserts and ice cream mix.

In the letter you state that at the time the "Frozen Desserts Law," G. L. c. 94, §§ 65G to 65S, inclusive, was enacted, frozen desserts plants were fixed places of business occupying some form of building. You further state that during the past few years a modern sanitary mobile unit from which customers can be served directly at the roadside, or at a fair or beach, has been developed, and that a question has arisen as to whether a mobile unit can be licensed under G. L. c. 94, § 65H.

General Laws c. 94, § 65H, requires that persons manufacturing frozen desserts in the Commonwealth file, upon a form prescribed and furnished by the Department of Public Health, an application for a license to manufacture the product with the board of health of the town in which the product is to be manufactured, and it is provided that the application state "that the applicant will manufacture such products only from pure and wholesome ingredients and only under sanitary conditions," and "shall show the location of each plant in such town at which such products are to be manufactured; . . ."

In G. L. c. 94, § 65I, it is provided that if the local board of health is satisfied, after inspection, that the plant referred to in an application for a license is maintained in accordance with the standards of sanitation prescribed in the rules and regulations of the department, it may grant a license to any suitable applicant.

It is apparent from a reading of the provisions of G. L. c. 94, §§ 65H and 65I, referred to, that the paramount interest of the Legislature in the enactment of the sections comprising the "Frozen Desserts Law" was, as

you state, "to require an adequate sanitary facility for the manufacture of frozen desserts."

There is no manifestation of any legislative interest in where the manufacture takes place other than that the place comply with applicable sanitary requirements, and no manifestation of any legislative interest that manufacture should be restricted to a plant having a fixed location.

In the case of *Chamberland* v. *Selectmen of Middleborough*, 328 Mass. 628, it was held that a board of health had exceeded its authority under G. L. c. 94, § 65H, in rejecting an application for a license for a plant for manufacturing frozen desserts because the location proposed for the plant would constitute a traffic hazard. In the case cited the court said at page 631:

"The power entrusted to the board by the Legislature concerned only matters which related to the public health. . . . The board had no authority to consider traffic and was acting beyond its power in denying the application on that ground."

In the case of *Commonwealth* v. *Rivkin*, 329 Mass. 586, the court set aside the conviction of a person, who was a hawker and pedler and held a State license, under a regulation of the board of health of the city of Northampton, adopted under what is now G. L. c. 94, § 146, prohibiting the sale of ice cream on any street, sidewalk or other public place. It was held that, so far as the regulation prohibited sales, it was not authorized under the statute which merely delegated a power to make rules relative to the manner in which food should be kept or exposed for sale in order to prevent contamination thereof and injury to the public health. The court said, at pages 587 and 588, "The object of such rules was to prevent the contamination of food intended for sale by prescribing the sanitary conditions under which it was to be kept and exposed for sale. . . . The statute said nothing about regulating the sale of food."

It is clear that the statutory provisions contained in G. L. c. 94, §§ 65G to 65S, inclusive, were framed with a single-minded purpose to assure that the frozen dessert and ice cream mix products dealt with are manufactured only under sanitary conditions. If frozen desserts can be manufactured in mobile units under such conditions, and you state that "from a public health point of view, this department would consider a mobile sanitary unit satisfactory as a manufacturing plant," there would be no objection to granting a license for manufacture in such a plant merely because the location of the unit in the city or town would be transitory and not fixed.

I therefore advise you that the provisions of G. L. c. 94, § 65H, permit the issuance of a license for manufacturing frozen desserts in a plant mounted on a mobile unit if the plant meets the requirements of any rules and regulations which the Department of Public Health has adopted and promulgated, or which it may hereafter adopt and promulgate applicable to such manufacture in such units.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JAMES J. KELLEHER,
Assistant Attorney General.

An erroneous sentence can be corrected only by court action. The Attorney General will, however, co-operate in determining the validity of the sentences of six juvenile offenders imposed under somewhat similar circumstances to those found objectionable in Metcalf *v.* Commonwealth.

May 2, 1959.

Hon. George F. McGrath, *Commissioner of Correction.*

Dear Sir: — In your recent letter you have requested my opinion as to what, if any, action you should take in view of the decision of the Supreme Judicial Court in the case of *Metcalf* v. *Commonwealth* (decided March 3, 1959, 338 Mass. 648) with regard to six prisoners in your custody, the validity of whose sentences may be open to the same objections which the court found as to Metcalf's sentence.

It appears from the information furnished in your letter that the six cases have the following points in common with Metcalf's case:

(1) Each prisoner was originally charged with murder in the first degree and in each case a plea of guilty was accepted to murder in the second degree and accordingly each is now serving a life sentence.

(2) In each case the offense was committed while the prisoner was under seventeen years of age.

(3) In each case no proceedings were brought against the prisoner as a delinquent child.

Although the six prisoners referred to by you were, like Metcalf, under seventeen years of age at the time of the commission of the homicides in which they were involved, it would appear that they were, while Metcalf was not, over fourteen years of age at that time. Since, as was pointed out by the court in the *Metcalf* case, there is a complete prohibition of criminal proceedings being taken against youths under fourteen, except for murder in the first degree, but no such complete prohibition when a youth is over fourteen, it is apparent that there is at least one possible distinguishing feature between Metcalf's situation and that of the six persons referred to in your letter.

An even more important distinction between the situation of some of the prisoners referred to in your letter and the situation of Metcalf is that it appears that the homicides in which two of the prisoners you refer to were involved occurred prior to the enactment of the amendment to G. L. c. 119, § 74, and effected by St. 1948, c. 310, § 12, and, in fact, that the sentences which they are serving were imposed in proceedings concluded before the date that amendment took effect, which, as provided in § 31 of said c. 310, was January 1, 1949. Prior to the amendment referred to, G. L. c. 119, § 74, permitted criminal proceedings against a child between fourteen and seventeen, without the necessity for prior proceedings against him as a delinquent child, for offenses punishable, as murder in the second degree is, for life, as well as for offenses punishable by death.

The commitments under which you are holding the six persons referred to were issued upon sentences of the Superior Court, and until you are ordered by the courts to do otherwise you must carry out the order of commitment.

Although there are, as stated, features in the cases of the six persons referred to by you distinguishing their situations from that of Metcalf, it may well be that the Supreme Judicial Court would hold, at least as to

some of them, that, as was held as to Metcalf, their sentences were invalid because no proceedings were taken against them as juveniles after their pleas of guilty to murder in the second degree were accepted.

Some steps should be taken to present the problem of the application of the holding in *Metcalf's* case to the two groups referred to in your letter, that is, those sentenced before January 1, 1949, and those sentenced after January 1, 1949. Petitions for writs of error could be brought in the Supreme Judicial Court for determination of the validity of the sentences imposed. If the prisoners referred to by you have counsel, this office will be most willing to co-operate with such counsel to have the cases presented and decided. If the prisoners cannot retain counsel, or cannot be furnished counsel in any other way, I should be glad, upon being so informed, to request the Supreme Judicial Court to appoint counsel to present the necessary petitions.

Although it would be desirable to have petitions filed for each individual concerned, that would not be absolutely necessary, for if the questions at issue as to each group should be finally determined by the Supreme Judicial Court for the Commonwealth in favor of prisoners for whom petitions had been brought, I would myself have petitions presented to make such determinations effective as to prisoners in the same situation for whom no petitions were brought.

I would be happy to have you refer to me counsel representing any of the persons referred to in your letter, and to co-operate in every possible way to have the cases heard and determined as quickly as a thorough consideration of the rights of the prisoners and the public requires.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

A pardon may be granted only after a conviction, and a record of a complaint for drunkenness with a suspension of further proceedings pursuant to G. L. c. 272, § 45, is not the subject of a pardon. Records of the Board of Probation of such complaints are not records of convictions and should not be made available for public inspection.

MAY 6, 1959.

Mr. CORNELIUS J. TWOMEY, *Chairman, Advisory Board of Pardons.*

DEAR SIR: — In your recent letter you have requested my opinion concerning the following:

Whether a court record of a complaint for drunkenness with a suspension of further proceedings, as provided in G. L. c. 272, § 45, after an arrest and a release under said section is the subject of a pardon by the Governor.

May the Board of Probation properly report such court records on inquiry by agencies inquiring at the Board?

This is to advise as follows:

1. In my opinion a court record of a complaint for drunkenness with suspension of further proceedings as provided in G. L. c. 272, § 45, is not the subject for a pardon by the Governor in that the Governor under the Constitution may pardon an offense after conviction but not before.

"The word 'conviction' . . . implies 'a judgment and sentence of the Court upon a verdict or confession of guilt.' . . . 'Nothing less than a final judgment, conclusively establishing guilt, will satisfy the meaning of the word "conviction" as here used.'" *Attorney General* v. *Pelletier*, 240 Mass. 264, 311.

The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone suspected the person apprehended of an offense. In view of the fact that the persons involved in the question which you have raised have not been tried and convicted, the Governor is precluded from granting a pardon to them.

2. As to your second question, it is my opinion that the Board of Probation may not properly enter such arrests as court records of convictions nor give them out as court convictions. Although under the provisions of G. L. c. 276, § 100, they may keep a record of the work of the probation officers, it would seem that the records dealing with persons arrested and released under G. L. c. 272, § 45, should be kept separate and distinct from the regular court records and not made available to public inspection.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JOSEPH C. DUGGAN,
Assistant Attorney General.

The provisions of G. L. c. 30A, § 13 (the Administrative Procedure Act), operate to require notice and hearing prior to the revocation of a license under G. L. c. 175, § 5; seven days' notice of hearing would be reasonable.

MAY 12, 1959.

Hon. OTIS M. WHITNEY, *Commissioner of Insurance.*

DEAR SIR: — In your recent letter you request an opinion upon the following two questions:

"(1) In connection with a proceeding initiated by the Commissioner of Insurance under G. L. c. 175, § 5, for the revocation of the license of a foreign insurance company, is it necessary that the requirements of G. L. c. 30A (commonly referred to as the State Administrative Procedure Act), relative to notice and hearing, be observed?"

Section 13 of c. 30A of the General Laws provides that, in general, a license shall not be revoked without prior notice and hearing. An exception is made for cases where a provision of the General Laws *expressly* provides that no hearing in regard to revocation need be held. G. L. c. 175, § 5, does not expressly provide that no hearing need be held in regard to revocation of a license referred to therein.

The provisions of c. 30A, § 13, require a hearing prior to the revocation of a license except in the instance already referred to and except when

revocation is required on the basis of a court conviction or judgment or where revocation is based *solely* upon failure of the licensee to file timely reports, schedules or applications, or to pay lawfully prescribed fees, or to maintain insurance coverage as required by any law or by regulation.

Subject to the aforementioned exceptions, the answer to your first question is in the affirmative.

Your second question is:

"(2) If the requirements of G. L. c. 30A as to notice and hearing must be complied with in a proceeding conducted by the Commissioner of Insurance under G. L. c. 175, § 5, for the revocation of the license of a foreign insurance company, would a seven-day or a ten-day notice of such hearing comply with the 'reasonable notice' provisions of (1) of § 11 of said c. 30A, or is it necessary that a twenty-one-day notice similar to that required by (1) of § 2 of c. 30A, be given?"

Chapter 30A, §2 (1), deals with the adoption or amendment of regulations by an agency and does not relate to the conduct of adjudicatory proceedings.

Sections 10 to 13, inclusive, of c. 30A deal with the conduct of adjudicatory proceedings. A hearing required under the provisions of § 13 of c. 30A is governed by §§ 10 to 12, inclusive, of the Administrative Procedure Act. Section 11 (1) of the Administrative Procedure Act sets forth a requirement of "reasonable notice of the hearing."

The answer to your second question is as follows:

The provisions of c. 30A, § 2 (1), do not apply to a hearing as to the revocation of a license held under the provisions of c. 175, § 5. The provisions of c. 30A, § 11 (1), providing for "reasonable notice of the hearing," do apply to such a proceeding. What constitutes "reasonable notice" usually depends upon the facts and circumstances of each particular case. In proceedings under G. L. c. 175, § 5, the alleged grounds for revocation deal with the conduct of the licensee, its business policies, management and financial condition, that is, matters that are or should be within the knowledge of the licensee.

In criminal proceedings in the Commonwealth, defendants are often put on trial within a week of being charged. In numerous civil proceedings no more than seven days' notice is usually required.

In answer to your question, it would appear that a seven-day notice of hearing would be reasonable.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By LEO SONTAG, *Assistant Attorney General.*

A licensed operator must be in attendance at all times during which a steam boiler requiring a licensed operator is in operation, including periods of operation for heating purposes only.

May 12, 1959.

Hon. Henry J. Goguen, *Commissioner of Public Safety.*

Dear Sir: — In a recent letter your predecessor in office requested my opinion on the following:

"May the holder of a Massachusetts license, who is in charge of the boiler or boilers, who signs the Engineers Record Book on Steam Boilers, leave the boiler or boilers in operation and unattended for heating purposes after everyone has gone home?"

General Laws c. 146, § 46, provides that it is unlawful for any person to have charge of or operate a steam boiler or engine (with certain exceptions) unless he is licensed. This statute has already been determined as intended for the safety and security of the public. 1 Op. Atty. Gen. 485.

In view of the necessity for the safe operation of these steam boilers, it is the opinion of this office that a licensed operator must be in attendance at all times during which said steam boiler is in operation, and it may not be left unattended for heating purposes after everyone has left the premises.

Very truly yours,

Edward J. McCormack, Jr., *Attorney General,*

By Joseph C. Duggan,
Assistant Attorney General.

A sentenced prisoner adjudicated a sexually dangerous person and given an indeterminate life commitment as such, suspended on condition that he receive outpatient treatment, is to receive such treatment while a prisoner, and his sentences will run concurrently with his commitment.

May 14, 1959.

Hon. George F. McGrath, *Commissioner of Correction.*

Dear Sir: — In your recent letter you request an opinion as to the effect G. L. c. 123A, § 6, has on the present sentence of a person referred to by you. Please be advised as follows:

As you mention, the person in question was sentenced for a term of 12 to 20 years for each of the crimes of robbery, rape and sodomy to be served concurrently. Subsequently, while serving the above sentenees, he was adjudicated a sexually dangerous person and the court ordered that he "be committed to the treatment center at the Massachusetts Correctional Institution, Walpole, for an indeterminate period of a minimum of one day and a maximum of natural life." "The Department of Mental Health having recommended . . . [the prisoner] . . . as a suitable sub-

ject for out-patient treatment, this commitment is suspended upon condition that . . . [the prisoner] . . . receive such out-patient treatment."

Two issues are raised by your letter:

(1) May the person referred to be discharged from the Massachusetts Correctional Institution for outpatient treatment despite the fact that his sentences totaling 12 to 20 years have not expired?

(2) What effect, if any, does the order of commitment as a sexually dangerous person have on his prison sentence?

In short, St. 1958, c. 646, § 6, provides for a procedure in dealing with prisoners under sentence who become sexually dangerous. Under this section, if the court finds that a prisoner is sexually dangerous, it must do one of four things: (1) commit him to the center for an indeterminate period of a minimum of one day and a maximum of such person's natural life; (2) commit such person to a mental institution; (3) place such person upon outpatient treatment; and (4) make such other disposition upon the recommendation of the Department of Mental Health consistent with the purpose of treatment and rehabilitation.

The court in the instant case elected to place the prisoner upon outpatient treatment. This raises the question as to whether this outpatient treatment is to be received as a prisoner at Walpole or as a citizen at large. This problem is partially answered in St. 1958, c. 646, § 6, as follows: "*Such prisoner shall be held in custody under sufficient security to protect society,* and he shall be subject to all laws, rules and regulations which govern inmates of the institution to which he has been committed, in so far as may be compatible with the treatment provided for by this chapter, and he shall be entitled to such rights and privileges of such inmates, in so far as may be compatible with such treatment."

It should also be noted in determining the legislative intent that in § 5 of the above-mentioned act it is expressly provided that the court may commit a sexually dangerous person for an indeterminate period of a minimum of one day and a maximum of such person's natural life, *in lieu* of the sentence required by law. However, § 6 of this act does not provide that a commitment order is to be served in lieu of the original sentence. Therefore, it would appear that if the legislators intended a commitment be served in place of a sentence, they would have used the words "in lieu of" as they did in § 5.

This being the case, it may be concluded that a commitment as a sexually dangerous person does not in any way abrogate the original sentence. Of course, a commitment order would not toll the running of a sentence since his commitment is involuntary on his part.

It should also be noted that § 9 of the aforementioned act provides for the parole and discharge procedure for persons committed under § 6 of this act. Therefore, the prisoner would be entitled to the benefits of this section. In the event that he was paroled or discharged under this section, he would immediately be returned to serve out the remainder of his sentence.

It would appear from the over-all reading of this chapter that the legislative intent was one of rehabilitation for a prisoner who is sexually dangerous. In the similar situation of a prisoner who becomes insane the Legislature has specifically provided that said prisoner be returned to the prison once his commitment for insanity is no longer necessary. Likewise, in the instant case the Legislature impliedly provides for the same result in the case of the sexually dangerous person.

In turning our attention to the problem of outpatient treatment, it would appear from the above reasoning that a sexually dangerous person shall receive his outpatient treatment as a prisoner and not as a citizen at large.

In answer to your first question, the prisoner in question would not be discharged as a citizen at large but on the contrary would receive his outpatient treatment while still serving his sentence at the Massachusetts Correctional Institution.

In answer to your second question, the order of commitment as a sexually dangerous person would have no effect on his prison sentences but would run concurrent therewith.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JOSEPH C. DUGGAN,
Assistant Attorney General.

The provision of G. L. c. 127, § 129A, added by St. 1959, c. 224, allowing a prisoner of any correctional institution of the Commonwealth time off for a donation of blood, does not include prisoners in county institutions.

MAY 28, 1959.

Hon. GEORGE F. MCGRATH, *Commissioner of Correction.*

DEAR SIR: — Your letter of recent date requests the opinion of this department upon the question:

"Whether or not the language 'a prisoner of any correctional institution of the commonwealth' restricts the donation of blood to prisoners who are confined in the institutions of the Commonwealth; namely, M.C.I., Walpole; M.C.I., Concord; M.C.I., Norfolk; M.C.I., Bridgewater; M.C.I., Framingham; M.C.I., Monroe and M.C.I., Plymouth."

It is my opinion that the new legislation is limited to State institutions and does not include any county penal institutions, in view of the provisions of the first paragraph of G. L. c. 125, § 1, and more specifically, the following sentence: "The above-named institutions together with such other state prison camps as may be established under sections eighty-three A and eighty-three E of chapter one hundred and twenty-seven, shall constitute *the* correctional institutions of the commonwealth." I am of the opinion, therefore, that corrective legislation will have to be introduced if it is the desire of the Legislature that prisoners in county penal institutions be given credit under the statute.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JOSEPH C. DUGGAN,
Assistant Attorney General.

A final decision of the Contributory Retirement Appeal Board is binding on the State Retirement Board and the questions determined cannot be re-examined by the Attorney General.

JUNE 3, 1959.

Hon. JOHN F. KENNEDY, *Treasurer and Receiver General.*

DEAR SIR: — In your recent letter you requested an opinion with reference to a decision of the Contributory Retirement Appeal Board, promulgated on April 17, 1959. The decision referred to reversed a decision of the State Retirement Board denying the widow of a deceased employee of the Department of Correction accidental death benefits under the provisions of G. L. c. 32, § 9.

In your letter you point out that the Contributory Retirement Appeal Board in making their decision applied the presumption of service connection of heart disease provided for by G. L. c. 32, § 94. You further point out that the amendment to G. L. c. 32, § 94, making said § 94 applicable to employees in the Department of Correction, which change was enacted by St. 1956, c. 580, did not become effective until after the death of the employee in question, which occurred on July 20, 1956, and you ask for an opinion on the question of "whether the presumption can legally be applied retroactively as has been done by the Contributory Retirement Appeal Board . . .."

General Laws c. 32, § 16, which provides for appeals to the Contributory Retirement Appeal Board from decisions of the retirement boards of the various contributory retirement systems, expressly provides in clause (4) that a decision of the Appeal Board "shall be final and binding upon the board involved and upon all parties in interest, and shall be complied with by such board and by such parties."

The request of the State Retirement Board for an opinion as to the correctness of the decision of the Contributory Retirement Appeal Board is, in effect, an attempt to obtain a re-examination of the decision of the Appeal Board. Not only is such a re-examination specifically forbidden by the express wording contained in G. L. c. 32, § 16 (4), quoted above, as you were informed in a letter to you dated September 19, 1958, from Assistant Attorney General Fred W. Fisher, but as is shown by the decision of our Supreme Judicial Court in *Casieri's Case*, 286 Mass. 50, even apart from such a specific provision, after a decision of an administrative board has become final it is not subject to re-examination. In the case cited it was held that a decision of the Industrial Accident Board which had final effect under the provisions of law in effect at the time it was rendered could not be re-examined under the provisions of a statute enacted at a later date.

Not only is the decision of the Contributory Retirement Appeal Board final and binding on the State Retirement Board but the decision of the Appeal Board does not, under established rules of statutory construction, give retroactive effect to the amendment to G. L. c. 32, § 94, effected by St. 1956, c. 580. Statutes such as G. L. c. 32, § 94, relating to evidence in support of, and the burden of proof as to, matters in issue, are procedural and remedial statutes. See *Duggan* v. *Bay State Street Railway*, 230 Mass. 370, so holding as to the statute providing for a presumption of due care on the part of the plaintiff, and certain others, in actions to recover damages for death or for injuries to the person or property.

It is well settled that such statutes are applicable to causes of action existing on the effective date of the statute which are the subject matter of actions pending on, or brought after, such effective date. As was stated in the case of *Smith* v. *Freedman*, 268 Mass. 38, at pages 41 and 42:

"The general rule, in civil cases at least, as to the interpretation of statutes dealing only with evidence, is that in the main they are remedial and should be construed liberally in order to effectuate that purpose, and that they are applicable to all causes coming on for trial after they became operative, whether the cause of action arose before, or after, and whether the writ was brought before, or after, the statutes became operative, unless a contrary legislative design is plainly expressed. *Brooks* v. *Holden*, 175 Mass. 137, 139. *Stocker* v. *Foster*, 178 Mass. 591, 603. *Hall* v. *Reinherz*, 192 Mass. 52. *Woodvine* v. *Dean*, 194 Mass. 40, 43. *Devine's Case*, 236 Mass. 588, 594. *Easterling Lumber Co.* v. *Pierce*, *supra*. See also *Paraboschi* v. *Shaw*, 258 Mass. 531, 533; *Hollingsworth & Vose Co.* v. *Recorder of Land Court*, 262 Mass. 45, 47. Since the statute is one relating solely to evidence and the conduct of trials in court, the question for decision accurately stated is, whether it is applicable to all cases or only to a restricted class of cases falling within the scope of its language and coming on for trial after it becomes operative, and not whether it is retroactive or prospective in effect. As the statute is one relating to the conduct of trials and not to substantive rights, it is of no consequence whether it takes effect upon its passage, or in accordance with G. L. c. 4, § 1, or with art. 48 of the Amendments to the Constitution, the Referendum, Parts I, II, III, or at some other specified date."

As is pointed out in the case of *Wynn* v. *Board of Assessors*, 281 Mass. 245, at page 249, the application of a procedural or remedial statute in trials occurring after the effective date of the statute, of causes of action or claims which arose before said effective date, is actually a prospective application of the statute.

In the case last cited the court also points out that aside from the fact that the application of a procedural or remedial statute in proceedings brought after the effective date of the statute, although with reference to causes existing prior to such effective date, is prospective and not retroactive, if a statute were more than a procedural statute there would be no constitutional objection to retroactive effect being given to the statute, if it made the requirements for enforcing a claim against the State, or a political subdivision thereof, less stringent, because the control of procedural requirements as far as concerns the rights of the State in such cases rests entirely with the General Court.

The statute in question, like the similar Federal statutes relating to compensation to veterans for wartime and peacetime disabilities providing certain presumptions as to sound condition and that certain diseases were incurred or aggravated by military service (see United States Code, Title 38, §§ 2312, 2313, 2333 and 2334) is intended to serve a beneficent purpose and should be given a liberal interpretation.

As was said of the remedial statute under consideration in the case of *Wynn* v. *Board of Assessors*, 281 Mass. 245, at page 250, the manifest purpose of the 1956 amendment to G. L. c. 32, § 94, was to give injured employees or their dependents less restricted means of enforcing their claims, and no reason appears why the considerations leading to the changes in

policy effected by the amendment are not applicable to pending cases. Nothing in the 1956 amendment indicates a legislative intention to exclude from its benefits any employee or a dependent of an employee, "whose rights had *not been finally adjudicated* and who brings himself within its terms. If such exclusion had been intended it could readily have been accomplished by an express provision to that effect" (emphasis supplied).

I therefore advise you that not only is the decision of the Contributory Retirement Appeal Board final and binding on the State Retirement Board and not open to re-examination in any event but that if the decision were open to re-examination it is in accord with the established rules of statutory construction.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By JAMES J. KELLEHER,
Assistant Attorney General.

The provision of the Separation Act of 1820 that the charter of Bowdoin College may be amended only with the consent of the Massachusetts Legislature has no effect as to scholarships or loan funds provided by our statutes, since they are not limited to students attending Massachusetts institutions.

JUNE 3, 1959.

HON. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR SIR: — You have referred to this office copy of a letter from the President of Bowdoin College, Brunswick, Maine, in which he states that that institution is subject to the control of the Massachusetts Legislature by virtue of the Act of Separation of 1820. In view of this fact the institution requests that it be recognized as having the same rights and privileges to participate in scholarship and loan programs of the Commonwealth as may be enjoyed by institutions geographically located within the Commonwealth.

We have examined the various statutes relating to scholarship and loan funds and find that the benefits provided are not limited to students attending institutions located in this Commonwealth. For this reason it would appear that the rights which Bowdoin College might enjoy as an institution geographically located in Maine are the same as it would enjoy if geographically located here in Massachusetts, at least in so far as such rights pertain to scholarship and loan funds provided by this Commonwealth. The pertinent chapters appear to be as follows:

Chapter 690 of the Acts of 1957 established a board of educational assistance which, according to § 26 "shall administer a scholarship program for the purpose of furnishing aid and assistance to students *domiciled* in the commonwealth and enrolled in and pursuing a program of higher education in any approved public or private college, normal school, scientific or technical institution, or any other approved institution furnishing a program of higher education. Such aid and assistance shall consist of the awarding

of one quarter, one half, or full scholarships to worthy and qualified students in need of financial assistance, *provided that not less than ten nor more than twenty-five per cent of the total amount of scholarships awarded in any one year shall be allotted to students at institutions of higher education supported by the commonwealth. . . .*"

The foregoing section has the limitation in favor of institutions supported by the Commonwealth. We do not understand that Bowdoin College contends that it is so supported.

Chapter 691 of the Acts of 1957 provides for the creation of a Medical, Dental and Nursing Scholarship Board for the awarding of one quarter, one half and full scholarships "to worthy and qualified students who have been residents of the commonwealth for a period of four years immediately prior to receiving such award and who are in need of financial assistance in order to pursue a course of study in medicine, dentistry or nursing. . . ."

Aid under this statute is limited to residents of the Commonwealth. No condition at all is attached with regard to geographical location of the institution attended.

Chapter 298 of the Acts of 1956 created the Massachusetts Higher Educational Assistance Corporation, which is a private group chartered by legislative enactment. The function of the corporation is to provide collateral for loans made to students through local commercial banks. Section 4 of the act states:

"The purposes of the corporation shall be to aid and assist *students* to fulfill a *program of higher education.*

"(*a*) . . . to make contracts and incur liabilities for any of the purposes of the corporation, including any secondary liability by way of guaranty or endorsement of the obligations of any *student,* his parent or guardian, or of any *approved educational institution.*

* * * *

"(*c*) To make loans to any *student,* his parent or guardian, or to any *approved educational institution, . . .*"

With respect to the above-quoted material, section 1 of the act defines an approved educational institution as "any educational institution approved by the state-approving agency for the state where such educational institution is situated, . . ." It would appear from the foregoing that the provisions of c. 298 are not limited to institutions located in Massachusetts but to institutions in any State, provided the institution is approved as required. It may be that there is some particular public scholarship fund in which Bowdoin College is interested, where geographical location or control by the Commonwealth may be significant. Such a fund has not been called to our attention. If such a fund exists, we will be happy to review the terms thereof in relation to Bowdoin College as you request.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

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

A State agency may lease space outside the State House when provision for the rent due in the current fiscal period is made by transfer from another appropriation subsidiary account of the agency to its rent subsidiary account, although none of the appropriation was originally allocated to the latter account.

JUNE 11, 1959.

HON. CHARLES FRANCIS MAHONEY, *Commissioner of Administration.*

DEAR SIR: — You have requested my opinion on the question of the authority to execute a lease for quarters outside the State House for the Division of Banks and Loan Agencies in the circumstances hereinafter stated.

It appears that it is felt that the space occupied in the State House by the Division of Banks and Loan Agencies should be assigned for the use of other State offices, with the result that it is necessary that other quarters be obtained for the division. It is clear that under the provisions of G. L. c. 8, § 10, providing that the State Superintendent of Buildings, under the supervision of the Governor and Council and with the approval of the Commission on Administration and Finance, shall assign the rooms in the State House and determine the occupancy thereof in such manner as the public service may require, the space presently assigned to the Division of Banks and Loan Agencies can lawfully be assigned for the use of other State offices.

In these circumstances it is proposed that quarters for the Division of Banks and Loan Agencies be provided for by leasing premises in non-State ownership, the lease to commence on June 15, 1959, and to extend for a period of two years.

You refer to the provision of G. L. c. 29, § 29, providing for transfers between subsidiary accounts set up as prescribed in the schedules referred to in § 27 of said c. 29, and state that it is proposed that a transfer be made from available balances in other subsidiary accounts within the current appropriation account for the Division of Banks and Loan Agencies to provide funds for the payment of the rent which will be due under the proposed lease for the period of the term falling within the current fiscal year and ask whether, if that is done, the lease can be approved under the provisions of G. L. c. 8, § 10A.

General Laws c. 29, § 27, referred to above, forbids an expenditure of funds by a State officer unless an appropriation has been made and funds have been allotted by the Governor to cover it. The section further provides that appropriations and allotments shall be expended only in the amounts prescribed in subsidiary accounts established for the several appropriation accounts in schedules established by, and on file with, the Joint Committee on Ways and Means. It appears that under the general accounting and appropriation plan for the Commonwealth subsidiary accounts for specified purposes are set up for each appropriation account, and that one of the subsidiary accounts, number 16, is for rent.

General Laws, c. 29, § 29, provides that any subsidiary account set up as prescribed in the schedules referred to in § 27 may be increased or decreased by interchange with any other such subsidiary account within the

same appropriation account, with the approval of the Budget Commissioner.

Under the provisions of §§ 27 and 29 of G. L. c. 29, referred to above, provision has been made for such flexibility in the expenditure of the total amount appropriated for an agency, as to provide an appropriation for any of the purposes represented by any subsidiary account set up under the general accounting and appropriation plan of the Commonwealth so long as there are balances in any of the other subsidiary accounts of the appropriation account available to be transferred to the subsidiary account from which an expenditure is desired to be made, and the approval of the Budget Commissioner to the transfer is obtained.

If, as you state, there are unexpended balances in one or more of the subsidiary accounts for the Division of Banks and Loan Agencies available for transfer in accordance with the provisions of G. L. c. 29, § 29, sufficient to provide for the payment of the rent which will become due for so much of the term of the proposed lease referred to by you as falls within the current fiscal year, and such a transfer is made, it is my opinion that provision for the rent of the premises for so much of the term of the lease as falls within the current fiscal year "has been made by appropriation," within the meaning of the phrase quoted as used in said G. L. c. 8, § 10A, and, therefore, that the execution and approval of the lease referred to will be authorized under that section.

The opinion stated herein is in agreement with that expressed by former Attorney General Clarence A. Barnes in an unpublished opinion dated May 4, 1948, to the then Chairman of the Committee on Ways and Means of the House of Representatives. In the opinion referred to, the members of the said Committee on Ways and Means were assured that their understanding was correct that under §§ 27 and 29 of c. 29 of the General Laws a transfer could be made to a subsidiary account listed under an appropriation account to which subsidiary account no allocation of funds was made at the time the appropriation and the allocations of the appropriation to other subsidiary accounts were made. See also the opinion of former Attorney General Barnes to the Commissioner of Administration under date of November 29, 1948 (Attorney General's Report, 1948, p. 47) to the effect that a statutory requirement that an "appropriation" have been made to cover a particular expenditure, is satisfied "if there is an available over-all appropriation in a particular department or division sufficient to cover, . . ." the proposed expenditure.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

Registered operators applying for registration as hairdressers after the effective date of the 1958 act, allowing experience credit for certain periods of work under temporary permits, are entitled to credit for such periods of work prior to the said effective date.

JUNE 22, 1959.

Mrs. HELEN E. SULLIVAN, *Director of Registration.*

DEAR MADAM: — In your recent letter you have requested my opinion relative to the effect of the amendment to G. L. c. 112, § 87W, enacted by St. 1959, c. 343, which was approved on May 26, 1959.

Your question is whether the amendment referred to, which takes effect on August 26, 1959, applies to registered operators who have been employed since August 26, 1958, as well as to students now registered in the beauty schools.

Section 2 of St. 1950, c. 540, amended G. L. c. 112, § 87W, to provide that any registered operator who had not less than one year's practical experience as such could be so registered by the board as a hairdresser and thereafter could practice hairdressing in a registered shop for compensation and supervise operators. Previous to the amendment, said § 87W provided that "any operator who has had not less than six months' practical experience" could be so registered.

Section 3 of St. 1950, c. 540, provided that within one year after the effective date of that act (September 15, 1950) any registered operator who had not less than one year's practical experience as such, and who made application therefor, accompanied by a fee of ten dollars and passed a practical examination satisfactory to the board could be registered as a hairdresser.

Chapter 343 of the Acts of 1959 amends G. L. c. 112, § 87W, by adding the sentence, "In computing practical experience under this paragraph, time which an operator has worked as such under a temporary permit shall be included in computing such period [i.e., not less than one year's practical experience]; provided, however, that credit for such work shall not exceed three months."

The provisions quoted, that in computing practical experience the time in which an operator has worked under a temporary permit may be included, except that credit allowed for such work shall not exceed three months, would apply to registered operators who have been employed as such prior to the effective date, August 26, 1959, as well as to persons qualifying as operators after August 26, 1959. Its operation is not restricted to students now registered in beauty schools becoming registered operators after the effective date of the 1959 act.

Under the provisions, any graduate of a beauty school who has been working under a temporary permit and who, in addition to not more than three months' work under such permit, has an additional nine months' practical experience, upon complying with the other requirements of the first paragraph of said § 87W may be registered as a hairdresser.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By LUCY BRODERICK BRADY,
Assistant Attorney General.

Workmen's compensation benefits are required to be set off against a disability pension or retirement allowance only when the same injury is the basis for both allowances.

June 24, 1959.

Hon. Charles Francis Mahoney, *Commissioner of Administration.*

Dear Sir: — Your letter of recent date posed the following question:

"Shall an employee, to be retired under §§ 56 to 60 as a veteran, have his lump sum Workmen's Compensation settlement, allocable to the period following his retirement, offset against his pension allowance granted under these sections, provided that the retirement is for physical causes or injuries other than the injury for which the Workmen's Compensation settlement was received?"

As you are doubtless aware, there are today in existence in this Commonwealth, in general, two types of retirement benefits for public employees. First, contributory retirement allowances in cases where the employee contributes a portion of his earnings regularly toward his retirement allowance, and secondly, provisions in certain limited cases for non-contributory pensions. Many, if not most, of the laws relating to both types of retirement allowances are to be found in G. L. c. 32. In both types, different benefits are usually provided, both in cases of superannuation retirements and retirements by reason of incapacity resulting from injuries received in the course of duty. At the same time many provisions may be found in G. L. c. 152, commonly called the Workmen's Compensation Act, providing modest compensation provisions for public employees who are injured in the course of their employment but not necessarily permanently. These compensation benefits are limited to "employees" and also limited as to amounts. Compensation claims for incapacity may be and often are settled by the claimant by the payment of a lump sum in full of liability (G. L. c. 152, § 48), and provisions are found in both c. 152 (§ 73) and c. 32 (§ 14) for offsetting lump sum payments against retirement allowances.

Most of the applicable provisions of law relating to contributory retirement allowances for public employees are found in G. L. c. 32, §§ 1 to 28, inclusive. General Laws, c. 32, §§ 56 to 60, inclusive, to which you refer, provide for non-contributory pensions for veterans. Under § 25 of c. 32, a member of a contributory retirement system who is also entitled to the benefits of §§ 56 to 60, inclusive, may at his option elect at the time of retirement whether he will take his contributory retirement allowances under §§ 1 to 28, inclusive, or waive them and receive his contributions back and take his veteran's pension under and subject to the provisions of §§ 56 to 60.

The elective provisions I have referred to are only available to the veterans referred to therein as a reward to those who have played their parts honorably and well in the Armed Forces of the Nation. My predecessor in office, Attorney General Fingold, in an opinion dated December 16, 1955, to the then Commissioner of Administration in answering a query something like yours, said: "I find a general legislative intent not to have public servants benefit from Workmen's Compensation payments for injuries under chapter 152 of the General Laws and at the same time receive pensions for disabilities originating *from the same source.*" The detailed

offset provisions of c. 152, § 73, c. 32, § 14, and c. 32, § 3 (7) (*g*), leave no doubt in my mind upon that subject. However, the question you pose is different in at least one important aspect from the one I have referred to. In substance, you wish to know if a lump sum settlement for injuries arising out of and in the course of his employment may be offset against his veteran's pension for an incapacity resulting from a different source, having nothing whatever to do with the former. My answer to your question is in the negative. You will notice that the elective provision between compensation and pension found in G. L. c. 152, § 73, is predicated in the very first sentence to persons entitled to receive compensation from the Commonwealth who are also entitled to a pension "*by reason of the same injury.*" You may also observe that the offset provisions found in c. 32, § 14 (2) (*a*), provide that the compensation payments "shall be offset against and payable in lieu of any pension payable on his account under the provisions of section six, seven or nine *by reason of the same injury.*" You have stated clearly that the pension in the case you refer to will be not for the same injury for which compensation was awarded but for a different injury.

It is not easy to reconcile all the provisions of G. L. c. 32, §§ 1 to 28, inclusive, relative to contributory retirement allowances, with § 73 of c. 152, relating to offset provisions, and §§ 56 to 60 of c. 32, relating to veterans' pensions, and it may be that legislation may be necessary to cover the situation you refer to. However, it is not the function of this office to write legislation nor speculate upon a legislative intent not clearly expressed. My opinion, therefore, is as above written.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

The increase in pensions granted under St. 1951, c. 781, as amended, is applicable to a person given a three-fourths pension by a special act.

JUNE 24, 1959.

Mr. FREDERICK J. SHEEHAN, *State Comptroller.*

DEAR SIR: — In your letter of recent date you requested an opinion relative to Mr. William L. Searle. You state that Mr. Searle, by the provisions of Res. 1939, c. 56, was given an annuity for five years equal to his salary which was $2,040; that under Res. 1943, c. 37, he was given an annuity of three-quarters of said salary after the period covered by said c. 56, to cease upon his death.

You call attention to the provisions of St. 1951, c. 781, as amended by St. 1952, c. 536, St. 1955, c. 670, § 2, and ask my opinion on the following question:

"1. Is the amount provided for in Res. 1943, c. 37, authorized to be increased by the provisions of St. 1951, c. 781, as amended by St. 1952, c. 536, and by the provisions of St. 1955, c. 670?"

Chapter 56 which you refer to was a resolve providing that ". . . there be allowed and paid out of the treasury of the commonwealth an annuity for a period of five years . . . to William L. Searle of Concord, who has served the commonwealth faithfully and is now permanently disabled for further performance of duty on account of injury sustained, while in the performance of duties as a guard at the Massachusetts reformatory, by reason of being assaulted by certain inmates of said reformatory. Said annuity shall be equal to the salary received by him during the last year of his active service, shall be paid in equal monthly installments, and shall cease upon the decease of said Searle if it occurs prior to the expiration of said period of five years."

Chapter 37 of the Resolves of 1943 provides "That for the purpose of discharging a moral obligation of the commonwealth . . . and after an appropriation has been made therefor there be allowed and paid . . . to William L. Searle . . . who served the commonwealth faithfully and is now permanently disabled for further performance of duty on account of injury sustained, while in the performance of duties as a guard at the Massachusetts reformatory, by reason of being assaulted by certain inmates of said reformatory, an annuity equal to three-fourths the salary received by him during the last year of his active service. Said annuity shall be payable in equal monthly installments . . . and shall cease upon the decease of said Searle . . . ."

Chapter 781 of St. 1951 is entitled, "An Act relative to increasing the amounts of pensions and retirement allowances payable to certain former public employees." It provides that "The annual amount of every pension, retirement allowance, annuity or other benefit payable under any general or *special* law by the commonwealth . . . to any former employee . . . who was separated from the service by retirement prior to November first, nineteen hundred and forty-nine, . . . including any former employee *retired because of accidental disability* . . . shall be increased by one hundred dollars; . . . " It is further provided that no increase shall be made of any annuity if it exceeds $2,000 and no increase shall be made which will make an annuity exceed $2,000 annually. The increase granted by c. 781 with respect to annuities payable by the Commonwealth takes effect on December 1 in the then current year. Chapter 536 of St. 1952 amends c. 781 by including in its benefits persons receiving pensions or annuities under the provisions of G. L. c. 32, §§ 89 and 89A. Chapter 670 of St. 1955 provides that the annual amount of *every* annuity payable under any general or *special* law by the Commonwealth to any former employee who was separated from the service prior to April 1, 1951, whose sole or principal employment was in the service of the Commonwealth, be increased by $200, but the increased total should not exceed $2,000. Section 2 provides that the annual amount of *any* annuity payable under *any* general or *special* law by the Commonwealth to *any* former employee *who was retired from the service for disability caused by accident or hazard undergone while in the performance of his duties shall be increased by $200.* It is further provided that no increase shall be paid which will make the total annuity exceed $2,000. It is still further provided that no person entitled to an increase under § 1 may receive the increase under § 2. Section 4 provides that the increase granted under this act shall take effect January 1, 1956.

There are numerous statutory provisions relating to retirement allowances, pensions and annuities of public servants. Most of the General Laws relating to that subject matter are to be found in G. L. c. 32, some

relating to contributory retirement allowances under the provisions of §§ 1 to 28, inclusive, of that chapter and others under numerous sections relating to non-contributory pensions, annuities or retirement allowances. In addition, many pensions or annuities are provided by special acts or resolves of the General Court covering specific cases, of which Resolves 37 and 56 are typical examples. It now remains to construe the legislation I have referred to and its application to the facts of the matter at hand.

The resolves in favor of Mr. Searle and cc. 781, 536 and 670 are to be interpreted in the light of their purpose and so far as reasonably may be to promote the accomplishment of their beneficent design, namely, to encourage worthy and dependable men and women to enter the public service by providing for them protection against want and despair resulting from the vicissitudes of life and the hazards of their employment. *Slavinsky* v. *National Bottling Torah Co.*, 267 Mass. 319. Statutes of the kind we are describing, of course, are to be construed so as to effectuate the intent and purpose of the Legislature. While some of the language of cc. 781, 536 and 670 refers to contributory retirement allowances under G. L. c. 32, §§ 1 to 28, inclusive, much of it is not so limited. These chapters repeatedly refer to "every" annuity payable to former State employees under a general or "special" law. The two provisions before referred to for the benefit of Mr. Searle are exactly that — "special" laws. I see no reason consistent with the over-all purpose of the legislation I have referred to for saying that the intent of the General Court was to provide a cost of living increase for superannuated former public servants and nothing whatever for former public servants who have been incapacitated from the performance of their duties by reason of an accident or hazard undergone in the performance of their duty. Quite the contrary is true. Every reason which would prompt the General Court to increase the retirement allowances to those who may be sound and well would seem to apply equally to those who may be helpless by reason of injuries received in their employment. I am assuming from the history of this legislation that Mr. Searle was permanently disabled for further performance of his duties and retired for that reason.

Subject to the foregoing, I answer your question in the affirmative.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

In determining whether an "emergency" exists under G. L. c. 94A, § 12, as regards milk supply, consideration of the supply from all inspected sources, rather than from Massachusetts producers only, is required.

JUNE 30, 1959.

Dr. ALFRED L. FRECHETTE, *Commissioner of Public Health.*

DEAR SIR: — You have requested an opinion as to "whether or not the maintenance of a regular, continuous and adequate supply of fresh, pure milk sufficient to meet the requirements of the market and to protect the public health therein refers to milk being received in the over-all market from all inspected sources or whether it refers to milk arriving on the market from Massachusetts producer sources," under the provisions of G. L. c. 94A, § 12.

In answer to your request, § 12 sets forth that one of the prerequisites for the establishment of an emergency is that "the maintenance of such price is necessary in order to secure a regular, continuous and adequate supply of fresh, pure milk *sufficient to meet the requirements of the market* named in said petition. . . ."

The only reference to Massachusetts producers in § 12 is the requirement that an investigation must be initiated upon petition by not less than twenty-five per cent of Massachusetts producers supplying a given area.

Therefore, it is my opinion that the requirement of the section refers to milk being received from all inspected sources and does not refer only to Massachusetts sources. It also appears that Massachusetts producers supply only three per cent of the market needs of Area 17. This supply in and of itself would not be sufficient to meet the requirements of the market.

Very truly yours,

EDWARD J. MCCORMACK, JR., *Attorney General.*

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