ERRATUM

These reports were erroneously bound with the Report for 1963 first instead of last. The other years, 1957-62, are found in the proper sequence.

Public Document No. 12

# The Commonwealth of Massachusetts

# REPORT

OF THE

# ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1963

Public Document No. 12

# The Commonwealth of Massachusetts

# REPORT

OF THE

# ATTORNEY GENERALS

FOR THE

YEAR ENDING JUNE 30, 1963

PUBLICATION OF THIS DOCUMENT APPROVED BY ALFRED C. HOLLAND, STATE PURCHASING AGENT.

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# The Commonwealth of Massachusetts

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BOSTON, DECEMBER 4, 1963

*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, 1962.

Respectfully submitted,

*Attorney General*

# The Commonwealth of Massachusetts

## DEPARTMENT OF THE ATTORNEY GENERAL

*Attorney General*
EDWARD W. BROOKE

*First Assistant Attorney General*
EDWARD T. MARTIN

*Assistant Attorneys General*

SAMUEL ADAMS
GEORGE W. ARVANITIS
JAMES W. BAILEY
AILEEN H. BELFORD
PAULL M. CUSHMAN[5]
NELSON I. CROWTHER, JR.[6]
JAY L. FIALKOW
SAMUEL W. GAFFER[4]
BENJAMIN GARGILL
S. JASON GINSBURG[2]
JAMES J. KELLEHER
LEE H. KOZOL
CARTER LEE[10]
GAEL MAHONY
GLENDORA J. MCILWAIN
PAUL F. X. POWERS
THEODORE REGNANTE, SR.
WALTER J. SKINNER
JOHN E. SULLIVAN[1]
EDWARD M. SWARTZ
HERBERT F. TRAVERS. JR.
HERBERT E. TUCKER, JR.
DAVID L. TURNER

*Assistant Attorney General; Director, Division of Public Charities*
PAUL B. SARGENT

*Assistant Attorneys General assigned to Department of Public Works*

ROBERT A. BELMONTE
BURTON F. BERG
JOHN S. BOTTOMLY
FRANK H. FREEDMAN
JAMES N. GABRIEL
JOHN J. GRIGALUS
VICTOR HATEM
FOSTER HERMAN
RICHARD A. HUNT[8]
RUDOLPH A. SACCO
JULIAN SOSHNICK[3]
SALVATORE F. STRAMONDO[7]
FRED D. VINCENT, JR.
HENRY G. WEAVER

*Assistant Attorneys General assigned to Metropolitan District Commission*

ARTHUR S. DRINKWATER[9]
ROBERT B. SHEIBER[8]
JOHN WRIGHT

*Assistant Attorneys General assigned to Division of Employment Security*

JOSEPH S. AYOUB
ROGER H. WOODWORTH

*Assistant Attorney General assigned to Veterans' Division*
DONALD W. WHITEHEAD

*Chief Clerk*
RUSSELL F. LANDRIGAN

*Head Administrative Assistant*
EDWARD J. WHITE

---

[1] Appointed, Jan. 28, 1963
[2] Resigned, Feb. 4, 1963
[3] Appointed, Feb. 12, 1963
[4] Appointed, Mar. 20, 1963
[5] Resigned, Mar. 26, 1963
[6] Appointed, Mar. 27, 1963
[7] Resigned, Mar. 29, 1963
[8] Appointed, Apr. 1, 1963
[9] Appointed, Apr. 2, 1963
[10] Appointed, May 13, 1963

## STATEMENT OF APPROPRIATIONS AND EXPENDITURES

### for the Period July 1, 1962–June 30, 1963

*Appropriations*

| | |
|---|---|
| Attorney General's Salary | $15,000.00 |
| Administration, Personal Services & Expenses | 388,331.00 |
| Veterans' Legal Assistance | 16,500.00 |
| Claims, Damages by State-Owned Cars | 115,000.00 |
| Moral Claims | 10,000.00 |
| Capital Outlay Program, Equipment | 900.00 |
| Total | $545,731.00 |

*Expenditures*

| | |
|---|---|
| Attorney General's Salary | $15,000.00 |
| Administration, Personal Services & Expenses | 387,908.20 |
| Veterans' Legal Services | 16,495.76 |
| Claims, Damages by State-Owned Cars | 114,996.31 |
| Moral Claims | 10,000.00 |
| Capital Outlay Program, Equipment | 891.30 |
| Total | $545,291.57 |

Financial statement verified (under requirements of C 7, S 19 GL), November 14, 1963.

By JOSEPH T. O'SHEA,
*For the Comptroller*

Approved for publishing.

JOSEPH ALECKS,
*Comptroller*

# The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, December 4, 1963

*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, 1963, totaling 26,428, are tabulated as follows:

| | |
|---|---|
| Extradition and interstate rendition | 121 |
| Land Court petitions | 281 |
| Land Damage cases arising from the taking of land: | |
| Department of Public Works | 2,498 |
| Metropolitan District Commission | 138 |
| Civil Defense | 1 |
| Department of Mental Health | 1 |
| Department of Natural Resources | 38 |
| Department of Public Safety | 1 |
| Department of Public Utilities | 1 |
| Government Center Commission | 48 |
| Lowell Technological Institute | 1 |
| Massachusetts Maritime Academy | 3 |
| Massachusetts Turnpike Authority | 6 |
| Salem Teachers College | 1 |
| Southeast Massachusetts Technological Institute | 3 |
| State Reclamation Board | 2 |
| Town of Tewksbury Water Commissioners Board | 1 |
| County Commissioners, Worcester | 1 |
| Miscellaneous cases, including suits for the collection of money due the Commonwealth | 12,711 |
| Estates involving application of funds given to public charities | 1,649 |
| Settlement cases for support of persons in State institutions | 423 |
| Small claims against the Commonwealth | 292 |
| Workmen's compensation cases, first reports | 6,139 |
| Cases in behalf of Division of Employment Security | 908 |
| Cases in behalf of Veterans' Division | 1,160 |

## Introduction

My first Annual Report as Attorney General of the Commonwealth of Massachusetts, as required by General Laws, Chapter 30, Section 32, covers only the period between January 16, 1963, the date on which I assumed office, and June 30, 1963, the end of the Commonwealth's fiscal year.

The Attorney General is the chief legal officer of Massachusetts. He is the primary source of official legal advice. He represents the Commonwealth, its 144 state departments, offices, and commissions, and their 229 subdivisions, except as otherwise specifically provided by statute.

The Attorney General is, in effect, general counsel to the state

government in the same manner as an attorney in private practice is general counsel to a huge corporation.

In modern society a high degree of specialization is required to cope with the ever-increasing complexity of legal problems which arise from the administration of our government and its laws.

Therefore, after surveying the necessary functions of the Department of the Attorney General, I reorganized the office into the following twelve Divisions:

| | |
|---|---|
| Administrative | Finance |
| Civil Rights | Health, Education and Welfare |
| Contracts | Industrial Accidents |
| Criminal | Public Charities |
| Eminent Domain | Torts, Claims and Collections |
| Employment Security | Veterans |

Each Division has a Chief and one or more Assistant Attorneys General and Legal Assistants. Each Chief handles the duties assigned to his Division with the greatest possible autonomy consistent with the nature of the legal work involved.

The wisdom of clearly delineating areas of responsibility coupled with responsible "on the spot" leadership was soon demonstrated. Immediate problems of vital concern to state officials arose in connection with the new Conflict of Interest statute which became effective on May 1, 1963; almost 1800 cases in the Eminent Domain Division demanded prompt action and fair treatment for our citizens; the Criminal Division faced the dual problem of bringing to trial complicated cases which were on the docket and keeping up with the ever-expanding investigative workload; the Collections Division was engulfed with the paper work incidental to recovering unprecedented sums of money for the Commonwealth; the Administrative Division was confronted with a surge of requests for legal opinions on varied and sophisticated legal problems; in short, the activity and workload of every Division was unparalled in the history of the Department.

Without the clearcut delineation and delegation of authority, a bottleneck could have developed at the top of the chain of command which could possibly have led to a chaotic situation. With the divisional arrangement outlined above, the Division Chiefs aided by a carefully selected group of dedicated lawyers — men and women — whom I sincerely believe to be one of the most able, thorough and dedicated teams ever to serve the Attorney General of this or any other state — have been able to provide the type of service that our state officers and agencies so desperately needed.

Over and above the prosecutions, investigations, and trials conducted by the Department, and because this office commands a most advantageous position for studying and assessing the problems which confront state government, I have felt a continuing need to suggest legislative changes where the need or propriety is suggested by our day-to-day experiences. As a result, I have filed with the legislature a varied group of bills. (See Exhibit A.) The enactment of this far-

reaching legislative program would, in my opinion, prove of enormous advantage to the citizens of Massachusetts.

As this report is written it is too early to predict how much of the proposed legislative package of thirty-eight bills will be enacted into law. The preliminary reception which some of the bills have received in the Legislature, particularly those which would require application of the open-meeting law and the competitive bidding law to public authorities, has already demonstrated the necessity of enlisting the support of the general public to insure their passage. Other bills are now well on their way to becoming laws of the Commonwealth.

The underlying thrust of the legislative program has been to emphasize that we are a government of laws and not of men; to change the basic scene and not merely punish the characters of the moment; and to remove veils of secrecy, to "get everything on top of the table" subject to full, open scrutiny. Such statutes assure the public that their officials *are* responsible to the people.

In conclusion, I am most pleased to report to the people of Massachusetts that in my opinion we have turned the corner in the fight against corruption. With renewed and intensified efforts, with the continued support of all good citizens and the help of Almighty God, I look forward to the day when the good name of our beloved Commonwealth is restored to the lofty pinnacle to which it is entitled by its glorious history of dedication and performance.

EXHIBIT A

1964 Legislation Proposed by the Department of the Attorney General

| *Bill No.* | *Description* |
|---|---|
| H. 1261 | Petition that civil service employees who have been found by the courts to have been illegally discharged or suspended from their positions be entitled to compensation. |
| H. 1262 | Petition for legislation to extend the period of time for appeals to the Civil Service Commission. |
| H. 126 | Petition for a legislative amendment to the Constitution authorizing the General Court to provide by law for the disqualification of a person to hold elected public office because of his conviction of a crime involving public office or trust. |
| H. 1316 | Petition for legislation relative to the classification of municipal employees for the purpose of preventing conflict of interest under the code of ethics law. |
| H. 1505 | Petition for penalizing the making of false reports, minutes or statements by public officers and employees. |
| H. 1507 | Petition for legislation to increase the maximum penalty for violation of town by-laws. |
| H. 1508 | Petition for authorizing appeals by the Commonwealth on questions of law in certain criminal cases. |
| H. 1509 | Petition for legislation to provide for the arrest without a warrant of violators of certain gaming and gambling laws. |
| H. 1510 | Petition for legislation relative to the powers and duties of police officers in cities and towns. |
| H. 1511 | Petition for the imposition of criminal penalties for the violation of certain zoning by-laws. |
| H. 1512 | Petition that bribery and certain related acts be adjudged as felonies under the act establishing a code of ethics for state, county and municipal employees. |
| H. 1518 | Petition relative to the apportionment of taxes in eminent domain proceedings. |
| H. 1519 | Petition relative to recommendations of the Real Estate Review Board in the Department of Public Works with reference to land taken by said department. |
| H. 1520 | Petition relative to the measure of damages in eminent domain proceedings. |
| H. 1521 | Petition relative to proceedings for the award and assessment of damages in eminent domain takings. |
| H. 1522 | Petition relative to proceedings for the taking of real estate and interests therein by eminent domain. |
| H. 1523 | Petition relative to interest in eminent domain proceedings. |
| H. 1524 | Petition for an amendment of the law regulating the issuance and contents of search warrants. |

| *Bill No.* | *Description* |
|---|---|
| H. 1525 | Petition that provisions be made for the payment of witness fees to persons assisting the Attorney General in an investigation. |
| H. 1539 | Petition that expenses of the Attorney General for the defense against claims for reimbursement under the workmen's compensation law be paid out of the special fund in the Department of the State Treasurer. |
| H. 1540 | Petition that expenses of the Attorney General for prosecution of claims and defense against claims for reimbursement under the workmen's compensation law be paid for out of the special fund for veterans in the Department of the State Treasurer. |
| H. 1541 | Petition relative to reimbursement of insurers under the workmen's compensation law out of the special fund for veterans in the Department of the State Treasurer. |
| S. 391 | Petition for legislation relative to the dismissal of public employees who refuse to testify concerning their official acts. |
| S. 403 | Petition for legislation to provide a penalty for the making of false reports, minutes or statements by a public officer or employee. |
| S. 469 | Petition that provision be made for public meetings by public authorities. |
| S. 470 | Petition for legislation to extend the provisions pertaining to public contracts to public authorities. |
| S. 471 | Petition for legislation relative to the filing of official reports by public authorities. |
| S. 472 | Petition for legislation to extend the requirements of competitive bidding for construction, reconstruction, alteration, remodeling, repair or demolition of public buildings to public authorities. |
| H. 1640 | Petition relative to the filing of official reports by public authorities created by the General Court. |
| H. 1641 | Petition for extending to public authorities the requirements of competitive bidding for construction, reconstruction, alteration or demolition of public buildings. |
| H. 1642 | Petition for legislation to provide that certain public authorities be subject to the open meeting law. |
| H. 1643 | Petition for legislation to provide that certain public authorities be subject to the law pertaining to public contracts. |
| H. 1667 | Petition that special town meetings called by justices of the peace be conducted as representative town meetings if such form of town government is in effect in the particular town. |
| H. 1149 | Petition relative to regulating the solicitation of charitable contributions from the public. |
| H. 1150 | Petition relative to financial reports filed with the Division of Public Charities of the Department of the Attorney General. |

| *Bill No.* | *Description* |
|---|---|
| H. 1151 | Petition for legislation to reduce the fee payable by certain charitable corporations filing returns with the Secretary of the Commonwealth. |
| H. 3663 | Petition for legislation regulating the operation of dancing schools and requiring the registration of the same. |
| H. 1508 | Petition for legislation to authorize appeals by the Commonwealth on questions of law under certain conditions in criminal prosecutions. |

## Administrative Division

The Administrative Division of the Department of the Attorney General is responsible for most of the "opinion work" of the office, for a substantial amount of civil litigation, and for approval of town by-laws.

Since the members of the Division devote a large amount of time to research, the Division has been assigned the additional task of formulating answers to a variety of legal problems faced by the office which do not necessarily call for the issuance of official opinions. The Division also handles a large volume of correspondence with private citizens who seek legal advice and counsel on and about the problems of state, county and municipal government. Time is also devoted to the discussion of legal problems with state officials and with private citizens.

Requests for opinions submitted by constitutional officers and agency and department heads must be honored by the rendering of an official opinion by the Attorney General. Most of these official opinions are drafted by members of the Administrative Division. They are thoroughly reviewed by the Attorney General before he approves the text. Should a request for an opinion be submitted which relates to a subject matter peculiarly within the province of another Division, the request is usually referred there so that individuals who are expert in the particular area involved may draft a response. Thus, for example, certain questions asked by the Department of Public Works are referred to the Contracts and Eminent Domain Divisions, requests relating to corporate or taxation matters are referred to the Finance Division, etc. Eventually, however, drafts of all official opinions are approved by the Administrative Division prior to being submitted to the Attorney General. Thus, a central clearinghouse for all opinions has been established.

Opinions of the Attorney General are a definitive interpretation of the law unless and until they are reviewed and reversed by courts of competent jurisdiction. They are relied upon by State officials and by the public at large. References to the opinions are included in the annotations of the General Laws. The drafting of opinions is, therefore, particularly important. Each must be carefully researched; it is the responsibility of the Administrative Division to see to it that the draft opinions submitted to the Attorney General contain accurate interpretations of the law. But these opinions must also be understandable to the citizen who is not a lawyer since they are written for his guidance as well.

During the first six months of our tenure, the Administrative Division has drafted opinions on a variety of subject matters — many of considerable sensitivity. Opinions are based strictly upon the law, without regard to political implications. Among the more controversial and newsworthy opinions drafted by the Division: responses to questions concerning "testimonial dinners," reapportionment of the Massa-

chusetts House of Representatives, the suspension of indicted public officials.

The important "testimonial dinner" law (G.L. c. 268, § 9A) forbade the sale of tickets to any function held as a "testimonial" to non-elective public officials in the service of the Commonwealth or any of its political subdivisions. The Opinion stated that the applicability of the law to an individual did not depend upon the specific duties of the individual, but upon the overall function of the agency for which he worked. For example, despite the fact that a clerk within the Department of Public Utilities performs only clerical duties, the regulatory nature of the Department itself would make this law applicable to the clerk. The statute has far-reaching application since many of the departments, boards and commissions as well as the judicial branch and the Governor's office fall within its ambit.

The revolutionary decision of the United States Supreme Court in *Baker* v. *Carr,* in which the Court finally dealt with the legislative apportionment question which it had long chosen to avoid, cast substantial doubt upon the apportionment of legislative representation in Massachusetts. In an opinion drafted by the Administrative Division, the Attorney General ruled that the General Court had a clear duty to reapportion the House of Representatives in accordance with the Constitutional guarantee of equal protection for every voter. Shortly thereafter the case of *Fishman* v. *White* was brought, as mentioned below, and reapportionment was effected by Chapter 666 of the Acts of 1963.

An important question arose relative to rights of appointing authorities to suspend appointees indicted for misconduct in office. This necessitated interpretation of G.L., c. 30, § 59, the so-called "Perry Law." The Opinion stated that an official indicted for misconduct which occurred prior to the effective date of the "Perry Law" could nevertheless still be suspended under its provisions. The Opinion did much to clarify the subject of suspension of appointed officials. The Administrative Division was also responsible for rendering responses to a variety of other requests, including opinions on the Franklin Fair Association charter, the authority of the Massachusetts Art Commission and Civil Service and Registration matters.

During the first six months of this administration, 125 formal Conflict of Interest Opinions have been issued. Effective May 1, 1963, the Conflict of Interest Law (G.L., c. 268A) authorizes State employees to seek opinions about their status from the Attorney General. A substantial amount of time has been spent in informal conferences with Town Counsel and City Solicitors, the officials charged with the duty of interpreting the Act for municipal employees. The Act is new and complicated, and judicial decisions interpreting it are naturally unavailable at this early date. Consequently, the opinions drafted by the Administrative Division on Conflict of Interest questions have provided an important clarification of the meaning of the statute. In addition, these opinions have had the effect of publicizing the statute and of making the public generally aware of its provisions.

The success of the new law can be measured not by the number of criminal prosecutions brought under it, but by the public acceptance of its provisions and wholesale honest attempts to comply with the statute.

The Division handles all civil litigation which affects the Constitutional officers or that is extraordinary in nature, and is also responsible for much of the court work involving State agencies and departments. Among the matters handled in court by members of the Division were cases involving the legislative pay-raise and reapportionment of the House of Representatives. In *Molesworth* v. *White,* a group of petitioners sought judicial review of the power of the General Court to make a salary increase for state legislators effective immediately by use of an emergency preamble. The petitioners contested the validity of such action. Handled by members of the Administrative Division, the Supreme Judicial Court eventually ruled that the Legislature itself is the final judge of the necessity for an emergency provision and that its determination could not be reversed in a judicial forum.

Failure of the Massachusetts House of Representatives to reapportion itself after *Baker* v. *Carr* led to more extraordinary litigation for the Division. In *Fishman* v. *White,* judicial proceedings were begun to enforce a proper apportionment of the Legislature. The Legislature, spurred on by the previously discussed opinion of the Attorney General, the pending litigation, and public opinion, complied with the United States Supreme Court mandate and passed a reapportionment statute.

Members of the Division appear in court on a variety of cases, including matters involving the Registrar of Motor Vehicles, Civil Service Commission, the Boards of Registration and many State Departments and agencies.

G.L., c. 40, § 32 requires that town by-laws be approved by the Attorney General before they become effective, and this duty is also assigned to the Administrative Division. The Town involved must submit copies of the by-law passed by its town meeting, together with evidence that all procedural requirements have been met; — quorum, notice provisions, etc. Action must be taken by the Attorney General within ninety days of submission of the by-law to the Department or the by-law is deemed to have been approved. Conferences are frequently held with town officials and interested citizens, and much informal advice rendered to the municipalities. The burden on the Division in this regard is especially heavy during the spring and summer, immediately after the holding of town meetings.

## Civil Rights Division

Among the most difficult and sensitive problems of law enforcement are the clashes between the individual citizen and his government.

Although working in an area that is undergoing extremely rapid change, the Civil Rights Division has sought to be true to the principles of lasting value. In drafting opinions, it has been the policy of the Civil Rights Division to be nonpartisan, fair, and legally correct.

Such a policy, administered with professional competence is the only type that can be acceptable as an Attorney General's course of action. Some of the major matters handled by this Division are mentioned below.

In February, 1963, scarcely one month after assuming the responsibilities of office, the Department was called upon to testify before a legislative committee on the proposed extension of the Fair Housing Laws. The members of this Division did not merely issue an emotional response. They analyzed the bill in its statutory setting, placing the bill within the context of a hundred years of legislative history. The office found that the law on this subject had grown irrationally in many ways, that it operated erratically and in several situations, unevenly. In a nine-page rationale to the Legislature — the only reasoned analysis of the bill submitted to that body — the Department sought to show that the bill's principal function would be to eliminate existing inequities by applying to all similar business transactions the requirements formerly applicable only to some. The bill was enacted into law. [Acts of 1963, Ch. 197, § 2]

In March, 1963, a seller of the book *Naked Lunch* was indicted by a Suffolk County grand jury, upon a presentation by the District Attorney, for selling an allegedly obscene book. After considerable study, the Attorney General decided that this type of prosecution is inconclusive, unfair, and sporadic in operation. The Attorney General called together all the District Attorneys and explained to them the problems and responsibilities existing in this area. They unanimously agreed with his suggestions that enforcement of the obscenity laws regarding books would be handled most efficiently and fairly through the Attorney General's office, on advice of the Obscene Literature Control Commission by civil proceedings against a book, rather than a bookseller or librarian. Such proceedings are conclusive throughout the Commonwealth.

This office represents and renders legal advice to the Massachusetts Commission against Discrimination, an administrative agency established to enforce our fair practices law. In a case that asserted illegal segregation in Boston Public Housing and that had been pending before the Commission for a year and a half, the Attorney General departed from precedent and entered the stalemated case at the pre-trial stage. He sent a representative to Washington to spend a full day there discussing the problem with officials. And now a draft agreement is being prepared by this Department to be used as a basis for negotiation.

Finally, a most recent opinion has stopped the Registry "roadwatch" as an invasion of the citizen's privacy. It is our belief that the law does not condone such a restriction of a citizen's liberty of motion.

In drafting opinions, this Division has operated on the theory that an advantage to decisions which are dictated by reason rather than by political expediency is that they supply the basis for a continuing program.

## Contracts Division

The Contracts Division examines all state contracts and leases for proper legal form and represents the Commonwealth in all civil actions brought by or against the State as a result of such contracts. Improved and more efficient methods of operation have resulted in substantial progress in all aspects of this Division's functions.

In regard to leases, the Division Chief now attempts to advise the various state departments while the contracts are still in the drafting stage so that errors are prevented. He watches contractual arrangements of agencies more closely than in the past and has considerably tightened drafting procedures. This attention to detail has saved much costly litigation.

Contracts for approval come into this Department constantly, often at the rate of twelve a day. These contracts are processed quickly so that the Commonwealth's business is unimpeded. Members of the Division have attended a host of meetings of various departments in connection with contract matters so that personal assistance and guidance can be provided. Much legal advice, on matters which do not require formal opinions, is furnished by this Division to the state departments on contract matters.

When we assumed office, we initiated a multi-pronged policy to cope with the existing backlog of cases. A policy was set; no cases would be settled out-of-court. Now, it is hoped, only companies with valid claims will submit cases, for each case will be adjudicated on its merits in a court of law. This office has carefully prepared all cases and has brought the docket up to date, filing pleadings in all instances.

Since assuming office, new cases have come in at the rate of about ten a month. Most are substantial claims against the Commonwealth, involving hundreds of thousands or even millions of dollars. These matters have received our prompt attention. All pleadings are in order, and every case has been carefully investigated and prepared for trial. To maintain current status, we are constantly in court on demurrers and lien cases in addition to the voluminous trial work.

This Division has adhered to its goals of pursuing honest and efficient methods, diligent work in the preparation of cases, determination to try all claims in court, clearing up a backlog of cases, and improving the morale of workers in the field of public construction.

## Criminal Division

The Attorney General is designated by law as the chief law enforcement officer of the Commonwealth. As such, he may assume control over any criminal matter at any stage of a criminal proceeding anywhere in this Commonwealth. For the most part, however, the Attorney General properly leaves routine law enforcement to District Attorneys and state and local police, who have the responsibility for dealing with crime in their own areas.

The Attorney General reserves ultimate authority in all criminal prosecutions, however, but assumes active control only in special circumstances. The Attorney General initiates criminal prosecutions in matters crossing county lines, where the circumstances have state-wide significance, or where the government of the Commonwealth is directly affected. It is in these latter areas that the Criminal Division of the Attorney General's office functions.

Dedicated to the vigorous and efficient prosecution of crime and corruption in the Commonwealth, the Division has investigated and prosecuted many cases.

*Boston Under-Common Garage Case* — Under the control of an Assistant Attorney General and a Special Assistant Attorney General, this instance of corruption, graft, and bribery was brought to trial in two stages. The scrupulously careful preparation and expert organization of a mass of complex material during the first trial in April, 1963, resulted in the conviction of the three defendants. Prison and jail terms totaling five to five and one-half years each were imposed for larceny of $450,000 from the Massachusetts Parking Authority. The second trial is underway as this is written.

*Contract-Swapping Conspiracy* — Shortly after assuming office, members of the Criminal Division uncovered a conspiracy involving a state department official and a private corporation. In May, 1963, the state official and executives of the corporation were found guilty of conspiring to swap contracts.

*Raceway Investigation — Hampden County* — Voluminous legal research into and meticulous organization of records relating to all phases of racing in Massachusetts, particularly dealing in the stock of Hancock Raceway Inc., culminated in the presentation of evidence to the Grand Jury. Indictments have been returned against three individuals for larceny and accessory before the fact to larceny.

*Building Inspector Cases* — Under the previous administration, indictments were returned against six Boston building inspectors for bribery under c. 268, § 8. This year, motions were filed by the defendants to quash the indictments. This Division has successfully disposed of these motions and will proceed with the cases.

The Criminal Division also represents the Commonwealth in extraordinary writs (writs of error, writs of habeas corpus and mandamus actions). These actions involve complex issues of constitutional law and statutory interpretation. Their preparation and presentation necessitates a great volume of legal research in the drafting of pleadings, the preparation of briefs, and the subsequent oral argument by staff members in the Supreme Judicial Court and the Superior Court Equity Session.

This office has made especially progressive and significant innovations in the field of criminal law. For instance, a Complaint Section has been established within the Criminal Division. Any Massachusetts citizen now has a forum where, in confidence, he may present complaints and/or evidence about violations of Massachusetts law. Although orig-

inally conceived as a center where complaints could be processed from citizens who felt aggrieved by their treatment from local public officials, this section, in practice, has received information covering a much larger spectrum of impropriety and illegality. Nine hundred seventy-seven complaints have been processed during the first six months of the Complaint Bureau's operation. Many of these complaints have been turned over to local police departments and arrests and prosecutions have resulted. When necessary, the Bureau advises the complainant that a problem requires legal assistance from private counsel. In one instance, the work of the Bureau saved a man's life. (The receipt of a telegram from an individual who was about to commit suicide resulted in a prompt call to the local police department which acted to save the citizen's life.)

The indictment, prosecution and imprisonment of men does not, of itself, prevent crime. These measures do have a deterrent effect. Far more important, however, is an understanding of the criminal and the crime. To increase this understanding a committee was formed to study how to devise a meaningful system of crime reporting within the Commonwealth. Dr. Sheldon Glueck of Harvard Law School is chairman of the committee whose members include Dr. Donald F. Kenefick of the Boston University Law Medicine Research Institute; Dr. Sheldon Roen, Psychologist and Director of Research at the South Shore Mental Health Center in Quincy; Atty. Thomas Chittenden, recently appointed Executive Secretary and Director of Research of the Crime Council; and Thomas Regan, from the Plymouth County District Attorney's office. The Committee plans to draft a reporting system which would incorporate all of the social and psychological research data about the causes of a crime. Such a system would put a valuable tool in the hands of all law enforcement agencies.

In addition, the Criminal Division has the responsibility of further investigating and preparing for presentation to grand juries, cases forwarded to the Attorney General by the Massachusetts Crime Commission. Such investigation, preparation and presentation has resulted in the return of six indictments.

Finally, the Criminal Division is currently preparing a comprehensive legislative program based on its experience and intensive study of the Massachusetts criminal law.

### Eminent Domain Division

The Eminent Domain Division is concerned with land-taking: the taking of private property for a public purpose. When land is taken by eminent domain the citizen is entitled to compensation for the fair value of his land. The taking agency and the land-owner seek to reach agreement concerning the fair value of the property. When agreement is not possible, the owner usually petitions the Superior Courts under Chapter 79 of the General Laws to solve the problem.

Significant progress has been made in two areas by this Division: reduction of the backlog of pending cases and institution of administra-

tive procedures to prevent such a backlog from ever accumulating again. These changes incorporate the philosophy that the individual citizen's right to prompt compensation for damages has priority over a public improvement, however meritorious the improvement may be.

When this administration assumed office on January 16, 1963, 1,614 land damage cases were pending. About 180 more cases were added by June 30, 1963, making a total of 1,794 cases. During my first six months in office, this Division disposed of 525 cases, reducing the number of claims awaiting settlement to 1,269. The awards made in these 525 cases, by settlements or court verdicts, were more than ten million dollars less than the damage claims made by the property owners. This $10,000,000 and the large amount of interest which would have been payable to the petitioners thereon represent a substantial saving to the Commonwealth.

To accomplish such rapid disposition and to continue the accelerated disposal of land damage cases, the Eminent Domain Division was completely reorganized. A policy that the Commonwealth always be completely prepared for trial in every pending case at the earliest possible date after filing of the petition was established and rigorously maintained. Detailed analysis of and recommendations on, cases are now made in advance by specially trained Assistant Attorneys General, — experts in their field.

For the purposes of settlement negotiations and trial the original files of the taking agencies were delivered to the Department of the Attorney General at my request. When I took office, approximately 1,000 substantive files were being withheld by taking agencies pending their duplication before delivery to the Attorney General. By agreement of the heads of the agencies involved, primarily the Department of Public Works, the copying process was avoided and the original documents were delivered. A new File Preparation Section was established within the Division, to review the material submitted by the taking agencies in the light of a probable trial. As a result, many deficiencies were detected and corrected before trial.

In addition, a carefully prepared checklist is now used for the analysis in detail of all cases. Among other things, this policy has resulted in an assignment to each case of a settlement figure based on the recommendation of trial counsel, approved or amended by the Chief of the Division.

To accelerate further the disposition of cases these new procedures permitted decentralization of the control of cases after approval of analysis and establishment of settlement authority.

In addition special sessions of the Superior Court for land damage cases were held in April, 1963, in Bristol, Norfolk and Middlesex (Lowell) Counties. In May pre-trial sessions were held for nine scheduled special sessions for July, 1963, three each in the Counties of Bristol, Essex and Middlesex.

The cause of the backlog of cases — the taking of private property for public purpose without prompt and fair payment therefor — has become one of the major concerns of the citizens of the Commonwealth,

not only because of the antiquated procedures involved, but also because of a failure to review the status of the law for over thirty years. I have directed the Eminent Domain Division to thoroughly review existing land-taking procedures in the light of existing law and to make appropriate recommendations.

A new section was created within the Division for the implementation of a long-range program for the codification of all the highway laws of the Commonwealth.

The need for better and more professional appraisals is being communicated to appraisers by the members of the Division in individual contacts, in speeches, and on panel discussions before their professional organizations. We are advising the public of its rights both in individual cases and by detailed correspondence. We are presently preparing a handbook for appraisers in the Department of Public Works to provide valuable guidance, in layman's language, on the important legal questions which arise in the field.

### Employment Security

Prosecution of delinquent employers and fraudulent compensation claimants has increased, resulting in significant sums of money being paid into the Treasury of the Commonwealth which otherwise would not have been recovered.

At the same time, the Attorney General's Department has followed a policy of giving the erring individual, the business, or the corporation every opportunity to make payment before prosecution actually begins. Usually, four or five letters of warning are sent so that the offender is given every possible opportunity — either to make restitution or to otherwise explain his side of the case, the prevailing circumstances and conditions.

Employer corporation problems have increased (that is, instances where one person is the principal stockholder and officer of many corporations, and taxes are not paid by any of the corporations). We have been able to concentrate on this type of case by cross-checking the files as to employer and stockholder names.

Serious problems have arisen because for years employers have had a more lax and casual attitude toward paying state taxes than is the case with their obligations to the federal government. It is hoped that with diligent prosecution of this type of case, employers will take a more serious attitude toward state taxes. From January 16, 1963, to June 30, 1963, in 97 employer cases, $60,227.69 was collected. In addition to this, 167 complaints were brought against 15 employers. The defendants in each case were found guilty and an order for restitution and jail sentence was generally meted out, and, in some instances, severe fines were imposed.

The intensive efforts of the Employment Security Division have brought about two noticeable results: a reduced amount of delinquent employers in areas where the Division has prosecuted — employers having been made aware that state taxes must be paid; and secondly,

a lower number of fraudulent cases has kept the employment tax rate for employers minimal, with 3.7 the maximum tax rate.

An increase in the prosecution of claimants who illegally collected unemployment benefits has had impressive results. From January 16, 1963 to June 30, 1963, seventeen cases were closed. One hundred seven criminal complaints were issued against five employees and $13,231 in overpayment benefits owed the Commonwealth was recovered. It should also be noted that in cities where there has been a significant increase in prosecution, a marked number of claimants have voluntarily returned the money they owed the State.

The Commonwealth is reaping the benefits of this new program. Increased prosecutions result in more convictions. Substantial sums are then collected without investigation and prosecution for there are fewer overall violations of law either by delinquent employees or employers.

## Finance Division

The primary function of the Finance Division is to act as counsel for the following State departments: Corporations and Taxation, Insurance and Banking. The Division advises the State Treasurer both in his capacity as Treasurer and as Chairman of the State Retirement Board. The Division assists in the preparation of all formal opinions requested by the above-named departments and officers. One of the members of this Division sits on the Contributory Retirement Appeal Board, as required by statute, and also acts, except in rare instances, as counsel to that Board and to the Teachers Retirement Board.

Cases from the Department of Corporations and Taxation are usually handled by this office on the appellate level at the Supreme Judicial Court. The Division is involved in income tax and corporate excise matters after a decision has been made by the Appellate Tax Board and in inheritance tax matters after a decree of the Probate Court has been entered. In the period covered by this report, six cases were argued before the full bench of the Supreme Judicial Court. As a result of the efforts of this office in successfully arguing against the sophisticated and complex methods of tax avoidance, thousands of dollars due the Commonwealth have been collected. Most notable of these was the case of *Dewey* vs. *State Tax Commission* which decided that the gain on a transfer of capital stocks in a merger of two corporations to foreign trustees was a taxable transaction to a resident settlor.

The preparation and writing of briefs for cases such as the above consumes a great deal of time of the personnel of this Division. In this regard, the legal bureau of the Department of Corporations and Taxation has been most cooperative in providing research and trial briefs.

Administrative decisions of the Commissioner of Insurance receive much attention by this Division. These decisions also find their way to the Supreme Judicial Court for determination. The residents of the Commonwealth have been the prime beneficiaries of the efforts of this office in this regard. Examples are *Commissioner of Insurance* vs. *Equity General Insurance Company,* where the Court held that deposits

of the insurance company in the Commonwealth must be held for the benefit of Massachusetts creditors before being sent to a receiver in another state; *Massachusetts Medical Association* vs. *Commissioner of Insurance* where a petition for increased rates was denied, saving the Commonwealth and state employees approximately $500,000 in premiums; *Baker* vs. *The Commissioner of Insurance* where the suspension of a broker's license for alleged improper practices was upheld.

As to the Board of Bank Incorporation, this Division has been successful in argument, upholding the Commissioner's decision with respect to the location of new banks or new locations for branches of banks already established, *City Bank & Trust Co.* vs. *Commissioner.*

The Treasurer of the Commonwealth, in that capacity, must have the approval as to form of all bonds issued by the State. In this six-month period, issues totalling several million dollars were so approved, thereby permitting the uninterrupted continuation of the business of the Commonwealth when it was found necessary to borrow money.

The Treasurer of the Commonwealth, in his capacity as Chairman of the State Retirement Board, requires the assistance of this Division in rendering opinions as to the method in which the retirement laws must be interpreted. These requests are rather frequent and have been attended to in a timely manner so as not to jeopardize whatever rights the subject of the request may have had.

As a member of the Contributory Retirement Appeal Board and as counsel to it, this Division has expeditiously disposed of those appeals coming before the Board and has defended its decisions before the Courts. The Board, mainly because of the greater life expectancy of most of the retiring claimants, had been faced with an ever-increasing number of appeals which resulted in unreasonably long waiting periods. Since assuming office, I have initiated a method of operation to reduce sharply the backlog of appeals. By setting up "show cause" hearings we have assured that appeals are now heard within four months of filing as compared to waiting periods of more than a year previously. These hearings are directed particularly towards those who, by asking for continuances, thwart the orderly procedures intended by the statute.

The Contributory Retirement Appeal Board sits once each week, hearing as many as four appeals at each sitting, barring the aforementioned continuances. About sixty appeals were disposed of in the period covered by this report. Probably the most important case handled during this time was *Smolinski* vs. *Boston Retirement Board.* The constitutionality of the "Graham Law" was upheld and those retirees who were receiving accidental disability pensions were compelled to report annual earnings.

In addition to the above-mentioned duties, this Division renders legal advice and informal opinions daily in a myriad of matters involving the general area of its assignment. To the extent to which it is permitted by statute, the members of the Division answer, in person and by letter, the legal questions of hundreds of residents of the Commonwealth.

## Division of Health, Education & Welfare

I established the Division of Health, Education and Welfare in January 1963, to fulfill a definite need. It coordinates the legal affairs and problems of the social and welfare agencies of the Commonwealth. In the first six months of its existence, the Division has fully demonstrated the merit of its creation.

First, the Division administers an orderly, efficient and complete program to assure the proper and intended application of social and welfare legislation. Secondly, by having one Division handle all social and welfare matters, a uniform and coordinated program of legal assistance has already been developed for the various departments and agencies in all educational, social and welfare programs. And thirdly, with one Division responsible for the legal work of these departments and agencies, the Department of the Attorney General is now able to view these problems in the overall perspective of the entire field rather than on a case-by-case basis. Thus we can maintain a complete check upon the activities and programs of these agencies and departments.

The administrative functions of the Division have included an immense volume of title and contract work for the State Housing Board and the Department of Education. In its first six months, the Division has reviewed all the site acquisition papers and construction agreements for many state-aided housing projects and for the expansion of educational facilities at state teachers' colleges and other educational institutions.

Many of the statutes creating our welfare programs are relatively new and therefore require interpretation. This Division has spent a great amount of time reviewing these new statutes and discussing them with the appropriate agencies in an attempt to assist the agencies in establishing effective welfare programs. A series of forty-eight cases regarding these new laws are now pending in the Superior Court. This Division will prepare and try these cases before the Superior Court, and if necessary, will argue them before the Supreme Judicial Court of the Commonwealth.

In the field of public health, the Division is confronted by many problems arising from inadequacies or ambiguities in the law dealing with the licensing and registration of professional people — nurses, pharmacists, doctors, laboratory technicians, funeral directors — to cite a few. We have made great strides in interpreting these licensing laws, and presently are considering possible changes for consideration by the Legislature which would tend to clarify these laws once and for all.

Also in the field of public health, the Division is concerned with the use of artificial or substitute food products. A case dealing with the manufacture, sale and use of artificial or substitute food products is being prepared for argument before the Supreme Judicial Court in the fall.

Under G.L. Ch. 138, commonly known as the Liquor Control Act, this Division has represented the Alcoholic Beverages Commission in

various matters before our Courts. The most recent litigation involves suspensions meted out by the Commission to various retailers for price-cutting. We are awaiting a decision by the Court in this matter and, in event of an adverse decision, I may well find it necessary to recommend remedial legislation in an effort to clear up this condition in the liquor industry.

### Division of Industrial Accidents

In accordance with the provisions of G.L. c. 152, § 69A, the Department of the Attorney General must approve all compensation payments made under this Chapter by the Commonwealth, as a self-insurer, to state employees who sustain injuries arising out of, and in the course of, their employment with the Commonwealth. This includes payment of medical and hospital bills arising out of such injuries.

Figures for the period covered by this report (January to July, 1963) indicate a marked increase in the number of agreements approved for payment of weekly compensation benefits in lost-time disability cases. Four hundred and sixty agreements in this category were approved. A total of 3,100 first reports of injury were received during the same period.

Payments made by the Commonwealth to injured state employees under § 69A for the entire fiscal year 1963 totalled as follows:

| | |
|---|---|
| For Compensation | $1,116,981.36 |
| Medical Payments to Doctors | 136,848.05* |
| Hospital Payments | 160,454.22* |
| | $1,414,283.63 |

*(Medical and Hospital Payments in Metropolitan District Commission cases not included.)

Increased expenditures of appropriated funds for this purpose may be attributed to a great extent to rising hospital and medical costs and more liberal compensation payment schedules under recently enacted amendments to Chapter 152. An added factor is the increased costs involved in the disposition of older cases which formed a sizeable backlog of claims pending hearings before the Industrial Accident Board.

In a cooperative effort to reduce this case backlog, the Industrial Accident Board, in 1963, allowed use of the pre-trial procedure in Commonwealth cases to expedite the fair handling of claims and eliminate further undue delays in hearing contested employee cases. As a result, the number of appearances by this office at the Board has nearly doubled. From January to June, 1963, over 150 such Board assignments were handled.

The Attorney General, through this Division, also represents the Commonwealth as the custodian of the so-called "second injury" funds

on petitions by insurers for reimbursements under § 37A of c. 152 to be made out of the special fund (Veterans, Industrial Accident Fund) established by § 65N of c. 152 and similar petitions by insurers under § 37 to be paid out of the special fund established by § 65 (General Industrial Accident Fund). All claims made by the Commonwealth under these provisions against insurers and self-insurers are brought by this Division.

At the close of fiscal year 1963, the balance on hand in the Veterans' fund was $313,884.00 with $37,813.73 collected during the period covered by this report. Payments out of this fund totalled $26,841.64.

The balance on hand at the close of the fiscal year in the General Fund was 6,355.00. This office collected $2,825.00 during the last six months of the fiscal period and during the same period disbursed $2,794.00. It should be noted that the General Fund has shown a steady decline due to diminishing contributions over the past several years, from $86,396.00 in 1956 to the present balance. This is explained in the fact that insurers are required to pay into this fund only in fatal cases where the deceased employee leaves no dependents. This situation has become relatively uncommon according to recent experience in such fatal cases. The significant difference from the Veterans' fund is than, in the latter, statutory provisions require payment by insurers into the Fund in all fatal cases. Emergency legislation filed in 1963 to build up the General Fund would improve this fund.

## Division of Public Charities

A comparatively large number of charitable organizations and trusts for charitable objects have always existed in Massachusetts. Until recently the charitable organizations consisted almost entirely of such institutions as hospitals, homes for the aged, schools, colleges, and other institutions. The trusts, for the most part, resulted from gifts by will.

In the past two decades, however, there have been great increases in charitable donations and in the establishment, or augmentation, of charitable organizations. This increase is due to the great post-World War II prosperity; Federal income tax laws which permit deductions from taxable income of gifts to charitable organizations; the Federal estate tax laws and the State inheritance tax laws; and the high tax rates for persons who have large incomes or who leave large estates. A distinct feature of the recent trend has been the establishment by individuals and corporations of inter-vivos trusts or corporations, for the purpose of holding and expending funds for public charitable purposes. These bodies, usually referred to as foundations, are generally established under written trust instruments. The trust instruments provide, in effect, that any funds held shall be expended for general charitable purposes, although some are established as charitable corporations with similar general purposes.

Disclosures were made that many of these charitable foundations

had been operated so as to make advantages to the donors the determinatives of the immediate activities of the organization, with the intended benefits to charity being postponed for years. As a result, the Federal income tax laws were amended to prevent such methods of operation, at least without the donations thereto, or the income therefrom, being subject to tax, and to require fairly immediate application of the income of the foundation for charitable purposes if the income of the foundation were to be exempt from tax. Although these amendments were enacted some years ago, disclosures resulting from recent Congressional investigations would appear to indicate that some foundations have evaded the provisions of the amendments to some extent and have not been subjected to the tax liability provided for such evasion.

The Federal government faces the problem of imposing tax liability on foundations which may be engaged in certain business activities, or are not currently expending their income. In addition, the Commonwealth has an interest in seeing that the funds of the foundation are protected, are not used for the benefit of the donors or others to the detriment of the charity, and are not used in violation of the terms of the instrument creating the charity.

As one step in the direction of more effective regulation of public charities, Massachusetts enacted legislation in 1954 requiring almost all the public charities in the Commonwealth to file annual financial reports with the Division of Public Charities. That legislation has been amended from time to time to make it more effective. The requirement, and the availability to the public, of these financial reports has been a very effective aid in the regulation of public charities in Massachusetts. The recent amendments together with amendments which will be proposed at the next session of the Legislature, will permit both closer supervision of public charities and the attainment of greater benefits from their operation.

Most of the more recently created charitable foundations recite very broad charitable purposes. However, most of the trusts created by will, both in recent and past periods, while motivated by a general charitable interest, provide that the funds shall be used for some stated charitable purpose in which the donor has an interest. Often, in the course of time, or because of changed conditions, the funds cannot be applied in just the way the donor desired. In such situations, the law is well-established that the courts will not allow the charity to fail but will apply the fund under the doctrine of *cy pres* for some charitable object similar to that desired by the donor. Such cases arise periodically and-since January 16, 1963, the Division acted to support gifts in many cases, such as that of Laban Pratt for hospital purposes in Weymouth and that of Catherine Johnson for a home for aged women in North Andover.

Other litigation in which we have been involved: — an appeal regarding the sale of park land in Brighton in which the contentions of the Division were upheld by the Supreme Judicial Court; and an

appeal relating to the trust under the will of Henry Lawton Blanchard for museum purposes in Avon, in which the Supreme Judicial Court upheld this administration's disavowal of support of the Probate Court order for the removal of the trustees.

At the inception of this administration it was learned that the practice in most Probate Courts was to refuse to allow any petition, or account, a citation which had been served on the Attorney General until written waiver was filed, no matter what his intest was.

To lighten the burdens of the Probate Courts, of this office, and of the Bar, letters were written to all the Probate Courts stating that, if after being served with a copy of the citation in matters of the probate of wills, appointment of public administrators and allowance of accounts, this office did not thereupon enter a written appearance, no waiver from the department of the Attorney General should be required as a condition precedent to the matter being presented to the court for action. This change has reduced the volume of paper work of the Division and has effected a desirable uniformity, not previously existing, in the proceedings in the various Probate Courts. The Division continues to issue waivers, or assents, upon request in those instances in which the Attorney General is the only party interested and the issuance of the waiver, or assent, obviates the necessity for the issuance of a citation.

In connection with the performance of its responsibility to see that money given for charity goes for charity to the greatest extent possible, the Division has studied situations of solicitations of funds from the public involving possible abuses either in the amount expended for the costs of solicitation, or for the costs of administration. We are preparing legislation to effectively regulate such abuses, and to assist the public in determining which charities deserve its support.

A large volume of matters with relation to public administrations was handled in the period. The high rate of economic activity since World War II has also affected this phase of the Division's work. Due to the generally increased prosperity, many more persons who die in the Commonwealth, without known heirs surviving them, leave estates which require that probate proceedings be instituted by a Public Administrator. The average value of the estates of such persons is much higher now than formerly.

### Torts, Claims and Collections Division

The Torts, Claims and Collections Division represents Commonwealth employees in tort actions (civil wrongs) brought against them. The Division determines the merits of each case and determines what is a reasonable amount for the damages involved.

G.L. c. 12, § 3B provides that the Attorney General shall defend state employees who operate state-owned vehicles in the course of their employment. The Attorney General may settle claims against such employees for not more than $10,000 in case of injury to or death of one person, and for not more than $5,000 for property damage.

A thorough investigation of the problems in the area of motor vehicle torts led this office to establish new and more efficient methods of operation. The division has developed a list of qualified appraisers in every city and town to assess the damage to motor vehicles. A list of approved examining physicians has also been compiled. When a claim is received, if there is damage of more than $100 to a motor vehicle, the damages are now appraised by an independent investigator. In all personal injury claims, a medical examiner is now appointed to submit a detailed report. This program eliminates fraudulent and exaggerated claims for damages. We are now utilizing such pre-trial procedures — motions to dismiss, interrogatories, etc., — to assist the Commonwealth in the proper defense of these suits.

All cases are now carefully and exhaustively prepared. The result: since this administration took office there have been no large verdicts against the Commonwealth.

The results of our new policy are evident. Costs to the taxpayers have been lowered. In six short months, the average motor tort settlement has been cut from $407.00 per claim to $235.00 per claim. We have already disposed of 176 motor tort cases, avoiding unreasonable delays in the trials of claimants. All cases in which the Commonwealth was clearly liable have been settled within two months of the accident. And all settlements have been promptly processed for payment. Correspondence is now being answered on a current basis.

We have inaugurated the practice of handling claims of less than $100 in the Small Claims Court. This saves the payment of sheriff fees, results in more efficient disposition of cases and further eliminates delay in trials of claimants.

This division also handles moral claims and defective highway cases. Moral claims (damages occurring in circumstances that impose a moral, though not legal, liability upon the Commonwealth, such as injuries caused by deers crossing the road) have accounted for 61 cases, which have been settled for an average amount of $105.00 per case. There have been five cases arising from damages caused by state highway defects and the average settlement per case in these instances is $624.00.

The Torts, Claims and Collections Division also represents all state departments in civil actions to recover money due the Commonwealth for damages to state property, for care of patients in state institutions, or for other obligations owed to the various departments.

In regard to claims and collections, we have consulted with numerous department representatives concerning pending claims and referrals which had been made to this Division. In order to avoid unnecessary work and expedite claims we have requested — and been furnished — more detailed, specific information in regard to pending cases. A comprehensive system of filing has been initiated. We have compiled detailed docket files which record the action taken in every case. We have also succeeded in bringing the correspondence in this field up-to-date.

By developing a systematic program we made the following collections in 229 cases from January 16, 1963 to June 30, 1963:

| *Department* | *Amount Collected* | *No. of Cases* |
|---|---|---|
| Department of Mental Health | $62,214.47 | 62 |
| Department of Public Works | 33,999.08 | 111 |
| Metropolitan District Commission | 2,354.23 | 12 |
| Department of Public Health | 31,447.05 | 33 |
| Department of Education | 385.00 | 5 |
| Department of Natural Resources | 185.00 | 2 |
| University of Massachusetts | 45.00 | 1 |
| Department of Labor and Industry | 27.00 | 1 |
| Department of Public Safety | 40.00 | 1 |
| Civil Defense Agency | 50.00 | 1 |

In nearly every instance, more was collected from January 16, 1963 to June 30, 1963 than from July 1, 1962 to January 15, 1963.

The total amount collected for the Commonwealth in the first six months of this Administration was $130,746.83. This sum, collected in only a six months period, is more than was collected in each full fiscal year from June 30, 1958 to June 30, 1962.

## Veterans' Division

The Veterans Division advises veterans of their rights and duties under Massachusetts and Federal law. It furnishes legal assistance to veterans and their dependents, and guides them in the securing of all the special services available to them.

The Division receives many inquires from veterans and from their dependents, especially in regard to their tax status.

To answer and advise these veterans, the Division has held numerous conferences with other state agencies and with local tax officials. We have received excellent cooperation from the Commissioner of Veterans' Services and from his entire staff.

## Springfield and Worcester Offices

We have continued the sound practice of maintaining offices in the cities of Springfield and Worcester so that the hundreds of thousands of Massachusetts residents in the western counties of the Commonwealth would have easy access to the services of the department of the Attorney General.

Assistant Attorneys General Frank Freedman of Springfield and Rudolph Sacco of Pittsfield, together with Legal Assistant Santo J. Ciccia of Springfield, staff the Springfield office.

Assistant Attorney General Burton F. Berg of Worcester and Legal Assistant Russell F. Bath, Jr. of North Grafton, staff the Worcester office.

They have been assisted in the preparation and trial of land damage cases and on other special legal problems by Special Assistant Attorneys General who have been appointed from time to time as needed.

It is my earnest belief that the department of the Attorney General should – in fact as well as in name – function as "the people's" attorney.

The citizens of our western counties should be able — conveniently — to bring questions and problems to our attention. The Springfield and Worcester offices fulfill an important and valuable role in this regard.

## Conclusion

We have been in office for less than six months. But I am proud of the record which the members of the staff have already compiled. Our achievements have been possible because dedicated attorneys have devoted long hours of hard work to *your* legal affairs. These men and women have truly been *public* servants. I am most grateful for the service rendered the citizens of the Commonwealth by this outstanding and talented staff.

Respectfully submitted,

EDWARD W. BROOKE,
*Attorney General*

*Places in which renting of rooms for lodging is solicited from the public, regardless of the number of guests, are places of public accommodation within the Anti-Discrimination Law.*

July 3, 1962.

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

Dear Madam: — In your recent letter you propose, for public information purposes, the following formulation concerning houses renting to less than five people in respect to the public accommodation law:

"In regard to the renting of rooms if the place in which the room or rooms are located is open to the public and accepts or solicits the patronage of the general public for housing, lodging, board, rest or recreation, such a place irrespective of whether it is licensed or unlicensed and irrespective of the number of guests whether they are permanent or transient is covered by the law of public accommodations."

Section 92A of G.L. c. 272, specifically reads that:

"A place of public accommodation . . . shall be deemed to include any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public and, without limiting the generality of this definition, whether or not it be (1) an inn, tavern, hotel, shelter, roadhouse, motel, trailer camp or resort for transient or permanent guests or patrons seeking housing or lodging, food, drink, entertainment, health, recreation or rest. . . ."

The definition of "family" set out in paragraph 11 of § 1 of c. 151B, defining the term "multiple dwelling" for purposes of determining jurisdiction within the meaning of the Massachusetts Fair Housing Practices statute, helps to determine only whether or not the dwelling in question is occupied as a residence by three or more families, living together independently of each other. It does not limit nor conflict with the broad definition of a public accommodation as set out in § 92A of c. 272.

In view of the foregoing, I am satisfied that the formulation which you propose constitutes a correct statement of the law.

Very truly yours,

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

*An owner of land posting it against hunting thereon may not be paid for damages caused by deer or moose even if he is willing to give permission to hunt to persons who ask.*

July 5, 1962.

Hon. Charles H. W. Foster, *Commissioner, Department of Natural Resources.*

Dear Sir: — In your letter of recent date relative to the provisions of G.L. c. 131, § 83, you state that:

"This office has received a claim for damage together with a statement 'Hunting on this farm is allowed to any or all persons who so ask.

There are "No Trespassing" signs on the property but written permission is given to all who ask to hunt or fish.' "
You then solicit our opinion as to your authority to pay this claim for damage in view of the fact that the land has been posted with "No Trespassing" signs.

Section 83 deals with the subject of compensation for damages caused by deer or moose and the method of claiming and obtaining compensation from the Commonwealth for such. The last sentence of the second paragraph of § 83 reads as follows:

"No compensation for damage shall be paid under this section to any owner or lessee of land if such owner or lessee has, within one year prior to the damage claim, posted said land, other than an orchard or that portion of the land immediately surrounding his house, barn or other outbuildings, to prevent the hunting of deer."

In the light of our conversation clarifying your letter, I understand that the owner of the land in question has lawfully posted it within the meaning of the sentence above quoted but has indicated a willingness to give written permission to all requesting such to hunt or fish on his land. In my opinion the claimant you refer to is not entitled to compensation if he has "posted" his land as provided in § 83. The "posting" is an assertion of his right to exclude the public at large from his property. The fact that the owner orally does give permission to those requesting such does not alter the situation. He has reserved his rights and must be bound by the statute.

As stated by former Attorney General Paul A. Dever in his opinion dated January 10, 1938 (Attorney General's Report (1938), p. 31):

"The owner of land has the exclusive right to take wild game upon his own land, in accordance with such regulations as the State may prescribe as to the times and manner in which game may be captured and killed. His ownership of the land gives him an interest in the game that may be located thereon, and a right to capture the same superior to those of the stranger. . . .

"No one, without the consent of the owner, may enter upon his premises for the purpose of hunting thereon. A hunting license is no justification for a trespass upon realty, and the right of the owner to the exclusive use of his land cannot be invaded by the holder of such a license. . . .

"In this Commonwealth the owner may protect his property against trespassing hunters by merely posting his land. . . ."

In the light of the foregoing, I answer your query in the negative.

Very truly yours,

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

By Fred W. Fisher, *Assistant Attorney General.*

*Expenditures may be made by the Metropolitan District Commission from the apropriation by St. 1962, c. 549, for an athletic plan in Medford if the city agrees to pay the Commission the damages later paid it for the taking of the municipal stadium by the Commonwealth.*

July 10, 1962.

Hon. Robert F. Murphy, *Commissioner, Metropolitan District Commission.*

Dear Sir: — You have requested my opinion on certain questions relative to the expenditure of funds under the authority of St. 1962, c. 549. Said Act which has an Emergency Preamble, reads as follows:

"SECTION 1. The metropolitan district commission is hereby authorized and directed to construct an athletic plant in the city of Medford on land to be acquired by said commission and may expend for such purpose a sum not to exceed five hundred thousand dollars.

"SECTION 2. For the purpose set forth in section one the sum of five hundred thousand dollars is hereby transferred from funds made available by item 9027-01 of section two of chapter five hundred and seventeen of the acts of nineteen hundred and sixty-one, provided, however, that the city of Medford shall make available to the metropolitan district commission any funds received by it from the commonwealth for the taking by eminent domain of Gillis Stadium in said city."

You inform me that the commission was notified on June 15, 1962, in a letter from the Comptroller's Bureau, of the authorization and allocation of the funds provided for in the act, and that it was stated in the letter that:

"The funds received from the City of Medford are not available for expenditure. No allotments from 9027-05 will be made until these funds are received by the Commonwealth."

You further inform me that the City of Medford has not received any payment by the Commonwealth in settlement of its claim for the taking of the Gillis Stadium, that it may be months or years before a settlement is made and that construction cannot begin if funds are not allotted from item 9027-05.

I assume that item 9027-01 was intended to be referred to in the letter to you from the Comptroller's Bureau and in that part of your letter to me quoted above, or that a new account number has been designated by the Comptroller for this project.

The questions you propose ask, in effect, whether it is a condition precedent to the award of a contract for, and expenditures for, the construction work authorized and directed by St. 1962, c. 549, that the City of Medford have received some payment from the Commonwealth in settlement of its claim for the taking of its stadium and have paid the amount received over to the commission.

In my opinion the intention of the Legislature in enacting the provision referred to was to require that any funds paid by the Commonwealth in settlement of the city's claim for damages for the taking of its stadium should be made available to the commission when they

are actually paid to the city by the Commonwealth, but that it was not the intention of the Legislature that the actual settlement of the claim and the payment of the amount received to the commission should be a condition precedent to the doing of the work or paying therefor.

In accordance with that view, it will be sufficient to authorize construction if the commission obtains from the city a formal written agreement that, as contemplated in chapter 549, any amount to be paid by the Commonwealth for the taking of the stadium shall be paid to the Metropolitan District Commission, a duly executed duplicate of the original is delivered to the State Department of Public Works and a copy is furnished to the Comptroller, together with a statement that an executed original has been delivered to the State Department of Public Works.

Very truly yours,

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

*No compensation may be paid a provisional state employee whose period of service expires prior to June 30, on account of vacation credits which would have accrued to him if he had served until that date.*

JULY 18, 1962.

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

DEAR SIR: — In your letter of recent date relative to the provisional employees in your department, you state that your department, being authorized by the Commission on Administration and Finance to employ through June 30, 1962 a number of junior clerks and typists, thereafter requested the Division of Civil Service to approve on a provisional basis, there then being no civil service register, the appointment of specified individuals to these positions; the Director of Civil Service approved the provisional appointments as designated by your department until April 28, 1962, but later on May 18, 1962, notified your department it would approve of their further provisional appointment from such date only through June 8, 1962, forwarding your department thereupon a then available list of civil service candidates from which to select such employees as were willing to accept these positions.

Your department finding it to be successful in filling a number of the positions above referred to from such civil service certification on June 1, 1962 notified the employees who had been provisionally employed in these jobs that due to certification of others from the civil service register, their services would be terminated at the close of business, Friday, June 8, 1962, this being the date to which civil service approval was extended as above indicated.

You further state that during the fiscal year, July 1, 1961 to July 1, 1962, these provisional employees were rendering service in the process of earning vacation rights which under the rules of the State Division of Personnel and Standardization were not creditable to their vacation account for use until the succeeding fiscal year commencing July 1, 1962.

Moreover, by reason of the foregoing your department terminated the service of these provisional incumbents and paid them no compensation for the vacation credits for their work during the fiscal year 1961-1962 relying upon an opinion of this office rendered June 23, 1952 interpreting G.L. c. 29, § 31A.

In the light of the foregoing, you ask our advice as to whether payments for vacation credits to such provisional employees whose employment was terminated on June 8, 1962 were properly denied.

At the outset, it is provided by G.L. c. 31, § 15, that the Director of Civil Service may authorize provisional appointments pending the establishment of an eligible list and fix the tenure of such appointments. This, I understand from your letter, took place. The employment of the provisional employees you have referred to therefore ended on June 8, 1962.

General Laws, c. 29, § 31A, contains various provisions for the payment of accumulated vacation allowances. Subsection (a) provides for payment of accumulated vacation allowances in cases of the death of state employees, which provides no solution for your problem. Subsection (b) provides for accumulated vacation allowances for State employees ". . . whose services terminated by dismissal, through no fault or delinquency of their own, or by retirement, . . . ." The employees you refer to I assume were not retired and in my opinion were not employees ". . . whose services terminated by dismissal, through no fault or delinquency of their own. . . ." Such employees, in my opinion, were not dismissed and therefore subsection (b) does not solve the problem.

As was stated in the informal opinion dated June 23, 1962:

"If an employee's service terminated because his position was abolished or because fewer employees were needed, that would constitute a dismissal. On the other hand, if an employee were engaged for a certain period of time, it could not reasonably be said, when his term of service ended, that he was dismissed. His service was terminated by virtue of the terms of his employment and not by any action of his employer in declaring his service at an end. The latter but not the former would constitute a dismissal."

Subsection (c) of section 31A provides that:

"Employees who are eligible for vacation under the rules of said director and whose services were terminated for reasons other than those defined in paragraphs (a) or (b) shall be paid an amount equal to the vacation allowance credited but not granted to them as of the final date of the next preceding vacation year; provided, that no monetary or other allowance has already been made therefor."

LV-2 of the Rules and Regulations of the Director of Personnel and Standardization, authorized by § 28 of c. 7 of the General Laws, effective June 26, 1960, provides as follows:

"Vacation leave earned during any vacation year shall be credited on June 30th and shall be available during the next vacation year. However, in the case of any temporary employee whose services terminate on June 30th, he shall be credited with earned vacation in accordance with these rules and he shall be paid therefor forthwith."

Provisional employees are temporary employees. The provisional employees you refer to were not in service on June 30th. Rule LV-2, therefore, gives us no help.

In conclusion, I am of the opinion that your action in declining to award compensation for vacation credits to the provisional employees you refer to was proper.

Very truly yours,

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

By FRED W. FISHER, *Assistant Attorney General.*

*A license, approved by the Commissioner of Public Safety, is required for showing motion pictures on Sunday, and such a requirement is valid.*

JULY 23, 1962.

HON. FRANK S. GILES, *Commissioner of Public Safety.*

DEAR SIR: — This will acknowledge your letter of recent date directing the attention of the Attorney General to St. 1962, c. 616, § 4. Your letter appears to ask for a ruling only as to whether the licensing of *motion pictures* on Sundays by the *mayor or selectmen* would be constitutional in view of the *Brattle Films* and *Times Films* decisions.

I answer this question in the affirmative. Immediately following the *Brattle* and *Times* decisions, c. 742 of St. 1955 was enacted which ". . . made clear that, notwithstanding the *Brattle* and *Times Films* decisions, local Sunday licenses must still be procured by motion picture exhibitors." See Attorney General's Report, 1955, pages 35, 36.

It must be noted historically that prior to the enactment of the present law there was contained in § 4 of c. 136 the provision that *both* the *issuing* of entertainment licenses by the *mayor* and the *approval* thereof by the *Commissioner* of Public Safety were to be *tested* by the standard that the entertainment be "in keeping with the character of th day," etc. The 1955 amendment did not strike out this provision; rather, it exempted, to a limited extent, motion pictures, television, and radio from its operation. As to these categories of entertainment, c. 742 specifically continues the licensing requirement by the mayor but *freed* from the test of being "in keeping with the character of the day," etc.; and completely does away with the requirement of approval by the Commissioner regardless of any test. See *Mosey Cafe, Inc.* v. *Mayor of Boston,* 338 Mass. 207, 210. Although the facts of the *Mosey* case dealt only with television and radio (and juke boxes) in cafes, its interpretation of c. 742 is equally applicable to motion pictures.

Since the *Mosey* decision clearly validates licensing by the mayor of television and radio, and by implication, motion pictures, so long as the character-of-the-day test is removed, I am of the opinion that approval by the Commissioner of Public Safety would similarly have been valid if freed from that test.

Nowhere in St. 1962, c. 616, § 4 is this test to be found. Keeping in mind the several duties and functions of the Department of Public Safety with respect, for example, to fire prevention, boiler inspections, building inspections, elevator regulations, to name but a few, it is

my opinion that the requirement of approval by the Commissioner of Public Safety provides an additional safeguard in "the preservation of public order at public entertainments." Section 4 does not authorize or empower censorship or prior restraint in the areas of free speech or press. See *Mosey Cafe, Inc.* v. *Licensing Board for Boston,* 338 Mass. 199, 204-205; *Mosey Cafe, Inc.* v. *Mayor of Boston,* 338 Mass. 207, 212.

Accordingly, I would advise that not only is a license from the mayor or selectmen required to show motion pictures on Sunday, but that your department must approve the application for such a license, not for the purpose of censorship of content but for the preservation of public order.

Very truly yours,

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

By EUGENE G. PANARESE,
*Assistant Attorney General.*

*No payments into the Highway Fund on account of occupancy of space in the Public Works Building by the Divisions of Waterways, Beaches and Motor Boats is required under St. 1931, c. 122.*

JULY 25, 1962.

HON. JACK P. RICCIARDI, *Commissioner of Public Works.*

DEAR SIR: — You have recently requested of me an opinion as to whether c. 122 of St. 1931 requires the Divisions of Waterways, Beaches, and Motor Boats to pay rent for the space they occupy at 100 Nashua Street, Boston.

You state that 100 Nashua Street was built under the authority of said c. 122. Section 6 of said chapter provides:

"All the space suitable for office purposes and not used for the activities of the department of public works in any building constructed or acquired hereunder for its use shall be assigned for the use of other state departments. There shall annually be paid from the general revenue into the Highway Fund a sum equal to the amount which would have been received if the space so assigned to other state departments had been leased at fair market rates for equivalent spaces in privately owned buildings. . . ."

It is to be noted that the Divisions of Waterways, Beaches, and Motorboats are all divisions within the Department of Public Works.

Waterways, G.L. c. 16, § 5A

Beaches, St. 1958, c. 640

Motorboats, G.L. c. 16, § § 12 and 5

It is, therefore, my opinion that the activities of all these divisions are "activities of the department of public works" and § 6 of c. 122 of St. 1931 does not require rental payment by those divisions or any diversion of funds from general revenue into the Highway Fund.

Very truly yours,

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

By LAWRENCE E. COOKE,
*Assistant Attorney General.*

*The statute invalidating provisions of insurance policies and health fund agreements excluding payments for care in a soldiers home is applicable to an out of state organization with members in Massachusetts.*

July 26, 1962.

Mr. John L. Quigley, *Commandant, Soldiers' Home, Chelsea 50, Mass.*

Dear Sir: — In your recent letter in which you enclose a copy of a letter from Irving J. Miller, Secretary-Treasurer, you state that the Health Benefit Plan of the National Postal Union has questioned the application of G.L. c. 175, § 22 to its plan. The provision of § 22 which is involved was added by amendment on May 2, 1960 and provided as follows:

"No policy of insurance issued by a company under the authority of section twenty-four, one hundred and eight and one hundred and ten, and no contract or agreement entered into by the trustee of any trust fund authorized by chapter one hundred and fifty-one D, shall contain a provision excluding liability on the part of the insurance company or health and welfare fund for hospital, medical or surgical expenses if the insured is hospitalized or receives medical or surgical treatment in a soldiers' home established by the commonwealth. Any such provision shall be void."

It would appear from your letter that the National Postal Union Plan has more than twenty-five members in our Commonwealth and thus is covered by c. 151 D, referred to in § 22. If this is so, it is my opinion that G.L. c. 175, § 22 is fully applicable to the National Postal Union Plan and the fact that the main office of the Plan is outside the Commonwealth is not significant. It has long been recognized that a state may regulate the type of insurance policy, or the like, sold to its citizens.

Very truly yours,

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

By Lawrence E. Cooke,
*Assistant Attorney General.*

*The 1946 lease of Hoosac Pier to the Boston and Maine Railroad expired in 1961, and the lessee is not liable outside the lease. Limitations as to the original leasing are not applicable in the negotiation of a new lease by the Massachusetts Port Authority.*

Aug. 1, 1962.

Mr. Emphraim A. Brest, *Chairman Massachusetts Port Authority.*

Dear Sir: — Reference is made to your recent letters and to the various facts therein set forth relating to a lease originally executed between the Commonwealth and the Boston and Maine Railroad for occupancy of the Hoosac Pier.

You call attention to the fact that the lease was originally executed on April 17, 1947, for a five-year period commencing on completion of construction of the pier. The lessee railroad was given an option to

renew for three additional five-year periods. The first five-year term appears to have expired in March of 1956. At that time a second five-year term was commenced expiring in March of 1961. You state that the lessee has declined to renew the lease on expiration of this second five-year term.

You note that the lease was executed under the authority of St. 1945, c. 619. Section 10 of that act contains the following limitation:

". . . provided, that no construction, to be paid from the proceeds of the bond issue hereby authorized, shall be done unless the Authority shall have first executed a written contract, approved by the governor, with a responsible party providing for the lease of said property, the minimum requirements of which shall be a rate sufficient to amortize sixty per cent of the actual cost to the commonwealth of the facilities included in the lease, over a period not exceeding twenty years, which contract may provide that at the expiration of the term of the lease it may, at the option of the lessee, be renewed for a further period of twenty years; and provided, further, that no expenditure of commitment from the proceeds of said bond issue in excess of five million dollars shall be made without further authorization by the general court therefor."

You ask whether the lease expired on March 31, 1961, or whether it continues for a full period of twenty years by virtue of the aforesaid statutory provision. As stated in your letter, the pier matter has already been the subject of two written communications from this office. The first was an opinion rendered on February 21, 1946, before the lease was executed; the second was a letter dated March 21, 1961. Both of these communications are to the effect that the lease in question need not be for a term of twenty years but may be for a lesser period provided that the rent is at an annual rate sufficient to amortize 60% of the cost over a twenty-year period. From the figures supplied in your letter, there is no doubt that the annual rate, if continued for twenty-years, would have been sufficient to amortize 60% of the cost.

Under the circumstances, it appears that the terms of the lease conform, at least technically, with the requirements of the statutory language. It would have been more prudent and more in accord with the spirit of the statute to have made the lease run for twenty years rather than providing for a five-year initial term with options to renew for three additional five-year periods; but this was a policy determination made by the appropriate authorities in the light of circumstances then existing and predicated upon a formal opinion of the then Attorney General. Answering your first question in the light of these circumstances, it appears that the lease expired by its own terms in March of 1961. It does not continue for a period of twenty years from the commencement of the term.

Your second question is as follows:

"If the lease did expire on March 31, 1961, and the Boston & Maine Railroad did not exercise its option for two further periods of five years each (total ten years) is the authority bound to follow the limitations of St. 1945, c. 619, § 10, and recover from the Boston & Maine Railroad a now outstanding 30% of construction cost as defined, or may it, notwithstanding the statute requirements for 60% recovery, now negotiate a lease on other terms which it may deem desirable?"

From the information supplied by you it appears that there is no direct obligation on the part of the Boston & Maine Railroad to pay construction costs. Its obligation is to pay rent under the lease. Since the lease has expired by its own terms without fault on the part of the railroad, the obligation of the railroad ceases.

In negotiating any new lease, your authority should strive to obtain a rental at least equal to that prescribed in the statute. It is noted, however, the statutory limitation, by its terms, applies to a contract to be executed before commencement of construction of the pier facilities. If a sufficiently broad contract was not then executed on behalf of the Commonwealth to provide for a full twenty-year lease at the required rate, your Authority may find that, in the light of present circumstances, it cannot now find a lessee willing to pay rent at the rate set forth in the statute. In this event, your authority would not be required to keep the pier vacant until the required rent could be obtained. Rather, it would be under an obligation to negotiate a lease or other arrangement which would be in the best interests of the Commonwealth and the authority bondholders.

Very truly yours,

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

*Provisional employees are entitled to reinstatement benefits for public employees serving in the armed forces. Public employees in armed forces reserves may not be paid for absence for a two months orientation course, and may be paid for the annual tour of duty only if actually employed on the date the tour begins.*

AUG. 1, 1962.

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

DEAR SIR: — You have recently requested of me an opinion regarding an employee in your department caused by certain military service that he is called upon to perform. You state that the employee was appointed on December 17, 1961 provisionally and is without civil service status, since there was no civil service register from which a selection could be made. You further state that your department received copies of a certain order and memorandum which may be summarized as follows: The order was issued to the employee by the Adjutant General of the Massachusetts Army Reserve National Guard, 101st Artillery and requires the employee to report to Fort Sill, Oklahoma for the purpose of pursuing a field artillery officer's orientation course from June 9, 1962 to on or about August 9, 1962, and specifies that the authority for these orders is to be found in 32 U.S.C. 505. Such service is apparently treated as U.S. military service by the federal government. See 40 Comp. Gen. 31 (1960). The memorandum consists of a training memorandum issued by the Adjutant of the First Howitzer Battalion, 101st Artillery Army National Guard, and indicates that the annual duty tour of the members of this battalion will take place at Camp Drum, New York from the 17th of August to the first of September, 1962.

Specifically, you ask four questions which are as follows:

"1. Is the employee entitled to a leave of absence from June 9, 1962 to September 1, 1962, or any portion thereof?

2. If the employee is entitled to a leave of absence, for how long may such leave continue, having in mind the employee is without any permanent status in this department?

3. Is the employee entitled to continuation of all or any portion of his regular State compensation during any period for which he is properly entitled to an approved leave of absence?

4. If he is entitled to continuation of regular State compensation during any such period, for what period is he so entitled?"

Chapter 708 of St. 1941, dealing with public employees in the military or naval services of the United States, was extended in 1960 through July 1, 1962 and the General Court within the last weeks of June further extended the operation of this statute from July 1, 1962 to July 1, 1964.

Section 1 of said statute provides that a public employee who terminates his service for the purpose of serving in the military forces of the United States is deemed to be on leave of absence "provided that in case he was appointed for a fixed term the term has not expired; and provided further that if so required by the appointing authority he files the certificate of a registered physician that he is not disabled or incapacitated for performing the duties of the office or position." Therefore, if the employee was appointed for a specific period of time, he would be entitled under this statute to apply for reinstatement after the termination of his military service, but before the expiration of the term for which he was appointed, I believe this answers questions numbered 1 and 2 in your letter.

In reference to the question of compensation, we must refer to G.L. c. 33 and the applicable provisions thereof. Section 59 of said chapter provides for a continuance of public salary for a person in the armed forces of the *Commonwealth* serving for certain purposes. One of those purposes is for the annual training period and, therefore, it would appear clear that the employee would be entitled to his public salary during the period of time that he actually serves with his Natioanl Guard unit in accordance with the training memorandum above referred to. Said § 59, however, makes no provision for payment to public employees during the period of time that they are engaged in the type of military service described by the order to the employee relating to the field artillery officer's orientation course and, therefore, in my opinion, he is not entitled to collect his salary from the Commonwealth during the period of June 9, 1962 to August 9, 1962.

I would further interpret § 59 to require that the employee actually be in the service of the Commonwealth at the time that he leaves for his annual training period with the National Guard to entitle him to collect his public salary. Therefore, unless the employee returned to the service of the Commonwealth after completion of his tour at Fort Sill, in my opinion, § 59 would not permit him to collect his public salary during his annual tour of duty at Camp Drum. I believe that the above has answered the questions 3 and 4 in your letter.

Very truly yours,

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

By LAWRENCE E. COOKE,
*Assistant Attorney General.*

*Item of General Appropriation Act for 1963 applicable to State Police providing for larger amount, and more permanent employees, than in 1962 item, prevails over reference in item of Supplementary Appropriation Act for 1963 as to State Police to number of permanent positions fixed in 1962 item.*

Aug. 7, 1962.

Hon. Joseph Alecks, *Comptroller.*

Dear Sir: — In your letter of recent date relative to the appropriation for the Division of State Police in the Department of Public Safety — you state that in House No. 3700, the Report of the Ways and Means Committee on the budget recommendations for the fiscal year 1963, the following item was shown:

"2926-01 For the service of the division, including not more than six hundred and fifty permanent positions . . . . . $5,198,200"

You further state the appropriation bill passed by the Legislature after amendment of the above item authorized an increase in the number of positions from 650 to 700 permanent positions. Chapter 591, which was based on House Number 3700, contains the following item:

"2926-01 For the service of the division, including not more than seven hundred permanent positions $5,538,170"

You further state that in the supplementary appropriation bill, c. 791 of St. 1962, additional funds were provided for the Division of State Police in the amount of $33,439., the item therefor reading as follows:

"2926-01 For the service of the division, including not more than six hundred and fifty permanent positions . . . . . $33,439."

In the light of these circumstances you pose the following question:

"Is the Division of State Police limited to 650 permanent positions or is the intent, as shown by the regular appropriation bill, c. 591, to be in effect, namely 700 permanent positions?"

The answer to your question requires a construction of the appropriation bill (c. 591) and the supplementary appropriation bill (c. 791). You will notice c. 791 is entitled "AN ACT IN *ADDITION* TO THE GENERAL APPROPRIATION ACT MAKING APPROPRIATIONS TO *SUPPLEMENT CERTAIN ITEMS CONTAINED THEREIN,* AND FOR CERTAIN NEW ACTIVITIES AND PROJECTS." (Emphasis supplied) Section 1 provides ". . . for supplementing certain items in the general appropriation act . . . the sums set forth in section two, for the several purposes and subject to the conditions specified therein . . ." and appropriating the sum of $33,439. subject to the provisions of law regulating the disbursement of public funds and the conditions pertaining to appropriations in c. 591. Said sums "so appropriated to be in addition to any amounts at present available for the purposes."

The answer to your question requires a construction of the statutory provisions you have referred to. This in turn requires the application of certain rules of statutory construction laid down by the Supreme

Judicial Court. To be sure, reason and common sense are not to be abandoned in the interpretative process. It is the duty of the courts to discover the real meaning contained in the words in the statute, to elucidate the signification of those words and to correlate the several parts of a complicated enactment so as to give a *rational and workable* effect to the whole so far as practical.

Moreover, all parts of a statute shall be construed as consistent with each other so as to form a harmonious enactment effectual to accomplish its manifest purpose. *Selectmen of Topsfield, et als.* v. *State Racing Commission,* 324 Mass. 309, 313.

A reading of the report and legislation referred to in your letter indicates to me a clear intent on the part of the General Court to increase the Division of State Police in the Department of Public Safety by the addition of a substantial number of men. The Report of the Ways and Means Committee recommended an appropriation of about five million two hundred thousand dollars for not more than 650 permanent positions. Chapter 591, the appropriation bill, presumably after careful thought provides over five million five hundred thousand dollars for the service of the Division including not more than *700* permanent positions. I find nothing in the supplementary appropriation bill, c. 791, to indicate an intent on the part of the General Court to cut the increased force. On the contrary, after the General Court had appropriated nearly five million and one half dollars to provide for the Division of State Police, including not more than *700* permanent positions, it provided in the supplementary appropriation bill, c. 791, a further sum for the same service of $33,439. I am of the opinion that the appropriation bill, c. 591, by appropriating $5,538,170. for the service of the Division of State Police, including not more than 700 permanent positions, the General Court meant what it said. It contemplated a substantial increase in the Division to enable its Department to fulfill its public responsibilities. The appropriation of over three hundred thousand dollars more than recommended in the report of the Ways and Means Committee resolves any doubt about the legislative intent.

Moreover, a reading of § 1 of c. 791 indicates to me that the additional appropriation for the Division of State Police found in c. 791 was to supplement the appropriation already made of $5,538,170. for the service of the enlarged Division including not more than 700 permanent positions. The reference in the supplementary appropriation bill to the former Division including not more than 650 positions must, in my opinion, give way to the provisions in the original appropriation bill enlarging the Division to not more than 700 permanent positions. A rational construction of House 3700, c. 591 and c. 791 inevitably leads one to that conclusion.

In the light of the foregoing, it is my opinion from the references you have given me that the Division of State Police is limited to not more than 700 permanent positions.

Very truly yours,

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

By Fred W. Fisher, *Assistant Attorney General.*

*The provision prohibiting the use of the words "certified public accountant" by a corporation is not applicable to their inclusion in the name of a non-profit membership corporation for social and cultural purposes.*

Aug. 8, 1962.

Hon. Guy J. Rizzotto, *Commissioner of Corporations and Taxation.*

Dear Sir: — In your letter of July 30, 1962 you state that a group of persons desire to be incorporated under G.L. c. 180, using the name "Massachusetts Association of Attorney-Certified Public Accountants, Inc.," and that the purpose of this organization is "to promote the social and cultural interests of its members, rather than the carrying out of any business activities."

In connection therewith you enclose the following documents which I return herewith as follows:

1. Articles of Organization of the Massachusetts Association of Attorney-Certified Public Accountants, Inc.
2. Agreement of Association.
3. Records of two meetings of the incorporators.
4. Copy of the By-laws.
5. Waiver of notice of first meeting and minutes of the first meeting of the directors.
6. Check for twenty-five dollars ($25.00) to cover the filing fee.

You quote G.L. c. 112, § 87E, and have asked the opinion of this office with regard to the following questions:

"1. With reference to a corporation, does the above section intend that the prohibition of the use of the words 'certified public accountant' apply only to the organization of a business corporation?

"2. Would the words 'and no corporation shall use the words' "certified public accountant" restrict or prevent me from approving the Articles of Organization of the said Massachusetts Association of Attorney-Certified Public Accountants, Inc. which seeks to be incorporated under c. 180 which concerns charitable and other non-profit corporations?

"3. Does the prohibition contained in c. 112, § 87E, apply to all kinds of corporations regardless of the nature of its activities?"

The Legislature for over sixty years has concerned itself with the practice of certain professions. As time went on a specialty practice, as opposed to general practice, evolved. Further legislation, more specific legislation, was enacted to regulate the practice of these professions, thereby raising professional standards where same have been lowered, reducing commercialism and generally restricting the activities of those holding themselves out as being capable of performing certain services for remuneration. These regulatory pieces of legislation have all been couched in G.L. c. 112. With regard to accounting, such regulations assure the public that persons practicing public accounting as experts, certified as such, have met the standards of qualification and tests fixed by the law.

It is important to note that c. 112, throughout, pertains to those activities from which certain remuneration will be obtained for services

rendered, and not to the activities of an organization such as has applied for a charter under c. 180.

In answering your question it is necessary to consider not only the ambiguity in, but also the history of, the pertinent legislation. A statute is to be construed so as to make it an effectual piece of legislation in harmony with common sense and sound reason. The apparent limitation of the use of the words "certified public accountants" in c. 112, § 87E, applies only to those corporations which are engaged in the practice of accounting. Any abuses which it sought to correct pertained only to corporations actually engaged in the profession of the practice of accounting.

The statutes are to be interpreted, not alone according to their simple, literal or strict verbal meaning, but in connection with their development and their progression through the legislative body, taking into consideration, in addition, the history of the times, contemporary customs and conditions.

For these reasons, it is the opinion of this office that the use of the words "certified public accountant" as there used in c. 112, § 87E, applies only to business corporations, and in light of this answer, it is unnecessary to consider questions 2 and 3, except to say that both are answered in the negative.

Very truly yours,

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

By HERBERT E. TUCKER, JR.,
*Assistant Attorney General.*

*One who has not attained her majority is a "child of school age" within the provisions as to the education of emotionally disturbed children.*

AUG. 9, 1962.

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

DEAR SIR: — In your letter of recent date, you pose certain questions relative to a young lady, about nineteen years old at the present time, who attended public schools in Newton until November, 1960, at which time she was enrolled in Grade XII. It would appear from one of the enclosures accompanying your letter that the young lady in question is emotionally disturbed and cannot be properly instructed in the regular public school programs of the Commonwealth. Request is therefore made that she be sent to the Hampshire Country School, East Rindge, New Hampshire. In the light of the foregoing you pose the following questions:

1. Can this young lady be categorized as a "child of school age"?
2. At what point does the Commonwealth's responsibility for said child cease?

As you are aware, § 46H of G.L., c. 71, inserted by c. 750 of the Acts of 1960, makes special provisions for education of "a child of school age . . . who is so emotionally disturbed as to make attendance at a public school not feasible." Classes where there are five or more "emo-

tionally disturbed children" are provided for. Another provision is made "where there is a child of school age . . . emotionally disturbed."

Section 46 I of c. 71, also inserted by c. 750, authorizes the Department of Education, upon request of the parents or guardians and with the approval of the Governor, to send "such emotionally disturbed children as it considers proper subjects for education to any school, hospital, sanatorium or like institution, within or without the commonwealth, affording remedial treatment for emotionally disturbed children for terms not exceeding twelve years, under regulations prescribed by the departments of education and mental health. The department may, upon like request and with like approval, continue for longer terms the education of any children therein who are meritorious pupils recommended by the principal or other chief administrative officer of such school, hospital, sanatorium or like institution."

The second paragraph of § 46 I provides that the expenses of the instruction and support of such children shall be paid by the Commonwealth, with a claim for reimbursement by the department in whole or in part.

You are, of course, familiar with the constitutional principles and statutory provisions of the right to education, and the duty of the Commonwealth to provide it. Section 46 I, as inserted by c. 750, appears to be very specific. It *authorizes* (the word "may" is significant), on the request of the parents and with the approval of the Governor, to send such emotionally disturbed children *as it considers* proper subjects for education to schools, sanatoriums or like institutions, within or without the Commonwealth, affording remedial treatment for emotionally disturbed children, under regulations prescribed by the Departments of Education and Mental Health. Your department is further *authorized,* upon like request and like approval, to continue for longer terms such education of meritorious pupils recommended by the institution.

From the foregoing you will observe that a liberal discretion covering almost every phase of this highly sensitive subject is vested in the Department of Education, and to a certain extent in the Governor and the Department of Mental Health. In my opinion, the answer to your first question is in the affirmative. See *Needham* v. *Wellesley,* 139 Mass. 372, at p. 375, where the court interpreted the words "scholars of legal age" to mean "all scholars who were of the age which entitled them to attend school, and for whom the town was compelled to keep its schools open." Be that as it may, § 46 I, as presently written, in my opinion, provides a wide discretion over the pupils which may need special treatment as therein provided.

Answering your second question, it is my opinion that a "child" ceases to be a "child" when it attains majority.

Very truly yours,

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

By FRED W. FISHER, *Assistant Attorney General.*

*Application of provision of St. 1962, c. 683 (Appropriations for County Maintenance) as to allowances for expenses for mid-day meals.*

Aug. 9, 1962.

Hon. Guy J. Rizzotto, *Commissioner of Corporations and Taxation.*

Dear Sir: — This acknowledges your letter of recent date, written at the request of the Director of the Bureau of Accounts, asking for a formal opinion of my interpretation of the provisions of the first paragraph of § 3 of c. 683 of St. 1962.

This paragraph reads as follows :

"No expense incurred for mid-day meals by county officers and employees, other than those who receive as part of their compensation a non-cash allowance in the form of full or complete boarding and housing, and those county officers and employees who are stationed beyond commuting distance from their homes for a period of more than twenty-four hours, shall be allowed by any county; provided, that officers or employees who have charge of juries or who have the care and custody of prisoners, insane persons or other persons placed in their charge by a court or under legal proceedings for transfer to or from court to an institution or from institution to institution and persons certified by a district attorney as engaged in investigation shall be reimbursed for the expense for mid-day meals when necessarily engaged on such duty; and provided, further, that county officers and employees in attendance at meetings and conferences called by or for any group or class on a statewide basis shall be so reimbursed, but not more than two may attend."

In your letter you state that:

"A question has been raised with the Director of Accounts as to whether or not the restrictions contained in this paragraph have any bearing on expenses incurred by county officers and employees who attend a conference or other type meeting which would cause them to be away from their homes for a period of more than twenty-four hours."

After stating that there have been occasions when some of the county agencies have sent as many as twenty (20) staff members to conferences at the University of Massachusetts you state that these conferences would require the absence of such staff members from their homes and regular business locations for periods of more than twenty-four hours.

You now pose the following question:

"Do the words 'but not more than two may attend', as used at the end of the foregoing quoted paragraph, apply to the attendance at meetings and conferences where expenses for only mid-day meals for county officials and employees are involved, or do they apply to attendance at meetings and conferences of county officials and employees for a period of more than twenty-four hours at a location beyond commuting distance from their homes. You will note that there is no reference to the distance from the place of their regular employment or base of operations."

Your second question calls attention to the fact that the three elected County Commissioners and the Sheriff may attend a meeting of the

County Commissioners and Sheriffs Association. You further state that in addition, there is the Massachusetts Association of County Officials to which all elected county commissioners are eligible for membership. In the light of the foregoing you ask:

"Do the words 'but not more than two may attend' restrict the Director of Accounts, in his approval of expense vouchers of the county commissioners to a limit of two such officials when more than two officials attend such a meeting."

It will be seen from an examination of G.L. c. 30, § 25 relating to expenses of *state officers* that the General Court is quite familiar with traveling and living expenses. Section 25 refers to ". . . *any* expenses in the nature of traveling or living expenses. . . ." Also references are made to ". . . actual reasonable expenses incurred in the performance of such duties. . . ." See G.L. c. 40, § 5 (34) authorizing appropriations "for the necessary expenses of municipal officers and employees of any particular department incurred outside the commonwealth . . ." and "Such expenses may also be incurred anywhere within the commonwealth. . . ."

I observe also that in G.L. c. 34, § 8 relative to the expenses of the county commissioners, a provision is made as follows:

"An itemized statement of the actual and proper cost to the commissioners for transportation and other necessary expenses incurred in the performance of their official duties shall, on the first day of each month, be certified by them to the director of accounts, who shall audit and if correct certify it to the county treasurer who shall reimburse them."

Moreover, it appears in G.L. c. 35, § 8 that:

"The county treasurer shall be paid his actual and proper traveling expenses incurred in the transaction of county business. An itemized statement thereof shall, on the first day of each month, be certified to the commissioners, by whom it shall be audited and approved."

In passing, I see no express provision in the paragraph you refer to repealing the provisions which I have before mentioned. In view of the foregoing, it may be pointed out that § 3 appears to refer purely and simply to reimbursement for expenses incurred for *mid-day meals.* Section 3 must be construed as it is written. In general it provides that no expense for mid-day meals by county officers and employees other than those who received them as part of a non-cash allowance for boarding and housing included in their compensation and mid-day meals of county officers and employees stationed beyond commuting distance from their homes for a period of more than twenty-four hours; provided that officers or employees having charge of juries or the care and custody of prisoners, insane persons and other persons in their custody under orders and persons certified by a district attorney as engaged in investigation shall be reimbursed for expenses of mid-day meals when engaged on such duty; and provided further that county officers and employees in attendance at meetings and conferences called by or for any groups or class on a statewide basis *shall be so reimbursed,* but not more than two may attend. Since you do not advise me of the various groupings or classifications of the numerous county officers and

employees, I think my opinion may be more useful if I construe the paragraph in § 3 generally as I see it instead of categorically answering your questions.

As I have already stated, G.L. c. 34, § 8, relative to the payment of the actual and proper cost to the county commissioners for transportation and other necessary expenses, remains untouched. General Laws, c. 35, § 8, to which I have also adverted, relative to traveling expenses of the county treasurer, remains untouched. Traveling expenses of the district attorneys are referred to in G.L. c. 12, § § 23 and 24. See also IV Op. Atty. Gen. 302.

As I have previously stated, § 3 prohibits the reimbursement of expenses for *mid-day meals* except to those who receive them as part of their compensation and those who are stationed beyond commuting distance from their homes for a period of more than twenty-four hours. In passing, I am aware, as are you, that no distance is referred to in connection with the use of the word "commuting." "Commuting" has been defined as "to travel daily to one's work." The word "stationed" has been defined as "to appoint or assign to a post, place, office or the like."

The proviso in the middle of the first paragraph of § 3 excepts from the prohibition against reimbursement for mid-day meals certain officers and employees having charge of juries or other persons under orders and expressly provides for reimbursement for mid-day meals of such persons when necessarily engaged on duty. The last proviso refers to, I assume, a totally different subject, namely, reimbursement for mid-day meals to certain county officers and employees at meetings and conferences and places a limitation of two upon any group or class.

These observations read together with the sections I have referred to and any administrative practices of which I am not advised relative to the subject matters you refer to I think will provide answers to your questions. The clause ". . . but not more than two. . . ." of any group or class seems to be clear and unambiguous.

Very truly yours,

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

By FRED W. FISHER, *Assistant Attorney General.*

*One is not over 50 years of age until his 51st birthday under a provision permitting qualified persons not over said age to be appointed teachers in vocational schools.*

AUG. 15, 1962.

MR. JOHN F. WOSTREL, *Senior Supervisor, Licensed Schools, Division of Vocational Education.*

DEAR SIR: — Your letter of recent date requests an opinion from this office of the words "Any person who is not over fifty years of age. . . ." as they appear in G.L. c. 74, § 24A.

Section 24A was inserted in the General Laws by the provisions of c. 497 of St. 1947. It then read as follows:

"Any veteran, as defined in section twenty-one of chapter thirty-one, who is not over fifty years of age and is otherwise qualified, shall be eligible for appointment as a teacher in state aided approved vocational schools."

By the provisions of c. 154 of St. 1958, § 24A was amended by striking out the reference to veterans and now reads as follows:

"Any person who is not over fifty years of age and is otherwise qualified shall be eligible for an appointment as a teacher in state aided approved vocational schools."

Curiously enough, provisions such as you inquire about do not often come before the courts for interpretations. I am unaware of any decision of such a clause by our Supreme Court. Decisions on this subject outside of the Commonwealth are meager and conflicting.

Provisions such as you refer to have been interpreted in two ways. The first being that a person is "over fifty years of age" when in truth and in fact he has lived over fifty years. A second interpretation has been that by the use of this clause it was intended to mean that the person referred to was to be considered fifty years of age until he became fifty-one. I incline to the latter construction. That is, that the words "any person who is not over fifty years of age" should be construed to mean any person who has not attained the age of fifty-one. I do not believe the General Court intended to prohibit the appointment under § 24A of persons in their fiftieth year. Apparently it felt called upon to place an age limit on appointments of the teachers of state aided approved vocational schools.

As you know, the laws relating to vocational education are to be found in G.L. c. 74. The primary purpose of vocational schools is to fit pupils for profitable employment in agriculture, industry, textiles, etc. Reason and practicalities require a liberal construction of the provisions to which you refer. My opinion has already been stated.

Very truly yours,

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

By Fred W. Fisher, *Assistant Attorney General.*

*Amount sufficient to satisfy all duly filed liens must be retained from final and semi-final estimates payable to general contractor on public works and public buildings until the liens are discharged or it is no longer possible to begin, or to intervene in, proceedings to enforce them.*

Aug. 29, 1962.

Mr. Oliver H. Viehl, *Supervisor of Fiscal Management, Department of Public Works.*

Dear Sir: — In your recent letter you have requested an opinion from this office concerning your department's responsibility to withhold from the payment against a semi-final estimate, sums sufficient to satisfy the outstanding liens filed against the general contractor under the provisions of G.L. c. 149, § 29. Attached to your request is a letter in

behalf of the general contractor making claim to full payment against the semi-final estimate notwithstanding the existence of liens listed therein for two reasons:

1. "retainage held by the Commonwealth is no longer security for claimants who must now look only to the statutory bond for security," and

2. "all claims (except two) filed against the contract in question" were filed more than a year ago and are now barred by the one year statute of limitations made applicable to this type of action by G.L. c. 149, § 29."

In answer to your first question, it is true that the retainage held by the department no longer constitutes part of the security required by G.L. c. 149, § 29 for the benefit of suppliers of labor and materials, but it does not follow that the department is no longer required to withhold the retainage from the general contractor.

General Laws c. 30, § 39G, provides:

"The contracting authority shall deduct and retain from payment of said final estimate a sum sufficient to satisfy any and all outstanding claims or liens that have been duly filed against a contractor under the provisions of section thirty-nine or thiry-nine A of this chapter or section twenty-nine of chapter one hundred and forty-nine, and may also . . ."

The same deductions are required to be made from payments against semi-final estimates (G.L. c. 30, § 39G). The length of time for which the Department must withhold such deduction brings us to the general contractor's second argument.

In answer to your second question, the fact that some of the listed claims were filed more than a year ago is not sufficient reason for the department to release funds retained from the general contractor in consequence of such claim.

General Laws c. 149, § 29 provides *two* means by which a supplier of labor or materials may perfect his rights against the bonding company. He may bring a petition within one year after the filing of his claim *or* he may intervene in an existing petition. He is not required to intervene within one year from the date of filing his claim. (*Water Works Supply Corp.* v. *Cahill*, 344 Mass. 442.)

It cannot be determined from your request or the attached material whether the listed claims were "duly" filed or filed within ninety days after each claimant ceased to perform labor or furnish materials. However, the department must retain from the payment of the semi-final estimate a sum sufficient to cover the amount of all duly filed claims until there is no possibility of any claimant bringing a petition to enforce his claim or intervening in an existing petition. Since the time has not elapsed for some of the claimants to institute proceedings to enforce their liens, the department must withhold from any payment against the semi-final estimate a sum sufficient to satisfy *all* claims duly filed.

In response to your request for an opinion dated July 10, 1961, and concerning the same contract, this office indicated that your department had no obligation to deduct amounts sufficient to satisfy the existing liens from payments against semi-monthly estimates. It should be noted

that that opinion applied to payments against *periodic estimates* only, and, as was pointed out therein, has no application to a payment against a semi-final or final estimate.

Very truly yours,

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

By WILLIAM D. QUIGLEY,
*Assistant Attorney General.*

*The question of the acceptance by the voters of Lawrence of St. 1960, c. 330, as to a regional school district for vocational education may be placed on the ballot for the 1962 State election.*

AUG. 31, 1962.

HON. KEVIN H. WHITE, *Secretary of the Commonwealth.*

DEAR SIR: — Your letter of recent date relative to the request of the City Clerk of the City of Lawrence to include on the ballot at the State election the question of acceptance of c. 330 of the St. 1960 by the City of Lawrence is at hand and contents noted.

Chapter 330 of St. 1960 is entitled, "AN ACT AUTHORIZING THE FORMATION OF A REGIONAL SCHOOL DISTRICT FOR VOCATIONAL EDUCATION BY THE TOWNS OF METHUEN, ANDOVER AND NORTH ANDOVER AND THE CITY OF LAWRENCE." It contains seventeen sections providing in detail for the establishment, operation and control of a regional school district as set forth in the title. Section 5 of c. 330 provides that:

"Upon receipt by the city council of Lawrence of a recommendation that a regional school district be established, and of a proposed agreement therefor submitted in accordance with the provisions of sections one to three, inclusive, of this act, said council shall direct the city clerk to cause the question of accepting the provisions of this act to be placed on the ballot to be used at the next state election or at the regular city election to be held in the year nineteen hundred and sixty-one, whichever occurs first, in substantially the form hereinafter set forth; and upon receipt by the selectmen of each of said towns of a recommendation that a regional school district be established and of a proposed agreement therefor submitted in accordance with the provisions of sections one to three of this act, said selectmen shall cause to be presented for determination by vote, with printed ballots at an annual or a special town meeting called for the purpose the question of accepting the provisions of this act, which question shall be in substantially the following form: — 'Shall the city (town) accept the provisions of an act passed by the General Court in the year nineteen hundred and sixty, providing for the establishment of a regional school district by the city of Lawrence, and the towns of (such towns as may be recommended under section three of this act) and the construction, maintenance, and operation of a regional school by the said district in accordance with the provisions of a proposed agreement filed with the city council of said city and the selectmen of said towns?' If a majority of the voters in said city, present and voting, and a majority of the voters present and voting on said question in at least two of

said towns shall vote in the affirmative, this act shall become fully effective, and the proposed regional school district, comprising said city and the towns which accepted this act as herein provided, shall be deemed to be established forthwith in accordance with the terms of the agreement so adopted."

I assume that for one reason or another the acceptance of c. 330 was not placed upon the ballot used by the voters of the City of Lawrence at the State election in 1960 or at the regular City election in the year 1961. I am obliged to assume from the language of § 5 that the State election in November of 1960 preceded the regular City election held in the year 1961.

In the light of the foregoing, you request an opinion "as to whether, under the phraseology of the act, I have the right to place the question, as submitted by the City Clerk of Lawrence, on the state election ballot in 1962 for vote by the electorate of that city, or whether the phrase 'the next state election' meant only the state election held in the year 1960."

The question you pose requires a determination from the provisions of § 5 of the intent of the General Court. "The aim of all interpretation is to give effect to the dominating idea of the instrument. Statements . . . must be given effect in consonance with the end they are designed to accomplish." *Lamson* v. *Secretary of the Commonwealth,* 341 Mass. 264, 270.

The dominating purpose of c. 330, as disclosed by the seventeen sections comprising it, is to enable the towns of Methuen, Andover and North Andover and the City of Lawrence to organize a regional school district for the convenience and education of the young people of the municipalities referred to therein.

The General Court apparently recognized the need for expediting the submission of the question af acceptance of the legislation by providing that upon compliance with the provisions of § 5, the city council of Lawrence "shall direct the city clerk to cause the question of accepting the provisions of this act to be placed on the ballot to be used at the next state election or at the regular city election to be held in the year nineteen hundred and sixty-one, whichever occurs first, in substantially the form hereinafter set forth. . . ." While the language of § 5 is somewhat peremptory I cannot attribute from it an intention on the part of the General Court to thwart its own purpose to expedite the regional school district by destroying the possibility of the project because for one reason or another a comparatively slight delay on the part of the City of Lawrence has taken place. I observe that no time limit is placed upon the towns to be included in the regional school district for voting on acceptances. Section 5 simply states that the ". . . selectmen shall cause to be presented for determination by vote, with printed ballots at *an* annual or *a* special town meeting. . . ." (Emphasis supplied.)

There seems to be no reason to construe § 5 in such a way as to foreclose action by the towns by a slight delay on the part of the City of Lawrence and to give the towns unlimited time in which to act themselves.

In the case of the *City of Boston* v. *Barry,* 315 Mass. 572, in ruling that a statute imperative in phrase was merely directory, the Court,

in over-ruling its then comparatively recent decision in the case of *Boston* v. *Cable,* 306 Mass. 124, said at page 578: "The rigidity of the *Cable* case ill comports with the liberal trend of statutes and decisions that began with St. 1915, c. 237." On page 578 the Court has collected together innumerable decisions supporting the view which I take of this matter. In the case of *Lamson* v. *Secretary of the Commonwealth,* 341 Mass. 264, the Supreme Court rules peremptory provisions of the Constitution relative to legislative reapportionments to be valid despite the failure to act within the period specifically provided by the Legislature.

Assuming the prior provisions of § 5 have taken place and the City Clerk of Lawrence has properly submitted the question of acceptance to you for action, it is my opinion that you have the right to place the question on the State election ballot in 1962 for vote by the electorate of that city.

Very truly yours,

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

By Fred W. Fisher, *Assistant Attorney General.*

*The per diem rate for payment to rest homes is not applicable to limit the amount of assistance to blind persons in rest homes which must be paid directly to them.*

Sept. 4, 1962.

Mr. John F. Mungovan, *Director, Division of the Blind, Department of Education.*

Dear Sir: — In your recent letter you ask whether an opinion could be given as to whether the provisions of G.L. c. 7, § 30L, as contained in St. 1961, c. 545, limit payments made by the division directly to blind persons who are being cared for in rest homes.

The provisions referred to specifically control only the per diem rate, "*to* . . . rest homes. . .". (Emphasis supplied). In view of that specific provision, it is my opinion that the provision of the section does not apply to limit payments made by the Division of the Blind directly to recipients of assistance, even in those instances where the recipient elected to be cared for either temporarily or for an extended period in a rest home of his or her choice.

Very truly yours,

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

*Medical students may serve as private duty nurses without being licensed by the Board of Registration in Nursing.*

Sept. 5, 1962.

Mrs. Helen C. Sullivan, *Director of Registration.*

Dear Madam: — You have recently requested an opinion relative to the statute governing the practice of nursing as it refers to private duty nurses.

The question has arisen as to whether medical students, who have completed the third year of medical school and who are endorsed by the dean of the medical school, may serve as private duty nurses without being licensed by the board as such. The assignment of these medical students as private duty nurses is made by a hospital, and is made *only* after depletion of the list of registered private duty nurses maintained by the hospital.

Under the provisions of G.L. c. 112, persons engaged in professional nursing or practical nursing must be registered with the board. However, § 80B of c. 112 provides that, "Neither 'professional nursing' nor 'practical nursing' shall mean or be construed to prevent . . . (2) the performance of any nursing service in an emergency . . . or (6) the performance of services by . . . medical students which are commonly recognized to be functions of their respective callings."

Medical students are assigned to hospital service as part of their educational program. Any patient service provided by them may be interpreted as an activity concomitant with the learning experiences selected for them. It would appear, therefore, that medical students, acting as private duty nurses, could be performing the duties for which they have been prepared and are carrying out the functions of their calling.

In any event, it would seem that these medical students come within exception (2) of § 80B. Before they are assigned as private duty nurses, the list of registered nurses maintained by the hospital is first exhausted. In other words, medical students are assigned to private duty nursing only when there is no registered nurse available. In such a case an emergency exists since we must assume the health of the patient requires that there be a professional nurse in attendance and there is none to be had. For a medical student to serve as a private duty nurse in such a situation would seem to be within exception (2) of § 80B, and, in my opinion, no license by the Board is required in such a case.

Very truly yours,

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

By Lawrence E. Cooke,
*Assistant Attorney General.*

*Highway bond issue funds may not constitutionally be used to pay the cost of a study of amounts charged the Metropolitan District Commission for street lighting to determine whether amounts charged included sum for depreciation of property owned by the Commonwealth.*

Sept. 24, 1962.

Hon. John F. Haggerty, *Acting Commissioner, Metropolitan District Commission.*

Dear Sir: — In your letter of recent date relative to the firm of James S. Minges and Associates regarding a review of the commission's position with respect to street lighting, plant depreciation, equipment and rates, you state that the commission has installed many poles and

conduits for the highway lighting system over a period of years; further, that the cost of these installations is estimated at between two and three million dollars. After indicating that the filed rates of the utility companies may include a depreciation charge upon property of the Commonwealth, you aver that it is felt by your commission that it may have been overcharged during the years. The purpose of the study referred to in your letter is twofold:

"1. Determine if there has been an overcharge and take necessary steps to obtain reimbursement.

"2. Determine the advisability of disposing of lighting equipment and allowing utility companies to take over present equipment (for an agreed price) and to install and maintain lighting equipment in the future."

Moreover, it may appear that the estimates of possible overcharges over a five-year period have been as high as $200,000 and that your commission feels an annual expenditure of over $700,000 for electricity warrants the study referred to in your letter. Moreover, while an estimated cost of the study might be $50,000, the Legislature has appropriated $10,000, which appears to be insufficient. In conclusion, you request an opinion as to whether, under the above circumstances, unencumbered balances of existing highway bond issues may be utilized to meet the expense of the proposed study contract to which you refer.

Section 4 of Art. LXII of the Amendments to the Constitution provides that:

"Borrowed money shall not be expended for any other purpose than that for which it was borrowed or for the reduction or discharge of the principal of the loan."

General Laws, c. 29, § 56 also relates to the disposition of unexpended proceeds from the sales of bonds.

It is a well-recognized principle of sound finance that capital, and especially borrowed capital, should not be used for current expenses. The Constitutional Amendment above referred to adopts this principle. It limits the purposes for which borrowed money may be used. Such money may not be used save for the purpose for which it was borrowed or to repay the loan. V Op. Atty. Gen. 491, 492.

I am not informed as to the specific statutes comprising the highway bond legislation to which you refer. Presumably, they relate to the construction of Metropolitan highway projects. The purpose now in mind is, I gather, to use not exceeding $50,000 from the balances of the highway construction bond issues to pay for a consultant study of the amounts claimed by the utility companies and paid by the commission for electricity, particularly with a view to determine whether or not charges against the Commonwealth were based, in part at least, upon items for depreciation of poles, conduits and incidental equipment which in fact belong to the commission.

Under the circumstances set forth in your letter, I am of the opinion, without knowledge of the language of the legislation to which you refer, that the balances of the bond issues for construction of the commission highways or highway projects may not be utilized for the purposes set forth in your letter. The proposed contract is to determine

whether utility companies have included in their charges against the commission depreciation upon property which belongs to the Commonwealth and if so to investigate the wisdom of obtaining reimbursement of any overcharges and also to consider the advisability of disposing of the lighting equipment of the utility companies.

In passing, I bear in mind the fact that the General Court appropriated under Item 2931-77 in § 2 of c. 791 of St. 1962 for the investigation and study of the matters in question the sum of $10,000.

Very truly yours,

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

*Increases in costs from overruns in unit price items and a negotiated price for an alteration are properly included in determining whether the Article of the Standard Specifications applying to federally aided highway projects which requires renegotiation when alterations increase cost of the work by more than 25%, was applicable; but renegotiation would not necessarily result in additional compensation.*

SEPT. 26, 1962.

HON. JACK P. RICCIARDI, *Commissioner of Public Works.*

DEAR SIR: — You have asked the opinion of this office with regard to a federally-aided highway construction project completed in the Town of Chelmsford by the firm of Wes-Julian Construction Company.

The main thrust of your letter seems to be the question as to value of the contract increasing beyond the twenty-five per cent figure within the purview of Art. 22 of the department's Standard Specifications.

On the basis of your letter and the accompanying data this office is of the opinion that Art. 22 applies and your office and the contractor should proceed to renegotiate the eight items mentioned in the Wes-Julian letter of November 1, 1961. It does not necessarily follow, however, that renegotiation will lead to additional compensation on any or all of the items mentioned.

Very truly yours,

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

By WILLIAM D. QUIGLEY,
*Assistant Attorney General.*

*A non-citizen, who complies with the law of the Commonwealth in all other respects, who takes the loyalty oath required by G.L. c. 264, s. 14, may be employed by the Commonwealth and paid from state appropriations.*

SEPT. 28, 1962.

MR. MARTIN J. LYDON, *President, Lowell Technological Institute.*

DEAR SIR: — In your letter of recent date relative to appointments, you pose the following question:

"Can a non-citizen, who might be willing to sign the teacher's oath or public employees' oath or both, be employed by the Commonwealth and paid from State appropriations?"

Under the provisions of G.L., c. 71, § 30A, as was stated to you in the letter from this office dated November 14, 1961, every citizen of the United States entering service, on or after October 1, 1935, as professor, instructor or teacher at any college, university, teachers' college, or public or private school in the commonwealth shall, before entering upon the discharge of his duties, take and subscribe to, before an officer authorized by law to administer oaths and affirmations, the oath set forth in § 30A. That section further provides that no professor, instructor or teacher who is a citizen of the United States shall be permitted to enter upon his duties within the Commonwealth unless and until such oath or affirmation shall have been so subscribed. Moreover, a penalty is provided for a violation of the oath. You will note that this section applies to the *citizens*.

General Laws, c. 264, § 14 requires that *every* person entering the employ of the commonwealth or any political subdivision thereof, before entering upon the discharge of his duties, shall take and subscribe to, under the pains and penalty of perjury, the oath or affirmation set forth in § 14.

If the non-citizen you refer to has in all other respects complied with the laws of the Commonwealth and complies with the provisions of G.L. c. 264, § 14, I see no reason why he may not be employed by the Commonwealth and paid by state appropriations.

Very truly yours,

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

By FRED W. FISHER, *Assistant Attorney General.*

*The Board of Examiners under G.L. c. 143, s. 71A, have authority to license persons only as elevator constructor, maintenance man and repairman.*

OCT. 1, 1962.

HON. FRANK S. GILES, *Commissioner Department of Public Safety.*

DEAR SIR: — You have requested of me an opinion as to whether The Board of Examiners provided for by G.L. c. 143, § 71A has the authority to issue limited and/or restricted licenses as follows:

"Can the Board issue a license as a maintenance man only?

"Can the Board issue a license as a repairman only?

"Can the Board issue a license as a maintenance man and repairman?

"Can the Board limit a license to a particular type of elevator?

"Can the Board restrict a license for work on an elevator or a group of elevators located in a particular building?"

An examination of § § 71A through 71D of c. 143 of the General Laws leads me to the conclusion that only one type of regular license was authorized by the Legislature. Wherever the license or the work

permitted by the license is described the same words are used and they are set forth conjunctively and not in the alternative.

Section 71A:

". . . The Chairman shall be a . . . licensed *elevator constructor, maintenance man and repairman*. . . ." (Emphasis supplied.)

Section 71B:

"No person shall work as an *elevator constructor, maintenance man and repairman* in the construction, maintenance or repair of elevators unless he holds a license therefor. . . ." (Emphasis supplied.)

Section 71C:

". . . if found by the board to be qualified, the applicant shall be granted a license as an *elevator constructor, maintenance man and repairman*." (Emphasis supplied.)

Section 71D:

"Whoever works as a *constructor, maintenance man and repairman* in the construction, maintenance or repair of elevators without a license . . . shall be punished. . . ." (Emphasis supplied.)

It is to be noted that § 71B provides that any person who has worked for more than five years prior to a specified date in 1945 "as an elevator constructor, maintenance man *or* repairman" requires no license and § 71C provides that one must have worked for at least two years "as an elevator constructor, maintenance man *or* repairman" to be eligible to apply for a license. Also the original form of §§ 71A through D, before amendment by c. 637 of St. 1957, referred in all instances to "constructor, maintenance man *or* repairman." It would therefore seem that the conjunctive word "and" has been deliberately and carefully used in describing the license which the Board may issue as distinguished from the disjunctive word "or." Thus, in my opinion the answers to your first three questions are in the negative: the elevator Board of Examiners cannot split the skills of constructor, repairman, and maintenance man for the purpose of issuing licenses under § 71B.

The answer to your last two questions must, in my opinion, also be in the negative with respect to the regular license. Subsection (2) of § 71C provides that if the Commissioner finds "that an emergency exists in the commonwealth due to disaster or an act of God and that the number of persons in the Commonwealth holding licenses granted by the board is insufficient to cope with the emergency" then the board may issue temporary licenses to certain non-residents "for such particular elevators or geographical areas" as may be designated. It is an accepted principle of statutory interpretation that where a matter is affirmatively set forth in one part of a statute, its omission in another part is intentional. Thus the failure to specifically authorize regular licenses limited to certain elevators indicates that the board has no authority to issue such licenses except under the special circumstances described in § 71C (2).

Very truly yours,

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

By Lawrence E. Cooke,
*Assistant Attorney General.*

*The Department of Public Safety is limited to a minimum charge of $50 for an annual license for Sunday entertainment, including such a license for motion picture houses.*

Oct. 3, 1962.

Hon. Frank S. Giles, *Commissioner of Public Safety.*

Dear Sir: — In your recent letter you ask for "a decision relative to whether or not all licenses on an annual basis and particularly motion picture houses, fall within the exception of musical entertainment provided by mechanical or electrical means." You explain in your letter that your practice prior to the enactment of St. 1962, c. 616 was to approve annual licenses for $50.00 only for certain categories of entertainment whereas in all other areas $2.00 weekly licenses were approved.

Your obvious concern is whether, under c. 616, your department is authorized to charge $2.00 weekly for the approval of licenses thus totaling $104.00 over the course of a year, or whether it is limited to a maximum charge over the course of a year of $50.00.

The old Lord's day law (c. 136, § 4, as amended through 1961) which authorized the granting of an annual license for "musical entertainment provided by mechanical or electrical means", as well as for certain other categories, is not to be confused with the new legislation embodied in § 4 of c. 616 of St. 1962. Under the old Lord's day law an annual license could be granted only for certain specified categories of entertainment; in all other categories, only a weekly license could be granted by the local authorities and approved by the Commissioner of Public Safety. In this latter instance, obviously, more revenue could be obtained by your department.

However, I am not aware of any provision in c. 616, and more particularly in § 4 thereof, which provides for an "exception of musical entertainment provided by mechanical or electrical means."

The present law, with an exception not here material, places all categories on the same footing. In both acts, the old and the new, the function of the department, is the *approval* of either a weekly license or an annual license *granted* by the local authorities. And in both acts, the old and the new, this application for *approval* is to be accompanied by a fee of $2.00 for a weekly license or $50.00 for an annual license granted by local authorities. The language adopted in both acts as they relate to the charging of fees is strikingly similar; the only difference, as already pointed out, is that the former applied to certain specified categories whereas the latter applies to all categories equally.

Your attention is respectfully called to my letter to you under date of July 23, 1962, to the effect that the area of your approval is confined to the realm of "the preservation of public order at public entertainment."

Very truly yours,

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

By Eugene G. Panarese,
*Assistant Attorney General.*

*A railroad which discharged employees in 1961 without compliance with the provisions of St. 1961, c. 464, was not entitled to an exemption from real estate taxes there under the Act for 1962.*

Oct. 4, 1962.

Hon. Roy C. Papalia, *Chairman, Department of Public Utilities.*

Dear Sir: — Your letter of recent date refers to the tax relief problem of the New York, New Haven and Hartford Railroad Company. You mention our letter to you dated December 26, 1961 in which we expressed the opinion that the New York, New Haven and Hartford Railroad was not eligible to receive relief in the year 1961 under the provisions of St. 1961, c. 464. You state that the question has arisen again in respect to the year 1962. Noting that it appears that between July 1, 1961 and December 31, 1961 the Railroad discharged employees without complying with the provisions of § 12D of c. 464 of St. 1961, you request our opinion "as to whether having so discharged employees in 1961 the Railroad is eligible to receive tax relief under the provisions of that Act for the year 1962."

Chapter 464 of St. 1961 is entitled, "AN ACT PROVIDING TAX RELIEF FOR CERTAIN RAILROADS DOING BUSINESS IN THE COMMONWEALTH AND MEETING CERTAIN ESTABLISHED STANDARDS OF SERVICE." Under c. 464, a railroad claiming an exemption under its provisions, must file an application with the Department of Public Utilities on or before July 1st of the year of which such exemption is claimed together with other supporting instruments and data as provided in § 2. Section 2 further provides that if the Department determines that any real estate of the railroad qualifies for an exemption from taxation under c. 464, it shall not later than October 1st in such year certify to the municipal assessors that the railroad corporation is entitled to the exemption referred to in the certificate.

Section 12D of c. 464 provides as follows:

"No railroad corporation receiving a tax exemption under this act shall discharge, suspend, or lay off any person employed on the effective date thereof except for just cause and with the consent of a justice of the superior court after a hearing. Any railroad corporation violating the provisions of this section shall forfeit the tax exemption provided by this act."

I understand from your letter that the railroad in question has violated the provisions of § 12D by discharging employees without complying with the provisions of § 12D and that such violation is still continuing. By the express terms of § 12D "any railroad corporation violating the provisions of this section shall forfeit the tax exemption provided by this act."

In the light of the circumstances, I answer your question in the negative.

Very truly yours,

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

By Fred W. Fisher, *Assistant Attorney General.*

*A life revocation of the license to operate motor vehicles of a person receiving a subsequent conviction of the offense of operating a motor vehicle under the influence of intoxicating liquor is required if his action in committing the subsequent offense caused an accident resulting in the death of another.*

Oct. 4, 1962.

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

Dear Sir: — You have requested of me an opinion regarding the correct interpretation of the last phrase of G.L. c. 90, § 24, subdivision (1), paragraph (c). Your letter makes reference to a specific case file and I have therefore assumed that your request has reference to a matter presently under consideration by you.

General Laws, c. 90, § 24 (1) (a) and (b) provides that the Registrar shall revoke the driving license of any person convicted by a court of operating a motor vehicle while under the influence of intoxicating liquor. The pertinent portion of § 24 (1) (c) reads as follows:

". . . but notwithstanding the foregoing no new license shall be issued by the registrar to any person convicted of a violation of paragraph (1) (a) of this section until ten years after the date of conviction in case the registrar determines upon investigation and after hearing that the action of the person so convicted in committing *such offence* caused an accident resulting in the death of another, nor at any time after a subsequent conviction of *such an offence*, whenever committed, in case the registrar determines in the manner aforesaid that the action of such person, in committing *the offence of which he was so subsequently convicted*, caused an accident resulting in the death of another." (Emphasis supplied.)

In my opinion, the underlined words "such offence", "such an offence", and "the offence" all refer back to the phrase "violation of paragraph (1) (a)" which, in turn, refers to operating a motor vehicle under the influence of liquor. It therefore follows that if a person is convicted of driving under the influence of liquor which does not cause a death and then is subsequently convicted of driving under the influence of liquor and on such subsequent occasion a death is caused, life revocation of this person's driving license is mandatory.

Very truly yours,

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

By Lawrence E. Cooke,
*Assistant Attorney General.*

*Only State taxes found to be assessed illegally or in error may be abated by the State Tax Commission under G.L. c. 58, s. 27.*

Oct. 18, 1962.

*State Tax Commission, Department of Corporations and Taxation.*

Gentlemen: — You have requested of me an opinion respecting the scope of authority of your commission to abate taxes under G.L. c. 58, § 27. Specifically you ask the following questions:

"1. Is the Commission authorized to abate, under G.L. c. 58, § 27, as amended, a corporation excise even though it determines that such excise would not have been abated if the taxpayer had filed an application for abatement under G.L. c. 63, § 51?

"2. Is the Commission authorized, under G.L. c. 58, § 27, as amended, to grant special relief beyond the statutory requirements of G.L. c. 63, § § 30 to 51, inclusive, as amended, in cases where it finds that equity and hardship justify such relief?

"3. Is the Commission authorized to determine under G.L. c. 58, § 27, as amended, that the excises assessed are 'excessive or unwarranted' if it finds that the excises, although proper under the provisions of §§ 30 to 51, inclusive, are inequitable, unreasonable or unconscionable in amount with respect to the taxpayer-applicants?"

The abatement provision relating to corporate excise taxes in G.L., c. 63 is found in § 51. Upon the filing of an application for abatement as therein provided the Commission is authorized to abate the tax in whole or in part accordingly if it finds that "the tax is excessive in amount or that the corporation assessed is not subject thereto." Refusal to abate under this section may be appealed as provided in § 71 of said chapter. It should be noted that, as the section presently stands, an abatement application thereunder may be filed within three years from the last day for filing a return or two years after a notice of assessment has been sent.

General Laws c. 58, § 27, in its pertinent parts, reads as follows:

"If it shall appear that an income tax, a legacy and succession tax, or a tax or excise upon a corporation, foreign or domestic, or an excise upon the sale of gasoline or special fuels, or an excise on alcoholic beverages or alcohol, or an excise upon charges for meals was in whole or in part illegally assessed or levied, or was excessive or unwarranted, the commission may issue a certificate that the party aggrieved by such tax or excise is entitled to an abatement, stating the amount thereof. If the tax or excise has been paid, the state treasurer shall pay the amount thus certified in such manner and with or without interest as the certificate shall provide, without any appropriation therefor by the general court. No certificate for the abatement of any tax or excise shall be issued under this section unless application therefor is made to the commission within two years after the date of the bill for said tax or excise, or for an amount exceeding the sum which in equity and good conscience ought to be abated under all the circumstances of the case. In issuing certificates hereunder, the commission may, if it deems it expedient, equalize the burden of repayment by providing in the certificate for postponement of payment, or for payment by instalments. The decision of the commission shall be final. . . . This section shall be in addition to and not in modification of any other remedies."

My analysis of the language of this section is that the first sentence spells out the abatement power of the commission and limits it to taxes "illegally assessed or levied, or excessive or unwarranted." I cannot find in this language any broader power than is granted under G.L. c. 63, § 51. The third sentence would appear to grant the commission a wide discretion in regard to the *amount* which it may abate and I find it significant that this discretion is phrased in the negative.

"No certificate . . . shall be issued . . . for an amount exceeding the sum which in equity and good conscience ought to be abated under all the circumstances of the case." In my opinion this sentence cannot be construed to grant the commission an omnibus equitable power to abate taxes; rather, it permits the commission to *limit* the amount it is otherwise authorized to abate.

The history of G.L. c. 58, § 27, starts with V Op. Atty. Gen., opinion dated January 15, 1919. It was then recommended that a simple abatement and refund method be authorized to take care of those cases where the Tax Commissioner agreed that a corporation tax had been "illegally or erroneously" assessed. Chapter 146 of St. 1919 established such a procedure for a tax "illegally exacted." In January of 1922, the Attorney General ruled that this statute afforded no relief to a taxpayer whose return was erroneously completed since, on the face of the return, the assessment was correct. VI Op. Atty. Gen., 386. Also on January 18, 1922 the Attorney General's Report contained a section which read in part as follows:

"Cases sometimes arise where through a mistake of an individual or corporation in the preparation of a tax return or through a mistake of the Department of Corporations and Taxation in computing the amount of the tax, a larger inheritance, corporation or income tax is assessed than the tax which ought to be paid. At the present time it is doubtful whether an error in preparing the return can be corrected even within the six months now allowed for recovery of taxes illegally assessed. It frequently happens, however, that the error in the return or in the assessment is not discovered until after six months have expired . . .

"I recommend that the Commissioner of Corporations and Taxation be authorized with the approval of the Attorney General to abate and repay any inheritance, corporation or income tax which, in their discretion, ought in equity and good conscience to be abated and repaid provided that such tax might have been abated if the taxpayer had seasonably applied for an abatement and provided that application for abatement be made within two years of the payment of the tax.

It is to be noted that for the first time in this report the language "equity and good conscience" appears but it is also clear that legal grounds for abatement should also be required. Thereafter, the present language of s. 27 was added by c. 382 of the Acts of 1922.

Until 1957, the time allowed for applying for relief under G.L. c. 58, s. 27 exceeded the regular time for filing abatement applications under G.L. c. 63, s. 51. This is no longer so since s. 27 relief is limited to applications filed within two years after the date of a tax bill and s. 51 relief may now be had upon applications filed within three years after the date for filing a return or two years from the date of an assessment.

Thus, although amendment of the regular abatement process has rendered s. 27 of questionable service, if indeed it is not surplusage, I do not believe that the original power granted the Commission under s. 27 has been thereby enlarged.

The Supreme Judicial Court has dealt specifically with G.L. c. 58, s. 27 on three occasions and I do not find in these decisions any support for the theory that said section grants the Commission general equitable

powers to relieve taxpayers from "inequitable, unreasonable, or unconscionable" taxes if the same have been legally levied in compliance with the applicable provisions of the General Laws .

"By the enactment of G.L. c. 58, s. 27 . . . the obvious purpose of the Legislature was to relieve from the consequences of taxes or excises in whole or in part *illegally* assessed or paid."

*Attleboro Trust Co.* v. *Commissioner of Corporations and Taxation, 257 Mass. 43, 52.*

"Apparently the mischief intended to be remedied /by G.L. c. 58, s. 27/ was the inability of the taxpayer to recover taxes *paid by mistake* or to get relief against an *illegal* assessment after the six months period even though the Commissioner and the Attorney General should be of opinion that there ought to be repayment or other relief." (Emphasis supplied.)

*Boston Safe Deposit and Trust Co.* v. *Commissioner of Corporations and Taxation,* 273 Mass. 212, 214.

"It has been said, however, in substance, that c. 58, s. 27 was enacted to afford a simple means for abatement and refund in cases where *error or illegality* is conceded and not to compel the commissioner to act against his own honest opinion."

*Chilton Club* v. *Commonwealth,* 323 Mass. 543, 548.

Indeed it should be noted that if section 27 were construed to grant the Commission an equitable power to abate taxes, with no measurable standard by which to apply it, the section would be subject to attack on constitutional grounds. See Article 10, Declaration of Rights, Constitution of the Commonwealth. *Opinion of the Justices,* 332 Mass. 769. *Beltigole* v. *Assessors of Springfield,* 1961 Adv. Sh. 1299.

Therefore, in conclusion, I would answer all three of your questions in the negative.

Very truly yours,

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

By LAWRENCE E. COOKE,
*Assistant Attorney General.*

*Absentee ballots may be mailed to the voter's home address. Retired public employees may be employed as polling officers.*

Oct. 19, 1962.

Hon. Kevin H. White, *Secretary of the Commonwealth.*

Dear Sir: — You have requested an opinion of this office concerning absentee ballots and the effect of St. 1962, c. 743, on election officers.

Your first question is whether or not the registrars or election commissioners should mail an absentee ballot to a voter's home address where the application indicates that the voter's eligibility for such a ballot is not based on physical disability.

General Laws, c. 54, § 86 provides that a voter who is absent during the polling hours from the city or town where he is registered by reason of employment "or for any other reason" may vote by absentee ballot.

Section 87 of said chapter provides for the form of application to be used and the affidavits to be printed on the ballot envelope. As you have noted in your letter, the application does not require an affirmative declaration of eligibility based upon intended absence from the city or town involved and contains a blank space to be filled in by the voter with the address he chooses to which the ballot should be mailed. I find no reason why this address may not be the voter's home address. If in fact, the ballot is marked and mailed by the voter in another city or town and the statutory affidavit is properly executed then it complies with all the provisions of G.L. c. 54, §§ 86 through 98, and where the registrars or commissioners have been asked to mail the ballot in the first instance would seem to be immaterial.

Your second question is whether § 91 of G.L. c. 32 still permits retired public employees to work as polling officers in view of St. 1962, c. 743. The answer to this question is affirmative. The said c. 743 repeals § 9 of c. 639 St. 1950 which permitted reemployment of retired employees with the approval of the Civil Service director or the appointing officer or board. Such repeal, however, leaves G.L. c. 32, § 91 unimpaired and that section specifically provides that retired employees may be paid for work as election officers at polling places at primaries or elections.

Your third question regarding registrars of voters is more properly addressed to the town counsel and city solicitors in each instance.

Very truly yours,

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

By Lawrence E. Cooke,
*Assistant Attorney General.*

*The Commonwealth is subject to liability to the city of Boston for charges imposed for the use of common sewers.*

Oct. 19, 1962.

Mr. Raymond I. Rigney, *Budget Commissioner.*

Dear Sir: — Your letter of recent date relative to a construction of G.L. c. 83, § 16 and its application to the Commonwealth is at hand and contents noted. After setting forth § 16, you state that the city of

Boston has submitted charges to the Commonwealth and its agencies for the use of common sewers, and you inquire whether the Comptroller must approve and the State Treasurer pay such charges.

Prior to 1961, G.L. c. 83, § 16 read as follows:

"The aldermen of any city except Boston or the sewer commissioners, selectmen or road commissioners of a town, may from time to time establish just and equitable annual charges for the use of common sewers, which shall be paid by every person who enters his particular sewer therein. The money so received may be applied to the payment of the cost of maintenance and repairs of such sewers or of any debt contracted for sewer purposes."

By the provisions of St. 1961, c. 311, approved March 30, 1961, and effective ninety (90) days thereafter, the words "except Boston" after the word "city" in line 1 were stricken out. The effect of c. 311, therefore, was to enable the city of Boston to obtain the rights and benefits of § 16 which had not been the case previously.

I am reliably informed that the Commonwealth has heretofore paid sewerage charges under the provisions of § 16 to municipalities for the use of their sewers. The usual rule of law applicable to the construction of statutes is as stated in the opinion of the Supreme Judicial Court dated April 20, 1962 in the case of *Hansen et als.* v. *Commonwealth,* reading as follows:

". . . it is a widely accepted rule of statutory construction that general words in a statute such as 'persons' will not ordinarily be construed to include the State or political subdivisions thereof."

Section 16 refers to annual charges that shall be paid by every "person who enters his particular sewer therein." Ordinarily this language would, in my opinion, be inappropriate to justify sewer charges under § 16 against the Commonwealth. However, in view of the fact that the General Court by the enactment of c. 311 of St. 1961 has opened the gate to the city of Boston to establish and demand just and equitable charges for the use of its sewers and in view of the further fact that the Commonwealth has been paying sewer charges under § 16 to municipalities of the Commonwealth, I see no reason for the Commonwealth to discriminate against the city of Boston and deny to it the same rights under § 16 as it accords to other municipalities in the state.

I therefore answer your question in the affirmative.

Very truly yours,

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

By Fred W. Fisher, *Assistant Attorney General.*

*It is for the Board of Certified Public Accountants to determine whether an applicant is a "resident" of the Commonwealth; "residence" in applicable statute does not necessarily mean domicile.*

Oct. 22, 1962.

Mrs. Helen C. Sullivan, *Director of Registration.*

Dear Madam: — You have requested an opinion for the Board of Registration of Certified Public Accountants regarding the present domicile of a certain individual applicant. You forwarded to me at the same time certain correspondence relating to this problem.

The statute under which your problem arises is § 87B of G.L. c. 112, which reads as follows:

"The board shall examine any citizen of the United States resident in the commonwealth and not less than twenty-one years of age, who may apply for a certificate, shall investigate his character and fitness, and shall require the payment of a fee of forty dollars. The fee for re-examination shall be fixed under regulations made by the board."

First, I call to your attention that the Legislature has placed upon the Board of Registration of Certified Public Accountants the responsibility for making the factual decisions regarding any applicant's qualifications. Section 87C reads:

"Any applicant whom the board deems to have the necessary qualifications and professional ability shall be registered as a public accountant by the board and shall receive a certificate thereof signed by the chairman and secretary of the board."

Therefore, it would be quite improper for me to make any factual decision regarding the applicant's qualifications and the board must make the ultimate decision as to whether this individual is "resident in the Commonwealth." It does seem to me, however, from your request and the correspondence enclosed, that an interpretation of "resident in the Commonwealth" would be helpful to the board in making their ultimate decision.

The words "residence", "reside" and "resident" do not necessarily refer to domicil. Frequently when such words are used in statutes regulating matters entrusted to the Probate Courts they do import domicil; otherwise, however, they are terms of flexible meaning. *Krakow* v. *Department of Public Welfare,* 326 Mass. 452, 454. In the case of *Marlborough* v. *Lynn,* 275 Mass. 394, 397 the Supreme Judicial Court said:

"One may have a residence in a place for reasons of performing the duties of an office . . . and yet have his home or domicil in a different place."

The word "residence" has been defined to mean "a personal presence at some place of abode with no present intention of definite and early removal and with a purpose to remain for an undetermined period not infrequently but *not necessarily* combined with an intent to stay permanently." (Emphasis supplied.) *Jenkins* v. *North Shore Dye House, Inc.,* 277 Mass. 440, 444; *Cambridge* v. *Springfield,* 303 Mass. 63, 67.

Therefore, it may be said that "residence" is distinguished from

"domicil" in the sense that a *permanent* intent to remain is not required. I am making no determination of whether or not applicant is in fact "resident in the Commonwealth", for the reasons stated above, but would advise you that in the statute involved residence does not necessarily mean domicil.

Very truly yours,

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

By LAWRENCE E. COOKE,
*Assistant Attorney General.*

*A person holding only a journeyman electrician's license may make a contract to install wiring and may hire an apprentice or helper. A person not having a master electrician's license may hire journeyman electricians or apprentices only on a regular (indefinite term) basis.*

OCT. 22, 1962.

MRS. HELEN C. SULLIVAN, *Director of Registration.*

DEAR MADAM: — You have recently requested of me an opinion regarding the effect of c. 582 of St. 1962 amending §§ 1 and 8 of G.L. c. 141. Specifically you have asked the following questions:

"1. Can a journeyman make a contract to install wiring without a master's license?

"2. Can a journeyman hire an apprentice or a helper?

"3. Can a journeyman work for an owner for a short period of time — regularly employed for hire or as a journeyman contractor?

"4. Can an owner hire a helper to help a journeyman if not regularly employed?"

Chapter 582 of St. 1962 amended § 1 of G.L., c. 141, to read as follows:

"No person, firm or corporation shall enter into, engage in, or work at the business of installing wires, conduits, apparatus, fixtures or other appliances for carrying or using electricity for light, heat or power purposes, unless such person, firm or corporation shall have received a license and a certificate therefor, issued by the state Examiners of electricians and in accordance with the provisions hereinafter set forth.

"The words 'master electrician' as used in this chapter shall mean a person, firm or corporation having a regular place of business, who, by the employment of journeymen, *learners or apprentices,* performs the work of installing wires, conduits, apparatus, fixtures and other appliances used for light, heat or power purposes; *provided, that no journeyman electrician in his employ shall have more than one learner or apprentice under his supervision; and provided, further, that not more than one such learner or apprentice be employed for each journeyman electrician.*

"The words 'journeyman electrician' as used in this chapter shall mean a person [qualified to do] any work of installing wires, conduits, apparatus, fixtures and other appliances for hire."

The underlined words added to the section and the bracketed words were substituted for the word "doing."

Section 8 was amended to read as follows:

"Electricians regularly employed by persons, firms or corporations other than holders of 'Certificate A', may install such electrical wiring, conduits and appliances or make such repairs as may be required only on the premises and property of such persons, firms or corporations; provided that such electricians hold journeymen's licenses, and have otherwise complied with this chapter. Any such person, firm or corporation may employ learners or apprentices to work with and under the direct personal supervision of electricians referred to in this paragraph in said installation and repair work, *provided that no such journeyman electrician shall have more than one learner or apprentice working with him and under his supervision as aforesaid: but not more than one such learner or apprentice shall be so employed for each journeyman electrician.*

"Electricians employed by theatrical companies may install temporary wiring and appliances required for the purpose of the engagement of any such company, subject to the supervision of a person licensed under this chapter."

The underlined words were added to the section and the following sentence which appeared at the beginning of former § 8 was deleted:

"This chapter shall not forbid the employment by holders of 'Certificate A' or of 'Certificate B' of learners or apprentices working with and under the direct personal supervision of licensed journeymen electricians; provided, that no such journeyman electrician shall have more than one learner or apprentice working with him and under his supervision as aforesaid; but not more than one such learner or apprentice shall be so employed for each licensed journeyman electrician."

A "Certificate A" license is a master electrician's license the holding of which, per § 3(1) of c. 141, "shall not entitle the holder individually to engage in or perform the actual work of installing electric wires, conduits, and appliances . . . but shall entitle him to conduct business as a master electrician." A "Certificate B", per § 3(2), authorizes the holder to engage in the occupation of a journeyman electrician. Section 1 of chapter 141 defines "master electrician" as one who "by the employment of journeymen, performs the work of installing wires, etc."; "journeyman electrician" is a person "doing any work of installing wires, etc."

Questions 1 and 2 in your letter are substantially the same as those which were answered in an opinion of the Attorney General dated October 6, 1915 concerning an earlier version of G.L. c. 141. IV Op. Atty. Gen. 496. As to question No. 1, that opinion read:

"A provision that a man licensed and certified to be competent to do the work in question could not lawfully do such work unless he was also licensed to employ others to do it, or without letting his services out to a licensed master electrician, would be such a limitation upon what have generally been recognized as fundamental rights of a citizen of this Commonwealth and Country that it should not be read into a statute unless clearly called for. The present statute instead of con-

taining such clear language, seems rather to countenance the opposite view. . . ."

I find no change in the statute in this regard and answer question No. 1 affirmatively.

The above referred to earlier opinion also held that a journeyman could employ learners or apprentices but relied chiefly on the quoted sentence in § 8 which was deleted by c. 582 of St. 1962. Since it is presumed that journeymen have employed learners or apprentices since 1916, I would expect a clear and categorical direction by the Legislature to deprive the journeymen of this long-standing right. I do not find such an intention merely from the deletion of the quoted sentence. Indeed, the title of c. 582 of St. 1962, "AN ACT PROVIDING FOR THE EMPLOYMENT OF LEARNERS OR APPRENTICES TO WORK WITH AND UNDER THE SUPERVISION OF JOURNEYMEN ELECTRICIANS", gives no hint of such an intention but seems rather to imply the opposite. Therefore, I follow the earlier opinion above referred to and also answer question No. 2 in the affirmative.

Questions 3 and 4 seem to raise the question as to whether a person not a holder of an "A" Certificate can *employ* journeymen or apprentices on an *irregular* or short term basis. The answer to this question is clearly given by the statute itself in the negative. Only "Certificate A" holders or persons employing on a regular (indefinite term) basis can employ journeymen or apprentices, subject to the conditions and limitations set forth.

Very truly yours,

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

By LAWRENCE E. COOKE,
*Assistant Attorney General.*

*Persons who are over age 70 and are not members of the Retirement System may serve as members of the Apprenticeship Council and the Council on Employment of the Aging, appointed by the Commissioner of Labor and Industries.*

OCT. 23, 1962.

HON. JOHN A. CALLAHAN, *Commissioner of Labor and Industries.*

DEAR SIR: — In our letter of recent date you state that there are two persons in the service of your department who are more than seventy years of age; one being a member of the Apprenticeship Council, appointed by the Commissioner of Labor and Industries under G.L. c. 23, § 11E, who receives a compensation of $15 per meeting, plus transportation and other necessary expenses, if any; and the other being a member of the Council on the Employment of the Aging, also appointed by the Commissioner, under G.L. c. 23, § 11M, who also receives traveling and other necessary expenses, but no compensation.

In the light of these facts you request my opinion on the question of whether:

". . . the employment of these individuals in their present positions is prohibited by chapter 32, section 3 (2) (f), or any other provision of the General Laws."

I am unaware of any provision of law limiting the activities in behalf of the Commonwealth to which you refer to persons under seventy years of age.

General Laws, chapter 32 carefully defines "employee", "member" and "regular compensation". Section 3 of chapter 32 is devoted to descriptions of "membership" in retirement systems. In the light of the definitions above referred to, it is my opinion that neither G.L. c. 32, § 3 (2) (e) nor (f) nor § 5 (1) (a) nor § 20 (5)(e) applies to the two persons you refer to in your letter under the circumstances already stated unless either or both are presently members of the State Employees' Retirement System.

I answer your question, therefore, in the negative.

Very truly yours,

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

By FRED W. FISHER, *Assistant Attorney General*

*Periodic absences for inspection trips by the licensed engineer required to be in charge of a steam boiler in excess of 150 horsepower are not permissible under G.L. c. 146, § 46.*

OCT. 26, 1962.

HON. FRANK S. GILES, *Commissioner of Public Safety.*

DEAR SIR: — You have recently requested of me an opinion regarding the interpretation of G.L. c. 146, § 46. Specifically, you ask:

"Has a duly licensed engineer, in accordance with G.L. c. 146, § 46, the right to leave steam engines which are in excess of one hundred and fifty horsepower for fifteen minutes every two hours while on duty and said steam engines are in operation, to make inspection trips through cold storage and ice making rooms, to check areas where anhydrous ammonia-$NH_3$ is used as a refrigerant and to check and log ambient temperatures and leave said steam engines attended by an oiler who is not duly licensed, in accordance with Section 49 of the General Laws."

General Laws, c. 146, §46 has been in our statutes in basically the same form since 1895. The obvious purpose of the legislation is the protection of the public by providing that those who have charge of such boilers shall possess the skill necessary for their safe operation. As it presently stands this section in its pertinent parts, reads as follows:

"No person shall have charge of *or operate* a steam boiler or engine or its appurtenances . . . unless he holds a license as hereinafter provided. The owner or user of a steam boiler . . . shall not operate or cause to be operated a steam boiler or engine or its appurtenances for a period of more than one week, unless the person in charge of and *operating it* is duly licensed; provided, that in manufacturing plants an unlicensed person may operate, under a licensed person on *duty*, a simple non-condensing engine of not more than one hundred and fifty horse power, and in any plant one unlicensed person may be employed under the *personal direction* of each licensed person in the plant to operate the appurtenances of a boiler or engine." (Emphasis supplied)

It should be noted that the statute requires *operation* of a boiler or engine with more than 150 h.p. to be by a licensed person. Neither of the last two exceptions affect this requirement; the first applies to engines under 150 h.p. and the second applies only to "appurtenances." In an earlier opinion of an Attorney General it was said that the stokers who shoveled coal under the boiler did not require licenses. In that opinion, the word "operate" was defined as "the directing or superintending of the work of the boiler" as distinguished from the work of "mere laborers, who have no responsibility or authority in the matter." I op. Atty. Gen. 485. I do not believe however that that opinion is authority for the proposition that the constant attention of a licensed person is not required.

The statute does permit an owner or user to operate a steam boiler for up to one week without a licensed person "in charge and operating." Another Attorney General said of this provision:

"It is obvious that this provision was intended *for emergencies,* so that a person in the exercise of good faith, *and in an unavoidable emergency,* might be allowed one week in which to provide himself with a licensed person within the requirements of the law." (emphasis supplied) III Op. Atty. Gen. 524.

This seems to me to be the sensible interpretation of §46 and §47 (prima facie violation of 46 if engine found without duly licensed person on two occasions, the second after a lapse of one week from the first); and it does not appear that the situation referred to in your letter is an "emergency" situation but rather a regular pattern of activity.

In view of the fact that this statute concerns the protection of the public from instruments that are highly dangerous if improperly operated or neglected, I am inclined to follow the literal wording of the statute as enacted by the Legislature and, therefore, answer your question in the negative.

Very truly yours,

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

By LAWRENCE E. COOKE,
*Assistant Attorney General*

*The Governor can appoint a person over age 70 who is retired from the service of the Commonwealth to a full or unexpired term as a state department head and, if the appointee waives his retirement benefits he may be paid the compensation attached to the position.*

OCT. 26, 1962.

HIS EXCELLENCY JOHN A. VOLPE, *Governor of the Commonwealth.*

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

"1. Can the Governor appoint, under §91 of c. 32 or some other section, a person over seventy, who was retired from State service, to a full or unexpired term as a department head?"

General Laws c. 32, §91, so far as here material, provides that "No person while receiving a pension or retirement allowance from the

commonwealth . . . shall, after the date of his retirement be paid for any service rendered to the commonwealth. . . ." with certain exceptions not applicable here. The section then provides that:

". . . Notwithstanding the foregoing provisions of this section or similar provisions of any special law, a person who, while receiving such a pension or retirement allowance, is appointed for a term of years to a position by the governor with or without the advice and consent of the council . . . shall be paid the compensation attached to the position to which he is appointed or elected; provided, that he files with the treasurer of the governmental unit paying such pension or allowance, a written statement wherein he waives and renounces for himself, his heirs and his legal representatives, his right to receive the same for the period during which such compensation is payable."

General Laws, c. 32, § 3, subdivision (2) paragraph (e) reads as follows:

"No member, except as otherwise provided for in subdivision (1) of section five or in section ninety-one, or in section twenty-six of chapter six hundred and seventy of the acts of nineteen hundred and forty-one, or in chapter sixteen of the acts of nineteen hundred and forty-two as amended, shall remain in service after attaining the maximum age for his group or after the date any retirement allowance becomes effective for him, whichever event first occurs."

It is to be noted that G.L. c. 32, § 3 (2)(e) is a prohibition, with exceptions, of remaining in service, while G.L. c. 32, § 91 is a prohibition, with exceptions, of the payment of retired persons for services rendered.

General Laws, c. 32, § 91 does not in terms prohibit the appointment of a retired person. It merely prohibits any payment for service rendered by a retired person with the specific exceptions stated.

I assume that your question is not merely whether the Governor can appoint a retired person over seventy but is also whether an appointee can be paid the salary for the position to which he is appointed.

In answer to your question as so construed, I advise you that under the provisions above quoted, the Governor can appoint a person over seventy who is retired from the State service to a full or unexpired term of years as a department head and that if the appointee files the waiver of his right to receive a pension or retirement allowance as referred to in § 91, he can be paid the compensation attached to the position.

You stated in your request that your particular interest is in the reappointment of the incumbent Commissioner of Mental Health and I inform you that the opinion stated is applicable to permit his appointment for the six-year term under G.L. c. 19, § 2, which began after the expiration of the previous term under that section on October 19, 1962.

Very truly yours,

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

*The Board of Regional Community Colleges may not, because of the provisions in St. 1962, c. 591 § 6A, (the General Appropriations Act) hire as professional personnel at a rate above the minimum a person already in the service of the Commonwealth.*

Nov. 1, 1962.

Mr. Kermit C. Morrissey, *Chairman, Board of Regional Community Colleges.*

Dear Sir: — You have requested an opinion on behalf of the Massachusetts Board of Community Colleges as to the legality of the action of the board in fixing the salary of its appointee as Executive Director at a salary rate above the minimum of the salary range for the job group to which that position is allocated.

You state that the Division of Personnel and Standardization has denied the right of the board to take the action it did, citing the provision of the first paragraph of § 6A of c. 591 of St. 1962 (The General Appropriation Act) as authority for its position.

The first paragraph of St. 1962, c. 591, § 6A reads as follows:

"Notwithstanding the provisions of paragraphs (5) and (5A) of section forty-six of chapter thirty of the General Laws, the director of the division of personnel and standardization shall not approve the recruitment of any person at a rate above the minimum of the grade if such proposed employee has been in the service of the commonwealth within a twelve-month period prior to the date of the proposed recruitment."

It is to be noted that the paragraph quoted refers only to paragraphs (5) and (5A) of G.L. c. 30, § 46. It makes no reference whatsoever, not even of a general nature, to other provisions of law which might permit an appointing authority to fix a salary at a rate above the minimum of a salary range for a particular job group.

As regards the Massachusetts Board of Regional Community Colleges, it is provided generally in G.L. c. 15, § 27, so far as here material, that ". . . the board . . . may employ and fix the duties of such other persons and expend such funds as are necessary to carry out the functions of the board within the limits of the amounts appropriated therefor." It is also provided in the same section that:

". . . The board shall have complete authority with respect to the election or appointment of officers and professional staff . . . including the assignment of their respective ranks and duties within quotas and titles established in the appropriation act by the general court. For the purposes of this section, professional staff shall include all persons employed for actual instruction of students and corresponding positions in the fields of experiment, extension, law enforcement and related activities.

"The board may hire such professional personnel at a rate above the minimum and within the grade to which the position is allocated upon determination by the board that the person to be employed has served satisfactorily in a comparable position for a period of time equivalent to the period required by the general salary schedule had such service been entirely in the service of the commonwealth."

In an opinion to the Commissioner of Administration under date of January 21, 1960 (Attorney General's Report, 1960, p. 78), it was noted

that a provision contained in G.L. c. 30, § 46 (5A), similar in all respects to that in the last full paragraph quoted above from G.L. c. 15, § 27, excluded persons who were already in the service of the Commonwealth from the operation of the provision.

Assuming, therefore, that the Executive Director of the Board is on its professional staff so that the provision of G.L. c. 15, § 27 as to hiring above the minimum referred to would be applicable, it would not, as stated in the earlier opinion, be applicable to permit the hiring of a person already in the service of the Commonwealth at a rate above that to which he would otherwise be entitled.

The result is that while the Division of Personnel and Standardization may, in view of the fact that St. 1962, c. 591, § 6A, refers only, and specifically, to G.L. c. 30, § 46 (5) and (5A), and does not refer to G.L. c. 27, § 15, have been in error in citing said section 6A as authority for its position, the position it took is correct in view of the provisions of the fifth paragraph of G.L. c. 15, § 27 quoted above, and the construction in the opinion cited of the comparable provision of G.L. c. 30, § 46 (5A) if your appointee was already in the service of the Commonwealth.

Very truly yours,

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

*There is no appeal from a revocation by the Registrar of Motor Vehicles in cases where the revocation is required by statute.*

Nov. 2, 1962.

HON. CLEMENT A. RILEY, *Registrar of Motor Vehicles.*

DEAR SIR: — I have received from you the following request for an opinion:

"General Laws, c. 90, § 28 provides that any person aggrieved by a rule or decision of the Registrar may appeal to the Board of Appeal on Motor Vehicle Liability Policies and Bonds.

"In such cases which are mandatory suspensions or revocations of licenses and registrations, such as conviction of driving under the influence of intoxicating liquor or cancellation of compulsory insurance policies for non-payment of premiums, I would appreciate your opinion as to whether the Registrar shall stay his action because of such an appeal."

The power of the board of appeal on motor vehicle liability policies and bonds from the rulings or decisions of the Registrar is entirely statutory. It is plain that this power is confined to consideration upon proper appeal, of rulings and decisions of the registrar only in cases where the registrar may exercise his discretion. No appeal may be made in cases where the Registrar has no discretion as to his action. See VII Op. Atty. Gen., 513.

Since the Registrar has no discretion as to his action in the situations covered by your questions, no appeal shall operate to stay the revocation of the license. See also, G.L. c. 90, § 24, (1) (b), which provides that:

"A conviction of a violation of the preceding paragraph of this section shall be reported forthwith by the court or magistrate to the registrar, who shall revoke immediately the license of the person so convicted, and no appeal, motion for new trial or exceptions shall operate to stay the revocation of the license."

Also, in the case of a cancellation by the insurer for non payment of premiums, the Registrar has no discretion as he is precluded by statute from permitting uninsured motor vehicles to be operated. See G.L. c. 90, § 34J, which provides:

"Whoever operates or permits to be operated a motor vehicle which is subject to the provisions of section one A during such time as the motor vehicle liability policy or bond or deposit required by the provisions of this chapter has not been provided and maintained in accordance therewith shall be punished by a fine of not less than one hundred nor more than five hundred dollars or by imprisonment for not more than one year."

Very truly yours,

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

By JAMES W. BAILEY, *Assistant Attorney General*

*Members of the Government Center Commission are entitled to be paid their expenses for travel to and from their homes if their duties do not require regular attendance at their office.*

Nov. 8, 1962

MR. JOSEPH ALECKS, *State Comptroller.*

DEAR SIR: — You have requested an opinion on a question relating to the payment of expenses incurred by a member of the Government Center Commission for travel to and from his home and the commission's office.

An opinion was given to the commission on the subject on August 14, 1961. In that opinion it was stated as follows:

"By the express terms of section 25, State officers receiving a salary who are provided with offices by the Commonwealth and whose duties require regular attendance at such offices shall not be allowed or paid by the Commonwealth any expenses in the nature of traveling or living expenses. Such officers whose duty requires them to travel elsewhere than to and from the office provided for them by the Commonwealth shall be allowed their actual reasonable expenses incurred in the performance of such duty. I am not informed as to whether the duties of the member of the Commission you refer to require regular attendance at the office of the Commission. If so, the statute does not authorize reimbursement. If not, the travel expenses may be reimbursed."

You stated that after the opinion given was rendered you ". . . received a letter from the Government Center Commission in which they stated the following: 'Please be advised that members of the Government Center Commission are not required to attend meetings on a regular basis.' "

You then stated:

"G.L. Chapter 30, Section 25, which was referred to in your opinion reads in part as follows: ". . . and those whose duties do not require daily attendance and who receive compensation by the day. . . ."

"The members of this Commission receive an annual salary. Accordingly, your opinion is respectfully requested on the following question:

"Are members of the Government Center Commission who are not required to attend meetings on a regular basis and receive an annual salary entitled to travel expenses from their home to the office?"

You further state that you do not believe the question is answered by the opinion referred to.

The Government Center Commission was established by St. 1960, c. 635, to construct a state office and other buildings. The Act provided that the commission shall be provided with quarters in the State House or elsewhere. The three members have control of the expenditure of $60,500,000. The Chairman receives a salary of $7,500, and the other members salaries of $5,000, annually.

General Laws, chapter 30, section 25 reads as follows:

"State officers, and members of departments receiving a salary or its equivalent, who are provided with offices by the commonwealth and whose duties require regular attendance at such offices, shall not be allowed or paid by the commonwealth any expenses in the nature of traveling or living expenses. Such officers or members of departments whose duties require them to travel elsewhere than to and from the offices provided for them by the commonwealth, and unpaid state officers or members of departments, and those whose duties do not require daily attendance and who receive compensation by the day, shall be allowed their actual reasonable expenses incurred in the performance of such duties, if such expenses are authorized by law to be paid by the commonwealth. Bills for such expenses shall be itemized and the dates when, and the purposes for which, such expenses were incurred shall be stated before their allowance by the comptroller."

The members of the Government Center Commission are salaried officials and are provided with offices by the Commonwealth. If their duties require regular attendance at their office they are within the prohibition of reimbursement for the travel expenses referred to. If their duties do not require such attendance they would not be within the prohibition, even though they are paid salaries and are not paid by the day.

The test, therefore, as regards the officers in question is, do their duties require regular attendance at the office of the Commission. Whether the duties require such regular attendance is a question of fact to be determined upon a consideration of all the applicable circumstances. It is not the function of this office to make determinations of questions of fact, we rule only on questions of law.

The fact that members of the commission are not required to attend meetings on a regular basis is one of the circumstances to be considered. Another is the fact that despite the wide scope of the projects committed to the commission, the large sums authorized to be expended, and the heavy obligations imposed on the members, annual salaries of only $7,500 for the chairman and $5,000 for each of the other members were provided. The latter fact suggests strongly that the Legislature did not

contemplate daily attendance and it is not a necessary conclusion that the proper performance of their duties, important as they are, would require the regular attendance of the members at their offices within the meaning of the provision in G.L. c. 30, § 25, that salaried officials whose duties require such regular attendance shall not be reimbursed for the expenses in question. The circumstance that if the provision referred to were to be applicable, the burden of travel expenses would militate against the acceptance of an appointment to the commission by qualified persons in sections of the Commonwealth located at any substantial distance from Boston would also be a factor in the determination of the applicability of the provision.

Very truly yours,

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

*The State Secretary has no investigatory powers as to statements of receipts and disbursements filed with him by candidates or political committees.*

Nov. 13, 1962.

HON. KEVIN H. WHITE, *Secretary of the Commonwealth.*

DEAR SIR: — In your recent letter you requested my opinion relative to the effect of the provisions of G.L. c. 55, § 23. Your letter poses the following question:

"In the light of the provision in G.L. c 55, § 23, that '. . . if it appears to the state secretary that any such statement filed with him does not conform to law . . .', does the duty of the secretary include investigatory powers as to the declarations made in the statement of contributions and expenses filed by a candidate or a political committee, or are his duties limited to obvious flaws in the face of the instrument, such as lack of signature, lack of addresses of contributors, lack of itemization, etc."

Section 23 of c. 55 states in part that:

"The state secretary shall inspect all statements of candidates filed with him . . . within thirty days and all other statements within sixty days, after the election to which they relate, and if upon examination of the official ballot it appears that any person has failed to file a statement as required by law, or if it appears to the state secretary that any such statement filed with him does not conform to law . . . the state secretary . . . shall in writing notify the delinquent person."

Section 24 of c. 55 states as follows:

"Upon failure to file a statement within ten days after receiving notice under section twenty-three, or if any statement filed after receiving such notice discloses any violation of any provision of this chapter, the state secretary or the city or town clerk, as the case may be, shall notify the attorney general thereof and shall furnish him with copies of all papers relating thereto, and the attorney general, within two months thereafter, shall examine every such case, and, if satisfied that

there is cause, he shall in the name of the commonwealth institute appropriate civil proceedings or refer the case to the proper district attorney for such action as may be appropriate in the criminal courts."

It is my opinion that the duties which are laid upon the Secretary of State are ministerial and not investigatory in character. These duties are not intended to extend to matters other than those appearing upon the face of the statements filed by a candidate for elective office or his political committee. A determination of the veracity of a report filed by a candidate or committee is not a determination that the Secretary of State, by the very nature of his ministerial duties, is authorized or qualified to make.

It is apparent, however, that if the Secretary of State should feel that any reports filed are unusual or possibly inaccurate in any respect, he has the additional duty to call the circumstances to the attention of the office of the Attorney General in order that a complete and thorough investigation may be made.

In accordance with the above cited statutory provisions, it is the duty of the Secretary of State to inspect all statements filed with him, and if it should appear that the statements filed do not conform to the law, it is incumbent upon him to notify the persons responsibile for their filing of the delinquency and the respects in which the statements should be amended to so conform.

Very truly yours,

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

By RICHARD M. DRAY,
*Assistant Attorney General*

*While it is a matter for administrative regulation as to its propriety, no conflict of interest is created under any existing statute where the medical consultant of the Massachusetts Rehabilitation Commission acts as referring doctor and then performs rehabilitative surgery for which he is paid by the Commonwealth.*

Nov. 14, 1962.

MR. FRANCIS A. HARDING, *Commissioner of Rehabilitation*

DEAR SIR: — You have requested my opinion as to whether there is any conflict of interest under any statute of the Commonwealth arising from the fact that the chief medical consultant for the Massachusetts Rehabilitation Commission acts as a referring doctor, and then performs rehabilitation surgical services on said patients for which he is paid by the commission.

It is my opinion that the situation described does not come within the purview of any existing statute of the Commonwealth and is rather a matter for administrative regulations as to its propriety in the context of the agency's operations.

Very truly yours,

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

*The Records Conservation Board is not subject to the provisions of the Administrative Procedure Act.*

Nov. 14, 1962.

Mr. I. Albert Matkov, *Chairman Records Conservation Board.*

Dear Sir: — In a recent letter you have requested an opinion on the following question:

"Is the Records Conservation Board an 'Agency' that falls within the scope of Chapter 30A of the General Laws of Massachusetts?"

The Records Conservation Board was created by c. 427 of Acts of 1962. Under § 2 of that act, the board is enabled to dispose of public records of the Commonwealth as defined therein. Section 2 further reads, "Until such action shall have been taken all public records shall remain the property of the commonwealth." The board is further required by this section to publish notice of its intention to dispose of records and is privileged, on fulfillment of certain conditions, to hold a public hearing to persons interested on ten days' notice. The proceeds of the sales are payable to the Commonwealth.

General Laws, c. 30A, known as the State Administrative Procedure Act, in paragraph 2 of § 1 defines "agency" as including:

". . . any department, board, commission, division or authority of the state government, or sub-division of any of the foregoing, or official of the state government, authorized by law to make regulations or to conduct adjudicatory proceedings, but does not include the following: the legislative and judicial departments; the governor and council; military or naval boards, commissions or officials; the department of correction, the youth service board and the division of youth service in the department of education; the parole board; the division of industrial accidents of the department of labor and industries; and the division of child guardianship of the department of public welfare."

If not wholly and expressly excluded from the operation of the act by virtue of paragraph 2, § 1, an agency is within its coverage only if "authorized by law to make regulations or to conduct adjudicatory proceedings." Both of these terms are defined in the act. "Regulation" is defined in paragraph 5 of § 1 to include:

". . . the whole or any part of every rule, regulation, standard or other requirement of general application and future effect adopted by an agency to implement or interpret the law enforced or administered by it, but does not include (a) advisory rulings issued under section eight; or (b) regulations concerning only the internal management or discipline of the adopting agency or any other agency, and not directly affecting the rights of or the procedures available to the public or that portion of the public affected by the agency's activities; or (c) regulations concerning the operation and management of state penal, correctional, welfare, educational, public health and mental health institutions and soldiers' homes, or the development and management of property of the commonwealth or of the agency; or (d) regulations relating to the use of public works, including streets and highways, when the substance of such regulations is indicated to the public by means of signs or signals; or (e) decisions issued in adjudicatory proceedings."

"Adjudicatory proceeding" is defined in paragraph 1 of § 1 to mean:

". . . a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provisions of the General Laws to be determined after opportunity for an agency hearing. Without enlarging the scope of this definition, adjudicatory proceeding does not include (a) proceedings solely to determine whether the agency shall institute or recommend institution of proceedings in a court; or (b) proceedings for the arbitration of labor disputes voluntarily submitted by the parties to such disputes; or (c) proceedings for the disposition of grievances of employees of the commonwealth; or (d) proceedings to classify or reclassify, or to allocate or reallocate appointive offices and positions in the government of the commonwealth."

Thus it will be seen that the Records Conservation Board is not numbered among the agencies which are wholly and expressly excluded from the operation of the act.

However, it does not appear that the board is an agency "authorized by law to make regulations." The power of the board to require all departments of the Commonwealth to report on the records that they hold and to set standards for their management and preservation and establish schedules for their destruction, even if construed as the authority to issue regulations, would, nevertheless, fall within the exception set out in clause (b) of paragraph 5, § 1, because it does not concern the public as distinguished from the state government. The power over records seems clearly to be a "development and management of property of the commonwealth" within the meaning of clause (c), paragraph 5, § 1.

Nor is the board authorized "to conduct adjudicatory proceedings." The public hearing which the board is privileged to hold would not seem to be an adjudication of "legal rights, duties, or privileges of specifically named persons" which "are required by constitutional right or by any provision of the General Laws" within the meaning of paragraph 1, § 1.

In view of the foregoing, the answer to your question must be in the negative.

Very truly yours,

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

By GERALD A. BERLIN,
*Assistant Attorney General*

*A Chapter 90 road project contract between a town and a corporation which was the low bidder, an officer and supervisor of work for which is a selectman of the contracting town, would be in violation of the provisions of the conflict of interest statutes.*

Nov. 14, 1962.

HON. GEORGE C. TOUMPOURAS, *Acting Commissioner of Public Works.*

DEAR SIR: — You have requested my opinion as to the applicability of G.L. c. 268A to the situation which has arisen in relation to the awarding of a contract to Ernest W. Briggs Inc. for work on Marion-Point Road in Marion, Massachusetts.

Chapter 268A, which was enacted as Chapter 610 of St. 1961, states in § 3 the following rule: "Rule with respect to conflicts of interest. No officer or employee of an agency should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest."

In addition, this chapter establishes certain standards of conduct for officers and employees.

It is my opinion that the dual position of Mr. E. A. Briggs as Selectman of the Town of Marion, and as officer and supervisor of work for Ernest W. Briggs Inc., brings him within the purview of this statute.

I wish to point out, however, that c. 779 of St. 1962, which will take effect on May 1, 1963, supplants in its entirety c. 610 of St. 1961 and establishes criminal penalties for violation of its provisions.

Under the provisions of this statute, participation in a contract similar to that in question and made after May 1, would be illegal and would make the officer or employee subject to criminal action, as well as constituting grounds for recision of the contract.

Very truly yours,

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

*Attorneys employed by the Labor Relations Commission who are permitted to engage in such private practice during normal working hours as does not conflict with their duties are subject only to those provisions of the Conflict of Interest Law applicable to a "Special state employee."*

Nov. 19, 1962.

MR. STEPHEN E. MCCLOSKEY, *Chairman, Labor Relations Commission.*

DEAR SIR: — You have requested my opinion as to the applicability of c. 779 of St. 1962 to two attorneys who are attached to the legal staff of the Massachusetts Labor Relations Commission.

Chapter 779 of St. 1962, which will become effective on May 1, 1963, regulates the activities of state, county, and municipal employees and establishes a code of ethics for said employees. The applicability of certain sections of this act to a given individual is determined in part according to the definitions contained in § 1. Your request relates specifically to whether an attorney appointed under c. 23, § 9P, as amended, is to be classified as a special state employee. Section 1 (o) of c. 779 defines a "special state employee" as a state employee:

"(1) Who is performing services or holding an office, position, employment or membership for which no compensation is provided, or

(2) Who is not an elected official and

(a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or

(b) in fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceeding

three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours a day. A special state employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation."

You have stated that one of the conditions of employment of the attorneys of the Massachusetts Labor Relations Commission is:

"That they be permitted to engage in the private practice of the law and to engage in such personal and private employment connected therewith during normal working hours as does not conflict with or interfere with their duties as Attorneys for the Commission."

It is my opinion that an attorney appointed under the terms you have outlined meets the requirements of c. 779, § 1 (o) (2) (a) and is therefore considered a "Special State Employee" for the purpose of said c. 779.

Very truly yours,

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

*The Department of Education may reimburse a town only for such transportation furnished to pupils in private schools as is required to be furnished by a town, and if a town does not furnish transportation to public schools outside the town there can be no reimbursement for any transportation furnished pupils attending private schools outside the town. No opinion expressed as to whether a town could furnish transportation regardless of reimbursement.*

NOV. 23, 1962.

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

DEAR SIR: — You have recently requested an opinion concerning the rights and obligations of your department and the cities and towns respecting transportation of private school students.

The first situation you pose is where a town has its own public high school and transports no public students to public high schools outside the town. In such an instance, in my opinion, your department is not authorized to reimburse the town for transportation of private high school students to a school outside the town. See my opinion to you dated November 2, 1961 construing *Quinn* v. *School Committee of Plymouth,* 332 Mass. 410.

The second situation you pose is where a town transports no public school students outside the town but proposes to provide private school students with transportation to the boundary of the town, leaving them to make their own arrangements to complete the trip to an out-of-town private school. In my opinion you are correct in your position that your department would not be authorized to reimburse the town for such transportation costs. Both G.L. c. 76, § 1 and G.L. c. 71, § 7A refer to transportation "to and from" a school and nowhere else.

The third situation you pose is where a town transports no public high school students outside the town but proposes to transport private high school students to the public high school in the town, along with

the public students, leaving the private students to make their own arrangements to complete their trip to an out-of-town private high school. The pertinent portion of §1 of G.L. c. 76 reads:

"Pupils who, in the fulfillment of the compulsory attendance requirements of this section, attend private schools . . . shall be entitled to the same rights and privileges as to transportation to and from school as are provided by law for pupils of public schools and shall not be denied such transportation because their attendance is in a school which is conducted under religious auspices or includes religious instruction in its curriculum."

The pertinent portion of § 7A of G.L. c. 71 reads:

"The state treasurer shall . . . pay to the several towns . . . the sums required as reimbursement for expenses . . . by any town for the transportation of pupils once daily to and from any school within the town, or in another town, in excess of . . ."

General Laws, c. 40, § 4 reads in part:

"A town may make contracts for the exercise of its corporate powers including the following purposes . . . For the furnishing of transportation of school children. . . ."

General Laws, c. 40, § 5 reads in part as follows:

"A town may . . . appropriate money for the exercise of any of its corporate powers, including the following purposes . . . (2) . . . for conveying pupils to and from the public schools, or if it maintains no high school or public school of corresponding grade, but affords high school instruction by sending pupils to other towns, for the necessary transportation expenses of such pupils, the same to be expended by the school committee in its discretion."

Although literally read the above sections do not exclude transportation of private school students to a public school, in my opinion, the Legislature did not contemplate that if transportation for private school students was supplied, it would be supplied for trips other than to the private school attended by the students so transported. I would, therefore, say that in the third situation you pose your department would not be authorized to approve reimbursement for the reason that the town is not authorized to supply the type of transportation described.

This opinion is founded upon the premise that your department is required to reimburse for transportation expenses for private school students only if such expenses are required to be made by the town. In my opinion this conclusion is required by proviso (b) of § 7A of G.L. c. 71 which limits reimbursement for transportation of private school students to the amount of reimbursement, per pupil, in the town for public school student transportation; this proviso in the light of *Quinn* v. *School Committee of Plymouth, supra,* rules out private school transportation reimbursement unless it is matching public school transportation.

You will note that I have restricted my opinion to the issue of reimbursement in each of the above situations. I purposely expressed no opinion on whether or not a town may, at its own expense and without

right of reimbursement from your department, provide transportation to private school students in the first situation. This is a question on which town counsel more appropriately rules and, since reimbursement is not at issue, is of no concern to you.

Very truly yours,

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

By LAWRENCE E. COOKE,
*Assistant Attorney General*

*Funds made available under St. 1962, c. 782 (Accelerated Highway Program), may be used for traffic safety devices although there is no federal participation in costs; and funds made available to cities and towns under the act may be used only for the construction of ways in accordance with specifications approved by the Department of Public Works under G.L. c. 44, s. 7 (5).*

Nov. 26, 1962.

HON. JACK P. RICCIARDI, *Commissioner of Public Works.*

DEAR SIR: — You have requested an opinion on various questions relating to expenditures under St. 1962, c. 782, "AN ACT RELATIVE TO THE ACCELERATED HIGHWAY PROGRAM."

Your first question is:

"Because of the language of the second paragraph of § 1 of c. 782 and after comparison with the provisions of c. 32 of St. 1958 the following question has come up within the department.

"May this department use funds provided in c. 782, St. 1962, for the installation of safety devices, including traffic control signals, at locations where there is no federal participation in payment of costs?"

The first paragraph of § 1 of St. 1962, c. 782, includes among the objects for which the funds authorized by the act may be expended, "traffic safety devices on state highways, parkways and on roads constructed under the provisions of section thirty-four of chapter ninety of the General Laws. . . ." Although both St. 1962, c. 782, and St. 1958, c. 32, make provision for the receipt of any federal funds available for projects under the acts neither act makes the availability of federal funds a condition precedent to the expending of any of the funds authorized on a particular project. I therefore answer your first question in the affirmative.

Your second question is:

"Under the provisions of § 4 of c. 782, St. 1962, municipalities may use allotted money for construction of local streets or roadways.

"(a) Would roadways constructed by municipalities have to meet the requirements of Department Standards under the provisions of c. 18, St. 1957?

"(b) Could municipalities use allotted funds for the construction of roadways of a type suitable for traffic yet not in full compliance with c. 90 standards?"

Acts of 1962, c. 782, § 4 provides for the apportionment of $10,000,000 of the $110,000,000 authorized to be expended under § 1 to cities and towns, and reads, in part, as follows:

"The sums received by each city and town hereunder shall be used only for the purposes for which said city or town may borrow money within its debt limit under clause (5) of section seven of chapter forty-four of the General Laws: provided, however, that such sums shall not be available for the construction, surfacing or resurfacing of off-street parking areas."

General Laws, c. 44, § 7, clause (5) reads as follows:

"For the original construction of public ways or the extension or widening thereof, including land damages and the cost of pavement and sidewalks laid at the time of said construction, or for the construction of stone, block, brick, cement concrete, bituminous concrete, bituminous macadam or other permanent pavement of similar lasting character, or for the original construction and surfacing or the resurfacing with such pavement of municipally owned and operated off-street parking areas, under specifications approved by the department of public works, ten years."

Acts of 1957, c. 18, amended St. 1956, c. 718, § 5A, by striking out the last paragraph and inserting the following paragraph in place thereof:

"Said sums received by each city or town hereunder shall, in the year of receipt, be included by the assessors thereof as an estimated receipt and deducted from the amount required to be raised by taxation to meet appropriation made in that year for highway purposes but shall be used only for the purposes for which said city or town may borrow money within its debt limit under clause (5) of section seven of chapter forty-four of the General Laws, or for the construction of town highways of a type equal to that currently used by said town under section thirty-four of chapter ninety of the General Laws, as approved by the department, or for the erection or maintenance of traffic lights; provided, however, that such sums shall not be available for the construction, surfacing or resurfacing of off-street parking areas. Said sums may be expended by a city or town for the purposes aforesaid in addition to federal funds, if any, allocated to such city or town and available for such expenditure."

The second paragraph of § 1 of St. 1962, c. 782, provides that:

"Funds authorized in this section shall, except as otherwise specifically provided in this act, be available subject to the same conditions and for the same purposes as funds authorized in chapter seven hundred and eighteen of the acts of nineteen hundred and fifty-six, chapter thirty-two of the acts of nineteen hundred and fifty-eight, chapter five hundred and twenty-eight of the acts of nineteen hundred and sixty, and chapter five hundred and ninety of the acts of nineteen hundred and sixty-one as amended."

Under the provisions of the second paragraph of § 1 of St. 1962, c. 782, quoted above, the expenditure of funds authorized thereunder is not subject to the same conditions and purposes as funds authorized

under St. 1956, c. 718, § 5A, as amended, when a provision of said c. 782 specifically provides otherwise. The provision of St. 1962, c. 782, § 4, quoted above, is such a specific provision and in accordance therewith funds allotted to cities and towns thereunder can be used only for the purposes stated in said § 4.

I advise you, therefore, in answer to your second question that funds allotted to cities and towns under St. 1962, c. 782, § 4, may be used only for the purposes specified in G.L. c. 44, § 7 (5), under specifications approved by your department, except that they may not be used for off-street parking area purposes.

Your third question reads as follows:

"There seems to be conflict between the provisions of § 1, paragraph 2, § 4, paragraph 2, of c. 782, St. 1962, and the provisions of c. 18 of St. 1957.

"Specifically, could the funds allotted to cities and towns under the provisions of c. 782, St. 1962, be used by the municipalities for the installation or modernization of traffic control signals?"

In accordance with my answer to your second question, I advise you in answer to your third question that funds apportioned to cities and towns under St. 1962, c. 782, § 4 may be used only for the construction of public ways under specifications approved by your department as provided in G.L. c. 44, § 7, clause (5).

Very truly yours,

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

By JAMES J. KELLEHER,
*Assistant Attorney General*

*A corporation, association or partnership is required to furnish a bond in order to be licensed as a real estate broker.*

Nov. 27, 1962.

MRS. HELEN C. SULLIVAN, *Director of Registration.*

DEAR MADAM: — You have requested an opinion as to whether or not a corporation, association or partnership is required to post a bond in order to obtain a real estate broker's license.

Section 87UU of G.L. c. 112, in its pertinent parts provides as follows:

"An application for a broker's license by a corporation, society association or partnership shall designate at least one of its officers or partners as its representative for the purpose of obtaining its said license, and each such officer or partner so designated shall apply to the board for a broker's license in his own name at the same time unless he is already a licensed broker.

"No broker's license shall be issued to a corporation, society, association or partnership unless an officer or partner so designated has been issued a broker's license as an individual. When the officer or partner so designated has been issued a broker's license as an individual and the corporation, society, association or partnership has complied with all pertinent requirements for the issuance of a broker's license to it, the board shall, without charge, issue to it a broker's license which shall

also bear the name of each designated officer or partner to whom a broker's license as an individual has been issued, and each such designated officer or partner shall be entitled to perform all the acts of a broker as agent or officer of such corporation, society, association or partnership, but shall not so act on his own behalf so long as he continues to be a designated officer or partner, unless the written consent thereto of such corporation, society, association or partnership is filed with the board. The license of a corporation, society, association or partnership shall cease unless at least one such designated officer or partner, as the case may be, is a licensed broker. . . . Upon the death or disability of a sole designated officer or partner, who has been licensed, or upon the severance of his connection with the corporation, society, association or the surviving partner or partners or successor partnership of the licensed partnership, if any, acting by another officer or partner, as the case may be, may continue to transact business and to exercise all rights of a broker subject to such regulations as may be made by the board, for a period not to exceed one year from such death, disability or severance as if its license were in full force and effect, subject to the suspension or revocation of a license; provided, that it shall proceed with due diligence to qualify for the issuance of a new license; and, provided, further, that the corporation, society, association or the surviving partner or partners or successor partnership, as the case may be, shall maintain in effect during said period a bond as prescribed in section eighty-seven TT as if a broker's license had been issued and was in effect for such period."

One of the requirements for the issuance of a broker's license is the posting of a bond as set forth in § 87TT as follows:

"No broker's license shall be issued or renewed until the applicant gives to the board a bond in the form approved by said board in the sum of one thousand dollars, executed by the applicant and by a surety company authorized to do business within the commonwealth, or by the applicant and by two good and sufficient sureties approved by the board. Said bond shall be payable to the commonwealth, for the benefit of any person aggrieved, and shall be conditioned upon the faithful accounting by the broker for all funds entrusted to him in his capacity as such."

The question you pose is essentially whether the bond requirement for a broker is a "pertinent" requirement for a partnership or corporate broker since the powers of a corporate broker's license must be exercised, under ordinary circumstances, only by an individually licensed broker who has personally posted a bond. In my opinion, however, there is a need for the corporate or partnership bond to protect the public in the extraordinary circumstance where the designated individually licensed officer or partner, or officers or partners, die, become disabled, or sever their connections with the partnership or corporation and the corporation or partnership continues to carry on a broker's business, as authorized in accordance with § 87UU. In such an event the statute requires the corporation or successor partners or partnership to "maintain in effect" the bond described in § 87TT; the word "maintain" is frequently used as a synonym for "continue" and seems to be so used in this case. A bond would also serve to protect the public

where an unauthorized person without a broker's license acts for the corporate or association broker.

Thus, in my opinion, a separate corporate or partnership bond is also required by the statute for the practical reason of avoiding a hiatus should the individual broker's bond not be available and for the further reason that the literal wording of the statute seems to contemplate such a requirement.

Very truly yours,

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

By LAWRENCE E. COOKE,
*Assistant Attorney General*

*Funds appropriated for the Board of Regional Community Colleges may be used to acquire land and buildings from the city of Worcester either by purchase or lease, for the establishment of a community college.*

Nov. 29, 1962.

MR. DONALD W. CADIGAN, *Executive Director, Board of Regional Community Colleges.*

DEAR SIR: — You have requested an opinion as to whether your board may use the funds appropriated for the board by St. 1962, §§ 649 and 705, to either purchase or lease land and buildings from the City of Worcester for the establishment of a community college.

Chapter 605 of St. 1958, which established your board, reads in part as follows:

"The board shall have the power to *construct, lease, or otherwise provide* any facilities required for these colleges, including the right to take land for such purposes by eminent domain under the provisions of chapter seventy-nine. The board may also enter into agreements for the use of local facilities with a local school committee or other local authority. . . ." (Emphasis supplied)

Chapter 649 of St. 1962, entitled "AN ACT TO PROVIDE FOR A SPECIAL CAPITAL OUTLAY PROGRAM FOR THE COMMONWEALTH", contains an item in § 2 thereof for your board as follows:

"8363-13 For establishing regional community colleges in the Boston, Greenfield, Springfield and Worcester areas, as authorized by chapter six hundred and five of the acts of nineteen hundred and fifty-eight, including the preparation of educational plans therefor, the selection of locations, the initial cost of agreements, if any, with local communities and including necessary supplies, furnishings and equipment to begin operation of any such community college; to be expended with any federal or other funds available for the purpose; to be in addition to the amount appropriated in item 8262-15 of section two of chapter five hundred and forty-four of the acts of nineteen hundred and sixty-one as amended . . . $255,000"

The regular Capital Outlay Program provided for by c. 705 of St. 1962 contains a similarly worded item, 8063-20, appropriating an additional $150,000 for the same purposes.

In my opinion, the words "construct, lease, or otherwise provide" in

c. 605 of St. 1958 include the power to acquire by purchase the fee in any land and buildings required for community college facilities.

I would, therefore, say that your board may use the monies appropriated under the two capital outlay bills cited for either the lease or purchase of land and buildings from the City of Worcester. It should be noted that any lease must comply with the provisions of G.L. c. 8, § 10A, as most recently amended by c. 290 of St. 1962, and should otherwise provide for the protection of the interests of the Commonwealth.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General*
By LAWRENCE E. COOKE,
*Assistant Attorney General*

*Forced circulation heaters are classified as steam boilers.*

DEC. 14, 1962.

HON. FRANK S. GILES, *Commissioner of Public Safety*

DEAR SIR: — You have recently requested an opinion "concerning the classification of forced circulation heaters such as the Clayton Steam Generators as manufactured by the Clayton Manufacturing Company." I assume from this request that you wish a ruling on whether or not G.L. c. 146, concerning steam boilers, is applicable to Clayton Steam Generators.

Nowhere in the General Laws or regulations issued by the Board of Boiler Rules do I find a definition of a steam boiler; however, Part II of the regulations of said Board incorporates Section I of the Boiler Construction Code of the American Society of Mechanical Engineers and in the preamble thereof certain definitions are found as follows.

"A pressure vessel in which steam is generated by the application of heat resulting from the combustion of fuel . . . shall be classed as a fired steam boiler.

"Unfired pressure vessels in which steam is generated shall be classed as unfired steam boilers with the following exceptions: . . . [exceptions not applicable]

"The material for forced-circulation boilers and boilers with no fixed steam and water line shall conform to the requirements of the Code. . . ."

According to the literature supplied me it appears that the Clayton Steam Generator is a combination super water heater and unfired pressure vessel. Water is heated in coils to steam temperature under pressure: when the superheated water reaches the unfired pressure vessel there occurs a drop in pressure and steam is created.

Thus it is seen that an integral part of the Clayton Steam Generator is an unfired pressure vessel in which steam is generated. Such a device is classed by the A.S.M.E. Code as an unfired steam boiler. In my opinion, G.L., c. 146 is applicable to Clayton Steam Generators.

Very truly yours,

EDWARD J. McCORMACK, JR., *Attorney General*
By LAWRENCE E. COOKE,
*Assistant Attorney General*

*The Adjutant General may order a brigadier-general to active duty in the division headquarters of a federally recognized infantry division.*

Dec. 28, 1962.

Major General Thomas J. Donnelly, *Adjutant General.*

Dear Sir: — You have requested my opinion as to whether a brigadier general can serve on active duty under the provisions of G.L. c. 33, § 18 (a).

The provision referred to reads as follows:

"The adjutant general, upon recommendation of the commanding officer of a federally recognized infantry division may order to active duty three officers to serve in the division headquarters. When so ordered to duty, such officers shall perform such duties appropriate to their positions as may be assigned by the commanding officer and shall receive the same pay as an officer of the regular service of corresponding grade with corresponding length of service but not exceeding the pay of a colonel, lieutenant colonel and major, respectively. To be eligible for duty as aforesaid, such officers shall have federal recognition for both their grade and position."

In my opinion it cannot be said that the provisions quoted require that the officers recommended and ordered to duty shall hold the ranks of colonel, lieutenant colonel, or major respectively. The provision that the officers ordered to duty ". . . shall receive the same pay as an officer of the regular service of corresponding grade with corresponding length of service *but not exceeding the pay of a colonel, lieutenant colonel and major, respectively*" (emphasis supplied) is a very strong indication to the contrary for it anticipates the situation you present, i.e., an officer of higher grade than any of the three ranks stated being assigned to duty under the section, and in lieu of a prohibition of such an assignment, which if the Legislature so intended could easily have been provided, the Legislature adopted the alternative restriction that in such an event the amount of pay for the officer of higher grade cannot exceed that of the lower grades referred to.

Very truly yours,

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

By James J. Kelleher,
*Assistant Attorney General*

*The Director of Hospital Costs and Finances is required to set rates for nursing and convalescent homes at least as often as annually, after hearing, and on the basis of the evidence presented at the hearing.*

Dec. 28, 1962.

Mr. Theodore W. Fabisak, *Director, Bureau of Hospital Costs and Finances.*

Dear Sir: — You have requested an opinion on certain matters relating to your duties in connection with the requirement of G.L. c. 7, § 30L, that you ". . . 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 (G.L. c. 111, § 71) . . . by the various depart-

ments, boards or commissions of the commonwealth or by the various subdivisions of the commonwealth receiving reimbursement therefor, in while or in part, from the commonwealth. . . ." You have stated that the rates presently in effect were promulgated in December of 1961 and were effective January 1, 1962 for the calendar year 1962.

You state that as required by G.L. c. 7, § 30L, you held a hearing on December 11, 1962, and in accordance with the provisions of said section that your determination shall be deemed to be a "regulation" as defined in the Administrative Procedure Act (G.L. c. 30A), complied with the requirements as to serving notice of the hearing prescribed by G.L. c. 30A, § 2, including publishing notice in ten newspapers in the Commonwealth. The hearing was concluded on said December 11th, and the matter taken under advisement.

On December 14, 1962, you state, you received a letter from the Special Commission to Study Convalescent or Nursing Homes asking you to appear before said Commission on December 20, 1962 at 11 A.M. In accordance with said letter, you appeared before the Special Commission on the requested date. At the conclusion of said hearing, you were asked to meet with said Commission on December 27, 1962 so that the Commission could make available to you some data that they have that might have a bearing on the setting of rates. You were also asked to defer the setting of the rates for 1963 until after you met with the Commission.

Your questions are as follows:

"1. Do the provisions of G.L., c. 7, § 30L, as amended, require me to set the rates for 1963, prior to January 1, 1963?

"2. Is the word 'shall', as appearing in the first line of section 30L, mandatory, when considered with the words 'at least as often as annually' contained in the second line of said section 30L?

"3. Am I committed under the law to receive or accept evidence of any kind effecting the setting of rates for 1963 after the close of the public hearing of December 11, 1962 and during a period that I have the need of promulgation of the rates for 1963 under consideration and advisement?

"4. Am I at liberty to discuss with the Special Commission on December 27, 1962 the various factors which I take into consideration under the law, in the setting of rates, at a time while I still have under consideration the promulgation of rates for 1963, the public hearing for the setting of said rates having been commenced and closed on December 11, 1962?"

1. The plain language of G.L. c. 7, § 30L, that you "shall, . . . at least as often as annually . . ." determine the rates, in view of the fact that the current and only prior determination of rates was for the calendar year 1962, requires an affirmative answer to your first question.

2. While under some circumstances the word "shall" as used in a statute is capable of being construed as directory rather than mandatory, "shall" in its ordinary sense is mandatory, and only unusual circumstances permit construing it otherwise. The subject matter in question and the context in which the word "shall" in the provision under examination is used not only do not permit construing the provision as other than mandatory but demonstrate that the duty prescribed was to be mandatory. The answer to your second question is, therefore, also in the affirmative.

3. and 4. The basic considerations involved in the determination of your third and fourth questions are those stated by our Supreme Judicial Court in the case of *American Employers' Insurance Company* v. *Commissioner of Insurance,* 298 Mass. 161. In that case the Court set aside rates which were required to be fixed after a public hearing because the Commissioner of Insurance had based his decision in part upon matters which were not presented at the hearing before him.

Chief Justice Rugg, speaking for the Court, said at pages 167, 168:

"The duty imposed upon the respondent carried with it fundamental procedural requirements. As was held in *Morgan* v. *United States,* 298 U.S. 468, 480, 'There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. *Nothing can be treated as evidence which is not introduced as such. . . . The "hearing" is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action.*' The "hearing" is the hearing of evidence and argument.' " (Emphasis supplied)

It is clear from the foregoing that the answer to your third question is that in making the determination under G.L. c. 7, § 30L, which, as stated, you must make by January 1, 1963, and, therefore, a period so limited as not to permit another public hearing, your decision can be based only on the record of the hearing of December 11, 1962, and you cannot receive, accept or consider any other evidence of any kind.

The answer to your fourth question is that in any discussion you might have with the Special Commission there should be a complete avoidance not only by you but by the members, or representatives, of the Special Commission, of any reference whatsoever of your consideration of the rates for the setting of which the December hearing was held. Such a course of conduct is clearly required of you under the language of Chief Justice Rugg quoted above, and is required of the commission and its representatives by that language and by the fundamental principle of constitutional law proscribing the exercise of executive powers by the legislative department, a limitation, which as stated in the *Opinion of the Justices to the Senate,* 300 Mass. 605 at 622: ". . . though sometimes difficult of application, must be scrupulously observed."

I would suggest that since the language of G.L. c. 7, § 30L, that you shall determine a rate "at least as often as annually" clearly implies that you can act oftener than once a year, that it would be advisable that any discussions between you and the commission be postponed until after you have made your determination. If, after any discussions you might have, it is deemed proper to do so, another public hearing could be scheduled at which the commission could present any evidence it thought pertinent. To that end, your determination currently under consideration could be made for the period beginning January 1, 1963, and for the calendar year thereafter unless sooner changed as a result of proceedings under G.L. c. 7, § 30L.

Very truly yours,

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

By FRANK E. RILEY, JR.,

*Assistant Attorney General*

*A certification as to the results of a recount by the Governor alone is not in conformance with law and does not supersede an earlier certification by the Governor and the Council.*

Dec. 31, 1962.

Hon. Kevin H. White, *Secretary of the Commonwealth.*

Dear Sir: — You have requested an opinion as to your duties with respect to two documents filed with you as regards the examination of the recount of votes in certain legislative contests.

At our request you have furnished us with copies of the two documents in question and also of copies of documents of a similar nature filed with you as to recounts at prior elections.

The document first filed with you, dated December 20, 1962, filed on December 25, 1962, is a certification by the Governor and Council in conformance with the requirements of G.L. c. 54, §§ 115, 116 and 117. This document has a heading showing that it emanated from the "Executive Department, Council Chamber", and after a tabulation of the votes in a senatorial and nine representative districts, with notations that protests had been filed as to three of the representative districts, closes as follows:

"In Council December 20, 1962 the foregoing findings are this day adopted with the exception of the following protests:

a. Thomas J. Clancy, Fifth Bristol District
b. John P. O'Brien, Ninth Hampden District
c. John C. O'Donnell, Second Hampshire District.

John A. Volpe, *Governor*
Harry J. Elam, *Executive Secretary*

It appears from the copies of certificates filed with you as to the examination of legislative recounts in prior years that the certificate referred to above is similar in form to the type of certificate used back at least as far as 1940, and to one bearing the present Governor's signature and that of the Executive Secretary, filed on April 27, 1962, as regards a showing that the certificates emanated from the Governor and Council and were adopted by votes in Council over the signatures of the Governor and the Executive Secretary.

The second of the two documents filed with you, also dated December 20, 1962, but filed with you on December 28, 1962, is a statement signed by the Governor alone, relating only to the recounts in four of the representative districts referred to in the first document, and purporting to certify that the Governor and at least five councillors made certain examinations, tabulations and determinations as to those districts.

Your questions are as follows:

"1. Your opinion is therefore sought as to what the proper disposition of the second certification should be, if it is valid.

"2. If said second certification is valid, does it supersede the certification filed on December 25?"

The first certificate filed with you manifests the formal, joint action to be taken by the Governor and Council contemplated by G.L. c. 54, § 115 and expressly states, over the signatures of the Governor and the

Executive Secretary, findings of the Governor and Council "In Council", with specific exceptions as stated.

It is our firm conclusion that the second document filed with you is, as a matter of law and also of historical precedent, clearly not a valid certification within the contemplation of the applicable constitutional and statutory provisions, and we advise you, therefore, that it does not supersede the certification filed on December 25, 1962, and has no effect on that certification.

As was stated in *Scullin* v. *Cities Service Oil Co.,* 304 Mass. 75, at page 78:

"The Constitution itself . . . discloses the intent that the Council shall act in a formal manner upon matters coming before it, and that an official record of such acts shall be kept."

In *Carbone, Inc.* v. *Kelley,* 289 Mass. 602, at page 605, it was stated: "It is a general rule that where a public board is required to act through votes at meetings and to keep records of its acts, the record duly kept cannot be varied or added to by other evidence."

We further advise you as respects your inquiry as to the proper disposition of the second document, that its only status is that of a communication to you, which having been addressed and delivered to you, you may properly retain in your files but upon which you may not base any official action.

The second document is merely a statement of the Governor alone inconsistent with the first document which is the certification of the Governor and Council, In Council, and the latter is the only certification properly before you and is the only certification which you can lay before the Senate and House of Representatives under G.L. c. 54, § 117.

Very truly yours,

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

By JAMES J. KELLEHER,
*Assistant Attorney General*

*Title to the land conveyed under St. 1954, c. 416, by the Commissioner of Mental Health to the Boston Police Post, 1018, Veterans of Foreign Wars, will be free from any restriction, and in the event of foreclosure of any mortgage will not revert to the Commonwealth, if a clubhouse is erected thereon prior to January 1, 1964.*

JAN. 3, 1963.

MR. JOSEPH P. GENTILE, *2nd Asst. Com'r., Department of Mental Health.*

DEAR SIR: — This will acknowledge your letter of recent date requesting an opinion regarding the interpretation of c. 416 of St. 1954, as amended by c. 317 of St. 1958.

In your letter you state that on August 27, 1954, the Department of Mental Health, under the provisions of the above cited chapters, conveyed a triangular parcel of land to the Boston Police Post 1018 Veterans of Foreign Wars of the United States, Inc., bounded as follows:

"Southerly by the line of American Legion Highway;
"Westerly by the line of Morton Street; and
"Northerly by the line of Canterbury Street."

In your letter you further state:

"This land has been under the jurisdiction of this Department since 1908 when it was acquired by the Commonwealth of Massachusetts (being the premises described in deed recorded with Suffolk Deeds, Book 3326, page 581) under Chapter 613 of the Acts of 1908 and Chapter 535 of the Acts of 1909.
"Boston Police Post 1018 Veterans of Foreign Wars of the United States, Inc. has notified this Department that construction of a clubhouse has started on the above described land."

In your letter you request my opinion on the following matters:

"First: After construction of this clubhouse in the event of foreclosure on the above described land by the mortgagee, would the land and clubhouse revert back to the Department of Mental Health and so to the Commonwealth of Massachusetts?
"Second: In the event the answer to number one is in the negative, would the future use of said land and clubhouse be restricted to be used as a recreational or educational center?"

Chapter 416 of St. 1954 authorized the Commissioner of Mental Health in and on behalf of the Commonwealth to convey to the Boston Police Post 1018 Veterans of Foreign Wars of the United States, Inc. for a nominal consideration all right, title and interest of the Commonwealth in the parcel of land described in your letter, said conveyance to be subject to the approval of the Governor and Council. This act further provides that "In the event that a structure such as a club house to be used as a recreational or educational center, is not constructed on said land by the grantee on or before the first day of January, nineteen hundred and fifty-nine, then title to all of said land shall revert to and be vested in the commonwealth." Chapter 416 was subsequently amended by Chapter 317 of the Acts of 1958. This act extended the construction date from January 1, 1959, to January 1, 1964.

The condition imposed by said legislation is that a building such as recreational or educational center must be constructed by January 1, 1964. It is my interpretation that when said buildings or structure is constructed prior to January 1, 1964, then all right, title and interest will vest absolutely in the Boston Police Post 1018 Veterans of Foreign Wars of the United States, Inc., and in no event, by foreclosure or otherwise, will title revert back to the Department of Mental Health and so to the Commonwealth of Massachusetts. Accordingly, the answer to your first question is in the negative.

With respect to question 2, it is my opinion that, under the provisions of the enabling act whereby this property was conveyed on August 27, 1954 by the Commissioner of Mental Health to the Boston Police Post 1018 Veterans of Foreign Wars of the United States, Inc., the only qualification was that the condition specifically set forth in the legislation be met. The legislation contains no language warranting the imposi-

tion of any further restriction. See *Battelle* v. *NY, NH & H RR.*, 211 Mass. 442. Accordingly, the answer to your second is also in the negative.

Very truly yours,

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

By RICHARD M. DRAY,
*Assistant Attorney General.*

*The Veterinary Medicine Approving Authority is legally constituted and veterinary schools must be approved by it; the approving authority may not be delegated.*

JAN. 4, 1963.

MRS. HELEN C. SULLIVAN, *Director of Registration.*

DEAR MADAM: — You have requested an opinion regarding whether the Veterinary Medicine Approving Authority consisting of the secretary of the Board of Registration in Veterinary Medicine and the director of the Division of Livestock Disease Control is "legal"; also whether said approving authority may accept the list of schools approved by the American Veterinary Medicine Association "in lieu of approval."

General Laws c. 112, § 55, created an approving authority to approve schools of veterinary medicine. By said section, the approving authority consists of only two persons, the secretary of the Board of Registration in Veterinary Medicine and the director of the Division of Livestock Disease Control. As established by this section, I deem the approving authority legally constituted.

In response to the second question I would state that the approving authority cannot delegate its power to approve to any other group or person. Undoubtedly, the authority may, in reaching its decision, consider the presence or absence of a school from an approved list of a professional veterinary association along with other factors. It would be improper, however, for the approving authority to accept the judgment of another person or group as a substitute for its own judgment.

Very truly yours,

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

By LAWRENCE E. COOKE,
*Assistant Attorney General.*

*St. 1962, c. 798, permitting the suspension of a person in the service of the Commonwealth who is under indictment for misconduct in his office or employment is not applicable to a person who was indicted prior to its effective date.*

JAN. 11, 1963.

HON. JACK P. RICCIARDI, *Commissioner of Public Works.*

DEAR SIR: — You have requested an opinion as to the applicability of St. 1962, c. 798, to permit the suspension of a person who was indicted prior to the effective date of that act and against whom criminal proceedings are now pending.

The act referred to permits an appointing authority, by a written

notice, to automatically suspend a person from the service of the Commonwealth during any period the person is under indictment for "misconduct in his office or employment. . . ." The suspension is to be terminated and the accused entitled to compensation and credit for his service after the notice only if the criminal proceedings against him are terminated without a finding or verdict of guilty.

The implication from the provisions last referred to is that if there is a finding or verdict of guilty that the accused, in addition to other punishment for the offense, forfeits any compensation or service credit for the period from the giving of the notice until conviction and, since the suspension is to terminate only if there is no conviction, that the conviction is to effect a forfeiture of the position of the accused.

The purpose of the statute would, therefore, appear to be to provide additional punishment for a person in the service of the Commonwealth convicted upon an indictment for a crime involving misconduct in his office or employment.

The fact that the additional punishment is conditional upon conviction and in the event of acquittal the person is to be entitled to be compensated for the period of this suspension and be restored to his position is not material in the consideration of the determination of the statute as being penal or not for the imposition of a criminal penalty is always conditional upon conviction.

The question of the application of the statute to offenses committed prior to its effective date requires, therefore, reference to the constitutional principles as to the validity of statutes increasing the penalties for offenses committed prior to their effective dates.

Under established principles of constitutional law, while the Legislature can constitutionally increase the punishment to be inflicted for an offense committed *after* the effective date of the act providing for the increase, it cannot constiutionally provide a greater penalty for an offense than that which was in effect at the time the offense was committed.

As stated in Hall's "General Principles of Criminal Law" 2nd ed. 1960, at page 59, ". . . there has probably been no more widely held value-judgment in the entire history of human thought than the condemnation of retroactive penal law. In the United States the guaranty was regarded as of such importance by the Fathers of the Constitution that it was stipulated in the original draft well in advance of the adoption of the Bill of Rights."

United States Constitution Art. 1, § 9, cl. 3, and § 10, cl. 1, and Massachusetts Constitution Part I, Art. XXIV, expressly prohibit the enactment of *ex post facto* laws.

In *Ex Parte Garland,* 4 Wallace (U.S.) 333, in speaking of an act of Congress requiring an oath by persons seeking admission as attorneys of the Supreme Court of the United States to the effect, in substance, that they had never taken any part against the United States in the service of the Confederacy, the Court said, at page 377:

"In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and for other of the acts it adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the Constitution against the passage of an *ex post facto* law."

In the case of *Lembersky* v. *Parole Board of the Department of Correction,* 332 Mass. 290, at page 293, the Court said:

"It is well settled, of course, that one cannot be convicted and sentenced for doing an act which was not a crime when it was performed but was condemned by some subsequent statute. *Neither can he be subjected to a penalty more severe than that in force when the act was performed.* Neither can he be convicted in accordance with a subsequent statute which changes the rules of evidence to detriment or which alters his situation to his detriment. *Cummings* v. *State,* 4 Wall. 277. *Kring* v. *Missouri,* 107 U.S. 221. *Duncan* v. *Missouri,* 152 U.S. 377. *Commonwealth* v. *McDonough,* 13 Allen, 581. *Murphy* v. *Commonwealth,* 172 Mass. 264." (Emphasis supplied.)

In the case of *Murphy* v. *Commonwealth,* 172 Mass. 264, cited by the Court in the *Lembersky* case, after pointing out that a statute as to sentences of criminal defendants effective after the date of the commission of the offense of which the petitioner was convicted would, since it would deprive him of certain credits for good behavior provided under the law in effect at the time when the offense was committed and thus increase the penalty for his offense, be inoperative and void as an *ex post facto* law, said at page 277:

". . . by construing it, as we think properly may be done pursuant to the general rule that statutes are to be construed prospectively, *to apply to offenses committed after it took effect,* this difficulty will be avoided." (Emphasis supplied.)

Under an application of the general rule referred to in the *Murphy* case, the provisions of St. 1962, c. 798 would be construed to apply only to offenses committed after it took effect.

See also *Commonwealth* v. *Homer,* 153 Mass. 343.

Such a construction would be in accord with the established rule that a construction of a statute which will eliminate any question of unconstitutionality in whole or in part is to be preferred.

See *Demetropolos* v. *Commonwealth,* 342 Mass. 658, 660, 661.

The fact that the Legislature expressly provided that the statute in question, which was approved on July 27, 1962, should not take effect until January 1, 1963, indicates that the Legislature intended that it should apply only to offenses committed after said effective date, for there would have been little purpose in so expressly postponing the effective date of the statute until said January 1, 1963, and, therefore, beyond the date ninety days after its approval upon which, in accordance with the provisions of the Constitution of the Commonwealth, it would otherwise have taken effect if, when effective, the act was to apply to offenses committed before it took effect.

In view of the considerations stated, it is our opinion that the statute is not to be construed as being applicable to a person who is under indictment for an offense which was committed prior to its effective date.

Very truly yours,

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

By James J. Kelleher,
*Assistant Attorney General.*

*The Massachusetts Turnpike Authority is authorized, if it is desirable to do so and it may be done at a location which will not adversely affect the public, which are questions of fact, to place fill in a portion of the Charles River Basin without the approval of Metropolitan District Commission.*

JAN. 11, 1963.

HON. WILLIAM F. CALLAHAN, *Chairman, Massachusetts Turnpike Authority.*

DEAR SIR: — In your recent letter you called to my attention certain matters relating to the present construction of the extension of the Massachusetts Turnpike.

You point out that construction of the extension in the vicinity of Boston University Bridge, requires the relocation of present Soldier's Field Road. As I understand the situation, such relocation contemplates the placing of fill along the Boston bank of the Charles River for a distance of approximately 2,500 feet. Since the fill would be placed beyond the U.S. Pier and Bulkhead Line established at that location, a permit for placing such fill must first be obtained from the U.S. Government, acting through the Corps of Engineers of the U.S. Army.

Your precise question is whether an additional permit is also required from the Metropolitan District Commission in view of the control exercised by that commission over the Charles River Basin under the applicable provisions of G.L. c. 92.

An examination of legislation applicable to the Charles River Basin indicates that the dam at the mouth of the Charles River was erected under the provisions of c. 465 of St. 1903 with the approval of the Federal Government and in accordance with the conditions prescribed by the Secretary of War (see c. 107 of the Resolves of 1904). Subject to such rights as may have been retained by the Federal Government, the control of the Basin has thereafter been exercisd by the Commonwealth, acting first through its Metropolitan Parks Commission and more recently through its Metropolitan District Commission (see c. 92, §§ 38, 69, et seq.).

The authority granted to the Metropolitan District Commission is predicated on legislative enactments of the General Court of the Commonwealth which, from time to time, may be amended, superseded, or repealed by subsequent legislation.

The construction of the extension of the Massachusetts Turnpike into downtown Boston is being carried out under a special grant of authority from the General Court embodied in c. 354 of St. 1952, as amended from time to time. This special enactment does not repeal the general power of control of the Metropolitan District Commission over the Charles River Basin, but it purports to provide some limitation on that power in so far as it relates to the single project of constructing the Turnpike within the general area prescribed by the act, and within the particular area selected by the Turnpike Authority and approved by the Massachusetts Department of Public Works.

The Turnpike Authority, by § 3 of c. 354 of St. 1952, has been constituted a public instrumentality and is deemed to be performing an essential governmental function. Except as provided in that Act or by possible future legislation, it is not subject to the supervision or regulation of any other department, commission, board, bureau, or agency of the Commonwealth. By § 7, the Commonwealth has consented to

the use, for Turnpike purposes, of all lands owned by it, including lands lying under water. By § 21 of that act, all other general or special laws, or parts thereof, inconsistent therewith are declared to be inapplicable.

An examination of the aforesaid c. 354 indicates that the Turnpike Authority must obtain certain approvals from the Department of Public Works which you state have been obtained. Subsequent legislation has made your Authority subject to audit by the State Auditor (c. 733 of St. 1962) and subject to the State Labor Relations Commission (c. 760 of St. 1962). There appears to have been enacted no legislation subjecting it to supervision or control by the Metropolitan District Commission.

I have also been informed by the Metropolitan District Commission that it has instituted court proceedings against your Authority on the ground that some of the provisions of its enabling legislation may be unconstitutional. I express no opinion on this question. Until the Courts have ruled otherwise, it is presumed that an enactment of the General Court is constitutional.

In view of the foregoing, it is my opinion that your Authority is not required to obtain a permit from the Metropolitan District Commission before placing fill in a portion of the Charles River Basin. As stated above, it is required to obtain specified approvals from the Department of Public Works and is required to obtain a permit from the appropriate Federal authorities because of the U.S. Pier and Bulkhead Line.

It is, of course, fundamental that your Authority, in performing the governmental function of constructing the Turnpike extension duly delegated to it by the General Court, must itself exercise care, discretion, and prudence particularly in areas where the rights of the general public are involved.

The Attorney General may give opinions on questions of law properly presented to him. It is not his function to make decisions of fact. The foregoing opinion relates to the legal right of your Authority to place fill as described. It does not constitute a determination as to whether the placing of such fill is desirable or not.

Very truly yours,

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

*While lands in tidewaters are held subject to the public rights, the Commonwealth would be entitled under its participation agreement with the Federal government for the construction of a hurricane barrier in New Bedford harbor to reimbursement of any amount it is compelled to pay persons from whom rights in land below high water mark are taken by eminent domain.*

JAN. 11, 1963.

MR. CLARENCE I. STERLING, JR., *Director and Chief Engineer, Water Resources Commission.*

DEAR SIR: — You have requested an opinion on behalf of the Water Resources Commission as to the liability of the Commonwealth for the taking by eminent domain of flats in tidewater below high water

mark, under the provisions of St. 1962, c. 565, relating to the construction of a hurricane protection barrier in New Bedford Harbor, and as to the right of the Commonwealth under the participation agreement with the United States for credit for costs incurred by it in acquiring such flats.

It appears that some of the lands required for the construction of the barrier lie between high and low water marks, that others lie below low water mark and that some of the latter lands are in the area described in St. 1945, c. 597, which authorized the Department of Public Works to sell and convey to a corporation the fee to the area described, all of which was below low water mark.

You state that the Federal authorities have taken the position that there is no private ownership below high water mark and, therefore, under the provision of the participation agreement that the cost of acquiring lands required shall be credited to the Commonwealth no credit can be given for the cost of acquiring interests in lands below high water mark.

While the position taken by the Federal authorities is correct for almost all the states of the United States, it is not correct as respects Massachusetts.

In Massachusetts, under the colonial ordinance of 1641-1647, which is treated as settling the common law of this Commonwealth, private ownership along the tidewaters was extended to "low water mark where the sea doth not ebb above one hundred rods, and not more wheresoever it ebbs further," subject to the public rights of navigation, fishing and fowling. The waters and the land under them beyond the line of private ownership are held by the State, both as the owner of the fee and as the repository of sovereign power, with a perfect right of control in the interest of the public.

*Michaelson* v. *Silver Beach Improvement Association, Inc.,* 342 Mass. 251, 253 (1961).

*Home for Aged Women* v. *Commonwealth,* 202 Mass. 422, 427.

The Commonwealth has the power to grant a title to land below the line of private ownership and to license building on, or filling of, such lands.

*Richard T. Green Co.* v. *City of Chelsea,* 149 F.2d 927, (C.C.A.1) 1945, c.d. 326 U.S. 741.

*Bradford* v. *McQuesten,* 182 Mass. 80.

Since 1865, however, as a result of the enactment of an earlier form of the provisions still in effect and now contained in G.L. c. 91, § 15, every grant of authority by the Commonwealth, whether so stated in the act or license granting it or not, to build on or fill lands below high water mark expires within five years except so far as it has been acted upon and thereafter the license remains revocable at the discretion of the General Court as to the work done thereunder.

*Commissioner of Public Works* v. *Cities Service Oil Company,* 308 Mass. 349, 363, 364.

It is to be noted that St. 1945, c. 597, authorizing the conveyance of lands of the Commonwealth below low water mark in New Bedford Harbor, in § 2, specifically contemplates that the lands conveyed can be filled only if a license is issued by the Department of Public Works and that there is nothing in the act making the provisions of G.L. c. 91, § 15, referred to, inapplicable to such licenses.

In *Joly* v. *Salem,* 276 Mass. 297, it was held that the owner of land

in tidewaters taken by eminent domain was not entitled to recover anything for an enhanced value to the flats caused by any illegal filling and that the test was the fair market value of the flats at the time of the taking considering the uses to which they could be put.

The answers to your specific questions are that in Massachusetts owners of land on the shore of the sea have title, subject to the public rights of navigation, fishing and fowling, to low water mark or where the tide ebbs more than that distance to one hundred rods from high water mark, that private interests in the public lands below the line of private ownership can be created by grants authorized by the Legislature, and that the owners of interests in lands in tidewaters between high water mark and low water mark, or having grants from the Commonwealth of interests in public lands in tidewaters, which are taken by eminent domain by the Commonwealth have a right to recover damages for the loss sustained by them, and the Commonwealth is entitled under the participation agreement with the United States for the costs incurred by it for acquiring the private interests in any lands below high water mark needed for the construction of the hurricane protection barrier in New Bedford Harbor under St. 1962, c. 565.

It should be pointed out, however, that the value to a private owner of interests in lands in tidewaters is greatly reduced by reason of the subordination of the private rights to the public rights and the need for, and the revocability under G.L. c. 91, § 15, of licenses for the erection of structures in, or the filling of, such lands.

Very truly yours,

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

By JAMES J. KELLEHER,
*Assistant Attorney General.*

*Dividends received by the Group Insurance Commission, including those received on account of optional insurance, are required to be used to pay current administrative costs of the Commission.*

JAN. 14, 1963.

HON. JOSEPH ALECKS, *State Comptroller.*

DEAR SIR: — In your letter of August 21, 1962 you state that certain dividends, listed below, were deposited with the State Treasurer by the Group Insurance Commission and credited to the Group Insurance Trust Fund established by St. 1961, c. 572. The dividends are as follows:

| Date | Amount | Applicable to Calendar Year | On Account of |
|---|---|---|---|
| 4/5/62 | $200,000.00 | 1961 | Optional Life Insurance Policies of Employees. The premiums on this insurance were paid in their entirety by employees. This type of insurance began January 1, 1961. |
| 6/29/62 | $ 20,370.90 | 1961 | Life Insurance Policies of Employees. One-half of the premiums on this insurance were paid by the Employees. |
| 6/29/62 | $ 6,294.46 | 1956 | Blue Cross-Blue Shield. Policies of Employees. One-half of the premiums on this Insurance was paid by the Employees. |
| | 7,079.35 | 1957 | |
| | 71,373.70 | 1959 | |
| | 98,913.44 | 1960 | |

You also state that the Comptroller's Bureau has denied a request by the Group Insurance Commission to transfer the administrative costs for the calendar year 1961, in the amount of $182,380.31, from the Group Insurance Trust Fund to the General Fund of the Commonwealth. In the request of June 13, 1962 of the Group Insurance Commission for permission to transfer, the Group Insurance Commission lumped the dividend of April 5, 1962 and the dividend of $20,370.90 which the Commission anticipated, and deducted administrative costs of $182,380.31. You state that of this sum, $18,743.67 had already been recovered but not all the participating Funds had been charged with their share of administrative costs and that you believe that it is a completely unreasonable interpretation of the intent contained in c. 572 of St. 1961 to require that the optional insurance dividend bear the major portion of the administrative costs for calendar 1961 in the amount of $182,380.31.

You asked the opinion of this office as to the following questions:

"1. Is any portion of the administrative costs of the calendar year 1961 deductible from the dividend received on account of optional insurance?

"2. Under said chapter 572 does 'other funds' include all participating state operating, Metropolitan District Commission and Trust Funds, other than the General Fund, in the Group Insurance plan, and are they chargeable with their pro rata share of administrative costs as an offset against any dividends distributable to them?

"3. Is any portion of a dividend derived from Optional Insurance, the premium cost of which is borne entirely by employees, distributable to federal or other funds?

"4. May the administrative costs of the calendar year 1961 be offset against the dividends of the calendar years 1956, 1957, 1959 and 1960?

"5. Is it the intent of said chapter 572 that the apportionment of a dividend received be on the basis of the relationship of the dividend to premium paid to the specific carrier from whom the dividend was received?

"6. Is the language in said item 0448-01 to be construed as requiring the Comptroller to transfer $182,380.31 from the Group Insurance Trust Fund to the General Fund, notwithstanding the provisions of said chapter 572?"

Chapter 32A, § 9, (as amended by St. 1961, c. 572, § 1). the first paragraph thereof, states in part "The commission shall compute the pro rata administrative cost by determining the total administrative cost to the commonwealth of the entire insurance program authorized by this chapter which is applicable to the period for which the dividend. . . .". "Total administrative cost" includes the cost of the optional insurance program authorized under c. 32A, § 10A. In addition, said § 9 requires the entire annual administrative expenses of the group insurance program of the commonwealth to be deducted from the dividends prior to the allocation of any balance of such dividends for the benefit of insured state employees. Accordingly, dividends received from the optional insurance program must be applied to reduction of annual administrative costs and I must answer your first question in the affirmative.

In your second question, you ask whether the words "other funds" contained in c. 572 include all participating state operating, Metropolitan District Commission and Trust Funds, other than the General Fund, in the group insurance plan, and you further ask whether they are chargeable with their pro rata share of administrative costs as an offset against dividends. I assume that you refer to the ". . . other funds contributed in place of the commonwealth's gross share of the premium cost."

Chapter 32A, § 9, the fourth paragraph thereof, provides that "whenever the pro rata share of the dividend allocable to the commonwealth's net share of the premium paid is in excess of the total administrative cost . . . such sum shall, upon authorization by the commission, be paid by the state treasurer into the General Fund. . . .". The aforementioned provisions clearly state that only those funds contributed in place of the Commonwealth's premium, share as individual funds in the dividend and administrative cost allocations.

The 1962 Appropriations Act. St. 1962, c. 591, item 0448-02, provides in part that the group insurance commission ". . . shall notify the comptroller of the amounts to be transferred, after similar determination, from the several state or other funds, . . . ." Such a computation is distinct from that portion which is allocable to the federal or other fund contributed in place of the Commonwealth's share of the premium cost.

Further, said item 0448-02 provides in part that ". . . the group insurance commission shall charge the division of employment security and other departments, authorities and divisions which have federal or other funds allocated to them for this purpose for that portion of the cost of the program as it determines should be borne by such funds. . . ."

The aforementioned provisions state that only those federal or other funds which have been made available for this purpose shall be specifically charged with their pro rata share of the administrative cost. The answer to your section question is therefore in the negative.

With reference to your third question, c. 32A, § 9, makes no distinction as to the source of dividends. Under the said statute, they are lumped together for purposes of dividend distribution and for reimbursement to the commonwealth of the entire cost of operating the group insurance program. The dividend resulting from the optional insurance program must be utilized for purposes of dividend distribution. Accordingly, the answer to your third question is in the affirmative.

The group insurance commission trust fund was created by § 1 of c. 572, St. 1961. Said section provides that "Any dividend . . . accepted by the commission . . . shall be deposited by the commission with the state treasurer and shall be maintained in a separate fund to be known as the group insurance commission trust fund."

In your fourth question, you ask whether the administrative costs of the calendar year 1961 can be offset against dividends of the calendar years 1956, 1957, 1959, 1960. I assume that your inquiry is directed to whether or not dividends, applicable to prior years, which are received by the group insurance commission subsequent to the enactment of c. 572 of St. 1961, can be used to defray the administrative cost for the calendar year 1961. Since such dividends must be deposited in the group insurance commission trust fund, it is apparent that it was the intention of the General Court that such dividends be used to pay

current administrative costs. The answer to your fourth question is in the affirmative.

With reference to your fifth question, there is no intention expressed or implied in § 9 of c. 32A which would require or permit any computations to be made on the basis of premiums paid to or dividends received from any particular insurance carrier. As previously stated, § 9 makes no distinction as to the source of dividends, either as to type of insurance coverage or particular carrier. The answer to your fifth question is in the negative.

In your sixth question, you ask in substance whether the following language of item 0448-01 of c. 791 of St. 1962, enacted July 27, 1962, is consistent with the provisions of c. 572 of St. 1961.

Item 0448-01 provides in part, as follows:

"In accordance with the provisions of section nine of chapter thirty-two A of the General Laws, the comptroller shall transfer from account number 6904-69, Group Insurance Trust Fund, to the General Fund the sum of one hundred and eighty-two thousand three hundred and eighty dollars and thirty-one cents, determined by the commission to be the administrative cost for the calendar year nineteen hundred and sixty-one."

The Supplementary Appropriation Act, of which item 0448-01 is a part, was enacted subsequent to c. 572 of St. 1961, and constitutes an express legislative mandate to the state comptroller to make the transfer directed by its provisions and is not only consistent with but is in furtherance of the legislative requirements expressed in c. 572. In answer to your sixth question, I must rule that the provisions of item 0448-01 require you to make the stated transfer.

I trust that the foregoing sufficiently answers your questions.

Very truly yours,

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

By Leo Sontag, *Assistant Attorney General.*

*Under the cost plus provision of a State highway design engineering contract, a small engineering partnership was entitled, in addition to allowance for overhead, principal's time and profit, to payment for the value of drafting, etc., work, not of an engineering nature, done by one of the partners in preparing ordered revisions of plans.*

Jan. 15, 1963.

Hon. Jack P. Ricciardi, *Commissioner of Public Works.*

Dear Sir: — In your letter of May 7, 1962, you have asked the opinion of this office with regard to the status of A. L. Delaney & Associates under contract No. 7669 awarded by your commission.

After a review of the facts set out in your comprehensive letter and the standard specifications, this office is of the opinion that the A. L. Delaney & Associates are entitled to additional compensation and the thoughts expressed in the second last paragraph of your letter are in accordance with our conclusion.

It is therefore our conclusion that the partners of the Delaney Company can be paid legally as employees under the terms of contract No. 7669.

Very truly yours,

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

By WILLIAM D. QUIGLEY,
*Assistant Attorney General.*

*The approval by the State Racing Commission of an application by a licensee to relinquish three of the days for which it was licensed constituted a modification of the license and the license fees for the three days could be refunded.*

JAN. 15, 1963.

*State Racing Commission.*

GENTLEMEN: — In your letter of May 25, 1960, you asked the advice of this office as to the following situation. You state that on January 5, 1960, the Eastern Racing Association, Inc. filed an application with the commission for a license to conduct a running horse racing meeting for the year 1960 and accompanied its application with a certified check in the amount of $3600 as payment for the first week's license fee; a daily license fee having been set by the Commission as $600 per day.

You further state that the Commission, on January 29, 1960, voted to grant a license to Eastern to conduct a running horse racing meeting from April 18, 1960, to July 2, 1960, both dates inclusive; and that the Commission, on March 17, 1960, issued the certificate of license, following formal vote of the Commission.

You further state that on March 24, 1960, a communication was received from Eastern advising that in the best interests of racing and in order to eliminate conflicts in racing dates with other New England tracks, Eastern had agreed to relinquish the first three days of its meet in conjunction with similar action by other tracks, upon the agreement of Lincoln Downs in Rhode Island to close its track on April 20, 1960. You state that Eastern requested approval of the commission to relinquish the April 18, 19, and 20th dates.

You further inform this office that at a meeting of the commission on March 31, 1960, the commission voted to take the following action:

"To approve the request of the Eastern Racing Association, Inc. to relinquish racing on April 18th, 19th and 20th, 1960 on the license granted to this Association on January 29th, 1960. This action of the commission is taken in the best interest of racing; to promote harmony among the New England running horse racing tracks; and to protect and safeguard the revenue to the Commonwealth from this running horse racing meeting."

You state that no new license certificate was issued to Eastern and subsequently a request was received from Eastern asking for refund of the license fees paid for said dates in the amount of $1800.

You ask whether or not the commission can approve the return of said license fees for the three dates on which Eastern did not operate.

From the above facts, it is apparent that the commission voted to grant a license for 66 days commencing April 18, 1960, and in fact issued said license on March 17, 1960, prior to April 18, 1960, the date on which the license of Eastern became effective.

Although no new license was in fact issued to Eastern following the vote of the commission approving the request of Eastern to relinquish racing on the three requested dates, it is the opinion of this office that said action of the commission amounted to a modification or amendment of the license issued to Eastern by eliminating the requested dates. The commission, having authority by law to issue the license, possessed authority to modify or amend it, at least prior to the effective date of said license. Perhaps it would have been better practice, administratively, following the vote of the commission, to have recalled the license of Eastern and to have issued a new license eliminating the requested dates.

In your letter you make reference to the provisions contained in the second paragraph of G.L. c. 128A, § 4. In the opinion of this office, said provisions are not applicable to the factual situation concerning which you seek advice. By its terms, § 4 does not apply to the facts in the instant case, where Eastern, prior to the effective date of its license, for good and sufficient reason, subsequently approved by the commission, voluntarily requested permission to relinquish certain dates, and where its request was formally approved by vote of the commission. Said action by the commission amounted to a modification or amendment of the license prior to its effective date.

On the facts, the commission can properly approve the return of the license fees requested in the amount of $1800 and request the State Treasurer to pay such amount to Eastern as licensee.

Very truly yours,

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

By Leo Sontag, *Assistant Attorney General.*

*Application of G.L. c. 268, s. 9A., to "Testimonial dinners."*

Jan. 24, 1963.

Attorney General Edward W. Brooke today issued the following opinion:

Many inquiries as to the application of Chapter 268, section 9A have been prompted by recent opinions of this office that the new statute which prohibits selling tickets for testimonial dinners cannot be construed as being applicable only to dinners at which a gift is made to the person for whom the dinner is given.

Questions have been asked as to the application of the new law to dinners honoring persons in a wide variety of public offices and employments.

Among these inquiries are questions as to the application of the new law to judges, clerks of courts and other persons serving in the judicial branch. Inquiries have also been made as to the application of the law to dinners for persons serving in several types of positions in various offices of the executive branch, including those of the

Governor and the Department of Corporations and Taxation. Further inquiry has been made with reference to persons retiring from, but at the time of the dinner still employed in, an office or position.

The statute imposes prohibitions on the *sale* of the tickets. It refers not only to testimonial dinners and functions, but prohibits "any affair," by whatever name it is called, which has a purpose "similar to that of a testimonial dinner or function."

Under the statute, testimonial dinners cannot be held for three broad categories of non-elective personnel, as follows:

Persons in the service of the Commonwealth or any of its political subdivisions in

1. a law enforcement body or agency;
2. a regulatory body or agency;
3. an investigatory body or agency.

In the general sense of the words, persons in the judicial branch are engaged in the enforcement of the law. Law enforcement is more than executive action relating to police matters. To enforce is to put into effect and execution. The courts are the final stage in the application and execution of the laws.

Our General Laws are replete with provisions expressly stating that particular courts shall "enforce" certain statutes. (See e.g., G.L. c. 40A, § 22, giving the Superior Court jurisdiction "to enforce" zoning laws, ordinances and by-laws; G.L. c. 68, § 16, providing that the Supreme Judicial and Superior Courts shall enforce the section which relates to the collection of funds for charitable purposes on ways; G.L. c. 90, § 28, Supreme Judicial or Superior Courts may "enforce" certain orders, etc., as to motor vehicles; G.L. c. 130, § 26, Supreme Judicial and Superior Court "to enforce" statutes against pollution of coastal waters; G.L. c. 143, § 57, Supreme Judicial and Superior Courts "to enforce" building laws and regulations.)

It is my opinion here that the new law has two main objectives. One is to remove persons in the public service in any of the described categories in the statute from any suspicion of being influenced in any way because of the sponsorship, purchase of tickets, attendance or non-attendance at such affairs. The other is to relieve the public from the actual and implied pressures to purchase dinner tickets imposed knowingly or unknowingly by the honored guest or persons sponsoring such affairs.

These objectives are as desirable with respect to persons in the judicial branch as with respect to those in other branches of the government.

It is my considered opinion that an office or employment in the judicial branch is an office or employment in the law enforcement agency of the Commonwealth within the meaning of the language of G.L. c. 268, § 9A (St. 1962, c. 633.)

It is my further opinion that under said statute the functions of the agency determine whether a testimonial dinner for a person employed in the agency is subject to its provisions. The fact that the person may perform duties in the agency not directly concerned with the functions of the agency placing it in any of the categories described, is of no consequence.

As regards offices in the executive branch, the Governor, as head of the State, has the overall responsibility for executing and enforcing

the laws, and most of the departments, offices, boards and commissions of the State and its political subdivisions are, to a greater or lesser extent, involved in the enforcement of the laws. For example, the Department of Corporations and Taxation clearly enforces the laws relating to taxation.

It is my opinion, therefore, that the new law is applicable to a dinner for any person employed in the Governor's office, in the Department of Corporations and Taxation, or in any other agency of the Commonwealth or any of its political subdivisions having functions in the categories described.

It is further my opinion that the new statute is applicable for the full period of the service of any person concerned and until the service is actually terminated, and the fact that the service is in prospect of termination by retirement or otherwise does not alter the situation.

The passage of Chaper 268, section 9A represents bold and forceful action on the part of the Legislature. Such action will be of great assistance in the restoration of public confidence in government.

*Action to be taken by the Alcoholic Beverages Control Commission to validate minimum consumer retail prices. The Commission would be warranted in finding that an emergency existed justifying establishing a price schedule pending such action.*

Feb. 1, 1963.

*Alcoholic Beverages Control Commission.*

Gentlemen: — You have requested my opinion in regard to legal procedures to be followed by your commission to validate minimum consumer resale liquor prices.

I note that the Supreme Judicial Court, in *Kneeland Liquor, Inc.* v. *Alcoholic Beverages Control Commission*, 345 Mass. 228, found that your agency is subject to the provisions of the Administrative Procedure Act, G.L. c. 30A, § 1 (2), and that your schedules of minimum prices are invalid unless preceded by notice and a public hearing.

In view of the holding of the Court, it is my opinion that the commission must begin at once to comply with all the requirements of both c. 138 and c. 30A. The next filing dates for the submission to your commission of minimum price schedules extend from March 1, to March 10, and cover the selling period of May 1 to June 30.

As soon in March as the schedule has been filed, the commission must give notice of a public hearing, at least twenty-one days prior to such hearing (c. 30A, § 2 (1)). And within thirty days after March 10, the commission must decide that the schedule of prices is not "excessive, inadequate or unfairly discriminatory," if the schedule is to become effective on May 1.

The Court has held that your approval of minimum prices constitutes the making of a regulation. You are therefore subject to the requirement of c. 138, § 71, which makes your regulation ineffective until approved by the Governor and Council.

The time limits imposed by c. 30A will permit only about three weeks for the Governor and Council to act before the intended effective

date of the commission's regulation. If the commission concludes that a longer period of time is needed for the several stages of approval required for a valid minimum price schedule, then its only remaining recourse is to the Legislature.

It is my opinion that the above procedures will satisfy the requirements of c. 138 and c. 30A and I recommend that they be followed faithfully for the bimonthly periods set forth in c. 138, § 25C (d).

You also request my opinion as to an emergency regulation to validate minimum consumer prices between this date and May 1.

In view of the drastic prohibition against the sale of any brand of alcoholic beverages unless a schedule of minimum prices is "then in effect," c. 138, § 25C (a), it appears imperative that some valid price schedule be approved forthwith, and be permitted to remain in force until a new price schedule shall become effective on May 1, 1963 in accordance with the requirements of c. 30A.

Exemption from the notice and public hearing requirements of c. 30A is permitted in emergency situations by c. 30A, § 2 (3). Under this provision, your commission can find that "immediate adoption . . . of a regulation is necessary for the preservation of the public health, safety or general welfare, and that observance of the requirements of notice and public hearing would be contrary to the public interest. . . ."

In addition to such findings, the Commission must supply a "brief statement of the reasons for its finding" and it must file the regulation, the findings and the reasons with the Secretary of State, c. 30A, § 2 (3). Under the provisions of the same subsection, an emergency provision can remain in effect for three months. This period is adequate to cover the time between February 1 and May 1, 1963.

The commission, in my opinion, has adequate grounds for finding that an emergency exists at the present time, particularly in the light of the language of the Supreme Judicial Court in *Kneeland Liquor, Inc.* v. *Alcoholic Beverages Control Commission,* 345 Mass. 228 at 233:

"We are of the opinion that the approval of the schedules by the commission is a regulation, and does fall within c. 30A. The public welfare is involved . . . The establishment of retail prices for customers of retail stores is an exercise of the police power in order to promote temperance, to stabilize the business, to avoid price wars, to instill observance of the law, and to protect the public."

The Supreme Judicial Court in this decision has supplied the commission with several possible reasons to justify an emergency regulation. If the commission, in the light of the prevailing facts, finds that any of these possible reasons apply at the present time, it should cite them in the "finding and . . . brief statement of the reasons" which must be filed with the Secretary of State, c. 30A, § 2 (3).

I trust that the foregoing answers the questions raised in your letter of January 30.

Very truly yours,

Edward W. Brooke, *Attorney General.*

*The approval of the Governor and Council is not required for the deposit of public moneys by the State Treasurer in co-operative banks or federal savings and loan associations.*

Feb. 26, 1963.

Hon. John T. Driscoll, *Treasurer and Receiver General.*

Dear Sir: — You have directed my attention to the provisions of G.L. c. 29, § 34A, as to deposits by the State Treasurer of public funds in certain co-operative banks, and investments by him of such funds in federal savings and loan associations.

You state that your office is of the opinion that the deposits and investments authorized under the section require the approval of the Governor and Council; you request an opinion on the question.

General Laws c. 29, § 34A, as amended, reads as follows:

"The state treasurer may deposit any portion of the public moneys in his possession and funds over which the commonwealth has exclusive control in co-operative banks lawfully doing business in the commonwealth for one year or more, subject, however, to the limitations set forth in section sixteen of chapter one hundred and seventy and may invest such public moneys and such funds in shares of federal savings and loan associations lawfully doing business in the commonwealth for one year or more, but the amount invested in any one federal savings and loan association shall not at any time exceed the sum of ten thousand dollars."

You refer to the fact that G.L. c. 29, § 34, regulating the deposit of public moneys by the State Treasurer in national and certain other banks, requires that the banks designated by the State Treasurer be approved by the Governor and Council at least once in each three months; you also point out that G.L. c. 29, § 38 provides that funds of the Commonwealth shall be invested by the State Treasurer, with the approval of the Governor and Council, in certain ways.

It is to be noted, however, that G.L. c. 29, § 34A does not incorporate any proviso for approval by the Governor and Council for deposits in co-operative banks in the one case, or for investments in shares of federal savings and loan associations in the other.

It must be assumed that in enacting G.L. c. 29, § 34A, the Legislature was cognizant of the provisions as to Governor and Council approval in G.L. c. 29, § § 34 and 38. By failing to include similar requirements in G.L. c. 29, § 34A, the Legislature evidenced its intent that approval by the Governor and Council was not required as to deposits by the State Treasurer in co-operative banks, or investments in federal savings and loan associations.

Accordingly, it is my opinion that the State Treasurer is authorized by G.L. c. 29, § 34A, to deposit public moneys in his possession and funds over which the Commonwealth has exclusive control in co-operative banks, and to invest such moneys and funds in shares of federal savings and loan associations, subject to the limitations set forth in the section, and that the approval of the Governor and Council is not required for such deposits or investments.

Very truly yours,

Edward W. Brooke, *Attorney General.*

*The charter of the Franklin Fair Association, Inc., may be revoked by the State Secretary for its failure to file reports.*

Feb. 27, 1963.

Hon. Kevin H. White, *Secretary of the Commonwealth.*

Dear Sir: — You have asked my opinion concerning your power to revoke the charter of Franklin Fair Association, Inc. for failure to file reports as required by G.L. c. 180, § 26A. You have stated that this corporation failed to file said reports as required, from 1955 through 1962. Your letter further states that on June 20, 1962, you gave the statutory ninety-day notice of your intention to revoke the charter.

It would appear that as of September 20, 1962, you were clearly entitled to revoke the charter of said corporation.

Your letter further indicates that on January 14, 1963, the corporation purported to file reports for the preceding years which are dated as of those years on forms which could not have existed on said dates. These forms were obviously backdated although subscribed to under the penalties of perjury. It is doubtful, however, that this constitutes a material defect sufficient in law to justify revocation of the charter of said corporation.

It is my opinion that these reports are defective for another reason apparent on their face not stated in your letter. The reports for the years 1955, 1956, 1957 and 1958 are signed by William A. Murray as attorney for Joseph G. DePasquale, who is described as the treasurer of the corporation. The statute requires that this report be signed and sworn to by the treasurer in person. It is therefore obvious that this execution is defective on its face.

Furthermore, records on file in the Department of Vital Statistics section of your office in Vol. 73, p. 50, reflect that Joseph G. DePasquale died on March 31, 1959. It is my opinion that no power of attorney will survive the death of the principal. Although the before-mentioned fact does not appear on the face of the document, it nevertheless is a material fact in the consideration of this question.

There are two other facts not contained in your letter which I found it necessary to consider in order to give a legally sufficient answer to your question.

The first is that the reports were accepted and filed by you and the fee paid, presumably after examination and approval by you as required by G.L. c. 180, § 26A. The second is that on January 15, 1963, the day following said filing, you issued a certificate that said corporation was duly organized and existing.

While the issue is not entirely free from doubt, in reliance and in affirmance of an opinion of the Attorney General dated November 24, 1926, VIII Op. Atty. Gen. 178, I advise you that these actions by you do not constitute an election or waiver which would terminate your authority to revoke the corporation charter of said corporation as provided in G.L. c. 180, § 26A.

It is also my opinion that since a corporation whose charter is revoked is still subject to the provisions of G.L. c. 155, §§ 51-53, no rights of individuals will be materially affected by your revocation of this charter.

I am of the opinion, therefore, that revocation of the charter of Franklin Fair Association, Inc., is within your power as Secretary of the Commonwealth.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The ownership of a pharmacy is not a prerequisite to appointment to the Board of Pharmacy.*

MARCH 1, 1963.

MR. LOUIS J. ROSSETTI, *Secretary, Board of Registration in Pharmacy.*

DEAR SIR: — You have requested a written opinion as to whether or not a "non pharmacy owner" can be legally appointed as a member of the Board of Registration in Pharmacy, under G.L. c. 13, § 22 which reads as follows:

"There shall be a board of registration in pharmacy, in the three following sections called the board, consisting of five persons, residents of the commonwealth, who shall be skilled pharmacists, and shall have had ten consecutive years of practical experience in the compounding and dispensing of physicians' prescriptions, and shall actually be engaged in the drug business. Not more than one member shall have any financial interest in the sale of drugs, medicines and chemicals and the compounding and dispensing of physicians' prescriptions in the same councillor district. One member shall annually in November be appointed by the governor, with the advice and consent of the council, for five years from December first following."

"Drug business" is defined as follows in G.L. c. 112, § 37:

" 'Drug Business', as used in the two following sections, shall mean the sale, or the keeping or exposing for sale of drugs, medicines, chemicals or poisons, except as otherwise provided in section thirty-five, also the sale or the keeping or exposing for sale of opium, morphine, heroin, codeine or other narcotics, or any salt or compound thereof, or any preparation containing the same, or cocaine, alpha or beta eucaine, or any synthetic substitute therefor, or any salt or compound thereof, or any preparation containing the same, and the said term shall also mean the compounding and dispensing of physicians' prescriptions."

Use of the word "owner" in turn raises questions. In addition to "proprietor" does the term "owner" include a partner or a corporate stockholder and, if so, is there any minimum requirement as to such partnership interest or stockownership?

It would seem that if the Legislature had intended to impart the suggested restrictive meaning to the words "actually be engaged in", it would have taken the additional step of adding "as proprietor, as partner, as majority stockholder" or whatever terms they felt apt to reflect the need for a proprietary interest.

On the other hand, our Supreme Judicial Court has stated (260 Mass. 300, at page 302) "The phrase 'engage in the business' means at least that the business shall be carried on as a regular occupation or *constant*

*employment* as distinguished from a single isolated act." (Emphasis supplied.) In the same vein I think that we would agree that a lawyer working for a salary in a private law firm would be actually engaged in the practice of law.

Support for the view that the Legislature intended that one could actually be engaged in the drug business without necessarily having a financial interest therein can be seen in G.L. c. 112, § 24 which provides that "A person who desires to do business as a pharmacist" shall meet certain qualifications, none of which refers to a financial interest in the business; in G.L. c. 112 § 39 which provides that registration of a corporation for the transaction of the retail drug business is conditioned upon the management of such store being in the hands of a registered pharmacist; and in the definition of "drug business" in G.L. c. 112 § 37 in which there is no suggestion of a required financial interest in order to perform the function set out therein.

It is accordingly my opinion that ownership of a pharmacy is not a prerequisite to appointment to the Board of Registration in Pharmacy under G.L. c. 13, § 22.

Very truly yours,

Edward W. Brooke, *Attorney General.*

*A finding of "not guilty" after the withdrawal of a plea of guilty makes the provision for the mandatory revocation of a license to operate motor vehicles after a conviction for operating under the influence, inapplicable.*

March 6, 1963.

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

Dear Sir: — In your letter of recent date you have asked my opinion as to whether or not you are bound by the mandatory provisions of G.L. c. 90, § 24, par. 1 (c) to withhold the motor vehicle operative license of an individual named therein.

As stated in your letter, the facts are that on August 24, 1962, this individual pleaded "guilty" to a charge of driving a motor vehicle while under the influence of intoxicating liquor and was fined $75. in a district court. On December 6, 1962, the case was re-opened by order of the court. The defendant was permitted to change his plea to "not guilty" and after trial was found "not guilty." His fine was remitted.

Without passing on the propriety of the court's action in re-opening the case (compare *Districty Attorney for the Northern District* v. *Superior Court,* 342 Mass. 119), it is enough to say that the subsequent judgment of acquittal is the final determination of the case and may not now be collaterally attacked by an administrative agency.

It is my opinion, therefore, that while you have authority to withhold this individual's license for a period of a year in your discretion, you are not bound by the mandatory provisions of G.L. c. 90, § 24, par. 1 (c).

Very truly yours,

Edward W. Brooke, *Attorney General.*

*The statutory provisions applicable to settlement of eminent domain damage claims in excess of $2,500 and of the Review Board figure, require that action be brought and that a judge of the Superior Court hold a hearing, examine the facts and approve the settlement.*

March 7, 1963.

Hon. Jack P. Ricciardi, *Commissioner of Public Works.*

Dear Sir: — In your letter of March 5, 1963, you have requested my opinion as to the appropriate procedures for settling cases arising from land takings made pursuant to c. 556 of St. 1952, c. 403 of St. 1954, and c. 718 of St. 1956.

Settlement procedures in all such cases are governed by identical language in § 6 of each of the three statutes referred to in your letter, which provides in part as follows:

"No payment in excess of twenty-five hundred dollars by way of purchase of real estate or any interest therein shall be made, and no settlement in excess of twenty-five hundred dollars shall be made out of court for damages recoverable under chapter seventy-nine of the General Laws in excess of the amount recommended by said real estate review board."

The limitations imposed by this provision are confined to settlements which exceed $2,500. and also exceed the amount recommended by the real estate review board. Unless the settlement exceeds both of these limits, § 6 has no application. Thus a settlement not in excess of the stated limits may be freely made by the Department of Public Works at any time before suit is commenced, G.L. c. 79, § 39, and by the Attorney General thereafter. VI Op. Atty. Gen. 169.

Where the amount of the settlement exceeds the stated limits, however, § 6 imposes two restrictions: (1) no settlement may be made *before suit is commenced*, and (2) no settlement may be made *out of court* thereafter. *Out of court* means "not in or before the court." Ballentine, LAW DICTIONARY WITH PRONUNCIATIONS, SUPPLEMENT, (1954), p. 168. It is synonymous with "extrajudicial." *People* v. *McWilliams*, 4 p. 2d 601, 603 (Dist. Ct. of Appeal Cal. 1931). A settlement *out of court* is one "arranged to take place between the parties or their counsel privately and without being referred to the judge or court for authorization or approval." BLACK, LAW DICTIONARY (4th ed. 1951) p. 1254. Thus, the authority of the Attorney General at the negotiation stage of these cases extends only to agreeing on a settlement figure to be suggested in the court. Actual settlement does not take place unless and until payment of the amount agreed upon has been approved by the Superior Court.

The appropriate procedure for obtaining such a court approval is the so-called pro forma hearing. Under this procedure, the Attorney General, or a duly authorized member of his staff, appears in open court, discloses the facts of the case and recommends the settlement figure to the court. Counsel for the petitioner then presents his case in the same manner. The court, after making such further inquiries as it deems necessary, either approves the proposed settlement and orders payment, or disapproves it. A settlement effected by this procedure is not an "out of court" settlement, since it takes place in open

court and not "between the parties or their counsel privately," and since it is not consummated "without being referred to the judge or court for authorization or approval." BLACK, LAW DICTIONARY (4th ed. 1951) p. 1254.

The procedural requirements of the pro forma hearing are further developed in that portion of § 6 which immediately follows the provision quoted above:

"No settlement in excess of twenty-five hundred dollars and in excess of the recommendation of the real estate review board shall be made by agreement of the parties during or after trial except with the written approval of the court; provided, that settlements in excess of the recommendation of the board may be made without such approval if the settlement does not exceed the amount of any verdict or finding which may have been rendered, together with interest and costs."

Thus, all settlements over the stated limits and not subject to the proviso at the end, must not only be made *in court,* but must have the *written approval of the court.* From a procedural standpoint, the use of the word "approval" is significant. *Approval* is defined in *Simpson* v. *Marlborough,* 236 Mass. 210, 214:

". . . the application of sound judgment to a proposition emanating from another source and submitted for investigation. It requires the exercise of faculties of criticism and discrimination. It denotes positive sanction. It does not mean original and inventive construction in the first instance. On the other hand, it is not a mere perfunctory act. It imposes no mean responsibility. It carries power and duty of an effective nature."

Accordingly, if a judge in a pro forma hearing entertains doubts about any matter bearing on the propriety of the settlement proposed, he has a duty to avail himself of his full judicial powers to investigate and resolve it. While the exercise of such judicial initiative will ordinarily be unnecessary where the proposed settlement is equitable and is proprly presented, the court should nonetheless be prepared to cross-examine witnesses called by the parties, and to call witnesses or order production of documents on its own motion, where the circumstances warrant such independent action. Nothing short of this, in my opinion, will satisfy the statutory requirements.

The fact that such approval be by "the court" imposes another procedural requirement on pro forma hearings. The word *court* is used with various meanings in Massachusetts statutes: sometimes it refers to the building or room in which judicial proceedings take place; sometimes, to an entire judicial institution (such as the *Superior* Court); sometimes, even to a quasi-judicial or non-judicial institution (such as the *General Court*). However, there is one striking uniformity in the Massachusetts statutes: whenever reference is made to the powers and duties of judge and jury, the term *court* invariably denotes *the judge* — not the jury, not the judge and/or jury, but the judge alone. Indeed, the word *judge* is almost never found in the statutes. Examples of this consistent usage appear in G.L. c. 79, § 22; G.L. 231, §§ 60, 77 and 81; G.L. c. 234, §§ 25, 26A, 26B, 28, 33, 34, 35 and 36. There appears no reason to suppose any deviation from this usage in the statutes under consideration. It is therefore my opinion that a pro

forma proceeding must in all cases be heard and determined by a judge sitting without jury.

In view of these statutory requirements, the choice of the term *pro forma* to describe the judicial proceeding customarily used in settling highway land-taking cases is unfortunate, in that it is a misnomer. *Pro forma* means "for the sake of form." WEBSTER, THIRD INTERNATIONAL DICTIONARY (1961) p. 1812. A more appropriate name would be *probare pacto* ("to approve a settlement"). Far from being a mere formality, the approval of such a settlement should amount to a trial on the merits. This does not mean that it need be an adversary proceeding. "In order to constitute a trial there need not be present an active controversy in the sense that it is indispensable that it must involve direct and cross-examination." *Chaffee* v. *Rahr*, 181 Misc. 64, 68, 40 N.Y.S. 2d 484, 488 (Supr. Ct. 1943); 88 C.J.S. 22 (1955). What it does mean is "the examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue." *Marsch* v. *Southern New England R.R.*, 235 Mass. 304, 307. "The facts put in issue" in a pro forma proceeding, as in any other trial, include all factual issues raised by the pleadings. Cf. *Churchill* v. *Ricker*, 109 Mass. 209, 211. "Examination" of these facts means such investigation and deliberation as are necessary to approve or disapprove the proposed settlement. The only "competent tribunal" in this context, as previously explained, is a judge of the Superior Court.

The fact that an actual *trial* of proposed settlements is contemplated is borne out by the reference in the last quoted provision to settlements "during or after trial," and the omission of the word *before*. This omission cannot be construed as forbidding agreements to settle which are reached before trial; the Attorney General has full power to settle cases except to the extent that his power is expressly limited. VI Op. Atty. Gen. 169. Nor can this omission be taken to mean that a settlement commenced *before* trial may be consummated without "the written approval of the court," for that would be an "out of court" settlement. The reason for the omission of any reference to settlements *before* trial, in my opinion, is that a properly conducted approval proceeding itself constitutes a trial, and "a settlement before trial" would therefore be a contradiction in terms.

I therefore advise you as follows with regard to settlement procedures in cases arising under c. 556 of St. 1952, c. 403 of St. 1954, and c. 718 of St. 1956: (1) settlements in such cases for an amount not in excess of the statutory limits may be freely made; (2) settlements in excess of these limits may not be made without the written approval of the court; (3) such approval must be obtained from a judge of the Superior Court sitting without jury; (4) such approval may not be properly granted until the judge has been satisfied, either through representations of counsel or (where necessary) through the exercise of his full investigative powers, that the suggested settlement is a fair and lawful one; (5) the proceeding wherein such approval is sought should be referred to as a *probare pacto* hearing.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*A license to the Franklin Fair Association, Inc., to conduct a race meeting, became nullity when the charter of the association was revoked. It would be appropriate for the State Racing Commission to seek consent decrees in court proceedings relating to certain racing dates, in circumstances stated.*

March 11, 1963.

*State Racing Commission.*

Gentlemen: — In your letter of recent date you state that your commission voted to refer to me for a formal opinion four numbered questions.

The first question is as follows:

"Is the action of the Secretary of State in revoking the charter of the Franklin Fair Association, Inc. sufficient grounds for this commission to revoke the license of Franklin Fair Association, Inc. to conduct a running horse racing meeting at Berkshire Downs, Hancock, Berkshire County, as voted by the commission at the meeting held on Wednesday, January 30th, 1963?"

It is my opinion that the revocation of the charter of the Franklin Fair Association, Inc. by the Secretary of State on March 2, 1963, terminated the existence of that corporation except as provided in G.L. c. 155, § 51. This section provides that the corporation shall continue as a body corporate for three years after the revocation of the charter "for the purpose of prosecuting and defending suits by or against it and of enabling it gradually to settle and close its affairs, to dispose of and convey its property and to divide its capital stock, but not for the purpose of continuing the business for which it was established. . . ." Under this section the corporation would not continue in existence for the purpose of conducting a fair at Berkshire Downs in July of 1963 and therefore would not have the right to exercise the license to conduct a running horse racing meeting voted by your commission on January 30, 1963. G.L. c. 128A, § 3. The existence of the licensee having been terminated by the action of the Secretary of State, the license must now be considered a nullity, without independent life. No formal act of revocation, therefore, is required by your commission. It would be appropriate for you to notify the Franklin Fair Association, Inc., that their license is now a nullity, and demand of them the return of any license, certificate or other documents of similar nature or legal effect which relate to your vote of January 30, 1963.

Your second and third questions relate to the necessity and manner of holding a hearing in the event of revocation of the racing license. In view of my opinion that no revocation is required, it does not become necessary to answer the second and third questions.

Your fourth question is as follows:

"Would you advise the commission to seek a Consent Decree in the Petition for Review now pending in the matter of *Shaker Community, Inc.* v. *State Racing Commission,* No. 20351, as it relates to Berkshire County Fair Association, Inc., and in the matter of two petitions now pending in the matter of *Shaker Community, Inc.* v. *State Racing Commission,* Nos. 20350 and 20352, as they relate to Hancock Raceway, Inc. said Consent Decree to provide for remanding said matter to the commission for further proceedings?"

If you determine that facts which have come to your attention make

it necessary or desirable for you to conduct further hearings or investigation concerning the granting of racing dates to Berkshire County Fair Association, Inc. and Hancock Raceway, Inc., the seeking of Consent Decrees in the proceedings referred to for the purpose of having the matters remanded to the commission would be an appropriate procedure, provided that the consent of all of the parties to these cases can be obtained.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*A salary rate in excess of the minimum for a grade, may not be approved for a person recruited for a position in the service of the Commonwealth who has been in that service within a twelve-month period prior to the date of the proposed recruitment.*

MARCH 14, 1963.

HON. WILLIAM A. WALDRON, *Commissioner of Administration.*

DEAR SIR: — In your recent letter you have requested my opinion relative to the approval by the Director of Personnel and Standardization of the maximum salary rate for Walter F. Costello in the position of Supervisor of Workmen's Compensation Agents. You have informed me that your commission has approved the establishment of the position as well as the payment of the maximum salary grade.

The specific question raised is whether or not the Director of Personnel and Standardization may lawfully approve payment to Mr. Costello of the maximum salary for the position, in view of the prohibition set forth in St. 1962, c. 591, § 6A.

The first paragraph of St. 1962, c. 591, § 6A reads as follows:

"Notwithstanding the provisions of paragraphs (5) and (5A) of section forty-six of chapter thirty of the General Laws, the director of the division of personnel and standardization shall not approve the recruitment of any person at a rate above the minimum of the grade if such proposed employee has been in the service of the commonwealth within a twelve-month period prior to the date of the proposed recruitment."

Your letter states that Mr. Costello clearly has been in the service of the Commonwealth within a twelve-month period prior to the date of his recruitment to the position of Supervisor of Workmen's Compensation Agents.

Inasmuch as the first paragraph of § 6A quoted above specifically prohibits the payment of maximum salary to an employee who has been in the service of the Commonwealth within a twelve-month period prior to recruitment, and this paragraph specifically excludes the provisions of paragraphs (5) and (5A) of § 46 of c. 30 of the General Laws, and Mr. Costello was in the service of the Commonwealth at the date of recruitment, it is my opinion that the Director of Personnel and Standardization may not lawfully pay Walter F. Costello the maximum salary grade for this recruitment position.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*Manufacturers and wholesalers of alcoholic beverages may authorize others to compile, publish and mail their filed price schedules to each retailer as required by law.*

March 14, 1963.

Mr. William H. Hearn, *Executive Secretary, Alcoholic Beverages Control Commission.*

Dear Sir: – You have called my attention to § 25C of c. 138 of the General Laws, which imposes upon "each manufacturer and wholesaler" of alcoholic beverages the duty of filing, compiling, publishing and mailing his price schedules.

The pertinent sub-section of § 25C, namely sub-section (e), reads as follows: ". . . and shall, as soon as practicable after the tenth day of the month in which such schedules are filed, compile, publish and mail to each retailer authorized to sell alcoholic beverages for off-premises consumption a list, to be designated 'minimum consumer resale price list.'"

You advise me that since 1952 "members of the commission have been of the opinion that a common utilization by the filers of the facilities of a trade publication" for the above purposes "would be in substantial compliance with the requirements contained in the statute."

You have submitted to this office a publication entitled: MASSACHUSETTS MINIMUM CONSUMER RESALE PRICE LIST, March and April 1963, Prices, No. 63 for the period March 1st to April 30th, and you have asked for my opinion as to whether this system of compiling, publishing and mailing the minimum consumer resale price list is in conformity with legal requirements.

I have reviewed the statute in question, and particularly sub-section (e), and note that the only duty clearly imposed upon the commission is to make available each schedule, or a composite thereof, for inspection by licensees and by the public.

The duty of compiling, publishing and mailing to each retailer is imposed upon "each manufacturer and wholesaler" who has filed a schedule with your commission. Whether the manufacturers and wholesalers who have filed schedules can then transfer the duties of compiling, publishing and mailing to a duly authorized agent is the heart of your question, specifically whether they can transfer these duties to a trade publication.

The requirements imposed upon the manufacturers and wholesalers appear to be ministerial in character. Surely the Legislature in adopting this statute was primarily concerned that the approved schedules reach the retail outlets, and that they be available there for the use of retail personnel and the consuming public. The requirements are not of such a nature that they can be performed only by the named principals; in fact, they can be performed better in all probability by businesses engaged in printing and direct mailing activities. Therefore, in my opinion, the statute imposes no bar to these duties being performed on behalf of manufacturers and wholesalers by a properly authorized agent or agents.

Counsel for the trade publication now being used by the industry has suggested that the statute can be complied with in the following manner:

1.) A filer can delegate to the trade publication through a Power of Attorney his functions under the statute.

2.) The trade publication can accept in writing the duties imposed by the Power of Attorney.

3.) An officer of the corporation issuing the trade publication can execute an affidavit swearing that he has carried out the requirements of G.L. c. 138, § 25C (e), and can file said affidavit with your commission.

4.) The trade publication can send written notice to each filer, with a copy of the minimum consumer resale price list as compiled, stating that the publishing and mailing requirement has been complied with.

5.) Each filer, after reviewing the scheduled list as compiled and published, can send a letter to the trade publication ratifying, approving and confirming the compilation, publishing and mailing of each specific publication as released.

It is my opinion that the procedures outlined above would be in substantial compliance with the statute in question. Manufacturers and wholesalers are free to select some other method of complying with their statutory duties, but if they choose the method described above, the commission can find properly that the purposes of the statute are being satisfied.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The General Court is under a duty to reapportion the House of Representatives.*

MARCH 17, 1963.

HON. PAUL D. REED, JR., *House of Representatives.*

DEAR SIR: — In your recent letter you asked my opinion relative to the present apportionment of the Massachusetts House of Representatives as apportioned under Art. XXI (as amended) of the Amendments to the Constitution of the Commonwealth as set forth in G.L. c. 57, § 4.

To clarify the situation a short review of the facts will prove helpful.

Article XXI (as amended) of the Amendments to the Constitution of the Commonwealth of Massachusetts provides that a special enumeration shall be taken every ten years, starting with the year 1935, to ascertain the number of legally qualified voters. After this census is taken, the constitution directs that a realignment of the House shall become effective within four years. The last reapportionment was by statute in 1947 (G.L. c. 57, § 4), in accordance with the special enumeration of 1945.

Since 1947 there has been no new realignment of the House. There was a special enumeration in accordance with the constitution in 1955. Article XXI (as amended) of the Amendments to the Constitution of the Commonwealth provides:

"The house of representatives shall consist of two hundred and forty members, which shall be apportioned by the general court, at its first regular session after the return of each special enumeration, to the several counties of the commonwealth, equally, as nearly as may be, according to their relative numbers of legal voters, as ascertained by said special enumeration. . . ."

According to law, the number of representatives allotted to each county is established by the population of that county, but each county shall have at least one representative. For this reason, the County of Dukes County and the County of Nantucket each have one representative.

The constitutional mandate embodied in this amendment is clear and concise. It is my opinion that the Legislature in its first session after the special enumeration in 1955 had the duty of reapportioning the House of Representatives. This duty should have been fulfilled by 1957.

It is my opinion that the clear purpose and design of Art. XXI (as amended) of the Amendments to the Constitution of the Commonwealth is to preserve voter equality at the polls.

Further guarantees of equality of the ballot are found in the Declaration of Rights of the Constitution of the Commonwealth:

"*Article I.* All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."

"*Article IV.* The people of this commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter, be by them expressly delegated to the United States of America in Congress assembled."

"*Article VII.* Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore, the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it."

"*Article IX.* All elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employment."

Under the Massachusetts Declaration of Rights, it cannot be denied that the right to vote is an inherent right of a citizen of this Commonwealth, and each citizen must have the privilege to equally exercise that right. Where changes in population have caused a ballot in one county being weighted more than another, the citizen is not being accorded the protection to which he is entitled under law.

The Massachusetts Constitution guarantees to the citizen that his vote shall be weighted equally. Our Supreme Judicial Court has spoken on this responsibility placed on the Legislature to protect this guarantee. The Court states in *Lamson* v. *Secretary of the Commonwealth*, 341 Mass. 264, at 270:

"This object belies a construction which would permit a single session of the General Court by its inaction to end the right of the

people to any reapportionment following a special enumeration. The Constitution does not contemplate that the Legislature, by failing to act when it should, can impose on the people for ten years an apportionment which changes in population have made unequal and hence constitutionally inappropriate."

The Legislature and courts are duty bound to enforce and preserve the rights of a citizen under the United States Constitution. One of these rights is embodied in the Fourteenth Amendment. This right is to equal protection of the laws — both State and Federal.

In the recent case of *Baker* v. *Carr*, 369 U. S. 186 (1962), the Court held that the Federal District Courts had jurisdiction to determine whether under the Fourteenth Amendment equal protection of the laws had been denied to citizens where a state legislature had failed to reapportion itself.

This recent case has generated reapportionment activity in some thirty jurisdictions throughout the United States. As a result of the Federal government stepping into this field, these legislatures have been galvanized into action. These legislatures would have been better advised to reapportion themselves before a decision of a Federal court established their duty to do so. It would seem that reapportionment should properly be handled by a state itself rather than by a Federal directive.

As previously stated Article XXI (as amended) of the Amendments to the Constitution of the Commonwealth, guarantees to the voter equality of the ballot and directs the Legislature to protect this guarantee by timely and proper apportionment. This right is reinforced by other provisions of the Commonwealth's Constitution.

As decided in the case of *Baker* v. *Carr*, the Fourteenth Amendment to the United States Constitution provides a Federal guarantee to the voter. This decision secures to the voter the right of equal protection of the laws which is manifested by a ballot of like weight with his fellow citizens.

It is, therefore, my opinion that the General Court after 1955 had a clearly defined duty to reapportion the House of Representatives in accordance with the specific mandate of the Fourteenth Amendment to the United States Constitution, the Twenty-first Amendment to the Massachusetts Constitution, as well as the Declaration of Rights set forth therein. This duty still remains to be discharged.

Very truly yours,

Edward W. Brooke, *Attorney General.*

*A proposed amendment to G.L. c. 136, s. 25C (d), to dispense with the necessity for a hearing prior to the approval of minimum consumer prices for alcoholic beverages should be redrafted in any event; view expressed that the proposal would not be in public interest.*

March 20, 1963.

Mr. William Hearn, *Secretary, Alcoholic Beverages Control Commission.*

Dear Sir: — The matter of your proposed amendment to the Liquor Control Act which would abolish the requirement for public hearings has been the subject of thorough discussion by Assistant Attorney Gen-

eral Harold Putnam, Chief of the Consumer Council Division of this office, and me.

Your memorandum setting forth new language designed to exempt the commission from the requirement that it hold public hearings before approving minimum consumer prices raises many questions of serious import to the liquor industry and, more importantly, to the public at large.

The amendment you have submitted appears to be a redraft of the final sentence of c. 138, § 25C (d) of the General Laws, as follows:

"No such filing, however, shall take effect unless within thirty days thereafter the Commission shall take action to approve such prices as not being excessive, inadequate or unfairly discriminatory, and the provisions of no other section of this chapter or of any section of chapter 30A of the General Laws, shall apply to this action."

I understand that the purpose of this proposal is to exempt the commission from the notice and public hearing requirements of the Administrative Procedure Act, c. 30A, and of the Liquor Control Act, c. 138. This purpose can be accomplished by similar but simpler language, as follows:

"No such filing, however, shall take effect unless within thirty days thereafter the commission shall have approved such prices as not being excessive, inadequate or unfairly discriminatory, and the notice and hearing requirements of this chapter and of chapter 30A shall not apply to said approval."

I realize that you have limited your question to me to the correctness of the language embodied in your proposal. But I cannot advise your commission wisely without commenting upon the probable effect of this legislative amendment upon the liquor industry and upon the public. The abolition of public hearings may seem to the commission and to the industry at the moment the simplest way of meeting the problem raised by the decision of the Supreme Judicial Court in *Kneeland Liquor, Inc.* v. *Alcoholic Beverages Control Commission,* 345 Mass. 228. But meeting this problem by abolition of the public's right to hearings may undermine public confidence in the existing price-setting system, may expose the commission to successful legal challenges of its price schedules, and may lead eventually to destruction of the price-setting system which the industry eagerly supports.

The industry, of course, can take any position it wishes in regard to public hearings before your commission. And the Legislature, of course, can uphold or discontinue the public hearing requirement. But I question the advisability of your commission supporting the abolition of public hearings.

Section 25C of the Liquor Control Act does not set forth clearly a requirement that your approval of minimum prices follow notice and public hearing. But the Supreme Judicial Court in *Bond Liquor Store, Inc.* v. *Alcoholic Beverages Control Commission,* 336 Mass. 70, at p. 75, seems to imply that your "required regulation" of the liquor traffic necessarily involves "notice and hearing."

The Court has held frequently that price-fixing is an extreme form of the exercise of the police power of the state. As such, it should be surrounded most carefully with proper safeguards, and notice and

public hearing are among the two most important safeguards available.

Our Court in the future may well take the position that the commission is not in a position to know whether prices are "excessive, inadequate or unfairly discriminatory" unless it has held a public hearing, and solicited the views of members of the public who might have useful information to contribute.

The Administrative Procedure Act was adopted by the General Court to impose upon all administrative agencies uniform notice and public hearing requirements. The Legislature appears to have believed that these requirements are necessary to protect the public interest. If the Legislature is now to exempt one agency from these requirements, it may take the position that it is setting a precedent which will expose it to similar requests from other agencies.

I take notice of the facts that many package store dealers are feeling the serious effects of monopolistic trends and price-cutting practices within the industry in this state, and that the public is concerned over prices higher than in some other states along the Atlantic seaboard. But the cure does not seem to lie in the abolition of public hearings.

Where liquor is being sold at prices less than your published schedules, our law is being violated, and your commission has the power to take action, including the suspension of such a dealer's license.

Where Massachusetts prices are higher than those being charged in New York, Florida or other states, without good reason, your commission has the power to order a satisfactory price adjustment or bar the distribution of the over-priced liquor.

Such pricing problems are apt to be with us for some time. In my opinion, they can be solved more speedily if the liquor dealers and the public exercise their present right to testify at public hearings. I do not believe it would be in the public interest if this right is denied to them.

I respectfully recommend that the commission take no position on pending legislation to change its powers, but make a sincere effort to make the present laws, as further defined by the Supreme Judicial Court, work effectively in the public interest.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*It is not constitutionally permissible to propose an initiative amendment to the Constitution of the Commonwealth to abolish the Governor's Council.*

MARCH 21, 1963.

HON. PHILIP A. GRAHAM, *Senator.*

DEAR SIR: — In your recent letter you have asked my opinion relative to whether it is constitutionally permissible to petition for an initiative amendment to the Constitution to abolish the Governor's Council.

Under the Massachusetts Constitution the responsibility of choosing the judiciary is shared by the Governor and his Council. The Governor must nominate and appoint the judges. A nomination, however, will not become effective unless the Council gives its assent.

Mass. Const. Pt. 2nd, c. II, § 1, Art. IX:

"All judicial officers, the solicitor-general, coroners, shall be nominated and appointed by the governor, by and with the advice and consent of the council; and every such nomination shall be made by the governor, and made at least seven days prior to such appointment."

Under the provision of the Constitution the functions of the Governor's Council must necessarily relate to the appointment of judges.

An initiative petition dealing with this subject matter is prohibited by the provisions of:

Mass. Const. Amend. Art. XLVIII, Pt. II., § 2:
"No measure that relates to . . . the appointment, qualification, tenure, removal, recall or compensation of judges . . . shall be proposed by an initiative petition. . . ."

It is, therefore, my opinion that the Massachusetts Constitution prohibits the use of an initiative amendment to abolish the Governor's Council.

Very truly yours,

Edward W. Brooke, *Attorney General.*

*The Comptroller is required to make the transfer, from the Group Insurance Trust Fund to the General Fund, directed in item 0448-01 of St. 1962, c. 791.*

April 2, 1963.

Hon. Joseph Alecks, *State Comptroller.*

Dear Sir: — Your recent letter requested clarification of portions of an opinion dated January 14, 1963, furnished to you by my predecessor in office, relative to ultimate disposition, pursuant to c. 572 of St. 1961, of certain dividends received and accepted by the Group Insurance Commission.

It is my judgment that the opinion to which you refer clearly interprets the relevant law; no useful purpose would be served by attempting to re-write the opinion.

Without enumerating all facets of the questions raised by you, it appears that the entire matter turns principally on whether or not the Comptroller is required as a matter of law to make the transfer stipulated by Item 0448-01 of c. 791 of St. 1962, the relevant part of which reads as follows:

"In accordance with the provisions of section nine of chapter thirty-two A of the General Laws, the comptroller shall transfer from account number 6904-69, Group Insurance Trust Fund, to the General Fund the sum of one hundred and eighty-two thousand three hundred and eighty dollars and thirty-one cents, determined by the commission to be the administrative cost for the calendar year nineteen hundred and sixty-one."

The answer to such question is clearly "yes." Chapter 572 of St. 1961 specifically directs the Group Insurance Commission to make all necessary calculations and to direct the disposition of *any* (emphasis supplied) dividends received; nowhere therein does it place upon the

Comptroller any responsibility or direction to participate or to concur in the interpretation of the Commission's duties.

The Group Insurance Commission has the duty under said c. 572 of St. 1961 to make the calculations and direct the disposition of dividends received; it appears that the Group Insurance Commission understands its duties under said c. 572 of St. 1961; it has made the necessary calculations in the light of such duty; and it has directed you to make the above-mentioned transfer of $182,380.31 to the General Fund.

It is therefore my opinion that effecting the above-mentioned transfer as directed by the Group Insurance Commission will constitute an effective discharge of your duties under applicable law.

If, as you indicate, you are not in sympathy with the disposition of dividends prescribed by the Legislature, you are of course aware that any changes therein which you deem desirable can be sought through normal legislative channels.

I appreciate your bringing this matter to my attention and hope that the foregoing discussion has helped to clarify your responsibilities in this matter.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*An agreement by the State Department of Public Works to construct buildings, in lieu of the payment of money damages to an owner whose land was acquired by eminent domain for state highway purposes would exceed the authority granted to the department.*

APRIL 23, 1963.

HON. JACK P. RICCIARDI, *Commissioner of Public Works.*

DEAR SIR: — On March 26, 1963, Acting Commissioner Toumpouras informed me that the reconstruction of a portion of State Highway 28 by the Department of Public Works involves a portion of land leased by the Commonwealth to the United States of America for Otis Air Force Base. He stated that there are several structures on this land which are the property of the United States of America. He expressed the opinion that an agreement to replace existing buildings by new construction would be in the best interest of all concerned. He requested my opinion as to the authority of the Department of Public Works to carry out such construction outside the limits of the State highway for the benefit of the United States of America.

It is my opinion that construction of new buildings to replace existing structures, not the property of the Commonwealth, cannot be undertaken by the Department of Public Works in connection with the construction or reconstruction of State highways without specific legislative authorization by the General Court.

Chapter 81 of the General Laws of the Commonwealth defines the authority of the Department of Public Works in connection with state highway Programs. Section 7 of c. 81 states:

"When injury has been caused to the real estate of any person by the laying out or the alteration of a state highway, he may recover compensation therefor from the commonwealth under chapter seventy-nine. . . . "

Chapter 79 of the General Laws of the Commonwealth considers damages only in terms of money damages. Reconstruction or replacement activities are not within its concept of damages. Chapter 79, § 13, which deals with the problems arising from buildings found on land taken does not in its provisions envision anything except money awards for damages.

The following cases are of value when considering the authority of the Department of Public Works where no specific legislation has been enacted authorizing an activity.

In the case of *Boston, Wor. & N.Y. St. Ry.* v. *Commonwealth, 301 Mass. 283,* the Supreme Judicial Court held that the Department of Public Works, in laying out and constructing a state highway with Federal aid, had no power to contract with a street railway company to pay to it money of the Commonwealth in return for the company's abandonment of its location within the proposed highway. The Court stated at p. 284:

"Stripped of incidentals and accessories, the contract is, in essence, one by which the Commonwealth by payment of a large sum of money buys out the petitioner's rights in its street locations. The department of public works had no authority to bind the Commonwealth by a contract of this kind. . . ."

At pp. 286 and 287 the Court said:

"The intent to grant such powers is not to be lightly inferred. Some clear indication of legislative purpose should be found.

"We do not find in the statutes any grant of such power. The department of public works may lay out State highways and, with the approval of the Governor and Council, make contracts for their construction. . . . The detailed enumeration and careful limitation of the powers granted suggest that no additional powers were intended. . . ."

In the case of *George A. Fuller Co.* v. *Commonwealth,* 303 Mass. 216 (1939), the Supreme Judicial Court held that the Department of Public Works had no authority to bind the Commonwealth by a contract to pay money in compromise of a disputed claim for alleged breach by the Commonwealth of a contract made through that Department for the construction of a State Highway. The Court stated at p. 222:

"Its (the Department of Public Works) duties are defined generally in G.L. (Ter. Ed.) c. 81 relating to State highways, which empowers the department to make various contracts *necessarily incident to the construction, repair and maintenance of certain highways* . . . subject to the approval of the Governor and Council, and also to acquire land for highway purposes by purchase, gift, or the right of eminent domain, in some instances, subject to the approval of the Governor and Council. . . ."

At pp. 223 and 224 the Court stated:

"An agreement of compromise, which by its terms seeks in part to bind the Commonwealth to pay damages for an alleged breach of contract by the department, is not an essential duty, the absence of which would inconvenience the functioning of the department in the

performance of other duties with which it is invested by statute. Such an agreement in a limited sense is ancillary and related to the original construction contract, but in its primary and ultimate effect, if enforceable, would serve the purpose of creating a new and independent obligation binding upon the Commonwealth, irrespective of the terms of the original contract. . . . This authority . . . *is not lightly to be inferred*. . . . We are not impressed by the argument . . . that by the exercise of such authority the Commonwealth, through the department, may, to its advantage, settle large claims for small amounts. If there is such advantage, we think it is outweighed by the dangers involved in the exercise of the power, and *unless the power is either expressly given or required by necessary implication, it ought not to be found.*" (Emphasis supplied.)

The reasoning of the *Fuller* case is applicable here. The Department of Public Works, in entering into an agreement with the United States of America for erection of any buildings, would expose the Commonwealth to liability for faulty construction of those structures et cetera. That authority should not be inferred. It must be clearly authorized.

There is no clear authorization in existing statutes for the Department of Public Works to enter into an agreement to construct buildings outside of the State highway program in lieu of money damages. Case law indicates a strict interpretation by the Court of the authority that has been granted to the Department of Public Works.

It is my opinion that the agreement proposed in Mr. Toumpouras' letter of March 26, 1963 would exceed the authority granted to the Department of Public Works by present Massachusetts law.

Very truly yours,

Edward W. Brooke, *Attorney General.*

*A justice of a District Court may accumulate unused vacation leave to a total of ninety days in any consecutive three year period.*

April 23, 1963.

Hon. Kenneth L. Nash, *Chairman, Administrative Committee of the District Courts.*

Dear Sir: — You have asked for an interpretation of the provisions for sick leave for justices of the district courts.

The provision for such sick leave is contained in the third paragraph of G.L. c. 218, § 6, which reads as follows:

"Special justices of the district courts other than the municipal court of the city of Boston, and special justices of the Boston juvenile court shall be paid by the county twenty-five dollars for each day's services, or at the rate by the day of the salary of the justices of the same court, whichever is the greater amount. For each day's service so paid for in excess of thirty days in any court in any one year, there shall be deducted by the county treasurer from the salary of the justice who absents himself from said court one day's compensation at the rate by the day of the salary of said justice, except for services of the special justice in holding simultaneous sessions; provided, however, that if a justice

is absent, due to his illness or physical disability, for a period not exceeding thirty days in any year, in addition to said thirty days, he shall be deemed to be on sick leave and no such deduction shall be made; *such thirty-day sick leave or any portion thereof not used in any year may be accumulated, but shall, in any event, not exceed ninety days in any consecutive three-year period; and provided, further, that if a justice is absent due to an assignment on the administrative committee . . . no such deduction shall be made therefor.*" (Emphasis supplied.)

Your question is, in effect, whether the reference in the provision underlined in the above quotation from G.L. c. 218, § 6, is to be taken to refer to the total accumulation of unused sick leave which is allowed, or the total sick leave which is to be allowed, for the period stated.

You state that there are differences of opinions among judges as to the correct interpretation of the provision and that the Director of the Bureau of Accounts has expressed the view that the provision in question refers to the total sick leave, and not to the total accumulation of sick leave, which is to be allowed.

In my opinion, for the reasons hereafter stated, the provision in question is properly to be construed as fixing a limitation on the number of days of unused sick leave which may be accumulated, rather than to the number of days of sick leave which may be taken, in any consecutive three-year period.

If the provision is construed as fixing the number of days of sick leave which may be taken in any "consecutive three-year period" the result would be that in a situation where at the beginning of a year a judge had an accumulation of sixty days unused sick leave and during that year he was out on sick leave for a total of ninety days, he would not be entitled to any sick leave for the next two consecutive years. That result would follow because the year in which he was out for ninety days is a part of the consecutive three-year period which it begins, as well as the consecutive three-year period which it ends. The injustice of the result of such a construction is so clearly apparent that it demonstrates that the Legislature, despite the admittedly awkward way in which the provision is phrased, must have intended that it should refer to the amount of unused sick leave credits which could be accumulated for any consecutive three-year period.

The construction, it is my opinion, which the Legislature intended, avoids the injustice referred to and the rule which results is that "sick leave . . . not used in any year may be accumulated . . ." up to a total of ninety days for any consecutive three-year period.

Very truly yours,

Edward W. Brooke, *Attorney General.*

*G.L. c. 32, s. 15, providing for the forfeiture of certain rights by members of retirement systems, is applicable only in cases of misappropriation of funds of the employing unit. (Need for amendments to § 15, referred to.) An administrative board has no authority to reconsider a decision but if convinced it acted wrongfully it may rescind its action.*

April 23, 1963.

Hon. John T. Driscoll, *Chairman, State Board of Retirement.*

Dear Sir: — I have your recent request for my opinion relative to your board's approval on February 27, 1963 of the retirement allowance for Mr. Fred B. Dole.

Section 10 of c. 32 of the General Laws, relating to the right to superannuation retirement allowance of a member of the retirement system, provides eligibility for retirement for said member if he or she ". . . resigns, . . . or fails of nomination or re-election, or fails to become a candidate for nomination or re-election, or fails of reappointment or is removed or discharged from his office or position without moral turpitude on his part, or any such member whose office or position is abolished. . . ." Inasmuch as Mr. Dole resigned voluntarily, fulfilling one of the requirements as set forth in the above-quoted provisions of § 10, his application for retirement was properly brought before your board.

Section 15 of said c. 32, relating to the denial of retirement allowances to members who have been derelict in their duties, provides under subsection 1 thereof, "Any member who has been charged with the misappropriation of funds or property of any governmental unit *in which or by which he is employed or was employed at the time of his retirement or termination of service,* as the case may be, or of any system of which he is a member, and who files a written request therefor shall be granted a hearing by the board in accordance with the procedure set forth in subdivision (1) of section sixteen. If the board after the hearing finds the charges to be true, such member shall forfeit all rights under sections one to twenty-eight inclusive to a retirement allowance or to a return of his accumulated total deductions for himself and for his beneficiary, or to both, to the extent of the amount so found to be misappropriated and to the extent of the costs of the investigation, if any, as found by the board. He shall thereupon cease to be a member, except upon such terms and conditions as the board may determine." (Emphasis supplied.)

Mr. Dole has been charged, indicted and convicted of conspiracy to defraud the Bureau of Public Roads of the Department of Commerce, an agency of the Federal government. This conviction has been appealed to the United States Circuit Court. Pending the determination of the appeal, further action by your Board would be inappropriate.

Mr. Dole, an Associate Commissioner of the Department of Public Works of the Commonwealth of Massachusetts prior to his resignation, has not been charged in this pending action with misappropriation of funds or property of the governmental unit "in which or by which he . . . was employed at the time of his retirement. . . ." Accordingly, the penalties providing for forfeiture of rights to retirement allowance as set forth in § 15 are not applicable to Mr. Dole.

Your letter states that the Board of Retirement considered Mr.

Dole's application for retirement on February 27, 1963 and voted to approve same. You now ask, in the light of new information that has come to your attention since approval, whether your board may reconsider its action of February 27, 1963. There is no statutory authority for your board to reconsider a matter either approved or disapproved. If disapproved, the applicant has his usual remedies of appeal. Under the broad principles of statutory procedure by administrative boards, your board, if convinced it has acted unlawfully, may rescind such unlawful action.

You have posed the further question as to whether, under all the circumstances, Mr. Dole is entitled to a retirement allowance at this time. The matter of Mr. Dole's eligibility for retirement is, under the statute, a decision which rests with your board.

The questions raised by your inquiry clearly make apparent the need for remedial legislation of the sections quoted. Without reference to the specific matter involved in this opinion, in a given instance a member of the retirement system, knowing very well he was guilty of moral turpitude or misappropriation of funds of his agency, may voluntarily resign and thus procure the benefit of his retirement allowance. Certainly a member of the retirement system need not be limited to the misappropriation of funds of his own agency to forfeit his rights to retirement allowance. To do otherwise is to reward our public servants for their own wrongdoing, a distinct disservice to the Commonwealth and its agencies.

I wish to reiterate that my comments concerning the desirability of remedial legislation are of general scope and not to be applied to the specific subject matter of your request.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*An exclusive right of copying information on magnetic tapes and microfilm rolls of motor vehicle registrations for private commercial use can be sold, but only in the way permitted under rules made, or to be made, pursuant to the provisions of G.L. c. 7, § 22.*

APRIL 26, 1963.

HON. CLEMENT A. RILEY, *Registrar of Motor Vehicles.*

DEAR SIR: — You have requested an opinion as to the authority to grant to a private company, for a consideration, an exclusive right of use of certain State property described by you, for a particular use referred to.

It appears from your statements that the Registry has prepared magnetic electronic data processing tapes or microfilm rolls of information as to motor vehicle registrations. By running these tapes and films through appropriate machines, lists in numerical order of the registration numbers, names and addresses of the owners and the type of motor vehicles registered, can be prepared in duplicate. The primary reason for the preparation of such tapes and rolls is to permit the duplication, for free distribution to law enforcement agencies in connection with law enforcement, of such numerical lists of registration numbers, owners, addresses and types of motor vehicles registered.

You have stated that an outside company could so process the tapes and rolls as to prepare lists of owners of registered motor vehicles either alphabetically by owners, by geographical areas or by makes and models of cars registered; the list so prepared to be sold for commercial use. Evidently the commercial use you refer to would be the sale of such lists of owners, alphabetically, by area, or by make and model, to persons desiring to mail advertisements to the owners whose names and addresses appear thereon.

In effect, your question is whether you have the authority to sell the exclusive right for private commercial purposes of property of the Commonwealth, the use of which for public purposes has been accomplished or, at least, will not be affected by the use of the property for the use contemplated to be allowed.

Ordinarily a state official has no right to make a sale or other disposition of public property unless the authority to do so has been delegated to him by the Legislature. Under G.L. c. 7, § 22, the Commissioner of Administration is authorized, subject to the approval of the Governor and Council, to make rules and regulations which shall regulate and govern among other matters, "Disposal of obsolete, excess and unsuitable supplies, salvage and waste material *and other property* . . ." of the Commonwealth. (Emphasis supplied.)

To the extent that the use of the magnetic tapes and microfilm rolls you refer to is valuable for purposes other than the public purposes for which they were prepared, in my opinion, a grant of a right to make a use of such tapes or rolls for other than public purposes can be made, but only in the mode and to the extent that such grants may be permitted under rules and regulations made, or to be made, pursuant to the provisions of G.L. c. 7, § 22.

Very truly yours,

Edward W. Brooke, *Attorney General.*

*The Trustees of the University of Massachusetts in fixing the salary for a position of the professional staff may use salary rates appearing in the ranges for different grades in the General Salary Schedule.*

May 2, 1963.

Hon. Joseph Alecks, *State Comptroller.*

Dear Sir: — In your letter of recent date you requested from this office an opinion on the following matters relating to the post-audit of the University of Massachusetts payroll:

"1. In implementing the provisions of § 14 of c. 75 as to 'salary range within the general salary schedule', are the trustees restricted for a given title and classification to the amounts shown on one horizontal line on the general salary schedule in accordance with the above-cited definition of 'salary range' in section forty-five?

"2. If the answer to the first question is in the negative, may the trustees for a given title and classification use any amount for a minimum and any amount for a maximum, regardless of the range, so long as the amounts appear in dollars and cents somewhere on the general salary schedule?"

You point out that the trustees of the University of Massachusetts have approved classification of position titles and salary rates of the professional staff with a range of salary from minimum to maximum, which is not in precise accord with the general salary schedule as set out in c. 30, § 46, as amended.

Pursuant to answering your questions, an examination has been made of c. 30, § 46, as amended, in the light of the provisions of c. 648 of St. 1962, with particular attention to § 14 of said c. 648.

Chapter 648 of St. 1962, which substantially amended §§ 1 through 15 of c. 75 of the General Laws, confers on the trustees broad discretionary powers as to their operation of the university. On salary matters this discretion is limited to their annual appropriation and as set forth in § 14 of c. 648, the trustees shall determine "the classification, title and salary within the general salary schedule. . . ." Section 14 further authorizes the trustees: "In establishing the classification, title and salary plan for the professional staff of the university, the trustees shall give recognition to the need to establish and maintain appropriate academic ranks and titles as may be appropriate for higher education in order to provide for outstanding scholars, scientists and teachers."

In view of the above-quoted provision, as well as the authoritative and discretionary fiscal policy apparent throughout the legislative enactment, it is my opinion that the trustees, in implementing salary schedules for their staff, are not bound on a horizontal line within the general salary schedule as set forth in G.L. c. 30, § 46.

Accordingly, my answer to the first question you pose is in the negative. My answer to the second question you pose is in the affirmative.

You have, however, pointed out that the performance of your post-audit functions requires the designation of a job group and step for each salary appearing in a payroll and it is, therefore, my opinion that you may properly require the trustees to designate the job group and step within the general salary schedule at which each salary amount contained on the payroll of the university appears.

Very truly yours,

Edward W. Brooke, *Attorney General.*

*Service as a member of the Metropolitan Transit Authority by the retired president of the former Boston Elevated Railway Company, would not violate the conflict of interest statutes, or St. 1913, c. 197.*

May 2, 1963.

His Honor Francis X. Bellotti, *Lieutenant Governor of the Commonwealth.*

Dear Sir: — I have your recent request relative to the nomination of Edward Dana as Trustee of the Metropolitan Transit Authority.

You present the question:

"Whether the mere nomination and confirmation of Edward Dana, retired President of the Boston Elevated Railway Authority, creates a conflict of interest pursuant to the conflict of interest statute and/or St. 1953, c. 197."

Specifically, you have inquired as to whether the "mere nomination and confirmation" of a retired president of the Boston Elevated Railway as Trustee of the Metropolitan Transit Authority constitutes a conflict of interest under c. 779.

Please be advised that on the facts presented, nothing more appearing, the nomination and confirmation of Mr. Dana would not violate c. 779 of St. 1962.

You have raised the further question whether there is a conflict under c. 197 of St. 1953.

Section 1A of said c. 197 provides:

"Section 3 of said chapter 544 is hereby amended by striking out the third sentence and inserting in place thereof the following sentence: — They shall not be in the employ of, or own any stock in, or be in any way, directly or indirectly, pecuniarily interested in, any gas or electric company, railroad corporation, bus or street railway company."

The Metropolitan Transit Authority acquired the assets, property and franchises of the Boston Elevated Railway Company under c. 544 of St. 1947. Accordingly, the Boston Elevated Railway Company is no longer an existing street railway company within the purview of said § 1A.

The pecuniary interest intended under this section is deemed to be ownership therein. Therefore, it is my opinion that, although Mr. Dana is a retired president of the Boston Elevated Railway Company, his interest as such is not a pecuniary interest within the intent and scope of c. 197 of St. 1953.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*St. 1956 c. 718 (Accelerated Highway Program), grants discretionary authority to reimburse an owner for the cost of an ordered necessary relocation of "utility facilities." Facts which may be considered in exercising authority. Such grant of authority is a constitutional exercise of the legislative power.*

MAY 3, 1963.

HON. JACK P. RICCIARDI, *Commissioner of Public Works.*

DEAR SIR: — In connection with the subject of Reimbursement of Utility Relocation Costs under Chapter 718 of Acts of 1956, you have asked for my opinion on two specific question:

"1. Does the Commonwealth of Massachusetts have the power under existing statutes to reimburse public utility companies, whether owned municipally or privately, for relocation of utility facilities which have been installed in highway locations pursuant to a governmental permit, even though the Commonwealth has no liability at common law?

"2. Is that portion of c. 718 of St. 1956, which authorizes the Commonwealth to reimburse public utilities for facility relocation made under Federal, Primary, Secondary, or Interstate Highway Systems, constitutional under the Massachusetts Constitution?"

In the letter submitting the two questions stated above, you incorporated by reference and requested that cognizance be taken in my opinion of the following quotation from the letter of the Bureau of Public Roads to E. J. McCarthy, Chief Engineer of your department, dated October 15, 1962:

"This office will accept a decision of the court of last resort of Massachusetts or an opinion of the State Attorney General establishing the validity of the subject law and of the policy of the Department of Public Works announced pursuant thereto. The opinion must be well reasoned and take into account such constitutional issues as (1) the lending of the State's credit, (2) the impairment of the obligation of contract, and (3) the grant of special privilege or franchise. Accordingly, we recommend that you inform the State Department of Public Works of our policy and suggest that it either obtain an opinion of the Attorney General of Massachusetts or secure a decision of the highest court of the State before we decide whether Federal funds could participate in utility relocation costs."

By custom and tradition public utilities have been permitted to use State, County, City and Town highways and rights of way for installation of transmission facilities. Statutory authority for such licenses is contained in § 7D of c. 81 of the General Laws of the Commonwealth.

Authorization to make use of a part of the highway for utility facilities has never been considered to create a property right or any estate or interest in the land occupied. It has been consistently construed as a license to use a public easement. *Springfield vs. Springfield Ry. Co., 182 Mass. 41; Lorain Steel Co. v. Norfolk Electric St. Ry Co., 187 Mass. 500.* If some other public need requires the removal or alteration of utility facilities installed under such a license it is well settled that such removal or alteration does not constitute a taking or damaging of property which requires payment or compensation by the public authority responsible for the highway. *Dudley v. Jamaica Pond Aqueduct, 100 Mass. 183; Natick Gas Light Co. v. Natick, 175 Mass. 246; N. E. Tel. & Tel. Co. v. Boston Terminal Co., 182 Mass. 397; Boston Electric Light Co. v. Boston Terminal Co., 184 Mass. 566.*

Under the common law of the Commonwealth there is no question but that public utilities must bear the cost of removing or altering any facilities which they may have installed by license under, on, or over public highways and roads. (See unpublished opinion of Assistant Attorney General Joseph H. Elcock, Jr. to H. G. Gray, Chief Engineer of the Department of Public Works, under date of July 15, 1954. This was reaffirmed in an unpublished opinion of Assistant Attorney General John E. Sullivan to the Commissioner of Public Works under date of February 15, 1963.)

The questions propounded raise the issue of whether or not certain provisions of c. 718 of St. 1956 either alter or supplement existing common law of the Commonwealth.

Chapter 718 of St. 1956 was enacted by the General Court to permit the Commonwealth to participate in the benefits of the Federal-Aid Highway Act enacted by the Congress of the United States in 1950. 23 U.S.C.A. § 151 et seq.

In the second paragraph of § 1 of said c. 718 the General Court directed the Department of Public Works and the Metropolitan District Commission to accept any Federal funds available by use of the following language:

"The department and the commission shall accept any federal funds available for such projects, and such federal funds when received shall be credited to the Highway Fund. . . ."

Section 1 of c. 718 of St. 1956 also provides in paragraph 3:

"Whenever the department or the commission shall determine it is necessary that any 'utility facilities' as referred to in section one hundred and eleven of the federal highway act of nineteen hundred and fifty-six, enacted by Congress as Public Law six hundred and twenty-seven, or as hereafter amended, be relocated because of the construction of a project on the federal aid primary or secondary systems or on the national system of interstate highways, including extensions thereof within urban areas, such facilities shall be rolcated by the owner thereof in accordance with the order of said department or commission; provided however, that the commonwealth may reimburse the owner of such utility facilities for the 'Cost of Relocation' as such cost is defined in said act."

As stated in letter of this department to you of February 15, 1963, it is my opinion that Chapter 718 of St. 1956 does not alter the common law of the Commonwealth on the issues covered by this opinion.

However, it is clear that c. 718 of St. 1956 was enacted by the General Court to provide statutory authority for Commonwealth acceptance of and maximum participation in the Federal Highway program by the inclusion of language directing that the Department of Public Works and the Metropolitan District Commission "shall accept any federal funds available."

The General Court is presumed to know the common law of the Commonwealth prohibiting compensation of public utilities for relocation costs as a matter of property right. However, it is not to be assumed that the General Court included the third paragraph in § 1 of c. 718 of St. 1956 for no reason. The General Court is presumed to understand and intend all consequences of its own measures. *Spaulding v. McConnell, 307 Mass. 144.*

It is my opinion that the General Court has given permission to the Commissioners of the Department of Public Works and the Metropolitan District Commission to compensate public utilities for relocation costs when said commissioners, in their discretion, consider such compensation to be in the public interest. However, it is significant that the General Court made the payment of such costs discretionary and not mandatory.

In the exercise of their discretion certain related facts may well be useful to the commissioners. First would be the methods by which public utilities compute their costs to support their rates. In this connection any payment to any utility under the authority granted by c. 718 of St. 1956 could be made only on the condition that the recipient utility warrant that such cost of relocation would never be included in any costs used to support rates. Copies of such agreements

and the amounts paid for specific relocation work should be sent to the Department of Public Utilities for information and file.

In addition the commissioners might well take cognizance of the three distinct highway systems included in the Federal Highway Act of 1956, as amended. They are the primary, secondary and inter-state systems. The Federal share of work done on primary and secondary systems shall not exceed fifty percent (50%) of the cost. *U.S.C.A. Title 23, Section 120 (a).* Payment of relocation costs to utilities in primary and secondary systems would decrease the amount of funds available for actual highway construction by at least one-half of the cost of relocation. Under those circumstances the commissioners may determine that payment of relocation costs is not in the public interest. However, the Federal reimbursement to the Commonwealth for work on the inter-state system is ninety percent (90%) of its cost. Under those circumstances the commissioners may consider the public interest to be best served by the payment of utility relocation costs because the Commonwealth would pay only ten percent (10%) thereof.

Statutory conditions are attached to the exercise of the discretionary authority of the commissioners to pay utility relocation costs. The commissioners must determine that any relocaion of utility facilities, as defined in the Federal Highway Act of 1956, is necessary. Reimbursement of the "cost of relocation" may be made only if the cost meets the definition contained in the Federal Highway Act of 1956. To be eligible for reimbursement, the relocation of utility facilities must have been ordered by either the Department of Public Works or by the Metropolitan District Commission.

For the purposes of the exercise of the discretionary authority to reimburse utilities for relocation costs the Federal Highway Act of 1956 in Section 123 (b) defines the word "utility" to include "publicly, privately and cooperatively owned utilities." This opinion is therefore equally applicable to privately, cooperatively and municipally-owned utilities.

The paragraph in the Bureau of Public Roads' letter of October 15, 1962, to which you invite my attention in connection with this opinion, among other things raises constitutional questions. The provisions of the Constitution of the Commonwealth which might be involved are contained in Art. LXII, Section 1, and Art. LXXVIII of the Amendments.

Article LXII, Section 1 of the Amendments to the Constitution of the Commonwealth provides:

"The credit of the commonwealth shall not in any manner be given or loaned to or in aid of any individual, or of any private association, or of any corporation which is privately owned and managed."

When considering Art. LXII, Section 1 of the Amendments to the Constitution, the Supreme Judicial Court has consistently held that an appropriation of funds to a private corporation or individual is valid when the money is to be spent for a public purpose. *Opinion of the Justices, 337 Mass. 800* (private railroad); *Boston v. Treasurer & Receiver General, 237 Mass. 403* (Boston Elevated Railway); *Opinion of the Jutsices, 320 Mass. 773* (Veterans' Housing); *Opinion of the Justices, 334 Mass. 721* (Mass. Port Authority); *McLean v. City of Botson,*

*327 Mass. 118; Allydonn Realty Corp. v. Holyoke Housing Authority, 304 Mass. 288.*

It is my opinion that the services rendered by public utilities are of a public nature as defined in the above-cited cases. Those services are accessible to all and are necessary to the public health, welfare and safety. Any payment made to utilities for necessary relocation costs incidental to the construction of an interstate highway would be payment for a public purpose. Chapter 718 of St. 1956, Section 1, paragraph 3 does not conflict with the provisions of Art. LXII, Section 1, of the Amendments to the Constitution of the Commonwealth.

Article LXXVIII of the Amendments to the Constitution of the Commonwealth, provides:

"No revenue from fees, duties, excises or license taxes relating to registration, operation or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than cost of administration of laws providing for such revenue, making of refunds and adjustments in relation thereto, payment of highway obligations, or cost of construction, reconstruction, maintenance and repair of public highways and bridges and of the enforcement of state traffic laws. . . ."

The issue raised by Art. LXXVIII of the Amendments to the Constitution of the Commonwealth as it relates to c. 718 of St. 1956 is whether or not the removal or relocation of utility facilities is properly included within the words ". . . cost of construction, reconstruction, maintenance, and repair of public highways and bridges. . . ."

Land taken for highways is taken not only for the passage of travelers but also for the transmission of intelligence between the points connected. Every such taking has for its object the procurement of an easement for the public. The incidental powers of the sovereign in connection therewith must be construed so as to most effectually secure for the public full enjoyment of such easement. *Commonwealth v. Temple, 14 Gray 69.* Although water or gas or other public services might be provided by private companies formed for the purpose, there has never been any doubt of the authority of the General Court to permit the use of highways for the location of gas, water or sewerage pipe subject to public regulation. *Commonwealth v. Lowell Gas Light Co., 12 Allen 75; Attorney General v. Metropolitan Railroad, 125 Mass. 515.* It is well-established in the law of the Commonwealth that the installation of public utility facilities in a public way is within the scope of the public easement taken for highway purposes. Many other jurisdictions concur. *101 N.H. 527; Northwestern Bell Tel Co. v. Wentz 103 N.W. 2d 245* (North Dakota); *State v. City of Austin, 160 Texas 348, 371 S.W. 2d 737; State v. Lavender, 365 P 2d 652* (New Mexico); *Edge v. Brice 113 N.W. 2d 755* (Iowa); *Minn. Gas Co. v. Zimmerman 91 N.W. 2d 642* (Minnesota).

It is to be noted that Art. LXXVIII of the Amendments to the Constitution of the Commonwealth neither specifically defines nor restricts ". . . cost of construction or reconstruction. . . ." Construction of a modern interstate highway encompasses matters which probably would not have been included in the construction of a country road fifty or even twenty-five years ago. Reason dictates that the proceeds of the highway fund may be expended for whatever is reasonably neces-

sary to accomplish all of the basic purposes for which a highway exists. In addition, every presumption is in favor of validity of a statute enacted by the General Court unless it is unmistakably unconstitutional. *Salisbury Land & Improvement Co.* v. *Commonwealth,* 215 Mass. 371; *Worcester County National Bank* v. *Commissioner of Banks,* 340 Mass. 695.

The language of the Federal Highway program makes it clear that the Congress of the United States recognizes that the relocation of public utility facilities is a part of highway construction.

It is my opinion that the costs of the relocation of utility facilities are included within the words ". . . costs of construction, reconstruction, maintenance and repair of public highways . . ." as they are used in Art. LXXVIII of the Amendments to the Constitution of the Commonwealth.

It is my opinion that c. 718 of St. 1956 of the General Court complies with the requirement of Art. LXXVIII of the Amendments to the Constitution of the commonwealth when it states ". . . (revenue) shall be expended by the commonwealth . . . for said highway purposes only and in such manner as the general court may direct. . . ."

In summary, it is my opinion that the provisions of c. 718 of St. 1956, examined herein, are not in conflict with any applicable provisions of the Constitution of the Commonwealth of Massachusetts.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*G.L. c. 112, s. 73E, limits a license as a dispensing optician to a citizen; one who has filed a declaration of intent to become a citizen does not qualify.*

MAY 7, 1963.

MRS. HELEN C. SULLIVAN, *Director of Registration.*

DEAR MADAM: — I am in receipt of your recent letter in which you make reference to c. 112, § 73E. You state that under § 73E "Application for registration as a dispensing optician may be made by any citizen. . . ."

In view of the foregoing you request my opinion as to whether an applicant for registration as a dispensing optician, having filed a "Declaration of Intent" to become a citizen of the United States, would be eligible for examination.

The law has been well-established that each word of a statute is to be accorded its appropriate weight and none of the words of a particular statute is to be rejected as surplusage, nor is any to be given undue emphasis. Each word is to be accorded the appropriate weight and meaning which the context and an examination of the statute as a whole indicate the framers of the statute intended it to have. More particularly, since § 73E is a statute penal in nature, carrying criminal sanctions for its violation, it must be strictly construed and matters which are not clearly included cannot be brought within its operation by construction, nor intended by implication.

*Libby* v. *N.Y. N.H. & H. R.R.,* 273 Mass. 522.
*Beloin* v. *Bullett,* 310 Mass. 206.

*Tilton* v. *City of Haverhill,* 311 Mass. 572.
*Commissioner of Corp. & Taxation* v. *Assessors of Boston,* 324 Mass. 32.

The statute to which you refer permits the filing of an application only by a citizen who meets the age requirement, the experience or training requirement and who pays the required fee. Only when all of these conditions have been met is the applicant in a position to take the examination. A "Declaration of Intent" to become a citizen does not fulfill these requirements. To cite one reason, although a declaration is filed, there is no certainty that the applicant will ever become a citizen.

In view of the foregoing, I am compelled to answer your question in the negative.

Very truly yours,

Edward W. Brooke, *Attorney General.*

*Sittings of the Second District Court of Plymouth should be held only at Hingham after thirty days from the date of approval of St. 1963, c. 198.*

May 8, 1963.

Hon. Alvin C. Tamkin, *Presiding Justice, Second District Court of Plymouth.*

Dear Sir: — You have requested my opinion as to the date upon which St. 1963, c. 198, which was approved on April 1st, 1963, took effect and specifically whether it took effect thirty days after or whether it takes effect ninety days after said April 1, 1963.

Acts of 1963, c. 198, amended G.L. c. 218, § 1 by striking out the first paragraph under the caption *Plymouth* and inserting in place thereof the following paragraph:

"The second district court of Plymouth, held at Hingham; Abington, Hingham, Whitman, Rockland, Hull, Hanover, Scituate, Norwell and Hanson."

Prior to the above amendment the said paragraph read as follows:

"The second district court of Plymouth, held at Abington and Hingham; Abington, Hingham, Whitman, Rockland, Hull, Hanover, Scituate, Norwell and Hanson."

The effect of the 1963 amendment was to provide that the sittings of the Second District Court of Plymouth be held only at Hingham rather than as was previously provided at both Hingham and Abington.

Under the provisions of G.L. c. 4, § 1, a statute which may not be made the subject of a referendum petition for which a different time of taking effect is not therein expressly provided and which is not declared therein to be an emergency law, shall take effect on the thirtieth day after the earliest day on which it has the force of law. Article XLVIII of the Articles of Amendment to the Constitution of the Commonwealth, pt. III, The Referendum, § 2 — "Excluded matters" provides that "No law that relates . . . to the powers, creation or aboli-

tion of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; . . . shall be the subject of a referendum petition."

In VIII Op. Atty. Gen. 331, the Attorney General considered a statute containing two sections. The first section authorized the appointment of a Fourth Assistant Register of Probate for the County of Middlesex and fixed his tenure at three years. The second section made a provision for the salaries of Fourth Assistant Registers of Probate generally.

The Attorney General ruled that the provision of the first section of the Act authorizing the appointment of a Fourth Register of Probate for the County of Middlesex clearly dealt with the powers of the courts and if it stood alone would be excluded from the referendum. The Attorney General also ruled that:

"The whole of section 1, if it stood alone, would be excluded from the operation of the referendum for the reason that its operation is restricted to a particular political division of the Commonwealth, namely, Middlesex County."

In the case of *Commonwealth* v. *Handren*, 261 Mass. 294, the Court considered the validity of sittings of the Superior Court for the County of Middlesex, which are referred to in the following quotation containing the rulings of the Court (261 Mass. 294, at 298 and 299):

". . . The time and place prescribed by G.L. c. 212, § 14, for the civil and criminal sittings of the Superior Court for the county of Middlesex, as also for the county of Norfolk, are essential constituents for the organization of that court; and sittings cannot be held elsewhere, unless provisions for sittings in other places is provided by statute. G.L. c. 34, § 3. G.L. c. 212, § 21. G.L. c. 220. St. 1927, c. 306. *Greenwood* v. *Bradford*, 128 Mass. 296. *McArthur Brothers Co.* v. *Commonwealth*, 197 Mass. 137. *Catheron* v. *County of Suffolk*, 227 Mass. 598, 602. In re Allison, 13 Col. 525. *Hobart* v. *Hobart*, 45 Iowa, 501. *Carter* v. *State*, 100 Mass. 342. *Adams* v. *State, supra.*

"The judge in the case at bar was without authority to adjourn the court from the place in Middlesex County prescribed by law to any place in another county or to a different place than that prescribed in Middlesex County, and the sittings held in Brookline and in Watertown were consequently null and void. . . ."

There is, as appears from the rulings of the Attorney General referred to above, a strong basis for the conclusion that St. 1963, c. 198, is excluded from the Referendum for the reason that its provisions relate to the powers of the courts and also for the conclusion that the operation of its provisions is restricted to a particular town, city or other political division, or to a particular district or locality of the Commonwealth, and, therefore, that it took effect thirty days after its effective date.

In view of the decision in the *Handren* case, there is a serious question whether sittings of the Second District Court of Plymouth may lawfully be held in Abington after the effective date of the amendment made by St. 1963, c. 198.

Under the circumstances, in order to preclude anyone from raising

a question as to the validity of any action taken by the Second District Court of Plymouth on the ground that it was taken at a sitting of the Court held in a place other than Hingham, on a date more than thirty days after the approval date of St. 1963, c. 198, it is my view, and I so advise you, that future sittings of the Court should be held only at Hingham.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The amount to be expended by the Southeastern Massachusetts Technological Institute for "educational planning" is limited, by the amendments to its enabling act, to $40,000.*

MAY 8, 1963.

HON. WILLIAM A. WALDRON, *Commissioner of Administration.*

DEAR SIR: — I have your request of April 3, 1963 for an opinion relative to the expenditure of appropriated funds for the Southeastern Massachusetts Technological Institute.

The Institute was established under Chapter 543 of St. 1960, now c. 75B of the Massachusetts General Laws. Under this statute the board of trustees was authorized to acquire a site and award construction contracts necessary for the carrying on of the work of the Institute. The sections of c. 543 of St. 1960 pertinent to this matter are as follows:

"*Section 4.* All receipts from student activities shall be retained by the trustees in a revolving fund or funds and shall be expended as the trustees shall direct in furthering the activities from which the receipts were derived; provided, that the foregoing shall not authorize any action in contravention of the requirements of section 1 of Article LXIII of the Amendments to the Constitution. The said fund or funds shall be subject to annual audit by the state auditor.

"*Section 5.* A complete accounting of receipts and expenditures shall be made to the governor annually. Monthly statements of receipts and expenditures shall be made to the comptroller by the president or his designated alternate, who shall keep complete records and files of payrolls and bills in his office. The term 'receipts' as herein used shall include all federal grants received by the trustees."

The planning and actual construction of the Southeastern Massachusetts Technological Institute could not have been started without funds. The Legislature provided the necessary funds and specified in the appropriation statute the specific purposes for which the money should be spent.

*St. 1960, c. 774, § 2, Item 8261-03.*

"For the acquisition of a site for the Southeastern Massachusetts Technological Institute, authorized by chapter five hundred and forty-three of the acts of the current year, by purchase or by eminent domain under chapter seventy-nine of the General Laws; provided, that no payment shall be made for the purchase of said site until an independent appraisal of the value of said site has been made by a qualified, disinterested appraiser; and for the preparation of plans for classroom and other buildings to be erected on said site. $1,500,000.00."

Closely allied with the problem of what buildings are needed, is the further matter of the purpose for which the buildings are to be used. In order to ascertain this, a curriculum must be devised and the building tailored to implement this program. Some educational planning must then necessarily precede the actual construction. The Legislature was not unmindful of this fact. They specifically earmarked a part of the original appropriation for this purpose.

*Chapter 185 of St. 1961.*

*"Whereas,* The deferred operation of this act would tend to defeat its purpose, which is to provide funds forthwith for the preparation of educational plans for the Southeastern Massachusetts Technological Institute, therefore, it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

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

Item 8261-03 of section 2 of chapter 774 of the acts of 1960 is hereby amended by adding after the word 'site,' in line 9, the following words: — ; and, provided further, that a sum not to exceed ten thousand dollars may be expended for the preparation of educational plans for said institute."

In 1962 the Legislature considered this matter further and increased the amount which would be expended for the "preparation of educational plans."

*St. 1962, c. 649, § 2, Item 8261-03.*

"Item 8261-03 of section two of chapter seven hundred and seventy-four of the acts of nineteen hundred and sixty, as amended by chapter one hundred and eighty-five of the acts of nineteen hundred and sixty-one, is hereby further amended by striking out the word 'ten' and inserting in place thereof the word: — forty."

In light of the action taken by the Legislature specifically designating those funds which can be spent for "educational planning," it is my opinion that no more than $40,000 may, without further legislative action, be expended for "the planning of educational specifications, program development and necessary expenses, both personnel and material, connected with such planning."

The scope of the enabling act, c. 543 of St. 1960, indicates a legislative intent to give the trustees broad authority in establishing all phases of the Southeastern Massachusetts Technological Institute. Were it not for the legislative amendments in 1961 and 1962 above quoted, the interpretation of the Legislature's intent in adopting the enabling act could well be deemed to include expenditures for educational planning. In this regard I think it appropriate to suggest that, in order to obviate the necessity of a succession of legislative amendments to provide funds for educational planning, c. 543 of St. 1960 be amended with language sufficient in form to allow the trustees more flexibility in the area of educational planning.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*A school committee electing to provide instruction for speech handicapped or hard of hearing, children, must do so for private as well as public school children. The Department of Education may regulate the granting of priorities for instruction; and an aggrieved parent, or the Department, may bring proceedings to enforce equal instruction.*

May 10, 1963.

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

Dear Sir: — In your letter of recent date you refer to the following questions that have been posed by a school committee of one of the towns relative to certain responsibilities of a school committee that intends to furnish a program under G.L. c. 69, § 29:

*"First:* If a school committee sees fit to put in a program under § 29, must it also provide instruction for residents of a town who attend private schools in the town?

*"Second:* If a public school system, through the school committee, decided to offer services to private school pupils but found itself unable to do so by reason of an excessive number of pupils within its own system needing speech help, is it the privilege of the school administration to determine the priority of treatment?

*"Third:* If a public school system did not choose to accept any responsibility for providing speech therapy to private school students, could it be forced to do so? If so, by whom?"

You state that your department has an interest in the matter because it administers c. 69, §§ 29 and 29B, and that you therefore seek an opinion on the questions raised.

The enactment of G.L. c. 69, § 29 permitted school committees to provide special instruction periods for any child who is speech handicapped or hard of hearing and in attendance at any public or private school, said instruction to be in a place under the control of the particular school committee, union, or district. The statute further provides that such instruction shall be in addition to the regular school instruction and shall be subject to such regulation as may be prescribed by the department.

I believe it is in order to examine the language of our Supreme Court in the case of *Quinn v. School Committee of Plymouth,* 332 Mass. 410, at 412. There, our Court interpreted G.L. c. 76, § 1 as a mandatory act, enacted by the Legislature with the intention that transportation be made available to school children in attendance at private schools to the same extent as a school committee, within its statutory powers, made transportation available to children in public schools. The Court said: "The question is not what the committee can be made to do. The requirement imposed is that there be no discrimination against private school children in what the committee in its discretion decides to do."

While it is true that the cited case concerns itself wtih the transportation of school children, we must, to a great extent, rely on the inference that is to be gained from the language used by the Court. It may well be argued that the wording of G.L. c. 69, § 29 is permissive rather than mandatory; but it would nevertheless seem that once such a course is inaugurated by a school committee, it should be offered

to the community as a whole. The incident of attendance at a private school is not a factor here, no more than it was in the *Quinn* case. True, the enabling language is different in the particular statutes that are involved, but once established, the course of instruction should be made available to both public and private school children, always, of course, subject to such regulations as may be prescribed by your department. This would necessarily involve various criteria of need, standards, and the like.

The answer to your first question, therefore, is in the affirmative; to your second question, in the negative, except within the purview of such rules and regulations as the Department of Education may prescribe; to your third question, the answer is in the affirmative and any person claiming to be aggrieved and who is a resident of the particular town may bring appropriate proceedings in this regard. Of course, your own department is in a position at all times to question the school committee's action in this respect.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The only records of the Board of Pharmacy which are made public records are those specified in G.L. c. 112, s. 25.*

*May 12, 1963*

MR. LOUIS J. ROSSETTI, *Secretary, Board of Registration in Pharmacy.*

DEAR SIR: — You have requested my opinion on your obligation to comply with a request received by your board from one Cal Brumley, New England News Manager, The Wall Street Journal. Mr. Brumley's request was set forth as follows in his letter dated April 30, 1963, a copy of which letter accompanied your request for the instant opinon:

"Specifically, I request access to the Board's records of applications for licenses to open new drug stores or pharmacies in the Commonwealth of Massachusetts, the records pertaining to the disposition of these applications, whether they are granted, denied or held in abeyance, records of reapplication and the disposition of these applications."

Such records as you are required by some specific statute to keep, receive for filing, or upon which you are required to make an entry are open to public inspection. VII Op. Atty. Gen. 8.

General Laws c. 112, § 25, provides:

"The board shall keep a record of the names of all persons examined and registered by it, of all persons to whom permits are issued under section thirty-nine, and of all money received and disbursed by it, and a duplicate thereof shall be open to public inspection in the office of the state secretary. The board shall make an annual report of the condition of pharmacy in the commonwealth."

I am therefore of the opinion that only the specific records referred to in the above-quoted paragraph are open to the inspection of the general public; representatives of the press stand upon the same footing as the general public. VII Op. Atty. Gen. 8.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The State Department of Public Works is not authorized to expend funds for furnishing advisory relocation assistance, not involving financial payments, to persons dislocated.*

*May 13, 1963.*

Hon. Jack P. Ricciardi, *Commissioner of Public Works.*

*Re: Relocation Assistance Payments by the Department of Public Works*

Dear Sir: — You have asked for my opinion on the following questions concerning Relocation Assistance Payments by the Department of Public Works:

"1. Has the Department of Public Works the right under the existing laws of the Commonwealth to expend funds for carrying out relocation assistance which did not include any financial payments to persons dislocated, but was advisory in nature and might require hiring a local office?

"2. Has the Department of Public Works a present right to enter into an agreement with a local agency to perform relocation assistance services on behalf of the department?"

In reply to your first question it is my opinion that under the present laws of the Commonwealth no authority for the expenditure of funds for such assistance exists.

In reply to your second question it is my opinion that under the present laws of the Commonwealth no authority for such an expenditure exists.

Chapter 81 of the General Laws of Massachusetts establishes the authority of the Department of Public Works in connection with State Highway Programs. Section 7 of said c. 81 provides in part:

"When injury has been caused to the real estate of any person by the laying out or alteration of a state highway, he may recover compensation therefor from the commonwealth under Chapter seventy-nine. . . ."

The concept of damages set forth in c. 79 of the General Laws of the Commonwealth neither envisions nor provides for relocation assistance. The few cases in this area indicate a strict and narrow interpretation by the Supreme Judicial Court of the authority of the Department of Public Works. The Court has held that no activity is permissible unless it has been specifically authorized by the General Court. *Boston, Worcester & N.Y. Street Railway v. Commonwealth, 301 Mass. 283 (1938); George A. Fuller Co. v. Commonwealth, 303 Mass. 216 (1939).*

The Federal-Aid Highway Act of 1962 provides for Federal reimbursement to those states that furnish relocation assistance in connection with their Federally-aided highway construction projects. However, the Federal Government may not require a state to make relocation payments where such payments are not authorized by state law. (Federal-Aid Highway Act of 1962, Sections 133 (b) and (c)).

As indicated above, it is my opinion that payments for that purpose are not authorized by present Massachusetts Law. Several bills are pending before the General Court which propose to authorize relocation assistance in connection with Federally-aided highway construction projects in Massachusetts. Until such legislation is enacted the laws of the

Commonwealth dealing with this subject will remain as stated herein even though relocation assistance is available in Federally-aided urban renewal projects.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The bidding procedures under G.L. c, 149, 44A, are applicable only to the construction of public buildings alone, and do not apply as to certain buildings to be constructed by the Metropolitan District Commission under St. 1957, c. 647, for a dam across the Mystic River.*

MAY 13, 1963.

HON. ROBERT F. MURPHY, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — You have requested an opinion as to whether or not the proposed work by the Metropolitan District Commission as authorized by St. 1957, c. 647, constitutes a "public building" within the meaning of G.L. c. 149, § 44A. so that the sixty-day bid period as contemplated by the present contract documents may be utilized.

The pertinent portions of said c. 647 provide as follows:

"Section 1. The metropolitan district commission, hereinafter called the commission, is hereby authorized and directed to construct, maintain and operate a dam with locks, drawbridge if needed, works and appurtenances across the Mystic river in the cities of Everett and Somerville, for the purpose of maintaining in said river and in the Malden river above said dam a substantially permanent water level, and a storage area to provide control of waters for flood relief purposes."

General Laws, c. 149, § 44A provides in part as follows:

"Every contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building by the commonwealth or by any governmental unit thereof, estimated to cost more than five thousand dollars in the case of the commonwealth, and more than two thousand dollars in the case of any governmental unit thereof, shall be awarded to the lowest responsible and eligible general bidder on the basis of competitive bids in accordance with the procedure set forth in the provisions of sections forty-four B to forty-four L, inclusive."

Chapter 647, as referred to above, authorizes the commission to construct a dam with its necessary appurtenances. The proposed contract for this work envisions construction of certain structures for employees maintaining and operating the facilities, the cost of which is estimated at two per cent to four per cent of the total cost of about six million dollars for the entire project. The buildings involved would be incidental to the work performed and the cost involved in proportion is a small part of the contemplated project.

Section 44A, as referred to above, specifically refers to and contemplates the construction of a "public building". The Legislature, in enacting this section, in my opinion, demonstrated an intent that it apply to the construction of public buildings alone. See *Deary* v. *Town of Dudley,*

343 Mass. 192, which held that this section could not be extended to cover a sewer project.

On the same subject, the Court, in the case of *Pacella* v. *Metropolitan District Commission,* 339 Mass. 338, stated at 346:

"It is not for us, however, . . . to impose rigid standards and requirements which the Legislature has not seen fit . . . to impose . . . and which the legislative history suggests may have been intentionally omitted."

It would seem to me, therefore, that to stretch § 44A to fit the contract in question would be imposing rigid standards that the Legislature has not seen fit to impose.

In the case of *Nowell* v. *Boston Academy of Notre Dame,* 130 Mass. 209, the Court made it clear that any "structure" did not fit the definition of a "building."

From an examination of the statutes involved and the facts that you have submitted, it is my opinion that it was the intention of the Legislature that this project as a whole, as contemplated by c. 647 of St. 1957, was one of a public work rather than a public building, does not literally fall within the purview of G.L. c. 149, § 44A, is not governed by said statute, and the thirty-day period is not applicable.

Very truly yours,

Edward W. Brooke, *Attorney General.*

*The Chairman of the State Housing Board being under indictment for for alleged misconduct in office, the Governor may suspend him and appoint a temporary Chairman who may exercise all the powers of the Chairman.*

*May 15, 1963.*

His Excellency Endicott Peabody, *Governor of the Commonwealth.*

Dear Sir: — I have your request dated May 14, 1963 for my opinion relative to the following:

"(1) Whether you have the power under c. 798 of St. 1962 to suspend the present Chairman of the State Housing Board, as Chairman and member while he is under indictment for alleged misconduct.

"(2) Whether or not the person appointed by you in his stead would possess the authority and powers of the chairman of the State Housing Board and, in particular, those powers set forth in c. 121, § 26 NN of the General Laws.

The State Housing Board was established by c. 260 of St. 1948, and thereafter has been amended in 1949, 1954 and 1960. The act, as amended, is now found as c. 6, § 64 of the General Laws. This section in part provides: "Any vacancy shall be filled in the manner aforesaid (appointment by you with the advice and consent of the Council) for the remainder of the unexpired term. Any vacancy therein shall not impair its powers nor affect its duties."

Accordingly, should you suspend the chairman of the State Housing Board, you have the power and authority, with the advice and consent of the Council, to appoint a chairman in his stead.

Chapter 798 St. 1962, now c. 30, § 59 of the General Laws, provides in part that:

"The appointing authority of any department of the commonwealth, or of any board, commission or agency thereof, in which a person is employed may suspend such person during any period during which said person is under indictment for misconduct in his office or employment of the commonwealth. Notice of said suspension shall be given in writing in hand to said person, and the receipt thereof shall automatically suspend the authority of said person until he is notified, in like manner, that his suspension is removed."

Said chapter further provides:

". . . During the period of any such suspension, the appointing authority may fill the position of the suspended employee on a temporary basis."

Therefore, since the present chairman is under indictment for alleged misconduct in office, you have the power and authority under c. 798 of St. 1962 to suspend him and to fill the position on a temporary basis. In respect to the authority of your appointee filling this position on a temporary basis, it is my opinion that such appointee has all the authority and power vested in the permanent chairman of the State Housing Board. The Legislature clearly provided for continuity in this office in stating in § 64 of c. 6 that, "Any vacancy therein shall not impair its powers nor affect its duties." The acts of the State Housing Board, acting by and through its chairman, have been dealt with in the case of *Bowker* v. *Worcester,* 334 Mass. 422.

It is my opinion that the chairman, as provided by statute, be he temporary or permanent, has the powers and duties as set forth in § 64 of c. 6, and as more particularly set forth in § 26 NN of c. 121.

In summation, I conclude that under c. 798 of St. 1962 you do have the power to suspend the chairman of the State Housing Board, and that your temporary appointee in his stead may properly exercise all the powers of the chairman of the State Housing Board as provided in c. 121, § 26 NN of the General Laws.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The Comptroller has authority to require affidavits and certifications on accounts or demands against the Commonwealth by contractors on public works regardless of any contract provisions.*

*May 15, 1963.*

HON. JACK P. RICCIARDI, *Commissioner of Public Works.*

DEAR SIR: — In your recent letter, you requested advice as to whether or not the John F. White Contracting Company is required, on its estimates submitted to the Comptroller for work done on contracts executed prior to July 17, 1962, with your department to submit a signed affidavit that the work specified in partial payment estimates has been performed.

Chapter 7, § 13 of the General Laws provides, in part, as follows:

"The comptroller shall examine all accounts and demands against the commonwealth. . . . He may require affidavits that articles have been furnished, services rendered and obligations incurred, as claimed."

Section 16 of the said chapter has the following provision:

"The comptroller shall design and install an accounting system for the commonwealth and prescribe the requisite forms and books of account to be used by each department, office, commission and institution of the commonwealth. No form or book of account other than that prescribed as aforesaid shall be used without the approval of the comptroller. He may revise such forms, books or system from time to time. He shall prepare and distribute a book of instructions covering the use and application of said accounting system for the guidance of the various departments, offices, commissions and institutions of the commonwealth."

I might add also that there are other applicable statutes which provide the comptroller with ample authority to require affidavits or certificates in situations of this sort.

The foregoing statutes were in effect when the contract in question was signed. It is, therefore, true that John F. White Contracting Company is held to the knowledge of and is bound by the statutes in effect at the time that it signed this contract. The argument of the contractor that he need only comply with certain sections of your Standard Specifications to obtain periodic partial payments does not in any way limit the powers of the Comptroller nor does it in any way pretend to limit the powers of the Comptroller to specify forms that he might require to authorize periodic payment. The specifications of the contract merely set forth the procedure to be followed between your department and the contractor and these specifications do nat supersede statutes governing public construction contracts.

In conclusion, it is my opinion that by signing a contract with the Commonwealth, the John F. White Contracting Company submitted itself to the clearly defined authority of the Comptroller to require affidavits or certification of all "accounts and demands" against the Commonwealth.

Very truly yours,

Edward W. Brooke, *Attorney General.*

*No person may, without the approval of the Art Commission, assert any control, or interfere with, the custody and care of historical relics or works of art in the State House.*

*May 20, 1963*

Mr. Joseph A. Coletti, *Chairman Massachusetts Art Commission.*

Dear Sir: — In a recent letter you have asked my opinion on the following:

"Your opinion is requested as to whether or not any individual has the right to remove, repair, change, arrange, or assert any control over or interfere with the custody and care of any of the historical relics or works of art as defined in Section 20, that are in the State House, without the express permission and approval of the Art Commission for the Commonwealth, or an order of a court of competent jurisdiction."

The powers and duties of the Art Commission are set forth G.L. c. 6, § 20. The last paragraph of said section, as inserted by c. 242 of St. 1924,

reads as follows: "Said commission shall have the custody and care of all historical relics in the state house, and of all works of art, as herein defined, erected or maintained therein."

According to the words "custody and care" in their usual and natural sense, pursuant to long-established guides of statutory construction, I answer your question in the negative.

Works of art are defined in said section 20 as ". . . any painting, portrait, mural decoration, stained glass, statue, bas-relief, ornament, fountain or any other article or structure of a permanent character intended for decoration or commemoration."

The foregoing opinion is buttressed by consideration of the purposes of adoption of the said last paragraph of said § 20 by c. 242 of St. 1924 (the statute prior thereto giving the Art Commission advisory powers only), which purposes were set forth in an address of the then Governor, Channing H. Cox, as follows:

"The Commonwealth is fortunate in the possession of many fine portraits and priceless relics. Some of these are in the Executive Chamber, some in the Senate reading and reception rooms, while others are in different places about the building. From time to time it has become necessary to clean or treat the portraits and to rearrange the relics. It is doubtful if any one has authority to act in such cases, although they have been usually referred to the Governor for decision. It is clear that the responsibility for proper care of these valuable portraits and memorials be definitely fixed. I therefore recommend legislation giving their custody to a commission composed of the Lieutenant-Governor, the Chairman of the Art Commission and a member of the Executive Council, or some other group of officials."

Accordingly, I answer your question by stating that it is my opinion that no person may remove, repair, change, arrange, or assert any control over or interfere with the custody and care of historical relics or works of art situated in the State House without the approval of your commission.

In answer to your further question relative to the action to be taken by the Art Commission should an individual remove, alter or change an historical relic or work of art in the State House, it is difficult to determine the appropriate procedural remedy without knowledge of the nature or degree of the specific violation. However, should a violation result from a dispute between state departments or boards, I respectfully call your attention to c. 30, § 5 of the General Laws, which provides for the disposition of disputes between state departments.

Very truly yours,

Edward W. Brooke, *Attorney General.*

*The proceeds of a bond issue of the Commonwealth were not subject to a limitation on the period for expenditure enacted after the date of issue.*

*May 21, 1963*

Hon. Robert F. Murphy, *Commissioner, Metropolitan District Commission.*

Dear Sir: — In your recent letter, you have asked my opinion concerning the legal effect of G.L. c. 29, § 14 upon the bond issue authorized by c. 546 of St. 1946.

Acts of 1946, cc. 86 and 546 authorize the town of Ashland to construct an extensive sewerage system. The financing and construction of this project is to be done largely by the town. The Metropolitan District Commission, however, is to construct a part of this project.

St. 1946, c. 546, § 3.

"The cost of constructing the works for pumping and conveying the sewage and the necessary lands, water rights, easements, and other property or interest in property shall be paid by the metropolitan district commission. For the cost of maintenance and operation of the above works, said commission shall pay and the town of Ashland shall accept in lieu of annual payments a lump sum of fifteen thousand dollars. . . ."

The Legislature was not unmindful of the fact that an undertaking such as this would need financing. A bond issue to pay for the cost of this part of the project is authorized by statute.

St. 1946, c. 546, § 4.

"To meet the cost of construction, maintenance and operation to be paid by the metropolitan district commission under the provisions of this act, the state treasurer shall from time to time on the request of said commission borrow on the credit of the commonwealth, a sum or sums, not exceeding, in the aggregate, one hundred and seventy-five thousand dollars, and may issue in one or more series bonds, notes or other forms of written acknowledgement of debt, hereinafter referred to as obligations. . . ."

General Laws c. 29, § 14, as originally enacted (St. 1939, c. 502, § 11), reads as follows:

Gen. Laws c. 29, § 14 (1939).

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

In 1941 the Attorney General rendered an opinion stating that this section did not apply to bond issues.

Attorney General's Report (1941) p. 104.

"In my opinion said section 14 of chapter 29 refers to appropriation of money already in the treasury, or money to be paid into the treasury

through taxation or the ordinary revenue, and does not apply to an act which authorizes the expenditure of money to be raised by an issuance of bonds."

Subsequent to this opinion, St. 1939, c. 502, § 11 was amended by St. 1945, c. 242, § 12. This was the statute in effect when the Ashland Sewerage System Acts were passed.

Gen. Laws c. 29, § 14 (1945).

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

The amendment to the 1939 version of this section has not altered the validity of the Attorney General's Opinion (1941). The scope of the two sections is the same. This section does not apply to a bond issue.

In order to ascertain the intent and purpose of the Legislature, the law to be applied would be that which was in effect at the time that St. 1946, c. 86 and c. 546 were enacted. At that time G.L. c. 29, § 14 did not apply to bond issues. Therefore, the bonds to be issued to finance the work of the Metropolitan District Commission are not subject to the provisions of G.L. c. 29, § 14.

Any subsequent amendments to that section could not alter this result unless the amendment specifically mentioned the Ashland Sewerage System or was inconsistent with the purpose of that statute. No reference or inconsistency is present.

"But, in accordance with the rule of construction . . . which special acts growing out of the peculiar wants, condition, and circumstances of the locality have been granted to a particular place, and afterwards a general law is passed having some of the same purposes in view . . . whether the general act is an implied repeal of all repugnant special acts depends upon a careful comparison of the statutes and the objects intended to be accomplished, and, speaking generally, it requires 'pretty strong terms in the general act, showing that it was intended to supersede the special acts, in order to hold it to be such a repeal'." *Copeland* v. *Springfield*, 166 Mass. 498, 504 (1896).

In view of the former opinion of this office and the action taken by the Legislature, it is my opinion that G.L. c. 29, § 14 (as amended) does not apply to c. 546 of St. 1946.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The requirement that contractors on public works give preference to domestic products is applicable only if other considerations are equal.*

MAY 23, 1963.

HON. CHARLES GIBBONS, *Chairman, Government Center Commission.*

DEAR SIR: — You have requested my opinion relative to the use of foreign steel in the construction of the State Office Building to be erected

pursuant to your contract numbered 62-04. You state that the contractor who was awarded this contract has notified you of its intention to use steel manufactured in England in certain portions of the building. You further state: (1) that this foreign steel appears to conform to the contract requirements; (2) that it will be fabricated by the foreign manufacturer for $14 per ton less than a comparable domestic product; (3) that this reduced price was reflected in the contractor's original bid.

General Laws c. 7 § 22, paragraph 17 reads as follows:

"A preference in the purchase of supplies and materials, other considerations being equal, in favor, first, of supplies and materials manufactured and sold within the commonwealth, with a proviso that the state purchasing agent may, where practicable, allow a further preference in favor of such supplies and materials manufactured and sold in those cities and towns within the commonwealth in which the ratio of unemployment to the total labor force, as determined by the division of employment security, is in excess of five and nine tenths per cent, and second, of supplies and materials manufactured and sold elsewhere within the United States."

The provisions of this statute have been expressly included in contract 62-04 (Page 5, § 2C), and the statute clearly creates a preference in favor of domestic steel in the event that the other considerations are equal (see Atorney General's Report (1956) p. 44).

The above-quoted opinion of the Attorney General concerned a situation very similar to the problem here presented, and has been cited, if not approved by the Supreme Judicial Court (*Pacella* v. *Metropolitan District Commission,* 339 Mass. 338 at page 348). In that opinion the Attorney General stated:

"There is, however, no prohibition against the use of foreign steel provided you determine as a question of fact that other considerations are not equal and that the use of such foreign steel would be more beneficial to the Commonwealth. In reaching this conclusion it should be determined first of all, as an engineering question, whether the foreign steel is at least the equivalent of domestic steel."

The contractor has stated that it was unable to obtain domestic steel at the lower price, that this lower price was reflected in the contractor's original bid and that as a result, a considerable saving has resulted to the Commonwealth. If you determine these allegations are true, then it would appear that other considerations are not equal and the contractor is complying with the provisions of the statute in question.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*Enabling legislation would be necessary to permit the Massachusetts Aeronautics Commission to assume operational control over any state airports which might be built in the future.*

MAY 28, 1963.

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

DEAR SIR: — In your recent letter you have asked my opinion as to whether St. 1956, c. 465, as amended by St. 1958, c. 599, could be inter-

preted as giving the Massachusetts Port Authority operational control over state-owned airports other than Laurence G. Hanscom (Bedford Airport) and General Edward Lawrence Logan International Airport (Logan Airport).

There are presently only two state-owned airports, Bedford Airport and Logan Airport. The airports are maintained and controlled by the Massachusetts Port Authority. Prior to this, operational control of these airports was maintained by the State Airport Management Board.

Acts of 1956, c. 465 created the Massachusetts Port Authority.

St. 1956, c. 465, § 2.

"There is hereby created and placed in the department of public works a body politic and corporate to be known as the Massachusetts Port Authority, which shall not be subject to the supervision or regulation of the department of public works or of any department, commission, board, bureau or agency of the commonwealth except to the extent and in the manner provided in this act. . . ."

When the Massachusetts Port Authority became a legal entity, the State Airport Management Board was dissolved and the Massachusetts General Laws creating this agency were repealed.

St. 1956, c. 465, § 32.

"Upon title to the airport properties becoming vested in the Authority under the provisions of section five of this act, sections fifty-nine A to fifty-nine C, inclusive, of chapter six of the General Laws and sections fifty A to fifty L, inclusive, of chapter ninety of the General Laws shall be inoperative and cease to be effective."

Acts of 1956, c. 465 designates those properties to be transferred to the Massachusetts Port Authority.

St. 1956, c. 465, § 1.

"(b) The term 'airport properties' shall include the General Edward Lawrence Logan International Airport, hereafter called the Logan Airport, and Laurence G. Hanscom Field, together with all buildings and other facilities and all equipment, appurtenances, property, rights, easements and interests acquired or leased by the commonwealth in connection with the construction or the operation thereof and in charge of the state airport management board."

It is evident then from the words of this section that it was the operational control of these specific properties which was being transferred. There is no provision for control of state airports to be acquired at a future date. This is to be contrasted with the broad provisions under which the now defunct State Airport Management Board operated.

G.L. c. 90, § 50B (as repealed by St. 1956, c. 465, § 32).

"The major responsibility of the state airport management board shall be to assure the adoption and carrying out of sound business management policies in the management and operation of Logan Airport and Hanscom Field and *any other state-owned airport that may be established. . . .*" (Emphasis supplied).

If the Massachusetts Port Authority were to maintain operational control of other state airports to be constructed at a future date, further legislative authority would be necessary.

The functions and duties of the Massachusetts Aeronautics Commission was thoroughly discussed and outlined in the Attorney General's Report (1948), p. 33. This opinion was not changed by St. 1956, c. 465. The Massachusetts Aeronautics Commission is not presently empowered to assume operational control over any state-owned airport. If the commission is to assume this responsibility, enabling legislation would be necessary.

It is my opinion that the Legislature must take further action before either the Massachusetts Port Authority or the Massachusetts Aeronautics Commission could assume operational control over state airports to be built at a future date.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*All amounts collected by the Massachusetts Port Authority on account of debts due the Commonwealth incurred prior to the transfer of the port, etc., properties to the Authority, must be remitted to the State Treasurer. The balance of a federal grant payable upon completition of a control tower finished by the Authority is to be shared with the Authority.*

MAY 28, 1963.

MR. EDWARD J. KING, *Secretary-Treasurer, Massachusetts Port Authority.*

DEAR SIR: — In your recent letter you have asked my opinion concerning the proper disposition of certain accounts receivable collected by the Massachusetts Port Authority for the Treasurer of the Commonwealth.

The Massachusetts Port Authority was created by St. 1956, c. 465, as amended by St. 1958, c. 599.

*St. 1956, c. 465, § 2.*

"There is hereby created and placed in the department of public works a body politic and corporate to be known as the Massachusetts Port Authority, which shall not be subject to the supervision or regulation of the department . . . commission, board, bureau or agency of the commonwealth except to the extent and the manner provided in this act. . . ."

The properties formerly administered by the State Airport Management Board and the Port of Boston Commission were transferred to the Massachusetts Port Authority. Under this statute the accounts receivable accruing to these now defunct administrative agencies were to be collected by the Treasurer of the Commonwealth.

*St. 1956, c. 465, § 5.*

"The treasurer shall collect for the commonwealth all accounts receivable as certified by the state airport management board outstanding on the date of transfer. . . ."

*St. 1956, c. 465, § 6.*

"The treasurer shall collect for the commonwealth all accounts receivable of the Port of Boston Commission outstanding on the date of transfer. . . ."

On February 14, 1959, the Commonwealth of Massachusetts and the Massachusetts Port Authority entered into an agreement by which the statutory duty of collecting the accounts receivable was modified. Under this agreement a closing date of February 17, 1959 was stipulated at which time the State Airport Management Board and the Port of Boston Commission would transmit to the State Treasurer and the Massachusetts Port Authority a copy of those accounts receivable which were still outstanding. These outstanding accounts receivable were then to be collected by the Port Authority and transmitted to the Treasurer.

Agreement between the Commonwealth of Massachusetts and the Massachusetts Port Authority (Feb. 14, 1959).

3. The Board and the Commission shall each certify and deliver to the State Treasurer and to the Authority at the closing a list of its outstanding accounts receivable as of said midnight.

4. The Board and Commission shall also prepare a list of all accounts receivable, including rentals and other fees and charges, for current periods commencing prior to said midnight which depend upon volume, or a percentage of sales, or other facts not presently determinable, showing the minimum and estimated maximum amounts that will accrue thereon up to said midnight.

5. The Commonwealth hereby authorizes the Authority to collect all accounts receivable referred to in section 3 above, and authorizes the Authority to notify all such debtors that all payments to be made by them after the closing on account of such accounts, rentals and other fees and charges shall be made to the Authority thereon, even if billed in the name of the Commonwealth, the Board or the Commission, shall be valid discharge to the debtors for the amount so paid.

The list of accounts receivable was drawn up and submitted in accordance with these sections of the agreement. This list included trade remittances as well as monies due from the federal government for federally-aided airport projects.

The source of the accounts receivable is immaterial. The duty of collection and remittance to the Treasurer of the Commonwealth is implicit in the agreement. If the payment is in the form of a negotiable instrument, the Massachusetts Port Authority is not expressly or impliedly authorized to endorse it as an agent of the Commonwealth. *Hallett* v. *Moore*, 282 Mass. 380, 395 (1933).

The Massachusetts Port Authority must transmit all the accounts receivable to the State Treasurer.

A further matter which you raise in your letter deals with the extent to which the Massachusetts Port Authority may participate in receiving federally appropriated funds. The problem which you have outlined deals with the construction of the control tower at Logan International Airport.

Construction on this tower was started while the airport was still under the supervision of the State Airport Management Board. The tower was to be partially financed through federal funds. When application for these funds was made to the federal government, the federal agency stated that it would not release the remainder of the funds for this project until the tower was satisfactorily completed. The project was completed by the Massachusetts Port Authority.

Acts of 1956, c. 465 empowered the Authority to participate in funds reimbursed by the federal government.

*St. 1956, c. 465, § 3.*

"The Authority is hereby authorized and empowered —

(n) To make application for, receive and accept from any federal agency grants for or in aid of the planning, construction or financing of any project or any additional facility, and to receive and accept contributions from any source of either money, property, labor or other things of value, to be held, used and applied only for the purposes for which such grants and contributions may be made. . . ."

The project here involved was started before the Massachusetts Port Authority became a legal entity. It could not then have applied for these funds. However, the Authority did assume the responsibilities of the state agency which had applied for these funds. The result was that the Massachusetts Port Authority had to complete the project to the satisfaction of the participating partner, the federal government.

*St. 1956, c. 465, § 5.*

"Thereupon, the possession of the airport properties shall be transferred to the Authority and there shall be vested in the Authority the control, operation and maintenance of the airport properties and all rents, tolls, charges and revenues pertaining thereto, provided, however, that the Authority shall assume all of the obligations and have the benefit of all the rights of the commonwealth in and to all leases, contracts and agreements relating to the airport properties and existing on the date of the transfer. . . ."

The benefit and the burden go hand in hand. Since the Authority had to complete the facilities started by its predecessor, and the project was federally subsidized, the Massachusetts Port Authority should share in this subsidy. The extent of this share would be the same as that enjoyed by its predecessor, and would be figured on the basis of what percentage the federal government contributed to the overall project for the construction of a completed control tower.

In light of the action taken by the Legislature and the agreement entered into between the parties, it is my opinion that all accounts receivable collected by the Authority, in whatever form, must be remitted forthwith to the Treasurer of the Commonwealth. As for the participation of the Massachusetts Port Authority in the federal funds appropriated for the building of the control tower at the Logan International Airport, the Authority may participate to the extent enjoyed by its predecessor.

Very truly yours,

Edward W. Brooke, *Attorney General.*

*Opinions rendered by the Attorney General pursuant to G.L. c. 12, s. 3, shall be rendered and signed by the Attorney General or the Acting Attorney General.*

May 29, 1963.

Hon. Joseph Alecks, *State Comptroller.*

Dear Sir: — Reference is made to your recent letter in which you state:

"As Comptroller I have been and shall be called upon to render decisions based upon written opinions from your office. Will you kindly inform me whether or not all opinions rendered by your office and signed by one of your Assistant Attorneys General have the same efficacy, validity and authority as an opinion rendered and signed by you personally."

It is my understanding that your question is inspired by receipt of a letter addressed to a member of the Senate and signed by an Assistant Attorney General.

First, let me state the circumstances under which formal opinions of this office are rendered. General Laws c. 12, § 3 provides in effect that all legal services required by the Commonwealth, its departments, officers and commissions shall, except as otherwise provided by statute, be rendered by the Attorney General or under his direction. In accordance with such statutory mandate, it has been the practice of Attorneys General to render opinions to such representatives of the Commonwealth upon questions which concern them in the performance of their official duties.

You are therefore advised that any opinions rendered by the Attorney General pursuant to the provisions of said § 3 of c. 12, shall be rendered and signed by the Attorney General or the Acting Attorney General at any given time.

It has also been the long-standing practice of this office to render what might be termed informal opinions to various representatives of the State on matters which are not necessarily the subject of a formal opinion. As was stated by Attorney General Benton (VIII Op. Atty. Gen. 125) after stating that there was serious doubt as to whether or not the addressee fell within the class of State departments, officers and commissions to whom the Attorney General is the duly constituted legal adviser, "nevertheless . . . it seems to me that I may properly express to you my personal views for such weight as you may see fit to ascribe to them."

The letter of the Assistant Attorney General to the State Senator falls within the second category; it was not rendered to a person to whom the Attorney General is the duly constituted legal adviser pursuant to G.L. c. 12, § 3; and it represents an informal point of view for the information of the addressee.

On the other hand, the subject matter of such informal point of view is one to which you, by virtue of your office, would be entitled to a formal opinion of the Attorney General, if you deemed it necessary or advisable to seek such an opinion as a basis for performing your official duties.

I hope that the foregoing will clarify the distinction between the two types of opinions which emanate from this office from time to time.

Very truly yours,

Edward W. Brooke, *Attorney General.*

*A person licensed to engage in the private detective business may engage in the business of a watch, guard or patrol agency under the license.*

June 7, 1963.

Hon. Frank S. Giles, *Commissioner of Public Safety.*

Dear Sir: — In your recent letter you have asked my opinion whether G.L. c. 147, § 25 requires a license to engage in the "private detective business" and a license to engage in the business of watch, guard, or patrol agency, by concerns engaged in both of these businesses.

Acts of 1960, c. 802 struck out §§ 22-30 of G.L. c. 147 and inserted in place thereof nine new sections. The pertinent sections of the former statute are as follows:

*G.L. c. 147, § 22 (before amendment).*

"No person shall engage in the business of or solicit business as a private detective, or the business commonly transacted by a private detective, under any name or title whatsoever, without first obtaining a license so to do. . . ."

*G.L. c. 147, § 25A (before amendment).*

"For the purposes of this chapter, the term 'private detective', shall include, among others . . . any agency which furnishes guard or patrol protection for homes, stores, industrial plants and private or public institutions."

From these sections it is apparent that prior to the present amendment only one license was necessary whether the holder was engaged in the private detective business, or the business of watch, guard or patrol, or both.

Acts of 1960, c. 802 completely rewrote the old provisions of G.L. c. 147, §§ 22-30. Under this new statute special qualifications must be met before one can be licensed as a private detective business. These qualifications do not apply to one applying for a license to operate a watch, guard or patrol agency.

*G.L. c. 147, § 24 (as amended).*

". . . The applicant, or, if the applicant is a corporation, its resident manager, superintendent or official representative, shall be at least twenty-five years of age and of good moral character, and, unless such application is for a license to engage in the business of watch, guard or patrol agency, shall have been regularly employed for not less than three years as a detective doing investigating work, a member of an investigative service of the United States, or a police officer, of a rank or grade higher than that of patrolman, of the commonwealth or any political subdivision thereof.

After fulfilling these qualifications, an applicant may apply for a license under G.L. c. 147, § 25.

"The commissioner may grant to an applicant complying with the provisions of section twenty-four a license to engage in the *private detective business* or a license to engage in the business of watch, guard or patrol agency; provided, however, that no such license shall be granted to any person who has been convicted in any state of the United States of a felony. . . . (Emphasis supplied.)

In order to ascertain what is meant by the phrase "private detective business" as used in this licensing section, one must turn to the definition section.

*G.L. c. 147, § 22 (as amended).*

"In this section and in sections twenty-three to thirty, inclusive, the following words shall have the following meanings unless a different meaning is clearly required by the context:

'private detective business', the business of private detective or private investigator, and the business of watch, guard or patrol agency."

Reading G.L. c. 147, § 22 together with § 25, it is evident that a license to engage in the private detective business also includes the right to engage in the business of watch, guard or patrol agency.

. . . . .

The converse, however, is not true. One who has qualified only to engage in the business of watch, guard or patrol agency may not be engaged in the further business of being a private detective.

In light of these statutory provisions, it is my opinion that a person who has fulfilled the qualifications to engage in the private detective business and has been licensed to do so may engage also in the business of watch, guard or patrol agency without obtaining a second license.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The Department of Public Works may grant an assignable option to purchase lands deemed to be no longer required for highway purposes.*

JUNE 10, 1963.

HON. JACK RICCIARDI, *Commissioner of Public Works.*

DEAR SIR: — You have requested my opinion as to whether your department has authority under G.L. c. 81, § 7E to execute an assignable option in favor of the United States Post Office Department, granting the Post Office Department the right to purchase a parcel of land located in Worcester.

It is my opinion that execution of an assignable option is permissible within the provisions of c. 81, § 7E.

Said statutory provision authorizes the deparment to sell at public or private sale any land which the department determines is no longer necessary for State highway purposes. No cases specifically state that by granting a power of sale, a statute thereby impliedly grants a power to option. However, each express power granted by a statute, such as a power to sell, carries with it by implication all incidental authority required for the full and efficient exercise of the power conferred. "All ordinary means reasonably necessary for the full exercise of the power . . ." conferred may be used. *Bureau of Old Age Assistance of Natick* v. *Commissioner of Public Welfare, 326 Mass. 121, 93 NE 2d 267, 1950.*

"The Legislature need not enumerate nor specify, definitely and precisely, each and every ancillary act. . . . It is enough for the Legislature to impose the duty to be performed within a prescribed field for

a designated end, leaving to the board's discretion the selection of the appropriate methods and means and the other administrative details to be employed in accomplishing the statutory purpose." *Scannell v. State Ballot Law Commission, 324 Mass. 494, 87 NE 2d 16, 1949.*

Thus, the Department of Public Works has discretion to employ such means as it sees fit toward accomplishing sale of lands no longer needed for State highway purposes. Grant of an option is, in my opinion, an appropriate ancillary step toward exercising a power of sale.

Therefore, in expressly conferring power of sale on the department, c. 81, § 7E of the General Laws also confers the power to grant an option as a reasonable means toward that end.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*A provision requiring the State Treasurer to invest funds in "bonds", excluded investment in notes or obligations other than bonds.*

JUNE 12, 1963.

HON. JOHN T. DRISCOLL, *Treasurer and Receiver General.*

DEAR SIR: — You have requested my opinion as to the applicability of G.L. c. 32A, § 9A with reference to the investment of funds.

Your request relates specifically to the use of the word "bonds" in the above section which reads:

"Subject in each instance to the approval of the investment committee established under the provisions of this section, the state treasurer shall invest and reinvest such funds to the extent not required for current disbursements as authorized by section nine in bonds . . . which are legal for the investment of funds of savings banks under the laws of the commonwealth. . . ."

There was a similar provision for the investment of funds in G.L. c. 32, § 23 wherein you are required to invest in bonds. However, this provision was amended in 1961 to allow the investment of funds "in securities, other than mortgages or collateral loans, which are legal for the investment of funds of savings banks under the laws of the commonwealth. . . . "St. 1961, c. 441, § 2.

General Laws c. 168, § 42 authorizes Savings Banks to "invest in bonds, notes or other interest-bearing obligations of the following classes. . . ."

On the basis of the above it is my opinion that the use of the word "bonds" in G.L. c. 32A, § 9A is restricted to the purchase of bonds to the exclusion of notes or other interest-bearing obligations.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The pension of a state police officer must be computed on the salary which was actually paid to him at the time of his retirement.*

JUNE 12, 1963.

HON. JOHN T. DRISCOLL, *Treasurer and Receiver-General.*

DEAR SIR: — You have asked my opinion relative to the computation of the pension of a former patrolman of the Department of Public Safety, which matter is currently before the Board of Retirement.

You state that the former patrolman was retired under the provisions of c. 32, § 57, effective as of close of business March 15, 1951. On March 16, 1951 his pension payments were begun and were computed at the rate of 62% of his regular salary.

You further state that on March 29, 1951 a general order, #1250, was issued by the department in which it was announced that the applicant was promoted to the grade of Special Officer Sergeant, effective March 15, 1951. The processing of those papers was never completed and the applicant never received the salary attached to the higher grade.

Pursuant to these facts you ask whether your office can now recompute the applicant's pension, based on his retirement at the higher grade, and make necessary adjustments retroactive to March 16, 1951.

Chapter 32, § 57 provides that a veteran who has been in the service of the Commonwealth for a period of ten years may be retired at one-half of the highest annual rate of compensation payable to him while he was holding the grade held by him at his retirement with certain additions for length of service.

In view of the fact that the subject of your inquiry did not serve even a single day under the higher grade, it is inconceivable that he is entitled to a greater pension based upon said promotion. ". . . the amount of the pension must be capable of computation at the time of retirement. . . ." *Selectmen of Brookline* v. *Allen,* 325 Mass. 482 at 486. The computation of the pension in question is to be based upon the payments actually received by the retiring employee. The phrase "payable to him while he was holding the grade held by him at his retirement", as it appears in c. 32, § 57, therefore, is to be construed as meaning paid. It is to be noted that the subject of your inquiry was never compensated at the grade of "Special Officer Sergeant."

In view of the foregoing, I am constrained to answer your inquiry in the negative.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*A regional school district may authorize a bond issue solely for the purpose of preparing architectural plans and specifications for the construction of a regional school.*

JUNE 19, 1963.

HON. SIMEON J. DOMAS, *Administrator, School Building Assistance Commission.*

HON. ARTHUR H. MACKINNON, *Emergency Finance Board.*

GENTLEMEN: — In a recent letter you have asked my opinion concerning G.L. c. 71, § 16 (d), which reads as follows:

"To incur debt for the purpose of acquiring land and constructing, reconstructing, adding to, and equipping a school building or buildings for a term not exceeding twenty years or for the purpose of remodeling and making extraordinary repairs to a school building or buildings for a term not exceeding ten years; provided, however, that any indebtedness so incurred shall not exceed an amount approved by the emergency finance board; and provided, further, that written notice of the amount of the debt and of the general purposes for which it was authorized shall be given to the board of selectmen in each of the towns comprising the district not later than seven days after the date on which said debt was authorized by the district committee; and no debt may be incurred until the expiration of thirty days from the date on which said debt was so authorized; and prior to the expiration of said period any member town of the regional school district may call a town meeting for the purpose of expressing disapproval of the amount of debt authorized by the district committee, and if at such meeting a majority of the voters present and voting thereon express disapproval of the amount authorized by the district committee, the said debt shall not be incurred and the district school committee shall thereupon prepare an alternative proposal and a new or revised authorization to incur debt."

You have attached to your letter copies of pertinent statutes and ask specifically whether a regional school district may, under the provisions of clause (d) of § 16 of c. 71 of the General Laws, incur debt only for the purpose of preparing architectural plans and specifications for the construction of a regional school. You make reference to the fact that various regional school districts have in many cases made two separate board authorizations, the first one for the purpose of preparing plans and specifications for the construction of the school and the second one for the purpose of completing the construction. In view of this reference, I assume that what you wish to know is whether a regional school district may first authorize the incurring of debt only for the purpose of preparing plans, and then authorize, at a later date, a bond issue for the entire cost of the school, and in that light I undertake to answer you.

The purpose of the legislation in question is, in my opinion, to pinpoint responsibility for the general construction and operation of the schools of the various school districts and to aid the duly constituted body to easily carry out these responsibilities. I am unable to determine that there was intended any restrictive measures to hamper the smooth functioning of the body politic.

It is a well-established principle of law, set forth in many cases, that a statute as a whole ought, if possible, to be so construed as to make it an effectual piece of legislation in harmony with common sense and sound reason.

*Acford* v. *Auditor of City of Cambridge,* 300 Mass. 391.

*Manser* v. *Secretary of Commonwealth,* 301 Mass. 264.

*Selectmen of Topsfield* v. *State Racing Commission,* 324 Mass. 309.

*Sun Oil Co.* v. *Director of Division on Necessaries of Life,* 340 Mass. 235.

Stronger language may be found in *McCarthy* v. *Woburn Housing Authority,* 341 Mass. 539, where the Court held that a construction

of a statute which would lead to an absurd and unreasonable conclusion is not to be adopted where its language is fairly susceptible to a construction leading to a logical and sensible result.

Such an interpretation must be placed upon G.L. c. 71, § 16, and in view of the foregoing, it is my opinion that a regional school district may authorize a bond issue solely for the purpose of preparing architectural plans and specifications for the construction of a regional school.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*No further legislative permission than that contained in the existing statutes is necessary for the promulgation of certain plumbing codes by the Board of Examiners of Plumbing.*

JUNE 24, 1963.

MRS. HELEN C. SULLIVAN, *Director of Registration.*

DEAR MADAM: — You have requested my opinion relative to the following:

"Under G.L. c. 142, § 21, is it necessary for the Board of State Examiners of Plumbers to secure the approval of the General Court in order to formulate or revise rules relative to the construction, alteration, repair and inspection of all plumbing work in buildings owned and used by the Commonwealth?

"Under G.L. c. 142, § 8, is it necessary for the Board of State Examiners of Plumbers to secure the approval of the General Court in order to formulate or revise rules relative to the construction, alteration, repair and inspection of all plumbing work in towns that petition this Board for regulations?"

Chapter 142, § 21 of the General Laws provides:

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

It is clear that § 21 of the statute gives the examiners the power to formulate rules relative to plumbing work in buildings owned and used by the Commonwealth. To hold that in each instance the examiners must return to the Legislature in order to revise such rules would, indeed, be a cumbersome procedure and not within the scope and the intent of the statute.

Accordingly, it is my opinion that the examiners may formulate or revise rules under this section without the necessity of permissive legislation therefor.

Section 8 of said c. 142 provides for the promulgation of rules by the examiners upon the petition of the Board of Health of any town. Accordingly, the Board of State Examiners of Plumbers may not on its own motion originally prescribe, nor formulate nor revise, regulations for towns unless it has received a petition by the appropriate Board of Health.

The said § 8 gives the Board the power to revise such regulations should a Board of Health petition for same.

Accordingly, it is my opinion that, under § 21 of c. 142, neither upon the original formulation of rules nor revision thereof is it necessary for the Board to seek permissive legislation enabling same.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The term of the incumbent Registrar of Motor Vehicles on December 12, 1962, expired on that day by virtue of St. 1959, c. 562, and his successor is to serve for the balance of a term of five years beginning on said December 12, 1962.*

JUNE 24, 1963.

HON. KEVIN H. WHITE, *Secretary of the Commonwealth.*

DEAR SIR: — In a recent letter your requested my opinion on the following matter:

"On April 26, 1956 Rudolph F. King was reappointed Registrar of Motor Vehicles for a five-year term under the provisions of G.L. c. 16, § 5, the expiration date being April 24, 1961. On November 30, 1957, Mr. King retired from that appointive office. Subsequently, on December 12, 1957, Clement A. Riley was appointed by former Governor Foster Furcolo to the office of Registrar for the unexpired term, the date of expiration being April 24, 1961. In 1959 the Great and General Court enacted c. 562 of St. 1959 which reads as follows:

'Notwithstanding any provision of law to the contrary, the term of office of the incumbent, on the date of the passage of this act, of the office of registrar of motor vehicles shall be five years from the date on which he was appointed.'

"Accordingly the date of expiration of Registrar Riley's term became December 12, 1962. This act purports to be applicable only to the then incumbent Registrar. On May 16, 1963 James Lawton was appointed and confirmed as Registrar of Motor Vehicles.

. . . . .

"Is the date of expiration of Registrar Lawton's term April 24, 1966, i.e., the remainder of the original expiration, or December 12, 1967, the remainder of Mr. Riley's expiration by virtue of c. 562 of St. 1959?"

Under the provisions of St. 1959, c. 562, the term of office of the incumbent of the office of Registrar of Motor Vehicles at the time the act was passed at the expiration of five years from the date on which he was appointed.

General Laws c. 30, § 10, which is applicable to the Registrar of Motor Vehicles, provides, in part, that ". . . the appointment of a successor of any incumbent . . . who is holding over after the expiration of his term of office shall be made . . . for the remainder of the term which would have begun at such expiration if his successor had then been appointed."

General Laws c. 16, § 5 provides a term of five years for the Registrar of Motor Vehicles.

The appointment of the present Registrar on May 16, 1963 was as the successor of the then incumbent, who was the incumbent referred to in St. 1959, c. 562.

The incumbent of the office of Registrar prior to the appointment of the present Registrar was holding over after the expiration of his term of office.

Under the provisions of G.L. c. 30, § 10, the successor of such an incumbent is to be appointed for the term which would have *begun* at the expiration of the term of the incumbent if his successor had then been appointed.

The period of any term to begin at the expiration of the term of the present Registrar's predecessor under G.L. c. 16, § 5 had to be for five years.

It is, therefore, my opinion that the date of expiration of the present incumbent's term is five years from the date of expiration of the term of his predecessor.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*Under St. 1960, c. 635, § 8 (Government Center), the annual payment in lieu of taxes to Boston is to equal the taxes received by the city as the result of the assessed values made as of January 1, 1959, reduced by any abatements.*

JUNE 26, 1963.

MR. LEO F. BENOIT, *Chairman, State Housing Board.*

DEAR SIR: — You have requested an opinion as to the construction of the provisions of § 8 of c. 635, St. 1960.

Said c. 635 established the Government Center Commission and authorized it to construct a State Office building and other buildings in the City of Boston.

Section 8 of the Act reads as follows:

"During each year after the acquisition of real estate under this act, the commonwealth shall make a payment in lieu of taxes to the city of Boston equal to the amount which the city actually received for taxes as of January first of the year preceding the passage of this act, on the land, buildings and other improvements comprising the real estate so acquired, as reduced by all abatements, if any."

You state that "The question now arises should the payment in lieu of taxes referred to in said section 8 for land taken be based upon the actual taxes received or collected on the 1958 assessments up to January 1, 1959 or be based upon the assessed valuations as of January 1, 1959, and collected through the year of 1959 . . ." and ask to be advised as to the correct interpretation of the section.

I advise you that, in my opinion, the amount to be paid the city in lieu of taxes is to be based upon the amounts actually received by the city for taxes as a result of the assessed valuations made as of January 1, 1959, reduced by all abatements, whether the amounts were received by the city in 1959 or were received thereafter.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*St. 1962, c. 798, authorizes the suspension of a state officer convicted after its effective date upon an indictment returned prior thereto.*

June 26, 1963.

Hon. Jack P. Ricciardi, *Commissioner of Public Works.*

Dear Sir: — In a recent letter you requested my opinion relative to the following:

"In view of the recent conspiracy conviction of Rodolphe G. Bessette, Director of the Division of Waterways of the Department of Public Works, I request your opinion as to whether this conviction, as well as his pending indictment for perjury, gives me the right to suspend Mr. Bessette under the laws of the Commonwealth."

In substance, your request relates to the applicability of St. 1962, c. 798, now § 59 of c. 30 of the General Laws, to the indictments and conviction of Rodolphe G. Bessette.

Mr. Bessette was indicted for conspiracy and perjury by the Suffolk County Grand Jury in November, 1962. He has subsequently been tried and convicted on June 18, 1963 on the conspiracy count, which conviction he has appealed to the Supreme Judicial Court. The trial on the perjury indictment is pending.

Section 59 of c. 30 of the General Laws provides in part:

"The appointing authority of any department of the commonwealth, or of any board, commission or agency thereof, in which a person is employed may suspend such person during any period during which said person is under indictment for misconduct in his office or employmen of the commonwealth. Notice of said suspension shall be given in writing in hand to said person, and the receipt thereof shall automatically suspend the authority of said person until he is notified, in like manner, that his suspension is removed.

"Any person so suspended shall not receive any compensation or salary during the period of such suspension, nor shall the period of his suspension be counted in computing his sick leave or vacation benefits or seniority rights, nor shall any person who retires from service while under such suspension be entitled to any pension or retirement benefits, notwithstanding any contrary provisions of law, but all contributions paid by him into a retirement fund, if any, shall be returned to him.

"A suspension under this section shall not, in any way, be used to prejudice the rights of the suspended person either civilly or criminally. During the period of any such suspension, the appointing authority may fill the position of . . . the suspended employee on a temporary basis. . . .

"If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the period of his suspension, and the time of his suspension shall count in determining sick leave, vacation, seniority and other rights, and shall be counted as creditable service for purposes of retirement."

The obvious intent of this statute is to provide for suspension of a public employee when such employee is under indictment for misconduct in office. The statute serves an excellent purpose in that it provides for suspension of an alleged wrongdoer in office, eliminating the possibility of continuing misconduct, promotes confidence of the public in its officials as well as sustaining the morale of employees serving the Commonwealth.

It is to be noted that should a person be suspended under this act and be subsequently found not guilty of the charge for which he was indicted, he is to be reinstated without prejudice to any rights accruing during the period of his suspension. The statute is qualifying in scope and intent in that it prescribes a hiatus period of suspension of employment pending the determination of an indictment for wrongdoing.

The conviction of Mr. Bessette for conspiracy dated June 18, 1963 necessarily includes the indictment for this crime. The Legislature, in enacting St. 1962, c. 798, having in mind an indictment for misconduct in office or employment of the Commonwealth, clearly intended that during such period the person so charged should not continue serving the Commonwealth in his given capacity. To hold that the Legislature did not comprehend a subsequent conviction under the indictment as contemplated, would be an absurd conclusion. Conviction following an indictment, duly prosecuted in the Courts of the Commonwealth with the benefit of counsel for the accused, manifestly falls within the legislative intent in enacting St. 1962, c. 798 since the onus of conviction could not attach to the crime unless there first had been an indictment of the person guilty of misconduct in office.

Further, the statute recites that the ". . . appointing authority . . . may suspend such person during any period during which said person is under indictment for misconduct in office . . ."

The statute was approved July 27, 1962 and became effective January 1, 1963. Thus, since the effective date of the statute, Mr. Bessette has been under indictment. Clearly, such indictments and conviction fall within the purview of St. 1962, c. 798 during the period of Mr. Bessette's employment by the Commonwealth.

The indictments alone are sufficient bases for suspension under the statute. Since the conviction for conspiracy has been appealed to the Supreme Judicial Court it would be inappropriate for me to comment on this finding herein and this opinion is not to be construed so as to affect the rights of the individual involved on appeal.

In the recent case of *Welch* v. *Mayor of Taunton*, 343 Mass. 485 (1962), Justice Whittemore, in construing a statute of like purpose, held that statute to be applicable to an act committed prior to the effective date of the statute.

Justice Whittemore quoted in part therein the case of *Hanscom* v. *Malden and Melrose Gas Light Co.*, 220 Mass. 1, 3 (1914), as follows: "statutes . . . relating to remedies and not affecting substantive rights . . . commonly are treated as operating retroactively. . . ."

It is clear and manifest, and need not be dealt with at length at this time, that the Legislature, having the power and authority to create public offices and prescribed the tenure of public servants serving therein, also has the power and authority to provide for revisions or abolishment of such tenure and offices.

In enacting St. 1962, c. 798, the Legislature provided a new remedy for the protection of the rights of the Commonwealth and the continued effective operation of its agencies. Prior to the enactment of this legislation, the appointing authority had no power to suspend an indicted employee save for the lengthy process of removal and suspension under Chapter 31 of the General Laws. It was obvious the legislative intent was directed to immediate suspension of the wrongdoer. The statute does not impair the contractual or vested rights of the person suspended inasmuch as should the person indicted be proven not guilty, he is restored to his position without impairment of rights.

The statute is remedial in nature and provides a remedy for a wrongful discontinuance already existing as well as for future misconduct. As stated in *Selectmen of Amesbury* v. *Citizens Electric Street Railway Company*, 199 Mass. 394, 395 (1908). "This statute . . . was purely remedial in its character and did not change any existing rights, it naturally would be applicable to proceedings begun after its passage, though relating to acts done previously thereto."

Accordingly, it is my opinion that St. 1962, c. 798 applies to servants of the Commonwealth indicted for misconduct during their period of employment, whether or not such indictment occurred prior or subsequent to the passage of the statute. It is therefore my considered opinion that you may properly and lawfully suspend Rodolphe G. Bessette, as Director of the Division of Waterways of the Department of Public Works.

Very truly yours,

Edward W. Brooke, *Attorney General.*

*The Governor may pardon a person convicted under the bastardy statute, but a condition that he continue to aid in the support of the child should be imposed.*

June 27, 1963.

Hon. Cornelius J. Twomey, *Chairman, Advisory Board of Pardons and Parole Board.*

Dear Sir: — You have asked my opinion as to whether or not a full and complete pardon of a person convicted under the provisions of G.L. c. 123, § 11, as set forth in your letter dated May 24, 1963, would in effect or fact wipe out the paternity adjudication, leaving the petitioner free of any obligation toward the minor child involved in the case.

It is provided under the provisions of G.L. c. 127, § 152:

"In a case in which the governor is authorized by the constitution to grant a pardon, he may, with the advice and consent of the council, and upon the written petition of the prisoner, grant it, subject to such conditions, restrictions and limitations as he considers proper, and he may issue his warrant to all proper officers to carry such pardon into effect. . . ."

It is my opinion that the petitioner was convicted of an offense within the meaning of the above statute for it has been held that the

act described in the statute (G.L. c. 273, § 11) is a criminal offense. See *Commonwealth* v. *Mekelburg,* 235 Mass. 383, 384.

It is important to note, however, that one of the purposes of bastardy statutes is to adjudge a person to be the putative father of the child so that he may be compelled to aid the mother in its support. The crime charged is closely allied with the duty of the putative father to aid in the support of the child. The statute further makes the begetting of an illegitimate child a misdemeanor and the non-support of such child a distinct and continuing offense. It utilizes the probation collection system, incidental to criminal proceedings, and adopts the practice of the Reciprocal Enforcement of Support Act, so far as it is possible. See *Commonwealth* v. *Dornes,* 239 Mass. 592; *Commonwealth* v. *Baxter,* 267 Mass. 591.

In view of the history of the legislation, it is my opinion that the Governor may pardon the offender for the crime. In his wise discretion, however, it would appear that such a pardon should be granted upon the condition that the petitioner continue to fulfill his duty to aid in the support of the child.

Very truly yours,

Edward W. Brooke, *Attorney General.*

*A "roadwatch," involving stopping vehicles without probable cause, is unlawful.*

June 27, 1963.

Hon. James R. Lawton, *Registrar of Motor Vehicles.*

Dear Sir: — Your predecessor has requested my opinion of the legality of a "roadwatch," which, according to the request, operates as follows: during the night, uniformed law enforcement officers station themselves at various points along the highways of the Commonwealth. There they select oncoming vehicles at random and stop them without reason to believe that the operator of any particular such vehicle is unlicensed, or is committing or has committed any offense, or that any particular such vehicle is not properly registered or in legal working order, or contains contraband or other seizable property. After each such vehicle has stopped, the officers inspect the operator's license, the registration of the vehicle, observe the condition of the operator, and check certain of the equipment on the vehicle to determine whether it is working properly.

The power to conduct a "roadwatch" must be derived, if at all, by implication from §§ 21 and 25 of c. 90. There is no precedent nor authority for such action either in common law or in traditional methods of law enforcement. Section 25 provides:

"Any person who, while operating or in charge of a motor vehicle, shall refuse, when requested by a police officer, to give his name and address or the name and address of the owner of such motor vehicle, or who shall give a false name or address, or who shall refuse or neglect to stop when signalled to stop by any police officer who is in uniform or who displays his badge conspicuously on the outside of his outer coat or garment, or who refuses, on demand of such officer, to produce

his license to operate such vehicle or his certificate of registration, or to permit such officer to take the license or certificate in hand for the purpose of examination, or who refuses, on demand of such officer, to sign his name in the presence of such officer, and any person who on the demand of an officer of the police or other officer mentioned in section twenty-nine or authorized by the registrar, without a reasonable excuse fails to deliver his license to operate motor vehicles or the certificate of registration of any motor vehicle operated or owned by him or the number plates furnished by the registrar for said motor vehicle, or who refuses or neglects to produce his license when requested by a court or trial justice, shall be punished by a fine of not less than twenty-five nor more than one hundred dollars."

Section 21, prior to its amendment in 1954, provided:

"Any officer authorized to make arrests may arrest without warrant and keep in custody for not more than twenty-four hours, unless Sunday intervenes, any person operating a motor vehicle on any way who does not have in his possession a license to operate motor vehicles granted to him by the registrar, and who violates any statute, by-law, ordinance or regulation relating to the operation or control of motor vehicles; and at or before the expiration of said period of time such person shall be brought before a magistrate and proceeded against according to law. An investigator or examiner appointed under section twenty-nine, may arrest without warrant, keep in custody for a like period, bring before a magistrate and proceed aaginst in like manner, any person operating a motor vehicle while under the influence of intoxicating liquors, irrespective of his possession of such a license."

Chapter 669 of St. 1954 amended § 21, by adding after the semicolon, the following:

"and any officer authorized to make arrests, provided such officer is in uniform or displaying his badge of office conspicuously on his outer coat or garment, may arrest without warrant any person, regardless of whether or not such person has in his possession a license to operate motor vehicles issued by the registrar, if such person upon any way or in any place to which the public has the right of access, operates a motor vehicle after his license or right to operate motor vehicles in this state has been suspended or revoked by the registrar, or whoever upon any way or place to which the public has the right of access operates a motor vehicle while under the influence of intoxicating liquor, or whoever uses a motor vehicle without authority knowing that such use is unauthorized, or any person who, while operating or in charge of a motor vehicle, shall refuse, when requested by such police officer, to give his name and address or the name and address of the owner of such motor vehicle, or who shall refuse on demand of such police officer, to produce his license to operate such vehicle or the certificate of registration for such vehicle for examination by such officer."

Subsequent amendments to § 21 authorized the arrest without warrant of persons under the influence of narcotics, and made other changes not material for these purposes.

1. Section 25 is directed to the motorist. It sets forth certain of his duties while operating a motor vehicle; it does not address itself to

the question of when the officer properly may signal the motorist to stop; it does not, in terms, qualify or limit the motorist's obligations. Similarly, § 21 sets forth the right of an officer to arrest without a warrant a motorist who, among other things, refuses to comply with the requirements of § 25. Like § 25, § 21 does not set forth the circumstances under which the officer first may order the motorist to stop. Accordingly, it could be argued that there are no limitations on the motorist's obligations; and that the corresponding powers of the officer must be equally broad. In my judgment, however, the statutes cannot be so construed.

2. Section 25 imposes no duty on the driver to speak to the officer, to submit to any test relevant to determine his condition to drive, or to permit the officer to inspect the vehicle or any of its equipment. Yet compliance with any or all such duties would detain the motorist only momentarily. The basic purpose of a roadwatch must be to minimize the incidence of highway accidents by clearing the roads of dangerous vehicles and drivers. To be sure, no roadwatch could be effective if papers were not checked. But on the other hand, the mere inspection of papers, without anything more, is so ill-suited to serve the basic purpose of a roadwatch as to indicate that the naked duties set forth in § 25 express policies wholly unrelated to roadwatches.

Section 25, to the extent that it deals with the motorist's duties on the highways, relates exclusively to problems of identification. An easy and trustworthy means of identifying motorist and vehicle ownership at the time a violation of the motor vehicle laws is observed is essential to the orderly processing of criminal and administrative complaints therefore. From the information derived as a result of compliance with § 25, the officer, without taking custody of the motorist, may institute appropriate administrative or criminal proceedings. See G.L. c. 90, § 20; G.L. c. 276, § 24. In the absence of § 25, the officer would be required in many cases to investigate to determine proper identity or to arrest. The latter alternative would be oppressive in most cases, and both alternatives would be unfeasible. Section 21 confirms and implements the policy of § 25. If, of course, the officer determines that an immediate danger to public safety, such as driving while under the influence of alcohol or narcotics, exists, or that a serious offense specified in § 21 has been committed he may, under that section, arrest the offender without a warrant. But if the motorist has committed one of the more common, minor, motor vehicle offenses, such as speeding, the officer can not arrest if the motorist complies with § 25. Accordingly, in my opinion, § 25 does not authorize an officer to stop a vehicle, but only sets forth the duties of a motorist who has theretofore been lawfully stopped by such officer. The authority of an officer, as an initial matter, to stop a vehicle, which is the condition precedent to § 25's becoming operative, must be found elsewhere.

3. As I indicated earlier, there is no precedent at common law for the conduct of a roadwatch. *Muniz* v. *Mehlman*, 327 Mass. 353, sets forth the limits of an officer's authority under circumstances relevant to your request. *Muniz* was an action for false imprisonment. The evidence showed that the plaintiff driver was weaving over the road. The defendant officer stopped the plaintiff, and thereupon arrested him for drunkenness. Plaintiff contended that he was not guilty of the crime. The Supreme Judicial Court first set forth the principle that

" 'If in fact no breach of the peace [which constitutes a misdemeanor] has been committed, a mistaken belief on the part of the actor, whether induced by a mistake of law or of fact and however reasonable, that a breach of the peace has been committted by the other, does not confer a privilege to arrest.' ", 327 Mass. at 358, quoting with approval, Restatement, Torts, section 119 (o) (comment). The Court continued as follows·

"We are not to be understood as intimating that the defendent had no right in the circumstances existing here to order the plaintiff to stop and to detain him long enough to make a reasonable examination concerning his fitness to operate his automobile. See G.L. (Ter. Ed.) c. 90, section 25; *Commonwealth* v. *Sullivan,* 311 Mass. 177. Even on the plaintiff's story the defendant had probably cause to make the investigation which he made. But when he went farther and arrested the plaintiff he was required to justify his act by showing that the plaintiff had in fact committed the offences for which he was arrested."

Thus, even if § 25 were to be held to contain a grant of authority to police officers on the highways — and the context within which the Court cited the section does not indicate this to be the case — the limits of such authority as set forth in *Muniz* fall far short of sanctioning random spot checks. True, the language indicates that the standards for determining "probable cause to make . . . [an] investigation" are less exacting than are those for determining the more traditional probable cause to arrest. See *Henry* v. *United States,* 361 U.S. 98; *Johnson* v. *United States,* 333 U.S. 10, *Ker* v. *California,* 31 U.S.L.W. 4611 (U.S.S.Ct. June 10, 1963). But the distinction constitutes an adaptation of the common law concept of probable cause, rather than its abandonment. The officer can observe the passing vehicle for but a short time. There is good reason to free him from exposure to actions for false arrest which would accompany any order to stop, were such an order irrevocably to be viewed an "arrest." See *Muniz* v. *Mehlman, supra.* Furthermore, current highway law enforcement practices, which have proved reasonably effective and are generally accepted as unoppressive by the populace, can proceed within a legal framework. The ultimate beneficiary of which is the motorist himself.

"It might be possible, for example, to lessen the risk of arrest without probable cause by giving the police clear authorization to stop persons for restrained questioning whenever there were circumstances sufficient to warrant it, even though not tantamount to probable cause for arrest. Such a minor interference with personal liberty would touch the right to privacy only to serve it well. If questioning failed to reveal probable cause, it would thereby forestall invalid arrests of innocent persons on inadequate cause and the attendant invasion of their personal liberty and reputation. If it revealed probable cause, it would do no more than open the way to a valid arrest. It would then not be possible for a guilty defendant to magnify slight detention for questioning, based on probable cause to question, into an arrest lacking the validity that proceeds from a higher level of probability, probable cause to arrest." Traynor, *Mapp* v. *Ohio at Large in the Fifty States,* 1962 Duke L.J. 319, 333 (footnote omitted).

4. It is not surprising that neither § 21 nor § 25, in terms, qualifies the motorist's obligations or otherwise deals with the problem at hand. The sections set forth narrowly-defined rules of conduct for specific purposes. They do not pretend to enunciate expansive principles of human behavior. They should not be expected to transgress the particular subject matter of concern. Sections 21 and 25 are, like most legislation, interstitial. As interstices, and without a clear indication to the contrary, the sections should be fitted into the context of existing, relevant principles. Those principles are set forth in *Muniz, supra.* So viewed, the basis for the absence of specific reference to spot checking becomes clear. For the legislative assumption that an officer order a motorist only when circumstances exist which justify further investigation is perfectly consistent with an absolute obligation of such motorist to stop when so ordered. The authority to arrest without warrant for failure to stop or display a license or registration, is equally consistent with an assumption that the initial request to do so not be made capriciously.

5. The 1954 amendment to § 21 is not inconsistent with the above. As an amendment to an existing statute, it was doubtless designed to extend the policies set forth therein, rather than to enunciate radically different, unrelated principles. Had the General Court sought to introduce such a dramatic change into the existing body of laws, it would have done so in a less oblique fashion. Furthermore, the *Muniz* case, decided but a few years earlier, pointed out the hiatus in the unamended statute which the amendment resolved; the situation which existed when, after having stopped the vehicle upon reasonable cause to justify an investigation, such investigation proves that the violation for which the investigation was instituted had not been committed, but that the motorist nonetheless was in violation of § 25. Prior to the amendment, the officer would be required to release the motorist. The importance of compliance with § 25, however, the Legislature determined, justifies the arrest of the motorist under such circumstances. Finally, it may well have been thought prior to *Muniz* that the order to stop itself constituted an "arrest." *Cf. Thompson* v. *Boston Publishing Co.,* 285 Mass. 344; *Opinion of the Attorney General of Washington,* 1959-60, No. 88. If this were the case, and if the officer's investigation proved that no violation in fact existed, then the "arrest" would have been illegal, see *Muniz* v. *Mehlman, supra; Commonwealth* v. *Gorman,* 288 Mass. 294, and discovery of another crime in connection with an illegal arrest itself might not justify arrest. *E.g., Henry* v. *United States,* 361 U.S. 98. *Muniz* disspelled any such conceptions, and by holding the order to stop to be justified, paved the way for the 1954 amendment.

6. Finally, the rules of permissible conduct enunciated above are, in my opinion, constitutional. I am not unaware that in *Henry* v. *United States,* 361 U.S. 98, the Court held an arrest to have been effected when a vehicle stopped on orders of the police. This holding, however, was based on the Government's concession of the point and on "our view of the facts of this particular case," 361 U.S. at 103, which justified the conclusion that the officers took custody of the men as soon as the car stopped. And even assuming that the order to stop, whether or not technically termed an "arrest" is a "seizure" within the meaning

of the Fourth Amendment, the states are free, within the broad constitutional limitations of "reasonableness," to fashion their own rules relative thereto. *Ker* v. *California,* 31 U.S.L.W. 4611 (U.S.S.Ct., June 10, 1963). As I have indicated, the rules of permissible official conduct set forth above constitute a reasonable and sensible accommodation between the need for efficient highway law enforcement and the rights of the motorist. The highest court of California has evolved similar rules, the validity of which were defended by an eminent jurist of that Court as follows:

"We have had to rule in our state on the validity of an arrest in several cases in which officers on night patrol have observed automobiles or pedestrians in questionable situations that arguably fell short of probable cause for arrest. We have upheld the authority of officers not only to question but also to make a subsequent arrest on the basis of probable cause that developed in the course of the questioning. When questioning prompts flight or obvious attempts to conceal or dispose of something, such action in sequence of the initial suspicious circumstances constitutes probable cause for arrest. It would seem highly unrealistic to hold such an arrest invalid on the ground that arrest actually coincided with the initial police questioning and that the then suspicious circumstances fell short of probable cause for arrest. Such technicality would invite the circumvention of building up suspicious circumstances to probable cause for arrest, and the eventual consequence might be lower standards of arrest. Surely there is a middle ground between the excesses of questioning on mere suspicion and of invalidating an arrest that followed upon questioning on suspicion reasonably generated by the immediate circumstances." (Footnotes omitted). Traynor, *supra* at 334.

Although the Supreme Court of the United States has not specifically ruled on the question, it has indicated that such practice is constitutional. See *Rios* v. *United States,* 364 U.S. 253.

I am fully aware of the necessity and desirability of retaining broad discretion in the Registrar to administer the motor vehicle laws. See G.L. c. 90, § 31. But, such discretion obviously must be confined by the limits of the principles of the statutes to be administered. As indicated above, those limits fall short of authorizing roadwatches. It is unnecessary for me, in view of this opinion, to consider the constitutionality of any statute which granted such authorization. See *Carroll* v. *United States,* 267 U.S. 132; *United States* v. *DiRe,* 332 U.S. 581; *Rios* v. *United States,* 364 U.S. 253; *Henry* v. *United States,* 361 U.S. 98; *Johnson* v. *United States,* 333 U.S. 10. Compare *Wirin* v. *Horrall,* 85 Cal.App. 2d 497, 193 P. 2d 470 and Opinion of Pa. Attorney General dated June 29, 1960 with *Miami* v. *Aronovitz,* 114 So. 2d, 784 (Fla.) and *Robertson* v. *State,* 184 Tenn. 277, 198 S.W. 2d, 633. It is interesting to note that the Attorney General of Washington concluded that a statute of that state, worded almost identically to § 25, did not confer authority upon the police to stop a vehicle without probable cause to believe that an offense was being committed, although on grounds other than those set forth herein. Attorney General's Opinion 1959-60, No. 88.

It is therefore my considered opinion, based on the reasons stated above, that a roadwatch, as defined in the request by your predecessor for an opinion, is unlawful.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*A person charged with crime and committed to a State hospital, the criminal proceedings against whom have been dismissed because he was mentally ill, may be granted temporary leave or be discharged by the superintendent. If such a person should be discharged, although possible, it is unlikely that criminal proceedings would be instituted against him.*

JUNE 27, 1963.

HON. HARRY C. SOLOMON, M.D., *Commissioner of Mental Health.*

DEAR SIR: – Referring to your recent letter wherein you recited the facts as they relate to a certain prisoner, my answer to your questions are as follows:

As to question (1), it would appear that the answer may be found in G.L. c. 123, § 105, which provides:

"If a prisoner under complaint or indictment is committed in accordance with section one hundred, and such complaint or indictment is dismissed . . . the superintendent of the institution to which commitment was made or said medical director and the commissioner, in case of commitment to the Bridgewater state hospital, as the case may be, may permit such prisoner temporarily to leave such institution in accordance with sections eighty-eight and ninety, or may discharge such prisoner in accordance with section eighty-nine. . . ."

It would therefore appear that the Legislature has granted your office the right to discharge said petitioner if you deem it expedient.

As to question (2), it is possible that criminal proceedings could be instituted against the petitioner after dismissal of the delinquency complaint under the provisions of G.L. c. 119, § 61. See *Nassar* v. *Commonwealth,* 341 Mass. 584, 589. However, it would appear highly unlikely that such proceedings would be instituted in view of the opinion of the superintendent of the state hospital referred to in the letter attached to your request for opinion that the patient was mentally ill at the time of the commission of the alleged crime.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

# INDEX TO OPINIONS